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File Name: 05a0269p.06

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

JOSEPH ARNOLD,

*Defendant-Appellant.*

No. 04-5384

Appeal from the United States District Court  
for the Western District of Tennessee at Memphis.  
No. 03-20089—Jon Phipps McCalla, District Judge.

Submitted: March 9, 2005

Decided and Filed: June 21, 2005

Before: MOORE and SUTTON, Circuit Judges; CARMAN, Judge.\*

COUNSEL

**ON BRIEF:** Robert C. Brooks, Memphis, Tennessee, for Appellant. David N. Pritchard, ASSISTANT UNITED STATES ATTORNEY, Memphis, Tennessee, for Appellee.

CARMAN, J., delivered the opinion of the court, in which MOORE, J., joined. SUTTON, J. (pp. 12-22), delivered a separate dissenting opinion.

OPINION

CARMAN, Judge. On November 5, 2003, Defendant/Appellant, Joseph Arnold ("Arnold"), was convicted after a trial by jury in the United States District Court for the Western District of Tennessee of possession of a firearm by a convicted felon. Arnold appealed his conviction to this court. On appeal, Arnold argues that the District Court committed error in allowing the out-of-court statements of his accuser to be introduced during his trial, that the proof submitted to the jury was not constitutionally sufficient to sustain the guilty verdict, and that the court committed error in excluding a witness whom the defense sought to introduce to impeach the statements of the accuser. For the reasons stated herein, this Court **REVERSES** and **REMANDS** the case for entry of a judgment of acquittal.

\*The Honorable Gregory W. Carman, United States Court of International Trade, sitting by designation.

### BACKGROUND

At about 7:43 a.m. on September 19, 2002 (J.A. at 197), a woman called the 911 emergency telephone number in Memphis, Tennessee, to report that her mother's boyfriend – Arnold – had threatened her with a gun. At the end of the call, the caller identified herself as Tamica Gordon ("Gordon"). (Audio tape: 911 Recording (Sept. 19, 2002)(Ct. Ex. 9).) At approximately 8:00 a.m., local police officers were dispatched to a Memphis address and found a young woman upset to the point that she was having difficulty speaking. (J.A. at 112-113.) The officers later learned that the young woman's name was Tamica Gordon. (J.A. at 122.) Although no witness during the trial testified to such, the young woman the police met was apparently also the same woman who made the 911 call.

Gordon told the officers that Arnold "pulled a gun on her" and threatened to kill her. (J.A. at 114.) Gordon described the gun as a "black handgun." (J.A. at 127.) She did not indicate that the gun had any special characteristics. (J.A. at 151.) Based on Gordon's hand gestures, the officers inferred that she was describing a semiautomatic weapon. (J.A. at 127.)

During a brief conversation,<sup>1</sup> Gordon began to calm. (J.A. at 115.) A short time after the officers arrived, a car pulled up to the address where Gordon and officers were conversing. (*Id.*) A woman was driving the car, and a man was in the passenger seat. (J.A. at 116.) As the car pulled up, Gordon became excited again. (J.A. at 115.) She pointed at the car and told the officers that the man in it was the same man who had pointed a gun at her. (*Id.*) According to one responding officer's testimony, Gordon said, "[T]hat's him, that's the guy that pulled the gun on me, Joseph Arnold, that's him." (*Id.*)

The officers "went to the car, asked [Arnold] to step out and patted him down for weapons." (J.A. at 117.) No weapons were found. (*Id.*) Arnold was cooperative and did not attempt to elude the police or run away. (J.A. at 126.) The officers then asked for and received consent from the car's owner (Gordon's mother) to search the automobile. (J.A. at 117, 129.) Under the passenger seat of the automobile, the officers found a loaded, black, semiautomatic handgun with a bullet in the chamber. (J.A. at 118-19.) The gun was in a clear plastic bag when the police located it. (J.A. at 142.) There were no fingerprints on the gun, and it was not stolen. (J.A. at 130-31.) The prosecution submitted no evidence that the gun belonged to Arnold, and Arnold did not admit that the gun was his. (J.A. at 131.)

