Opinion issued January 27, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-01136-CR

WILLIAM HENRY PERRY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 122nd Judicial District Court
Galveston County, Texas
Trial Court Case No. 08CR1123

MEMORANDUM OPINION

Appellant, William Perry, appeals the trial court's judgment convicting him for the murder of Gary Wayne Bell. *See* TEX. PENAL CODE ANN. § 19.02 (West 2003). In three issues, appellant challenges the legal sufficiency of the evidence to

support his conviction and corroborate accomplice testimony, the factual sufficiency of the evidence, and the trial court's dismissal of a juror who was replaced with an alternate after the jury began deliberating. We conclude that the accomplice testimony was corroborated, that the evidence is sufficient to support appellant's conviction, and that the trial court properly substituted a juror with an alternate juror. We affirm.

Background

Because of the number of people who testified concerning the events, we detail the background by examining (A) the facts as told by Joshua Coleman and April Mowers, (B) the physical evidence recovered by police, (C) the facts as told by Mary Jowers, (D) the facts as told by Arnold Garza, and (E) the procedural history of the trial.[1]

A. The Facts as Told by Joshua Coleman and April Mowers

On April 12, 2008, appellant, Coleman, April, Mary, and Brian Richardson lived together at a Travelodge Hotel in La Marque, Texas. Coleman and April were romantically involved. All but April were habitual cocaine users.

Appellant, Coleman, and April planned to leave for San Antonio that day, intending eventually to leave Texas. In the morning, they drove a stolen Toyota Camry to a Comfort Inn Suites in Texas City, Texas. They approached the door to

[1] Because of the similarity between their last names, we will refer to April Mowers and Mary Jowers by their first names.

room 112, but Richardson, who already was there, allowed only appellant to enter. Coleman testified that Richardson said that he "was trying to take care of some business." Coleman and April returned to the Camry and waited. A short time later, Garza left room 112 and joined Coleman and April at the Camry. Garza informed Coleman and April about "a guy" in room 112. Garza briefly went back inside the hotel and returned three minutes later.

Approximately 20 minutes after entering room 112, appellant left the hotel and approached the Camry. Coleman testified that appellant said that "business was taken care of, that [they] had a new PT Cruiser." April testified that appellant said that he "took care of the guy and . . . ha[d] a free PT Cruiser." Although their testimonies different as to the location, Coleman and April both noticed that appellant had on his shirt some small blood spots, which they had not seen before appellant entered room 112. Coleman told appellant about the blood, and appellant entered the Camry and removed his shirt. Coleman and April both testified that appellant left the Camry, carrying the shirt in his arms.

Appellant and Garza left in the PT Cruiser with appellant driving. Coleman thought they were going to buy crack cocaine for the group. Appellant and Garza returned approximately 15 to 20 minutes later. April heard appellant instruct Garza to "go in and help clean up the mess." Appellant went back into the hotel for about five minutes, came back to the Camry, and asked Coleman and April not

to leave. Coleman and April saw appellant briefly meet with Richardson in the parking lot. Coleman and April could not hear what appellant and Richardson said. Appellant returned to the Camry and left with Coleman and April. They drove to Gonzales, Texas, where they rented a hotel room. As they were driving, April asked appellant whether he killed Bell. Appellant became angry and said that he did not want to talk about it. Appellant, Coleman, and April were arrested later that night while breaking into a self-service laundry.

After she was arrested, April immediately told Gonzales police that she knew about a murder at the Comfort Inn Suites. She testified, "I wasn't sure what happened. . . . I wanted them to check into it and find out. . . . Because if they really killed him, I was just worried about it." April admitted that she initially gave a false name to Gonzales police because of a warrant for her arrest in Missouri.

B. The Physical Evidence Recovered by Police

The next morning, Galveston police found Bell's body floating next to a concrete pier in Galveston Bay. Bell's body was naked except for his socks. His wrists and ankles were bound with belts, and there was a string around his neck. Bell had been beaten and hog-tied. His death was caused by a combination of blunt force trauma, asphyxiation, and drowning. That night, police arrested Mary,

Richardson, and Garza at a hotel in Jersey Village, Texas. They were found in possession of Bell's PT Cruiser.

Police collected various pieces of physical evidence from room 112 of the Comfort Inn Suites as well as the two hotels where Mary, Richardson, and Garza, and April, Coleman, and appellant, were staying when they were taken into custody. Neither DNA nor fingerprint evidence connected appellant to Bell's death. DNA and fingerprint evidence linked Mary, Richardson, and Garza to the crime. For example, Mary's DNA was discovered under Bell's fingernails, and Garza left a fingerprint on a lamp in room 112.

Police prepared a timeline from the Comfort Inn Suites's camera recordings that provided a second-by-second breakdown of relevant events. The tapes showed the following series of events:

Shortly after 3:00 a.m., Richardson, Garza, and two unidentified individuals arrived at the Comfort Inn Suites. Garza signed something at the front desk, and all four went to room 112. At 3:50 a.m., all four left the hotel.

Richardson and Garza returned more than two hours later. At 6:45 a.m., Bell arrived with Mary in Bell's PT Cruiser. Bell entered the lobby, used the front-desk phone, and returned to the PT Cruiser. Mary got out of the PT Cruiser and went into the lobby, at which point Bell drove away. Seconds later, Richardson ran out of the lobby, got into an unidentified vehicle, and drove away.

About a half-hour later, appellant arrived in a Toyota Camry. Appellant walked toward room 112 and a few minutes later, returned to the Toyota Camry and left the parking lot. The Camry's driver was not visible.

Just before 7:40 a.m., the PT Cruiser and the unidentified vehicle driven by Richardson returned. The two unidentified individuals took the unidentified vehicle and left, while Richardson and Bell entered the hotel. Bell was carrying a guitar. Bell was never again seen alive on the security tapes.

Shortly before 8:30 a.m., the Camry returned, and appellant, Coleman and April got out. They went into the hotel, but the camera does not show whether they went into room 112. Coleman and April came back out a minute later and returned to the Camry. Shortly thereafter, Garza also left the hotel and went to the Camry with Coleman and April.

At 8:44 a.m., Garza briefly reentered the hotel and came back out less than a minute later. Seconds after Garza exited the hotel, appellant followed. Appellant briefly got into the Camry. Garza and appellant then went to the PT Cruiser and drove away. Although the driver's side of the PT Cruiser could not be clearly seen, the timeline stated Garza entered the passenger side, and the police assumed appellant drove.

A little more than 30 minutes later, appellant and Garza returned and reentered the hotel. A few minutes after that, appellant left the hotel, followed by

Richardson. Richardson and appellant had a brief interaction. Appellant got into the rear passenger side of the Camry, and the Camry drove away. Appellant, Coleman, April, and the Camry do not again appear on the security tapes.

Mary drove away in the PT Cruiser later that morning for 45 minutes, and Richardson took the PT Cruiser for a little over an hour early that afternoon. After 7:00 p.m., they both drove away in the PT Cruiser and returned with Garza, who was not shown leaving the hotel previously. The three reentered the hotel, left again at 8:45 p.m., and returned again about 15 minutes later.

At 9:47 p.m., Richardson and Mary exited the hotel with a luggage dolly, which the police timeline identified as carrying Bell's body. Richardson loaded Bell's body into the PT Cruiser, and Richardson and Mary drove away. They returned an hour later. When they exited the car, Richardson was wearing only shorts, and Mary was wearing her underwear. The two went back into the hotel. Shortly before midnight, Richardson and Garza drove away. The timeline of events ends at midnight of April 12.

C. The Facts as Told by Mary Jowers

Mary testified that in the early morning hours of April 12, she met Bell at the Travelodge in La Marque. They agreed that Bell would pay her $250 for sex. They left the Travelodge in Bell's PT Cruiser and went to his mother's house to retrieve the money. While there, Bell played his guitar for Mary, and the two

smoked crack cocaine. They then went to a different motel in La Marque to consummate the transaction. Bell and Mary used crack cocaine, and Mary blacked out. When Mary regained consciousness, she was naked in bed with a used condom beside her. The money Bell had given her was missing from her purse. She felt that she had been raped because Bell had engaged in anal sex with her without her permission. She asked Bell for the money he owed her, and he told her they would have to go get it.

Bell and Mary drove to the Comfort Inn Suites in Texas City. Telling Mary that he was getting change in order to pay her, Bell went to the front desk area of the hotel. He returned to the PT Cruiser and told her, referring to Richardson, "that black guy in there wants to talk to you." Mary and Richardson had a romantic relationship. Richardson knew she was a prostitute and had on a few occasions arranged for her to have sex with men for money, but Mary said that she did not consider Richardson to be her pimp. Mary went inside to meet Richardson, and Bell drove away without paying her. Mary told Richardson that Bell "just took off with [her] money and raped [her]." Garza was also present, but Mary did not indicate whether he was involved in her conversation with Richardson.

Richardson left in pursuit of Bell. Richardson convinced Bell to return. Richardson, Bell, Garza, and Mary entered room 112 of the Comfort Inn Suites. Richardson confronted Bell about what happened at the motel, but there was no

physical altercation between the two. A short time later, appellant, Coleman, and April approached the door of room 112, but Richardson allowed only appellant to enter. Richardson told appellant that Bell had drugged and raped Mary. Richardson then shoved Bell toward appellant, and appellant shoved Bell to the ground. Appellant and Richardson struck Bell with their fists and feet. Garza left the room just as appellant shoved Bell. During the beating, appellant took the keys to Bell's PT Cruiser. Appellant then took Bell to the bathroom with Richardson following close behind.

After Bell was in the bathroom, Richardson returned to the main room looking for something to use to tie up Bell. He told Mary to stay out of the bathroom, and he went back in with Bell and appellant. Mary heard water running in the bathroom and a sound "like somebody was wrestling." At one point, Mary saw Bell in the bathtub through the reflection in the bathroom mirror; he was not tied up at that time. After about 20 minutes, appellant left the bathroom and room 112 with the keys to Bell's PT Cruiser. Appellant returned to the room approximately 30 minutes later. He smoked crack cocaine in the bathroom, gave the keys to the PT Cruiser to Richardson, left, and never returned. Mary admitted that she also smoked crack cocaine throughout the night and morning but said that she was "not so high." She admitted that she was not certain about how long the above events lasted.

Approximately 15 minutes after appellant left for the second time, Mary left room 112 to get milk. She encountered Garza, and the two returned to room 112. While Mary was gone, Richardson was alone in the hotel room with Bell. When Mary and Garza returned, Bell was no longer in the bathroom.

