

RECEIVED

03-08-2017

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2016 AP 1611 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

SHAUN R EZROW,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 12, THE HONORABLE DAVID T. FLANAGAN III, PRESIDING

Allison E Cogbill
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1089103

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT ON PUBLICATION AND ORAL ARGUMENT . . .	iii
STATEMENT OF THE ISSUE	iii
STATEMENT OF THE CASE	1
ARGUMENT	1
THE TRIAL COURT PROPERLY ORDERED THAT THE DEFENDANT- APPELLANT PAY THE COST OF THE VICTIM COMPANY'S SECURITY SYSTEM UPGRADE IN THE RESTITUTION ORDER	
CONCLUSION	6
CERTIFICATION	7
CERTIFICATE OF COMPLIANCE.	8

TABLE OF AUTHORITIES

<u>CASES CITED</u>	<u>PAGE(S)</u>
<u>State v. Baker</u> 2001 WI App 100, 243 Wis. 2d 77, 626 N.W.2d 862	1
<u>State v. Canady</u> 2000 WI App 87, 234 Wis. 2d 261, 610 N.W.2d 265	1-2
<u>Crawford County v. Masel</u> 2000 WI App 172 238 Wis. 2d 380, 617 N.W.2d 188	2
<u>State v. Behnke</u> 203 Wis. 2d 43, 553 N.W.2d 265	2-3
<u>State v. Johnson</u> 2002 WI App 166, 256 Wis. 2d 871, 649 N.W.2d 284	5
 <u>STATUTES CITED</u>	
Wis. Stat. § 809.19	1
Wis. Stat. § 973.20	2

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Plaintiff-Respondent anticipates that the issues raised in this appeal can be fully addressed by the briefs. Accordingly, Plaintiff-Respondent is not requesting oral argument. Plaintiff-Respondent agrees that this opinion will not merit publication because the issues are fact-specific, and the case is governed by existing precedent.

STATEMENT OF THE ISSUE

Whether the circuit court properly ordered that the Defendant-Appellant pay the cost of the victim company's security system upgrade in the restitution order without a finding that the upgrade was necessary to redress valid special damages cause by Mr. Ezrow's conduct.

STATEMENT OF THE CASE

As Plaintiff-Respondent, the State exercises its option not to present an additional statement of the case, but will supplement facts as necessary in its argument. See Wis. Stat. § 809.19(3)(a)2.

ARGUMENT

STANDARD OF REVIEW

The scope of a circuit court's authority to order particular conditions of probation, including restitution, presents a question of statutory interpretation that is reviewed *de novo*. State v. Baker, 2001 WI App 100, ¶ 4, 243 Wis. 2d 77, 626 N.W.2d 862.

Circuit courts have discretion in deciding on the amount of restitution and in determining whether the defendant's criminal activity was a substantial factor in causing any expenses for which restitution is claimed. State v. Canady, 2000 WI App 87, ¶¶ 6, 12, 234 Wis. 2d 261, 610 N.W.2d 265, 272. When a circuit court's exercise of discretion is reviewed, the record is examined to determine whether the circuit court logically interpreted the facts, applied the proper legal standard and used a demonstrated,

rational process to reach a conclusion that a reasonable judge could reach. Crawford County v. Masel, 2000 WI App 172, ¶ 5, 238 Wis. 2d 380, 617 N.W.2d 188.

**I. THE TRIAL COURT PROPERLY ORDERED THAT THE DEFENDANT-
APPELLANT PAY THE COST OF THE VICTIM COMPANY'S
SECURITY SYSTEM UPGRADE IN THE RESTITUTION ORDER**

In *State v. Canady*, the court stated that Wis. Stat. § 973.20 (1997-98) should be interpreted "broadly and liberally in order to allow victims to recover their losses as a result of a defendant's criminal conduct." State v. Canady, 2000 WI App 87, ¶ 8, 234 Wis. 2d 261, 610 N.W.2d 147. The court additionally observed that "restitution is the rule and not the exception and that restitution should be ordered whenever warranted." Id.

