COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP891-CR
2011AP892-CR

Cir. Ct. Nos. 2009CF4634
2010CF2400

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY D. MOSELEY,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

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

¶1 KESSLER, J. Timothy D. Moseley appeals from a trial court decision denying his motion to suppress evidence based on an illegal search. Moseley also appeals from a trial court decision denying his motion for an *in*

camera review of a victim's counseling records. Finally, Moseley appeals his judgments of conviction on the grounds that the trial court was biased, thereby violating his right to a fair trial. We affirm.

BACKGROUND

¶2 On October 7, 2009, Moseley, a United States Marshal, was arrested by City of South Milwaukee police officers based on allegations of domestic violence against M.K. While Moseley was in custody, and pursuant to a consent form signed by Moseley, South Milwaukee police officers seized numerous items from Moseley's apartment, including his computer, camera, external hard drive and CDs. A search of the computer and related items revealed a number of nude photographs of two women, M.K. and T.H.

¶3 Moseley was charged with one count of capturing an image of nudity without consent and two counts of false imprisonment, with regard to M.K. After Moseley was bound over for trial, he moved to suppress seized evidence claiming the search of his apartment was unlawful.

¶4 Later, Moseley was charged, in a separate case, with eight counts of possession of a recording of nudity of T.H., without consent. Moseley filed another motion to suppress the images found of T.H., again claiming the search of his apartment was unlawful. Moseley also moved for an *in camera* inspection of T.H.'s counseling records.

¶5 The two cases were consolidated for trial. At the hearing on the motions to suppress, South Milwaukee police officers testified that after a phone conversation with a lawyer, Moseley signed a consent form for the search of his apartment without oral or written limitations on the scope of the search. Moseley

agreed that he signed the consent form, but testified that he orally limited the search to his bedroom where certain items were located. Moseley also testified that he signed the form because he was under the impression that his interview with South Milwaukee police, including the part in which he limited the search, was being recorded.

¶6 The trial court denied the motions, stating that it found the testimony of the officers more credible. Therefore, the trial court found that Moseley did not limit or withdraw his consent at any time, a technical error prevented the portion of Moseley's interview dealing with consent from being recorded, and evidence was legally obtained from Moseley's apartment.

¶7 Moseley's request for an *in camera* inspection of T.H.'s mental health records was based on his claim that T.H. suffered from memory lapses and memory problems, that she spoke with her therapist and shared notes about "alleged instances of sexual abuse" committed by Moseley, the details of which Moseley claimed went to T.H.'s credibility, and that she suffered from a psychological disorder at the time of the alleged incident. Moseley claimed this information was relevant to a fair determination of his guilt or innocence and was necessary for his defense because a review of the records would reveal that the two actually had a consensual sexual relationship.

¶8 The trial court disagreed, finding that Moseley could impeach T.H. with regard to her memory lapses without viewing her records, that T.H.'s conversations with her therapist about Moseley's alleged abuse were other acts unrelated to the charges, and that Moseley's assertion that the records have impeachment value was speculative.

¶9 A jury found Moseley guilty on all three charges pertaining to M.K. and on three of the eight charges pertaining to T.H. This appeal follows.

DISCUSSION

¶10 On appeal, Moseley contends that the trial court: (1) erroneously denied his motions to suppress evidence; (2) erroneously denied his motion to conduct an *in camera* review of T.H.'s counseling records; and (3) exhibited bias, thereby denying Moseley his right to a fair trial. We disagree. Additional facts are provided as necessary to the discussion.

Motion to Suppress.

¶11 "In reviewing a trial court's decision on a suppression motion, we apply a mixed standard of review." ***State v. Kelley***, 2005 WI App 199, ¶8, 285 Wis. 2d 756, 704 N.W.2d 377. "We will uphold the trial court's factual findings unless they are clearly erroneous, but will independently evaluate those facts under the constitutional standard to determine whether the search violated the Fourth Amendment." ***Id.*** "Searches inside a person's home without a warrant are presumptively unreasonable." ***Id.*** "There are several exceptions to that dictate, one of which is presented in this case—a warrantless search is constitutionally permissible where consent to search has been granted." *See* ***id.***

¶12 Moseley contends that his computer, camera, DVDs and other items, not related to the battery and false imprisonment allegations of "incident number 09022010," were wrongfully seized because Moseley limited his consent to the search of his apartment to that incident number.

¶13 South Milwaukee Police Department witnesses testified that Moseley gave them unrestricted consent to search his apartment. Investigator

Steven Hesse testified that he obtained written consent to search Moseley's apartment. Hesse testified that all allegations pertaining to Moseley, even those subsequent to the domestic battery and false imprisonment allegations, would have been filed under the same incident number that Moseley was initially given. Hesse further testified that he was present when the consent form was read to Moseley. When asked to read the form at the hearing, Hesse read the following statement:

> I am giving written permission to the above named officer voluntarily and without threats or promises of any kind. I understand that I can refuse to give consent to a search, and that I may withdraw my consent at any time I wished [sic] during the execution of the search.

