COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00398-CR

MICHAEL LORENCE — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 362ND DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. F-2014-2002-D

MEMORANDUM OPINION ON REHEARING[1]

Appellee the State of Texas filed a motion for rehearing of our July 6, 2017 memorandum opinion and judgment. We deny the motion but withdraw our prior opinion and substitute the following in its place. Our memorandum opinion, with the exception of a spelling correction, a typographical correction, and the addition of a clarifying paragraph, otherwise remains unchanged.

[1]*See* Tex. R. App. P. 47.4.

In nine points, Appellant Michael Lorence appeals his conviction for aggravated assault. *See* Tex. Penal Code Ann. § 22.02 (West 2011). We reverse.

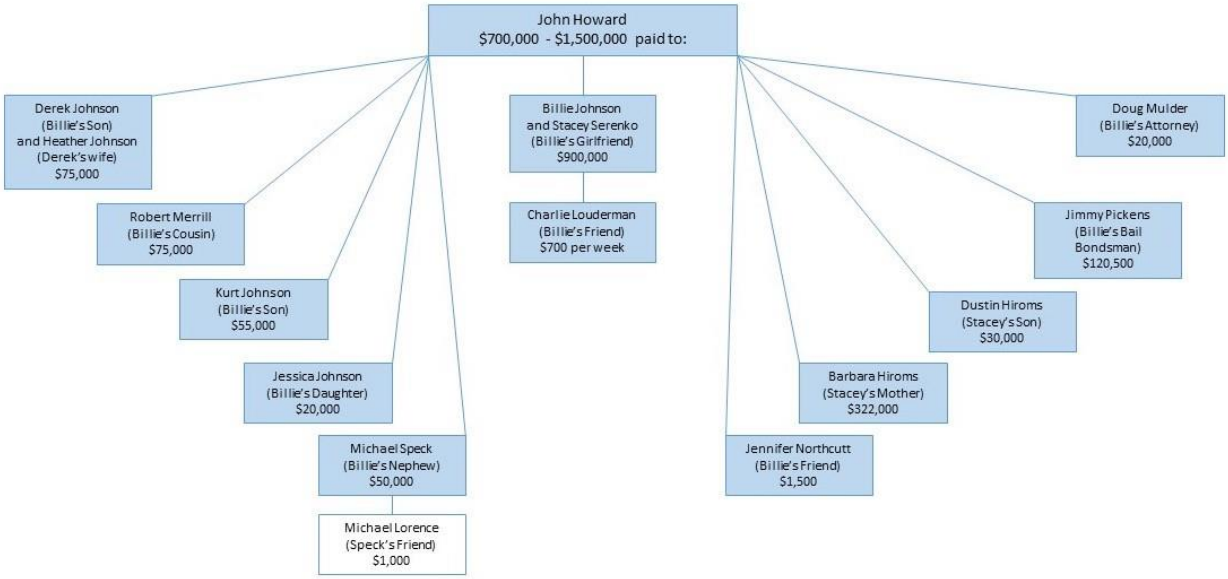
Background

On August 18, 2012, Nancy Howard was shot in the head as she exited her vehicle in the garage of her Carrollton home upon returning from church. Although she lost an eye, suffered damage to her mouth, throat, and brain, suffered a collapsed lung because the bullet lodged itself in her lung, and lost the use of her right arm and fingers, after 18 days in the hospital, multiple surgeries, and rehabilitation therapy, Nancy survived. In March 2013, Appellant was indicted for criminal conspiracy and aggravated robbery as the alleged shooter of Nancy. In October 2014, Appellant was indicted for aggravated assault, and the State proceeded to trial in August 2015 only on the charge for aggravated assault.

During the six-day guilt-innocence phase of the trial, 34 witnesses testified on behalf of the State and 115 exhibits offered by the State were admitted, including approximately 11,000 pages, as well as three bankers boxes and one brown paper bag full of additional paper records. The State's case focused primarily on a murder-for-hire scheme led by Nancy's husband, John, that began three years earlier, in 2009.[2] In fact, the majority of the State's witnesses and

[2]In 2016, this court affirmed John's conviction for attempted capital murder. *See Howard v. State*, No. 02-14-00395-CR, 2016 WL 1469993, at *1 (Tex.

exhibits focused on John's connections to Billie Johnson—the man who was originally hired as the hitman—and Billie's friends and family who were also involved to various degrees in the murder-for-hire scheme. Much of the evidence focused on the estimated $700,000 to $1,500,000 in payments that John made over the three-year span to a group of conspirators comprised of Billie, Billie's friends, and Billie's family, even though, by all accounts, Appellant did not become involved in the plot until approximately a month prior to the shooting, and he received no more than $1,000 for the role he played. The monetary disbursements are illustrated below:



Approximately a month prior to the assault, Billie's nephew, Michael Speck, contacted Appellant, an old friend who was living in California at the time. According to Speck, the two reconnected through Facebook, and thereafter they

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App.—Fort Worth Apr. 14, 2016, pet. ref'd) (mem. op., not designated for publication).

discussed the murder for hire "to an extent."[3] At some point, Speck invited Appellant to visit him in Texas.

I. Appellant's reconnection with Speck and trip to Texas

On August 14, 2012, four days before the shooting, Speck wired $1,000 to Appellant's girlfriend, Misti Ford, to cover expenses for their upcoming drive to Texas. Within days of receiving the funds, Appellant and Ford left California, but before they left, they picked up Speck's brother, Virgil Rodriguez, whom Speck had invited to accompany Appellant and Ford just a few hours prior to their departure. Appellant used the $1,000 sent by Speck to pay for food and lodging on the trip, including food and lodging for Rodriguez.

When the three arrived in Grand Saline, they all stayed at Speck's home, and, according to Speck, he and Appellant again discussed the plan to kill Nancy. Speck testified that he revealed to Appellant John's desire to have his wife Nancy killed and that John had provided Speck with information as to Nancy's whereabouts over the next few days. And, according to Speck, he and Appellant then discussed how they would get the job done, and the two also agreed to split the $20,000 Speck had been promised by John to murder Nancy. They initially planned that Speck would be the shooter, that Appellant would be the driver, and that they would carry out the deed at Nancy's church. However, according to Speck, the plan changed when, out of consideration for Speck's

[3]Speck had become involved in the murder-for-hire scheme just a few months earlier after he met with John and they discussed killing Nancy.

son, who was only a few months old at the time, Appellant volunteered to act as the triggerman.

A. The shooting

Appellant, Ford, and Speck rented a 2006 Nissan Altima in Ford's name on August 16, and the next day Speck and Appellant drove the rental car to Carrollton to scope out the area in general and Nancy's house in particular. When Rodriguez asked to tag along, Speck and Appellant told him they were leaving "to handle some business, and [he] wasn't allowed to go with them." During their journey that day, Speck and Appellant stopped at a La Quinta hotel in Addison but did not stay the night, instead choosing to return to Speck's house in Grand Saline.

Appellant and Speck left Grand Saline again the next day in the Altima—this time with a gun purchased earlier by Dustin Hiroms[4] stashed in the glove box. After arriving in Carrollton, they first stopped to purchase clothing for the shooting: Speck bought a gray hooded sweatshirt and Appellant bought a black hat, shiny red Nike shoes, and a dark-colored hooded sweatshirt to add to the black knit gloves and dark-rimmed glasses he had brought with him. Afterwards, Speck and Appellant happened to see Nancy driving, so they began following her.

[4]Hiroms took over the lead as the second hitman in July 2012 when Billie, the first hitman, was arrested. However, in mid-July 2012, Hiroms, too, was arrested and unable to fulfill his obligation in the scheme. Speck then took over the job of hitman.

When Nancy arrived at her church and parked her vehicle, they parked the Altima in the same parking lot, but a few moments later they decided to go to a nearby Chili's to have drinks. After they left Chili's, they returned to the church, parked the Altima in the church parking lot again, and waited for Nancy to come out of the church. When she did, they began to follow her as she made her way home. At some point along the way, Speck sped up and passed Nancy's car in order to beat her to her house. When they arrived at Nancy's house, Speck dropped off Appellant, armed with the gun, in the alley behind the house leading to her garage. Speck then parked the Altima on the street near the entrance to the alley and waited.

Speck testified that when he heard a gunshot a minute or two later, he pulled up to the alley entrance and saw Appellant running down the alley carrying Nancy's purse. Appellant got into the car and the two "took off," leaving the neighborhood. When they stopped at a nearby business to throw the purse into a dumpster, Speck noticed that Appellant was missing his hat. So they returned to the house and retrieved the hat, which they found in the middle of the alley. The two then stopped to buy some liquor before returning to Grand Saline. Along the way back, Speck texted John, "It's done." Then they tossed the gun into Lake Tawakoni and discarded Appellant's clothes on the side of the road near the lake.

B. Appellant's confessions

Ford testified that Appellant and Speck returned to Speck's house at around 11:00 p.m. According to Ford, Appellant's behavior was unusual. Although he usually liked to talk a lot, he was very quiet; he was also drinking alcohol, something Ford said Appellant did not do "often at all." Because of his strange behavior, Ford asked him what was wrong, and Appellant told her that he had followed a woman home from a church event and into her garage, shot her between the eyes when she got out of her car, and "watched her brains splatter across the wall behind her."

Ford claimed that when she heard this, she was too scared of Appellant to call the police. The evening of the shooting Appellant and Ford stayed at a local hotel in Grand Saline, the next morning Appellant, Ford, and Speck returned the Altima to the rental agency, and that evening Appellant and Ford began their drive back to California. Ford testified that after they had returned to California, Appellant told her on a few occasions that he regretted shooting Nancy. Ford also said she observed him crying about it a couple of times.

At trial, Grady Vollintine testified that he and Appellant became friends while the two men were incarcerated in the Denton County Jail. Vollintine claimed that Appellant—or "No Good," as Vollintine knew him—confessed to Vollintine that he "shot that b***h." Appellant also told Vollintine that Speck had sent him $1,000 to come to Texas, and Appellant used that money not just for the trip to Texas but also to buy pills. Vollintine further testified that Appellant

regretted telling his "wife" about what he had done and that she had information that was unknown to the public that made her testimony more valuable to the State.

II. Other evidence presented at trial

Speck, Kayla Christman (Speck's then-fiancée), Ford, Rodriguez, and Vollintine were the only witnesses who provided direct evidence about Appellant's involvement in the murder-for-hire scheme. Additional evidence was admitted showing the movements of the Altima in the Carrollton area on August 17 and 18 as recorded by North Texas Tollway Authority (NTTA) cameras and a police license-plate reader. Ford's and Speck's phone records also provided evidence of the contacts between them prior to the trip to Texas, as well as contact between Speck and John on the night of the shooting.

In her testimony at trial, Nancy described the shooter as wearing a dark—possibly charcoal gray—hooded sweatshirt, dark, baggy wind pants, and a black baseball cap over dark hair, and dark-rimmed glasses with a "little bit wider plastic rim." She also described him as having dark eyes, a strong jaw line, and "very thin" stubble facial hair. She did not think the shooter was very tall.

Aside from these witnesses and five first-responder witnesses—9-1-1 dispatchers and the paramedics and officers who arrived at the scene or otherwise participated in the immediate aftermath of the shooting—the remainder of the trial focused on background and contextual information, specifically, the murder-for-hire scheme led by John.

The record here reveals extensive and detailed testimony and documents regarding the murder-for-hire scheme, its tortured history, the byzantine relationships between the coconspirators, John's enormous financial wealth, and the recurring and substantial monetary transactions spanning three years between John, Billie, and others involved in the scheme. The jury heard testimony from records custodians from four telephone companies and received more than 7,000 pages of phone records admitted to show contacts between John, Billie, and his associates. They were provided three bankers boxes and a large brown paper bag full of John's bank records to examine. Two laptops belonging to John were admitted into evidence to provide evidence of money transfers from John to Billie and the other cohorts. A bail bondsman testified that John bankrolled bail bonds for Billie and others involved in the scheme. The jury saw screenshots of phone conversations between Billie's son and John related to the murder-for-hire scheme. A forensic accountant testified about John's financial records and those of his former business partner, claiming that John may have had access to as much as $36,000,000. Finally, the jury received evidence relating to John's extramarital affair, including a photo of him and his mistress, testimony from the police that John had transferred $200,000 to her, and Nancy's testimony that John had admitted the affair to her after the shooting. Except for Nancy's testimony about John's admission, all of this voluminous evidence predated Appellant's involvement in the scheme.

III. The verdict

The jury convicted Appellant of aggravated assault. The conviction was enhanced by evidence of two prior felonies committed by Appellant, and he was sentenced to 60 years' confinement.

Discussion

Appellant brings nine points on appeal. In his first point, Appellant argues that the evidence is insufficient to support the conviction because the testimony of eight accomplice witnesses and one jailhouse informant was not sufficiently corroborated by the other evidence presented. We disagree and overrule his first point, as further discussed below.

In his second, third, fourth, and fifth points, Appellant argues that the trial court erred by allowing the admission of evidence dating back to 2009 and relating to John's plans and efforts to hire someone to kill his wife. We sustain his second point, holding that the probative value of such evidence was outweighed by the risk of unfair prejudice in violation of rule 403, reverse the trial court's judgment, and order the cause remanded for a new trial. Because we sustain Appellant's second point, we do not reach his third, fourth, or fifth points; nor do we reach the remaining four points he raises complaining of the trial court's rejection of a proposed jury instruction, challenging the admission of testimony regarding friction ridge analysis, complaining of the denial of his motion for new trial, or generally complaining of due process violations. *See* Tex. R. App. P. 47.1.

I. Sufficiency of the evidence

A. Standard of Review

In our due-process review of the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.* at 319, 99 S. Ct. at 2789; *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015).

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014). Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray*, 457 S.W.3d at 448. We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Id.* at 448–49.

To determine whether the State has met its burden under *Jackson* to prove a defendant's guilt beyond a reasonable doubt, we compare the elements of the crime as defined by the hypothetically correct jury charge to the evidence adduced at trial. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014); *see Crabtree v. State*, 389 S.W.3d 820, 824 (Tex. Crim. App. 2012) ("The essential elements of the crime are determined by state law."). Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Thomas*, 444 S.W.3d at 8. The law as authorized by the indictment means the statutory elements of the charged offense as modified by the factual details and legal theories contained in the charging instrument. *See id.*; *see also Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014) ("When the State pleads a specific element of a penal offense that has statutory alternatives for that element, the sufficiency of the evidence will be measured by the element that was actually pleaded, and not any alternative statutory elements.").

