NO. 12-11-00260-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

DANNY GLENN HALL, APPELLANT	§	***APPEAL FROM THE 294TH***
V.	§	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	§	***VAN ZANDT COUNTY, TEXAS***

MEMORANDUM OPINION

Danny Glenn Hall was convicted of manufacturing methamphetamine and was sentenced to fourteen years of imprisonment. In one issue, Appellant argues that the trial court committed reversible error by failing to include an accomplice witness instruction in the court's charge. We affirm.

BACKGROUND

Appellant was indicted by a Van Zandt County grand jury for the offense of manufacture of methamphetamine[1] on or about March 6, 2008. He pleaded not guilty, and the case was tried before a jury. Constable Pat Jordan testified that a reliable confidential informant told him that a woman known as "Goldie" and a man named "Danny" were cooking methamphetamine at a residence in Van Zandt County. Other evidence showed that the woman known as "Goldie" was Nina Magnuson, the man known as "Danny" was Appellant, and the owner of the residence was James "Slim Jim" Irby. Magnuson was also charged with the manufacture of methamphetamine on the same offense date as Appellant. Despite Irby's knowledge and consent to the use of his property as a methamphetamine lab, he was not arrested for manufacture of methamphetamine.

[1] *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112 (West 2011).

After Appellant was found guilty, he reached an agreement with the State and was sentenced to fourteen years of imprisonment.

ACCOMPLICE WITNESS INSTRUCTION—PRESERVATION OF ERROR

In his sole issue, Appellant argues that the trial court committed reversible error by failing to include an accomplice witness instruction in the court's charge. It is undisputed that Magnuson was an accomplice as a matter of law and that the trial court's failure to provide an accomplice witness instruction was error. *See* ***Herron v. State***, 86 S.W.3d 621, 631 (Tex. Crim. App. 2002) (prosecution witness indicted for same offense as defendant is accomplice as a matter of law; failure to provide accomplice witness instruction when witness is accomplice as a matter of law is error). The dispute is whether the error requires reversal.

We review charge error pursuant to the parameters set forth in ***Almanza v. State***, 686 S.W.2d 157 (Tex. Crim. App. 1984). If the error in the charge was the subject of a timely objection at trial, then reversal is required if the error resulted in *some* harm to the defendant. *See* ***id.*** at 171. If no proper objection was made at trial, then reversal is required only if the error resulted in egregious harm. *See* ***id.*** The State contends that Appellant's objection at trial was insufficient to call the trial court's attention to the error in the charge.

Preservation of Error

A defendant is required to present his objections to a charge prior to its being read to the jury and may also submit a special requested instruction. *See* TEX. CODE CRIM. PROC. ANN. arts. 36.14, 36.15 (West 2011). The objections may embody errors claimed to have been committed in the charge, as well as errors claimed to have been committed by omissions therefrom or in failing to charge upon issues arising from the facts. *See* ***id.*** art. 36.14. The purpose of these articles is to enable a trial judge to know in what respect a defendant regards the charge to be defective and to afford the judge an opportunity to correct it before reading the charge to the jury. ***Brown v. State***, 716 S.W.2d 939, 943 (Tex. Crim. App. 1986). This procedure helps prevent the trial judge "from being 'sand-bagged' and in preventing unnecessary reversals." ***Seefurth v. State***, 422 S.W.2d 931, 936 (Tex. Crim. App. 1967).

Objections must be sufficiently specific to point out the errors about which a complaint is made. ***Brown***, 716 S.W.2d at 943. If the objection does not specify where the charge is defective, or is too general to call the court's attention to the defect or omission, then it presents

nothing for review. *See* ***id.*** The adequacy of an objection must be judged on whether it isolates the portion of the charge that is alleged to be deficient and identifies the reason for its deficiency. *See* ***Taylor v. State***, 769 S.W.2d 232, 234 (Tex. Crim. App. 1989).

The Charge Conference

The following paragraph was included as paragraph 3 of the jury charge:

> A person is criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense[,] he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.

During the charge conference, the following exchange occurred:

Trial Court:	Any objection to the Court's Charge from the Defense?
Defense Attorney:	Yes ma'am. We would object to the clause regarding the accomplice under paragraph 3.
Trial Court:	Which is the third paragraph in the numbered paragraph 3. All right.
Defense Attorney:	Yes ma'am.
Trial Court:	All right. The Court will overrule that objection.

This was trial counsel's sole objection, and he made no request for special instructions to be included in the charge. Appellant argues that trial counsel's objection was sufficient to bring to the trial court's attention the omission of the accomplice witness instruction.

The quoted language in the charge is drawn from the penal code provision regarding the law of parties, and makes no reference to the accomplice witness rule requiring corroborating evidence. *See* TEX. PENAL CODE ANN. § 7.02 (West 2011); TEX. CODE CRIM. PROC. ANN. art. 38.14 (West 2011). Thus, it is unclear whether counsel wanted the entire paragraph deleted, or merely sought the addition of an accomplice witness instruction. Despite counsel's isolation of his objection to paragraph 3 in the charge, he failed to articulate the specific reason for his objection. Therefore, counsel failed to inform the trial court as to how the charge was deficient. Because the objection did not call the trial court's attention to the omission of the accomplice witness instruction, trial counsel did not preserve error. When charge error is not properly

preserved, we review the record for egregious harm. *See* ***Herron***, 86 S.W.3d at 632. Accordingly we will apply ***Almanza's*** egregious harm standard in conducting our analysis.

ACCOMPLICE WITNESS INSTRUCTION—HARM ANALYSIS

Whenever it appears that any requirement under Articles 36.14 and 36.15 has been disregarded, "the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial." TEX. CODE CRIM. PROC. ANN. art. 36.19 (West 2011). The omission of an accomplice witness instruction is generally harmless unless the nonaccomplice evidence is "so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive." ***Herron***, 86 S.W.3d at 632.

Egregious harm occurs when an error affects the very basis of a case, deprives the defendant of a valuable right, or vitally affects a defensive theory. ***Allen v. State***, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008). When reviewing the record for egregious harm, we consider (1) the entire jury charge, (2) the state of the evidence, including the contested issues and the weight of the probative evidence, (3) the final arguments of the parties, and (4) any other relevant information revealed by the record of the trial as a whole. *See* ***id.***

Applicable Law

"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. ANN. art. 38.14 (West 2011). The corroborating evidence required when we are reviewing for egregious harm need not be as strong as would be required if we were reviewing only for "some harm." *See* ***Freeman v. State***, 352 S.W.3d 77, 83 (Tex. App.—Houston [14th] 2011, pet. ref'd) (quoting ***Herron***, 86 S.W.3d at 633)).

To determine whether evidence is sufficient to corroborate accomplice testimony, we first eliminate from consideration the accomplice witness's testimony and then examine the other inculpatory evidence to ascertain whether the remaining evidence tends to connect the defendant with the offense. *See* ***McDuff v. State***, 939 S.W.2d 607, 612 (Tex. Crim. App. 1997). The sufficiency of the nonaccomplice evidence is judged according to the particular facts and circumstances of each case. ***Smith v. State***, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011). The

direct or circumstantial nonaccomplice evidence is sufficient corroboration if it shows that rational jurors could have found that it sufficiently tended to connect the accused to the offense. ***Id.*** When there are conflicting views of the evidence, we will defer to the fact finder's resolution of the evidence. *See* ***id.***

<u>Discussion</u>

We now apply the ***Allen*** factors to determine whether the trial court's omission of the accomplice witness instruction constituted reversible error.

1. **<u>Entire Jury Charge</u>**

The charge was deficient in that it omitted the accomplice witness instruction, but nothing from the face of the charge appears to have contributed to any additional error. The inclusion of the law of parties contributed to the State's final argument during its closing argument, but this instruction did not call upon the jury to grant more weight to one witness's testimony over another's. An additional instruction admonished the jury that it was the exclusive judge of the credibility of the witnesses and the weight to be given their testimony.

2. **<u>State of the Evidence</u>**

Magnuson testified that she and Appellant both manufactured methamphetamine in the metal building on Irby's property. She also testified that she was with Appellant the day he purchased items at Walmart to use in manufacturing methamphetamine, that she, Appellant, and Irby purchased the items together, and that Appellant was in charge of cooking the methamphetamine at Irby's garage.

The only other evidence coming from a possible accomplice witness came from a written statement by Irby that was admitted without objection. Irby's statement explained that he gave Appellant permission to cook methamphetamine in his shop if Appellant gave him one gram of methamphetamine. According to the statement, Appellant cooked methamphetamine on more than one occasion, and there were times when he would come home and smell ether and ammonia. He denied purchasing any ingredients for the manufacture of the methamphetamine.

Constable Jordan testified that he had received a tip from a confidential informant that a man named "Danny" and a woman named "Goldie" were cooking methamphetamine on Jim Irby's property and that they were driving a gold-colored pickup truck. On the date of Appellant's arrest, Jordan saw the pickup truck on Irby's property and a male and female standing next to a metal building with the door open. Jordan learned that the man and woman on the

premises went by "Danny" and "Goldie," which was consistent with information gained from the confidential informant months earlier. As Jordan approached them, he smelled ether and noticed that the door to the building had been closed and locked shut. Approximately twenty yards from Appellant's truck, Jordan saw an active burn pile full of drain cleaner bottles, fuel cans, starter fluid cans, and other miscellaneous trash.

Jordan later learned that Appellant had a key to the locked building. But Appellant testified that when Constable Jordan initially asked whether he had a key to the building, he "didn't know [he] had a key to the building." A search of the building uncovered several items commonly used in the manufacture of methamphetamine—funnels, syringes, gloves, bottles, grinders, batteries, burners, and a variety of tubing. Photographs of these items and the crime scene were introduced at trial. A search of the gold-colored truck, Appellant's vehicle, revealed baggies of methamphetamine located near the center console and in Appellant's duffle bag that was in the bed of the truck. Jordan also found a box containing nine pseudophedrine pills underneath the driver's seat of Appellant's truck.

Upon arresting Appellant, Constable Jordan found a "shopping list" in Appellant's left front pocket, and an "ingredient list" and Walmart receipt dated from the day prior, in Appellant's wallet. The State introduced the lists and the receipt as exhibits during its case in chief. The receipt showed the purchase of Coleman fuel (a common ingredient used in the production of methamphetamine), funnels, and batteries. These items were also included in the shopping list Jordan found in Appellant's front pocket. Several photographs of the crime scene showed the existence of funnels, batteries, and fuel cans present at the clandestine lab.

During Appellant's case in chief, Paula Pickard, an ex-girlfriend of Appellant's late brother, testified that Appellant, Irby, and Magnuson all had reputations of "being involved with methamphetamine." She testified about her knowledge of Irby's manufacturing and selling methamphetamine, and also that Magnuson had a history of vindictiveness and a reputation as being a "liar and a thief." Pickard admitted that she too had a criminal history, used methamphetamine, and was not at Irby's residence on the day Constable Jordan arrested Appellant.

Appellant testified that he was a methamphetamine user and had purchased methamphetamine in the past. Appellant explained that he agreed to clean Irby's property in return for receiving payment in methamphetamine. He testified that he did not write the lists

found in his possession, but never explained why the lists were in his possession, or why he purchased the items that were listed on the Walmart receipt dated the day before his arrest. In essence, Appellant testified that both Magnuson and Irby lied about Appellant's role in manufacturing methamphetamine.

3. <u>Final Arguments of the Parties</u>

During his final argument, Appellant's trial counsel focused on impeaching Magnuson's and Irby's testimony. He argued that both were unreliable witnesses because they were "lying thieving felons" who abused drugs. The State did not challenge the fact that Magnuson and Irby were "lying thieving felons," and that Irby was also guilty of manufacturing methamphetamine. Instead, the State argued that even if Appellant's story was true, that he was only "cleaning everything up" and did not "manufacture" methamphetamine, Appellant was still guilty. In referencing the provision in the charge regarding the law of parties, the prosecutor stated, "[I]f you think Slim Jim is the one cooking, then the evidence supports that [Appellant's] the one helping him cook. And if he's the one helping him cook, then he is criminally responsible, because, ladies and gentlemen, he aided in the preparation of it."

4. <u>Record as a Whole</u>

Finally, we note that during voir dire, trial counsel confirmed with the venire that ways to judge credibility include body language, inconsistent stories, motives for untruthfulness, and the existence of corroborating "facts."

<u>Conclusion</u>

In determining whether sufficient corroborating evidence exists to connect Appellant to the crime, we exclude Magnuson's testimony and Irby's statement. Both parties agree Magnuson was an accomplice. Based on the contents of Irby's statement and the State's closing argument, we assume, for purposes of this analysis, that Irby was an accomplice as well.

Appellant's possession of the shopping list, ingredient list, and Walmart receiptt, when coupled with his presence at a clandestine methamphetamine lab and his reputation of "being involved with methamphetamine," independently connect Appellant with the manufacture of methamphetamine. Appellant testified that he had no role in manufacturing the methamphetamine, but the jury did not find his testimony credible, and we must defer to the fact finder's credibility determination. Accordingly, we hold the evidence is sufficient for rational jurors to connect Appellant to the crime and that Magnuson's and Irby's statements were

corroborated. Therefore, Appellant was not egregiously harmed by the trial court's failure to include an accomplice witness instruction in the charge. *See* ***Herron***, 86 S.W.3d at 632. Appellant's sole issue is overruled.

DISPOSITION

The judgment of the trial court is ***affirmed***.

BRIAN HOYLE
Justice

Opinion delivered May 9, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)