No. 2016AP1541

In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

SHAWN T. WISKERCHEN,
DEFENDANT-APPELLANT-PETITIONER

On Appeal From The Racine County Circuit Court,
The Honorable Faye M. Flancher, Presiding,
Case No. 2015CF742

RESPONSE BRIEF OF THE STATE OF WISCONSIN

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General

SOPEN B. SHAH
Deputy Solicitor General
Counsel of Record

Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
shahsb@doj.state.wi.us
(608) 261-8107

Attorneys for the State of Wisconsin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

ISSUE PRESENTED

Whether the circuit court erroneously exercised its broad discretion when it ordered that Wiskerchen must pay restitution for all of the losses that he inflicted on the victim, including losses not directly flowing from the crime of conviction.

The circuit court and Court of Appeals answered no.

INTRODUCTION

In the spring of 2015, Shawn T. Wiskerchen repeatedly broke into the home of his neighbor, N.D., through a basement storm window that he modified. He made a "nest" in her bedroom closet, and stole her jewelry, electronics, and other items to obtain income for drugs. On May 8, 2015, N.D. caught him hiding in her bedroom. Wiskerchen attempted to punch her, threw her down the stairs, and fled. She called the police, who apprehended him that day and found jewelry and other stolen items in his backyard. Wiskerchen's criminal record and the ensuing investigation revealed that he had burglarized multiple homes to support his drug habit. Wiskerchen, for his part, admitted that he had broken in and taken items from N.D.'s home and pleaded to one count of burglary. N.D. identified 74 items missing from her home, and the circuit court ordered restitution for their value under Wis. Stat. § 973.20 (hereinafter "Restitution Statute").

Wisconsin's Restitution Statute explicitly authorizes the restitution order here, and the order is necessary to fully compensate N.D. for the losses Wiskerchen's criminal conduct imposed on her. The statute's plain language permits a court to order restitution for losses beyond those directly flowing from the crime of conviction as an "appropriate" "other" "factor[ ]." Wis. Stat. § 973.20(13)(a)5. The purpose of the Restitution Statute is to return victims to their original position—as if the defendant's conduct did not occur. *See State v. Sweat*, 208 Wis. 2d 409, 422, 561 N.W.2d 695 (1997);

State v. Anderson, 215 Wis. 2d 673, 682, 573 N.W.2d 872 (Ct. App. 1997). Restitution also serves rehabilitative goals by holding an offender responsible for his actions. *State v. Jackson*, 128 Wis. 2d 356, 363, 382 N.W.2d 429 (1986). Because Wiskerchen stole N.D.'s missing property, the only way to make N.D. whole and hold Wiskerchen responsible for his actions was for the court to order that Wiskerchen pay N.D. full restitution.

Wiskerchen's contrary argument—that the Restitution Statute contains a *per se* rule limiting restitution to only the harms flowing directly from the crime of conviction (here, the May 8 incident)—finds no support in the statutory text, is contrary both to the Restitution Statute's purposes and binding precedent, and would lead to unjust results in cases like this one. Wiskerchen has no meaningful answer to the Restitution Statute's broad grant of discretion to circuit courts and fails to address how his position could be reconciled with the statute's express purposes: to return victims to the position they were in before the defendant's criminal activity and to help offenders take responsibility for their actions. *See Sweat*, 208 Wis. 2d at 422; *Jackson*, 128 Wis. 2d at 363; *see also* Wis. Const. art. I, § 9m. In this case, for example, Wiskerchen stole N.D.'s property on multiple dates, only the last of which was the crime of conviction, and it is not entirely clear which items he took on which day. If this Court were to adopt Wiskerchen's interpretation of the Restitution Statute, that would give him—and criminals like him—an unjustified

windfall at the victim's expense, undermining both purposes of the Restitution Statute.

ORAL ARGUMENT AND PUBLICATION

By granting Wiskerchen's petition for review, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. Legal Background

Wisconsin leads the nation in protecting the rights of crime victims. In 1980, Wisconsin became the first State to enact a Bill of Rights for Victims. *See* Wis. Legis. Fiscal Bureau, Info. Paper 78, *Crime Victim and Witness Rights and Services* 1 (Jan. 2005), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2005/078_crime_victim_and_witness_rights_and_services_informational_paper_78.pdf. In 1993, the people of Wisconsin enshrined the protection of victims' rights in the State's Constitution, overwhelmingly adopting an amendment that provides: "[t]his state shall ensure that crime victims have all of the following privileges and protections as provided by law," including "restitution." Wis. Const. art. 1, § 9m; *see Wisconsin*, The Nat'l Ctr. for Victims of Crime, http://victimsofcrime.org/our-programs/public-policy/amendments/wisconsin (last visited June 28, 2018). The State must treat victims of crime with "fairness, dignity, and respect for their privacy." Wis. Const. art. 1, § 9m.

The present case involves Wisconsin's restitution statute, Wis. Stat. § 973.20, which reflects "a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution," *State v. Kennedy*, 190 Wis. 2d at 258, 528 N.W.2d 9 (Ct. App. 1994) (citing *State v. Dziuba*, 148 Wis. 2d 108, 112–13, 435 N.W. 2d 258 (1989)). The statute is designed "to return victims of a crime to the position they were in before the defendant injured them." *State v. Johnson*, 2005 WI App 201, ¶ 14, 287 Wis. 2d 381, 704 N.W.2d 625. Indeed, the "primary purpose" of restitution is "to compensate" victims and make them whole. *Sweat*, 208 Wis. 2d at 422. Restitution also serves rehabilitative purposes by "strengthening [offenders'] sense of responsibility." *Jackson*, 128 Wis. 2d at 363. An offender who makes restitution "should have a positive sense of having earned a fresh start and will have tangible evidence of his [ ] capacity to alter old behavior patterns and lead [a] law-abiding li[fe]." *Id.* (citations omitted).

The Restitution Statute identifies when restitution is appropriate and who can receive restitution, and provides circuit courts with various options to calculate the amount due. There is a strong presumption in favor of restitution; a court must order restitution "[w]hen imposing sentence . . . for any crime . . . unless [it] finds substantial reason not to do so *and* states the reason on the record." Wis. Stat. § 973.20(1r) (emphasis added); *accord id.* (describing similar standard for domestic-abuse crimes, not relevant here). Only certain

victims are entitled to receive restitution. The "defendant" must "make full or partial restitution under this section to *any victim of a crime considered at sentencing*." Wis. Stat. § 973.20(1r) (emphasis added). Section 973.20(1g) defines a "'[c]rime considered at sentencing' [as] any crime for which the defendant was convicted and any read-in crime." Wis. Stat. § 973.20(1g)(a). It further defines "read-in crimes" as those "uncharged or . . . dismissed as part of a plea agreement, that the defendant agrees to be considered by the court at the time of sentencing." *Id.* § 973.20(1g)(b). Other provisions of the statute, *id.* § 973.20(2)–(5), "give[ ] a sentencing judge a wide range of alternatives" to set the amount of restitution due based on the "unique factual circumstances and the rehabilitative component of restitution," *Kennedy*, 190 Wis. 2d at 260–61. If a crime "resulted in . . . loss . . . of property, the restitution order may require" the defendant to either "[r]eturn the property to the owner" or pay the owner "the reasonable" "replacement cost" or the "value of the property" either on the date it was damaged or the date of sentencing. Wis. Stat. § 973.20(2). In cases of "bodily injury," the restitution order "may require that the defendant" pay medical expenses, and/or reimburse the victim for lost income. *Id.* § 973.20(3). In cases of "death," the court "may" order the defendant also to pay "funeral" expenses. *Id.* § 973.20(4). "In any case, the restitution order may require" the defendant to "[p]ay all special damages, . . . substantiated by evidence in the record, which could be recovered in a civil action against

the defendant for his or her conduct in the commission of a crime considered at sentencing." *Id.* § 973.20(5). The Legislature intended Section 973.20(5) to "ma[k]e it easier for victims to be compensated for their losses without undergoing civil litigation." *State v. Fernandez*, 2009 WI 29, ¶ 72, 316 Wis. 2d 598, 764 N.W.2d 509 (A.W. Bradley, J., dissenting).

