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STATE OF WISCONSIN  
C O U R T O F A P P E A L S  
DISTRICT I  
Case No. 2018AP000259-CR

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STATE OF WISCONSIN,  
Plaintiff-Respondent,

v.

DAMIEN FAROLD ROBINSON,  
Defendant-Appellant.

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On Appeal from a Judgment of Conviction Entered  
in Milwaukee County Circuit Court,  
the Honorable Dennis R. Cimpl, Presiding

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BRIEF AND APPENDIX OF  
DEFENDANT-APPELLANT

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## **ISSUE PRESENTED**

1. Did the circuit court erroneously exercise its discretion in awarding restitution to two victims despite a lack of evidence that the amounts in question were “reasonable” repair costs under Wis. Stat. § 973.20(2)(b)?

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Publication of this case is requested as it will help to guide litigants in future cases with similar facts.

While Mr. Robinson does not request oral argument, he welcomes the opportunity to discuss the case should the Court believe that oral argument would be of assistance to its resolution of the matter.

## **STATEMENT OF THE CASE**

An information charged Mr. Robinson with eight counts of burglary of a building or dwelling as a party to the crime contrary to Wis. Stats. 943.10(1 m)(a) and 939.05. (5). Mr. Robinson was also charged with a single count of attempted burglary of a building or dwelling as a party to the crime contrary to Wis. Stats. § 943.10(1m)(a), 939.32 and 939.05. (5).

Mr. Robinson pleaded guilty to four counts of burglary of a building or dwelling as a party to the crime. (22:1). The remaining charges were dismissed and read-in. (22:3). He was sentenced to a lengthy term of imprisonment in the Wisconsin State Prison System. (22:1). He was also ordered to pay restitution. (22:1).

Mr. Robinson filed a timely notice of intent to pursue postconviction relief. (24). He ultimately filed a Rule 809.30 motion seeking modification of his sentence because his substantial cooperation with law enforcement was not discussed on the record at the sentencing hearing. (30). An exchange of written briefs followed. (36; 37). That motion was denied in a written order. (38).<sup>1</sup>

Mr. Robinson timely filed a notice of appeal. (39).

## **STATEMENT OF RELEVANT FACTS<sup>2</sup>**

### Restitution Proceedings

On February 8, 2017, Mr. Robinson appeared in the Circuit Court for Milwaukee County, the Honorable Dennis R. Cimpl presiding, for sentencing. (48); (App. 105).

At that hearing, the State submitted numerous requests for restitution resulting from the underlying burglaries in which Mr. Robinson participated. (48); (App. 105). Many of those requests were not contested:

- S.P. stated that her back door was damaged in a break-in. (7:1). She also had items stolen from her home. (7:1). She requested \$1,000 in restitution for an insurance deductible. (7:1). Mr. Robinson did not object. (48:3); (App. 107). The circuit court ordered \$1,000 in restitution, joint and several with Mr. Robinson's co-defendants. (48:3); (App. 107).

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<sup>1</sup> Mr. Robinson is not raising that issue on appeal.

<sup>2</sup> As the only challenged issue is restitution, Mr. Robinson is including only those facts directly relevant to that issue.

- M.F. submitted correspondence from his insurance company attesting that he had also paid a \$1,000 deductible. (17:2). Mr. Robinson stipulated to that amount. (48:4); (App. 108). That amount is also joint and several with Mr. Robinson's co-defendants. (48:4); (App. 108).
- B.R. submitted a restitution worksheet stating that she had both property losses and damage to her door. (8:2). The circuit court ordered Mr. Robinson to repay the cost of the insurance deductible, which was \$500. (48:4); (App. 108). There was no objection from Mr. Robinson. (48:4); (App. 108). That amount is joint and several with Mr. Robinson's co-defendants. (48:4); (App. 108).
- S.M. asked to be reimbursed for her \$500 insurance deductible. (48:6); (App. 110). There was no objection from Mr. Robinson. (48:6); (App. 110). That amount is joint and several with Mr. Robinson's co-defendants. (48:6); (App. 110).
- J.P. asked for \$500 relating to an insurance deductible. (48:6); (App. 110). He also asked that Mr. Robinson repay \$254.24 in lost wages. (48:6); (App. 110). The circuit court ruled that it could not reimburse him for lost wages but that it would order restitution with respect to the insurance deductible. (48:6); (App. 110). There was no objection from Mr. Robinson. (48:6); (App. 110). That amount is joint and several with Mr. Robinson's co-defendants. (53); (App. 105).
- R.R. asked for, and was awarded, \$340 as a result of a broken door. (16:1). There was no objection from Mr. Robinson. (48:13); (App. 117). That amount is joint

and several with Mr. Robinson's co-defendants. (53); (App. 101).

