In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00023-CR

JIMMY RAY ELLIS, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 235th District Court
Cooke County, Texas
Trial Court No. CR18-00145; Honorable Janelle M. Haverkamp, Presiding

March 18, 2021

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

Appellant, Jimmy Ray Ellis, appeals from his conviction by jury of the first degree felony offense of engaging in organized criminal activity-murder,[1] enhanced, and the resulting sentence of forty years of imprisonment. Appellant challenges his conviction

[1] TEX. PENAL CODE ANN. § 71.02(a)(1) (West 2019). As indicted, an offense under this section of the Penal Code is punishable by confinement for life or for any term of not more than 99 years or less than 15 years.

through three issues: (1) the evidence was insufficient to corroborate the testimony of the co-defendants; (2) the trial court erred in failing to admonish Appellant of his constitutional rights when the prosecutor failed to recuse from the case in which his brother-in-law was a witness; and (3) the trial court erred when it failed to grant a new trial or reverse the judgment to allow Appellant to accept the plea bargain offered by the State prior to trial. For the reasons that follow, we will affirm.[2]

BACKGROUND

This appeal involves the 2006 fatal drive-by shooting of sixteen-year-old Raymundo Torres. Appellant was not charged in this matter until 2018, some twelve years later. The indictment alleged Appellant "as a member of a criminal street gang, intentionally and knowingly commit[ted] the offense of Murder, [by] then and there intentionally and knowingly caus[ing] the death of an individual, namely Raymundo Torres, by gunfire."

The evidence presented at trial showed Torres was killed when he was shot from a passing vehicle being driven by a street gang. A witness testified that Torres was a rival gang member and, on the night of the shooting, he and Appellant drove by Torres's home for the express purpose of shooting up the home. According to his testimony, the witness was a passenger, and Appellant was both the driver and the shooter. In addition,

[2] Originally appealed to the Second Court of Appeals, sitting in Fort Worth, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between precedent of the Second Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

a neighbor testified he saw shots fired from the driver's side of the vehicle as it passed by.

At the time of the shooting, the police investigated the drive-by shooting and the death of Torres. They obtained statements from various witnesses concerning what they observed that day. The police also obtained fingerprints, shell casings, ammunition magazines and clips, and a bandana from the vehicle Appellant was driving when Torres was shot; however, no arrests were immediately made.

When the matter finally came to trial, after hearing the evidence and the arguments of counsel, the jury found Appellant guilty as charged in the indictment and sentenced him as previously noted. The trial court also made an affirmative finding that Appellant engaged in conduct or committed the offense as part of the activities of a criminal street gang, as defined in section 71.01 of the Texas Penal Code, to-wit: the "Nortenos."

ANALYSIS

ISSUE ONE—ACCOMPLICE TESTIMONY

Via his first issue, Appellant argues the accomplice witness testimony offered by the State was insufficiently corroborated and, therefore, the evidence was insufficient to support his conviction. In Texas, a conviction cannot be secured on the testimony of an accomplice unless that testimony is corroborated by other evidence tending to connect the defendant to the offense. TEX. CODE CRIM. PROC. ANN. art. 38.14 (West 2005). Thus, the applicable standard requires that, to corroborate accomplice testimony, some amount of non-accomplice evidence must tend to connect the defendant to the commission of the crime in some way. *Joubert v. State*, 235 S.W.3d 729, 731 (Tex. Crim. App. 2007)

(holding that there must be "*some* non-accomplice evidence *tending to connect* the defendant to the offense"), cert. denied, 552 U.S. 1232, 128 S. Ct. 1446, 170 L. Ed. 2d 278 (2008). The non-accomplice evidence does not, however, need to be sufficient alone to convict the defendant beyond a reasonable doubt, *Malone v. State*, 253 S.W.3d 253, 257-58 (Tex. Crim. App. 2008); *Joubert*, 235 S.W.3d at 731, so long as it is sufficient to "tend to connect" the defendant to the offense.

We thus eliminate the accomplice testimony from consideration and examine the remaining portions of the record to see if there was any evidence that tends to connect the accused with the commission of the offense. *Malone*, 253 S.W.3d at 257 (quoting *Solomon v. State*, 49 S.W.3d 356, 361 (Tex. Crim. App. 2001)). The remaining evidence must "simply link the accused in some way to the commission of the crime[.]" *Simmons v. State*, 282 S.W.3d 504, 508 (Tex. Crim. App. 2009) (quoting *Malone*, 253 S.W.3d at 257).

