In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00079-CR

KENYA ABDULE MARTIN, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 47th District Court
Potter County, Texas
Trial Court No. 69,825-A; Honorable Dan Schaap, Presiding

March 15, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.[1]

This appeal concerns the accomplice-witness instruction submitted to a jury in a criminal case. Appellant, Kenya Abdule Martin, was convicted by a jury of capital murder and sentenced to life without parole.[2] Originally, Appellant asserted four issues;

[1] Justice Mackey K. Hancock, retired, not participating.

[2] *See* TEX. PENAL CODE ANN. §§ 19.03(a)(2), 12.31(a)(1) (West Supp. 2016).

however, two of those issues (issues one and three) were abandoned at oral argument based upon the holding of the Texas Court of Criminal Appeals in *Druery v. State,* 225 S.W.3d 491, 498-500 (Tex. Crim. App. 2007), *cert. denied*, 552 U.S. 1028, 128 S. Ct. 627, 169 L. Ed. 2d 404 (2007). Therefore, in this opinion, we will only address the remaining two issues wherein he contends the trial court committed egregious error by failing to issue an accomplice-witness instruction as to a particular witness (issue two) and by failing to properly define an accomplice witness in the court's charge to the jury (issue four). We affirm.

BACKGROUND

In December 2013, an indictment issued alleging Appellant intentionally or knowingly caused the death of Edward Pendleton by shooting him with a firearm while in the course of committing or attempting to commit the offense of robbery. In February 2014, a four-day jury trial was held.

As is relevant to the issues presented on appeal, testimony established that on the morning of May 1, 2013, two men broke into the home of the decedent and robbed him. In the course of that robbery, the decedent was shot several times by one of the intruders. Based upon a dying declaration by the decedent, the police began to focus the investigation on Damarrus Ary. The investigation revealed a connection between Ary and Andrea Brown. Around the time of the offense, Brown lived in an apartment with her friend, Korntee Fennell, Fennell's boyfriend, Marquis Wilkins, and Wilkins's friend, Zyrus Williams. Also staying at the apartment from time to time were Ary and Stevon Polk. A day or two prior to the robbery, Polk brought Appellant to the apartment

for the first time. During that visit, Brown observed Appellant loading bullets into a hand gun.

On the day of the robbery, Ary asked Brown for a ride so that he, Polk, and Appellant could "hit a kick." Brown agreed. In route to their destination, Polk directed her to the decedent's residence while he and the other two men discussed who was going to kick the door open. Brown parked the vehicle a block over from the decedent's residence and waited after the three men exited her vehicle. A short time later, Ary, Polk, and Appellant returned to the vehicle carrying a purse taken in the robbery. At the time, Appellant was carrying a gun. Brown testified that Appellant, appearing angry and upset, stated, "I clapped that nigger."

During the investigation, the police were able to lift a shoe print from the decedent's front door that possibly matched shoes belonging to Wilkins. Testimony indicated, however, that Polk was wearing Wilkins's shoes on the day of the robbery.

Collateral to the offense itself, but relevant to Appellant's issues, Fennell testified that, during the course of the investigation, she did not tell the police everything she knew about the incident because she "didn't think it was her business." She also admitted to having been convicted of burglary of a motor vehicle in an unrelated offense. Additionally, during testimony being given by Wilkins, he admitted that he, Polk, and Fennell's brother were involved in the aggravated robbery of a convenience store in April of 2013.

At the conclusion of the trial, the jury was instructed as follows:

> A conviction cannot be had upon the testimony of an accomplice unless the jury first believes that the accomplice's evidence is true and that it shows the defendant is guilty of the offense charged against him, and even then you cannot convict unless the accomplice's testimony is corroborated by other evidence tending to connect the defendant with the offense charged, and the corroboration is not sufficient if it merely shows the commission of the offense, but it must tend to connect the defendant with its commission.
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> * * * *
>
> You are charged that ANDREA BROWN was an accomplice if any offense was committed, and you are instructed that you cannot find the defendant guilty upon the testimony of ANDREA BROWN unless you first believe that the testimony of the said ANDREA BROWN is true and that it shows that the defendant is guilty as charged in the indictment; and even then you cannot convict the defendant unless you further believe that there is other evidence in this case, outside the evidence of said ANDREA BROWN, tending to connect the defendant with the commission of the offense charged in the indictment and then from all the evidence you must believe beyond a reasonable doubt that the defendant is guilty.
>
> An accomplice as the word is here used means anyone connected with the crime charged as a party to the offense.

Thereafter, the jury convicted Appellant of capital murder and the trial court sentenced him to confinement for life without parole. This appeal followed.

ISSUE TWO—ACCOMPLICE-WITNESS INSTRUCTION AS TO MARQUIS WILKINS

Through his second issue, Appellant asserts the trial court egregiously erred by failing to give a specific accomplice-witness instruction as to Wilkins because physical evidence (the shoe print matching his shoes) tied him to the offense. He asserts such an instruction was warranted because there was sufficient evidence at trial to raise a fact issue as to whether Wilkins participated in the robbery and was, therefore, an accomplice as a matter of law. As a result of not receiving such an instruction as to

Wilkins, Appellant asserts the jury was deprived of any opportunity to consider whether his testimony required corroboration. We disagree.