Hesse stated that at no time did Moseley limit the search, ask questions about the search or incident number, or withdraw his consent, as the form stated he was entitled to do. Hesse also testified that while recording interviews with arrested individuals is standard procedure, a technical error most likely prevented a portion of Moseley's interview from being recorded.

¶14 Lieutenant Peter Jaske testified that Moseley gave his consent prior to the search, that Moseley phoned an attorney prior to signing the consent form, that Moseley never limited the scope of the search, and that Moseley was aware of his right to withdraw his consent at any time, but did not do so. Jaske also testified that Moseley did not ask about the incident number assigned to his arrest.

¶15 Both Hesse and Jaske testified that the incident number assigned to Moseley was not limited to the domestic battery and false imprisonment allegations, and that any subsequent allegation against Moseley would have been (and was) added to the same incident number.

¶16 Moseley admitted that he signed a broad consent form giving officers access to his entire apartment. However, he testified that he thought police would only be searching for evidence pertaining to allegations of domestic battery and false imprisonment, and he orally limited the scope of the consent form to one bedroom in his apartment, where he said the officers would find handcuffs and a rope. Moseley asserted that he was under the impression that this verbal limitation on the written consent was being recorded based on his understanding that the police department's policy was to record arrestee interviews.[1] Moseley contends that in limiting the scope of his consent to a search related to the incident number, he was limiting the search of his apartment to evidence pertaining to the domestic battery and false imprisonment charges. Moseley argues that his signature on the consent form was only obtained after he verbally limited the search.

¶17 The trial court expressly found the testimony of the officers to be more credible, and that the failure to record a portion of the interview was not the result of police misconduct. Specifically, the trial court stated that the incident number "simply meant the investigation," and did not by itself limit the scope of the search. The trial court also stated that if Moseley did attempt to verbally limit the scope of the search, the limit would have been noted on the consent form:[2]

> I find the officers again more credible…. I thought Lieutenant Jaske testified credibly that … the officers indeed would allow and would certainly have allowed more

[1] It is undisputed that arrestee interviews are recorded, but that the portions of Moseley's interview relevant to his consent argument were not recorded.

[2] The actual consent form could not be located in the record, however, as stated, the text of the form was read at the suppression hearing by Officer Hesse. We assume that items not a part of the appellate record support the trial court's findings. *See* ***State v. Benton***, 2001 WI App 81, ¶10, 243 Wis. 2d 54, 625 N.W.2d 923.

> writing to be written into the consent if the consent was gonna be more limited … and none of that writing appears.
>
> … [I]f the arrestee is asking in particular that the consent be limited to specific items or a specific location … that's not reflected in the way the consent's worded…. Again, it simply says "apartment." It doesn't say bedroom. It says, "searching for evidence." It doesn't list the items. That in light of that stark discrepancy, that if the arrestee is seeking to limit in those fashions, I think it's only reasonable to believe that that would indeed be reflected on the actual written and signed consent.
>
> That's particularly … true with somebody like Mr. Moseley who I think you have to view as certainly not somebody who's unsophisticated or without the understanding that getting consent in writing is obviously important[.]

¶18 The trial court is in the best position to judge the credibility of witnesses. *See* ***State v. Angiolo***, 186 Wis. 2d 488, 495, 520 N.W.2d 923 (Ct. App. 1994). When witness testimony conflicts, "the trial court is the ultimate arbiter of the credibility of witnesses." *See* ***id.*** We review determinations of credibility with deference. *See* ***Huehne v. Huehne***, 175 Wis. 2d 33, 43, 498 N.W.2d 870 (Ct. App. 1993). Upon reviewing the evidence in the record, we conclude that the trial court's factual findings were not clearly erroneous. The officers' testimony, together with Moseley's admission that he signed the consent form, amply supports the trial court's findings.

¶19 Because the evidence supports the conclusions that Moseley did not limit his consent, did not withdraw his consent at any time, and that the signed consent form was not obtained as a result of police misconduct, the motions to suppress the evidence obtained in the search were properly denied.

***In Camera* Review.**

¶20 Moseley also contends that he was entitled to an evaluation of T.H.'s counseling records because the records would have revealed that T.H. suffered from memory lapses and would have confirmed that T.H.'s relationship with Moseley was consensual, contrary to T.H.'s anticipated testimony at trial.

