

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 1, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

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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. 2010AP1349-CR**

**Cir. Ct. No. 2007CF1116**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**WISCONSIN GAS COMPANY, LLC D/B/A WE ENERGIES,**

**INTERVENOR-RESPONDENT,**

**v.**

**GUENTHER HUEBNER,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Waukesha County:  
LINDA M. VAN DE WATER, Judge. *Affirmed.*

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Guenther Huebner appeals from an order denying his motion for reconsideration of the \$130,000 in restitution he was ordered to pay Wisconsin Gas Company, LLC, d/b/a WE Energies. He asks that we set restitution at zero because (1) WE Energies' loss estimate is unsupported by any credible evidence and (2) he was wrongly convicted. The second matter is not before us on this appeal. As to the first, we disagree and affirm the order.

¶2 Huebner was charged with the theft from WE Energies of at least \$10,000 worth of natural gas over a period of about thirty years. *See* WIS. STAT. § 943.20(1) and (3)(c) (2009-10).<sup>1</sup> At trial, the State presented evidence that the theft was \$24,276.40, an amount sufficient to prove the criminal case against Huebner. A jury convicted him and this court affirmed. *See State v. Huebner*, No. 2010AP319-CR, unpublished slip op. (WI App Dec. 8, 2010) (per curiam).

¶3 Huebner requested a restitution hearing. Because WE Energies bore the burden of proving its loss, *see* WIS. STAT. § 973.20(14)(a), it continued to investigate to assess the full scope of the theft. WE Energies theft and fraud investigator Jeff Meyer and Eric Wall, an energy engineer, conducted a postconviction site investigation to more accurately determine the amount of unmetered natural gas used on Huebner's property. The inspection revealed significant new information. Contrary to what had been thought, there was more square footage, more gas-fired appliances and more reconfigured ductwork, and the house and outbuildings had been modified for multiple-tenant occupancy.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

¶4 Over four days of hearings, WE Energies experts' set forth its recalculated loss. Wall, who employed a mathematical methodology, estimated the theft to be between a low of approximately \$15,664 and a high of \$127,285.<sup>2</sup> Fraud investigator Meyer, who based his estimate on his investigation, interviews and materials provided to him, opined that the theft amount "far exceeds \$100,000" and likely was between \$130,000 and \$180,000. The trial court ordered restitution of \$130,000 for the stolen natural gas and \$17,537.08 in expenses incurred in the investigation.

¶5 Huebner moved for reconsideration, on grounds that the restitution request was based on speculation. The court denied the motion. Huebner appeals.

¶6 Determining the amount of restitution is a matter within the trial court's discretion. *See State v. Johnson*, 2002 WI App 166, ¶7, 256 Wis. 2d 871, 649 N.W.2d 284. To review the trial court's exercise of discretion, we examine the record to determine whether the 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.*

¶7 Huebner argues that the trial court's adoption of WE Energies' restitution figure was an erroneous exercise of discretion because the amount is

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<sup>2</sup> Wall calculated the amount of unmetered gas used both for heating and for "appliances" such as the pool, gas fireplaces and the hot tub. To determine the amount of unmetered gas used for heating the house and outbuildings, Wall subtracted the amount of metered gas used for heating from the amount of gas likely necessary to do so. Determining the likely necessary amount entailed factoring in the size of the buildings, their average heating density and weather data. Wall then deducted the amount of heat that could have been provided by electric space heaters. To calculate the amount of gas likely necessary for purposes other than heating, Wall considered the number and nature of appliances that probably were connected to the bypass pipe, the amount of unmetered gas the appliances probably used and the cost of gas at the times they probably were used.

unsupported by any credible evidence. The gist of his complaint seems to be that the inability to name a precise number translates to WE Energies' failure to demonstrate its loss by a preponderance of the evidence. We disagree.

¶8 Wall and Meyer described how their findings from the on-site inspection increased their estimates of Huebner's unmetered gas use. Significant to their new calculations was discovering that the residence actually had multiple units and occupants, and five, rather than two, natural-gas fireplaces, factors which impact both the amount and efficiency of gas usage. The inspection also revealed that the Huebner property contained a number of appliances and amenities, such as a hot tub and an in-ground pool, heated by natural gas but not reflected in Huebner's metered usage. Interviewing people familiar with the property enabled Meyer to estimate a "range of possible theft," depending, for instance, on whether the pool was heated, as some interviewees said, or not, as Huebner said.

¶9 WE Energies submitted detailed spreadsheets and charts outlining its conclusions and the evidence supporting them. Its experts explained the numerous factors they considered in making their calculations. Wall testified that he used conservative estimates and gave Huebner every benefit of the doubt to make sure all calculations were fair and credible.

¶10 Wilson, Huebner's expert, challenged WE Energies' estimates and methodologies but acknowledged that he had no way of calculating unbilled usage. Further, Wilson did not do an energy-use analysis, or present alternative restitution figures or an alternative methodology to estimate one.

¶11 The trial court considered the differing testimony. It found significant that Huebner offered no alternate numbers to refute those put forth by WE Energies' experts. The court also noted that Wilson had no industry-related

degrees, certifications or formal training and never had worked on a theft-of-gas case, testified as an expert or been declared a witness. We give deference to the trial court to judge the credibility of the witnesses. *See* WIS. STAT. § 805.17(2).

¶12 The purpose of restitution is to return victims to the position they occupied before the defendant injured them. *State v. Holmgren*, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999). We construe the restitution statute broadly and liberally to allow victims to recover their losses resulting from the defendant’s criminal conduct. *Id.* While a claim of lost profits naturally involves some speculation and uncertainty, the victim can meet its burden by proving its loss to a reasonable certainty, that is, producing sufficient evidence to permit a reasonable inference regarding the amount of the loss. *See State v. Johnson*, 2005 WI App 201, ¶¶20, 22, 26, 287 Wis. 2d 381, 704 N.W.2d 625.

¶13 We are not persuaded by Huebner’s vigorous contention that restitution hinges on more exacting proof of WE Energies’ loss. It states the obvious to say that uncertainty about the amount of natural gas stolen is inherent in the nature of the crime. As a WE Energies witness noted, “That’s why we have meters.” Further, “we may give due weight to the fact that it was the defendant’s own wrongful conduct that created the speculation or uncertainty in the first instance.” *Id.*, ¶20.

¶14 The State established in the criminal case that Huebner altered WE Energies’ gas lines and his own property to allow the theft to go undetected for nearly thirty years. Upon learning he was under suspicion, Huebner dismantled piping to disconnect the bypass pipe and the appliances to which unmetered gas could have flowed. Where the defendant’s wrong causes the difficulty of proof of damage, he or she cannot complain of the resulting uncertainty. *Town of Fifield*

*v. State Farm Mut. Auto Ins. Co.*, 119 Wis. 2d 220, 230, 349 N.W.2d 684 (1984). Said another way, Huebner has relinquished any right to complain about the uncertainty because his criminal conduct was so inconsistent with a purpose to stand on his rights as to leave no room for a reasonable inference to the contrary. See *Brunton v. Nuvelt Credit Corp.*, 2010 WI 50, ¶38, 325 Wis. 2d 135, 785 N.W.2d 302.

¶15 While Wall and Meyer acknowledged the virtual impossibility of stating the theft figure with exactitude, they explained the underlying rationale for the range of numbers presented and which of the figures they thought were most likely and reasonable. We conclude it was reasonable for the trial court to accept WE Energies' investigation results as reliable support for the theft claim. By not proffering alternative estimates, Huebner failed to refute WE Energies' evidence of loss. The trial court appropriately found that WE Energies' established the loss by a preponderance of the evidence. The \$130,000 has adequate record support. Huebner does not object to the additional \$17,537.08.

¶16 Finally, Huebner also contends that the trial court's ruling on restitution did not demonstrate a proper exercise of discretion because its initial ruling after several days of testimony was too brief and the written order on the motion for reconsideration was denied without explanation.

¶17 We conclude that the trial court's initial restitution decision, although succinct, met the standards for an appropriate exercise of discretion. The court heard four days of testimony; it considered documentary evidence and noted that, as a result of further inspecting the property, WE Energies' estimates now were more accurate than what they could present at trial. The court explained that the inability to pinpoint exactly how much gas was stolen was not fatal because

WE Energies' methodology and estimates provided a sufficient basis upon which to order restitution. The figures at each end of the range were plausibly supported to a reasonable certainty. Based on the law and the evidence, the court's selection of the higher-end amount is sustainable as a proper exercise of discretion.

¶18 As to the order on the motion for reconsideration, the motion simply asked the court to take another look at Meyer's testimony "and the speculative nature of the basis for his request for restitution." The order denying the motion states that the court "reconsidered the determination regarding restitution." Where the trial court fails to set forth its reasoning in exercising its discretion, this court may independently review the record to determine if it provides a basis for the trial court's discretionary call. *See State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983). We have done so. The court already had explained its reasons in the oral decision after the restitution hearings. We have found those reasons adequate. We conclude the decision demonstrates a proper exercise of discretion.

*By the Court.*—Order affirmed.

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

