

No. 01-24-00825-CR

In the Court of Appeals
for the
First District of Texas

FILED IN
1st COURT OF APPEALS
HOUSTON, TEXAS
4/22/2025 2:20:46 PM
DEBORAH M. YOUNG
Clerk of The Court

KYLE AVERY JACKSON
Appellant

v.

THE STATE OF TEXAS,
Appellee

No. 1887408 in the 183rd District Court
Harris 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

Identity of Parties and Counsel

APPELLANT:

Kyle Avery Jackson

DEFENSE COUNSEL AT TRIAL:

Robert Kent Loper
Douglas Bradley Loper
Loper Law
111 West 15th Street
Houston, Texas 77008-4220

DEFENSE COUNSEL ON APPEAL:

Adam Banks Brown
300 Main St., Suite 200
Houston, Texas 77002
adambrownlaw@yahoo.com

TRIAL PROSECUTORS:

Phillip David White
Matthew Magill
Harris County District Attorney's
Office
1201 Franklin Street
Houston, Texas 77002

APPELLATE PROSECUTOR:

Jessica A. Caird
Harris County District Attorney's
Office
1201 Franklin Street
Houston, Texas 77002

TRIAL JUDGE:

Hon. Vanessa Velasquez

Contents

| | |
|--|----|
| Identity of Parties and Counsel..... | 2 |
| Contents | 3 |
| Index of Authorities | 4 |
| Statement of the Case | 6 |
| Statement of Facts..... | 6 |
| Issues Presented | 11 |
| Issue One: The trial court erred in submitting an ambiguous application paragraph for party liability that failed to clarify that the generic term “offense” referred to the murder, rather than the underlying burglary or robbery..... | 11 |
| Issue Two: The trial court erred in failing to submit supplemental written instructions when the jury requested clarification on the law of party liability. | 11 |
| Summary of the Arguments..... | 11 |
| Arguments..... | 12 |
| A. Standard of Review..... | 12 |
| B. The party liability application paragraph was deficient..... | 13 |
| C. The trial court erred in failing to submit supplemental written instructions when the jury advised that it did not understand the law of party liability..... | 18 |
| D. Reversal is required because the harm is egregious..... | 20 |
| Prayer | 30 |
| 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) | 13, 20, 21 |
| <i>Castillo-Fuentes v. State</i> , 707 S.W.2d 559 (Tex. Crim. App. 1986) | 17, 26 |
| <i>Chamberlain v. State</i> , 998 S.W.2d 230 (Tex. Crim. App. 1999) | 20 |
| <i>Dolkart v. State</i> , 197 S.W.3d 887 (Tex. App.—Dallas 2006, pet. ref'd) | 27 |
| <i>Gamblin v. State</i> , 476 S.W.2d 18 (Tex. Crim. App. 1972) | 19 |
| <i>Harris v. State</i> , 56 S.W.3d 52 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd)..... | 20 |
| <i>Harris v. State</i> , 668 S.W.3d 83 (Tex. App.—Houston [1st Dist.] 2022, pet. ref'd) | 19, 20 |
| <i>Holford v. State</i> , 177 S.W.3d 454 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) | 16, 17, 25, 27 |
| <i>Hutch v. State</i> , 922 S.W.2d 166 (Tex. Crim. App. 1996) | 12, 29 |
| <i>Lucio v. State</i> , 353 S.W.3d 873 (Tex. Crim. App. 2011) | 19 |
| <i>Middleton v. State</i> , 125 S.W.3d 450 (Tex. Crim. App. 2003) | 12 |
| <i>Nava v. State</i> , 415 S.W.3d 289 (Tex. Crim. App. 2013) | 17, 22, 25, 27 |
| <i>Sanchez v. State</i> , 209 S.W.3d 117 (Tex. Crim. App. 2006) | 29 |
| <i>Stahl v. State</i> , 749 S.W.2d 826 (Tex. Crim. App. 1988) | 20 |

Yzaguirre v. State, 394 S.W.3d 526, 530 (Tex. Crim. App. 2013) 16

Statutes and Rules:

| | |
|---|--------|
| Tex. Code Crim. Proc. Ann. art. 36.14 | 19, 20 |
| Tex. Code Crim. Proc. Ann. art. 36.27 | 18, 19 |
| Tex. Pen. Code Ann. § 19.03(a)(2) | 6, 13 |
| Tex. Penal Code Ann. § 7.02(a) | 13, 14 |

Statement of the Case

Appellant Kyle Avery Jackson was charged by indictment with capital murder. CR9; *see Tex. Pen. Code Ann. § 19.03(a)(2)*. Jackson pled not guilty and a jury found him guilty. 3RR24; 5RR46; CR361. The trial court sentenced Jackson to automatic life in prison without parole. 5RR48; CR363. Jackson filed timely written notice of appeal. CR373.

Statement of Facts

On February 3, 2020, 26-year-old Anthony Marroquin was fatally shot during a home invasion in his trailer. Eduardo Trejo, who lived in the trailer next door, got a call from his 12-year-old son reporting that there were two black males outside, which was unusual. 3RR30-40. Minutes later Trejo heard what sounded like a gunshot. After waiting about 15 minutes, Trejo ventured outside. 3RR41. Hiding behind a car, Trejo saw a vehicle with a heavyset female in the driver's seat and two black males exiting Marroquin's trailer, one carrying a TV and other carrying a bag. The males spotted Trejo and went back inside. 3RR43-44. Trejo took a photo of the suspects' vehicle. SX3; 3RR45. About five minutes later the two males left the trailer and departed in the car, and Trejo called the police. 3RR46.

Humble PD Officer Golden responded to the call at 4:45 p.m. 3RR61. Trejo reported that the male carrying the TV was young and was wearing a blue jacket,

black pants, and black slide footwear. The other male was also young and was wearing a gray jacket and carrying a white bag. 3RR50-55, 103.

Officer Golden approached the trailer and saw damage to door frame. 3RR65; SX8. Looking through glass storm door, he saw Marroquin seated on the floor, leaning against a couch. 3RR66. Marroquin was unresponsive and EMS was summoned. Paramedics were unable to find a pulse. 3RR66.

Marroquin's mother, Esmeralda Medrano, happened to be visiting her son that afternoon. Upon arrival she encountered first responders outside his trailer. 3RR79. She described Marroquin's tattoos and police confirmed that her son had been killed. 3RR79. Medrano testified that Marroquin had told her that a friend named Davon Arrington had taken his car without permission and damaged it a few days before the shooting. 3RR88.

Humble PD Officer Olvera responded to assist in the investigation. 3RR91. After getting descriptions of the suspects and their car, she traveled to a nearby Shell station to check security video. 3RR95. On the footage Olvera saw a Chevy Impala matching the description arrive at the Shell station 4:07 p.m. 3RR 97-98. A black male with blue hoodie exited the car and went inside the Shell station for a transaction, then the Impala departed at 4:20 p.m. 3RR98, 106; SX 18-21. Olvera identified the registered owner of the Impala as Clive Laville. 3RR107.

Investigators processing the crime scene noted damage to the driver's side front wheel of Marroquin's car. 3RR118. A chunk of the front door frame of the trailer was broken off, indicating that the door likely had been kicked in. 3RR118, 169. There were blood stains and droplets throughout the trailer. 3RR170. A steak knife was on the coffee table and a hammer was next to the couch, but there was no blood on either. 3RR120-21. The furniture appeared to be ransacked. 3RR124. A bullet was recovered from a hole in the back cushion of the couch. 3RR126, 147. A shell casing was found near the victim's foot by a coffee table in front of the couch. 3RR147, 175. There was a bullet hole through the floor in the living room and a bullet was recovered from under the trailer. 3RR171-72. There were bullet fragments in kitchen and laundry room walls. 3RR126, 171. A traffic citation issued to Davon Arrington was found in the trailer. 3RR127.

Investigators collected latent fingerprints from the storm door and the traffic citation. 3RR128-30. A latent print examiner ran a comparison through the AFIS database and determined that several prints from the storm door and the citation matched Davon Arrington, and that prints from the storm door matched Kyle Jackson. 3RR130-32, 153-54, 158.

