IN THE
TENTH COURT OF APPEALS

No. 10-14-00405-CR

ANDRE JAMMAR ASH,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 82nd District Court
Falls County, Texas
Trial Court No. 9414

MEMORANDUM OPINION

Andre Jammar Ash was convicted of possession of cocaine over four grams but less than 200 grams with the intent to deliver and sentenced to 35 years in prison. *See* TEX. HEALTH AND SAFETY CODE ANN. § 481.112(a), (d) (West 2010). Because the trial court did not err in failing to submit an accomplice-as-a-matter-of-law instruction and any error in failing to submit an accomplice-as-a-matter-of-fact instruction was harmless, the trial court's judgment is affirmed.

BACKGROUND

Ash, his girlfriend, and three professional female dancers headed to Houston where Ash had arranged for the dancers to perform at a club. It was too early to dance when they arrived in Houston; so, the group headed to Crockett where Ash dropped off the dancers at Ash's friend's house while Ash and his girlfriend went to Wal-Mart. After spending time in Crockett and having an issue regarding the performance arranged in Houston, the group decided to drive to Killeen. On the way to Killeen, the vehicle they were travelling in, a Suburban owned by Ash, was stopped by police in Marlin for the failure to dim the vehicle's headlights. During the traffic stop, cocaine was found in the Suburban, and all five occupants were arrested. The women testified against Ash at his trial.

ACCOMPLICE WITNESS INSTRUCTIONS

In one issue, Ash contends the trial court erred in overruling his "requested accomplice witness instructions," asserting the four women with whom he was travelling were accomplices. Ash argues he was harmed by the trial court's action, and thus, his argument continues, his conviction should be reversed and his case remanded for a new trial.

Jury Charge Error

A claim of jury-charge error is reviewed using the procedure set out in *Almanza*. *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985); *Riggs v. State*, ___ S.W.3d ___, No. 10-14-00229-CR, 2015

Tex. App. LEXIS 12561 (App.—Waco Dec. 10, 2015, no pet. h.). If error is found, we then analyze that error for harm. *Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003).

If an error was properly preserved by objection, reversal will be necessary if there is some harm to the accused from the error. *Almanza*, 686 S.W.2d at 171. Conversely, if error was not preserved at trial by a proper objection, a reversal will be granted only if the charge error causes egregious harm, meaning the appellant did not receive a fair and impartial trial. *Id*. Jury-charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Stuhler v. State*, 218 S.W.3d 706, 719 (Tex. Crim. App. 2007); *Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006).

Accomplice Witness Testimony

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. ANN. art. 38.14 (West 2005). Presence at the crime scene does not make a person an accomplice, *Kunkle v. State*, 771 S.W.2d 435, 439 (Tex. Crim. App. 1986); rather, an accomplice must have engaged in an affirmative act that promotes the commission of the offense that the accused committed. *Smith*, 332 S.W.3d at 439. A person is not an accomplice if the person knew about the offense and failed to disclose it or helped the accused conceal it. *Id*.; *Gamez v. State*, 737 S.W.2d 315, 322 (Tex. Crim. App. 1987).

A State's witness may be an accomplice as a matter of law or as a matter of fact. *Cocke v. State*, 201 S.W.3d 744, 747 (Tex. Crim. App. 2006). The evidence in each case will dictate whether an accomplice-as-a-matter-of-law or accomplice-as-a-matter-of-fact instruction is required. *Id*. A person who participates with the defendant before, during, or after commission of the crime for which the defendant is on trial is an accomplice as a matter of fact. *Ex parte Zepeda*, 819 S.W.2d 874, 875-76 (Tex. Crim. App. 1991). Thus, a person who is a party to the crime and could be charged for that crime, is an accomplice as a matter of fact. *Id*. at 876. Conversely, the Court of Criminal Appeals has most recently held that a person who is indicted for the same offense or a lesser-included offense as the accused or has had that indictment dismissed in exchange for testifying against the accused is an accomplice as a matter of law. *Smith v. State*, 332 S.W.3d 425, 439 (Tex. Crim. App. 2011); *Herron v. State*, 86 S.W.3d 621, 631 (Tex. Crim. App. 2002); *Zepeda*, 819 S.W.2d at 876. *But see Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007) (a person who is *susceptible* to prosecution for the offense with which the accused is charged or a lesser included offense is also an accomplice as a matter of law); *Paredes v. State*, 129 S.W.3d 530, 536 (Tex. Crim. App. 2004) (same); *Blake v. State*, 971 S.W.2d 451, 455 (Tex. Crim. App. 1998) (same).[1]

When the evidence clearly shows or there is no doubt that a witness is an accomplice as a matter of law, the trial court must instruct the jury accordingly. *Smith*,

[1] The Court of Criminal Appeals has vacillated on whether a person who could be charged with the same or lesser included offense is an accomplice as a matter of law. The Court's current case authority does not include this type of witness as an accomplice as a matter of law.

332 S.W.3d at 439; *Blake v. State*, 971 S.W.2d 451, 455 (Tex. Crim. App. 1998). The failure to do so is error. *Herron*, 86 S.w.3d at 631. When there is doubt or the evidence is conflicting as to whether a witness is an accomplice, then the trial court must leave to the jury the question of whether the witness is an accomplice witness as a matter of fact under instructions defining the term "accomplice." *Paredes v. State*, 129 S.W.3d 530, 536 (Tex. Crim. App. 2004); *Blake*, 971 S.W.2d at 455. Finally, when the evidence clearly shows that a witness is not an accomplice, the trial judge is not obligated to instruct the jury on the accomplice witness rule—as a matter of law or fact. *Smith v. State*, 332 S.W.3d 425, 440 (Tex. Crim. App. 2011).

Ash's Argument

Ash argues that the four women in the Suburban with Ash, were accomplices as a matter of law and thus, the trial court erred in failing to submit that instruction. However, none of these women were indicted for possession of cocaine with the intent to deliver as was Ash. Nor were any of them indicted for a lesser included offense of that crime. Thus, none of these women were accomplices as a matter of law, and the trial court did not err in failing to submit an accomplice-as-a-matter-of-law instruction.

But Ash also contends on appeal that the trial court erred in failing to submit an instruction regarding the women being accomplices as a matter of fact. This alleged error, however, was not preserved. At the charge conference, Ash specifically declined to request an accomplice-as-a-matter-of-fact instruction because he believed the women were accomplices as a matter of law, and any other instruction would be erroneous.

Thus, assuming without deciding that the trial court erred in failing to submit an instruction on the women being accomplices as a matter of fact, we review the record for egregious harm rather than for some harm.

Egregious Harm

In determining the strength of a particular item of non-accomplice evidence, we examine (1) its reliability or believability and (2) the strength of its tendency to connect the defendant to the crime. *Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002). The difference in harm standards impacts how strong the non-accomplice evidence must be for the error in omitting an accomplice witness instruction to be considered harmless. *Id*. 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." *Id*. (quoting *Saunders v. State*, 817 S.W.2d 688, 692 (Tex. Crim. App. 1991).

Non-Accomplice Evidence

In this case, non-accomplice evidence is provided by the police officer, Josh Tulloch, who pulled over the Suburban in which Ash and the women were riding. The Suburban was Ash's vehicle, although he was not driving at the time the vehicle was stopped. As Tulloch approached the vehicle, Ash, a middle row passenger on the driver's side, rolled down his window halfway and verified with Tulloch that the vehicle was pulled over because the driver failed to dim the vehicle's headlights.

Tulloch could smell the odor of burned marijuana coming from the open window. When Tulloch approached the driver, he could still smell the odor of burned marijuana coming from the vehicle. Based on that odor, he decided to have everyone exit the vehicle. When the other middle row passenger, Jefferi Varnado, wiped marijuana off of her as she was getting out of the vehicle, Tulloch decided everyone in the vehicle needed to be detained and placed them in handcuffs after they exited the Suburban.

After Ash was taken out of the vehicle and placed in handcuffs, the front passenger asked for cigarettes, and Tulloch went to the vehicle to look for them. While looking for them, he found a white plastic bag, such as a bag from Wal-Mart, by the door jamb between the front and back passenger seats. He looked in the bag, said, "Bingo," looked up, and looked back in it. At the time Tulloch looked back in the bag, Ash started yelling at the others to "claim your stuff," and saying, "Those aren't my drugs." Ash also said that if he was to get in trouble, he would violate his parole. Tulloch had not yet said what he found in the bag or emptied the bag out for Ash or any of the four women to see its contents when Ash made these statements. In the bag was 41.63 grams of cocaine.

Ash and the four women were transported to the police station to begin the booking process. Tulloch had the driver and front row passenger in an interview room with him. Tulloch could hear Ash, although Ash was outside the room, yelling and again telling the others to "claim their stuff." When Tulloch brought Ash into the interview room, Ash was agitated, jittery, and getting angry.

Application

The cocaine was found in Ash's vehicle. Ash disclaimed possession of the cocaine and yelled at the other occupants of the vehicle to claim it as theirs even before the officer revealed to Ash what the officer had found. After reviewing this non-accomplice evidence, we find it reliable and tends to connect Ash to the offense. Further, we find the evidence was not so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive without the accomplice testimony. Accordingly the omission of an accomplice-as-a-matter-of-fact instruction was harmless.

CONCLUSION

Ash's sole issue is overruled. The trial court's judgment is affirmed.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed February 4, 2016
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