STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP1541-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAWN T. WISKERCHEN,

Defendant-Appellant.

On a Notice of Appeal From the Restitution Order
and Amended Judgment of Conviction Entered in
the Circuit Court for Racine County,
the Honorable Faye M. Flancher, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Mr. Wiskerchen pled no contest to one count of burglary stemming from an incident that occurred on May 8, 2015. The victim saw Mr. Wiskerchen leave her home with nothing but a backpack on his back. The victim claimed $32,138.43 in restitution, comprised of 74 items. These items included a computer printer; a microwave; an electric lawn edger; multiple jackets; an air hammer and chisel set; and a PlayStation 3.

At the restitution hearing, the victim testified that she did not know which of the 74 items were taken on May 8, 2015, and which were taken on other days that she believed Mr. Wiskerchen had illegally entered her home. Despite the victim's suspicion, Mr. Wiskerchen was not charged with any burglary predating May 8, 2015, and he did not admit to any such conduct at sentencing.

Did the victim meet her burden to show by a preponderance of the evidence that her purported losses were caused by a crime considered at sentencing?

The circuit court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. It is anticipated that the issues will be sufficiently addressed in the briefs. Publication may be warranted pursuant to Wis. Stat. §§ 809.23(1)(a)1 or 2.

STATEMENT OF THE CASE AND FACTS

Mr. Wiskerchen challenges the circuit court's restitution order dated April 6, 2016. The court awarded the victim $8,487.41 for losses she claimed to incur as a result of (1) the burglary on May 8, 2015; and (2) other burglaries that she suspected took place prior to May 8, 2015.

The charges

On May 8, 2015, at approximately 12:05 p.m., police responded to a report of a home burglary. (1:2). The victim, N.E.D., stated that she came home and saw that the cabinets in her bathroom had been opened. (1:2). She then heard someone walking upstairs. (1:2). She went upstairs and it looked like someone had gone through her bedroom. (1:2). She noticed that the back bedroom door was closed. (1:2). She opened the door and saw Mr. Wiskerchen, who was her next door neighbor. (1:2-3). A struggle ensued and Mr. Wiskerchen eventually got past N.E.D. and exited the house. (1:2).

In speaking with police, N.E.D. reported that she had sustained injuries during the struggle. (1:2). She further indicated that several items were missing from her home. (1:2). However, the complaint does not list those items. (1:2).

On May 22, 2015, the state charged Mr. Wiskerchen with the following offenses:

- Count 1: Misdemeanor Battery, Repeater;
- Count 2: Possession of Burglarious Tools, Repeater;
- Count 3: Burglary of a Building or Dwelling, Repeater; and
- Count 4: Second Degree Recklessly Endangering Safety, Repeater.

(1:1-2). The Information filed on June 3, 2015, amended count 3 to burglary – commit battery on a person, repeater. (2:1).

The plea and sentencing

Ultimately, the parties reached a plea agreement in this case. (14; 33).

On September 8, 2015, Mr. Wiskerchen pled no contest to count 3, burglary, without the battery and without the repeater. (33:2-12). Counts 1, 2, and 4 were dismissed and read in. (14:2; 33:2). Further, the state agreed not to issue any additional charges in the case. (14:2; 33:2; 34:10).

During the plea colloquy, the circuit court confirmed that counts 1, 2, and 4 would be dismissed and read in. (33:10). The court informed Mr. Wiskerchen that it could consider those charges for the purpose of sentencing. (33:10). Further, the court stated that Mr. Wiskerchen might be required to pay restitution to any victim of those charges. (33:10). The court never mentioned that Mr. Wiskerchen might be required to pay restitution for any uncharged offenses.

Sentencing took place on November 25, 2015. (34). The circuit court sentenced Mr. Wiskerchen to nine years of imprisonment, consisting of five years of initial confinement and four years of extended supervision. (34:35; App. 101). The court then scheduled a contested restitution hearing. (34:36).

The restitution hearing

The restitution hearing took place on March 23, 2016. (35). N.E.D. sought restitution for the full amount of her alleged losses, totaling $32,138.43, even though her insurer had already reimbursed her $13,791.59. (35:6-7; 39:1).[1]

At the hearing, N.E.D. testified that she did not know which of the 74 items were taken on May 8, 2015, and which were taken on other days that she believed Mr. Wiskerchen had illegally entered her home. (35:7). She indicated that she went through her house after the burglary on May 8, 2015, and made a list of missing items. (35:9-10). She offered exhibit 1—a document that she prepared for her insurer that detailed the purportedly missing items and their values. (35:5-6; 39). The document claimed missing items such as a computer printer; a microwave; an electric lawn edger; multiple men's and women's jackets; an air hammer and chisel set; and a PlayStation 3. (39). N.E.D. also offered exhibit 2—various receipts that she managed to locate for some of the missing items. (35:5; 40).

N.E.D. testified that she did not notice any of the 74 items missing before May 8, 2015. (35:10). However, she had never taken an inventory of the items prior to that date. (35:9). With respect to the missing items, the following exchange ensued:

[1] N.E.D.'s insurer depreciated the alleged losses to $22,279.91. (35:7; 39:1).

Q: Going through this list, which items were taken on May 8 when this incident happened?

A: *I have no idea which were taken on May 8 and which were taken the other times that he entered my home illegally*.

Q: When you saw him on May 8 did he have anything in his hands?

A: No, he had a backpack.

Q: Do you know what was in the backpack?

A: I presume it was my stuff.

Q: Do you know what was in the backpack?

A: No.

Q: Do you know if the police searched his residence – Mr. Wiskerchen's residence at some point in time during the investigation?

A: I believe they did, but I was at the hospital at that point.

Q: Okay, there were some items recovered, correct?

A: I haven't seen anything yet.

Q: Okay, did you see the police reports in this matter?

A: I don't think I did.

Q: Okay, so you don't know if the police recovered any items? They didn't tell you that they did?

A: I think they recovered a couple of earrings that they found in his home.

Q: And a necklace?

A: A necklace with a butterfly on it.

> Q: And those aren't things that you claimed in your claim?
>
> A: No, they are not.
>
> ***
>
> Q: Do you think he could have fit all of these items you listed to the insurance company in the backpack?
>
> A: *Not on that day*. It was many days that he was in my house. His mother admitted that during the other hearing that we had.

(35:7-9, 11) (Emphasis added.)

Based on N.E.D.'s testimony, the state argued that she was entitled to roughly $18,227—the difference between her total alleged losses and the amount that her insurer paid. (35:17). Mr. Wiskerchen contended that (1) restitution must be based on the crimes considered at sentencing; (2) the only crimes considered at sentencing took place on May 8, 2015; and (3) N.E.D.'s testimony failed to establish which of the missing items were taken on May 8, 2015. (35:19-23).

The circuit court ordered briefing. (35:23-24). In its brief, the state maintained its position that Mr. Wiskerchen was responsible for the full amount of restitution, less the amount paid by N.E.D.'s insurer. (25:2). It further contended that Mr. Wiskerchen could be ordered to pay restitution for items allegedly taken during burglaries that were not charged. (25:1-2). The state suggested that such conduct was read in at sentencing as part of the plea agreement and was therefore subject to restitution. (25:1-2).

In his response brief, Mr. Wiskerchen argued that the other alleged burglaries were not read-in crimes subject to restitution. (26:1-2). He contended that he never agreed that the court could consider N.E.D.'s allegations of other

burglaries at sentencing. (26:1-2). He noted that, pursuant to the plea agreement, the only read-in charges were count 1 (battery); count 2 (possession of burglarious tools); and count 4 (second degree recklessly endangering safety). (26:2). Therefore, he maintained that the court lacked the authority to order restitution for losses caused by burglaries allegedly committed prior to May 8, 2015. (26:2).

The oral ruling on restitution

The circuit court ruled on restitution on April 6, 2016. (36). The court acknowledged that it was NED's burden to show that she sustained a loss as a result of a crime considered at sentencing. (36:4; App. 107). The court then recited the terms of the parties' plea agreement: plead to count 3; counts 1, 2, and 4 would be dismissed and read in; and the state would not issue further charges in the case. (36:4; App. 107).

The circuit court proceeded to recount N.E.D.'s testimony from the restitution hearing. (36:5-6; App. 108-09). Specifically, it noted that N.E.D. "could not say what items the defendant took on May 8th of 2015, or which items would have been taken at other times." (36:6; App. 109).

