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 III

July 11, 2023

To:

Hon. Joseph D. Boles
Circuit Court Judge
Electronic Notice

Megan Erwin
Juvenile Clerk
Pierce County Courthouse
Electronic Notice

Michelle M. Erdman
Electronic Notice

Halle Elizabeth Hatch
Electronic Notice

Kaley Sue Walker
Electronic Notice

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

2021AP542 State of Wisconsin v. P. H. (L. C. No. 2019JV4A)

Before Gill, J.[1]

Summary disposition orders 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).

Phillip[2] appeals from a dispositional order adjudicating him delinquent of one count of first-degree sexual assault of a child under thirteen years of age. Phillip also appeals from an order denying his motion for postdisposition relief. Phillip argues that the circuit court erroneously exercised its discretion by viewing portions of a recorded audiovisual interview of the victim after the State had conceded that the recording did not comply with WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] For ease of reading, we refer to the appellant in this confidential appeal using a pseudonym, rather than his initials. Pursuant to the policy underlying WIS. STAT. RULE 809.86, we likewise use a pseudonym to refer to the victim.

§ 908.08(3) and only sought to admit a specific portion of the recording. Phillip also contends that the court evidenced a serious risk of bias through remarks it made regarding the victim. Based upon our review of the briefs and record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We conclude that the court did not erroneously exercise its discretion by viewing portions of the recording beyond what the State sought to admit. Additionally, we conclude that the court did not evidence a serious risk of actual bias. We therefore affirm.

According to the delinquency petition, an officer for the Ellsworth Police Department received information from the Goodhue County Sheriff's Office, located in Minnesota, that Phillip had sexually assaulted Brittany in Ellsworth. Upon further investigation, the officer learned that a Goodhue County social worker had recorded an audiovisual interview of Brittany—who was twelve years old at the time of the assault and the recording—describing the assault.

After filing the delinquency petition, the State filed a motion to admit the audiovisual recording of Brittany's interview. By that time, Brittany had turned thirteen years old. The State conceded that Brittany did not make her statements "upon oath or affirmation," or affirm that she understood "that false statements are punishable and … the importance of telling the truth." *See* WIS. STAT. § 908.08(3)(c). The State instead argued that the court should admit the recording under § 908.08(7), which provides that a court may admit an audiovisual recording "of an oral statement of a child that is hearsay and is admissible under [WIS. STAT. ch. 908] as an exception to the hearsay rule." In a three-sentence response, Phillip objected to the State's motion, arguing that Brittany, "while 12 at the time of the interview, will be 13 by the time of the trial," and

therefore the State needed to meet the higher standard under § 908.08(4) to admit the recording. The State replied to Phillip's objection, and a hearing was scheduled on the State's motion.

Thereafter, Phillip filed a further reply to the State's motion, asserting that the State failed to point to an applicable hearsay exception under WIS. STAT. § 908.08(7). Phillip also argued that the circuit court should deny the State's motion without viewing the audiovisual recording. Phillip stated that "such a viewing is damaging, as with all due respect to the [c]ourt[,] your Honor is the trier of fact and viewing what would otherwise be hearsay for the purposes of this motion may paint [Phillip] in an unfairly poor light."

The motion hearing was held the next day. The circuit court informed the parties that it had not read either party's most recent response. The court also indicated that prior to the hearing it had viewed parts of the recording that the State was not seeking to admit. The State argued that the audiovisual recording was admissible under WIS. STAT. § 908.08(7) and the residual hearsay exception in WIS. STAT. § 908.03(24). Ultimately, the court denied the State's motion to admit the recording, but granted the State's previously filed motion to allow Brittany to testify at the fact-finding hearing via simultaneous televised video. Following a trial, the court found Phillip to be delinquent of first-degree sexual assault of a child under thirteen years of age.

Phillip filed a postdisposition motion for a new trial. As relevant to this appeal, Phillip argued that he was entitled to a new trial because the circuit court should not have reviewed the audiovisual recording as it was not admissible under WIS. STAT. § 908.08(3)(c), and that by reviewing the recording, the court evidenced a serious risk of actual bias. Conversely, the State argued that the court was required to review the recording under § 908.08(2)(b) because the State

was seeking to admit the recording under § 908.08(7). The court denied Phillip's motion in an oral ruling. Phillip now appeals.

"Video-recordings of a child's statements are admissible if the child is available to testify and the child's statements fall into one of the provisions of WIS. STAT. § 908.08." ***State v. Mercado***, 2021 WI 2, ¶41, 395 Wis. 2d 296, 953 N.W.2d 337. Section 908.08 provides two avenues for admission of an audiovisual recording. *See* ***State v. Snider***, 2003 WI App 172, ¶12, 266 Wis. 2d 830, 668 N.W.2d 784. "The first is by meeting the various requirements set forth in [§ 908.08](2) and (3)."[3] ***Snider***, 266 Wis. 2d 830, ¶12. The second avenue for admission of an audiovisual recording is under § 908.08(7). ***Snider***, 266 Wis. 2d 830, ¶12. Section 908.08(7) permits a circuit court to admit a child's recorded statement "that is hearsay and is admissible under this chapter as an exception to the hearsay rule." Sec. 908.08(7). "When a party introduces a child's video-recording under § 908.08(7), the video-recording's admissibility is not limited by the requirements of [§] 908.08(2) and (3)." ***Mercado***, 395 Wis. 2d 296, ¶55.

[3] When a party introduces a child's statement in an audiovisual recording under WIS. STAT. § 908.08(2) and (3), the party:

> "shall file … an offer of proof" that shows certain information relating to the video and provide that offer of proof to other parties. [Sec.] 908.08(2)(a). Next, the [circuit] court "shall conduct a hearing on the statement's admissibility [and] [a]t or before the hearing, the court shall view the statement." [Sec.] 908.08(2)(b). Finally, at the hearing, "the court … shall rule on objections to the statement's admissibility." [***Id.***]

State v. Mercado, 2021 WI 2, ¶42, 395 Wis. 2d 296, 953 N.W.2d 337 (some alterations in original). "If these requirements are met, the court 'shall admit the videotape statement,' § 908.08(3), and it need not consider any other grounds for admitting the statement." ***State v. Snider***, 2003 WI App 172, ¶12, 266 Wis. 2d 830, 668 N.W.2d 784.

Here, the State pursued the latter of the two avenues and sought to admit the audiovisual recording under the residual hearsay exception found in WIS. STAT. § 908.03(24), which permits the admission of hearsay "not specifically covered by any of the foregoing [hearsay] exceptions but having comparable circumstantial guarantees of trustworthiness." Sec. 908.03(24). Our supreme court has set forth "five factors that courts look to in determining whether a video-recording of a child's statement meets circumstantial guarantees of trustworthiness." ***Mercado***, 395 Wis. 2d 296, ¶56.

The question before us is not whether the circuit court properly exercised its discretion in denying the State's motion. Instead, we must consider whether the court properly exercised its discretion in viewing parts of the audiovisual recording.[4] A circuit court exercises its discretion in determining how much of an audiovisual recording to view when addressing its admissibility. *See* ***id.***, ¶47; ***Snider***, 266 Wis. 2d 830, ¶¶16-17. "We will not disturb a [circuit] court's discretionary ruling if the … court applied accepted legal standards to the facts of record and we can discern a reasonable basis for its ruling." ***Snider***, 266 Wis. 2d 830, ¶16.

We conclude that the circuit court did not erroneously exercise its discretion by viewing portions of the audiovisual recording beyond the specific portion the State sought to admit in

[4] Phillip does not renew his arguments on appeal that the circuit court should not have viewed *any* portion of the recording, or that the court should not have viewed the recording prior to the motion hearing because it was not in evidence. Because he abandons these arguments, we will not consider them further. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

Additionally, the audiovisual recording is not in the record before us. "It is the appellant's responsibility to ensure completion of the appellate record and 'when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the [circuit] court's ruling.'" ***Gaethke v. Pozder***, 2017 WI App 38, ¶36, 376 Wis. 2d 448, 899 N.W.2d 381 (citation omitted).

order to determine whether the recording was admissible in accordance with WIS. STAT. § 908.08(7). Following the State's assertion that the recording was admissible under § 908.08(7) and WIS. STAT. § 908.03(24), the court was entitled to conduct an analysis of the above-referenced factors to assess the circumstantial guarantees of trustworthiness of Brittany's statements given in the audiovisual recording.[5] *See* ***Mercado***, 395 Wis. 2d 296, ¶56; § 908.03(24).

To do so in accordance with WIS. STAT. § 908.03(24), the circuit court clearly needed to view the audiovisual recording of Brittany. Given that the court was tasked with conducting an analysis of, for example, Brittany's ability to communicate, her motivation for telling the truth, her ability to comprehend the statements or questions of others, and any "sign of deceit or falsity" in the audiovisual recording, *see* ***Mercado***, 395 Wis. 2d 296, ¶56 (citation omitted), it was reasonable for the court to view portions of the recording beyond what the State sought to admit.

Phillip argues that in making its decision to deny the State's request to admit a portion of the audiovisual recording, the circuit court "did not rely on the [audiovisual recording] in any way." We disagree. At the motion hearing, the court referenced the recording, stating that "[t]he closest" Brittany came to offering her knowledge of the difference between right and wrong occurred when she discussed that she was "a religious person." According to the court, this discussion had "at least a connotation that you're going to be honest and that you know … the

[5] The State incorrectly relies on WIS. STAT. § 908.08(2)(b) to argue that the circuit court could review portions of the video under § 908.08(7). As stated above, § 908.08(2)(b) is inapplicable if a party seeks admission of an audiovisual recording under § 908.08(7). ***Mercado***, 395 Wis. 2d 296, ¶55; *see also* ***Snider***, 266 Wis. 2d 830, ¶¶12, 16.

difference between right and wrong and being honest and … that there are consequences for not being honest." However, the court found that the statement on religion was insufficient to warrant admitting the video, finding "that's really what it boils down to is, you got to have the oath or something like it, and I don't think that statement about being religious is" sufficient.[6]

In support of his argument that the circuit court erroneously exercised its discretion by viewing portions of the audiovisual recording beyond what the State sought to admit, Phillip relies on a single case—***Bourjaily v. United States***, 483 U.S. 171 (1987)—stating that "[a] court, in making a preliminary factual determination under [the Federal Rules of Evidence], *may examine the hearsay statements sought to be admitted*."

Phillip fails to explain why ***Bourjaily*** would limit the scope of a court's review of an audiovisual recording review under WIS. STAT. §§ 908.08(7) and 908.03(24). Nor does he explain why ***Bourjaily*** would apply and not Wisconsin case law that requires a five-factor analysis of the circumstantial guarantees of trustworthiness. *See* ***Mercado***, 395 Wis. 2d 296, ¶56.

[6] Parts of the circuit court's oral ruling do seem to suggest that the court was considering other bases to admit the recording beyond those relevant to the residual hearsay exception. Notably, the court discussed with the parties the different levels of trauma Brittany would be subject to if she were required to give "her testimony by video when she's not here in the presence of the perpetrator, versus, again, admitting that video but then still subjecting her to cross-examination."

The circuit court also stated that "[i]n terms of the other factors, if I were just going to consider those factors and the oath wasn't the consideration, I would have granted the motion. But the oath is the problem." Given the court's reasoning that the analysis "boils down to" having "the oath or something like it," we interpret the court's statements to be applying the residual hearsay exception. In other words, we do not interpret the court as incorrectly applying WIS. STAT. § 908.08(3) to § 908.08(7).

Clearly, when a party seeks to admit even part of a recording under the residual hearsay exception, a circuit court may have to expand its review beyond the part sought to be admitted to adequately analyze the circumstantial guarantees of trustworthiness. For example, if a party offered only thirty seconds of a recording into evidence under WIS. STAT. § 908.08(7), it might be difficult for a circuit court to adequately analyze the child's "ability to communicate verbally." *See* ***Mercado***, 395 Wis. 2d 296, ¶56 (citation omitted). Therefore, we conclude that the circuit court did not erroneously exercise its discretion in reviewing portions of the audiovisual recording beyond the portion of the recording the State was seeking to admit.

Next, Phillip contends that the circuit court was objectively biased when it "prejudged the evidence" in violation of Phillip's due process rights. The right to an impartial judge is a basic requirement of due process. ***In re Murchison***, 349 U.S. 133, 136 (1955). "We presume that a judge has acted fairly, impartially, and without bias. To overcome that presumption, the burden is on the party asserting judicial bias to show bias by a preponderance of the evidence." ***Miller v. Carroll***, 2020 WI 56, ¶16, 392 Wis. 2d 49, 944 N.W.2d 542. Whether a judge acted impartially is a question of law. ***State v. Marcotte***, 2020 WI App 28, ¶16, 392 Wis. 2d 183, 943 N.W.2d 911.

In "evaluating whether a party has rebutted the presumption [of impartiality], Wisconsin courts have taken both a subjective and objective approach."[7] ***Miller***, 392 Wis. 2d 49, ¶21. As

[7] Phillip does not contend that the circuit court was subjectively biased, and we will therefore focus our analysis on objective bias.

(continued)

noted above, Phillip claimed the circuit court evidenced a serious risk of actual bias. A judge is required to recuse himself or herself if, "as an objective matter," "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." ***Id.***, ¶22 (citation omitted).

