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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

06-25-2018
CLERK OF COURT OF APPEALS
OF WISCONSIN

Case No. 2018AP259-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

DAMIEN FAROLD ROBINSON,
Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN THE MILWAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE DENNIS R. CIMPL,
PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

Whether the circuit court erroneously exercised its discretion in ordering Damien Farold Robinson to pay restitution.

The circuit court inherently said no.

This Court should say no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

INTRODUCTION

Robinson pleaded guilty to committing a string of burglaries in the Milwaukee area in 2014. At sentencing, the victims presented evidence of their losses. The court, exercising its discretion, ordered Robinson to pay about \$6000 in restitution.

Undeterred by the high hurdle he must surmount to succeed on appeal, Robinson challenges part of this order. According to Robinson, the court erred in ordering him to pay about \$800 of the \$6000. But because the circuit court properly exercised its discretion, Robinson is wrong.

STATEMENT OF THE CASE

In late 2014, Robinson took part in a series of burglaries in the Milwaukee area in which he and his friend would “kick in the door” of the victim’s home, steal items,

and flee.¹ (R. 2.) As relevant here,² Robinson broke into Betsy Marlow's³ home in Wauwatosa while she was gone and stole cash, a laptop, and a television. (R. 2:5–6.) Robinson damaged her back door, breaking its lower half. (R. 2:6.)

Brenda Star was home asleep in her basement when she heard a knock on her door, followed by a loud “boom.” (R. 2:7.) She could then hear two people walking around on the first floor of her home. (R. 2:7.) She called 911, but hid in her basement until the police arrived. (R. 2:7.) From Star's home, Robinson stole a television and a watch. (R. 2:7.) As he did in burglarizing Marlow's home, Robinson caused damage to Star's back door and frame. (R. 2:7.)

When Robinson was eventually caught, the State charged him with nine counts of burglary, as a party to the crime, contrary to Wis. Stat. § 943.10(1m)(a), for his role in the crime spree. (R. 2.) Pursuant to a plea agreement, Robinson pleaded guilty to four of the counts, while the remaining counts were dismissed and read in.⁴ (R. 22; 47:3.)

¹ The State relies on the facts in the criminal complaint, which Robinson agreed may form the factual basis of his pleas. (R. 2; 47:18.)

² The State limits its statement of the case to the facts necessary to understand Robinson's sole claim on appeal, which is that the court erred in awarding restitution to two victims.

³ To comply with Wis. Stat. § 809.86, the State uses pseudonyms in place of the victims' names.

⁴ Robinson's burglary of Marlow's home constituted one of the four convictions, whereas Robinson's burglary of Star's home was a dismissed and read-in crime. (R. 2; 22; 47:18–19.) But for purposes of restitution, a crime considered at sentencing is both a crime for which the defendant was convicted and a read-in crime. *See* Wis. Stat. § 973.20(1g)(a).

At sentencing, the court considered the claims of the victims who had submitted requests for restitution. (R. 48:2–13.) Marlow sought \$1000 in restitution, which included \$500 to cover the insurance deductible, \$200 in lost wages, and \$300 to replace her door that was broken during the course of the burglary. (R. 2:6; 9:1; 48:5–6.) Marlow’s statement and accompanying restitution worksheet, both of which were submitted to the court, stated that the latter two amounts were not covered by her insurance. (R. 9:2; 48:5–6.) Robinson objected to Marlow’s request for the additional \$300 for the door, wondering if it was included in the deductible. (R. 48:5.)

The court granted Marlow’s request for restitution for both the deductible and the additional amount for the door, reasoning that Marlow had paid more for the door than the insurance company allowed and that the overage was reasonable. (R. 48:6.) But the court denied Marlow’s request for reimbursement for lost wages. (R. 48:5.)

Star sought \$1848.21 in restitution. (R. 15; 48:7.) She asked for compensation for the items Robinson stole—a television, a watch, and a wireless keyboard—as well as reimbursement for a replacement door, and the costs associated with boarding up the door to secure her house, replacing the door, and installing locks. (R. 15; 48:7–10.) She also asked to be reimbursed for parking fees that she paid to go to court and for acupuncture treatments she received for anxiety. (R. 15:4–5; 48:8.) Robinson objected to paying the \$535.57 to board up the door because Star’s receipt did not specify what work was done and he did not believe the cost was reasonable. (R. 48:9.)

