OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

April 30, 2013

To:

Hon. Robert P. VanDeHey
Circuit Court Judge
Grant County Courthouse
130 W. Maple St.
Lancaster, WI 53813

Kimberly Kohn
Clerk of Circuit Court
Grant County Courthouse
130 W. Maple St.
Lancaster, WI 53813

Todd A. Infield
Infield Law Office, LLC
P. O. Box 189
Lancaster, WI 3813-0189

Gayle Branaugh Jebbia
165 N. Iowa St.
P. O. Box 39
Dodgeville, WI 53533

Dept. of Justice, Civil Litigation Unit
P.O. Box 7857
Madison, WI 53707-7857

Renee D. Mullen
808 W. 2nd Avenue
Brodhead, WI 53520

Bernard I. Onyeukwu 576666
Racine Corr. Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

Racine Correctional Institution
P.O. Box 900
Sturtevant, WI 53177-0900

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

2012AP833 In re the paternity of J. R. B.: Renee D. Mullen v. Bernard I. Onyeukwu (L.C. # 2009PA309PJ)

Before Sherman, Blanchard and Kloppenburg, JJ.

Bernard Onyeukwu appeals an order denying his motion to reduce child support payments. Onyeukwu argues that the circuit court erroneously exercised its discretion by denying his motion to reduce payments based on Onyeukwu's incarceration. Based upon our

review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).[1] We summarily affirm.

In 2009, the circuit court ordered Onyeukwu to pay $123 per week in child support. In 2011, Onyeukwu moved the circuit court to modify the child support payments based on his incarceration. Onyeukwu argued that the child support payments should be reduced because he no longer had sufficient income to make the payments. The court determined that under the particular circumstances of this case, Onyeukwu's incarceration was the result of Onyeukwu's intentional conduct and did not warrant a reduction in child support payments. The court acknowledged that Onyeukwu would not be able to make the payments and that they would accrue, and stated that Onyeukwu would have to make arrangements to pay that debt once he was released from prison.

A party moving to modify child support has the burden to show a substantial change in circumstances sufficient to justify modification. ***Rottscheit v. Dumler***, 2003 WI 62, ¶11, 262 Wis. 2d 292, 664 N.W.2d 525; *see also* WIS. STAT. § 767.59(1f). Changes in a payor's earning capacity, the needs of the child, or other relevant factors may constitute a substantial change in circumstances. § 767.59(1f)(c). We review a circuit court decision on a motion to modify child support payments for an erroneous exercise of discretion. ***Id.*** "All that is required for us to affirm a trial court's exercise of discretion is a demonstration that the court examined the evidence before it, applied the proper legal standards and reached a reasoned conclusion." ***Id.*** (citation omitted).

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Onyeukwu argues that the court erroneously exercised its discretion by determining that Onyeukwu was "shirking" through intentional incarceration. *See* ***Chen v. Warner***, 2004 WI App 112, ¶11, 274 Wis. 2d 443, 683 N.W.2d 468 ("Courts use earning capacity, rather than actual earnings, to determine child support and maintenance payments when the party in question is shirking. Shirking is an employment decision to reduce or forgo income that is both voluntary and unreasonable under the circumstances." (citation omitted)), *aff'd*, 2005 WI 55, 280 Wis. 2d 344, 695 N.W.2d 758. Onyeukwu argues that it was not reasonable for the circuit court to determine that Onyeukwu's incarceration is intentional, and that the shirking analysis does not apply in the case of an incarcerated parent. While we agree that the shirking analysis does not apply in this context, we do not agree that the circuit court determined that Onyeukwu had intentionally become incarcerated or that the court determined that Onyeukwu was shirking. Rather, we conclude that the court properly exercised its discretion by relying on the evidence before it and the proper legal standards to reach a reasonable determination.

The supreme court has addressed whether a child support payor's incarceration and resulting loss in income support a reduction in child support payments. In ***Rottscheit***, 262 Wis. 2d 292, ¶1, the court stated that incarceration is a relevant factor in the totality of circumstances when deciding a motion to modify child support, but that "the fact of incarceration by itself neither mandates nor prevents modification." The court explained that "[p]arents with child support obligations should not automatically be rewarded with a payment reduction as a result of incarceration." ***Id.***, ¶30. The court explained that the normal "shirking" analysis does not apply to an incarcerated parent, but that "there is some element of voluntariness involved with incarceration," in that most incarceration is "a foreseeable result of unreasonable behavior." ***Id.***, ¶38. It held that a circuit court should consider incarceration as one factor in its analysis as

to whether there has been a substantial change in circumstances warranting child support modification. ***Id.***, ¶39. The court stated that circuit courts should also consider:

> the length of incarceration, the nature of the offense and the relevant course of conduct leading to incarceration, the payer's assets, the payer's employability and the likelihood of future income upon release, the possibility of work release during incarceration, the amount of arrearages that will accumulate during the incarceration, and the needs of the children.

Id., ¶41.

Here, Onyeukwu moved to modify child support based on the fact that he is incarcerated and thus no longer able to make the payments. The court denied the motion, explaining that "incarceration is generally not considered a good enough reason to reduce child support," and that "given the particular circumstances of this case," it found that Onyeukwu's incarceration "is a result of an intentional act on [Onyeukwu's] part and does not warrant reducing support." While this explanation was not lengthy and did not include an analysis of all of the factors outlined in ***Rottscheit***, it was a correct application of the law to the only evidence Onyeukwu put before the court: the fact of his incarceration.

Additionally, while the court referenced "shirking" as a type of situation in which earning capacity is used, the court did not find that Onyeukwu was shirking in this case. Rather, the court stated that:

> Incarceration is one of those specific situations where a court is allowed to ignore actual earnings and base the support upon earning capability under the theory that people who are incarcerated committed a crime which is an intentional act, and … intentionally committing an act which led to their loss of employment is the equivalent of intentionally, you know, lowering your income, intentionally quitting, those sorts of things.

Thus, the court explained that incarceration is generally the result of intentional conduct and does not require the court to rely on an incarcerated parent's actual income, as established in ***Rottscheit***.

Onyeukwu also points out that he will be over $30,000 in debt by the time he is released from prison under the current child support order. However, the ***Rottscheit*** court acknowledged that continuation of child support payments during incarceration may result in a large amount of debt upon release from prison, but held that a child support order may nonetheless remain in place. ***Id.***, ¶36. The court recognized that a large debt may discourage a parent from even attempting to pay down that debt, but determined that the anticipated debt in that case—$25,000—would not necessarily be insurmountable. ***Id.*** Additionally, the court noted that the parent may well have grounds to seek child support modification again upon release based on the amount of debt that accumulated while he was in prison. ***Id.*** The court also reasoned that leaving child support obligations in place during incarceration did not constitute additional punishment, but rather "leaves intact" a parent's responsibility taken on by having children. ***Id.***, ¶33.

Finally, in his reply brief, Onyeukwu asserts that he is innocent of the crimes for which he is incarcerated, and that his actual innocence is a factor that supports child support modification. However, Onyeukwu did not raise that argument in the circuit court, and we will not consider it for the first time on appeal. *See* ***State v. Dowdy***, 2012 WI 12, ¶5, 338 Wis. 2d 565, 808 N.W.2d 691 ("As a general rule, issues not raised in the circuit court will not be considered for the first time on appeal.").

We conclude that we have no basis to disturb the circuit court's exercise of discretion in denying Onyeukwu's motion to modify child support. The court considered the only fact set forth by Onyeukwu—Onyeukwu's current incarceration—and relied on the proper standard of law, that incarceration alone does not constitute a substantial change in circumstances warranting modification. It was Onyeukwu's burden to set forth facts establishing a substantial change in circumstances, and he did not do so.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals