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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP870-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DESHAWN J. DRIVER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, THE HONORABLE DENNIS R. CIMPL, PRESIDING, AND AN ORDER DENYING POSTCONVICTION RELIEF, THE HONORABLE DENNIS P. MORONEY, PRESIDING, BOTH ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Deshawn J. Driver was present at the restitution hearing in his case, where his counsel advanced Driver's arguments, advocated for him, and cross-examined the victim's claims of property and other monetary losses due to Driver's stealing her purse and car. Did Driver receive all the process that was due to him at the restitution hearing?

The postconviction court said yes.

This Court should affirm.

2. Did the restitution court demonstrate objective bias when it indicated that it would believe the victim's testimony over Driver's proffered testimony regarding property she claimed she lost due to Driver's stealing her purse and car?

Driver did not contemporaneously object during the restitution hearing. The postconviction court rejected Driver's claim that the restitution court exhibited bias.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is warranted. This Court may resolve the issues by applying settled law, and the parties' briefs should adequately set forth the relevant facts and legal standards.

INTRODUCTION

Driver is not entitled to a new restitution hearing. He received all of the process guaranteed to him under the restitution statute, Wis. Stat. § 973.20. Further, he has forfeited his judicial bias claim, which in any event is meritless.

STATEMENT OF THE CASE

While P.B. was unloading groceries from her Ford Escape, Driver and Kenyacies Phipps approached her, held a gun to her side, and demanded her keys. (R. 1:2.) After taking P.B.'s keys and purse, Phipps and Driver got into the Escape and drove off. (R. 1:2.) The two men drove the Escape for most of the day until police saw them. (R. 1:2.) Phipps and Driver then led police on a high-speed chase that ended when they crashed the Escape into another car. (R. 1:2–3.) Phipps and Driver attempted to flee the crash on foot, but police caught and arrested them. (R. 1:2–3.)

Driver pleaded guilty to armed robbery as a party to a crime. (R. 18.) The court sentenced him to a ten-year sentence (five years' initial confinement and five years' extended supervision) and ordered restitution, with the amount to be determined at a later hearing. (R. 14.)

Before the restitution hearing,[1] P.B. submitted a restitution worksheet through the district attorney's office. (R. 17; 37:6–7.) Among other expenses listed on the worksheet was an itemized list of unrecovered property and each item's value, totaling $2105. (R. 37:6–7.) The main items P.B. listed included a stroller, a child's car seat, her purse, and her cell phone. (R. 17:1.) She also listed numerous items along with their values that were either in her purse or in the car, including the cash in her wallet, her driver's license, hand lotion, a Kate Spade wallet, a tool set, groceries, and other items. (R. 17:2.)

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[1] Judge Dennis R. Cimpl presided over the conviction and sentencing; whereas, Judge Dennis P. Moroney presided over the restitution hearing.

P.B. appeared by phone and was sworn in. (R. 37:6.) She explained that the things on the itemized list were in the car, either on their own—such as the car seat and stroller—or in her purse, which Phipps and Driver took. (R. 37:7.) When the court asked whether P.B. ever got "any of that stuff back," P.B. explained that the Escape was taken to a tow lot and that between her and her husband, "only one of us could . . . go look at the car"; she did not want to do it. (R. 37:7.) She said that her husband could not get into the glove compartment and that he "grabbed a . . . few things" from the car. (R. 37:7.) She stated that the list represented items that she did not recover. (R. 37:7.) During questions from Phipps's counsel, P.B. acknowledged that it was possible that her husband missed some of the smaller items listed. (R. 37:18.) But in any event, she went on, the items were no longer recoverable because the tow lot destroyed the car—which Driver and Phipps had totaled—after her husband left the lot. (R. 37:18.)

Through counsel, both Phipps and Driver claimed that not all of the items listed were in the car. (R. 37:20—21.) Phipps's counsel also emphasized that it was possible that P.B.'s husband overlooked some of the otherwise recoverable small items listed. (R. 37:21.)

As for the itemized list, the court explained that it did not need to hear Driver's or Phipps's testimony regarding whether they saw specific items on the list: "I'll take that without their testimony that they didn't see all these items. That's why I didn't give them a chance to say it. They simply deny these items were there, and frankly, their credibility is not . . . good with the Court. [P.B.'s] credibility is better. She's the one that's the victim." (R. 37:21.)

The court went on to award P.B. the full restitution she requested, $5175.34, which included the itemized property loss, medical expenses, lost wages, and other

expenses that stemmed from the carjacking. (R. 37:23.) As for P.B.'s claimed property loss, the court explained that P.B. has "testified that all of the items were in her car or her purse. These two young men carjacked the car. They took the purse. They're responsible for all of these items based on the fact that she is credible and testified they were there. The fact that she didn't make an effort to go to the tow lot and get the items out of the car is irrelevant. The law does not require her to do that." (R. 37:21–22.)

Driver filed a postconviction motion seeking a new restitution hearing. He claimed that the court denied his right to due process when it did not permit him to testify. (R. 25:4–5.) He also claimed that the court showed actual bias at the hearing when it commented that the victim was more credible than Driver. (R. 25:6.)

