DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. WILLIAM EUGENE SHELLEY, Appellant.	)	No. 1 CA-CR 10-1012 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Mohave County

Cause No. CR-2010-00027

The Honorable Steven F. Conn, Judge

AFFIRMED IN PART; VACATED IN PART

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J O H N S E N, Judge

¶1 William Eugene Shelley appeals his conviction of leaving the scene of an accident involving death and the resulting sentence. We affirm the conviction and sentence, but vacate the restitution order.

FACTS AND PROCEDURAL BACKGROUND

¶2 A light blue flatbed truck turned left in front of an oncoming motorcycle, fatally injuring the motorcyclist.[1] The driver of the truck fled before police arrived. Detective James Todd Foster received an anonymous tip linking a blue flatbed to Shelley's residence in a rural area outside Kingman. Aerial surveillance of his residence revealed two blue flatbed trucks parked in a carport and a third blue flatbed parked behind a partially dismantled trailer near the rear.

¶3 Foster, Detective Sergeant Bob Fisk, Detective Gabe Otero and another detective, all in plain clothes with badges and guns holstered on their hips, went to Shelley's property. In unmarked vehicles, they drove through the gate, which was then unlocked and open, and parked in front of the residence. Foster knocked on the front door; when there was no response, Fisk walked around the residence and knocked on the back door.

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[1] Upon review, we view the facts in the light most favorable to sustaining the verdict and resolve all inferences against Shelley. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998). Similarly, we view evidence elicited at a suppression hearing in the light most favorable to affirming the court's decision. *State v. Stanley*, 167 Ariz. 519, 525, 809 P.2d 944, 950 (1991).

Shelley then approached Fisk from behind a vehicle in the carport attached to the back of the residence. Fisk identified himself and informed Shelley they were investigating a traffic accident in Kingman. Foster then came around from the front door, introduced himself and asked Shelley "if it was okay to look at these trucks that are on your property." Shelley responded, "Go ahead." Foster determined the flatbed behind the partially dismantled trailer was the vehicle involved in the accident.

¶4 Shelley was charged with leaving the scene of an accident involving death in violation of Arizona Revised Statutes ("A.R.S.") section 28-661(B) (2012), a Class 2 felony.[2] He filed two motions to suppress evidence, one alleging the officers' entry onto and search of his property violated the Fourth Amendment and a second alleging a violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).[3]

¶5 The court heard evidence on the Fourth Amendment motion over the course of three days. At the conclusion of the third day of testimony, the court denied the motion, ruling that Shelley "did in fact consent to a search of the property [and]

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[2] Absent material revisions after the date of an alleged offense, we cite to a statute's current Westlaw version.

[3] The court granted the *Miranda* motion in part and denied it in part. Shelley has not appealed from the court's ruling on that motion.

that there was no search of the property until after he had consented." Ten days after the second day of testimony but before the scheduled third day of the proceedings, Shelley moved for a change of judge for cause, alleging several statements and rulings at the hearing demonstrated that the assigned superior court judge was biased. Another judge denied the motion without hearing.

¶6 At a subsequent trial management conference, the parties submitted a written Stipulation to Waive Jury Trial and Submit Case to Court on Agreed Record signed by Shelley and both attorneys. After a colloquy, the court found Shelley had "knowingly, intelligently and voluntarily agreed to waive a jury trial and to submit the case to the court on an agreed record."

¶7 Three days later, the court issued an order finding Shelley guilty as charged. It sentenced him to a mitigated term of four years' incarceration and ordered him to pay restitution of $9,922, representing the motorcyclist's medical bills and damage to the motorcycle.

¶8 Shelley timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. § 12-120.21(A)(1), 13-4031 and -4033 (2012).

DISCUSSION

A. Motion to Suppress.

1. Restriction of cross-examination of police witnesses.

¶9 Shelley first argues the court erred by restricting his examination of police witnesses at the suppression hearing. We generally review limitations on the scope of cross-examination for abuse of discretion, but review *de novo* evidentiary rulings implicating the Confrontation Clause. *State v. Ellison*, 213 Ariz. 116, 129, 131-32, ¶¶ 42, 52, 140 P.3d 899, 912, 914-15 (2006).

¶10 The constitutional right to confrontation encompasses cross-examination of a witness to expose bias or motive. *See Davis v. Alaska*, 415 U.S. 308, 315-18 (1974). However, "[t]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant." *State v. Canez*, 202 Ariz. 133, 153, ¶ 62, 42 P.3d 564, 584 (2002) (quotations omitted). We evaluate limitations on cross-examination "on a case-by-case basis to determine whether the defendant was denied the opportunity to present evidence relevant to issues in the case or the witness's credibility." *Id.* The touchstone is whether the cross-

examination as limited leaves the fact-finder "in possession of sufficient information to assess the bias and motives of the witness." *State v. Bracy*, 145 Ariz. 520, 533, 703 P.2d 464, 477 (1985).

¶11 At the hearing on the motion to suppress, Shelley sought to offer evidence of police policies on obtaining and recording a suspect's consent to search in an effort to impeach Fisk's and Foster's testimony that Shelley consented to the search. The court sustained the State's objections on the basis of relevance. The court, however, heard ample evidence impeaching the officers' credibility on whether Shelley consented to the search and explicitly recognized that "it is obviously very damaging to [the officers'] credibility that [consent] is a critical issue that was not included in a police report" and took into consideration the officers' failure to note in their report that Shelley consented to the search. We see no error when, as here, the court heard "sufficient information to assess the bias and motives of the witness[es]" and explicitly did so. *See Bracy*, 145 Ariz. at 533, 703 P.2d at 477.

¶12 Shelley also sought to show that Kingman police had failed to obtain consent from a neighboring landowner before they observed Shelley's residence from the neighboring parcel; the court sustained the State's objection on grounds of

relevance. The court did not abuse its discretion in disallowing such evidence. A warrantless entry onto a third party's property does not implicate the defendant's own constitutional rights. *See, e.g.*, *State v. Harris*, 131 Ariz. 488, 490, 642 P.2d 485, 487 (App. 1982) (citing *Rakas v. Illinois*, 439 U.S. 128 (1978)). Nor did the court err in concluding that the evidence would be irrelevant to whether officers violated Shelley's Fourth Amendment rights when they came onto his property. We do not agree that one assertedly illegal entry provides a motive for or bears on the propriety of another.

2. Restriction of defense expert's testimony.

¶13 Shelley next contends the court erred by improperly limiting the scope of a defense expert's opinion testimony at the suppression hearing. Arizona Rule of Evidence 702 allows expert opinion testimony "[i]f [the expert's] specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Ariz. R. Evid. 702.[4] "The law does not permit expert testimony on how the [fact-finder] should decide the case." *State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986). Whether the proffered opinion appropriately will assist the fact-finder rests within the

[4] We cite to the version of Rule 702 in effect at the time of the hearing.

superior court's sound discretion, and we will reverse only upon a clear abuse of that discretion. *State v. Mincey*, 141 Ariz. 425, 441, 687 P.2d 1180, 1196 (1984).

¶14 The court precluded Shelley's expert from testifying on the existence of probable cause to search, the availability of a search warrant and whether and when Shelley was in custody. But probable cause to search and the possibility of obtaining a search warrant were irrelevant to Shelley's motion to suppress, given that the officers testified, and the court found, that Shelley consented to the search. *See, e.g.*, *State v. Guillen*, 223 Ariz. 314, 317, ¶ 11, 223 P.3d 658, 661 (2010) (consent as exception to Fourth Amendment warrant requirement). To the extent the issue of whether Shelley was in custody could be relevant to the voluntariness of his consent, expert opinion testimony is not admissible unless it may assist the trier of fact. Ariz. R. Evid. 704 & cmt. The superior court is presumed to know the law, *see State v. Trostle*, 191 Ariz. 4, 22, 951 P.2d 869, 887 (1997), and we fail to see how the court abused its discretion in precluding expert opinion on the issue of consent.