An accomplice is one "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, 748 (Tex. Crim. App. 2006). To be considered an accomplice, the witness must have affirmatively acted to promote the commission of the offense with which the defendant is charged. *Smith v. State*, 332 S.W.3d 425, 439 (Tex. Crim. App. 2011). "[A] witness is not deemed an accomplice witness because he knew of the crime but failed to disclose it or even concealed it." *Gamez v. State*, 737 S.W.2d 315, 322 (Tex. Crim. App. 1987).

In Texas, a "conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed[.]" TEX. CODE CRIM. PROC. ANN. art. 38.14 (West 2005); *Zamora v. State*, 411 S.W.3d 504, 509 (Tex. Crim. App. 2013) (quoting *Druery*, 225 S.W.3d at 498). Specifically, article 38.14 of the Texas Code of Criminal Procedure provides:

> A conviction cannot be had upon the testimony of an accomplice unless 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.

This rule reflects a legislative determination that accomplice-witness testimony implicating another person should be viewed with a measure of caution because accomplices often have an incentive to shift blame to another person. *Zamora,* 411 S.W.3d at 509. Therefore, where implicated by the facts of a given case, because the

rule requires the testimony of an accomplice to be corroborated before a conviction can stand on that testimony, jury instructions must include a proper definition of an accomplice. *Zamora*, 411 S.W.3d at 510.

In addition, the particular accomplice-witness instruction that must be given to the jury depends on whether the witness is an accomplice as a matter of law or as a matter of fact. This is a matter determined according to the circumstances of each case and "[a] proper accomplice-witness instruction informs the jury either that a witness is an accomplice as a matter of law or that he is an accomplice as a matter of fact." *Id.* (citing *Cocke*, 201 S.W.3d at 747).

A witness is an accomplice as a matter of law if he has been charged with the offense in question, or a lesser-included offense. *Zamora*, 411 S.W.3d at 510; *Druery*, 225 S.W.3d at 498. Furthermore, when the evidence clearly shows that the witness could have been so charged, he too is considered to be an accomplice as a matter of law. *Druery*, 225 S.W.3d at 499; *Cocke*, 201 S.W.3d at 747-48. Under either circumstance, if a witness is an accomplice as a matter of law, the trial court is required to affirmatively instruct the jury that the witness is an accomplice and that his testimony requires corroboration. *Zamora*, 411 S.W.3d at 510.

By way of contrast, when conflicting or unclear evidence is presented as to whether a particular witness is an accomplice as a matter of law, then the court must instruct the jury to first determine whether the witness is an accomplice as a matter of fact before applying the corroboration requirement. *Smith*, 332 S.W.3d at 439-40. An accomplice-witness instruction submitted under those circumstances "asks the jury to

(1) decide whether the witness is an accomplice as a matter of fact, and (2) apply the corroboration requirement, but only if it has first determined that the witness is an accomplice." *Zamora*, 411 S.W.3d at 510.

Regardless of whether a witness is an accomplice as a matter of law or as a matter of fact, "there must still be some evidence of an affirmative act on the part of the witness to assist in the commission of the charged offense before such an instruction is required." *Druery*, 225 S.W.3d at 499. Accordingly, if the evidence presented at trial clearly shows that a witness is not an accomplice, then the trial court is not required to instruct the jury on the accomplice-witness rule. *Smith*, 332 S.W.3d at 440. *See Gamez*, 737 S.W.2d at 322.

Here, Appellant asserts that a jury instruction concerning whether Wilkins was an accomplice as a matter of fact was required because there was evidence that (1) a pair of his shoes was worn during the commission of the robbery/homicide, (2) he was not forthcoming when law enforcement officers questioned him after the commission of the crime, (3) he allowed Appellant to remain at his apartment after knowing of Appellant's involvement, (4) he committed an aggravated robbery several weeks before the commission of the crime (although Appellant was not involved), (5) he was described as a suspect by law enforcement officers after the commission of the crime, and (6) another witness (Fennell) was not forthcoming when questioned by law enforcement, presumably to protect him. None of these facts constitute an affirmative act by Wilkins which would assist commission of the offense of capital murder.

Based upon the record before us, we find the evidence is clear that Wilkins was neither an accomplice as a matter of law or fact. He was not indicted for capital murder or a lesser-included offense of capital murder, and the evidence does not show that he could have been so charged. There is no evidence indicating Wilkins performed any affirmative act to assist in the commission of the offense of capital murder or any lesser-included offense. *See Smith*, 332 S.W.3d at 439 (stating that one is not an accomplice "if the person knew about the offense and failed to disclose it or helped the accused conceal it"). Neither is there any evidence Wilkins had any prior knowledge that a robbery, much less a homicide, was going to be committed. The only connection whatsoever was that a pair of shoes he owned was a possible match for the shoe print on the door of the decedent's residence. As such, because there is no evidence that Wilkins acted to promote or assist commission of the offense in question, the trial court was not required to instruct the jury on the accomplice-witness rule with regard to Wilkins. *See Smith*, 332 S.W.3d at 439-40 (holding that when there is doubt as to whether a witness is an accomplice, then the trial judge *may* instruct the jury to determine the witness's status as a fact issue). Here, the trial court did not err by failing to give a specific accomplice-witness instruction as to Wilkins.

