In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00205-CR

MICHAEL RILES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
Jefferson County, Texas
Trial Cause No. 14-20846

MEMORANDUM OPINION

A jury found Michael Riles guilty of robbery. Riles pleaded true to multiple enhancement paragraphs in the indictment. The jury assessed Riles's punishment at twenty-five years of confinement. On appeal, Riles argues the trial court erred in (1) failing to charge the jury regarding accomplice testimony, (2) admitting evidence of extraneous offenses during the guilt-innocence phase of the trial, (3) permitting the State to inject Riles's general reputation before the jury as character evidence, and (4) denying Riles's motion for mistrial. We affirm.

BACKGROUND FACTS

S.G.[1] testified that on the night of August 12, 2014, he drove to an Exxon gas station on Gulfway Drive in Port Arthur, Jefferson County, Texas, to play the illegal gambling machines inside. S.G. explained at trial that when he arrived at the store there were "roughly about 8 or 12[]" people "hang[ing] out" in the parking lot and that it was a location where people were known to sell drugs. S.G. stated that, once inside the store, he played the machines for approximately thirty or forty minutes and won approximately $600. S.G. testified he also had extra money with him and, combined with his winnings, he had $957 in his pocket as he walked out of the store.

According to S.G., as he walked out, he saw a man standing by S.G.'s car. The man had his head down, and S.G. "knew something was really just fixing to go down[.]" S.G. testified he saw another man, whom S.G. identified at trial as Riles, outside the store. S.G. testified that the man by S.G.'s car looked at him and "asked [him] did [he] have some change or something like that[.]" S.G. explained to the jury that he told the man, "I don't have anything[]" and the man hit S.G. in the jaw. S.G. testified that he tried to get away, and he and the man began to

[1] We identify the victim and witnesses by using initials. *See* Tex. Const. art. I, § 30(a)(1) (granting crime victims the "right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

wrestle and the man was putting his hands in S.G.'s pockets. S.G. testified that Riles "jumped in[]" and tried to get his hands in S.G.'s pockets. S.G. explained at trial that while he was wrestling with the two men he was trying to hold his pockets so his money would not come out, but the two men were trying to get money out of his pockets. According to S.G., none of the bystanders would help him. S.G. explained that when Riles grabbed the money out of S.G.'s pocket, money "flew out" and scattered on the ground, and the bystanders began picking the money up and "[e]verybody ran and scattered." S.G. testified that the men that were wrestling with him "took off[]" and he did not know whether they picked up any of his money. S.G. called the police. S.G. testified that he had previously seen one of the two men "around[]" and he knew one of the men went by the name "Chuck or something like that[,]" but S.G. denied having any prior dealings with the men.

A police officer with the Port Arthur Police Department testified he was dispatched to the Exxon station on the night of the incident. He explained at trial that drug dealing, fighting, robbery, and prostitution often occur at that location. The officer stated that, when he arrived around 11:00 p.m., he spoke with S.G. who appeared "shaken up." According to the officer, S.G.'s shirt was torn and he was pacing back and forth in front of the store saying, "I can't believe they robbed me,

just jumped me. I can't believe nobody helped me." The officer testified that S.G. told him he had been robbed and S.G. provided a description of the perpetrators. The officer was unable to locate the perpetrators in the area based on S.G.'s description. The officer explained that he talked to the store clerk and she told the officer that she did not see anything. The officer testified that no other witnesses would speak with him about the incident, which he explained was not unusual for that part of town. The officer asked the store clerk if he could get a copy of the store's video surveillance and she told him she did not know how to work the machine and she would have to wait for the owner to return to town. No video surveillance was presented at trial.

An eye-witness, A.S., testified that on August 12, 2014, she had dropped her cousin off at the store and A.S. was smoking marijuana and sitting in her parked truck, outside the store. A.S. explained to the jury that a lot of people were standing outside the store and that she saw S.G. in the store "playing the machine." She said she saw S.G. walk to his car and then she witnessed "Demoine," whom she knew as "Puffy[,]" and S.G. "tussling." She testified that she knew both of the men and thought they were joking until she saw "Riles, AKA Chuck," whom she also knew, grab S.G.'s arms. According to the witness, S.G. was holding on to his pockets and screaming for help. The witness explained to the jury that Riles "was

trying to pull [S.G.'s] arms up" and "that's how Demoine got in the pockets." She testified that "money just start[ed] flying and everybody start[ed] grabbing" the money and that she "grabbed [] some too." The witness also testified that she did not call anyone to help S.G. because she saw money and grabbed "three 20's[]" because she "was broke." The witness also testified that prior to trial, "Chuck" contacted her through Facebook and offered her $300 not to testify against him.

The jury found Riles guilty of robbery. After Riles pleaded true to multiple enhancement paragraphs in the indictment, the jury assessed Riles's punishment at twenty-five years of confinement. Riles appealed.

Issues on Appeal

In Riles's first issue on appeal, he argues that the trial court's erroneous charge omitting an accomplice witness instruction denied him a fair and impartial trial by jury. In his second issue, Riles contends the trial court abused its discretion in admitting evidence of extraneous offenses during the guilt or innocence portion of the trial over Riles's objection. In issues three and four, Riles complains the trial court abused its discretion in allowing the State, over Riles's objection, to place his general reputation before the jury as character evidence "when Appellant had not placed his reputation at issue[,]" and that the trial court erred in denying his motion for mistrial.

Accomplice Witness Instruction

In issue one, Riles specifically argues that A.S., the eye-witness, was an accomplice as a matter of law, and that "the erroneous [jury] charge omitting the required accomplice witness instruction" caused "obvious[]" egregious harm because "[i]t allowed Appellant to be convicted by evidence from a corrupt source[.]" Riles contends that, because A.S. knew S.G. and Riles and admitted at trial to grabbing three twenty-dollar bills that came out of S.G.'s pocket, A.S.'s testimony constituted a confession that "she was a willing accomplice to the offense[.]" According to Riles, "[i]t defies logic to suggest that the trial court's failure to provide an accomplice witness instruction *sua sponte* was harmless based upon how reprehensible [A.S.] was in her testimony, boldly confessing to participating in the crime and then laughing at what occurred to the complainant." Riles did not request an accomplice witness instruction and did not object to the jury charge that did not contain an accomplice witness instruction.

In a criminal matter, we review the alleged error in a jury charge under a "two-step process." *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). *Id*. First, we must decide whether the jury instruction is erroneous. *Id*. Second, if error exists, we must determine whether the error caused sufficient harm to warrant reversal. *Ngo v. State*, 175 S.W.3d 738, 743-44 (Tex. Crim. App. 2005). The issue

of error preservation is not relevant to our inquiry until we reach the second inquiry because the degree of harm necessary for reversal depends upon whether the error was preserved. *Id*. When, as in this case, the alleged error was not objected to, the error must be "fundamental" and requires reversal "only if it was so egregious and created such harm that the defendant 'has not had a fair and impartial trial.'" *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009) (quoting *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g)). Egregious harm exists when the record shows that a defendant has suffered actual, rather than theoretical, harm from the jury-charge error. *Almanza*, 686 S.W.2d at 174. In determining whether the error was so egregious that the defendant was denied a fair and impartial trial, we examine: (1) the entire jury charge; (2) the state of the evidence; (3) the arguments of counsel; and (4) any other relevant information in the record. *Ngo*, 175 S.W.3d at 750 n.48 (citing *Almanza*, 686 S.W.2d at 171).

Under Texas Code of Criminal Procedure article 38.14, a conviction cannot stand on an accomplice witness's testimony unless the testimony is corroborated by other, non-accomplice evidence that tends to connect the accused to the offense. *See* Tex. Code Crim. Proc. Ann. art. 38.14 (West 2005). An accomplice is a person who participates in the offense with the defendant before, during, or after its

commission with the requisite mental state. *Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007), *cert. denied*, 552 U.S. 1028 (2007). Mere presence at the crime scene does not make a person an accomplice; an accomplice must have engaged in an affirmative act that promotes the commission of the offense that the accused committed. *Smith v. State*, 332 S.W.3d 425, 439 (Tex. Crim. App. 2011) (citing *Kunkle v. State*, 771 S.W.2d 435, 439 (Tex. Crim. App. 1986)).

Witnesses may be accomplices as a matter of law or as a matter of fact. *Smith*, 332 S.W.3d at 439. A witness who is indicted for the same offense or a lesser-included offense as the accused is an accomplice as a matter of law, and the trial court must instruct the jury accordingly. *Id.* If conflicting evidence of the witness's role in the offense exists, then the trial judge may instruct the jury to determine a witness's status as a fact issue. *Id.* at 439-40. But if the evidence "clearly shows that a witness is not an accomplice, the trial judge is not obliged to instruct the jury on the accomplice witness rule—as a matter of law or fact." *Id.* at 440.

Riles argues that A.S. is an accomplice as a matter of law. In determining whether a person is an accomplice, either as a matter of fact or law, courts may look to events occurring before, during, and after the commission of the offense including actions that show an understanding and common design to do a certain

act. *King v. State*, 29 S.W.3d 556, 564 (Tex. Crim. App. 2000); *Kunkle*, 771 S.W.2d at 439; *see Druery*, 225 S.W.3d at 498 (explaining an accomplice participates with the defendant before, during, or after the commission of a crime and acts with the required mental state). A person is not an accomplice unless he affirmatively assists in the commission of the offense. *Paredes v. State*, 129 S.W.3d 530, 536 (Tex. Crim. App. 2004). Mere presence during the crime, or knowledge about the crime, or failure to disclose it occurred, or even concealment of the crime would be insufficient facts when considered separately to render a person an accomplice witness. *Medina v. State*, 7 S.W.3d 633, 641 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1102 (2000); *Blake v. State*, 971 S.W.2d 451, 454 (Tex. Crim. App. 1998).

Although A.S. admitted she knew S.G. prior to the incident and that she grabbed "three 20's[]" because she "was broke[,]" there is no evidence in the record that she knew of Riles's intentions that evening to engage in the robbery, nor is there any evidence in the record that A.S. did anything to assist Riles in assaulting S.G. or in taking the money out of S.G.'s pocket. Additionally, the record is void of any evidence of an agreement or understanding between A.S. and Riles to rob S.G., or to cover up the robbery. There is no indication in the record that A.S. was charged with the offense of robbery or a lesser-included offense

based on the incident in question. We conclude on the record before us that the trial judge was not obliged to instruct the jury on the accomplice witness rule. *See Smith*, 332 S.W.3d at 440.

Nevertheless, even assuming the trial court erred in not instructing the jury on the accomplice witness rule regarding A.S.'s testimony in this case, we must determine whether any error in the omission of the instruction was egregious error or harmless error. 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)). In this case, the victim, S.G., identified Riles as one of his assailants and as the person who grabbed the money out of S.G.'s pocket. The corroborating evidence was not unconvincing. Riles was not denied a fair and impartial trial, and the omission of the accomplice witness instruction, if error, was not egregious error. Issue one is overruled.

EXTRANEOUS-OFFENSE EVIDENCE AND CHARACTER EVIDENCE

In his second issue, Riles contends the trial court abused its discretion in admitting evidence of extraneous offenses during the guilt or innocence portion of

the trial over Riles's objection. In issues three and four, Riles complains the trial court abused its discretion in allowing the State, over Riles's objection, to place his general reputation before the jury as character evidence "when Appellant had not placed his reputation at issue[,]" and that the trial court erred in denying his motion for mistrial. We address issues two, three, and four together.

On appeal, Riles asserts that "[m]ultiple times the State was allowed to place Appellant's character into evidence over his objection by parading before the jury evidence that Appellant had allegedly committed other extraneous offenses." Riles cites to two portions of the record in support of this argument. First, Riles complains that the trial court erred in allowing the following testimony by S.G. in response to the State's questioning:

> [State's Attorney:] Have you seen any of these people since that happened?
>
> [S.G.:] Well, I hadn't seen the other guy, you know.
>
> [State's Attorney:] Okay. What about this gentleman, have you seen him?
>
> [Defense counsel]: Objection to relevance, Your Honor.
>
> THE COURT: Overruled.
>
> [State's Attorney:] Have you seen him since this happened?
>
> [S.G.:] Yes, I seen him. I seen him around.

> [State's Attorney:] Okay.
>
> [S.G.:] Well, he never did bother me or nothing or say anything to me.
>
> [State's Attorney:] Okay. Has anybody called to ask you not to testify before today? You're under oath.
>
> [Defense counsel]: Your Honor, I'm going to object to the relevance of this.
>
> THE COURT: Overruled.
>
> [Defense counsel]: An additional objection is lodged under Rule 403 any probative value is outweighed by the undue prejudicial nature of the testimony.
>
> THE COURT: Overruled.
> Answer the question please, sir.
>
> [S.G.:] Yes, I got a call. It was a blocked call.
>
> [State's Attorney:] It was a blocked call?
>
> [S.G.:] Yeah.
>
> [State's Attorney:] Somebody asked you not to come testify, right?
>
> [S.G.:] Yes, sir.
>
> [State's Attorney:] Okay.

Next, Riles complains that the trial court allowed the following testimony of A.S. in response to the State's questioning:

> [State's Attorney:] Now, do you know whether -- excuse me. Do you know whether Puffy and Chuck know each other?

[A.S.:] Yeah, they from the same hood. They are both from Eighth Street.

[State's Attorney:] Do you know if they kind of hang together?

[A.S.:] Yes, they do.

[State's Attorney:] Now, before you testified here today, did you ever get a call from anybody or a call from anyone asking you not to testify?

[A.S.:] Yeah.

[Defense counsel]: Objection; relevance, Your Honor.

[A.S.:] Michael Riles.

THE COURT: Overruled.

[Defense counsel]: Your Honor, additional objections lodged under 403 that any probative value is outweighed by the prejudicial nature -- unjustifiably prejudicial nature of the testimony.

THE COURT: Okay.

[State's Attorney:] You can answer. Who called you?

[A.S.:] Michael Riles.