¶21 Psychological treatment records are privileged. WIS. STAT. § 905.04(2) (2009-10).[3] The statutorily created privilege must be balanced against the defendant's constitutional right to a fair trial. *See* ***State v. Robertson***, 2003 WI App 84, ¶12, 263 Wis. 2d 349, 661 N.W.2d 105; ***State v. Shiffra***, 175 Wis. 2d 600, 609, 499 N.W.2d 719 (Ct. App. 1993), *abrogated on other grounds by* ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298. A defendant seeking access to another's treatment records must make a preliminary evidentiary showing before the court conducts an *in camera* review. ***Green***, 253 Wis. 2d 356, ¶20. The defendant must show "a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. WISCONSIN STAT. § 905.04(2) provides:

> GENERAL RULE OF PRIVILEGE. 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, among the patient, the patient's physician, the patient's podiatrist, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, podiatrist, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

determination of guilt or innocence and is not merely cumulative." ***Id.***, ¶34. The defendant must explain how the evidence is relevant and how it supports the particular theory of defense. ***Id.***, ¶33. The evidentiary showing must be based on more than mere speculation or conjecture. ***Id.***

¶22 We review factual findings made by the trial court in this respect under the clearly erroneous standard. ***Id.***, ¶20. However, whether the preliminary evidentiary showing was sufficient to warrant an *in camera* review implicates a defendant's constitutional right to a fair trial and therefore presents a question of law that we review *de novo*. ***Id.*** If *in camera* review is granted, the records must contain independently probative, non-cumulative evidence before they will be released. *See* ***id.***, ¶34.

¶23 The central issue as to T.H. was whether T.H. consented to allowing Moseley to take nude photographs of her. The resolution of that question had nothing to do with whether the two had a consensual relationship. The trial court correctly noted that "the specific issue of what [T.H.] may have told a therapist, that is that she admits some consensual acts or not, at this point … I can only find that to be really a speculative venture that nobody knows necessarily what she said[.]"

¶24 We conclude that Moseley did not meet the burden required for an *in camera* inspection. Under ***Shiffra*** and ***Green***, Moseley was required to establish a specific factual basis demonstrating a reasonable likelihood that information in T.H.'s counseling records would be relevant to a determination of his guilt or innocence. *See* ***Green***, 253 Wis. 2d 356, ¶34. T.H. demonstrated to the jury herself that perhaps she did suffer from memory lapses by answering many questions with "I don't recall." What the counseling records would have added to

the demonstrated memory lapses, that was not merely cumulative, Moseley does not explain. Moseley has not shown that additional evidence of memory lapses—which he alleged would be found in the counseling records—was anything more than cumulative of what was demonstrated clearly to the jury during T.H.'s testimony.

¶25 With regard to T.H.'s conversations with her therapist, which Moseley claims would have shown that the two had a consensual, rather than a forced, sexual relationship, the trial court correctly stated that such information was unrelated to the charges and was unnecessary to impeach T.H. Moseley's defense was that he and T.H. had an ongoing consensual sexual relationship. He claimed that a review of her counseling records would impeach T.H.'s credibility. However, the "mere assertion … that … sexual assault was discussed during counseling and that the counseling records may contain statements that are inconsistent with other reports is insufficient to compel an *in camera* review." ***Id.***, ¶37 (emphasis added).

Trial Court Bias.

¶26 Finally, Moseley argues that the trial court was biased towards him, denying him his right to a fair trial. Moseley contends that this bias was demonstrated when the trial court made unduly harsh comments to his defense counsel in the presence of the jury while counsel was cross-examining T.H. During cross-examination, Moseley's defense counsel showed T.H. multiple photographs of T.H. in compromising positions. Because the photographs had been identified by T.H. prior to cross-examination, the trial court stated:

> [Trial Court]: … [Y]ou can appreciate the fact that if she has already been shown an offensive picture once, if there

> is no reason to show it again, you don't have to. If there is a good reason, I would like to hear it.
>
> ….
>
> [Trial Court]: [Defense counsel], anything else?
>
> [Defense Counsel]: I would show a video, so I don't know if she wants to take a break.
>
> [Trial Court]: Let's do this the humane way. Why don't we ask her if she–
>
> [Defense Counsel]: I would ask we talk about this outside the jury.
>
> [Trial Court]: Let's go to side bar.
>
> ….
>
> [Defense counsel]: [T.H.], do you know, or as you sit here now, do you know that there are videos taken of you?
>
> [T.H.]: No, I do not.
>
> [Defense Counsel]: And during those videos, you consented to sex, did you not?
>
> [Trial Court]: Well, that is a different question. This case is not about consent to sex. There are points at which you are making the point in front of the jury that the witness said she did not consent. You tried to impeach her on that. But you are not making a claim that these videos are of things we already talked about. The question for the jury is whether she consented to the taking of the video tapes. If you want to reframe your question, I will allow it.
>
> [Defense counsel]: Judge I'm entitled to impeach her. She said she was forced to do it and the videos showed she wasn't forced.
>
> [Trial court]: If you want to establish that and impeach her with the video, I will allow that after she leaves the stand.

¶27 Outside of the presence of the jury, defense counsel moved for a mistrial on the basis of trial court bias. The trial court denied the motion, stating that it was within its right to interject when defense counsel questioned the witness

aggressively, given the sensitivity of the subject of questioning. The trial court offered to read a curative instruction stating that the trial court was concerned for T.H.'s experience with the entire judicial process, not just with defense counsel. The following day, the trial court told the jury:

> Yesterday I made a comment about your process of having [T.H.] confirm these exhibits and you can see that was a painful process for her and I made the comment we were not doing that in a humane way. I didn't want to give you the impression I was blaming any of the attorneys for doing that in a way that was less than humane. That was my comment on our general legal process as lawyers and judges for having this done and you should not attach to my comments any kind of impression or anything like that that I have about whether Mr. Moseley is guilty or not guilty of any or all of these offenses or whether the State has proved its case beyond a reasonable doubt or any such matter.

¶28 Moseley's defense counsel did not object to the instruction at the time it was given; however, outside of the presence of the jury, Moseley's defense counsel told the trial court that the instruction was insufficient because it did not clarify that defense counsel was not the cause of the trial court's frustration during the cross-examination of T.H. The trial court disagreed.

¶29 On appeal, Moseley argues that the trial court's comments exhibited bias, implied that defense counsel was victimizing T.H., and implied that T.H.'s testimony was credible. Moseley also contends that the trial court referred to T.H. and M.K. as victims—once in the presence of the jury and once outside of the presence of the jury—thereby denying Moseley the right to a fair trial.

¶30 "Every person charged with a crime is entitled, under the federal and state constitutions, to a fair trial which includes the right to be tried by an impartial and unbiased judge." ***State v. Sarinske***, 91 Wis. 2d 14, 34, 280 N.W.2d 725 (1979). "When analyzing a judicial bias claim, we always presume that the judge

was fair, impartial, and capable of ignoring any biasing influences." ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. The presumption of impartiality is, however, rebuttable. ***Id.*** To determine "whether a defendant has rebutted the presumption in favor of the court's impartiality, we generally apply two tests, one subjective and one objective." ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. "Either sort of bias can violate a defendant's due process right to an impartial judge." ***Gudgeon***, 295 Wis. 2d 189, ¶20. "We first look to the challenged judge's own determination of whether the judge will be able to act impartially…. Next, we look to whether there are objective facts demonstrating that the judge was actually biased…. This requires that the judge actually treated the defendant unfairly." ***State v. Neuaone***, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 700 N.W.2d 298.

¶31 Moseley does not argue a specific form of bias, but rather argues that the cumulative effect of the trial court's comments in the presence of the jury exhibited partiality and influenced the jury's decision.

¶32 Our review of the record persuades us that Moseley has not overcome the presumption that the trial court was impartial. First, the record demonstrates that in denying Moseley's motion for a mistrial, the trial court subjectively determined that it was not biased. This determination is binding. *See* ***State v. McBride***, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994). Second, the record reflects the trial court's concern with the way in which the "general legal process" involving the answering of sensitive questions was affecting T.H and does not reflect objective bias. The trial court's comments to defense counsel were a result of defense counsel's aggressive questioning. "'[E]xpressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been

confirmed as … judges, sometimes [are] display[ed].'" ***State v. Pirtle***, 2011 WI App 89, ¶34, 334 Wis. 2d 211, 799 N.W.2d 492 (citation omitted).

¶33 Finally, the trial court's references to T.H. and M.K. as victims, in the context of this record, do not demonstrate trial court bias. Moseley points to two specific references. The first, made outside of the presence of the jury, was in response to defense counsel's motion for a mistrial after the cross-examination of T.H.:

> At a certain point, I think a court has a right to step in and say, let's see if we can do this without bruising the victim any more than she's been bruised.

Moseley argues that this statement "revealed the [trial] court's feelings about the case and the witness." The second reference Moseley complains of was made at the beginning of the State's closing argument:

> Among one of the people listening [to closing arguments] today is one of the victims, and victims in Wisconsin have a constitutional right to participate in the proceedings.

¶34 With regard to the first comment, we note that the jury could not have been influenced by a comment it did not hear. With regard to the second comment, an examination of the entire record shows that the comments were, in context, *de minimis*. The trial court's comment was made in the context of discussing the courtroom's acoustics, as the trial court was instructing the attorneys to speak close to their microphones. Doing so, the trial court stated, would allow those who had come to closing arguments to hear properly.

¶35 Further, the trial court clearly instructed the jurors to "disregard any … impression" of "[its] opinion as to whether … Mr. Moseley is guilty or not guilty." "Juries are presumed to follow the court's instructions." ***State v.***

Delgado, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490. Moseley, therefore, has not overcome the presumption that the trial court was impartial.

By the Court.—Judgments affirmed.

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