STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2017AP1683-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SARA L. STEPPKE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF
CONVICTION ENTERED IN THE
CIRCUIT COURT FOR DODGE COUNTY,
THE HONORABLE BRIAN A. PFITZINGER, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF THE PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page(s)

Statutes

ISSUE PRESENTED

Whether the circuit court appropriately ordered Defendant-Appellant Sara L. Steppke to make restitution for her crime victim's security system upgrade.

Answered by the circuit court: Yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

INTRODUCTION

The circuit court appropriately ordered that Steppke make restitution in the amount of $7,980.00 for the installation of a new security surveillance system as well as $8,144.40 for the installation of a key fob system (hereinafter referred to as "security upgrades") as a condition of probation as set forth by Wis. Stat. § 973.09(1)(b)[1] and Wis. Stat. § 973.20(5)(a)[2] in addition to the uncontested $3,000 for unreturned flea and tick medication which she stole and sold on Amazon for personal profit while she was employed by V.V. (R. 24.)

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[1] Wis. Stat. § 973.09(1)(b) provides "[i]f the court places a person on probation, the court shall order the person to pay restitution under s. 973.20, unless the court finds there is a substantial reason not to order restitution as a condition of probation. . . ."

[2] Wis. Stat. § 973.20(5)(a) provides that the defendant "[p]ay all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing."

STATEMENT OF THE CASE

In April of 2015, Sara L. Steppke was charged with one count of felony theft of movable property, a Class I Felony (R. 6), for stealing flea and tick medication with a value of $2,800 from her employer V.V. on November 14, 2014 (R. 3:1).

As part of a plea bargain, the State amended the one count of felony theft of movable property to three counts of misdemeanor theft. (R. 13.) On November 5, 2015, Steppke pled guilty to three counts of misdemeanor theft. The circuit court withheld sentence and ordered Steppke to serve three (3) years' probation on each count which was subsequently amended to two years of probation on each count. (R. 59:31; 45:1.)

At the plea and sentencing hearing, the parties agreed to the initial amount of restitution of $3,000 for the unrecovered flea and tick medication. However, the parties remained in dispute over the remaining restitution components. Steppke argued that she should not be required to make restitution in the amount of $8,1440.40 for a new key fob system and $7,980 for a new security surveillance system. (R. 59:6.) The parties then proposed submission of "letter briefs with regard to those [restitution components]" and the relevance/irrelevance of the circuit court to order Steppke to make restitution on V.V.'s security system upgrades. (R. 59:4.) The circuit court then set a briefing schedule and ordered the parties to submit their corresponding briefs. (R. 59:32–34.)

After submission of the respective briefs, the State argued pursuant to *State v. Heyn*[3], *State v. Behnke*[4], and

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[3] *State v. Heyn*, 155 Wis. 2d 621, 456 N.W.2d 157 (1990).

[4] *State v. Behnke*, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996).

State v. Johnson[5], that the court was within its scope of authority to order Steppke to pay restitution for the contested amounts, because the key fob system and security surveillance system represented special damages to which V.V. was "entitled under a broad interpretation of the restitution statute," moreover, it would further "the rehabilitative objectives of probation" and restore a "lost sense of safety and security" to V.V. (R. 20:4.) Steppke acknowledged in her response to State's brief that *Heyn*, *Behnke*, and *Johnson* are "cases upon which the court can be guided in deciding whether to order [] Steppke to pay the special damages requested by [V.V.]" (R. 21:1.) Furthermore, Steppke argued in her response brief that "[c]ourts are permitted to impose any condition which appear[s] to be reasonable and appropriate, but the $17,209.40 claimed by [V.V.] is not reasonable or appropriate, nor would imposing such a financial burden on a person of limited means serve to effectuate the objectives of probation." (R. 21:1.)

In the court's decision and order, the court found that the *Heyn* case was "instructive to the court, in that there is a portion of the claim that is *appropriately deemed restitution and portion of the claim which may appropriately be* ordered by this Court as a condition of probation. . . . The *Heyn* court sets forth the logic and appropriateness of ordering additional financial conditions of probation." (R. 24:1 (emphasis in original).) Furthermore, the court found that the $8,144.40 for the installation of a new key fob system and the $7,980.00 for a new security surveillance system were appropriate to be ordered to be repaid as a condition of probation. Additionally, the court found that there was "a serious breach of trust and that the offender needs to

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[5] *State v. Johnson*, 2002 WI App 166, 256 Wis. 2d 871, 649 N.W.2d 284.

understand that breach and breadth of the consequence of that breach, and therefore, the court [was] satisfied that ordering [those] sums as a condition of probation [was] appropriate." (R. 24:2.)

Steppke filed a motion for postconviction relief stating that she did not have the ability to pay the $8,144.40 for the installation of a new key fob system and the $7,980.00 for a new security surveillance system. Furthermore, Steppke further argues in her motion for post-conviction relief that *Heyn* is no longer applicable to govern her case and that *State v. Torpen*[6] was more appropriate. (R. 34:3–5.) The State then responded to Steppke's motion for post-conviction relief and argued that Steppke's motion did in fact "paint a somewhat inaccurate picture of what actually transpired in the case." (R. 37:1.) Additionally, the State went on to point out the truly accurate events which transpired. (R. 37:1–2.) The State further argued that "post-*Heyn* amendments to Chapter 973 of Wisconsin Statutes [] does not . . . render the entire case moot." (R. 37:2.) Furthermore, the State disagreed with Steppke's argument that *Torpen* was the governing case, because "the trial court's order in this case simply does not constitute the kind of 'bootstrapping' prohibited by *Torpen*." (R. 37:3.) The State further went on to state that the cases were "distinguishable in that the expenditures claimed by the victims of this case relate to the facts of the case. The claimed expenditures were not from unrelated cases that were 'bootstrapped' in." (R. 37:3.) The State went on to say that there was a causal nexus between Steppke's thefts of the stolen product from V.V. and the installation of the security system and the installation of the key fob system.

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[6] *State v. Torpen*, 2001 WI App 273, 248 Wis. 2d 951, 637 N.W.2d 481.

At a hearing held on December 6, 2016, the court found it necessary to hold a restitution hearing in order to make a reasonable and sound decision regarding the contested amounts of restitution. (R. 65:3.) On December 22, 2016, the court issued an order to vacate and reopen the court's February 5, 2016, decision and ordered a restitution hearing. (R. 39.)

At the restitution hearing held on February 27, 2017, an owner of V.V. testified that because of Steppke's thefts V.V. no longer fully trusted its current employees. (R. 64:22–23.) Prior to finding out about the thefts by Steppke, V.V. claimed that they "basically . . . ha[d] some trust factor with [their] employees and that [it had] changed [due to finding out that Steppke was stealing from them.]" (R. 64:22.) Furthermore, V.V. testified that additional security measures such as the security surveillance system and key fob system were warranted because they felt the need to "protect [themselves] from [their] own employees." (R. 64:24.) Not only did Steppke take away a sense of security from V.V., she also caused a damaged reputation between V.V. and its drug vendors. (R. 64:15.)

At the close of the hearing the circuit court concluded that a causal nexus existed "between the crime for which the defendant was convicted . . . and the damages" (R. 64:40) and was satisfied that V.V. had shown the court that there was "a substantial factor in causing the upgrading of the system, which is what [was] being requested [] . . . and [that] type of action is a natural consequence of the defendant's actions" (R. 64:41). The court further found that the $8,144.40 for the key fob system and the $7,980.00 for system surveillance upgrades would appropriately be paid as restitution. (R. 64:41.)

Steppke now appeals the amended judgment of conviction dated from March 2017.

STANDARD OF REVIEW

The scope of the circuit court's authority to order restitution as a condition of probation 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 the jurisdiction to exercise discretion in terms of determining whether the defendant's criminal actions were a considerable component in creating any damages of which restitution is declared. *State v. Boffer*, 158 Wis. 2d 655, 658, 462 N.W.2d 906 (Ct. App. 1990); *State v. Canady*, 2000 WI App 87, ¶ 12, 234 Wis. 2d 261, 610 N.W.2d 147.

When a circuit court's exercise of jurisdiction is reviewed "the record [is examined] to determine if 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." *State v. Keith*, 216 Wis. 2d 61, 69, 537 N.W.2d 888 (Ct. App. 1997).

ARGUMENT

The circuit court properly exercised its discretion when it ordered Steppke to pay the cost of V.V.'s security upgrades in the restitution order.

A. "Special damages" are readily ascertainable pecuniary losses suffered by a crime victim as a result of the crime committed.

Steppke defines "special damages" as "the natural, but not the necessary result of an alleged wrong," *citing Musa v Jefferson Cnty. Bank*, 2001 WI 2, ¶ 30, 240 Wis. 2d 327, 620 N.W.2d 797. This would include the cost of a victim's medical care, lost wages, or impaired earning capacity, as well as stolen/destroyed/broken property. If the dollar

amount of the requested restitution is "easily estimable in monetary terms," Steppke agrees that the amount is appropriately deemed "special damages." (Steppke's Br. 7.) Steppke maintains that if the dollar amount is *not* easily estimable in monetary terms, the item is "general damages." This would include pain and suffering, anguish, or humiliation.

