

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio
Appellee

Court of Appeals No. L-11-1187

Trial Court No. CR0201002349

v.

Martin Cheno

DECISION AND JUDGMENT

Appellant

Decided: April 26, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeffrey D. Lingo, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals his conviction for complicity to commit attempted aggravated murder, with three firearm specifications, entered on a jury verdict in the Lucas County Court of Common Pleas. Because we conclude that the trial court did not abuse its discretion sustaining the state’s objection to a line of questioning that could inform the jury of the potential sentences appellant could receive, we affirm.

{¶ 2} On July 19, 2010, at 2:49 a.m., Toledo police received a report of multiple shots fired near the Southwyck mall in the city. A patrolling officer responded within minutes, but failed to find anything unusual. The officer circled the mall and began to patrol a nearby residential street when he detected movement in the parking lot of an apartment complex. The officer then observed a blue pickup truck turn on its lights and exit the complex. The officer made a U-turn and followed.

{¶ 3} The driver of the pickup truck made an abrupt left turn; a maneuver the officer later testified was called a “cop turn,” a turn that commonly suggested a desire to avoid police. The officer followed the truck into the parking lot of another apartment complex and turned on his overhead lights. At that point the truck increased its speed.

{¶ 4} A chase ensued through the parking lot and onto an adjacent street. When the truck slowed and began to make a wide turn, the officer thought the occupants intended to “bail out.” The officer testified that he had pulled within 15 feet of the rear of the truck and was checking his stolen vehicle list when a bullet came through the passenger side of the cruiser. Someone from the passenger window of the truck was firing at the officer.

{¶ 5} The officer temporarily disengaged until the firing stopped, then called for backup and resumed the chase. When the pickup went down a dead-end street, the officer blocked the road with his cruiser and waited. When the officer heard the noise of an engine revving, he went on foot, only to discover that the truck had crossed a lawn and smashed through a fence into the parking lot of an apartment building on an adjacent

street. The truck was stopped with the doors open. The officer saw one man running into the apartments. A search of the apartment building produced no suspects.

{¶ 6} By this time other officers and medical assistance arrived on the scene. Officers searching the area found 11 shell casings from a nine millimeter pistol along the street where the chase occurred. At the scene of the abandoned pickup truck, they found a wallet containing identification for Chad Rabara. The truck was registered to the wife of an associate of Rabara, Jorge Rojas.

{¶ 7} Their investigation led police to believe that the occupants of the blue pickup truck that night were Rabara, Rojas, Raul Moya and appellant, Martin Cheno, members or associates of the east-side Surenos 13 gang. Rabara and Moya testified at appellant's trial.

{¶ 8} According to Moya's testimony, the four got together late in the evening at Rojas' house and decided to "hit a lick," meaning commit a robbery. Rabara was the driver. The target was a free standing ATM machine at a bank near Southwyck mall. The men fired several blasts from a 12 gauge shotgun and rounds from a 9 millimeter pistol at the machine, to no avail. When they heard sirens, they left; Rabara driving, appellant in the front passenger seat, the other two in the back jump seats of the king cab pickup. They pulled into the parking lot of a nearby apartment, turned off the truck lights and waited several minutes.

{¶ 9} They moved out of the parking lot after some time, turning on the lights as they entered the street and saw the patrolling police cruiser. At his point, Moya's

testimony parallels that of the officer. When the officer activated his overhead lights, the pickup sped away. As the cruiser came closer, Moya testified, appellant leaned out the passenger window and began to shoot at the police cruiser with a pistol. Multiple shots were fired. When the cruiser slowed, the truck sped away, eventually crashing through a fence at the end of a dead-end street. The four exited the truck. Appellant went into an apartment building; the other three jumped fences and ran along the turnpike right of way until they reached the apartment of a friend of one of them. When they eventually called for a ride, police came instead. All four men were eventually arrested.

{¶ 10} On July 29, 2010, the Lucas County Grand Jury named Rojas and appellant in a two count indictment, charging felonious assault and attempted aggravated murder. Each count contained a firearm specification, a discharging a firearm from a motor vehicle specification and a discharging a firearm at a peace officer specification. Appellant pled not guilty and the matter proceeded to a trial before a jury.

