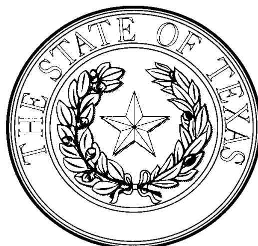
Opinion issued February 27, 2018



In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00611-CR

TYBRANDON COLEMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Case No. 1393334

MEMORANDUM OPINION

Tybrandon Coleman was found guilty of the murder of E. Tristan[1] and was assessed punishment at 35 years' confinement. In three issues, Coleman contends that the evidence to convict him was insufficient, that he received ineffective

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1 *See* TEXAS PENAL CODE § 19.02.

assistance of counsel, and that the trial court erred by preventing him from calling his mother as a witness during the trial's punishment phase. We affirm.

Background

One day, Coleman was in his apartment's living room with Tristan and K. Atkins. S. Johnson was in the apartment's bedroom with her child. An argument began in the living room. S. Johnson could hear it from the bedroom. The argument ended with Coleman shooting Tristan, killing him.

Atkins, who was under a blanket playing video games, did not see Coleman fire any shots, but, after hearing gunfire, he saw Tristan fall to the floor. Atkins left the living room to grab the baby from the bedroom. While in the bedroom, he heard more gunshots. When he returned to the living room, he saw Coleman standing near Tristan's body and holding two guns—a silver revolver and a black semi-automatic pistol.

Then Johnson went to the living room and saw Tristan's body lying on the floor, Coleman standing by his body, and a black gun in Coleman's hand.

Atkins was holding a box. Coleman put both guns into the box. Coleman, Atkins, and Johnson left the apartment together. On the way to a car, Atkins "cussed out" Coleman because he was upset that Coleman had killed his friend.

F. Myers lived in the apartment below. She had heard the arguing and gunshots, so she went outside. She saw Coleman, Atkins, and Johnson coming

downstairs. She saw them get into a car and leave the parking lot. Myers went upstairs, knocked on the door to Coleman's apartment, opened the unlocked door after no one answered, saw Tristan's body, and called 9-1-1.

After the police arrived, Atkins and Johnson returned, and they gave statements to the police. The police obtained a search warrant and searched the apartment. Atkins also led the police to a bridge where, he claimed, Coleman and he had disposed of the two guns. The guns were never recovered.

A firearms examiner with the Harris County Institute of Forensic Sciences reviewed bullet casings recovered from the apartment and concluded that five recovered casings had been fired from a 9mm and that five other casings had been fired from a .44. An assistant medical examiner with the Institute removed several bullets or bullet fragments from Tristan's body. The firearms examiner identified four bullets or bullet fragments as having been fired from a .44.

The Harris County District Attorney's office indicted Coleman for murdering Tristan. He pleaded not guilty. A jury convicted him of the murder. During the trial's punishment phase, Coleman's counsel called Coleman's sister, Marissa, but not his mother, to testify. After the punishment phase, the jury recommended, and the trial court assessed, punishment at 35 years' confinement, though the State had asked for at least 50. Coleman appealed.

Sufficiency of the Evidence and Atkins's and Johnson's Testimony

In his first issue, Coleman contends that the evidence was insufficient to support a conviction for intentionally or knowingly causing Tristan's death by shooting him. Coleman divides his first issue into three parts: (1) no rational trier of fact could have found Coleman guilty of shooting Tristan, (2) Atkins's and Johnson's testimony constitutes no evidence at all because their testimony was "completely unreliable" and contained "conflicting statements," and (3) the State elicited affirmatively false testimony from Atkins and Johnson.

A. Standard of review and applicable law

We review evidence sufficiency under the standard from *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). We examine all the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 318–19. Our review includes both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from that evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

We do not reevaluate the weight and credibility of the evidence or substitute our judgment for that of the factfinder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). It is for the jury, not a reviewing court, "to resolve

conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319; *accord Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Because the jury is the sole judge of the credibility of the witnesses and of the weight given to their testimony, any conflicts or inconsistencies in the evidence are resolved in favor of the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). "When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination." *Clayton*, 235 S.W.3d at 778 (citing *Jackson*, 443 U.S. at 326). "Our role on appeal is restricted to guarding against the rare occurrence when a factfinder does not act rationally." *Isassi*, 330 S.W.3d at 638.

A person commits the offense of murder when he or she either (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 § 19.02(b)(1), (2).

The specific intent to kill may be inferred from the use of a deadly weapon. *Cavazos v. State*, 382 S.W.3d 377, 384 (Tex. Crim. App. 2012). A firearm, as was alleged in the indictment, is a deadly weapon. *See* TEX. PENAL CODE § 1.07(a)(17)(A).

B. There was legally sufficient evidence

Coleman challenges the legal sufficiency of the evidence to support the finding that he committed murder. First, Coleman contends that there is insufficient evidence to prove beyond a reasonable doubt that he caused Tristan's death. Second, he contends that Atkins's and Johnson's testimony is insufficient evidence of anything because they are unreliable and because their testimony conflicts with each other's. Third, he contends that Atkins's and Johnson's testimony was "false testimony," the offering of which violated his due-process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution.

Viewing the evidence in the light most favorable to the verdict, testimony from Myers, Atkins, and Johnson provide sufficient evidence of Coleman's having intentionally or knowingly caused Tristan's death by shooting him.

Their testimony supports the following chain of events. Coleman, Tristan, Atkins, and Johnson were all in the apartment together—the first three in the living room and Johnson in the bedroom with her child. Atkins was under a blanket playing video games when an argument started. Johnson could hear the argument from the bedroom. The argument ended with gunshots, which Myers heard from the apartment below. Atkins saw Tristan fall to the floor, and Atkins went to the bedroom to grab the child. Atkins then heard more gunshots in the living room. Both Atkins and Johnson went toward the living room. They saw Coleman

standing near Tristan's body. They both saw a black pistol in Coleman's hand. Atkins saw a silver revolver in Coleman's other hand. Coleman, Atkins, and Johnson left the apartment together and walked downstairs to a car. On the way to the car, Atkins "cussed out" Coleman because he was upset that Coleman had killed his friend. Atkins and Coleman then left in the same car.

The testimony supports the finding that Coleman used a firearm, so the testimony supports the inference that Coleman had the specific intent to kill Tristan. *See Cavazos*, 382 S.W.3d at 384. Based on the testimony, then, a rational trier of fact could have found beyond a reasonable doubt that Coleman intentionally or knowingly caused Tristan's death by shooting him. *See Jackson*, 443 U.S. at 318–19.

The second part of Coleman's evidence-sufficiency challenge is not a ground for reversal because it asks us to review Atkins's and Johnson's credibility, which we may not do. Coleman contends that certain "completely unreliable and conflicting statements of Atkins and Johnson" must be disregarded as insufficient evidence. Coleman points to these purported defects or inconsistencies in their testimony: (i) Atkins and Johnson admitted at trial that their prior statements to police included lies or fabrications; (ii) the bullets recovered from Tristan's body did not match the kind of gun that Johnson testified that Coleman had used (though they did match the second gun, a .44, that Atkins testified about); and (iii) Atkins

and Johnson disagreed about whether Atkins grabbed the baby and whether the argument was between Coleman and Tristan or Atkins and Tristan.

It is for the jury, and not a reviewing court, to make credibility determinations. *See Jackson*, 443 U.S. at 319; *Isassi*, 330 S.W.3d at 638; *Williams*, 235 S.W.3d at 750. The jury believed that Coleman shot Tristan based on sufficient evidence in Myers's, Atkins's, and Johnson's testimony. That evidence means the jury's verdict was not irrational. *See Isassi*, 330 S.W.3d at 638. Therefore, the claimed inconsistencies listed above must be resolved to support the verdict, not undermine it. *Clayton*, 235 S.W.3d at 778 (citing *Jackson*, 443 U.S. at 326). We may not reverse on this ground.

The third part of Coleman's evidence-sufficiency challenge is his contention that Atkins and Johnson testified falsely. Coleman appears to be suggesting that the State suborned perjured testimony from Atkins and Johnson. An assertion that the State suborned perjured testimony must first be presented to the trial court. *See* TEX. R. APP. P. 33.1(a); *Reed v. State*, Nos. 01-12-01128-CR, 01-12-01129-CR, 2014 WL 3887716, at *6–7 (Tex. App.—Houston [1st Dist.] Aug. 7, 2014, no pet.) (mem. op., not designated for publication); *Donaldson v. State*, No. 01-11-00366-CR, 2013 WL 816215, at *4–5 (Tex. App.—Houston [1st Dist.] Mar. 5, 2013, no pet.) (mem. op., not designated for publication) (holding that defendant failed to preserve suborned-perjury issue under Texas Rule of Appellate Procedure 33.1(a)

because she first raised issue in late-filed motion for new trial and did not explain why she could not have raised it before trial, during trial, or by motion-for-new-trial deadline). Coleman did not object at trial to the State's introduction of allegedly false testimony from Atkins or Johnson, nor did Coleman seek any relief, including by a motion for new trial, on this issue from the trial court. This objection must be presented to the trial court first, so Coleman has waived it by not having done so. *See* TEX. R. APP. P. 33.1(a); *Reed*, 2014 WL 3887716, at *6–7; *Donaldson*, 2013 WL 816215, at *4–5. We overrule Coleman's first issue.

Ineffective Assistance of Counsel and Accomplice-Witness Instruction

In his second issue, Coleman contends that he received ineffective assistance of counsel in violation of the Sixth Amendment because his trial counsel failed to request an accomplice-witness instruction for Atkins.

A. Standard of review and applicable law

We review ineffective-assistance claims under the two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984). *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Under the first part, the defendant must show deficient assistance by counsel, which is assistance that falls below an objective standard of reasonableness. *Id.* Under the second part, the defendant must affirmatively prove prejudice. *Id.* Under both parts, the defendant must carry his or her burden by a preponderance of the evidence. *See id.* at 813. "Any allegation of

ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Id.* A reviewing court must be highly deferential to trial counsel, avoid the deleterious effects of hindsight, and apply a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Id.*

"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 . . . ." TEX. CODE CRIM. PROC. art. 38.14. An accomplice is someone who 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). To be an accomplice, a witness must have performed "some affirmative act that promotes the commission of the offense." *Id.* A witness is not an accomplice merely because he or she knew of the offense and concealed it. *Id.* And simply being present at the scene of an offense does not make a witness an accomplice. *Id.* If the witness cannot be prosecuted for the same offense, or a lesser included offense, the witness is not an accomplice as a matter of law. *Id.*

An accomplice is characterized as an accomplice either as a matter of law or as a matter of fact. *Robinson v. State*, No. 01-14-00656-CR, 2015 WL 3799493, at *3 (Tex. App.—Houston [1st Dist.] Aug. 26, 2015, pet. ref'd) (mem. op., not

designated for publication). A trial court has no duty to give an instruction about an accomplice as a matter of law "unless no doubt exists that the witness is an accomplice." *Id.* For accomplices as a matter of fact, if

> the evidence presented is conflicting on the issue of whether a witness is an accomplice, then the trial judge should submit whether the witness is an accomplice witness as a matter of fact to the jury, defining an accomplice and instructing the jury that it must first find corroborating evidence before it considers the testimony of a witness it finds to be an accomplice.

Id. To raise a fact issue and warrant an accomplice-witness instruction, some evidence must show an affirmative act by the witness to assist in the commission of the charged offense. *Id.* A trial court has no duty to provide an accomplice-witness instruction when it is not raised by the evidence. *Cocke v. State*, 201 S.W.3d 744, 748 (Tex. Crim. App. 2006).

B. Coleman's counsel's assistance was not deficient

Under the first part of the *Strickland* test, Coleman contends that his counsel's assistance fell below an objective standard of reasonableness because counsel did not request an accomplice-witness instruction for Atkins.

During a pre-trial *in camera* discussion between the trial court, Coleman, and Coleman's counsel, Coleman insisted that his counsel present a theory of the case based on Coleman's not being in the apartment at all. When a defendant preempts his attorney's strategy by insisting that a different defense be followed, the defendant cannot claim ineffective assistance. *Duncan v. State*, 717 S.W.2d

345, 348 (Tex. Crim. App. 1986). Coleman's chosen defense logically excluded a request that the court instruct the jury that Atkins was an accomplice in Coleman's crime. Because Coleman insisted on a strategy that precluded the accomplice-witness instruction he now seeks, he cannot claim ineffective assistance. Coleman's brief does not address this.

Coleman does contend, though, that Atkins's general unreliability and the following testimony suggest that Atkins was an accomplice in Tristan's murder:

- according to Johnson, Atkins was in a heated argument with Tristan before the shooting;
- according to both Johnson and Atkins himself, he carried a box containing the guns when Atkins and Coleman left the apartment;
- according to the firearms examiner, two guns were fired; and
- according to Atkins, he was under a blanket when the shooting happened, and a crime-scene investigator testified that he found spent shell casings entangled in and under a blanket at the scene.

This testimony does not support an accomplice-witness instruction.[2] The first and fourth items place Atkins near the murder scene, and reflect that Atkins knew of Tristan's murder, but do not suggest any affirmative act by Atkins in committing the murder. *See Druery*, 225 S.W.3d at 498; *Robinson*, 2015 WL 3799493, at *3. The second item suggests that Atkins helped to conceal the murder, "but a witness is not an accomplice simply because of his knowledge of the offense, even if he

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[2] Coleman's trial counsel told the trial court that he did not believe that the evidence supported an accomplice-witness instruction.

does not report the offense or helps to conceal the offense." *Robinson*, 2015 WL 3799493, at *3. In this case, as in *Robinson*, the alleged accomplice's "assistance in disposing of a weapon after a crime does not make him an accomplice witness to the crime without evidence of an affirmative act promoting the commission of the murder." *Id.* The third item falls short of placing either gun in Atkins's hands. No witness testified that Atkins held, much less used, either of the two guns during or before the shooting. Because this testimony does not show an affirmative act on the part of Atkins to assist in the commission of the murder, it does not raise a fact issue and warrant an accomplice-witness instruction. *See Robinson*, 2015 WL 3799493, at *3.

Coleman also relies on *Ex parte Zepeda*, 819 S.W.2d 874 (Tex. Crim. App. 1991) (per curiam), and *Howard v. State*, 972 S.W.2d 121 (Tex. App.—Austin 1998, no pet.), but both of those cases are distinguishable. They involved accomplices "as a matter of law," for whom no accomplice-witness instructions had been included in the jury charge. *See Ex parte Zepeda*, 819 S.W.2d at 876–877; *Howard*, 972 S.W.2d at 125, 129. In both cases, the accomplices had been indicted (and, in *Howard*, convicted) for the same criminal activity as the respective defendants had been, though for lesser-included offenses. In contrast, Coleman has not shown that "no doubt exists" that Atkins was an accomplice,

which is necessary to support a jury instruction on an accomplice as a matter of law. *See Robinson*, 2015 WL 3799493, at *3.

Applying, as we must, the highly deferential, strong presumption in favor of counsel's effectiveness, we hold that Coleman has failed to make the required showing under *Strickland* part one. We therefore overrule Coleman's second issue. *See Thompson*, 9 S.W.3d at 813.

Limitation on Presenting Mitigating Evidence

In his third issue, Coleman contends either that the trial court erred by prohibiting him from calling his mother as a witness during the punishment phase or that he was given ineffective assistance by his counsel's failure to call her.

A. Standard of review

During the punishment phase, the trial court has wide discretion in evidentiary rulings. *See Williams v. State*, 535 S.W.2d 637, 639–40 (Tex. Crim. App. 1976); *Semere v. State*, No. 01-11-00482-CR, 2012 WL 1956415, at *3 (Tex. App.—Houston [1st Dist.] May 31, 2012, no pet.) (mem. op., not designated for publication). We review a trial court's exclusion of evidence for an abuse of discretion. *See Harris v. State*, 152 S.W.3d 786, 793 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd). To be entitled to a new sentencing hearing, an appellant must show that the trial court denied the appellant the opportunity to present evidence to mitigate punishment. *Semere*, 2012 WL 1956415, at *3. Generally, any

harm in the improper exclusion of evidence is cured by admission of the same or similar evidence elsewhere. *Id.* To preserve error, a defendant is generally required to make a timely objection in the trial court. TEX. R. APP. P. 33.1(a); *Semere*, 2012 WL 1956415, at *3.

Coleman's ineffective-assistance claim is analyzed under the same rubric discussed above. Under the second part of *Strickland*, to show a reasonable probability of prejudice, Coleman "must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Thompson*, 9 S.W.3d at 812.

B. Coleman's punishment-witness contentions are without merit

Neither of Coleman's contentions are meritorious. Coleman attempts to show from the following discussion between his trial counsel, Mr. Stone, and the trial court "that the trial court made Appellant's counsel choose between having Appellant's mother or sister testify":

> THE COURT: Okay. Anything further?
>
> MR. STONE: If I may. I was going to have the mother to come in with the two children to stand there so the jury can see they are here.
>
> THE COURT: I'm sure they are here.
>
> MR. STONE: May they come in, Judge.
>
> MR. HANDLEY: Your Honor, may we approach.

> THE COURT: You may.
>
> (Discussion at the bench on the record.)
>
> MR. STONE: This was a compromise. The mother wants to testify. I said if you step in with the kids --
>
> THE COURT: I don't care if it's a compromise or not. You chose. What's the relevance of the children? They know they are here. That's the main thing.
>
> MR. STONE: That's fine, Judge.
>
> (In the presence and hearing of the jury.)
>
> THE COURT: Ms. Coleman, again the mother and the two children -- what are the ages of the children?
>
> THE WITNESS: Two and three.
>
> THE COURT: Two and three here out in the hallway; is that correct?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: The jury, everybody agrees that they are out in the hallway, awaiting the verdict. Anything further?

This exchange suggests that Coleman's counsel chose not to call Coleman's mother. Had Coleman's counsel instead been forced not to call Coleman's mother, counsel should have objected or otherwise stated with specificity to the trial court why he should have been able to call Coleman's mother. Coleman has not pointed us to any such objection, so he has failed to preserve this contention. *See* TEX. R. APP. P. 33.1(a).

Coleman alternatively argues that his counsel was ineffective because he did not call Coleman's mother to testify. Coleman's showing under *Strickland* part two

comes up short. He says only that there is “no doubt” that he was not permitted to offer “additional evidence about his life story and ties to his family that could have served to mitigate his sentence.” Coleman ties this statement to *Shanklin v. State*, 190 S.W.3d 154 (Tex. App.—Houston [1st Dist.] 2005), *pet. dism’d as improvidently granted*, 211 S.W.3d 315 (Tex. Crim. App. 2007), and particularly the *Shanklin* court’s reliance on *Milburn v. State*, 15 S.W.3d 267 (Tex. App.—Houston [14th Dist.] 2000, pet. ref’d). But neither *Shanklin* nor *Milburn* applies. In both of those cases, trial counsel had wholly failed to investigate or interview any of the 20 witnesses (in each case) who were willing to testify on the defendant’s behalf during the punishment phase. *See Shanklin*, 190 S.W.3d at 164–66 (holding defense counsel’s complete failure to investigate or call any punishment witnesses was ineffective assistance and not simply discretionary trial strategy); *Milburn*, 15 S.W.3d at 270–71 (same).

Coleman’s contention that he was not permitted to bring out *additional* evidence during the punishment phase misstates the harm that *Shanklin* and *Milburn* addressed. Coleman’s counsel did call his sister, Marissa, as a witness during the punishment phase. And Marissa testified that Coleman’s and Marissa’s mother “would basically say the same thing” that Marissa said on the stand. Therefore, if there was any harm in Coleman’s and Marissa’s mother not testifying, it was “cured by admission of the same or similar evidence” from

Marissa. *See Semere*, 2012 WL 1956415, at *3. Coleman makes no showing about why his counsel, by calling Marissa but not Coleman's and Marissa's mother, committed an error that involved a reasonable probability that he would have been assessed fewer than 35 years of imprisonment (which was already reduced from the 50 that the State had sought). *See Thompson*, 9 S.W.3d at 812. We therefore overrule Coleman's third issue.

Conclusion

We overrule all of Coleman's issues and affirm the trial court's judgment.

Harvey Brown
Justice

Panel consists of Justices Keyes, Brown, and Lloyd.

Do Not Publish. TEX. R. APP. P. 47.2(b).