The postconviction court denied Driver's motion in a written decision and order. (R. 26:1–2.) Driver appeals.

ARGUMENT

I. Driver received all the process that he was due at the restitution hearing.

This Court reviews a challenge to the circuit court's restitution decision for an erroneous exercise of discretion, but it reviews de novo the application of the restitution statute to the facts. *State v. Fernandez*, 2009 WI 29, ¶ 20, 316 Wis. 2d 598, 764 N.W.2d 509.

Wisconsin Stat. § 973.20(14) sets forth the procedures for restitution hearings. At the restitution hearing, interested parties "shall have an opportunity to be heard, personally or through counsel, to present evidence and to cross-examine witnesses called by other parties." Wis. Stat. § 973.20(14)(d). That language serves to protect a

defendant's due process rights. *Fernandez*, 316 Wis. 2d 598, ¶¶ 59–60.

Moreover, the statute authorizes the court to "conduct the proceeding so as to do substantial justice between the parties according to the rules of substantive law and may waive the rules of practice, procedure, pleading or evidence." Wis. Stat. § 973.20(14)(d); *see Fernandez*, 316 Wis. 2d 598, ¶ 60. Based on the restitution statute's twin aims—"to balance the needs of the victim to recover losses without complicated legal barriers against the needs of the defendant to ascertain the validity of the claims—the legislature clearly elected to give the circuit court a great deal of discretion in conducting a restitution hearing." *Fernandez*, 316 Wis. 2d 598, ¶ 60.

Here, Driver received all the process that was due to him at the hearing. He had the opportunity to be heard, which was accomplished through counsel's assertions that Driver did not see the items P.B. claimed were in the car and her purse. He had the opportunity to present evidence. And he had the opportunity to cross-examine P.B. *See* Wis. Stat. § 973.20(14)(d).

Driver complains that the court deprived him of his due process right to be heard when it declined to permit him to testify. (Driver's Br. 6–8.) But that argument conflates the general due process right to be heard into a right to testify upon demand at a restitution hearing. Nothing in Wis. Stat. § 973.20(14)(d) requires that a court in restitution hear direct testimony from a defendant. To the contrary, the statute expressly provides that a defendant "shall have *an opportunity to be heard, personally or through counsel*." Wis. Stat. § 973.20(14)(d). Driver identifies nothing in the

statutory language or case law[2] requiring a court to hear Driver's testimony personally.

Further, the court soundly exercised its discretion in conducting the restitution hearing as it did. It expressed its understanding that Driver was going to testify that he did not see all of the items from the list in the car and decided to forgo hearing Driver say those words. That was a reasonable exercise of discretion under the circumstances. P.B. made an exacting list of items—with supporting documentation to justify each item's associated value—that she swore were in the car or her purse and that she did not recover. (R. 17.) Driver was simply going to testify that he did not see some of the things in the car. The court was entitled to take the position that if P.B. said something was in the car or her purse, it was there. Indeed, nothing on the list stood out as highly unlikely to have been in the car or her purse. The court was further entitled to determine that Driver damaged his own credibility on the topic by stealing P.B.'s car and purse in the first place. *See* Wis. Stat. § 906.09; *Nicholas v. State*, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971) (stating that "the law in Wisconsin presumes that one who had been convicted of a crime is less likely to be a truthful witness than one who has not been convicted").

Driver complains that the court's procedure did not square with his right to "present evidence" under section 973.20(14)(d). (Driver's Br. 8.) But he does not explain what

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[2] Driver invokes *Estate of Derzon*, 2018 WI App 10, ¶ 42, 380 Wis. 2d 108, 908 N.W.2d 471, for the proposition that the right to be heard includes the right to offer the testimony of witnesses. (Driver's Br. 8.) *Derzon* is not a restitution case. In any event, it does not stand for the proposition that a defendant must personally testify in a restitution hearing if he so wishes, even when the court finds that the content of his proffered testimony is not necessary to its decision.

evidence he did not present to the court. Again, the restitution court expressed its understanding that Driver would say that some of the items P.B. listed were not in the car or her purse. Driver does not claim that the court misunderstood the content of his proffered testimony. Accordingly, that evidence was presented; the court did not need to hear those words coming from Driver's mouth. Moreover, Driver does not claim that he had additional evidence—such as photos from his and Phipps's joyride, inventory sheets from the police or tow lot, or documentation disputing the costs P.B. attributed to the items—that the court disregarded by not allowing him to testify.

