COURT OF APPEALS
DECISION
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Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1541-CR **Cir. Ct. No. 2015CF742**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAWN T. WISKERCHEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 REILLY, P.J. Shawn T. Wiskerchen appeals from the restitution component of a judgment convicting him of burglary. Wiskerchen contends the court erred in ordering $8487.41 in restitution for losses not caused by a crime considered at sentencing. We conclude that under the reasoning set forth in ***State***

v. Queever, 2016 WI App 87, 372 Wis. 2d 388, 887 N.W.2d 912, there was a causal nexus between the victim's missing items and Wiskerchen's final burglary of her home. We affirm.

BACKGROUND

¶2 On May 8, 2015, police responded to the home of N.D. for a report of a home burglary. N.D. told officers that she arrived home around noon to discover that all the cabinets in her bathroom were open and she heard noises upstairs. N.D. went upstairs and found Wiskerchen, her neighbor, and a struggle ensued. Wiskerchen threw N.D. down the stairs and fled. Officers found Wiskerchen hiding in the backyard of a neighboring home.

¶3 Wiskerchen was charged with misdemeanor battery, possession of burglarious tools, burglary of a building or dwelling, and second-degree recklessly endangering safety, all as a repeater. A plea agreement was reached in which Wiskerchen pled no contest to burglary, without the repeater; the remaining charges were dismissed and read in; and the State agreed not to issue any additional charges in the case. Wiskerchen was sentenced to five years' initial confinement and four years' extended supervision.

¶4 N.D. sought restitution for her losses, totaling $32,138.43.[1] At Wiskerchen's request, the court held a restitution hearing. N.D. admitted at the hearing that she had "no idea which [items] were taken on May 8 and which were taken the other times that he entered my home illegally." N.D. testified that

[1] N.D. submitted her losses to her insurance company which depreciated the value of the stolen items to $22,279. N.D.'s insurance company reimbursed her the policy limit of $13,791.59.

Wiskerchen's mother informed her that Wiskerchen "had been in [N.D.'s home] numerous times" because N.D.'s medication was in the mother's home. N.D. also testified that she discovered that Wiskerchen had made a "nest" in one of her closets, as she discovered liquor bottles and it appeared that he "hid out" there during the day. Wiskerchen told the presentence investigation (PSI) writer that N.D. was lying "about how many items were taken." Wiskerchen admitted that he had burglarized about 100 to 200 homes, that he takes the stolen items to Illinois to sell, and that he was never caught.

¶5 The circuit court determined that it could consider the prior burglaries as conduct related to Wiskerchen's May 8 burglary and ordered restitution in the amount of $8487.41—the difference between the depreciated value of the items stolen and the payment from N.D.'s insurance company. Wiskerchen appeals.

DISCUSSION

¶6 Wiskerchen argues that the circuit court erred in its restitution order as N.D. failed to meet her burden to show that her losses were caused by a crime considered at sentencing. We disagree. In disputes concerning the calculation of criminal restitution, we review the decision of the circuit court for an erroneous exercise of discretion. ***State v. Canady***, 2000 WI App 87, ¶6, 234 Wis. 2d 261, 610 N.W.2d 147. "We may reverse a discretionary decision only if the circuit court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts." ***Id.*** "Whether the trial court is authorized to order restitution pursuant to WIS. STAT. § 973.20 under a certain set of facts presents a question of law that we review *de novo*." ***State v. Lee***, 2008 WI App 185, ¶7, 314 Wis. 2d 764, 762 N.W.2d 431.

¶7 Restitution in a criminal case is governed by WIS. STAT. § 973.20 (2015-16).[2] As applicable, the statute provides:

> When imposing sentence or ordering probation for any crime … for which the defendant was convicted, the court, in addition to any other penalty authorized by law, 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 and states the reason on the record.

