

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002026-MR

WILLIAM SWINGLE, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 98-CR-002380

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE: William Swingle, Jr. (Swingle) appeals from a July 26, 2000 judgment of conviction and sentence of the Jefferson Circuit Court, which sentenced him to one year to serve in prison but probated that sentence for five years for the offense of theft by failure to make required disposition of property over \$300.00. Kentucky Revised Statute (KRS) 514.070. Swingle now appeals as a matter of right.

Swingle entered into a sales contract with Synergism Co. Inc (Synergism). Pursuant to the contract, Swingle agreed to purchase a large quantity of t-shirts from Synergism and to pay for the t-shirts upon pick-up. On March 31, 1998, Swingle went to Synergism's warehouse to retrieve the t-shirts he ordered.

Synergism demanded cash payment before it would release the items. While at the warehouse, Swingle allegedly promised to have the purchase price wired to Synergism's account. While waiting for the wire transfer and during a crowded and chaotic moment at Synergism's warehouse, Swingle allegedly slipped away with approximately seventy-two dozen t-shirts without paying. Synergism contacted the Jefferson County Police Department. On September 23, 1998, a Jefferson County Grand Jury subsequently indicted and charged Swingle with theft by failure to make required disposition over \$300.00.

Swingle went to jury trial on the charge on May 17 and 18, 2000. After the first day of trial, a juror sent a note to the judge regarding contact between a juror and one of the prosecution's witnesses, Virginia Kapfhammer (Kapfhammer), who worked for Synergism. Before the trial resumed on the second day, the circuit court questioned the juror. The juror told the circuit court that another juror, juror number forty-three (juror #43), spoke with Kapfhammer while all three were in the restroom before the jury was selected. The juror stated that juror #43 and Kapfhammer recognized one another and spoke briefly to one another, making comments such as "how are you?"; "where are you working now?" and "you are looking good." The juror characterized the two women's interactions as that between acquaintances. The juror stated that later, after lunch when the jurors were returning from lunch and were passing through the lobby of the court house, juror #43 and Kapfhammer saw one another and said "hi." The juror also told the circuit court

that during Kapfhammer's testimony that Kapfhammer and juror #43 seemed to acknowledge one another with smiles.

Later on the second day of trial, the circuit court questioned juror #43 regarding her relationship with Kapfhammer. Juror #43 told the circuit court that she had previously met Kapfhammer through juror #43's job, while Kapfhammer was working as a vendor. Juror #43 stated that she and Kapfhammer did not have a personal relationship; had only briefly interacted with one another through their respective jobs and that juror #43 did not even know Kapfhammer's last name.

At the end of the first day and again on the second day, Swingle, through counsel, moved for a mistrial stating that juror #43 was biased and that juror #43 had tainted the jury by "flaunting" her relationship with Kapfhammer that could cause the jury to treat Kapfhammer and Synergism more favorably than himself and to find Kapfhammer more credible and give her testimony more weight. The circuit court denied Swingle's motion but, in response to his motion, designated juror #43 as an alternate juror. The jury subsequently convicted Swingle and the circuit court sentenced him to one year in prison but probated that sentence for a period of five years. Swingle filed a motion for a judgment not withstanding the verdict and requested the circuit court reverse the conviction based on insufficient evidence and error, namely failure to grant a mistrial regarding juror #43's contact with Kapfhammer. In the alternative, Swingle requested a new trial on the same ground. On July 17, 2000, the circuit court denied Swingle's motion and, on July 26, 2000, sentenced him as mentioned above. Hence, this appeal followed.

Swingle presents one issue for our consideration: whether the Jefferson Circuit Court erred in not granting Swingle a mistrial based upon juror #43's contact with Kapfhammer, one of the prosecution's witnesses. On appeal, we review issues regarding mistrial to insure the trial court did not act clearly erroneously nor abuse its discretion. Commonwealth v. Scott, Ky., 12 S.W.3d 682, 684 (2000). A trial court grants a mistrial only when the movant shows a "manifest necessity" to do so. Id. No clear definition for manifest necessity exists but it has been described as an "urgent or real necessity." Id. A trial court determines what is "manifest necessity" on a case by case basis. Id. Exclusion of a juror lies within the trial court's sound discretion and on appeal, we will only reverse if the trial court acted clearly erroneously. Caldwell v. Commonwealth, Ky., 634 S.W.2d 405, 407 (1982).

On appeal, Swingle argues that the circuit court erred when it refused to grant his motion for mistrial. Swingle argues that mistrial was appropriate because juror #43 was biased towards Ms. Kapfhammer since they had a close personal relationship. In response to Swingle's motion for mistrial, the circuit court designated juror #43 as an alternate juror. Swingle argues this action did not cure the bias against him. He contends that juror #43 tainted the rest of the jury against him by "the blatant flaunting of her personal relationship with a primary witness for the Commonwealth." Appellant's Brief, page 9. According to Swingle, juror #43 flaunted her personal relationship by greeting Kapfhammer in the lobby of the courthouse and by possibly smiling at Kapfhammer during her

testimony. He contends these actions caused the jury to be more sympathetic towards Synergism; thus, he was deprived of an impartial jury. We disagree.

A juror should be excused when he or she has a close relationship with the prosecutor; with one of the prosecution's witnesses; with the defendant; with one of the defendant's witnesses or with the victim, if that relationship is so close that it creates a presumption of prejudice. George v. Commonwealth, Ky., 885 S.W.2d 938, 941 (1994). "The definition of what constitutes a 'close relationship' requiring a juror to be dismissed for cause is not clear." Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 547 (1988). However, the trial court has the discretion to determine if such a relationship is prejudicial. Id. Further, the Kentucky Supreme Court has held, "[i]t is elementary logic and sound law that a defendant's right to be tried by an impartial jury is infringed if and only if an unqualified juror participates in the decision of the case." Sanders v. Commonwealth, Ky., 801 S.W.2d 665, 669 (1990), quoting Randolph v. Commonwealth, Ky., 716 S.W.2d 253 (1986); Sanborn v. Commonwealth, supra; Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L. Ed.2d 80 (1988). Also, "[b]ias and preconceived ideas must be proven by the party alleging it." Caldwell v. Commonwealth, supra; quoting Watson v. Commonwealth, Ky., 433 S.W.2d 884 (1968).

After reviewing the record, we do not find that the relationship between juror #43 and Kapfhammer was so close as to raise a presumption of prejudice. Juror #43 was not related to Kapfhammer either by consanguinity or affinity. See Sanborn v.

Commonwealth, supra and Pennington v. Commonwealth, Ky., 316 S.W.2d 221 (1958). Upon review of the record, we find that juror #43's relationship was not close at all. The juror, who observed juror #43 and Kapfhammer in the lady's restroom, characterized their interaction as that between acquaintances not that of close friends. Further, when the circuit court inquired into their relationship, juror #43 stated that she did not know Kapfhammer's last name but merely recognized her from work. Further, juror #43, who may have been biased towards Kapfhammer, was only an alternate juror that did not participate in the jury's deliberations. Finally, Swingle's argument that juror #43 flaunted a close personal relationship with Kapfhammer was neither supported by the record nor by Swingle's own recitation of the facts. Swingle failed to explain how juror #43 tainted the jury. Nor did he establish any prejudicial effect or show a causal connection between juror #43's tenuous relationship with Kapfhammer and the prejudice he alleged.

Upon review of the record, we find that the circuit court neither erred nor abused its discretion. Therefore, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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