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IN THE COURT OF CRIMINAL APPEALS OF TEXAS
AT AUSTIN

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COURT OF CRIMINAL APPEALS
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ANTHONY RUFFINS, Appellant
v.
THE STATE OF TEXAS, Appellee

03-18-00540-CR
In the Third Court of Appeals
Austin, Texas

Appealed from the 207th Judicial District Court
Cause No. CR2016-614
Comal County, Texas

STATE'S BRIEF ON THE MERITS

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<u>Oral Argument Has Been Granted</u>

Identity of Judge, Parties and Counsel

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Table of Contents

Index of Authorities iv

Statement of the Case.....1

Statement Regarding Oral Argument 2

Questions Presented for Review 3

Statement of Facts.....4

Summary of the Argument 15

Argument 16

Standard of Review 16

1. The *Ruffins* Majority Erred in Its Application of the Harm Analysis in This Case, and Appellant Did Not Suffer Egregious Harm From Any Alleged Error in the Accomplice-in-Fact Instruction. 17

a) The jury charge contained two accomplice witness instructions, one of which undoubtedly required corroboration. 19

b) The arguments of counsel reinforced the corroboration requirement for Trevino's—and Hogarth's— testimony and highlighted the corroborative evidence for the jury......21

c) The state of the evidence reveals substantial non-accomplice-testimony corroborative evidence that tends to connect Appellant to the crime. 22

2. Where Appellant *Specifically Requested* an Instruction That the Jury Determine Whether Hogarth Was an Accomplice Beyond a Reasonable Doubt, Was Pointed to the Now Complained-of Instruction in the Charge, and Said "I'm Good," Appellant Invited the Error and Is Precluded by General Principles of Estoppel From Complaining About the Instruction on Appeal. 36

3. Appellant Was Not Entitled to an Accomplice-in-Fact Instruction Regarding Hogarth's Testimony in the First Place. 36

Ferguson v. State 43

Kunkle v. State 45

Paredes v. State 46

Druery v. State 47

4. In a Case Involving Alleged Accomplice Witnesses, the Defendant Bears the Burden to Prove a Witness's Status as an Accomplice as a Matter of Fact And Any Alleged Error In the Instruction Submitted Did Not Egregiously Harm Appellant. 52

a) Neither article 38.14 of the Texas Code of Criminal Procedure nor the* Haney *opinion—cited by the majority in* Ruffins*—provide that the State must* dis*prove a witness's status as an accomplice 'beyond a reasonable doubt.' 53

b) Precedent and simple logic indicate the burden to show a witness is an accomplice as a matter of law or fact is on the defendant in a criminal case. 58

Prayer 63

Certificate of Service 64

Certificate of Compliance 64

Index of Authorities

Cases

Abdnor v. State, 871 S.W.2d 726 (Tex. Crim. App. 1994) 16

Alcala v. State, 476 S.W.3d 1 (Tex. App.—Corpus Christi 2013, pet. ref'd).....31

Almanza v. State, 686 S.W. 2d 157 (Tex. Crim. App. 1985).....35

Arroyo v. State, 117 S.W.3d 795 (Tex. Crim. App. 2003) 37

Barrios v. State, 283 S.W.3d 348 (Tex. Crim. App. 2009) 17

Bennett v. State, 392 A.2d 76 (Md. 1978).....60

Bingham v. State, 913 S.W.2d 208 (Tex. Crim. App. 1995)..... 24, 25

Boozer v. State, 717 S.W.2d 608 (Tex. Crim. App. 1984) 57

Brooks v. State, 323 S.W.3d 893 (Tex. Crim. App. 2010) 28

Brooks v. State, 40 A.3d 346 (Del. 2012).....59

Brooks v. State, No. 08-17-00026-CR, 2018 Tex. App. LEXIS 2913 (Tex. App.—El Paso Apr. 25, 2018, pet. ref'd) (not designated for publication).....28

Campbell v. State, 227 S.W.3d 326 (Tex. App.—Houston [1st Dist.] 2007, no pet.).....22

Carbough v. State, 93 S.W. 738 (1906) 39

Casanova v. State, 383 S.W.3d 530 (Tex. Crim. App. 2012)..... 32, 33, 34

Castillo v. State, 517 S.W.3d 363 (Tex. App.—Eastland 2017, pet. ref'd).....44

Catchings v. State, 394 So. 2d 869 (Miss. 1981) 59

Cawley v. State, 310 S.W.2d 340 (1957) 27

Cocke v. State, 201 S.W.3d 744 (Tex. Crim. App. 2006) 50

Commonwealth v. Dominico, 306 N.E.2d 835 (Mass. App. Ct. 1974).....59

Commonwealth v. Pressel, 184 A.2d 358 (Pa. 1962) 59

Cortez v. State, 469 S.W.3d 593 (Tex. Crim. App. 2015) 16

Creel v. State, 754 S.W.2d 205 (Tex. Crim. App. 1988) 42

Cyr v. State, 308 S.W.3d 19 (Tex. App.—San Antonio 2009, no pet.) 53

Deen v. State, 509 S.W.3d 345 (Tex. Crim. App. 2017) 37

Delacerda v. State, 425 S.W.3d 367 (Tex. App.—Houston [1st Dist.], pet. ref'd).....42

Drollinger v. State, 408 N.E.2d 1228 (Ind. 1980) 59

Druery v. State, 225 S.W.3d 491 (Tex. Crim. App. 2007) ..... passim

Dyer v. MacDougall, 201 F.2d 265 (2d Cir. 1952) 31

Elliot v. State, 976 S.W.2d 355 (Tex. App.—Austin 1998, pet. ref'd) 53

Estrada v. State, No. 08-15-00271-CR, 2018 Tex. App. LEXIS 4885 (Tex. App.—El Paso 2018, pet. ref'd) (not designated for publication) 53

Ex parte Bates, 461 So. 2d 5 (Ala. 1984) 60

Ex parte Pete, 517 S.W.3d 825 (Tex. Crim. App. 2017) 36

Ferguson v. State, 573 S.W.2d 516 (Tex. Crim. App. 1978) 43, 44

Gardner v. State, No. 13-07-446-CR, 2008 Tex. App. LEXIS 7326 (Tex. App.—Corpus Christi 2008, no pet.) (not designated for publication) 35

Godsey v. State, 719 S.W.2d 578 (Tex. Crim. App. 1986) 42

Hacker v. State, 389 S.W.3d 860 (Tex. Crim. App. 2013) 31

Haney v. State, 951 S.W.2d 551 (Tex. App.—Waco 1997, no pet.) 55, 56, 57

Hankins v. State, 646 S.W.2d 191 (Tex. Crim. App. 1983) 24

Hargrove v. State, 54 S.E. 164 (Ga. 1906).....60

Herron v. State, 86 S.W.3d 621 (Tex. Crim. App. 2002) 18

Hicks v. State, 149 S.W. 1055 (Tenn. 1912)..... 60, 61

Hodge v. State, 17 S.W.3d 824 (Ky. 2000).....59

In re Seaman, 627 A.2d 106 (N.J. 1993).....59

Johnson v. Commonwealth, 298 S.E.2d 99 (Va. 1982).....59

Juarez v. State, 2005 Tex. App. LEXIS 8436 (Tex. App.—Austin 2005, no pet.) (not designated for publication).....42

Kastigar v. United States, 406 U.S. 441 (1972) 53

Kuhn v. State, 393 S.W.3d 519 (Tex. App.—Austin 2013, pet. ref'd) 17

Kunkle v. State, 771 S.W.2d 435 (Tex. Crim. App. 1986) 45, 46

Laster v. State, 275 S.W.3d 512 (Tex. Crim. App. 2009) 28

Longoria v. State, 154 S.W.3d 747 (Tex. App.--Houston [14th Dist.] 2004, pet. ref'd).....31

Losoya v. State, No. 05-10-00396-Cr, 2012 Tex. App. LEXIS 5103 (Tex. App.—Dallas 2012, pet. ref'd) (not designated for publication).....53

Lovings v. State, No. 05-08-01204-CR, 2010 Tex. App. LEXIS 3143 (Tex. App.—Dallas 2010, no pet.) (not designated for publication).....18

Lundy v. State, 296 S.W.2d 775 (Tex. Crim. App. 1956) 58

Malik v. State, 953 S.W.234 (Tex. Crim. App. 1997) 57

Malone v. State, 253 S.W.3d 253 (Tex. Crim. App. 2008) 32

Maynard v. State, 166 S.W.3d 403 (Tex. App.—Austin 2005, pet. ref'd) 25

McIntosh v. State, 552 S.W.2d 649 (Ark. 1977).....60

Moore v. State, 520 S.W.3d 906 (Tex. Crim. App. 2017) 31

Ngo v. State, 175 S.W.3d 738 (Tex. Crim. App. 2005) 16

Oliva v. State, 548 S.W.3d 518 (Tex. Crim. App. 2018) 53

Ostrowski v. State, 665 P.2d 471 (Wyo. 1983) 59

Pace v. State, 124 S.W. 949 (Tex. Crim. App. 1910) 55

Padon v. State, No. 03-17-00695-CR, 2019 Tex. App. LEXIS 6508 (Tex. App.—Austin July 31, 2019, no pet. h.) (not designated for publication).....36

Paredes v. State, 129 S.W.3d 530 (Tex. Crim. App. 2004) 46, 47

Patt v. State, No. 10-10-00023-CR, No. 10-10-00024-CR, 2010 Tex. App. LEXIS 7288 (Tex. App.—Waco 2010, pet. ref'd) (not designated for publication) 18

People v. Heikkinen, 646 N.W.2d 190 (2002) 59

People v. Martinez, 531 P.2d 964 (Colo. 1975) 59

People v. Rossi, 183 N.E.2d 895 (N.Y. 1962) 61

People v. Sage, 11 N.E.3d 177 (N.Y. 2014) 60

People v. Tewkberry, 544 P.2d 1335 (Cal. 1976) 60, 61

People v. Williams, 588 N.E.2d 983 (Ill. 1991) 59

Phelps v. State, 532 S.W.3d 437 (Tex. App.—Texarkana 2017, pet. ref'd) 59

Prystash v. State, 3 S.W.3d 522 (Tex. Crim. App. 1999) 36, 37

Reed v. State, 550 S.W.3d 748 (Tex. App.—Texarkana 2018, no pet.) 23

Reed v. State, 744 S.W.2d 112 (Tex. Crim. App. 1988) 23

Romero v. State, No. 08-05-00005-CR, 2006 Tex. App. LEXIS 7552 (Tex. App.—El Paso 2006, no pet.) (not designated for publication).....42

Roys v. State, 416 S.W.3d 229 (Tex. App.—Amarillo 2013, pet. ref'd) 50

Ruffins v. State, 613 S.W.3d 192 (Tex. App.—Austin 2020, pet. granted)..... passim

Silba v. State, 275 S.W.2d 108 (Tex. Crim. App. 1954) 41

Simmons v. State, 282 S.W.3d 504 (Tex. Crim. App. 2009).....62

Smith v. State, 332 S.W.3d 425 (Tex. Crim. App. 2011) 28, 30, 32, 61

State v. Ambrose, 487 S.W.3d 587 (Tex. Crim. App. 2002)..... 17, 23

State v. Bixby, 177 P.2d 689 (Wash. 1947).....60

State v. Carvelo, 361 P.2d 45 (Haw. 1961).....59

State v. Deiter, 446 S.W.2d 609 (Mo. 1969).....59

State v. Guzman, 95 P.3d 302 (Utah Ct. App. 2003).....59

State v. Houston, 206 N.W.2d 687 (Iowa 1973) 60

State v. Hughes, 943 So. 2d 1047 (La. 2006).....59

State v. Jewell, 285 A.2d 847 (Me. 1972).....59

State v. Jones, 216 A.3d 907 (Md. 2019)..... 59, 60

State v. Kelly, 6 S.E.2d 533 (N.C. 1940).....59

State v. Loveless, 451 N.W.2d 692 (Neb. 1990).....59

State v. McLaughlin, 485 P.2d 1360 (Kan. 1971).....59

State v. O'Dell, 543 N.E.2d 1220 (Ohio 1989) 59

State v. Oatney, 66 P.3d 475 (Or. 2003) 60

State v. Riddell, 96 A. 531 (R.I. 1916).....59

State v. Rumney, 258 A.2d 349 (N.H. 1969).....59

State v. Rutledge, 101 S.E.2d 289 (S.C. 1957).....59

State v. True, 190 N.W.2d 405 (Iowa 1971).....60

State v. Turnbow, 354 P.2d 533 (N.M. 1960).....59

Taylor v. State, 332 S.W.3d 483 (Tex. Crim. App. 2011) 17

Tran v. State, 870 S.W.2d 654 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).....23

United States v. Zafiro, 945 F.2d 881 (7th Cir. 1991).....31

Villarreal v. State, 576 S.W.2d 51 (Tex. Crim. App. 1978) 42

Wiede v. State, 214 S.W.3d 17 (Tex. Crim. App. 2007) 30

Woodall v. State, 336 S.W.3d 634 (Tex. Crim. App. 2011) 36

Woodard v. State, 322 S.W.3d 648 (Tex. Crim. App. 2010) 40

Statutes

Tex. Code Crim. Proc. art. 38.14 52
Tex. Code Crim. Proc. art. 38.22 61
Tex. Code Crim. Proc. art. 38.23 61

Other Authorities

23A C.J.S., Criminal Procedure and Rights of Accused § 1414 (2020) 59

Comm'n on Pattern Jury Charges, State Bar of Tex., *Texas Criminal Pattern Jury Charges: Special Instructions* CPJC 3.4 (2018) 55

George E. Dix and Robert O. Dawson, 43 *Texas Practice—Criminal Practice and Procedure* § 42.141 (Supp.1999) 37

State Bar of Tex., *Texas Criminal Pattern Jury Charges: Special Instructions* CPJC 3.4 (2018) 55

Wigmore on Evidence, § 2060(e) (4th Ed. 2007) 59

Statement of the Case

Appellant was charged with one count of Aggravated Robbery, enhanced pursuant to the habitual offender statute (I C.R. at 5-10). Appellant pled not guilty and a jury trial commenced on August 7, 2018 (*see* II-III R.R.). The jury found Appellant guilty (I C.R. at 140). Following a punishment hearing, the Trial Court sentenced Appellant to life in the Institutional Division of TDCJ (*id*. at 141; VI R.R).

At trial, a witness named David Hogarth testified regarding his presence during conversations in which Appellant and his co-defendants planned to rob a tattoo shop in New Braunfels, Texas (*see* III R.R. at 40-41, 44-45). Hogarth further testified that he observed Appellant and his co-defendants leave to commit the robbery in a white Volvo and identified Appellant and the other individuals that were involved in the robbery (*id*. at 46-52). Hogarth also testified Appellant threatened to harm Hogarth if Hogarth cooperated with law enforcement (*id*. at 54-55). Gus Trevino, the mastermind of the robbery, testified at trial regarding the plan to commit the robbery and Appellant's role in the robbery (*id*. at 201-10).

Appellant requested the jury charge include instructions that both Hogarth and Trevino were accomplices as a matter of law (*see* V R.R. at 15). The Trial Court denied Appellant's request for an accomplice as a matter of law instruction regarding Hogarth, but submitted the issue as a matter of fact for the jury to determine (*id*.; *see*

I C.R. at 136-37). The Trial Court submitted the accomplice as a matter of law instruction regarding Trevino (I C.R. at 135-36).

Appellant specifically requested that Hogarth's accomplice-in-fact instruction include language that the jury had to agree 'beyond a reasonable doubt' that Hogarth was an accomplice (V R.R. at 22). The State read the charge out loud on the record and Appellant stated "I'm good" (*id*.). The charge was submitted to the jury with language that required the jury to determine if they believed Hogarth was an accomplice beyond a reasonable doubt, then his testimony had to be corroborated (I C.R. at 136-37). The charge also instructed the jury that because Trevino was an accomplice as a matter of law, Trevino's testimony had to be corroborated (*id*. at 135-36). The record contained substantial non-accomplice corroborative evidence tending to connect Appellant to the offense. *See infra*.

In a 2-1 decision, the Austin Court of Appeals reversed Appellant's conviction, asserting the charge erroneously inverted the burden of proof on the accomplice-in-fact instruction and speculating that said instruction harmed Appellant. *Ruffins v. State*, 613 S.W.3d 192 (Tex. App.—Austin 2020, pet. granted).

Statement Regarding Oral Argument

Oral argument has been granted in this case.

Questions Presented for Review

1. If the testimony from an alleged accomplice witness-in-fact is completely removed from consideration, where the jury charge contained two accomplice witness instructions—one regarding an accomplice as a matter of law and one regarding an accomplice as a matter of fact—and there was substantial non-accomplice evidence to corroborate either accomplice witness's testimony, did Appellant suffer egregious harm from any alleged error in the accomplice-in-fact instruction?

2. Did Appellant invite—or is he otherwise estopped from challenging—the allegedly erroneous instruction he now complains of on appeal?

3. Was Appellant even entitled to an instruction on whether Hogarth was an accomplice as a matter of fact?

4. In a case where the Defense argues a witness was an accomplice, who bears the burden to prove a witness's status as an accomplice as a matter of fact, and what is the appropriate burden?

Statement of Facts

On May 10, 2016, Gustavo Trevino drove Anthony Ruffins ("Appellant"), Olanda Taylor, and Kenneth McMichael from the Palms Apartments ("the Palms") in San Antonio to New Braunfels in Trevino's distinctive white Volvo (III R.R. at 46, 206).[1] The group was headed for Timeless Ink—a New Braunfels tattoo and piercing shop owned by Trevino's cousin (*id*. at 43, 200-02). In the weeks leading up to May 10th, Trevino and Taylor hatched a plan to rob Timeless Ink (*id*. at 41-42). Appellant, McMichael, and Robert Ruffins—Appellant's relative—agreed to participate in the robbery (*id*. at 201).

On the way to Timeless Ink, the group picked up Robert Ruffins and stopped at Wal-mart to get zip ties (*id*. at 206). They drove by Timeless Ink and parked in a nearby parking lot (*id*. at 207). Inside the Volvo, the group "got ready" to go inside (*id*.). They "masked up," put gloves and hats on, "made sure [their] guns were right, backpacks [were] ready, [and the] zip ties" were ready (*id*. at 207-08). They nailed down "everything [that was] going to happen, who [wa]s going to do what, [and] how it [was] going [to] go down" (*id*. at 207). Trevino stayed in the car (*id*.). Armed,

[1] The individuals involved in the Timeless Ink robbery used the following nicknames:

- Appellant—"Pooh" or "Poohbear,"
- Robert—"Robbie,"
- Trevino—"Gus,"
- McMichael—"Red," and
- Taylor—"Tazz" or "Tazz Ruffins."

Appellant, Taylor, McMichael, and Ruffins entered Timeless Ink around 11:54 P.M. (State's Ex. 42; III R.R. at 176).

Inside Timeless Ink, Sarah Zamora and her husband Anthony were working a late-night shift (III R.R. at 109-110). Sarah waited upstairs while Anthony worked on a tattoo for one of their regular customers, Tony Hernandez (III R.R. at 110). Sarah heard someone enter the shop downstairs and went to greet them (*id*. at 111). When she got to the stairs she saw Taylor[2] standing on the steps pointing a gun in her direction (*id*.). Sarah ran and told Anthony there was someone with a gun (*id*. at 112). Before Sarah could say anything else, Taylor, Appellant and Ruffins were in the room (*id*.). The men told them to put their hands up and get on the ground (*id*.). Taylor walked over to Anthony; Anthony told him to take whatever they wanted (*id*.). Taylor hit Anthony and knocked him to the ground (*id*.). Appellant stomped on Anthony's head (*see* State's Ex. 42). The men kept hitting Anthony, saying "shut him up, shut him up" (III R.R. at 113). They also hit Hernandez in the head and he began bleeding pretty badly (*id*.).

Appellant kicked Sarah in the face and Taylor grabbed Sarah's wallet out of her back pocket (*id*. at 113-14). Appellant told Sarah to get up and grabbed her by

[2] Appellant and his co-defendants are seen on video in State's Ex. 42 and were identified through the course of the investigation. The record citations refer to Sarah Zamora's testimony and, to avoid unnecessary repetition, State's Ex. 42 should be considered a parallel source—as it corroborates her account.

her hair (*id*. at 114-15). The robbers told Sarah not to look at them or they would shoot her (*id*. at 117). Appellant took Sarah downstairs by her hair and commanded her to open the cash register (*id*. at 115). Sarah complied, but the register was empty (*id*.). One of the robbers asked Sarah where the safe was (*id*.). Appellant removed the safe and took it (*id*. at 119). Sarah could hear feet moving around upstairs and Anthony making a noise that sounded like he was trying to breathe (*id*. at 119-20). Appellant grabbed Sarah by the hair again, walked her halfway up the stairs, pointed the gun at her and told her not to look at them or move until they left, or they would kill her (*id*. at 120).

After the men left, Sarah locked the doors and called 911 (*id*. at 120-21). The New Braunfels Police Department (NBPD) responded (*id*. at 121, 162). Anthony was taken to the hospital by ambulance (*id*. at 121-22).

Detective Groff with NBPD was the on-call detective who responded to the scene (*id*. at 161-62). Groff observed four suspects on the Timeless Ink surveillance video (*id*. at 167). The video showed what the suspects were wearing, their movements, and contained audio (*id*. at 166; State's Ex. 42).

Anthony, Sarah, and Hernandez's wallets and cell phones were stolen during the robbery (III R.R. at 114). Groff tracked Sarah's stolen phone using the *Find My iPhone* application and learned the phone was located in San Antonio, Texas (*id*. at 173). The detective also tracked Anthony's phone using the application and the

phone pinged at 3735 East Commerce Street – the Palms – in San Antonio at 12:31 a.m. (*id*. at 174-76; State's Ex. 65). The robbery began around 11:54 P.M.; the Palms is approximately 25 minutes south of New Braunfels (State's Ex. 42; III R.R. at 175).

Detective Groff sent a message through the app asking for whoever found the phone to call him (III R.R. at 177). A woman named Rosa Garcia called Groff and he went to the Palms to meet her (*id*.). Rosa and her son had Sarah and Anthony's cell phones (*id*. at 177-79). Rosa identified the individual from whom she received the phones as "Tazz Ruffins" and showed Detective Groff Tazz's Facebook page (*id*. at 179-80, 182). The NBPD also located the stolen safe in a dumpster at the Palms (*id*. at 181; State's Exs. 68-70).

Detective Mahoney was the lead detective on the Timeless Ink robbery (IV R.R. at 9). Mahoney took screenshots from the surveillance footage of the four suspects that were depicted (*id*. at 15; State's Exs. 71-74). Using the Facebook profile Groff obtained for "Tazz" and intelligence from SAPD, Mahoney identified "Tazz" as Olanda Taylor (IV R.R. at 18). Detective Mahoney learned Taylor lived at the Palms (*id*.).

Mahoney went to the Palms to try to get more information about the robbers (*id*. at 19-20). The Palms was a "high-crime area"; people generally avoided law enforcement and feared being labeled "a snitch" (*id*.). Detective Mahoney received

information from "one or two sources about someone named Gus driving a white car being involved" (*id*. at 105).

While speaking with sources at the Palms, Mahoney learned that an individual named David Hogarth was an acquaintance of some of the suspects (*id*. at 20-21). Mahoney had also reviewed Taylor's Facebook account and suspected Ruffins and Appellant were involved (*id*. at 95, 105).

Detective Mahoney tried to reach out to Hogarth on multiple occasions but was unsuccessful (*id*. at 94). On May 23rd, Detective Mahoney went to the Palms to try to talk with Hogarth in person and he saw Hogarth standing with Appellant (*id*. at 94, 23). Appellant quickly walked away and Detective Mahoney asked Hogarth to come with him to the San Antonio police station (*id*.). Hogarth was reluctant but agreed to go (*id*. at 24-25). Initially, Hogarth denied that it was Appellant that had been standing with him (*id*. at 98).

During the May 23rd interview, Hogarth assisted in identifying the robbers based on the surveillance video screenshots (III R.R. at 79-80). Hogarth told detectives that he, Trevino, and Taylor had gone to New Braunfels prior to the robbery and that Trevino and Taylor had discussed the robbery during the trip (IV R.R. at 99, 105). Hogarth informed Detective Mahoney that Trevino had been telling Hogarth what to say to police and Hogarth agreed to provide his cell phone to the police (*id*. at 26-27). On June 3rd, 2016, Hogarth had not followed through so

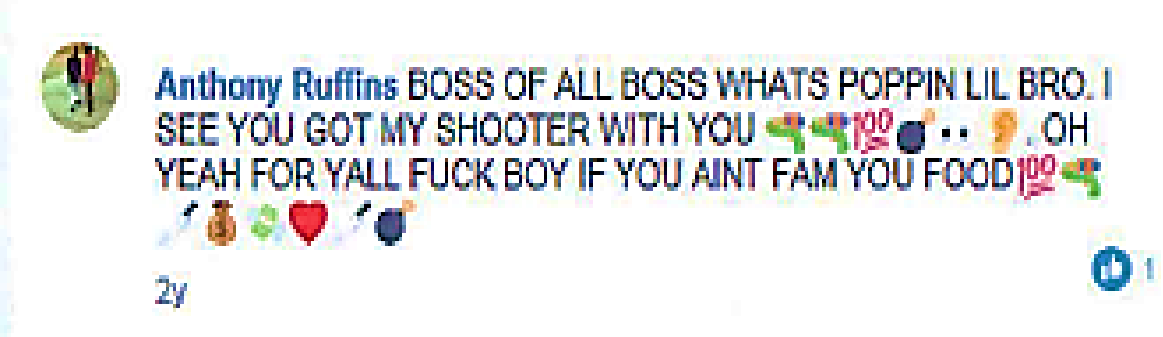
Mahoney obtained a search warrant for Hogarth's phone (*id*. at 97-98). The search of Hogarth's phone revealed text messages that confirmed what Hogarth reported (*id*. at 27). Detective Mahoney also learned that Appellant threatened to harm Hogarth if he cooperated with police (*id*. at 113; *see also* III R.R. at 54).

