NUMBER 13-15-00394-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

HENRY THOMAS GOODMAN, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 347th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Hinojosa
Memorandum Opinion by Justice Hinojosa

Henry Thomas Goodman, appellant, appeals his conviction for aggravated assault and engaging in organized criminal activity. *See* TEX. PENAL CODE ANN. §§ 22.02, 71.02 (West, Westlaw through 2015 R.S.). The jury assessed punishment at ten years' confinement for each count. The trial court ordered the sentences to run concurrently.

In two issues, appellant complains that the trial court committed (1) reversible error by refusing his request to instruct the jury that one of the State's witness was an accomplice as a matter of law; and (2) fundamental error by failing to instruct the jury that it should determine whether the State's witness was an accomplice as a matter of fact. We affirm.

I. BACKGROUND[1]

It is undisputed that in the early afternoon of November 18, 2014, Alex Garcia sustained a single gunshot wound while he was a guest at Amy Quintanilla's apartment. At the time of the shooting, the second-story apartment was occupied by Quintanilla; Jesse Martinez, who was Quintanilla's boyfriend and a frequent guest at Quintanilla's apartment; Garcia, a friend to Quintanilla; and Randall Villegas, an acquaintance to Quintanilla. After a police investigation, appellant, Derrick Miculka, and Rolando Sanchez were indicted for aggravated assault, deadly conduct, and engaging in organized criminal activity. *See id.* §§ 22.02, 22.05, 71.02 (West, Westlaw through 2015 R.S.). Miculka and Sanchez entered into plea agreements with the State in exchange for their testimony against appellant.[2] The witnesses at trial may be broadly categorized as (a) non-accomplice apartment occupants, (b) accomplices as a matter of law, (c) a disputed accomplice, (d) a jailhouse informant, and (e) police officers. Appellant did not testify.

[1] The background in this memorandum opinion comes from the statement of facts presented in the parties' briefs and our review of the testimony at trial. The testimony from each witness is denoted by a heading.

[2] The State and Miculka agreed that he would serve fifteen and eight years, to run concurrently in exchange for his testimony. As for Sanchez, the State agreed to dismiss the criminal counts pending against him.

A. Non-Accomplice Apartment Occupants

Quintanilla testified that before the shooting, she was watching movies in her apartment with Garcia, Martinez—who was nicknamed "Jaybird"—and Villegas.[3] Quintanilla heard two sets of footsteps come up the stairs. Someone pounded on Quintanilla's front door, and she heard Miculka say, "it's the U.S. Marshall's[. . .]. We know you're in there." Quintanilla saw appellant holding a "can" through the peephole. Then, she heard the click of a gun and saw "fire" through the door. Next, Quintanilla saw Garcia fall to the floor; she believed Garcia was ducking because they did not know if another round was going to go off.

According to Garcia's testimony, about an hour before the shooting, he observed Miculka arrive at the apartment and give Martinez something. However, Garcia did not see what had been given. Shortly before the shooting, Garcia heard unrecognizable voices yelling from the outside, "Man, I'm gonna get you, or—for doing something." Graffiti was then spray painted, and he heard shots. Garcia did not see the shooter.

Claiming that he and appellant were good friends, Martinez testified that the argument on November 18, 2014 was between him and Miculka. Martinez saw people arrive at the apartment building through the back restroom window. Martinez later testified that he saw Miculka and appellant and that Orfia Bocanegra was driving. Through the front door's peephole, Martinez saw appellant spray painting. Miculka fired a shot when Villegas opened the door.

[3] Villegas did not testify at trial.

B. Accomplices as a Matter of Law

1. Sanchez

Sanchez recounted the morning of November 18, 2014. Sanchez, appellant, and others had rented a hotel room for sleeping and manufacturing synthetic marijuana.[4] At some point in the morning, appellant received a phone call from a "Jaybird." The phone call aggravated appellant as evidenced by his voice and "hand talking." According to Sanchez, appellant stated that he "wanted to go do something about it" and that he had to "take care of some business." Sanchez interpreted the statement as "usually having to do with fighting or something." Sanchez testified that appellant then called Bocanegra back to the hotel room so that she could drive the group.

Bocanegra, according to Sanchez, picked up appellant, who got in the passenger's seat, as well as Sanchez, Miculka, and an individual called "Junior," who all got in the backseat. Miculka took cans of gold spray paint to tag the walls.

When they got to Quintanilla's apartment,[5] appellant and Miculka went up the stairs towards the second floor apartment. Sanchez stayed towards the bottom of the stairwell. Nevertheless, Sanchez had a view of some of the activities on the second floor. Miculka tagged the walls. Appellant knocked on the door, and he stated, "It's the U.S. Marshall, bitch." After a few minutes, appellant pulled out a gun and shot at the door. Appellant and Miculka stayed on the second floor for a while as Sanchez walked

[4] According to Sanchez, synthetic marijuana is made by spraying marijuana with acetone.

[5] Quintanilla's apartment complex had a security surveillance video that, according to Sanchez, captured the group arriving. Sanchez acknowledged that the video did not clearly identify the three individuals and that the jury would have to take Sanchez's word for it.

back to the car. Appellant and Miculka then ran back to the car.

As the group drove away, Sanchez recalled that Bocanegra asked what happened. Appellant answered, "We got him." In the car ride back to the hotel, Miculka encouraged appellant by stating that he had probably gotten Martinez. When they returned to the hotel, appellant recounted the events to Bocanegra, as described by Sanchez.

2. Miculka

Miculka, an admitted member of the Rolling 60 gang, testified that he received a call from appellant at around 11:00 a.m. on November 18, 2014. At the time, Miculka was with Bocanegra, whom he claimed to be his common law wife. Appellant needed to be picked up and to take care of something. Bocanegra drove Miculka to pick up appellant. Bocanegra then drove the group to pick up a pistol. According to Miculka, on the way to Quintanilla's apartment, appellant said that Jaybird owed them some money and they were going to get it.

Miculka explained that when the group arrived at Quintanilla's apartment, appellant knocked on the door, and he stated that the U.S. Marshalls were there. Miculka spray painted the wall with gold spray paint. Miculka denied that appellant ever spray painted the wall. When no one answered the door, appellant shot at the door. Finally, Miculka testified that after the three returned to the car, the group drove to Portland, which had the nearest body of water. Appellant threw the gun over the causeway.

C. Disputed Accomplice

Bocanegra recalled being in the hotel room on November 18, 2014 when appellant received the aggravating phone call. According to Bocanegra, appellant stated to the

other person, “You aren’t getting shit.” Appellant was also mad because the other person was talking about his mother. After appellant hung up, he asked Miculka, “Do you have my back?” Miculka answered, “Yes.” Appellant said that he wanted to shoot Jaybird.

According to Bocanegra, after appellant’s statement, Bocanegra drove appellant, Miculka, Sanchez, and Junior to Quintanilla’s apartment. Appellant, Miculka, and Sanchez got out and went inside. Bocanegra and Junior stayed in the running car. Bocanegra heard gunshots, and then Sanchez, Miculka, and appellant returned to the car in that order. Bocanegra claimed to have first seen a gun when appellant pulled it out of his pocket. As Bocanegra drove the group away, appellant stated, “I got him.”

D. Jailhouse Informant

Perez testified that he met appellant “on the streets,” and he was also in the same “pod” as appellant while both were in the county jail for approximately ten months after the shooting. According to Perez, appellant confessed to shooting “Jaybird.” Appellant told Perez that Jaybird disrespected appellant’s deceased mother by saying that he was going to dig up appellant’s mother and have sex with her corpse and that Jaybird and appellant “had some drug deals.” According to Perez, before embarking to Quintanilla’s apartment appellant told the group in the hotel room, “You all know what time it is. I’m not going over there to play.” During the drive to Quintanilla’s apartment, appellant, according to Perez’s testimony, told the group that when they got there, they would impersonate federal agents or the police. Appellant further told Perez that he heard a female and Jaybird talking inside the apartment when he was at the apartment door.

Lastly, Perez recalled appellant telling him that Miculka knocked on the door and spray painted it.

