STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1179

State of Minnesota,
Respondent,

vs.

Eric James Rutherford,
Appellant.

Filed May 19, 2014
Affirmed
Worke, Judge
Dissenting, Klaphake, Judge[*]

Ramsey County District Court
File No. 62-CR-12-5600

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Kaarin Long, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. F. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Worke, Judge; and Klaphake, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant challenges the district court's denial of his mistrial motion, arguing that the district court judge was disqualified from presiding over his trial for fifth-degree criminal sexual conduct. Because there is no reasonable probability that the outcome of the trial would have been different if the district court had granted appellant's mistrial motion, we affirm.

FACTS

On July 11, 2012, respondent State of Minnesota charged appellant Eric James Rutherford with fifth-degree criminal sexual conduct for allegedly touching R.N.'s buttocks and vaginal area. Rutherford requested a court trial and waived his right to a jury.

At Rutherford's trial, the state called R.N. as its first witness. Following the full examination of the state's witness but before commencing cross examination, appellant's trial counsel disclosed on the record that she has seen R.N. in court, that they are not friends, and that she might say "hi" to R.N. in passing. The district court called a recess. The judge then stated on the record:

> The alleged victim in this case is a woman named [R.N.] who is a Ramsey County Deputy and also provides court security here in the courthouse. I know [R.N.] just by virtue of the fact that she provides court security in the courthouse and has provided court security in my courtroom. I don't know her beyond that. I don't have any kind of personal relationship with her. In fact, when I see her sometimes, I can't even remember what her first name is.

The judge noted that he had read neither the complaint nor the witness list prior to the trial because he "wanted to go into this case with a completely clear slate" because he was going to be the finder of fact. The judge further stated:

> So when [R.N.] took the stand to testify in uniform, my assumption was that she was somehow involved in apprehending the defendant in this case, that she was an arresting officer, that she had some relationship to the arrest. *I had no idea that [R.N.] was the victim of this—the alleged victim of this offense until the testimony went forward and we were well into the testimony.* I was, to say the least, surprised that she was the alleged victim. But I thought it important to let the state, as well as the defendant know this, that I know her, that I don't have any kind of personal relationship with her. That I will treat her testimony the way I would any other witnesses in this case. But I wanted to make sure that that information was available to everyone. And I wanted the record to be absolutely clear that I did not know who the alleged victim was in this case, counsel never told me, no information was ever given to me to let me know that one of our bailiffs or court security people was the alleged victim.
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> With that, I can tell both the defense as well as the state that I approach this case with an open mind, that I can decide this case without any bias one way or the other for either side, for the defense or the state, and I don't feel that I have any particular need to recuse myself. What's more, jeopardy has attached in this case, and so it would literally be impossible for me to recuse myself. But I wouldn't—even if I had known ahead of time, that is not to say that I would feel that I would have needed to recuse myself, had I known in advance. (Emphasis added.)

Following another recess, Rutherford moved the district court for a mistrial arguing that R.N.'s relationship with the district court created an appearance of impropriety and that on one occasion the judge had referred to R.N. as the victim. The state opposed the request and stated that it had disclosed to appellant that R.N. was a

Ramsey County deputy, and that she worked at the Ramsey County courthouse, six to seven months prior to trial. The district court denied Rutherford's motion and ultimately found Rutherford guilty as charged. This appeal follows.

D E C I S I O N

Rutherford argues that the district court judge "created an appearance of impropriety by serving as the trier of fact over a case involving a Ramsey County sheriff's deputy who worked in the judge's courtroom." The denial of a motion for a mistrial is reviewed for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003) (holding no abuse of discretion to deny a mistrial motion based on prosecutorial misconduct). But "[w]hether a judge is disqualified from presiding over a case is a question of law, which we review de novo." *In re Jacobs*, 802 N.W.2d 748, 750 (Minn. 2011).

"A motion to remove a judge for cause is procedural and is therefore governed by the rules of criminal procedure." *Hooper v. State*, 680 N.W.2d 89, 93 (Minn. 2004). Under the rules, "[a] judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct." Minn. R. Crim. P. 26.03, subd. 14(3). And according to the Minnesota Code of Judicial Conduct, "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Minn. Code Jud. Conduct Rule 2.11(A).

"Whether a judge's impartiality may reasonably be questioned is determined by an objective examination into the circumstances surrounding" the challenge. *Jacobs*, 802 N.W.2d at 752 (quotation omitted). "[T]he appropriate standard for determining whether

a judge must be disqualified due to an appearance of partiality is whether a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality." *Id*. at 753. "The mere fact that a party declares a judge partial does not in itself generate a reasonable question as to the judge's impartiality." *State v. Burrell*, 743 N.W.2d 596, 601-02 (Minn. 2008). "Likewise, the fact that a judge avows he is impartial does not in itself put his impartiality beyond reasonable question." *Id*. at 602.

