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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. BILLY WAYNE TOLLISON, Appellant.	2 CA-CR 2012-0010 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100583001

Honorable Jane Eikleberry, Judge
Honorable Sarah Simmons, Judge
Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

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M I L L E R, Judge.

¶1 Billy Wayne Tollison was convicted by a jury of indecent exposure to a minor under fifteen, two counts of sexual conduct with a minor under fifteen, five counts of child molestation, and seven counts of sexual exploitation of a minor under fifteen. He was sentenced to fifteen consecutive prison terms, including a term of life imprisonment. On appeal, Tollison argues three trial judges erred by failing to recuse, failing to remove for cause, failing to suppress evidence seized pursuant to a search warrant, and denying his motion to preclude showing child pornography videos to the jury. We affirm the convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Tollison's convictions. *See State v. Rivera*, 226 Ariz. 325, ¶ 2, 247 P.3d 560, 562 (App. 2011). In February 2010, C.B. told her mother that her maternal grandfather, Tollison, had been touching her inappropriately. C.B.'s friend, S.B., testified that Tollison had touched her inappropriately. Tollison's adopted daughter B.T. also testified to inappropriate touching and sexual conduct on the part of Tollison. Both C.B. and B.T. testified that Tollison showed them child pornography videos.

¶3 Police officers obtained search warrants and seized Tollison's computer and hard drives, as well as various compact discs and digital video discs. A forensic examiner found multiple videos depicting child pornography on the seized items.

¶4 Judge Eikleberry issued the search warrant and was initially assigned to the case. Judge Simmons was the superior court presiding judge who ruled on the motion to remove Judge Eikleberry. For reasons unrelated to the issues on appeal, the case was

transferred to Judge Godoy for trial. The jury convicted Tollison of all charges in the indictment. This appeal timely followed.

Discussion

Assignment of the Issuing Magistrate as the Trial Judge

¶5 Tollison argues that Judge Eikleberry should have recused herself from the case and, absent her voluntary decision to recuse, Judge Simmons, the presiding judge of the superior court, should have assigned it to another judge for cause. The allegation of bias is predicated solely on Judge Eikleberry's issuance of the search warrant. We review a trial court's ruling on claims of judicial bias for an abuse of discretion. *State v. Ramsey*, 211 Ariz. 529, ¶ 37, 124 P.3d 756, 768 (App. 2005). We start from the presumption that a trial judge is "free of bias and prejudice, and a defendant must show by a preponderance of the evidence that the trial judge was, in fact, biased." *Id.* (internal citation omitted).

¶6 Judge Eikleberry issued the warrant authorizing the search of Tollison's office. Immediately after the indictment was issued, Judge Eikleberry was assigned to the case. Tollison did not move for a change of judge as a matter of right pursuant to Rule 10.2, Ariz. R. Crim. P. Approximately sixteen months after Judge Eikleberry was assigned to the case, Tollison requested that she "recuse herself" because he intended to file a motion to suppress evidence seized pursuant to the search warrant.

¶7 At the hearing for Tollison's recusal request, Judge Eikleberry declined to recuse herself from the case, finding that issuing a warrant does not require recusal. Following the hearing, Tollison filed a motion for change of judge for cause pursuant to

Rule 10.1, Ariz. R. Crim. P. Judge Simmons summarily denied Tollison's motion as untimely and without merit.

¶8 Rule 10.1, Ariz. R. Crim. P., allows a party to file a motion, verified by affidavit, for a change of judge for cause within ten days after discovery that such grounds exist, but before the commencement of a hearing or trial. Ariz. R. Crim. P. 10.1(b). The Rule 10.1 motion must specifically allege grounds for the change. *Id.* The bias and prejudice necessary to disqualify a judge for cause must arise from an extra-judicial source and not from what a judge has done in her participation in the case. *See State v. Greenway*, 170 Ariz. 155, 162, 823 P.2d 22, 29 (1991).

¶9 We conclude neither of these judges abused her discretion. First, Tollison's Rule 10.1 motion was untimely. The parties were aware of the case assignment and had notice of the search warrant within a month of the indictment. They also appeared before Judge Eikleberry within thirty days of the case assignment. At the very latest, Tollison was aware of the alleged bias on July 18, 2011, when he filed his request for the trial judge to recuse herself. His Rule 10.1 motion, however, was not filed until sixteen days later, on August 3, 2011, well outside the ten-day limit. *See* Ariz. R. Crim. P. 10.1(b). Furthermore, Tollison's motion for change of judge for cause was filed after the commencement of several hearings and was not verified by affidavit, contrary to the procedure outlined in Rule 10.1(b).

¶10 Moreover, even if Tollison's Rule 10.1 motion had been timely filed, it would have failed on its merits. He argued to both Judges Eikleberry and Simmons that a judge who issues a search warrant becomes a "part of the investigation." He conceded

that a judge's issuance of a warrant does not mean she would be unfair in subsequent proceedings, but he contended that her assignment as trial judge might create the "appearance of impropriety." Tollison also argued that allowing the same judge to issue a warrant and preside over the case may erode confidence in the judiciary, in contravention of Rule 1.2 of the Arizona Code of Judicial Conduct. That rule provides: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Rule 1.2, Ariz. Code of Judicial Conduct, Ariz. R. Sup. Ct. 81.

¶11 Judge Eikleberry directly addressed Tollison's concerns, as well as the high standards of Rule 1.2 in her oral ruling at the hearing:

> Further, you know, we all make mistakes sometimes. If I approved a warrant I shouldn't have approved, I am going to be the first to admit I made a mistake or in a case where there's an allegation that the law enforcement exceeded the scope of the warrant, I am going to be the person who is most likely to jump on them for that. Now, there's not going to be any going back and remembering the hearing. I have no recollection of the hearing. I have no recollection of what was meant. All I can do is read the plain words of the warrant and decide whether the scope of it was exceeded or not.

There was no evidence of actual bias by Judge Eikleberry.

¶12 The appearance of impartiality is also lacking. The bias and prejudice necessary to disqualify a judge for cause must arise from an extra-judicial source and not from what a judge has done in her participation in the case. *Greenway*, 170 Ariz. at 162, 823 P.2d at 29. Here, however, the alleged appearance of impartiality arises directly from Judge Eikleberry's participation in the case; that is, her issuance of a search warrant

coupled with her presiding over the subsequent suppression hearing. Tollison cites no authority, and we aware of none, that prohibits a trial judge from issuing a search warrant and presiding over a subsequent suppression hearing. "[A] magistrate does not 'wholly abandon' his or her judicial role unless there is evidence of systemic or patent partiality." *State v. Hyde*, 186 Ariz. 252, 274-75, 921 P.2d 655, 677-78 (1996); *see State v. Stanley*, 167 Ariz. 519, 526, 809 P.2d 944, 951 (1991) (holding, based on "unique facts" presented, that magistrate who "visit[ed] the crime scene to study the affidavits" remained neutral and detached).

¶13 Thus, Tollison failed to present legally sufficient grounds for a change of judge in a motion that was untimely and failed to comply with the requisite procedure under Rule 10.1(b). In addition, as Tollison's motion did not allege facts "which, if taken as true, would entitle the defendant to relief," no hearing was required. *State v. Eastlack*, 180 Ariz. 243, 255, 883 P.2d 999, 1011 (1994).

¶14 In summary, Judge Eikleberry did not abuse her discretion in declining to voluntarily recuse herself from the case, nor did Judge Simmons abuse her discretion by denying the Rule 10.1 motion without a hearing.

Suppression Hearing

¶15 Tollison next argues the trial court erred in failing to suppress evidence that was seized outside the scope of the search warrant. "In reviewing a trial court's ruling on a motion to suppress, we defer to the trial court with respect to the factual determinations it made but review the court's legal conclusions de novo." *State v. Estrella*, 230 Ariz. 401, ¶ 5, 286 P.3d 150, 152 (App. 2012); *see also State v. Moody*, 208 Ariz. 424, ¶ 62, 94

P.3d 1119, 1140 (2004) ("We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo.") (citation omitted). *State v. Manuel*, 229 Ariz. 1, ¶ 11, 270 P.3d 828, 831 (2011). We find the trial court did not err in denying Tollison's motion to suppress.

¶16 The Fourth Amendment to the United States Constitution requires that a search warrant particularly describe the place to be searched and the things to be seized. *See Maryland v. Garrison*, 480 U.S. 79, 84 (1987). The search warrant in question provided that "the search . . . be limited to the unattached garage, that Billy Wayne Tollison maintains a private office in." Upon executing the search warrant, it was discovered that the garage was connected to a shed by a "breezeway." The "breezeway" provided direct access from the main garage to an "attachment." This garage "attachment" contained two rooms, one of which served as Tollison's office. Tollison moved to suppress evidence collected from this office, arguing the search of the shed was beyond the scope of the warrant. The trial judge denied Tollison's motion, finding the search was conducted in good faith and that "the shed had been altered to make it a part of the garage structure."

¶17 Tollison largely relies on *State v. Adams*, 197 Ariz. 569, 5 P.3d 903 (App. 2000) and *People v. Sanchez*, 548 N.E.2d 513 (Ill. App. Ct. 1989) to support this argument. The facts of this case, however, distinguish it from both *Adams* and *Sanchez*.

¶18 In *Adams*, we determined that a warrant authorizing the search of a theater did not permit police officers to enter an adjoining personal apartment that shared a

common address but had a separate entry, where police officers knew or should have known the theater owner lived on the premises but did not mention the apartment's existence in the warrant. *Adams*, 197 Ariz. 569, ¶ 25, 5 P.3d at 908. We went on to find that "extending . . . a 'commercial' warrant to a private residence violates the Fourth Amendment's particularity requirement and the special role of the home in Fourth Amendment jurisprudence." *Id.* ¶ 27.

¶19 Here, a commercial warrant was not extended to include a private residence. The warrant explicitly sought authorization to search Tollison's "private office." In addition, the police, to the best of their knowledge, believed Tollison's private office was located in an unattached garage. Furthermore, while the shed or garage attachment might have once been considered a separate structure, Tollison, through his alterations, had incorporated the shed as part of the unattached garage, such that there can be no distinction between the two structures under the Fourth Amendment's particularity requirement.

¶20 Tollison cites *Sanchez*, a case not binding on this court, for the proposition that "connecting two structures by creating a passageway between them does not convert them into a single structure." 548 N.E.2d at 516-17. In *Sanchez*, the two structures at issue were distinct commercial entities, each with a separate address. *Id.* Here, the garage and attached shed are not distinct commercial entities and do not have separate addresses. The combined structure, in which Tollison's private office is located, is designated by a single address. This address was properly identified on the warrant and the trial court did not err in denying Tollison's suppression motion.

Motion to Preclude Child Pornography Videos

¶21 Next, Tollison argues the trial court erred in denying his motion to preclude showing child pornography videos to the jury on two grounds: he offered to stipulate to the contents of the videos and they were unfairly prejudicial. Judge Godoy found the state had valid reasons not to stipulate to the content of the videos, the videos were found admissible under Rule 404 by Judge Eickleberry, and the probative value of the child pornography was not outweighed by the danger of unfair prejudice. We review the admissibility of evidence for a clear abuse of discretion. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 7, 186 P.3d 33, 35 (App. 2008); *see also State v. Hampton*, 213 Ariz. 167, ¶ 17, 140 P.3d 950, 956 (2006).

¶22 Tollison relies on *State v. Leonard*, 151 Ariz. 1, 8, 725 P.2d 493, 500 (App. 1986), for the proposition that potentially prejudicial evidence should be precluded if the defendant proffers a stipulation that meets a specific, necessary element within the state's burden of proof, and the state's refusal to accept the stipulation burdens the trial with evidence on an uncontested issue. We conclude that the stipulation arguably met the first prong, but failed the second prong.

¶23 The sexual exploitation charges required the state to prove in relevant part that Tollison knowingly possessed a visual depiction of a minor under fifteen with exposed genitals or engaging in sexual conduct. *See* A.R.S. § 13-3553. Tollison offered to stipulate that the digital media found on his computer depicted minors in sexual displays or engaging in sexual conduct. He demanded, however, as was his right, that the state prove to a jury that he knowingly possessed the child pornography.

¶24 The state correctly points out that a verbal description of a photograph or video does not necessarily convey to the jury the size, clarity, or detail of the images. These factors could be relevant in the determination whether Tollison was mistaken in his belief about the content or, alternatively, that he knowingly possessed child pornography. The trial court considered Tollison's offer to stipulate against all the elements the state was required to prove before deciding to reject the stipulation. The trial court met the requirements of *Leonard*.

¶25 Tollison also argues the videos were more prejudicial than probative under Rule 403, citing to *State v. Coghill*, 216 Ariz. 578, 169 P.3d 942 (App. 2007) for the proposition that "in some cases it is appropriate to preclude showing videos containing child pornography to the jury." In *Coghill*, however, we stated that the trial court retained discretion to preclude the showing of child pornography videos and that "an offered stipulation is only one factor to consider in that determination." *Coghill*, 216 Ariz. 578, ¶ 38, 169 P.3d 942 at 951. Further we did not ultimately resolve the admissibility of child pornography in that case. *Id*. (declining to reach question of whether stipulation there required preclusion because issue not properly raised before trial court). Thus, Arizona courts have not addressed this precise situation, particularly as it pertains to child pornography.

¶26 Federal courts have addressed the Rule 403 balancing test in light of a defendant's proffered stipulation. In *Old Chief*, 519 U.S. 172 (1997), the Supreme Court recognized that a defendant cannot typically force the state to use "second best" evidence, holding the general rule is that "the prosecution is entitled to prove its case free from any

defendant's option to stipulate the evidence away" because "the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story." *Id.* at 189-90.

¶27 In light of *Old Chief*, many federal courts have concluded that Rule 403 does not require the exclusion of child pornography photographs and videos when a defendant proposes to admit or stipulate to the contents. *See, e.g.*, *United States v. Alfaro-Moncada*, 607 F.3d 720, 734 (11th Cir. 2010); *United States v. Polouizzi*, 564 F.3d 142, 152-53 (2d Cir. 2009); *United States v. Ganoe*, 538 F.3d 1117, 1123-24 (9th Cir. 2008); *United States v. Morales-Aldahondo*, 524 F.3d 115, 120 (1st Cir. 2008); *United States v. Campos*, 221 F.3d 1143, 1148-49 (10th Cir. 2000).

¶28 Here, the physical handling of the discs, together with what was immediately apparent with the opening images, allowed the state to form a narrative that falls within the general rule stated in *Old Chief*. The jury could also use the physical exhibits to understand how the digital images were found by law enforcement, as well as the method and location of storage of the discs in Tollison's office. All of these aspects of the evidence are probative on the element of knowing possession. The child pornography was also admissible for the legitimate purpose of showing an aberrant sexual propensity under Rule 404(b) and (c). Finally, and potentially most important, the jury panel was screened during voir dire for persons who would be unduly upset by the videos or would return a guilty verdict solely based on the content of the videos.

¶29 The trial court did not abuse its discretion in its conclusion that the probative value of the evidence was outweighed by the danger of unfair prejudice.

Disposition

¶30 For the reasons stated above, Tollison's convictions and sentences are affirmed.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge