

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 15, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2024AP981
STATE OF WISCONSIN**

Cir. Ct. No. 2006CF568

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN A. BURMEISTER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed.*

Before Stark, P.J., Hruz, and Gill, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. John Burmeister, pro se, appeals from an order denying his motion for postconviction relief from a 2007 judgment convicting him

of multiple counts of sexual assault of a child. Burmeister contends that he is entitled to a new trial or sentence modification because: (1) the circuit court judge was biased against him; and (2) the circuit court violated his due process right to present a defense by refusing to direct the county to pay for the expert witness of Burmeister's choice.¹ We reject both arguments and affirm.

BACKGROUND

¶2 We will limit our background discussion to the facts relevant to the two claims on appeal; as such, we need not discuss the details of the sexual assaults. The judicial bias claim is premised on the fact that the circuit court judge who presided over Burmeister's trial had previously presided over the trial of Burmeister's sister. Burmeister's sister had been accused, but was acquitted, of sexually assaulting one of the girls who was also a victim in this case. During the sister's trial, the judge heard extensive evidence regarding allegations of sexual abuse by Burmeister. After the circuit court ruled against Burmeister on several pretrial motions (as discussed further below), Burmeister asked the judge to recuse himself on the ground that the judge might not be able to separate his "feelings" from the sister's case in order to be objective in Burmeister's case. The judge refused to recuse himself, stating that he believed that he had handled both cases fairly and objectively, not based on emotion.

¶3 Regarding the right to present a defense, Burmeister filed a pretrial motion seeking to obtain county funding to hire psychiatrist Dr. Terrance Campbell

¹ To the extent that Burmeister mentions additional issues in his briefs, those issues are insufficiently developed to warrant individual discussion. In particular, Burmeister does not directly challenge the denial of his access to the victim's mental health records and does not raise the issue of ineffective assistance of counsel until his reply brief. We therefore do not address those issues. See *State v. Chu*, 2002 WI App 98, ¶42 n.5, 253 Wis. 2d 666, 643 N.W.2d 878 (noting that we will generally not address issues raised by an appellant for the first time in a reply brief).

as an expert witness. Campbell had previously prepared a report in Burmeister's sister's trial, and Burmeister wanted to obtain Campbell's opinion about whether counselors or other individuals had suggested to one or both of the victims that the sexual assaults had occurred and whether one of the children had a propensity to fabricate allegations. However, Campbell's hourly fee was above that which the State Public Defender (SPD) would pay. The circuit court denied the motion for county funding to hire Campbell because it found that Burmeister could hire, at government expense, an alternate expert from a list the SPD had provided.

¶4 Burmeister subsequently moved to adjourn the trial and obtain access to the victims' mental health records so that he could obtain an expert opinion from psychologist Dr. Robert Barahal, who was on the SPD list. The circuit court refused to grant access to the mental health records of one of the victims, which it had previously reviewed in camera during the sister's case, and after review of the records related to the second victim, permitted the review of only one note. The court therefore also refused to adjourn the trial. After reviewing the available materials from the sister's case, Barahal was unable to render an opinion and did not testify.

DISCUSSION

I. Judicial bias

¶5 Motions to disqualify a judge may be made upon either statutory or constitutional grounds. Here, Burmeister has not identified any relationship that would require a statutory recusal under WIS. STAT. § 757.19(2) (2023-24). Rather, Burmeister raises a due process claim based upon the absence of an impartial tribunal. See *State v. Goodson*, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771

N.W.2d 385. The partiality of a judge presents a question of law that this court reviews de novo. *Id.*, ¶7.

¶6 In analyzing a claim of judicial bias, we begin with the presumption that a judge is fair, impartial, and capable of ignoring any biasing influences. *State v. Gudgeon*, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. To overcome that presumption, a party must demonstrate the objective² existence of “actual bias” (i.e., that the judge in fact treated the party unfairly), or the “appearance of bias” (i.e., that there are circumstances present under which “a reasonable person—taking into consideration human psychological tendencies and weaknesses—[would conclude] that the average judge could not be trusted to ‘hold the balance nice, clear and true’”). *Id.*, ¶¶20-24 (citation omitted). Opinions formed by a judge based upon facts introduced or events occurring during the course of a current or prior proceeding involving a party do not constitute the basis for a bias or partiality motion unless they display “a deep-seated favoritism or antagonism that would make fair judgment impossible.” *State v. Rodriguez*, 2006 WI App 163, ¶36, 295 Wis. 2d 801, 722 N.W.2d 136 (citation omitted); *see also Liteky v. United States*, 510 U.S. 540, 555 (1994) (stating that judicial rulings alone almost never constitute a valid basis for a partiality motion).

¶7 The fact that the circuit court judge in this case previously presided over the trial of Burmeister’s sister does not demonstrate either actual bias or the appearance of bias. It was not improper for the judge to take into account information he had learned from the prior proceedings—particularly when Burmeister himself was seeking to appoint the same expert witness used in his

² Although a judge may also be subjectively biased, that is a determination that can only be made by the judge him or herself. *State v. McBride*, 187 Wis. 2d 409, 414-15, 523 N.W.2d 106 (Ct. App. 1994).

sister's trial and was asking the court to conduct an in camera review of the same mental health records that had been reviewed in that case. We see nothing in the trial transcripts showing any prejudgment or antagonism against Burmeister on the judge's part. Rather, the record shows that the judge made individualized and reasonable rulings in this case, even when some of the facts he relied upon overlapped with the sister's case.

II. Right to present a defense

¶8 The right to present a defense through the testimony of favorable witnesses is grounded in the compulsory process clause of the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution. *State v. Pulizzano*, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). The right to present a defense is not absolute, but rather it is limited to the presentation of relevant evidence whose probative value is not substantially outweighed by its potential prejudicial effect. *Id.* at 646. Additionally, in order to warrant a new trial, a defendant must show that a violation of the compulsory process clause “completely” prohibited the defendant from exposing a witness’s bias or motive for testifying falsely, or deprived the defendant of material evidence so favorable to the defense as to “necessarily” prevent the defendant from having a fair trial. *United States v. Manske*, 186 F.3d 770, 778 (7th Cir. 1999); see *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 872 (1982) (requiring a showing that a potential witness’s testimony would be material and favorable to the defense).

¶9 A circuit court has discretion to grant an indigent defendant’s request for an expert witness at the government’s expense when a defendant makes a plausible showing that the proposed expert’s testimony would be both material and favorable to the defense. *State ex rel. Dressler v. Circuit Ct. for Racine Cnty.*,

Branch 1, 163 Wis. 2d 622, 640, 472 N.W.2d 532 (Ct. App. 1991). It is insufficient for a defendant to make a conclusory assertion that an expert is required for the defense, however. *Id.* at 640-41. There is a constitutional violation only if the defendant makes a particularized showing that the expert is necessary to his or her defense and the circuit court nonetheless refuses to appoint or authorize payment for an expert. See **State v. Kirschbaum**, 195 Wis. 2d 11, 20, 535 N.W.2d 462 (Ct. App. 1995). Whether a defendant's right to present a defense has been violated presents a question of constitutional fact, meaning that we will uphold the court's factual findings unless clearly erroneous but independently apply the relevant constitutional principles to those facts as a question of law. **State v. Schmidt**, 2016 WI App 45, ¶72, 370 Wis. 2d 139, 884 N.W.2d 510.

¶10 Here, Burmeister has failed to make any particularized showing that Dr. Campbell's testimony was necessary for his defense. First and foremost, Burmeister has not presented an affidavit setting forth what testimony Campbell would have presented. Therefore, there is no evidentiary basis for this court to determine that Campbell had any material and favorable testimony to offer, much less to evaluate how that testimony would have differed from what Dr. Barahal could have provided.

¶11 To the extent that Burmeister also complains that the circuit court refused to grant him a continuance to have Dr. Barahal review additional materials, he fails to identify any additional materials that would have been favorable to his defense. The court reviewed the victims' mental health records in camera and determined that there was nothing in them that would support the asserted defense theory. Burmeister has not identified any other materials that Barahal could have reviewed with additional time.

¶12 We conclude that Burmeister has failed to establish a violation of his right to present a defense. The circuit court therefore properly denied his motion for a new trial or resentencing.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2023-24).