3. Denial of motion to suppress.

¶15 We review the superior court's denial of a motion to suppress for abuse of discretion, but consider *de novo* its conclusions on constitutional or purely legal issues. *State v. Blakley*, 226 Ariz. 25, 27, ¶ 5, 243 P.3d 628, 630 (App. 2010).

We consider only evidence presented at the suppression hearing, *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996), and view this evidence in the light most favorable to sustaining the court's decision. *State v. Stanley*, 167 Ariz. 519, 525, 809 P.2d 944, 950 (1991).

¶16 "[S]ubject only to a few specifically established and well-delineated exceptions," a warrantless search is presumed unreasonable under the Fourth Amendment. *Katz v. United States,* 389 U.S. 347, 357 (1967). Consent is one such exception. *Guillen*, 223 Ariz. at 317, ¶ 11, 223 P.3d at 661.

¶17 On appeal, Shelley does not contest the superior court's conclusion that he consented to the search. He argues, however, that the court should have granted his motion to suppress because "the officer's [sic] entry onto [his] property at the location in the carport where they encountered him, and where they began the search of the vehicle prior to obtaining consent was illegal."

¶18 Consent is invalid if "tainted by a prior constitutional violation." *Guillen*, 223 Ariz. at 317, ¶ 13, 223 P.3d at 661. The "question . . . is 'whether, granting establishment of the primary illegality, the evidence to which instant objection [has been] made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Blakley*,

226 Ariz. at 31, ¶ 20, 243 P.3d at 634 (alteration in original) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).

¶19 We discern no circumstances invalidating Shelley's consent. The four officers legitimately entered Shelley's property through the open front gate, as Foster testified, "to make contact with [Shelley] and ask permission to look at the vehicle." "[N]o Fourth Amendment violation occurs when an officer, without a warrant, crosses the curtilage to knock on the front door to ask questions of the resident." *State v. Olm*, 223 Ariz. 429, 433, ¶ 13, 224 P.3d 245, 249 (App. 2010) (citing *United States v. Hammett,* 236 F.3d 1054, 1059 (9th Cir. 2001)). Although Shelley argues Fisk improperly proceeded to the rear of his residence as Foster was at the front, officers may "sometimes move away from the front door when they are attempting to contact the occupants of a residence," as by proceeding to a back door also accessible to the general public. *United States v. Garcia*, 997 F.2d 1273, 1279 (9th Cir. 1993) (collecting cases); *see also Blakley*, 226 Ariz. at 30, ¶ 17, 243 P.3d at 633 (constitutional violation may occur where officer "exceed[ed] the boundaries of the area commonly accessed by visitors, with no intent to locate an occupant"). Shelley's testimony that visitors generally would park near his back door evidenced his belief that the area near the back door was accessible to the general public.

¶20 Shelley further argues Otero was illegally inspecting the flatbed truck before Fisk and Foster obtained his consent and that this constitutional violation tainted the consent. We need not determine whether Otero's conduct violated the Fourth Amendment, however, because Shelley conceded at the hearing that as he was talking to Foster and Fisk in his carport, he could not see whether other officers had "already gone back to look at the truck" at the rear of his property. As a result, Shelley may not argue that his consent was tainted by the knowledge that officers already had discovered the flatbed truck or were about to do so. *See Wong Sun*, 371 U.S. at 488; *Guillen*, 223 Ariz. at 317, ¶ 13, 223 P.3d at 661. To the contrary, evidence at the hearing supports the superior court's conclusion that the search did not occur until after Shelley had given his consent.

¶21 Nor do the circumstances suggest Shelley's consent was coerced in any way. Only two officers, Fisk and Foster, approached Shelley. They were in plain clothes with badges visible. Their guns, while visible, remained holstered. Neither Fisk nor Foster physically restrained Shelley in any way while seeking consent. Under these circumstances, the court did not err in concluding that Shelley voluntarily gave consent to search before any search commenced.

B. Motion for Change of Judge.

¶22 Shelley also contends the court erred by failing to hold a hearing on his motion for change of judge and by denying that motion. We review the superior court's ruling on a motion for change of judge for cause for an abuse of discretion. *State v. Ramsey*, 211 Ariz. 529, 541, ¶ 37, 124 P.3d 756, 768 (App. 2005).

¶23 A criminal defendant is entitled to a fair trial before a fair and impartial judge. *Mincey,* 141 Ariz. at 442, 687 P.2d at 1197. To preserve this right, a defendant may move for a change of judge "if a fair and impartial hearing or trial cannot be had by reason of the interest or prejudice of the assigned judge." Ariz. R. Crim. P. 10.1(a).

¶24 Although Rule 10.1(c) states that "the presiding judge shall provide for a hearing" upon a defendant's motion for change of judge for cause, a hearing is required only if the defendant presents a colorable claim of bias, "alleg[ing] facts which, if taken as true, would entitle the defendant to relief." *State v. Eastlack*, 180 Ariz. 243, 255, 883 P.2d 999, 1011 (1994); *see also State v. Neil*, 102 Ariz. 110, 114, 425 P.2d 842, 846 (1967) ("If the facts are not such as would warrant the affiant as a reasonable person in honestly believing that the questioned judge is biased . . . , the application should be denied as a matter of law."). "[M]ere speculation, suspicion,

apprehension, or imagination" is insufficient to trigger the hearing requirement. *Ellison*, 213 Ariz. at 128, ¶ 37, 140 P.3d at 911 (quoting *State v. Rossi*, 154 Ariz. 245, 248, 741 P.2d 1223, 1226 (1987)).

¶25 "Judges are presumed to be impartial, and the party moving for change of judge must prove a judge's bias or prejudice by a preponderance of the evidence." *State v. Smith*, 203 Ariz. 75, 79, ¶ 13, 50 P.3d 825, 829 (2002). Moreover, adverse judicial rulings, by themselves, rarely, if ever, provide a sufficient basis for a change of judge for cause, absent a showing of "an extrajudicial source of bias [] or any deep-seated favoritism." *Ellison*, 213 Ariz. at 129, ¶ 40, 140 P.3d at 912 (alteration in original) (quotations omitted).

¶26 Shelley filed his motion for change of judge and accompanying affidavit ten days after the second day of the suppression hearing, citing the judge's conceded personal knowledge of Fisk, his rulings limiting the defense expert's testimony and his ruling limiting defense examination and cross-examination of witnesses.

¶27 The judge to whom the motion was referred dismissed the motion, concluding it was untimely and that Shelley's allegations did not constitute grounds for change of judge. Assuming Shelley's Rule 10.1 motion was timely, it failed to present a colorable claim of the judge's bias, so the court did

not err by denying the motion without a hearing. *See Eastlack*, 180 Ariz. at 255, 883 P.2d at 1011. At one point during the second day of the hearing, defense counsel asked Fisk to stand beside Shelley to demonstrate their relative sizes to show that Fisk's mere presence could intimidate Shelley; the judge then stated he had "been around" Fisk on "numerous occasions" and was "well aware of his size," concluding that "Fisk would dominate Mr. Shelley in every sense of the word." The judge's personal knowledge of Fisk's height, however, does not suggest the court was biased against the defense or favored the witness or the State. The second and third grounds Shelley offers essentially mirror his evidentiary arguments on appeal. We reiterate that adverse judicial rulings, without more, will almost never support a change of judge for cause. *Ellison*, 213 Ariz. at 129, ¶ 40, 140 P.3d at 912. Furthermore, as we have explained *supra*, the rulings on which Shelley bases his claim of bias were not erroneous and therefore are not evidence that the judge was biased against Shelley.[5]

[5] On appeal, Shelley raises the judge's comments at the sentencing hearing as evidence of "deep seated antagonism and unfavorable predisposition amounting to bias." At sentencing, the judge remarked that after viewing a video of Shelley's confession, he found Shelley "an unpleasant individual," but the judge went on to say that he would "try[] to rise above that." The judge also noted "the fact that I wouldn't invite him to my Rotary Club, or to a house of worship . . . does not [a]ffect the decision that I have to make in this case."

C. *Avila* Colloquy.

¶28 Shelley next argues the court erred by failing to advise him of certain constitutional rights before accepting his agreement to submit the case on an agreed record. *See State v. Avila*, 127 Ariz. 21, 617 P.2d 1137 (1980). Shelley maintains the court failed to warn him that he was giving up his right to representation by counsel at trial and failed to tell him that the court's decision would be based solely on the agreed record.

¶29 Because Shelley did not object to the court's *Avila* colloquy at trial, he has forfeited appellate relief absent fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005); *State v. Bunting*, 226 Ariz. 572, 574-75, ¶ 5, 250 P.3d 1201, 1203-04 (App. 2011).

¶30 A defendant submitting the issue of guilt to the court on an agreed record is entitled to be advised by the court, *inter alia*, that he has "[t]he right to a trial by jury where he may have representation of counsel" and "[t]he right to have the issue of guilt or innocence decided by the judge based solely

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A judge's opinion formed on the basis of evidence introduced in the course of trial generally does not demonstrate bias or prejudice, unless so extreme as to "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Ellison*, 213 Ariz. at 129, ¶ 38, 140 P.3d at 912 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). Here, the judge's statements expressing an opinion formed on the basis of evidence presented – that Shelley is an "unpolished, unpleasant, co[a]rse individual" with whom the judge had little desire to socialize - do not evidence a fundamental antagonism that would call into question the judge's impartiality.

upon the record submitted." *Avila*, 127 Ariz. at 24, 317 P.2d at 1140. As Shelley correctly notes, the court advised him that submission of the case would waive his right to a trial by jury. Although the court did not also expressly tell Shelley he was giving up the right to be represented by counsel at a jury trial, the court stated, "The jury will not decide your guilt or innocence; we will not have any hearing at which the attorneys try to convince me what decision I should make; I will make that decision based upon the reports and nothing else."

¶31 We conclude Shelley was adequately informed of his right to counsel. Not only did the court let Shelley know that "attorneys" would not be present to argue his case, Shelley plainly knew of his right to counsel; he was represented by an attorney during the three-day suppression hearing prior to submission. No fundamental error occurred when the court failed to expressly warn Shelley of his right to counsel at a jury trial.

¶32 Likewise, the fact that the court did not use the word "solely" when describing the record it would consider does not amount to fundamental error. The parties submitted the case on an agreed record consisting of certain "police reports and evidence presented during the evidentiary hearing on the defendant's motion to suppress." During the colloquy, the court

effectively advised Shelley that it would decide the case based on the police reports and evidence from the suppression hearing.

D. Restitution.

¶33 Finally, Shelley argues the court erred by ordering restitution because his crime – leaving the scene after the accident – did not cause or aggravate any injury suffered by the victim. The State concedes the restitution order was in error, and we agree.

¶34 Restitution is proper only where the defendant's criminal conduct "directly cause[s]" the victim's economic loss. *State v. Wilkinson*, 202 Ariz. 27, 28-29, ¶¶ 6-7, 39 P.3d 1131, 1132-33 (2002). The superior court found that "the financial impact on the family is not so much from [Shelley] leaving the scene of the accident as causing the accident itself" and that "[t]he victim in this case was going to have died from the accident no matter what Mr. Shelley did." While the court noted that "the victim's family has suffered emotional loss" from Shelley leaving the scene, restitution is proper only for economic loss, not purely emotional loss. *See id.* at 29, ¶ 7, 39 P.3d at 1133; *see also* A.R.S. § 13-105(16) (2012). Because the victims' economic loss was caused solely by the underlying accident and not by Shelley's leaving the scene, we vacate the court's order imposing restitution.

CONCLUSION

¶35 For the foregoing reasons, we affirm the judgment and sentence imposed, but vacate the restitution order.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
LAWRENCE F. WINTHROP, Judge