STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP1541-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAWN T. WISKERCHEN,

Defendant-Appellant.

APPEAL FROM A RESTITUTION ORDER AND AMENDED JUDGMENT OF CONVICTION ENTERED IN THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE FAYE M. FLANCHER, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 266-9594 (Fax)
kumferle@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Statutes

ISSUE PRESENTED

Did the circuit court err when it found a sufficient nexus between Shawn T. Wiskerchen's burglary of the victim's home on May 8 and the victim's loss to order restitution to ensure the victim recovered the full depreciated value of the items missing?

The circuit court found that the victim met her burden to show a nexus between Wiskerchen's burglary of her home and the loss she incurred. It ordered $8487.41 in restitution, the difference between what her insurance had paid her and the depreciated value of the missing items.

This Court should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument, but agrees with Wiskerchen that publication may be appropriate pursuant to Wis. Stat. § (Rule) 809.23(1)(a)1. or 5.

INTRODUCTION

The circuit court appropriately exercised its discretion when it ordered restitution for all the items the victim found missing after Wiskerchen was caught burglarizing her home. The circuit court found a sufficient nexus between evidence that Wiskerchen had been stealing the victim's items for weeks and the conduct for which he was convicted to support restitution for all the items missing. That decision was not in error, and any argument that Wiskerchen cannot be held responsible for items taken before the burglary for which he was convicted is foreclosed by this Court's decision in *State v. Queever*.

STATEMENT OF THE CASE

N.E.D. came home around noon on May 8, 2015, and saw that all of her bathroom cabinets were open. (R.1:2.) She then heard a creaking sound from someone walking around on the upper level of her home, and went upstairs to see what was happening. (*Id.*) N.E.D then found that someone had rifled through her bedroom, and the back bedroom door was closed. (*Id.*) She opened the door, hitting Wiskerchen, her neighbor, with it. Wiskerchen was in the process of burglarizing her home. (*Id.*) Wiskerchen began yelling and tried to punch N.E.D. in an attempt to escape. (*Id.*) He threw N.E.D. down the stairs, ran past her, and fled from the house. (*Id.*) N.E.D. got up and went outside, screaming for the neighbors to chase Wiskerchen. (*Id.*)

When the police arrived, N.E.D. was visibly upset and shaking. (*Id.*) She told them that she had suffered numerous injuries from her struggle with Wiskerchen and that several items were missing from her home. (R.1:2–3.) The responding officer found that someone had drilled a hole in N.E.D.'s basement storm window so that it could be opened with a screwdriver. (R.1:3.) Police found Wiskerchen, along with a pile of clothes matching N.E.D.'s description of what the burglar was wearing when he fled the house and a bent screwdriver in a neighbor's backyard, and arrested him. (*Id.*)

The State charged Wiskerchen with: 1) misdemeanor battery; 2) possession of burglarious tools; 3) burglary of a building or dwelling; and 4) second-degree recklessly endangering safety, all with repeater enhancers. (R.2:1.) Wiskerchen reached an agreement with the State to plead no contest to the burglary without the repeater enhancement. (R.14:1.) The State agreed to dismiss and read-in the remaining counts and not to pursue additional charges in the case after police discovered that Wiskerchen

was attempting to persuade witnesses not to testify against him. (R.33:2–3; 34:10.)

The court inquired of Wiskerchen at the plea hearing, "Do you understand further that upon conviction, you may be required to pay restitution to the victim of your crime?" Wiskerchen replied, "Yes, ma'am." (R.33:9.) The court ordered a presentence report. (R.33:13.) The PSI writer talked to Wiskerchen and to N.E.D. N.E.D. told the PSI writer that Wiskerchen's mother told her that Wiskerchen had been in her home many times before being caught. (R.16:3.) N.E.D. reported that she found a "nest" in her back closet with several liquor bottles, where it appeared Wiskerchen hid and drank alcohol during the day while N.E.D. was at work. (R.16:3.) She also reported that she had lost tools, jewelry, and other household items, including irreplaceable items like her children's baby rings and her grandparents' wedding rings. (R.16:3.)

Wiskerchen denied fighting with N.E.D. to the PSI writer and claimed that she was lying about how many items were taken. (R.16:2.) Wiskerchen told the PSI writer that he had broken into houses many times, and that he took the items he stole to Illinois, where he pawned them. (R.16:2–3.) The PSI writer concluded that Wiskerchen "displayed a sense of accomplishment with his ability to break into homes and the income he has made selling stolen property. The process has become matter of fact to him like a daily job." (R.16:15.)

At sentencing the court discussed several aggravating factors present, including that Wiskerchen:

> had meticulously drilled a hole in the storm window so that it could be opened with a screwdriver. All the debris was taken away. In fact the police officer investigating had a difficult time finding where

> entry and exit to the home was being had. So that took a lot of planning on your part.
>
> When I read initially in the PSI that your mother had told [N.E.D.] that you had been in [N.E.D.'s] house multiple times without being caught, I was stunned by that. . . .
>
> [I]t made I guess some sense that she wouldn't have the common sense, the whatever, to tell her neighbor that you were actually going in and out of her house. [N.E.D.] reports that you actually made a nest in one of her back closets.
>
> Now, Mr. Ekes says why would he have the incentive to do that when he can just stay at home across the street with his mother and do drugs with her all day. But [N.E.D.] discovers a nest in one of the back closets where she discovered liquor bottles and it appeared that you actually hid out during the day.
>
> You told the PSI writer that but for the fact that you were so high and stayed too long you would not have been caught. Again, almost bragging about that.

(R.34:27–28.) The court sentenced Wiskerchen to nine years of imprisonment, consisting of five years of initial confinement and four years of extended supervision. Wiskerchen requested a restitution hearing, which the court granted. (R.34:11, 35.)

At the restitution hearing, N.E.D. testified that the police had recovered almost none of her missing items apart from "a couple of earrings that they found in his home" and "[a] necklace with a butterfly on it." (R.35:8.) After the May 8 burglary, she inventoried her home and found multiple jewelry boxes emptied and several expensive items missing; her cost of the items lost was over $30,000, though her insurance company had depreciated the value of the items to $22,279. (R.35:7–10.) She testified that she had continued to find things missing, but her insurance had already paid her

policy limit of $13,791.59. (R.35:5–6.) She submitted a list of missing items to the court, claiming she should be reimbursed the full amount. (R.35:7.) When asked which items were taken on May 8, she replied, "I have no idea which were taken on May 8 and which were taken the other times that he entered my home illegally." (*Id.*)

The State argued that N.E.D. lost not only her items, some of which had a deeply sentimental value, but also her sense of safety. (R.35:17.) The State noted, "I don't know that we'll ever be able to make her completely whole, but I would think at least attempting to replace some of the items would be beneficial to her," and asked that the court order restitution in the amount of $18,227: the cost of her items minus the $13,791 that insurance had already paid. (R.35:17.)

Wiskerchen disputed the total value of the items on N.E.D.'s list and argued that the court could not order restitution for anything that Wiskerchen might have stolen before May 8. (R.35:20–22.) He claimed that because he had not been charged with any of the other burglaries they were not "crimes considered at sentencing." Therefore, Wisckerchen argued, he could not be held responsible for anything other than what he stole the day N.E.D. caught him in the house. (R.35:22–23.)

The court ordered briefing on the scope of conduct that it could consider for restitution. (R.35:23.) After briefing, the court determined that it could consider the prior burglaries as conduct related to Wiskerchen's May 8 burglary, and require him to pay restitution for all of the missing items. (R.36.) The court noted that the restitution statute requires the court to order the defendant to make restitution "to any victim of a crime considered at sentencing," which includes any crime for which the defendant is convicted and any read-in crime (R.36:3.) The court acknowledged that the victim

had the burden to show the amount of loss sustained as a result of a crime considered at sentencing by a preponderance of the evidence. (R.36:4.)

The court then recounted what it had considered at sentencing. It pointed out that Wiskerchen had told the PSI writer that he would not have been caught had he not been too high to recognize how much time he spent looting the house. (R.36:6.) He had also told the PSI writer that he had burglarized many homes in the past and would typically pawn the items he stole in Illinois, where they would not be reported stolen and therefore not recovered. (R.36:6.) The court also recounted N.E.D.'s testimony that Wiskerchen's mother told her that Wiskerchen had been in her home many times before actually being caught, and that N.E.D. had found a nest in the back of her closet where it appeared Wiskerchen would hide out during the day while N.E.D. was at work. (R.36:6–7.)

The court found that, based on the record, "there is a nexus between Mr. Wiskerchen's conduct and the victim's loss." (R.36:7.) The court also found that N.E.D. had met her burden of proof on the amount of the damage, and ordered restitution in the amount of $8487.41: the difference between the depreciated value of the items stolen and the $13,791.59 that N.E.D.'s insurance company had paid. (R.36:8.)

Wiskerchen appeals the restitution order.

STANDARD OF REVIEW

"Whether a circuit court has the authority to order restitution under a particular set of facts is a question of law" that this Court reviews de novo. *State v. Rouse*, 2002 WI App 107, ¶ 6, 254 Wis. 2d 761, 647 N.W.2d 286. But "[t]he determination of the *amount* of restitution to be

ordered . . . 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.

ARGUMENT

The circuit court appropriately exercised its discretion when it found a causal nexus between the victim's missing items and Wiskerchen's last burglary of her home and ordered restitution for all the missing items.

A. Applicable legal principles.

Pursuant to Wis. Stat. § 973.20(1r), a trial court "shall" order restitution for a crime considered at sentencing "unless the court finds substantial reason not to do so and states the reason on the record." "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 (citing *State v. Madlock*, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999)). "In proving causation, a victim must show that the defendant's criminal activity was a 'substantial factor' in causing damage." *Id.* (quoting *Madlock*, 230 Wis. 2d at 333). At sentencing, the district attorney has the burden of demonstrating the victim's loss by a preponderance of the evidence. *State v. Kayon*, 2002 WI App 178, ¶ 13, 256 Wis. 2d 577, 649 N.W.2d 334; *see also* Wis. Stat. § 973.20(14)(a).

"[T]rial courts have discretion . . . in determining whether the defendant's criminal activity was a substantial factor in causing any expenses for which restitution is claimed." *State v. Johnson (Mark)*, 2005 WI App 201, ¶ 10, 287 Wis. 2d 381, 704 N.W.2d 625 (citation omitted).

"As contemplated by the restitution statute, the 'crime considered at sentencing' is defined in broad terms." *Canady*,

234 Wis. 2d 261, ¶ 10. "[T]he '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.'" *Id.* (quoting *Madlock*, 230 Wis. 2d at 333).

Similarly, "[u]nder the restitution statute, the sentencing court takes a defendant's entire course of conduct into consideration. The restitution statute does not empower the court to break down the defendant's conduct into its constituent parts and ascertain whether one or more parts were a cause of the victim's damages." *Madlock*, 230 Wis. 2d at 333 (quoting *State v. Rodriguez*, 205 Wis. 2d 620, 627, 556 N.W.2d 140 (Ct. App. 1996)). Therefore, under the required liberal construction of the restitution statute, costs "are recoverable if a causal nexus is established between the costs and the entire course of the defendant's criminal conduct considered at sentencing." *State v. Queever*, 2016 WI App 87, ¶ 26, 372 Wis. 2d 388, 887 N.W.2d 912.

B. The circuit court did not err in finding a causal nexus between Wiskerchen's entire course of conduct and N.E.D.'s loss, and *State v. Queever* establishes that ordering Wiskerchen to pay restitution for the prior burglaries was proper.

1. The circuit court was authorized by law to consider the burglaries that occurred before May 8 as part of the crime of conviction.

This Court should affirm the circuit court's restitution order. The facts and reasonable inferences concerning Wiskerchen's course of conduct related to the May 8 burglary support the court's finding that a preponderance of the evidence showed there was a "causal nexus" between

Wiskerchen's conduct on May 8 and all of N.E.D.'s losses. *See Queever*, 372 Wis. 2d 388, ¶ 11. Therefore, the court did not erroneously exercise its discretion in ordering Wiskerchen to pay the total amount of the depreciated value of the missing items in restitution, even though many of them were likely taken before the May 8 burglary. *See id.* ¶ 12.

The restitution statute provides that restitution may be ordered to compensate a victim for losses resulting from a "crime considered at sentencing," which the statute defines as "any crime for which the defendant was convicted and any read-in crime." Wis. Stat. § 973.20(1g)(a). The State does not dispute that the other burglaries were not read-in crimes. *See* Wis. Stat. § 973.20(1g)(b). (*See also* R.21:1–3; Wiskerchen's Br. 11–12.)

However, read-in crimes are not the only conduct related to the crime of conviction a court may "consider at sentencing" for purposes of restitution under the statute. The statute also defines a "crime considered at sentencing" as any crime for which the defendant was convicted. A "crime for which the defendant was convicted" is broadly construed for purposes of restitution. *See Madlock*, 230 Wis. 2d at 333. It is not limited to the conduct establishing the elements of the crime of conviction. *See Canady*, 234 Wis. 2d 261, ¶ 10.

Rather, as Wiskerchen acknowledges, for purposes of restitution a "crime for which the defendant was convicted" includes the defendant's *entire course of conduct,* including "all facts and reasonable inferences concerning the defendant's activity related to the 'crime' for which the defendant was convicted." (Wiskerchen's Br. 13 (emphasis omitted) (quoting *Canady*, 234 Wis. 2d 261, ¶ 10).) This means restitution for the crime of conviction appropriately includes *all* losses incurred when, like here, the defendant is

charged for only one of a series of multiple acts that constitute a "single course of criminal conduct." *Queever*, 372 Wis. 2d 388, ¶ 22. It does not matter if the conduct causing the loss began before the crime of conviction; nor does it matter that the conduct itself could be, but has not been, charged as a separate crime. What matters is that the prior burglaries of N.E.D.'s home were "related to" the botched burglary that N.E.D. interrupted on May 8. *Id.*

The circuit court properly ordered restitution based on losses N.E.D. incurred from the entire course of conduct that encompassed the burglary; in other words, the restitution was ordered based on the "crime for which [Wiskerchen] was convicted." Wis. Stat. § 973.20(1g)(a); *Canady*, 234 Wis. 2d 261, ¶ 10. Ergo, the circuit court was authorized by law to consider the prior burglaries as part of the crime of conviction.

Consequently, Wiskerchen is incorrect that "a circuit court may not consider uncharged or dismissed crimes for the purpose of restitution unless the defendant first acknowledges those crimes as true." (Wiskerchen's Br. 9.) Furthermore, the fact that the circuit court said it considered Wiskerchen's conduct relating to the other burglaries at sentencing does not mean the circuit court impermissibly mistook those burglaries as read-ins, as Wiskerchen suggests.[1] (Wiskerchen's Br. 11.) The cases

[1] Though even if the court had mistaken the other burglaries as read-ins, the error would be harmless. As the State will show in part two, the court properly found that a preponderance of the evidence showed a causal nexus between N.E.D.'s loss and Wiskerchen's conduct. Therefore the restitution order would have been the same regardless of whether the court erroneously interpreted the prior burglaries as read-ins or appropriately interpreted the prior burglaries as part of the crime of conviction,

interpreting the restitution statute clearly state that the circuit court may indeed consider uncharged or dismissed crimes as part of the "crime considered at sentencing" if those crimes were part of a single course of criminal conduct. *See, e.g.*, *Queever*, 372 Wis. 2d 388, ¶ 22; *Madlock*, 230 Wis. 2d at 333.

2. *State v. Queever* establishes that the other burglaries were a part of the crime for which Wiskerchen was convicted and thus properly considered for restitution.

State v. Queever, which involved similar facts to those here, supports the circuit court's restitution award. There, the 86-year-old victim noticed on multiple occasions that money was missing from her purse. *Id.* ¶ 2. The victim paid to have a security system installed, which eventually allowed police to identify Queever as the thief after he triggered an alarm while trying to open the victim's sliding glass door. *Id.* ¶ 5–6.

The victim requested $2495—the amount she paid to have the security system installed—in restitution. *Id*. ¶ 8. Queever objected, arguing that the victim was not entitled to the cost of the security system "because she purchased it before the conduct underlying his conviction" for attempted burglary. He denied that he was responsible for the prior burglaries, and argued that there was no evidence showing that he caused the victim to install the system. *Id.*

The circuit court rejected that argument and found by a preponderance of the evidence that Queever had entered the victim's home multiple times before the crime for which

---

because the court was authorized to consider the conduct either way.

he was being sentenced. *Id.* ¶ 9. It then found that the victim had the security system installed "as a result of those prior break-ins" and ordered Queever to pay the cost of the security system in restitution. *Id.*

Queever appealed, arguing that "the circuit court had interpreted the statutory term 'crime considered at sentencing' too broadly by considering the burglaries that were committed before" Queever was caught. *Id.* ¶ 19. Queever argued restitution was limited to losses caused by the attempted burglary he was convicted of, which could not possibly include the security system because its cost was incurred before the crime. *Id.* Like Wiskerchen, he claimed that because the "crime considered at sentencing" was the failed attempted burglary, the victim had not established that the loss she claimed was caused by his crime. *Id.* (S*ee also* Wiskerchen's Br. 19.)

