NO. 14-24-00465-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF T

EMMANUEL PLATER,
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1845979
From the 399TH District Court of Harris County, Texas

BRIEF FOR APPELLANT

ALEXANDER BUNIN
Chief Public Defender
Harris County, Texas

ANNE MORE BURNHAM
Assistant Public Defender
Harris County, Texas
TBN 00798088
1310 Prairie, 4th Floor
Houston, Texas 77002
Phone: (713) 274-6700
Email: Anne.Burnham@pdo.hctx.net

Counsel for Appellant

IDENTITY OF PARTIES AND COUNSEL

DEFENDANT/ APPELLANT: Emmanuel Plater

ATTORNEYS FOR THE STATE:

Ms. Liza Liberman
Assistant District Attorney
Ms. Dana Nazarova
Assistant District Attorney
HARRIS COUNTY DISTRICT ATTORNEYS OFFICE
1201 Franklin Avenue, 4th Floor
Houston, Texas 77002

ATTORNEYS FOR THE DEFENDANT:

COUNSEL FOR TRIAL:

Mr. Neal Davis, III
Attorney at Law
Mr. Feroz Farook Merchant
Attorney at Law
440 Louisiana, Ste. 200
Houston, Texas 77002

COUNSEL ON APPEAL

Anne More Burnham
Assistant Public Defender
Harris County Public Defender Office
1310 Prairie Street, 4th Floor
Houston, Texas 77002

PRESIDING JUDGE:

VOIR DIRE:

Hon. Ike Okorafor
339thth District Court
Harris County, Texas

TRIAL PROCEEDINGS:

Hon. Te'iva Bell
339thth District Court
Harris County, Texas

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested.

STATEMENT OF THE CASE

Guilt-Innocence:

Mr. Plater was charged with the offense of Aggravated Robbery with a Deadly Weapon, namely a crow bar, in Cause No. 1845979. [CR145].[1] The indictment included two enhancement paragraphs for the following prior convictions: an aggravated robbery with a deadly weapon in Cause No. 1254841 in the 178th District Court in Harris County; and a conviction for Evading Arrest with a Motor Vehicle in

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[1] References to the Appellate Record will appear as:

1) Trial Reporters' Records Volumes 1-7 will appear as: [volume number + RR + page number]. E.g., "[1RR 2]," et seq.
2) There are two sets of Supplemental Reporters' Records – a two volume set and a 4 volume set. To avoid confusion over the volume number, citations to the supplemental volumes will include the hearing date of each volume.
   A) For the two volume Supplemental Reporter's Record, citations to volume 1 of this set will be: [SuppRR - Vol 1 of 2 (9/3/2024) at p.1, et seq.]; citations to volume 2 of this set will be: [SuppRR - Vol 2 of 2 (9/3/2024 Exhibits) at CX1].
   B) For the four volume Supplemental Reporter's Record, citations to volume 1 of this set will be: [SuppRR - Vol 1 of 4 (7/16/2024) at p.1, et seq]; citations to volume 2 of this set will be: [SuppRR - Vol 2 of 4 (7/18/2024) at p.1, et seq.]; citation to volume 3 of this set will be: [SuppRR - Vol 3 of 4 (7/23/2024) at p.1, et seq]; citation to volume 4 of this set will be: [SuppRR - Vol 4 of 4 (9/18/2024) at p.1, et seq.].
3) References to the 1 volume Clerk's Record will appear as [CR + page number] and the 1 volume Supplemental Clerk's Record will appear as [Supp. CR + page number]. E.g., "[CR1, et seq.]" and "[SuppCR1, et seq.]."
4) State's Exhibits are abbreviated as "SX1," et seq.; Defense Exhibits as "DX1," et seq.; and Court's Exhibits as "CX1," et seq.

Cause No. 1462212 in the 339th District Court of Harris County, Texas. [CR145]. Mr. Plater entered a plea of "not guilty" [3RR11], and on June 20, 2024, was found guilty by the jury of the lesser included offense of robbery. [5RR45; SuppRR -Vol. 1 of 2 (9/3/2024) at 3; CR599, 603].

Punishment:[2]

Mr. Plater elected to have his punishment assessed by the Court, and pleaded "not true" to the enhancement paragraphs of the indictment. [CR603-4]. On June 21, 2024, finding the enhancement paragraphs to be true, the court assessed punishment at forty (40) years in the Institutional Division of the Texas Department of Criminal Justice. [6RR246; CR603]. Mr. Plater filed a timely notice of appeal. [SuppRR -Vol. 1 of 2 (9/3/2024) at 3; CR610].

On July 1, 2024, Appellant filed a timely Motion to Reconsider Sentence.[3] [SuppRR -Vol. 1 of 2 (9/3/2024) at 3; CR637]. The court held a hearing on Appellant's motion on July 16, 2024, and after hearing argument on that date, did not rule on the motion, but took the matter under advisement. [SuppRR -Vol. 1 of 4 (7/16/2024) at 12-13]. On July 18, 2024, the court granted Appellant's Motion to

[2] Due to complicated facts and procedure regarding Appellant's Motion to Reconsider Sentence, Appellant provides detailed case history as to punishment.

[3] Appellant's Motion to Reconsider Sentence was treated as a Motion for New Trial as to punishment. [1 of 2 SuppRR (9/3/2024) at 8].

Reconsider Sentence stating, "I can't say that it's not disproportionate. As a result, I am going to sentence you to 35 years TDC." [SuppRR - Vol. 3 of 4 (7/18/2024) at 4]. Thus, the court orally pronounced punishment at thirty-five (35) years in the Institutional Division of the Texas Department of Criminal Justice. [SuppRR - Vol. 2 of 4 (7/18/2024) at p. 4; SuppRR -Vol. 1 of 2 (9/3/2024) at p. 3; CR605, 655]. Additionally, the court made the following written notation on the judgment expressly memorializing the granting of Appellant's Motion to Reconsider/Motion for New Trial as to punishment: "7/18/2024: Motion to Reconsider Sentence Granted - Sentence reduced to 35 years TDCJ-ID." [CR605].[4] Also on July 18, 2024, the State filed "State's Objections to Trial Court's Grant of a Motion for New Trial and Request for Findings of Fact and Conclusions of Law." [CR643]. After the granting of Appellant's Motion for New Trial, Appellant filed a second Notice of Appeal on July 22, 2024. [CR647]. On July 23, 2024, in response to the State's objections, the court orally vacated the 35-year sentence and stated it would conduct a punishment hearing. [SuppRR- Vol. 3 of 4 (7/23/2024) at p. 4]. No new punishment hearing was

[4] At a hearing on September 3, 2024 regarding the status of the case, the State argued that the court's written notation on the judgment sufficed as a written order memorializing the court's oral granting of Appellant's Motion to Reconsider Sentence: "And just for purposes of the record, Judge, I believe the Court's July 18th, 2024 modified judgment saying that you granted the motion to reconsider and reduce the sentence to 35 years would memorialize the Court's oral order." [SuppRR – Vol. 1 of 2 (9/3/2024) at p. 13]. However, the State objected to the lack of an individualized sentencing hearing prior to the court assessing the new 35-year sentence. [SuppRR – Vol. 1 of 2 (9/3/2024) at p. 11].

held. [SuppRR - Vol. 1 of 2 (9/3/2024) at pp. 3, 10-11].

Thereafter, on September 3, 2024 the parties appeared in court and argued the court's oral vacation of the 35-year sentence was void, and therefore the 35-year sentence still stood for purposes of the appellate record. [SuppRR - Vol. 1 of 2 (9/3/2024) at pp. 7, 12; SuppRR – Vol. 4 of 4 (9/18/2024) at p. 9]. This appeal followed and Appellant's brief was due filed in this Honorable Court on or before January 16, 2024. Appellant timely filed a request for an extension of ten days to file his brief to and including January 26, 2025.

ISSUES PRESENTED

POINT OF ERROR NUMBER ONE: THE TRIAL COURT ERRED IN FAILING TO SUA SPONTE INSTRUCT THE JURY THAT ONTERIO BARKINS WAS AN ACCOMPLICE AS A MATTER OF LAW AND THAT HIS TESTIMONY MUST BE CORROBORATED. THE ERROR WAS EGREGIOUSLY HARMFUL.

POINT OF ERROR NUMBER TWO: THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S MOTION FOR MISTRIAL AFTER THE STATE'S WITNESS GRATUITOUSLY MENTIONED THE SUSPECTS' "AFFILIATIONS" AND "TATOOS" IN REFERENCE GANG MEMBERSHIP.

STATEMENT OF FACTS

***Facts from Guilt-Innocence*:**

On the morning of May 22, 2018, grocery store clerks Annie Hernandez and Marcela Harmon were working at Kroger when it was robbed. Annie was working in the customer service booth, which was stocked with cash. [3RR81]. Marcela was working at a register, for customer check-out. [3RR112]. Annie testified four robbers entered the store. [3RR94]. Three went to Annie's booth, and one to the cash register operated by Marcela. [3RR94].

The three men gained access to Annie's booth by using a pry bar and kicking in the door, which she described as wobbly. [3RR85, 89-90]. The robber wearing the white jacket was the first to enter the booth. [3RR98; 7RR SX32, SX33]. The robber wearing a black and yellow jacket had a crowbar, and followed. [3RR98-99; 7RR SX35]. Another robber was wearing black attire with a bandana face-covering [3RR99; SX36]. Annie was afraid they would harm her, but they did not. [3RR85]. Although the pry bar frightened her, Annie acknowledged that aside from its capability of being used as a weapon, it was a tool used to open things, such as doors. [3RR105-6]. For her safety, she got out of the way and let the robbers take the registers. [3RR85, 96-97]. They also got into the safe room where employees counted money, where the Western Union receipts were kept, and where the store's safe is

kept. [3RR97]. Although the men got in close proximity to her, they had their faces covered and Annie could only see their eyes. [3RR86-87, 106-7]. The robbers did not say anything to her or to each other. [3RR86]

The other clerk, Marcela, was working at a customer check-out when one of the robbers took her register. [3RR115]. He was not armed, but Marcela was afraid. [3RR116-17]. The robber grabbed Marcela's register and ran off with it without saying a word to her. [3RR116-17]. After the robbery, Annie called her manager and 9-1-1. [3RR85-86].

