Third District Court of Appeal

State of Florida

Opinion filed April 29, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1592
Lower Tribunal No. 15-38-A-P

Keith Knespler,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Monroe County, Luis M. Garcia, Judge.

Carlos J. Martinez, Public Defender, and Robert Kalter, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Linda Katz, Assistant Attorney General, for appellee.

Before LINDSEY, HENDON and GORDO, JJ.

GORDO, J.

Keith Knespler appeals his convictions and sentences for burglary of a dwelling and grand theft. Mr. Knespler argues that the trial court erred in denying his motions to disqualify the Monroe County State Attorney's Office and in denying his motion for judgment of acquittal as to the charge of felony grand theft. As is explained further below, we affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

On March 10, 2015, the State Attorney's Office for the Sixteenth Judicial Circuit of Florida, in and for Monroe County, charged Mr. Knespler with one count of burglary of a dwelling and one count of grand theft over $20,000. As a result, Mr. Knespler consulted with attorney Dennis W. Ward, who was then in private practice. During that consultation, Mr. Knespler shared confidential information with Mr. Ward regarding the case. Mr. Ward ultimately declined to represent Mr. Knespler.

In November 2016, Mr. Ward was elected as the State Attorney for the Sixteenth Judicial Circuit. Prior to trial, Mr. Knespler requested that the State Attorney's Office recuse itself from his case. The office denied the request. Mr. Ward's name then appeared on the pleadings filed in Mr. Knespler's case—the signature block stated that the pleadings were "respectfully submitted" by Gail F. Conolly on behalf of "Dennis W. Ward, State Attorney." Thereafter, Mr. Knespler

filed a motion to disqualify the entire State Attorney's Office from prosecuting him, asserting he provided confidential information to Mr. Ward during the consultation, and therefore, the State Attorney's Office presented a conflict of interest in the prosecution of the case.

During the hearing on Mr. Knespler's motion to disqualify, the State called Mr. Ward as a witness. On direct, Mr. Ward testified that while in private practice, Mr. Knespler consulted with him about the pending charges, but he did not take the case. Mr. Ward remembered some of the communications he had with Mr. Knespler during the consultation. He testified that he had not provided any prejudicial information gained from the consultation to the prosecutor assigned to Mr. Knespler's case, Ms. Conolly, or to any other prosecutor or person in the office, and that he had not assisted in any capacity in the prosecution of Mr. Knespler's case.

On cross-examination, Mr. Ward testified he met with Mr. Knespler for fifteen to twenty minutes regarding his criminal case and, during the consultation, Mr. Knespler divulged confidential "information that could be used to his disadvantage." Following the consultation, Mr. Ward declined to represent Mr. Knespler because he knew one of the victims in the case. Mr. Knespler's counsel asked Mr. Ward whether it is possible he told Mr. Knespler that he was declining to represent him because he did not think he could obtain a better result than the current plea offer extended by the State. In response, Mr. Ward testified that it is possible.

During direct and cross-examination, Mr. Ward also testified as to the makeup of the Plantation Key Office, which was the office prosecuting Mr. Knespler.[1] The Plantation Key Office consists of three prosecutors, including Ms. Conolly, who is the Division Chief of the Plantation Key Office. Ms. Connolly reports to Mr. Ward and to Mr. Wilson, who is a Chief Assistant State Attorney. At the conclusion of the hearing, the trial court reserved ruling. Thereafter, the trial court entered an order denying Mr. Knespler's motion to disqualify the State Attorney's Office.

Following the denial of the motion to disqualify, Mr. Knespler was tried before a jury by Ms. Conolly of the Plantation Key Office. The defense renewed the motion to disqualify at the conclusion of the State's case-in-chief, which the trial court denied. Mr. Knespler then testified and, at the conclusion of the defense's case, the defense once again renewed the motion to disqualify, which the trial court denied. Each time the defense renewed its motion to disqualify, it simply made a pro forma renewal but did not raise any new or additional factual grounds or legal arguments in support of its motion.

The jury found Mr. Knespler guilty as charged, and he was later sentenced as a prison releasee reoffender. Mr. Knespler's appeal followed. During the pendency

[1] The State Attorney's Office for the Sixteenth Judicial Circuit maintains three offices—Key West Office, Marathon Office, and Plantation Key Office. The Upper Keys Criminal Division is known as the Plantation Key Office. About Us, Office of the State Attorney, 16th Judicial Circuit Florida, https://www.keyssao.org/197/About-Us (last visited April 28, 2020).

of this appeal, the parties entered into a stipulation pursuant to Florida Rule of Appellate Procedure 9.200(f)(1) "to correct factual omissions in the record on appeal." The stipulation stated, in relevant part, as follows:

> 1. Dennis Ward was present as a spectator at various times throughout the trial and sat in the rear of the courtroom gallery. He did not participate in the trial. Nor did he communicate with Assistant State Attorney Gail Conolly, who was prosecuting the case, during the trial.
>
> 2. Mr. Ward was present as a spectator at the sentencing hearing and sat in the rear of the courtroom gallery. He did not participate in the sentencing hearing. Nor did he communicate with Assistant State Attorney Gail Conolly during the sentencing hearing.

LEGAL ANALYSIS

I. Denial of Motion to Disqualify the State Attorney's Office

"Denial of a motion to disqualify a State Attorney's office is reviewed for abuse of discretion." Hayward v. State, 183 So. 3d 286, 322 (Fla. 2015) (citing Rogers v. State, 783 So. 2d 980, 991 (Fla. 2001)). Disqualification is evaluated on a case-by-case basis. Id. (quoting Rogers, 783 So. 2d at 991). Despite the extraordinary facts of this case, we cannot conclude that the trial court erred in denying Mr. Knespler's motion to disqualify the State Attorney's Office.

There is "a distinction between private law firms and government prosecutorial offices."[2] State v. Fitzpatrick, 464 So. 2d 1185, 1187 (Fla. 1985). As

[2] See R. Regulating Fla. Bar. 4-1.18(a) ("A person who consults with a lawyer about

a result of the distinction, the Florida Supreme Court has recited that "imputed disqualification of the entire state attorney's office is unnecessary when the record establishes that the disqualified attorney has neither [1] provided prejudicial information relating to the pending criminal charge nor [2] has personally assisted, in any capacity, in the prosecution of the charge." Id. at 1188.

In the instant case, it is undisputed that Mr. Ward, himself, was personally disqualified from prosecuting Mr. Knespler. However, there is no per se rule requiring the disqualification of the entire State Attorney's Office based solely on the fact that Mr. Ward subsequently became the State Attorney for the Sixteenth Judicial Circuit following the consultation. See Reaves v. State, 574 So. 2d 105, 107 (Fla. 1991) (stating that the "entire state attorney's office may be disqualified only if the individual prosecutor is not properly screened from direct or indirect participation in, or discussion of the case"); Fitzpatrick, 464 So. 2d at 1188 (noting that the "imputed disqualification of the entire state attorney's office is unnecessary

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the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client."). Rule 4-1.18(b) of the Rules Regulating the Florida Bar provides that "[e]ven when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client may not use or reveal that information[.]" Further, rule 4-1.18(c) provides that a lawyer "may not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be used to the disadvantage of that person in the matter[.]" If a lawyer is disqualified from representation under rule 4-1.18(c), "no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter[.]"

when the record establishes that the disqualified attorney has neither provided prejudicial information relating to the pending criminal charge nor has personally assisted, in any capacity, in the prosecution of the charge"); see also Stabile v. State, 790 So. 2d 1235, 1237 (Fla. 5th DCA 2001) (holding that "mere supervisory position" of the state attorney was "not sufficient in itself to require disqualification of the entire office staff").

Mr. Ward's unrefuted testimony at the pretrial hearing showed that, although Ms. Conolly reports to Mr. Ward, he had not provided any prejudicial information gained from Mr. Knespler's consultation to Ms. Conolly, any other prosecutor, or anyone else in the office, and prior to the hearing, Mr. Ward had not assisted in any capacity in the prosecution of Mr. Knespler's case. Thus, based on Mr. Ward's unrefuted testimony at the hearing on Mr. Knespler's motion to disqualify, we conclude the trial court did not abuse its discretion by denying Mr. Knespler's pretrial motion to disqualify the entire State Attorney's Office.[3] See Reaves, 574 So. 2d at 107; Fitzpatrick, 464 So. 2d at 1188.

We now turn to whether the trial court abused its discretion by denying defense counsel's renewed motions to disqualify the entire State Attorney's Office made during Mr. Knespler's trial. We conclude it did not as we are bound by the

[3] All three judges of this panel agree that the trial court's denial of the pretrial motion for disqualification was not an abuse of discretion.

parties' stipulation that Mr. Ward did not communicate with Ms. Connolly during the trial and sentencing hearing, and that Mr. Ward did not participate in the proceedings, despite his presence at various critical stages of the trial. Further, the issue of Mr. Ward's presence at trial was not noted on the record and was not properly preserved for appellate review.

