

DONALD C. KING *v.* STATE OF ARKANSAS

CR 73-136

504 S.W. 2d 365

Opinion delivered January 28, 1974

CRIMINAL LAW—NEW TRIAL—DISCRETION OF TRIAL COURT.—Refusal to grant a mistrial before the jury returned or a new trial thereafter *held* not an abuse of the trial court's discretion where defendant's mother recanted after the jury retired but before the verdict, and wanted to state decedent did have a knife during the first altercation, but neither she nor defendant's brother supported defendant on that issue during trial.

Appeal from Pulaski Circuit Court, First Division,
William J. Kirby, Judge; affirmed.

Harold L. Hall, for appellant.

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins*,
Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Appellant Donald C. King seeks to set aside his manslaughter conviction on the basis of evidence discovered after the verdict. We find no merit in the contention.

The record shows two altercations between appellant and the decedent, his brother, on the date of the killing. The first altercation occurred while their mother and another brother were present. After that altercation was

broken up and the decedent had started to watch television the brother and the mother departed. Thereafter appellant shot decedent at close range with a shotgun. To bolster his contention that he shot his brother because he was advancing toward him with a steak knife, appellant sought to show that decedent had a knife during the first altercation. Neither his brother nor his mother supported him on that issue during the trial. However, after the jury had retired, but before the verdict, the mother recanted and wanted to state that decedent did have a knife during the first altercation. The trial court refused to grant a mistrial before the jury returned or a new trial thereafter.

We find no abuse of discretion. See *Cooper v. State*, 246 Ark. 368, 438 S.W. 2d 681 (1969).

Affirmed.

HARRIS, C.J., not participating.
