COURT OF APPEALS DECISION DATED AND FILED

October 27, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2784-CR **Cir. Ct. No. 2011CF69**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD L. BRABSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Richard Brabson appeals a judgment of conviction for felony criminal damage to property and disorderly conduct and an order denying his motion for postconviction relief. Brabson argues his trial counsel was ineffective for failing to request a proper jury instruction regarding the law of easements, seeks a new trial in the interest of justice due to juror confusion regarding easements, argues there was insufficient evidence that the criminal damage to property exceeded $2500, and argues the trial court improperly ordered restitution for the victims' attorney's fees.[1] We reject Brabson's arguments, except that we agree some of the attorney's fees were not properly ordered to be paid as restitution. Accordingly, we affirm in part, reverse in part, and remand for the circuit court to recalculate the attorney's fees awarded as restitution.

BACKGROUND

¶2 This case stems from a property dispute between neighbors. In 2001, Brabson purchased his Unit 14 condominium property together with an existing view enhancement easement. The Wessel family owned the property subject to the easement, which had been created in 1996. The easement provided:

> 3. The view enhancement easement to be granted by [the Wessels' predecessor] to [Brabson's predecessor] is on, over, and across the "Easement Area" described in Exhibit "B" attached hereto and incorporated herein by this reference.[2] No structures, objects, or vegetation shall be constructed, placed, or permitted within this area which would in any way adversely affect the view of the waters of Green Bay from the Single-Family Residence Grounds

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[1] Brabson's brief also sets forth a fifth argument titled, "The trial court erred when holding that an easement is not consent as a matter of law to anything within its terms." However, Brabson's argument fails to identify any such holding. Further, Brabson appears to be addressing the trial court's rationale for denying his postconviction motion, and he does not explain how any legal error at that stage would entitle him to relief. We therefore deem the argument undeveloped, *see* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994), and we regard the argument as merely an introduction to the ineffective assistance of counsel claim that it precedes.

[2] It appears undisputed that all cut trees were located within the easement area.

> located within Units 12, 13 and 14, [Meadow Bluff Farm Condominium].
>
> 4. The easement granted over the view easement area shall not be construed as a right to clear cut the entire easement area to enhance the view, but rather to (i) remove dead trees and shrubs, (ii) top trees, and (iii) trim trees and shrubs within the view easement area.
>
> 5. The topping of trees and the removal of dead trees and shrubs within the view easement area may be done without prior written consent of [the Wessels] and at the discretion of the … Condominium Owners' Association … or the owners of Units 12, 13, and 14 …. For purposes of this agreement, "topping" means removing that portion of a tree which is growing within the view enhancement easement area and blocking or impeding the view of the waters of Green Bay from the Single-Family Residence Grounds located within Units 12, 13 and 14 ….
>
> 6. Any and all trimming of vegetation other than that allowed under paragraph 5 above or any cutting down of live trees within the view easement area which obstruct the view from the Single-Family Residence Grounds located within Units 12, 13, or 14 … shall not be undertaken without the prior written approval of [the Wessels].

¶3 Brabson began building a house on his condominium property in 2007, and he contacted the Wessels in 2008 because his water view was obstructed and he wished to exercise his easement rights. The Wessels agreed only to limited tree trimming and told Brabson not to cut down any trees or turn them into "totem poles." Brabson contacted his condominium association, which sent a letter to the Wessels reciting the rights and obligations under the view easement and informing them Brabson intended "to engage the services of a professional tree service to enhance the[] view by topping trees and removing dead trees and shrubs in the easement area according to the terms of the agreement." The letter noted the Wessels were being informed "as a courtesy."

¶4 Following ongoing discussions with the Wessels and then their landscaper, Ivan Bridenhagen; Brabson and Bridenhagen met for the final time in

November 2009. Bridenhagen knew of the easement by then, but did not know it allowed topping. He reiterated the Wessels' position that only limited tree trimming was permitted. Brabson then gave up trying to work with Bridenhagen because Brabson never received any acknowledgment that the Wessels were obliged to give him an unobstructed view.

¶5 Brabson contacted David Burke of Dave's Tree Services and explained he wanted a water view pursuant to his easement and was entitled to top trees. Burke visited the site several times and warned Brabson that topping the trees at the height he wanted would kill them and that he might as well cut them down. Burke explained at trial that topping meant cutting off the top of a tree and it was no longer a common practice. Burke and Brabson marked seven or eight of the Wessels' trees with neon orange flagging tape in November. Burke's son, Todd Burke, did the tree cutting work in March 2010. Todd first cut down seven trees as Brabson requested. However, Brabson was still dissatisfied with the view and directed Todd to cut down another seven.