E. Police Officer

Among the law enforcement officers who testified was Paul Lisowski, a plain clothes detective in the gang unit of the Corpus Christi Police Department. Detective Lisowski testified that appellant's tattoos indicated gang affiliation. According to Detective Lisowski, appellant's tattoo of "361" is used by the TANGO Corpitos gang to show where the member is from. Detective Lisowski also identified the graffiti left on Quintanilla's door:

> Q Now, obviously this is a different language. The graffiti stands for something. What do you attribute these to be, based on your experience and training?
>
> A This is a symbol or a sign basically saying that Rolling 60 is writing this and it's showing that they are Latin King Killers or they're going to kill a Latin King. It's a way that they show disrespect to the other gang.

F. Jury Charge

At one of the charge conferences, appellant objected to the omission of an instruction informing the jury that Bocanegra was an accomplice as a matter of law on the grounds that she participated in the offense and that the State made a deal that it would not prosecute her if she testified.[6] The trial court overruled appellant's objection. The

[6] In response to appellant's assertion that the State had made a deal with Bocanegra to secure her testimony, the State argued,

> . . . The issue was—and we made this pretty clear to him—was that at that time, she was not a suspect. I'm sorry. That she had not been charged. And I just told him the truth. There's—I didn't want to make a deal at all, but the truth of the matter is we have individuals that were indicted but—and at that point, we had no plans of indicting her, which is the truth. I mean, we just had no plans to indict her, but that had nothing to do with her

jury charge instructed the jury that Miculka and Sanchez were accomplices as a matter of law. It also included instructions regarding parties to offenses and criminal responsibility for the conduct of another. *See* TEX. PENAL CODE ANN. §§ 7.01(a),[7] 7.02(a)(2)[8] (West, Westlaw through 2015 R.S.). The counts provided:

Count 1

> Now, if you find from the evidence beyond a reasonable doubt that on or about NOVEMBER 18, 2014, in Nueces County, Texas, HENRY THOMAS GOODMAN acting alone or with DERRICK MICULKA, AND ROLANDO SANCHEZ did then and there intentionally, knowingly, or recklessly cause bodily injury to ALEX GARCIA by shooting the said ALEX GARCIA with a handgun, to wit a firearm, then you will find the defendant guilty of Aggravated Assault, as alleged in the indictment.
>
> . . . .

Count 2

> Now, if you find from the evidence beyond a reasonable doubt that on or about NOVEMBER 18, 2014, in Nueces County, Texas, HENRY THOMAS GOODMAN acting alone or with DERRICK MICULKA AND ROLANDO SANCHEZ did then and there, as a member of a criminal street gang, conspire to commit the offense of Aggravated Assault by agreeing with DERRICK MICULKA OR ROLANDO SANCHEZ that they would engage in conduct that constituted said offense, and the defendant HENRY THOMAS GOODMAN acting alone or with DERRICK MICULKA AND ROLANDO SANCHEZ, performed an overt act in pursuance of said agreement, to wit: by shooting the said ALEX GARCIA with a handgun, to wit a firearm, then you will find the defendant guilty of ENGAGING IN ORGANIZED CRIMINAL ACTIVITY, as alleged in the indictment.

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testimony. I mean, we just didn't have any plans to indict her.

[7] "A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." TEX. PENAL CODE ANN. § 7.01(a) (West, Westlaw through 2015 R.S.).

[8] "A person is criminally responsible for an offense committed by the conduct of another if [] acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense[.]" *Id*. § 7.02(a)(2) (West, Westlaw through 2015 R.S.).

The jury found appellant guilty on both counts.

At the punishment phase, the jury found that appellant used a deadly weapon while engaging in organized criminal activity, and it assessed punishment at ten years' confinement for each count. The trial court signed a judgment in accordance with the jury's verdict. This appeal followed.

II. DISCUSSION

By appellant's first issue, he complains that the trial court erred by overruling his objection to omitting an instruction that Bocanegra was an accomplice as a matter of law. He further complains that the only evidence corroborating Bocanegra's testimony comes from Miculka and Sanchez, accomplices as a matter of law. By appellant's second issue, he asserts that the trial court's failure to instruct the jury that Bocanegra was an accomplice as a matter of fact constitutes egregious harm.

