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No. 54116-5-II

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION TWO

LEWIS COUNTY SUPERIOR COURT NO. 19-2-00595-21

MANUEL EDWARD BOLIVAR

Appellant

v.

STACY LEE JONES

Respondent

APPELLANT'S BRIEF

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RCW 4.12.030(2)

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GR 36
ER 408

I. INTRODUCTION

Appellant Manuel Bolivar seeks a ruling overturning the trial court's denial of his motion to change venue, the denial of his motion to continue trial, the court's denial of his motion to exclude his domestic violence evaluation under ER 408,, and the entry of the Domestic Violence Protective Order and Order to Surrender Weapons.

The Appellant brought his Motion to Change Venue or Appoint a Visiting Officer when his attorney discovered that 1) a picture of the Appellant was conspicuously posted in the Lewis County Superior Court administration office and 2) a public records request for Lewis County Superior Court emails revealed that all sitting judicial officers had prior knowledge of the case or the Appellant being an alleged safety risk to the county and a recused judicial officer had further email communication regarding the case with the sitting judicial officer two months after her recusal. After hearing argument in front of the Hon. Joely O'Rourke, the Court denied this motion but the Court allowed for an affidavit of prejudice to be filed against Judge O'Rourke.

The Hon. Andrew Toynbee then recused himself.

The Case then proceeded to a hearing in front of Lewis County District Court Judge, the Hon. R.W. Buzzard where a the Petition for a Domestic Violence Protection Order was granted. This Appeal follows.

The trial court's ruling should be overturned because there was sufficient evidence warranting a change of venue and this resulted in a deprivation of the

Appellant's due process rights and the court abused its discretion in denying the Appellant's Motion to Continue on account of his absence.

II. ASSIGNMENTS OF ERROR

1. The trial court erred and deprived the Appellant of his due process rights in denying the Appellant's Motion to Change Venue or Appoint a Visiting Judicial Officer when the trial court was presented with strong evidence that a fair trial was not possible given the photograph of Appellant being posted in court administration, every judicial officer in the Court having prior knowledge of the case and Appellant, and Court Commissioner Mitchell having email communication with Judge O'Rourke about the case two months after Commissioner Mitchell refused herself.

2. The trial court erred in denying the Appellant's motion to continue the hearing on November 25th, 2019, when the Appellant's flight to Washington from New Mexico was cancelled and he could not personally appear and aid in defending Petition against him.

3. The trial court erred in allowing the admission of the Appellant's domestic violence evaluation in the Respondent's second declaration when it was the product of settlement negotiations and shielded by ER 408.

III. STATEMENT OF THE CASE

A. Procedural History

The parties were never married, but have four children subject to a parenting plan in Lewis County Cause #12-5-62-9 that was entered in 2012. (CP 2: 7–29). The Appellant was ordered to services in Case #12-5-62-9, but was unable to complete these services on account of his work as an Engineering Inspector.(CP 30: 206–09). The Appellant has had no direct contact with the Respondent or their children since the entry of the Court’s order in 2012. *Id.*

Upon the expiration of her protection order in Case #12-5-62-9, the Respondent petitioned for a Domestic Violence Protection Order for herself and her four children. (CP 1: 1-6). A temporary order of protection was issued. (CP 12 156-159). The first hearing on the protective order was held on June 17, 2019, and the temporary order of protection was reissued. (CP 16: 163), The Appellant retained counsel on June 26, 2019. (CP 19: 169). On July 19, 2019 Commissioner Mitchell recused herself due to a safety concern related to the Appellant. (CP 20: 170)

A series of continuances and extensions of the order ensued. (CP 18:167-68); (CP 22: 172–73); (CP 23: 172-73); (CP 25: 177); (CP 26: 178); (CP 32: 210); (CP 37: 220); (CP 40: 224).

During the series of reissuances, the parties engaged in negotiations to enter into an agreed parenting plan and restraining order in Case #12-5-62-9 and

to dismiss the Petition for a DVPO, and the Appellant agreed to be evaluated for both chemical dependency and domestic violence issues with the Respondent as a collateral contact. (CP 29: 188-89). The Respondent then went on to use this evaluation as evidence in support of her Petition. *Id.*

On September 27, 2019, the Appellant's attorney was present in Lewis County Superior Court Administration at the 1:30 p.m. Ex Parte calendar on an unrelated matter, and observed a photograph of the appellant conspicuously posted in the Administration office. (CP 35:217-18). Counsel for the Appellant then filed a Motion to Change of Venue or to Approve a Visiting Judicial Officer. (CP 34: 213-16). After receiving results from a public record request regarding internal Lewis County Superior Court email communication about the Appellant, Counsel filed an additional declaration detailing that every judicial officer in Lewis County Superior Court had been notified that the Appellant was a safety concern and that Commissioner Mitchell forwarded Judge O'Rourke the communication regarding the Appellant being a safety concern two months after Commissioner Mitchell recused herself. (CP 42:228-45).

On November 14, 2019, the Court heard and denied the Appellant's Motion to Change Venue or to Appoint a Visiting Judicial Officer. (CP 54: 436-37). However, Judge O'Rourke disclosed that she was in the Lewis County Prosecutor's Office while the Appellant was charged with several felonies in 2011 and offered to allow the Appellant to file an affidavit of prejudice. (*Id.*). The Appellant then filed an affidavit of prejudice against Judge O'Rourke. (*Id.*).

On November 25, 2019, Judge Toynbee recused himself from the case as he was made aware of statements that the Appellant allegedly made about Commissioner Mitchell that were viewed as threatening, he was aware that the Appellant did not wish that the Judicial Officers in Lewis County Superior Court, and to avoid the appearance of impropriety. (CP 66: 477).

On November 25, 2019, the case proceeded to be heard in front of Lewis County District Court Judge R.W. Buzzard. (Transcript of Proceeding Page 23-26). The Appellant was not present on account of a cancelled flight from Hobbs, New Mexico to his connecting flight to Seattle, Wa from Denver, Co.. (Id. At 23-24). The Appellant moved for a continuance through counsel and this motion was denied. (Id. 23-30) The hearing then proceeded. (Id at 30).

The Appellant renewed his motion to exclude the evaluation that was produced during the course of settlement negotiations pursuant to ER 408, but this motion was denied. (Id. at 30).

The Respondent presented her case in chief, with only the Respondent testifying. (Id. at 37-97). The Appellant made a series of objections regarding the relevance of testimony and a lack of personal knowledge but none were sustained. (Id.. at 23-26). The Appellant presented his case, calling two witnesses, Ashely Elliot and Rocky Elliot. (Id. at 98-112). The case then proceeded to argument. (Id at 113).

The Court granted the petition and entered a lifetime Domestic Violence Protective Order restraining the Appellant from the Respondent. (CP 61 461-66)

and Domestic Violence Protective Orders lasting one year as to the children (CP 62 467-472). An order to Surrender Weapons and a judgement for attorney's fees were entered against the Appellant. (CP 60) This appeal follows.

IV. ARGUMENT

A. The Trial Court Erred and Denied the Appellant his Due Process Rights When It Denied the Appellant's Motion to Change Venue or Appoint a Visiting Judge.

A trial court's decision on a motion to change venue under RCW 4.12.030 is reviewed under the abuse of discretion standard. *West v. Osborne*, 108 Wn. App. 764, 770, 34 P.3d 816, 819 (2001), as corrected (Nov. 16, 2001). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *Rossmiller, v. Rossmiller*, 112 Wn. App. 304, 309, 48 P.3d 377 (Div. II 2002). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *In re: Marriage of Katare*, 125 Wn. App. 813, 822-23, 105 P.3d 44 (Div. I 2004). An abuse of discretion exists only when no reasonable person would take the position adopted by the trial. *State v. Nelson*, 108 Wn.2d 491, 505, 740 P.2d 835, 843 (1987).

However, the Appellant asks that the Court address the denial of the motion to change venue as a question of law and review the trial court's decision

de novo given the clear existence of prejudice against the Appellant on account of 1) Lewis County Superior Court having a picture of the Appellant displayed on the interior of Court Administrations' front wall; 2) the notification of a "safety concern" regarding the Appellant that was sent to all Lewis County Superior Court judicial officers from presiding Judge Lawler; and 3) the email communication concerning the Appellant from the recused Commissioner Mitchell to sitting Judge O'Rourke concerning the defendant two months after Commissioner Mitchell's recusal.

Due process requires that a motion to change venue be granted when a probability of prejudice to the defendant is shown. *State v. Boot*, 89 Wn. App. 780, 786, 950 P.2d 964, 967 (1998). Actual prejudice need not be shown. *State v. Crudup*, 11 Wn. App. 583, 586, 524 P.2d 479, 482 (1974). Though the Supreme Court has encouraged the interlocutory review of decision on changes of venue, the law is clear that this issue may still be brought up for review when the party seeking venue was prejudiced by the reason in which their trial was held; the burden is on the party seeking relief to show this. *Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 578, 573 P.2d 1316, 1320 (1978)(citing *State v. Hillman*, 42 Wash. 615, 85 P. 63 (1906).

A new trial may be granted because a party had been prejudiced by reason of the county in which the trial was held. *Id.* In *Hillman*, the defendants were prejudiced by reason of the county where the trial was held because of widespread publicity in the paper of general circulation in the county had ran multiple stories

regarding the defendants that were calculated to inflame the public and a group of citizens had associated for the purpose of creating sentiments against the defendants. *Hillman*, 42 Wash. 619-620. Though the jurors that were selected indicated that they could fairly and impartially sit on the trial despite their exposure to the publicity, the Court still found that the publicity still created a condition of the public mind not permissive to a fair trial and ordered that a new trial be had.

This case concerns a bench trial, and generally the trial court is presumed to perform its functions regularly and properly without bias or prejudice. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877, 879 (2000). However, judicial officers are not immune from bias and prejudice and the bias and prejudice in this case is as overwhelming as it was in *Hillman*. Here, every Judicial Officer in Lewis County Superior Court should have recused given the communications about the Appellant that had been circulated throughout the office to all judicial officers, that there was a picture of Mr. Bolivar hanging in court administration, and that recused Commissioner Mitchell had emailed Judge O'Rourke (who heard the motion for a change of venue) nearly two months after Commissioner Mitchell's recusal. (CP 35 217-218; CP 42 228-245). Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned. *Id.* This issue was clearly raised by the Appellant in his motion to change venue but was not acted on by the Court. (CP

34 213-216).

The evidence of prejudice in this case surpasses the negative publicity that the defendants in *Hillman* experienced. There, the defendants were the targets of inflammatory journalism and an association seeking to create public sentiments against them. Clearly, given the state of affairs that existed for the Appellant in Lewis County Superior Court, he could not have received a fair trial as the trial court itself created the sentiments and publications concerning the Appellant. The evidence is in the record regarding Lewis County's Superior Court's internal discussions and targeting of the Appellant is only what counsel was able to glean from public records requests and observations of the Court's posting of the Appellants picture. It is not unduly speculative to imagine that there were verbal conversations concerning the Appellant had amongst Lewis County Superior Court judicial officers and staff. The evidence of prejudice Appellant is ample, this is not a mere probability, and due process requires that the trial court's denial of the motion to change venue be overturned and trial in a new venue be ordered. Where the circumstances involve a probability that prejudice will result, it is to be deemed inherently lacking in due processes. *State v. Stiltner*, 80 Wn.2d 47, 54, 491 P.2d 1043, 1048 (1971)(citing *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966)). Here, this was a clear denial of due process given that the trial court targeted the Appellant in internal communications and posted a picture of him in their main office where all judicial administrative affairs are conducted.

The Respondent may ask the court to examine factors proposed by the American Law Review have been adopted by Washington Courts to determine when a court ought to change venue based on alleged prejudicial pretrial publicity. *State v. Crudup*, 11 Wn. App. 583, 587, 524 P.2d 479, 482 (1974). These include: (1) the inflammatory or noninflammatory nature of the publicity; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5) the familiarity of prospective or trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both peremptory and for cause; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn. *Id.*

However, the Appellant submits that the Court should not be applying these factors in this case as this matter concerns only internal Lewis County Superior Court communication concerning the Appellant while the body of caselaw concerning the application of these factors concerns garden variety media coverage of the precedent cases. *See Unger v. Cauchon*, 118 Wn. App. 165, 171, 73 P.3d 1005, 1008 (2003) (holding newspaper coverage of accident that was the subject of case against Island County was insufficient to support a change of venue when the appellant solely offered this publication as evidence supporting the motion to change venue); *State v. Crudup*, 11 Wn. App. 583, 587, 524 P.2d

479, 482 (1974) (holding extensive pretrial publicity in homicide case did not give grounds to change venue when media coverage was “non inflammatory factual reporting” and a venire of jurors later showed no indications of being prejudiced against the defendant due to the coverage)(citing Annot. 33 A.L.R.3d 17, 33 (1970)) and Pretrial Publicity-Fair Trial, Annot. 10 L.Ed.2d 1243 (1964)); *State v. Jackson*, 111 Wn. App. 660, 670, 46 P.3d 257, 263 (2002), aff’d, 150 Wn.2d 251, 76 P.3d 217 (2003) (holding that extensive news media coverage of murder due to violent nature of crime did not entitle defendant to change of venue).

In this case, the Court need only concern itself with the statutory standard of “there is reason to believe that an impartial trial cannot be had therein” to decide whether or not a change of venue should have been granted. RCW 4.12.030(2). This case is readily distinguishable from *Unger*, *Crudup*, and *Jackson* as there was no media coverage of this case and a jury trial was not at issue. Rather, the record here indicates that venue in Lewis County was inappropriate and erred when it maintained jurisdiction over the case.

Lewis County Superior Court’s internal circulation of the emails concerning the Appellant and their decision to single him out by placing a picture of him clearly on the inside of court administration’s window prejudiced the Appellant and at least should have given a reasonable judicial officer reason to believe that an impartial trial could not be had in Lewis County. Though the Trial Court indicated it merely followed “standard safety protocol” (Transcript pg. 18) and the guidance of GR 36, the elephant in the room is the involvement of recused

Commissioner Mitchell emailing the sitting judicial officer, Judge O'Rourke, about the case two months after Commissioner's recusal and the trial court's posting of the Appellants picture in court administration's front wall. Further, Judge Toynee's self recusal goes to the overall impropriety of the Court's decision to maintain jurisdiction when he recused himself for one of the same basis the Appellant complained of in his motion to change venue- the appearance of impropriety.(CP 66) The Appellant could not have received a fair trial in Lewis County Superior Court as the court specifically targeted him as a threat.

B. The Trial Court erred in denying the Appellant's motion to continue the hearing on November 25th, 2020.

Whether a motion for continuance should be granted or denied is within the discretion of the trial court. *Balandzich v. Demeroto*, 10 Wn.App. 718, 720, 519 P.2d 994 (1974). A trial court's decision is reviewed for manifest abuse of discretion. *Id.* In exercising its discretion, the court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted to the moving party and conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court. *Id.*

In *Chamberlin v. Chamberlin*, a husband sued his wife for divorce in forum 2,000 miles from where parties had maintained their home for 20 years and defendant still resided and she was taken seriously ill a week before trial date.

Chamberlin v. Chamberlin, 44 Wn.2d 689, 698, 270 P.2d 464, 469 (1954). The defendant/wife moved for a continuance, but the court granted the divorce to husband after denying defendant's motion for 30 days continuance of trial. *Id.* The court examined *Strom v. Toklas*, which stated that “(o)rdinarily the court will not go into a trial when one of the parties, on account of sickness or other unavoidable cause, is unable to be present” but that this rule has limits. *Id.* (Citing *Strom v. Toklas*, 78 Wash. 223, 224, 138 P. 880, 880 (1914)). Though the court acknowledged that “it cannot be doubted that it is the right of the parties to the action to be present at the trial of their case “ the court noted that the rule regarding continuances for an absence of a party is that a party knowing the date a cause is set for trial, cannot absent himself from the jurisdiction of the court and expect the court to delay the trial merely to suit his personal convenience. *Id.* at 701 to 703. However, the court noted that fault of the absence is critical and a continuance should be granted if a denial thereof would operate to delay or defeat justice; and courts have been said to be liberal in continuing a cause when to do otherwise would deny applicant his day in court. *Id.* at 703.

The court then reasoned that the denial of the continuance prevented the defendant from assisting her attorney and testifying in support of her answer and supporting affidavits and constituted a denial of justice when no hardship could have been caused to the plaintiff by delaying trial for the 30 day time period. *Id.* at 704-07.

In this case, the Appellant was denied his day in court much like in

Chamberlin. Though the Appellant was not ill, he was certainly unable to attend at no fault of his own when his flight from Hobbs, New Mexico was delayed and subsequently canceled. Further, it was impossible for the Appellant to have filed a declaration with the court fully explaining his absence and need for a continuance as this cancellation was late in the evening on the eve of his trial. He not only was not allowed to be present to assist counsel in his examination of the Respondent, but also to have testified on his own behalf should he have elected to. Further, the Respondent had been present for every court appearance to that date and every continuance to the point of the trial was either by the agreement of the parties or by the trial court's decision to continue. Last, the Respondent could not have been prejudiced by another continuance as the Court would have again necessarily extended the temporary order of protection against the Appellant until the date of the next hearing. The Respondent was in her local court, minutes from her home, and terms for the appearance were offered by Appellant's counsel on the record and further illustrates the lack of prejudice the Respondent would have suffered.. (transcript of proceedings at 26). The Court abused its discretion in denying the Appellant's motion for a continuance.

C. The Trial Court Erred in admitting and considering the domestic violence evaluation filed by the Respondent.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012).

ER 408 provides:

In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) 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 rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.(emphases added)

Statements made for purposes of settlement negotiations are inadmissible, and this exclusion has been extended by the Rules of Evidence to completed compromises when offered against the compromisor. *Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc.*, 486 F. Supp. 414 (S.D.N.Y. 1980). This rule attaches to settlement negotiations as soon as a dispute has arisen. *Finley v. Curley*, 54 Wn. App. 548, 774 P.2d 542 (1989) (holding corporate officer's offer to exchange his stock for consultant's shares in corporation was inadmissible settlement offer when there was already a disagreement between the parties as to shareholder's status. Further, documents and other statements that are an integral part of settlement negotiations or the settlement itself are barred by ER 408¹.

When a letter or document is part of a settlement offer and provides that evidence containing an offer of valuable consideration to settle a claim is not admissible to prove liability for the claim or its amount.. *Fetty v. Wenger*, 110 Wn. App. 598, 602, 36 P.3d 1123, 1125 (2001), as amended on denial of

¹ Rule408.Compromise and Offers to Compromise, 5D Wash. Prac., Handbook Wash. Evid. ER 408 (2019 ed.), Tegland

reconsideration (Mar. 27, 2002) (holding letter from defendant to plaintiff as to fees owed by defendant was admissible because it did not contain an offer to settle a claim). Thus, when there is a nexus between the statement or document and an offer to settle a claim, it will be inadmissible pursuant to ER 408.

Here, the parties engaged in negotiations to settle their dispute over the DVPO by entering an agreed restraining order restraining the Appellant from the Respondent in lieu of the Respondent pursuing the DVPO. (CP 29:188-89). The Respondent discussed the terms of this declaration and the Appellant's diagnosis in her "second declaration" once settlement negotiations broke down. (*Id.*). At the hearing on September 26, 2019, the Appellant moved to seal the declaration because of its sensitive content; this motion was denied. At the hearing in front of Judge Buzzard on November 25, 2019, the Appellant then moved to exclude the declaration portions that discussed the evaluation pursuant to ER 408, but the Court would not rule on this issue and the Court decided it was admitted, but would be given proper weight. (Transcript of Proceeding Page 33).

The Court erred on both occasions in both refusing to seal and allowing the substance of the declaration to be admitted into evidence. At the time the evaluation was produced, the parties were actively disputing the DVPO. But for the settlement negotiations that the parties engaged in, the evaluation would not have been produced. This evaluation was integral and meant to produce an updated evaluation recommending treatment for the Appellant to complete once the evaluation was filed in connection with a parenting plan in Case # 12-5-62-9.

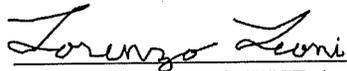
ER 408 is clear that if there is a connection between a document or statement and an offer to settle a dispute.

Here, the Court erred in allowing it to be considered in evidence and “read all the documents filed in this action” before making its ruling. *Id.* at 129. The court clearly considered inadmissible material regarding the evaluation in making its determination. This was error under ER 408 and this error was not harmless as it was overwhelmingly prejudicial to the Appellant given that no alleged act of domestic violence occurred since 2011. Accordingly the orders of protection entered by the court should be overturned.

V. CONCLUSION

The trial court’s denial of the Appellant motion to change venue and the entry of the domestic violence protection order against the Appellant should be overturned and a new trial ordered in a neighboring county.

Respectfully submitted,



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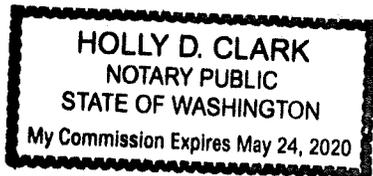
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Holly D. Clark

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