"To assess whether the probability of actual bias rises to the level of a due process violation, … [w]e ask whether there is 'a serious risk of actual bias—based on objective and reasonable perceptions.'" ***Id.***, ¶24 (citation omitted). Specifically, we consider "a reasonable person would conclude 'that the average judge could not be trusted to hold the balance nice, clear, and true under all the circumstances.'" ***Marcotte***, 392 Wis. 2d 183, ¶17 (citation omitted).

According to Phillip, the circuit court evidenced a serious risk of actual bias when it made the following statements at the WIS. STAT. § 908.08 motion hearing:

> I think [Brittany] wanted to—to stop the, in her mind, immoral behavior. She didn't want to do that and didn't want to have that done to her…. [I]t's akin to her recognizing that, hey, I'm a religious person, which has at least a connotation that you're going to be honest and that you know … the difference between right and being honest and … that there are consequences for not being honest.
>
> ....
>
> [B]ecause of the potential harm to the witness, you'll be able to see her by video and she'll be able to see in the court, but she won't have to look at him and she won't be in his presence. I think that, to me, that's—that's the right decision to make, again, because we don't want to cause any more harm.

Objective bias can also exist where there is actual bias—that is, "where objective facts demonstrate that a judge treated a party unfairly." ***State v. Marcotte***, 2020 WI App 28, ¶17, 392 Wis. 2d 183, 943 N.W.2d 911. Phillip does not argue that the circuit court's statements constituted actual bias. To the extent Phillip raises such an argument, we deem it to be undeveloped and do not address it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Phillip argues that the court's statements are "indicative that in [the court's] mind, the decision ha[d] already been made" to adjudicate Phillip delinquent of first-degree sexual assault of a child under thirteen years of age.

We conclude that Phillip has failed to show by a preponderance of the evidence that a reasonable person would conclude that the circuit court's statements created a serious risk of actual bias. Taken in context, the court's statements were largely related to analyzing the State's WIS. STAT. § 908.08 motion. The court's first statement (regarding immoral behavior) and the court's second statement (regarding religion) were both made during the court's discussion of the § 908.08 admissibility standards, as evidenced by the court's statement immediately afterward that "that would be the only thing that would even come close to an oath." In other words, the court was referencing Brittany's statement to the interviewer that she wanted to stop the immoral behavior that was being done to her because she was a religious person. The court was not stating or implying that it believed that Phillip had engaged in immoral behavior.

The remaining circuit court statement of which Phillip complains can similarly be looked at in context of the State's WIS. STAT. § 908.08 motion and the State's previously filed motion to allow Brittany to testify at the fact-finding hearing via simultaneous televised video. Earlier in the motion hearing, the court had discussed the legislative purpose behind § 908.08, stating that

> the legislature has recognized [that sexual assault cases] are very difficult because they're, first of all, usually a "he said, she said" type of situation, but they also … subject the victim to additional victimization through having to come to court. And that's why you have, you know, the video permissions in those cases ….
>
> So the rationale suggests that you don't want to, arguably, victimize the victim a second time by making them go through the questioning a second time, even though they have to be available for cross-examination, so one alternative would be to—because of the, you know, the potential emotional damage of having to

> confront, in the sense of be present with, the alleged perpetrator, is to do some type of video feed, and I've done that in other cases.

The court made these statements in the context of protecting alleged victims; the court was not making statements suggesting it was going to adjudicate Phillip delinquent before any evidence had actually been presented to it as the fact finder.

To the extent Phillip renews his postdisposition argument that the circuit court became biased by viewing the audiovisual recording before the WIS. STAT. § 908.08 motion hearing, we disagree. To begin, the court stated during its oral ruling on Phillip's postdisposition motion that it was able to "objectively disassociate" itself from the recording. Furthermore, as explained above, the court was required to view the recording to the point where it could make a determination regarding the circumstantial guarantees of trustworthiness of the victim's statements. *See* ***Mercado***, 395 Wis. 2d 296, ¶56. Phillip fails to explain why a circuit court—the "gatekeeper" of the admissibility of evidence, *see* ***State v. Jones***, 2018 WI 44, ¶31, 381 Wis. 2d 284, 911 N.W.2d 97—should not review evidence to determine its admissibility. A circuit court is often required to consider the admissibility of evidence that it may hear later in the context of a hearing or trial to the court, and this circumstance is no different. *See, e.g.*, WIS. STAT. ch. 904 (relevancy of evidence and limits on its admissibility).

Upon the foregoing,

IT IS ORDERED that the orders are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals