COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

MICHAEL SHANE READ,	'	
Appellant,	'	No. 08-13-00222-CR
V.	'	Appeal from the
THE STATE OF TEXAS,	'	355th District Court
Appellee	'	of Hood County, Texas
	'	(TC# CR12347)

O P I N I O N[1]

Appellant, Michael Shane Read, appeals his conviction of evading arrest with a motor vehicle, enhanced to a second degree felony, and sentenced to fifteen years. In a single issue, Appellant argues the trial court erred in allowing the State to improperly argue that Appellant failed to call his wife as a witness under Texas Rules of Evidence 513 and 504. We affirm.

Factual History and Procedural Background

Appellant was observed travelling with a female passenger on a motorcycle at 89 miles per hour per his radar gun by State Trooper Duecker. Trooper Duecker took chase, reaching his vehicle's maximum speed of 125 miles per hour and momentarily lost sight of Appellant's

[1] This case was transferred to this Court from the Second Court of Appeals pursuant to an order issued by the Supreme Court of Texas. *See* TEX.GOV'T CODE ANN. § 73.001 (West 2013).

motorcycle. During the ensuing chase, Trooper Duecker estimated the speed of the motorcycle to be approximately 140 miles per hour. Trooper Duecker's squad car video showed Appellant's motorcycle travelling at a high rate of speed, passing other vehicles on the wrong side of the road, avoiding other vehicles that had pulled over in response to the lights and sirens of the accompanying police cars. Appellant is also seen in the video passing two other police cars assisting in the chase. Appellant's motorcycle begins to shed parts (ie. exhaust pipe), but he continued to flee as Trooper Duecker attempted to pull him over. Eventually, Appellant lost control and crashed.

Trooper Sappington testified, that based on his investigation, a truck had pulled out causing Appellant to swerve to avoid impact and he "laid the motorcycle over on its side" as it slid across several lanes of traffic. Appellant, the driver of the motorcycle, and his wife, the passenger, Lisa Kay Brown were injured in the accident and transported by ambulance to the hospital. Brown was later flown to a Fort Worth hospital by helicopter. Appellant and Brown's medical records were introduced at trial reflecting their blood test results were positive for Amphetamines. The medical records indicated that each identified the other as their spouse. Brown was found with a fanny pack on, which was open and empty. A search of the crash area did not reveal anything unusual.

Sergeant Davis, who was also involved in the pursuit, observed Brown get up from the accident, limp across the intersection to the side of the road and fall to the ground. Davis also testified to seeing Appellant attempt to get up, limp along, fall down and seemed to be looking for something in the grassy area next to the roadway.

Trooper Duecker, during punishment, testified that based on his experience and training, he concluded that Appellant was fleeing because he was in possession of narcotics and disposed of it in flight. Trooper Duecker pointed to Appellant and Brown's positive test for amphetamines and the open, empty fanny pack found on Brown. Trooper Duecker also testified that Appellant had been previously placed on deferred adjudication in Tarrant County. However, Appellant had been adjudicated guilty, in part, because he had tested positive for methamphetamine.

Appellant called four character witnesses in the punishment phase. The first was his mother, Ms. Williams, who requested mercy from the jury because Appellant assists her in taking care of his 91 year old grandmother and another brother who needs a heart transplant. The second witness, Redding, was a step-brother who had had a recent heart attack which necessitated Appellant taking care of their 91 year old grandmother. He asked for mercy so Appellant could continue to care for the family. He did acknowledge he was aware that Appellant had gone to prison after having his probation revoked for the use of methamphetamine. He told the jury that last time he was aware of Appellant using methamphetamine was three years ago. The next witness, Heidelberg, was a roommate and co-worker of Appellant. This witness also asked the jury for mercy on behalf of Appellant. Heidelberg testified that he had known Appellant since junior high school and was aware that Lisa Kay Brown was Appellant's wife. Heidelberg testified the last time Appellant used methamphetamine was a year ago after Appellant was released from prison. Heidelberg also stated that he had used methamphetamine with Appellant and that Appellant had supplied him with methamphetamine.

After Appellant rested in the punishment phase of the trial, outside the presence of the jury, the State called Lisa Kay Brown as a witness. Brown testified that she and Appellant had been

married through an official ceremony in 2004. Brown invoked her privilege not to testify against her husband, the Appellant.

The State's final remarks of closing argument at the punishment phase included the following:

> State: I want you to uphold the law in the charge the Judge has given you and not consider for any purposes whether or not the defendant testified. But you can consider this, you can consider the fact that he didn't call his wife –
>
> Defense: Objection –
>
> State: -- as a witness.
>
> Defense: -- Rule 513(a) and (b), no comment or inference permitted, and the Rule 504(b)(2) exception does not apply, Your Honor.
>
> Court: I'll allow the – the argument.
>
> State: It specifically says I can't call her. She has a privilege not to testify against him. But if she doesn't, that I can comment and y'all can consider the fact that she has relevant evidence as to both the crime and punishment in this case. And yet she chose not to testify and they chose not to call her as a witness.

Issue

Appellant's sole issue is the trial court abused its discretion in allowing the State to comment on Appellant's failure to call his wife as a witness and that the State was prohibited from doing so pursuant to Rules 504 and 513 of the Texas Rules of Evidence.[2]

The State responds that the trial court did not err, in that, Rule 504 (b)(2) of the Texas Rules of Evidence specifically authorizes such comments.

[2] We note that Rules 504 and 513 were amended by order of the Supreme Court and Court of Criminal Appeals effective April 1, 2015. This case was tried in 2013 and thus the former versions of Rules 504 and 513 form the basis of Appellant's points of error. All references to TEX.R.EVID. 504 and 513 are to the former versions that were effective January 1, 2007 and March 1, 1998, respectively.

Standard of Review

A trial court's ruling on an objection to a jury argument is reviewed using an abuse-of-discretion standard. *Lemon v. State*, 298 S.W.3d 705, 707 (Tex.App.--San Antonio 2009, pet. ref'd); *see also Garcia v. State*, 126 S.W.3d 921, 924 (Tex.Crim.App. 2004); *Fahrni v. State*, 473 S.W.3d 486, 501 (Tex.App.--Texarkana 2015, pet. ref'd).

Applicable Law

We construe Appellant's argument that the trial court erred by permitting improper jury argument in allowing the State to comment on the failure of Appellant to call his wife as a witness. Proper jury argument includes four areas: (1) summation of the evidence presented at trial; (2) reasonable deduction drawn from that evidence; (3) answer to the opposing counsel's argument; or (4) a plea for law enforcement. *Freeman v. State*, 340 S.W.3d 717, 727 (Tex.Crim.App. 2011); *Underwood v. State*, 176 S.W.3d 635, 639 (Tex.App.--El Paso 2005, pet. ref'd). Improper jury argument that falls outside the proper areas, cannot constitute reversible error unless it violates a mandatory statute, is extreme or manifestly improper, or inserts harmful new facts against the accused into the trial. *Temple v. State*, 342 S.W.3d 572, 602-603 (Tex.App.--Houston [14th Dist.] 2010), *aff'd,* 390 S.W.3d 341 (Tex.Crim.App. 2013); *see Brown v. State*, 270 S.W.3d 564, 570 (Tex.Crim.App. 2008).

Turning to the applicable statutes, former TEX.R.EVID. 513 (effective March 1, 1998), in part, instructs that:

> (a) **Comment or Inference Not Permitted.** Except as permitted in Rule 504(b)(2), the claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel, and no inference may be drawn therefrom.
>
> (b) **Claiming Privilege Without Knowledge of Jury**. In jury cases,

> proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

While former TEX.R.EVID. 504(b)(2)(effective January 1, 2007) states:

> *Failure to call as witness.* Failure by an accused to call the accused's spouse as a witness, where other evidence indicates that the spouse could testify to relevant matters, is a proper subject of comment by counsel.

Rule 504(b)(2) permits the State to properly comment on the accused in calling a spouse to testify, especially when "other evidence indicates that the spouse could testify on relevant matters[.]" *Johnson v. State*, 803 S.W.2d 272, 282 (Tex.Crim.App. 1990), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2914, 115 L.Ed.2d 1078 (1991), *overruled on other grounds* by *Heitman v. State*, 815 S.W.2d 681 (Tex.Crim.App. 1991); *also see McDuffie v. State*, 854 S.W.2d 195, 217 (Tex.App.--Beaumont 1993, pet. ref'd)*; Vasquez v. State*, No. 13-05-531-CR, 2008 WL 1822519, at *11 (Tex.App.--Corpus Christi April 24, 2008, pet. ref'd)(mem. op., not designated for publication). The *Johnson* Court concluded that this comment is allowed due to the State's inability to call the spouse as a witness. 803 S.W.2d at 282. This inability could possibly allow the jury "to draw an inference adverse to the State's case." *Id.* at 282 n.6, *citing* 33 S. Goode, O. Wellborn & M. Sharlot, Guide to the Texas Rules of Evidence: Civil and Criminal § 504.7 (Texas Practice 1988)(If the defendant's spouse's testimony could be adverse, the defendant's failure to present this testimony "may be properly be viewed as the responsibility of the accused."). The *Johnson* Court also noted in footnote 7 that the general rule that Rule 513(b) and 504(b)(2) taken together forbid the State from calling a spouse in the presence of the jury to compel an invocation of the privilege so the jury may draw a negative inference of the defendant, but may comment on the accused's failure to call a spouse if he or she could testify to relevant matters. *Johnson*, 803

S.W.2d at 282 n.7. The Court points out that if the State was permitted to call spouses, forcing the invocation in the presence of the jury, then the underlying policy allowing for a comment of the failure of the accused in calling a spouse disappears. *Id.* It follows that the invocation of a spousal privilege in the presence of the jury will almost inevitably allow the jury to draw a negative inference to the accused. *Id.*

ANALYSIS

Brown was in position to testify as to relevant matters. She was present during the offense that gave rise to the charges of which the Appellant stands convicted. Conceivably, she would have known if he was in possession of prohibited contraband as he fled from State Trooper Duecker. She could have explained the purpose of the fanny pack she carried, open and empty. Brown may have been able to shed some light on why Appellant chose to flee instead of pulling over. Brown could also offered evidence regarding Appellant's drug rehabilitation or lack thereof.

During punishment, as a witness, Brown's testimony could bear on relevant matters the jury had before it. The State's comment on Appellant's failure to call Brown as a witness is expressly permitted under Rule 504(b)(2). The trial court did not abuse its discretion in overruling the Appellant's objection during closing argument.

CONCLUSION

We find no reversible error in the case. The judgment is affirmed.

September 28, 2016

YVONNE T. RODRIGUEZ, Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.

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