IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JIMMIE ROY JEMISON, Appellant, v. BILLY RAY JEMISON, Respondent.	No. 42671-4-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Jim R. Jemison appeals the trial court's decision in favor of his brother, Billy Ray Jemison, after a bench trial and the trial court's denial of his motion for reconsideration. At trial, Jim[1] sought to have title to a residence located at 1668 Little Hanaford Road, Centralia, Washington ("Hanaford property"), now in his brother's name, restored to him. Jim alleges (1) that Billy tricked him into signing a deed transferring the property to Billy, (2) that the trial court erred in denying his request for a continuance to subpoena his father, (3) that the trial court erred in excluding evidence of Jim's incompetency on the date he signed the deed transferring ownership to Billy, (4) that the trial court erred when it refused to invalidate the transfer due to lack of consideration, and (5) that he submitted sufficient evidence to prove the

[1] We use the parties' first names for clarity and mean no disrespect.

allegation in his complaint that Jim owned the property at issue.[2] We affirm.

FACTS

On January 16, 2007, Jim signed a document conveying the Hanaford property to Billy. Billy prepared the document. The purpose of the transfer was to defend against a county enforcement action related to Jim's use of the property so the family "would not lose the property." Report of Proceedings (RP) (July 8, 2010) at 21. Billy spoke with the county representative and learned that he "was getting ready to do an abatement." RP (July 8, 2010) at 22. The transfer "stopped the abatement." RP (July 8, 2010) at 22. After the transfer, Billy evicted Jim from the property until a few weeks before trial.

Jim filed a complaint, alleging that Billy tricked him into signing over his entire interest in the Hanaford property and that his intention was to transfer only a half-interest to Billy. In March, the trial court set a trial date of July 2, 2010. On July 2, 2010, Jim appeared for trial and requested a continuance because his father, a witness, did not appear. Jim admitted that he never subpoenaed his father. Nevertheless, the trial court continued the trial to July 8, 2010.

The parties appeared for trial. Jim again requested a continuance because his father did not appear. The trial court denied the motion due to Jim's failure to subpoena his father. Jim responded, "My father was there when I signed the 'quick' claim. He knows about the financing." RP (July 8, 2010) at 5.

At trial, Jim first attempted to introduce evidence, in the form of a physician's letter, that he was mentally ill the day before he transferred the Hanaford property. The trial court refused to

[2] A commissioner of this court initially considered Jim's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

admit the letter due to hearsay concerns. Jim then testified that on January 16, 2007, with his father present, Billy gave him a deed to sign. Jim thought the transfer was for only half of his interest in the property, so he signed it. Jim did not read what he signed because he "thought [his] dad knew all about it" and he thought his father prepared the document. RP (July 8, 2010) at 17-18. He said he discovered it was a full transfer after the property tax bill arrived in Billy's name.

Billy also testified. He stated that on January 16, 2007, his brother appeared "calm and normal acting." RP (July 8, 2010) at 21. He prepared a deed for Jim and Jim signed it. The purpose of the transfer was to stop an abatement proceeding. Specifically, he said that Jim deeded the Hanaford property to him "[s]o [he] could have a chance to deal with the County, get on good terms. He was not on good terms with the County and nothing could be worked out." RP (July 8, 2010) at 24. After Billy took possession, he hauled large amounts of garbage from the site.

The trial court ruled that Jim failed to prove any present ownership interest in the Hanaford property. Jim filed a motion for a new trial, which the trial court denied. He moved for reconsideration, which the trial court denied, and he appeals.

DISCUSSION

Continuance

Jim first argues that the trial court abused its discretion in denying him a second continuance. He contends that his father's testimony is material and that his absence resulted in an unfair trial. A trial court's decision to deny a continuance under CR 40(e) is reviewed for an abuse of discretion. *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 276, 215 P.3d 990 (2009), *review denied*, 168 Wn.2d 1024 (2010). CR 40(e) states,

> A motion to continue a trial on the ground of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and address of the witness or witnesses. The court may also require the moving party to state upon affidavit the evidence which he expects to obtain.

Billy first contends that Jim failed to comply with this rule because he did not submit an affidavit. Although there is no affidavit in the record, Jim orally provided the trial court with the reason for his father's testimony.

