

**No. 01-24-00273-CR**

In the Court of Appeals  
for the  
First District of Texas

FILED IN  
1st COURT OF APPEALS  
HOUSTON, TEXAS  
11/13/2024 9:30:16 AM  
DEBORAH M. YOUNG  
Clerk of The Court

---

**ASHTON JUWAN BYRON**  
*Appellant*

v.

**THE STATE OF TEXAS,**  
*Appellee*

---

No. 23-CR-0557 in the 405<sup>th</sup> District Court  
Galveston County, Texas

---

**APPELLANT'S BRIEF**

---

**ADAM BANKS BROWN**  
DeToto, Van Buren & Brown  
Texas Bar No. 24003775  
300 Main St., Ste. 200  
Houston, Texas 77002  
(713) 223-0051  
(713) 223-0877 (FAX)  
adambrownlaw@yahoo.com  
**Attorney for Appellant**

**ORAL ARGUMENT REQUESTED**

## **Identity of Parties and Counsel**

**APPELLANT:**

Ashton Juwan Byron

**DEFENSE COUNSEL AT TRIAL:**

Zachary S. Maloney  
2925 Gulf Freeway S. Suite B #295  
League City, Texas 77573

Salvador Edward Faus  
711 59th St.  
Galveston, Texas 77551-4140

**DEFENSE COUNSEL ON APPEAL:**

Adam Banks Brown  
DeToto, Van Buren & Brown  
300 Main St., Suite 200  
Houston, Texas 77002  
(713) 223-0051  
[adambrownlaw@yahoo.com](mailto:adambrownlaw@yahoo.com)

**TRIAL PROSECUTORS:**

Quinten McConico  
Raneca Henson  
Galveston County District Attorney's  
Office  
600 59th Street, Suite 1001  
Galveston, Texas 77551

**APPELLATE PROSECUTORS:**

Jack Roady  
Rebecca Klaren  
Galveston County District Attorney's  
Office  
600 59th Street, Suite 1001  
Galveston, Texas 77551

**TRIAL JUDGE:**

Hon. Jared Robinson

## Contents

Identity of Parties and Counsel.....	2
Contents .....	3
Index of Authorities .....	5
Statement of the Case .....	7
Issues Presented .....	7
1. The trial court erred in instructing the jury on party liability. ....	7
2. The trial court erred in instructing the jury on liability as a coconspirator.....	7
3. The trial court erred in instructing the jury on the unindicted offense of criminal conspiracy.....	7
4. The trial court erred in failing to instruct the jury that conviction under the coconspirator liability theory required proof that Andrea Arispe had the specific intent to commit aggravated assault.....	7
Facts .....	7
A. Background Facts.....	7
B. The Indictment .....	11
C. The Jury Instructions.....	11
Summary of the Arguments.....	13
Arguments.....	14
A. Standard of Review .....	14
B. The trial court erroneously submitted instructions on party and coconspirator liability because there was no evidence that	

Arispe intended to commit aggravated assault by using or exhibiting a deadly weapon (Issues One and Two) .....	14
C. The trial court erred in instructing the jury on the uncharged offense of criminal conspiracy.....	17
D. The trial court erred in failing to instruct the jury that conviction under the coconspirator liability theory required proof that Andrea Arispe had the specific intent to commit aggravated assault.....	18
E. Reversal is required.....	22
Prayer .....	29
Certificate of Service .....	31
Certificate of Compliance .....	31