Most critically for purposes of the present case, the Restitution Statute mandates that courts consider five factors when "determining whether to order restitution and the amount thereof." Wis. Stat. § 973.20(13)(a). Those five factors are: (1) the "loss suffered by any victim as a result of a crime considered at sentencing," (2) the "financial resources of the defendant," (3) the defendant's "earning ability," (4) the "needs and earning ability of the defendant's dependents," and (5) "*[a]ny other factors which the court deems appropriate*." *Id.* § 973.20(13) (emphasis added).

The statute also provides the court broad leeway to resolve any disputes about restitution. *See id.* § 973.20(13)(c). If a defendant contests the amount of restitution, the court "may" hold a hearing, and it has significant discretion to conduct the hearing as it sees fit. *See id.* § 973.20(13)–(14). For example, the court "may waive the rules of . . . procedure[ ] or evidence." *Id.* § 973.20(14)(d); *State v. Pope*, 107 Wis. 2d 726, 729–30, 321 N.W.2d 359 (Ct. App. 1982). The Restitution Statute requires the court to "conduct the proceeding so as to do substantial justice between the parties." Wis. Stat. § 973.20(14)(d). At the hearing, the victim has the burden of

demonstrating by a "preponderance of the evidence" "the amount of loss sustained by a victim as a result of a crime considered at sentencing," the first factor from Subection 973.20(13)(a). *Id.* § 973.20(14)(a). The defendant has the burden to prove facts related to his own or his dependents' financial situation, the second through fourth factors from Subsection 973.20(13)(a). *Id.* § 973.20(14)(b). As to "other matters . . . the court deems appropriate," the fifth factor from Subsection 973.20(13)(a), the burden is on "the party designated by the court, as justice requires." *Id.* § 973.20(14)(c).

B. Factual Background

In the spring of 2015, Wiskerchen broke into the home of his neighbor, N.D., made a "nest" in her bedroom closet that he used during the day while she worked, and pilfered valuable and irreplaceable items from her house over the course of several weeks. R. 1:1; SA 5–27.[1] Wiskerchen "chisel[ed] the storm window out of [her] basement, br[oke] the latches and glass on the inner window and then pick[ed] up all of the glass so [that she] didn't notice it was broken." SA 5. Wiskerchen "fit the storm window back into the frame, so at a quick look it looked like nothing had happened." SA 5. While N.D. was at work during the day on Mondays through

[1] References to "R. __" correspond to the document number on the circuit court index for appeal in this case. References to "SA __" correspond to Respondent's Supplemental Appendix.

Thursdays, Wiskerchen "used" her home "as a personal shopping center" and "a flop." R. 1:2; SA 5, 14. Wiskerchen had "pulled clothing down and arranged a place where he could hide" in N.D.'s "back bedroom . . . closet." SA 5–6. N.D. found a "nest" in the closet with "alcohol," where Wiskerchen "could sit up there and drink and do whatever he chose to do." SA 5–6, 18. During his time in N.D.'s home, Wiskerchen took N.D.'s possessions, including her medication. SA 6. Wiskerchen's mother knew about these numerous break-ins and thefts. SA 6. Although she attempted to notify Wiskerchen's parole officer, she never warned N.D. about them. SA 6, 27.

Wiskerchen burglarized N.D.'s home again on Friday, May 8, 2015. R. 1:1; R. 14. Wiskerchen was "hanging out" and getting high with his friend that day when he "realized" that they were "out of money and out of drugs." R. 16:2. Wiskerchen "knew" that N.D. "had some money in her residence so he decided to break in." R. 16:2. N.D. returned home in the middle of the day to find all of her bathroom cabinets open. R. 1:2. While downstairs, she heard "what sounded like creaking from someone walking" around upstairs. R. 1:2. N.D. went upstairs, saw that her bedroom "looked like someone had gone through it," and noticed that her back bedroom door was closed. R. 1:2. When she opened that door, it hit Wiskerchen, who was hiding in her room. R. 1:2. She yelled, and he attempted to punch her. R. 1:2. N.D. attempted to stop him, but he "grabbed [N.D.] by the arm

and threw her down the stairs." R. 1:2. Wiskerchen unlocked the front door and fled the area. R. 1:2. N.D. got up and went outside, "screaming for neighbors to give chase." R. 1:2.

N.D. reported the burglary to the Racine Police Department and officers arrived to investigate. R. 1:2. Officer Leslie responded and arrived to find N.D. "visibly upset, crying, [ ] shaking," and "bleeding from her fingernails on her right hand." R. 1:2. N.D. had a wrist injury, "a deep bruise on her right shoulder" and "bruising to her left ankle." R. 1:2–3. N.D. identified Wiskerchen as her next-door neighbor. R. 1:2. She told them that Wiskerchen had been breaking into her home and spending time upstairs without her consent, and that "several items were missing from her home." R. 1:2–3. While investigating, Officer Leslie observed that "someone had drilled a hole in the basement storm window so that it could be opened with a screwdriver." R. 1:2. That window was the point of entry. R. 1:2. Police located a screwdriver "bent very badly" in Wiskerchen's backyard. R. 1:3. Investigators also recovered "certain items of jewelry" from Wiskerchen's "clothes [and] areas where he dropped clothes, including a jewelry box containing a gold necklace with a heart pendant, 2 silver pendants, and 4 earrings." R. 24:3; SA 48, 60, 62. That day, Wiskerchen's mother finally admitted to N.D. that "he had been into [her] house on numerous other occasions," and that Wiskerchen had "[N.D.'s] medication." SA 6.

C. Procedural History

The State charged Wiskerchen with four offenses committed on May 8, 2015: misdemeanor battery, possession of burglarious tools, burglary, and second-degree recklessly endangering safety. R. 1:1–2 ("on or about" this date). The State added a "repeater" enhancement to all of the charges, which applies to individuals with at least one felony or three misdemeanor convictions during the five-year period preceding the crime. R. 1:1–2. Wiskerchen's "last two crimes involved breaking into homes." SA 35. Most recently, Wiskerchen was convicted of disorderly conduct, criminal trespass to dwelling, and attempted theft for breaking into a home through a window while "armed with a knife." *See* SA 31; R. 16:6. The victim was home and "scared [him] off." SA 31; *see also* R. 16:6. Indeed, it had been less than three weeks since Wiskerchen's release when N.D. caught him in her home. SA 7, 31.

Wiskerchen eventually pleaded to the burglary count without the repeater enhancement and agreed to have the remaining charges—with the repeater enhancements—read in. *See* R. 14:2. The State, in exchange for his plea, agreed not to issue charges for Wiskerchen's attempts to "dissuade witnesses from coming to [the] trial." SA 10; R. 14:2. At the plea hearing, the court advised Wiskerchen that he "may be required to pay restitution to the victim of [his] crime," and that burglary was a Class F felony, which carried a maximum of 12.5 years in prison and a $25,000 fine. R. 33:9–10.

Evidence presented at the sentencing hearing indicated that Wiskerchen had repeatedly broken into N.D.'s home throughout the spring of 2015. N.D. described the "plotting and planning" that went into Wiskerchen's burglaries. SA 5. As discussed above, he used tools to create an inconspicuous point of entry, had a hiding place in her bedroom closet where he had made a "nest" with items he collected from around her house, and stole various items, including medication, during his repeated break-ins. SA 5–6. Wiskerchen had modified the storm window with such skill that "[i]t took the police quite a long time to figure out that was how [Wiskerchen] was gaining entry and exit to [her] home." SA 5. Wiskerchen stole valuable and irreplaceable items, including N.D.'s "children's baby rings" passed down through her husband's family from Germany "that were about 200 years old," her grandmother's wedding rings dating back to the Great Depression, and her mother's high school "class key." SA 6–7.

