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January 9, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2018AP14-CR State of Wisconsin v. Markiel D. Hendricks (L.C. # 2016CF1693)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Markiel D. Hendricks appeals the judgment, entered on a jury's verdict, convicting him of false imprisonment as a party to the crime. *See* WIS. STAT. §§ 940.30, 939.05 (2015-16).[1] Based on our review of the briefs and record, we conclude at conference that this matter is

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We summarily affirm the judgment.

Background

According to the criminal complaint, Hendricks and Anthony Perkins kidnapped and falsely imprisoned Perkins's ex-girlfriend. At the time the crimes occurred, a no-contact order was in effect between Perkins and the victim based on a then-pending charge that Perkins had interfered with the custody of their child.

The complaint alleged that Hendricks and Perkins were friends. Hendricks told police that the day before the crimes occurred, the two went to a store where Perkins bought duct tape, lighter fluid, and charcoal. Hendricks relayed that Perkins told him he was going to restrain the victim and burn her feet for "playing with his money." At approximately 4:30 a.m. the next day, the two men took a bus to the victim's residence where Perkins called her, to no avail.

The victim told the police that around 6:30 a.m., Hendricks entered her home and told her that she needed to leave the residence immediately. The victim ran upstairs and attempted to barricade herself in a bedroom, but the door was forced open. The next thing the victim remembered was Perkins standing over her and punching her multiple times in the face.

The victim said that Perkins dragged her out of her home with Hendricks following. Perkins then put her in a dark van, and they travelled all over the city before the men took her to another home. While there, Hendricks discovered that the victim's abduction was being reported on the news, and the men began to panic.

Police officers eventually discovered where the two were keeping the victim and arrived at that location approximately fourteen hours after she was taken from her home.

The case proceeded to a jury trial. When cross-examining the victim, defense counsel asked her about a statement she gave to a detective on the day of her abduction. The following exchanges took place during defense counsel's cross-examination:

> [Defense Counsel:] All right. So you're not protecting Mr. Perkins there, are you?
>
> You know, … I'm not trying to bother you or hurt you. I'm just asking questions about what you told the detectives. So if you take—
>
> [The victim:] I told the detectives what I remembered.
>
> [Defense Counsel:] Don't take it as me trying to hurt you.
>
> THE COURT: *All right. She said she told the detectives what she remembered.*
>
> ….
>
> [Defense Counsel:] Your statement to the detective was that it was Mr. Perkins, Anthony Perkins, that pulled you by your arm out the door; true?
>
> [The victim:] That he was behind me with the gun.
>
> [Defense Counsel:] Well, you told the detective that you didn't observe anyone with a firearm throughout the course of the day.
>
> [The victim:] I told him what they wanted me to tell them. How many times to say that?
>
> [Defense Counsel:] Who wanted you to tell them?
>
> [The victim:] Them.
>
> [Defense Counsel:] Who's them?
>
> THE COURT: *I think she's told you over and over, the co-actors. So let's move on with that.*

….

[Defense Counsel:] When did they tell you that? When did they tell you that?

[The victim:] When they seen what they been charged with on TV. When they seen us all on TV.

….

[Defense Counsel:] You told the detective … that indeed Mr. Hendricks didn't say or do much of anything during the incident, didn't you?

[The victim:] He was the reason I didn't leave.

[Defense Counsel:] But you told the detective that Mr. Hendricks—

[The victim:] I don't care what I told them. How many times do I say that?

[Defense Counsel:] But you're telling this jury that—

[The victim:] I'm gonna tell you what I just said, though.

[Defense Counsel:] Well, listen to me, listen to me. You're telling this jury that Mr. Hendricks on one hand didn't say or do anything during the incident, and now—

….

[Defense Counsel:] All I'm asking you is about what you—

[The victim:] He shouldn't have came.

[Defense Counsel:] —told the detectives.

THE COURT: *I think it's probably challenging—I don't know if anybody's reviewed with her what she's told the police. That's probably—*

[The victim:] I didn't talk to nobody since then.

THE COURT: *It's probably very challenging for her, [defense counsel], to answer some of these questions.*

[Defense Counsel:] Well, I object to the [c]ourt's interjection.

THE COURT: Let me see you both in back.

(Emphasis added.)

Later in the day, outside of the jury's presence, defense counsel asked to make a record of the sidebar.[2] He said that he had objected to the trial court's comment, but he did not explain anything that was discussed in chambers. The trial court responded that it had "made a comment about [the victim] probably not having the ability to have … reviewed the police reports before she testified because she was being asked questions about what she told the police." Defense counsel then moved for a mistrial.

The trial court denied the motion explaining that it commented because "it was very clear to me [the victim] was struggling." The trial court said, "I couldn't tell if she was struggling to try to remember what she said. I didn't know what kind of review she had done, if any, of the police reports." Additionally, the trial court stated that it "would not have interceded" had defense counsel first asked the victim whether she had reviewed the police reports. The trial court added that "it was challenging to watch her struggle and not intervene."

The jury convicted Hendricks of false imprisonment but acquitted him of kidnapping. The trial court sentenced him to three years of initial confinement and three years of extended supervision.

[2] The sidebar itself was not transcribed.

Discussion

The sole issue on appeal is whether the trial court erred when it denied defense counsel's mistrial motion, which was premised on what Hendricks describes as the trial court's impermissible vouching for the victim and shielding her from relevant cross-examination. Hendricks claims that the trial court's objective bias against him is reflected in three comments it made while defense counsel was cross-examining the victim at trial.

The State argues that Hendricks forfeited his judicial bias claim by not properly objecting to the trial court's comments below. *See* ***State v. Nielsen***, 2001 WI App 192, ¶11, 247 Wis. 2d 466, 634 N.W.2d 325 ("It is axiomatic that to preserve a proposed trial court error for review, trial counsel or the party must object in a timely fashion with specificity to allow the court and counsel to review the objection and correct any potential error."). The State points out that Hendricks did not object to the trial court's two initial comments with which he takes issue on appeal.[3] As to the remaining comment by the trial court that it was "probably very challenging" for the victim to answer defense counsel's questions about her statement to the detective, the State argues that Hendricks' objection was insufficient to preserve a judicial bias claim because he never asserted his position with specificity when he made a record of the sidebar. We agree that Hendricks forfeited his right to raise a judicial bias claim on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727. However, it is within our "discretion to disregard [an] alleged forfeiture and consider the merits of any issue because the rule of

[3] The first comment by the trial court was as follows: "All right. She said she told the detectives what she remembered." The second comment by the trial court encouraged defense counsel to move forward with his questioning: "I think she's told you over and over, the co-actors. So let's move on with that."

forfeiture is one of judicial administration and not of power." *See* ***State v. Wilson***, 2017 WI 63, ¶51 n.7, 376 Wis. 2d 92, 896 N.W.2d 682. We decline the State's invitation to apply the forfeiture rule in this case and instead choose to address the merits.

Every person charged with a crime is entitled to "an impartial and unbiased judge." ***State v. Bell***, 62 Wis. 2d 534, 536, 215 N.W.2d 535 (1974). Whether a judge was unbiased is a question of constitutional fact we review *de novo*. ***State v. Neuaone***, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 700 N.W.2d 298. We presume a judge has acted fairly, impartially, and without bias, but the presumption is rebuttable. ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. The burden is on the party asserting judicial bias to demonstrate that bias by a preponderance of the evidence. ***Neuaone***, 284 Wis. 2d 473, ¶16. Either subjective or objective bias "can violate a defendant's due process right to an impartial judge." ***Gudgeon***, 295 Wis. 2d 189, ¶20.

Hendricks complains only that the trial court was objectively biased. The objective bias test "asks whether a reasonable person could question the judge's impartiality." ***Id.***, ¶21. It is not sufficient to show only that there is an appearance of partiality or that the circumstances might lead one to speculate that the judge is biased. *See* ***State v. McBride***, 187 Wis. 2d 409, 416, 523 N.W.2d 106 (Ct. App. 1994). Rather, a party must show objective facts that demonstrate actual bias, *see* ***id.***, or that, under all the circumstances, a reasonable person could "conclude[] that the average judge could not be trusted to 'hold the balance nice, clear[,] and true,'" ***Gudgeon***, 295 Wis. 2d 189, ¶24.

"[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," ***Liteky v. United States***, 510 U.S. 540, 555 (1994), and bias is not demonstrated by mere "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women ... sometimes display," ***id.*** at 555-56. "A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune." ***Id.*** at 556. Rather, the challenged remarks must "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." ***Id.*** at 555.

The circumstances required to show bias are not present here. The trial court's two initial comments with which Hendricks takes issue involved the trial court telling defense counsel that the victim had already answered the questions he had asked. This was proper and reflects the trial court's efforts to exercise reasonable control over the presentation of evidence so as to avoid wasting time and to protect the witness from harassment. *See* WIS. STAT. § 906.11(1)(a)-(c).

The trial court's third comment, that it was "probably very challenging" for the victim to answer defense counsel's questions about her statement to the detective likewise reflects its effort to exercise reasonable control. Pursuant to WIS. STAT. § 906.11(1)(a), a trial court "shall exercise reasonable control over the mode … of interrogating witnesses and presenting evidence so as to … [m]ake the interrogation and presentation effective for the ascertainment of the truth." This is what occurred here.

Contrary to Hendricks' assertion, the trial court's comments were not designed to shield the victim from answering defense counsel's question. Indeed, after the sidebar, the trial court allowed defense counsel to resume questioning the victim about her statement to detectives. Hendricks has not met his burden of demonstrating judicial bias.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals