TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00540-CR

Anthony Ruffins, Appellant

v.

The State of Texas, Appellee

FROM THE 207TH DISTRICT COURT OF COMAL COUNTY
NO. CR2016-614, THE HONORABLE DWIGHT E. PESCHEL, JUDGE PRESIDING

O P I N I O N

Anthony Ruffins was charged with the offense of aggravated robbery. *See* Tex. Penal Code §§ 29.02, .03. The indictment contained enhancement paragraphs alleging that Ruffins had four prior felony convictions. *See id.* § 12.42. At the end of the guilt-innocence phase, the jury found Ruffins guilty of the charged offense. Ruffins elected to have the trial court assess his punishment, and the trial court found the enhancement allegations to be true and sentenced him to life imprisonment. *See id.* In eleven issues on appeal, Ruffins asserts that the trial court erred by including multiple errors in the jury charge, failing to grant his motion for new trial, making a deadly weapon finding in its judgment, and imposing more court costs than were authorized. We will reverse the trial court's judgment of conviction and remand for further proceedings.

BACKGROUND

Ruffins was charged with committing aggravated robbery at a tattoo shop in New Braunfels, Texas. The indictment alleged that the following individuals also were involved: codefendant Olanda Taylor, codefendant Robert Ruffins,[1] and codefendant Kenneth McMichael. The alleged victim in this case was Sarah Zamora, who worked at the shop with her husband. At the time of the offense, a customer, Tony Hernandez, was in the shop. During the guilt-innocence phase, Zamora and Hernandez both testified. In addition, two law-enforcement officers—Officers Richard Groff and John Mahoney—testified regarding their investigation in this case. Further, codefendant Gustavo Trevino provided testimony regarding the offense, including his role in facilitating the robbery, and David Hogarth testified regarding his knowledge of events leading up to and following the robbery. Audio and visual recordings from surveillance cameras inside the shop were also admitted into evidence.

The surveillance footage showed four African American men wearing masks entering the shop at night while carrying handguns and with several of the men wearing gloves. One man was wearing a white hat. Another man was wearing a dark shirt. The third man was wearing shorts with a red stripe. And the fourth man was wearing shorts with a white stripe. In addition, the footage showed the man in the white hat kick Zamora in the head before pointing a gun at her head and directing her to a cash register and to a safe where the man removed the safe from a cabinet before the man in the dark shirt placed the safe in a bag. The man in the white hat and the other three men are seen repeatedly kicking Hernandez's head and using their pistols to hit his head before dragging him around the floor. The footage shows the man in the dark shirt,

[1] Because Robert Ruffins and Anthony Ruffins share the same surname, we will refer to Robert Ruffins by his first name for ease of reading.

the man wearing shorts with a red stripe, and the man wearing shorts with a white stripe leaving the shop and captures one of those men stating that it was time to leave before the man in the white hat is seen walking down the stairs and leaving the shop.

Zamora and Hernandez testified about the events on the night in question and the injuries that they and Zamora's husband sustained, but neither was able to identify Ruffins as one of the offenders. Zamora and Hernandez both testified that the offenders took their cell phones.

After Zamora and Hernandez testified, Officer Groff explained that in his initial investigation of this case, he used the "Find My iPhone" app to locate the two stolen phones and determined that the phones were in the custody of a woman and her son who lived at the Palms Apartments in San Antonio. Officer Groff testified that the woman explained that codefendant Taylor had given her the phones. Officer Groff also stated that the police found a safe in the dumpster of the apartment complex and that the safe was consistent with the one stolen from the tattoo shop.

Next, Officer Mahoney testified that his investigation in this case led him to believe that the following people were involved in the robbery: Ruffins and codefendants Taylor, McMichael, Trevino, and Robert. Further, Officer Mahoney stated that he learned through his investigation that Taylor, Robert, and Ruffins were all related. Next, Officer Mahoney stated that his review of surveillance footage of businesses near the tattoo shop showed a white Volvo driving toward the shop shortly before the robbery, and he learned in his investigation that codefendant Trevino owned a white Volvo.

