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

**May 14, 2019**

**Sheila T. Reiff**
**Clerk of Court of Appeals**



**Appeal Nos. 2017AP406**
**2018AP988**

**Cir. Ct. No. 2016CV671**

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

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**PETITIONER,**

**PETITIONER-RESPONDENT,**

**V.**

**KURT ALLEN GRAY,**

**RESPONDENT-APPELLANT.**

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APPEALS from orders of the circuit court for Marathon County: JILL N. FALSTAD, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kurt Gray appeals a domestic abuse injunction entered in favor of his former girlfriend, Brenda.[1] He also appeals an order denying his WIS. STAT. § 806.07 (2017-18)[2] motion for relief from that injunction. Gray argues: (1) he was denied due process because the petition seeking a domestic abuse injunction did not adequately notify him of the allegations against him; (2) the evidence was insufficient to support the circuit court's findings that Gray had engaged in domestic abuse and that there was a substantial risk he would commit intentional homicide against Brenda; (3) the court was objectively biased; (4) Gray is entitled to a new trial in the interest of justice; and (5) the court should have granted Gray's motion for relief from the domestic abuse injunction pursuant to § 806.07(1)(a), (b) or (h). We reject each of Gray's arguments and affirm.

## BACKGROUND

¶2 Brenda and Gray dated for approximately three months in 2016. On September 8, 2016, Brenda filed a petition for a domestic abuse temporary restraining order and injunction against Gray pursuant to WIS. STAT. § 813.12.

¶3 Brenda's petition alleged facts concerning the following specific incidents as the basis for the requested domestic abuse injunction: (1) a July 14, 2016 incident in London, England; (2) a July 19, 2016 incident at Grand Daddy's dance club in Schofield, Wisconsin; (3) a September 5, 2016 incident at Dollar General and The Office Bar in Schofield; and (4) two phone calls on September 7, 2016. The petition also alleged, generally, that Gray had left threatening voice

[1] For ease of reading, we refer to the petitioner using a pseudonym.

[2] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

messages for Brenda; that he had called her, emailed her, and sent her letters after she asked him not to contact her; and that he "had his roommate come to [her] house several times." The petition further alleged that Brenda was "in imminent danger of physical harm." It asked the court to "[o]rder the injunction, which is in effect for not more than 10 years, if the court finds a substantial risk the respondent may commit 1st or 2nd degree intentional homicide, or 1st, 2nd or 3rd degree sexual assault against the petitioner."

¶4 A temporary restraining order was granted the same day Brenda filed her petition, and an injunction hearing was scheduled for September 14, 2016. Following that hearing, a court commissioner dismissed Brenda's petition and the temporary restraining order, concluding Brenda had failed to meet her burden of proof. Brenda then moved for a de novo hearing before the circuit court, which took place on November 10, 2016.

¶5 At the de novo hearing, Brenda testified that on July 14, 2016, Gray "bent [her] backwards over a railing and choked [her]" while the parties were visiting London, England. She explained, "He had both of his hands around my neck, choking me off, and because I wouldn't sleep with a prostitute." Brenda testified Gray's actions caused her to fear for her safety, and she "got a different hotel room that night and then … went to a different hotel … for the next three nights."

¶6 Brenda also testified regarding the July 19, 2016 incident at Grand Daddy's, stating Gray "begged" her to go there with him and "pretty much … forced [her] to go." After they had been at Grand Daddy's for a while, Brenda testified Gray became angry when she attempted to walk home, and he stood in the parking lot "towering over the top of [her], with his hands clenched, screaming

at [her] to get in his car." Brenda then ran back into Grand Daddy's "just for witnesses, people around, because [she] was afraid he was going to beat [her] up again."

¶7 Brenda next testified—over Gray's objection—that she believed Gray had attempted to open windows at her home on two occasions in October 2016. She then testified that she had a video of a person in Gray's truck entering her driveway at 1:11 a.m. on September 10, 2016, and shooting the window of her business.[3] She further testified she was aware that Gray had access to firearms, and she did not know of anyone else who would have "such animosity" toward her as to shoot at the window of her business.

¶8 Gray's attorney briefly cross-examined Brenda, and the circuit court then asked Brenda additional questions about the shooting incident. Brenda testified she had installed video cameras at her business after she and Gray broke up. She stated the video footage from September 10, 2016, showed "[a] truck that is the same make, year, model that [Gray] has pulled into my driveway, shot a firearm at my window." Brenda testified this incident left a hole in the window of her business.