N.D. also discussed how the event affected her. Wiskerchen had introduced himself to her and her friends just the night before she caught him in her home. SA 7. In addition, not only did he punch N.D. "in the head and thr[o]w [her] down the stairs," but he also fled without making sure she had not "bec[o]me permanently disabled" or "died." SA 6.

In addition, evidence in the Presentence Investigation report (PSI) indicated that Wiskerchen repeatedly burglarized homes and stole others' property for drug money and other income. R. 16:2–3; *see* SA 20, 33 (court referencing

"significant substance abuse history"). He bragged to the PSI author that he burglarized 100 to 200 homes in the county, that he was never caught, and that he "make[s] more money than any cop or judge" from that activity. SA 26. Wiskerchen's friend taught him to burglarize homes. SA 3–4; R. 16:3. Wiskerchen chose "nice houses" without "close neighbors to hear windows breaking." R. 16:3; SA 3. He reported finding some type of narcotic in 80 percent of the houses he broke into. R. 16:2–3; SA 3. He broke into N.D.'s house because he "knew" that she had money in it. R. 16:2. He was high on codeine and cough suppressant when he broke in, R. 16:2, and was "so high" that he "stayed too long" in N.D.'s home and got caught, SA 28. Wiskerchen admitted that he took from N.D.'s home "a couple bottles of hard alcohol, some gold, and some 'nasty 10 ml. Percocet,'" referring to a type that contains aspirin. R. 16:2. Wiskerchen would take the items he stole during his burglaries to a contact in Illinois who would pawn them without asking for identification. R. 16:3. This system worked well for him because Wisconsin did not report missing items to Illinois. R. 16:3.

The State asked the court for a prison sentence, and Wiskerchen conceded that incarceration was appropriate. He asked for 18 months' initial incarceration. SA 25. The State, in response, emphasized Wiskerchen's "blatant disregard for the whole [criminal] process." SA 10. For example, Wiskerchen told others on prison phone calls that he "d[id]n't

even care" about his felon status and that he "should have just killed somebody." SA 10. Although Wiskerchen denied that he told the PSI author that he burglarized 100 to 200 other homes in the county, SA 26, counsel conceded that Wiskerchen admitted he had committed at least a "couple" burglaries, SA 3, and later acknowledged that Wiskerchen had a "very large, very bad [drug] habit," and like many such offenders, stole to acquire money for drugs, SA 20.

After hearing counsel's presentations, the court imposed sentence. Wiskerchen was a serious repeat offender. Burglary "ha[d] become matter of fact to him like a daily job and he show[ed] no remorse for his victims." SA 34; *see also* SA 3, 18. Wiskerchen was skilled at planning these burglaries and "displayed a sense of accomplishment" about it. SA 34. Wiskerchen had "meticulously drilled a hole in [N.D.'s] storm window so that it could be opened with a screwdriver." SA 27. "All the debris was taken away." SA 27. As a result, the police "had a difficult time finding where entry and exit to the home was" occurring. SA 27. The court acknowledged that Wiskerchen denied telling the PSI author that he burglarized hundreds of other homes in the county, but could not think of an "incentive" the author would have had "to make that [fact] up." SA 26. Indeed, Wiskerchen's "last two crimes involved breaking into homes." SA 35. After proper consideration of all the sentencing factors, the court sentenced Wiskerchen to five years' initial confinement and four years' extended supervision. SA 35. The court also

notified Wiskerchen that N.D. sought full restitution. *See* SA 10, 36.

Wiskerchen disagreed with the State on restitution, so the court scheduled a hearing. The State asked that the court impose full restitution to N.D. for all of the items missing from her home as a condition of Wiskerchen's supervised release. SA 10. But Wiskerchen argued that the court could not impose restitution for any items he took before May 8 because the State did not convict him of those burglaries. SA 59. He also contended that the State did not have evidence to prove that Wiskerchen entered N.D.'s house prior to May 8 other than her testimony and a "report" showing that Wiskerchen had gathered things in "one spot" in her closet "includ[ing] some bottles of alcohol." SA 18. Thus, in his view, the court could hold him responsible only for the items that he took on May 8. SA 60.

At the restitution hearing, N.D. discussed how she calculated her loss amount. She identified 74 items missing from her home, including 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, R. 39, and documented their cost at the time of purchase based upon her memory, "some receipts," and "talking to other[s]." SA 47, 50. She very clearly remembered the jewelry she had, where it was located, and how she acquired it. For example, she mentioned that her brother had worked extra jobs and saved up to give her "carnelian hoops with gold on them" as a

"graduation gift" in 1977. SA 53–54. The total value of the missing items was $32,138.43. App. 114. She submitted that claim to her insurance company, which depreciated the total value of the stolen items to $22,279 and paid her its policy limit of $13,791.59. App. 114.

Wiskerchen argued that he should not be responsible for the value of all of the stolen items. In his view, the Restitution Statute limited the court's consideration to the events of May 8 for which he had been convicted. SA 61–63. And on May 8, Wiskerchen fled N.D.'s home with a backpack. SA 51, 53. N.D. did not know which items he had on that day and admitted that he probably could not have fit all of her missing items in the backpack. SA 51.

The circuit court ordered restitution of $8,487.41, the difference between the depreciated value of N.D.'s items and her insurance reimbursement. App. 115. The court discussed the Restitution Statute, Wis. Stat. § 973.20, noting that Section 973.20(1r) requires the court to "order" restitution "to any victim of a crime considered at sentencing." App. 102. In addition, under Section 973.20(13), the court "needs to consider" "the loss suffered by any victim as a result of a crime considered at sentencing" and "*any other factors that the Court deems appropriate*." App. 102–03 (emphasis added). Various pieces of evidence indicated that Wiskerchen had been in N.D.'s home multiple times before May 8, 2015: Wiskerchen somehow "knew" she had money inside her home, Wiskerchen's mother told N.D. about his repeated break-ins,

Wiskerchen had N.D.'s medication, SA 6, and there was a "nest" in the back of N.D.'s closet where Wiskerchen had collected some items, including liquor bottles. App. 105–06. And Wiskerchen had repeatedly burglarized other houses and pawned the items in Illinois. App. 105. After "consider[ing]" "all of this information," the court concluded that N.D. had met her burden of proof that Wiskerchen's criminal conduct caused "the victim's loss." App. 106–07.

Wiskerchen appealed, and the Court of Appeals affirmed the circuit court's decision. Wiskerchen argued that the circuit court erred in awarding restitution to N.D. because under his reading of Wisconsin's Restitution Statute, the court could compensate N.D. for losses from only the May 8 burglary. *See* App. 118. The Court of Appeals disagreed, relying in part on *State v. Queever*, 2016 WI App 87, 372 Wis. 2d 388, 887 N.W.2d 912, *review denied*, 2017 WI 20, 373 Wis. 2d 647, 896 N.W.2d 362. App. 119. In *Queever*, the Court of Appeals held that a court could order restitution for a security system installed *before* the crime of conviction, also a burglary. *Id.* ¶ 1. The victim in *Queever* noticed that "[m]oney went missing from" her purse on "multiple occasions." *Id.* ¶ 2. Although the "victim and her family initially thought that she might be confused or that her memory was slipping, . . . the victim's family began to suspect that someone was entering her home at night and stealing money from her purse." *Id.* ¶ 2. The victim installed a security system in her home, *id.* ¶ 5, and a police officer recognized Queever from the video

footage, *id.* ¶ 6. The court ordered restitution for the security system, although the State charged Queever with only the last burglary. *Id.* ¶¶ 7–9. The court "found by a 'preponderance of the evidence' that Queever had entered the victim's home multiple times before the attempted burglary for which he was sentenced." *Id.* ¶ 9. And his criminal actions caused the victim to purchase the security system. *Id.* The Court of Appeals determined that the circuit court did not erroneously exercise its discretion in ordering restitution because the prior burglaries "were part of a single course of criminal conduct" related to the crime of conviction. *Id.* ¶ 22.

