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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2017AP257-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANGELA C. NELLEN,

Defendant-Appellant.

On a Notice of Appeal From the Restitution Order and
Amended Judgment of Conviction
Entered in the Circuit Court for Dane County,
the Honorable Ellen K. Berz, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Ms. Nellen pleaded guilty to two counts of misdemeanor theft involving less than or equal to \$2,500. The victims sought restitution for a variety of purportedly missing items, including a collection of silver coins. They also claimed restitution for the cost to replace the locks on their home on three separate occasions.

At the restitution hearing, the victims' daughter guessed that there were between 30 to 50 silver coins missing. She testified that their value depended on their condition and year of origination. She did not know the condition or year of origination of a single coin in the collection. However, she guessed that the coins were worth \$500 apiece based on a Google search that she performed.

As for the cost to replace the locks, the testimony established that Ms. Nellen's conduct did not cause the third lock change.

The circuit court ordered \$90,000 in restitution for the silver coins—30 coins valued at \$3,000 apiece. The court further ordered \$168 for the third lock replacement.

Did the circuit court erroneously exercise its discretion in awarding the above amounts?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested.

STATEMENT OF THE CASE AND FACTS

Ms. Nellen challenges two portions of the circuit court's restitution order dated July 7, 2016. (24; App. 101). Specifically, Ms. Nellen disputes the court's award of \$90,000 for a collection of silver coins and \$168 for the cost to replace the locks on the victims' home for a third time.

The charge

On November 30, 2015, Officer Williams responded to a report of a theft involving a home in Madison. (2:1). The victim, K.K., said that she lived at the home with her husband, G.K. (2:1). G.K. was suffering from ALS and dementia. (2:1). K.K. explained that she hired Ms. Nellen and Ms. Nellen's roommate, Tom, to assist her in reorganizing her home so that she could provide better care for her husband. (2:2). Ms. Nellen and Tom lived a couple houses down from K.K. (2:2).

K.K. said that Ms. Nellen and Tom had been working on the house for several weeks. (2:2). They were responsible for remodeling the walls and floors and for storing various items. (2:2). K.K. had given Ms. Nellen a key to the house to facilitate the project. (2:2).

K.K. explained that she became aware of missing items when Tom told her that Ms. Nellen was stealing from the home. (2:2). According to Tom, money and food stamps had disappeared. (2:2). He said an "unknown male" told him

that Ms. Nellen had deposited some coins at a pawn shop and a bank. (2:2). The “unknown male” also told him that Ms. Nellen had pawned several drills. (2:2).

K.K. then noticed that the safe in her bedroom was empty and several buckets of coins were missing. (2:2). K.K. explained that she and her husband had been collecting change for several years. (2:2). She estimated that she had between \$15,000 and \$20,000 in change. (2:2). She also claimed that two Craftsman drills, valued at \$100 each, were gone. (2:2).

On December 6, 2015, Officer Williams discovered that Ms. Nellen had pawned items at Rick’s Olde Gold on two separate occasions. (2:2). On November 16, 2015, Ms. Nellen had pawned 10 silver dollars for a total of \$150. (2:2). On November 19, 2015, Ms. Nellen had pawned dimes, quarters, and half-dollars for a total of \$200. (2:2).

On December 7, 2015, Officer Williams spoke with Ms. Nellen. (2:2). Ms. Nellen admitted to pawning the items listed above. (2:2). She also acknowledged depositing about \$102 of coins into her bank account. (2:3). According to Ms. Nellen, G.K. told her that she could take the coins. (2:3).

On December 11, 2015, the state charged Ms. Nellen with one count of theft involving an amount greater than \$10,000. (2:1).

The plea and sentencing

Ultimately, the parties reached a plea agreement in this case. (14; 15).

On April 19, 2016, Ms. Nellen pleaded guilty to two counts of misdemeanor theft involving less than or equal to \$2,500. (13; 14:5, 6). Sentencing took place that same day.

(14). The circuit court, the Honorable Ellen K. Berz, presiding, adopted the parties' joint recommendation of a withheld sentence and 2 years of probation. (14:3, 14).

The matter was set over for a contested restitution hearing.

The restitution hearing

The restitution hearing took place on June 14, 2016. (33). The victims sought \$25,000 in restitution. (38). K.K. and her daughter, M.C., testified in support of the claimed amount. (33).

M.C. explained that she helped her parents come up with the restitution figure. (33:5). Her testimony covered four categories of purported losses. (33:5-21). Only one is relevant here: her father's collection of original silver coins (quarters made with silver) from the late 18th or early 19th century. (33:6, 15).¹

M.C. testified that her father kept the silver coins in a tackle box in his safe. (33:5-6). She explained that there was no itemized inventory of the coins due to her father's condition as a hoarder. (33:13). Therefore, her testimony was based on her memory from seeing the coins in the safe at least once within the last decade. (33:13-14).

M.C. acknowledged that she did not know how many silver coins were in the safe. (33:6, 20). She guessed that there were around 30 to 50 coins. (33:20). She explained that the value of the coins depended on their condition and year of

¹ M.C. described the following alleged losses: (1) 12 two-liter containers filled with loose change; (2) three leather-bound statehood quarter books; (3) 20 display boxes of silver dollars; and (4) 30 to 50 silver coins from the late 18th or early 19th century. (33:5-21). Ms. Nellen is not contesting the first three categories of claimed damages.

origination. (33:18-19). She admitted that she did not know the condition or year of origination of any of the coins. (33:6, 14-15).

M.C. testified that she performed a Google search to help her guess the value of the silver coins in her father's safe:

As far as the coins themselves we did some research on the Internet just with Google to see what the going rates were with some of the coins that we knew were in the safe. We don't really know the quantities or the actual . . . condition of the coins, so it's difficult to put an actual number on it, so we really just kind of low-balled everything and just made a guess for everything that was missing and that was how we came to that.

Just from the guesses we were making and just from the notation I was kind of doing as we were going along, it was somewhere—depending on how much the value of the silver coins themselves were ranging anywhere between \$3,000 and \$15,000 each, so we kind of went with . . . \$500 for each of those and that was where we came up the with lowest number.

(33:6, 8-9). The circuit court later asked M.C. to clarify whether a coin in the worst condition, in the least valuable year, would be worth \$3,000. (33:19). She indicated that she could not say what a coin in a lesser condition would be worth. (33:19). She explained that a coin in poor condition might essentially be worthless. (33:19).

K.K. testified that she had nothing to add with respect to the silver coins. (33:24). She indicated that she stayed out of the safe. (33:24). She could not recall the last time she had gone into the safe prior to learning that money was allegedly missing. (33:24).

As for the lock replacements to her home, K.K. testified that she changed the locks on three occasions. (33:22). The first two lock changes cost \$50 apiece. (33:23). The third lock change cost \$168. (33:23). K.K. explained that the third lock change was necessary after Ms. Nellen's roommate, Tom, had left the house. (33:26).

At the close of testimony, the state argued that the restitution request submitted to the court (\$25,000) was appropriate. (33:37; 38). Yet, the state conceded that the amount allegedly taken was "unknowable." (33:38). The prosecutor said that "we can't even begin to state the amount that has been taken." (33:37).

With respect to the silver coins, Ms. Nellen contended that the victims failed to prove by a preponderance of the evidence the amount of loss sustained as a result of the crimes considered at sentencing. (33:39-41). She argued that M.C.'s testimony was based on guesswork and that there was no way to determine the value of the purportedly missing coins. (33:40-41).

Ms. Nellen further maintained that she should not be responsible for the cost of the third lock replacement. (33:41-42). She noted that her roommate, Thomas J. Gannon, Jr., was a co-actor in this case and had continued contact with the victims after her arrest. (33:42-43).² She argued that at one point, Tom even lived with the victims. (33:42). She therefore contended that her conduct did not cause the expense incurred for the third lock replacement. (33:42).

² A review of the Consolidated Court Automation Programs (CCAP) indicates that Thomas J. Gannon, Jr., was charged with one count of theft and 26 counts of misappropriation in Dane County Case No. 2016-CF-1663. The offense dates span from December 31, 2015, to February 1, 2016. He entered guilty pleas to one count of theft and one count of misappropriation on June 23, 2017.

The oral ruling on restitution

The circuit court ordered \$90,000 in restitution for the silver coins. (33:46; App. 104). The court analyzed the issue as follows:

Then we have in the safe the tackle box of original silver coins, the value of each being somewhere between \$3,000 and \$15,000. There were somewhere between 30 and 50 coins, I have to take the least number. I am not valuing them at \$500. I see absolutely no basis to value them at \$500. There may indeed be some that are worthless because they've lost their engravings or something. There is certainly going to be some that are more than \$3,000 because of the year, the mint or something along those lines. So I'm valuing them each at \$3,000, the lowest . . . that the coin was valued [] of that kind. There were at least 30 of them [so] that is \$90,000. . . .

(33:46; App. 104). In addition, the court ordered \$168 for the third lock replacement. (33:45; App. 103).

This appeal follows.

ARGUMENT

The Circuit Court Erroneously Exercised Its Discretion in Ordering Ms. Nellen to Pay \$90,000 in Restitution for the Silver Coins and \$168 in Restitution for the Cost to Replace the Locks on the Victims' Home for a Third Time.