Steppke claims that Wisconsin courts have gone wrong by defining "special damages" as "any readily ascertainable pecuniary expenditure [the victim pays] out because of a crime . . ." *State v. Holmgren*, 229 Wis. 2d 358, 365, 599 N.W.2d 876 (Ct. App. 1999). Steppke points *to State v. Stowers*[7], as the point where the Wisconsin Court of Appeals began to incorrectly define special damages.

The State recognizes that the problem with the trial court's restitution award in *Stowers* was twofold: first, it was a mixed award, and second there was insufficient evidence of the cost of the victim's counseling and hospitalization. Stowers was convicted of fourth degree sexual assault. The trial court ordered him to pay restitution in the amount of $5,000, ostensibly for counseling, but also to redress the wrong he perpetrated upon the victim. On appeal, this Court held that a criminal restitution order cannot mix general and special damages by awarding an amount designed in part to redress wrong or compensate for nonpecuniary injury. The case was remanded to the trial court so that the victim could provide evidence as to the cost and duration of her hospitalization and ongoing psychological care.

In *Stowers*, the trial court erred not only by awarding a dollar amount for hospitalization and treatment when the victim had not provided sufficient evidence of those costs,

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[7] *State v Stowers*, 177 Wis.2d 798, 503 N.W.2d 8 (Ct. App. 1993)

but also in tacitly concluding that the victim ought to get some amount of money as "redress." When "redress" operates as a synonym for "pain and suffering", a trial court impermissibly crosses over into general damages. It is important to note, however, that in ordering the case remanded to the trial court for further proceedings, both the victim and the defendant were given the opportunity to have the restitution claim measured against Wis. Stat. § 973.20(3)(a).

B. Under Wisconsin law, "special damages" go beyond the return/repair/replace analysis espoused by Steppke.

From *Stowers*, Steppke moves to *State v. Behnke*, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996). In *Behnke*, the court of appeals found that the trial court did not misuse its discretion in concluding that the cost of a new lock for the victim's door constituted special damages for which the victim was entitled to restitution. In reaching this conclusion, the court found that the victim's desire to buy the new lock was a consequence of the defendant's crime. The victim testified that she wanted a stronger lock for her door because she was afraid of the defendant. The court held that the victim was entitled to restitution for the new lock. It was a "readily ascertainable pecuniary loss" that was caused by the defendant's crime, and was therefore a "special damage" covered by restitution law.

Steppke is missing an important distinction in Wisconsin's restitution law. We know that a victim may not be compensated in criminal court for the pain and suffering caused by a defendant. A victim may absolutely be compensated, however, for the cost of restoring the victim's sense of security as measured by an item that can be purchased at a local hardware store or installed by a security company. Such amounts can be subjected to the scrutiny of the trial court's sound and reasoned discretion at

a restitution hearing. Steppke focuses only on what is required to restore a crime victim to the *financial* state the victim was in prior to the crime.

Behnke is still good law in Wisconsin. The trial court's restitution order therefore meets the parameters of settled law. Steppke's only basis for excluding the security upgrades as civilly compensable is her spurious claim. *Behnke*, moreover, has been relied upon in three unpublished decisions. The State cites these cases for persuasive value only, and points out that petitions for review by the Wisconsin Supreme Court have been denied in all three cases.

- *State v. Piotter*, No. 2009AP2005-CR, 2010 WL 282325 (Wis. Ct. App. Jan. 26, 2010) (unpublished)
- *State v. Fries*, No. 2011AP517-CR, 2012 WL 6743529 (Wis. Ct. App. Dec. 12, 2012) (unpublished)
- *State v. Ezrow*, No. 2016AP1611-CR, 2017 WL 2294648 (Wis. Ct. App. May 25, 2017).

In *State v. Piotter*, the defendant was convicted of entry to an unlocked condominium. The trial court ordered restitution for two expenditures: a $430 lock that the condominium association installed *before* the crime, and an $1800 more secure locking system that the condominium association installed *after* the crime. The stated rationale for the $430 lock was that the defendant had been seen walking through the lobby of the building. The court of appeals found that there was an insufficient nexus between the defendant's pre-crime walk through and the crime itself, thus the condominium association could not recover the cost of that lock. With regard to the $1800 more secure locking system, however, this Court found that the defendant could be required to pay. The court rejected the defendant's argument that he should not have to pay for the security upgrade

because he did not cause damage to the system. The court was persuaded by the testimony of the president of the condo association, who testified that "the association believed that increased security was needed because of Piotter's successful break-ins." *Piotter*, 2010 WL 282325. *2. The court recognized the victim's need to "bolster the condominium association's security against intrusion" and found the $1800 to be "a justified and needed expense that was triggered by Potter's (sic) criminal entry into the association's building. . . ." *Id.* Petition for review by the Wisconsin Supreme Court was denied on February 24, 2010. (R-App. 105.)

In *State v. Fries*, the defendant was convicted of armed robbery of a gas station/convenience store. The trial court ordered restitution for a new security system. The stated rationale for the upgraded security system was to help the employees feel more comfortable and to restore a sense of security. *Fries*, 2012 WL 6743529, *1. The trial court relied on *State v. Heyn* to find that the defendant's criminal activity caused a "'serious and increased level of insecurity'" and that in order to restore a sense of security the store owner had to upgrade the security system. *Id.* The court specifically defined "'special damages'" within the criminal restitution contest as "'[a]ny readily ascertainable pecuniary expenditure paid out because of the crime.'" *Id.* at *3. When there is a "causal connection between the defendant's criminal conduct and the need for improved security in order to restore a lost sense of security," it is lawful and appropriate to order a criminal defendant to pay restitution. *Id.* at *4. Petition for review by the Wisconsin Supreme Court was denied on January 28, 2013. (R-App. 116.)

In *State v. Ezrow*, the defendant was convicted of misdemeanor employee theft from the bar & restaurant where he worked. The trial court ordered, in addition to restitution for stolen money and labor expenses which were

not contested, restitution in the amount of $2,150 for moving existing security camera and installing new, additional security cameras. Once again, the court defined "special damages" as "any readily ascertainable pecuniary expenditure paid out *because of the crime*", *citing State v. Johnson*, 2005 WI App 201, ¶ 12, 287 Wis. 2d 381, 704 N.W.2d 625 (emphasis added). Echoing a familiar theme, the defendant tried to avoid responsibility for restitution, arguing that he had not damaged the existing security camera, and that the camera was not needed to restore a sense of security. What became clear in the *Ezrow* case was that a defendant's criminal activity can serve to alert a victim that additional security is necessary. The court observed that "Ezrow's theft exposed weaknesses in The Nitty Gritty's security system" and found that "a circuit court judge could reasonably determine that the additional security measures taken by The Nitty Gritty following Ezrow's theft is a 'natural consequence' of that theft. Accordingly, [the court] conclude[d] that . . . the cost of security system changes was an item of The Nitty Gritty's special damages." *Ezrow*, 2017 WL 2294648, *2. Petition for review by the Wisconsin Supreme Court was denied on June 26, 2016. (R-App. 124.)

What we see in these cases is recognition by Wisconsin courts that making victims "whole" after a crime requires more than merely restoring them to the financial status they enjoyed before the crime was committed. Compensable damage to a crime victim takes more into account than just the victim's financial status. Wisconsin courts have clearly applied a broad and liberal interpretation of the restitution statute, recognizing that the "return/repair/replace" analysis espoused by Steppke does not, in fact, adequately compensate a crime victim. When the need for a new lock or a new/improved security system is occasioned because of the commission of a crime, a broad and liberal construction of

the restitution statute must include compensation for such expenditures. As was made clear in *State v. Longmire*[8], a trial court may order restitution if there is a "causal link", i.e. "when 'the defendant's criminal act set[s] into motion events that resulted in the damage or injury." *State v. Longmire*, 2004 WI App 90, ¶ 13, 272 Wis. 2d 759, 681 N.W.2d 534,

This Court must 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." *Keith*, 216 Wis. 2d at 69. The State urges this Court to affirm the order of the circuit court. Steppke admitted stealing $3,000 worth of flea and tick product from V.V. As the victim made clear at the restitution hearing, Steppke's crime created the injury, i.e. the loss of security experienced by V.V. Because Steppke stole from her employer, V.V. instituted security upgrades. These upgrades were a specific expenditure paid by the victim because of the crime committed by Steppke. But for the defendant's crime, V.V. would not have purchased security upgrades. Similarly to the victim in *State v. Ezrow*, Steppke's theft from V.V. exposed weaknesses in the existing security features in use at V.V.'s place of business. Like the victim in *State v. Piotter*, Steppke's theft was the triggering action that caused V.V. to need increased security. Just as in *State v Fries*, Steppke's criminal conduct was the causal connection leading to the victim's need for improved security in order to restore a lost sense of security.

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[8] *State v. Longmire*, 2004 WI App 90, 272 Wis. 2d 759, 681 N.W.2d 534.

CONCLUSION

For the reasons discussed above, the trial court properly ordered that Steppke pay the cost of V.V.'s security upgrades in the restitution order. Therefore, Plaintiff-Respondent respectfully requests that the trial court's order be upheld and the Steppke's appeal be denied.

Dated: December 5, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,302 words.

Dated: December 5, 2017.

YOLANDA J. TIENSTRA
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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: December 5, 2017.

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