Texas Ranger Wesley Doolittle interviewed the registered owner of the Impala, Clyde Laville, and learned that his daughter, Clavia Laville, was driving the car at the time of the shooting and was dating Kyle Jackson. 4RR54. Doolittle

checked a pawn-tracking website and learned that Marroquin's iPhone was pawned at an EcoATM in a Walmart about four miles from the crime scene shortly after the shooting, and that gaming equipment was pawned at a GameStop. 4RR56.

Humble PD Officer Lopez reviewed Walmart surveillance footage from February 3 and determined that Arrington and Jackson arrived at the store in the Impala around 6:30 p.m. 3RR219. Inside the store they used the EcoATM to pawn the iPhone and then split the cash. 3RR197-203. The digital readout of the EcoATM showed that Jackson used his photo ID for the transaction. 3RR201.

Investigators conducted a search of Arrington's grandparents' residence, which was less than ten minutes from the crime scene. 3RR206-07. Ring surveillance footage from February 3 showed Arrington being picked up in the Impala at 3:52 p.m. SX122; 3RR211-12; 4RR72. The footage showed the Impala returning to the residence at 4:47 p.m. and one of two males removing slide footwear from the trunk. 3RR211-12. A 50-inch TV was found in the backyard. 3RR210-11.

Ranger Doolittle reviewed surveillance footage from a nearby GameStop store for February 3 and observed Clavia Laville attempting to pawn Xbox controllers at 5:41 p.m. 4RR56. Doolittle secured arrest warrants for Laville, Arrington, and Jackson. 4RR58. Arrington was arrested on February 7, 2020, and Laville was arrested the following day. 4RR58.

Ranger Doolittle contacted Jackson by text message and spoke to him by phone on February 17, 2020. 4RR95, 103. On the recorded phone call, Jackson reported that his involvement was limited to giving Arrington ride to a friend's house to pick up some things. SX154; 4RR63-65.

Ranger Doolittle interviewed Jackson in person on February 19, 2020, and Jackson initially gave the same account. Subsequently he admitted that he was present in the trailer during the shooting, which occurred during a physical altercation between Arrington and Marroquin. SX155; 4RR69. Jackson said that Arrington told him he needed a ride to recover some property from Marroquin. When they arrived at the trailer, Arrington kicked the door several times to break in. Jackson said that he went inside only to use the restroom. Marroquin was asleep on the couch and Darrington confronted him with violent threats. The two began fighting and Marroquin went for a knife. Jackson said Arrington shot Marroquin three times with a 9mm handgun; the first shot only grazed Marroquin so Arrington shot him again, and the third shot was in the head. SX155.

Ranger Doolittle told Jackson that a neighbor reported seeing two males carrying things out of the trailer. Jackson asked if there was a photo, and after learning there was not, denied carrying anything. Jackson told Doolittle that he was scared after witnessing the shooting and went out to the car, but Laville refused to drive away. Jackson said that Arrington made two trips carrying property from the

trailer to the Impala. Jackson admitted that after the shooting they went to Arrington's grandparent's house, then attempted to sell gaming equipment at two GameStop locations, then pawned the iPhone at a Walmart, then went to a hotel room where they played with the Xbox game console taken from the trailer. SX155. Jackson insisted that he never saw Arrington with a gun before the shooting. 4RR74, 108. He acknowledged that there was a disagreement between Arrington and Marroquin, but said, "I wouldn't kill the guy, I didn't even know him." 4RR82.

The autopsy revealed that Marroquin died from gunshot wounds to the cheek, chest, and head. 4RR19-22. Marroquin also had a blunt impact injury near his eye and an injury to his head consistent with a blow from a hammer. 4RR26-28.

All three suspects charged with capital murder. 4RR118.

Issues Presented

Issue One: The trial court erred in submitting an ambiguous application paragraph for party liability that failed to clarify that the generic term "offense" referred to the murder, rather than the underlying burglary or robbery.

Issue Two: The trial court erred in failing to submit supplemental written instructions when the jury requested clarification on the law of party liability.

Summary of the Arguments

Issue One: The application paragraph in the juror charge was erroneous and deficient because it set out the elements of party liability in generic terms rather than applying the law to the facts as charged in the indictment. The trial court instructed that, to convict for the charged offense of capital murder, the jury must find that

Jackson “with the intent to promote or assist the commission of **the offense**, if any, encouraged, directed, aided or attempted to aid [co-defendants] to commit **the offense.**” The application paragraph failed to clarify that the general term “the offense” referred to the murder, rather than the underlying felonies of burglary or robbery. Jackson suffered egregious harm because the jury could have found him guilty of capital murder based solely on his being a party to a burglary or robbery.

Issue Two: The trial court abused its discretion in failing to submit supplemental instructions when the jury sent out a note seeking clarification of the law of party liability. The jury asked whether Jackson would be guilty of capital murder simply by being a party to the burglary that resulted in a death, even if he did not “aid” in the killing. The trial court was obligated to provide an additional instruction because the question properly addressed the law applicable to the case. Jackson was egregiously harmed because the jury could have found him guilty of capital murder based solely on his being a party to a burglary or robbery.

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 party liability application paragraph was deficient.

Jackson was charged with capital murder under § 19.03(a)(2) of the penal code, which provides that a person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and “the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat under Section 22.07(a)(1), (3), (4), (5), or (6).” Tex. Pen. Code Ann. § 19.03(a)(2).

The indictment alleged that Jackson committed capital murder in the course of committing or attempting to commit burglary or robbery. CR9.

The jury charge included instructions on the law of parties, thus allowing the jury to convict Jackson of capital murder if it determined that he was a principal or a party to the offense. See Tex. Penal Code Ann. § 7.02(a)(2), (b).

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). The trial court submitted instructions under both theories of party liability. CR350-51.

The abstract charge on the intent to promote or assist theory party liability correctly stated that the jury had to find “that the defendant, Kyle Avery Jackson, with the intent to promote or assist in the commission of the offense of burglary of a habitation or robbery, if any, encouraged, directed, aided, or attempted to aid Davon Arrington, and/or Clavia Laville in shooting Anthony Marroquin, if he did, with the intention of thereby killing Anthony Marroquin ...”. CR351-52.

But the application paragraph contained ambiguous references to “the offense.” In two paragraphs applying the law as to the alternative underlying felonies of robbery and burglary, the trial court instructed:

... if you find from the evidence beyond a reasonable doubt that on or about the 3rd day of February, 2020, in Harris County, Texas, Davon Arrington, and/or Clavia Laville, did then and there unlawfully, while in the course of committing or attempting to commit the burglary of a habitation owned by Anthony Marroquin with the intent to commit or attempt to commit another felony other than theft, intentionally cause the death of Anthony Marroquin by shooting with a deadly weapon, namely a firearm, and that the defendant, Kyle Avery Jackson, with the intent to promote or assist the commission of **the offense**, if any, encouraged, directed, aided or attempted to aid Davon Arrington, and/or Clavia Laville to commit **the offense**, if he did; or

... if you find from the evidence beyond a reasonable doubt that on or about the 3rd day of February, 2020, in Harris County, Texas, Davon Arrington, and/or Clavia Laville, did then and there unlawfully, while in the course of committing or attempting to commit robbery of Anthony Marroquin, intentionally cause the death of Anthony Marroquin by shooting with a deadly weapon, namely a firearm, and that the defendant, Kyle Avery Jackson, with the intent to promote or assist the commission of **the offense**, if any, encouraged, directed, aided or attempted to aid Davon Arrington, and/or Clavia Laville to commit **the offense**, if he did ... then you will find the defendant guilty of capital murder, as charged in the indictment.

CR353-54.

This instruction was deficient because it used the generic language of the party liability statute in referring to “the offense,” rather than applying the law to the facts of the case by specifying “the offense of murder.”

The application paragraph is the 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. *Vasquez v. State*, 389 S.W.3d 361, 366 (Tex. Crim. App. 2012). The application paragraph is thus the jury charge’s “heart and

soul.” *Id.* at 367. It is the application paragraph of the charge, not the abstract portion, that “explains to the jury, in concrete terms, how to apply the law to the facts of the case.” *Yzaguirre v. State*, 394 S.W.3d 526, 530 (Tex. Crim. App. 2013). Courts look at the “wording of the application paragraph to determine whether the jury was correctly instructed in accordance with the indictment and also what the jury likely relied upon in arriving at its verdict.” *Id.*

The application paragraphs were vague and ambiguous with regard to which “offense” the defendant intended to promote or assist and “encouraged, directed, aided or attempted to aid.” The only named offenses preceding the phrase “the offense” were the underlying felonies of burglary of a habitation and robbery. “Shooting” is not an offense.

