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May 21, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP511-CRNM State of Wisconsin v. Derek A. Forbes (L.C. # 2011CF165)

Before Neubauer, P.J.¹

Derek A. Forbes appeals from an August 16, 2012 restitution order in the amount of \$16,620.98 entered in connection with his no contest pleas to one count of felony theft by contractor, three counts of misdemeanor violation of unfair trade practices, and two counts of

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

misdemeanor theft in a business setting.² Forbes's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32, and *Anders v. California*, 386 U.S. 738 (1967). Forbes received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, we conclude that the restitution order³ may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

In 2011, Forbes, a general contractor, was charged with theft and unfair trade practices in connection with home improvement projects involving three separate homeowners: (1) Sarah Jamieson, (2) Denise King, and (3) Bruce Green. Pursuant to the parties' negotiated agreement, the trial court entered judgment on five misdemeanors, withheld sentence, and ordered a three-year term of probation. Forbes also pled no contest to one count of theft by contractor, a Class I felony. The court deferred entry of judgment on the felony pending Forbes's successful completion of probation. Restitution was held open and the State later submitted a proposed restitution order totaling \$16,620.98, divided as follows: (1) \$2,032.98 to Jamieson, (2) \$3,577

² Forbes was convicted and sentenced in connection with the five misdemeanor counts as part of Dane County Circuit Court Case No. 2011CF165. The felony on which the court deferred entry of the judgment is part of this same circuit court case. Forbes did not file a notice of appeal from the judgment of conviction entered in connection with his misdemeanor convictions. Instead, he filed a notice of appeal from the trial court's August 16, 2012 restitution order. Given that no judgment of conviction has yet been entered in connection with the felony count which is also part of circuit court case No. 2011CF165, we are fully not convinced that the restitution order is final for purposes of appeal. However, in order to ensure appellate review of the restitution order, to the extent it is nonfinal, we hereby grant leave to appeal the August 16, 2012 restitution order arising out of case No. 2011CF165. Other than any potential restitution implications, our review in this appeal does not include the undisposed of felony for which no judgment has yet been entered.

³ It appears from the record that the trial court never entered an amended judgment of conviction reflecting its August 16, 2012 amended restitution order. For clarity's sake, we suggest that the trial court direct the clerk's office to enter an amended judgment.

to Green, (3) \$9,500 to King, and (4) administrative costs equal to \$1,511, or ten percent of the restitution ordered. Based on Forbes's partial objection to the restitution amount, the trial court scheduled a hearing. At the start of the first restitution hearing, the parties explained that Forbes was not contesting the \$2,032.98 owed to Jamieson and that the amount owed to King would be limited to between \$4,500 and \$9,500.⁴ There was no stipulation concerning the amount owed to Green.

Green testified that he entered into two contracts with Forbes for home improvements, paid Forbes \$14,000, and received a \$1,000 credit for work that he performed himself. The contracts were received into evidence. Green testified about the work that Forbes failed to perform under the contract. Green testified that he had either hired other contractors to complete the work or had done it himself. Green explained the necessary work in detail and provided receipts for each work-related expense. He testified that he paid \$3,577 to finish the work left uncompleted under the contract with Forbes.

Denise King testified that she paid \$11,500 to Forbes for home improvements and that he did not complete the majority of the work under the contract. King agreed to cap her restitution claim at \$9,500 because Forbes had completed about \$2,000 of work under the contract. Because Forbes agreed that he owed King \$4,500 for concrete, King testified that she was entitled to an additional \$5,000 for unperformed work. As did Green, King supported her claim with documentary evidence, including photographs, contracts and receipts.

⁴ Forbes agreed that he owed \$4,500 for money he was provided to purchase concrete, and King agreed to cap her request at \$9,500.

Various other witnesses testified and the hearing spanned three days. After considering the evidence and the parties' arguments, the trial court ordered: (1) \$2,032.98 as stipulated for the Jamieson project; (2) \$9,500 for the King project; (3) \$3,577 for the Green project; and (4) administrative costs of \$1,511.

The no-merit report addresses the sufficiency of the evidence underlying the trial court's restitution order. WISCONSIN STAT. § 973.20(1r) requires a court to order full or partial 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." Section 973.20(5)(a) requires the defendant to "[p]ay all special 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." Whether a trial court has the authority to order restitution on the particular facts of a case is a question of law. *State v. Holmgren*, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999). When a trial court has such authority, we review its decision to order a particular amount for an erroneous exercise of discretion. *Id.*

There is no arguable merit to a claim that the trial court improperly imposed restitution in the amount of \$16,620.98. The trial court was authorized to and did order restitution for the victims' special damages resulting from Forbes's crimes considered at sentencing.⁵ The trial

⁵ In determining its authority, the trial court considered *State v. Longmire*, 2004 WI App 90, ¶¶24-26, 272 Wis. 2d 759, 681 N.W.2d 534, which clarifies that a victim may not be entitled to claim separate restitution for less-than-perfect work actually performed under the contract. The trial court determined, and we agree, that the amounts ordered are allowable under *Longmire*. There was ample evidence that the restitution sought was for work not performed under the contract, none of the victims received more restitution than they actually paid to Forbes, and the restitution statute reflects "a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution." *State v. Kennedy*, 190 Wis. 2d 252, 258, 528 N.W.2d 9 (Ct. App. 1994).

court considered and weighed the evidence and carefully explained its decision. Its factual findings are not clearly erroneous and its decision represents an appropriate exercise of discretion.

Our independent review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the order for restitution, and discharges appellate counsel of the obligation to represent Forbes further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that, to the extent the restitution order appealed from is nonfinal, this court grants leave to appeal under WIS. STAT. § 808.03(2).

IT IS FURTHER ORDERED that the restitution order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Farheen Ansari is relieved from further representing Derek A. Forbes in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals