Affirmed and Opinion filed October 26, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-01136-CR

———————————

LARRY EUGENE PENNINGTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 98-09109

O P I N I O N

Appellant, Larry Eugene Pennington, appeals his conviction for misdemeanor driving while intoxicated in five points of error, complaining that the trial court erred: (1) in failing to grant a mistrial when the State repeatedly commented on his failure to testify; (2) in allowing testimony about his post-arrest silence; (3) in permitting hearsay evidence that he was driving; (4) in permitting the State to bolster its witness; and (5) in instructing the jury that it could find appellant intoxicated by a combination of alcohol and another substance. We overrule his points of error and affirm.

BACKGROUND

Witness Daniel Nowak awoke late one night to the sound of a loud crash coming from the parking lot in his condominium complex, the Trophy Club. When he looked out his window, he saw at least five crumpled cars under the carport, which was falling onto them. He ran outside and saw appellant in the driver's seat, trying to re-start his car. Appellant appeared to Nowak to be angry, inattentive, and uncooperative. Finally, appellant crawled through the window of his car and walked toward his own condominium. Nowak noticed that appellant's speech was slurred; he swayed on his feet, and he appeared intoxicated. Nowak testified that using abusive language, appellant announced to the gathering crowd of neighbors, "I don't know what the f— all you people are worried about. I've got enough money to buy all of these cars."

When the police arrived, they asked appellant for his driver's license, with which appellant then fumbled and dropped. The police testified that appellant smelled strongly of alcohol. Further, they testified that he was uncooperative in performing the horizontal gaze nystagmus (HGN) field sobriety test. A police officer also testified that appellant was belligerent and uncooperative at the police station in refusing to perform the sobriety tests.

FAILURE TO TESTIFY

In his first point of error, appellant contends that the trial court erred in failing to grant a mistrial after the State commented about his silence, and thus failure to testify. During closing argument, the following exchange occurred:

STATE: "You heard nothing from Mr. Pennington – "

DEFENSE: "Objection, Your Honor, that is a comment on – "

STATE: "– through his offense [sic] attorney's– "

COURT: "Overruled."

DEFENSE: "He is striking at the defendant over the shoulders of counsel."

COURT: "Overruled."

STATE: "On his closing argument, he has told you there is nothing that he said and he is not even controverting the fact that his client was not [sic] impaired."

DEFENSE: "Objection, Your Honor, commenting on– "

COURT: "Sustained."

DEFENSE: "I ask that the jury be instructed to disregard."

COURT: "The jury will disregard it, please."

DEFENSE: "We would move for mistrial."

COURT: "Denied."

Later the prosecutor stated, "You know what the sad thing is. I bet Mr. Pennington doesn't even remember." The court sustained an objection to this comment, instructed the jury to disregard, and denied a mistrial.

A prosecutor must not comment on a defendant's failure to testify. *See Bird v. State*, 527 S.W.2d 891, 893 (Tex. Crim. App. 1975). When the State improperly makes a direct comment on a defendant's failure to testify, an instruction to disregard usually does not cure the error. *See Montoya v. State*, 744 S.W.2d 15, 37 (Tex. Crim. App. 1987), *overruled on other grounds*, *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996). A comment, however, which only indirectly refers to the defendant's failure to testify can usually be cured by an instruction to disregard. *See id.* An instruction regarding an improper jury argument may cure error unless "the remark is so inflammatory that its prejudicial effect cannot reasonably be removed by such an admonishment." *Caldwell v. State*, 818 S.W.2d 790, 801 (Tex. Crim. App. 1991), *overruled on other grounds*, *Castillo v. State*, 913 S.W.2d 529, 530-35 (Tex. Crim. App.1996); *see Barnum v. State*, 7 S.W.3d 782, 794-95 (Tex. App.—Amarillo 1999, pet. ref'd).

Here, the prosecutor's arguments cannot be considered as direct comments on appellant's failure to testify. If considered indirect comments on appellant's failure to testify, we find that the court's instructions to disregard removed any prejudicial effect. *See Mijores v. State*, 11 S.W.2d 253, 258 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Chimney v. State*, 6 S.W3d 681, 703-04 (Tex.

App.—Waco 1999, pet. filed); *Saldivar v. State*, 980 S.W.2d 475, 503 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). Accordingly, we overrule point of error one.

POST-ARREST SILENCE

In his second point of error, appellant contends that the trial court erred in permitting testimony about his post-arrest silence. First, an investigating officer, Deputy David Hilborn, testified appellant never mentioned that he was taking medication. Appellant's objection to this testimony, that it shifted the burden of proof, is not the same as his contention on appeal. A complaint on appeal must comport with the objection at trial. *See Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995). Thus, appellant has waived any error about whether this testimony was an impermissible comment on his post-arrest silence. Second, Deputy David Hilborn also testified that in the Trophy Club parking lot, appellant did not complain about any injuries. The trial court denied appellant's objection that this was an unconstitutional comment on his post-arrest silence. However, only evidence that testimonially incriminates a defendant is protected by the Fifth Amendment. *See Sims v. State*, 735 S.W.2d 913, 917 (Tex. App.—Dallas 1987, pet. ref'd). Inquiries about medical assistance and injuries are not protected by the Fifth Amendment. *Id*. at 917-18. Accordingly, the trial court did not err in overruling appellant's objection, and we overrule point of error two.

HEARSAY

In his third point of error, appellant contends the trial court erred in permitting hearsay that appellant was driving. In his testimony, Deputy Hilborn said that a neighbor had identified appellant as the person driving the car which caused the accident. Even if this testimony was inadmissible hearsay, any error in admitting it was harmless. The standard for harm for such nonconstitutional error is Texas Rule of Appellate Procedure 44.2(b): "error . . . that does not affect substantial rights must be disregarded." If it was error to admit hearsay testimony that appellant was driving, it does not affect his substantial rights because two prior witnesses had already identified appellant as the driver of the car. *See Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App.) (holding that any error in the admission of hearsay testimony was harmless in light of other properly admitted evidence proving the same fact), *cert. denied*, 120 U.S. 384, 120 S. Ct. 384, 145 L. Ed.2d 300 (1999). Accordingly, we overrule point of error three.

BOLSTERING

In his fourth point of error, appellant contends that the trial court erred in permitting the State to bolster its witness. After the testimony of the arresting officer, Deputy Hilborn, the State asked of a second officer, "You work [sic] with David Hilborn for a number of years. Do you consider him a reliable person?" The witness answered, "Yes." The trial court overruled appellant's objection to bolstering. Texas Rules of Evidence prohibit evidence of a witness's character for truthfulness unless the witness's character for truthfulness has been attacked by the opposing party. *See* TEX. R. EVID. 608(a). Bolstering occurs when the proponent offers evidence solely to convince the fact finder that a particular witness or source of evidence is worthy of credit when the credibility of that witness or source has not been attacked. *See Cohn v. State*, 849 S.W.2d 817, 819 (Tex. Crim. App. 1993).

Here, the second officer's testimony was offered to bolster Deputy Hilborn's reputation for truthfulness. In reviewing the record, we cannot find an instance where appellant attacked the credibility of Deputy Hilborn. Thus, the trial court erred in permitting evidence of Deputy Hilborn's truthfulness. Having determined that the trial court erroneously admitted such testimony, we must next determine whether the error was harmless. *See* TEX. R. APP. P. 44.2(b). "In applying the harmless error test, the appellate court is to view the whole proceeding, not just the error in isolation." *Woods v. State*, 13 S.W.3d 100, 105 (Tex. App.—Texarkana 2000, pet. ref'd). "An error is harmless if the court, after examining the record as a whole, is reasonably reassured that the error did not influence the jury verdict or had but a slight effect." *Id*.

The bolstering question was a single question in the entire trial. In viewing the record as a whole, we note that there is much evidence of appellant's consumption of an anti-depressant, Zoloft, at the time the accident. His own doctor testified that the anti-depressant would exacerbate the effects of alcohol two hundred to three hundred percent. Another witness testified that she saw appellant at a local bar at ten-thirty o'clock in the evening, where he drank two to three alcoholic drinks in her presence. After our examination of this evidence and the record as a whole, we are reasonably assured that the error in allowing one bolstering answer did not influence the jury in its decision. We thus overrule point of error four.

JURY INSTRUCTION

In his fifth point of error, appellant appeals that the trial court erred in instructing the jury that it could convict him based on a finding of intoxication from a combination of alcohol and another substance. The trial court's instruction to the jury allowed the jury to consider the combination of alcohol with appellant's anti-depressant:

> You are further instructed that if a Defendant indulged in the use of Zoloft, to such an extent that he thereby makes himself more susceptible to the influence of alcohol than he would otherwise would have been, and by reason thereof becomes intoxicated from the recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

The application paragraph allowed the jury to find Appellant guilty if he was intoxicated by reason of the introduction of alcohol into his body, either alone or with Zoloft. Appellant argues that the instruction enlarges the information, which only alleged intoxication by reason of alcohol.

The case *Sutton v. State*, 899 S.W.2d 682 (Tex. Crim. App. 1995), is directly on point. In that case, as here, the information charged the defendant with driving while under the intoxicating influence of alcohol. *Id*. at 683. As in this case, the defendant in *Sutton* claimed to have taken medication that exacerbated the influence of alcohol. *Id*. at 684-84. The trial court gave an instruction to the jury identical to the one at issue in this case, and a plurality of the Court of Criminal Appeals held that the trial court correctly instructed the jury. *Id*. at 685. Although appellant urges us to overrule *Sutton*, we are not in a position to do so. We adhere to its holding and, accordingly, overrule appellant's fifth point of error.

Having addressed all five of appellant's points of error, we affirm the judgment of the trial court.

_____

Joe L. Draughn
Justice

Judgment rendered and Opinion filed October 26, 2000.

Panel consists of Justices Cannon, Draughn, and Lee.[*]

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

[*] Senior Justices Bill Cannon, Joe L. Draughn, and Norman Lee sitting by assignment.