

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 29, 2014

Diane M. Fremgen
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. 2013AP1796-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 of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Reversed and remanded.*

¶1 NEUBAUER, P.J.¹ Thomas G. Felski appeals from an order for restitution contained in his amended judgment of conviction for performing home

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version.

improvement services without a written contract, contrary to WIS. ADMIN. CODE § ATCP 110.05 (Oct. 2004). This is Felski's second appeal in this matter. In the first appeal, we upheld the restitution order but remanded for clarification regarding the circuit court's method in computing the amount. We remand again for the circuit court to explain how it addressed the cost of materials paid by the Derricks when it calculated the amount of restitution due. We reverse and remand.

¶2 We need not reiterate the facts of this case because we issued a previous opinion in this matter, *State v. Felski*, No. 2012AP1115, unpublished slip op. (WI App Jan. 3, 2013). On remand, in response to our request for explanation regarding the method of computation and the rationale for including or excluding materials costs, the circuit court revised its restitution award to \$25,920.62. As we understand it, the circuit court's computation went as follows:

\$ 148,055.04	Amounts Derricks paid (undisputed)
- 89,180.00	Addition
- 21,354.19	March 2008 contract (undisputed)
- 17,496.34 ²	April 2008 contract (undisputed)
+ <u>5,897.16</u>	Garage kit (undisputed)
\$ 25,920.62	

¶3 This appeal is about whether and how the circuit court included the cost of the materials paid for directly by the Derricks in its calculation, amounts

² This figure should be \$17,496.39, according to the record. Additionally, the garage kit figure should be \$5896.16, according to the record.

which would not be owing by Felski because the Derricks retained the benefit. There is a dispute about the amount that should be subtracted for the value of the addition received by the Derricks. The circuit court referenced the court commissioner's determination that the value of the addition was \$89,180, based on the price per square foot multiplied by square footage. Felski argues that this figure should not include the cost of materials, as the previous written contracts, on their face, were for labor only. In its written decision, the circuit court noted that Felski "fail[ed] to show any basis in the evidence that the \$89,180 was for labor only." It also noted that Felski "never claims he paid for any materials nor is there a single exhibit showing he did." Therefore, the State suggests that the \$89,180 figure is justified by adding the expert's estimate of \$63,045.35 for the work on the addition to the Derricks' out-of-pocket expenses for materials of \$27,492.82.

¶4 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. The weighing and evaluation of the evidence is for the circuit court. *Lellman v. Mott*, 204 Wis. 2d 166, 172, 554 N.W.2d 525 (Ct. App. 1996). When the circuit court is confronted by competing evidence, it is for the circuit court, not this court, to decide which evidence is more credible. *See* WIS. STAT. § 805.17(2). However, the circuit court's conclusion must be based on a discernible rationale. *See Johnson*, 287 Wis. 2d 381, ¶10.

¶5 The trouble is, the circuit court's opinion still does not explain how it factored in the cost of materials paid for by the Derricks. First, it is unclear whether the court added the expert's estimate of \$63,045.35 and the Derricks' direct materials expenditures of \$27,492.82, because these figures do not total \$89,180. Second, \$63,045.35, the expert's estimate, includes both labor and

materials, so adding in the \$27,492.82 for materials paid for by the Derricks could double-count the cost of materials. Third, if we infer from the circuit court's decision that the \$89,180 includes cost of materials for all three projects, what is the rationale for this decision? See *Felski*, No. 2012AP1115, unpublished slip op. at ¶14 n.7 (“If the intention was to include materials in the \$89,190 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.”) The two written contracts are for labor only, so there must have been materials costs involved. The circuit court does not tell us why or how it included the cost of materials for all three projects in the \$89,190 figure for the value of work on the addition, if indeed that is what it did. It is precisely our uncertainty that compels us to remand again for the circuit court to explain how it has included or excluded materials costs and why.

By the Court.—Judgment reversed and remanded.

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

