Opinion issued August 12, 2010.

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00093-CR

TRISTIAN DIONDRAY WEATHERS, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Case No. 1173115

MEMORANDUM OPINION

A jury found Tristian Diondray Weathers guilty of burglary of a habitation and assessed a sentence of sixty years' incarceration. On appeal, Weathers contends that the trial court erred by not instructing the jury about the law of accomplice witness testimony. Finding no error, we affirm.

Background

One afternoon in June 2008, Filiberto Perez and his teenage son, also named Filiberto, looked through the front window of their home and saw three men with black suitcases in the yard of his neighbor, Glenda Salazar. The men, later identified as Weathers, Sotero Chavez, and Jamarcus Smith, carried the suitcases through Salazar's front door into her home and then carried them out to a brown four-door car parked in the driveway.

Perez called 911 to report a burglary in progress and gave them the license tag number for the parked car. The Harris County Sheriff's Department traced the number to Weathers at an address on Gatton Park, a street a few miles away. The Department dispatched Deputy C. Mullins to respond to the call. Because the car had already left the site of the burglary, Mullins first headed for the address listed on the car registration and called for back-up to meet him there. As Mullins approached, he saw several people, including Weathers, standing in the driveway by a brown four-door car bearing the reported license plate number. Deputy R. Lee had also arrived at the scene to assist Mullins.

When the people in the driveway noticed the patrol cars, they ran into the house. The officers followed, noting that a black suitcase like the one Perez described sat open in the living room with electronics inside. The officers reached the back door, which was open, and saw that some of the people fled through

broken boards in the back fence. A few individuals, however, remained near the car and in the house. The officers detained three of the men, including Weathers.

While other officers held Weathers and the other suspects, Mullins left to meet with the Perezes. The Perezes agreed to accompany Mullins to the Gatton Park house to identify the suspects. When they arrived a little less than an hour later, Perez identified Weathers as one of the burglars he saw at Salazar's home, explaining that he recognized Weathers by the white sleeveless t-shirt he was wearing. A search of Weathers' person led to discovery of Salazar's identification in his pocket. The officers recovered numerous electronics and jewelry from the Gatton Park house and the brown car that Salazar later identified as hers. The police arrested and charged Weathers with burglary of a habitation.

During its case-in-chief, the State called Chavez to testify. Chavez confirmed that, earlier on the day of the burglary, Weathers asked him if he wanted "to go hit a lick." Chavez explained that he understood Weathers' question as asking if Chavez wanted to break into somebody's house and take their belongings. Chavez said he would, and got into Weathers' car along with Smith. Chavez explained that once they arrived at Salazar's house, they went their separate ways to collect the valuables and that Weathers kept telling them to hurry up. Chavez brought some of the stolen items to a pawnshop, where they were later recovered

by the police and reclaimed by Salazar, along with a pawnshop video of Chavez's transaction. With this evidence, the police charged Chavez with felony theft.

Charge Error

A. Standard of review

Weathers' single issue on appeal concerns the absence of a jury instruction on the law of accomplice witness testimony. We review a claim of jury-charge error using the procedure set out in *Almanza v. State*, 686 S.W.2d 157 (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). Under both standards, we look to the actual degree of harm in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole. *Id.*

B. Corroboration of informant testimony

The Texas Code of Criminal Procedure requires that accomplice testimony be "corroborated by other evidence tending to connect the defendant with the offense committed." TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 2005); *Colella v. State*, 915 S.W.2d 834, 838 (Tex. Crim. App. 1995). An accomplice is an individual who participates with a defendant in the commission of a crime by doing some affirmative act with the requisite culpable mental state that promotes the commission of that offense. *Cocke v. State*, 201 S.W.3d 744, 748 (Tex. Crim. App. 2006) (citing *Paredes v. State*, 129 S.W.3d 530, 536 (Tex. Crim. App. 2004)); *Blake v. State*, 971 S.W.2d 451, 454–55 (Tex. Crim. App. 1998); *Pena v. State*, 251 S.W.3d 601, 607 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd).

The record shows that Chavez agreed to participate in the burglary with Weathers, went with Weathers and Smith to Salazar's home, and removed valuables from the home in connection with the criminal enterprise. This evidence requires the conclusion that Chavez was Weathers' accomplice in the robbery. Because the State presented Chavez's testimony as part of the evidence used to convict Weathers, the Code of Criminal Procedure requires that his testimony be corroborated, and failure to instruct the jury on that requirement is error. *See Herron v. State*, 86 S.W.3d 621, 631–32 (Tex. Crim. App. 2002) (holding that failure to instruct jury of corroboration requirement for accomplice testimony was

error); *see also Simmons v. State*, 205 S.W.3d 65, 77 (Tex. App.—Fort Worth 2006, no pet.) (holding that failure to instruct jury of corroboration requirement for confidential informant testimony under article 38.141 was error).

C. Harm

Having determined that the trial court erred by failing to give the instruction, we must next decide whether the error harmed Weathers. Weathers did not request the instruction or object to its omission, and thus failed to preserve error. Accordingly, our review focuses on whether Weathers suffered "egregious harm" as a result of the missing instruction. *See Herron*, 86 S.W.3d at 632 (citing *Almanza*, 686 S.W.2d at 171); *Saunders*, 817 S.W.2d at 690; *Simmons*, 205 S.W.3d at 77.

1. The charge

The absence of a jury instruction specifically requiring corroboration of an accomplice's testimony likely misled the jury into believing that Chavez's testimony did not need to be corroborated because the charge did not contain an instruction requiring corroboration of the accomplice's testimony. This factor tends to support a finding of harm.

2. The evidence

Non-accomplice evidence need not directly link the accused to the crime nor independently prove his guilt beyond a reasonable doubt. *McDuff v. State*, 939

S.W.2d 607, 613 (Tex. Crim. App. 1997). The erroneous omission of an instruction that tells the jury that testimony must be corroborated generally is 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. In reviewing the strength of the corroborating evidence, we "examine (1) its reliability or believability and (2) the strength of its tendency to connect the defendant to the crime." *Id.*; *see Burks v. State*, 876 S.W.2d 877, 888 (Tex. Crim. App. 1994); *see also Simmons*, 205 S.W.3d at 77 (applying *Herron* to informant testimony).

Weathers claims that "the State's case against [him] relied heavily on Chavez's testimony" and, as in the *Saunders* case, "rational jurors could have assessed the State's case as 'significantly less persuasive' without Chavez's testimony." *See Saunders*, 817 S.W.2d at 693. According to Weathers, without Chavez, the evidence to prove that [Weathers] actually entered the residence of the complainant is razor thin."

We disagree. Independent of Chavez's testimony, the State presented ample evidence to support the jury's finding that Weathers committed the burglary. As Weathers notes, the testimony of Perez and his son, both eyewitnesses, placed Weathers at Salazar's home on the day of the burglary. Perez's son identified Weathers as one of the individuals he saw coming out of Salazar's house with

suitcases and putting them in the trunk of the car. Both of the officers who responded to the burglary in progress call testified to the identification of Weathers' car as the vehicle used in the burglary, the discovery of Weathers, his car, and the items stolen from Salazar's home in Weathers' car and at his house. Salazar also appeared and confirmed that she owned the items recovered from Weathers' house and car by the officers, as well as the items recovered from the pawn shop.

In contrast, the independent corroborating evidence in *Saunders* allowed for "rather weak" inferences (1) that appellant committed arson based on the fact that appellant had given several inexpensive items for safekeeping to a neighbor shortly before the fire, but lost numerous valuable and irreplaceable items in the fire, and (2) that appellant impeded the criminal investigation by consciously disregarding orders to leave the site intact and burning down the remainder of the damaged home before arson investigators could examine it, although the evidence was "far more probative" that his conduct resulted from misunderstanding, not disobedience. 817 S.W.2d at 692–93. Here, the quantum of independent corroborating evidence directly places Weathers and his car at Salazar's home, places Salazar's belongings in Weathers' car and his home, and places Salazar's identification on Weathers' person with no valid explanation for his possession of them.

The independent testimony from the police officers and eyewitnesses, as well as the owner of the stolen property, standing alone, is sufficient to connect Weathers to the burglary. That evidence is not so unconvincing in fact that it renders the State's overall case for conviction clearly and significantly less persuasive. *See Herron*, 86 S.W.3d at 632 (holding defendant was not harmed under lower "some harm" standard "where there is no such basis in the record for doubting the reliability of the remaining . . . items of non-accomplice evidence").

3. The arguments of counsel

In its opening argument, the State focused on the testimony of the investigating officers and the eyewitnesses, the use of Weathers' car in committing the burglary and the identification of Salazar's property in Weathers' possession. The State made no mention of Chavez.

At closing, defense counsel attempted to cast doubt on Perez's identification of Weathers by the shirt he was wearing and emphasized the defense witnesses' testimony that Weathers was at home when the burglary occurred. The State waived its right to open but reserved rebuttal. It initially stressed the effect of the crime on Salazar's peace of mind and her identification of her property found in Weathers' house and car, as well as the eyewitness testimony from the Perezes identifying Weathers as a participant in the burglary. The State argued:

> Is there any doubt? And if there was, then you have the one person who got up here today with no reason to lie. The one person

> who got up here and didn't lie under oath to all 12 of you: Sotero Chavez. He's doing his time. He took responsibility for his part in this. He pled. And he's not getting a reduction in sentence. He's not getting anything. But he got up here and he told you the truth.
>
> He told you whose idea it was: [Weathers]. He told you whose car they took: His. He told you who drove both ways: Him. Told you what this guy said: Do y'all want to go hit a lick?

The State concluded with another reference to Salazar's testimony.

The State's waiver of the right to begin closing signals its apparent belief in the strength of the evidence supporting conviction. It used about a quarter of the time in its brief rebuttal discussing Chavez's testimony. The State's argument does not emphasize the actual evidence adduced by Chavez's testimony, but the reasons why the jury should find his testimony credible. We conclude that these arguments do not focus the jury's attention on Chavez's testimony in a way that would cause the jury to rely on it without the corroborating evidence in finding that Weathers committed the burglary.

4. Other information in the record

The State presented all of the evidence except for Chavez's testimony in its case in chief. It called Chavez only as a rebuttal witness, after the defense adduced testimony from its witnesses that Weathers did not participate in the burglary and was at his house when it occurred. The testimony elicited from Chavez directly rebutted Weathers' defensive theory and identified Weathers as an active participant in the burglary.

The record shows that strong and reliable evidence connects Weathers to the burglary, and the State's limited purpose in presenting Chavez's testimony lessened any impact caused by the lack of an instruction requiring corroboration of the accomplice's testimony. We therefore hold that Weathers was not egregiously harmed by the lack of an instruction regarding the corroboration requirement for Chavez's testimony.

Conclusion

We hold that Weathers was not egregiously harmed by the lack of a jury instruction on the need for independent corroboration of accomplice testimony. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Bland and Sharp.

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