Billy then argues that the trial court did not abuse its discretion in denying the continuance due to lack of diligence by Jim in securing his father's appearance at trial. The record supports that Jim never sought a subpoena for his father. Because this was a tenable ground for the trial court to conclude that Jim did not use "due diligence," it did not abuse its discretion in denying the motion for a second continuance. CR 40(e).

Competency and Exclusion of Documents

Jim sought to introduce a letter written by a physician describing his mental state on January 15, 2007, the day before he transferred the Hanaford property. Billy objected because the document was prepared by a physician for use at trial and not in the process of medical diagnosis or treatment. ER 803(a)(4). The trial court did not admit the document because it was hearsay.

The rejected letter was written by Dr. Sandra Ritland on October 7, 2007. It states that Jim was under her care since February 2006. Ritland stated that Jim has mental health issues and she "felt" that "he had a lot of racing thoughts and was not mentally stable" on January 15, 2007. Br. of Appellant, Ex. 3.

On appeal, a trial court's decision to exclude evidence is reviewed for abuse of discretion. *See State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007). Hearsay is "a statement, other

than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is not admissible unless allowed by court rule or statute. ER 802. The general bar to hearsay testimony excludes "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." ER 803(a)(4). The rule allows doctors and other providers to testify about out-of-court statements made by patients related to medical treatment. *See generally State v. Sandoval*, 137 Wn. App. 532, 537, 154 P.3d 271 (2007). This is not what happened here; Dr. Ritland did not testify. Moreover, it is not at all clear that the October 7, 2007 letter was created during Ritland's diagnosis or treatment of Jim.

On appeal, Jim argues that the doctor's letter also falls within the hearsay exception as a statement of his "then existing state of mind." ER 803(a)(3). This rule states that "the following are not excluded by the hearsay rule, even though the declarant is available as a witness. . . . (3) [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . but not including a statement of memory or belief." ER 803(a).

Assuming this rule could reach Jim's effort to present out-of-court statements by Dr. Ritland regarding Jim's state of mind when he transferred the property to Billy, the trial court did not abuse its discretion in excluding the letter.[3] ER 803(a)(3) does not permit statements of memory or belief. Ritland composed her letter in October 2007, and in it she recalls her feelings about his mental state 10 months prior in January 2007. Br. of Appellant, Ex. 3 ("I felt he had a

[3] The trial transcript does not indicate that the trial court considered this hearsay exception. Jim argued it applied in his motions for a new trial and for reconsideration, which the trial court denied.

lot of racing thoughts and was not mentally stable on January 15, 2007."); *see generally Ensley v. Mollmann*, 155 Wn. App. 744, 755, 230 P.3d 599 (excluding statements made regarding apparent intoxication of accident victim "a couple of days" after the accident "were statements of memory or belief"), *review denied*, 170 Wn.2d 1002 (2010). In sum, the trial court did not abuse its discretion when it excluded Ritland's letter as hearsay.

Jim also takes issue with the trial court's decision to prevent him from presenting evidence indicating how Jim obtained the property in 1986 from third parties. Given that Billy did not contest that Jim owned the property before Billy acquired it in January 2007, Jim cannot show how this decision, even if erroneous, harmed him. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Consideration

Jim argues that the Hanaford property transfer occurred in the absence of consideration. Specifically, he argues that because Billy did not let him stay on the property, he received no value for giving up the property.

All contracts must be supported by consideration. Consideration exists when there is a bargained-for exchange of promises. *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 833, 100 P.3d 791 (2004). Billy's testimony supports the fact that the entire Jemison family was concerned with losing the house in an abatement proceeding due to Jim's ownership and that they made a decision to have Billy own the property to delay a threatened abatement proceeding and to be able to take actions needed to prevent abatement in the future. Billy cleaned up the property and the county stopped threatening abatement. These circumstances are sufficient to demonstrate consideration for the transfer.

Additional Argument On the Merits

Finally, Jim argues that there is no evidence that he voluntarily transferred the Hanaford property and that the trial court erred in excluding evidence that Jim owned the property prior to transferring it to Billy. Although Jim testified that he was somehow "tricked" by Billy, he does not identify how Billy deceived him. RP (July 8, 2010) at 16. Indeed, Jim admits he simply did not read the deed he signed in January 2007. Billy, in contrast, testified that Jim willingly signed the deed. Accordingly, Jim's argument that there is "no" evidence on this issue lacks merit.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, P.J.

HUNT, J.