

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-50320
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ANTHONY S. MCGEE,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

(SA-93-CR-275)

(November 3, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

The grand jury charged Anthony S. McGee, a person who had been convicted of a felony, with possession of a .25 caliber semiautomatic pistol (Count 1) and making a false written statement concerning his conviction on ATF Form 4473 (Count 2). McGee

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

testified at trial, raising a defense of justification.

According to McGee, he purchased the firearm for protection. James and Anthony Dukes had shot him a year and a half earlier. After McGee was released from the hospital, James Dukes shot at him again while he was stopped at a gas station. Arthur "Papa" Dukes went to his home several times and threatened McGee if he testified against the Dukes. Because of these threats and attacks, McGee moved four times. A few days before McGee purchased the firearm on July 5, 1993, a man attacked him with a knife. McGee grabbed the blade to protect himself and, as a result, lost the use of two fingers.

A jury returned a verdict of guilty as charged on both counts. The district court imposed concurrent terms of imprisonment of 235 months on Count 1 and 60 months on Count 2, concurrent terms of supervised release of five years on Count 1 and three years on Count 2, and a special assessment of \$100.

OPINION

McGee challenges the admission of rebuttal testimony by Officer Field concerning the circumstances under which law enforcement officers came into possession of McGee's gun. Officer Field testified that, on July 10, 1993, he responded to a suspicious-person call and found a young man, Andre Ford, lying on the ground held at gunpoint. The man holding the gun on Ford stated that Ford had tried to break into a house and that he had a gun in his pocket. The gun recovered from Ford was the same gun that McGee had purchased five days earlier. The incident occurred

about two or three blocks from McGee's apartment.

McGee contends that Officer Field's testimony "that he recovered McGee's firearm from a "kid" named Andre Ford, who was attempting to burglarize a home, was irrelevant and highly prejudicial." McGee argues that, although there was no link between McGee and Ford, "Field's testimony implied that McGee had supplied the firearm to Ford" and "labelled McGee as an irresponsible man who would furnish a gun to a child." McGee argues that the evidence was not admissible for impeachment or rebuttal. Further, he contends that Field's testimony did not concern other evidence already before the jury; therefore, it was not inconsistent with McGee's testimony.

As a preliminary matter, the Government asserts that review is for plain error because McGee's objection to the admission of Field's testimony was not specific enough to alert the district court's attention to his "concern that it would be prejudicial to him to allow the jury to hear testimony regarding a juvenile's possession of a gun." The argument is disingenuous at best.

The Government called Officer Field to testify, and the following colloquy ensued:

[Defense counsel]: I believe that the prosecutor is going to call the police officer to attempt to impeach Mr. McGee's testimony about leaving the gun or something about the date of the recovery.

The prosecutor, on his cross examination, never gave Mr. McGee a date, so that he could respond, so that there is no inconsistency to rebut.

This is simply trying to get in, through the back door, prejudicial material. It's not proper to be brought before the jury.

[Government]: Well, your Honor, I guess it is

prejudicial in that it shows the defendant lied.

He said he left the gun in the apartment on the 8th, when he left town, and then he back tracked.

THE COURT: I will overrule the objection.

Previously, in a motion in limine at the start of the trial, and during the Government's cross-examination of McGee, counsel objected to the admission of evidence that the firearm was recovered from a juvenile gang member. The district court carried the motion in limine with the trial and disallowed questions concerning the recovery of the firearm on cross-examination. The district court limited the scope of the Government's cross-examination to questions concerning McGee's conduct in buying the gun to protect himself and then leaving it in his apartment when he moved. In view of the previous objections and discussion, counsel's objection to Officer Field's testimony was specific enough to make the district court fully aware of the scope of the objection.

Traditionally, district courts' control of the scope of rebuttal evidence has been reviewable "only for a `gross abuse' of discretion." United States v. Sanchez, 988 F.2d 1384, 1393 (5th Cir.), cert. denied, 114 S. Ct. 217 (1993). Rule 611(a) of the Federal Rules of Evidence was meant to codify the judge's discretion and authority over the scope of rebuttal evidence. Id. The district court's decisions to allow or disallow rebuttal testimony will rarely be disturbed on appeal. Id. (citing, inter alia, Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 611[01] at 611-30-31).

McGee's defense was based on the premise that he needed the gun to protect himself from the Dukes family. McGee's testimony that he bought the gun for his protection was inconsistent with his conduct in leaving the gun behind in his apartment, even though the Dukes followed him wherever he moved. The testimony concerning the circumstances under which the firearm was recovered was relevant to show that, although McGee asserted that he needed to purchase a gun for protection on July 5, 1993, by July 10, 1993, the gun was in the possession of another. Contrary to McGee's contention, the evidence that the firearm was recovered from a juvenile was not so prejudicial as to outweigh its probative value. There was no evidence that McGee knew the juvenile or that McGee provided him with the gun. Equally unavailing is McGee's argument that Field's testimony did not concern other evidence already before the jury. As discussed, the evidence was relevant to the question whether McGee's act of abandoning the gun was consistent with his testimony that he needed the gun for his protection. The evidence was proper because it discredited McGee's defense of justification, and the district court did not abuse its discretion.

AFFIRMED.