Additionally, Officer Mahoney testified that he interviewed Taylor after the cell phones had been recovered and after codefendant Taylor had been arrested for a separate offense. Taylor provided information furthering his investigation. During his investigation, he

reviewed Taylor's Facebook page to attempt to identify other suspects in the case, and his social media search led him to the Facebook pages for Ruffins and codefendants Robert and McMichael. Officer Mahoney related that he learned from Ruffins's page that Ruffins's nickname was "Poohbear," and when Officer Mahoney listened to the surveillance footage from the tattoo shop, he heard someone say, "Let's go, let's go, Poohbear" before the man in the white hat came down the stairs. Officer Mahoney described how Ruffins referred to codefendant McMichael as his "shooter" in a Facebook post months before the offense in which Ruffins used emojis for knives, guns, money, and money bags. Further, Officer Mahoney explained that his online research of the Facebook pages showed pictures of Ruffins and codefendants Robert and Taylor each wearing a white hat similar to the one in the surveillance footage. Officer Mahoney stated that although the four men in the surveillance footage were wearing masks, the footage captured a unique tattoo on one of the offender's arm, and Officer Mahoney explained that codefendant McMichael had a tattoo on his arm that looked like the one in the surveillance footage.

Moreover, Officer Mahoney testified that he learned from the Palms Apartments' residents that Hogarth was linked with some of the individuals discussed above and that he saw Ruffins talking with Hogarth when he drove to the apartment complex to talk to Hogarth but that Ruffins left before he approached Hogarth. Officer Mahoney stated that he learned that Hogarth had information related to the robbery and he obtained a search warrant for Hogarth's phone. The search of the phone revealed a text thread between Hogarth and codefendant Trevino in which Trevino told Hogarth what to tell the police, and that Trevino told Hogarth to get a lawyer. Further, Officer Mahoney testified that Hogarth initially was uncooperative and lied to the police about whether he knew anything about the offense but later cooperated with the police by

providing information about the offense and those involved. Similarly, Officer Mahoney related that Hogarth stated that he was afraid of Ruffins and that Ruffins had threatened to hurt him if he testified. Moreover, Officer Mahoney testified that he believed that Hogarth told Trevino's wife not to cooperate with the police. Officer Mahoney stated that Hogarth told him that he went to the tattoo shop with codefendants Taylor and Trevino days before the offense but that he did not learn that Taylor and Trevino were planning to rob the shop until they were driving home from the shop. When describing Hogarth's involvement in this case, Officer Mahoney testified that there was no evidence that Hogarth encouraged anyone to participate in the robbery or aided or attempted to aid anyone in the commission of the robbery.

Furthermore, Officer Mahoney stated that a search of Ruffins's father's apartment at the Palms Apartments led to the discovery of a gun and a pair of gloves. Additionally, Officer Mahoney recalled that when he showed codefendant Robert's mother a picture of the masked man in the white hat from the surveillance footage of the tattoo shop, she stated that the man was Robert and not Ruffins. Regarding Ruffins's arrest, Officer Mahoney stated that Ruffins did not react when shown the violent footage from the robbery. Further, Officer Mahoney testified that while Ruffins denied any involvement in the case, he also made unusual statements such as "[i]f you say I did it, I did it." Officer Mahoney related that Ruffins stated that he was with his girlfriend, Shante Benton, on the night of the offense but did not provide her contact information. When discussing Benton, Officer Mahoney mentioned that his search of Ruffins's Facebook page indicated that he was romantically involved with Benton, but Officer Mahoney did not attempt to contact Benton as part of his investigation.

In his testimony, Hogarth explained that he lived at the Palms Apartments around the time of the offense and that he associated with Ruffins and codefendants Taylor, Robert,

and Trevino. Hogarth stated that Trevino and Taylor decided to rob Trevino's cousin's tattoo shop and that he rode with Trevino and Taylor to the tattoo shop days before the offense occurred. Additionally, Hogarth related that he was present during conversations in which Taylor, Robert, Ruffins, and Trevino made plans to rob the shop and that Ruffins recruited codefendant McMichael to help. Regarding the night of the offense, Hogarth recalled that he saw McMichael, Trevino, Taylor, and Ruffins drive off in a white Volvo. When he was shown a photo from the surveillance footage of the masked man in the white hat, Hogarth testified that the man in the photo was Ruffins and that Ruffins always wore that hat. But Hogarth also admitted on cross-examination that he previously told the police that he would just be guessing when asked the identity of the man in the white hat and that the man in the photo looked like someone other than Ruffins. Relatedly, Hogarth explained that although the men wore masks, he recognized the men when watching the surveillance footage by how they moved and how they sounded. Hogarth also related that he told the police everything he knew about the robbery and that Ruffins threatened to hurt him if he testified.

When called to testify, codefendant Trevino explained that he had already been convicted for his role in the tattoo shop robbery and that he entered into an agreement with the State in which he agreed to testify in this case in exchange for the State not recommending a punishment in his case in the hopes of a lesser punishment. Trevino also testified regarding his extensive criminal history. Further, Trevino related that his cousin owned the tattoo shop and that he decided to rob the shop because he needed money. Additionally, Trevino said that before the robbery he drove by the tattoo shop with Hogarth and codefendant Taylor, that he discussed the possibility of robbing the shop, that Hogarth was not part of the plan and just overheard the conversation between Trevino and Taylor, that Hogarth did not help anyone commit the robbery,

and that he told Hogarth to get a lawyer and not talk to the police after the robbery. Regarding the offense, Trevino testified that he drove to the tattoo shop in his white Volvo with Ruffins and codefendants Taylor, McMichael, and Robert. Further, he related that the four passengers put on masks and gloves and had their guns ready and stated that Ruffins was wearing a white hat.

After the State finished its case in chief, Ruffins called Benton to the stand. In her testimony, Benton explained that she was dating Ruffins around the time of the offense, that he was with her the entire night of the robbery, and that she remembered the night of the offense because that night she was planning a birthday party for one of her children scheduled for the following day.

Once both sides rested, the jury charge was prepared. The charge contained an accomplice-as-a-matter-of-law instruction for Trevino and an accomplice-as-a-matter-of-fact instruction for Hogarth. After considering the evidence, the jury found Ruffins guilty of aggravated robbery.

DISCUSSION

In his first five issues on appeal, Ruffins asserts that the jury charge contained multiple errors. In his sixth through ninth issues on appeal, Ruffins contends that the trial court erred by denying his motion for new trial and by failing to issue findings of fact and conclusions of law regarding its ruling on his motion. In his tenth issue, Ruffins argues that the trial court erred by including a deadly weapon finding in its judgment of conviction. In his final issue on appeal, Ruffins urges that the trial court erred by imposing more court costs than were authorized. Because Ruffins's first issue is dispositive of this appeal, we turn to that issue now.

Jury Charge Error

In his first issue, Ruffins asserts that there is error in the trial court's jury charge setting out the accomplice-witness instructions for Hogarth. *See* Tex. Code Crim. Proc. art. 38.14. As set out above, the charge included an accomplice-as-a-matter-of-fact instruction for Hogarth, which reads, in relevant part, as follows:

> You must determine whether David Hogarth is an accomplice to the crime of aggravated robbery, if it was committed. If you determine that David Hogarth is an accomplice, you must then also determine whether there is other evidence corroborating the testimony of David Hogarth.
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> . . .
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> If you find beyond a reasonable doubt that David Hogarth is an accomplice to the crime of aggravated robbery, you must consider whether there is evidence corroborating the testimony of David Hogarth. The defendant, Anthony Ruffins, cannot be convicted on the testimony of David Hogarth unless the testimony is corroborated.

On appeal, Ruffins contends that the "trial court erred by requiring proof beyond a reasonable doubt that . . . Hogarth was an accomplice and, by doing so, creating a presumption that he was not."

In its brief, the State contends that Ruffins may not argue that this portion of the charge is erroneous because he requested the "beyond a reasonable doubt" instruction and, therefore, is barred from challenging the instruction under the doctrine of invited error. *See Prystash v. State*, 3 S.W.3d 522, 531-32 (Tex. Crim. App. 1999). Having reviewed the record, we cannot agree with the State's assertion.

