

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 2, 2003

Cornelia G. Clark
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. 02-1720-CR

Cir. Ct. No. 96-CF-59

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JASON D. LANDRATH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County:
HENRY B. BUSLEE, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Jason D. Landrath appeals from an order requiring him to pay \$23,000 in restitution resulting from his no contest plea to criminal

damage to property contrary to WIS. STAT. § 943.01(2)(d) (1993-94).¹ Landrath challenges the sufficiency of the nexus between his crime and the victim's damages, the sufficiency of the evidence of the damages and his ability to pay the restitution amount. We reject his appellate challenges and affirm.

¶2 Landrath pled no contest to setting fire in October 1994 to an unoccupied house, rendering the building a total loss. In December 1998, the court withheld sentence and imposed probation and restitution of \$23,000. At the August 2000 restitution hearing, the owner testified about the value of the house, and the court reiterated the restitution amount of \$23,000. At a June 2002 hearing focusing on Landrath's ability to pay restitution, the court found that Landrath could pay the \$23,000 in restitution.

¶3 Landrath argues that his criminal conduct and the owner's loss were not sufficiently connected to warrant the restitution order. In order to award restitution under WIS. STAT. § 973.20 (1999-2000),² the victim must establish:

[A] causal nexus ... between the "crime considered at sentencing," and the disputed damage. In proving causation, a victim must show that the defendant's criminal activity was a "substantial factor" in causing damage. The defendant's actions must be the "precipitating cause of the injury" and the harm must have resulted from "the natural consequence[s] of the actions."

State v. Canady, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 610 N.W.2d 147 (citations omitted).

¹ Landrath was also convicted of disorderly conduct contrary to WIS. STAT. § 947.01 (1993-94) on his no contest plea.

² All subsequent references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 Landrath pled no contest to damaging the house. The owner testified that the fire Landrath set and the ensuing damage “totaled” the house. Instead of repairing the house, the owner sold it and six acres of land for \$23,000. The house was built in 1975 at a cost of \$14,842. The owner opined that the land alone was worth between \$25,000 and \$30,000, and that the \$23,000 sale price was based on the value of the land.³ The house had been vacant for fourteen years at the time of the fire and was in a state of disrepair. The owner planned to use it in his retirement and had visited the property periodically. The owner sought \$23,000 in restitution.

¶5 The court found that the owner placed a value of \$23,000 on the property, and that the fire, smoke and water damage caused by Landrath’s conduct reduced the value of the property to the owner. The court set restitution at \$23,000.

¶6 We reject Landrath’s claim that the nexus between his conduct and the victim’s damages is insufficient. The victim testified that he was forced to sell the property as a result of the fire damage, and it is undisputed that Landrath caused the fire. There is no question that Landrath’s criminal activity was a substantial factor in causing the damage, even if the property was not in pristine condition before the fire.

¶7 We affirm the circuit court’s finding that the victim suffered \$23,000 in damages. A property owner is competent to testify about the value of his or her property. *Trible v. Tower Ins. Co.*, 43 Wis. 2d 172, 187, 168 N.W.2d 148 (1969).

³ Had the house not burned down, the owner believed the property would have had a value of \$45,000.

The circuit court was free to accept the owner's testimony as credible, *State v. Owens*, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989), and the circuit court's findings are not clearly erroneous based on this record, *State v. Anderson*, 215 Wis. 2d 673, 677, 573 N.W.2d 872 (Ct. App. 1997). Because the circuit court's finding of the victim's damages is not clearly erroneous, the court did not misuse its discretion in awarding \$23,000 as restitution to the victim. See *State v. Leighton*, 2000 WI App 156, ¶54, 237 Wis. 2d 709, 616 N.W.2d 126.

