FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-3432

KEVIN J. KOELEMIJ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Leon County.
Angela C. Dempsey, Judge.

December 10, 2019

JAY, J.

In this appeal from his conviction and sentence for sexual battery on a physically helpless victim, Appellant claims that the trial court erred when it (1) denied his motions for new trial and disqualification on the ground that the court improperly admonished Appellant and defense counsel in front of the jury and (2) considered impermissible factors at sentencing. We affirm as to the second claim without discussion. We also affirm as to the first claim for the reasons that follow.

I.

During the State's direct examination of the victim at trial, the following transpired:

Q And do you see the person who you know to be Kevin Koelemij in the courtroom here today?

A Yes, ma'am.

Q Will you please describe something that he's wearing—

THE COURT: Sit down.

[DEFENSE COUNSEL]: I asked him to stand up, Judge, for identification.

THE COURT: Okay. Well, I'm telling—I'm ordering him—

[DEFENSE COUNSEL]: I understand. I just didn't want the Court to—

THE COURT: Okay. I don't need to hear anything from you.

[DEFENSE COUNSEL]: Right.

At the conclusion of direct examination, defense counsel requested to make an objection for the record, but the court responded that the objection would have to be made at a later time.

Following defense counsel's cross-examination of the victim, the following occurred outside the presence of the jury:

[DEFENSE COUNSEL]: Okay. I want to make it clear to the Court that I instructed Mr. Koelemij, as I do in every case, the hundreds of cases I've tried, when it comes to identification to make sure there's no question of identification or anything else. And I'm unaware of this Court and the number of trials I've had before it, but I told Mr. Koelemij to stand.

THE COURT: I know. You said that.

[DEFENSE COUNSEL]: Okay. But the Court's demeanor in front of the jury was troubling to me. I enjoy practicing before this Court, but when the Court yells directly at my client and then when I respond, the Court's demeanor is less than appropriate, in my—in my professional opinion, I don't think that is biding well for the Court, I don't think it's biding well for the jurors, I don't think it is biding well for the defendant.

That having been said, **I don't think it's affected the outcome of this trial**, in all candor, to put that on

> the record, but I'd like to know what it is I did to solicit that from the Court in front of the jury. I have no problem with this Court dressing me down, but in front of the jury is what concerns me.
>
> THE COURT: Okay. Well, it's my responsibility to control the flow of the trial, and the only time anyone should be standing is when the lawyers are addressing the Court or questioning witnesses.
>
> [DEFENSE COUNSEL]: I will follow that from this point forward, Your Honor.
>
> THE COURT: Okay. And I never yelled at anybody.
>
> [DEFENSE COUNSEL]: Well, I disagree, Your Honor, but that's your opinion. I'll respect it. But I—I don't raise these issues. In fact, I've been practicing for over 20 years; I've never raised this issue with any judge in this jurisdiction. But today I saw a lot of anger, your voice was raised, you yelled at my client.

(Emphasis added).

After the jury returned a verdict finding Appellant guilty of sexual battery on a physically helpless victim, Appellant filed a verified motion to disqualify pursuant to Florida Rule of Judicial Administration 2.330(d). The motion stated in pertinent part:

> In conclusion, the combination of the following creates a well-founded fear of judicial bias from the perspective of a reasonably prudent defendant: this Court's admonishment of Defendant and counsel in the presence of the jury, the Judge's seemingly unrelated reference to her previous admonishments of Defendant, and the extrajudicial knowledge this Court possesses regarding the Defendant. The notably angry reaction to the commonplace act of having a defendant stand up during an identification stage was beyond what was necessary to control the courtroom and it merely evidenced bias and prejudice against Defendant when considered in the complete context of the trial. The well-founded fear of bias and prejudice possessed by Defendant is further amplified by the broad discretion that a trial judge is afforded in sentencing hearings. An

> order granting disqualification would remove the appearance of judicial bias from the reasonable perspective of Defendant.

The trial court denied the motion as legally insufficient.

In addition, Appellant filed a motion for new trial. Among other things, the motion stated:

> Lastly, during the identification phase of the State's direct examination of . . . the alleged victim, defense counsel quietly directed Defendant to stand up so that the record would properly reflect this identification. Defendant silently stood up following this direction. This Court promptly yelled at Defendant to sit down, using an aggressive tone of voice toward Defendant in front of the jury. After discussing a separate evidentiary matter outside of the presence of the jury, defense counsel placed on the record that the Court's demeanor toward Defendant in front of the jury was troubling. This Court then repeated that the judge controls the courtroom, and further referenced the previous day when Defendant was late to jury selection and was wearing lapel pins which she believed to constituted [sic] signals to the potential jurors. The tone of voice used in admonishing Defendant and defense counsel during the jury trial on July 3rd far exceeded the comments or actions necessary to control the courtroom. The response to Defendant's silent, benign act of standing up was wholly out of proportion and the fact that it occurred in front of the jury contributed to Defendant not receiving a fair and impartial trial.

The trial court denied the motion, adjudicated Appellant guilty, and sentenced him to fifteen years in prison followed by five years of sex offender probation. This appeal followed.

