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STATE OF WISCONSIN
COURT OF APPEALS – DISTRICT IV
Case No. 2020AP1578-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY D. WRIGHT,

Defendant-Appellant.

On Appeal from the Amended Judgment of
Conviction and Restitution Order
Entered in the Sauk County Circuit Court,
the Honorable Michael P. Screnock, Presiding.

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. When the disorderly conduct involved statements made to specific employees, was the corporate owner of the property a victim for restitution purposes and were the costs associated with the round-the-clock armed guard special damages recoverable by the corporate owner as restitution under Wis. Stat. § 973.20(5)(a)?

The circuit court answered: “I don’t really think I need to parse out whether a corporation can be a victim for purposes of Chapter 950. I am satisfied that given Mr. Wright’s status as a former employee, that it was wholly reasonable for the employer under these circumstances...”. (25:28; App. 130).

2. Did the circuit court erroneously exercise its discretion when it ordered Mr. Wright to pay \$14,755 in restitution despite evidence that he was unable to work due to health reasons, faced \$10,000 in debt and his monthly social security income barely exceeded his monthly living expenses?

The circuit court ordered Mr. Wright to pay \$14,755 in restitution, holding: “I’m mindful that Mr. Wright currently does not have the ability to pay, write out a check for \$14,755. I do need to take into account his ability to pay, as well as I believe the statute allows me to set a payment plan.” (25:29-30; App. 131-32).

**STATEMENT ON ORAL ARGUMENT
AND PUBLICATION**

Neither oral argument nor publication is requested. Counsel anticipates that the briefs will adequately address the issue presented, and publication is not permitted because this is a one-judge appeal under Wis. Stat. § 752.31(2)(d).

**STATEMENT OF THE CASE AND
STATEMENT OF FACTS**

Mr. Wright worked at Christmas Mountain Resort. According to the criminal complaint filed on March 22, 2019, Mr. Wright was displeased with his annual review. He yelled and swore at his supervisor and threw the paperwork at her. Ten days later, Mr. Wright complained to a coworker about a supervisor and said he wanted to “choke him” and “tear his heart out.” Several weeks later, Mr. Wright again complained to a coworker and again swore, made racially inappropriate comments and said he would go to the corporate office in Boca Raton, Florida and “shoot them all.” One worker reported feeling unsafe around Mr. Wright because of his racist statements. (1:2). Finally, the complaint alleged that after another month went by, Mr. Wright said “that fucker from corporate is a joke and all of those fuckers from corporate need to be taken out.” (1:2). The state charged Mr. Wright with four counts of disorderly conduct in violation of Wis. Stat. § 947.01(1). (1).

On October 7, 2019, before the Honorable Michael P. Screnock, Mr. Wright entered no contest

pleas to two counts of disorderly conduct. The remaining two counts were dismissed and read in. The parties jointly recommended 18 months probation with restitution to be taken up at a later date. (24:2). The court accepted the plea and followed the joint recommendation. (24:11).

A restitution hearing was held on November 26, 2020. (25; App. 103-133). The state did not appear or take a position at the hearing. Instead Bill Hansen, the general manager of Christmas Mountain Village by Bluegreen Vacations, testified as to the amount of restitution requested. (25:2-12; App. 104-114). Mr. Hansen worked directly for the management company, Bluegreen, which manages Christmas Mountain Village and four associations that are in a time share. (25:7-8; App. 109-110).

Christmas Mountain Village by Bluegreen Vacations requested \$14,755 in restitution for an armed guard service that was retained after Mr. Wright was fired on March 22, 2019. The armed guard provided 227 hours of service at \$65 an hour and was present 24 hours a day. The armed service was provided from March 22, 2019, until March 31, 2019. (25:4-5; App. 106-107).

Mr. Hansen started working for Bluegreen Vacations on May 28, 2019, and specifically with the Christmas Mountain property on June 4, 2019. (25:9; App. 111). He was not working for the company when the incidents involving Mr. Wright took place or when the armed security was retained. (25:9; App. 111). Three of the five employees who witnessed

Mr. Wright's outbursts no longer worked for Christmas Mountain. (25:9-10; App. 111-112).

Mr. Hansen provided Exhibit 1, which included a receipt dated May 7, 2019, indicating the invoice was paid. (25:5; App. 107). He explained that Christmas Mountain has an owners' association because it is a time share. The money for the 24-hour armed guard came out of the operating fund. (25:6; App. 108).

Mr. Hansen told the court that armed guard services are not a common practice, and in fact he had worked in the industry 25 years for multiple employers and never hired an armed guard. (25:11; App. 113).

Mr. Wright also testified at the restitution hearing. He told the court that he had not been employed since he was terminated by Christmas Mountain Resort on March 22, 2019. (25:13; App. 115). His only income was \$960 per month in social security. (25:14; App. 116). His monthly expenses were between \$800-900 per month. (25:14; App. 116). Mr. Wright testified that he had a heart attack shortly after leaving Christmas Mountain and was awaiting scheduling for two pending surgeries (for bladder stones and a prostate issue). (25:14; App. 116). He would be unable to work until after recovering from these surgeries and he was approximately \$10,000 in debt. (25:15; App. 117).

Defense counsel argued that the restitution being sought came under the special damages provision, Wis. Stat. § 973.20(5)(a). Counsel pointed

out that the people Mr. Wright directed his speech to were not present in court, were not listed among the victims “and we have no information from them about how this impacted them or any losses they suffered as a result.” Instead, a corporation who was not a direct victim of the crime requested the restitution. (25:17-20; App. 119-122). Counsel noted that “no one who was even working on the property at the time is here today to talk about the calculus that went into deciding why that security was appropriate, how it was related to the conduct of Mr. Wright.” (25:20; App. 122). Thus counsel contended that there was no showing of loss by any specific, actual victim of the crimes. (25:23; App. 125).

Counsel also reasoned that Mr. Wright was in jail from March 22, 2019, until March 25, 2019. (25:20-21; App. 122-123). Once released, Mr. Wright was subject to bond conditions and temporary restraining orders. (25:22-23; App. 124-125).

In terms of Mr. Wright’s financial resources, counsel told the court that Mr. Wright had minimal income, was significantly in debt and faced significant health problems. Based on these factors, counsel argued that Mr. Wright did not have the ability to pay. (25:25; App. 127). Counsel continued to argue ability to pay when the circuit court interrupted to point out “I’ve got to – I have a whole family waiting for an adoption hearing...we’re now eight minutes overdue.” (25:25; App. 127).

The circuit court then granted Christmas Mountain Village by Bluegreen Vacations’ restitution

request. The circuit court chose not to address the special damages argument “I don’t think I need to parse out whether a corporation can be a victim for purposes of Chapter 950” and found “the corporation reasonably determined to increase security for that ten-day period when Mr. Wright’s passions about getting fired and getting charged criminally would be at their height...” (25:29; App. 131).

As for Mr. Wright’s ability to pay, the circuit court noted “And I’m mindful that Mr. Wright currently does not have the ability to pay, write out a check for \$14,755. I do need to take into account his ability to pay, as well as I believe the statute allows me to set a payment plan.” (25:29; App. 131). The court then ordered Mr. Wright to pay \$14,755 in restitution by making payments of \$100 per month beginning on February 1, 2020. (25:29-30; App. 131-32).

Mr. Wright now appeals the amended judgment of conviction that included an order for \$14,755 in restitution.

ARGUMENT

- I. The \$14,755 restitution order to the corporation was improper because: (1) the individuals who heard Mr. Wright’s statements, and not the corporate owner or the resort, were the victims of the disorderly conduct; and (2) the corporation’s costs incurred by hiring a 24-hour armed guard were not special damages because these costs could not be recovered in a civil action.

A. Christmas Mountain Village by Bluegreen Vacations was not a victim in this case because the disorderly conduct charges involved Mr. Wright making statements to individual coworkers.

Restitution is governed by Section 973.20 of the Wisconsin Statutes. As relevant in this case, that statute provides that “when imposing sentence or ordering probation for any crime...the court...shall order the defendant to make full or partial restitution...*to any victim of a crime considered at sentencing...*” Wis. Stat. § 973.20(1r) (emphasis added).

Whether Wis. Stat. § 973.20 provides a circuit court with the authority to order restitution under a certain set of facts is a question of law this court reviews de novo. *State v. Storlie*, 2002 WI App 163, ¶6, 256 Wis. 2d 500, 647 N.W.2d 926.

Mr. Wright was charged with disorderly conduct. (1). This case involved specific statements Mr. Wright made to specific individuals. The individuals were Mr. Wright’s coworkers at Christmas Mountain Resort in Sauk County. According to the complaint, the statements appeared to be precipitated by Mr. Wright’s annual review and were directed at: K.K.D, J.M., C.E.S., J.J.H. and C.Z. (1:2). Mr. Wright’s statements included racist comments about K.K.D., a statement that he wanted to “choke” and tear the heart out of another coworker and a statement “fuck all of those assholes down at

Corporate” followed by a statement that he wanted to “go down to Boca and shoot them all.”¹ (1:2).

At the restitution hearing, Mr. Hansen testified that K.K.D. and J.J.H. were no longer employed at Christmas Mountain Resort. Mr. Hansen testified that he had never heard of J.M. (25:10; App. 112). Mr. Hansen also explained that “Christmas Mountain is – a time-share. So we’re made up of four different associations...” and that the money paid to the 24-hour armed security firm came out of an “operating fund.” (25:6; App. 108).

In certain situations, there may be no victim in a disorderly conduct charge as “the plain language of the disorderly conduct statute does not require a victim.” *State v. Vinje*, 201 Wis. 2d 98, 104, 548 N.W.2d 118 (Ct. App. 1996). However, “if the disorderly conduct is directed at a person, then that person is the victim of disorderly conduct...” *Id.*

Therefore, the victims in this case were the individuals Mr. Wright made the statements to. The \$14,755 in restitution would not be paid to any of these victims. The \$14,755 would be paid to Christmas Mountain Village by Bluegreen Vacations; K.K.D., J.M., C.E.S., J.J.H. or C.Z. would receive nothing.

Cases involving restitution claims by government entities provide guidance in Mr. Wright’s

¹ The corporate headquarters were in Boca Raton, Florida.

case. In *State v. Ortiz*, 2001 WI 215, 247 Wis. 2d 836, 634 N.W.2d 860, this court held that the city of Racine could not collect overtime costs incurred by the police department because the city was not a direct and actual victim of the defendant's actions for purposes of restitution. Instead, the police officers involved in the standoff were the direct victims as the defendant's conduct was targeted directly at the police. *Id.* at ¶21.

Likewise, in *State v. Haase*, 2006 WI App 86, 293 Wis. 2d 322, 16 N.W.2d 526, the defendant fled from police. During the pursuit, a squad car drove through rough terrain, caught on fire and was destroyed. The circuit court ordered the defendant to pay restitution to the county for the squad car. This court reversed, concluding that the county sheriff's department was not the direct victim of the criminal conduct because the defendant's conduct did not directly cause the loss of the squad car. *Id.* at 331.

In Mr. Wright's case, his conduct, the inappropriate statements, was targeted directly at the people he worked with. They were the victims. The corporation in Florida that owned the resort was not a victim. Payment of \$14,755 to this corporation was improper because Mr. Wright did not commit crimes against the corporation, he committed crimes against K.K.D, J.M., C.E.S., J.J.H. and C.Z., the individuals against whom the disorderly conduct was directed. For this reason, the restitution order must be vacated.

- B. Restitution for a 24-hour armed guard was improper because it was not a special damage that could be recovered in a civil action.

As set forth above, Mr. Wright's position is that the corporation was not a victim. If this court concludes that the corporation is a victim of the disorderly conduct, the restitution is improper because the cost of the armed guards was not a special damage recoverable in a civil action.

A restitution order may require a defendant to “[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.” Wis. Stat. § 973.20(5)(a) (emphasis added). While courts are to construe the restitution statute broadly, sub. (5)(a) imposes limitations on the court's ability to order restitution. *See State v. Longmire*, 2004 WI App 90, ¶¶11-12, 272 Wis. 2d 759, 773, 681 N.W.2d 534, 541; *See also State v. Johnson*, 2005 WI App 201, ¶11, 287 Wis. 2d 381, 704 N.W.2d 625.

Special damages are “specific expenditure[s] by the victim paid out because of the crime.” *State v. Behnke*, 203 Wis. 2d 43, 61, 553 N.W.2d 265 (Ct. App. 1996). Thus, “the ultimate question in deciding whether an item of restitution is ‘special damages’ within the meaning of the statute is whether the item is a readily ascertainable pecuniary expenditure attributable to the defendant's criminal conduct *that could be recovered in any type of civil action*, such as

conversion or breach of contract.” *Johnson*, 2005 WI App 201, ¶12 (emphasis added).

Whether an item of restitution falls within this limitation and is thus recoverable under Wis. Stat. § 973.20, is a question of law that this court reviews de novo. *Longmire*, 2004 WI App 90, ¶12.

Although Mr. Wright’s case involved armed guards and not a security system, it is apt to review and distinguish a line of cases from this court holding that the cost to install or upgrade a lock or security system can be awarded as special damages under the restitution statute. *See State v. Behnke*, 203 Wis.2d at 43; *Johnson*, 2002 WI App. 166; *State v. Piotter*, No. 2009AP2005-CR, unpublished slip op. (WI App Jan. 26, 2010) (App. 138); *State v. Fries*, No. 2011AP517-CR, unpublished slip op. (WI App Dec. 27, 2012) (App. 142); *State v. Ezrow*, No. 2016AP1611-CR, unpublished slip op. (WI App May 25, 2017) (App. 150).² The critical distinction is that none of those cases held that the costs awarded would have been recoverable in a civil suit against the defendant, or that the costs were not subject to the civil suit limitation. *See Id.* The defendants in those cases did not argue that the restitution award was improper because the amounts were not special damages recoverable in a civil action and, therefore, this court made no reference to the issue. *See Id.*³ Recently,

² Pursuant to Wis. Stat. § 809.23(3)(b), unpublished opinions issued after July 1, 2009, may be cited for persuasive value and are not binding on the court.

³ *State v. Behnke*, 203 Wis. 2d 43 at 60 (upholding restitution ordered for a new lock over defendant’s argument that the victim failed to prove causation); *Johnson*, 2002 WI

however, in *State v. Steppke*, this court overturned a restitution award for upgrades to a security system on just such grounds. *State v. Steppke*, No. 2017AP1683-CR, unpublished slip op. (WI App March 1, 2018)(App. 155).

The defendant in *Steppke* was convicted of misdemeanor theft and the circuit court awarded restitution in the amount of \$16,124.40 for security system upgrades undertaken by the victim after the theft was discovered. *Id.*, ¶1. (App. 156). On appeal, Steppke challenged the restitution, arguing that the security system costs were general, not special damages, and that even if they were special damages, they could not be recovered as restitution because the costs would not be recoverable in a civil action against her for her criminal conduct. *Id.* (App. 156). Specifically, Steppke argued that the plain language of Wis. Stat. § 973.20(5)(a) limits restitution for

App. 166, ¶¶15-21 (upholding restitution ordered for a security system over defendant's argument that it was improper because it was purchased by the victim's stepfather); *State v. Piotter*, No. 2009AP2005-CR, unpublished slip op. (WI App Jan. 26, 2010)(upholding restitution ordered for new locks over defendant's argument that there was no causal nexus and he did not damage the existing locks)(App. 138); *State v. Fries*, No. 2011AP517-CR, unpublished slip op., (WI App Dec. 27, 2012)(upholding restitution ordered for an upgraded security system over defendant's argument that it was not a special damage "spent to return the victim to the financial state he was in before the crime occurred")(App. 149); *State v. Ezrow*, No. 2016AP1611-CR, unpublished slip op. (WI App May 25, 2017)(upholding restitution awarded to upgrade a security system over defendant's argument that the victim failed to show that the crime was a substantial factor in its decision to upgrade the system)(App. 154).

special damages to those recoverable in a civil action and that the security system costs would not be recoverable in a civil suit for conversion. *Id.*, ¶13. (App. 161). While holding that the costs for security system upgrades were special damages, this court nonetheless overturned the restitution award, finding that the state conceded that Steppke's argument regarding the civil action limitation was correct. *Id.*, ¶¶1, 13-15. (App. 161-162).

In Mr. Wright's case, the civil action limitation is squarely before the court. In cases involving theft, robbery or unlawful entry, the comparable civil claims would be conversion and trespass. *See Traeger v. Sperberg*, 256 Wis. 2d 330, 333, 41 N.W.2d 214 (1950); *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). In an action for conversion, the plaintiff can only recover the value of the property at the time of conversion, plus interest. He cannot recover general damages to compensate him for his lost sense of security. *Traeger*, 256 Wis. 2d at 333. Likewise, in an action for trespass the plaintiff can only recover nominal, compensatory and consequential damages but cannot recover for installing locks and alarms. *Gavcus v. Potter*, 808 F.2d 596, 598 (1986). Thus the restitution for enhanced security that was approved in *Ezrow* (theft), *Fries* (armed robbery) and *Piotter* (unlawful entry) do not defeat Mr. Wright's argument because had those cases properly addressed the civil action claim the outcomes likely would have been different.

It is difficult to identify a comparable civil claim to the disorderly conduct charges in Mr. Wright's case. Intentional infliction of emotional distress permits the recovery of damages but this

action requires proof of “disabling” distress. WIS JI-CIVIL 2725. No such proof was elicited in Mr. Wright’s case, and if the corporation is found to be a victim it obviously cannot experience emotional distress.

