Affirmed and Opinion filed May 18, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00685-CR

DARLENE U. HROMADKA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 14
Harris County, Texas
Trial Court Cause No. 98-40646

O P I N I O N

A jury convicted appellant, Darlene Hromadka, of driving while intoxicated (DWI). Following the trial, the court sentenced her to 180 days in jail probated for one year, assessed a fine, and required her to perform community service. Though she raises four issues on appeal, we affirm her conviction.

BACKGROUND

Early one morning, Houston Police Officer Kevin O'Brien saw appellant driving down Kirby Street in Houston. Thinking she might be speeding, he pulled behind her to pace her car in an effort to verify his suspicions. As he followed her for several blocks, he confirmed that she was indeed exceeding the speed limit. Also during this time period, Officer O'Brien saw her car drift over the center dividing line three times. Now suspecting she might be intoxicated as well, he instituted a traffic stop.

Appellant exhibited several more characteristics leading officer O'Brien to believe she was intoxicated. He noticed the smell of alcohol on her breath. When he asked to see her driver's license and proof of insurance, appellant took several minutes to comply with his request. Officer O'Brien next conducted several field sobriety tests, all of which appellant failed. He placed her under arrest and took her to the station, where she submitted to a breath test. The breath test revealed her blood-alcohol content to be in excess of .10, the legal limit at the time of the stop.[1] Appellant was charged with DWI and a jury convicted her of this offense.

Appellant raises four issues on appeal. She first claims that the prosecutor, in his closing argument, made a comment on her failure to testify. In her second issue, she claims that she was entitled to a limiting instruction in the jury charge regarding the jury's consideration of a sheet of paper listing the warnings given to her before she took the breath test. Appellant also brings a third issue relating to the jury charge, claiming that she was entitled to an instruction on the voluntariness of the field sobriety tests. Finally, appellant claims that the trial court erred in overruling her objection to the State's mischaracterization of Officer O'Brien's testimony in its closing argument.

THE STATE'S COMMENT ON APPELLANT'S FAILURE TO TESTIFY

Appellant claims that the State commented on her failure to testify during its closing argument.

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[1] The legal blood-alcohol limit was changed after the date of this stop. It is currently .08. *See* TEX. PEN. CODE ANN. § 49.01(2)(B) (Vernon Supp. 2000).

During his argument, the prosecutor stated:

> Let me show you [the evidence] we brought. Uh, first, we have the driving facts. We have that she was speeding. She broke the law. Now, what did she say? The officer's testimony is she says, "I didn't think I was speeding." She had no idea— . . .
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> She indicated she didn't think she was speeding, Well, that's reasonable considering the level of intoxication she was under at the time. *Is there any testimony to contradict that? There's not*.

(emphasis added). Appellant objected, persuaded the trial court to instruct the jury to disregard, but was unsuccessful in her motion for a mistrial. Appellant argues that the final two sentences of the prosecutor's argument amount to a comment on her failure to testify, urging that the statement refers to the lack of testimony contradicting what she thought—testimony only she could give. The State, however, argues that the prosecutor's statement refers to the lack of evidence to contradict the fact that she was intoxicated at the time she was stopped.

Comments on the defendant's failure to testify violate the Code of Criminal Procedure, as well as the State and Federal Constitutions. *See* TEX. CODE CRIM. PROC. ANN. art. 38.08 (Vernon 1984); *see also Gardner v. State*, 730 S.W.2d 675, 700 (Tex. Crim. App. 1987). Such comments become reversible error, however, only in two circumstances: (1) when the prosecutor manifestly intended the statement to be a comment on the defendant's failure to testify; or (2) if the comment is of such a character that the jury would naturally take it to be a comment on the defendant's failure to testify. *See Nickens v. State*, 604 S.W.2d 101, 105 (Tex. Crim. App. 1980).

Here, while the jury might take the comment to be directed at the defendant's failure to testify, it is not clear that the prosecutor "manifestly intended" this goal, nor is it clear that this is the only meaning a juror would naturally glean from the comment. Rather, since the comment is capable of two interpretations, one improper and the other proper, we find any error in the comment, if any, was cured by the court's instruction to disregard. *See Montoya v. State*, 744 S.W.2d 15 (Tex. Crim. App. 1987) (reaching a like conclusion on similar facts). Because any error was cured by the court's instruction, we do not find the prosecutor's comment warranted a mistrial. Appellant's first issue is overruled.

ENTITLEMENT TO A LIMITING INSTRUCTION ON THE USE OF EVIDENCE

Appellant claims that she was entitled to a limiting instruction in the jury charge on the use of the warnings read to her before her breath test. During its case-in-chief, the State proffered a sheet of paper signed by Officer O'Brien, listing the warnings given to appellant before she took the breath test at the station. Appellant objected to the admission of this document on relevance grounds, and the State responded that the warnings were being admitted solely to show the voluntariness of the breath test. Appellant asked for and received a jury instruction limiting the jury's consideration of the warnings only to the issue of voluntariness. The instruction was given contemporaneously with the admission of the evidence. At the charge conference, however, appellant asked for a limiting instruction in the charge, as well. The trial court denied her request, which appellant claims was error. In support of her argument appellant relies on *Rankin v. State*, 974 S.W.2d 707 (Tex. Crim. App. 1996), a case involving the aggravated sexual assault of a child.

In *Rankin*, the State sought to introduce two other instances of sexual molestation that occurred immediately prior to the event forming the basis of the indictment. *See id.* at 708. The defendant objected to the admission of the testimony on the basis of Rule 404(b), which prohibits the admission of evidence of extraneous offenses to show character conformity. *See id.* The trial court overruled the objection but granted appellant's request for a limiting instruction, giving it only in the jury charge. *See id.* The Court of Criminal Appeals found the denial of a contemporaneous instruction was erroneous, since the limiting instruction in the jury charge was too untimely to ensure the jury would properly consider the evidence. *See id.* at 712-13. The court sent the case back to the court of appeals to determine if the error was subject to harmless error review, and, if so, whether the error was harmless. *See id.* at 713. The court also stated that both a contemporaneous limiting instruction and a jury charge limiting instructions were required when requested. *See id.* at 712-13 n.3.

Here, however, unlike the situation in *Rankin*, the evidence was admissible only for one purpose. Unlike extraneous offenses which can easily be used to establish guilt if a limiting instruction is not given or is given untimely, the warnings read to appellant are only relevant to the voluntariness of the breath test.

Because the evidence had no other purpose, a limiting instruction was not required under Rule of Evidence 105. *See* TEX. R. EVID. 105.

Further, even if such an instruction was required by *Rankin*, we fail to see how the lack of an instruction in the jury charge was harmful. Under the standard set out by the Court of Criminal Appeals in *Almanza v. State*, an error in the jury charge must be reversed if the defendant objects and shows "some harm" resulting from the error. *See* 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). A review of the record, however, reveals that no harm resulted from the error. Here, since the evidence could not have been used to establish guilt, a fact which appellant concedes, it could not have had an effect on the jury's verdict.[2] Thus, even if the court erred, we find no harm in its error and overrule appellant's second issue.

ENTITLEMENT TO A JURY CHARGE LIMITING INSTRUCTION ON VOLUNTARINESS OF THE FIELD SOBRIETY TESTS

Appellant also argues that she was entitled to an instruction in the jury charge on the voluntariness of the field sobriety tests. The State counters by claiming that appellant waived this argument by failing to raise the objection at trial. We agree.

To preserve an error for appeal, the record must reflect that the complaint was made to the trial court in a timely fashion and the trial court ruled on the complaint. *See* TEX. R. APP. P. 33.1(a). If, however, an objection is made to the admission of evidence, but the same evidence is later admitted without objection, the complaint about the admission is waived. *See Rogers v. State*, 853 S.W.2d 29, 35 (Tex. Crim. App.1993).

Here, though appellant objected to the use of the field sobriety test in a pretrial motion alleging that the tests were involuntary, Officer O'Brien testified without objection about the tests and the test results. Accordingly, we find appellant has waived her objection to the admission of this evidence and was not

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[2] Appellant argues that the prosecutor's emphasis on the results of the breath test show that she was harmed by the charging error. The results of the breath test, however, have no relation to the admission of the warnings read to her before the test was taken, especially since appellant did not argue at trial that the breath test was involuntary, nor did she request an instruction on the voluntariness of the breath test.

entitled to a limiting instruction in the jury charge on this issue. We, therefore, overrule her third issue.

MISCHARACTERIZATION OF WITNESS TESTIMONY IN CLOSING ARGUMENT

In her final issue, appellant complains that the trial court erred in overruling her objection to the State's comments in closing argument regarding Officer O'Brien's testimony. During its closing argument, the prosecutor stated, "The officer's testimony is she [the appellant] says [after he pulled her over], 'I didn't think I was speeding.'" Appellant objected, claiming that this was a misstatement of the officer's testimony since the officer actually testified that appellant told him, "I wasn't speeding." The trial court overruled her objection, and the State responded by stating, "She indicated she didn't think she was speeding."

The State's argument was proper. There are four permissible areas of closing argument: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to the argument of opposing counsel; and (4) pleas for law enforcement. *See Johnson v. State*, 915 S.W.2d 653, 660 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). We do not find the State's characterization of appellant's testimony to be outside this realm. Certainly, if appellant did not tell the officer that she did not think she was speeding, it is a reasonable deduction from the evidence that she would necessarily have formed that thought in her effort to tell him she was not speeding. Moreover, a summary of the evidence does not entail a verbatim recitation of witness testimony. Further, a review of the record fails to reveal that the statement affected her substantial rights by contributing to the jury's verdict. We overrule her fourth issue and affirm the judgment of the trial court.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed May 18, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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