Affirmed as Modified and Opinion Filed November 7, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01218-CR

CURTIS FRANKLIN MORROW, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court No. 9
Dallas County, Texas
Trial Court Cause No. MB-1545684-K

MEMORANDUM OPINION

Before Justices Francis, Myers, and Whitehill
Opinion by Justice Whitehill

Following a trial during which appellant testified that his field sobriety test performances were due to preexisting physical injuries and a head injury due to his accident, a jury convicted appellant of driving while intoxicated and assessed punishment at forty-five days confinement in the county jail and a $500 fine. Appellant argues that the State exceeded the scope of proper jury argument and shifted the burden of proof by arguing that he failed to produce medical records supporting his claimed head injury and a pre-existing hip injury and failed to take a breath test to prove he was not intoxicated.

He further argues that: (i) the State improperly argued that liability concerns would have precluded his confinement had he sustained a head injury; (ii) the errors concerning argument constitute cumulative error; (iii) his conviction is invalid because the trial court failed to adjudge

him guilty and properly pronounce his sentence; and (iv) the judgment should be modified to reflect that the jury assessed punishment.

We modify the judgment, and affirm as modified.

I. Background

At about 3:00 in the afternoon, appellant's truck collided with a brick stairwell in a shopping center. Immediately before the collision, appellant was stopped at a red light. He did not move when the light turned green, so the traffic went around him. He then abruptly sped off and hit the center curb, causing the left tire to come off of the truck. The truck then travelled across several lanes of oncoming traffic and into the shopping center parking lot, where it ran over a flower bed and slammed into the brick stairwell. Bricks from the stairwell fell on the truck, the windshield was shattered, and the air bags deployed.

Officer James Knabel investigated the accident and interacted briefly with appellant. Knabel did not notice if appellant was intoxicated, and his accident report said appellant was not injured.

Officer Robert Porter was dispatched to the scene as back-up. When he initially spoke with appellant, Porter thought he seemed "a little shaken up," "unsure of himself," and confused by where he was and what he was doing, but he did not appear to be injured. Porter asked appellant if he was injured and wanted an ambulance, but appellant assured him he was okay and did not require assistance. As he continued speaking with appellant, Porter noticed that appellant's breath smelled like alcohol, his eyes were bloodshot and watery, and he was having trouble standing. Appellant denied that he had been drinking.

Appellant told Porter that he had suffered a hip injury years ago, and asked him if that would prevent him from performing field sobriety tests. Appellant submitted to the tests. Appellant also asked about taking a breathalyzer test.

Porter, however, did administer three field sobriety tests. The first test, the horizontal gaze nystagmus test, could not be completed because appellant was unable to follow Porter's instructions. Appellant's performance on the walk-and-turn test showed five of eight possible intoxication "clues." Appellant displayed three of four intoxication clues on the one-leg stand test. The squad car recording of these tests was played for the jury.

While performing the tests, appellant complained that there was a "slope" in the parking lot. Porter, however, testified that there was no slope. Porter also said that most people are able to perform the field sobriety tests and it was unusual that appellant could not follow instructions. Based on his observations of appellant, the accident scene, and appellant's performance on the field sobriety tests, Porter believed that appellant had lost the normal use of his mental and physical faculties and was intoxicated, and he arrested appellant for DWI.

Appellant was then taken to the DWI room and given his statutory warnings. Appellant refused to take a breathalyzer test at that time because the officer "annoyed" him. Appellant's time in the DWI room was recorded and played for the jury.

Due to time constraints and staffing issues, Porter did not get a warrant for a blood draw. Therefore, the State did not present a blood or a breath test at trial.

On cross-examination, Porter admitted that appellant's statement to him that he had a lot of things coming at him fast could be interpreted as telling Porter that he had a head injury. He also agreed that (i) the symptoms of a head injury include confusion, difficulty thinking, and imbalance; and (ii) an individual's performance on field sobriety tests could be affected if he had a brain injury or an injury to the back or legs. He also agreed that appellant told him he had trouble with his hips.

