

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20090272-CA
v.)	
)	F I L E D
Jesse D. Clark,)	(November 4, 2010)
)	
Defendant and Appellant.)	2010 UT App 301

Eighth District, Duchesne Department, 061800204
The Honorable A. Lynn Payne

Attorneys: Michael L. Humiston, Vernal, for Appellant
Mark L. Shurtleff and Kris C. Leonard, Salt Lake
City, for Appellee

Before Judges Davis, McHugh, and Christiansen.

DAVIS, Presiding Judge:

Defendant Jesse D. Clark appeals from a conviction on an unconditional guilty plea to aggravated assault, a third degree felony, see Utah Code Ann. § 76-5-103 (2008) (current version at Utah Code Ann. § 76-5-103 (Supp. 2010)), raising several claims of error with respect to the trial court's decisions. First, Defendant argues that the trial court improperly denied his motion to dismiss. Second, Defendant claims that the trial court abused its discretion by imposing rule 11 sanctions. See generally Utah R. Civ. P. 11. Finally, Defendant contends that the trial court erroneously denied his motion to disqualify Judge A. Lynn Payne. We affirm in all respects.

Defendant first argues that the trial court erred in denying his motion to dismiss because "[t]he State cannot exercise criminal jurisdiction over a member of a federally recognized Indian tribe for acts committed on an Indian reservation." Rather, Defendant contends, because he is a member of the Uintah Band of Indians, "the offenses alleged against [him] fall under exclusive federal and tribal jurisdiction." "Whether the district court . . . has jurisdiction is a question of law that we review for correctness, giving no deference to the lower court." State v. Reber, 2007 UT 36, ¶ 8, 171 P.3d 406.

As correctly pointed out by the State, in order to prevail on the question of jurisdiction, Defendant must prove not only that the crime occurred on Indian land¹ but also that he is an Indian. See id. ¶ 9. "[I]n order to claim the status of an Indian, a person must '(1) [have] a significant degree of Indian blood and (2) [be] recognized as an Indian by a tribe or society of Indians or by the federal government.'" Id. ¶ 21 (second and third alterations in original) (quoting State v. Perank, 858 P.2d 927, 932 (Utah 1992)). At the hearing on Defendant's motion to dismiss, Defendant's counsel acknowledged that "[Defendant was] not making an allegation based on blood quantum" under the first prong of the test. On appeal, Defendant now takes the position that blood quantum is irrelevant to determining Indian status. Moreover, in addition to his failure to establish any degree of Indian blood, Defendant's failure to establish the second prong of the two-part test is fatal to his claim. Defendant purports to be a member of the Uintah Band of Indians. However, "[t]he Uintah Band . . . is not recognized as a tribe by the federal government. As a consequence, [Defendant's] claimed membership in that tribe does not help establish [his] Indian status under federal law." See id. ¶ 24. Accordingly, the trial court correctly concluded that Defendant had failed to establish his Indian status for jurisdictional purposes.

Defendant next argues that the trial court abused its discretion in imposing rule 11 sanctions.

[T]he standard of review for evaluating the . . . imposition of rule 11 sanctions involves a three-tiered approach: (1) findings of fact are reviewed under the clearly erroneous standard;^[2] (2) legal conclusions are reviewed under the correction

¹Because we ultimately conclude that Defendant's claim that he is an Indian fails, we need not reach the issue of whether the crime occurred on Indian land.

²Defendant's brief summarily states that "the trial court's factual finding was clearly erroneous." However, Defendant does not identify which of the trial court's eighteen findings he is challenging, nor does he marshal any evidence in support of said finding. Accordingly, we do not address the issue further. See Traco Steel Erectors, Inc. v. Comtrol, Inc., 2009 UT 81, ¶ 17, 222 P.3d 1164 ("To establish that a factual finding is clearly erroneous, the appealing party must marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." (internal quotation marks omitted)).

of error standard; and (3) the type and amount of sanction to be imposed is reviewed under an abuse of discretion standard.^{3]}