The stipulation entered into by the parties unequivocally forecloses the defense's claim because it establishes, for purposes of this appeal, that (1) Mr. Ward did not communicate with Ms. Connolly and (2) he did not participate in the trial or sentencing hearing.[4] See Fitzpatrick, 464 So. 2d at 1188. The stipulation states that Mr. Ward was merely a "spectator" at the trial and sentencing hearing who did not participate in those proceedings. This stipulation in combination with Mr. Ward's pretrial testimony that he had not given Ms. Conolly any of the confidential information learned during the consultation means that Mr. Ward's presence at trial, under the facts of this case, does not require the disqualification of the entire State Attorney's Office.

[4] While defendant argues that the appearance of impropriety is sufficient to warrant disqualification, the Florida Supreme Court has held otherwise. Bogle v. State, 655 So. 2d 1103, 1106 (Fla. 1995) (finding that the appearance of impropriety is only sufficient to warrant disqualification where either prejudicial information has been exchanged or the disqualified attorney personally assisted in the prosecution (citing Castro v. State, 597 So. 2d 259 (Fla. 1992); Reaves v. State, 574 So. 2d 105 (Fla. 1991))).

We note, however, that we are troubled by Mr. Ward's actions after the trial court denied the defense's disqualification motion, specifically, his voluntary attendance at Mr. Knespler's trial and the sentencing hearing. The presence at trial of the State Attorney with whom a defendant had previously consulted and shared confidential information for the same offense can potentially have a chilling effect.[5] Still, we are bound by the record and the stipulation between the parties.

Although the defense renewed its motion to disqualify the State Attorney's Office both at the close of the State's case and at the close of the defense case, defense counsel failed to bring to the trial court's attention the fact that Mr. Ward was in the courtroom. Counsel failed to assert Mr. Ward's presence as new and additional grounds for disqualifying the entire State Attorney's Office. The trial transcript is devoid of any showing that Mr. Ward was present at any time during the trial and no objection for disqualification was made based on Mr. Ward's presence in the courtroom. As a result, this issue was not properly preserved for this Court's review because, according to the record before us, the trial court was never given an opportunity to consider that fact prior to ruling on the defense's renewed motions. Castor v. State, 365 So. 2d 701, 703 (Fla. 1978) ("The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have

[5] Mr. Knespler ultimately testified on his own behalf.

been committed, and provides him an opportunity to correct it at an early stage of the proceedings."). This Court is an appellate court—one that reviews cases before the lower courts to discern error, if any—it is not a court that considers issues never before raised in the lower tribunal. See Dade Cty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla. 1999) ("[I]f a claim is not raised in the trial court, it will not be considered on appeal." (citing Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp., 537 So. 2d 561 (Fla. 1988); Dober v. Worrell, 401 So. 2d 1322 (Fla. 1981))).

The dissent speculates and presumes the trial court must have seen Mr. Ward and deduced the arguments the defense could have raised in opposition, stating that the trial judge was "clearly aware of the basis for Mr. Knespler's counsel's renewal." While we do not assume the trial court did not notice the state attorney walk in and sit in the courtroom during Mr. Knespler's trial, the record lacks any mention of or defense objection to his presence, and any defense argument that his presence was akin to participation. Upon the record before us, we cannot say that the trial court knew of the potentially new but unargued grounds for the defense's renewal.

In the absence of fundamental error, it is not the trial court's duty or job to raise possible arguments on behalf of a defendant represented by counsel.[6] The trial

[6] To require trial judges to identify and raise all errors sua sponte, regardless of whether they are fundamental, "would place an unrealistically severe burden upon trial judges concerning a matter which should properly be within the province and

court, recognizing that courts are open forums, may not have thought it appropriate to order someone out of the courtroom. This is emphatically so when neither side argued that Mr. Ward should not be present as a spectator. Additionally, defense counsel may have had strategic reasons for failing to raise the argument to the trial court and subsequently stipulating that Mr. Ward did not participate in the proceedings. We also note that while both the majority and dissent are concerned with Mr. Ward's presence having a chilling effect on Mr. Knespler's decision to testify, he ultimately testified in the defense case in chief. Thus, the chilling effect, if any, is not apparent on the face of the record before us. As a result of the foregoing, although Mr. Ward's conduct was extraordinary, we cannot discern error or find an abuse of discretion in the trial court's rulings to deny Mr. Knespler's motions to disqualify the entire office of the State Attorney.

II. Denial of Motion for Judgement of Acquittal as to Grand Theft

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responsibility of defense counsel as a matter of trial tactics and strategy." Smith v. State, 573 So. 2d 306, 310 (Fla. 1990) (quoting Smith v. State, 539 So. 2d 514, 517 (Fla. 2d DCA 1989)). Neither party has argued to this Court that the alleged error committed by the trial court amounts to fundamental error in this case, and this Court does not discern fundamental error based on this record. See Smith v. State, 521 So. 2d 106, 108 (Fla. 1988) ("The doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." (citing Ray v. State, 403 So. 2d 956 (Fla. 1981))).

Mr. Knespler contends that the trial court erred by denying his motion for judgment of acquittal as to the charge of felony grand theft and by not reducing the charge to second-degree petit theft, a second-degree misdemeanor. We agree.

The denial of a motion for judgment of acquittal is reviewed de novo. See Gonzalez v. State, 275 So. 3d 766, 768 (Fla. 3d DCA 2019). In Gonzalez, this Court recently addressed the State's burden to establish the value of the stolen property, stating as follows:

> "'Value' [of the stolen property] is defined as 'the market value of the property at the time and place of the offense or, if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the offense.'" Bruce v. State, 276 So. 3d 1, 2019 WL 2121652 (Fla. 4th DCA May 15, 2019) (quoting § 812.012(10)(a)(1), Fla. Stat. (2016)). "Because the value of the stolen items is an essential element of the offense, the value must be established beyond a reasonable doubt." A.D. v. State, 30 So. 3d 676, 677 (Fla. 3d DCA 2010).

Id. at 769.

In the instant case, the expert's valuation testimony was based on the insurance replacement cost values for the stolen items, not the "market value of the property at the time and place of the offense." Further, there was no testimony that the "market value" could not be satisfactorily ascertained, which would then have allowed for the value to be determined based on the replacement cost of the property. See A.D. v. State, 30 So. 3d 676, 678 (Fla. 3d DCA 2010) ("Replacement cost . . . is not appropriate under the theft statute unless the State first presents evidence that

the market value could not be satisfactorily ascertained." (footnote omitted)). In addition, the State did not present testimony establishing costs minus depreciation pursuant to the test set forth in Negron v. State, 306 So. 2d 104 (Fla. 1974). Thus, as the State failed to elicit sufficient evidence as to the value of the stolen property, the trial court should have granted Mr. Knespler's motion for judgment of acquittal as to the charge of felony grand theft, and the count should have proceeded to the jury as a second-degree petit theft. As we find there was competent, substantial evidence to support a jury finding of second-degree petit theft, we reverse and remand for entry of judgement and resentencing on the reduced offense. See Covello v. State, 154 So. 3d 401 (Fla. 4th DCA 2014).

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

LINDSEY, J., concurs.

HENDON, J., dissenting, in part.

I respectfully dissent from the majority's affirmance of Mr. Knespler's conviction and sentence for burglary of a dwelling. Based on the unique and unprecedented circumstances of this case, the trial court abused its discretion by denying Mr. Knespler's renewed motion to disqualify the entire State Attorney's Office.

Overall, the facts set forth in the majority opinion are accurate. I agree with the majority's determination that the trial court did not abuse its discretion by denying Mr. Knespler's pretrial motion to disqualify the entire State Attorney's Office. Mr. Ward's unrefuted testimony at the pretrial hearing, which we are bound to accept,[7] reflects that he had not provided Ms. Conolly or anyone else in the State Attorney's office with any prejudicial information gained from his consultation with Mr. Knespler, and, at the time of the pretrial hearing, Mr. Ward had not assisted in any capacity in prosecuting the case.

[7] I do not question the veracity of Mr. Ward's testimony at the hearing. However, I note that if he had testified that he revealed confidential information learned during the consultation with Mr. Knespler, Mr. Ward would have been subject to disciplinary proceedings.

Although I agree with the majority's determination as to the denial of Mr. Knespler's pretrial motion to disqualify, I am disturbed by Mr. Ward's post-hearing actions, specifically, Mr. Ward's voluntary decision to attend both Mr. Knespler's trial and sentencing hearing.

