

**No. 1-24-00490-CR & 1-24-491-CR**

**IN THE COURT OF APPEALS  
FOR THE FIRST DISTRICT OF TEXAS**

FILED IN  
1<sup>st</sup> COURT OF APPEALS  
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**HERBERT SIMON**  
*Appellant*

DEBORAH M. YOUNG  
Clerk of The Court

v.

**THE STATE OF TEXAS**  
*Appellee*

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On Appeal from Cause Nos. 1759494 & 1783144  
From the 185<sup>th</sup> District Court of Harris County, Texas

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**BRIEF FOR APPELLANT**

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**Oral Argument Requested**

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## **STATEMENT OF THE CASE**

On October 31, 2022, a Harris County grand jury returned an indictment charging Herbert Simon with the felony offense of aggravated kidnapping alleged to have occurred on or about December 11, 2017. (C.R. at 27). On the same date, an indictment was returned charging Simon with the felony offense of murder also alleged to have occurred on or about December 11, 2017. (2 C.R. at 31).<sup>1</sup> On June 26, 2024, a jury found Simon guilty of the offenses of aggravated kidnapping and murder. (C.R. at 164; 2 C.R. at 586; 6 R.R. at 9-10). The trial court assessed concurrent Life sentences in the Texas Department of Criminal Justice, Correctional Institutions Division. (C.R. at 164; 2 C.R. at 586; 7 R.R. at 39). The trial court certified Simon's right to appeal and he timely filed his notice of appeal on June 26, 2024. (C.R. at 163, 171; 2 C.R. at 585, 592). No Motion for New Trial was filed.

## **STATEMENT REGARDING ORAL ARGUMENT**

Oral argument is requested.

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<sup>1</sup> For Cause No. 1783144 (Murder), counsel references the clerk's record as: "2 C.R. at #."

## **ISSUES PRESENTED**

### **Issue One**

Whether the trial court erred in failing to include accomplice witness instructions in the murder charge regarding the testimony of Dante Nava?

### **Issue Two**

Whether the trial court erred in failing to include accomplice witness instructions in the aggravated kidnapping charge regarding the testimony of Cesar Nava?

### **Issue Three**

Whether the trial court erred in failing to include accomplice witness instructions in the murder charge regarding the testimony of Cesar Nava?

### **Issue Four**

Whether the evidence was insufficient to support Simon's aggravated kidnapping conviction because the accomplice witness testimony of Dante Nava was not sufficiently corroborated?

### **Issue Five**

Was the evidence insufficient to convict Simon of murder?

## STATEMENT OF FACTS

On December 11, 2017, something went terribly wrong at Susie’s Hair Studio leaving two people dead. Police had no leads in the case until October 2020, when Dante Nava picked up a federal drug charge for fifteen kilograms of methamphetamine—another offense he committed along with Josue Daniel Casco. Pursuant to an immunity agreement, Dante debriefed with law enforcement and confessed to numerous violent crimes as a member of a gang. The state’s resolution of the case against Herbert Simon stems from the stories told by Dante to law enforcement during his proffer.

### A. State’s Evidence

#### 1. *Accomplice Witness Testimony*

Dante Nava was thirty-eight years’ old at the time of his testimony. (4 R.R. at 36). He had been initiated into gang life as a member of “Tango Blast” at the age of twenty.<sup>2</sup> (4 R.R. at 20). Outside the presence of the jury, the State indicated that Dante had entered an immunity agreement with the State that “any statements he uses to testify here today will not be used against him in prosecution in the future.” (3 R.R. at 114). The court noted it had signed an order granting use immunity. (3

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<sup>2</sup> Not long before this incident, a 2015 Texas Gang Threat Assessment published by the Texas Department of Public Safety indicated that “Tango Blast” ranked as a Tier 1 gang. This ranking meant it was one posing the greatest “threat to Texas due to their relationships with Mexican cartels, high levels of transnational criminal activity, level of violence, and overall statewide presence.” (Executive Summary at \* 3).

R.R. at 115). The State said Dante also received a downward departure cutting his sentence in half for the federal drug case. (3 R.R. at 115). In addition, his family received money for relocation. (3 R.R. at 115).

Dante was wearing orange as he was in federal custody at the time of his testimony. (3 R.R. at 117-118). He had been charged with possession of fifteen (15) kilograms of methamphetamine in October of 2020. (3 R.R. at 118). It was his testimony that he committed that drug offense with Daniel Casco—another co-defendant in the instant case. (3 R.R. at 118; State Ex. 49).

Dante stated it was his understanding that he was granted immunity for the information he offered during his federal proffer. (3 R.R. at 120). He gave the federal government information about multiple crimes—including the killing of the complainants, Robert Cerda and Rachel De La Rosa. (3 R.R. at 121-122). He confessed his own participation in a different murder that he committed with Casco related to retaliation for the killing of a Mexican drug dealer's son. (3 R.R. at 122). Two people died as a result of that shooting and four others were injured. (3 R.R. at 123; 246-247).

Next, Dante testified about another capital murder he and Casco were involved in where he admitted to destroying the murder weapon. (3 R.R. at 123). "I was just disposing some—some weapons," he stated. "...we...turned the whole gun into shavings, shaving metals." (3 R.R. at 124; 247). He knew those guns had been

involved in a murder. (3 R.R. at 124). Dante stated his federal sentence was reduced from a potential 25-40-year sentence to 10 years in exchange for providing information in the three cases. (3 R.R. at 124). Harris County also offered Dante immunity in exchange for his testimony. (3 R.R. at 125).

Regarding his criminal history, Dante was convicted of aggravated robbery in 2002. (3 R.R. at 126). He met Casco in 2012 he bought cannabis from Casco. (3 R.R. at 128-129). By 2017, the two were “good friends.” (3 R.R. at 129). Dante would visit Casco at “Susie’s salon,” which was run by “Nana”—Casco’s sister. (3 R.R. at 129).

It was Dante’s testimony that he met Herbert Simon “a few times” in 2017 through Casco. (3 R.R. at 131; 133). Dante identified Simon in court by an article of clothing he was wearing. (3 R.R. at 131). He testified that during the time of the incident, Simon was living at the salon: “staying at—watching over the beauty salon.” (3 R.R. at 133). Dante stated he did not personally know the decedents. (3 R.R. at 137-138). He met them on the day of the incident. (3 R.R. at 139).

Next, Dante discussed the involvement of his cousin, Cesar Nava. (3 R.R. at 134). Dante stated that before the incident, Dante had been doing machinist work on windmill blades, but had been fired because of drug use. (3 R.R. at 140; 4 R.R. at 20). Leading up to the day of the incident, Casco and Dante discussed a pill press in need of repair. (3 R.R. at 141). The pill press was being used to make illegal



pharmaceutical pills. (3 R.R. at 142). Cesar Nava—Dante’s cousin—offered to give Dante a ride to meet with Casco so Dante could look at the pill press. (3 R.R. at 143). Since Cesar wanted a haircut and Casco cuts hair, Dante called Casco to see if Casco could cut Cesar’s hair. (3 R.R. at 134, 144).

It was his testimony that Casco and Simon were at the salon upon their arrival. (3 R.R. at 149). Dante brought a bag of tools to work on the pill press. (3 R.R. at 149). He stated everyone was hanging out, “drinking beer and just doing a little bit of coke.” (3 R.R. at 150). After a couple hours of hanging out, Dante said Casco was “[p]aranoid” and watching the surveillance camera. (3 R.R. at 151). Dante was carrying a Glock .45 in his waistband. (3 R.R. at 152). He stated he also saw Casco and Simon with weapons and added, “there’s weapons around in the house.” (3 R.R. at 152).

Dante stated Cesar left after getting a haircut to get more beer. (3 R.R. at 153-154). When Cesar left, “Dante Nava; Herbert [Simon]; and Casco” remained at the salon. (3 R.R. at 154). Dante stated Simon went across the street to also buy beer, and eventually Dante and Casco dragged the pill press from a closet into the back room. (3 R.R. at 154-155). Dante did not state at what point Simon returned.

While he was in the back room, there was a knock at the front door and, according to Dante, Simon went to answer it. (3 R.R. at 162-163). From the back bedroom, Dante heard voices. (3 R.R. at 163). Dante claimed Casco and Simon

appeared to be “shocked.” (3 R.R. at 163). Complainant Cerda (State Ex. 52) walked up to him as he waited in the room, asked him for a cigarette, looked at the pill press and smiled before walking out. (3 R.R. at 164-165). Since he was engaged in repairing an illegal pill press, Dante was concerned about this unknown man walking towards him. (3 R.R. at 165). He went to investigate and testified that he saw Simon with Casco’s Glock .45 in hand. (3 R.R. at 166-167).

It was Dante’s testimony that Cerda then came back inside the building and announced, “I’m going to use the restroom,” before walking down the hallway to the restroom. (3 R.R. at 169). Dante stated Casco was outside and that he could see Simon pointing the gun towards Cerda’s direction, though he could not see Cerda. (3 R.R. at 169-170). Dante stated while Cerda was in the restroom Simon “pulled the trigger and he looks at me and he says, ‘The gun didn’t go off.’... ‘What’s wrong with the gun?’ ” (3 R.R. at 171-172). He said the next thing Simon did was “chamber a fresh round.” (3 R.R. at 172). The complainant was in the restroom for “[l]ike ten seconds and he came out speed walking,” made his way towards the front door and Simon began shooting at him. (3 R.R. at 173). Dante testified that the complainant then said, “What the fuck?” and “he charged at [Simon]” after being struck. (3 R.R. at 175). He further indicated Simon shot four to five additional shots at the complainant. (3 R.R. at 175). The complainant fell against the front door as someone tried to open it from outside. (3 R.R. at 176).

Dante testified that after a brief struggle to open the front door, it opened, and a female (De La Rosa) was “shoved in” by Casco and fell over Cerda. (3 R.R. at 177). He stated when she tried to get back up, Simon punched her and Casco drug her into the hallway. (3 R.R. at 178). It was his testimony that Simon pointed a gun at her head and said, “Is this this bitch? Is that that bitch?” (3 R.R. at 179). He stated everyone was yelling and arguing with one another. (3 R.R. at 179). Eventually, he stated Casco and Simon ordered De La Rosa to take off her clothes. (3 R.R. at 180-181). He stated that at this point during the incident, Cerda was still alive. (3 R.R. at 181).

Cesar returned to the scene from the beer run. (3 R.R. at 185). Dante warned him not to touch anything. (3 R.R. at 189). He covered Cesar’s face with his hoodie because he did not want anyone to see it. (3 R.R. at 190-191). He also claimed that he did not pull out his gun to defend the complainants because he “forgot;” ...“If I would have remembered, yes. I would have did something and got her out of there.” (3 R.R. at 196).

It was Dante’s testimony that eventually he gave De La Rosa’s clothes back to her. (3 R.R. at 193). While holding the firearm used to shoot Cerda, Casco grabbed De La Rosa by the clothes and walked her to Casco’s car outside. (3 R.R. at 199). He claimed he knew it was the same gun because it had a “long extended clip.” (3 R.R. at 199). Casco put De La Rosa in the back seat, Dante was in the

driver's seat and Casco was in the back seat next to De La Rosa. (3 R.R. at 200). He stated Simon and Cesar remained at the salon. (3 R.R. at 201). He said he left his firearm at the salon with Cesar, and they left the scene. (3 R.R. at 201-202).

Dante testified that once Casco ordered him to stop the car, "Casco tells her to take her clothes off and she takes her pants off and her shoes and he grabs the car keys from me." (3 R.R. at 209). Casco and De La Rosa walk away from the car. (3 R.R. at 209). Dante stated he heard approximately seven shots fired and then saw Casco running back to the car. (3 R.R. at 210). He stated Casco gave him the keys and told him to drive away. (3 R.R. at 210). They stopped for beer. (3 R.R. at 212

Next, Casco and Dante went to Walmart and Dante helped Casco disassemble the firearm. (3 R.R. at 213). They went inside to buy cleaning supplies. (3 R.R. at 214). Casco again took the car keys. (3 R.R. at 214). They bought "Black plastic tarp, white rope, a bunch of shop rags and some thinner, like two gallons of paint thinner." (3 R.R. at 215).

When they left Walmart, Dante drove them to the ship channel and Casco threw the pistol barrel into the water. (3 R.R. at 218). Next, they stopped at two different apartment complexes where Casco threw different parts of the pistol into dumpsters. (3 R.R. at 218-219). They went to Casco's apartment where he retrieved another pistol before returning to the salon. (3 R.R. at 219).

Dante testified that Simon was alone in the salon with Cerda's body. (3 R.R. at 220). He stated he noticed bullet defects in a window and door. (3 R.R. at 220). According to Dante, he, Casco, and Simon laid out a black tarp, put Cerda's body on it and removed most of his clothes. (3 R.R. at 221). Cerda's clothes were put into a trash bag and after placing another tarp down, they wrapped his body with ropes and plastic. (3 R.R. at 222). He stated they all wore gloves and carried Cerda's body to the trunk of Casco's Chevy Malibu. (3 R.R. at 223; 225).

He stated Simon remained at the salon while he drove Casco and the deceased to the next location. (3 R.R. at 226). After searching around, Dante and Casco took Cerda's body from the trunk and placed it in the grass near the roadside. (3 R.R. at 227). They left the scene and threw Cerda's clothes into a nearby apartment dumpster. (3 R.R. at 228). They also discarded De La Rosa's clothes that were still in the back seat. (3 R.R. at 228). He testified that they next returned to the salon where he and Simon began cleaning. (3 R.R. at 229-230).

After describing how he, Simon and Casco cleaned up the salon to cover up Cerda's killing, the prosecutor asked, "What did *you* do with all the rags and all the mess at that point?" (3 R.R. at 233). "*We* threw it all in one—one trash bag...And *we* put it in the car." (3 R.R. at 233). It was his testimony that Simon and Casco had an ongoing "beef" with Cerda because of a home invasion committed against Susie Arbizu—sister of Casco and owner/operator of Susie's Hair Studio.

(3 R.R. at 235-236).<sup>3</sup> (emphasis added).

After the incident, Dante remained close to Casco, and they continued to commit crimes together. “I was in his hip pocket,” he added. (3 R.R. at 239; 248). He further indicated that what he had testified to on the witness stand was also what he told the federal government during the proffer. (3 R.R. at 239).

On cross examination, Dante, himself, agreed that there were no other witnesses and no way to check the truth of what he described regarding the killing of the complainants. (3 R.R. at 249). He agreed that the government was asking the jury to depend on his word, alone. (3 R.R. at 249). He agreed with defense counsel’s assertion that the identity of the person who shot those shots could not be independently verified from his proffered information, and that he was armed with a pistol and in the same position as Simon on the day of the incident. (3 R.R. at 11).

## *2. Only Other Scene Witness*

### **Dante’s Cousin, Cesar, kept incident secret, threw murder weapon off bridge**

Cesar Nava testified he had a good relationship with his cousin, Dante, and that they were “close.” (5 R.R. at 7-8). Cesar stated Dante’s wife and his sister were best friends, that Dante had gotten his brother a job and that their dads are brothers with a close relationship of their own. (5 R.R. at 64).

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<sup>3</sup> Arbizu’s testimony confirmed that she had lived there but moved out after a home invasion in January of 2017. (4 R.R. at 285)

Cesar did not have a “deal” with the state—no agreement for immunity in exchange for his testimony.<sup>4</sup> (5 R.R. at 9, 49) Around the time of the incident, he had been working temporary contract jobs, but was laid off on the morning of December 11, 2017. (5 R.R. at 10; State Ex. 238). He stated he called Dante so they could “go look for work.” (5 R.R. at 12). Cesar picked Dante up at home in his Suburban and they drove to the Spring Branch area to “pick up a machine.” (5 R.R. at 13-14). Cesar knew they were going to meet Casco and had met him before. (5 R.R. at 15). Cesar referred to Simon as Casco’s “friend” whom he met the first time on the day of the incident. (5 R.R. at 17-18). It was Cesar’s testimony that when he and Dante arrived at the salon, Casco gave him a haircut. (5 R.R. at 18). He stated Dante was carrying a gun in his waistband and there was no question in his mind that Dante knew he was carrying a gun on his person. (5 R.R. at 19-20; 57). It was also his testimony that Dante always carried a handgun. (5 R.R. at 59). Cesar stated that Simon showed him a gun. (5 R.R. at 21).

After getting a haircut, Cesar stated he went to the grocery store for beer while Dante, Casco and Simon remained at the salon. (5 R.R. at 22-23). Dante called Cesar as he was leaving the grocery store and, hearing a female screaming in the

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<sup>4</sup> However, what he did have was three cases dismissed shortly before Simon was set to go to trial. According to the state’s *Brady* notice, two alleged violations of a protective order were dismissed on April 24, 2023, and one alleged Indecency with Child was dismissed on August 1, 2023. (C.R. at 143). Three months later, on November 1, 2023, Simon was set for a final pretrial conference to take place on January 16, 2024, with a jury trial to follow on February 27, 2024. (C.R. at 112).

background, Cesar became concerned. (5 R.R. at 23-24). Cesar testified that he returned to Susie's and before walking inside, Dante told him what had happened and pulled his jacket hood over his head. (5 R.R. at 27, 55). Upon entering, Cesar stated that Simon was "all over the place." (5 R.R. at 28). There was a woman standing in her underwear crying. (5 R.R. at 29). It was Cesar's testimony that he wanted to leave the scene, but was not allowed: "They said I was in. 'You're in. You're in. You're in. You can't leave. You're in. You're in. You can't leave.'" (5 R.R. at 29). Cesar stated it was Dante who initially told him he could not leave the scene. (5 R.R. at 55-56). Despite all the commotion, Cesar stated Simon "never really said too much." (5 R.R. at 30).

Cesar stated he told the crying woman he would take her home, but he was not allowed to do so. (5 R.R. at 30). Cesar did not believe the woman was free to leave. (5 R.R. at 32). Realizing that Cesar was upset about the chaos he had walked into, Casco directed Dante to "talk to" Cesar: "Dante, talk to your—talk to your cousin, man, talk to him, talk to him." (5 R.R. at 32). Cesar testified Dante had also given the woman back her clothes and she put them on. (5 R.R. at 33). Cesar identified De La Rosa as the woman at the scene. (5 R.R. at 33; State Ex. 121). Cesar stated he also saw the body of Cerda on the floor of the salon. (5 R.R. at 34). He did not personally know either of the complainants. (5 R.R. at 29; 36). Contrary



to Dante's testimony (3 R.R. at 201-202), Cesar said he never had a weapon on him during the incident. (5 R.R. at 31, 41).

It was Cesar's testimony that when a phone "in the area" of Cerda began to ring, Simon retrieved it and began destroying it. (5 R.R. at 37). He was clear that he did not know whether this phone was physically taken from Cerda's person. (5 R.R. at 37). Dante, Casco and De La Rosa left the scene in Casco's car. (5 R.R. at 39). Cesar stated he was left alone with Simon, who was holding some kind of assault rifle. (5 R.R. at 42). According to Dante, at least by this point in time, Cesar was also carrying a gun on his person. (3 R.R. at 201-202).

Cesar testified to having studied the security monitors with the rest of the men throughout the night. (5 R.R. at 44). He stated when he was alone at the salon with Simon, he offered to delete the security videos. (5 R.R. at 44). Cesar stated he and Simon tried unsuccessfully to delete the footage from the salon's cameras. (5 R.R. at 45). The prosecution suggested to Cesar that he was only pretending to help in order to "build kind of a rapport" with Simon, and Cesar agreed. (5 R.R. at 45).

Cesar testified that as he was leaving the scene, Simon gave him a sock with the broken phone inside and asked him to "get rid of it." (5 R.R. at 47-48). He left and on his way home, he threw the phone off a bridge in Baytown. (5 R.R. at 48).

Cesar kept this secret locked away until police confronted him with it after Dante's proffer. (5 R.R. at 59). Cesar continued his familial relationship with Dante

but claimed to have less contact than before the incident. (5 R.R. at 60). He stated Dante brought up the incident every time they spoke. “Don’t worry. Everything’s okay. Don’t worry,” Dante would tell him. “Remember this.” (5 R.R. at 61).

### *3. The Investigation*

On the evening of December 11, 2017, Missouri City Police Department Crime Scene Unit investigator Michelle Betenbaugh was called to work a scene where a woman’s body was found near a roadway in Fort Bend County. (4 R.R. at 138). She collected .45 caliber shell casings from the scene. (4 R.R. at 144). The deceased was later identified as Rachel De La Rosa. (4 R.R. at 197).

Early on the morning of December 12, 2017, Danny Tima was out collecting scrap metal in his neighborhood just north of the 610 Loop and east of Interstate Highway 59 when he saw a tarp on the ground. (3 R.R. at 27). After discovering the tarp contained human remains, Tima and his friend called police. (3 R.R. at 29, 33, 35). Investigators later determined this was the body of Robert Cerda. (State Ex. 232).

According to the testimony of Cerda’s mother, Valerie Cerda, Cerda and De La Rosa had been involved in a dating relationship. (4 R.R. at 40). It was Valerie’s testimony that on the day of the incident, her son and De La Rosa went to Texas Work Source to look for jobs before going to eat at Connie’s seafood restaurant. (4 R.R. at 43; 45-46).

Time passed with no leads developing. Houston Police Department Homicide Detective Joshua Caten was assigned this “cold case” investigation in 2020. (4 R.R. at 192-193). It was his opinion that Cerda’s body was brought after his death to the location where it was found, and that De La Rosa was shot at the location where her body was found. (4 R.R. at 197; 198-199). In De La Rosa’s case, shell casings and bullet fragments were near the body and “also neighbors had called in 911, that they heard gunshots.” (4 R.R. at 199).

Surveillance videos from Connie’s Seafood in Houston showed the complainants had, indeed, been there before they went missing. (4 R.R. at 200; State Ex. 210). Based on his review of the video, Caten believed the complainants were at Connie’s for about four hours—from 3:00 p.m. to 7 p.m. (4 R.R. at 206). Next, surveillance video showed them patronizing the Madco Food Store where Cerda bought beer. (4 R.R. at 210). According to Caten, they left the premises at about 7:09 PM. (4 R.R. at 211).

*Dante Nava proffer provides break in the case*

The investigation stalled until 2021, when Dante Nava made a federal proffer. (4 R.R. at 219; 221). The proffer yielded four suspects and a new scene: “Dante Nava, Josue Casco, Cesar Nava and Herbert Simon” and Susie’s barber shop. (4 R.R. at 221-222). Police obtained a search warrant for “Susie’s Hair Studio.” Based on statements Dante made, investigators recovered a bullet fragment from a door

frame and suspected bloodstains on the floor. (State Ex. 233; 4 R.R. at 10-11, 225, 254-255, 258, 260-261; State Ex. 103, 104, 113, 118 & 215).

*Suzanne Arbizu—Owner of Suzie’s Hair Studio and Sister of Accomplice Casco*

Police interviewed Suzanne Arbizu—shop owner and sister of named suspect Josue Daniel Casco. (4 R.R. at 226). She told police that her brother and Herbert Simon had both been staying at the shop. (4 R.R. at 227). Arbizu had lived at the salon for a time but moved out after suffering a home invasion in January of 2017. (4 R.R. at 285). She testified that her brother Casco “was usually the one getting into trouble” and she knew him to carry a gun. (4 R.R. at 287).

Arbizu stated she knew Herbert Simon (“Herb”) as Casco’s friend since middle or high school. (4 R.R. at 289-90). She stated that Simon moved into the salon after she moved out. (4 R.R. at 290). According to Arbizu, this was a short-term favor to her brother’s friend and there was to be no partying or drinking in her place of business. (4 R.R. at 292). She testified that she found evidence of partying, however, along with a broken window by the door. (4 R.R. at 292-293).

She did not know Dante but said she “knew of him” through her brother Casco. (4 R.R. at 295). Prior to the warrant, she said she had been unaware of any criminal activity going on inside the salon. (4 R.R. at 296).

In 2021, investigators acquired records from a local Walmart showing that various items had been paid for in cash on the date of the incident: “cleaning

supplies, gloves, trash bags, ropes.” (3 R.R. at 106-107; 4 R.R. at 228-229; State Ex. 209). (According to accomplice-witness Dante, it was he and Casco who made these purchases. (3 R.R. at 213).)

### *Simon is charged*

Police interviewed Herbert Simon and Josue Daniel Casco, who consented to the collection of their DNA. (4 R.R. at 231-232; 233-234; State Ex. 62, 63, 212, and 213). Casco’s interview was also pursuant to a federal proffer; he identified Herbert Simon as a suspect. (4 R.R. at 234). After the interview with Dante, Simon was first charged with kidnapping and then murder. (4 R.R. at 240-241).

### **DNA, firearms, and a jail call**

Former Harris County Institute of Forensic Sciences DNA analyst Emily Ricco previously worked in the forensic genetics laboratory and was also a trace DNA evidence collection analyst. (3 R.R. at 40). She described “trace DNA” as “small amounts of DNA that are left behind by someone from direct contact with a person or an object. (3 R.R. at 41).

Ricco was called out to the scene in this case. (3 R.R. at 42). She generated worksheets and a report from her trace collection that became State Exhibit 200. (3 R.R. at 43). Later at the medical examiner’s office, analysts collected four white ropes that had been wrapped around Cerda’s body, which Ricco swabbed with gauze pads. (3 R.R. at 50, 56).

Molly Van Buren, forensic analyst at the Houston Forensic Science Center, performed analyses and statistical comparisons on items of interest in the case including the ropes, the evidence bags themselves and Cerda's hands. (4 R.R. at 64; State Ex. 228).

*Where was Simon's DNA?*

### **Torn edge of bag swab**

Item 16.2.1 is a "portion of the torn edge of the bag swabs." (4 R.R. at 78; State Ex. 228 & 235). Van Buren stated the DNA profile from this item "was interpreted as a mixture of two individuals with at least one male contributor and with Robert Cerda as an assumed contributor." (4 R.R. at 79). Her analysis determined the DNA results are "approximately 11.1 times more likely if they originated from Robert Cerda and Herbert Simon" than some other mixture providing "limited support that Herbert Simon is a contributor to the DNA from this item." (4 R.R. at 80). Van Buren stated, "Based on the screening paperwork, it was contact DNA," meaning touch DNA. (4 R.R. at 124).

### **Swabs of ropes**

Item 16.19.1—gauze swabbing of rope 2—testing provided "limited support that Herbert Simon is a contributor to the DNA from this item." (4 R.R. at 97; State Ex. 235 at \*5). Item 16.20.1—gauze swabbing of rope 3—indicated "limited support that Herbert Simon is a contributor to the DNA from this item" and "strong

support that Josue Casco is a contributor.” (4 R.R. at 97-98; State Ex. 235 at \*5 & 6). Item 16.21.1—gauze swabbing of rope 4—testing indicated “very strong support that Josue Casco is a contributor to the DNA from this item” and “moderate support that Herbert Simon is a contributor.” (4 R.R. at 99; State Ex. 235 at \*6). However, when the DNA mixture is run as three known contributors together—Robert Cerda, Josue Casco and Herbert Simon—the likelihood ratio does not support the conclusion that the DNA material was from those three. (4 R.R. at 100; State Ex. 235 at \*6).

*Where Simon’s DNA was not*

According to Van Buren, Simon’s DNA was not found in the portions of the knots in ropes 1, 2, 3 or 4, or on the bottom edge of bag swab from item 16.6.1. (4 R.R. at 77, 84-86, State Ex. 228). Moreover, his DNA was not found on the complainants’ hand or ankle swabs. (4 R.R. at 88-89, 93; State Ex. 228 & 235). His DNA was not found on the gauze swabbing of rope 1. (4 R.R. at 96; State Ex. 235).

During cross-examination, Ms. Van Buren agreed that “contact” DNA is from skin cells and that those skin cells can be transferred. (4 R.R. at 129). “That is Locard’s principle,” she added. (4 R.R. at 129). She explained the process of skin cell transfer: “And so like if I touch this surface, I could be leaving behind some skin cells just from touching it and that’s how DNA is transferred -- or skin cells are transferred from one thing to another in -- within your DNA because you have DNA

in your skin cells.” (4 R.R. at 130). Van Buren agreed that it is possible that after visiting someone’s home or spending a night in a hotel room, one could “walk away with” the DNA of others who had been present—even the “cleaning Lady’s DNA.” (4 R.R. at 130). She also agreed that DNA could be transferred from room surfaces to a physical object brought into the room. (4 R.R. at 131). It was her testimony that the amount of time a surface was touched, and the type of surface can affect the amount of DNA transferred from surface to surface—i.e. smooth versus porous or rough. (4 R.R. at 131). She also agreed it was possible that an item can contact another item (like a rope) resulting in DNA transfer. (4 R.R. at 132). “Anything can transfer,” she added. (4 R.R. at 132).

### *Firearms*

Dr. Garrett Phillips performed the autopsy of Robert Cerda. (3 R.R. at 70-71; State Ex. 232). He opined the manner of death was “multiple gunshot wounds” and the cause of death was “homicide.” (3 R.R. at 100). He also believed a firearm to be a deadly weapon. (3 R.R. at 101).

Sean Daniel, a forensic scientist who formerly worked for the Texas DPS, had examined two sets of items. (4 R.R. at 168). He opined that in the first set of cases, “all six cartridge cases referenced were fired by the same firearm” and were .45 caliber. (4 R.R. at 178; State Ex. 230). Next, he believed the second set to all be .45 caliber. (4 R.R. at 187). His database suggested potential firearms manufacturers,



but to know for sure, he would need the actual firearm used for comparison. (4 R.R. at 188).