The standard of review is the same for direct and circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt. *Dobbs*, 434 S.W.3d at 170; *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014).

B. Corroboration of testimony

Appellant argues that the evidence is insufficient to establish that he was the individual who shot Nancy Howard. Appellant's argument hinges on whether the testimony of a jailhouse informant may be corroborated by the testimony of an accomplice witness and vice versa. Appellant argues that because both jailhouse informant testimony and accomplice testimony require corroboration to be admitted into evidence, neither can corroborate the other. We need not reach that question here because we find that the non-accomplice and non-informant evidence in this record was sufficient to corroborate the accomplice and jailhouse informant testimony.

Articles 38.075 and 38.14 of the code of criminal procedure set out the requirements for the corroboration of testimony by an accomplice witness or by a jailhouse informant. Tex. Code Crim. Proc. Ann. art. 38.075 (West Supp. 2016), art. 38.14 (West 2005). Each article provides that a conviction may not be had upon such testimony unless the testimony is "corroborated by other evidence tending to connect the defendant with the offense committed." *Id.* arts. 38.075(a), 38.14. Each article further provides that corroboration is not sufficient if it merely shows the commission of the offense. *Id.* arts. 39.075(b), 38.14.

The court of criminal appeals has recognized as a fundamental principle that the testimony of one accomplice cannot corroborate the testimony of another accomplice. *Chapman v. State*, 470 S.W.2d 656, 660 (Tex. Crim. App. 1971). However, it has not addressed whether the testimony of an accomplice witness

can corroborate the testimony of a jailhouse informant, or vice versa. Some of our sister courts have, each falling on different sides of the issue. *Compare Phillips v. State*, No. 10-12-00164-CR, 2015 WL 7443625, at *2 (Tex. App.—Waco Nov. 19, 2015, pet. ref'd) (mem. op., not designated for publication) (holding trial court did not err in refusing to include an instruction that the testimony of jailhouse witnesses could not corroborate that of accomplice because such a limitation was not supported by any authority), *with Patterson v. State*, 204 S.W.3d 852, 859 (Tex. App.—Corpus Christi 2006, pet. ref'd) (op. on reh'g) (holding that accomplice evidence may not be corroborated by jailhouse informant evidence), *and Brooks v. State*, No. 01-16-00070-CR, 2017 WL 1173889, at *10 n.7 (Tex. App.—Houston [1st Dist.] Mar. 30, 2017, pet. ref'd) (mem. op., not designated for publication) (relying on *Patterson*). But, as stated above, we need not decide that issue here.

When evaluating the sufficiency of corroboration evidence under the accomplice-witness rule, we "'eliminate the accomplice testimony from consideration and then examine the remaining portions of the record to see if there is any evidence that tends to connect the accused with the commission of the crime.'" *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008) (quoting *Solomon v. State*, 49 S.W.3d. 356, 361 (Tex. Crim. App. 2001)). To meet the requirements of the rule, the corroborating evidence need not prove the defendant's guilt beyond a reasonable doubt by itself. *Id.* Nor is it necessary for the corroborating evidence to directly link the accused to the commission of the

offense. *Cathey v. State*, 992 S.W.2d 460, 462 (Tex. Crim. App. 1999), *cert. denied*, 528 U.S. 1082 (2000). Rather, the direct or circumstantial evidence must show that rational jurors could have found that it sufficiently tended to connect the accused to the offense. *Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011); *Simmons v. State*, 282 S.W.3d 504, 508 (Tex. Crim. App. 2009). There is no precise rule as to the amount of evidence required to corroborate the testimony of an accomplice witness; each case must be judged on its own facts. *See Gill v. State*, 873 S.W.2d 45, 48 (Tex. Crim. App. 1994).

While the above standard for conducting a sufficiency review under the accomplice-witness rule is well-known, *see Malone*, 253 S.W.3d at 257, the court of criminal appeals has not established the standard of sufficiency review under the jailhouse-informant statute, *see Schnidt v. State*, 357 S.W.3d 845, 851 (Tex. App.—Eastland 2012, pet. ref'd). However, at least five of our sister courts have held that the standard of review required for corroboration of jailhouse-informant testimony is the same as that required for accomplice-witness testimony. *Hernandez v. State*, No. 03-10-00863-CR, 2013 WL 3723203, at *3 (Tex. App.—Austin July 11, 2013, no pet.) (mem. op., not designated for publication); *Schnidt*, 357 S.W.3d at 851; *Brooks v. State*, 357 S.W.3d 777, 781 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd); *Ruiz v. State*, 358 S.W.3d 676, 680 (Tex. App.—Corpus Christi 2011, no pet.); *Watkins v. State*, 333 S.W.3d 771, 778 (Tex. App.—Waco 2010, pet. ref'd). We see no reason to apply a different standard of review.

Applying the standards of review articulated above and assuming, without holding, that accomplice and jailhouse informant testimony cannot corroborate one another, in our review of the evidence we will first eliminate all evidence presented by the accomplices and the jailhouse informant to determine if there is sufficient evidence remaining to connect Appellant to the crime.

Eight accomplice witnesses testified at trial: Speck, Billie, Hiroms, Ford, Christman, Kurt Johnson (Billie's son), Stacey Serenko (Billie's girlfriend), and Charlie Louderman (Billie's friend). Apart from first responders, police officers, investigators, and records custodians, Nancy and Rodriguez were the only remaining non-accomplice, non-jailhouse informant witnesses at trial. Both provided corroborating evidence at trial.

On appeal, Appellant focuses on Rodriguez's testimony, arguing that his testimony was the only non-accomplice, non-jailhouse-informant evidence yielding anything relevant to the charges against him. However, in our review we cannot look solely to Rodriguez's testimony but must consider the "combined force of all of the non-accomplice evidence that tends to connect the accused to the offense." *Smith*, 332 S.W.3d at 442 & n.33 (citing *Mitchell v. State*, 650 S.W.2d 801, 807 (Tex. Crim. App. 1983) (noting that corroborative evidence may be circumstantial or direct), *cert. denied*, 464 U.S. 1073 (1984)). Thus, although we also rely primarily on Rodriguez's testimony, in considering the sufficiency of the evidence to support the verdict, we also consider the description Nancy

provided regarding her attacker, as well as the tollway and license-plate reader evidence introduced at trial.

There was ample evidence of opportunity. One day after Speck and Appellant told Rodriguez he could not accompany them when they left the house "to handle some business," a suspicious circumstance we will discuss below, they left the house again without Rodriguez. Although Rodriguez was not certain which car they left in, NTTA records presented at trial showed where the Altima traveled, and cell phone records also admitted into evidence supported the conclusion that Speck was traveling in the Altima. Specifically, the NTTA records provided evidence that the Altima traveled on the Dallas North Tollway (DNT) and President George Bush Turnpike (PGBT) in the Dallas-Carrollton border area at approximately 11:30 a.m. on the day of the shooting. Records of Speck's cell phone calls indicated that Speck was in the Carrollton area between 4:48 and 5:01 p.m. that day and that he was within range of a cell tower located at Rosemeade and Josey Lane at 5:11 p.m.

