No. 16AP883

In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT-PETITIONER,

v.

JAMAL L. WILLIAMS,
DEFENDANT-APPELLANT-PETITIONER

On Appeal From The Milwaukee County Circuit Court, The Honorable Timothy G. Dugan and The Honorable Ellen R. Brostrom, Presiding, Case No. 2013CF002025

RESPONSE BRIEF OF THE STATE OF WISCONSIN

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ISSUE PRESENTED

1. Did the circuit court erroneously exercise its discretion when sentencing Jamal Williams by mentioning Williams' unwillingness to contribute to the victim's funeral expenses?

The circuit court and Court of Appeals both answered no.

INTRODUCTION

The circuit court sentenced Jamal Williams to 10 years of imprisonment and 7.5 years of extended supervision—2.5 years below the statutory maximum—for his role in an attempted armed robbery that resulted in the shooting death of a victim in front of the victim's three-year-old daughter. As part of a comprehensive explanation of this sentence, the circuit court pointed to Williams' lack of remorse for his criminal activities. Williams now seeks to challenge that sentence because the circuit court made a single reference to Williams' unwillingness to contribute to the victim's funeral expenses. This challenge fails for at least three independently sufficient reasons: the circuit court did not actually rely upon Williams' failure to contribute to the funeral expenses in determining his sentence; if the circuit court had relied upon that failure to contribute, that would have been permissible; and any error on this score was harmless because ample other record evidence supported the sentence that the circuit court imposed.

STATEMENT OF THE CASE

A. On April 25, 2013, Williams and his younger brother, Tousani Tatum, attempted a robbery at a drug deal that resulted in R.W.'s death. R. 2:1; Williams App. 103. On that day, Williams drove himself and his brother to a drug deal that Williams had arranged with B.P. R. 74:20; Williams App. 103. Williams knew that his brother planned to rob B.P.

and had a gun for that purpose. R. 74:20. At some point, Williams beckoned to B.P., whom he knew, to initiate the transaction, R. 74:20, and Tatum held a gun to B.P.'s head, demanding money and drugs, Williams App. 103. Tatum then made demands of R.W., who was sitting in a car parked down the street, fired at the car, and struck R.W., Williams App. 103, who then crashed the car into another parked vehicle, R. 2:1. Williams and Tatum ran back to Williams' car and drove away. Williams App. 103. Although Williams did not know whether R.W. was dead, he did not call the authorities. R. 74:20. By the time medical personnel arrived, R.W. had died in the presence of his three-year-old daughter. R. 2:1; R. 74:20–21; Williams App. 103.

B. In January 2014, Williams pleaded guilty to felony attempted armed robbery as party to a crime, in violation of Wis. Stat. §§ 943.32(2) (robbery), 939.32(1g) (attempt), and 939.05 (party to a crime). R. 28; R. 73.

The circuit court, the Honorable Timothy G. Dugan presiding, ordered a Presentence Investigation Report ("PSI"), R. 30; R. 31, which concluded that Williams showed an "atrocious lack of remorse." Williams App. 106.[1] Williams refused to acknowledge any responsibility for R.W.'s death, despite claiming that he could have stopped the transaction

[1] Williams made only one small correction to the information in the PSI at the sentencing hearing. R. 74:5. The PSI is sealed below, R. 31, and the citations in this brief are to the Court of Appeals' discussion of the PSI. Williams has not disputed the accuracy of the Court of Appeals' characterization of the PSI.

at any time as the "big brother." Williams App. 104. Williams repeatedly asked the interviewer why she mentioned R.W.'s death because, according to Williams, it had "nothing to do with" his case. Williams App. 104–05. When the PSI author asked about remorse at the interview, Williams' initial response was that he was remorseful for his brother, his mother, and his son. Williams App. 105. Only after specific prompting did Williams even mention the victims. Williams App. 105. "Williams went on and on about how he feels *he* deserves a fair outcome in sentencing," "illustrating [that] his only concern is for himself." Williams App. 105–06. Williams stated that he pleaded guilty because that outcome was better than going to trial on felony murder, not because he wanted to take responsibility for his actions. Williams App. 105. Indeed, Williams pleaded guilty in January 2014, months after his brother was convicted after trial of felony murder in October 2013. *See State v. Tousani C. Tatum*, No. 13CF2024, Dkt. 40 (Milwaukee Cty. Cir. Ct. Oct. 4, 2013). Nor did Williams show remorse for any of his previous numerous criminal activities, "minimiz[ing] his behavior in every single arrest, or plac[ing] blame on another person." Williams App. 105. Indeed, Williams "appeared to be proud and seemingly found it humorous how many times charges have been dropped in court." Williams App. 105.

The circuit court held a sentencing hearing in March 2014, during which L.R.—R.W.'s fiancée—and Williams both testified. R. 74. L.R. stated that her now-four-year-old

daughter, who was in the car during the shooting, was traumatized by her father's death. The daughter was diagnosed with post-traumatic stress syndrome and takes pills three times a day. R. 74:12. She wakes up screaming in the middle of the night, does not like to go outside, and hides when she sees groups of men. R. 74:11. She continues to ask when her father is coming home because she does not understand that death is "permanent." R. 74:11. L.R. stated that she finds it difficult to look at her daughter because she looks so much like her father. R. 74:11. L.R. asked the court to impose the maximum sentence of 12.5 years of initial confinement and 7.5 years of extended supervision. R. 74:12; *see* Wis. Stat. §§ 943.32(2), 939.32(1g); *see also* R. 73:2. Williams, in turn, testified that he was remorseful for "what took place April 25th." R. 74:18. He stated that he had been "feelin[g] bad" that someone "lost their life" "over a drug deal." R. 74:18.

