NUMBER 13-14-00689-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

FRANKIE WAYNE NEALY, **Appellant,**

v.

ROBIN MICHELLE NEALY, **Appellee.**

On appeal from the 36th District Court of San Patricio County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Benavides, and Perkes
Memorandum Opinion by Justice Benavides

The trial court entered a final decree of divorce between appellant Frankie Wayne Nealy and appellee Robin Michelle Nealy. By eight issues, Frankie argues on appeal that: (1) the trial court engaged in ex parte communications; (2) the trial court erred when it denied his motions for continuance; (3) the trial court erred when it withdrew a

previous final decree of divorce; (4) the trial court erred when it denied his jury request; (5) the evidence is legally and factually insufficient to support the judgment; (6) the trial court erred in admitting evidence; (7) the trial court's findings of facts are legally and factually insufficient; and (8) the trial court erred in refusing to rule on his second motion for a bench warrant. We affirm.

I. BACKGROUND

Robin filed for divorce alleging that the marriage had become insupportable due to discord or conflict of personalities that destroyed the legitimate ends of the marital relationship and prevented any reasonable expectation of reconciliation. More than a year prior to the divorce action, Frankie pleaded true during a revocation hearing for violating the conditions of his probation. Frankie was sentenced to life imprisonment for aggravated kidnapping and received a twenty-year sentence for sexual assault. *See* TEX. PENAL CODE ANN. §§ 20.04, 22.011 (West, Westlaw through 2015 R.S.).

A. The July 7, 2014 Hearing

Frankie timely filed a request for a jury trial and an unsworn declaration of inability to pay the jury fee before the July 7, 2014 hearing on the contested divorce. Robin did not file any motion opposing the jury request.

At the hearing, Frankie appeared by telephone and Robin appeared in person. No jury was empaneled. Robin testified that the marriage had become insupportable due to discord or conflict rendering it irreconcilable. During the proceeding, Frankie objected stating that he timely filed his jury request and requested a ruling in order to preserve the error for appeal. The trial court never expressly ruled on the objection, however, and continued with testimony of the parties.

After the contested hearing, the trial court entered a final decree of divorce dated July 16, 2014. The divorce decree granted the divorce and ordered that issues regarding the division of property be heard separately.

B. The September 22, 2014 Hearing

The property issues were set for hearing on September 22, 2014. Frankie again appeared by telephone and Robin appeared in person. The trial court informed the parties at the beginning of the hearing that it was "setting aside the order of July 7th and today we are here to hear the divorce which does include the division of property." Frankie made a request for a continuance so that he could prepare for the divorce issue. The trial judge denied his request stating that the case had been pending for over two years.

Frankie made a second request for a continuance stating that he needed additional time to review Robin's discovery materials because he only received them forty-five minutes before the hearing began. Robin's trial counsel informed the trial court that Frankie had handwritten the discovery letters that Robin produced, and Frankie had them previously. The trial court denied Frankie's second motion for continuance.

Also during this hearing, Frankie again requested a jury trial. The record indicates that the judge never expressly ruled on the jury request; the case proceeded. After the hearing, the trial court entered a final decree of divorce. This appeal followed.

II. EX PARTE COMMUNICATIONS

By his first issue, Frankie asserts that the trial court engaged in judicial misconduct by participating in ex parte communications with Robin's trial counsel.

A. Standard of Review and Applicable Law

To reverse a judgment on the ground of judicial misconduct, we must find judicial impropriety coupled with probable prejudice to the complaining party. *Pitt v. Bradford Farms*, 843 S.W.2d 705, 706 (Tex. App.—Corpus Christi 1992, no writ); *Silcott v. Oglesby*, 721 S.W.2d 290, 293 (Tex. 1986); *see also* TEX. R. APP. P. 44.1; *Erskine v. Baker*, 22 S.W.3d 537, 539 (Tex. App.—El Paso 2000, pet. denied). Ex parte communications are those that involve fewer than all of the parties who are legally entitled to be present during the discussion of any matter. *In re Thoma*, 873 S.W.2d 477, 496 (Tex.1994). The Texas Code of Judicial Conduct provides that a judge shall not directly or indirectly initiate, permit, or consider ex parte or other private communications concerning the merits of a pending or impending judicial proceeding, except as authorized by law. TEX. CODE JUD. CONDUCT, Canon 3B(8), (West, Westlaw through 2015 R.S.). However, communications between other judges or the court's personnel are permissible. *Id.*

B. Discussion

Frankie contends that the trial judge engaged in ex parte communications because the trial judge made the following statement:

> For the purposes of the record, Frankie and Robin, I had taken the ruling on July 7th I guess you would say *under advisement and was told* that the divorce had been granted improvidently. I am setting aside my order of July 7th and today we are here to hear the divorce which does include the division of property; is there any question about that?

