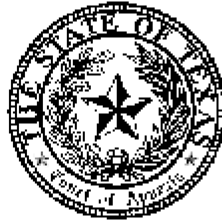
Affirmed and Opinion filed January 25, 2001.



In The

Fourteenth Court of Appeals

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NO. 14-99-00388-CR

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HULON G. REED, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 7
Harris County, Texas
Trial Court Cause No. 9838549

O P I N I O N

Appellant, Hulon G. Reed, Jr., appeals his conviction, by a jury, for driving while intoxicated. In six issues, appellant contends: (1) the trial court erred in overruling his objections and motions for mistrial when the State's attorney asserted facts outside the record during his closing argument; (2) the trial court erred by overruling his motion to suppress statements, motion to suppress evidence, and his assertion of privilege regarding statements and evidence gathered during the accident investigation; (3) the trial court erred in permitting the State's attorney to insinuate that appellant called his supervisor in an attempt to interfere with a criminal investigation; (4) the evidence is factually insufficient to support the jury's verdict and the jury's verdict is contrary to the overwhelming weight of the evidence; (5) the trial court erred in

denying his requested jury instructions; and (6) the trial court erred in overruling his objection to the introduction of the DIC-24 Statutory Warning Form. We affirm.

Appellant, an off-duty state trooper, wrecked his car in the early morning hours of September 24, 1998. Appellant lost control of his vehicle while traveling northbound on Highway 59 and struck a paint machine being used by a road crew. Appellant's vehicle also knocked down several construction barrels. David Boehm, the road crew's foreman, was injured when appellant's vehicle struck the paint machine. Two other workers narrowly avoided injury by jumping over a highway barrier-wall.

Immediately after the accident, Deputy Wayne Huddleston of the Harris County Sheriff's Department approached appellant. Deputy Huddleston, an off-duty peace officer working extra-employment at the work-site, asked appellant for his identification and proof of insurance. Appellant handed Deputy Huddleston his driver's license. Deputy Huddleston then instructed his co-worker, Deputy Larry Bush, to contact the Houston Police Department.

Approximately fifteen minutes later, Houston police officer Darren Schlosser arrived at the scene. Upon his arrival, Officer Schlosser was informed that the accident involved an off-duty police officer. Officer Schlosser also learned from an unidentified party that appellant may have been drinking. Officer Schlosser asked appellant if he had been drinking, and appellant replied affirmatively. Officer Schlosser then asked his dispatcher to send a supervisor to the accident scene. Houston police officer William Powell arrived at the scene shortly after Schlosser's request. Officer Powell noticed that appellant had slurred speech and bloodshot eyes. Moreover, appellant admitted to Officer Powell that he had consumed four or five beers.

As the investigation proceeded, Officer Raymond Cibulski of the Houston Police Department's DWI task force arrived at the accident scene. Officer Cibulski testified that upon his arrival he noticed appellant's breath smelled of alcohol, that he had slurred speech, and that he was swaying slightly. Officer Cibulski asked appellant to perform a battery of field sobriety tests, but appellant refused. Appellant told Officer Cibulski he wanted to wait for his supervisor to arrive at the scene. After appellant's supervisor arrived, appellant agreed to perform two field sobriety tests, but refused to perform another. Officer Cibulski testified that appellant showed signs of intoxication while performing the field sobriety tests. After

failing the field sobriety examinations, appellant was arrested for DWI. Officer Cibulski's conclusion that appellant was intoxicated was bolstered at trial by the testimony of appellant's supervisor, Sergeant Kenneth Tuck. Sergeant Tuck testified that appellant smelled of alcohol and appeared intoxicated.

Subsequent to his arrest, appellant was taken to the Houston Police Department's central police station. At the police station, Officer D. J. Guitierrez asked appellant to perform a battery of field sobriety tests. Appellant refused to perform all but one of the tests. Officer Guitierrez testified that appellant failed the one test he did perform. Officer Guitierrez then requested appellant to submit a breath specimen for an intoxilyzer test. Appellant refused.

In his first issue, appellant asserts the trial court erred by overruling appellant's objections and motions for mistrial when the State's attorney improperly argued facts outside the record during his closing argument. Appellant contends the State's closing argument contained statements that were highly inflammatory and resulted in the denial of appellant's right to due process of law and appellant's right to a fair trial.

