

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 11AP-117
	:	(C.P.C. No. 10CR-03-1335)
Harold McGraph,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 29, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Dennis Pusateri, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Harold McGraph, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

Factual and Procedural Background

{¶2} In the early morning hours of February 20, 2010, appellant and another man got into a fight inside Club Twitter, an after hours club in Columbus, Ohio. Phillip Hall, who worked security at the club, escorted appellant out of the club. Appellant

seemed upset about getting kicked out of the club. A witness at the club heard appellant yell as he left the club that he would "shoot up the place." (Tr. 113.) When appellant began walking away, Hall knocked on the closed door to return to the club. At this point, Hall heard a gunshot. The door opened and Hall heard the shots getting closer to him. He saw appellant firing a gun. Hall attempted to get inside the club and close the door to avoid the gunshots. However, he was shot in the shoulder and a woman inside the club, Tina Banks, died from a gunshot wound to the head.

{¶3} As a result of Banks' death, a Franklin County Grand Jury indicted appellant with one count of aggravated murder in violation R.C. 2903.01 and one count of murder in violation of R.C. 2903.02. As a result of Hall's injury, the grand jury indicted appellant with one count of attempted murder in violation of R.C. 2923.02 and R.C. 2903.02 and one count of felonious assault in violation of R.C. 2903.11. All four counts also contained firearm specifications pursuant to R.C. 2941.145. Appellant entered a not guilty plea to the charges and proceeded to a jury trial.

{¶4} At trial, Hall identified appellant as the man he escorted out of the club on February 20, 2010. He also identified appellant as the shooter. Although appellant did not testify at trial, Columbus Police Detective Robert Wachelec testified that he spoke with appellant shortly after the shooting and that appellant admitted to being at the club but denied shooting anyone. The jury found appellant guilty of felonious assault and the firearm specification and not guilty of aggravated murder. The jury did not reach a verdict on the remaining two counts and the trial court declared a mistrial on those counts. Before sentencing, however, appellant agreed to enter a guilty plea to one count of involuntary manslaughter as a stipulated lesser included offense of murder. The trial

court dismissed the remaining attempted murder count. The trial court accepted appellant's guilty plea, found him guilty of that charge, and sentenced appellant for the involuntary manslaughter and felonious assault convictions.

{¶5} Appellant appeals and assigns the following errors:

FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED BY OVERRULING A DEFENSE MOTION FOR MISTRIAL AFTER THE PROSECUTOR IMPROPERLY ARGUED IN SUMMATION THAT AN ACQUITTAL COULD LET "A MURDERER LOOSE IN OUR COMMUNITY."

SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT [ERRED] BY ANSWERING SEVERAL IMPORTANT JURY QUESTIONS WITHOUT CONSULTING WITH COUNSEL.

THIRD ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED BY PERMITTING, OVER OBJECTION, POLICE TESTIMONY WHICH ATTRIBUTED THE SHOOTER'S IDENTITY AS "LITTLE MAN," APPELLANT'S NICKNAME, TO HEARSAY AND RUMORS AMONG BAR PATRONS, AND BY GIVING NO LIMITING OR CAUTIONARY INSTRUCTION, THEREBY ALLOWING THE JURY TO CONSIDER THE HEARSAY "IDENTIFICATIONS" FOR THE TRUTH OF THE MATTER.

FOURTH ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED BY REFUSING TO GIVE A JURY INSTRUCTION REQUESTED BY THE DEFENSE ON THE LESSER INCLUDED OFFENSE OF RECKLESS HOMICIDE.

{¶6} For ease of analysis, we address appellant's assignments of error out of order.

Appellant's Third Assignment of Error- Hearsay Testimony

{¶7} Appellant contends the trial court admitted inadmissible hearsay testimony. Detective Wachelec testified that he learned of a person known as "Little Man" while speaking to potential witnesses at the scene of the shooting. Over appellant's objection,

Detective Wachelec testified that the club's owner called him after the shooting and told him that appellant was known as "Little Man." Appellant claims that this was inadmissible hearsay testimony. We disagree.

{¶8} Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Evid.R. 801(C). Hearsay is inadmissible unless an exception applies. Evid.R. 802. The state argues that Detective Wachelec's testimony that the club owner told him that appellant was known as "Little Man" was not hearsay because it was not admitted to prove the truth of the matter asserted but, rather, to explain how the police identified appellant as a suspect. Detective Wachelec testified that once he learned appellant's name, he was able to create a photo array to present to Hall.

{¶9} Generally, statements offered into evidence to explain an officer's conduct during the course of investigating a crime are not hearsay. *State v. Gordon*, 10th Dist. No. 10AP-1174, 2011-Ohio-4208, ¶21. There are limits, however, to this general rule because of the great potential for abuse and potential confusion to the trier of fact. *Id.* (citing *State v. Blevins* (1987), 36 Ohio App.3d 147, 149). To limit the potential for abuse: (1) the conduct to be explained must be relevant, equivocal, and contemporaneous with the out-of-court statements, and (2) the out-of-court statements must meet the standard of Evid.R. 403(A); that is, the evidence must be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury, even if it is relevant. *Id.* Here, the statement satisfies these requirements. The conduct sought to be explained, a photo array that included appellant, was relevant and occurred right after Detective Wachelec learned that

appellant was known as "Little Man." Additionally, the statement's probative value is not substantially outweighed by the danger of unfair prejudice, because appellant's trial counsel admitted during opening statement that appellant was known as "Little Man." (Tr. 27.) Thus, the statement was admissible to explain Detective Wachelec's investigative activities.

{¶10} Moreover, we cannot say that the admission of this statement affected the outcome of the trial. *State v. Lipsey*, 10th Dist. No. 08AP-822, 2009-Ohio-3956, ¶23. As previously noted, appellant's trial counsel admitted during opening statement that appellant was known as "Little Man." (Tr. 27.) Moreover, the alleged hearsay statement did not identify appellant as the shooter. Finally, Hall, who identified appellant as the shooter, did not know him as "Little Man." Hall identified appellant as the person he escorted out of the club and as the person who immediately thereafter fired multiple shots in the direction of the club. The statement identifying appellant as "Little Man" was inconsequential.

{¶11} For these reasons, we overrule appellant's third assignment of error.

Appellant's First Assignment of Error- Motion for Mistrial

{¶12} Appellant argues that the prosecutor made comments in closing argument that deprived him of a fair trial and warranted a mistrial. We disagree.

{¶13} A mistrial should not be ordered merely because some error or irregularity has occurred. *State v. Dennis*, 10th Dist. No. 08AP-369, 2008-Ohio-6125, ¶23 (citing *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33). A mistrial is an extreme remedy, declared only when the ends of justice so require and a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127; *State v. Drayer*, 159 Ohio App.3d 189,

198, 2004-Ohio-6120, ¶24. The trial court is in the best position to determine whether the circumstances in the courtroom warrant the declaration of a mistrial. *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, ¶92. Thus, the decision whether to grant a mistrial is within the discretion of the trial court, and will not be reversed on appeal absent an abuse of discretion. *State v. Iacona*, 93 Ohio St.3d 83, 100, 2001-Ohio-1292; *State v. Bruce*, 10th Dist. No. 07AP-355, 2008-Ohio-4370, ¶75. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Dennis*, supra.

{¶14} During closing arguments, defense counsel commented that this was "a serious case involving serious consequences for everyone concerned." (Tr. 290.) Counsel also noted that "this decision that you're faced with here is going to be one of [the] most important decisions that you've made in your life or maybe even will ever make in your life. All right. You want it to be the right decision." (Tr. 292.) The prosecutor, in his final argument to the jury, agreed with defense counsel that "there's a lot riding on this for all of us. There's a lot riding on it for Ms. Banks, who's deceased, for the Defendant, and for our community." (Tr. 299.) Counsel then added "[y]our decisions are to commit -- convict someone of murder and felonious assault or not. One could possibly result in letting a murderer loose in our community." (Tr. 299.) The trial court sustained defense counsel's objection to this last comment. The trial court subsequently denied a motion for mistrial based on the "letting a murderer loose in our community" comment, concluding that the comment was not so egregious to warrant a mistrial and that the jury heard the court sustain counsel's objection to the comment.

{¶15} Appellant now claims that the comment warranted a mistrial because it deprived him of a fair trial. We disagree. Assuming the prosecutor's comment was improper, the trial court promptly sustained appellant's objection. Further, the trial court instructed the jury that comments made by the attorneys during the trial, including closing arguments, are not evidence. The jury is presumed to have followed the court's instructions. *State v. Raglin* (1998), 83 Ohio St.3d 253, 264. Appellant did not request an additional limiting instruction. Given the trial court's actions and instructions to the jury, the prosecutor's isolated comment did not deny appellant a fair trial. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶131; *Dennis* at ¶24. Accordingly, the trial court did not abuse its discretion by refusing to grant a mistrial. We overrule appellant's first assignment of error.

Appellant's Second Assignment of Error- Jury Questions

{¶16} Appellant contends that the trial court answered four jury questions without first consulting with defense counsel. We disagree.

{¶17} A trial court commits error, although not always reversible error, by responding to jury questions without first consulting counsel and allowing an opportunity to be heard or object. *State v. Thomas*, 8th Dist. No. 81393, 2003-Ohio-2648, ¶27-28. In this case, the transcript of the proceedings indicates that the jury asked four questions. Before each response, the transcript reads simply: "[t]he Court returned the following answer." (Tr. 323-26.) There is no indication whether or not the trial court consulted with defense counsel or the prosecution before answering the jury's questions. To clarify matters, the state filed a motion to settle the record, pursuant to App.R. 9(E), in the trial court. The trial court granted that motion and noted that "this Court held in-chambers

discussions with counsel from both sides as to each jury question. Trial prosecutor Rogers and defense counsel Robert Bernard were involved in those discussions and agreed to the answers that this Court then gave to the jury in response to each question. The defense made no objection to this procedure for handling the jury's questions." (July 21, 2011 Decision on Motion.)

{¶18} Because it is clear that the trial court consulted with appellant's counsel before responding to the jury's questions, we overrule appellant's second assignment of error.

Appellant's Fourth Assignment of Error- Jury Instructions

{¶19} This assignment of error concerns jury instructions the trial court declined to give for the count of murder appellant faced at trial. However, after the jury failed to arrive at a verdict on this count and before sentencing, appellant pled guilty to one count of involuntary manslaughter as a lesser included offense of murder. A guilty plea following a trial and prior to sentencing waives all appealable errors which may have occurred at trial, unless the errors are shown to have precluded the defendant from voluntarily entering his or her plea. *State v. Kelley* (1991), 57 Ohio St.3d 127, paragraph two of the syllabus. See also *State v. Fortner*, 10th Dist. No. 08AP-191, 2008-Ohio-5067, ¶8 ("A criminal defendant who enters a voluntary plea of guilty while represented by competent counsel waives all nonjurisdictional defects in the proceedings."). The error alleged by appellant does not implicate the voluntary nature of his guilty plea to resolve the murder charge against him or the trial court's jurisdiction to try his case. Accordingly, appellant is precluded from raising this error on appeal. *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, ¶77-79. We overrule appellant's fourth assignment of error.

{¶20} In conclusion, we overrule appellant's four assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and DORRIAN, JJ., concur.
