

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP517-CR

Cir. Ct. No. 2010CF41

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSE D. FRIES,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Juneau County:
PAUL S. CURRAN, Judge. *Affirmed.*

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 HIGGINBOTHAM, J. Jesse Fries was convicted of armed robbery of a gas station and convenience store located in Juneau County. As part of its sentence, the court ordered Fries to pay restitution, including \$8,715.11, an amount which the owner of the store incurred to install a new security system in

the convenience store. Fries appeals the court's restitution order and the order denying postconviction relief on the ground that the cost of the new security system does not constitute a "special damage" within the meaning of the restitution statute, WIS. STAT. § 973.20 (2009-10).¹ In accordance with our holdings in *State v. Behnke*, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996), and *State v. Johnson*, 2002 WI App 166, 256 Wis. 2d 871, 649 N.W.2d 284, we conclude that the court appropriately exercised its discretion in awarding the store owner the cost of the upgraded security system to help restore a sense of security in the store. Accordingly, we affirm.

BACKGROUND

¶2 Jesse Fries pled no contest to a charge of armed robbery. Fries robbed a BP gas station and convenience store owned by Jeff Scully located in Juneau County. A female overnight clerk, who was staffing the store at the time of the robbery, suffered significant psychological trauma as a result of the robbery. At the sentencing hearing, Scully sought restitution for the money that was stolen and for worker's compensation benefits provided to the female clerk. Scully also requested reimbursement for an upgraded security system he had installed in the store to help his employees "feel more comfortable" and to restore a sense of security. Scully noted that the security system in place at the time of the armed robbery was adequate to gather evidence of the crime, but felt that it was necessary to install a new security system after his employees expressed that they did not feel safe at the store.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted

¶3 At the sentencing hearing, Fries did not object to paying restitution for the stolen money or for the worker's compensation claim. However, Fries requested that the court hold a separate restitution hearing regarding the upgraded security system. In a separate restitution hearing, the court ordered restitution in the amount of \$8,715.11 for the upgraded security system. Relying primarily on *State v. Heyn*, 155 Wis. 2d 621, 456 N.W.2d 157 (1990), the court awarded the store owner the cost of the security system because, "as a result of the acts of [Fries], there was a serious and increased level of insecurity" that the store owner had to address by restoring the employees' "sense of security in working there."

¶4 Fries filed a postconviction motion challenging that part of the restitution order awarding the store owner the cost of the upgraded security system. Fries argued that the court's reliance on *Heyn* was misplaced because, while that case held that the cost of a burglar alarm could be ordered as a condition of probation, it did not hold that the burglar alarm could be ordered as restitution under WIS. STAT. § 973.20. Fries also argued that the court could not order him to pay the cost of the upgraded security system because the upgraded security system was not a "special damage." The court disagreed and concluded that, under a liberal construction of the restitution statute, it was proper to award the store owner the cost of the upgraded security system. The court reasoned that the cost of the system was a "special damage" because it was a "specific expenditure by the victim paid out because of the crime." Accordingly, the court denied the motion. Fries appeals.

DISCUSSION

¶5 The parties dispute whether the circuit court erroneously exercised its discretion in awarding the store owner \$8,715.11, the cost of the upgraded

security system. We review a court's determination of the amount of restitution for an erroneous exercise of discretion. *State v. Longmire*, 2004 WI App 90, ¶16, 272 Wis. 2d 759, 681 N.W.2d 534. A court properly exercises its discretion when it logically interprets the facts, applies the proper legal standard, and uses a rational process to reach a reasonable conclusion. *Crawford Cnty. v. Masel*, 2000 WI App 172, ¶5, 238 Wis. 2d 380, 617 N.W.2d 188.

¶6 Restitution in the criminal context is governed by WIS. STAT. § 973.20(1r), which requires circuit courts, as part of sentencing, to order the defendant to pay restitution to the victim of the defendant's crime. The restitution statute is broadly and liberally construed to "reflect[] a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution." *State v. Kennedy*, 190 Wis. 2d 252, 258, 528 N.W.2d 9 (Ct. App. 1994); *State v. Anderson*, 215 Wis. 2d 673, 682, 573 N.W.2d 872 (Ct. App. 1997). This is because "restitution serves the purposes of punishment and rehabilitation of the defendant, while seeking to make the victim of criminal acts whole in regard to the special damages sustained." *State v. Walters*, 224 Wis. 2d 897, 904, 591 N.W.2d 874 (Ct. App. 1999). Accordingly, "restitution is the rule and not the exception" and therefore "restitution should be ordered whenever warranted." *State v. Madlock*, 230 Wis. 2d 324, 332-33, 602 N.W.2d 104 (Ct. App. 1999).

¶7 As we discussed in *Longmire*, WIS. STAT. § 973.20(5)(a), the statute under which restitution was ordered, limits a court's authority to order restitution in two ways:

First, before a trial court may order restitution “there must be a showing that the defendant’s criminal activity was a substantial factor in causing” pecuniary injury to the victim.^[2] In making its determination, however, a trial court may “take[] a defendant’s entire course of conduct into consideration” including “all facts and reasonable inferences concerning the defendant’s activity related to the ‘crime’ for which [he] was convicted, not just those facts necessary to support the elements of the specific charge.” Put another way, we have said that a causal link for restitution purposes is established when “the defendant’s criminal act set into motion events that resulted in the damage or injury.”

