

70868-6

70868-6

No. 70868-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GENE ALFRED PALMER, II,
Appellant,

vs.

ANDY LEE and "JANE DOE" LEE, husband and wife, and their marital
community,
Respondents.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 APR 23 PM 3:24

BRIEF OF RESPONDENT

David J. Wieck, WSBA #16656
Coreen Wilson, WSBA #30314
Attorney for Respondents Lee
400 112th Ave NE, Suite 340
Bellevue, WA 98004
(425) 454-4455

ORIGINAL

TABLE OF CONTENTS

- I. Introduction.....1
- II. Issues Pertaining to Assignments of Error.....1
- III. Statement of the Case.....4
- IV. Argument.....13
 - A. The trial court’s refusal to give a jury instruction on willful misconduct should be affirmed because there is no record of any objection by Mr. Palmer.....13
 - 1. Standard of review.....14
 - 2. There is no record of any evidence presented at trial regarding the tort of intentional misconduct.....14
 - 3. There is no record to indicate that Mr. Palmer preserved error on this issue.....15
 - B. The trial court’s alleged refusal to allow a witness to testify by Skype should be affirmed because there is no record on this issue.....15
 - 1. Standard of review.....16
 - 2. There is nothing in the record to support the argument that the witness was unavailable because Mr. Lee requested a continuance.....16
 - 3. There is no record regarding the identity of witness, the request for testimony via Skype, the reason for her alleged unavailability, or the rationale behind the court’s alleged denial of the request.....17
 - C. The trial court’s decision regarding the admission of medical records under ER 904 should be affirmed because

	Mr. Palmer did not comply with ER 904, there is no record to review, and any error is harmless.....	19
	1. Standard of review.....	19
	2. If the trial court refused to admit any of the proposed exhibits, such refusal was proper because Mr. Palmer admittedly did not comply with the requirements of ER 904.....	20
D.	The trial court’s alleged denial of Mr. Palmer’s request for a subpoena duces tecum to State Farm should be affirmed because there is no record to review and nothing to justify a request for post-trial discovery.....	22
	1. Standard of review.....	22
	2. If Mr. Palmer made a request for a subpoena duces tecum, it was properly denied because post-trial discovery was not warranted.....	22
E.	Mr. Palmer’s felony conviction for False Statement by Claimant was properly admitted because it is admissible per se under ER 609.....	23
	1. Standard of review.....	24
	2. Mr. Palmer’s conviction for False Statement of Claimant is per se admissible under ER 609(a)(2).....	24
F.	The trial court properly permitted voir dire regarding Mr. Palmer’s alleged mental illness because it was raised by the jury, discussed at length by Mr. Palmer’s attorney, and never objected to.....	25
G.	The Lees are entitled to an award of attorney fees and costs.....	26
V.	Conclusion.....	26

TABLE OF AUTHORITIES

TABLE OF CASES

Washington State Cases:

Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160,
151 Wn.2d 203, 210, 87 P.3d 757 (2004).....14

Cox v. Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000)
.....14

Fox v. Mahoney, 106 Wn. App. 226, 229, 22 P.3d 839, 840-41 (2001)....21

Goehle v. Fred Hutchinson Cancer Research Ctr., 100 Wn. App. 609,
614-17, 1 P.3d 579, 582-84 (2000)15

Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994)
.....19, 20

Hendrickson v. King County, 101 Wn. App. 258, 269, 2 P.3d 1006, 1012
(2000)21

In re Marriage of Swaka, 179 Wn. App. 549, 556, 319 P.3d 69 (2014)
.....16, 17, 19

John Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 778, 819 P.2d 370
(1991)22

Kinsman v. Englander, 140 Wn. App. 835, 840, 167 P.3d 622 (2007).....16

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)
.....22

State v. Rivers, 129 Wn.2d 697, 705, 921 P.2d 495 (1996).....25

State v. Teal, 117 Wn. App. 831, 844, 73 P.3d 402 (2003).....24

Stuart v. Consol. Foods Corp., 6 Wn. App. 841, 846-47, 496 P.2d 527,
531 (1972)15

Vaughn v. Vaughn, 23 Wn. App. 527, 531, 597 P.2d 932 (1979)23

REGULATIONS AND RULES

ER 904.....2, 19, 20, 21
ER 609.....3, 23, 24, 25
CR 51.....15
CR 43.....17
RAP 14.2.....26
FRCP 43 (advisory committee's note to 1996 amendments).....19

I. INTRODUCTION

The primary problem on review in this case is the insufficiency of the record. Very few clerk's papers have been designated, and only limited portions of the report of proceedings were transcribed. Nonetheless, Mr. Palmer demands that the court review a long list of alleged errors, many of which appear nowhere in the record.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should the trial court's refusal to give a jury instruction on willful misconduct be affirmed when there is no record of any objection by Mr. Palmer?

2. Should the trial court's decision not to permit a witness to testify via Skype be affirmed when:

A. The alleged unavailability was not occasioned by Mr. Lee's request for a trial continuance, because Mr. Palmer was granted a subsequent continuance specifically for the purpose of accommodating his witnesses;

B. There is no record that Mr. Palmer made a request for a lay witness to testify via Skype;

C. There is no record that the request, if made, was refused;

D. There is no record as to why the request, if made, was refused; and

E. There is no record as to the identity of the witness or the expected content of her testimony?

3. Should the trial court's decision regarding the admission of medical records under ER 904 be affirmed when:

A. The jury found in favor of Mr. Lee on liability, so any error regarding the admission of Mr. Palmer's medical records and bills is harmless;

B. Plaintiff's counsel admitted on the record that he did not submit copies of his proposed exhibits as required by ER 904;

C. There is no record as to which records were admitted during trial;

D. There is no record as to which records were refused during trial; and

E. There is no record as to the basis for admission or exclusion?

4. Should the trial court's denial of Mr. Palmer's request for issuance of a subpoena duces tecum to State Farm be affirmed when:

A. There is no record of any request by Mr. Palmer to the trial court for the issuance of a subpoena;

- B. There is no record that such a request was denied;
- C. There is no record as to why the trial court declined to issue a subpoena; and
- D. Assuming that such a request was made, it was allegedly made following trial, and there is nothing in the record to justify a request for post-trial discovery?

5. Should the court affirm the trial court's decision to permit evidence of Mr. Palmer's felony conviction for False Information by Claimant when it is a crime of dishonesty and is explicitly admissible under ER 609(a)?

6. Should the court affirm the trial court's decision to permit voir dire regarding Mr. Palmer's alleged mental illness, when:

A. The jury raised concerns over Mr. Palmer's mental health during the court's questions, before either counsel had the opportunity to inquire;

B. Mr. Palmer's attorney discussed mental illness at length during voir dire; and

C. Mr. Palmer made no objections to any references to mental illness?

III. STATEMENT OF THE CASE

This case arises out of a personal injury action. CP 1-5. Mr. Palmer claims that while he was riding his bicycle on Northeast 50th Street in Seattle, Mr. Lee hit him with his vehicle. CP 2. Mr. Palmer also claimed that Mr. Lee then got out of his vehicle and battered him. *Id.* Mr. Lee admitted that a collision occurred, but alleged that it was Mr. Palmer who negligently ran to his car, and denied that he battered Mr. Palmer.

The trial date was continued a number of times before the case finally proceeded to trial. Just before trial was set to begin, Mr. Palmer filed two affidavits of prejudice and a third judge recused herself, resulting in the case not proceeding to trial as scheduled and instead being placed on standby for two weeks. RP II 5:8-16. When a trial judge was finally secured to hear the case, Mr. Lee's attorney was unavailable. RP II 5:14-16. The parties thus stipulated to a new trial date of July 15, 2013. RP II 5:16-18. However, Mr. Palmer's witnesses were apparently unavailable for the new trial date, so Mr. Palmer's trial counsel requested—and received—and additional continuance specifically to accommodate his witnesses. CP 37-50.

The case finally went to trial in King County Superior Court before the Honorable Andrea Darvas on August 5, 2013. Before the trial commenced, Judge Darvas heard pretrial motions. Mr. Palmer attended

the hearing on pretrial motions with his attorney. After repeated outbursts by Mr. Palmer, which included foul language and derogatory comments directed toward defense counsel, the court stated:

The Court: Mr. Palmer, let me say one other thing. If you persist in this behavior once we have potential jurors in the room, you're gonna be creating a bad impression of yourself in front of them. You really need to control your behavior.

