COURT OF APPEALS
DECISION
DATED AND RELEASED

September 4, 1997

NOTICE

No. 96-3499-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHARLES R. WINCEK,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Monroe County: MICHAEL J. McALPINE, Judge. *Affirmed.*

DEININGER, J.[1] Charles Wincek appeals an order for restitution and an order denying postconviction relief. The trial court adjudged Wincek guilty of theft by a contractor, contrary to § 943.20(1)(b), STATS., and ordered him to pay $4,501.37 in restitution to a homeowner for whom he had agreed to perform

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

work. Wincek claims that the trial court erred in the amount of restitution ordered and that his trial counsel was ineffective for not calling him as a witness at the restitution hearing. We reject both claims.

BACKGROUND

Wincek pleaded guilty to misdemeanor theft. The conviction was based on his failure to complete a home improvement contract which he had agreed to perform for $10,700. The trial court placed Wincek on two years probation, consecutive to an unrelated prison term, with restitution ordered as a condition of probation. At the restitution hearing, conducted under § 973.20(13)(c)2., STATS., Wincek stipulated that he had received $5350 from the homeowner. The homeowner testified that Wincek delivered some materials to the site but performed little other work. The homeowner purchased some additional materials for $151.37 and retained Al Harrison to complete the work, for which he paid Harrison the remaining $5350 he had agreed to pay Wincek.

Harrison testified that he completed the work at the request of the homeowner's son because he "[f]elt sorry for the people" and because he had done other work for Wincek in the past. He said that he agreed to do the work for $5350 because he didn't want either the homeowner or Wincek to "take a loss." Harrison also testified that he had an "oral agreement" with Wincek to complete the work for the homeowner as he had done on several past occasions when Wincek did not complete a job. Finally, Harrison testified that he had incurred a shortfall of some $2000 for his labor on the job and that he valued the materials Wincek provided for the project at $1000.

Following the testimony and argument at the restitution hearing, Wincek asked the court, as it announced its ruling, if he could "say something,"

but was told "[n]o, not at this point." The court established restitution at $4,501.37, computed as follows: $5350, which Wincek received from the homeowner; less $1000 for the materials Wincek provided for the work; plus $151.37, which the homeowner paid for additional materials for the work. Wincek then moved for sentence modification claiming the court had erred in setting the amount of restitution and that his counsel had been ineffective for not calling him to testify at the restitution hearing.

At the ***Machner***[2] hearing, Wincek claims that the following transpired:[3] (1) Wincek's trial counsel testified that he "probably" did not inform Wincek of his right to be heard at the restitution hearing; (2) Wincek's trial counsel stated that his failure to call Wincek was based on his belief that Wincek's testimony would not help his case, but acknowledged that if Wincek had testified to an agreement with Harrison to complete the work, his argument to limit restitution to $151.37 (the amount the homeowner had paid beyond the $10,700 original contract price for the work), would have been strengthened; and (3) Wincek testified regarding his business relationship with Harrison. The trial court denied Wincek's postconviction motion, and Wincek appeals both the restitution ordered and the denial of his postconviction motion.

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[2] ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] There is no transcript of the November 21, 1996 postconviction hearing in the record. The record was filed on January 10, 1997. Court Reporter Mindie Robertson notified the clerk of this court that she filed an original of the 11/21/96 transcript with the trial court and counsel on February 5, 1997. The record in this court was never supplemented, however. It is the appellant's responsibility to ensure that the record contains all items necessary to his appeal. ***State v. Smith***, 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972). We do not consider assertions of fact outside the record. *See* ***Jenkins v. Sabourin***, 104 Wis.2d 309, 313-14, 311 N.W.2d 600, 603 (1981). As we discuss below, however, even if Wincek's assertions regarding the testimony at the ***Machner*** hearing were supported by the record, we would affirm. We have not, therefore, ordered on our own motion that the record be supplemented with the missing transcript.

ANALYSIS

Section 973.20(5)(a), STATS., provides that a court may order as restitution "all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of the crime." Wincek argues that the trial court erred in the amount of restitution ordered because the homeowner's recovery in a breach of contract action against him would have been limited to the amount the homeowner was required to pay over and above the original contract price of $10,700. Thus, according to Wincek, except for the additional materials purchased for $151.37, the homeowner received the "benefit of his bargain" and should only be compensated for this additional amount.

The calculation of restitution is a matter of discretion for the trial court, and we will disturb a restitution order "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, 57-58, 553 N.W.2d 265, 272 (Ct. App. 1996) (citation omitted). It is true that a trial court must "consider any possible defense that a defendant could raise in a comparable civil case." ***Id.*** at 58, 553 N.W.2d at 272; § 973.20(14)(b), STATS. In exercising its discretion, however, the court may consider "legitimate sentencing factors, such as the rehabilitative component of restitution," ***State v. Kennedy,*** 190 Wis.2d 252, 259, 528 N.W.2d 9, 12 (Ct. App. 1994), and it may employ the restitution statute in order to "fashion the punishment to fit the crime." ***State v. Boffer***, 158 Wis.2d 655, 662, 462 N.W.2d 906, 909 (Ct. App. 1990). We conclude the trial court properly exercised its discretion in ordering Wincek to pay restitution of $4,501.37.

The trial court here fashioned a restitution award that fit the crime Wincek committed and one that promoted his rehabilitation. *See* ***Kennedy***, 190 Wis.2d at 257-58, 528 N.W.2d at 11 (restitution is an important element of rehabilitation because it serves to strengthen sense of responsibility and consideration of consequences of offender's actions). The trial court concluded that "[i]f I were to say that [Wincek] is not responsible for paying back what he took, other than the Thousand Dollars of work that he did, in essence I'm saying crime pays. Crime does not pay."

The preceding remarks make it clear that the trial court calculated restitution on an unjust enrichment theory, not on the basis of a breach of contract. The supreme court has described the theory and elements of unjust enrichment as follows:

> Unlike claims for breach of an express or implied in fact contract, a claim of unjust enrichment does not arise out of an agreement entered into by the parties. Rather, an action for recovery based upon unjust enrichment is grounded on the moral principle that one who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust.
>
> Because no express or implied in fact agreement exists between the parties, recovery based upon unjust enrichment is sometimes referred to as "quasi contract," or contract "implied in law" rather than "implied in fact." Quasi contracts are obligations created by law to prevent injustice.
>
> In Wisconsin, an action for unjust enrichment, or quasi contract, is based upon proof of three elements: (1) a benefit conferred on the defendant by the plaintiff, (2) appreciation or knowledge by the defendant of the benefit, and (3) acceptance or retention of the benefit by the defendant under circumstances making it inequitable for the defendant to retain the benefit.

Watts v. Watts, 137 Wis.2d 506, 530-31, 405 N.W.2d 303, 313 (1987) (citations and footnote omitted). The measure of damages in actions for unjust enrichment is "the benefit conferred upon the defendant, not the plaintiff's loss." ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis.2d 157, 187, 557 N.W.2d 67, 79-80 (1996) (citations omitted).

The three elements of an unjust enrichment claim were established at the restitution hearing. The homeowner conferred a benefit on Wincek: the stipulated payment of $5350 from the homeowner to Wincek, less the $1000 worth of materials Wincek provided in return. Wincek's stipulation also satisfies the requirement that he have "appreciation or knowledge" of the benefit he received. And, under circumstances where Wincek was convicted of theft for the transaction, it cannot seriously be argued that the trial court erred in concluding that it would be inequitable to allow Wincek to retain the benefit of his crime. Awarding the homeowner $4350, the amount by which Wincek benefited from the transaction, is thus an amount "which could be recovered in a civil action against [Wincek] for his … conduct in the commission of [the] crime."[4] Section 973.20(5)(a), STATS.

Wincek maintains, however, that awarding damages for unjust enrichment was not proper because he had entered into an express contract with the homeowner. *See* ***Continental Cas. Co. v. Wis. Patients Compensation Fund***, 164 Wis.2d 110, 118, 473 N.W.2d 584, 587 (Ct. App. 1991) ("The doctrine of

[4] Wincek does not contest the court's order that restitution be paid for the $151.37 in additional materials purchased by the homeowner in order to complete the work. We do not consider, therefore, whether it was improper for the court to include this amount in addition to the $4350 which is at issue in this appeal. *See* ***Waushara County v. Graf***, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (appellate court generally does not consider issues not raised by the parties to an appeal), *cert. denied*, 506 U.S. 894 (1992).

unjust enrichment does not apply where the parties have entered into a contract.") (citation omitted). We conclude, however, that this defense would not be available to Wincek in a civil action. His guilty plea and conviction for theft under § 943.20(1)(b), STATS., establishes that Wincek "[b]y virtue of his … business … intentionally use[d], transfer[red], conceal[ed], or retain[ed] possession of [] money … without the owner's consent, contrary to his … authority, and with intent to convert to his or her own use." The specific intent established by his conviction renders Wincek's transaction with the homeowner tantamount to a fraud, which refutes Wincek's claim that he had a valid contract with the homeowner. *See* ***Eklund v. Koenig & Assoc., Inc.***, 153 Wis.2d 374, 381, 451 N.W.2d 150, 153 (Ct. App. 1989) ("When a party discovers an alleged fraud by the seller, he may affirm the contract and sue for damages, or he may disaffirm and seek restitution.").

Since we have concluded that the trial court properly ordered restitution on an unjust enrichment theory, we also reject Wincek's claim of ineffective counsel. The only testimony Wincek claims he should have been allowed to give at the restitution hearing related to reinforcing the notion that Harrison essentially completed the work as Wincek's agent. This testimony would have been relevant only to Wincek's "benefit of the bargain" theory in arguing for lesser restitution. It would have had no bearing whatsoever on the trial court's determination that Wincek had unjustly received a benefit of $4350 as a result of his crime. Wincek was not therefore prejudiced by his failure to testify at the restitution hearing, and we need not consider whether trial counsel's failure to present his testimony constituted deficient performance. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

By the Court.—Orders affirmed.

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