¶6 After the trees were cut, Brabson offered the wood to the Wessels and offered to hire a professional to clean up. The Wessels ultimately reported the cutting to the sheriff's department and indicated the trees had been cut without consent. They also commenced a civil action. After the district attorney declined to prosecute Brabson, the Wessels' private attorney commenced a successful John Doe proceeding, and a special prosecutor was appointed. The case proceeded to a jury trial on charges of felony criminal damage to property and disorderly conduct.

¶7 Brabson was convicted on both charges and was ordered to pay approximately $109,000 in restitution, which included over $26,000 of the Wessels' attorney's fees. The attorney's fees were incurred for work on the John

Doe proceeding, assisting the prosecution, and representing the Wessels' interests at the restitution proceedings. Brabson moved for postconviction relief, which was denied following a ***Machner***[3] hearing. Brabson now appeals.

DISCUSSION

I. Ineffective assistance of counsel

¶8 To prove ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance was deficient and that the defendant suffered prejudice as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, a defendant must show "counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. Prejudice is established if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.*** Whether counsel's performance was deficient and prejudicial are questions of law subject to de novo review. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

¶9 Brabson presents three related ineffective assistance of counsel arguments, asserting trial counsel's misunderstanding of the law of easements caused "(1) the failure to propose a proper jury instruction to explain the effect of the view easement on the elements of the crimes charged; (2) the failure to explain the concept properly in opening and closing statements; and (3) the failure to properly question witnesses concerning consent."

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶10 The crux of Brabson's argument is a single sentence from ***Grygiel v. Monches Fish & Game Club, Inc.***, 2010 WI 93, ¶42, 328 Wis. 2d 436, 787 N.W.2d 6, which stated, "[T]he holder of an express easement has consent to use the easement in accordance with the terms of the easement grant." Brabson asserts his trial counsel should have requested a jury instruction setting forth this statement of law, which bore directly on the two elements of criminal damage to property that (1) the damage was caused without the owner's consent and that (2) the defendant knew the other person did not consent to the damage.[4] *See* WIS. STAT. § 943.01.[5]

¶11 Rather than proposing an instruction that included the sentence from ***Grygiel***, Brabson's trial counsel proposed the following instruction:

> Evidence of a recorded view easement has been admitted into evidence.
>
> Mr. Brabson maintains as part of his defense that he acted in reliance on this view easement and that it granted him entitlements to act without the consent of [the Wessels].
>
> You should consider the view easement, along with all the other evidence, in determining whether Mr. Brabson intentionally caused damage; in determining whether [the Wessels'] consent to Mr. Brabson's actions was required, and in determining the state of Mr. Brabson's knowledge at the time of his actions.

The trial court, however, rejected the proposed instruction and instructed the jury as follows:

[4] Although focused on the criminal damage to property charge, Brabson contends his argument similarly applies to the disorderly conduct charge as well, reasoning that the cutting would not be disorderly if the jury found Brabson's conduct was permitted by the easement.

[5] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

> Evidence of a recorded view easement has been admitted into evidence. Mr. Brabson maintains as a part of his defense that he acted in reliance on this view easement and that it granted him certain rights justifying his actions. You should consider this view easement, along with all the other evidence, in determining whether the State has proven the 5 elements of the criminal damage to property charge.

Brabson does not contend the trial court erroneously rejected the proposed instruction.[6] Rather, he argues trial counsel should have ensured the court inserted the ***Grygiel*** statement as part of the instruction actually given.

¶12 In his related arguments, Brabson contends his trial counsel was ineffective in her questioning of witnesses and arguments to the jury because, rather than referring to the easement as granting Brabson consent, counsel referred to the easement as an "entitlement" that made consent unnecessary.

¶13 There are two critical problems with Brabson's arguments. First, they ignore the context of the ***Grygiel*** statement of law regarding consent, and, second, they ignore the view easement's language. The following is Brabson's ***Grygiel*** statement in its proper context:

> [T]he holder of an express easement has consent to use the easement in accordance with the terms of the easement grant. Beyond this, the owner of the servient estate has the "right to exclude others from his or her land" to protect "his or her land from trespass." It follows then that when an easement holder's use of an express easement contravenes its express terms, absent consent or some other circumstances permitting lawful entry on the grantor's

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[6] In rejecting the proposed instruction, the trial court explained:

> As to the defense theory on the criminal damage to property, I'm also going to limit that. I—I think that it's dangerous for the Court to be honing in or focusing on either intent or consent. It really is—is sort of leading the jury in that direction, and I just don't think that that's proper.