All told, Mr. Robinson agreed to repay \$3,840 with respect to these victims. (53); (App. 101).

However, there were two partially contested restitution requests relating to victims K.S. and M.T. (48); (App. 105).

*K.S.*

K.S. submitted a restitution worksheet. (9:2). She requested \$300 for the "cost of replacement door not covered by insurance." (9:2). She also requested \$200 in lost wages related to the door installation. (9:2). She asserted that her insurance deductible was \$500. (9:2). She therefore requested a total of \$1,000. (9:2).

The circuit court initially indicated that K.S. was only entitled to \$300 in restitution. (48:5); (App. 109). However, the State proposed that she be awarded \$800 to account for the deductible and the extra cost of repairing the door. (48:5); (App. 109). Counsel for Mr. Robinson proposed that she only be awarded the amount corresponding to the \$500 deductible. (48:5); (App. 109).

According to the circuit court, "Apparently, the insurance company must of said the door was only worth so much when they paid for everything, and it was \$300 more." (48:6); (App. 110). Counsel for Mr. Robinson began to respond before he was interrupted by the circuit court. (48:6); (App. 110). The circuit court stated, "Maybe she got a stronger door because of what happened." (48:6); (App. 110). It awarded \$800 to K.S. (48:6); (App. 110). According to the circuit court, "I just think that is what she intends." (48:6); (App. 110).



*M.T.*

M.T. submitted two documents. (15; 12). In the first, she claimed \$375 in property losses. (12). She stated that she paid \$550 to have her house boarded up, \$200 to have a door replaced, and \$250 for new locks. (12:2). She also requested \$300 for acupuncture expenses. (12:2). She declined to file an insurance claim. (12:2). Altogether, she asked for \$1,675 in restitution. (12).

In the second document she claimed that she had suffered \$409.83 in property losses as a result of the burglary. (15:2). She also submitted a past due invoice from “Carl Krueger Construction” made out to a misspelled version of M.T.’s name totaling \$535.57. (15:3). She also asked that Mr. Robinson bear the cost of a new door, priced at \$292.81 as well as the cost of new locks priced at \$250. (15:3-4). She asked that Mr. Robinson reimburse her for \$300 for “Acupuncture and Massage” as well as \$60 in parking costs related to court appearances. (15:5). The grand total was \$1,848.21. (15).

The circuit court stated that it would not award restitution for the acupuncture expenses. (48:8); (App. 112). Counsel for Mr. Robinson indicated that he was only challenging the \$535.57 payment to Carl Krueger Construction as the cost did not seem “reasonable.” (48:9); (App. 113).

M.T. was sworn as a witness and questioned by the circuit court. (48:10); (App. 114). She told the circuit court that the amount in question related to the construction company temporarily boarding up the broken door pending its repair. (48:10); (App. 114). She stated it was “a crime how much they charged.” (48:10); (App. 114). Neither party had questions for M.T. (48:11); (App. 115). Counsel for Mr.

Robinson indicated that he would have liked to question Mr. Krueger had he been present, which he was not.<sup>3</sup> (48:11); (App. 115).

The circuit court then ruled on the disputed amount:

I think it is appropriate. Based upon her testimony, under oath, that is what she had to pay to repair the damages. Now, we may think that Mr. Crueger overcharged her. I think she thinks Mr. Crueger overcharged her, but that is what she had to pay. So \$1,548.21 to [M.T].

(48:11); (App. 115).

Mr. Robinson's total restitution amount, joint and several with his co-defendants, is therefore \$6,188.21. (53); (App. 105).

### **SUMMARY OF ARGUMENT**

The circuit court erroneously exercised its discretion in awarding \$300 in restitution to K.S. and \$535.57 to M.T. With respect to the disputed award to K.S., the circuit court failed to faithfully apply the requirements of Wis. Stats. §§ 973.20(2)(b) and 973.20(14)(a) as there was insufficient proof to conclude that the \$300 award was a reasonable repair or replacement cost not otherwise covered by insurance. With respect to M.T., the circuit court failed to faithfully apply 973.20(2)(b) and 973.20(14)(a) as there was insufficient proof to conclude that the \$535.57 award was a reasonable repair cost.

