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**CLERK OF COURT OF APPEALS
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COURT OF APPEALS OF WISCONSIN
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2015AP2320 CR

THOMAS J. QUEEVER,

Defendant-Appellant.

Defendant-Appellant's Brief and Appendix

Appeal from the circuit court for Marinette County, Judge James A. Morrison.

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the trial court erroneously exercised its discretion in granting the victim's restitution request for an expense incurred before the offense for which the appellant was sentenced.

The trial court answered: no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because it is anticipated that the briefs will fully present and discuss the issues on appeal.

The opinion in this case should not be published because it does not meet any of the criteria for publication under Rule 809.23 (1)(a).

STATEMENT OF THE CASE

Statement of Facts

The appellant, Thomas J. Queever, was initially charged by complaint with a single count of attempted burglary as a repeater, based upon an incident that occurred on August 5, 2014. R.1. On March 16, 2015 he entered a plea to the attempted burglary charge, absent the repeater allegation, pursuant to a plea agreement with the State. R.60:4-17.

At the beginning of his sentencing hearing, the court indicated that the victim had submitted a restitution request for a total of \$2,744.50 (A.Ap., A101; R.32, 33)., the majority of which was for a security system that had been installed in the victim's home on July 1, 2014, over a month *before* the crime for which Mr. Queever was being sentenced that day. R.61:4-6.

The parties stipulated that the following facts were true as to the restitution claim: 1) in the spring of 2014 the victim installed video recording equipment because they believed that someone was unlawfully entering their home; 2) after the victim showed police a video of someone entering the home, the police installed a camera as well; 3) on the evening of April 13, 2014, both video cameras recorded images of a person (with a flashlight) outside a back patio door, but neither recording showed "clearly enough to be able to say beyond a reasonable doubt" the identity of the person; the victim had a professional video security system installed on July 1, 2014; on August 5, 2014 the new security system captured video images that clearly identified Mr. Queever trying to enter the victim's home, which led to him being charged with the offense for which he was being sentenced. R.61:7-10.

The court heard the arguments of the prosecutor, whose position was that if the victim has not installed the professional security system a month earlier, Mr. Queever would not have been caught trying to enter her home. R.61:12-15. Defense counsel then reminded the court that restitution can only be ordered for damages that are the proximate result of a defendant's conduct, that his client denied responsibility (and was never convicted or even charged) for any of the break-ins that occurred before the professional security system was installed on July 1st and that there was no evidence to show that anything Queever did led to the installation of this security system. R.61:15-16. He then argued that the two cases cited by the State should not apply to this case because they were factually different. R.61:16-17.

Asked by the court if it should be allowed to "consider" the suggestions in the victim impact statements that Mr. Queever was responsible for the earlier break-ins, defense counsel said that it should not do so to conclude that he was responsible for them, since he had not been found guilty of them. R.61:20. The State's response was that the court could consider the previous break-ins as being similar to "other acts" that might have been admitted at a trial. R.61:21. The court stated that it would make its restitution decision after hearing the sentencing arguments and imposing sentence. R.61:24.

Before imposing sentence, then, the court returned to the restitution issue, stating that defense counsel had earlier made a good argument that if the court imposed restitution for a security system that "was deployed before the crime occurred, that doesn't follow logically. But it does follow logically from the fact that there were clearly prior home invasions, whether you did them or

not. ... It does follow that [the victim's] family engaged in a series of steps" that led to the purchase of the security system for which they were seeking restitution. A.Ap., A104; R.61:57. The court then ordered restitution for the full amount claimed, while acknowledging that its "opinion of the law" was not clear and that it believed that under "case law," victims were "to be rewarded for in effect turning people in and taking responsible steps to prevent crime..." A105; R.61:58.

Mr. Queever now appeals the judgment of conviction (R.39) on the grounds that the trial court erred, as a matter of law, when it awarded the restitution for a security system that was installed over a month *before* the date of the crime for which Mr. Queever was sentenced.

Procedural History

This is an appeal from the judgment of conviction, entered May 26, 2015 in the circuit court for Marinette County, James A. Morrison, Judge. R.39. Following the filing of the Notice of Intent to Pursue Post Conviction Relief and the appointment of postconviction counsel, a Notice of Appeal was filed in the trial court on November 12, 2015. R.46.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN GRANTING THE VICTIM'S RESTITUTION REQUEST.

Standard of Review

The scope of a circuit court's authority to order particular conditions of probation, including restitution, presents a question of statutory interpretation that we review *de novo*. *State v. Baker*, 2001 WI App 100, ¶ 4, 243 Wis. 2d 77, 626 N.W.2d 862. Circuit courts have discretion in deciding on the amount of restitution and in determining whether the defendant's criminal activity was a substantial factor in causing any expenses for which restitution is claimed. *State v. Canady*, 2000 WI App. 87, ¶6, 12, 234 Wis. 2d 261, 610 N.W.2d 147.

In making its restitution order, the trial court was governed by a single question: whether the defendant's conduct, for which he was being sentenced, was a substantial factor in causing the expenses for which restitution was claimed. *Id.* "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." *Canady*, 2000 WI App. 87 at ¶9.

No such nexus could ever be established in this case for the simple reason that the crime considered at sentencing took place more than a month after the installation of the security system for which the victim requested restitution. The trial court even acknowledged this fact when it referenced defense counsel's earlier argument about the logical impossibility, under the clear wording of the statute, of ordering restitution for an expense that was incurred before the occurrence of the crime for which Mr. Queever was being sentenced.

Despite this acknowledgment, the court ordered restitution for the security system installed by the victim because of its apparent belief that some unnamed case held that victims should be rewarded for "turning people in" and trying to prevent crime. A105; R.61:58. With all due respect to the trial court, there is no such case, and it erroneously exercised its discretion in ordering restitution in this case.

"When we review a circuit court's exercise of discretion, we examine the record to determine whether the circuit 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." *Crawford County v. Masel*, 2000 WI App 172, ¶ 5, 238 Wis. 2d 380, 617 N.W.2d 188. It is respectfully submitted that the trial court did not logically interpret the facts, that it did not apply the proper legal standard to those facts and that its conclusion was not one that a reasonable judge could reach.

CONCLUSION

For the foregoing reasons Mr. Queever respectfully requests that the court's restitution order be reversed and that his case be remanded with instructions to enter an amended judgment of conviction with no restitution ordered.

RESPECTFULLY SUBMITTED this 18th day of February, 2016.

Schertz Law Office
Attorneys for the Appellant

By:



Dennis S. Schertz

APPENDIX

RESTITUTION SUMMARY AND CLAIM FORM	A101
TRANSCRIPT OF COURT'S RESTITUTION ORDER	A104


CERTIFICATION REGARDING APPENDIX CONTENTS

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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CERTIFICATION REGARDING BRIEF LENGTH

I certify that this brief conforms to the rules contained in sec. 809.19(8) (b) and (c), Stats., for a brief produced using the following font:

- ☒ Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 1,225 words.


CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: February 18, 2016

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