



NUMBER 13-16-00021-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

DAVID ALLEN PERRY,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

**On appeal from the 52nd District Court
of Coryell County, Texas.**

MEMORANDUM OPINION

**Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Contreras**

A jury found appellant, David Allan Perry, guilty of delivery of a controlled substance, methamphetamine, in the amount of one gram or more but less than four grams, a second-degree felony offense. See TEX. HEALTH & SAFETY CODE ANN. §

481.112(a), (c) (West, Westlaw through Ch. 49, 2017 R.S.). The trial court assessed punishment at sixteen years' imprisonment. By a single issue, appellant contends the trial court erred in not charging the jury with an accomplice-witness instruction, see TEX. CODE CRIM. PROC. ANN. art. 38.14 (West, Westlaw through Ch. 49, 2017 R.S.), and that the error caused him egregious harm. We affirm.

I. BACKGROUND¹

Christopher West, the recipient of the drugs delivered by appellant, testified to the following facts at appellant's trial. West met appellant and began working for him doing general construction work in January 2015. Because West was homeless, appellant agreed to rent West a room in his home. In late February, West stated that he was at a convenience store in Copperas Cove, Texas. West had been using methamphetamines for several days. While at the store, West received a text message from appellant that appellant had a "nice shard."² West texted a response, requesting that appellant "front" him for the drugs.³ Through a phone call, appellant arranged to bring the drugs to the convenience store. West observed appellant pull into the parking lot of the store; as appellant did so, however, a police vehicle with its lights activated followed appellant's truck into the parking lot. West observed that the officer briefly spoke to appellant and then walked back to his police vehicle. As the officer walked away, appellant called West

¹ This case is before this Court on transfer from the Tenth Court of Appeals in Waco pursuant to an order issued by the Texas Supreme Court. See TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through Ch. 49, 2017 R.S.).

² West testified that a "shard" is a slang term for rock crystal methamphetamine.

³ West explained that to "front" drugs means that a drug transaction occurs with an understanding that the buyer will reimburse the seller later for the cost of the drugs.

and told him to come out and get in the truck. West initially refused, but relented after appellant threatened to no longer permit West to live with him. After West entered appellant's truck, appellant handed the methamphetamine to West, and West put it in his pocket. The police officer walked up to the window and asked what was going on. Appellant told the officer that West was trying to retrieve a knife from his pocket. The officer then handcuffed West and asked West's permission to retrieve the knife. West consented, and the officer retrieved a pocket knife, the methamphetamine, and two drug pipes from West's pocket. West was placed in the back seat of a police vehicle. He watched as the officer talked to appellant. Eventually, appellant was placed in the same vehicle next to West. The officer took West's phone; West gave the police permission to search the phone. Appellant asked West if the text messages between them were still on his phone; although West knew the messages were still there, he told appellant he did not know. West pleaded guilty to possession of methamphetamine; he testified at appellant's trial that he did not receive any favorable treatment in exchange for testifying against appellant.

The jury found appellant guilty, and the trial court assessed punishment at sixteen years' imprisonment. This appeal followed.

II. STANDARD OF REVIEW AND APPLICABLE LAW

Our first duty in analyzing a jury-charge issue is to determine whether error exists. *See Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005) (en banc). If we find error, we analyze it for harm. *Id.* The degree of harm necessary for reversal depends on whether the error was preserved by objection. *Id.* If the error was preserved by

objection, we will reverse if we find “some harm” to the defendant's rights. *Id.* If no objection was made, we will reverse only if the record shows “egregious harm” to the defendant. *Id.*

The accomplice witness rule is a statutorily created rule which states that “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.” TEX. CODE CRIM. PROC. art. 38.14. An accomplice is someone who participates with the defendant before, during, or after the commission of a crime and acts with the required culpable mental state. *Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007). To be considered an accomplice witness, the witness's participation with the defendant must have involved some affirmative act that promotes the commission of the offense with which the defendant is charged. *Id.* A witness is not an accomplice witness merely because he or she knew of the offense and did not disclose it, or even if he or she concealed it. *Id.* In addition, the witness's mere presence at the scene of the crime does not render that witness an accomplice witness. *Id.* And complicity with an accused in the commission of another offense apart from the charged offense does not make that witness's testimony that of an accomplice witness. *Id.*

A State's witness may be an accomplice as a matter of law or a matter of fact. *Smith v. State*, 332 S.W.3d 425, 439 (Tex. Crim. App. 2011). 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. *Id.* But if the State dismisses the indictment before the witness testifies,

the witness is no longer deemed an accomplice as a matter of law. *Id.* A witness continues to be regarded as an accomplice as a matter of law, however, if the witness agrees to testify against the accused in exchange for the dismissal of the charge. *Id.*

When there is doubt as to whether a witness is an accomplice (*e.g.*, the evidence is conflicting), then the trial judge may instruct the jury to determine a witness's status as a fact issue. *Id.* at 439–40. “However, as with an accomplice as a matter of law, 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. The trial court is not required to give the jury an accomplice-witness instruction when the evidence is clear that the witness is neither an accomplice as a matter of law nor as a matter of fact. *Smith*, 332 S.W.3d at 440; *Cocke v. State*, 201 S.W.3d 744, 748 (Tex. Crim. App. 2006).

III. DISCUSSION

West pleaded guilty to possession of methamphetamine, a violation of section 481.115 of the health and safety code. See TEX. HEALTH & SAFETY CODE ANN. § 481.115(a), (c) (West, Westlaw through Ch. 49, 2017 R.S.). Appellant was convicted of delivery of methamphetamine by actual transfer, a violation of section 481.112. See *id.* § 481.112(a), (c). Appellant argues that: (1) a person indicted for a lesser-included offense, based on the same offense as another, is an accomplice as a matter of law; (2) possession of a controlled substance (to which West pleaded guilty) is a lesser-included offense of possession with intent to deliver a controlled substance; and (3) West was therefore an accomplice as a matter of law.

Although generally, a person indicted for a lesser-included offense, based on the same offense as another, is an accomplice as a matter of law, see *Smith*, 332 S.W.3d at 439, the court of criminal appeals has excluded recipients of drugs from being considered parties or accomplices to the delivery of those drugs to them. *Rodriguez v. State*, 104 S.W.3d 87, 92 (Tex. Crim. App. 2003) (“Any offense stemming from K.R.’s receipt of the cocaine is separate from the delivery that appellant committed.”). The *Rodriguez* Court explained that “there is an exception to the law of criminal responsibility ‘where the crime is so defined that participation by another is inevitably incident to its commission.’ [Robinson v. State], 815 S.W.2d 361, 363 (Tex. App.—Austin 1991, no pet.) (citing 2 W. LaFave & A. Scott, *Substantive Criminal Law* Section 6.8(e) at 165–66 (1986)). Delivery is such an offense.” *Id.* In *Robinson*, the Austin Court of Appeals found that purchasers of a controlled substance were not parties to the delivery of the controlled substance. 815 S.W.2d at 364; see also *Lando v. State*, No. 03-11-00666-CR, 2012 WL 3793445, at *2 (Tex. App.—Austin Aug. 31, 2012, no pet.) (mem. op., not designated for publication) (relying on *Rodriguez* in finding that a buyer of drugs was not an accomplice witness to the delivery of the drugs); *Tave v. State*, No. 02-02-449-CR, 2004 WL 1175 283, at *3 (Tex. App.—Fort Worth May 27, 2004, pet. ref’d) (mem. op., not designated for publication) (relying on *Rodriguez* in finding that the recipient of a drug cannot be a party to the offense of delivery of a controlled substance).

Here, because West cannot be prosecuted as a principal or party to appellant’s delivery offense, he cannot be deemed an accomplice witness as a matter of law in this

trial. See *Druery*, 225 S.W.3d at 498.⁴ We conclude the trial court did not err by not giving an accomplice-witness instruction. We overrule appellant's sole issue.

IV. CONCLUSION

We affirm the trial court's judgment.

DORI CONTRERAS
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
6th day of July, 2017.

⁴ Appellant does not argue that West was an accomplice as a matter of fact.