The court disagreed with Robinson, granting Star restitution on all of her claims but the acupuncture. (R. 48:9–11.) The court said that while Star may have been

overcharged to have her door boarded up, she had to incur that cost and it was reasonable to make it part of restitution. (R. 48:11.)

The court sentenced Robinson to a total term of 12 years' initial confinement, to be followed by eight years' extended supervision. (R. 22.) The court ordered Robinson to pay restitution, jointly and severally, with his co-actors in specific amounts to each victim, including \$800 to Marlow, and \$1548.21 to Star. (R. 22:1.)

Robinson appeals, challenging part of the restitution award to Marlow and part of the award to Star.

STANDARD OF REVIEW

The decision to award restitution, including the amount, is committed to the circuit court's discretion and this Court will reverse that decision only when that discretion is exercised erroneously. *State v. Gibson*, 2012 WI App 103, ¶ 8, 344 Wis. 2d 220, 822 N.W.2d 500.

In reviewing an exercise of discretion, this Court "examine[s] the record 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." *State v. Longmire*, 2004 WI App 90, ¶ 16, 272 Wis. 2d 759, 681 N.W.2d 534.

ARGUMENT

The circuit court properly exercised its discretion when it ordered Robinson to pay the amounts of restitution that he now challenges.

A. Relevant law on restitution.

Wisconsin Stat. § 973.20 governs restitution. The trial court must order restitution for a crime considered at

sentencing “unless the court finds substantial reason not to do so and states the reason on the record.” Wis. Stat. § 973.20(1r).⁵

“A primary purpose of restitution is to compensate the victim.” *Gibson*, 344 Wis. 2d 220, ¶ 10. The court may require a defendant to pay special damages that the victim sustained and which the evidence in the record supports. *State v. Holmgren*, 229 Wis. 2d 358, 365, 599 N.W.2d 876 (Ct. App. 1999). Special damages “represent the victim’s actual pecuniary loss.” *Id.* The victim must prove her claim by a preponderance of the evidence. *See* Wis. Stat. § 973.20(14)(a).

Granting a victim restitution is the rule, not the exception. *State v. Canady*, 2000 WI App 87, ¶ 8, 234 Wis. 2d 261, 610 N.W.2d 147. The restitution statute must be interpreted broadly so that victims may recover their losses. *Id.*

⁵ Although a circuit court’s determination of the *amount* of restitution is discretionary, a determination of the court’s *authority* to order restitution is a question of law. *See State v. Rouse*, 2002 WI App 107, ¶ 6, 254 Wis. 2d 761, 647 N.W.2d 286. But Robinson does not challenge the court’s authority to order the restitution at issue; he challenges only the court’s discretionary determination of the amount. (Robinson’s Br. 7.)

B. The circuit court’s decision that Robinson must pay \$835.57 in restitution was not an erroneous exercise of discretion.

1. The circuit court properly exercised its discretion in granting Marlow restitution for out-of-pocket expenses to replace her broken door.

Marlow submitted a request for restitution that included reimbursement of \$300 to cover the cost of the replacement door that she said was “not covered by insurance.” (R. 9:1.) The court granted Marlow’s request. (R. 22; 48:6.) The court properly exercised its discretion in awarding Marlow restitution for the cost of the door.

At the plea hearing, Robinson admitted that he burglarized Marlow’s home, which caused her property loss and damage. (R. 2; 22; 47:4–5, 18–19.) Specifically, Robinson broke Marlow’s back door and she had to replace it. (R. 2:6; 9:1; 48:5–6.) She told the court that the insurance company did not reimburse her for the full cost of the replacement door, so she asked for Robinson to pay the remaining cost in restitution. (R. 9:1; 48:5–6.) This remaining cost—\$300—was a special damage incurred as a direct result of Robinson’s actions. Thus, the circuit court’s order that Robinson pay this amount in restitution was a proper exercise of the court’s discretion.

Robinson complains that the circuit court’s award to Marlow was arbitrary and an unreasonable exercise of its discretion for three reasons: (1) there was “absolutely no evidence” to support Marlow’s request for reimbursement; (2) Marlow’s potential upgrade to her door was inappropriate under the restitution statute; and (3) there was no evidence of the door’s previous value. Robinson’s complaints are meritless.

Robinson first seems to argue that to succeed on her claim, Marlow had to submit some kind of documentary evidence of her loss and her failure to do so should have been “fatal” to her claim.⁶ But the State is aware of no authority that holds that a circuit court may not award restitution in the absence of a victim’s documentary evidence. Marlow’s averment to the court that she suffered a loss in a greater amount than that covered by insurance was enough to satisfy her evidentiary burden of proof. *See State v. Queever*, 2016 WI App 87, ¶ 16 n.2, 372 Wis. 2d 388, 887 N.W.2d 912 (stating that the burden of proof in restitution matters is the preponderance of the evidence). It is not incredible to believe that Marlow would have to pay more for a door than an insurance company would cover and Robinson has not shown otherwise. And furthermore, Robinson has failed to show how the circuit court erroneously exercised its discretion in finding Marlow’s claim credible.

Robinson next points to the circuit court’s “speculation” that Marlow upgraded her door and argues that, if Marlow did so, the \$300 is not recoverable in restitution under Wis. Stat. § 973.20(2)(b).⁷ But Robinson’s argument is flawed for several reasons. First, the circuit court’s statement that Marlow “[m]aybe . . . got a stronger door because of what happened” is, as Robinson says, speculation. (R. 48:6.) There is no evidentiary support for the circuit court’s statement. Maybe Marlow bought a stronger door or maybe she replaced her door with a door similar to the one she had, but the insurance company simply would not compensate her for its full cost.

⁶ Robinson’s Br. 10.

⁷ Robinson’s Br. 11.

And second, Robinson’s reliance on Wis. Stat. § 973.20(2)(b) is misplaced. The State agrees that section 973.20(2)(b) instructs a circuit court to order a defendant to pay an owner for the reasonable repair or replacement cost of stolen or damaged property. But Robinson ignores that a victim is entitled to restitution when she can show that the defendant’s actions for items that may make her feel more secure when the defendant violated her sense of safety. See *State v. Johnson*, 2002 WI App 166, ¶ 21, 256 Wis. 2d 871, 649 N.W.2d 284 (upholding award of restitution for home security system that was installed to make child victim feel safer); *State v. Behnke*, 203 Wis. 2d 43, 60–61, 553 N.W.2d 265 (Ct. App. 1996) (upholding award of restitution for a new dead bolt). Presumably here—where Robinson broke into Marlow’s home by kicking in her back door—a stronger door would qualify as a special damage. Therefore, even though the circuit court’s statement was speculative, awarding restitution for a stronger door in this case is not an erroneous exercise of discretion.

Finally, Robinson argues that the circuit court could have, but did not, evaluate the cost of Marlow’s door before he destroyed it and then assign this cost to him.⁸ This argument ignores that the circuit court properly exercised its discretion by finding Marlow’s submission credible. And having found Marlow’s submission credible, and concluded that she was entitled to \$800 in restitution—which included \$300 for the door—the court was under no obligation to decide how much money the door cost before Robinson broke it. And declining to assign a pre-destruction value to the door was certainly not an erroneous exercise of the court’s discretion.

⁸ Robinson’s Br. 11–12.

In sum, the court's decision to assign Robinson \$800 in restitution costs pertaining to his burglary of Marlow's home was supported by the evidence and a proper exercise of the court's discretion.

2. The circuit court properly exercised its discretion in granting Star restitution for the costs to board up her door to secure her home.

Star submitted a request for restitution that included a request that Robinson reimburse her for the \$500-plus amount she paid to Carl Krueger Construction to board up her back door. (R. 12:2; 15:3; 48:10.) In support of her claim, she provided the court with a receipt from the construction company that billed her for \$535.57. (R. 15:3; 48:8–10.) The court granted Star's request. Again, the court properly exercised its discretion in awarding Star restitution for the money she spent to secure her home.

Although Robinson did not admit that he burglarized Star's home, he understood that the facts underlying the charge that he did so would be accepted as true by the court and the crime would be read-in at sentencing. (R. 47:6, 16–19.) The complaint alleged that Robinson burglarized Star's home while she hid in the basement. (R. 2:7.) He stole a television, a watch, and damaged her door and door frame. (R. 2:7.) She told the court that she had been "severely affected" by Robinson's action, suffering from PTSD, anxiety, and stress. (R. 12:1.) She said that she was afraid to be alone, to be in her own home, and of loud noises. (R. 12:1.)

At sentencing, Star asked for the \$500-plus reimbursement, telling the court that it "was to board-up the door that they busted in." (R. 48:9.) The court said, "That seems like a legitimate expense since she also has a receipt for it." (R. 48:9.) But Robinson objected, complaining that the

receipt did not “say what was done” and that the amount did “not seem reasonable.” (R. 48:9.)

The court then had Star sworn and asked her what the charge to Krueger construction was for. (R. 48:10.) Star replied, under oath, that she paid him to board up the door. (R. 48:10.) When pressed by the court on whether the \$500-plus amount was what she “actually” paid, Star responded, “They came out that day and boarded-up so my home was secure.” (R. 48:10.) Neither the State nor Robinson asked Star any questions. (R. 48:10–11.) The court granted Star’s request, finding that Krueger may have overcharged Star for his work, but that the amount was “what she had to pay.” (R. 48:11.)

The court’s exercise of discretion in awarding Star \$535.57 was proper because Star not only told the court that she paid someone to board up her home as a result of Robinson’s actions, she submitted a receipt and testified under oath about the amount of money she spent to keep her home secure. She amply met her burden to prove by a preponderance of the evidence that Robinson’s actions caused her to lose her door and that she required a stop-gap before she could get a new door. And she showed that she paid over \$500 to have the door boarded up before she could get the new door. The court properly exercised its discretion in ordering Robinson to pay Star \$535.57 in restitution.

On appeal, Robinson complains that the court’s order was “arbitrary” and an unreasonable exercise of its discretion because Star’s request was not supported by adequate evidence and because Krueger overcharged her for his work.⁹ Robinson’s complaints are meritless.

⁹ Robinson’s Br. 12–13.

The evidence showed that Robinson was involved in destroying Star's door and, as a direct result of Robinson's actions, Star paid to have her home secured until the door could be replaced. The latter is supported both by Star's testimony and an invoice from a construction company to her supporting her claim. This evidence satisfies her burden of proof. Robinson's argument to the contrary—that the receipt from Krueger is not enough, that Star's testimony is not enough, or that she must present “further documentation of what was done”—is unsupported by any authority. Star's evidence was ample to meet her burden to show by a preponderance of the evidence that she is entitled to relief.

And finally, Robinson's complaint that Star's request for restitution was unreasonable because Star may have been overcharged by Krueger is unavailing. Robinson is not entitled to have Star ask for bids from contractors to board up her home after Robinson broke in and destroyed her door. And he is not entitled to pick the lowest bidder.

Robinson cites Wis. Stat. § 973.20(14)(a) to argue that Star had the burden to prove the “reasonableness of the proposed repair cost.” But the subsection says no such thing. Section 973.20(14)(a) merely states that the victim bears the burden of demonstrating her loss by a preponderance of the evidence. And Star did so here.

Robinson broke into her home and damaged her door, which required her to hire a repair company that day to secure her home. (R. 48:10.) She paid \$535.57 to the company for that service. (R. 48:10.) The circuit court found Star's testimony and submission reasonable and Robinson offers no credible argument to disturb that decision on appeal.

In sum, the circuit court's order awarding restitution to Marlow and Star was not an erroneous exercise of its discretion.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the judgment of conviction.

Dated this 25th day of June, 2018.

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 2,958 words.

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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 this 25th day of June, 2018.

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