

**NO. 47366-6-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**ANDREA ADLER,**

**Appellant.**

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**RESPONDENT'S BRIEF**

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**I. ISSUES**

- I. Was it abuse of discretion when the trial judge refused to award appellant a new trial when he failed to recall any involvement in her dissolution case and that involvement did not address substantive matters?
- II. Was it ineffective assistance of counsel when defense counsel failed to file an affidavit of prejudice against Judge Evans when he was not informed of any potential prejudice until after the appellant was convicted of Forgery?

**II. SHORT ANSWER**

- I. No.
- II. No. Appellant was the person in possession of any information necessary to her defense, including her concerns of prejudice, and she failed to inform defense counsel of that information.

**III. FACTS**

The State generally agrees with appellant's rendition of the facts, but, where any disagreement exists, will address them within the body of its brief.

**IV. ARGUMENT**

**I. The appearance of fairness doctrine was not offended.**

Appellant claims a violation of the appearance of fairness doctrine resulted when she was found guilty of Forgery by Cowlitz County Superior Court trial judge, Michael Evans. After the trial court's ruling on guilt, but before the trial court imposed a sentence, the appellant moved for a new

trial based on her perceived prejudice. This was made without previous complaint or motion, either before or during the trial. In fact, appellant's post-verdict motion was the first time she mentioned any concern regarding Judge Evans' prejudice towards her case. Her motion discussed a ruling made by the Judge Evans, where he denied her request to re-open a matter already litigated in her dissolution case. Judge Evans did not hear substantive issues involved in that singular matter, nor did he rule on substantive matters when he denied her motion to re-open a previously litigated issue. But more importantly, he could not remember any aspect of her case. RP 195. By her standards, every seated judge in Cowlitz County should have recused himself or herself and a special judge pro tem be appointed. That is both flawed and impractical.

Any party has the option of filing an affidavit of prejudice against a judge before that judge has made a ruling on the case. RCW 4.12.050. But the appellant failed to file an affidavit against Judge Evans, despite the knowledge that he heard a minor issue in her dissolution case. RP 192-93. Indeed, the appellant is in the best position to know these specific facts and should have made her counsel aware of those facts had she considered them relevant to her criminal case. She did not. A defendant cannot wait until he or she receives an adverse ruling and then move for disqualification. *State v. Carlson*, 66 Wash.App. 909, 917, 833 P.2d 463 (1992).

A litigant who proceeds to trial when aware of a potential bias by the trial court waives his objection and cannot challenge the court's qualifications on appeal. *Tatham v. Rogers*, 1170 Wash.App. 76, 96, 283 P.3d 583 (2012) citing *In re Welfare of Carpenter*, 21 Wash.App. 814, 820, 587 P.2d 588 (1978). Obviously, any waiver is valid only if the waiving party knew the grounds requiring recusal prior to a decision is made. *Tatham*, 170 Wash.App. at 97, 283 P.3d 583.

Here, the appellant was aware that Judge Evans denied her motion to reopen a Guardian Ad Litem investigation because he felt she was stalling the dissolution trial. By proceeding to trial, she waived any ability to complain about him hearing the matter.

Still, a trial court cannot be biased or interested in the outcome of a case. The appearance of fairness doctrine is directed at the evil of a biased or potentially interested judge. *State v. Post*, 118 Wash.2d 596, 619, 826 P.2d 172 (1992). The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that "a reasonable person knows and understands all the relevant facts. Because a trial court is presumed to perform its functions regularly and properly without bias or prejudice, "a party asserting a violation of the doctrine must produce sufficient evidence demonstrating bias, such as a personal or

pecuniary interest on the part of the decision maker; *mere speculation is not enough*. *Tatham*, 170 Wash.App. at 96, 283 P.3d 583, citing *In re Pers. Restraint of Haynes*, 100 Wash.App. 366, 377 n.23, 996 P.2d 637 (2000)(emphasis added). Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit. *Post*, 118 Wash.2d at 619, 826 P.2d 172.

Recusal decisions lie within the sound discretion of the trial court. *State v. Bilal*, 77 Wash.App. 720, 722, 893 P.2d 674 (1995). Appellate courts review a trial court's recusal decision for an abuse of discretion. *State v. Davis*, 175 Wn.2d 287, 305, 290 P.3d 43 (2012). A trial court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds for untenable reasons.

