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

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

WISCONSIN STATUTES CITED

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. 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.

As argued in Mr. Wiskerchen's brief-in-chief, the circuit court lacked authority to order restitution on the other alleged burglaries because they were not "crimes considered at sentencing" within the meaning of the restitution statute. (Wiskerchen's Brief, 10-18). Specifically, the other alleged burglaries were neither "read-in crimes" nor part of the "crime for which the defendant was convicted" under Wis. Stat. § 973.20. (Wiskerchen's Brief, 10-18).

The state does not dispute that the other alleged burglaries were not read-in crimes subject to restitution. (State's Brief, 9). Rather, the state maintains that they were part of the crime for which Mr. Wiskerchen was convicted. (State's Brief, 11-17). Relying on ***State v. Queever***, 2016 WI App 87, 372 Wis. 2d 388, 887 N.W.2d 912, the state argues that the other alleged burglaries and the May 8 burglary were part of a single course of criminal conduct. (State's Brief, 13-17). The state did not make this contention at the circuit court level. Its argument on appeal therefore requires this court to make a variety of tenuous assumptions in order to affirm the restitution award.

i. Unlike ***Queever***, the circuit court did not find by a preponderance of the evidence that Mr. Wiskerchen was responsible for the other alleged burglaries.

In suggesting that this case is on all fours with ***Queever***, the state runs into some roadblocks. The first is that, contrary to ***Queever***, the circuit court did not find by a preponderance of the evidence that Mr. Wiskerchen committed the other alleged burglaries. Instead, it erroneously assumed that Mr. Wiskerchen had admitted to such conduct for the purpose of sentencing. The state argues that Mr. Wiskerchen's position elevates "form over substance." (State's Brief, 13). Mr. Wiskerchen is happy to focus on the substance of the court's restitution ruling.

There was a lack of evidence presented at the restitution hearing on whether Mr. Wiskerchen committed the other alleged burglaries. Indeed, as the state acknowledges, the circuit court's restitution ruling primarily focused on what had been *presented at the sentencing hearing* by way of the *presentence investigation report* (PSI). (State's Brief, 13). The contents of the PSI were not offered as evidence at the restitution hearing.[1] The court understood that fact. It explained that "all of this information was considered by me *at sentencing*" and concluded that the victim had met her burden of proof to show a causal nexus between Mr. Wiskerchen's conduct and the victim's purported losses. (36:7) (Emphasis added.) Given these remarks, the state's

[1] Nor should they have been. The purpose of a presentence investigation report is *not* to gather evidence for the state to use to prove its case against the defendant. *See* ***State v. Knapp***, 111 Wis. 2d 380, 386, 330 N.W.2d 242 (Ct. App. 1983). "Rather, presentence reports are designed to gather information . . . so that the judge can make an informed sentencing decision." ***Id***.

claim that the court made a factual finding that Mr. Wiskerchen committed the other alleged burglaries is pure fiction.

The state's position is further undermined by the fact that it never before argued that the other alleged burglaries were subject to restitution as part of the crime for which Mr. Wiskerchen was convicted. At the circuit court, the state suggested that the other alleged burglaries were subject to restitution as read-in crimes, (25:1-2),[2] making it all the more logical that the court's restitution award was premised on this error of law.

The bottom line is that, unlike ***Queever***, the circuit court in this case never found by a preponderance of the evidence presented at the restitution hearing that Mr. Wiskerchen committed the other alleged burglaries. Rather, it mistakenly assumed that Mr. Wiskerchen had admitted to such conduct for the purpose of sentencing. This was in line with the state's suggestion that the other alleged burglaries were read-in crimes subject to restitution.

A remand on this issue is inappropriate. *See* ***State v. Tarlo***, 2016 WI App 81, ¶19 n. 9, 372 Wis. 2d 333, 887 N.W.2d 898. A full and fair restitution hearing has already taken place. With the assistance of the state, the victim had the opportunity to present evidence of her purported loss. While the restitution hearing in this matter predated ***Queever***, it did not predate the prior case law that ***Queever*** relied upon to reach its decision. *See* ***Queever***, 372 Wis. 2d 388, ¶22. The victim therefore had the chance (with the help of the state) to argue that the other alleged burglaries were part of the crime

[2] The state does not contend otherwise. Noticeably absent from the state's otherwise comprehensive statement of the case is a discussion of its position on this issue at the circuit court. (State's Brief, 2-6).

for which Mr. Wiskerchen was convicted—not read-in crimes—which might have prompted the circuit court to make the factual finding the state now wishes had occurred.

ii. Unlike ***Queever***, a preponderance of the evidence presented at the restitution hearing does not show that (1) Mr. Wiskerchen committed the other alleged burglaries; or (2) the other alleged burglaries shared strong commonalties with the May 8 burglary.

