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RENDERED: AUGUST 21, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2001-SC-0747-MR

AMOS STILTNER — APPELLANT

V.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
00-CR-0115

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING IN PART

This appeal is from a judgment based on a jury verdict which convicted Stiltner of four counts of conspiracy to commit murder and being a first-degree persistent felony offender. He was sentenced to a total of two hundred years in prison.

The questions presented are whether the four conspiracy to commit murder charges should have been merged into one charge; whether Stiltner was entitled to a directed verdict on two of the conspiracy charges; whether improper character evidence was introduced; whether the playing of surveillance tapes and recordings was repetitious and reversible error; whether the sentence exceeded the maximum allowed pursuant to KRS 532.110; whether it was an abuse of discretion to place Stiltner in handcuffs during the penalty phase, and whether allowing the victims to testify during the penalty phase was an abuse of discretion.

While in jail on other charges, Stiltner revealed to a jailhouse informant his desire to kill a circuit judge, a commonwealth's attorney and the wife and daughter of the commonwealth's attorney. Apparently, Stiltner was upset that he was denied an early release so that he could attend his mother's out-of-state funeral and be with his ailing father. Stiltner told the informant that he knew that Alfrey, an individual the informant knew, was attempting to contract with someone to kill the circuit judge and the commonwealth's attorney. Stiltner asked the informant to let Alfrey know that he was willing to take the contract. The inmate instead informed the Kentucky State Police.

Based on the information it received, the police set up an undercover sting operation. As part of that operation, the informant told Stiltner that someone was willing to meet with him. Stiltner instructed the informant to tell this person to meet him at an animal shelter where he (Stiltner) was employed as part of a work release program. On October 19, 2000, Stiltner met with a person whom he thought represented Alfrey. That person, however, was an undercover police officer who was wired with both a video camera and a tape recorder.

During their initial meeting, Stiltner told the undercover officer his willingness to "take care of business" for Alfrey. He explained that he wanted a four-wheel drive truck and $20,000 up front. Then, when he finished, he wanted an additional $100,000. When the officer asked what Alfrey was getting in return, Stiltner stated, "the word is [the circuit judge] and [the commonwealth's attorney] is to be wiped out."

On October 25, 2000, the undercover officer met with Stiltner a second time. The officer told Stiltner that Alfrey agreed to the final amount, but that he (Alfrey) would only agree to $10,000 and the truck up front. Stiltner agreed to accept the smaller $10,000 payment but insisted that he wanted $2,000 - $4,000 immediately. Then,

when he got out of jail, he wanted another $10,000. Stiltner also explained that he planned on poisoning the commonwealth's attorney and his family and shooting the circuit judge.

Stiltner met with the undercover officer for the final time on November 9, 2000. The meeting began with the officer informing Stiltner that he had brought a $2,000 payment. He indicated that if Stiltner accepted the money, Alfrey would expect him to complete the murders. Stiltner responded, "I'm going to do it." Stiltner even offered to kill another person if Alfrey left some cocaine inside the truck when it was dropped off.

The meeting concluded when Stiltner took an envelope containing $2,000 from the passenger door of the officer's truck and returned to the animal shelter. Once inside, Stiltner showed the money to a co-worker who was also on a work release program. Immediately thereafter, the Kentucky State Police converged on the shelter and arrested Stiltner. The envelope containing the money was recovered from behind a trashcan within reach of where Stiltner was sitting.

Stiltner was indicted on four counts of conspiracy to commit murder and one count of being a persistent felony offender. At trial, Stiltner testified in his own defense and claimed that he was running his own undercover operation. Although the charges for which Stiltner was currently incarcerated were to be served out December 29, 2000, he claimed that he undertook the operation so he could use the information to gain an early release.

The jury convicted Stiltner of four counts of conspiracy to commit murder and being a persistent felony offender. His twenty-year sentence on each count was enhanced to fifty years on each count because of the PFO conviction. The sentences were run consecutively for a total of two hundred years in prison. This appeal followed.

I. Merger of Charges

Stiltner argues that the trial judge erred to his substantial prejudice and denied him his rights to due process and subjected him to double jeopardy when he refused to merge four counts of a four count conspiracy to commit murder indictment into a single count where all four counts arose from the same agreement. We agree that the charges should have been merged.

KRS 506.050(2) states:

> A person who conspires to commit more than one (1) crime, all of which are the object of the same agreement or continuous conspiratorial relationship, is guilty of only one (1) conspiracy.

Here, the conspiracy was to murder the circuit judge, the commonwealth's attorney and the wife and daughter of the commonwealth's attorney. There were four victims but there was only one agreement which was for Stiltner to murder the four individuals in exchange for a certain sum of money and a truck. Thus, under the facts of this case, Stiltner could be guilty of only one conspiracy. We are not persuaded by the argument of the Commonwealth to adopt the rationale of People v. Liu, 54 Cal.Rptr.2d 578 (Cal.App.1st Dist. 1996) which seemingly would allow the four conspiracy convictions. KRS 506.050(2) controls.

Double jeopardy protects against multiple punishments, not multiple convictions. Thus, if improper multiple convictions are obtained in the same trial, the error is cured by dismissing the lesser offense of which the defendant was convicted. See 1 Cooper, Kentucky Instructions to Juries (Criminal) §1.14A(7) (1999) *citing e.g.* Baker v. Commonwealth, Ky., 922 S.W.2d 371 (1996). In this case, however, all four conspiracy convictions were the same and each carried an enhanced fifty-year sentence. Thus,

we believe that merger of all four convictions is appropriate. Accordingly, we reverse this case in part in order to merge all four convictions into one conviction of conspiracy to commit murder against the four victims, thereby affirming the one conviction of conspiracy and the sentence of fifty years in prison.

We must observe that the jury could have determined that one or more of the victims were not part of the conspiratorial agreement. Consequently, the better practice in these cases would be to instruct the jury so as permit their finding of guilt as to one conspiracy against any combination of victims.

II. Directed Verdict

Next, Stiltner contends that the trial judge erred to his substantial prejudice and denied him due process of law when he refused to direct a verdict on counts three and four of the indictment when the prosecution failed to prove that the wife and daughter of the commonwealth's attorney were objects of the alleged conspiracy. We disagree.

We must note that Stiltner only contests the sufficiency of the evidence as it relates to the wife and daughter of the commonwealth's attorney. Considering our decision to merge all four convictions into one conviction, there is an element of mootness to this claim.

At the close of the Commonwealth's case, defense counsel moved for a directed verdict on the grounds that there was no co-conspirator; that there was insufficient evidence to follow through with the agreement, and "just in general that there is not sufficient grounds to submit the case to the jury." At the close of all the evidence, defense counsel simply renewed the first motion, "on the same grounds as raised earlier." The trial judge overruled the motion both times.

It is clear from our review of the record that sufficient evidence existed to overcome the motions for a directed verdict on these two counts. Stiltner told another inmate that he was going to kill the family of the commonwealth's attorney. During his meeting with the undercover detective, Stiltner again indicated that he was going to kill the entire family. The detective responded in the affirmative indicating his understanding of the plan. Based on all the evidence, a reasonable jury could easily conclude that Stiltner agreed to kill the wife and daughter of the commonwealth's attorney. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

III. Bad Acts

Stiltner argues that the introduction of evidence which revealed that he was a member of a motorcycle gang was in violation of a pre-trial ruling and was prosecutorial misconduct. He also contends that it was improper to introduce evidence that he offered to kill a fifth person. Initially, we must observe that defense counsel never asserted to the trial judge that the introduction of any of this evidence was prosecutorial misconduct. Stiltner is not permitted to change an evidentiary claim at trial to one of prosecutorial misconduct on appeal. Cf. Davis v. Commonwealth, Ky., 967 S.W.2d 574 (1998); Todd v. Commonwealth, Ky., 716 S.W.2d 242 (1986).

Before trial, the trial judge granted the defendant's motion in limine to prohibit any reference of Stiltner's involvement in motorcycle gangs. The trial judge, however, overruled the pre-trial objection to reference being made to the killing of a fifth person. That ruling apparently was made on the basis that the acts were all intertwined.

At trial, the unredacted tapes were played and references were made therein by Stiltner to his involvement in a motorcycle gang and his offer to kill a fifth person in

exchange for drugs. The undercover officer also briefly mentioned Stiltner's gang affiliation during his testimony.

The issue of the pre-trial ruling on the gang affiliation was revisited prior to Stiltner testifying. The trial judge, recognizing that the information was already introduced, did not preclude the Commonwealth from questioning Stiltner about his gang affiliation. Thereafter, during its cross-examination of Stiltner, the Commonwealth asked him if he was a member of the Outlaw Gang. Stiltner responded that he had affiliated with some of the members and had told several people that he was a member in order to build up his reputation and follow through on his plan.

Considering the overwhelming evidence of guilt, the error, if any, in not redacting the tapes and precluding references to the gang affiliation and a fifth victim was certainly harmless. Abernathy v. Commonwealth, Ky., 439 S.W.2d 949 (1969); RCr 9.24.

IV. Undercover Tapes

Stiltner argues that the trial judge erred to his substantial prejudice and denied him due process of law when he allowed the Commonwealth to play the undercover tapes during its opening statement, its case-in-chief and during closing argument. We are obliged to observe that because the trial record in this case consists of transcripts and not videotape it is impossible to tell how much of the undercover tapes were played during the Commonwealth's opening statement and closing argument. However, based on the statements of the prosecutor and defense counsel at trial, it is clear that the Commonwealth only played certain selections of the tapes at these stages.

The only objection ever raised by defense counsel was when the Commonwealth sought to play these tapes in their entirety during the testimony of the undercover

detective. At that time, defense counsel contended that "They've already played the significant portions during their opening statement." The Commonwealth responded that the tapes had not yet been introduced as evidence and the trial judge overruled the objection.

Reliance by Stiltner on Fields v. Commonwealth, Ky., 12 S.W.3d 275 (2000) is misplaced. In Fields, supra, the Commonwealth, during its opening statement, case-in-chief and closing argument, played a videotape in its entirety which reenacted the criminal investigation. This Court held that the repetition of inadmissible evidence regarding a disupted fact was so prejudicial as to preclude any finding of harmless error. The Court declined to decide whether the repetition of admissible evidence could so prejudice a defendant at to entitle him to a new trial.

Here, the tapes played were actual footage of the crime as it was taking place and were clearly admissible. Unlike the situation in Fields, only selected portions of the admissible tapes were played in the commonwealth's opening statement and closing argument. The only time the tapes were played in their entirety was in the commonwealth's case-in-chief. Fields recognized that prosecutors are allowed to display admissible items of real evidence to the jury during opening statement and are generally allowed to replay excerpts from recorded testimony in their closing argument. Considering all the circumstances, the error, if any, was certainly harmless. RCr 9.24.

V. Sentence

The Commonwealth concedes that the 200-year sentence imposed in this case was contrary to KRS 532.110(1)(c). Stiltner is guilty of only a single count of conspiracy to commit murder and his amended sentence should be fifty years.

VI. Handcuffs

Stiltner argues that the trial judge erred by placing him in handcuffs during the penalty phase. This Court has long held that the practice of shackling a defendant during trial is to be condemned. See Commonwealth v. Conley, Ky., 959 S.W.2d 77 (1997). See also Tunget v. Commonwealth, 303 Ky. 834, 198 S.W.2d 785 (1946). This Court has also recognized that the use of shackles to restrain certain defendants has been necessary in cases where the trial court appears to have encountered some good grounds for believing such defendants might attempt to do violence or to escape during their trials. Conley, supra; Tunget, supra. Ultimately, this is a matter that rests in the "sound and reasonable discretion" of the trial judge. Conley; Tunget.

Here, the trial judge determined that "based upon the allegations in this case, the Court feels that there is a possibility of attempted flight and this security is necessary . . ." Although there was no proper basis enunciated for the trial judge's finding of necessity, the error was certainly harmless. It must be remembered that Stiltner was only handcuffed during the sentencing phase of the trial.

VII. Victim Testimony

The trial judge did not abuse his discretion in allowing the commonwealth's attorney and the wife and daughter of the commonwealth's attorney to testify during the penalty phase. Although KRS 421.500 does not specifically list "conspiracy" in its definition of "victim," the trial judge retains discretion to allow those injured as a result of lesser crimes to testify. See Brand v. Commonwealth, Ky.App., 939 S.W.2d 358 (1997). It was clear from the testimony of the victims that they suffered emotional harm. We recognize the daughter was a minor at the time she testified but defense counsel made no objection on that ground.

There was no violation of any of the defendant's state or federal constitutional rights.

Therefore, the judgment is reversed in part in order to merge all four convictions into one conviction of conspiracy to commit murder against the four victims. We otherwise affirm the one conviction of conspiracy, the persistent felony offender offense and the enhanced fifty year sentence.

All concur.

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