The Court of Appeals reached the same conclusion about the circuit court's restitution order here. App. 119. Like the victim in *Queever*, N.D. presented sufficient evidence to the circuit court to meet her burden of proof that Wiskerchen's criminal activity caused her losses. Wiskerchen's prior criminal actions were clearly related to the May 8 incident because "they involved the same home, the same victim, the same entry point (the basement window that had been tampered with prior to May 8), and the same time of day." App. 119 (citing *Queever*, 2016 WI App 87, ¶ 22). An opposite result, the court noted, "would eviscerate the mandate to broadly interpret the restitution statute." App. 117, 120 (citing *State v. Gibson*, 2012 WI App 103, ¶ 10, 344 Wis. 2d 220, 822 N.W.2d 500).

Judge Hagedorn dissented, contending that the circuit court's restitution order violated the Restitution Statute.

App. 121 (Hagedorn, J., dissenting). In his view, the statute prohibits restitution for conduct related to a "crime considered at sentencing" that could have been charged as a separate crime. *See* App. 130–31. *Queever* was contrary to the statute, he argued, but could be read as providing a narrow exception for items "used to catch [a defendant] in the crime he was convicted of." App. 130, 132 & n.3.

STANDARD OF REVIEW

This Court reviews questions of statutory interpretation de novo. *N.E.M. v. Strigel*, 208 Wis. 2d 1, 6, 559 N.W.2d 256 (1997).

Circuit courts have broad discretion to set the amount of restitution, as with many other aspects of sentencing. *State v. Fernandez*, 2009 WI 29, ¶ 50, 316 Wis. 2d 598, 764 N.W.2d 509. Thus, this Court reviews restitution orders for an erroneous exercise of discretion and will reverse only if the court applied the wrong legal standard or did not "logically interpret[ ] the facts." *State v. Johnson*, 2002 WI App 166, ¶ 7, 256 Wis. 2d 871, 649 N.W.2d 284.

SUMMARY OF ARGUMENT

I.A. The circuit court acted well within its broad discretion when it ordered Wiskerchen to reimburse N.D. for *all* of the property that he stole from her. The court's order complies with the Restitution Statute and Wisconsin case law. N.D. is a "victim of a crime considered at sentencing," Wis. Stat. § 973.20(1r), and the items that Wiskerchen stole

were worth at least $8,487.41, *id.* § 973.20(2), (5). The court properly ordered restitution for losses beyond those directly "result[ing] [from] a crime considered at sentencing," the May 8 burglary, *id.* § 973.20(13)(a)1, as an "appropriate" "other factor[ ]," *id.* § 973.20(13)(a)5, because Wiskerchen's criminal conduct caused all of N.D.'s losses. The Restitution Statute reflects the Legislature's purpose to return victims to the position they were in before the defendant's misconduct, and Wisconsin courts have repeatedly approved of restitution orders that fully compensate victims for their losses, even if they were caused by conduct that the State might have charged as a separate crime, *State v. Rodriguez*, 205 Wis. 2d 620, 629, 556 N.W.2d 140 (Ct. App. 1996) (circuit court could properly order restitution for bicyclist's death although State charged defendant with only leaving the scene of a fatal accident, not with homicide by negligent operation of a vehicle or other crime); *Queever*, 2016 WI App 87, ¶ 14, or they occurred before the crime of conviction, *Queever*, 2016 WI App 87, ¶ 1.

In addition, the circuit court logically interpreted the facts to conclude that a preponderance of the evidence showed that Wiskerchen caused all of N.D.'s losses. Wiskerchen's mother told N.D. and his parole officer that Wiskerchen had been in N.D.'s house and had N.D.'s medication before May 8. Wiskerchen knew that N.D. had money in her house even before he broke in on May 8, he modified her basement storm window with a screwdriver to facilitate discreet access, he

created a nest in her closet where he had collected bottles of alcohol and other items, he admitted that he stole at least some of her property, and he had a documented pattern of burglarizing homes and stealing to feed his drug habit.

I.B. Wiskerchen's primary contrary argument—that the Restitution Statute limits circuit courts to reimbursing victims for losses flowing directly from only the "crime considered at sentencing," Opening Br. 11—finds no support in the statutory text and is contrary to binding precedent. The three provisions he relies on contain no such limit. Section 973.20(1g) merely defines what "[c]rime considered at sentencing" means when it is used elsewhere in the statute. Section 973.20(1r) simply identifies *who* must receive restitution: "any victim of a crime considered at sentencing." Section 973.20(2) gives the court one discretionary option to calculate the amount owed: it "may" require the defendant to return or replace stolen property. The statute does not prevent courts from ordering restitution for conduct that could have been charged as a separate crime or that occurred before the crime of conviction. *See Rodriguez*, 205 Wis. 2d at 629; *see also Queever*, 2016 WI App 87, ¶ 1. Moreover, Wiskerchen's interpretation of the Restitution Statute would lead to an absurd result where he receives a windfall *because* he repeatedly broke into N.D.'s home to steal her property instead of just stealing everything at once.

II. If this Court finds that the Restitution Statute limits the court to ordering restitution for losses directly flowing

from Wiskerchen's May 8 burglary alone, the Court must remand for an evidentiary hearing so that the circuit court can try to sort out which items Wiskerchen stole on May 8.

ARGUMENT

I. The Restitution Order Here Was Lawful

A. The Circuit Court Did Not Erroneously Exercise Its Broad Discretion In Requiring Wiskerchen To Reimburse N.D. For *All* Of The Losses That He Inflicted On Her

1. This Court interprets statutes according to their plain meaning. It looks first to the "language of the statute" to discern the intent of the Legislature. *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory language is "given its common, ordinary, and accepted meaning." *Id.* ¶ 45. The language is "interpreted in the context in which it is used," "in relation to the language of surrounding or closely-related statutes," and "to avoid absurd or unreasonable results." *Id.* ¶ 46. This Court "give[s] reasonable effect to every word." *Id.* If this examination of language and "[c]ontext" results in a "plain, clear statutory meaning," then the Court applies the statute accordingly. *Id.* (citation omitted). Only where statutory language is ambiguous, or "capable of being understood by reasonably well-informed persons in two or more senses," *id.* ¶ 47, will the Court consult "extrinsic sources" to identify the proper interpretation, *id.* ¶ 50. This Court, however, "should not search for ambiguity." *Hamilton v. Hamilton*, 2003 WI

50, ¶ 38, 261 Wis. 2d 458, 661 N.W.2d 832. Rather, it must "enforce a clear statute." *Id.*

Here, Wisconsin's Restitution Statute gives circuit courts broad authority "in determining whether to order restitution and the amount thereof." Wis. Stat. § 973.20(13)(a).