## Index of Authorities

### Cases:

<i>Almanza v. State,</i> 686 S.W.2d 157 (Tex. Crim. App. 1985).	14, 22
<i>Alvarez v. State,</i> 570 S.W.3d 792 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd)	29
<i>Cathey v. State,</i> 992 S.W.2d 460 (Tex. Crim. App. 1999).	24
<i>Chamberlain v. State,</i> 998 S.W.2d 230 (Tex. Crim. App. 1999)	22
<i>Forbes v. State,</i> 513 S.W.2d 72 (Tex. Crim. App. 1974)	16
<i>Gross v. State,</i> 380 S.W.3d 181 (Tex. Crim. App. 2012).	15
<i>Harris v. State,</i> 56 S.W.3d 52 (Tex. App.-Houston [14th Dist.] 2001, pet. ref'd).	22
<i>Hutch v. State,</i> 922 S.W.2d 166 (Tex. Crim. App. 1996).	14, 27
<i>Ladd v. State,</i> 3 S.W.3d 547 (Tex. Crim. App. 1999).	15
<i>Middleton v. State,</i> 125 S.W.3d 450 (Tex. Crim. App. 2003).	14
<i>Montoya v. State,</i> 810 S.W.2d 160 (Tex. Crim. App. 1989), <i>cert. denied</i> , 502 U.S. 961, 112 S.Ct. 426, 116 L.Ed.2d 446 (1991).	18
<i>Richardson v. State,</i> 879 S.W.2d 874 (Tex. Crim. App. 1993)	16, 26

<i>Rojas v. State</i> , 986 S.W.2d 241 (Tex. Crim. App. 1998). ....	16
<i>Sanchez v. State</i> , 209 S.W.3d 117 (Tex. Crim. App. 2006) .....	27
<i>Schmuck v. United States</i> , 489 U.S. 705, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989) .....	18
<i>Stahl v. State</i> , 749 S.W.2d 826 (Tex. Crim. App. 1988) .....	22
<i>United States v. Miller</i> , 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985). ....	18
<i>Vasquez v. State</i> , 389 S.W.3d 361 (Tex. Crim. App. 2012). ....	20
<i>Woodard v. State</i> , 322 S.W.3d 648 (Tex. Crim. App. 2010). ....	17, 28
<b>Statutes and Rules:</b>	
Tex. Const. Art. I, § 10 .....	18
Tex. Penal Code § 1.07(17). ....	11
Tex. Penal Code § 7.01.....	14, 16
Tex. Penal Code § 7.02.....	14, 15, 17
Tex. Penal Code § 15.02.....	17
Tex. Penal Code § 22.02(a)(2).....	11, 16
Tex. Penal Code § 30.02(a)(1).....	11, 16

## **Statement of the Case**

**Indictment:** First degree felony of burglary of a habitation with intent to commit aggravated assault with a deadly weapon. CR6.

**Plea:** Not guilty to jury. 2RR139.

**Verdict:** Guilty. CR137.

**Sentence:** 25 years confinement, assessed by jury. CR142.

**Notice of appeal:** timely filed. CR143.

## **Issues Presented**

1. The trial court erred in instructing the jury on party liability.
2. The trial court erred in instructing the jury on liability as a coconspirator.
3. The trial court erred in instructing the jury on the unindicted offense of criminal conspiracy.
4. The trial court erred in failing to instruct the jury that conviction under the coconspirator liability theory required proof that Andrea Arispe had the specific intent to commit aggravated assault.

## **Facts**

### **A. Background Facts**

On February 1, 2023, complainant Nicolas Richie was living in an apartment with his girlfriend, Melanie Carter, and their two children. 3RR99. That afternoon he and Carter went to a tax service office in Texas City; their children and Richie's mother accompanied them. 3RR99. Outside the office Richie encountered Defendant Ashton Byron, with whom he had a disagreement a few days prior, along

with another male. 3RR100. Richie took a photo of Byron, and they exchanged words. Byron pulled out some brass knuckles, and Richie departed in his truck and went home. 3RR100.

Shortly after they arrived home, Carter's friend Andrea Arispe telephoned Carter about a disagreement. 2RR102, 135. Suddenly the front door opened and Richie saw Arispe, Byron, and Efren Gonzalez. 3RR104. Richie testified that Ashton was behind Arispe firing a shotgun into the apartment. 3RR106-07. Arispe and Gonzalez did not have weapons. 3RR126.

Richie testified that he grabbed his firearm and tried to cover his two young children. Richie was hit in his hand and chest, and his mother was hit in the face. 3RR106-07. Richie loaded his firearm and "shot a couple of shots out the door." 3RR109. They ran toward the parking lot with Richie chasing and shooting at them. They got into their car and Richie saw the shotgun pointed at him. Richie shot at them twice as they drove away. 3RR109.

Melanie Carter testified that she saw Arispe kick the door open, angry and yelling. 3RR19. Carter saw Gonzalez behind Arispe outside the doorway. 3RR135; 4RR15. Carter initially testified that she saw Byron "outside of my door" firing a shotgun. 4RR16. Thereafter she testified that she saw the shotgun when Byron "stepped in my house," but she still insisted that the shotgun blasts happened outside of the apartment. 4RR19. Carter testified that she got on the floor. 3RR139;

4RR16. After Richie chased the group out, Carter moved her children to the hallway. She heard gunshots shatter the window to the children's room. 3RR138-39. Richie returned to his apartment and confirmed that the children were not injured. 3RR110.

Richie's neighbor, Kevin McCurley, testified that he was walking his dog and heard three shots that sounded like a 12-gauge shotgun. 3RR13-14. A few seconds later he heard six or seven pistol shots. 3RR15, 25. It was dark outside but he saw four people wearing hoods running from the apartment building with Richie chasing and shooting at them. 3RR15, 20. Richie's hand was bleeding profusely. McCurley told Richie the people had run around the corner. Richie followed and "shot the clip out." 3RR16. McCurley called 9-1-1. 3RR17

Richie and Carter were transported to the hospital. Richie had birdshot (BB pellet) injuries that caused long-term loss of hand function. 3RR112-13. Carter required emergency surgery for birdshot injuries to her abdomen. 3RR141. Andrea Arispe was treated at the hospital for a pistol bullet injury to her shoulder and a shotgun pellet injuries to her back. 3RR22.

Texas City PD Officer Ham responded to the scene and observed two shotgun shells on the ground near a bush a few feet outside the door of the apartment. 3RR51; SX2-3. Four pistol shell casings were found in the parking lot. 3RR51-52. Ham saw blood droplets on the floor inside the apartment and a trail of blood leading to the parking lot. 3RR54, 69; SX13, 14, 17. Ham documented damage consistent with

shotgun birdshot pellets on several walls and furnishings inside the apartment, approximately 3 to 5 feet high. 3RR57-59; SX21-29. Ham found plastic wadding for two shotgun shells on the floor of the apartment. 3RR60, 72; SX29-33. Ham collected a 9-millimeter pistol with blood on it from inside the apartment. 3RR67-68.

A week after the incident Texas City PD Detective Ralph Cardona interviewed Byron. 3RR79. After initially denying involvement, Byron admitted being present at the shooting. He stated that went to the tax service office with his friend "CJ." 3RR88. Outside the office, a Hispanic male with tattoos was "mean mugging" him and there was a verbal confrontation. 3RR80-81. Byron retrieved brass knuckles from his car, and the male pulled out a gun. 3RR81. The male took a picture of Byron then drove away. 3RR81. Byron went home and picked up Gonzalez, CJ, and Arispe. Byron drove the group to Richie's apartment to "throw knuckles." 3RR82-83. Arispe knocked and opened the door. As soon as the door opened, Byron saw the man from the tax office pointing a gun and shooting at them. 3RR83-84. The group fled; Gonzalez exclaimed that Arispe "got hit." 3RR85. Byron reported that CJ "probably had a pistol" but did not know if he fired it. 3RR85, 95. Byron was adamant that he did not shoot Arispe in the back. 3RR96.

## **B. The Indictment**

Byron was charged with burglary of a habitation under Texas Penal Code § 30.02. A person commits an offense if, without the effective consent of the owner, the person “enters a habitation … with intent to commit a felony, theft, or an assault.” Tex. Penal Code Ann. § 30.02(a)(1).

The indictment alleged that Byron:

… did then and there, with intent to commit the felony offense of Aggravated Assault With Deadly Weapon, enter a habitation, without the effective consent of Nicholas Richie, the owner thereof.

CR6.

A person commits aggravated assault if the person “uses or exhibits a deadly weapon during commission of assault.” Tex. Penal Code Ann. § 22.02(a)(2). A deadly weapon includes a firearm. Tex. Penal Code Ann. § 1.07(17).