Sec. 973.20(1r). The phrase "crime considered at sentencing," found in subsection (1r), is defined as "any crime for which the defendant was convicted and any read-in crime."[3] Sec. 973.20(1g)(a). To order restitution, the court must find a "causal nexus" between the "crime considered at sentencing" and the victim's alleged damage. ***Queever***, 372 Wis. 2d 388, ¶11 (quoting ***Canady***, 234 Wis. 2d 261, ¶9). "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.'" ***Queever***, 372 Wis. 2d 388, ¶11 (alteration in original; citation omitted). The victim has the burden of demonstrating his or her loss by a preponderance of the evidence. Sec. § 973.20(14)(a).

¶8 "A primary purpose of restitution is to compensate the victim." ***State v. Gibson***, 2012 WI App 103, ¶10, 344 Wis. 2d 220, 822 N.W.2d 500. The mandatory language ("shall") contained in WIS. STAT. § 973.20(1r) "creates a

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] The statute defines a "read-in crime" as "any crime that is uncharged or that is dismissed as part of a plea agreement, that the defendant agrees to be considered by the court at the time of sentencing and that the court considers at the time of sentencing the defendant for the crime for which the defendant was convicted." WIS. STAT. § 973.20(1g)(b).

presumption that restitution will be ordered in criminal cases," absent a substantial reason. ***Gibson***, 344 Wis. 2d 220, ¶10. The restitution statute "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 252, 258, 528 N.W.2d 9 (Ct. App. 1994). To that end, "the restitution statute should be interpreted broadly and liberally in order to allow victims to recover their losses as a result of a defendant's criminal conduct." ***Gibson***, 344 Wis. 2d 220, ¶10.

¶9 Consistent with these general principles, in ***Queever***, the defendant was ordered to pay restitution to the victim for the expenses she incurred to install a home security system after her home had been burglarized multiple times. ***Queever***, 372 Wis. 2d 388, ¶¶1-2. After agreeing with the circuit court that Queever committed previous burglaries of the victim's home, we found that the prior uncharged burglaries were "related to" the attempted burglary that was considered at Queever's sentencing. ***Id.***, ¶22. We reiterated that "the statutory term 'crime considered at sentencing is defined in broad terms.'" ***Id.***, ¶21 (quoting ***Canady***, 234 Wis. 2d 261, ¶10). "It encompasses 'all facts and reasonable inferences concerning the defendant's activity *related to* the "crime" for which the defendant was convicted, not just those facts *necessary* to support the elements of the specific charge of which the defendant was convicted.'" ***Queever***, 372 Wis. 2d 388, ¶21 (quoting ***State v. Madlock***, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999)). "Accordingly, 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.'" ***Queever***, 372 Wis. 2d 388, ¶21 (quoting ***Madlock***, 230 Wis. 2d at 333). Where the circuit court concludes that prior unlawful actions "were part of a single course

of criminal conduct," the court may consider those actions to be "part of the 'crime considered at sentencing.'" ***Queever***, 372 Wis. 2d 388, ¶22 (citation omitted).

¶10 We conclude that the circuit court did not err in finding a causal nexus between Wiskerchen's entire course of conduct and N.D.'s losses and that ordering Wiskerchen to pay restitution for losses incurred as a result of prior uncharged burglaries was proper under this court's decision in ***Queever***. Wiskerchen argues that "[t]he victim failed to establish that she suffered any loss as a result of the May 8, 2015 burglary" and that "there is a lack of evidence to establish that the prior burglaries of the victim's home actually occurred, let alone that Mr. Wiskerchen was responsible for those alleged crimes." We disagree since the court found N.D. credible, as demonstrated by the circuit court's acceptance of her testimony and acceptance of her losses. It was not error for the circuit court to conclude that Wiskerchen's criminal behavior was a "substantial factor" in causing that damage. *See* ***id.***, ¶11.

