Affirmed and Opinion filed May 28, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00099-CR

ZACHARY FOYT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Cause No. 79248-CR

OPINION

A young woman gave an account at trial of a murder that her ex-boyfriend recounted to her, and the State presented corroborating evidence. Appellant Zachary Foyt contends the jury's murder finding is not supported by legally sufficient evidence on the grounds that (1) the State lacked DNA evidence; (2) appellant did not confess to police; (3) witness testimony lacked credibility; (5) the murder weapon was not recovered; (6) the State lacked evidence placing appellant at the crime scene; and (7) there was evidence implicating someone else

in the murder. Appellant also asserts the trial court erred in (1) denying his requested jury charge instructions and motion to suppress his videotaped statement admitted at trial, (2) removing a juror as disabled, (3) admitting evidence that he purchased a gun that could have been used to kill the complainant, and (5) denying his motion for mistrial. We affirm.

Background

Jubal Alexander had finished the night shift at his job in Chocolate Bayou, Texas on April 27, 2016. He went to the gym that morning. Afterward, he parked his truck under a bridge near a boat ramp not far from the plant where he worked. He had been showering at the gym and sleeping in the truck so he could save money to send home to his girlfriend in Port Arthur. After 9:19 a.m., there was no outgoing activity from Alexander's cell phone. No one heard from Alexander again.

Meanwhile, appellant had no outgoing activity on his cell phone from 11:49 a.m. until 2:23 p.m. that day. Cell phone tower records, though inexact, placed appellant in the area surrounding the boat ramp during that timeframe. Appellant had texted his grandmother at 9:38 a.m.: "decided not to show up for work today." Work records corroborated that appellant did not work on April 27 or 28.

Appellant had a friend, nicknamed Sparky, who lived near the boat ramp. Appellant called Sparky on April 30 but apparently did not reach him. Appellant followed up with a text: "I was just calling for some [advice;] been thinking and an idea occurred[;] thought to shoot it by you first." Appellant was supposed to help his dad with a crawfish boil that night and invited Sparky, but Sparky was in Angleton. Appellant texted, "Alright[,] come over [to] my place[;] I'll tell you more." Appellant's dad later asked appellant, "Where are you[,] you still coming?"

Appellant responded, "Sorry I had something come up." After an outgoing phone call to Sparky at 9:12 p.m., appellant's cell phone records showed no activity until 12:45 a.m. on May 1.

Appellant started texting his ex-girlfriend, Lauren, at 12:51 a.m.:

- "Hey was just wanting to say goodbye. I'm planning on leaving for good."
- "I'll be fine but it's something I did I can't say for I feel you may even look at me different."
- "I'm not staying to burn."

In the morning, Lauren's father, Laurence, was awakened by his wife. Something she said made him concerned about appellant. At the time, appellant was renting an apartment from Laurence. Laurence went to see him. When Laurence arrived, he noticed appellant was packing to leave. Appellant told Laurence he was going to sell his possessions and move to Colorado because "he did something but he couldn't [say] what it was." Appellant showed Laurence some letters he had written to his family members in which he referenced "giving his stuff away." Laurence became even more worried for appellant and kept checking on him throughout the day.

The next day, appellant went to see Lauren's mother, Frances. He told her that he had done something wrong, "he had a lot of demons he needed to go release," and if he stayed in the area, "he would hurt other people he loved." Frances, not knowing any details about what appellant had done and thinking "maybe he might have beat somebody up really bad," suggested he should go to Colorado to make a fresh start.

Lauren texted appellant on May 3, asking why he had to leave. He responded, "[T]he reason is bad enough," and "I couldn't tell . . . you what I did

but when it's found out it's more likely going to be on the news." Lauren had a feeling at that point that appellant had hurt someone and asked why he "did it," to which he responded, "Because it felt good." Later that day, Lauren texted, "Maybe what you did isn't so bad." Appellant said, "It is." Lauren asked if appellant broke the law, and he said, "[Y]es I did."

Two minutes later, Lauren called appellant. According to Lauren, appellant told her that he found someone in a truck by the water and shot him in the head. Appellant also said the man was around his age and the truck had a Mississippi license plate. After he talked to a friend with a weird nickname about "what to do about the bullet," appellant reported that he returned to the scene "[l]ike a day" later and beheaded the man with a knife to hide ballistic evidence. There was a bad smell because the body had been decomposing. Appellant told Lauren he was planning to flee to Colorado.

The same day, Alexander's decapitated body was discovered in the truck near the boat ramp. By that point, his body had been decomposing in the Texas heat for six days. Alexander and appellant were both 24 years old at the time of the murder. The truck had Mississippi license plates—Alexander had purchased it in that state but had not transferred the title. Alexander's head was never found.

The medical examiner classified Alexander's death as "homicidal death by unknown means with . . . postmortem decapitation." A forensic anthropologist determined that the decapitation occurred when there was still soft tissue on the bones and likely it took two to four hours to behead Alexander. She concluded that a knife with a very thin blade was used.

No DNA evidence other than Alexander's DNA was recovered from the scene of the crime. This was not surprising, given the state of decomposition of the body. Even Alexander's DNA was difficult to retrieve because of the condition of

his body. The conditions were also consistent with the scene having been cleaned and evidence having been destroyed. No bullet casings were found on the scene, but a .38 caliber bullet was recovered from the passenger side door panel of the truck.

Lauren also said she met appellant at his apartment on Mother's Day. Appellant told her the man clung to life after appellant shot him—he had "gasped and wanted to live."

Appellant had a garage sale around this time and sold almost all his possessions for $300 to the person who would be moving into the apartment. Appellant told her that he was moving to Colorado. He left behind clothes and photographs of himself and others hanging on the wall.

Officer Kincheloe received a phone call on May 24 regarding a lead in the case. That day, Kincheloe and his partner interviewed Laurence and Frances together and then Lauren. Information provided by Lauren was consistent with information not disseminated to the public, including the fact that Alexander's truck had Mississippi license plates. Appellant became the sole focus of the investigation.

While these events were ongoing, a young man named Chevy lived with Sparky. At some point, Sparky showed Chevy the barrel of a gun that he had been hiding under his couch cushion. Sparky nervously told Chevy that he and appellant had done something with the gun. Several Google searches had been made on Chevy's phone the evening of April 27 for "forensic gun ballistics," and an internet article entitled "6 Remarkable Ways Guns Can Be Linked to a Crime Scene" had been accessed. The Wikipedia page for "Ballistic fingerprinting" had also been accessed as well as the website forensicoutreach.com. Chevy denied performing the searches but said that he had allowed Sparky to use his phone on several

occasions. Chevy did not think the phone was password protected (it was), but said that if it had been, Sparky would have had the password. Chevy had a .38 caliber pistol, a 9-millimeter pistol with two magazines, and a 9-millimeter bullet in a storage unit.

