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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2021AP002212-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY W. BUTLER,

Defendant-Appellant.

On appeal from a restitution decision and amended judgment of conviction entered in the Winnebago County Circuit Court, the Honorable Scott C. Woldt, presiding.

BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

At Jeffrey Butler's restitution hearing, A.S.¹ sought \$1,940 for damage to various items in her bedroom, including clothes. (34:5; App. 9). A.S. did not testify to the value of any particular damaged clothing item, nor did she specify what the damaged items were. Instead she said she Googled "each item that was damaged" and came up with \$1,940. (*Id.*; App. 9).

After evidence closed, the circuit court said its task was to set "a reasonable amount of restitution" for the "damaging of clothes." (34:18-19; App. 22-23). It declared that amount \$500. (34:19; App. 23).

Was the evidence sufficient to order that Mr. Butler pay \$500 in restitution for A.S.'s damaged clothes?

This Court should answer "no."

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Butler does not request oral argument or publication. Briefing will fully develop the issue presented, and since this is a misdemeanor appeal, the Court's decision will be ineligible for publication. *See* Wis. Stat. §§ 809.22(2)(b), 809.23(1)(b)4., 753.31(2)(f).

¹ This brief uses initials in lieu of the victim's name. *See* Wis. Stat. § 809.86(4).

STATEMENT OF THE CASE AND FACTS

Jeffrey Butler pleaded no contest to the sole count against him: misdemeanor criminal damage to property. (*See* 2:1; 18:1). Per the plea deal, the parties recommended a 30-day jail sentence. (35:2; App. 6). The circuit court followed their joint recommendation, then scheduled a contested restitution hearing. (18:2; 35:5; App. 9). This appeal challenges a portion of the restitution ordered at the conclusion of that hearing. (*See* 34:18-19, 24:2; App. 22-23).

Per the complaint, Mr. Butler damaged property belonging to A.S. (then his fiancée) while she was out celebrating a birthday and he was home, “intoxicated and very frustrated.” (2:2). A.S. called the police after she discovered the damage. (*Id.*). She told them Mr. Butler was likely responsible. (*Id.*).

At that point Mr. Butler was “being held on an emergency committal” at a nearby hospital, so police went to the hospital to question him. (*Id.*). He confessed and was charged not long after. (2:1-2).

Early in the case, the State filed a restitution request on A.S.’s behalf, asking for \$6,200. (16). The document does not specify the damages for which A.S. wanted recompense; it simply reflects how much money she wanted. Later (not long before the restitution hearing), the State filed an amended restitution request seeking \$6,391.99. (22). Again it did not allege any damages; it merely requested a sum of money.

At the outset of the restitution hearing, the State clarified the damages in question and set forth the parties' positions. (34:2; App. 6). First, Mr. Butler had agreed to pay \$179.99 for A.S.'s cell phone and \$362 for her TV. (*See id.*; App. 6). Second, Mr. Butler was contesting the \$400 A.S. sought for damage to a wall, as well as the \$1,940 she sought for "perfume, clothes, shoes and other ... items." (34:3; App. 7). Finally, for reasons she did not set forth on the record, A.S. was withdrawing her request for the remainder of the money. (*Id.*; App. 7). She now sought \$2,881.99.

Mr. Butler does not challenge the portion of the restitution order based on his stipulation. (34:19; App. 23). Nor does he challenge the portion ordered for damage to A.S.'s wall (\$100). (*Id.*; App. 23). He challenges only the \$500 ordered for damage to A.S.'s clothing.² (*Id.*; App. 23).

The State's evidence of the damage to A.S.'s clothing consisted exclusively of her testimony; as it explained before calling A.S. as a witness, there was no "supporting document" for her \$1,940 request. (*See* 34:3; App. 7). A.S. did not, however, enumerate the items that were damaged or specify their value. Instead A.S. spoke in generalities about "all of [her] clothes" and testified that she'd "Googled every

² While A.S. requested restitution for a variety of items damaged in her bedroom, her testimony revolved around her clothing. The circuit court limited its restitution order accordingly.

damaged item of clothing and determined the amount to re-buy it new.” (34:11; App. 15).

After A.S. stepped down, defense counsel called Mr. Butler. (34:12; App. 16). He testified to various sums of money he’d payed A.S. since the incident underlying this case, saying they “probably” added up to “close to \$2,500 or \$3,000.” (34:12-14; App. 16-18).

After expressing frustration with the evidence, the circuit court ordered “\$500 toward clothing,” explaining:

[W]hen someone comes to court, they have a burden ... to prove their damages. In this case, I have nothing other than [A.S.’s] testimony saying she’s ... Googled it and she doesn’t bring in any receipts. Then we have the defendant saying he’s paid her all this money. Nothing, I have nothing.

So the Court is left with, based upon the testimony, what’s a reasonable amount of restitution

(34:18-19; App. 22-23).

Additional details regarding the restitution hearing testimony are set forth in the argument section, below.

ARGUMENT

The evidence was insufficient to support a \$500 restitution order against Mr. Butler for damage to an unspecified assortment of clothing items.