In the present case, the appellant moved for a new trial based on her assertion that the Judge Evans was prejudiced against her. She first attacks his ability to hear the case and, surreptitiously, his ability to determine whether a new trial was warranted. Courts have ruled on circumstances of this nature and found it "unusual to require a judge to recuse himself from ruling on a motion for a new trial even where the motion...[is] critical of the trial judge." *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wash.App. 836, 840, 14 P.3d 877 (2000). The trial judge is fully informed and is

presumed to perform his functions regularly and properly without bias or prejudice. 103 Wash.App. at 841, 14 P.3d 877. A different rule would lead reward groundless tactical attacks. *Tatham*, 170 Wash. App. At 87, 283 P.3d 583 (nonmoving party has right to have trial court make decision on new trial).

In *Carter*, where the defendant appealed his conviction at trial, the Court of Appeals held it did not offend the appearance of fairness doctrine and affirmed the conviction even though the trial judge refused to recuse himself from hearing the matter after he heard the defendant's vacated *Alford* plea. 77 Wash. App at 12, 888 P.2d 1230. There, in its pronouncement of the sentence, the trial court made specific assessments of the defendant's credibility, and went so far as to mention the size of the defendant's criminal history when making its ruling. 77 Wash.App at 11. In considering the import those statements had on the issue of prejudice, the Court said they were appropriate for the *Alford* plea and a determination of guilt. Id. at 12. The Court stated it could not "say those comments evidenced actual or potential bias as required by *Post*." Id. But, more importantly, the Court found there was no evidence of any prejudice or bias on the part of the judge during the course of the defendant's trial. Id.

Similarly, no evidence of bias on the part of Judge Evans can be found during trial. Indeed, appellant has not even pointed to one instance that could possibly suggest prejudice. She has not shown any instances of prejudicial decisions or of improperly considered evidence, suggesting she agrees her case was fairly considered in spite of Judge Evans' earlier decision. It goes without saying it is a long standing presumption that, in a bench trial, the court will disregard improper evidence when making its findings. *See State v. Miles*, 77 Wash.2d 593, 601, 464 P.2d 723 (1970) (noting that in a bench trial there is "a presumption on appeal that the trial judge, knowing the applicable rules of evidence, will not consider matters which are inadmissible when making his findings"). In bench trials, judges are routinely asked to exclude probative evidence on the ground that it unfairly prejudicial, even disregard probative statements because they are prohibited under hearsay laws. Indeed, every time a judge makes a ruling determining evidence inadmissible, he must know what the evidence is before making that ruling. *State v. Read*, 147 Wash.2d 238, 245, 53 P.3d 26 (2002) quoting *Hawkins v. Marion Corr. Inst.*, 62 Ohio App.3d 863, 869, 577 N.E. 720, overruled on other grounds by 55 Ohio St.3d 705, 562 N.E.2d 898 (1990).

A defendant can rebut the presumption by showing the verdict is not supported by sufficient admissible evidence, or the trial court relied on the

inadmissible evidence to make essential findings that it otherwise would not have made. *State v. Read*, 147 Wash.2d at 244-46, 53 P.3d 26, citing *Greater Kan. City Laborers Pension Fund v. Superior Gen. Contractors, Inc.*, 104 F.3d 1050, 1057 (8th Cir.1997); *State v. Gower*, 179 Wash.2d 851, 855-56, 321 P.3d 1178 (2014). Appellant has not done this. Judge Evans made decisions based on law, often excluding evidence for one reason but allowing it for other purposes. RP: 38. Judge Evans considered the evidence that came out at trial and only the evidence that came out at trial when making his decision.

## **II. Appellant received effective assistance of counsel.**

The appellant argues she received ineffective assistance because counsel failed to file an affidavit of prejudice against a judge, who had no personal stake in her matter.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that defense counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The first prong requires a showing that counsel made errors so serious that it fell below a minimum standard of reasonable attorney conduct based on all the circumstances. The Court should give high deference to

defense counsel's performance and there is a strong presumption of reasonableness.

The second requires the defendant to show there is a probability that the outcome would be different but for the attorney's conduct. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 687-88, 104 S.Ct. 2052, 2064-65; *State v. Thomas*, 109 Wash.2d 222, 225-226, 743 P.2d 816 (1987). If an appellant fails to make either showing her allegation of ineffective assistance of counsel fails.

When arguing the first prong, appellant relies on *Carlson* to support her belief that defense counsel should have made further enquiries into the involvement every Cowlitz County judicial officer had with her dissolution case. However, this overlooks both the factual issues as well as the holding in *Carlson*. There, the judge and opposing counsel had a significant and well-documented relationship that included campaign involvement. 66 Wash.App. at 916-17. While the Court felt it odd that such a well-publicized relationship was not investigated by defense counsel, it did not consider the case on the issue of ineffective assistance of counsel, nor did it state the efforts were deficient in dicta. *Id.* Indeed, the Court made its decision on the

issue of recusal and held that, despite the numerous connections between the judge and counsel, recusal was not necessary. 66 Wash.App. at 923.

In the present case, the appellant waived jury trial. Once that waiver was made, the presiding judge, understanding the issues in the dissolution case, took precautions to ensure a fair trial. RP 195-96. He reviewed the case and ultimately disqualified two judicial officers before he named Judge Evans the trial judge. If appellant had concerns regarding Judge Evans' impartiality she should have, and could have, voiced them to her counsel prior to trial. *City of Seattle v. Williams*, 101 Wash.2d 445, 452, 680 P.2d 1051 (1984)(if the right to jury trial is waived, a defendant must be afforded a certain number of days in which to change her mind). RP 192-93. Without that information, it is unreasonable to expect defense counsel to make further enquiries into Judge Evans' involvement with appellant's dissolution case. This is especially the case when the presiding judge for Cowlitz County Superior Court reviewed the appellant's dissolution case and made the determination that two judicial officers could not hear her criminal trial. Evidently, appellant expects defense counsel to replace his judgment for that of the bench, already alerted to the contentious nature of the domestic proceedings.

Moreover, appellant's argument is empty because she has not shown why defense counsel should have filed an affidavit against Judge Evans other than he once denied her motion to reopen a guardian ad litem investigation. Such a claim does not suggest prejudice, which is necessary to show that an attorney's actions were deficient. *State v. King*, 24 Wash.App. 495, 503, 601 P.2d 982 (1979)(without providing a reason for prejudice, failure to file affidavit was not ineffective assistance despite the fact trial court had heard prior case involving defendant).

That said, waiving the right to a jury trial can be a tactical decision. *State v. Likakur*, 26 Wn.App. 297, 303, 613, P.2d 156 (1980). Counsel's advice in this area is deemed to be within the area of judgment and trial strategy, and rests exclusively in trial counsel. *State v. Thomas*, 71 Wash.2d 470, 471, 429 P.2d 231 (1967).

Here, the waiver of jury trial was a tactical decision. Given the issues that developed between the appellant and her victim husband in their dissolution case, defense counsel believed the appellant had a better chance of acquittal through a bench trial than a jury trial. RP 150. The strategy assumed that jurors were not equipped to distinguish the differences of marital property and forgery, and trusted that a seated judge could. RP 150. Whether the tactic worked or not does not negate its legitimacy—there are

some legal and factual issues which are perhaps best left to a more seasoned mind. Not to be overlooked, this explanation was made at trial, with appellant present, yet she failed to make an objection to Judge Evans presiding over trial.

Even if the failure to affidavit Judge Evans was deficient, appellant has not shown there is a reasonable probability the error undermined the outcome of the trial. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Thomas*, 109 Wash.2d at 226, 743 P.2d 816. This requires a look at the trial proceedings.

It is presumed that a trial court follows the evidentiary rules and the applicable law during a bench trial. *Miles*, 77 Wash.2d at 601. 464 P.2d 723. In this instance, the trial judge followed the rules of evidence, denying the entry of several types of evidence, and followed the relevant law of forgery when making its ruling. Indeed, the judge took time out following closing arguments to collect his thoughts and formulate his ruling. His verbal and written rulings were based on the facts of the trial, not emotion and not bias. RP 169-179, CP 26. He ruled that appellant unlawfully completed a written instrument by signing a check that required both her and her ex-husband's signature held it out as true to another, Sara Haeck, in order to defraud that person or another. She signed this check against her ex-husband's wishes.

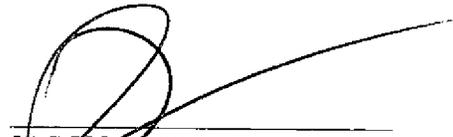
who told her he would not sign the check because he felt she would use the money for things other than fixing a damaged vehicle, and did not sign the check. RP 17-20, 23-25, 36. These are facts she admitted to at trial. RP 134-39. Failure to affidavit a judge who once denied an attempt to continue a custody trial will never undermine those facts, facts that support a conviction.

**V. CONCLUSION**

For the above reasons, the State asks the Court to uphold the appellant's conviction for one count of Forgery.

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By:



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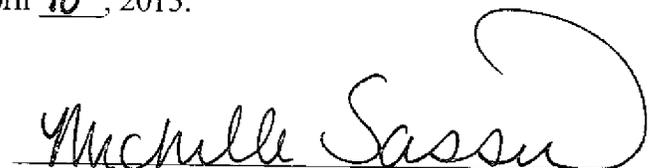
**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 10<sup>th</sup>, 2015.

  
Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

**April 10, 2015 - 12:31 PM**

## Transmittal Letter

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