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<sup>3</sup> Krueger is consistently misspelled in the transcript; counsel is using the spelling in the invoice included in the record at 15:3.

## ARGUMENT

### I. The Circuit Court Erroneously Exercised Its Discretion In Awarding Restitution to K.S. and M.T.

#### A. Legal principles and standard of review.

1. A restitution order is reviewed for an erroneous exercise of discretion.

Restitution is governed by the statutory procedures set forth in Wis. Stat. § 973.20. Interpretation of those statutory requirements is a question of law reviewed de novo. *State v. Johnson*, 2005 WI App 201, ¶ 10, 287 Wis. 2d 381, 704 N.W.2d 625. “However, trial 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.” *Id.* In reviewing the circuit court order, this Court must “examine the record to determine whether the trial 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.” *Id.*

“The term ‘discretion’ contemplates a process of reasoning which depends on facts in the record or reasonably derived by inference from the record that yield a conclusion based on logic and founded on proper legal standards.” *State v. Delgado*, 223 Wis. 2d 270, 280–81, 588 N.W.2d 1 (1999). “The record on appeal must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case.” *Id.* An appropriate exercise of discretion must also be based on more than the arbitrary judgments of the circuit court. *Edwards v. Edwards*, 97 Wis. 2d 111, 117, 293 N.W.2d 160 (1980).

While appellate review of discretionary determinations is deferential, the standard is not without meaning and requires that the ruling at issue be, among other descriptors, consistent with “the essential demands of fairness.” *State v. Koch*, 144 Wis. 2d 838, 847, 426 N.W.2d 586, (1988); *see also Martindale v. Ripp*, 2001 WI 113, ¶ 45, 246 Wis. 2d 67, 97, 629 N.W.2d 698 (discussing legal standard).

2. Legal standard for awarding restitution.

When restitution is contested, the claimant has the burden of proving their loss by a preponderance of the evidence. Wis. Stat. § 973.20(14)(a). When that claimed loss results from damaged property, Wis. Stat. § 973.20(2) governs. That statute reads:

(2) If a crime considered at sentencing resulted in damage to or loss or destruction of property, the restitution order may require that the defendant:

(a) Return the property to the owner or owner's designee;  
or

(b) If return of the property under par. (a) is impossible, impractical or inadequate, pay the owner or owner's designee the reasonable repair or replacement cost or the greater of:

1. The value of the property on the date of its damage, loss or destruction; or

2. The value of the property on the date of sentencing, less the value of any part of the property returned, as of the date of its return. The value of retail merchandise shall be its retail value.

When determining damages, the circuit court is further guided by sub. (5) which states that the defendant may be ordered 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. Stat. § 973.20(14)(5)(a).

B. The circuit court's order regarding K.S. constitutes an arbitrary and unreasonable exercise of discretion.

K.S. claimed that she was entitled to funds related to property damage as a result of two separate expenses: her insurance deductible (which, in context of her other request, presumably went to the cost of repairing the door) and a separate out of pocket cost for the door replacement amounting to \$300. (9).

There was no documentation to explain why the cost of the door exceeded the apparent insurance payout. Without an adequate explanation by the claimant, the circuit court was left to speculate that the insurance company may have “said the door was only worth so much when they paid for everything, and it was \$300 more.” (48:6); (App. 110). It also hypothesized that K.S. may have made the decision to get a “stronger”—and therefore more expensive—door as a result of the burglary. (48:6); (App. 110).

There are at least three problems with the court's discretionary determination that K.S. was entitled to \$300 in restitution.

First, K.S. did not prove by a preponderance of the evidence that the additional \$300 payout was recoverable under Wis. Stat. § 973.20(2)(b) as a “reasonable” repair or replacement cost. Because sub. 5 of the statute explicitly directs the reader to consult the law of damages as it applies to civil actions, a review of WIS JI-Civil 1804 (damage to repairable property) is instructive:

The second measure of damage is the "Cost of Repair" rule. If the property can be restored to its condition before the [damage], compensation to the owner is measured by the reasonable cost of the repairs necessary to restore the property to its prior condition. The measure under this second rule is the reasonable cost to restore the property to its former condition, **not what may have been the actual cost of repair.**

WIS JI-Civil 1804. (brackets in original; emphasis added).