Officers Nichols and Velez went to Colorado on June 8 to locate appellant. The same day, Detective Lee and Agent Griffith from Colorado were conducting surveillance on appellant. Griffith observed appellant coming out of his apartment building. He "look[ed] around as if he [were] being watched, looking for anybody." Griffith noted appellant's behavior was unusual. Appellant was carrying a banana, which he then held out as if it were a handgun. Griffith testified, "He [brought the banana] up, look[ed] down his arm, and then [did] this (indicating) as if he were doing a double tap. You got two recoils." The banana was pointed at the back of a car. Appellant then laughed and walked to his car. He drove his car to another parking spot, got out, walked around some buildings, then came back, got back into his car, and drove away.

Nichols and Velez found appellant two days later in the parking lot of his apartment complex. He agreed to go with them to a local police station for an interview. The three rode in the officers' rental car, and the officers took appellant's keys and his phone. During the interview, appellant said he moved to Colorado for a job. According to him, he did not own any knives. He acknowledged that he had purchased a 9-millimeter handgun from Academy on February 3 but told the officers that he sold the gun to a large, hairy man in a bar in late February to pay his rent. He denied telling Lauren he had done "something bad" but later told the officers he wanted to go to Colorado when "it" happened. He refused to explain what "it" meant and denied any involvement in the murder. Immediately following the interview, an arrest warrant was issued in Brazoria

County, and appellant was arrested in Colorado.

Two other phones and three knives were found in appellant's car. A yellow notebook was also in the car containing handwritten information regarding how "[t]o get new identity" and a list with someone's name, an identification number, a date of birth, a Social Security number, and an address. A list of phone numbers was handwritten on another page, including numbers for Lauren, Laurence, Frances, Sparky, and Chevy.

Police officers also interviewed Sparky on June 10. Three days later, the officers went to Sparky's house and executed a search warrant. They located a box of latex gloves in Sparky's bathroom, a crushed cell phone, a rusted gun, a bullet that may have been the same caliber as the one used in the crime, and several knives. No information could be retrieved from the crushed cell phone. Sparky also had a newer cell phone with records that did not begin until May 14. Officers took a shop vac from Sparky's living room that contained metal shavings. Sparky ultimately turned over a grinder and a box of bullets. Officers were concerned that the grinder had been used to destroy the murder weapon. Sparky was charged with the crime of tampering with evidence.

Similar latex gloves were found in Alexander's truck, outside the truck in a nearby field, in appellant's glovebox, and in Sparky's house. The murder weapon was never recovered, but the handgun appellant had purchased could fire the type of ammunition recovered from the passenger side door panel of the truck. The recovered bullet was eliminated as having been fired from any of the guns taken from Sparky or Chevy.

Discussion

Appellant challenges the sufficiency of the evidence in support of the jury's

guilty finding. Appellant also contends the trial court erred in (1) refusing to submit lesser included offense and accomplice witness jury instructions; (2) failing to suppress video evidence of appellant's purported custodial interrogation; (3) removing a juror as disabled; (4) admitting evidence regarding appellant's gun purchase; and (5) refusing to grant a mistrial.

I. Evidence in Support of Murder Finding Sufficient

Appellant challenges the sufficiency of the evidence in support of the jury's guilty finding in his first issue. According to appellant, the only evidence in support of the jury's finding is Lauren's testimony. Appellant asserts the evidence is insufficient because (1) there is no DNA evidence linking him to the murder; (2) he did not confess to police; (3) his text messages to Lauren do not mention murder; (4) testimony from Laurence, Frances, and Lauren is not credible; (5) the murder weapon was never found; (6) no evidence places appellant at the crime scene; and (7) Chevy may have killed Alexander.[1]

When reviewing sufficiency of the evidence, we view all the evidence in the light most favorable to the verdict and determine, based on that evidence and any reasonable inferences therefrom, whether any rational factfinder could have found the elements of the offense beyond a reasonable doubt. *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)). We do not sit as a thirteenth juror and may not substitute our judgment for that of the factfinder by reevaluating the weight and credibility of the evidence. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Rather, we defer to the factfinder to fairly resolve conflicts in testimony, weigh the evidence, and draw

[1] We granted appellant's motion requesting to file a pro se brief supplementing the first issue in his appellate brief. We thus consider the arguments raised in his supplemental brief along with his counsel's arguments challenging legal sufficiency.

reasonable inferences from basic to ultimate facts. *Id*. This standard applies equally to both circumstantial and direct evidence. *Id*. Each fact need not point directly and independently to the appellant's guilt so long as the cumulative effect of all incriminating facts is sufficient to support the conviction. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

As correctly set forth in the charge to the jury, a person commits murder if he "intentionally or knowingly causes the death of an individual" or "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual." Tex. Penal Code § 19.02(b). Appellant concedes that Lauren's testimony "shows that Appellant intentionally and knowingly caused the death of Alexander" but contends that the lack of other evidence incriminating appellant "overwhelmingly outweighs" the evidence of his guilt.[2] Appellant similarly complains in his pro se brief that Lauren's testimony "only leads to a suspicion of guilt."

We do not weigh the credibility of Lauren's testimony: that job belonged solely to the factfinder.[3] *See Isassi*, 330 S.W.3d at 638; *see also McIntyre v. State*, No. 14-13-00407-CR, 2014 WL 6602420, at *6 (Tex. App.—Houston [14th Dist.] Nov. 20, 2014, no pet.) (mem. op., not designated for publication) ("As an initial matter, appellant's credibility attacks cannot support reversal because we do not re-evaluate the jury's credibility determinations on appeal."). Applying the proper

[2] Under the legal sufficiency standard, although we consider all the evidence presented, we do not reweigh it. *See Gear*, 340 S.W.3d at 746.

[3] Appellant argues that testimony from Lauren and her family was not credible because (1) Laurence asked if there was a Crime Stoppers reward and asked to be removed from the sex offender registry in exchange for information, and (2) Lauren initially withheld information regarding the Mother's Day meeting. The family still shared the information without receiving any benefit, and Lauren explained that she initially withheld information about the meeting with appellant because she did not want her husband to know about it. We presume the jury took this information into account in weighing the credibility of the evidence.

sufficiency standard and deferring to the factfinder's credibility determination, as we must, we turn to whether a rational factfinder could have found beyond a reasonable doubt that appellant murdered Alexander.

Alexander was never heard from again after 9:19 a.m. on April 27. The same day, appellant told his grandmother at 9:38 a.m. that he had decided not to go to work, and indeed he did not go to work. He was off his cell phone from 11:49 a.m. until 2:23 p.m., and during that time, he was in the area where Alexander's body was found.

Appellant texted Lauren on May 1 that he was "planning to leave for good" because of "something he did" and he was "not staying to burn." Appellant also told Laurence and Frances he had done something wrong, so he was going to sell his possessions and leave town. Appellant told Frances he needed to leave to avoid "hurt[ing] other people he loved."

