Opinion filed August 31, 2017

In The

Eleventh Court of Appeals

No. 11-14-00311-CR

CURTIS JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 161st District Court
Ector County, Texas
Trial Court Cause No. B-41,613

M E M O R A N D U M O P I N I O N

The jury found Curtis Johnson guilty of the murder of Evan Fitts[1] and assessed his punishment at confinement for life and a $10,000 fine. The trial court sentenced Appellant accordingly. On appeal, Appellant asserts four issues. We affirm.

I. *Evidence at Trial*

A. The day before the drug buy and the circumstances of the drug buy.

The day before Evan Fitts's murder, Brent Odom texted Fitts's telephone

[1]*See* TEX. PENAL CODE ANN. § 19.02 (West 2011)

number to Trevor Atchison. Atchison had asked Odom if he knew where to find any marihuana; Odom knew that Fitts used marihuana and thought he might have some. Ronald Martz, a detective with the Odessa Police Department, testified that he retrieved texts from Atchison's phone, and he confirmed that Odom had texted Fitts's phone number to Atchison. Atchison and Fitts exchanged several texts that began one day and continued to the next day when the drug buy was to occur. Atchison asked about "2 G's" or a "quarter," and Fitts responded that he would sell "13 G's bagged" and "4 or 5 more G's not bagged" for "260" and then said, "15 G's for 270." Atchison and Fitts agreed that they would meet at 6:10 p.m.

Parish Glenn King, Fitts's cousin, testified that while he was in Fitts's pickup, he heard a phone conversation between Fitts and someone.[2] The conversation came through the speakers in Fitts's pickup and concerned a drug sale. The person on the other end of the conversation called Fitts about "[s]elling weed" and mentioned "[t]welve grams" or half an ounce. King and Fitts weighed out some marihuana, put it into baggies, and put the baggies in the headlights of Fitts's pickup so that Fitts could complete the sale the next day. The next day, King and Fitts talked several times and agreed to meet at 6:00 to go sell the marihuana. However, "at about 6:01," Fitts told him that he would complete the sale and then come to King's house. King called Fitts at 6:15 p.m., but his voicemail answered and King knew something was wrong.

Jermaine Gearard testified that he was at Atchison's house but that he did not go with Jamar Gearard (Jermaine's brother), Atchison, and Appellant, who sometimes carried a gun, to buy marihuana from Fitts. Jermaine said that, after they

[2]The defense argued that Fitts received a call about the drug buy from a caller who spoke "Spanish." Jose Prieto Canales testified that he was friends with Atchison, that he lived at Third Edition Apartments, that he spoke Spanish, and that he hung out at Atchison's house. King testified that he told the police that the victim had spoken to Fitts about buying the marihuana and said that the person was not speaking Spanish but sounded "Black."

left, he heard a commotion and what sounded like a car "smashing off" or "peeling" off. Jermaine saw Jamar and Appellant standing outside and saw that they had a bag of marihuana, but he did not see Atchison. Jamar told Jermaine a couple of days later that Appellant had shot the driver of the pickup.

B. The Sherwood Park incident.

Otinio Longoria had just recently arrived home at 412 East 48th Street when she heard a revved engine, tires screeching, and "something like a wreck." Longoria went outside and "[saw] a commotion." Ronald Dominguez saw a pickup go into Sherwood Park, hit a mound of dirt, go airborne, land and turn, and then go toward a house. Odom testified that, while he was in Sherwood Park, a pickup almost hit him. There were more than fifty people in the park, and several of those in and near the park saw others fall out of the pickup. Shelly Chavez testified that the pickup ran over someone. Odom, Dominguez, and Chavez saw the victim fall out of the pickup, and they all ran over to him and discovered that he was severely injured. Chavez observed that he had blood coming from his nose and mouth and that he was gasping for air. Odom knew Fitts, and testified that Fitts was unrecognizable, very pale, and swollen. Odom also knew Atchison, and he thought he saw Atchison jump out of the pickup. Afterward, he saw a black male in a hoodie go west on 48th street. Chavez said that she saw four black people jump out of the pickup: two ran east, one ran southwest, and another ran toward 48th street. Longoria heard a commotion at Sherwood Park and saw a young black male in a black hoodie walk past her house; the black male said something to Jose Pena. Pena also saw a black man run down 48th street about ten minutes after the pickup entered Sherwood Park.

