STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2017AP257-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANGELA C. NELLEN,

Defendant-Appellant.

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On a Notice of Appeal From the Restitution Order and
Amended Judgment of Conviction
Entered in the Circuit Court for Dane County,
the Honorable Ellen K. Berz, Presiding

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# REPLY BRIEF OF DEFENDANT-APPELLANT

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First, the state argues that the court logically interpreted the facts in awarding $90,000 in restitution where the witness "couldn't even make a guess" as to the value of the purportedly missing silver coins and the state requested only $25,000 total restitution. Second, the state argues that Ms. Nellen is lawfully subject to $168 in restitution based on the victims' need to replace their locks for a third time long after Ms. Nellen had committed her offenses and where another person's continuing criminal actions necessitated this final security measure.

This court should reject both of the state's arguments. First, the state's argument concerning the validity of the $90,000 restitution figure is, as was the circuit court's decision, not based on a logical interpretation of the evidence introduced at the restitution hearing. Second, the state's argument concerning the third lock replacement ignores the established timeline that showed Ms. Nellen's "course of conduct" had long ceased and had been interrupted by another person's actions before the victims' were forced to change their locks a final time.

### A. The circuit court's $90,000 restitution award is based on an illogical interpretation of the facts.

At the restitution hearing, the victims had the burden to prove, by a preponderance of the evidence, the amount of loss sustained as a result of Ms. Nellen's crimes. Wis. Stat. § 973.20(14)(a). A preponderance of the evidence finding cannot be based on guesswork. *See* WIS JI-CIVIL 200 at 4 ("The Committee feels that "greater weight is an exact synonym for "fair preponderance"). Guesswork, however well intentioned, is not evidence that has a "convincing power" or may be believed "in light of reason and common

sense." (*Id*. at 1). Further, a witness' "guess" as to the quantity and quality of purportedly missing property is "not enough to meet the burden of proof." (*Id*.).

In its attempt to provide support for the circuit court's restitution award, the state exaggerates M.C.'s testimony about the purportedly missing silver coins: First, the state claims that M.C. and her family "did an inventory of the coins kept in the safe." (State's brief at 1). What M.C. actually testified to is that the family "kind of did an inventory" from memory. (33:5-6). M.C. also confirmed that there was no written inventory of the silver coins (33:13). Second, M.C. never "found the value of the missing silver coins to range between $3,000 and $15,000 each" (State's brief at 2). Rather M.C. testified that her Google search resulted in coins ranging in value between $3,000 and $15,000, "so we kind of went with, you know, 500 each." (33:8-9). M.C.'s testimony is clear that she was forced to guess as to the quantity, quantity, and the ultimate value of the purportedly missing coins.

While the state attempts to rely on the M.C.'s testimony that her father, G.K., "spent time with her explaining the coins and teaching her how to recognize the coins" (state's brief at 11), the state fails to directly respond to C.M.'s honest assessment that she could only "guess" as to the actual value of any missing coins. (33:5-6, 8-9, 19-20). While the state attempts to argue that the victims originally undervalued the coins at $500 apiece, the record is clear that the $500 figure itself was a guess. (State's brief at 12, 33:8-9). The victim's "undervalued" guess is no more logical than the court's overvalued $90,000 restitution award because both figures are based on an undisputedly unknown quantity and quality of missing silver coins. Based on the testimony at the restitution hearing, the court's restitution award is not based on a logical interpretation of the facts.

B. The circuit court was unauthorized to order $168 in restitution for the cost to replace the locks on the victims' home a third and final time.

Restitution may be ordered to "any victim of a crime considered at sentencing." Wis. Stat. § 973.20(1r). In ordering restitution to a victim for a "crime considered at sentencing," a circuit court may take a *defendant's* entire course of criminal conduct into consideration. ***State v. Canady***, 2000 WI App 87, ¶10, 234 Wis. 2d 261, 610 N.W.2d 147.

As previously argued (initial brief at 12-14), the testimony shows that Ms. Nellen's course of criminal conduct terminated at least when she was charged and booked and released in this case on December 11, 2016. (33:41-42). Further, it is undisputed that Ms. Nellen's co-actor, Thomas Gannon, Jr., was charged with 26 counts of misappropriation in Dane County Case No. 2016-CF-1663 for offenses he allegedly committed from December 31, 2015 to February 1, 2016. (Initial brief at 6, fn.2). Moreover, K.K. testified that the final lock replacement was after Mr. Gannon left the house. (33:26). Thus, logically, K.K. changed her locks for a final time (1) at some point after February 1, 2016, (2) well after Ms. Nellen had terminated her course of conduct, and (3) after Mr. Gannon committed his own crimes against the victims. The person whose conduct was a substantial factor in the third and final lock replacement was Mr. Gannon, not Ms. Nellen.

## CONCLUSION

For the reasons stated above, and as argued in Ms. Nellen's initial brief, the circuit court erroneously exercised its discretion in ordering Ms. Nellen to pay $90,000 in restitution for the silver coins and $168 in restitution for the cost to replace the locks on the victims' home for a third time. Those portions of the circuit court's restitution order should therefore be reversed, and Ms. Nellen's judgment of conviction should be amended accordingly.

Dated this 15th day of December, 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 917 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of December, 2017.

Signed:

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