The government subpoenaed Gordon for the trial, but she did not appear. (J.A. at 28-29.) The District Court issued a warrant for Gordon's arrest, but she could not be produced before or during the trial.

The government moved at trial to introduce a tape of the 911 call alleged to have been made by Gordon and statements she later made to the police at the scene of Arnold's arrest. (J.A. at 38-39.) The government argued that the 911 tape was admissible under two exceptions to the hearsay rule: excited utterance and present sense impression. (J.A. at 38.) The government argued that Gordon's statements to the police were admissible as excited utterances. (J.A. at 39.)

After a hearing out of the presence of the jury, the District Court ruled that a redacted 911 tape was admissible as an excited utterance (J.A. at 64-65) but not as a present sense impression (J.A. at 63). The District Court also ruled that Gordon's statements to the police at the scene of Arnold's arrest were admissible as excited utterances. (J.A. at 78-79.) In issuing his ruling, the

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<sup>1</sup>The initial conversation between the officers and the young woman apparently lasted between thirty seconds (J.A. at 115) and five minutes (J.A. at 146).

District judge stated, “[i]t would not upset me if the Court of Appeals overturned this determination, it wouldn’t bother me.” (J.A. at 80.)

### STANDARDS OF REVIEW

All evidentiary rulings, including those that challenge constitutionality, are reviewed by the appellate court under the “abuse of discretion” standard. *U.S. v. Schreane*, 331 F.3d 548, 564 (2003), *cert. denied*, 540 U.S. 973, 124 S. Ct. 448, 157 L. Ed. 2d 323 (2003). *See also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) (“We have held that abuse of discretion is the proper standard of review of a district court’s evidentiary rulings.”). This Court will find an abuse of discretion when there is a “definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.” *Schreane*, 331 F.3d at 564 (quoting *Super Sulky, Inc. v. U.S. Trotting Ass’n*, 174 F.3d 733, 740 (6th Cir. 1999)). Abuse of discretion also results when the “lower court relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard.” *U.S. v. Heavrin*, 330 F.3d 723, 727 (6th Cir. 2003) (quotation and citation omitted).

As to Arnold’s contention that the proof submitted to the jury was not constitutionally sufficient to sustain a guilty verdict, this Court must assess “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *U.S. v. Samuels*, 308 F.3d 662, 666 (6th Cir. 2002), *cert. denied*, 537 U.S. 1225, 123 S. Ct. 1335, 154 L. Ed. 2d 1085 (2003) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). On appeal, the court must “determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” *Jackson*, 443 U.S. at 318. In assessing the sufficiency of the evidence, the court does not substitute its judgment for that of the jury and draws inferences in favor of the jury’s verdict. *Salgado*, 250 F.3d at 446. Nonetheless, there must be “substantial evidence”<sup>2</sup> of the elements of the crime upon which the jury could determine the defendant’s guilt beyond a reasonable doubt. *Burks v. U.S.*, 437 U.S. 1, 17, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *U.S. v. Orrico*, 599 F.2d 113, 117 (6th Cir. 1979). If this Court finds that the evidence was insufficient to sustain a defendant’s conviction, the case must be reversed with direction to the lower court to enter judgment of acquittal. *Burks*, 437 U.S. at 18.<sup>3</sup>

### DISCUSSION

On appeal, Arnold asserts that his conviction should be overturned for any, or in the combination, of three errors that occurred at trial:

1. The out-of-court statements of Gordon were erroneously admitted;
2. The proof offered was constitutionally insufficient to sustain a conviction; and
3. Defense counsel should have been permitted to present an impeachment witness.

(Arnold Br. at ii.) Each of these arguments will be examined in turn.

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<sup>2</sup>Substantial evidence is greater than a “mere scintilla.” *U.S. v. Orrico*, 599 F.2d 113, 117 (6th Cir. 1979). “It means such relevant evidence as a reasonable mind might accept to support a conclusion. It is evidence affording a substantial basis of fact from which the fact in issue can be reasonably inferred.” *Id.*

<sup>3</sup>The “Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient.” *Burks*, 437 U.S. at 18. Hence, judgment of acquittal must be entered if the evidence is legally insufficient. *Id.*