C. The police investigate the murder and collect evidence.

Patrick Harris, a crime scene technician for the Odessa Police Department, testified that he processed the entire pickup for evidence. He also took photographs of the exterior and interior of the pickup, items in the pickup, bloodstains in the

interior of the pickup, and of tire impressions. Additionally, Harris collected a .25 caliber shell casing. Jessie Calendar, who was part of the Community Response Unit, completed surveillance on 303 East 48th Street following the murder, and he did not recall seeing Appellant at the house. Tommy Jones, a corporal with the Odessa Police Department, spoke to King, who claimed that the victim set up the drug deal with someone who spoke Spanish and that that is who the victim met. Corporal Jones said that he picked up Jamar a few days after the murder, and Jamar did not tell him that he was in the pickup and saw Appellant shoot the victim.

D. Firearms evidence and pictures of Appellant and others.

Anita Todd worked for the crime scene unit at the Odessa Police Department, and she observed the autopsy of the victim and collected a bullet that was removed from his body. Officer Calendar found an empty box of .25 caliber ammunition when he searched Appellant's room. Kevin Callahan, a firearms examiner for the Texas Department of Public Safety, testified that he analyzed a fired, copper-jacketed bullet retrieved from the victim's body, which was like the ammunition found in Appellant's room. Jose Prieto Canales testified that he saw Appellant regularly carry a chrome handgun; he also said everyone had guns.

Corporal Jones collected a phone from Appellant. Detective Martz retrieved from Appellant's phone a "selfie" picture of a black male, Tuli,[3] holding a silver handgun; picture of two people, with one person holding a silver handgun; another picture with the same two people; and a fourth picture with three people in it, one of whom had a gun. The fourth picture was too blurry to identify the people pictured. Jermaine explained that Tuli was in two of the pictures and held the gun, that Jermaine was in two of the pictures, and that the other person with a gun was DeQuay Harris. Jermaine said that Appellant was in a tank top in the picture, Exhibit No. 156,

[3]Tuli is Daren Cooper.

with Harris and that the gun that Tuli held was Appellant's silver handgun. Dominique Blankenship, a friend of Appellant, lived with Appellant in November 2011 in an apartment. According to Blankenship, Appellant had access to a .25 caliber handgun at that apartment.

E. Examination of victim's body and autopsy of victim.

Sondra Wolfe, a forensic investigator for the Ector County Medical Examiner's Office, testified that she saw the victim's body at the hospital and that he had what appeared to be a bullet hole in the back of his shirt. She collected the victim's clothing and gave it to the police, ordered the victim's body to be transported to Tarrant County for an autopsy, and noted that the victim may have died from a gunshot wound to the back.

Nizam Peerwani, a forensic pathologist in Tarrant County, completed the autopsy. Dr. Peerwani observed abrasions on the victim's body and a small, circular gunshot wound in the mid-back area with powder tattooing, and he noted that a small caliber copper-jacketed bullet, possibly a .22 or .25 caliber, was recovered from the body. The bullet traveled in the body "back to front," "right to left," and "upwards." The gunshot occurred from ten to twenty-four inches away, and the bullet went through the spine and shattered the fourth and fifth discs; through the left lung; through the chest pool; and into the soft features of the left armpit. The victim died from the injury to his left lung.

F. Jamar Gearard—accomplice's testimony.

Jamar testified that he met Appellant at Nimitz Junior High School and that he and Appellant were friends with Atchison because Jamar knew Atchison's brother. Jamar spent a lot of time at Atchison's house, and Atchison wanted to "hit a lick" and buy marihuana. Atchison knew a "White dude" that he could call. Atchison called him and set up a meeting to buy marihuana. Atchison, Appellant, and Jamar met the "White dude," who drove a red pickup, at the Third Edition

Apartments in Ector County. Jamar got into the front passenger seat of the pickup; Atchison got into the back passenger seat; and Appellant sat in the backseat behind the driver. The driver passed the marihuana to the backseat, and Jamar got out of the pickup. Once Jamar exited the pickup, he heard a gun cock and heard Appellant demand that the driver give him his wallet. Jamar and the driver looked at each other, and Jamar saw the gun. The driver put the pickup transmission into "drive." When he did, the pickup hit the curb, and Appellant pulled the trigger and shot the driver; Appellant then fell out of the pickup as he held his gun and phone.