Morse v. Packer, 2000 UT 86, ¶ 16, 15 P.3d 1021 (internal quotation marks omitted). Here, the trial court's order imposing sanctions was based exclusively on rule 11 of the Utah Rules of Civil Procedure, see Utah R. Civ. P. 11. Indeed, the trial court concluded that Defendant's counsel "violated Rule 11(b)(2) when he brought the Motion to Dismiss[because i]n view of [c]ounsel's familiarity with Indian law, his failure to raise [and address binding precedent] was not merely negligent but was intentional." On appeal, however, Defendant does not address rule 11. Rather, his argument focuses entirely on rules 3.1 and 3.3 of the Utah Rules of Professional Conduct. Because Defendant has failed to address the trial court's basis for the challenged ruling, he has waived appellate review of the issue. See State v. Patrick, 2009 UT App 226, ¶ 24, 217 P.3d 1150 ("The district court admitted the challenged evidence under rule 404(a), and [the defendant] has neither preserved nor argued any error in the district court's application of that rule. Accordingly, we will not disturb the district court's ruling."), cert. denied, 225 P.3d 880 (Utah 2010).

Finally, Defendant contends that the reviewing judge erred in denying his motion to disqualify Judge Payne because of Judge Payne's "long history of animosity toward the Uintah Band." A claim of error regarding the denial of a motion to disqualify a judge under rule 29 of the Utah Rules of Criminal Procedure presents a question of law, which we review for correctness. See State v. Alonzo, 973 P.2d 975, 979 (Utah 1998). We conclude that the reviewing judge did not err in determining that Defendant's motion and supporting affidavits were legally insufficient and that disqualification was not warranted under the circumstances.

Pursuant to rule 29, "[a] party to any action . . . may file a motion to disqualify a judge." Utah R. Crim. P. 29(c)(1)(A). Furthermore, "[t]he motion shall be . . . supported by an affidavit stating facts sufficient to show bias or prejudice." Id. In this case, Defendant submitted four affidavits in support of his motion, three of which, as the trial court noted, "[were] more than three years old and were created in reference to entirely separate matters." Moreover, the trial court concluded that the affidavits contained "inadmissible testimony that lacks foundation, draws conclusions, lacks personal knowledge, makes legal argument, and/or relies upon hearsay." Cf. Oman v. Davis Sch. Dist., 2008 UT 70, ¶ 63, 194 P.3d 956 (holding that the

³Defendant does not challenge the type or amount of the sanction.

district court had not erred in striking portions of an affidavit that contained inadmissible hearsay).

Additionally, the affidavits fail to establish any bias on the part of Judge Payne. See generally Utah R. Crim. P. 29(c)(1)(A) ("The motion . . . shall be supported by an affidavit stating facts sufficient to show bias."). Indeed, contrary to the affiants' contentions otherwise, Judge Payne's previous rulings on the requirement of blood quantum to establish Indian status are consistent with the law, see State v. Reber, 2007 UT 36, ¶ 21, 171 P.3d 406 (requiring that an individual have a certain quantum of Indian blood to establish status as an Indian). Furthermore, the affidavits' attempt to demonstrate bias because of Judge Payne's prior adverse rulings on similar and related issues is misplaced because it is well settled that "bias cannot be inferred from an adverse ruling." Edwards v. Powder Mountain Water & Sewer, 2009 UT App 185, ¶ 31, 214 P.3d 120.⁴ In light of the foregoing, we conclude that the trial court did not err in concluding that Defendant's motion and accompanying affidavits were legally insufficient to justify Judge Payne's disqualification from the matter.

Affirmed.

James Z. Davis,
Presiding Judge

WE CONCUR:

Carolyn B. McHugh,
Associate Presiding Judge

Michele M. Christiansen, Judge

⁴The affidavits also imply that bias can be inferred because Judge Payne's original decision in State v. Reber, 2007 UT 36, 171 P.3d 406, was overturned by this court on appeal. However, even assuming that reversal on appeal could establish judicial bias, the supreme court subsequently reversed this court's decision, upholding Judge Payne's original determination in the case, see id. ¶ 27.