RENDERED: April 23, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003268-MR

BILLY JOE STACY — APPELLANT

V.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 95-CR-20

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION AFFIRMING

* * * * * * * * *

BEFORE: GUDGEL, Chief Judge; COMBS and DYCHE, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from a judgment entered by the Breathitt Circuit Court. Appellant, Billy Joe Stacy, was convicted of second-degree manslaughter and sentenced to ten years' imprisonment. On appeal appellant contends that the trial court erred by denying his motion for a continuance, by failing to disqualify the entire jury panel, and by failing to allow a certain witness to testify regarding statements made by appellant. We disagree with all of appellant's contentions. Hence, we affirm.

Appellant was indicted for murder stemming from a May 1995 stabbing death. At trial the Commonwealth adduced evidence

that in the early morning hours of May 4, 1995, appellant went to the home of his cousin, Clifford Hollon, and was introduced to Hollon's father-in-law, the victim William Shepherd. After Hollon and his wife went to sleep in another room, appellant and Shepherd watched television and drank beer. Two of Hollon's three children testified that they were awake after 5:00 a.m., preparing for school, when they observed appellant stabbing Shepherd with a butcher knife without apparent provocation. Hollon and his wife each testified that they were awakened by the children's screaming and they went into the living room, whereupon they saw Shepherd wounded in the chest and appellant holding a bloody knife. Shepherd died shortly after he was stabbed. Appellant left the house through the back door and was arrested later that morning.

Appellant denied involvement with the murder. He testified that he and Shepherd were the only persons awake in the house at 5:00 a.m. when he went outside to use the bathroom, that an unknown person pushed him into a creek, and that he then heard Hollon's wife shouting that he killed her father. Appellant further testified that he then walked away from Hollon's house. The jury convicted appellant of second-degree manslaughter and recommended a sentence of ten years' imprisonment. This appeal followed.

First, appellant contends that the trial court erred by failing to grant his motion for a continuance which was made on the morning of the trial. We disagree.

A trial court is vested with broad discretion in ruling on a motion for a continuance. Dishman v. Commonwealth, Ky., 906 S.W.2d 335 (1995). Its decision will not be disturbed on appeal absent a clear showing of an abuse of its discretion. Hunter v. Commonwealth, Ky., 869 S.W.2d 719 (1994). The procedure for obtaining a continuance due to the absence of a witness is clearly stated in RCr 9.04:

> A motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it. If the motion is based on the absence of a witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant believes them to be true. . . .

Clearly, a trial court does not abuse its discretion by denying a continuance due to a party's failure to submit the affidavit as required by RCr 9.04. McIntosh v. Commonwealth, Ky. App., 582 S.W.2d 54 (1979). Indeed, a party seeking a continuance based upon the absence of a witness must demonstrate that reasonable steps were used to secure the witness's attendance. Delacey v. Commonwealth, Ky., 494 S.W.2d 735 (1973). Moreover, the party requesting a continuance must show that a subpoena was issued for the witness. Corbett v. Commonwealth, Ky., 717 S.W.2d 831 (1986). Further, once a subpoena is issued, the party must make diligent efforts to serve the subpoena. Cornwell v. Commonwealth, Ky., 523 S.W.2d 224 (1975).

Here, appellant sought a continuance on the day of trial because one of the three alleged eyewitnesses to the murder, Jimmy Hollon, did not appear to testify. Specifically, appellant requested a continuance based upon his unsupported allegation that two unidentified persons said that Jimmy Hollon implicated his father in William Shepherd's murder. However, during a hearing appellant could not identify for the court the persons to whom Jimmy Hollon implicated his father.

Further, appellant did not file an affidavit as required by RCr 9.04. Moreover, the instant action clearly does not involve a situation where the defendant had inadequate time to investigate and locate either the missing witness or the two unidentified persons who allegedly implicated the victim's son-in-law. Indeed, appellant does not suggest otherwise. More important, appellant's trial had been continued twice before, yet appellant offered no explanation whatever as to the reason for waiting until the day of trial to request a continuance. Nor did appellant make any assurances that either Jimmy Hollon or the two unidentified persons could be located if the trial was continued. See Farris v. Commonwealth, Ky. App., 836 S.W.2d 451 (1992). Finally, we note there is nothing in the record to establish that appellant even requested that a subpoena be issued for the missing witness prior to trial. Given the obvious deficiencies and circumstances confronting the trial court, it is clear that it did not abuse its discretion by denying appellant's motion for a continuance.

Next, appellant contends that the trial court erred by failing to disqualify the entire jury panel on the ground that the spouse of a potential witness was on the panel. We disagree.

A criminal defendant "is entitled to be tried by a fair and impartial jury composed of members who are disinterested and free from bias and prejudice, actual or implied or reasonably inferred." Tayloe v. Commonwealth, Ky., 335 S.W.2d 556, 558 (1960). Bias on behalf of a potential juror may be implied from a close relationship with a party, counsel, victim, or witness resulting from familial, financial, or situational ties. Ward v. Commonwealth, Ky., 695 S.W.2d 404 (1985). In Hellard v. Commonwealth, Ky. App., 829 S.W.2d 427, 429 (1992), this court held that a "'close relationship' of the situational type" was established where the complaining witness was a member of the jury panel, had served with four other members of the jury panel, and "had numerous opportunities to meet the other members" of the panel."

Nevertheless, the mere fact that one member of the jury panel may have some type of relationship with a party, counsel, victim or witness does not require disqualification of the entire jury panel. Indeed, disqualification is warranted only where the prospective jurors' knowledge precludes impartiality. Bowling v. Commonwealth, Ky., 942 S.W.2d 293 (1997), cert. denied, ____ U.S. ____, 118 S.Ct. 451, 139 L.Ed.2d 387 (1997). Our supreme court recently held in Scholler v. Commonwealth, Ky., 969 S.W.2d 706 (1998), that bias was not implied where a prospective juror and

the prosecutor were both members of large card club and knew each other through mutual friends. Further, bias is not implied from a mere acquaintanceship with the defendant. Key v. Commonwealth, Ky. App., 840 S.W.2d 827 (1992). Likewise, bias is not implied on behalf of a former patient of a defendant doctor in a medical malpractice case. Altman v. Allen, Ky., 850 S.W.2d 44 (1992).

Here, appellant argues that the entire jury panel should have been excused because Brenda Deaton, the wife of one of the Commonwealth's witnesses, was a member of the jury panel. John Deaton testified for the Commonwealth that he lived approximately one-half mile from Clifford Hollon, that around 6:00 a.m. the day of the murder appellant was in his yard, and that appellant said to him "I didn't kill that fellow over there," but thereafter stated, "Yeah, I did -- I shoved a knife plumb through him."

However, appellant's assertion on appeal that "the jurors had served together and had tried cases together" is not supported by the record. Indeed, the record shows that half of the jury panel had been serving for a few months while the other half of the panel had been recently empaneled. Further, the record does not demonstrate whether Ms. Deaton had previously served with other members of the jury panel, and as noted by the trial court, no showing was made as to whether the other members of the jury panel would recognize that Ms. Deaton was the wife of one of the witnesses.

Appellant urges that Hellard, supra, controls this case. Clearly, however, Hellard is inapposite. Here, unlike in Hellard, 829 S.W.2d at 429, the record simply fails to establish that a "'close relationship' of the situational type" had developed between Ms. Deaton and other prospective jurors. Rather, the record shows that during the thorough voir dire examination, the trial court carefully considered the answers of the prospective jurors and eliminated possible prejudice to appellant. Ms. Deaton was stricken for cause, as were other prospective jurors whose impartiality was subject to question. In last analysis, given the record before us, we simply cannot say that the trial court abused its considerable discretion by denying appellant's motion to strike the entire jury panel because a witness's spouse was a member of the panel.

Finally, appellant contends that the trial court erred by excluding certain testimony regarding statements allegedly made by him subsequent to the murder. However, we agree with the Commonwealth that this issue was not properly preserved for review.

The excluded testimony which was submitted by avowal consisted of a school bus driver's testimony that a man flagged down his bus and told him, "[S]omebody stabbed his buddy." At trial, appellant argued that this testimony should be admitted for the purpose of impeaching the testimony of another witness. On appeal, however, he urges that the testimony should have been

admitted under the excited utterance exception to the hearsay rule.

Appellant cannot present one theory to the trial court and another theory to the appellate court. See Commonwealth v. Duke, Ky., 750 S.W.2d 432 (1988). Hence, this issue was not preserved for review. More important, there is no merit in the contention in any event. To qualify an otherwise inadmissible hearsay statement under the excited utterance exception, the proponent must adduce evidence that the "declarant was under the stress of excitement caused by the event or condition." KRE 803(2). Here, appellant did not comply with this requirement of the rule. Thus, no reversible error in this vein occurred.

The court's judgment is affirmed.

ALL CONCUR.

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