

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-16-00304-CR

ARTHUR CHRISTOPHER HARMON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 14-19422

MEMORANDUM OPINION

In eleven issues, Arthur Christopher Harmon appeals his murder conviction for which he received a forty-five-year prison sentence. In issues one, two, nine, and ten, Harmon complains of the trial court's failure to instruct the jury that accomplice-witness testimony requires corroboration under article 38.14 of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. Ann. art. 38.14 (West 2005). Harmon contends in his third issue the jury charge lacked instructions properly

addressing the law of parties. His fourth issue argues he was denied a fair and impartial trial due to cumulative charge errors. In issues five and six, Harmon asserts he cannot be held criminally responsible for one of the means by which he was charged with committing the murder. In his seventh and eighth issues, Harmon claims his lawyer's failure to object to the court's charge omitting an accomplice-witness instruction and an instruction of the law of parties amounted to ineffective assistance of counsel. Finally, in his eleventh issue, Harmon contends the evidence is insufficient to support his conviction. We overrule all issues and affirm the trial court's judgment.

I. Background

Harmon and his roommate, Yiannis Mihail, initiated contact with the Jefferson County Sheriff's Department regarding the death of Kevin Moyer and the disposal of his body. Harmon and Mihail met with detectives and provided voluntary statements regarding their involvement in a plan to lure Moyer to their apartment to rob him. In addition to his written statement, Harmon was video recorded while being interviewed by police regarding the details of the murder. The video of the interview was played for the jury during trial.

In his interview with detectives, Harmon explained he and Mihail lived together at Harmon's garage apartment. Harmon stated he and Mihail used a phone

app to set up a meeting with Moyer during which he, Mihail, and another friend, Cody Lewis, planned to rob Moyer. Although Harmon claimed he had nothing to do with Moyer's death, Harmon admitted he and Mihail assisted Lewis in disposing of Moyer's body and car after Moyer was killed.

Harmon stated in his interview that Mihail met with Moyer in the bedroom of their apartment. Upon Mihail's signal, Harmon and Lewis, who was armed with a BB gun belonging to Harmon, entered the room and found Moyer naked. Lewis suddenly began beating Moyer in the head with the butt of the BB gun. Harmon admitted to tying one of Moyer's hands and his foot but claimed it was at Lewis's instruction. According to Harmon, he thought Moyer was dead when he tied him up.

They wrapped Moyer in a sheet, carried him outside, and placed him in the backseat of his own car. Harmon indicated he and Mihail took Harmon's car, and Lewis drove Moyer's car to a site approximately fifteen to twenty minutes from Harmon's apartment, and left Moyer's body in his car out in a field.

On the way back from disposing of the body and the car, Harmon was pulled over by a sheriff's deputy for speeding and subsequently arrested for outstanding warrants. Harmon stated that while he was in jail, Lewis and Mihail went back to his apartment to clean the crime scene and dispose of evidence. Harmon also told

detectives Lewis threw a bag of clothing and the sheet used to move Moyer's body out of Harmon's vehicle right before they were pulled over.

In his statement to police, Harmon admitted he burned some of the clothes he wore during the incident. He also admitted taking one of Moyer's credit cards but indicated he did not use it. Rather, he threw it in the trash at his home, where the police later recovered it. Harmon maintained he only planned to rob Moyer, not kill him. According to Harmon, Lewis told him afterward he just "flipped."

Cody Lewis testified for the State at Harmon's trial. Lewis gave a statement to the police and pled guilty to murder, but he had not yet been sentenced at the time of trial. Lewis professed the State had not offered him any deal in exchange for his testimony.

According to Lewis, while he was at Harmon's apartment washing clothes, Mihail used a phone app to arrange a meeting with Moyer at Harmon's apartment under the guise of a homosexual encounter. In reality, Mihail and Harmon planned to rob Moyer. Lewis testified he was unaware of the plan until right before Moyer arrived. Because Lewis needed money, he agreed to participate; however, he thought it would be a "simple theft," and no one would get hurt.