(Emphasis added.) Frankie does not direct this Court to any evidence, nor do we find any, related to with whom the trial court purportedly engaged in ex parte communications. Frankie alleges in his brief that it was Robin's trial counsel who communicated with the

trial judge. However, there is no evidence supporting this allegation. The communication could have reasonably been between the trial court's staff, which is permitted. *See* TEX. CODE JUD. CONDUCT, Canon 3B(8)(d). Because Frankie has provided no evidence that the trial court engaged in ex parte communications, we overrule Frankie's first issue.

III. MOTIONS FOR CONTINUANCE

By his second issue, Frankie asserts that the trial court abused its discretion by denying his motions for continuances.

A. Standard of Review

We review the denial of a motion for continuance under an abuse of discretion standard. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004); *Ngo v. Ngo*, 133 S.W.3d 688, 692–93 (Tex. App.—Corpus Christi 2003, no pet.). A court abuses its discretion when it acts without reference to any guiding rules or principles; in other words, when the act is arbitrary or unreasonable. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

B. Applicable Law and Discussion

1. First Motion for Continuance

Frankie argues that the court abused its discretion when it denied his first motion for continuance. He claims that the court failed to provide reasonable notice that the grounds for divorce would be reheard at the September 22 hearing, which was originally set for property issues only. It occurred as follows:

Court: I am setting aside my order of July 7th and today we are here to hear the divorce which does include the division of property; is there any question about that?

Frankie: For the purposes of preservation since I had not been given notice that the Court had withdrawn [its] original order, I would ask that I be granted a continuance to prepare.

Court: All right, Frankie, this case has been on file since 2012 and the Court is going to deny your oral motion for continuance.

After a case has been previously set for trial, a court may reset the case to later date on reasonable notice to parties. TEX. R. CIV. P. 245; *O'Connell v. O'Connell*, 843 S.W.2d 212, 215 (Tex. App.—Texarkana 1992, no pet.). To determine what constitutes reasonable notice for resetting a case to a later date, a court must look to facts of the individual case rather than being guided by an arbitrary time period. *Id*.

In the instant case, the trial court referenced that the case had been pending on its docket for over two years before Frankie requested more time to prepare. Additionally, Frankie had already presented his case on the same issue before the trial court during the hearing of July 7th. Under these facts, the trial court did not abuse its discretion in denying the first motion for continuance. *See Joe*, 145 S.W.3d at 161; *Ngo*, 133 S.W.3d at 692–93.

2. Second Motion for Continuance

Frankie made his second oral motion for continuance, claiming that he received discovery material forty-five minutes prior to the hearing and because it was voluminous, he needed more time to prepare. The trial judge denied his request after opposing counsel stated the documents she wished to tender to the court were letters made in Frankie's handwriting, which should have acted as no surprise to Frankie. Additionally,

Robin's trial counsel disputed when Frankie received the discovery responses by showing the trial court the certified mail receipt indicating that the materials were delivered to Frankie's correctional unit days prior to the hearing.

Because the trial court concluded that the reasons for Frankie's request for continuance were baseless and unsupported by the record, we hold that the trial court did not abuse its discretion in denying the second motion for continuance. *See Joe*, 145 S.W.3d at 161; *Ngo*, 133 S.W.3d at 692–93. We overrule Frankie's second issue.

IV. WITHDRAWING A PREVIOUS ORDER

By his third issue, Frankie asserts that the trial court erred when it failed to give him proper notice that it withdrew its first final decree of divorce.

The trial court has plenary power to vacate its judgment. TEX. R. CIV. P. 329b(d); *Morris v. O'Neal*, 464 S.W.3d 801, 807 (Tex. App.—Houston [14th Dist.] 2015, no pet.). Frankie's argument does not assert that the trial court's plenary power had expired. Instead, he asserts that the trial court erred because he was not notified the issue of divorce would be reheard at the second hearing. We addressed this contention under his first motion for continuance challenge, and we decline to do so again here. We overrule Frankie's third issue.

V. RIGHT TO JURY TRIAL

By his fourth issue, Frankie asserts that the trial court erred when it proceeded with a bench trial after implicitly denying his jury request.

A. Standard of Review and Applicable Law

The Texas Family Code expressly provides that in a suit for divorce, "either party may demand a jury trial." TEX. FAM. CODE § 6.703 (West, Westlaw through 2015 R.S.);

see Goetz v. Goetz, 534 S.W.2d 716, 718 (Tex. Civ. App.—Dallas 1976, no writ). There is no right to a jury trial when the jury's verdict is merely advisory, as in issues of property division. *Cockerham v. Cockerham*, 527 S.W.2d 162, 173 (Tex. 1975). A party that has requested a jury demand may waive his right to a jury trial by failing to appear for trial. TEX R. CIV. P. 220; *Carruth v. Shelter Air Syst., Inc.*, 531 S.W.2d 913, 915 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ)

B. Discussion

Robin argues on appeal that Frankie waived his right to a jury trial because he failed to be present in court after the trial court denied his motion for a bench warrant. Even assuming without deciding that Frankie did not waive his right to a jury trial by failing to be present at court, we nevertheless conclude that any denial for his jury trial request was harmless error.

We find the facts of this case similar to a case decided by our sister court in Amarillo. *See In re Marriage of Richards*, 991 S.W.2d 32, 34 (Tex. App.—Amarillo 1999, pet. dism'd). In *Richards*, the appellate court found that the trial court had erred in denying a jury request in a contested divorce. *Id* at 36–37. The respondent in *Richards* filed a jury trial request before the elements of insupportability were established. *Id*. The court reasoned that the statutory elements of insupportability are fact issues that a party must establish by evidence. *Id*. Further, because the respondent requested a jury before these elements were established, it was error to deny the request. *Id*. However, the court found the error was harmless because the respondent did not introduce evidence that contradicted the petitioner's testimony that the marriage was insupportable. *Id*. Therefore, an instructed verdict would have been proper at the

conclusion of the hearing because the only evidence presented to the trial court supported but one conclusion, so any error in denying the jury request was harmless. *Id*.

Here, Frankie likewise requested a jury trial before Robin established the elements of insupportability. Therefore, issues of material facts were present when Frankie requested a jury and it was error for the trial court to deny the jury request. However, for an error to require reversal of the trial court's judgment, we must conclude that it either probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case to this court. TEX. R. APP. P. 44.1(a); *Richards* 991 S.W.2d at 38.

The evidence in *Richards* established the statutory elements of insupportability, without stating the specific events on which his testimony was based. *Richards* 991 S.W.2d at 38. In our case, Robin testified that there was "no chance whatsoever" that reconciliation was possible and that the marriage became insupportable due to discord or conflict. Additionally, Robin admitted into evidence Frankie's convictions and jail sentences showing that he was serving a life sentence without the possibility for parole until 2040. Frankie's cross-examination focused on refuting a specific date that the marriage became insupportable. However, like in *Richards*, the specific events that led to the breakdown of the marriage are irrelevant. Therefore, denying Frankie's jury request was harmless because the only evidence presented to the trial court supported but one conclusion. *See id*. We overrule Frankie's fourth issue.

VI. SUFFICIENCY OF THE EVIDENCE

By his fifth issue, Frankie asserts that the trial court erred in granting the divorce because the evidence was insufficient to establish insupportability.

A. Standard of Review and Applicable Case Law

When the divorce is tried by the court, whether the evidence is sufficient to establish insupportability is left to the discretion of the trial court. *In re Marriage of Scott*, 117 S.W.3d 580, 582 (Tex. App.—Amarillo 2003, no pet.). A trial court does not abuse its discretion if there is some evidence of a substantive and probative character to support the decision. *Moroch v. Collins*, 174 S.W.3d 849, 857 (Tex. App.—Dallas 2005, pet. denied); *LaFrensen v. LaFrensen*, 106 S.W.3d 876, 878 (Tex. App.—Dallas 2003, no pet.). A no-fault divorce in Texas is granted in terms of insupportability and contains three elements: (1) the marriage has become insupportable because of discord or conflict; (2) discord or conflict destroys the legitimate ends of the marriage; and (3) there is no reasonable expectation of reconciliation. *Richards*, 991 S.W.2d at 37.