In Hayward v. State, 183 So. 3d 286 (Fla. 2015), the Florida Supreme Court addressed the trial court's denial of a motion to disqualify an entire state attorney's office, stating as follows:

> Denial of a motion to disqualify a State Attorney's office is reviewed for abuse of discretion. Rogers v. State, 783 So. 2d 980, 981 (Fla. 2001). We explained in Rogers that "although we have stated that the appearance of impropriety created by certain situations may demand disqualification, we have evaluated such situations on a case-by-case basis." Id. (quoting Bogle v. State, 655 So. 2d 1103, 1106 (Fla. 1995)). We held in Downs v. Moore, 801 So. 2d 906 (Fla. 2001), that "[t]o disqualify the State Attorney's Office, a defendant must show substantial misconduct or 'actual prejudice.' " Id. at 914. "Actual prejudice" is more than the mere appearance of impropriety. Id.; see also Kearse v. State, 770 So. 2d 1119, 1129 (Fla. 2000).

Id. at 322.

In the instant case, there is no doubt that Mr. Ward's decision to appear at the trial and sentencing hearing showed poor judgment, and, in my opinion, is quite concerning as he knew that Mr. Knespler had already unsuccessfully moved to disqualify the entire State Attorney's Office based on the confidential information disclosed to Mr. Ward during their consultation. Following the denial of Mr.

Knespler's motion to disqualify, it would have been prudent for Mr. Ward to stay clear of Mr. Knespler's trial and sentencing hearing. Instead, Mr. Ward chose to attend both, indicating he had a special interest in the case that went beyond being the State Attorney of the Sixteenth Judicial Circuit.

Upon seeing Mr. Ward at his trial, Mr. Knespler's concerns regarding the State Attorney's Office were likely heightened. Mr. Ward is not only the State Attorney of the Sixteenth Judicial Circuit, but the attorney to whom Mr. Knespler had revealed confidential information relating to the case he was then being tried for. Mr. Ward's special interest in the case—whether from knowing one of the victims or because Mr. Knespler had consulted with him about the case—and his presence at trial may have affected the case in many respects, including having a chilling effect on Mr. Knespler's decision concerning whether or not to invoke his Fifth Amendment right not to testify. Based on Mr. Ward's purposeful actions, I would conclude that his presence at the trial was more than just poor judgment. Rather, his actions are akin to participation in the action. As such, on these unique and unprecedented facts, I believe that the trial court abused its discretion by denying defense counsel's renewed motion to disqualify the entire State Attorney's Office.[8] As stated by the Florida Supreme Court: "When defendants no longer have absolute

[8] I have reviewed the numerous cases relied on by the State and Mr. Knespler. None of the cases are factually identical to the disturbing facts in this case.

faith that all confidential communication with counsel will remain forever inviolate, no candid communication will transpire, and the guarantee of effective assistance of counsel will become meaningless. This is too high a cost for society to bear." Castro v. State, 597 So. 2d 259, 260 (Fla. 1992) (quoting State v. Fitzpatrick, 464 So. 2d 1185, 1188 (Fla. 1985) (Ehrlich, J., dissenting)).

Although the majority also appears to be troubled by Mr. Ward's actions, the majority has concluded that Mr. Knespler's trial counsel failed to preserve for appellate review any argument relating to Mr. Ward's attendance at trial because defense counsel did not specifically apprise the trial court of Mr. Ward's appearance at trial when renewing the motion to disqualify. The majority's view amounts to a fiction. The trial judge in the instant case presided over the pretrial hearing on Mr. Knespler's motion to disqualify, and thus, was well aware of Mr. Knespler's concerns prior to the commencement of the trial. At trial, while seated on the bench, the trial judge had a bird's-eye view of everyone who entered the courtroom and sat in the gallery. Thus, when Mr. Knespler's counsel renewed the motion to disqualify, the trial judge was clearly aware of the basis for the renewal of the motion to disqualify.

Finally, I have not overlooked the "stipulation" the parties entered into pursuant to rule 9.200(f)(1) "to correct factual omissions in the record on appeal," which characterizes Mr. Ward as a "spectator" who sat in the rear of the gallery, but

did not participate in the proceedings or communicate with the assistant state attorney prosecuting the case, Ms. Conolly. The stipulation, however, does not address the effect of Mr. Ward's presence on Mr. Knespler, namely his decision relating to whether he should invoke his Fifth Amendment Right not to testify.

Accordingly, I would reverse Mr. Knespler's conviction and sentence for burglary of a dwelling and remand with instructions that the entire State Attorney's Office must be disqualified. Further, as I agree with the majority's determination that the trial court should have granted Mr. Knespler's motion for judgment of acquittal as to the charge of felony grand theft, I would remand with instructions that Mr. Knespler be tried for the offense of burglary of a dwelling and the reduced offense of second-degree petit theft.