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February 12, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP1129-CR State of Wisconsin v. Andrew V. Krumrey (L.C. # 2013CF245)

Before Lundsten, Sherman and Blanchard, JJ.

Andrew Krumrey appeals a judgment of conviction for possession of methamphetamine, in which he was ordered to pay restitution. Krumrey argues that there was insufficient evidence that the cost of 76 hours of cleaning time and a month's lost rent awarded as part of the restitution had a causal nexus with his crime, and he argues that the circuit court erred in including those costs. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm the judgment.

"The determination of the *amount* of restitution to be ordered (and thus whether a victim's claim should be offset or reduced for any reason) is reviewed under the erroneous exercise of discretion standard." ***State v. Longmire***, 2004 WI App 90, ¶16, 272 Wis. 2d 759, 681 N.W.2d 534. At a restitution hearing, "The 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." WIS. STAT. § 973.20(14)(a). A victim is "[a] person against whom a crime has been committed." *See* WIS. STAT. § 950.02(4); ***State v. Gribble***, 2001 WI App 227, ¶¶70-71, 248 Wis. 2d 409, 636 N.W.2d 488 (holding that "victim" in § 973.20(1r) is most reasonably interpreted using the definition in § 950.02(4)(a), a related statute).

"Before restitution can be ordered, a causal nexus must be established between the 'crime considered at sentencing,' WIS. STAT. § 973.20(2), and the disputed damage." ***State v. Canady***, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 610 N.W.2d 147. "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.'" ***Id.*** (citation and quoted source omitted).

During a search of the apartment where Krumrey was living, police recovered a crystalline substance throughout the apartment, including on a baking pan in the oven. Due to

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

concerns that what appeared to be a methamphetamine manufacturing operation might have contaminated the apartment building, the building was temporarily evacuated. Laboratory testing showed that .213 grams of methamphetamine was present in the apartment and that the remainder was fake methamphetamine. Krumrey admitted making the fake methamphetamine from methylsulfonylmethane (MSM) washed with acetone. Krumrey pled guilty to one count of possession of methamphetamine, and the plea agreement provided that four dismissed charges, including a charge of operating a drug house, could be considered by the circuit court for purposes of restitution. Krumrey and the landlord testified at the restitution hearing. The landlord testified that he needed to have the apartment cleaned, and he submitted evidence that he had spent money for 79 hours of cleaning. The circuit court ordered restitution for the costs documented by the landlord related to cleaning the apartment: new carpet, dumpster rental, one month's rent, and payment to workers for 79 hours of cleaning.

Before the circuit court, Krumrey challenged the restitution sought by the landlord on two grounds: first, that under the restitution statute, the landlord did not "fit as a victim for a conviction for possession of less than a gram of methamphetamine at this particular residence," and, in the alternative, that the landlord had not met his burden of proof as to *any of the restitution* requested, specifically that "the factual connection [between the claimed loss and Krumrey] still isn't there given [the] testimony and the evidence that we've heard." On appeal, Krumrey acknowledges the circuit court's finding that it would be reasonable for the landlord to have to replace the carpet and that "it cannot be argued that the circuit court erroneously exercised its discretion in ordering restitution for the new carpet." Of the hours spent cleaning, Krumrey's argument is now different. He now says that three hours were identified as being for "carpet removal," and Krumrey no longer disputes those three hours. Instead, he focuses on the

cost of the other 76 hours of cleaning and the month's rent that the landlord alleged was lost due to the time it took to clean the apartment.

The State argues that, in the circuit court, Krumrey failed to challenge a subset of the 79 hours, as he now does on appeal, and has, therefore, forfeited the argument. In response, Krumrey asserts that he did argue that the landlord was unable to meet his burden, which included his burden for supporting those alleged costs. In the alternative, Krumrey argues that he did not need to present that argument to the circuit court, citing ***State v. Hayes***, 2004 WI 80, ¶54, 273 Wis. 2d 1, 681 N.W.2d 203, for the proposition that a challenge to the sufficiency of the evidence may be raised on appeal as a matter of right.

We disagree with Krumrey as to both points. First, the record does not reflect that Krumrey made the same arguments before the circuit court that he makes now disputing specific cleaning tasks from a list that was submitted by the landlord to document the hours spent cleaning the apartment. The circuit court had no opportunity to address these specific arguments—about *which* among the *cleaning tasks* performed *were causally connected* to Krumrey's crime—because the argument was not raised there. *See* ***State v. Bannister***, 2007 WI 86, ¶42, 302 Wis. 2d 158, 734 N.W.2d 892. Second, Krumrey's reliance on ***Hayes*** is misplaced. In ***Hayes***, the sufficiency of the evidence challenge being discussed there is without question the sufficiency of the evidence *to support a conviction*. *See* ***Hayes***, 273 Wis. 2d 1, ¶¶3, 45-46. The reasoning of the majority is based on the fact that such a challenge "goes to the heart of a determination of guilt in a criminal trial." *See* ***id.***, ¶48; *see also* ***id.***, ¶118 (Roggensack, J., concurring). ***Hayes*** does not address other situations, much less a challenge to the sufficiency of the evidence in support of a restitution order. Moreover, the ***Hayes*** court's reasoning for allowing unpreserved challenges to the sufficiency of the evidence to convict does not apply in

this case. *See* ***State v. Madlock***, 230 Wis. 2d 324, 329-37, 602 N.W.2d 104 (Ct. App. 1999) (primary purpose of restitution is not to punish defendant but to compensate victim).

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals