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DISTRICT I

May 8, 2018

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

2017AP1750-CR State of Wisconsin v. Eric J. Ortiz (L.C. # 2015CF004659)

Before Kessler, Brash and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Eric J. Ortiz appeals from a judgment of conviction for one count of criminal damage to property valued at more than \$2500 and one count of theft from a person, both as acts of domestic violence and as a domestic abuse repeater, contrary to WIS. STAT. §§ 943.01(2)(d),

943.20(1)(a), 973.055(1), and 939.621(1)(b) and (2) (2015-16).¹ Ortiz also appeals from an order denying his postconviction motion, which challenged the amount of restitution Ortiz was ordered to pay the victim. The sole issue on appeal is whether the trial court erroneously exercised its discretion when it did not offset the restitution amount by \$3000 that Ortiz claims was given to the victim. We conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We summarily affirm the judgment and the order.

Ortiz pled guilty to the aforementioned crimes, as well as to additional crimes in a separate case involving the same domestic violence victim.² The criminal damage to property conviction relates to an October 18, 2015 incident where Ortiz intentionally damaged the victim's car. The crimes in the second case relate to a December 27, 2015 incident where Ortiz damaged the victim's home.

A restitution hearing was held to determine how much restitution Ortiz should be ordered to pay the victim and her insurance company.³ At the hearing, it was undisputed that in May 2016 the victim paid \$6092.21 to repair her car, which Ortiz admittedly damaged.⁴ Ortiz asserted that he was entitled to an offset of \$3000 because the first car repair shop he paid to

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² Ortiz did not file a notice of appeal from his convictions in Milwaukee County Circuit Court Case No. 2015CF5647.

³ Four judges presided over the hearings relevant to this decision. The Honorable Jeffrey Kremers accepted Ortiz's guilty pleas. The Honorable Janet Protasiewicz imposed the sentences and scheduled a restitution hearing at Ortiz's request. The Honorable Timothy M. Witkowiak conducted the restitution hearing and set the amount of restitution. Finally, the Honorable Michael J. Hanrahan denied Ortiz's postconviction motion challenging the amount of restitution ordered.

⁴ The victim submitted a receipt showing she paid for the repairs in May 2016.

repair the damage in late 2015 did a poor job and therefore refunded \$3000 of the payment to the victim.⁵

The State told the trial court that the victim said the refund went to Ortiz, not to her. The State referred to a copy of a May 2016 email the victim filed with her restitution request that stated:

[Ortiz] had me take [the car] to his friend[']s shop because the dealership was at I believe over \$8,000 for a paint job. [Ortiz] paid for the paint job at his friend[']s shop BUT then he got the money back because it was poorly done and we were scheduled to bring it to the dealership 12/30 but the [next] incident happened 12/27.

Trial counsel told the trial court that Ortiz disputed that he received the refund. The trial court asked the victim, who was in the courtroom, about the refund from the first repair shop.

The following exchange took place:

[COURT]: Let me ask the victim. Did you receive \$3500 back from that paint job?

[VICTIM]: \$3,000 and Eric got money back.

[TRIAL COUNSEL]: She said Mr. Ortiz kept it.

[COURT]: And Mr. Ortiz kept it?

[TRIAL COUNSEL]: We dispute that fact.

[COURT]: Sure. Okay.

The trial court later made the explicit finding that “the victim basically has to pay \$6,092.21 for the vehicle to be brought back to where it was” and ordered Ortiz to pay that

⁵ There was confusion at the hearing about whether the refund was \$3000 or \$3500, including a discussion about a different payment of \$3500 for an incident that occurred in September 2015. On appeal, Ortiz seeks credit for \$3000.

amount as part of the restitution. The trial court did not explicitly address Ortiz's request for an offset, but it implicitly rejected that request.

Represented by new counsel, Ortiz filed a postconviction motion alleging that the trial court that set restitution had erroneously exercised its discretion by not offsetting the amount owed by \$3000, which, Ortiz's motion claimed, the victim acknowledged she received. A different judge who was assigned the case pursuant to judicial rotation denied the motion in a written order. This appeal follows.

At issue is whether the trial court that conducted the restitution hearing and determined the amount of restitution erroneously exercised its discretion when it set the victim's restitution for car repairs at \$6092.21 without offsetting the amount owed for those repairs by \$3000. *See State v. Longmire*, 2004 WI App 90, ¶16, 272 Wis. 2d 759, 681 N.W.2d 534 (“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.”) (emphasis omitted). Ortiz acknowledges that he bears the burden of demonstrating that he is entitled to an offset. *See Huml v. Vlazny*, 2006 WI 87, ¶22, 293 Wis. 2d 169, 716 N.W.2d 807; *State v. Walters*, 224 Wis. 2d 897, 907, 591 N.W.2d 874 (Ct. App. 1999).

Ortiz argues that the victim's answer to the trial court's question at the restitution hearing—“\$3,000 and [Ortiz] got money back”—constituted an admission that she received \$3000. Accordingly, Ortiz argues, he is entitled to a \$3000 offset.⁶

⁶ Ortiz relies solely on the victim's single in-court statement in support of his assertion that she received the refund. He did not offer any receipts or other evidence at the hearing demonstrating that the refund went to her.

We are not persuaded. We do not agree that the victim's statement, read in context, constituted an admission that she received \$3000. Instead, we interpret her statement to be first correcting the amount of the refund—\$3000 not \$3500 as the trial court stated in its question—and then indicating that Ortiz received the money. Trial counsel's immediate statement, "She said Mr. Ortiz kept it," underscores his understanding that the victim was asserting that Ortiz received the refund. Moreover, the victim's written restitution request asserted that Ortiz received the refund, and the State reiterated that position at the hearing.

The trial court was clearly aware that there was a factual dispute over whether the refund went to Ortiz or the victim. The trial court implicitly resolved that factual dispute in favor of the victim when it ordered Ortiz to pay for the car repairs and did not grant him an offset. The trial court's implicit finding is not clearly erroneous, as it is supported by written and oral statements from the victim. Moreover, it was Ortiz's burden to demonstrate that he was entitled to an offset. *See id.* We conclude that the trial court did not erroneously exercise its discretion when it ordered Ortiz to pay the victim restitution for the car repairs without granting Ortiz an offset of \$3000. Therefore, we summarily affirm the judgment and the order.

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals