COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0148

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RUSSELL K. SCHREIBER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: PATRICK M. BRADY, Judge. *Affirmed.*

¶1 CANE, C.J. Russell Schreiber appeals from a judgment finding him guilty of one count of hunting deer after hours, contrary to WIS. ADMIN. CODE § NR 10.06(3).[1] Schreiber argues that the trial court erred by (1) denying his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

(continued)

motion in limine regarding a pretrial experiment; (2) denying his motion to suppress all statements and evidence obtained by warden Donald Mezei; (3) allowing evidence of a compromise, contrary to WIS. STAT. § 904.08; and (4) allowing the State to amend the citation. Schreiber additionally argues that there was insufficient credible evidence to establish his guilt and that his right to a fair trial by an impartial and unbiased judge was violated. This court rejects Schreiber's arguments and affirms the judgment.

BACKGROUND

¶2 Schreiber was found guilty of hunting deer with a firearm past the time permitted by WIS. ADMIN. CODE § NR 10.06(5). It is undisputed that on November 24, 1997, deer hunting with a firearm was prohibited after 4:30 p.m. At trial, two witnesses testified that on November 24, at approximately 4:40 p.m., they heard a gun shot (or shots) coming from the direction of property owned by Glenn Podgorski. Although Schreiber did not dispute shooting a deer on Podgorski's property that afternoon, he maintained that he shot the deer before 4:30 p.m. Two defense witnesses, Schreiber's brother and Podgorski's brother, corroborated Schreiber's recollection of the time.

¶3 Glenn Podgorski testified that after returning from a business trip on November 25, he was informed of the previous day's hunting incident. He testified that he consequently telephoned Schreiber to ask what had transpired. Podgorski stated that when he asked Schreiber "what went on," Schreiber responded that he had "made a mistake." Podgorski additionally testified that

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Although the judgment references WIS. ADMIN. CODE § NR 10.06(3), this court presumes the judgment meant to refer to § NR 10.06(5). *See* infra ¶¶ 9-11.

when he pressed Schreiber with the statement, "You came in my yard, you shot it after hours," Schreiber stated, "I know, I got excited, I made a mistake." Podgorski testified that in the course of their discussion, Schreiber made two additional admissions to shooting the deer after hours. The trial court found that Schreiber shot the deer at 4:40 p.m., contrary to WIS. ADMIN. CODE § NR 10.06(5) and entered judgment accordingly. This appeal followed.

ANALYSIS

I. MOTION TO EXCLUDE EVIDENCE OF PRETRIAL EXPERIMENT

¶4 Schreiber initially argues that the trial court erred by denying his motion in limine to exclude evidence of a pretrial experiment involving the sound and test firing of a gun. It is undisputed, however, that evidence of the experiment was ultimately never introduced at trial. Because resolution of this issue will have no practical effect on the underlying controversy, this court concludes that it is moot and refrains from addressing it. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425.

II. MOTION TO SUPPRESS—ADMISSIBILITY OF STATEMENTS

¶5 Schreiber contends that the trial court erred by denying his motion to suppress statements and evidence arising from his conversation with Donald Mezei, a DNR warden. Schreiber argues that the evidence and statements should have been suppressed as the fruits of a ***Miranda*** violation.[2] Alternatively, Schreiber maintains that because his statements to Mezei were made in context of

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

a compromise or offer to compromise, the statements were inadmissible pursuant to WIS. STAT. § 904.08.[3] This court need not address these arguments.

¶6 First, this court notes that because a forfeiture action is a civil action, ***Miranda***'s requirements do not apply. *See* ***Village of Menomonee Falls v. Kunz***, 126 Wis. 2d 143, 148, 376 N.W.2d 359 (Ct. App. 1985). Moreover, Schreiber's contentions regarding his statements to Mezei are moot, as the trial court made no findings of fact with respect to Mezei's testimony. The court stated:

> I find that the circumstances, the conversations between Warden Mezei and the defendant are sufficiently muddled in my mind that I don't believe that the state has met its burden of proof with respect to admission, so I'm specifically making no findings with respect to the testimony of Warden Mezei.

Because the trial court ultimately disregarded Mezei's testimony in making its determination, this court concludes that Schreiber's challenge to the admissibility of that testimony is moot. *See* ***Litscher***, 2000 WI App 61 at ¶3.

[3] WISCONSIN STAT. § 904.08 provides:

> Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution.

III. SUFFICIENCY OF THE EVIDENCE

¶7 Schreiber argues that the evidence adduced at trial was insufficient to establish his guilt. This court disagrees. In reviewing the sufficiency of the evidence, this court asks "whether a reasonable trier of fact could be convinced of the defendant's guilt to the required degree of certitude by the evidence which it had a right to believe and accept as true." ***City of Milwaukee v. Wilson***, 96 Wis. 2d 11, 21, 291 N.W.2d 452 (1980). A trial court's factual determinations will not be reversed unless clearly erroneous. *See* ***Town of Mt. Pleasant v. Werlein***, 119 Wis. 2d 90, 95, 349 N.W.2d 102 (Ct. App. 1984). Further, this court will not examine the record for evidence to support a finding that the trial court did not make, but rather, for facts to support the finding the trial court did make. *See* ***id.***

¶8 Generally, in civil forfeiture cases, a defendant's guilt need be shown by only a mere preponderance of the evidence. *See* ***Wilson***, 96 Wis. 2d at 21. However, in forfeiture actions that involve or are closely associated with acts of a criminal nature, a defendant's guilt must be proved by "clear, satisfactory and convincing evidence." ***Id.*** at 22. This court concludes that even under the higher standard of proof, the evidence is sufficient to establish Schreiber's guilt.

¶9 Citing ***Triplett v. State***, 65 Wis. 2d 365, 371-72, 222 N.W.2d 689 (1974), Schreiber argues that proof of the commission of a crime cannot be grounded on the admissions or confessions of the accused alone. However, because ***Triplett*** is a criminal case involving a higher burden of proof, it is inapplicable to the present case. In any event, the record supports the trial court's conclusion. Because Schreiber did not dispute shooting the deer on Podgorski's property, the main issue before the court was when the deer was shot. Podgorski

testified that Schreiber admitted shooting the deer after hours and two other witnesses testified that they heard the shot after 4:30 p.m. Although there was conflicting testimony regarding the time of the shot, the trial court, not the appellate court, is the ultimate arbiter of weight and credibility. *See* WIS. STAT. § 805.17(2). Because the record demonstrates support for the trial court's conclusion that the deer was shot at 4:40 p.m., this court will not overturn that determination on appeal.

IV. CITATION AMENDMENT

¶10 Schreiber argues that the trial court misused its discretion by allowing the State to amend the citation. On cross-examination of the State's fourth witness, defense counsel first alerted the court that the citation mistakenly charged Schreiber under WIS. ADMIN. CODE § NR 10.06(3), which addresses bear, bow deer and small game hunting. Defense counsel asked: "Officer Mezei, were you investigating Russ Schreiber for hunting bears?" The court then granted the State's request to amend the citation to conform to the evidence.

¶11 WISCONSIN STAT. § 802.09(1) provides, in relevant part, that where a party may no longer amend a pleading as a matter of course, the party may otherwise amend a pleading by leave of court, "and leave shall be freely given at any stage of the action when justice so requires." Whether to allow amendment to pleadings is within the trial court's discretion and is proper if the amendment does not come at a time likely to cause unfairness, prejudice or injustice. *See* ***Goff v. Seldera***, 202 Wis. 2d 600, 616, 550 N.W.2d 144 (Ct. App. 1996).

¶12 Here, this court's review of the record reveals that defense counsel was ever cognizant that he was defending Schreiber against an alleged violation of WIS. ADMIN. CODE § NR 10.06(5), governing deer hunting with firearms.