Detective Mahoney obtained surveillance footage from other businesses near Timeless Ink and observed a white, box-shaped vehicle with a distinctive side blinker traveling in the vicinity shortly before the robbery (IV R.R. at 69-70; State's Exs. 92-98). Mahoney went to Trevino's apartment[3] and located Trevino's white Volvo that matched what Mahoney observed in the surveillance footage (*id*. at 71). Trevino provided an alibi, but Mahoney's investigation revealed the alibi was false (*id*. at 76-77).

A San Antonio news broadcast sought assistance in identifying an individual that Mahoney recognized as Taylor (*id*. at 29-30). Mahoney notified the robbery task force in San Antonio that the individual they sought was Taylor, and Taylor was arrested in June for a Capital Murder in San Antonio (*id*. at 30-32). Detective Mahoney later interviewed Taylor regarding the Timeless Ink robbery and Taylor confessed to the crime (*id*. at 58). Taylor also provided information to assist in the investigation, including identifying information for the other suspects (*id*.).

[3] Hogarth had informed Mahoney that Trevino moved to a different apartment complex (IV R.R. at 121-22).

Taylor's Facebook profile was linked to Appellant, Ruffins, and McMichael's Facebook profiles (*id*. at 34; State's Exs. 76-79, 81-82, 84-85). Ruffins' Facebook contains a photo of Ruffins and McMichael on which Appellant commented:



(State's Ex. 84). Appellant's comment contained emoticons of guns, money, a money bag, knives, and a bomb (*id*.; *see also* IV R.R. at 49-50; State's Exs. 87-89).

Detective Mahoney obtained arrest warrants for the remaining suspects, including Appellant (IV R.R. at 34). Appellant—located in Houston—was the "last one to be found" and was transported back to Comal County (*id*. at 57). When Mahoney showed Appellant the surveillance footage from the robbery, Appellant did not react in a shocked or surprised manner, despite the brutal nature of the assault (*id*. at 59). Appellant denied involvement in the Timeless Ink robbery and claimed he had an alibi (*id*. at 60-61). However, Appellant also made comments such as "if you say I did it, I did it. If you say that's me, it's me" and refused to provide any information that would enable the detectives to follow-up on his alleged 'alibi' (*id*. at 60).

Hogarth and Trevino testified at trial. Hogarth testified that—while living at The Palms—he normally hung out with Taylor, Ruffins, Appellant and Trevino (III R.R. at 39). Sometime in the middle of May 2016, Hogarth learned of a plan to rob Timeless Ink (*id*. at 41). Hogarth testified that Trevino took him to New Braunfels one day (*id*.). Trevino said they "were going to visit [Trevino's] cousin's tattoo shop" (*id*.). Trevino drove Hogarth and Taylor to New Braunfels in Trevino's white Volvo (*id*. at 41-42). Trevino took them by the tattoo shop and said he wanted to "hit a lick" (*id*. at 41). Hogarth was present for other discussions about the robbery in which Trevino, Appellant, Ruffins and Taylor participated (*id*. at 44).

Hogarth testified that Appellant initially said "he was going to think about" participating in the robbery (*id*. at 45). Appellant and McMichael were close friends and Hogarth believed it was Appellant that recruited McMichael to assist (*id*.). On the night of the robbery, Hogarth saw Trevino, Taylor, Appellant, and McMichael leave for the robbery in Trevino's white Volvo (*id*. at 46). Hogarth stayed behind (*id*. at 45-46). Hogarth identified Appellant and his co-defendants through photos from the surveillance video based, in part, on having watched the surveillance video (*id*. at 46-52, 91-92). Hogarth identified the individual in State's Exhibit 71 as Appellant, noting that Appellant "always wore that hat" (*id*. at 46). Hogarth further testified regarding aspects of Appellant's demeanor and behavior on the video

surveillance footage and that he recognized the sound of Appellant's voice on the surveillance video (*id*. at 47-48, 52).

Hogarth testified that he identified the other individuals involved in the robbery based on reviewing the surveillance footage and identified McMichael based on his skin color, Ruffins based on his voice and the way he was standing, and Taylor based on his shorts and the streak of blonde in his hair (*id*. at 47-52). Hogarth testified that Appellant, Trevino, Taylor, Ruffins, and McMichael used to frequent the Palms, but they all "disappeared" after the robbery (*id*. at 53-54). Hogarth also testified that Appellant threatened that if "[Hogarth] said anything about the robbery that he—something would happen to [Hogarth]" (*id*. at 54). Hogarth testified he avoided Mahoney because he feared for his life and the lives of his family members (III R.R. at 93).

On cross-examination, Hogarth maintained that when he went to New Braunfels with Trevino and Taylor, he believed they were just going "to visit [Trevino's] cousin" and that Hogarth did not know about the plan to rob the tattoo shop until Trevino mentioned it when they got to New Braunfels (*id*. at 70, 88, 90).

Trevino testified that he was convicted by a jury for his role in the robbery (*id*. at 188). Around the time of the robbery, Trevino hung out with Ruffins, Appellant, Taylor, Hogarth and a couple of other people at The Palms (*id*. at 199). Trevino knew Appellant by his initials, "A.R." (*id*. at 200). Trevino testified that

he, Appellant, McMichael, Ruffins, and Taylor were originally involved in the plan to rob Timeless Ink (*id*. at 201).

Trevino identified Appellant in court and testified that he and Appellant discussed the possibility of robbing the tattoo shop on "a few occasions" (*id*. at 202-03). Trevino recalled the trip he took to New Braunfels with Taylor and Hogarth and noted that Hogarth "wasn't really in the plan…He was more like a – just a hang-around type of guy" (*id*. at 204). According to Trevino, Hogarth "just happened to be in the car. He was in the car and overheard what [Trevino and Taylor] were talking about" (*id*.).

At the point when Trevino and his co-defendants decided to go do the robbery, Trevino, Appellant, McMichael and Taylor all left in Trevino's white Volvo (*id*. at 205). Everybody in the group had guns on them (*id*.). They stopped on the way to New Braunfels and picked up Ruffins at a Tiger Mart (*id*. at 206). Then, the group went to Walmart to pick up some zip ties "to zip-tie people" during the robbery (*id*.). Trevino testified that he parked in an apartment complex by the tattoo shop, the group put masks on, gloves, made sure their guns were "right," and got the backpacks and zip ties ready (*id*. at 207). They discussed "who [wa]s going to do what, [and] how [it was] going to go down" (*id*.).

Trevino stayed behind and waited in the car because he feared he would be recognized (*id*. at 207-08). Trevino identified Appellant as the individual in State's

Exhibit 71, noting Appellant's "white hat" and "his posture" (*id*. at 209). Trevino confirmed that he saw Appellant wearing that white hat when Appellant got out of the car and walked towards Timeless Ink (*id.*). Trevino testified that while Appellant, Ruffins, Taylor, and McMichael were inside the tattoo shop, Trevino got cold feet and fled back to San Antonio (*id*. at 208-09).

At trial, Appellant had an alibi witness testify she had been dating Appellant for several years and that Appellant was with her on the night of the robbery (IV R.R. at 203). The alibi witness also admitted that Appellant had asked her to come to court and provide an alibi and that she never provided the alibi information to investigative authorities, despite the fact she knew Appellant had been in custody for two years awaiting trial (*id*. at 219, 228).

The jury convicted Appellant of Aggravated Robbery (V R.R. at 99-101). At a punishment hearing, the Trial Court sentenced Appellant to Life and pronounced a deadly weapon finding (*id*. at 67).

Summary of the Argument

To reverse the judgment in this case, the *Ruffins* majority opinion ignored fundamental principles of law, stepped into the role of fact-finder, and imposed a burden on the State that does not appear in article 38.14 of the Texas Code of Criminal Procedure.

The majority's harm analysis is gravely flawed; the majority essentially assumed the role of a 'thirteenth juror.' The majority ignored Trevino's testimony, conducted a piecemeal evaluation of some of the evidence, afforded credibility to defensive evidence the jury rejected, and reversed the judgment of the trial court when it concluded the evidence was no longer 'overwhelming.' However, even removing Hogarth's testimony from consideration, the remaining evidence included the testimony from accomplice-as-a-matter-of-law Trevino, a proper instruction on Trevino, and substantial non-accomplice-testimony corroborative evidence that tended to connect Appellant to the crime; the 'State's overall case for conviction [cannot be said to be] clearly and significantly less persuasive.'

Additionally, as Appellant requested the accomplice-in-fact instruction and its particular phrasing, he is estopped from complaining about that instruction on appeal. Moreover, a comparison of the facts in the instant case to analogous binding precedent reveals Appellant was never entitled to the accomplice-in-fact instruction

regarding Hogarth in the first place, and could only have *benefitted* from its submission to the jury.

Finally, the majority's imposition of a burden on the State to *dis*prove a witness's status as an accomplice-in-fact beyond a reasonable doubt was based on an incorrect reading of a distinguishable case and imposed a burden not otherwise present in article 38.14. Indeed, many jurisdictions that require corroboration of accomplice-witness testimony have expressly held it is the defendant—not the State—who bears the burden of proof on the accomplice-witness issue. For these reasons, the *Ruffins* majority opinion must be reversed.

Argument

Standard of Review

A claim of error in the jury charge is reviewed using a two-step process. *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994). First, the reviewing court must determine whether error actually exists in the charge. *Id*. If error does exist, "the court must determine whether sufficient harm resulted from the error to require reversal." *Abdnor*, 871 S.W.2d at 731-32. "When the defendant fails to object or states that he has no objection to the charge," only "egregious harm" to the defendant will require reversal. *Ngo v. State*, 175 S.W.3d 738, 744 (Tex. Crim. App. 2005).

The egregious harm standard requires reversal only if the charge error was so egregious that the defendant was deprived of a fair and impartial trial. *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). Courts review the entire jury charge, the state of the evidence, the arguments of counsel, and any other relevant information revealed by the record as a whole to determine whether a defendant was deprived of a fair and impartial trial. *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011). There must be "actual, not just theoretical, harm to the accused" to warrant reversal. *Id*. "Egregious harm is a difficult standard to prove and such a determination must be done on a case-by-case basis." *Kuhn v. State*, 393 S.W.3d 519, 525 (Tex. App.—Austin 2013, pet. ref'd). A reviewing court "should affirm unless it can say—possibly 'with confidence'—that the error resulted in harm." *Young v. State*, 283 S.W.3d 854, 881 (Tex. Crim. App. 2009).

1. The *Ruffins* Majority Erred in Its Application of the Harm Analysis in This Case, and Appellant Did Not Suffer Egregious Harm From Any Alleged Error in the Accomplice-in-Fact Instruction.

"Under the egregious harm standard, the *omission* of an accomplice witness instruction is generally harmless unless the corroborating (non-accomplice) evidence is so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive." *State v. Ambrose*, 487 S.W.3d 587, 598 (Tex. Crim. App. 2002) (emphasis added). When an accomplice witness

instruction has been *completely omitted* or an accomplice as a matter-of-*fact* instruction has been *improperly submitted in lieu of* an accomplice as a matter-of-*law* instruction, an egregious harm analysis proceeds *by removing that accomplice witness' testimony from consideration* and assessing whether the remaining evidence was "so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive." *Patt v. State*, No. 10-10-00023-CR, No. 10-10-00024-CR, 2010 Tex. App. LEXIS 7288, at *8 (Tex. App.—Waco 2010, pet. ref'd) (not designated for publication) (citing *Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002)); *Lovings v. State*, No. 05-08-01204-CR, 2010 Tex. App. LEXIS 3143 (Tex. App.—Dallas 2010, no pet.) (not designated for publication).

This is not a case where an accomplice witness instruction was completely omitted. Nor is this a case where an accomplice as a matter-of-*fact* instruction was improperly submitted *in lieu of* an accomplice as a matter-of-*law* instruction. In this case, a proper accomplice-as-a-matter-of-law instruction was submitted regarding one accomplice: Trevino. In addition, an accomplice-as-a-matter-of-fact instruction was submitted regarding Hogarth. An alleged error in the phrasing of the instruction regarding Hogarth's testimony—though *requested* by Appellant[4]—was wrongly deemed egregiously harmful. The analysis that applies to this particular set of facts—involving *two* accomplice witness instructions and alleged error in *one* of the

[4] *See* Section 2, *infra*.

instructions—is not entirely clear. Even so, applying the approach used in cases where an instruction is *omitted* or the *wrong* instruction is submitted, removing Hogarth's testimony from consideration, the remaining evidence was 'not so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive.' Accordingly, the *Ruffins* majority erred in reversing the judgment.

Removing Hogarth's testimony from consideration, the State's remaining evidence included:

1) testimony from Trevino, an accomplice as a matter of law, on whom a correct accomplice witness instruction was submitted, and

2) substantial non-accomplice-testimony evidence that corroborated Trevino's testimony and tended to connect Appellant to the offense.

The majority failed to recognize the foregoing, incorrectly assessed the *Almanza* harm factors, and arrived at the inaccurate conclusion that Appellant suffered egregious harm. *Ruffins*, 613 S.W.3d at 204.

a) The jury charge contained* two *accomplice witness instructions, one of which undoubtedly required corroboration.

In the instant case, a review of the entirety of the jury charge reveals *two* accomplice witness instructions were submitted to the jury. One instruction provided that Trevino **was** an accomplice as a matter of law and his testimony **must** be

corroborated. The second—complained of—instruction asked the jury to determine whether Hogarth was an accomplice as a matter of fact. If Hogarth were deemed an accomplice by the jury, then his testimony likewise required corroboration.

The majority's review of the entirety of the jury charge was limited to whether the "remainder of the charge corrected the [alleged] error" regarding the accomplice-in-fact instruction. *Ruffins*, 613 S.W.3d at 200. This analysis, however, ignores significant portions of the charge that weigh against a finding of harm.

In no uncertain terms, the jury was informed that Trevino's testimony *had* to be corroborated. *If* Hogarth was an accomplice, his testimony likewise required corroboration. The instant case is distinguishable from the authorities cited by the *Ruffins* majority on those facts alone; this is *not* a case where an instruction was completely omitted, leaving the jury to consider testimony of an accomplice and a potential accomplice without any consideration given to corroborating that testimony. Instead, the jury received two accomplice witness instructions, one of which undoubtedly required the jury to corroborate Trevino's testimony. Moreover, in addition to the instructions requiring corroboration, the jury was repeatedly instructed that they had to be convinced of Appellant's guilt beyond a reasonable doubt.

Considering the charge contained an explicit directive requiring corroboration of Trevino's testimony and several reiterations that the jury had to find Appellant

guilty "beyond a reasonable doubt," any alleged error regarding the phrasing of the Hogarth's accomplice-in-fact instruction did not result in actual, egregious harm to Appellant.

b) The arguments of counsel reinforced the corroboration requirement for Trevino's—and Hogarth's— testimony and highlighted the corroborative evidence for the jury.

In reviewing the arguments of counsel, the *Ruffins* majority focused exclusively on portions of counsel arguments that discussed aspects of Hogarth's testimony. *See id*. But this case is unique in that Trevino—an accomplice as a matter of law—*also* testified. Naturally, in addition to a discussion of Hogarth's testimony, the arguments of counsel also remarked upon Trevino's testimony, the instruction regarding Trevino's testimony, and corroborating evidence. The proper egregious harm analysis should have contemplated the effect of the supposed erroneous accomplice-in-fact instruction in light of the arguments of counsel regarding *both* Trevino and Hogarth and the corroborative evidence in the record.

In closing arguments, *both* parties acknowledged Trevino was an accomplice as a matter of law and his testimony *must be corroborated*.[5] Notably, Appellant did not really challenge the content of Trevino's testimony regarding Appellant's involvement in the crime.[6] Instead, Appellant generally implored the jury not to

[5] (V R.R. at 43).
[6] (*id*. at 63-65).

believe Hogarth or Trevino and asserted the corroborating evidence was insufficient.[7] The State, however, highlighted abundant corroborating evidence for the jury.[8] Considering the totality of the arguments of counsel regarding Hogarth *and* Trevino's testimony—which included repetition of the corroboration requirement that applied to Trevino's testimony and the identification of specific corroborative evidence—this factor should weigh against a finding of harm.

c) *The state of the evidence reveals substantial non-accomplice-testimony corroborative evidence that tends to connect Appellant to the crime*.

With regard to the state of the evidence, the *Ruffins* majority—having erroneously determined the jury could have had a 'reasonable doubt' as to whether Hogarth was an accomplice-in-fact (*see also infra* at 3)—went on to discuss the corroborating evidence of Appellant's guilt. *Ruffins*, 613 S.W.3d at 200-04. Specifically, the majority noted that "although *some* corroborating evidence was presented, the evidence of [Appellant's] guilt *other than* the testimony from Trevino *and* Hogarth was less than overwhelming." *Id*. at 202 (emphasis added).[9]

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[7] (*id*. at 61-62, 72-74).
[8] (*id*. at 43-44, 87, 93, State's Ex. 42).
[9] Following this assertion, the *Ruffins* majority cited three readily distinguishable cases. In *Campbell v. State*, the First Court of Appeals considered whether an instruction requiring the jury to unanimously acquit the defendant before considering the lesser-included offense egregiously harmed the defendant. 227 S.W.3d 326, 327 (Tex. App.—Houston [1st Dist.] 2007, no pet.). While the court made an observation that the "overwhelming weight of the evidence supported the jury's verdict," the case had nothing to do with accomplices or accomplice witness instructions in general.

In reviewing the corroborative evidence, however, the applicable standard is whether the corroborative evidence "tends to connect" Appellant to the offense. *State v. Ambrose*, 487 S.W.3d 587, 599 (Tex. Crim. App. 2016)("Because there was strong corroborative evidence *tending to connect* Ambrose to the offense, the *totality of the record fails to show that she was egregiously harmed* by the *omission* of the accomplice-witness instruction.") (emphasis added).

"The corroborative evidence may be circumstantial or direct." *Reed v. State*, 744 S.W.2d 112, 126 (Tex. Crim. App. 1988). "It is not necessary that the corroboration directly link the accused to the crime or be sufficient in itself to establish guilt." *Id*. Indeed, "insignificant circumstances sometimes afford most satisfactory evidence of guilt and corroboration of accomplice witness testimony."

In *Reed v. State*, the Sixth Court of Appeals assessed whether the *lack* of any accomplice-witness instruction egregiously harmed the defendant. 550 S.W.3d 748, 757-58 (Tex. App.—Texarkana 2018, no pet.). The Sixth Court goes on to cite various standards of review applicable in cases involving "the *failure* to submit an accomplice-witness instruction." *Id*. at 758 (emphasis added). Ultimately the *Reed* court determined that the defendant was not harmed by the omission of the accomplice-witness instruction. *Id*. at 760. As *Reed* cites various standards of review applicable in cases where an instruction was completely *omitted*—and ultimately held the omission of the accomplice-witness instruction did not harm the defendant—the *Ruffins* majority's reliance on *Reed* is similarly misplaced.

Finally, in *Tran v. State*, the First Court of Appeals assessed the effect of the trial court's *failure* to submit an *requested* instruction on a witness's status as an accomplice. 870 S.W.2d 654, 658 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). The review for 'some harm' in *Tran* was completely different than the harm analysis applicable in the instant case, as the defendant in *Tran* objected to the lack of the instruction. Moreover, reliance on *Tran* is misplaced as it dealt with a completely *omitted* instruction. *Id*. at 658-59 ("Here, the other evidence, if the jury believed it, was legally sufficient to convict, but the charging error was greater than in *Harrell* because ***this jury did not even have a partially correct instruction how to consider the accomplice evidence. It had no instruction at all.***") (emphasis added).

Id. "[D]irect and circumstantial evidence are equally probative." *Hankins v. State*, 646 S.W.2d 191, 199 (Tex. Crim. App. 1983). Even the arguably more stringent analysis that applies in the case of an *omitted* instruction would have removed *only* Hogarth's testimony from consideration and assessed the strength of the State's remaining evidence—which *included* Trevino's testimony *and* the non-accomplice-testimony corroborative evidence.

Moreover, article 38.14's corroboration requirement only applies to in-court *testimony* from an accomplice witness. *Bingham v. State*, 913 S.W.2d 208, 210 (Tex. Crim. App. 1995). On cross-examination, Detective Mahoney—who was *not* an accomplice witness—testified that Hogarth told him Appellant threatened Hogarth if Hogarth cooperated with law enforcement, Hogarth was afraid for himself and for his family, and that Hogarth provided the names of the individuals involved in the Timeless Ink robbery (*id*. at 163, 172). Additionally, Detective Mahoney testified that he showed Appellant a video of Olanda Taylor's confession to the crime during Appellant's interview (*id*. at 58).

Detective Mahoney's testimony regarding Appellant's threat to Hogarth, Hogarth's fear for his safety and his family's safety, the identification information from Hogarth, and Taylor's out-of-court confession to Mahoney was evidence which was not subject to the corroboration requirements of article 38.14. *Bingham*, 913 S.W.2d at 210. The *Ruffins* majority failed to consider this evidence in its harm

analysis. As article 38.14 applies only to *testimony* by an accomplice witness, these out-of-court statements could be used by the jury as corroborative evidence in making its determination of guilt. *See Bingham*, 913 S.W.2d at 210; *Maynard v. State*, 166 S.W.3d 403, 413-14 (Tex. App.—Austin 2005, pet. ref'd) (determining an accomplice's "out-of-court statement" to another witness "may be used to corroborate the *other* accomplice witnesses' testimony…and the jury could have considered that evidence in making its determination of guilt") (emphasis added).

Removing Hogarth's testimony from consideration, the record contains Trevino's testimony regarding Appellant's involvement in the robbery *and* the following *non*-accomplice-testimony evidence that tends to corroborate Trevino's testimony and connect Appellant to the crime:

- surveillance footage placing Trevino's White Volvo in the vicinity of the tattoo shop around the time of the robbery[10],
- surveillance video depicting the individuals committing the robbery[11],
- Detective Mahoney's testimony that he believed Appellant walked with a similar gait and had a similar appearance to the individual who had been identified as Appellant on the surveillance video[12],

[10] (State's Exs. 90-98). Hogarth testified he saw Appellant and his co-defendants leave in a white Volvo (III R.R. at 46).
[11] (State's Ex. 42).
[12] (IV R.R. at 156-57, 170).

- Appellant was called by his nickname—"Pooh"—on the surveillance video,[13]

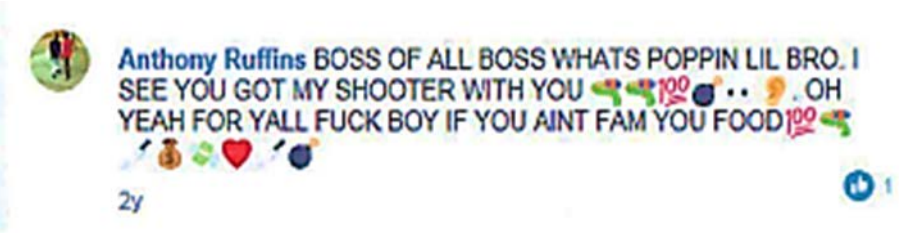
- Appellant is the *last* person to come down the stairs as the robbers exit the tattoo shop as one his co-defendants yells "Let's go Pooh",

- social media posts that showed Appellant wearing a fairly distinctive hat similar to the hat Appellant was wearing in the surveillance video[14],

- social media evidence and testimony that Appellant and the other perpetrators of the robbery were closely associated with one another,[15]

- evidence that Appellant, Robert Ruffins, and Olanda Taylor were related to one another[16],

- this social media post in which Appellant called co-defendant McMichael his "shooter," included several emoticons of guns, knives, and money, and stated "if you aint fam" you are their prey:[17]



[13] (State's Ex. 42 at 11:59:29 PM).
[14] (State's Exs. 71, 78).
[15] (State's Exs. 75-89).
[16] (IV R.R. at 132).
[17] (State's Ex. 84). The majority hypothesized the interaction occurred "months before the charged offense" but there is no evidence in the record conclusively establishing *when* the interaction occurred. The original Facebook post was posted February 21, 2016. At some point thereafter, Appellant posted his comments on the original post (State's Ex. 84).

- approximately 37 minutes after the robbers had *entered* the tattoo shop, the victims' cell phones pinged at the Palms Apartments in San Antonio where Appellant was reportedly living *and* where Detective Mahoney subsequently observed Appellant on May 23, 2016,[18]

- the day after the robbery, a safe consistent with the safe stolen from Timeless Ink was located in a dumpster at the apartment complex where Appellant was living[19],

- the day after the robbery, the victims' cell phones were recovered from civilians living at the same apartment complex where Appellant was living[20],

- the victims' cell phones had been given to the civilians by Taylor—Appellant's co-defendant,

- when detectives arrived at The Palms apartments in San Antonio and observed Appellant with Hogarth, Appellant "quickly" departed through the breezeway,[21]

- Appellant was the "last one to be found" and was apprehended in Houston, though he previously resided in San Antonio[22],

- when shown the video footage of this particularly brutal robbery, Appellant showed no reaction,[23]

- during Appellant's interview Appellant stated "if you say I did it, I did it. If you say it's me, it's me[24],"

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[18] (III R.R. at 174-76; IV R.R. at 23; State's Ex. 65).
[19] (III R.R. at 181, State's Exs. 68-70).
[20] (III R.R. at 177-80).
[21] *See Cawley v. State*, 310 S.W.2d 340, 342 (1957)("flight has long been deemed indicative of a consciousness of guilt").
[22] (IV R.R. at 57); *see Cawley*, 310 S.W.2d at 342.
[23] (*id*. at 58-59).
[24] (IV R.R. at 59-60).

- Appellant refused to provide contact or follow up information regarding his alleged 'alibi witness' for his whereabouts during the brutal robbery,[25]

- Mahoney's testimony that Hogarth said Appellant threatened Hogarth to keep him from cooperating with the investigation,

- Mahoney's testimony that Hogarth had identified Appellant and Appellant's co-defendants as the robbers,

- Mahoney's testimony that Appellant's close associate Taylor had confessed to the robbery,

- Mahoney's testimony that Taylor provided "lots of information" that assisted in the investigation, including identifying information for his co-defendants,[26] and

- Mahoney obtained an arrest warrant for Appellant the day after he interviewed Taylor.[27]

It is well-settled that an appellate court cannot substitute its judgment for that of the jury, should not "usurp the role of the factfinder," and is "ill-equipped to weigh the evidence." *Cf. Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Brooks v. State*, 323 S.W.3d 893, 922 (Tex. Crim. App. 2010); *Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011) ("[I]t is not appropriate for appellate courts to independently construe the non-accomplice evidence.").

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[25] (*id*. at 61). Indeed, Appellant's witness's implausible 'alibi' testimony – which the jury plainly found not credible – could itself be additional corroboration (IV R.R. at 217-18) (alibi witness acknowledges Appellant "asked [her] to come to court and testify for him to be his alibi"). *See Brooks v. State*, No. 08-17-00026-CR, 2018 Tex. App. LEXIS 2913, at *19 n.5 (Tex. App.—El Paso Apr. 25, 2018, pet. ref'd) (not designated for publication) ("Attempts to set up false alibi are evidence of guilt").
[26] (IV R.R. at 33).
[27] (*Id*. at 34).

The majority reached its conclusion that Appellant suffered egregious harm by "placing itself too far in the role of the factfinder." *Ruffins*, 613 S.W.3d at 208 (Goodwin, J., dissenting). While a harm analysis "involves evaluating the strength and weaknesses of the evidence…at some point an appellate court crosses the line when it substitutes ***its own credibility assessments and fact determinations for those of the jury***." *Id*. at 209 (emphasis added).

Though the majority apparently acknowledged the existence of some of the non-accomplice corroborative evidence in the record, it then assumed the role of fact-finder and explained it away in piecemeal fashion:

- ***Even though*** *Officer Mahoney testified that there was a picture on Facebook of Ruffins wearing a white hat that is similar to the one seen in the surveillance footage*, Officer Mahoney also stated that there were photos Officer Mahoney also stated that there were photos showing codefendants Robert and Taylor both wearing a similar white hat and that Robert's mother stated that the man wearing the hat in a photo from the surveillance footage was Robert and not Ruffins;

- …***even though*** *Officer Mahoney's investigation of the Facebook pages pertaining to the individuals charged in this offense showed an interaction between Ruffins and codefendant McMichael*, that interaction occurred months before the charged offense;

- …***although*** *Officer Mahoney testified that he saw Ruffins interacting with Hogarth at the Palms Apartments*, that interaction was not "at or near the time or place of" the offense;

- …***even though*** *Officer Mahoney testified that Ruffins did not react when he saw the surveillance footage and made strange statements during his questioning by the police*, Officer

Mahoney also explained that Ruffins denied any involvement in the crime;

- …***although*** *Officer Mahoney testified that the police found a weapon and gloves in Ruffins's father's home*, no evidence was introduced regarding whether the gun or gloves were used in the offense;

- …***even though*** *Officer Mahoney testified that someone can be heard saying "let's go, Poohbear" on the surveillance footage*, the audio portion for that part of the footage is not entirely clear as the State partially conceded[28] in its closing arguments.

Ruffins, 613 S.W.3d at 203 (emphasis added).

These piecemeal observations completely disregard the importance of each piece of non-accomplice-testimony evidence and fail to consider their effect in *totality*. Perhaps most disturbingly, all of these characterizations involve the majority usurping the role of the factfinder. This Court has explicitly rejected such an approach in assessing the sufficiency of corroborating evidence. *See Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011) ("The court of appeals improperly supplanted the jury's verdict with its own view of the evidence, offering alternative, seemingly innocent explanations in certain instances, in direct opposition to the jury's implicit determination in this case.").[29]

[28] While the State 'partially conceded' that one of the two statements—"'Poohbear' might be harder to hear"—it maintained that the second statement, "Let's go, Pooh", *was* on the video (V R.R. at 93).

[29] *See also cf. Wiede v. State*, 214 S.W.3d 17, 25 (Tex. Crim. App. 2007) ("When determining probable cause…a 'divide-and-conquer' or piecemeal approach is prohibited.").

The majority did not end its analysis there. Instead, it tried to emphasize all the 'evidence' that was *not* present in the record. [30] Moreover, the *Ruffins* majority improperly "afford[ed] credibility to [Appellant's] alibi witness and [his] self-serving denials," though the jury obviously rejected both. *See Ruffins*, 613 S.W.3d at 209 (Goodwin, J., dissenting). Furthermore, after Appellant asked his alleged alibi witness to testify for him in court, *the jury's plain rejection of her testimony as 'not credible' is evidence of Appellant's guilt in addition to* the other non-accomplice-testimony evidence in the record. *See Longoria v. State*, 154 S.W.3d 747, 757 (Tex. App.--Houston [14th Dist.] 2004, pet. ref'd) (attempt to procure false alibi is some evidence of guilt); *see also cf. United States v. Zafiro*, 945 F.2d 881, 888 (7th Cir. 1991) (noting that if the defendant testifies "and denies the charges and the jury thinks he's a liar, this becomes evidence of guilt to add to the other evidence"), *aff'd on other ground*, 506 U.S. 534 (1993); *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952).[31]

In subsequently concluding "the evidence of [Appellant's] guilt *other than* the testimony from Trevino *and* Hogarth was less than overwhelming" (*Ruffins*, 613

[30] This approach consistently been disavowed in other contexts. *See cf. Moore v. State*, 520 S.W.3d 906, 912 (Tex. Crim. App. 2017) ("We think that the court of appeals in this case focused too acutely on what was *not* in evidence and not enough on the reasonable inferences a fact-finder could have drawn from what was.")(emphasis in original).

[31] The approach in *Zafiro* and *Dyer* was cited favorably in *Hacker v. State*, 389 S.W.3d 860, 872 (Tex. Crim. App. 2013)*; see also Alcala v. State*, 476 S.W.3d 1, 21 (Tex. App.—Corpus Christi 2013, pet. ref'd).

S.W.3d at 202 (emphasis added)), the majority also failed to recognize that the "tends-to-connect standard…does not present a high threshold." *Ruffins*, 613 S.W.3d at 209 (Goodwin, J., dissenting). Corroborating evidence "must simply link the accused in some way to the commission of the crime." *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008). The majority "substitute[ed] its own fact findings to lower the standard for egregious harm and raise the standard for corroboration." *Ruffins*, 613 S.W.32d at 209 (Goodwin, J., dissenting).

The fact that there may be "evidence in the record that also tends to refute" the corroborative evidence "does not translate into a conclusion that there was no evidence that a rational trier of fact could conclude [the evidence] tended to connect [an] appellant to the offense for purposes of Article 38.14's corroboration requirement." *Casanova v. State*, 383 S.W.3d 530, 539 (Tex. Crim. App. 2012); *see also cf. Smith*, 332 S.W.3d at 447 ("Though each of the facts discussed above, considered individually, would not satisfy Article 38.14, *the cumulative force* of the non-accomplice evidence, *giving proper deference to the jury's resolution of the facts*, tends to connect [the appellant] to the murders.") (emphasis added).

Corroborating evidence has been characterized as "exceedingly weak" when it is "inherently unreliable," "unbelievable," or "dependent upon inferences from evidentiary fact to ultimate fact that a jury might readily reject." *Casanova*, 383 S.W.3d at 539. The non-accomplice-testimony corroborative evidence—including

the evidence even the majority acknowledges—does not fall into any of those categories. The cumulative force of the non-accomplice-testimony evidence had a very strong tendency to connect Appellant to the crime.

The corroborative evidence in this case is such that it is "implausible that a jury would fail to find that it tends to connect [Appellant] to the commission of the charged offense, [and] a reviewing court may safely conclude that the only resultant harm wa[s] purely theoretical...since the jury would almost certainly have found that the accomplice witness's testimony was corroborated had it properly been instructed that it must do so in order to convict." *See Casanova*, 383 S.W.3d at 539-40.

This case is quite unlike *Saunders*, where the only non-accomplice evidence included a financial motive and a few potentially suspicious facts, the inculpatory inferences were "tenuous," and the defense presented "plausible defensive evidence that cast *all* of the State's corroborating evidence in a light that *convincingly undermined every inculpatory inference*." *Id*. at 540 (emphasis added).

Instead, like *Casanova*, "the inferences to be drawn from the State's corroborating evidence *more than sufficiently tend to connect* [Appellant] to [the offense], and in order for the jury to have discounted that tendency, it would have had to accept [Appellant's] *less-than-creditable* explanations." *Id*. (emphasis added). The non-accomplice evidence is not so unconvincing as to render the State's case for conviction significantly less persuasive nor is it dependent on tenuous

inferences from evidentiary facts. The likelihood that the jury would have accepted Appellant's self-serving denials and alibi witness—whom Appellant apparently refused to name for two years while sitting in jail, and who miraculously materialized for the first time at trial—"is too remote to justify a conclusion that the corroborating evidence presented by the State was 'so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive.'" *Id*. Indeed, the jury heard Appellant's alibi witness testify in this case—and based on her demeanor, etc., necessarily found her 'not credible' in convicting Appellant. The *Ruffins* majority should not have substituted its judgment—particularly on a cold record—for the jury's.

Even applying the analyisis used in cases where an instruction is *completely omitted*, appellate courts do not recharacterize, reframe, or reweigh the non-accomplice-testimony evidence. Reviewing courts should not create a wishlist of what 'should have been' or credit witness testimony that was obviously rejected. Instead, they review the record for the corroborative evidence—both direct and circumstantial—and determine whether it was reliable or believable and how compellingly it tends to connect the accused to the charged offense. *Casanova*, 383 S.W.3d at 539. The non-accomplice-testimony evidence in this case was reliable, believable, and conclusively connects Appellant to the charged offense. Appellant

cannot be said to have suffered egregious harm from any alleged error in the instruction regarding Hogarth's testimony.

Moreover, egregious harm requires *actual*—not theoretical—harm. The majority speculated that "the jury *could* have had a reasonable doubt regarding whether Hogarth was an accomplice." *Ruffins*, 613 S.W.3d at 201 (emphasis added). Speculation, however, "only leads to theoretical harm, rather than actual harm." *Gardner v.* State, No. 13-07-446-CR, 2008 Tex. App. LEXIS 7326, at *42 (Tex. App.—Corpus Christi 2008, no pet.) (not designated for publication) (citing to *Almanza v. State*, 686 S.W. 2d 157, 174 (Tex. Crim. App. 1985)).[32]

Because the majority improperly engaged in its own fact-finding, failed to consider the combined and cumulative force of Trevino's testimony *and* the non-accomplice-testimony evidence, and came to the incorrect conclusion that Appellant was 'actually, egregiously harmed,' the opinion must be reversed.

[32] *See also Ruffins*, 613 S.W.3d at 209-10 (Goodwin, J., dissenting) ("The majority's conclusion that 'the jury *could* have had a reasonable doubt regarding whether Hogarth was an accomplice' because of the alleged error in the accomplice-witness instruction is, in my view, merely theoretical harm.").

2. Where Appellant *Specifically Requested* an Instruction That the Jury Determine Whether Hogarth Was an Accomplice Beyond a Reasonable Doubt, Was Pointed to the Now Complained-of Instruction in the Charge, and Said "I'm Good," Appellant Invited the Error and Is Precluded by General Principles of Estoppel From Complaining About the Instruction on Appeal.

"If a party affirmatively seeks action by the trial court, that party cannot later contend that the action was error." *Prystash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999). This Court has observed the rationale for this rule:

> Where a party by a request for a ruling leads the court into error, he should be precluded from claiming a reversal of the judgment by reason of the error so committed. To hold otherwise would be to permit him to take advantage of his own wrong.

Id. "Just as the law of entrapment estops the State from making an offense of conduct that it induced, the law of invited error estops a party from making an appellate error of an action it induced." *Id.* "The rule of invited error in jury charges is one of long standing …. [and courts] will not permit [an] appellant to complain of the trial court's" submitting or deleting a jury charge that he requested. *Id*. at 531-32; *Woodall v. State*, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011) (doctrine applies to even 'fundamental' error); *Ex parte Pete*, 517 S.W.3d 825, 832-33 (Tex. Crim. App. 2017); *Padon v. State*, No. 03-17-00695-CR, 2019 Tex. App. LEXIS 8455, at *23 (Tex. App.—Austin Sep. 20, 2019, no pet h.) (not designated for publication) ("…[the] appellant affirmatively agreed, repeatedly, to the trial court removing the instruction…the doctrine of invited error precludes [the] appellant from seeking

appellate relief based on alleged error that she induced by affirmatively agreeing to the trial court's action."); George E. Dix and Robert O. Dawson, 43 *Texas Practice—Criminal Practice and Procedure* § 42.141 (Supp.1999).

Additionally, "[e]stoppel is a flexible doctrine that takes many forms" and invited error is merely *one* form of estoppel. *Deen v. State*, 509 S.W.3d 345, 348 (Tex. Crim. App. 2017); *Prystash*, 3 S.W.3d at 531. Under the more general principle of estoppel, "a party may be estopped from asserting a claim that is inconsistent with that party's prior conduct." *Arroyo v. State*, 117 S.W.3d 795, 798 (Tex. Crim. App. 2003); *see also Druery v. State*, 225 S.W.3d 491, 505-06 (Tex. Crim. App. 2007) (defendant—after saying he did not want a charge on a lesser-included offense—was estopped by the equitable doctrine of invited error from complaining of an action he induced).

In the middle of the jury charge conference, Appellant interrupted and specifically requested an instruction that the jury "ha[s] to agree beyond a reasonable doubt that [Hogarth] is an accomplice" (V R.R. 22). The majority charactized Appellant's request and subsequent statement "I'm good" as merely withdrawing Appellant's objection to the charge. *Ruffins*, 613 S.W.3d at 198. In context, however, it is apparent Appellant specifically requested the instruction he now complains of on appeal:

Trial Counsel: …there is nothing in the charge that gives them an

instruction with respect to how they determine someone is an accomplice, ***and it has to be done with if you have a reasonable doubt or not, in that respect***.

[….]

Trial Counsel: ***But I don't think there's been an instruction that they need to believe – when they consider accomplice, they have to agree beyond a reasonable doubt that he is an accomplice. I don't think that's in here.***

Trial Court: I thought it was.

Trial Counsel: Unless I'm wrong. I mean, I – let me see here. I don't – I don't see it.

State: "***If you find beyond a reasonable doubt that David Hogarth is an accomplice*** to the crime of aggravated robbery, you must consider whether there is evidence corroborating the testimony of David Hogarth. The Defendant, Anthony Ruffins, cannot be convicted on the testimony of David Hogarth, unless that testimony is corroborated."

Trial Counsel: ***I'm good***.

Trial Court: Okay.

State: And, Judge, for the record, that was on page 8.

(V R.R. at 21-22)(emphasis added).

Read in context, Appellant's request and affirmance that he was "good" with the instruction demonstrates "not only an acceptance of the instruction but an affirmation that the allegedly erroneous instruction sufficed to address his requested

instruction." *Id*. at 209 (Goodwin, J., dissenting). Indeed, the "trial court stopped addressing that particular instruction—and left it in the form [Appellant] now complains about—[] because [Appellant] indicated to the court that he was 'good.'" *Id*. at 206 (Goodwin, J., dissenting). Appellant invited—or at least joined in inviting—this alleged error.

At a minimum, however, Appellant is barred from asserting this error by the more flexible doctrine of estoppel because "knowing full well the exact content of the reasonable-doubt instruction in the court's jury charge (because it had just been read verbatim in open court), [Appellant] accepted the allegedly erroneous instruction." *Id*. at 205 (Goodwin, J., dissenting).

"An inspection of the charge given and that requested by [A]ppellant shows they are almost identical, at least they are practically the same in verbiage." *Carbough v. State*, 93 S.W. 738, 738 (1906). "It is a general rule that when counsel has requested the court to charge a given proposition of law and it is given, if the charge requested and given is erroneous, such error cannot be taken advantage of by the party whose counsel made the request." *Id*. at 739. This rule is a "deduction from the doctrine of estoppel." *Id*. "Where a party by a request for a ruling leads the court into error, he should be precluded from claiming a reversal of the judgment by reason of the error so committed." *Id*. "To hold otherwise would be to permit him to take

advantage of his own wrong." *Id*. "Where the court, upon the trial is requested to affirm a proposition of law in the charge, and it is so affirmed the rule applies." *Id*.

Appellant "made a request for a particular reasonable-doubt instruction but accepted an alternate instruction that differed from what he requested." *Id*. at 205 (Goodwin, J., dissenting). Appellant "did not remain silent on the issue," "simply fail to object," "assert 'no objection' to the charge," or "merely 'withdraw his objection.'" *Id*. at 207 (Goodwin, J., dissenting). Instead, Appellant requested the specific instruction he now complains of, "affirmatively communicated…that the instruction [as given] sufficed and, in doing so, overtly abandoned his requested instruction—that is, he accepted the allegedly erroneous instruction *in lieu of* his requested instruction." *Id*. (Goodwin, J., dissenting)(emphasis added). Appellant is barred by the more flexible doctrine of estoppel from asserting this claim on appeal. *See Woodard v. State*, 322 S.W.3d 648, 659 (Tex. Crim. App. 2010) (Defendant could not be heard to complain about charge error for which he "at the very least" bore "some responsibility.").

Because Appellant invited this error, or at least accepted the instruction *in lieu of* his requested instruction, he is barred from complaining about the instruction on appeal. The majority erred to find otherwise.

3. Appellant Was Not Entitled to an Accomplice-in-Fact Instruction Regarding Hogarth's Testimony in the First Place.

If the evidence demonstrates a witness is answerable to the law as a principal or an accomplice or has been indicted as such, then he is an accomplice as a matter of law. *Silba v. State*, 275 S.W.2d 108, 109 (Tex. Crim. App. 1954). "If there is a conflict in the evidence, *then* the question is submitted to the jury." *Id*. (emphasis added). *But if there is not enough evidence* to support a charge against the witness as either a principal, an accomplice, or an accessory, then he is *not* an accomplice witness…" *Id*. (emphasis added).

The majority believed there was "conflicting" evidence whether Hogarth was an accomplice. *Ruffins*, 613 S.W.3d at 200. However, an objective review of the entire record—particularly in light of established case law the majority failed to recognize—demonstrates the evidence is wholly insufficient to suggest Hogarth should be 'answerable' to the law for a role in the Aggravated Robbery or any lesser-included offense thereof.

Generally speaking, the evidence the majority identified in support of their conclusion is evidence that Hogarth was present for the planning of the robbery, (according to Trevino) Hogarth seemed disappointed he was not taken along, and Hogarth was initially uncooperative with law enforcement in the investigation. The majority opinion also isolated two statements from Hogarth as support for its notion that Hogarth 'admitted' he was involved in the planning of the robbery, but ignored

the context of his statements and the rest of Hogarth's answers in that very same line of questioning.[33] *But see cf. Godsey v. State*, 719 S.W.2d 578, 584 (Tex. Crim. App. 1986) (in determining the applicability of a defensive instruction, one statement "cannot be plucked out of the record and examined in a vacuum"); *Romero v. State*, No. 08-05-00005-CR, 2006 Tex. App. LEXIS 7552, at *15-17 (Tex. App.—El Paso 2006, no pet.) (not designated for publication) (citing *Godsey* for this proposition and determining the appellant was not entitled to an accomplice-in-fact instruction).

Cases involving accomplice witnesses necessarily involve case-specific fact analyses. That being said, in a review of cases in which witnesses had *significantly* more ties to the planning, execution of, or aftermath of a crime, this Court has repeatedly deemed the evidence *insufficient* to warrant an accomplice instruction. A comparison of some of those cases to the facts of the instant case reveals Appellant was never entitled to an instruction on Hogarth's status as an accomplice witness in

[33] *Ruffins* also relied on evidence that this Court and other appellate courts have determined does *not* constitute evidence of an 'affirmative act to assist in the commission of the offense.' *See, e.g.*, *Villarreal v. State*, 576 S.W.2d 51, 56 (Tex. Crim. App. 1978) ("A witness is not deemed an accomplice witness because he knew of the crime but failed to disclose it or even concealed it."); *Delacerda v. State*, 425 S.W.3d 367, 395-96 (Tex. App.—Houston [1st Dist.], pet. ref'd) (even if two witnesses either initially lied or told someone to lie to law enforcement, these "were not affirmative acts assisting in the commission of the [offense]," and accomplice-in-fact instruction was correctly denied); *Juarez v. State*, 2005 Tex. App. LEXIS 8436, at *7-8 (Tex. App.—Austin 2005, no pet.) (not designated for publication) (where witness *believed he was a co-defendant* but investigation ultimately ruled him out, no error in omitting accomplice as a matter-of-fact instruction); *Creel v. State*, 754 S.W.2d 205, 213 (Tex. Crim. App. 1988) ("…a witness'[s] complicity with the accused in the commission of another offense does not make [his] testimony that of an accomplice for which the accused is on trial."); *see also* Brief for the State at 9-19.

the first place. As such, any instruction requiring corroboration of Hogarth's testimony actually benefitted Appellant.

Ferguson v. State

In *Ferguson v. State*, this Court rejected a defendant's contention that the trial court erred by refusing to instruct the jury on the question of whether two witnesses (Robbins and Ferguson—the defendant's brother) were accomplice witnesses. *Ferguson v. State*, 573 S.W.2d 516, 523-24 (Tex. Crim. App. 1978). The defendant had asked Robbins if Robbins was interested in "robbing some store," showed Robbins a pistol, discussed the robbery in the presence of Robbins, Ferguson and two co-defendants, and threatened Robbins and Ferguson if they called police. *Id*. at 519. When the perpetrators left to commit the offense, Robbins knew that they planned on committing a robbery. *Id*. When the perpetrators returned, Robbins saw blood on the defendant's hands and knife. *Id*. The defendant gave Robbins, Ferguson, and one other co-defendant $2 upon returning to Robbins' apartment. *Id*. Robbins assumed the money was taken during the robbery. *Id*. Robbins, Ferguson, and the other co-defendant who received $2 went to buy food with the money, ate the food, and went to sleep. *Id*.

Ferguson testified to the substantially the same facts as Robbins. *Id*. Ferguson also testified he loaned the knife that was used to kill the victim, and that he loaned out his jacket to one of the perpetrators that night. *Id*. at 519, 523. The Court

considered the defendant's characterization of Robbins' and Ferguson's testimony and observed that the record "[did] not bear out all of [the defendant's] assertions concerning the actions of Robbins and Ferguson." *Id*. at 523.

For example, while there was evidence Robbins siphoned gas into one of the co-defendant's cars, there was no evidence Robbins did so at the behest of the co-defendants. *Id*. While Ferguson loaned out his knife, he loaned it to one of the co-defendants to clean his fingernails and the co-defendant did not return the knife (later used in the murder). *Id*. While Ferguson lent one of the co-defendants his jacket, the Court could not say that by doing so he aided in the crime. The Court noted an accomplice is someone who "participate[s] with another before, during or after[34] the commission of a crime" and that "[a] witness is not deemed an accomplice witness because he knew of the crime but failed to disclose it or even concealed it." *Id*. at 523. The Court concluded the trial court did not err in refusing to submit the issue of whether Robbins and Ferguson were accomplices as an issue for the jury. *Id*. at 524.

[34] *But see Castillo v. State*, 517 S.W.3d 363, 375 (Tex. App.—Eastland 2017, pet. ref'd) (noting that following changes to the Penal Code, a "witness who assisted the defendant only after the defendant committed the crime with which he is charged cannot be an accomplice witness….").

Kunkle v. State

In *Kunkle v. State*, this Court addressed a defendant's complaint that the trial court erred by refusing to instruct the jury on accomplice witness testimony regarding a witness named Sauls. *Kunkle v. State*, 771 S.W.2d 435, 437 (Tex. Crim. App. 1986). The defendant argued there was a fact issue about whether Sauls was an accomplice because 1) Sauls knew of a prior robbery, 2) Sauls made no attempt to abandon the group when another robbery was planned, 3) Sauls looked for a victim, 4) Sauls allowed the victim in the instant case to be induced into entering the car, 5) Sauls was on the lookout for police and would have warned the others if he saw police, 6) Sauls knew one of the defendants had a loaded gun, and 7) Sauls knew the group was serious about committing the crime. *Id*. at 439-40.

