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# Commonwealth of Kentucky

# Court of Appeals

NO. 2008-CA-001213-MR

BEVE STEWART APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, SPECIAL SENIOR JUDGE
ACTION NO. 07-CR-00079

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND VANMETER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

NICKELL, JUDGE: Beve Stewart has appealed from the Knox Circuit Court's December 27, 2007, judgment and sentence following a jury trial convicting him of the offense of attempted murder[2] and sentencing him to seventeen years'

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[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

[2] KRS 507.020, 506.010, a Class B felony.

imprisonment in conformity with the punishment fixed by the jury. For the following reasons, we affirm.

Beve's mother, Georgia Stewart, passed away on February 7, 2003. Georgia's granddaughter, Brenda France, was her power of attorney at the time of her passing. Upon learning of Georgia's death, the family made plans to meet at a local funeral home to make arrangements for Georgia's funeral. The day after the death, Brenda was the first to arrive at the funeral home. Shortly thereafter, Beve arrived with his wife, Peggy Stewart, his sisters, Bessie Deaton and Beatrice Jones, and his brother-in-law, Lynville Deaton. Beve was the last to enter the building.

Brenda's family walked past her and moved further into the funeral home. As Brenda turned to look at Beve, he pulled out a gun and shot her. The first shot knocked her to the ground. Beve then stood over her and fired five more shots, the final one being aimed at her head. Beve then exited the building and was seen by an eyewitness driving out of the parking lot of the funeral home.

Brenda survived the gunshot wounds and began searching for a place to hide fearing Beve would return. A woman directed her to a room. Brenda, realizing it was Beve's wife who had shown her the room, attempted to hide behind a couch. When police and ambulance workers arrived, they located Brenda behind the couch and began treating her wounds. She had been shot twice in her stomach, once in her right hand, once in her ribs, once in her right leg, the tip of her nose had been blown off, and a ricochet had struck her in the temple. The police would later recover one spent shell casing from the funeral home.

Beve was located at his nephew's home a short time later and he accompanied officers to his own residence where he consented to a search of his home and vehicle. The officers located an empty box of Federal Special Hydra-Shok .38 caliber ammunition on a table in the home and fourteen live rounds of the same ammunition on the ground under the home. The empty box had originally contained twenty rounds of ammunition. A ballistics expert would later determine the round recovered at the funeral home was of the same make and caliber as the bullets found at Beve's home. Upon questioning by the officers, Beve denied shooting Brenda, denied being at the funeral home that day, denied owning a gun, denied knowledge of the ammunition located at his home, denied having any problems with Brenda, and told the officers he hoped they were able to catch the real perpetrator.

The investigation revealed the ammunition had been purchased at the Wal-Mart located in Barbourville the night before the shooting. Video surveillance footage showed Beve and his wife making the purchase hours after Georgia's death. Presented with the footage, Beve admitted purchasing the bullets but insisted he had done so at the request of his stepson who intended to resell them. He told officers he had kept the empty box to keep screws in and maintained his denial of any knowledge of the bullets found under his trailer.

A Knox County Grand Jury indicted Beve for the attempted murder and other offenses not relevant to this appeal. Following a jury trial in August of 2004, Beve was convicted and sentenced to eighteen years' imprisonment. Beve

successfully appealed to this Court and the case was remanded for a new trial. He was re-tried on December 12-13, 2007. Testimony consistent with the facts recited above was unchanged in the retrial.

At the second trial, Bessie and Lynville would not confirm Beve's presence at the funeral home at the time of the shooting. All of Beve's family members who were present during the shooting testified they did not know who had shot Brenda. Detective K.Y. Fuson testified that at the time of the shooting, Beve's sister Bessie had informed him Beve was unhappy with the manner in which Brenda had handled Georgia's affairs and believed Brenda was too sick to handle the responsibility. Bessie said Beve was upset with Brenda, but not mad enough to kill her. At the close of the Commonwealth's case-in-chief, Beve moved for a directed verdict arguing the Commonwealth had failed to prove Brenda had suffered serious physical injury. The motion was denied.

Beve testified on his own behalf. He stated he harbored no ill will toward Brenda and he loved her like he did all of his nieces and nephews. However, he testified he thought Georgia was being starved at the hospital so he had her moved to a nursing facility. He stated Brenda had then removed Georgia from the nursing home and readmitted her to the same hospital from which he had taken her and where she died a week later. Beve testified he was hurt by his mother's death and expressed his confusion over how Brenda was able to obtain power of attorney over his mother when Georgia had living children. He again denied being at the funeral home on the date of the shooting. Although he

admitted purchasing the ammunition, he claimed he had given it to his stepson and kept the box for storage. He theorized his stepson had given the bullets to the police officers who subsequently "planted" them near his trailer. He maintained he did not own a handgun. At the close of his case, Beve's renewed motion for a directed verdict was denied, as was his request for an instruction on assault in the second degree[3] as a lesser-included offense.

The trial court drafted proposed jury instructions and presented them to the parties for review.[4] No objections were lodged to the draft instructions. The jury was instructed on attempted murder and the lesser-included offense of assault in the first degree.[5] Following a short deliberation, the jury returned a unanimous verdict finding Beve guilty of attempted murder. Beve declined the trial court's invitation to poll the jury members. The jury fixed Beve's punishment at seventeen years' imprisonment. This appeal followed.

Before this Court, Beve argues the trial court erred in failing to fully instruct the jury on the whole law of the case. He contends the trial court should have included the mitigating element of extreme emotional disturbance (EED)[6] in

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[3] KRS 508.020, a Class C felony.

[4] We are unable to ascertain whether the Commonwealth or the defense drafted proposed jury instructions as neither appears on the face of the record and there is no mention of any such proposed instructions during the videotaped portions of the trial included in the record on appeal.

[5] KRS 508.010, a Class B felony.

[6] EED has been defined as "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force . . . rather than from evil or malicious purposes." *McClellan v. Commonwealth*, 715 S.W.2d 464, 468-69 (Ky. 1986). The reasonableness of such a mental disturbance is to be determined from the defendant's viewpoint. *Id*. The EED must also be traceable to a triggering event or series of

its attempted murder instruction, added EED to the definition instruction, given an instruction on "attempted first degree manslaughter based on EED," and instructed the jury on reasonable doubt as to the degree of the offense. In his second allegation of error, Beve claims he was denied a unanimous verdict when the trial court submitted an instruction to the jury which was unsupported by the evidence. Beve concedes these issues were not preserved for appellate review and requests palpable error review under RCr[7] 10.26. We shall review the claims presented only for palpable error. Discerning no such error occurred, we affirm.

First, Beve contends the trial court erred in failing to *sua sponte* include EED in its attempted murder instruction and in failing to instruct on the accompanying lesser offense of attempted manslaughter in the first degree[8] based on EED. This contention is without merit.

RCr 9.54 provides in pertinent part:

> (2) No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

It is undisputed that Beve did not request the EED instructions he now contends were mandated. It is further undisputed he did not object to the instructions

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events, the emotional effect of which continues uninterrupted until culminating in the violent act. *Benjamin v. Commonwealth*, 266 S.W.2d 775, 782-83 (Ky. 2008).

[7] Kentucky Rules of Criminal Procedure.

[8] KRS 507.030, 506.010, a Class C felony.

actually given to the jury. "The failure to comply with RCr 9.54(2) has consistently been interpreted to prevent review of claimed error in the instructions because of the failure to preserve the alleged error for review." *Caldwell v. Commonwealth*, 133 S.W.3d 114, 451 (Ky. 2004) (citing *Commonwealth v. Thurman,* 691 S.W.2d 213 (Ky. 1985)). *See also Binion v. Commonwealth*, 891 S.W.2d 383 (Ky. 1995); *Alexander v. Commonwealth*, 220 S.W.3d 704, 710 (Ky. App. 2007); *Day v. Commonwealth*, 174 S.W.3d 496, 500 (Ky. App. 2004).

In addition, we are unable to conclude palpable error occurred. Beve completely denied being at the funeral home, denied shooting Brenda, and denied having a reason to harm her. He presented no evidence of a mental "break" or being emotionally affected in any way other than sadness and "hurt" at his mother's passing. Thus, it is easily deducible that his defense followed an "all or nothing" strategy. Based on this strategy and the evidence adduced during the trial, it would be unreasonable to impose a duty on the trial court to *sua sponte* instruct the jury on EED. We discern no manifest injustice and conclude no palpable error occurred. *See Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

Next, Beve contends he was denied a unanimous verdict because the trial court submitted instructions to the jury that were unsupported by the evidence. Jurors were instructed to find Beve guilty of attempted murder if they believed beyond a reasonable doubt:

> A. That in this county on or about the 8th day of February, 2003[,] and before the finding of the Indictment herein, acting alone or in concert with others, he committed the offense of Attempted Murder by intentionally attempting to cause the death of Brenda France by shooting her with a pistol.

Beve claims the court's inclusion of the phrase "acting alone or in concert with others"[9] was infirm. He contends this verbiage presented the jury with an alternative theory upon which to find guilt that was wholly unsupported by the evidence. We disagree.

Similar to his first allegation of error, Beve did not comply with the mandates of RCr 9.54(2) as he did not raise this issue before the trial court nor lodge any objection to the proposed instructions. Thus, as stated previously, we will review this issue only for the presence of palpable error.

It is fundamental in this Commonwealth that a defendant in a criminal trial is entitled to a unanimous verdict. *Hayes v. Commonwealth*, 625 S.W.2d 583, 584 (Ky. 1981). However, contrary to Beve's assertion, an instruction allowing the jury to convict a defendant of the same offense under two different theories does not deprive the defendant of a unanimous verdict if either theory is supported by substantial evidence. *Miller v. Commonwealth*, 77 S.W.3d 566, 574 (Ky. 2002); *Johnson v. Commonwealth*, 12 S.W.3d 258, 265-66 (Ky. 1999). Here, the combination instruction described two alternative theories by which a conviction

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[9] The court's instruction on assault in the first degree contained similar language. For the purpose of judicial economy, we shall discuss this issue only in terms of the attempted murder instruction. However, our analysis and resolution of the issue applies with equal weight and force to the assault instruction.

could be sustained. Based on the evidence adduced at trial, the jury could easily have believed Beve was acting alone in his attempt to kill Brenda when he shot her six times. However, testimony was also presented that Beve's wife accompanied him to purchase the ammunition he later used to commit the crime, his wife was the person who directed Brenda to a hiding location immediately after the shooting, and Beve's family members were present at the time of the shooting but denied knowledge of the identity of the shooter and would not or could not confirm Beve's presence at the funeral home. Thus, the jury could also have believed Beve acted in concert with his wife and other relatives in carrying out his nefarious plot. Substantial evidence was presented on each of these theories. It is immaterial which theory the jurors chose to believe as the resulting conviction would be the same. *Hudson v. Commonwealth*, 979 S.W.2d 106 (Ky. 1998). *See also Burnett v. Commonwealth*, 31 S.W.3d 878 (Ky. 2000); *Ice v. Commonwealth*, 667 S.W.2d 671 (Ky. 1984); *Hayes*; *Wells v. Commonwealth*, 561 S.W.2d 85 (Ky. 1978).

> The legal effect of the alternative conclusions is identical. There was ample evidence to support a verdict on either theory of the case. We hold that a verdict can not (sic) be successfully attacked upon the ground that the jurors could have believed either of two theories of the case where both interpretations are supported by the evidence and the proof of either beyond a reasonable doubt constitutes the same offense.

561 S.W.2d at 88. The jury returned a guilty verdict on the attempted murder charge and the foreperson declared in open court that the verdict was unanimous. Beve declined the opportunity to poll the jury and this failure could clearly be held

to foreclose his opportunity to complain he was denied a unanimous verdict. *Eversole v. Commonwealth*, 550 S.W.2d 513, 516 (Ky. 1977). Nevertheless, the instructions were not prejudicial and Beve was not denied a unanimous verdict.

Therefore, for the foregoing reasons, the judgment of the Knox Circuit Court is affirmed.

ALL CONCUR.

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