

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 14, 2003

Cornelia G. Clark
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. 03-1204-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01CF001995

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SCOTT T. GRABOWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ Scott T. Grabowski appeals from a judgment entered after a jury trial, wherein he was found guilty of two counts of unfair home improvement trade practices, contrary to WIS. STAT. § 100.20(2) (1999-2000).²

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

He also appeals from an order denying his postconviction motion. He claims that the trial court erroneously exercised its discretion in finding evidence sufficient to support his conviction as required by WIS. ADMIN. CODE § ATCP 110.02(6)(m). He also claims that the trial court erroneously exercised its discretion in setting restitution. Because the record contains sufficient credible evidence to support the jury's determination that Grabowski failed to provide written lien waivers as required by WIS. ADMIN. CODE § ATCP 110.02(6)(m), and because the payment of restitution could properly be ordered for Grabowski's failure to comply with WIS. ADMIN. CODE § ATCP 110.02(6)(m) regarding all contractors, subcontractors, and material suppliers, this court affirms.

I. BACKGROUND

¶2 In December of 1999, Brian Fendry contacted Grabowski for an estimate of rehabilitation and improvement costs for a condominium Fendry and three others were interested in purchasing. Following the purchase of the condominium, Fendry verbally agreed to pay Grabowski \$54,000 for the rehab and improvement of the condominium. On approximately February 11, 2000, Fendry paid Grabowski \$20,000—the first of three installment payments for the rehab and improvement project. Immediately thereafter, Grabowski hired “Donny” as a demolition foreman to monitor and assist several temporary employees engaged in work at the condominium. Approximately two weeks later, on February 25, 2000, Grabowski asked for and received the second payment of \$20,000. On March 4, 2000, Grabowski provided Fendry with a written contract for the rehab and improvement project. At some point following the provision of the written contract, drywall and carpentry work began at the condominium.

¶3 Ultimately, Fendry became dissatisfied with Grabowski's pace of work and disagreements arose between the two regarding the project. Grabowski requested that the final payment of \$14,000 be made sometime between April 10 and April 20, 2000, for the project to be completed. However, the disagreements between Grabowski and Fendry were never resolved and Grabowski left the job site without the final payment. During the time Grabowski acted as primary contractor for the rehabilitation and improvement project on the condominium, Fendry never received lien waivers from subcontractors provided by Grabowski.

¶4 A criminal complaint was filed against Grabowski charging him with one count of theft by contractor and three misdemeanor counts of unfair home improvement trade practices. On January 9, 2002, the case was presented to the court. A jury convicted Grabowski on two unfair trade practice counts—failure to furnish lien waivers from all subcontractors, and failure to provide a written contract prior to receiving payment and beginning work. At the restitution hearing, Grabowski was ordered to pay \$10,828.60 for his failure to furnish lien waivers. Thereafter, Grabowski filed a postconviction motion claiming that the trial court erroneously exercised its discretion in finding evidence sufficient to support his conviction for failure to furnish lien waivers. Furthermore, Grabowski claimed that the trial court erroneously exercised its discretion in setting restitution. The trial court denied the motion on both grounds, reasoning that the jury heard sufficient evidence to find Grabowski guilty beyond a reasonable doubt and that the restitution award was within statutory limits. Grabowski now appeals.

II. DISCUSSION

A. *Sufficiency of the Evidence*

¶5 Grabowski first claims that the trial court erred when it concluded the evidence was sufficient to support his conviction for failure to furnish lien waivers. This court rejects his claim.

¶6 In reviewing the sufficiency of evidence to support a conviction, this court will not disturb a trial court's verdict unless the evidence presented was so insufficient in probative value that no reasonable trier of fact could be convinced of guilt beyond a reasonable doubt. *State v. Lossman*, 118 Wis. 2d 526, 540-41, 348 N.W.2d 159 (1984). Moreover, this court is required to review the evidence in the light most favorable to the verdict. *State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). Accordingly, this court shall not overturn a verdict if any possibility exists that the trier of fact could have drawn the necessary inferences from the evidence presented at trial. *Id.* at 507.

