IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS
AT HOUSTON

SAMUEL ALAN WILLINGHAM, Appellant	§ §	
v.	§	CASE NO. 14-24-00418-CR
THE STATE OF TEXAS, Appellee.	§ §	

APPELLANT'S BRIEF
ON APPEAL FROM TRIAL CASE NUMBER
22-CR-4483, 405TH DISTRICT COURT
GALVESTON COUNTY, TEXAS

Respectfully submitted by:

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IDENTITY OF PARTIES AND COUNSEL

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STATEMENT OF THE CASE

1. Samuel Alan Willingham was charged with the offense of Possession of a Controlled Substance with Intent to Deliver PG 1/1-B >=4G<200G and tried for the offense in the Impact Court of Galveston County, Texas as assigned from the 405th District Court with the Honorable James H. Shoemake Presiding. Motions were ruled on May 6, 2024. *CR, pgs.59-63.* Jury selection began that day and a jury was seated.

2. Defendant, herein "Appellant," was arraigned on May 7, 2024 and the trial began. *CR, p.64.* He pled not guilty of the offense charged. *Id.*

3. Testimony was heard on May 7, 2024. *RRV1-3.*

4. The jury was excused late afternoon and ordered to return on May 8, 2024 to hear the charge of the court and to begin deliberations. *RRV3.*

9. On May 8, 2024 the jury re-assembled and the charge was read by the Court. *CR, pgs.74-82.*

10. A verdict was reached finding Defendant guilty of the lesser charge of Possession of a Controlled Substance, the lesser included from the originally charged Possession of a Controlled Substance with Intent to Deliver. *CR, p.83.*

11. He was punished by the Court on the same day as the conviction and sentenced to six years in the Texas Department of Corrections. *CR, pgs.86-89.*

12. Trial counsel filed a Notice of Appeal on May 8, 2024. *CR, p.93.*

13. A Motion for New Trial was filed on May 9, 2024. *CR, pgs.99-100.*

14. That motion was denied on May 16, 2024. *CR, p.106.*

15. Appeal was taken, the Notice of Assignment was generated on June 7, 2024 *(CR, p.108)* and Appellant's Brief was filed with the 14th Court of Appeals, Houston, Texas on December 9, 2024.

ISSUE

1. Whether appellant was harmed by the erroneous inclusion of the joint-possession instruction (**"*[t]wo or more people can possess the same controlled substance at the same time*"**) under the heading Relevant Statutes in the jury charge.

STATEMENT OF FACTS

On December 29, 2022, Appellant was driving on Broadway Avenue in Galveston, Texas at approximately 3:00 a.m. when he drew the attention of Officer Zachary Williams, stationed near the intersection of Avenue J and Broadway. The following relevant excerpts of the exchange between the State and Officer Williams is presented herein:

Q. "Did you notice any vehicles as you were patrolling?

A. So 3:00 a.m. in December in Galveston, usually there's not too much traffic. So, you do, especially, you know, for me, I was sitting on Broadway a lot of the night, Avenue J; and there's not too many cars. So, I did notice one vehicle that was driving down Broadway past me."

Q. So, what did you observe about this vehicle?

A. So, the vehicle was heading eastbound, so towards Ferry Road down Broadway. And when the car passed me, I observed the car to turn into a neighborhood off of Broadway. So, they turned off of Broadway into a neighborhood, and I continued to follow the vehicle. I observed the vehicle while I was driving make a block,

go around, and then come down a different street back to Broadway." *RRV3, p.13, lines 4-18.*

The officer trailed the vehicle Appellant was driving and while doing so determined, in his mind, that traffic violations had occurred.

A. "Okay. The license plate of the vehicle was obstructed. The bike right there [watching in car camera] is covering the license plate completely, which is against the Texas Transportation Code." *RRV3, p.15, lines 21-24.*

The second violation that the officer purported to observe was Appellant's failure to stop at an intersection behind the white stripe, marking a pedestrian crossing point.

A. "Yes. So, the -- there's a -- you have a designated stopping point on stop signs. That's typically the stripes across the roadway. If you don't have stripes across the roadway, it would be up to the curb, would be your designated stopping point. The vehicle also failed to stop at the designated stopping point." *RRV3, p.16, lines 8-14.*

The officer hit his emergency lights signaling for Appellant to pull over, to which he complied.

A. "I had the driver step out of the vehicle. I patted him down to make sure he didn't have any weapons on him. I asked him to step back to my vehicle so I could continue my traffic stop, to continue to check the license status, go about whatever the next step would be, either a citation or a warning while we are waiting for the license check." *RRV3, p.21, lines 9-15.*

At that point, the officer placed Appellant in the police cruiser while he ran his name and license.

A search then ensued, the origin or basis of how it came to be is not part of the testimony. It appears the search first located a baggie with residue. The officer's comment that follows is arguably what he believes is confirmation of what he suspected all along when he formed the intent to follow the Appellant's vehicle and eventually pull him over.

Q. "So, at that point you said, "There you go." Can you explain to me what led you to make that statement?

A. I found a small individual baggie with an insignia on it I know through my training and experience commonly used for narcotics packaging, and it was a narcotics residue in it. It looked like a white powder or granular substance." *RRV3, p.26, lines 1-7.*

He then showed the baggie to his support officer Gaus and as he leaned in he discovered what was admitted as Exhibit 3, a baggie holding what later was determined to be approximately 11 grams of methamphetamine.

A. "I leaned it -- with a narcotics residue I leaned it across towards Officer Gaus, at which point I was showing him to see if he thought it was methamphetamine or cocaine because at the time it was, like I said, a white powder, which you will get from both narcotics. While looking, I found a -- this package in the center console area on the driver's side of the vehicle." *RRV3, p.26, lines 18-25.*

Both Officer Williams and Officer Gaus located other items that were seized in the arrest of Appellant. In total, two baggies with residue *(RRV3, p.30, lines 11-12),* a glass pipe *(RRV3, p.30, lines 19-25),* a digital scale *(RRV3, p.31, lines 12-14),* and a bong (RRV3, p.27, lines 11-13) were located in the vehicle.

Based on what appeared to be the totality of circumstances and evidence seized, Appellant was arrested for possession of a controlled substance with intent to manufacture and deliver, Penalty Group 1. *RRV3, p.34, lines 14-15.*

The jury's verdict, though, found Defendant guilty of possession only. Intent to deliver was rejected despite the State eliciting what it believed would lead to a conviction of possess with intent to distribute:

Q. "In your time as a peace officer, have you had the occasion to make arrests for drug cases many or few times?

A. Yes, ma'am.

Q. Many or few times?

A. Many times.

Q. And with that, have you -- what is the typical amount of drugs that you would find when you have conducted these?

A. Typically, less than a gram."

RRV3, p.35, lines 24-25: p.36, lines 1-8.

In explaining his decision to charge intent to deliver, Officer Williams answered as follows:

A. "Due to the weight, the amount of the narcotic, along with the digital scale, along with the baggies.

Q. And based on your training and experience, do you know how much meth it would take to get someone high?

A. Yes, ma'am.

Q. And how much is that?

A. Approximately .2 grams.

Q. And can you repeat for me how much you said the weight of this narcotic was?

A. Approximately 11 grams.

MS. HINDMAN: I would object, asked and answered probably three times.

THE COURT: Well, I will give him one more answer; and that's it. Go ahead.

Q. So, based on that calculation, about how many highs would someone get out of that one packet?

MS. HINDMAN: Your Honor, I would object. He has not been -- the objection is he has not been established as an expert in the use of any type of drug, any type of titrations of drugs or what it takes to make a person high. So, I object to him testifying as a patrol officer being elevated to the level of an expert on the effects of narcotics.

THE COURT: I am inclined to let him testify based on his training and experience, and that limits it. That's not the same thing as a

chemist testing, but it also is more than a layman. So, I am going to allow it for that purpose. Go ahead.

A. So .2 grams approximately is enough -- is a dose enough to get somebody high from one use. With the approximately 11 grams, you have over 50 doses."

RRV3, p.37, lines 11-25; p.38, lines 1-19.

Officer Williams continues along with his unqualified testimony during cross examination.

A. "Well, through numerous arrests I have made for methamphetamine. A lot of times I like to ask the people and talk to them and ask them how far -- a lot of time it's about a gram and ask them how far it will go, and they usually tell me. "You know, I will get a handful out of it." And then out of curiosity I Googled it and I also talked to one of our narcotics officers and he is the one who told me .2. Google said .1. He told me .2. And then most times I have stopped people with around a gram. They tell me, you know, at least a handful of highs."

RRV3, p.73, lines 1-11.

Appellant's counsel strikes back.

Q. You have come to this conclusion from interviewing drug addicts and Google and narcotics officers, correct?

A. Yes, ma'am.

Q. Do you aspire to be a narcotics officer?

A. I believe it would be an interesting career.

Q. So, it's interesting, but you have no aspirations?

A. Possibly one day. I am happy as a patrol officer right now.

Q. You, even based on your three years experience and your 50 arrests, you have no idea, do you, how many doses one can get out of an alleged 11 grams, do you?

A. An exact amount, no, ma'am; but I could tell you it's a lot.

RRV3, p.73, lines 12-25; p.74, line 1.

This line of testimony is significant because it is an insight into the jury's thinking as it decided guilt and innocence. The jury seemed to want to give Defendant the benefit of the doubt and the State's error as it regards the joint possession instruction has to be read in that context.

SUMMARY OF ARGUMENT

Appellant was convicted of possession of a controlled substance, the lesser included offense of the charged offense of possession with intent to deliver. The jury charge is the focus of this appeal. That charge included non-statutory language in defining possession, which simply "means actual care, custody, control or management."

The trial court, at the behest of the State, included in the jury charge under the heading of Relevant Statutes the following language: ***"Two or more people can possess the same controlled substance at the same time."***

According to the current state of the law and in contravention of the pattern jury charge, this exact instruction has been held to be unnecessary, impermissibly focuses the jury's attention on particular evidence and thus constitutes an improper comment on the weight of the evidence [interposing the court's opinion]. There can be no doubt that error occurred. An appropriate and timely objection was made by Defendant and thus, the harmless error analysis is based on whether "some harm" occurred, a much lesser standard than if an objection had not been offered to the court.

The State's closing argument reinforced the error by pointedly focusing on the language in question in the wholesale absence of testimony regarding the passenger's connection to the controlled substance and instrumentalities, equal to that of the arrested driver (Appellant).

The State never presented evidence of what may have or have not been the involvement of the passenger and strategically Defendant left that matter alone, which resulted in absolutely no discussion about the passenger's possible relationship to both the driver and the contraband. A jury would be sure to consider that question in deciding whether the State has proved possession beyond a reasonable doubt, but its curiosity would find an answer based on the inclusion of the joint offense language.

ARGUMENT

Appellant offers its point of error in the trial of the *State of Texas v. Samuel Willingham,* which led to the wrongful conviction of Samuel Willingham for the possession of a controlled substance 4-200 grams.

First, the court's charge to the jury contained an impermissible comment on the weight of the evidence which served to focus the jury's attention to a matter that the jury would have likely considered to be guidance from the judge in deciding the facts of the case and applying the relevant law to such facts.

The court also permitted, over the objection of Appellant, the arresting police officer to testify to arguably scientific knowledge (typical drug weight/high) without first conducting a preliminary assessment of whether the officer possessed the necessary education and training to engage in such a discussion or render an opinion that purports to assist the jury to understand or determine a fact issue. While dubious, this purported error could not have reasonably affected the jury's judgment in that intent to deliver was rejected. Nonetheless, it serves as insight into the jury's thinking as it came to a verdict, relevant to whether harm occurred, the issue before this Court.

I. Jury Charge Error

A. <u>The law and applicable standard:</u>

In reviewing a jury charge for error there are two steps, first a determination is made whether error exists, and, if so, then second, the court determines whether sufficient harm resulted from the error to require reversal. See *Thomas v. State*, 454 S.W.3d 660, 664 (Tex. App.-Texarkana 2014, pet. ref'd), *Middleton v. State*, 125 S.W.3d 450, 453-54 (Tex. Crim. App. 2003), *Ngo v. State*, 175 S.W.3d 738, 743 (Tex.Crim.App.2005).

"The amount of harm necessary to warrant a reversal depends on whether the appellant objected to the jury charge. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

If error was properly preserved by objection, reversal will be necessary if the error is not harmless. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). If a defendant preserved error with a timely objection in the trial court and the reviewing court finds error, the record need show only 'some harm' to warrant a reversal. *Briscoe v. State,* NO. 14-19-00467-CR at p.9 (Tex. App. - Houston [14th] May 18, 2021). A defendant's objection to an erroneous jury charge need not constitute a

paragon of clarity and specificity in order to trigger [*Almanza's*] some harm analysis. *Pedregon v. State*, No. 08-18-00119-CR at p. 8 (Tex. App.-El Paso March 10, 2020).

This is a less stringent standard than 'egregious harm.' *Ansari v. State*, 511 S.W.3d 262, 266 (Tex. App. 2015).

In a case subsequent to *Almanza, Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986), the Court expounded on the understanding of the term "some harm."

In *Airline*, the Court said that the term "some" was chosen to indicate the minimum degree of harm necessary for reversal of cases involving preserved charging error, though, that term was left undefined. *Id.* The Court then held expressly that, in the context of *Almanza* and Article 36.19, the presence of any harm, regardless of degree, which results from preserved charging error, is sufficient to require a reversal of the conviction. *Id.* Cases involving preserved charging error will be affirmed only if ***no harm has occurred***. In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless.

Where there is no timely objection to jury charge error, the appellant must show that 'egregious harm' occurred, that is, when it affects the very basis of the case, deprives the accused of a valuable right, or vitally affects a defensive theory. *Alcoser v. State*, 663 S.W.3d 160, 165 (Tex. Crim. App. 2022). That is, a defendant is deprived of being judged by a fair and impartial jury. *Texas Code of Criminal Procedure, Art. 39.14.* This is a difficult standard to meet. *Poor v. State*, 11-22-00221-CR at p.16 (Tex. App. Oct 03, 2024).

Furthermore, a finding of harm in order to reverse jury charge error, requires that the appellant must have suffered actual harm and not just merely theoretical harm. *Sanchez v. State*, 376 S.W.3d 767, 775 (Tex. Crim. App. 2012); *Arline v. State*, 721 S.W.2d 348, 352 (Tex. Crim. App. 1986); *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015).

In determining if error resulted in harm ('some harm' or 'egregious harm'), the court considers (1) the charge itself, (2) the state of the evidence, including contested issues and the weight of the probative evidence, (3) arguments of counsel, and (4) any other relevant

information revealed by the trial record in its entirety. *Brown v. State,* 12-21-00116-CR, p. 2 (Tex. App. - Tyler May 04, 2022).

Neither party bears a burden of proof or persuasion in an *Almanza* harm analysis. See *Warner v. State,* 245 S.W.3d 458, 464 (Tex. Crim. App. 2008).

"The purpose of the jury charge is to inform the jury of the applicable law and guide them in its application to the case." *Beltran De La Torre v. State*, 583 S.W.3d 613, 617 (Tex. Crim. App. 2019) (quoting *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996)); see also Tex. Code Crim. Proc. Ann. art. 36.14 (West 2007) (the judge shall, before the argument begins, deliver to the jury, except in pleas of guilty, where a jury has been waived, a written charge distinctly setting forth the law applicable to the case).

A trial judge must maintain neutrality in providing such information and guidance. *Brown v. State*, 122 S.W.3d 794, 798 (Tex. Crim. App. 2003). He or she may not express any opinion on the weight of the evidence or draw the jury's attention to particular facts. *Id.* at 798, 801. This legal point is encapsulated in the Code of Criminal Procedure.

Article 36.14 of the Texas Code of Criminal Procedure covers the charge of court in jury trials:

- **Written charge**: Before the argument begins, the judge must provide the jury with a written charge that explains the law applicable to the case.
- **No opinion**: The charge cannot express an opinion on the weight of the evidence.
- **No testimony**: The charge cannot summarize the testimony.
- **No emotional arguments**: The charge cannot include any facts or arguments that are intended to evoke an emotional response from the jury ("arouse the sympathy or excite the passions of the jury").
- **Objections**: The defendant or their counsel can object to the charge in writing or by dictating it to the court reporter. The objections must clearly specify each ground of objection.

Tex. Code Crim. Proc. § art. 36.14.

B. The Analysis

The charge conference revealed the following:

MS. HINDMAN: All right. Page 6, relevant statutes. I don't know what statute you are referring to where it says, "two or more people can possess the same controlled substance at the same time."

MR. ALLEY: That is pulled directly from the most recent pattern charge instructions for controlled substance offenses. Two or more people can possess the same controlled substance at the same time. It's included if it's raised by the evidence. The particular statute, I don't have that ready; but I can go find it.

MS. HINDMAN: Well, I don't, either. I would have to find it. But if it's under relevant statutes, I have never seen it.

THE COURT: It's a known finger pointing instruction, isn't it?

MS. HINDMAN: It says instructions of the Court.

THE COURT: No, I mean everybody is pointing at each other.

MS. HINDMAN: Well, that's still my objection. I have never seen it in a jury charge.

RRV3, p.134, lines 5-25; p.135, lines 1.

The jury charge included both the definition of possession of a controlled substance and a section entitled "Relevant Statutes."

Chapter 481, Subchapter A, Section 481.002(38) of the Texas Controlled Substances Act defines possession as the following:

"Possession" means actual care, custody, control, or management. *Tex. Penal Code 1.07(a)(39); Tex. Health & Safety Code 481.002(38).* This was included in the jury charge as was the following:

"***Relevant statutes***. Our law provides that a person commits an offense if the person knowingly possesses with intent to deliver a controlled substance and the amount of the controlled substance is by aggregate weight, including any adulterants or dilutants 4 grams or more but less than 200 grams. Methamphetamine is a controlled substance.

Two or more people can possess the same controlled substance at the same time. If the evidence shows only that the Defendant was at a place where the controlled substance was being possessed, that evidence alone is not enough to convict him. If the evidence shows only that the Defendant knew that someone else was in possession of the controlled substance, that evidence alone is not enough to convict him." *C.R. pgs. 79, Volume 4 Lines 20-25, p.80 Lines 1-9.*

The inclusion of the section entitled "Relevant Statutes" modified the statutory definition of possession. It is here where the trial court unquestionably erred, which will be discussed in detail below.

Defendant's objection to the inclusion of the statement "[t]wo or more people can possess the same controlled substance at the same time," was overruled as a matter of law in that the trial court chose to ignore the objection and implicitly overruled it by the court's failure to remove such language from the jury charge.

To begin, in a prosecution for possession of a controlled substance, the jury should be instructed on at least this statutory definition of possession. See *Reed v. State*, 479 S.W.2d 47, 48 (Tex. Crim. App. 1972). Whether there should be additional instruction for a jury to consider in making a determination of "possession" has been the subject of debate.

From the perspective of a question of legal sufficiency of evidence, "possession of a controlled substance need not be exclusive and evidence which shows that the accused jointly possessed the controlled substance with another is sufficient." *Brooks v. State*, 529 S.W.2d 535, 537 (Tex. Crim. App. 1975).

The Committee on pattern jury charges has concluded that present law establishes the propriety of instructing juries in possession cases on joint possession and that doing so is appropriate. Rather than use the legal term joint possession, however, the Committee recommends that juries be told simply, "[t]wo or more people can possess the same [substance] at the same time." 76 CPJC 41.6.

That is the exact language that the State contended was part of the most recent edition of the "Criminal Pattern Jury Charges," as it respects joint possession. As stated, the Committee has approved of its inclusion in a jury charge when the issue of joint possession is present.

Herein, there were two people in the vehicle when stopped for the investigation of two separate traffic offenses - Defendant and a female passenger. *RRV3, p.21, lines 7-8. RRV3, p.63, line 6-9. RRV3, p.79, lines 1-4.* Defendant became the target of the investigation as the events of the stop transpired. Defendant was placed in the back of the police cruiser as the arresting officer ran his driver's license. *RRV3, p.21, lines 9-15.* The passenger, a female, was apparently attended to by the support officer, Gaus. *RRV3, p.89, lines 10-12.*

It is unclear from the record how the stop transformed into a contraband search. The State's attorney was telling the story by showing and commenting on a body cam video. The subject of how the stop warranted a search of the vehicle was not part of the testimony. Nonetheless, the contraband and instruments of drug use - bong, baggies, scale and glass smoking pipe - were located at various places in the vehicle that were accessible by the female passenger. For instance, the baggie containing the confiscated methamphetamine was located in the center console. *RRV3, p.26, lines 18-25.* The glass pipe was located in the glove box *(RRV3, p.30, lines 23-25, p. 31, lines 1-6).* A single residue ridden baggie was found in the driver's side door. *RRV3, p.26, lines 1-9.* Another baggie was found in a cup holder in the center console by Officer Gaus. *RRV3, p.98, lines 10-25.* It is unclear from the record where the scale was located in the vehicle. The bong was found on the passenger seat near the left hip of the female passenger. *RRV3, p.99, Lines 1-9.* Arguably, access to the glass pipe was easier for the female passenger than Defendant. Both arguably had equal access to the baggie containing the methamphetamine.

Thus, the issue of "joint possession" was present before the jury. It seems reasonable to assume the State's motivation for the inclusion of the language in question was to minimize the importance of the presence of more than one person in the searched vehicle.

While the Committee has chosen the course to include the instruction on joint possession, the Court of Criminal Appeals disagrees, which is consistent with the Court's recent emphasis to discourage the inclusion of possession defining language not included in the statutory definition.

Notably, as briefly referenced above, in *Beltran De La Torre v. State*, 583 S.W.3d 613 (Tex. Crim. App. 2019), the Court dealt with a fact pattern mirroring the case now before this Appellate Court. Three persons, driver and front seat passenger and backseat passenger, were in a vehicle later found to contain a controlled substance located on the center console. *Id.* at 615.

After the close of evidence, the jury was charged on the applicable statutory elements of possession of a controlled substance - A person commits an offense if the person intentionally or knowingly possesses a controlled substance. *Id.* at 16.

The statutory definition of "possession" was also included ("Possession means actual care, custody, control, or management"). *Id.*

Immediately following the statutory definition of "possession," the jury charge included the *non-statutory* instruction on joint possession ("Two or more people can possess the same controlled substance at the same time."). *Id.*

The Court of Criminal Appeals held that the trial court erred by including the joint possession instruction because the "instruction was unnecessary [not needed to clarify the law because definition of possession is broad enough to include joint possession], impermissibly focused the jury's attention on particular evidence [singles out a particular piece of evidence for special attention], and thus constituted an improper comment on the weight of the evidence [interposing the court's opinion about the evidence]" *Beltran De La Torre v. State*, 583 S.W.3d 613, 622-623 (Tex. Crim. App. 2019). Also see generally *Beltran* at 619-620.

The language examined in *Beltran* was suggested by the Committee on pattern jury charges. Its conflict with the *Beltran* holding does not go unnoticed by the Court:

"We acknowledge that, in rejecting both instructions as improper comments on the weight of the evidence, we part ways with the recommendations of the Texas Committee on Pattern Jury Charges. See Comm. on Pattern Jury Charges, State Bar of Tex., Texas Criminal Pattern Jury Charges: Intoxication, Controlled Substance & Public Order Offenses PJC 41.6 (2019) (suggesting that instructions on "joint possession" and "mere presence" are permissible when raised by the facts). As the Committee recognizes, there is "clear tension" between our older cases that were more permissive in allowing non-statutory instructions and our "later emphasis on the need to avoid commenting on the evidence." *Id.* Applying our more recent decisions to the situation at hand here, for all of the reasons discussed above, the instant instructions fall within the category of improper emphasizing/highlighting instructions that we have consistently rejected as impermissible judicial comments." *Beltran* at 623 n. 7.

