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CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 2021AP002212-CR

v.

JEFFREY W. BUTLER
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM A RESTITUTION DECISION AND AMENDED
JUDGMENT OF CONVICTION ENTERED IN THE WINNEBAGO
COUNTY CIRCUIT COURT, THE HONORABLE SCOTT C. WOLDT,
PRESIDING

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I. Statement of Issues Presented for Review

- 1) Whether the trial court had sufficient evidence to order \$500. restitution for damaged clothing after hearing the victim's testimony.

II. Statement on Oral Argument and Publication

The State is requesting neither publication nor oral argument.

III. Statement of the Case

The State believes the Defendant-Appellant's recitation of the facts of the case is sufficient, and pursuant to Wis. Stat. 809.19(3)(a)(2), omits a repetitive statement of the case.

IV. Argument

The victim's testimony at the restitution hearing was sufficient to support the trial court's \$500. restitution order for damaged clothing.

Certainly, Section 973.20, Wis. Stats., the restitution statute, is the applicable statutory authority. Specifically:

“When imposing sentence or ordering probation for any crime ... for which the defendant was convicted, the court, in addition to any other penalty authorized by law, **shall** order the defendant to make full or **partial** restitution under this section to any victim of a crime considered at sentencing or, if the victim is deceased, to his or her estate, **unless** the court finds substantial reason not to do so and states the reason on the record.”

(emphasis added) Wis. Stat. §973.20(1r).

The State of Wisconsin now also has Marsy's Law, Wis. Const. art. I, s. 9m. With regard to restitution, Wis. Const. art. I, s. 9m(2)(m) states that crime victims are entitled “[t]o full restitution from any person who has been ordered to pay restitution to the victim and to be provided with assistance collecting restitution.” This provision is self-executing, so that

victims may now seek to have their rights enforced by the courts. Wis. Const. art. I, s. 9m(4).

As for the amount of restitution ordered, the trial court may require the defendant to “pay the owner or owner’s designee the reasonable repair or **replacement cost** or the greater of” either (1) the property value on date of damage, loss or destruction, or (2) the property value on date of sentencing minus value of any returned part of the property. (emphasis added) Wis. Stat. §973.20(2)(b). Here, as required by Wisconsin’s restitution statute, the trial court ordered partial restitution based on the victim’s testimony of her out of pocket cost to replace her damaged clothing through the date of the post-sentencing restitution hearing.

Wisconsin’s restitution statute also provides trial courts with guidance in determining whether to order restitution and how much, by requiring consideration of the following factors:

1. The amount of loss suffered by any victim as a result of the crime considered at sentencing.
2. The financial resources of the defendant.
3. The present and future earning ability of the defendant.

4. The present and future earning ability of the defendant's dependents.
5. Any other factors which the court deems appropriate.

Wis. Stat. §973.20(13)(a)(1-5).

As for the burden of proof at a restitution hearing, the victim has the burden of proving the amount of loss sustained by the preponderance of the evidence. Wis. Stat. §973.20(14)(a).

The State wholeheartedly disagrees with the Defendant-Appellant's characterization of the victim's testimony as not establishing any amount of clothing loss by a preponderance of the evidence. Her testimony, without any physical documentation such as receipts, absolutely established by a preponderance of the evidence that she had "spent at least \$500. on new clothes so far." (34:6; App. 10) In keeping with the Wisconsin Criminal Jury Instructions; namely, 103 Evidence Defined and 170 Circumstantial Evidence, if the sworn testimony of a witness is evidence that can establish an element of a crime beyond a reasonable doubt, this victim's testimony certainly established that she had spent at least \$500. to replace her damaged clothes by a preponderance of the evidence.

With idealistic expectations, the Defendant-Appellant wishes the victim had given more specifics about the individual items of clothing, clarified aspects of her basis for valuation, or enumerated what exactly she had purchased for \$500. so that she could have something to wear. The reality, however, is that this victim testified under oath about the totality of her losses to the best of her ability in the courtroom that day. A restitution hearing is not the equivalent of a civil trial and does **not** require strict adherence to the rules of evidence and burden of proof. *State v. Loutsch*, 2003 WI App 16, ¶ 21, 259 Wis. 2d 901, 656 N.W.2d 781 (overruled on other grounds); *State v. Anderson*, 215 Wis. 2d 667, 573 N.W.2d 872 (Ct. App. 1997). The victim provided what documentation she could and explained herself and her reasoning for the rest, i.e., the clothing. Speculation after the fact about what more could have been learned is futile.

Within the statutory parameters and relevant factors, the ultimate determination of the amount of restitution owed rests in the discretion of the trial court. *State v Boffer*, 158 Wis. 2d 655, 462 N.W.2d 906 (Ct. App. 1990); *State v. Anderson*, 215 Wis. 2d 667, 573 N.W.2d 872 (Ct. App. 1997). The presiding judge observed her conduct, demeanor and tone of voice on the witness stand to assess her credibility. The trial court expressed

its displeasure with the dearth of documentation provided by both parties, and then proceeded to do its best “based upon the testimony.” (34:18; App. 22) The trial court then allocated \$500., which was the minimum amount she said she already spent on new clothes so far, out of her original \$1,940. request for the value of her whole wardrobe. The trial court ordered partial restitution based on the victim’s testimony. Although disappointed with both parties’ lack of supporting documentation, the trial court did not find, nor state on the record, a substantial reason not to order restitution at the close of the hearing.

V. Conclusion

After hearing the victim's testimony, the trial court correctly exercised its discretion in ordering \$500. restitution for the victim's damaged clothing, when she originally claimed the value of her whole wardrobe was \$1,940. The victim's testimony alone was sufficient to establish to a preponderance of the evidence that she had already spent at least \$500. on new clothes so far. The victim's testimony provided the trial court with sufficient proof to find to a preponderance of the evidence to support its \$500. restitution order, which was equal to the minimum amount that she had spent out of pocket to obtain new clothes thus far. Therefore, this Court should affirm the \$500. restitution order.

Dated at Oshkosh, Wisconsin this October 13, 2022

Electronically signed by:

Stephanie A. Stauber

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 1066 words.

Dated at Oshkosh, Wisconsin this October 13, 2022

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