RP II 50:6-10. Mr. Palmer responded with repeated swearing and argued with the court. RP II 50:11-51:24. The court finally warned Mr. Palmer:

The Court: Mr. Palmer, the next piece of profanity that comes out of your mouth, you're out of here for the rest of the day. Do you understand me? I am not going to put up with this. I expect you to keep in control of your mouth. You – [Mr. Palmer interrupts.]

RP II 51:25-52:4.

Despite the court's warning, Mr. Palmer's behavior continued during voir dire the following day. Mr. Palmer made repeated outbursts during the court's questions to the jury, which included:

Mr. Palmer: None of this means shit.

RP I 23:14.

Mr. Palmer: I'm still going to put a bullet in that guy's head.

RP I 25:22-23. Mr. Palmer made several other interruptions. RP I 23:9-10, 14; RP I 25:4; 22-23; RP I 29:11-12; RP I 31:8. The court finally addressed Mr. Palmer:

The Court: So, Mr. Palmer, I need to have you keep your voice down and if you can't do that, then just write notes to your lawyer please, because you're kind of disrupting the proceedings here a little bit. Thank you.

Mr. Palmer: Whatever.

RP I 32:5-9. While the jury was out of the room, the court again expressed concern over Mr. Palmer's behavior and the impact of his outbursts on the jury panel:

The Court: ...I don't see how we can have a jury trial if I'm going to excuse everyone who has a bad impression of Mr. Palmer when he swears in court and raises his voice and interrupts people.

RP I 66:9-12. The court was not alone in its concern. Before either attorney had the opportunity to conduct voir dire, several members of the panel expressed concern over Mr. Palmer's behavior and questioned his mental health:

Juror 23: I really apologize for this, but I've been sitting here listening to Mr. Palmer and I do not like him, his attitude or anything. And I don't think I would be a very good juror on this case. I apologize.

RP I 34:8-12.

Juror 23: ...I couldn't hear a lot of what you said the first time and I answered a couple of questions wrong because I was so distracted. But then his last comment, I was – I just don't think that I can – I don't know if it would be fair to him at this point.

RP I 34:23-35:3

Juror No. 7: I was gonna say the same exact thing as her – that I'm sitting here the whole time and all I can focus on is him. I'm thinking perhaps he's handicapped in some way because no normal person would act like that in a court with total disrespect, snapping his fingers. He appears to be aggressive. I don't trust him and that's definitely swaying me. I am willing to sit here and listen to the evidence, but he would have a better chance if he didn't show up personally today.

RP I 35:18-36:1. Other jurors also expressed a concern that it would be difficult to be impartial in light of Mr. Palmer's behavior. RP I 38:9-14 (Juror 6), RP I 36:17-24 (Juror 9), RP I 50:6-27 (Juror 14).

After much discussion of Mr. Palmer's behavior, counsel were finally permitted to conduct voir dire. As Plaintiff, Mr. Palmer's attorney had the first round. His first question to the jury was:

So who here has dealt with anyone who is mentally challenged in their close family, or themselves?

RP I 41:7-8. Mr. Palmer's attorney spent his entire first round of voir dire discussing his client's alleged mental illness and improper behavior. He commented on his client's behavior during voir dire, telling the jury:

This is nothing what he did today. I've been with the man three years. Showing me some papers and snapping his fingers at me and saying a few things, this is nothing. You guys haven't seen anything.

RP I 49:24-50:2. Throughout counsel's questioning, the jury panel continued to raise issues with Mr. Palmer's behavior and question his mental health:

Juror 14: But just, to me, it was rude. It was rude. The language, the swearing, the ability for all of us to hear that. I think it was rude for him to be here knowing full well, I think that was a disgrace to the court system, and I would have excused him.

RP I 55:17-21.

Juror No. 9: I'm telling you that there's something wrong with him.

RP I 59:24-25.

Juror No. 1: Is he going to be here every day of the trial?

...

Mr. Budigan [Plaintiff's counsel]: I – I hope he's here every second and I hope at the end of five days, I've convinced all of you guys –

Juror No. 1: Well then you should quit arguing about this then.

Mr. Budigan: - to be more tolerant of someone who is mentally challenged.

RP I 61:25-62:1, 62:10-16. Because of the concerns over Mr. Palmer's behavior and mental health, the court had a discussion with counsel outside of the presence of the jury following the afternoon recess:

The Court: Mr. Budigan, I don't know what to do. I said yesterday that I had concerns about Mr. Palmer and his behavior having negative influences on the jury room if he repeated the type of behaviors we saw him displaying yesterday today. I am not going to excuse every single juror because your client misbehaves in court. I'm not going to do that. I don't think that is a fair thing to do at all. I'm not sure what to do. I don't know what kind of psychological or psychiatric testimony we're going to be hearing. I haven't seen any indication that we're going to be hearing any.

...

[T]he only bias that other people are articulating is that your client has made an incredibly negative impression on them. Now the truth of the matter is, once I impanel a jury, he's going to probably continue to do that. So I don't see how I can possibly impanel 12 men and women, or 14 men and women, who aren't going to be negatively influenced by his antics. And it sounds like you're not going to have any evidence to explain any of this stuff.

RP I 63:12-22; RP I 64:12-20. Although the court twice questioned whether Mr. Palmer would produce evidence as to his alleged mental illness or disability, his attorney did not produce any, despite having suggested to the court and to the jury during voir dire that such evidence did exist.

When Mr. Lee's attorney had the opportunity to inquire of the panel, he focused the majority of his questions on the panel's experience with bicycling accidents, personal injury lawsuits, and medical training. RP I 68:13- He posed only a few questions with regard to mental illness, picking up where Mr. Palmer's attorney had left off. RP I 89:13-91:19.

Mr. Palmer's counsel's second round of questioning was replete with argument and speechmaking, for which he was reprimanded by the court. RP I 58:4-59:1; 63:22-64:4; 66:24-67:25; 105:15-106:12; 108:24-109:4; 110:13-15. He also asked a number of inappropriate questions, such as:

Mr. Budigan: ...[W]hen you're actually weighing the testimony of the two, then, I love you, you're a great juror.

Mr. Wieck: Your Honor, objection.

The Court: Sustained.

Mr. Budigan: If you can't do that, I love you for being honest.

The Court: Excuse me. Mr. Budigan, personal opinions about who you love and who you don't love do not belong in this courtroom.

Mr. Budigan: I didn't mean love. I'm sorry.

Juror No. 7: I understand you.

Mr. Budigan: I don't mean I love you. I – I do my best with those that I do love and I'm sorry.

RP I 98:23-99:11. Several other objections were sustained over inappropriate questions. RP I 94:25-95:10; 96:5-13; 98:9-16; 111:7-21.

Although he referred to his client's mental illness several times, Mr. Palmer's attorney did not raise the issue of disability under the Americans with Disabilities Act (ADA) until the second day of trial. RP I 121:1-3. Confusingly, Mr. Palmer's attorney raises the ADA and then states:

Mr. Budigan: His mental illness is not an issue.

The Court: What evidence are you planning on putting on regarding his mental illness?

Mr. Budigan: None, except for this process of selecting jurors. If the court says, "I don't want to recognize the ADA and I want to," then I say we have a hearing on his competency. Not competency – I misspoke

– that we have a hearing on his ability to –
on his disability.

The Court: But Mr. Budigan, how can I
have a hearing when you just told me you’re
not gonna present any evidence?

RP I 124:13-23. Plaintiff’s counsel does not respond to this inquiry, and
launched into a tangential discussion. RP I 124:24-127:18. The court
asked again:

The Court: Okay Mr. Budigan, I’m going
to stop you. Give me an offer of proof with
respect to this hearing you want on his
disability status because of mental illness.

Mr. Budigan: I don’t have to. And here’s
why.

The Court: You want a hearing?

Mr. Budigan: No, let me – here’s why.

The Court: What are you gonna do at a
hearing?

Mr. Budigan: No, and here’s why Your
Honor. The offer of proof is that actual
jurors themselves are saying, “I observed
this man and there’s nothing wrong with
him.”

RP I 127:19-128:4. Despite several invitations by the court, Mr. Palmer’s
attorney never provided an offer of proof as to any evidence he would
present to the effect that Mr. Palmer suffered from a mental illness or
other impairment that resulted in a disability as defined by the ADA.

The case proceeded to trial, and the jury found in favor of Respondent Andy Lee on liability. CP 74-76. It would be a gross understatement to say that Mr. Palmer is unhappy with the verdict. Mr. Palmer has filed a complaint against the trial judge with the Commission on Judicial Conduct, RP 4:3-24; CP 136-141, a bar complaint against Mr. Lee's attorney, CP 114-129, and a federal lawsuit against Mr. Lee's attorney and insurance company. CP 154-158. He now appeals.

Mr. Palmer has included very few clerk's papers for review, and only selected portions of the report of proceedings. Mr. Palmer nonetheless requests that the court review a number of claimed errors, including alleged discrimination against him by the trial court for his disability as a result of mental illness and the admission of evidence regarding his criminal history of fraudulently collecting unemployment benefits.

IV. ARGUMENT

A. The trial court's refusal to give a jury instruction on willful misconduct should be affirmed because there is no record of any objection by Mr. Palmer.

Mr. Palmer asks the court to review the trial court's refusal to give his proposed instruction regarding willful misconduct. However, the report of proceedings he has submitted does not include any discussion or argument related to jury instructions. There is no record that Mr. Palmer's

attorney objected to the trial court's failure to give the proposed instruction. Likewise, there is no record of any evidence offered at trial that would support Mr. Palmer's claim for willful misconduct, nor is there any evidence or argument to suggest that Mr. Palmer was unable to argue his theory of the case without the proposed instruction. Accordingly, the trial court's decision to omit the proposed instruction on willful misconduct should be affirmed.

1. Standard of review.

The court reviews jury instructions de novo. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). Jury instructions are sufficient when they allow counsel to argue their case theories, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied. *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 210, 87 P.3d 757 (2004).

2. There is no record of any evidence presented at trial regarding the tort of intentional misconduct.

Mr. Palmer claims that there is evidence sufficient to support an instruction on the intentional tort of willful misconduct. However, the record on review does not contain any such evidence, nor does it contain any argument with regard to his proposed jury instructions. Without such

evidence, this court is unable to review the claimed error. The trial court's decision should thus be affirmed.

3. There is no record to indicate that Mr. Palmer preserved error on this issue.

In order to preserve error as to the failure of the trial court to give a proposed instruction, a party must object on the record and explain the grounds for the objection. CR 51(f). There is no indication that Mr. Palmer made any such objection. A record of a colloquy between the court and counsel discussing the particularities of each objection is essential to review. *See Stuart v. Consol. Foods Corp.*, 6 Wn. App. 841, 846-47, 496 P.2d 527, 531 (1972); *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 614-17, 1 P.3d 579, 582-84 (2000). Because Mr. Palmer does not present any record indicating compliance with CR 51, the court should decline to review this alleged error and should affirm the trial court.

B. The trial court's alleged refusal to allow a witness to testify by Skype should be affirmed because there is no record on this issue.

Mr. Palmer alleges that his "star" witness to the collision was not permitted to testify via Skype. He does not identify the witness, does not provide any specifics as to the expected content of her testimony, does not explain when the request was made or why it was allegedly denied, and

does not provide any legal argument on this issue. There is no record as to any request to allow a lay witness to testify by Skype, so there is nothing for the court to review.

1. Standard of review.

Trial court decisions as to whether to permit testimony via Skype or other remote contemporaneous methods are reviewed for abuse of discretion. *In re Marriage of Swaka*, 179 Wn. App. 549, 553, 319 P.3d 69 (2014). A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds. *Kinsman v. Englander*, 140 Wn. App. 835, 840, 167 P.3d 622 (2007).

2. There is nothing in the record to support the argument that the witness was unavailable because Mr. Lee requested a continuance.

Mr. Palmer alleges that his “star” witness was unavailable as a result of defense counsel’s request for a continuance. This is untrue. Mr. Palmer’s trial counsel requested—and received—and additional continuance specifically to accommodate his witnesses. CP 37-50. Furthermore, the only reason defense counsel had to request a continuance is because Mr. Palmer filed two affidavits of prejudice and a third judge recused herself, resulting in the case not proceeding to trial as scheduled and instead being placed on standby for two weeks. RP II 5:8-16. In any event, when Mr. Palmer raised the issue of witness availability prior to

trial, and the trial was continued again to accommodate him. CP 37-50. Because the trial date was rescheduled at his request for the specific purpose of accommodating his witnesses, he cannot complain now.

3. There is no record regarding the identity of witness, the request for testimony via Skype, the reason for her alleged unavailability, or the rationale behind the court's alleged denial of the request.

Even if we assume that the court refused to allow Mr. Palmer' "star" witness to testify via Skype, there is no basis upon which this discretionary ruling can be questioned. Under CR 43(1), the court may—but is not required to—permit the contemporaneous transmission of witness testimony from another location. CR 43(1). Before remote testimony is permitted, the requesting party must demonstrate "good cause in compelling circumstances." *Id.* Determining whether a party has shown good cause in compelling circumstances involves a fact-specific inquiry that rests in the sound discretion of the trial court. *In re Marriage of Swaka*, 179 Wn. App. 549, 556, 319 P.3d 69 (2014). Here, the record is devoid of any facts related to the witness's availability and why Skype transmission was requested. Because live testimony is critically important, it is typically required. As the court in *In re Marriage of Swaka*, 179 Wn. App. 549, 554-55, 319 P.3d 69, 71-72 (2014), explained:

The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other—and perhaps more important—witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously.... An unforeseen need for the testimony of a remote witness that arises during trial ... may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness....

A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances....

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

Id., quoting FRCP 43 advisory committee's note to 1996 amendments.

Here, there is no record as to any compelling circumstances that would overcome the preference for live testimony. As such, any ruling by the trial court denying a request for testimony via Skype should be affirmed.

C. The trial court's decision regarding the admission of medical records under ER 904 should be affirmed because Mr. Palmer did not comply with ER 904, there is no record to review, and any error is harmless.

Once again, the record is not sufficient for the court to review this issue. The limited record available reflects the fact that Mr. Palmer did not attach copies of his proposed exhibits to his ER 904 notice, as explicitly required by the rule. However, the issue of which medical records and bills were admitted and which were refused is entirely irrelevant anyway, because the jury found no liability by Mr. Lee. The medical bills and records relate to damages and have no bearing on the liability issue. Thus, even if error could be found, it is harmless.

1. Standard of review.

Trial court rulings on the admissibility of evidence are generally reviewed under an abuse of discretion standard. *Havens v. C & D*

Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994). A trial court abuses its discretion when its decision to admit or exclude evidence is manifestly unreasonable or based on untenable grounds. *Id.* at 168.

2. If the trial court refused to admit any of the proposed exhibits, such refusal was proper because Mr. Palmer admittedly did not comply with the requirements of ER 904.

There is no record as to when the exhibits were offered, which exhibits were offered, whether they were admitted or refused, and why. Assuming certain records were refused, Mr. Palmer's attorney admitted in pretrial motions that he did not attach copies of the proposed exhibits to his notice. RP II 112:15-25. ER 904(b) requires:

The notice shall be accompanied by (1) numbered copies of the documents and (2) an index, which shall be organized by document number and which shall contain a brief description of the document along with the name, address and telephone number of the document's author or maker. The notice shall be filed with the court. Copies of documents that accompany the notice shall not be filed with the court.

Id. (emphasis added). Documents must be submitted in accordance with ER 904(b) or they are not deemed admissible. Mr. Palmer's ER 904 submission was not made in accordance with section (b), because as his attorney admitted on the record, he did not attach numbered copies of the documents. Under the rule, therefore, they cannot be deemed admissible.

If the trial court ultimately refused to deem some or all of the documents admissible, such a decision was in accordance with ER 904 and should be affirmed.

Furthermore, ER 904 does not require the court to admit documents offered under this rule; it may exercise its traditional discretion to address a party's evidentiary objection and admit or exclude the evidence. *Fox v. Mahoney*, 106 Wn. App. 226, 229, 22 P.3d 839, 840-41 (2001). Without knowing what, exactly, Mr. Palmer attempted to offer under ER 904, it is impossible to say whether the court's discretion was exercised appropriately.

Mr. Palmer cites *Hendrickson v. King County*, 101 Wn. App. 258, 269, 2 P.3d 1006, 1012 (2000), for the proposition that a party cannot object to the exhibits offered in the party's own ER 904 designation. However, there is no record as to which exhibits were included in Mr. Lee's ER 904 designation, which exhibits were offered at trial, and which exhibits were admitted and refused. Without such a record, the court cannot review whether the alleged refusal of exhibits was proper. The trial court's decision should thus be affirmed.

D. The trial court’s alleged denial of Mr. Palmer’s request for a subpoena duces tecum to State Farm should be affirmed because there is no record to review and nothing to justify a request for post-trial discovery.

Mr. Palmer alleges that he requested that the trial court issue a subpoena duces tecum to State Farm. He seems to claim that he made this request following trial. However, the record is devoid of any such request, nor does anything in the record support a request for post-trial discovery.

1. Standard of review.

An appellate court reviews a trial court's discovery order for an abuse of discretion. *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 778, 819 P.2d 370 (1991). An appellate court will find an abuse of discretion only “on a clear showing” that the court's exercise of discretion was “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

2. If Mr. Palmer made a request for a subpoena duces tecum, it was properly denied because post-trial discovery was not warranted.

There is no record of a request for a subpoena, nor is there any indication that such a request was denied. However, assuming these allegations are true, there is nothing to suggest that post-trial discovery was warranted in this case. Mr. Palmer did not file a motion for a new

trial or request any other form of post-verdict relief from the trial court. There was no basis upon which he could demand additional discovery following trial.

It appears that Mr. Palmer wanted the State Farm records to support an alternative case theory. This new case theory was not presented at any point before the verdict was entered. Mr. Palmer provides no explanation for the delay. The posttrial discovery of a new theory of recovery is not sufficient reason to either grant a new trial. *Vaughn v. Vaughn*, 23 Wn. App. 527, 531, 597 P.2d 932 (1979). Mr. Palmer's request for a subpoena, if made, was thus properly denied.

E. Mr. Palmer's felony conviction for False Statement by Claimant was properly admitted because it is admissible per se under ER 609.

Of Mr. Palmer's lengthy list of criminal convictions, Mr. Lee sought to admit only one: the felony conviction for False Information by Claimant, related to providing false information to the Department of Labor and Industries regarding whether he working while he was collecting unemployment benefits. RP II 116:4-13. The court ruled during motions in limine that evidence of the conviction would be allowed because it was a crime of dishonesty. RP II 120:10-13. However, there is no record as to whether any evidence related to the conviction was offered

at trial. In any event, the conviction, as a crime of dishonesty, was admissible under ER 609(a)(2).

1. Standard of review.

A ruling allowing impeachment of a witness with a prior conviction for a crime of dishonesty is reviewed for an abuse of discretion. *State v. Teal*, 117 Wn. App. 831, 844, 73 P.3d 402 (2003).

2. Mr. Palmer's conviction for False Statement of Claimant is per se admissible under ER 609(a)(2).

Under ER 609(a), evidence of prior criminal convictions shall be admissible in the following circumstances:

For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

ER 609. The criminal conviction at issue in this case meets this standard.

The conviction involved a false statement, which is a crime of dishonesty.

As a crime of dishonesty, it is per se admissible under ER 609(a)(2).
State v. Rivers, 129 Wn.2d 697, 705, 921 P.2d 495 (1996).

Furthermore, Mr. Palmer did a fine job creating of prejudice against himself through his own antics in open court. It is difficult to imagine how the admission of prior criminal convictions could possibly prejudice him any further. Any error as to the admission of Mr. Palmer's criminal history is therefore harmless.

F. The trial court properly permitted voir dire regarding Mr. Palmer's alleged mental illness because it was raised by the jury, discussed at length by Mr. Palmer's attorney, and never objected to.

It is unclear exactly to which decision or order this assignment of error relates. There is no indication as to what, exactly, the trial court did or did not do that is allegedly erroneous. Mr. Palmer seems to argue that the trial court either engaged in discrimination against him or permitted others to discriminate against him on the basis of disability. But it was Mr. Palmer's attorney who first raised, and continued to raise, the issue of mental illness. There is no record of any objection by Mr. Palmer to any discussion of or reference to Mr. Palmer's alleged mental illness during trial. Furthermore, the trial court invited Mr. Palmer's counsel to provide an offer of proof as to the alleged disability, and Mr. Palmer's counsel declined to do so. The trial court committed no error.

G. The Lees are entitled to an award of attorney fees and costs.

As the prevailing parties on appeal, the Lees are entitled to an award of fees and costs under RAP 14.2.

V. CONCLUSION

Therefore, for the reasons set forth above, this court should affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 22nd day of April, 2014.



DAVID J. WIECK, WSBA #16656
COREEN WILSON, WSBA #30314
Attorney for Respondents Lee