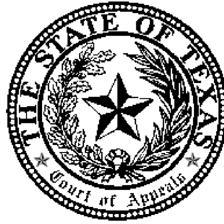
Affirmed in part, Reversed and Remanded in part, and Opinion filed January 10, 2002.



In The

Fourteenth Court of Appeals

NO. 14-00-01238-CR

DENNIS ANTHONY DELGADO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 749,432

O P I N I O N

Appellant, Dennis Anthony Delgado, appeals his conviction of the offense of manslaughter. Appellant was charged by indictment with murder and manslaughter. A jury convicted him of the offense of manslaughter and assessed punishment at twenty years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant asserts three points of error on appeal. We affirm in part, and reverse and remand in part.

FACTUAL BACKGROUND

On September 30, 1996, Christopher Vasquez, Rodrigo Benitez, and Ramiro Gonzalez were driving in Rodrigo's Blazer. Rodrigo was driving, Ramiro was in the front passenger seat, and Christopher was in the back seat. All three males were members of the Riverview Bloods Gang. At approximately 7:30 p.m., they were traveling south in the right lane on the feeder road at Interstate 45 and Griggs Road. Rodrigo saw a blue Cadillac drive up along the left side of their vehicle. They heard a gun discharge. Rodrigo and Ramiro turned around and saw that Christopher had been shot in the neck. The Cadillac sped by and Rodrigo pulled in to a store at the corner and called an ambulance and the police.

Officer White heard a description of the Cadillac over the radio. He noticed a vehicle matching the description and pulled it over. Courtney Steve Turner, the driver, immediately got out of the car with his hands up. The rest of the vehicle's occupants were removed from the car by officers at the scene. Andre Trevino was in the front passenger seat. John Sorola was seated in the back seat on the driver's side. Appellant was in the back seat on the passenger's side. Officers found a 12-gauge shotgun in the back seat of the Cadillac and a shotgun shell outside the vehicle on the passenger side.

Courtney Steve Turner's Testimony

Courtney testified that he met "these guys" through a member of their gang, the Southeast Crips. On the night in question, Courtney picked up Andre, John, and appellant. He testified that he did not see any guns in the car when appellant got in. As they drove down the feeder road and approached Rodrigo's Blazer, Courtney said appellant yelled "They're Riverview," and John threw gang signs at the Blazer. Next, he heard a blast and when he turned around he saw appellant pulling a shotgun into the car and smoke coming from the barrel. Courtney immediately pulled over and told John, Andre, and appellant to get out of his car. He said that their response was: "You better go. We thought you were down with us." Courtney decided to keep driving. Courtney testified that before they were

pulled over by the police appellant stated: "We got that slob." When they were being pulled over, everyone in the car warned Courtney not to say anything.

Andrea Patino's Testimony

Andrea Patino, a friend of appellant's sister, testified that she overheard Andre bragging about how had he killed a guy named Chris. She also heard Andre talking about how he "blew Chris' head off and how the cops were so stupid because he was getting away with it."

Jack Howsley's Testimony

Jack Howsley testified that he asked Andre about the shooting and Andre told him that he "got out," and he "beat it."

Angela Delgado's Testimony

Angela Delgado, appellant's sister, testified that she saw appellant leave her house that night when Courtney, Andre, and John picked him up. She said appellant was not carrying anything when he left.

Appellant's Testimony

According to appellant, he was in the Cadillac with his brother, Michael Enriquez, John Sorola, and Andre Trevino. Appellant testified that he was rolling a joint when the Cadillac exited Interstate 45 at Griggs. Appellant heard John say that the guys in the Blazer were the guys that "got" his friend Rudy. Then, Andre said "fuck Bloods," shot one time, and threw the gun in the back seat. Before they were pulled over, Courtney stopped to let Michael out of the car. The remaining passengers discussed who was going to take the blame for shooting the Blazer. Appellant testified that the gun belonged to Andre, but he agreed to take the blame for it because nobody else would, and Andre was already on probation and did not want to go back to prison. Appellant said he did not know the gun was in the car before the shooting, and he did not encourage or assist Andre. He also said

that when he agreed to take the blame for the gun he did not know someone had been shot. However, when he gave a statement to the police admitting the gun was his, he was aware Christopher had been shot.

POINTS OF ERROR PRESENTED ON APPEAL

Appellant asserts three points of error on appeal: (1) the trial court erred in overruling appellant's objection to the jury charge regarding an instruction on the law of parties; (2) the evidence is legally insufficient to sustain appellant's conviction; and (3) the trial court erred in refusing to give appellant credit for time he spent in juvenile detention.

I. JURY CHARGE

Appellant argues the trial court erred in overruling his objection to the jury charge which authorized the jury to find appellant guilty if they found he was a party to the offense. Appellant asserts there was no evidence appellant was a party with anyone in commission of this offense, and as such, it was improper to instruct the jury they could find him guilty as a party.

An instruction regarding the law of parties may be given to the jury when there is evidence sufficient to support a jury's verdict that the defendant is responsible as a party to the crime. *Ladd v. State*, 3 S.W.3d 547, 564 (Tex. Crim. App. 1999) (citing *McCuin v. State*, 505 S.W.2d 827, 830 (Tex. Crim. App. 1974)). A person is criminally responsible as a party to an offense if he acts with intent to promote, assist, solicit, direct, aid, or attempt to aid in the commission of an offense. TEX. PEN. CODE ANN. §§ 7.01, 7.02 (Vernon 1994). Mere presence at the scene of a crime is not, by itself, sufficient to make a person a party to the crime. *Ellis v. State*, 551 S.W.2d 407, 412 (Tex. Crim. App. 1977) (citations omitted).

When the evidence clearly supports a conviction of the actor as a principal, any error of the trial court in charging on the law of parties is harmless. *Ladd*, 3 S.W.3d at 564–65 (citing *Black v. State*, 723 S.W.2d 674, 675 (Tex. Crim. App. 1986)). The rationale behind this rule is that if there was no evidence to support a defendant's conviction on a party

theory, the jury must not have relied on the party instruction in reaching its verdict and instead convicted the defendant because they thought he was the principal actor. *Id*. at 565.

Appellant argues that if the jury believed Courtney's testimony, appellant is the only one who knew about the shotgun and no one aided or solicited appellant in commission of the crime. On the other hand, appellant asserts, if the jury believed appellant's testimony, appellant had nothing to do with the commission of the offense. Therefore, appellant argues he was either the principal actor or not guilty of the offense.

Accepting arguendo appellant's contention there was insufficient evidence to support his conviction under the law of parties, we overrule appellant's first point of error. As stated above, if there is no evidence from which the jury could have found appellant guilty as a party, the jury must have found appellant guilty as the principal actor. *Id*. Therefore, any error of the trial court is harmless. *Id*.

II. LEGAL SUFFICIENCY OF THE EVIDENCE

Appellant asserts the evidence is legally insufficient to support his conviction. Appellant contends if the evidence showed Courtney and appellant were parties to the offense, Courtney's testimony must be considered accomplice testimony. Therefore, appellant contends, it must be corroborated by sufficient evidence in order to support his conviction, and it was not. The State argues there is no evidence Courtney was an accomplice. For purposes of our analysis, we will proceed accepting appellant's contention that Courtney was an accomplice.

When reviewing legal sufficiency of the evidence, this court must view the evidence in a light more favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). The reviewing court examines all of the evidence, but ultimately disregards any evidence that does not support the verdict. *Clewis v. State*, 922 S.W.2d 126, 132 n.10 (Tex.

Crim. App. 1996). This standard of review applies to cases involving both direct and circumstantial evidence. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, this court does not re-evaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

A conviction cannot stand solely upon the testimony of an accomplice witness. TEX. CRIM. PRO. CODE ANN. art. 38.14 (Vernon 1991). It must be corroborated by other evidence tending to connect the defendant with the offense. *Id*. The corroborating evidence need not be sufficient in itself to establish guilt; it need only tend to make the accomplice's testimony more likely than not. *Pinson v. State*, 598 S.W.2d 299, 302 (Tex. Crim. App. 1980) (citations omitted). Evidence that the accused was present at the time and place of the commission of the offense is proper corroborating evidence, but is not alone sufficient corroboration. *Nolley v. State*, 5 S.W.3d 850, 854 (Tex. App.—Houston [14th Dist.] 1999, no pet.). There must be some evidence which, when coupled with the evidence of the accused's presence, tends to connect the accused to the commission of the offense. *Id*. The reviewing court shall eliminate all of the accomplice testimony from the record in order to determine whether accomplice testimony is corroborated. *Burks v. State*, 876 S.W.2d 877, 887 (Tex. Crim. App. 1994). In determining the sufficiency of the corroborating evidence, the reviewing court shall view the evidence in a light most favorable to the jury's verdict and apply the standard set out above. *Bledsoe v. State*, 21 S.W.3d 615, 619 (Tex. App.—Tyler 2000, no pet.) (citations omitted).

A person commits the offense of murder if he "intentionally or knowingly causes the death of an individual; intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual." TEX. PEN. CODE § 19.02 (Vernon 1994). A person acts with intent "with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." *Id*. § 6.03(a). A person acts knowingly "with respect to the result of

his conduct when he is aware that his conduct is reasonably certain to cause the result." *Id.* § 6.03(b). A person commits the offense of manslaughter if he "recklessly causes the death of an individual." *Id.* § 19.04. A person acts recklessly when "he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exists or the result will occur." *Id.* § 6.03(c).

Appellant correctly points out that, excluding Courtney's testimony, the evidence reflects the following:

(1) A shot was fired from the blue Cadillac that caused Christopher's death.

(2) Appellant was a passenger in the Cadillac.

(3) The shotgun was found in the back seat of the Cadillac.

(4) Appellant was sitting in the back seat of the Cadillac.

(5) The shotgun was purchased by appellant.

In addition to the evidence listed by appellant, the following facts were also in evidence:

(6) After learning an occupant of the Blazer had been shot, appellant told the police that the gun was his.

(7) When appellant was initially questioned by the police, he gave them the wrong name, and lied about other various things, such as his membership in a gang.

(8) Appellant was a member of the victim's rival gang.

(9) oA shotgun shell was found on the ground on the passenger side of the vehicle, where appellant had been sitting.

While none of these facts taken alone may be sufficient, taken together and viewed in a light favorable to the jury's verdict, we find this evidence tends to connect appellant to the commission of the crime, and thus is sufficient to corroborate Courtney's testimony. Therefore, assuming without deciding that Courtney was an accomplice, the evidence is legally sufficient to support appellant's conviction. Accordingly, we overrule appellant's second point of error.

III. CREDIT FOR TIME SPENT IN JUVENILE DETENTION

In his final point of error, appellant argues the trial court erred by not giving him credit for time he spent in juvenile detention prior to his certification as an adult. The State argues that the record on appeal is insufficient to show error.

The record reflects the following discussion between appellant's attorney and the court:

> Appellant's Attorney: Your Honor, will the Court be giving him credit for the time he spent in juvenile detention after September 30th, 1996? He was in custody– in juvenile custody through the date of certification.
>
> The Court: There's an affirmative finding in that. Am I required to?
>
> The State: You're not required to do so, sir.
>
> The Court: I'll not give him credit for his time.
>
> Appellant's Attorney: He was taken into custody on September 30th, 1996, until—
>
> The Court: I'll give him credit for every day that he's entitled to under the law. And if I'm not required to give him credit for juvenile time, I shall not.

A defendant is entitled to credit for time of confinement from the time of his arrest and confinement until he is sentenced by the trial court. TEX. CODE CRIM. PRO. ANN. art. 42.03, § 2(a) (Vernon Supp. 2001). The State concedes that a defendant who is initially detained as a juvenile and later certified as an adult is entitled to credit for time of confinement, including time spent in a juvenile detention facility before certification. *Ex Parte Gomez*, 15 S.W.3d 103, 103–04 (Tex. Crim. App. 2000) (citations omitted). As appellant was initially detained as a juvenile and later certified as an adult, he is entitled to have his sentence credited for the time he spent in juvenile detention before certification.

The record reflects that appellant was placed in juvenile detention on October 1, 1996. On April 3, 1997, trial court signed an order certifying appellant as an adult. Appellant was transferred to Harris County Jail the next day. The record does not reflect when or if appellant was released on bond from Harris County Jail. At sentencing, the trial

court credited appellant's sentence for 104 days, but did not specify the basis for that determination. The record does not reflect how much time appellant spent confined in Harris County Jail, but it does show appellant spent more than 104 days confined in juvenile detention. Therefore, the trial court's order does not reflect the correct amount of time appellant's sentence should be credited for: the time appellant spent confined in juvenile detention *and* Harris County Jail.

An appellate court may reform a judgment to reflect credit for time served if the necessary information is before the court. *Stokes v. State*, 688 S.W.2d 539, 542 (Tex. Crim. App. 1985) (citing *Knight v State*, 581 S.W.2d 692 (Tex. Crim. App. 1979); *Wilson v. State*, 240 S.W.2d 774 (1951)). Based on the record before us, we do not know how much time appellant spent confined in Harris County Jail. Therefore, we cannot calculate how much time appellant's sentence should be credited for. We sustain appellant's third point of error, but we deny appellant's request to modify the judgment because we do not have all of the necessary information to do so. Instead, we remand this cause to the trial court and we instruct it to determine how much time appellant was confined in juvenile detention and in Harris County Jail, from the time of his arrest and confinement until his sentence, and modify appellant's sentence to reflect a credit for the total time appellant was confined.

CONCLUSION

We overrule appellant's first and second points of error, and sustain appellant's third point of error. We remand this cause to the trial court for further proceedings consistent with this opinion.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed January 10, 2002.
Panel consists of Justices Anderson, Hudson, and Frost.
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