Affirmed and Opinion filed December 16, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00547-CR

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JOHN WAYNE ALEXANDER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 779,736

O P I N I O N

John Wayne Alexander appeals his conviction by a jury for capital murder. The trial court sentenced appellant to life imprisonment. In nine issues, appellant contends: (1) through (5), the trial court erred in allowing the jury to determine if Charles Orin "Red" Ross (Ross) was an accomplice witness; (6) through (8), the evidence is legally and factually insufficient to sustain appellant's conviction; and (9) the trial court erred in refusing to quash the jury panel after telling the venirepersons that a co-defendant's trial counsel asked the panel a "trick question" during voir dire. We affirm.

On March 2, 1994, after appellant and his brother, Mitchell Alexander (Mitchell), tried to break her neck, Ronald Alexander dragged semiconscious Esther Shrader (Esther) to Mitchell's car, and put her into the trunk. Ronald told Ross to drive, and Ross drove Ronald and appellant to a wooded area where Ronald beat Esther to death with a bumper jack. Earlier that day, the Alexander brothers (Ronald, Mitchell, and appellant) drank beer for several hours with Lewis Pyle (Pyle) at a bar called The Watering Hole. The group then went back to Blackie Barilleaux's (Blackie) trailer, and Pyle went into a bedroom and took a nap. Later in the evening, Mitchell aroused Pyle, who got up and went into the living room and saw Blackie, appellant, Ronald, Mitchell, Ross, and Esther. Esther had come over to Blackie's from her trailer next door to retrieve her vacuum cleaner.

Ronald was mad at Pyle because Pyle had finished the beer, and Ronald knocked him down and tried to break his neck. Mitchell kicked Esther in the back, and knocked her onto the couch. Ronald dragged Esther by her hair to a bedroom where he sexually assaulted her. When Ronald dragged Esther into the bedroom, Pyle left Blackie's trailer to call the police. Ross heard Esther yelling, "Please, don't do it!" After Ronald was finished, Mitchell went into the room, sexually assaulted her, and Esther screamed again. After Mitchell finished, Blackie went in the room, and sexually assaulted Esther. Appellant and Ross declined an invitation by Blackie to go into the room and molest Esther.

After they had finished with Esther, Ronald told the rest of the group that they could not let Esther go because they would all go to jail for it. Ronald, Mitchell, and appellant decided to "get rid of her," and appellant attempted twice to break her neck by twisting her head with his hands. Appellant knocked her out, but did not kill her. Mitchell then tried to break her neck, but also failed to kill her. Ronald told Ross to drive Mitchell's car, and that only he, Ross, and appellant were going to take Esther away. Ronald then dragged Esther by her hair to Mitchell's car and put her in the trunk. Ronald then told Ross to drive to the Old River Bridge on Highway 90. Ross drove appellant and Ronald to the bridge, but there was too much traffic around to throw Esther off the bridge, so Ronald told Ross to go down to a dirt road about one-half mile away. Ross drove to the dirt road, as instructed, and parked. Ronald took Esther out

of the trunk and she said, "don't do it." Ronald then told Esther, "you going to die," and dragged her off into the woods near the dirt road, carrying a bumper jack and a can of lighter fluid. Ronald held Esther's head down on the ground with his foot, and then struck her twice in the head with bumper jack causing her death. Appellant retrieved the bumper jack and put in the trunk of the car. Appellant and Ronald told Ross that he was just as involved as they were, and Ross testified, "I figured they'd kill me the same way they did her if I tell anybody."

After leaving the area, Ronald told Ross to drive them to a Stop N Go where Ronald picked up a twelve-pack of beer. Thereafter, Ross drove Ronald and appellant back to Blackie's trailer. The next day, Ross threw the bumper jack under an abandoned trailer next to Blackie's trailer. Ross stated that he found Esther's clothes in Blackie's trailer, and he threw them in a dumpster nearby. Ross told appellant, Ronald, Mitchell, that he had thrown the jack under the trailer and the clothes in a dumpster, and they asked him why Ross didn't throw the jack in the dumpster. However, the jack remained under the trailer where it was recovered by the police three years later. Appellant, Ronald, Mitchell, and Ross agreed that they would tell the police that the last time they saw Esther was when she was walking away with Lewis Pyle. Ross stated several times that he participated in the crime because he was in fear of his life. Shortly after the murder, appellant, Ronald, Mitchell, and Blackie left the trailer and moved to Louisiana.

Lewis Pyle contacted the sheriff's department March 3, 1994, and Deputy Porter investigated Pyle's complaint. Pyle told Deputy Porter what happened at Blackie's trailer, that he was assaulted by Blackie and Ronald, and he was worried about Esther. Porter went to Blackie's trailer and talked to Blackie and Ronald. Porter observed that Ronald had a long scratch on his left forearm, and it appeared to Porter the scratch was made by a woman's fingernail. Both Ronald and Blackie told Porter they did not know the whereabouts of Esther.

Esther lived with Michael Crum in a trailer next to Blackie's. After Esther's disappearance, Crum asked Ross several times what had happened to Esther, but learned nothing. Near the end of 1996, a man found Esther's skull in the woods where she had been murdered, and turned it over to State Trooper Michele Cianci, Texas Department of Public

Safety. Esther's skull was positively identified through her dental records. In May 1997, Ross told Crum about the murder, and they went to the sheriff's department where Ross gave Detective Norman Welsh a written statement. Ross told Welsh where he had thrown the bumper jack, and Welsh retrieved it from under the abandoned trailer next to Blackie's trailer. Appellant was arrested shortly thereafter and charged with capital murder.

In issues one and two, appellant contends that Ross was an accomplice as a matter of law, and the trial court erred in failing to so instruct the jury. He contends it was error to allow the jury to determine if Ross was an accomplice. In issues three and four, appellant further contends that the trial court should not have instructed the jury that the defense of duress was applicable to its determination that Ross was an accomplice. In issue five, he further asserts that the trial court should have included a specific burden of proof in its instruction on duress.

An accomplice witness is someone who has participated with someone else before, during or after the commission of a crime. *Kunkle v. State*, 771 S.W.2d 435, 439 (Tex.Crim.App. 1986), *cert. denied*, 114 S.Ct.122(1987); *Harris v. State*, 645 S.W.2d 447 (Tex.Crim.App.1983); *Russell v. State*, 598 S.W.2d 238 (Tex.Crim.App.1980), *cert. denied*, 449 U.S. 1003, 101 S.Ct. 544, 66 L.Ed.2d 300 (1981); *Carrillo v. State*, 591 S.W.2d 876 (Tex.Crim.App.1979).

If the witness cannot be prosecuted for the offense with which the accused is charged, then the witness is not an accomplice witness as a matter of law. *Kunkle*, 771 S.W.2d at 435. Moreover, a witness is not an accomplice witness merely because he or she knew of the offense and did not disclose it, or even concealed it. *Id.* The witness' presence at the scene of the crime does not render that witness an accomplice witness. *Id.* Last, complicity with an accused in the commission of another offense does not make that witness' testimony that of an accomplice witness for the offense for which the accused is on trial if there is no showing of the witness' complicity in that offense. *Id.*

If there is doubt whether a witness is an accomplice witness, the trial court may submit the issue to the jury even though the evidence weighs in favor of the conclusion that the witness is an accomplice as a matter of law. *Id.*

Ross testified that he was afraid the Alexander brothers would kill him if he did not do as they instructed him. He stated that he could not help Esther because he was afraid for his own life. He saw Ronald and Blackie beat Lewis Pyle, for supposedly drinking all the beer. He saw Mitchell kick Esther, and then drag her into the back bedroom. He saw Mitchell and appellant try and break Esther's neck. After Ronald killed Esther with the bumper jack, Ronald and appellant told Ross that he was just as involved as they were. Ross stated he felt that they meant they would kill him if he told anybody about the murder. Ross heard appellant and his brothers discussing the possibility of killing Lewis Pyle as well. Michael Crum and Deputy Hennessy testified that Ross told them he was scared of the Alexander brothers, and could not tell anyone about the murder for fear they would kill him. Appellant produced no evidence to controvert Ross's testimony.

Although there is evidence that Ross was present during the actual murder of Esther, there is no evidence to show that Ross affirmatively participated in the murder. He did not intervene on Esther's behalf when Mitchell kicked her in the back, because he feared for his life. He did not partake in the multiple sexual assaults upon Esther in Blackie's trailer. He did not help Ronald drag Esther to Mitchell's car, and help Ronald put her in the trunk. He had no choice but to drive Mitchell's car because he was told to do so by Ronald. Ronald told Ross where to go. Ross took no part of the actual killing. Ross stated he did throw the jack under the trailer the next day after the killing, and he did throw Esther's clothes in a dumpster. However, the record is silent as to whether he willingly did this as an after-the-fact participant, or whether he acted out of fear of his life. Ross did state that his participation in the entire crime was out of fear that the Alexander brothers would kill him.

No charges were filed against Ross for his participation in the crime. A person is an accomplice if he or she could be prosecuted for the same offense as the defendant, or a lesser

included offense. *Blake v. State*, 971 S.W.2d 451, 454-455 (Tex.Crim.App. 1998). A person is an accomplice if there is sufficient evidence connecting them to the criminal offense as a blameworthy participant. *Id.; Singletary v. State*, 509 S.W.2d 572, 575 (Tex.Crim.App.1974). "[T]he test is whether or not there is sufficient evidence in the record to support a charge against" the witness alleged to be an accomplice. *Morgan v. State*, 171 Tex.Crim. 187, 346 S.W.2d 116, 118 (1961). To determine whether the *Morgan* witnesses were accomplices, the court of criminal appeals examined the record for evidence of their participation in the crime. *See Blake*, 971 S.W.2d at 454-455. Whether the person is actually charged and prosecuted for their participation is irrelevant to the determination of accomplice status--what matters is the evidence in the record. *Id.* Having examined the record in this case, we find there was no evidence that Ross participated in the murder of Esther. *See Kunkle*, 771 S.W.2d at 439. There must be some evidence of an affirmative act by the witness committed to assist in commission of the offense before that witness may be considered an accomplice. *Id.* at 441. Ross stated he threw the bumper jack under a trailer, and threw Esther's clothes in a dumpster. However, there is no evidence that these acts were intentional on his part or that they were done out of fear for his life. Since there was no evidence that Ross participated in the murder, he was not an accomplice witness as a matter of law.

By disposing of the bumper jack and Esther's clothes the day after the murder, Ross would possibly be subject to prosecution under section 38.05, Texas Penal Code, for hindering apprehension or prosecution, because he aided the Alexander brothers with "any means of avoiding arrest or effecting escape." TEX. PEN. CODE ANN. § 38.05(a)(2) (Vernon 1994 & Supp. 1999). The court of criminal appeals has held that a person who would have been an "accessory after the fact" under former law, was an accomplice witness within the procedural statute requiring corroboration. *Easter v. State*, 536 S.W.2d 223, 227 (Tex.Crim.App.1976). Under the 1974 Penal Code, the distinction between a principal and an accomplice (to the crime) was abolished and an accessory has been eliminated as a party to a crime and replaced with section 38.05. *Id.* at 228. Therefore, an accessory cannot be an accomplice witness whose testimony is required to be corroborated. *Id.* at 229. *See also Harris v. State*, 738

S.W.2d 207, 215 (Tex.Crim.App.1986); *Navarro v. State*, 863 S.W.2d 191, 202 (Tex.App.-Austin 1993), *pet. refused*, 891 S.W.2d 648 (Tex.Crim.App.1995) (the fact that witness was present at the time of the offense, that he failed to disclose the crime, hid the weapon after the murder, that he was involved in other crimes, and that he might be subject to prosecution for the separate offense under section 38.05, Texas Penal Code, for his actions after the killing would not constitute him an accomplice witness or raise any question about his status as such a witness which would require a fact issue for the jury as to accomplice status). Since there was no evidence that Ross intentionally disposed of the bumper jack and Esther's clothes, he cannot be an accomplice witness for these reasons as a matter of law or fact. *Easter*, 536 S.W.2d at 229.

We recognize that the testimony of a witness that he was without knowledge or that he was forced or coerced does not compel the conclusion that he was not an accomplice witness, but if a State's witness implicates himself, his statement that his participation was compulsory raises the issue of fact as to whether his testimony is or is not that of an accomplice witness. *Easter v. State*, 536 S.W.2d 223, 226 (Tex.Cr.App.1976); *Drummond v. State*, 624 S.W.2d 690, 692 (Tex.App.--Beaumont 1981), *review refused*, 624 S.W.2d 692 (Tex.Crim.App.1982). The same is true where the witness' actions were caused by fear of appellant, where the actions of the witness are reasonably consistent with the expressed fear. *Drummond*, 624 S.W.2d at 692.

The trial court submitted the issue of whether Ross was an accomplice witness as a question of fact for the jury to decide. Where there is a doubt whether a witness is an accomplice, submitting the issue to the jury is sufficient even though the evidence seems to preponderate in favor of the conclusion that the witness is an accomplice as a matter of law. *Id.* It is only when the evidence clearly shows that the witness is an accomplice witness as a matter of law that the trial court has a duty to so instruct the jury. *Id.*

The trial court properly refused to instruct the jury that Ross was an accomplice witness as a matter of law. Issues one and two are overruled.

In issue three, appellant contends the trial court erred in instructing the jury that the defense of duress was applicable to the determination of whether or not Ross was an accomplice. In issues four and five, appellant contends the trial court erred by not instructing the jury as to the "appropriate" burden of proof to be utilized by the jury in determining how the defense of duress would be applicable to Ross. Appellant cites no authority to support his conclusory argument that the trial court's duress charge was outside the scope of accepted law, and these grounds are waived. TEX. R. APP. P. 38.1(h); *See also Vuong v. State,* 830 S.W.2d 929, 940 (Tex.Crim.App.1992), *cert. denied,* 506 U.S. 997, 113 S.Ct. 595, 121 L.Ed.2d 533 (1992); *Bullard v. State*, 891 S.W.2d 14, 15 (Tex.App.--Beaumont 1994, no pet.). Appellant's contentions in issues three, four, and five, concerning the erroneous jury charge, are overruled.

In issue six, appellant contends the evidence is legally insufficient to convict the appellant for capital murder in that the testimony of Ross was not sufficiently corroborated.

The accomplice witness rule provides:

> 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. ANN. art. 38.14 (Vernon 1979 & Supp. 1999).

The test for weighing the sufficiency of corroborative evidence is to eliminate from consideration the testimony of the accomplice witness and then examine the testimony of other witnesses to ascertain if there is evidence which tends to connect the accused with the commission of the offense. *Hernandez v. State*, 939 S.W.2d 173, 176 (Tex.Crim.App. 1997); *Reed v. State*, 744 S.W.2d 112, 125 (Tex.Crim.App.1988). The non-accomplice evidence need not be sufficient in itself to establish the accused's guilt beyond a reasonable doubt. *Reed*, 744 S.W.2d at 126. Nor is it necessary for the non-accomplice evidence to directly link the accused to the commission of the offense. *Reynolds v. State*, 489 S.W.2d 866, 872

(Tex.Crim.App.1972). The accomplice witness rule is satisfied if there is some non-accomplice evidence which tends to connect the accused to the commission of the offense alleged in the indictment. *Gill v. State*, 873 S.W.2d 45, 48 (Tex.Crim.App.1994) (citing *Gosch v. State*, 829 S.W.2d 775, 777 (Tex.Crim.App.1991), *cert. denied*, 509 U.S. 922, 113 S.Ct. 3035, 125 L.Ed.2d 722 (1993); *Cox v. State*, 830 S.W.2d 609, 611 (Tex.Crim.App.1992).

Ross testified that he was instructed to drive Mitchell's car from Blackie's trailer after Mitchell and appellant tried to break Esther's neck. Ross testified the car was a maroon Pontiac. Michael Crum, Esther's common-law husband, testified Mitchell owned white Pontiac with a brown, "landau" roof. Lewis Pyle stated that Mitchell owned a Pontiac. Ross stated that Ronald dumped a semiconscious Esther into the trunk of Mitchell's car, and then Ross drove appellant and Ronnie to the road off of Highway 90 where Ronnie killed Esther and left her. Crum's and Pyle's testimony sufficiently corroborates Ross's testimony that Mitchell's Pontiac, either brown and white, or maroon, was used to take Esther to the area where she was murdered. This tends to connect appellant to the commission of the offense as a party acting together with his other brothers because Esther was last seen by Lewis Pyle at Blackie's trailer on the night of her murder after she had been kicked by Mitchell, and then dragged to a bedroom by Ronald. The next day Esther could not be found and the same people that had beaten her and dragged her into the bedroom all testified they last saw her leaving the trailer with Lewis Pyle. Lewis Pyle was not a suspect in the killing. It wasn't until three years later that Esther's remains were found several miles from Blackie's trailer in some woods. These suspicious circumstances indicated Esther was transported from Blackie's trailer to these woods in Mitchell's Pontiac. Appellant and Ronald had motive and opportunity to transport Esther in Mitchell's car to the remote location, and kill her.

On December 12, 1996, DPS trooper Michele Cianci met with George Wood who lived at the end of road off Highway 90 where the murder took place. Wood found Esther's skull and a few bones in the woods near his residence. The skull was positively identified as Esther's skull by forensic dental testimony. This would corroborate Ross's testimony that he drove

down an old road near the river bridge on Highway 90 and witnessed the murder. This would tend to connect appellant to the murder as a party. Appellant, Blackie, Ronald, and Mitchell were the last persons to see Esther alive, and all of them had the motive and opportunity to drive her to the woods and kill her. The location of Esther's skull would create suspicious circumstances indicating that the Alexander brothers and Blackie were lying to Detective Welsh when they said they last saw Esther leaving Blackie's trailer with Lewis Pyle. Esther's skull being found in the woods indicated she was transported there, and the Alexander brothers and Blackie were the last persons to see her alive, and they had the motive and opportunity to kill her.

On the night of the murder, Lewis Pyle testified he was at Blackie's trailer and saw Ross, Blackie, appellant, Mitchell, Ronnie, and Esther. He stated that when Mitchell kicked Esther in the back, he stood up but was struck in the face by Ronald. He also observed Ronald drag Esther to a bedroom. Pyle then left to call the police. This would corroborate Ross's testimony concerning the events in the trailer immediately prior to Esther's sexual assaults by Mitchell, Ronnie, and Blackie. This would tend to connect appellant to Esther's murder as a party. Ross testified that the Alexander brothers and Blackie agreed they would have to get rid of Esther because of what they had done to her. The reasons for murdering Esther were the sexual assaults on her which took place immediately after Pyle left the premises. Therefore, the suspicious circumstances witnessed by Pyle before left Blackie's trailer showed that the Alexander brothers and Blackie had a motive and an opportunity for killing Esther. They were the last persons to see her alive, and they lied to the police about not knowing her whereabouts.

On March 5, 1994, Detective Norman Welsh talked to appellant and Blackie and asked them if they knew anything about Esther. Both appellant and Blackie told Detective Welsh that they saw Esther leave Blackie's trailer with Lewis Pyle on the night she was murdered, March 2, 1994. This would corroborate Ross' testimony that they all agreed that they would tell anyone that asked that they last saw Esther leaving Blackie's trailer with Lewis Pyle and walking down the road. On March 8, 1994, Detective Welsh interviewed Ronnie who told the

detective the same story. This strongly tends to connect appellant, Blackie, Mitchell, and Ronnie, with the murder in that they were all using the same lie to avoid prosecution.

On May 12, 1997, Ross told Detective Welsh about the murder, and took him to the abandoned trailer next to Blackie's trailer and showed him where he threw the murder weapon, the ratchet part of the bumper jack. In a demonstration by Dr. Tommy Brown, Harris County Medical Examiner, he showed Esther's skull had three square type teeth marks on it that exactly fit the ratchet's teeth. This would corroborate Ross' testimony that a bumper jack was used to kill Esther, which took place in the woods near a road off Highway 90. This would be another suspicious circumstance tending to connect appellant to the murder of Esther as a party.

Shortly after Esther's murder, the Alexander brothers and Blackie moved to Louisiana. This also would be a suspicious circumstance because flight indicates feelings of guilt.

Evidence that appellant was in the company of the accomplice at or near the time or place of a crime is proper corroborating evidence to support a conviction. *Jackson v. State*, 745 S.W.2d 4, 13 (Tex.Crim.App.1988) (presence in company of accomplice near time of offense not alone conclusive, but important factor for corroboration), *cert. denied*, 487 U.S. 1241, 108 S.Ct. 2916, 101 L.Ed.2d 947 (1988). Evidence of flight and guilty demeanor, coupled with other corroborating circumstances, may tend to connect a defendant with the crime. *Burks v. State*, 876 S.W.2d 877, 888 (Tex.Crim.App.1994), *cert. denied*, 513 U.S. 1114, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995); *see also Passmore v. State*, 617 S.W.2d 682, 685 (Tex.Crim.App.1981) (evidence presented at trial which shows flight serves to corroborate accomplice testimony).

All the law requires is that there be some non-accomplice evidence which tends to connect the accused to the commission of the offense. While individually these circumstances might not be sufficient to corroborate the accomplice testimony, taken together, we find that rational jurors could conclude that this evidence sufficiently tended to connect appellant to the offense. *See Cox*, 830 S.W.2d at 612 (holding evidence of other

suspicious circumstances filled sufficiency gap left by evidence of appellant's mere presence at scene of offense); *Paulus v. State*, 633 S.W.2d 827, 846 (Tex.Crim.App.1981) (evidence showing motive or opportunity can be considered in connection with other evidence tending to connect the accused with the crime). *See Hernandez*, 939 S.W.2d at 179. We overrule appellant's contention in issue six that the evidence was legally insufficient to sustain his conviction because there was no corroboration of Ross' testimony.

In issue seven, appellant contends the evidence is legally insufficient to support appellant's conviction because the evidence was insufficient to prove Ross's defense of duress. The evidence clearly indicates that Ross participated to some degree in the crime, but only out of fear for his life. Ross told this to Michael Crum and the police officers. Appellant, Ronald, Mitchell, and Blackie were violent individuals and were quite capable of killing Ross, and they had considered killing Pyle. Appellant presented no evidence to refute the State's evidence of duress. Appellant's argument goes to the credibility of the witnesses which is a jury determination. *Cunningham v. State*, 877 S.W.2d 310, 312 (Tex.Crim.App. 1994). We overrule appellant's contention in issue seven.

In issue eight, appellant contends the same evidence is factually insufficient to support appellant's conviction because the evidence was insufficient to prove Ross's defense of duress.

A factual sufficiency review must be appropriately deferential so as to avoid the appellate court's substituting its own judgment for that of the fact finder. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997). This court's evaluation should not substantially intrude upon the fact finder's role as the sole judge of the weight and credibility of witness testimony. *Id*. The appellate court maintains this deference to the fact findings, by finding fault only when "the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust." *Id*. We will defer to the jury's fact findings and hold that the verdict is not against the great weight of the evidence presented at trial so as to be clearly wrong and unjust. We overrule appellant's contention in issue eight.

In issue nine, appellant contends that the trial court erred in refusing to quash the jury panel due to a comment made by the trial court that the trial counsel for appellant's co-defendant asked the venirepersons a "trick question." The "trick question" asked was:

> If an accomplice witness testified in a criminal case and you believed that witness' testimony, but there was no other testimony in the case to show that the person on trial had committed the offense, would you be able to find the person on trial not guilty based upon this accomplice witness rule?

Many venirepersons responded that they would find the defendant not guilty, and one venireperson asked: "[Y]ou know, I guess I'm struggling that you would have a scenario where you would have absolutely no other information to offer besides this." To which the trial court replied:

> Well, let me – I hate to interrupt lawyers, but you are probably right. If that were the case, the case would never get to the jury. There would be an instructed verdict of not guilty. So, it's a trick question.

Trial counsel objected to the statement, as follows:

> There would be an inference that the Court is giving the panel if the Court does not grant it, that it would not be a consideration for the jury to consider.

The trial court responded by stating:

> The inference is if the State doesn't prove what they've got to prove, I'm bound by the law to instruct the verdict of not guilty. There's no inference of anything. If there is no corroboration of an accomplice witness, the law says it's [*sic*] not guilty.

Appellant argues that such a comment by the trial court undermines the trial counsel's credibility and indicates a disbelief in the defense's position. Appellant cites *McClory v. State*, 510 S.W.2d 932, 934 (Tex.Crim.App.1974) in support of this proposition. *McClory* involved a statement by the prosecutor during final argument that the judge did not necessarily

believe self-defense was involved although the charge contained a self-defense instruction. *Id.* at 933. Defense counsel objected to the prosecutor's statement "saying what the judge believes about anything." To which the trial court stated: "He didn't say I did; he said I didn't. Overruled." The court of criminal appeals held that the trial court's remark was a comment on weight of the evidence and was reasonably calculated to prejudice the defendant's rights and benefit the State, in violation of article 38.05, Texas Code of Criminal Procedure.

In this case, the trial court answered, and stated the correct rule of law: that without corroboration of an accomplice witness, the law would be required to enter an instructed verdict of not guilty. After this, an exchange occurred between appellant's counsel and the trial court, but appellant did not pursue any type of adverse ruling on his alleged objection to preserve error on this appeal. Appellant neither asked for an instruction by the trial court to disregard its comment to the panel, nor did appellant ask for a mistrial.

The proper method of pursuing an objection until an adverse ruling is to (1) object and, if the objection is sustained, (2) request an instruction to disregard, and (3) if an instruction is given, move for a mistrial. *Harris v. State*, 784 S.W.2d 5, 12 n. 4 (Tex.Crim.App.1989). TEX. R. APP. P. 33.1(a); *Moore v. State*, 907 S.W.2d 918, 921 (Tex.App.-Houston(1 Dist.) 1995, pet. ref'd). By not pursuing his objection and obtaining an adverse ruling, appellant has waived this contention. We overrule appellant's contentions in issue nine.

We affirm the judgment of the trial court.

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Bill Cannon
Justice

Judgment rendered and Opinion filed December 16, 1999.

Panel consists of Justices Robertson, Cannon, and Lee[1].

Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Justices Sam Robertson, Bill Cannon, and Norman Lee sitting by assignment.