Melissa Nally, firearms examiner for HFSC (4 R.R. at 263), indicated the only item of value noted in her laboratory report was Lab Item # 1-01. (4 R.R. at 271; State Ex. 231). When compared to the bullets recovered from the Fort Bend County scene, she determined they “had the same class characteristics,” but she was unable to determine whether the bullets were “fired in the same firearm.” (4 R.R. at 271). Nally stated the bullets were all from a .45 caliber firearm. (4 R.R. at 272).

*Jail call mentions “the shop”*

Police acquired a recorded jail call made by Simon about a month after the incident. (5 R.R. at 75-76; State Ex. 239). In the call, Simon asked the person on the other end of the line if they had seen the previous night’s television news story about a kidnapping in the area. (State Ex. 239 at 0:10). He said, “Look, they be right in front of the shop, and I don’t know, they was trying to kidnap somebody.” (State Ex. 239 at 0:18). Simon continued: “Text Jay and see what happened over there.” (State Ex. 239 at 0:34). Then he added:

They was on the news last night at the Chinese Express, the Valero and they didn’t show you nothing at the shop, but they said that they was...the fools tried to kidnap somebody...I don’t know. I didn’t get the fully story because dumb asses was talking and they didn’t have the closed caption on.

(State Ex. 239 at 0:45-1:02). Simon referenced the fact that he had been staying at the salon because the women there were vulnerable. “That’s why I be over there,” he said. “Shit like that happens.” (State Ex. 239 at 1:14-1:18).

HPD Detective Michael Burrow interviewed Simon. (5 R.R. at 78). It was Burrow’s testimony that Simon was not truthful with him about having lived at Susie’s. (5 R.R. at 79). Burrow stated Simon denied knowing Dante or Cesar. (5 R.R. at 80). Further, Burrow indicated that after Casco and Dante’s proffers, the direction of his investigation did not change. (5 R.R. at 81). Burrow believed the evidence was supported by Dante’s account. (5 R.R. at 72-73, 82-85).

*Things Detective Burrow cited as sufficient corroboration of Dante’s proffer*

- warrant search at Susie’s Hair Studio revealed a fired .45 projectile and Cerda’s DNA from under the floor at the shop (5 R.R. at 73, 82);
- Walmart receipts (5 R.R. at 72);
- Connie’s Seafood surveillance footage (5 R.R. at 72);
- Simon jail call about a month after the incident mentioning “the shop” (5 R.R. at 75);
- Simon’s assertion during interview that he had not stayed overnight at Susie’s, but only got haircuts (5 R.R. at 79);
- Simon’s assertion that he did not know Dante (5 R.R. at 80);
- Casco’s proffer did not change his opinion (5 R.R. at 81);
- Cerda’s wound patterns (5 R.R. at 83); and
- Layout of scenes where complainants’ bodies were found; (5 R.R. at 84-85).

The investigation led to Simon being charged in the cases, and Casco was charged with capital murder for the abduction and killing of De La Rosa. (5 R.R. at 86).

## **B. Defense Evidence**

There was none.

### **SUMMARY OF THE ARGUMENT**

The court erred in failing to include accomplice witness instructions in the murder charge regarding the testimony of Dante Nava because the evidence established that he was an accomplice and co-conspirator to the organized criminal activity at the salon. While Detective Burrow opined that Dante's statement was corroborated, his opinion is not proof. Further, Burrow testified about needing corroborating information in order to *file* criminal charges. The jury notes demonstrate confusion about this issue. Based on the state of the evidence, the jury appeared to rely on Burrow's opinion alone as evidence of corroboration. The lack of an accomplice-witness instruction deprived Simon of the statutory right not to be convicted of an offense based on the uncorroborated testimony of an accomplice witness. Simon is entitled to a reversal and a new trial.

The court erred in failing to include accomplice witness instructions in the aggravated kidnapping and murder charges regarding the testimony of Cesar Nava because he committed numerous affirmative acts indicating he was an accomplice aligned with Dante and, by extension, Casco. Because of these errors, Simon is entitled to a reversal and a new trial.

The State failed to corroborate the testimony of the accomplice witness, Dante Nava, regarding the alleged aggravated kidnapping. At best, the non-accomplice testimony could only establish Simon's presence at the salon. The non-accomplice testimony is insufficient to support a conviction beyond a reasonable doubt. Consequently, the evidence is insufficient to support Simon's conviction beyond a reasonable doubt and he is entitled to a reversal and to an order of acquittal.

Finally, the evidence is insufficient to support Simon's conviction for murder. The physical evidence and non-accomplice testimony is insufficient to support a conviction beyond a reasonable doubt. At best, the non-accomplice testimony could establish only Simon's presence at the salon. Consequently, the evidence is insufficient to support Simon's conviction beyond a reasonable doubt and he is entitled to a reversal and to an order of acquittal.

### **Issue One**

Whether the trial court erred in failing to include accomplice witness instructions in the murder charge regarding the testimony of Dante Nava?

#### **A. Applicable law and standard of review**

The accomplice-witness rule is not a defensive issue. *Zamora v. State*, 411 S.W.3d 504, 513 (Tex. Crim. App. 2013). If even a scintilla of evidence suggests that a witness might be an accomplice to the offense, a trial court has a duty to instruct the jury accordingly, because the question is part of the law of the case. *See*

*Id.* If the court fails to do so, the error is reviewed for harm under the *Almanza*<sup>5</sup> framework: if objected to, then the error is reviewed for some harm; if unobjected to, then it is reviewed for egregious harm. *Id.* at 512-13. Defense counsel did not object to the lack of an accomplice witness instruction. (5 R.R. at 89). Therefore, the trial court's error in omitting the instruction is reviewed for egregious harm. See *id.* at 506.

There are three types of accomplice witnesses. An accomplice is someone who participates with the defendant before, during, or after the commission of a crime and acts with the required culpable mental state. *Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007). To be an accomplice, a witness must have performed "some affirmative act that promotes the commission of the offense." *Id.* A witness is not an accomplice merely because he or she knew of the offense and concealed it. *Id.* And simply being present at the scene of an offense does not make a witness an accomplice. *Id.* If the witness cannot be prosecuted for the same offense, or a lesser included offense, the witness is not an accomplice as a matter of law. *Id.* To raise a fact issue and warrant an accomplice-witness instruction, some evidence must show an affirmative act by the witness to assist in the commission of the charged offense. *Id.* *Robinson v. State*, No. 01-14-00656-CR, 2015 WL

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<sup>5</sup> *Almanza v. State*, 686 S.W.2d 157, 160-74 (Tex. Crim. App. 1985) (op. on reh'g).

3799493, at \*3 (Tex. App. –Houston [1st Dist.] Aug. 26, 2015, pet. ref'd) (mem. op., not designated for publication).

*Accomplice as a matter of law or fact*

An accomplice is characterized as an accomplice either as a matter of law or as a matter of fact. *Id.* A trial court has no duty to give an instruction about an accomplice as a matter of law “unless no doubt exists that the witness is an accomplice.” *Id.* For accomplices as a matter of fact, if:

the evidence presented is conflicting on the issue of whether a witness is an accomplice, then the trial judge should submit whether the witness is an accomplice witness as a matter of fact to the jury, defining an accomplice and instructing the jury that it must first find corroborating evidence before it considers the testimony of a witness it finds to be an accomplice.

*Id.*

A person can also be an accomplice as a party. Under a party-conspirator theory of accomplice liability, an individual is an accomplice when the evidence establishes that she and the defendant were co-conspirators to commit a felony other than the one with which the defendant is charged, and in furtherance of the unlawful purpose, the accused commits another felony “that should have been anticipated as a result of the carrying out of the conspiracy.” TEX. PENAL CODE § 7.02(b); *Zamora*, 411 S.W.3d at 511. *Quintanilla v. State*, No. 01-16-00282-CR, 2018 WL 1003525, at \*2 (Tex. App. Feb. 22, 2018) (mem. op., not designated for publication).

A unanimous Court of Criminal Appeals opined that a trial court must *sua sponte* give an accomplice witness instruction when the evidence raises the issue under the theory that the witness was a party as a co-conspirator. *Zamora v. State*, 411 S.W.3d at 506 (Tex. Crim. App. 2013). Further, this court has cited the Court of Criminal Appeals regarding when the lack of a parties instruction may be harmless: “[w]here the evidence clearly supports a defendant's guilt as a principal actor, any error in the trial court in charging [the jury] on the law of parties is harmless. *Black v. State*, 723 S.W.2d 674, 675 (Tex. Crim. App. 1986).” *Malbrough v. State*, 612 S.W.3d 537, 563 (Tex. App. — Houston [1<sup>st</sup> Dist.] 2020).

## **B. Analysis**

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 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. Proc. 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. Proc. art. 38.14. *See, also, Zamora v. State*, 411 S.W.3d 504, 510 (Tex. Crim. App. 2013).

*Accomplice witness instructions included in kidnapping, but not murder charge*

No defense-proposed instructions appear in the record. (4 R.R. at 300). In the aggravated kidnapping case, the court instructed the jury that Dante was an accomplice “if an offense was committed” and that they could not convict Simon unless they believed

that there is other evidence in the case, outside of the testimony of Dante Nava tending to connect the defendant with the offense committed, if you find that an offense was committed, and the corroboration is not sufficient if it merely shows the commission of the offense, but it must tend to connect the defendant with its commission...

(C.R. at 7-8).

No accomplice witness instruction was included regarding the murder charge and defense counsel did not request one or object to its absence. (4 R.R. at 300).

There was very little discussion on the record about the jury instructions. In the first instance, the following occurred:

“MR. GODINICH: Do we have a copy of the charge, Judge?

THE COURT: Yes, and we will chat about that in just a second.

MR. GODINICH: Okay.” (4 R.R. at 300).



According to the docket sheet, the jury charge and other legal matters were discussed off the record for about thirty-two minutes. (C.R. at 201; 2 C.R. at 622). On the record, neither Simon nor the state lodged objections to the court’s proposed jury charge. (5 R.R. at 89).

*Dante was an accomplice to the alleged murder as a matter of law*

The evidence was overwhelming that Dante was an accomplice and it would have been reasonable for the jury to make that determination. Before Simon’s trial, Dante had debriefed with the federal and state governments regarding his role in multiple offenses committed with Daniel Casco—including the ones for which Simon was on trial. He made an agreement with the state to testify against Simon in the aggravated kidnapping and murder cases which were tried together—the very same aggravated kidnapping about which the jury was clearly instructed he was an accomplice. (3 R.R. at 120; C.R. at 152-153). Despite the one instance during closing when the state claimed Simon shot and killed Cerda “for no reason” (5 R.R. at 109), overall, the state treated “this case” (5 R.R. at 110) as one transaction with Casco, Dante and Simon working in concert. “[W]e’ve known since the beginning of this that *this case* comes down to Dante Nava,” the state argued. (5 R.R. at 104).

Moreover, Dante agreed that there were no other witnesses and no way to check the truth of what he described regarding the killing of the complainants. (3 R.R. at 249). He agreed with defense counsel’s assertion that the identity of the

person who shot those shots could not be independently verified from his proffered information, and that he was armed with a pistol and in the same position as Simon on the day of the incident. (3 R.R. at 11). He admonished Cesar repeatedly to “remember this.” (5 R.R. at 61).

*Alternatively, there was a fact issue regarding Dante’s accomplice-witness status*

All parties agreed that Dante—a member of the criminal street gang “Tango Blast”—was an accomplice as a matter of law to the aggravated kidnapping that happened *at the same time* as Cerda’s killing. Who had apparent authority over the location? Casco. His sister owned the place. Who was telling people what to do? Dante and Casco. Who drove De La Rosa out into the night, shot her, got rid of the murder weapon, bought cleaning supplies at Walmart, and removed Cerda’s body from the salon? Dante and Casco. About whom was there evidence of extensive gang violence? Dante and Casco. In addition, the evidence clearly established that Dante and Casco were partners in crime regarding other violent offenses similar to this one including one involving retaliation where multiple people lost their lives or were injured.

Before, during and after the incident, the evidence suggests that in two ways Dante committed the offense of “Engaging in Organized Criminal Activity”<sup>6</sup> for which Cerda was likely a casualty.

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<sup>6</sup> Texas Penal Code §71.02.

The Texas Penal Code enumerates many ways a person can commit the offense of Engaging in Organized Criminal Activity:

(a) A person commits an offense if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, the person commits or conspires to commit one or more of the following:

(1) Murder, capital murder, arson, aggravated robbery, robbery, burglary, theft, aggravated kidnapping, kidnapping, aggravated assault....;

(5) unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception.

Texas Penal Code §71.02.

Dante was at the salon for the purpose of repairing the pill press. There was no testimony that anyone was a pharmacist or a pharmaceutical manufacturer—these were illegal drugs being made for profit. When Cerda got too comfortable in the salon, Dante considered that an invasion of privacy. The evidence clearly raised the issue that Dante could have conspired with Casco and Simon to commit a felony and reasonably should have anticipated Cerda's killing as a cost of doing business. Moreover, his was the only testimony that suggested Cerda may have had something to do with a previous home invasion that scared Arbizu so much that she moved out. (3 R.R. at 235-236).

*No evidence to corroborate Dante's testimony regarding Cerda's killing*

Disregarding the accomplice testimony of Dante, the remaining evidence did not connect Simon to the offense of murder. Without Dante's testimony, the State had absolutely no evidence that Simon did anything that resulted in Cerda's death. Further, if Cesar's testimony is true and Simon did show him that he possessed a common handgun before the complainants arrived, that does not lead to the reasonable inference that he killed Cerda or was criminally responsible for the actions of Dante or Casco.

*Egregious harm*

In examining the record for egregious harm, the court should consider the entire jury charge, the state of the evidence, the closing arguments of the parties, and any other relevant information in the record. *Olivas v. State*, 202 S.W.3d 137, 144 (Tex. Crim. App. 2006)

In the case of *Saunders v. State*, the Court of Criminal Appeals clarified the egregious harm standard in accomplice witness cases: "[A]ppellate 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." *Saunders*, 817 S.W.2d 688, 692. (See also, *Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002), *Casanova v. State*, 383 S.W.3d 530, 534 (Tex. Crim. App. 2012)).

### *Jury charge*

First, the jury charge provided no information at all about Section 38.14's requirement that an accomplice witness' testimony must be corroborated (2 CR at 562). Therefore, it did not mitigate the harm caused by the trial court's failure to properly instruct the jury.

### *State of the evidence and affirmative acts*

Second, no evidence corroborated Dante's testimony that Simon shot Cerda or in any way acted as a principal. At most, Dante's testimony demonstrated that *he* had both motive and opportunity, was familiar with the scene at the salon, with the fact that Cerda was shot and killed, and the way his body was left. He took affirmative acts promoting the commission of murder. The aggravated kidnapping to which he was a party co-occurred with Cerda's killing. He was also armed and engaging in organized criminal activity of a felonious nature when the incident occurred.

It was Dante who went to the salon for the purpose of repairing a broken pill press for his partner Casco. He was caught off guard when Cerda shockingly marched through the house like he owned the place, smiled at him, and asked him for a cigarette. He testified: "I mean, this is like a private thing going on back here, right?" (3 R.R. at 165). Dante did not even try to hide his irritation over the matter

years after the fact. Moreover, it was defense counsel's theory that Dante was the shooter. (5 R.R. at 103).

Detective Burrow believed the evidence was supported by Dante's account. (5 R.R. at 82-85). However, none of the evidence connected Simon to any act related to the offense. While there is no doubt that Simon had at least been physically present in Susie's Hair Studio at times, his presence did not connect him to any acts of homicide. Only Dante's testimony provides the necessary link between Simon and the alleged murder.

### *Closing arguments*

Third, the closing arguments focused at length on Dante's credibility and newfound candor, making it a key issue in the case. The arguments emphasize Dante as an accomplice in both alleged offenses. Defense counsel reviewed the kidnapping instructions and the importance of sufficient corroboration of accomplice witness testimony. (5 R.R. at 103). Regarding the murder charge, however, counsel stated: "You don't get that instruction in the murder charge because it is our position that [Dante] committed the murder of Robert Cerda." (5 R.R. at 103).

The prosecution argued:

- [W]e've known since the beginning of this that *this case* comes down to Dante Nava." (5 R.R. at 104) (emphasis added).
- "You know why he told the truth about what happened to Rachel and Robert? Because he had to live with it. He knew that Robert was executed in that salon and he knew that he took part in driving Rachel to her death in Fort Bend

because she was kidnapped the entire time and she was not free to leave.” (5 R.R. at 105).

- “And now we're supposed to believe that because he comes forward on this proffer, that HPD, these detectives are just going to file a case on somebody without doing their diligence?” (5 R.R. at 105);
- “Then he tells us that they--as soon as the shooting happens, Casco forces Rachel in the door.” (5 R.R. at 107).

Further, the prosecution again referred to the matter as “*this case*.” (5 R.R. at 110), theorized that Simon shot and killed Cerda “for no reason” (5 R.R. at 109) and that Simon “is solely responsible for [Cerda’s] death.” (5 R.R. at 112).

Neither the state’s theory that Simon shot Cerda “for no reason” (5 R.R. at 109) nor defense counsel’s theory that Dante was the shooter obviated the need for the court to provide an accomplice-witness instruction. The nuances of this case made it even more critical for the trial court to properly instruct jurors about the requirement that Dante’s testimony be corroborated, and more egregiously harmful that it failed to do so.

*Other relevant information—Jury notes reveal real struggle with corroboration*

On day two of deliberation, jurors sent their first note.<sup>7</sup> (C.R. at 202; 2 C.R. at 622). It reads:

We understand from the voir dire process that an accomplice’s testimony can be considered evidence if appropriately corroborated. If that is correct, can we please get a clarification about what is legally required to establish corroboration?

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<sup>7</sup> All jury notes explicitly refer to both cause numbers.

(C.R. at 145; 2 C.R. at 559).

The court instructed them to “refer to the jury charge.” (C.R. at 145; 2 C.R. at 559).

Next, they asked for a witness list, which was provided. (C.R. at 158-159; 2 C.R. at 573-574; 6 R.R. at 5). They asked for Dante and Cesar’s testimony. (C.R. at 160; 2 C.R. at 571). The court brought them back into the courtroom to explain why they could not get a transcript. (6 R.R. at 4). They asked, “What is the next step if we cannot come to a consensus on the murder charges?” and the court responded, “Please continue deliberating.” (C.R. at 161; 2 C.R. at 575). Next, they asked for a read-back of Detective Burrow’s testimony:

“The State asked Detective Burrow about proffer for Casco and Dante. *Some of us believe the detective explicitly stated that Dante’s story had been corroborated but others don’t agree.*” (C.R. at 162; 2 C.R. at 572). (emphasis added).

The court reporter read from a portion of Burrow’s testimony where he noted his beliefs about corroboration. (6 R.R. at 6-9).

The jury notes demonstrate the harm this omission caused. Indeed, the jury was hung for a while on the murder charge, unable to agree. (C.R. at 161; 2 C.R. at 575). One by one, their notes show they were working hard to apply the law they had to the facts; unfortunately, it was a flawed process from the outset. Had they received the required accomplice-witness instruction regarding Dante’s testimony, the likelihood of acquittal increases dramatically as there is so little evidence “tending to connect” Simon to the alleged murder.



