

RECEIVED

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

11-30-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2017AP257-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ANGELA C NELLEN,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 11, THE HONORABLE ELLEN K. BERZ, PRESIDING

Erin Hanson
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1037939

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT ON PUBLICATION AND ORAL ARGUMENT . . .	1
STATEMENT OF THE ISSUE	1
ARGUMENT	7
CONCLUSION	18
CERTIFICATION	19
CERTIFICATE OF COMPLIANCE.	20

TABLE OF AUTHORITIES

<u>CASES CITED</u>	<u>PAGE(S)</u>
<u>McCleary v. State</u> , 49 Wis. 2d 263, 278, 182 N.W.2d 512, 520 (1971)	7
<u>State v. Canady</u> , 2000 WI App 87, ¶ 12, 234 Wis. 2d 261, 268, 610 N.W.2d 147, 150. . .	9,10,13
<u>State v. Gibson</u> , 2012 WI App 103, ¶ 10, 344 Wis. 2d 220, 822 N.W.2d 500	14
<u>State v. Harris</u> , 119 Wis. 2d 612, 622, 350 N.W.2d 633, 638 (1984)	7
<u>State v. Holmgren</u> , 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999)	8
<u>State v. Kennedy</u> , 190 Wis. 2d 252, 258, 528 N.W.2d 9 (Ct. App. 1994)	8,9
<u>State v. Madlock</u> , 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999)	14
<u>State v. Queever</u> , 2016 WI App 87, ¶ 21, 372 Wis. 2d 388, 887 N.W.2d 912	9,16
<u>State v. Rash</u> , 2003 WI App 32, ¶5, 260 Wis. 2d 369, 374, 659 N.W.2d 189, 191	7,8,9,15

STATUTES CITED

Wisconsin Statute Section § 805.17(2).	10
Wisconsin Statute Section 973.20	4,8
Wisconsin Statute Section § 973.20(13)(a).	11
Wisconsin Statute Section 973.20(14)(a).	8
Wisconsin Statute Section § 973.20(14)(d).	12

STATEMENT OF THE ISSUE

Did the circuit court properly exercise its discretion in determining the amount of restitution?

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

It is the position of the Plaintiff-Respondent that neither oral argument nor publication is necessary in this case. The issue in this case is straightforward and can be decided based on well-settled case law.

SUPPLEMENTAL STATEMENT OF FACTS

At the restitution hearing, the victims' daughter, M.C., testified regarding the coins for which the victims were requesting restitution. M.C. stated that her father, G.K., was "doing very poorly" with his ALS and dementia (33:4-5). M.C. testified that she was not able to speak with G.K. about any of the items taken from his home because of his health and inability to communicate (33:4-5). In coming up with values for the stolen property, M.C. and her mother, victim K.K., with assistance from M.C.'s brother and sister, did an inventory of the coins kept in the safe (33:5). They also did some internet research to

check the going rates for some of the coins they knew were in the safe (33:6). M.C. testified that they did not really know the quantities, mint or condition of the coins (33:6). M.C. described G.K.'s coin collection as "a really great collection of original silver coins" and further described them as being quarters that were made from silver from the late 18th or 19th centuries (33:6). M.C. testified that G.K. had taught her the difference between the coins when she was a kid (33:6).

M.C. described that G.K. had a whole collection of the valuable silver coins and that he kept them in a tackle box, with different kinds of coins in each section (33:6-7). The tackle box was kept in the safe (33:7).

Based on the internet search and her own notations, M.C. testified that she found the value of the missing silver coins to range between \$3,000 and \$15,000 each (33:8).

When later questioned about the value of tools that had been taken from the home, M.C. stated that she did not have enough knowledge of them to perform an internet search to figure out their value (33:10). She did, however, have enough familiarity with the silver coins to figure out their value because her dad always wanted her to have them,

so he went through the effort of teaching her about them and how to recognize them (33:10).

On cross-examination, M.C. testified that she saw the coin collection in the safe at least once within the last decade (33:13). G.K.'s condition as a hoarder prevented him from writing an inventory of the coins, but the family members knew there were the coins in the safe (33:13). M.C. testified that she recognized that one of the silver quarters that was in the safe was on eBay for over \$15,000 (33:14-15). M.C. could not give a specific date for the coin (33:15).

The circuit court then questioned M.C., confirming that the value of the original silver coins ranged in price based upon the year, the coin denomination, the mint and the condition of the coins (33:18-19). The circuit court confirmed that the range of the value of the coins was between \$3,000 and \$15,000 (33:19). M.C. testified that if a coin had been in very, very poor condition, it would be difficult to give it a value because nobody would be trying to sell it (33:19). There was no testimony that any of the coins stolen from the safe were in such poor condition. M.C. also testified that she believed there were at least 30 to 50 original silver coins in the tackle box (33:20).

Victim K.K. also testified at the restitution hearing. K.K. stated that the locks on her house had been changed three times (33:22). The third time cost her \$168 because the lock company had to change the lock in the garage and the two house locks (33:23). M.C. previously testified that the locks had been changed three times due to the thefts in this case (33:11). On cross-examination, K.K. testified that she could not be sure of the dates that the locks were changed, but believed the dates to be in December and January (33:25). The third time the locks were changed was once "Tom" left the house (33:26). M.C. had previously testified that the tools that had been taken (and pawned) by the defendant were stored in the garage (33:10; 2:2). K.K. confirmed that the tools were kept in the garage and that when she looked, the "...whole counter where the tools are hanging...looked emptier"(33:23).

In its ruling at the restitution hearing, the circuit court stated that "Restitution is primarily governed by Wisconsin Statute 973.20. The burden is on the State to demonstrate by a preponderance of the evidence the amount of loss sustained by a victim..." (33:44). Regarding the locks, the court stated, "The locks on the house, the testimony showed that there were three lock changes valued

at \$50 plus \$50 plus \$168 equals \$268" (33:45). The court commented that "...there are a number of items which there has been testimony as to the value and I have to have some testimony on which to base a value, or some reasonable common life experience that we can all attest to..." (33:45-46). Regarding the silver coins, the court ruled:

Then we have in the safe the tackle box of original silver coins, the value of each being somewhere between 3,000 and 15,000. There were somewhere between 30 and 50 coins, I have to take the least number. I am not valuing them at 500. I see absolutely no basis to value them at \$500. There may indeed be some that are worthless because they've lost their engraving or something. There is certainly going to be some that are more than \$3,000 because of the year, the mint or something along those lines. So I'm valuing them each at \$3,000, the lowest that-that the coin was valued at of that kind. There were at least 30 of them that is \$90,000...

(33:46). The court continued, "Restitution is not to punish... Ms. Nellen, what you did was wrong. We order restitution to compensate the victim" (33:47). The court determined the value of the loss which was proven to the court was \$91,525.50 (33:47). The court stated that it did not believe that Nellen could actually pay the restitution, but that the court would not relieve Nellen of her

responsibility for the total restitution amount (33:48).
The court determined that even paying a token amount of
restitution per month "... is more for Ms. Nellen's
rehabilitation and learning right from wrong..." (33:48).

ARGUMENT

The circuit court properly exercised its discretion in determining restitution.

A. Standard of Review

Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether there was an abuse of discretion. *State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633, 638 (1984) (citing *Elias v. State*, 93 Wis. 2d 278, 286 N.W.2d 559 (1980); *State v. Bernal*, 111 Wis. 2d 280, 286-87, 330 N.W.2d 219 (Ct. App. 1983)). The trial court is afforded the presumption that it acted reasonably based on the strong public policy against interference with the sentencing discretion of courts. See *id.* The trial court misuses its discretion when it fails to articulate the bases for the sentence imposed on the facts of record or when its discretion was exercised based on irrelevant or improper factors. See *McCleary v. State*, 49 Wis. 2d 263, 278, 182 N.W.2d 512, 520 (1971).

A trial court's assessment of restitution is within its discretion; whether a restitution order comports with the statute, however, is subject to the appellate court's de novo review. See *State v. Rash*, 2003 WI App 32, ¶5, 260

Wis. 2d 369, 374, 659 N.W.2d 189, 191 (cited sources omitted).

B. Legal Principles

Wisconsin Statute Section 973.20 directs the circuit court how to proceed with regards to restitution. Section 973.20(14)(a) discusses the burden of proof at restitution hearings: "The burden of demonstrating by the preponderance of the evidence the amount of loss sustained by a victim as a result of a crime considered at sentencing is on the victim." Wis. Stat. Sec. 973.20(14)(a).

The primary purpose of restitution is to "return the victims to the position they were in before the defendant injured them," and, thus, the restitution statute must be construed "broadly and liberally to allow victims to recover their losses resulting from the defendant's criminal conduct." See *State v. Holmgren*, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999); see also *State v. Kennedy*, 190 Wis. 2d 252, 258, 528 N.W.2d 9 (Ct. App. 1994). "Restitution is an important element of the offender's rehabilitation because it may serve to strengthen his or her sense of responsibility and teach the offender to consider more carefully the consequences of his or her actions." *Kennedy*, 190 Wis. 2d at 257-58, 528

N.W.2d 9 (citing *Huggett v. State*, 83 Wis. 2d 790, 798, 266 N.W.2d 403 (1978)).

It is in the trial court's discretion whether there is a sufficient nexus between the defendant's criminal conduct and damage for which restitution is ordered. See *State v. Canady*, 2000 WI App 87, ¶ 12, 234 Wis. 2d 261, 268, 610 N.W.2d 147, 150. "In proving causation, a victim must show that the defendant's criminal activity was a 'substantial factor' in causing damage. The defendant's actions must be the 'precipitating cause of the injury; and the harm must have resulted from 'the natural consequence[s] of the actions.'" *State v. Rash*, 2003 WI App at ¶ 6, 260 Wis. 2d at 374, 659 N.W.2d at 192. (quoting *State v. Canady*, 2000 WI App 87 at ¶ 9, 234 Wis. 2d at 267, 610 N.W.,2d at 150 (quoted sources omitted)). "Precipitating cause" merely means that the defendant's criminal act(s) set into motion events that resulted in the damage or injury. See *Rash*, 2003 WI App at ¶ 7, 260 Wis. 2d at 375, 659 N.W.2d at 192. When determining whether there is a causal nexus between the victim's claimed damage and the crime considered at sentencing, a court should "take a defendant's entire course of conduct into consideration." *State v. Queever*, 2016 WI App 87, ¶ 21, 372 Wis. 2d 388, 887 N.W.2d 912

(quoting *State v. Madlock*, 230 Wis. 2d 324,333, 602 N.W.2d 104 (Ct. App. 1999)(other quoted source omitted)). "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.*

**C. The Circuit Court Properly Exercised Its Discretion In
Determining Restitution**

**1. The Circuit Court Properly Exercised Its
Discretion in Determining the Amount of
Restitution for the Silver Coins**

In determining restitution, the circuit court applied the correct legal standard and grounded its decision on a logical interpretation of the facts. *See State v. Canady*, 2000 WI App 87, ¶ 6, 234 Wis. 2d 261, 610 N.W.2d 147 (citations omitted). The circuit court listened to the testimony of M.C. and K.K. and was in the best position to assess the credibility of the testimony and the weight to be given to the evidence. This Court should give deference to the trial court in assessing the credibility of the witnesses. *See Wis. Stat. § 805.17(2).*

When Nellen claims that the testimony presented at the restitution hearing was based on guesswork (Defendant-Appellant's Brief, p. 10), she ignores the testimony that M.C.'s father, G.K., spent time with her explaining the coins and teaching her how to recognize the coins (33:6,10, 17, 24). Nellen is correct when she states that M.C. was "quite straightforward about what she did and did not know" (Defendant-Appellant's Brief, p. 12). M.C. knew about the coins and, assisted by the internet, was able to tell the court the values of the coins. M.C. felt confident in her abilities to talk about the values of the coins because she had knowledge about the coins; compare this with her hesitancy to even do an internet search about the value of tools that were stolen(33:10). The circuit court was able to weigh the strength of this evidence.

The circuit court applied the proper legal standard, citing the proper burden of proof for a restitution hearing (33:44). The restitution statute allows for a circuit court, in determining whether to order restitution and the amount thereof, to consider the amount of loss suffered by any victim and any other factors which the court deems appropriate. See Wis. Stat. § 973.20(13)(a). The restitution statute further gives a nod towards the court

doing justice, while following the rules of substantive law and letting all parties be heard. See Wis. Stat. § 973.20(14)(d).

The circuit court demonstrated its discernment by not granting restitution when no evidence had been presented as to particular items (33:44-45). The circuit court ordered only the minimum amount of restitution that was rationally able to be discerned. For example, when granting restitution for containers filled with coins, the court granted restitution in the minimal amount of \$100, when the court's experience was that each container would be valued between \$100 and \$200 (33:45). The circuit court continued this when ordering the restitution for the silver coins. The court found that the evidence was that there were between 30 and 50 coins, the court found only 30 coins missing (33:46). In valuing the coins, the victims had initially undervalued the coins, but the court found that it could not rationally accept the undervalued number because there was no basis from which to pick that number (33:46). Instead, the court found that the victims had proven by a preponderance of the evidence, through M.C's testimony, that the silver coins were valued between \$3,000 and \$15,000 each. The court picked the lesser value of

\$3,000 (33:46). The circuit court's discretionary decision can be reversed only if it applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts. See *State v. Canady*, 234 Wis. 2d 261, ¶ 6. The circuit court here applied the correct legal standard and decided restitution based on a logical interpretation of the facts.

The circuit court considered the proper purpose of restitution—to compensate the victim (33:47). With the purpose of returning the victims to the position they were in before the defendant injured them, the court carefully weighed the evidence and decided the minimal amount of restitution to which the victims were entitled. The court desired restitution to be an important part of Nellen's rehabilitation and to help her learn right from wrong (33:48).

Nellen should not now benefit from her own wrongdoing—yes, a detailed inventory of the coins did not exist, but M.C. was familiar with the coins. Because Nellen stole the coins from a victim who has dementia and is unable to communicate, there was no way to determine the precise value of each coin. The circuit court rationally considered this and other facts, applied the proper legal

standard and used a demonstrated, rational process to reach its conclusion in setting restitution—a conclusion a reasonable judge could reach.

2. The Circuit Court Properly Exercised Its Discretion in Determining the Amount of Restitution for the Locks

Restitution to the victim of a crime is the rule, not the exception. See *State v. Gibson*, 2012 WI App 103, ¶ 10, 344 Wis. 2d 220, 822 N.W.2d 500. “Under the restitution statute, the sentencing court takes a defendant’s entire course of conduct into consideration.” *State v. Madlock*, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999)(citation omitted). And again, the circuit court, after listening to the testimony at the restitution hearing, was in the best position to assess the credibility of the testimony and the weight to be given to the evidence. Nellen was appropriately held accountable for the installation of the third lock

Nellen’s course of conduct involved getting her roommate “Tom” to assist her in helping the victims, by remodeling the house and storing items away (2:2). K.K. first had contact with Nellen, but agreed to let Nellen and “Tom” assist her in organizing the household (2:2).

Nellen's own attorney argued that "Tom" was a co-actor and should be held jointly held responsible for the restitution (33:42). Nellen's course of conduct continued by stealing items from G.K. and K.K.'s house and garage (2:2; 33:10; 33:23).

The circuit court properly found a sufficient nexus between the defendant's criminal conduct and the property for which the restitution is ordered. Nellen's criminal activity was a 'substantial factor' in K.K.'s need to have the locks changed three times. Not only did Nellen's actions precipitate the need for the locks to be changed, but the locks being changed were a natural consequence of her actions. See *State v. Rash*, 2003 WI App at ¶ 6 (quoting *State v. Canady*, 2000 WI App 87 at ¶ 9) (quoted sources omitted)). But for Nellen's criminal activities, the victims would not have needed to change their locks.

Nellen claims that she should not be responsible for the third time the locks were changed because she had already been charged with the crime and had a no contact order with the victims when the third set of locks were installed (Defendant-Appellant's Brief, p. 13). However, she fails to recognize two things: first, that it was her course of conduct, stealing from the victims, and

introducing her roommate to steal from them as well, that precipitated the need for the victims to change their locks; second, the third time the locks were changed involved the garage lock being changed (33:23). Nellen stole tools out of the garage (2:2; 33:10; 33:23). Defense counsel's argument at the restitution hearing that "Tom" had continued contact with the victims and even lived with them, and thus somehow should be solely responsible for the changing of the locks the third time, is just that—argument (33:42). No factual information was before the circuit court to support Nellen's argument, to show that the two co-actors were no longer colluding to prey upon the victims, or to discredit the victims' testimony at the restitution hearing.

The circuit court listened to the testimony, weighed the evidence and determined the credibility of the witnesses. The circuit court obviously determined that both M.C. and K.K. were credible. The circuit court was not empowered to break down Nellen's conduct into its constituent parts to ascertain whether one or more parts were a cause of the victims' damages. *See Queever*, 372 Wis. 2d 388, ¶ 21. Instead, the court took Nellen's entire course of conduct into consideration. The evidence was

sufficient to find a causal nexus between Nellen's criminal activities and the cost of the third lock installation. The court did not err in concluding that the victims satisfied their burden of demonstrating their loss by a preponderance of the evidence.

CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court's restitution order in this case.

Dated this 30th day of November, 2017.

Erin Hanson
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1037939

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: 10 characters
per inch; double spaced; 1.5
inch margin on left side and 1
inch margins on the other 3
sides. The length of this brief
is 18 pages.

Dated: November 30, 2017.

Signed,

Attorney

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 30th day of November, 2017.

Erin Hanson
Assistant District Attorney
Dane County, Wisconsin