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April 29, 2015

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

2014AP1662-CRNM State of Wisconsin v. Thomas G. Felski (L.C. #2009CM442)

Before Brown, C.J.[1]

Martha K. Askins, counsel for Thomas G. Felski, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967), concluding that no grounds exist to challenge the restitution order and amended judgment convicting Felski of failing to enter into a written contract for home improvement services, contrary to WIS. ADMIN. CODE § ATCP 110.05(1)(a) (hereafter, ATCP 110.XX). Felski has filed a response; counsel

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

filed a supplemental report. Upon consideration of the no-merit reports, the response, and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we accept the no-merit report, as we conclude that there is no arguable merit to any issue that could be raised on appeal. We summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21.

Felski's 2010 conviction stemmed from a never-completed remodeling and construction project at the home of Richard and Paula Derrick, the latter stages of it, which included a new garage, without a written contract. He was ordered to pay the Derricks restitution. This is Felski's third appeal of the restitution order. *See* ***State v. Felski***, No. 2012AP1115, unpublished slip op. (WI App Jan. 3, 2013) (***Felski I***), and ***State v. Felski***, No. 2013AP1796, unpublished slip op. (WI App Jan. 29, 2014) (***Felski II***). The restitution order essentially was upheld but both times we remanded for the circuit court to clarify how the restitution figure was determined. On remand of ***Felski II***, the court set restitution at $30,109.50, supported by an over-seven-page written decision. The judgment of conviction was amended accordingly. This no-merit appeal followed.

The no-merit report considers whether the circuit court erred in computing restitution. "The determination of the amount of restitution to be ordered (and thus whether a victim's claim should be offset or reduced for any reason) is reviewed under the erroneous exercise of discretion standard." ***State v. Longmire***, 2004 WI App 90, ¶16, 272 Wis. 2d 759, 681 N.W.2d 534. We affirm if the court applied a correct legal standard, logically interpreted the facts, and used a rational process to reach a reasonable conclusion. ***Id.*** As the fact finder in a restitution hearing, the circuit court is "free to accept and reject evidence and to give accepted evidence such weight as it desires." *See* ***State v. Boffer***, 158 Wis. 2d 655, 663, 462 N.W.2d 906 (Ct. App.

1990). We accept the factual findings that are part of a discretionary decision unless they are clearly erroneous. ***State v. Holmgren***, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999).

The circuit court here first set forth a summary of its prior restitution computation, then examined each item, and explained why it adjusted any of the amounts. It also explained why it found some testimony more credible than others and rejected certain evidence. The court noted that failing to employ a written contract for the entire project made more difficult its efforts to fashion a restitution order that held Felski accountable while giving him credit for work he actually completed. The court applied a correct legal standard, logically interpreted the facts, and used a rational process to reach a reasonable conclusion. No issue of arguable merit could be raised in this regard.

Felski raises numerous issues in his response. We agree with appellate counsel's analysis and her conclusion that none have arguable merit.

Felski first contends postconviction counsel ineffectively failed to move to dismiss the case on the ground that he was unfairly convicted of a violation of ATCP 110.05(1)(a) for failing to have a written contract for the garage portion of the project. He claims ATCP 110.05(1)(a) does not apply to him because (1) it involves home remodeling, not new construction, and the garage was new construction, and (2) he did no work on the garage. Instead, he returned the garage kit the Derricks had purchased and Paula allegedly instructed him to put the refunded money toward what they still owed him.

To prove a claim of ineffective assistance of counsel, a defendant must show both deficient representation and resultant prejudice. ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional deficiency, the defendant must establish that

counsel's conduct falls below an objective standard of reasonableness." ***Id.*** "To prove constitutional prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** (citation omitted).

Felski reads the code too narrowly. ATCP 110.01(2) defines "home improvement" to "include[] … the construction … of … garages …." And while he did not construct the new garage, he lists $675.00 for "the existing garage update and repair." Lastly, ATCP 110.05(1)(a) provides that home-improvement contracts "requiring any payment of money or other consideration … prior to completion of the seller's obligation under the contract" must be in writing. Paula bought a garage kit from Menards for Felski to undertake the garage project. That purchase of the garage kit was "other consideration," particularly once Felski returned it and kept the refund. A motion to dismiss would have failed. Not pursuing a meritless motion or argument does not constitute deficient performance. ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

Felski's next claim, that the court erred in computing restitution, already was addressed above. Similarly, this court already has rejected his third claim, that there is no nexus between his crime and any loss to the Derricks. *See* ***Felski I***, ¶¶9-11.

Felksi's fourth point is that the Derricks continued to pay on the home improvements pursuant to an oral contract, such as Paula telling him to "go ahead with the drywall." ATCP 110.05(1)(a) requires a written contract. The existence of an oral contract would not affect his conviction for the ATCP violation.

Fifth, Felski argues that trial counsel was ineffective in his cross-examination of Paula. He contends Paula testified at trial that she asked him several times how much they still owed him and told him to put the garage kit refund against any money they owed, effectively admitting that they still owed him money. He argues that she perjured herself at the restitution hearing when she denied telling Felski to keep the money from the garage kit return. Felski contends trial counsel should have exposed the conflicts in her testimony.

Even if counsel might have confronted Paula with her conflicting statements about the refund, no prejudice could have resulted from the failure to do so. The discrepancy is irrelevant to whether Felski committed the crime with which he was charged. Her statement might be relevant to a claim that Felski owed no restitution, but the circuit court found that not to be the case. The court's final restitution ruling reflects a proper exercise of discretion.

The crime alleged was the failure to have a written contract for the garage. Felski argues that he could not have violated ATCP 110.05 because he did not do any work on the garage and that the circuit court erred when it denied trial counsel's motion to dismiss on that basis. He also contends the Derricks breached the two contracts used early in the remodeling process.

We addressed the garage issue in ***Felski I*** in the context of the nexus between the crime and the restitution ordered, and concluded the garage was part of a larger relationship with the homeowners. *See* ***Felski I***, ¶13 (stating that Felski's work on the home addition was part of his evolving noncontractual relationship with the Derricks, which culminated in the garage project). A claim that he did no work on the garage or that the Derricks breached the first two contracts would not be a defense to the crime.

Felski next complains that the circuit court erred when it permitted the State to amend the complaint on the day of trial to reflect a new charging period and a different administrative code subsection. The court allowed the original allegation that the offense occurred "on or about May 29, 2008" to be amended to "on or about and between May 30, 2008 to October 18, 2008," and the allegation that Felski's actions were contrary to ATCP 110.05(1)(b) to be amended to ATCP 110.05(1)(a).

At trial, the circuit court may allow amendment of the complaint to conform to the proof when the amendment is not prejudicial to the defendant. WIS. STAT. § 971.29(2). We review the court's decision for an erroneous exercise of discretion. ***State v. Malcom***, 2001 WI App 291, ¶23, 249 Wis. 2d 403, 638 N.W.2d 918. A court misuses its discretion when the defendant is prejudiced by the amendment. ***State v. Neudorff***, 170 Wis. 2d 608, 615, 489 N.W.2d 689 (Ct. App. 1992). "Rights of the defendant [that] may be prejudiced by an amendment are the rights to notice, speedy trial and the opportunity to defend." ***Id.***

Felski contends the amendments deprived him of notice of and the ability to defend against the charge against him. We disagree. The crime alleged consistently was the lack of a written contract for home improvement services, and Felski always was aware that his work relationship with the Derricks spanned many months.

Similarly, the amendment of the code subsection could have caused no prejudice. The complaint originally alleged that Felski "failed to sign a written contract with Dick and Paula Derrick and required payments of money by Dick and Paula Derrick prior to the completion of seller's obligations, contrary to ATCP 110.05(1)(b)." ATCP 110.05(1) provides that the following home improvement contracts, as well as changes to them, must be in writing:

> (a) Contracts requiring any payment of money or other consideration by the buyer prior to completion of the seller's obligation under the contract.
>
> (b) Contracts which are initiated by the seller through face-to-face solicitation away from the regular place of business of the seller, mail or telephone solicitation away from the regular place of business of the seller, mail or telephone solicitation, or handbills or circulars delivered or left at places of residence.

The language in the complaint plainly tracks subsec. (1)(a). We agree with the circuit court that the "(1)(b)" in the complaint was the result of a scrivener's error. Felski was not caught unaware of the facts underlying the amended charge. *See* ***Malcom***, 249 Wis. 2d 403, ¶28. Neither amendment possibly compromised his ability to defend himself.

Felski raises two final issues that we construe as further attacks on the circuit court's restitution decision underlying this no-merit appeal. He alleges:

> The Trial court erred by refusing to correct the court of appeals last two reverse and remands back to circuit court properly.
>
> The trial court erred in sealing the bounced checks with the credit card statements because it showed proof that the [D]erricks owe more money than what the circuit court referred to on (Appendix 1) to show there [sic] last restitution order reflected in the no-merit report.

Again, we already have reviewed the court's decision and determined that it represents a proper exercise of discretion. An appellate challenge would have no arguable merit. Our independent review reveals no other arguable issues. Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Martha K. Askins is relieved of any further representation of Thomas G. Felski in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals