TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-22-00411-CR

Freddie Lee Smith, Appellant

v.

The State of Texas, Appellee

FROM THE 21ST DISTRICT COURT OF BASTROP COUNTY
NO. 16,977, THE HONORABLE CHRISTOPHER DARROW DUGGAN, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Freddie Lee Smith was convicted of capital murder and sentenced to life imprisonment for his participation in the murder for hire of Samantha Dean and her unborn child. *See* Tex. Penal Code §§ 12.31, 19.03 (setting out punishment for capital murder and specifying that person commits capital murder if he murders more than one person during same criminal transaction or if he murders someone for remuneration). On appeal, Smith challenges the sufficiency of the evidence corroborating the testimony from the accomplice witness and argues that the trial court erred by removing a juror without cause. We will affirm the trial court's judgment of conviction.

BACKGROUND

Around 2:00 a.m. on February 4, 2015, an officer with the Bastrop Police Department was patrolling businesses in Bastrop, Texas, and drove to the parking lot of a

shopping center that had no current tenants. While at the shopping center, the officer noticed a car in the otherwise empty parking lot. When the officer drove closer to the car, he saw the body of a woman that was partially inside the car. The deceased woman was later identified as Dean, a victim-witness counselor for the Kyle Police Department. Dean was twenty-six weeks' pregnant and had been shot in the head three times with .25 caliber bullets. The father of her baby was later identified as Von Trey Clark, an officer with the Austin Police Department. As part of a massive multi-agency investigation lasting for years, Clark, Kevin Watson, and Smith were all charged with the murder for hire of Dean and her unborn child. Watson elected to plead guilty in exchange for a reduced sentence. As part of the agreement, Watson also agreed to testify at Smith's trial.

In his testimony, Watson explained that he and Clark had been friends for years and that they continued to be friends when he decided to sell illegal drugs even though Clark was a police officer. Additionally, Watson testified that he had been friends with Smith for several years. Watson also related that his common-law wife was Kyla Fisk. Watson lived in Houston, Texas, with Fisk, and Smith lived in a different area of Houston. Clark lived in Austin, Texas.

Regarding the events leading up to Dean's death, Watson related that Clark was upset that Dean was pregnant with his child and that Dean did not want to have an abortion. Clark did not want Dean to have the child because he was involved with another woman. Because Dean did not want to have an abortion, Clark decided that he needed to have her killed and asked for Watson's help. To further the plan, Clark asked Watson to buy some burner cellphones. Watson agreed, purchased two burner phones with 405 area codes in October 2014, and gave Clark the phones. Next, Clark asked Watson to put him in contact with Smith because he wanted to see if Smith would kill Dean for $5,000. Although Smith was initially reluctant

because Clark was a police officer, he ultimately agreed to participate. Watson testified that he facilitated the calls between Clark and Smith but that they eventually started talking directly to one another. In his testimony, Watson related that Clark came up with the idea of making the murder appear to have been a drug deal gone wrong. As part of the plan, Clark mailed one of the 405 burner phones to Watson with some money for Watson to purchase another burner phone and to purchase drugs. After Clark tried to call Smith from one of the 405 phones and after Smith did not answer, Watson sent from his personal cellphone a text message to Smith saying that Clark was trying to contact him.

Regarding the day in question, Watson explained that he purchased another burner phone on February 3, 2015, from a Walmart in Stafford, Texas. At trial, Watson agreed that surveillance footage from the Walmart showed him wearing a red hoodie in the store on February 3, 2015. The new phone had a 213 area code. Watson explained that shortly after activating the 213 number, he had to get a new number assigned to that phone because he made a mistake. Additionally, Watson related that after returning home, he left his personal cellphone at his home, took the two burner phones that he had, and drove to pick up Smith in Fisk's Toyota. However, because Smith's contact information was in Watson's personal cellphone, he was unable to call Smith for directions. Watson then called Fisk from one of the burner phones to ask her to contact Smith for directions, and Watson said Fisk may have looked in his personal cellphone to find Smith's contact information. Once he learned how to get to Smith's home, Watson picked up Smith and headed to meet Clark. Clark called and said he wanted to meet in Bastrop. After getting in the car, Smith used one of the burner phones to contact his friend Eric about purchasing some marijuana. Watson and Smith met Eric in a Walmart parking lot west of

Houston to make the exchange, and the marijuana was in a white grocery bag. After acquiring the drugs, Watson and Smith headed to Bastrop.

According to Watson, Smith had a .25 caliber pistol with him, and Smith stated that he brought a lower caliber weapon because he thought it would be quieter. When Watson and Smith arrived in Bastrop, they scoped out some potential meeting locations and decided on a vacant shopping center. Clark said that he would convince Dean to come with him by saying that they were meeting someone to buy a computer tablet. Watson testified that Smith and he used the burner phones to talk with Clark.