¶8 Finally, Landrath argues that there is no evidence he is able to pay \$23,000 in restitution. While the victim bears the burden of proving the amount of loss sustained as a result of the crime by a preponderance of the evidence, WIS. STAT. § 973.20(14)(a), the defendant bears the burden of proving his or her financial resources and ability to pay by a preponderance of the evidence, § 973.20(14)(b). *State v. Madlock*, 230 Wis. 2d 324, 336, 602 N.W.2d 104 (Ct. App. 1999). The court may consider the present and future earning ability of the defendant. Sec. 973.20(14)(b).

¶9 At the hearing to determine his ability to pay the \$23,000 in restitution, Landrath testified that he receives \$920 per month in unemployment because he was laid off from his last position, and his wife is employed at \$1244 per month. Currently, the family expenses exceed the family income. Landrath earned \$11.75 per hour in his last position performing small motor repair, and in the three weeks since he was laid off, he applied for other small motor repair and mechanics positions. Landrath stated that as soon as he finds employment, he would be able to make payments toward his restitution obligation on a weekly or monthly basis.

¶10 Landrath suffered a work-related injury with a previous employer. He has medical expenses arising from that injury and other uninsured family medical expenses. Landrath testified that he did not know if he is eligible to recover any worker's compensation funds for his work-related injury. The court questioned Landrath closely about the injury and his efforts to seek worker's compensation or other recovery relating to it. The court found that Landrath had not explored the possibilities such that the court could find that Landrath was without recourse for the work-related injury. The court also noted that none of the information on Landrath's financial disclosure statement was supported by documentary evidence.⁴ Although Landrath claimed that his work injury left him with a lifting restriction, he did not present the court with any medical records substantiating this claim.

¶11 The court acknowledged that Landrath bore the burden to show his inability to pay restitution. Given his youth and the income-producing years ahead of him, the court declined to eliminate the restitution obligation. The court deemed pure speculation Landrath's prediction that his future income would be in the \$9 per hour range when he had previously earned almost \$18 per hour. The court also was not satisfied that Landrath has exhausted all of his medical or legal remedies to maximize recoveries relating to his work-related injury or that he presented to the court information substantiating that he has no further options for recovery.

⁴ The court later amended this finding to reflect that Landrath's unemployment compensation benefits were documented.

¶12 Additionally, the court considered that the victim's entitlement to restitution outweighed Landrath's need to be free of the restitution obligation, particularly since Landrath did not demonstrate an inability to pay restitution. The court's approach is in line with the restitution statute's "strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution." *State v. Dugan*, 193 Wis. 2d 610, 622, 534 N.W.2d 897 (Ct. App. 1995).

¶13 The court required Landrath to pay \$50 per week toward his restitution obligation and permitted the probation agent to adjust the weekly payment as Landrath's financial circumstances change due to employment or the receipt of other benefits. The court expected that the unpaid balance of restitution would be converted into a civil judgment in favor of the victim at the conclusion of Landrath's probation. Landrath agreed that the court's order was consistent with the evidence presented and the considerations applicable to a defendant's request to be relieved of restitution due to an alleged inability to pay.

¶14 The court concluded that Landrath did not meet his burden to show that his financial circumstances rendered him unable to pay restitution. In so concluding, the court essentially performed a credibility analysis as to Landrath's testimony regarding his financial condition. Assessing Landrath's credibility was within the province of the circuit court. *Owens*, 148 Wis. 2d at 930.

¶15 Whether a party met his or her burden presents a question of law which we decide independently of the circuit court. *State v. Moederndorfer*, 141 Wis. 2d 823, 831, 416 N.W.2d 627 (Ct. App. 1987). We agree with the circuit court that Landrath did not meet his burden to show an inability to pay restitution.

Therefore, we do not reach the parties' arguments about the applicability of WIS. STAT. §§ 973.09(3) and 973.20(10).⁵

By the Court.—Order affirmed.

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

⁵ We are aware of *State v. Loutsch*, 2003 WI App 16, ___ Wis. 2d ___, 656 N.W.2d 781. We disagree with this opinion because we believe that it unduly restricts the discretion and authority of a circuit court to address restitution and retain jurisdiction over the question of restitution.