Lewis testified that when Moyer arrived, he and Harmon were waiting upstairs, and were to go in the bedroom to rob Moyer upon receiving a text from

Mihail. Lewis testified he had a BB gun, Harmon had what Lewis described as orange medical tape, and both wore do-rags over their faces. After receiving Mihail's text, Lewis entered the bedroom and found Mihail and Moyer unclothed, with Moyer's back to the door. Startled by the intrusion, Moyer swung at Lewis and missed. Lewis panicked and hit Moyer in the head with the butt of the BB gun seven or eight times. Moyer started bleeding and "surrendered." Lewis testified Harmon then taped Moyer's "legs and wrist, and he tried to put it around his mouth, but it slipped . . . to his neck." Lewis described Mihail's and Harmon's behavior as hysterical. It was "an adrenaline rush" for everyone, but Harmon also appeared angry.

Lewis claimed he went through Moyer's car, and the only thing he found of value was methamphetamine, which he took. When Lewis returned after going through Moyer's car, he saw Moyer unconscious on the floor. Lewis panicked and told Mihail and Harmon they all needed to remove Moyer's body from the house. While in the living room, Mihail took the tape off Moyer's arms and legs, but Lewis did not know what Mihail did with the tape. They placed a sheet underneath Moyer to make it easier to drag him out of the house. Once they dragged Moyer's body outside and placed him in the backseat of his car, Lewis drove Moyer's vehicle and followed Harmon and Mihail, who were in Harmon's car. When they made it out of

town, Harmon pointed out of his car window, and Lewis drove Moyer's car in that direction into a field until the car became stuck. Lewis left the car and Moyer's body in the field and rode off with Harmon and Mihail.

On their way back after dumping Moyer's body and the car, Harmon was stopped by police for speeding and arrested for outstanding warrants. Before stopping for police, Harmon turned onto another road and instructed Lewis to throw out a bag. Lewis complied and threw out the bag, as well as a GPS and a phone. Neither Mihail nor Lewis were arrested during the traffic stop.

Lewis explained he and Mihail returned to Harmon's apartment to clean the crime scene. They threw some of the cleaning supplies in the trash beside the garage. They threw other cleaning supplies, including a mop; the BB gun; Moyer's wallet; and clothing in a dumpster beside a convenience store.

Deputy Chris Berry of the Jefferson County Sheriff's Office worked as a detective at the time of the incident. He initially interviewed Harmon and Mihail when they were brought to the Sheriff's Department. Harmon provided Deputy Berry a written statement. Deputy Berry indicated Harmon gave his statement voluntarily and he cooperated while giving it. During Harmon's interview and in his statement, Harmon admitted to being with Mihail and Lewis on the day of the murder, driving his vehicle after they had dumped Moyer's body, being with Lewis

when he dumped a black bag containing items covered in blood out of his vehicle, being stopped and arrested for speeding near the location they dumped the body, and seeing what he thought were blood stains on his mattress in his house.

Jefferson County Sheriff's Deputy Ryan Bodley testified that on the night of the incident, he stopped Harmon for speeding. After the stop, Deputy Bodley arrested Harmon for outstanding warrants. A recorded video of the traffic stop was entered into evidence and played for the jury. The video showed a trash bag on the side of the road near Harmon's vehicle. Deputy Bodley testified he noticed the bag but did not look in it because he was focused on the traffic stop. At the time, Deputy Bodley was unaware the bag was related to the occupants of the car. Deputy Bodley also testified he did not notice blood on the vehicle or on anyone inside.

Jefferson County Sheriff's Deputy Jorge Cardenas testified he responded to a call concerning a report someone found a bag on the roadside containing bloody clothing. The bag of bloody clothing was found near where Harmon was stopped and arrested. After examining the bloody items, Deputy Cardenas placed them into an evidence bag to transport them directly to the crime lab. The next day, Deputy Cardenas was called to the scene where Moyer's car and body were located.

Detective Jeffrey Chadney served as the lead detective. He was present when Moyer's body was removed from Moyer's car. He observed that Moyer's face had

contusions and bruising, and his jaw seemed deformed. Moyer's body had other scrapes and marks, and dirt on his knees and abdomen suggesting he had been dragged.

Dr. John William Ralston, a forensic pathologist, performed an autopsy on Moyer. Dr. Ralston testified that one of Moyer's primary injuries resulted from stretchy "vet tape," wrapped around his neck several times. The tape left an impression around his neck and would have "cut off the blood supply and possibly the oxygen supply to his head." Moreover, Moyer "had hemorrhages in the muscles around his neck indicating that [the tape] had been tightly wrapped about his neck." Dr. Ralston also described "three parallel curved lacerations" on Moyer's forehead, a large gaping laceration on his head, and several bruises on various parts of his body. Dr. Ralston opined that the lacerations could have been caused by "any solid blunt object with a good kind of edge[,] such as the BB gun. A toxicology test indicated Moyer had a significant amount of methamphetamine in his system at the time of his death. After performing the autopsy, Dr. Ralston concluded that while the injuries to his head would have caused significant bleeding, "ligature strangulation" was Moyer's cause of death. According to Dr. Ralston, the person who wrapped the tape around Moyer's neck had to be in close proximity to Moyer, implying that the person likely would have had blood on their shoes and clothing.

Detective Chadney attended the autopsy and saw the tape wrapped around Moyer's neck that he too described as "vet tape". He testified that vet tape is non-adhesive and stretchable, so it sticks to itself rather than to an animal's fur or skin. Detective Chadney noted Harmon worked at a kennel and would have access to vet tape; however, he did not find any vet tape in Harmon's apartment. Harmon admitted working at the kennel but denied having any tape or placing it around Moyer's neck. Instead, Harmon admitted he tied Moyer's hand and leg at some point, but no one found anything used to tie Moyer's body in such a way. Detective Chadney saw ligature marks on Moyer's wrists, but he did not see any wire or tape on Moyer's wrists or feet. Nevertheless, Detective Chadney speculated electrical wire that was found in a bag placed inside a dumpster at the convenience store with other items from the crime scene could have been used.

Deputy Berry testified about evidence he collected, including the BB gun, a mop, and other clothing from a dumpster near Harmon's house. In addition, Deputy Berry took pictures of the crime scene. Other evidence collected included Harmon's tennis shoes found in a trash can outside of Harmon's apartment, which tested positive for blood. Moyer's credit card was found in the kitchen trashcan. The victim's vehicle contained blood, as did Harmon's vehicle. Police also found a prescription bottle with Moyer's name on it in Harmon's vehicle. Moreover, Deputy

Bodley identified some clothing found after the murder that Lewis and Harmon were wearing the night of the traffic stop.

During the jury charge conference, Harmon's counsel did not object or request additional instructions be included in the charge. In closing argument, Harmon's counsel discussed the law of parties and argued Harmon was not responsible for Lewis's actions. The State also explained the law of parties in its closing statement. Specifically, the State used a majority of its time to explain the law of parties, how it applied in this situation to hold Harmon liable for Lewis's actions, and argued all three men were responsible for Moyer's death.

II. Accomplice-Witness Testimony

In issues one, two, nine, and ten, Harmon argues his conviction should be reversed because the trial court failed to provide the jury with an accomplice-witness instruction explaining to the jury Lewis's testimony must be corroborated by a non-accomplice witness to support its decision to convict Harmon.

To obtain a conviction based on the testimony of an accomplice, Texas requires accomplice-witness testimony be "corroborated by other evidence tending to connect the defendant with the offense committed[.]" Tex. Code Crim. Proc. Ann. art. 38.14; *see Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007) (instructing that testimony of an accomplice must be corroborated by "independent

evidence tending to connect the accused with the crime”). Such evidence may be either direct or circumstantial. *See Cathey v. State*, 992 S.W.2d 460, 462 (Tex. Crim. App. 1999) (“It is not necessary that the corroborating evidence directly connect the defendant to the crime or that it be sufficient by itself to establish guilt; it need only tend to connect the defendant to the offense[.]”).

Depending on what type of accomplice the witness is considered—an accomplice as a matter of law or an accomplice as a matter of fact—determines the proper jury instruction given, if any. *Cocke v. State*, 201 S.W.3d 744, 747 (Tex. Crim. App. 2006). A witness is an accomplice as a matter of law, which the State concedes Lewis is in this case, when he or she has been “charged with the same offense as the defendant or a lesser-included offense or when the evidence clearly shows that the witness could have been so charged.” *Druery*, 225 S.W.3d at 498. In the case of an accomplice witnesses as a matter of law, “the trial court affirmatively instructs the jury that the witness is an accomplice and that his testimony must be corroborated.” *Zamora v. State*, 411 S.W.3d 504, 510 (Tex. Crim. App. 2013) (citing *Druery*, 225 S.W.3d at 498–99). *Zamora* directs that in cases where a witness is an accomplice under a party-conspiracy theory, an accomplice-witness instruction must be given, even if that means the judge *sua sponte* provides the instruction. *See id.* at

512–14. Failing to provide such instruction is error. *Herron v. State*, 86 S.W.3d 621, 631 (Tex. Crim. App. 2002).

We analyze this type of charge error for harm under the applicable standard set out in *Almanza v. State*. 686 S.W.2d 157 (Tex. Crim. App. 1984) (op. on reh’g); *see also Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). Because Harmon failed to object to the jury charge error at trial, we will reverse only if the error is “so egregious and created such harm that the defendant ‘has not had a fair and impartial trial.’” *Barrios*, 238 S.W.3d at 350 (quoting *Almanza*, 686 S.W.2d at 171). We assess whether Harmon suffered egregious harm “in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole.” *Almanza*, 686 S.W.2d at 171. “Egregious harm is a difficult standard to prove and such a determination must be done on a case-by-case basis.” *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011) (internal quotations omitted). “Errors which result in egregious harm are those that affect the very basis of the case, deprive the defendant of a valuable right, vitally affect the defensive theory, or make a case for conviction clearly and significantly more persuasive.” *Id.* at 490.

In assessing “egregious harm under *Almanza* in the context of the failure to submit an accomplice-witness instruction[,]” we review the record “to assess whether the jury, had it been properly instructed on the law requiring corroboration of accomplice-witness testimony, ‘would have found the corroborating evidence so unconvincing in fact as to render the State’s overall case of conviction clearly and significantly less persuasive.’” *Casanova v. State*, 383 S.W.3d 530, 533–34 (Tex. Crim. App. 2012) (quoting *Saunders v. State*, 817 S.W.2d 688, 692 (Tex. Crim. App. 1991)). To measure the sufficiency of the corroborating evidence, we eliminate the accomplice evidence from the record and determine whether the remaining inculpatory evidence tends to connect the defendant to the offense. *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008). In evaluating the non-accomplice evidence, we consider its reliability and the strength of its tendency to connect the defendant to the crime. *Herron*, 86 S.W.3d at 632. Corroborating evidence is reliable if “there is no rational and articulable basis for disregarding the non-accomplice evidence or finding that it fails to connect the defendant to the offense.” *Id.* at 633.

“It is well established that appellant’s admission or confession, under most circumstances, will be sufficient to corroborate the accomplice witness.” *Jackson v. State*, 516 S.W.2d 167, 171 (Tex. Crim. App. 1974); see *Joubert v. State*, 235 S.W.3d 729, 731 (Tex. Crim. App. 2007). Harmon admitted he was involved in, and actively

participated in the plan to rob Moyer, which resulted in Moyer's death, and to tying Moyer up, loading his body into his car, and assisting in dumping the body and car in a field. Harmon was stopped for speeding and arrested for outstanding warrants near the area where Moyer's body and car were found at a time that coincided with the time that Moyer's body was placed in that area. Blood was found in Harmon's house, in his vehicle, and on his shoes. His burned clothes were found at his house and he admitted to burning them because of his involvement in Moyer's death. Corroborating evidence need not directly connect a defendant to an offense or be sufficient by itself to establish guilt. *Cathey*, 992 S.W.2d at 462. "The evidence must simply link the accused in some way to the commission of the offense and show that rational jurors could conclude that the evidence sufficiently tended to connect the accused to the offense." *Hernandez v. State*, 454 S.W.3d 643, 648 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (citing *Simmons v. State*, 282 S.W.3d 504, 508 (Tex. Crim. App. 2009)).

