

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC

CASE NO: 502013AP900068AX

L.T. NO: 502012CT020842AXX

HENRY G. WIENEKE, JR.,  
Appellant,

v.

STATE OF FLORIDA,  
Appellee.

Opinion filed: MAY 6 - 2015

Appeal from the County Court in and for Palm Beach County,  
Judge Frank Castor

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PER CURIAM.

THIS CAUSE came before the Court on Appellant's Motion for Rehearing filed on

March 10, 2015. Appellant's Motion for Rehearing and Clarification is GRANTED, therefore, we withdraw our prior opinion and enter the following in its place:

Henry G. Wieneke, Jr., was charged and convicted of driving under the influence ("DUI") following a jury trial. Wieneke raised three claims of error on appeal: first, that the trial court abused its discretion by precluding Wieneke from testifying that was having a heart attack or that he believed he was having a heart attack; second, that the trial court abused its discretion by allowing the State to comment on Wieneke's silence; and third, that the trial court abused its discretion by allowing the arresting officer to testify regarding horizontal gaze nystagmus. As to the first issue, we agree that the trial court erred and but nevertheless affirm because the error was harmless.

Evidentiary rulings are reviewed for abuse of discretion, and the trial court's discretion "is limited by the rules of evidence and by the principles of stare decisis." *Gregory v. State*, 118 So. 3d 770, 780 (Fla. 2013) (quoting *Johnson v. State*, 969 So. 2d 938, 949 (Fla. 2007)) (internal quotation marks omitted). Wieneke contends that the trial court erred by precluding him from testifying that he was having a heart attack or that he believed he was having a heart attack. While he was allowed to testify to all of the symptoms he was experiencing on the night of his arrest, as well as the fact that he had previously had a stroke and heart attack, Wieneke contends that he should have been allowed to further testify that he believed he suffered a heart attack that night. The trial court excluded this testimony based on a finding that it was overly prejudicial. This Court finds that, although it is a very close issue given that he was allowed to testify about both his symptoms and his previous medical episodes, Wieneke should have been able to testify that he "thought he experienced a heart attack" on the night in question.

Since this Court finds that Wieneke's testimony was improperly limited, it applies the

harmless error test. The harmless error test places the burden on the State, as beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or alternatively that there is no reasonable possibility that the error contributed to the conviction. *State v. Diguilio* , 491 So.2d 1129, 1135 (Fla. 1986). For the reasons provided below, this Court finds that any error that resulted from the exclusion of the testimony was rendered harmless because there was no reasonable probability that the error affected the verdict. *Williams v. State*, 143 So. 3d 1120, 1126 (Fla. 4th DCA 2014) (“The question is whether there is a reasonable possibility that the error affected the verdict.”).

Natalie Banks testified that around 1:00 a.m. on August 26, 2012, a vehicle driven by Wieneke drove up behind her in two different lanes with no headlights on and struck her vehicle and then fled the scene, running the red light. Banks followed Wieneke to his driveway and noticed his vehicle was swerving all over the road.

Deputy Lutz testified that when he responded to Wieneke’s driveway, he found Wieneke was asleep behind the wheel. Deputy Lutz further testified that Wieneke tried to drive away when the deputy woke him up. Wieneke was unsteady on his feet, had bloodshot, glassy eyes, and had an odor of alcohol coming from his breath. Because he was unsteady on his feet, Deputy Lutz had Wieneke sit on the bumper of his vehicle because he was afraid Wieneke would fall down.

Deputy Perrin similarly testified that Wieneke had bloodshot and glassy eyes, slow slurred speech, and was noticeably swaying. Deputy Perrin observed a very noticeable odor of alcohol coming from Wieneke’s breath. Wieneke then admitted to Deputy Perrin that he was coming from a bar where he had consumed three beers and one glass of wine. Further, Wieneke refused to perform the field sobriety exercises and became abrasive. During the drive to jail,

In order to challenge the State's evidence, Wieneke was permitted to testify to all of the symptoms he suffered that night and describe how he felt. He was also permitted to testify about a past heart attack and other ailments he had suffered. The trial court merely prevented Wieneke from stating that he was having or thought he was having a heart attack that night. Based upon the totality of the evidence, this Court determines that even if Wieneke was permitted to add to his testimony that he thought he was having a heart attack, there is no reasonable probability that this would have affected the verdict. In light of the testimony from the State's witnesses, the videos submitted into evidence, and the symptoms described by Wieneke himself, this additional statement was not reasonably likely to affect the verdict.

Accordingly, the lower court's decision is hereby **AFFIRMED**.

**RAPP, MILLER, KROLL, JJ. concur.**