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WISCONSIN COURT OF APPEALS

District IV

12-20-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

Appeal No. 2017AP001683 CR
Circuit Court Case No. 2015CF000121

SARA L. STEPPKE,

Defendant-Appellant.

On appeal from a Judgment of Conviction
in the Circuit Court for Dodge County,
the Honorable Brian A. Pfitzinger, Circuit Judge, presiding.

**DEFENDANT-APPELLANT'S
REPLY BRIEF**

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ARGUMENT

I. The state's primary argument.

Steppke raised two basic issues in this appeal. One was that the circuit court's restitution analysis in her case was incomplete. (Steppke's Br. at 20-22). Although the court found a sufficient nexus between Steppke's crime and the clinic's need to upgrade its security, and although it found that Steppke's conduct was a substantial factor in causing the clinic to upgrade, it failed to determine whether the clinic's security upgrades were "special damages" that could be recovered in a comparable civil action. (*Id.*). Given that the upgrades would not constitute "special damages" under the facts of this case, and given that the clinic could not recover the cost of a new security system in a civil action for conversion, Steppke argued that the circuit court erred in ordering her to pay \$16,000 in restitution. (*Id.*).

The second issue Steppke raised was that "special damages" are not *any readily ascertainable expenditure paid out because of a crime*. (Steppke's Br. at 6-11). To the contrary, she said, "special damages" are the victim's actual pecuniary loss due to the crime committed. (*Id.*). She raised this point to show that our courts are using this incorrect definition to order restitution for new security systems and system upgrades, even when the victim has no special damages. (*Id.*). That is, these courts, in a round-about way, are actually ordering defendants to pay general damages when the restitution statute states that courts should not order defendants to pay general damages. (*Id.*).

The state has not directly addressed either issue in its response. Instead, it says that Steppke's approach to

restitution is too narrow – that restitution encompasses more than restoring a victim to his or her pre-crime financial status. (State’s Br. at 9, 11). Our courts, says the state, apply the restitution statute broadly and liberally, recognizing that the return/repair/replace analysis Steppke advocates does not adequately compensate a crime victim in all cases. (*Id.* at 11). According to the state, when the need for a security system upgrade is occasioned because of a crime, the broad and liberal construction of the statute must include compensation for such expenditures. (*Id.* at 11-12.).

Steppke responds that the state’s argument is all well and good, but the restitution statute, as presently written, provides no authority for a court to order a defendant to pay for a victim’s security system if that system does not constitute special damages in the first instance. No matter how broadly and liberally a court wants to construe the statute, our courts still must follow the law. The restitution statute is very specific. It authorizes a court to order a defendant to:

Pay 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.

Wis. Stats. § 973.20(5)(a).

When ordering a defendant to pay restitution a court must first determine that the victim suffered a loss. If so, then it must determine whether that loss could be recovered in a comparable civil action. In Steppke’s case the circuit court made neither determination.

As for construing the restitution statute broadly and liberally, as the state suggests, what the supreme court said was our courts should construe the restitution statute broadly and liberally in order to allow victims to recover their losses. *State v. Anderson*, 215 Wis.2d 673, 682, 573 N.W.2d 872 (Ct. App. 1997). The operative word in the instruction is “losses.” Our courts should not construe the statute so broadly that it goes beyond the victim’s losses and nets the victim a windfall, like it did in this case. In other words, restitution should make the victim whole, not make him better off. *Id.* at 682 (*the restitution statute is drafted to permit the trial court to order restitution in order to make the defendant's victim whole*).

In this same regard, the state borrows from the *Ezrow* case to argue that when a defendant’s conduct exposes weaknesses in a victim’s security system, then the victim’s need to upgrade becomes a natural consequence of the crime and is therefore compensable. (State’s Br. at 11, 12). Here, the state says, Steppke’s theft exposed weaknesses in V.V.’s old security system making her theft the triggering action that caused V.V. to need increased security. (*Id.* at 12). Thus, based on *Ezrow*, the upgrade should be compensable.

While this argument has some initial appeal, closer examination causes it to lose its luster. Awarding V.V. an upgraded system not because of any damage Steppke did to the old system, but solely to correct a preexisting vulnerability puts V.V. in a better position than it would have been in had Steppke’s conduct never occurred. In other words, the clinic is now far more secure than it was before Steppke ever entered the picture. V.V. is not just made whole, but is made way better off, contrary to the primary goal of restitution.

II. The state's other arguments.

On page 7 of its brief, the state says that Steppke points to *State v. Stowers* as the point where the court of appeals began to incorrectly define special damages. (State's Br. at 7). This is incorrect. Steppke cited to *Stowers* for the innocent remark that a stolen stereo was the type of *readily ascertainable pecuniary loss* the law has always considered to constitute special damages. (Brief in Chief at 8). As she explained, the incorrect definition arises in the *Behnke* case which borrowed from this remark in *Stowers*. (*Id.* at 8-9).

On page 8 of its brief, the state says that:

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. (State's Br. at 8).

The state cites to no authority for this proposition. Indeed, this is what Steppke is complaining about in this appeal. That making defendants pay to restore a victim's sense of security is not permitted under the restitution statute. (Brief in Chief at 11). A victim's lost sense of security represents general damages, which are not recoverable under the statute.

On page 9 of its brief, the state says that *Behnke* is still good law and that *Piotter*, *Fries*, and *Ezrow* all rely on *Behnke*. (State's Br. at 9). Steppke agrees that *Behnke* is still good law. The point she makes in her brief-in-chief is that the flawed definition of "special damages" arises in *Behnke* and is simply perpetuated in *Piotter*, *Fries*, and *Ezrow*. The *Piotter*, *Fries*, and *Ezrow* courts affirmed security system awards based on what she maintains is this incorrect definition. (Brief in Chief at 8, 15-16).

On page 12 of its brief, the state says that Steppke's crime created the injury, i.e., the loss of security experienced by V.V. (State's Br. at 12). While this may be true, restitution does not concern itself with these types of injuries. As Steppke stated in her brief-in-chief, a lost sense of security equates to general damages, as they naturally flow from being victimized. (Brief in Chief at 11). But under the statute, general damages are not compensable.

CONCLUSION

In summary, the restitution statute permits the circuit courts to order restitution only for "special damages." Special damages are not any readily ascertainable pecuniary expenditure paid out because of the crime. To the contrary, special damages are the victim's actual pecuniary loss due to the crime committed. In Steppke's case the victim, V.V., did not suffer any actual financial loss of its security system because of Steppke's conduct. Therefore, pursuant to the restitution statute the circuit court erred in ordering her to pay \$16,000 in restitution for those system upgrades. For these reasons the circuit court's \$16,000 restitution order must be reversed.

Dated this _____ day of December 2017.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 1,307 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding appendix, if any, which complies with the requirements of s. 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 December 2017.

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