This Court rejected that argument and affirmed the restitution amount. *Id.* ¶ 20. It noted that the restitution statute is construed "broadly and liberally to allow victims to recover their losses resulting from the criminal conduct." *Id.* ¶ 20 (citation omitted). To that end, a court must "take a defendant's entire course of conduct into consideration" when determining whether there is a causal nexus between the victim's damage and the crime considered at sentencing. *Id.* ¶ 21 (citation omitted). The court may not "break down the defendant's conduct into its constituent parts and ascertain whether one or more parts were a cause of the victim's damages." *Id.* (citation omitted). Because the prior burglaries were "related to" the attempted burglary considered at Queever's sentencing—they involved the same home, the same victim, the same time of night, and each involved the perpetrator entering or attempting to enter through the same sliding glass door—they were all part of a

"single course of criminal conduct" and thus constituted part of the crime considered at sentencing. *Id.* ¶ 22.

Just like in *Queever*, the prior burglaries here all "involved the same home, the same victim, the same time of [day], and the same point of entry." (Wiskerchen's Br. 17.) S*ee also Queever*, 372 Wis. 2d 388, ¶ 22.

Wiskerchen's burglaries of N.E.D.'s home involved the same home and the same victim. The mode of entry was the broken window, which Wiskerchen took pains to conceal. The number of missing items, Wiskerchen's mother's statements that Wiskerchen had been in N.E.D.'s house numerous times, and the "nest" N.E.D. found in her closet indicate that Wiskerchen had been using the broken window repeatedly to burglarize N.E.D.'s house multiple times. The fact that N.E.D. caught Wiskerchen in her home around noon indicates he was entering during the day while N.E.D. was usually at work to avoid being caught. Like the foiled burglary attempt in *Queever*, a preponderance of the evidence shows that Wiskerchen's botched burglary on May 8 and the prior burglaries of N.E.D.'s home were all part of a "single course of criminal conduct" and therefore the prior burglaries were properly considered for restitution.

Wiskerchen's attempts to distinguish *Queever* fail. He first claims that the circuit court here never found by a preponderance of the evidence that he committed the other burglaries. (Wiskerchen's Br. 15.) His interpretation of the court's findings at the restitution hearing elevate form over substance. The court recounted what had been presented at the sentencing hearing: Wisckerchen told the PSI writer that he would not have been caught had he not been so high. The PSI writer claimed that Wiskerchen said he'd burgled

hundreds of homes[2] and sold the items in Illinois so they would not be flagged as stolen. Wiskerchen's mother told N.E.D. that he had been in N.E.D.'s home several times before. N.E.D. testified about the large number of items she found missing and the "nest" she found in her closet. (R.36:6–7.) The court then stated that "[b]ased on the record, I find 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." (R.36:7.) Wiskerchen fails to explain how this is not a finding that a preponderance of the evidence shows he committed the other burglaries.

Wiskerchen next contends that the evidence linking him to the continuous looting of N.E.D.'s home in this case was insufficient to justify the restitution award because it is not exactly the same as the evidence that connected the defendant to the burglaries in *Queever*. (Wiskerchen's Br. 15–17). He states that "*Queever* sets the bar high for the type of evidence needed to sustain a restitution award" in this type of case, and claims that bar has not been met. (Wiskerchen's Br. 16.) Specifically, he argues that the circuit court's finding of a sufficient causal nexus to N.E.D.'s loss does not satisfy *Queever* because: 1) N.E.D. did not notice any items missing before May 8; 2) there is no video footage of Wiskerchen breaking into N.E.D.'s home; and 3) there are no similarities between the May 8 burglary and the prior burglaries of N.E.D.'s home that would establish a *modus operandi*. (*Id.* at 16–17.)

Wiskerchen is wrong.

