

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2016AP1264-CR

Cir. Ct. No. 2014CF50

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON NAPIWOCKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: JOHN V. FINN and ROBERT J. SHANNON, Judges. *Affirmed.*

¶1 BLANCHARD, J.¹ Jason Napiwocki was convicted of contractor fraud related to a single remodeling contract with a single identified victim. He

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

disputed the restitution amount. The court referred the restitution issue to a court commissioner for an evidentiary hearing and a recommendation. In this appeal, Napiwocki challenges the resulting restitution order by the court, and the court's denial of his post-conviction motion to vacate the order. Napiwocki argues that the court commissioner erroneously exercised his discretion by admitting evidence over Napiwocki's objections. Napiwocki argues that, because the commissioner erroneously exercised his discretion, the court erred in ordering restitution in reliance on the commissioner's flawed findings, and that the court did not "adequately" provide analysis of its own to support its decision. I conclude that the court did not erroneously exercise its discretion regarding the amount of restitution ordered and properly denied Napiwocki's post-conviction motion, and accordingly affirm.

¶2 Following Napiwocki's convictions resulting from pleas, the court issued a proposed order for restitution in the amount of \$65,200, based on the prosecutor's request. After Napiwocki contested the amount, the court referred the matter to the commissioner for a hearing, pursuant to WIS. STAT. § 973.20(13)(c)4.²

¶3 At the hearing before the commissioner, Napiwocki and the victim both testified and presented evidence. Based on the victim's testimony, the prosecutor argued that restitution must account for two sets of costs: (1) the \$45,400 that the victim paid Napiwocki when he began work on the project; and (2) the approximately \$20,000 that the victim testified was needed to repair

² The Hon. John V. Finn presided over the plea and sentencing hearing, including restitution issues. Court Commissioner David Worzalla conducted the restitution hearing. The Hon. Robert J. Shannon presided over the post-conviction hearing.

damage that Napiwocki did to the home during the project and to continue work on the project.

¶4 The parties disputed the number of hours Napiwocki worked, the amount of work left to be completed after Napiwocki stopped working, as well as the quality of Napiwocki's work. Specifically, Napiwocki disputed the victim's testimony that Napiwocki had damaged the structure of the house by failing to properly calculate the effects of adding a second story to it.

¶5 The victim provided receipts showing that he had paid another contractor, to date, \$14,609.44 for necessary work in the wake of Napiwocki's departure from the project: finishing the roof and plumbing, redoing the window fixtures, and hanging drywall. Napiwocki objected to the commissioner's consideration of the cost of hiring a replacement contractor on the ground that the State failed to establish that the bills that the victim submitted to the commissioner were for work contemplated in the project, instead of being separate work to benefit the victim. Napiwocki contended that the project was nearly complete when he stopped working, and that the work that he failed to complete should not have cost the victim the amount that the victim claimed it did. The commissioner overruled Napiwocki's objection to the admission of the replacement-contractor evidence, concluding that the evidence was pertinent to the factual question of whether the introduced bills related to the work that the victim hired Napiwocki to do.

¶6 Napiwocki submitted receipts for supplies and building material that he represented were used in the project, totaling \$8,824.90. Additionally,

Napiwocki testified to, but did not provide receipts for, other project costs, specifically the cost of a dumpster rental, a lift rental, and building permits.³ Napiwocki and his assistant also testified that he should not owe restitution in the amount requested by the victim because the victim did not pay him for the total cost of labor.

¶7 On the wages topic, Napiwocki testified that he charges \$35 per hour for remodel projects, but conceded that he had not explicitly stated this figure in the contract. Napiwocki testified that he and his assistant worked on the project every day for 13 weeks—excluding weekends and six or seven weekdays when he was not available to work on this project—although he did not provide a work log to support this testimony. Napiwocki provided a document that he had prepared for purposes of the hearing, purporting to reflect how many hours the two men worked and the total cost of their labor, namely, 524 hours for Napiwocki and 491 hours for his assistant. Napiwocki testified that he spent the entirety of the \$45,400 upfront payment from the victim to purchase supplies and to pay himself and his assistant for the cost of labor, but that there remained an outstanding \$3,299 in labor costs.

¶8 The victim testified that Napiwocki’s testimony about the hours that he and his assistant worked was “a joke.” The victim testified that, based on his observations, neither Napiwocki nor his assistant ever worked a full day on the

³ After the court entered the final order, Napiwocki filed a motion to vacate the restitution order, to which he attached purported copies of receipts for the dumpster rental, the lift rental, and the building permits, although he failed to provide an explanation for why he had failed to produce these receipts at the restitution hearing.

project and that they worked only one or two days per week during this period, so that neither could possibly have worked the claimed approximately 500 hours.

¶9 After evidence was closed and the commissioner heard arguments, the commissioner said that both parties should submit proposed findings of fact and conclusions of law to be included in the record for the court to review. Neither party complied.⁴ Following the hearing, the commissioner timely submitted the record to the court, along with the commissioner's proposed findings of fact and conclusions of law, consistent with the procedure described in WIS. STAT. § 973.20(13)(c)4.

¶10 After reviewing the commissioner's proposed findings of fact and conclusions of law, the court issued a final restitution order, in the amount of \$51,184.54, which matched that proposed by the commissioner and was below the initial pre-hearing proposed order amount of \$65,200. The court's final order states that the restitution amount is based on evidence that: (1) the victim paid Napiwocki \$45,400 upfront to begin work on the project; (2) the victim paid another contractor \$14,609.44 to repair and continue working on the project; and (3) Napiwocki used \$8,824.90 of the \$45,400 to purchase supplies and materials that were used in the project.

¶11 In a post-conviction motion to vacate the final restitution order, Napiwocki argued that the court erroneously exercised its discretion by failing to

⁴ I question whether Napiwocki might not have forfeited a challenge to the court's restitution order that is based on an attack on the commissioner's findings of fact because the commissioner said that he should submit proposed findings of fact and he failed to do so. However, the State does not make a forfeiture argument and in Napiwocki's favor I ignore the potential forfeiture issue.

consider legislatively mandated criteria when ordering restitution. Specifically, he argued that the court failed to offset the amount of restitution ordered by the monetary value of time and labor and by all of the expenses paid by Napiwocki. Napiwocki argued that the court engaged in “unfettered decision-making” by failing to state, on the record, why it set restitution at the same level as proposed by the commissioner without “adequately” providing analysis of its own. The court denied Napiwocki’s motion for post-conviction relief. Napiwocki appeals.

¶12 On appeal, Napiwocki challenges the court’s restitution order and the denial of his post-conviction motion to vacate the restitution order and order a new restitution hearing. In cases in which a commissioner conducts a restitution hearing and an appellant alleges that the commissioner abused its discretion, I consider only whether the court erroneously exercised its discretion in relying on the commissioner’s decision. See *State v. Tarlo*, 2016 WI App 8, ¶¶6, 17, 372 Wis. 2d 333, 887 N.W.2d 898. On appeal, Napiwocki renews his “unfettered decision-making” argument, contending that the court’s actions were “prohibited by” *Hartung v. Hartung*, 102 Wis. 2d 58, 306 N.W.2d 16 (1981) (holding that a circuit court’s discretionary decision must be based on a rational analysis of the record and, if it is not, then the court has erroneously exercised its discretion). He argues that the court, after reviewing the commissioner’s proposed findings of fact and conclusions of law, is mandated by WIS. STAT. § 973.20 to explain its reasons for ordering restitution in the amount ordered and that the court’s order here did not provide an “adequate[.]” explanation for its decision. Based on these alleged discrepancies, Napiwocki argues that the court improperly denied his motion to vacate the restitution order.

¶13 The following are applicable legal standards. The purpose of restitution is to return victims to the position they were in before defendants

injured them. *See State v. Holmgren*, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999). Under WIS. STAT. § 973.20, the court takes a defendant’s entire course of conduct into consideration in determining the amount of restitution to order. *State v. Madlock*, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999) (quoting *State v. Rodriguez*, 205 Wis. 2d 620, 627, 556 N.W.2d 140 (Ct. App. 1996)). I construe the restitution statute broadly and liberally to allow the victim here to recover his losses resulting from Napiwocki’s criminal conduct. *See Holmgren*, 229 Wis. 2d 358, 366. A victim need show only that the defendant’s criminal activity substantially related to the damage caused. *Madlock*, 230 Wis. 2d 324, 333. A restitution hearing does not require strict adherence to the rules of evidence. *State v. Stowers*, 177 Wis. 2d 798, 806, 503 N.W.2d 8 (Ct. App. 1993) (quoting *State v. Pope*, 107 Wis. 2d 726, 729, 321 N.W.2d 359 (Ct. App 1982)).

¶14 Napiwocki’s first argument is that *Hartung* stands for the proposition that the circuit court must “provide explicit explanation of its discretionary decisions,” and that that did not occur here. Napiwocki’s summary of *Hartung* is, at a minimum, misleading. Given in the context of determining spousal maintenance during a divorce proceeding, the proposition stated in *Hartung* is that discretionary decisions of circuit courts must be based on record facts that support a conclusion that the court used a rational analysis of the facts and relied on the applicable law, when the law is correctly understood. That is the same standard that I apply here. *See State v. Canady*, 2000 WI App 87, ¶6, 234 Wis. 2d 261, 610 N.W.2d 147 (citations omitted) (“In disputes concerning the calculation of criminal restitution ... [w]e may reverse [the] discretionary decision only if the circuit court applied the wrong legal standard or did not ground its decision on logical interpretation of the facts.”). Thus, I may reverse the

challenged restitution decision only if the record reveals that the court applied the wrong legal standard or that the court could not have grounded its decision on a logical interpretation of the facts. *See id.*

¶15 I conclude that the court applied the correct legal standard. WIS. STAT. § 973.20 directs the procedure for criminal restitution. The court heard arguments at sentencing and received evidence from the record created before the commissioner to consider the factors required by statute before issuing the final restitution order. There is no suggestion in the record that the court applied an incorrect legal standard. Further, I conclude that the restitution order is grounded in a logical interpretation of the facts in the record, including the victim's testimony that Napiwocki and his assistant worked only minimal hours and that the victim needed to spend the additional money that was necessary to repair and complete what Napiwocki had done.

¶16 Without developing an argument to this effect, Napiwocki implies that he was entitled to de novo review in the circuit court of his challenges to the proposed restitution order. However, the circuit court does not have statutory authority for de novo review after a commissioner has conducted a restitution hearing, and the court need not demonstrate its independent decision-making authority by altering the proposed findings or offering explanation beyond what has already been given.

¶17 Separately, Napiwocki purports to rely on *State v. Longmire*, 2004 WI App 90, 272 Wis. 2d 759, 681 N.W.2d 534, to argue that the court erroneously failed to credit him for expenses that he testified were related to the project, but for which he failed to provide supporting receipts or work logs, in particular the value of labor, building permit fees, and equipment rental fees. In *Longmire*, this court

concluded that the circuit court erroneously exercised its discretion by failing to allow “any offset whatsoever” for undisputed expenses that the contractor incurred fulfilling a home remodel contract. *Id.*, ¶18 (emphasis added). I reject Napiwocki’s *Longmire*-based argument, because the court here did allow for all offsets proven by Napiwocki. See *State v. Walters*, 224 Wis. 2d 897, 907, 591 N.W.2d 874 (Ct. App. 1999) (defendant bears burden of proving that court should apply offset to proposed restitution order). The restitution order here provided an offset of \$8,824.60, accounting for all the expenses that the court found Napiwocki proved that he incurred on the project.

¶18 Explaining further, as stated above, in his post-conviction motion, Napiwocki submitted purported copies of receipts and other evidence that he did not provide at the restitution hearing. The restitution statute requires that the defendant be allowed “an opportunity to be heard, personally or through counsel, to present evidence and to cross-examine witnesses called by other parties.” WIS. STAT. § 973.20(14)(d). Here, Napiwocki had the opportunity to present evidence and to cross examine witnesses at the restitution hearing and failed to provide evidence necessary to establish offsets. Further, the commissioner said that Napiwocki should submit proposed findings of fact and conclusions of law after the restitution hearing, which he also failed to do. There is no basis to conclude that the court erroneously exercised its discretion in failing to provide an offset for expenses not supported by receipts or work logs. See *Holmgren*, 229 Wis. 2d 358, 376. Additionally, Napiwocki has provided no basis for me to conclude that the court erroneously exercised its discretion, or made any calculation errors, in arriving at the total restitution ordered.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)4.