On May 3, appellant again texted Lauren, telling her the reason he had to leave town was "bad enough" and would "likely . . . be on the news." He said he did it "[b]ecause it felt good" and admitted he broke the law.

Lauren testified that she called appellant after he sent these texts, and phone records show that they had a lengthy phone conversation starting two minutes after appellant's last text. According to Lauren, appellant said a man around his age was in a truck with Mississippi plates by the water and appellant shot the man. Alexander was the same age as appellant, and his truck had Mississippi plates. Appellant told Lauren he went back "[l]ike a day" after talking to a friend with a weird nickname and beheaded the victim with a knife. The medical examiner classified Alexander's death as homicide with postmortem decapitation, so that finding was consistent with Lauren's testimony. Moreover, the forensic anthropologist testified that a knife was used to behead Alexander.

Phone records show that appellant sought advice from Sparky on April 30, invited Sparky to "come over," and after that, was off his phone that night for over three hours. Those records are consistent with Lauren's testimony that appellant told her he went back to the scene after talking to a friend with a weird nickname and that there was a bad smell from the decomposing body. The forensic anthropologist also testified that the victim was decapitated perimortem, meaning after death but "when there's soft tissue still on the bone."

Lauren said that appellant again confessed his crime to her on Mother's Day. Lauren provided information to the police about the crime that had not been disseminated to the public.

Around Mother's Day, appellant sold his possessions at a garage sale for a nominal amount of money. He left behind personal items such as photographs and clothing. He moved to Colorado, which was consistent with the plans he relayed to Lauren and her parents. *See Balderas v. State*, 517 S.W.3d 756, 767 & n.16 (Tex. Crim. App. 2016) (noting that evidence of flight evinces consciousness of guilt).

The murder weapon was never found, but the State presented evidence from which the jury could have inferred that appellant might have destroyed it. Chevy testified that Sparky showed him the barrel of the gun and told him that he (Sparky) and appellant had done something with it. Sparky turned over a grinder to police. Police recovered metal shavings from Sparky's shop vac. *See Lily v. State*, 789 S.W.2d 433, 435 (Tex. App.—Houston [14th Dist.] 1990, no pet.) ("[D]estruction of evidence is probative of guilt."); *see also Martin v. State*, 151 S.W.3d 236, 244 (Tex. App.—Texarkana 2004, pet. ref'd) (same).

In addition, appellant's missing handgun could fire the type of ammunition found in the door of the victim's truck, and the recovered bullet had not been fired from any of the weapons obtained from Sparky or Chevy. Appellant admitted that

he had owned such a handgun but told police officers that he sold it to a "heavyset, hairy guy" at a bar. *See Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) ("Attempts to conceal incriminating evidence, inconsistent statements, and implausible explanations to the police are probative of wrongful conduct and are also circumstances of guilt."). The State was not required to produce the murder weapon to establish appellant's guilt. *See Tijerino v. State*, No. 14-06-01012-CR, 2008 WL 509880, at *6 (Tex. App.—Houston [14th Dist.] Feb. 26, 2008, no pet.) (mem. op., not designated for publication); *see also Delacerda v. State*, 425 S.W.3d 367, 382 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) ("Sufficient evidence can support a murder conviction even in the absence of physical evidence such as DNA evidence, fingerprinting evidence, and the murder weapon; thus, such evidence is not required to obtain a conviction."); *Harmon v. State*, 167 S.W.3d 610, 614 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) ("A rational jury could have found appellant guilty of aggravated robbery without DNA evidence, fingerprint evidence, or evidence of the gun . . . ."); *Craig v. State*, 783 S.W.2d 620, 624 (Tex. App.—El Paso 1989) (concluding evidence of murder was sufficient because defendant had a weapon at the time of the murder "consistent in calibre [sic] with the murder weapon" and then "fled and destroyed his own pistol"), *rev'd and remanded on other grounds*, 825 S.W.2d 128 (Tex. Crim. App. 1992).

While under police surveillance in Colorado, appellant acted as if he thought he were being watched. He also mimicked shooting toward a car, while laughing, when he thought he was alone. During his police interview, he denied owning any knives, even though he had knives in his car, and denied having texted Lauren that he had done something bad, which was rebutted by the phone records presented at trial. *See Guevara*, 152 S.W.3d at 50 (making false statements to authorities can be

probative of guilt). Appellant also said that he decided to go to Colorado when "it" happened. Although appellant did not confess to police what "it" meant, he confessed to Lauren.

In addition to the knives, police found two phones in appellant's car, along with a notebook containing information regarding how to get a new identity and someone else's identification number, birth date, Social Security number, and address. The notebook also contained phone numbers for Lauren, her parents, Sparky, and Chevy. Similar latex gloves were found in Sparky's house, appellant's car, Alexander's truck, and a field near the crime scene.

The lack of DNA evidence, according to the State's expert, was not surprising, given the state of decomposition of Alexander's body and given the evidence that appellant went back to the crime scene to destroy evidence. Physical evidence is not required to establish identity. *See Earls v. State*, 707 S.W.2d 82, 85 (Tex. Crim. App. 1986) ("Evidence as to the identity of the perpetrator of an offense can be proved by direct or circumstantial evidence."); *Delacerda*, 425 S.W.3d at 382 (noting DNA evidence was not required to establish elements of offense); *Harmon*, 167 S.W.3d at 614 (same); *Tinker v. State*, 148 S.W.3d 666, 669 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (holding despite lack of DNA evidence, complainant's testimony was sufficient to uphold conviction for aggravated sexual assault).

As to the evidence implicating Chevy, appellant pinpoints the Google searches that were conducted after the likely time of the murder on Chevy's phone regarding ballistics evidence. The jury was free to weigh this evidence and still conclude that appellant murdered Alexander. *See, e.g., Gilmore v. State*, No. 14-06-00620-CR, 2007 WL 2089294, at *5 (Tex. App.—Houston [14th Dist.] July 24, 2007, pet. ref'd) (mem. op., not designated for publication) (concluding evidence

in support of jury's robbery finding was sufficient because jury could disregard evidence regarding four other possible suspects); *Martin v. State*, 246 S.W.3d 246, 261 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (upholding murder conviction despite fact that defendant was "one of several other people who had the opportunity to injure" complainant); *Ates v. State*, 21 S.W.3d 384, 392-93 (Tex. App.—Tyler 2000, no pet.) (concluding circumstantial evidence was sufficient to support jury's murder finding because jury could have disregarded evidence of three other potential suspects as "weak and unpersuasive"); *Reeves v. State*, 969 S.W.2d 471, 479-80 (Tex. App.—Waco 1998, pet. ref'd) ("Reeves tried to raise questions regarding other potential suspects, but the jury, as the sole judges of the credibility of the witnesses and the weight to be given the evidence, could have disregarded his evidence as weak and unreliable.").

We conclude the jury's murder finding is supported by legally sufficient evidence. This is not a case involving speculative evidence of appellant's guilt or conclusive evidence disproving appellant's guilt—appellant's conviction is based on testimony that the jury determined to be credible along with corroborating evidence. *See, e.g., McIntyre*, 2014 WL 6602420, at *6 (holding evidence in support of murder finding was legally sufficient when testimony was presented that defendant admitted to shooting complainant, purchased a gun before the shooting and sold it afterward, and was in vicinity of murder around time of killing); *Delacerda*, 425 S.W.3d at 382 (noting physical evidence was not required to convict); *Fisher v. State*, 851 S.W.2d 298, 304 (Tex. Crim. App. 1993) ("[T]estimony regarding appellant's oral confession was by itself sufficient evidence to warrant a rational finding of appellant's guilt of all the elements of the offense beyond a reasonable doubt."). We overrule appellant's first issue.

II. Not Entitled to Lesser Included Offense Instructions

Appellant complains in his second issue that the trial court denied his requests for jury instructions on tampering with evidence and abuse of corpse as lesser included offenses of murder. A defendant is entitled to an instruction on a lesser included offense when the proof for the offense charged includes the proof necessary to establish the lesser included offense and there is some evidence in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser included offense. *Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007). We first compare the statutory elements of the offense and any descriptive elements alleged in the indictment to the statutory elements of the purported lesser included offense to determine as a matter of law whether the indictment (1) alleges all of the elements of the lesser included offense, or (2) alleges elements plus facts from which all of the elements of the lesser included offense may be deduced. *See Ex parte Watson*, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009).

As discussed, a person commits murder if he "intentionally or knowingly causes the death of an individual" or "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual." Tex. Penal Code § 19.02(b). Appellant was charged with three possible means of murder—(1) intentionally or knowingly causing the death of Alexander by shooting him with a firearm; (2) intentionally or knowingly causing the death of Alexander by unknown means; or (3) with intent to cause serious bodily injury, committing an act dangerous to human life by shooting Alexander.

In contrast, a person commits the offense of tampering with evidence, as relevant under these facts, only after he knows that the underlying offense has been

committed.[4] *Id*. § 37.09(d)(1). Thus, by definition, a person cannot commit tampering with evidence until after the underlying offense, here, murder, has been committed. The State, in alleging that appellant committed murder, did not allege all the elements of tampering with evidence or facts from which all the elements of tampering with evidence could be deduced.

Several of our sister courts have held that tampering with evidence is not a lesser included offense of capital murder. *See Bulington v. State*, 179 S.W.3d 223, 229 (Tex. App.—Texarkana 2005, no pet.); *see also McKee v. State*, No. 05-10-01410-CR, 2012 WL 1021446, at *16 (Tex. App.—Dallas Mar. 28, 2012, pet. ref'd) (mem. op., not designated for publication); *Dermody v. State*, No. 03-02-00279-CR, 2002 WL 31317126, at *3 (Tex. App.—Austin Oct. 17, 2002, no pet.) (mem. op., not designated for publication). Comparing the elements of tampering with evidence and murder as alleged, we likewise conclude that tampering with evidence is not a lesser included offense of murder.

Similarly, the offense of abuse of corpse cannot be committed until after there is a corpse.[5] Tex. Penal Code § 42.08(a)(1). By definition, one cannot murder a corpse. Therefore, the State, in alleging murder, did not allege all the elements of abuse of corpse or facts from which all the elements of abuse of corpse could be deduced.

Under these facts, the offense of murder had to be committed before the

[4] Under the statute, a person commits the offense of tampering with evidence if, in relevant part, he, "knowing that an offense has been committed, alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation of or official proceeding related to the offense." Tex. Penal Code § 37.09(d)(1).

[5] A person commits the offense of abuse of corpse if, in relevant part, he "without legal authority, knowingly . . . disinters, disturbs, damages, dissects, in whole or in part, carries away, or treats in an offensive manner a human corpse." Tex. Penal Code § 42.08(a)(1).

offense of tampering with evidence or abuse of corpse could be committed. Therefore, these are not lesser included offenses of murder. Accordingly, appellant was not entitled to his requested jury instructions on these offenses. We overrule appellant's second issue.

III. No Harm in Failing to Submit Accomplice Witness Instruction

Appellant contends in his third issue that the trial court erred in denying his request for an instruction that Chevy was an accomplice witness. An accomplice is a person who participates in the offense before, during, or after its commission with the requisite mental state. *Smith v. State*, 332 S.W.3d 425, 439 (Tex. Crim. App. 2011). An accomplice must have engaged in an affirmative act that promotes the commission of the offense that the accused committed. *Id*. A person is not an accomplice if the person knew about the offense and failed to disclose it or helped the accused conceal it. *Id*. Complicity with an accused in the commission of another offense apart from the charged offense does not make that witness's testimony that of an accomplice witness. *Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007). A State's witness may be an accomplice as a matter of law or as a matter of fact. *Ash v. State*, 533 S.W.3d 878, 884 (Tex. Crim. App. 2017).

Accomplice Witness as a Matter of Law. For accomplice witnesses as a matter of law, the trial court affirmatively instructs the jury that the witness is an accomplice and that his testimony must be corroborated. *Zamora v. State*, 411 S.W.3d 504, 510 (Tex. Crim. App. 2013). A witness is an accomplice as a matter of law (1) if the witness has been charged with the same offense as the defendant or a lesser-included offense; (2) if the State has charged a witness with the same offense as the defendant or a lesser-included of that offense, but dismisses the charges in exchange for the witness's testimony against the defendant; or (3) when

the evidence is uncontradicted or so one-sided that no reasonable juror could conclude that the witness was not an accomplice. *Ash*, 533 S.W.3d at 886. A trial court is under no duty to instruct the jury unless there exists no doubt or the evidence clearly shows that a witness is an accomplice witness as a matter of law. *Paredes v. State*, 129 S.W.3d 530, 536 (Tex. Crim. App. 2004).

Appellant concedes that Chevy was not charged with the same offense as appellant or a lesser included offense but argues that Chevy is an accomplice as a matter of law because, according to appellant, in exchange for his testimony, Chevy was given immunity from being charged for the offense of tampering with evidence. *Cf. Smith*, 332 S.W.3d at 439 (noting when a witness agrees to testify in exchange for dismissal of a charge, he continues to be regarded as an accomplice). But Chevy was not given immunity from prosecution for tampering with evidence, otherwise known as transactional immunity. He was given use immunity—meaning that his testimony elicited during appellant's trial could not be used against him in another proceeding.[6] Moreover, as discussed, tampering with evidence is not a lesser included offense of murder. Finally, appellant does not contend the evidence is uncontradicted or so one-sided that no reasonable juror could conclude that Chevy was not an accomplice. Appellant has not shown on this record that Chevy was an accomplice as a matter of law. *See Ash*, 533 S.W.3d at 886.