First, Wiskerchen's argument ignores the well-established principle that the preponderance of the evidence standard simply requires a finding that it is "more likely

[2] Wiskerchen disputed making this comment.

than not" that the conduct occurred. *In re Commitment of West*, 2011 WI 83, ¶ 80, 336 Wis. 2d 578, 800 N.W.2d 929. Wiskerchen meticulously drilled a hole in N.E.D.'s storm window and carried away the debris so no one would notice. After N.E.D. surprised him and chased him out of her house, she found that a large number of valuable items were missing, very few of which were found. These facts alone support a finding that it is more likely than not that Wiskerchen burglarized the home on multiple occasions. Coupled with Wiskerchen's own statements that he frequently sold what he stole in Illinois where it would not be recovered, his mother's statements that he had been in N.E.D.'s home several times, and the "nest" N.E.D. found in her back closet, the preponderance of the evidence standard is met here.

Second, Wiskerchen's attempt to distinguish the factors the court relied on in *Queever* from the factors the court considered here draws distinctions without differences. (*See* Wiskerchen's Br. 16.) The reasonable inferences that can be drawn from Wiskerchen's conduct indicate that Wiskerchen caused N.E.D.'s loss. *See Madlock*, 230 Wis. 2d at 333. That N.E.D. did not notice the missing items until she took an inventory of her home simply means Wiskerchen was less bumbling than the defendant in *Queever*; it does nothing to alter the analysis of whether Wiskerchen's prior burglaries were part of the same course of conduct as the May 8 burglary. (*See* Wiskerchen's Br. 16.) Similarly, that the mode of entry in this case was a storm window instead of a sliding glass door, or that Wiskerchen was entering during the day rather than at night, or that Wiskerchen stole valuables instead of money is irrelevant. These burglaries involved the same home, the same victim, the same time of day, and the same point of entry. The "strong commonalities" between the prior burglaries and the attempted burglary in *Queever* are exactly the same "strong

commonalities" between Wiskerchen's burglary on May 8 and the reasonable inferences that can be drawn from that conduct. A preponderance of the evidence shows Wiskerchen committed the prior burglaries.

Wiskerchen's suggestion that the preponderance of the evidence standard is not met here because there is no video footage and no proof of a *modus operandi*[3] is absurd. The State is not required to produce video footage or evidence of a *modus operandi* even to prove guilt beyond a reasonable doubt. Furthermore, such a high standard would eviscerate the broad interpretation of the restitution statute mandating that "the sentencing court takes a defendant's entire course of conduct into consideration" in order to compensate the victim. *Madlock*, 230 Wis. 2d at 332–33.

In sum, Wiskerchen's argument that the circuit court's restitution award was unauthorized by law does not withstand scrutiny.[4] He could only prevail if this Court overruled—or at least disregarded—*Queever*, which this Court cannot do. *Cook v. Cook*, 208 Wis. 2d 166, 186, 560 N.W.2d 246 (1997). There was ample evidence for the court

---

[3] The State does not concede that the reasonable inferences drawn from Wiskerchen's conduct do not show a *modus operandi*.

[4] Should this Court disagree, however, the proper course of action is to remand for a new restitution hearing. *Madlock*, 230 Wis. 2d at 326 (remand for a restitution hearing was required where the record failed to sufficiently establish the fact of damage and the necessary nexus to the crime). Wiskerchen's suggestion that "a remand is unnecessary" due to what he claims was a lack of evidence presented at the first hearing (Wiskerchen's Br. 19) would not be consistent with the "strong equitable public policy" of "allow[ing] victims to recover their losses as a result of a defendant's criminal conduct." *Madlock*, 230 Wis. 2d at 332 (first quoting *State v. Kennedy*, 190 Wis. 2d 252, 258, 528 N.W.2d 9 (Ct App. 1994); then quoting *State v. Anderson*, 215 Wis. 2d 673, 682, 573 N.W.2d 872 (Ct. App. 1997)).

to properly find by a preponderance of the evidence that Wiskerchen's botched burglary on May 8 was the last in a long series of Wiskerchen's burglaries of N.E.D.'s home. Therefore, the circuit court did not erroneously exercise its discretion when it found the prior burglaries were "part of a single course of criminal conduct" subject to restitution. *Queever*, 372 Wis. 2d 388, ¶ 22.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the circuit court's restitution order.

Dated this 12th day of April, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 266-9594 (Fax)
kumferle@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,663 words.

_____
LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 this 12th day of April, 2017.

_____
LISA E.F. KUMFER
Assistant Attorney General