Opinion filed July 13, 2017

In The

Eleventh Court of Appeals

No. 11-15-00081-CR

DESIRAE MONIQUE MATA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 106th District Court

Gaines County, Texas

Trial Court Cause No. 14-4486

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

The jury found Desirae Monique Mata guilty of two counts of capital murder: one that involved the death of John Allen and the other, the death of Jay Doyal. The trial court imposed the mandatory sentence on each count at life without parole. *See* TEX. PENAL CODE ANN. § 12.31(a)(2) (West Supp. 2016).[1] We affirm.

[1]The grand jury returned another multi-count indictment against Appellant. After the jury had returned its verdict in this case, the State moved to dismiss the other indictment; the trial court dismissed it without prejudice and with no objection from Appellant's trial counsel.

Appellant first asks this court to reverse and remand this cause for a new trial because the trial court failed to charge the jury on the law regarding corroboration of the testimony of a jailhouse informant. In her second issue on appeal, Appellant claims that the trial court violated her constitutional right of confrontation when it allowed a witness to testify as to out-of-court statements made by another.

In Appellant's well-written brief to this court, counsel makes the statement: "This case is about a clique of individuals (mostly criminals) and the consequences of their lifestyles." The record in this case supports that statement. It was from within this drug subculture that the facts of this case arose.

We will first examine the genesis of the initial question presented to us by Appellant. Texas authorities obtained an arrest warrant for Appellant. Authorities ultimately arrested Appellant in Alabama, and she was incarcerated there on the charges in this case. Angie Brown was an inmate in a cellblock with Appellant. Brown maintained that Appellant had told her about the murders that occurred in this case. Brown told her Alabama attorney, Rita Briles, what Appellant had said to her. Briles scheduled a meeting between the Texas Rangers and Brown.

Texas Ranger Brian Burney, among others, went to Alabama. Brown gave a statement to Ranger Burney. At Brown's request, Briles typed the statement, and it was admitted as an exhibit at Appellant's trial. Brown also testified in person at Appellant's trial.

At trial and in her statement to Ranger Burney, Brown said that, in early August 2012, Appellant came into her cell and told her about a double murder in which Appellant had been involved. Brown said that Appellant showed no emotion. Appellant said that she had come to her sister's house in Alabama in June, after the murders. Appellant told Brown that "John," one of the murdered men, owed "Rollie," her baby's dad, $60,000 on a jewelry and methamphetamine deal and that Rollie had put a hit out on John.

Appellant also told Brown that, on the day of the murders, John was expecting Appellant to come to his house. John was very paranoid, but he trusted Appellant. Brown said that Appellant told her that she, "Smokey," "Dan Dan," and "Bobby" went to John's house in Appellant's car.[2] When they got to John's house, Smokey and Bobby hid, and Appellant went inside the house. When Smokey and Bobby knocked on the door, Appellant let them in. Once they were in the house, they shot Jay (an innocent bystander) in the head and also shot John in the head. Jay was in the hallway when they shot him, and John was in his bedroom when they shot him. Rollie put "the hit" out on John, and he made the deal with Dan Dan. Dan Dan solicited the others; they were Rollie's friends.

Appellant told Brown that the police discovered the bodies between 3:00 p.m. and 4:00 p.m. and that the murders happened around 9:30 that morning. Appellant told Brown that, on the day of the murders, she had an appointment for a drug test with Child Protective Services and that she intended to use that as her alibi. After the murders had taken place, she kept the appointment.

After the murders, Smokey took John's surveillance equipment from the house. Brown said that Appellant was worried that Bobby and Smokey would make statements against her. She was also concerned about whether police could trace footprints left in the white carpet that was in the house.

Article 38.075 of the Texas Code of Criminal Procedure addresses those situations in which the State offers evidence of statements made by a defendant to another inmate, commonly known as jailhouse confessions. It contains the following language:

> (a) A defendant may not be convicted of an offense on the testimony of a person to whom the defendant made a statement against the defendant's interest during a time when the person was

[2]A number of individuals in this case use nicknames or street names. Appellant has provided us with an exhibit to her brief in which, from the record, she pairs the nicknames or street names with actual names: "Smokey" is Juan Castillo; "Dan Dan" is Nicomedes Daniel Sosa.

> imprisoned or confined in the same correctional facility as the defendant unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed.
>
> (b) Corroboration is not sufficient for the purposes of this article if the corroboration only shows that the offense was committed.

