

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 1, 2011

A. John Voelker
Acting 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. 2010AP1930-CR

Cir. Ct. No. 2004CM19

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY R. SAMPSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washburn County:
EUGENE D. HARRINGTON, Judge. *Affirmed in part; reversed in part, and
cause remanded with directions.*

¶1 PETERSON, J.¹ Gary Sampson was convicted of misdemeanor theft in a business setting, contrary to WIS. STAT. § 943.20(1)(b). The circuit court

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

ordered Sampson to pay restitution. Sampson argues the court erred by setting restitution at the amount the victim had to pay others to finish the contract Sampson failed to complete. We agree and reverse that portion of the judgment awarding restitution. We remand with directions to set restitution at \$11,457.30, the amount of the down payment Sampson converted.

BACKGROUND

¶2 A criminal complaint alleged that, while acting as a building contractor, Sampson entered into a contract with Rick Saletri to make improvements to Saletri's business. It further alleged that Saletri paid Sampson \$11,457.30 as a down payment, but Sampson failed to complete the contract and retained the down payment. Sampson pled no contest.

¶3 At a restitution hearing, Saletri testified he hired Sampson to install heating, electrical, and air conditioning systems in his tire shop. The total cost of the contract was \$15,276.40. Sampson did not complete the contract, and what little work he did perform was substandard. Saletri had to hire two other contractors to finish the job and to correct Sampson's shoddy work. Saletri ultimately paid \$11,143 to complete the heating and air conditioning systems and \$4,045 for the electrical work.

¶4 The court set restitution at the sum of those two numbers—\$15,186.² It explained:

² The sum of \$11,143 and \$4,045 is actually \$15,188. Because we remand with directions to set restitution at the amount of the down payment, we need not address this apparent arithmetical error.

I calculated that by just looking at what [Saletri] had to pay someone else to cover the contract. The contract was for 15,276.40. I recognize that Mr. Sampson did some work, but ... he breached the contract. He failed to perform. Even though he did have some work that he did, what did it cost the other parties to cover the contract? From the testimony that I can determine, [Saletri] paid Early Plumbing and Heating 11,143, and [he] paid this Weber Electric 4,045. The sum of the two is 15,186. Restitution is set at 15,186.

Sampson appeals, arguing the court should have set restitution at \$11,457.30, the amount of the down payment he converted.

DISCUSSION

¶5 Restitution in criminal cases is governed by WIS. STAT. § 973.20. Subsection 973.20(1r) states that a circuit court “shall” order the defendant to pay restitution “to any victim of a crime considered at sentencing ... unless the court finds substantial reason not to do so and states the reason on the record.” However, § 973.20(5)(a) limits the restitution a court may award in two ways. First, restitution is limited to special damages recoverable in a civil action. WIS. STAT. § 973.20(5)(a). Second, the victim’s loss must be attributable to the defendant’s criminal conduct considered at sentencing. *Id.* Although the amount of restitution ordered is generally within the circuit court’s discretion, *State v. Johnson*, 2002 WI App 166, ¶7, 256 Wis. 2d 871, 649 N.W.2d 284, whether a particular item of restitution comes within § 973.20 is a question of law that we review independently, *State v. Rash*, 2003 WI App 32, ¶5, 260 Wis. 2d 369, 659 N.W.2d 189.

¶6 The outcome of this case is controlled by *State v. Longmire*, 2004 WI App 90, 272 Wis. 2d 759, 681 N.W.2d 534, where we held that a victim’s costs to correct construction deficiencies in a theft by contractor case are not

recoverable as a separate item of restitution under WIS. STAT. § 973.20(5)(a). *Id.*, ¶2. Longmire was convicted of theft by contractor after he failed to complete a home improvement project for which he had received a \$30,000 down payment. *Id.*, ¶¶4-5. Longmire paid a subcontractor \$5,533 to excavate and pour concrete footings, but he did not complete any other work on the project. *Id.*, ¶4. The circuit court ordered Longmire to pay \$34,985 in restitution, which included both the \$30,000 down payment and \$3,100 the homeowners spent to correct the subcontractor’s shoddy concrete work. *Id.*, ¶¶5, 10.