¶9 The circuit court also questioned Brenda about the September 5, 2016 incident at Dollar General and The Office Bar that she had described in her petition. Brenda testified Gray was parked in the Dollar General parking lot next door to her home and overheard Brenda and her friends, who were in her backyard, talking about going to The Office Bar. Brenda stated, "[B]y the time I

[3] Brenda later clarified, upon questioning by the circuit court, that her business is "right next door" to her residence.

got to the driveway, [Gray's] car was pulling out of Dollar General, and he headed straight to The Office." While at the bar later that night, Gray "lunged at [her] and tried to grab [her] by the throat."

¶10 On recross-examination by Gray's trial attorney, Brenda conceded she could not identify the model and year of Gray's truck, only that it was a Dodge. Counsel then inquired about the incident at The Office Bar, asking why Brenda's petition did not allege that Gray had lunged at her and grabbed at her throat that night. Both Brenda's attorney and the circuit court then stated that allegation was present on an unnumbered page of the petition located between pages four and five. Gray's attorney responded, "Okay. I don't have that, frankly. So what he was served with was not a complete copy of the petition. I will drop that line of questioning."

¶11 Gray's counsel then asked Brenda to confirm that she had not brought any video of the shooting incident to court with her, at which point Brenda's attorney interjected, stating he had the video with him on a jump drive and on his laptop. The circuit court inquired whether Brenda's attorney wanted to present the video to the court, and counsel responded in the affirmative. After the court viewed the video, Gray's attorney objected on the grounds that the incident it depicted occurred two days after Brenda filed her petition, and "conduct after the filing of the [petition cannot] form the basis for the granting of the injunction." The court overruled that objection and received the jump drive containing the video as an exhibit.

¶12 Brenda's attorney then called one additional witness—John Kielman—who testified about an incident at Sconni's Bar and Grill on August 2, 2016. Kielman testified he met Brenda at Sconni's at about 11 p.m., and Gray

entered the establishment within a few minutes of her arrival. Kielman stated Gray was "adamant" that Brenda leave the bar area and speak with him at a table. He described Gray's posture and tone of voice as "threatening." Kielman testified Gray and Brenda ultimately went outside to talk, and Brenda seemed upset when she came back inside.

¶13 Finally, Brenda introduced an email she had received from Gray on August 4, 2016, in which he stated, "I made a mistake and grabbed you. I never beat you up." Brenda's attorney then stated that he had no further witnesses, and the circuit court confirmed that Brenda had "rested." At that point, due to time constraints, the court stated it was forced to continue the de novo hearing on another day.

¶14 The continued de novo hearing took place twenty-two days later, on December 2, 2016. At the beginning of the hearing, Brenda's attorney announced that he wanted to recall Brenda as a witness in order to introduce "material evidence" he had received following the previous hearing. The circuit court granted counsel's request, over Gray's objection. Counsel then recalled Brenda and introduced photographs that she testified were taken on July 20, 2016, and depicted bruising on her arms caused by the London incident.

¶15 Gray then presented his case, beginning with his own testimony. He testified that Brenda drank alcohol on a daily basis during their relationship, that she liked to drink heavily, and that she took Adderall in amounts that exceeded her prescribed dose. According to Gray, mixing Adderall and alcohol made Brenda combative and affected her ability to recall events. Gray testified Brenda was drunk and had taken Adderall prior to the London incident. He asserted Brenda

instigated that incident by trying to hit him, at which point he "grabbed her by the arms and … pushed her away, and she fell against a railing."

¶16 As for the incident at Grand Daddy's, Gray testified that after drinking and taking Adderall, Brenda accused him of sleeping with another woman, tried to hit him, and then left Grand Daddy's on foot. Gray also disputed Kielman's account of the incident at Sconni's. He testified he went to Sconni's with a friend that night, talked with Brenda, finished his drink, and then left without incident.

¶17 With respect to the incident at The Office Bar, Gray testified he was at the bar with friends when Brenda arrived. Around closing time, Brenda rushed toward him, began screaming at him, spat in his face, and slapped him. Gray denied all involvement in the shooting incident at Brenda's business. He also denied trying to enter her residence in October 2016 and explained he had provided police with an alibi for the date of one of the alleged break-ins. Gray further testified that someone had broken into his home the prior month and had taken his car keys and two photographs of him and Brenda. The intruder wrote "You are dead" on two of his mirrors and "Fuck you" on the windows of his car.

¶18 Gray's roommate, Chuang Chen, corroborated Gray's testimony that nothing significant occurred at Sconni's on August 2, 2016. Chen also corroborated Gray's testimony that Brenda had slapped Gray at The Office Bar on September 5, 2016. He denied that Gray had lunged at or tried to grab Brenda that night. Finally, Chen testified that he was with Gray the entire night of the alleged shooting.

¶19 The circuit court ultimately found there were "reasonable grounds to believe [Gray] engaged in domestic violence against" Brenda. The court relied on

the London incident, citing Brenda's testimony that Gray choked her and bent her over a railing, as well as Gray's concession that he "grabbed her and that she ended up against a railing." The court also found the shooting incident at Brenda's business "compelling." The court stated, "There is a video of the shooting. It involves a vehicle that … [Brenda] was able to identify as consistent and similar to the type of vehicle that Mr. Gray drove, and … what that video depicts is the discharge of a firearm into her front window." Although the court acknowledged that Gray had denied any involvement in the shooting incident, it expressly found that Gray was not a credible witness.[4]

¶20 Based on its finding that there were reasonable grounds to believe Gray had engaged in domestic abuse of Brenda, the circuit court granted Brenda a domestic abuse injunction against Gray. The court further found that there was "a substantial risk that [Gray] may commit a homicide." Based on that finding, the court ordered that the injunction would remain in effect for ten years. *See* WIS. STAT. § 813.12(4)(d)1.a.

[4] In support of its finding that Gray was not credible, the circuit court noted Gray had provided inconsistent testimony regarding his criminal record, whether he had violent tendencies, and whether there were other restraining orders against him. For instance, Gray initially testified on direct examination that he did not have a criminal record. On cross-examination, however, he conceded that he had been convicted of misdemeanor indecent exposure in Texas.

Gray also testified on direct examination that he was not violent and did not have violent tendencies. Yet, on cross-examination, Brenda's attorney introduced evidence showing that Gray had been charged in Texas with assault involving family violence. That charge was apparently resolved pursuant to a deferred prosecution agreement.

In addition, when asked on cross-examination whether anyone currently had a restraining order against him, Gray initially responded in the negative. However, Brenda's attorney then produced documentation showing that a restraining order which had been obtained against Gray by his ex-wife remained in effect.

¶21 In March 2017, Gray filed a notice of appeal from the circuit court's order granting Brenda a domestic abuse injunction. That appeal was designated case No. 2017AP406. In December 2017, Gray filed a motion for relief from the injunction in the circuit court, pursuant to WIS. STAT. § 806.07. We subsequently granted Gray's motion to stay his appeal in case No. 2017AP406 pending the circuit court's resolution of his § 806.07 motion.

¶22 Gray's WIS. STAT. § 806.07 motion asked the circuit court to grant him relief from the domestic abuse injunction on three grounds: (1) surprise, *see* § 806.07(1)(a); (2) newly discovered evidence, *see* § 806.07(1)(b); and (3) in the interest of justice, *see* § 806.07(1)(h). The motion alleged that Gray did not have the opportunity to review the video of the shooting incident before it was presented to the court during the de novo hearing on November 10, 2016. It asserted Gray's subsequent lay review of the video indicated that "the truck in the video may have been two-toned, and therefore not Gray's truck." Gray's motion also asserted that an "expert firearms analyst" had reviewed the video and "determined there was, in fact, no firearm discharged in the incident depicted in the video."

¶23 The circuit court issued an order denying Gray's motion for relief from the domestic abuse injunction on May 3, 2018. Gray then filed a notice of appeal from the court's May 3, 2018 order, and that appeal was designated case No. 2018AP988. We subsequently issued an order consolidating case Nos. 2017AP406 and 2018AP988 for decision. We now address Gray's arguments in both appeals.

