COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2955-CR **Cir. Ct. No. 2010CF1848**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SERGION CAZARES-HERRERA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: NICHOLAS McNAMARA, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Sergion Cazares-Herrera appeals from a judgment of conviction of first-degree sexual assault, strangulation, and being a party to the crime of kidnapping. He argues that his motion to suppress DNA evidence should have been granted because in obtaining his consent to providing a DNA bucal

swab, the police lied when they said they were investigating a robbery. We conclude that the police deception did not render Cazares-Herrera's consent involuntary and use of the DNA sample did not exceed the scope of that consent. We affirm the judgment.

¶2 Three police officers contacted Cazares-Herrera at his workplace, a restaurant, after learning that he had a connection to the apartment building where a woman had been repeatedly sexually assaulted and the woman reported having seen a man she believed to be one of her assailants outside the apartment building.[1] With one officer serving as a Spanish interpreter, the officers explained to Cazares-Herrera that they were investigating a robbery and his name had come up during the investigation. Cazares-Herrera was told that the officers did not believe he was involved in the robbery but they had DNA evidence and if Cazares-Herrera would provide a DNA sample, they could rule him out as a suspect. Cazares-Herrera was told he did not have to provide the sample. Cazares-Herrera indicated he would give the sample and he did so after a consent form was explained to him and he signed it.

¶3 Cazares-Herrera was identified as the source of DNA recovered from the sexual assault crime scene and from the victim. After his motion to suppress the DNA evidence was denied, Cazares-Herrera entered a guilty plea. We review the suppression ruling pursuant to WIS. STAT. § 971.31(10) (2011-12).[2]

[1] Two suspects in the sexual assault had been arrested and charged. After the preliminary hearing for one of the suspects, the victim saw a man outside the apartment building who looked like one of her assailants. The victim reported this to police and was concerned that she had misidentified one of the charged suspects.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 When a search is based on consent and not a warrant, the State has the burden of proving by clear and convincing evidence that consent was voluntarily given. ***State v. Phillips***, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998). "The test for voluntariness is whether consent to search was given in the absence of duress or coercion, either express or implied." ***Id.*** We look at the totality of the circumstances, including whether any misrepresentation, deception or trickery was used to entice the defendant to give consent, whether the defendant was threatened or intimidated, the conditions at the time the request to search was made, the defendant's response to the request, the defendant's age, intelligence, education, and physical and emotional condition, and whether the defendant was told that consent could be withheld. ***Id.*** at 197-203. On review we rely on and uphold the circuit court's findings of historical fact unless clearly erroneous and independently apply the constitutional standards to those facts. ***State v. Kelley***, 2005 WI App 199, ¶8, 285 Wis. 2d 756, 704 N.W.2d 377.

¶5 The circuit court found that: the three officers fully identified themselves to Cazares-Herrera, one officer provided translation and there was no failure of communication because of language, education or level of understanding, the officers truthfully told Cazares-Herrera he was not in trouble at that point, they truthfully told him that they had DNA evidence and that depending on the DNA results he could be ruled out as a suspect in the crime they were investigating, the officers told Cazares-Herrera that he did not have to provide a DNA sample and he understood he was free to decline to give the DNA sample, there was no overt pressure, threats, or promises for Cazares-Herrera to give consent, the consent form was fully explained to Cazares-Herrera, and although Cazares-Herrera may have sensed time pressure because he wanted to get back to his job, the officers did not take an unduly long period of time expressing their

request. The court also found that the officers told Cazares-Herrera they were investigating a robbery and excluded reference to the sexual assault investigation and that it was an intended deception.[3] These findings of fact are not challenged and we turn to consider whether the deception was coercion which rendered consent involuntary under the totality of the circumstances.

¶6 Cazares-Herrera argues that police cannot fabricate a story about a non-existent crime in order to obtain consent. He cites ***Kelley***, 285 Wis. 2d 756, ¶12, in support. In ***Kelley***, police officers obtained consent to search Kelley's home after telling him they were investigating a murder. ***Id.***, ¶11. Kelley argued his consent was invalid because the police did not disclose that they also suspected he was in possession of child pornography. ***Id.***, ¶12. The court was "not persuaded that the detectives' failure to disclose all their suspicions invalidated an otherwise validly obtained consent." ***Id.*** Although the court indicated that it was not a case involving deception or false pretense to obtain consent because the officers had not fabricated a story about a nonexistent murder in order to search for child pornography, ***id.***, the case does not stand for the proposition that the fabrication of another crime as a pretense automatically vitiates consent.

¶7 Cazares-Herrera also relies on ***State v. Munroe***, 2001 WI App 104, ¶13, 244 Wis. 2d 1, 630 N.W.2d 223, as invalidating consent given after police lie about the purpose of their search. In ***Munroe***, officers were conducting hotel

[3] The victim's cell phone was left behind at the crime scene and not returned to her. The circuit court rejected the notion that the missing cell phone made truthful the representation that the police were investigating a robbery and found that the cell phone was simply "an after-the-fact explanation by the officers." The State does not dispute these findings and only suggests that because the cell phone was missing, the "'ruse' was not made up out of whole cloth and had some basis in reality." Because the circuit court's finding that police made an intended deception is not challenged, we do not address whether the missing cell phone made the representation truthful.

interdiction by checking hotels for illegal activity involving drugs, guns or prostitution. ***Id.***, ¶2. They asked to enter Munroe's hotel room telling him they needed to verify his identification because when he checked in he had not shown a photo ID as required by a local ordinance. ***Id.***, ¶¶3, 5. The court addressed the scope of the search made pursuant to consent to search given after the officers had verified Munroe's identification and the stated purpose of their entry was complete. *See* ***id.***, ¶11. It is not a case that deals with deception in obtaining the initial consent to enter the room. The nondisclosure of the police's alternative purpose for seeking entry into the hotel room did not render the entry unlawful. ***Id.***

¶8 Not all forms of police deceit constitute impermissible coercion. *See* ***State v. Johnston***, 184 Wis. 2d 794, 806-07, 518 N.W.2d 759 (1994) (consent to enter was voluntary when invitation to an illegal party was extended to officers who concealed their identity as undercover officers); ***State v. Rodgers***, 119 Wis. 2d 102, 349 N.W.2d 453 (1984) (mother's consent to enter home was voluntary despite police representation that they only wanted to talk to her son and police did not disclose that they intended to arrest her son); ***State v. Stevens***, 123 Wis. 2d 303, 309-11, 367 N.W.2d 788 (1985) (consent for garbage collection by ordinary collector acting as agent of police was not involuntary if the defendant was deceived as to the identity of the collector as an agent of police and the purpose of collecting the garbage). Indeed courts have recognized that to preserve community safety and security, police need "'stealth and strategy'" to encourage "consent to facilitate law enforcement activities." ***State v. Stankus***, 220 Wis. 2d 232, 238, 582 N.W.2d 468 (Ct. App. 1998) (quoted source omitted). Recently our supreme court recognized that "exaggerations of evidence against a defendant are the least coercive police deceptions because they can be countered with the

knowledge of the person being questioned." ***State v. Lemoine***, 2013 WI 5, ¶32, 345 Wis. 2d 171, __ N.W.2d __.

¶9 The representation that a DNA sample is sought to evaluate involvement in a crime other than the true crime being investigated is akin to the exaggeration of evidence against a defendant. The deception as to the purpose of the request for a DNA sample can be countered by the person's own knowledge of his or her criminal activity. That is particularly true when no limitation is placed on the use of the DNA sample.

¶10 Here the officers were truthful to Cazares-Herrera that they had DNA evidence which they suspected was his and that they wanted a DNA sample for a criminal investigation. Cazares-Herrera was told he was free to refuse their request for a sample. There was no barrier of communication nor any expression that Cazares-Herrera did not understand the request to provide the sample. Cazares-Herrera complains that the officers' contact with his boss, the presence of other persons at the restaurant, and the confrontation by three officers created an uncomfortable situation tending to compel consent to quickly terminate the encounter. However, nothing links those circumstances to his consent. Other than the deception as to the nature of the crime, which was a minimal coercive tactic, no other pressure was put on Cazares-Herrera. We conclude that under the totality of the circumstances, consent to provide the DNA sample was voluntary.

¶11 Cazares-Herrera contends that the use of his DNA sample for the sexual assault investigation exceeded the scope of his consent. We recognize that "'[t]he scope of a search is generally defined by its expressed object.'" ***Kelley***, 285 Wis. 2d 756, ¶13 (quoting ***Florida v. Jimeno***, 500 U.S. 248, 251 (1991)). However, "[t]he touchstone of the Fourth Amendment is reasonableness."

Jimeno, 500 U.S. at 250. Here the intrusion was on Cazares-Herrera's Fourth Amendment right to keep his person free from unreasonable searches. Once he consented to allowing the DNA buccal swab and it was completed, the intrusion on his privacy interest terminated. Even though the officers indicated they were investigating a robbery, there was no limitation on the use of the DNA sample. Once the sample was in possession of the police by valid consent, its use was no longer within Cazares-Herrera's privacy interest. *See* ***State v. Petrone***, 161 Wis. 2d 530, 545, 468 N.W.2d 676 (1991) (development of film lawfully seized was not "a separate, subsequent unauthorized search having an intrusive impact on the defendant's rights wholly independent of the execution of the search warrant"). *See also* ***Pharr v. Virginia***, 646 S.E.2d 453, 457-58 (Va. Ct. App. 2007) (a continuing expectation of privacy in a DNA sample outside the context in which it is given is not one that society recognizes as reasonable and the expectation of privacy in the sample ends when it is voluntarily provided to police). Cazares-Herrera consented to give the sample and the scope of his consent was not exceeded.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.