That afternoon, Mary left to meet two customers for acts of prostitution. When she returned, she saw that the shower curtain was missing and went to get another so that she could use the shower. Garza left to purchase more crack cocaine. After Mary showered, Richardson pulled Bell's body out of the bedroom closet. Mary and Richardson loaded Bell's body onto a luggage cart, and they took him to the PT Cruiser. Richardson put the body in the PT Cruiser. Richardson and Mary drove to Galveston Bay, where they placed Bell's body into the water. Mary did not see Bell move or hear him make any noise.

Mary and Richardson returned to the Comfort Inn Suites. The next morning, Mary, Richardson, and Garza left the Comfort Inn Suites together. When they left, they had with them Bell's guitar, which Mary later traded for $50 worth of crack cocaine. They went to visit Mary's children because Mary believed she would be incarcerated in the near future. Mary, Richardson, and Garza were arrested at a hotel in Jersey Village that evening.

At trial, Mary admitted that she was "[r]eally high" having "smoked a lot" while she and Richardson transported Bell's body from room 112 to Galveston

Bay. She admitted that she was not honest with police about Richardson's involvement in the events at the Comfort Inn Suites because she wanted to protect him. She admitted that she also lied to police in order to protect herself. She admitted that she had made a deal with the State: in exchange for her truthful testimony, she would receive only a ten-year sentence for tampering with physical evidence by moving Bell's body.

D. The Facts as Told by Arnold Garza

Garza testified that he was a cocaine addict having used crack cocaine off and on for ten years. He was regularly using cocaine at the time Bell was killed.

Early in the morning of April 12, Garza and Richardson were at the front desk of the Comfort Inn Suites. They were renting a room with a stolen credit card issued to a person with a Hispanic name, so Garza signed for the room. Bell entered the front-desk area, used the courtesy phone, and then walked out. Shortly after Bell left, Mary walked in. Mary briefly spoke to Richardson, who then left.

Garza and Mary went to room 112. Richardson returned with Bell, and Garza left to buy drugs. Garza returned, and Mary explained that Bell had not paid her for sex as Bell had promised to do. Appellant, Coleman, and April came to the room, but Richardson would not let them enter. A few minutes later, appellant

returned alone and entered the room. Appellant pulled a knife,[2] and told Garza to leave and buy crack cocaine. Garza moved towards the door but turned around when he heard a "ruckus." Garza saw Bell on the ground with appellant holding him down. Garza then left the room.

Garza did not want to ride with Coleman and April to buy drugs so he waited in the parking lot. Garza briefly went back into the hotel lobby but did not go back into room 112. Appellant came to the parking lot, changed his shirt, and said "Well, now we got a PT Cruiser. Let's go." Appellant did not say how he acquired the keys to the PT Cruiser. Appellant and Garza left the Comfort Inn Suites in the PT Cruiser. on the way to buy drugs, appellant told Garza about Bell's beating, admitting that he knocked out Bell because Richardson could not. Appellant said that they had put Bell in the bathtub and that appellant was going to get plastic and a chain saw "to clean up the mess." Appellant told Garza that he did not stab Bell "because it would have been too messy." The two purchased drugs but did not buy anything else before they returned to the Comfort Inn Suites. On cross-examination, appellant's trial counsel elicited testimony from Garza that he had not told police about his conversations with appellant in the PT Cruiser.

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[2] On cross-examination, appellant's trial counsel elicited testimony from Garza that he had not told police about appellant's display of a knife. Garza stated that he mentioned the knife for the first time when questioned by the district attorney prior to trial.

Garza stated that he was not directly questioned about any conversation with appellant until he spoke with the district attorney.

Garza and appellant returned to the hotel room approximately 15 to 20 minutes after they left, rejoining Mary and Richardson. Garza could hear Bell kicking in the bathtub. Garza did not ask what was happening. Appellant said he was going to buy plastic and left. Richardson asked Garza to come into the bathroom. The shower curtain was closed, but Garza could hear Bell asking for help from the bathtub. Richardson tried to open the shower curtain, but Garza stopped him. Garza left the bathroom, took his bag, left the hotel room, and went to a crack house. Richardson and Mary picked him up that evening, and they returned to the Comfort Inn Suites to smoke more crack cocaine. Richardson and Mary left again for 30 to 45 minutes, and they returned in their underwear, wet, with their clothes in their arms. They said they had gone swimming but Garza did not believe them.

Garza, Richardson, and Mary stayed in the Comfort Inn Suites for a few more hours and then left to break into vending machines. Garza did not clearly remember what happened next. The following day, the three stole the hotel's television set and left in the PT Cruiser. They later stole clothes and shoes in the Tomball area, broke into more vending machines, and visited Mary's children at

her father's house. Garza, Richardson, and Mary were arrested in the PT Cruiser on April 14.

Garza was charged with state-jail-felony theft with two enhancements for stealing Bell's PT Cruiser. He stated that he had not made any deal with the State for his testimony.

E. Procedural History

Appellant was indicted for murder. At appellant's trial, Mary, Garza, Coleman, and April testified. The jury charge designated Mary as an accomplice as a matter of law and Garza as an accomplice as a matter of fact. The charge did not designate Coleman and April as accomplices.

Accomplice Testimony

As part of his first issue, appellant contends that Mary's accomplice testimony is insufficiently corroborated by non-accomplice testimony. He also asserts that the jury charge should have included accomplice-in-fact instructions as to Coleman and April.

A. Standard of Review

"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 an offense." TEX. CODE CRIM. PROC. ANN. art 38.14 (West 2005).

A person is an accomplice if he participates with the defendant before, during, or after the commission of a crime and acts with the required culpable mental state. *Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007). A person is an accomplice if his participation involves some affirmative act that promotes the commission of the offense with which the defendant is charged. *Id.* A witness who has knowledge of an offense is not an accomplice merely because he did not disclose it or even because he concealed it. *Id.* Additionally, mere presence at the scene of the crime does not render a witness an accomplice. *Id.* Similarly, complicity with the accused in the commission of another offense apart from the charged offense does not render a witness an accomplice. *Id.*

A witness may be an accomplice either as a matter of law or as a matter of fact; the evidence in a case determines which jury instruction, if any, needs to be given. *Cocke v. State*, 201 S.W.3d 744, 747 (Tex. Crim. App. 2006). A trial court is obligated to instruct the jury that a witness is an accomplice as a matter of law only if there is no doubt that the witness is an accomplice. *Druery*, 225 S.W.3d at 498. A matter-of-law accomplice instruction is appropriate when the witness is charged with the same offense as the defendant or with a lesser-included offense, or the evidence clearly shows that the witness could have been so charged. *Id.* If the evidence is conflicting, the trial court should instruct the jury to decide whether the witness is an accomplice as a matter of fact. *Id.* at 498–99. A trial court is

only required to charge the jury to determine whether a witness is an accomplice as a matter of fact when there is some evidence of an affirmative act on the part of the witness to assist in the commission of the charged offense. *Id.* at 499. The trial court is not required to give the jury an accomplice-witness instruction when the evidence is clear that the witness is an accomplice neither as a matter of law nor as a matter of fact. *Cocke*, 201 S.W.3d at 748.

When an appellant challenges the sufficiency of the evidence to corroborate an accomplice witness's testimony, we eliminate the testimony of the accomplice witness and consider the remaining evidence to determine whether a rational juror could determine that the non-accomplice evidence tends to connect the accused in some way to the commission of the offense. *Simmons v. State*, 282 S.W.3d 504, 508–09 (Tex. Crim. App. 2009). We view the corroborating evidence in the light most favorable to the finding of guilt. *Torres v. State*, 137 S.W.3d 191, 196 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Cantelon v. State*, 85 S.W.3d 457, 461 (Tex. App.—Austin 2002, no pet.). The non-accomplice evidence by itself need not establish the defendant's guilt beyond a reasonable doubt or directly link the defendant to the commission of the crime. *Hernandez v. State*, 939 S.W.2d 173, 177 (Tex. Crim. App. 1997). The law requires only that some evidence tend to connect the accused to the commission of the offense. *Id.* An accused's mere presence in the company of the accomplice or the informant before, during, or after

the commission of the offense is insufficient to corroborate testimony. *See Dowthitt v. State*, 931 S.W.2d 244, 249 (Tex. Crim. App. 1996).

B. Accomplice Status of Joshua Coleman and April Mowers

The jury cannot rely on the testimony of one accomplice to corroborate another. *Badillo v. State*, 963 S.W.2d 854, 857 (Tex. App.—San Antonio 1998, pet. ref'd) (citing *Chapman v. State*, 470 S.W.2d 656, 660 (Tex. Crim. App. 1971)). We, therefore, will first consider whether the jury should have been given accomplice-in-fact instructions as to Coleman and April. Appellant contends that he, Mary, Richardson, Garza, Coleman, and April were part of a de facto gang involved in a continuing series of criminal enterprises, and that Bell's death "may well have been" a consequence of their gang activity. Appellant also suggests that Coleman and April were acting as lookouts or standing guard outside the Comfort Inn Suites, that they provided appellant's "getaway transportation," and that such activity would render them accomplices whose testimony could not corroborate Mary's testimony. Finally, appellant suggests that April's statements and behavior after Bell was killed indicate that she was part of a common plan with appellant.

The evidence establishes that Coleman and April drove appellant to the Comfort Inn Suites. They tried to enter room 112 with appellant, but Richardson denied them entry. They returned to their stolen Toyota Camry and waited in the parking lot. While waiting in the parking lot, they had occasional contact with

Garza, Richardson, and appellant. They spoke with appellant after he left room 112 and told him that he had blood on his shirt. They continued to wait while appellant and Garza left in the PT Cruiser. Appellant returned, went back into room 112 for a few minutes, and came back to the Camry. Coleman, April, and appellant drove away.

Appellant has not alleged any affirmative act on the part of Coleman or April to assist in Bell's killing. *See Druery*, 225 S.W.3d at 499. Neither their presence in the parking lot of the Comfort Inn Suites nor their participation with appellant in other offenses render them accomplices. *See id.* at 498.

Citing an opinion from the Court of Criminal Appeals, an opinion from this Court, and an unpublished opinion from the Fort Worth Court of Appeals, appellant argues that in this case, "all of the direct witnesses were members of a 'gang' in all but formal name, clearly associated in a continuing series of criminal enterprises, e.g., thefts, forgery, drug dealing, prostitution, and pimping." He suggests that gang membership and presence at the scene of the crime is sufficient to warrant an instruction that Coleman and April were accomplices as a matter of fact. Appellant, however, has presented no evidence of his theory, making the cases he cites distinguishable.

In *Medina v. State*, the Court of Criminal Appeals held that Holmes, a gang member who testified about a drive-by shooting, was an accomplice as a matter of

fact based on "(1) Holmes' presence in the car with appellant when the crime occurred, (2) evidence that the crime was a gang-motivated crime, (3) Holmes' membership in the same gang as appellant, and (4) Holmes' efforts to cover up the crime" by hiding the murder weapon. 7 S.W.3d 633, 642 (Tex. Crim. App. 1999). Two other witnesses were not accomplices in any degree because each lacked one of the above factors; one did not cover up the crime, and the other was not present when the shooting occurred. *Id.* Here, Coleman and April were not present with appellant when Bell was beaten. Rather, the evidence establishes that they never went inside room 112 and remained outside in the parking lot of the Comfort Inn Suites. Thus, the first factor in *Medina* is not present here. Further, the second and third factors that the *Medina* court noted both depended on the membership of the defendant and accomplice in a formal gang, La Raza 13, and there was affirmative evidence that the crime was gang-related. *Id.* at 636 n.1, 643. Here, while there is evidence that appellant, Mary, Richardson, Garza, Coleman, and April participated in illegal activities together, there is no evidence of any formal relationship like there was in *Medina*. Thus, the second and third *Medina* factors are lacking here. Finally, in *Medina*, the purported accomplice helped the defendant hide the murder weapon. *Id.* at 641. Here, there is no such affirmative act with any requisite mental state. *See Druery*, 225 S.W.3d at 498. Appellant has established none of the factors enumerated by the Court of Criminal Appeals in *Medina*.

In *Roof v. State*, a memorandum opinion, the Fort Worth Court of Appeals found the evidence sufficient to warrant an accomplice-in-fact instruction. No. 2-08-148-CR, 2009 WL 485673 (Tex. App.—Fort Worth Feb. 26 2009, pet. ref'd). Like in *Medina*, the *Roof* defendant and the others who committed the offense were members of a formal gang, the Aryan Circle, and the witness knew it. *Id.* at *1. Further, in advance of the murder, the group in *Roof* "discussed killing a person, asking whether [the defendant] was up to it and trying to pump him up." *Id.* at *3. Additionally, the crime took place just outside the witness's truck. *Id.* Here, there is no evidence of a formal gang and no evidence that Coleman and April had advance knowledge that a killing was planned. Moreover, Bell's death occurred in a hotel room to which Coleman and April were denied entry.

Appellant also relies on *Roof* for his assertion that Coleman and April "were waiting in close attendance in the parking lot of the Comfort Inn, 'as a lookout would.'" No evidence shows that Coleman and April were acting as lookouts. Coleman and April were merely present in the parking lot of the hotel where the crime took place. Presence near the scene of the crime is not enough to transform a witness into an accomplice. *Druery*, 225 S.W.3d at 498.

No evidence shows that Coleman and April were acting as "getaway drivers." The record shows that the day before the murder, Coleman and April had planned to leave town with appellant. Furthermore, no evidence shows that

Coleman and April were acting with any culpable mental state by leaving with appellant.

Similarly to *Roof*, this Court held in *Tran v. State* that an accomplice-in-fact instruction was appropriate where at least three members of the defendant's group had guns, the witness understood that the defendant and others planned to shoot at least one person, the witness did not disclose the defendant's plans, the witness went along to the scene of the crime, and the witness did not seek medical help after the shooting occurred even though he was wounded. 870 S.W.2d 654, 657 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). This Court noted in *Tran* that the fact that the witness entered the sandwich shop where the shooting took place "may be evidence of an affirmative act in assisting the commission of a crime by preventing members of complainant's group from escaping." *Id.* Here, there is no evidence that April and Coleman knew who Bell was, much less what was happening to him while they waited in the parking lot. Furthermore, there is no evidence of an affirmative act assisting the commission of the offense.

Medina, *Roof*, and *Tran* are distinguishable from the present case. Here, no evidence supports a conclusion that the criminals involved in Bell's killing were members of a formal gang, that April and Coleman knew that Bell would be killed, or that April and Coleman took any affirmative act in furtherance of Bell's murder. We conclude that presence at the scene of the crime and membership in a loosely-

associated group of criminals is insufficient to support an accomplice-in-fact instruction.

Appellant also suggests that by asking him "whether he killed the guy" after they left the Comfort Inn Suites, April indicated that she in fact knew what had happened to Bell and was "attempt[ing] to gauge her own exposure . . . in what she perceived to be a common plan." Even if the question indicated that she knew that something had happened to Bell in room 112 earlier that day, April would not be rendered an accomplice to Bell's murder merely by after-the-fact knowledge that the crime took place. *See Druery*, 225 S.W.3d at 498.

Similarly, a witness's cooperation or deals with police or the district attorney concerning other crimes has no bearing on a witness's status as an accomplice. *See, e.g.*, *id.* at 497–98; *Cocke*, 201 S.W.3d at 747–48. April is not an accomplice merely by her offer to give information about Bell's death after she was arrested or her negotiation of a plea agreement with the district attorney involving crimes unrelated to the murder of Bell.

We hold there is no evidence that would support an accomplice-in-fact charge as to the testimony of either Coleman or April. *See Cocke*, 201 S.W.3d at 748. We overrule the portion of appellant's first issue challenging the omission of such a charge.

C. Corroboration of Mary Jowers's Testimony

Appellant contends that even if Coleman and April were not accomplices, their testimony failed to link appellant with Bell's death and, therefore, does not corroborate the testimony of Mary and Garza.[3] Specifically, he argues that April "collapsed as a competent witness" when she explained that she gave her statements to police because she "wasn't for sure what happened."[4] Appellant also contends that his "business" was merely drugs, not murder, and that Coleman's belief that the trip to the Comfort Inn Suites was about a crack cocaine purchase was true. Appellant contends that his use of the PT Cruiser was permissive and that he returned to the hotel in order to give the car keys back to Bell or Mary. He finally suggests that Coleman's testimony is not credible because of purported discrepancies and omissions in his statements about past offenses.[5]

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[3] Without elaboration, appellant suggests that Garza "was mistakenly charged as an accomplice in fact." Appellant does not brief any argument that the jury should have been instructed that Garza was an accomplice as a matter of law. We note, however, that because we hold that the testimony of Coleman and April is sufficient to tend to connect appellant with the charged offense, it serves to corroborate Garza just as it serves to corroborate Mary. *See Druery v. State*, 225 S.W.3d 491, 498–99 (Tex. Crim. App. 2007).

[4] April's statement that she "wasn't for sure what happened" is consistent with her testimony that she never went inside room 112 and that when she asked appellant whether he had killed Bell, appellant did not answer. She explained that she told police about the incident at the Comfort Inn Suites because she did not know what happened there and she was worried that Bell had really been killed.

[5] During cross-examination, appellant's attorney elicited testimony from Coleman that he had misstated the color of the shirt that appellant removed after he left

The standard of review for corroboration of accomplice testimony does not require us to find that Coleman or April established appellant's guilt or directly linked him to the commission of the crime. *See Hernandez*, 939 S.W.2d at 177. It is only necessary that we find some evidence that tends to connect appellant to the offense. *Id.*

Here, the video shows Bell entering room 112 of the Comfort Inn Suites. The video and the non-accomplice testimony from Coleman and April establish that appellant also went into room 112. The non-accomplice testimony indicates that when appellant exited the hotel 20 minutes later, he had blood on his shirt. The video shows appellant driving away in Bell's vehicle. Additionally, the non-accomplice testimony includes appellant's statement that he "took care of the guy," and that by doing so he obtained a "free PT Cruiser." Evidence that a defendant was at or near the scene of the charged crime at or about the time of its commission when coupled with other suspicious circumstances may connect the accused to the

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room 112 for the first time. Counsel asked Coleman if the prosecutor asked about the inconsistencies in Coleman's statements, and the State objected on work product grounds.

Appellant contends that the trial court "should have, at a minimum, conducted an in camera review." Appellant did not request an in camera review at trial. That complaint, therefore, is waived. *See* TEX. R. APP. P. 33.1(a)(1); *see also Jabari v. State*, 273 S.W.3d 745, 755 (Tex. App.—Houston [1st Dist.] 2008, no pet.). Furthermore, appellant effectively cross-examined Coleman by pointing out the inconsistency in his testimony, and any further discussion of that inconsistency would have been cumulative. *See Menke v. State*, 740 S.W.2d 861, 867 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd).

crime so as to furnish sufficient corroboration of an accomplice witness's statement. *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008). We conclude the non-accomplice evidence that appellant was in room 112 at or about the time that Bell was killed there, combined with the evidence that appellant had blood on his shirt, that appellant used of Bell's vehicle, and that appellant made incriminating admissions after leaving room 112 is sufficient to corroborate Mary's testimony. *See id.*

Sufficiency of the Evidence

In his first and second issues, appellant contends that the State's evidence is legally and factually insufficient to support the jury's verdict.

A. Standard of Review

This Court reviews legal and factual sufficiency challenges using the same standard of review. *Ervin v. State*, No. 01-10-00054-CR, 2010 WL 4619329, at *2–4 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, pet. filed) (construing majority holding of *Brooks v. State*, 323 S.W.3d 893, 912, 926 (Tex. Crim. App. 2010)). Under this standard, evidence is insufficient to support a conviction if considering all the record evidence in the light most favorable to the verdict, no rational factfinder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *In re Winship*, 397 U.S. 358, 361, 90 S. Ct.

1068, 1071 (1970); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Viewed in the light most favorable to the verdict, the evidence is insufficient under this standard in two circumstances: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense; or (2) the evidence conclusively establishes a reasonable doubt. *See Jackson*, 443 U.S. at 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 & n.11; *Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750. Additionally, the evidence is insufficient as a matter of law if the acts alleged do not constitute the criminal offense charged. *Williams*, 235 S.W.3d at 750.

If an appellate court finds the evidence insufficient under this standard, it must reverse the judgment and enter an order of acquittal. *See Tibbs v. Florida*, 457 U.S. 31, 41, 102 S. Ct. 2211, 2218 (1982). An appellate court determines whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (citing *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). In viewing the record, direct and circumstantial evidence are treated equally. *Id.* Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Id.* An appellate

court presumes that the factfinder resolved any conflicting inferences in favor of the verdict and defers to that resolution. *See Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793; *Clayton*, 235 S.W.3d at 778. An appellate court also defers to the factfinder's evaluation of the credibility and weight of the evidence. *See Williams*, 235 S.W.3d at 750.

2. Sufficiency Analysis

In his challenges to the sufficiency of the evidence, appellant's primary argument is that the testimonies of Mary, Garza, Coleman, and April are fatally unreliable. He further contends that this Court determine that a note from the jury indicates that the evidence is insufficient. He also asserts that the State's decision not to take a DNA sample from Garza undermines confidence in the jury's verdict.

a. Elements of Murder

Under Texas Penal Code section 19.02, a person commits murder when she (1) intentionally or knowingly causes the death of an individual or (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual. TEX. PENAL CODE ANN. § 19.02. A person is criminally responsible for the conduct of another when 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. *Id.* § 7.02(a)(2).

When viewed in the light most favorable to the prosecution, the evidence permits a finding that appellant was guilty of murder. Mary testified that appellant, along with Richardson, delivered a brutal beating to Bell, and the medical examiner stated that the beating was the primary cause of Bell's death. The photographs of Bell's body and Mary's description of events in room 112 support the occurrence of a severe beating. We hold that the jury could have rationally determined that appellant committed murder by intentionally or knowingly causing Bell's death, by intending to seriously injure Bell and thereby causing Bell's death, or by acting with intent to aid Richardson and aiding Richardson in the commission of the murder of Bell. *See Ervin*, 2010 WL 4619329, at *3.

b. Reliability

In his sufficiency argument, appellant contends that Mary, the only witness who testified that she saw appellant and Richardson deliver the fatal beating to Bell, was so influenced by drug use and self-preservation that the jury "could not accept [her] testimony without making unfounded assumptions about her very competence as a witness to see, perceive, and recall events with any accuracy." Further, he asserts that Garza purposefully avoided any actual knowledge of the beating and that like Mary, Garza was under the influence of drugs and therefore his memory of the events was unreliable. In an additional sufficiency argument, he asserts that Mary, Garza, Coleman, and April should not be credited because they

all testified with either "an explicit deal or . . . obvious incentives to shade or outright fabricate their testimony."

We are required to view the evidence in the light most favorable to the prosecution and to defer to the jury's determination of weight and credibility of witness testimony. *See Williams*, 235 S.W.3d at 750. Appellant, however, contends that the Fourteenth Court of Appeals' opinion in *Redwine v. State* requires a higher degree of scrutiny in these circumstances. 305 S.W.3d 360 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). *Redwine* is inapplicable to the present case. In *Redwine*, the evidence was held to be deficient because the State's sole witness who testified as to a crucial fact expressly equivocated on the stand regarding that fact, undermining an essential element of the offense as a matter of law. *See id.* at 366-67. The witness in *Redwine* testified equivocally about a specific fact and upon reflection, testified that his earlier equivocal statement was not correct. *Id.* Here, none of the witnesses reversed themselves on the stand regarding an essential piece of evidence. Furthermore, the videotapes taken from the hotel corroborated the stories told by the witnesses.

The fact that a witness entered a plea bargain or is alleged to have played some role in the underlying criminal scheme affects the weight of the witness's testimony. *Gonzalez v. State*, 63 S.W.3d 865, 874 (Tex. App.—Houston [14th Dist.] 2001), *aff'd*, 117 S.W.3d 831 (Tex. Crim. App. 2003). The fact that a

witness is high on drugs at the time of the events to which he testifies or makes inconsistent statements to police are also matters of weight and credibility. *Ward v. State*, No. 05-05-00366-CR., 2006 WL 3028923, at *1–2 (Tex. App.—Dallas Oct. 26, 2006, pet. ref'd) (mem. op., not designated for publication). Under the *Jackson* standard of review, we do not evaluate weight and credibility of witnesses. *See Williams*, 235 S.W.3d at 750.

c. Jury Communication

Appellant urges this Court to review a note from the jury to the trial court as support for his contention that the evidence is insufficient to support the verdict. He cites no authority, and we have found none, that holds that we may weigh the contents of jury communications as part of our review of the sufficiency of the evidence.

The note reads: "If we are split in a decission [sic] of murder and assault then according to page 9 paragraph three do we have to choose aggravated assault as our ruling?" Appellant contends that except for the use of the term "we," this statement would be a verdict of not guilty on the murder charge and guilty of aggravated assault. The jurors' note is no evidence that the evidence is insufficient because it concerns the actual internal jury deliberations about the evidence rather than a proper sufficiency of the evidence review, which focuses on any rational factfinder. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789.

d. Lack of DNA Evidence

Appellant contends that the State's decision not to test Garza's DNA for comparison to "unknowns" undermines the jury's verdict. He suggests that if Garza's DNA had matched the "unknown" sample on a "cut belt" found in room 112 of the Comfort Inn Suites, then Garza would have been implicated in Bell's death, and the State could not have prosecuted appellant.

Even if Garza's DNA were found on the cut belt, that evidence would have been cumulative. The jury was aware that the DNA and fingerprint evidence did not connect appellant to the crime scene. The jury was also aware that Garza had been at the crime scene and left a fingerprint there. Appellant has failed to explain how the absence of DNA testing of Garza requires a conclusion that no rational factfinder could find any element of the crime charged beyond a reasonable doubt. *See Williams*, 235 S.W.3d at 750. Viewing the evidence in a light most favorable to the verdict, we hold a rational fact finder could have found each essential element of murder was proven beyond a reasonable doubt. *See Ervin*, 2010 WL 4619329 at *2–4.

We overrule appellant's first and second issues.

Juror Substitution

In his final issue, appellant contends that the trial court erred by excusing a juror and replacing her with an alternate. He asserts that the Legislature "carefully

crafted a higher burden" for replacing a juror after deliberations begin and that the juror's stated reason for being unable to perform her duties did not meet that burden.

During voir dire, Juror No. 3 informed the trial court that she had a cousin who was dying of AIDS and that he had been rushed to the hospital that day. She stated that she was very close to her cousin and that his illness would be a distraction. She also stated that if her cousin died and she was unable to attend the funeral, her ability to concentrate on this case would be affected. She was not challenged for cause, and neither side used a peremptory challenge to strike her.

The jury began formal deliberations on Monday, October 27, 2009. Juror No. 3 informed the trial court that she received a phone call that her cousin was near death and that there was nothing more that the doctors could do. Juror No. 3's mother, who lived in Louisiana, wanted to be with the family, and Juror No. 3 was the only person who could give her mother a ride. Juror No. 3 told the trial court that she could not say that she would be able to put her personal emergency out of her mind and concentrate on the case, but she said that she would do her best.

Appellant objected to Juror No. 3's dismissal on the ground that she was the only African-American on the jury, and the alternate juror who would replace her was a white male. Over appellant's objection, the trial court discharged Juror No. 3 and replaced her with the alternate. Appellant timely filed a motion for new trial

asserting that Juror No. 3 was not "unable" to perform her duties, and thus she could not be properly replaced by an alternate juror pursuant to article 33.011 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 33.011 (West Supp. 2010).

In 2007, the Legislature amended article 33.011 to provide that "[a]lternate jurors . . . shall replace jurors who, prior to the time the jury renders a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment, become or are found to be unable or disqualified to perform their duties[.]" TEX. CODE CRIM. PROC. ANN. art. 33.011(b). The previous version of article 33.011(b) stated that "Alternate jurors . . . shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties." Act of May 30, 1983, 68th Leg., R.S., ch. 775, § 2, 1983 Tex. Gen. Laws 4594 (amended 2007). Therefore, the only difference between the prior and current versions is that the current statute permits alternates to replace jurors after the time that the jury retires but before the jury renders its verdict.[6] Because the Legislature declined to change the phrase "unable

[6] The Legislature's revision of article 33.011 followed the Texarkana Court of Appeals' 2006 opinion in *Sneed v. State*, in which the court wrote, "We recommend the Legislature consider amending the statute concerning the substitution of duly qualified alternate jurors for jurors on the panel who may have developed legitimate reasons to be excused after the jury has been empaneled." 209 S.W.3d 782, 787 (Tex. App.—Texarkana 2006, pet. ref'd); *see also Uranga v. State*, 247 S.W.3d 375, 377 n.2 (Tex. App.—Texarkana 2008), *aff'd*, 2010 WL

or disqualified" when it revised article 33.011, we will apply authorities construing this phrase prior to the change in the statute. *See Grunsfeld v. State*, 843 S.W.521, 523 (Tex. Crim. App. 1992).

We first must address appellant's contention that the term "unable" is intentionally distinct from the term "disabled" as used in article 36.29 of the Code of Criminal Procedure and that it is restricted to those cases in which a juror is physically sick or objectively mentally ill. *See* TEX. CODE CRIM. PROC. ANN. art. 36.29(a) (West Supp. 2010). However, in *Sneed v. State*, the Texarkana Court of Appeals held that "unable" for the purposes of section 33.011 is indistinguishable from the term "disabled" as used in article 36.29 of the Code of Criminal Procedure, which permits a trial court to allow eleven jurors to try a case when a juror "dies or . . . becomes disabled." 209 S.W.3d 782, 786 (Tex. App.—Texarkana 2006, pet. ref'd). In *Sneed*, the State argued that the Legislature's use of the term "unable" gave the trial court broader discretion than the term "disabled." *Id.* at 786–87. The Texarkana court disagreed, concluding that "one must strain to recognize real differences in the meaning of the two words in this context." *Id.* at 786. Thus, the test for whether Juror No. 3 was unable to perform her duties is the same as the test for whether she is "disabled"—that is, whether she

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4628550 (Tex. Crim. App. Nov. 17, 2010) (noting revision of article 33.011 in response to *Sneed*).

was under some physical, mental, or emotional condition that hinders her ability to perform her duties properly. *Id.* at 785.

The determination of whether a juror is disabled is within the discretion of the trial court. *Brooks v. State*, 990 S.W.2d 278, 286 (Tex. Crim. App. 1999). Juror No. 3 was under severe emotional strain from the immediately impending death of her cousin, with whom she was very close. This strain was increased by the fact that her mother was unable to be with the family at that difficult time. She informed the trial court that she did not know whether she could continue to keep her mind on the case but only that she could do her best.

Texas courts have repeatedly held that deaths in the family are sufficient to permit the discharge of a juror due to disability. *See, e.g.*, *Clark v. State*, 500 S.W.2d 107, 108–09 (Tex. Crim. App. 1973) (death of father-in-law); *Ricketts v. State*, 89 S.W.3d 312, 318 (Tex. App.—Fort Worth 2002, pet. ref'd) (death of father); *Allen v. State*, 867 S.W.2d 427, 429–30 (Tex. App.—Beaumont 1993, no pet.) (aunt and brother-in-law died within 24-hour period); *Mills v. State*, 747 S.W.2d 818, 820 (Tex. App.—Dallas 1987, no pet.) (grandfather's funeral scheduled during trial); *see also Carillo v. State*, 597 S.W.2d 769, 771 (Tex. Crim. App. 1980) (noting civil precedent holding that illness in juror's family was sufficient to support discharge). While no case presents circumstances directly analogous to those here, we note that the trial court had the benefit of examining

Juror No. 3 to evaluate her demeanor when the juror indicated she did not know if she could concentrate on the case. *See Ricketts*, 89 S.W.3d at 318. We hold that the trial court did not abuse its discretion by concluding that Juror No. 3 was incapable of performing her duties because of the impending death of her close relative. We overrule appellant's third issue.

Conclusion

We affirm the judgment of the trial court.

Elsa Alcala
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.

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