### *Egregious Harm?*

The question restated is: did the evidence raise a fact issue regarding whether Dante engaged in an affirmative act to “encourage, direct, aid or attempt to aid” the commission of murder. Simon asserts that it did. Next: did the omission of the accomplice-witness instruction affect the “very basis of the case,” a “valuable right,” or “vitally affect a defensive theory?” *Druery v. State*, 225 S.W.3d 491, 504 (Tex. Crim. App. 2007). Simon asserts that it did.

In *Zamora v. State*,<sup>8</sup> the Court of Criminal Appeals remanded after holding that a trial court must “*sua sponte* give an accomplice-witness instruction when the evidence raises the issue under the theory that the witness was a party as a co-conspirator.” *Id.* at 506. The facts of *Zamora* are similar to the instant case. It involved brothers who operated an international illegal drug business. Relationships between numerous co-conspirators soured and conflicts emerged. *Id.* Money was owed, storehouses were robbed, and a decision was made to kill the complainant in retaliation. *Id.* at 507. Things became so toxic among the group that the court opined it was “reminiscent of the Hatfields and McCoys.” *Id.* Over a series of events, three people perished. *Id.* Upon remand, the 14<sup>th</sup> Court of Appeals reversed the conviction and remanded for a new trial based on the *Almanza* harm analysis holding:

“the trial court's failure to instruct the jury that there was a question of fact about Rosales's status as an accomplice under a co-conspirator

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<sup>8</sup> 411 S.W. 3d 504 (Tex. Crim. App. 2013).

theory of liability egregiously harmed appellant in that it made the case clearly and significantly more persuasive and deprived him of the statutory right not to be convicted of an offense based on the uncorroborated testimony of accomplice witnesses.

*Zamora v. State*, 432 S.W.3d 919, 933 (Tex. App. –Houston [14<sup>th</sup> Dist.] 2014).

On the other hand, in *Griffin v. State*<sup>9</sup>, this court held that “the trial court’s decision to not include an accomplice-witness instruction in the jury charge was not in error.” *Id.* at 408. The court applied an abuse of discretion standard of review to the denial of a requested accomplice-witness jury instruction. *Griffin* at 412. (Unlike the instant case, Griffin requested the instruction.) It was shown that the witness in *Griffin* knew of a plan to kill the complainant, was present in the nightclub when the killing occurred, was a member of the gang that perpetrated the killing, ducked upon the shooter’s signal, partied with other affiliated gang members in celebration of the killing and had been previously convicted of engaging in organized criminal activity. (*Id.* at 413).

Ultimately, however, even though the complained-of witness appeared to be a Johnny-on-the-spot who engaged in a fair amount of schadenfreude after the complainant’s death, he was still not deemed to be an accomplice. *Id.* 413. The affirmative acts alleged by Griffin were not found to rise to the requisite level of blameworthiness. Simon submits the facts in *Griffin* were significant enough to

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<sup>9</sup> 571 S.W. 3d 404 (Tex. App. –Houston [1<sup>st</sup> Dist.] 2019, pet. ref’d).

warrant an accomplice witness instruction; regardless, *Griffin* is distinguishable from the case at bar.

In *Griffin*, the incident occurred in a public place full of people and there was no question that the witness was not the actual shooter. Here, everything happened in private behind closed doors. Where in *Griffin* the witness was not found to have taken an affirmative act in support of the killing, here, Dante was not only involved in the co-occurring aggravated kidnapping, but he acknowledged that—based on the lack of corroborating evidence tending to connect Simon to Cerda’s murder—he could have been the one who killed Cerda. Dante was the one concerned with Cerda invading his privacy whilst repairing a broken pill machine. Dante was the one who implied Cerda had something to do with a prior home invasion at the salon. And where the witness in *Griffin* merely celebrated the complainant’s death along with his gang associates, the facts here show Dante did much more than celebrate. Lastly, in *Griffin*, the witness had a prior conviction of engaging in organized criminal activity, but the evidence here shows Dante was engaging in organized crime before, during and after this incident along with Casco.

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. (absence of a jury instruction on the need for corroboration of an accomplice’s testimony denied the defendant a fair

trial). Appellant's conviction should be reversed due to the egregious harm that resulted from the trial court's error in failing to instruct the jury regarding Dante's accomplice status. The corroborating (non-accomplice) evidence is 'so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive.'" *Herron v. State*, 86 S.W.3d 621, 632 (Tex.Crim.App.2002) (citing *Saunders v. State*, 817 S.W.2d 688, 692 (Tex.Crim.App.1991)).

## **Issue Two**

Whether the trial court erred in failing to include accomplice witness instructions in the aggravated kidnapping charge regarding the testimony of Cesar Nava?

### **A. Applicable law and standard of review**

Undersigned counsel incorporates by reference legal authorities discussed *supra* regarding accomplice-witness jury instructions and harm. Additionally, a person is criminally responsible for the conduct of another 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." Tex. Penal. Code 7.02.

### **B. Analysis**

Dante's proffer added Cesar's name to the list of suspects. (4 R.R. at 221-222). Moreover, Cesar's testimony revealed:

- 1) a strong and obvious bias in favor of Dante (an established gang member);

- 2) he knew Dante always carried a gun (5 R.R. at 59);
- 3) He knew Casco (with whom Dante had committed multiple violent crimes with firearms); and
- 4) Numerous affirmative acts suggesting he was aligned with Dante and, by extension, Casco (picked up Dante to go fix a broken illicit pill press for Casco, monitored the surveillance cameras throughout the night with the rest of the men, maybe carried a firearm (Dante testified that Cesar had a firearm (3 R.R. at 201-202); Cesar said he didn't (5 R.R. at 31, 41)), admitted he offered and tried to delete surveillance footage from the security monitors).

It was Cesar's testimony that he told De La Rosa he would take her home, but he was not allowed to do so. (5 R.R. at 30). That might be supported by the evidence if he had handled himself differently after these alleged events. If the testimony is to be believed, De La Rosa was alive when she, Casco and Dante left the salon. Cesar had a window of opportunity to save De La Rosa's life. Instead, Cesar offered and "tried to" delete the salon's security footage. Oddly, jurors saw no security footage from inside the salon during the incident despite the presence of cameras.

Jury instructions are like oxygen—be deprived of enough and you suffocate. Correct ones are required for due process because they define the law of the case. An instruction mistake that affects the "very basis of the case," a "valuable right," or "vitally affect a defensive theory" tarnishes the integrity of the verdict. *Druery v. State*, 225 S.W.3d 491, 504 (Tex. Crim. App. 2007). Failing to submit the correct

law to the jury in this case lowered the state's burden of proof by chipping away at the necessary parts in plain sight.

These case facts provide insufficient corroboration of what should have been defined as accomplice-witness testimony. Citing the concept as a “fundamental principle” *Chapman v. State*<sup>10</sup> held that, “the testimony of one accomplice witness cannot corroborate another accomplice witness' testimony.” Based on this premise, the court should have also then included the following important caveat:

“You are further instructed that one or more accomplices cannot corroborate each other. Such corroborative evidence, if any, must be from some source other than said accomplices, and, or either of them, as herein charged.”

Elizabeth Berry & George Gallagher, § 3:350 MULTIPLE ACCOMPLICE WITNESSES, Texas Crim. Jury Charges § 3:350 (2023). Failing to give appropriate accomplice witness instructions where there are multiple accomplices wholly undermines the verdict. *Fields v. State*, 426 S.W.2d 863, 865 (Tex. Crim. App. 1968) (Held: Failure to instruct the jury regarding multiple accomplices erroneous even though one witness is an accomplice as a matter of law and the other is under a jury determination).

A trial court's failure to inform the jury of a corroboration requirement makes it possible for rational jurors to convict absent corroboration. *See Saunders*, 817

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<sup>10</sup> 470 S.W. 2d 656, 660 (Tex. Crim. App. 1971).

S.W.2d at 692 (holding that the absence of a jury instruction on the need for corroboration of an accomplice's testimony denied the defendant a fair trial). Appellant's conviction should be reversed due to the egregious harm that resulted from the trial court's error in failing to instruct the jury.

### **Issue Three**

Whether the trial court erred in failing to include accomplice witness instructions in the murder charge regarding the testimony of Cesar Nava?

#### **A. Applicable law and standard of review**

Undersigned counsel incorporates by reference legal authorities discussed *supra* regarding accomplice-witness jury instructions and harm. Additionally, a person is criminally responsible for the conduct of another 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." Tex. Penal. Code 7.02.

#### **B. Analysis**

Dante's proffer added Cesar's name to the list of suspects. (4 R.R. at 221-222). Cesar's testimony established:

- 1) a strong and obvious bias in favor of Dante (an established gang member);
- 2) he knew Dante always carried a gun (5 R.R. at 59);
- 3) He knew Casco (with whom Dante had committed multiple violent crimes with firearms); and

- 4) Numerous affirmative acts suggesting he was aligned with Dante and, by extension, Casco (picked up Dante to go fix a broken illicit pill press for Casco, monitored the surveillance cameras throughout the night with the rest of the men, maybe carried a firearm (Dante testified that Cesar had a firearm (3 R.R. at 201-202); Cesar said he didn't (5 R.R. at 31, 41), admitted he offered and tried to delete surveillance footage from the security monitors).

For obvious reasons, the state spun Cesar's testimony in such a way so as to remove any suggestion of his guilt because it needed Cesar to specifically **not** be involved. Acknowledging Cesar's heightened level of involvement in these events would mean his testimony could not be used to corroborate Dante's. But Cesar testified that the men watched the surveillance cameras "throughout the day" (5 R.R. at 44) and he joined in. "I don't know what we were looking at, but we were looking," he added. (5 R.R. at 44). He claimed he was just trying to build a rapport with Simon, but these are unverifiable self-serving statements. Not only does this establish that he was helping the men monitor the store surveillance for potential intruders, but he later offered to help delete the footage. (5 R.R. at 45). Further, he claimed that as he was leaving, Simon gave him a sock with the broken phone inside and asked him to "get rid of it." (5 R.R. at 47-48). Even though he knew it was wrong, and even though he had witnessed terrible things he claimed not to be a part of, he did it anyway. (5 R.R. at 48).

Considering Cesar's involvement in the totality of the events, the court erred in failing to instruct the jury in the murder charge with accomplice-witness



language—whether in law or fact. Appellant’s conviction should be reversed due to the egregious harm that resulted from the trial court’s error in failing to instruct the jury.

#### **Issue Four**

Whether the evidence was insufficient to support Simon’s aggravated kidnapping conviction because the accomplice witness testimony of Dante Nava was not sufficiently corroborated?

##### **A. Applicable Law and Standard of Review**

“The Texas Code of Criminal Procedure prohibits a conviction based on an accomplice witness’s testimony unless other non-accomplice evidence that tends to connect the accused to the offense corroborates it.” *Hernandez v. State*, 454 S.W.3d 643, 647 (Tex. App. — Houston [1st Dist.] 2014, pet. ref’d), citing TEX. CODE OF CRIM. PROC. ART. 38.14. The evidence is insufficient if it proves merely the commission of the offense. *Cathey v. State*, 992 S.W.2d 460, 462 (Tex. Crim. App. 1999), citing *Colella v. State*, 915 S.W.2d 834, 838-839 (Tex. Crim. App. 1995).

“The purpose of the rule is to ensure that the jury does not consider accomplice witness evidence *unless* the jury finds both that the accomplice witness is telling the truth and that other evidence corroborates the accomplice witness’ testimony.” *Nolley v. State*, 5 S.W.3d 850, 852 (Tex. App. — Houston [14th Dist.] 1999, no pet.) (op. on reh’g), citing *Tran v. State*, 870 S.W.2d 654, 658 (Tex. App. — Houston [1st Dist.] 1994, pet. ref’d).

“In reviewing the sufficiency of the corroborating evidence, we exclude the accomplice testimony from our consideration and determine whether there is any independent evidence that tends to connect the defendant with the commission of the offense.” *Hernandez*, 454 S.W.3d at 647. The corroborating evidence is viewed “in the light most favorable to the jury’s verdict.” *Id.* “In evaluating the sufficiency of the corroboration, we consider each case on its own facts and circumstances, and look to all facts as furnishing the corroboration.” *Nolley*, 5 S.W.3d at 853, citing *Munoz v. State*, 853 S.W.2d 558, 559 (Tex. Crim. App. 1993). “The corroborative evidence may be circumstantial or direct.” *Id.* “The evidence must simply link the accused in some way to the commission of the offense and show that rational jurors could conclude that the evidence sufficiently tended to connect the accused to the offense.” *Hernandez*, 454 S.W.3d at 648, citing *Simmons v. State*, 282 S.W.3d 504, 508 (Tex. Crim. App. 2009).

“If there are two views of the evidence, one tending to connect the accused to the offense and the other not, we defer to the jury’s view.” *Hernandez*, 454 S.W.3d at 647, citing *Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011). “[A]n accomplice’s testimony cannot be corroborated by prior statements made by the accomplice witness to a third person.” *Smith*, 332 S.W.3d at 439. In determining the strength of a particular item of non-accomplice evidence, a reviewing court must examine two things. First, the court must examine the strength of the reliability or

believability of the evidence. Second, the court must consider the strength of the tendency of the evidence to connect the defendant to the crime. *Jones v. State*, 195 S.W.3d 279, 291 (Tex. App.—Fort Worth 2006), *aff'd* 235 S.W.3d 783 (Tex. Crim. App. 2007). “If, however, the corroborating evidence does no more than point the finger of suspicion towards the accused, it is insufficient to satisfy the requirements of article 38.14, Texas Code of Criminal Procedure.” *Nolley*, 5 S.W.3d at 853, citing *Paulus v. State*, 633 S.W.2d 827, 843 (Tex. Crim. App. 1981). “Even though an accomplice witness may state any number of facts that are corroborated by other evidence, if the corroborated facts do not *tend* to connect the accused with the crime, article 38.14 is not satisfied.” *Id.* Finally, “[a]lthough non-accomplice testimony that the accused was in the company of the accomplice at or near the time or place of the offense is proper corroborating evidence, such evidence alone is not conclusive corroboration.” *Id.* at 854, citing *Hernandez v. State*, 939 S.W.2d 173, 178 (Tex. Crim. App. 1997), *Cox v. State*, 830 S.W.2d 609, 612 (Tex. Crim. App. 1992); *Jackson v. State*, 745 S.W.2d 4, 13 (Tex. Crim. App. 1988). “There must be *some* evidence which, when coupled with evidence which places the accused in the company of the accomplice at the time of the offense, tends to connect the accused to the commission of the crime.” *Id.*

## **B. Analysis**

The State's evidence against Simon came almost exclusively from the testimony of Dante Nava, a person who was unquestionably an accomplice as a matter of law. *See* TEX. PENAL CODE §§ 7.01 and 7.02. *See also Paredes v. State*, 129 S.W.3d 530, 536 (Tex. Crim. App. 2004) (noting that an accomplice as a matter of law is a person susceptible to prosecution for the offense with which the accused is charged or a lesser included offense). The jury was charged regarding Dante being an accomplice witness in the aggravated kidnapping case. (C.R. at 152-153).

Aggravated kidnapping, as charged in the instant case, would have occurred “if the person intentionally or knowingly abducts another person and uses or exhibits a deadly weapon during the commission of the offense.” TEXAS PENAL CODE 22.04 (b). Further, “ ‘Abduct’ means to restrain a person with intent to prevent his liberation by: A) secreting or holding him in a place where he is not likely to be found; or (B) using or threatening to use deadly force.” TEXAS PENAL CODE 20.01 (2).

In order to determine whether the evidence is sufficient to support Simon's conviction, this Court must eliminate all accomplice evidence from the record and determine whether the other inculpatory facts and circumstances in evidence tend to connect Simon to the offense. *Hernandez*, 454 S.W.3d at 647. When Dante's testimony is eliminated from the sufficiency evaluation, this Court is left with only

the following evidence regarding Simon's involvement in the alleged aggravated kidnapping:

--Cesar's testimony that Simon showed him a gun when he and Dante arrived at the salon (5 R.R. at 21);

--Cesar's testimony that when he returned to the salon from the store, he saw De La Rosa standing in her underwear crying (5 R.R. at 29);

--Cesar's testimony that he did not believe De La Rosa was free to leave (5 R.R. at 32);

--Cesar's testimony that he and Simon tried unsuccessfully to delete the footage from the salon's cameras (while Dante and Casco were out taking De La Rosa to meet her demise (5 R.R. at 45);

--Shop owner Arbizu's testimony that she knew Simon as Casco's friend since middle or high school. (4 R.R. at 289-90);

--Detective Caten's testimony that Arbizu told police that her brother Casco and Simon had been staying at the shop (4 R.R. at 227);

--jail call recording during which Simon mentions "the shop" and suggests he may have been around it to protect women because it was in a dangerous area. (State Ex. 239).

The remaining non-accomplice evidence serves as evidence that would relate to Simon's mere presence, motive or opportunity as a party. A party to whom? Casco and Dante.

Cesar's statement that Simon showed him a gun at the salon, if believed, would merely show that Simon potentially possessed a firearm before the complainants arrived.

“[M]otive and opportunity evidence is insufficient on its own to corroborate accomplice-witness testimony, but both may be considered in connection with other evidence that tends to connect the accused to the crime.” *Smith*, 332 S.W.3d at 442. And in this case, that is all the non-accomplice witness evidence demonstrates: mere presence or a possible motive or opportunity.

Cesar’s testimony, Arbizu’s testimony and the DNA results show that Simon was potentially in the company of an alleged accomplice at or near the time or place of the offense, but this evidence alone is not conclusive corroboration. *Nolley*, 5 S.W.3d at 853. Presence, without more, is insufficient to corroborate an accomplice’s testimony and certainly insufficient to convict Simon. See *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008) and *Dowthitt v. State*, 931 S.W.2d 244, 249 (Tex. Crim. App. 1996). Rather, there must be other suspicious circumstances to connect an accused to the commission of an offense. *Id.* Cesar did not offer any testimony as to what Simon allegedly did to assist or aid Dante and Casco during the alleged commission of the offense of aggravated kidnapping. In fact, he testified that it was his cousin Dante and Casco who were the driving force behind the evening’s events. Moreover, Arbizu was clear in her testimony that Simon had been staying at the shop. (4 R.R. at 290). There would be nothing at all suspicious, then, about the trace presence of Simon’s DNA on items recovered from the salon.

*Was there other evidence tending to connect Simon with the crime?*

- Did Cesar allege that Simon took De La Rosa anywhere or that he directed Dante or Casco to do so? No.
- Were any of the criminal instrumentalities found in Simon's possession? No.
- Was there any evidence of a prior relationship between Simon and De La Rosa? No.
- Were there any phone records or business records establishing plans for any business dealings between Simon and De La Rosa or Simon and Casco or Simon and Dante? No. (5 R.R. at 75).
- Was there any evidence of Simon confessing or bragging or describing a role in the offense to anyone? No.
- Was there any evidence that Simon was a gang member? No.
- Was the murder weapon in either case found by police and connected to Simon through fingerprints or DNA? No.

#### *The DNA*

The fact that Simon had at least spent time at the salon was not in dispute. (4 R.R. at 227, 290; State Ex. 239). This is a reasonable explanation for the small/trace amount of DNA alleged to have been found in connection the ropes used to bind Cerda—items that would have most certainly been dragged across the floor like a rough and porous sponge. If anything, the state proved Simon had temporarily stayed at the salon and his DNA could not be excluded from a narrow set of items after the offense occurred. (State Ex. 228, 235). Since most of the testimony regarding Simon's commission of aggravated kidnapping came from an accomplice

-witness and a biased witness who could have reasonably been considered an accomplice, the state did not even prove Simon's "mere presence" at the scene during the time of the incident. For the sake of argument, even if one were to concede mere presence, there is still nothing outside the accomplice-witness testimony tending to connect Simon to the commission of the alleged offense.

After eliminating the accomplice testimony from the record, it is apparent that the other facts and circumstances in evidence do not tend to connect Simon to the offense. The corroborating evidence in this case does no more than point the finger of suspicion towards Simon and is insufficient to satisfy the requirements of article 38.14, Texas Code of Criminal Procedure. Because the State failed to corroborate the accomplice's testimony, Simon is entitled to a reversal and to an order of acquittal.

### **Issue Five**

Was the evidence insufficient to convict Simon of murder?

#### **A. Applicable law and standard of review**

Under the Texas Murder statute, a person may commit murder if he "(1) intentionally or knowingly causes the death of an individual; or (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual." Tex. Penal Code Ann. § 19.02. And "[i]t is well-established that a conviction may be based on the testimony of a single eyewitness."



*Davis v. State*, 177 S.W.3d 355, 359 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (affirming conviction for aggravated robbery where central issue involved witness’s credibility).

In a sufficiency challenge, the reviewing court is to consider the “cumulative force of all the evidence” *Merritt v. State*, 368 S.W.3d 516, 526 (Tex. Crim. App. 2012); *Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017) and measure the sufficiency of the evidence by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A hypothetically correct jury charge reflects the governing law, the charging instrument, the State’s burden of proof and theories of liability, and an adequate description of the offense for the particular case. *Id.*

To obtain a valid conviction, the finder of fact must decide that the defendant is guilty "beyond a reasonable doubt," but, ultimately, the evidence on which the case is decided must be sufficient to support the conviction. *See Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Jackson v. Virginia*, 443 U.S. 307 (1979). There is no more important burden in the justice system than the burden of proof required to convict a criminal defendant, as constitutional protections require that such a defendant is entitled to the most stringent standard available, regardless of station, standing, or suspicion: "The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or

innocence. The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." *Jackson*, 443 U.S. at 323 (citing *Mullaney v. Wilbur*, 421 U.S. 684, 697-698 (1975) (requirement of proof beyond a reasonable doubt is not "limit[ed] to those facts which, that if not proved, would wholly exonerate" the accused)).

The standard in Texas for assessing sufficiency of the evidence is determined by *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010), which explicitly adopted the standard laid out by the Supreme Court's decision in *Jackson v. Virginia*, 443 U.S. 307 (1979) for both legal and factual insufficiency claims. *Brooks*, 323 S.W.3d at 895. In *Brooks*' words, the *Jackson* legal-sufficiency standard adopted is: "[c]onsidering all of the evidence in the light most favorable to the verdict, was a jury rationally justified in finding guilt beyond a reasonable doubt." *Brooks*, 323 S.W.3d at 899 (citing *Jackson*, 443 U.S. at 319).

Under *Jackson*, there are two circumstances in which evidence is legally insufficient: "(1) the record contains no evidence, or merely a 'modicum' of evidence, probative of an element of the offense, or (2) the evidence conclusively establishes a reasonable doubt. In viewing the record, direct and circumstantial evidence are treated equally." *Fisher v. State*, 01-11-00516-CR, 2013 WL 4680226 at \*2 (Tex. App.-Houston [1st Dist.] Aug. 29, 2013, pet. ref'd.) (mem. op., not designated for publication) (citing *Jackson*, 443 U.S. at 314 & n. 11; *Williams v. State*, 235 S.W.3d

742, 750 (Tex. Crim. App. 2007); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)).

## **B. Analysis**

Simon was charged with murder by an indictment alleging, in pertinent part, the following:

[T]he defendant...on or about December 12, 2017, did then and there unlawfully, intentionally and knowingly cause the death of Robert Cerda...by shooting the complainant with a deadly weapon, namely, a firearm.

It is further presented that ...the Defendant...on or about December 12, 2017, did then and there unlawfully intend to cause serious bodily injury to Robert Cerda...and did cause the death of the Complainant by intentionally and knowingly committing an act clearly dangerous to human life, namely shooting the complainant with a deadly weapon, namely, a firearm.

(2 C.R. at 31).

As discussed *supra*, aside from Dante's testimony, there was no evidence linking Simon to the offense itself, nor any evidence to indicate that Simon intentionally and knowingly caused the death of Cerda by shooting him with a firearm that night. The only evidence which could tend to support the conclusion that Simon was in any way involved with the death of Cerda was Dante's testimony.

Additionally, contradicting Dante's version of events as presented by the state, according to Cesar, "Simon never really said too much." (5 R.R. at 30). From what

Cesar allegedly witnessed, it was Dante and Casco taking action and telling people what to do and not to do throughout the incident.

Aside from Dante and Cesar's testimony, there was no evidence presented that Simon was at the scene during the incident. Further, Arbizu's statements about Simon having stayed at Susie's Hair Studio and Simon's admission to police that he had gotten haircuts there establish without controversy a history of Simon's physical presence at the salon. The state's own evidence, then, neutralizes any suspicion that may come from the alleged inability to exclude Simon's DNA from items that would have touched surfaces inside the salon.

Any claims which involved Simon in any aspect of the crime was pure speculation on the part of the testifying witnesses (that were not Dante), and any inference drawn by the jury from those statements was no more than speculation, which is insufficient to support a conviction. *See Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007) ("Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt. . . . [Juries] are not permitted to draw conclusions based on speculation."); *Gross v. State*, 352 S.W.3d 238, 244 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2011) ("[E]vidence that a person simply handed the deadly weapon to the attacker does not in and of itself show intent to

commit murder; intent can only be inferred from handing the attacker the deadly weapon if other circumstances warrant.") (internal citations omitted).

Under the *Jackson* standard adopted by Texas courts in *Brooks*, evidence is insufficient if "the record contains no evidence, or merely a 'modicum' of evidence," or if "the evidence conclusively establishes a reasonable doubt" that a defendant was involved in the offense. *Fisher*, 01-11-00516-CR, 2013 WL 4680226 at \*2. In Simon's case, there is less than a modicum of evidence that he took part in any aspect of Cerda's murder. The only evidence tending to connect Simon to the murder comes from Dante's testimony. But even Dante's testimony was not clear about when Simon returned from the corner store after leaving to go buy beer. (3 R.R. at 154-155). If Simon was present at the salon that night, he could very well have been absent when Cerda's killing occurred. Cesar cannot corroborate Simon's presence during Cerda's killing because, if Cesar is to be believed, he was not present when Cerda was shot. He would, then, not have anything to offer about whether Simon intentionally and knowingly caused the death of Robert Cerda or committed an act clearly dangerous to human life by shooting Cerda with a firearm.

Under the second circumstance outlined by *Jackson*, the evidence conclusively establishes reasonable doubt for the same reasons. Witness testimony paints a picture that makes Simon seem like either an afterthought or an outright fall guy. If Dante, a well-seasoned participant in organized crime, had no qualms about

helping Casco kill people in his line of work, he would surely have no hesitation in putting Cerda's murder on someone else to make sure Casco (the shot-caller) and Cesar (a close family member) would escape as much responsibility as possible. The prosecution argued:

What reason would he have to blame Herbert Simon for this offense? They barely knew each other. Herbert is Josue Casco's friend. The police don't even know about him until Dante gives his story. He has no motive to blame Herbert. You know why he told the truth about what happened to Rachel and Robert? Because he had to live with it.

(5 R.R. at 105).

This argument explains exactly what motive Dante *would* have to lie and why it would be easy to do so: Simon was an outlier with no connection to Dante and he was not on police radar. The dearth of physical evidence, or, indeed, any testimony which links him to the crime except Dante's, creates reasonable doubt more than sufficient for a finding of insufficient evidence.

In the particular circumstances of a "law of parties" case as this one would be had the jury been properly instructed regarding Dante's testimony, the State must additionally prove "conduct constituting an offense, plus an act committed by appellant with intent to promote or assist such conduct." *Gross*, 352 S.W.3d at 240 (citing *Beier v. State*, 687 S.W.2d 2, 3 (Tex. Crim. App. 1985)). Likewise, there is no support in the record to prove such conduct. Aside from Dante's testimony, there is no evidence Simon committed murder, and no evidence of his intent to promote or

assist in committing a murder. Even assuming that Cesar did see Simon "all over the place" when he returned to a chaotic salon, there is no evidence that Simon exercised any control over the place or the men in the situation. And, assuming Simon did give Cesar a phone to "get rid of" that night, that is not proof of an act done with the intent to promote or assist in Cerda's killing. (5 R.R. at 47-48). To the contrary, all the evidence supports the conclusion that Simon, if present during Cerda's killing, was merely present. Being present—even if armed—does not indicate an intent to assist the other men in murder, and the fact that there is nothing to support the state's theory besides Dante's testimony eliminates any possibility of evidence that he did in fact commit any act to assist in the offense. Simon may have been present during Cerda's killing, he may have asked Cesar to "get rid of" a firearm and may have helped clean up the mess, but using his conduct after he became aware of the crime to attempt to convict him of being complicit in the events before the crime cannot support his conviction. *Gross*, 352 S.W.3d at 243-44 (citing *Morrison*, 608 S.W.2d 233, 235 (Tex. Crim. App. 1980) ("Acts done after the [offense] was completed [do] not make [the accused] a party to the offense.")).

The record in this case does not contain evidence on which a reasonable jury could find that appellant either shot Robert Cerda or acting with intent to promote or assist the commission of the offense, he solicited, encouraged, directed, aided, or attempted to aid the other persons to commit the offense. Tex. Penal Code 7.02.

Simon's conviction stands on insufficient evidence and must be reversed and remanded and an acquittal ordered.

### **PRAYER**

Mr. Simon respectfully requests this Court to reverse his convictions and enter judgments of acquittal due to insufficient evidence. Alternatively, he requests the Court to reverse and remand the convictions for a new trial due to egregiously harmful jury charge errors. Appellant also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

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A true and correct copy of the foregoing brief was e-filed with the First Court of Appeals and was served electronically upon the Appellate Division of the Harris County District Attorney's Office on December 27, 2024.

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