STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2017AP2087-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY C. LOKKEN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN EAU CLAIRE COUNTY CIRCUIT COURT, THE HONORABLE JON M. THEISEN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED[1]

1. Did the circuit court impose an illegal sentence on Defendant-Appellant Larry C. Lokken for count two, theft in a business setting over $10,000?

The circuit court answered, "No."

This Court should answer, "No."

2. If the circuit court imposed an illegal sentence on count two, is Lokken entitled to resentencing on all counts?

The circuit court did not address this issue.

This Court should answer, "No."

3. Did the circuit court impose an unreasonable condition of probation?

The circuit court answered, "No."

This Court should answer, "No."

4. Did the circuit court erroneously exercise its discretion by failing to explain why its sentences met the minimum custody standard?

The circuit court answered, "No."

This Court should answer, "No."

5. Was the circuit court objectively biased at sentencing?

The circuit court answered, "No."

This Court should answer, "No."

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[1] This brief represents the State's best attempt at discerning the issues for review. If this Court disagrees, the State requests permission for additional briefing upon clarification of the issues.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs should adequately set forth the facts and applicable precedent. Resolution of this appeal requires only the application of well-established precedent to the facts of this case.

INTRODUCTION

As Eau Claire county treasurer, Lokken and his office manager stole over one-half million in taxpayer dollars. Recognizing that a primary sentencing goal would be to make the victim whole, Lokken agreed to pay $625,758.22 in restitution, jointly and severally with his office manager.

At sentencing, the circuit court determined that 14.5 years' initial confinement was consistent with its sentencing objectives of punishment, deterrence, and public protection. However, it stayed a portion of that confinement to try to meet its other sentencing objective: making the victim whole. Specifically, the court imposed and stayed a sentence on count two and placed Lokken on probation. As a condition of that probation, the court ordered Lokken to pay the stipulated restitution, jointly and severally, within four and one half years.

Lokken appears to assert five arguments on appeal. First, he argues that the circuit court illegally sentenced him on count two, either by ordering excessive conditional jail time or by ordering his probation revoked if he does not meet the restitution condition. This argument fails because (1) the court ordered an imposed and stayed sentence on count two, (2) Lokken's other challenge is not ripe, and (3) regardless, the court did not intend to order Lokken's probation revoked if he fails to pay restitution on time.

Second, Lokken argues that if the circuit court illegally sentenced him on count two, he is entitled to a complete resentencing. This argument fails because resentencing on count two alone would not affect the overall dispositional scheme of the initial sentence.

Third, Lokken claims that the circuit court ordered an unreasonable condition of probation, either because it based its decision on an error of law, or because the court did not determine Lokken's ability to pay restitution. This argument fails because (1) the court did not base its decision on an error of law, (2) Lokken forfeited any argument claiming an inability to pay restitution, and (3) regardless, the court properly considered Lokken's ability to pay restitution.

Fourth, Lokken claims that the circuit court erroneously exercised its discretion by failing to explain why its sentences met the minimum custody standard. This argument fails because the court discussed the primary sentencing factors, identified its objectives of greatest importance, and logically explained the linkage between its sentence structure and its sentencing objectives.

Fifth and finally, Lokken claims that the circuit court was objectively biased at sentencing, apparently because the court revoked his bail before sentencing and ordered him to pay the stipulated restitution within four and one half years. This claim fails because a reasonable person could not question the court's impartiality at sentencing.

This Court should therefore affirm Lokken's judgment of conviction and the circuit court's order denying postconviction relief.

STATEMENT OF THE CASE

The charges

On May 18, 2015, the State charged Lokken with 11 counts of theft in a business setting over $10,000 as a party

to a crime, and three counts of misconduct in office. (R. 1:1–5.) The complaint alleged that Lokken, as Eau Claire county treasurer, and his office manager, Kay Onarheim, stole $625,758.22 from the county between 2011 and 2013. (R. 1.)

Per the complaint, Lokken's successor discovered a discrepancy of over $450,000 upon comparing the delinquent tax reports from 2012 and 2013. (R. 1:6.) A forensic audit revealed a general transaction scheme by which Lokken and Onarheim would steal tax payments by voiding transactions and depositing the money into their various personal bank accounts. (R. 1:6–18.) According to the audit, the pattern of voided transactions stopped once Lokken and Onarheim retired in September 2013. (R. 1:9.)

Police executed a search warrant at Lokken's home and discovered evidence of document shredding. (R. 1:19.) Police also identified "hundreds and hundreds" of gambling receipts. (R. 1:19.) Lokken initially denied ever taking "a dime" from the county. (R. 1:19.) However, he later admitted that he took money from the treasurer's office. (R. 1:20.) He also acknowledged that he knew that Onarheim was taking money from the county, too. (R. 1:20.)

The proceedings

Initial appearance. At the initial appearance on May 18, 2015, the State requested a $250,000 cash bond because it had information that Lokken was attempting to sell his properties in Wisconsin and Florida and move to somewhere "tucked away." (R. 1:18–19; 85:3.) Defense counsel indicated that Lokken's plan was to sell his properties and buy a "larger place" in Florida. (R. 85:4.) The circuit court, the Honorable William M. Gabler, presiding, set a $7500 cash bond and Lokken posted it. (R. 3; 85:7.)

Bond modifications. On July 1, 2015, Lokken filed a motion to modify his bond so that he could go to Florida to finalize the purchase of his new home. (R. 87:3–4.) The

circuit court, the Honorable Jon M. Theisen, presiding, granted Lokken's request. (R. 87:5–6.) On August 20, 2015, the court granted Lokken's additional request to modify his bond so that he could travel within the state of Wisconsin. (R. 88:3.)

Plea hearing. Ultimately, the parties reached a plea agreement. (R. 13; 90.) On November 2, 2015, Lokken pled no contest to three counts of misconduct in office and five counts of theft. (R. 90:2–3, 17.) Per the plea agreement, Lokken also stipulated to $625,758.22 in restitution. (R. 13:5; 90:3.) The State agreed to dismiss and read in the remaining six counts of theft; to not file additional charges against Lokken; to not file charges against Lokken's wife; and to cap its sentencing recommendation to six and one half years' initial confinement and seven years' extended supervision. (R. 90:3.)

Status conference. On December 14, 2015, the circuit court notified the parties that it wished to hold a hearing to discuss preparations for the upcoming sentencing hearing. (R. 18.) The court indicated that it was "concerned about timing issues, security and accommodations." (R. 18.)

On December 18, 2015, the circuit court held the status conference in the courtroom because members of the public were present. (R. 91:2.) During the status conference, the court indicated that one of its primary sentencing goals would be to make the victim whole. (R. 91:9–12, 15–17, 19, 21.) It therefore requested information on "where . . . [the money] went or . . . where it is now." (R. 91:10.) In response, counsel for Onarheim stated that Onarheim was selling her home and various clothing items to contribute to restitution. (R. 91:11, 21.) Counsel for Lokken said that Lokken was trying to sell his Wisconsin home. (R. 91:17.)

The circuit court also addressed the issue of public threats, noting, "I sense a tension like I've never had. And

I've done homicides. But I sense an increased tension, which is bothersome." (R. 91:21.) Counsel for Lokken said that he "heard a voicemail that [he] could perceive as a threat," and that he received "a call from the same individual the next day." (R. 91:20.) Accordingly, the court revoked bond for both parties, reasoning that "[t]hey're safer as individuals incarcerated." (R. 91:26.) The court also noted that neither party seemed to be using bond as a chance to gather funds for restitution. (R. 91:26.)

Recusal motion. After the revocation of bond, Lokken and Onarheim filed motions requesting that Judge Theisen recuse himself. (R. 19; 20.) They claimed that Judge Theisen considered himself a victim in their cases; that Judge Theisen might have alerted the press of their recent status conference; that Judge Theisen might have made the decision to revoke bond before the status conference; that Judge Theisen might have had ex parte communications with representatives of the county or the media; that Judge Theisen invited up to 90,000 residents to give victim impact statements; and that Judge Theisen might be improperly influenced by statements made by the chairman of the county board. (R. 19; 23:2–4, 7–9.) Judge Theisen denied the recusal motions without a hearing. (R. 21.)

The State then requested that Judge Theisen explain his decision to deny the recusal motions. (R. 24.) In a written decision, Judge Theisen noted that the parties' allegations contained "misinformation," "misleading information," and sought "support from speculation." (R. 26.) Judge Theisen found that he did not consider himself a victim; that he did not alert the press about the status conference;[2] that he did not decide to revoke bond before the status conference; that

[2] Counsel for Onarheim later admitted that his speculation in this regard was "totally unfounded." (R. 92:35.)

he did not have ex parte communications; and that he did not invite up to 90,000 residents to voice their concerns at sentencing. (R. 26:2–3.) He further determined that he was not biased and that his handling of the matter did not create the appearance of bias. (R. 26:4.)

Presentence investigation (PSI). The PSI indicated that the victims were most interested in being fully reimbursed for the county's losses. (R. 28:4.) Accordingly, as a condition of either probation or extended supervision, the PSI writer concluded "that paying the court-ordered restitution should be Mr. Lokken's highest priority and area of need." (R. 28:16.)

Lokken submitted his own presentence report that recommended probation with some jail time. (R. 42:6–7.) The report indicated that Lokken "has the ability and willingness to pay restitution." (R. 42:5.)

Sentencing. Sentencing took place on January 21, 2016. (R. 93:1.) The circuit court first confirmed that as part of the plea agreement, Lokken agreed to pay $625,758.22 in restitution, jointly and severally with Onarheim. (R. 93:7–12.)

During the victim impact statements, the chairman of the county board said that Lokken had "arguably committed the worst violation of public trust in the history of Eau Claire County." (R. 93:19.) He stated that he worried "that Mr. Lokken's crimes may foster public cynicism about government and discourage good, civic-minded individuals from stepping forward and choosing public service." (R. 93:20.) He also said that he expected Lokken to "do all that he can to repay Eau Claire County for the stolen money." (R. 93:20.)

The circuit court also highlighted other victim impact statements that expressed cynicism about the county. (R. 93:22–33.) In addressing some of the victim letters that were

submitted to the court, defense counsel noted that one of the letters was "highly threatening" to Lokken and Onarheim. (R. 93:24.) The court agreed and discounted the letter. (R. 93:24.)

Consistent with the plea agreement, the State recommended a total sentence of six and one half years' initial confinement and seven years' extended supervision. (R. 93:39.) The State based its recommendation on the need for punishment and the need to make the victim whole. (R. 93:40.) Though the State made clear that it was only seeking restitution relative to the charging periods, it noted that its investigation uncovered additional missing funds. (R. 93:7, 33–34.) Specifically, evidence from Onarheim's home showed an additional $762,579.21 in fraudulent transactions. (R. 53; 93:55–56.)

Counsel for Lokken began his sentencing argument by asking whether the circuit court reviewed Lokken's financial disclosure information. (R. 93:42–44.) The court said that it had. (R. 93:44.) Lokken's financial disclosure addressed his monthly net income, his total monthly expenses, his assets, and his debts. (R. 36:1–8.) Regarding restitution, counsel noted that Lokken had assigned the proceeds of the sale of his home to the county and also had sold a car for $10,000. (R. 93:67.) Counsel further indicated that Lokken and his wife received pensions and social security benefits. (R. 93:66–67.) Though counsel contended that placing Lokken on probation would "maximize" restitution (R. 93:74), he never disputed Lokken's ability to pay the stipulated amount. (R. 93:42–75.)[3]

[3] Nor did Lokken dispute his ability to pay an additional $56,088.70 in restitution, jointly and severally with Onarheim. Lokken later stipulated to that additional amount despite his opportunity for a contested restitution hearing. (R. 65; 93:77.)

The circuit court considered the three primary sentencing factors. The court discussed the severity of the offenses in terms of the number of thefts and the amounts involved; that Lokken "put many people in a difficult and uncomfortable position"; that Lokken "destroyed public trust"; that Lokken gave "ammunition to the cynics"; and that Lokken disrespected an office he had served for over 30 years. (R. 93:85–86.) It noted Lokken's character in terms of his age; his lack of prior convictions; his civic and business relationships; his long career as county treasurer; his betrayal of the office; and his failure to cooperate with the investigation. (R. 93:83–84.) Finally, the court discussed the need to protect the public, stating that "there is damage to the community and there is a need to protect the community from this type of behavior." (R. 93:81.)

The circuit court addressed other relevant sentencing factors. Specifically, the court stressed that punishment and deterrence were significant factors. (R. 93:81, 84, 86.)

Regarding the misconduct in office charges—counts 12, 13, and 14—the circuit court imposed the maximum sentence on each count: one and one half years' initial confinement and two years' extended supervision, consecutive. (R. 93:85–86.)

Regarding the theft charges, on count one, the circuit court imposed the maximum sentence: five years' initial confinement and five years' extended supervision, consecutive to counts 12, 13, and 14. (R. 93:87.) On counts five, six, and ten, the court withheld sentence and placed Lokken on ten years' probation, concurrent with the other sentences. (R. 93:87, 89–90.) Finally, on count two, the court imposed and stayed the maximum sentence—five years' initial confinement and five years' extended supervision—consecutive to counts one, 12, 13, and 14, and placed Lokken on probation for ten years. (R. 93:87–91.)

As a condition of the probation on count two, the circuit court ordered the payment of restitution within four and one half years. (R. 93:88.) Specifically, the court stated that the stay "will be lifted unless the restitution joint and several is paid in full within four-and-a-half years." (R. 93:88.)

The circuit court then entered a judgment of conviction reflecting an imposed and stayed sentence on count two. (R. 55:4.) The judgment of conviction also notes the condition that restitution be paid jointly and severally within four and one half years. (R. 55:8.)

Postconviction motion. Postconviction, Lokken sought resentencing before a new judge on several grounds. (R. 71.) First, he argued that he received an illegal sentence on count two. (R. 71:7–11.) Second, he contended that the circuit court did not adequately explain its sentence. (R. 71:12–15.) Third, he appeared to maintain that Judge Theisen was objectively biased at sentencing. (R. 71:15–24.) Following briefing, the court denied Lokken's motion in a written decision. (R. 80.)

Lokken appeals.

ARGUMENT

I. The circuit court did not illegally sentence Lokken on count two.

Lokken's challenge to the legality of his sentence on count two appears two-fold. First, he argues that the circuit court withheld sentence on count two and ordered conditional jail time in excess of that authorized by Wis. Stat. § 973.09(4)(a). (Lokken's Br. 20–21.) Second, he contends that if the court imposed and stayed a sentence on count two, it unlawfully ordered his probation revoked if he fails to meet the condition of probation that he pay

restitution on a joint and several basis within four and one half years. (Lokken's Br. 20–21.)[4]

As explained below, Lokken's arguments fail. First, the circuit court did not withhold sentence on count two; rather, it lawfully imposed and stayed a sentence under Wis. Stat. § 973.09(1)(a). Second, Lokken's claim that the court unlawfully ordered his probation revoked if he fails to meet the restitution condition is not ripe. But even if it was, his claim is meritless because the court did not intend to order Lokken's probation revoked if he fails to pay restitution on time.

A. Standard of review

"Sentencing is a matter committed to the trial court's discretion." *State v. Holloway*, 202 Wis. 2d 694, 697, 551 N.W.2d 841 (Ct. App. 1996). Here, Lokken contends that the circuit court's sentence contravenes two different statutes. Review is therefore de novo. *Id.*

B. The circuit court ordered an imposed and stayed sentence on count two, not a withheld sentence with conditional jail time.

Lokken's first claim is that the circuit court withheld sentence on count two and ordered conditional jail time in excess of that authorized by Wis. Stat. § 973.09(4)(a). Instead of withholding sentence and ordering jail time as a

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[4] Lokken also claims that his sentence is illegal because the circuit court imposed an unreasonable condition of probation. (Lokken's Br. 23–26.) An unreasonable condition of probation does not render a sentence illegal—the unreasonable condition simply is removed. *See State v. Martel*, 2003 WI 70, ¶ 37, 262 Wis. 2d 483, 664 N.W.2d 69. The State thus properly addresses this argument in a separate section.

condition of probation, the circuit court lawfully imposed and stayed a sentence on count two. This Court should therefore affirm the circuit court's denial of Lokken's claim in this regard.

Wisconsin Stat. § 973.09(1)(a) gives the circuit court two options when placing a defendant on probation. First, it may withhold sentence. Wis. Stat. § 973.09(1)(a). Second, it may impose a sentence and stay its execution. *Id.* If the sentencing court withholds sentence, it may impose up to one year of jail time as a condition of probation. Wis. Stat. § 973.09(4)(a).

Pursuant to Wis. Stat. § 973.09(1)(a), the circuit court imposed and stayed a sentence on count two. Initially, the court characterized its disposition as "conditional jail," "conditional prison," and "imposed but stayed." (R. 93:87–88.) But the court clarified, through the parties' questioning, that it meant to impose and stay a sentence. (R. 93:89–90.) For example, the court did not correct the district attorney's statement that the court imposed and stayed a sentence on count two. (R. 93:89–90.) Nor did the court correct defense counsel when he stated, "I heard count two and imposed and stayed." (R. 93:90.) Moreover, the court indicated that unlike count two, it was withholding sentences on counts five, six, and ten. (R. 93:89–90.) It also referred to count two as an extra *sentence*. (R. 93:91.) Lest there be any confusion, the judgment of conviction recites an imposed and stayed sentence (R. 55:4), and the court stated in its postconviction order that it imposed and stayed a sentence on count two (R. 80:5).

Still, Lokken contends that the circuit court ordered a withheld sentence and condition time in excess of that authorized by Wis. Stat. § 973.09(4)(a). (Lokken's Br. 20–21.) His argument appears to be that the court's oral pronouncement was unambiguous and therefore it controls

over the written judgment ordering an imposed and stayed sentence. (Lokken's Br. 20.)

Given the above record, the best that Lokken can do is to show that the court's oral pronouncement was ambiguous on whether it was ordering a withheld sentence with condition time or an imposed and stayed sentence. The test for ambiguity in sentencing asks whether "reasonably well-informed persons could construe the trial court's sentencing remarks" in two or more different ways. *State v. Oglesby*, 2006 WI App 95, ¶ 19, 292 Wis. 2d 716, 715 N.W.2d 727. If the sentence is ambiguous, this Court must review the entire record to discern the circuit court's sentencing intent. *Id.* ¶¶ 20–21.

Even if this Court were to decide that the circuit court's sentencing remarks were ambiguous in this context, other parts of the record—the judgment of conviction and the postconviction order—establish that the court's intent was to impose and stay a sentence on count two. *See State v. Brown*, 150 Wis. 2d 636, 642, 443 N.W.2d 19 (Ct. App. 1989) (partially relying on judgment of conviction to show that the circuit court's intent was to impose a consecutive sentence). Lokken's first claim attacking the legality of his sentence on count two therefore fails.

C. Lokken's remaining challenge to the legality of his sentence on count two is not ripe for judicial review.

Lokken's remaining challenge to his sentence on count two is that, according to him, the circuit court effectively ordered his probation revoked if he does not pay restitution within four and one half years. (Lokken's Br. 19–28.) In making this argument, Lokken concedes that "[n]either the oral pronouncement of the sentence nor the written judgment refers to probation on count two being 'revoked' at the 4.5-year mark of the 10-year probationary term."

(Lokken's Br. 20.) Lokken also concedes that it is not clear what would happen if he does not meet the condition of probation—he questions whether "probation would end by advanced judicial order alone, be deemed revoked, or become terminated or revoked after some unknown process." (Lokken's Br. 21.) Nevertheless, he argues that the court's sentence violates Wis. Stat. § 973.10(2), as it "prevents the executive branch from exercising its valid statutory authority to determine whether to initiate revocation." (Lokken's Br. 22.)

Because Lokken's remaining challenge to the legality of his sentence depends on hypothetical or future facts, and because there is no hardship to Lokken if this Court withholds consideration of his claim, Lokken's claim is not ripe for judicial review. This Court may affirm the circuit court's denial of Lokken's claim on this alternative basis. *State v. Holt*, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985), *superseded on other grounds by statute* ("An appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court.").

"If the resolution of a claim depends on hypothetical or future facts, the claim is not ripe for adjudication and will not be addressed by this court." *State v. Armstead*, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998). "The two fundamental considerations in a ripeness analysis are 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *State v. Thiel*, 2012 WI App 48, ¶ 7, 340 Wis. 2d 654, 813 N.W.2d 709 (citation omitted).

In *Armstead*, Armstead filed an interlocutory appeal raising constitutional challenges to the statutory scheme that mandated adult court jurisdiction over the State's charges against her. *Armstead*, 220 Wis. 2d at 631–37. This Court held that Armstead's constitutional claims were not fit for judicial review because each claim required it to base its

decision on the *possibility* that an event would occur—specifically, that Armstead would be convicted of a lesser-included offense; that Armstead would receive life imprisonment without parole; or that Armstead would be imprisoned with adult inmates. *Armstead*, 220 Wis. 2d at 635–37. In other words, each of Armstead's claims depended on hypothetical or future facts, making judicial review improper. *Id.; accord Clark v. Mudge*, 229 Wis. 2d 44, 49, 599 N.W.2d 67 (Ct. App. 1999) (Mudge's constitutional claim not ripe because it depended "only on his potential financial exposure and the possibility that the jury's verdict [would] permit a recovery in excess of the preamendment caps.").

Conversely, in *Thiel*, this Court decided that Thiel's claims were fit for judicial review. *Thiel*, 340 Wis. 2d 654, ¶ 7. There, Thiel challenged two of the 48 rules that he was required to follow on supervised release. *Id.* ¶¶ 3–5. The State argued that Thiel's claims were not ripe because no one had tried to enforce the rules against him. *Id.* ¶ 7. This Court disagreed: "Thiel is not challenging how Rules 13 and 16 *would be* applied to him—he is instead arguing that the State has no statutory authority to impose these rules." *Id.* Because this Court could decide the merits of Thiel's claims without further factual development, Thiel's claims were fit for judicial review. *Id.*; *accord Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977) (purely legal question fit for judicial review).

This Court also has held that an issue is ripe where it involves the reach of a condition of probation. *See State v. Simonetto*, 2000 WI App 17, ¶ 4 n.1, 232 Wis. 2d 315, 606 N.W.2d 275. There, Simonetto challenged "a condition of probation that he not 'go where children may congregate' as being vague and overly broad." *Id.* ¶ 1. The State argued that the issue was not ripe because Simonetto had failed to show how he was harmed by the condition. *Id.* ¶ 4 n.1. This

Court held that the issue was ripe because "a probationer is entitled to know in advance the reach of a condition so that he or she may regulate his or her conduct accordingly." *Id.*

In this case, Lokken's remaining challenge to the legality of his sentence on count two is not fit for judicial review. His concessions say it all: it is not clear what *might* happen to Lokken *if* he fails to satisfy the condition of his probation. What is clear, however, is that the circuit court has not revoked Lokken's probation, nor has Lokken violated any condition of his probation. Thus, as in *Armstead*, and unlike in *Thiel*, resolution of Lokken's claim requires this Court to base its decision on hypothetical or future facts, making judicial review inappropriate. *See Armstead*, 220 Wis. 2d at 635–37; *Thiel*, 340 Wis. 2d 654, ¶ 7.

Moreover, there is no hardship to Lokken if this Court withholds consideration of his claim. Unlike *Simonetto*, this is not a situation where the defendant seeks clarification of a condition of probation so that he can regulate his conduct accordingly. *See Simonetto*, 232 Wis. 2d 315, ¶ 4 n.1. Here, the condition of probation is clear: pay restitution on a joint and several basis within four and one half years. (R. 93:88.) Lokken does not contend that this condition is ambiguous; rather, his challenge focuses on what *might* happen to him if he does not meet it. If, as Lokken speculates, he fails to pay restitution, and if the circuit court revokes his probation, he can appeal from the court's revocation order. *See State v. Burchfield*, 230 Wis. 2d 348, 350, 602 N.W.2d 154 (Ct. App. 1999) (appeal from circuit court's revocation of probation); *see also Mudge*, 229 Wis. 2d at 50 (claim not ripe because Mudge could litigate it in the future).

Because this Court does not decide issues based on hypothetical or future facts, and because there is no hardship to Lokken if this Court withholds consideration of his claim, this Court should conclude that Lokken's claim is not ripe for judicial review.

D. The circuit court did not unlawfully order Lokken's probation revoked if Lokken fails to pay restitution within four and one half years.

If this Court decides that Lokken's remaining claim is ripe for judicial review, it fails on the merits because the circuit court did not intend to order Lokken's probation revoked if Lokken fails to pay restitution within four and one half years.

The revocation of probation falls within an area of shared powers. *State v. Horn*, 226 Wis. 2d 637, 648, 594 N.W.2d 772 (1999). However, the Legislature has delegated the authority to revoke probation to the executive branch under Wis. Stat. § 973.10(2), and the Wisconsin Supreme Court has held that the delegation is constitutional because it does not "unduly burden[ ] or substantially interfere[ ] with the judiciary's constitutional function to impose criminal penalties." *Horn*, 226 Wis. 2d at 653. Therefore, Wis. Stat. § 973.10(2) lawfully "prohibits judicial revocation of probation by trial courts." *Burchfield*, 230 Wis. 2d at 354.

Here, Lokken's challenge focuses on the following language from the circuit court's oral pronouncement of the conditions of probation: "The stay . . . will be lifted unless the restitution joint and several is paid in full within four-and-a-half years." (Lokken's Br. 20–21; R. 93:88.) This statement is ambiguous because reasonably well-informed persons could construe it in different ways. *See Oglesby*, 292 Wis. 2d 716, ¶ 19.

One reasonable interpretation of the above statement is that the circuit court was advising Lokken of a lawful condition of his probation and the potential consequence for

violating it, namely, the revocation of probation.[5] Although the court referred to the "stay" being "lifted" as opposed to probation being revoked, this reasonably can be seen as a misuse in terminology because the court imposed and stayed a sentence on count two instead of withholding sentence and ordering conditional jail time. *See State v. Johnson*, 2005 WI App 202, ¶ 7, 287 Wis. 2d 313, 704 N.W.2d 318 (courts have power to impose conditional jail time and stay it until the completion or occurrence of some event). And while the court spoke of probation revocation for failure to pay restitution as a certainty, not a possibility, this reasonably can be seen as a way of emphasizing the need to pay restitution in a case where the court primarily was concerned with making the victim whole. That the court never said that it would personally revoke Lokken's probation furthers the reasonableness of the State's interpretation.

However, Lokken also offers a reasonable construction of the circuit court's remark. The language that the stay "will be lifted" (R. 93:88) upon Lokken's failure to pay restitution within a certain time reasonably can be seen as an order for probation revocation.

Since reasonably well-informed persons could construe the circuit court's remark in different ways, and since the court did not fully clarify what it meant in its postconviction order (R. 80:5), the statement is ambiguous. *See Oglesby*, 292 Wis. 2d 716, ¶ 19. Thus, this Court must review other parts of the record to discern the circuit court's intent. *Id.* ¶ 20. As

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[5] Lokken suggests that a probationer cannot be revoked for failing to pay restitution as a condition of probation. (Lokken's Br. 24.) He is incorrect. *See generally Bartus v. Wis. Dep't. of Health & Soc. Servs., Div. of Corr.*, 176 Wis. 2d 1063, 501 N.W.2d 419 (1993) (noting that the Department of Corrections may revoke probation for failure to pay restitution).

in *Oglesby*, where one party came "to the debate with a threshold advantage," *Id.* ¶ 21, the same is true here: the State's construction is favored because this Court presumes that the circuit court knew the law at sentencing. *See Tri-State Mechanical, Inc. v. Northland College*, 2004 WI App 100, ¶ 10, 273 Wis. 2d 471, 681 N.W.2d 302. Thus, the question is whether the record rebuts the presumption that the circuit court sentenced Lokken in a lawful manner. *See Oglesby*, 292 Wis. 2d 716, ¶ 21. It does not.

As Lokken concedes, nowhere in the record does it say that the circuit court will revoke Lokken's probation if he fails to pay restitution on time. (Lokken's Br. 20–21.) The judgment of conviction simply reflects the court's sentencing remark: "[s]tay to be lifted if restitution joint and several not paid in full within 4.5 years." (R. 55:8.) Although the record shows that the court asked the district attorney to notify it of the date that is four and one half years from sentencing (R. 60), nothing in the record (or CCAP) indicates that the court scheduled a probation review hearing. Nor is there anything to show that the court requested notification if Lokken fails to timely pay restitution. Thus, a review of the record simply furthers speculation as to what the court intended, which is not enough to rebut the presumption that the court knew the law and sentenced Lokken in a lawful manner. *See Oglesby*, 292 Wis. 2d 716, ¶¶ 33–34.

Therefore, if this Court decides that Lokken's remaining challenge to the legality of his sentence on count two is ripe for judicial review, it fails on the merits.

II. If the circuit court illegally sentenced Lokken on count two, he is not entitled to resentencing on all counts.

Lokken next argues that if the circuit court illegally sentenced him on count two, he is entitled to a complete resentencing, apparently because he believes that the court's

initial sentencing intent is unclear. Lokken's claim fails because resentencing on count two alone would not affect the overall dispositional scheme of the initial sentence.

A. Standard of review and relevant law

The circuit court did not decide whether Lokken would be entitled to a complete resentencing if the court illegally sentenced him on count two. Review is therefore de novo.

If this Court concludes that the sentence on count two is illegal, whether Lokken is entitled to a complete resentencing depends on the sentencing court's original intent. *See State v. Church*, 2003 WI 74, ¶¶ 3, 26, 262 Wis. 2d 678, 665 N.W.2d 141. In *Church*, after vacating one of Church's five convictions as being multiplicitous, the court of appeals remanded the case for resentencing on the four remaining counts. *Id.* ¶ 3. The Wisconsin Supreme Court reversed, reasoning that "[w]here, as here, the vacated count did not affect the overall dispositional scheme of the initial sentence, resentencing on the remaining counts is unnecessary and therefore not required." *Id.* ¶ 4.

Thus, under the rationale of *Church*, in this case, if resentencing on just one count would not "disturb[ ] the overall sentence structure or frustrate[ ] the intent of the original dispositional scheme," *Church*, 262 Wis. 2d 678, ¶ 26, resentencing on all counts is unnecessary.

B. Resentencing on count two alone would not affect the overall dispositional scheme of the initial sentence.

If this Court determines that the circuit court illegally sentenced Lokken on count two, resentencing is limited to count two.

On the misconduct-in-office counts, the circuit court sentenced Lokken to the maximum penalty, reasoning, "[T]he maximum penalty for those counts is wholly

appropriate, if not *insufficient*, for the damage your actions caused." (R. 93:86.) On the theft counts, the court said that Lokken deserved "swift and strong punishment." (R. 93:86.) "Largely based on the severity of the offense and the need to protect the public," the court gave the maximum sentence on count one, consecutive to the misconduct counts. (R. 93:87). It then imposed and stayed the maximum sentence on count two, consecutive to the other counts, for the sole purpose of giving Lokken an opportunity to pay restitution and "avoid that extra sentence." (R. 93:91.) Finally, the court ordered probation on the remaining counts, concurrent. (R. 93:87.)

Therefore, the circuit court determined that 14.5 years' initial confinement was proper; however, it wanted to give Lokken a chance to avoid the five years' confinement on count two by paying restitution. If this Court decides that the circuit court erred in this regard, only resentencing on count two would be necessary to effectuate the court's initial sentencing intent—either the court would find a lawful way to give Lokken an opportunity to avoid the additional five years' custody, or it would impose the five years' custody that it deemed appropriate. Since count two was the outlier, resentencing on count two would not implicate the validity of the punishments on the other sentences. Only resentencing on count two is thus necessary. *See Church*, 262 Wis. 2d 678, ¶ 26.

As noted, Lokken claims that he is entitled to a complete resentencing if this Court invalidates the sentence on count two. (Lokken's Br. 29–32.) His challenge appears rooted in the notion that the circuit court failed to properly explain its sentences and therefore its initial sentencing intent is unclear. (Lokken's Br. 31–32.) However, as argued

below, the circuit court properly explained its sentences. Therefore, Lokken's claim for a complete resentencing fails.[6]

III. The circuit court did not order an unreasonable condition of probation.

Lokken also argues that the circuit court ordered an unreasonable condition of probation, either because it based its decision on an error of law, or because the court did not determine Lokken's ability to pay restitution. These arguments fail for three reasons: (1) the court did not base its decision on an error of law, (2) Lokken forfeited any argument claiming an inability to pay restitution, and (3) regardless, the court properly considered Lokken's ability to pay restitution.

A. Standard of review and relevant law

"A circuit court's imposition of conditions of probation is discretionary, but a discretionary decision that is based on an error of law is an erroneous exercise of discretion." *State v. Martel*, 2003 WI 70, ¶ 8, 262 Wis. 2d 483, 664 N.W.2d 69.

Wisconsin Stat. § 973.09(1)(a), governing probation, authorizes the circuit court to "impose any conditions which appear to be reasonable and appropriate." Under the probation statute, the court is required to order restitution as a condition of probation "unless the court finds there is substantial reason not to order" it. Wis. Stat. § 973.09(1)(b).