The State and Williams' counsel made oral arguments about Williams' potential sentence. The State argued that a "substantial" period of "confinement" was warranted because of the nature of this violent offense; the harm to the victims; and Williams' extensive criminal history, failure to comply with supervision, and lack of remorse. R. 74:5–10. The State also requested that the court order restitution, $794 related to R.W.'s funeral costs, for which the State argued Williams would be jointly and severally liable with Tatum. *See*

R. 74:9.[2] The State argued that this restitution was appropriate because R.W.'s death was a "direct extension" of the felony attempted armed robbery that Williams participated in. R. 74:7, 9. At the very least, Williams knew that his brother had a gun and planned to rob B.P., R. 74:6, thus, a shooting was foreseeable, R. 74:7. Williams' counsel, in turn, argued for a sentence of three years' initial confinement and three years of extended supervision. R. 74:17. Counsel acknowledged that, "objectively," Williams' "hedging" of his and his brother's responsibility for the crime "may come across as being less than candid," R. 74:15, but claimed that Williams took responsibility for his actions by pleading guilty and expressing to him remorse for everyone involved, R. 74:13–15. As to restitution, Williams' counsel argued that Williams should not be responsible for the $794 toward R.W.'s funeral expenses because the shooting was a "separate transaction." R. 74:17. Although Williams "set up the drug transaction," "knew that there was a gun," and "went along with it," "the act of his brother firing into" a "bystander['s]" car "was unforeseeable." R. 74:16.

The circuit court then issued Williams' sentence. The court first discussed the goals of sentencing and the factors it would consider to choose an appropriate sentence. Sentencing's goals include "punishment," "deter[r]ence," and

[2] Tatum was ordered to contribute $100 to R.W.'s funeral expenses as restitution in his case. *See* R. 74:3.

"rehabilitat[ion]." R. 74:19. The court explained that it analyzes three primary factors when imposing sentence: "the nature of the offense," "who [the defendant is] as an individual," and "the interests of society," and then applied these factors to Williams' case. R. 74:19.

Williams committed a "serious offense." R. 74:20. The Legislature considered felony attempted armed robbery to be serious because the Legislature assigned a relatively high maximum sentence to the offense: 20 years' total imprisonment with a maximum of 12.5 years' initial confinement and 7.5 years of supervised release. R. 74:20; *see* Wis. Stat. §§ 943.32(2) (robbery), 939.50 (penalties for felonies), 939.32(1g) (attempt). Williams facilitated the "outcome in this particular instance," R.W.'s death, by setting up the drug deal, driving his brother to the transaction, "call[ing] over to" B.P., whom he knew, and—after the shooting—not calling for help and instead driving away with his brother. R. 74:20–21. Williams could have prevented the transaction at any time but did not. R. 74:20–21.

Next, the court examined Williams' characteristics "as a[n] individual," R. 74:19, beginning with his criminal history. Williams had many "contacts with the juvenile system," R. 74:21. His first arrest was shortly after his 12th birthday, and the only significant periods without arrests were when he was incarcerated. R. 74:22. The court specifically mentioned "juvenile probation for burglary, the numerous retail thefts, trespass, destroying property, [and] endangering safety."

R. 74:21. Despite the juvenile system's "efforts," Williams reoffended as an adult—"prohibited person in possession of a firearm and bail jumping," a "possession of marijuana, theft and vandalism," "[f]elony shots fired," and a "[v]iolation of extended supervision with assaultive allegations." R. 74:21–22. And Williams was unwilling "to comply with supervision" as an adult, R. 74:24; he absconded twice, once escaped from a halfway house, and committed this offense while on supervision, R. 74:22, 23–24.

As part of considering this sentencing factor, the circuit court determined that Williams did not show remorse for the instant offense. R. 74:25. In the crime's immediate aftermath, Williams fled the scene with his brother instead of calling authorities in case R.W. was still alive. R. 74:20–21. Williams focused his remorse on himself, his family, and his brother, not the victims. R. 74:25. Only in response to a specific prompt did Williams even mention the victim and his family. Williams App. 105; *see* R. 74:25. In the PSI, Williams hedged his responsibility for the sequence of events on April 25, repeatedly asking why R.W.'s death was being mentioned in his case and expressing concern that it made him "look bad." Williams App. 104; *see* R. 74:25. "[A]lthough a family lost their son and a father," Williams could not fathom how sending him to prison "[wa]s going to make that any better." R. 74:25. Finally, the court noted that although Williams pleaded guilty, that decision was "certainly strategic" and not indicative of remorse or contrition. R. 74:20–21.

The court also concluded that Williams was not "remorseful" for his past criminal activity. R. 74:25. Williams "minimized [his] behavior in all of [his] arrests," placed blame on others, and seemed "proud" of the times his cases were dropped due to witness absence or unlawful search. R. 74:22–23. Moreover, despite being given an opportunity to turn his life around by escaping conviction in those cases—Williams continued to engage in criminal conduct. R. 74:23.

Finally, the court concluded that Williams was "a risk and a danger to the community because of [his] continued conduct and" unwillingness to comply with supervision. R. 74:24. Williams absconded from supervision multiple times and he committed the instant offense while on supervision. R. 74:22, 23–24. In addition, Williams' cavalier attitude toward his criminal activity and its consequences made it likely that he would reoffend. *See* R. 74:25–26. Thus, there was "a strong need, sadly, to protect the community from [Williams'] conduct." R. 74:25–26.

The court explained how these factors—gravity of the offense, character of the offender, and need to protect the public—informed its choice of sentence. The factors justified a period of incarceration because "probation would unduly depreciate the seriousness of the offense" and Williams' rehabilitative needs counseled for a "structured, confined" setting. R. 74:25–26. In addition, recognizing the connection between remorselessness and recidivism, the court ordered "cognitive behavioral therapy" as a condition of supervised

release to "help [Williams] understand what [he's] doing is wrong, it's a crime, [and to] try to convince [him] not to do it again." R. 74:26.

The court then turned to the issue of restitution—the State's request that Williams contribute $794 for R.W.'s funeral expenses. R. 74:26. The court decided it had no authority to order restitution,[3] stating: "I don't think I have authority to order the restitution. Had you been convicted of the felony murder, party to a crime, certainly yes, but the nature of the attempt[ed] armed robbery doesn't justify the restitution or give me authority, and I think the fact that you're not willing to join in on that also reflects your lack of remorse under the circumstances, and I'm certainly considering that." R. 74:26.

"Considering all of those factors and circumstances," the court sentenced Williams to 10 years of initial confinement and extended supervision of 7.5 years, 2.5 years under the maximum sentence. R. 74:28; *see* Wis. Stat.

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[3] The Court of Appeals "seriously question[ed] the correctness of the circuit court's conclusion that it did not have the authority to order the requested restitution." Williams App. 108 n.2 (citing *State v. Tarlo*, 2016 WI App 81, ¶ 6, 372 Wis. 2d 333, 887 N.W.2d 898 (holding that restitution may be ordered if there is "a causal nexus between the crime considered at sentencing and the damage" (citation omitted))). Although the State did not cross-appeal on this issue and does not ask this Court to reconsider the circuit court's conclusion here, the State believes that the Court of Appeals' skepticism of the circuit court's conclusion appears well-founded given the causal nexus between Williams' conduct and R.W.'s death. *See State v. Rash*, 2003 WI App 32, ¶¶ 6–7, 260 Wis. 2d 369, 659 N.W.2d 189; *see generally* Wis. Stat. § 973.20.

§§ 943.32(2) (robbery), 939.50 (penalties for felonies), 939.32(1g) (attempt).

C. Williams sought post-conviction relief in May 2015, raising numerous claims of error. Williams App. 134. As relevant to this cross-appeal,[4] he claimed that the sentencing court improperly considered his refusal to contribute voluntarily to R.W.'s funeral expenses—which he did not legally owe—when imposing the sentence. R. 47:1, 12–14. In August 2015, the circuit court, the Honorable Ellen R. Brostrom now presiding, denied Williams' motion. Williams App. 140–41. The post-conviction court examined the sole statement from the sentencing court's order that Williams marshaled in support of his argument: "I think the fact that you're not willing to join in on [the restitution] also reflects your lack of remorse under the circumstances, and I'm certainly considering that." Williams App. 139 (citing R. 74:26). Williams claimed that what the circuit court was "certainly considering" was his failure to stipulate to restitution. *See* R. 47:13. The post-conviction court rejected this argument, and concluded that the sentencing court was "certainly considering" Williams' lack of remorse, not his failure to contribute voluntarily to R.W.'s funeral costs.

[4] Williams also requested that the court vacate his $250 DNA surcharge because he had already provided a DNA sample to the State's DNA database as a result of a felony conviction in 2009. That dispute is the subject of the State's appeal in this case, as the Court of Appeals ruled in Williams' favor on that issue. *See* Order Granting Petitions for Review, *State v. Williams*, No. 16AP883 (Wis. Oct. 10, 2017).

Williams App. 140. The comment indicated "that the challenge to the restitution reflected the lack of remorse that the court was already considering." Williams App. 140. Thus, the sentencing court did not rely on Williams' failure to contribute voluntarily to R.W.'s funeral expenses when imposing sentence. *See* Williams App. 140. The post-conviction court further determined that even if the sentencing court had relied on Williams' failure to contribute to the victim's funeral expenses, any error was harmless because the court had ample basis to conclude that Williams was not remorseful. *See* Williams App. 140. Thus, the sentencing court would have imposed "the same sentence regardless of any discussion about restitution." Williams App. 140.

Williams appealed, and the Court of Appeals affirmed the post-conviction court's decision denying him relief. *See* Williams App. 101–31. The Court of Appeals agreed "with the postconviction court's conclusion that [the disputed] 'that' refers to Williams' lack of remorse, not his refusal to stipulate to restitution." Williams App. 110. The sentencing court was "merely noting that [Williams'] refusal was *another* example of his lack of remorse," which is a "legitimate basis for a harsher sentence." Williams App. 110, 112 (emphasis added). The sentencing court had ample other evidence to conclude that Williams lacked remorse. Williams App. 112. That evidence included, *inter alia*, Williams' gloating about the dismissal of past charges, his cavalier attitude toward his

criminal history, and his exclusive focus on himself and his family, not the victims. Williams App. 111–12. By the time the sentencing court mentioned restitution, it was "thoroughly convinced" by that other evidence that "Williams lacked any serious remorse for his actions related to this case or his criminal past." Williams App. 112. Thus, considering the statement at issue in the "context of the whole sentencing transcript," Williams' failure to stipulate to restitution "did not form part of the basis for Williams' sentence." Williams App. 110 (citation omitted). Moreover, the Court of Appeals was "convinced [that] the sentencing court would have imposed the same sentence in this case even if it had never considered Williams' failure to stipulate to restitution." Williams App. 113 n.4.

STANDARD OF REVIEW

This Court "will affirm the sentencing decision of a circuit court so long as the court does not erroneously exercise its discretion." *State v. Alexander*, 2015 WI 6, ¶ 16, 360 Wis. 2d 292, 858 N.W.2d 662. "A circuit court erroneously exercises its discretion when it 'actually relies on clearly irrelevant or improper factors.'" *Id.* ¶ 17 (quoting *State v. Harris*, 2010 WI 79, ¶ 66, 326 Wis. 2d 685, 786 N.W.2d 409).

