

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 3, 2013

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. 2012AP1115-CR

Cir. Ct. No. 2009CM442

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS G. FELSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 BROWN, C.J.¹ Thomas G. Felski appeals from an order for restitution based on his conviction for failing to enter into a written contract for

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

home improvement services contrary to WIS. ADMIN. CODE § ATCP 110.05. He argues that the circuit court had no authority to order restitution because the restitution it ordered was not related to the crime of conviction. He additionally argues that even if the circuit court had the authority to order restitution, none was owed because Felski was underpaid by the victims for services he rendered. We affirm the circuit court's authority to order restitution in this case but remand for further proceedings as to the amount—it is unclear from the record how the circuit court arrived at the amount of restitution it imposed.

¶2 Felski originally entered into a written contract with Paula and Richard Derrick in March 2008 to do work on their kitchen and bathroom. For that work, the Derricks agreed to pay \$21,354.19 for labor plus the cost of materials. Felski and the Derricks entered into a second written contract in April 2008, this time involving \$17,496.39 in costs for labor plus the cost of materials. Felski met Paula at home improvement stores numerous times to choose and purchase materials for the projects. On those occasions, Paula paid for the materials directly; no money was paid to Felski.

¶3 At some point, Felski and the Derricks began discussing two additional projects: an addition to the house and a new garage. Felski worked on the addition and helped Paula purchase a kit to begin work on the garage. Later, after the Derricks ended their relationship with Felski, he returned the garage kit and kept the money. The court commissioner valued the kit at \$4200. At the postconviction motion hearing, the circuit court valued the kit at \$5,896.16, which it stated it was basing on a check payment.

¶4 The parties' dispute revolves primarily around the value of the work Felski performed on the addition. Paula testified that the oral agreement was to

pay \$125 per square foot for the addition, which was estimated at 686 square feet. Her testimony is unclear as to whether that amount was to include materials. Richard testified that the \$125 per square foot rate included materials. Felski testified that the agreement was for \$130 per square foot plus the cost of materials, as it had been for the other projects. In addition to the parties' recollections of the oral agreement, the Derricks' expert testified that the going rate for a project like the one in this case would be \$115-\$130 per square foot, including labor and materials.

¶5 The parties agree that the total amount paid for the projects by the Derricks was \$148,055.04.² Of that, Felski argues that the record shows \$33,465.20 paid to home improvement stores for materials, including \$5,896.16 for the garage kit.

¶6 After the restitution hearing, the court commissioner found that the Derricks "paid ... Felski ... \$148,055.04 for a variety of home improvements which were not completed." It credited Felski \$89,180.00 "for the work he performed" on the addition, which amounts to \$130 per square foot for 686 square feet. He did not specify whether he intended for that number to include labor and materials or just labor. Next, and presumably based on that, the court commissioner calculated the "overage in favor of the homeowners" to be \$52,237.85.³ The commissioner then credited the Derricks with \$4200 for the

² Felski's brief-in-chief actually uses an even \$148,055.00, which matches Paula's testimony at the restitution hearing. In its order, however, the court commissioner used \$148,055.04 as the total payment amount and that number also appears to have been used by the circuit court. Neither party argues that this difference is significant, and Felski uses that number in his reply brief.

³ It is unclear to us how the court commissioner arrived at this number. According to our calculation, \$148,055.04 minus \$89,180.00 equals \$58,875.04.

garage kit for a total restitution amount of \$56,437.85. The circuit court adopted the court commissioner's restitution recommendation at Felski's sentencing hearing.

¶7 Felski filed a postconviction motion challenging the court's authority to issue a restitution award, claiming that because the State focused on the lack of written contract for the garage project at trial, restitution should be based on that particular project. In the alternative, Felski claimed that the numbers from the restitution hearing show that he was not overpaid for the work he did. Based on that, he argued that he did not owe any restitution to the Derricks. The circuit court found that restitution based on the addition was appropriate and amended the judgment to order restitution totaling \$47,274.81. It explained its method for arriving at that number as follows:

I took the contract prices, first of all, and I add those two up....

....

Plus the amount that [the court commissioner] credited [Felski] with as being I guess the value of his work regarding the non-contracted addition plus the garage set...

It then clarified that it was using \$5896.16 as the amount for the garage kit. Both Felski and the State note that the circuit court appears to have calculated the total award incorrectly. Felski now appeals.

¶8 We begin with Felski's threshold argument—that the court lacked the authority to order restitution based on the addition because the crime of conviction was entering into the *garage project* without a written contract. Whether the circuit court has the authority to order restitution under a particular set of facts is an issue of law we review de novo. *State v. Haase*, 2006 WI App

86, ¶5, 293 Wis. 2d 322, 716 N.W.2d 526. WISCONSIN STAT. § 973.20(1r) provides that sentencing courts “shall order the defendant to make full or partial restitution ... *to any victim of a crime considered at sentencing.*” (Emphasis added.) For restitution to be appropriate there must be a causal nexus between the “crime considered at sentencing” and the victim. *See State v. Canady*, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 610 N.W.2d 147.

¶9 Felski argues that there is no causal nexus between the crime of conviction and the restitution ordered because he was convicted of a single count of failing to have a written contract and the State focused the jury on the garage project for that conviction. Because of that, he argues that restitution should not have been ordered based on the addition project. We disagree.

¶10 As we have stated in the past, the “crime considered at sentencing” 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.” *Id.*, ¶10 (citation omitted) (emphasis omitted). In this case, even if we accept Felski’s argument that he was only convicted of failing to have a written contract for the garage project,⁴ his work on the addition was part of his evolving noncontractual relationship with the Derricks, which culminated in the garage project. So, while the facts related to Felski’s work on the addition were not necessary to support the elements of a charge that related only to the

⁴ On this point, the State argues that although the State’s theory of the case revolved around the garage incident, the trial involved both the addition and the garage incident as “the entire portion of the construction project that stemmed from Felski’s failure to have a written contract with the Derricks.”

garage project, they absolutely were “facts and reasonable inferences concerning the defendant’s activity related to the crime” of not having a written contract. *See id.* (citation omitted) (emphasis omitted).

¶11 In addition, as the State points out, the lack of written contract set the stage for a situation where the Derricks were writing multiple checks to cover an unknown total expense. To the extent that they overpaid on those projects, that overpayment has a causal nexus to the crime of not having a written contract. The circuit court therefore had the authority to order restitution based on the addition and the garage project.

¶12 We now move to Felski’s second issue—whether the order should be vacated because the value of Felski’s work on the project exceeded what he was paid by the Derricks. As Felski points out and the State acknowledges, Felski is entitled to an offset for the work he did for the Derricks. *See State v. Longmire*, 2004 WI App 90, ¶20, 272 Wis. 2d 759, 681 N.W.2d 534. The circuit court has discretion in deciding the amount of restitution owed to victims. *State v. Johnson*, 2005 WI App 201, ¶10, 287 Wis. 2d 381, 704 N.W.2d 625. “When we review a trial court’s exercise of discretion, we examine the record to determine whether the trial 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.*

¶13 In this case, as we laid out in the facts, the number the circuit court came to for restitution does not appear to match its reasoning. The circuit court’s explanation of its calculation is not entirely clear, but it appears that the circuit court intended to start with the Derricks’ total expenses of \$148,055.04, give Felski credit for the work done on the two written contracts (\$21,354.19 and

\$17,496.39), credit him \$89,180.00 for the noncontracted work, and then credit the Derricks \$5896.16 for the garage kit.⁵ When we do that, however, we arrive at a restitution award of \$25,920.62, which is substantially lower than the \$47,274.81 the circuit court ordered.⁶ Based on that discrepancy alone, we reverse and remand so that the circuit court can either better explain its reasoning or correct its mathematical error.

¶14 Felski argues that the circuit court's apparent calculation error is irrelevant because the circuit court's reasoning failed to take into account the cost of materials. As Felski points out, not all of the \$148,055.04 paid by the Derricks was paid to him. By his calculation, \$33,465.20 of that money was paid directly to home improvement stores for materials that he claims fell outside of the contract price. According to him, that money is not accounted for in the numbers used by the circuit court, which he argues are for labor only. If that amount is factored into the circuit court's equations, he points out that the offset for his work exceeds the amount paid by the Derricks. We agree with Felski that the circuit

⁵ Our calculation based on our understanding of the circuit court's reasoning is as follows:

$$\$148,055.04 - \$21,354.19 - \$17,496.39 - \$89,180.00 + \$5,896.16 = \$25,920.62.$$

⁶ Interestingly, it is \$21,354.19—the value of the first written contract—less than what the circuit court ordered. Our best guess is that the circuit court inadvertently omitted the first written contract from its calculation.

court was unclear as to how or if it factored the cost of materials into its analysis, and we order the circuit court to clarify that issue on remand.⁷

¶15 To summarize, based on the record in this case, we are unable to discern whether the circuit court “used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach” regarding the amount of restitution owed. Because of that, we reverse and remand for further proceedings.

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

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

⁷ Felski urges us to determine as a matter of law that he owes no restitution, but we cannot do so because there is at least one view of the evidence where the circuit court intended to include the cost of materials in the \$89,180, or \$130 per square foot, it credited Felski for the work he performed on the addition. While that number is supported by Felski’s testimony that the oral agreement was for \$130 per square foot for labor *plus* the cost of materials, it is also supported by the Derricks’ expert’s testimony that the going rate for such work would be \$115-\$130 for labor *and* materials. The circuit court did not specify whether it was intending to credit Felski based on what he claimed the terms of the oral contract were or based on the high end of what the Derricks’ expert testified would be reasonable. If the intention was to include materials in the \$89,180 figure but not the contract figures, then the circuit court must still determine and explain how to factor in the cost of materials related to the initial written contracts.

