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 Reply Brief

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

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ARGUMENT

A. The State is Apparently Not Bound by the Facts or the Law.

Before it even gets to its argument, the State takes some
liberties with the facts of record when it claims that, at the
sentencing hearing, the trial court "found" that Mr. Queever
entered the victim's home "multiple times before the August 2014
attempted burglary for which he was convicted." State's brief, p.4.
The court made no such finding; rather, it stated that it merely
assumed that he had been in her house before because a reasonable
person could "believe" that he had been in there before. R.61:53-
54; R-Ap. 105-06. There is a big difference between finding
something and assuming something.

When it does get to its argument, the State plays fast and loose
with the precise wording of the restitution statute when it argues
repeatedly that a "crime considered at sentencing" (for which
restitution may properly be order) somehow includes alleged
crimes for which Mr. Queever was not (and never will be) charged
(or convicted). No matter how many times the State makes this
specious argument, it cannot overcome the simple fact that
Queever's conduct, for which he was being *sentenced*, was not a
substantial factor in *causing* the expenses for which restitution
was claimed. No such nexus could ever be established for the
simple reason that the sole crime considered at sentencing
occurred over a month after the installation of the security system
for which restitution was requested.

The State's second argument is a twisted series of what-ifs,
hypotheticals and strange public policy arguments that in the end

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suggest that prosecutors should file charges in cases in which they do not believe they could prove guilt beyond a reasonable doubt, which the state earlier stated, correctly, would be unethical. At one point it attempts to transform Queever's alleged prior entries into the victim's house into "burglaries" (State's brief, p.12), which, of course, they were not since he was not convicted of any such offenses.

In the end, the State should not be allowed to ignore the clear language of the restitution statute and to make up "facts" that support its skewed argument. Having again failed in its attempt to ignore the unambiguous language of this statute and the undisputed facts, it goes on to suggest that an illegal restitution order could somehow be justified by calling it a condition of extended supervision. To paraphrase The Bard, a skunk by any other name would still smell as bad.

The State's primary argument is that this illegal restitution order would be permissible as a condition of extended supervision, which can only be upheld "as long as the condition is reasonably related to the dual purposes of extended supervision." State's brief, p.18 (quoting *State v. Agosto*, 2008 WI App 149, ¶12, 314 Wis.2d 385, 760 N.W.2d 415). The State then goes on to argue that those dual purposes – "rehabilitation of the defendant and the protection of a state or community interest" (*Id*) – would be served by such a condition, relying almost exclusively on the supreme court's decision in *State v. Heyn*, 155 Wis.2d 621, 456 N.W.2d 157 (1990).

The State's misplaced reliance on this case centers on a couple of extremely important facts, which the State would wish this Court to ignore, namely, that Mr. Heyn was convicted of a

burglary and that the amount awarded was for an alarm system that was installed *after* the burglary (for which he was convicted and sentenced) took place. As a result, it is undoubtedly true that it was reasonable to order Heyn to reimburse the victim for this cost (as a condition of probation in his case) because the amount he was ordered to pay was directly related to conduct for which he had been convicted and sentenced. Had it not been for the particular wording of the restitution statute at that time, it would have also been a proper restitution award.

In the end, the State repeatedly asks this Court to ignore and then circumvent the clear wording and intent of the restitution statute in effect at the time of Mr. Queever's sentencing hearing. For all of the above reasons, this Court should not do so and should reverse the trial court's restitution order as being an erroneous exercise of its discretion under that statute.

CONCLUSION

For the foregoing reasons and those set out in his opening brief, Mr. Queever respectfully requests that his judgment of conviction be amended to remove the restitution ordered by the trial court.

RESPECTFULLY SUBMITTED this 5th day of May, 2016.

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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:

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Dated: May 5, 2016

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