Although the citation misquoted the subsection number, the narrative portion of the citation clearly stated Schreiber was being cited for hunting deer after hours. Defense counsel heard the State's witnesses preceding Mezei testify about gunshots and deer hunting, not bear, bow deer or small game hunting, after hours. He had earlier unsuccessfully motioned the court to exclude evidence of a pretrial experiment involving the sound and test firing of a gun. Counsel had also argued a motion to suppress statements Schreiber made to Mezei regarding shooting the deer. Because the record reveals that defense counsel was prepared to defend Schreiber against the allegation of hunting deer after hours, this court concludes the trial court properly exercised its discretion by allowing the State to amend the citation.

V. RIGHT TO A FAIR TRIAL BY AN IMPARTIAL AND UNBIASED JUDGE

¶13 Schreiber contends that he was denied the right to a fair trial by an impartial and unbiased judge. Specifically, Schreiber directs this court's attention to the following discourse during cross-examination of Mezei:

> [Defense counsel]: Officer, if someone was going to shoot a deer illegally, would they go tell everybody they were doing it?
>
> [Prosecutor]: Objection.
>
> [The Court]: Calls for speculation on the part of the witness.
>
> [Defense counsel]: Officer, do you have any knowledge as to who Russ Schreiber talked to on November 24, 1997?
>
> [Mezei]: Yes.
>
> [Defense counsel]: And who did he talk to on that day?
>
> [Prosecutor]: I'm going to object to the relevance of it.
>
> [Defense counsel]: Again, Your Honor—
>
> [The Court]: What's the relevance?

> [Defense counsel]: Your Honor—again, Your Honor, this goes – there was nothing hidden on this, there was nothing clandestine, Mr. Schreiber went and talked to—
>
> [The Court]: That's right, he confessed.

Arguing that the court's statement evinced its partiality, defense counsel moved for a mistrial. The court denied the motion.

¶14 There is a presumption that a judge is free of bias and prejudice. *See* ***State v. McBride***, 187 Wis. 2d 409, 414, 523 N.W.2d 106 (Ct. App. 1994). "To overcome this presumption, the party asserting judicial bias must show that the judge is biased or prejudiced by a preponderance of the evidence." ***Id.*** at 415. To determine whether Judge Brady was actually biased, this court "must evaluate the existence of bias in both a subjective and an objective light." ***Id.***

¶15 "The subjective component is based on the judge's own determination of whether he [or she] will be able to act impartially." ***Id.*** Had Judge Brady subjectively believed he would not be able to act impartially, he would have been required to disqualify himself. Because he did not disqualify himself, this court may presume that Judge Brady believed himself capable of acting in an impartial manner, thus terminating this court's inquiry into the subjective test. *See* ***id.***

¶16 Turning to the objective component, this court "must determine whether there are objective facts demonstrating that [Judge Brady] was actually biased." ***Id.*** at 416. Under this test, Schreiber must show that the "trial judge in fact treated him unfairly." ***Id.*** (quoting ***State v. Rochelt***, 165 Wis. 2d 373, 378-79, 477 N.W.2d 659 (Ct. App. 1991)). "Merely showing that there was an appearance of partiality or that the circumstances might lead one to speculate that the judge was partial is not sufficient." ***Id.***

¶17 Schreiber speculates that the trial court's comment that Schreiber confessed evinces bias against him. In context of the discourse between the court and counsel, Judge Brady's comments merely reiterated past testimony. The record supported the judge's comments, as Podgorski had testified that Schreiber thrice admitted shooting the deer after hours. Schreiber provides no other support for his contention that Judge Brady was biased. Because Schreiber has failed to show, by a preponderance of the evidence, that the trial judge in fact treated him unfairly, this court concludes that Schreiber was not denied his right to a fair trial by an impartial and unbiased judge.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.