The probation statute also directs the circuit court, in ordering restitution as a condition of probation, to use the procedure outlined in the restitution statute. Wis. Stat. § 973.09(1)(b). Under the restitution statute, courts may

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[6] The State agrees with Lokken that this Court should not engage in resentencing, if necessary. (Lokken's Br. 29–30.)

"require that restitution be paid immediately, within a specified period or in specified installments." Wis. Stat. § 973.20(10)(a). "If the defendant is placed on probation . . . the end of a specified period shall not be later than the end of any period of probation . . . ." *Id.*

Under Wis. Stat. § 973.20(13)(a), courts are required "to consider any evidence introduced by [the defendant] with respect to his ability to pay when determining the amount of restitution." *State v. Szarkowitz*, 157 Wis. 2d 740, 749, 460 N.W.2d 819 (Ct. App. 1990). The defendant has the burden to prove his inability to pay restitution. *Id.* If the defendant does not raise his inability to pay restitution as an issue before the court, the court does not need to make detailed findings on the defendant's ability to pay. *Id.* at 750. The issue also is forfeited on appeal. *State v. Johnson*, 2002 WI App 166, ¶ 12, 256 Wis. 2d 871, 649 N.W. 2d 284.

B. The circuit court properly exercised its discretion when it ordered Lokken to pay $625,758.22 in restitution on a joint and several basis within four and one half years.

Because the circuit court did not erroneously exercise its discretion in ordering restitution as a condition of probation, this Court should affirm the circuit court's denial of Lokken's claim in this regard.

As noted, Lokken's argument that the circuit court ordered an unreasonable condition of probation appears two-fold. First, he argues that the restitution condition conflicts with Wis. Stat. § 973.10(2), based on "the deadline for meeting the condition, the sanction for failing to meet it, and the process (or lack of process) triggering imposition of the prison term." (Lokken's Br. 24.)

As for the deadline for meeting the condition, Lokken appears to overlook the circuit court's authority to order that

restitution be paid within a specified period. Wis. Stat. § 973.20(10)(a). Nothing in Wis. Stat. § 973.10(2) interferes with that authority. Regarding the "sanction" for failing to meet the condition and the "process (or lack of process)" triggering revocation, as argued above, the circuit court did not order Lokken's probation revoked if he fails to pay restitution on time. Thus, Lokken's first argument fails.

Second, Lokken argues that the circuit court failed to "properly consider [his] ability to pay" restitution. (Lokken's Br. 25–26.) This claim fails for the simple fact that Lokken never once claimed an inability to pay restitution at the sentencing hearing; rather, he *agreed* to pay restitution as a clear legal strategy. (R. 93:7–12.) While Lokken submitted a financial disclosure form (R. 36), he did not propose a modification of the stipulated restitution based on his inability to pay it.[7] Thus, the court was not required to make findings regarding Lokken's ability to pay, *see Szarkowitz*, 157 Wis. 2d at 750, and Lokken has forfeited the issue on appeal. *See Johnson*, 256 Wis. 2d 871, ¶ 12.

However, even if the circuit court was required to make findings regarding Lokken's ability to pay restitution on a joint and several basis, the record supports a proper exercise of discretion. For starters, Lokken stipulated to a factual basis showing that he and Onarheim stole $625,758.22 from the county. (R. 90:17.) Moreover, evidence

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[7] The closest that Lokken came to suggesting an inability to pay is in his sentencing memorandum where he cites to Wis. Stat. § 973.20(13)(a). (R. 30:14.) But this reads more like a statement of the law than an argument on his inability to pay restitution—he does not apply the law to the facts of his case. (R. 30:14.) It was Lokken's burden to prove his inability to pay. *State v. Szarkowitz*, 157 Wis. 2d 740, 749, 460 N.W.2d 819 (Ct. App. 1990).

from Onarheim's home showed an additional $762,579.21 in fraudulent transactions. (R. 53; 93:55–56.)

Before sentencing, Lokken submitted his own presentence report stating that he "has the ability and willingness to pay restitution." (R. 42:5.) At the December 18, 2015, status conference, Lokken's counsel suggested that Lokken was selling his Wisconsin home to contribute to restitution. (R. 91:17.) He also indicated that Lokken had purchased a new home in Florida. (R. 91:23.) Further, counsel for Onarheim stated that Onarheim was selling her home and various clothing items to contribute to restitution. (R. 91:11, 21.)

At sentencing, the circuit court indicated that it had reviewed Lokken's financial disclosure form, which noted his monthly net income, his total monthly expenses, his assets, and his debts. (R. 36:1–8; 93:44.) Counsel represented that Lokken had assigned the proceeds of the sale of his home to the county and also had sold a car for $10,000. (R. 93:67.) Counsel also stated that Lokken and his wife received pensions and social security benefits. (R. 93:66–67.) Lokken offered no evidence as to what happened to the $625,758.22 that he agreed to pay as restitution.

In its postconviction order, the circuit court confirmed that it considered Lokken's ability to pay in setting restitution. (R. 80:1–3.) In addition to the above factors, it also considered the likelihood that Onarheim had retirement benefits as a former county employee. (R. 80:2.) It also considered the possibility that Lokken and Onarheim might receive gifts toward the payment of restitution from friends or family members who benefitted from their crimes. (R. 80:2–3.) Though Lokken disagrees (Lokken's Br. 25–26), the court could lawfully consider that possibility. *See State v. Dugan*, 193 Wis. 2d 610, 625, 534 N.W.2d 897 (Ct. App. 1995), *overruled on other grounds by State v. Muldrow*, 2018 WI 52 (May 18, 2018) ("The offender's ability to pay

restitution should not be restricted to the offender's financial condition only at the moment of sentencing. Circumstances might change during the offender's sentencing, probation or parole which bear upon that question.").

Given the above record, the circuit court considered Lokken's ability to pay and properly exercised its discretion in ordering restitution on a joint and several basis. Lokken's second argument thus fails.[8]

In sum, the circuit court did not order an unreasonable condition of probation.

IV. The circuit court did not erroneously exercise its discretion by failing to explain why its sentences met the minimum custody standard.

Though imbedded in his other arguments, Lokken appears to claim that he is entitled to resentencing because the circuit court failed to explain why its sentences met the minimum custody standard. This argument fails because the court discussed the primary sentencing factors, identified its objectives of greatest importance, and logically explained the linkage between its sentence structure and its sentencing objectives.

A. Standard of review and relevant law

An appellate court "will not interfere with the circuit court's sentencing decision unless the circuit court

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[8] Lokken notes that his "postconviction motion addressed his ability to pay restitution within the framework established by the sentence." (Lokken's Br. 26.) Under Wis. Stat. § 973.09(3)(a), Lokken may seek a modification of the conditions of probation before his probationary term expires. However, Lokken did not request such relief at the circuit court. (R. 71.) Any argument on this point is therefore forfeited. *See In re Guardianship of Willa L.*, 2011 WI App 160, ¶ 25, 338 Wis. 2d 114, 808 N.W.2d 155.

erroneously exercised its discretion." *State v. Lechner*, 217 Wis. 2d 392, 418–19, 576 N.W.2d 912 (1998). When reviewing a sentencing decision, an appellate court presumes that the circuit court acted reasonably. *State v. Gallion*, 2004 WI 42, ¶ 18, 270 Wis. 2d 535, 678 N.W.2d 197. A reviewing court will search the record for reasons to sustain a circuit court's exercise of sentencing discretion. *McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). The defendant bears a "heavy burden" of establishing that a circuit court erroneously exercised its sentencing discretion. *State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409.

As noted, sentencing lies within the circuit court's discretion. *See, e.g.*, *Gallion*, 270 Wis. 2d 535, ¶ 17. A sentencing court properly exercises its discretion when the court engages in a reasoning process that "depend[s] on facts that are of record or that are reasonably derived by inference from the record" and imposes a sentence "based on a logical rationale founded upon proper legal standards." *McCleary*, 49 Wis. 2d at 277.

When deciding on a sentence, a sentencing court must consider three principal factors: the gravity of the offense, the character of the defendant, and the need to protect the public. *McCleary*, 49 Wis. 2d at 276. "In each case, the sentence imposed shall 'call for the minimum amount of custody or confinement which is consistent with'" these factors. *Gallion*, 270 Wis. 2d 535, ¶ 44 (quoting *McCleary*, 49 Wis. 2d at 276). Thus, the minimum custody standard is not something separate from the general rule that a sentencing court explain its decision with reference to the proper sentencing factors. *See State v. Ramuta*, 2003 WI App 80, ¶ 25, 261 Wis. 2d 784, 661 N.W.2d 483.

The Wisconsin Supreme Court has set forth the following additional and related factors that may be examined at sentencing: the defendant's criminal record,

history of undesirable behavior patterns, social traits, remorse, cooperativeness, degree of culpability, the results of the PSI, the aggravated nature of the crime, the need for close rehabilitative control, and the rights of the public. *Gallion*, 270 Wis. 2d 535, ¶ 43 n.11. The circuit court has discretion to determine both the factors that it believes relevant when imposing sentence and the weight to assign each relevant factor. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

B. The circuit court properly exercised its discretion in imposing Lokken's sentence.

The circuit court, by reference to the proper sentencing factors, provided a reasonable explanation for how the sentences imposed promoted its sentencing objectives of punishment, deterrence, public protection, and making the victim whole.

First, it considered the primary sentencing factors, applying the relevant facts to each. The court discussed the severity of the offenses in terms of the number of thefts and the amounts involved; that Lokken "put many people in a difficult and uncomfortable position"; that Lokken "destroyed the public trust"; that Lokken gave "ammunition to the cynics"; and that Lokken disrespected an office he had served for over 30 years. (R. 93:85–86.) The court also addressed Lokken's character in terms of his age; his lack of prior convictions; his civic and business relationships; his long career as county treasurer; his betrayal of the office; and his failure to cooperate with the investigation. (R. 93:83–84.) Finally, the court recognized the need to protect the public, stating that "there is damage to the community and there is a need to protect the community from this type of behavior." (R. 93:81.)

Second, the circuit court identified the sentencing objectives of greatest importance. It indicated that it was

most concerned with punishment, deterrence, public protection, and making the victim whole. (R. 93:81, 84, 86–89.)

Third, the circuit court logically explained the linkage between its sentence structure and its sentencing objectives. The court ruled out probation alone because it would unduly depreciate the severity of the offenses. (R. 93:82.) It ordered the maximum sentence on the misconduct in office counts to punish Lokken for his disrespect to public office and "the damage that [was] done to the public trust." (R. 93:86.) As for the sentences imposed on the theft counts, the court reasoned that Lokken was entitled to "swift and strong punishment" given the number of thefts and the amounts involved. (R. 93:86.) It further explained that it needed to "send a message that [Lokken's] behavior is just simply not tolerable," and that "the public deserves to be protected from such thefts." (R. 93:86.)

After linking its sentence structure to its sentencing objectives of punishment, deterrence, and public protection, the circuit court explained why it was imposing and staying a sentence on count two: to try to meet its other sentencing objective, namely, making the victim whole. (R. 93:88–89.) In its postconviction order, the court reiterated its conclusion that nearly 15 years' imprisonment was consistent with the need for punishment, deterrence, and public protection—it only stayed a portion of that custody to try to make the victim whole. (R. 80:3.)

In light of the foregoing, Lokken cannot succeed in his challenge to the circuit court's sentencing discretion. *See Gallion*, 270 Wis. 2d 535, ¶¶ 46, 76 (sentencing court properly exercises its discretion when it rationally links the relevant facts, sentencing factors, and sentencing objectives). Yet, that is his apparent contention on appeal. Specifically, he argues that the court erred by failing to explain how its

sentences met the minimum custody standard. (Lokken's Br. 31–34.)

As noted above, the circuit court explained why it rejected probation alone as a sentencing disposition. It also explained the reasons why it ordered maximum sentences on five of the eight counts, as well as the reason for staying one of those sentences. It was not required to explain its sentences with mathematical precision. *Gallion*, 270 Wis. 2d 535, ¶ 49. Lokken's claim boils down to the court's failure to use the magic words, "minimum custody standard" (Lokken's Br. 31), but no magic words are needed to support a proper exercise of discretion. *See Gallion*, 270 Wis. 2d 535, ¶ 49. When the court discussed the primary sentencing factors, identified its objectives of greatest importance, and logically explained the linkage between its sentence structure and its sentencing objectives, it properly exercised its discretion. *See Ramuta*, 261 Wis. 2d 784, ¶ 25.

V. The circuit court was not objectively biased at sentencing.

Finally, Lokken argues that the circuit court was objectively biased at sentencing, apparently because the circuit court revoked his bail before sentencing and ordered him to pay the stipulated restitution within four and one half years. Lokken's claim fails because a reasonable person could not question the court's impartiality at sentencing.

A. Standard of review and relevant law

Whether a judge was objectively biased is a question of law that this Court reviews independently. *State v. Herrmann*, 2015 WI 84, ¶ 23, 364 Wis. 2d 336, 867 N.W.2d 772.

A biased judge is "constitutionally unacceptable." *Herrmann*, 364 Wis. 2d 336, ¶ 25 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). "There is a presumption that a judge

acted fairly, impartially, and without prejudice." *Id.* ¶ 3. The burden of rebutting this presumption is on the party asserting bias, which it must do by a preponderance of the evidence. *Id.* ¶ 24.

