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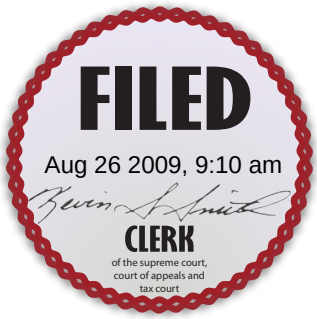

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IN THE
COURT OF APPEALS OF INDIANA

THOMAS A. SMITH, MICHAEL J. HEFFERN,)
TINA L. WHITING, ADDISON R. PIJNAPPLES,)
RODERICK BERRY,)

Appellants/Defendants,	)	
vs.	)	No. 38A05-0812-CR-720
STATE OF INDIANA,	)	
Appellee/Plaintiff.	)	

INTERLOCUTORY APPEAL FROM THE JAY CIRCUIT COURT
The Honorable Brian D. Hutchison, Judge
Cause Nos. 38C01-0809-MR-1, 38C01-0809-MR-2,
38C01-0809-MR-3, 38C01-0809-MR-4, 38C01-0809-MR-5

August 26, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellants/Defendants Thomas Smith, Michael Heffern, Tina Whiting, Addison Pijnapples, and Roderick Berry (collectively, "Appellants") bring this consolidated interlocutory appeal from the trial court's denial of their motions for a change of judge. Appellants contend that the trial court erred in denying their motions for a change of judge because certain statements allegedly made by the trial judge suggest that the trial judge was biased or prejudiced against the Appellants. We affirm.

FACTS AND PROCEDURAL HISTORY

On or about September 10, 2008, Shawn Buckner was found dead in Jay County. The next day, on September 11, 2008, the trial court found probable cause to charge each of the Appellants with Buckner's murder and one count of Class B felony robbery resulting in

bodily injury. Appellants subsequently filed individual motions requesting a change of judge, alleging that the trial judge was biased and prejudiced against them.

In support of their motions for a change of judge, Appellants filed individual affidavits alleging that prior to the probable cause hearing, the trial judge privately commented to attorney Tom Diller that "a murder had occurred and that three of the murderers were in jail and that we were going to arrest one more." Consolidated Appellants' App. pp. 14, 90, 155, 219; Appellant Berry's App. p. 2. Appellants' affidavits also alleged that the trial judge indicated at the conclusion of the probable cause hearing that "the Court would find probable cause for the filing of a greater charge if it was requested." Consolidated Appellants' App. pp. 14, 90, 155, 219; Appellant Berry's App. p. 2. The trial court, after having conducted individual hearings on Appellants' motions, denied Appellants' motions for a change of judge finding that the alleged comments did not create a rational inference that the court was biased or prejudiced against the Appellants. The trial court subsequently certified these decisions for interlocutory appeal, and this consolidated appeal follows.

DISCUSSION AND DECISION[1]

The Appellants contend that the trial court erred in denying their motions for a change of judge. This court reviews the trial court's denial of a motion for a change of judge for

[1] To the extent that Appellant Berry included materials in his Appendix that were not properly part of record on appeal, namely a Chronological Case Summary for an unrelated criminal matter with the cause number of 38C01-0712-FC-17 and the Affidavit of B. Joseph Davis, Berry's appellate counsel, dated April 29, 2009, well after the initiation of appellate proceedings, we grant the State's motion to strike these documents in an order issued simultaneously with this opinion.

clear error. *Sturgeon v. State*, 719 N.E.2d 1173, 1182 (Ind. 1999). We will reverse the trial court's decision "only upon a showing of clear error–one that which leaves us with a definite and firm conviction that a mistake has been made." *Noble v. State*, 725 N.E.2d 842, 848 (Ind. 2000).