Several individuals were arrested and charged with aggravated robbery with a deadly weapon at the Kroger grocery store, including the Appellant Emmanuel Plater, and co-defendants Cedric Seals, Marcus Hickman, Kenneth Williams and Onterio Barkins. [4RR147]. In exchange for a plea bargain wherein his capital murder charge was reduced to an aggravated robbery with a capped punishment of 40 years, the latter, co-defendant Onterio Barkins testified for the State regarding the May 22, 2018 Kroger robbery. [4RR143].

The investigation of the Kroger robbery began as a surveillance operation of the actors involved in the robbery, and it began before the robbery itself took place. Houston Police Officer Cockrill testified he was part of a 9-member undercover surveillance team that conducted surveillance related to this case on May 22, 2018,

at multiple locations. [3RR23-24]. On the morning of the robbery, but prior to the robbery, Officer Cockrill was tasked with undercover surveillance of Mr. Plater's White Crown Vic car at the Timber Ridge Apartment complex at 12200 Fleming. [3RR19, 21-22, 41; 7RR-SX7 & SX8]. Surveilling the Timber Ridge scene, Cockrill was in plain clothes and in an unmarked Toyota Camry. [3RR23, 42]. Co-defendant Barkins testified that he and another co-defendant Marcus Hickman slept at Plater's Timber Ridge apartment the night before the robbery. [4RR146].

Officer Cockrill testified at 6:15 a.m. a maroon Chevrolet Impala arrived at Plater's apartment complex and parked near the Crown Vic. [3RR24]. A black male identified as co-defendant Cedric Seals got out of the Impala and headed to the northeast corner of the complex. [3RR24-25]. At 6:40 a.m. Cedric Seals and another black male, identified as Mr. Plater, exited an unknown apartment, and got into the Crown Vic. [3RR26]. The Crown Vic traveled a couple of miles away, to 12411 Wood Forest Chase Apartments complex. [3RR27. 29].

Houston Police Officer Tae Hoon Kim, who was assisting the gang division with surveillance of the white Crown Vic was positioned at the Wood Forest Chase Apartments. [3RR51, 53]. Kim was undercover, wearing plain clothes and in an unmarked car. [3RR 64]. Kim testified the Crown Vic entered the Wood Forest complex and parked. [3RR54-55]. Next, a maroon Ford Econoline cargo van that was

parked at the complex moved to park next to the Crown Vic. [3RR54-55; 4RR61]. The driver of the van, wearing red, got out to communicate with the occupants of the Crown Vic. [3RR55]. The van driver left the van at the Wood Forest apartment complex and got into the Crown Vic which exited the Wood Forest complex and headed back to the Timber Ridge complex. [3RR55-56].

Officer Cockrill, who was still positioned at the Timber Ridge Apartments testified the Crown Vic returned to the Timber Ridge Apartments shortly before 7:00 a.m. [3RR30]. He saw the three men exit the Crown Vic, and go into one of the apartment units. [3RR30-31]. Another officer conducting Surveillance at the Timber Ridge Apartments, Sgt. Alejandro Carmona, saw these three men get out of the Crown Vic and go to Apartment 1312. [4RR53]. Soon thereafter, Cedric Seals went back to the Crown Vic to get something out of the trunk. [3RR30-31]. Cedric returned to Apartment 1312, only to come out a few minutes later to get a pair of shoes out of the same car before going back to Apartment 1312. [3RR30-31]. Next, Emmanuel Plater, Cedric Seals and three others came out of an apartment and left the complex in Plater's Crown Vic. [3RR31].

Over police radio from other members or the surveillance team, Officer Cockrill learned the Crown Vic drove back to the Wood Forest apartments a second time, where Officer Kim was still stationed. [3RR59, 75]. Officer Kim reported

seeing a lot of movement among some occupants of the Crown Vic. [3RR59]. An occupant wearing a black shirt and white jacket with black lining[5] changed the license plate on the maroon van. [3RR59, 62]. A male wearing a yellow and black jacket filled the gas tank of the van with a portable gas can, while another male wearing a red and black jacket stood by. [3RR59-60; 7RR– SX18-SX25]. Kim saw the male wearing the white jacket get into the van which then exited the apartment complex. [3RR64]. The others followed the van in the Crown Vic. [3RR64]. Kim could not see how many occupants were in the Crown Vic because of the dark window tint. [3RR68-69]. Kim stayed at the apartments and cleared the area by conducting a perimeter surveillance. [3RR72]. Officer Kim did not have contact with the actors again until they were arrested. [3RR73]

After leaving the Wood Forest apartments, the Crown Vic followed the van, and they traveled in tandem for approximately 20-25 minutes. [3RR36]. The two vehicles were under surveillance the entire time. [3RR36]. Officer Cockrill arrived at a spot just north of the Kroger parking lot. [3RR37]. Additionally, Houston Police Department Lieutenant Christian Dorton of the Northeast tactical unit was involved in the surveillance in this case, and tasked with watching the Kroger grocery store

[5] Law enforcement witnesses involved in this surveillance testified as to what the actors were wearing, rather than who they were.

entrance. [3RR159, 163-64]. He refused to testify as to where he was parked in the Kroger lot so as not to teach criminals how police find them. [3RR166-67]. However, he said he was parked generally in the middle of the parking lot area depicted in SX53. [3RR166-67; 7RR– SX53]. Dorton was working undercover in plain clothes and an unmarked car. [3RR163]. Dorton testified he saw the Crown Vic and maroon van circle the area of Kroger and the Kroger lot, and then both vehicles left for the apartment complex on Crosby, just north of the Kroger. [3RR170-71].

Trooper Jordan Teel with the Texas Department of Public Safety Aviation division testified that on May 22, 2018 he was assigned to the DPS Aircraft Houston station. [3RR123]. He was conducting helicopter surveillance in this case. [3RR126]. Teel's helicopter was equipped with cameras, which took video during this surveillance mission. [3RR130, 132; SX127]. Teel explained the camera is able to zoom in to see more than can be seen with the eyes alone. [3RR153]. When zooming in, they were at around 3500 feet elevation. However, Teel's camera did not provide a view of the actors' faces. [3RR153].

Teel's mission was to locate a white Crown Victoria and a maroon van at an apartment complex in the Crosby area. [3RR135-36]. Lt. Dorton testified that at the apartment complex, all the occupants of both the Crown Vic and maroon van got into the maroon van. [3RR170]. Trooper Teel's helicopter camera then captured the van

going into the parking lot of Kroger. [3RR137-38]. When the van parked in front of the Kroger entrance, it was briefly out of view of the helicopter camera. [3RR137-38]. But Lt. Dorton videotaped the van stopping in front of the Kroger entrance. [3RR171-72; 7RR– SX67]. State's Exhibit 67, Dorton's video, shows four of the five occupants entering the Kroger. [3RR173]. One of the occupants who was not photographed, the driver, remained in the van. [3RR174]. Of those who entered the Kroger, Dorton testified one of them was wearing a maroon sweater, black pants and shoes, a baseball hat and red face covering. [3RR177]. The second was wearing a yellow jacket. [3RR177]. The third person was in all black and wearing high water pants. [3RR177]. The fourth person was wearing a white jacket. [3RR178]. Defense Exhibit 1 was a still shot from Dorton's video, and shows the four suspects entering the Kroger. [4RR37, 7RR– DX1]. Dorton claimed that he thought the suspects were carrying rifles, but learned they were crowbars, also known as pry bars. [3RR173].

Mr. Plater was identified at his apartment at Timber Ridge, with his Crown Victoria car and the other suspects on the morning of May 22, 2018. He was also identified as present at the time of arrest, when his Crown Vic was stopped on Highway 90, later that day, after the robbery. However, the identification of the suspects and actors involved in the different sequences of events that day, and the identity of who was present with the Kroger robbery occurred, was at issue in this

case and is unclear from the record: Lt. Dorton testified that after the five occupants were arrested they were brought back to the Kroger, along with their vehicles, to be photographed. [3RR180-1; 7RR SX62-66, SX146-147]. After attempting to inject information about the co-defendants' gang affiliations, in violation of the court's order on Appellant's motion in limine,[6] Dorton admitted that at the time of his investigation, he identified the suspects entering the Kroger as: Cedric Seals was the suspect wearing the black pants with the white stripe and the white jacket when he entered the Kroger [4RR47-48; 7RR–DX1, DX2]; Kenneth Williams was wearing a yellow and black security jacket when entering the Kroger [4RR48; 7RR– DX3]; Marcus Hickman was wearing the maroon sweatshirt upon entering Kroger [4RR49, 7RR– DX4]; and Onterio Barkins was the actor wearing all black and a white face mask when entering the Kroger. [4RR49; 7RR–DX5]. Dorton testified one of the suspects, the driver, who he did not identify, stayed in the van. [3RR174]. The Appellant, Mr. Plater was photographed and not identified.

After the suspects entered the Kroger, at the 1:04 minute mark, Dorton's video shows them exiting the Kroger with the stolen items and getting into the van. [3RR174; 7RR– SX67]. At the 6:46 minute mark, Trooper Teel's helicopter video

[6] This was the basis of Appellant's Motion for Mistrial, and these facts are addressed in greater detail in Appellant's Point of Error Number Two, infra.

depicts the actors leaving Kroger, jumping into the maroon panel van in the Kroger parking lot, and then accelerating out of the parking lot at a high rate of speed. [3RR136-38]. From the moment the van left Kroger, Teel had his eyes on the van from the helicopter. [3RR141]. The van proceeded to the apartment complex where the occupants threw clothes over the fence and got into their "switch vehicle"- the white Crown Vic. [3RR174-75, 179-80]. Teel testified there were surveillance units on the ground, and it was his job to help those units on the ground follow the Crown Vic and maroon van. [3RR138]. Along with Sgt. Carmona, Officer Cockrill was one of the officers on the ground that followed the van from Kroger to the apartment complex near Kroger. [3RR38; 4RR60]. The van went back to the apartments where the Crown Vic was parked. [3RR128]. On the way to the apartments, the van cut through a CVS parking lot and at the 10:10 mark of Trooper Teel's helicopter video, can be seen entering the apartment complex. [3RR139; 7RR– SX127]. Teel's video does not show the occupants getting out of the van, although he testified he witnessed this with his eyes and "to his knowledge" all the occupants got out of the van. [3RR141-42]. It then shows a couple of the van occupants at the fence line tossing items over the fence into the field, and then running back and getting in the Crown Vic. [3RR141; 7RR– SX127]. Cockrill was on the ground at the apartment complex, and he testified he did not know who was in either the maroon van or the Crown Vic.