During the jury-charge conference, Ruffins stated that "there is nothing in the charge that gives them an instruction with respect to how they determine someone is an accomplice, and it has to be done with 'if you have a reasonable doubt or not,' in that respect."

In response, the trial court stated that the charge already had an instruction directing the jury that "they have to find he is an accomplice beyond a reasonable doubt." Next, Ruffins stated that he did not "think there's been an instruction that they need to believe—when they consider accomplice, they have to agree beyond a reasonable doubt that he is an accomplice." At that point, the State read the portion of the jury charge summarized above instructing the jury that Hogarth's testimony must be corroborated if the jury determines beyond a reasonable doubt that Hogarth was an accomplice. When the State finished reading that part of the charge, Ruffins stated that he was "good" and did not provide further argument on the issue.

Although the State correctly highlights that part of the exchange summarized above showed that Ruffins mentioned that there was no instruction requiring the jury to determine beyond a reasonable doubt that Hogarth was an accomplice, the totality of Ruffins's objection indicates that he was requesting an instruction specifying that there must be evidence corroborating Hogarth's testimony if the jury had a reasonable doubt as to whether or not Hogarth was an accomplice. In any event, the instruction had already been included in the jury charge when Ruffins made his objection, and nothing in the remainder of the record indicates that any change was made to the charge as a result of his objection. Accordingly, we cannot agree that Ruffins's challenge is barred by the doctrine of invited error. However, by informing the trial court that he was "good" and by failing to further object to that portion of the jury charge, Ruffins effectively withdrew his objection to that part of the charge. *See Bluitt v. State*, 137 S.W.3d 51, 53 (Tex. Crim. App. 2004) (explaining that stating that party has "no objection" to jury charge is "equivalent to failure to object" and does not prevent appellate review of jury-charge issue); *Tyson v. State*, 172 S.W.3d 172, 177 & n.2 (Tex. App.—Fort Worth 2005,

pet. ref'd) (stating that party did not invite error to jury charge by stating, "[W]e believe it's charged properly").

When addressing an issue regarding an alleged jury-charge error, appellate courts must first decide whether there is error before addressing whether the alleged error resulted in any harm. *See Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). The amount of harm needed for a reversal depends on whether a complaint regarding "that error was preserved in the trial court." *Swearingen v. State*, 270 S.W.3d 804, 808 (Tex. App.—Austin 2008, pet. ref'd). If no objection was made, which is essentially what occurred here, a reversal is warranted only if the error "resulted in 'egregious harm.'" *See Neal v. State*, 256 S.W.3d 264, 278 (Tex. Crim. App. 2008) (quoting *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g)). "The purpose of the egregious-harm inquiry is to ascertain whether the defendant has incurred actual, not just theoretical, harm." *Swearingen*, 270 S.W.3d at 813. The analysis depends "on the unique circumstances of" each case and "is factual in nature." *See Saenz v. State*, 479 S.W.3d 939, 947 (Tex. App.—San Antonio 2015, pet. ref'd).

Regarding whether there was error in the charge, we note as an initial matter that the Court of Criminal Appeals has explained that the accomplice-witness rule in article 38.14 of the Code of Criminal Procedure is essentially "a legislative judgment that a reasonable doubt exists if the only evidence the State presents in satisfaction of its burden of proof is the testimony of an uncorroborated accomplice witness" because "an uncorroborated accomplice witness cannot by itself persuade to a level of confidence beyond a reasonable doubt." *Castillo v. State*, 913 S.W.2d 529, 535 n.3 (Tex. Crim. App. 1995). Similarly, this Court has explained that article 38.14 "reflects a legislative determination that accomplice testimony implicating another person should be viewed with a measure of caution, because accomplices often have incentives

to lie, such as to avoid punishment or shift blame to another person" and that an "accomplice's motives in testifying against the accused may well include malice or an attempt to curry favor from the state in the form of a lesser punishment, or perhaps, no punishment." *Wincott v. State*, 59 S.W.3d 691, 698 (Tex. App.—Austin 2001, pet. ref'd); *see also id.* (describing accomplice-witness testimony as "inherently untrustworthy" and warning that testimony "should be viewed with caution").

Consistent with the legislature's recognition of the problems surrounding the trustworthiness of accomplice-witness testimony, one of our sister courts of appeals has explained that a proper accomplice instruction should inform the jury that if "they have a reasonable doubt regarding whether or not the witness acted as [an] accomplice, then corroboration is necessary." *Haney v. State*, 951 S.W.2d 551, 553 (Tex. App.—Waco 1997, no pet.). Similar "reasonable doubt" language has been included in numerous jury charges reviewed by various appellate courts. *See, e.g.*, *Cyr v. State*, 308 S.W.3d 19, 24 (Tex. App.—San Antonio 2009, no pet.); *Elliot v. State*, 976 S.W.2d 355, 358 n.4 (Tex. App.—Austin 1998, pet. ref'd); *see also Estrada v. State*, No. 08-15-00271-CR, 2018 WL 3193498, at *3 (Tex. App.—El Paso June 29, 2018, pet. ref'd) (op., not designated for publication); *Losoya v. State*, No. 05-10-00396-CR, 2012 WL 2402609, at *6 (Tex. App.—Dallas June 27, 2012, pet. ref'd) (op., not designated for publication). Although the Texas Criminal Pattern Jury Charge states that it may not be necessary to include "reasonable doubt" language in an accomplice-witness instruction regarding whether a witness is an accomplice witness, it has also explained that if an instruction requiring proof beyond a reasonable doubt is included, it should state that corroboration *is required unless* "the [S]tate proves beyond a reasonable doubt that a witness is

not an accomplice witness." *See* Comm'n on Pattern Jury Charges, State Bar of Tex., *Texas Criminal Pattern Jury Charges: Special Instructions* CPJC 3.4 (2018).

The charge at issue in this case essentially inverts this requirement by only requiring corroboration if it is shown beyond a reasonable doubt that Hogarth is an accomplice. This language of this instruction is not only inconsistent with case law and the Pattern Jury Charge, it is also inconsistent with the nature and treatment of accomplice testimony. *See Holladay v. State*, 709 S.W.2d 194, 196 (Tex. Crim. App. 1986). Accordingly, we conclude that the charge at issue in this case was erroneous.

Having determined that there was error, we must now address whether Ruffins was harmed by that error. *Ngo*, 175 S.W.3d at 743. Neither side has the burden of establishing either the presence or a lack of harm. *See Warner v. State*, 245 S.W.3d 458, 464 (Tex. Crim. App. 2008). Instead, the reviewing court makes "its own assessment" when evaluating what effect an error had on the verdict by looking at the record before it. *Ovalle v. State*, 13 S.W.3d 774, 787 (Tex. Crim. App. 2000) (quoting Wayne R. LaFave & Jerold H. Israel, Criminal Procedure 1165 (2d ed. 1992)). In assessing harm, reviewing courts "consider: (1) the jury charge as a whole, (2) the arguments of counsel, (3) the entirety of the evidence, and (4) other relevant factors present in the record." *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013); *see also State v. Ambrose*, 487 S.W.3d 587, 598 (Tex. Crim. App. 2016) (setting out these factors in issue regarding error from omission of accomplice-witness instruction); *Ratliff v. State*, No. 03-18-00569-CR, 2020, __S.W.3d__ WL 746642, at *15, *16 (Tex. App.—Austin Feb. 14, 2020, no pet. h.) (applying these factors to issue of whether jury-charge error constituted "an impermissible comment on the weight of the evidence").

Regarding the charge as a whole, we observe that nothing in the remainder of the charge corrected the error set out above or otherwise indicated that corroboration is required if the jury has a reasonable doubt as to whether Hogarth was an accomplice. Accordingly, we believe that this factor weighs in favor of finding that Ruffins was harmed by the erroneous omission.

