Affirmed and Opinion Filed November 19, 2015

In The

Court of Appeals

Fifth District of Texas at Dallas

No. 05-14-01455-CR

JEREMIE NEWSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 5
Dallas County, Texas
Trial Court Cause No. F-1261998-L

MEMORANDUM OPINION

Before Justices Evans, Whitehill, and Schenck
Opinion by Justice Whitehill

Three men kidnapped Travis Henderson, drove him to an isolated park, and one of the men murdered him. Appellant was part of the group but did not personally kill Henderson. One of the other two offenders accepted a plea bargain and one agreed to testify for the State in hope of a favorable agreement. Appellant, however, went to trial. A jury convicted him of capital murder, and the trial court sentenced him to life imprisonment.

In seven issues, appellant argues that the trial court erred by:

(1) preventing him from telling prospective jurors about his eligibility for probation if he was instead convicted of a lesser included offense;

(2) denying his motion to suppress statements made following a twenty-minute break in his interrogation when there was no new *Miranda* warning;

(3) overruling his objection to testimony about a jailhouse conversation he had with an accomplice;

(4) failing to conduct a hearing on admissibility of the jailhouse-witness testimony;

(5) refusing to allow evidence of a co-defendant's sentence; and

(6) denying his requested jury instruction on necessity.

Appellant's seventh issue asserts that the evidence is insufficient to support his conviction because the accomplice testimony is not corroborated.

For the reasons discussed below, we conclude that:

(1) appellant's mandatory life sentence rendered any error in limiting voir dire harmless;

(2) the trial court did not err in denying the motion to suppress because the short break in the single, continuous interview did not require new *Miranda* warnings;

(3) the trial court did not abuse its discretion by allowing testimony that appellant was in jail at some unknown time;

(4) appellant was not harmed by any lack of corroboration of this jailhouse conversation;

(5) the trial court's exclusion of evidence concerning appellant's co-defendant's plea bargained-sentence was not erroneous because the State did not open the door to this evidence and it was not relevant to the determination of guilt or innocence; and

(6) the trial court did not err in denying a jury instruction on necessity because there was no evidence that appellant's actions were necessary in the face of imminent harm and, even if the trial court erred in that regard, there is no indication that appellant suffered harm.

We further conclude that the evidence is sufficient to corroborate the accomplice testimony.

We therefore affirm the trial court's judgment.

I. Background

Travis Henderson was abducted and subsequently found dead in a park. His injuries included a fractured jaw and a shotgun wound to the left side of his neck. Laquan Hughes a/k/a "Q," David Langston, and appellant had been looking for Henderson because he owed Q and a female acquaintance, Val, money. Val told Langston that he could find Henderson at Ricky Hernandez's house.

Armed with a shotgun, Langston, Q, and appellant went to Hernandez's house. Although Henderson was not there, Hernandez was supposed to meet him. Coincidentally, Henderson called Hernandez while everyone was there. Henderson's name appeared on the caller-ID, and, after a short conversation with Henderson, Hernandez told the three men that they could find Henderson at an area IHOP.

Cynthia Baird-McKenna, an IHOP employee, saw the trio forcing Henderson into a car in the IHOP parking lot, and a surveillance camera captured the activity on videotape. Baird-McKenna called 911 on a taped conversation. Both the videotape and the audiotape were admitted into evidence.

After Henderson's body was found, Q confessed that he, Langston, and appellant took Henderson from the IHOP, roughed him up, and then Q shot him. In an interview with Dallas police detectives Lorne Ahrens and Steven David, appellant admitted that he had driven the car. Appellant, Langston, and Q were all charged with capital murder.

Langston testified for the State in appellant's trial, but he had no plea agreement at that time. Q accepted a sixty-year plea bargained sentence for murder, but did not testify against appellant. Appellant refused a plea bargain and requested a trial.

Appellant's trial theory was that he acted involuntarily because his co-defendants threatened him with a gun and he feared for his and his family's safety. The trial court instructed

the jury on duress, but refused appellant's additional requested instruction on necessity. The jury was charged on the law of the parties, capital murder, and the lesser-included offenses of murder and kidnapping.

The jury found appellant guilty of capital murder, and the trial court sentenced him to life imprisonment.

II. Analysis

A. Issue One: Did the trial court err by limiting voir dire concerning possible probation if appellant was convicted of a lesser included offense instead of capital murder?

Appellant asserts that he was denied due process of law and his right to qualify prospective jurors because the trial judge would not allow him to inform prospective jurors that he was eligible for probation if he was convicted of a lesser-included offense. Based on the facts before us, we disagree.