Finally, Driver complains that his opportunity to cross-examine P.B. was meaningless "since the judge had decided her testimony would be credible before he heard it." (Driver's Br. 9.) This argument suggests that the court was unwilling to question the accuracy of P.B.'s claimed expenses resulting from the carjacking. But the record demonstrates the opposite. As for the itemized list, the court asked P.B. whether the items were in the car or her purse, whether she was able to have any of the items returned to her, and whether the items in the list represented unrecovered things.[3] (R. 37:7.) The court asked P.B. for an explanation of her claim for reimbursement of a new door and lock to her home. (R. 37:7–8.) It reduced by $400 the total amount that she sought for lost wages, noting that she was off work for five days when her worksheet reflected seven days' worth of wages. (R. 37:10.) It also asked P.B. to explain her request

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[3] The court also correctly concluded that it was irrelevant that P.B. did not personally "go to the tow lot and get the items out of the car" because "[t]he law does not require her to do that." (R. 37:22.) *Accord State v. Knoll*, 2000 WI App 135, ¶ 17, 237 Wis. 2d 384, 614 N.W.2d 20 (contributory negligence is not a defense in restitution proceedings).

for sales tax on a new car, her increased insurance premium, and her claimed medical expenses. (R. 37:8–13.) In other words, the court held P.B. to her burden of justifying her requests; it did not blindly rubber-stamp P.B's worksheet based on a preconceived notion of credibility.

In all, the restitution hearing was fair. Driver received all the process he was due. He is not entitled to a new hearing.

II. Driver's judicial bias claim is forfeited and meritless.

Whether a defendant has properly preserved a claim for appellate review is a question of law this Court reviews de novo. *See State v. Corey J.G.*, 215 Wis. 2d 395, 405, 572 N.W.2d 845 (1998).

To preserve a claim for appellate review, a party must raise it in the circuit court. *State v. Nelis*, 2007 WI 58, ¶ 31, 300 Wis. 2d 415, 733 N.W.2d 619. Specifically, as is relevant to Driver's claim of judicial bias, Driver is seeking recusal of the restitution judge. *See* Wis. Stat. § 757.19(2)(g) (requiring recusal "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner"). Yet "[a] challenge to a judge's right to adjudicate a matter must be made as soon as the alleged infirmity is known and prior to the judge's decision on a contested matter." *State v. Marhal*, 172 Wis. 2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992) (citation omitted).

Here, Driver did not object to the alleged bias and seek the judge's recusal at the restitution hearing. Rather, he raised this claim for the first time in his postconviction motion. (R. 25.) Under *Marhal*, that objection was untimely, and Driver's request for recusal based on bias is forfeited. 172 Wis. 2d at 505. This Court may decline to address the

claim for that reason. *See State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727 ("It is a fundamental principle of appellate review that issues must be preserved at the circuit court.").

In any event, Driver cannot establish that the restitution court was objectively biased. 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)). This Court starts with the presumption that the judge "acted fairly, impartially, and without prejudice." *Id.* ¶ 24. Driver bears the burden of rebutting this presumption by a preponderance of the evidence. *See id.*

"Objective bias can exist in two situations." *State v. Goodson*, 2009 WI App 107, ¶ 9, 320 Wis. 2d 166, 771 N.W.2d 385. The appearance of bias occurs when "a reasonable person could question the court's impartiality based on the court's statements." *Id.* Actual bias is present when "there are objective facts demonstrating . . . the trial judge in fact treated [the defendant] unfairly." *Id.* (citation omitted). "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555 (1994).

The court did not exhibit either actual bias or the appearance of bias when it commented that P.B. was inherently more credible than Driver regarding what was in her car or purse when Driver and Phipps stole them. But again, the court was entitled to express that it was going to

favor P.B.'s word over Driver's on that issue. *See* Wis. Stat. § 906.09; *Nicholas*, 49 Wis. 2d at 688 (stating legal presumption that person convicted of crime is less credible than a person without a criminal record).

Further, the court had broad discretion in how it conducted the restitution hearing. *Fernandez*, 316 Wis. 2d 598, ¶ 60. It was entitled to decline to hear direct testimony from Driver based on Driver's proffer that he was simply going to deny seeing some of P.B.'s items. *Cf.* Wis. Stat. § 906.11 (providing judges authority to exercise "reasonable control over the mode and order of . . . presenting evidence so as to . . . [a]void needless consumption of time"); *see also State v. Bembenek*, 111 Wis. 2d 617, 636–37, 331 N.W.2d 616 (Ct. App. 1983) (stating that a court's impatience or unduly harsh comments to a defendant made while exercising its authority under section 906.11 do not violate a defendant's right to a fair trial).

Driver complains that the judge declared he would believe P.B. over Driver before he even heard P.B.'s testimony, which he claims was proof that the court prejudged the matter. (Driver's Br. 10.) But again, based on Driver's proffer that he was denying the presence of some of the items, the court was entitled to indicate that it would believe P.B. if she testified affirmatively that the items were in the car or her purse. As discussed above, P.B. indeed testified that the items were in the car or her purse and that she did not recover them. (R. 37:6–8.) The court held P.B. to her burden of proof and did not simply rubber-stamp her restitution request. Its decision to forgo hearing Driver's testimony was within its discretion and did not deprive him of an impartial decision-maker.

CONCLUSION

This Court should affirm the judgment of conviction and the decision and order denying postconviction relief.

Dated this 11th of October, 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 2,847 words.

____

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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 11th day of October, 2018.

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