IN THE COURT OF APPEALS OF IOWA

No. 3-294 / 12-0860
Filed May 30, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSEPH STEVEN HILL,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Eliza Ovrom, Judge.

Joseph Hill appeals from a conviction of operating a motor vehicle while intoxicated. **AFFIRMED.**

Ryan R. Gravett of Oliver Law Firm, P.C., Windsor Heights, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, John Sarcone, County Attorney, and David Porter, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

EISENHAUER, C.J.

Joseph Hill appeals from a conviction of operating a motor vehicle while intoxicated. He asserts the State presented insufficient evidence to the jury that he was operating the vehicle in question. He also contends the prosecutor made improper statements during closing arguments.

I. Facts.

On October 29, 2012, Police Officer Andrew Wierck was overseeing the impoundment of a vehicle on the side of the road and saw a van run a red light. Officer Wierck saw the van pull into a Quiktrip and then back up to a gas pump. After completing the impoundment, the officer drove to the Quiktrip, pulled behind the van, and approached a man who was about to pump gas. The man identified himself to Officer Wierck as Joseph Bonner, denied being the driver of the van, and stated the driver was inside.

Joseph Hill came out of the Quiktrip and asked what was going on. Officer Wierck asked Hill if he was driving the vehicle, and Hill said he was. Officer Wierck noticed indications Hill was intoxicated, administered field sobriety tests, and arrested Hill for operating while intoxicated.

At trial, Officer Wierck testified as above. He acknowledged he did not see the driver of the van as it went through the red light and did not see who exited the van from the driver's seat at the gas pump. The State called no other witnesses.

At trial, Hill testified:

> Q. And you heard Officer Wierck claim earlier that your van ran a red light? Do you recall that that happened? A. Yes, he said my van ran a red light.

> Q. No. Do you recall your van running a red light? A. No, I do not recall my van running a red light because I was watching. It was not red.
>
> Q. What color was the light when the van entered the intersection? A. When I entered the intersection, the light started turning yellow then.

On cross-examination, the prosecutor asked Hill:

> Q. And you testified today, when I entered the intersection, right? A. No.
>
> Q. You did not testify to that? A. No. I said when we entered the intersection.
>
> Q. Are you certain? A. Yes, I'm pretty certain, because I was not driving.
>
> Q. I want to make sure we're on the same page, Mr. Hill. It's your testimony right here, right now under cross-examination that you did not say, when I entered the intersection? A. No. I was aware that I said when we entered the intersection. Which intersection are you talking about?
>
> Q. The intersection where the red light was. A. Then I most likely said when the van entered the intersection. I'm in the van, so I'm in the intersection.

Hill stated Sarah was driving the car. He testified, "Sarah was my girlfriend that I was protecting." Just prior to closing arguments, the prosecutor delivered copies of two appellate court opinions[1] to the court and the defense. The prosecutor informed the court they were relevant

> [i]f in the event based upon, and strictly based upon, what [defense counsel] argues in his closing arguments, if in rebuttal and rebuttal only I ask the rhetorical question of, Why didn't Sarah testify or why didn't the [defendant's] brother testify for the defendant to say they were operating the motor vehicle, that's a proper comment for me to make under *State v*. *Craig*.

The defense objected, "Regardless of what the ruling was in *Craig*, the Court has already ruled on a motion in limine offered by the State . . . that evidence that was not entered into the record cannot be commented on in argument."

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[1] *State v. Craig*, 490 N.W.2d 795 (Iowa 1992), and *State v. Singh*, No. 10-1583, 2011 WL 5387279 (Iowa Ct. App. Nov. 9, 2011).

Both sides argued the matter came down to a question of credibility—did the jury believe Hill when he made the unsworn statement that he was driving, or his sworn statement that he was not driving. In closing rebuttal argument, the prosecutor stated:

> The old adage is deny what you can't admit, admit what you can't deny. What he couldn't deny that night was he was driving because he believed the officer caught him, and this whole argument that somehow he had time to think about it when the officer came up to the car, serious, are we serious? The flaw in the argument is this: If Sarah, his girlfriend, was driving, or Joe, his best friend, saw Sarah driving, where is that testimony? We heard testimony that the defendant was driving, not Sarah, not Joe, not James.

Hill was found guilty of operating while intoxicated. Hill appeals, arguing there is insufficient evidence corroborating his admission to support the conviction and the State's closing argument improperly shifted the burden of proof to the defendant.

