COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2606-CR **Cir. Ct. No. 2006CF47**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD JAMES GLASEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pepin County: JAMES J. DUVALL, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Gerald Glasel appeals a judgment convicting him of burglary of a building or dwelling, as party to a crime. Glasel challenges only that part of the judgment ordering him to pay $800 restitution, claiming his due process rights were violated because he was not given the opportunity to testify at

the restitution hearing. Glasel also challenges the amount of restitution ordered and further contends the circuit court erred by setting restitution without considering his ability to pay. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 Glasel was charged with party to the crime of burglary to a building or dwelling and two counts of misdemeanor theft. The probable cause portion of the complaint recounted Glasel's statement to police, in which Glasel indicated he and Mike Wild parked down the road and walked to a tavern near Mondovi, later identified as Coyote Carol's. According to Glasel, Wild popped off a window screen and crawled through the opening into the tavern while Glasel waited outside. An alarm went off, Wild climbed back out and the two ran back to the car. Glasel and Wild later returned to a garage next to the tavern and stole a trailer, tool box, and an all-terrain vehicle. Those items were later recovered by the police. Glasel also indicated he and Wild stole copper wire from Durand Auto Salvage.

¶3 In exchange for his no contest plea to party to the crime of burglary to a building or dwelling, the State agreed to dismiss and read in the remaining counts and recommend no more than three years' initial confinement and four years' extended supervision, to run concurrent to his sentence in an Eau Claire County case. During the plea hearing, the State informed the court that restitution would total $800, consisting of $500 to Coyote Carol's and $300 to Durand Auto Salvage. Glasel was convicted upon his no contest plea and sentenced to three years' initial confinement and four years' extended supervision. At the subsequent restitution hearing, Glasel appeared through counsel, but did not appear

personally. The court heard victim testimony and ultimately ordered $800 in restitution. This appeal follows.

DISCUSSION

¶4 Glasel claims his due process rights were violated because he was not given the opportunity to testify at the restitution hearing. We are not persuaded. WISCONSIN STAT. § 973.20(14)[1] governs the procedures for restitution hearings and para. (d) of that statute provides, in relevant part, that interested parties "shall have an opportunity to be heard, personally or through counsel, to present evidence and to cross-examine witnesses called by other parties." The statute further provides that "[i]f the defendant is incarcerated, he or she may participate by telephone under s. 807.13 unless the court issues a writ or subpoena compelling the defendant to appear in person." WIS. STAT. § 973.20(14)(d).

¶5 Glasel acknowledges that at the hearing, defense counsel noted Glasel was in prison and further expressed his belief that Glasel did not need to appear because they would be addressing "legal issues" for which Glasel's testimony was unnecessary. Glasel now argues that "several factual issues were raised during the hearing separate from the legal issues" and he would have provided testimony if present. Pursuant to WIS. STAT. § 973.20(14)(d), however, Glasel had no right to appear in person at the hearing. Glasel was represented at the hearing by counsel. Although he could have participated by telephone, or in person if ordered by the court, Glasel does not assert that he requested these forms of participation. Therefore, regardless whether factual issues were ultimately

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

raised at the hearing, the court did not violate Glasel's due process rights by holding the hearing and determining restitution.

¶6 Glasel nevertheless disputes the amount of restitution owed for the copper wire and further challenges the notion that Wild stole $500 from the tavern safe. The evidence presented at the hearing, however, supported the amount of restitution ordered. At a restitution hearing, the burden is on the victim to demonstrate the amount of loss, by a preponderance of the evidence. WIS. STAT. § 973.20(14)(a). Here, one victim testified as to his loss, stating that 101 pounds of copper wire and tubing, worth a little more than $300, was stolen. Because Glasel told the police that he and Wild stole fifty-six pounds of silver, the State asked the victim to specify how he knew the stolen copper weighed 101 pounds. The victim explained that he had just bought the copper, weighed it and took it off the scale, and the whole container had been stolen from "right by the scale." In the absence of evidence to the contrary, the court properly set restitution for the copper at $300.

¶7 The other victim testified that $500 was taken from the safe at Coyote Carol's. The State pointed out that in the police report, the investigator indicated the "cash register and safe were secured and did not appear to be tampered with." The victim indicated, however, that the safe initially appeared to be intact, but when she later went to open the safe the door fell off because the pin had been knocked out of the hinge. Although defense counsel moved for a continuance to call the investigating officer, the court expressed doubt that the officer's testimony would significantly change the evidence, as the victim had given a reasonable explanation as to why the safe would have appeared secure. The court found the victim to be credible and properly set restitution at $500. We discern no error.

¶8 Finally, Glasel contends the circuit court erred by setting restitution without considering his ability to pay. While a court setting restitution is to consider the defendant's ability to pay, *see* WIS. STAT. § 973.20(13)(a), the defendant has the burden at the restitution hearing to demonstrate by a preponderance of the evidence "the financial resources of the defendant, the present and future earning ability of the defendant and the needs and earning ability of the defendant's dependents." WIS. STAT. § 973.20(14)(b). As this court has stated, § 973.20(14)(b) "clearly allocates the burden of proof as to ability to pay to the offender." ***State v. Dugan***, 193 Wis. 2d 610, 625, 534 N.W.2d 897 (Ct. App. 1995). A defendant who fails to contest the ability to pay restitution, and therefore presents no evidence on the issue, waives it on appeal. ***State v. Johnson***, 2002 WI App 166, ¶16, 256 Wis. 2d 871, 649 N.W.2d 284. Here, Glasel's counsel neither asserted an inability to pay nor presented evidence at the restitution hearing regarding his ability to pay. The issue is therefore waived.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.