Video evidence showed that at 5:55 p.m., Nancy's car entered and parked in the First Baptist Church in Carrollton's parking lot. Nancy then got out of her car and went inside the church. A silver sedan followed Nancy's car into the lot and parked nearby. No one emerged from the silver car; instead, it left the church parking lot just a few minutes later. At 6:25 p.m., a Carrolton Police Department (CPD) license-plate reader recorded that the Altima was parked at a

Chili's restaurant located only three blocks away from the First Baptist Church in Carrollton.

At 6:55 p.m., the church surveillance cameras recorded the silver car as it returned to the church parking lot and parked in a space at the back of the lot. Within minutes, video cameras recorded Speck exiting the silver car, going inside the church to use the restroom, and then returning to the silver car. At approximately 7:26 p.m., surveillance cameras at the church recorded Nancy leaving the church, getting back into her car, and leaving the parking lot, with the silver car pulling out of the lot behind her. Thirty minutes later, the 9-1-1 call was made from Nancy's residence. Fifteen minutes after that, NTTA recorded the Altima traveling south on DNT, away from the Carrollton area. According to Rodriguez, Appellant and Speck returned to Grand Saline together later that evening. Considered together, a reasonable jury could conclude that Appellant and Speck left Grand Saline together in the Altima on the morning of August 18, that the Altima travelled to the Carrollton area where it followed Nancy to her church and then to her home, and that it left the Carrollton area almost immediately after the offense was committed, returning to Grand Saline with both Speck and Appellant inside.

We recognize that evidence of opportunity alone is not enough. *Smith*, 332 S.W.3d at 442 ("Motive and opportunity evidence is insufficient on its own to corroborate accomplice-witness testimony, but both may be considered in connection with other evidence that tends to connect the accused to the crime.");

Malone, 253 S.W.3d at 257 (noting that a defendant's mere presence at the scene of a crime is insufficient to corroborate accomplice testimony). But when this evidence is coupled with other suspicious circumstances, "'proof that the accused was at or near the scene of the crime at or about the time of its commission . . . may tend to connect the accused to the crime so as to furnish sufficient corroboration to support a conviction.'" *Smith*, 332 S.W.3d at 443 (quoting *Richardson v. State*, 879 S.W.2d 874, 880 (Tex. Crim. App. 1993), *cert. denied*, 513 U.S. 1085 (1993)).

Appellant argues that neither the NTTA records, the cell phone records, the parking lot video, nor the CPD license-plate reader establish that Appellant was in the Altima during the time it travelled around the Carrollton area. In other words, Appellant argues that the evidence does not establish that Appellant and Speck were together during the entire day; he posits that Speck could have dropped him off somewhere along the way and reconnected with him on his way back to Grand Saline and that Appellant may have been nowhere near Carrollton when Speck drove the Altima in the vicinity of the crime scene. In his brief, Appellant relies upon authority that corroboration is not present when time gaps exist or where the evidence establishes only the accused's presence in the company of an accomplice before, during, or after commission of the offense. *Compare Dowthitt v. State*, 931 S.W.2d 244, 249–50 (Tex. Crim. App. 1996) (holding corroboration was sufficient where appellant admitted he was present during commission of crime but denied guilt and other witnesses testified to blood

on appellant's clothing, appellant's admissions to the crime, and identification of murder weapon as belonging to appellant), *with Nolley v. State*, 5 S.W.3d 850, 854 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (op. on reh'g) (holding testimony that appellant was seen in a car with accomplice at least three-and-a-half hours before murder was committed was not sufficient to corroborate accomplice's testimony), *and Badillo v. State*, 963 S.W.2d 854, 858–60 (Tex. App.—San Antonio 1998, pet. ref'd) (holding that testimony placing defendant near location of offense some time before offense was not sufficient to corroborate accomplice's testimony). However, the circumstances here differ from the cases Appellant cites for this proposition.

First, Rodriguez did not observe Appellant in a stationary location; Rodriguez's testimony placed Appellant inside a motor vehicle—an object specifically designed for travel and whose movements were subsequently tracked to Carrollton.

Second, Appellant was not a resident, but a visitor to Grand Saline, a small town located more than 50 miles to the east of Carrollton. Thus, on that day there were no places—home, workplace, business, hangout, haunt, or watering holes—in the area that Appellant, a nonresident, might reasonably be expected to visit during the regular course of his daily life. Nor as a visitor would he have any appointments to keep, errands to run, or any other activity of daily home living that he would be expected to perform. Even if he did, under the circumstances observed by Rodriguez, Appellant would have no independent

means of accessing any of these places or activities, as Appellant did not leave in a separate vehicle. He left as a passenger in a vehicle operated by Speck.[5] Under these circumstances, it would be reasonable for a jury to infer that on the day in question Appellant and Speck took a journey together and that Appellant could be found inside that vehicle as it moved on the journey.

Suspicious circumstances also exist in the record that tend to corroborate the accomplice and jailhouse informant testimony. *See Smith*, 332 S.W.3d at 443. For example, the financing of Appellant's last-minute trip to Texas is suspicious. Appellant does not dispute that Speck—an old friend with whom Appellant had just recently reconnected—paid his travel expenses to drive to Texas. According to Appellant, the reason Speck paid these expenses was because Appellant was also bringing Speck's brother, Rodriguez, to visit. However, the plausibility of this explanation is betrayed by the fact that Rodriguez himself only learned about the trip in a last-minute phone call invitation from Speck. By that point, Speck had already wired the $1,000 to Appellant—not Rodriguez—and only a couple of hours passed after the phone call before Appellant and Ford arrived to pick up Rodriguez and begin the journey. While the evidence supports Appellant's contention that the money Speck wired to him paid for Speck's brother's food and hotel rooms during the journey, the timing of

[5]Even though Rodriguez was not asked whether Appellant or Speck was driving the vehicle, a necessary component of Appellant's theory that he might have been dropped off somewhere prior to the vehicle reaching Carrollton is the presumption that Speck, not Appellant, must have driven the vehicle.

events suggests that Rodriguez's participation in the trip was an afterthought rather than the primary purpose of the $1,000 advance for travel expenses.

The acquisition of a rental car once Appellant, Ford, and Rodriguez arrived in Grand Saline provides another suspicious circumstance. After driving their own vehicle more than a thousand miles from California to Texas, and despite the fact that Speck owned a pickup as well, upon arrival in Grand Saline, Ford rented yet another car, a Nissan Altima. Coincidentally or not, the vehicle Ford rented was the same Altima that was identified as present in the Carrollton area at the time of the shooting. While there may be legitimate reasons explaining the necessity of renting another vehicle, this fact, when combined with the Altima's presence near the crime scene at the time of the offense, raises at least a suspicious circumstance.

Additionally, the day before the shooting, as Appellant and Speck were leaving Speck's house in Grand Saline, they[6] refused to allow Rodriguez to accompany them "because they . . . had to handle some business." That such a business endeavor was of a type as to preclude the presence of an outsider gives rise to some suspicion as well.

The events leading up to and including Ford and Appellant's abrupt departure from Texas the day after the shooting provide two more suspicious circumstances. First, on the evening after the shooting Ford and Appellant's

[6]Rodriguez did not specify at trial which of the two told him that he could not accompany them on their business-related outing.

lodging arrangements suddenly changed. Instead of spending that night at Speck's house, as they had during the previous evenings, they separated from Speck and acquired lodging at a nearby hotel. Second, Rodriguez testified that the original plan was that he would stay in Texas for "about a week" and then ride back to California with Appellant and Ford. But instead of taking Rodriguez back to California with them as planned, on the morning after the shooting, Appellant and Ford suddenly decided to leave Grand Saline without Rodriguez or explanation.[7]

Additionally, we have the benefit of Nancy's description of the shooter. She testified that the shooter wore a black cap, dark hooded sweatshirt, and glasses. Her testimony corroborates Speck's testimony of what Appellant was wearing when he dropped him off at Nancy's house minutes before the shooting.

The sufficiency of non-accomplice evidence is judged according to the particular facts and circumstances of each case. *Smith*, 332 S.W.3d at 442. Circumstances that may appear insignificant may nevertheless constitute sufficient evidence of corroboration. *Trevino v. State*, 991 S.W.2d 849, 852 (Tex. Crim. App. 1999). Considering this evidence's cumulative effect and deferring to the jury's view of the facts, we believe that rational jurors could have found that the corroborating evidence sufficiently tended to connect Appellant to the offense. We therefore hold that the testimonies of the accomplices and jailhouse

[7]Speck arranged to pay for Rodriguez to return to California by bus some days later.

informant were sufficiently corroborated. *See Smith*, 332 S.W.3d at 442. With such testimony sufficiently corroborated, the evidence as a whole was sufficient to support the conviction. We therefore overrule Appellant's first point.

II. Evidence related to John

In his second, third, fourth, and fifth points, Appellant argues that it was error for the trial court to admit evidence that was related to the overall murder-for-hire scheme devised by John to kill Nancy. Appellant specifically argues in his second point that the admission of such evidence violated rule 403 because any probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, considerations of undue delay, or needless presentation of cumulative evidence. *See* Tex. R. Evid. 403.

A. Standard of Review

We review a trial court's rulings on evidentiary objections for an abuse of discretion. *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). A trial court does not abuse its discretion unless its ruling is arbitrary and unreasonable; the mere fact that a trial court may decide a matter within its discretionary authority in a different manner than an appellate court would in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Foster v. State*, 180 S.W.3d 248, 250 (Tex. App.—Fort Worth 2005, pet. ref'd) (mem. op.).

B. The contested evidence

During the six-day trial, the State called 34 witnesses and introduced approximately 11,000 pages of documents, three bankers boxes, and one brown paper bag full of additional paper records, comprising 115 exhibits related to John's murder-for-hire scheme and the many cohorts who participated in the plot in various ways. Of those witnesses and exhibits, only approximately 17 witnesses and 40 exhibits arguably related directly to Appellant or to the actual shooting on the day in question.

While Appellant agreed that a limited amount of this evidence was relevant as background evidence, from the outset Appellant objected to the introduction of too much evidence related to John but unrelated to Appellant. Appellant's attorneys voiced their concern that to inundate the record with voluminous background evidence would cause the trial to devolve into "part two of the John Howard trial," marked by "witness after witness who doesn't know [Appellant], never talked to him, never gave him money, never called him, doesn't know a thing about him."

On appeal, the State admits that, over defense's objections, a substantial amount of time during trial was spent on developing background on the murder-for-hire plan, most of which predated Appellant's involvement in that plan. Specifically, the State spent much of its time establishing John's financial wealth, his payments to Billie and Billie's family and friends, and various contacts—via phone and otherwise—made between John and his many accomplices.

1. Evidence of contacts between John, Billie, and Billie's family and friends

Of the over 11,000 pieces of paper offered by the State and admitted into evidence, over 7,200 consisted of phone records belonging to John, Billie, Stacey, Hiroms, and Derrick Johnson. These records were admitted through the testimony of four custodians of records from four different phone companies. None of these phone records belonged to Appellant or were otherwise associated with Appellant.

Hiroms's cell phone records and screenshots of text messages between himself and John were also admitted into evidence, and two CPD investigators testified as to their content. None of these text messages referred to or were otherwise connected to Appellant.

Hotel records were admitted over objection, purportedly offered to prove contact between John and Billie's various associates and to corroborate information that John allegedly communicated to Billie. A custodian of records for La Quinta testified to a record of a one-night stay by Christman at a North Texas La Quinta in June 2012—two months prior to the shooting and at least a month before Speck and Appellant reestablished their friendship. A custodian of records for an Econo Lodge Inn and Suites in Lewisville offered testimony about an even earlier hotel stay in May 2012 by Hiroms and another man. No evidence at trial connected Appellant to this hotel visit, or even to Hiroms. Lastly, a custodian of records testified to a stay by Nancy at the Gaylord Texan hotel on

August 8–11, 2012, purportedly to corroborate testimony that John informed Hiroms of Nancy's movements in furtherance of the murder scheme. This stay was in no way connected with Appellant.

Recordings of two jail phone calls between John and Billie were also admitted, despite the fact that Appellant was not mentioned or otherwise connected in any way to either of these phone calls.

2. Financial records and evidence of money transfers

William Brown, a forensic accountant, generally testified about the nine bank accounts under John's control. As part of his testimony, Brown explained the business and bookkeeping practices of Richard Raley, John's former business partner and through whom John had access to approximately $36,000,000 to fund his murder scheme. Brown testified that John funneled approximately $6,000,000 from these accounts into his own accounts and, beginning in 2010, John started making frequent and generous disbursements to the various people involved in his murder-for-hire scheme. Appellant, however, was not one of them.

John's enormous wealth was displayed at trial through three bankers boxes and a large brown paper bag filled of John's bank records, all of which were admitted into evidence. Nowhere in those thousands of pages of records was Appellant's name mentioned, nor did the State even claim that these records provided any evidence of payments by John to Appellant. Rather, the State

offered the above evidence to show transfers of money from John to Billie, Billie's family, and Billie's friends.

The jury also heard testimony from a former Secret Service agent who retrieved records from two of John's laptops evidencing 22 separate bank wire transfers from John to Billie and Billie's associates. Both the agent's testimony and the two laptops themselves were admitted into evidence, even though none of these wire transfers were connected to Appellant in any way. Additionally, Billie, along with Speck, Jimmy Pickens (a bail bondsman who had worked with the Johnson family), Stacey, Kurt Johnson, Louderman, Hiroms, and Christman provided direct testimony about these various transfers of money from John. Yet, none of these witnesses connected any of the wire transfers to Appellant.

Pickens testified that John financed many of the Johnson family's various bail bond needs. Although he had never met and did not "have any idea" who Appellant was, several records of these bond payments, which included information about the underlying criminal charges, were also admitted. No other witness connected Appellant to any of these bond payments or criminal activity.

3. Photographs

Approximately 15 photographs of John, Billie, and Billie's family and friends were admitted in evidence. One photograph depicted John with an alleged mistress. Appellant was not connected to or depicted in any of these photographs.

C. Analysis

Appellant argues that this voluminous evidence was irrelevant, or, in the alternative, that any relevance of this evidence was outweighed by its potential to unfairly prejudice him. At trial and on appeal, the State argued that the photographs were relevant to prove identity and that the other evidence was relevant to provide necessary background and context and to provide answers to the jury as to questions that would otherwise go "unanswered." We are generally bound to uphold the trial court's ruling admitting these exhibits "so long as it is correct under any theory of law that is applicable to the case, regardless of whether the appellee raised or the trial court actually ruled on that particular basis." *State v. Esparza*, 413 S.W.3d 81, 89–90 (Tex. Crim. App. 2013).

1. Relevance

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Montgomery v. State*, 810 S.W.2d 372, 375 (Tex. Crim. App. 1990) (op. on original subm'n) (citing Tex. R. Evid. 401). Evidence need not prove or disprove a particular fact to be relevant; "it is sufficient if the evidence provides a small nudge toward proving or disproving some fact of consequence." *Id.* at 376.

Rule 404(b) provides that evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show the person acted in conformity with that character on a particular occasion, but does allow for such

evidence to be admitted for "another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Tex. R. Evid. 404(b). So-called "background contextual evidence" provides an exception to rule 404(b)'s general proscription because its relevance stems not from a consequential fact, but because "it illuminates a circumstance otherwise dimly perceived by the factfinder." *Mayes v. State*, 816 S.W.2d 79, 85 (Tex. Crim. App. 1991), *superseded on other grounds by* Tex. Code Crim. Proc. Ann. art. 38.37 (West Supp. 2016). *Mayes* noted that background evidence can be helpful to the jury's understanding and "fill[s] in the background of the narrative and give[s] it interest, color, and lifelikeness." *Id.* at 87.

Nevertheless, the court of criminal appeals has warned of the "marginal" relevance of background evidence:

> Typically, so-called "background" evidence is admissible, not because it has particularly compelling probative value with respect to the elements of the alleged offense, but simply because it provides the jury with perspective, so that the jury is equipped to evaluate, in proper context, *other* evidence that more directly relates to elemental facts. But it is not necessary to go into elaborate detail in setting the evidentiary scene, and there is a danger inherent in doing so. **Because the relevance of "background" evidence is marginal to begin with**, the introduction of too much incriminating detail may, whenever the evidence has some objectionable quality not related to its marginal relevance, prove far more prejudicial than probative.

Langham v. State, 305 S.W.3d 568, 580 (Tex. Crim. App. 2010) (emphasis added).

Here, the State sought to illuminate for the jury that Appellant was a part of a murder-for-hire scheme. Otherwise, Appellant's alleged participation in the crime would have appeared random, occurring in a vacuum and making little sense. In such circumstances, the jury "has a right to hear what occurred immediately prior to and subsequent to the commission of [the] act so that they may realistically evaluate the evidence." *Albrecht v. State*, 486 S.W.2d 97, 100 (Tex. Crim. App. 1972). Thus, evidence of the murder-for-hire scheme was relevant, albeit marginally so. *See id.*

Because the jury was entitled to understand Appellant's alleged involvement from a contextual viewpoint, the question is whether its relevance is substantially outweighed by the danger of unfair prejudice or the needless presentation of cumulative evidence as argued by Appellant. We thus proceed to an analysis under rule 403.

D. Rule 403 analysis

Rule 403 provides that the trial court may exclude relevant evidence if its probative value is "substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Tex. R. Evid. 403. Factors to consider in conducting a rule 403 analysis include the evidence's potential to impress the jury in some irrational but nevertheless indelible way, the time used to develop the evidence, and the proponent's need for the evidence. *See Wheeler v. State*, 67 S.W.3d 879, 888 (Tex. Crim. App. 2002).

We begin with an evaluation of the evidence's probative value, an inquiry measured by more than simply the relevance of the evidence. *Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006). An item's probative value refers to "how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation," and it is analyzed in light of the proponent's need for that item of evidence. *Id.* Thus, when faced with a rule 403 objection, the trial court should examine whether the proponent of the evidence has the ability to prove the particular proposition or fact with other evidence. *Id.* If so, then the probative value of the objectionable evidence "will weigh far less than it otherwise might in the probative-versus-prejudicial balance." *Id.*

We disagree with the State's assignment of a high probative value to the contested evidence. Here, the existence of the murder-for-hire scheme was not even disputed at trial. Its existence and Appellant's connection to one of its primary participants could have been summarily proven short of flooding the record with multiple witnesses and voluminous records revealing an entire cast of bad characters with criminal records, illegal drug connections, possession of firearms, and involvement in family violence incidents, and who all shared as beneficiaries in the wealth of an unfaithful husband with access to vast resources and willingness to use an obscene amount of money to mastermind and fund the unthinkable.[8]

[8]We note that, although it initially charged Appellant with criminal conspiracy, the State did not proceed to trial on that indictment, instead choosing

The lion's share of the evidence complained of here had no obvious connection to Appellant. For instance, the low probative value of John's financial status for three years prior to Speck's making contact with Appellant is widely disproportionate to the amount of proof offered—the presentation of over 1,500 pages, three bankers boxes, a large paper bag, and an expert witness who went on to testify about John's prior financial dealings and those of John's former business partner. While the State argues that it was imperative for the jury to understand the extent of John's resources, this argument is undermined by the evidence that Appellant only expected to receive, at most, $10,000 for his part in the murder-for-hire scheme.

In this case, the sheer volume of the contested evidence, especially when weighed against its low probative value, weighs against its admissibility. *See Mosley v. State*, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998) (op. on reh'g) (noting that evidence "may become unfairly prejudicial through sheer volume"), *cert. denied*, 526 U.S. 1070 (1999). In *Pawlak v. State*, 420 S.W.3d 807, 811 (Tex. Crim. App. 2013), the court of criminal appeals held that the admission of 9,900 pornographic images, including homosexual child pornography, was error

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to prosecute Appellant for aggravated assault. Despite this change of course, the State did not adjust its trial strategy and insisted on presenting evidence that was more pertinent to the original charge of criminal conspiracy than it was to aggravated assault. *Compare* Tex. Penal Code Ann. § 15.02 (West 2011) (providing the elements of criminal conspiracy, including an individual's agreement with one or more persons to commit an offense), *with id.* § 22.02(a)(1) (providing elements of aggravated assault).

in a prosecution for sexual assault crimes in part because of its sheer volume. The court agreed that the possession of the male pornographic photos might rebut the defendant's claims that he was not interested in men but noted that "there was no allegation that Appellant took the pictures [found in his possession] or that he in any way participated in coercing children to be involved in producing child pornography, much less that he assaulted them." *Id.* at 810. Thus, the court determined that the images were, at most, "marginally probative." *Id.* at 811; *see also Cox v. State*, 495 S.W.3d 898, 906–07 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (discussing and applying *Pawlak*). Similarly, most of the voluminous evidence here is marginally relevant at best.

The State admits in its brief that it spent "a large amount of time developing the complained-of evidence" and even admits that "none of the complained-of testimony directly implicated Appellant." Notwithstanding the highly prejudicial nature of much of the evidence, the potential for juror confusion when faced with voluminous records that fail to implicate Appellant alone mitigates against admitting the evidence.

Furthermore, we find it hard to reconcile this extensive amount of evidence and time spent developing this evidence with the State's purported "need" for it as background evidence. As we have noted above, the contested evidence consisted of thousands of pieces of paper, in addition to three bankers boxes and a large paper bag of more paper, two laptops, and two phone call recordings. Much of the trial testimony concentrated on the murder-for-hire scheme,

including that of seven records custodians, Pickens, Brown, CPD officers, Billie, Speck, Hiroms, Stacey, Kurt Johnson, Christman, and Louderman. While the State professes to the evidence's necessity, background evidence is only intended to provide the jury with perspective, and "the introduction of too much incriminating detail may, whenever the evidence has some objectionable quality not related to its marginal relevance, prove far more prejudicial than probative." *Langham*, 305 S.W.3d at 580. The sheer volume of the evidence in question—including abundant evidence of prior bad acts of persons who did not even know Appellant—betrays its purported purpose of admission as background evidence.

For example, from this evidence the jury learned that:

- **Billie** was hired by John as the original hitman, although Billie admitted that he did not plan to follow through with killing Nancy, but instead intended to milk John for money as long as he could. Billie admitted that he used a lot of the money he received from John to buy drugs, particularly methamphetamine. Billie, who had a lengthy criminal history that began in 1984, including various assault, firearm possession, drugs, theft and protective order violation charges, met John not long after he finished serving a five-year sentence in prison for aggravated assault with a deadly weapon as a result of striking his daughter in the face. Shortly after he met John, Billie went back to jail, although the record does not specify what he was arrested for. Billie was arrested again in June 2012 and remained incarcerated until the time of trial, at which point he was serving a 15-year sentence in federal prison after pleading guilty to conspiracy to possess and intent to distribute methamphetamine. He also faced separate state charges for aggravated assault with a deadly weapon and theft. Billie acknowledged that he had a reputation for "roughing people up," that he had been a "violent man," that he would slap his own mother in the face if she deserved it, and that he should have been indicted for solicitation of Nancy's murder. He also admitted that, even though it was illegal for him, as a felon, to own firearms, before he was arrested in 2012, he owned multiple guns, including 9 millimeter handguns, shotguns, an SKS rifle, and an AK-47. Billie testified that he did not know Appellant, had never talked to him, and had never met him.

- **Stacey Serenko** was Billie's fiancée prior to the shooting. Stacey admitted that she and Billie had drug habits, using methamphetamine and cocaine, and that they used a lot of the money that John gave them to kill Nancy to purchase drugs. According to Stacey, Billie would also blow through the money paid by John by purchasing cars, homes, hotel rooms, and giving money to his kids and to Stacey's mother, Barbara Hiroms. Stacey also admitted, as Billie did, that that the killing was never supposed to happen and that they were just milking John for his money. Stacey also testified that both she and Billie had been in and out of jail in various counties in Texas. At the time of trial, Stacey was serving a 60-month sentence in federal prison for possession of methamphetamine with the intent to distribute and simultaneously faced drug charges pending in state district court. Stacey testified that she did not know Appellant and had never spoken to him or even seen him until she appeared in court to testify in this trial.

- **Dustin Hiroms**, Stacey's son, became the second hitman when, after Billie's and Stacey's arrests in 2012, he told John he would kill Nancy. Although he solicited Michael Speck's help to accomplish the plan, as with Billie and Stacey, Hiroms testified at trial that he actually did not intend to kill Nancy, but just wanted to take John's money. Hiroms, who had a significant methamphetamine addiction, used most of the $30,000 he received from John to support his habit. Hiroms testified that in July 2012, he drove to Carrollton, got lost while looking for Nancy's house, and at about 1:00 in the morning, he was pulled over and arrested for possession of methamphetamine. During the traffic stop, Hiroms told the Carrollton police that he was "there to try to kill Nancy," a confession he blamed on being high. At the time of trial, Hiroms was in jail facing a pending charge of aggravated assault with a deadly weapon committed against his grandmother, Barbara Hiroms, which carried a possible sentence of 30 years. When he appeared in court to testify at Appellant's trial, Hiroms was wearing a jumpsuit that designated him as posing a risk of assaultive conduct or escape. Hiroms did not know Appellant, but he did purchase the gun that was used to shoot Nancy.

- **Jessica Johnson**, Billie's daughter, also had a drug habit, according to Louderman, who testified that Jessica stayed with him while she tried to quit using. There was no evidence that Jessica knew or had ever met Appellant.

- **Jennifer Northcutt** was Billie's friend. Her criminal history included one prior charge of possession of a controlled substance. There was no evidence that Jennifer knew or had ever met Appellant.

- **Charlie Louderman** and Billie became friends in 2011 when Billie contacted Louderman about acquiring firearms. Billie lived with Louderman at one point, and Louderman, Billie, and Stacey used drugs together. Billie paid Louderman $700 a week to let him store some of his property—including his trailers and boats—at Louderman's house and for Louderman to "protect" the property. At the time of trial, Louderman was serving a four-year sentence in state prison for violating the terms of a community supervision sentence by committing deadly conduct. Louderman did not know Appellant.

- **Jimmy Pickens**, a bail bondsman, posted bond for Billie on approximately 10 occasions for 20 different charges starting in April 2011. He admitted that Billie was a good source of business. Pickens received approximately $120,500 from John to bail Billie out of jail on various occasions. Pickens also bailed Stacey out five or six times, courtesy of John. Pickens did not know Appellant and had never posted bond for Appellant.

- **Michael Speck** became the third hitman when he reached out to John to offer his services after Hiroms was arrested in 2012. He testified that he had met Appellant in prison when he was 19 or 20. Speck had a significant criminal history, admitting at trial to at least three stays in California prison for burglary, a weapons offense, and auto theft. He also admitted at trial that, although prohibited from owning firearms because he was a felon, he owned several guns during the time of the shooting. He also had a history of drug abuse, and although he claimed at trial that he had been clean for five years prior to the shooting, both Hiroms and Christman testified that Speck frequently used methamphetamine in 2012 and that Speck was responsible for introducing Hiroms to the drug. Although none of the wire transfer evidence was linked to Speck, he did receive at least $26,000 from John. At the time of trial, Speck had been in the Denton County Jail since the shooting on charges related to the shooting, specifically criminal conspiracy to commit capital murder, aggravated assault, and aggravated robbery, for which he was facing up to a life sentence. He appeared in court to testify in jail attire and handcuffs.

- **Kayla Christman**, Speck's wife, had a significant methamphetamine habit. Christman admitted that she and Speck used methamphetamine "all the time," "every day all day pretty much," and that they used the money they got from John to buy it. At the time of trial, there was an active felony

> warrant out for her arrest in New Mexico. In our review of the record, there is nothing to indicate that Christman knew Appellant before Speck reached out to him on Facebook.

With the possible exception of Speck, none of the nine individuals listed above—or their relationship with or involvement in guns, drugs, violence, or crime in general—were related to Appellant in any meaningful way.

We recognize that some of the background evidence was potentially helpful to the jury in illuminating circumstances that might otherwise not be understood, and thus the trial court did not err in admitting some of it. But the volume and detail of the incriminating background evidence admitted here exceeded permissible bounds. *See id.* Accordingly, we hold that the trial court erred in admitting such voluminous and extensive background evidence regarding the murder-for-hire scheme and the host of characters who were involved in it.

D. Harm Analysis

Having found error, we must conduct a harm analysis to determine whether the error calls for reversal of the judgment. Tex. R. App. P. 44.2. If the error is constitutional, we apply rule 44.2(a) and reverse unless we determine beyond a reasonable doubt that the error did not contribute to appellant's conviction or punishment. Tex. R. App. P. 44.2(a). Otherwise, we apply rule 44.2(b) and disregard the error if it did not affect appellant's substantial rights. Tex. R. App. P. 44.2(b); *see Mosley*, 983 S.W.2d at 259.