Jamar said that the pickup then "took" off down 48th Street toward Sherwood Park. Jamar testified that he saw Appellant load the bullet into the chrome .25 caliber gun and that Appellant often carried guns. Jamar and Appellant went to Atchison's house after the shooting, and Atchison arrived later. Jamar said that Atchison had choked the victim because the pickup would not stop and that Atchison had blood on him. Jamar said that Atchison's mother told him to get into a Suburban, and Jamar took Appellant out of the area in order to avoid the police.

Jamar said that Appellant told him, "I caught a body," which meant that he had killed someone. Jamar admitted that he had been arrested for evading arrest and for a controlled-substance offense but that he had not received any deals or a promise of pardon or parole in exchange for his testimony in Ector County; he also had a pending charge for unlawfully carrying a weapon in Ector County.[4] Jamar said that Canales also lived at the Third Edition Apartments. Jamar denied that he had told Blankenship that he was offered twenty-five years but, because he liked "f-----g whores and getting money," he was going to tell the police that Appellant did it and that Blankenship gave Appellant the gun. Jamar admitted that he pleaded guilty to

[4]Jamar said that he was part of the robbery and murder of the victim, but he was not charged with robbery of the victim or his murder.

a charge in Ward County and that his Ector County charges were taken into account in that deal. Jamar said that they got into the victim's pickup to rob him. Jamar stated that Jermaine[5] was not present when the robbery and murder occurred.

G. Manuel Franco—jailhouse informant's testimony.

Manuel Franco testified that he was in the Ector County jail when Appellant was there and that Appellant had talked to him about Fitts's murder. Franco said that he had heard television news about the murder. Appellant told Franco that he had arranged to buy drugs and planned to rob Fitts. In addition, Appellant told Franco that, because Fitts did not give Appellant his wallet, he shot him in the back with a .25 caliber handgun. Appellant told Franco that the pickup was a red F-150 four-door pickup and that the shooting was near Sherwood Park. Appellant also told Franco that Fitts took off across the park in his pickup, that Atchison remained in the pickup, and that the pickup crashed. Appellant had jumped out of the pickup before it crashed. Appellant told Franco that he went to Atchison's house and stayed there overnight and that Atchison's mother gave them a car to use to leave the area. Appellant also told Franco that he got away in that car but that Atchison was on a monitor and could not get away. Franco testified that he was not promised anything for his testimony. He explained his prior criminal history and said that he testified about what he heard because Appellant had boasted about the murder.

II. *Issues Presented*

Appellant claims in his first issue that the State failed to meet its burden on corroboration testimony under Articles 38.14 and 38.075 of the Texas Code of Criminal Procedure. He asserts in his second issue that the State adduced insufficient evidence for the jury to convict Appellant. Next, he claims that the trial court failed to instruct the jury that accomplice and jailhouse witnesses could not

[5]Jamar testified that Jermaine was not charged with the robbery or murder of the victim.

corroborate each other's testimony. Finally, he argues that the State made improper closing arguments about defense counsel's motives during trial.

III. *Analysis*

We will initially address Appellant's issues on corroboration testimony under Articles 38.14 and 38.075 of the Texas Code of Criminal Procedure and his sufficiency-of-the-evidence issue. We will then address Appellant's argument that the trial court should have instructed the jury on the corroboration requirements for testimony of accomplices and jailhouse informants. Finally, we will then review Appellant's claim of improper closing arguments from the State.

A. Issues One and Two: The State met its burden for corroboration testimony under Articles 38.14 and 38.075 and adduced sufficient evidence for jury to find beyond a reasonable doubt that Appellant murdered the victim.

In his first issue, as we have pointed out, Appellant asserts that the State failed to meet its burden under Article 38.075 and Article 38.14 to corroborate testimony of accomplice and a jailhouse informants. *See* TEX. CODE CRIM. PROC. ANN. arts. 38.075, 38.14 (West 2005 & Supp. 2016). Appellant's second issue is related. In it, he argues that the evidence is insufficient to support a finding that he is guilty. In response, the State asserts that it met its burden under both articles and that it adduced sufficient evidence of Appellant's guilt. As we explain below, we agree with the State.

1. Corroboration Requirements

Article 38.075 provides the following:

> (a) A defendant may not be convicted of an offense on the testimony of a person to whom the defendant made a statement against the defendant's interest during a time when the person was imprisoned or confined in the same correctional facility as the defendant unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed. In this subsection, "correctional facility" has the meaning assigned by Section 1.07, Penal Code.

> (b) Corroboration is not sufficient for the purposes of this article if the corroboration only shows that the offense was committed.

CRIM. PROC. art. 38.075. Article 38.14 provides the following:

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

CRIM. PROC. art. 38.14. The standard required for corroboration of jailhouse-informant testimony under Article 38.075 is the same as that required for corroboration of accomplice-witness testimony under Article 38.14. *See Schnidt v. State*, 357 S.W.3d 845, 851 (Tex. App.—Eastland 2012, pet. ref'd); *Ruiz v. State*, 358 S.W.3d 676, 680 (Tex. App.—Corpus Christi 2011, no pet.); *Brooks v. State*, 357 S.W.3d 777, 781 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd); *Watkins v. State*, 333 S.W.3d 771, 778 (Tex. App.—Waco 2010, pet. ref'd); *see also Hernandez v. State*, No. 03-10-00863-CR, 2013 WL 3723203, at *3 (Tex. App.—Austin July 11, 2013, no pet.) (mem. op., not designated for publication). When we apply this standard to accomplices and jailhouse informants, we must eliminate the accomplice and jailhouse informant's testimony from consideration and then examine the remaining portions of the record to see if there is any evidence that tends to connect the accused with the commission of the crime. *See Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2001) (corroboration of accomplice-witness testimony); *Ruiz*, 358 S.W.3d at 681 (corroboration of jailhouse-informant testimony); *see also Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008). The remaining evidence is "sufficient corroboration if it shows that rational jurors could have found that it sufficiently tended to connect the accused to the offense." *Smith*, 332 S.W.3d at 442.

"The tends-to-connect standard presents a low hurdle for the State." *Patterson v. State*, 204 S.W.3d 852, 859 (Tex. App.—Corpus Christi 2006, pet.

ref'd) (citing *Dowthitt v. State*, 931 S.W.2d 244, 249 (Tex. Crim. App. 1996); *Munoz v. State*, 853 S.W.2d 558, 559 (Tex. Crim. App. 1993)). There is no precise rule as to the amount of evidence required to corroborate the testimony of an accomplice witness; each case must be judged on its own facts. *See Gill v. State*, 873 S.W.2d 45, 48 (Tex. Crim. App. 1994). "The evidence used for corroboration does not need to be in itself sufficient to establish guilt beyond a reasonable doubt." *Patterson*, 204 S.W.3d at 859; *see Joubert v. State*, 235 S.W.3d 729, 731 (Tex. Crim. App. 2007); *Reed v. State*, 744 S.W.2d 112, 126 (Tex. Crim. App. 1988). "Nor must it directly link the accused to the commission of the offense." *Patterson*, 204 S.W.3d at 859; *see Cathey v. State*, 992 S.W.2d 460, 462 (Tex. Crim. App. 1999). Rather, the direct or circumstantial evidence must show that rational jurors could have found that it sufficiently tended to connect the accused to the offense. *Smith*, 332 S.W.3d at 442; *Simmons v. State*, 282 S.W.3d 504, 508 (Tex. Crim. App. 2009). Both direct and circumstantial evidence may furnish the necessary corroboration. *Smith*, 332 S.W.3d at 442.

As a reviewing court, we are not to independently construe the corroborating evidence but are to consider the combined force of all the corroborating evidence that tends to connect the accused with the offense. *Cox v. State*, 830 S.W.2d 609, 611–12 (Tex. Crim. App. 1992); *Reed*, 744 S.W.2d at 126. When there are conflicting views of the evidence, we are to defer to the factfinder's resolution of the evidence. *Smith*, 332 S.W.3d at 442. Circumstances that may appear insignificant may nevertheless constitute sufficient evidence of corroboration. *Trevino v. State*, 991 S.W.2d 849, 852 (Tex. Crim. App. 1999). "Insignificant circumstances sometimes afford most satisfactory evidence of guilt and corroboration." *Reed*, 744 S.W.2d at 126.

In Appellant's case, we exclude the testimony of Jamar and Franco and determine if the remaining evidence tended to connect Appellant to the commission

of the offense. At trial, the State adduced evidence of texts between Atchison and Fitts, in which they arranged the drug deal. Jermaine saw Appellant and Jamar standing on the street immediately after the victim's pickup sped down the street, and he also noticed that they had a bag of marihuana. The State also introduced evidence that Fitts was shot and killed with a .25 caliber gun. A roommate of Appellant testified that they kept a silver .25 caliber handgun at their residence. Canales testified that Appellant carried a chrome handgun, and pictures found on Appellant's cell phone had "selfies" of Appellant and another person holding a silver handgun.

The medical examiner explained that the victim had powder tattooing and had been shot in the back at close range with a small caliber weapon. The shell casing found in the victim's pickup after the murder was a Remington .25 caliber; the empty ammunition box in Appellant's residence was also Remington .25 caliber. The bullet that was removed from Fitts's body was also a .25 caliber. Considering the cumulative effect of this evidence and in deference to the jury's view of the facts, we believe that rational jurors could have found that the corroborating evidence sufficiently tended to connect Appellant to the offense. After a review of the record, we hold that Jamar's testimony and Franco's testimony were sufficiently corroborated. *See Smith*, 332 S.W.3d at 442. We overrule Appellant's first issue.

2. Sufficiency of the evidence.

Appellant contends that there was insufficient evidence to support his conviction. We review a sufficiency challenge by asking whether any rational juror could have found Appellant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). This court views all of the evidence in the light most favorable to the jury's verdict and determines whether any rational jury could have found each element of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. The trier of fact

may believe all, some, or none of a witness's testimony because the factfinder is the sole judge of the weight and credibility of the witnesses. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986); *Isham v. State*, 258 S.W.3d 244, 248 (Tex. App.—Eastland 2008, pet. ref'd). We defer to the trier of facts' resolution of any conflicting inferences raised in the evidence and presume that the trier of fact resolved such conflicts in favor of the verdict. *Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 894; *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). We have previously set out the evidence that independently corroborated Jamar's and Franco's testimony. We further note that Jamar exited the pickup after the victim gave the marihuana to Appellant. We also recall that he said that Appellant cocked the gun, pointed it at the victim, and demanded his wallet. When the victim did not give Appellant the wallet, Appellant shot him and fell out of the pickup as it sped down 48th Street. Franco testified that Appellant admitted that he shot and killed the victim when the victim would not hand over his wallet. Other witnesses saw the pickup go through Sherwood Park, saw the victim fall out of the pickup, saw Atchison jump out of the pickup, and saw the victim on the ground in the park—severely injured and dying from a gunshot wound to the back. After a review of the entire record, we hold that a rational jury could have found that Appellant was guilty beyond a reasonable doubt of the offense of murder. We overrule Appellant's second issue.

B. Issue Three: Even if the trial court failed to provide a jury instruction, Appellant suffered no harm.

In his third issue, Appellant asserts that the trial court improperly refused to give his requested instruction that the accomplice, Jamar, and the jailhouse informant, Franco, could not corroborate each other's testimony. The State responds that the trial court provided an instruction to that effect and that, even if the trial court's instruction was erroneous, Appellant suffered no harm. "An instruction

under article 38.075 'merely informs the jury that it cannot use the . . . testimony unless there is also some [independent] evidence connecting the defendant to the offense.'" *Brooks v. State*, 357 S.W.3d 777, 781 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). "Unlike the accomplice-witness rule (Article 38.14), which requires an instruction in the jury charge if the accomplice witness testifies at all, the jailhouse-witness rule (Article 38.075(a)) requires a jury instruction only if the jailhouse witness testifies about a statement made by the defendant that was against the defendant's interest." *Phillips v. State*, 463 S.W.3d 59, 67 (Tex. Crim. App. 2015).

The Court of Criminal Appeals has recognized as a fundamental principle that the testimony of one accomplice cannot corroborate the testimony of another accomplice. *Chapman v. State*, 470 S.W.2d 656, 660 (Tex. Crim. App. 1971); *see Taylor v. State*, 7 S.W.3d 732, 736 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (citing *Harris v. State*, 645 S.W.2d 447, 454 (Tex. Crim. App. 1983); *Chapman*, 470 S.W.2d at 660); *Badillo v. State*, 963 S.W.2d 854, 857 (Tex. App.—San Antonio 1998, pet. ref'd). If the trial court fails to give an instruction that one accomplice cannot corroborate the testimony of another accomplice, the trial court errs. *See Fields v. State*, 426 S.W.2d 863, 865 (Tex. Crim. App. 1968). However, we note that this case involves an accomplice and a jailhouse informant instead of two accomplices. The Court of Criminal Appeals has not addressed whether the testimony of an accomplice witness can corroborate the testimony of a jailhouse informant, or vice versa. Some of our sister courts have addressed the issue and have reached conflicting results. *Compare Phillips v. State*, No. 10-12-00164-CR, 2015 WL 7443625, at *2 (Tex. App.—Waco Nov. 19, 2015, pet. ref'd) (mem. op., not designated for publication) (holding trial court did not err in refusing to include an instruction that the testimony of jailhouse witnesses could not corroborate that of an accomplice because such a limitation was not supported by any authority), *with*

Patterson, 204 S.W.3d at 859 (holding that accomplice evidence may not be corroborated by jailhouse-informant evidence), *and Brooks v. State*, No. 01-16-00070-CR, 2017 WL 1173889, at *10 n.7 (Tex. App.—Houston [1st Dist.] Mar. 30, 2017, pet. ref'd) (mem. op., not designated for publication) (relying on *Patterson*).

In this case, if we assume, without deciding, that the trial court erred when it failed to give such an instruction, then we conduct a harm analysis. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985); *see also Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If a defendant failed to object to a jury-charge error, then we will reverse only if he suffered "egregious harm." *Ngo*, 175 S.W.3d at 743–44; *Almanza*, 686 S.W.2d at 171. If the defendant objected to the jury-charge error, as in this case, then we reverse if we determine there is some harm. *Almanza*, 686 S.W.2d at 171. Neither the State nor the defendant bears the burden of proving harm; we must review the entire record to determine if the defendant suffered harm. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). The less stringent standard of finding "some harm" still requires us to find that the defendant "suffered some actual, rather than merely theoretical, harm from the error." *Elizondo*, 487 S.W.3d at 205 (quoting *Reeves*, 420 S.W.3d at 816). "[R]eversal is required if the error is 'calculated to injure the rights of the defendant.'" *Cornet v. State*, 417 S.W.3d 446, 449 (Tex. Crim. App. 2013); *Almanza*, 686 S.W.2d at 171.

During the charge conference, defense counsel objected that the jury charge did not include an instruction that an accomplice and a jailhouse informant cannot corroborate one another's testimony and cited two cases, *Chapman* and *Badillo*. *See Chapman*, 470 S.W.2d at 660; *Badillo*, 963 S.W.2d at 857. Defense counsel also proposed two special instructions on Jamar and Jermaine Gearard being accomplice witnesses as a matter of fact, which the trial court overruled. For purposes of our

review, we will assume, without deciding, that the trial court was required to give the jury charge that Appellant requested.

The difference in *Almanza* harm standards affects how strong the non-accomplice evidence must be for the error in omitting an accomplice-witness instruction to be considered harmless. *Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002). In *Medina v. State*, the Court of Criminal Appeals found the omission of an accomplice-witness instruction to be harmless error under the "some harm" standard. 7 S.W.3d 633, 642–43 (Tex. Crim. App. 1999). The *Medina* court noted that there was a substantial amount of non-accomplice evidence and that the evidence of the witness's accomplice status was tenuous. *Id.* In *Medina*, the non-accomplice evidence included eyewitness testimony that the defendant was the shooter, as well as the defendant's incriminating statements to non-law enforcement witnesses. *Id.* at 642. The *Medina* court held that, although it was theoretically possible for the jury to (1) believe that the alleged accomplice was in fact an accomplice, (2) believe this person's testimony, and (3) disbelieve two other witnesses, it held that the some harm test was not satisfied by that possibility. *Id.* at 643.

In Appellant's case, there was a substantial amount of non-accomplice testimony and evidence. Evidence showed texts between Atchison and Fitts about a drug deal. Jermaine saw Jamar, Atchison, and Appellant go to the drug buy, and after he heard a car "peeling" out, he saw Appellant and Jamar standing with a bag of marihuana immediately after the victim's pickup sped down the street. Appellant's roommate told the jury that they kept a silver .25 caliber handgun at their residence. Canales testified that Appellant carried a chrome handgun, and pictures found on Appellant's cell phone had "selfies" of Appellant with another person holding a silver handgun. The victim was shot and killed with a .25 caliber gun at close range. The shell casing found in the victim's pickup after the murder

was a Remington .25 caliber, the same as the ammunition box found in Appellant's residence. The bullet that killed the victim was a .25 caliber, the same as an empty ammunition box found in Appellant's residence. Appellant also evaded the police after the shooting, and flight is admissible as evidence of guilt. *Fentis v. State*, 582 S.W.2d 779, 780–81 (Tex. Crim. App. 1976). Like *Medina*, the non-accomplice testimony and evidence tended to connect Appellant to the offense, and there is no basis for disregarding it. For these reasons, we hold that any charge error was harmless. *See Herron*, 86 S.W.3d at 633–34. Appellant's third issue is overruled.

C. Issue Four: State's closing argument was not objectionable, but in any event, Appellant's substantial rights were not affected.

In his fourth and final issue, Appellant asserts that the prosecutor made an improper jury argument when he stated that defense counsel was trying to "trick" the jury when he implied that Franco "[got] something" from the "feds" in exchange for his testimony. Defense counsel objected to the use of the word "trick," and the trial court overruled the objection. The State argues that defense counsel "opened the door" when defense counsel questioned Franco about federal sentencing guidelines and about whether he could get a reduced sentence.

"Permissible jury argument falls into one of four areas: (1) summation of evidence; (2) reasonable deduction from the evidence; (3) an answer to the argument of opposing counsel; or (4) a plea for law enforcement." *Gallo v. State*, 239 S.W.3d 757, 767 (Tex. Crim. App. 2007). Counsel's remarks during final argument must be considered in the context in which they appear. *See Denison v. State*, 651 S.W.2d 754, 761 (Tex. Crim. App. 1983). In addition, counsel has wide latitude in drawing inferences from the evidence as long as the inferences are reasonable and in good faith. *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988). Remarks must be "extreme or manifestly improper" to qualify as reversible error. *Denison*, 651 S.W.2d at 762. The remarks must be part of a "calculated effort on the part of the

State to deprive appellant of a fair and impartial trial." *Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997).

In this case, defense counsel questioned Franco about the federal sentencing guidelines with the intent to show that Franco could get a reduced sentence for his testimony. In response, the prosecutor, during closing argument, attempted to refute defense counsel's inference. Although responding to opposing counsel's theories and arguments is permissible in closing arguments, the State may not improperly impugn the character of defense counsel. *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998). In this case, the State's isolated remark was invited by defense counsel's questioning of Franco and does not constitute reversible error. *See Nethery v. State*, 692 S.W.2d 686, 703 (Tex. Crim. App. 1985); *Aitch v. State*, 879 S.W.2d 167, 175 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd). But even if we are incorrect on permissible argument or invited error, any "error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b). In making a determination under Rule 44.2(b), we will consider three factors: "(1) severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks), (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge), and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction)." *Mosley*, 983 S.W.2d at 259. Although the prosecutor could have avoided the word "trick" when he referred to defense counsel, the comment was isolated and was not extreme or manifestly improper, given the strength of the State's case. We overrule Appellant's fourth issue.

IV. This Court's Ruling

We affirm the judgment of the trial court.

MIKE WILLSON

JUSTICE

August 31, 2017

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

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.