A. The Accomplice Witness Rule

Under the accomplice witness rule, "[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." TEX. CODE CRIM. PROC. ANN. art. 38.14 (West, Westlaw through 2015 R.S.). "The rule reflects a legislative determination that accomplice testimony implicating another person should be viewed with a measure of caution," since "accomplices often have incentives to lie . . . [and] avoid punishment or shift blame to another person." *Blake v. State*, 971 S.W.2d 451, 454 (Tex. Crim. App. 1998). The defendant is entitled to an accomplice-witness instruction if and only if "there

is sufficient evidence in the record to support a charge against the witness alleged to be an accomplice." *Medina v. State*, 7 S.W.3d 633, 641 (Tex. Crim. App. 1999) (quoting *Smith v. State*, 721 S.W.2d 844, 851 (Tex. Crim. App. 1986)).

B. Harm Analysis: Some Harm vs. Egregious Harm

We review a claim of jury-charge error, including a failure to provide an accomplice witness instruction, using the procedure set out in *Almanza v. State*. 686 S.W.2d 157, 171-74 (Tex. Crim. App. 1985). First, we determine whether there is error in the charge. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005) (citing *Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003)). If error exists and the appellant objected to the error at trial, reversal is required if the error "is calculated to injure the rights of the defendant," in other words, if there is "some harm." *Almanza*, 686 S.W.2d at 171. If the error was not objected to, it must be "fundamental" and will require reversal only if it was so egregious and created such harm that the defendant "has not had a fair and impartial trial." *Id*.; *Saunders v. State*, 817 S.W.2d 688, 690 (Tex. Crim. App. 1991). Whether analyzing the record for some harm or egregious harm, we should consider the entire jury charge, the state of the evidence, the arguments of counsel, and any other relevant information revealed by the record of the trial as a whole. *Sanchez v. State*, 376 S.W.3d 767, 774 (Tex. Crim. App. 2012). The harm must be actual, not merely theoretical. *Almanza*, 686 S.W.2d at 174.

C. Accomplice as a Matter of Law

Appellant's first issue presumes that the jury could have found him guilty of aggravated assault only if he acted as the principal. In response, the State asks us to

abandon precedent from the Texas Court of Criminal Appeals and this Court. First, the State "concedes that the Court of Criminal Appeals has long held that the testimony of one accomplice witness cannot corroborate another accomplice witness's testimony." Yet, in the next sentence, the State argues, "[h]owever, nothing in the Accomplice Witness statute itself prevents one accomplice from corroborating another accomplice's testimony." The circular flaw that plagues the State's accomplice-witness argument was explained in *Patterson v. State*. 204 S.W.3d 852, 858–59 (Tex. App.—Corpus Christi 2006, pet. ref'd) (en banc).[9] Second, the State, citing *Patterson*, writes that "this Court has concluded that the testimony of an informant may not corroborate that of an accomplice." *See id*. Yet, the State argues "there is nothing in Article 38.14 that prevents such corroboration." *But see id.* at 859.

We respectfully decline the State's invitation to revisit settled law. The presumption in appellant's first issue that the jury could have found him guilty of aggravated assault only if he acted as the principal fails under the review prescribed by *Smith*[10], *Casanova*[11], and *Almanza*.[12] Assuming without deciding that Bocanegra was

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[9] In *Patterson*, we wrote,

> Under the State's interpretation, an accomplice would be able to corroborate the testimony of an informant at trial. The same informant could then testify at the same trial to corroborate the same accomplice. In this circular fashion, a defendant could be convicted on nothing more than the testimony of an accomplice and an informant. This result would be absurd in light of the legislature's clear action to disfavor such evidence and to hold it insufficient for conviction as a matter of law.

Patterson v. State, 204 S.W.3d 852, 859 (Tex. App.—Corpus Christi 2006, pet. ref'd) (en banc),

[10] *Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011).

[11] *Casanova v. State*, 383 S.W.3d 530, 540 (Tex. Crim. App. 2012).

[12] *Almanza v. State*. 686 S.W.2d 157, 171-74 (Tex. Crim. App. 1985).

an accomplice as a matter of law and that the trial court's error is subject to a "some harm" analysis, the non-accomplice evidence coupled with the disjunctive submission of the charged offenses is sufficient under controlling precedent to render any error harmless.

There is no bright-line rule concerning corroboration of accomplice testimony, and non-accomplice evidence is not viewed piecemeal. Instead, we look at the combined force of the non-accomplice evidence, including motive, opportunity, demeanor, and actions before and after the offense. *Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011). The Texas Court of Criminal Appeals has also provided:

> [A]s the corroborating evidence gains in strength to the point that it becomes implausible that a jury would fail to find that it tends to connect the accused to the commission of the ***charged offense***, then a reviewing court may safely conclude that the only resultant harm is purely theoretical and that there is no occasion to reverse the conviction, ***even in the face of an objection***, since the jury would almost certainly have found that the accomplice witness's testimony was corroborated had it been properly instructed that it must do so in order to convict.

Casanova v. State, 383 S.W.3d 530, 540 (Tex. Crim. App. 2012) (emphasis added).

Applying the approach mandated by the Texas Court of Criminal Appeals, we must evaluate the existence and strength of the non-accomplice witness testimony. *Casanova*, 383 S.W.3d at 540. We must also consider, among other things, the entire jury charge. *Sanchez*, 376 S.W.3d at 774. Count 1 was submitted on disjunctive theories. The jury may have convicted appellant of aggravated assault if he was "acting alone or with" Miculka and Sanchez.[13] Thus, the jury may have found appellant guilty as

[13] We note that appellant did not object to the inclusion of the law of parties in the jury charge, and we express no opinion regarding the propriety of including both the law of parties and the accomplice witness rule in the same jury charge. *But see Thomas v. State*, No. 03-97-00421-CR, 1998 WL 546269 at *4 (Tex. App.—Austin Aug. 31, 1998, pet. ref'd) (not designated for publication) ("We are not persuaded that instructions on the law of accomplice witness testimony and the law of parties are mutually exclusive.").

either the principal or a party.

The non-accomplice witness testimony satisfies the tends-to-connect standard as to appellant's conviction as a party. Quintanilla and Garcia, non-accomplice occupants of the apartment, identified appellant as being in the hallway immediately before the shooting and holding a can of spray paint. Garcia testified that graffiti was spray painted before the shooting, and he identified Miculka as the shooter. Detective Lisowski testified, without objection, that graffiti found outside the apartment was from a Rolling 60 gang member showing that the gang member was going to kill or show disrespect to a Latin King Killer. The jury may have determined that appellant spray painted the graffiti to encourage Micukla to shoot at an apartment he thought Martinez occupied. *See* TEX. PENAL CODE ANN. § 7.02(a)(2).

Making a case for some harm as to Count 2 is even more daunting. Even ignoring the testimony of Quintanilla, Miculka, Sanchez, and Perez, the jury may have concluded that appellant conspired with Miculka and Sanchez to shoot Martinez. Detective Lisowski identified some of appellant's tattoos as indicative of him being a member of the TANGO Corpitos gang. Quintanilla testified that appellant belonged to the TANGO gang and that Miculka belonged to a gang called the "60's or something like that." Martinez, another non-accomplice occupant, identified Bocanegra as the driver. Further, Martinez saw appellant spray painting outside the apartment.

As to both counts, appellant has presented nothing more than a case of theoretical harm. *See Almanza*, 686 S.W.2d at 174. Appellant's first issue is overruled.

D. Accomplice as a Matter of Fact

As framed, appellant's second issue implicitly concedes that he failed to object to the omission of such an instruction. 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." *Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002) (quoting *Saunders v. State*, 817 S.W.2d 688, 692 (Tex. Crim. App. 1991)).

Having concluded that appellant failed to establish some harm regarding Bocanegra as a matter of law, we cannot say that failure to instruct the jury that Bocanegra was an accomplice as a matter of fact constitutes egregious harm for the reasons stated above. The testimony of Quintanilla, Garcia, and Martinez is not so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive. *See Herron*, 86 S.W.3d at 632. Accordingly, appellant's second issue is overruled.

III. CONCLUSION

The judgment of the trial court is affirmed.

LETICIA HINOJOSA
Justice

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

Delivered and filed the
16th day of March, 2017.