The court in *Behnke* acknowledged that it is "the victim's burden to prove cause." State v. Behnke, 203 Wis. 2d 43, 59, 553 N.W.2d 265 (1996). However, the court continued on to note that it is only the victim's burden to prove that the defendant's actions were a *substantial* factor in producing the injury. The burden is not to prove that the defendant's actions were the sole factor. Id.

There is no question in this case that the Defendant-Appellant's actions were a substantial factor in producing the injury, that being the loss of security at the victim's company. The Defendant-Appellant stole cash from the safe of N.G. while he was an employee. (R.4-7) As a result of this theft, N.G. made improvements to their security system to prevent future thefts. (R.8-10) That leaves the question of whether or not the improvements to N.G.'s security system are valid "special damages" compensable through a restitution order under existing law.

The court in *Behnke* noted that:

the "special damage" limitation within the restitution statutes restrains the trial court from assessing damages intended to generally compensate the victim for damages such as pain and suffering, anguish or humiliation which are often experienced by crime victims. While the trial court may not assess these "general damages" as part of a restitution award, any specific expenditure by the victim paid out because of the crime, a "special damage," is appropriate.

Behnke at 60 - 61.

The improvements to N.G.'s security system absolutely fall under this definition of "special damages." The improvements were a specific expenditure by the victim paid out because of the crime that the Defendant-Appellant

committed, so they are appropriate "special damages" compensable through a restitution order.

Defendant-Appellant argues that the improvements may have made solving the crime easier had it been previously installed, but the improvements were not necessary to restore the victim to its original condition. However, the improvements to N.G.'s security system were absolutely necessary to restore the sense of security lost after Defendant-Appellant stole from the company.

At the restitution hearing, one of N.G.'s corporate officer's, J.F., testified on direct examination that N.G. added additional cameras after Defendant-Appellant stole from them to cover blind spots in the security system that were exposed during the investigation of the crime. (R.10) When asked if N.G. would have done that had it not been for the offense that the Defendant-Appellant committed, J.F. responded "Not at this time." Id. Defendant-Appellant tries to argue that the response "not at this time" means that the security system improvements would have happened at some point even without Defendant-Appellant's actions, but that does not change the fact that Defendant-Appellant's actions forced N.G. to make those improvements to their security system. N.G. would not have made security system

improvements at that time, or perhaps at any time, but-for Defendant-Appellant's actions.

Therefore, Defendant-Appellant's actions were the sole factor in causing N.G.'s loss of a sense of security. Defendant-Appellant argues that because there was not specific testimony at the restitution hearing regarding N.G.'s loss of a sense of security, the court should conclude that there was no injury to the victim as a result of Defendant-Appellant's actions. However, J.F. testified at the restitution hearing that the security system improvements were made to cover blind spots that were discovered as a result of Defendant-Appellant's actions. (R.52:10) It can be inferred from this testimony that the victim lost a sense of security as a result of Defendant-Appellant's actions. Improvements would not be made to the security system if N.G. and its employees felt safe. Defendant-Appellant's crime damaged N.G.'s sense of security, so it needed to improve its security system to restore it.

As outlined in Defendant-Appellant's brief, this is exactly the same reason that restitution was ordered in *State v. Johnson*. See State v. Johnson, 2002 WI App 166, 256 Wis. 2d 871, 649 N.W.2d 284. The facts of that case are

very different from the present case, but that does not change the fact that, like the court in *Johnson*, the trial court concluded in the present case that there was a causal connection between Defendant-Appellant's criminal conduct and the need for the improvements to N.G.'s security system.

CONCLUSION

Based on the above analysis, the trial court properly ordered that the Defendant-Appellant pay the cost of the victim company's security system upgrade in the restitution order. Therefore, Plaintiff-Respondent respectfully requests that the trial court's order be upheld, and the Defendant-Appellant's appeal be denied.

Allison E Cogbill
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1089103

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: 10 characters
per inch; double spaced; 1.5
inch margin on left side and 1
inch margins on the other 3
sides. The length of this brief
is 6 pages.

Dated: _____.

Signed,

Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this day of March, 2017.

Allison E Cogbill
Assistant District Attorney
Dane County, Wisconsin