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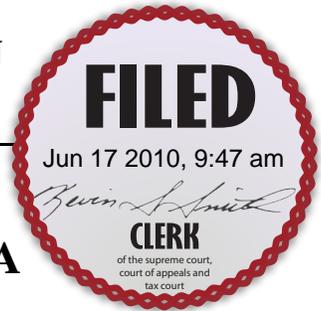
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**IN THE
COURT OF APPEALS OF INDIANA**

DANIEL MOJICA, as Special Administrator of)
the Estate of Felix Mojica, Jr., Deceased,)
)
Appellant-Plaintiff,)

vs.)

No. 45A03-0903-CV-116)

HECTOR ROSARIO, Individually, and in his)
Official Capacity as an East Chicago Police)
Officer; and City of East Chicago, Indiana,)
)
Appellees-Defendants.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Gerald N. Svetanoff, Judge
Cause No. 45D04-0707-CT-00186

JUNE 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

STATEMENT OF THE CASE

Plaintiff-Appellant Daniel Mojica, as Special Administrator of the Estate of Felix Mojica, Jr. (Estate), appeals the jury’s verdict in favor of Defendants-Appellees Hector Rosario and City of East Chicago (collectively “Defendants”).

We affirm.

ISSUES

Estate presents five issues for our review, which we consolidate and restate as:

- I. Whether the trial court erred by admitting certain testimony into evidence.
- II. Whether the trial court erred by admitting certain exhibits into evidence and by refusing to admit other documents.
- III. Whether the trial court erred when it instructed the jury.
- IV. Whether the trial court erred by continuing the second trial setting.

FACTS AND PROCEDURAL HISTORY

Felix Mojica (Mojica) suffered from schizophrenia. In the early morning hours of January 4, 2005, Mojica went to the home of his sister, Nereida Nieves. There were some problems while Mojica was at Nieves’ home, so Nieves called for emergency help. Officer Hector Rosario of the East Chicago Police Department responded to Nieves’ home, and Nieves informed him that Mojica needed help but that he had left. Rosario left to find Mojica and, not long thereafter, Rosario located him. Mojica ran from Rosario and went between two houses. Rosario pursued Mojica and drew his gun before

following Mojica between the houses. In the darkness, Mojica grabbed Rosario's gun, and Rosario either fell or was pushed backward onto the ground. A struggle ensued which culminated in the shooting of Mojica. Mojica died as a result of the gunshot. Estate filed this lawsuit against Officer Rosario, the City of East Chicago and other city officials. Following the granting of dispositive pre-trial motions, the remaining defendants for trial were Officer Rosario and the City of East Chicago. Thus, this case comes to us on appeal from the jury trial with only these remaining Defendants-Appellees.

DISCUSSION AND DECISION

I. ADMISSION OF TESTIMONY

Estate contends that the trial court erred by denying its motion in limine and allowing certain testimony to be admitted into evidence. Estate identifies five witnesses whose testimony it asserts was improperly admitted at trial.

The granting of a motion in limine does not determine the ultimate admissibility of the evidence. *Bova v. Gary*, 843 N.E.2d 952, 955 (Ind. Ct. App. 2006). Rather, the purpose of a ruling in limine is to prevent the presentation of potentially prejudicial evidence until the trial court can rule on the admissibility of the evidence in the context of the trial itself. *Id.* If the trial court admits evidence at trial that was sought to be excluded by a motion in limine, the alleged error is the improper admission of the evidence at trial, not the denial of the motion in limine. *Id.* Therefore, the appropriate standard of review is that applicable to questions concerning the admission of evidence.

Perry v. Gulf Stream Coach, Inc., 871 N.E.2d 1038, 1047 (Ind. Ct. App. 2007). The decision to admit or exclude evidence lies within the sound discretion of the trial court, and we will not disturb the trial court's decision absent a showing of an abuse of that discretion. *Strack and Van Til, Inc. v. Carter*, 803 N.E.2d 666, 670 (Ind. Ct. App. 2004). An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Perry*, 871 N.E.2d at 1047. Moreover, we will not reverse the trial court's admission of evidence absent a showing of prejudice. *Gary Community School Corp. v. Boyd*, 890 N.E.2d 794, 798 (Ind. Ct. App. 2008), *trans. denied*.

For the purpose of background information, we include the following facts. Estate filed its motion in limine requesting the trial court to prohibit Defendants from introducing character evidence of Mojica and specific instances of his conduct or other crimes, wrongs, or acts in order to prove that he attacked Rosario. Estate based its motion in limine on Indiana Rule of Evidence 404(b), which provides, in pertinent part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The trial court denied this portion of Estate's motion.

A. Ronald Edmonds

1. Indiana Evidence Rule 404(b)

Estate first claims that the trial court erred in admitting the testimony of Ronald Edmonds. Edmonds testified that in 1996 he was a police officer, and he also worked as

a security officer at a hospital. Edmonds further testified that in December of that year, Mojica had been waiting in the hospital's emergency room waiting area when he became boisterous and began to use foul language. When Edmonds told Mojica to quiet down, Mojica attacked Edmonds. Estate avers that Edmonds' testimony of Mojica's prior act prejudiced Estate in violation of Ind. Evidence Rule 404(b) because it allowed the jury to make the forbidden inference that because Mojica had acted violently in the past, he acted violently in the present case against Rosario.

Defendants respond that a specific objection is required to preserve the error for appeal and that Estate failed to object to Edmonds' testimony based upon Evid. Rule 404(b), resulting in waiver of the alleged error. In its reply brief, Estate counters that its trial objections were sufficient to preserve this issue because a relevancy objection is adequate to maintain an Evid. Rule 404(b) argument for appeal.

Failure to object at trial to the admission of evidence results in waiver of the claimed error, notwithstanding a prior motion in limine. *Raess v. Doescher*, 883 N.E.2d 790, 796-97 (Ind. 2008), *reh'g denied*. Moreover, to preserve a claimed error in the admission of evidence, a party must make a specific, contemporaneous objection. *Id.* at 797. A mere general objection, or an objection on grounds other than those raised on appeal, is ineffective to preserve an issue for appellate review. *Id.*

Our review of the trial transcript reveals that during Edmonds' testimony, Estate objected several times; however, these objections were not Evid. Rule 404(b) objections.

Rather, Estate made objections based on insufficient foundation, improper refreshing of witness' recollection, and improper reading from a report. *See* Tr. at 904-05, 906, 908 and 910. In addition, none of Estate's objections were relevancy objections, which Estate argues would preserve an Evid. Rule 404(b) objection. We note that not only did Estate not object on relevancy grounds but also that the rule cited by Estate is more limited than Estate suggests. *Jones v. State*, 708 N.E.2d 37 (Ind. Ct. App. 1999), *trans. denied*, cited by Estate in its reply brief, holds that a relevancy objection is sufficient to preserve an Evid. Rule 404(b) argument for appeal *where the evidence offered by the state is that of a defendant's prior convictions*. *Id.* at 39.

At trial, Estate objected to Edmonds' testimony based upon grounds of insufficient foundation, improper refreshing of witness' recollection and improper reading from a report. Accordingly, Estate has waived any other claims, including its Evid. Rule 404(b) claim.

2. Refreshed Recollection

Estate further argues that the trial court erred by admitting Edmonds' testimony because his recollection was improperly refreshed by a report he did not write and because he read from the report while testifying. Indiana Evidence Rule 612(a) provides: "If, while testifying, a witness uses a writing or object to refresh the witness's memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying." The proper procedure for refreshing a witness's recollection has been explained as follows:

The witness must first state that he does not recall the information sought by the questioner. The witness should be directed to examine the writing, and be asked whether that examination has refreshed his memory. If the witness answers negatively, the examiner must find another route to extracting the testimony or cease the line of questioning.

Thompson v. State, 728 N.E.2d 155, 160 (Ind. 2000), *reh'g denied*.

While Edmonds was on the stand, defense counsel asked him if he recalled the exact date of the occurrence about which he was testifying, and Edmonds responded in the negative. Defense counsel then had Edmonds review a report of the incident. Edmonds stated that the report refreshed his recollection as to the date of the event, and he then testified as to the specific date of the incident. Edmonds did not write the report he reviewed to refresh his recollection, and Estate objected on this basis.

The procedure to be followed when refreshing the recollection of a witness was followed in this case. Further, Evid. Rule 612 does not suggest, much less require, that the writing used to refresh a witness's memory must have been prepared by the witness. *Id.* at 160-61. Moreover, prior to the adoption of the Indiana Rules of Evidence, our Supreme Court had held that a writing used to refresh a witness's memory could be prepared by the witness or another person. *See Gaunt v. State*, 457 N.E.2d 211, 216 (Ind. 1983), *overruled on other grounds by, Modesitt v. State*, 578 N.E.2d 649, 652 (Ind. 1991). Although Edmonds did not write the report he used to refresh his recollection, there is no requirement that he had done so. Also, the only information gleaned from the report by Edmonds was a date. Accordingly, the trial court did not err by permitting Edmonds to use the report to refresh his recollection.

In addition, Estate objected to Edmonds' testimony on the basis that he was reading from the report. Upon refreshing his memory as to the date by reviewing the report, Edmonds was asked to state the date of the incident. He then testified that the date of the incident was December 9, 1996. Tr. at 909. Upon that response, Estate objected that Edmonds was reading from the report. We find no error here. The trial court properly allowed Edmonds' memory as to the date of the incident with Mojica to be refreshed by the report, and his testimony was merely the result thereof.

3. Leading Questions

Estate also asserts that the trial court improperly allowed the use of leading questions during the direct examination of Edmonds by defense counsel. The exchange objected to by Estate's counsel and addressed by Estate in its brief is as follows:

EDMONDS: At this time I turned around, and he was right behind me, and he like attacked me.

DEFENSE COUNSEL: And this was totally unprovoked on your part?

EDMONDS: Yes.

Tr. at 910-11. Estate objected to defense counsel's question as leading, and the trial court overruled the objection.

On appeal, Estate presents no argument in support of its contention and has therefore wholly failed to demonstrate that the trial court abused its discretion. Thus, we do not find that the trial court's decision to admit this piece of testimony constitutes an abuse of its discretion.

B. George Paulauski

The second witness whose testimony Estate avers was improperly admitted at trial is George Paulauski. Estate claims that the trial court improperly admitted Paulauski's testimony of Mojica's prior bad acts, hearsay testimony, testimony regarding Mojica's eviction, testimony of Mojica's threat, and narrative testimony.

1. Indiana Evidence Rule 404(b)

Estate alleges that the trial court abused its discretion by allowing Paulauski to testify regarding Mojica's prior bad conduct. This argument again involves Ind. Evidence Rule 404(b), as set forth in Estate's motion in limine.

Paulauski was Mojica's landlord. He testified at trial regarding an incident in which Mojica came after him with a knife, threatened to blow up the apartment building, and fought with police officers. Although Estate objected to some of Paulauski's testimony, it did not object under Evid. Rule 404(b). Instead, Estate objected based upon relevancy, hearsay, and narrative testimony. *See* Tr. at 946-47, 948, 950, and 951.

The failure to make a specific, contemporaneous objection at trial waives any claimed error in the admission of the evidence, notwithstanding a prior motion in limine. *Raess*, 883 N.E.2d at 796-97. Furthermore, an objection at trial on grounds other than those raised on appeal, is ineffective to preserve an issue for appellate review. *Id.* at 797. Thus, in the present case, any argument based upon Evid. Rule 404(b) has been waived.

Notwithstanding the aforementioned waiver, we note that Estate did object to Paulauski's testimony on relevancy grounds at trial, and, in its brief to this Court, Estate

mentions that the dispute between Mojica and Paulauski was irrelevant to the issues in Mojica's complaint. However, Estate failed to demonstrate an abuse of discretion by the trial court and/or any resulting prejudice. *See Strack and Van Til, Inc.*, 803 N.E.2d at 670 (on appeal, trial court's decision will not be disturbed absent showing of abuse of discretion); *see also Gary Community School Corp.*, 890 N.E.2d at 798 (stating that appellate court will not reverse trial court's admission of evidence absent showing of prejudice).

2. Hearsay

As a second assertion of error with regard to Paulauski's testimony, Estate contends that the trial court erred by admitting hearsay testimony. In discussing Mojica's occupancy of the apartment on direct examination, Paulauski was asked if he had complaints from other tenants about Mojica. Estate objected to this testimony as hearsay. *See Tr.* at 950.

Estate's entire argument in support of this issue is contained in one sentence: "Pursuant to Evid. R. 802, hearsay is not admissible." Appellant's Brief at 15. Estate has not affirmatively shown that it was prejudiced by this testimony, and, thus, we find no error. *See Gary Community School Corp., supra.*

3. Eviction

The third allegation of error in Paulauski's testimony relates to the eviction of Mojica from his apartment. However, Estate did not object to this testimony at trial. In addition, Estate provided no argument in his brief regarding this alleged error. Therefore,

any error in the admission of this evidence is waived. *See Raess*, 883 N.E.2d at 797 (to preserve claimed error in admission of evidence, a party must make specific, contemporaneous objection); *see also* Ind. Appellate Rule 46(A)(8)(a) (argument must contain contentions of appellant on issues presented, supported by cogent reasoning).

4. Threat

In its brief, Estate mentions Paulauski's testimony of Mojica's threat to blow up the apartment building. Although there was no objection to this testimony, there had previously been a continuing relevancy objection by Estate to the testimony of the incident in which Mojica pulled a knife on Paulauski. This objection could conceivably refer also to the testimony of Mojica's threat to blow up the building because the threat was made during the knife occurrence, and the testimony thereof was provided with testimony of the knife incident.

Again, Estate mentions in its brief that the dispute between Mojica and Paulauski is irrelevant to the issues set forth in Mojica's complaint, but Estate's argument ends there. If a party does not submit its claims and supportive reasoning, the appellate courts cannot definitively resolve the issue. This is the situation here. Estate has made neither a showing of an abuse of discretion by the trial court nor a showing of prejudice. *See Strack and Van Til Inc.* and *Gary Community School Corp.*, *supra*.

5. Narrative Testimony

Finally, Estate argues that the trial court should not have allowed Paulauski to testify in a narrative form. Estate objected to the testimony, and the trial court overruled the objection.

On appeal, however, Estate merely states that Paulauski testified in the narrative and that the “unrestrained narrative testimony resulted in prejudice to [Estate].” Appellant’s Brief at 16. There is no discussion of why the narrative testimony was improper or how it prejudiced Estate. “A bald assertion of prejudice is insufficient to overcome the burden placed upon the complaining party to affirmatively show prejudice.” *Lumbermens Mut. Cas. Co. v. Combs*, 873 N.E.2d 692, 719 (Ind. Ct. App. 2007), *trans. denied*. We will not presume prejudice. *Id.* We find no error.

C. Nancy O’Neill

Defendants called Nancy O’Neill, Mojica’s sister, as a witness in their case-in-chief. She was asked if she recalled an occasion when her nephew, David, hit Mojica. Estate objected to this question on the basis of relevancy, and the trial court overruled the objection.

On appeal, Estate claims that O’Neill’s testimony should not have been admitted because it was irrelevant, and the only basis for its admission was to inflame the prejudices of the jury. We reiterate that we will not reverse the trial court’s admission of evidence absent a showing of prejudice. *Gary Community School Corp.*, 890 N.E.2d at 798. Even assuming, for argument’s sake, that the trial court should not have admitted O’Neill’s testimony, Estate has failed to demonstrate that it was prejudiced by this brief

testimony. Therefore, we must decline Estate's invitation to vacate the jury verdict and remand for a new trial.

D. Faye Lindsey

Lindsey testified that she was a nurse in the intensive care unit at a local hospital in 1998 when Mojica was a patient there. She further testified that Mojica bit her arm as she was trying to assist him. She needed assistance getting Mojica to release her arm from his mouth, and she required a skin graft as a result of the injury caused by the bite. Estate objected to the relevancy of Lindsey's testimony, which was overruled by the trial court.

With regard to this testimony, Estate simply asserts that the incident to which Lindsey testified had nothing to do with the issues in Estate's complaint. A mere assertion is not sufficient to fulfill the appellant's burden of establishing reversible trial court error. Assuming, *arguendo*, the trial court erred by admitting Lindsey's testimony at trial, Estate's argument still fails because Estate has not shown any prejudice as a result of the admitted testimony. *See Gary Community School Corp., supra.*

E. Natalie Gonzalez

Gonzalez recounted an incident when Mojica was in the hospital, and she worked as a nurse at the hospital. She testified that Mojica hit her in the jaw with a closed fist and tried to hang himself.

On appeal, Estate avers that the trial court erred by admitting Gonzalez's testimony. However, Estate did not object to any of Gonzalez's testimony at trial. Thus,

this claim of error is waived. *See Raess*, 883 N.E.2d at 797 (party must object in order to preserve error for appellate review).

II. ADMISSION OF EXHIBITS AND DOCUMENTS

Estate next alleges that the trial court erred by admitting Exhibits 28 and 29 at trial. Specifically, Estate contends that the trial court abused its discretion by allowing Mojica's medical records to be admitted through a records custodian instead of a medical expert. In addition, Estate argues that the trial court erred by refusing to admit documents regarding Rosario's myspace web page. We will address each allegation in turn.

The decision to admit or exclude evidence lies within the sound discretion of the trial court, and we will not disturb the trial court's decision absent a showing of an abuse of that discretion. *Strack and Van Til, Inc.*, 803 N.E.2d at 670. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Perry*, 871 N.E.2d at 1047. What is more, we will not reverse the trial court's admission of evidence absent a showing of prejudice. *Gary Community School Corp.*, 890 N.E.2d at 798.

A. Admission of Medical Records

At trial, the court admitted Exhibits 28 and 29 into evidence. These exhibits contain Mojica's medical records from Tri-City Community Mental Health and St. Catherine Hospital, respectively. The records were introduced through Tri-City's medical records clerk and through St. Catherine's clerical supervisor. Estate objected to

the admission of both sets of medical records. In essence, Estate argues that, due to Mojica's complicated medical history, his medical records should have been introduced through a medical expert who could answer questions regarding his conditions.

Indiana Evidence Rule 803(6) governs the admission of business records and provides that the following are not excluded by the hearsay rule, even though the declarant is available as a witness:

Records of Regularly Conducted Business Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in this Rule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The medical records of Tri-City and St. Catherine contain opinions and diagnoses. While these records are not excluded by the hearsay rule, they generally must also be otherwise admissible. *Brooks v. Friedman*, 769 N.E.2d 696, 701 (Ind. Ct. App. 2002), *reh'g denied, trans. denied*. Medical opinions and diagnoses must meet the requirements for expert opinions set forth in Ind. Evidence Rule 702 in order to be admitted into evidence.

Id. Evid. Rule 702 provides as follows:

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

In the present case, however, Defendants did not seek to qualify their witnesses as experts under Evid. Rule 702 because they were not seeking to admit the records for any reason having to do with Mojica's health issues. Rather, Defendants sought to admit the records for the purpose of establishing a time period in which Mojica received treatment for his health issues. Defense counsel and the court responded to Estate's objection as follows:

DEFENSE COUNSEL: I don't think there's any confusion at all. I think it helps the jury understand the fact that even though his family members testified that he treated at Tri-City, he had not been to Tri-City since September of 2001.

COURT: Well, see, in the usual situation where medical records are admitted, you're making a claim for some type of an injury, and that's where you need some type of foundation in terms of relating the injury to the incident in question. All we're having here is the records to reflect the fact that at some points in time he did treat at Tri-City. You're not trying to in any way relate what's in those records to any specific event in the past that they might otherwise correlate with.

Tr. at 991. Therefore, it was not necessary for Defendants to seek admission of the records through an expert witness under Evid. Rule 702. No scientific, technical or specialized knowledge was required in this case for the jury to ascertain the dates Mojica was treated. In other words, a lay person could determine Mojica's dates of treatment without specialized knowledge. Further, we note that Estate's argument with regard to this issue merely consists of one sentence with no showing of any prejudice to Estate.

Under these circumstances, we cannot say the trial court abused its discretion by admitting Exhibits 28 and 29. We note that a better practice in this situation would have been for Mojica's counsel to request redaction of the records as to all information other than the dates of treatment, or to stipulate to the dates, if there was no genuine dispute about them.

B. Admission of Myspace Web Page

Estate further sought to use evidence of Rosario's Myspace web page to contradict his testimony that he shut out family and friends following Mojica's shooting. Prior to trial, the web page evidence was included in Defendants' motion in limine, which the trial court granted. During trial, Rosario testified that following this incident he was depressed, had trouble sleeping and closed himself off from his friends and family. During defense counsel's questioning of Rosario on cross-examination,¹ Estate requested a sidebar conference and indicated to the trial court its belief that Rosario's testimony had "opened the door" to the admission of the web page documentation. Tr. at 569. There followed a discussion regarding the date of the inception of the web page, and the trial court again declined to allow the admission of the evidence.

As we stated previously, the granting of a motion in limine does not determine the ultimate admissibility of the evidence. *Bova*, 843 N.E.2d at 955. On appeal, the standard of review employed is that applicable to the admission of evidence. *Perry*, 871 N.E.2d at 1047. The admission or exclusion of evidence lies within the sound discretion of the trial

¹ Rosario was being cross-examined by his own counsel because Estate called him as a witness in its case-in-chief.

court, and its decision will not be disturbed absent a showing of an abuse of that discretion. *Strack and Van Til, Inc.*, 803 N.E.2d at 670. Further, Ind. Evidence Rule 103(a)(2) states:

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked.

In the present case, it is clear from the transcript that both counsel and the trial court were aware of the substance of the web page evidence. Yet, we fail to see how reversible error can be premised on the trial court's exclusion of this evidence. The issue of whether Rosario closed himself off from friends and family may be relevant, but it is not an issue determinative of Defendants' liability to Estate. Rather, it is a collateral issue which, by its very nature as a collateral issue, is not determinative in this lawsuit. "In a wide variety of contexts, Indiana courts have held that improper rulings regarding the admission of evidence going to matters that are not central to the determination of guilt or liability are not the basis for relief." *Singh v. Lyday*, 889 N.E.2d 342, 355 (Ind. Ct. App. 2008), *reh'g denied, trans. denied*. We conclude that the trial court's exclusion of the evidence of Rosario's myspace web page did not affect Estate's substantial rights. Therefore, the error cannot serve as the basis for a new trial.

III. JURY INSTRUCTIONS

As its third error, Estate claims that the trial court erred both by rejecting its proposed jury instruction and by giving an instruction Estate asserts misstates the law. Instruction of the jury is left to the sound judgment of the trial court. *Franciose v. Jones*, 907 N.E.2d 139, 151 (Ind. Ct. App. 2009). In reviewing a trial court's decision to give or refuse a tendered instruction, we consider whether the instruction (1) correctly states the law, (2) is supported by the evidence in the record, and (3) is covered in substance by other instructions. *Id.* Due to the trial court's discretion in instructing the jury, we will reverse on the last two factors only when the instructions amount to an abuse of discretion. When an instruction is challenged as an incorrect statement of the law, however, appellate review of the ruling is de novo. *Id.*

Estate asserts that it submitted a proposed jury instruction on probable cause. Estate's brief refers to page 431 of its Appendix, but the proposed instruction is not found in Estate's Appendix. Because Defendants do not contest Estate's assertion, we will make a determination on this issue. Estate's tendered instruction provided as follows:

Let me explain what "probable cause means. There is probable cause for an arrest if at the moment the arrest was made, a prudent person would have believed that Plaintiff had committed a crime. In making this decision, you should consider what Defendant Hector Rosario knew and what reasonably trustworthy information Defendant Hector Rosario had received." Probable cause requires more than just a suspicion. But it does not need to be based on evidence (which) would be sufficient to support a conviction, or even a showing that Defendant's belief was probably right.