Wisconsin has both subjective and objective tests for determining whether a defendant's due process right to an impartial decisionmaker has been violated. *Herrmann*, 364 Wis. 2d 336, ¶ 26. The subjective test is "based on the judge's own determination of his or her impartiality" and the objective test is "based on whether impartiality can reasonably be questioned." *State v. Walberg*, 109 Wis. 2d 96, 106, 325 N.W.2d 687 (1982).

Where the judge determines his or her ability to remain impartial, "the subjective test has been satisfied." *Id.*; *State v. Rochelt*, 165 Wis. 2d 373, 379, 477 N.W.2d 659 (Ct. App. 1991). The subjective test does not appear at issue in this case. (Lokken's Br. 35.)

Regarding the objective test, "[o]bjective bias can exist in two situations." *State v. Goodson*, 2009 WI App 107, ¶ 9, 320 Wis. 2d 166, 771 N.W.2d 385. One is the appearance of bias, which occurs when "a reasonable person could question the court's impartiality based on the court's statements." *Id.* The other situation occurs when the judge is actually biased, that is, when "there are objective facts demonstrating . . . the trial judge in fact treated [the defendant] unfairly." *Id.* (citation omitted).

Here, Lokken argues that actions and statements by the circuit court establish the appearance of bias. (Lokken's Br. 35–40.) "When the appearance of bias reveals a great risk of actual bias, the presumption of impartiality is rebutted, and a due process violation occurs." *Herrmann*, 364 Wis. 2d 336, ¶ 46.

B. A reasonable person could not question the circuit court's impartiality at sentencing.

As noted, Lokken argues that the circuit court's decision to revoke his bail before sentencing, combined with its decision to order Lokken to pay stipulated restitution in four and one half years, shows the appearance of bias. (Lokken's Br. 34–40.)[9] Specifically, Lokken contends that both decisions demonstrate "a desire to coerce payment" over "fair, rational treatment." (Lokken's Br. 35.) Notably, Lokken faults the court for pursuing "a restitution-related mission" (Lokken's Br. 36) in a case where he pled no contest to stealing over one half million dollars from Eau Claire county, and the PSI recommended restitution repayment as Lokken's "highest priority and area of need." (R. 28:16.) Lokken's due process claim fails for the following two reasons.

First, a reasonable person could not question the circuit court's partiality based on its decision to revoke Lokken's bail. Wisconsin Stat. § 969.01(2)(a) authorizes a judge to release a defendant after conviction and before sentencing. However, the court has the discretion to revoke its order releasing the defendant. Wis. Stat. § 969.01(2)(e).

Here, though Lokken would have this Court believe that the circuit court revoked his bail solely for his failure to pay restitution before sentencing (Lokken's Br. 34–35), the record shows that the court primarily based its decision on the issue of public threats to Lokken and Onarheim. (R. 91:21, 26.) The court reasoned that they would be "safer as individuals incarcerated." (R. 91:26.) At a subsequent

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[9] Lokken also argues that the circuit court's illegal sentence on count two establishes the appearance of bias. (Lokken's Br. 35.) As explained above, the court did not illegally sentence Lokken on count two.

hearing, the court further explained its decision: "I don't usually get emails on cases. I don't usually have people say there's a whole stack of letters here about this case . . . . I don't usually go to the grocery store and overhear people talking about things." (R. 92:33.) Counsel for Lokken agreed that he got a phone call that he "could perceive as a threat." (R. 91:20.) Moreover, at sentencing, Lokken's counsel noted that he saw a letter that was "highly threatening" to Lokken and Onarheim, thereby confirming the validity of the court's concern regarding bail. (R. 93:24.)

On this record, a reasonable person could not question the judge's impartiality in revoking bail, regardless whether the court made a passing comment about unpaid restitution. It also is worth noting that the court twice granted Lokken's request to modify his bail to allow him to travel—once for the purpose of purchasing a "larger place" in Florida. (R. 85:4; 87:3–6; 88:3.) The bottom line is that the circuit court, in revoking bail, considered the proper law and reached a decision reasonably supported by the facts of record. *See State v. Jackson*, 2014 WI 4, ¶ 43, 352 Wis. 2d 249, 841 N.W.2d 791 (erroneous exercise of discretion standard). Lokken does not contend otherwise. (Lokken's Br. 34–36.) His claim therefore fails.

Second, a reasonable person could not question the circuit court's impartiality based on its decision to require Lokken to pay stipulated restitution on a joint and several basis within four and one half years. The State already has explained why that is a reasonable condition of probation. Lokken adds nothing new to the conversation other than to refer to the court's lawful and reasonable restitution order as coercive (Lokken's Br. 35–36), and to assert that the court's order denying postconviction relief adds to the appearance of bias in this case (Lokken's Br. 37–40).

On the latter point, Lokken takes issue with the circuit court's belief that friends or family members may give

gifts toward restitution (Lokken's Br. 37), but as noted, the court lawfully considered that. *See Dugan*, 193 Wis. 2d at 625. He also objects to the court's remark that "the record reflects that the defendant *and his co-defendant* committed theft of over one million dollars." (R. 80:1; Lokken's Br. 38 (emphasis added).) For starters, there is nothing incorrect about this statement, as evidence from Onarheim's home showed an additional $762,579.21 in fraudulent transactions. (R. 53; 93:55–56.) And though Lokken suggests that the court illegally ordered restitution on these additional funds (Lokken's Br. 38–39), that simply did not happen. The court properly took this evidence into account as relevant to the defendants' ability to pay joint and several restitution for the crimes considered at sentencing, and Lokken does not argue otherwise. (Lokken's Br. 38–40.)

In the end, while Lokken believes that the circuit court's lawful and reasonable restitution order amounts to coercion, that is not the inquiry. The question is whether a reasonable person could question the court's impartiality in ordering restitution. And a reasonable person would consider the following: (1) the court determined that 14.5 years' initial confinement was consistent with the need for punishment, deterrence, and public protection in this case; (2) the court stayed a portion of that confinement to try to make the victim whole; (3) the court was required to order restitution under the law; (4) the court was authorized to order restitution to be paid by a certain time; (5) Lokken *agreed* to pay restitution; (6) the court ordered restitution to be paid jointly and severally with Onarheim; and (7) there was evidence of missing funds of over one million dollars, with no explanation for where the money went. On this record, a reasonable person could not question the court's impartiality in ordering restitution.

The bottom line is that Lokken has failed to overcome the presumption that the circuit court acted fairly,

impartially, and without prejudice. His due process claim therefore fails.

CONCLUSION

This Court should affirm Lokken's judgment of conviction and the circuit court's order denying postconviction relief.

Dated this 21st day of June, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,782 words.

Dated this 21st day of June, 2018.

_____
KARA L. MELE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 21st day of June, 2018.

_____
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