Appellant identifies fourteen instances of alleged improper jury argument. In three of the instances of alleged impropriety, the trial court sustained appellant's objections and instructed the jury to disregard the argument. The statements by the prosecutor provoking such objections were:

> **[The State's attorney:]** . . . 70 times [the appellant] pulled somebody over for DWI and asked them to perform field sobriety tests, same field sobriety tests he was asked to perform today. And how many times were those people taken into custody?
>
> **[Defense counsel:]** Objection, inflammatory and prejudicial.
>
> **[Court:]** Sustained, it's not in the record.
>
> **[Defense counsel:]** Respectfully ask that the jury be instructed to disregard.
>
> **[Court:]** Disregard the last statement.
>
> **[Defense counsel:]** Move for mistrial.
>
> **[Court:]** Denied.
>
> * * *

[The State's attorney:] He knows exactly what theses officers know, and I'm here to tell you that if in one of those DWI arrests he was subpoenaed to court to testify, he'd be sitting up here just like Cibulski was."

[Defense counsel:] Objection.

[Court:] Sustained.

[Defense counsel:] I ask the jury be instructed to disregard.

[Court:] Disregard.

[Defense counsel:] Move for mistrial.

[Court:] Denied.

* * *

[The State's attorney:] Send him a message and tell him you're offended that someone that we trusted as a peace officer in Harris County, Texas . . .

[Defense counsel:] Objection, it's inflammatory, prejudicial, improper argument.

[Court:] Sustained.

[Defense counsel:] Ask that jury be instructed to disregard.

[Court:] Disregard please.

[Defense counsel:] Move for mistrial.

[Court:] Denied.

Generally, an instruction to disregard cures impermissible jury argument. *See Dinkins v. State*, 894 S.W.2d 330, 357 (Tex. Crim. App. 1995). Moreover, the reviewing court must examine the alleged instances of improper argument in light of the facts adduced at trial and in the context of the entire argument. *See McGee v. State*, 774 S.W.2d 229, 239 (Tex. Crim. App. 1989). Even if an argument is improper, it will not constitute grounds for reversal unless the statements to the jury injected new and harmful facts to the case, or were so extreme, so manifestly improper, that they deprived appellant of a fair and impartial trial. *See id.* at 238. We find the above statements did not deny appellant a fair and impartial trial. To the extent these arguments were impermissible, the trial court's instruction to disregard constituted an effective cure.

In three other instances of alleged improper jury argument, appellant failed to pursue his objection to an adverse ruling:

> **[The State's attorney:]** You've heard a lot of talk about State didn't bring witnesses because when the DPS trooper is intoxicated and crashes there is a lot of officers out there, and a lot of them don't really do much.
>
> **[Defense counsel:]** Objection to testifying. There is no evidence of that. It's improper and prejudicial.
>
> **[Court:]** Stay within the record. Objection is sustained.
>
> * * *
>
> **[The State's attorney:]** He's going to do everything he can to get his client . . .
>
> **[Defense counsel:]** Objection to what I would do to get my client off. That's improper and prejudicial.
>
> **[Court:]** Sustained.
>
> **[Defense counsel:]** I request the jury disregard.
>
> **[Court:]** Please disregard.
>
> * * *
>
> **[The State's attorney:]** Why would a DPS trooper who just got in an accident and was intoxicated want a supervisor out there? He needs a little help. Come on Sergeant, cone out here. I messed up. He knew at that point when he crashed that all those officers were out there, he's got to call his sergeant. Maybe he can get him out of it, maybe his sergeant can talk to the other officers. Hey he's the . . .
>
> **[Defense counsel:]** Objection, that is clearly outside the record. No such evidence of that. In fact, there was contrary.
>
> **[Court:]** Sustained. Let's stay within the record please.

A defendant is not permitted to complain on appeal about an instance of improper jury argument unless he objected and pursued his objection to an adverse ruling. *See Valdez v. State*, 2 S.W.3d 518, 521 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). In two of the identified instances, appellant properly objected, and the objection was sustained, but appellant failed to ask the court for a limiting

instruction or a mistrial. Thus, appellant waived error. In the third instance, appellant requested a limiting instruction, but not a mistrial. The trial court granted the limiting instruction. Accordingly, appellant did not pursue his objection to an adverse ruling and nothing is preserved for review.

The trial court overruled appellant's objections in the remaining eight instances of alleged improper jury argument:

> All the arguing and the witnesses, there is something that's gotten lost, and it's a matter of a foot, twelve inches. Two people, Mr. Boehm, Mr. Delarosa were within a foot, from me to you, from losing their life . . .
>
> * * *
>
> They were within feet possibly of losing their life.
>
> * * *
>
> How many times did this officer, when he was a DPS Trooper, take someone's liberty? I think he said 70 times he performed the field sobriety.
>
> * * *
>
> And he was in the field for four years performing these tests on people like you and me and everyone in this courtroom.
>
> * * *
>
> He knows exactly how the tests were performed, and he knows exactly what to look for. And he's done it, he's done it to people that he's pulled over.
>
> * * *
>
> The people that almost got ran over, the person that had a paint machine knocked out of his hands and hot paint slopped over him, it's his fault that happened.
>
> * * *

He's going to do everything he can to get all the witnesses in to testify for his case. He could have done that. He had access to the file.

* * *

How can someone who is trained, certified, who received his training, who pulled people over and performed these tests and arrested them.

The scope of proper jury argument is: (1) summation of the evidence; (2) any reasonable deduction from the evidence; (3) an answer to the argument of opposing counsel; and (4) pleas for law enforcement. *See Whiting v. State*, 797 S.W.2d 45, 48 (Tex. Crim. App. 1990). We find the above statements all fall within the scope of proper jury argument. The statements identified by appellant as improper were either summations of the evidence or reasonable deductions from the evidence. Appellant's first issue is overruled.

Appellant's second issue asserts that he was denied due process of law and his right to a fair trial when the trial court overruled his motion to suppress evidence and statements. Appellant contends the court erred in overruling his assertion of privilege regarding statements made by him during the course of the accident investigation because he was not properly advised of his constitutional rights. Appellant argues he was required to remain at the scene of the accident pursuant to section 550.021 of the Texas Transportation Code and that he was required to submit to an interrogation pursuant to section 550.023 of the Texas Transportation Code.[1] Because he was statutorily obliged to remain at the scene of the accident, appellant claims he was in "custody," and the investigating officers were required to give him his *Miranda* warnings prior to being questioned.

In *Berkemer v. McCarty*, the United States Supreme Court rejected an argument analogous to appellant's. 468 U.S. 423, 435-42 (1984). In *Berkemer*, the Supreme Court held that a roadside stop does not constitute "custody" for Miranda purposes. *See id*. The Court recognized "that a traffic

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[1] Section 550.021 requires an operator of a vehicle involved in an accident resulting in injury or death to remain at the scene until he complies with section 550.023. TEX. TRANS. CODE ANN. § 550.021 (Vernon 1999). Section 550.023 requires the driver of a vehicle involved in an accident resulting in injury or death to provide specified, enumerated information to the injured party and to provide reasonable assistance to the injured party. TEX. TRANS. CODE ANN. § 550.023 (Vernon 1999).

stop significantly curtails the 'freedom of action' of the driver." *Id.* at 436. However, the Court likened a traffic stop to a *Terry* stop, and held that an officer is entitled to ask an individual detained at a traffic stop, "a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Id.* at 439. The Texas Supreme Court, in *State v. Stevenson*, applied the *Berkemer* Court's analysis to a post-accident roadside stop. 958 S.W.2d 824, 828-29. (1997). The court held that "the mere fact that the suspect becomes the focus of a criminal investigation does not convert a roadside stop into an arrest." *Id.* at 829. Appellant was not in "custody" for *Miranda* purposes until Officer Cibulski arrested him for DWI. Thus, the trial court did not err in overruling appellant's motion to suppress the responses he gave at the accident scene.

Additionally, appellant argues that the requirement that he provide the injured party with specified information, pursuant to section 550.023, violated his right against self incrimination guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. This argument is also without merit. Section 550.023 does not require a driver involved in an accident resulting in injury or death to cooperate with a police accident investigation. Section 550.023 merely requires the driver to provide his name, address, and insurance information to the injured party or the person attending that party, and to provide reasonable assistance to the injured party. The driver is not required to provide police with a statement about the accident, nor is the driver required to cooperate with a police investigation of the accident. Thus, appellant's second issue is overruled.

Appellant's third issue asserts that the trial court erred by allowing extraneous evidence to be introduced against appellant when the prosecutor was permitted to insinuate that appellant called his supervisor from the Department of Public Safety to intercede on his behalf and interfere with a criminal investigation, which was not alleged in the information and was undisclosed to the defense, despite timely request. An issue is not preserved on appeal unless, at trial, there was a timely objection which specifically articulated the legal basis for the objection. *See* TEX. R. APP. P. 33.1 (Vernon Supp. Pamph. 2000). Here, appellant's objection at trial does not comport with his argument on appeal. At trial, appellant asserted that the prosecutor's question was argumentative and assumed facts not in evidence. An objection stating one legal theory may not be used to support a different legal theory on appeal. *See Macias v.*

State, 959 S.W.2d 332, 338 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd). Thus, appellant waived any error by failing to properly object. Appellant's third issue is overruled.

Appellant's fourth issue asserts that the evidence is factually insufficient to support the jury's verdict that appellant was guilty of driving while intoxicated and had lost the normal use of his physical and mental faculties; or in the alternative, the jury's verdict was contrary to the overwhelming weight of the evidence. When reviewing factual sufficiency challenges, appellate courts must determine "whether a neutral review of all of the evidence, both for and against the finding, demonstrates that the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000).

Appellant contends that the overwhelming evidence establishes Trooper Reed had the normal use of his mental and physical faculties. Appellant relies on four points to support this contention: (1) he asserts that he immediately called the first available unit to the scene; (2) he claims that Deputy Huddleston testified that he did not notice appellant exhibiting any signs of intoxication; (3) he avers that Officer Schlosser testified that appellant did not exhibit any signs of intoxication; and (4) Lanita Gregory testified that appellant was not intoxicated. We find, however, that appellant's assertions are not accurate reflections of the record.

Appellant crashed his vehicle into a road crew. Two members of that road crew were uniformed peace officers. One officer, Deputy Huddleston, testified that he approached appellant immediately after the accident. Deputy Huddleston testified that appellant used his cellular phone after he asked appellant for his license and proof of insurance. Deputy Huddleston did not testify that he did not notice any signs of intoxication. Deputy Huddleston testified that he did not smell alcohol on appellant. On direct examination, Officer Schlosser testified that he asked appellant if he had been drinking and that appellant responded affirmatively. On cross-examination, Officer Schlosser testified that appellant did not exhibit any "outstanding" signs of intoxication, but that he did not attempt to determine whether or not appellant was, in fact, intoxicated. Lanita Gregory did testify that appellant was not intoxicated when she last saw him before the accident. However, she also testified that she last saw appellant in a bar several hours before the accident.

Five officers testified that they formed the opinion that appellant was intoxicated on the evening of the accident, the jury also viewed a video recording of appellant shortly after his arrest, and the jury heard appellant repeatedly admit that he had consumed alcohol that morning. "[D]ue deference must be accorded the fact finder's determinations, particularly those determinations concerning the weight and the credibility of the evidence." *Johnson*, 23 S.W.3d at 9. Clearly, the jury chose to believe the testimony of the five officers that determined that appellant was intoxicated. Based on a review of the evidence, we do not find that the jury's determination of guilt was contrary to the overwhelming weight of the evidence. Accordingly, appellant's fourth issue is overruled.

Appellant's fifth point of error asserts that the trial court erred by denying appellant's requested jury instructions concerning an individual's right to refuse give a breath specimen and right to refuse to submit to field sobriety tests. Any evidence raised and admitted at trial, irrespective of its substantive character, that raises a defensive theory to the charged offense, requires a jury charge thereon. *See Brown v. State*, 955 S.W.2d 276, 279 (Tex. Crim. App. 1997). However, appellant's request that the jury be instructed that he was not obligated to submit a breath specimen and that he was not obligated to submit to field sobriety tests does not constitute a "defensive theory." Furthermore, a defendant is not harmed when the charge refused is akin to or is adequately covered by the charge given by the trial court. *See Garcia v. State*, 901 S.W.2d 724, 730 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd). Here, the instruction given by the trial court accurately reflected the applicable statute, and appellant was adequately protected by the instruction given. Appellant's fifth issue is overruled.

Appellant's sixth issue asserts that the trial court erred in overruling appellant's objections to the admission of the DIC-24 Statutory Warning Form which contained not only appellant's refusal to give a breath specimen, but contained other irrelevant and damaging warnings, which evidence was obtained by law enforcement officers from appellant in the course of an accident investigation and resulted in the denial of due process of law and of the right to a fair trial. Assuming, *arguendo*, that the trial court erred by allowing the admission of the DIC-24 form, we must determine whether the error was harmful. We look to rule of appellate procedure 44.2 to determine if reversal is mandated. *See* TEX. R. APP. P. 44.2. The proper harm analysis is dependent upon the kind of error involved. If the error is constitutional, we apply rule 44.2(a), otherwise we apply rule 44.2(b).

Complaints of erroneous evidentiary rulings are not constitutional and, therefore, are reviewed under the substantial rights standard set out in 44.2(b). *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App.1997). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *See King*, 953 S.W.2d at 271 (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). A criminal conviction will not be reversed for non-constitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). The only harm identified by appellant is his assertion that the State wanted to use the DIC-24 to infer guilt because he exercised his right to decline to take the test. Both appellant and Officer Guitierrez testified that appellant refused to submit a breath specimen. Therefore, after reviewing the record as a whole, we conclude the admission of the DIC-24 did not influence or had only a very slight influence on the finding of guilt. Accordingly, we find the trial court's error, if any, in admitting the evidence was harmless. *See* TEX. R. APP. P. 44.2(b). Appellant's sixth issue is overruled.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed January 25, 2001.

Panel consists of Chief Justice Murphy and Justices Amidei* and Hudson.

Do Not Publish — TEX. R. APP. P. 47.3(b).

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* Former Justice Maurice Amidei sitting by assignment.