> property, the easement holder may be held liable for trespass.

Grygiel, 328 Wis. 2d 436, ¶42 (citations omitted). Even ***Grygiel*** recognized the common-sense proposition that an easement holder must obtain further consent to act beyond the rights expressly afforded by the easement. Thus, it was not improper for Brabson's trial counsel to address whether Brabson had obtained the Wessels' consent-in-fact to cut down their trees.

¶14 Moreover, Brabson's easement explicitly stated he needed to obtain the Wessels' "written consent" and "written approval" to trim or cut trees beyond that which was expressly permitted by the easement. Thus, regardless whether the easement was treated as consent to do certain acts or as an entitlement to do those acts without consent, the jury still had to consider whether Brabson had consent for any cutting beyond the scope of his easement rights. Brabson's purported distinction on appeal between consent to act versus an entitlement to act without consent is semantics. Accordingly, trial counsel committed no error and her performance was not deficient.

¶15 Brabson characterizes the view easement as confusing and poorly drafted. We disagree. The easement is clear and specific with respect to what Brabson was and was not entitled to do without the Wessels' written consent. No reasonable person would have understood the easement to permit Brabson to cut down live trees at their base without additional written consent, as opposed to cutting off the upper portions of trees that were obstructing Brabson's view. Further, Brabson cites no evidence nor develops any argument in support of a theory that he believed it was unnecessary to obtain further consent prior to cutting down trees at their base. Because Brabson acted beyond his rights under the easement, and does not claim ignorance that he lacked the requisite consent, a failure to give the instruction he desires regarding the easement would have been harmless. Thus, under no reasonable view could trial counsel's failure to request a different jury instruction be deemed prejudicial to Brabson's defense.

II. Interest of justice

¶16 Brabson alternatively argues that, even if his trial counsel was not ineffective, he should receive a new trial in the interest of justice because the real controversy was not fully tried and justice miscarried. We exercise our discretionary reversal power only in exceptional cases, *see* ***Vollmer v. Luety***, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990), and this is not such a case. As explained above, there is no reasonable possibility that the jury was confused or misled regarding the view easement or its legal effect.

III. Sufficiency of the evidence

¶17 Brabson argues the State failed to put forth sufficient evidence to prove he criminally damaged the Wessels' property in excess of $2500. We may not reverse on this basis unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶18 Brabson was convicted of felony criminal damage to property. To convict as a felony rather than misdemeanor, the State must prove a defendant's unlawful conduct "reduced [the property] in value by more than $2,500." WIS. STAT. § 943.01(2)(d). "[P]roperty is reduced in value by the amount which it would cost either to repair or replace it, whichever is less." ***Id.***

¶19 Brabson does not dispute that the fourteen hardwood trees he cut down—primarily red oak and sugar maple—were reduced in value by well beyond $2500. However, he argues the State failed to prove the *criminal* damage exceeded $2500, because some of the lost value was due to consensual removal of those portions of the trees obscuring his view within his easement and the State did not present any evidence regarding the value of fourteen trees that had been merely topped and left standing in an unhealthy state. *See* WIS. STAT. § 943.01(1) (prohibiting intentional damage to property "without … consent").

¶20 The view easement unambiguously gave Brabson consent to remove those portions of the fourteen trees obscuring his view. However, the jury could have convicted Brabson if it found the replacement value of the remaining portion of each of the fourteen trees, if only topped, was a mere $178.58 on average.[7]

¶21 "Jurors may rely on their common sense and life experiences during deliberations[,]" ***State v. Heitkemper***, 196 Wis. 2d 218, 225, 538 N.W.2d 561 (Ct. App. 1995), which would be more than sufficient to allow them to infer that massive trees could not be purchased, delivered, and planted for less than $178.58 each. While there was testimony that topping the fourteen trees was likely to ultimately kill them, that result was not a certainty. Moreover, to attempt replacement of the topped trees with trees of equivalent height and trunk diameter of the fifty- to one-hundred-year-old trees that Brabson felled (but hypothetically topped), the jurors' common sense would tell them there are only two replacement choices: (1) new trees of the largest size available for sale, which would

[7] We refer only to replacement value of the trees, and not repair cost, as it would be impossible to repair a living tree that has been cut down to a stump.

necessarily not be of equivalent trunk diameter to the mature trees cut by Brabson; or (2) topped trees of equivalent size transplanted from another location.

