COURT OF APPEALS
DECISION
DATED AND FILED

September 6, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP264-CR **Cir. Ct. No. 2003CF33**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. VANDENHEUVEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County: LARRY JESKE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Michael Vandenheuvel appeals a judgment of conviction fixing the amount of restitution due to the person whose home he burglarized. He argues that the court erred when it awarded restitution for a window the court found was damaged as part of the burglary. Because evidence

supports the court's determination that Vandenheuvel was responsible for the damage to the window, we affirm the judgment.

BACKGROUND

¶2 On January 21, 2003, Vandenheuvel broke into Karlene LaMay's home while she was at work. He took money and two books of checks. Police interviewed Vandenheuvel in February, and he admitted breaking into LaMay's residence and taking and cashing checks. He said he entered the house by prying open the back door of the residence with a library card. However, according to police reports, the marks on the door showed that he had used a crowbar or large screwdriver to gain entry.

¶3 Two months after the burglary, LaMay noticed damage to a front window. She believed that the window damage also was caused by the break-in. Her house was less than six months old at the time of the break-in, the marks on the window had not been there prior to the burglary, and the marks were consistent with a prying tool like the one used to open the front door.

¶4 Vandenheuvel entered a no contest plea to the burglary charge on October 22, 2004. On February 23, 2005, the court held a restitution hearing. At the hearing, Vandenheuvel admitted causing the damage to the back door but denied causing any damage to the window.

¶5 The circuit court, in a written decision, stated that it chose to believe LaMay, citing the consistent tool marks at both locations. It ordered restitution of $1,900 for the damage to the house without separating the amounts due for the window and door. Vandenheuvel appeals the award of restitution for the window, and asks that we remand for a determination of the cost of the door alone.

DISCUSSION

¶6 In general, we review restitution awards for an erroneous exercise of discretion.

> [W]e address whether the circuit court misused its discretionary authority. We may reverse a discretionary decision only if the circuit court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts.

State v. Canady, 2000 WI App 87, ¶6, 234 Wis. 2d 261, 610 N.W.2d 147 (citations omitted).

¶7 Reviewing courts have had difficulty, however, applying this standard of review to the burden of proof placed on the victim by WIS. STAT. § 973.20(14)(a).[1] That statute provides that "[t]he burden of demonstrating by the preponderance of the evidence the amount of loss sustained by a victim as a result of a crime considered at sentencing is on the victim."

¶8 The State argues that whether the victim met her burden is committed to the trial court's discretion; or, alternatively, that it is a finding of fact reviewed under the clearly erroneous standard. Vandenheuvel argues that whether the victim met her burden is a question of sufficiency of the evidence, and that whether the victim produced sufficient evidence to support the court's finding is reviewed without deference.

¶9 All of these positions have some support. *See* ***State v. Ross***, 2003 WI App 27, ¶¶54-57, 260 Wis. 2d 291, 659 N.W.2d 122 (noting only the

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

erroneous exercise of discretion standard); ***State v. Holmgren***, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999) (findings of fact underlying discretionary determinations are upheld unless clearly erroneous); *see* ***In re Brown***, 2005 WI 29, ¶29, 279 Wis. 2d 102, 693 N.W.2d 715 (suggesting that where a statute sets out a specific burden, courts should review whether a party has produced evidence sufficient to meet that burden without deference).

¶10 In this case, it is unnecessary to decide which standard of review to apply because Vandenheuvel challenges only the court's underlying factual determination that he damaged the window.[2] Underlying factual determinations are reviewed using the same methodology under all three proposed standards of review. That is, it is an erroneous exercise of discretion for the circuit court to base its decision on facts not in the record. ***State v. Madlock***, 230 Wis. 2d 324, 336, 602 N.W.2d 104 (Ct. App. 1999). Similarly, a circuit court's finding of fact is clearly erroneous if no evidence in the record supports it. ***Woodard v. Woodard***, 2005 WI App 65, ¶12, 281 Wis. 2d 217, 696 N.W.2d 221. Finally, a fact finder's determination will be upheld under a sufficiency of the evidence test if evidence in the record supports the determination, even if the fact finder has chosen to disregard other contrary evidence. ***Brown***, 279 Wis. 2d 102, ¶¶40-41. We therefore review whether evidence in the record supports the circuit court's determination that Vandenheuvel damaged the window.

[2] Vandenheuvel does not challenge the legal significance of the court's finding that he damaged the window. That is, he does not argue that even if he broke the window, he is not legally obligated to pay restitution for some reason. Had Vandenheuvel challenged the legal significance of that fact, the choice of standard of review would make a difference. The circuit court's decision on the legal significance of that fact would be entitled to more deference under sufficiency of the evidence review than it would if the question was treated as a mixed question of fact and law.

¶11 At the restitution hearing, LaMay testified (reading from the police report) that the damage to the back door was caused by "prying open house door with a small crowbar or large screwdriver" and that the window damage appeared to have been caused when "something was trying to get stuck into it."[3] She also testified that it would be plausible for Vandenheuvel to have tried the window first, because the window was out of view of her neighbors, then go to the more visible back door as a second option. Pictures were received of the door and window, which allowed the court to compare the damage. Finally, the house was relatively new, reducing the possibility that the damage was caused in a different manner. We have no difficulty concluding that evidence in the record supported the court's determination that Vandenheuvel caused the damage to the window.

¶12 The court did choose to disregard Vandenheuvel's testimony that he had not attempted to enter by the window, and it apparently gave little weight to other facts supporting his position, such as the fact that the damage to the window was not discovered until well after the crime was committed. But this was simply weighing and balancing conflicting evidence–a task that was properly within the court's province as fact finder. We therefore affirm the circuit court's judgment.

By the Court.—Judgment affirmed.

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

[3] In his brief, Vandenheuvel asserts that "no testimony or evidence" of any tool marks was introduced at the restitution hearing. However, the police report noting that "[e]ntry was gained by prying open house door with a small crow bar or large screwdriver[]" was introduced at the restitution hearing as State's exhibit 1.