

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 30, 2011

A. John Voelker
Acting 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. 2011AP551-CR

Cir. Ct. No. 2008CF146

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS J. HAIDUK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Vilas County: NEAL A. NIELSEN III, Judge. *Reversed and cause remanded with directions.*

¶1 BRUNNER, J.¹ Thomas Haiduk appeals a judgment and order requiring him to pay \$31,984.50 in restitution. He contends the circuit court erred

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

when calculating restitution because it improperly considered Linda Hanke's cost of completion, inaccurately calculated his offset for design and profits, and improperly considered Hanke's general damages. He asserts he only owes Hanke \$1,632.79 in restitution.

¶2 The State concedes that the court improperly considered Hanke's cost of completion in its restitution calculation. However, the State argues that the court correctly calculated Haiduk's offset for materials, labor, and design, and thus Haiduk owes \$35,877.29 in restitution.

¶3 We conclude the circuit court never explained how it calculated Haiduk's design offset. We also determine the court never made a finding of whether Haiduk is, or is not, entitled to receive a profit based on the work he performed. Therefore, we reverse and remand for an explanation of how the court calculated Haiduk's design offset and a determination of whether Haiduk is entitled to a profit offset, and if so, the amount.

BACKGROUND

¶4 Haiduk was charged with theft by contractor, contrary to WIS. STAT. § 779.02(5) and felony theft, contrary to WIS. STAT. § 943.20(1)(a) and (3)(c), after he misappropriated funds distributed to him by Hanke. Hanke accepted an oral agreement from Haiduk to build an addition on her house. Hanke advanced Haiduk \$136,395.29. Haiduk converted the money and failed to complete the addition. Haiduk pled no contest to theft by contractor and entered into a deferred prosecution agreement. He pled outright to a reduced charge of misdemeanor theft and was sentenced to probation with various conditions. One condition on both the deferred prosecution agreement and probation was the payment of restitution.

¶5 The court held a restitution hearing to determine the amount owed to Hanke. It is undisputed that Haiduk performed some work on the project. The parties stipulated that Hanke advanced Haiduk \$136,395.29. The parties also stipulated that Haiduk was entitled to an offset of \$61,687.96 for materials. The parties disputed other terms of the agreement and Haiduk's offset for labor and plan designs.

¶6 Hanke testified she and Haiduk had a fixed-price contract. Under the contract, the addition would be fully completed for a firm price of \$150,000. Haiduk, however, testified that the \$150,000 was only an estimate.

¶7 Haiduk argued that he did not owe Hanke any restitution. Although he admitted he originally used Hanke's money to fund other projects, he argued that he repaid any money he took and his labor costs, design costs, and his profit coincidentally equaled the remaining \$74,707.33. Specifically, he asserted he was entitled to an offset of \$6,800 for the project designs and the remaining \$67,907.33 equaled labor costs and markups.

¶8 The State, however, disputed Haiduk's offset calculation. Haiduk testified on cross examination that he did not keep an accounting of the hours worked on the Hanke project and had no way of determining how much he paid to his workers for their work on the Hanke project. Additionally, the State's expert design engineer testified the value of Haiduk's "design plans" (drawings) was \$250 and Haiduk's \$6,800 price was unreasonable.

¶9 The court, in determining restitution, first noted that "because ... the parties fail[ed] to be more specific about the nature of their relationship[,] the issue of restitution becomes extraordinarily difficult for the Court." The court considered two ways to calculate restitution: (1) the cost to complete the project;

and (2) the value of Hanke's \$136,395.29 advance minus an offset for Haiduk's materials, labor, and design costs.

¶10 Under the cost completion method, the court determined Haiduk would owe Hanke \$28,092 in restitution. The court reasoned that because it cost Hanke \$178,092, or \$28,092 more than the contracted \$150,000 price, to complete her addition, Hanke's loss was the extra \$28,092 she was forced to spend.

¶11 Alternatively, the court determined Haiduk's restitution by subtracting his offset for legitimate expenses from the converted \$136,395.29 advance. The court made factual findings regarding Haiduk's materials, labor, and design costs, and determined Haiduk legitimately spent \$100,517.96² of Hanke's \$136,395.29 deposit. The court noted it could order restitution in the amount of \$35,877.33.

¶12 Unconvinced that either number represented the fairest way to determine restitution, the court concluded the best solution would be to average the two amounts together, which would leave Haiduk with a restitution payment of approximately \$31,984.50. After making its determination, the court stated that by averaging the numbers together, it would be giving Hanke "something for all of the other difficulties."

DISCUSSION

¶13 On appeal, Haiduk asserts the circuit court erred by considering Hanke's cost of completion in its restitution determination. He also argues that the

² The court determined Haiduk legitimately spent \$61,687.96 on materials, \$1,500 on designs, and \$37,330 on labor.

court incorrectly calculated his offset for design and profits, and improperly awarded Hanke general damages.

¶14 WISCONSIN STAT. § 973.20(1r) provides the circuit court “shall order the defendant to make ... restitution ... 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.” However, before a circuit court may order a defendant to pay restitution, “there must be a showing that the defendant’s criminal activity was a substantial factor in causing pecuniary injury to the victim.” *State v. Longmire*, 2004 WI App 90, ¶13, 272 Wis. 2d 759, 681 N.W.2d 534 (quotations omitted). Further, restitution is limited to “special damages ... which could be recovered in a civil action against the defendant for his ... conduct in the commission of [the] crime” WIS. STAT. § 973.20(5)(a). This limitation prevents a court from awarding general damages, which are “amounts intended to generally compensate the victim for damages such as pain and suffering, anguish, or humiliation.” *Longmire*, 272 Wis. 2d 759, ¶14. “The term ‘special damages’ as used in the criminal restitution context, means any readily ascertainable pecuniary expenditure paid out because of the crime.” *Id.* (quotations omitted).

¶15 The determination of the *amount* of restitution to be ordered, including the court’s award of any offsets, is reviewed under the erroneous exercise of discretion standard. *Id.*, ¶16. A discretionary determination will be affirmed if “the circuit court logically interpreted the facts, applied the proper legal standard and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach.” *Id.* The State bears the burden of proving the amount the victim lost as a result of the crime, and the defendant bears the burden of proving “whether an offset should be allowed and in what amount.” *Id.*

¶16 Haiduk first argues the circuit court erred by determining one way to calculate restitution would be to award Hanke \$28,092, or the amount it cost her to complete her project. The State agrees. Based on the parties' position, we will not consider the court's \$28,092 restitution calculation. We also note that removal of this number from consideration negates the court's final restitution award of \$31,984.50 because the court used the \$28,092 amount in its final calculation.

¶17 We are therefore left to review the legitimacy of the court's other restitution calculation, which the court calculated to be \$35,877.29. The court made this calculation after determining Haiduk's legitimate offset for labor, materials, and designs equaled \$100,517.96. It then subtracted Haiduk's offset from Hanke's \$136,395.29 advance. On appeal, Haiduk argues the circuit court erred when determining his \$100,517.96 offset. Specifically, he asserts the court erred by incorrectly calculating his design and profit offset.

¶18 Haiduk first alleges the circuit court erred by awarding him an offset of only \$1,500 for the designs created for Hanke's addition. He asserts the court erred because it "clearly failed to recognize the existence of the previous set of plans that were utilized at the preliminary examination." He also contends that the \$6,800 "amount proffered by Mr. Haiduk was the contract amount and, as such, should be accepted by the court in light of the fact there is no evidence to the contrary." Finally, he argues the circuit court erroneously exercised its discretion by "arbitrar[ily]" valuing the design amount at \$1,500.

¶19 We disagree that the court erred by failing to set Haiduk's design offset at \$6,800. First, Haiduk bears the burden of proving he is entitled to an offset. There is no evidence, besides Haiduk's testimony, that \$6,800 was the amount verbally contracted between the parties for the drawings. If Haiduk

thought the plans introduced at the restitution hearing were insufficient to show the work he actually completed, he should have introduced additional plans.³ Second, the State presented an expert witness who testified he would have charged \$250, not \$6,800, for Haiduk's drawings. Finally, Haiduk admitted he never created blueprints, construction drawings, or scale drawings for the project.

¶20 Although we conclude the court did not erroneously exercise its discretion by refusing to award Haiduk a \$6,800 offset for the drawings, we agree with Haiduk that the court provided no explanation for how it determined the value of the designs was \$1,500. We thus cannot determine whether the court properly exercised its discretion when setting the design offset at \$1,500, and we remand for an explanation of how the court reached this offset amount.

¶21 Haiduk next contends the court improperly deprived him of his profit. Specifically, he asserts the court, when calculating the cost of labor, improperly used the pay-rate⁴ instead of the bill-rate and failed to give him a separate ten-percent markup on the total cost of labor and materials.

¶22 The court's value-based \$100,517.96 offset, and corresponding \$35,877.33 restitution award, only includes an offset for the *cost* of Haiduk's materials, labor, and designs. The court never made a finding of whether Haiduk

³ In his reply brief, Haiduk seems to suggest that because the designs were previously introduced at the preliminary hearing, it was the court's responsibility to find and consider these designs at the restitution hearing. The burden of proving an offset is on Haiduk, not the court. *See State v. Longmire*, 2004 WI App 90, ¶16, 272 Wis. 2d 759, 681 N.W.2d 534. Moreover, we note that the designs introduced at the preliminary hearing consist of five hand-drawn sketches and, except for one drawing, mirror the designs introduced at the restitution hearing.

⁴ The court found Haiduk legitimately *spent* \$37,330 in labor, and Haiduk does not dispute that finding.

was or was not entitled to a profit offset or the amount. We therefore remand to the circuit court for a determination on this issue. We note that a profit offset determination will also require the court to resolve whether the agreement between the parties was for a fixed-price or time-and-materials contract.

¶23 If the court determines the agreement was a \$150,000 fixed-price contract, Haiduk's billing rates and markups are irrelevant for calculating profit, because, in a fixed-price contract, the contractor's profit is already built into the agreement. *See 1325 North Van Buren, LLC v. T-3 Group, Ltd.*, 2006 WI 94, ¶47, 293 Wis. 2d 410, 716 N.W.2d 822 (In a fixed-price contract, parties bargain for the final price of the project, not the amount of time or what is required to complete the project.). However, if the court concludes the agreement was for a time-and-materials project and the \$150,000 was just an estimate, evidence of Haiduk's billing rates and markups may be relevant to determine Haiduk's profit offset.

¶24 Finally, we address Haiduk's argument that the court relied on general damages when calculating his restitution amount. *See Longmire*, 272 Wis. 2d 759, ¶14 (restitution award for general damages not allowed). We agree with Haiduk that the circuit court improperly considered Hanke's general damages when it determined that, by averaging its two restitution calculations of \$28,092 and \$35,877.29 together, it would be giving Hanke "something for all her difficulties." However, the court only made this determination when it averaged its two restitution calculations together and, based on the parties' agreement, we did not consider whether the averaged amount was proper.

By the Court.—Judgment and order reversed and cause remanded with directions.

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