First, we are not convinced that the district court judge was disqualified from presiding over this trial. The record indicates that Rutherford was well aware that R.N. provided security at the Ramsey County courthouse before trial and yet chose to proceed. At trial, the prosecutor stated that he "did say to [defense counsel] yesterday afternoon, if the defendant viewed it as a conflict, he should raise it." The prosecutor further noted that defense counsel spoke with R.N. before trial "to see what the status of her relationship might be with [R.N.]" and she "spoke with her client" who "chose to proceed. So this isn't some big surprise." The prosecutor also stated that "it is significant . . . that this was not raised before [R.N.] testified. [R.N.] was a criminal sexual conduct victim, and she had to talk about the most private of assaults occurring to her. I think it is significant in this timeline, that this issue did not come up until afterwards."

The judge also responded to a statement made by appellant's trial counsel that suggested the "court turned white" in response to a record that was being made. The judge stated "that I think that's a bit of a stretch. I think what was going on in my mind was the same thing that was going on in [counsel's] mind, is that I also know the witness

in passing. Deputies come through this courthouse with great regularity. They come and go. . .” and that “[t]here are many instances where judges admonish court personnel, including deputies . . . [s]o any knowledge of her in terms of being someone who is in the courthouse does not necessarily mean it works to the advantage of the state and the disadvantage of the defendant.” On these facts, the standard for disqualification has not been met because it is not clear that “a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge’s impartiality.” *See Jacobs*, 802 N.W.2d at 752.

Moreover, we need not decide if the judge was disqualified from presiding over this case because “[a] mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different.” *State v. Spann*, 574 N.W.2d 47, 53 (Minn. 1998). R.N. testified at trial that Rutherford, a stranger, groped her as she was entering her apartment building. R.N. told Rutherford that she is a police officer, and he ran away from her. R.N. ran after him and called dispatch during the chase. A witness testified that he saw R.N. chasing Rutherford, yelling “stop him, stop him, help,” at which point he and a coworker joined the chase. He further testified that, after the police arrived and arrested Rutherford, R.N. thanked the officer and stated that Rutherford had groped her. The coworker also testified that R.N. stated at the scene that she was assaulted by Rutherford.

In contrast, Rutherford testified that he approached R.N. seeking directions and the time, and she inexplicably “slipped, like mentally” and “went crazy,” pulled out a gun, and threatened to “blow his f---ing brains out.” He claimed that R.N. knocked him down,

at which point he dislocated his hip, and then R.N. pulled out his hair. Rutherford further testified that he then ran away from R.N., screaming for help, and did jumping jacks to get the attention of people nearby. The state introduced evidence, for impeachment purposes, that Rutherford made a false police report in 2009. On this record, the evidence clearly and convincingly supports the district court's guilty verdict, and there is no reasonable probability that the outcome of this trial would have been different if the district court had granted Rutherford's motion for a mistrial.

Affirmed.

KLAPHAKE, Judge (dissenting)

I respectfully dissent because a reasonable examiner of the facts would question the trial judge's impartiality.

Here, appellant waived a jury trial and agreed to a bench trial. R.N., who was called to testify, wore a deputy sheriff uniform. By the judge's own statement, he expected R.N. to testify as an investigating officer. As it became clear that R.N. was not an investigating officer but rather "the alleged victim," appellant's counsel observed that the trial judge "pretty much turned white." On the record, the trial judge revealed that he recognized R.N. as a deputy sheriff who had in the past provided security in his courtroom. The trial judge at one point called her "the victim," which he corrected to call her "the alleged victim." The trial judge went on in some length to describe that he did not know her well and that he could be impartial.

The question here is not whether the trial judge was, in fact, partial or impartial. Instead, the standard is whether a reasonable examiner would question the judge's impartiality. *State v. Pratt*, 813 N.W.2d 868, 876 (Minn. 2012); *In re Jacobs*, 802 N.W.2d 748, 752 (Minn. 2011). Minn. R. Crim. P. 26.03, subd. 14(3), provides that "[a] judge must not preside at a trial . . . if disqualified under the Code of Judicial Conduct." Rule 1.2 of the Code of Judicial Conduct provides that "[a] judge . . . shall avoid . . . the appearance of impropriety." And rule 2.11(A) provides that "[a] judge shall disqualify himself . . . in any proceeding in which the judge's impartiality might reasonably be questioned."

Under the facts here, a reasonable examiner would question the trial judge's impartiality when considering the following: (1) the trial judge presided and was the sole factfinder at a bench trial where the credibility of R.N. was a compelling issue; (2) the state did not advise the court in advance of R.N.'s prior security duties before this judge; (3) R.N. appeared in uniform; (4) the trial judge's demeanor changed visibly upon recognizing R.N.; (5) the trial judge recognized the need to reassure everyone present that he would be impartial; (6) the trial judge rejected the motion for a mistrial; (7) the trial judge, while reassuring everyone that he could be impartial, referred to R.N. as "the victim," even though thereafter he corrected himself.

Together these facts may not show that the trial judge was biased, but they do provide a basis for a reasonable examiner to question the trial judge's impartiality. As such, the motion for a mistrial should have been granted, and failure to do so warrants reversal and a new trial.