¶7 Here, the trial court states in its postconviction order that the jury heard evidence sufficient to sustain a conviction for Grabowski's failure to provide lien waivers to Fendry. During trial, the jury heard evidence of multiple individuals working at the condominium between the first and second \$20,000 payments. Fendry testified that the second payment was made "a couple of weeks after the first check." During that time, Fendry stated that a worker, "Donny" was on the premises doing demolition work. Grabowski testified that he had hired Donald Lecki to work at the property, and that he had also hired several temporary employees. Furthermore, the jury heard evidence that Fendry did not receive any lien waivers from Grabowski at any time before or after the second payment was made for the value of the work provided by these individuals. This evidence was

sufficient for the jury to infer facts necessary to find Grabowski guilty of this offense beyond a reasonable doubt.³ Accordingly, there is no basis for this court to disturb the trial court's verdict.

B. Restitution

¶8 Grabowski next contends that the trial court erroneously exercised its discretion in setting restitution. Grabowski sets forth four arguments: (1) there was no nexus between the restitution ordered and the crimes of conviction; (2) the State and the trial court failed to distinguish between work performed by subcontractors prior to the second installment payment and work performed thereafter; (3) affidavits of subcontractors which directly contradict Fendry's claims should have been considered by the court at the postconviction stage; and (4) the trial court failed to appropriately grant a set-off for the \$14,000 left owing to him under the contract with Fendry.

³ The administrative code provision at issue provides:

ATCP 110.02 Prohibited trade practices. No seller shall engage in the following unfair methods of competition or unfair trade practices:

....

(6) PRICE AND FINANCING.

....

(m) Where partial payments are required at various stages in the performance of the contract, fail[ure] to give or furnish to the buyer lien waivers in writing from all contractors, subcontractors and material suppliers for the proportionate value of all labor, services and products or materials furnished or delivered as of the time partial payment is made.

¶9 A trial court properly exercises its discretion when calculating restitution, if it examines the relevant facts, applies a proper standard of law, and reaches a rational conclusion. *State v. Foley*, 153 Wis. 2d 748, 752, 451 N.W.2d 796 (Ct. App. 1989). This court recognizes that restitution should be ordered for the benefit of “a[ny] crime considered at sentencing.” WIS. STAT. § 973.20(1r). A “[c]rime considered at sentencing” means “any crime for which the defendant was convicted and any read-in crime.” WIS. STAT. § 973.20(1)(a). Furthermore, a restitution order may require a defendant to “[p]ay 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 a crime considered at sentencing.” WIS. STAT. § 973.20(5)(a). A “special damage” is recognized by this court as a “readily ascertainable pecuniary loss.” *State v. Behnke*, 203 Wis. 2d 43, 60, 553 N.W.2d 265 (Ct. App. 1996).

¶10 Here, the record reflects that the trial court examined relevant facts, applied a proper standard of review, and reached a rational conclusion. First, by law, Fendry was allowed to recover all special damages, substantiated in the record, which could be recovered in a civil action. Accordingly, a nexus was formed between Fendry’s losses recoverable in a civil action and Grabowski’s failure to provide lien waivers.

¶11 Second, Grabowski had a continuing duty to provide lien waivers from all subcontractors and material men for which he had received payment. Grabowski was holding the \$40,000 he had received as payment by Fendry in trust. During that time, Grabowski had contracted with several subcontractors to provide labor and materials for the project. Based on WIS. ADMIN. CODE § ATCP 110.02(6)(m), Grabowski was obligated to provide lien waivers from those

individuals. He did not. It was undisputed that lien waivers were *at no time* provided. Therefore, this court need not distinguish between work performed by subcontractors prior to the second installment payment and work performed thereafter.

¶12 Third, the affidavits presented here by Grabowski are not a part of the record to be considered by this court. As the trial court states in its postconviction order, Grabowski had the opportunity to present these witnesses at the restitution hearing, but he failed to do so.

¶13 Fourth, Grabowski complains that the trial court failed to consider the \$14,000 still owed on the original contract when setting the restitution amount. Although a court can consider a set-off as a defense in a restitution hearing, the burden is on Grabowski to prove the amount. *State v. Walters*, 224 Wis. 2d 897, 908, 591 N.W.2d 874 (Ct. App. 1999). Under the facts and circumstances of the instant case, the trial court determined that the proper resolution for the claim for offset would come in the context of the civil action currently pending and not in a challenge to a restitution award in a criminal proceeding. This is so because the amount due and owing is a disputed issue and will be resolved in the civil case. Accordingly, the trial court's decision relative to this contention was not erroneous.

¶14 Based on the foregoing, this court concludes that the trial court did not erroneously exercise its discretion in setting restitution.

By the Court.—Judgment and order affirmed.

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