A. Introduction and applicable law.

Restitution serves two aims: “rehabilitating the defendant” and “making the victim whole.” *Huml v. Vlazny*, 2006 WI 87, ¶38, 293 Wis. 2d 169, 716 N.W.2d 807. To further those aims, a circuit court shall order “full or partial restitution” unless it “finds substantial reason not to do so and states the reason on the record.” Wis. Stat. § 973.20(1r). But before it can determine what “full or partial restitution” might be in a particular case, the person seeking recompense must prove “the amount of loss sustained” by a preponderance of the evidence. § 973.20(14)(a). A circuit court may only order an amount supported by such evidence.

Thus, while a restitution order is a discretionary decision, the question of whether a circuit court was authorized to order a specific amount on a specific record is a legal one this Court reviews de novo. *State v. Haase*, 2006 WI App 86, ¶5, 293 Wis. 2d 322, 716 N.W.2d 526; *see also State v. Walters*, 224 Wis. 2d 897, 901, 591 N.W.2d 874 (Ct. App. 1999).

A.S’s vague testimony about Googling her wardrobe did not prove by a preponderance of the evidence that she sustained \$500 in clothes-related

damages. It did not establish *any* amount of clothing loss by a preponderance of the evidence. Thus, this portion of the circuit court's restitution order should be reversed. (*See* 34:19; App. 23).

B. The evidence relevant to the clothing losses A.S. sustained.

All of the evidence this Court will consider comes from the restitution hearing testimony. There were just two witnesses: A.S. and Mr. Butler.

A.S.'s direct examination

The State began by asking A.S. which of her items were damaged. (34:5; App. 9). A.S. confirmed it was "lotion, perfume, clothes, shoes." (*Id.*; App. 9). She did not, however, name or describe a single damaged item in any of those categories. She also did not know "how many items of clothing were damaged," instead saying it was "[e]verything." (34:6; App. 10).

As to the value of these unspecified items, A.S. testified that the police officer investigating the incident set out her damaged clothing and determined how much it was worth. (*Id.*; App. 9). Then, though she had just said an officer handled it, the State asked A.S. whether she used "an estimated replacement value" when deciding how much money to seek for her clothes, or whether she came up with \$1,940 some other way. (34:5; App. 9). Now A.S. responded that she'd used Google. (*Id.*; App. 9). The State asked whether she Googled "each item that was damaged," and A.S. said she did. (*Id.*; App. 9). A.S. did not say

what, specifically she had Googled, since she did not say what, specifically, “each item” was. (*Id.*; App. 9). Nor did A.S. clarify whether the clothes she’d looked up were still available for purchase or whether she’d found prices for items she considered similar.

The final piece of the State’s direct examination pertained to clothing A.S. had purchased since the incident underlying this case. (*See id.*). A.S. said she was “not even close to replacing everything yet,” but had “probably spent at least \$500 on new clothes so far.” (34:6; App. 10). The State then asked, “How much more is it going to cost you to replace everything that he had destroyed?” (*Id.*; App. 10). A.S. answered, “About \$1,500.” (*Id.*; App. 10). She was silent as to what items she had purchased, what those items were meant to replace, and what items she still had to buy. (*See id.*; App. 10).

A.S.’s cross-examination

On cross, defense counsel began by asking A.S. whether Mr. Butler had paid her money “in repayment for certain debts.” (34:7; App. 11). She said whatever money he transferred to her went to a shared phone bill and other “bills because he was living with me, eating my food.” (*Id.*; App. 11).

Defense counsel next addressed the value of A.S.’s damaged clothing. After clarifying that some of her clothing “had been worn ... for some time,” counsel asked whether she had provided “the State with any receipts for any clothing that [she had] re-purchased.” (34:9; App. 13). A.S. answered, “Most of us don’t save

receipts for our clothing.” (34:9). Defense counsel followed up: “Well, you did re-buy some of your clothing after the criminal charges were filed in this case. Is that correct?” (34:9-10; App. 13-14). A.S. said, “Yes.” (34:10; App. 14). The two then had the following exchange:

Q And you knew that this was a case involving damage to your clothing?

A Yes. I can show account statements for various shopping centers that I’ve got clothes from but I didn’t know that.

Q You were asked by the prosecutor to provide receipts for any damages related to this case. Is that true?

....

A Yes.

Q You did in fact provide receipts for some other damages, but not clothing, correct?

A Yes,

(34:10-11; App. 14-15).

There was no redirect examination, and the State did not call any other witnesses or introduce any other evidence.

Mr. Butler's direct examination

Defense counsel called Mr. Butler as a witness. Mr. Butler testified to a series of sums he paid A.S. after the incident underlying this case. (34:12-13; App. 16-17). He used an app to make these payments, sometimes noting in the app that the money was “for debt.” (34:13; App. 17). Mr. Butler’s payments to A.S. amounted to \$1,400, not including “the time[s] she used [his] card or [he] gave her cash.” (34:14; App. 18).

Mr. Butler's cross-examination

The State began by asking, “You damaged [A.S.’s] entire wardrobe, correct?” (34:16; App. 20). Mr. Butler answered, “Some of it.” (*Id.*; App. 20). The State then asked a series of questions geared towards assessing whether the payments Mr. Butler had testified to were for unrelated debts—which he denied. (34:16-17; App. 20-21).

Again, there was no redirect examination. Defense counsel did not call any other witnesses or present any additional evidence.

- C. The evidence is insufficient to support the \$500 of restitution the circuit court ordered for A.S.’s clothes.

A.S.’s testimony—the only evidence presented about the clothing-related losses she sustained—was insufficient to support a \$500 restitution order. While mathematical precision is not required at a restitution hearing, A.S.’s testimony lacked even minimal

specificity about the damages she had the burden to prove. Thus, the circuit court should not have ordered restitution for her damaged clothes. This Court should reverse and remand so Mr. Butler's judgment of conviction can be amended accordingly.

A.S. testified that “[e]verything” in her wardrobe was damaged and that she'd used Google to determine “[e]verything” was worth \$1,940. (34:5-6; App. 9-10). She also testified that she'd bought new clothes since the incident here and had “probably” spent \$500 or more. (34:6; App. 10). What she did not testify to were specifics: what particular items had been damaged, what those particular items were worth, what items she had Googled to determine their worth, or what she had purchased to replace her damaged items. Finally, though the District Attorney's office asked her to provide receipts and documentation regarding the losses she'd sustained—and though she did so for other losses—she offered nothing as to her damaged clothes.

There are thus more questions than answers about what those losses were. For example, A.S. said she didn't have any bra to wear after this incident (one of the most specific statements she made), but how many bras had she had? Two? Ten? Likewise, when A.S. went shopping to replace her damaged clothing, did she purchase the same items from the stores, the same types of items in the same price range, or entirely different clothing items?

The circuit court was left with no means to assess what A.S. had actually lost, or whether she'd quantified her losses with reasonable accuracy. It acknowledged as much by commenting: “[W]hen someone comes to court, they have a burden ... to prove their damages. In this case, I have nothing other than [A.S.’s] testimony saying she’s ... Googled it and she doesn’t bring in any receipts. Then we have the defendant saying he’s paid her all this money. Nothing, I have nothing.” (34:18; App. 22). Thus, while the circuit court tried to set a reasonable amount of restitution, it lacked an evidentiary basis for ordering any amount at all.

State v. Stowers, 177 Wis. 2d 798, 806-07, 503 N.W.2d 8 (1993), supports this analysis. Roy Stowers was convicted of fourth-degree sexual assault. The victim testified at sentencing that “she had been hospitalized for a week due to a posttraumatic stress disorder resulting from her relationship with Stowers and that she was receiving weekly counseling.” *Id.* at 801. The State requested \$5,000 in restitution, saying it was the “minimum amount ... necessary for her to continue her counseling.” *Id.* The circuit court granted that request. *Id.* at 802. It made clear that some of the funds were intended “to reimburse the victim for her pecuniary loss—the expense of her psychological counseling.” *Id.* at 803. This, said the court of appeals, was error.

Like A.S., the victim in *Stowers* presented only her own testimony to support her restitution request. *Id.* at 807. That testimony, like A.S.’s, lacked critical

specifics—nothing on “the cost or duration of the victim’s psychological counseling or the cost of her hospitalization.” *Id.* Thus, while the court of appeals reaffirmed the principle that “the formalities and legal and evidentiary requirements of a civil trial may be dispensed with in restitution hearings,” it held that the victim’s testimony “was insufficient under any standard to support a *specific* monetary award.” *Id.* (emphasis added). There was no question the victim had sustained losses, but there was no evidentiary basis on which the circuit court could order any particular amount.

In *Stowers*, the court of appeals reversed and remanded for a new restitution hearing. But in that case, there had been no dedicated restitution hearing; the circuit court simply granted the State’s restitution request at sentencing. In addition, in *Stowers*, the circuit court had misapprehended the type of damages a victim could seek restitution for—not just the evidence required to prove those damages. Under these circumstances, ordering a full restitution hearing was a reasonable remedy.

Here, there has already been a full and fair restitution hearing. The State understood its burden at that hearing, and the circuit court understood what sorts of damages A.S. could lawfully seek. Further, most of the restitution the circuit court ordered is not contested here. Remanding for a partial restitution hearing, regarding damages the State failed to prove the first time around, makes little sense.

The State did not meet its preponderance-of-the-evidence burden. The restitution order should thus be reduced by \$500.

CONCLUSION

Mr. Butler respectfully requests that this Court to hold the evidence insufficient to support the circuit court's order that Mr. Butler pay \$500 in restitution for A.S.'s damaged clothes. Mr. Butler further asks that the Court to reverse the circuit court's restitution decision in part and remand the case with instructions to reduce its restitution order by \$500 and amend the judgment of conviction accordingly.

Dated this 15th day of July, 2022.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,503 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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 15th day of July, 2022.

Signed:

Electronically signed by

Megan Sanders-Drazen

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