The court then focused on various statements contained in the presentence investigation report. (36:6-7; App. 109-110). In particular, it highlighted Mr. Wiskerchen's purported statement that he had "burglarized between one hundred to two hundred homes and had never been caught." (36:6; App. 109).[2] The court also referenced N.E.D.'s statement that Mr. Wiskerchen had been in her home before May 8, 2015 (according to Mr. Wiskerchen's mother). (36:6-7; App. 109-110). Moreover, it credited N.E.D.'s

[2] At sentencing, Mr. Wiskerchen denied making this statement to the presentence investigation writer. (34:3).

statement regarding her belief that Mr. Wiskerchen would hide out at her house while she was at work. (36:7; App. 110).

The circuit court then stated: "*so all of this information was considered by me at sentencing*. Based on the record, I find that there is a nexus between Mr. Wiskerchen's conduct and the victim's loss, and I find that the victim has met her burden of proof." (36:7; App. 110) (Emphasis added.) As a result, the court ordered restitution in the amount of $8,487.41, the difference between the depreciated value of the missing items and the amount the insurer paid. (36:7-8; App. 110-111).

ARGUMENT

The Circuit Court Erroneously Exercised Its Discretion in Finding That the Victim Met Her Burden to Show That Her Alleged Losses Were Caused By a Crime Considered at Sentencing.

A. General legal principles and standard of review.

Restitution in criminal cases is governed by Wis. Stat. § 973.20. The main purpose of the restitution statute "is not to punish the defendant, but to compensate the victim." ***State v. Canady***, 2000 WI App 87, ¶8, 234 Wis. 2d 261, 610 N.W.2d 147. The statute is construed liberally to allow victims to recover their losses. ***State v. Anderson***, 215 Wis. 2d 673, 682, 573 N.W.2d 872 (Ct. App. 1997). However, the statute itself places limits on the restitution a court may order.

A circuit court is authorized to order restitution to "any victim of a crime considered at sentencing. . . ." Wis. Stat. § 973.20(1r). The statutory definition of a "crime considered at sentencing" is two-fold. First, it means "any crime for which the defendant was convicted. . . ." Wis. Stat.

§ 973.20(1g)(a). In this regard, the defendant's entire course of criminal conduct may be taken into consideration. ***Canady***, 234 Wis. 2d 261, ¶10.

Second, a "crime considered at sentencing" means "any read-in crime." Wis. Stat. § 973.20(1g)(a). A "read-in" crime is:

> any crime that is uncharged or that is dismissed as part of a plea agreement, *that the defendant agrees to be considered by the court at the time of sentencing*, and that the court considers at the time of sentencing the defendant for the crime for which the defendant was convicted.

Wis. Stat. § 973.20(1g)(b) (Emphasis added.) As the statute indicates, a circuit court may not consider uncharged or dismissed crimes for the purpose of restitution unless the defendant first acknowledges those crimes as true. *See* ***State v. Frey***, 2012 WI 99, ¶¶42-43, 343 Wis. 2d 358, 817 N.W.2d 436.[3]

Restitution orders are reviewed under the erroneous exercise of discretion standard of review. ***State v. Lee***, 2008 WI App 185, ¶7, 314 Wis. 2d 764, 762 N.W.2d 431. "A trial court 'erroneously exercises its discretion when its decision is based on an error of law.'" ***Id***. (quoted source omitted). "Whether the trial court is authorized to order restitution pursuant to Wis. Stat. § 973.20 under a certain set of facts presents a question of law that [the court] reviews de novo." ***Id***.

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[3]By contrast, a circuit court may consider uncharged or dismissed crimes for the purpose of sentencing irrespective of whether the defendant first acknowledges those crimes as true. ***State v. Frey***, 2012 WI 99, ¶47, 343 Wis. 2d 358, 817 N.W.2d 436. This is due to the court's obligation to discern a defendant's character in fashioning an appropriate sentence. ***Id***.

B. The victim's allegations of other burglaries were not "crimes considered at sentencing" within the meaning of the restitution statute; therefore, the court erred as a matter of law in ordering restitution on those purported crimes.

The circuit court erred as a matter of law in ordering restitution on the other alleged burglaries. Specifically, it had no authority to order restitution on those purported crimes. The court's authority to order restitution in this case was limited to (1) losses caused by any crime for which Mr. Wiskerchen was convicted; and (2) losses caused by any read-in crime.

Here, the court mistakenly utilized the second route to order restitution for claimed losses predating May 8, 2015: it treated N.E.D.'s allegations of other burglaries as read-in crimes. This was error because Mr. Wiskerchen never acknowledged those purported crimes as true at sentencing. Without that requisite acknowledgement, the court was not authorized to consider N.E.D.'s allegations of other burglaries as read-in crimes subject to restitution.

The circuit court was similarly unauthorized to consider N.E.D.'s allegations of other burglaries as part of the crime for which Mr. Wiskerchen was convicted and thus subject to restitution on that basis. A court may consider the defendant's entire course of criminal conduct when utilizing that first route to order restitution. But where, as here, the defendant has not admitted to the conduct in question, the court must make specific findings to subject that conduct to restitution. Specifically, the court must find that (1) the defendant was responsible for the conduct; and (2) the conduct shared sufficient commonalities with the specific criminal acts underlying the offense of conviction. ***State v. Queever***, 2016 WI App 87, ¶22, 372 Wis. 2d 388, 887

N.W.2d 912. The court never made these requisite findings. To the extent that it did, the findings are clearly erroneous.

Without any authority to order restitution on the other alleged burglaries, the circuit court's restitution award is premised on an error of law and must be vacated. Since there is insufficient evidence on which to find that the victim sustained any loss as a result of the May 8, 2015, burglary, a remand with the instruction to decide restitution in light of the applicable law is unnecessary.

i. The other alleged burglaries were not "read-in crimes" subject to restitution.

In ordering restitution for claimed losses predating May 8, 2015, the circuit court treated N.E.D.'s allegations of other burglaries as read-in crimes. The court mistakenly reasoned that because it considered N.E.D.'s allegations of other burglaries at sentencing, those purported crimes were subject to restitution.

To support its decision in this regard, the circuit court relied on multiple statements contained within the presentence investigation report. It referenced Mr. Wiskerchen's purported statement that he had burglarized between one hundred to two hundred homes and had never been caught. It further noted N.E.D.'s statement that Mr. Wiskerchen had been in her home before May 8, 2015 (according to Mr. Wiskerchen's mother). And it highlighted N.E.D.'s statement that she believed Mr. Wiskerchen would hide out at her house while she was at work. Upon recounting this information, the court concluded "*so all of this information was considered by me at sentencing*. Based on the record, I find that there is a nexus between Mr. Wiskerchen's conduct and the victim's loss. . . ." (36:7; App. 110) (Emphasis added).

The circuit court misapplied the restitution statute by treating the allegations of other burglaries as read-in crimes. The text of Wis. Stat. § 973.20(1g)(b) is unambiguous. Uncharged crimes are not read-in crimes subject to restitution unless the defendant first acknowledges those crimes as true for the purpose of sentencing. *See* Wis. Stat. § 973.20(1g)(b); *see also* ***Frey***, 343 Wis. 2d 358, ¶¶42-43.

At sentencing, Mr. Wiskerchen never acknowledged N.E.D.'s allegations of other burglaries as true. He acknowledged the May 8, 2015, burglary as true by virtue of his plea to that particular charge. He also acknowledged the charges of battery, possession of burglarious tools, and second degree recklessly endangering safety as true because he agreed to have them read in at sentencing. But that was the extent of Mr. Wiskerchen's agreement concerning the crimes that could be considered by the court at sentencing. Under such circumstances, the court was not authorized to consider the allegations of other burglaries as read-in crimes subject to restitution, regardless of whether it considered those allegations at sentencing without Mr. Wiskerchen's consent. *See* ***Frey***, 343 Wis. 2d 358, ¶43 ("Dismissed [or uncharged] charges may be considered by the court in sentencing, but they are not subject to restitution.").

ii. The other alleged burglaries were not part of the "crime for which the defendant was convicted" and thus subject to restitution.

The circuit court was similarly unauthorized to consider the allegations of other burglaries as part of the crime for which Mr. Wiskerchen was convicted and thus subject to restitution on that basis. At the restitution hearing, the state never argued that the other alleged burglaries were part of the crime for which Mr. Wiskerchen was convicted.

(25:1-2). Nevertheless, Mr. Wiskerchen addresses this issue in the event that the circuit court's decision might somehow be construed as making that determination sua sponte.

The restitution statute does not define "crime for which the defendant was convicted." However, case law instructs that a court may consider a defendant's conduct during the entire incident that leads to his or her conviction in making this inquiry. Specifically, courts have held that "the 'crime' encompasses 'all facts and reasonable inferences concerning the defendant's activity *related to* the 'crime' for which the defendant was convicted, not just those facts *necessary* to support the elements of the specific charge of which the defendant was convicted." ***Canady***, 234 Wis. 2d 261, ¶10 (quoting ***State v. Madlock***, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999)).

For example, in ***Canady***, the defendant was convicted, among other things, of resisting arrest. ***Id***., ¶3. During the defendant's struggle with the police, he attempted to grab a pry bar to use as a weapon. ***Id***., ¶2. A police officer grabbed the pry bar and threw it away, damaging a door in the process. ***Id***. Noting that a court may consider the defendant's entire course of criminal conduct in ordering restitution, the court held that the defendant was obligated to pay damages for the door. ***Id***., ¶¶10-12. Specifically, the court reasoned that the defendant's action in reaching for the pry bar *during* his crime of resisting arrest was a precipitating cause of the damage. ***Id***., ¶¶11-12; *accord* ***State v. Rodriguez***, 205 Wis. 2d 620, 556 N.W.2d 140 (Ct. App. 1996) (holding that the defendant's action in injuring a motorist *during* his crime of hit and run was a precipitating cause of the damages claimed).

The court of appeals' recent decision in ***State v. Queever***, 2016 WI App 87, 372 Wis. 2d 388, 887 N.W.2d 912, takes the rule articulated in ***Canady*** one step further. There, the defendant was convicted of attempted burglary.

State v. Queever, 2016 WI App 87, ¶7, 372 Wis. 2d 388, 887 N.W.2d 912. The victim sought restitution for the cost of a security system that she had installed a month before the attempted burglary. ***Id***., ¶8. The victim contended that she installed the security system as a result of *prior*, uncharged burglaries by the defendant. ***Id***., ¶17. The circuit court awarded restitution. ***Id***., ¶9.

The court of appeals affirmed. Although the conduct at issue did not occur *during* the defendant's crime of attempted burglary, the court relied on the rule set forth in ***Canady*** to conclude that "the prior burglaries and the attempted burglary were part of a single course of criminal conduct." ***Id***., ¶¶21-22. Critical to its decision was the fact that the great weight and clear preponderance of the evidence established that (1) the defendant was responsible for prior burglaries that caused the victim's loss; and (2) the prior burglaries and the attempted burglary shared strong similarities such that a *modus operandi* was established. ***Id***., ¶22.

Specifically, the evidence in ***Queever*** showed that the victim noticed money missing from her purse on several occasions. ***Id***., ¶¶2-4. As a result, her family set up a hidden camera in her house to catch the perpetrator. ***Id***. Video footage of one of the prior burglaries "captured a relatively discernible profile view of the burglar's face, mullet haircut, and baseball cap." ***Id***., ¶15.

To get a better image of the perpetrator, the victim installed the security system. ***Id***., ¶5. The security system captured footage of the attempted burglary. ***Id***., ¶6. That footage contained "similar profile views of Queever's face and show[ed] him wearing a mullet haircut and baseball cap." ***Id***. Further, it showed that the defendant's build was similar to that of the man in the prior video footage. ***Id***. The evidence also demonstrated that the defendant had used the same entry

point to commit the prior burglaries and the attempted burglary, and they all happened around the same time of night. ***Id***., ¶16.

Thus, both the quantity and quality of the evidence presented in ***Queever*** allowed the court to find by a preponderance of the evidence that (1) the defendant was responsible for the prior burglaries; and (2) the prior burglaries shared strong commonalities with the attempted burglary. These findings led the court to conclude that the crimes were part of a single course of criminal conduct subject to restitution. ***Id***., ¶22.

In this case, N.E.D.'s allegations of other burglaries were not part of the crime for which Mr. Wiskerchen was convicted. The alleged conduct did not occur *during* the burglary on May 8, 2015. Therefore, the rule set forth in ***Canady*** is inapplicable. And to the extent that the circuit court's decision might somehow be interpreted as applying a rationale similar to that of ***Queever***,[4] this case is distinguishable from ***Queever*** in significant ways.

For starters, unlike ***Queever***, the circuit court in this case never found by a preponderance of the evidence that Mr. Wiskerchen committed the other alleged burglaries. Rather, the court mistakenly assumed that Mr. Wiskerchen had admitted to such conduct at sentencing. This led the court to mistakenly consider the other alleged burglaries as read-in crimes subject to restitution. Without a finding that Mr. Wiskerchen committed the other alleged burglaries, the court had no basis to determine that those supposed crimes and the May 8, 2015, burglary were part of a single course of criminal conduct that caused the victim's purported losses. *See* ***id.,*** ¶22. And absent that conclusion, the court had no authority to order restitution on the other alleged burglaries.

[4] The circuit court's decision in this case predates ***Queever***.

Even if the circuit court's decision could somehow be interpreted as finding that Mr. Wiskerchen committed the other alleged burglaries, that finding is clearly erroneous. ***Queever*** sets the bar high for the type of evidence needed to sustain a restitution award in this regard. And nothing remotely close to the evidence presented in ***Queever*** would support the court's conclusion that Mr. Wiskerchen committed the other alleged burglaries.

At the restitution hearing, the only evidence presented on the question whether Mr. Wiskerchen committed the other alleged burglaries was in the form of N.E.D.'s testimony. Her testimony was that she believed Mr. Wiskerchen had illegally entered her home prior to May 8, 2015. (35:11). N.E.D.'s belief was based on a single statement that Mr. Wiskerchen's mother had purportedly made about finding N.E.D.'s medication in her home. (35:12).

This is a far cry from the evidence presented in ***Queever*** on the issue of whether the defendant was responsible for the prior burglaries. In ***Queever***, it was clear that prior burglaries of the victim's home actually occurred: the victim noticed money missing from her purse on several occasions and there was video footage of the prior break-ins. Moreover, it was clear in ***Queever*** that the defendant was responsible for those crimes: the video footage captured his face, build, and mullet haircut and therefore gave him away.

Here, there is a lack of evidence to establish that the prior burglaries of the victim's home actually occurred, let alone that Mr. Wiskerchen was responsible for those alleged crimes. Unlike ***Queever***, the victim testified that she did not notice any items missing from her home prior to the May 8, 2015, burglary. Moreover, there is no video footage

demonstrating that such break-ins occurred.[5] That Mr. Wiskerchen's mother might have seen the victim's medication in her home does not establish by a preponderance of the evidence that Mr. Wiskerchen broke into the victim's home to retrieve such medication. Mr. Wiskerchen lived next door to the victim and could have simply found the medication outside the home.

And even if N.E.D.'s testimony was enough to establish that Mr. Wiskerchen committed the other alleged burglaries, there was no evidence presented that would support a finding that such burglaries were one and the same with the May 8, 2015, burglary, as required by ***Queever***. In ***Queever***, the evidence showed strong commonalities between the prior burglaries and the attempted burglary: each involved the same home, the same victim, the same time of night, and the same point of entry. *See* ***Queever***, 372 Wis. 2d 388, ¶22. Moreover, the prior burglaries all involved stealing money from the victim's purse, ***Id***., ¶¶2-4, and it is reasonable to assume that the attempted burglary was headed in that direction. A *modus operandi* was therefore established.

Here, however, no such *modus operandi* can be discerned from the evidence presented at the restitution hearing. The only similarities between the other alleged burglaries and the May 8, 2015, burglary are that they involved the same home and the same victim. There is simply no other evidence to show that these crimes were virtually

[5] It is noteworthy that the video footage obtained in ***Queever*** provided the defendant with notice of the particular dates on which the prior burglaries occurred, thereby affording him an opportunity to defend himself against the allegations. Here, there was no way for Mr. Wiskerchen to defend himself against the victim's allegations of burglaries on unspecified dates.

one and the same. Unlike ***Queever***, there is no evidence to establish that the crimes involved the same point of entry, the same time of day, and the same type of damages.