¶7 Longmire appealed, arguing the homeowners’ remediation costs were not recoverable as a separate item of restitution. We agreed, concluding:

Even if the work-correction expenditures could have been recovered in a civil action against Longmire for breach of contract, they would not constitute “special damages ... which could be recovered in a civil action against [him] for his ... *conduct in the commission of a crime considered at sentencing.*” [WIS. STAT. §] 973.20(5)(a) (emphasis added).

Id., ¶23. We determined the remediation costs were not attributable to the criminal conduct considered at sentencing—Longmire’s conversion of the \$30,000 deposit. *Id.*, ¶24. Rather, the precipitating cause was shoddy construction work performed in furtherance of Longmire’s contractual obligations. We noted that, even if Longmire had not stolen the homeowners’ money and had applied it all toward completing the contracted work, the homeowners might still have found it necessary to incur additional expenses to correct deficiencies. *Id.*, ¶25. We concluded, “The poor quality of the work actually performed under the contract ... [is] purely a civil wrong and the criminal restitution statute cannot be enlisted to remedy it.” *Id.*, ¶26.

¶8 In *Longmire*, we specifically held that costs incurred to correct shoddy work performed by a contractor “are not recoverable as a separate item of restitution under WIS. STAT. § 973.20(5)(a).” *Id.*, ¶23. Just as the homeowners’ remediation costs were not recoverable in *Longmire*, Saletri cannot recover the amount he paid to complete his project and correct Sampson’s substandard work. As in *Longmire*, the criminal conduct considered at sentencing was Sampson’s conversion of the down payment, not his breach of the contract. *See id.*, ¶¶23-24. The only pecuniary loss Saletri suffered as a result of Sampson’s criminal conduct was the loss of the down payment. *See id.*, ¶19 (citing *Topzant v. Koshe*, 242 Wis. 585, 588, 9 N.W.2d 136 (1943) (explaining that the amount of damages for conversion is the value of items wrongfully taken)). Thus, under § 973.20(5)(a), Saletri is entitled to recover his down payment, but he is not entitled to recover those amounts he paid other contractors to complete Sampson’s contract and correct Sampson’s substandard work.³

¶9 The State attempts to distinguish *Longmire*, arguing that Sampson’s conversion of the down payment was part of a “comprehensive criminal scheme to maximize Sampson’s own criminal ‘take’ while expending minimal labor and equipment costs on Saletri’s project.” The State alleges Saletri’s remediation costs are connected to this criminal scheme because Sampson’s work was so slipshod and incomplete, “it was obviously performed ... to string [Saletri] along until

³ When a contractor is convicted of converting a down payment and is ordered to return the down payment as restitution, the contractor may be entitled to an offset for work performed. *State v. Longmire*, 2004 WI App 90, ¶18, 272 Wis. 2d 759, 681 N.W.2d 534. In that case, the victim’s costs to correct defects in the contractor’s work may be used to determine the amount of the contractor’s offset. *Id.*, ¶21. However, absent a contractor’s claim for an offset for work performed, the corrective costs may not be included in a restitution order. *Id.*, ¶22. The circuit court did not grant Sampson an offset for work performed, and he does not argue on appeal that he is entitled to an offset.

Sampson’s plans were in place to flee the area and abscond with [Saletri’s down payment].” However, the State does not provide any support for these assertions. There is no evidence in the record of a “comprehensive criminal scheme.”

¶10 The necessary assumption underlying the State’s argument is that if Sampson had not intended to convert the deposit money, the project would have been completed in a professional manner. However, even if Sampson had applied the entire down payment to the contracted work, Saletri may still have needed to retain other contractors to correct deficiencies. *See Longmire*, 272 Wis. 2d 759, ¶25.

¶11 Because the amounts Saletri paid to cover Sampson’s contract were not attributable to the criminal conduct for which Sampson was sentenced, those amounts were not proper items of restitution. We therefore reverse in part and remand with directions that the circuit court set restitution at \$11,457.30, the amount of Saletri’s down payment.

By the Court.—Judgment 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.

