

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

State of Ohio

Court of Appeals No. H-12-011

Appellee

Trial Court No. CRI2011-1089

v.

Gary L. Lacy

DECISION AND JUDGMENT

Appellant

Decided: March 8, 2013

* * * * *

Michael B. Jackson, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} This is an *Anders* appeal. Appellant, Gary Lacy, appeals the judgment of the Huron County Court of Common Pleas, ordering him to serve a 42-month prison term following a jury's determination of guilt on three separate felony charges.

I. Facts and Procedural Background

{¶ 2} At 7:30 p.m. on December 16, 2011, Lacy traveled to Terry Shepherd's house in order to pick up a Pontiac Montana minivan owned by Shepherd. Lacy and

Shepherd were longtime friends, but had not spoken for several months. When he arrived at Shepherd's house, Lacy wrote Shepherd a note indicating he was taking the minivan, and drove off without obtaining Shepherd's permission to take the minivan. Some time later, Shepherd decided to take his cat outside. While doing so, he noticed that the minivan was missing. Concerned that the minivan had been stolen, he called the police and reported the incident.

{¶ 3} Meanwhile, police officer Ryan Gillmor spotted Lacy driving the minivan through Willard, Ohio. As a routine matter, Gillmor ran the license plates on the van, and determined that they were registered to a Ford pickup truck that belonged to Shepherd. Wanting to make sure that he ran the correct license plate number, Gillmor followed the minivan through the streets of Willard until he was able to run the plates a second time.

{¶ 4} After it was confirmed that the license plates belonged to a different vehicle, Gillmor activated the flashing lights on his cruiser. Instead of pulling over for Gillmor, Lacy immediately sped off at a high rate of speed toward the city limits, running a stop sign in the process. Gillmor proceeded to follow Lacy beyond the city limits until he reached the point where the road dead ends into Section Line 30. Gillmor was able to follow closely until he reached 70 miles per hour. At that point, Gillmor maintained his speed, allowing Lacy, who was traveling much faster, to put some distance between himself and Gillmor.

{¶ 5} As he approached the intersection, Lacy lost control of the minivan and ran through a stop sign into an adjoining field. Because the ground was saturated, the

minivan was immediately trapped in the mud. Lacy attempted to rock the minivan back and forth to free it from the field, but was unsuccessful in doing so. In the meantime, Gillmor arrived on the scene, and immediately exited his cruiser and approached the minivan.

{¶ 6} As Gillmor made his way to the minivan, Lacy shifted from the driver's seat to the passenger seat. Gillmor removed his handgun from its holster and ordered Lacy to show his hands. When Lacy failed to do so, Gillmor reached in the vehicle to try to pull Lacy out. Lacy freed himself from Gillmor, exited the vehicle, and fled the scene on foot.

{¶ 7} After chasing Lacy for a quarter of a mile, Gillmor caught up to him and informed him that he was under arrest. Gillmor attempted to subdue Lacy, but Lacy punched him in the lip and headed for a patch of woods that was connected to the field. Feeling threatened, Gillmor maintained his distance and radioed for assistance.

{¶ 8} Several officers arrived on the scene. Eventually, Lacy exited the woods and surrendered himself to officer Jeffrey Kerber without incident. Kerber arrested Lacy and transported him back to Gillmor's cruiser for transportation to the local jail.

{¶ 9} Lacy was indicted on January 17, 2012, on one count of receiving stolen property in violation of R.C. 2913.51(A), a felony of the fourth degree, one count of failing to comply with the order or signal of a police officer in violation of R.C. 2921.331(B), a felony of the third degree pursuant to R.C. 2921.331(C)(5)(a)(ii), and one count of assault on a police officer in violation of R.C. 2903.13(C)(3), a felony of the

fourth degree. Lacy was subsequently arraigned on January 18, 2012, at which time he pled not guilty and was appointed counsel.

{¶ 10} On January 23, 2012, Lacy filed a motion to proceed pro se. After a hearing on the motion, the trial court concluded that Lacy was competent to represent himself and allowed him to waive his right to counsel. A jury trial commenced, and Lacy was found guilty on all three counts. Lacy then moved for a new trial. The trial court subsequently denied his motion and set the matter for sentencing.

{¶ 11} Ultimately, Lacy was sentenced to a total of 42 months of incarceration. Following appointment of appellate counsel, Lacy filed this timely appeal. Lacy's counsel has filed a motion to withdraw as appointed counsel pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). In addition, Lacy has filed a pro se "Request for Judicial Review or De Novo Review for Bias or Prejudice," asking this court to appoint a new appellate counsel from somewhere other than Huron County, if necessary.

II. Analysis

{¶ 12} *Anders, supra*, and *State v. Duncan*, 57 Ohio App.2d 93, 385 N.E.2d 323 (8th Dist.1978), set forth the procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the case, determines it to be wholly frivolous, he should so advise the court and request permission

to withdraw. *Anders* at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.*

{¶ 13} Counsel must also furnish his client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that he chooses. *Id.* Once these requirements have been satisfied, the appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 14} In this case, Lacy's appointed counsel has satisfied the requirements set forth in *Anders*, supra. Accordingly, this court shall proceed with an examination of the potential assignments of error set forth by Lacy's counsel and the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 15} In his brief, Lacy's counsel assigns the following possible errors:

1. THE TRIAL COURT ERRED BY FAILING TO GRANT A
NEW TRIAL WHEN IT WAS ALLEGED THAT THE PROSECUTOR
HAD INAPPROPRIATELY DISCUSSED THE CASE IN THE
HALLWAY
2. THE TRIAL COURT ERRED BY NOT EXCLUDING
INCONSISTENT TESTIMONY OF THE OFFICERS

3. THE APPELLANT'S CONVICTION WAS AGAINST THE
MANIFEST WEIGHT OF THE EVIDENCE

4. THE TRIAL COURT ERRED BY EXHIBITING BIAS IN THE
DENIAL OF THE DEFENDANT'S MOTIONS AND FAILURE TO
HAVE THE JURY FASHION A STATEMENT OF FACTS AT
SENTENCING

Motion for New Trial

{¶ 16} In Lacy's first potential assignment of error, his counsel argues that the trial court erred by failing to grant Lacy's motion for new trial. In support of his motion, Lacy argued that a new trial was justified because, prior to trial, he overheard the prosecutor discussing his belief that Lacy would be convicted within an earshot of potential jurors. Additionally, Lacy argued that the verdict was not sustained by sufficient evidence.

{¶ 17} Pursuant to Crim.R. 33(A)(2) and R.C. 2945.79, a new trial may be granted if prosecutorial misconduct materially affected a defendant's substantial rights. Notably, the motion for new trial will not be granted "unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial." Crim.R. 33(E). Further, pursuant to Crim.R. 33(A)(4), a new trial may be granted if "the verdict is not sustained by sufficient evidence or is contrary to law." This standard has been explained as "whether a rational factfinder, viewing the evidence in a light most favorable to the prosecution, could have found that the essential elements of the crimes

were proven beyond a reasonable doubt.” *State v. Thomas*, 1st Dist. No. C-010724, 2002-Ohio-7333, ¶ 16.

{¶ 18} The trial court’s determination on a motion for new trial is given great deference and will not be reversed absent an abuse of discretion. *State v. Glover*, 35 Ohio St.3d 18, 19, 517 N.E.2d 900 (1988). The deference given is “in recognition of the fact that the trial judge is in the best position to determine whether the situation in his courtroom warrants the declaration of a mistrial.” *Id.* To reverse on an abuse of discretion standard, an appellate court must find that the trial court’s attitude was arbitrary, unreasonable, or unconscionable. *Koch v. Rist*, 89 Ohio St.3d 250, 252, 730 N.E.2d 963 (2000), citing *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990).

{¶ 19} As an initial matter, we note that Crim.R. 33(C) mandates that affidavits be submitted in support of any motion alleging prosecutorial misconduct under Crim.R. 33(A)(2). Here, Lacy failed to submit affidavits to support his claim of prosecutorial misconduct. Where a defendant fails to produce supporting affidavits as required by Crim.R. 33(C), the trial court does not abuse its discretion in denying the motion for new trial. *Toledo v. Stuart*, 11 Ohio App.3d 292, 293, 465 N.E.2d 474 (6th Dist.1983). Further, our review of the record reveals no evidence that any juror actually heard the prosecutor’s remarks. In addition, there is no evidence that the remarks, if heard, would have prejudiced Lacy or prevented a fair trial. Therefore, the trial court did not abuse its discretion when it denied Lacy’s motion for new trial on the basis of Crim.R. 33(A)(2).

{¶ 20} In addition to his argument concerning the prosecutor's pretrial remarks, Lacy also argued that the verdict was not sustained by sufficient evidence. We disagree.

{¶ 21} As to the first count, receiving stolen property, Lacy argues that Shepherd permitted him to take the minivan and, consequently, the property was not stolen. Lacy asserts that Shepherd's testimony supports that argument. However, Shepherd testified that he had not given Lacy permission to take the minivan. Further, Shepherd testified that he considered the minivan stolen at the time he reported it to the police. Thus, there is sufficient evidence to support a guilty verdict as to Count 1.

{¶ 22} As to the second count, failing to comply with the order or signal of a police officer, the record is replete with instances in which Lacy failed to comply with police orders. Specifically, Lacy attempted to evade Gillmor after Gillmor activated his cruiser's lights. Further, Lacy resisted arrest, failed to obey Gillmor's instructions to show his hands, and failed to submit to Gillmor's efforts to handcuff him. Ultimately, we conclude that a rational jury could have found Lacy guilty of failing to comply with the order or signal of a police officer beyond a reasonable doubt.

{¶ 23} Finally, Lacy argues that his conviction on the third count, assault on a police officer, was not sustained by sufficient evidence. Essentially, Lacy argues that it was dark during the incident and that Gillmor could not be certain that Lacy had hit him. In light of Gillmor's direct testimony that he was sure that he had been punched in the lip by Lacy, we find that the state presented sufficient evidence to the jury to support Lacy's conviction on Count 3.

{¶ 24} Having found that Lacy's motion for new trial pursuant to Crim.R. 33(A)(2) and (4) was properly dismissed for want of supporting affidavits and because the evidence supports the convictions, we conclude that the trial court did not abuse its discretion. Accordingly, Lacy's first potential assignment of error is not well-taken.

Inconsistent Testimony of the Officers

{¶ 25} In Lacy's second potential assignment of error, his counsel argues that the trial court erred in permitting several police officers to testify in a manner inconsistent with their written statements. As counsel correctly concludes, however, inconsistent statements of a witness do not give rise to reversible error. Rather, such statements may be used during cross-examination to call the witness's credibility into question, which is precisely what Lacy attempted to do in this case. In addition, Lacy's counsel states that his review of the record revealed no such inconsistencies. Likewise, we were unable to locate any inconsistencies. Accordingly, Lacy's second potential assignment of error is not well-taken.

Manifest Weight of the Evidence

{¶ 26} In Lacy's third potential assignment of error, his counsel argues that his conviction was against the manifest weight of the evidence. When reviewing a manifest weight claim,

The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way

and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220.

{¶ 27} Here, we find no “manifest miscarriage of justice” that would prompt us to reverse the conviction and order a new trial. *Id.* In light of the evidence discussed previously under Lacy’s first potential assignment of error, we find that the jury did not clearly lose its way in weighing the evidence and considering the credibility of the witnesses. While Lacy testified that another person was driving the van on the date of the incident, his testimony is contradicted by every other witness called by the state. In fact, none of the officers that testified mentioned noticing another person running in the woods. Further, Gillmor specifically stated that he saw Lacy driving the vehicle when he caught up with Lacy in the field. The inconsistencies in Lacy’s self-serving testimony cast serious doubt on his credibility.

{¶ 28} In light of the credibility issue pertaining to Lacy and the abundant evidence presented by the state, we conclude that Lacy’s manifest weight challenge is without merit. Accordingly, Lacy’s third potential assignment of error is not well-taken.

Trial Court's Alleged Bias

{¶ 29} In Lacy's fourth potential assignment of error, his counsel argues that the trial court demonstrated a bias in favor of the prosecution by allowing the prosecution, and not the jury, to fashion a statement of facts for the judge at the sentencing hearing.

{¶ 30} Crim.R. 32(A) sets forth the procedure a trial court is to follow when it imposes a sentence following a guilty verdict in a criminal trial. As relevant here, the rule requires the trial court to allow the defendant, defendant's counsel, the prosecuting attorney, and the victim to speak. As is clear from a straightforward reading, the rule makes no provision for the jury or a member of the jury to speak, and Lacy's counsel cites no rule of law that requires a judge to order a jury to create a statement of facts to be used at sentencing.

{¶ 31} Accordingly, Lacy's fourth potential assignment of error is not well-taken.

III. Conclusion

{¶ 32} Finally, this court, as required under *Anders*, has undertaken our own examination of the record to determine whether any issue of arguable merit is presented for appeal. Upon our independent review of the record, we find no meritorious issues on appeal. This appeal is therefore determined to be wholly frivolous. Appointed counsel's request to withdraw is granted.

{¶ 33} The judgment of the Huron County Court of Common Pleas is affirmed.

Costs are assessed to Lacy pursuant to App.R. 24. The clerk is ordered to serve all parties with notice of this decision.

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

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, 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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