Opinion filed October 5, 2017

In The

Eleventh Court of Appeals

No. 11-15-00244-CR

DUSTIN LEVI ROCK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 104th District Court
Taylor County, Texas
Trial Court Cause No. 19126B

M E M O R A N D U M O P I N I O N

Dustin Levi Rock was indicted for the third-degree felony offense of theft. The jury convicted him of the lesser included offense of state jail felony theft and assessed his punishment at confinement for a term of two years in the State Jail Division of the Texas Department of Criminal Justice. The jury also assessed a $10,000 fine. In a single issue on appeal, Appellant asserts that the trial court erred

by failing to sua sponte give an accomplice-witness jury instruction, thereby causing him egregious harm. We affirm.

Background Facts

Appellant was convicted of the theft of numerous items of personal property owned by H.L. Bowen from land in Ovalo. The personal property included personal effects and several old vehicles that the Bowen family had been restoring for generations.

Juan Keeling is an employee of Pine Street Salvage. Around September 9, 2012, he observed Appellant bring in scrap metal for sale. Keeling testified that he approached Appellant to inquire if he needed help hauling scrap metal because the holidays were approaching. Appellant told Keeling that the items he brought in for sale came from his family's land in Ovalo. Keeling testified that he offered his assistance to Appellant because he owned a pickup and knew somebody with heavy-duty hauling equipment. Text messages from Keeling's cell phone showed that the two agreed to do something the next day because Appellant "need[ed] to." Within the same text message, Appellant inquired as to whether Keeling was "going to be able to get the flatbed truck?"

Keeling testified that he and Appellant traveled to the property in Ovalo the following day to get a better understanding of what exactly the project entailed. Photographs of different items obtained from Keeling's cell phone indicate that he took pictures of the items to load. While on the property, Appellant told Keeling that his family needed to clean up the property because they were selling it. The two gathered material to sell at Pine Street Salvage the next day.

Business records confirm that, on the morning of September 11, Pine Street Salvage paid Keeling for various pieces of scrap metal. The State introduced a photograph of Appellant at Pine Street Salvage's sale counter that morning. This

photograph was taken during the sale of scrap items on Keeling's account. Keeling testified that they went back out to the property that day and collected more material to sell. However, Keeling's pickup suffered a flat tire while on the property. Appellant kept Keeling's pickup because he had a used tire to put on it.

Keeling texted Appellant on September 12, directing Appellant to "[c]all me when ur comein." Appellant responded, "Ok." After not hearing anything from Appellant for several hours, Keeling sent a text message asking if everything was "ok." Appellant responded that he was "headed in now."

Appellant returned Keeling's pickup to Pine Street Salvage on September 12, laden with items for sale. Keeling testified that, although they had loaded some items in the pickup bed the day before, the pickup arrived with new items he did not remember loading, including a vintage Coke Machine. A photograph taken by Keeling's cell phone depicted Appellant with Keeling's pickup and the items sold to Pine Street Salvage that day. Bowen's stepfather testified that the vintage Coke machine seen in the photo belonged to his wife. After selling the items, Keeling and Appellant drove back out to the Ovalo property to meet with Jody Gwinn, a scrap metal businessman that had bigger hauling equipment.

Gwinn testified that he met Keeling and Appellant the evening of September 12 at the Ovalo property after Keeling contacted him to help move a tractor. Gwinn arrived with his hired helper, Carlos Hernandez. Gwinn testified that Appellant told him the land was willed to Appellant's father and that they needed to get it cleaned up to sale. Hernandez testified that Appellant said that his grandfather just passed away and his grandmother wants it cleaned up. Appellant, Keeling, and Gwinn agreed to a three-way split of the proceeds. Hernandez testified that he had been hired by Gwinn and was not part of the split agreement.

The next morning, Keeling texted Gwinn's phone number to Appellant and informed Appellant that "[h]e is on the way up there." Appellant, Gwinn, Hernandez, and several hired hands arrived at the Ovalo property with two trucks, two trailers, and a loader to begin hauling items off the land. Tony Barrientes, Hernandez's nephew, accompanied them to assist. On September 13 and 14, each truck with an attached trailer took two loads per day equaling eight loads in total. Danise Wills, records custodian for Pine Street Salvage, testified that payouts were made on September 13 and 14 to Gwinn's business account, "JAGS," for the eight loads. Gwinn testified that he agreed to store a Studebaker pickup after Keeling and Appellant decided they wanted to try to resell it.

After finishing work for the day on September 14, Keeling suggested to Appellant that they lock up the Ovalo property. Keeling's wife, Sharon Keeling, testified that she purchased a lock and that she and her husband placed it on the gate at the property in Ovalo. She also accompanied her husband to give Appellant a key to the lock that they placed on the gate.

Keeling testified that Appellant informed him on September 15 that he was moving to Flour Bluff. Keeling testified he and Appellant formed a new agreement whereby Keeling would continue hauling material from Ovalo and split the proceeds with Appellant 70/30. Pursuant to the agreement, Keeling went back out to the property and loaded his pickup up with scrap metal on September 23. Pine Street Salvage paid him the next morning, and he called Appellant for his address to send his thirty percent share via MoneyGram. Text messages show that Appellant told Keeling the correct city and thanked him for sending the money and that he was "broke." Business records from Pine Street Salvage confirmed that Keeling was paid $408.35 on the morning of September 24.

That same day, Lieutenant Angel Gonzalez of the Taylor County Sheriff's Department arrived at Pine Street Salvage to meet with the victims who had found their stolen vehicles there. While there, Keeling and Gwinn voluntarily explained to Lieutenant Gonzalez the events that they testified to at trial. Later that day, the Bowen family recovered the Studebaker pickup from Gwinn's property.

Appellant testified on his own behalf during the guilt/innocence phase of the trial. He admitted that he told Keeling about the Ovalo property, but denied the accusation that he told Keeling that he had access or authority to the property. Appellant identified himself in the September 11 photo at the payout counter. He testified that the signature on the bottom of the invoice could have been his but that he "[did not] think so." Appellant asserted he did not know that Keeling took a photograph of Appellant standing next to Keeling's pickup containing stolen items since his back was to the camera. Appellant also admitted that he helped Keeling with his flat tire but said that he was only helping a friend in need. Additionally, Appellant testified that the $100 that Keeling sent to him was payment for a prior job.

Appellant testified that he moved to the Corpus Christi area the morning of September 14 and, thus, could not have been at the Ovalo property that day. Appellant's friend, sister, and brother-in-law all testified on Appellant's behalf and indicated that it was not possible for Appellant to have been at the Ovalo property on September 14 since he moved to Corpus Christi that day. Appellant contends that he never told Keeling he was moving to Flour Bluff and that he only decided to move to Flour Bluff after moving to Ingleside and encountering an issue with a rental home there.[1]

[1]Flour Bluff and Ingleside are both located in the Corpus Christi area.

Analysis

Appellant argues that the trial court erred by failing to sua sponte provide the jury an accomplice-witness instruction under Article 38.14 of the Texas Code of Criminal Procedure regarding the testimony of Keeling, Gwinn, Hernandez, and Barrientes. *See* TEX. CODE CRIM. PROC. ANN. art. 38.14 (West 2005). Appellant acknowledges that he did not request an accomplice-witness instruction for these witnesses. Appellant asserts that these men were accomplices because they were involved in appropriating the property. He contends that the trial court's error egregiously harmed him because there was no other evidence connecting him to the commission of the underlying offense. We disagree.

We review a claim of jury charge error using the procedure set out in *Almanza v. State*.[2] *State v. Ambrose*, 487 S.W.3d 587, 594 (Tex. Crim. App. 2016). Our first duty in analyzing a jury charge issue is to decide whether error exists. *Arteaga v. State*, 521 S.W.3d 329, 333 (Tex. Crim. App. 2017) (citing *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009)). If error exists, we must determine whether the error caused sufficient harm to warrant reversal. *Id.* When, as in this case, the error was not objected to, reversal is proper only if the error caused actual, egregious harm to the defendant. *Arrington v. State*, 451 S.W.3d 834, 840 (Tex. Crim. App. 2015). Such a determination must be based on a finding of "actual rather than theoretical harm." *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015) (quoting *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011)).

"A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." CRIM. PROC. art. 38.14; *see Ambrose*, 487 S.W.3d at 593. If an

[2]686 S.W.2d 157, 171 (Tex. Crim. App. 1985).

accomplice to the offense testifies for the State, the accomplice's testimony must be corroborated by non-accomplice evidence that tends to "connect the accused to the offense." *Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011). When the issue is raised by the evidence, the trial court must instruct the jury on the accomplice-witness rule because it is the "law applicable to the case." *Zamora v. State*, 411 S.W.3d 504, 513 (Tex. Crim. App. 2013); *see* CRIM. PROC. art. 36.14 (West 2007). For the purpose of our analysis, we will assume that the trial court erred by failing to include an accomplice-witness instruction for the testimony of Keeling, Gwinn, Hernandez, and Barrientes.

"Under the egregious harm standard, the omission of an accomplice witness instruction is generally harmless unless the corroborating (non-accomplice) evidence is 'so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive.'" *Ambrose*, 487 S.W.3d at 598 (quoting *Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002); *Saunders v. State*, 817 S.W.2d 688, 692 (Tex. Crim. App. 1991)). Appellant cites *Casanova v. State* for the proposition that "appellate review must examine the corroborating evidence and determine its value to the jury." *Casanova v. State*, 383 S.W.3d 530, 539 (Tex. Crim. App. 2012). He contends that there is no evidence other than the photograph of Appellant and his wife standing beside the pickup loaded with scrap at Pine Street Salvage that connects Appellant to the crime. The State counters that Appellant's own testimony, photographs, and text messages "match[] the testimony of the witnesses and lend[] credence to their testimony."

In *Casanova*, the Court of Criminal Appeals stated that the strength of the corroborating evidence is what determines whether failure to submit the instruction is harmful. *Id.* The strength of corroborating evidence emanates from "(1) its reliability or believability and (2) how compellingly it tends to connect the accused

to the charged offense." *Id.* Our task is to analyze the evidence tending to connect the person with the charged offense rather than corroboration as to every aspect of an accomplice's testimony or element of a crime. *Ambrose*, 487 S.W.3d at 598. The reviewing court is essentially determining whether the jury would have found that the accomplice witness's testimony was corroborated had the jury been properly instructed that it must do so in order to convict. *See Casanova*, 383 S.W.3d at 540.

In this case, text messages, photographs, non-accomplice testimony, and Appellant's own testimony tended to connect Appellant to the theft. Text messages extracted by the Taylor County Sheriff's Department from Keeling's phone connected Appellant to the offense and corroborated Keeling's testimony. In addition to the text messages, photographs offered into evidence connected Appellant to the offense. One photograph showed Appellant in front of Keeling's pickup with items identified by non-accomplices as originating from the property. Appellant admitted that he is in the photograph. Furthermore, a photograph at Pine Street Salvage's sale counter showed Appellant selling scrap items on Keeling's account. Sharon Keeling testified that she accompanied her husband to purchase a lock and was present when he put the lock on the gate of the property and delivered a key to Appellant.

Finally, Appellant's own testimony tends to connect him to the theft. Appellant admitted that he helped Keeling with his flat tire as a friend and identified himself on camera selling scrap material on Keeling's account. Appellant testified that the signature on the bottom of the invoice could have been his. Furthermore, Appellant identified himself in a photograph as the person standing next to Keeling's pickup, which contained items identified at trial as having been stolen from the Bowen family. Because there was strong corroborative evidence tending to connect Appellant to the offense, the totality of the record fails to show that he was

egregiously harmed by the omission of the accomplice-witness instruction. *See Ambrose*, 487 S.W.3d at 598–99; *Casanova*, 383 S.W.3d at 539. We overrule Appellant's sole issue.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
JUSTICE

October 5, 2017

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.