The Court found there was no evidence Sauls "knew the group was serious," acted as a lookout, or assisted in finding a victim. *Id*. at 440. The Court noted that the remaining evidence "d[id] not raise a factual issue as to whether Sauls was an accomplice witness." *Id*. "In order to be an accomplice witness, there must be some evidence of an *affirmative act* on the witness' part to assist in commission of the offense." *Id*. (emphasis in original). The Court held that "[e]ven if Sauls knew about the prior robbery, failed to abandon the group, permitted [the victim] to be induced into entering the vehicle, and would have told the others (but did not) if he saw police, he would not be shown to have committed an *affirmative act* in order to assist

in the murder." *Id*. at 441 (emphasis in original). The Court found that "[i]n the absence of such an act, [Sauls] [could] not be an accomplice witness, even as a matter of fact." *Id*.

Paredes v. State

In *Paredes*, this Court addressed a defendant's claim that the trial court erred by denying his request for instructions that three individuals were accomplices as a matter of law or fact. *Paredes v. State*, 129 S.W.3d 530, 537 (Tex. Crim. App. 2004). Regarding one witness—Ayala—the Court noted that Ayala arrived after the murders occurred and "[a]lthough Ayala assisted after the fact in the disposal of the bodies" he was not an accomplice as a matter of law and the trial court had no duty to instruct the jury on whether Ayala was an accomplice "as a matter of fact…because there [wa]s no conflicting evidence or doubt on the question of his complicity in the murders." *Id*. at 537.

Regarding a second witness—Priscilla—the Court noted that while Priscilla "may have suspected that foul play would occur….there [wa]s no evidence that she assisted in the preparation for or planning of the murders." *Id*. at 538. Accordingly, the trial court did not need to instruct the jury on her status as an accomplice as a matter of law or fact. *Id*.

The third witness—Gonzalez—assisted by putting the bodies of the victims in a truck and "cleaning up the blood in the house." *Id*. Gonzalez also drove the

bodies "out into the country…and observed some of the others set fire to the bodies" after which they returned to town and Gonzalez "helped wash out the vehicles." *Id*. The Court determined Gonzalez was not an accomplice as a matter of law or fact, and there "[wa]s nothing to support a theory that the evidence was conflicting on Gonzalez's complicity in the murders" to entitle the defendant to an accomplice-in-fact instruction. *Id*.

Druery v. State

In *Druery v. State*, this Court addressed another such complaint regarding charge error and alleged accomplice witnesses. *Druery*, 225 S.W.3d at 497-98. The Court observed all of the claims of charge error rested upon the "threshold issue" of whether the witnesses at issue were accomplices. *Id*. at 497. If the witnesses—Pitts and Harris—"[were] not accomplices, then the trial judge's instructions regarding accomplice witnesses as a matter of fact was superfluous and did not harm [the defendant]." *Id*. at 497. "Indeed, such an instruction could only benefit him because it allowed the jury to require corroboration of the witnesses' testimony if it believed that the witnesses were accomplices to [the victim's] murder." *Id*. at 497-98.

In *Druery*, the defendant, his ex-girlfriend (Pitts), a friend (Harris), and the victim (Rome) went to a local club. *Id*. at 496. The group left the club together and headed to property owned by the defendant's family. *Id*. The group took turns

shooting Rome's gun at bottles in a stock pond. *Id*. The defendant called Pitts back to the car and told her that he was going to kill Rome because he wanted Rome's belongings. *Id*. Pitts thought he was joking but reminded the defendant that he had a child to consider. *Id*. After the defendant took his turn shooting the gun, he said the ammunition ran out and went back to the car. *Id*. Pitts saw the defendant getting bullets, wiping them clean, and loading the gun's magazine. *Id*.

The defendant called Harris back to the car and told Harris that he was going to shoot Rome. *Id*. Harris thought the defendant was just "tripping" on drugs. *Id*. The defendant ordered Pitts and Harris to sit in the car. *Id*. The defendant then walked up to Rome, held the gun about six inches from Rome's head, and fired. *Id*. The defendant fired an additional shot after Rome's body hit the ground. *Id*. Pitts and Harris cried and screamed. *Id*. They watched as the defendant knelt over Rome's body. *Id*. The defendant returned to the car with Rome's cell phone, money, marijuana, and gun. *Id*. The defendant gave Pitts and Harris forty dollars each. *Id*.

The defendant "obtained some gasoline (perhaps with Harris's assistance) and poured it on Rome's body." *Id*. The defendant set Rome's body on fire, then the defendant, Pitts, and Harris left "as the body burned." *Id*. The defendant told Pitts and Harris what to say if anyone asked about what happened to Rome. *Id*. at 497. Pitts returned to the pond the next day with the defendant and two other people. *Id*.

They burned Rome's body a second time and threw his body in the pond. *Id*. Harris later helped the defendant dispose of the murder weapon. *Id*.

The Court of Criminal Appeals rejected the defendant's contention that Pitts and Harris were accomplices and therefore rejected his claims of jury charge error. *Id*. at 498-99. The Court observed that:

> To be considered an accomplice witness, the witness's participation with the defendant must have involved ***some affirmative act that promotes the commission of the offense*** with which the defendant is charged.

Id. (emphasis added). The fact that a witness 1) knew of the offense and did not disclose it, 2) concealed the offense, 3) was merely present at the scene of the crime, or 4) was complicit in the commission of another offense apart from the charged offense *does not* make that witness's testimony that of an accomplice witness. *Id*. at 498. If the evidence is conflicting and it remains unclear whether the witness is an accomplice, the judge should allow the jury to decide. *Id*. "However, as with an accomplice as a matter of law, *there must still be some evidence of an affirmative act on the part of the witness to assist in the commission of the charged offense before such an instruction is required*." *Id*. (emphasis added).

The Court evaluated the defendant's claims 1) Pitts and Harris were present prior to and during the murder, 2) neither warned Rome that Druery said he intended to kill Rome, 3) both witnesses may have distracted Rome, 4) Harris assisted in

disposal of the body and gun, and 5) Pitts and Harris received 40 dollars after the murder. *Id*. at 500. The Court noted there was no evidence that Pitts or Harris distracted Rome to help facilitate the murder. *Id*. The Court went on and observed that the "mere presence" of Pitts and Harris at the scene did not render them accomplices. *Id*. Additionally, knowing of the plan to kill Rome and failing to disclose it did not render them accomplices. *Id*. Moreover, assisting in the disposal of the body and gun did not "transform" the witnesses into an accomplice witness in a prosecution for murder, "[t]he witness must still be susceptible to prosecution *for the murder itself* by having *affirmatively assisted* in committing the offense." *Id*. (emphasis added). The Court also observed that Pitts and Harris receiving money from the defendant after the murder "d[id] not transform either witness into an accomplice witness." *Id*. The Court noted it was reasonable to infer the money was given in an attempt to calm Pitts and Harris after the murder. *Id*. The Court concluded that "none of the evidence presented at trial indicate[d] that either Pitts or Harris was an accomplice as a matter of law or as a matter of fact." *Id*.[35]

[35] *See also Roys v. State*, 416 S.W.3d 229, 233-34 (Tex. App.—Amarillo 2013, pet. ref'd) (rejecting complaint that trial court failed to give accomplice witness instruction because disposing of murder weapons and car tires did not make them accomplices, nor was there evidence to "suggest they acted with the culpable mental state required for murder"); *Cocke v. State*, 201 S.W.3d 744, 748 (Tex. Crim. App. 2006) ("The trial court is not required to 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*.") (emphasis added).

The majority apparently either failed to consider or adequately address the foregoing binding precedent presented by the State.[36] The majority did try to 'distinguish' *Druery*, though it did so unconvincingly. *See Ruffins*, 613 S.W.3d at 202 n.2. The majority asserted *Druery* was distinguishable from the instant case because "the evidence [in *Druery*] showed ***among other things***…the witnesses 'mere presence, knowledge of planned offense, and failure to disclose it did not render them accomplice witnesses…" *Id*. (emphasis added). Importantly, the 'among other things' glossed over by the majority included evidence that one of the alleged accomplice witnesses in *Druery* assisted in disposing of the victim's body and assisted in disposing of the murder weapon. *Druery*, 225 S.W.3d at 500. The *Druery* Court determined *even those facts* did not entitle the defendant to an accomplice as a matter-of-fact instruction on the witnesses. *Id*.

The majority failed to acknowledge—let alone explain—how the presence of far more damning facts in binding cases like *Ferguson*, *Kunkle*, *Paredes*, and *Druery* were *insufficient* to entitle a defendant to an accomplice-in-fact instruction, while the meager facts in the instant case entitled Appellant to an instruction.

Because Appellant was not entitled to an accomplice-witness instruction regarding Hogarth's testimony in the first place, the alleged error in the jury charge could not have caused Appellant egregious harm. Instead, the instruction actually

[36] *See* Brief for the State on direct appeal at 12 n.5.

benefitted Appellant. *See Druery*, 225 S.W.3d at 497-98 (superfluous instruction could only benefit defendant). The majority erred in concluding otherwise.

4. In a Case Involving Alleged Accomplice Witnesses, the Defendant Bears the Burden to Prove a Witness's Status as an Accomplice as a Matter of Fact And Any Alleged Error In the Instruction Submitted Did Not Egregiously Harm Appellant.

The majority and Appellant believed the jury charge in the instant case was erroneous based on the premise that 1) there should have been an accomplice-in-fact instruction on this record, and 2) the standard of proof on the accomplice as a matter of fact issue had been "inverted." Neither the majority nor Appellant cited any authority directly addressing what the burden is or should be, or who bears the burden to prove—or disprove—whether a witness is an accomplice.

There is no authority from this Court or the Third Court that places the burden *on the State to disprove* a witness's status as an accomplice as a matter of fact beyond a reasonable doubt. Indeed, Article 38.14 makes no mention of any burden on any party but simply imposes the corroboration requirement *if* a witness is an accomplice. Tex. Code Crim. Proc. art. 38.14. Moreover, precedent from the Court of Criminal Appeals places the burden to develop or raise the accomplice issue *on the defendant*. In fact, several jurisdictions recognize the burden is on a defendant to prove the witness was an accomplice. Because *Ruffins* held otherwise, it must be overruled.

a) Neither article 38.14 of the Texas Code of Criminal Procedure nor the **Haney** *opinion—cited by the majority in* **Ruffins***—provide that the State must* **dis***prove a witness's status as an accomplice 'beyond a reasonable doubt.'*

In support of its rationale, the majority observed "[s]imilar 'reasonable doubt' language has been included in numerous jury charges reviewed by various appellate courts." *Ruffins*, 613 S.W.3d at 199. The authorities cited by the majority, however, do not actually address this "language" as a contested 'issue' in those cases, nor render any 'holding' on the matter.[37] Such recitations might be considered 'dictum'—though likely not even that, as the respective courts did not even express an opinion[38] on the propriety of such language, but merely recounted what factually took place. At best, these cases are merely examples of what has been done on occasion—at the trial court level—in the past. The majority opinion's failure to examine the rationale for such a practice or its appropriateness sets a dangerous

[37] The cases cited by the *Ruffins* majority involved complaints by the appellants that the trial courts erred by failing to instruct the jury that witnesses were accomplices as a matter of law. In these opinions, the intermediate courts of appeals quoted the jury instructions that *were* submitted. The instructions in those cases included language that asked the jury to determine whether a witness was an accomplice or if they had a reasonable doubt of the witness's status as an accomplice. Presumably because the phrasing of these instructions benefitted the appellants, none of those opinions addressed, let alone analyzed, a complaint about the burden of proof in the instruction. As such, these cases are inapposite. *Cyr v. State*, 308 S.W.3d 19, 24 (Tex. App.—San Antonio 2009, no pet.); *Elliot v. State*, 976 S.W.2d 355, 358 (Tex. App.—Austin 1998, pet. ref'd); *Estrada v. State*, No. 08-15-00271-CR, 2018 Tex. App. LEXIS 4885, at *4 (Tex. App.—El Paso 2018, pet. ref'd) (not designated for publication); *Losoya v. State*, No. 05-10-00396-Cr, 2012 Tex. App. LEXIS 5103, at *11-13 (Tex. App.—Dallas 2012, pet. ref'd) (not designated for publication).

[38] *See Oliva v. State*, 548 S.W.3d 518, 524, 524 n.34, n.35 (Tex. Crim. App. 2018); *see also Kastigar v. United States*, 406 U.S. 441, 454-55 (1972).

precedent. Indeed, "[t]he most damaging phrase in the [English] language is 'We've always done it this way.'"[39]

While each of the cases cited by the majority—factually—included an instruction that asked the jury to determine whether the accomplice witness was an accomplice, or the jury had a reasonable doubt thereof, *none of these cases analyzed whether such instruction was correct*, let alone *required*.

The majority also referenced the comment on Texas Criminal Pattern Jury Charges § CPJC 3.4 for the proposition that "if an instruction requiring proof beyond a reasonable doubt is included, it should state that corroboration *is required unless*, 'the [S]tate proves beyond a reasonable doubt that a witness is not an accomplice witness." *Ruffins*, 613 S.W.3d at 199. The majority mischaracterized the reach of the Pattern Jury Charge's comment. The comment actually states that it is "[e]xisting practice" to instruct jurors that corroboration is required "unless the state proves beyond a reasonable doubt that a witness is not an accomplice witness." Comm'n on Pattern Jury Charges, State Bar of Tex., *Texas Criminal Pattern Jury Charges: Special Instructions* CPJC 3.4 (2018).[40] 'Existing practice' and what is *correct* or

[39] Rear Admiral Grace Hopper.

[40] The cases cited in the comment are *Pace v. State*, 124 S.W. 949, 952-53 (Tex. Crim. App. 1910) and *Haney v. State*, 951 S.W.2d 551, 553 (Tex. App.—Waco 1997, no pet.). The State relies on its later arguments regarding the inapplicability of *Haney*. In *Pace*, again—the opinion merely quoted an instruction that contained the "beyond a reasonable doubt" language, but did not analyze, pass upon, or determine whether the burden on accomplice status was on the State or the defendant, nor did it address what the proper burden should be. *Pace*, 124 S.W. at 952-53.

required are two entirely different concepts. *See id*. at 208 (Goodwin, J., dissenting) ("…while such an instruction may have been given and upheld in some cases…that does not mean that the law requires that such an instruction be given.").

Article 38.14 "places no burden on either party to prove—beyond a reasonable doubt or otherwise—the accomplice status." *Id*. Indeed, the comment on the accomplice witness instruction in the Texas Criminal Pattern Jury Charge observes that "[t]here seems neither need nor justification for imposing a requirement of proof beyond a reasonable doubt." Comm'n on Pattern Jury Charges, State Bar of Tex., *Texas Criminal Pattern Jury Charges: Special Instructions* CPJC 3.4 (2018).

The authorities cited by the majority could just as easily support the proposition that trial courts have been submitting erroneous instructions increasing the State's burden, on which the State 1) did not object, or 2) the State's objection was overruled at trial, and the State had relatively little motive to attempt to argue the matter on appeal, since the defendant had been convicted anyway. This further illustrates the need for this Court to reiterate that an appropriate instruction places the burden of establishing whether a witness is an accomplice on the defendant.

The majority also claimed that *Haney* had "explained that a proper accomplice instruction should inform the jury that if 'they have a reasonable doubt regarding whether or not the witness acted as [an] accomplice, then corroboration is necessary.'" *Ruffins*, 613 S.W.3d at 199. The majority's reliance on *Haney* is

misplaced. *Haney* did not "explain" or espouse that a proper instruction "should" inform the jury that the burden of proof on the accomplice-as-a-matter-of-fact issue is beyond a reasonable doubt or that the burden rests on the State. Instead, *Haney* addressed the defendant's very specific claim and determined the instruction given did not *im*properly shift the burden of proof to the defendant. But the fact that the instruction was not improper, does not mean the instruction—which improperly placed the burden on the State—was appropriate or *required* under the law.

Haney involved an appellant's *complaint* that the "phrasing of the accomplice witness instruction…improperly place[d] the burden of proof on the defendant to show whether or not the witness was an accomplice." *Haney*, 951 S.W.2d at 553. The *Haney* court cited the trial court's instructions that the jury was to determine whether the witness "was an accomplice, or [if the jury had] a reasonable doubt whether he was or not." *Id*. The appellant complained that this instruction improperly shifted the burden to him. *Id*. The *Haney* court expressly observed that "Haney ha[d] cited no cases discussing his proposition that the 'or not' language shifts the burden of proof onto the defendant, and we have found none." *Id*. *Haney* observed that the State must prove all the **elements** of a criminal offense beyond a reasonable doubt. *Id*. at 553. *Haney* also noted that "the use of instructions on conclusive or rebuttable presumptions which lessen the State's burden of proof impermissibly shift the burden onto the defendant [violate] due process," because that was the nature of the

appellant's complaint on appeal. *Id*. *Haney* did *not* say, however, that 1) the status of a witness as an accomplice is an element of a criminal offense on which the State bore the burden of proof , or 2) the accomplice witness instruction *was* an instruction on a conclusive or rebuttable presumption which lessened the State's burden of proof.

Haney noted that the instruction actually placed the burden on the State, but expressed *no opinion* on whether that was actually *proper*. *Id*. Based on the instruction *given*, if the State failed to prove that the witness was not an accomplice, then corroboration was required. *Id*. *Haney* cited to *Boozer* for the proposition that "when the State fails to object to the court's giving an accomplice witness instruction it bears the burden of proof on *this issue*." *Id*. (emphasis added). The "burden of proof" that the State bore was *the burden to produce corroborating evidence* in order to meet its burden of proof beyond a reasonable doubt, not a burden on the witness's status as an accomplice. *See Boozer v. State*, 717 S.W.2d 608, 609 (Tex. Crim. App. 1984), overruled by *Malik v. State*, 953 S.W.234, 235 (Tex. Crim. App. 1997).

It appears much has been extrapolated from *Haney* that *Haney* did *not* decide. The most that can be gleaned from *Haney* is that the appellant's factual premise was incorrect. *Haney* addressed the appellant's very specific claim that the instruction 'shifted the burden' onto him and the appellate court determined the instruction *did not* do so. *Haney* does not stand for the further proposition that *if* the charge *had*

placed the burden on defendant, such would automatically have been improper. *Haney* never had to reach the latter issue, because the defendant's factual premise was incorrect. Accordingly, *Haney* does not mean the instruction in that case—which improperly placed the burden on the State—was appropriate, much less *required*.

b) Precedent and simple logic indicate the burden to show a witness is an accomplice as a matter of law or fact is on the defendant in a criminal case.

As noted *supra*, the fact that various trial courts have submitted the 'beyond-a-reasonable-doubt' language in prior cases does not mean such an instruction is required or proper. This begs the question: what is the burden and on whom does it lie?

Generally, "[i]t is incumbent upon the accused to develop such facts as would show that the [accomplice-witness] rule applies." *Lundy v. State*, 296 S.W.2d 775, 776 (Tex. Crim. App. 1956). "[A]s in any other criminal prosecution, the defendant must point to sufficient evidence in the record establishing that [a witness] was an accomplice in order to invoke the accomplice witness rule." *Phelps v. State*, 532 S.W.3d 437, 447 (Tex. App.—Texarkana 2017, pet. ref'd). It appears that it has long

been the rule that burden is upon the accused to demonstrate that a witness is an accomplice. [41]

A nationwide search reveals the majority of states allow a conviction on the uncorroborated testimony of an accomplice[42] or place the burden of proving a witness's status as an accomplice on the defendant in a criminal case.[43] While some states allow a conviction on the uncorroborated testimony of an accomplice, they often include an instruction that the accomplice testimony is to be viewed with caution. The witness's status as an accomplice goes to the weight of his or her testimony. Texas law provides a similar but more stringent protection, codifying that

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[41] *See also* 23A C.J.S., Criminal Procedure and Rights of Accused § 1414 (2020) ("The defendant bears the burden of proving that a witness is an accomplice whose testimony must be corroborated…[t]he party that raises the accomplice issue has the burden of proving the accomplice status…it must be established by a preponderance of the evidence…"); Wigmore on Evidence, § 2060(e) (4th Ed. 2007).

[42] Some—though not all of these states—still recognize that an accomplice's testimony should be viewed with greater caution. *See People v. Martinez*, 531 P.2d 964, 965 (Colo. 1975); *Brooks v. State*, 40 A.3d 346, 350 (Del. 2012); *State v. Carvelo*, 361 P.2d 45, 59 (Haw. 1961); *People v. Williams*, 588 N.E.2d 983, 1006 (Ill. 1991); *Drollinger v. State*, 408 N.E.2d 1228, 1242 (Ind. 1980); *State v. McLaughlin*, 485 P.2d 1360, 1363 (Kan. 1971); *Hodge v. State*, 17 S.W.3d 824, 841 (Ky. 2000); *State v. Hughes*, 943 So. 2d 1047, 1051 (La. 2006); *State v. Jewell*, 285 A.2d 847, 851 (Me. 1972); *State v. Jones*, 163, 216 A.3d 907, 919 (Md. 2019); *Commonwealth v. Dominico*, 306 N.E.2d 835, 854 (Mass. App. Ct. 1974); *People v. Heikkinen*, 646 N.W.2d 190, 193 (2002); *Catchings v. State*, 394 So. 2d 869, 870 (Miss. 1981); *State v. Deiter*, 446 S.W.2d 609, 612 (Mo. 1969); *State v. Loveless*, 451 N.W.2d 692, 694 (Neb. 1990); *State v. Rumney*, 258 A.2d 349, 350 (N.H. 1969); *In re Seaman*, 627 A.2d 106, 114 (N.J. 1993); *State v. Turnbow*, 354 P.2d 533, 538 (N.M. 1960); *State v. Kelly*, 6 S.E.2d 533, 544 (N.C. 1940); *State v. O'Dell*, 543 N.E.2d 1220, 1225 (Ohio 1989); *Commonwealth v. Pressel*, 184 A.2d 358, 360 (Pa. 1962); *State v. Riddell*, 96 A. 531, 534 (R.I. 1916); *State v. Rutledge*, 101 S.E.2d 289, 290 (S.C. 1957); *State v. Guzman*, 95 P.3d 302, 312 (Utah Ct. App. 2003, *aff'd*); *Johnson v. Commonwealth*, 298 S.E.2d 99, 101 (Va. 1982); *Ostrowski v. State*, 665 P.2d 471, 487 (Wyo. 1983).

[43] *See* FN 44, *infra*.

a conviction cannot be based on the uncorroborated testimony of an accomplice. That being said, article 38.14 makes no mention of who bears the burden of proof on the witness's status as an accomplice. And in several jurisdictions where accomplice-witness testimony requires corroboration, courts have explicitly placed the burden of proof on that issue on the defendant.[44]

The rationale for placing the burden on the defendant is "obvious," since it is the defendant who "receives the benefit of the statutory requirement that the state present [corroborating evidence]." *State v. Oatney*, 66 P.3d 475, 480 (Or. 2003). The burden to show that a witness was an accomplice rests on the defendant because the accomplice witness instruction is "in the nature of a defense." *People v. Rossi*, 183 N.E.2d 895, 897 (N.Y. 1962). "If the jury find[s] the witness to be an accomplice, they will apply the rule requiring corroboration; but if the jury fail to so find, his

[44] *See, e.g.*, *Ex parte Bates*, 461 So. 2d 5, 6 (**Ala**. 1984) (defendant's burden unless evidence shows 'accomplice' without dispute); *McIntosh v. State*, 552 S.W.2d 649, 651 (**Ark**. 1977) (defendant's burden since he is asserting 'accomplice')(quoting 23 C.J.S., Criminal Law § 796a (1961)); *People v. Tewkberry*, 544 P.2d 1335, 1346-47 (**Cal**. 1976) (defendant bears burden of producing evidence to raise 'accomplice'; in absence of such, not an accomplice); *Hargrove v. State*, 54 S.E. 164, 165 (**Ga**. 1906) (burden is on defendant or party invoking the rule); *State v. True*, 190 N.W.2d 405, 407 (**Iowa** 1971) (defendant's burden to show 'accomplice' by preponderance); *State v. Houston*, 206 N.W.2d 687, 689 (Iowa 1973) (placing burden on the State to prove 'not accomplice' beyond a reasonable doubt "improper"); Maryland recently abrogated the accomplice corroboration rule in *State v. Jones*, 216 A.3d 907, 918-20 (**Md**. 2019) but previously placed the burden on the defendant. *Bennett v. State*, 392 A.2d 76, 81 (**Md**. 1978); *People v. Sage*, 11 N.E.3d 177, 193 (**N.Y**. 2014) (defendant's burden); *Oatney*, 66 P.3d at 480 (**Or**. 2003) (defendant's burden); *Hicks v. State*, 149 S.W. 1055, 1056 (**Tenn**. 1912) (burden is on defendant or party invoking the rule); *State v. Bixby*, 177 P.2d 689, 702 (**Wash.** 1947) (defendant's burden).

evidence will be given the same weight as that of other witnesses." *Hicks*, 149 S.W. at 1056.[45]

The "degree of proof by which an accused must establish that a witness is an accomplice is the same as in other instances wherein he has the burden of establishing a collateral fact which conditions a challenge to the reliability of incriminating evidence…by proof by a preponderance of the evidence." *Tewkberry*, 544 P.2d at 1346. When a defendant succeeds in doing so, "there are *two* means by which the [State] may nevertheless vest the witness' testimony with reliability[:] …overcome the accused's proof that the witness is an accomplice, or produce corroboration." *Id*. at 1347 (emphasis in original). Corroborative evidence, however, need only "connect the accused with the commission of the crime…[and] may be slight and entitled to little consideration when standing alone." *Id*.; *see also Smith*, 332 S.W.3d 447 (though facts considered individually would not satisfy 38.14, "the cumulative force of the non-accomplice evidence…tends to connect [the appellant to the offenses]"); *Simmons v. State*, 282 S.W.3d 504, 509 n.6 (Tex. Crim. App. 2009) (non-accomplice evidence "cannot be considered in a vacuum. It must be considered in conjunction with the other corroborating evidence[.]").

[45] This distinguishes the accomplice witness rule from evidentiary rules that place a burden on the State before the evidence can be considered. *See e.g.*, Tex. Code Crim. Proc. arts. 38.22-38.23. In a case involving an accomplice witness—even if the witness is believed to be an accomplice—the witness's testimony may still be considered, the question is merely whether or not it requires corroboration.

The majority in this case has announced a new rule which imposes a burden on the State that 1) has no statutory authority, 2) is unsupported by the authorities the majority relies upon, and 3) appears to be logically inconsistent with the purpose and nature of the rule. Article 38.14 is intended to protect an accused from conviction based on the testimony of an accomplice *alone*. Article 38.14 remedied that concern by requiring corroboration of accomplice witness testimony.

If the instruction should have set out that it was Appellant's burden to show Hogarth was an accomplice by a preponderance of the evidence, then the jury charge contained an error. Even so, Appellant is not entitled to reversal for the reasons noted *supra*, *i.e.*, 1) Appellant *requested* the jury to be instructed that it had to believe Hogarth was an accomplice 'beyond a reasonable doubt' and subsequently stated "I'm good" when the charge was read to him in open court, 2) Appellant was never entitled to an instruction on Hogarth in the first place, 3) Hogarth's testimony was corroborated and, 4) even removing Hogarth's testimony from consideration, the proper harm analysis demonstrates Appellant did not suffer egregious harm because the record contained *another* accomplice witness's testimony (Trevino), a proper accomplice-witness instruction on Trevino's testimony, and substantial corroborative evidence tending to connect Appellant to the offense.

Accordingly, the majority erred in endorsing an instruction that would place the burden on the State to disprove Hogarth's status as an accomplice beyond a

reasonable doubt and a proper harm analysis reveals Appellant was not egregiously harmed by the instruction he requested.

PRAYER

Wherefore, premises considered, the State respectfully prays that this Honorable Court reverse the *Ruffins* majority's holding that there was error in the charge and that Appellant suffered egregious harm, and affirm Appellant's conviction. The State also prays for all other relief to which it may be entitled.

Respectfully submitted,

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Certificate of Compliance

I hereby certify, pursuant to Rule 9.4 of the Texas Rules of Appellate Procedure that the instant petition is computer-generated using Microsoft Word and said computer program has identified that there are 14,960 words within the portions of this petition required to be counted by the Texas Rules of Appellate Procedure.

The document was prepared in proportionally-spaced typeface using Times New Roman 14 for text and Times New Roman 12 for footnotes.

/s/ Jacqueline Hagan Doyer
Jacqueline Hagan Doyer

Certificate of Service

I, Jacqueline Hagan Doyer, attorney for the State of Texas, Appellee, hereby certify that a true and correct copy of this *State's Brief on Discretionary Review* and the attached appendix have been delivered to Appellant ANTHONY RUFFINS's attorney of record in this matter, along with the State Prosecuting Attorney's office:

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By electronically sending it through efile.txcourts.gov to the foregoing email addresses on this, the 16th day of March, 2021.

/s/ Jacqueline Hagan Doyer
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Appendix

A. *Opinion in Ruffins v. State*, 613 S.W.3d 192 (Tex. App.—Austin 2020, pet. granted).

A

Caution
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Ruffins v. State

Court of Appeals of Texas, Third District, Austin

August 14, 2020, Filed

NO. 03-18-00540-CR

Reporter
613 S.W.3d 192 *; 2020 Tex. App. LEXIS 6499 **; 2020 WL 4782668

Anthony Ruffins, Appellant v. The State of Texas, Appellee

Notice: PUBLISH

Subsequent History: Motion granted by Ruffins v. State, 2020 Tex. App. LEXIS 8060, 2020 WL 6018642 (Tex. App. Austin, Oct. 6, 2020)

Petition for discretionary review granted by In re Ruffins, 2021 Tex. Crim. App. LEXIS 50 (Tex. Crim. App., Jan. 13, 2021)

Prior History: [1]** FROM THE 207TH DISTRICT COURT OF COMAL COUNTY NO. CR2016-614, THE HONORABLE DWIGHT E. PESCHEL, JUDGE PRESIDING.

McMichael v. State, 2019 Tex. App. LEXIS 7862, 2019 WL 4068562 (Tex. App. Austin, Aug. 29, 2019)

Disposition: Reversed and Remanded.

Core Terms

accomplice, accomplice-witness, corroborated, accomplice's testimony, jury charge, shop, beyond a reasonable doubt, convict, robbery, codefendant, tattoo, trial court, instructions, jury-charge, reasonable doubt, Appeals, connect, footage, reasonable-doubt, tending, wearing, surveillance, omission, accomplice witness, instruct a jury, white hat, non-accomplice, pet, commission of the offense, witness testimony

Case Summary

Overview
HOLDINGS: [1]-Defendant's conviction for aggravated robbery under Tex. Penal Code Ann. §§ 29.02 and 29.03 was improper because the jury charge was erroneous since it only required corroboration if it was shown beyond a reasonable doubt that a codefendant was an accomplice. This language of that instruction was not only inconsistent with case law and the Pattern Jury Charge, it was also inconsistent with the nature and treatment of accomplice testimony. The error was not harmless, in part because none of the victims could identify defendant as one of their attackers and all of the men committing the robbery were wearing masks.

Outcome
Judgment reversed and remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Jury Instructions

HN1[] **Preservation for Review, Failure to Object**

Stating that party has no objection to a jury charge is equivalent to a failure to object and does not prevent appellate review of jury-charge issue.

Criminal Law & Procedure > Appeals > Reversible Error > Jury Instructions

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Jury Instructions

HN2[] **Reversible Error, Jury Instructions**

When addressing an issue regarding an alleged jury-charge error, appellate courts must first decide whether there is error before addressing whether the alleged error resulted in any harm. The amount of harm needed for a reversal depends on whether a complaint regarding that error was preserved in the trial court. If no objection was made, which is essentially what occurred here, a reversal is warranted only if the error resulted in egregious harm. The purpose of the egregious-harm inquiry is to ascertain whether the defendant has incurred actual, not just theoretical, harm. The analysis depends on the unique circumstances of each case and is factual in nature.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Accomplice Testimony

Criminal Law & Procedure > Trials > Witnesses > Presentation

HN3[] **Particular Instructions, Accomplice Testimony**

Regarding whether there was error in the charge, the accomplice-witness rule in Tex. Code Crim. Proc. Ann. art. 38.14 is essentially a legislative judgment that a reasonable doubt exists if the only evidence the State presents in satisfaction of its burden of proof is the testimony of an uncorroborated accomplice witness because an uncorroborated accomplice witness cannot by itself persuade to a level of confidence beyond a reasonable doubt. Article 38.14 reflects a legislative determination that accomplice testimony implicating another person should be viewed with a measure of caution, because accomplices often have incentives to lie, such as to avoid punishment or shift blame to another person and that an accomplice's motives in testifying against the accused may well include malice or an attempt to curry favor from the state in the form of a lesser punishment, or perhaps, no punishment. Accomplice-witness testimony as has been described as inherently untrustworthy; that testimony should be viewed with caution.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Accomplice Testimony

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Reasonable Doubt

Criminal Law & Procedure > Trials > Witnesses > Presentation

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN4[] **Particular Instructions, Accomplice Testimony**

Although the Texas Criminal Pattern Jury Charge states that it may not be necessary to include reasonable doubt language in an accomplice-witness instruction regarding whether a witness is an accomplice witness, it has also explained that if an instruction requiring proof beyond a reasonable doubt is included, it should state that corroboration is required unless the State proves beyond a reasonable doubt that a witness is not an accomplice witness.

Criminal Law & Procedure > Appeals > Reversible Error > Jury Instructions

Evidence > Burdens of Proof > Allocation

HN5[] **Reversible Error, Jury Instructions**

Neither side has the burden of establishing either the presence or a lack of harm with regard to a jury charge error. Instead, the reviewing court makes its own assessment when evaluating what effect an error had on the verdict by looking at the record before it. In assessing harm, reviewing courts consider: (1) the jury charge as a whole, (2) the arguments of counsel, (3) the entirety of the evidence, and (4) other relevant factors present in the record.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > Criminal Offenses > Lesser Included Offenses > Miscellaneous Crimes

Criminal Law & Procedure > Trials > Witnesses > Presentation

HN6[] **Accessories, Aiding & Abetting**

An accomplice is someone who could be charged for offense in question or lesser-included offense and further clarifying for direct party liability that witness is accomplice if he participates with a defendant before, during, or after the commission of the crime, acts with the requisite culpable mental state, and performs an affirmative act that promotes the commission of the offense with which the defendant is charged. If there is conflicting or inconclusive evidence that a witness was complicit in the crime, then the witness is an accomplice as a matter of fact.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Accomplice Testimony

HN7[] **Particular Instructions, Accomplice Testimony**

Omission of accomplice witness instruction can result in egregious harm if corroborating evidence is unconvincing and renders State's case for conviction significantly less persuasive.

Counsel: For State: Mr. Sammy McCrary, Comal County Criminal District Attorney's Office, Mr. Joshua D. Presley, Assistant District Attorney, Mr. Clayten H. Hearrell, Assistant Criminal District Attorney Comal County, Texas, New Braunfels, TX.

For Appellant: Ms. Karen E. Oprea, The Law Office of Oprea & Weber, Austin, TX.

Judges: Before Justices Goodwin, Baker, and Kelly. Dissenting Opinion by Justice Goodwin. Concurring Opinion by Justice Baker.

Opinion by: Chari L. Kelly

Opinion

[*194] Anthony Ruffins was charged with the offense of aggravated robbery. *See* Tex. Penal Code §§ 29.02, .03. The indictment contained enhancement paragraphs alleging that Ruffins had four prior felony convictions. *See id.* § 12.42. At the end of the guilt-innocence phase, the jury found Ruffins guilty of the charged offense. Ruffins elected to have the trial court assess his punishment, and the trial court found the enhancement allegations to be true and sentenced him to life imprisonment. *See id.* In eleven issues on appeal, Ruffins asserts that the trial court erred by including multiple errors in the jury charge, failing to grant his motion for new trial, making a deadly weapon finding in its judgment, and imposing more court costs than were authorized. We will reverse the trial court's judgment of conviction and remand for further proceedings.

BACKGROUND

Ruffins was charged with committing aggravated robbery at a tattoo shop in New Braunfels, Texas. The indictment **[**2]** alleged that the following individuals also were involved: codefendant Olanda Taylor, codefendant Robert Ruffins,[1] and codefendant Kenneth

[1] Because Robert Ruffins and Anthony Ruffins share the same

McMichael. The alleged victim in this case was Sarah Zamora, who worked at the shop with her husband. At the time of the offense, a customer, Tony Hernandez, was in the shop. During the guilt-innocence phase, Zamora and Hernandez both testified. In addition, two law-enforcement officers—Officers Richard Groff and John Mahoney—testified regarding their investigation in this case. Further, codefendant Gustavo Trevino provided testimony regarding the offense, including his role in facilitating the robbery, and David Hogarth testified regarding his knowledge of events leading up to and following the robbery. Audio and visual recordings from surveillance cameras inside the shop were also admitted into evidence.

The surveillance footage showed four African American men wearing masks entering the shop at night while carrying handguns and with several of the men wearing gloves. One man was wearing a white hat. Another man was wearing a dark shirt. The third man was wearing shorts with a red stripe. And the fourth man was wearing shorts with a white stripe. **[**3]** In addition, the footage showed the man in the white hat kick Zamora in the head before pointing a gun at her head and directing her to a cash register and to a safe where the man removed the safe from a cabinet before the man in the dark shirt placed the safe in a bag. The man in the white hat and the other three men are seen repeatedly kicking Hernandez's head and using their pistols to hit his head before dragging him around the floor. The footage shows the man in the dark shirt, the man wearing shorts with a red stripe, and the man wearing shorts with a white stripe leaving the shop and captures one of those men stating that it was time to leave before the man in the white hat is seen walking down the stairs and leaving the shop.

Zamora and Hernandez testified about the events on the night in question and the **[*195]** injuries that they and Zamora's husband sustained, but neither was able to identify Ruffins as one of the offenders. Zamora and Hernandez both testified that the offenders took their cell phones.

After Zamora and Hernandez testified, Officer Groff explained that in his initial investigation of this case, he used the "Find My iPhone" app to locate the two stolen phones and determined **[**4]** that the phones were in the custody of a woman and her son who lived at the Palms Apartments in San Antonio. Officer Groff testified that the woman explained that codefendant Taylor had given her the phones. Officer Groff also stated that the police found a safe in the dumpster of the apartment complex and that the safe was consistent with the one stolen from the tattoo shop.

Next, Officer Mahoney testified that his investigation in this case led him to believe that the following people were involved in the robbery: Ruffins and codefendants Taylor, McMichael, Trevino, and Robert. Further, Officer Mahoney stated that he learned through his investigation that Taylor, Robert, and Ruffins were all related. Next, Officer Mahoney stated that his review of surveillance footage of businesses near the tattoo shop showed a white Volvo driving toward the shop shortly before the robbery, and he learned in his investigation that codefendant Trevino owned a white Volvo.

Additionally, Officer Mahoney testified that he interviewed Taylor after the cell phones had been recovered and after codefendant Taylor had been arrested for a separate offense. Taylor provided information furthering his investigation. **[**5]** During his investigation, he reviewed Taylor's Facebook page to attempt to identify other suspects in the case, and his social media search led him to the Facebook pages for Ruffins and codefendants Robert and McMichael. Officer Mahoney related that he learned from Ruffins's page that Ruffins's nickname was "Poohbear," and when Officer Mahoney listened to the surveillance footage from the tattoo shop, he heard someone say, "Let's go, let's go, Poohbear" before the man in the white hat came down the stairs. Officer Mahoney described how Ruffins referred to codefendant McMichael as his "shooter" in a Facebook post months before the offense in which Ruffins used emojis for knives, guns, money, and money bags. Further, Officer Mahoney explained that his online research of the Facebook pages showed pictures of Ruffins and codefendants Robert and Taylor each wearing a white hat similar to the one in the surveillance footage. Officer Mahoney stated that although the four men in the surveillance footage were wearing masks, the footage captured a unique tattoo on one of the offender's arm, and Officer Mahoney explained that codefendant McMichael had a tattoo on his arm that looked like the **[**6]** one in the surveillance footage.

Moreover, Officer Mahoney testified that he learned from the Palms Apartments' residents that Hogarth was linked with some of the individuals discussed above and that he saw Ruffins talking with Hogarth when he drove to the apartment complex to talk to Hogarth but that

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surname, we will refer to Robert Ruffins by his first name for ease of reading.

Ruffins left before he approached Hogarth. Officer Mahoney stated that he learned that Hogarth had information related to the robbery and he obtained a search warrant for Hogarth's phone. The search of the phone revealed a text thread between Hogarth and codefendant Trevino in which Trevino told Hogarth what to tell the police, and that Trevino told Hogarth to get a lawyer. Further, Officer Mahoney testified that Hogarth initially was uncooperative and lied to the police about whether he knew anything about the offense but **[*196]** later cooperated with the police by providing information about the offense and those involved. Similarly, Officer Mahoney related that Hogarth stated that he was afraid of Ruffins and that Ruffins had threatened to hurt him if he testified. Moreover, Officer Mahoney testified that he believed that Hogarth told Trevino's wife not to cooperate with the police. Officer **[**7]** Mahoney stated that Hogarth told him that he went to the tattoo shop with codefendants Taylor and Trevino days before the offense but that he did not learn that Taylor and Trevino were planning to rob the shop until they were driving home from the shop. When describing Hogarth's involvement in this case, Officer Mahoney testified that there was no evidence that Hogarth encouraged anyone to participate in the robbery or aided or attempted to aid anyone in the commission of the robbery.

Furthermore, Officer Mahoney stated that a search of Ruffins's father's apartment at the Palms Apartments led to the discovery of a gun and a pair of gloves. Additionally, Officer Mahoney recalled that when he showed codefendant Robert's mother a picture of the masked man in the white hat from the surveillance footage of the tattoo shop, she stated that the man was Robert and not Ruffins. Regarding Ruffins's arrest, Officer Mahoney stated that Ruffins did not react when shown the violent footage from the robbery. Further, Officer Mahoney testified that while Ruffins denied any involvement in the case, he also made unusual statements such as "[i]f you say I did it, I did it." Officer Mahoney related that **[**8]** Ruffins stated that he was with his girlfriend, Shante Benton, on the night of the offense but did not provide her contact information. When discussing Benton, Officer Mahoney mentioned that his search of Ruffins's Facebook page indicated that he was romantically involved with Benton, but Officer Mahoney did not attempt to contact Benton as part of his investigation.

In his testimony, Hogarth explained that he lived at the Palms Apartments around the time of the offense and that he associated with Ruffins and codefendants Taylor, Robert, and Trevino. Hogarth stated that Trevino and Taylor decided to rob Trevino's cousin's tattoo shop and that he rode with Trevino and Taylor to the tattoo shop days before the offense occurred. Additionally, Hogarth related that he was present during conversations in which Taylor, Robert, Ruffins, and Trevino made plans to rob the shop and that Ruffins recruited codefendant McMichael to help. Regarding the night of the offense, Hogarth recalled that he saw McMichael, Trevino, Taylor, and Ruffins drive off in a white Volvo. When he was shown a photo from the surveillance footage of the masked man in the white hat, Hogarth testified that the man in the **[**9]** photo was Ruffins and that Ruffins always wore that hat. But Hogarth also admitted on cross-examination that he previously told the police that he would just be guessing when asked the identity of the man in the white hat and that the man in the photo looked like someone other than Ruffins. Relatedly, Hogarth explained that although the men wore masks, he recognized the men when watching the surveillance footage by how they moved and how they sounded. Hogarth also related that he told the police everything he knew about the robbery and that Ruffins threatened to hurt him if he testified.

When called to testify, codefendant Trevino explained that he had already been convicted for his role in the tattoo shop robbery and that he entered into an agreement with the State in which he agreed to testify in this case in exchange for the State not recommending a punishment in his case in the hopes of a lesser punishment. Trevino also testified regarding his **[*197]** extensive criminal history. Further, Trevino related that his cousin owned the tattoo shop and that he decided to rob the shop because he needed money. Additionally, Trevino said that before the robbery he drove by the tattoo shop with Hogarth **[**10]** and codefendant Taylor, that he discussed the possibility of robbing the shop, that Hogarth was not part of the plan and just overheard the conversation between Trevino and Taylor, that Hogarth did not help anyone commit the robbery, and that he told Hogarth to get a lawyer and not talk to the police after the robbery. Regarding the offense, Trevino testified that he drove to the tattoo shop in his white Volvo with Ruffins and codefendants Taylor, McMichael, and Robert. Further, he related that the four passengers put on masks and gloves and had their guns ready and stated that Ruffins was wearing a white hat.

After the State finished its case in chief, Ruffins called Benton to the stand. In her testimony, Benton explained that she was dating Ruffins around the time of the offense, that he was with her the entire night of the

robbery, and that she remembered the night of the offense because that night she was planning a birthday party for one of her children scheduled for the following day.

Once both sides rested, the jury charge was prepared. The charge contained an accomplice-as-a-matter-of-law instruction for Trevino and an accomplice-as-a-matter-of-fact instruction for Hogarth. After **[**11]** considering the evidence, the jury found Ruffins guilty of aggravated robbery.

DISCUSSION

In his first five issues on appeal, Ruffins asserts that the jury charge contained multiple errors. In his sixth through ninth issues on appeal, Ruffins contends that the trial court erred by denying his motion for new trial and by failing to issue findings of fact and conclusions of law regarding its ruling on his motion. In his tenth issue, Ruffins argues that the trial court erred by including a deadly weapon finding in its judgment of conviction. In his final issue on appeal, Ruffins urges that the trial court erred by imposing more court costs than were authorized. Because Ruffins's first issue is dispositive of this appeal, we turn to that issue now.

Jury Charge Error

In his first issue, Ruffins asserts that there is error in the trial court's jury charge setting out the accomplice-witness instructions for Hogarth. *See* Tex. Code Crim. Proc. art. 38.14. As set out above, the charge included an accomplice-as-a-matter-of-fact instruction for Hogarth, which reads, in relevant part, as follows:

> You must determine whether David Hogarth is an accomplice to the crime of aggravated robbery, if it was committed. If you determine that **[**12]** David Hogarth is an accomplice, you must then also determine whether there is other evidence corroborating the testimony of David Hogarth.
>
> . . .
>
> If you find beyond a reasonable doubt that David Hogarth is an accomplice to the crime of aggravated robbery, you must consider whether there is evidence corroborating the testimony of David Hogarth. The defendant, Anthony Ruffins, cannot be convicted on the testimony of David Hogarth unless the testimony is corroborated.

On appeal, Ruffins contends that the "trial court erred by requiring proof beyond a reasonable doubt that . . . Hogarth was an accomplice and, by doing so, creating a presumption that he was not."

In its brief, the State contends that Ruffins may not argue that this portion of the charge is erroneous because he requested **[*198]** the "beyond a reasonable doubt" instruction and, therefore, is barred from challenging the instruction under the doctrine of invited error. *See Prystash v. State*, 3 S.W.3d 522, 531-32 (Tex. Crim. App. 1999). Having reviewed the record, we cannot agree with the State's assertion.

During the jury-charge conference, Ruffins stated that "there is nothing in the charge that gives them an instruction with respect to how they determine someone is an accomplice, and it has to be **[**13]** done with 'if you have a reasonable doubt or not,' in that respect." In response, the trial court stated that the charge already had an instruction directing the jury that "they have to find he is an accomplice beyond a reasonable doubt." Next, Ruffins stated that he did not "think there's been an instruction that they need to believe—when they consider accomplice, they have to agree beyond a reasonable doubt that he is an accomplice." At that point, the State read the portion of the jury charge summarized above instructing the jury that Hogarth's testimony must be corroborated if the jury determines beyond a reasonable doubt that Hogarth was an accomplice. When the State finished reading that part of the charge, Ruffins stated that he was "good" and did not provide further argument on the issue.

Although the State correctly highlights that part of the exchange summarized above showed that Ruffins mentioned that there was no instruction requiring the jury to determine beyond a reasonable doubt that Hogarth was an accomplice, the totality of Ruffins's objection indicates that he was requesting an instruction specifying that there must be evidence corroborating Hogarth's testimony if **[**14]** the jury had a reasonable doubt as to whether or not Hogarth was an accomplice. In any event, the instruction had already been included in the jury charge when Ruffins made his objection, and nothing in the remainder of the record indicates that any change was made to the charge as a result of his objection. Accordingly, we cannot agree that Ruffins's challenge is barred by the doctrine of invited error. However, by informing the trial court that he was "good" and by failing to further object to that portion of the jury charge, Ruffins effectively withdrew his objection to that part of the charge. *See Bluitt v. State*, 137 S.W.3d 51, 53 (Tex. Crim. App. 2004)***HN1***[↑] (explaining that

stating that party has "no objection" to jury charge is "equivalent to failure to object" and does not prevent appellate review of jury-charge issue); *Tyson v. State*, 172 S.W.3d 172, 177 & n.2 (Tex. App.—Fort Worth 2005, pet. ref'd) (stating that party did not invite error to jury charge by stating, "[W]e believe it's charged properly").

HN2[] When addressing an issue regarding an alleged jury-charge error, appellate courts must first decide whether there is error before addressing whether the alleged error resulted in any harm. *See Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). The amount of harm needed for a reversal depends on whether a complaint regarding "that error was preserved in the trial **[**15]** court." *Swearingen v. State*, 270 S.W.3d 804, 808 (Tex. App.—Austin 2008, pet. ref'd). If no objection was made, which is essentially what occurred here, a reversal is warranted only if the error "resulted in 'egregious harm.'" *See Neal v. State*, 256 S.W.3d 264, 278 (Tex. Crim. App. 2008) (quoting *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g)). "The purpose of the egregious-harm inquiry is to ascertain whether the defendant has incurred actual, not just theoretical, harm." *Swearingen*, 270 S.W.3d at 813. The analysis depends "on the unique circumstances of" each case and "is factual in nature." *See Saenz v. **[*199]** State*, 479 S.W.3d 939, 947 (Tex. App.—San Antonio 2015, pet. ref'd).

HN3[] Regarding whether there was error in the charge, we note as an initial matter that the Court of Criminal Appeals has explained that the accomplice-witness rule in article 38.14 of the Code of Criminal Procedure is essentially "a legislative judgment that a reasonable doubt exists if the only evidence the State presents in satisfaction of its burden of proof is the testimony of an uncorroborated accomplice witness" because "an uncorroborated accomplice witness cannot by itself persuade to a level of confidence beyond a reasonable doubt." *Castillo v. State*, 913 S.W.2d 529, 535 n.3 (Tex. Crim. App. 1995). Similarly, this Court has explained that article 38.14 "reflects a legislative determination that accomplice testimony implicating another person should be viewed with a measure of caution, because accomplices often have incentives to lie, such as to avoid punishment or shift blame to another person" and **[**16]** that an "accomplice's motives in testifying against the accused may well include malice or an attempt to curry favor from the state in the form of a lesser punishment, or perhaps, no punishment." *Wincott v. State*, 59 S.W.3d 691, 698 (Tex. App.—Austin 2001, pet. ref'd); *see also id.* (describing accomplice-witness testimony as "inherently untrustworthy" and warning that testimony "should be viewed with caution").