¶11 The State does not dispute that Wiskerchen was neither charged with prior burglaries of N.D.'s home nor were the burglaries read-in charges. *See* WIS. STAT. § 973.20(1g)(a)-(b). Wiskerchen was, however, convicted of burglary of N.D.'s home on May 8, and construing "a crime for which the defendant was convicted" broadly, we are authorized to consider Wiskerchen's entire course of criminal conduct, including "all facts and reasonable inferences," as it relates to the crime of conviction. *See* ***Queever***, 372 Wis. 2d 388, ¶21. Prior to May 8, Wiskerchen entered N.D.'s home "through a rear basement window … that took some planning. That took some time," as Wiskerchen had drilled a hole in the basement storm window so it could be opened with a screwdriver, and Wiskerchen's mother admitted that she knew that Wiskerchen was repeatedly

going into N.D.'s house. The court also recognized N.D.'s discovery of Wiskerchen's "nest" in one of her back closets with liquor bottles, and it appeared that Wiskerchen "actually hid out during the day" in N.D.'s closet. The court also took into account Wiskerchen's admission that he "burglarized between one hundred to two hundred homes and had never been caught." The circuit court concluded that "[b]ased on the record, I find that there is a nexus between Mr. Wiskerchen's conduct and the victim's loss, and I find that the victim has met her burden of proof."

¶12 As in ***Queever***, we find a sufficient causal nexus that the prior burglaries of N.D.'s home were "related to" the May 8 burglary as 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 (Wiskerchen likely used his "nest" while N.D. was at work). *See* ***id.***, ¶22. Wiskerchen's burglary of N.D.'s home on May 8 was merely the last in a series of invasions.[4] Accordingly, we conclude that the circuit court did find by a preponderance of the evidence that Wiskerchen committed the other burglaries at N.D.'s home.[5] We reject Wiskerchen's suggestion that ***Queever*** "sets the bar high for the type of evidence needed to sustain a restitution award" since there was "video footage of

[4] We recognize that the standard of evidence necessary to convict a defendant of a crime is different than the standard necessary to order restitution, and while the evidence presented in this case is sufficient to uphold the circuit court's findings as to restitution, the same might not be true had Wiskerchen been charged with the prior burglaries. *See* ***State v. Queever***, 2016 WI App 87, ¶21, 372 Wis. 2d 388, 887 N.W.2d 912 (noting that the court's restitution review "encompasses 'all facts and reasonable inferences concerning the defendant's activity *related to* the "crime" for which the defendant was convicted, not just those facts *necessary* to support the elements of the specific charge.'" (citation omitted)).

[5] "Proof by a preponderance of the evidence would require a mere showing that it is more likely than not" that the burglaries occurred. ***State v. West***, 2011 WI 83, ¶80, 336 Wis. 2d 578, 800 N.W.2d 929.

the prior break-ins." Such an impossible standard is an unreasonable interpretation of the ***Queever*** decision and would eviscerate the mandate to broadly interpret the restitution statute.

CONCLUSION

¶13 Based on the facts in this case, the evidence was sufficient to find a causal nexus demonstrating that the prior burglaries were "part of a single course of criminal conduct" related to the May 8 burglary and subject to restitution. ***Id.***, ¶22. The court did not err in concluding that N.D. satisfied her burden of demonstrating her loss by a preponderance of the evidence. Accordingly, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶14 HAGEDORN, J. (*dissenting*). Our criminal restitution statute serves noble purposes, and our cases instruct us to interpret it broadly and liberally to further those goals. However, in fulfilling our mandate to broadly and liberally interpret the statute, we must not disregard our duty to actually *interpret* the statute.

¶15 The majority errs on two grounds. First, the majority sanctions a restitution award that the restitution statute, by its plain language, does not authorize. The alleged prior-committed crimes here are not crimes "considered at sentencing" as defined in WIS. STAT. § 973.20 and are therefore not permissible bases for restitution. Second, the circuit court erred in concluding that Wiskerchen's single burglary occurring on May 8, 2015, caused losses resulting from prior burglaries. Finding such a causal nexus was not only an unreasonable conclusion, it was a logical impossibility, and hence, an erroneous exercise of discretion. Accordingly, I dissent.

The Restitution Award is Legally Impermissible

¶16 Whether a court has statutory authority to order restitution under WIS. STAT. § 973.20 is question of law we review de novo. *See* ***State v. Rash***, 2003 WI App 32, ¶5, 260 Wis. 2d 369, 659 N.W.2d 189.

