

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**JULY 17, 1996**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-3105-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**STEVEN A. JOHNSON,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Winnebago County: WILLIAM E. CRANE, Judge. *Reversed and cause remanded with directions.*

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

ANDERSON, P.J. Steven A. Johnson appeals from the portion of the restitution order establishing his obligation to pay restitution for lottery tickets with a \$500 retail value. Johnson contends that the victim failed to prove by a preponderance of the evidence how many lottery tickets

were stolen. Although the rules of evidence are generally not applicable to restitution hearings, a victim does have to meet a minimal burden of proof and mere speculation as to the value of stolen property does not fulfill the victim's obligation. Therefore, we reverse and remand.

Johnson was convicted of being a party to the crime of burglary of the Prime Time Club in the town of Menasha in violation of §§ 943.10(1)(a) and 939.05, STATS. Among the items stolen were scratch-off tickets from the Wisconsin lottery. The criminal complaint alleged that a total of 796 lottery tickets were stolen. The complaint specified that the tickets were stolen from six different lottery games, the name of each lottery game, the number of tickets stolen, the serial numbers and the total value of the tickets stolen for each game.

At sentencing, the trial court allowed the State to submit information on restitution within thirty days. Subsequently, the State submitted a letter to the court setting the victim's loss at \$796. At Johnson's request, a restitution hearing was conducted. Under the provisions of § 973.20(14)(a) STATS., the district attorney represented the owners of the Prime Time Club at the hearing. Michael Goss, a co-owner, testified as to the losses suffered as a result of the burglary.

Goss testified that he could not estimate the exact number of stolen lottery tickets because the stolen tickets were removed from a roll of tickets. He said that the retail value of the stolen tickets was estimated to be \$500. Goss told the trial court that lottery tickets are purchased in rolls of 200, 300 or 400 and that at the time of the burglary there were eight different lottery games,

each with a separate roll of tickets. He testified that they did not keep an inventory of tickets and could not determine how many tickets they sold on a daily basis from each roll.

On cross-examination, Goss conceded that he had no way of knowing exactly how many tickets were stolen. He stated that the tickets were taken from a relatively new ticket roll. When questioned by defense counsel, Goss acknowledged that it was possible that only 100 lottery tickets were stolen.

Based on this testimony, the trial court set restitution at \$500 for the stolen lottery tickets:  
The lottery ticket numbers have not been fully established here today, but I will accept Mr. Goss' estimate of \$500, which is less than the total of the inventory value provided in the complaint in this case.

Johnson appeals this portion of the trial court's restitution order.<sup>1</sup> He insists that the testimony of the co-owner of the Prime Time Club was not sufficient to establish, by a preponderance of the evidence, the value of the stolen lottery tickets. Because the evidence was insufficient, Johnson asks us to vacate that portion of the restitution order establishing the value of the stolen lottery tickets.

Johnson challenges the discretion the trial court exercised at sentencing and our review is limited to determining whether there was a

---

<sup>1</sup> The total restitution order was for \$1132.50. Johnson does not contest \$632.50 in restitution for broken windows, damaged felt on the pool table, clean up, boarding of windows, damaged light fixtures and missing alcoholic beverages.

misuse of discretion in sentencing. *State v. Kennedy*, 190 Wis.2d 252, 257, 528 N.W.2d 9, 11 (Ct. App. 1994). Likewise, our determination of the amount of restitution due a victim is reviewed for an erroneous exercise of discretion. See *State v. Boffer*, 158 Wis.2d 655, 658, 462 N.W.2d 906, 907-08 (Ct. App. 1994). We are guided by the 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. Dziuba*, 148 Wis.2d 108, 112-13, 435 N.W.2d 258, 260 (1989).

A victim seeking restitution has the burden of demonstrating by the preponderance of the evidence the amount of loss that he or she sustained as a result of the crime. Section 973.20(14)(a), STATS. This burden of proof not only requires the victim to produce evidence of greater convincing power in the mind of the finder of fact than the evidence produced by the other side, but the proof must satisfy or convince the finder of fact of the truth of the victim's contention. See *Anderson v. Chicago Brass Co.*, 127 Wis. 273, 279-80, 106 N.W. 1077, 1079 (1906).

Goss failed to carry his burden. He testified that the stolen tickets, with an estimated retail value of \$500, were taken from a single roll of tickets that was relatively new. But he could not testify as to the number of tickets taken because he and his partner did not keep an inventory of lottery tickets. Although he presented no evidence of the retail value of an individual lottery ticket, the State concedes that there is no dispute that the retail value of an individual ticket was \$1. At the restitution hearing, he told the court that lottery tickets are purchased in rolls of 200, 300 or 400. We are at a loss to understand

how, if the rolls have 200, 300 or 400 tickets, 500 tickets could have been stolen from a single and relatively new roll of tickets.

The State argues that the trial court properly relied upon the criminal complaint for the information that 796 tickets were stolen. The State's position is that although the statement in the complaint is hearsay, at a restitution hearing the court is not bound by the rules of evidence in accepting such evidence as reliable.<sup>2</sup> However, this argument ignores two glaring discrepancies between Goss's testimony and the statements in the criminal complaint. First, Goss testified that the tickets were taken from a single roll; the complaint states that tickets from six different rolls were taken. Second, Goss advised the court that neither he nor his partner kept an inventory of the tickets sold; the complaint lists specific sequences of serial numbers of the stolen tickets indicating that a detailed inventory had been kept.<sup>3</sup>

We are satisfied that Goss failed to carry his minimal burden of proof because the evidence he presented could not convince a finder of fact of the truth of his contention that he suffered a loss of \$500. The trial court's

---

<sup>2</sup> We note that aside from limited exceptions, small claims actions are not governed by the common law or statutory rules of evidence. Section 799.209(2), STATs. However, the finder of fact in a small claims action cannot make essential findings of fact based solely on oral hearsay. See *Scholten Pattern Works, Inc. v. Roadway Express, Inc.*, 152 Wis.2d 253, 258, 448 N.W.2d 670, 672 (Ct. App. 1989).

<sup>3</sup> For example, Goss testified that the beginning serial number of a roll of tickets would be zero and the numbers would be sequential for how many tickets were on the roll; in the complaint, it is alleged that for a lottery game called *Five Card Stud*, tickets with the serial numbers between 250 and 381 were stolen. The only inference from this example is that an inventory had to have been taken in order to determine that tickets with serial numbers 0 to 249 were not stolen.

decision demonstrates on its face the lack of consideration of any evidence on which the decision should have been properly based; therefore, it constitutes a misuse of discretion and, accordingly, we reverse. *See Schmid v. Olsen*, 107 Wis.2d 289, 295, 320 N.W.2d 18, 22 (Ct. App. 1982). We reverse the part of the restitution order assessing a \$500 loss for stolen lottery tickets. We remand to the trial court with directions to issue a new restitution order that does not include any amount for stolen lottery tickets.

*By the Court.*—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.