¶22 Indeed, the State's expert valuation witness testified that equivalent-sized replacement trees did not exist; the largest commercially available replacement trees would be only six to eight inches in diameter; and the largest replacement trees available in the area were only four to six inches in diameter. It would cost $32,000 to replace the fourteen trees with these smaller, locally available trees.[8]

¶23 The second potential replacement option would require digging up existing living trees just to obtain an equivalent topped tree.[9] Thus, the replacement value of topped trees is really the same as the replacement value of an entire mature tree. Regardless, even if equivalent topped trees could be obtained, jurors could reasonably infer that cost would exceed the $32,000 cost of transplanting the much smaller trees discussed by the State's expert. Notably, the State's expert appraised the Wessels' fourteen trees as if they were still standing as complete trees and valued them at just under $107,000 based on industry guidelines.

¶24 Based on the valuation evidence presented and the jurors' common sense and collective knowledge, and viewing this evidence and knowledge in the

[8] Numerous photograph exhibits showed the fourteen cut trees; a site plan identified as exhibit 2 listed the tree diameters, as did the State's expert's report, which indicated the trees varied from fourteen to thirty inches in diameter.

[9] While we recognize trees may be occasionally topped by storm damage or otherwise, no reasonable fact finder could conclude fourteen such trees of equivalent size and species could be located, purchased, transported and planted for under $2500.

light most favorable to the State, the only reasonable conclusion is that the replacement-value damage to the Wessels' fourteen (hypothetically topped) trees far exceeded $2500. Brabson therefore fails to satisfy the ***Poellinger*** standard for reversal.

IV. Attorney's fees ordered as restitution

¶25 Brabson argues the trial court erroneously awarded the Wessels over $26,000 in attorney's fees incurred in bringing the John Doe action, assisting the prosecution, and representing their interests during the restitution proceedings. We hold that the Wessels could not recover any such fees incurred relative to the John Doe proceedings, but could recover attorney's fees reasonably incurred during the criminal proceedings. Because the Wessels' attorney's affidavit and attached, partially redacted billing statement is insufficiently detailed to permit us to determine what amounts were reasonably incurred for cooperating with the criminal case and recovering restitution, we reverse the global award of attorney's fees and remand for the trial court to redetermine the amount of attorney's fees allowed, consistent with our decision.

¶26 We review an order of restitution under the erroneous exercise of discretion standard of review. ***State v. Ross***, 2003 WI App 27, ¶53, 260 Wis. 2d 291, 659 N.W.2d 122. "A trial court erroneously exercises its discretion when its decision is based upon an error of law." ***Arents v. ANR Pipeline Co.***, 2005 WI App 61, ¶71, 281 Wis. 2d 173, 696 N.W.2d 194. Whether a trial court had authority to order restitution under a particular set of facts is a question of law that we review de novo. ***State v. Storlie***, 2002 WI App 163, ¶6, 256 Wis. 2d 500, 647 N.W.2d 926.

¶27 The trial court's restitution order for attorney's fees had two bases. First, the court determined that the fees incurred relative to the John Doe proceeding qualified as special damages under WIS. STAT. § 973.20(5)(a), which permits restitution for "all special damages, but not general 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 [the] crime …." The court recognized that, pursuant to the American Rule, ***State v. Anderson***, 215 Wis. 2d 673, 681, 573 NW.2d 872 (Ct. App. 1997), and ***State v. Longmire***, 2004 WI App 90, ¶29, 272 Wis. 2d 759, 681 N.W.2d 534, attorney's fees are generally not recoverable as restitution for special damages. However, the court reasoned that the exception for civil actions against third parties, *see* ***Anderson***, 215 Wis. 2d at 681, applied because Brabson was not a party to the John Doe proceeding.

¶28 We reject the argument that the John Doe proceeding falls within the ***Anderson*** exception to the American Rule, allowing recovery of attorney's fees when the defendant's actions subject the victim "to litigation with a party other than the defendant." ***Id.*** The very object of the John Doe proceeding was to compel the State to file a criminal action against Brabson, which would largely negate the need for the Wessels to continue their separate civil action against him. *See* ***Longmire***, 272 Wis. 2d 759, ¶32 (WISCONSIN STAT. § 973.20(5)(a) "plainly contemplates that restitution ordered in a criminal case will generally render actual civil litigation unnecessary."). In effect, the John Doe action was no different than a direct civil action against Brabson as defendant. The Wessels would not have been required to bring the John Doe action, in addition to a direct civil action against Brabson, in order to fully recover their damages.

¶29 Further, allowing recovery of attorney's fees for pursuing John Doe proceedings would encourage civil plaintiffs to utilize the criminal courts for civil recovery, contrary to our supreme court's repeated admonition that "the criminal justice system should not be employed to supplement a civil suit or as a threat to coerce the payment of a civil liability or to perform the functions of a collection agency." ***Id.***, ¶34 (quoting ***Huggett v. State***, 83 Wis. 2d 790, 803-04, 266 N.W.2d 403 (1978)). Consequently, the trial court erred as a matter of law in awarding restitution for any attorney's fees incurred prior to commencement of the criminal case.[10]

¶30 The court's second basis for awarding attorney's fees as restitution was WIS. STAT. § 973.20(5)(b), which permits restitution for "reasonable out-of-pocket expenses incurred" by the victim "resulting from the filing of charges or cooperating in the investigation and prosecution of the crime."[11] In the court's initial restitution decision, it observed:

> [I]t is apparent that [the Wessels'] private attorney assisted *to some degree* in the prosecution. Given that the public was already shouldering more expense than normal by paying for the special prosecution, [the special prosecutor] no doubt welcomed any assistance, to lessen the public expense.
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> ….
>
> I have concluded … that [the private attorney's] entire bill of just over $28,000 is appropriately allowed.[12] It does not

[10] The Wessels' attorney conceded during the postconviction proceedings that the attorney's fees incurred relative to the civil action were not recoverable.

[11] The general rule recognized in ***State v. Longmire***, 2004 WI App 90, 272 Wis. 2d 759, 681 N.W.2d 534, that attorney fees are not available as restitution is limited to claims under WIS. STAT. § 973.20(5)(a). The ***Longmire*** court noted it was not considering whether restitution for attorney fees might have been permissible under para. (5)(b), as the issue had not been raised. ***Longmire***, 272 Wis. 2d 759, ¶29 n.8.

[12] The final restitution amount for attorney's fees was slightly less than initially ordered. The trial court subtracted the amount charged for work on the civil case, but then added for fees incurred responding to Brabson's postconviction motion.

> invade the prohibition of not allowing collateral law enforcement expenses, and in this unusual case, was reasonably incurred.

(Emphasis added.) In its supplemental decision on postconviction review, the court observed that, with respect to restitution, "[i]t was reasonable … for the special prosecutor to rely upon the victim's counsel for assistance in this complex case." Further, it held:

> I believe that [§ 973.20(5)(b)] is an additional avenue to recovery. I believe the attorney[']s fees were out-of-pocket expenses incurred which resulted "from the filing of charges or cooperating in the investigation and prosecution of the crime." Given that the case law instructs the Court to broadly and liberally construe the statute to allow [the Wessels] to recover [their] losses as a result of … Brabson's criminal conduct, I find that the attorney[']s fees under the unique circumstances of this care are allowable, appropriate and not barred by Wisconsin case law.

¶31 We are given pause by the trial court's stated rationale that it was proper to shift the prosecutorial costs onto Brabson, given the similarity to the prohibited practice of shifting law enforcement costs to the defendant via restitution. *See* ***State v. Haase***, 2006 WI App 86, ¶13, 293 Wis. 2d 322, 716 N.W.2d 526 (government is not entitled to restitution for "'collateral expenses incurred in the normal course of law enforcement'") (quoting ***Storlie***, 256 Wis. 2d 500, ¶10). However, Brabson's only argument against ordering attorney's fees under WIS. STAT. § 973.20(5)(b) is the ***Longmire*** admonition that the criminal justice system should not be employed for civil recovery. *See* ***Longmire***, 272 Wis. 2d 759, ¶32. While that is a valid concern, para. (5)(b) is limited by the requirement that all incurred expenses be "reasonable." We cannot say that no victim may ever reasonably incur attorney's fees as a result of the filing of charges or cooperating in the investigation or prosecution of a criminal matter.

¶32 Indeed, here the trial court found it reasonable for the private attorney to assist with the "complex" restitution task of determining the amount of monetary damages caused by cutting down the fourteen trees. That discretionary determination appears reasonable, and Brabson does not argue to the contrary. On the other hand, it does not clearly appear that the court separately considered the reasonableness of the other attorney's fees incurred during the criminal prosecution—untainted by the improper premise that attorney's fees were proper restitution due solely to the John Doe origination of the case. To be considered reasonable under WIS. STAT. § 973.20(5)(b), it seems axiomatic that the private legal work for which fees were incurred had to be reasonably necessary in the first instance.

¶33 In light of the foregoing, we remand for the trial court to deny restitution for any attorney's fees incurred prior to commencement of the criminal case. The court shall order restitution for only those attorney's fees that it determines were reasonably incurred under WIS. STAT. § 973.20(5)(b) as part of the criminal case.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

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