[3RR45]. However, he was position approximately a football field's distance from the fence line and testified generally to seeing some suspects throwing clothes over the fence near the bayou, before leaving the complex in the Crown Vic. [3RR40, 45-6].

When the Crown Vic left the apartments, Teel acted as the eye in the sky and was communicating about the Crown Vic's location with officers on the ground. [3RR143]. Teel was tasked with following the Crown Vic, and he testified that most of the vehicles near the Crown Vic were undercover law enforcement. [3RR13-44]. Cockrill was one of the officers who followed the Crown Vic on Highway 90 where they conducted a traffic stop, and took the car and five people into custody. [3RR39].

At the video's 15:19 minute mark, the helicopter video shows a coordinated vehicle pin and felony takedown where law enforcement vehicles surrounded and stopped the Crown Vic. [3RR144; 7RR– SX127]. The road was shut down for this procedure, to protect the public. [3RR147]. The helicopter assisted the ground officers by calling out what they were seeing. [3RR145]. After the Crown Vic was stopped, the helicopter stayed overhead as the five occupants exited the Crown Vic, and until the ground had been secured. [3RR148, 151]. Trooper Teel reported seeing the occupants exiting the Crown Vic, and described them, not by identity, but by their attire, as follows:

1. The driver exited the driver door and start walking backwards towards the officers. [3RR145]. He was wearing blue pants and a black T-shirt, and started walking toward the officers. [3RR145].

2. Next, the passenger-side occupant exited the front driver's side door wearing a black T-shirt with white below it, that could have been an undershirt or part of his pants. [3RR145-46, 51].

3. A rear passenger came out the other side of the Crown Vic. [3RR146, 148]. Another third occupant was wearing blue jeans and a black shirt. [3RR151].

4. The fourth occupant was wearing a white T-shirt and dark shorts or pants. [3RR151].

5. The fifth occupant is wearing black pants, a black shirt and shoes with white. [3RR151].

Sgt. Carmona, also present at the arrest, testified Mr. Plater was wearing blue pants, and no one entering the Kroger had blue pants on. [4RR76-77]. The four suspects who entered the Kroger were wearing black pants. [4RR84]. In his experience, Sgt. Carmona said people often wear layers of clothing when committing crimes; after they commit the crime, they remove the top layer of clothes and wear something completely different underneath. [4RR82].

After the five suspects and the car were taken into custody, Cockrill went back to the apartment complex near the Kroger to collect the clothing he saw the suspects throw over the fence there. [3RR39]. Sgt. Carmona was responsible for collecting the cell phones from the scene. [4RR68, SX123 and SX124]. Carmona claimed State's

Exhibit 126, an iPhone, was collected from the front seat of the Crown Vic which Carmona claimed was in the vicinity where Mr. Plater was seated. [4RR68-69, 78; 7RR–SX126]. However, Carmona also admitted not having any video or photograph documentation of SX126's original location, and that it was possible another officer picked up the phone from elsewhere in the car and placed it on the seat. [4RR79, 81]. It was also understood that during the arrest, suspects other than Mr. Plater had to slide out of the driver's side door because the other door on the Crown Vic was pinned closed. [3RR 146, 4RR 181-82]. Because the State failed to sufficiently connect the iPhone, SX126, to Mr. Plater, no phone extraction information was admitted at trial. [4RR186].

Lt. Dorton testified that after the five occupants were arrested they were brought back to the Kroger, along with their vehicles, to be photographed and for the scene to be processed. [3RR180-1; 7RR SX62-66, SX146-147]. When shown defense Exhibits 1-5, comparison photos of the suspects entering Kroger, and photos of what they were wearing when arrested, Dorton agreed to the following: at the time of the initial investigation, it was his opinion Cedric Seals was wearing the black pants with the white stripe and the white jacket when he entered the Kroger. [4RR47-48; 7RR–DX1, DX2]. But as depicted in the clothing camparison, when brought back to Kroger after arrest, he was wearing black pants and a black shirt. [4RR47; 7RR–

DX2]. At the Kenneth Williams entered the Kroger he was wearing a yellow and black security jacket, but after arrest, per DX3, he had on a white T-shirt and black bottoms. [4RR48; 7RR– DX3]. Marcus Hickman was wearing the maroon sweatshirt upon entering Kroger, but after arrest, DX4 shows him in a black T-shirt, and blue jeans covered by black pants pulled down to his knees. [4RR49, 7RR– DX4]. Onterio Barkins was wearing all black and a white face mask when entering the Kroger, and later when arrested was depicted in DX5 wearing all black. [4RR49; 7RR–DX5].

Sergeant Gibson's assignment was to inventory evidence in the white Crown Vic and the maroon van. [5RR88-89]. Inside the Crown Vic, there was a fuchsia colored face covering on the front seat. [4RR92]. In the back seat were gloves, loose money and a backpack/bag. [4RR93]. There were also some red shoes. [4RR94]. They pulled all the items out, and photographed them: a security officer hat, a green construction crew jacket, a dark colored backpack full of money. [4RR94-95; 7RR–SX78, SX80-81]. They also photographed light colored pants, a face covering, a hooded black sweatshirt, black track pants, two construction gloves, a maroon sweatshirt, a red shirt, a camouflage ball cap, blue sandals, and a cell phone among other items. [4RR95-97, 110; 7RR–SX83-92]. There were two license plates, and some bandannas. [4RR97; 7RR–SX79, SX96]. Gibson found a Texas ID card, insurance cards, a wallet and worker ID belonging to Mr. Plater, and brass knuckles.

[4RR98]. In his testimony, Gibson was unable to say exactly where some of the evidence he photographed was originally found, as there were several officers involved and so many items in the car that it looked like someone was living in it. [4RR105-106]. They also found a pair of gray pants, and two black shoes. [4RR107-108; 7RR–SX83, SX74]. The latter were found on the Crown Vic driver's side floorboard. [4RR108; 7RR–SX74].

Gibson's inventory of the maroon van contained the empty cartridges, registers Western Union slips, and a pry bar. [4RR99-100; 7RR–SX113-114]. In his training and experience, he testified a crowbar can be a deadly weapon, but it is also a tool [4RR100-101, 114-115]. Gibson admitted the crowbar photographed in State's Exhibit 119 was actually a pry bar that has a flat surface and is used for prying things open, such as prying tills out of registers or prying a door open. [4RR115; 7RR–SX119]. The evidence that Gibson photographed was turned over to Detective Wallace Wyatt with the Harris County Sheriff Office to be tagged and admitted into property. Wyatt testified he also photographed and then tagged the evidence that as recovered in this case. [4RR117-8].

In contrast to what Lt. Dorton had testified to, Mr. Barkins, an accomplice witness, testified regarding the suspects' alleged roles during the robbery as follows: Showing SX58, a photo of the four robbers entering the Kroger, Barkins said the first

one, closest to the door wearing a burgundy or red sweater, a red mask and a hat was Mr. Plater. [4RR153-4; 7RR–SX58]. He testified tSX136 was the same sweater, hat and face covering. [4RR153-4]. Barkins said the second person, Kenneth Williams was wearing a yellow jacket. [4RR154-5]. Barkins said he was the third person and was wearing a white mask and black sweater. Mr. Williams also had a crowbar. [4RR156-7; 4RR155, SX131, SX135]. Barkins identified the fourth person, Cedric Seals as wearing a white jacket and face mask and carrying a backpack on his back. [4RR156, SX13]. According to Barkins, Marcus Hickman waited in the car for them. [4RR157]. Barkins testified he went to the first cash register and without saying anything to the clerk, pulled it out. [4RR157]. The others went to the check cashing spot. [4RR157]. He ran back to the van and the others did too. [4RR158]. Hickman drove them back to the apartments where the Crown Vic was parked. [4RR158]. According to Barkins, they all got into the Crown Vic and some started undressing and they started counting the money. [4RR158-9]. Mr. Plater was the owner of the Crown Vic and was driving. [4RR159].

Punishment:

***The State's Evidence*:**

Mr. Plater elected to have his punishment assessed by the Court, and pleaded "not true" to the enhancement paragraphs of the indictment. [CR603-4]. The State

presented the pen packets for both offenses in the enhancement paragraphs, and the court ultimately found the enhancements to be "true." [7RR–SX204, SX205; [6RR246; CR603]. Mr. Plater had been alleged to be involved in a capital murder case, but the court refused to consider it in assessing punishment because after hearing the State's evidence, did not find the evidence sufficient to consider it. [6RR242, 244]. The State also presented evidence that on June 14, 2023, Mr. Plater was in possession of a controlled substance in prison. [6RR46, 49; 7RR– SX206, SX207]. Mr. Doss, a detention officer for the Harris County Sheriff's Office testified he conducted the strip search of Mr. Plater and found a durag wrapped around a small plastic bag which was tied around the base of his penis. [6RR49]. Doss was able to collect the pouch from Mr. Plater; it contained several sheets of paper, a light blue pill, a box of matches, letters and a green leafy substance. [6RR50]. James Ross, a forensic chemist from the Harris County Institute of Forensic Sciences tested the suspected laced sheets of paper, which he described as white with an orange stain. [6RR83]. His report, SX208 was admitted. [6RR84]. The suspected laced sheet tested positive for a synthetic cannabinoid. [6RR87]. Deputy Ontiveros was the administrator and records custodian for the Harris County jail's call system, Securus. [6RR53]. He testified to having retrieved jail calls made by Plater, who he identified and connected to the calls through his unique identifying SPN number which an

inmate gets when they enter the Harris County jail. [6RR54-55]. State's exhibit 231 contained two calls alleged to have been associated with Mr. Plater. [6RR56]. Deputy Urdina of the Harris County Sheriff's Office's Special Investigations unit inside the jail was involved in investigating the substances found on Mr. Plater. [6RR59]. Urbana testified Plater was making calls to the person who manages his Cash App to make sure he was getting paid for the sale of the paper laced with drugs. [6RR72, 7RR–SX232]. She further explained there are many overdoses and deaths in jail because inmates are smoking these papers and don't know what is on them. [6RR72].

The Defense Evidence*:*

The defense called two witnesses at punishment. Marvella Davis was Mr. Plater's aunt and she raised him from ages 11 months to 11 years while his mother was in prison. [6RR 216, 222]. Mr. Plater had been a good child, and he cried when his mother came home and he had to leave his aunt's home. [6RR217, 222]. Ms. Davis acknowledged Mr. Plater had been in and out of prison over the years, but said he was a hard-working person who always kept a job. [6RR 215, 217, 222].

Mr. Plater's former girlfriend Jessica Hightower also testified at his punishment. [6RR225]. Ms. Hightower, a licensed clinical social worker, testified she dated Mr. Plater for about a year in 2016. [6RR226]. Since then, they have kept in touch as friends. [6RR226-27]. She testified Mr. Plater was hardworking because

he was always looking for employment and he has persevered despite his upbringing. [6RR 227-28, 232]. She was unaware of the full extent of his criminal history, but when asked why he was stealing from people if he is so hard working, she testified it was very hard to obtain work when one has a criminal history. [6RR231].

***The Court Refused to Consider the Unadjudicated Capital Murder**:*

The Court ruled it would not consider the capital murder case against Mr. Plater, because it had not been proven. [6RR242]. The court found Mr. Barkins' testimony to be incredible. [6RR242]. The court stated it was sentencing Mr. Plater to 40 years based on the robbery conviction in the instant case, the prior aggravated robbery and his criminal history alone. [6RR245].

The Motion to Reconsider Sentence:

After the court sentenced Mr. Plater to forty years, the defense filed a Motion to Reconsider Sentence. [SuppRR -Vol. 1 of 2 (9/3/2024) at 3; CR637]. The court held a hearing on Appellant's motion on July 16th and 18th 2025. [SuppRR -Vol. 1 of 4 (7/16/2024) at 12-13; SuppRR - Vol. 3 of 4 (7/18/2024) at 4]. On the record, the court granted Appellant's Motion to Reconsider Sentence stating, "I can't say that it's not disproportionate. As a result, I am going to sentence you to 35 years TDC." [SuppRR - Vol. 3 of 4 (7/18/2024) at 4]. Thus, the court orally pronounced punishment at thirty-five (35) years in the Institutional Division of the Texas

Department of Criminal Justice. [SuppRR - Vol. 2 of 4 (7/18/2024) at p. 4; SuppRR -Vol. 1 of 2 (9/3/2024) at p. 3; CR605, 655]. Additionally, the court made the following written notation on the judgment expressly memorializing the granting of Appellant's Motion to Reconsider/Motion for New Trial as to punishment: "7/18/2024: Motion to Reconsider Sentence Granted - Sentence reduced to 35 years TDCJ-ID." [CR605]. Also on July 18, 2024, the State filed "State's Objections to Trial Court's Grant of a Motion for New Trial and Request for Findings of Fact and Conclusions of Law." [CR643]. In response to the State's objections, on July 23, 2025, the court orally vacated the 35-year sentence and stated it would conduct a punishment hearing. [SuppRR- Vol. 3 of 4 (7/23/2024) at p. 4]. No new punishment hearing was held. [SuppRR - Vol. 1 of 2 (9/3/2024) at pp. 3, 10-11].

On September 3, 2024 the parties appeared in court and agreed the court's oral vacation of the 35-year sentence was void, and therefore the 35-year sentence still stood for purposes of the appellate record. [SuppRR - Vol. 1 of 2 (9/3/2024) at pp. 7, 12; SuppRR – Vol. 4 of 4 (9/18/2024) at p. 9].

SUMMARY OF THE ARGUMENT

An accomplice witness as a matter of law, Onterio Barkins, testified against Mr. Plater. He is the only witness who put Mr. Plater at the scene of the Kroger

robbery, as allegedly being the actor depicted on video wearing a purple sweatshirt, that entered the Kroger and robbed it. Even more, the State's investigator actually named another co-defendant, Marcus Hickman, as the individual wearing the purple sweatshirt. This investigator did not even identify Mr. Plater as being present at the Kroger robbery. The trial court failed to instruct the jury that Barkins was an accomplice witness, what that meant, and that Barkins's testimony required non-accomplice witness corroboration. Because Mr. Plater did not object to the charge, this error was subject to an egregious harm standard. The harm was egregious because the State's evidence was contradictory on key issues, such as who actually robbed the Kroger, and who was who, where and when, throughout the sequence of events. The faulty charge gave Mr. Plater's jury free reign to consider Barkins's testimony without finding that it was corroborated by other evidence connecting Mr. Plater with the offense alleged. The trial court erred in failing to provide an accomplice witness instruction, and it resulted in egregious harm.

Compounding the harm, and as reversible error in itself, was the fact the State's investigator improperly injected comments that he identified all the suspects by their "tattoos" and "affiliations" - an obvious reference to gang membership. The investigator also had the suspects' identities outlined by what they were wearing during the offense, so his gang references were unnecessary and gratuitous. Mr. Plater

moved for a mistrial due to the prejudicial nature of the testimony and severity of the misconduct. The court declined to grant a mistrial and considered providing a curative instruction, but ultimately did not, believing an instruction would draw attention to the investigator's prejudicial testimony. In essence this served as the court's tacit agreement that an instruction would not cure the harm. Instead, the court instructed the State to clear the prejudice through questioning of the investigator that made it clear the photograph of a suspect with tattoos and possible gang affiliation was not Mr. Plater. In that the investigator's improper testimony indicated he identified *all* the suspects by their tattoos and affiliations, this did nothing to ameliorate the concern the jury now thought all suspects, including Mr. Plater, were in a gang. In assessing the certainty of the conviction, absent the improper references to suspects' "tattoos" and "affiliations," it is clear that even if the evidence passed muster for legal sufficiency standards for principal or party liability, it was far from certain. In a case such as this, where the State's evidence is contradicted on key points, and relies on uncorroborated accomplice witness testimony on key points, without the benefit of an accomplice witness instruction in the jury charge, this type of inflammatory gang membership evidence may well have tipped the jury over the edge of any doubt, and into conviction. Accordingly, the trial court abused its discretion in denying Mr. Plater's request for mistrial.

ARGUMENT

POINT OF ERROR NUMBER ONE: THE TRIAL COURT ERRED IN FAILING TO SUA SPONTE INSTRUCT THE JURY THAT ONTERIO BARKINS WAS AN ACCOMPLICE AS A MATTER OF LAW AND THAT HIS TESTIMONY MUST BE CORROBORATED. THE ERROR WAS EGREGIOUSLY HARMFUL.

A. Summary of the Argument for Point of Error One Restated:

An accomplice witness as a matter of law, Onterio Barkins, testified against Mr. Plater. He is the only witness who put Mr. Plater at the scene of the Kroger robbery, as allegedly being the actor depicted on video wearing a purple sweatshirt, that entered the Kroger and robbed it. Even more, the State's investigator actually named another co-defendant, Marcus Hickman, as the individual wearing the purple sweatshirt. This investigator did not even identify Mr. Plater as being present at the Kroger robbery. The trial court failed to instruct the jury that Barkins was an accomplice witness, what that meant, and that Barkins's testimony required non-accomplice witness corroboration. Because Mr. Plater did not object to the charge, this error was subject to an egregious harm standard. The harm was egregious because the State's evidence was contradictory on key issues, such as who actually robbed the Kroger, and who was who, where and when, throughout the sequence of events. The faulty charge gave Mr. Plater's jury free reign to consider Barkins's

testimony without finding that it was corroborated by other evidence connecting Mr. Plater with the offense alleged. The trial court erred in failing to provide an accomplice witness instruction, and it resulted in egregious harm.

B. Relevant Facts:

The jury charge did not contain an accomplice witness instruction. [CR587-597]. There was no charge conference on the record; as such there is nothing in the record to show defense counsel made any proposed submissions to the charge, or objected to the charge.

Co-defendant Onterio Barkins testified for the State, with his own defense counsel present. [4RR136-137, 141]. Barkins admitted to being one of the suspects who entered the Kroger and participated in the robbery [4RR155-7]. However, he also testified Mr. Plater was one of the four men who entered the Kroger and committed the robbery. [4RR153-4].

The Robbers' Identities According to Accomplice Witness Barkins Were Contrary to Law Enforcement's Identification:

Identifying the four robbers from a photo of them entering the Kroger store, State's Exhibit 58, Barkins testified to the robbers' identities thusly:

1. Emmanuel Plater, the Appellant, was the first person closest to the Kroger door – he was wearing a burgundy or red sweater, a red mask and hat [4RR153-4; 7RR–SX58];

2. Kenneth Williams was the second person and he was wearing a yellow jacket and carrying a crow bar [4RR154-5, see also 4RR150-1];

3. Onterio Barkins himself was the third person and was wearing a white mask and black sweater [4RR156-7; 4RR155, SX131, SX135];

4. Cedric Seals was and the fourth person and he was wearing a white jacket and face mask and carrying a backpack on his back. [4RR156, SX13].

5. According to Barkins, Marcus Hickman waited in the car for them. [4RR157].

Barkins's identification of the robbers was contrary to the State's investigator Lt. Dorton's identification. For the State, Dorton testified the four suspects who entered the Kroger and committed the robbery were:

1. Marcus Hickman was the person wearing the maroon sweatshirt upon entering Kroger [4RR49, 7RR– DX4];

2. Kenneth Williams was wearing a yellow and black security jacket when entering the Kroger [4RR48; 7RR– DX3];

3. Onterio Barkins was the actor wearing all black and a white face mask when entering the Kroger [4RR49; 7RR–DX5]; and,

4. Cedric Seals was the suspect wearing the black pants with the white stripe and the white jacket when he entered the Kroger [4RR47-48; 7RR–DX1, DX2].