Accomplice Witness as a Matter of Fact. We turn to whether appellant was entitled to an instruction asking the jury to decide whether Chevy was an accomplice witness as a matter of fact. If the record contains evidence that a

[6] Transactional immunity is "immunity from prosecution for offenses to which compelled testimony relates"; use immunity is "immunity from the use of the compelled testimony and any evidence derived therefrom." *See Smith v. State*, 70 S.W.3d 848, 860 (Tex. Crim. App. 2002) (Cochran, J., concurring).

witness may have been an accomplice, the trial court should submit the issue to the jury to decide whether the witness was an accomplice as a matter of fact. *Id*. at 884. If the evidence demonstrates that a witness is not an accomplice, then the trial judge is not obliged to instruct the jury on the accomplice-witness rule—as a matter of law or fact. *Smith*, 332 S.W.3d at 440. Whether an accomplice witness instruction is justified, therefore, requires a case-specific and fact-specific inquiry. *Cocke v. State*, 201 S.W.3d 744, 748 (Tex. Crim. App. 2006). When the evidence presented by the parties as to the witness's complicity is conflicting or inconclusive, then the accomplice witness instruction asks the jury to (1) decide whether the witness is an accomplice as a matter of fact, and (2) apply the corroboration requirement, but only if the jury has first determined that the witness is an accomplice. *Zamora*, 411 S.W.3d at 510.

Appellant relies on the internet searches performed on Chevy's phone after the apparent time of the murder as evidence that Chevy was an accomplice as a matter of fact. Presuming without deciding that the internet searches constitute evidence that Chevy was an accomplice, we must analyze whether appellant was harmed by the trial court's failure to submit an accomplice witness as a matter of fact instruction.

The degree of harm necessary for reversal of jury charge error depends on whether the appellant preserved the error by objection. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). Here, appellant's counsel requested an accomplice witness instruction as to Chevy. Jury charge error requires reversal when the defendant has properly objected to the charge and we find "some harm" to his rights. *Id*. (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984)).

Error is harmless under the "some harm" standard when there is a substantial

amount of non-accomplice evidence and the evidence of the witness's accomplice status was tenuous or barely enough to support submission of an instruction that the witness was an accomplice as a matter of fact. *Herron v. State*, 86 S.W.3d 621, 633 (Tex. Crim. App. 2002). Error is also harmless under this standard when the corroborating evidence is so strong that "it becomes implausible that a jury would fail to find that it tends to connect the accused to the commission of the charged offense." *Casanova v. State*, 383 S.W.3d 530, 539–40 (Tex. Crim. App. 2012). At that level of strength, a reviewing court may safely conclude that the resulting harm is "purely theoretical" because, if the trial court had given the instruction, the jury would have almost certainly found that the testimony of the accomplice witness was corroborated. *Id*.

We have already analyzed the strength of the evidence presented in support of the jury's finding of appellant's guilt. The jury heard Lauren's testimony recounting appellant's detailed confession to her. Appellant did not go to work on the day of the murder and was in the area near where the body was found. Appellant texted Lauren about his plan to leave "for good" because he did something so bad it would be on the news. The medical examiner's testimony and the forensic anthropologist's testimony regarding the cause of death and condition of the body were consistent with appellant's confession. Phone records were consistent with appellant's having consulted with Sparky regarding concealing appellant's participation in the crime. The State also presented evidence that Sparky helped appellant destroy the murder weapon and that appellant had owned a gun that could have fired the bullet found in Alexander's truck. Appellant fled the state after the crime was committed. In his interview, appellant made several false statements to police. The evidence strongly points to appellant as the killer. *See id*.

Turning to the evidence supporting an accomplice witness instruction, we note that there is little evidence that Chevy was involved in the commission of the offense. The only evidence cited by appellant involves internet searches that were conducted after the apparent time of the murder. Although it is possible that a jury could have inferred Chevy intended to assist in a murder, such an inference could only be made on the basis that Chevy was with appellant when he came across Alexander in his truck and they decided together to murder him for unknown reasons. If the jury found such an inference to be unreasonable, then Chevy would not have been an accomplice.

Moreover, appellant could not have been convicted based on Chevy's testimony alone. His testimony related only to the destruction of the murder weapon after the fact of the murder. Lauren was essential to the prosecution because she was the only witness who testified that appellant confessed to her. The jury apparently was persuaded by the strength of her testimony and the evidence corroborating her testimony.

Having considered the strength of Lauren's testimony and the other evidence incriminating appellant in contrast to the relative weakness of Chevy's status as an accomplice, we conclude that if an accomplice witness instruction had been given, the jury would have found Chevy's testimony to be corroborated. *See Guillory v. State*, No. 14-13-01037-CR, 2015 WL 545551, at *5-6 (Tex. App.—Houston [14th Dist.] Feb. 10, 2015, pet. ref'd) (mem. op., not designated for publication) (citing *Casanova*, 383 S.W.3d at 539-40). Any error in omitting the instruction was therefore harmless. We overrule appellant's third issue.

IV. No Harm in Denying Motion to Suppress

Appellant challenges in his fourth issue the trial court's denial of his motion to suppress statements he made to officers on the grounds that appellant did not

receive *Miranda* warnings or statutory warnings under article 38.22 of the Texas Code of Criminal Procedure before making the statements. He alleges that the statements he made during his interview at the police station were obtained while he was in custody and should have been excluded.

The warnings set out by the United States Supreme Court in *Miranda v. Arizona* were established to safeguard an unrepresented individual's Fifth Amendment privilege against self-incrimination during custodial interrogation. 384 U.S. 436, 442–57, 467–79 (1966); *Kuether v. State*, 523 S.W.3d 798, 805 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). Unwarned statements obtained as a result of custodial interrogation may not be used as evidence by the State in a criminal proceeding during its case in chief. *Miranda*, 384 U.S. at 444; *Keuther*, 523 S.W.3d at 805.

Code of Criminal Procedure article 38.22, section 3, similarly requires that the accused be given statutory warnings "and the accused knowingly, intelligently, and voluntarily waive[] any rights set out in the warning[s]" before oral statements made during custodial interrogation are admissible as evidence at trial. Tex. Code Crim. Proc. art. 38.22 § 3(a); *Keuther*, 523 S.W.3d at 805. Our construction of "custody" for purposes of article 38.22 is consistent with the meaning of "custody" for purposes of *Miranda*. *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007).

A trial judge's ultimate custody determination presents a mixed question of law and fact. *Id*. We afford almost total deference to a trial court's custody determination when the questions of historical fact turn on credibility and demeanor. *Id*. at 526–27. Conversely, when the questions of historical fact do not turn on credibility and demeanor, we will review a trial court's custody determination de novo. *Id*. at 527. When, as here, the trial court has made no

findings of fact, we view the evidence in the light most favorable to the ruling and presume the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010); *Keuther*, 523 S.W.3d at 807. We must sustain the trial court's ruling if it is supported by the record and is correct on any theory of law applicable to the case. *Valtierra*, 310 S.W.3d at 447–48.

Case law segregates interactions between police officers and citizens into three categories: consensual encounters, investigative detentions, and arrests or their custodial equivalent. *Ortiz v. State*, 421 S.W.3d 887, 890 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) (citing *Crain v. State*, 315 S.W.3d 43, 49 (Tex. Crim. App. 2010)). Both detention and arrest involve a restraint on one's freedom of movement: the difference is in the degree. *Id*. (citing *State v. Sheppard*, 271 S.W.3d 281, 290–91 (Tex. Crim. App. 2008)). An arrest places a greater degree of restraint on an individual's freedom of movement than does an investigative detention. *Id*. Persons temporarily detained for purposes of investigation are not "in custody" for *Miranda* purposes, and thus the right to *Miranda* warnings is not triggered during an investigative detention. *Hauer v. State*, 466 S.W.3d 886, 893 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984), and *State v. Stevenson*, 958 S.W.2d 824, 829 (Tex. Crim. App. 1997)).

When considering whether a person is in custody for *Miranda* purposes, we apply a "reasonable person" standard, i.e., "[a] person is in 'custody' only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest." *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996); *Kuether*, 523 S.W.3d at 808. The inquiry requires an examination of all the objective circumstances

surrounding the questioning at issue. *Herrera*, 241 S.W.3d at 525.

Several factors often come into play in considering whether a particular encounter amounted to an arrest or detention, including the amount of force displayed, the duration of detention, the efficiency of the investigative process and whether it was conducted at the original location or the person was transported to another location, and whether the officer told the detained person that he or she was under arrest or was being detained only for a temporary investigation. *Sheppard*, 271 S.W.3d at 291. "If the degree of incapacitation appears more than necessary to simply safeguard the officers and assure the suspect's presence during a period of investigation, this suggests the detention is an arrest." *Id*. While stationhouse questioning does not, in and of itself, constitute custody, the mere fact that an interrogation begins as noncustodial does not prevent custody from arising later. *Dowthitt*, 931 S.W.2d at 255.

Appellant agreed to accompany officers to the police station for an interview. When he did so, the officers took his car keys and cell phone but did not put handcuffs on him. Sergeant Velez testified that he did a pat down for officer safety. Appellant rode in the officers' rental car, which was not a marked police vehicle. He was placed into an interview room. At the beginning of the interview, an officer told appellant he was not under arrest and would be free to leave at the end of the interview. The interview lasted three hours. Appellant was never told he was not free to leave, but he asked to go home at the end of the interview. An officer told him at that time to "hang tight" and they would arrange to take him home. But instead, an arrest warrant was signed at the end of the interview, and appellant was arrested.

We need not decide whether appellant was in custody during some or all of the interview, because we conclude appellant was not harmed by the statement's

admission. Any error would be of constitutional magnitude, so we must reverse the judgment unless we determine beyond a reasonable doubt that the error did not contribute to the conviction or punishment.[7] *See Jones v. State*, 119 S.W.3d 766, 777 (Tex. Crim. App. 2003) (citing Tex. R. App. P. 44.2(a)). If there is a reasonable likelihood that the error materially affected the jury's deliberations, the error was not harmless. *Id*. We must "calculate, as nearly as possible, the probable impact of the error on the jury in light of the other evidence." *Id*. In determining whether constitutional error in the admission of evidence is harmless, we consider the entire record in light of several factors, including the importance of the evidence to the State's case; whether the evidence was cumulative of other evidence; the presence or absence of other evidence corroborating or contradicting the evidence on material points; the overall strength of the State's case; and any other factor, as revealed by the record, that may shed light on the probable impact of the error on the mind of the average juror. *Clay v. State*, 240 S.W.3d 895, 904 (Tex. Crim. App. 2007).

Appellant did not confess. He continually denied any involvement in the offense. He said he could not remember ever having been at the boat ramp where Alexander's body was discovered, although he admitted having been to several bars in the area. He said that he knew Sparky and possibly spoke to him on April 27 (the day of the murder) but contended that they only would have talked about "bullshit." He admitted that he purchased a 9-millimeter Smith & Wesson pistol

[7] The erroneous admission of a statement in violation of article 38.22 amounts to non-constitutional error. *See Woods v. State*, 152 S.W.3d 105, 118 (Tex. Crim. App. 2004). However, appellant challenged the admission of his statement under both the Fifth Amendment and article 38.22. Therefore, we address harm under the standard for constitutional error. *See Campbell v. State*, 325 S.W.3d 223, 239 (Tex. App.—Fort Worth 2010, no pet.) ("[B]ecause . . . the error in failing to administer . . . *Miranda* warnings did not contribute to [defendant's] conviction or punishment beyond a reasonable doubt under rule 44.2(a), we need not also analyze whether admission of the . . . statement in violation of section 38.22 violated [defendant's] substantial rights under rule 44.2(b).").

from Academy but claimed that he sold it to a "heavyset, hairy guy." He denied having any knives. He admitted that he had spoken to Lauren a month before the interview to tell her goodbye and that he had told Laurence he was leaving town. He denied sending text messages to Lauren admitting that he had done something bad and denied confessing any crime to her. He accused Lauren and Laurence of lying. He said he went to Colorado for a job and because he wanted to distance himself from Lauren.

Although appellant denied his involvement in the offense, his testimony tends to incriminate him because it reveals several falsehoods, such as his denying that he sent the incriminating text messages to Lauren, his refuting ownership of any knives, and his explanation regarding the sale of the gun in contrast with evidence that he and Sparky destroyed it. *See Guevara*, 152 S.W.3d at 50 (noting falsehoods can be probative of guilt). However, as discussed, compelling evidence outside of appellant's statements supported the jury's finding of guilt. Despite appellant's denials, Lauren's testimony, the evidence of his location around the time of the murder, text messages to Lauren, Laurence's and Frances's testimony, evidence that Sparky helped appellant destroy the murder weapon, and appellant's fleeing, among other things, all support the jury's verdict.

Considering all the evidence presented at trial, the above factors weigh in favor of our conclusion that the trial court's error, if any, in denying the motion to suppress was harmless. In contrast to the other evidence, appellant's statements were not particularly important to the State's case: although appellant's falsehoods tend to incriminate him, the State relied heavily on other evidence, which was ample, and did not heavily emphasize appellant's statements. And the State's case was strong because of Lauren's testimony and the evidence corroborating her testimony. Based on these factors, we conclude beyond a reasonable doubt that any

error in admitting appellant's statement did not contribute to the jury's verdict. *See, e.g., Trejo v. State*, 594 S.W.3d 790, 798 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (holding any error in admitting statement after defendant invoked right to counsel was harmless). We overrule appellant's fourth issue.

V. No Abuse of Discretion in Removing Juror

In his fifth issue, appellant argues the trial court abused its discretion in removing a juror as disabled. Approximately one week into trial, one of the jurors was arrested for driving while intoxicated, incarcerated, and unavailable for trial the next morning. The trial court removed the juror and replaced him with an alternate juror, finding, among other things, that the original juror was still incarcerated.[8] Appellant contends that the trial court abused its discretion in failing to postpone the trial "for at least a few hours to allow the juror to post bond for his release from jail so that he could return to jury duty."

The trial court has discretion to determine whether a juror has become disabled under article 36.29 of the Code of Criminal Procedure and to seat an alternate juror under article 33.011 of the code. *Scales v. State*, 380 S.W.3d 780, 783 (Tex. Crim. App. 2012); *Romero v. State*, 396 S.W.3d 136, 142 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). The trial court must make a sufficiently supported finding that the juror was disqualified or unable to perform the duties of a juror. *Scales*, 380 S.W.3d at 784; *Romero*, 396 S.W.3d at 142.

On review, we cannot substitute our own judgment for the trial court's: we

[8] In addition, the State discovered pending misdemeanor charges against the juror for reckless driving and striking a highway fixture. The juror previously had been convicted of driving while intoxicated and reckless driving. He had not answered a question during voir dire regarding whether any panel members had ever been arrested. The trial court also found that the juror was not candid in voir dire and in another incident during the trial, had overheard witnesses discussing the case during a bathroom break.

must assess whether, after viewing the evidence in the light most favorable to the trial court's ruling, the ruling was arbitrary or unreasonable. *Scales*, 380 S.W.3d at 784; *Romero*, 396 S.W.3d at 142. We must uphold the trial court's ruling if it falls within the zone of reasonable disagreement. *Scales*, 380 S.W.3d at 784; *Romero*, 396 S.W.3d at 142.

The Court of Criminal Appeals has interpreted article 36.29 to mean that a juror is disabled if the juror suffers from a "physical illness, mental condition, or emotional state that would hinder or inhibit the juror from performing his or her duties as a juror, or that the juror was suffering from a condition that inhibited him from fully and fairly performing the functions of a juror." *Scales*, 380 S.W.3d at 783; *Romero*, 396 S.W.3d at 143. In *Griffin v. State*, a juror was arrested for driving while intoxicated during the noon recess of trial. 486 S.W.2d 948, 950 (Tex. Crim. App. 1972). The trial court determined that the juror was disabled because he was "in jail, the jury was reassembled after noon recess, and court was about to reconvene." *Id*. at 951. The court proceeded without the juror under article 36.29. *Id*. The Court of Criminal Appeals affirmed, holding that disability is not limited to physical disease but also includes "any condition that inhibits a juror from fully and fairly performing the functions of a juror." *Id*.; *see also Reyes v. State*, 30 S.W.3d 409, 411 (Tex. Crim. App. 2000) (holding same); *Carrillo v. State*, 597 S.W.2d 769, 770 (Tex. Crim. App. 1980); *Price v. State*, 526 S.W.3d 738, 742 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd).

Although appellant complains that the trial court should have considered the likely duration of the juror's incarceration, the trial court did not abuse its discretion by discharging the juror without doing so. *See Romero*, 396 S.W.3d at 144-45 (holding trial court did not abuse discretion in removing juror for stomach ailment, headaches, and lack of sleep); *Lopez v. State*, 316 S.W.3d 669, 679–80

(Tex. App.—Eastland 2010, no pet.) ("Article 36.29 does not require the trial court to consider postponing the trial . . . in the event of a juror's disability."); *Moore v. State*, 82 S.W.3d 399, 406-07 (Tex. App.—Austin 2002, pet. ref'd) (concluding trial court did not abuse discretion in overruling request to postpone trial and removing juror with stomach ailment under article 36.29), *overruled on other grounds by Taylor v. State*, 268 S.W.3d 571 (Tex. Crim. App. 2008). Moreover, appellant did not request postponement. *See Romero*, 396 S.W.3d at 145.

We conclude the trial court did not abuse its discretion in concluding that the juror was disabled because he had been arrested for driving while intoxicated and was still incarcerated when trial reconvened the next morning. *See Griffin*, 486 S.W.2d at 951. The trial court was not required to postpone the trial to allow the juror to post bond and return to jury duty. *See Romero*, 396 S.W.3d at 145. We overrule appellant's fifth issue.

VI. No Abuse of Discretion in Admitting Evidence of Gun Purchase

Appellant contends in his sixth issue that the trial court abused its discretion in admitting business records that show appellant purchased a 9-millimeter pistol almost three months before Alexander died. According to appellant, the evidence was irrelevant without proof that his gun was used to kill Alexander and the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009). If the trial court's ruling falls within the zone of reasonable disagreement, we will affirm that decision. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003).

Relevance. Evidence is relevant if it has any tendency to make a fact that is of consequence in determining the action more or less probable than it would be without the evidence. Tex. R. Evid. 401. This definition is necessarily broad. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g). Relevant evidence is generally admissible. Tex. R. Evid. 402. Even "marginally probative" evidence should be admitted if "it has any tendency at all, even potentially, to make a fact of consequence more or less likely." *Fuller v. State*, 829 S.W.2d 191, 198 (Tex. Crim. App. 1992).

During trial, the State offered evidence that appellant purchased a 9-millimeter pistol in February 2016, approximately three months before the murder. The State also recovered a .38 caliber bullet from the door of Alexander's truck. The gun that appellant purchased could fire a .38 caliber bullet. Lauren testified that appellant told her he shot Alexander. The State also presented evidence that appellant destroyed a pistol with Sparky's help. The evidence that appellant owned a weapon that could have fired the bullet into Alexander's truck tends to make a fact of consequence more probable—whether appellant used the same firearm to shoot appellant. Accordingly, the evidence was relevant under Rule 401.

Unfair Prejudice. Under Rule 403, a "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Tex. R. Evid. 403. In conducting a rule 403 analysis, courts must balance (1) the inherent probative force of the proffered evidence and (2) the proponent's need for that evidence, against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency to confuse or distract the jury from the main issues, (5) any tendency to be given undue weight by the jury, and (6) the likelihood that presentation of the

evidence will consume an inordinate amount of time or be cumulative of other evidence. *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006); *Ripstra v. State*, 514 S.W.3d 305, 318 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

All evidence tends to be prejudicial to one party or the other. *Hernandez v. State*, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012). Only "unfair" prejudice provides the basis for exclusion of relevant evidence. *Montgomery*, 810 S.W.2d at 378; *Webb v. State*, 995 S.W.2d 295, 301 (Tex. App.—Houston [14th Dist.] 1999). Prejudice is "unfair" if it has an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Montgomery*, 810 S.W.2d at 378.