¶17 WISCONSIN STAT. § 973.20(1r) provides that "unless the court finds substantial reason not to do so," a court "shall order … restitution" for "a crime considered at sentencing." This statutory phrase can easily be confused with its colloquial meaning. While sentencing courts ordinarily "consider" all sorts of

alleged crimes during a sentencing hearing—whether charged or uncharged, convicted or not[1]—the phrase is a defined term in the law.

¶18 WISCONSIN STAT. § 973.20(1g)(a) states that a "crime considered at sentencing" only includes two categories: a) "any crime for which the defendant was convicted" and b) "any read-in crime." "Read-in crime" is further defined to include "any crime that is uncharged or that is dismissed as part of a plea agreement, that *the defendant agrees to be considered* by the court at the time of sentencing and that the court considers at the time of sentencing the defendant for the crime for which the defendant was convicted." Sec. 973.20(1g)(b) (emphasis added).

¶19 This means that not all alleged crimes discussed at a sentencing hearing are permissible bases on which to award restitution. Rather, restitution is only permissible if the crime was the one the defendant was convicted of, or if the crime was "read-in" as defined by WIS. STAT. § 973.20(1g)(b).

¶20 Wiskerchen pled no contest to burglary (along with other charges dismissed and read in that are not relevant to this case). Wiskerchen's victim, N.D., sought restitution for a lengthy list of items she alleged had been stolen from her property. She estimated the loss at $32,138.43. Her insurance company depreciated the value of her lost items to $22,279 and reimbursed her up to her policy limits of $13,791.59.

[1] "Evidence of unproven offenses involving the defendant may be considered by the court" at sentencing. ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990).

¶21 At the restitution hearing, it became abundantly clear that these items were taken during what appeared to be a series of burglaries, not just the May 8 burglary to which Wiskerchen pled guilty. N.D. testified that following her encounter with Wiskerchen in her home on May 8, she took an inventory to see what was missing. The list submitted to the insurance company cited seventy-four missing items, including items quite difficult to fit into the single backpack Wiskerchen was carrying when confronted—a guitar amplifier, multiple power tools, a gaming system, a BB gun, and a crockpot. She testified as follows at the restitution hearing:

> Q: Going through this list, which items were taken on May 8 when this incident happened?
>
> A: I have no idea which were taken on May 8 and which were taken the other times that he entered my home illegally.
>
> Q: When you saw him on May 8 did he have anything in his hands?
>
> A: No, he had a backpack.
>
> Q: Do you know what was in the backpack?
>
> A: I presume it was my stuff.
>
> Q: Do you know what was in the backpack?
>
> A: No.
>
> Q: Do you know if the police searched his residence—Mr. Wiskerchen's residence at some point in time during the investigation?
>
> A: I believe that they did, but I was at the hospital at that point.
>
> Q: Okay, there were some items recovered, correct?
>
> A: I haven't seen anything yet.
>
> Q: Okay, did you see the police reports in this matter?

> A: I don't think I did.
>
> Q: Okay, so you don't know if the police recovered any items? They didn't tell you that they did?
>
> A: I think they recovered a couple of earrings that they found in his home.
>
> Q: And a necklace?
>
> A: A necklace with a butterfly on it.
>
> Q: And those aren't things that you have claimed in your claim?
>
> A: No, they are not.

N.D. also admitted that Wiskerchen was carrying nothing when he left her house except the backpack. When asked whether Wiskerchen could have fit all of the numerous and bulky missing items into the backpack, she responded in the negative. But she reiterated that she believed that Wiskerchen had been in her house over a period of "many days," citing the admission of Wiskerchen's mother.

¶22 In rendering its ruling, the court noted that N.D. relayed to "the PSI writer how Mr. Wiskerchen's mother told her how the defendant had been in her home many times prior to actually being caught." Relying further on the PSI, the court recounted N.D.'s assertion that Wiskerchen "made what [N.D.] referred to as a nest in the back of her closet where she discovered liquor bottles, and it appeared that he had hid out during the day when she was at work." The court acknowledged N.D.'s testimony that the items were taken over multiple days and that "she could not say what items the defendant took on May 8th." The court nevertheless concluded that "there is a nexus between Mr. Wiskerchen's conduct and the victim's loss" and granted the entirety of N.D.'s request. The circuit court awarded N.D. $8487.41, which represented the difference between the depreciated value of all the items and the amount she had already received from her insurance

company. Thus, the restitution award here was based not only on the May 8 burglary, but prior burglaries that the circuit court concluded Wiskerchen had committed.