5. Dorton testified one of the suspects, the driver, who he did not identify, stayed in the van. [3RR174].

Dorton did not identify Mr. Plater as being one of the robbers that was at Kroger. [See

4RR 48-49]. Beside the accomplice witness, Onterio Barkins, no other witness affirmatively identified Mr. Plater as having been present at Kroger - either as one of the individuals who entered Kroger, or as the driver of the van.

C. Applicable Law:

1. The Standard of Review

In analyzing a jury charge issue, an appellate court's first duty is to decide whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If error exists, the court then analyzes that error for harm. *Id.* If the appellant did not object to the charge, the appeals courts examine the record for egregious harm. *Id.* Errors that result in egregious harm are those that affect "the very basis of the case," "deprive the defendant of a valuable right," or "vitally affect a defensive theory." *Id.* at 750.

2. The Law Regarding Accomplice Witness Instructions

An accomplice is any person who, with the requisite culpable mental state, participated with the accused before, during, or after the crime by performing some affirmative act that promoted its commission. *See Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007). Tex. Code Crim. Proc. art. 38.14 provides that "[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[.]"

This rule reflects a determination by the legislature that testimony from an accomplice implicating the defendant must be viewed with some wariness as "accomplices often have incentives to lie, such as to avoid punishment or shift blame to another person." *Blake v. State*, 971 S.W.2d 451, 454 (Tex. Crim. App. 1998).

In *Zamora v. State*, the Court of Criminal Appeals held the Almanza[7] framework applied to complainants regarding accomplice witness jury instructions in cases involving party liability, such as the instant case. See *Zamora v. State*, 411 S.W.3d 504, 510 (Tex. Crim. App. 2013). A witness is an accomplice if he could be prosecuted for the same offense as the defendant or for a lesser included offense. *Id*. "When the evidence clearly shows (i.e., there is no doubt) that a witness is an accomplice as a matter of law, the trial judge must instruct the jury accordingly." *Smith v. State*, 332 S.W.3d 425, 439 (Tex. Crim. App. 2011). Mr. Barkins was arrested and charged with the Kroger aggravated robbery, along with Mr. Plater and the other co-defendants in the instant case. [4RR159-60]. At the time of his testimony, Barkins had pled guilty to the offense of aggravated robbery for this same Kroger robbery, and was awaiting sentencing on the case. [4RR166]. Because he pled guilty without a cap as to punishment, at the time of his testimony, Mr. Barkins was facing the full range of punishment of 5 to 99 years or life. [4RR166].

[7] *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984 (op, on reh'g).

In *Smith v. State*, the Court of Criminal Appeals held "a witness who is indicted for the same offense or a lesser-included offense as the accused is an accomplice as a matter of law." *Smith v. State*, 332 S.W.3d 425, 439 (Tex.Crim.App.2011). Thereafter, in *Casanova v. State*, the Court reiterated this position, holding a witness who had been indicted for the same offense, had pled guilty and was awaiting sentencing was an accomplice as a matter of law and it was error for the court to fail to submit an instruction accordingly. *Casanova v. State*, 383 S.W.3d 530, 533 (Tex. Crim. App. 2012). Thus, the law dictates Mr. Barkins was an accomplice as a matter of law and the trial court erred in failing to sua sponte instruct the jury as such.

3. Accomplice Witness Testimony Must Be Corroborated

With or without a party's request, a trial court must instruct the jury that it cannot convict solely on an accomplice's testimony. The testimony of an accomplice witness must be corroborated by other evidence that tends to connect the defendant with the offense committed. See Tex. Code Crim. P. art. 38.14: "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." The trial court must instruct the jury regarding this corroboration requirement. *See Oursbourn v. State*, 259 S.W.3 149, 180 (Tex. Crim. App. 2008).

The Code of Criminal Procedure requires that a trial judge "shall, before the argument begins, deliver to the jury ... a written charge distinctly setting forth the law applicable to the case." Tex. Code Crim. P. art. 36.14. This means that when the evidence shows that a witness is an accomplice as a matter of law, a trial court must affirmatively instruct the jury:

1. that the witness is an accomplice;

2. that his testimony must be corroborated; and

3. what the definition of "accomplice" is.

See Tex. Code Crim. P. art. 38.14. *See, also, Zamora v. State*, 411 S.W.3d 504, 510 (Tex. Crim. App. 2013); *Oursbourn v. State*, 259 S.W.3 149, 180 (Tex. Crim. App. 2008).

The testimony of an accomplice witness must be corroborated by other evidence that tends to connect the defendant with the offense committed. See Tex. Code Crim. P. art. 38.14: "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." An accomplice is any person who, with the requisite culpable mental state, participated with the accused before, during, or after the crime by performing some affirmative act that promoted its commission. *See Druery v.*

State, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007).The trial court must instruct the jury regarding this corroboration requirement. *See Oursbourn v. State*, 259 S.W.3 149, 180 (Tex. Crim. App. 2008).

4. Lack of Instruction Egregiously Harmed Mr. Plater

Because there is nothing in the record to suggest defense counsel objected to the trial court's failure to instruct the jury that Mr. Barkins was an accomplice as a matter of law, the court's error is reviewed under the "egregious harm" standard of *Almanza*. Egregious harm consists of those errors that affect the very basis of the case, deprive the defendant of a valuable right, vitally affect a defensive theory, or make the case for conviction clearly and significantly more persuasive. *Taylor v. State*, 332 S.W.3d 483, 490 (Tex. Crim. App. 2011). In *Saunders v. State*, the Court explained the standard for egregious harm per *Almanza* in the context of the failure to submit an accomplice witness instruction:

> [I]f the omission is not made known to the trial judge in time to correct his error, appellate review must inquire whether the jurors would have found the corroborating evidence so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive.

Id. 817 S.W.2d 688, 692 (Tex.Crim.App.1991). In applying this standard,

> "...the reviewing court must take the entire record into account, as in any *Almanza* analysis, to assess whether the jury, had it been properly instructed on the law requiring corroboration of accomplice-witness

> testimony,"would have found the corroborating evidence so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive."

Casanova v. State, 383 S.W.3d 530, 534 (Tex. Crim. App. 2012).

a. The Entire Record Considered:

As a threshold matter, the determination of egregious harm, and particularly the assessment of whether the corroborating evidence was "...so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive," the court is not tied to a sufficiency of the evidence analysis. *Casanova v. State*, 383 S.W.3d 530, 534 (Tex. Crim. App. 2012). In *Casanova*, the Court explained:

> In the sufficiency context, we have said that, "when there are two permissible views of the evidence (one tending to connect the defendant to the offense and the other not tending to connect the defendant to the offense), appellate courts should defer to that view of the evidence chosen by the fact-finder."

Id. Indeed, deference to the fact-finder does not work when, such as in the instant case, no accomplice witness instruction was submitted to the jury. *Id.* This is so because "...there is no fact-finder's view to which an appellate court can defer for purposes of assessing egregious harm, vel non." *Id.*

Even so, the *Casanova* Court went on to explain:

That non-accomplice evidence may be, at a bare minimum, sufficient to

> support a finding that the accomplice witness's testimony was corroborated, when viewed in the light most favorable to the jury's verdict, does not dispose of the question of egregious harm. Instead, the reviewing court must take the entire record into account, as in any *Almanza* analysis, to assess whether the jury, had it been properly instructed on the law requiring corroboration of accomplice-witness testimony, "would have found the corroborating evidence so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive."

Id. This analysis begins with taking stock of the entire record, and the evidence related to Mr. Plater's guilt, without consideration of the accomplice witness Barkins's testimony. *Id.*

b. The Jury Charge:

The jury was authorized to find Mr. Plater guilty of aggravated robbery directly or under a party theory of liability, or the lesser offense of robbery under the same. [CR 590-91]. The jury convicted him of the lesser offense of robbery. [CR599]. In addition to failing to provide a definition of "accomplice," and failing to instruct the jury that Barkins was an accomplice as a matter of law, the charge did not contain any limitation on jury's consideration and the use of Mr. Barkins's testimony. Indeed the must also inform the jury it must find corroboration of Mr. Barkins's testimony before they could consider his testimony in deliberations. See Tex. Code Crim. P. art. 38.14. *See, also, Zamora v. State*, 411 S.W.3d 504, 510 (Tex. Crim. App. 2013); *Oursbourn v. State*, 259 S.W.3 149, 180 (Tex. Crim. App. 2008). The charge instructed on the

law of parties, but failed to instruct on the accomplice witness rule. [CR 589].

Another portion of the charge instructed that the jury that if they heard evidence of a witness's convictions, it was only for aiding the jury in determining that witness's credibility, and cannot be considered for anything else. [CR594]. The State used this instruction to argue Barkins had criminal history and the jury did not have to like him but that everything Barkins said was corroborated by the evidence. [5RR19]. When examined as a whole, the charge does not ameliorate the harm caused by the omission of a proper accomplice witness instruction.

c. The Evidence Aside from the Accomplice Witness Testimony

<u>What the Record Does Not Evidence</u>:

As outlined below, the jury heard evidence there were many officers involved in surveillance of the suspects. The only time identification of Mr. Plater was clear was: Mr. Plater was identified as being with the other suspects in the morning at Mr. Plater's Timber Wood apartment complex, and leaving in his Crown Vic. [3RR26, 31]. Mr. Plater was also present at the time of arrest, when the Crown Vic was pulled over. [4RR66]. Other than those two identifications of Mr. Plater, the record evidences confusion as to who was who and who was present where, throughout the sequences of the day.

What is also clear is, aside from the accomplice witness testimony 4RR 153-7],

Mr. Plater was not identified as present at the Kroger robbery. [See 4RR 48-9]. In fact, the lieutenant who identified the suspects did not identify Mr. Plater as being present. [4RR 48-49]. The suspect depicted entering the Kroger store wearing maroon, who accomplice Barkins testified was Mr. Plater [4RR153-4; 7RR–SX58], was identified by law enforcement as a different suspect, Marcus Hickman. [4RR49, 7RR– DX4].

What the Record Evidences:

- Mr. Plater owned the white Crown Vic car. [3RR41].
- Officer Cockrill and Sgt. Carmona were conducting surveillance the morning of May 22, 2018 of Mr. Plater's Crown Vic at the Timber Ridge apartments.
- Before the Kroger store was robbed, Cockrill and Carmona saw Plater, Barkins Williams, Seals and Hickman come and go between the Timber Ridge and Wood Forest apartments. [3RR 30-31; 4RR 53-4].
- Cockrill took no photographs of his surveillance and could not testify to what Mr. Plater was wearing at any time prior to his arrest. [3RR43].
- Cockrill and Carmona stayed at Timber Ridge apartments and did not follow the suspects as they traveled to and from the Wood Forest apartments.
- Officer Kim was at the Wood Forest apartments where he also surveilled Mr. Plater's white Crown Vic and the maroon van. Kim did not identify any of the suspects he was surveilling; he simply referred to the individuals he saw as "occupants" of either the Crown Vic or maroon van, and described what clothes he saw various occupants wearing: "A guy, male, wearing [] a white jacket and black shirt" got out and started messing with the license plate on the van. [3RR59]. Also "one male, wearing a red and black jacket and another one wearing a yellow and black jacket" start filling the van's gas tank." [3RR59-

60, 62].

- Officer Kim did not identify suspects, or Mr. Plater by name or by his clothing. Officer Kim admitted, "...I wasn't trying to identify anybody, just clothing, what they are wearing." [3RR68].

- When the Crown Vic left Wood Forest, Officer Kim did not know how many occupants were inside, as the window tint was too dark. [3RR68-69].

- When both the Crown Vic and maroon van left Wood Forest in tandem, Officer Kim testified he lost sight of both vehicles and did not see where they went next. [3RR44]. He only learned via radio, the vehicles were "going outbound on 90 toward Crosby," and he headed in that direction where he parked at Crosby near the Kroger. [3RR66-67, 78].

- Trooper Teel conducted surveillance from a helicopter and began searching for the white Crown Vic and maroon van at the Crosby area, near the Kroger. His video was admitted in evidence as State's Exhibit 127.

- Trooper Teel's helicopter camera located and photographed the van in the parking lot of Kroger. [3RR137-38; 7RR– SX127, at 6:36]. The maroon van moved in front of the Kroger entrance where it was out of view of the helicopter camera until after the robbery, at video mark 8:04, when the suspects are seen jumping into the van as it drives away from Kroger. [3RR137-38; 7RR– SX129 at 7:24-8:11].

- Lt. Dorton was conducting surveillance on the ground in the Kroger parking lot. [3RR 163-4, 166-7]. He photographed the suspects entering the Kroger. [3RR159, 163-64]. Dorton identified the four people he saw enter the Kroger, but did not identify Mr. Plater as being one them. [4RR 48-9].

- Lt. Dorton identified the four suspects who entered the Kroger and committed the robbery were:

    1. Marcus Hickman (depicted wearing the maroon sweatshirt upon entering Kroger) [4RR49, 7RR– DX4];

2. Kenneth Williams (depicted wearing a yellow and black security jacket when entering the Kroger) [4RR48; 7RR– DX3];

3. Onterio Barkins (depicted wearing all black and a white face mask when entering the Kroger) [4RR49; 7RR–DX5]; and,

4. Cedric Seals (depicted wearing the black pants with the white stripe and the white jacket when he entered the Kroger) [4RR47-48; 7RR–DX1, DX2].

- Dorton testified one of the suspects, the driver, who he did not identify, stayed in the van. [3RR174].

- At around the 10:26 minute mark, Trooper Teel's camera recorded the maroon van park in a corner spot at an apartment complex on Crosby, near the Kroger. [7RR– SX129, at 10:26].

- However, before anyone exited the van, at the 10:57 mark, the camera panned to a different area and no longer had the van in sight. [7RR– SX129, at 10:57-11:39].

- Teel testified he kept his eyes on the van and "to his knowledge" he believes everyone exited it. [3RR142].

- At approximately the 11:29 mark in SX129, a person wearing yellow and a person in dark clothing can be seen running in the upper right corner of the video screen. [7RR– SX129, at 11:29-11:32].

- At 11:52, two people are seen running from out of view, toward the fence line, and throwing things over the fence, and then running back, out of view. [7RR-SX129, at 11:52-12:01]. At 12:10, the white Crown Vic is seen pulling out of a parking spot, which had been out of view, and exiting the complex. [7RR–SX129, at 12:10].

- Officer Cockrill was on the ground at the apartment complex, and he testified to seeing some of the suspects throwing their clothes over the fence near the bayou before leaving the complex in the Crown Vic. [3RR40].

- Cockrill did not recall seeing anyone wearing blue sweat pants. [3RR46]. Mr. Plater was arrested in the Crown Vic, wearing blue sweat pants. [4RR76-77].

- At the 15:19 minute mark, the helicopter video shows a coordinated vehicle pin and felony takedown where law enforcement vehicles surrounded and stopped the Crown Vic. [3RR144; 7RR– SX127].

- The helicopter camera captured the five occupants exiting the Crown Vic [3RR148, 151].

- Sgt. Carmona testified Mr. Plater was wearing blue pants when arrested, and no one entering the Kroger had blue pants on. [4RR76-77]. All four of the suspects who entered the Kroger were wearing black pants. [4RR84].

- When arrested, four of the suspects were still wearing black pants indicating they did not change their pants. [5RR 83-84; 7RR DX2, DX3, DX4, and DX5].

- Officers testified to their belief the suspects were wearing layers of clothing, which they discarded after the crime to disguise their identities. [4RR 82; 5RR 182].

- After arrest the suspects, the Crown Vic and the maroon van were all brought back to the Kroger so that they could be photographed. [3RR180].

- State's Exhibit 74 depicted the inside of the Crown Vic's front seats, and in between them was purple-hooded sweatshirt. [4RR 91-2, 95-9; 7RR– SX74 and SX90].

- Officer Carmona testified that when the suspects were arrested, Mr. Plater was the driver and exited the Crown Vic first. [4RR 75; see also 7RR– SX140].

- Because the passenger side door was pinned closed by another vehicle, the front passenger slid over and exited the driver's side door. [3RR146].

- The State argued the maroon sweater was found next to where Plater had been sitting in the Crown Vic, but the testimony was clear it was in the front consol

between the driver and passenger seats. [4RR 96-7]. Also, other suspects were in the front seat area and had to slide over to get out the driver's side. [3RR 146; 4RR 105]. Therefore, the sweater's location upon arrest was not indicia of who had been wearing it. [See 4RR 105].

- Officers Gibson and Wyatt testified regarding the clothing that was recovered from the Crown Vic and the maroon van. Items recovered from the Crown Vic included:

    - a fuchsia colored face covering on the front seat [4RR92];
    - gloves, loose money and a backpack/bag in the back seat. [4RR93].
    - red shoes [4RR94];
    - a security officer hat, a green construction crew jacket, a dark colored backpack full of money [4RR94-95; 7RR–SX78, SX80-81];
    - light colored pants, a face covering, a hooded black sweatshirt, black track pants, two construction gloves, a maroon sweatshirt, a red shirt, a camouflage ball cap, blue sandals, and a cell phone among other items [4RR95-97, 110; 7RR–SX83-92];
    - two license plates, and some bandannas [4RR97; 7RR–SX79, SX96];
    - a Texas ID card, insurance cards, a wallet and worker ID belonging to Mr. Plater, and brass knuckles [4RR98];
    - a pair of gray pants, and two black shoes on driver's side floorboard. [4RR107-108; 7RR–SX83, SX74].

The inventory of items recovered from the maroon van included:

- the empty cartridges, registers Western Union slips, and a pry bar.

[4RR99-100; 7RR–SX113-114].

Officer Wyatt stated he believed some items recovered from the vehicle were tested for DNA. [4RR132]. The State presented no DNA evidence at trial.

Per the foregoing referenced evidence, aside from Barkins's accomplice witness testimony, the corroborating evidence of Mr. Plater's involvement is contradictory and weak such that "...jurors would have found the corroborating evidence so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive." *Saunders*, 817 S.W.2d at 688. *Accord, Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002), *Casanova v. State*, 383 S.W.3d 530, 533 (Tex. Crim. App. 2012).

d. Closing Arguments:

Although the jury was not instructed on its role in determining whether Barkins's accomplice witness testimony was corroborated, the State gratuitously and conclusively argued that Barkins's testimony was corroborated. [5RR19]. The defense argument highlighted the problem that the State's investigation described the actors by what they are wearing, and that it is "...not clear who was who and where." [5RR26]. Underscoring the problem attendant with the court's failure to instruct the jury on accomplice witness testimony, in rebuttal the State argued "... [f]urthermore we brought you Barkins. The guy who is actually in that specific robbery and he told

you, who is who." [5RR42].

e. Other Relevant Information:

As discussed in Point of Error Number Two, below, Lt. Dorton gratuitously testified he kept track of the names of the arrestees' by their tattoos, but did not want to "bring up their affiliations." [3RR183]. Dorton's unnecessary references to "tattoos" that show gang "affiliations" were designed to connect Mr. Plater to gangs, and the other co-defendants, in order to show his bad character. Dorton was persistent in his references and said he was having a hard time matching them up without saying something he should not say. [3RR183]. The defense contended Dorton's references to affiliations and tattoos were transparently related to gang membership and so prejudicial that a jury instruction could not remedy the harm, and formed the basis of Appellant's motion for mistrial. [3RR185].

Further compounding the harm were the facts the jury heard, i.e., there were many officers from multiple agencies, and a helicopter, casing the apartment complex parking lots, and the Kroger parking lot at the same time. [4RR12]. Plater argued that when Dorton's tattoo and affiliation comments are looked at in the context of all the facts the jury heard, they clearly suggest gang membership. [4RR12]. The Court opted not to provide a curative instruction because doing so might highlight the problem. [4RR18-19]. Instead the court instructed the State to clear it up with questioning that

made it clear the suspect depicted in SX62 with tattoos and possible gang affiliation was not Mr. Plater. [4RR21-22]. Given the state's theory that the suspects acted in concert, this was not helpful and only served to spread the bad character of one actor to the others.

