



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-15-00171-CR

ELOY DANIEL TREVINO, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 287th District Court
Parmer County, Texas
Trial Court No. 3405, Honorable Gordon Houston Green, Presiding

March 22, 2017

MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and PIRTLE, JJ.

Over his plea of not-guilty, the jury convicted appellant Eloy Daniel Trevino of the second-degree felony offense of delivery of methamphetamine,¹ more than one but less than four grams. The trial court assessed sentence of imprisonment for a term of 15 years. Appellant brings four issues on appeal, three asserting error in the jury charge and one asserting insufficiency of the evidence. We will affirm.

¹ TEX. HEALTH & SAFETY CODE ANN. § 481.112(c) (West 2014).

Background

In late 2013, Special Agent Gabriel Medrano was involved in a narcotics investigation in Friona, Texas. At trial, Medrano testified a confidential informant told him of a local resident, Dottie Osborn, and Medrano contacted her, seeking to buy methamphetamine. She told Medrano she did not have the drugs he wanted but would get them from another person. After Osborn placed a phone call to an individual, she and Medrano drove to a specified location in Friona. They parked and a man reached inside the car and handed a “package” to Osborn. Medrano and Osborn drove back to Osborn’s home, where Medrano weighed the package and paid Osborn \$250. Osborn testified to the same events at trial and also told the jury she received a favorable sentence in her own case for testifying against appellant, who she and Medrano identified as the man who delivered the package.

Appellant was found guilty as charged in the indictment and the court assessed punishment as noted. This appeal followed.

Analysis

Application Paragraph

By appellant’s first three issues, he contends the trial court reversibly erred by failing to submit a complete jury charge regarding the testimony of Dottie Osborn, who all agree was an accomplice witness. He contends that while the jury charge included the requisite abstract paragraph, it did not include a proper application paragraph.

To convict an accused on the basis of an accomplice witness's testimony, the accomplice's testimony must be corroborated by other evidence tending to connect the accused with the crime. *Zamora v. State*, 411 S.W.3d 504, 509-10 (Tex. Crim. App. 2013); *Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007) (citing TEX. CODE CRIM. PROC. ANN. art. 38.14 (West 2013)). If a witness is an accomplice as a matter of law, the trial judge must instruct the jury accordingly. *Smith v. State*, 332 S.W.3d 425, 439 (Tex. Crim. App. 2011). The instruction simply informs the jury that it cannot use the accomplice witness testimony unless there is also some non-accomplice evidence connecting the defendant to the offense. *Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002). Once it is determined that such non-accomplice evidence exists, the purpose of the instruction is fulfilled, and the instruction plays no further role in the fact finder's decision-making. *Id.*

Specifically, appellant contends that a proper application paragraph on accomplice-witness testimony "must list the specific conditions under which a jury is authorized to acquit." See *Vega v. State*, 394 S.W.3d 514, 520 (Tex. Crim. App. 2013) (addressing defensive issue of entrapment). Appellant also cites section 2.03 of the Penal Code, stating that if the issue of the existence of a defense is submitted to the jury, "the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted." TEX. PENAL CODE ANN. § 2.03 (West 2011). As the State points out, however, and as the Court of Criminal Appeals has made clear, the accomplice-witness statute is law applicable to the case, but it is not a defensive issue. *Zamora*, 411 S.W.3d at 513. Appellant does not cite authority requiring that an

accomplice-witness instruction describe for the jury circumstances or conditions under which it must acquit the defendant if the accomplice's testimony is not corroborated.

The court's charge contained an abstract accomplice-witness instruction, which appellant does not challenge. The abstract instruction was followed by a paragraph instructing the jury that Osborn was an accomplice witness, and applying the abstract instruction to her testimony. It read:

You are charged that Dottie Lorene Osborn was an accomplice if any offense was committed, and you are instructed that you cannot find the defendant guilty upon the testimony of Dottie Lorene Osborn unless you first believe that the testimony of the said Dottie Lorene Osborn is true and that it shows the defendant is guilty as charged in the indictment; and even then you cannot convict the defendant, Eloy Daniel Trevino, unless you further believe that there is other evidence in this case, outside the evidence of said Dottie Lorene Osborn, 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.

The Court of Criminal Appeals has long held that an accomplice witness instruction must set out the law in the abstract and apply the law to the facts of the case. *Armstrong v. State*, 26 S.W. 829, 830 (Tex. Crim. App. 1894); *Doyle v. State*, 133 S.W.2d 972, 973 (Tex. Crim. App. 1939). The instruction given here does so. See *Holladay v. State*, 709 S.W.2d 194, 197 (Tex. Crim. App. 1986); State Bar of Texas, Texas Criminal Pattern Jury Charges (General, Evidentiary and Ancillary Instructions), 3.3 Instruction—Accomplice Witness Testimony—Accomplice as Matter of Law (2015).

Accordingly, we overrule appellant's first three issues.

Sufficiency of the Evidence

In appellant's last issue, he contends the evidence was insufficient to support his conviction for delivery of methamphetamine. He presented an alibi defense at trial, supported by the testimony of five witnesses who said he was not in Friona at the time of the transaction with Osborn.

In evaluating the sufficiency of the evidence supporting a conviction, our inquiry is "whether, after viewing the evidence in a light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Garcia v. State*, 367 S.W.3d 683, 686-87 (Tex. Crim. App. 2012) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). It is the role of the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from that evidence. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318-19). The trier of fact is the sole judge of the credibility of witnesses and the weight, if any, to be given to their testimony. *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010) (plurality op.). The State may prove the elements of an offense by either direct or circumstantial evidence. *Hooper*, 214 S.W.3d at 13. In a sufficiency review "circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Id.* If the record could support conflicting inferences, we presume that the fact finder resolved the conflict in favor of the prosecution and defer to that resolution. *Garcia*, 367 S.W.3d at 687.

The State was required to demonstrate beyond a reasonable doubt that appellant knowingly delivered methamphetamine. TEX. HEALTH & SAFETY CODE ANN. § 481.112(c). “‘Deliver’ means to transfer, actually or constructively, to another a controlled substance” TEX. HEALTH & SAFETY CODE ANN. § 481.002(8).

Appellant’s alibi was established by the testimony of his wife and his four children. Appellant also, through his wife’s testimony, identified Prieto as the man who gave the drugs to Medrano and Osborn. On appeal, appellant further points to deficiencies in Medrano’s identification of him and argues the agent had seen him only once and did not know who was on the other end of the phone when Osborn placed the call to set up the meeting.²

Shortly after the drug transaction, Medrano was shown several photographs and he identified appellant as the person who came to the car and gave the plastic baggie containing drugs to Osborn. He testified, “as soon as I saw the first one, I knew exactly who it was and knew that it was the guy that had come up to the vehicle that day.” Although Medrano did not know appellant before the drug transaction, he testified he did know Prieto. Medrano told the jury appellant, not Prieto, was the person who delivered the drugs to Osborn. Osborn testified she had known appellant since elementary school.³ She told the jury she recognized appellant when he approached

² Appellant characterizes the photo line-up during which Medrano identified appellant as a “suspect” line-up. Appellant does not, however, challenge the propriety of the line-up or otherwise contend it was unreliable.

³ Appellant does not challenge the adequacy of the evidence corroborating Osborn’s accomplice-witness testimony. Medrano’s testimony identifying appellant as the person who delivered the drugs accomplished that purpose. Regarding Osborn’s testimony, we note that once corroborated, the testimony of an accomplice may be

the car and that no one else came to the car that day. Osborn also testified appellant and Prieto do not look alike.

Appellant also points to Osborn's testimony that Medrano paid her before receiving the methamphetamine while Medrano testified he paid her after the two returned from their receipt of the drugs. And, appellant notes Osborn's conviction for delivery of methamphetamine and her favorable sentence as a result of her testimony in his trial.

It was the task of the jury to assess the credibility of the testimony offered by the State's witnesses, as well as those testifying on behalf of appellant, and the weight to be given the testimony of each. The jury, acting within its proper role, rationally could have accepted the version of events described by Medrano and Osborn and disbelieved appellant's family members who testified on his behalf. *Ashley v. State*, No. 08-11-00231-CR, 2012 Tex. App. LEXIS 8847, at *2-3 (Tex. App.—El Paso, Oct. 24, 2012, no pet.) (mem. op., not designated for publication).

Conflicts in the testimony given by Medrano, Osborn, and other witnesses also were for the jury to resolve, and we accept their resolution of such inconsistencies in favor of the verdict. See *Garcia*, 367 S.W.3d at 687. None reflected by this record renders the evidence insufficient to support appellant's conviction. Viewed in the light most favorable to the verdict, the evidence is sufficient to permit a rational trier of fact to find beyond a reasonable doubt appellant knowingly delivered the methamphetamine.

considered by the jury in the same manner as any other competent evidence. See *Herron*, 86 S.W.3d at 632.

We resolve appellant's second issue against him.

Conclusion

Having overruled each of appellant's issues on appeal, we affirm the judgment of the trial court.

James T. Campbell
Justice

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