Affirmed and Opinion filed October 14, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-00300-CR

VENTRESS CRAIG RUFFIN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 769,737

O P I N I O N

Ventress Craig Ruffin appeals a felony conviction for aggravated assault on the grounds that the trial court erred by: (1) failing to instruct the jury to disregard a question asked by the prosecutor which bolstered the testimony of a witness; (2) admitting hearsay testimony; and (3) giving a coercive *Allen* charge to the jury. We affirm.

Background

Appellant's supervisor, the complainant, confronted appellant regarding his handling of company property. Appellant responded by cursing at the complainant. Observing that appellant had a pistol in his pocket, the complainant proceeded to his supervisor's office for assistance. The complainant, his

supervisor, and another individual then approached appellant and questioned him about the incident. Appellant began hitting the complainant and subsequently pulled the gun from his pocket and shot complainant in the abdomen. Appellant was convicted by a jury of aggravated assault.

Failure to Instruct

Appellant's first point of error contends that the trial court erred in failing to instruct the jury to disregard a question asked by the prosecutor and to which defense counsel's objection was sustained by the court.

The witness, Benjamin Plair, testified concerning the events surrounding appellant's assault of the complainant. He also testified that he had previously spoken to the prosecutor regarding the case, to which the prosecutor asked, "[a]nd you told us basically the same story that you just told us here today?" Appellant's counsel objected to this question as bolstering and the court sustained the objection, but denied counsel's request for an instruction to the jury to disregard.

Bolstering occurs when evidence is offered solely to convince the factfinder that a witness or source of evidence is worthy of credit without having any additional relevance to the case. *See Cohn v. State*, 849 S.W.2d 817, 819-20 (Tex. Crim. App. 1993); *Rousseau v. State*, 855 S.W.2d 666, 681 (Tex. Crim. App. 1993). Similarly, a witness's prior consistent statement is inadmissible except if offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive. *See* TEX. R. EVID. 613(c), 801(e)(1)(B).[1] Improperly admitted bolstering evidence is subject to harmless error analysis. *See Rousseau*, 855 S.W.2d at 681; *Washington v. State*, 771 S.W.2d 537, 545-46 (Tex. Crim. App. 1989) (acknowledging that, although testimony was improper bolstering, it was harmless in light of the additional evidence of appellant's guilt).

In this case, the question was asked before the witness was directly impeached. However, the record fails to demonstrate that the question, even without an instruction to disregard, harmed appellant in

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[1] *See also Yount v. State*, 872 S.W.2d 706, 708-10 (Tex. Crim. App. 1993) (examining the admissibility of allegedly bolstering expert testimony under the Rules of Criminal Evidence and concluding that it is admissible without necessity of previous impeachment if it is relevant as substantive evidence under Rule 702); *Cohn*, 849 S.W.2d at 819-21 (asserting that the only bolstering rules are Rules of Criminal Evidence 608(a) and 612(c), and determining admissibility of the evidence under those rules).

anyway.[2] Prior to Mr. Plair's testimony, the State had called three witnesses: the complainant, his supervisor, and another employee. Two of these individuals had also witnessed the assault and testified to essentially the same facts. Therefore, Mr. Plair's testimony failed to introduce facts into the case which had not already been testified to. In light of the consistent testimony of the other witnesses on those facts, the truthfulness of this one witness was not significant.

Nor can it be said that the question was of such a character as to "inflame the minds of the jury."[3] The improper question did nothing more than raise whether the witness had testified consistently, and the jury had substantial evidence, including appellant's own admission that he shot complainant, on which to believe the facts to which this witness testified.[4] Because the record fails to demonstrate harm resulting from the trial court's failure to instruct the jury to disregard the unanswered question, we overrule appellant's first point of error.

Hearsay

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[2] If the record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. *See* TEX. R. APP. P. 44.2(a). Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded. *See* TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). Although we have not found a Court of Criminal Appeals opinion which addresses who has the burden of showing harm for Rule 44.2(b) "other" errors, other appellate courts have reasoned that the burden of showing it is on the appellant. *See Merritt v. State*, 982 S.W.2d 634, 636-37 (Tex. App.–Houston [1st Dist.] 1998, pet. ref'd, untimely filed).

[3] *Gonzalez v. State*, 685 S.W.2d 47, 49 (Tex. Crim. App. 1985) (acknowledging that when a witness has not had an opportunity to answer an improper question, an instruction to disregard will generally cure any harm to the defendant unless the question is "clearly calculated to inflame the minds of the jury"); *see also Nenno v. State*, 970 S.W.2d 549, 563 (Tex. Crim. App. 1998).

[4] Further, during cross-examination of the State's prior witnesses, defense counsel questioned each regarding the extent of their meetings with prosecutors and the owners or management of appellant's employer. Defense counsel questioned the complainant as to whether he had contacted an attorney in an attempt to pursue a civil suit against the employer and asked Hall if there had been meetings regarding the company's liability for the incident. By implying that the testimony of the State's witnesses may have been improperly motivated, defense counsel put the credibility of the State's witnesses in issue.

Appellant's second and third points of error argue that the trial court erred in admitting hearsay testimony. The first statement involved the complainant's remarks when he initially sought the assistance of his supervisor, Mark Hall. An individual who had been waiting to speak with Hall testified that the complainant approached Hall's office and stated "well, I have something -- ." Defense counsel then objected to the testimony as hearsay and the court overruled the objection. The witness then testified further that "[the complainant] said that there was a situation that he needed to speak with Mark immediately. And I said what's the problem? And he said, well . . . [appellant] is using some abusive language on me and throwing things around and I need to speak with Mark about it. . . . He mentioned that he thought he might have a gun in his pocket." Appellant argues that this statement was offered only for its truth and is therefore, hearsay.

The other statements complained of were made by an officer, Theodore Villareal, in investigating the shooting. He testified that, after being told the name and description of the individual who allegedly did the shooting, he contacted a dispatcher to broadcast the information to alert other officers to look out for the subject. After some additional testimony, the prosecutor asked Villareal the name of the suspect on whom he had put out the general broadcast and defense counsel objected to the question as hearsay. The court overruled the objection and the officer responded with appellant's name. Appellant also asserts that Officer Villareal testified indirectly that witnesses to the shooting named appellant as the shooter and that admission of this testimony was also hearsay.[5]

On appeal, a trial court's evidentiary ruling is reviewed for abuse of discretion. *See Angleton v. State*, 971 S.W.2d 65, 67 (Tex. Crim. App. 1998). Overruling an objection to evidence will not result in reversal when other such evidence was received without objection, either before or after the complained of ruling. *See Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998).

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[5] However, defense counsel objected only to the questions which required specifically naming appellant.

In this case, the facts contained in the first statement complained of had previously been testified to by other witnesses without objection by defense counsel.[6] Additionally, appellant did not deny he shot complainant; but only that the shooting was accidental.[7] Because this evidence was admitted without objection at other times during the trial, appellant has failed to preserve error or demonstrate how the court's ruling was harmful. Therefore, we overrule his second and third points of error.

Supplemental Jury Charge

Appellant's fourth point of error complains that the *Allen*[8] charge given to the jury was coercive. The charge read:

> You are instructed that this case has been ably tried by experienced lawyers; and in the interest of justice, if you could end this litigation by your verdict, you should do so. It is your duty to agree on a unanimous verdict, if you can do so without violating conscientiously held convictions that are based on the evidence. No juror, from mere pride of opinion hastily formed or expressed, should refuse to agree. Yet, no juror, simply for the purpose of terminating the case, should acquiesce in a conclusion that is contrary to his own conscientiously held view of the evidence. You should listen to each other's views; talk over your differences of opinion in a spirit of fairness and candor; and, if possible, resolve your differences and come to a common conclusion, so that a verdict may be reached and this case may be disposed of.

Appellant argues that the underlined language was coercive because it singled out the lone juror who had voted for acquittal and pressured her to "get on board." The juror testified during the hearing on the motion for new trial, that after receiving the supplemental charge several of the jurors stated that it was

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6 For example, the complainant testified that he approached his supervisor, Mark Hall, and told him appellant was "cursing him out" and may have a gun. He testified that Frank Hall, Mark's father, and other individuals were also present. Mark Hall testified that the complainant came to him, with an "urgent" matter, reporting that he was "having problems" with appellant and that appellant was "verbally using bad language" and throwing parts around. Both of these witnesses testified that Frank Hall was also present during the conversation.

7 Appellant testified that while he and the complainant were scuffling, he was being partially restrained though no one was holding the complainant. He further testified that he pulled the gun out of his pocket, which he carried cocked, and it went off during the struggle. Other witnesses also testified without objection that appellant shot the complainant.

8 *See Allen v. United States*, 164 U.S. 492 (1896).

directed at her and she "could not handle it anymore." Appellant also contends that the coercive nature of the charge was evidenced by the fact the jury reached a verdict twenty minutes after receiving it, whereas the jury had deliberated for five hours and fifty-five minutes before receiving it.

To determine the propriety of an *Allen* charge, the primary inquiry is its coercive effect on juror deliberation in the context and under all circumstances in which it was given. *See Howard v. State*, 941 S.W.2d 102, 123 (Tex. Crim. App. 1996). If a supplemental charge merely suggests that all jurors reevaluate their opinions in the face of contrary viewpoints, it is not coercive. *See id.* Additional factors which the court considers in evaluating an *Allen* charge is whether the judge knew the numerical split of the jury, whether the charge was a comment on the evidence, or whether the judge knew who the hold-out juror was. *See id.*

In this case, appellant conceded in oral argument that, had the language not been underlined, the charge would have been proper and not coercive.[9] Although appellant argues in his brief that the trial court underlined the complained of portion of the charge, he failed to present any evidence of that fact and conceded during oral argument that a juror could have underlined it. Further, there is no evidence from the record that the trial judge had any indication of the numerical split of the jury or any information as to the identity of the hold-out juror. Therefore, appellant has failed to establish that the *Allen* charge used had a coercive effect upon jury deliberations in the context and under the circumstances in which it was given. Accordingly, his fourth point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed October 14, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig.

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[9] The language of the charge is similar to that approved in *Howard v. State*, 941 S.W.2d 102, 123-24 (Tex. Crim. App. 1996); *see also Lowenfield v. Phelps*, 484 U.S. 231, 235 (1988).

Do not publish — TEX. R. APP. P. 47.3(b).