A. Introduction and standard of review.

The victims in this case sought restitution for a variety of purportedly missing items, including a collection of original silver coins. They also claimed restitution for the cost

to replace the locks on their home on three separate occasions. To recover restitution, the victims had the burden of proving, by a preponderance of the evidence, the amount of loss sustained as a result of the crimes considered at sentencing. Wis. Stat. § 973.20(14)(a).

A preponderance of the evidence finding cannot be based on guesswork. *See* WIS JI—CIVIL 200. With respect to the silver coins, the testimony presented at the restitution hearing required the circuit court to simply guess the amount of loss sustained as a result of the crimes considered at sentencing. Not only was the court compelled to guess the *quantity* of coins purportedly taken, it had to guess the *value* of those coins.

The restitution statute may be liberally construed to allow victims to recover their losses, *State v. Anderson*, 215 Wis. 2d 673, 682, 573 N.W.2d 872 (Ct. App. 1997), but the statute is not without limits. And one of those limits is that a victim must provide credible evidence—evidence believable in light of reason and common sense—to establish the loss that he or she suffered as a result of the defendant’s conduct. *See* Wis. Stat. § 973.20(14)(a); WIS JI—CIVIL 200.

The witness testified that she “couldn’t even make a guess” as to the number of silver coins allegedly missing. (33:20). She ultimately guessed that there were at least 30 to 50 coins. She said that their value depended on their condition and year of origination. She could not speak to the condition or year of origination of a single coin in the collection. Moreover, she acknowledged that a coin in poor condition might essentially be worthless. Under these circumstances, the circuit court’s award of \$90,000 for the coins—\$65,000 more than the victims requested—constitutes an erroneous exercise of discretion.

As for the cost to replace the locks on the victims' home, the circuit court was unauthorized to order \$168 for the third lock replacement. Under the restitution statute, a circuit court is authorized to order restitution to "any victim of a crime considered at sentencing. . . ." Wis. Stat. § 973.20(1r). In relevant part, a "crime considered at sentencing" means "any crime for which the defendant was convicted." Wis. Stat. § 973.20(1g)(a). A defendant's entire course of conduct may be taken into consideration in this regard. *See State v. Canady*, 2000 WI App 87, ¶10, 234 Wis. 2d 261, 610 N.W.2d 147.

Here, the testimony at the restitution hearing established that the cost to replace the locks for a third time was not a result of the crimes for which Ms. Nellen was convicted. The testimony was that the victims needed to change the locks for a third time after Ms. Nellen's co-actor, Tom, left the victims' home. As the third lock change had nothing to do with Ms. Nellen's conduct, the circuit court was unauthorized to order \$168 in restitution. Its decision to do so therefore constitutes an erroneous exercise of discretion as well.

"A request for restitution, including the calculation as to the appropriate amount of restitution, is addressed to the circuit court's discretion and its decision will only be disturbed when there has been an erroneous exercise of that discretion." *State v. Gibson*, 2012 WI App 103, ¶8, 344 Wis. 2d 220, 822 N.W.2d 500. A circuit court erroneously exercises its discretion if it "applies the wrong legal standard or did not ground its decision on a logical interpretation of the facts." *Canady*, 234 Wis. 2d 261, ¶6. "Whether the trial court is authorized to order restitution pursuant to Wis. Stat. § 973.20 under a certain set of facts presents a question of law that [this court] reviews de novo." *State v. Lee*, 2008 WI App 185, ¶7, 314 Wis. 2d 764, 762 N.W.2d 431.

- B. There is insufficient evidence to support the circuit court's restitution award of \$90,000 for the purportedly missing silver coins.

The circuit court's award of \$90,000 for the purportedly missing silver coins is not grounded on a logical interpretation of the facts presented at the restitution hearing. The decision therefore constitutes an erroneous exercise of discretion.

The testimony presented at the restitution hearing was based on guesswork. There was no itemized inventory of the silver coins that were allegedly missing from the safe. The testimony in support of the restitution claim was therefore based on the witness's memory from seeing the coins in the safe at least once within the last decade. As memory goes, the witness understandably "couldn't even make a guess" as to the number of silver coins in the safe. (33:20). She admitted that she did not "really know" the quantity. (33:6). She ultimately guessed that there were at least 30 to 50 coins.

But more importantly, the witness acknowledged that (1) the value of the silver coins depended entirely on their condition and year of origination; and (2) she did not know the condition or year of origination of a single coin in the collection.³ She also did not know what a coin in lesser condition would be worth, except that a coin in poor condition might essentially be worthless. She knew that scratches, dings, and wear and tear could all affect the value of the coins. (33:19-20). Candidly—based on what she did and did not know—the witness told the circuit court that her

³ The witness specifically testified, "There is no way without it being written down that I could have recalled any specific one." (33:15).

estimation of \$500 per coin was just a guess. (33:20). Even the prosecutor acknowledged that there was no way to put a number on it.