Furthermore, because Appellant neither requested an accomplice-witness instruction as to Wilkins, nor objected to its omission in the court's charge as given, in order to be entitled to a reversal, any harm in failing to give an accomplice-witness instruction as to Wilkins must be shown to be egregious. *Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002) (citing *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984)). Under the egregious harm standard, the omission of an accomplice-

witness instruction is generally harmless unless the non-accomplice evidence is "so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive." *Id.*

Here, other evidence tending to incriminate Appellant showed that (1) a gun was recovered from underneath the seat where he was sitting in Brown's vehicle when stopped by the police, (2) bullets recovered from the murder scene were directly connected to that gun by expert forensic testimony; (3) ammunition in the magazine of that gun was the same brand and caliber as the ammunition found in the apartment where he was staying, (4) his fingerprints and palm prints were recovered from the ammunition box, (5) his fingerprints were recovered from the gun and its ammunition magazine, and (6) the clothing he was wearing when arrested was similar to the gunman's clothing, as identified by the decedent's wife. Such evidence was not "so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive." *Id.* Therefore, even if we were to assume the evidence failed to clearly show Wilkins was not an accomplice and the trial court erred by failing to instruct the jury to determine whether Wilkins was an accomplice as a matter of fact, any such error was not egregious. Appellant's second issue is overruled.

FOURTH ISSUE—ACCOMPLICE WITNESS IMPROPERLY DEFINED

By his fourth issue, Appellant asserts the trial court erred when it instructed the jury that "[a]n accomplice as the word is here used, means anyone connected with the crime *charged* as a party to the offense." (Emphasis added.) He contends that the instruction was erroneous because it excluded Wilkins and Fennell from the

accomplice-witness instruction since they were not charged with the capital murder offense, or any lesser-included offense, but could have been so charged. As a result, he asserts the jury was denied the opportunity to consider whether Wilkins and Fennell were accomplices in the first instance.

In analyzing a jury-charge issue, we first determine if error occurred, and, if so, we conduct a harm analysis. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). As discussed above, the degree of harm required for reversal depends on whether appellant has preserved error by objection. *Id.* Where, as here, the Appellant did not object to the accomplice-witness definition given by the court, he must show egregious harm in order to be entitled to a reversal. *Id. See Zamora*, 411 S.W.3d at 512-13.

We find that the trial court's instruction was erroneous because the jury could have read it as requiring that an accomplice *actually* be charged with the crime before they would be considered as an accomplice. *See Zepada v. State*, 819 S.W.2d 874, 876 (Tex. Crim. App. 1991) ("An accomplice witness is a state's witness that the evidence shows could be prosecuted for the same offense as the accused or for a lesser included offense of that offense."). *See also Druery*, 225 S.W.3d at 498 (the question of whether the alleged accomplice was actually charged or prosecuted for his participation is irrelevant to the determination of accomplice status); *Cocke*, 201 S.W.3d at 748 (whether the accomplice witness is actually charged or prosecuted is irrelevant). That being said, we turn to an analysis of whether Appellant suffered egregious harm as a result of that error.

For the instruction to be applicable to Wilkins or Fennell, there had to be sufficient evidence to find that they were accomplices as a matter of law or entitled to an instruction asking whether they were accomplices as a matter of fact. In our discussion of issue two, we determined that there was no evidence establishing that Wilkins could be an accomplice as a matter of law or as a matter of fact. The same is true of Fennell. Appellant asserts there was sufficient evidence Fennell was an accomplice because (1) she collaborated with Wilkins in covering up her knowledge of the offense, (2) she was convicted of burglary of a motor vehicle (unrelated to the capital murder prosecution) and she violated provisions of her community supervision, and (3) she saw Appellant the morning of the offense with a handgun. There is no evidence whatsoever that she (1) had any prior knowledge that the crime was going to be committed, (2) aided or assisted in the commission of the offense, or (3) was present when the crime took place. Neither is there any evidence to indicate that she performed any affirmative act to assist in the commission of the capital murder or any lesser-included offense. Based upon this record, we conclude that there was no evidence to suggest Fennell was an accomplice as a matter of law or fact and the trial court did not err in failing to include a specific accomplice-witness instruction as to her.

Because no accomplice-witness instruction was required as to either Wilkins or Fennell, the erroneous definition of an accomplice in the charge did not harm Appellant. Even if Wilkins's and Fennell's testimony were excluded entirely, the absence of their testimony would not have rendered the State's overall case for conviction clearly and significantly less persuasive. Consequently, we find Appellant was not egregiously

harmed by the erroneous definition of an accomplice witness and we overrule Appellant's fourth issue.

CONCLUSION

The trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

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