Dorton was asked, based on the prior identification of the suspects by their clothing, as evidenced in his supplemental report, who the individuals were who entered the Kroger and robbed it. [4RR38-39]. Rather than consult the supplemental report he had access to on the stand and had just stated he read yesterday, [4RR38-9], in front of the jury, Dorton answered:

> Like I said yesterday, I can't recall which persons are which and I have been given explicit instructions not to identify persons from photographs ... I don't know how to answer this properly. I feel like I am being tricked.

[4RR39]. The defense objected to Dorton's response and explained they invited Dorton to refer to his report wherein he identified the suspects by their clothing; and also:

> I am not asking about the tattoos. I am asking about what the clothes are and how he identifies them by their clothes. Again, that's material to our defense."

[4RR44]. Dorton continually tried to inject the fact he identified the suspects by tattoos and affiliations, rather than answer how he had identified them by their clothes

in his report. [3RR183]. Dorton's identification of the suspects by clothing put every suspect at the scene of the Kroger robbery except Mr. Plater. [See 4RR48-9].

In addition to not corroborating Mr. Barkins's testimony that Plater was present at the Kroger robbery, the State's identification of those present at the Kroger conflicted with Barkins's testimony. [See 4RR 48-49]. For that reason, Dorton's continued and deliberate evasion of the question, and efforts to inflame the jury with inadmissible character evidence instead of answering it, compounded the egregious harm related to the court's failure to provide an accomplice witness jury instruction in the court's charge.

The jury charge gave jurors free reign to consider Mr. Barkins's testimony without first finding that his testimony was corroborated by other evidence that tended to connect Mr. Plater to the offense alleged. A trial court's failure to inform the jury of a corroboration requirement "makes it possible for rational jurors to convict even absent corroboration which they find convincing." *See Saunders*, 817 S.W.2d at 692. Given law enforcement's inability to identify who was present throughout the sequences of the robbery, it was Barkins's testimony that provided and solidified Mr. Plater's connection to the robbery. Therefore, the trial court's erroneous charge was egregiously harmful, and Mr. Plater's conviction should be reversed and remanded for a new trial.

POINT OF ERROR NUMBER TWO: THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S MOTION FOR MISTRIAL AFTER THE STATE'S WITNESS GRATUITOUSLY MENTIONED THE SUSPECTS' "AFFILIATIONS" AND "TATOOS" IN REFERENCE TO GANG MEMBERSHIP

A. Summary of the Argument for Point of Error Two Restated:

Compounding the egregious harm attendant to Point of Error One, supra, and as reversible error in itself, was the fact the State's investigator improperly injected comments that he identified all the suspects by their "tattoos" and "affiliations" - an obvious reference to gang membership. The investigator also had the suspects' identities outlined by what they were wearing during the offense, so his gang references were unnecessary and gratuitous. Mr. Plater moved for a mistrial due to the prejudicial nature of the testimony and severity of the misconduct. The court declined to grant a mistrial and considered providing a curative instruction, but ultimately did not, believing an instruction would draw attention to the investigator's prejudicial testimony. In essence this served as the court's tacit agreement that an instruction would not cure the harm. Instead, the court instructed the State to clear the prejudice through questioning of the investigator that made it clear the photograph of a suspect with tattoos and possible gang affiliation was not Mr. Plater. In that the investigator's improper testimony indicated he identified *all* the suspects by their

tattoos and affiliations, this did nothing to ameliorate the concern the jury now thought all suspects, including Mr. Plater, were in a gang. In assessing the certainty of the conviction, absent the improper references to suspects' "tattoos" and "affiliations," it is clear that even if the evidence passed muster for legal sufficiency standards for principal or party liability, it was far from certain. In a case such as this, where the State's evidence is contradicted on key points, and relies on uncorroborated accomplice witness testimony on key points, without the benefit of an accomplice witness instruction in the jury charge, this type of inflammatory gang membership evidence may well have tipped the jury over the edge of any doubt, and into conviction. Accordingly, the trial court abused its discretion in denying Mr. Plater's request for mistrial.

B. Standard of Review:

The trial court's denial of a motion for mistrial is reviewed under an abuse of discretion standard. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). The determination of whether a given error necessitates a mistrial must be made by examining the particular facts of the case. *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999).

C. The Facts:

Houston Police Department Lieutenant Christian Dorton of the Northeast

tactical unit, worked undercover surveillance at the Kroger grocery store entrance on May 22, 2018. [3RR 159, 163-64]. From where he was parked, he was able to clearly see the Kroger entrance. [3RR167-8; 7RR–SX53]. Lt. Dorton videotaped the van stop in front of the Kroger entrance as four suspects jumped out and entered the Kroger to rob it. [3RR171-72].

***1. Prejudicial Facts Gratuitously Referenced By Lt. Dorton*:**

During Dorton's testimony, when asked by the prosecution which four of the five arrested suspects were depicted entering Kroger in the photograph, State's Exhibit 62, Dorton said he would have to review his notes. [3RR182]. After reviewing his report, he was asked again who was depicted in State's exhibit 62. [3RR183]. Thereafter, Dorton testified to confusion in answering the question and gratuitously mentioned he kept track of the names of the arrestees by their tattoos, but didn't want to "bring up their affiliations." [3RR183]. Further, he said that it had been a long time since the incident and he was having a hard time matching them up without saying something he should not say. [3RR183].

2. The Defense Objection

Defense counsel immediately requested to be heard outside the presence of the jury on Dorton's statements regarding tattoos, affiliations, and not wanting to say "something maybe I shouldn't." [3RR183]. The Defense objected that the State's

witness offered prejudicial evidence related to gang activity - and noted that this had violated the court's ruling on a motion in limine. [3RR184; 4RR9]. The State claimed they had admonished their witnesses regarding the motion in limine, and offered to abandon that line of questioning. [3RR184]. The defense argued Dorton was an experienced law enforcement witness who should have known better than to talk about tattoos and affiliations, as these were clear references to gang membership. [3RR184, 186].

The defense contended Dorton's references to affiliations and tattoos were so transparently related to gang membership and prejudicial that a jury instruction could not remedy it. [3RR185]. On the other hand, the State argued Dorton's testimony regarding identifying people from their tattoos did not suggest any specific type of tattoos, and his reference to not wanting to bring up affiliations was also non-specific. [3RR185]. The State contended a jury instruction would remedy the situation. [3RR185]. Initially, the court agreed a curative instruction could work to cure the prejudice, but was concerned about crafting an instruction that did not "exacerbate the problem." [3RR 187]. The court also expressed concerns over some of the photos that had been admitted that show tattoos. [3RR189]. The court noted the individual depicted in State's Exhibit 62 had a tattoo of an oil rig on the bottom of his left arm, and a paw print on the upper arm. [3RR 189]. Dorton noted the paw print was how

he identified the individual, but did not want to say anything about what the paw print tattoo meant. [3RR189]. The court instructed the parties to think about a curative instruction overnight [3RR 188-192] and excused the jury for the day. [3RR 193].

The following day, the court noted that the individual depicted in SX62 was not Mr. Plater. However, the court acknowledged Appellant's concern that the jury would assume that if one person in the car (i.e., the person depicted in SX62) was in a gang, perhaps all of them, including Mr. Plater, are gang members. [4RR8, 16]. The defense moved for a mistrial citing several factors, including the fact the officer's testimony about identifying the robbers by tattoos in relation to affiliation was a transparent reference to gang affiliation. [4RR9]. Even more, the State's questioning was about what Dorton saw the actors wearing, and it was an untenable stretch for the officer to answer the identification question based on tattoos that show "affiliation." [4RR12-13]. The defense also argued that other facts the jury heard further compounded the harm attendant with Dorton's gang related testimony: i.e., that there were many officers from multiple agencies, including a helicopter, involved in surveillance of multiple apartment complex parking lots, and the Kroger parking lot at the same time. [4RR12]. Plater argued that when Dorton's tattoo and affiliation comments are looked at in the context of all the facts the jury heard, they clearly suggest gang membership. [4RR12]. For these reasons, the defense stated they could

not agree to an instruction and the only remedy was a mistrial. [4RR 13]. The Court did not grant the mistrial, but Court determined that instead of drawing attention to what was said about tattoos and affiliation with an instruction, "we are going to call it for what it is, and what it is not in terms of questioning." [4RR18-19]. Instead of an instruction the court opined the prejudice could be cleared up by questioning. [4RR21-22]. First, the court instructed the State to make it clear through their questions, that the person depicted in SX62 with the tattoos was not the defendant. [4RR22-23]. Thus, the court stated a "clearing instruction" was not needed because by letting the jury know SX62 was not Mr. Plater, it would explain that while the person in SX62 might have some gang affiliation, it was not Plater. [4RR24]. Further, the court cautioned the State that there would be no further mention of gangs, working in gang units, tattoos or affiliations moving forward, or the case would end in a mistrial. [4RR 21, 26, 30].

The defense also noted that SX62 through SX66, all photos of the arrestees were admitted previously without objection, but that in light of Dorton's improper testimony about tattoos and affiliations, the defense now objected to them. [4RR30-31]. The court granted a running objection for the duration of trial as it "...as it relates to the issue that you have presented as it relates to gang affiliation and also any objection you have as to the admission of those pictures." [4RR31].

Despite the prior ruling, Lt. Dorton did not stop his efforts to inflame the jury, however. After the court instructed the State to clear up Dorton's references to tattoos and affiliations, defense counsel questioned Dorton about identities of the individuals in Defendant's Exhibits 1-5. [4RR39]. Dorton was asked, based on the prior identification of the suspects by their clothing, as evidenced in his supplemental report, who the individuals were who entered the Kroger and robbed it. [4RR38-39]. Rather than consult the supplemental report he had access to on the stand and had just stated he read yesterday, [4RR38-9], in front of the jury, Dorton answered:

> Like I said yesterday, I can't recall which persons are which and I have been given explicit instructions not to identify persons from photographs ... I don't know how to answer this properly. I feel like I am being tricked.

[4RR39]. The defense objected and reurged the motion for mistrial because even though the words gang and affiliations were not used, Dorton's remark "refers back to the testimony yesterday that was improper..." [4RR40, 43]. Further, "And by saying, you know, I have been instructed not to identify anybody, that just emphasizes the fact that – that yesterday's testimony was improper." [4RR42]. The court determined this remark was different and not related to the gang references made previously. [4RR41, 43].

After being instructed by the court, Dorton admitted during cross-examination

that he identified the four suspects who robbed the Kroger as: Marcus Hickman (depicted wearing the maroon sweatshirt upon entering Kroger) [4RR49, 7RR– DX4];

Kenneth Williams (depicted wearing a yellow and black security jacket when entering the Kroger) [4RR48; 7RR– DX3]; Onterio Barkins (depicted wearing all black and a white face mask when entering the Kroger) [4RR49; 7RR–DX5]; and, Cedric Seals (depicted wearing the black pants with the white stripe and the white jacket when he entered the Kroger) [4RR47-48; 7RR–DX1, DX2]. Dorton did not identify the driver of the van. [3RR174].

D. Analysis:

"When a party's first action is to move for mistrial, as this appellant's was, the scope of appellate review is limited to the question whether the trial court erred in not taking the most serious action of ending the trial." *Young v. State*, 137 S.W.3d 65, 70 (Tex. Crim. App. 2004). Mr. Plater's counsel did not pursue the familiar procedure of objection followed by a request for an instruction to disregard prior to moving for a mistrial. However, the *Young* Court explained situations when this is not required. *See Id.* Indeed:

> the request for an instruction that the jury disregard an objectionable occurrence is essential only when such an instruction could have had the desired effect, which is to enable the continuation of the trial by an impartial jury. The party who fails to request an instruction to disregard will have forfeited appellate review of that class of events that could

have been "cured" by such an instruction.

Id., at 70. However, the *Young* Court addressed the scenario present in the instant case, where an instruction could not have enabled the continuation of the trial by an impartial jury:

> But if an instruction could not have had such an effect, the only suitable remedy is a mistrial, and a motion for a mistrial is the only essential prerequisite to presenting the complaint on appeal. Faced with incurable harm, a defendant is entitled to a mistrial and if denied one, will prevail on appeal.

Id.

In Mr. Plater's case, he objected and immediately argued an instruction could not cure the harm. [3RR 186]. After hearing argument, the court did not grant a mistrial but also expressed concerns that an instruction would exacerbate the problem and highlight the prejudicial remarks. [3RR 187, 191; 4RR 21]. In light of this concern, the court instructed counsel for the State and defense to prepare an instruction they believed would cure the error but not exacerbate it. [3RR 188, 191]. Thereafter, the defense argued the prejudice could not be cured by an instruction and moved for a mistrial. [4RR9]. The State, on the other hand, prepared an instruction stating "the jury is instructed to disregard this witness mentioned of the word gang." [4RR17]. The Court refused to use the State's proposed instruction. [4RR17]. The court did not grant a mistrial but also determined, sua sponte, that instead of drawing

attention to the improper testimony with an instruction, the court would instruct the State to "clear up" the problem through questioning of its witness to make it clear the person depicted in the photo with tattoos and possible gang affiliation was not Mr. Plater. [4RR 17-19, 21-22, 24]. By sua sponte declining to give an instruction for fear it would draw attention to the problem, the Court essentially acknowledged that the problem presented by Dorton's inflammatory and improper testimony could not be cured by an instruction. Thus, per the analysis in Young, the only suitable remedy was mistrial, which Plater requested. *See Young*, at 70.

The court reviewing a denial of a motion for mistrial must consider (1) the severity of the misconduct or magnitude of the prejudicial effect; (2) the measures adopted to cure the misconduct; and (3) the certainty of conviction absent the misconduct. *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998).

1. Severity of the Misconduct or Magnitude of the Prejudicial Effect

Lt. Dorton did not need to reference anything about the suspects' "tattoos" or "affiliations" to answer questions about identifying the suspects. While he may have used tattoos and gang affiliation to identify the suspects for his own purposes, his supplemental report listed the suspects' identities by what they were wearing when they entered Kroger. [See RR438-39]. Dorton's unnecessary references to "tattoos" that show gang "affiliations" were designed to connect Mr. Plater to gangs in order

to show his bad character. In *Pondexter v. State*, the Court held an accused gang affiliation to show character is not admissible at the guilt-innocence phase of a trial. *Pondexter v. State*, 942 S.W.2d 577, 584, n. 2 (Tex. Crim. App. 1996).

In addition to the prejudical and inflammatory nature of the gang-activity evidence in question, the severity of the misconduct is underscored by Dorton's repeated intent to inflame the jury with this information. First, the parties agreed Dorton's comments about the suspects' tattoos and affiliations were in violation of the court's ruling on Appellant's motion in limine. [3RR184]. Further, the State proffered to the court that it had "admonished all our witnesses." [3RR184]. As the defense mentioned, this was not a lay witness, but a police office who had testified before and should have known better. [3RR 184, 186].

Even more, the State's questioning was about what Dorton saw the actors wearing, and if he identified them. [4RR12]. It was an untenable stretch for the officer to answer the identification question based on tattoos that show "affiliation." [4RR13]. The officer's statement he could identify the robbers by tattoos in relation to affiliation was a transparent reference to gang affiliation. [4RR9]. As detailed in the facts, supra, despite the court ruling there would be no reference to identifying suspects by tattoos or gang affiliation, Dorton continued to reference back to that issue. [4RR 38-39].

2. Steps taken to Cure the Misconduct

Plater argued that when Dorton's tattoo and affiliation comments are looked at in the context of all the facts the jury heard, they clearly suggest gang membership. [4RR12]. For these reasons, the defense stated they could not agree to an instruction and the only remedy was a mistrial. [4RR 13]. The court declined to grant the mistrial but also determined it would not give an instruction as doing so could draw attention to what was said. [4RR14]. The court acknowledged Appellant's concern that having heard Dorton's remarks, the jury might think if one person in the car is in a gang then possibly all of them are in a gang. [4RR8]. Despite recognizing this as the problem, the Court decided it would not provide an instruction, but instead ordered the State to clear the problem with questions that make it clear the person in the photo with tattoos and possible gang affiliation was not Mr. Plater. [4RR24].

3. The Certainty of Conviction absent the Misconduct

In this case, the jury was not presented with overwhelming evidence of Mr. Plater's guilt. During argument, the defense highlighted the problem that throughout the State's case, identification of the suspects involved was weak and contradicted and it was "...not clear who was who and where." [5RR26]. The jury heard evidence there were many officers involved in surveillance of the suspects in each area where the suspect were alleged to have been. Yet, the only time identification of Mr. Plater

was clear was: Plater was identified as being with the other suspects in the morning at Mr. Plater's Timber Wood apartment complex, and leaving in his Crown Vic [3RR26, 31]; and Mr. Plater was also present at the time of arrest, when the Crown Vic was pulled over. [4RR66]. Other than those two identifications of Mr. Plater, the record evidences confusion as to who was who and who was present where, throughout the sequences of the day.

What is also clear is, aside from the accomplice witness testimony [4RR 153-7], Mr. Plater was not identified as present at the Kroger robbery. [See 4RR 48-9]. In fact, Lt. Dorton, who identified the suspects did not identify Mr. Plater as being present.[4RR 48-49]. The suspect depicted entering the Kroger store wearing maroon, who accomplice Barkins testified was Mr. Plater [4RR153-4; 7RR–SX58], was identified by law enforcement as a different suspect, Marcus Hickman. [4RR49, 7RR– DX4].

Therefore in looking at the certainty of the conviction, absent the improper references to suspects' "tattoos" and "affiliations," it is clear conviction was not certain. Indeed, while the evidence may be legally sufficient under the *Jackson v. Virginia* standard, that does not necessarily mean the conviction was certain. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Watts v. State*, 371 S.W.3d 448 (Tex. App.--Houston [14th Dist.] 2012, no pet.) (court reversed for improper argument stating although

"from a sufficiency standpoint, a jury could have inferred appellant's knowledge…. [t]his finding was far from "certain").

In a case such as this, where the State's evidence is contradicted on key points, and relies on uncorroborated accomplice witness testimony on key points, without the benefit of an accomplice witness instruction in the jury charge, this type of inflammatory gang membership evidence may well have tipped the jury over the edge of any doubt, and into conviction.

The error was so egregious that an instruction to disregard would have been futile. The court essentially acknowledged this when it opted not to provide an instruction. Dorton's persistent inflammatory and unnecessary references to "tattoos" that show gang "affiliations" were designed to connect Mr. Plater to gangs, and to connect Plater to gangs through his associates, so as to show bad character. Given the state's theory that the suspects acted in concert, this only served to spread the bad character, i.e. gang affiliation, of one actor to the others and irreparably prejudiced the jury against Plater. Accordingly, the trial court abused its discretion in denying Mr. Plater's Motion for Mistrial. Appellant's Second Point of Error should be sustained and his case Reversed and Remanded.

PRAYER

Wherefore, Appellant prays that his judgment of conviction be reversed and remanded for a new trial.

Respectfully submitted,
ALEXANDER BUNIN
Chief Public Defender
Harris County Texas

/s/Anne More Burnham
ANNE MORE BURNHAM
State Bar No. 00798088
Assistant Public Defender
Harris County Texas
1201 Franklin 13th Floor
Houston Texas 77002
Main (713) 274-6700
Direct (713) 274-6907
(713) 437-4327 e-fax
anne.burnham@pdo.hctx.net

CERTIFICATE OF SERVICE

I certify that I provided a copy of the foregoing brief to the Harris County District Attorney via service through efiling on the day the brief was filed.

/s/Anne More Burnham
ANNE MORE BURNHAM
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4(e)(I).

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/s/Anne More Burnham
ANNE MORE BURNHAM
Assistant Public Defender

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Bar No. 798088
anne.burnham@pdo.hctx.net
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jessica Caird	24000608	caird_jessica@dao.hctx.net	1/26/2025 6:58:28 PM	SENT
Anne Burnham		anne.burnham@pdo.hctx.net	1/26/2025 6:58:28 PM	SENT