II.

Although the better practice is to excuse the jury before admonishing an attorney in open court, reproving defense counsel in the jury's presence "does not, in itself, constitute reversible error." *Paramore v. State*, 229 So. 2d 855, 860 (Fla. 1969), *vacated*

in part on other grounds, 408 U.S. 935 (1972). "[I]n order to constitute reversible error, [reprimands] must prejudice the party whose counsel was rebuked." *Id*. "Whether a new trial should be granted under such circumstances is subject to the trial judge's discretion, as [the trial court] is in a better position to determine the effect of such rebuke or reprimand." *Id.* "However, reversible error occurs when the judge's comments and conduct 'so severely call into question an attorney's level of advocacy and sense of fairness' that they create a prejudicial effect on the defendant." *London v. State*, 127 So. 3d 688, 689 (Fla. 4th DCA 2013) (*quoting Wilkerson v. State*, 510 So. 1253, 1254 (Fla. 1st DCA 1987)).

Contrary to Appellant's assertion on appeal, the trial court did not abuse its discretion in denying Appellant's motion for new trial on the ground that the trial court improperly reprimanded Appellant and defense counsel in front of the jury. Unrelated to a question or directive from the court, Appellant stood up during the State's examination of the victim. Even though defense counsel asserted that he told Appellant to stand to avoid any "question of identification," given the context, it was eminently reasonable for the trial court to order Appellant to retake his seat. Although the court may have raised its voice, the court's response was in accord with its duty to maintain order in the courtroom. Based on the disruptive nature of this unanticipated event, counsel's reprimand was not unexpected, nor improper. *See London*, 127 So. 3d at 689-90 (holding that the trial court's admonishment of defense counsel was "not improper" where the court prevented an investigator from reading a "police report into the record by stating: 'No, she cannot read it directly into the record, you must ask questions . . . that violates Florida law, police reports are not admissible into evidence. Do I need to show you the Evidence Code?'"); *see also Todd v. Stegal*, 40 F. App'x 25, 27 (6th Cir. 2002) ("The trial judge undeniably expressed some impatience and frustration with defense counsel during the trial, but his expressions were generally in response to defense counsel's combative style and his failure to accept the court's direction. The reprimands were not out of line, nor were they substantially adverse to the defendant himself.").

Moreover, when defense counsel initially addressed the court about the reprimand, he conceded that he did not believe that the

event had "affected the outcome" of the trial—i.e., he admitted that the admonishment had not unjustly prejudiced his client. It was not until after the jury returned its guilty verdict that counsel moved for a new trial on the ground that Appellant was prejudiced by the court's reproach. Under these circumstances, the court's admonishment did not prejudice Appellant. *See Kelvin v. State*, 610 So. 2d 1359, 1366 (Fla. 1st DCA 1992) (holding that the trial court's reprimand of defense counsel in the presence of the jury for being two minutes late after a break was not sufficiently egregious to constitute reversible error); *see also United States v. Marquez-Perez*, 835 F.3d 153, 161 (1st Cir. 2016) ("[A] judge's mere displeasure at an attorney's litigation conduct is unlikely to prejudice a party."); *Bowman v. Winn*, No. 2:18-CV-11822, 2019 WL 1977417, at *7 (E.D. Mich. May 3, 2019) ("Any expression of impatience and/or frustration with defense counsel in front of the jury was limited to defense counsel's repetitive questioning and disregard for the court's evidentiary rulings; thus, the judge's conduct was not prejudicial, such as to deprive petitioner of a fair trial."); *McDonald v. State*, 578 So. 2d So. 2d 371, 374 (Fla. 1st DCA 1991) ("While we note that the better practice is to issue any such warning out of the presence of the jury, we do not find that the error is reversible given the nature of defense counsel's remarks, and the comparatively mild tenor of the rebuke.").

The effect of the court's reprimand was further minimized by the court's instructions to the jury. Before deliberations began, the court provided the following instructions: "Deciding a verdict is exclusively your job. I cannot participate in that decision in any way. **Please disregard anything I have may said or done that made you think I preferred one verdict over another.**" (Emphasis added). "In assessing the impact of a judge's actions, jury instructions can be a means of allaying potential prejudice." *Logue v. Dore*, 103 F.3d 1040, 1046-47 (1st Cir. 1997) (citing *United States v. Polito*, 856 F.2d 414, 419 (1st Cir. 1988)). "Absent a finding to the contrary, juries are presumed to follow the instructions given them." *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932, 942 (Fla. 2000). Accordingly, the court's instructions cured "any conceivable prejudice." *United States v. Candelaria-Silva*, 166 F.3d 19, 36 (1st Cir. 1999); *see also Bowman,* 2019 WL 1977417 at *7 ("[A]ny prejudice was also cured by the fact that the judge instructed the jury that her rulings were not

evidence, and further advised the jurors that if they believed she had an opinion about how they should decide the case, that they should disregard that opinion and that they were the only judges of the facts.").

III.

A ruling on a motion to disqualify is reviewed under a de novo standard to determine whether the allegations of the motion are legally sufficient. *Braddy v. State*, 111 So. 3d 810, 833-34 (Fla. 2012). "A mere 'subjective fear' of bias will not be legally sufficient; rather, the fear must be objectively reasonable." *Arbelaez v. State*, 898 So.2d 25, 41 (Fla. 2005). In order to constitute grounds for disqualification of the trial judge, a reprimand must create in the defendant a reasonable fear that he would not receive a fair trial at the hands of the judge. *Gates v. State*, 784 So. 2d 1235, 1237 (Fla. 2d DCA 2001).

"A trial judge's expression of dissatisfaction with counsel or a client's behavior alone does not give rise to a reasonable belief that the trial judge is biased and the client cannot receive a fair trial." *Ellis v. Henning*, 678 So. 2d 825, 827 (Fla. 4th DCA 1996). Notably, the United States Supreme Court has explained:

> [J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. . . . Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.

Liteky v. United States, 510 U.S. 540, 555-56 (1994). The Fourth Circuit has further elaborated:

> The high bar set by *Liteky* for predispositional recusals makes good sense. If it were otherwise—if strong views on a matter were disqualifying—then a judge would hardly have the freedom to be a judge. . . . This is not to say judicial distemper is somehow admirable. It is not. But the alternative of purging through recusal motions all those with strong or strongly stated beliefs not only threatens limitless gamesmanship but the fearless administration of justice itself.

Belue v. Leventhal, 640 F.3d 567, 573-74 (4th Cir. 2011); *see also Gordon v. Lafler*, 710 F. App'x 654, 663 (6th Cir. 2017) ("Though trial by an impartial judge is a core right, we must consider the judge's alleged bias in light of his or her role in the courtroom. During a jury trial, 'the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct.'") (quoting *Quercia v. United States*, 289 U.S. 466, 469 (1933)); *Todd*, 40 F. App'x at 27 ("Trial judges must be given wide latitude in conducting their trials. . . . [A] trial judge has a duty 'to conduct the trial in an orderly fashion, to insure that the issues are not obscured and to act at all times with a view toward eliciting the truth.'")(quoting *United States v. Tilton*, 714 F.2d 642, 643 (6th Cir. 1983)).

Different from Appellant's assertion on appeal, we conclude that the trial court properly denied Appellant's motion for disqualification. The court's admonishment was directly related to an unanticipated event—standing in the courtroom—that disrupted an ongoing trial. As the court explained, it issued the reprimand in an effort to maintain order. *See United States v. Anderson*, 577 F.2d 258, 260 (5th Cir. 1978) ("The trial court had not only the right but a duty to assure that the trial was conducted in an orderly fashion."). Even if the court raised its voice, the court's attempt to control the courtroom did not give rise to a reasonable fear that the court was biased and that Appellant would not receive a fair trial.[*] *See United States v. Collier*, 932 F.3d

[*]Appellant supplemented the record with an audio/video recording of the trial that included the admonishment in question.

1067, 1078-79 (8th Cir. 2019) (holding that the trial court did not err in denying defendant's motions for mistrial and recusal where, although the transcript showed that the court at times spoke "harshly" to defendant, the court's comments, at most, fell under the category of impatience, dissatisfaction, and annoyance); *United States v. Rodriguez-Rivera*, 473 F.3d 21, 29 (1st Cir. 2007) ("Although comments made in the presence of the jury generally have a greater potential for unfairness, 'appellate courts cannot expect that a trial judge, under siege, will function as a bloodless automaton.'") (citation omitted); *Braddy*, 111 So. 3d at 834 (holding that the trial judge's comments were not legally sufficient to require disqualification where the judge responded to the defendant's interruptions with statements such as "[e]xcuse me. I'm not talking to you," "this isn't a cat fight," and "[w]e went through this already. Stop it."); *Fetzner v. State*, 219 So. 3d 834, 837-38 (Fla. 4th DCA 2017) (affirming the denial of defendant's motion for disqualification where the trial judge's alleged conduct, which included raising her voice at defense counsel, scolding defense counsel, pointing a finger at defense counsel in clear view of the jury, and threatening one of the defense attorneys at a sidebar conference that the attorney would be required to remain seated if she continued to speak on the record, would not cause a reasonably prudent person in the defendant's position to fear that he could not get a fair and impartial trial); *Ellis*, 678 So. 2d at 827 (affirming the denial of a motion for disqualification that alleged that the trial judge treated plaintiff's counsel with "disdain and obvious animosity" and addressed counsel in a "hostile angry manner and in a tone, expression, and body language that evinced anger, hostility, and personal contempt").

IV.

In conclusion, the trial court correctly denied Appellant's motion for new trial because the court's admonishment of Appellant and defense counsel in front of the jury was not improper and did not prejudice Appellant. Likewise, the trial court properly denied Appellant's motion for disqualification as legally insufficient because the court's reprimand did not give rise to a reasonable belief that the court was biased and that Appellant would not receive a fair trial. Accordingly, we affirm Appellant's conviction and sentence.

AFFIRMED.

WOLF and KELSEY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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