¶23 The restitution Wiskerchen was ordered to pay was not based on crimes "considered at sentencing" under the statute. The record is clear that the prior alleged burglaries were not dismissed as part of the plea agreement, nor is there any evidence that Wiskerchen agreed that these uncharged crimes could be considered at sentencing as the statute plainly provides. Thus, as even the State concedes, these were not "read-in crime[s]" as defined by WIS. STAT. § 973.20(1g)(b). Second, these prior alleged burglaries were not, by any stretch, crimes "for which the defendant was convicted." Sec. 973.20(1g)(a). Wiskerchen was convicted of only one burglary—the one that occurred on May 8, 2015.

¶24 It does not matter that evidence was presented at the sentencing hearing to the effect that Wiskerchen likely committed prior burglaries of N.D.'s home and had a "nest" there during the workday, awful as these allegations are if true. Nor does it matter that the circuit court relied on this evidence and effectively found that Wiskerchen likely did commit these crimes when awarding restitution. By the plain language of the statute, these crimes were not "considered at sentencing" because these were not the crimes for which he was convicted, nor

were they "read in" within the meaning of the statute.[2] The restitution ordered here was not authorized by law.

¶25 Even so, the majority reaches a contrary outcome. How can that be? This case, I think, illustrates a common pitfall in common law decision-making. Sometimes courts, when construing a statutory or constitutional provision, establish a doctrinal framework or further amplify a defined term to aid in deciding a case. But over time, courts can fall into the trap of using the doctrinal framework or amplification to the exclusion of the text of the law itself. And pretty soon, cases like this one arise that are entirely unjustifiable when analyzed under the statutory or constitutional provision they are purportedly based on.

¶26 The majority's decision cannot be justified by the statutory language; it makes no real attempt to do so. Rather, it rests instead on explanatory language from prior cases interpreting the statute. In doing so, it takes that language out of context and creates a path to restitution under a new and expanded legal framework that is unmoored from the statutory text.

¶27 Prior cases have made clear, as the majority notes, that "a crime considered at sentencing" includes "a defendant's entire course of conduct." ***State***

[2] The current restitution statute was amended to codify ***State v. Szarkowitz***, 157 Wis. 2d 740, 460 N.W.2d 819 (Ct. App. 1990). ***Szarkowitz*** held that the then-statute's allowance of restitution for "any victim of the crime" includes "victims of any crimes to which the defendant admits as part of the read-in procedure as well as victims of the particular crime for which he is convicted." ***Id.*** at 746, 754. This removes any doubt, if there was any, that the current statutory language, for nonread-in crimes, allows restitution only for the "particular crime for which he is convicted," not like crimes. *See also* ***State v. Mattes***, 175 Wis. 2d 572, 581, 499 N.W.2d 711 (Ct. App. 1993) (explaining that "our [original] restitution statute was modeled on a federal statute which has been interpreted by the United States Supreme Court to authorize an award of restitution only for the loss caused by the specific conduct that constitutes the basis for the offense of conviction," and "restitution to a party with no relationship on the record to the crime of conviction ... or to read-in crimes is improper").

v. Rodriguez, 205 Wis. 2d 620, 627, 556 N.W.2d 140 (Ct. App. 1996). Similarly, we have described restitution as including "all facts and reasonable inferences concerning the defendant's activity related to the 'crime' for which the defendant was convicted, not just those facts necessary to support the elements of the specific charge." ***State v. Canady***, 2000 WI App 87, ¶10, 234 Wis. 2d 261, 610 N.W.2d 147 (emphasis added; citation omitted). The cases themselves give important context to this language.

¶28 ***Rodriguez*** concerned whether restitution was allowable for a hit-and-run driver who, in the course of his crime, caused the death of a bicyclist. ***Rodriguez***, 205 Wis. 2d at 624. Rodriguez argued that since he was only charged with fleeing the scene, there was no causal link between this crime and the death of the person he hit. ***Id.*** We explained that the restitution statute encompasses the defendant's "entire course of conduct" when committing the crime, not just the specific elements of the crime itself. ***Id.*** at 627-29. Thus, consistent with the language of the restitution statute, Rodriguez stands for the simple proposition that, in the commission of a crime, all of the conduct related to the commission of *that crime* is a permissible subject of restitution.

¶29 Similarly, ***State v. Madlock***, 230 Wis. 2d 324, 326, 602 N.W.2d 104 (Ct. App. 1999), concerned damage to a stolen vehicle. Madlock pled no contest to operating a vehicle without the owner's consent—though he was not charged with stealing the vehicle. ***Id.*** at 326-27. Madlock challenged the circuit court's order that he pay restitution for damage to that vehicle after it was stolen. ***Id.*** at 327. He argued that the damage must have occurred in the four to six days between when it was stolen and when he (admittedly) drove it illegally. ***Id.*** Of particular note here, the court cited the "entire course of conduct" language in ***Rodriquez*** and overturned the restitution award. ***Madlock***, 230 Wis. 2d at 333-34.

The court explained that "for a restitution order to be appropriate, the crime must have some nexus to the damage." ***Id.*** at 334. The court pointed to statutory language requiring the loss be the "*result of* a crime considered at sentencing," and that damages be for "*conduct in the commission of a crime*." ***Id.*** The court found evidence of actual damage lacking and established the clear principle that the defendant's conduct must be "the precipitating cause of the injury," the harm flowing as "the natural consequence" of that conduct. ***Id.*** at 333 (citation omitted). As another court put it, "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. Longmire***, 2004 WI App 90, ¶13, 272 Wis. 2d 759, 681 N.W.2d 534 (quoting ***Rash***, 260 Wis. 2d 369, ¶7).

¶30 In ***Canady***, the restitution award involved damages resulting from Canady's conviction for resisting an officer when, during a struggle, the officer threw a pry bar and damaged a door. ***Canady***, 234 Wis. 2d 261, ¶11. The court reiterated that we must look to the "entire course of conduct"; it is not just the crime itself, but activity *related to* the crime. ***Id.***, ¶10 (citation omitted). Thus, the court determined that the crime itself—resisting an officer—was a substantial factor in causing damage to the door, and hence, the restitution award was affirmed. ***Id.***, ¶12. "But for" the burglary and resisting arrest, the damage would not have occurred. ***Id.***

¶31 All of these cases put "course of conduct" into context. Restitution is appropriate for activity by the convicted criminal "related to" the crime, as the majority notes. Majority, ¶12. However, this means that restitution must always "relate to" the specific crime for which the defendant was convicted—i.e., the broader course of conduct associated with the commission of *that particular*

crime. The logic and language of the statute are in accord with these well-established and uncontroversial principles.

¶32 In the midst of this background, this court recently decided ***State v. Queever***, 2016 WI App 87, 372 Wis. 2d 388, 887 N.W.2d 912, on which the majority principally relies. The facts of ***Queever*** are, in many respects, quite similar. A home was subject to repeated burglaries, but attempts to catch the perpetrator were unsuccessful. ***Id.***, ¶¶2-8. The victim then installed an enhanced home security system that would have sufficient video clarity to catch the bad guy. ***Id.***, ¶5. It worked, and Queever was apprehended. ***Id.***, ¶6. Queever was only charged with a single burglary, but everyone seemed to think it was quite likely he was not a first-time visitor. ***Id.***, ¶¶7-8. The question was whether the enhanced home security system used to catch Queever—not, by the way, all losses from prior burglaries—was a proper subject of restitution. *See* ***id.***, ¶9.

¶33 We said it was, explaining:

> Those prior burglaries were "*related to*" the attempted burglary that was considered at Queever's sentencing, [citing ***Canady***, 234 Wis. 2d 261, ¶10], in that the prior burglaries and the attempted burglary involved the same home, the same victim, and the same time of night, and each involved the perpetrator entering or attempting to enter the victim's home through the same sliding glass door. On these facts, we conclude the prior burglaries and the attempted burglary were part of a single course of criminal conduct.

Queever, 372 Wis. 2d 388, ¶22. Thus, we concluded the circuit court did not erroneously exercise its discretion in finding that Queever did commit those prior crimes, and that the cost of the home security system was appropriately considered as caused by "the defendant's criminal conduct considered at sentencing." ***Id.***, ¶26.

¶34 ***Queever*** could be read to suggest that any previous similar crimes are fair game so long as they are sufficiently similar and the circuit court concludes by a preponderance of the evidence the defendant committed them as part of the "entire course of the defendant's criminal conduct." ***Id.***, ¶26. The majority follows those trail-markings here, concluding the May 8 burglary was "related to" the prior burglaries 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 (Wiskerchen likely used his 'nest' while N.D. was at work)." Majority, ¶12.

¶35 But why should this be so? This transforms the "course of conduct related to the crime for which the defendant was convicted" into prior crimes related to and consistent with the crime for which the defendant was convicted. These are not the same thing. What if the prior crimes were somewhat different; does that change the conclusion? What if these prior crimes go back years? Can such a long-term criminal pattern constitute a "single course of criminal conduct" when only one criminal act is charged? Neither ***Queever*** nor the majority explores the ramifications of this reasoning. For my part, I see no logic or limiting principle behind this conclusion—and again, no connection to the statutory language itself.

¶36 One of the unfortunate side effects of this new approach to restitution is that restitution hearings could—legitimately—turn into minitrials regarding uncharged alleged crimes. Defendants may wish to contest allegations that they committed prior crimes. And if they do, one can imagine the whole gamut of witnesses, documents, and even criminal discovery (which the statute does not allow "except for good cause shown," *see* WIS. STAT. § 973.20(14)(d)). If this all seems incongruous with the nature of a restitution hearing, that is

because it is. This is not how the legislature designed the law to work. If the crimes were, instead, the ones the defendant was convicted of or "agrees to be considered," as the statute plainly requires (*see* § 973.20(1g)(b)), then this new series of headaches goes away.

¶37 We are, of course, bound by ***Queever***. But we are also bound to follow our prior cases and the statutory language itself. If ***Queever*** must be read as broadly as the majority reads it, the appropriate response would be to certify this question to the Wisconsin Supreme Court. But the majority has not chosen this route; the majority does not even acknowledge the tension between its holding and both the statute and other, binding case law. Instead, the majority takes ***Queever***'s more expansive language and applies it to an even more extreme set of facts that amounts, in my view, to a rewrite of the restitution statute altogether.

¶38 The logic of the majority's opinion—and its discontinuity with the statute—bears reflection. Assume that, for the past ten years, a man engages in systematic thievery of cars from the local car dealership. Every six months or so, the thief steals another car (which means over twenty cars have been stolen) with an average value of $25,000, for a total value of $500,000. But lo and behold, number twenty-one does not go so well and the thief is caught. The State cannot prove any of the past thefts and chooses not to press charges, though prosecutors are confident they have their man. So the thief is only charged with stealing car number twenty-one. At the restitution hearing, some evidence related to this likely pattern of car theft is presented—though proof is illusive. Nonetheless, the court "finds" that the man likely committed all of those past crimes. Can the circuit court really order $525,000 (rather than $25,000) in restitution? Under the majority's expansive reading of ***Queever***, yes! That is plainly contrary to the statute itself.

¶39 ***Queever*** does not purport to be a significant departure from prior cases. It even offers the caveat that "[o]ur holding in this case should not be interpreted to mean that costs incurred by a victim before the occurrence of the specific criminal acts underlying the offense of conviction and any read-in offense will always be recoverable under the restitution statute." ***Queever***, 372 Wis. 2d 388, ¶26. Thus, I think we should not give ***Queever*** such a scopious reading.[3] Faced with binding language from prior cases, and a statute that is plain-as-day, I cannot accept the majority's reading of ***Queever***.

¶40 In short, because Wiskerchen's alleged prior-committed burglaries are not crimes "considered at sentencing," they are not permissible grounds for restitution as a matter of law. On this ground, the restitution award must be reversed.

The Circuit Court Erroneously Exercised Its Discretion

¶41 The restitution award must also be reversed because the circuit court erred in concluding that Wiskerchen's May 8 burglary caused damages resulting from prior, uncharged burglaries. Whether the defendant's criminal activity was a substantial factor in causing any expenses for which restitution is claimed is generally a matter left to the court's discretion. ***State v. Johnson***, 2002 WI App 166, ¶7, 256 Wis. 2d 871, 649 N.W.2d 284 (citing ***Canady***, 234 Wis. 2d 261, ¶¶6, 12).

[3] If ***Queever*** can be justified, it is likely on the grounds that the security system in particular was used to catch Queever in the crime he was convicted of—and therefore, was a compensable damage resulting from the one burglary he was convicted of.

¶42 As previously discussed, restitution—if authorized by law—is permissible if the crime considered at sentencing was a precipitating cause of the damages. We have explained:

> Thus, "precipitating cause" merely means that the defendant's criminal act set into motion events that resulted in the damage or injury. "The phrase 'substantial factor' denotes that the defendant's conduct has such an effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense." For example, in the civil-law context, the first tortfeasor is responsible for subsequent harm caused by those rendering aid to the injured plaintiff, irrespective of whether those rendering aid were negligent, ***Butzow v. Wausau Mem'l Hosp.***, 51 Wis. 2d 281, 286-287, 187 N.W.2d 349, 351-352 (1971), or by subsequent tortfeasors whose contribution to the plaintiff's ultimate damages or injuries was a "foreseeable consequence" of the original tortfeasor's negligence, ***Johnson v. Heintz***, 61 Wis. 2d 585, 600-602, 213 N.W.2d 85, 93-94 (1973).

Rash, 260 Wis. 2d 369, ¶7. We therefore look to whether it was reasonable for the court to conclude that the crime was a "but for" cause of the alleged damage. ***Id.*** Such a finding here is not only unreasonable, it is impossible.

¶43 We said as much in ***State v. Tarlo***, 2016 WI App 81, 372 Wis. 2d 333, 887 N.W.2d 898. In that case, we concluded that damages and lost income due to a husband's production of child pornography were not and could not be caused by Tarlo's viewing of those images years later. ***Id.***, ¶9. We explicitly rejected the notion that a later consumer of child pornography can be said to have "retrospectively encouraged" its creation and distribution. ***Id.***, 17. "It cannot be said ... that Tarlo's actions, which occurred *after* the husband produced the pornography, caused the husband to produce it." ***Id.*** We further explained that restitution losses must be the "result of a crime considered at sentencing," and a

"'result' of a crime *follows* from the commission of the crime; the result does not *precede* the crime." ***Id.***, ¶18 (emphasis added).

¶44 So it is here. While Einstein taught us that time is relative, such lofty notions do not allow us to ignore our own experience of the space-time continuum. I can conceive of no coherent way to conclude that Wiskerchen's May 8 burglary "caused" losses that, even if sufficiently proven as losses, admittedly occurred prior to the May 8 burglary. Said in the language of our case law, the May 8, 2015 burglary could not have been "the precipitating cause" of the prior injuries; the prior losses could not have "flow[ed] as 'the natural consequence'" from the May 8 crime; and the May 8 burglary could not possibly have "set into motion events that resulted" in losses occurring during earlier, as-yet uncharged burglaries. *See* ***Madlock***, 230 Wis. 2d at 333; ***Longmire***, 272 Wis. 2d 759, ¶13. No one could reasonably conclude that the May 8 burglary was the "but for" cause of losses from earlier-in-time burglaries. *See* ***Rash***, 260 Wis. 2d 369, ¶¶7-8.

¶45 Therefore, the restitution award must be reversed as an erroneous exercise of discretion.

Conclusion

¶46 Criminals should, so far as it is possible, make their victims whole. The restitution statute is a crucial component of our system of criminal justice. But this court errs by substituting the heart behind our cases for their holdings and by making the noble policy underlying the restitution statute supreme to the statute itself. While some of the language in ***Queever*** could be read to make this a close call, the statute and other controlling cases do not. I respectfully dissent.