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THIRTEENTH COURT OF APPEAL
CORPUS CHRISTI, TEXAS
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CAUSE NO. 13-13-00349-CR

IN THE COURT OF APPEALS

FILED IN
13th COURT OF APPEALS
CORPUS CHRISTI/EDINBURG, TEXAS
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FOR THE THIRTEENTH JUDICIAL DISTRICT

AT CORPUS CHRISTI, TEXAS
ADRIAN BARRERA,
APPELLANT

vs.

THE STATE OF TEXAS,
APPELLEE

ON APPEAL FROM THE 138th DISTRICT COURT
TRIAL COURT CASE NUMBER 2011-DCR-2796-B

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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January 27, 2015

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it argues that because the state decides to dismiss a charge after indictment, the accomplices will never be accomplices as a matter of law.

Issue#2. The State's points on Issues 2 through 8 are merely distractions,.... 7
attempting to get this court to ignore the law and facts of the issue. Appellant stands by his brief and his framing of the issues and ask this court to overturn his conviction.

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NOTICE OF PARTIES:

Appellant informs the Court that the following persons have an interest in this case.

Hon. Luis Saenz
State Bar No.
Cameron County District Attorney
Hon. Rene Gonzalez
State Bar No. 08131380
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Statement on Oral Argument

A good discussion between the parties and this court will help sort out the equities in order for this court to appropriately fashion appropriate remedies. Issues 5 and 8 are unusual, and there does not seem to be very much recent case law concerning these issues. A Cameron County jury convicted a person for murder a few years ago, and the legislature responded by removing probation from consideration by the jury and judge. Now, the new law catches up with us and an error took place because no one remembered the law had changed, and jurors were improperly stricken because they could not grant probation if a person was convicted of murder. The prohibition in Rule of Evidence 605 is still an open question in case law, at least as to what is the functional equivalent of testimony. This court should find oral argument useful in making a determination as to how to be handle these issues, as well as the other issues in this case.

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TO THE HONORABLE JUSTICES OF THIS COURT:

Comes now, ADRIAN BARRERA, hereinafter referred to as Appellant or Barrera, who submits this brief, pursuant to the provisions of the Texas Rules of Appellate Procedure, in support of his request for a judgment of acquittal, and, in the alternative his request for a new trial and other remedies, in cause number 2011-DCR-2796-B.

Preliminary Statement

The preliminary statement in the original brief is adopted for purposes of this reply brief.

Statement of Facts

The Statement of Facts in the original brief is adopted for purposes of this reply brief.

STATEMENT OF THE ISSUES

Issue#1. The State Mis-characterizes the Evidence and the Rule when it argues that because the state decides to dismiss a charge after indictment, the accomplices will never be accomplices as a matter of law.

Issue#2. The State's points on Issues 2 through 8 are merely distractions, attempting to get this court to ignore the law and facts of the issue. Appellant stands by his brief and his framing of the issues and ask this court to overturn his conviction.

SUMMARY OF THE ARGUMENT

Appellant stands by his issues in his original brief. He argues that the state mis-characterizes the facts and rule concerning accomplice witnesses, and that the state should not be able to circumvent the rule by dropping charges in order to sanitize testimony.

ARGUMENT

Issue#1. The State Mis-characterizes the Evidence and the Rule when it argues that because the state decides to dismiss a charge after indictment, the accomplices will never be accomplices as a matter of law.

Certainly if there is no evidence in a case that witness are accomplices, then they are not accomplices. In this case, very simply, three co-defendants were charged by indictment with the same murder as Appellant was charged with, and for that reason an accomlice witness instruction was appropriate. One of them was convicted, sentenced, served a sentence of probation, and then had it set aside on a writ. The state, in its brief, admits that a witness who is indicted for the same offense or a lesser-included offense as the accused is an accomplice as a matter of law. Ex parte Zepeda, 819 S.W.2d 874, 876 (Tex. Crim. App. 1991); *Solis v. State*, 792 S.W.2d 95, 97 (Tex. Crim. App. 1990); Herrera v. State, 115 Tex. Crim. 526, 27 S.W.2d 211,212 (1930); Chastain v. State, 97 Tex. Crim. 182, 260 S.W. 172, 173 (1924). The State contents that Smith v. State indicates that an accomplice is no longer an accomplice if the state abandons the indictment against the accomplice before he or she testifies. Smith v. State, 332 S.W.3d 425, 439-40 (Tex. Crim. App. 2011). In that case, the Court of appeals did not get to that question. It is thus still not the law of the state that a person who was charged and indicted and then had the charges dismissed are not accomplices as a matter of law

if the charges are dismissed before the person testifies. The purpose of the rule is met, as here, when the state chooses to indict a person, and not, as later, when the state seeks to structure the trial of a defendant and then proceed to sanitize the accomplices by dismissing the charge in order to have them testify substantively against a defendant. This later scenario would undercut a great part of the accomplice witness rule by having defendants bargain away their crimes, and for the state to remain forever mum about the deal, in exchange for getting the biggest bad guy. This is what happened in this case. The state wants to make its version of Smith the rule. That is not the rule, and this court should not make it the law of the land.

In the last point, on this issue, the state argues that because defense counsel did not ask for an accomplice witness instruction requiring the jury to determine first if the witnesses were accomplishes the error was not preserved for appeal. Appellant response that a request for an accomplice witness instruction is sufficient to clue a trial court as to the fact that the jury is to determine whether someone is an accomplice. The defense does not have to get into the finer points of accomplice witness law to preserve error. The trial court, if it has any basis for handing the issue to the jury, and an accomplice witness instruction is requested, must charge to the jury, in some fashion, in order to meet the purposes of the

statute.

Issue#2. The State's points on Issues 2 through 8 are merely distractions, attempting to get this court to ignore the law and facts of the issue. Appellant stands by his brief and his framing of the issues and ask this court to overturn his conviction.

Conclusion

Appellant stands by his brief and his framing of the issues and ask this court to overturn his conviction.

PRAYER

Issue 1 requires an acquittal if the court finds no corroborating evidence other than accomplice witness testimony. If not, it requires remand for retrial as the jurors were not informed as to the true nature of the accomplices when they testified as ordinary witnesses.

Issue 2, 3, 5, and 8 requires reversal and remand for retrial. And, Issue 6 and 7 require remand for re-sentencing. However, because the evidence is insufficient to convict, following Issue 4, Barrera must be acquitted.

Respectfully Submitted by,

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CERTIFICATE of SERVICE

This is to certify that on January 27, 2015 a true and correct copy of the above and foregoing document was served on the District Attorney's office, the Hon. Jennifer Avendano, Cameron County, 974 E. Harrison St., Brownsville, Texas 78520, by email.

____/s/Philip T. Cowen___
Philip T. Cowen

Certificate of Compliance

I certify that this brief was prepared with WordPerfect X4, in Time New Roman 14 point type for the body of the brief, and 12 point type for footnotes and long quotations from the transcript or from cases.

I also certify that, according to the Wordperfect X4 program's word-count function, the sections covered by TRAP 9.4(i)(1), (excluding any caption, identity of parties and counsel, statement regarding oral argument, table of contents, table of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance) contains 599 words.

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____/s/Philip T. Cowen___
Philip T. Cowen