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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: SEPTEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 1-19-06 ELIA Grouin, D.C.

2004-SC-0475-MR

STEVE ELDRIDGE — APPELLANT

V.

APPEAL FROM WOLFE CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
2001-CR-24

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict that convicted Eldridge of murder, first-degree assault and two counts of first-degree robbery. He was sentenced to a total of seventy years in prison.

The questions presented are whether the trial judge erred in refusing to dismiss the jury panel based on an allegation of a substantial deviation in the jury selection process; whether a juror should have been removed for cause; and, whether certain documentary evidence was properly admitted.

Eldridge was indicted for the murder of one victim, the first-degree assault of a second victim and one count of first-degree robbery against each of the victims. The second victim was found incompetent to testify at trial, apparently due to the severity of his injuries.

Among other evidence, the Commonwealth presented the testimony of an accomplice, McIntosh. He testified that after Eldridge obtained a .22 caliber gun from a relative, they drove to the home of the deceased victim in order to rob him. Eldridge eventually entered the home alone while McIntosh remained in the car. During that time, he heard four gunshots. When Eldridge reemerged three to four minutes later, he told McIntosh that the best thing he could do was keep his mouth shut. Eldridge then gave him $100 and four pills. After they stopped and injected drugs, they went to McIntosh's home. That is when Eldridge threw the gun over the hill and burned the wallet of the second victim in a fire pit.

Another witness for the Commonwealth testified about a conversation he had with Eldridge while they were in a detention center. The witness stated that Eldridge told him that he had shot the two victims and that he divided the money evenly with McIntosh. Eldridge admitted throwing the gun over the hill from where McIntosh's parents lived.

The Commonwealth also presented the testimony of a witness who was married to Eldridge's step-daughter. He indicated that sometime before the murder, Eldridge borrowed a .22 caliber gun from him, but never returned it. He was able to positively identify the gun that was recovered by police and introduced at trial as his own.

Eldridge did not testify, but the defense offered evidence that attempted to implicate McIntosh in the crimes. The jury convicted Eldridge of all the charges and recommended a sentence of fifty years for the murder and twenty years each on the remaining counts, to run consecutively for a total of 110 years in prison. The trial judge ultimately ran the twenty year sentences concurrently, but consecutive to the fifty year sentence for a total of seventy years in prison. This appeal followed.

I. Jury Panel

Eldridge argues that the trial judge committed reversible error when he refused to dismiss the jury panel that had been summoned to hear his trial. He bases his complaint on six allegations which he maintains resulted in the trial judge substantially deviating from the relevant statutes and Administrative Procedures of the Court of Justice concerning jury selection. They are as follows: 1) the trial judge excused and postponed numerous jurors before they appeared for orientation; 2) the trial judge automatically exempted students from service; 3) the trial judge excused from service numerous jurors who did not demonstrate "undue hardship" or "extreme inconvenience"; 4) the trial judge invented an unauthorized process of "alternate" jurors who served on stand-by; 5) the trial judge permitted jurors to call the clerk's office and excuse themselves for reasons such as illness or attending to family business; and, 6) the trial judge delegated authority to the circuit clerk to excuse/postpone prospective jurors. We will address these individual complaints separately.

A. Excusal and Postponement of Jurors before Orientation

Eldridge contends that the trial judge improperly excused and postponed numerous jurors before they appeared for orientation. We disagree.

According to the pertinent statute and administrative procedure, the chief circuit judge or his designee shall determine on the basis of the information provided on the juror qualification form whether a prospective juror is disqualified from service. See KRS 29A.080 and AP II, §8(1), which materially differ only as to who qualifies as a designee. A prospective juror is disqualified from service on a jury if he or she: a) is not eighteen years of age; b) is not a United States citizen; c) is not a resident of the county; d) does not have sufficient knowledge of the English language; e) is a convicted

felon and has not been pardoned; f) is presently under indictment; or, g) has served on a jury within the past twelve months. See KRS 29A.080(2) and AP II, §8(2).

Upon the request of a prospective juror, the chief judge or the trial court, depending on the circumstances, is permitted to excuse an individual upon a showing of undue hardship, extreme inconvenience, or public necessity. See KRS 29A.100 and AP II, §12(1). The statute further states in relevant part as follows: "On the day on which the prospective jurors are summonsed to appear, **any person not previously excused** who desires to be excused shall be heard . . ." KRS 29A.100(1). Similar language is employed in AP II, §9.

Clearly, the statutes and administrative procedures permit the trial judge to excuse a prospective juror before they appear at the designated time in court. The argument by Eldridge to the contrary would require substituting the word "disqualified" for the word "excused" so that the statute and administrative procedure read "any person not previously 'disqualified'." That position is simply untenable. Additionally, to implement the procedure suggested by Eldridge would be an utter waste of time for all persons involved in the judicial process. The trial judge did not err in excusing and postponing jurors before they appeared for orientation.

B. Automatically Exempting Students

Eldridge claims that the trial judge automatically exempted students from jury service. We disagree.

Responding to the complaint by Eldridge of automatic excusal, the trial judge explained that he excused students who had contacted him under the hardship exemption. He also indicated that not all of the students had asked to be excused on their qualification forms and that he may have inadvertently excused them orally. The

trial judge further stated that he directed the students he excused orally to return to the clerk's office and to make the proper notation on the form, but that they may have failed to do so.

We fully recognize that there are no automatic exemptions from jury service. See KRS 29A.090 and AP II, §11. Here, the trial judge granted no such automatic or per se exemptions. Instead, he applied the hardship provision of KRS 29A.100 and AP II, §12(1), and did so correctly. That such application tends to allow the trial judge to excuse students who have to focus their attention on the pursuit of their education is almost an inevitable result of a hardship exemption. However, this is not the sort of "systematic exclusion of a distinctive group" that is prohibited in jury selection. Bratcher v. Commonwealth, 151 S.W.3d 332, 346 (Ky. 2004) *quoting* Commonwealth v. McFerron, 680 S.W.2d 924, 927 (Ky. 1984).

Eldridge also complains that Jurors 387 and 242 only asked for service to be postponed, but that the trial judge excused them entirely. Juror 242 stated that she was a full-time student at Wolfe County High School. She requested that her jury service be postponed, but did not indicate until when. Juror 387 declared that in order to graduate in May, he needed student teaching hours and that he was a currently a student teacher at Morgan County High School. He requested postponement until after graduation in June 2004.

When possible, the trial judge is to favor temporary postponement of service or reduced service over permanent excuse. See KRS 29A.100(3) and AP II, §12. Here, even if the trial judge should have postponed or reduced service instead of excuse it, Eldridge has no basis to complain. The trial in this case occurred on April 26 -29, 2004. Neither of the prospective jurors would have been available to serve at that time.

C. Excusing Jurors for Extreme Inconvenience and Undue Hardship

Eldridge asserts that the trial judge substantially deviated from the prescribed procedures by using an "easy excuse" process to shrink the jury pool. He maintains that the reasons given by the prospective jurors in requesting to be excused from service were not good enough.

Neither the statutes nor the administrative procedures set forth any type of test for determining undue hardship or extreme inconvenience. The criteria for excuse or postponement are very broad, requiring the exercise of substantial interpretation and discretion. Commonwealth v. Nelson, 841 S.W.2d 628 (Ky. 1992).

Here, the trial judge noted that he reviewed each individual claim and made his decision accordingly. Again, it is not required that the jurors appear at orientation before they are excused. The statute and regulation permitting the juror to be heard is for their benefit not their detriment. Having examined the record, we find no abuse of discretion by the trial judge. The statistical analysis undertaken by Eldridge is unconvincing.

D. Unauthorized Process

Eldridge makes a one sentence accusation in his brief that "the court invented an unauthorized process of 'alternate' jurors who served on stand-by." In his reply brief, he acknowledges that "while this specific point may not have been raised by trial counsel, he may have been unaware of it or forgotten it." Obviously, this issue was not properly preserved for appellate review. Carrier v. Commonwealth, 142 S.W.3d 670 (Ky. 2004). Regardless, the process used by the trial judge was consistent with the directives of KRS 29A.100(3) and AP II, §12.

E. Allowing Jurors to Excuse Themselves

Eldridge claims that the trial judge allowed jurors to call the clerk's office and excuse themselves for reasons such as illness or attending to family business. This allegation apparently stems from events occurring just prior to the beginning of trial. Defense counsel noticed that six names on the jury list were circled and questioned the court on the significance of that. The trial judge indicated that when jurors were qualified they were directed to call the clerk's office and inform the clerk if they were unable to be there that day. The circuit clerk confirmed that the names were circled for that reason. Once that was verified, defense counsel expressed satisfaction. Consequently, this issue has been waived.

In any event, there is nothing in the record that the jurors had asked to be excused or that they had been excused entirely. Instead, the jurors were granted temporary absences due to unavoidable conflicts. We find nothing in the statutes or administrative regulations that would prohibit this procedure.

F. Excusal by the Clerk

Eldridge argues that the trial judge delegated authority to the circuit clerk to excuse/postpone prospective jurors. He contends that the circumstances surrounding prospective Juror 347 establish that the circuit clerk was excusing or at least postponing jurors.

Prospective Juror 347 had his service postponed until the resolution of a pending civil case involving his son. His juror qualification form which was signed by the chief circuit judge/trial judge reflected that reason. He returned to court, however, claiming he had received a letter from the circuit clerk telling him he had been placed back in

service. Apparently the civil case was still pending, so the trial judge reiterated that his service was postponed until its completion.

Defense counsel moved for a mistrial, arguing that the trial judge did not have discretion to postpone jury service and then summon the juror back in before the postponement had expired. The trial judge denied the motion because the situation had been discovered and did not in any way prejudice Eldridge.

It is clear from our review of the record that Eldridge did not base his motion for a mistrial on an allegation that the clerk, rather than the trial judge, had given the postponement. Consequently, this issue is not properly preserved for appellate review. Carrier, supra. Regardless, the record does not support the claim raised on appeal. The juror qualification form postponing the service of Juror 347, like all the other forms, was signed by the chief circuit judge/trial judge. The circuit clerk may have communicated decisions to prospective jurors, but those decisions were still made by the trial judge.

Having reviewed the record, we find no substantial deviation from the requirements set forth in the statutes and administrative procedures. There was no abuse of discretion by the trial judge in his decision regarding prospective jurors and certainly none that prejudiced the defendant in any manner.

II. Removal for Cause

Eldridge contends that the trial judge committed reversible error by refusing to excuse for cause Juror 3 who advised that her work responsibilities would probably weigh on her mind during jury service. We disagree.

Juror 3 initially stated that her service on the jury may be burdensome to her employer. She also said that if she were chosen to sit, it may weigh on her mind and

probably make it difficult for her to concentrate. Upon further questioning, however, Juror 3 indicated that her work situation would probably not affect her concentration. She then stated, "You know, if I have to be here, I will be here. I will do my job." The motion by defense counsel to excuse this juror was denied. He exhausted all of his peremptory challenges.

The trial judge has broad discretion in determining whether to excuse a juror for cause. Mills v. Commonwealth, 95 S.W.3d 838 (Ky. 2003). That determination will not be reversed on appeal absent a clear abuse of discretion. Mills, supra. Here, the juror indicated that she would be able to remain focused and unequivocally stated that she could do the job of a juror. There was no abuse of discretion by the trial judge in denying the motion to excuse this juror.

III. Admission of Evidence

Eldridge asserts that the trial judge committed reversible error by admitting Commonwealth's Exhibit 6, a piece of paper seized from his residence, without any proof that the writings on the paper were made by him. Specifically, he complains that the paper was not admissible due to a lack of foundation, was irrelevant, was hearsay and was not properly authenticated.

The piece of paper was found in the living room dresser drawer in the Eldridge residence. It contained multiple names and notations, including the name of one of the victims – written repeatedly, names of members of the Eldridge family, and words such as "stealing" and the number "500." Defense counsel objected to the admission of the exhibit without a proper foundation, arguing there would be no evidence as to who made the notations, when it was done and what they mean. The Commonwealth conceded it could not prove who wrote the paper. Nevertheless, it argued that the

paper was relevant because it was found in the home of the defendant and that there was evidence that he took $500 from the victim. The trial judge overruled the objection.

Circumstances associated with a writing may be sufficient to support a finding that it is what it is claimed to be. See Apple v. Commonwealth, 296 S.W.2d 717 (Ky. 1956). Here, the paper was found in the living room dresser drawer in the Eldridge residence. Though it was admitted that the author was unknown, the location of the item along with its contents was adequate to authenticate the evidence.

The only objection by Eldridge at trial was that there was a lack of a proper foundation. Consequently, the other issues he raises are not properly preserved for appellate review. Carrier. Even if we were to conclude otherwise and determine that the paper was not properly admissible, considering the overwhelming evidence of guilt, especially the testimony of his accomplice, the error would be deemed harmless. RCr 9.24.

Eldridge received a fundamentally fair trial. He was not denied any of his due process rights under the state or federal constitutions.

The judgment of conviction is affirmed.

All concur.

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