Even if this court were to assume that the circuit court found by a preponderance of the evidence that Mr. Wiskerchen committed the other alleged burglaries, the fact remains that further roadblocks exist on the state's path toward harmonizing this case with ***Queever***. Specifically, there is insufficient evidence to show that (1) Mr. Wiskerchen committed the other alleged burglaries; or (2) the other alleged burglaries shared strong commonalties with the May 8 burglary.

As to the first point, the state inappropriately argues that certain statements contained within the PSI count as "evidence" presented at the restitution hearing. (State's Brief, 15). As noted above, the purpose of a PSI is not to gather evidence for the state to use to prove its case against the defendant. *See* ***State v. Knapp***, 111 Wis. 2d 380, 386, 330 N.W.2d 242 (Ct. App. 1983). While statements in a PSI may be used to support an uncontested restitution claim, *see* ***State v. Hopkins***, 196 Wis. 2d 36, 43-44, 538 N.W.2d 543 (Ct. App. 1995), Mr. Wiskerchen is aware of no authority—and the state points to none—to support the proposition that

statements in a PSI may be used to support a contested restitution claim where they are not admitted into evidence at the restitution hearing.

The state's position is especially troubling considering Mr. Wiskerchen did not have a right to counsel at the presentence interview, ***Knapp***, 111 Wis. 2d at 381, and due process required that Mr. Wiskerchen had notice and an opportunity to be heard on this point. *See* Wis. Stat. § 973.20(14)(d) ("All parties interested in the matter shall have an opportunity to be heard, personally or through counsel, to present evidence and to cross-examine witnesses called by other parties.").[3] The statements contained within the PSI—which were neither made under oath nor admitted into evidence at the restitution hearing—are simply not relevant to the question of whether the victim met her burden of proof at the restitution hearing.

The proper focus is on the evidence presented at the restitution hearing: the victim's testimony. She testified that she believed Mr. Wiskerchen had illegally entered her home prior to May 8. (35:11). Her belief was not based on the fact that she had seen Mr. Wiskerchen in her home before May 8, like in ***Queever***. Nor was her speculation due to the fact that she had noticed items missing from her home prior to the date in question, as was the case in ***Queever***. Rather, her belief was based on hearsay: Mr. Wiskerchen's mother allegedly told her that Mr. Wiskerchen was in her home before May 8.

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[3] At sentencing, Mr. Wiskerchen denied telling the PSI writer that he had burglarized hundreds of homes. (34:3). Had he been put on notice that the state intended to use his purported statement as evidence to support the restitution award, he could have addressed the claim at the restitution hearing.

The question is whether the victim demonstrated "by the greater weight of credible evidence the certainty of . . . her claim." ***Town of Schoepke v. Rustick***, 2006 WI App 222, ¶11, 296 Wis. 2d 471, 723 N.W.2d 770. The answer was obvious in ***Queever***: the video footage gave the defendant away. Here, however, the victim's belief that Mr. Wiskerchen burglarized her home prior to May 8 depends on unreliable information.

While Mr. Wiskerchen recognizes that due process does not require the rules of evidence to apply at restitution hearings, ***State v. Pope***, 107 Wis. 2d 726, 730, 321 N.W.2d 359 (Ct. App. 1982), he questions the propriety of that rule in light of ***Queever***. The rule might be justified where the question is simply whether a causal link exists between the victim's claimed loss and the defendant's conduct—conduct that has either been proven beyond a reasonable doubt or acknowledged as true by virtue of a plea or read-in offense. But is the rule proper where the conduct at issue has *not* been established by one of those mechanisms? Mr. Wiskerchen submits that it is not. In such situations, a victim's speculation based on unreliable information must not pass muster for a "preponderance of the evidence" to support his or her restitution claim. And that is all we have here: a hunch based on hearsay. This is not credible evidence demonstrating the certainty of the victim's claim that Mr. Wiskerchen committed the other alleged burglaries.