On this record, the circuit court's award of \$90,000—30 missing silver coins valued at \$3,000 a piece—is illogical. The question is whether the above testimony established to a *reasonable certainty* that there were 30 missing silver coins valued at \$3,000 each. *See* WIS JI—CIVIL 200. A rational consideration of the evidence leads to one answer: “no.”

There is no question that the witness's testimony required the circuit court to guess on the amount and, more importantly, the value of the purportedly missing coins. The court's own analysis reflects as much: “There *may* indeed be some coins that are worthless because they've lost their engravings *or something*. There is [sic] certainly going to be some that are more than \$3,000 because of the year, the mint, *or something along those lines*.” (33:46) (Emphasis added.) The simple fact is this: we do not know about the engravings—or the “something”—that might have made coins in the collection worthless. We also do not know about the year or the mint—or the “something along those lines”—that might have made coins in the collection valuable. Thus, even if there were credible evidence to support the *amount* of silver coins purportedly missing (there is not), the fact remains that it is impossible to determine the *value* without guessing.

The bottom line is that the circuit court seemingly discounted the only testimony in this regard that was *not* based on guesswork: (1) the value of the coins depended entirely on their condition and year of origination; and (2) the witness did not know the condition or year of origination of a single coin in the collection; and (3) a coin in poor condition

might essentially be worthless.⁴ Nothing discredited the witness's testimony on these three points. She was quite straightforward about what she did and did not know. Had the court rationally considered this evidence, it would have concluded that the victims failed to meet their burden to prove to a reasonable certainty that they suffered *any* loss as a result of the purportedly missing silver coins.

- C. The circuit court was unauthorized to order \$168 in restitution for the cost to replace the locks on the victims' home for a third time.

The circuit court had no statutory authority to award \$168 for the cost to replace the locks on the victims' home for a third time. Its decision to do so therefore constitutes an erroneous exercise of discretion because it is based on an error of law.

A circuit court is authorized to order restitution to "any victim of a crime considered at sentencing. . . ." Wis. Stat. § 973.20(1r). While the statutory definition of "crime considered at sentencing" is two-fold, only one aspect is relevant here: it means "any crime for which the defendant was convicted. . . ." Wis. Stat. § 973.20(1g)(a). In this regard, the defendant's entire course of criminal conduct may be taken into consideration. *Canady*, 234 Wis. 2d 261, ¶10. The court's authority to order restitution in this case was therefore limited to losses that resulted from the criminal conduct related to Ms. Nellen's convictions. *See id.*, ¶9 ("Before restitution can be ordered, a causal nexus must be established between 'the crime considered at sentencing,' Wis. Stat. § 973.20(2), and the disputed damage.").

⁴ Despite the witness's undisputed testimony that a coin in the collection might essentially be worthless because of its condition, (33:19), the circuit court considered \$3,000 "the lowest . . . that the coin was valued [] of that kind." (33:46). This finding is clearly erroneous.

It was the victims' burden to show that Ms. Nellen's criminal conduct was a substantial factor, or precipitating cause, of the loss incurred from changing the locks on the house for a third time. *Id.*, ¶9. The testimony about the lock changes was brief, albeit informative. While the victims' daughter testified that the locks needed to be changed three times "due to the thefts in this case," (33:11), her mother clarified that testimony:

Q: Ma'am, do you remember the dates that the locks were changed?

A: They were end of December and January . . . I think just those two months. It could have been early February, too, but I'm not sure. . . .

Q: Okay. At least one was towards the end of December?

A: One was towards the end of December and then one was probably a couple weeks after that . . . because the other ones weren't working. *And then the third one was once Tom left the house . . . I called in . . . Jim's Key . . . they came and replaced three locks.*

(33:26) (Emphasis added.)

As noted by defense counsel at the restitution hearing, Ms. Nellen's co-actor, Tom, had continued contact with the victims after Ms. Nellen's arrest. (33:42). He even lived with the victims for a while. (33:42). The victim's testimony confirms as much: the first two lock changes were caused by the criminal conduct for which Ms. Nellen was convicted, and the third lock change was caused by Tom's continued contact with the victims.

As there is no causal nexus between the crimes considered at sentencing and the cost to replace the locks for a third time, the circuit court was unauthorized to order \$168 in restitution.

CONCLUSION

For the reasons stated above, the circuit court erroneously exercised its discretion in ordering Ms. Nellen to pay \$90,000 in restitution for the silver coins and \$168 in restitution for the cost to replace the locks on the victims' home for a third time. Those portions of the circuit court's restitution order should therefore be reversed, and Ms. Nellen's judgment of conviction should be amended accordingly.

Dated this 31st day of July, 2017.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,514 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 31st day of July, 2017.

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APPENDIX

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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