## DISCUSSION

### I. Denial of due process

¶24 Gray first argues that the circuit court violated his right to procedural due process by granting the domestic abuse injunction. "Procedural due process requires that a party whose rights may be affected by government action be given an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." ***City of S. Milwaukee v. Kester***, 2013 WI App 50, ¶13, 347 Wis. 2d 334, 830 N.W.2d 710 (citation omitted). Whether a due process violation has occurred is a question of law that we review independently. ***Id.***

¶25 As relevant here, a petition for a domestic abuse injunction "shall allege facts sufficient to show … [t]hat the respondent engaged in, or based on prior conduct of the petitioner and the respondent may engage in, domestic abuse of the petitioner." WIS. STAT. § 813.12(5)(a)3. In order to satisfy due process, the notice provided by the petition "must be 'reasonable,' i.e. reasonably calculated to inform the person of the pending proceeding and to afford the person an opportunity to object and defend his or her rights." ***Schramek v. Bohren***, 145 Wis. 2d 695, 706, 429 N.W.2d 501 (Ct. App. 1988) (citation omitted).

¶26 Gray argues his right to procedural due process was violated in this case because Brenda's petition did not provide sufficient notice of the allegations against him, thus impairing his ability to present a defense. Specifically, he contends the petition failed to provide any notice of three of the incidents Brenda relied upon at the de novo hearing: (1) the incident at Sconni's Bar and Grill; (2) the two alleged break-ins at Brenda's residence during October 2016; and (3) the shooting incident at Brenda's business. Gray contends a domestic abuse

injunction cannot, as a matter of law, be based on events not alleged in the petition. Gray also asserts that Brenda's petition provided inadequate notice of her allegations regarding the incident at The Office Bar because he was not served with the page of the petition alleging that he "lunged" at Brenda that night.

¶27 We reject Gray's argument that he was denied procedural due process for two reasons. First, as we discuss in greater detail below, the July 14, 2016 incident in London provided a sufficient basis—in and of itself—for the circuit court to issue a domestic abuse injunction. Gray does not dispute that Brenda's petition provided him sufficient notice of that incident. Second, while we acknowledge that Brenda's petition did not notify Gray of all the incidents she relied upon at the de novo hearing, after Brenda presented her case, the hearing was adjourned for twenty-two days. That adjournment gave Gray ample time to prepare a defense as to the incidents not originally alleged in Brenda's petition. Any due process violation was therefore cured by the adjournment.

## II. Sufficiency of the evidence

¶28 Gray next argues that the evidence was insufficient to support the issuance of a domestic abuse injunction. When reviewing the sufficiency of the evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). A finding of fact is clearly erroneous when it is against the great weight and clear preponderance of the evidence. ***Phelps v. Physicians Ins. Co. of Wis.***, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615. When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). If more than one reasonable inference can be

drawn from the credible evidence, we must accept the inference drawn by the circuit court. ***Id.***

¶29 In order to issue a domestic abuse injunction, a court must find there are "reasonable grounds to believe that the respondent has engaged in, or based upon prior conduct of the petitioner and the respondent may engage in, domestic abuse of the petitioner." WIS. STAT. § 813.12(4)(a)3. As relevant here, "domestic abuse" is defined as: "[i]ntentional infliction of physical pain, physical injury or illness"; "[i]ntentional impairment of physical condition"; "[a] violation of s. 940.32 [i.e., stalking]"; or "[a] threat to engage in the [preceding] conduct." Sec. 813.12(1)(am).

¶30 Gray argues the circuit court could not rely on any incidents that were not included in Brenda's petition when determining whether there were reasonable grounds to believe he had engaged in, or might engage in, domestic abuse of Brenda. Gray further contends the copy of Brenda's petition that he received alleged only a single instance in which he physically harmed or threatened to harm Brenda—the July 14, 2016 incident in London. Based on his own testimony from the continued de novo hearing, Gray argues that during the London incident he "only reacted in defense to [Brenda] taking a swing at him." He asserts there is "no evidence [he] intended to harm [Brenda] by terminating her assault, and, regardless, the statute cannot reasonably be interpreted to apply to a situation involving self-defense."

¶31 For purposes of these appeals, we assume, without deciding, that the circuit court could consider only the incidents alleged in Brenda's petition when deciding whether to issue a domestic abuse injunction. Nevertheless, we conclude the London incident alone was sufficient to support the court's finding that there

were reasonable grounds to believe Gray had engaged in domestic abuse of Brenda. The court clearly believed Brenda's account of the London incident—namely, that Gray "bent [Brenda] backwards over a railing and choked [her]." A reasonable inference from Brenda's testimony regarding the London incident is that Gray intended to—and did—cause Brenda physical pain or injury. *See* WIS. STAT. § 813.12(1)(am)1. While Gray relies on his own testimony that he acted in self-defense, the court expressly stated that it did not consider Gray to be a credible witness.[5] Given Brenda's testimony regarding the London incident, the court's finding that there were reasonable grounds to believe Gray had engaged in domestic abuse of Brenda was not clearly erroneous.

¶32 Gray also challenges the circuit court's finding that there was a substantial risk he would commit intentional homicide against Brenda. Normally, the length of a domestic abuse injunction is "the period of time that the petitioner requests, but not more than 4 years." WIS. STAT. § 813.12(4)(c)1. However, the court may "order that the injunction is in effect for not more than 10 years" if it finds, by a preponderance of the evidence, that there is a substantial risk the respondent may commit an intentional homicide against the petitioner. Sec. 813.12(4)(d)1.a. Gray argues that in making this assessment, the circuit court could not consider the shooting incident at Brenda's business because that incident

[5] Gray asserts the circuit court accepted his "unrefuted testimony that, essentially, he grabbed and pushed [Brenda] in self-defense" during the London incident. The record belies this assertion. When discussing Gray's testimony about the London incident, the court merely stated that Gray "acknowledges he grabbed [Brenda] and that she ended up against a railing." The court never stated or implied that it believed Gray's testimony that he grabbed and pushed Brenda in self-defense. To the contrary, the court stated, as a general matter, that its decision was based on "a credibility assessment, and the Court did not find [Gray] credible." When the court's comments are read together, it appears the court made a general observation that Gray conceded he had engaged in acts of physical violence toward Brenda in London, while it disbelieved Gray's explanation for his conduct.

occurred after Brenda filed her petition for a domestic abuse injunction. Without that incident, Gray contends there was "no basis whatsoever to conclude there was a substantial risk [he] would commit an intentional homicide."

¶33 We disagree. As noted above, the circuit court clearly credited Brenda's testimony that Gray bent her over a railing and attempted to choke her during the London incident. Based on that testimony, the court could reasonably infer there was a substantial risk that Gray would commit an intentional homicide against Brenda. As such, the court's finding in that regard was not clearly erroneous. The court therefore properly ordered that the domestic abuse injunction would remain in effect for ten years, pursuant to WIS. STAT. § 813.12(4)(d)1.a.

## III. Objective bias

¶34 Gray also argues reversal is warranted because the circuit court was objectively biased. "The right to an impartial judge is fundamental to our notion of due process." ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. Whether a judge was unbiased is a question of constitutional fact that we review independently. ***State v. Neuaone***, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 700 N.W.2d 298. We presume that a judge has acted fairly, impartially, and without bias. ***Goodson***, 320 Wis. 2d 166, ¶8. The party asserting judicial bias has the burden to show, by a preponderance of the evidence, that the judge was biased or prejudiced. ***Neuaone***, 284 Wis. 2d 473, ¶16.

¶35 Although a judge may be either subjectively or objectively biased, *see* ***Goodson***, 320 Wis. 2d 166, ¶8, only objective bias is at issue here. Objective bias can exist in two situations: (1) where there is an appearance of bias or partiality; and (2) where objective facts demonstrate that a judge treated a party

unfairly. ***Id.***, ¶9. The appearance of bias or partiality constitutes objective bias when a reasonable person could conclude "that the average judge could not be trusted to 'hold the balance nice, clear, and true' under all the circumstances." ***Id.*** (citation omitted).

¶36 In this case, Gray argues the circuit court was objectively biased because: (1) the court "largely took over prosecution of the case" when questioning Brenda, particularly by inquiring about topics that her attorney did not raise on direct examination; (2) the court "asked one witness substantial follow-up questions"; (3) the court laid the foundation for evidence and explained how Brenda's attorney should introduce evidence; (4) the court allowed Brenda to reopen her case without prior notice at the continued de novo hearing; and (5) the court suggested imposing a ten-year injunction, even though Brenda had only requested a four-year injunction. Gray argues that, when considered together, these acts demonstrate that the court was objectively biased against him.

¶37 We conclude Gray has failed to rebut the presumption that the circuit court was unbiased. As Gray acknowledges, a circuit court has statutory authority to question witnesses. WIS. STAT. § 906.14(2). To be sure, when exercising this authority, a court must be careful not to function as a partisan or an advocate. ***State v. Asfoor***, 75 Wis. 2d 411, 437, 249 N.W.2d 529 (1977). However, a judge "is more than a mere referee." ***Id.*** In fact, a judge has "a right to clarify questions and answers and make inquiries where obvious important evidentiary matters are ignored or inadequately covered" by the parties. ***Id.*** That is precisely what the circuit court did here. Our review of the record confirms that the court's questioning of the witnesses did not cross the line into advocacy or demonstrate a preference for one party over the other.

¶38 As for Gray's assertions that the circuit court laid the foundation for evidence, explained how Brenda's attorney should introduce evidence, and allowed Brenda to reopen her case at the continued de novo hearing, we observe that a circuit court has broad discretion to control the mode and order of the presentation of evidence. *See* WIS. STAT. § 906.11(1); ***State v. Copeland***, 2011 WI App 28, ¶9, 332 Wis. 2d 283, 798 N.W.2d 250. Gray does not develop any argument that the court erroneously exercised its discretion with respect to the rulings at issue here. Moreover, Gray fails to acknowledge that, in each instance in which the court allegedly aided Brenda in presenting her case or permitted her to introduce evidence over Gray's objection, Gray was given a full opportunity to cross-examine Brenda regarding the evidence she introduced.

¶39 Finally, although Gray asserts that the circuit court sua sponte suggested imposing a ten-year injunction, even though Brenda had only requested a four-year injunction, the record belies that assertion. Brenda's petition for a domestic abuse injunction specifically asked the court to "[o]rder the injunction, which is in effect for not more than 10 years, if the court finds a substantial risk the respondent may commit 1st or 2nd degree intentional homicide, or 1st, 2nd or 3rd degree sexual assault against the petitioner." Thus, it was Brenda, not the circuit court, who first raised the issue of imposing a ten-year injunction.

¶40 In short, none of the circuit court's actions—whether considered individually or cumulatively—are sufficient to overcome the presumption that the court was unbiased. We therefore reject Gray's objective bias argument.

## IV. New trial in the interest of justice

¶41 Gray also asserts that if we decline to grant him relief on any of the grounds discussed above, we should nevertheless grant him a new trial in the

interest of justice, pursuant to WIS. STAT. § 752.35. Gray contends the real controversy has not been fully tried, based on "[t]he cumulative effect of the lack of notice of allegations and opportunity to respond, the improper consideration of highly prejudicial evidence, and the circuit court's substantial assistance in the presentation of [Brenda's] case."

¶42 An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983). Here, we have already rejected each of Gray's claims of error regarding the circuit court proceedings. "Adding them together adds nothing. Zero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). As such, we decline to grant Gray a new trial in the interest of justice.

## V. Denial of Gray's WIS. STAT. § 806.07 motion

¶43 In case No. 2018AP988, Gray appeals the circuit court's order denying his WIS. STAT. § 806.07 motion for relief from the domestic abuse injunction. However, a significant portion of Gray's brief in case No. 2018AP988 is devoted to arguing that his § 806.07 motion and the court's decision denying it provide "additional support" for his arguments in case No. 2017AP406. We are not persuaded.

¶44 As noted above, Gray's WIS. STAT. § 806.07 motion relied on the fact that Gray did not have the opportunity to review the video of the September 10, 2016 shooting incident before it was presented to the circuit court during the de novo hearing on November 10, 2016. The motion claimed that Gray's subsequent lay review of the video indicated that the truck shown in the

video was not Gray's, and that an "expert firearms analyst" had reviewed the video and determined no firearm was discharged.

¶45 On appeal, Gray argues these allegations support his claim that he was denied due process because Brenda's petition for a domestic abuse injunction did not provide him with notice of her allegations regarding the shooting incident. Gray also argues that because his WIS. STAT. § 806.07 motion "affirmatively disprove[d]" the shooting incident, there is no evidence to support the circuit court's findings that there were reasonable grounds to believe he had engaged in domestic abuse of Brenda and that there was a substantial risk he might commit an intentional homicide against her. We reject these arguments because, as explained above, the London incident alone was sufficient to support the issuance of a domestic abuse injunction for a period of ten years. It is undisputed that Brenda's petition provided Gray with adequate notice of her allegations regarding the London incident. As such, Gray's § 806.07 motion does not bolster his arguments regarding due process and the sufficiency of the evidence.

