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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

In its brief, the state argues that a corporation can be a victim for the purposes of restitution. To support this claim, the state cites the definition of "person" in Wis. Stat. § 990.01(26) as including "bodies politic or corporate." (State's Brief at 3). This statutory argument was not addressed at the restitution hearing since the state chose not to appear, the general manager of Christmas Mountain Village by Bluegreen Vacations made no legal argument and the circuit court held "I don't think I need to parse out whether a corporation can be a victim for purposes of Chapter 950." (25:28; App. 130).

Regardless, the facts completely undercut the state's victim argument. The state tries, and fails, to link Mr. Wright's statements such as "all of those

fuckers from corporate need to be taken out" to the corporation becoming a victim of the disorderly conduct. (State's Brief at 4). But, as the state acknowledges, the corporate office is in Boca Raton, Florida. Mr. Wright's statements were made in Sauk County, Wisconsin. The 24-hour armed security guard was in Sauk County, Wisconsin. The armed security in Wisconsin in no way protected the Florida corporate office. The state appears to argue that there was a direct threat to "kill individuals at the corporation's home office." (State's Brief at 4). If that is the case, then an armed guard in Wisconsin did not address that perceived threat in any way, shape or form.

Further, the statement to kill or harm was directed at individuals, not at the corporation. Mr. Wright could not "kill" Christmas Mountain Village by Bluegreen Vacations.

The armed guard did not protect the Florida corporation and the statements were not directed at the corporation. Under these facts, Christmas Mountain Village by Bluegreen Vacations is not a victim.

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.

First, the state argues that restitution to the corporation was recoverable as special damages in an action for private nuisance by intentional conduct. (State's Brief at 6).

The private nuisance doctrine is "traditionally used to adjudicate conflicts between private landowners…" *Prah v. Maretti*, 108 Wis. 2d 223, 238, 321 N.W.2d 182 (1982). While these statements were upsetting, there is no evidence that they interfered with the *use of the land*. This is simply a bad fit; the doctrine clearly was intended to address interference with property and not statements made to individuals.

Further illustrating the ill fit of the nuisance doctrine to the facts in this case is that the corporation is located in Florida and there was no interference with its land in Florida and no actions taken to protect its land in Florida. If the corporation is indeed the victim, it follows that the victim is in Florida.

The state also argues that this claim is forfeited because trial counsel did not raise this argument in the circuit court. (State's Brief at 8-9). The state is wrong. Trial counsel specifically argued that "the restitution being sought is under 973.20(5), special 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." (25:17; App. 119).

Further, defense counsel's argument was cut short by the court:

> Defense counsel: His physical ability to work at this time is questionable. Certainly there's been no testimony as to any dependents. But I think –
>
> The court: I've got to – I have a whole family waiting for an adoption hearing.

> Defense counsel: Okay.
>
> The court: We're now eight minutes overdue.
>
> Defense counsel: I apologize, Judge.

(25:25; App. 127).

The purpose of the forfeiture rule is to give the parties and circuit court notice of an issue and an opportunity to address the issue. *State v. Ndina*, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612. Trial counsel noted the civil action issue, thus providing notice. In *State v. Markwardt*, 2007 WI App 242, 306 Wis. 2d 420, 742 N.W.2d 546, the defendant argued that the state's failure to cite case law in its suppression argument deemed the argument waived. The court of appeals disagreed, holding that the citations in the state's appellate brief were not a new argument but merely citation to additional authority. *Id.* at ¶33. Finding that even scant argument is sufficient, the court noted that even a short mention gave the circuit court notice and "if the court had not been comfortable making a ruling because of the limited depth of the State's analysis, it could have simply requested further briefing." *Id. See also City of Oshkosh v. Winkler*, 206 Wis. 2d 538, 557 N.W.2d 464 (Ct. App. 1996).

As noted above in Argument A, the state's decision not to appear at the restitution hearing prevented the issue from being challenged or debated in more detail.

Regardless, the forfeiture rule is a rule of judicial administration and a reviewing court may disregard a forfeiture and address the merits of an unpreserved issue. *State v. Counihan*, 2020 WI 12,

¶27, 390 Wis. 2d 172, 938 N.W.2d 530. The question of whether there was a civil action in this case is a question of law that has been briefed by both parties. This court can decide the issue despite the fact that trial counsel did not make an in-depth argument on this point.

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.

The state concedes that the circuit court failed to make a strong record on the ability to pay issue, noting that the court's statements were not "the most lengthy, full, or robust record that could have been made on the issue" and "the record in this case could have been more fully developed…" (State's Brief at 10, 16).

The state is correct that the record is sparse on the ability to pay ruling. The circuit court appeared to be rushed and that may have led to the limited findings.

The circuit court did find that Mr. Wright "currently does not have the ability to pay." (25:29; App. 131). This is an obvious conclusion, as Mr. Wright showed he was unemployed, his only income was $960 per month in social security while his expenses were $800-900 per month, he had significant health issues and $10,000 in debt. (25:13-15; App. 115-117).

The state, again, chose not to appear at the restitution hearing and raises these arguments for the first time on appeal. Relying on *State v. Fernandez*, 2009 WI 29, 316 Wis. 2d 598, 764 N.W.2d

509, the state argues that despite the circuit court's deficient ruling and Mr. Wright's obvious financial limitations, there was no error because the overall amount ordered and the installment amount ordered were less than what was ordered in *Fernandez*. (State's Brief at 13).

This ignores the purpose of Wis. Stat. § 973.20(13)(a), which mandates that circuit courts consider a defendant's limited ability to pay when determining restitution. The circuit court failed to consider the factors in Wis. Stat. § 973.20(13)(a) and that erroneous exercise of discretion cannot be saved simply because the restitution amount was less than the amount imposed in *Fernandez*.

Additionally, the circuit court's erroneous exercise of discretion in determining restitution contradicts one of the purposes of restitution: rehabilitation of the defendant. In this case, ordering full restitution trivializes the importance of rehabilitation of Mr. Wright. The purpose of restitution is two-fold: (1) to make the victim whole; and (2) rehabilitating the defendant. *State v. Sweat*, 208 Wis. 2d 409, ¶21, 561 N.W.2d 695 (1997). Mr. Wright contends that while $14,755 might make the Florida corporation Christmas Mountain Village by Bluegreen Vacations whole, it will not rehabilitate Mr. Wright. In fact, by setting the amount so high as to be unachievable, the circuit court has inadvertently minimized the importance of paying restitution. Because Mr. Wright cannot pay the $14,755, the circuit court has implicitly set him up to fail which defeats the purpose of rehabilitation.

CONCLUSION

For these reasons, as well as those set forth in the brief-in-chief, 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 22nd day of January, 2021.

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 1,480 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 22nd day of January, 2021.

Signed:

SUSAN E. ALESIA
Assistant State Public Defender