

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1054-CR

Cir. Ct. No. 2013CF1549

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH R. WAMSER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Judgment affirmed in part, reversed in part; order reversed and cause remanded with directions.*

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Kenneth R. Wamser appeals from that portion of a judgment of conviction requiring him to pay \$4698.32 in restitution, and from an order denying his postconviction motion to reduce the restitution amount by

\$4000. Wamser contends that there is insufficient evidence establishing a causal nexus between his burglary and the victim's claimed \$4000-loss of two necklaces. We agree, so we reverse the order and the portion of the judgment imposing restitution for the jewelry, and we remand this matter to the circuit court with directions to amend the judgment of conviction to reflect an obligation of \$698.32.

BACKGROUND

¶2 On April 30, 2013, Wamser broke into his aunt's home, stealing porcelain figurines, baseball cards, and a flute. While police were on the scene, Wamser returned to the scene and returned the items he had taken. Wamser pled guilty to one count of burglary and was sentenced to two years' initial confinement and two years' extended supervision. The restitution hearing was set for a later date.

¶3 Prior to the hearing, a restitution worksheet was submitted. The worksheet had been prepared by the victim's niece, who had acquired power-of-attorney for the victim in March 2013, after the victim's husband died. This worksheet claimed \$560 for damage to a door that Wamser had used to enter the home, plus \$6000 for three necklaces. A supplemental worksheet later revised the door damages to \$699.42.

¶4 At the restitution hearing, only the victim's niece testified. She said that Wamser had called her shortly after the burglary and told her what he had done, so she went to her aunt's home and waited for police. When police were there, she called the victim, who told her to check a bathroom drawer for jewelry. There was a "bare spot" in the back of the drawer instead of the jewelry. Wamser denied taking the jewelry. Only two necklaces were reported missing to police,

and the circuit court awarded \$4000 restitution for those two pieces. The circuit court also awarded \$698.32 for damage to the door, as documented by receipts.

¶5 Wamser moved for modification of the restitution order, arguing that any finding he had stolen jewelry was speculative and that no causal nexus existed between his burglary and the victim's loss. Specifically, the niece had testified that the victim was in a nursing home and had not lived in her home for at least five years preceding the burglary. However, the victim's husband was residing in the home until his death in March 2013. The niece also said that she had not been in the home in at least five years. Thus, neither the victim nor her representative could say when the necklaces had last been seen, only that they were no longer in the house. The circuit court concluded that it was reasonable to infer the necklaces had been in the home before the burglary and that Wamser had taken them, so it denied the motion.

DISCUSSION

¶6 “We review an order [for] restitution under the erroneous exercise of discretion standard of review.” *State v. Haase*, 2006 WI App 86, ¶5, 293 Wis. 2d 322, 716 N.W.2d 526. “We may reverse a discretionary decision only if the trial court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts.” *State v. Behnke*, 203 Wis. 2d 43, 58, 553 N.W.2d 265 (Ct. App. 1996).

¶7 There is no dispute that the circuit court could impose restitution generally. *See* WIS. STAT. § 973.20(1r) (2011-12) (“When imposing sentence ... for any crime ... for which the defendant was convicted, the court ... shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing ... unless the court finds substantial reason not to

do so[.]”¹ “Before restitution can be ordered, a causal nexus must be established between the ‘crime considered at sentencing’ and the disputed damage.” *State v. Canady*, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 610 N.W.2d 147 (citation omitted). “[A] causal link for restitution purposes is established when ‘the defendant’s criminal act set into motion events that resulted in the damage or injury.’” *State v. Johnson*, 2005 WI App 201, ¶13, 287 Wis. 2d 381, 704 N.W.2d 625 (citation omitted). The victim carries the burden of proving the loss sustained due to the crime by a preponderance of the evidence. See WIS. STAT. § 973.20(14)(a); see also *State v. Madlock*, 230 Wis. 2d 324, 336, 602 N.W.2d 104 (Ct. App. 1999).

¶8 The circuit court awarded the victim \$4000 for the two necklaces she had reported missing to the police. Wamser, who returned other items he had taken, denied taking the jewelry. However, the circuit court, in ordering restitution, explained that Wamser:

was also found with having plastic gloves in his possession at the time of the arrest which would indicate why there was no fingerprints which obviously indicates to me that he had a little bit better idea of what he was in there for than he might want to indicate here today.

I believe that \$4,000 in lost necklaces certainly has been brought to the Court’s attention and part of the reported loss here.

....

Now, it’s the claimant’s position that they were there. Now, when they were last there is when she last saw them. She has no reason to believe why they would be gone subsequent to that.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

There was also, and I think importantly, an observation by [the niece] in response to her aunt's checking on the necklaces and their whereabouts noted that the black case in which they were kept in the back of the drawer in the bathroom was noticeably absent at that point. I think the inference is yes, it was there, and yes, the inference is that it was taken in this burglary. I think that's the reasonable inference to be given.

We disagree with this conclusion.

¶9 This is not a case where, before moving to the nursing home, the victim boxed up her possessions and put them in a secured space to which only she had the key. In such a case, we could agree that she would have no reasonable explanation for how the jewelry had gone missing. Instead, her jewelry was in her home, where her husband resided until about six weeks before the burglary. It had been at least five years since the victim had seen her necklaces. Neither the victim nor her niece knows whether some guest to the home may have taken the jewelry or whether the victim's husband might have moved, sold, donated, or given away the jewelry. Further, while the niece's testimony appears to imply that the jewelry had only been recently removed, she has no basis for concluding Wamser was the person who removed it because she has no way to know what the drawer looked like before she checked it or how long it looked that way.

¶10 Certainly, Wamser could have been the person who took the jewelry. However, given his denial and the return of all of the other stolen property, along with the niece's lack of personal knowledge regarding the jewelry and the time elapsed since even the victim last saw the jewelry, we cannot say it has been established by a preponderance of the evidence that Wamser is responsible for the jewelry's absence.

¶11 Accordingly, we reverse the portion of the judgment awarding \$4000 in restitution and the order denying the motion to adjust the restitution amount.² We remand this matter to the circuit court with directions to enter an amended judgment of conviction requiring Wamser to pay \$698.32 in restitution.

By the Court.—Judgment affirmed in part, reversed in part; order reversed and cause remanded with directions.

This opinion shall not be published. See WIS. STAT. RULE 809.23(1)(b)5.

² Wamser also raised a challenge to the manner in which the missing jewelry was valued. However, based on the holding herein, we need not reach this second issue.