B. Discussion

Frankie argues that Robin did not establish the insupportability ground because she did not testify that discord or conflict destroyed the legitimate ends of the marriage. However, when asked by her counsel whether the marriage was insupportable because of discord or conflict of personalities Robin responded affirmatively. In addition, Robin introduced Frankie's prison sentences showing he was serving a life sentence without the possibility for parole until 2040. The evidence is sufficient for the trial court to have found the marriage was insupportable because Robin offered substantive and probative evidence to support that the marriage in this case had become insupportable. *See In re Marriage of Scott*, 117 S.W.3d at 582. We overrule Frankie's fifth issue.

VII. ADMISSIBILITY OF EVIDENCE

By his sixth issue, Frankie asserts that the trial court erred by admitting three

letters, all in Frankie's handwriting, after he objected to all three on the basis of authenticity and untimely delivery.

A. Standard of Review and Applicable Law

The admission and exclusion of evidence is committed to the trial court's discretion. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). The trial court abuses its discretion when it acts without regard for any guiding rules or principles. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). An appellate court must uphold the trial court's evidentiary ruling if there is any legitimate basis for doing so. *Strong v. Strong*, 350 S.W.3d 759, 763 (Tex. App.—Dallas 2011, pet. denied). Authentication is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. TEX R. EVID. 901(a). Handwriting may be properly authenticated by way of non-expert opinion testimony as to its genuineness based upon the non-expert's familiarity of the handwriting acquired independently of the litigation. *Id.* at R. 901(b)(2).

B. Discussion

Robin's testimony authenticated the three letters admitted into evidence. When her counsel asked her to identify the letters, she had established on the record that she was familiar with Frankie by stating that they were married January 1, 2009 and ceased living together on February 11, 2011. Robin's trial counsel did not specifically ask if she recognized the handwriting on the first letter admitted. However, when she was presented with all of the letters, her trial counsel asked her, "would you take a look and do you recognize these documents and who they came from?" Robin responded that, "these are all letters that Frankie Nealy has sent me." Robin responded affirmatively

when asked if she recognized the handwriting as Frankie's writing on the second and third letter. Therefore, the trial court did not err in admitting the letters concerning authenticity because Robin's testimony properly authenticated the handwriting. *See id.* at R. 901(b)(2).

Frankie also objected to the trial court admitting the letters because they were untimely produced. Frankie claims that discovery responses were due before the first hearing, but he did not receive the discovery material until forty-five minutes prior to the second hearing. However, Robin's trial counsel disputed this argument by offering to show the trial court the certified mail receipt indicating the materials were delivered to Frankie prior to the second hearing. As a result, we hold that the trial court did not abuse its discretion in overruling Frankie's objection. *See Alvarado*, 897 S.W.2d at 753. We overrule Frankie's sixth issue.

VIII. LEGAL AND FACTUAL FINDINGS

By his seventh issue, Frankie asserts that the trial court's findings of fact are legally and factually insufficient.

A. Standard of Review and Applicable Law

In reviewing the legal sufficiency of the evidence, we view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). We will sustain a legal sufficiency point if the record reveals the following: (1) the complete absence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere

scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact. *Id*. at 810. The fact finder is the sole judge of the credibility of the witnesses and the weight to give their testimony. *Id*. at 819.

When reviewing factual insufficiency complaints, this Court considers, weighs, and examines all evidence, which supports or undermines the finding. *Golden Eagle Archery v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). The finding is set aside only if the evidence standing alone is too weak to support the finding or the finding is so against the overwhelming weight of the evidence as to be manifestly unjust and clearly wrong. *Id*.

