Reversed and Remanded and Opinion filed September 16, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00987-CR

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TRI CONG VU, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 739,149

O P I N I O N

Appellant Tri Cong Vu appeals his conviction by a jury for the offense of aggravated assault. Finding enhancement paragraphs to be true, the jury assessed his punishment at sixty years in the Texas Department of Criminal Justice, Institutional Division. In five points of error, appellant contends that the trial court committed reversible error by (1) allowing a co-defendant's hearsay statement to be introduced against him in violation of the Confrontation Clause of the United States Constitution; (2) allowing a co-defendant's hearsay statement to be introduced against him because the statement did not comply with Rule 803(24) of the

Texas Rules of Evidence; (3) not properly instructing the jury on the law of parties and applying the law to the facts; (4) submitting the jury charge that appellant acted alone in the commission of the offense; and (5) not granting appellant's motion for an instructed verdict based upon insufficient evidence.

We reverse and remand. The trial court erred in allowing the statement by appellant's accomplice to be admitted because the State failed to introduce sufficient evidence to show that the statement was trustworthy. Therefore, the statement was not admissible under Rule 803(24) of the Texas Rules of Evidence, and its introduction violated appellant's right of confrontation as guaranteed by the Sixth Amendment to the United States Constitution. We are unable to find beyond a reasonable doubt that this error did not contribute to appellant's conviction.

Before we discuss the error in the admission of the evidence, however, we will discuss appellant's claim in point of error five that the evidence is insufficient to support his conviction. We address this point first because were we to sustain the point we would have to reverse and render. This point of error challenges the sufficiency of the evidence. *See Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996). We must, therefore, determine, after viewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). We must measure the sufficiency of the evidence by the elements of the offense as defined by the hypothetically correct jury charge for the offense. *See Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. l997).

The record reflects that one group of young Asians was attacked by another group of Asians as they left a Houston club. The group that was attacked was going to their car, a Toyota 4Runner. One of the group testified that the individuals who attacked them were also driving

another Toyota 4Runner, and they attempted to ram the 4Runner being driven by the first group. The group being attacked eventually was able to leave the club's parking lot in their 4Runner.

Subsequently, someone in a black car fired two shots at the driver's side of the 4Runner driven by the attackers. The black car immediately made a u-turn after the shooting. A Harris County constable on patrol in the area heard the shots and saw a black Toyota Supra making the u-turn. He pursued the vehicle, sometimes at a speed of approximately ninety miles per hour, until the vehicle lost control on a turn. Appellant, the driver of the vehicle, fled on foot, but was subsequently apprehended and arrested for assault. Appellant's companion, Hoang Tran, who was subsequently arrested for the shooting, told a Houston police detective that he had been at the club at the time of the altercation between the two groups of Asians, had seen both Toyota 4Runners, and that Tran and appellant were not on good terms with the group who attacked the others. Other evidence showed that appellant had spent the evening with his companion.

A person is criminally responsible for an offense committed by the conduct of another if, acting with the 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. TEX. PEN. CODE ANN. § 7.02(a)(2) (Vernon 1994). We find that a rational jury could have determined that appellant, driving the Toyota Supra, had followed the Toyota 4Runner from the club, and had driven it to a position where his companion could fire a shot at the vehicle, and then led a high-speed chase, seeking to avoid capture. We hold that this evidence is sufficient to support the conviction.

Appellant relies on the case of *Ortiz v. State*, 577 S.W.2d 246 (Tex. Crim. App. [Panel Op.] 1979). We find that case to be distinguishable. There, a companion standing twenty-five feet away from the defendant shot someone in the parking lot outside a bar. *See id.* at 248. The companion and the defendant then left the scene in the defendant's truck. *See id.* The court held that the evidence was insufficient to support the conviction. *Ortiz* did not involve

a driver who followed another vehicle, drove his vehicle to a position where his companion could fire a shot at that vehicle, and then led the police on a high-speed chase. Appellant also relies on the case of *Urtado v. State*, 605 S.W.2d 907 (Tex. Crim. App. 1980). There, someone observed the defendant make a cutting motion on the screen of a house whose owner was away from home. *See id.* at 908. After being confronted by a neighbor, the defendant and two young women fled, with the defendant driving the car. *See id.* at 909. The defense presented testimony that one of the two young women had cut the screen outside the defendant's presence, and that when the defendant discovered it he scolded them and ran his finger across the cut to examine the damage. *See id.* at 910. The court held that the evidence was insufficient because the State failed to exclude every reasonable hypothesis other than that the screen was cut as a result of the defendant's conduct. *See id.* This test has subsequently been rejected. *See Geesa v. State*, 820 S.W.2d 154, 155 (Tex. Crim. App. 1991). With respect to the defendant's guilt as a party, the *Urtado* court noted that the defendant's allegedly criminal conduct did not occur prior to or contemporaneous with the criminal event. *See id.* at 911.

We find *Urtado* to be distinguishable because there the State failed to show that the defendant was doing anything at or before the commission of the offense that could be construed as being a party to a criminal offense. He merely drove himself and his companions away. On the other hand, in this case the jury could have determined that appellant had followed the 4Runner after the altercation at the club and maneuvered his automobile into position for his companion to fire shots into it, all before he sought to elude police in a high-speed chase. Appellant's conduct in effecting a speedy getaway suggests that he knew what was going on and the part he was expected to play. *See Banda v. State*, 758 S.W.2d 902, 904 (Tex. App.—Corpus Christi 1988, no pet.). Therefore, even if driving the car away was insufficient in and of itself to make him a party, his flight may be used to infer that he followed the other vehicle from the club and drove the car while the shooting occurred. We overrule point of error number five.

In his first point of error, appellant argues that the trial court committed reversible error by allowing his co-defendant's hearsay statement to be introduced as evidence against him in violation of the Confrontation Clause of the United States Constitution. In his second point of error, appellant contends that the statement did not comply with Rule 803(24) of the Texas Rules of Evidence. The State introduced evidence showing that appellant's companion told police that he had been at the club at the time of the altercation and seen the 4Runner involved in the shooting and that he was in the Toyota Supra at the time of the shooting.

Rule 803(24) of the Texas Rules of Evidence provides that a statement against interest is not excluded by the hearsay rule. *See* TEX. R. EVID. 803(24). It defines a statement against interest as "one which . . . at the time of its making . . . so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in declarant's position would not have made the statement unless believing it to be true." *Id*. The rule further provides that in criminal cases a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. *See id*. In the statement, appellant's companion stated that he was at the club at the time of the altercation between the Asians and that the companion was driving the Toyota Supra at the time of the shooting. The statement also indicated that appellant committed the shooting from the passenger seat.

We have held that evidence of these facts constitutes sufficient evidence to support a conviction. Although the companion's statement was to some extent inculpatory, the declarant sought to minimize his participation by telling police that he was the driver and naming appellant as the shooter. Therefore, the declarant's statement sought to minimize his participation and was in the declarant's best interest. The statement did not meet the requirement that, so far as it tended to subject him to criminal liability, a reasonable person in his position would not have made the statement unless he believed it to be true. *See United States v. Sarmiento-Perez*, 633 F.2d 1092, 1096 (5th Cir. 1981). Therefore, the statement was not admissible under Rule 803(24). *See id.* (statement inculpating declarant held not to

be admissible under Federal Rule of Evidence 804(b)(3) where there was a desire to curry favor with arresting officers and a desire to alleviate culpability by implicating others); *see also Williamson v. United States*, 512 U.S. 594, 603 (1994) (Court stated that "Even the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor."). Inasmuch as the statement of appellant's companion, while inculpatory as to the declarant, was also shown to be one given in an effort to curry favor by falsely minimizing the declarant's participation, we hold that it does not meet the admissibility requirements of Texas Rule of Evidence 803(24). *See* TEX. R. EVID. 803(24).

Even if the statement were admissible under Texas Rule of Evidence 803(24), its admission might still be in violation of Vu's rights under the Confrontation Clause of the Sixth Amendment to the Constitution of the United States, unless the declarant is shown to be unavailable and unless the statement is shown to have an indicia of reliability. *See Ohio v. Roberts*, 448 U.S. 56, 66,(1980).

At trial, counsel for appellant conceded that the witness was unavailable because criminal charges arising out of this incident were pending. We will, therefore, seek to determine whether the statement is shown to have an indicia of reliability for purposes of the Confrontation Clause. Accomplices' confessions that incriminate defendants are presumptively unreliable. *See Lee v. Illinois*, 476 U.S. 530, 541(1986). In determining whether an accomplice's statement is sufficiently reliable to be admitted without violating the Confrontation Clause, we are to determine from the totality of the circumstances whether the declarant's truthfulness is so clear that the test of cross-examination would be of marginal utility. *See Idaho v. Wright*, 497 U.S. 805, 819 (1990).

The evidence shows that appellant's companion gave his statement to police after appellant had been charged. He approached police, telling them that he had been in the car that night and wanted to come in and tell them about it. He was not under arrest at the time he gave

the statement and was not arrested at the time that he gave the statement. The officer who took the statement indicated that the reason he did not arrest the companion at the time he gave the statement was because he feared it might lead to the suppression of the statement. The detective who took the statement acknowledged that he did not think that all of the things the companion said in his statement were true. Although this case was tried on the theory that appellant was the driver of the car and that his companion fired at the complainant, the companion told the police in his statement that he was the driver, thereby showing that the State did not consider his statement to be trustworthy and showing that the declarant was attempting to curry favor with the police by implicating appellant and minimizing his own participation. We, therefore, find nothing indicating that the declarant's truthfulness is so clear that the test of cross-examination would be of marginal utility. *See United States v. McVeigh*, 940 F. Supp. 1541, 1571 (D. Colo. 1996) (court held, with respect to the use of Terry Nichols' statement in the trial of Timothy McVeigh, that when the declarant makes both inculpatory and exculpatory statements, the opportunity to cross-examine becomes an imperative both under the Sixth Amendment and for the fundamental fairness necessary for due process of law). While it might be argued that the companion's statement was shown to be reliable because it was corroborated by other facts in evidence, we may not consider the corroboration of the statement by other evidence in the record in our analysis with respect to the Confrontation Clause. *See Idaho v. Wright*, 497 U.S. at 822. Consequently, we conclude that the admission of the statement violated appellant's rights under the Confrontation Clause contained in the Sixth Amendment to the United States Constitution.

The State contends that the statement was admissible under Rule 803(24) because of such corroborating circumstances, and relies on the cases of *Cofield v. State*, 891 S.W.2d 952 (Tex. Crim. App. 1994) and *McFarland v. State*, 845 S.W.2d 835-36 (Tex. Crim. App. 1992). In *Cofield*, the court noted that even the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempting to shift blame or curry favor. *See* 891 S.W.2d at 956 (citing *Williamson v. United States*, 512 U.S. 594

(1994)). In *McFarland*, the court held that certain statements made by the defendant's accomplice were admissible under Rule 803(24) as a statement against interest. *See* 845 S.W.2d at 835. The declarant's statement in *McFarland* was not made to the police, and there was no showing that the statement was made to curry favor or place principal blame on the defendant. *See id.* Additionally, the court considered other corroborating evidence in determining whether the statement was admissible under Rule 803(24) *See id.* at 836. Neither *Cofield* or *McFarland* analyzed the statements at issue under the Confrontation Clause. Also, as we have demonstrated, appellant's companion appeared to be attempting to shift blame and curry favor.

The State further contends that the Confrontation Clause is not applicable because the statements did not charge appellant with any wrongdoing and did not even mention him, and relies upon *Bruton v. United States*, 391 U.S. 123 (1968). There, the Court held that a defendant's conviction must be set aside where a co-defendant's confession inculpating that defendant was admitted, even though the jury was instructed that it must disregard that confession in determining the defendant's guilt or innocence. *See id.* at 136. Here, we find that the companion's statement harmed appellant because, for example, the statement that the companion was at the club earlier allowed the jury to conclude that appellant, who had been with the companion all evening, was following the 4Runner after the altercation at the club and was driving the Supra into position while his companion was firing the shot. Statements of factual matters, while not inculpatory taken by themselves, may be inculpatory when considered in the context of the facts of the case. *See Williamson v. United States*, 512 U.S. at 603-04.

The State argues that the mere fact that the companion's statements were genuinely self-inculpatory is one of the particularized guarantees of trustworthiness that makes a statement admissible under the Confrontation Cause. *See Williamson v. United States*, 512 U.S. at 605. While the Court made that statement in *Williamson*, it was made in dicta in the context of discussion as to whether the declaration against interest exception to the hearsay

rule is "firmly rooted" for Confrontation Clause purposes. *Id.* The Court did not reach the issue of whether the statement introduced against Williamson was inadmissible under the Confrontation Clause, because it held that the statement introduced in that case was inadmissible under Federal Rule of Evidence 804(b)(3), the federal equivalent to Texas Rule of Evidence 803(24). We see nothing in *Williamson* that would cause us to disregard the earlier authorities that we have cited that hold that a statement such as that introduced here is presumed to be unreliable for purposes of the Confrontation Clause.