II. Scope and Standard of Review.

We review sufficiency challenges for correction of legal error and will uphold the verdict if it is supported by substantial evidence. *State v*. *Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006). Substantial evidence is that proof which would convince a rational finder of fact of the defendant's guilt beyond a reasonable doubt. *State v*. *Meyers*, 799 N.W.2d 132, 138 (Iowa 2011). We view the evidence in the light most favorable to the verdict. *State v*. *Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011) (instructing courts to review the totality of the evidence and not simply that which supports the verdict). The burden remains on the State to prove every fact necessary to constitute the crime charged. *Id*.

Hill complains the prosecutor was guilty of misconduct by a remark made in closing argument to the jury. Our review is for abuse of discretion. *See State v*. *Craig*, 490 N.W.2d 795, 797 (Iowa 1992).

III. Discussion.

A. *Corroboration of Admission*. Iowa Rule of Criminal Procedure 2.21(4) provides, "The confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the defendant committed the offense."[2]

> Admissions can constitute a confession when they "amount to an acknowledgement of the guilt of the offense charged." [*State v*.] *Capper*, 539 N.W.2d [361,] 364 [(Iowa 1995)]. As a result, admissions are treated with the same evidentiary precautions as confessions. *See State v*. *Polly*, 657 N.W.2d 462, 466 n.1 (Iowa 2003). Thus, admissions of essential facts or elements of the crime made after the alleged crime must be supported with sufficient corroborating evidence. *Id*.
>
> Corroborating evidence is sufficient to support a conviction based on a confession when it tends to "confirm[ ] some material fact connecting the defendant with the crime." *State v*. *Robertson*, 351 N.W.2d 790, 793 (Iowa 1984). It is sufficient as long as it supports the content of the confession and if, together with the confession, proves the elements of the charge against the defendant beyond a reasonable doubt. *State v*. *Wescott*, 104 N.W. 341, 344 ([Iowa] 1905). Corroborating evidence may be either direct or circumstantial. *See* [*State v*.] *Liggins*, 524 N.W.2d [181,] 187 [(Iowa 1994)]. It need not be strong evidence, "nor need it go to the whole of the case so long as it confirms some material fact connecting the defendant with the crime." *Id*. Circumstantial

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[2] Our courts have

> recognized a distinction between a confession and an admission. *State v. Davis*, 212 Iowa 131, 134, 235 N.W. 759, 761 (1931). "[A] *confession* comprises the whole criminal charge; whereas an admission relates only to a particular fact or circumstance covered thereby." *Id.* To constitute a confession the admissions or declarations must amount to an acknowledgement of the guilt of the offense charged. *State v. Abrams*, 131 Iowa 479, 484, 108 N.W. 1041, 1043 (1906).

State v. Capper, 539 N.W.2d 361, 364 (Iowa 1995) *abrogated on other grounds by State v. Hawk*, 616 N.W.2d 527 (Iowa 2000).

> corroborating evidence may include several facts that, when combined, support the admission. *Id*.

Meyers, 799 N.W.2d at 139.

"The existence of corroborating evidence is an issue to be decided by the court. The sufficiency of such evidence is a question for the jury." *State v*. *Gregory*, 327 N.W.2d 218, 221 (Iowa 1982).

Here, the trial court determined Hill's testimony, "when I entered the intersection," constituted corroborating evidence with respect to Hill's admission to Officer Wierck. "It is well settled that a defendant's trial testimony may furnish corroboration of his confession." *Id*. Viewing the evidence in the light most favorable to the State, we conclude Hill's own testimony provided sufficient corroboration to send the question to the jury.

Instruction No. 9 informed the jury that "[t]he defendant previously confessed to an element of the crime, i.e., that he was driving." The instruction continued, "The defendant cannot be convicted by a confession alone. There must be other evidence that the defendant committed the crime. This evidence need not completely prove the crime charged, but it must support the veracity of the defendant's confession." As noted above, the sufficiency of corroborating evidence is for the jury to determine. *See id*.

Inherent in our standard of review of jury verdicts in criminal cases is the recognition the jury was free to reject certain evidence and credit other evidence. *State v*. *Anderson*, 517 N.W.2d 208, 211 (Iowa 1994). The credibility of witnesses, in particular, is for the jury. "A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its

judgment, such evidence should receive." *Liggins*, 557 N.W.2d at 269; *see also State v*. *Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). Thus, the jury was free to disbelieve Hill's recantation of his admission and testimony. We will not interfere with the jury's verdict here.

B. *Closing Arguments*. On appeal, Hill argues the prosecutor's comments about the lack of testimony from the defendant's girlfriend or best friend violated the principle espoused in *State v*. *Hanes*, 790 N.W.2d 545, 557 (Iowa 2010). The State argues this issue is not preserved for our consideration. Although counsel made no objection at the time the prosecutor made the statements in closing argument, he did object when the prosecutor told the court of his plan to refer to the defense's failure to call certain witnesses. We find error was properly preserved.

In *Hanes*, 790 N.W.2d at 556, our supreme court discussed the propriety of a prosecutor's rebuttal arguments, which were described as follows:

> Hanes's complaint is the prejudicial nature of the prosecuting attorney's statement in rebuttal shifting the burden to call witnesses to the defense.
>
> The prosecution's opening statement referenced two witnesses, Paul McGonigle and Willie Brown, and explained their anticipated testimony. The State then failed to call these witnesses. Hanes's defense attorney highlighted this inconsistency in his closing argument, stating "The state has the burden to prove its case. Where are these people if they're so important?" In response, the State argued in rebuttal:
>
> > Now, the-the defense brought up Paul McGonigle. And I mentioned Paul McGonigle in my opening. I also mentioned Willie Brown. You didn't see them; did you? No, we didn't call them. You know who else didn't call them? The defense didn't call them. The defense called witnesses. The defense can call any witness they so desire. If there was anything helpful for the defendant, the defense could have called Paul McGonigle or Willie Brown.

> . . . .
> . . . If there was anything the defense really wanted from either one of these individuals that they felt was beneficial or helpful to the defendant, they could have called them.

Hanes's attorney did not object, and on appeal he claimed trial counsel was ineffective. The supreme court stated:

> The State bears the burden of proof in criminal cases. It is improper for the State to shift the burden to the defense by suggesting the defense could have called additional witnesses. "'It is generally improper for a prosecutor to comment on a defendant's failure to call a witness. Such comment can be viewed as impermissibly shifting the burden of proof to the defense.'" *Byford v*. *State*, 994 P.2d 700, 709 (Nev. 2000) (quoting *Rippo v*. *State*, 946 P.2d 1017, 1026 (Nev. 1997) (citation omitted)); *cf*. *State v*. *Poppe*, 499 N.W.2d 315, 318 (Iowa Ct. App. 1993) ("[T]he prosecutor's suggestions about defendant counting on the witnesses not coming in to testify comes extremely close to suggesting the State does not bear the burden of proving defendant's guilt.").
>
> It was appropriate for defense counsel to call attention to the State's failure to call these witnesses after the State had outlined the witnesses' expected testimony in the opening statement. *It was not proper for the State to attempt to shift the burden to the defense to call the witnesses or to suggest the jury could infer from the defense's failure to call the witnesses that they would not have said anything helpful to the defense*. This situation is not one where the prosecutor generally referenced an absence of evidence supporting the defense's theory of the case. *See United States v*. *Emmert*, 9 F.3d 699, 702-03 (8th Cir. 1993); *State v*. *Swartz*, 601 N.W.2d 348, 353 (Iowa 1999).[3]

Hanes, 790 N.W.2d at 556-57 (emphasis added). However, the *Hanes* court did not decide the ineffective-assistance-of-counsel claim because it had reversed on other grounds. *Id*. at 557 ("[W]e need not address whether defense counsel was deficient and caused prejudice by failing to object to the prosecutor's

[3] Both *Emmert* and *Swartz* involved questions about whether the State improperly commented on the defendant's failure to testify and thus are inapposite to the cases here. *See Emmert*, 9 F.3d at 703; *Swartz*, 601 N.W.2d at 353.

statements. We trust the prosecutor will refrain from similar statements upon retrial.").

In *Craig*, 490 N.W.2d at 797, the court articulated the "correct rule" regarding a prosecutor's comment on a defendant's failure to call witnesses as follows: "A prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as it is not phrased to call attention to the defendant's own failure to testify." *See also State v*. *Bishop*, 387 N.W.2d 554, 563 (Iowa 1986) ("In the past we have expressed concern about prosecution arguments that focus on lack of evidence or failure to produce witnesses when the law places the burden to produce evidence on the State, not the defendant. However, not all remarks relating to the evidence are forbidden. 'A prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as it is not phrased to call attention to the defendant's own failure to testify.'" (citations omitted)). Hill argues that *Hanes* changed that rule. We disagree.

Hanes held that where the State outlined in its opening statement expected testimony of witnesses and then failed to present that testimony—

> It was appropriate for defense counsel to call attention to the State's failure to call these witnesses after the State had outlined the witnesses' expected testimony in the opening statement. It was not proper for the State to attempt to shift the burden to the defense to call the witnesses or to suggest the jury could infer from the defense's failure to call the witnesses that they would not have said anything helpful to the defense.

790 N.W.2d at 557. The *Hanes* court then inferred it is not improper for a prosecutor to generally reference an absence of evidence supporting the defense's theory of the case. *See id.* ("This situation is *not* one where the

prosecutor generally referenced an absence of evidence supporting the defense's theory of the case." (emphasis added)). Here, the prosecutor generally referenced an absence of evidence supporting the defense's theory of the case—that Hill was not driving. Hill's claim of prosecutorial misconduct is not supported by the record.

Moreover, the jury was properly instructed that it was the State's burden to prove the defendant was operating the vehicle. We presume the jury obeys the instructions given. *See State v. Morrison*, 368 N.W.2d 173, 176 (Iowa 1985) ("A jury is presumed to have followed its instruction absent evidence to the contrary.").

AFFIRMED.

Tabor, J., concurs; Potterfield, J., dissents.

POTTERFIELD, J. (dissenting)

I dissent from the majority's conclusion that the prosecutor's argument did not attempt to shift the burden of proof to Hill. I would reverse and remand for new trial.

The prosecutor explicitly argued that the defense should have produced two witnesses, violating the rule in *Hanes* and conflicting with the presumption of innocence. *See* 790 N.W.2d at 556 ("It is generally improper for a prosecutor to comment on a defendant's failure to call a witness. Such comment can be viewed as impermissibly shifting the burden of proof to the defense." (internal quotation marks and citations omitted)). The majority suggests that *Hanes* will prohibit the State from burden-shifting arguments only when the facts include the State's opening comments to the jury that certain, specific witnesses will testify. *Hanes* is not drawn so narrowly. Whenever a prosecutor argues the defendant has an obligation to call witnesses, the defendant's presumption of innocence is critically undermined.

The prosecutor here argued to the jury that Hill's testimony that he was not the driver of the van was not believable. But then, the prosecutor said: "If Sarah, his girlfriend, was driving, or Joe, his best friend, saw Sarah driving, where is that testimony? We heard testimony that the defendant was driving, not Sarah, not Joe, not James." There is no meaningful distinction between the prosecutor's statement here and the *Hanes's* prosecutor's formulation that the defense could have called witnesses: "If there was anything helpful for the defendant, the defense could have called Paul McGonigle or Willie Brown." *See id.*

Undoubtedly, the "correct rule" as announced in *Bishop*, 387 N.W.2d at 563, and reiterated in *Craig*, 490 N.W.2d at 797, that the State may not comment on the defendant's failure to testify, was expanded in *Hanes* to prohibit a prosecutor's argument that the defense should have called witnesses. *See Hanes*, 790 N.W.2d at 556-57. In *Craig*, the defendant asserted the affirmative defense of justification, and the prosecutor's argument was that Craig failed to support his claim that his victim was armed and reaching for a weapon. *See* 490 N.W.2d at 796. *Bishop* involved two general comments in rebuttal argument: "[Defense counsel] did not put the defendant on trial," *see* 387 N.W.2d at 562, and "[T]he defendant had the opportunity to put on evidence if he chose to." *See id.* at 563. The statements made in *Bishop* are exactly the argument that "generally referenced an absence of evidence supporting the defense's theory of the case." *Hanes*, 790 N.W.2d at 557. That argument would still be permissible under *Hanes*.

Particularly where the defendant testifies as in *Hanes* and here, the prosecutor asking the jury to hold the defendant responsible for the absence of potential defense witnesses is a clear signal that the defendant, not the State, should have presented the evidence. The improper statement is prejudicial when it challenges an element of the crime on which the State bears the burden of proof.

It is the State's burden to prove each of the elements beyond a reasonable doubt. *State v*. *Gray*, 216 N.W.2d 306, 307 (Iowa 1974). The district court abused its discretion in allowing the prosecutor to tell the jury the defendant should have called particular witnesses. There was no additional instruction to

the jury. Unlike in *Hanes*, defense counsel here objected to the argument, giving the district court ample opportunity to prevent it. I would reverse and remand for new trial.