Harmon's statements and other non-accomplice evidence introduced by the State corroborated Lewis's testimony and connected Harmon to the offense. *See Joubert*, 235 S.W.3d at 731. As a result, Harmon did not suffer egregious harm by the trial court's failure to instruct the jury that Lewis's testimony had to be independently corroborated. *See Herron*, 86 S.W.3d at 632. We therefore overrule

issues one, two, nine, and ten as they pertain to the trial court's failure to provide an accomplice-witness instruction.

III. Law of Parties

A. Inclusion of Instruction in Application Paragraph

Harmon argues in his third issue that the trial court erred by failing to include the law of parties in the application portion of the jury charge. The jury charge includes a separate page instructing the jury on the law of parties. The application paragraph of the charge does not reference the law of parties nor refer to any of the general or specific instructions.

As stated above, we review alleged jury charge error in two steps: first, we determine whether error exists; if so, we then evaluate whether sufficient harm resulted from the error to require reversal. *Arteaga v. State*, 521 S.W.3d 329, 333 (Tex. Crim. App. 2017); *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015) (citing *Almanza*, 686 S.W.2d at 171). Courts have held that without at least a reference in the application paragraph to the abstract section that includes the instructions on the law of parties, error has occurred. *See Vasquez v. State*, 389 S.W.3d 361, 367 (Tex. Crim. App. 2012); *Plata v. State*, 926 S.W.2d 300, 304 (Tex. Crim. App. 1996), *overruled on other grounds by Malik v. State*, 953 S.W.2d 234

(Tex. Crim. App. 1997). Therefore, we will assume, without deciding, the omission of the law of parties in the application paragraph was error.

Here, because Harmon did not object to the trial court's jury instruction, any jury charge error the trial court may have committed will not result in reversal of the conviction without a showing of egregious harm. *See Price*, 457 S.W.3d at 440. "Jury charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory." *Arteaga*, 521 S.W.3d at 338. "An egregious harm determination must be based on a finding of actual rather than theoretical harm." *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011). "In examining the record for egregious harm, we consider the entire jury charge, the state of the evidence, the closing arguments of the parties, and any other relevant information in the record." *Arteaga*, 521 S.W.3d at 338 (citing *Olivas v. State*, 202 S.W.3d 137, 144 (Tex. Crim. App. 2006)).

1. Entirety of the Jury Charge

Although the application paragraph did not reference the law of parties, the abstract portion correctly explained the circumstances under which one person can be held criminally responsible for another's actions. In addition, the charge directed the jury at the onset that the charge contained all the law necessary to enable the jury to reach its verdict, and if there was any evidence presented to raise an issue, the law

on the issue was provided in the charge. The instructions on law of parties was set out on a page of its own within the abstract section of the charge. “We conclude that a reasonable jury would refer to the abstract definition of the law of parties without needing to have it repeated [] in the application paragraph.” *Vasquez*, 389 S.W.3d at 371. Therefore, we further determine the entirety of the jury charge weighs only slightly in favor of a finding of egregious harm or is neutral.

2. State of the Evidence

Many of the facts in this case were uncontested. Harmon admitted during his various statements to the police that he agreed to the plan to rob Moyer. Harmon also admitted that after Lewis beat Moyer in the head with the BB gun, he helped tie one of Moyer’s hands and a foot together. Additionally, Harmon explained his involvement disposing of Moyer’s body. Harmon also attempted to destroy evidence by burning the clothes he wore that evening. The material dispute regarding Harmon’s involvement revolved around whether he placed vet tape around Moyer’s neck. Because the jury found Harmon guilty, we presume the jurors rejected his assertions that he was an innocent bystander. The indictment allowed Harmon to be convicted either by his actions in association as a party with Lewis and Mihail or individually by placing tape around Moyer’s neck thereby causing his strangulation and death. Therefore, the jury could have found Harmon guilty of murder for being

a party to the crime or through his individual actions in the crime. *See Vasquez*, 389 S.W.3d at 371. Accordingly, we weigh this factor against finding egregious harm.

3. Closing Arguments

During closing argument, the State discussed the law of parties in detail and sought a conviction based on the law of parties or Harmon's direct involvement for placing the tape around Moyer's neck and strangling him. Thus, although the application paragraph of the jury charge did not directly reference the law of parties, the State's closing argument served much the same function by explaining how the law of parties applies in Harmon's case. During Harmon's defense counsel's closing argument, he did not suggest Harmon was not present at the crime scene or Harmon was not involved, so the arguments did nothing to exacerbate the alleged charge error. Accordingly, we conclude this factor weighs against finding egregious harm.

4. Other Relevant Information

Finally, we consider any other relevant information revealed by the record as a whole. During voir dire, the State explained the law of parties to the venire panel, provided an example, and inquired as to whether anyone disagreed with the doctrine, to which no one replied. After swearing in the jury panel and while giving the jury its initial instructions, the trial court told the jury it would be given a charge at the end of the trial providing all the law and definitions applicable to the case to be used

in reaching its decision. Moreover, the State referred to the specific evidence of Lewis's testimony concerning his involvement in the case, then explained to the jury the law of parties and how it applied in this case. Considering the record as a whole, we conclude this factor weighs against a finding of egregious harm.

After carefully reviewing the entire record, we conclude the jury could not have been misled by the court's charge. Analyzing the above factors, we hold Harmon's rights were not harmed by the trial court's error, if any, to include the appropriate language regarding party liability in the application paragraph of the jury charge. Harmon's third issue is overruled.

B. Unanimous Verdict

In issues five and six, Harmon complains the trial court erred by instructing the jury it could convict Harmon of murder either by the means of him hitting Moyer in the head or by strangulation, because there was no evidence to show he hit Moyer in the head, rendering the jury's verdict non-unanimous. The State concedes Lewis hit Moyer in the head, but asserts that because Harmon acted with Lewis, Harmon can be convicted of murdering Moyer by this means based on the law of the parties doctrine.

The law of the parties definition was included in the jury charge. The State, as well as Harmon's counsel, explained and discussed the application of the doctrine

under the circumstances. Lewis admitted to hitting Moyer several times in the head with the BB gun until Moyer fell to the ground. Harmon admitted to being part of the plan to rob Moyer and then participated in tying Moyer up, moving Moyer's body and placing it in Moyer's car, then assisted in directing Lewis where to drive and leave Moyer's car and body. Thus, when considering all the circumstances in this case, Harmon worked in conjunction with Lewis and Mihail in soliciting, encouraging, directing, aiding, or attempting to aid Lewis even if he did not hit Moyer in the head or hold Moyer down while Lewis hit him. *See* Tex. Penal Code Ann. §§ 7.01, 7.02 (West 2011). The evidence was sufficient for the trial court to instruct the jury that, under the law of the parties, it could find Harmon committed murder by finding Lewis hit Moyer in the head or by strangulation.

Concerning Harmon's complaint that by allowing the jury to consider the means of hitting Moyer in the head and strangulation, he was deprived of a unanimous verdict. The Texas Court of Criminal Appeals has explained neither the manner nor the means need to be agreed upon unanimously by a jury. *Sanchez v. State*, 376 S.W.3d 767, 773 (Tex. Crim. App. 2012); *Ngo v. State*, 175 S.W.3d 738, 746 n.27 (Tex. Crim. App. 2005) (noting the jury must be unanimous on the gravamen of the offense of murder, which is causing the death of a person, but the jury need not be unanimous on the manner and means). "The jury need only

unanimously agree that appellant caused the death of the complainant.” *Sanchez*, 376 S.W.3d at 774 (citing *Ngo*, 175 S.W.3d at 746). We overrule issues five and six.