The State additionally relies upon the cases of *Fuentes v. State*, 880 S.W.2d 857, 862 (Tex. App.—Amarillo 1994, pet. ref'd) and *Tidrow v. State*, 916 S.W.2d 623, 633 (Tex. App.—Fort Worth 1996, no pet.). In *Fuentes*, the defendant was convicted of two counts of injury to a child. The child, Fuentes' cousin, was in the custody of Fuentes and his wife. At trial, the State introduced a statement by Fuentes' wife which, although inculpatory as to her, placed a great portion of the blame on Fuentes. The court noted that on appeal Fuentes did not question the existence of corroborating circumstances to clearly indicate the trustworthiness of his wife's statement. *See Fuentes*, 880 S.W.2d at 862. It noted that the wife's statement implicated her in the crime and, because she was thereafter indicted, it exposed her to criminal liability. *See id.* The opinion does not discuss her statement in view of the concerns expressed by the United States Supreme Court relating to statements by accomplices used against a defendant, especially where the accomplice making the statement is attempting to curry favor with authorities. It does not discuss the criteria for determining whether such a statement violates the Confrontation Clause, seemingly assuming that if the statement meets the requirements of Rule 803(24), its admission does not violate the Confrontation Clause. *Fuentes* appears to hold that a declarant's statement is admissible under Rule 803(24) and does not violate the defendant's rights under the Confrontation Clause even if, while inculpatory as to the declarant, it also seeks to curry favor and to place the principal blame upon the defendant. If, as it appears, the opinion is authority for such a view, we believe it to be in error and respectfully decline to follow it.

We also find *Tidrow* to be distinguishable. There, the State presented out-of-court statements made by individuals who participated with Tidrow in committing a capital murder. *See Tidrow*, 916 S.W.2d at 628. The court held that these statements were trustworthy because they were consistent with the defendant's statement and because neither attempted to exonerate its declarant or anyone else. *See id*. at 628-29. The court further held that the admission of the out-of-court statements did not violate Tidrow's right of confrontation because the statements were self-inculpatory, were trustworthy, and were admissible as exceptions to the hearsay rule. *See id*. at 629. The Court relied upon *Williamson v. United States*, *supra*, and *Lee v. Illinois*, 476 U.S. 530, 542(1986).

As we previously noted, *Williamson* involved a discussion of whether certain evidence qualified for admission under Federal Rule of Evidence(804(b)(3), not whether such evidence was admissible under the Confrontation Clause. The Court did not reach that issue because it held that the evidence was inadmissible under the Federal Rules of Evidence.

In *Lee*, the Court held that the State failed to show that a co-defendant's statement, which was presumptively unreliable, was trustworthy, so that it violated the defendant's right to confrontation. *See Lee v. Illinois*, 476 U.S. at 546. The Court held that "there is no occasion to depart from the time-honored teaching that a codefendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation." *Id.* Inasmuch as we have already held that the co-defendant's statement was inculpatory as to appellant, we find *Lee* to support the conclusion that we have reached in this case. We find *Tidrow* to be distinguishable because in that case none of the co-defendants was seeking to exonerate himself or herself when making a statement. Here, although we have held that the co-defendant's statement was inculpatory both to himself and to appellant, the evidence also shows that the co-defendant may have thought that the statement was exculpatory because he showed himself to be the driver of the car rather than the one who shot the complainant. The State has failed to establish that appellant's companion was not seeking to curry favor and minimize his participation in the offense at the

time he gave his statement. As did the Court in *Lee*, therefore, we conclude that the companion's statement was presumptively unreliable, and the State failed to meet its burden to show, considering the circumstances of the taking of the statement, that it is trustworthy. Consequently, we hold that its admission violated appellant's right of confrontation.

The State also relies upon the cases of *Lawton v. State*, 913 S.W.2d 542 (Tex. Crim. App. 1995) and *Coffin v. State*, 885 S.W.2d 140 (Tex. Crim. App. 1994). We find both cases to be distinguishable. *Lawton* involved the admission of an excited utterance. *See Lawton*, 913 S.W.2d at 553. *Coffin* concerned the admission of the testimony of a witness deceased at the time of trial, testimony that had been taken at a prior juvenile hearing. *See Coffin*, 885 S.W.2d at 149. Neither case involved the admission of testimony presumed to be unreliable, as was the testimony in this case.

The State also relies upon the cases of *United States v. Taggart*, 944 F.2d 837 (11th Cir. 1991); *Jennings v. Maynard*, 946 F.2d 1502, 1504-6 (10th Cir. 1991); *Berrisford v. Wood*, 826 F.2d 747, 751 (8th Cir. 1987), *cert. denied*, 484 U.S. 1016 (1988); *United States v. Smith*, 792 F.2d 441, 443-44 (4th Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987); and *United States v. Seeley*, 892 F.2d 1 (1st Cir. 1989).

We find these cases to be distinguishable. In *Taggart*, there was no suggestion that the accomplice's statement to law enforcement officials was made in an effort to curry favor with officials or place greater blame on the defendant. *See* 944 F.2d at 840. We also note that the court considered other evidence for the purpose of determining whether the statement was trustworthy, in contravention of the statement in *Idaho v. Wright* prohibiting the use of such evidence in determining the trustworthiness of presumptively unreliable statements in connection with a Confrontation Clause analysis. *See id.* (citing *Idaho v. Wright*, 497 U.S. at 819). Finally, the Court determined that any error was harmless. Here, the record reflects that the declarant was seeking to curry favor and place greater blame on the defendant. We do not use corroboration by other evidence to determine if the statement is trustworthy for purposes

of a Confrontation Clause analysis or for admissibility under Rule 803(24) of the Texas Rules of Evidence. Further, as we later discuss, error in the admission of the statement of appellant's companion was not harmless.

In *Jennings v. Maynard*, the court, in upholding the admissibility of an out-of-court statement by an unindicted codefendant, observed that the record revealed no motivation on the part of the declarant to exculpate himself. *See* 946 F.2d at 1506. Here, the record revealed such a motivation on the part of the declarant.

In *Berrisford*, the declarant's statement was not made to the police, so the opinion makes no suggestion that the declarant had any motive to curry favor or place greater blame on the defendant. *See Berrisford v. Wood,* 826 S.W.2d at 751. Also, the court, in an opinion written after *Idaho v. Wright,* considered corroboration by other evidence in determining the reliability of the declarant's statement. *See id.* As previously noted, the declarant in this case did seek to curry favor and place greater blame on the defendant, and we do not consider corroboration by other evidence in determining the reliability or trustworthiness of the declarant's statement.

In *Smith,* the court considered corroboration by other evidence. *See United States v. Smith,* 792 F.2d at 444. Additionally, the court applied the doctrine of interlocking confessions, finding that the defendant's confession to two witnesses interlocked with the declarant's statement. *See id.* Here, appellant made no confession, and we do not consider other evidence as corroboration in determining the trustworthiness or reliability of the declarant's statement. The court in *Seeley* also considered whether the declarant's statement was corroborated by other witnesses. *See United States v. Seeley*, 892 F.2d at 3-4.

Having found that the trial court committed error, we must reverse the judgment unless we determine beyond a reasonable doubt that the error did not contribute to appellant's conviction or punishment. *See* TEX. R. APP. P. 44.2(a). Appellant was tried as a party based upon his companion's shooting into the car in which the complainant was riding. His

companion's statement was crucial to the State's evidence because it allowed the jury to reasonably determine that appellant had followed the other car from the club where the altercation had occurred and that he was, therefore, driving the car into position so that his companion could fire at the adjoining car. Under the evidence that was presented, we are unable to determine beyond a reasonable doubt that the admission of the companion's statement did not contribute to appellant's conviction. Consequently, we further find that the error affected appellant's substantial rights. We sustain points of error numbers one and two.

In his third point of error, appellant contends that the trial court erred by failing to include as part of its instructions to the jury: "The defendant, Tri Cong Vu, then and there knew of the intent, if any, of said Hoang Tran to shoot the said Trong Van Ly." Appellant did not submit such a statement for inclusion in the charge, nor did he object to its absence. Consequently, we must determine whether the absence of such a statement in the charge was error, and, if so, whether its absence caused appellant egregious harm. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). The trial court's charge appears to be an appropriate charge on the law of parties, instructing the jury that it was to acquit appellant unless it found beyond a reasonable doubt that appellant, "with the intent to promote or assist the commission of the offense, if any, aided or attempted to aid Hoang Tran to commit the offense. . . ." We find that the failure to include the instruction appellant now suggests was not error, and that, even if it were, appellant suffered no egregious harm by virtue of its absence in view of the instruction on the law of parties that was given. Appellant relies upon the case of *McFarland v. State*, 928 S.W.2d 482 (Tex. Crim. App. 1996). We find nothing in *McFarland* that would require such an instruction. We overrule point of error number three.

Appellant insists in point of error number four that the trial court committed reversible error by submitting an instruction to the jury that would have allowed the jury to convict based upon a finding that he alone committed the offense because there was no evidence to support it. Inasmuch as our record reflects that the jury was instructed to convict appellant only upon a finding of his guilt as a party, we overrule point of error number four.

Because the trial court erred in admitting the companion's statement in violation of appellant's right of confrontation; because we are unable to determine, beyond a reasonable doubt, that the error did not contribute to appellant's conviction; and because we find that the error affected appellant's substantial rights, we reverse the judgment and remand this cause for a new trial.

/s/ John Hill
Justice

Judgment rendered and Opinion filed September 16, 1999.

Panel consists of Justice Fowler, Lee and Hill.[1] (J. Fowler concurs in the result only).

Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justices Norman Lee and John Hill sitting by assignment.