COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP651-CR **Cir. Ct. No. 2011CM1159**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEBORAH A. SCHICKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Deborah A. Schicker appeals from a judgment of restitution and the circuit court's postconviction order denying her motion to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

reduce the restitution amount. She contends the circuit court erroneously exercised its discretion in ordering her to pay restitution for unrecovered items which the court, at the restitution hearing, found she stole along with other items she admitted to stealing and which were recovered. She argues that the victim "did not meet her burden to show that the unrecovered items were part of the 'crime considered at sentencing.'" We disagree and affirm.

BACKGROUND

¶2 Schicker was charged with one count of misdemeanor theft for, "on or between August 5, 2011, and August 11, 2011, … intentionally tak[ing] and carry[ing] away the movable property of [the victim], without consent and with intent to permanently deprive the owner of possession of the property." The probable cause portion of the complaint states the following. Between these dates, Schicker was painting at the victim's home. On August 16, 2011, the victim noticed that some of her prescription drugs were missing and, after looking through her home, further noticed four rings missing. Suspecting Schicker had stolen the items, the victim contacted police and a surveillance camera was installed to observe Schicker when she returned to do more painting. When Schicker returned, she was recorded "rummaging through the closet and jewelry boxes in [the victim's] bedroom … [and] looking at several bottles of prescription medication … in the bedroom." Confronted by police, Schicker first denied stealing any items, but after police showed her a photo from the video, she admitted to stealing two items—one of the rings which the victim had previously identified as one of the stolen items and a cigarette case. The ring and cigarette case were found in Schicker's truck.

¶3 Schicker pled guilty to the single misdemeanor theft charge. While she indicated during the plea colloquy that she disagreed with certain parts of the complaint, including portions alleging she stole items other than the one ring and cigarette case, she acknowledged the accuracy of the complaint's statement that she had admitted to stealing those two items.

¶4 Schicker was subsequently sentenced and a restitution hearing was held. At the hearing, the victim submitted a list of stolen items and their values. The list included the rings which had not been recovered and which had been identified in the probable cause portion of the complaint, as well as an additional item—a bracelet—which had not been listed in the complaint. The victim's daughter testified as to the value of the items and that the victim had kept all the jewelry, including the ring found in Schicker's truck, in the same shoe box hidden in her closet; that the victim had seen the items seven to ten days prior to discovering them missing; and that the items had all gone missing at the same time, a time when Schicker had access to the home. Schicker testified that she did not steal any items other than the one ring and cigarette case found in her truck. Focusing on the daughter's undisputed testimony that the jewelry had been seen seven to ten days before the victim discovered them missing and the stolen ring found in Schicker's truck had been hidden in the same box in the same closet as the unrecovered jewelry, the court found the evidence "overwhelming" that Schicker stole all the items and it ordered her to pay restitution for all the unrecovered items.

¶5 Schicker filed a postconviction motion seeking a reduction in the restitution,[2] arguing in part, as she does on appeal, that the amount was excessive because the court ordered her to pay "for alleged crimes that were not part of the 'crimes considered at sentencing.'" The court denied the motion and Schicker appeals both the judgment of restitution and the denial of her postconviction motion. Additional facts are discussed as needed.

DISCUSSION

¶6 We note at the outset that

> [a] primary purpose of restitution is to compensate the victim. To that end, this court has consistently recognized that WIS. STAT. § 973.20 creates a presumption that restitution will be ordered in criminal cases and that the restitution statute should be interpreted broadly and liberally in order to allow victims to recover their losses as a result of a defendant's criminal conduct.

State v. Gibson, 2012 WI App 103, ¶10, 344 Wis. 2d 220, 822 N.W.2d 500 (citation omitted). We review the circuit court's award of restitution for an erroneous exercise of discretion, ***State v. Johnson***, 2002 WI App 166, ¶7, 256 Wis. 2d 871, 649 N.W.2d 284; however, whether a court's restitution order is authorized under a particular set of facts is a question of law we review de novo, ***State v. Lee***, 2008 WI App 185, ¶7, 314 Wis. 2d 764, 762 N.W.2d 431.

¶7 Schicker contends the circuit court erroneously exercised its discretion in ordering her to pay restitution for the unrecovered items because the victim "did not meet her burden to show that [those] items were part of the 'crime

[2] As part of the restitution, the court also ordered Schicker to pay $100 related to the cost of changing locks at the victim's home. Because she does not challenge this amount on appeal, we address it no further.

considered at sentencing.'" Specifically, Schicker argues that the court erred because "she did not admit to stealing other items, and the State never proved that she did," individual theft charges could have been filed for the various unrecovered items, and the bracelet was not listed in the complaint as an item that had been stolen and thus she "had no notice that she might be responsible" for that item. Schicker is incorrect.

¶8 To begin, proof at a restitution hearing of the amount of the victim's loss is not limited to what a defendant admits, either at the plea hearing or restitution hearing, to having stolen. *See* ***State v. Longmire***, 2004 WI App 90, ¶¶13-14, 272 Wis. 2d 759, 681 N.W.2d 534; *cf.* ***State v. Huntington***, 132 Wis. 2d 25, 28, 390 N.W.2d 74 (Ct. App. 1986). Rather, a victim seeking restitution must show '"that the defendant's criminal activity was a substantial factor in causing' pecuniary injury to the victim." ***Gibson***, 344 Wis. 2d 220, ¶11. The victim bears the burden of proving by a preponderance of the evidence the amount of the loss sustained as a result of "a crime considered at sentencing," meaning "any crime for which the defendant was convicted and any read-in crime." WIS. STAT. § 973.20(1g)(a), (14)(a). In making its restitution determination, a circuit 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 [she] was convicted, not just those facts necessary to support the elements of the specific charge." ***Longmire***, 272 Wis. 2d 759, ¶13 (emphasis and citation omitted).

¶9 As the finder of fact at a restitution hearing, "the court is free to accept and reject evidence and to give accepted evidence such weight as it desires." ***State v. Boffer***, 158 Wis. 2d 655, 663, 462 N.W.2d 906 (Ct. App. 1990). Here, the circuit court accepted the victim's evidence that Schicker stole all of the

claimed items and rejected Schicker's testimony to the contrary. We find no reason to conclude that the court erred in this regard. The court concluded that the victim's loss, including all items of jewelry, was caused by Schicker's theft from the victim, and we find no error in that conclusion.

¶10 Schicker's argument that she could not be held responsible for the unrecovered items because the potential existed for additional theft charges related to those items is equally unpersuasive. The victim needed to prove that Schicker's "criminal activity was a substantial factor in causing pecuniary injury to the victim." ***Gibson***, 344 Wis. 2d 220, ¶11 (citation omitted). We agree with the circuit court's obvious conclusion that the victim proved this. At a restitution hearing, the victim's burden of proof is "a preponderance of the evidence," not beyond a reasonable doubt as with a criminal charge. *See* WIS. STAT. § 973.20(14)(a). Schicker has not convinced us that the victim here is precluded from receiving restitution for the unrecovered items simply because the possibility may have existed that Schicker could also have been separately charged related to the unrecovered items.[3]

¶11 Schicker argues that, at a minimum, the victim is not entitled to restitution related to the bracelet because the bracelet was not included in the complaint as one of the stolen items the victim originally reported to police and because Schicker never admitted to stealing it. She claims she had no notice that she might be held responsible for this item. Again, she is mistaken.

[3] Schicker's own argument on this point is undermined by her contention in her brief-in-chief that, in this case, the State is precluded from filing additional charges related to the unrecovered items because it did not file a "bill of particulars" pursuant to WIS. STAT. § 971.36(4).

¶12 In support of her position on this issue, Schicker cites to our decisions in ***Lee*** and ***State v. Piotter***, No. 2009AP2005-CR, unpublished slip op. (WI App Jan. 26, 2010). These cases, however, are inapposite. In ***Lee***, the defendant, Lee, was charged with armed robbery with threat of force and armed burglary, both as a party to a crime. ***Lee***, 314 Wis. 2d 764, ¶4. He pled guilty to the armed robbery, and the burglary count was dismissed and read in. ***Id.*** A worker's compensation insurer sought, and the circuit court ordered, restitution for monies it paid to a police officer who was injured while apprehending Lee following the crimes. ***Id.***, ¶¶2, 5-6, 8. On appeal, we reversed, concluding that the officer was not a victim of a crime considered at sentencing because those crimes were armed robbery and burglary, not assaulting an officer, fleeing an officer, or any crime relating to his flight from the officer who was injured. ***Id.***, ¶14. We therefore concluded the insurer was not entitled to restitution for expenses paid in connection with the officer's injury. ***Id.***, ¶¶11-12.

¶13 In ***Piotter***, a condominium association was the victim of Piotter's unlawful entry. ***Piotter***, No. 2009AP2005-CR, unpublished slip op., ¶2. In addition to ordering restitution for the association's cost of upgrading the relevant locking system after the unlawful entry for which Piotter was charged and convicted, the circuit court also ordered Piotter to pay restitution for the cost of installing a lock *prior* to the unlawful entry. ***Id.*** The basis for the restitution related to the earlier lock installation was the association president's testimony that the association had incurred that cost in response to an earlier, uncharged, unauthorized entry by Piotter. ***Id.***, ¶5. We reversed, summarily concluding that the earlier entry by the defendant was not a crime considered at sentencing. ***Id.***

¶14 ***Lee*** is of no help to Schicker because, unlike the situation in ***Lee***, the victim of the theft here is the same individual seeking restitution[4] and, as the circuit court found, the restitution directly relates to Schicker's act of stealing from the victim. ***Piotter*** also provides Schicker no assistance because, unlike the scenario in ***Piotter***, the unrecovered items included in the restitution order here all relate to the time frame of the theft with which Schicker was charged and to which she pled guilty—August 5 through 11, 2011.

¶15 We are also unmoved by Schicker's contention that she had no notice she might be held responsible for the cost of the bracelet. Schicker demonstrated her awareness during the plea colloquy that the victim was alleging Schicker stole more items from the shoe box than just the two items she admitted stealing. Further, Schicker has identified no law stating that a victim's right to restitution is limited to items a government official may have included in the complaint. The fact that the probable cause portion of the complaint did not specifically identify the bracelet does not limit the victim's right to recover restitution for that item when, as the circuit court found, it was clearly related to Schicker's theft from the victim. As the circuit court concluded, the loss of the bracelet was "clearly part of what happened here." The victim needed to prove that Schicker's "criminal activity was a substantial factor in causing pecuniary injury to the victim." ***Gibson***, 344 Wis. 2d 220, ¶11 (citation omitted). The circuit court found the evidence to this effect "overwhelming," and we agree.

[4] Schicker also attempts to analogize her situation to that considered by the United States Supreme Court in ***Hughey v. United States***, 495 U.S. 411 (1990). Her attempt fails, however, because the Court there too reversed on the ground that the victim seeking restitution was not the victim for the crime that was the basis of the conviction. ***Id.*** at 413-14, 422.

¶16 For the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

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