Opinion issued June 25, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00026-CR

DAVID JOHN DIAZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 427th District Court
Travis County, Texas[1]
Trial Court Case No. D-1-DC-17-900125

MEMORANDUM OPINION

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[1] The Texas Supreme Court transferred this appeal from the Court of Appeals for the Third District of Texas. *See* TEX. GOV'T CODE § 73.001 (authorizing transfer of cases between courts of appeals).

A jury convicted appellant, David Diaz, of murder, found two enhancements true, and assessed his punishment at confinement for life. In five issues on appeal, appellant contends that the trial court erred by (1) failing to conduct a formal sentencing of appellant; (2 & 3) failing to give an accomplice-witness instruction to the jury regarding the testimony of two witnesses; (4) erroneously instructing the jury regarding another accomplice witness; and (5) overruling his objection that a witness's testimony was a comment on appellant's post-arrest silence. We affirm.

BACKGROUND

The Murder

On January 19, 2014, at 6:30 a.m., Marshall Smiley, an overnight security guard for a construction road discovered a dead body in the middle of a dirt road off Old Manor Road in Travis County. Smiley had driven down the same dirt road at 5:30 a.m. but had not seen a body then. When police responded to the scene, they determined that the complainant, Robert Morales, Jr., had been stabbed multiple times in the chest and neck.

The night before the murder, Morales and his girlfriend, Michelle McInes, ate dinner at a restaurant and then drove to a bar in Austin. They arrived at the bar around 9 p.m. and stayed until it closed. When Michelle and Morales left the bar, they went to the home of Michael Briones at 1408 Singleton in Austin. Michelle

and Morales drank a beer with Briones and his girlfriend before Morales ordered Michelle to leave, which she did. Later that night, Morales sent Michelle a text that said, "If something happens, you know where I'm at." The next day, Michelle learned that Morales had been murdered.

The Initial Investigation

The case was assigned to Sergeant R. Jennings, a homicide detective with the Austin Police Department ["APD"]. As a part of their investigation, Jennings obtained information that led him to believe that the murder occurred at Briones's house. The police recovered pebbles from the alley behind Briones's house, which appeared to have bloodstains on them. After talking with Briones and his girlfriend, Anna Amaro, police believed that Lisa Salas, Mark Anthony Quiroga, and appellant were at Briones's house during the murder.

On January 22, 2014, police searched Salas's car and saw a reddish-brown stain on the cloth portion of the back-left passenger door, which later tested positive for blood. On May 28, 2015, appellant, Salas, and Quiroga were arrested for Morales's murder. However, those charges were dismissed in 2015. After Sergeant Jennings was transferred from homicide, the case was transferred to another detective.

The Cold Case Investigation

No progress was made on the case until it was transferred to the APD Cold Case Homicide Unit in May 2017 and assigned to Detective R. Metcalf. After reviewing the file, Metcalf re-interviewed some of the people identified during the 2015 investigation, including Briones and three others believed to have information—Alberto Botello, Michael Luna, and Grant Terral. Police believed that Terral's Suburban had been used to move the body from the murder scene to the dirt road where it was eventually discovered, so they began a search for the vehicle. The Suburban, which had been sold or given away, was located in a small town outside of Caldwell, Texas, and was processed for evidence. Detective Metcalf also subpoenaed the cell phone records for appellant, Morales, Briones, Luna, Botello, and Quiroga. Metcalf also determined that Luna, Botello, and appellant were documented members of the Texas Syndicate prison gang.

The Cell Phone Records

Sheila Hargis, an APD crime analyst, examined the collected cell phone data. The data showed that Morales had 12 calls between midnight and 3:59 a.m. on the morning he was murdered. During this time, he was communicating with Michelle and Briones and was using a cell phone tower near the bar he had been to with Michelle.

Between 4:00 a.m. and 4:59 a.m., Morales's cell phone was using a tower near Briones's house. At 4:06 a.m., Morales called appellant. Morales's last call was at 5:43 a.m. and was to Michelle.

Hargis also examined Salas's, Quiroga's, and appellant's cell phone records. Cell phone data from these phones began in Lockhart, traveled north on I-35, and ended up in the vicinity of Briones's house. The records showed that Briones called appellant at 4:22 a.m., as the appellant's phone's location was moving north on I-35. There were then a series of phone calls between appellant, a person named Cesar Olivarez, and Briones. At 5:48 a.m., appellant received a call from Briones; appellant's cell phone was in the vicinity of Briones's house. At 5:51 a.m., appellant's cell phone was again moving south along I-35. During this time, appellant exchanged calls with Briones. Beginning at 6:15 a.m., from an area near Buda, Texas, appellant exchanged calls with Olivarez and Quiroga.

The Texas Syndicate Testimony

The State called several Texas Syndicate members to the stand. Quiroga, Luna, and Botello all testified to similar, but not identical versions of the offense. Briones invoked the Fifth Amendment[2] and refused to answer any questions.

Quiroga testified that appellant was his friend, whom he knew as "Frosty." On the night of the murder, Quiroga and his girlfriend, Salas, were out in her car

[2] *See* U.S. CONST. amend. V.

when they picked up appellant and went to a bar in Lockhart. Appellant told them that he needed a ride to Austin, so they drove him to Austin. Salas was driving, Quiroga was in the passenger seat, and appellant was in the seat behind Salas. When they got to Austin, they went to "Mike's" [Briones's] house. Quiroga testified that he and Salas went into the house to use the restroom, then went back to the car to wait. He did not see a fight or see anyone go in the backyard. He and Salas got tired of waiting, so he, appellant, and Salas left. He did not see any blood and did not know that anyone had been stabbed. Quiroga claimed that he was not a member of the Texas Syndicate and he did not know if appellant or Briones were members. He testified that he and Salas dropped appellant off at his house in Buda.

Michael Luna testified that he was a Texas Syndicate member and that the gang would probably put a hit out on him because of his testimony. He said that on the night of the murder he was hanging out with Alberto Botello and Grant Terral, a non-Texas Syndicate member who had been staying with Botello. Sometime after midnight, Botello received a phone call, so Luna, Botello, and Terral drove to Briones's house in Terral's Suburban. When they got to Briones's house, Luna saw Briones and a person he called "Moe" [Morales] and he said that "Moe" was the person who had complained about appellant to the Syndicate. Shortly after Luna, Botello, and Terral arrived at the house, appellant, a woman

[Salas], and "Sinner" [Quiroga] showed up. Appellant and "Moe" started arguing, and Briones told Luna to tell appellant and "Moe" to take it to the backyard. Luna and Quiroga followed appellant and Morales to the backyard and Luna heard appellant ask Briones if he could beat Morales up. In the backyard, appellant and Morales continued arguing. When Luna got between the two men and pushed Morales to the ground, appellant began stabbing Morales. Luna claimed that he was shocked when appellant began stabbing Morales and that he and "Sinner" [Quiroga] just watched. Appellant stabbed Morales about 10 times and then stopped. Luna testified that he told Briones what had happened, and Briones confronted appellant and told him that he did not have permission to "do that." Appellant resumed stabbing Morales, then stopped, and abruptly left with "Sinner" [Quiroga] and Salas. Luna and Botello then put the body in the back of Terral's Suburban and dumped it at the site at which it was later located. Luna and Botello then returned to Botello's house and cleaned up Terral's Suburban. Luna testified that he did not believe that the murder was a Texas Syndicate hit, but that it was a personal dispute between appellant and Morales. Luna identified Cesar Olivarez, with whom appellant had exchanged several phone calls that night, as the chairman of the Texas Syndicate in Austin.

Alberto Botello testified that he was a former member of the Texas Syndicate. On the night of the murder, he was at his house with Luna and Terral

when he received a call from Briones. Botello, Luna, and Terral drove to Briones's house in Terral's Suburban. When they arrived, Morales and Briones were already there. They sat and drank for a while waiting for appellant to arrive. Soon, appellant, who seemed agitated, arrived with a man and a woman [Salas and Quiroga]. Appellant and Morales began arguing. Because of the increased tension, Botello took Terral, who was not a member of the Texas Syndicate, home before returning to Briones's house. Botello testified that as he and Terral were leaving, appellant and Morales were wrestling in the driveway. Botello said that he saw appellant with a knife and heard him stab Morales. When he returned after taking Terral home, Briones asked Botello and Luna to dispose of Morales's body, which was lying in the backyard near the alley. Briones and Lunas then loaded the body in Terral's Suburban and dumped it on a dirt road.

Finally, Demion Rodallegas, a member of the Texas Syndicate, testified that, after the murder, he let appellant stay with him at his house in Juarez, Mexico. While appellant was staying with him, he told Rodallegas that he had committed a murder in Austin. Appellant told Rodallegas that the murder happened at a meeting at a Texas Syndicate member's house in Austin at which Morales was going to be told that he needed to stop associating with the Texas Syndicate. At some point, appellant said Morales was knocked down and that he alone began stabbing him. In contrast to the others witness testimony, appellant told Rodallegas that he helped

dump the body and that he then disposed of the knife at his job at Goodwill. Rodallegas testified that appellant stayed with him in Mexico for seven or eight months and that appellant checked the internet daily for information about the murder. Appellant told Rodallegas that the murder was not planned.

Other Witnesses' Testimony

Grant Terral testified that, in January of 2014, he sometimes slept at Botello's house. On the night of the murder, he went with Botello and Luna to someone else's house. Once there, he was given drugs in exchange for letting Botello and Luna use his Suburban. The next time he saw the Suburban, it was at Botello's house and Botello was cleaning it. Terral also testified that he had no idea what happened at the house after he left and that he was not a member of the Texas Syndicate.

Lisa Salas testified that on the night of the murder, she, Quiroga, and appellant went to a bar in Maxwell, Texas [near Lockhart] and then left to go to a house nearby. While at the house, someone called appellant and Quiroga and they then told Salas that they needed to go to Austin. Salas drove Quiroga and appellant to Briones's house in Austin; Quiroga was in the passenger seat and appellant was in the back seat behind her. When they arrived at Briones's house, appellant and Quiroga got out while she waited in the car. When she got tired of waiting, Salas cranked the car and Quiroga came out and got in. As she was backing up to leave,

appellant also came out and got in the back seat. Salas said that she did not notice anything unusual about Quiroga or appellant, and she did not see any blood. Salas testified that she then drove appellant to his sister's house in Buda, dropped him off, and then drove back to her apartment.

DNA and Medical Evidence

The medical examiner testified that Morales suffered 28 stab wounds, 12 of which caused significant injuries that caused his death.

DNA recovered from the back seat of Salas's car matched that of Morales. Morales's DNA was also found on a pebble from Briones's back yard.

The Trial and Conviction

The jury charge contained an accomplice-witness charge for both Luna and Botello but did not contain an accomplice-witness charge for either Salas or Quiroga. Briones refused to testify, so no accomplice-witness charge was needed for him. Appellant did not object to the charge.

The jury found appellant guilty, found two enhancements true, and assessed punishment at confinement for life.

FAILURE TO CONDUCT A FORMAL SENTENCING PROCEEDING

In his first issue on appeal, appellant contends that the trial court erred in failing to conduct a formal sentencing proceeding for appellant. Specifically, appellant notes that, after the jury returned its punishment verdict, the trial court

read the jury's punishment verdict and then discharged the jury without formally sentencing appellant in violation of article 42.03 of the Texas Code of Criminal Procedure.

The State agreed and filed a motion to abate the appeal so that the trial court could conduct a formal sentencing. This Court granted the State's motion and abated this appeal, remanding the case to the trial court for oral pronouncement of sentence. *See Diaz v. State*, No. 01-19-00026-CR, (Tex. App.—Houston [1st Dist.] Nov. 21, 2019, mem. order). The trial court complied with this Court's abatement order, orally pronounced sentence against appellant, and this Court reinstated the appeal. *See Diaz*, No. 01-19-00026-CR, (Tex. App.—Houston [1st Dist.] Jan. 14, 2020, mem. order).

Because the trial court has now orally pronounced sentence against appellant, issue one is moot.

FAILURE TO GIVE ACCOMPLICE-WITNESS INSTRUCTION

In his second and third issues, appellant contends that the trial court erred by failing to submit a jury instruction under Article 38.14 of the Texas Code of Criminal Procedure, which requires a jury to find that the testimony of an accomplice witness was corroborated before it can rely on that testimony for a conviction. Appellant asserts that Lisa Salas and Mark Quiroga were accomplices as a matter of law because they "were arrested and charged with conspiracy to

commit the murder for which appellant was being tried." Alternatively, appellant argues that "the jury should have been given an accomplice witness instruction as a matter of fact so that the jury could determine for themselves if Salas and Quiroga were accomplice witnesses."

Standard of review and applicable law

We review a trial court's failure to include an accomplice-witness instruction in a jury charge for an abuse of discretion. *Delacerda v. State*, 425 S.W.3d 367, 395 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd); *see Paredes v. State*, 129 S.W.3d 530, 538 (Tex. Crim. App. 2004). A trial court abuses its discretion only if its decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008). The trial court must give the jury a written charge that sets forth the applicable law. TEX. CODE CRIM. PROC. art. 36.14; *Oursbourn v. State*, 259 S.W.3d 159, 179 (Tex. Crim. App. 2008). When a party contends that the trial court erred in its charge to the jury, we must determine whether the charge was erroneous and, if so, whether the error was harmful. *See Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002). When, as here, a party fails to object to the jury charge, "reversal is required only if the error was so egregious and created such harm that the defendant did not have a fair and impartial trial." *See Marshall*

v. State, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984)).

An accomplice is one who participates with the defendant before, during, or after the commission of the crime and acts with the required culpable mental state for the crime. *Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007). In this context, participation means the witness promoted the commission of the defendant's charged offense. *Cocke v. State*, 201 S.W.3d 744, 748 (Tex. Crim. App. 2006). "Mere presence at a crime scene does not make an individual an accomplice, nor is an individual an accomplice merely because he has knowledge about a crime and fails to disclose that knowledge." *Id.*

If the witness participates in the commission of the crime through affirmative acts and maintains the required mental state, the witness will be considered either an accomplice as a matter of law or an accomplice as a matter of fact. *Id.* An accomplice as a matter of law is a witness who has been, or could have been, indicted for the same offense. *See id.*; *Ash v. State*, 533 S.W.3d 878, 886 (Tex. Crim. App. 2017) (providing examples of an accomplice as a matter of law). If the evidence presented by the parties is conflicting and it remains unclear whether the witness is an accomplice, then the jury must decide whether the inculpatory witness is an accomplice as a matter of fact under instructions defining the term "accomplice." *Cocke*, 201 S.W.3d at 748. The trial court need not 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. *Id.*

Jury charge was not erroneous

Article 38.14 of the Texas Code of Criminal Procedure provides:

> 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; *see Nelson v. State*, 297 S.W.3d 424, 429 (Tex. App.—Amarillo 2009, pet. ref'd). The purpose of an accomplice-witness instruction "merely reminds the jury that it cannot use the accomplice's testimony to convict the defendant unless there also exists some non-accomplice testimony tying the defendant to the offense." *Cocke*, 201 S.W.3d at 747.

Not an Accomplice as a Matter of Law

Appellant contends that Salas and Quiroga were accomplices as a matter of law because they were arrested and charged with conspiracy to commit the murder for which appellant was being tried. We disagree.

A witness is an accomplice as a matter of law in the following circumstances: (1) the witness has been charged with the same offense as the defendant or a lesser-included offense; (2) the State charges the witness with the same or lesser-included offense as the defendant but dismisses the charges in exchange for the witness's testimony against the defendant; and (3) when the

evidence is uncontradicted or so one-sided that a reasonable juror could only conclude the witness was an accomplice. *Ash*, 533 S.W.3d at 886.

It is true that, as a part of the initial 2015 investigation, appellant, Salas, and Quiroga were all arrested and charged with conspiracy to commit murder. However, those charges were dropped. When the State dismisses charges for the same offense or a lesser-included offense before the witness testifies in the defendant's case, then the witness is no longer an accomplice as a matter of law, unless the State dismissed the charges in exchange for the witness's testimony against the defendant. *Id.* at 884. The record lacks any evidence that the charges were dismissed in exchange for Salas's or Quiroga's testimony. Salas testified that she had never spoken with the prosecutors before trial and that she had received no deal in exchange for her testimony. Indeed, the record indicates that the charges were dropped against Salas and Quiroga several years before the Cold Case Unit reopened the investigation in 2017. When appellant was subsequently arrested, no new charges were brought against Salas and Quirogas; the charges against them that had been previously dismissed remained dismissed.

Because the State had no pending charges against Salas and Quiroga, and the prior charges against them were not dropped in exchange for their testimony, Salas and Quiroga were not accomplices as a matter of law.[3]

Not an Accomplice as a Matter of Fact

Appellant's second and third issues are based on the premise, which we have already rejected, that Salas and Quiroga were accomplices as a matter of law. However, in a single sentence in his brief, appellant argues that "at the very least the jury should have been given an accomplice witness instruction as a matter of fact so that the jury could determine for themselves if Salas and Quiroga were accomplice witnesses." However, this singular reference in the brief provides no argument or authority analyzing the application of the law related to accomplice witnesses as a matter of fact. Rule 38.1 requires a brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record" in the body of the brief. TEX. R. APP.P. 38.1(i). Conclusory statements do not comply with the briefing rules or preserve a complaint for appellate review. *See, e.g.*, *Rhoades v. State*, 934 S.W.2d 113, 119 (Tex. Crim. App. 1996) (holding point of error inadequately briefed when appellant "simply

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[3] Appellant makes no argument that the third reason for determining someone to be an accomplice as a matter of law has been met. That is, appellant does not argue that the evidence is uncontradicted or so one-sided that a reasonable juror could only conclude that Salas and Quiroga were accomplices. *See Ash*, 533 S.W.3d at 886. Thus, we need not reach this issue.

declare[d] that his right to counsel was violated, and present[ed] no argument or authority for this contention"). As such, appellant's claim that the trial court should have submitted an accomplice as a matter of fact claim is waived.

Although it is not necessary to the resolution of this case because appellant has failed to preserve an accomplice-as-a-matter-of-fact challenge, appellant cannot demonstrate egregious harm even if we were to assume error. An accomplice-witness instruction does not say that the jury should be skeptical of accomplice-witness testimony. *See Herron*, 86 S.W.3d at 632. Nor does it tell the jury that such testimony should receive less weight than other evidence. *Id.* Rather, the instruction informs the jury that it cannot use the accomplice-witness testimony unless there is also some non-accomplice witness evidence connecting the defendant to the offense. *Id.* Once it is determined that such non-accomplice witness evidence exists, the purpose of the instruction is fulfilled, and the instruction plays no further role in the jury's decision-making. *Id.* Thus, non-accomplice witness evidence can render harmless a failure to submit an accomplice-witness instruction by fulfilling the purpose an accomplice-witness instruction is designed to serve. *Id.*

"[A] harm analysis for the omission of an accomplice witness instruction should be flexible, taking into account the existence and strength of any non-accomplice evidence and the applicable standard of harm." *Id.* We examine the

strength of non-accomplice witness testimony by its reliability or believability and by the strength of its tendency to connect the defendant to the crime. *Id.* The reliability inquiry is satisfied when there is non-accomplice witness evidence, and there is no rational and articulable basis for disregarding the evidence or finding that it fails to connect the defendant to the offense. *Id.* at 633.

Here, the record contains substantial non-accomplice testimony connecting appellant to the offense. First, Morales's DNA was found in the backseat of Salas's car, where appellant was sitting after the murder. Second, cell phone records corroborated Salas's testimony about hers, Quiroga's, and appellant's activities before, during, and after the murder, and were consistent with appellant murdering Morales at approximately 5:43 a.m. near Briones's home, and then heading south toward his home while others disposed of Morales's body. Third, Grant Terral, a non-accomplice witness, corroborated Luna's and Botello's testimony that they went to Briones's house in Terral's Suburban; Terral testified that they took him home, but used his Suburban in exchange for drugs, and that he later saw Botello cleaning his Suburban. Finally, and most importantly, in appellant's extrajudicial confession to Rodallegas, appellant said that he stabbed Morales with a knife in the backyard of a Texas Syndicate member named "Mike," a name the evidence shows to be Briones.

This substantial non-accomplice evidence, particularly appellant's confession to Rodallegas, another non-accomplice, renders any failure to provide an accomplice-witness instruction as to Salas and Quiroga harmless. *See Medina v. State*, 7 S.W.3d 633, 642 (Tex. Crim. App. 1999) (holding trial court's failure to give accomplice-as-a-matter-of-fact instruction was harmless error because of "substantial non-accomplice evidence linking appellant to the offense," including eyewitness testimony identifying appellant as shooter and appellant's own incriminating statements to non-law-enforcement witnesses).

Accordingly, we overrule issues two and three.

ERRONEOUS ACCOMPLICE-WITNESS INSTRUCTION

In issue four, appellant contends that error in the court's accomplice-witness charge that *was* given caused him egregious harm.[4]

Unlike Salas and Quiroga, the trial court *did* give an accomplice-as-a-matter-of-fact instruction regarding the testimony of Michael Luna and Alberto Botello. The court's charge as to Michael Luna correctly provided:

> You must determine whether Michael Luna is an accomplice to the crime of murder, if it was committed. If you determine that Michael

[4] Appellant did not object to the error in the charge. Therefore, "reversal is required only if the error was so egregious and created such harm that the defendant did not have a fair and impartial trial." *See Marshall*, 479 S.W.3d at 843(citing *Almanza*, 686 S.W.2d at 171).

> Luna is an accomplice, you must then also determine whether there is evidence corroborating the testimony of Michael Luna.

However, the court's charge as to Alberto Botello appeared to copy the Michael Luna charge, but neglected to change Michael Luna's name in one line. The court's charge as to Alberto Botello provided:

> You must determine whether Albert Botello[5] is an accomplice to the crime of murder, if it was committed. *If you determine that Alberto Botello is an accomplice, you must then also determine whether there is evidence corroborating the testimony of Michael Luna.* Evidence is sufficient to corroborate the testimony of an accomplice if that evidence tends to connect the defendant, David Diaz, with the commission of the offense committed. Evidence is not sufficient to corroborate the testimony of an accomplice if that evidence merely shows an offense was committed. Testimony of another accomplice is not sufficient to corroborate the testimony of an accomplice. The corroborative evidence, in other words, must be from some source other than accomplices. Proof that the defendant was merely present in the company of the accomplice shortly before or after the time of any offense that was committed is not, in itself, sufficient corroboration of the accomplice's testimony. The evidence, however, can be considered along with other suspicious circumstances. Proof that the defendant was present at the scene of any crime that was committed is not, in itself, sufficient to corroborate the testimony of an accomplice. That evidence, however, can be considered along with other suspicious circumstances. (Emphasis added).

Immediately after the paragraph above, the charge then applied these instructions to Alberto Botello as follows:

> You can convict the defendant on the testimony of Albert Botello only if —

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[5] In portions of the record, Botello is referred to as Albert Botello and in other portions he is referred to as Alberto Botello.

1. you find that Albert Botello was not an accomplice, or

2. you find that Albert Botello was an accomplice, and —

    a. you believe that the testimony of Albert Botello is true and shows the defendant is guilty; and

    b. there is other evidence, outside of the testimony of Albert Botello, that tends to connect the defendant, David Diaz, with the commission of the offense; and

    c. on the basis of all the evidence in the case, you believe, beyond a reasonable doubt, that the defendant is guilty.

Because the second portion of the accomplice-witness instruction correctly instructs the jury on how to apply the law to Botello's testimony, the error in the initial paragraph is not egregious. *See Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999); *Gilbert v. State*, 494 S.W.3d 758, 768 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (holding that error in abstract portion of charge not egregious when application paragraph is correct).

Furthermore, a trial court's failure to properly instruct the jury on accomplice-witness corroboration is harmless when corroborating non-accomplice evidence tends to connect the defendant to the offense. *See Herron*, 86 S.W.3d at 632. As we discussed above, the record contains substantial non-accomplice testimony connecting appellant to the offense, including (1) Morales's DNA was found in Salas's car where appellant had been sitting, (2) cell phone records were consistent with appellant murdering Morales at approximately 5:43 a.m. in the area

near Briones's home, and then heading south toward his home while others disposed of Morales's body, (3) Grant Terral, a non-accomplice witness, corroborated Luna's and Botello's testimony that they went to Briones's house in Terral's Suburban; Terral testified that they took him home, but used his Suburban in exchange for drugs, and that he later saw Botello cleaning his Suburban, and (4) appellant's extrajudicial confession to Rodallegas, a non-accomplice witness, in which appellant said that he stabbed Morales with a knife in the backyard of a Texas Syndicate member named "Mike."

Because the application paragraph correctly applied the accomplice-witness testimony to Alberto Botello and non-accomplice witness evidence connected appellant to the crime, we conclude that the typographical error in the charge did not cause appellant egregious harm.

We overrule issue four.

COMMENT ON POST-ARREST SILENCE

At trial, Detective Metcalf testified about the process of presenting the case to the grand jury and obtaining an indictment, after which the following exchange took place:

> [Prosecutor]: And at some point, was David Diaz arrested?
>
> [Metcalf]: Yes, he was.
>
> [Prosecutor]: Now, Detective Metcalf, at some point, did you attempt to interview Mr. Diaz?

[Metcalf]: Yes, I did.

[Defense Counsel]: I'm going to object to that question, Your Honor.

[Trial Court]: Objection overruled.

In his fifth issue on appeal, appellant contends that "the trial court erred in overruling appellant's objection when Detective [] Metcalf testified that appellant was arrested, and police tried to interview him." Specifically, appellant argues that the question and answer violated (1) his due process rights under Article I, Section 10 of the Texas Constitution and the Fourteenth Amendment of the United States Constitution, as well as (2) his Fifth Amendment privilege against self-incrimination. The State responds that error was not preserved. We agree.

For an issue to be preserved for appeal, there must be a timely objection that specifically states the legal basis for the objection. TEX. R. APP. P. 33.1(a); *Rezac v. State*, 782 S.W.2d 869, 870 (Tex. Crim. App. 1990). A general or imprecise objection will not preserve error for appeal unless "the legal basis for the objection is *obvious* to the court and to the opposing counsel." *Vasquez v. State*, 483 S.W.3d 550, 554 (Tex. Crim. App. 2016) (quoting *Buchanan v. State*, 207 S.W.3d 772, 775 (Tex. Crim. App. 2006) (emphasis in original)). When a complaint on appeal differs from that made at trial, the error is waived. *Cook v. State*, 858 S.W.2d 467, 474 (Tex. Crim. App. 1993). "The purpose of requiring a specific objection in the trial court is twofold: (1) to inform the trial judge of the basis of the objection and

togive him the opportunity to rule on it; (2) to give opposing counsel the opportunity to respond to the complaint." *Resendez v. State*, 306 S.W.3d 308, 312 (Tex. Crim. App. 2009).

On appeal, appellant gives three different grounds for his objection: Article I, Section 10 of the Texas Constitution, the Fourteenth Amendment of the United States Constitution, and the Fifth Amendment of the United States Constitution. However, at trial, he never specified to the trial court which of these three grounds formed the basis for his general, nonspecific objection. In fact, he never gave *any* basis for his objection. Thus, appellant did not preserve error. *See Heidelberg v. State*, 144 S.W.3d 535, 542–43 (Tex. Crim. App. 2004) (holding that appellant failed to preserve error when trial judge overruled objection without comment and record gave no indication of whether appellant was making state or federal constitutional objection to post-arrest silence).

We overrule issue five.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Kelly and Goodman.

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