¶46 Gray also argues that the circuit court's denial of his WIS. STAT. § 806.07 motion supports his claim that the court was objectively biased against him. However, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." ***Liteky v. United States***, 510 U.S. 540, 555 (1994). Moreover, for the reasons explained below, we conclude the court did not err by denying Gray's § 806.07 motion.

¶47 Whether to grant relief from a judgment or order under WIS. STAT. § 806.07 is committed to the circuit court's discretion. ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493. A court erroneously exercises its discretion when it makes an error of law or fails to base its decision

upon the facts of record. ***Ash Park, LLC v. Alexander & Bishop, Ltd.***, 2010 WI 44, ¶32, 324 Wis. 2d 703, 783 N.W.2d 294. We may search the record for reasons to sustain a circuit court's discretionary decision. ***State v. Pico***, 2018 WI 66, ¶15, 382 Wis. 2d 273, 914 N.W.2d 95.

¶48 Here, Gray sought relief from the domestic abuse injunction under WIS. STAT. § 806.07(1)(a), based on "surprise." He contended he was unfairly surprised when Brenda introduced the video of the shooting incident during the de novo hearing on November 10, 2016. As the circuit court aptly noted, however, although Gray may have been surprised when the video was initially introduced on November 10, the de novo hearing was then continued for twenty-two days until December 2. The continuance would have given Gray an opportunity to review the video and prepare a defense.[6]

¶49 Gray emphasizes that the de novo hearing was continued solely due to time constraints, and "[e]very indication is that the court would have concluded the trial that same day had there been sufficient time on its calendar." However, the reason for the continuance is immaterial. Regardless of the reason, the de novo hearing was, in fact, continued for twenty-two days, which gave Gray the opportunity to review the video of the shooting incident and prepare a defense. In addition, any "surprise" related to the video is ultimately inconsequential, as we have already concluded that the London incident—in and of itself—was sufficient to support the issuance of a ten-year domestic abuse injunction. On these facts,

[6] Gray asserts the circuit court overlooked the fact that Brenda did not provide him with a copy of the video following the November 10 hearing. However, Gray does not explain what prevented him from requesting a copy of the video.

the circuit court did not erroneously exercise its discretion by declining to grant Gray relief under WIS. STAT. § 806.07(1)(a).

¶50 Gray also sought relief from the domestic abuse injunction under WIS. STAT. § 806.07(1)(b), based on newly discovered evidence. In order to obtain relief on this basis, a party must establish, among other things, that the new evidence would probably change the result of the proceeding. ***Wenzel v. Wenzel***, 2017 WI App 75, ¶17, 378 Wis. 2d 670, 904 N.W.2d 384. We agree with the circuit court that Gray failed to make this showing. Gray's new evidence consisted of his own lay opinion that the truck in the video of the shooting incident was not his, as well as his expert's opinion that the video did not show a firearm being discharged. However, again, we have already concluded that the London incident—standing alone—provided a sufficient basis to grant a ten-year domestic abuse injunction. It is therefore not probable that Gray's new evidence regarding the shooting incident would have changed the result of the de novo hearing.

¶51 Finally, Gray argues the circuit court should have granted him relief from the domestic abuse injunction under WIS. STAT. § 806.07(1)(h). A court may grant relief under para. (1)(h) when extraordinary circumstances justify relief in the interest of justice. ***Miller***, 326 Wis. 2d 640, ¶35. "[E]xtraordinary circumstances are those where 'the sanctity of the final judgment is outweighed by the incessant command of the court's conscience that justice be done in light of *all* the facts.'" ***Id.*** (citation omitted).

¶52 Our supreme court has set forth five nonexclusive factors a court should consider when deciding whether to grant relief under WIS. STAT. § 806.07(1)(h). *See* ***Miller***, 326 Wis. 2d 640, ¶36. One of those factors is the existence of a meritorious defense. *See* ***id.*** Here, even assuming that Gray's new

lay and expert analyses of the video footage would have provided him with a meritorious defense to the shooting incident, we have already determined that the circuit court could have issued a ten-year domestic abuse injunction based on the London incident alone. Thus, as discussed above, there is no reasonable probability that Gray's new evidence would have changed the result of the de novo hearing. Under these circumstances, the court did not erroneously exercise its discretion by concluding that Gray's case did not present extraordinary circumstances justifying relief in the interest of justice under § 806.07(1)(h).

*By the Court.*—Orders affirmed.

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