

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2016AP1611-CR

Cir. Ct. No. 2015CM883

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAUN R. EZROW,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DAVID T. FLANAGAN III, Judge. *Affirmed.*

¶1 SHERMAN, J.¹ Shaun Ezrow appeals a judgment of conviction for misdemeanor theft, contrary to WIS. STAT. § 943.20(1)(b), and an order of the circuit court denying his postconviction motion to modify an order of restitution.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Ezrow contends that the record is insufficient to support part of the court's restitution order. For the reasons discussed below, I affirm.

BACKGROUND

¶2 Following a jury trial, Ezrow was found guilty of misdemeanor theft. Ezrow, who at the time of the theft was a shift supervisor and a bartender at The Nitty Gritty bar and restaurant in Sun Prairie, stole \$1,212 from The Nitty Gritty's safe.

¶3 After the trial, the circuit court held a hearing to determine the amount of restitution to award The Nitty Gritty. After the hearing, the court issued its restitution order, ordering Ezrow to pay \$4,357.86 to The Nitty Gritty. The restitution ordered by the court included the amount of money stolen by Ezrow, labor expenses by employees of The Nitty Gritty related to the theft, as well as expenses totaling \$2,150 that related to moving existing security cameras and installing new, additional security cameras.

¶4 Ezrow moved the circuit court to modify its restitution order, challenging only the \$2,150 that related to the modification of The Nitty Gritty's security camera system. Ezrow argued that the changes The Nitty Gritty made to its security camera system are not "special damages" because Ezrow's theft did not injure or damage The Nitty Gritty's old security cameras and his theft was not a substantial factor in The Nitty Gritty's decision to upgrade its security system. The court denied Ezrow's motion. Ezrow appeals.

DISCUSSION

¶5 Ezrow contends that the circuit court erred in ordering him to pay restitution in the amount of \$2,150 for The Nitty Gritty's expenditures related to the modification of its security system.

¶6 WISCONSIN STAT. § 973.20(1r) provides, in relevant part, that when imposing a sentence, a circuit court “shall order the defendant to make full or partial restitution ... to any victim of a crime considered at sentencing ... unless the court finds substantial reason not to do so and states the reason on the record.” When determining whether and how much restitution to order, the court must consider, among other factors, “the amount of loss suffered by any victim as a result of a crime considered at sentencing.” Sec. 973.20(13)(a)1. A circuit court has authority to order 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 a crime considered at sentencing,” Sec. 973.20(5)(a). The burden of proof lies with the victim. Sec. 973.20(14).

¶7 The term “special damages” in § 973.20(5)(a) “means any readily ascertainable pecuniary expenditure paid out *because of the crime.*” *State v. Johnson*, 2005 WI App 201, ¶12, 287 Wis. 2d 381, 704 N.W.2d 625 (emphasis added). To establish the causal nexus between the crime and the damage for which restitution is sought, the “victim must show that the defendant's criminal activity was a ‘substantial factor’ in causing damage.” *State v. Canady*, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 610 N.W.2d 147. A defendant's criminal activity is a “substantial factor” in causing a particular damage if “[t]he defendant's actions [were] the ‘precipitating cause of the injury’ and the harm ... resulted from ‘the

natural consequence[s] of the actions.” *Id.* (quoted source omitted). Whether a defendant’s criminal activity was a substantial factor in causing any pecuniary loss for which restitution is claimed is a discretionary determination for the circuit court. *Johnson*, 287 Wis. 2d 381, ¶10. When reviewing a circuit court’s exercise of discretion, this court “examine[s] the record to determine whether the [circuit] court logically interpreted the facts, applied the proper legal standard and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach.” *Id.*

¶8 Ezrow argues that the record is insufficient to show that the changes The Nitty Gritty made to its security camera system constitute “special damages” because the record does not show that his theft was a “substantial factor” in The Nitty Gritty’s decision to make those changes. Ezrow argues that The Nitty Gritty did not present any evidence that his theft directly caused damage to The Nitty Gritty’s security cameras, thus the changes cannot be said to have been made to restore The Nitty Gritty’s security cameras to their pre-theft position. Ezrow also argues that although it has been found that a crime can be a “substantial factor” in a victim’s decision to install security cameras after a crime, in those cases the installation of security cameras was needed to restore a sense of security following a violent crime. See *Johnson*, 256 Wis. 2d 871, and *State v. Behnke*, 203 Wis. 2d 43, 553 Wis. 2d 265 (1996). Ezrow argues that in the present case, The Nitty Gritty has not shown that anyone’s sense of safety was damaged by his theft or that the installation of new cameras was necessary to put any employees’ minds at ease.

¶9 However, at the restitution hearing, James Fanone, the general manager and a part owner of the Nitty Gritty, testified that The Nitty Gritty spent \$2,150 “for the moving and addition of cameras, the recoding of the security

system, issuing new manager codes to everyone that comes and leaves, and also some immediate assistance the day after [Ezrow's theft] to help [The Nitty Gritty] retrieve data from [a] DVR." Fanone testified that Ezrow had a key code for The Nitty Gritty's security system, so the key code had to be changed and reissued to all managers. Fanone testified that during the investigation into the theft, it was discovered that certain areas of The Nitty Gritty were not covered by the cameras, and that because of the theft, The Nitty Gritty "beefed up [its] security" by repositioning existing cameras and installing additional cameras "to cover those blind spots" and to provide "more coverage of the office."

¶10 In *Johnson* and *Behnke*, restitution for additional security measures undertaken by the victim of a crime was upheld where the victims lost feelings of security as a result of the crimes committed against them. Fanone's testimony established that Ezrow's theft exposed weaknesses in The Nitty Gritty's security system. I conclude that a circuit court judge could reasonably determine that the additional security measures taken by The Nitty Gritty following Ezrow's theft is a "natural consequence" of that theft. Accordingly, I conclude that the circuit court acted within its discretion in determining that the cost of security system changes was an item of The Nitty Gritty's special damages.

CONCLUSION

¶11 For the reasons discussed above, I affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