After Watson and Smith waited for several hours, Clark called from the 405 burner phone in his possession to say that he was on his way. When Clark and Dean arrived, Smith got out and went over to their car. At that point, Watson drove off and waited for Clark or Smith to call him and tell him to return. When he received the call, he learned that the gun had jammed and that Smith told Dean that he had to leave to go get the charger for the tablet as a way to provide an excuse for why he needed to leave. Watson drove back to the parking lot, and Smith got in the car. Watson then drove to a gas station while Smith fixed the gun. They returned to the shopping center, and Smith got in the backseat of Dean's car as part of the plan to kill Dean. Watson left again and drove in a loop waiting for a call and received a call twenty minutes later telling him to come back.

When Watson arrived, Dean was dead, and Clark walked over to the Toyota, told Watson to move over, sat in the driver's seat, and drove off. Contemporaneously, Smith got into the driver's seat of Dean's car and drove off. Clark and Smith drove to a nearby road before pulling over, and the three of them looked for shell casings inside Dean's car. Clark and Smith were wearing gloves, and Watson put socks on his hands. They found two casings but could not

find the third. They drove back to the shopping center to continue the search and took out the backseat of Dean's car to aid in their search. Watson testified that someone moved Dean's body partially out of the car as part of the search. They then placed the bag of marijuana in the car and attempted to collect all of the phones out of Dean's car but inadvertently left one phone behind.

Watson then drove Clark and Smith toward Austin for a few miles before pulling over to allow Smith and Clark to change clothes and then place the old clothes and the collected phones, including the burner phones, in a bag that Clark brought with him. The three of them got back into the car, and Watson drove Clark to his car near his house in Austin. When they arrived in Austin, they found the third casing in Clark's pants. Clark gave Smith a bank envelope with money in it. After dropping off Clark, Watson drove Smith back to his house in Houston. On the way, Watson called Fisk from one of the burner phones around midnight to tell her that he was coming home. When discussing the incident on the way to Houston, Smith said that he shot Dean in the head twice, that Clark then asked for the gun because he wanted to shoot her too, and that Clark subsequently shot her. Once they arrived at Smith's house, Smith took the bag of evidence and said that he would dispose of the contents. After dropping Smith off, Watson headed home.

When Watson arrived home, Fisk told him that Smith had been calling his personal cellphone. Watson called Smith back, and Smith informed him that there was no gun in the bag. Watson then went to look for the gun in the Toyota, but he realized that he had locked the keys inside the car and had to break one of the smaller windows to get inside the car. Watson talked with Smith on the phone multiple times about his search for the gun. Because he did not find the weapon in the car, he decided that he needed to go back to Bastrop to look for the weapon and picked up Smith on the way. When they got to Bastrop, they saw police at the

shopping center. Watson drove to the area where Smith and Clark changed clothes, but neither he nor Smith saw the weapon. Watson and Smith then headed back to Houston. When they arrived at Smith's home, Watson found the gun "wedged . . . between the driver's seat and the door" and handed the weapon to Smith so that he could dispose of it.

In his testimony, Watson explained that he called and texted Clark multiple times to talk about the weapon being unaccounted for but that Clark never answered. A few days later, on February 8, 2015, Clark asked Watson to send a threatening message to one of Dean's co-workers. To accomplish this, Watson decided to purchase another burner phone. Watson's friend Aaron Williams drove Watson to Walmart to purchase another phone and walked into Walmart with him. Williams then drove Watson to Bastrop. When they reached Bastrop, Watson activated the phone and sent a threatening message to the phone number Clark provided. Clark wanted the message sent from Bastrop to make it appear to authorities that the killer was still there because the police had already questioned Clark about Dean's death. Watson then destroyed the phone.

Regarding later events, Watson explained that the police questioned Williams about his whereabouts on February 8, 2015, and questioned Eric about his communication with one of the 405 burner phones on the day of the offense. Further, Watson testified that he had phone calls with Clark and Smith discussing the police investigation, the possibility of them all switching phone numbers, and the police interviewing Fisk.

During the trial, Fisk also testified. Fisk explained that Watson was her common-law husband, that Watson was arrested in 2012 for drug charges, and that they were both arrested in 2014 in Fort Bend County for selling drugs. She explained that she pleaded guilty to that charge and was placed on deferred-adjudication community supervision. As part of her plea

agreement in the drug case, Fisk agreed to testify in any case involving the death of Dean. Fisk admitted that she was originally charged with tampering with evidence for disposing of the red hoodie Watson was wearing when he went to Walmart, but she stated that the charge was later dismissed. Although she admitted that she disposed of the hoodie, she stated that she had no idea of its significance and had disposed of a lot of Watson's property after having to move out of their home. Further, she denied being a party to or otherwise participating in the case and explained that she had never been charged in this case or entered into any deal in this case. A law-enforcement officer testified that Fisk hid the hoodie and other clothes at a friend's house and could possibly have been a party to the offense but further explained that she would not have been if she did not find out details about the offense until after the crime occurred.

Fisk testified that she had a white Toyota that she allowed Watson to drive, that Watson used burner phones regularly, and that Watson had a personal cellphone that he used. Additionally, Fisk explained that on the night in question, Watson said that he was going to Austin with Smith and drove her car on the trip. Fisk remembered that Watson left his personal cellphone at their house and then called her from a number that she did not recognize asking for directions to Smith's house. Because she did not have Smith's number in her phone, she used Watson's phone to call Smith and was talking on both phones to get the directions from Smith and relay them to Watson. Next, Fisk related that she received a call from Watson from a 405 number late at night. When Watson returned home that night, he received a call from Smith and then began looking for the car keys before realizing that the keys were locked inside her car and then breaking a window to gain access. Fisk remembered that Watson then drove off and returned later that day. In addition, Fisk testified that she found Smith's jacket in her car after February 4, 2015, and that the jacket had money in it. Although Fisk began to wonder if Watson

had been involved in Dean's death after seeing a news story about it, she explained that Watson repeatedly denied being involved before ultimately admitting his complicity. According to Fisk, Watson said that Clark wanted to kill Dean because she was pregnant and that Smith shot Dean. A subsequent search of Fisk's car revealed glass inside, and Fisk's phone records showed that she called an automobile glass repair company on February 4, 2015.

Following Fisk's testimony, Eric Unuigboje testified that he had been friends with Smith for years. Further, Unuigboje admitted that he used to sell marijuana and had sold it to many people. Additionally, he testified that Smith called him from a 405 number on February 3, 2015, but that he did not remember if he met with Smith to sell him marijuana. However, although he denied remembering making the statement, he admitted that he told the Texas Rangers that he met Smith and another person to sell them marijuana. Unuigboje also admitted that after he spoke with the Texas Rangers, he called Smith and told him that the Texas Rangers had questioned him about a 405 number.

In addition to the above witnesses, the State called law-enforcement officials from multiple agencies to discuss the joint investigation undertaken in this case. One officer testified that after a police officer found Dean, the officer called for backup and that the responding officers learned that the vehicle belonged to Dean and noticed a white bag containing marijuana. Two of the officers later testified that the bag of marijuana seemed to have been placed in the car after the shooting because there was no blood on the bag. The police also found money inside the car, and one of the officers testified that it would be unusual to find money in the car if the death had been the result of a drug deal gone wrong. While searching around the car, the police observed that the backseat had been removed from inside Dean's car and placed outside nearby. The police discovered Dean's personal cellphone in the car and performed a forensic data

extraction on the phone to learn whom Dean had been communicating with before her death. During their investigation, the police learned that Dean worked for the Kyle Police Department as a Victims' Services Coordinator and had been dating Clark, who was a police officer for the Austin Police Department and had a common-law wife. DNA testing performed on Dean's baby confirmed that Clark was the father.

The data extracted from Dean's phone showed that Clark had previously sent text messages to Dean pressuring her to have an abortion but that Dean had informed him that she wanted to have the baby. The extraction also revealed that Dean's phone had exchanged calls and texts with a number with no associated contact information in her phone starting at 9:34 p.m. on February 3, 2015. The number was (213) 257-5010 ("first burner phone"), and the first burner had become active that day and had only been used to communicate with two numbers: Dean's phone and another phone with phone number (405) 534-6043 ("second burner phone"). In the time leading up to her death, Dean's phone pinged off a tower near her home in south Austin but began to move after receiving a call from the first burner phone. The phone travelled to William Canon Drive, and surveillance footage from a convenience store on William Cannon Drive showed Dean entering the store at 9:37 p.m. On the footage, Dean was not using her cellphone, but the records for her phone showed that someone was using the phone at the time to talk with the first burner phone. Dean's phone then travelled east toward Bastrop. There were several text exchanges between Dean's phone and the first burner phone in which the user of the first burner phone instructed the other user to get $120 and in which the phone users planned to meet at a shopping center in Bastrop. Dean's phone sent a message saying that the user "only ha[d] a bill," and the ATM receipt from the convenience store showed that Dean withdrew $100.

Dean's phone travelled to Bastrop and at 10:04 p.m. began pinging off a cell tower near the shopping center where she was later found.

The first burner phone had been purchased at a Walmart in Stafford. The phone had a different number assigned to it when it was first purchased—(213) 257-7689—but the number was changed to the 5010 number an hour after it was first activated. The phone was activated at or near Kuykendahl Road in Houston. Before the phone switched numbers, the 7689 number had been used to call Clark's number multiple times and to call Fisk's phone. All of those calls also occurred on February 3, 2015. After examining Fisk's Facebook account and public records, the police learned that Fisk was romantically involved with Watson and lived with him on Kuykendahl Road in Houston and that Watson and Fisk had previously been arrested for a drug offense in another county. The first burner phone was at or near their address between 11:20 a.m. and 1:34 p.m. on February 3, 2015, and was near the crime scene after 10:00 p.m. That phone had multiple phone calls and text exchanges with Dean's phone between 9:34 p.m. and 10:30 p.m. on February 3, 2015.

Phone records for the second burner phone showed that the phone had made calls to Fisk's phone, to a number listing Smith's grandmother as the subscriber, and to (405) 534-6069 ("third burner phone"), which had no registered user. The records for Smith's grandmother's account showed that Smith was an authorized user of that phone and that the phone had contacted the second burner phone, the third burner phone, and Watson's cellphone. The second burner phone made two calls to the number for which Smith was an authorized user on January 22, 2015, and January 30, 2015, but no one answered. After no one answered, Watson sent a text message to Smith's phone stating that Clark was trying to get in touch with Smith "from a 405 number." The second burner phone again called Smith's number, and

someone answered. At that time, the second burner phone and Clark's known phone were pinging off the same cellphone tower.

The records for the second and third burner phones showed that the phones were purchased at a Walmart in Katy, Texas. Until January 30, 2015, both phones were pinging from a tower near Clark's house. Around that time, Clark sent Watson a text message asking for Watson's address, and Watson responded with his Kuykendahl address. The phone records for Clark's phone showed that his phone subsequently pinged off a tower near a post office in Austin, and a receipt from the post office obtained during the investigation showed that Clark sent a package to Watson in Houston on January 30, 2015. The records for the third burner phone established that the phone had been moved to Houston, and the records for the second burner phone showed that the phone was still in Austin. On the night in question, between 7:00 p.m. and 8:30 p.m., the second burner phone was located "at or near" Clark's home in Austin, Texas. The phone then moved to William Cannon Drive before heading east and connecting to a cell tower near the crime scene in Bastrop. That night the second burner phone had multiple interactions with the third burner phone and the first burner phone, including one phone call at 10:43 p.m. near the shopping center. A little after midnight, the second burner phone was in Austin near Clark's home and was used to call Fisk's phone.

The phone records for the third burner phone showed that on the day in question it was in Houston when it communicated with the second burner phone, which was in Austin. The third burner phone then moved to another area in Houston around 3:00 p.m. On the way, the phone made a call to Fisk, and Watson's cellphone was contemporaneously used to contact Smith. Both Fisk's and Watson's known phones were pinging off a tower near their home. Following the phone call with Fisk, the third burner phone was pinging off a tower near Smith's

house on Kenilwood Drive. Watson's personal phone stayed connected to the cell tower near his and Fisk's home on February 3, 2015. The third burner phone was near the crime scene between 7:30 p.m. and 10:45 p.m. on the night in question. That phone had contact with only four numbers: the second burner phone, Fisk's phone, Watson's phone, and the number of an individual later determined to be Unuigboje. Around the time of Dean's death, her phone, the third burner phone, the second burner phone, and the first burner phone were all using the same cellphone tower near the shopping center.

In their investigation, the police discovered that Clark's and Smith's known phones began exchanging calls and texts on December 18, 2014. On February 2, 2015, Watson's known phone texted Clark's phone to ask, "What time tomorrow"? Clark's phone responded, "We haven't talked it through." Then Watson's phone replied, "Thought you had the spot. We were just going to show up." Around the same time, Smith's phone called Watson's phone. That same day, Watson's and Clark's phones continued to exchange calls and texts, and Watson's and Smith's phones also made calls to one another. On the morning on February 3, 2015, Clark's phone called Watson's phone as Watson's phone was traveling from near his home to a Walmart in Stafford before returning home. After Watson's phone returned to near his home, Watson's phone repeatedly called Clark's phone and Smith's phone. Smith's known primary phone called the third burner phone a few times but had no more activity from 3:00 p.m. on February 3, 2015, to 3:00 a.m. on February 4, 2015; however, another phone that Smith owned and used called Unuigboje before the third burner phone began calling Unuigboje and travelling toward Unuigboje's phone. From 3:00 a.m. to 4:30 a.m. on February 4, 2015, Smith's phone and Watson's phone had twenty phone calls to one another. Until 4:10 a.m., Smith's phone was pinging off a tower near his home, and Watson's phone was pinging off a tower near

his home; however, after 4:10 a.m., Watson's phone began travelling toward Smith's home, and Smith's phone called Watson's phone when Watson's phone was close to Smith's home. Hours later, Watson's phone pinged off cellphone towers in a manner indicating that the phone was traveling from Bastrop to Houston. Watson's phone then pinged off a tower near Smith's home around 9:30 a.m. before traveling back to Watson and Fisk's home. During the time of the offense and in the weeks leading up to and following the offense, Smith's known phone never pinged off a tower outside the Houston area.

On February 8, 2015, a few days after the police found Dean, a friend of hers received a text message threatening to hurt the friend and referencing Dean's death. The police learned that the threat had been sent by a phone purchased at a Walmart in Katy and activated shortly before the threat was sent. An officer with the Austin Police Department drove to the Walmart and obtained a copy of the receipt as well as surveillance footage of the person who purchased the phone. The surveillance footage showed two men entering Walmart, purchasing the phone, walking to a car, and driving off. The license plate number was visible on the footage, and the police learned that the car was registered to the grandfather of Watson's friend Williams.

The officer who drove to Katy later drove to a Walmart in Stafford to obtain surveillance footage of the person who purchased the first burner phone on February 3, 2015. The footage showed a man in a red hoodie talking on a cellphone the entire time he was in the store, buying another cellphone, walking to a white Toyota, and driving off. The license plate number for the Toyota could be seen on the footage, and the police learned that the car was registered to Fisk. The cellphone records for Watson's cellphone showed that Watson was on his

personal cellphone when the person in the red hoodie purchased the new cellphone, and the phone was pinging from a cellphone tower near the Walmart then.

As part of the investigation, the law-enforcement agencies obtained a warrant to do phone intercept monitoring on Clark's phone, Watson's phone, Smith's phone, Fisk's phone, and Williams's phone. In one call between Smith and Watson following the police's interviewing Unuigboje, Smith and Watson agree that they need to change numbers because Watson called Smith and Fisk trying to get directions and because the police were questioning Unuigboje about a 405 number. On another call, Smith said that the cellphone that he was using was connected to the house in which he was living but was not in his name. In another call, Smith and Watson again discussed whether Watson called him using a 405 number, and Smith said that Watson never called him from a 405 number because Watson also had a different burner phone in his possession then with a different area code. Smith and Watson agree that they should be fine because Smith was right about the phones. During an earlier call, Watson and Smith discussed Fisk being asked to submit to an interview, and Watson said that he thought Smith would be interviewed next. Watson expressed that they were both alright, but Smith stated that he believed people were watching him.

After listening to the intercepted phone calls, the police obtained a warrant to search Smith's home on Kenilwood. When the officers arrived, they discovered that Smith had moved out of the home but left behind personal items in the home. A search of Smith's room in his home revealed a receipt from when Smith purchased the phone that listed his grandmother as the subscriber. The police also discovered a second phone with a different number belonging to Smith. Records for the secondary line revealed that the phone called Unuigboje's phone 30 minutes before the third burner phone called Unuigboje's phone. A search of Smith's Facebook

account showed multiple instances in which Smith stated that his personal phone number was the one associated with his grandmother's account. In his Facebook account, Smith also indicated that he lived on Kenilwood.

When Smith was arrested later for a separate offense, he had the phone that listed his grandmother as the subscriber. The phone had pictures of Smith on the camera roll and his emails. The search of the phone also resulted in the discovery of a 2013 photo of two .25 caliber pistols, and a firearm forensic expert testified that the bullets recovered from Dean's body were all fired from the same weapon and that one of the guns in the photo was the type of pistol that would have produced the rifling pattern found on the recovered bullets.

Once the State finished calling its witnesses, both sides rested and closed. The jury charge included an instruction that Watson was an accomplice to the alleged offense and that, therefore, Smith could not be convicted based on Watson's testimony unless the testimony was corroborated. After considering the evidence presented at trial, the jury found Smith guilty of capital murder. Smith appeals his conviction.

DISCUSSION

In his first issue on appeal, Smith contends that the evidence was insufficient to corroborate the accomplice witness testimony in this case. In his second issue, Smith asserts that the trial court erred by removing one of the jurors.

Sufficiency of the Evidence

In challenging the sufficiency of the evidence supporting the accomplice-witness testimony, Smith asserts that the testimony and evidence presented through witnesses that were not accomplices established "at best that [he] was a mere acquaintance of both Clark and

Watson." As support, Smith notes that Unuigboje testified that he was unsure if he sold marijuana to Smith and argues that even if Unuigboje had testified that he sold marijuana to Smith, that sale "would not provide any meaningful connection to the charge of capital murder." Further, Smith emphasizes that the evidence showed that his personal phone never left Houston around the time of the offense. Additionally, Smith highlights that Watson testified that he found the gun on the driver's side of the vehicle that he was driving, and Smith asserts this is consistent with the evidence establishing that Clark and Watson, not Smith, formulated and executed a plan to kill Dean. Moreover, Smith notes that "no DNA evidence, fingerprints[,] or any kind of physical evidence or video evidence" connected him "to this capital murder." On the contrary, according to Smith, "[i]t was only Watson's testimony that egregiously caused this miscarriage of justice and without Watson's testimony, there is no other evidence that would tend to connect appellant to this capital murder."

A witness is an accomplice as matter of law "[i]f the witness has been charged with the same offense as the defendant or a lesser-included offense"; if the witness is charged "with the *same* offense as the defendant or a lesser-included of that offense," but the charges are dismissed "in exchange for the witness's testimony against the defendant"; or "the evidence is uncontradicted or so one-sided that no reasonable juror could conclude that the witness was not an accomplice." *See Ash v. State*, 533 S.W.3d 878, 886 (Tex. Crim. App. 2017) (emphasis added); *see also Medina v. State*, 7 S.W.3d 633, 641 (Tex. Crim. App. 1999) (noting that "[a] person is an accomplice if he . . . can be prosecuted for the same offense as the defendant or for a lesser-included offense"). "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the

offense." Tex. Code Crim. Proc. art. 38.14. This rule "is not mandated by common law or the federal constitution" and instead "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." *Blake v. State*, 971 S.W.2d 451, 454 (Tex. Crim. App. 1998) (internal footnote omitted).

Because the accomplice-testimony rule under article 38.14 is statutorily imposed, it "is not derived from . . . constitutional principles that define the legal . . . sufficiency standard[]." *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008) (quoting *Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007)). "When reviewing the sufficiency of non-accomplice evidence under article 38.14, we decide whether the inculpatory evidence tends to connect the accused to the commission of the offense." *Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011); *see Roys v. State*, 416 S.W.3d 229, 234 (Tex. App.—Amarillo 2013, pet. ref'd). In performing this analysis, "the reviewing court eliminates all of the accomplice testimony from consideration and then examines the remaining portions of the record." *Castillo v. State*, 221 S.W.3d 689, 691 (Tex. Crim. App. 2007). The non-accomplice evidence is viewed "in the light most favorable to the verdict," *Knox v. State*, 934 S.W.2d 678, 686 (Tex. Crim. App. 1996), and it "need not directly link the defendant to the crime" or "'establish his guilt beyond a reasonable doubt'" on its own, *Roys*, 416 S.W.3d at 234 (quoting *Castillo*, 221 S.W.3d at 691). Non-accomplice evidence may be circumstantial or direct. *See Smith*, 332 S.W.3d at 442. "[W]hen there are conflicting views of the evidence—one that tends to connect the accused to the offense and one that does not—we will defer to the factfinder's resolution of the evidence." *Id.*

Although "the accused's mere presence in the company of the accomplice before, during, and after the commission of the offense is insufficient by itself to corroborate accomplice

testimony, evidence of such presence, coupled with other suspicious circumstances, may tend to connect the accused to the offense." *Dowthitt v. State*, 931 S.W.2d 244, 249 (Tex. Crim. App. 1996). "Even apparently insignificant incriminating circumstances may sometimes afford satisfactory evidence of corroboration." *Id.* "[T]he tends-to-connect standard does not present a high threshold." *Turner v. State*, 571 S.W.3d 283, 287 (Tex. App.—Texarkana 2019, pet. ref'd). "There is no set amount of non-accomplice corroboration evidence that is required for sufficiency purposes." *Malone*, 253 S.W.3d at 257. If the non-accomplice evidence does not sufficiently corroborate an accomplice's testimony, "then the defendant is entitled to an acquittal on appeal." *Taylor v. State*, 10 S.W.3d 673, 685 (Tex. Crim. App. 2000).

In this case, phone records for Smith's, Watson's, and Clark's known cellphones established extensive communication among the three of them in the weeks leading up to and following the offense and showed that Smith's phone had also repeatedly communicated with the burner phones that were in the vicinity of the murder at the time of the offense. Of particular significance, the second burner phone called Smith's phone multiple times. When Smith did not answer one of the earlier calls from the second burner phone, Watson sent a text message to Smith's phone saying that Clark was trying to contact Smith from a "405 number," which was the area code for the second burner phone used in the offense. Following that exchange, the second burner phone called Smith's phone again, and Smith answered. Moreover, the phone records for the third burner phone showed that it went near Smith's house on the day of the offense, that the third burner phone called Fisk's phone, and that Watson's cellphone located at Fisk and his home was contemporaneously used to call Smith.

Additionally, Clark's and Smith's phones began exchanging texts and calls two months before the offense. After the first burner phone was purchased on February 3, 2015,

Watson's personal phone repeatedly called Clark's and Smith's phones. Moreover, Smith's phone called the third burner phone a couple of times on the day of the offense. Also on the day of the offense, Smith's secondary phone called Unuigboje a little before the third burner phone was used to call Unuigboje and before the third burner phone traveled toward Unuigboje. Although Unuigboje testified at trial that he did not remember if he sold Smith marijuana on the day of the offense, Unuigboje also admitted that Smith called him from a 405 number that day and that he previously told the Texas Rangers that he sold marijuana to Smith and another person that day.

Approximately five hours after the offense, Watson's phone and Smith's phones have twenty separate calls during a one-and-a-half-hour period starting at 3:00 a.m. Moreover, the phone records for Watson's phone demonstrated that the phone travelled to near Smith's home and that Smith's phone called Watson while Watson was driving. The phone records for Watson's phone documented that hours later Watson was travelling back to Houston from Bastrop and was heading toward Smith's home. *See Longoria v. State*, 154 S.W.3d 747, 758 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (observing that "[t]he main pieces of corroborative evidence in the present case are the cellular telephone records," noting that "[t]here is a natural and permissible assumption that calls from a person's cellular telephone were made by that person," and concluding that phone records "tend to connect appellant to the crime" because they showed "a flurry of communications and attempted communications between appellant" and others allegedly involved "during the course of the robbery and immediately thereafter"); *see also Barrera v. State*, 321 S.W.3d 137, 149 (Tex. App.—San Antonio 2010, pet. ref'd) (determining that non-accomplice evidence sufficiently corroborated accomplice witness's

testimony in part because cellphone records "revealed a pattern of frequent communications" among appellant and others allegedly involved in kidnapping "on the day of the kidnapping").

Moreover, on recorded phone conversations between Smith and Watson after the offense, they both talk about how they need to change their phone numbers because Watson called Smith and Fisk trying to get directions to Smith's house and because the police asked Unuigboje about a 405 number, which is the area code for the burner phone used to call Smith's phone on the day of the offense. In another call, Smith and Watson again discuss whether Watson had used a 405 number to call Smith. When talking about the investigation in another call, Watson said that he believed that the police would interview Smith next. *Cf. Casey v. State*, Nos. 14-04-01165-CR, 14-05-00165-CR, 2006 WL 348164, at *8 (Tex. App.—Houston [14th Dist.] Feb. 14, 2006, no pet.) (mem. op., not designated for publication) (concluding that accomplice witness testimony was sufficiently corroborated "[b]ased on the audio recording" of defendant "and the testimony of the non-accomplice witnesses").