## **C. The Jury Instructions**

The trial court instructed the jury on three theories of liability: primary actor, party, and coconspirator. The instructions set out abstract definitions of these theories, then applied the definitions to the facts in the application sections.

The “primary actor” application section required the jury to find that Byron entered a habitation without the consent of the owner and intended to commit aggravated assault. CR134.

The party liability application section required the jury to find that:

- Andrea Arispe entered a habitation;
- without the consent of the owner;
- Andrea Arispe intended to commit aggravated assault; and
- Byron encouraged, aided, or attempted to aid Andrea Arispe to commit burglary of a habitation.

CR135.

The coconspirator liability application section required the jury to find that:

- Byron joined a conspiracy to commit aggravated assault;
- In attempt to carry out the conspiracy, Andrea Arispe entered a habitation;
- Without consent of the owner;
- The burglary of a habitation was committed in furtherance of the unlawful conspiracy; and
- The burglary of a habitation should have been anticipated as a result of the conspiracy.

CR135.

The jury was instructed that it need not be unanimous as to whether Byron was guilty as a primary actor, as a party, or as a coconspirator. CR136.

## **Summary of the Arguments**

**Issues One and Two:** The trial court erred in instructing the jury on party and coconspirator theories of liability and designating Arispe as the primary actor. Neither of these theories was raised by the evidence: Arispe could not have committed the charged offense as a primary actor because she was unarmed. Byron was egregiously harmed because the erroneous instructions and the State's arguments conveyed that Byron could be convicted without proof that anyone was guilty as a primary actor.

**Issue Three:** The trial court erred in instructing the jury on the unindicted offense of criminal conspiracy. Byron was egregiously harmed because he did not request or help draft the instruction.

**Issue Four:** The trial court erred in omitting an essential element from coconspirator liability: proof that Arispe, as the primary actor, had the specific intent to commit aggravated assault by using and exhibiting a deadly weapon. Byron was egregiously harmed because the instructions reduced the State's burden of proof and allowed the jury to convict on insufficient evidence.

## **Arguments**

### **A. Standard of Review**

In reviewing a jury charge issue, an appellate court's first duty is to determine whether the charge contains error. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). If the jury charge contains error, the appellate court must analyze that error for harm. *Middleton v. State*, 125 S.W.3d 450, 453-54 (Tex. Crim. App. 2003). The court will reverse if an error was properly preserved by objection and is not harmless. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). If, as in this case, the defendant did not object to it, reversal is required only if the error is so egregious that the appellant was deprived of a fair and impartial trial. *Almanza*, 686 S.W.2d at 171.

### **B. The trial court erroneously submitted instructions on party and coconspirator liability because there was no evidence that Arispe intended to commit aggravated assault by using or exhibiting a deadly weapon (Issues One and Two).**

Under Section 7.01 of the Penal Code, “[a] person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.” Tex. Penal Code § 7.01(a).

Under Section 7.02(a) of the Penal Code, party liability attaches to a defendant if “acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.”

*Id.* § 7.02(a)(2).

Under Section 7.02(b), party liability attaches to co-conspirators as follows:

If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

*Id.* § 7.02(b).

An instruction under Section 7.02(a) or (b) may be given to the jury whenever there is sufficient evidence to support a jury verdict that the defendant is criminally responsible under those theories. *Ladd v. State*, 3 S.W.3d 547, 564 (Tex. Crim. App. 1999). To determine whether an individual is a party to an offense, a court may look at circumstantial evidence, including events before, during, and after the commission of the offense. *Gross v. State*, 380 S.W.3d 181, 186 (Tex. Crim. App. 2012).

In this case, neither party liability nor coconspirator liability was raised by the evidence because Arispe, who was unarmed, could not have been guilty as the primary actor.

The indictment charged Byron with burglary of a habitation with the intent to commit a felony, specifically, the felony of aggravated assault with a deadly weapon. CR6. The elements of the offense as charged in the indictment are that Byron:

- entered a habitation;

- without the consent of the owner;
- with the intent to:
  - cause bodily injury, and
  - use or exhibit a deadly weapon.

*See Tex. Penal Code Ann. §§ 30.02(a)(1); 22.02(a)(2).* When an indictment facially alleges a complete offense, the State is bound by the theory alleged in the indictment, and the reviewing court is also bound by this theory in its sufficiency analysis. *Rojas v. State*, 986 S.W.2d 241, 246 (Tex. Crim. App. 1998).

The record contains no evidence that Andrea Arispe intended to commit aggravated assault by using or exhibiting a deadly weapon. The two witnesses to the offense (Richie and Carter) testified that only Byron was armed. 3RR108, 126, 137-38; 4RR19.<sup>1</sup>

“To prove a defendant’s guilt as a party beyond a reasonable doubt, the State must first prove the guilt of another person(s) as the primary actor(s).” *Richardson v. State*, 879 S.W.2d 874, 882 (Tex. Crim. App. 1993); *Forbes v. State*, 513 S.W.2d 72, 79 (Tex. Crim. App. 1974); Tex. Penal Code § 7.01(a) (to convict a defendant under party or coconspirator liability, there must be proof that “***the offense is***

---

<sup>1</sup> Byron’s statement to police indicated that another participant named “CJ” may have been armed, but Byron did not know whether he “used or exhibited” a weapon, and there was no evidence from any source that CJ entered a habitation (Carter and Richie both testified that they did not see a fourth perpetrator).

*committed ... by the conduct of another* for which he is criminally responsible.”); Tex. Penal Code § 7.02(b) (“If, in the attempt to carry out a conspiracy to commit one felony, another felony *is committed by one of the conspirators*, all conspirators are guilty of the felony actually committed ...”).

Because there was no evidence that Arispe was armed, the trial court erred in submitting party and coconspirator liability theories designating Arispe as the primary actor.

**C. The trial court erred in instructing the jury on the uncharged offense of criminal conspiracy.**

The trial court erroneously instructed the jury in the abstract portion of the jury charge on the law of criminal conspiracy pursuant to Texas Penal Code § 15.02, which was not alleged in the indictment. The instructions stated:

*Conspiring with Others to Commit a Criminal Offense*

A defendant conspires with others to commit a criminal offense if—

1. the defendant intends that a felony be committed;
2. the defendant agrees with one or more persons that one or more of them engage in the conduct that would constitute the felony offense; and
3. one or more of them performs an overt act in pursuance of the agreement.

CR133.

Unlike the law of parties under § 7.02 of the Penal Code, the offense of criminal conspiracy must be alleged in the indictment. *Woodard v. State*, 322 S.W.3d

648, 656 (Tex. Crim. App. 2010). *See also Montoya v. State*, 810 S.W.2d 160, 165 (Tex. Crim. App. 1989) (rejecting argument that indictment needed to allege law of parties theory as would be needed if offense of criminal conspiracy had been submitted to the jury), *cert. denied*, 502 U.S. 961, 112 S.Ct. 426, 116 L.Ed.2d 446 (1991).

In *Woodward*, the Court recognized both the federal and Texas constitutions guarantee that a defendant cannot be held to answer a charge not contained in the indictment brought against him. *Id.* at 656-57; Tex. Const. Art. I, § 10; *Schmuck v. United States*, 489 U.S. 705, 717-18, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989); *United States v. Miller*, 471 U.S. 130, 139-40, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985).

**D. The trial court erred in failing to instruct the jury that conviction under the coconspirator liability theory required proof that Andrea Arispe had the specific intent to commit aggravated assault.**

The application paragraph for party liability correctly required jury to find that “Andrea Arispe intended to commit aggravated assault.” CR134. But the jury instructions in the abstract and application sections relating to coconspirator liability were defective in omitting this essential element.

Under an abstract section titled “Responsibility for Felony Committed by Coconspirator,” the trial court instructed the jury that “[a]t least one member of the unlawful conspiracy must have intentionally entered a habitation without the consent of the owner before the defendant can be responsible for burglary of a habitation.”

CR131. This instruction erroneously conveyed that Byron would be guilty as a coconspirator if Arispe simply “entered a habitation,” even if she could not have committed the charged offense because she was unarmed.

Likewise, in the application section omitted the element of Arispe’s specific intent to commit aggravated assault using or exhibiting a deadly weapon. The trial court instructed that the jury could find Byron guilty as a coconspirator if:

- Byron joined a conspiracy to commit aggravated assault;
- In attempt to carry out the conspiracy, Andrea Arispe entered a habitation;
- Without consent of the owner;
- “The burglary of a habitation was committed in furtherance of the unlawful conspiracy;” and
- “The burglary of a habitation should have been anticipated as a result of the conspiracy.”

CR135. Again, this application paragraph allowed the jury to convict if it found that Arispe “entered a habitation” without requiring proof that she was armed.

Compounding the error, this incomplete application paragraph aligned with the erroneously submitted “criminal conspiracy” instruction, which instructed that the defendant would be guilty if any member “performs an overt act in pursuance of

the agreement” to commit aggravated assault. The jury could find that Arispe committed an “overt act” by entering the habitation, requiring conviction without any proof that she was guilty as a primary actor.

Moreover, the jury could not ascertain all the elements for coconspirator liability by referring to definitions in the abstract portion. “Burglary of a habitation” was defined only under a section titled “Liability as a Primary Actor.” And the definition contained no reference to a specific intent to commit aggravated assault with a deadly weapon, as alleged in the indictment:

A person commits the offense of burglary of a habitation if the person without the effective consent of the owner, enters a habitation with the intent to commit a felony, theft, or assault.

CR130. A jury cross-referencing this generic definition could convict if Arispe entered a habitation with the intent to commit simple assault, reducing the State’s burden of proof.

Although “aggravated assault” was correctly defined in the abstract portion (CR130), this definition also appeared only in the section titled “Liability as a Primary Actor.” The instructions did not clarify that coconspirator liability required proof that Arispe was guilty as a primary actor of the charged offense.

The purpose of the trial judge’s jury charge is to instruct the jurors on all of the law that is applicable to the case. *Vasquez v. State*, 389 S.W.3d 361, 366 (Tex. Crim. App. 2012). “Because the charge is the instrument by which the jury convicts,

[it] must contain an accurate statement of the law and must set out all the essential elements of the offense.” *Id.* The application paragraph is that portion of the jury charge that applies the pertinent penal law, abstract definitions, and general legal principles to the particular facts and the indictment allegations. *Id.* Because that paragraph specifies the factual circumstances under which the jury should convict or acquit, it is the “heart and soul” of the jury charge. *Id.* at 367.

When a definition or instruction on a theory of law—such as the law of parties—is given in the abstract portion of the charge, the application paragraph must

- (1) specify all of the conditions to be met before a conviction under such theory is authorized;
- (2) authorize a conviction under conditions specified by other paragraphs of the jury charge to which the application paragraph necessarily and unambiguously refers; or
- (3) contain some logically consistent combination of such paragraphs.

*Id.*

The instructions failed to meet these requirements. Nowhere in the instructions was the jury unambiguously informed that it had to find Arispe guilty as a primary actor (*i.e.*, that she had the specific intent to commit aggravated assault by using or exhibiting a deadly weapon) to convict Byron as a coconspirator. Instead, the application paragraph was the functional equivalent of an instruction on the uncharged offense of criminal conspiracy.

## **E. Reversal is required.**

Because Byron did not object to the errors, reversal is required only if the errors are so egregious that he was deprived of a fair and impartial trial. *Almanza*, 686 S.W.2d at 171. An appellate court should consider the cumulative effect when there are multiple errors. *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999); *Stahl v. State*, 749 S.W.2d 826, 828 (Tex. Crim. App. 1988); *Harris v. State*, 56 S.W.3d 52, 59 (Tex. App.-Houston [14th Dist.] 2001, pet. ref'd). The record must show that the defendant has suffered actual, rather than merely theoretical, harm from jury charge error. *Almanza* at 174.

In examining the record to determine whether such harm occurred, a reviewing court considers (1) the entire jury charge, (2) the state of the evidence, including the contested issues and weight of probative evidence, (3) the argument of counsel and (4) any other relevant information revealed by the record of the trial court as a whole. *Almanza* at 171.

### **1. The entire jury charge**

Considered as a whole, the charge misled the jury on numerous issues and reduced the State's burden of proof:

- Erroneously instructed the jury on the unindicted offense of criminal conspiracy, which would allow conviction upon proof that any conspirator

committed an “overt act,” rather than requiring the State to prove that Arispe committed the complete charged offense.

- Erroneously instructed the jury that it could convict Byron as a coconspirator if “[a]t least one member of the unlawful conspiracy … intentionally entered a habitation without the consent of the owner,” rather than requiring the State to prove that Arispe committed the complete charged offense.
- Omitted the element that Arispe intended to commit aggravated assault by using and exhibiting a deadly weapon from the coconspirator liability application paragraph.
- Allowed the jury to convict Byron as a coconspirator if it found that Arispe “entered a habitation” without requiring proof that she had the specific intent to commit aggravated assault by using or exhibiting a deadly weapon.
- Defined the offenses of “burglary of a habitation” and “aggravated assault” only under a section titled “Liability as a Primary Actor” while failing to clarify that coconspirator liability required proof that Arispe was guilty of the charged offense as a primary actor.

Nothing in the jury charge mitigated the harm from instructing the jury on two theories of liability that were not applicable to the case, submitting an instruction on an unindicted offense, and omitting an essential element of coconspirator liability.

## **2. The state of the evidence**

Generally, a defendant is not harmed by an improper instruction on the law of parties if the evidence “clearly supports” his guilt as the primary actor. *Cathey v. State*, 992 S.W.2d 460, 466 (Tex. Crim. App. 1999).

That is not the case here. The evidence did not clearly establish that Byron entered the habitation. Nicolas Richie testified that he “saw a shotgun come through” and that Byron fired the shotgun as he stood behind Arispe. 3RR104-06. Melanie Carter initially testified that she saw Byron “outside of my door” firing a shotgun. 4RR16. Thereafter she testified that she saw the shotgun when Byron “stepped in my house,” but later insisted that the shotgun blasts happened outside of the apartment:

Q. And when the shotgun blasts go off, were you aware of the person that was discharging the firearm on the inside or outside of the house of the apartment?

A. It was -- it wasn’t inside. It was outside of my door.

4RR16.

Q. Just to clarify, during my testimony [sic], you said that the shotgun blast happened outside of your apartment, correct?

A. Yes, sir.

4RR19.

The physical evidence indicates that the shooter was outside. Officer Ham documented two shotgun shells found outside of the apartment; no shells were found inside. 3RR51. State's Exhibits 2 and 3 show the two shotgun shells on the ground several feet from the apartment door. SX2-3. The evidence also established that Arispe was shot in the back with a shotgun, indicating that the shooter was behind her and likely did not enter the apartment. 3RR22.

Because the evidence was at best ambiguous as to the location of the shooter, it does not "clearly support" Byron's guilt as a primary actor. Harm cannot be ruled out.

### **3. The arguments of counsel**

The State's arguments leave little doubt that the jury likely convicted under the erroneously submitted and incorrectly formulated theories of party and coconspirator liability. From the outset of its closing argument, the State's main theory was that "Andrea steps in, and it's the defendant who fires the shotgun." 4RR46. The State repeatedly argued that only "Andrea made entry," while "this defendant was directly behind her." 4RR60.

The principal harm flowing from the multiple errors in the jury instructions was that the jury was authorized to convict under the party and coconspirator theories

without finding that Arispe committed the charged offense, specifically, that she intended to commit aggravated assault by using and exhibiting a deadly weapon.

The State's arguments took full advantage of its reduced burden of proof. Addressing party liability, the State erroneously argued that the jury could satisfy the element of specific intent to use or exhibit a deadly weapon by transferring Byron's intent to Arispe:

And Andrea Arispe intended to commit aggravated assault. Again, this was Andrea looking for Melanie. This was her friend. She went there looking, and she dragged them along with her armed with a shotgun. Her intent was to commit this aggravated assault, and this defendant was present with her.

4RR48-49. This argument improperly conveyed that the jury could convict under the uncharged criminal conspiracy law, without proof that anyone committed the offense as a primary actor. *Richardson*, 879 S.W.2d at 882 (to prove a defendant's guilt as a party beyond a reasonable doubt, the State must first prove the guilt of another person as the primary actor).

Addressing coconspirator liability, the State's argument tracked the defective application paragraph by omitting the requirement of proof that Arispe completed the charged offense. The State argued that Arispe's mere entry in furtherance of a conspiracy to commit aggravated assault established Byron's liability as a coconspirator. 4RR49-50. This argument harmonized with the improperly submitted instruction on the unindicted offense of criminal conspiracy, which authorized

conviction if the participants conspired to commit aggravated assault and “one or more of them performs an overt act in pursuance of the agreement.”

The State emphasized the errors by arguing that the jury did not need to be unanimous as to which theory of liability applied. 4RR47. The State argued that “for all three of these, I submit to you that the elements are there.” 4RR47-50.

Egregious harm occurs if the error:

- affects the very basis of the case,
- deprives the defendant of a valuable right,
- vitally affects a defensive theory, or
- makes the case for guilt or punishment clearly and substantially more compelling.

*Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006); *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996).

The cumulative harm from the multiple jury charge errors is egregious:

- **actual and non-theoretical:** The erroneous instructions allowed the jury to convict under party and coconspirator liability with Arispe designated as the primary actor, even though Arispe could not have committed the charged offense because she was unarmed. The State argued to the jury that it could

convict Byron as a party and as a coconspirator if it found that Arispe entered a habitation while Byron used and exhibited a deadly weapon.

- **affects the very basis of the case:** The instructions authorized conviction even if the jury found that no one committed the charged offense as a primary actor.
- **deprives the defendant of a valuable right:** The instructions omitted an essential element of the charged offense and authorized the jury to convict under the law of an unindicted offense.
- **makes the case for guilt clearly and substantially more compelling:** The instructions reduced the State's burden by authorizing conviction without proof that anyone committed the offense as a primary actor.

The harm from the improper submission of the unindicted offense of criminal conspiracy alone is sufficient to require reversal. *In Woodard v. State*, 322 S.W.3d 648 (Tex. Crim. App. 2010), the Court held that the harm from submission in the jury charge of unindicted criminal conspiracy is egregious, as long as the defendant did not participate in drafting the instruction. *Id.* at 659 (where defendant was indicted for murder and convicted of unindicted offense of conspiracy to commit aggravated robbery. he could not complain for the first time on appeal that trial court erred by instructing jury on the unindicted offense because he helped prepare the

jury charge, including the instruction relating to the unindicted offense, to which the state unsuccessfully objected).

Likewise, in *Alvarez v. State*, 570 S.W.3d 792, 794-95 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd), this Court reversed where trial court submitted an uncharged offense and there was no indication that defense counsel requested or helped to prepare the erroneous instruction.

In this case, the trial court improperly instructed the jury on the uncharged offense of criminal conspiracy in the abstract portion, then compounded the error by submitting an erroneous coconspirator liability instruction that was the functional equivalent of a criminal conspiracy instruction.

The cumulative harm of the errors was egregious. The Court should reverse Byron's conviction.

### Prayer

Appellant respectfully requests that the Court reverse his conviction and remand for a new trial.

Respectfully submitted,

/s/ Adam Banks Brown

ADAM BANKS BROWN  
Texas Bar No. 24003775  
300 Main, Suite 200  
Houston, Texas 77002  
(713) 223-0051  
(713) 223-0877 (FAX)

[adambrownlaw@yahoo.com](mailto:adambrownlaw@yahoo.com)

ATTORNEY FOR APPELLANT

## **Certificate of Service**

This document has been served on the following parties in conjunction with e-filing through the electronic filing manager.

Jack Roady  
jack.roady@co.galveston.tx.us

Rebecca Klaren  
rebecca.klaren@co.galveston.tx.us

/s/ Adam Banks Brown  
Adam Banks Brown

## **Certificate of Compliance**

Pursuant to Texas Rule of Appellate Procedure 9.4(i), the undersigned attorney certifies that the relevant sections of this computer-generated document have **4,723** words, based on the word count function of the word processing program used to create the document.

/s/ Adam Banks Brown  
Adam Banks Brown