**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 5, 2011**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2010AP354-CR** **Cir. Ct. No. 2006CF6765**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BRYAN PETER LEATHER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. CONEN,[1] Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

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[1] This case was pending from December 20, 2006, until the judgment of conviction was entered on December 11, 2009. During that time, this case was presided over at various times by Judges William W. Brash, Jeffrey A. Wagner, Daniel M. Konkol, M. Joseph Donald, John Franke, and Jeffrey A. Conen. We will identify the particular judges involved in specific decisions as necessary to understanding particular issues raised in this appeal.

¶1 KESSLER, J. Bryan Peter Leather was convicted of one count of second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2) (2005-06),[2] and one count of repeated sexual assault of the same child, contrary to WIS. STAT. § 948.025(1)(e) (2005-06). Both charges involved the sexual assault of Leather's autistic stepdaughter, M.W. Leather appeals the judgment of conviction, asserting that three evidentiary errors and the trial court's bias against both him and his trial attorney require reversal and remand for a new trial. We conclude that the disputed evidentiary rulings were proper exercises of trial court discretion. We also conclude that Leather has not established an objective or subjective bias to compel disqualification by the trial judge as required by WIS. STAT. § 757.19(2). We affirm.

## BACKGROUND

¶2 The charges against Leather were based on his confession to police that he had sexual contact with M.W. involving her breasts and buttocks. In a written confession, Leather also admitted rubbing and squeezing M.W.'s bare buttocks once after she got out of the shower. He confessed to touching her breasts when she was between twelve and thirteen years old while they were "ruff-housing" because "his hormones got excited … and he was curious." He also confessed to rubbing her buttocks multiple times when she was between twelve and thirteen years old both over and under her clothing "because he was curious and got the urge." Leather also sent a letter to his family apologizing for sexually assaulting M.W. The State planned to rely on Leather's written confession;

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

however, after the trial court ruled that the confession was not sufficiently corroborated to support a conviction, the State decided to call M.W. as a witness.

¶3 M.W. testified at trial. She responded to the prosecutor's questions, indicating that shortly after turning thirteen, Leather first touched her under her clothes on her buttocks, in a way that made her feel uncomfortable. M.W. testified that the same type of touching occurred a second time when she was in the 8th grade. She stated that while sitting on the bed in her mother and Leather's room, she was watching television when Leather "sat down by me and just kinda like dig in there and just kinda like rub it a little bit underneath the clothes – the pants and the underwear." M.W. testified that Leather touched her in a way that made her feel uncomfortable for a third time on a Sunday, again while watching television in her mother and Leather's room. M.W. stated:

> [H]e dig my vagina, like put his finger in there, well, underneath my pants and underwear. But then, like, when I was like in the middle of watching television, he just kind of pulled my pants down and -- well, not all the way down just like between my legs and just like rubbed, like scratched in there and stuff, like put his finger in it and just like moved it around.

M.W. explained further that "[h]e just kinda dug in there, and it hurt a lot." Another incident M.W. described occurred a month or so after she turned fourteen. She was again watching television in her mother and Leather's room when Leather grabbed her breasts and twisted her nipples underneath her bra. M.W. also described an incident that occurred when she was sixteen years old on a day that she had stayed home sick from school. M.W. stated that after she had taken a shower, she was wrapped in a towel when Leather asked her for a hug. M.W. refused to give Leather a hug, but he took her towel off and hugged her anyway. She said: "I just told him no and he wouldn't listen."

¶4 A jury found Leather guilty on both charges. Leather now appeals. Additional facts will be discussed in the context of the issues resolved in this appeal.

## DISCUSSION

¶5 Leather bases his appeal on three evidentiary issues and his assertion that the trial court was biased towards him and his defense counsel. Specifically, Leather contends that: (1) the trial court erred when it refused to allow Leather to call the prosecutor as a witness to whom M.W. gave an inconsistent statement; (2) the trial court erred when it denied Leather the opportunity to use a Child Protective Service (CPS) report as impeachment evidence; (3) the trial court erred when it refused to order disclosure of a portion of ***Shiffra***[3] materials that revealed M.W. was out of touch with reality; and (4) the trial judge was in error for not recusing himself upon Leather's request because remarks made throughout the proceedings revealed the judge's bias towards Leather's defense counsel, and in turn, Leather. Because we conclude that the evidentiary rulings were proper exercises of the trial court's discretion and that Leather has not established grounds requiring the trial judge's recusal under WIS. STAT. § 757.19(2), we affirm.

### *Evidentiary Issues.*

¶6 We review discretionary evidentiary decisions to determine whether there was an erroneous exercise of discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. The decision to exclude evidence lies within the sound discretion of the trial court. ***State v. Lindh***, 161 Wis. 2d 324,

[3] *See* ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993).

348-49, 468 N.W.2d 168 (1991) ("The appellate court should reverse a trial court's determination to limit or prohibit a certain area of cross-examination offered to show bias only if the trial court's determination represents a prejudicial abuse of discretion."). A trial court properly exercises its discretion when it applies the relevant law to the applicable facts and reaches a reasonable conclusion. ***State v. Robinson***, 146 Wis. 2d 315, 330, 431 N.W.2d 165 (1988) ("A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law.").

(A) Prosecutor as a witness

¶7 Leather contends that his Sixth Amendment rights to confrontation and compulsory process were violated because he was not allowed to call the prosecutor to testify about statements M.W. made to the prosecutor prior to M.W. being called as a witness. Leather argues that M.W.'s statements to the prosecutor were relevant to impeach M.W. Because M.W.'s statements to the prosecutor are hearsay, the trial court properly excluded the prosecutor as a witness.

¶8 During the prosecutor's examination of M.W., the following exchange took place:

> Q: You said there was another time you were about to talk about when he touched you in a way that made you feel uncomfortable, is that correct?
>
> A: That is.
>
> Q: Okay. And this other time you're thinking of, can you tell me what it is that happened?
>
> A: Okay … I was watching TV in his bedroom again, and it was … a Sunday, and he dig my vagina, like put his finger in there … like put his finger in it and just like moved it around.

¶9 Counsel for Leather cross-examined M.W. about her delay in reporting the vaginal penetration and whom she had reported it to. M.W. said she did not tell the police about the vaginal penetration. She stated that she "said something about" vaginal contact to hospital personnel but "d[id]n't know" if she "told like the whole thing." She said she did not tell her mother about the vaginal penetration until later and that she told her regular doctor after telling her mother. Leather's counsel concluded by asking M.W. if she told the prosecutor about the vaginal penetration. M.W. said: "Yes, I did, yesterday. And like last year, the hearing stuff when I had to be there, I did." Leather's counsel asked whether M.W. had been alone with the prosecutor, and M.W. said that she had been.

¶10 Leather's counsel said that he had "no choice but to declare [the prosecutor] a witness." He referred to a conversation he recalled from an in-chambers meeting with the trial court and the prosecutor that took place immediately after M.W.'s vaginal contact testimony, but which was not transcribed:

> In chambers [the prosecutor] implied to me – I inferred from what she said – that what the witness said on the stand today about talking about insertion of the finger into her vagina did not occur, that that conversation to that extent had never took place. But the witness has testified otherwise. Therefore, [the prosecutor] would be impeaching this witness.

¶11 The prosecutor responded that she had a "very brief conversation" with M.W. in preparation of trial. She said that she "did not ask a bunch of probing questions like I did when [M.W.] was on the stand" and "just said tell me generally what happened." She said that M.W.'s "description seemed substantially consistent with information in the file." She explained that M.W. "did mention that he was, quote, 'digging in her vagina,'" but that "there was

reference to touching of the vagina in the medical records." The reference to vaginal touching is contained in Children's Hospital records relating to an examination of M.W. on December 13, 2006.

¶12 The trial court adjourned the matter to the next day to give the parties time to brief the issue, which they did. The next day, the trial court stated that whether the prosecutor was a witness depended on whether M.W. gave the prosecutor consistent or inconsistent information. The trial court explained that Leather could not introduce a prior consistent statement by M.W. but could introduce a prior inconsistent statement. The trial court allowed Leather to call the prosecutor outside the presence of the jury to make an offer of proof.

¶13 Leather protested that no record was made of what the prosecutor said in chambers the previous day. The trial court then made a record of its recollection of the in-chambers conference:

> My recollection was that she was surprised that this came out and became an issue. She said I'm not sure what she said to me, I talked to her briefly. I don't recall her saying anything about actual penetration….
>
> …And that's consistent with the quasi-penetration statement that she made on the record. She said something about digging, she did not say anything about actual penetration.

¶14 During the offer of proof, the prosecutor said she met with M.W. two days before M.W. testified to introduce herself, to find out "generally what [M.W.] would say," and to ensure "that there wasn't going to be any new information, or a recant, or anything like that before the autistic child took the stand." She said of M.W.'s references to the vaginal touching:

> With respect to the vaginal touching, I asked her, you know, what did he use? His hand? Under or over the clothes? She said under. I said how did he touch you? I

> think *she said something about he was digging down there with his hand.*
>
> *I didn't ask any clarifying questions beyond the general nature of the touch for each of the incidents and whether it was over or under clothes.*
>
> To my recollection, *that was substantially consistent with information I had in my file*.

(Emphasis added.)

¶15 Leather questioned the prosecutor about whether "[d]igging in [the] vagina can only be construed as penetration." The prosecutor responded that she "had no belief either way" and "did not even contemplate the issue" when she met with M.W.

¶16 After the offer of proof, the trial court denied Leather's motion to call the prosecutor as a witness, stating:

> Bottom line is that the testimony that may be given by [the prosecutor] that may be relevant in this case is a prior consistent statement. It is not inconsistent with what the victim testified about. [The prosecutor] did not ask the alleged victim the specific questions that were asked by [the defense counsel], and at this point she is [not] going to be a witness.

¶17 Leather claims the trial court's refusal to allow him to compel the prosecutor to testify about what M.W. told her was a violation of his rights of confrontation and compulsory process, thus denying him the constitutional objective of a fair trial. Leather, relying on ***Chambers v. Mississippi***, 410 U.S. 284, 294-95 (1973), claims that this was an error of constitutional dimensions. We disagree.

¶18 The right to present a defense is "'subject to reasonable restrictions,'" and is therefore not absolute. ***State v. Shomberg***, 2006 WI 9, ¶35,

288 Wis. 2d 1, 709 N.W.2d 370 (citation omitted). Defendants generally "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." ***Chambers***, 410 U.S. at 302. Defendants do not have a constitutional right to present irrelevant evidence. *See* ***Shomberg***, 288 Wis. 2d 1, ¶35. Nor do they have a right to present relevant evidence when its probative value is substantially outweighed by its prejudicial effect. *See* ***State v. St. George***, 2002 WI 50, ¶15, 252 Wis. 2d 499, 643 N.W.2d 777. Further, they do not have a right "to secure the attendance of witnesses whose testimony [they have] no right to use." ***State v. Sorenson***, 152 Wis. 2d 471, 489, 449 N.W.2d 280 (Ct. App. 1989).

¶19 M.W.'s statements to the prosecutor are out of court statements by a witness, and thus are hearsay. *See* WIS. STAT. § 908.01(3).[4] Hearsay statements are generally inadmissible. *See* WIS. STAT. § 908.02.[5] However, if Leather had shown in the offer of proof that M.W.'s statements to the prosecutor regarding the vaginal touching were inconsistent with M.W.'s trial testimony, the statements

[4] WISCONSIN STAT. § 908.01 provides:

> **Definitions**. The following definitions apply under this chapter:
> **(1)** STATEMENT. A "statement" is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> ….
>
> **(3)** HEARSAY. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

[5] WISCONSIN STAT. § 908.02 provides that hearsay "is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute."

would have been admissible under WIS. STAT. § 908.01(4)(a)[6] as statements inconsistent with a witness's trial testimony.

¶20 The offer of proof involving the prosecutor's sworn testimony does not establish inconsistency between the two statements. The record shows that the prosecutor's statement that M.W. "said something about he was digging down there with his hand. I didn't ask any clarifying questions," was substantially consistent with information in the prosecutor's file. The information in the file includes a Children's Hospital record summarizing M.W.'s statements to the hospital examiner as: "[M.W.] disclosed that her step-father, Bryan Leather touched her over and under clothes. He touched her breast and vaginal area."

¶21 At trial, M.W. testified that "he dig my vagina, like put his finger in there … like put his finger in it and just like moved it around" and that she "said something about" the vaginal touching to hospital personnel but "d[id]n't know" if she "told like the whole thing." Like the trial court, this court can not conclude that M.W.'s report of "digging" in the vaginal area and touching the vagina are necessarily inconsistent statements by M.W. Penetration was counsel's term, not M.W.'s. Her description of Leather's conduct to the prosecutor as "digging" and her testimony during trial describing Leather's assault as "digging her vagina," further explained at trial by M.W. as putting his finger in her vagina and moving it around, convey essentially the same information.

¶22 Thus, we conclude that M.W.'s statement to the prosecutor was inadmissible hearsay and was properly excluded because it was not inconsistent

[6] WISCONSIN STAT. § 908.01(4)(a) provides that a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is … [i]nconsistent with the declarant's testimony."

with M.W.'s later testimony. *See* WIS. STAT. §§ 908.01(3) & 908.02. Because the evidence was inadmissible, Leather had no constitutionally protected right to compel the prosecutor to testify. *See* ***Sorenson***, 152 Wis. 2d at 489.

(B) Use of Child Protective Service Records

¶23 Leather also complains that he was unfairly denied the right to impeach M.W. with what he claims are "her prior false allegations of physical abuse" against Leather, disclosed in a CPS report as to which no case was ever filed. The State acknowledged that M.W.'s mother believed there had been a physical abuse allegation which was unsubstantiated.

¶24 The CPS report is not in the record; however, during the trial, both the State and counsel for Leather referred to the CPS report outside the presence of the jury and the court even read portions into the record. The document is reported to reflect an allegation, made by an undisclosed person, to a CPS worker that Leather injured M.W. by grabbing her wrists and shoving her because he was mad at M.W. for slamming a door. M.W. confirmed the door-slamming, but told a CPS worker that "she didn't get injuries to her wrist as a result of that incident" other than a "few small scratches she got from rubbing her arm on the wall." The court read a portion of the report which stated that Leather "felt bad for what happened and … will be going to see a counselor … to learn how to better work with [M.W.] and her special needs." The court further read that the CPS worker closed the case as "unsubstantiated for physical abuse." Leather's counsel inferred that the reporting person was M.W. and argued that M.W.'s subsequent denial that Leather caused injury to her wrist meant that M.W. lied about Leather physically

abusing her.[7] The trial court excluded evidence of the prior "false" allegation of physical abuse on the grounds that it was irrelevant. We agree that the information contained in the discussion about the CPS report was irrelevant to any issue in this case and was therefore inadmissible.

¶25 Generally evidence that is relevant is admissible. Evidence that is not relevant is not admissible. *See* WIS. STAT. § 904.02.[8] WISCONSIN STAT. § 904.01 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ***Id.***

¶26 Leather's insistence on the admission of the report was based solely on information that *someone* made an allegation to CPS that he physically abused M.W. and that M.W. denied that allegation. The portion of the report read by the trial court reflects that Leather partially confirmed the truth of that allegation by telling the CPS worker that he "felt bad for what happened" and would see a counselor "to learn how to better work with [M.W.]." The CPS worker concluded that the allegations were unsubstantiated. "Unsubstantiated" is not the equivalent of "false"; rather, it implies that there was inadequate evidence for CPS to proceed. There is no evidence that M.W. made the allegation. The mere fact that someone accused Leather of physically abusing M.W. does not have any tendency to make M.W.'s later claim of sexual assault by Leather either more or less credible. The record does not contain expert or other testimony linking the

[7] Specifically, Leather's counsel stated: "If this child lied, and it appears obvious that she did … [i]t is exculpatory."

[8] WISCONSIN STAT. § 904.02 provides: "All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible."

allegation of *physical* abuse with the allegation of *sexual* assault. Evidence is relevant if it has a "tendency to make the existence of any fact that is of consequence to the determination" of the matter at issue either "more probable or less probable than it would be without the evidence." ***Id.*** The physical abuse allegations by an unknown party and denied by M.W. are irrelevant to the sexual assault allegation made by M.W.

(C) Disclosure of M.W.'s school psychological/psychiatric records

¶27 Leather also argues that the trial court erred when it refused to order disclosure of a portion of the ***Shiffra*** materials that revealed M.W. was out of touch with reality. Because three *in camera* inspections, as well as our independent review of M.W.'s records, did not produce information which could support a finding that M.W. was out of touch with reality, we disagree.

¶28 During the course of the pretrial proceedings, the court ordered production of school records involving psychological/psychiatric information about M.W., including those referred to as M-Team reports. Such information is privileged, and a patient may prevent disclosure under WIS. STAT. § 905.04(2).[9] Disclosure of such information in criminal proceedings is authorized in ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993). However, ***Shiffra*** requires an *in camera* review of the records after the patient has consented to disclosure and the defendant has made a preliminary showing that the "sought-after evidence is material to his or her defense." ***Id.*** at 605. During the *in camera* review, the court must determine whether the records are relevant or

[9] WISCONSIN STAT. § 905.04(2) provides: "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition[.]"

material and whether they "have any independent probative value" to a "fair determination of guilt or innocence." ***Id.*** at 608-11. This obviously requires a case-specific factual determination by the trial court. Leather received not one, but three separate judicial *in camera* reviews of M.W.'s records by two different judges.

¶29 After the first review of M.W.'s school records, Judge Jeffrey A. Wagner stated at a hearing:

> The Court does not find anything that's probative in those records nor relevant. Most of the reports had to do with academic performance and social functioning memory, but nothing to do with anything exculpatory.

Leather's counsel pursued inquiry about the M-Team reports. The matter adjourned to chambers, and on return to the record Judge Wagner stated that he would re-review some of the records both counsels believed might be relevant. After a second review, Judge Wagner stated at a hearing:

> [T]here are speech and language disabilities. There are specific learning disabilities and there is autism. There is nothing in these records that would indicate to the court that … it would be relevant.
>
> ….
>
> [T]he court doesn't believe that … there might be an issue as to fact or fiction.

¶30 Subsequently the case was transferred to Judge John Franke. Counsel for Leather renewed his request for access to M.W.'s mental health records under ***Shiffra***. He asked Judge Franke[10] to review the records specifically

[10] Judge Franke had already reviewed the school records before engaging in the more specific review requested by Leather's counsel. On November 17, 2008, at the third motion

(Continued)

for a diagnosis by an expert that M.W. is not in touch with reality or involving schizophrenia. Judge Franke agreed to do the requested *in camera* inspection.

¶31 At a subsequent hearing, defense counsel claimed that a document Judge Wagner read to counsel in chambers indicated "that we're in essence dealing with a schizophrenic here who's not in touch with reality, not somebody autistic." Judge Franke asked defense counsel to pinpoint where that document was. Defense counsel did not do so.

¶32 After his review, Judge Franke ruled that he was not going to disclose the records because he had "not located the alleged passage that [defense counsel] said was read off" and because he did not "believe there's anything … that meets the standard that I'm supposed to apply at this stage for disclosure." He explained that he was "unable to find anything that is relevant or material and that is not equally available to the defendant through any number of other sources."

¶33 Judge Jeffrey A. Conen succeeded Judge Franke on this case and presided over the trial. Judge Conen stated, with regard to M.W.'s school records, that he was "not looking at the stuff again" because it had already "been looked at by two judges" who found "that there was nothing there."

¶34 The standard for disclosing confidential records is explained in ***State v. Solberg***, 211 Wis. 2d 372, 564 N.W.2d 775 (1997). In ***Solberg***, the Wisconsin Supreme Court held that "[i]n conducting an *in camera* inspection of an alleged

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hearing over which Judge Franke presided, he noted:

> I've spent more time than I care to summarize looking at the MPS records that were filed. Both before and after, I recall that the state was indicating that it did not intend to call the child victim at the trial, so I don't know if we can or should address any issues related to those documents.

victim's privileged records, the circuit court must determine whether the records contain any relevant information that is 'material' to the defense of the accused." ***Id.*** at 386 (one set of quotation marks and citation omitted). "If the [reviewing] court determines that the records contain such information, that information should be disclosed to the defendant if the patient consents to such a disclosure." ***Id.*** at 386-87. "If the records do not contain relevant information material to the defense, the [reviewing] court must not disclose the records or any information therefrom to the defense." ***Id.*** at 387.

¶35 The materiality standard for disclosure is higher than the standard for *in camera* review.[11] *See* ***State v. Green***, 2002 WI 68, ¶31, 253 Wis. 2d 356, 646 N.W.2d 298. "'[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'" ***State v. Richard A.P.***, 223 Wis. 2d 777, 785, 589 N.W.2d 674 (Ct. App. 1998) (citation omitted; brackets in ***Richard A.P.***). Information is "'necessary to a determination of guilt or innocence' if it 'tends to create a reasonable doubt that might not otherwise exist.'" ***Green***, 253 Wis. 2d 356, ¶34 (citation omitted). In addition, "the evidence sought from the records must not be merely cumulative to evidence already available to the defendant." ***Id.***, ¶33.

¶36 Our supreme court held that a "[trial] court's materiality decision is reviewed under the clearly erroneous standard." ***Solberg***, 211 Wis. 2d at 386. "A

[11] We do not discuss in detail the preliminary showing a defendant must make in order to obtain an *in camera* review of a witness's mental health records because no party here disputes that the necessary preliminary showing was made.

[trial] court properly exercises its discretion when it applies the relevant law to the applicable facts and reaches a reasonable conclusion." ***Id.***

¶37 Judge Franke made a detailed record of his observations regarding M.W.'s school records and his reasons for concluding that nothing in the records should be turned over to the defense:

> Other than the notion that everything that's written about a child's personality and a development and academic skills might conceivably be used by some juror that reflect on credibility, or by some attorney to argue credibility, I just don't see anything here that reflects on credibility. *I found nothing close to the kind of statement that [defense counsel] has related.*
>
> But these reports are incredibly repetitious. Most of them say the same things over and over. They describe the child's learning disability. You can trace the evolution of the question of whether the diagnosis of autism applies or not through this.
>
> ….
>
> There are other labels that appear over and over in here that may or may not apply to this child: ADHD, personality disorder, Asperger's syndrome. And *I'm assuming these are all things Mr. Leather has some awareness of, because he's referenced in these reports as, at least early on, as the source of some of this information.*
>
> Now, *what's missing* both in the underlying showing and now, as far as I can tell, *is some evidence that these labels can be used by a jury to make a judgment about credibility.* I'm not sure the cases have spoken directly to this but *Green* itself *suggests strongly that a psychological label itself is not relevant to credibility without the expert testimony that would allow jurors to take that label and make a judgment about credibility*. Clearly if there's legitimate and admissible psychiatric opinion evidence that someone hallucinates or falsely accuses people all the time of bad things, and they're demonstratively not true, that has some relevance.
>
> I couldn't find any references – I'm not sure what it would mean if in K-5 [M.W.] told a lie to a teacher – but I didn't find that. Is it in here somewhere? It could be. But I

> can't believe that that kind of school report that a child lied would be significant.
>
> Now, if she had a history of falsely accusing people of serious offenses of sexual misconduct, then there might be something that needs to be struggled with but I can find nothing like that. And the whole idea, or part of the idea, is this is not supposed to be cumulative, it's not supposed to be available elsewhere, and if there is a clear diagnosis of autism at some point and if some expert can give a jury the basis to find that because of that diagnosis that if someone is either less credible or more likely to make these allegations falsely than the next person, then I don't see that these labels are material.

(Emphasis added.)

¶38 We have also reviewed M.W.'s school records. *See* ***Solberg***, 211 Wis. 2d at 384. Considered in the context of Leather's possible defenses in this case, we only need conclude that the records support the trial judges' exercise of discretion. Both judges correctly concluded that the information would not be disclosed. Based on our independent review, we conclude that M.W.'s school records contain no information that would tend to create a reasonable doubt that did not otherwise exist, *see* ***Green***, 253 Wis. 2d 356, ¶34, contain no information of independent probative value, *see* ***Shiffra***, 175 Wis. 2d at 611, and contain no information that would be otherwise material to the defense, *see* ***Solberg***, 211 Wis. 2d at 379-81.

***Disqualification of the trial judge.***[12]

¶39 Leather also argues that remarks made by Judge Conen revealed a bias towards Leather and his defense counsel and that Judge Conen should have disqualified himself. We disagree.

¶40 Leather first moved for Judge Conen to disqualify himself before trial, after Judge Conen referred to a letter written on the Wisconsin Department of Justice's letterhead, recounting the delay in the case and asking the trial court (when Judge Franke was presiding) to consider M.W.'s and M.W.'s mother's "plea for you to reschedule the jury trial as soon as possible and prior to you leaving office so that this matter can be resolved for the family." Judge Conen denied the disqualification motion stating:

> I have reviewed this case, thought about it, took a look at the statutes. The bottom line is that the Court believes it can be fair in this matter, the – Any future judges would be made aware of this letter and be under the same set of circumstances that this Court is.…
>
> [T]he Court finds that there is no reason to recuse itself with regard to this…. The Court believes it can be fair and impartial in this case and any and all rulings in this case will be fairly listened to and the Court will rule fairly on the matters with regard to promptly disposing of this case.

¶41 Later, during the sentencing hearing, Leather again moved for Judge Conen to disqualify himself. The motion came at the end of an admonition by the court to Leather not to talk "in [counsel's] ear" while counsel made a sentencing

[12] The transcript and the briefs submitted to this court use the term "recusal" to refer to the motion to bar Judge Conen from continuing to conduct the trial in this case. WISCONSIN STAT. § 757.19(2) determines when a judge must be disqualified from hearing proceedings. The statute does not use the term "recuse" or "recusal." Although we consider the terms "recusal" and "disqualification" synonymous in this context, we use only the statutory term in this decision to avoid confusion.

argument. Judge Conen said: "Mr. Leather, you can talk sometime soon. Let [defense counsel] make his sentencing argument right now." Counsel took issue with the judge's comment, to which Judge Conen responded, apparently in a raised voice, that Leather did not have any more right than the people in the gallery "to sit and talk" and that "[o]ne person talks at a time in here, and at this point you can finish up and then Mr. Leather can talk." Defense counsel pursued further discussion about the court's statements, turning the record into counsel's defense of his own trial methods. The matter culminated in the court acknowledging that "I have raised my voice to emphasize a point throughout the course of these proceedings because it has become painful the way the tactics of the defense have been going on over the course of the last 11 months." Defense counsel rejoined: "[T]hat statement alone implies a bias" and asked Judge Conen to disqualify himself. Judge Conen denied the motion and continued the sentencing hearing.

¶42 Disqualification of a judge from hearing a proceeding is governed by WIS. STAT § 757.19(2).[13] Our supreme court has explained the application of this

[13] WISCONSIN STAT. § 757.19(2) provides:

> Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> (a) When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship.
>
> (b) When a judge is a party or a material witness, except that a judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.
>
> (c) When a judge previously acted as counsel to any party in the same action or proceeding.

(Continued)

statute in ***State v. American TV & Appliance of Madison, Inc.***, 151 Wis. 2d 175, 443 N.W.2d 662 (1989). The first six statutory standards that mandate disqualification are objective standards which require disqualification regardless of whether the judge believes he or she remains impartial and can be fair. ***Id.*** at 181-82. As the court explained:

> The mandatory disqualification statute, sec. 757.19(2), Stats., establishes seven situations in which a judge must disqualify himself or herself from an action or proceeding. The first six of these are susceptible of objective determination, that is, without recourse to the judge's state of mind. For example, subsection (a) requires disqualification when a judge is related to any party or counsel to a party or the spouse of any party or counsel within the third degree of kinship. The effect, if any, of such a relationship upon a judge's ability to act impartially in a case is immaterial; the very existence of the relationship creates a disqualification by law. The same type of objective determination applies to the situations described in subsections (b) through (f).

***Id.*** (footnote omitted).

¶43 None of the objective statutory factors are relevant to the case before us. Leather, while basing his motions to disqualify Judge Conen on conduct which Leather concludes demonstrated bias against Leather and his counsel, does

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> (d) When a judge prepared as counsel any legal instrument or paper whose validity or construction is at issue.
>
> (e) When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court.
>
> (f) When a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party.
>
> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

not articulate whether his motion is based on WIS. STAT. § 757.19 or on ethical rules. Leather asks that we hold that this conduct required Judge Conen's removal from Leather's case. The Wisconsin Supreme Court, in ***American TV & Appliance***, held that if a claim for recusal is based on WIS. STAT. § 757.19(2)(g), the test is purely subjective. *See* ***American TV & Appliance***, 151 Wis. 2d at 183, 186. In ***American TV & Appliance***, our supreme court gave the following explanation when ruling on a motion to void a judgment based on a party's claim that a Supreme Court justice should have been disqualified because of an alleged appearance of bias:

> However, the seventh situation requiring disqualification set forth in sec. 757.19(2), Stats., concerns not what exists in the external world subject to objective determination, but what exists in the judge's mind. Subsection (g) requires disqualification "[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." *The determination of a basis for disqualification here is subjective.*

***Id.*** at 182 (emphasis added; brackets in ***American TV & Appliance***).

¶44 In this case, Judge Conen specifically determined that he was impartial as to Leather and Leather's counsel and that he could rule fairly. Leather argues that we should independently review the record and reject Judge Conen's determination. In his brief, Leather spends many pages editorializing numerous statements made by the court throughout the trial, which are presented with no context except Leather's negative "spin" on the statements. For example, Leather points to a comment made by Judge Conen stating that he had returned from vacation early to accommodate defense counsel's schedule. Leather also points to the judge's refusal to review discovery rulings made by a previous judge on this case, the judge's mischaracterization of Leather's height as "six-foot-two" rather than "five-foot-six," and the judge's objection to Leather walking around the

courtroom and standing in front of a witness who was testifying. Because these events were not a basis for either of the motions for disqualification actually made, we decline to consider them. *See* ***State v. Turner***, 200 Wis. 2d 168, 176 n.5, 546 N.W.2d 880 (Ct. App. 1996) (An appellate court need not consider issues that were not raised by the defendant in the trial court.).

¶45 In support of his argument for an objective review of a subjective determination, Leather relies on ***State v. Walberg***, 109 Wis. 2d 96, 325 N.W.2d 687 (1982), and ***State v. Asfoor***, 75 Wis. 2d 411, 249 N.W.2d 529 (1977). Our supreme court decided ***American TV & Appliance*** well after its decisions in ***Afsoor*** and ***Walberg*** and distinguished those cases on the grounds that they were based on ethical rules. *See* ***American TV & Appliance***, 151 Wis. 2d at 185. However, we conclude that Leather has not established an ethical rule violation based on an objective bias because Judge Conen's conduct simply indicates an attempt to impose reasonable decorum in the courtroom.

¶46 Leather apparently objects to the opinions formed by Judge Conen based on events that occurred over the course of proceedings in this case and to the judge's insistence on controlling decorum in his courtroom. Neither of those factors is included in those that require disqualification under WIS. STAT. § 757.19(2)(a)-(f). "'Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a 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 (citing ***Liteky v. United States***, 510 U.S. 540, 555 (1994)) (brackets omitted). When, as here, the trial judge determines that he is impartial and can rule fairly in the matter or proceeding, our supreme court has explained that WIS.

STAT. § 757.19(2)(g) does not require disqualification. *See* ***American TV & Appliance***, 151 Wis. 2d at 186.

## CONCLUSION

¶47 For all the foregoing reasons, we affirm the judgment of conviction.

*By the Court*.—Judgment affirmed.

Not recommended for publication in the official reports.