STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2018AP000259-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAMIEN FAROLD ROBINSON,

Defendant-Appellant.

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

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REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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I. The Circuit Court Erroneously Exercised Its Discretion In Awarding Restitution to K.S.

While the State is correct that "restitution is the rule and not the exception," *See* State's Br. at 5, they ignore the remainder of the quoted language from ***State v. Canady***, 2000 WI App 87, ¶ 8, 234 Wis. 2d 261, 610 N.W.2d 147—that it "should be ordered *whenever warranted*." (Emphasis added). In this case, restitution was not warranted under these facts and circumstances. As Mr. Robinson has argued in the initial brief, the circuit court's order with respect to the extra money used to repair or replace the door is not supported by record evidence and is in tension with plain statutory authority. Accordingly, it is an erroneous exercise of discretion.

The State, however, argues that the contested $300 award was a proper exercise of discretion. Their arguments are not persuasive and will be addressed below:

A. Restitution related to property damage is governed by Wis. Stat. § 973.20(2), not Wis. Stat. § 973.20(5).

The State's first argument is that the $300 award—which was related to the cost of repairing or replacing a door damaged by Mr. Robinson—was allowable as "special damages." (State's Br. at 6). Thus, in the State's view, the extra $300 was recoverable under Wis. Stat. § 973.20(5)(a). That position is problematic for several reasons.

First, the restitution statute plainly sets forth a mechanism for dealing with claims of damaged property in sub. (2). Accordingly, K.S.' claim was governed by that statute, as she was requesting money related to the damaged

door. (2:6; 9:1; 48:5-6). In this case, K.S. is incapable of satisfying that statute's requirements, which speak of "reasonable" repair or replacement costs. Wis. Stat. § 973.20(2)(b).

To get around that hurdle, the State seeks to fit the claim in under sub. (5), which deals with generic claims for "special damages." However, that argument ignores the plain applicability of another, more specific statute. "It is well-settled that 'where two conflicting statutes apply to the same subject, the more specific controls.'" ***State ex rel. Hensley v. Endicott***, 2001 WI 105, ¶ 19, 245 Wis. 2d 607, 629 N.W.2d 686 (quoting ***Jones v. State***, 226 Wis. 2d 565, 576, 594 N.W.2d 738 (1999)).

The argument also appears to contradict the rule that statutes should be read together and that this Court must "construe them so that they are harmonious." ***State ex rel. Rupinski v. Smith***, 2007 WI App 4, ¶ 19, 297 Wis. 2d 749, 728 N.W.2d 1 (quoting ***Antonio M.C. v. State***, 182 Wis. 2d 301, 309, 513 N.W.2d 662 (Ct. App. 1994). The State's reading, however, would radically alter the restitution statute, allowing sub. (5) to overtake and effectively replace the carefully drafted mechanism in sub. (2). If the State is correct that damaged property is governed by sub. (5), then sub. (2) is effectively rendered surplusage, which cannot be the correct result. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.")

Asserting that claims of damaged property are recoverable under sub. (5), rather than sub. (2), also ignores binding case law, which shows that sub. (5) is intended to

supplement—and not replace—the other provisions in the restitution statute. The purpose of sub. (5) is "to include, within the coverage of the statute, damages and situations not set forth in the preceding subsections." ***State v. Boffer***, 158 Wis. 2d 655, 661, 462 N.W.2d 906, (Ct. App. 1990). However, the situation at issue—damage to a door—is already covered by sub. (2), so clearly sub. (5) is not applicable.

Finally, while resort to extrinsic evidence is not necessary in light of the plain meaning of these statutes, the robust restitution statute now in existence replaced the more generic language in older versions of the statutes. Prior to the new Wis. Stat. § 973.20, the statutes merely directed the sentencing court to "require restitution designed to compensate the victim's pecuniary loss resulting from the crime to the extent possible, unless the court finds there is substantial reason not to order restitution as a condition of probation." Wis. Stat. § 973.09(1)(b) (1985-1986). However, 1987 Wisconsin Act 398, in creating the new restitution statute we now utilize today, specifically created two differing subsections—one for damaged property, and one for other "special damages." This demonstrates an express intent to adjudicate these two claims differently. Accordingly, it is improper that a claim for property damage should be considered under sub. (5).

B. State's remaining arguments.

The State claims that the victim'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." (State's Br. at 7). However, the statute explicitly requires the claimant to show that the amount claimed is "reasonable." Wis. Stat. § 973.20(2)(b); Wis. Stat.

§ 973.20(14)(a). A conclusory statement, unsupported by any other documentary evidence, is insufficient to carry the statutory burden. The preponderance standard requires, and necessarily implies, the existence of *some* evidence. However, a mere conclusory allegation is not, in and of itself, evidence. Ordering restitution on that basis is an erroneous exercise of discretion.

The State also takes an inconsistent position with respect to the sentencing court's admitted "speculation." (State's Br. at 7-8). It is Mr. Robinson's position that proper exercise of discretion ought not to be premised on mere speculation. While the State appears to agree that this is speculation—and that "[t]here is no evidentiary support for the circuit court's statement"—it nonetheless avers that this is an appropriate basis for an award of restitution. (State's Br. at 7-8). Simply put, the State cannot have it both ways and any argument reliant on such "speculation" is therefore unavailing. To that end, the State's reliance on ***State v. Johnson***, 2002 WI App 166, 256 Wis. 2d 871, 649 N.W.2d 284 and ***State v. Behnke***, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996) is not helpful as the sentencing court did not actually make any real findings about the door being "stronger." In contrast, both the cases cited by the State had detailed factual findings to support the special restitution requests at issue.

Finally, the State flatly disregards Mr. Robinson's alternate argument under Wis. Stat. § 973.20(2)(b)1. (State's Br. at 8). While Mr. Robinson agrees that the sentencing court was not obligated to use this valuation metric—and, as he conceded, applicability to this case is difficult—it remains a possible route toward a proper award of discretion. Failure to

invoke that statute, when no other justification has been given, is therefore also an erroneous exercise of discretion.[1]

For all of the foregoing reasons, the award to K.S. is an erroneous exercise of discretion and must be vacated on appeal.

II. The Circuit Court Erroneously Exercised Its Discretion In Awarding Restitution to M.T.

The State claims that the award to M.T. was not erroneous, suggesting that so long as M.T. can claim that her monetary loss was due to Mr. Robinson's conduct, there is no need for further analysis. (State's Br. at 10-11). The State's assertion does not grapple with the statutory language requiring that this cost be reasonable—a requirement which is incompatible with the limited factual findings the circuit court made.

Instead, the State flatly dismisses such a reasonableness requirement, asserting that "Robinson is not entitled to have Star ask for bids from contractors to board up her home after Robinson broke in and destroyed the door." (State's Br. at 11). Their pithy critique misses the mark, however. Mr. Robinson is not imposing some extra-statutory requirement on M.T. as it is the plain language of the statute—and not Mr. Robinson—that requires her request for repayment to be "reasonable." Wis. Stat. § 973.20(2)(b).

[1] Throughout its submission, the State alleges that the sentencing court found the victim's submission "credible." (State's Br. at 8). However, the sentencing court did not really analyze the credibility of said submission and, as Mr. Robinson pointed out, awarded restitution in the absence of any real evidence.

The State also alleges that there was no requirement that M.T. prove the reasonableness of the claimed repair cost. (State's Br. at 11). However, the statute plainly allocates the burden of proving a claimed loss to the victim. Wis. Stat. § 973.20(14)(a). Wis. Stat. § 973.20(2)(b) defines what kind of losses are recoverable. Read in conjunction, this means that the victim must prove that they bore not only a generic "loss" but that they also bore a "loss" recoverable under the statute's terms. If the State's position is correct—that victims are entitled to whatever they ask for, regardless of any other statutory authority further governing their claim—then the text of the restitution has been totally eviscerated and the careful drafting of the legislature made meaningless.

Finally, the State also alleges that Mr. Robinson is in the wrong for requiring proof to substantiate claimed losses. (State's Br. at 11). However, again, it is the statute—and not Mr. Robinson—who requires the victim to prove their loss. Before awarding restitution, the circuit court needs to have actual evidence before it. The victim's say-so, without more, is not sufficient.

For all of the foregoing reasons, the State's arguments are unpersuasive. The award to M.T. is an erroneous exercise of discretion and should be vacated on appeal.

CONCLUSION

Mr. Robinson therefore asks this Court to vacate the controverted restitution for all of the reasons set forth in his submissions to this point.

Dated this 10th day of July, 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 1,610 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 10th day of July, 2018.

Signed:

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