Appellant testified that he had not used drugs or alcohol the day of the accident and he was not intoxicated. According to appellant, the accident occurred because he did not turn sharply enough, overcorrected when he hit a curb, and lost control of his truck.

Appellant explained that he performed poorly on the field sobriety tests because he suffered a head injury in the collision. He said he felt confused immediately after the accident and may or may not have hit his head on the steering wheel column or the airbag. He thought he told Porter about the injury, but he did not ask for an ambulance.

Appellant also described an injury he suffered ten years earlier when he fell off of a building and fractured his hip, shoulder, and left elbow, and was in the hospital for three days. He then saw a doctor every two weeks for ninety days. Appellant said that he still felt that injury's effects. He also claimed to have told Porter he would not be able to perform the walk-and-turn and one-leg stand tests due to this prior injury. According to appellant, the injury affected the left side of his body from hip to shoulder, and he now walks "with a slight diagonal" unless he concentrates. He demonstrated his uneven leg length to the jury.

The jury found appellant guilty of DWI and assessed punishment at forty-five days confinement in the county jail and a $500 fine. This appeal followed.

II. Analysis

A. Improper Jury Argument

Appellant's first four issues argue that the trial court allowed improper jury argument concerning his failure to provide medical records substantiating his alleged injuries, his refusal to take a breath test, his having been taken to jail with a head injury, and that these errors combined constitute cumulative error.

We review a trial court's ruling on improper jury argument for an abuse of discretion. *Garcia v. State*, 126 S.W.3d 921, 924 (Tex. Crim. App. 2004). Proper jury argument generally

falls within one of four areas: (i) summation of the evidence, (ii) reasonable deduction from the evidence, (iii) answer to an argument of opposing counsel, and (iv) plea for law enforcement. *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008).

1. Failure to Provide Medical Records

Appellant's first two issues concern the State's argument that he produced no medical records to substantiate the head and hip injuries he claimed caused his poor performance on the field sobriety tests. According to appellant, these arguments improperly shifted the burden of proof to him. We disagree because the argument was in response to appellant's testimony on those subjects.

Specifically, the State has the burden to prove each element of an offense beyond a reasonable doubt. *See Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012). Though the State maintains the burden of persuasion, a defendant has the burden of production regarding his defensive theories. *See Zuliani v. State*, 97 S.W.3d 589, 594 & n.5 (Tex. Crim. App. 2003). Commenting on a defendant's failure to present evidence supporting a defensive theory does not shift the burden of proof, but instead summarizes the state of the evidence and is a reasonable deduction from the evidence. *Jackson v. State*, 17 S.W.3d 664, 673 (Tex. Crim. App. 2000).

Here, the State argued:

> Then I think you ought to look at the evidence, right? I think [Appellant] said today that he told the officer he had a head injury. I think you see from the video a little different story . . .
>
> But what I remember from watching the video was what the officer said when beginning to perform the field sobriety tests, do you have a head injury? I think [Appellant] said, no, never until today, and the officer said, wait a second, because he's heard that, but until today, what do you mean until today? He said, oh, well, things were just coming at me all fast and all crazy and everything. He didn't say, oh, my head hurts, oh, I need to go to the doctor or anything like that. ***In fact, we don't have any medical records. We don't have any records of doctors.***

(Emphasis added). The State further argued that other than appellant's testimony, the jury had not seen any medical records or other evidence showing any medical diagnosis of a hip or head injury.

This does not constitute improper argument. Appellant's defensive theory was that something other than intoxication—his hip or head injury—caused his poor field sobriety test performances. This theory was evident and emphasized during voir dire, cross-examination of the investigating officers, and appellant's own testimony. In fact, appellant testified that he had been hospitalized and under a doctor's care for his hip injury. Thus, it was not improper for the State to argue that appellant had not provided medical records concerning these injuries, and the trial court did not abuse its discretion by overruling appellant's objection. *See Jackson*, 17 S.W.3d at 674. We resolve appellant's first two issues against him.

2. Refusal to Take a Breath Test

Appellant also complains about the State's arguments concerning his refusal to take a breath test, specifically, when the State argued:

> And you can use this defendant's refusal against him as evidence of his guilt. If he wanted to prove that he wasn't intoxicated, he could have consented to that breath test, but he didn't. He didn't want to help the prosecution at all.

Defense counsel objected that the argument improperly shifted the burden of proof, but the objection was overruled.

The law on the burden of proof is constitutional; the Fourteenth Amendment's Due Process Clause requires that every state criminal conviction be supported by evidence that a rational factfinder could find sufficient to prove all the elements of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362–64, (1970); *Coit v. State*, 808 S.W.2d 473, 475 (Tex. Crim. App. 1991). Although the presumption of innocence is guaranteed by a Texas

statute, the statute itself arises from the constitutional guarantee of a fair and impartial trial. U.S. Const. amend. XIV; TEX. CODE CRIM. PROC. ANN. art. 38.03.

Transportation code § 724.061 provides that a person's refusal to submit to a breath test may be introduced in evidence. TEX. TRANSP. CODE § 724.061. Appellant's refusal to take a breath test was in evidence here. Thus, the State could properly have commented on that fact in closing argument. *See Emigh v. State*, 916 S.W.2d 71, 73 (Tex. App.—Houston [1st Dist.] 1996, no pet.).

The argument here, however, went beyond summarizing or reasonable inferences from the evidence when the State said, "if he wanted to *prove* that he wasn't intoxicated . . . ." (Emphasis added). This suggests that appellant was required to prove something that he was not. Thus, the argument was improper, and the trial court erred by overruling the objection.

Next, we consider whether the error caused appellant harm. Because the error is constitutional, we must reverse the judgment of conviction unless we determine beyond a reasonable doubt that the prosecutor's and the trial court's errors did not contribute to the conviction. TEX. R. APP. P. 44.2(a); *see Abbott v. State*, 196 S.W.3d 334, 344 (Tex. App.—Waco 2006, pet. ref'd).

In conducting a harm analysis under rule 44.2(a), an appellate court's emphasis is not on "the propriety of the outcome of the trial." *Scott v. State*, 227 S.W.3d 670, 690 (Tex. Crim. App. 2007). Instead, the court considers "the likelihood that the constitutional error was actually a contributing factor in the jury's deliberations in arriving at that verdict." *Id*. In reaching this decision, a reviewing court considers every circumstance in the record concerning whether beyond a reasonable doubt the error contributed to the conviction or punishment, and if applicable,: (i) the nature of the error; (ii) the extent to which the State emphasized the error; (iii) the error's probable collateral implications; (iv) the weight a juror would probably place upon the

error; and (v) whether declaring the error harmless would encourage the State to repeat it with impunity. *Snowden v. State*, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011); *Mason v. State*, 322 S.W.3d 255, 257 n. 10 (Tex. Crim. App. 2010).

As to the source and nature of the error, we have already noted that the State could properly comment on appellant's refusal to take the breath test because such refusal was in evidence. But discussing the evidence as though appellant had the burden of proof exceeded the scope of permissible comment.

Turning to the second and fourth factors, we note that aside from the complained-of argument, the jury was properly instructed on the burden of proof throughout the trial. During voir dire, the trial judge emphasized that the State had the burden of proof and the defense was not required to present any evidence. The judge told the jury, "at no time will it [the burden of proof] shift from the prosecution's table over to the defense's table." The judge also told the jury that the attorneys' comments in opening statements and closing arguments were not evidence.

During the defense's opening statement, counsel told the jury that the State had the burden of proof. Both parties again reminded the jury of that burden in closing arguments.

The court's charge told the jury that the prosecution had the burden of proof and was required to prove every element of the charged offense beyond a reasonable doubt. And we presume that the jury followed the court's instructions. *See Crocker v. State*, 248 S.W.3d 299, 306–07 (Tex. App —Houston [1st Dist.] 2007, pet. ref'd).

Appellant does not argue that the evidence is insufficient to support his conviction, and the error did not occur until the State's closing argument. Nothing in the record suggests that the jury would put undue weight on the argument, particularly given the numerous reminders about the State's burden.

Finally, there is nothing to establish that finding the error harmless would encourage the State to repeat it with impunity, particularly because our conclusion is not that such an argument is always harmless, but rather, is confined to these case-specific facts.

Therefore, considering the above factors and the record as a whole, we conclude that, beyond a reasonable doubt, the error did not contribute to appellant's conviction, and we resolve appellant's third issue against him.

3. Jail Liability Argument

Regarding the jail liability argument, appellant urges that the State injected new facts into the case when the prosecutor commented on jail policy not to admit injured persons as inmates due to liability concerns. Specifically, on cross-examination, the prosecutor asked appellant, "Would it surprise you that you are unable to—that the jail has to send you to the hospital if there's a significant injury, that you were not able to be admitted to a jail? Just would it surprise you? Appellant responded, "I wouldn't know what the standard would be on that."

During closing argument, defense counsel argued that appellant was not intoxicated, but rather, had a head injury. During rebuttal, the State argued:

> Don't let the Defense plant reasonable doubt in your mind when there just isn't reasonable doubt. [Appellant is] trying to claim that he had this head injury, a head injury he didn't even allude to at the scene. Then he goes to the jail, to the Richardson city jail. Then he's transferred to Lew Sterrett. You cannot accept someone into the jail. It's a liability if they have an injury –

Defense counsel objected that there was "no evidence of that," but the objection was overruled. Thereafter, the State continued:

> It's [sic] liability to accept someone with an injury so significant as a traumatic brain injury. There was no brain injury. There was no brain injury. No head injury at all.
>
> The only thing that he has to hang his hat on is that he was injured. That's why he looks like that in that video, because I was injured. He wasn't injured.

Counsel is given wide latitude in drawing inferences from the evidence so long as the inferences drawn are reasonable, fair, legitimate, and offered in good faith. *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988). But counsel may not use argument to present evidence to the jury that is outside the record. *Id.*

Assuming without deciding that the argument was improper, appellant is not entitled to the reversal of his conviction unless the record demonstrates that he was harmed. We analyze argument that improperly refers to evidence outside the record as non-constitutional error under TEX. R. APP. P. 44.2(b). *See Freeman v. State*, 340 S.W.3d 717, 728 (Tex. Crim. App. 2011). A non-constitutional error that "does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b). To determine whether appellant's substantial rights were affected, we balance the severity of the misconduct (i.e., the prejudicial effect), any curative measures, and the certainty of conviction absent the misconduct. *Martinez v. State*, 17 S.W.3d 677, 692–93 (Tex. Crim. App. 2000).

Here, the improper argument was brief, and went to appellant's credibility rather than an element of the offense. Thus, we cannot conclude that the argument had significant prejudicial effect. Appellant's objection was overruled, so there was no curative instruction.

The evidence that appellant was intoxicated was strong. The jury saw photographs of the accident scene where appellant's truck had slammed into the brick stairwell. They also saw the recording of appellant's performance on the field sobriety tests, where he was unable to complete one test because he couldn't follow the instructions, and where he exhibited a number of clues of intoxication on the remaining tests. Officer Porter testified that he smelled alcohol on appellant's breath, his eyes were bloodshot and watery, and he was having difficulty standing.

The jury also heard appellant's explanation for his poor performance on the field sobriety tests, had the opportunity to weigh appellant's credibility over the State's evidence.

Thus, even without the State's argument, conviction was reasonably certain. Accordingly, we conclude that even if the State's comments exceeded the permissible scope of argument, appellant was not harmed by the error. We resolve appellant's fourth issue against him.

B. Cumulative Error

Appellant's fifth issue argues that the previously alleged errors cumulatively harmed him so his case should be reversed. We disagree.

While a number of errors may be harmful in their cumulative effect, we have not concluded that there are a number of errors here. *See Gamboa v. State*, 296 S.W.3d 574, 585 (Tex. Crim. App. 2009). And, given the strength of the State's guilt evidence, we cannot conclude that the aggregate weight of any such errors deprived appellant of a fundamentally unfair trial. *See Estrada v. State*, 313 S.W.3d 274, 311 (Tex. Crim. App. 2010). We thus resolve appellant's fifth issue against him.

C. Sentence Pronouncement

Appellant's sixth issue argues that his conviction is "invalid because the trial court failed to expressly receive and accept the jury's guilty verdict." He further argues that his sentence was not pronounced because he was not present when the trial judge signed the judgment.

A defendant has been adjudged guilty when the trial court receives and accepts the jury's verdict convicting him. TEX. CODE CRIM. PROC. ANN. arts. 37.04, 37.05 (West 2006); *Jones v. State*, 795 S.W.2d 199, 201 (Tex. Crim. App. 1990). No further ritual or special incantation from the trial court is necessary. *Jones*, 795 S.W.2d at 201. A trial court's failure to verbalize the adjudication of guilt does not render the judgment void. *Villela v. State*, 564 S.W.2d 750, 751 (Tex. Crim. App. 1978).

Moreover, as a general rule, an appellant may not assert error pertaining to his sentence or punishment where he failed to object or otherwise raise such error in the trial court. *Mercado v. State*, 718 S.W.2d 291, 296 (Tex. Crim. App. 1986).

Here, the trial judge said, "Members of the jury, I've received your verdict form." After confirming that the verdict was unanimous, the judge read the guilty verdict aloud, and polled the jury. The judge then began the punishment phase of trial, and appellant did not object.

When the punishment phase concluded, the judge confirmed that the jury's verdict was unanimous, and read the verdict aloud. After the jury was excused, the trial judge pronounced appellant's sentence, stating, "So, at this time, I will formally sentence you to forty-five days confinement in the county jail and a fine of $500." Again, appellant did not object.

Appellant did not object or bring the alleged error to the trial court's attention, so his arguments were not preserved for our review. *See* TEX. R. APP. P. 33.1. But even had they been, there was no error. The trial judge's words and actions make clear that he accepted the jury's verdict on guilt/innocence, and he expressly received the jury's punishment verdict.

Moreover, appellant's sentence was properly pronounced. Article 42.03 does not require that the defendant be present when the judgment is signed; as applicable here, it only requires that "sentence shall be pronounced in the defendant's presence." *See* TEX. CODE CRIM. PROC. art. 42.03. The sentence here was pronounced in accordance with the statute, and nothing further was required.

We thus resolve appellant's sixth issue against him.

D. Reforming the Judgment

Appellant requests that we modify the judgment to show that the jury, not the trial court, assessed appellant's punishment, and the State agrees that this is appropriate.

We have the power to modify an incorrect judgment when we have the necessary information to do so. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993). Here, the judgment states that the trial court assessed punishment, but the record reflects that the assessment was by the jury. Accordingly, we modify the judgment to reflect that the jury set punishment.

As modified, we affirm the trial court's judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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TEX. R. APP. P. 47
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CURTIS FRANKLIN MORROW,
Appellant

No. 05-16-01218-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court
No. 9, Dallas County, Texas
Trial Court Cause No. MB-1545684-K.
Opinion delivered by Justice Whitehill.
Justices Francis and Myers participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to state that the jury rather than the court assessed punishment.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered November 7, 2017.