

**Affirmed and Opinion filed April 5, 2001.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-99-01144-CR**  
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**JOSHUA BRENT WELCH, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from 179th District Court  
Harris County, Texas  
Trial Court Cause No. 819,491**  
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**OPINION**

Joshua Brent Welch appeals a conviction for aggravated assault on the ground that the trial court erred in overruling his requested jury charge instruction that Aaron Pilcher be designated as an accomplice as a matter of law. We affirm.

On the night in question, a group of six individuals, including appellant, were involved in a "drive-by" shooting incident in which appellant fired some of the shots and Pilcher drove the vehicle. The shots were fired toward a house where Sherry Cryer lived, injuring at least three people who were standing outside. Appellant was charged by indictment with aggravated assault, found guilty by a jury, and sentenced by the jury to sixty-five years' confinement.

A person cannot be convicted upon the testimony of an accomplice unless that testimony is corroborated by other evidence tending to connect the defendant with the offense committed. TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979). An “accomplice” is a person who participates before, during, or after the commission of a crime and can be prosecuted for the same offense as the defendant or for a lesser-included offense. *Medina v. State*, 7 S.W.3d 633, 641 (Tex. Crim. App. 1999).

When there exists no doubt or the evidence clearly shows that a witness is an accomplice as a matter of law, the trial judge is under a duty to so instruct the jury. *Kutzner v. State*, 994 S.W.2d 180, 187 (Tex. Crim. App. 1999). Conversely, if the evidence is conflicting, and it is not clear whether a witness is an accomplice, it is proper to submit to the jury the issue of whether an inculpatory witness is an accomplice witness as a matter of fact, with instructions defining the term accomplice, even though the evidence weighs in favor of the conclusion that the witness is an accomplice as a matter of law. *See Blake v. State*, 971 S.W.2d 451, 455 (Tex. Crim. App. 1998); *Harris v. State*, 738 S.W.2d 207, 216 (Tex. Crim. App. 1986).

In this case, appellant claims that he was entitled to a jury instruction that Pilcher was an accomplice as a matter of law because: (1) Pilcher’s testimony constituted a judicial confession to his committing the offense of assault; (2) Pilcher knew that appellant had guns in the car and that appellant’s plan was to scare the people standing outside Cryer’s residence; and (3) Pilcher aided the shooters by stopping the vehicle while they fired their guns and then driving them away.

Although Pilcher admitted driving the vehicle to Cryer’s house, knowing there were guns in it, then driving it away after the shooting, there was also evidence that, in doing so, Pilcher was acting under duress. Pilcher repeatedly testified that he was scared and unsure what to do because he knew appellant was carrying a gun. Pilcher testified that he did not want to stop the vehicle at Cryer’s house, but either appellant or another passenger yelled at him to do so. In addition, Pilcher and Brittany Freeman, another passenger in the vehicle, both testified that appellant told them not to mention the incident to anyone and

that they complied because they were afraid of appellant. In light of this conflicting evidence, the issue of whether Pilcher participated in the crime willingly or out of fear, and thus, whether he was an accomplice,<sup>1</sup> was a fact question. Therefore, the trial court did not err in denying appellant's request to instruct the jury that Pilcher was an accomplice as a matter of law.

In addition, even if the trial court erred in denying appellant's request for the instruction, he would be entitled to reversal only if it appeared from the record that the error was calculated to injure appellant's rights or that he was denied a fair and impartial trial. TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 1981); *Jimenez v. State*, 32 S.W.3d 233, 237 (Tex. Crim. App. 2000). A determination that Pilcher was an accomplice, whether as a matter of fact or law, is material only for invoking the requirement that his testimony be corroborated. *See* TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979). Because appellant does not contend that Pilcher's testimony was not corroborated, and the record reflects instead that his testimony was sufficiently corroborated by other non-accomplice evidence, no harm is indicated.<sup>2</sup> Accordingly, appellant's issue is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman  
Justice

Judgment rendered and Opinion filed April 5, 2001.

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<sup>1</sup> If Pilcher's involvement was compelled by a threat of death or serious bodily injury or by force or a threat of force, he would not be guilty of an offense. *See* TEX. PEN. CODE ANN. § 8.05(a), (b) (Vernon 1994). In that event, he would also not be an accomplice. *See Easter v. State*, 536 S.W.2d 223, 226 (Tex. Crim. App. 1976); *State v. Trevino*, 930 S.W.2d 713, 715 (Tex. App.—Corpus Christi 1996, pet. ref'd).

<sup>2</sup> *See Burns v. State*, 703 S.W.2d 649, 651-52 (Tex. Crim. App. 1985) (analyzing harm from error in instructing jury on accomplice as a matter of fact rather than law based on the extent to which the accomplice testimony was corroborated).

Panel consists of Justices Edelman, Frost, and Lee.<sup>3</sup>

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<sup>3</sup> Senior Justice Norman Lee sitting by assignment.