Second, restitution is limited to “special damages ... which could be recovered in a civil action against the defendant for his ... conduct in the commission of a crime.”^[3] This limitation restrains a sentencing court from ordering the payment of “general damages,” that is, amounts intended to generally compensate the victim for damages such as pain and suffering, anguish, or humiliation. The term “special damages” as used in the criminal restitution context, means “[a]ny readily ascertainable pecuniary expenditure paid out because of the crime.”

Thus, Wis. Stat. § 973.20(5)(a) limits the items of damages that a sentencing court may order a convicted defendant to pay as restitution in a criminal case to a victim’s pecuniary losses attributable to the defendant’s criminal conduct.... [H]owever, a court may not order a criminal defendant to compensate a victim under § 973.20(5)(a) for any item that does not constitute “special damages,” nor for any losses that arise solely from the defendant’s non-criminal conduct.

² The restitution statute does not define the term “victim.” However, in *State v. Gribble*, 2001 WI App 227, ¶¶70-71, 248 Wis. 2d 409, 636 N.W.2d 488, we adopted the definition provided in WIS. STAT. § 950.02(4)(a). That statute defines “victim” as “a person against whom a crime has been committed.” WIS. STAT. § 950.02(4)(a). In this case, the store owner and, at a minimum, the clerk working at the time of the robbery, are “victims.”

³ Fries argues for the first time in his reply brief that the cost of an upgraded security system could not be recovered in a civil action. Therefore, Fries forfeits any arguments on that issue. See *Swartwout v. Bilsie*, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981) (providing that we will not address an argument first presented in a reply brief).

Longmire, 272 Wis. 2d 759, ¶¶13-15 (citations and emphasis omitted).

¶8 As established above, the sole issue on appeal is whether the cost of the upgraded security system constitutes a “special damage” within the meaning of WIS. STAT. § 973.20(5)(a). Fries’ primary contention is that an expenditure does not qualify as a special damage unless it was “spent to return the victim to the financial state he was in before the crime occurred.” Here, Fries maintains that the cost of the system was not incurred to return the store owner to his former financial state because he caused no damage to the system and the system was, by the store owner’s own admission, adequate to gather evidence of the crime. Thus, Fries argues, the circuit court erred in awarding restitution to the store owner for the cost to replace the store’s security system.

¶9 We now turn to the circuit court’s reasoning in awarding the store owner restitution for the security system. After considering several key cases on the topic, including *Heyn*, *Behnke* and *Johnson*, the court determined that the store owner’s purchase of the new security system was a “special damage” within the meaning of WIS. STAT. § 973.20(5)(a) because it was a readily ascertainable pecuniary expenditure paid out because of Fries’ criminal conduct. In reaching its conclusion, the court relied on the store owner’s statement to the court in which he explained that his employees expressed concern during an employee meeting that they felt less secure following the armed robbery and that he allowed the employees to place upgraded security systems throughout the store to restore a sense of security. The court also relied on the statement of the female clerk present during the robbery in which she explained that, after the armed robbery, she had suffered from anxiety and felt less secure.

¶10 We conclude that the court properly relied on the statements from the store clerk and the store owner in awarding the store owner the cost of the system. As the court found, the cost to replace the security system was a readily ascertainable amount that was paid by the store owner, a victim of Fries' crime, because his employees felt less secure, which was a natural consequence of the armed robbery.⁴

¶11 Wisconsin case law supports the circuit court's decision. *Behnke* and *Johnson*⁵ involved similar situations where circuit courts awarded restitution for the cost of improved security on the ground that there was a causal connection between the defendant's criminal conduct and the need for improved security in order to restore a lost sense of security. *See Behnke*, 203 Wis. 2d at 60 (a stronger lock because of the victim's fear of the defendant); *Johnson*, 256 Wis. 2d 871, ¶21 (a home security system for the first time). In both cases, we upheld the restitution orders on the ground that the cost of a security device to restore a sense of security constituted a "special damage," even though the defendants in those cases, similar to Fries, had not caused damage to the security devices. *Id.* Indeed, in *Behnke*, we determined that the cost of a stronger lock was properly awarded as restitution even though the defendant, similar to Fries, did not pose an actual threat to the victim. *See Behnke*, 203 Wis. 2d at 60.

⁴ While Fries disputes whether the upgraded security system was a "special damage," he does not argue that it was unreasonable for the store owner to allow the employees to place security cameras throughout the store in order to feel more comfortable and secure at work.

⁵ Although in *Johnson* we applied WIS. STAT. § 973.20(5)(d) in reaching our conclusion, we apply similar reasoning in concluding that the cost of the upgraded security system was properly awarded under WIS. STAT. § 973.20(5)(a).

CONCLUSION

¶12 For the reasons explained above, we conclude that the court did not erroneously exercise its discretion in awarding restitution to the store owner for the cost of the upgraded security system because it is a “special damage” within the meaning of WIS. STAT. § 973.20(5)(a). Accordingly, we affirm.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