Error in the admission of evidence in violation of rule 403 is generally not constitutional error, *see, e.g.*, *Reese v. State*, 33 S.W.3d 238, 243 (Tex. Crim. App. 2000), so rule 44.2(b) is applicable. Tex. R. App. P. 44.2(b) ("Any [non-constitutional] error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253 (1946)). As explained in *Kotteakos*,

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

328 U.S. at 765, 66 S. Ct. at 1248.

In making this determination, we review the record as a whole, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, and the character of the alleged error and how it might be considered in connection with other evidence in the case. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). We may also consider the jury instructions, the State's theory and any defensive theories,

whether the State emphasized the error, closing arguments, and even voir dire, if applicable. *Id.* at 355–56.

The State admits in this case that it placed considerable emphasis on John's murder-for-hire scheme, readily conceding in its brief that it "spent a large amount of time developing the complained-of evidence." So important was this aspect of the evidence to the State that the prosecutor highlighted the evidence in the State's opening statement, starting with the statement, "This crime lasted approximately three years" and informing the jury that they would be hearing "a lot about John Franklin Howard" and his so-called "double life."

The State then spent more than half of its opening statement discussing John's extramarital affair, his payments to Billie and Billie's family and friends, his relationship with Richard Raley, his former business partner, and the various meetings and phone calls among John, Billie, and—except for Appellant—virtually the entire cast of characters who participated in the plan.

After opening statements, the State proceeded to offer the voluminous background evidence we have previously discussed. This evidence focused upon John and his murder-for-hire scheme, and, as the State admits, did not directly implicate Appellant.

This concentration on John, his wealth, and his association with numerous criminals involved in the murder-for-hire scheme invited the jury to convict Appellant based on the unsavory behavior and character of those individuals. This guilt-by-association approach is dimly viewed by our justice system. *See*

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 178–79, 71 S. Ct. 624, 652 (1951) (Douglas, J., concurring) ("[G]uilt by association [is] one of the most odious institutions in history . . . . Guilt under our system of government is personal."); *see also Booker v. State*, 103 S.W.3d 521, 539 (Tex. App.—Fort Worth 2003, pet. ref'd) ("Basic, black-letter law prohibits the State from trying a defendant for a collateral offense or for being a criminal generally."); *Macias v. State*, 959 S.W.2d 332, 340 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd) (holding admission of irrelevant gang affiliation evidence was harmful because it implied that defendant was a criminal because he was part of a gang).

For example, in *Russell v. State*, 113 S.W.3d 530, 550–51 (Tex. App.—Fort Worth 2003, pet. ref'd), we held that the admission of evidence of an extraneous offense of sexual assault constituted harmful error where it led to the natural inclination by the jury to infer defendant's guilt "because 'that's the kind of man he is,' that is, the type of person who would force two women at gunpoint to perform sexual acts on each other for his entertainment." In *Russell*, the State spent nearly one-third of the trial proving up the extraneous offense, presenting twelve witnesses—four of which testified in depth regarding the "emotionally-charged and gruesome details of the offense"—and exhibits including nude photographs of the victim. *Id.* at 550. The State also discussed the extraneous offense in its opening and closing statements. *Id.* at 551. Taking those factors into account, we held that we could not say with fair assurance that the admission of the extraneous-offense evidence "did not have a substantial and

injurious effect or influence on the jury's verdict." *Id.; see Pawlak v. State*, No. 13-10-00535-CR, 2014 WL 1370032, at *3 (Tex. App.—Corpus Christi Apr. 3, 2014, pet. ref'd) (mem. op., not designated for publication) (holding on remand that erroneous admission of 9,900 pornographic images was not harmless "[d]espite the overwhelming weight of evidence" presented against defendant in prosecution for child sex offenses); *Booker*, 103 S.W.3d at 538 (holding that admission of extraneous offense evidence was harmful error where State spent just over half of the trial proving up the "inherently inflammatory" extraneous offense of aggravated kidnapping and aggravated sexual assault and repeatedly emphasized the offense); *DeLeon v. State*, 77 S.W.3d 300, 316 (Tex. App.—Austin 2001, pet. ref'd) (holding admission of extraneous-offense evidence was harmful error where "[m]ore time was spent developing the extraneous wrongdoing than proving the ultimate issues alleged in the indictment").

Here, the State presented 34 witnesses and over 11,000 pages of evidence proving up a murder-for-hire scheme that was not even disputed at trial. At best, only half of those witnesses and barely 10% of the pages directly related to Appellant in any way.

Then, on final argument, the State connected the guilt-by-association dots quite clearly, arguing that Speck, a "hard-core criminal," deliberately surrounded himself with other criminals, criminals who live in a "different world" where they talk about crime and murder the way ordinary people discuss sports and the weather. And once the "money started to flow," Speck added yet another

criminal to the world of criminals that surrounded him, his "prison buddy," Appellant—

> So let's talk about Michael Speck, and let's talk about what he said. Because there is no doubt whatsoever that Michael Speck is cold, Michael Speck is calculating, and Michael Speck is a hard-core criminal. We can't hide that. We can't run from that, and we don't.
>
> Think about who Michael Speck surrounds himself with. I assure you it's not folks like us. It's folks who are exactly like him. And at the end of the day, it didn't matter to Michael Speck or anyone involved who actually completed this job, whether it was Michael and his brother Ryan, whether it was Michael and Billie, Michael and [Hiroms], or any combination of those individuals. It simply did not matter to him.
>
> But what he was going to do from the time he got involved, from the time the money started to flow to Michael Speck, he was going to surround himself with people like him. He was going to surround himself with individuals who were capable, ready, and willing to do this job.
>
> This is a different world, folks. It's not the same one that you and I live in. They talk about killing and crime and doing bad things like the rest of us talk about the Ranger game last night or how hot it is. It's a different world, and you have to understand that. They are all hard-core criminals, and there is no denying that whatsoever.
>
> And so he surrounds himself with individuals capable of doing the job. It doesn't matter if they're there from day one. It doesn't matter if they're there at the last minute to help him out. Michael Speck is going to surround himself by those who can do the job to kill Nancy Howard.
>
> . . . .
>
> And I'll leave you with this. This whole ordeal has been going on for over two years. And so was it the most unfortunate of circumstances for Michael Lorence that the three days he was in Texas that the job, that the killing of Nancy Howard, that the planning that was taking years and years, is it the most unfortunate circumstances for him that the three days he was in Texas the

> shooting actually happens? It's not. It's not. Because his old prison buddy was down for the job, and that is exactly what they did. Thank you.

Given the argument of counsel and the sheer volume of the highly prejudicial and erroneously-admitted evidence, we conclude that the trial court's error in admitting the contested evidence and testimony had an injurious effect on the jury's verdict such that Appellant's substantial rights were affected. *See Haley v. State*, 173 S.W.3d 510, 518–19 (Tex. Crim. App. 2005). We therefore sustain Appellant's second issue.

Conclusion

We overruled Appellant's first point; having sustained Appellant's second point, we need not consider his remaining points. *See* Tex. R. App. P. 47.1. We reverse the trial court's judgment and remand the case for a new trial.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: WALKER, MEIER, and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: September 21, 2017