TEX. CODE CRIM. PROC. ANN. art. 38.075 (West Supp. 2016).

Appellant is correct, and the State agrees, that the trial court erred when it failed, sua sponte, to instruct the jury in accordance with Article 38.075 of the Texas Code of Criminal Procedure. A trial court must sua sponte include an Article 38.075 jailhouse-witness instruction when applicable to the case. *Phillips v. State*, 463 S.W.3d 59, 65 (Tex. Crim. App. 2015); *Brooks v. State*, 357 S.W.3d 777, 781 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

Because we have found error, it is necessary for us to assess harm. Appellant did not object to the failure of the trial court to include a jailhouse-witness instruction in the jury charge. Therefore, we review the error for egregious harm. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).

Jury charge error is egregiously harmful when it affects the very basis of the case, when it deprives the defendant of a valuable right, or when it vitally affects a defensive theory. *Stuhler v. State*, 218 S.W.3d 706, 719 (Tex. Crim. App. 2007); *Cook v. State*, 460 S.W.3d 703, 711 (Tex. App.—Eastland 2015, no pet.). When we determine whether jury charge error is egregious, we will consider the entirety of the charge; the evidence, to include any contested issues and weight of the probative evidence; the arguments of counsel; and any other relevant information revealed in the record as a whole. *Cook*, 460 S.W.3d at 711.

"Under the 'egregious harm standard,' the omission of a corroborating-evidence instruction may be rendered harmless if other evidence than the testimony of the [jailhouse witness] does exist that fulfills the purpose of the instruction." *Simmons v. State*, 205 S.W.3d 65, 77 (Tex. App.—Fort Worth 2006, no pet.)

(quoting *Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002)). The trial court's failure to include a jailhouse-witness instruction is "generally harmless unless the corroborating . . . evidence is 'so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive.'" *Herron*, 86 S.W.3d at 632 (quoting *Saunders v. State*, 817 S.W.2d 688, 692 (Tex. Crim. App. 1991)).

We have examined Brown's testimony as to the statements she claimed that Appellant made to her. We will now examine the remainder of the record in order that we might determine, under the standards set forth above, whether the error in this case results in egregious harm.

The State's overall case for conviction included testimony that Trent Ashlock stole three diamond rings—one solitaire and a set of rings that someone had soldered together. Roland Cantu, whose nickname was "Rollie," was, among other things, a drug dealer. Ashlock traded the three rings to Rollie in exchange for drugs.

Rollie apparently showed the rings to Appellant, and she began to refer to one of them as "my diamond." Much to Appellant's apparent consternation, Rollie asked a friend, John Allen, who was a fence for stolen goods as well as a drug user, to sell all the rings. Allen formerly worked for Zales and he believed that the rings were "worth a whole lot of money." Allen not only fenced stolen property, he was a drug user and, like others involved in this case, was connected to the drug world.

Later, when Rollie was in prison on unrelated charges, he wrote to Allen and instructed him to sell the rings and give Appellant "10 g's each" and to take the rest and "live it up homie, it's all good!"

Allen and a friend, Nathan Webster, went to New York City where they fenced the diamonds. Ranger Burney testified that after Allen and Webster had sold the diamonds—he thought for a price of $80,000—they purchased a used Maserati

vehicle, with a salvage history, for $20,000. They returned from New York to Seminole in the Maserati.

At some point in time after Allen returned to Seminole in the Maserati, Appellant moved in with Allen and lived with him for a month or two. It was generally thought that Allen had gotten a good bit of money, and people began to steal from him. Allen became extremely paranoid. He carried a pistol, wore a body cam and kept a list of people whom he thought had done him wrong. Additionally, Allen installed a surveillance system at his house and, at one point, boarded up windows to his house.

A month or so before the murders, images of Dan Dan and Appellant appeared on Allen's surveillance equipment as they attempted to turn off power to the house. After the murders, the perpetrators forcibly removed the surveillance recording equipment and took it with them.

Juan Castillo, a codefendant, gave a statement to law enforcement officers in which he detailed the crime. He included certain details that the police had intentionally withheld from the public. One such detail was that, after they had killed Doyal, the perpetrators had positioned Doyal's body in such a fashion that he appeared to be holding a meth pipe and a lighter. Investigators could not exclude Appellant as a donor of a DNA sample found on that pipe.

Castillo named Bobby Ruiz and Dan Dan as two of the others involved in the murders. However, when shown a lineup, Castillo identified Desirae Reyna as the person whom he referred to as "Rollie's Desirae." But testimony showed that Desirae Reyna was incarcerated at the time of the murders. While he was in jail, Castillo wrote a letter to Appellant and told her that she, Bobby, and Dan Dan—the others who were involved in the murders—needed to tell the authorities that he was not there at the time of the murders.

Not only did Castillo talk to law enforcement, he also talked to a friend, David Delapaz. Castillo told Delapaz that "he had to get something off his chest." Castillo then said that he, along with Dan Dan, Bobby, and "Desirae," went to rob "John, his safe." Castillo was the driver. Dan Dan, Bobby, and Castillo had Appellant knock on the door while they waited "on the side of the house." When somebody opened the door for Appellant, Bobby and Dan Dan "came running in with their pistols pulled, aiming. Dan Dan told Allen that all they wanted was his safe and that that was the only reason they were there. Allen said, "No, y'all ain't going to f-----g take my safe." Further words were exchanged, and Bobby hit Doyal in the head with his pistol. Dan Dan hit Allen in the head with his pistol. Bobby shot Doyal in the chest.

Allen told them to take the safe and just "get the f--k out of here." Allen tried to go toward a back room, but Dan Dan shot him twice in the back. Castillo told Delapaz that, after about an hour, they were still there; "they were just playing with the bodies." They put the meth pipe in Doyal's hand in an effort to make it look like the victims were there smoking and "that somebody did a drive-by."

After the murders, Appellant went to visit family in Alabama; she was to return on a July 27, 2012 flight. On July 26, 2012, authorities obtained arrest warrants for all four persons believed to have been involved in the murders, and the authorities attempted to serve Appellant. At 10:58 p.m. on July 26, Appellant canceled her July 27 return flight from Alabama to Texas.

We do well to remember that our review is not one for sufficiency of the evidence to convict; we are to review the trial court proceedings for egregious harm caused by jury charge error. Here, the jury could have reasonably found that, excluding Brown's testimony, the evidence that we have outlined above tended to connect Appellant to the murders.

Appellant argues that she was not angry over the fact that Allen had not paid her the money from the sale of the diamonds as instructed by Rollie; her interest was

in the solitaire diamond itself. However, when we read the entire transcripts of the jail phone calls between Rollie and Appellant, we find that there was a good bit of testimony that showed Appellant's agitation over the nonpayment of the money, in addition to anger over the sale of "my diamond." Appellant lived with Allen for a time and would have been familiar with his paranoia, his safe, and his surveillance equipment. Appellant could not be excluded as a contributor of DNA to the meth pipe that was purposefully placed in Doyal's hands after he was dead. Appellant and Rollie had lived together and were the parents of a young boy. There was testimony that "Rollie's Desirae" was the fourth person involved in the killings and that she was the one to gain access to Allen's house on the date of the murders. The only other "Desirae" connected to Appellant was Desirae Reyna, and she was in jail on the date that the murders took place. Appellant had reservations to return to Texas from Alabama the day after an arrest warrant was issued for her in Texas. After the Texas warrant was issued, Appellant canceled that return flight.

The corroborating evidence in this case is not "so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive." *Herron*, 86 S.W.3d at 632 (quoting *Saunders*, 817 S.W.2d at 692). Further, because of the corroborating evidence in the record, the omission of the instruction on corroboration "likely had a very minimal effect" on the verdict. *Cook*, 460 S.W.3d at 711. The omission of the instruction did not affect the very basis of this case, deprive Appellant of a valuable right, or vitally affect a defensive theory. *Id.* We overrule Appellant's first issue on appeal.

In her second issue on appeal, Appellant complains that her right to confrontation was violated when the trial court allowed a law enforcement officer to testify about an out-of-court statement that he took from a third party who never testified at trial. Appellant made no objection at trial and has preserved nothing for review. A defendant waives his constitutional right to confront witnesses if he does

not object to the denial of that right at trial. *Holland v. State*, 802 S.W.2d 696, 700 (Tex. Crim. App. 1991). Appellant's second issue on appeal is overruled.

We affirm the judgments of the trial court.

JIM R. WRIGHT
CHIEF JUSTICE

July 13, 2017

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

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