"The law presumes a judge is unbiased and unprejudiced." *Garland v. State*, 788 N.E.2d 425, 433 (Ind. 2003); *Buggs v. State*, 844 N.E.2d 195, 205 (Ind. Ct. App. 2006), *trans. denied*. Appellants' request for a change of judge is governed by Indiana Rule of Criminal Procedure 12(B), which requires the moving party to file an affidavit that states the "historical facts" and "reasons" for the judge's alleged bias or prejudice against the moving party. Criminal Rule 12(B) states that the motion "shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice." "A showing of prejudice that calls for a change of judge must be established from personal, individual attacks on a defendant's character, or otherwise." *Garland*, 788 N.E.2d at 433. "Adjudicating a request for a change of judge based on Criminal Rule 12(B) requires an objective, not subjective, legal determination by the judge, who is 'to examine the affidavit, treat the facts recited in the affidavit as true, and determine whether these facts support a rational inference of bias or prejudice.'" *Voss v. State*, 856 N.E.2d 1211, 1216 (Ind. 2006) (citing *Sturgeon*, 719 N.E.2d at 1181). A change of judge is neither automatic nor discretionary, but rather requires the trial judge to make a legal determination, not a self-analysis, of actual bias or prejudice. *Voss*, 856 N.E.2d at 1217 (citing *Allen*, 737 N.E.2d at 743; *Sturgeon*, 719 N.E.2d at 1181).

In addition, Canon 3(E)[2] of the Indiana Code of Judicial Conduct states that a trial judge shall disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned. "[T]he appearance of bias and partiality requires recusal just as does the actual existence of those impediments." *Thakkar v. State*, 644 N.E.2d 609, 612 (Ind. Ct. App. 1994). Thus, the true question is whether an objective person, knowledgeable of all the circumstances, would have a rational basis for doubting the judge's impartiality. *Id*.

In this consolidated appeal, the Appellants' affidavits allege two historical facts which they claim support an inference of bias or prejudice. Appellant Heffern's affidavit, which most comprehensively represents the Appellants' individual affidavits, alleges that the following historical facts support an inference of bias or prejudice:

> a. That the Judge in this cause of action … has indicated to attorney Tom Diller, before testimony was presented at the probable cause hearing, "that a murder had occurred and that three of the murderers were in jail and that we were going to arrest one more."
>
> b. That at the probable cause hearing and in the Court's ruling the Court indicated that the Court would find probable cause for the filing of a greater charge if it was requested.

Appellants' Consolidated App. p. 90.

I. Alleged Statement by Trial Judge to Attorney Diller

Appellants contend that a rational inference of the trial judge's bias or prejudice is demonstrated by the trial judge's alleged statement to Attorney Diller that "a murder had

[2] In 2009, the Indiana Code of Judicial Conduct was reorganized. The section regarding disqualification of a judge, formerly found in Canon 3(E) can now be found in Canon 2.11.

occurred and that three of the murderers were in jail and that we were going to arrest one more." Consolidated Appellants' App. pp. 6, 78, 142, 207. With respect to this alleged statement, the record establishes that Buckner was robbed and murdered on Monday, September 8, 2008, that Buckner's body was recovered on September 10, 2008, and that the trial judge conducted a probable cause hearing on Thursday, September 11, 2008, after which the Appellants were each charged with one count of murder and one count of Class B felony robbery resulting in bodily injury. Appellants claim that the trial judge made the alleged statement to Attorney Diller during a judicial conference in Indianapolis prior to the September 11, 2008 probable cause hearing. Therefore, any alleged statement by the trial judge would have had to have been made on either Wednesday September 10, 2008, or prior to the beginning of the probable cause hearing on September 11, 2008, which was nearly contemporaneous with the trial judge learning of the murder, the recovery of the body, and the subsequent arrest of the Appellants.

It is of note that Appellants did not include an affidavit by Attorney Diller attesting to any specifics relating to the alleged conversation, such as date, nature, possible audience, or context. Rather, Appellants simply relied on second-hand hearsay in setting forth the historical facts that they claim support their motions for a change of judge. It is also of note that the trial judge stated during a hearing regarding Appellants' motions for a change a judge that the alleged statement, as presented by the Appellants, "does not meet the court's recollection of the discussion with Mr. Diller." Tr. p. 11.

Even assuming, however, for the purpose of this appeal that the facts as presented by

the Appellants are true, the judge's alleged statements do not reasonably demonstrate a formulated bias or prejudice against the Appellants. A reasonable person informed of all the facts and circumstances might assume that such comments were related to the judge's expectation that an additional suspect would be arrested in this case.

In light of the second-hand nature of the judge's alleged comments to Attorney Diller and the lack of specificity regarding the date, nature, possible audience, or context of the alleged statement by the trial judge, we are unconvinced that an objective person, knowledgeable of all of the facts and circumstances presented in the instant matter, would have a rational basis for doubting the trial judge's impartiality. Appellants bore the burden of demonstrating that the historical facts in their affidavits supported an inference of bias or prejudice. Based on the foregoing, we cannot say with a definite and firm conviction that the trial court made a mistake in denying Appellants motions for a change of judge. Thus, it follows that the trial court's decision was not clearly erroneous in this regard.[3]

II. Statement by Trial Judge at the Conclusion of the Probable Cause Hearing

Appellants also contend that the statement by the trial judge at the conclusion of the

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[3] To the extent that Appellant Berry argues that the trial judge improperly excluded the recitation of the alleged statement made by the trial judge to Attorney Diller provided in Appellant Berry's affidavit in support of his motion for a change of judge as hearsay, we note that the trial court's order explicitly provides as follows:

> Assuming further, but without finding, that on September 11, 2008, the presiding judge stated "that a murder had been committed in Jay County and that three of the murders were in jail and we expect to get the others," such a statement does not support a rational inference of bias or prejudice in the matter.

Appellant Berry's App. p. 33. The trial court's order clearly shows that the trial court did not exclude the alleged statement from consideration, but rather properly assumed that the alleged statement was true for the purpose of considering Appellant Berry's motion for a change of judge.

probable cause hearing that "the Court would find probable cause for the filing of a greater charge if it was requested" demonstrates a rational inference of bias or prejudice against them by the trial judge. Consolidated Appellants' App. pp. 6, 78, 142, 207. With respect to this statement, we observe that during the probable cause hearing, the trial judge engaged in an exchange with the prosecuting and deputy prosecuting attorneys in open court regarding the level of the felony class of the robbery charge to be filed against each of the Appellants. The prosecuting and deputy prosecuting attorneys indicated that the State was planning to file charges alleging that the Appellants engaged in Class B felony robbery, resulting in bodily injury rather than Class A felony robbery, resulting in serious bodily injury. The trial judge, having heard testimony relating to the serious injuries suffered by the victim resulting in his death, stated that the court is "going to find probable cause for the filing of those charges. The Court would find probable cause for the filing of a greater charge if it was requested." Prob. Cause Hr. Tr. p. 31.

The trial judge did not suggest or encourage that the State file a higher level of felony charges against the Appellants, but merely stated that based on the evidence presented, *i.e.* the death of the victim, the Court would find probable cause to support the higher level of felony charges if requested by the State. The distinguishing factor between the two levels of felony robbery in question is whether the victim suffered serious bodily injury as opposed to mere bodily injury. *See* Ind. Code § 35-42-5-1 (2008). It is undisputed that bodily injury resulting in death of the victim is sufficient to support a charge of Class A felony robbery resulting in serious bodily injury. *See Nelson v. State*, 664 N.E.2d 386, 388 (Ind. Ct. App.

1996), *trans. denied*. In light of the context behind the trial judge's statement regarding the level of felony battery charge to be filed against the Appellants and the undisputed proposition that bodily injury resulting in death is sufficient to support a charge of Class A felony robbery, we conclude that the trial judge's one sentence statement recognizing that the evidence presented would support a higher charge was not such that an objective person, knowledgeable of all of the circumstances, could have a reasonable basis for doubting the trial judge's impartiality. Thus, the trial court's order denying Appellants' requests for a change of judge on this basis was not clearly erroneous.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.