

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 1, 2018

Sheila T. Reiff
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. 2017AP1683-CR

Cir. Ct. No. 2015CF121

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SARA L. STEPPKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: BRIAN A. PFITZINGER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 KLOPPENBURG, J.¹ Sara Steppke appeals the amended judgment of conviction for misdemeanor theft, which added as restitution \$16,124.40 for

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

security system upgrades undertaken after the theft was discovered. On appeal, Steppke makes two arguments in support of her contention that the costs of the security system upgrades are not recoverable as restitution under WIS. STAT. § 973.20: (1) the costs of the security system upgrades are prohibited general damages, not special damages; and (2) even if the costs of the security system upgrades are special damages, WIS. STAT. § 973.20(5)(a) limits special damages awarded as restitution to those that could be recovered in a civil action and, here, the security system upgrades would not be recoverable in a civil action for conversion. I reject Steppke’s first argument because I conclude that under controlling case law the security system upgrades are special damages within the meaning of WIS. STAT. § 973.20(5)(a). However, I take the State to concede Steppke’s second argument because the State does not refute that argument in any developed manner in its response brief. Therefore, I reverse.

BACKGROUND

¶2 Steppke pled guilty to three counts of misdemeanor theft for stealing approximately \$3,000 worth of flea and tick product from her former employer, V.V. The circuit court withheld sentence and placed Steppke on three years’ probation for each count. At sentencing, the parties stipulated that Steppke owed V.V. \$3,000 in restitution for the stolen flea and tick product, but disputed whether the \$16,124.40 for the security system upgrades could properly be recovered as restitution.

¶3 Without holding a hearing, the circuit court ordered Steppke to pay “\$3,000 in restitution, [and \$16,124.40] as a condition of probation, not characterized as restitution.” Steppke challenged this order, moving the court to either vacate the order to pay for the security system upgrades as a condition of

probation or grant Steppke a restitution hearing pursuant to WIS. STAT. § 973.20(13)(c) and (14). The court granted Steppke's postconviction motion, vacating the order and scheduling a restitution hearing.

¶4 At the restitution hearing, the owner of V.V. testified about the security system upgrades that he felt he was required to make after discovering Steppke's theft of flea and tick product. The owner testified that he has "to have some trust factor with our employees and that has changed." The owner testified that he now spends an hour or two every week reviewing security footage on the new system. The circuit court ruled that "the actions of the defendant were a substantial factor in causing the upgrading of the system ... and certainly this type of action is a natural consequence of the defendant's actions" and, therefore, the costs of the security system upgrade were appropriately paid as restitution. The court entered an amended judgment of conviction, which ordered Steppke to pay the additional \$16,124.40 for the security system upgrades as restitution.² Steppke appeals from this amended judgment.

DISCUSSION

¶5 Steppke argues that the costs of the security system upgrades are not recoverable as restitution under WIS. STAT. § 973.20. This court reviews a circuit 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 circuit court properly exercises its discretion when it logically

² V.V.'s original claim for restitution also included \$995 for a personality test to assess new employees and \$90 for a new employee background check, and on the day of the restitution hearing the State introduced an invoice for additional security system upgrades. The circuit court did not include any of these amounts in the restitution order.

interprets the facts, applies the proper legal standard, and uses a rational process to reach a reasonable conclusion. *Id.* Whether the circuit court applied the proper legal standard is reviewed de novo. *State v. Rash*, 2003 WI App 32, ¶5, 260 Wis. 2d 369, 659 N.W.2d 189 (“whether a restitution order comports with the statute ... is subject to our de novo review”).

¶6 WISCONSIN STAT. § 973.20 governs restitution in criminal cases and provides in pertinent part:

(5) In any case, the restitution order may require that the defendant do one or more of the following:

(a) Pay 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.

¶7 As stated, Steppke makes two arguments in support of her contention that the costs of the security system upgrades are not recoverable as restitution under WIS. STAT. § 973.20(5): (1) the security system upgrades are prohibited general damages, not special damages; and (2) even if the security system upgrades are special damages, WIS. STAT. § 973.20(5)(a) limits special damages awarded as restitution to those that could be recovered in a civil action and, here, the security system upgrades would not be recoverable in a civil action for conversion.³ I address each of Steppke’s arguments in turn.

³ It is not clear from the record whether Steppke presented the second argument relating to damages “which could be recovered in a civil action” to the circuit court. However, the State does not argue that Steppke forfeited this argument, so I proceed to address it.

I. Whether Expenditures for Security System Upgrades are Special Damages

¶8 The distinction between general and special damages as relevant to WIS. STAT. § 973.20(5)(a) is well established. General damages are those that “compensate the victim for damages such as pain and suffering, anguish or humiliation,” damages crime victims often experience. *State v. Behnke*, 203 Wis. 2d 43, 60-61, 553 N.W.2d 265 (Ct. App. 1996). In contrast, special damages are “specific expenditure[s] by the victim paid out because of the crime.” *Id.* at 61. See also *State v. Holmgren*, 229 Wis. 2d 358, 365, 599 N.W.2d 876 (Ct. App. 1999) (special damages encompass “harm of a more material or pecuniary nature,” and “represent the victim’s actual pecuniary losses” and “[a]ny readily ascertainable pecuniary expenditure paid out because of the crime” (quoted source omitted)).

¶9 In *Behnke*, the victim sought restitution after a jury convicted Behnke of false imprisonment, battery, and sexual assault. 203 Wis. 2d at 47. The victim sought the cost of a new, stronger lock for her door as part of her claim for restitution because “Behnke knew where she lived and ... she thought he might try to escape.” *Id.* at 60. Although the offense did not occur at the victim’s home, there were no allegations of damage to the victim’s home, and Behnke was in jail at the time of the restitution hearing, the *Behnke* court concluded that the new lock was an appropriate special damage because it was a “specific expenditure by the victim paid out because of the crime.” *Id.* at 60-61.

¶10 Here, the circuit court found that “the system that was in place had some shortcomings ... and that’s why [the owner] ended up feeling based upon what happened with the, with Ms. Steppke ... the [owner] was convinced that it was [necessary to upgrade] the system that was in place in order to afford [the

owner] some security and safety.” As in *Behnke*, where the victim’s cost of the lock was a “special damage” because it was a specific ascertainable expenditure necessitated by Behnke’s crime, even though there was no damage to the victim’s home or door, V.V.’s costs of the security system upgrades are “special damages” because they are specific ascertainable expenditures necessitated by Steppke’s theft, even though there was no loss or damage to V.V.’s security system.

¶11 Steppke acknowledges that the security system upgrades were specific *expenditures* paid out by V.V. as a result of her theft. But, she argues, the security system upgrades are prohibited general damages because V.V. suffered no pecuniary *losses* relating to the security system itself, and the sole purpose of the security system upgrade was to compensate V.V. for a lost sense of security and trust in its employees, which is akin to the anguish that is a non-recoverable general damage under the statute.

¶12 However persuasive Steppke’s argument may be, as the State points out and as Steppke concedes on reply, the definition of “special damages” set forth in *Behnke*—a “specific expenditure by the victim paid out because of the crime,” *id.* at 61—controls. See *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997) (“the court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals”). Under that controlling law, I conclude that costs of the security system upgrades are “special damages” within the meaning of WIS. STAT. § 973.20(5)(a) because they were specific expenditures paid out by V.V. as a result of Steppke’s theft.

II. *Whether Expenditures for Security System Upgrades are Special Damages Recoverable in a Civil Action*

¶13 Steppke contends that even if the costs of V.V.’s security system upgrades are special damages, they are not recoverable as restitution because: (1) the plain language of WIS. STAT. § 973.20(5)(a) limits special damages awarded as restitution to those that could be recovered in a civil action; and (2) the costs of the security system upgrades would not be recoverable in a civil action for conversion. *See Metropolitan Sav. & Loan Ass’n v. Zuelke’s, Inc.*, 46 Wis. 2d 568, 577, 175 N.W.2d 634 (1970) (limiting recovery in an action for conversion to “the value of the property at the time of the conversion plus interest to the date of the trial” (quoted source omitted)).

¶14 In its response brief the State asserts in a wholly conclusory fashion that Steppke’s arguments based on the “recovered in a civil action” limitation is “spurious” and that “[w]hen the need for a new lock or a new/improved security system is occasioned because of the commission of a crime, a broad and liberal construction of the restitution statute must include compensation for such expenditures.” However, the State does not address or refute in any developed manner, or cite any legal authority contrary to, either of Steppke’s arguments relating to the “recovered in a civil action” limitation in WIS. STAT. § 973.20(5)(a). More specifically, the State does not explain how Steppke’s plain language interpretation of the statute is incorrect, or challenge Steppke’s application of that plain language interpretation by identifying any civil action in which V.V.’s costs of the security system upgrades would be recoverable. Accordingly, I deem the State to concede that Steppke’s arguments are correct. *See Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (“Respondents on appeal cannot complain if propositions of

appellants are taken as confessed which they do not undertake to refute.” (quoted source omitted)).

¶15 Accordingly, the part of the amended judgment that orders Steppke to pay \$16,124.40 is reversed. The circuit court shall enter a corrected judgment of conviction that omits the \$16,124.40.

CONCLUSION

¶16 For the foregoing reasons, I reverse in part and remand with directions.

By the Court.—Judgment 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)4.