The bottom line is that there was insufficient evidence presented at the restitution hearing on which to find that (1) Mr. Wiskerchen committed any other alleged burglaries; and (2) such burglaries shared sufficient commonalities with the May 8, 2015, burglary. To the extent that the circuit court found otherwise, the court erred. Without these requisite findings, the court had no basis to conclude that the other alleged burglaries were part of the crime for which Mr. Wiskerchen was convicted. And absent that determination, the court was without authority to order restitution on the other alleged burglaries.[6]

C. The circuit court's restitution award is premised on an error of law and must be vacated.

There is no doubt that the circuit court ordered restitution on the other alleged burglaries: the court awarded restitution for all 74 purportedly missing items, and the evidence established that it was impossible for Mr. Wiskerchen to have fit all of those items in his backpack on May 8, 2015. (35:11). Since the court was unauthorized to order restitution on the other alleged burglaries, its restitution award is premised on an error of law and must be vacated.

It might be argued that a remand for another restitution hearing is appropriate with the instruction that the court decide whether any of the victim's purported losses were caused by a crime considered at sentencing, i.e., the

[6] Mr. Wiskerchen recognizes that this court is bound by the precedent set forth in ***Queever***. Should this court determine that ***Queever*** controls the outcome of this case, Mr. Wiskerchen reserves the right to petition for review on the issue of whether the principle set forth in ***Queever*** is inconsistent with Wisconsin law.

May 8, 2015, burglary.[7] However, given the lack of evidence presented at the restitution hearing, a remand is unnecessary.

It was the victim's burden at the restitution hearing to show that Mr. Wiskerchen's criminal conduct was a substantial factor in causing her purported losses. ***Canady***, 234 Wis. 2d 261, ¶9. The circuit court has discretion in determining whether a victim has met his or her burden in this regard. ***Queever***, 372 Wis. 2d 388, ¶12. However, that discretionary decision must be based on (1) a logical interpretation of the facts adduced at the restitution hearing; and (2) a reasonable conclusion based on those facts. ***Id***.

Here, the evidence adduced at the restitution hearing showed that Mr. Wiskerchen left the victim's house with a backpack on his back and nothing in his hands. (35:8, 11). The victim did not know what was in the backpack. (35:8). The police searched Mr. Wiskerchen's residence after the fact and recovered a couple earrings and a necklace; however, the victim did not claim restitution for those items. (35:8-9). The victim claimed that she went through her house after May 8, 2015, and listed items that she "knew" were missing. (35:9-10). However, she had never taken an inventory of those purportedly missing items before May 8, 2015. (35:9). The simple fact is that the victim had "no idea" what items were taken on May 8, 2015. (35:7).

The logical interpretation of the above facts leads to just one reasonable conclusion: the victim failed to establish that she suffered any loss as a result of the May 8, 2015, burglary. Mr. Wiskerchen recognizes that the restitution statute is construed liberally to allow victims to recover their losses. ***Anderson***, 215 Wis. 2d at 682. However, the

[7] While counts 1, 2, and 4 were considered at sentencing, the victim did not claim that any of these read-in crimes caused her purported losses.

legislature has chosen to place the onus on the victim to prove that the defendant's criminal conduct caused his or her loss. The victim in this case was given the opportunity to meet that burden with the assistance of the state and she failed to prove that Mr. Wiskerchen took any of the 74 purportedly missing items on May 8, 2015.

Because the circuit court erroneously exercised its discretion in finding that the victim met her burden to show that her purported losses were caused by a crime considered at sentencing, and because a remand is unnecessary in light of the scarcity of evidence presented at the restitution hearing, Mr. Wiskerchen respectfully requests that the court vacate the circuit court's restitution order.

CONCLUSION

The circuit court erroneously exercised its discretion in ordering Mr. Wiskerchen to pay restitution by premising its decision on a misapplication of the law. A remand with the instruction to determine restitution in light of the correct law is unnecessary because there is insufficient evidence on which to find that the victim sustained a loss as a result of a crime considered at sentencing. Therefore, the circuit court's restitution order should be reversed, and Mr. Wiskerchen's judgment of convicted should be amended accordingly.

Dated this 15th day of March, 2017.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 5,132 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 this 15th day of March, 2017.

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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation 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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