In this case, there was absolutely no evidence submitted as to what repairs were actually done and what those repairs cost. That error should have been fatal to K.S., as she had the burden of submitting such evidence. Wis. Stat. § 973.20(14)(a). Thus, as a threshold matter, the lack of an explanation as to why the extra \$300 was warranted should have independently disqualified that claim. An award of restitution, unsupported by evidence, cannot constitute a reasoned exercise of discretion.

Going further, a review of the evidence suggests that even if such documentation had been produced, the \$300 was still improperly awarded. Based on K.S.’ representations, it is clear that there had already been an insurance claim relating to the damaged door. (9:2). This suggests that the repair or replacement costs *were* fairly assessed—and reimbursed—by the homeowner’s insurance company. The fact that an additional \$300 was then paid out of pocket is therefore a

significant red flag, as it suggests a possible dispute—between the homeowner and the insurance company at least—as to the reasonable repair or replacement cost of the door. That is precisely what the circuit court inferred in its comments. (48:6); (App. 110). Thus, the only evidence which the circuit court did have was evidence that the cost may have been unreasonable—at least from the insurance adjuster’s point of view—and that is not a sufficient basis for a legally adequate exercise of discretion.

The second problem is created by the circuit court’s speculation that the victim took this opportunity to upgrade their damaged property and to install a stronger door. (48:6); (App. 110). However, that would mean that the extra \$300 is clearly *not* an appropriate replacement cost under either the statute or the jury instruction, which distinguish between actual and reasonable costs. If the circuit court is correct, then the \$300 award is clearly improper under Wis. Stat. § 973.20(2)(b). The law simply does not allow an aggrieved property owner to obtain a windfall by having the defendant pay for an upgrade to their damaged property. And, because there is no other statutory authority to require Mr. Robinson to reimburse K.S. for a property upgrade, the award is again inconsistent with an adequate exercise of discretion.

Third, there was absolutely no evidence that this award was appropriate under the alternative procedure outlined in the statute, which would require Mr. Robinson to repay the approximate value of the property as it existed before the damage was done. Wis. Stat. § 973.20(2)(b)1. While this may be a difficult and—from the victim’s point of view, potentially undesirable—means of determining restitution, the circuit court could have tried to assign a value to the door as it existed before it was kicked in by Mr. Robinson and his co-

conspirators. However, there was no attempt to justify the award under this alternative.

Accordingly, the circuit court erroneously exercised its discretion in ordering Mr. Robinson to pay this amount given the lack of proof to support the proposed request and the apparent unreasonableness of the proposed repair or replacement cost.

This Court should therefore vacate that portion of the judgment of conviction imposing \$300 in restitution to K.S.

C. The circuit court's order regarding M.T. constitutes an arbitrary and unreasonable exercise of discretion.

M.T. also asked for repair costs—in this case, the cost of temporarily boarding up a broken door until it could be permanently replaced. (48:10); (App. 114). The cost of that repair was \$535.57. (48:9); (App. 113). Problematically, both the circuit court and the victim agreed that this was an unreasonable and excessive cost. (48:10-11); (App. 114-115). Like K.S., the victim also did not present further documentation of what was done or why the cost was so high. The only documentation presented was a past due invoice and, as counsel for Mr. Robinson pointed out, the contractor in question was never called as a witness to justify the cost.

As the foregoing discussion indicates, M.T. had the burden of proving the reasonableness of the proposed repair cost. Wis. Stat. § 973.20(14)(a). She failed to carry that burden and, in fact, was candid that the amount in question was patently *unreasonable* in her view. Accordingly, the circuit court erroneously exercised its discretion in ordering that Mr. Robinson should be responsible for the cost. Restitution is not governed by the victim's requests alone—as



the circuit court seemed to apply in its ruling. Rather, restitution must be ordered in compliance with the relevant legal authorities. In this case, the court was required to apply the “reasonable cost of repair” rule. Using the civil jury instruction, this means that the circuit court cannot inflexibly award the actual repair costs—only those costs which, in its discretion, it finds to be “reasonable.” In departing from statutory guidance, the circuit court erroneously exercised its discretion.

This Court should therefore vacate that portion of the order awarding \$535.57 to M.T.

### **CONCLUSION**

Mr. Robinson therefore respectfully requests that this Court grant the relief requested.

Dated this 30<sup>th</sup> day of March, 2018.

Respectfully submitted,

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### **CERTIFICATION AS TO FORM/LENGTH**

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,028 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 30<sup>th</sup> day of March, 2018.

Signed:

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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 § 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.

Dated this 30<sup>th</sup> day of March, 2018.

Signed:

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# **APPENDIX**

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