1. Standard of Review.

The trial court has broad discretion over the jury selection process. *Barajas v. State*, 93 S.W.3d 36, 38 (Tex. Crim. App. 2002). Any restrictions the judge imposes are reviewed for an abuse of discretion. *See Faulder v. State*, 745 S.W.2d 327, 334 (Tex. Crim. App. 1987).

2. Voir Dire Limitations.

During voir dire, the prosecutor told the venire members that the offenses of kidnapping and aggravated kidnapping might be included in the jury charge. She also told them that the punishment range for kidnapping is probation or two to ten years' imprisonment and that the punishment range for aggravated kidnapping is probation or five to ninety-nine years or life in prison. The prosecutor further said that there is a difference between "being eligible for probation and deserve[ing] probation."

When defense counsel spoke to the venire, he began discussing probation eligibility requirements. The prosecutor interrupted, asked to approach the bench, and an off-the-record conversation occurred. Once back on the record, defense counsel stated, "In the interest of time, I'm going to move on. We don't want to quarrel. We've already had enough of that."

After the jury was selected, the judge asked if there were any objections to the jury's make-up. Both the prosecutor and defense counsel replied that there were not. Defense counsel then said that, before the above bench conference, he had planned to talk about the probation application process, qualifications for probation, and the fact that appellant filled out a probation application stating that he had no prior felony convictions. According to defense counsel, his inability to do so denied appellant "due process and a fair voir dire." Defense counsel further noted that he stopped his probation discussion because the judge told him not to go into it and the parties agreed that the issue would be presented later *sub rosa*.

After hearing the State's response, the trial court stated, "It's the court's belief that stating to the jury that the defendant is in fact eligible for probation interjects a matter of fact into the case that is not applicable."

Giving appellant every benefit of the doubt concerning the preservation of this issue for our review, we conclude that, even if we assume (without deciding) that the trial court erred, appellant suffered no harm. *See* TEX. R. APP. P. 44.2 (b).

As an initial matter, appellant was not denied the right to question the venire about their ability to consider the full range of punishment, including probation. Instead, defense counsel wanted to advise the jury that appellant was eligible for probation because he had no prior felony convictions. This was premature because the State told the jury that they would not determine punishment if appellant was convicted of capital murder because that offense carries a

mandatory life sentence. As the trial judge observed, appellant's eligibility for probation was not applicable.

Moreover, the State told the panel about the punishment range for the two lesser-included offenses and asked if they understood the concept of probation. The prosecutor said this would be relevant in the sentencing phase of trial if the jury found appellant guilty of a lesser-included offense. Although one panel member expressed an opinion as to the efficacy of a lesser sentence, neither that panel member or any other stated they could not consider the entire range of punishment.

Furthermore, appellant did not object to the jury after it was selected, nor does he complain on appeal about the jury's composition. Ultimately, the jury found appellant guilty of capital murder, which carries a mandatory life sentence. Thus, appellant's eligibility for probation was never an issue for the jury to consider. We therefore conclude that appellant was not harmed by the trial court's refusal to allow defense counsel to inform the jury of appellant's eligibility for probation if convicted of a lesser-included offense. *See Mendoza v. State*, No. AP-75213, 2006 WL 4803471, at *13 (Tex. Crim. App. Nov. 5, 2008) (mem. op. not designated for publication).

For the above reasons, we overrule appellant's first issue.

B. Issue Two: Was it error to deny the motion to suppress regarding a pause in appellant's questioning and the introduction of a new interviewer?

Appellant contends that the trial court erred in denying his motion to suppress the recorded statement he gave to the police after he was first given a *Miranda* warning. According to appellant, an "interruption of the interrogation process and the substituting of a different interrogating officer required a new *Miranda* warning." On the facts before us, we disagree.

1. Standard of Review.

We review a trial court's denial of a motion to suppress evidence under a bifurcated standard of review. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). We give almost total deference to a trial court's determination of historical facts, especially if those determinations turn on witness credibility or demeanor, and we review de novo the trial court's application of the law to facts not based on an evaluation of credibility and demeanor. *Gonzales v. State*, 369 S.W.3d 851, 854 (Tex. Crim. App. 2012). At a suppression hearing, the trial court is the sole and exclusive trier of fact and judge of the witnesses' credibility, and it may choose to believe or disbelieve all or any part of the witnesses' testimony. *Maxwell v. State*, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002); *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000).

When, as here, there are no explicit findings of historical fact, we review the evidence in the light most favorable to the trial court's ruling, assuming that the trial court made implicit findings of fact supported in the record that buttress its ruling. *Carmouche v. State*, 10 S.W.3d 323, 327–28 (Tex. Crim. App. 2000). We will uphold the court's ruling if it is correct under any legal theory applicable to the case. *Estrada v. State*, 154 S.W.3d 604, 607 (Tex. Crim. App. 2005).

2. Appellant's Police Interview.

The State offered into evidence excerpts of appellant's more than eight hour videotaped interview with detectives David and Ahrens. In a hearing outside the jury's presence, defense counsel argued that, although appellant was *Mirandized* when the taped interview began, appellant should have been *Mirandized* again after the detective left the room for twenty minutes and another detective came in to question him, so "everything after that point should be suppressed." The State responded that the break was so that appellant could be fingerprinted,

and that there was only one continuous interview. The trial court denied the motion and ruled that the tape would be played for the jury.

Appellant contends that the technique the police employed in this case is similar to the "two step question first warn later" technique that was criticized in *Missouri v. Siebert*, 542 U.S. 600, 601 (2003). We disagree.

Siebert involved what is known as a "midstream warning." A "midstream warning" occurs when police begin a custodial interrogation without advising a defendant of his *Miranda* rights, and then continue questioning to re-elicit the incriminating statements after administering warnings. *Siebert*, 542 U.S. at 604. That did not occur here, however, because appellant was *Mirandized* before questioning began.

Appellant does not identify which portion of the videotape (Exhibits 95 and 96) he contends is inadmissible, nor does he identify where the new *Miranda* warning allegedly should have been given. Our record does not include the video of the entire interview. The excerpts show appellant briefly speaking with one detective, and then in another frame, he is being returned to the interview room and his handcuffs removed. This is shown in the first part of the excerpts, and thus appears to occur near the beginning of the interview. Then, another detective comes into the room and tells appellant "let's just recap here." There is, however, no dispute but that the police gave *Miranda* warnings before the interview began and that the break was only twenty minutes long.

The law is settled that a mere pause in police questioning does not require additional warnings. *See Dunn v. State*, 721 S.W.2d 325, 338 (Tex. Crim. App. 1986) ("rewarning is not required where the interrogation is only a continuation about the same offense"), *abrogated on other grounds by Creager v. State*, 952 S.W.2d 852, 856 (Tex. Crim. App. 1997); *Burruss v. State*, 20 S.W.3d 179, 183–84 (Tex. App.—Texarkana 2000, pet. ref'd) (pause in interrogation

did not require rewarning); *Franks v. State*, 712 S.W.2d 858, 861 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd) (same). That is, where a suspect is warned about his *Miranda* rights, a break in the questioning occurs, and questioning resumes without new *Miranda* warnings, the *Miranda* warnings administered in the first interview remain effective as to admissions made during the second interview if, in the totality of the circumstances, the second interview is essentially a continuation of the first. *Bible v. State,* 162 S.W.3d 234, 241–42 (Tex. Crim. App. 2005).

Here, there is no sign that there was anything other than one continuous interview with a brief pause to fingerprint appellant. Thus, there was no break in the interrogation that required new warnings, and the trial court did not abuse its discretion by denying the motion to suppress. Nor did appellant identify any evidence indicating that the introduction of a new officer to conduct the interview after the short break hindered appellants' rights.

For the reasons discussed above, we decide appellant's second issue against him.

C. Issue Seven: Was the accomplice testimony sufficiently corroborated?

Appellant contends that there is insufficient evidence to support his conviction because Langston's accomplice testimony is not corroborated. For the reasons below, we reject this argument.

1. Applicable Law.

"A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed[,] and the corroboration is not sufficient if it merely shows the commission of the offense." TEX. CODE CRIM. PROC. ANN. art. 38.14 (West 2005).

When evaluating the sufficiency of corroboration evidence under the accomplice-witness rule, we "eliminate the accomplice testimony from consideration and then examine the

remaining record to see if there is any evidence that tends to connect the accused with the commission of the crime." *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008). To meet the rule's requirements, the corroborating evidence need not by itself prove the defendant's guilt beyond a reasonable doubt. *Id.* Nor is it necessary for the corroborating evidence to directly link the accused to the commission of the offense. *Cathey v. State*, 992 S.W.2d 460, 462 (Tex. Crim. App. 1999). Rather, direct or circumstantial evidence must show that rational jurors could have found that the corroborating evidence sufficiently tended to connect the accused to the offense. *Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011); *Simmons v. State*, 282 S.W.3d 504, 508 (Tex. Crim. App. 2009). The sufficiency of non-accomplice evidence is judged according to the particular facts and circumstances of each case. *Smith*, 332 S.W.3d at 442; *Malone*, 253 S.W.3d at 257.

2. The Accomplice Testimony.

The jury was instructed that Langston was an accomplice as a matter of law, and Langston testified to the following:

He did not have a plea agreement with the State, but he was hoping to receive less than thirty years' imprisonment by testifying for the State.

Henderson was his friend, and he introduced Henderson to Q because Q sold methamphetamine and Henderson knew a lot of people who used it.

Q was angry because Henderson owed him money. The crime occurred in October, and Q had been looking for Henderson since August. Langston was also upset with Henderson because he had taken money from Val, and as a result, she faced eviction from her apartment.

He alerted Q that Val knew where Henderson was. Then Q and appellant picked Langston up in appellant's car and they went to where Henderson was supposed to be—Ricky Hernandez's house.

Langston knew that Henderson "would probably get his ass whooped for stealing some money," but it never occurred to him that Henderson would be harmed. Q said that he was just going to rough Henderson up and scare him because Q wanted his money.

The trio went to Hernandez's house, but Henderson was not there. Appellant was carrying a shotgun and held it on Hernandez. Langston had seen the shotgun before because Q had it with him on numerous occasions. They asked where Henderson was, and Hernandez told them he was supposed to meet up with him.

Henderson, however, called Hernandez while Langston and Q were there, his name appeared on the caller-ID, and Hernandez told Henderson that he would pick him up at an area IHOP that Henderson identified. Langston, Q, and appellant then drove to the hotel next to the IHOP.

Appellant ran into the IHOP to use the restroom. Henderson started screaming that he did not want to go with the group of men. Langston grabbed him by the shirt, and as appellant exited the IHOP, appellant was behind Henderson. Appellant then helped Langston push Henderson into the car.

As they were pulling away, Henderson said he would get the money. Appellant then started hitting him.

They first parked the car in front of an apartment complex, and appellant moved to the front of the car to drive. Then, they went to a convenience store and sat in the parking lot for a while. Appellant was on his phone, and then a "black guy" pulled up. They followed that man

into an apartment complex parking lot where "the guy" got in the car with them.[1] After that, they drove to "Ty's apartment."[2]

When they left Ty's place, the group dropped Langston off at Val's apartment. Langston found out a couple of days later that Henderson had been killed, but he did not go to the police.

According to Langston, the entire time the trio was with Henderson, appellant never said he wanted to leave or tried to leave. And nobody threatened appellant.

Langston also described a conversation with appellant while they were in jail. Appellant wanted Langston to "corroborate his story that he [appellant] didn't know anything about this."

3. Corroboration.

The record contains sufficient non-accomplice evidence connecting appellant to the offense. For example, appellant was found driving the car with the license number of the car used in the kidnapping and he admitted to driving the car during the offense. And, as discussed below, there was additional corroboration through the testimony of Toriell Williams, Ricky Hernandez, and Cynthia Baird-McKenna.

Hernandez

Hernandez testified that Henderson was his friend. On Sunday, October 28, 2012, Henderson called Hernandez and said that some people were looking for him. Hernandez knew that Henderson was in some kind of trouble.

At about 10:00 p.m. that evening, Hernandez heard people knocking at the door yelling his name. He opened the door, but did not know the person at the door. This person, described by Hernandez as a "white man," asked where Henderson was. Hernandez replied that he did not know.

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[1] The identity of this fourth individual was not conclusively established at trial, but the police looked for an individual Langston identified as "Duce."

[2] "Ty" was identified as Toriell Williams, an individual who lived in the same apartment with Q.

Two other African-American men "came out of the dark." One had long, braided hair—later identified as appellant—and the other had no hair showing because he had a beanie on. All three men entered Hernandez's house and asked him where Henderson was. The man with the braids was armed with a long shotgun.[3] The "white guy" and the guy with the beanie said that Henderson had "screwed over" a lot of people and "when we find him, we're gonna hurt him." Hernandez was scared.

It got everyone's attention when Hernandez's phone rang and Henderson's name appeared on the screen. Hernandez was told to answer the phone, find out where Henderson was, and tell him that he (Hernandez) would pick him up. Hernandez did as he was told.

Henderson told Hernandez that he was staying at a hotel, and would meet him at an area IHOP. When Henderson gave him the address, one of the three guys wrote it down.

Hernandez asked the three men not to hurt or kill his friend. The white guy said, "We're not going to kill him. We're just going to put him in the hospital." Hernandez was told that the three men would call him when they were getting close to Henderson's location so that he could call Henderson and tell him to wait outside.

After the men left, Hernandez's phone rang. He was told that the men were close to Henderson and that he should call him. Hernandez did not comply. Then he got another call, and heard a voice that "sounded like the white guy" saying, "Get in the car." When Hernandez said, "Hello, who is this,? the voice said, "Oh, I'm sorry," and hung up. Hernandez got another call from the men at about 5:30 that morning, but he did not answer it.

The police contacted Hernandez while he was at work on Tuesday, but he waited to return the call. When he got home that afternoon, he logged on to Facebook and learned that Henderson had been killed. (3 RR 23).

[3] Detective David testified, however, that appellant's co-defendants reported that nobody had a gun at Hernandez's apartment.

When he was shown a photo-lineup, Hernandez said he thought he recognized appellant. Henderson also identified appellant in-court and said that appellant was one of the three individuals in his apartment.

Williams

Williams knew both Q and appellant. Williams's father was a drug dealer, and Williams and Q both lived with Williams's father. Williams identified a picture of Q, who is African-American and bald, and a picture of appellant, who is African-American and wears dreadlocks.

Williams testified that he woke one night to find appellant and Q in his bedroom. Q put something in the closet and appellant put something in the nightstand. When the police searched the apartment a few days later, Williams directed them to the nightstand and the closet where there was something wrapped in a towel that was usually not there.[4]

Baird-McKenna

Baird-McKenna was coming to work at the IHOP on the day of the kidnapping, and she saw two white men scuffling in the parking lot. As she got closer, she saw a black man wearing dreadlocks leave the IHOP. Then a car driven by a black guy pulled up, but the driver never got out of the car. The "darker" black man and the white man both put a young white man with short hair and a beard in the car's backseat. Baird-McKenna yelled, "Hey, what are y'all doing," but they ignored her. She heard a young man yelling, "Help me."

The car drove off after she went inside, but she got the license plate number. She called the police and gave them the license plate information. The 911 call and the video taken at the IHOP showing a black man with dreadlocks were admitted into evidence. In the video, the man with dreadlocks enters the IHOP, walks to the restroom, and then exits the restaurant shortly thereafter.

[4] Police retrieved a shotgun in a towel from this location.

The License Plate

Dallas police officer Norma Massu received the license plate number of the car involved in the kidnapping, and conducted surveillance of the address associated with that vehicle. The vehicle arrived, driven by a black man with dreadlocks. Massu went to the house and identified appellant as the man there with dreadlocks and Carinda Nash, the owner of the vehicle.

Appellant's Confession

During his interview with the police, appellant's story changed continuously. But he consistently said that Q did everything. Then, at the interview's conclusion, appellant finally admitted that he took Q and Langston to the park where the shooting occurred.

Conclusion

We conclude that, with this non-accomplice testimony, the jury could have rationally found that other evidence sufficiently tended to connect appellant to the offense such that it corroborated Langston's testimony. We thus overrule appellant's seventh issue.

D. Issues Three, Four, and Five: Was other evidence improperly admitted or excluded?

Appellant brings three challenges concerning the trial court's admission of other evidence. First, he contends the trial court erred in allowing the State to introduce evidence of a jailhouse conversation Langston had with appellant. Second, he argues that there should have been a hearing to determine if there was evidence to corroborate the jailhouse conversation. Finally, appellant contends the State opened the door to evidence of a non-testifying co-defendant's sentence, and the trial court erred by excluding that evidence. Based on the record before us, however, we reject appellant's arguments.

1. Standard of Review.

An appellate court reviews a trial court's admission or exclusion of evidence for abuse of discretion. *Green v. State*, 934 S.W.2d 92, 101–02 (Tex. Crim. App. 1996). A reviewing court

should not reverse a trial court's ruling if it falls within the "zone of reasonable disagreement." *Id*. at 102. A trial court abuses its discretion when it acts "without reference to any guiding rules and principles" or acts arbitrarily or unreasonably. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). "The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred." *Id*.

2. Issues Three and Four: Langston's jailhouse conversation with appellant.

Appellant's third issue complains that admitted evidence of appellant's statements to Langston while appellant was incarcerated with him were erroneously admitted because the evidence was akin to trying appellant in prison clothes and "could have affected the jury's ability to presume him innocent until proven guilty." We disagree.

When Langston testified, the prosecutor asked him if he had spoken with appellant in jail. Langston said yes and that appellant wanted him "to corroborate his story that he didn't know anything about any of this. He was just along for the ride." Defense counsel objected, asked to approach the bench, and the court considered the matter outside the jury's presence. Defense counsel objected as follows:

> The events that they're talking about, they keep pointed out lying [sic], as learned counsel points out. The specific offense that he's being asked to commit is aggravated perjury, is what needs to be corroborated. What he's asking him to do is get up here and commit aggravated perjury. If that's in fact what they're saying, he was asking him to lie. So that's where it fits into that section of the Code. I just wasn't putting it as eloquently as I needed to, in the legal terms.

The State responded that the testimony requiring corroboration concerned the murder offense, not whether appellant had asked him to commit perjury.

Defense counsel then stated " . . . his coming up here and saying that is not enough. And being able to state it and him bringing up the fact that he was incarcerated at the time, without having a hearing, I think that's all objectionable."

The following exchange then ensued:

> **THE COURT**: The fact that both this witness and the Defendant were both in jail at the same time is already in evidence. And the State's question does not specify a point in time. It just says "when you were incarcerated."
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> **DEFENSE COUNSEL**: I might not agree with the Court's characterization that they were both in jail at the same time. They were both arrested. Who knows what happens after they get arrested? So when that happened. But I understand what the Court is saying.
>
> I'm just saying, there's been comparison of you got arrested here, you got arrested then, to make that connection to say they were in jail at the same time.
>
> **THE COURT**: Just for the record, there's so far no implication as to whether the Defendant is currently incarcerated or not. That has not been raised by the State's question.
>
> **DEFENSE COUNSEL**: I understand the Court's view of things. I have a different viewpoint, obviously. I believe that that - - I believe specifically that statement right there and everything tries to elicit or bring out the information he's in jail.
>
> **THE COURT**: All right. Okay. Objection's overruled.

When the jury returned, defense counsel elicited testimony that Langston and appellant shared a cell in jail for about a week.

On appeal, appellant argues that the trial court erred in admitting Langston's testimony about what the appellant said while Langston was incarcerated because the testimony demonstrated that appellant was in custody, which could have affected the jury's ability to presume him innocent until proved guilty, and this is tantamount to trying a defendant while in prison clothes. Appellant further asserts that the court erred by not conducting a *sub rosa* hearing to decide whether the code of criminal procedure article 38.075 requirements were met.[5]

The State maintains that the jury already knew that Langston and appellant had been arrested and jailed for this case. While the record reflects that the jury was informed that

[5] Appellant's heading for this issue also refers to error resulting from the failure conduct a *sub rosa* hearing to determine the admissibility of an extraneous offense, but this issue is not preserved because it was neither raised nor briefed in the court below. *See* TEX. R. APP. P. 33.1.

Langston and appellant had both been *charged with the offense,* there was no mention of appellant's incarceration before Langston testified. Despite the fact that the complained-of evidence had not been previously admitted, we conclude that the trial court did not abuse its discretion in admitting the testimony.

For example, the prosecutor's initial question was whether Langston had spoken to appellant in jail—there is no mention of when that conversation occurred, or that appellant remained incarcerated after his arrest. Indeed, there was no indication that the two were actually in jail together until defense counsel's cross-examination.

Moreover, appellant cites no authority suggesting that a reference to a defendant being in jail at some unidentified time rises to the level of being tried in prison garb. *See e.g., Estelle v. Williams*, 425 U.S. 501, 503 (1976) (presumption of innocence is a basic component of a fair trial); *Randle v. State*, 826 S.W.2d 943, 946 (Tex. Crim. App. 1992) (trying a defendant in prison clothes violates the right to a fair trial and the presumption of innocence).

Furthermore, we cannot agree that the effect on the jury, if any, stemming from this limited and somewhat ambiguous reference to being in jail equates to the recurring impression created when a defendant appears throughout trial in handcuffs, shackles, or jail clothing. Jurors would not be surprised to learn that a person on trial for capital murder had spent some time in jail following his or her arrest. And the single, limited question and answer did not advise the jury whether appellant was currently in custody, or in any way taint the presumption of innocence. Nothing in the record suggests that the comment in any way undermined the jury's impartiality when deciding appellant's guilt. We therefore reject appellant's third issue.

Appellant's fourth issue contends that the jailhouse conversation testimony had to be corroborated and the trial court should have conducted a hearing to determine admissibility. This argument concerns article 38.075 of the Code of Criminal Procedure, which requires

corroboration of testimony regarding a defendant's statement against interest made to a witness while the witness was imprisoned or confined in the same facility as the defendant. TEX. CODE CRIM. PROC. ANN. art. 38.075 (West 2005).[6] Article 38.075 was enacted to address the potential of unreliability of jailhouse-witness testimony, just as article 38.14 was enacted to address accomplice-witness testimony. *Phillips v. State*, 463 S.W.3d 59, 67 (Tex. Crim. App. 2015).

The distinction is immaterial in this case because Langston was both an accomplice and a jail-house witness, and corroboration is required for both types of testimony. *See* TEX. CODE CRIM. PROC. ANN. arts. 38.075, 38.14. The only testimony that can truly be characterized as jailhouse-witness testimony is the single question and answer about the jailhouse conversation. Otherwise, the remainder of Langston's testimony was accomplice testimony.

The court conducted a hearing outside the jury's presence, and it is unclear what additional measures appellant claims should have been employed. But even if we assume, without deciding, that the trial court erred by allowing testimony concerning appellant's jailhouse statement to Langston, we cannot conclude that appellant suffered harm.[7] *See* TEX. R. APP. P. 44.2(b).

Under Rule 44.2(b), we disregard an error unless it affects appellant's substantial rights. TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial, injurious effect or influence on the jury's verdict. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

Here, the trial court instructed the jury under the accomplice-witness rule, and told them that Langston's testimony could not be used to convict appellant unless there was other

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[6] The State maintains that this issue was not preserved because appellant did not raise a 38.075 objection in the court below. We disagree. Although appellant did not specifically cite the statute, the State referenced article 38.075 when responding to appellant's argument, and the nature of appellant's complaint is clear from the context of the record. *See Ford v. State*, 305 S.W.3d 530, 533 (Tex. Crim. App. 2009).

[7] Appellant does not claim charge error. He only argues that the court abused its discretion by admitting evidence of the jailhouse conversation. Therefore, we analyze harm under TEX. R. APP. P. 44.2(b). *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

testimony in the case that tended to connect appellant with the offense and that corroboration was not sufficient if it merely tended to show the commission of the offense. Although the instruction was not specific as to the jailhouse testimony under 38.075, it was sufficiently broad to include all of Langston's testimony. We generally presume the jury follows the court's instructions in the manner presented. *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998).

As discussed above, we have already concluded that Langston's other testimony was sufficiently corroborated. On this record, there is no basis to conclude that the only aspect of Langston's testimony that was not corroborated—appellant's request that Langston back him up on his story—had a substantial, injurious effect or influence on the jury's verdict. We therefore resolve appellant's fourth issue against him.

3. Issue Five: Evidence of a non-testifying defendant's plea bargain.

Appellant contends that the trial court erred because he was not permitted to introduce evidence of co-defendant Q's plea bargained sentence, although Q did not testify at appellant's trial. As discussed below, we reject appellant's argument because the State did not open the door to this otherwise inadmissible evidence.

The conviction or acquittal of a co-defendant to the same offense is usually inadmissible at the trial of one charged with a crime. *Beasley v. State*, 838 S.W.2d 695, 703 (Tex. App. — Dallas 1992, pet ref'd).

On the other hand, evidence used to fully explain a matter opened up by the other party need not ordinarily be admissible. *Fuentes v. State*, 991 S.W.2d 267, 279 (Tex. Crim. App. 1999). A party opens the door by leaving a false impression with the jury that invites the other side to respond. *Hayden v. State*, 296 S.W.3d 549, 554 (Tex. Crim. App. 2009). "Opening the door," however, is limited in scope; the party offering the otherwise inadmissible evidence may

not "stray beyond the scope of the invitation." *Schutz v. State*, 957 S.W.2d 52, 71 (Tex. Crim. App. 1997).

Here, appellant acknowledges that "this type of evidence is generally inadmissible," but claims the State opened the door to this evidence. Specifically, he argues that the testimony of detectives David and Ahrens, coupled with the videotape, left the jury with a false impression that "if you are not the shooter and you cooperate during the interview, you will get a better deal."

In this case, appellant, Q, and Langston were all charged with capital murder and the jury heard that Q admitted he was the shooter. Nonetheless, mentioning the identity of a non-testifying co-defendant and his role in the crime does not create any false impressions with the jury and thus does not open the door to admit evidence of his sentence. *See Miller v. State*, 741 S.W.2d 382, 389 (Tex. Crim. App. 1987).

Likewise, telling a defendant that his cooperation during a police interview will be favorably viewed does not create the impression that the defendant is more or less culpable than a co-defendant and does not open the door to evidence of that co-defendant's sentence. *See id.*

We see no logical nexus between non-testifying Q's plea to a lesser offense with a reduced sentence and the jury's determination of appellant's guilt or innocence for the charged offense. Because Q did not testify, the terms of his punishment did not have any tendency to make the existence of any fact of consequence to the determination in the guilt/innocence stage more or less probable than it would be without the evidence. *See* TEX. R. EVID. 401.

Moreover, "Plea bargaining is essential to the administration of justice in America." *Prystash v. State*, 3 S.W.3d 522, 528 (Tex. Crim. App. 1999). And "to permit admission into evidence of plea-bargained sentences obtained by non-testifying accomplices would discourage

the State from making plea bargains to avoid their admission into evidence." *Eichelberger v. State*, 232 S.W.3d 225, 228 (Tex. App.—Fort Worth 2007, pet. ref'd).

For the above reasons, we reject appellant's fifth issue.

E. Issue Six: Was there charge error when the trial court did not instruct on necessity?

Appellant urges that the trial court erred in refusing his requested instruction on necessity because his "statement given to the investigating detective admitted liability under the law of the parties" and thus satisfied the requirement that a defendant must admit all elements of his or her offense before he or she may receive a necessity instruction.[8] We disagree.

1. Standard of Review and Applicable Law.

A necessity instruction states generally that conduct is justified if the actor reasonably believes the conduct is immediately necessary to avoid imminent harm. TEX. PENAL CODE ANN. § 9.22 (1) (West 2011); *Harper v. State*, No. 02-14-00189-CR, 2015 WL 4043288, at *4 (Tex. App.—Fort Worth June 30, 2015, no pet. h.). Necessity is a confession-and-avoidance defense that requires the defendant to admit the elements of the charged offense—including the culpable mental state—while claiming the otherwise illegal action was justified. *See Juarez v. State*, 308 S.W.3d 398, 399 (Tex. Crim. App. 2010).

We review alleged charge error by considering two questions: (1) whether error existed in the charge; and (2) whether sufficient harm resulted from the error to compel reversal. *Ngo v. State*, 175 S.W.3d 738, 744 (Tex. Crim. App. 2005). The degree of harm necessary for reversal depends on whether the appellant preserved the error. *Id*. at 743. If the appellant objected to the charge, we will reverse if there is "some harm." *Id*. That is, we must find that the defendant

[8] Under the law of the parties, "[a] person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." TEX. PENAL CODE ANN. § 7.01(a) (West 2011). "A person is criminally responsible for an offense committed by the conduct of another if: . . . acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." TEX. PENAL CODE ANN. § 7.02(a)(2) (West 2011).

"suffered some actual, rather than merely theoretical, harm from the error." *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

2. The Evidence.

In support of his argument that he was entitled to a necessity instruction, appellant relies solely on his confession to detective David establishing that he was a party to the offense. But appellant cites no evidence, nor have we identified any, establishing that he faced imminent harm that would necessitate his actions. Although appellant generally claimed that he acted under duress, there is no evidence that the threat to him was so immediate that he had to act to avoid that harm. *See Dewalt v. State*, 307 S.W.3d 437, 454 (Tex. Crim. App.—Austin 2010, pet. ref'd).

Moreover, even if the trial court erred in refusing the instruction, the record does not reflect that appellant suffered harm. Specifically, the jury was instructed on duress, which, like necessity, is a confession-and-avoidance defense that requires a defendant to admit all elements of the underlying offense and then claim that his commission of the offense is justified because of other facts. *See Juarez*, 308 S.W.3d at 401–03. But, the jury rejected appellant's duress defense, and there is no indication that the jury would have found that appellant's conduct was justified on a similar defensive theory. The jury also declined to find appellant guilty on either of the two lesser-included offenses.

Here, the evidence against appellant was strong, and the record does not support a conclusion that the inclusion of a necessity instruction in the charge would have yielded a different result.

We accordingly resolve appellant's seventh issue against him.

III. Conclusion

Having resolved all of appellant's issues against him, we affirm the trial court's judgment.

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/Bill Whitehill/
BILL WHITEHILL
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JEREMIE NEWSON, Appellant	On Appeal from the Criminal District Court No. 5, Dallas County, Texas
No. 05-14-01455-CR V.	Trial Court Cause No. F-1261998-L. Opinion delivered by Justice Whitehill.
THE STATE OF TEXAS, Appellee	Justices Evans and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered November 19, 2015.