An identical charge was found not to be reversible error by this Court in *Holford v. State*, 177 S.W.3d 454 (Tex. App.—Houston [1st Dist.] 2005, pet. ref’d), but this case is distinguishable. In *Holford* the Court concluded that, read logically, the phrases “with the intent to promote or assist the commission of the offense” and “solicited, encouraged, directed, aided or attempted to aid [the codefendant] to commit the offense” referred to the murder and not the underlying offense of robbery. *Id.* at 460-61. The Court held that if there was error it did not cause egregious harm because (1) the preceding paragraphs required the jury to find that the defendant acted “with the intention of thereby killing [the complainant]”; and (2)

both sides argued to the jury that it had to find that the defendant intended the murder. *Id.* at 461.

Holford is distinguishable because in this case the record affirmatively demonstrates that the jury was confused about which offense the defendant had to encourage, direct, aid or attempt to aid. The jury sent out a note during deliberations with the following question:

We are not clear on the party. If there is evidence that a person is a party to a burglary which resulted in a death, do we have to prove that he aided in the killing or is it automatic?

This note shows that the ambiguous wording confused the jury as to whether it was permitted to convict Jackson as a party to capital murder if he encouraged, directed, aided or attempted to aid only the burglary, when the State was required to prove that he encouraged, directed, aided or attempted to aid the killing of Marroquin. Rather than clarifying the ambiguous instruction with a supplemental instruction, trial court responded: "Please refer to the charge." CR346.

A jury note "shows that a jury was confused and misled." *Castillo-Fuentes v. State*, 707 S.W.2d 559, 563 (Tex. Crim. App. 1986). There was no affirmative evidence in the record in *Holford* that the jury was confused by the generic reference to "the offense."

Moreover, the Court of Criminal Appeals has subsequently held that a similar instruction was ambiguous and deficient. In *Nava v. State*, 415 S.W.3d 289 (Tex.

Crim. App. 2013), the defendant was charged with felony murder based on a fatal shooting committed in the course of felony theft. *Id.* at 294. The jury was instructed on the intent to promote and assist theory of party liability. The application paragraph instructed the jury that it must find that the defendant “with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid [co-defendant] to commit the offense ...”. *Id.* The Court held that this instruction was ambiguous and should have read, “... with the intent to promote or assist the commission of the offense *of murder*, if any, solicited, encouraged, directed, aided or attempted to aid [co-defendant] to commit the offense *of murder* ...”. *Id.* & n. 5. Having found error, the Court of Criminal Appeals conducted a harm analysis. *Id.* at 298.

The ambiguity in this case is no different. The trial court erred in using generic abstract language from the law of parties in the application paragraph rather than applying the law to the specific facts as charged in the indictment.

C. The trial court erred in failing to submit supplemental written instructions when the jury advised that it did not understand the law of party liability.

A jury’s communications with the trial court are governed by article 36.27 of the code of criminal procedure, and a trial court’s responses are reviewed for an abuse of discretion. *See Tex. Code Crim. Proc. Ann. art. 36.27.*

Article 36.27 requires the trial court to answer communications from the jury and to give additional instructions on questions of law requested by the jury when the request is proper. *Id.* If the request is not proper, the trial court should so inform the jurors by referring them to the court's charge. *Id.*; *Gamblin v. State*, 476 S.W.2d 18, 20 (Tex. Crim. App. 1972).

If the jury's request is a proper one on a question of law, Article 36.27 obligates the trial court to substantively answer with an additional or supplemental instruction. *Gamblin*, 476 S.W.2d at 20; *Harris v. State*, 668 S.W.3d 83, 108 (Tex. App.—Houston [1st Dist.] 2022, pet. ref'd). If not, the trial court does not err in refusing to give an additional or supplemental instruction. *Id.*

A question is proper if the question concerns substantive law applicable to the case. *Harris*, 668 S.W.3d at 108; Tex. Code Crim. Proc. Ann. art. 36.14. A trial court must answer a question of applicable substantive law if it can do so without expressing an opinion on the weight of the evidence, summarizing the testimony, discussing the facts, or including argument calculated to provoke the jury's sympathy or passions. *Id.*; *Lucio v. State*, 353 S.W.3d 873, 875 (Tex. Crim. App. 2011).

The jury's question was proper. It requested further instruction on the law applicable to the facts of the case: whether under the law of party liability the defendant must be a party only to the underlying felony or whether the defendant

must “aid” in the murder as well. The applicable law is an appropriate subject for an additional or supplemental jury instruction. *Harris*, 668 S.W.3d at 110; Tex. Code Crim. Proc. art. 36.14. A correct answer would have informed the jury that, to be guilty of capital murder under the intent to promote or assist theory of party liability, the evidence must prove that Jackson encouraged, directed, aided or attempted to aid Davon Arrington and/or Clavia Laville to commit the offense of murder. This answer would not express an opinion on the weight of the evidence, summarize the testimony, discuss the facts, or include argument calculated to provoke the jury’s sympathy or passions.

The trial court abused its discretion in failing to submit supplemental instructions in response to the jury’s proper question.

D. Reversal is required because the harm is egregious.

Because Ellis 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

The application paragraphs were vague and ambiguous with regard to which “offense” the jury had to find defendant intended to promote or assist and “encouraged, directed, aided or attempted to aid.” The generic term “the offense” would logically relate back to a named offense in preceding text. The only named offenses preceding the phrase “the offense” were the underlying felonies of burglary of a habitation and robbery. While the application paragraph also referred to the codefendants “shooting with a deadly weapon,” shooting is not an offense.

It is true that the abstract charge immediately preceding the application paragraphs correctly stated that the jury had to find that Jackson “with the intent to promote or assist in the commission of the offense of burglary of a habitation or robbery, if any, encouraged, directed, aided, or attempted to aid Davon Arrington, and/or Clavia Laville in shooting Anthony Marroquin, if he did, with the intention of thereby killing Anthony Marroquin...”. CR351-52. But this instruction was buried in the middle of a 29-line paragraph that set out the elements of primary actor

liability as well as both different theories of party liability. The jury's question indicates that the jury focused on the application paragraphs in determining the elements, rather than the abstract portion.

2. The state of the evidence

The case for capital murder, as a primary actor or under either of the two theories of party liability, was entirely circumstantial. Jackson admitted that he was present during the home invasion and the shooting, and that he participated in pawning the complainant's property. But there was no direct evidence that the shooting was planned, that Jackson knew Arrington was armed, or that Jackson encouraged, directed, aided, or attempted to aid in the shooting.

Jackson told police that he did not know Arrington was armed and was surprised by the shooting. This statement, if believed, would foreclose a finding that Jackson intended to promote or assist in the murder or that he encouraged, directed, aided, or attempted to aid in the murder, both of which are required to convict of capital murder under the intent to promote or assist theory of party liability. This statement also counters an inference that the shooting should have been anticipated, a required element for the co-conspirator theory of liability.

The state of the evidence factually contrasts this case from *Nava v. State*, where the Court of Criminal Appeals found no egregious harm. In *Nava* the centerpiece of the State's felony murder case was evidence that the defendant said

“tírale” (“shoot him”) just before the codefendant shot the complainant. 415 S.W.3d at 301. The Court reasoned that the State’s focus on this fact made it unlikely that the jury would construe the ambiguous application paragraph to dispense with the required element that the defendant intended to promote or assist in the killing.

Here, in contrast, there was no direct evidence that Jackson did anything to encourage, direct, or aid in the shooting. A jury would not necessarily infer from the evidence or the contested facts that the State was required to prove that Jackson encouraged, directed, aided, or attempted to aid in the shooting.

3. The arguments of counsel

The State’s argument did not make it clear that party liability required proof that Jackson intended to promote or assist in the shooting and encouraged, directed, or aided in the shooting. Instead, the State argued that the intent to cause death element in the charge applied only to Arrington:

The specific intent to cause his death. What it’s talking about is when Davon Arrington is pulling that trigger. That’s an intentional act where he’s trying to cause the result of Anthony’s death.

5RR7.

The State also repeatedly insinuated that a person who participates in certain dangerous crimes, such as burglary or robbery, is automatically guilty of capital murder if someone is intentionally killed by another participant:

There are a number of offenses that make a capital murder a capital murder. It's not just any felony. It's not a third-degree evading motor vehicle; it's not a state jail theft. But there are certain specific offenses that raise that level of seriousness to bring capital: Robbery, burglary, sexual assault, kidnapping, arson. The reason being is that those crimes are so serious. **Those crimes are so innately dangerous that if someone dies in the commission of that offense, that's capital.** A robbery, causing an assault to steal someone's property, is so inherently personal and dangerous. A burglary, for breaking into someone's home, their place of refuge, their place of safety, is so inherently personal that what happens when you do these things, someone can die. What happens when you kick that door in? Someone can die, and that's what happened here. Anthony Marroquin is dead, shot three times because of his actions (indicating), not just Davon Arrington, because of what he did as well. That is why we're charging him with capital murder because we believe the evidence shows that. We believe that what you've been presented with shows that he not only did a burglary, that he not only did a robbery, but because Anthony Marroquin was intentionally shot three times, he is responsible for that death.

5RR36-37. These arguments went beyond simply asking the jury to infer that a killing "should have been anticipated" under the co-conspirator theory of liability. The arguments conveyed that liability for capital murder was "automatic," in the words of the jury note.

The State also argued that Jackson's participation in the robbery or burglary, combined with Arrington's intentional killing, satisfied the elements of capital murder:

Because every step he takes inside there, every moment he spends rifling through those drawers, every moment that there's a punch or a kick, or he holds the door open while somebody brings out a television set, or when he asked his girlfriend to drive him over there, where he goes and sells the stolen phone and then splits up the proceeds, he's aiding or attempting to go aid this felony. That makes him a party; **that**

makes him guilty of robbery or burglary, and if you're guilty of robbery or burglary, and Davon Arrington had the specific intent to kill Anthony, you're guilty of capital murder. Because on page 1, a person commits the offense of capital murder if he intentionally commits murder as hereinbefore defined and in the course of committing or attempting to commit the offense of burglary of a habitation or robbery. **That's all this is. It's one of those felonies of burglary or a robbery, and somebody -- Davon, in this case, was the shooter. That's all the capital murder is.**

5RR16-17. This argument left out essential elements for party liability (that Jackson intended to promote and assist in the shooting *and* encouraged, directed, aided, or attempted to aid the shooting) and for co-conspirator liability (that the killing should have been anticipated).

The State's misleading argument sets this case apart from *Holford*, in which the court of appeals found no egregious harm because the State made it clear in its argument that in order to convict the jury must find that Holford intended the complainant's murder. 177 S.W.3d at 461 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd). Likewise, in *Nava* the Court of Criminal Appeals noted that “[t]he prosecutors never argued that appellants could be convicted of felony murder under the ‘intent to promote or assist’ theory of party liability based solely on an intent to commit the theft.” 415 S.W.3d at 301. But here, the State's argument did just that.

The defense argument focused primarily on the lack of evidence to prove that the shooting should have been anticipated under the co-conspirator theory (pointing out that there was no evidence that Jackson knew Arrington had a gun and no

evidence of a plan), while overlooking the other theory of party liability (“...without that anticipation, all it can be burglary.”). 5RR21-22, 27, 36. On the intent to promote and assist theory of party liability, defense counsel argued only that there was no evidence the Jackson promoted, assisted, directed, encouraged, or aided in the burglary, noting he did not lead Arrington to the trailer or kick open the door. 5RR20-21. This argument could have been interpreted as an indication that the elements of “encourage, direct, aid, or attempt to aid” applied only to the burglary, not the killing. Critically, the defense argument never explained that, under the intent to promote and assist theory of party liability, Jackson had encourage, direct, aid, or attempt to aid *the shooting*.

4. Other relevant information: the jury question

The most important piece of the record informing this harm analysis is the jury’s note asking: “if … a person is a party to a burglary which resulted in a death, do we have to prove that he aided in the killing or is it automatic?” The note demonstrates that the jury was confused by the ambiguous application paragraphs and by the State’s misleading arguments.

The Court of Criminal Appeals has held that a jury note asking for clarification on the law shows actual, non-theoretical harm. *Castillo-Fuentes v. State*, 707 S.W.2d 559, 563 (Tex. Crim. App. 1986) (“The jury’s question strikingly shows, however, in a non-theoretical, real-life situation … that this jury was

confused and misled”). Hence, when a jury note reflects that the jury was actually confused, the record demonstrates egregious harm. *Dolkart v. State*, 197 S.W.3d 887, 894 (Tex. App.—Dallas 2006, pet. ref’d) (finding egregious harm from absence of unanimity instruction where the jury sent out a note showing it was confused about unanimity).

The jury’s note distinguishes this case from *Holford* and *Nava*, in which no egregious harm was found because the appellate courts assumed, with no direct evidence to the contrary, that the jury properly construed the ambiguous references to “the offense.” The *Holford* court relied on a correct statement of the law in the abstract portion in concluding that the charge “read in its entirety” was sufficient. But in this case, the Court need not speculate as to whether the proper statement of the law in abstract portion resolved any ambiguity, because the jury’s note affirmatively shows it was confused about the elements of party liability for capital murder.

Likewise, in *Nava* the Court of Criminal Appeals relied heavily on the remainder of the jury charge in finding no egregious harm. The Court noted that the abstract portion correctly instructed that party liability required proof of an intent to cause death. *Id.*, 415 S.W. 3d at 300. The Court also reasoned that the extra requirement of the “should have been anticipated” element for co-conspirator liability would seem logically incongruous if a defendant could be guilty as a party

simply by participating in the underlying felony. Finally, the Court observed that trial court submitted the underlying felonies as lesser-included offenses, which would be superfluous if the defendant could be guilty of felony murder by merely participating in the underlying felonies, with the only extra element being a death, for which the evidence was uncontested.¹ *Id.* at 300-301.

All of these factors are present in this case as well. The jury was instructed on co-conspirator liability and on the lesser-included offenses of burglary of a habitation and robbery. But these factors lose their salience in the face of the jury question showing actual confusion. The jury's note shows that the jury was not able to resolve the ambiguity by parsing through the entire jury charge looking for incongruities, superfluities, and other clues, perhaps a tall order for the average juror.

Moreover, the jury most likely did not consider the lesser-included offenses in trying to make sense of the application paragraph for capital murder because the State told the jury in argument that it could not move on to any lesser-included offense until it decided unanimously that Jackson was not guilty of capital murder. 5RR9. Because the jury convicted on the charged offense, it would not have read through to the lesser-included offenses.

¹ This analysis presumes that the jury read through to the instructions on the lesser-included offenses, rather than stopping after convicting on the charged offense.

In this case, the harm is egregious. Egregious harm occurs if the error (1) affects the very basis of the case; (2) deprives the defendant of a valuable right; (3) vitally affects a defensive theory; or (4) 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 harm here is actual and non-theoretical because the jury note affirmatively shows that the jury was confused about the elements of party liability for capital murder. The ambiguous instructions made the case for conviction “clearly and substantially more compelling” because the jury could have assumed that proof of capital murder was “automatic” if Jackson was a party to burglary and an intentional killing occurred. By refusing to submit a supplemental instruction, the trial court signaled its implicit approval of the jury’s assumption that conviction for capital murder was “automatic” even if Jackson did not aid in the shooting.

The cumulative harm of the errors is egregious and calls for a new trial.

Prayer

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

Respectfully submitted,

/s/ Adam Banks Brown

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

ATTORNEY FOR APPELLANT

Certificate of Service

This document has been served on the following parties electronically through the electronic filing manager on April 22, 2025.

Jessica A. Caird
Harris County District Attorney's Office
1201 Franklin Street
Houston, Texas 77002

/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 **6,630** words, based on the word count function of the word processing program used to create the document.

/s/ Adam Banks Brown

Adam Banks Brown