As outlined above, *see supra* pp. 5–8, the Restitution Statute defines who can receive restitution, *id.* § 973.20(1r), gives the court various discretionary options to calculate the amount, *id.* § 973.20(2)–(5), provides guidance for resolving restitution disputes, *id.* § 973.20(14), and mandates that the court consider five factors when deciding whether and how much restitution to order, *id.* § 973.20(13)(a). Section 973.20(1r) identifies *who* is eligible to receive restitution: "any victim of a crime considered at sentencing." Wis. Stat. § 973.20(1r); *see also State v. Schmaling*, 198 Wis. 2d 756, 761, 543 N.W.2d 555 (Ct. App. 1995); *State v. Mattes*, 175 Wis. 2d 572, 581, 499 N.W.2d 711 (Ct. App. 1993). Sections 973.20(2)–(5) give the court options to calculate the amount of restitution due. It "may" order the return of lost property or payment of its replacement cost, Wis. Stat. § 973.20(2), payment of a victim's medical costs, *id.* § 973.20(3), or funeral expenses, *id.* § 973.20(4). "In any case," the restitution order "may" require the defendant to pay "all special damages" that could be "recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing" to save victims the hassle of civil litigation. *Id.*

§ 973.20(5); *Fernandez*, 2009 WI 29, ¶ 72 (A.W. Bradley, J., dissenting). Section 973.20(13)(c) lists various options the court has to resolve restitution disputes. The goal of any proceeding is to "do substantial justice between the parties," so the court may dispense with the rules of evidence and procedure as it deems appropriate. Wis. Stat. § 973.20(14)(d).

Most relevant here, Section 973.20(13) mandates that the court consider five factors "in determining whether to order restitution and the amount thereof." Those five factors are: (1) the "loss suffered by any victim as a result of a crime considered at sentencing," (2) the "financial resources of the defendant," (3) the defendant's "earning ability," (4) the "needs and earning ability of the defendant's dependents," and (5) "*[a]ny other factor* which the court deems appropriate." Wis. Stat. § 973.20(13)(a) (emphasis added).

Subsection 5—*"[a]ny other factor*"—gives circuit courts broad authority to take into account the defendant's misconduct, the victim's losses, and other equitable considerations. The word "any" in Subsection 5 indicates that no factor is off-limits, so long as the court "deems [it] appropriate." *Id.* § 973.20(13)(a)5. "'Any' has an [unequivocally] expansive meaning," and indicates that the Legislature did not intend to limit the information that courts could consider. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219–20 (2008); *see also United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588–89 (1980). The word "other," in turn, means that the court should

consider factors *in addition to* those listed in Subsections one through four. *See generally Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) (a "catchall provision" is "to be read as bringing within a statute categories similar in type to those specifically enumerated").

The statutory "[c]ontext," *Kalal*, 2004 WI 58, ¶ 46, supports an interpretation that gives a circuit court broad authority to exercise its discretion. The Restitution Statute is peppered with discretionary language. *See* Wis. Stat. § 973.20(1r) ("court . . . shall order . . . full or partial restitution"); *id.* § 973.20(2)–(5) (restitution order "*may* require that the defendant" pay certain amounts (emphasis added)); *id.* § 973.20(13)(a) (court "shall consider" "*[a]ny* other factors which the court *deems appropriate*" (emphases added)); *id.* § 973.20(14)(c) (burden to prove other factors is "on the party designated by the court, *as justice requires*" (emphasis added)); *id.* § 973.20(14)(d) (lifting rule requirements so that courts can do "*substantial justice* between the parties" (emphasis added)). The Legislature trusts circuit courts to consider "appropriate" factors, collect relevant evidence, fairly total the victim's losses, and ultimately order "just[ ]" restitution. This discretion is consistent with a court's authority to consider a broad range of information at sentencing. *See State v. McQuay*, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990).

The statutory "[c]ontext," *Kalal*, 2004 WI 58, ¶ 46, also supports an interpretation that compensates victims for *all* of

the losses that a defendant's unlawful conduct caused. Section 973.20(1r) creates a strong presumption in favor of restitution, mandating courts to order it unless they explicitly find "substantial reason" not to, App. 116–17, and other provisions strive to reach 100 percent reimbursement. For example, the court may reimburse the victim for the *greater of* the value of the stolen property on the date of loss or the date of sentencing, *id.* § 973.20(2)(b), for "lost income" as a wage-earner *or* homemaker, *id.* § 973.20(3)(c)–(d), for out-of-pocket expenses incurred while "cooperating in the investigation and prosecution" of the crime, *id.* § 973.20(5)(b), or even "reward[ ]" money that led to the "apprehension or successful prosecution of the defendant," *id.* § 973.20(5)(c).

The statute's purpose, *Kalal*, 2004 WI 58, ¶ 48, is to fully compensate victims. The "primary purpose" of restitution is "to compensate" victims and make them whole, *Sweat*, 208 Wis. 2d at 422, "within the defendant's ability to pay," *see State v. Anderson*, 215 Wis. 2d 673, 682, 573 N.W.2d 872 (Ct. App. 1997). Restitution also serves rehabilitative goals by holding offenders responsible for their actions. *Jackson*, 128 Wis. 2d at 363. And this Court must interpret the statute consistently with Wisconsin's constitutional provision for victims, *see Milwaukee Journal Sentinel v. Wis. Dep't of Admin.*, 2009 WI 79, ¶ 41, 319 Wis. 2d 439, 768 N.W.2d 700, which makes clear that the State must treat victims with "fairness" and "respect," Wis. Const. art. 1, § 9m.

2. Wisconsin courts have repeatedly interpreted the Restitution Statute broadly to grant full relief to crime victims for *all* of the losses that the defendant's criminal activity imposed on them. "Under the restitution statute, the sentencing court takes a defendant's entire course of conduct into consideration." *Rodriguez*, 205 Wis. 2d at 627. "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." *Id.* at 628. Courts may issue restitution for the defendant's conduct that is "*related to* the 'crime' for which the defendant was convicted." *State v. Madlock*, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999). The defendant's conduct must cause the victim's loss, but the causation requirement is not strict. A victim must show only that the defendant's conduct "set into motion events that resulted in the damage or injury" to the victim. *State v. Rash*, 2003 WI App 32, ¶ 7, 260 Wis. 2d 369, 659 N.W.2d 189; *see State v. Canady*, 2000 WI App 87, ¶ 9, 234 Wis. 2d 261, 610 N.W.2d 147.

Circuit courts may order restitution for conduct that could have been charged as a separate crime. For example, the defendant in *Rodriguez* was one of two drivers who struck a bicyclist with his car. 205 Wis. 2d at 624. The State charged him with leaving the scene of an accident that resulted in death. *See id.* at 627–28. Rodriguez argued that the statute did not permit restitution for the victim's death because his

offense—leaving the scene—was criminal but the accident, which caused the bicyclist's death, was not. *See id.* at 629. The State could theoretically have charged Rodriguez for the collision as a separate criminal act, for example, as homicide by negligent operation of a vehicle or another similar offense. *See generally id.* at 625; *see also* Wis. Stat. § 940.10. The Court of Appeals rejected this argument, stating that the statute did not "empower" it to "break down the defendant's conduct into its constituent parts." *Id.* at 627. Indeed, if that were the rule, no burglary victim could recover restitution for stolen items unless the defendant were also charged with larceny or theft. *See* Wis. Stat. § 943.10(1m) (burglary requires only that the defendant "intentionally enters [a defined place] with the intent to steal or commit a felony [therein]"). Thus, simply, "a defendant is responsible for restitution when his or her criminal acts cause harm to the victim." *Rodriguez*, 205 Wis. 2d at 630; *see also Queever*, 2016 WI App 87, ¶ 20; *Madlock*, 230 Wis. 2d at 333.

Most directly relevant to the issues in dispute here, courts may order restitution for losses stemming from a defendant's conduct even if those losses occurred before the offense of conviction. In *Queever*—discussed at length in the Court of Appeals' opinions below—the Court of Appeals approved of restitution for a security system purchased before the burglary occurred because the defendant's prior burglaries caused the expenditure. 2016 WI App 87, ¶¶ 1, 22. The defendant's prior criminal activities were "*related to*" the

"attempted burglary" for which he was apprehended because they "involved the same home, the same victim, [ ] the same time of night," and the same *modus operandi*—"entering . . . the victim's home through the same sliding glass door." *Id.* ¶ 22. Thus, the circuit court appropriately ordered the defendant to reimburse the victim for the security system in order to make her whole. *Id.* ¶ 1.

3. Here, the sentencing court applied the proper legal standards and logically interpreted the facts to reasonably conclude that Wiskerchen should reimburse N.D. for *all* of the property that he stole.

The court's restitution order complies fully with the terms of the Restitution Statute and relevant Wisconsin case law. N.D. is a victim of a crime considered at sentencing, Wis. Stat. § 973.20(1r); the items that Wiskerchen stole were worth $8,487.41 as of the date of his sentencing, *id.* § 973.20(2), (5); and Wiskerchen's conduct caused all of N.D.'s losses on May 8, *id.* § 973.20(13)(a)1, and on the days leading up to it, *id.* § 973.20(13)(a)5.

The circuit court reasonably determined that restitution for all of the losses Wiskerchen inflicted upon N.D. was "appropriate." *Id.* § 973.20(13)(a)5. Wiskerchen's unlawful conduct—entering N.D.'s home without permission and taking her property—caused N.D. harm. *See Rodriguez*, 205 Wis. 2d at 630; *see also Madlock*, 230 Wis. 2d at 333. It is irrelevant that the State could have charged Wiskerchen's conduct as separate crimes, *see Rodriguez*, 205 Wis. 2d at 629,

or that some of N.D.'s losses occurred before May 8, *see, e.g.*, Wis. Stat. § 973.20(13)(a)5; *Queever*, 2016 WI App 87, ¶ 22. Moreover, the close relationship between Wiskerchen's criminal activity and the offense of conviction bolsters this conclusion. As the Court of Appeals noted, Wiskerchen's criminal activity involved the same home, the same victim, and the same method of entering her house through the basement storm window that he modified. *See* App. 119; *Queever*, 2016 WI App 87, ¶ 22.

In addition, the circuit court logically interpreted the facts to conclude that a "preponderance of the evidence," *id.* § 973.20(14), showed that Wiskerchen had repeatedly broken into N.D.'s home and stolen her items to obtain money for drugs. Wiskerchen somehow "knew"—before he entered N.D.'s home on May 8—that she had money inside. *Supra* p. 9. Wiskerchen admitted that he stole at least some of N.D.'s items, including gold; N.D. and the police found Wiskerchen's "nest" in her bedroom closet; Wiskerchen modified the basement storm window with his screwdriver for easy and discreet access; and Wiskerchen's mother told N.D. and Wiskerchen's parole officer that he was repeatedly in N.D.'s house and that he had her medication. *See supra* pp. 9, 12. The police found jewelry and other stolen items on Wiskerchen's person and "in his backyard." SA 60, 62. Wiskerchen told the PSI writer that he had burglarized 100 to 200 houses in the county to obtain money for drugs, and that he only got caught on May 8 because he was too high and

"stayed too long." *See supra* p. 13. Indeed, Wiskerchen had a documented pattern of breaking into people's homes. *See supra* pp. 11, 14–15.

4. Wiskerchen does not dispute that N.D. is a victim of a crime considered at sentencing, that his criminal activity caused at least some of N.D.'s losses, and that her losses total over $8,000.

He instead attempts to distinguish his case from *Queever*, 2016 WI App 87. Opening Br. 24. As an initial matter, even if Wiskerchen's case were somehow distinguishable from *Queever*, he is not entitled to relief. The circuit court's order was appropriate because N.D. is a victim of the May 8 burglary and Wiskerchen stole her property valued at over $8,000. *See supra* pp. 29–30. But, in any event, Wiskerchen's case is indistinguishable from *Queever*. *Queever* also involved losses resulting from conduct that the State could have charged as a prior crime. *See* Opening Br. 24 ("Queever's prior burglaries caused the victim to pay to install the security system."). N.D. presented far more evidence than the *Queever* victim that the defendant's unlawful activity caused her losses. In *Queever*, only "susp[icion]" and missing money supported the victim's belief that someone had been burglarizing her home. 2016 WI App 87, ¶¶ 2, 9. Here, the physical evidence, Wiskerchen's admissions, and third-party statements all corroborated N.D.'s testimony that Wiskerchen had been breaking in and taking her property. *See supra* pp. 12–13; R. 16:2; SA 22.

Wiskerchen's criticisms of two pieces of that evidence are futile. Wiskerchen argues that his mother's statements to N.D. are "hearsay." Opening Br. 25 n.6. But, as mentioned above, the court may waive the rules of evidence at restitution hearings. *See* Wis. Stat. § 973.20(14)(d). Wiskerchen also points out that he later denied telling the PSI author that he burglarized 100 to 200 homes. SA 3. But, as the circuit court noted, the PSI author would have had no incentive to fabricate that statement. SA 26. And, at the very least, Wiskerchen admitted that he told the PSI author "that he ha[d] [burglarized homes] a couple of times before," and that he learned how to burglarize homes from a friend. SA 3–4. Other uncontroverted evidence showed that Wiskerchen had a pattern of committing similar offenses. *See* R. 1:2. Wiskerchen's partial denial at sentencing does little to undermine the court's determination that he was responsible for all of N.D.'s losses.[2]

---

[2] Wiskerchen has forfeited any potential constitutional arguments. He does not make any constitutional arguments in his Opening Brief, and mentioned them only briefly on a single page of his Petition for Review. *See* Pet. for Review 2. This Court "generally choose[s] not to decide issues that are not adequately developed by the parties in their briefs," especially those involving constitutional claims. *Cemetery Servs., Inc. v. Wis. Dep't of Regulation & Licensing*, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998). For example, in *McEvoy v. Group Health Co-operative of Eau Claire*, 213 Wis. 2d 507, 530 n.8, 570 N.W.2d 397 (1997), this Court "decline[d] to address" an equal-protection argument because it was "undeveloped and the defendant fail[ed] to cite any authority in support of its position." *Id.* Wiskerchen's "brief[ ] reference" in his PFR without argument or citation, *see id.*, is certainly insufficient to justify this Court's review. Nor did Wiskerchen make constitutional

B. The Restitution Statute Does Not Include A Non-Texutal, *Per Se* Prohibition Against Circuit Courts Considering Losses Not Directly Flowing From The Crime Of Conviction Or Read-In Crimes

Wiskerchen's primary argument on appeal is that the Restitution Statute limits circuit courts to reimbursing victims for only the "crime considered at sentencing" and losses flowing directly therefrom. Opening Br. 11. That position finds no support in the statutory text, is contrary to binding precedent, and would lead to unjust results in other cases like this one.

Wiskerchen first contends that Section § 973.20(1g) imposes this limit on circuit courts. Opening Br. 12 (citing

---

arguments in the circuit court, R. 24; R. 35, or the Court of Appeals, App. 113–14. "[E]ven the claim of a constitutional right will be deemed waived unless timely raised in the circuit court." *See State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997); *accord Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 31, 273 Wis. 2d 76, 681 N.W.2d 190.

Moreover, compensating N.D. for her losses does not violate Wiskerchen's constitutional rights to "fair notice," to present an adequate defense, or to force the State "prove him guilty beyond a reasonable doubt." Pet. For Review 2; *see also United States v. Berrios*, 869 F.2d 25, 32 (2d Cir. 1989)*, abrogated on other grounds by Hughey v. United States*, 495 U.S. 411 (1990). Wiskerchen had "fair notice" that the court would hold him responsible for the losses that he imposed on N.D. Indeed, Wiskerchen understood that he "may be required to pay restitution to the victim of [his] crime" at the plea hearing. R. 33:9. Nor did the restitution order affect Wiskerchen's ability to defend himself or to hold the State to its burden of proof. The restitution order does not adjudicate Wiskerchen's guilt of any crimes other than the offense to which he pleaded guilty: the May 8 burglary. Moreover, Wiskerchen, represented by counsel, had a full and fair opportunity to contest restitution during the hearing. *See supra* pp. 15–16.

State v. Frey, 2012 WI 99, ¶¶ 42–43, 343 Wis. 2d 358, 817 N.W.2d 436); *see also* App. 122 (Hagedorn, J., dissenting). But this argument is contrary to the statutory text. Section (1g) merely defines terms used in the Restitution Statute. "In this section," it states, a "'[c]rime considered at sentencing' means any crime for which the defendant was convicted and any read-in crime." Wis. Stat. § 973.20(1g)(a). It defines "read-in crimes" as those "uncharged or . . . dismissed as part of a plea agreement, that the defendant agrees to be considered by the court at the time of sentencing." *Id.* § 973.20(1g)(b). Section 973.20(1g) does not prevent the court from considering any factor. And the plain language of other sections directs the courts to consider factors *other* than losses caused directly by the crime considered at sentencing. As discussed above, Section 973.20(13) *mandates* that the court consider "factors" "other" than the "losses" from "crime[s] considered at sentencing." Thus, the plain language of the Restitution Statute indicates that the loss directly from a "crime considered at sentencing" is but *one* element of the restitution calculus and that courts *must* consider other factors, including the victim's other losses, if it finds them "appropriate." Wis. Stat. § 973.20(13)(a)5.

Wiskerchen argues that the next section, Section § 973.20(1r), limits the court to reimbursing losses from only crimes considered at sentencing. Opening Br. 11; *see also* App. 121 (Hagedorn, J., dissenting). Again, this position has no textual support. Section 973.20(1r) merely identifies *who*

should receive restitution, not what they can receive restitution for. Wis. Stat. § 973.20(1r) states: "When imposing sentence . . . for any crime, . . . the court . . . shall order the defendant to make full or partial restitution under this section to *any victim of a crime considered at sentencing*." *Id.* (emphasis added). The prepositional phrase "of a crime considered at sentencing" functions as an adjective modifying the noun "victim." So, under Section 973.20(1r), courts must order restitution to any victims of crimes considered at sentencing. N.D. is undisputedly a victim of a crime considered at sentencing. Section § 973.20(1r) does no further work. And, as discussed repeatedly above, other provisions explicitly *permit* a court to consider factors *in addition to* the loss directly from the crime of conviction. *Compare* Wis. Stat. § 973.20(13)(a)1, *with id.* § 973.20(13)(a)5. When the plain language of a statute is clear, this Court must apply it according to its terms. *Kalal*, 2004 WI 58, ¶ 46. It need not embark on a "search for ambiguity." *Hamilton*, 2003 WI 50, ¶ 38.

Wiskerchen then argues that Section § 973.20(2) limits reimbursement to "crimes considered at sentencing" and the losses flowing directly therefrom. Opening Br. 11. But that section does not impose any sort of limit, let alone one on the amount of restitution a court can order. Section 973.20(2) states: "If a crime considered at sentencing resulted in . . . loss . . . of property, the restitution order *may* require" the defendant to "[r]eturn the property" or "pay the owner" the

"reasonable repair or replacement cost" or the "value of the property on the date of" sentencing or of "damage, loss or destruction." *Id.* (emphasis added). The statute uses the word "may," not "shall" or "must." "May" is undoubtedly a discretionary term, *State v. Cox*, 2018 WI 67, ¶ 13, which leaves the court the option not to do what that provision says. Moreover, other provisions of the statute explicitly allow the court to order restitution for losses other than those directly caused by a crime considered at sentencing. *Compare* Wis. Stat. § 973.20(13)(a)1, *with id.* § 973.20(13)(a)5; *see also id.* § 973.20(5).

Wiskerchen claims that circuit courts will struggle to "draw the line" around which losses are appropriately subject to restitution if this Court disagrees with his interpretation of the statute. Opening Br. 23. But circuit courts are frequently tasked with "drawing lines," especially at sentencing. Discretion, by definition, involves some line-drawing. *See* Discretion, *Black's Law Dictionary* (10th ed. 2014) (defining "judicial discretion" as "[t]he exercise of judgment by a judge or court based on what is fair under the circumstances"). As mentioned above, the Restitution Statute is peppered with discretionary language. *See supra* p. 25. This language indicates that the Legislature trusts courts to consider appropriate factors, collect relevant evidence, fairly total the victim's losses, including those from the crime of conviction, and ultimately order just restitution. Indeed, this discretion is consistent with a court's authority to consider a broad range

of information when making other decisions at sentencing: *e.g.*, terms of incarceration and extended supervision and criminal fines. *See State v. McQuay*, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990).

More generally, Wiskerchen's contention that the Restitution Statute limits the circuit court to ordering restitution for losses stemming only directly from "crimes considered at sentencing" would lead to absurd and unjust results. *See Kalal*, 2004 WI 58, ¶ 46. In this case, Wiskerchen would receive a windfall *because* he committed multiple burglaries. The fact that his conduct occurred on different days may make it difficult, if not impossible, for the victim to prove that he stole a particular item on a particular day. As a result, N.D. suffers more than she would if Wiskerchen had unlawfully entered her home and endangered her physical safety only one time. And Wiskerchen would escape responsibility for his criminal actions, *Jackson*, 128 Wis. 2d at 363, because he committed more of them. The Legislature would not have intended this outcome.

Wiskerchen's arguments based upon caselaw fare no better.

This Court's decision in *Frey*, which Wiskerchen quotes, Opening Br. 12, 27, does not support his interpretation of the Restitution Statute. *Frey* held that a court could consider dismissed charges at sentencing as relevant to a "defendant's character" without the defendant's consent. 2012 WI 99, ¶ 47. In a single sentence, the Court off-handedly remarked that

charges "[d]ismissed" during plea bargaining "are not subject to restitution." *Id.* ¶ 43. The Court merely reproduced Wis. Stat. § 973.20(1g) in the opinion, *id.* ¶ 42, but did not analyze the text or interpret it in context with the other multiple provisions of the long Restitution Statute, *see id.* ¶ 73; *compare Kalal*, 2004 WI 58, ¶ 46. Indeed, the scope of the Restitution Statute was not the issue before the Court. "This Court is not bound by its own dicta," *Am. Family Mut. Ins. Co. v. Shannon*, 120 Wis. 2d 560, 565, 356 N.W.2d 175 (1984), especially when the parties did not provide argumentation and the Court did not explain its reasoning on the issue, *see generally Paddock Publ'ns, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 46 (7th Cir. 1996) (United States Supreme Court's "unreasoned dictum" does not "bind the inferior courts").

Wiskerchen next relies upon *State v. Tarlo*, 2016 WI App 81, 372 Wis. 2d 333, 887 N.W.2d 898, Opening Br. 28, but that case similarly does not support his position. In *Tarlo*, the Court of Appeals overruled a court's restitution order not because of timing but because the defendant's "criminal conduct" did not cause the financial losses—another individual's criminal conduct did. 2016 WI App 81, ¶ 1. The State convicted the *Tarlo* defendant of five counts of possession of child pornography. *Id.* ¶ 2. A woman who purported to be the mother of a child in one of those images sought restitution from Tarlo. *Id.* ¶ 3. She wanted compensation for the income support she lost during the time her husband was incarcerated for producing that image. *Id.*

The circuit court ordered the restitution, and the Court of Appeals reversed that decision. *Id.* ¶ 1. Assuming *arguendo* that the mother qualified as a "victim" of "a crime considered at sentencing" as Wis. Stat. § 973.20(1r) requires, the Court of Appeals determined that her *husband*'s criminal activity, not Tarlo's, caused her "financial losses." *Id.* ¶ 8. Because a "bedrock principle" of restitution is that "a defendant should be made liable for the consequences of his own conduct, not the conduct of others," *id.* ¶ 7 (quoting *Paroline v. United States*, 134 S. Ct. 1710, 1725, 1729 (2014) (citations omitted)), the court could not hold Tarlo responsible for the mother's loss, *id.* Therefore, chronology was not the dispositive issue. *See id.*; *see also Queever*, 2016 WI App 87, ¶ 22 (approving of restitution for security system purchased before burglary).