Appellant provides no analysis of the Rule 403 balancing test, but he argues the evidence is "purely inflammatory and hardly probative." We disagree. First, the trial court could reasonably have concluded that the probative force of the evidence was considerable. Appellant was in the area where Alexander's body was found on the day of the murder, and he did not use his phone around the likely time of the murder. A bullet that could have been fired from the gun appellant owned had been fired into the passenger door of Alexander's truck. Appellant told Lauren that he shot appellant, killing him. He also told Lauren he went back to the scene of the crime to hide ballistics evidence. And the State presented evidence that appellant and Sparky destroyed a pistol. This evidence tends to make it more probable that appellant's pistol was the murder weapon. The trial court also could have concluded that the State's need for the evidence was considerable since the State's theory was that appellant shot Alexander and returned to the scene of the crime a few days later to destroy evidence.

The trial court reasonably could have concluded that the evidence did not

have a tendency to suggest decision on an improper basis—appellant's ownership of the weapon related directly to the charged offense of murder because the medical examiner determined that Alexander's cause of death was homicide with postmortem decapitation and a bullet was found on the scene. The trial court likewise reasonably could have concluded that the evidence did not tend to confuse or distract the jury from the main issues in the case. The State presented other evidence that appellant killed Alexander, particularly Lauren's testimony. Thus, the main issue was whether appellant had done so.

The trial court further reasonably could have concluded that the jury would not tend to give the evidence undue weight—the jury heard appellant's statement to police that he sold the gun before the murder, and appellant cross-examined the State's witnesses with evidence that the cause of death was unknown. Finally, the trial court reasonably could have concluded that presentation of the evidence would not consume an inordinate amount of time or be needlessly cumulative—it took up only a few minutes of the nearly two-week trial.

The trial court, after balancing the Rule 403 factors, reasonably could have concluded that the probative value of the evidence of appellant's gun purchase was not substantially outweighed by the countervailing factors specified in the rule. *See Gigliobianco*, 210 S.W.3d at 642-43. We conclude the trial court did not abuse its discretion in admitting the evidence. We overrule appellant's sixth issue.

VII. Discovery Issue Not Preserved

In his seventh and final issue, appellant complains that the trial court denied his motion for a mistrial after the State failed to disclose before trial Lauren's testimony that she met with appellant on Mother's Day 2016. Appellant contends he was entitled to this information under article 39.14 of the Code of Criminal Procedure. Article 39.14, also known as the Michael Morton Act, governs

procedures for discovery in criminal cases. *See Glover v. State*, 496 S.W.3d 812, 814-15 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). The State contends that Lauren's testimony regarding her meeting with appellant does not "fall within the purview" of the Act and that even if it did, appellant failed to preserve error on his complaint by failing to object to Lauren's testimony. We need not decide whether the State was required to disclose Lauren's testimony about the meeting because we conclude that appellant's motion for mistrial was untimely and thus appellant did not preserve error on his complaint.

Lauren testified at trial that she went to appellant's apartment on Mother's Day and they "got in [her] car and talked." Appellant told Lauren "[b]asically the same thing" he had told her before but added that Alexander "gasped and wanted to live" after appellant shot him. Appellant's counsel did not object to this testimony. Instead, he cross-examined Lauren regarding the meeting and asked her whom she told about the meeting. He also asked her if she told police officers about the meeting and when she said no, asked her why. She responded that she did not want her husband to know. Appellant's counsel did not move for a mistrial until the next morning.

We have already held that the statutory rights created by the Act are subject to waiver. *See id*. at 816. But we must determine whether appellant's motion for mistrial was sufficient to preserve error on his complaint. To preserve error for appellate review, a party generally must complain in the trial court. *London v. State*, 490 S.W.3d 503, 506–07 (Tex. Crim. App. 2016). A defendant's complaint may be in the form of (1) a timely, specific objection, (2) an instruction to disregard, or (3) a motion for a mistrial. *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004); *see* Tex. R. App. P. 33.1(a).

An objection is preemptive because it informs the trial court and opposing

counsel of the potential for error, while the other two methods of complaint are corrective. *Young*, 137 S.W.3d at 69. An instruction to disregard attempts to cure any harm or prejudice resulting from events that have already occurred. *Id*. When the prejudice is curable, the instruction eliminates the need for a mistrial. *Id*. A mistrial should be reserved for those cases in which an objection could not have prevented and an instruction to disregard could not have cured any prejudice stemming from an event at trial. *Id*. Therefore, a mistrial is appropriate only in "extreme circumstances" involving a narrow class of highly prejudicial and incurable errors. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004); *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000).

A party must make a complaint as soon as the grounds for it become apparent. *London*, 490 S.W.3d at 507. That is, "as soon as the [defense] knows or should know that an error has occurred." *Id*. The preferred method to preserve error is sequential—first to object, then to request an instruction to disregard, and finally to move for a mistrial. *Young*, 137 S.W.3d at 69. However, this sequence is not essential—the essential requirement is a timely, specific request that the trial court refuses. *Id*. The lack of an objection to a reasonably unforeseeable event will not prevent appellate review. *Id*. at 70. Similarly, requesting an instruction to disregard is only required when the instruction would enable the continuation of trial by an impartial jury. *Id*.

But when a party's first step is to move for a mistrial, we must ask whether the trial court abused its discretion in not taking the most serious action of ending the trial. *See id*. An event that could have been prevented by timely objection or cured by instruction to the jury will not justify a reversal on appeal in favor of a party who did not request these lesser remedies in the trial court. *Id*. Likewise, if a party delays a motion for mistrial and by failing to object allows for the

introduction of further objectionable testimony, the party cannot rely on an untimely motion for mistrial. *Id*.

During direct examination, the State elicited Lauren's testimony about her meeting with appellant without any objection by defense counsel. Defense counsel, moreover, introduced further testimony about the meeting through cross-examination. The record does not show that a timely objection would not have prevented the admission of objectionable testimony and an instruction to disregard would not have cured any error. *See Glover*, 496 S.W.3d at 816 (requiring timely objection to officer testimony that was not included in offense report); *see also Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009) (holding record did not show witness's outburst could not be cured by instruction to disregard). Even if a mistrial were the only suitable remedy, appellant's motion for mistrial was untimely. *See Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007). Instead of moving for a mistrial as soon as Lauren testified about the meeting, defense counsel cross-examined her and delayed the motion until the next day after she had left the witness stand. *See id*. (holding motion for mistrial was untimely when defense counsel failed to move for mistrial until after witnesses concluded their testimony and defense counsel had cross-examined them).

Because appellant failed to object to Lauren's testimony, failed to ask for an instruction to disregard the testimony, and failed to make a timely motion for mistrial, we conclude appellant failed to preserve error on this issue for appeal. We overrule appellant's seventh issue.

Conclusion

We affirm the judgment of the trial court.

/s/ Frances Bourliot
Frances Bourliot
Justice

Panel consists of Justices Jewell, Bourliot, and Zimmerer.

Publish — TEX. R. APP. P. 47.2(b).