[State's Attorney:] Now, do you know it was Michael Riles?

[A.S.:] Yeah, he said his name was Chuck.

[State's Attorney:] Okay. Do you recognize the voice?

[A.S.:] No. I don't talk on the phone with Chuck or I am not his friend on Facebook.

[State's Attorney:] But the person that called you identified themselves as –

[A.S.:] As Chuck. And he offered $300 for me not to show up. Like I told him, that's not enough. . . .

. . . .

[State's Attorney:] Did you-all also get any other contact from him from some other source?

[A.S.:] His wife called [S.G.], but I wasn't there when the wife called [S.G.].

[Defense counsel]: Objection. Objection; nonresponsive, Your Honor. It's also hearsay and speculation.

THE COURT: All right. Sustained.

[State's counsel]: Yes, sir.

[Defense counsel]: Ask the jury -- move for [] instruction to disregard.

[State's counsel]: I have no objection, Judge, to that last little part talking about [S.G.].

THE COURT: Okay. All right. The last answer is his wife called [S.G.], but I wasn't there. That answer, please disregard, Ladies and Gentlemen, and do not consider that for any purposes in your deliberations on this case.

[Defense counsel]: Move for mistrial, Your Honor.

THE COURT: That is denied. Thank you. Go ahead.

[State's Attorney:] Someone else contact you on any other social media, like, Facebook or anything?

> [A.S.:] Michael Riles.
>
> [State's Attorney:] Okay. How do you know it was him?
>
> [A.S.:] Because it was his friend request and it was in my inbox.
>
> [State's Attorney:] The phone call you got, did that come from just a regular phone call or from Facebook?
>
> [A.S.:] Facebook.
>
> [State's Attorney:] When you checked the person whose Facebook it was to look and see, make sure that was the same person, did you look to see the photographs?
>
> [A.S.:] Yeah.
>
> [State's Attorney:] And was it photographs of Michael Riles in this courtroom?
>
> [A.S.:] Yes.

The general rule pertaining to character evidence is set forth in Rule 404 of the Texas Rules of Evidence. Rule 404(a) provides that evidence of a person's character or character trait is not admissible for the purpose of proving that on a particular occasion the person was acting in accordance with his character or character trait. *See* Tex. R. Evid. 404(a). Rule 404(a) and (b) include exceptions and permitted uses. *Id*. Rule 404(a)(2)(A) states that in a criminal case, evidence of a pertinent character trait of the defendant may be offered by the defendant, and if offered by the defendant, the prosecutor may offer evidence in rebuttal. *Id.*

404(a)(2)(A). Rule 404(b) of the Texas Rules of Evidence prohibits the introduction of evidence of other crimes to prove the character of a person in order to show action in conformity therewith, but provides permitted uses for another purpose, such as to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Tex. R. Evid. 404(b)(1)-(2).

As a general rule, to preserve error for appellate review, a complaining party must make a timely and specific objection. *See* Tex. R. App. P. 33.1(a)(1); *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). Additionally, the point of error on appeal must correspond or comport with the objection made at trial. *Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014). When the objection at trial does not comport with the issue raised on appeal, nothing has been preserved for review. *Ibarra v. State*, 11 S.W.3d 189, 197 (Tex. Crim. App. 1999); Tex. R. App. P. 33.1.

As to S.G.'s complained-of testimony, S.G. did not identify Riles as the person that allegedly called him and asked him not to testify. In fact, on cross-examination, S.G. testified that Riles was not the individual that called him. Furthermore, Riles's objection to S.G.'s testimony was to the "relevance" of the testimony, and that it was more prejudicial than probative under Texas Rule of Evidence 403. *See* Tex. R. Evid. 401, 403. Similarly, Riles's only objection to

A.S.'s testimony regarding the phone call she received from Riles was relevance, and that "any probative value is outweighed by the undue prejudicial nature of the testimony." And, the trial court actually sustained Riles's objection to A.S.'s statement about the call she heard had been made to S.G., and then also instructed the jury not to consider that portion of A.S.'s testimony.

The record contains no objection to the complained-of testimony by S.G. or A.S. on the ground that the testimony constituted impermissible character evidence under Texas Rule of Evidence 404(a) or that the extraneous offense evidence was improper character evidence under Texas Rule of Evidence 404(b). *See* Tex. R. Evid. 404. Because his points on appeal do not comport with his trial objections, Riles failed to preserve issues two, three, and four for review. *See* Tex. R. App. P. 33.1. We overrule issues two, three, and four. We affirm the trial court's judgment.

AFFIRMED.

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LEANNE JOHNSON
Justice

Submitted on December 8, 2015
Opinion Delivered February 10, 2016
Do Not Publish

Before McKeithen, C.J., Horton and Johnson, JJ.