Opinion issued January 18, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00789-CR

JUAN JOSE ARELLANO-VELAZQUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Case No. 1479333

MEMORANDUM OPINION

Juan Arellano-Velazquez was tried and convicted for possession with intent to deliver over 400 grams of a controlled substance, namely, cocaine.[1] Arellano

[1] TEX. HEALTH & SAFETY CODE § 481.112(a), (f).

raises six issues. In his first, he contends that the accomplice-witness testimony presented by the State was not sufficiently corroborated. In his second, he contends that the trial court abused its discretion in admitting evidence of extraneous bad acts. In his third, fourth, fifth, and sixth, he contends that trial counsel's failure to make certain evidentiary objections constituted ineffective assistance of counsel. We affirm.

Background

The police surveil Arellano, observe him pick up narcotics, and arrest him and his accomplices

One morning, Officer M. Zamora of the Houston Police Department was surveilling a Honda parked in front of a house in east Houston. The house was the residence of Juan Arellano-Velasquez, whom Zamora had been investigating for suspected drug trafficking. Zamora had received a tip from a confidential informant that the Honda would soon be leaving town with an undetermined amount of narcotics. He observed that the Honda had a broken window and then left the scene in his unmarked vehicle.

When Officer Zamora returned to the residence later in the day, he observed that the window had been repaired, leading him to suspect some movement was about to occur. He then observed Arellano exit his house, get into the Honda, and drive away. He called Officers G. Haselberger and K. Venables to provide rolling surveillance.

Communicating through a back-channel police radio, the officers followed the Honda to a shopping center, where they observed Arellano pick up a man, later identified as Omar Hernandez. The officers continued to follow the Honda as it left the shopping center and drove to a washateria.

Surveilling the washateria from across the street, Zamora observed the Honda park next to a Toyota, which was driven by a man later identified as Edgar Henriquez. He then observed an Infiniti pull up and park beside the Honda. Zamora continued to watch as Hernandez got out of the Honda, retrieved a backpack from a passenger in the Infiniti, put the backpack in the backseat of the Toyota, and then got back into the Honda.

After the exchange, the Honda and Toyota left the washateria and drove "in tandem" to a convenience store, where the officers stopped and detained Arellano, Hernandez, and Henriquez. Officer Haselberger asked Henriquez whether there were drugs in the Toyota, and he responded, "Yes. In the black bag."

The officers then searched the Toyota, retrieved the backpack from the backseat, and found six bricks of cocaine inside. Zamora testified that the cocaine was worth approximately $600,000 and that the amount was consistent with distribution, not personal use.

The officers also seized multiple cell phones from the three men (two from Arellano, one from Henriquez, and three from Hernandez). Zamora testified that

finding multiple phones on an individual is consistent with narcotics trafficking, as it is common for drug dealers to use multiple phones to create a buffer between dealers, couriers, and customers.

The records of the calls from those phones were retrieved by other officers pursuant to a search warrant. The records showed that, in the days leading up to the offense, Arellano and Hernandez exchanged 36 phones calls. Zamora testified that the high number of calls indicated that they were planning something.

Arellano is indicted, tried, and convicted

Arellano was indicted for possession with intent to a deliver over 400 grams of cocaine. At trial, Henriquez and Hernandez testified as witnesses for the State.

Henriquez testified that Arellano was the "boss" of the operation and Hernandez was the "go-between." According to Henriquez, Arellano told Hernandez what to do, and Hernandez, in turn, told Henriquez where to go. Henriquez further testified that, while in the holding cell after the arrest, Arellano offered to pay him $100,000 if he took the blame, but he refused.

Hernandez's testimony was more detailed. Hernandez testified that, on the day of the arrest, Arellano called him in the morning and instructed him on what to do and that, once they were detained by the police, Arellano told him, "It's over."

Hernandez further testified to several instances in the months leading up to the arrest in which he and Henriquez picked up or delivered narcotics at Arellano's

behest. Hernandez claimed that he did not want to continue working for Arellano but felt like he had to in order to pay a debt for a shipment of drugs that had been stolen. Hernandez testified that he was afraid that if he quit before paying the debt, Arellano would kill him or his mother. Hernandez testified that Arellano had once threatened to cut his friend's head off because Arellano believed his friend had stolen a shipment of drugs from him.

A jury found Arellano guilty and assessed punishment at 60 years' confinement and a $250,000 fine. The trial court sentenced Arellano in accordance with the jury's verdict. Arellano appeals.

Corroboration of Accomplice-Witness Testimony

In his first issue, Arellano argues that the evidence is insufficient to support his conviction because the accomplice-witness testimony presented by the State was not corroborated. The State responds that the accomplice-witness testimony was corroborated by the officers' testimony and the cell phones recovered from Arellano, Hernandez, and Henriquez.

Under the accomplice-witness rule, a defendant cannot be convicted on accomplice testimony unless the testimony is "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. CRIM. PROC. CODE art. 38.14.

In determining whether accomplice-witness testimony was sufficiently corroborated, we view the evidence in the light most favorable to the jury's verdict. *Brown v. State*, 270 S.W.3d 564, 567 (Tex. Crim. App. 2008). "The corroborating evidence need not be sufficient by itself to establish guilt . . . ." *Castillo v. State*, 221 S.W.3d 689, 691 (Tex. Crim. App. 2007). Nor must it "directly link" the defendant to the offense. *Id.* (quoting *McDuff v. State*, 939 S.W.2d 607, 613 (Tex. Crim. App. 1997)). "There must simply be *some* non-accomplice evidence which *tends* to connect appellant to the commission of the offense alleged in the indictment." *Castillo*, 221 S.W.3d at 691.

Thus, "circumstances that are apparently insignificant may constitute sufficient evidence of corroboration." *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008). The Court of Criminal Appeals has explained that "proof that the accused was at or near the scene of the crime at or about the time of its commission, when coupled with other suspicious circumstances, may tend to connect the accused to the crime so as to furnish sufficient corroboration to support a conviction." *Smith v. State*, 332 S.W.3d 425, 443 (Tex. Crim. App. 2011) (quoting *Richardson v. State*, 879 S.W.2d 874, 880 (Tex. Crim. App. 1993)).

At trial, the State corroborated the accomplice-witness testimony with Officer Zamora's testimony. Zamora testified that he observed Arellano leave his residence in his Honda, pick up Hernandez, drive to a washateria, and park next to the Toyota

driven by Henriquez. He then observed the Infiniti pull up and park next to the Honda and Hernandez exit the Honda, retrieve a backpack from the Infiniti's passenger, and place the backpack in the backseat of the Toyota. Finally, he observed the Honda and Toyota drive "in tandem" to the convenience store, where the police stopped, detained, and searched Arellano, Hernandez, and Henriquez, finding six bricks of cocaine and multiple cell phones. Zamora testified that both the amount of cocaine and number of cell phones were consistent with narcotics trafficking.

The State further corroborated the accomplice-witness testimony with evidence retrieved from Hernandez's cell phone, which showed that Hernandez and Arellano called each other 36 times the day before the arrest. Zamora testified that the number of calls between Hernandez and Arellano was "very consistent with narcotics transactions" and indicated that there was "some sort of coordination or preparation going on right before the incident occurred." Hernandez's cell phone further showed that, on the day of the arrest, shortly before the exchange at the washateria, Hernandez texted Arellano, "Ya vamos" ("We are on our way"), and Arellano responded, "Okay." Zamora testified that these texts were sent around the same time he observed Arellano leave his house.

Thus, the corroborating evidence placed Arellano in the company of Hernandez and Henriquez at the scene of the narcotics exchange. *See McDuff v. State*, 939 S.W.2d 607, 613 (Tex. Crim. App. 1997) ("Evidence that the defendant

was in the company of the accomplice at or near the time or place of the offense is proper corroborating evidence."). It showed that the three of them had coordinated their movements and were working together. *See Silva v. State*, No. 01-10-00245-CR, 2012 WL 1564541, at *5 (Tex. App.—Houston [1st Dist.] May 3, 2012, pet. ref'd) (mem. op., not designated for publication) (holding that accomplice testimony was sufficiently corroborated in possession-with-intent-to-deliver case when officer observed that defendant and accomplice "appeared to act in tandem" as they arrived at used car lot, spoke on their cellphones and then with each other, had no contact with workers on site, left lot together, returned together, and pulled cover from car in which cocaine was found); *Herron v. State*, No. 01-04-00640-CR, 2005 WL 1646043, at *4–5 (Tex. App.—Houston [1st Dist.] July 14, 2005, pet. ref'd) (mem. op., not designated for publication) (holding that accomplice testimony was sufficiently corroborated in possession-with-intent-to-deliver case when officer observed defendant follow accomplice vehicle and remain close at hand during drug transaction). We hold that the State presented evidence that sufficiently corroborated the accomplice-witness testimony. Therefore, we overrule Arellano's first issue.

Admission of Extraneous Acts

In his second issue, Arellano contends the trial court abused its discretion by allowing Hernandez to testify to several prior instances in which he and Henriquez sold drugs at Arellano's behest. Arellano contends that the testimony was

inadmissible under Rules 403 and 404(b). The State responds that Arellano failed to preserve error because he did not make specific objections under Rules 403 and 404(b). We agree.

Before Hernandez testified, the State informed the trial court that it intended to examine Hernandez about the prior drug dealing, and the trial court ruled that the testimony was admissible. Arellano then stated that he "would object" without specifying a ground for his objection or obtaining a ruling from the trial court. *See Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008) ("To preserve error for appellate review, a party must make a timely and specific objection or motion at trial, and there must be an adverse ruling by the trial court."). Arellano did file a pretrial motion in limine that requested that the trial court exclude "all extraneous crime or misconduct evidence" under Rules 403 and 404(b). But motions in limine do not preserve error. *See id.*[2]

Because Arellano failed to make a timely and specific objection that the testimony was inadmissible under Rules 403 and 404(b), he did not preserve error on this issue for appeal. *See id.* Therefore, we overrule Arellano's second issue.

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[2] *See also Evans v. State*, No. 01-15-00593-CR, 2016 WL 2743555, at *3 (Tex. App.—Houston [1st Dist.] May 10, 2016, no pet.) (mem. op., not designated for publication) (holding that defendant who "objected that the offense was unfairly prejudicial in his motion in limine" but did not "renew his objection under Rule 403 at the time the offense was admitted at trial" failed to preserve error on appeal).

Ineffective Assistance of Counsel

In his third, fourth, fifth, and sixth issues, Arellano argues that he received ineffective assistance of counsel because trial counsel failed to make certain evidentiary objections. Specifically, Arellano contends that his trial counsel was ineffective in failing to object to evidence that Arellano had previously sold or directed the sale of cocaine, heroin, methamphetamine, and marijuana and that he once threatened to murder Hernandez's friend for allegedly stealing a shipment of methamphetamine.

To prevail on a claim for ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687–90 (1984). Under the first prong, "the defendant must show deficient performance—that the attorney's error was so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017) (quoting *Strickland*, 466 U.S. at 687) (internal quotations omitted). Under the second prong, "the defendant must show that the attorney's error prejudiced the defense." *Id.*

In reviewing a claim for ineffective assistance of counsel, we are "highly deferential" to trial counsel. *Taylor v. State*, 461 S.W.3d 223, 228 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd). We indulge a "strong presumption" that trial counsel's performance "fell within the wide range of reasonable professional

assistance." *Ex parte LaHood*, 401 S.W.3d 45, 50 (Tex. Crim. App. 2013). To prove that counsel's performance was deficient, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Blackwell v. State*, 193 S.W.3d 1, 21 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

"Any allegation of ineffectiveness must be firmly founded in the record, which must demonstrate affirmatively the alleged ineffectiveness." *Id.* And "trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective." *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). Thus, if the record does not contain affirmative evidence of counsel's reasoning or strategy, we normally presume that counsel's performance was not deficient. *Blackwell*, 193 S.W.3d at 21. "In rare cases, however, the record can be sufficient to prove that counsel's performance was deficient, despite the absence of affirmative evidence of counsel's reasoning or strategy." *Id.*

The record is silent as to why trial counsel failed to object to the extraneous evidence. We must therefore presume that trial counsel pursued a sound trial strategy, such as concluding that the evidence was likely admissible and that objecting to it might actually harm Arellano's defense by forcing the State to develop the evidence even further.

Because the record is silent as to why trial counsel did not make the evidentiary objections, we hold that Arellano has failed to rebut the "strong presumption" that counsel's performance "fell within the wide range of reasonable professional assistance." *LaHood*, 401 S.W.3d at 50. Accordingly, we overrule Arellano's third, fourth, fifth, and sixth issues.

Conclusion

We affirm the trial court's judgment.

Harvey Brown
Justice

Panel consists of Justices Keyes, Brown, and Lloyd.

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