Similarly, the civil action of nuisance does not fit the disorderly conduct charges. “The term ‘nuisance’ refers to a condition or activity which unduly interferes with the use of land or a public place.” WIS JI-CIVIL 1920. The focus is on the “use and enjoyment of the land” and nuisance requires proof of “significant harm.” WIS JI-CIVIL 1926. Again, no such proof was elicited in Mr. Wright’s case and that undercuts any claim the corporation might have brought in civil court.

There isn't a civil claim that the corporation could have brought against Mr. Wright for his actions. Therefore, the expenses would not have been recoverable in a civil action and could not be awarded as restitution.

Because the cost of the armed guard service was not a special damage recoverable in a civil action, the restitution order must be vacated.

II. The evidence presented at the restitution hearing proved that Mr. Wright does not have and will not have the ability to pay \$14,755 in restitution.

At the restitution hearing, Mr. Wright testified that he had not been employed since he was terminated by Christmas Mountain Resort on

March 22, 2019. (25:13; App. 115). His only income was \$960 per month in social security while his monthly expenses were between \$800-900 per month. (25:14; App. 116). Mr. Wright testified that he had a heart attack shortly after leaving Christmas Mountain and was awaiting scheduling for two pending surgeries (for bladder stones and a prostate issue). (25:14; App. 116). These health issues would prevent him from returning to work until after he recovered from the surgeries. Mr. Wright also testified he had approximately \$10,000 in debt. (25:15; App. 117).

The circuit court held “I’m mindful that Mr. Wright currently does not have the ability to pay, write out a check for \$14,755. I do need to take into account his ability to pay, as well as I believe the statute allows me to set a payment plan.” (25:29; App. 131). Without further analysis, the circuit court then imposed the full \$14,755 the corporation requested. (13; App. 101).

The circuit court’s determination of the restitution amount is within its discretion and will be upheld absent an erroneous exercise of discretion. *State v. Johnson*, 2002 WI App. 166, ¶7, 256 Wis. 2d 871, 649 N.W.2d 284.

The circuit court erroneously exercised its discretion when it imposed over \$14,000 in restitution despite acknowledging that “I’m mindful that Mr. Wright currently does not have the ability to pay, write out a check for \$14,755.” (25:29; App. 131).

Mr. Wright met his burden under Wis. Stat. § 973.20(14)(b) to prove that he did not and will not have the ability to pay. He testified about his

inability to find work since losing his job in March 2019. This is not a surprise based on the circumstances surrounding his termination. Mr. Wright testified that social security provides him with \$800 per month but his monthly expenses nearly exceed this. Mr. Wright testified about his complicated health problems, including recovery from a heart attack and two impending surgeries. (25:13-15; App. 115-117). This evidence showed by a preponderance of the evidence that Mr. Wright did not have the ability to pay \$14,755.

Wisconsin Statute § 973.20(a) states “The court, in determining whether to order restitution and the amount thereof, shall consider all of the following:

1. The amount of loss suffered by any victim as a result of a crime considered at sentencing.
2. The financial resources of the defendant.
3. The present and future earning ability of the defendant.
4. The needs and earning ability of the defendant’s dependents.
5. Any other factors which the court deems appropriate.

The circuit court did not discuss these factors before imposing restitution. The restitution statute does not include a presumption that all defendants can pay restitution. The fact that the five factors in Wis. Stat. § 973.20(a) exist show that the legislature knew there would be a wide range of ability to pay among defendants; otherwise the factors to consider would be unnecessary.

This was not a financial crime. There are no unaccounted for funds that are related to the crimes. Mr. Wright was represented by the Office of the State Public Defender, suggesting an uncontroverted level of indigency.

The circuit court stated “I’m mindful that Mr. Wright currently does not have the ability to pay...” (25:29; App. 131). Despite this, the circuit court then imposed the full restitution amount without first considering the five factors in Wis. Stat. § 973.20(a) The circuit court erroneously exercised its discretion and this court should vacate the restitution.

CONCLUSION

For these reasons, Mr. Wright respectfully requests that this court vacate the restitution and remand for the circuit court to enter an amended judgment of conviction deleting the \$14,755 in restitution.

Dated this 1st day of December, 2020.

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 3,748 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 1st day of December, 2020.

Signed:

SUSAN E. ALESIA
Assistant State Public Defender

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 1st day of December, 2020.

Signed:

SUSAN E. ALESIA
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