SUMMARY OF ARGUMENT

I. A. The framework that this Court outlined in its *Alexander* decision governs improper- or irrelevant-factor claims. *See* 2015 WI 6. This Court examines the entirety of

the sentencing transcript to determine whether the sentencing court "actually relied" on an allegedly irrelevant or improper factor. Even if the sentencing court relied on improper or irrelevant factors, the State may prevail by proving that the error was harmless: that the court would have imposed the same sentence without the improper factor.

B. In the present case, the circuit court relied solely on factors that this Court has already deemed proper to sentence Williams: the gravity of the offense, the character of the offender, and the need to protect the public. Williams' offense, felony attempted armed robbery, was serious because it involved a gun and resulted in someone's death. There was a grave need to protect the public given Williams' violent crime, extensive criminal history, and unwillingness to comply with supervision. And as to Williams' character, the court concluded that he lacked remorse for his criminal activity. Williams fled the scene once his brother shot R.W. instead of calling for medical assistance, demonstrating indifference toward the victim. Williams continued to minimize his responsibility for the events leading to R.W.'s death. In addition, Williams shifted blame for his past crimes and gloated about the times he escaped punishment. Thus, Williams' character and the gravity of the offense indicated that a substantial term of imprisonment—10 years' initial confinement and 7.5 years of supervised release—was necessary to protect the public.

C. Williams claims that the sentencing court punished him for not contributing voluntarily to R.W.'s funeral expenses, but his argument fails for three independently sufficient reasons. The sentencing transcript clearly indicates that the court considered Williams' lack of remorse, not his failure to contribute to R.W.'s funeral expenses. In any case, consideration of Williams' callous indifference to the financial hardship that he played a part in placing upon R.W.'s family was relevant to his poor character, and thus could have been properly considered by the circuit court. Finally, any alleged error is harmless because the circuit court's sentence was supported by the three primary factors and Williams' lack of remorse without any mention of R.W.'s funeral expenses.

ARGUMENT

I. The Circuit Court "Actually Relied" On Only Proper And Relevant Sentencing Factors

A. The Test From This Court's *Alexander* Decision Governs Improper- And Irrelevant-Factor Cases

A criminal sentence has three aims: punishment, deterrence, and rehabilitation. *See McCleary v. State*, 49 Wis. 2d 263, 271, 182 N.W.2d 512 (1971). To forward those ends, a circuit court must analyze three primary factors when sentencing a defendant: "the gravity of the offense, the character of the offender, and the need to protect the public." *Alexander*, 2015 WI 6, ¶ 22; Wis. Stat. § 973.017(2). The court

may also consider: "(1) [p]ast record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention." *Alexander*, 2015 WI 6, ¶ 22; *State v. Gallion*, 2004 WI 42, ¶ 43 n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court *cannot* consider "race or national origin, gender, alleged extra-jurisdictional offenses, and the defendant's or victim's religion," *Alexander*, 2015 WI 6, ¶ 23, and cannot punish the defendant for exercising a constitutional right, *see State v. Church*, 2003 WI 74, ¶ 28, 262 Wis. 2d 678, 665 N.W.2d 141. Outside this handful of prohibited factors and considerations, the "circuit court possesses wide discretion in determining what factors are relevant to its sentencing decision." *Gallion*, 2004 WI 42, ¶ 68. The court determines what weight to give to each factor and need discuss only relevant factors at sentencing. *See Alexander*, 2015 WI 6, ¶ 22.

This Court uses the framework in *Alexander* to assess improper- or irrelevant-factor claims, grounded in a defendant's "due process right" to be sentenced based on accurate information and proper considerations. 2015 WI 6,

¶¶ 17–19. If the factor at issue is, in fact, improper, *id.* ¶ 23, the question becomes whether the circuit court "actual[ly] relied" on that improper factor, *id.* ¶ 25. The "actual reliance" inquiry has two parts: (1) whether "the court gave explicit attention to the allegedly improper factor," and (2) "whether the improper factor formed part of the basis for the sentence." *Id.* ¶ 25 (citations omitted). This Court conducts the inquiry by "review[ing] the circuit court's articulation of its basis for sentencing in the context of the entire sentencing transcript." *Id.* "There are no 'magic words' that the circuit court must use" for "a reviewing court to conclude" that a circuit court actually relied on a factor. *See State v. Travis*, 2013 WI 38, ¶ 30, 347 Wis. 2d 142, 832 N.W.2d 491. The "linkage," *Gallion*, 2004 WI 42, ¶ 46, need not be as explicit as: "Because of the existence of this [improper factor], you are sentenced to X years of imprisonment," *Travis*, 2013 WI 38, ¶ 30. But mere mention of an improper or irrelevant factor is insufficient to prove actual reliance. *See Alexander*, 2015 WI 6, ¶ 25 ("explicit attention" plus actual reliance required); *Travis*, 2013 WI 38, ¶ 31 (attention plus impact on sentence required); *Gallion*, 2004 WI 42, ¶ 46; *State v. Lechner*, 217 Wis. 2d 392, 420–22, 576 N.W.2d 912 (1998). "A defendant bears the burden of proving, by clear and convincing evidence, that the sentencing court actually relied on irrelevant or improper factors." *Alexander*, 2015 WI 6, ¶ 17; *accord Harris*, 2010 WI 79, ¶ 3. This burden, although "difficult[ ]" to meet, "satisfies the purpose of sentence modification," "the

correction of unjust sentences." *Alexander*, 2015 WI 6, ¶ 20 (citation omitted).

For example, in *Lechner*, this Court held that a sentencing court did not violate the defendant's rights during sentencing when it explicitly referenced an inaccurate number of the defendant's criminal convictions at sentencing. *Lechner*, 217 Wis. 2d at 419–22, 423. This Court, after examining the reference in context, determined that the circuit court was not relying on the convictions themselves but rather the "events giving rise to" them as evidence of the defendant's "history of drug and alcohol abuse" and failure to correct his behavior. *Id.* at 422. Thus, the circuit court—although it mentioned the wrong number of convictions—did not actually rely on inaccurate information in imposing the sentence. *Id.* at 423.

Even where a sentencing court "actually relies" upon an improper factor, the reviewing court must uphold the sentence if the State can prove that the error was harmless. *Alexander*, 2015 WI 6, ¶ 18; *see State v. Evers*, 139 Wis. 2d 424, 452, 407 N.W.2d 256 (1987); *see also United States v. Mikos*, 539 F.3d 706, 719 (7th Cir. 2008); Williams App. 113 n.4. The State can meet its burden by "demonstrating that the sentencing court would have imposed the same sentence absent the error," *Travis*, 2013 WI 38, ¶ 73; Williams App. 113 n.4, or that the error "did not contribute to the [sentence] obtained," *State v. Martin*, 2012 WI 96, ¶ 45, 343 Wis. 2d 278, 816 N.W.2d 270 (citation omitted), relying on the sentencing

transcript, *Travis*, 2013 WI 38, ¶ 73. "Several factors assist this [C]ourt's analysis of whether an error is harmless: the frequency of the error; the importance of the erroneously admitted [factor]; the presence or absence of [factors] corroborating or contradicting the erroneously admitted [factor]; whether the erroneously admitted [factor] duplicates untainted [factors]," and the overall strength of the evidence supporting the sentence. *Martin*, 2012 WI 96, ¶ 46.

B. The Circuit Court Properly Exercised Its Discretion In Applying The *Alexander* Sentencing Factors

Here, the circuit court relied solely on factors that this Court has already deemed proper to sentence Williams.

The circuit court explicitly considered the three primary factors: "the gravity of the offense, the character of the offender, and the need to protect the public," *Alexander*, 2015 WI 6, ¶ 22; and many of the permitted factors as relevant to the three primary factors, *id.* As to the "gravity of the offense," the court explained that felony attempted armed robbery was a "serious" crime. R. 74:20, 25. The Legislature assigned it a relatively high maximum penalty, R. 74:20; *see* Wis. Stat. §§ 943.32(2) (robbery), 939.50 (penalties for felonies), 939.32(1g) (attempt); *see also United States v. Bajakajian*, 524 U.S. 321, 336 (1998), and the "harm caused by the crime" to the victims and community was severe, *Gallion*, 2004 WI 42, ¶ 70 (citation omitted); R. 74:25. Indeed, one individual was fatally shot in front of his young daughter

and another was threatened with a gun. R. 74:20–21. Thus, this "serious" crime deserved a "substantial sentence." *See Harris v. State*, 75 Wis. 2d 513, 521, 250 N.W.2d 7 (1977); *McCleary*, 49 Wis. 2d at 278. There was also a "strong" need to protect the public from Williams' conduct. R. 74:25–26. Given Williams' extensive criminal history, *see Lechner*, 217 Wis. 2d at 422–23, unwillingness to comply with supervision, R. 74:23–24; *see United States v. Garcia*, 804 F.3d 904, 907 (7th Cir. 2015); *State v. Killory*, 73 Wis. 2d 400, 408, 243 N.W.2d 475 (1976), and the violent nature of this offense, *Gallion*, 2004 WI 42, ¶ 61; *see United States v. Jackson*, 549 F.3d 1115, 1118 (7th Cir. 2008), the court properly relied upon this factor to impose a significant term of incarceration and supervised release. Finally, the court examined Williams' character to the extent that it served two of sentencing's aims: deterrence and rehabilitation. *Klimas v. State*, 75 Wis. 2d 244, 247, 249 N.W.2d 285 (1977); *see Mikos*, 539 F.3d at 718. Although Williams had positive "social traits," *see Killory*, 73 Wis. 2d at 408, such as a high school education and the ability to read at over a ninth-grade level, R. 74:24, those traits were outweighed by Williams' extensive criminal history and pattern of undesirable behavior, *see United States v. Russell*, 662 F.3d 831, 854 (7th Cir. 2011); *Elias v. State*, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980).

Most relevant to this cross-appeal, the circuit court properly considered Williams' lack of remorse as part of its inquiry into his character. *See Alexander*, 2015 WI 6, ¶ 22;

Killory, 73 Wis. 2d at 408; Williams App. 112. A defendant's "lack of remorse" is "relevant" to "his need for rehabilitation, and the extent to which the public might be endangered by his being at large," factors the court is "obligat[ed] to consider." *State v. Baldwin*, 101 Wis. 2d 441, 459, 304 N.W.2d 742 (1981); *see State v. Paske*, 163 Wis. 2d 52, 62, 471 N.W.2d 55 (1991); *see also Burr v. Pollard*, 546 F.3d 828, 832 (7th Cir. 2008). Under this factor, a court analyzes a defendant's "attitude" toward his crime. *Baldwin*, 101 Wis. 2d at 459; *Drinkwater v. State*, 73 Wis. 2d 674, 680, 245 N.W.2d 664 (1976); *State v. Schilz*, 50 Wis. 2d 395, 403–04, 184 N.W.2d 134 (1971). A defendant demonstrates a lack of remorse by being "cavalier" about, *State v. Naydihor*, 2004 WI 43, ¶ 26, 270 Wis. 2d 585, 678 N.W.2d 220, or "indifferent" toward one's criminal activities, *Burr*, 546 F.3d at 832, gloating or "bragging about one's criminal escapades," doing nothing "to reduce or redress the hurt [one's] crimes ha[ve] caused," or "[l]etting victims bear the loss of crime," losses including "the costs of [the shooting victim's] burial," *Mikos*, 539 F.3d at 718–19. Defendants also show remorselessness by refusing to admit their guilt, *id.* at 718 (citing *Zant v. Stephens*, 462 U.S. 862, 886 n.22 (1983)); *Baldwin*, 101 Wis. 2d at 459; *see also State v. Fuerst*, 181 Wis. 2d 903, 916, 512 N.W.2d 243 (Ct. App. 1994), or providing only "couched admissions," *see United States v. Dachman*, 743 F.3d 254, 260 (7th Cir. 2014). A defendant's decision to plead guilty "for the apparent purpose of obtaining a lighter sentence" does not demonstrate

that he is remorseful. *United States v. Hammick*, 36 F.3d 594, 600 (7th Cir. 1994); Williams App. 111. The PSI is an important source of information about a defendant's lack of remorse and character. *See State v. Melton*, 2013 WI 65, ¶¶ 27–30, 349 Wis. 2d 48, 834 N.W.2d 345; *Schilz*, 50 Wis. 2d at 401–02.

Here, the sentencing court acted well within its broad discretion in concluding that Williams demonstrated a lack of remorse. R. 74:25–26; *see Melton*, 2013 WI 65, ¶ 26; *Schilz*, 50 Wis. 2d at 402–03; Williams App. 112. First, the court noted that Williams' reactions to the events of April 25, 2013, were focused on himself and his family, not remorse for the victims and their families, R. 74:25, suggesting "indifferen[ce]" toward them, *see Burr*, 546 F.3d at 832; *see generally Mikos*, 539 F.3d at 718–19. Second, Williams repeatedly minimized his responsibility for his actions in this offense and others, R. 74:22–23, indicating a lack of "regret and contrition," *see Mikos*, 539 F.3d at 719. Even Williams' counsel admitted that "objectively," Williams' "hedging" of his and his brother's responsibility for the crime "may come across as being less than candid." R. 74:15; *see generally Dachman*, 743 F.3d at 260. Third, Williams' pattern of reoffending suggested he did not repent for his actions. R. 74:21–22; *see Baldwin*, 101 Wis. 2d at 459. Fourth, Williams gloated about escaping responsibility for criminal activity in the past. R. 74:22–23; *see Mikos*, 539 F.3d at 718. Fifth, Williams had not "cooperat[ed]," *Killory*, 73 Wis. 2d

at 408, with the justice system's repeated reform efforts, absconding from supervision twice, escaping from a halfway house, and committing this offense while on supervision, R. 74:22, 23–24; *see also Baldwin*, 101 Wis. 2d at 459. Sixth, Williams fled after the shooting instead of calling the authorities, R. 74:20–21, indicating a "cavalier attitude" toward his victims and his criminal activity, *see Naydihor*, 2004 WI 43, ¶ 26. And although Williams eventually pleaded guilty, *compare Mikos*, 539 F.3d at 718, that decision was "strategic" because it came after his brother had been convicted after trial of felony murder, R. 74:21; *see Hammick*, 36 F.3d at 600. Thus, Williams' remorselessness indicated that "a protracted period of custodial rehabilitation" and cognitive behavioral therapy "w[ere] required." *See Schilz*, 50 Wis. 2d at 403–04; R. 74:25–26.

C. The Circuit Court's Single Mention Of Williams' Failure To Contribute To R.W.'s Funeral Expenses Does Not Render The Sentence Unlawful

Williams' sole objection to the sentencing court's detailed analysis of the sentencing factors is that the court mentioned his failure to contribute voluntarily to R.W.'s funeral expenses. The court stated: "I don't think I have authority to order the restitution. Had you been convicted of the felony murder, party to a crime, certainly yes, but the nature of the attempt armed robbery doesn't justify the restitution or give me authority, and I think the fact that

you're not willing to join in on that also reflects your lack of remorse under the circumstances, and I'm certainly considering that." R. 74:26. Williams argues that this passage shows that the court actually relied upon his failure to contribute voluntarily to R.W.'s funeral expenses and that this is an improper or irrelevant factor. Williams Opening Br. 24–27. Williams' argument is unavailing for three independently sufficient reasons.

First, as both the post-conviction court and the Court of Appeals properly concluded, Williams App. 110, 140, the sentencing court's reference in the disputed passage indicates the court did not "actually rely" upon, *see Alexander,* 2015 WI 6, ¶¶ 26–27, Williams' failure to voluntarily pay a portion of R.W.'s funeral expenses in determining his sentence. As mentioned above, a reviewing court must examine the court's statement "in context," considering the sentencing transcript in its entirety. *Gallion*, 2004 WI 42, ¶ 72. And "explicit" mention of a fact is insufficient to prove that the court actually relied upon it: the *Alexander* inquiry also requires "actual reliance." 2015 WI 6, ¶¶ 26–27.

In the present case, the single disputed passage indicates that the circuit court was not "actually" relying upon Williams' failure to contribute to R.W.'s funeral expenses. Again, the court stated: "I think the fact that you're not willing to join in on [the restitution] also reflects your lack of remorse under the circumstances, and I'm certainly considering *that*." R. 74:26 (emphasis added). When the

circuit court said that it was "certainly considering *that*," the court used "that" as a pronoun, and its logical antecedent is "lack of remorse." *See Lockhart v. United States*, 136 S. Ct. 958, 962–63 (2016); *In re Marriage of Meister*, 2016 WI 22, ¶ 29 & n.13, 367 Wis. 2d 447, 876 N.W.2d 746 (citing *Rule of the Last Antecedent*, *Black's Law Dictionary* 1532–33 (10th ed. 2014)). In other words, the circuit court was *not* "actually" relying upon the funeral expenses issue, but instead relying upon Williams' lack of remorse, as discussed previously in the sentencing transcript and supported by numerous other considerations. *See supra* pp. 22–23; *accord* Williams App. 111, 140. That is also why the circuit court used the phrase "*also reflects*," indicating that it "was already thoroughly convinced Williams lacked any serious remorse for his actions related to this case or his criminal past." Williams App. 112 (quoting R. 74:26 (emphasis added)).

Williams argues that the word "that" in "certainly considering *that*," R. 74:26 (emphasis added), is "clearly referencing the earlier 'that.'" Williams Opening Br. 25. According to Williams, both uses of "that" refer to Williams' "failure to stipulate to restitution." Williams Opening Br. 25. But that reading is less convincing than the State's (and the post-conviction court's and the Court of Appeals') contrary interpretation of what the sentencing court said. *See* Williams App. 110, 140. If Williams were correct, the sentence at issue would read: "I think the fact that you're not willing to join in on [paying R.W.'s funeral expenses] also

reflects your lack of remorse under the circumstances, and I'm certainly considering that [failure to pay R.W.'s funeral expenses in setting your sentence]." *See* R. 74:26. But the better reading is that the first "that" refers to R.W.'s funeral expenses and the second "that" refers to Williams' lack of remorse, such that the circuit court was stating that it was considering *only* the latter in deciding the proper sentence, while not considering the former. *See* Williams App. 110, 140.

Second, even though the circuit court did not "actually" rely upon Williams' failure to contribute to R.W.'s funeral expenses as part of deciding Williams' sentence, such reliance—had it occurred—would have been permissible.

Although a sentencing court may not punish a defendant for doing "what the law plainly allows him to do," *Church*, 2003 WI 74, ¶ 28 (citation omitted), lawful conduct—such as the defendant's silence or other inaction—can sometimes evidence poor character, *see Kubart v. State*, 70 Wis. 2d 94, 100, 233 N.W.2d 404 (1975); *see also Holmes v. State*, 76 Wis. 2d 259, 275–76, 251 N.W.2d 56 (1977). In such circumstances, the circuit court's consideration of lawful conduct as reflecting a defendant's poor character is permissible, so long as the court is not punishing the defendant more harshly solely for exercising a constitutional right. Thus, for example, in *Kubart*, this Court found no error in a circuit court mentioning that the defendant had not cooperated with the police until after the jury had found him guilty, even though the defendant had a constitutional right

to insist on a jury trial. 70 Wis. 2d at 97–100. Similarly, in *Holmes*, this Court held that a defendant's silence in refusing to name his accomplices can be considered when evaluating the defendant's character for sentencing purposes, 76 Wis. 2d at 274–76, even though a defendant has a constitutional right to remain silent in the face of State questioning.

Federal Courts of Appeals have often adopted the same approach. For example, the Seventh Circuit in *Burr* held that "silence can be consistent not only with exercising one's constitutional right," but also with a defendant's "lack of remorse." 546 F.3d at 832; *accord United States v. Keskes*, 703 F.3d 1078, 1091 (7th Cir. 2013). To decide whether a sentencing court "legitimate[ly]" considered a defendant's silence as part of its inquiry into the defendant's character and not simply to punish the defendant for remaining silent, the Seventh Circuit explained that a reviewing court "[v]iew[s] the record in its entirety" to see whether the sentencing court's reference to the defendant's silence was "simply another way of noting [the defendant's] lack of remorse." *Burr*, 546 F.3d at 832. Similarly, the Seventh Circuit in *Mikos* held that a criminal defendant can demonstrate a lack of remorse by "[l]etting victims bear the loss of crime," which in that case included the defendant not "cover[ing] the costs of the [shooting victim's] burial" and instead leaving that expense to her family and church. *See* 539 F.3d at 718–19. And the Sixth Circuit in *United States v. Kennedy*, 499 F.3d 547 (6th Cir. 2007), concluded that a

defendant's refusal to voluntarily submit to a psychosexual examination and polygraph after pleading guilty to distribution of child pornography could properly be considered in determining his dangerousness. *See id.* at 552.[5]

In the present case, the circuit court mentioned Williams' failure to contribute to R.W.'s funeral expenses as "simply another way of noting [the defendant's] lack of remorse." *Burr*, 546 F.3d at 832. The circuit court, after all, was understandably troubled by Williams "[l]etting victims bear the loss of crime" as a sign of his poor character. *Mikos*, 539 F.3d at 718–19. While the State believes that by far the better reading of the single disputed passage was that the circuit court did *not* "*actually*" take this instance of lack of remorse into account in setting Williams' sentence, *see supra* pp. 24–26, had the court considered this example of Williams' indifference to R.W.'s family, that would have been appropriate, especially given the sentencing court's "wide discretion" to determine what information is relevant, *Gallion*, 2004 WI 42, ¶ 68.

[5] The Supreme Court has held that where a defendant asserts his constitutional right to remain silent at sentencing, the Court cannot draw a negative inference on a *factual* matter in dispute. *See Mitchell v. United States*, 526 U.S. 314 (1999). The Supreme Court has explicitly recognized that *Mitchell*'s narrow holding does not undermine federal Court of Appeals decisions such as *Kennedy* and *Burr*, which hold that a defendant's silence or inaction can be relevant to the sentencing court's consideration of the defendant's character. *See White v. Woodall*, 134 S. Ct. 1697, 1703 n.3 (2014).

Williams bases his lengthy contrary argument on the assumption that any consideration of his failure to contribute to R.W.'s funeral expenses is impermissible because the circuit court previously held that he had no legal obligation to pay restitution. Williams Opening Br. 11–20. The fundamental flaw in Williams' reasoning is that while the circuit court cannot increase a defendant's punishment for doing "what the law plainly allows him to do," *Church*, 2003 WI 74, ¶ 28 (citation omitted), it *can* consider whether lawful conduct also reflects poorly on his character. That is why the circuit court in *Kubart* could consider the defendant's minimal cooperation with police, the circuit court in *Holmes* could take into account the defendant's failure to name his accomplices, the district court in *Burr* could look to the defendant's silence, the district court in *Kennedy* could consider the defendant's failure to submit to a psychosexual examination and polygraph, and the jury in *Mikos* could take into account the defendant's willingness to allow the victim's family and community to bear the costs of his crimes.

Once Williams' overbroad assumption—that the circuit court can *never* consider a defendant's lawful conduct as part of its sentencing—is properly rejected, his arguments fall with it. The failure to contribute to a victim's funeral expenses can, under appropriate circumstances, constitute callous indifference to the victim's plight, going to the defendant's character, *see Mikos*, 539 F.3d at 718–19, and is thus not an "irrelevant and immaterial" consideration, Williams Opening

Br. 16. The same cannot be said of the hypotheticals that Williams posits, such as a defendant simply "disagree[ing] with the State regarding his eligibility for early release programming." Williams Opening Br. 21.[6]

Third, even assuming that the circuit court actually relied upon Williams' failure to voluntarily contribute to R.W.'s funeral expenses as part of its consideration of whether Williams lacked remorse, *and* assuming that this consideration would have been improper, any error would be harmless because the "sentencing court would have imposed the same sentence absent the error." *Travis*, 2013 WI 38, ¶ 73; *see Alexander*, 2015 WI 6, ¶ 18.

As a threshold matter, the circuit court's findings on the three primary sentencing factors fully supported Williams' sentence of 10 years' initial confinement and 7.5 years of extended supervision, a sentence 2.5 years under the statutory maximum. *See* Wis. Stat. §§ 943.32(2) (robbery), 939.50 (penalties for felonies), 939.32(1g) (attempt). The gravity of the offense, the character of the offender, and the need to protect the public, *Alexander*, 2015 WI 6, ¶ 22, all counseled for a "substantial sentence," *Harris*, 75 Wis. 2d at 521. To repeat, the Legislature recognized that felony attempted armed robbery was a grave offense because it

[6] Similarly, Williams' suggestion that a circuit court could rely on racial stereotypes does not support his position, *see, e.g.*, Williams Opening Br. 26 & n.15, as a court *can never* consider "race or national origin, gender, . . . [or] religion" in sentencing, *Alexander*, 2015 WI 6, ¶ 23.

assigned a hefty sentence to it. R. 74:20; *see* Wis. Stat. §§ 943.32(2) (robbery), 939.50 (penalties for felonies), 939.32(1g) (attempt). Crimes involving weapons are especially serious because of the outcome in cases like this one: an individual's death. In addition, Williams' negative character traits—an extensive criminal history and unwillingness to comply with supervision—indicated that his rehabilitative needs could be addressed only in a "structured, confined setting." R. 74:25. Finally, a substantial term of imprisonment was necessary to protect the public from the threat of violence and bodily harm. R. 74:25–26. These proper considerations justified a sentence of 2.5 years below the statutory maximum for felony attempted armed robbery. *See* R. 74:20.

Even when focusing on just Williams' lack of remorse, his failure to contribute voluntarily to R.W.'s funeral expenses—if that were considered by the circuit court at all, *but see supra* pp. 24–26—was not "importan[t]" to the sentencing court's conclusion because that court had numerous other strong pieces of evidence supporting its determination that Williams lacked remorse. *See Martin*, 2012 WI 96, ¶ 46. As discussed above, overwhelming evidence supports Williams' lack of remorse, including his indifference to the suffering of the victim and his family, Williams' repeated minimization of his responsibility for his actions in this offense and others, his pattern of reoffending, his gloating about escaping responsibility for criminal activity in his past,

and his refusal to cooperate with the justice system's repeated reform efforts. *See supra* pp. 22–23. As the Court of Appeals correctly observed, the sentencing court "was already thoroughly convinced Williams lacked any serious remorse for his actions" by the time it discussed the funeral expenses. Williams App. 112. Thus, Williams' failure to voluntarily contribute to R.W.'s funeral expenses would have been "duplicat[ive]" of this evidence. *See Martin*, 2012 WI 96, ¶ 46.

Williams' contrary arguments are unavailing. Williams Opening Br. 28–29. Williams asserts that his failure to contribute voluntarily to R.W.'s funeral costs was the "*deciding* factor the court relied on to infer that he lacked remorse for his conduct." Williams Opening Br. 29 (emphasis added). There is no record basis for this *ipse dixit*, which contradicts the mountain of evidence that the circuit court cited for its conclusion that Williams lacked remorse. Williams also argues that the court's other evidence of his lack of remorse came from a "third-party opinion," the PSI. Williams Opening Br. 28. But this Court has encouraged courts to rely on the results of the PSI at sentencing. *See Alexander*, 2015 WI 6, ¶ 22; *Melton*, 2013 WI 65, ¶¶ 26–30; *Gallion*, 2004 WI 42, ¶ 43 n.11; *Schilz*, 50 Wis. 2d at 401–02. In any event, the sentencing court also drew its own conclusions about Williams' level of remorse. *See* R. 74:22–26. Finally, Williams claims that he "adamantly expressed remorse for his actions" at sentencing. Williams Opening Br. 28. But the sentencing court need not accept a

defendant's expression of remorse as credible even if adamant. *See United States v. Ewing*, 129 F.3d 430, 436 (7th Cir. 1997). A defendant's decision to express remorse at the last minute, for example, may undermine the expression's "sincer[ity]." *Id.* (citation omitted). The sentencing court here reasonably concluded that, despite Williams' belated statements to the contrary, he lacked remorse for his crimes.

CONCLUSION

The decision of the Court of Appeals should be affirmed with respect to this sentencing issue.

Dated: January 2, 2018.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 7,886 words.

Dated: January 2, 2018.

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Dated: January 2, 2018.

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