IV. Cumulative Error

In his fourth issue, Harmon contends the alleged charge errors constituted cumulative error, denying him a fair and impartial trial. The cumulative error doctrine recognizes that the combined effect of multiple errors can, in the aggregate, constitute reversible error, even though each individual error, analyzed separately, was harmless. *Gamboa v. State*, 296 S.W.3d 574, 585 (Tex. Crim. App. 2009); *see also United States v. Bell*, 367 F.3d 452, 471 (5th Cir. 2004) (quoting *Derden v. McNeel*, 978 F.2d 1453, 1457 (5th Cir. 1992) (en banc)) (“The cumulative error doctrine provides relief only when constitutional errors so ‘fatally infect the trial’ that they violated the trial’s ‘fundamental fairness.’”). But, in a concurring opinion in *Linney v. State*, Justice Cochran explained the doctrine further, by stating that

cumulative error is an independent ground for relief, separate from the underlying instances of error. A string of harmless error does not arithmetically create reversible, cumulative error. Instead, we look for “multiple errors [that] synergistically achieve ‘the critical mass necessary to cast a shadow upon the integrity of the verdict.’”

413 S.W.3d 766, 767 (Tex. Crim. App. 2013) (Cochran, J., concurring in refusal of pet.) (footnotes omitted).

Even considering the charge errors we deemed harmless, Harmon has failed to show that such alleged cumulative error prejudiced his defense to the point there is a probability the result would have been different but for the charge errors. There was overwhelming evidence of Harmon's participation in Moyer's murder, both directly and indirectly as a party. Despite the charge errors, if any, both the State and the trial court explained how the theories applied in this case to a degree we conclude that the jury would not reasonably have been confused. While the charge may have contained errors, Harmon has not shown that they "synergistically achieve the critical mass necessary to cast a shadow upon the integrity of the verdict." *Id.* (internal quotation marks omitted). Accordingly, we overrule Harmon's fourth issue complaining of cumulative charge error.

V. Ineffective Assistance of Counsel

Harmon contends in his seventh and eighth issues he received ineffective assistance of counsel because his defense counsel failed to object to the charge as submitted and request instructions based on the accomplice-witness testimony and the inclusion of the law of parties doctrine in the application paragraph, as well as failed to request the removal of the additional means in which Harmon could be convicted of murdering Moyer.

To prevail on a claim of ineffective assistance of counsel, an appellant must satisfy a two-pronged test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also Hernandez v. State*, 726 S.W.2d 53, 56–57 (Tex. Crim. App. 1986). An appellant must demonstrate a reasonable probability that but for his counsel's errors, the outcome would have been different. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). An allegation of ineffectiveness will be sustained only if it is firmly founded in the record and the record affirmatively demonstrates the alleged ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). "Appellate review of defense counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable and professional assistance." *Bone*, 77 S.W.3d at 833.

While defense counsel did not object to the charge, defense counsel did move for an instructed verdict concerning Harmon being responsible for the means of murdering Moyer by hitting him on the head based on the law of the parties. The trial court determined the evidence was sufficient and denied his motion. Defense

counsel was not shown to have been ineffective; and thus, Harmon has not shown his counsel committed error. *See Strickland*, 466 U.S. at 687.

Even if we were to assume error on the part of Harmon's defense counsel's failure to object and request instructions, we have conducted an extensive analysis and shown how each alleged error was harmless. The evidence indicating Harmon's guilt was extensive. Additionally, as we have previously explained, the law of parties and its application to this case was explained many times avoiding any potential of jury confusion. Based on this record, even if we presume defense counsel erred, Harmon failed to demonstrate a reasonable probability that, but for counsel's alleged errors, the outcome of his trial would have been different. *See Bone*, 77 S.W.3d at 833. Accordingly, we overrule issues seven and eight.

VI. Sufficiency of the Evidence

Finally, Harmon asserts in his eleventh issue that the evidence is legally insufficient to support his conviction. Specifically, he continues to complain about the possibility that his conviction is based on Lewis's actions under the law of parties doctrine.

We review the sufficiency of the evidence in the light most favorable to the verdict and then determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Acosta v. State*, 429

S.W.3d 621, 624–25 (Tex. Crim. App. 2014); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The jury is the sole judge of witness credibility and the weight to be attached to witness testimony. *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981). When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict, and we defer to that determination. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014). Moreover, direct and circumstantial evidence are equally probative. *Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016). Not every fact presented must directly indicate that the defendant is guilty, so long as the cumulative force of the evidence is sufficient to support a finding of guilt. *Nowlin v. State*, 473 S.W.3d 312, 317 (Tex. Crim. App. 2015).

A person commits the offense of murder if he intentionally or knowingly causes the death of an individual. Tex. Penal Code Ann. § 19.02(b)(1) (West 2011). In addition to a person’s direct actions, a jury can also convict someone for the acts of another under the law of parties. *See id.* § 7.01(a). “A person is criminally responsible for an offense committed by the conduct of another if . . . acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense[.]” *Id.* § 7.02(a)(2). “Each party to an offense may be charged with commission of the

offense.” *Id.* § 7.01(b). “[C]ircumstantial evidence may be used to prove party status.” *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994). Nevertheless, there must be sufficient evidence showing an understanding and common design to commit the offense. *Gross v. State*, 380 S.W.3d 181, 186 (Tex. Crim. App. 2012); *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004). As long as the cumulative effect of the facts is sufficient to support the defendant’s conviction under the law of parties, each fact need not have to point directly to the defendant’s guilt. *Guevara*, 152 S.W.3d at 49. To determine whether a defendant participated in an offense, a jury may consider “events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act.” *Ransom*, 920 S.W.2d at 302.

Initially, we note that according to Dr. Ralston, Moyer’s cause of death resulted from strangulation from the vet tape found around Moyer’s neck during the autopsy. The jury heard evidence Harmon worked in a facility where he would have access to such tape. Lewis testified Harmon had medical tape while waiting on the signal from Mihail. While Harmon did not admit to placing any tape around Moyer’s neck, he did admit to tying up Moyer’s hand and foot, among his many other actions. Additionally, Lewis claimed that Harmon tried to tape Moyer’s mouth shut, but the

taped slipped around Moyer's neck. While Harmon argues that Lewis's statement implies the tape around Moyer's neck was loose, Dr. Ralston's autopsy report explains otherwise. Therefore, we conclude the evidence is legally sufficient to support the jury's verdict that Harmon murdered Moyer directly by strangulation. *See Jackson*, 443 U.S. at 319.

Moreover, while Lewis admitted to hitting Moyer in the head with the BB gun, Harmon's conviction for murdering Moyer as a responsible party, is supported by sufficient evidence as well. Harmon admitted being a party to the plan with Lewis and Mihail to rob Moyer at Harmon's house. Harmon, along with Lewis, was to come in at Mihail's signal and rob Moyer. While Harmon did not strike Moyer in the head, Harmon admitted to assisting Lewis by restraining Moyer after Lewis hit him, moving Moyer into his car, and then accompanying Lewis, who was driving the car with Moyer's body in the back seat, to a remote location to leave Moyer without medical attention. Harmon then assisted Lewis and Mihail by driving them away from the scene. Harmon further admittedly participated in destroying evidence by, among other acts, attempting to burn clothing he wore when Moyer was murdered. Based on the events that occurred before, during, and after the offense, the jury could reasonably conclude Harmon was criminally responsible as a party to the offense. *See Tex. Penal Code Ann.* §§ 7.01(a), 7.02(a)(2); *Gross*, 380 S.W.3d at

186; *Ransom*, 920 S.W.2d at 302. Viewing the evidence in the light most favorable to the verdict, we conclude a rational jury could have found, beyond a reasonable doubt, Harmon aided Lewis during and after the commission of Moyer's murder. We determine the jury could conclude, beyond a reasonable doubt, that Harmon committed the offense of murder under the law of parties doctrine. *See* Tex. Penal Code Ann. §§ 7.01(b), 19.02(b)(1); *Jackson*, 443 U.S. at 319. We overrule Harmon's eleventh issue.

Having overruled all of Harmon's issues, we affirm the trial court's judgment.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on November 2, 2017
Opinion Delivered September 26, 2018
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.