Wiskerchen presents no persuasive reason why *Queever*, 2016 WI App 87, should be overruled. Opening Br. 22; App. 130–31 (Hagedorn, J., dissenting). His argument that the *Queever* order improperly compensated the victim for losses other than those directly flowing from the offense of conviction is based upon his misreading of the Restitution Statute. The court, in its discretion, "appropriate[ly]" decided that Queever should be responsible for the cost of the victim's security system because his criminal conduct caused that expense and restitution was necessary to make her whole. *See* Wis. Stat. § 973.20(1g), (1r), (5), (13)(a)1 & 5. The fact that the court ordered restitution for conduct that could have been charged as a separate crime is unavailing. *See*

Rodriguez, 205 Wis. 2d at 629.[3] If such a limit existed, Wisconsin burglars would argue that they should not be responsible for any stolen items because the State could also have charged them with larceny or theft. Nor are there "practical and policy" reasons to overrule *Queever*. Opening Br. 23. "[R]estitution hearings" would not "turn into minitrials regarding uncharged alleged crimes," Opening Br. 23, because the outcome of a restitution hearing is not a criminal conviction, *see* Wis. Stat. § 973.20(13)–(14). And defense counsel can easily advise clients about restitution by explaining that the defendant might have to compensate "any victim of [his] crime considered at sentencing" for losses resulting from his conduct as the court deems "appropriate" and "just[ ]". *See* Wis. Stat. § 973.20(13)–(14). Indeed, restitution is no less predictable than other sentencing decisions where the court has broad discretion: terms of imprisonment, supervised release, and criminal fines.

Finally, the Supreme Court's interpretation of the federal restitution statute in *Hughey v. United States*, 495 U.S. 411, 416 (1990), does not require Wiskerchen's

[3] Judge Hagedorn states that *Queever* could be distinguished from the Court of Appeals' other decisions because the security system was used to catch the perpetrator and was therefore compensable damage *resulting from* the one burglary he was convicted of. App. 132 & n.3 (Hagedorn, J., dissenting). But the initial purchase of the security system was not damage *resulting from* Queever's later burglary. The cost of *triggering* the system once might be damage resulting from that burglary, but the victim received restitution for the cost of the *entire system*.

interpretation of the Wisconsin Restitution Statute. Authorities from "other jurisdictions" are generally "inapplicable because of the different language employed in their statutes." *Huml v. Vlazny*, 2006 WI 87, ¶ 46, 293 Wis. 2d 169, 716 N.W.2d 807; *see generally State v. Hopkins*, 168 Wis. 2d 802, 815, 484 N.W.2d 549 (1992) (when other authorities "rely on . . . policy that has not been implemented by the Wisconsin Legislature" to interpret statutes, they are "inapplicable"). Many state supreme courts—relying on their State's own restitution statutes—allow courts to compensate victims for losses from a defendant's criminal conduct beyond the offense of conviction. *See Rhode Island v. LaRoche*, 925 A.2d 885, 889 (R.I. 2005); *Kansas v. Hunziker*, 56 P.3d 202, 208 (Kan. 2002); *see generally Maryland v. Stachowski*, 103 A.3d 618, 637–28 (Md. 2014); *Kansas v. Ball*, 877 P.2d 955, 959–60 (Kan. 1994). In any event, in *Hughey*, the United States Supreme Court relied upon "principles of lenity" to resolve any ambiguity in the federal statute in favor of criminal defendants, 495 U.S. at 422, but lenity does not apply in the same way here. The "rule of lenity was developed in the federal courts" and is "echoed in the familiar Wisconsin rule that penal statutes are generally construed strictly to safeguard a defendant's rights." *State v. Kittilstad*, 231 Wis. 2d 245, 267, 603 N.W.2d 732 (1999) (citations omitted). It is unclear whether the Restitution Statute qualifies as a "penal statute." *See State v. Dugan*, 193 Wis. 2d 610, 624, 534 N.W.2d 897 (Ct. App. 1995), *abrogated by State v. Muldrow*,

2018 WI 52, ¶ 35, 381 Wis. 2d 492, 912 N.W.2d 74; *see also State v. Williams*, 2018 WI 59, ¶ 21, 912 N.W.2d 373. And lenity applies only "if a *grievous* ambiguity remains *after* a court has determined the statute's meaning by considering statutory language, context, structure and purpose, such that the court must simply guess at the meaning of the statute." *State v. Guarnero*, 2015 WI 72, ¶ 27, 363 Wis. 2d 857, 867 N.W.2d 400 (emphases added, citations omitted); *State v. Rabe*, 96 Wis. 2d 48, 70, 291 N.W.2d 809 (1980). There is no ambiguity—let alone "grievous ambiguity"—here. The plain language of the Restitution Statute clearly allows courts to go beyond losses directly flowing from the offense of conviction. Moreover, the specific provision about victims in the Wisconsin Constitution provides a counterbalance to the rule of lenity. *See* Wis. Const. art. 1, § 9m. The United States Constitution contains no such provision for victims. Wisconsin clearly intends to "provide greater protections for" crime victims "under the Wisconsin Constitution." *State v. Agnello*, 226 Wis. 2d 164, 180, 593 N.W.2d 427 (1999). And Wisconsin courts are to interpret statutes to be consistent with the Wisconsin Constitution. *See Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 41.

II. If This Court Concludes That The Restitution Order Was Unlawful, It Should Remand For A New Hearing

If this Court finds that the Restitution Statute limits courts to order restitution for losses directly flowing from only

Wiskerchen's May 8 burglary, the Court should remand for an evidentiary hearing. An evidentiary hearing is necessary if the record before this Court "does not sufficiently establish the . . . nature of the damage in the first instance." *Madlock*, 230 Wis. 2d at 337. The Restitution Statute does not limit the number of hearings per case, *see* Wis. Stat. § 973.20(13)(c), but this Court may choose not to order an additional hearing if it would be impossible for a victim to prove that the defendant's criminal conduct caused her losses, *see, e.g.*, *Tarlo*, 2016 WI App 81, ¶ 19 (victim's husband, not defendant, caused her losses). Here, if this Court determines that the circuit court erred, a hearing is necessary to establish which items Wiskerchen took on May 8. *See Madlock*, 230 Wis. 2d at 337. Wiskerchen admits that he took some of N.D.'s property that day in a backpack, including bottles of hard alcohol, some gold, and Percocet. *See supra* p. 13. If this Court reversed without remanding for an evidentiary hearing, Wiskerchen would pay N.D. *no* restitution: an absurd and arguably unlawful result. *See* Wis. Stat. § 972.30(1r) (court must order restitution for May 8 burglary unless it finds "substantial reason" not to and states it on the record); Wis. Const. art. I, § 9m.

CONCLUSION

This Court should affirm the decision of the Court of Appeals.

Dated: July 2, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General

SOPEN B. SHAH
Deputy Solicitor General
State Bar #1105013
Counsel of Record

Wisconsin Department of Justice
17 W. Main Street
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8107
shahsb@doj.state.wi.us

Attorneys for the State of Wisconsin

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,794 words.

Dated: July 2, 2018.

_____

SOPEN B. SHAH
Deputy Solicitor 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: July 2, 2018.

_____

SOPEN B. SHAH
Deputy Solicitor General