While a defendant's mere presence at the scene of the crime is not sufficient to link the defendant to the commission of the offense, a defendant's presence, coupled with other suspicious circumstances, can be sufficient to tend to connect a defendant to the offense. *Malone*, 253 S.W.3d at 257 (citing *Golden v. State*, 851 S.W.2d 291, 294 (Tex. Crim. App. 1993), and *Brown v. State*, 672 S.W.2d 487, 489 (Tex. Crim. App. 1984)). Suspicious circumstances may include the defendant being in the company of the accomplice at or near the time of the offense. *Brown*, 672 S.W.2d at 489 (an appellant's presence with the accomplice witness shortly before the commission of the offense is a suspicious circumstance); *LeBlue v. State*, No. 03-08-00278-CR, 2010 Tex. App. LEXIS 4822, at *12 (Tex. App.—Austin June 24, 2010, pet. ref'd) (mem. op., not designated for

publication) (citing *Killough v. State*, 718 S.W.2d 708, 711 (Tex. Crim. App. 1986)). Additionally, police observations can sufficiently connect the defendant with the offense. *See Malone*, 253 S.W.3d at 258-59 (concluding the officer's use of informants, following the informants to the location of the drug deal, watching the informants interact with the defendant, and then seizing drugs from the informants that they did not have before, was sufficient evidence to corroborate accomplice testimony); *Herron v. State*, Nos. 01-04-00640-CR, 01-04-00641-CR, 2005 Tex. App. LEXIS 5474, at *10 (Tex. App.—Houston [1st Dist.] July 14, 2005, pet. ref'd) (mem. op., not designated for publication) (finding police watching the appellant drive a separate vehicle "in tandem" with the vehicle that contained drugs and then stand next to the vehicles during the drug deal was sufficient corroborating evidence).

Lastly, when there are conflicting views of the evidence, appellate courts should defer to the fact finders' view of the evidence. *Simmons*, 282 S.W.3d at 508 (holding that when there are two permissible views of the evidence (one tending to connect the defendant to the offense and the other not tending to connect the defendant to the offense), appellate courts should defer to that view of the evidence chosen by the fact finder). Accordingly, if a rational fact finder could conclude that the non-accomplice evidence tends to connect the appellant to the offense, the appellate court should hold that the evidence is sufficient to corroborate the accomplice testimony. *Id*. at 509 (internal quotations omitted).

Appellant argues the State failed to present any "hard evidence" linking him to the shooting of Torres.[3] But, the State is not required to present direct evidence. The State's theory was Appellant was the person driving the vehicle involved in the drive-by shooting and that he was the shooter. To support its theory, the State presented the testimony of two accomplice witnesses, "Indio" and "Little Rob." One of those witnesses, Little Rob, admitted to being in the vehicle when Torres was shot. Little Rob also testified Appellant was in the car with him.[4] He said Appellant was driving and he was in the passenger seat. Little Rob said he did not have a gun, but when asked if the only other person in the vehicle had a gun, he answered, "[p]robably." Little Rob also said he did not see or hear Appellant shoot Torres, but he remembered seeing this "flash" and "believe[d]" there "were gunshots that happened."

Once Little Rob's testimony is removed from consideration, Appellant argues, the State had only evidence of latent prints in the vehicle that did not match his and physical evidence found in the car including shell casings, an ammunition magazine/clip, and a bandana, none of which was found to have his DNA on it or was in any other way connected to him. Thus, Appellant asserts, outside of the accomplice witness testimony, there was no evidence that tended to connect him to Torres's shooting. We disagree.

As noted by the State, another witness, Roy Gonzalez, testified he was present at a party where Appellant and the two accomplice witnesses were present. Gonzalez became aware that a house was going to be "shot up" and saw another party guest, Albert

[3] We note that the law does not require any direct evidence, such as fingerprint or DNA evidence, to establish "corroboration" under the accomplice witness rule.

[4] When asked, Little Rob said, "I think it was me and Jimmy."

Arenas, punch Appellant. Furthermore, it was established that the red car seen at the site of the shooting belonged to one of Indio's ex-girlfriends, Allison Brown. At the time of the shooting, Indio had an on-and-off relationship with Brown and was living with another woman, Portia McKinnon. Brown testified Brandon Skaggs took the car to fix it after she asked Indio for some help fixing it. She also told the jury the car was never returned to her.

McKinnon testified Indio stayed with her in her apartment "off and on." She said he kept rifles and handguns and clothes there. McKinnon testified that on August 11, 2006, the day of the shooting, Skaggs and Indio were at her apartment when she came home from work. Appellant and Little Rob arrived shortly thereafter. Appellant said they were going to someone's house to "talk to them" and he asked Indio to go. McKinnon testified she saw Appellant, Little Rob, and Indio with an AK, a .22 rifle, and an SKS. She also testified that the three men later returned to her apartment and Indio was mad at Appellant and said, "it jammed, it jammed." McKinnon also noticed Appellant "was real red and he was real hyped up and everything, and they had said he got into a fight with Albert." This testimony corroborated that of Gonzales. McKinnon also testified she saw Appellant with a handgun she knew belonged to Arturo Herrera. He and Little Rob left her apartment in the red car, each with a gun. McKinnon testified that later that day, she was sitting with Indio and Skaggs when someone called to say a shooting had occurred. Indio called Appellant and instructed him to get rid of the car. McKinnon testified that a few days later, Appellant came to her apartment again. He and Indio got into a fight in the street when Indio told Appellant "he'd brought heat over to [the] apartment and he

didn't appreciate that . . . ." She also said she remembered Appellant saying, "Man, I didn't know it was a 16-year-old boy."

While no single piece of evidence alone may tend to connect Appellant to the offense charged, we find the cumulative effect of this non-accomplice testimony tends to connect Appellant to the crime with which he was charged, i.e., committing the offense of murder as a member of a criminal street gang. Gonzalez's testimony places Appellant at a party with Indio and Little Rob shortly before the shooting. Gonzalez testified he became aware from that party that a shooting was supposed to occur. McKinnon's testimony connected Appellant to the type of gun used in the shooting. She testified she saw Appellant with Herrera's handgun and police determined a handgun was used to shoot Torres. McKinnon's testimony also connected Appellant to the red car seen by the neighbor at the scene of the shooting. She said the red car was at her apartment but was gone when Appellant and Little Rob left. Brown testified the red car was hers and that Skaggs took it ostensibly to fix it. Police found shell casings linked to the shooting in that red car. McKinnon also testified that Appellant stated he "didn't know it was a 16-year-old boy." When considered as a whole, that statement, combined with the other evidence offered, tended to connect Appellant to Torres's shooting.

Accordingly, we find under the requisite standard sufficient evidence tending to connect Appellant to the crime with which he was charged and convicted. *See, e.g., Hernandez v. State*, 939 S.W.2d 173, 176-79 (Tex. Crim. App. 1997); *Brosky v. State*, 915 S.W.2d 120, 138-39 (Tex. App.—Fort Worth 1996, pet. ref'd) (finding sufficient corroborating evidence under comparable circumstances). We therefore overrule Appellant's first issue.

ISSUE TWO—VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS

Through his second issue, Appellant argues the trial court erred when it failed to admonish him of the violation of his constitutional rights when the prosecutor failed to recuse himself after discovering that his brother-in-law was a witness for the State in this case. After calling Officer Justin Galvan as a witness for the State, the prosecutor immediately proceeded to ask the witness, "[j]ust to get this out of the way now, you and I are related. We know each other, right?" The witness answered "yes" and then proceeded to confirm the prosecutor's next statement that he was married to the prosecutor's sister. The witness also affirmed that he would not lie on account of that relationship and it would not impact his testimony. At that point, the prosecutor immediately proceeded with his questioning. Neither the Court, nor Appellant made any contemporaneous objection to the witness's testimony.

Nevertheless, Appellant now argues his constitutional rights under the Fifth, Sixth, and Seventh Amendments were violated when the prosecutor was not required to recuse himself from this case. U.S. CONST. amends. V, VI, VII. Contending there is very little relevant Texas case law on this issue, Appellant relies on an advisory opinion from New Jersey that indicates that when there is a relationship between the prosecutor and the defense attorney, there is at least the appearance of impropriety. N.J. Eth. Op. 599 (N.J. Adv. Comm. Prof. Eth), 119 N.J.L.J. 632. According to Appellant, the opinion found that because such a relationship existed, the prosecutor was required to screen herself from cases involving her relative attorneys. Appellant also points to *Ex parte Martinez*, 560 S.W.3d 681, 684 (Tex. App.—San Antonio, 2018, pet. ref'd), a case in which the second-chair attorney had a short-term affair with a witness and voluntarily chose to remove

herself, as support that the prosecutor in this matter should have done the same. Because the prosecutor did not remove himself from the matter and because the trial court failed to admonish Appellant of his right to a fair trial, Appellant argues, his constitutional rights under the Fifth, Sixth, and Seventh Amendments were violated. Without any real analysis, he also argues this error harmed him.

We first note that Appellant did not object at the time the witness testified. To preserve an error for appellate review, the record must show that: (1) a complaint was made by a timely request, objection, or motion, (2) sufficiently specific to make the trial court aware of the complaint, and (3) the trial court ruled on the complaint either implicitly or explicitly. TEX. R. APP. P. 33.1(a); *Reyna v. State*, 168 S.W.3d 173, 177 (Tex. Crim. App. 2005). The record does not show any such complaint. Further, this is not an error exempt from the requirements of Rule 33.1. Consequently, by failing to make a proper objection in a timely manner, Appellant forfeited his right to appellate review on this issue.

Moreover, even assuming preservation of error on this issue, it is highly unlikely that any error would have egregiously harmed Appellant. The witness at issue was a former police officer. He testified he was called to the scene shortly after Torres was shot. He established the crime scene outside and took photographs. He also followed the ambulance in which Torres rode to the hospital, was present when Torres was pronounced dead, and took photographs of Torres after he passed away. The witness did not interview any of the witnesses or have any other involvement in the case and no special bias or prejudice was shown.

Given the witness's limited involvement in the case, we find that even assuming both preservation and commission of error, Appellant was not harmed by the failure of the trial court to admonish him of his constitutional rights when the prosecutor failed to recuse himself. Accordingly, we overrule Appellant's second issue.

ISSUE THREE—PRIOR PLEA OFFER

Via his last issue, Appellant contends the trial court erred when it failed to grant his motion for new trial or reverse the judgment to allow Appellant to accept the State's previous plea bargain offer of twenty years of imprisonment.

We review a trial court's ruling on a motion for new trial under an abuse of discretion standard. *State v. Gonzalez*, 855 S.W.2d 692, 696 (Tex. Crim. App. 1993). In considering a motion for new trial, the trial court possesses broad discretion in determining the credibility of the witnesses and in weighing the evidence to determine whether a different result would occur on retrial. *Burke v. State*, 80 S.W.3d 82, 87 (Tex. App.—Fort Worth 2002, no pet.) (citation omitted). We do not substitute our judgment for that of the trial court, but rather, we decide whether the trial court's decision was arbitrary or unreasonable. *Id.* (citation omitted).

A few days prior to trial, the State offered Appellant, through his trial counsel, a plea offer that presented Appellant, in lieu of proceeding to trial, with the choice of accepting a sentence of twenty years of imprisonment in exchange for his plea of guilty to the indicted charge. The State did not indicate a deadline by which Appellant was to accept or reject the offer. Trial counsel informed Appellant of the offer. According to Appellant, he asked his counsel if he had received all discovery so that he would be able

to make an informed decision. He specifically requested that he be allowed to view a certain video but was not permitted to do so. On October 31, 2019, the day of trial announcement, Appellant told his trial counsel he would accept the State's offer. Appellant stated in an affidavit that he desired to accept the State's offer but he was not provided with a deadline for making his decision. The State declined the offer, telling counsel the "plea offer was now off the table." As a result, Appellant's case was tried to a jury, where he was tried and convicted. In his motion for new trial and on appeal, Appellant argued he should have been granted a new trial "because he was not advised of a deadline to accept or reject a plea bargain offer."

On appeal, Appellant frames this issue as one under counsel's duty to fully explain a plea offer to help a client make an informed decision.[5] *State v. Williams*, 83 S.W.3d 371, 373-74 (Tex. App.—Corpus Christi 2002, no pet.) (citing *Howard v. State*, 667 S.W.2d 265, 267 (Tex. App.—Dallas 1984), *aff'd*, 690 S.W.2d 252 (Tex. Crim. App. 1985); *Hanzelka v. State*, 682 S.W.2d 385, 387 (Tex. App.—Austin 1984, no pet)).

Courts have held that failure of counsel to convey a deadline to a client constitutes ineffective assistance of counsel, requiring reversal and remand to the trial court with orders to withdraw the appellant's plea, require the State to reinstate the plea offer as it existed prior to the violation, and allow the appellant to replead to the indictment. *Turner v. State*, 49 S.W.3d 461, 471 (Tex. App.—Fort Worth 2001, pet. dism'd) (citing *Ex parte*

[5] Appellant argues both that he was not permitted to review all of the evidence presented in discovery and that he was not provided a deadline by which to accept or reject the State's offer. In his motion for new trial, Appellant raises only the lack of a deadline before which to accept or reject the plea offer. As such, it does not appear Appellant preserved for our review his complaint regarding the evidence he was not permitted to view.

Lemke, 13 S.W.3d 791, 798 (Tex. Crim. App. 2000)). *See also Paz v. State*, 28 S.W.3d 674, 676 (Tex. App.—Corpus Christi 2000, no pet.) (citing *Ex parte Lemke*, 13 S.W.3d at 798). Here, counsel conveyed to Appellant the plea offer as it was given to him by the State. The State did not include a hard deadline. However, the State is not required to do so. "The question we must answer is whether effective assistance of counsel requires an attorney in a criminal case to advise the accused that the State can withdraw a plea bargain at any time when the State has not set a deadline for the accused to accept the plea bargain. We hold that counsel does not have such a duty." *Barreiro v. State*, No.13-99-375-CR, 2000 Tex. App. LEXIS 5976, at *7 (Tex. App.—Corpus Christi Aug. 31, 2000, no pet.) (mem. op., not designated for publication). Thus, we do not find reversible error here. Accordingly, we overrule Appellant's third issue.

CONCLUSION

Having resolved each of Appellant's issues against him, we affirm the judgment of the trial court.

Patrick A. Pirtle
Justice

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