Consistent with the legislature's recognition of the problems surrounding the trustworthiness of accomplice-witness testimony, one of our sister courts of appeals has explained that a proper accomplice instruction should inform the jury that if "they have a reasonable doubt regarding whether or not the witness acted as [an] accomplice, then corroboration is necessary." *Haney v. State*, 951 S.W.2d 551, 553 (Tex. App.—Waco 1997, no pet.). Similar "reasonable doubt" language has been included in numerous jury charges reviewed by various appellate courts. *See, e.g., Cyr v. State*, 308 S.W.3d 19, 24 (Tex. App.— San Antonio 2009, no pet.); *Elliott v. State*, 976 S.W.2d 355, 358 n.4 (Tex. App.—Austin 1998, pet. ref'd); *see also Estrada v. State*, No. 08-15-00271-CR, 2018 Tex. App. LEXIS 4885, 2018 WL 3193498, at *3 (Tex. App.—El Paso June 29, 2018, pet. ref'd) (op., not designated for publication); *Losoya v. State*, No. 05-10-00396-CR, 2012 Tex. App. LEXIS 5103, 2012 WL 2402609, at *6 (Tex. App.—Dallas June 27, 2012, pet. ref'd) (op., not designated for publication). ***HN4***[] Although the Texas Criminal Pattern Jury Charge states that it may not be necessary to include "reasonable doubt" language in an accomplice-witness instruction regarding whether **[**17]** a witness is an accomplice witness, it has also explained that if an instruction requiring proof beyond a reasonable doubt is included, it should state that corroboration *is required unless* "the [S]tate proves beyond a reasonable doubt that a witness is not an accomplice witness." *See* Comm'n on Pattern Jury Charges, State Bar of Tex., *Texas Criminal Pattern Jury Charges: Special Instructions* CPJC 3.4 (2018).

The charge at issue in this case essentially inverts this requirement by only requiring corroboration if it is shown beyond a reasonable doubt that Hogarth is an accomplice. This language of this instruction is not only inconsistent with case law and the Pattern Jury Charge, it is also inconsistent with the nature and treatment of accomplice testimony. *See Holladay v. State*, 709 S.W.2d 194, 196 (Tex. Crim. App. 1986). Accordingly, we conclude that the charge at issue in this case was erroneous.

Having determined that there was error, we must now address whether Ruffins was harmed by that error. *Ngo*, 175 S.W.3d at 743. ***HN5***[] Neither side has the **[*200]** burden of establishing either the presence or a

lack of harm. *See Warner v. State*, 245 S.W.3d 458, 464 (Tex. Crim. App. 2008). Instead, the reviewing court makes "its own assessment" when evaluating what effect an error had on the verdict by looking at the record before it. *Ovalle v. State*, 13 S.W.3d 774, 787 (Tex. Crim. App. 2000) (quoting **[**18]** Wayne R. LaFave & Jerold H. Israel, Criminal Procedure 1165 (2d ed. 1992)). In assessing harm, reviewing courts "consider: (1) the jury charge as a whole, (2) the arguments of counsel, (3) the entirety of the evidence, and (4) other relevant factors present in the record." *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013); *see also State v. Ambrose*, 487 S.W.3d 587, 598 (Tex. Crim. App. 2016) (setting out these factors in issue regarding error from omission of accomplice-witness instruction); *Ratliff v. State*, No. 03- 18-00569-CR, 2020, __S.W.3d __, 2020 Tex. App. LEXIS 1270, WL 746642, at *15, *16 (Tex. App.—Austin Feb. 14, 2020, no pet. h.) (applying these factors to issue of whether jury-charge error constituted "an impermissible comment on the weight of the evidence").

Regarding the charge as a whole, we observe that nothing in the remainder of the charge corrected the error set out above or otherwise indicated that corroboration is required if the jury has a reasonable doubt as to whether Hogarth was an accomplice. Accordingly, we believe that this factor weighs in favor of finding that Ruffins was harmed by the erroneous omission.

Regarding the arguments of counsel, we note that the State emphasized the testimony from Hogarth and codefendant Trevino when arguing that Ruffins was one of the individuals involved in the robbery. In fact, the State characterized **[**19]** Hogarth's testimony as the most important evidence that was presented during the trial, explained that the case depended on the information that Hogarth gave the police, and related that if Hogarth had not identified Ruffins and the codefendants, the case "would have gone in a totally different direction." Similarly, Ruffins described Hogarth as the State's "main witness." Although both sides stated that Hogarth's testimony would need to be corroborated if Hogarth was an accomplice, the State repeated the error present in the charge by asserting that the jury had to determine beyond a reasonable doubt that Hogarth was an accomplice before his testimony needed to be corroborated. Accordingly, we believe that this factor also weighs in favor of a finding that Ruffins was harmed by the jury-charge error.

Turning to the evidence, we note that identity was a central issue in this case and that the State relied heavily on the testimony from codefendant Trevino and Hogarth in connecting Ruffins to the robbery of the tattoo shop. Moreover, the evidence presented at trial established that Trevino was an accomplice because he was convicted for his role in the robbery, and conflicting evidence **[**20]** was presented regarding whether Hogarth was also an accomplice. In his testimony, Hogarth denied going to the tattoo shop on the night of the offense and further denied soliciting, encouraging, or directing anyone to commit the robbery. Similarly, Hogarth denied aiding or attempting to aid in the robbery, and he asserted that he was not arrested because he did not assist in the robbery. Moreover, although Hogarth admitted that he went to the tattoo shop with codefendants Taylor and Trevino before the offense occurred and that Taylor and Trevino mentioned wanting to rob the tattoo shop, Hogarth related that he did not know of the possibility of someone robbing the shop until he was already in the car, that he thought the three of them were just going for a ride when he got in the **[*201]** car, and that he did not go inside the shop when they drove to New Braunfels.

In addition, Trevino testified that he, Taylor, and Hogarth went to the tattoo shop before the robbery occurred and that he discussed the possibility of robbing the shop, but he stated that Hogarth was not part of the plan to rob the tattoo shop and that Hogarth did not attempt to aid in the commission of the robbery or encourage anyone **[**21]** to commit the robbery. Furthermore, Officer Mahoney explained that he concluded that Hogarth was not criminally responsible for the robbery based on his investigation, that he had no information from which to conclude that Hogarth planned the robbery or encouraged anyone to participate in the robbery, and that although Hogarth admitted to going to the tattoo shop before the robbery, Hogarth stated that he did not learn of any plan to rob the shop until after the other people in the car left the shop.

On the other hand, Hogarth also admitted that the trip to the tattoo shop was a scouting mission "for [Trevino] and [Taylor] and [him] to do this robbery in New Braunfels" and explained that he was present in subsequent conversations when Ruffins and codefendants Taylor, Robert, and Trevino were discussing robbing the shop in the near future. In addition, when asked whom *he* was planning to rob, Hogarth answered by saying Trevino's "cousin . . . [a]t the tattoo shop." Moreover, Trevino explained that he told Hogarth to consult with a lawyer based on his involvement in the case. When asked whether Hogarth

had lied during Trevino's trial, Trevino stated that Hogarth previously testified that **[**22]** "we went into the shop." Further, Trevino related that Hogarth was with him shortly before he and the others went to rob the tattoo shop and that after the robbery Hogarth expressed to Trevino his disappointment that they left him behind to go and commit the robbery without him. Trevino also testified regarding an earlier incident in which Hogarth offered to help him steal some drugs by informing him about a guy who was selling drugs.

Additionally, Officer Mahoney explained that Hogarth initially lied to the police about knowing Ruffins and tried to mislead the police. Further, Officer Mahoney testified that Hogarth admitted that he had been asked to participate in the robbery, that he obtained a search warrant to search Hogarth's phone, and that the search revealed that Trevino had been instructing Hogarth on what to tell the police. When describing his investigation, Officer Mahoney stated that he learned that a man told Trevino's wife not to cooperate with the police and that he suspected the man was Hogarth.

In light of the evidence summarized above, including Hogarth's admission that he went on a scouting trip for the robbery and Trevino's testimony that Hogarth was disappointed **[**23]** that he did not get to be part of the actual robbery, the jury could have had reasonable doubt regarding whether Hogarth was an accomplice as that term has been defined by the Court of Criminal Appeals. *See Zamora v. State*, 411 S.W.3d 504, 510 (Tex. Crim. App. 2013) ***HN6***[] (explaining that accomplice is someone who could be charged for offense in question or lesser-included offense and further clarifying for direct party liability that witness is accomplice if he "'participates with a defendant before, during, or after the commission of the crime,' 'acts with the requisite culpable mental state,' and performs an 'affirmative act that promotes the commission of the offense with which the defendant is charged'" (quoting *Cocke v. State*, 201 S.W.3d 744, 748 (Tex. Crim. App. 2006)); *see also Castillo v. State*, 517 S.W.3d 363, 372 (Tex. App.—Eastland 2017, pet. ref'd) (explaining that "if there is **[*202]** conflicting or inconclusive evidence that a witness was complicit in the crime, then the witness is an accomplice as a matter of fact"). However, as set out above, the jury charge only instructed the jury to determine if Hogarth's testimony was corroborated if it was shown beyond a reasonable doubt that Hogarth was an accomplice.[2] In essence, the flawed instruction created a presumption that corroboration *wasn't* required unless it was proved beyond a reasonable doubt that Hogarth *was* an accomplice, **[**24]** when the reverse should have been true: corroboration *was* required unless it was proved beyond a reasonable

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[2] In its brief, the State asserts that there is no harm regarding any of the alleged errors in the instructions pertaining to Hogarth because, according to the State, the evidence presented at trial established that Ruffins was not entitled to an accomplice-in-fact instruction regarding Hogarth because "[m]erely being present . . ., having knowledge of the planned offense but failing to disclose it, and even concealing the offense does not turn a witness into an accomplice witness." *See Delacerda v. State*, 425 S.W.3d 367, 396 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). Similarly, the State argues that the evidence establishing that a defendant lied to the police after the crime was committed is not an act assisting in the commission of the offense. *See id.* Accordingly, the State contends that the charge was unwarranted and, therefore, that the inclusion of the charge, even if erroneous, benefitted Ruffins.

However, there was also evidence that Hogarth was uncooperative with the police, subjectively believed that he might be criminally responsible for the robbery, and directed another not to cooperate with the police. This evidence raises an issue as to whether Hogarth performed an affirmative act promoting the commission of the aggravated robbery with the requisite intent when he went to the tattoo shop with Taylor and Trevino. *Cf. Hedrick v. State*, 473 S.W.3d 824, 830, 831 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (explaining that evidence showing "[a] consciousness of guilt is perhaps one of the strongest kinds of evidence of guilt" and that evidence regarding defendant's conduct after commission of crime can indicate consciousness of guilt); *Bryan v. State*, 990 S.W.2d 924, 928 (Tex. App.—Beaumont 1999, no pet.) (noting that "[e]vidence of attempts to suppress or fabricate evidence proves consciousness of guilt"). Moreover, the evidence set out in the body of the opinion would allow the jury to have a reasonable doubt regarding whether Ruffins performed an affirmative act promoting the commission of the offense and is, therefore, distinguishable from the evidence in the case that the State primarily relies on. *See Druery v. State*, 225 S.W.3d 491, 499-500 (Tex. Crim. App. 2007) (noting that evidence at trial showed, among other things, that defendant told two witnesses that he was going to kill victim, took the victim's property after shooting victim, and gave witnesses some money after the shooting; explaining that witnesses "mere presence," knowledge of planned offense, and failure to disclose it did not render them accomplice witnesses, particularly where evidence indicated that neither witness believed defendant would actually go through with shooting, that neither witness distracted victim "to help facilitate the murder," and that neither witness asked for money; and concluding that evidence did not indicate that witnesses were accomplices as matter of law or fact).

doubt that Hogarth *wasn't* an accomplice.

Moreover, although some corroborating evidence was presented, the evidence of Ruffins's guilt other than the testimony from Trevino and Hogarth was less than overwhelming. *See Campbell v. State*, 227 S.W.3d 326, 331 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (determining that defendant was not egregiously harmed by alleged jury-charge error, in part, because "overwhelming weight of the evidence supported the jury's verdict"); *see also Reed v. State*, 550 S.W.3d 748, 758 (Tex. App.—Texarkana 2018, no pet.) (explaining that fact that evidence might be sufficient to support determination that accomplice witness's testimony was corroborated when viewed in light most favorable to verdict does not answer question of whether defendant suffered egregious harm); *cf. Nghia Van Tran*, 870 S.W.2d 654, 658 **[*203]** (Tex. App. — Houston [1st Dist.] 1994, pet. ref'd) (finding harm from omission of accomplice instruction where record indicated that "there is good reason to believe the jury did use" potential accomplice's testimony and where "the corroborating evidence" was not "so strong that any reasonable jury would have found it to be true").

Even though Officer Mahoney testified that there was a picture on Facebook of Ruffins **[**25]** wearing a white hat that is similar to the one seen in the surveillance footage, Officer Mahoney also stated that there were photos showing codefendants Robert and Taylor both wearing a similar white hat and that Robert's mother stated that the man wearing the hat in a photo from the surveillance footage was Robert and not Ruffins. Additionally, even though Officer Mahoney's investigation of the Facebook pages pertaining to the individuals charged in this offense showed an interaction between Ruffins and codefendant McMichael, that interaction occurred months before the charged offense. Similarly, although Officer Mahoney testified that he saw Ruffins interacting with Hogarth at the Palms Apartments, that interaction was not "at or near the time or place of" the offense. *See Hernandez v. State*, 939 S.W.2d 173, 178 (Tex. Crim. App. 1997). In addition, even though Officer Mahoney testified that Ruffins did not react when he saw the surveillance footage and made strange statements during his questioning by the police, Officer Mahoney also explained that Ruffins denied any involvement in the crime. In addition, although Officer Mahoney testified that the police found a weapon and gloves in Ruffins's father's home, no evidence was introduced regarding **[**26]** whether the gun or gloves were used in the offense. Moreover, even though Officer Mahoney testified that someone can be heard saying "let's go, Poohbear" on the surveillance footage, the audio portion for that part of the footage is not entirely clear as the State partially conceded in its closing arguments.

Further, none of the victims could identify Ruffins as one of their attackers, and all of the men committing the robbery were wearing masks. No evidence was presented that Ruffins's fingerprints or DNA were found in the tattoo shop, that Ruffins's cellphone connected to any cell towers near the tattoo shop at the time of the offense, or that the safe found in the dumpster of the Palms Apartments was the one taken from the tattoo shop. Additionally, no evidence was presented that the police found a white hat in Ruffins's possession, and no non-accomplice evidence linked Ruffins to the white Volvo. Finally, Ruffins had an alibi, as Benton testified that Ruffins was with her at the time of the robbery and that she remembered that night well because she was planning her daughter's birthday party scheduled for the following day.

In light of the preceding, we conclude that the third factor **[**27]** also weighs in favor of a determination that Ruffins was harmed by the jury-charge error. *Cf. Ambrose*, 487 S.W.3d at 598 (providing that ***HN7***[] omission of accomplice witness instruction can result in egregious harm if corroborating evidence is unconvincing and renders State's case for conviction significantly less persuasive); *Casanova v. State*, 383 S.W.3d 530, 539 (Tex. Crim. App. 2012) (stating that corroborating evidence that is weak because it depends on inferences from evidentiary facts to ultimate facts that jury may readily reject may result in egregious harm); *Reed*, 550 S.W.3d at 758 (noting that strength of corroborating evidence is function of how believable it is and how compellingly it connects accused to offense).

Turning to the fourth factor, nothing in our review of the record has revealed any **[*204]** other relevant information bearing upon our harm analysis.

Given our resolution of the factors listed above, we conclude that the jury-charge error egregiously harmed Ruffins. For these reasons, we sustain Ruffins's first issue on appeal. Because we have sustained Ruffins's first issue, we need not address his remaining issues.

CONCLUSION

Having sustained Ruffins's first issue on appeal, we reverse the trial court's judgment of conviction and remand for further proceedings.

Chari L. Kelly, Justice **[**28]**

Before Justices Goodwin, Baker, and Kelly

Dissenting Opinion by Justice Goodwin

Concurring Opinion by Justice Baker

Reversed and Remanded

Filed: August 14, 2020

Publish

Concur by: Thomas J. Baker

Concur

CONCURRING OPINION

I join the Court's opinion concluding that there was error in the jury charge and that the error harmed Anthony Ruffins. I write separately to express my belief that there was additional error in the jury charge.

In his fifth issue, Ruffins asserts that there is error in the trial court's jury charge setting out the accomplice-witness instructions for David Hogarth and codefendant Gustavo Trevino. *See* Tex. Code Crim. Proc. art. 38.14. The charge specified that "[a] person cannot be convicted of a crime on the uncorroborated testimony of an accomplice." As set out in the Court's opinion, the charge included instructions specifying that Trevino was an accomplice as a matter of law. Specifically, the charge provides, in relevant part, as follows:

> Gustavo Trevino is an accomplice to the crime of aggravated robbery if it was committed. The defendant, Anthony Ruffins, therefore cannot be convicted on the testimony of Gustavo Trevino unless that testimony is corroborated.

The charge also included an accomplice-as-a-matter-of-fact instruction **[**29]** for Hogarth, which reads, in relevant part, as follows:

> You must determine whether David Hogarth is an accomplice to the crime of aggravated robbery, if it was committed. If you determine that David Hogarth is an accomplice, you must then also determine whether there is other evidence corroborating the testimony of David Hogarth.

On appeal, Ruffins acknowledges that the accomplice instructions contained a corroboration requirement but contends that the accomplice instructions were erroneous because they failed to instruct the jury that "it must determine whether or not Trevino and Hogarth's testimony was both true and showed [his] guilt before using the testimony to convict." When addressing an issue regarding an alleged jury-charge error, appellate courts must first decide whether there is error before addressing whether the alleged error resulted in any harm. *See Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005).

[*218] For well over a century, Texas has enacted statutes requiring that an accomplice witness's testimony be corroborated. One of the earliest statutes provided that "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; **[**30]** and the corroboration is not sufficient if it merely shows the commission of the offense." *See Blakeley v. State*, 24 Tex. Ct. App. 616, 7 S.W. 233, 235 (Tex. App. 1888) (quoting statute in effect at time). The most recent codification in article 38.14 of the Code of Criminal Procedure is nearly identically worded. *See* Tex. Code Crim. Proc. art. 38.14. When explaining what should be included in an accomplice-witness instruction in a jury charge to fully effect this statutory requirement, the Court of Criminal Appeals provided the following example of a properly worded accomplice-witness charge: "Now, you cannot convict the defendant upon [an accomplice's] testimony alone, unless you first believe *that his testimony is true*, and connects the defendant with the offense charged, and then you cannot convict the defendant upon said testimony, unless you further believe that there is other testimony in the case, corroborative of the accomplice's testimony, tending to connect the defendant with the offense charged; and the corroboration is not sufficient if it merely shows the commission of the offense charged." *Campbell v. State*, 57 Tex. Crim. 301, 123 S.W. 583, 584 (Tex. Crim. App. 1909) (emphasis added). In *Campbell*, the Court also explained that it had approved language in other charges, and both of the cases cited by the Court had charges requiring the jury to believe the accomplice's testimony. *Id.* (citing *Brown v. State*, 57 Tex. Crim. 570, 124 S.W. 101, 103-04 (Tex. Crim. App. 1909); *King v. State*, 57 Tex. Crim. 363, 123 S.W. 135, 139 (Tex. Crim. App. 1909)) **[**31]** . When later describing the example instruction that it included in its opinion in *Campbell*, the Court of Criminal Appeals stated that it included the example "with a view of furnishing trial courts with an accurate" accomplice-

witness instruction to avoid error in the future. *See Wadkins v. State*, 58 Tex. Crim. 110, 124 S.W. 959, 961 (Tex. Crim. App. 1910) (explaining that Court in *Campbell* "set out in haec verba an approved charge" on law of accomplice testimony).

In light of the above requirements, the Court of Criminal Appeals has repeatedly stated that it is error for an accomplice-witness instruction not to inform the jury (1) that it could not convict a defendant based on the testimony of an accomplice unless the testimony is corroborated and (2) that the jury must believe the accomplice's testimony to convict. *See Jones v. State*, 44 Tex. Crim. 557, 72 S.W. 845, 846 (Tex. Crim. App. 1903). Additionally, the Court has explained that the failure to include the second type of instruction listed above is error because the absence of the instruction constitutes an impermissible comment on the weight of the evidence. *Id.* Essentially, the Court reasoned that a charge without that instruction assumed "the truth of the accomplice's evidence" by directing "the jury that, if they believe the testimony of the accomplice has been corroborated, they could convict. In other words, the charge simply requires the jury to believe that the accomplice has been corroborated, thus suggesting to them the truth of the accomplice's testimony." *Id.* Consistent **[**32]** with this holding, the Court issued several opinions reversing convictions where the jury charge failed to instruct the jury that it had to believe that an accomplice's testimony is true. *See Wadkins*, 124 S.W. at 961; *Crenshaw v. State*, 48 Tex. Crim. 77, 85 S.W. 1147, 1148 (Tex. Crim. App. 1905); *see also Doyle v. State*, 138 Tex. Crim. 17, 133 S.W.2d 972, 973 (Tex. Crim. App. 1939) (noting that objection to jury charge for failing to instruct that jury must believe "the testimony of these accomplices **[*219]** to be true" was "well taken" and referring to authority saying that failure to include this instruction is erroneous).

Consistent with that prior case law, the Court of Criminal Appeals and various intermediate courts have continued to explain that proper accomplice-witness instructions should include directives requiring that juries believe an accomplice witness in addition to determining that the witness's testimony is corroborated before convicting a defendant. *See Farris v. State*, 819 S.W.2d 490, 507 (Tex. Crim. App. 1990) (determining that accomplice-witness instruction was proper because it "made clear that the jury had to find . . . that the accomplice witness['s] . . . testimony was true" and that accomplice witness's testimony was corroborated), *overruled on other grounds by Riley v. State*, 889 S.W.2d 290, 298 (Tex. Crim. App. 1993) (on reh'g); *Holladay v. State*, 709 S.W.2d 194, 199 (Tex. Crim. App. 1986) (deciding that accomplice-witness instruction was proper because it told jury that it could not find defendant guilty unless **[**33]** it found, among others things, that "*the testimony of [the accomplice] was truthful*" and that there was evidence "outside of [the accomplice]'s testimony[] that tended to connect the appellant to the commission of the" crime) (emphasis added); *Davis v. State*, No. 06-15-00011-CR, 2015 Tex. App. LEXIS 12662, 2015 WL 8953889, at *4, *5 (Tex. App.—Texarkana Dec. 16, 2015, pet. ref'd) (mem. op., not designated for publication) (concluding that instruction that included requirement that jury find accomplice's testimony "is true" complied with requirements set out by Court of Criminal Appeals); *Tuma v. State*, No. 04-00-00522-CR, 2002 Tex. App. LEXIS 93, 2002 WL 21962, at *2 (Tex. App.—San Antonio Jan. 9, 2002, no pet.) (op., not designated for publication) (same); *see also Ferguson v. State*, 573 S.W.2d 516, 524 (Tex. Crim. App. 1978) (noting that "the charge did not allow the jury to convict without believing the accomplice witness's testimony"); George E. Dix & John M. Schmolesky, 43A Texas Practice: Criminal Practice and Procedure § 51:93 (3d ed. 2019) (warning that improper accomplice instructions could allow conviction on basis of accomplice's testimony alone provided that it is corroborated by obscuring jury's need to evaluate accomplice's testimony and stating that, to avoid this problem, "the jury charge should inform the jurors that they cannot find the accused guilty on the testimony of the accomplice witness unless **[**34]** they find, first, that the testimony of the witness is true"); Michael J. McCormick, Thomas D. Blackwell, and Betty Blackwell, 8 Tex. Prac., Criminal Forms and Trial Manual §§ 108.2, .3 (11th ed. 2020) (commenting that jury instructions should specify that defendant cannot be convicted "upon the testimony of an accomplice unless the jury first believe that the accomplice's evidence is true").

In fact, several of our sister courts of appeals have explained that when the State elicits testimony from an accomplice to prove a defendant's guilt, "the defendant is entitled to an instruction that a conviction cannot be based on the accomplice testimony unless the jury believes the testimony to be true, and unless there is other evidence tending to connect the defendant to the offense." *Scales v. State*, No. 04-12-00435-CR, 2014 Tex. App. LEXIS 1744, 2014 WL 667506, at *11 (Tex. App.—San Antonio Feb. 19, 2014, pet. ref'd) (mem. op., not designated for publication); *Fritz v. State*, No. 07-06-00206-CR, 2008 Tex. App. LEXIS 3996, 2008 WL 2229533, at *2 (Tex. App.—Amarillo May 30, 2008, pet. ref'd) (mem. op., not designated for publication);

Simmons v. State, 205 S.W.3d 65, 76 (Tex. App.—Fort Worth 2006, no pet.). *But see Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002) (addressing issue regarding omission of entire accomplice-witness **[*220]** instruction and explaining that this type of instruction "informs the jury that it cannot use the accomplice witness testimony unless there is also some non-accomplice **[**35]** evidence connecting the defendant to the offense" and that purpose of instruction is fulfilled if that type of non-accomplice evidence exists).

Similarly, multiple intermediate courts of appeals have observed that "[t]he purpose of the" accomplice evidence rule is to ensure that a "jury does not consider accomplice" evidence unless the jury finds *both* that the accomplice "is telling the truth and that other evidence corroborates the accomplice." *See Nolley v. State*, 5 S.W.3d 850, 852 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Nghia Van Tran v. State*, 870 S.W.2d 654, 658 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). Moreover, many appellate courts have quoted from jury charges requiring juries believe that the accomplice witness's testimony is true as part of the accomplice-witness instruction. *See, e.g., Gill v. State*, 873 S.W.2d 45, 47 (Tex. Crim. App. 1994); *Golden v. State*, 851 S.W.2d 291, 293-94 (Tex. Crim. App. 1993); *Yost v. State*, 222 S.W.3d 865, 873 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd); *Jester v. State*, 62 S.W.3d 851, 855 (Tex. App.—Texarkana 2001, pet. ref'd); *Wallace v. State*, No. 03-97-00823-CR, 1999 Tex. App. LEXIS 2574, 1999 WL 189961, at *5 & n.4 (Tex. App.—Austin Apr. 8, 1999, no pet.) (op., not designated for publication); *Elliott v. State*, 976 S.W.2d 355, 357-58 & n.4 (Tex. App.—Austin 1998, pet. ref'd). Consistent with this case law, the Texas Criminal Pattern Jury Charges, until relatively recently, included instructions requiring the jury to believe that an accomplice's testimony is true before convicting. *Compare* Comm'n on Pattern Jury Charges, State Bar of Tex., *Texas Criminal Pattern Jury Charges: Special Instructions* CPJC 3.3 (2015), *with* Comm'n on Pattern Jury Charges, State Bar of Tex., *Texas Criminal Pattern Jury Charges: Special Instructions* ***[**36]*** CPJC 3.3 (2018).

In its brief, the State contends that case law has established that the type of omission at issue here is not error if the charge included an instruction on reasonable doubt as to the whole case. As support for this proposition, the State cites *White v. State*, 385 S.W.2d 397 (Tex. Crim. App. 1964). In that case, the Court of Criminal Appeals summarized one of the issues on appeal as asserting "that the trial court erred in failing to charge the jury that they must believe that the testimony of the accomplice witness was true beyond a reasonable doubt" and concluded that there was no error because another portion of the jury charge properly set out "the law of reasonable doubt . . . as to the whole case." *Id.* at 400. Although the Court of Criminal Appeals did not quote from the charge in *White* except for the global reasonable-doubt portion, it explained that the charge "was in substance the same as given in" *Stovall v. State*, 104 Tex. Crim. 210, 283 S.W. 850 (Tex. Crim. App. 1925). The charge at issue in *Stovall* specified that the jury "could not convict on the testimony of the accomplice Green unless they believed the same to be true," and the Court of Criminal Appeals overruled the defendant's assertion that this portion of the charge was erroneous for failing to require the jury to believe the accomplice's **[**37]** testimony "beyond a reasonable doubt" because there was a reasonable-doubt instruction later in the charge. *Id.* at 853. In light of the Court of Criminal Appeals' characterization of the issue and charge in *White* as being the same as in *Stovall*, I surmise that the charge in *White* required the jury to believe the accomplice-witness testimony but did not include the terms "reasonable doubt" in that particular instruction. Accordingly, I cannot agree with the State's assertion that the **[*221]** omission at issue here was not error because there was a reasonable-doubt instruction in another portion of the charge. On the contrary, both *White* and *Stovall* support a determination that the jury charge in this case should have but did not include an instruction requiring the jury to believe the accomplice testimony.

In light of the preceding case law, I would conclude that the failure to include an instruction requiring the jury to believe the accomplice-witness testimony from Hogarth and Trevino before relying on it was error. In addition, because this error and the error discussed in the Court's opinion regarding the inclusion of a reasonable-doubt instruction both pertain to the accomplice-witness instructions, **[**38]** I believe that the omission described above further compounded the harm described by the Court in its opinion.

For example, in addition to the problems with the jury charge the Court identifies in its opinion, nothing in the remainder of the charge specified that the jury had to believe the testimony of an accomplice witness before it could use that testimony to convict. Although the charge included an instruction specifying that the jury was the exclusive judge of the credibility of all of the witnesses and the weight to give their testimonies, the Court of Criminal Appeals has specifically rejected the argument

that this type of instruction cures the error stemming from the omission at issue. *See Jones*, 72 S.W. at 846. Therefore, the charge incorrectly allowed the jury to convict based on corroborated accomplice-witness testimony without also believing that testimony was true and, as set out in the Court's opinion, instructed the jury that it only needed to consider whether the testimony from Hogarth was corroborated if it first determined beyond a reasonable doubt that he was an accomplice.

Accordingly, based on my review of the charge, I believe that the entirety of the charge strongly weighs in favor **[**39]** of finding that Ruffins was harmed in this case. Similarly, the Court reasons that the arguments of counsel weighed in favor of a finding of harm because the State emphasized the testimony from Hogarth and Trevino when arguing that Ruffins was one of the individuals involved in the robbery and because the State further argued that the jury only had to consider whether Hogarth's testimony was corroborated if it first determined beyond a reasonable doubt that Hogarth was an accomplice. In addition to those arguments, I note that neither the State nor Ruffins specifically argued that the jury was required to first believe the testimony of an accomplice witness before that testimony could be used as a basis for convicting Ruffins if properly corroborated.

Accordingly, I believe that the arguments of counsel weigh in favor of a finding that Ruffins was harmed.

Regarding the evidence presented at trial, the Court explains that identity was a central issue in the case, that the State relied on the testimony from Hogarth and Trevino as evidence that Ruffins was one of the individuals involved in the robbery, that the jury could have had a reasonable doubt regarding whether Hogarth was also an **[**40]** accomplice based on the evidence presented at trial, and that the evidence of Ruffins's guilt from sources other than the testimonies of Trevino and Hogarth was not overwhelming. Additionally, I note that although the evidence of Ruffins's guilt separate from the testimonies of Trevino and Hogarth was not overwhelming, some evidence potentially corroborated the testimony of Hogarth and Trevino, which under the jury charge would have erroneously allowed the jury to convict Ruffins based on the accomplice testimony without **[*222]** also believing the accomplice testimony to be true.

In light of the preceding, I believe that the third factor also weighs strongly in favor of a determination that Ruffins was egregiously harmed by the jury-charge errors.

Regarding the fourth factor, nothing in my review of the record has revealed any other relevant information bearing upon the harm analysis.

Given the resolution of the factors listed above, I conclude that the jury-charge errors individually and in aggregate egregiously harmed Ruffins. Accordingly, I would sustain Ruffins's fifth issue on appeal as well as his first issue.

For these reasons, I concur in the Court's judgment reversing the trial court's **[**41]** judgment of conviction and remanding for further proceedings.

Thomas J. Baker, Justice

Before Justices Goodwin, Baker, Kelly

Filed: August 14, 2020

Publish

Dissent by: Melissa Goodwin

Dissent

DISSENTING OPINION

As this case demonstrates, accomplice-witness instructions are complicated and, in several respects, the law as to what should, should not, must, or must not be included in them is unclear.

This Court's majority opinion concludes that the jury charge contained error with respect to the reasonable-doubt instruction in the application paragraph of the accomplice-witness instruction relating to Hogarth, and that Ruffins suffered egregious harm from that error.

In his concurring opinion, Justice Baker agrees that Ruffins suffered egregious harm from that alleged jury-charge error but also concludes that additional error was present in the jury charge based on the omission of language directing the jury to first find the accomplice-witness testimony to be true in the accomplice-witness instructions as to both Hogarth and Trevino.

I disagree that either of the alleged errors identified in these opinions supports reversal of the trial court's

judgment of conviction.

Dissent to Majority Opinion

After the charge conference, **[**42]** during the objections to the charge, the following discussion occurred:

> [RUFFINS]: You know what, I just thought of something. I'm sorry, Judge. I still think that, with a question of fact, that the instruction "therefore, if you believe" — the application instruction, "therefore, if you believe from the evidence beyond a reasonable doubt that an offense was committed and you further believe from the evidence that the witness" — in this case it would be David Hogarth — "was an accomplice or you have a reasonable doubt whether he was or was not as the term is defined in the foregoing instructions, then you cannot convict the Defendant upon the testimony of — unless you further believe that there is other evidence in the case outside of testimony of David Hogarth tending to connect the Defendant with the offense charged in the indictment." And then, "From the all the evidence, you must believe beyond a reasonable doubt that the Defendant is guilty" —
>
> . . . (bailiff reports presence of all twelve jurors returning from break)
>
> [RUFFINS]: — because there is nothing in the charge that gives them an instruction with respect to how they determine someone is an accomplice, and it has to be done **[**43]** with "if you have a reasonable doubt or not," in that respect.
>
> [STATE]: I'm not sure I followed most of what [defense counsel] just said there.
>
> **[*205]** [RUFFINS]: Well, you should be familiar with that, because that's from Houston.
>
> COURT: And it says in there they have to find that he is an accomplice beyond a reasonable doubt.
>
> [STATE]: And, Judge, I would say, then, "from all the evidence you must believe beyond a reasonable doubt the Defendant is guilty" is already covered abundantly in the charge.
>
> [RUFFINS]: That part certainly is.
>
> [STATE]: Okay.
>
> [RUFFINS]: But I don't think there's been an instruction that they need to believe — when they consider accomplice, they have to agree beyond a reasonable doubt that he is an accomplice. I don't think that's in here.
>
> COURT: I thought it was.
>
> [RUFFINS]: Unless I'm wrong. I mean, I — let me see here. I don't — I don't see it.
>
> [STATE]: "If you find beyond a reasonable doubt that David Hogarth is an accomplice to the crime of aggravated robbery, you must consider whether there is evidence corroborating the testimony of David Hogarth. The Defendant, Anthony Ruffins, cannot be convicted on the testimony of David Hogarth, unless that testimony is corroborated." **[**44]**
>
> [RUFFINS]: I'm good.
>
> COURT: Okay.
>
> [STATE]: And, Judge, for the record, that was on page 8.
>
> COURT: Yeah. Okay. I thought it was in there.

Citing to portions of this exchange, the State contends that Ruffins is estopped under the doctrine of invited error from complaining about error in the reasonable-doubt instruction given, which he contends erroneously placed the burden of proving Hogarth was an accomplice on him rather than the State. The majority rejects the State's argument.

The majority concludes that the doctrine of invited error does not bar Ruffins from complaining about the reasonable-doubt instruction given because the instruction at issue was already in the jury charge when Ruffins objected to the omission of a reasonable-doubt instruction and requested his reasonable-doubt instruction, and no changes were made to the jury charge in response to his objection and requested instruction. However, no changes were made because, as the majority notes, Ruffins informed the trial court he was "good" and made no further objections.

The majority characterizes Ruffins's actions—commenting that he was "good" and not objecting further—as "withdrawing his objection." But, in context, his "good" **[**45]** comment reflected that he was "good" with the instruction. After the jury-charge instruction at issue was read to him—word for word in open court—in response to his requested reasonable-doubt instruction, Ruffins said, "I'm good," thereby communicating to the trial court his acceptance of the now complained-of instruction. He had made a request for a particular reasonable-doubt instruction but accepted an alternate instruction that differed from what he requested. In doing so, he accepted as "good" the allegedly erroneous instruction.

That his "good" comment was accepting the allegedly erroneous instruction is particularly evident when this

objection is read in the context of the charge conference as a whole. Throughout the charge conference, Ruffins objected to the jury charge by requesting various instructions that specified what words and phrases he sought as well as by requesting a particular order for the instructions to be given in **[*206]** the charge.[1] Given the specificity and particularity of his other objections to the jury charge, his communication to the trial court that he was "good" was a comment that he was "good" with the instruction at issue and constituted not only an acceptance **[**46]** of the instruction but an affirmation that the allegedly erroneous instruction sufficed to address his requested instruction.

Under the doctrine of invited error, a defendant cannot invite or cause error and then complain about it on appeal. *See Cary v. State*, 507 S.W.3d 750, 755 (Tex. Crim. App. 2016) (explaining that "the law of invited error estops a party from making an appellate error of an action it induced" (quoting *Prystash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999))); *Woodall v. State*, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011) (explaining that "[t]he law of invited error provides that a party cannot take advantage of an error that it invited or caused, even if such error is fundamental"); *Prystash*, 3 S.W.3d at 531 (explaining that "invited error" "is part of the definition of what can constitute error, and quite reasonably defines error of which a party may complain as excluding those actions of the trial court actually sought by the party in that tribunal" (quoting George E. Dix and Robert O. Dawson, 43 *Texas Practice—Criminal Practice and Procedure* § 42.141 (Supp. 1999))). While it is true that the complained-of reasonable-doubt instruction was in the jury charge before Ruffins requested his reasonable-doubt instruction, I am not convinced that, given his affirmative acceptance of the allegedly erroneous instruction, Ruffins did not "invite," or at least join in inviting, **[**47]** the alleged error. The reason the trial court stopped addressing that particular instruction—and left it in the form Ruffins now complains about—was because Ruffins indicated to the court that he was "good." The record reflects that, based on the discussion that followed Ruffins's objection and request for a reasonable-doubt instruction and Ruffins's actions during that discussion, the trial court believed that the jury charge addressed Ruffins's objection and the specific concern he raised.[2]

However, even if Ruffins's complaint is not barred by the doctrine of invited error, as the majority contends, the doctrine of **[*207]** invited error is simply one form of estoppel. *See Prystash*, 3 S.W.3d at 531 (describing doctrine of invited error as species of estoppel). "Estoppel is a flexible doctrine that takes many forms." *Deen v. State*, 509 S.W.3d 345, 348 (Tex. Crim. App. 2017); *see Murray v. State*, 302 S.W.3d 874, 882 (Tex. Crim. App. 2009) ("[E]stoppel is a flexible doctrine that manifests itself in various forms that are not limited to unilateral requests." (quoting *Rhodes v. State*, 240 S.W.3d 882, 891 (Tex. Crim. App. 2007))); *see also Rhodes*, 240 S.W.3d at 891 (observing that, in *Prystash*, court dealt "with a type of estoppel involving unilateral requests that result in 'invited error,' but estoppel is a flexible doctrine that manifests itself in various forms that are not limited to unilateral requests").

Under the **[**48]** doctrine of estoppel, a party may be estopped from asserting a claim that is inconsistent with that party's prior conduct. *Arroyo v. State*, 117 S.W.3d 795, 798 (Tex. Crim. App. 2003); *State v. Yount*, 853 S.W.2d 6, 9 (Tex. Crim. App. 1993); *see State v. Stewart*, 282 S.W.3d 729, 739-40 (Tex. App.—Austin

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[1] For example, Ruffins objected to the omission of language referring to the statute in the instruction setting forth the accomplice-witness rule—that is, he requested that the instruction "say '38.14.'" (The trial court denied that requested language.) He also objected to the accomplice-witness instruction relating to Trevino, requesting that the phrase "as a matter of law" be added to the instruction telling the jury that Trevino was an accomplice. (The trial court denied that request.) In objecting to the instruction defining sufficient corroboration—which stated, "Evidence is sufficient to corroborate the testimony of an accomplice if that evidence tends to connect the Defendant, Anthony Ruffins, with the commission of any offense."—he requested the phrase "any offense" be changed to "aggravated robbery." (The prosecutor suggested changing the phrase to "the offense," and Ruffins agreed.)

[2] When Ruffins first made this objection and requested a reasonable-doubt instruction, which included the language he now complains was missing from the instruction given, the trial judge said that a reasonable-doubt instruction was in the jury charge: "[I]t says in there they have to find that he is an accomplice beyond a reasonable doubt." Ruffins expressed that he did not think such an instruction was in the charge—"But I don't think there's been an instruction that they need to believe — when they consider accomplice, they have to agree beyond a reasonable doubt that he is an accomplice. I don't think that's in here."—and the trial judge again indicated that he "thought it was." The instruction was then read by the prosecutor, and Ruffins said he was "good." The prosecutor informed the trial judge which page the instruction was on, and the judge said, "Yeah. Okay. I thought it was in there."

2009, no pet.) (explaining that basis for estoppel ruling is that "the estopped party was asserting a claim or taking a position that was inconsistent with the party's earlier conduct in the same cause"); *see, e.g., Arroyo*, 117 S.W.3d at 798 (holding that State was estopped from challenging admissibility of defense exhibits that were certified copies of criminal records summarized in rap sheet produced by State); *Jones v. State*, 119 S.W.3d 766, 784 (Tex. Crim. App. 2003) (holding that appellant was estopped from complaining about trial court's discharge of juror when appellant had proposed discharge as alternative to mistrial); *Yount*, 853 S.W.2d at 9 (holding that defendant who requested and received jury-charge instruction on lesser included offense was estopped from complaining on appeal that conviction for lesser included offense was barred by limitations), *overruled in part by McKinney v. State*, 207 S.W.3d 366, 373-74 (Tex. Crim. App. 2006) (restricting application of estoppel rule as it applies to sufficiency challenges for lesser included offenses).

Here, the record reflects that, knowing full well the exact content of the reasonable-doubt instruction in the court's jury charge (because it had just been read verbatim in open court), **[**49]** Ruffins accepted the allegedly erroneous instruction. He did not remain silent on the issue, simply fail to object to the instruction, or assert "no objection" to the charge; nor did he merely "withdraw his objection." Rather, when he expressed that he was "good" with the instruction, he affirmatively communicated to the court that the instruction at issue sufficed and, in doing so, overtly abandoned his requested instruction—that is, he accepted the allegedly erroneous instruction in lieu of his requested instruction.

Under the circumstances present here, I believe that Ruffins is estopped from complaining about error in the reasonable-doubt accomplice-witness jury-charge instruction. *See, e.g., Woodard v. State*, 322 S.W.3d 648, 659 (Tex. Crim. App. 2010) (concluding that record "fairly" reflected that appellant had some responsibility for challenged instruction and, thus, appellant was precluded from raising complaint regarding instruction for first time on appeal).

Even were Ruffins not estopped from complaining on appeal about the instruction at issue—contending that it erroneously omitted language informing the jury that if they had a reasonable doubt as to whether Hogarth was an accomplice, corroborating evidence was required—I am uncertain **[**50]** that this omission is error.

[*208] The accomplice-witness statute places no burden on either party to prove—beyond a reasonable doubt or otherwise—the accomplice status. The majority indicates that not only is proof beyond a reasonable doubt required, but that if such proof is not provided, the law requires corroborating evidence. That is, the majority maintains that corroborating evidence is required if the jury has a reasonable doubt as to whether a witness is an accomplice. While this may be a sound policy, given the theory underlying the accomplice-witness rule, such a requirement is not in the statute. The statute requires corroboration of the testimony of "an accomplice." *See* Tex. Code Crim. Proc. art. 38.14 ("A conviction cannot be had upon the testimony of *an accomplice* unless corroborated by other evidence . . . ." (emphasis added)). It does not say "an accomplice or a possible accomplice," "a suspected accomplice," "someone who might be an accomplice," or even "someone the jury is unsure about whether the person is an accomplice."

Further, while such an instruction may have been given and upheld in some cases, and the majority cites cases that do so, that does not mean that the law requires that such an instruction **[**51]** be given. *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Criminal Pattern Jury Charges: Special Instructions*, CPJC 3.4 (2018) (observing that "[e]xisting practice is often to instruct jurors that corroboration is required unless the state proves beyond a reasonable doubt that a witness is not an accomplice witness" but stating that "[t]here seems neither need nor justification for imposing a requirement of proof beyond a reasonable doubt" (citations omitted)).

Assuming that such an instruction is erroneous, I have concerns about the harm analysis performed by the majority.

While any type of harm analysis involves the evaluation of evidence,[3] *see Herron v. State*, 86 S.W.3d 621, 632

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[3] For example, assessing the harmfulness of the omission of an accomplice-witness instruction is a function of the strength of the corroborating evidence. *See Casanova v. State*, 383 S.W.3d 530, 539 (Tex. Crim. App. 2012). In assessing the strength of the non-accomplice evidence, courts examine (1) its reliability or believability, and (2) the strength of its tendency to connect the defendant to the crime. *State v. Ambrose*, 487 S.W.3d 587, 598 (Tex. Crim. App. 2016) (citing *Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002)). "Under the egregious harm standard, the omission of an accomplice witness instruction is generally harmless unless the corroborating (non-accomplice) evidence is 'so

(Tex. Crim. App. 2002) ("[A]ll harmless error applications, including that prescribed by *Almanza*, are essentially empirical inquiries concerning the effect of flaws and mistakes on the particular strengths and weaknesses of individual cases." (quoting *Saunders v. State*, 817 S.W.2d 688, 690 (Tex. Crim. App. 1991))), I am concerned that the Court is placing itself too far in the role of factfinder.

The majority discounts the testimony of Detective Mahoney (whose demeanor the jury was able to observe during his testimony), the video of the security footage (which the jury was able to review for itself), the digital **[**52]** evidence (such as Facebook posts), the evidence recovered from the apartments (like the firearm and gloves), and Ruffins's suspicious statements during the investigation. *See, e.g., Smith v. State*, 332 S.W.3d 425, 447 (Tex. Crim. App. 2011) ("Though each of the **[*209]** facts discussed above, considered individually, would not satisfy Article 38.14, the cumulative force of the non-accomplice evidence, giving proper deference to the jury's resolution of the facts, tends to connect [appellant] to the murders."); *cf. Mitchell v. State*, 650 S.W.2d 801, 807 (Tex. Crim. App. 1983) (explaining that "combined cumulative weight of the incriminating evidence furnished by the non-accomplice witnesses which tends to connect the accused with the commission of the offense supplies the test").

Yet, the majority affords credibility to Ruffins's alibi witness (his girlfriend, who waited until trial to establish his alibi) and Ruffins's self-serving denials. *Cf. Simmons v. State*, 282 S.W.3d 504, 508 (Tex. Crim. App. 2009) (recognizing that, in sufficiency review, "when there are two permissible views of the evidence (one tending to connect the defendant to the offense and the other not tending to connect the defendant to the offense), appellate courts should defer to that view of the evidence chosen by the fact-finder"); *Brown v. State*, 270 S.W.3d 564, 567 (Tex. Crim. App. 2008) (explaining that in determining whether non-accomplice evidence tends to connect **[**53]** defendant to commission of offense, "we view the evidence in the light most favorable to the jury's verdict").

While our role as an appellate court conducting a harm analysis for jury-charge error involves evaluating the strength and weaknesses of the evidence, I think at some point an appellate court crosses the line when it substitutes its own credibility assessments and fact determinations for those of the jury. I fear that line has been crossed here.

We are dealing with two standards. "Egregious harm is a 'high and difficult standard' to meet, and such a determination must be 'borne out by the trial record.'" *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015) (quoting *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013) (citations omitted)); *accord Marshall v. State*, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016); *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011). The "tends-to-connect" standard, however, does not present a high threshold.[4] *Turner v. State*, 571 S.W.3d 283, 287 (Tex. App.—Texarkana 2019, pet. ref'd); *Cantelon v. State*, 85 S.W.3d 457, 461 (Tex. App.—Austin 2002, no pet.); *see Solomon v. State*, 49 S.W.3d 356, 361 (Tex. Crim. App. 2001); *see also Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008) (observing that corroborating evidence "must simply link the accused in some way to the commission of the crime"). I think the Court is substituting its own fact findings to lower the standard for egregious harm and raise the standard for corroboration. I understand that harm in this context may relate to the strength of the non-accomplice evidence. *See Casanova v. State*, 383 S.W.3d 530, 539 (Tex. Crim. App. 2012); *Herron*, 86 S.W.3d at 632. But this is not a situation where the accomplice-witness instruction was completely **[**54]** omitted. In this case, the issue of Hogarth's status as accomplice and the need for corroborating evidence for accomplice-witness testimony were presented to the jury in the court's charge. The fact that the jury deliberated on the issue of guilt less than two and a half hours suggests that this was not an issue the jury struggled with.

Finally, I think the majority fails to keep in mind that under an *Almanza* egregious-harm **[*210]** standard, an appellant must have suffered some actual—rather than merely theoretical—harm. *See Chambers v. State*, 580 S.W.3d 149, 154 (Tex. Crim. App. 2019); *Marshall*, 479

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unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive.'" *Ambrose*, 487 S.W.3d at 598 (quoting *Herron*, 86 S.W.3d at 632). Although the majority does not appear to apply this standard here, in support of its conclusion that Ruffins suffered egregious harm, it cites to cases analyzing harm related to the omission of an accomplice-witness instruction under this standard.

[4] The majority acknowledges that "some corroborating evidence was presented" but laments that the evidence of guilt outside of the testimony of the accomplice-witness testimony was "less than overwhelming."

S.W.3d at 843. The majority's conclusion that "the jury *could* have had a reasonable doubt regarding whether Hogarth was an accomplice" (emphasis added) because of the alleged error in the accomplice-witness instruction is, in my view, merely theoretical harm.

Because I conclude that Ruffins is estopped from challenging the reasonabledoubt instruction at issue, have doubts about the law concerning the burden of proof regarding the accomplice status (and jury-charge instructions related to any such burden), and have the above concerns about the majority's egregious-harm analysis, I respectfully dissent from the majority opinion.[5]

Comment in Response to Concurring Opinion

Although the majority **[**55]** opinion is dispositive of this appeal, I write separately to address Justice Baker's concurrence in this published opinion.

Can a conviction be "had upon" testimony that is believed by a jury to be not true? Does the law require an instruction to jurors that they cannot convict on accomplice-witness testimony that they do not believe to be true? That is essentially the instruction at issue in the concurrence.

A conviction is a finding of guilt beyond a reasonable doubt. Implicit in an instruction to jurors that they must believe that the accomplice-witness testimony is true is the idea that the jury would or could convict based on such testimony (properly corroborated) if the jurors did not believe it to be true. This defies logic. All evidence supporting a finding of guilt—that is, evidence the conviction is "had upon"—is based on the jury's belief that the supporting evidence is true. I find it implausible that a finding of guilt beyond a reasonable doubt would be based on testimony not believed to be true. Thus, an instruction telling the jury that it cannot base its decision about guilt (a finding beyond a reasonable doubt) on untrue testimony—which is essentially what the instruction **[**56]** at issue here does—is unwarranted, and I do not believe such an instruction is required by law. I disagree with the concurring opinion indicating the contrary.

I am concerned about the concurrence's reliance on cases from more than a century ago—which predate *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g) (setting forth procedure for appellate review of claim of jury-charge error), and *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993) (categorizing rights and establishing framework for which rights are subject to procedural default), *overruled on other grounds by Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997), and fail to take into account a long history of changing instructions relating to accomplice-witness testimony, *see, e.g., Holladay v. State*, 709 S.W.2d 194, 198 (Tex. Crim. App. 1986) (observing that requirement of materiality of corroborating evidence in instruction "has come and gone several times" in that "[b]efore the turn of the century, a jury charge need not have instructed that the corroboration relate to 'some material matter'" but that "by the 1940's, corroboration of 'all material facts' was necessary" (internal citations omitted)).

It is true that, in *Campbell v. State*, decided in 1909, the Court of Criminal Appeals explained what "should" be included **[*211]** in an accomplice-witness jury-charge instruction to effectuate the accomplice-witness rule, now codified **[**57]** in article 38.14 of the Code of Criminal Procedure. *See* 57 Tex. Crim. 301, 123 S.W. 583, 584 (Tex. Crim. App. 1909) (reversing conviction for crime of seduction "on account of the error in the charge of the court on the subject of accomplice" and providing form of accomplice-witness instruction, stating that "the following form of charge should be given, and same is hereby in terms approved as a correct charge"). In the years immediately following, when reviewing complaints about accomplice-witness instructions, the court approved of the use of the *Campbell* instruction, or those substantially similar, *see, e.g., Ice v. State*, 84 Tex. Crim. 509, 208 S.W. 343, 345 (Tex. Crim. App. 1919); *Tindel v. State*, 80 Tex. Crim. 14, 189 S.W. 948, 950 (Tex. Crim. App. 1916); *Grimes v. State*, 77 Tex. Crim. 319, 178 S.W. 523, 526 (Tex. Crim. App. 1915); *McCue v. State*, 75 Tex. Crim. 137, 170 S.W. 280, 286 (Tex. Crim. App. 1913); *Oates v. State*, 67 Tex. Crim. 488, 149 S.W. 1194, 1198 (Tex. Crim. App. 1912); *Martinez v. State*, 61 Tex. Crim. 29, 133 S.W. 881 (Tex. Crim. App. 1911), and urged its use by the trial courts, *see, e.g., Long v. State*, 62 Tex. Crim. 540, 138 S.W. 401 (Tex. Crim. App. 1911); *Jordan v. State*, 62 Tex. Crim. 388, 137 S.W. 114, 115 (Tex. Crim. App. 1911); *Grant v. State*, 60 Tex. Crim. 358, 132 S.W. 350, 352 (Tex. Crim. App. 1910); *Thorp v. State*, 59 Tex. Crim. 517, 129 S.W. 607, 610 (Tex. Crim. App. 1910).

However, in due course, the instruction fell under

[5] I have the same concerns with the egregious-harm analysis in the concurring opinion. I do not repeat my concerns in my remarks concerning that opinion.

criticism for various reasons and was deemed to be inaccurate, inadequate, and inappropriate. *See, e.g., Lightfoot v. State*, 128 Tex. Crim. 281, 80 S.W.2d 984, 986-87 (Tex. Crim. App. 1935); *Schlesinger v. State*, 121 Tex. Crim. 517, 50 S.W.2d 319, 320-21 (Tex. Crim. App. 1932); *Morse v. State*, 106 Tex. Crim. 520, 293 S.W. 568 (Tex. Crim. App. 1927); *McGary v. State*, 99 Tex. Crim. 142, 268 S.W. 475, 476 (Tex. Crim. App. 1925); *Abbott v. State*, 94 Tex. Crim. 31, 250 S.W. 188, 190 (Tex. Crim. App. 1923). The use of the *Campbell* instruction was discouraged, *see, e.g., Bass v. State*, 62 S.W.2d 127 (Tex. Crim. App. 1933) ("The charge in *Campbell v. State* . . . is not correct, and should not be given[.]"), and ultimately, in 1950, the Court of Criminal Appeals rejected and overruled the instruction, *see Green v. State*, 155 Tex. Crim. 43, 231 S.W.2d 433, 436 (Tex. Crim. App. 1950) ("*Campbell v. State*, supra, is no longer 'an approved form' of instruction on accomplice testimony, and in that regard is expressly overruled.").

Further, unlike the concurrence, I am not convinced that the Court of Criminal Appeals **[**58]** has "repeatedly stated" that the failure to include an instruction about first believing the accomplice witness's testimony to be true is itself an impermissible comment on the weight of the evidence that constitutes error. The concurrence relies on *Jones v. State*, decided in 1903, in which the court concluded that the instruction complained of, which did not instruct the jury that it had to first believe the accomplice's testimony to be true, was a comment on the weight of the testimony. *See* 44 Tex. Crim. 557, 72 S.W. 845, 846 (Tex. Crim. App. 1903). However, the *Jones* opinion based its holding on *Bell v. State*, 39 Tex. Crim. 677, 47 S.W. 1010, 1011 (Tex. Crim. App. 1898), and the jury charge in that case.

In *Bell*, an 1898 cattle theft case, the accomplice witness, a man named John Pelt, described his commission of the offense with appellant—which the State maintained was "theft in pursuance of a conspiracy." 47 S.W. at 1011. The trial court gave a charge on theft generally, a charge on "theft in pursuance of a conspiracy," the "usual charge defining who were accomplices," and then instructed the jury,

> Now, you are charged that the witness John Pelt was an accomplice according to his own testimony, as that term is defined in the foregoing instruction; and you are further instructed that you cannot find the defendant guilty upon **[**59]** his **[*212]** testimony, unless you are satisfied that the same has been corroborated by other evidence tending to establish that the defendant did in fact commit the offense.

Id. In responding to appellant's objection "to that part of the charge on accomplice testimony which stated to the jury that Pelt was an accomplice on his own testimony," the Court of Criminal Appeals explained,

> We understand appellant's contention to be that the court's charge on accomplice testimony was on the weight of the evidence,—that is, that the matter of conspiracy between Pelt and appellant depended alone on Pelt's testimony, which was denied by appellant; that, on the doctrine of accomplices, Pelt might be an accomplice with the appellant by virtue of being a co-conspirator with him, and that, consequently, the effect of the court's charge was to tell the jury that it was true, as had been testified to by Pelt, that he was a co-conspirator with appellant; that this was upon the weight of testimony[.]

Id. The court concluded that "the jury were [sic] liable to regard Pelt as an accomplice by virtue of his testimony regarding the conspiracy between himself and appellant; and then to be told, in effect, that Pelt's **[**60]** testimony as to the conspiracy was true, was a charge upon the weight of the testimony." *Id.* It was not the absence of an instruction about finding the accomplice-witness testimony to be true that rendered the instruction a comment on the weight of the evidence. Rather, it was the factual circumstances under which the trial court instructed the jury that Pelt was an accomplice "according to his own testimony." The only way Pelt could have been an accomplice was by participating in the alleged conspiracy as he described in his testimony. Thus, the instruction that Pelt was an accomplice was, essentially, also an instruction that his testimony was truthful and that he was a co-conspirator.

The court then addressed appellant's contention that "the charge as framed by the [trial] court was upon the weight of the testimony, because it assumed as true the truth of the accomplice's testimony throughout, and then only required that the jury find that the state had introduced other testimony tending to corroborate the same." *Id.* at 1012. The court agreed and cautioned that "[i]n every case where an accomplice testifies, the judge should be careful not to assume in any manner the truth of the accomplice's **[**61]** testimony, but leave the truth of that, as well as all other, evidence, to be found by the jury." *Id.* The court then suggested that

> in some method [the jurors] should be clearly told, if they believed the accomplice's testimony to be true,

> and that it showed or tended to show that defendant was guilty of the offense, still they could not convict unless they further believed that there was other testimony, outside of the accomplice testimony, tending to connect defendant with the commission of the offense charged.

Id. From this statement, the "requirement" for language in the accomplice-witness instruction telling the jury that it must first believe the accomplice-witness testimony to be true seems to have emerged.[6] However, the court did not provide **[*213]** a requisite instruction nor mandate the inclusion of such an instruction in the accomplice-witness instruction. *Cf. Geesa v. State*, 820 S.W.2d 154, 162 (Tex. Crim. App. 1991) (expressly adopting instruction on "reasonable doubt" and mandating its submission to juries), *overruled by Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000). I believe the notion that an accomplice-witness instruction lacking language directing the jury to first find the accomplice-witness testimony to be true itself may constitute an impermissible comment on the weight of **[**62]** the testimony (and, therefore, is erroneous) arises from a misinterpretation of this 1898 case.

The cases following *Bell* seem to involve a similar flaw. For example, in *Jones*, upon which the concurrence relies, the trial court instructed the jury that "the uncontradicted evidence before you shows that, if [the deceased] was murdered, Sam Tittsworth was an accomplice to said murder." 72 S.W. at 846. Similar to *Bell*, by instructing the jury that the "uncontroverted evidence" showed that Tittsworth was an accomplice, the court essentially instructed the jury that the uncontroverted evidence showed that Tittsworth's testimony was true. It was the manner in which the trial court instructed the jury that the witness was an accomplice as a matter of law that rendered the instruction a comment on the weight of the evidence (by assuming the truthfulness of the accomplice witness's testimony in characterizing **[**63]** it as "uncontroverted evidence") not the absence of the "first believe to be true" instruction.

I also disagree with the concurrence's statement that the Court of Criminal Appeals and various intermediate courts have "continued to explain the proper accomplice-witness instructions should include directives requiring that juries believe an accomplice witness in addition to determining that the witness's testimony is corroborated before convicting a defendant." While it is true that the cases cited by the concurrence are cases in which the accomplice-witness instruction at issue contained a "first believe to be true" component, the legal issue in those cases was unrelated to that part of the instruction and instead concerned different aspects of the instruction.

Both *Farris* and *Holladay* addressed the issue of whether an instruction that the accomplice witness's testimony must be corroborated as to the specific elements that make the crime of murder capital murder (the aggravating element) was required under article 38.14. *See Farris v. State*, 819 S.W.2d 490, 507 (Tex. Crim. App. 1990), *overruled on other grounds by Riley v. State*, 889 S.W.2d 290 (Tex. Crim. App. 1993); *Holladay*, 709 S.W.2d at 195. The court in both cases found that a corroborating instruction as to the aggravating element of capital murder was not required and that the **[**64]** accomplice-witness instruction given was "more than adequate to satisfy the requirements of Art. 38.14," *Holladay*, 709 S.W.2d at 199, and "satisfie[d] **[*214]** the requirements of Art. 38.14," *Farris*, 819 S.W.2d at 507.

In *Davis*, the accomplice-witness instruction used the phrase "other testimony" rather than the statutory phrase "other evidence" when instructing about the

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[6] In chronological order, *see, e.g., Jones v. State*, 44 Tex. Crim. 557, 72 S.W. 845, 846 (Tex. Crim. App. 1903) (citing *Bell*); *Hart v. State*, 47 Tex. Crim. 156, 82 S.W. 652, 653 (Tex. Crim. App. 1904) (citing *Bell* and *Jones*); *Washington v. State*, 47 Tex. Crim. 131, 82 S.W. 653, 654 (Tex. Crim. App. 1904) (citing *Bell* and *Jones*); *Harrison v. State*, 47 Tex. Crim. 393, 83 S.W. 699, 704 (Tex. Crim. App. 1904) (citing *Bell* and *Jones*); *Crenshaw v. State*, 48 Tex. Crim. 77, 85 S.W. 1147, 1148 (Tex. Crim. App. 1905) (citing *Bell, Jones*, *Hart*, and *Washington*); *Garlas v. State*, 48 Tex. Crim. 449, 88 S.W. 345, 346 (Tex. Crim. App. 1905) (citing *Hart* and *Crenshaw*); *Barton v. State*, 49 Tex. Crim. 121, 90 S.W. 877 (Tex. Crim. App. 1905) (citing *Garlas, Crenshaw*, *Hart, Jones*, and *Bell*); *Reagan v. State*, 49 Tex. Crim. 443, 93 S.W. 733, 734 (Tex. Crim. App. 1906) (citing *Bell, Jones*, *Hart, Washington*, *Crenshaw*, and *Garlas*); *Carbough v. State*, 49 Tex. Crim. 452, 93 S.W. 738 (Tex. Crim. App. 1906) (citing *Bell*, *Jones, Hart*, *Washington, Crenshaw*, and *Barton*); *Oates v. State*, 50 Tex. Crim. 39, 95 S.W. 105, 106 (Tex. Crim. App. 1906) (citing *Barton, Garlas*, *Crenshaw, Hart*, *Jones, Washington*, and *Bell*); *Jordan v. State*, 51 Tex. Crim. 145, 101 S.W. 247 (Tex. Crim. App. 1907) (citing *Bell, Jones*, *Garlas, Hart*, *Crenshaw*, *Washington, Barton*, and *Oates*). These are just a few examples of the chain of citation, each building upon prior cases, that cite *Bell* and the immediately succeeding case(s) without consideration of *Bell*'s actual holding or of its unique facts or legal issues that rendered the instruction given an impermissible comment on the weight of the evidence.

corroboration requirement. *See Davis v. State*, No. 06-15-00011-CR, 2015 Tex. App. LEXIS 12662, 2015 WL 8953889, at *3-5 (Tex. App.—Texarkana Dec. 16, 2015, pet. ref'd) (mem. op., not designated for publication). The court concluded that the instruction did not improperly limit consideration of non-accomplice evidence and concluded that the instruction given "was sufficient under Article 38.14." 2015 Tex. App. LEXIS 12662, [WL] at *5. In *Tuma*, the issue was the omission of language that "the corroboration is not sufficient if it merely shows the commission of the offense" and language stating that the jury must believe beyond a reasonable doubt from all of the evidence that appellant is guilty. *See Tuma v. State*, No. 04-00-00522-CR, 2002 Tex. App. LEXIS 93, 2002 WL 21962, at *1 (Tex. App.—San Antonio Jan. 9, 2002, no pet.) (mem. op., not designated for publication). The court concluded that the instruction "met the test" of the instruction the Court of Criminal Appeals found to be "sufficient" in *Holladay*. 2002 Tex. App. LEXIS 93, [WL] at *2.

Finally, the issue in *Ferguson* was the omission of appellant's requested instruction on circumstantial evidence. **[**65]** *See Ferguson v. State*, 573 S.W.2d 516, 524 (Tex. Crim. App. 1978). The court found that because the instruction given "did not allow the jury to convict without believing the accomplice witness' [sic] testimony, there was no necessity to charge on the circumstantial nature of the nonaccomplice [sic] incriminating evidence." *Id.* However, that case was decided before the court dispensed with the necessity of instructing the jury on the law of circumstantial evidence, *see Hankins v. State*, 646 S.W.2d 191, 200 (Tex. Crim. App. 1981), under a different legal framework, which included the reasonable-alternative-hypothesis construct for reasonable doubt, and at a time when circumstantial evidence was deemed weaker than direct evidence. Further, the court did not address the propriety of giving the instruction about first believing the accomplice-witness testimony to be true or state that such an instruction was required; it just noted the impact of the instruction given—that because it was given, "there was no necessity to charge on the circumstantial nature of the nonaccomplice [sic] incriminating evidence." *Ferguson*, 573 S.W.2d at 524.

The fact that the courts have held that the accomplice-witness instructions given in a particular case, which included language about first believing the accomplice-witness testimony to be true, "satisfied" **[**66]** the article 38.14 requirements does not equate to a holding that such language is statutorily required to be included in every accomplice-witness instruction.

In addition, I find the concurrence's reliance on *Scales, Fritz*, and *Simmons* to be problematic. First, the issue before our sister courts in those cases was the absence of an instruction that a confidential informant's testimony must be corroborated, in conformity with article 38.141, which provides a corroboration requirement similar to article 38.14 for a conviction of a drug offense on the testimony of a confidential informant working with law enforcement. *See Scales v. State*, No. 04-12-00435-CR, 2014 Tex. App. LEXIS 1744, 2014 WL 667506, at *11 (Tex. App.— San Antonio Feb. 19, 2014, pet. ref'd) (mem. op., not designated for publication); *Fritz v. State*, No. 07-06-0206-CR, 2008 Tex. App. LEXIS 3996, 2008 WL 2229533, at *2 (Tex. App.—Amarillo May 30, 2008, pet. ref'd) (mem. op., not designated for publication); *Simmons v. State*, 205 S.W.3d 65, 76 (Tex. App.— Fort Worth 2006, no pet.); *see also* Tex. Code Crim. Proc. art. 38.141. The **[*215]** issue in those cases was the entitlement to an instruction at all, not the form of the instruction. Further, *Scales* and *Fritz* cite to and rely on *Simmons* in support of the statement quoted by the concurrence. *See Scales*, 2014 Tex. App. LEXIS 1744, 2014 WL 667506, at *11; *Fritz*, 2008 Tex. App. LEXIS 3996, 2008 WL 2229533, at *2. In support of the quoted statement in *Simmons*, the Fort Worth court cited *Green v. State*, 72 S.W.3d 420, 423 (Tex. App.—Texarkana 2002, pet. ref'd), *disapproved of on other grounds by Zamora v. State*, 411 S.W.3d 504, 514 n.6 (Tex. Crim. App. 2013), a case from the Texarkana Court of Appeals. *Green* simply addressed the issue of **[**67]** when a defendant is entitled to an accomplice-witness instruction (that is, when a witness is an accomplice as a matter of law or a matter of fact). *Id.* In its discussion, the Texarkana court did not state that the defendant is entitled to an instruction "that a conviction cannot be based on the accomplice testimony unless the jury believes the testimony to be true," as the Fort Worth court did. The *Green* opinion makes no mention of the purported requirement that the jury be instructed that it must first find the accomplice-witness testimony to be true.

I also find the concurrence's reliance on *Nolley* and *Tran* for the idea that the purpose of the accomplice-witness rule is to ensure that "a jury does not consider accomplice evidence unless the jury finds *both* that the accomplice is telling the truth and that other evidence corroborates the accomplice" to be problematic. *See Tran v. State*, 870 S.W.2d 654, 658 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). In *Nolley*, the Fourteenth Court of Appeals cites to *Tran* in support of this position. *See Nolley v. State*, 5 S.W.3d 850, 852 (Tex. App.—Houston [14th Dist.] 1999, no pet.). In *Tran*,

the First Court of Appeals makes the assertion without citation to any authority whatsoever. *See* 870 S.W.2d at 658. I believe the purpose of the rule can be determined by looking to the statute itself, which, by its plain language, **[**68]** addresses only corroboration. *See, e.g., Gosch v. State*, 829 S.W.2d 775, 777 (Tex. Crim. App. 1991) (observing that if combined cumulative weight of other evidence tends to connect accused with commission of offense, "then the mandate of Article 38.14 has been fulfilled").

The accomplice-witness rule, embodied in article 38.14, is a statutory rule. *Blake v. State*, 971 S.W.2d 451, 454 (Tex. Crim. App. 1998); *Thompson v. State*, 691 S.W.2d 627, 631 (Tex. Crim. App. 1984); *see Zamora*, 411 S.W.3d at 509. The purpose of the accomplice-witness instruction is to remind 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 v. State*, 201 S.W.3d 744, 747 (Tex. Crim. App. 2006) (citing *Herron*, 86 S.W.3d at 632). As the Court of Criminal Appeals has explained,

> The instruction does not say that the jury should be skeptical of accomplice witness testimony. Nor does it provide for the jury to give less weight to such testimony than to other evidence. The instruction merely informs the jury that it cannot use the accomplice witness testimony unless there is also some nonaccomplice evidence connecting the defendant to the offense. Once it is determined that such non-accomplice evidence exists, the purpose of the instruction is fulfilled, and the instruction plays no further role in the factfinder's decision-making.

Herron, 86 S.W.3d at 632; *see Beeson v. State*, 60 Tex. Crim. 39, 130 S.W. 1006, 1008 (Tex. Crim. App. 1910) ("Is it not rather the intent of the statute that, when other evidence **[**69]** tends to show the crime and defendant's complicity, the disabled or discredited accomplice witness is thereby placed in the **[*216]** same position with other witnesses? It does not say accomplice shall not be believed unless corroborated, but that corroboration is requisite to conviction. Corroboration being furnished, what is to prevent conviction if the jury give credence to her testimony[?]").

While the statute "limits the effect that may be given the testimony of an accomplice, it does not define the terms in which an instruction to the jury shall be framed." *Holladay*, 709 S.W.2d at 198. The Court of Criminal Appeals has noted that, in the past, when provisions of article 38.14 and its precursors were implicated, "the jury charge was held sufficient if it: (1) defined the term accomplice; (2) gave the statutory inhibition against conviction on uncorroborated accomplice testimony; (3) stated that the corroboration must be as to some material matter tending to connect the accused with the commission of the offense; and (4) applied the law to the facts." *Id.* (citing example of *Standfield v. State*, 84 Tex. Crim. 437, 208 S.W. 532, 538 (Tex. Crim. App. 1918), which explained what "a charge on accomplice testimony" should do "to be sufficient" and did not include instruction that accomplice-witness testimony must **[**70]** first be believed to be true).

I understand that an accomplice-witness's testimony should be viewed with caution given the individual's possible incentive to lie. *See Blake*, 971 S.W.2d at 454 (recognizing that accomplice-witness rule "reflects a legislative determination that accomplice testimony implicating another person should be viewed with a measure of caution, because accomplices often have incentives to lie, such as to avoid punishment or shift blame to another person"). However, that may be the reason for the statutory corroboration requirement. *See Zamora*, 411 S.W.3d at 509 (explaining that accomplice-witness rule expressed in article 38.14 "has been a part of Texas law since at least 1925, and reflects 'a legislative determination that accomplice testimony implicating another person should be viewed with a measure of caution'" (quoting *Blake*, 971 S.W.2d at 454)). The statute does not require an additional instruction as to the truthfulness of the testimony. *See id.* at 513 (stating that statute's plain meaning "disallows any conviction based upon uncorroborated testimony of an accomplice" and "sets out an 'implicit "If-then" proposition: If the evidence raises an issue of [the witness's status as an accomplice], then the trial court shall instruct the jury [regarding **[**71]** the corroboration requirement]'" (quoting *Oursbourn v. State*, 259 S.W.3d 159, 180 (Tex. Crim. App. 2008)) (alterations in original)). Indeed, I have concerns about an instruction that singles out particular witness testimony for a truthfulness determination in such a manner. *See Spears v. State*, 102 Tex. Crim. 86, 277 S.W. 142, 143 (Tex. Crim. App. 1925) ("[W]e have fears as to the correctness of the giving of a charge in any case which instructs the jury that if they believe the testimony of any witness is true, they may convict if they believe other specified testimony is present. This smacks tremendously of a charge on the weight of the evidence."). The instruction at issue is simply not necessary—as the statutory corroboration requirement

and the criminal burden of proof for conviction fully address the need for belief in the truthfulness of accomplice-witness testimony to sustain a conviction (without drawing attention to one specific type of evidence)—nor, in my view, is it appropriate.

The Criminal Pattern Jury Charges do not include such an instruction in the instruction on accomplice-witness testimony for either an accomplice as a matter of law or for an accomplice as a matter of fact. *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Criminal Pattern Jury Charges: Special Instructions*, CPJC 3.3, **[*217]** 3.4 **[**72]** (2018). In fact, the committee explicitly recommends *against* including such an instruction because the statute does not require it and, further, it may be an inaccurate statement of the law. *See id.* 3.3, 3.4 at 62, 75 ("Consequently, an instruction that the jury must first find the accomplice's testimony is true may not be an accurate statement of the law. For these reasons, and because there is nothing in article 38.14 to support such an instruction, the Committee recommends against it.").

Ultimately, the issue is not whether a jury-charge instruction has been approved, suggested, repeatedly given, or upheld, but whether the instruction is required by law. Because I do not believe the instruction at issue here is required by law, I respectfully disagree with the view expressed in the concurring opinion.

Conclusion

Because I conclude that Ruffins is estopped from complaining about the reasonable-doubt instruction in the application paragraph of the accomplice-witness instruction as to Hogarth and I further conclude that language in the accomplice-witness instruction directing the jury to first find the accomplice-witness testimony to be true is not required by law, I conclude that neither of these **[**73]** alleged jury-charge errors supports reversal of the trial court's judgment of conviction. Accordingly, I respectfully dissent.

Melissa Goodwin, Justice

Before Justices Goodwin, Baker, and Kelly

Filed: August 14, 2020

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