{¶ 11} At trial, the police officer involved testified to the pursuit and shooting. Raul Moya testified to the events surrounding the chase and named appellant as the shooter. Chad Rabara admitted to being the driver of the truck and confirmed much of Moya's testimony, but went short of identifying appellant as the shooter. Rabara confirmed that appellant was in the passenger seat when the shots were fired and conceded that the rear side windows, where Rojas and Moya sat, only opened a few inches.

{¶ 12} The jury found appellant guilty of complicity in attempted aggravated murder and all three firearm specifications. The trial court entered judgment on the verdict and, following a presentence investigation, sentenced appellant to a ten year term of imprisonment for the principal offense, a mandatory three years for the firearm specification, a consecutive mandatory five-year term for the discharging a firearm from a motor vehicle specification and mandatory seven years for discharging a firearm at a peace officer. The court merged the peace officer specification with the other specifications.

{¶ 13} From this judgment of conviction appellant now brings this appeal. Appellant sets forth a single assignment of error:

The trial court's limitation on cross examination of state's witnesses resulted in a denial of Mr. Cheno's constitutional rights to confront and cross-examine witnesses, his right to present a defense, and his right to a fair trial and due process of law, in violation of the United States Constitution's Fifth, Sixth and Fourteenth Amendments and Article I, Sections 10 and 16 of the Ohio Constitution.

{¶ 14} Appellant complains that he was denied his constitutional right to confront witnesses against him when, in a single instance, the trial court sustained the state's objection to a line of questioning during the defense's cross-examination of Raul Moya:

Q. All right. Mr. Moya, let's start with where the prosecutor left off. You were charged with attempted aggravated murder of a police officer; is that correct?

A. Yes.

Q. All right. With a gun spec?

A. Yes.

* * *

Q. With firearm specs?

A. Yes.

Q. And with discharging a weapon from a motor vehicle spec?

A. Yes.

Q. Correct. So in addition to the penalty, I'm sure you talked to your attorney about the penalty for a conviction of that offense, did you not?

A. Yes.

Q. And many years?

A. Yes.

Q. All right. And you were charged with felonious assault upon a police officer?

A. Yes.

Q. Both felonies of the first degree, is that correct?

A. Yes.

Q. And firearm spec which carries 3 years?

A. Yes.

* * *

Q. Discharging a weapon from a motor vehicle, 5 years?

A. Yes.

Q. And –

[Prosecutor]: Judge, I'm going to object. I don't think the amount of time has anything to do with this.

THE COURT: Sustained.

{¶ 15} Appellant explains that in this line of questioning he was attempting to point out that, prior to his agreement to testify against appellant, Moya was facing substantial penalties, 28 years of incarceration, from the charges against him. This was an incentive to fabricate testimony, appellant wanted to argue. The court's refusal to allow him to continue this questioning was to his prejudice, appellant insists.

{¶ 16} Evidentiary rulings are within the discretion of the court and will not be reversed absent an abuse of that discretion, resulting in material prejudice. *State v. Long*, 53 Ohio St.2d 91, 98, 372 N.E.2d 804 (1978). An abuse of discretion is more than a mistake of law or an error in judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 19.

{¶ 17} Ordinarily, the sentence which may be imposed upon a defendant is outside the province of the jury. *State v. Smith*, 80 Ohio St.3d 89, 116, 684 N.E.2d 668 (1997). The jury should not be told the potential sentences a defendant faces for the charged offenses. *State v. Bajaj*, 7th Dist. No. 03 CO 16, 2005-Ohio-2931, ¶ 163.

{¶ 18} Moya and appellant were charged with identical offenses. As a result, when the defense began an enumeration of the sentences Moya might receive for each offense and specification, the sentences were the same as appellant faced. Consequently, the trial court did not abuse its discretion in sustaining the state's objection.

{¶ 19} As to whether this ruling infringed on appellant's right to present a defense, the record does not reveal that appellant was significantly inhibited from arguing that Moya's arrangement with the prosecution was an incentive to fabricate testimony. Any restriction on appellant's ability to impeach the witness was minimal and certainly did not rise to the level of infringement on any constitutional right. Accordingly, appellant's sole assignment of error is not well-taken.

{¶ 20} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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