



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00475-CR

Dominique **GREEN**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 226th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CR7880
Honorable Sid L. Harle, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: August 9, 2017

AFFIRMED

Dominique Green appeals his conviction for capital murder, presenting four issues on appeal. We affirm the trial court's judgment.

BACKGROUND

Green was indicted for the capital murder of Reynaldo Guerrero, Jr. committed during the course of "attempting to commit and committing robbery, kidnapping, obstruction or retaliation." TEX. PENAL CODE ANN. § 19.03(a)(2) (West Supp. 2016). After a pretrial hearing, the trial court

denied Green's request that Barbara Castillo, a State's witness with whom Green cohabitated, be permitted to invoke spousal privilege.

At trial, the jury heard the accomplice witness testimony of Michael Ramos, the man who set up the drug deal with Guerrero. Ramos testified that, on the evening of December 2, 2014, he set up a drug buy from his co-worker Guerrero on behalf of Green. Ramos arranged for Guerrero to meet them at a house located at 371 Dorie, which was across the street from the house where Green lived with Castillo. While Ramos, Guerrero, and another party, Jason, were inspecting and discussing the marijuana to be sold, a masked gunman, identified by Ramos as Green, came out from another room and pointed a gun at Guerrero, commanding him to "freeze." Jason also pulled out a gun and pointed it at Guerrero. Ramos ran out of the house and across the street to Castillo's house. Green came into Castillo's bedroom and threw a bag of marijuana on the bed, along with a wallet and a cell phone in front of Ramos and Castillo.

Green and Ramos then walked outside into the street separating the two houses, where Green asked Ramos, "What do you want me to do with him?" Ramos could see through the window of 371 Dorie and saw Guerrero standing against a wall with a pillowcase over his head; Jason was still inside with Guerrero. Ramos stated he told Green that Guerrero "knew who he was." Green then retrieved black zip-ties from Castillo's residence and took them inside the house where Guerrero was located. According to Ramos, Green threatened him that if he told anyone or did anything, Green would kill him. Ramos testified he left at that time. Ramos also stated that he observed Green remove the speakers from the back of Guerrero's Jeep.

Castillo testified that two to three weeks prior to the date of the offense, she overheard Ramos suggest to Green that they "hit a lick," which she testified means to obtain drugs by buying or stealing them. Castillo stated that Green agreed with Ramos to rob the drug seller. On the night of December 2, 2014, Ramos called the house asking to speak to Green about "that guy." Later,

between 10 and 11 p.m., Castillo was getting ready for bed when Green and Ramos came into her bedroom with three non-ziploc sandwich bags of marijuana, along with a wallet and a cell phone. She saw the photograph of a Hispanic male on the driver's license inside the wallet, but did not recall the name. At one point, Ramos told her outside Green's presence that "they were going to kill him . . . that guy." Ramos said "they" had asked him what to do with "the guy," and he had replied that "the guy" could get Ramos's information from work. Castillo testified she later learned that "they" meant Green and two other men. Some time between midnight and 1:00 a.m., Green took the keys to Castillo's suburban and drove off. Castillo stated that when Green returned about one hour later, he told her "they took him over the bridge . . . over to Corliss." Green stated "they left a car over at Corliss and the man was dead." Green further stated that the man was killed because he knew Ramos's identity, and that Green had asked Ramos what to do with the man. Castillo confirmed that Green kept many types of zip ties, including black ones, in the house.

Detective Buddy Branham testified that on December 3, 2014, he responded to the 200 block of Corliss Street, and discovered Guerrero, lying face down inside the rear passenger compartment of a black Jeep Cherokee with apparent gunshot wounds, and his hands bound behind his back with black zip-ties. Detective Branham observed loose speaker wires in the back of the Jeep and confirmed with Guerrero's girlfriend that the Jeep had contained speakers. Dr. Samantha Evans, the forensic pathologist, testified that Guerrero's manner of death was a homicide caused by three close-range gunshot wounds in his skull and spine.

Guerrero's girlfriend, Jenny Bingham, testified she personally packaged the marijuana that Guerrero took the night of December 2, 2014 in three flip-top, non-ziploc sandwich bags and placed the smaller baggies into a larger plastic Walmart or HEB bag. Guerrero left the house that night in their Jeep sometime after 8:30 p.m. Bingham also confirmed the identity of the Jeep in which Guerrero was found the morning of December 3, 2014, and confirmed that the speakers

recovered from Sheryl and James Jackson were the ones taken from Guerrero's Jeep. In addition, Sheryl and James Jackson testified that Green gave them the speakers shortly after December 2, 2014.

Finally, Green presented the testimony of Tainisha Willis with whom Green has a two-year-old son. Willis identified Green as her ex-boyfriend. Willis stated she was staying at Castillo's house at the time of Guerrero's murder. Specifically, Willis testified that at about 10 or 11 p.m. on the night of December 2, 2014, Michael Ramos burst into Castillo's house. Ramos was "very excited and upset" or "flustered" and said he had gotten in some trouble and needed Green's help. According to Willis, Green became upset and told Ramos "he didn't need his situations," and instructed Ramos to leave. Ramos offered to give Green marijuana if he would help him, but Green declined. Ramos left and Green stayed inside Castillo's house. Willis stated she never saw Green with a gun that night.

The jury found Green guilty of capital murder as charged in the indictment.¹ The trial court assessed the automatic sentence of life imprisonment for capital murder. TEX. PENAL CODE ANN. § 12.31(a)(2) (West Supp. 2016). Green appealed.

ANALYSIS

Green raises the following issues on appeal: (1) the trial court erred in finding there was no informal marriage between Green and Castillo and that spousal privilege did not apply; (2) there is insufficient evidence to corroborate the accomplice witness testimony by Ramos; (3) the trial court erred in admitting an unduly prejudicial autopsy photograph of the decedent; and (4) the trial court erred in denying a mistrial after a witness testified that Green was "scary" and "was known for having weapons."

¹ The jury was also instructed that it could find Green guilty of capital murder under the law of parties.

Spousal Privilege

Green filed a pretrial motion requesting a hearing to determine whether spousal privilege could be invoked by or on behalf of Barbara Castillo, who he claimed to be his common law wife. *See* TEX. R. EVID. 104(a), 504. Specifically, Green requested that the trial court determine whether he could invoke the privilege on Castillo’s behalf with regard to “any confidential communications [between them] not intended to be disclosed to any other individual” pursuant to Rule 504(a), and whether Castillo herself desired to invoke the privilege not to testify for the State pursuant to Rule 504(b). *See* TEX. R. EVID. 504(a), (b). After an evidentiary hearing, the trial court found there was insufficient evidence to establish that Green and Castillo were informally married. The trial court therefore ruled that spousal privilege did not apply under either subsection (a) or (b). *See* TEX. R. EVID. 504(a), (b).

On appeal, Green argues the trial court abused its discretion in ruling that the privilege was not available because he presented sufficient evidence to prove the informal, or common law, marriage. *See Colburn v. State*, 966 S.W.2d 511, 514 (Tex. Crim. App. 1998) (applying abuse of discretion standard to trial court’s ruling regarding existence of informal marriage). A party seeking to assert spousal privilege has the burden to prove the privilege applies. *Id.* The word “spouse” in Rule 504 means one who is legally married to another, and does not include a girlfriend, significant other, or putative spouse. *Weaver v. State*, 855 S.W.2d 116, 120 (Tex. App.—Houston [14th Dist.] 1993, no pet.). In the absence of a ceremonial marriage, the party must prove the existence of an informal or common law marriage at the time of the event or the communications. *Colburn*, 966 S.W.2d at 514; *Douglas v. State*, 489 S.W.3d 613, 628 (Tex. App.—Texarkana 2016, no pet.); see also *Hightower v. State*, 629 S.W.2d 920, 924 (Tex. Crim. App. 1981) (party claiming existence of informal marriage has burden of proof by preponderance of the evidence). Under Texas law, there are two methods to prove the existence of an informal

or common law marriage. TEX. FAM. CODE ANN. § 2.401 (West 2006). The first method is by signing a written declaration of informal marriage under oath and filing it with the county clerk. *Id.* at § 2.401(a)(1). The second method is by presenting evidence proving the elements of what is known as a common law marriage: (i) an agreement to be married; (ii) cohabitation in Texas after the agreement; and (iii) representation to others that the couple is married. *Id.* at § 2.401(a)(2). Here, there was no evidence of a properly recorded declaration of informal marriage, so Green was required to prove the three elements of a common law marriage.

Barbara Castillo testified at the pretrial hearing that she and Green began living together at her home at 370 Dorie in August 2013. Castillo stated they began holding themselves out as husband and wife in September 2013, and Green gave her an engagement ring in December 2013 in front of her friend Norma. Castillo testified they told their family and friends they were going to get married, but as of the July 12, 2016 hearing, had not set a date. Castillo testified that, since August 2013, she has sometimes referred to Green as her boyfriend, but usually refers to him as her husband. She conceded referring to Green as her “boyfriend” in her July 2015 testimony before the grand jury in this case. Castillo stated that she has “her own children,” and has no children with Green. She has not taken Green’s last name, and files her federal tax returns as “single.” Green is not on the lease for the house at 370 Dorie. Castillo testified that Green was arrested in the spring of 2015, and she is on the list of visitors permitted to see Green in jail because he listed her as his spouse. She has visited him multiple times in jail, most recently about one week before the hearing.

Detective Branham testified that during his investigation of Guerrero’s murder he interviewed both Green and Castillo in January 2015. On her statement information form, Castillo left the space for “spouse” blank. During her interview, Castillo told the detective that she and Green were “not legally married, we’ve just been living together.” She never stated they were

common law married. Castillo further commented that she was surprised they had “lasted that long.” On his statement information form, Green circled “no” in response to the question whether he was married. However, Green did refer to Castillo as his spouse during his interview with Detective Branham.

Bexar County Sheriff’s Sergeant Octavia Mitchell testified that she administers the jail visitation logs and calls. She confirmed that Green listed Castillo as his “spouse” on his visitor list. Green also included Tainasha Willis on the list, first as a “friend,” and later as his “girlfriend.” An audio recording of a jail visit between Green and Willis indicates they engaged in sexual relations. Two other audio recordings of phone calls between Green and Castillo shortly before trial reveal Green urging Castillo to sign and file sworn marriage papers and to open a joint bank account.

At the conclusion of the hearing, the trial court found there was insufficient evidence “at this point” to establish a common law or informal marriage, and noted there was “no outside holding out” evidence. The existence of an informal marriage is a question of fact, and when the trial court is the trier of fact it evaluates the credibility of the witnesses and the weight to be given to their testimony. *Hightower*, 629 S.W.2d at 924; *Small v. McMaster*, 352 S.W.3d 280, 282-83 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). The three elements of an informal marriage may be established by circumstantial evidence, as well as direct evidence. *Tompkins v. State*, 774 S.W.2d 195, 209 (Tex. Crim. App. 1987). An informal or common law marriage does not exist until all three statutory elements are present, and all three elements must exist at the same time. *McMaster*, 352 S.W.3d at 283.

The first element of an agreement requires “some agreement presently to be married,” not merely to marry sometime in the future. *Colburn*, 966 S.W.2d at 515. The evidence must show the couple “intended to create an immediate and permanent marriage relationship, not merely a

temporary cohabitation that may be ended by either party.” *In re C.M.V.*, 479 S.W.3d 352, 360 (Tex. App.—El Paso 2015, no pet.) (agreement to be married cannot be inferred from mere evidence of cohabitation and representations of marriage to others, but such evidence may be circumstantial evidence of the existence of an agreement to marry). Castillo testified they became engaged and Green gave her a ring in December 2013 and they told friends and family they were going to marry, but as of the date of the July 2016 hearing they had not set a wedding date.

As to the second element, mere cohabitation alone is insufficient to establish a common law marriage; the cohabitation must be pursuant to an agreement to be married. *See* TEX. FAM. CODE ANN. § 2.401(a)(2) (requiring cohabitation after the agreement); *see also Welch v. State*, 908 S.W.2d 258, 265 (Tex. App.—El Paso 1995, no pet.). Castillo testified that she and Green have lived together since August 2013, but they did not become engaged until December 2013. Castillo also stated that she and Green broke up a few times after getting engaged, but always got back together.

With respect to the third element of representing themselves as husband and wife to the public, although Castillo testified that she and Green were common law married and held themselves out as such, conclusory testimony that a common law marriage existed or that the parties held themselves out as married is not sufficient by itself. *Tompkins v. State*, 774 S.W.2d 195, 209 (Tex. Crim. App. 1987). The evidence must show the couple had a consistent reputation in the community as being married. *McMaster*, 352 S.W.3d at 285; *Freeman v. State*, 230 S.W.3d 392, 402-03 (Tex. App.—Eastland 2007, pet. ref’d). Occasional references to each other as husband and wife are not sufficient to establish the element of holding out. *McMaster*, 352 S.W.3d at 285. The evidence must show that *both* parties intended to create an immediate and permanent marriage relationship. *Id.* at 283 (emphasis added). Although Castillo testified she considered Green her husband and usually referred to him that way in public, she conceded filing as “single”

on her income taxes, having periodic break-ups with Green, and sometimes referring to Green as her boyfriend rather than her husband. Castillo called Green her “boyfriend,” not “husband,” when she testified before the grand jury in this case. Neither Green nor Castillo listed each other as “spouse” on their statement information forms, although Green did list Castillo as his spouse on his jail visitor list. However, Green also listed Tainisha Willis as his “girlfriend” on his visitor list and engaged in sexual relations with her during a jail visit. Castillo’s daughter, Lola, stated that Green was her mother’s “boyfriend” and her mother was scared of him. In addition, the recorded jail calls between Green and Castillo in which Green repeatedly urges Castillo to file sworn marriage papers and open a joint bank account support an inference that they were not already operating as a married couple. *C.f. Dermody v. State*, No. 03-02-00077-CR, 2002 WL 31026777, at *4 (Tex. App.—Austin Sept. 12, 2002, no pet.) (mem. op., not designated for publication) (alleged common law wife testified that she only started using the defendant’s name and agreeing with him they were common law married at his suggestion after he was in jail). Castillo admitted she was scared of Green “at times,” but stated that she did not file the marriage paper work or open a joint account prior to trial, as requested by Green.

Given the conflicting evidence presented at the hearing, and considering the evidence in the light most favorable to the trial court’s ruling, we conclude that Green did not carry his burden of proof to establish a common law marriage with Castillo.² *See Freeman*, 230 S.W.3d at 402; *see also Jasper v. State*, 61 S.W.3d 413, 419 (Tex. Crim. App. 2001). We therefore overrule Green’s first issue.

² The record does not reflect that Green ever sought to re-urge spousal privilege during trial.

Corroboration of Accomplice Testimony

In his second issue, Green challenges the sufficiency of the evidence to corroborate Ramos's accomplice witness testimony. The jury was properly instructed that Michael Ramos was an accomplice witness as a matter of law, and that it could not convict Green on the basis of his testimony, even if credible, unless the testimony was corroborated by other evidence tending to connect Green with the commission of Guerrero's murder. *See* TEX. CODE CRIM. PROC. ANN. art. 38.14 (West 2005) (conviction cannot be upheld on the basis of accomplice testimony unless it is corroborated by "other evidence tending to connect the defendant with the offense committed"). An accomplice is a person who participated with the defendant before, during, or after the commission of the crime and who acted with the required culpable mental state. *Smith v. State*, 332 S.W.3d 425, 439 (Tex. Crim. App. 2011); *see Paredes v. State*, 129 S.W.3d 530, 536 (Tex. Crim. App. 2004) (an accomplice as a matter of law is a person susceptible to prosecution for the offense with which the defendant is charged or a lesser included offense). The corroborating evidence need not be sufficient by itself to establish the defendant's guilt with respect to the offense committed, and need not directly link the defendant to commission of the offense. *Brown v. State*, 270 S.W.3d 564, 567 (Tex. Crim. App. 2008); *Cathey v. State*, 992 S.W.2d 460, 462 (Tex. Crim. App. 1999).

In reviewing the sufficiency of the corroborating evidence in the record, we exclude the accomplice testimony from our consideration and focus on the remainder of the record to determine whether there is any independent evidence that tends to connect the defendant with the commission of the crime. *Solomon v. State*, 49 S.W.3d 356, 361 (Tex. Crim. App. 2001); *Cathey*, 992 S.W.2d at 462-63. We view the independent evidence in the light most favorable to the jury's verdict. *Brown*, 270 S.W.3d at 567. The corroborating evidence may be direct or circumstantial, and is sufficient if the combined weight of the non-accomplice evidence tends to connect the

defendant to the offense. *Solomon*, 49 S.W.3d at 361; *Gosch v. State*, 829 S.W.2d 775, 777 (Tex. Crim. App. 1991). While a defendant's mere presence at the scene of the crime is, by itself, insufficient corroboration, the defendant's presence combined with other suspicious circumstances may be sufficient to tend to connect the defendant to the crime. *Cox v. State*, 830 S.W.2d 609, 611 (Tex. Crim. App. 1992); *Dowthitt v. State*, 931 S.W.2d 244, 249 (Tex. Crim. App. 1996). Likewise, evidence that the defendant was in the presence of an accomplice at or near the time or place of the crime is proper corroborating evidence. *McDuff v. State*, 939 S.W.2d 607, 612 (Tex. Crim. App. 1997).

Our review of the record leads us to conclude that sufficient independent evidence tends to connect Green with the commission of Guerrero's murder. Non-accomplice evidence places Green at the scene of Guerrero's murder close in time to its commission. *See Smith v. State*, 392 S.W.3d 190, 195 (Tex. App.—San Antonio 2012, pet. ref'd) (non-accomplice testimony that places the defendant at or near the scene of the crime near the time of its commission is a factor that tends to connect the defendant to the crime and can corroborate an accomplice's testimony) (citing *Brown v. State*, 672 S.W.2d 487, 489 (Tex. Crim. App. 1984)). Green's statements to Castillo place him at the scene of Guerrero's murder on Corliss Street that night, and implicate him in the planning of the murder because Guerrero "knew Ramos's identity." Moreover, Castillo linked the black zip ties used to bind Guerrero's hands to Green. The timing of Guerrero's murder during the late evening of December 2, 2014, as confirmed by the discovery of his body and vehicle the next morning on Corliss Street, coincides with the timing of the robbery, Green's possession of Guerrero's marijuana, wallet and cell phone in Castillo's bedroom that night, and Green's use of Castillo's Suburban to accompany the other men and Guerrero's Jeep to Corliss Street.

Considering the combined weight of the non-accomplice evidence detailed above, we conclude it tends to connect Green to the commission of Guerrero's murder, and sufficiently corroborates the accomplice testimony given by Ramos. *See Brown*, 270 S.W.3d at 567 (corroborating evidence need not directly link defendant to commission of the crime and need not be sufficient by itself to establish his guilt); *see also Cathey*, 992 S.W.2d at 462 (same). Therefore, we overrule Green's second issue on appeal.

Autopsy Photograph

In his third issue, Green contends the trial court erred in admitting State's Exhibit 11A, an autopsy photograph of the decedent, because the photograph was cumulative and unfairly prejudicial under Rule 403. TEX. R. EVID. 403. The admissibility of photographic evidence is within the sound discretion of the trial court, and we review the ruling for abuse of discretion. *Young v. State*, 283 S.W.3d 854, 874 (Tex. Crim. App. 2009); *Prible v. State*, 175 S.W.3d 724, 734 (Tex. Crim. App. 2005). We do not reach the merits of Green's complaint, however, because the issue was not preserved for appellate review. TEX. R. APP. P. 33.1(a); *Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003). For an appellate complaint to be preserved for review, the issue on appeal must comport with the objection made at trial. *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). "An objection stating one legal theory may not be used to support a different legal theory on appeal." *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995) (quoting *Johnson v. State*, 803 S.W.2d 272, 292 (Tex. Crim. App. 1990)).

At trial, when the State sought to admit its Exhibit 11A, Green objected to admission of the photograph based on its lack of relevance and materiality. *See* TEX. R. EVID. 401. On appeal, Green's argument is that the probative value of the autopsy photograph was substantially outweighed by the danger of unfair prejudice and the cumulative nature of the photograph. *See* TEX. R. EVID. 403. Green's complaint on appeal does not correspond to his trial objection.

Therefore, Green has not preserved his third issue for review. *See* TEX. R. APP. P. 33.1(a); *see also Clark*, 365 S.W.3d at 339.

Denial of Mistrial

In his last issue, Green asserts the trial court erred in denying his request for a mistrial based on Ramos's testimony that he did not leave or call the police after Green pulled the gun on Guerrero because Green is "a very scary man" and is "known to have weapons." Green objected to the nature of the testimony, and the trial court sustained his objection. The trial court instructed the jury to disregard the testimony, but denied Green's subsequent motion for a mistrial. On appeal, Green argues the instruction to disregard was insufficient to cure the testimony's extreme prejudicial effect and a mistrial was required. *See* TEX. R. EVID. 404(a) (evidence of a person's character or character trait is not admissible to prove the person acted in accordance with the character or trait on a particular occasion). We review the denial of a mistrial for abuse of discretion. *De La Fuente v. State*, 432 S.W.3d 415, 424 (Tex. App.—San Antonio 2014, pet. ref'd).

It is well established that a prompt instruction to disregard will usually cure any error associated with an improper question and answer. *Id.*; *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). We must presume the jury followed the trial court's instruction to disregard the improper testimony. *Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009). "A mistrial is required only in 'extreme circumstances, where the prejudice is incurable.'" *De La Fuente*, 432 S.W.3d at 424 (quoting *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007)).

Here, Green argues the instruction to disregard was ineffective to cure the harm because the State's question was directly calculated to elicit inadmissible character evidence, Ramos's response went directly to what the State sought to prove, and Green received the most serious punishment that could be applied, a life sentence. *See Hardin v. State*, 20 S.W.3d 84, 93-94 (Tex.

App.—Texarkana 2000, pet. ref'd) (citing nonexclusive factors to be considered). We disagree. The State's question was a general "why" question inquiring why Ramos did not just leave the scene or call the police when the drug deal went wrong. Ramos could have answered any number of ways, including that he was scared, which would not have been objectionable. Further, Ramos's response was a brief, general statement, to which the trial court promptly sustained Green's objection and instructed the jury to disregard the statement. There is nothing in the record to suggest the jury was unable to follow the instruction. *See Gamboa*, 296 S.W.3d at 581. The State did not refer to Ramos's characterization of Green in subsequent questioning or closing argument. In addition, Green received an automatic life sentence under the capital murder statute; it was not the jury's role to assess punishment in this case. *See TEX. PENAL CODE ANN. § 12.31(a)(2)*. As the State points out, we have previously held an instruction to disregard sufficient to cure any prejudice stemming from a witness's answer that she lied because she was scared of the defendant since she was "always talking about how [she] has access to guns and drugs." *See Alexander v. State*, 229 S.W.3d 731, 743-44 (Tex. App.—San Antonio 2007, pet. ref'd) (Rule 404(b) objection). The record before us does not show that Ramos's testimony was so emotionally inflammatory or extremely prejudicial that the rare remedy of a mistrial was necessary. *See De La Fuente*, 432 S.W.3d at 424; *see also Young v. State*, 137 S.W.3d 65, 71 (Tex. Crim. App. 2004). Assuming Ramos's testimony was improper character evidence, we conclude any error was cured by the trial court's prompt instruction to disregard and the court did not abuse its discretion in denying Green's motion for a mistrial. Therefore, we overrule Green's final issue.

CONCLUSION

Based on the foregoing analysis, we affirm the trial court's judgment.

Rebeca C. Martinez, Justice

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