COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1842-CR **Cir. Ct. No. 2005CF807**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMIE L. KNIGHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Jimmie Knight appeals a judgment of conviction for arson and criminal damage to property and an order denying his postconviction motion. Knight claims he received ineffective assistance of trial counsel. Specifically, Knight asserts trial counsel was deficient for failing to pursue an alibi

defense, adequately advise Knight on his decision not to testify, and object to the amount ordered for restitution. Knight also claims the circuit court imposed a harsh and excessive sentence and erred in setting the amount of restitution. We affirm.

BACKGROUND

¶2 Knight was charged with arson and criminal damage to property, both as domestic abuse, after a fire set on the afternoon of July 30, 2005, burned through the apartment of Knight's girlfriend, Amy Zepnick.[1] The criminal complaint alleged that Knight started moving his belongings out of Zepnick's apartment at about 10:00 that morning. At about 12:30 p.m., Knight returned to Zepnick's apartment with Glenda Hollsten, whom he was moving in with, and allegedly spilled soda on Zepnick's carpet, poured milk down the basement stairs, kicked a chair into a wall, and broke a picture frame. Zepnick requested the apartment key, but Knight refused, indicating that he still had some things to move out. Knight left at approximately 1:15 p.m.

¶3 The criminal complaint further alleged that Zepnick left her apartment to visit her mother at approximately 1:45 p.m. Zepnick returned home shortly after 4:00 p.m. and discovered sugar next to the gas tank of her car in the garage. She smelled gasoline and heard her smoke detectors ringing inside the apartment. Police determined the fire was set intentionally using gasoline as an accelerant. Officers spoke with one of Zepnick's neighbors, who claimed to see Knight leaving Zepnick's apartment at approximately 3:30 p.m.

[1] A repeater enhancer was added to both charges in the Information.

¶4 Sergeant Lance Catalano conducted a videotaped interview with Knight later that evening. Knight denied returning to Zepnick's apartment and stated that he was asleep at Hollsten's apartment all afternoon. Catalano asked Knight if he would be willing to submit to a polygraph examination, and Knight stated that he would. After Knight agreed to the examination, Catalano asked if Knight had ever taken a polygraph before. Knight responded that he did not know what a polygraph was. After Catalano described the process, Knight repeatedly asked for the test to be administered.[2]

¶5 Knight reached a plea agreement with the State. Knight pled no contest to the arson charge, and the State dismissed the criminal damage charge and repeater enhancer. The State also agreed to recommend a seven-year sentence consisting of three years' initial confinement and four years' extended supervision. The court ordered a presentence investigation (PSI), in which Knight admitted starting the fire. Knight was sentenced to twenty years' imprisonment, consisting of ten years' initial confinement followed by ten years' extended supervision. The court also ordered Knight to pay $12,145.14 in restitution to Zepnick for the loss of her personal property, and $325 to the property owners for the cost of their insurance deductible. The court did not address a claim by American Family Insurance for the amount of its loss.

¶6 Counsel filed a no-merit report, which we rejected in a November 17, 2007 order. At the plea hearing, the circuit court failed to personally inform Knight that the court was not bound by the plea agreement, contrary to ***State v. Hampton***, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d

[2] It is not clear from the record whether a polygraph examination was ever performed.

14. Knight filed a motion for plea withdrawal. At an evidentiary hearing, Knight asserted he was innocent and stated he did not believe his sentence could exceed the sentence recommended by the plea agreement. The circuit court permitted Knight to withdraw his plea, vacated the judgment of conviction, and set the matter for trial.

¶7 Trial counsel was appointed for Knight on January 2, 2009. A two-day jury trial commenced in April 2009. The day before trial, defense counsel received the videotape of Knight's July 30, 2005 interview with Catalano. Counsel indicated on the first day of trial that he had not yet viewed the tape, but would do so that night. Knight elected not to testify in his defense. He was ultimately convicted of both charges and sentenced to twenty years for arson and two years for criminal damage to property. Knight was also ordered to pay $113,596.22 in restitution to American Family, in addition to the amounts previously established to Zepnick and the property owners.

¶8 Knight filed a postconviction motion. He sought a new trial for ineffective assistance of counsel and alleged an erroneous exercise of the circuit court's sentencing discretion. The court held a ***Machner***[3] hearing at which trial counsel and Catalano testified. At the conclusion of the hearing, the court denied Knight's motion.

DISCUSSION

¶9 Knight challenges his conviction on two grounds. First, he maintains that his trial attorney rendered ineffective assistance of counsel.

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

Second, he asserts the circuit court erroneously exercised its discretion by imposing a harsh and excessive sentence.

I. Ineffective Assistance

¶10 Whether counsel rendered effective assistance is a mixed question of law and fact. ***State v. Ludwig***, 124 Wis. 2d 600, 606-07, 369 N.W.2d 722 (1985). We review the circuit court's findings of fact under the clearly erroneous standard, while the ultimate question of whether the attorney's conduct deprived the defendant of effective assistance of counsel is a determination subject to de novo review. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

¶11 An ineffective assistance claim has two components. The defendant must first show that counsel's performance was deficient. ***Id.*** at 633. The adequacy of the representation is assessed using an objective reasonableness standard. ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984). In conducting our assessment, we indulge "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance …." ***Id.*** at 689. We are mindful that counsel's function is to "make the adversarial testing process work in the particular case." ***Id.*** at 690.

¶12 In addition to deficient performance, the defendant must show that the errors "actually had an adverse effect on the defense." ***Id.*** at 693. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." ***Id.*** The defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶13 Knight claims he received ineffective assistance in three ways. First, he claims trial counsel was ineffective for failing to pursue an alibi defense and request an alibi jury instruction. Second, Knight contends trial counsel failed to properly advise him regarding his decision not to testify at trial. Third, Knight asserts his counsel was ineffective for failing to object to the amount of restitution.

A. Alibi Defense

¶14 Knight asserts trial counsel should have pursued an alibi defense. Specifically, Knight maintains counsel should have had him take the stand, or else introduced his alibi defense through Hollsten's testimony. "In the very least," Knight contends, "trial counsel should have asked for the alibi jury instruction at the close of all the evidence."

¶15 We first address Knight's assertion that trial counsel should have called him to testify about his claimed alibi. At the ***Machner*** hearing, counsel testified that, before trial, he read the PSI in which Knight admitted to starting the fire. When counsel raised the issue with Knight, Knight again admitted starting the fire. Knight now maintains that, despite his admission, trial counsel should have called him as a witness to testify regarding his innocence.

¶16 An attorney whose client seeks to offer perjured testimony is faced with an ethical quandary; counsel must balance the duties of zealous advocacy, confidentiality, and loyalty to the client with his or her responsibility to the courts and our "truth-seeking system of justice." ***State v. McDowell***, 2003 WI App 168, ¶54, 266 Wis. 2d 599, 669 N.W.2d 204, *aff'd*, 2004 WI 70, 272 Wis. 2d 488, 681 N.W.2d 500. "On those occasions when a defendant informs counsel of the intention to testify falsely, the attorney's first duty shall be 'to attempt to dissuade the client from the unlawful course of conduct.'" ***McDowell***, 272 Wis. 2d 488,

¶45 (quoting ***Nix v. Whiteside***, 475 U.S. 157, 169 (1986)). If unsuccessful, the attorney should move to withdraw or elicit testimony from the defendant in narrative form. ***Id.***, ¶¶46-47.

¶17 At the ***Machner*** hearing, trial counsel explained that he advised Knight not to take the stand:

> But he was never going to take the stand. Was it possible he might have? Sure. It's up to him. It's his power to do so, but the concept was all along he wasn't in a position to do that because one of the things that I explained to him is if he did take the stand, I was going to have to make a final analysis as to whether or not I could do Q and A [question and answer] with him or whether I would have to ask for permission to do a narrative because I can't participate in the perpetration of a fraud upon the court.
>
> So that's – it all started with the PSI and that paragraph, and I read that. I talked to him about that, and so this thing about proclaiming his innocence and he was – maybe he was going to testify, that doesn't register with my memories of his and my interviews and conference.

