IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30110
Summary Calendar

JOHN WILLIAM ATHERTON,

Plaintiff-Appellant,

versus

ROY CASEY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA-92-1283-N)

(September 13, 1994)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM*:

Plaintiff-Appellant John William "Bill" Atherton appeals the judgment of the district court, entered on a verdict in favor of defendants Roy Casey, his wife Melanie Casey, and State Farm Fire and Casualty Company. Atherton sued for tort damages resulting

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

from the death of his alleged wife, Ann Beattie, who was shot and killed by her landlord, Roy Casey. Liability for the murder and insurance coverage were not contested. The sole issues tried were the existence of a marriage between Atherton and Beattie and Atherton's damages. The jury found that there was no marriage between Atherton and Beattie, a finding Atherton contests on appeal. Finding substantial evidence to support the jury's verdict, and no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

On April 13, 1991, Atherton left New Orleans to visit his father in Kentucky, who was suffering from heart disease. Two days later, Beattie was shot and killed by her landlord Roy Casey while she was sitting in her car in the driveway to her apartment. Casey was subsequently found not guilty by reason of insanity and has been institutionalized. Casey and his wife had two policies of homeowner's insurance which afford coverage to Beattie's survivors because Casey was insane.

Under Louisiana law, Beattie's spouse or children, if any, have the exclusive right of action for damages resulting from Beattie's wrongful death.[1] Atherton, who had moved to Virginia five or six months after Beattie's death, filed this suit in federal court based on diversity jurisdiction.[2] Beattie's natural grandmother, Mary Ellen Chipley Beattie, who had adopted Beattie as

[1]LA. CIV. CODE ANN. art. 2315.2.

[2]The Caseys were Louisiana residents.

a child, filed suit in state court for her damages resulting from Beattie's death, claiming that Atherton is not Beattie's spouse, and that she, as Beattie's next-of-kin, has the right to file an action for damages arising from Beattie's death. Atherton's federal court case came to trial first. Mary Beattie petitioned to intervene in the federal suit but was denied intervention. She was called to testify, however. When this appeal was filed, trial of Mary Beattie's suit was scheduled to begin October 5, 1994.

As liability for the murder was not contested, the only issue tried was whether Beattie and Atherton were married, and if so, what quantum of damages Atherton sustained.

In the fall of 1980, Atherton, then 35 years old, met Beattie, then 21. They began living together in 1981, but did not then hold themselves out to the public as married. Atherton was still married to his then-current (third) wife, from whom he was later divorced. In 1984, Beattie became pregnant, but she and Atherton decided to put the baby up for adoption.

The following evidence was presented in support of Atherton's claim that he and Beattie were married. In 1985, Atherton and Beattie began to discuss getting married. But Beattie's grandmother, Mary Beattie, did not approve of Atherton, who had had three previous failed marriages and was significantly older than Beattie. Atherton and Beattie decided to get married anyway but to keep their marriage a secret from their families.

Beattie made all the arrangements for the wedding. On May 1, 1985, Beattie and Atherton were married in their basement apartment

by a Baptist minister with the minister's wife in attendance. Atherton's best friend, John DuRell, and Beattie's best friend, Nancy Yager, were witnesses. Atherton, Yager, and DuRell each testified to the number of guests present, but DuRell testified to twice the number of guests testified to by Atherton and Yager. Atherton and Beattie exchanged vows, and the Baptist minister conducting the ceremony purportedly allowed the couple to delete the word "obey" from the marriage vows, and substitute "spiritual" for "God." As they were not financially well off, the couple exchanged aluminum foil rings. DuRell and Yager both testified that they signed a marriage license. After the ceremony, the couple hosted a cake and wine reception in the apartment. The couple eventually replaced their aluminum foil rings with silver rings that Atherton designed. DuRell, who was a jeweler, made the rings for the couple.

For the next several years, Atherton and Beattie continued to keep their marriage a secret from their families, but Beattie told several of their friends that they were married. At least seven witnesses presented testimony to that effect.

Consistent with Atherton's testimony that he and Beattie kept their marriage a secret from their families, Mary Beattie testified that Beattie and Atherton had never been married. And notwithstanding his present representation that he and Beattie had been married in a ceremony in 1985, Atherton admitted to the jury that he had lied at times regarding his relationship with Beattie.

When Atherton opened a business account in 1990, he listed

Beattie simply as a friend. When Beattie went to Charity Hospital for treatment of a cat bite, Atherton advised her to list herself as single, and she did so. Atherton admitted telling Beattie's family, even after her death, that they had never married. He originally told the funeral home that they were not married, but after realizing that Beattie would not be buried as his wife, he changed his story. The funeral home required a document to prove their marital status. As Atherton could find none, and there was no time for a search at the Bureau of Vital Records, he forged a marriage certificate on the advice of an attorney, which forgery was signed by Yager and DuRell. William Barlow, the State Registrar of Vital Records in Orleans Parish, testified that after searching records between 1984 and 1986, he could find no application, license, or marriage certificate for Atherton or Beattie.

The jury determined that no marriage existed between Atherton and Beattie. The magistrate judge conducting the trial entered judgment on the verdict. Atherton timely appealed, arguing that the jury verdict is not supported by the evidence, and claiming other errors in the conduct of the trial and rulings by the court.

II

ANALYSIS

A. Sufficiency of the Evidence

Under Louisiana law, three requirements for marriage exist: (1) the absence of legal impediment, (2) a marriage ceremony, and (3) the free consent of the parties to take each other as husband

and wife, expressed at the ceremony.[3] With regard to the ceremony, the only formal requirement for a valid marriage,[4] Louisiana law provides that

> [t]he parties must participate in a marriage ceremony performed by a third person who is qualified, or reasonably believed by the parties to be qualified, to perform the ceremony. The parties must be physically present at the ceremony when it is performed.[5]

The jury was instructed accordingly.

We may overturn the jury's determination that there was no marriage only if the facts and inferences favor Atherton so strongly that a reasonable jury could not have reached a verdict for the defendants.[6] To find that Atherton and Beattie were married, the jury was required to find that a marriage ceremony was performed, and that the free consent of the parties to take each other as husband and wife was expressed at the ceremony. The jury would have been required to credit testimony given by Atherton, DuRell, and Yager to find that Atherton and Beattie were married. Given Atherton's at best inconsistent representations about the status of his and Beattie's relationship, and DuRell's and Yager's assistance in forging a marriage certificate after Beattie's death, albeit for the express purpose of allowing Beattie to be buried as Atherton's wife, the jury understandably had grounds to discredit

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[3]LA. CIV. CODE ANN. art. 87.

[4]Id. cmt. c.

[5]LA. CIV. CODE ANN. art. 91.

[6]Marcel v. Placid Oil Co., 14 F.3d 563, 566 (5th Cir. 1994) (citations omitted).

their testimony that a marriage ceremony had been performed by an apparently qualified person. We conclude that the verdict is supported by substantial evidence.

B. JURY INSTRUCTION ON PRESUMPTION OF MARRIAGE

Atherton requested a jury instruction on the presumption of marriage, and asked the court to instruct the jury on the resulting shift of the burden of proof to the defendants, but the court refused his request. We review the instructions to the jury with deference,[7] using a two-part test to evaluate Atherton's objection to the court's failure to give a requested instruction[8]: First, Atherton must show that the proposed instruction correctly states the law.[9] If that showing is made, we will then determine whether the instructions actually given were accurate or misleading.[10] "A judgment will be reversed only when `the charge as a whole leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.'"[11]

Atherton asked the court to instruct the jury as follows:

> Where a man and a woman have lived publicly as husband and wife for a period of time there arises a presumption that they are lawfully married and this presumption is one of the strongest known to our law. A marriage proven by reputation means that the acts and conduct of the parties, as established

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[7] Hunnicutt v. Wright, 986 F.2d 119, 122 (5th Cir. 1993).

[8] Treadaway v. Societe Anonyme Louis-Dreyfus, 894 F.2d 161, 167 (5th Cir. 1990).

[9] Id.

[10] Id.

[11] Hunnicutt, 986 F.2d at 122 (quoting Stine v. Marathon Oil Co., 976 F.2d 254, 259 (5th Cir. 1992)).

> by satisfactory proof, authorize and create the presumption that there was a marriage. This presumption yields only to proof that there was no such marriage or that it was void because of some nullity established by law. Under these circumstances, persons asserting that there [was] no marriage have the burden of proof.

Even assuming that the requested instruction is correct, the presumption of marriage does not apply in this case. Louisiana law is apparently well settled that

> in order for the presumption to arise, from its beginning the relationship must have the appearance and general reputation of marriage; if the relationship began in open concubinage, the presumption does not arise and the litigant seeking to prove the marriage must bear the burden of showing that some change took place in the relationship which converted the illicit union into a marriage valid under the laws of this state.[12]

"It is a prerequisite to the presumption that from its beginning the relationship had the appearance and general reputation of marriage and the parties were free to marry."[13] Atherton admits that he and Beattie did not represent themselves as married when they first began living together; moreover, he was then still married to his third wife and was not free to marry. Nevertheless, he argues that because he offered evidence that "some change took place . . . which converted the illicit union into a marriage"))i.e., he and Beattie introduced each other as husband and wife, discussed the marriage with friends and wore wedding

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[12]Succession of Rossi, 214 So. 2d 223, 226 (La. App. 4th Cir.), writ refused, 216 So. 2d 309 (La. 1968) (citing Succession of Theriot, 185 So. 2d 361 (La. App. 4th Cir.), writ refused, 187 So. 2d 443 (La. 1966)).

[13]Blasini v. Succession of Blasini, 30 La. Ann. 1388, 1399 (1878); Succession of Theriot, 185 So. 2d at 363 (citing Powers v. Executors of Charbmury [Charmbury], 35 La. Ann. 630 (1883) and Blasini, 30 La. Ann. 1388)).

rings))he again is entitled to the benefit of the presumption of marriage.

Atherton's interpretation of the relevant authority is incorrect. As his relationship with Beattie did not have the appearance and general reputation of marriage from the beginning, Atherton has "deprived [himself] of the benefit of the presumption; [he] must bear the burden of proving the valid marriage which [he] alleges took place"[14] on May 1, 1985. As Atherton is not entitled to the presumption, the court properly refused to instruct the jury on his requested instruction.

Atherton also claims that the court erroneously instructed the jury that it could consider evidence that the parties ignored the forms and solemnities required by law. After charging the jury with the three absolute requirements for marriage, the court gave examples of the kind of evidence the jury might consider. The court instructed the jury to consider all of the evidence, including the general reputation of the parties in the community and the parties' attempt to follow the forms and solemnities prescribed by law, such as the existence of a marriage license and blood tests, and whether there was a record of the marriage. The court instructed the jury that these questions might assist its deliberations and understanding of the overall situation, even though none of these facts were sufficient to prove or disprove a marriage, and were not strictly necessary for a valid marriage. The jury was properly guided by these instructions, and was not

[14]Succession of Rossi, 214 So. 2d at 226 (emphasis added).

mislead or confused about the requirements to prove a marriage.

C. FAILURE TO ADMIT PSYCHIATRIC RECORDS OF MRS. ROY CASEY

Atherton designates as error the court's failure to allow into evidence admissions of Mrs. Casey, a defendant, that she regarded Atherton and Beattie as married. On April 17, 1991, two days after the murder of Beattie, Roy Casey was admitted to Depaul Hospital for an assessment of his psychological status. During the process of assessing Mr. Casey, Mrs. Casey was interviewed regarding the murder. She made several references to "the victim and her husband." The admissions were contained in Depaul Hospital records, which were listed as an exhibit by Atherton. He insists that he wanted to admit only those portions of the psychiatric records containing the admissions of Mrs. Casey. Atherton asserts that these were not hearsay, but admissions of a party opponent. Defendants counter that the documents were of little probative value, as they were essentially cumulative of the uncontested fact that Beattie and Atherton had a general reputation in the community as husband and wife.[15]