Regarding the arguments of counsel, we note that the State emphasized the testimony from Hogarth and codefendant Trevino when arguing that Ruffins was one of the individuals involved in the robbery. In fact, the State characterized Hogarth's testimony as the most important evidence that was presented during the trial, explained that the case depended on the information that Hogarth gave the police, and related that if Hogarth had not identified Ruffins and the codefendants, the case "would have gone in a totally different direction." Similarly, Ruffins described Hogarth as the State's "main witness." Although both sides stated that Hogarth's testimony would need to be corroborated if Hogarth was an accomplice, the State repeated the error present in the charge by asserting that the jury had to determine beyond a reasonable doubt that Hogarth was an accomplice before his testimony needed to be corroborated. Accordingly, we believe that this factor also weighs in favor of a finding that Ruffins was harmed by the jury-charge error.

Turning to the evidence, we note that identity was a central issue in this case and that the State relied heavily on the testimony from codefendant Trevino and Hogarth in connecting Ruffins to the robbery of the tattoo shop. Moreover, the evidence presented at trial established that Trevino was an accomplice because he was convicted for his role in the robbery, and conflicting evidence was presented regarding whether Hogarth was also an accomplice. In his testimony, Hogarth denied going to the tattoo shop on the night of the offense and further

denied soliciting, encouraging, or directing anyone to commit the robbery. Similarly, Hogarth denied aiding or attempting to aid in the robbery, and he asserted that he was not arrested because he did not assist in the robbery. Moreover, although Hogarth admitted that he went to the tattoo shop with codefendants Taylor and Trevino before the offense occurred and that Taylor and Trevino mentioned wanting to rob the tattoo shop, Hogarth related that he did not know of the possibility of someone robbing the shop until he was already in the car, that he thought the three of them were just going for a ride when he got in the car, and that he did not go inside the shop when they drove to New Braunfels.

In addition, Trevino testified that he, Taylor, and Hogarth went to the tattoo shop before the robbery occurred and that he discussed the possibility of robbing the shop, but he stated that Hogarth was not part of the plan to rob the tattoo shop and that Hogarth did not attempt to aid in the commission of the robbery or encourage anyone to commit the robbery. Furthermore, Officer Mahoney explained that he concluded that Hogarth was not criminally responsible for the robbery based on his investigation, that he had no information from which to conclude that Hogarth planned the robbery or encouraged anyone to participate in the robbery, and that although Hogarth admitted to going to the tattoo shop before the robbery, Hogarth stated that he did not learn of any plan to rob the shop until after the other people in the car left the shop.

On the other hand, Hogarth also admitted that the trip to the tattoo shop was a scouting mission "for [Trevino] and [Taylor] and [him] to do this robbery in New Braunfels" and explained that he was present in subsequent conversations when Ruffins and codefendants Taylor, Robert, and Trevino were discussing robbing the shop in the near future. In addition, when asked whom *he* was planning to rob, Hogarth answered by saying Trevino's "cousin . . .

[a]t the tattoo shop." Moreover, Trevino explained that he told Hogarth to consult with a lawyer based on his involvement in the case. When asked whether Hogarth had lied during Trevino's trial, Trevino stated that Hogarth previously testified that "we went into the shop." Further, Trevino related that Hogarth was with him shortly before he and the others went to rob the tattoo shop and that after the robbery Hogarth expressed to Trevino his disappointment that they left him behind to go and commit the robbery without him. Trevino also testified regarding an earlier incident in which Hogarth offered to help him steal some drugs by informing him about a guy who was selling drugs.

Additionally, Officer Mahoney explained that Hogarth initially lied to the police about knowing Ruffins and tried to mislead the police. Further, Officer Mahoney testified that Hogarth admitted that he had been asked to participate in the robbery, that he obtained a search warrant to search Hogarth's phone, and that the search revealed that Trevino had been instructing Hogarth on what to tell the police. When describing his investigation, Officer Mahoney stated that he learned that a man told Trevino's wife not to cooperate with the police and that he suspected the man was Hogarth.

In light of the evidence summarized above, including Hogarth's admission that he went on a scouting trip for the robbery and Trevino's testimony that Hogarth was disappointed that he did not get to be part of the actual robbery, the jury could have had reasonable doubt regarding whether Hogarth was an accomplice as that term has been defined by the Court of Criminal Appeals. *See Zamora v. State*, 411 S.W.3d 504, 510 (Tex. Crim. App. 2013) (explaining that accomplice is someone who could be charged for offense in question or lesser-included offense and further clarifying for direct party liability that witness is accomplice if he "'participates with a defendant before, during, or after the commission of the crime,' 'acts

with the requisite culpable mental state,' and performs an 'affirmative act that promotes the commission of the offense with which the defendant is charged'" (quoting *Cocke v. State*, 201 S.W.3d 744, 748 (Tex. Crim. App. 2006)); *see also Castillo v. State*, 517 S.W.3d 363, 372 (Tex. App.—Eastland 2017, pet. ref'd) (explaining that "if there is conflicting or inconclusive evidence that a witness was complicit in the crime, then the witness is an accomplice as a matter of fact"). However, as set out above, the jury charge only instructed the jury to determine if Hogarth's testimony was corroborated if it was shown beyond a reasonable doubt that Hogarth was an accomplice.[2] In essence, the flawed instruction created a presumption that corroboration

[2] In its brief, the State asserts that there is no harm regarding any of the alleged errors in the instructions pertaining to Hogarth because, according to the State, the evidence presented at trial established that Ruffins was not entitled to an accomplice-in-fact instruction regarding Hogarth because "[m]erely being present . . . , having knowledge of the planned offense but failing to disclose it, and even concealing the offense does not turn a witness into an accomplice witness." *See Delacerda v. State*, 425 S.W.3d 367, 396 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). Similarly, the State argues that the evidence establishing that a defendant lied to the police after the crime was committed is not an act assisting in the commission of the offense. *See id.* Accordingly, the State contends that the charge was unwarranted and, therefore, that the inclusion of the charge, even if erroneous, benefitted Ruffins.

However, there was also evidence that Hogarth was uncooperative with the police, subjectively believed that he might be criminally responsible for the robbery, and directed another not to cooperate with the police. This evidence raises an issue as to whether Hogarth performed an affirmative act promoting the commission of the aggravated robbery with the requisite intent when he went to the tattoo shop with Taylor and Trevino. *Cf. Hedrick v. State*, 473 S.W.3d 824, 830, 831 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (explaining that evidence showing "[a] consciousness of guilt is perhaps one of the strongest kinds of evidence of guilt" and that evidence regarding defendant's conduct after commission of crime can indicate consciousness of guilt); *Bryan v. State*, 990 S.W.2d 924, 928 (Tex. App.—Beaumont 1999, no pet.) (noting that "[e]vidence of attempts to suppress or fabricate evidence proves consciousness of guilt"). Moreover, the evidence set out in the body of the opinion would allow the jury to have a reasonable doubt regarding whether Ruffins performed an affirmative act promoting the commission of the offense and is, therefore, distinguishable from the evidence in the case that the State primarily relies on. *See Druery v. State*, 225 S.W.3d 491, 499-500 (Tex. Crim. App. 2007) (noting that evidence at trial showed, among other things, that defendant told two witnesses that he was going to kill victim, took the victim's property after shooting victim, and gave witnesses some money after the shooting; explaining that witnesses "mere presence,"

wasn't required unless it was proved beyond a reasonable doubt that Hogarth *was* an accomplice, when the reverse should have been true: corroboration *was* required unless it was proved beyond a reasonable doubt that Hogarth *wasn't* an accomplice.

Moreover, although some corroborating evidence was presented, the evidence of Ruffins's guilt other than the testimony from Trevino and Hogarth was less than overwhelming. *See Campbell v. State*, 227 S.W.3d 326, 331 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (determining that defendant was not egregiously harmed by alleged jury-charge error, in part, because "overwhelming weight of the evidence supported the jury's verdict"); *see also Reed v. State*, 550 S.W.3d 748, 758 (Tex. App.—Texarkana 2018, no pet.) (explaining that fact that evidence might be sufficient to support determination that accomplice witness's testimony was corroborated when viewed in light most favorable to verdict does not answer question of whether defendant suffered egregious harm); *cf. Nghia Van Tran*, 870 S.W.2d 654, 658 (Tex. App. — Houston [1st Dist.] 1994, pet. ref'd) (finding harm from omission of accomplice instruction where record indicated that "there is good reason to believe the jury did use" potential accomplice's testimony and where "the corroborating evidence" was not "so strong that any reasonable jury would have found it to be true").

Even though Officer Mahoney testified that there was a picture on Facebook of Ruffins wearing a white hat that is similar to the one seen in the surveillance footage, Officer Mahoney also stated that there were photos showing codefendants Robert and Taylor both

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knowledge of planned offense, and failure to disclose it did not render them accomplice witnesses, particularly where evidence indicated that neither witness believed defendant would actually go through with shooting, that neither witness distracted victim "to help facilitate the murder," and that neither witness asked for money; and concluding that evidence did not indicate that witnesses were accomplices as matter of law or fact).

wearing a similar white hat and that Robert's mother stated that the man wearing the hat in a photo from the surveillance footage was Robert and not Ruffins. Additionally, even though Officer Mahoney's investigation of the Facebook pages pertaining to the individuals charged in this offense showed an interaction between Ruffins and codefendant McMichael, that interaction occurred months before the charged offense. Similarly, although Officer Mahoney testified that he saw Ruffins interacting with Hogarth at the Palms Apartments, that interaction was not "at or near the time or place of" the offense. *See Hernandez v. State*, 939 S.W.2d 173, 178 (Tex. Crim. App. 1997). In addition, even though Officer Mahoney testified that Ruffins did not react when he saw the surveillance footage and made strange statements during his questioning by the police, Officer Mahoney also explained that Ruffins denied any involvement in the crime. In addition, although Officer Mahoney testified that the police found a weapon and gloves in Ruffins's father's home, no evidence was introduced regarding whether the gun or gloves were used in the offense. Moreover, even though Officer Mahoney testified that someone can be heard saying "let's go, Poohbear" on the surveillance footage, the audio portion for that part of the footage is not entirely clear as the State partially conceded in its closing arguments.

Further, none of the victims could identify Ruffins as one of their attackers, and all of the men committing the robbery were wearing masks. No evidence was presented that Ruffins's fingerprints or DNA were found in the tattoo shop, that Ruffins's cellphone connected to any cell towers near the tattoo shop at the time of the offense, or that the safe found in the dumpster of the Palms Apartments was the one taken from the tattoo shop. Additionally, no evidence was presented that the police found a white hat in Ruffins's possession, and no non-accomplice evidence linked Ruffins to the white Volvo. Finally, Ruffins had an alibi, as Benton

testified that Ruffins was with her at the time of the robbery and that she remembered that night well because she was planning her daughter's birthday party scheduled for the following day.

In light of the preceding, we conclude that the third factor also weighs in favor of a determination that Ruffins was harmed by the jury-charge error. *Cf. Ambrose*, 487 S.W.3d at 598 (providing that omission of accomplice witness instruction can result in egregious harm if corroborating evidence is unconvincing and renders State's case for conviction significantly less persuasive); *Casanova v. State*, 383 S.W.3d 530, 539 (Tex. Crim. App. 2012) (stating that corroborating evidence that is weak because it depends on inferences from evidentiary facts to ultimate facts that jury may readily reject may result in egregious harm); *Reed*, 550 S.W.3d at 758 (noting that strength of corroborating evidence is function of how believable it is and how compellingly it connects accused to offense).

Turning to the fourth factor, nothing in our review of the record has revealed any other relevant information bearing upon our harm analysis.

Given our resolution of the factors listed above, we conclude that the jury-charge error egregiously harmed Ruffins. For these reasons, we sustain Ruffins's first issue on appeal. Because we have sustained Ruffins's first issue, we need not address his remaining issues.

CONCLUSION

Having sustained Ruffins's first issue on appeal, we reverse the trial court's judgment of conviction and remand for further proceedings.

Chari L. Kelly, Justice

Before Justices Goodwin, Baker, and Kelly
Dissenting Opinion by Justice Goodwin
Concurring Opinion by Justice Baker

Reversed and Remanded

Filed: August 14, 2020

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