Appellant's Brief at 22.

This instruction is a correct statement of the law with regard to probable cause in a *criminal* action. However, in the instant civil case, it is not a statement of the relevant law and could have been misleading to the jury. Rosario and the other law enforcement officers had authority to detain Mojica pursuant to Ind. Code § 12-26-4-1, which, at the time of this incident, provided:

A law enforcement officer, having reasonable grounds to believe that an individual is mentally ill, dangerous, and in immediate need of hospitalization and treatment, may do the following:

- (1) Apprehend and transport the individual to the nearest appropriate facility. The individual may not be transported to a state institution.
- (2) Charge the individual with an offense if applicable.

There is a clear distinction between detaining a person based upon probable cause for the commission of a criminal offense and detaining a person who is mentally ill. The instruction tendered by Estate would have caused the jury to incorrectly believe that Rosario could have detained Mojica only if he believed Mojica had committed a crime. The trial court did not err by refusing Estate's tendered instruction.

Additionally, Estate maintains that Final Instruction No. 25 misstates the law because it "totally ignored the criminal aspect of probable cause." Appellant's Brief at 23. Final Instruction No. 25 provides:

There is probable cause for a seizure of an individual if when the seizure was made a prudent person would have believed that the person seized was an individual who was subject to apprehension and detention by a police officer. In making this decision, you should consider what the Defendant, Hector Rosario, knew and what reasonably trustworthy information he had received which would warrant the action that he took with respect to the Decedent, Felix Mojica, Jr.

If you find by a preponderance of the evidence that Officer Rosario acted in a good faith belief that he had the authority to apprehend and detain the Decedent, Felix Mojica, Jr., then the officer acted with probable cause as long as such good faith belief was reasonable.

The burden of proving the absence of probable cause is upon the Plaintiff, Daniel Mojica, as Special Administrator for the Estate of Felix Mojica, Jr., Deceased.

Appellees' Appendix at 182a.

This is not a criminal case. This is a case about a mentally ill individual who police were trying to apprehend in order to transport him to a facility where he could get help. This instruction correctly states the law with regard to this case. We note that the trial court also instructed the jury as to Ind. Code § 12-26-4-1. Estate did not challenge any other instruction. We find no error.

IV. CONTINUANCE

Finally, Estate avers that the trial court erred by granting a continuance of the second trial setting. The decision to grant or deny a motion for continuance lies within the sound discretion of the trial court. *Thompson v. Thompson*, 811 N.E.2d 888, 907 (Ind. Ct. App. 2004), *reh'g denied, trans. denied*. We will not disturb a trial court's decision to grant or deny a motion to continue a trial date absent a showing of clear and prejudicial abuse of discretion. *Parmeter v. Cass County Dept. of Child Services*, 878 N.E.2d 444, 449 (Ind. Ct. App. 2007), *reh'g denied*. In addition, there is a strong presumption the trial court properly exercised its discretion. *Gunashekar v. Grose*, 915 N.E.2d 953, 955 (Ind. 2009).

On July 15, 2008, Defendants filed a motion to vacate trial setting, to extend deadline for filing of pre-trial order, to extend discovery cut-off and to extend deadline for disclosure of expert witnesses. Two days later on July 17, 2008, Estate filed its response in opposition to Defendants' motion. The trial court granted Defendants' motion.

On appeal, Estate baldly contends that the continuance of the trial "resulted in unfair prejudice" to it. Appellant's Brief at 25. Estate fails to show or explain how it was prejudiced. Thus, Estate's argument that the trial court abused its discretion by continuing the trial must fail.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that there exists no reversible error, and the trial court is affirmed on all issues.

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.