Further, when the police executed a search warrant of Smith's home after Smith participated in the conversation about potentially being interviewed by the police, the police discovered that Smith had moved out. *Cf. Bigby v. State*, 892 S.W.2d 864, 883 (Tex. Crim. App. 1994) (explaining that evidence of flight or escape can support inference of guilt). When the police arrested Smith, he had on his person the phone that had been used to contact Watson's phone, Clark's phone, and the burner phones. Smith's phone had a photo of two pistols that were the same caliber as the weapon used to kill Dean, and one of those pistols was a type that would produce rifling characteristics like those present on the bullets retrieved from Dean's head.

Viewing the non-accomplice evidence in the light most favorable to the verdict, including the suspicious circumstances, we conclude that the evidence is sufficient to connect Smith to the capital murder of Dean.

In this issue, Smith argues that Fisk also "provided accomplice witness testimony." In presenting this argument, Smith refers to the testimony establishing that she had been charged with tampering with evidence for allegedly destroying Watson's red hoodie and that she was obligated to testify in this case as a requirement of her deferred-adjudication community supervision for an unrelated drug charge. Although Smith suggests that Fisk should be considered an accomplice, it is not entirely clear what relief he is seeking in making this claim.

To the extent that Smith is suggesting that Fisk's testimony should be disregarded in our sufficiency review, we note that the jury charge included an instruction on the proper consideration of the testimony from an accomplice witness and named Watson, not Fisk, as an accomplice witness. *Cf. Casey*, 2006 WL 348164, at *6 (disregarding defendant's assertion in challenge to sufficiency of non-accomplice evidence that another witness should have been considered "an accomplice witness" in sufficiency analysis and reasoning that jury charge instructed "the jury on consideration of accomplice testimony" and specified which witness was accomplice). In any event, the corroborating evidence detailed in the above sufficiency analysis does not address Fisk's testimony at trial.

To the extent that Smith is arguing that the trial court erred by failing to include in the jury charge an accomplice instruction for Fisk, that issue is multifarious. *See Davidson v. State*, 249 S.W.3d 709, 717 n.2 (Tex. App.—Austin 2008, pet. ref'd) (explaining that issue containing "more than one specific ground of error is a multifarious one" and that appellate court "may refuse to consider it"). Moreover, Smith's brief points to no supporting authority for that

proposition. *See* Tex. R. App. P. 38.1(i) (setting out requirements for briefs); *see also Jessop v. State*, 368 S.W.3d 653, 681 (Tex. App.—Austin 2012, no pet.) (concluding that complaints were inadequately briefed because appellant did not make argument or cite authority).

Even if we were to address this subissue, we would be unable to sustain it. When addressing an issue regarding an alleged jury-charge error, appellate courts must first decide whether there is error before addressing whether the defendant was harmed. *See Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). Based on the record here, the trial court did not err because Fisk was not an accomplice. Although Fisk agreed to testify in this case as a requirement of her deferred-adjudication community supervision, that agreement was for an unrelated drug charge. *See Ash*, 533 S.W.3d at 886. Moreover, although Smith notes that Fisk was charged with tampering with evidence for disposing of the red hoodie, tampering with or destroying evidence after a crime has been committed is insufficient to create accomplice liability. *See Worthen v. State*, 59 S.W.3d 817, 820 (Tex. App.—Austin 2001, no pet.). Moreover, the charges against Fisk were dismissed.

In any event, we would be unable to conclude that Smith was harmed by the omission. Because Smith did not object to this alleged jury-charge error, reversal would only be warranted if he suffered egregious harm. *See Neal v. State*, 256 S.W.3d 264, 278 (Tex. Crim. App. 2008). 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. *Arrington v. State*, 451 S.W.3d 834, 840 (Tex. Crim. App. 2015). Although nothing in the remainder of the jury charge corrected the alleged error, the entirety of the evidence compellingly established Smith's guilt. Moreover, although the State briefly mentioned Fisk's testifying that Watson called her for directions to Smith's house, the State emphasized that her

testimony was corroborated by the phone records. Similarly, although the State quickly discussed Fisk's testimony about Watson's breaking her car window, the State emphasized that the testimony was corroborated by her phone records and by the search of her car's revealing broken glass. The State also mentioned that Fisk testified that Watson admitted that Smith and he committed the crime and that she found Smith's jacket in her car after the incident, but the State also extensively detailed all the evidence indicating Smith's guilt. In light of the preceding, we would be unable to conclude that Smith suffered egregious harm from the alleged error. *Cf. id.* (explaining that "reversal for an unobjected-to erroneous jury instruction is proper only if the error caused actual, egregious harm to" defendant).

For these reasons, we overrule Smith's first issue on appeal.

Removal of Juror

In his second issue, Smith argues that the trial court erred by sua sponte dismissing one of the jurors after all the evidence had been presented but before the jury charge had been read to the jury. On the last day of trial, the trial court called one of the jurors and the court reporter to the judge's chambers. The trial court explained that it had been informed that the juror might have done some research on legal issues involved in the case, and the juror explained that he had been confused about the meaning of "reasonable doubt" and tried to find a definition for that term. Further, the juror stated that he told the other jurors that he had done the research but that he did not disclose the results of his search. The trial court then asked the juror and the court reporter to return to the courtroom. In the courtroom, the trial court stated that it was excusing the juror because he violated the trial court's instructions not to perform independent research. The trial court then instructed one of the alternates to serve on the jury.

On appeal, Smith acknowledges that trial courts may replace a juror with an alternate, but he asserts that trial courts must first find that the juror was disqualified from performing or unable to perform his duties. *See* Tex. Code Crim. Proc. art. 33.011. Moreover, Smith emphasizes that no such finding was made and that this Court should not presume that the juror was properly dismissed. Smith contends that dismissal was not warranted even though the trial court instructed the jury not to perform research on the internet because the Court of Criminal Appeals has determined that a previously required definition of "reasonable doubt" is no longer required. *See Paulson v. State*, 28 S.W.3d 570, 571, 572 (Tex. Crim. App. 2000). In other words, Smith suggests that the juror did not engage in anything improper because the topic he researched would have produced a useless result. Additionally, Smith contends that he was harmed by the removal of the juror because the juror's need to perform the research indicated that he was concerned about the sufficiency of the evidence supporting Smith's guilt. Accordingly, Smith asserts that the juror might have determined that he was not guilty, which might also have resulted in a deadlocked jury and a mistrial.

Generally, before a party may present "a complaint for appellate review, the record must show that . . . the complaint was made to the trial court by a timely request, objection, or motion" and that "the trial court . . . ruled on the request, objection, or motion, either expressly or implicitly" or "refused to rule on the request, objection, or motion, and the complaining party objected to the refusal." *See* Tex. R. App. P. 33.1(a). Preservation of error is a "systemic requirement" on appeal. *See Darcy v. State*, 488 S.W.3d 325, 327 (Tex. Crim. App. 2016). "An appellant fails to preserve error by failing to object when he had the opportunity." *Burt v. State*, 396 S.W.3d 574, 577-78 (Tex. Crim. App. 2013). "To avoid forfeiting a complaint on appeal, the party must 'let the trial judge know what he wants, why he thinks he is entitled to

it, and to do so clearly enough for the judge to understand him at a time when the judge is in the proper position to do something about it.'" *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009) (quoting *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)). Appellate courts should not address the merits of an issue that has not been preserved for appellate consideration. *See Blackshear v. State*, 385 S.W.3d 589, 591 (Tex. Crim. App. 2012).

In this case, Smith did not object when the trial court dismissed the juror or otherwise challenge the dismissal. Accordingly, we must conclude that Smith failed to preserve this issue for appellate consideration. *See Trinidad v. State*, 312 S.W.3d 23, 29 (Tex. Crim. App. 2010) (noting that defendants failed to object on grounds that article 33.011 of Code of Criminal Procedure runs afoul of article 36.22 and concluding that defendants procedurally defaulted statutory arguments on appeal); *see also Meador v. State*, Nos. 01-02-00505—00506-CR, 2003 WL 21026915, at *4 (Tex. App.—Houston [1st Dist.] May 8, 2003, pet. ref'd) (mem. op., not designated for publication) (emphasizing that defendant "did not object to the trial court's [sua sponte] dismissal of the juror" and determining that defendant failed to preserve right to complain on appeal).

Even if the alleged error had been preserved for appeal, we would be unable to sustain this issue. In presenting this claim, Smith asserts that the trial court failed to comply with the requirements of article 33.011 of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 33.011. Accordingly, the alleged error is nonconstitutional error, which must be disregarded unless the error affected Smith's substantial rights. *See* Tex. R. App. P. 44.2(b). An error affects a defendant's substantial rights when it has a substantial and injurious effect or influence on the jury's verdict. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

On the other hand, the error is harmless if it had no influence or only a slight effect on the verdict. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

The record before this Court does not show that the removal of the juror affected the verdict. The dismissed juror was replaced with an alternate juror who had been present for the trial, and the dismissed juror told the trial court that he had not provided the results of his research to the other jurors. Although Smith suggests that he was harmed by the removal because the dismissed juror had doubts about the sufficiency of the evidence, the record does not support that contention. The dismissed juror indicated that he was researching the legal question of the meaning of "reasonable doubt" and did not make any assertion that he believed that the evidence was insufficient to convict Smith. Moreover, as expressed above, the evidence supporting Smith's guilt was substantial. *See Motilla v. State*, 78 S.W.3d 352, 357-58 (Tex. Crim. App. 2002) (noting that overwhelming evidence of defendant's guilt is one factor to be considered in harm analysis under Rule 44.2(b)).

For these reasons, we overrule Smith's second issue on appeal.

CONCLUSION

Having overruled Smith's issues on appeal, we affirm the trial court's judgment of conviction.

Thomas J. Baker, Justice

Before Justices Baker, Kelly, and Smith

Affirmed

Filed: August 30, 2023

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