

SUPREME COURT OF LOUISIANA

No. 99-K-1272

STATE OF LOUISIANA

versus

ANWAR HADDAD (SENTENCED AS “ANWAR G. HADDAD”)

KNOLL, JUSTICE, dissenting.

I disagree with the majority’s conclusion that the trial court committed reversible error when it refused to issue a special neutralizing instruction to the jury alerting it to Lionel Smith’s failure to testify. The defendant was neither entitled to such an instruction nor was the refusal on the part of the trial court reversible error. Accordingly, I respectfully dissent.

The State charged defendant with felon in possession of a handgun. At trial, the jury was presented with the testimony of the arresting officer, Sergeant Buckley, the defendant, and Samir Haddad, defendant's brother. Sergeant Buckley testified that he saw defendant pull the gun from his waistband and point it at him. The defendant testified that when he and Smith were stopped by Sergeant Buckley, Smith tossed the gun to him and told him to run. Finally, Samir testified that the car defendant and Smith were stopped in belonged to his girlfriend, that the gun was his and used for his own protection, and that he inadvertently left the gun under the seat the night before the defendant was stopped.

In charging the jury, the trial court gave the following instructions:

You must determine the facts only from the evidence presented. The evidence which you should consider consists of the testimony of witnesses and any other evidence which the Court has permitted the parties to introduce.

. . . .

You are not bound to decide any issue of fact in accordance with the number of witnesses presented on that point. Witnesses are weighed and not counted. The test is not which side brings the greater number of witnesses before you, or presents the greater quantity of evidence, but rather which witnesses and which evidence appeals to your minds as being the most convincing.

. . . .

The defendant is not required by law to call any witnesses or produce any evidence.

The majority concludes that this instruction was insufficient and that the trial court should have granted the defendant's request of a special neutralizing instruction. I disagree. For the same reason that defendant had no constitutional right to place Smith on the stand and have him invoke his Fifth Amendment privilege against self-incrimination in the presence of the jury, Haddad has no right for the trial court to give the jury a special neutralizing instruction.

As the majority correctly points out, it is impermissible to knowingly call a witness to the stand who will claim a privilege. The reason for this prohibition on both the State and the defendant is that the witness' refusal to testify on a claim of privilege, in and of itself, has no real probative significance in the determination of defendant's guilt or innocence. Further, the witness' refusal to testify could be based upon considerations wholly unrelated to the crime at issue, but could have a disproportionate impact upon the minds of the jurors and create the impression that the witness is guilty of the crime.¹ Thus, we preclude such action to prevent undue weight that may be given by a juror to the claim of privilege and due to the impossibility of cross-examination as to its assertion. *State v. Day*, 400 So. 2d 622, 624 (La. 1981). Accordingly, once a witness has appeared in court and refuses to testify, the

¹ That such testimony can lead to a disproportionate impact upon the minds of the jurors and create the impression that the witness is guilty of the crime is seen in this case by the results of defendant's first trial.

defendant's Sixth Amendment rights are satisfied and the trial court was under no obligation to grant defendant's request to place the witness on the stand to invoke the privilege in the presence of the jury.

For the same reasons, I believe the trial court correctly refused to give a special neutralizing instruction. By requiring a neutralizing instruction, the majority is allowing the defendant, in essence, to accomplish indirectly that which we have repeatedly held could not be done directly, *i.e.*, an attempt to substantially put before the jury information that a witness has invoked his Fifth Amendment privilege to testify. Nothing in the proposed neutralizing instruction prevents speculation on the part of the jury. Instead, by highlighting the absence of this witness, the instruction alerts the jurors to this omission and fosters the speculation that the majority attempts to remedy. I believe by omitting a specific reference to a witness who has invoked his Fifth Amendment privilege and giving the general instruction of the law, the trial court averted any unwarranted and harmful speculation by the jurors that the witness is guilty of the alleged crime. *See, e.g., United States v. Griffin*, 66 F.3d 68, 71 (5th Cir. 1995); *Commonwealth v. Gagnon*, 557 N.E.2d 728, 737 (Mass. 1990); *People v. Thomas*, 415 N.E.2d 931, 934-95 (N.Y. 1980); and cases cited in each. The United States Court of Appeals for the Fifth Circuit has stated in refusing to allow just such a "neutralizing instruction," "neither side has the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege." *Griffin*, 66 F.3d at 71 (quoting *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973)).

Furthermore, even assuming *arguendo* that such an instruction should have been given, the refusal on the part of the trial court was harmless error. The harmless error rule test whether the guilty verdict actually rendered in the case was surely unattributable to the alleged error. The test is not, however, whether a guilty verdict

would surely have been rendered in a trial without the alleged error. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). The jury clearly found Sergeant Buckley's testimony credible and based its verdict of guilty on that testimony. Given the testimony and the trial court's instruction, the guilty verdict rendered in this particular trial is surely not attributable to the trial court's refusal to give a neutralizing instruction. *Id.*