We agree with defendants that the admissions contained in the documents were merely cumulative of all other uncontested evidence offered by Atherton that he and Beattie had a reputation in the community as being married. Had the parties not cohabited before holding themselves out as husband and wife and while Atherton was

[15]The defendants also assert that the records were obtained in violation of Louisiana law and that disclosure would violate the psychotherapist-patient and health care provider-patient privilege of defendants and defendants' constitutional right to privacy. We need not address these arguments.

still married to his third wife, reputation evidence might have given rise to a presumption of marriage; such evidence is not, however, required to prove a marriage. It certainly does nothing to prove the central issue in this case: whether Atherton and Beattie participated in a marriage ceremony. The court's decision not to admit the psychiatric records was within its discretion under Federal Rule of Evidence 403[16] and did not affect a substantial right of Atherton.

D. No Judicial Misconduct

Atherton also claims that the magistrate judge conducting the trial made comments and rulings before the jury that, coupled with the fact that the magistrate's law clerk served as a witness for the defense, "could" have indicated a bias for the defense. Absent an objection to such comments at trial, we review the record for plain error.[17]

After learning that defendants might call her law clerk, Barry Yager, as a witness, the judge refused to recuse herself voluntarily and told the parties that a motion would have to be filed.[18] Atherton admits that he failed to file such a motion, but

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[16]That rule provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[17]Newman v. A.E. Staley Mfg. Co., 648 F.2d 330, 335 (5th Cir. 1981).

[18]Barry was in fact called to testify about the substance of two conversations that he had had with Nancy during the week following Beattie's death, in which Nancy inquired about common-

blames his failure on his "incorrect" assumption that the judge could be fair. Atherton insists that Barry, Nancy Yager's brother-in-law, apparently had been speaking negatively to the judge about his sister-in-law, Nancy, who is in the midst of a bitter divorce with Barry's brother, and that such comments must have created a bias against his case. The judge explained several concepts to the jury during the course of the plaintiff's case, including hearsay and depositions. Atherton does not complain that the statements were incorrect, but instead insists that the comments helped defense counsel. He asserts that the court sua sponte assisted the cross-examination of the plaintiff by asking the name of the minister that "supposedly" performed the ceremony. Atherton also protests the judge having allowed defense counsel to retrieve a law book from her chambers to assist his effort to impeach the plaintiff.[19]

Reviewing the record as a whole,[20] it is clear that the comments about which Atherton complains were made within the

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law marriage and informed Barry that although the original license had not been found, "Bill [Atherton] was able to take care of everything and it's, you know, no longer important."

[19]Defense counsel was trying to establish whether the plaintiff had been told that the forgery of a marriage certificate was a violation of state law. (Atherton had claimed that he was advised by an attorney that he could duplicate the marriage certificate.) Atherton's attorney objected that Atherton should not testify as to what state law provides. The court offered to break to retrieve the relevant statute, but Atherton's attorney then withdrew his objection. Nevertheless, the court stated that it was best to be accurate about the statute and allowed the statute book to be retrieved for that purpose.

[20]Newman, 648 F.2d at 334-35.

court's province as governor of the trial to ensure that the trial was properly conducted.[21] The court instructed the jury in the charge to disregard any conduct on the court's part that suggested that she favored one party or the other, and that it, not the court, was the sole judge of the facts. We find no merit to Atherton's complaint that the court engaged in judicial misconduct or exhibited any bias that would warrant a new trial of this case. The record reveals no plain error impairing Atherton's right to a fair and impartial trial.

III

CONCLUSION

We find no reversible error in any instructions or rulings of the court. Neither do we find that the trial was tainted by judicial misconduct. As the verdict is supported by substantial evidence, the judgment in favor of defendants is

AFFIRMED.

[21] Johnson v. Helmerich & Payne, Inc., 892 F.2d 422, 425 (5th Cir. 1990).