

RENDERED: April 1, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-002256-MR

DONALD STILTNER

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE STEVEN D. COMBS, JUDGE  
ACTION NOS. 02-CR-00244 & 02-CR-00244-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, McANULTY, AND VANMETER, JUDGES.

VANMETER, JUDGE: A Pike Circuit Court jury convicted appellant, Donald Stiltner, of complicity to commit first-degree manslaughter, and he was sentenced to eleven years in the state penitentiary. On appeal, Stiltner asserts that the trial court erred by (1) failing to declare a mistrial after the Commonwealth's opening remarks referred to testimony that was not presented at trial, (2) allowing a detective to testify

regarding a ballistics report prepared by another person, and (3) not defining the word "conspiracy" in the jury instructions. We affirm.

On December 2, 2002, Stiltner and David Dotson visited Stiltner's ex-wife's trailer where Ronald Dale Skeens was staying. The Commonwealth's theory of the case, as presented by its witnesses and as found by the jurors by virtue of their verdict, was that Stiltner and Dotson initially approached the trailer and argued with Skeens, who fired shots from a .25 caliber revolver. Stiltner and Dotson left the vicinity of the trailer. After a short time, they returned and Dotson fired a shotgun, resulting in Skeens' death. Both Stiltner and Dotson were indicted for murder, and/or complicity to commit murder. At Stiltner's trial, the Commonwealth pursued both theories, and the jury found him guilty of complicity to commit first-degree manslaughter. Stiltner's motion for a judgment notwithstanding the verdict was denied and this appeal followed.

Stiltner's defense was that Dotson and he had dropped Tony Reed off at the trailer so that Reed could collect a debt from Skeens. Upon their return, Stiltner exited the car to speak to his son who was staying at the trailer. As Stiltner approached the trailer, Skeens opened fire with the handgun, and Dotson in self-defense returned fire, resulting in Skeens death.

During the opening statement the Commonwealth stated that before the shooting, Stiltner told Reed that he would kill Skeens, and Dotson attempted to persuade Stiltner otherwise. Stiltner objected to the statement and requested a mistrial because he had not been provided with such statements during discovery. At a bench conference, the Commonwealth admitted that Reed may have made the statements after his videotaped interview, and that it would not seek to introduce the statements at trial since they had not been disclosed in discovery. The judge then admonished the jurors, saying:

Ladies and gentlemen of the jury, you understand that opening and closing arguments are both arguments of counsel. The evidence that you are to base your decision on comes from the witness box and witnesses and the evidence they bring. These are times when counsel tries to outline the case for you and both sides get an ample opportunity to do that and in closing. Any statements they make is trying to characterize evidence and telling you what they are going to present. The evidence will come from the witness stand and you'll have to listen to what the witnesses say. They are just trying to set you on the right course at this time so you know where we are going with this case and both sides will have ample opportunity to do that.

No evidence was produced at trial regarding Stiltner's alleged incriminating statements to Reed.

Stiltner's first claim of error is that the Commonwealth's opening reference to Reed's inadmissible

statements so prejudiced the proceeding that the court erred by not declaring a mistrial. We disagree.

Ordinarily, the presumption is that

an admonition controls the jury and removes the prejudice which brought about the admonition. A mistrial is appropriate only where the record reveals "a manifest necessity for such an action or an urgent or real necessity." . . . In the absence of evidence to the contrary, we must assume the admonition achieved the desired effect. A trial court has discretion in deciding whether to declare a mistrial, and its decision should not be disturbed absent an abuse of discretion.<sup>1</sup>

Absent a showing of bad faith, a prosecutor's misstatements regarding the evidence to be produced at trial need not result in a mistrial unless the trial court determines that prejudice will result to the defendant.<sup>2</sup> In this instance, the trial court admonished the jurors that opening and closing statements were not evidence, and that they were to base their decision on the evidence presented at trial. The trial court determined that this admonition was sufficient to preserve the fairness of the trial.<sup>3</sup> Having reviewed the record, we cannot say that the court abused its discretion in this regard.

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<sup>1</sup> *Kinney v. Butcher*, 131 S.W.3d 357, 360 (Ky. App. 2004) (internal citations omitted).

<sup>2</sup> *Freeman v. Commonwealth*, 425 S.W.2d 575, 578 (Ky. 1967); *Mullins v. Commonwealth*, 25 Ky.L.Rptr. 2044, 79 S.W. 258, 259 (1904).

<sup>3</sup> *Hayes v. Commonwealth*, 58 S.W.3d 879, 883 (Ky. 2001).

Stiltner's second claim of error concerns the testimony of Detective David Maynard. At trial, Det. Maynard testified on both direct and cross-examination that he found six empty .25 caliber shell casings on the porch of the trailer. Upon re-direct, and over Stiltner's objection, the Commonwealth requested the detective to read from the report of a ballistics expert that three of the shell casings were .25 caliber, and the other three were actually .22 caliber.

While we agree with Stiltner that the contents of the ballistics report constituted hearsay and should have been excluded,<sup>4</sup> we believe the introduction of the statement was harmless error.<sup>5</sup> The Commonwealth made no further reference to the shell casings, and Stiltner in closing argued that the Commonwealth had been forced to discredit one of its own witnesses by introducing the ballistics report.

Stiltner argues on appeal that the significance of this discrepancy is that since "only 3 of the 6 spent shell casings found were that of a .25 caliber it may have indicated to the jury that the deceased only fired three shots." Stiltner fails, however, to indicate what significance, favoring either the prosecution or the defense, attached to the number of times the victim shot a handgun. Both sides agreed that the victim

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<sup>4</sup> KRE 803(8).

<sup>5</sup> RCr 9.24.

fired a gun a number of times, and the dispute involved the point in time when he did so, rather than the number of shots fired. Again, since neither party made any substantive reference to the shell casings, the entire report lacked relevance and any error in its admission did not prejudice Stiltner. The introduction of the ballistics report therefore was harmless error.

Finally, Stiltner contends that the trial court erred by denying his oral motion to define "conspiracy" in the jury instructions. The Commonwealth asserts that this issue was not preserved for appellate review since Stiltner did not tender a conspiracy instruction to the court.<sup>6</sup> Objection to an instruction, however, may also be preserved by making an "objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection."<sup>7</sup> As the record reflects that Stiltner's objection and the supporting grounds were made clear to the trial judge in chambers, the issue was preserved for our review.

The failure to define a technical term does not always result in reversible error,<sup>8</sup> especially when "the definition is

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<sup>6</sup> RCr 9.54(2).

<sup>7</sup> *Id.*

<sup>8</sup> *Herring v. Lunderman*, 302 Ky. 271, 194 S.W.2d 506, 508 (1946).

commonly known and a reasonable man could understand the term without a formal definition being provided.”<sup>9</sup> Conspiracy is only one of a host of actions described within KRS 502.020, which creates complicity liability for the criminal conduct of another.

The trial court gave the following jury instruction

#12:

If you do not find Donald Lee Stiltner guilty under Instruction No. 11, you will find him guilty of Complicity to First-Degree Manslaughter under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about December 2, 2002, and before the finding of the Indictment herein, David Dotson killed Ronald Dale Skeens by shooting him with a shotgun;

B. That prior to the killing, Donald Lee Stiltner solicited, commanded, or engaged in a conspiracy with David Dotson to shoot Ronald Dale Skeens or aided, counseled, or attempted to aid David Dotson in planning to shoot Ronald Dale Skeens;

C. That in so doing, Donald Lee Stiltner did not intend that Ronald Dale Skeens be killed, but intended that Ronald Dale Skeens would get a serious physical injury from the shooting;

AND

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<sup>9</sup> *Commonwealth v. Hager*, 35 S.W.3d 377, 379 (Ky. App. 2000).

D. That David Dotson was not privileged to act in self-protection.

This instruction established the elements that were necessary to convict Stiltner of complicity to first-degree manslaughter and mirrored the instructions set out by Justice Cooper in his concurring opinion in *Harper v. Commonwealth*.<sup>10</sup> No additional definition of "conspiracy" was required.

The court's judgment is affirmed.

BUCKINGHAM, JUDGE, CONCURS.

McANULTY, JUDGE, DISSENTS AND WILL NOT FURNISH

SEPARATE OPINION.

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<sup>10</sup> 43 S.W.3d 261, 269-70 (Ky. 2001).