There was also insufficient evidence presented at the restitution hearing to show that the other alleged burglaries shared strong commonalities with the May 8 burglary. In apparent recognition of this fact, the state makes a startling assertion: "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*." (State's brief, 13)

(internal quotations omitted) (Emphasis added.) There is no evidence in the record to establish that the other alleged burglaries involved the same time of day or the same point of entry as the May 8 burglary. Without a single citation to the record, the state does not suggest otherwise.

The simple fact is that there is no credible evidence in the record to establish that Mr. Wiskerchen even committed the other alleged burglaries. This forces the state to rely on mere conjecture to keep its argument in line with ***Queever***: since Mr. Wiskerchen used a storm window to enter the victim's home on May 8, he must have always used that point of entry (State's brief, 13); and since Mr. Wiskerchen was found in the home at noon on May 8, he must have always entered at that time of day. (State's brief, 13). This position must be dismissed out of hand.

The actual evidence presented in this case shows that the only similarities between the other alleged burglaries and the May 8 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 one and the same. And though the state finds it "absurd" for Mr. Wiskerchen to suggest that more facts establishing a *modus operandi* are necessary to show that the other alleged burglaries and the May 8 burglary were part of a single course of criminal conduct, (State's brief, 16), it is clear that the defendant's *modus operandi* was central to the court's analysis in ***Queever***. ***Queever***, 372 Wis. 2d 388, ¶22.

Absurd results will follow if the court's decision in ***Queever*** is not limited to factual situations such as the one at issue in that case, which involved an overwhelming amount of evidence that the defendant was repeatedly committing (or attempting to commit) the same crime against the same

victim. Allowing restitution for a loss caused by a defendant's conduct *related to* a crime of conviction [or read-in crime] is a slippery slope, and based on the state's arguments, it appears that we are already sliding down it. ***Queever*** does not stand for the proposition that Wis. Stat. § 973.20 allows restitution for a loss caused by a defendant's conduct *related to* a crime of conviction [or read-in crime] where (1) there is no reliable evidence that the defendant was responsible for the alleged conduct; and (2) the only similarities between the alleged conduct and the crime of conviction are that they involved the same victim and the same location.

Consequently, even if this court were to assume that the circuit court found by a preponderance of the evidence that Mr. Wiskerchen committed the other alleged burglaries, the fact remains that ***Queever*** is inapposite. The court therefore lacked authority to order restitution on the other alleged burglaries.

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

Should this court agree that the circuit court lacked authority to order restitution on the other alleged burglaries, Mr. Wiskerchen maintains his position that a remand for a new restitution hearing is not necessary. The only question would be whether the evidence presented at the restitution hearing showed that the victim's purported losses were caused by the crime considered at sentencing, i.e., the May 8 burglary. As argued in Mr. Wiskerchen's brief-in-chief, the victim failed to establish that she suffered any loss as a result of the May 8 burglary. (Wiskerchen's Brief, 19).

The state's reliance on ***State v. Madlock***, 230 Wis. 2d 324, 602 N.W.2d 104 (Ct. App. 1999), to argue that a remand for a new restitution hearing is appropriate in this situation is

confusing. In ***Madlock***, the circuit court never held an evidentiary hearing on whether there was a sufficient nexus between Madlock's criminal conduct and the claimed damage. ***State v. Madlock***, 230 Wis. 2d 324, 336, 602 N.W.2d 104 (Ct. App. 1999). The court therefore remanded the case in order to develop the record on this issue. ***Id***. at 337. Of course, in this case, there was an evidentiary hearing where the victim was given the opportunity (with the assistance of the state) to prove the amount of loss sustained as a result of a crime considered at sentencing—the May 8 burglary. That she failed to meet her burden in this regard does not entitle her to a new hearing.

CONCLUSION

For the reasons stated in this brief, as well as those set forth in the brief-in-chief, the circuit court's restitution order should be reversed, and Mr. Wiskerchen's judgment of conviction should be amended accordingly.

Dated this 1st day of May, 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 2,481 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 1st day of May, 2017.

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