B. Discussion

The trial court's findings of fact are legally and factually sufficient because the evidence supports these findings. Robin testified: (1) that the marriage was insupportable; (2) that there was no community property; (3) that she only owned small personal effects as her separate property; and (4) that she sold Frankie's separate property with his permission. Frankie asked Robin at trial whether she ever received a power of attorney from him that allowed her to sell his separate property, to which she responded, "No." However, Robin introduced Frankie's handwritten letter he sent her to corroborate her testimony. The letters requested that Robin sell his property and deposit the proceeds in his account at the correctional facility where he was housed. Thus, reviewing the evidence in the light most favorable to the verdict and disregarding all contrary evidence that a reasonable fact finder could have disbelieved, we conclude the evidence is legally sufficient to support the trial court's findings on the divorce and the property division. *See City of Keller* 168 S.W.3d at 807.

Moreover, when evaluating the factual sufficiency by considering, weighing, and examining all evidence which supports or undermines the finding, we conclude the evidence standing alone is not too weak to support the finding or the finding is not so against the overwhelming weight of the evidence as to be manifestly unjust and clearly wrong. *See Golden Eagle Archery* 116 S.W.3d at 761. Thus, we conclude that there is factually sufficient evidence to support the trial court's findings on the divorce and the property division. We overrule Frankie's seventh issue.

IX. BENCH WARRANT MOTION

By his eighth and final issue, Frankie asserts that the trial court abused its discretion when it implicitly denied his second motion for a bench warrant by proceeding to trial without a ruling.

A. Standard of Review and Applicable Law

We review a trial court's denial of a bench warrant motion for an abuse of discretion. *See In the Interest of Z.L.T., J.K.H.T., & Z.N.T.*, 124 S.W.3d 163, 165 (Tex. 2003); *Pedraza v. Crossroads Security Sys.*, 960 S.W.2d 339, 342 (Tex. App.—Corpus Christi 1997, no pet.).

It is well-established that litigants cannot be denied access to the courts simply because they are inmates. *In the Interest of Z.L.T.* at 165 (citing *Hudson v. Palmer*, 468 U.S. 517, 524 (1984)). However, an inmate does not have an absolute right to appear in person in every court proceeding. *Id*.; *see Pedraza* at 342. The inmate's right of access to the courts must be weighed against the protection of our correctional system's integrity. *Id*. The Texas Supreme Court identified the following eight factors that the trial court should consider when deciding whether to grant a request for a bench warrant:

> [1] the cost and inconvenience of transporting the prisoner to the courtroom; [2] the security risk the prisoner presents to the court and public; [3] whether the prisoner's claims are substantial; [4] whether the matter's resolution can reasonably be delayed until the prisoner's release; [5] whether the prisoner can and will offer admissible, noncumulative testimony that, cannot be effectively presented by deposition, telephone, or some other means; [6] whether the prisoner's presence is important in judging his demeanor and credibility; [7] whether the trial is to the court or a jury; and [8] the prisoner's probability of success on the merits.

Z.L.T., 124 S.W.3d at 165; *see Pedraza*, 960 S.W.2d at 342. The trial court has no responsibility to independently inquire into the applicability of the factors; rather, the inmate has the burden to establish his right to relief. *See Z.L.T.*, 124 S.W.3d at 166. If the inmate fails to identify with sufficient specificity the grounds for the ruling he seeks under the factors identified above, the trial court does not abuse its discretion in denying his request. *See id*.

B. Discussion

The trial court did not abuse its discretion when it implicitly denied Frankie's second motion for issuance of a bench warrant because it acted reasonably. The record lacks any indication as to why the trial court denied Frankie's second bench warrant motion. However, the trial court had previously denied his first motion for a bench warrant and Frankie filed his second motion only eleven days before the hearing. Additionally, the trial court ensured Frankie was present at all hearings telephonically. In his motion, Frankie concedes that there would be cost and expense incurred if the trial court granted his motion. Frankie was housed in a correctional unit approximately 270 miles away from the trial court. Although in his second motion for a bench warrant he presented reasons the trial court should grant his request, he has failed to articulate on appeal how the trial court abused its discretion in denying the bench warrant. Therefore, we find the

trial court did not abuse its discretion. We overrule Frankie's eighth issue.

X. CONCLUSION

We affirm the trial court's judgment.

GINA M. BENAVIDES,
Justice

Delivered and filed the
28th day of July, 2016.