Counsel further explained that he believed that Knight, if called, would have to be questioned in the narrative, which would harm Knight's chances of success at trial:

> I know you can't perpetrate a fraud on the [c]ourt. If you know your client is going to take the stand and testify falsely, you can't do Q and A. They get to take the stand, but you sit there and they speak in the narrative.
>
> But the problem is the Judge and the prosecuting attorney and maybe some of the jurors know exactly – there's only one reason that occurs, and even if just one juror knows it, when they go back to deliberate … you run the risk of that juror telling the other eleven or whatever and then they all know that's what happened is the lawyer knew quote-unquote that the guy was going to take the stand and falsely testify that he didn't do it.

¶18 Here, Knight and the State vigorously dispute the extent of trial counsel's knowledge about Knight's guilt. Knight contends his admissions to trial counsel and to the PSI writer are insufficient to compel a belief that his testimony, if offered, would be perjured, because he denied starting the fire when interviewed by police. The State asserts that trial counsel was justified in relying on Knight's admission of guilt.

¶19 "Knowledge" that a client intends to falsely testify generally requires an explicit statement of such intent. *See* ***McDowell***, 272 Wis. 2d 488, ¶43. However, our supreme court recognized that, in some cases, counsel might be presented with the same ethical dilemma even absent a direct admission by the defendant. ***Id.***, ¶36. Both the supreme court and court of appeals in ***McDowell*** used the example of a couple "conclusively captured on video and apprehended at the scene of the crime who inform counsel of their intent to testify that they were never even at the bank." ***Id.***, ¶36 n.10 (citing ***McDowell***, 266 Wis. 2d 599, ¶48 n.16).

¶20 The ***Machner*** hearing transcript reveals that trial counsel never seriously considered calling Knight to testify. Thus, it does not appear that Knight discussed the content of his potential testimony with trial counsel, or informed counsel that he desired to testify regarding an alibi. Knight apparently expected trial counsel to derive his alibi from other sources, specifically the initial police report and the transcript of the plea withdrawal hearing, in which Knight professed his innocence.

¶21 In essence, Knight asserts that, despite his admissions of guilt, trial counsel was required to independently ascertain and introduce Knight's alibi in order to render effective assistance. We cannot accept this result. After Knight

professed his guilt to trial counsel under the cloak of attorney-client privilege, counsel would arguably have been justified in viewing any request to testify regarding a claimed alibi as unequivocally conveying an intent to commit perjury.

¶22 Even if Knight's admissions of guilt would have been insufficient for trial counsel to "know" that Knight intended to lie on the stand, we nonetheless conclude counsel's decision not to elicit alibi testimony from Knight was a reasonable strategic decision. When a defendant admits guilt to trial counsel, and then requests to testify inconsistently with that admission, we conclude counsel must elicit answers in the narrative form to avoid suborning perjury. Such an admission constitutes an "extraordinary circumstance" that presents counsel with the same ethical dilemma as a defendant's direct admission that he or she intends to lie. *See* ***McDowell***, 272 Wis. 2d 488, ¶36.

¶23 In any event, trial counsel offered a second strategic reason, prompted by Knight himself, for not having Knight testify as to his asserted alibi. Trial counsel stated that Knight was "concerned about a potential sentencing if he'd lost at the trial … and the Judge then comparing what he possibly theoretically could have said from the stand denying he did it [with Knight's admission of guilt to the PSI writer]." Counsel continued, "That could have had a bad impact at sentencing. That was one of the things he was very concerned about." Thus, counsel's decision not to have Knight testify regarding his alibi was attributable, at least in part, to Knight's desire for a lenient sentence in the event of a conviction.

¶24 We also conclude counsel was not deficient for failing to elicit alibi testimony from Glenda Hollsten.[4] To be of any help to Knight, Hollsten had to place Knight somewhere other than Zepnick's apartment at the time the fire was set, approximately 4:00 p.m. on July 30, 2005. At trial, Hollsten testified that she slept through the entire afternoon of the fire. Knight was at her house in the early afternoon, and again when she woke up at 5:00 p.m., but Hollsten could not vouch for Knight's location between approximately 1:30 and 5:00 p.m. Further inquiry regarding Knight's whereabouts would have been fruitless in light of Hollsten's testimony that she was unconscious during the relevant time period.

¶25 Because Knight did not testify, and Hollsten's testimony did not provide an alibi, trial counsel was not deficient for failing to request an alibi jury instruction. In any event, specific instruction regarding an alibi is generally unnecessary. "The state is required to prove that the defendant committed the crime, and it is obvious that if the defendant was somewhere else when the crime was committed, he did not commit it." WIS JI—CRIMINAL 775 cmt. 1 (May 2005).

B. Knight's Decision to Testify

¶26 Knight also claims that trial counsel failed to properly advise him regarding his decision not to testify. Specifically, Knight asserts that he could not make a knowing, voluntary, and intelligent waiver of his right to testify because trial counsel did not show Knight the videotape of his interview with Catalano,

[4] Knight relies heavily on ***State v. Cooks***, 2006 WI App 262, 297 Wis. 2d 633, 726 N.W.2d 322, as an analogous case. ***Cooks***, however, focused on the attorney's duty to investigate a potential alibi, *see* ***id.***, ¶50; here, Knight does not claim inadequate investigation, only inadequate trial performance.

and did not advise him that his agreement to take a polygraph was admissible at trial to bolster his credibility. *See* ***State v. Garcia***, 2010 WI App 26, ¶5, 323 Wis. 2d 531, 779 N.W.2d 718.

¶27 We reject Knight's contention that he could not validly waive his right to testify without seeing the videotape of his interview with police. Knight was present for the interview with Catalano; he therefore had full knowledge of the content of that interview. Indeed, trial counsel testified during postconviction proceedings that Knight stated he did not need to see the videotape. In the circuit court's words, "You didn't have to show it back to the defendant because the defendant was there, he lived it, and he knew what he said in that interview." Counsel was therefore not deficient for failing to show the videotape to Knight.[5]

¶28 We also conclude that trial counsel was not deficient for failing to advise Knight that his offer to submit to a polygraph examination was admissible at trial. The result of a polygraph test is generally inadmissible in Wisconsin, ***State v. Dean***, 103 Wis. 2d 228, 279, 307 N.W.2d 628 (1981), but an offer to take a polygraph test may be admissible for the purpose of assessing the offeror's credibility, ***State v. Pfaff***, 2004 WI App 31, ¶26, 269 Wis. 2d 786, 676 N.W.2d 562. "An offer to take a polygraph test is relevant to the state of mind of the person making the offer—so long as the person making the offer believes that the

[5] This is a separate question from whether trial counsel was deficient for failing to view the videotape prior to trial. As the circuit court recognized at the ***Machner*** hearing, trial counsel was arguably deficient for failing to watch the videotape of the interview sooner. However, Knight does not raise that issue on appeal and, in any event, we would conclude that Knight was not prejudiced. The pertinent information on the videotape was also included in Catalano's report and the written statement signed by Knight, items trial counsel did review.

test or analysis is possible, accurate, and admissible." ***Id.*** (citing ***State v. Santana-Lopez***, 2000 WI App 122, ¶4, 237 Wis. 2d 332, 613 N.W.2d 918).

¶29 What constitutes an "offer" to take a polygraph has been a subject of repeated litigation. In ***Estate of Neumann v. Neumann***, 2001 WI App 61, ¶64, 242 Wis. 2d 205, 626 N.W.2d 821, we concluded that an agreement to submit to the examination at the behest of law enforcement does not constitute an offer to take the test. In ***Pfaff***, 269 Wis. 2d 786, ¶29, it was the defendant's attorney who requested the polygraph; because defense counsel knows—or should know—that the polygraph results are inadmissible, we concluded once again that the idea of a polygraph must originate with the defendant. And in ***State v. Shomberg***, 2006 WI 9, ¶40, 288 Wis. 2d 1, 709 N.W.2d 370, our supreme court expressly adopted the position that mere agreement to take a polygraph, as opposed to an offer, is insufficient.

¶30 Here, trial counsel did not perform deficiently by failing to advise Knight that he could bolster his credibility at trial with evidence of his agreement to take a polygraph test. As Catalano's written report and the videotape of the June 30, 2005, interview make clear, Knight did not offer to take a polygraph; he merely responded affirmatively to Catalano's questions about the test and expressed his willingness to submit after Catalano explained the process. Under ***Neumann***, ***Pfaff***, and ***Shomberg***, this is insufficient. The evidence was inadmissible, and therefore would not have aided Knight's credibility had he chosen to testify.

¶31 Further, admissibility of the evidence was contingent on Knight showing that he believed the test was "possible, accurate, and admissible." ***Neumann***, 242 Wis. 2d 205, ¶65 (internal quotation marks omitted). Knight has

failed to make the requisite showing. Knight did not testify at the ***Machner*** hearing. Instead, Knight submitted an affidavit stating, in conclusory fashion, that he "believed that the test was possible, accurate and admissible" at the time he agreed to take it. We generally require more than such conclusory statements to set aside a judgment of conviction or order a new trial. *See* ***State v. Machner***, 92 Wis. 2d 797, 805-06, 285 N.W.2d 905 (Ct. App. 1979).

¶32 Knight argues that an affidavit is sufficient and that testimony is not required to show the offeror's state of mind. As the State correctly notes, Knight's failure to testify at the ***Machner*** hearing deprived the State of the opportunity to test Knight's allegations regarding his state of mind, and the circuit court of the opportunity to make credibility findings. In the erroneous-exclusion-of-evidence context, our courts have repeatedly held that an offer of proof in the form of testimony is necessary to establish the defendant's state of mind at the time he or she offers to take a polygraph. *See* ***Shomberg***, 288 Wis. 2d 1, ¶41; ***Neumann***, 242 Wis. 2d 205, ¶¶66-67. In a sense, Knight's affidavit, rather than stating evidentiary facts, stated only a legal conclusion. We are mindful that, in this case, the legal question surrounding the admissibility of Knight's "offer" is intricately intertwined with his subjective state of mind. Yet a court is not obligated to accept a witness's legal conclusions and, without additional testimony, the circuit court could not reasonably make any findings regarding Knight's state of mind. *See* ***St. Mary's Congreg. v. Industrial Comm'n***, 265 Wis. 525, 531, 62 N.W.2d 19 (1953).

¶33 In sum, we reject Knight's assertions that his attorney was deficient for failing to show Knight a videotape of his police interview and failing to advise Knight that he could introduce evidence of his agreement to take a polygraph test to bolster his credibility at trial.

C. Amount of Restitution

¶34 Knight next claims trial counsel was deficient for failing to object to the additional $113,596.22 in restitution ordered to American Family at the second restitution hearing. Knight's claim has no merit. At the ***Machner*** hearing, trial counsel stated he advised Knight that some clients believe they can "curry favor" with the sentencing court by choosing not to fight restitution. Trial counsel further stated that Knight "wanted to show remorse, repentance and what have you indirectly by not challenging restitution." Counsel's failure to object was reasonable trial strategy that does not constitute deficient performance.

II. Erroneous Exercise of Sentencing Discretion

¶35 The length of a sentence within the permissible range set by statute is a matter left to the trial court's discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). On appeal, our review is limited to determining if that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "In reviewing a sentence to determine whether or not discretion has been exercised or whether such discretion has been abused, there is a presumption that the trial court acted reasonably and the complainant is required to show some unreasonable or unjustifiable basis … for the sentence complained of." ***Ocanas***, 70 Wis. 2d at 183-84.

¶36 Knight contends that his sentence was harsh and excessive. A sentencing court erroneously exercises its discretion in this fashion when "the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Id.*** at 185.

¶37 The maximum potential penalties for the crimes are extremely relevant to the "harsh and excessive" inquiry. "A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

¶38 Arson carries a substantially greater penalty than that imposed by the sentencing court. Arson of a building without the owner's consent is a Class C felony punishable by up to forty years' imprisonment.[6] *See* WIS. STAT. §§ 943.02(1)(a); 939.50(3)(c). Knight was sentenced to only twenty years' imprisonment, which included ten years' initial confinement followed by ten years' extended supervision.

¶39 As for criminal damage to property, the court sentenced Knight to the maximum, but appropriately exercised its discretion in doing so. Criminal damage to property is a Class A misdemeanor, punishable by up to nine months' imprisonment. *See* WIS. STAT. §§ 943.01(1); 939.51(3)(a). The habitual criminality enhancer increased the maximum to two years' imprisonment, *see* WIS. STAT. § 939.62(1)(a), the sentence Knight received.

¶40 At sentencing, the court concluded that the manner and potential destructive effect of the crime justified the maximum penalty. Knight attempted

[6] The maximum penalty for Knight's crime was increased by six years because Knight had a 2005 felony conviction. *See* WIS. STAT. § 939.62(1)(c).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

to destroy all of the victim's personal property, including her car by pouring sugar in her gas tank.[7] As the court stated, "No one deserves to have all their memories taken away like that and burnt up in ashes." We are mindful that maximum penalties are generally reserved for the most aggravated breaches of the statutes. *See* ***McCleary v. State***, 49 Wis. 2d 263, 275, 182 N.W.2d 512 (1971). On the spectrum of potential physical damage to property, the attempted destruction of all of another's personal possessions falls close to the most egregious form of the offense.

¶41 Knight also contends his sentence was excessive because the court deviated from the PSI writer's recommendation, but this contention is without merit. An addendum to the original PSI recommended that Knight receive no more imprisonment than the original sentence of twenty years for arson, but, in addition to that sentence, the court imposed a consecutive two-year term on the criminal damage to property charge. "While the recommendation in a presentence report is a relevant factor in determining type and length of sentence, the sentencing judge is not bound by it." ***Ocanas***, 70 Wis. 2d at 188. The circuit court appropriately exercised its sentencing discretion in ordering a longer total sentence, noting that, until trial, it was unaware of the sugar in the victim's vehicle and that Knight had "tri[ed] to get that fire to run out of the house … and into the garage almost to go into the gas tank of the vehicle almost so it would explode like in the TV or movies …."

[7] Though sugar might disable a vehicle by clogging the fuel filters, the common rumor that combining sugar with gasoline will produce a semi-solid goo that can clog a vehicle's engine and fuel lines is false. Tom and Ray Magliozzi, *Dear Tom and Ray*, CARTALK.COM (Feb. 2001), http://www.cartalk.com/content/columns/Archive/2001/February/02.html.

¶42 Knight also asserts the circuit court erroneously exercised its discretion when setting the amount of restitution. Prior to plea withdrawal, the circuit court ordered restitution of $325 to the property owners and $12,145.14 to Zepnick. Following the jury trial, the court ordered an additional $113,596.22 to be paid to American Family for its losses. Knight contends the court should not have ordered payment of the latter amount.

¶43 When imposing sentence for a crime involving conduct that constitutes domestic abuse, the court has an affirmative obligation to "order the defendant to make full or partial restitution … to any victim of a crime … unless the court finds that imposing full or partial restitution will create an undue hardship on the defendant or victim and describes the undue hardship on the record." WIS. STAT. § 973.20(1r). The primary purpose of restitution is not to punish the defendant, but to compensate the victim, who should not bear the burden of losses if the defendant is capable of doing so. ***State v. Canady***, 2000 WI App 87, ¶8, 234 Wis. 2d 261, 610 N.W.2d 147. Restitution is the rule and not the exception, and should be ordered whenever warranted. ***Id.***

¶44 We cannot discern from the record any error by the court in ordering restitution to American Family. At the sentencing on Knight's plea, the court noted that although Knight was willing to pay for the out-of-pocket expenses incurred by the victims, he contested the "major expenses which are to the insurance company for covering house damage" and desired a hearing. At the restitution hearing later that year, Knight requested that American Family "be left to their civil remedies rather than making it part of this court order." The court did not address restitution to the insurance company at that time. However, at the 2009 sentencing, the court was reminded of the American Family claim, and ordered Knight to pay the full amount. The court recognized that Knight would

have limited earning potential in the immediate future, but stated that Knight was a young man with no disabilities and would probably have to make small monthly payments for the remainder of his life. The court's failure to address restitution to American Family at the earlier hearing appears to have been simply an oversight.

¶45 The State devotes a portion of its brief to arguing that the circuit court was not, by the higher restitution and longer total sentence, punishing Knight for challenging his no contest plea and taking his case to trial. While Knight raised that issue in the circuit court, we deem it abandoned on appeal and do not address it.[8]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[8] Knight refers to the restitution order as "punitive," later explaining, in conclusory fashion, that it "amounted to another punishment for going to trial." Knight does not cite any legal standards or authorities related to vindictive sentencing or otherwise mention the allegedly punitive nature of the restitution order. We will not consider propositions "which are not specifically argued and are unsupported by citations to legal authority." ***Riley v. Town of Hamilton***, 153 Wis. 2d 582, 588, 451 N.W.2d 454 (Ct. App. 1989).