

Affirmed and Memorandum Opinion filed December 14, 2010.



In The

Fourteenth Court of Appeals

NO. 14-10-00108-CR

LEMUEL IGNACIO QUIJANO, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 1152406**

MEMORANDUM OPINION

In three issues, appellant Lemuel Ignacio Quijano challenges his conviction for aggravated assault, arguing that the trial court erred in refusing to instruct the jury that the complainant was appellant's accomplice as a matter of law or as a matter of fact and that there is insufficient non-accomplice evidence to corroborate his accomplices' testimony. Because the complainant corroborated the codefendant's testimony but was not an accomplice in her own aggravated assault, we affirm.

I. BACKGROUND

In January 2008, complainant Maria Poulos was asked to help appellant and Jose Solorzano commit a robbery. According to Poulos, she was to accompany the two men¹ and pose as a prostitute to gain admittance to a garage where the men expected the intended victim to be working. She did not know the intended victim's name or the garage's location, and she was unarmed. She testified that after she got into a vehicle with Solorzano and appellant at around 2:00 or 3:00 a.m., Solorzano began driving very fast and erratically, switching lanes, running red lights, and failing to yield. Poulos stated that she screamed at Solorzano, "That's it. I'm not doing it." She testified that Solorzano initially yelled at her to shut up, but after he stopped at a gas station to refuel the car, he telephoned someone and his demeanor changed. According to Poulos, Solorzano then told her that he would take her home if she did not want to go through with the robbery, but asked her not to withdraw and promised not to "drive crazy."

After leaving the gas station, Solorzano and appellant each spoke on their cell phones. Poulos believed they were getting directions, and told them they were going the wrong way. When Solorzano turned the car onto a darkened street, Poulos looked at appellant, who was seated behind her, and saw that he was pulling on a pair of black gloves. She was afraid appellant would shoot her and tried to engage him in conversation, but he did not speak to her. Eventually, Solorzano stopped the car without pulling over, and according to Poulos, all three occupants got out. Poulos asked where they were, and Solorzano told her that they had to walk down a dirt road. Poulos did not begin walking, but instead turned to look at appellant and saw he was pointing a gun at her. Appellant shot Poulos five times, then both men got back into the car and drove away.

¹ Poulos testified that another person was also expected to participate in the robbery, but she did not identify that person at trial or explain that person's intended role.

Poulos was able to run for assistance to a house she saw nearby. The resident, whom she did not know, eventually agreed to drive her to the hospital where she was treated and spoke with police. Although Poulos did not know appellant's legal name, she told police his nickname and address and identified him in a photo spread.

Solorzano and appellant were arrested, and Solorzano testified at appellant's trial that appellant shot the complainant. Solorzano denied that he drove erratically or that he ever got out of the car, but his testimony was otherwise consistent with the complainant's testimony.

The trial court refused appellant's request to charge the jury that complainant was an accomplice as a matter of law, but instructed the jury that it could not convict appellant upon Solorzano's testimony unless it believed that Solorzano's testimony (a) was true, (b) showed appellant's guilt as charged in the indictment, and (c) was corroborated by other evidence that tended to connect appellant to the offense. The jury found appellant guilty as charged, and after applying enhancements, assessed punishment of a \$10,000 fine and confinement for life in the Texas Department of Criminal Justice, Institutional Division.

II. ISSUES PRESENTED

In his appeal, appellant first argues that the jury should have been instructed that Poulos was an accomplice as a matter of law. In his second issue, appellant contends that Poulos was his accomplice as a matter of fact because he could have been charged with attempted capital murder; she could have been charged with attempted robbery; and attempted robbery is a lesser-included offense of capital murder. Appellant argues in his third issue that because Solorzano and Poulos are accomplices and therefore cannot corroborate one another's testimony, there is insufficient evidence to corroborate the testimony of either of them.

III. ANALYSIS

In Texas, a conviction cannot be secured upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant to the offense. TEX. CODE CRIM. PROC. art. 38.14 (West 2005). An accomplice is an individual who participates with a defendant before, during, or after the commission of the crime and acts with the requisite culpable mental state. *Cocke v. State*, 201 S.W.3d 744, 747 (Tex. Crim. App. 2006); *Yost v. State*, 222 S.W.3d 865, 871 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). Such participation must involve an affirmative act that promoted the commission of the offense with which the accused was charged. *Paredes v. State*, 129 S.W.3d 530, 536 (Tex. Crim. App. 2004).

A witness may be an accomplice either as a matter of law or as a matter of fact. *Cocke*, 201 S.W.3d at 747. An accomplice as a matter of law is one who is susceptible to prosecution for the offense with which the accused is charged or a lesser-included offense. *Paredes*, 129 S.W.3d at 536. If the evidence clearly shows that the witness was an accomplice as a matter of law, the trial court must so instruct the jury, but if the evidence on the issue is conflicting or is unclear as to whether the witness is an accomplice, the trial court must leave to the jury the question of whether the inculpatory witness is an accomplice as a matter of fact. *Id.* When reviewing allegations of charge error, we first determine whether error actually exists in the charge. If so, we determine whether sufficient harm resulted from the error to require reversal. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).

Here, all of appellant's arguments are predicated on the idea that Poulos was an accomplice to a planned robbery. Appellant, however, was tried for the offense of aggravated assault, not the offense of robbery. If a State's witness has no complicity in the offense for which an accused is on trial, her testimony is not that of an accomplice witness regardless of whether she may have been complicit with the accused in committing

other offenses. *Gamez v. State*, 737 S.W.2d 315, 322 (Tex. Crim. App. 1987); *Caraway v. State*, 550 S.W.2d 699, 702 (Tex. Crim. App. 1977); *Easter v. State*, 536 S.W.2d 223, 225 (Tex. Crim. App. 1976). There is no evidence that Poulos was appellant's accomplice in her own aggravated assault, nor does appellant contend otherwise. Consequently, she was not appellant's accomplice as a matter of law or as a matter of fact. We therefore overrule appellant's first and second issues, and affirm the trial court's judgment without reaching his third issue.

/s/ Tracy Christopher
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.

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