Beltran has been followed by numerous decisions correctly following the precedent it set. For instance, it was held in *Kersey v. State*, No. 08-20-00037-CR, 2021 Westlaw 5860920 at *5 (Tex. App. - El Paso Dec. 10, 2021, pet ref'd) that "[g]enerally, definitions for terms that are not statutorily defined are not considered to be 'applicable law' under Art. 36.14, and thus it is usually error for the trial court to define those terms because such instructions frequently constitute impermissible comments on the weight of the evidence."

The identical language recommended by the Committee, yet rejected as improper by the Court of Criminal Appeals, was included in the jury charge in the case herein as a result of the State's attorney

looking solely to the pattern jury charges for guidance. The trial court's inclusion of the joint possession instruction in the jury charge is clearly error in light of the Court of Criminal Appeals precedent. There is no other way to read the law as it now stands in Texas. Hence, a harmless error review is necessitated.

C. The Harmless Error Review

As referenced above, the degree of harm necessary to reverse a case based on charge error depends upon whether the error was preserved in the trial court. See *Marshall v. State,* 479 S.W.3d 840, 843 (Tex. Crim. App. 2016); *Almanza v. State*, 686 S.W.2d at 171. An erroneous jury charge requires reversal when the defendant has properly objected to the charge and we find "some harm" to his rights. *Almanza*, 686 S.W.2d at 171; see also Tex. Code Crim. Proc. art. 36.19 (providing that judgment shall not be reversed unless error appearing from record was calculated to injure rights of defendant or unless it appears from record that defendant has not had a fair and impartial trial). *French v. State,* 563 S.W.3d 228, 237 (Tex. Crim. App. 2018) (calculated to injure the rights of defendant).

In this case, error was preserved through a proper objection by Defendant. Hence, the standard for reversal is 'some harm,' as opposed to "egregious harm."

Assessment of harm is highly case specific and requires a close examination of what happened during the complete course of the trial. *Pedregon v. State*, No. 08-18-00119-CR at p. 1 (Tex. App. - El Paso March 10, 2020).

The analysis regarding "some error" begins with the Court's emphasis that the presence of any harm, regardless of degree, which results from preserved charging error, is sufficient to require a reversal of the conviction.

Any harm whatsoever will justify a reversal, presumably even a scintilla of evidence to support harm would be acceptable. Hence, the bar is low when jury charge error is identified such to find harm and reverse a conviction.

Trial courts are limited in what they are permitted to include in the jury charge and Article 36.14 allows the court to give the jury only 'the law applicable to the case. *Kirsch v. State*, 357 S.W.3d 645, 651 (Tex. Crim. App. 2012). The definition of possession in the Texas Penal Code

and Health and Safety Code is uncomplicated. The trial court's inclusion of the joint possession so-called instruction, upsets the balance and breadth of the definition by directing a jury's attention to that singular issue. It is reasonable that a jury would have in its collective mind that the presence of two people in close proximity to contraband could give rise to a question regarding who actually was in possession. Further, the court included the non-statutory instruction in a subheading entitled Relevant Statutes, effectively changing the definition of possession and communicating to the jury that the definition of possession included the joint possession caveat.

Jurors reading that "two or more people can possess the same controlled substance at the same time," in the context of testimony void of the role of the passenger of the vehicle, may very well conclude that the instruction was intended to guide the jury to focus solely on Defendant and disregard the normal thought process that both persons had access, thus how is one person singled out to the exclusion of the other, especially when the issue was never explored in the testimony.

There was nothing to distinguish between the Defendant driver and passenger, other than one was driving and one was not, as it regards

possession. So, when the trial court includes the joint possession modification, the court is really communicating to the jury to disregard what would be a reasonable question, that in the presence of two persons, distinguished only by who was driving, how do you conclude who had possession when that consideration was not a topic in the trial. The trial court's action essentially gives the jury cart blanch to infer an element of the crime of possession with intent to deliver.

It may well have been a strategy employed by Defendant to remain silent about that matter so that the jury did not have the information necessary to resolve their question of who, thereby concluding that the State did not prove the case beyond a reasonable doubt that the methamphetamine and attendant items were possessed by Defendant.

Almanza factors:

1. *The entire jury charge:*

In assessing this first factor, we look for anything in the balance of the jury charge that either exacerbated or ameliorated the error. *Pedregon v. State*, No. 08-18-00119-CR (Tex. App. Mar 10, 2020).

Arguably, a review of the jury charge reveals some information that the error of including the joint possession modifier could have been

exacerbated. Specifically, the charge included joint possession under the heading of relevant statute. It is one thing to include an instruction not part of the statutory definition and quite another to represent its inclusion as part and parcel of the statutes applied in the prosecution of an offense.

2. Argument of Counsel

A defendant is entitled to be convicted upon a correct statement of the law. When the trial court fails to correctly charge the jury on the applicable law, the integrity of the verdict is called into doubt. *Green v. State*, PD-0738-14 (Tex. Crim. App. Dec 16, 2015).

Fairness demands a correct statement of the law, notably absent in this case.

Furthermore, the State's closing argument went right to the heart of the matter now before this Court:

"So, I'm going to point you to the Jury Charge in this offense. It says two or more people can possess the same controlled substance at the same time. So even if there's another person in the car, it does not absolve the Defendant from actually possessing that item. So, it is orderly that that element also has been proven

because it was found in the Defendant's car. That's his vehicle among other items that are consistent with the knowledge that that item is in the car. So, he had knowledge that that item -- that he possessed that item and it was in his car." *RR, V4, p.25, lines 1-11.*

The very matter that was reasonably on the minds of the jury was foreclosed by the State's emphasis on the "two or more people can possess the same controlled substance at the same time." There is no argument the inclusion of the definition modifier was error. That error easily rises to the level of some harm (just more than no harm), when emphasized as an important part of the State's argument. Its inclusion excused the State's consideration that there may have been another person whose interest was exclusive, if that case and testimony had been developed. And the State's argument, directly after illuminating the joint possession comment, was devoid of substantive discussion, just that Defendant would know something was in his car, a weak link to connect him to the crime.

Finally, the officers' investigation at the scene simply presumed the controlled substance was exclusively Defendant's. The female passenger

was not even considered as a suspect despite being in the same position as Defendant as it relates to the State's argument of custody and control.

The court in *Williams v. State*, No. 06-19-00093-CR at p.8 (Tex. App.- Texarkana Oct 16, 2019) examined the wrongful inclusion of the joint possession modifier (two or more people can possess the same controlled substance at the same time) in the jury's charge and focused on the fact that when examining the arguments of counsel, it did not see joint possession as a central issue in the case, thus in the context of egregious harm found that reversible error did not occur.

Herein, the State made it a central issue in the case when it directed the attention of the jury to the statement. Courts have said that a charge directing a jury to specific parts of the evidence is impermissible and error. The State's further highlighting exacerbates the effect of such error, a small skip to 'some harm.' And offers a justification for the lack of exploration of passenger participation in the trial itself.

Other courts have addressed this issue in similar contexts. Although the Court of Criminal Appeals stated in *Beltran* that a joint-possession instruction constitutes an improper comment on the weight of the evidence, it also acknowledged that the State was free to argue that

the statutory definition of possession includes the concept of joint possession. See *Beltran*, 583 S.W.3d at 620.

Kersey v. State, 08-20-00037-CR at p.15 (Tex. App. - El Paso Dec 10, 2021) illustrates this point. During voir dire, the State stated the following:

"Possession is not just ownership of the drug. What that means is that you don't have to actually own the drug for you to be in possession of it. It has to be in your care, custody, control, or management." *Id.*

The State also stated that "if [a person does] not have care, custody control or management, . . . then they are not in possession. *Id.*

And, in its closing argument, the State again argued that possession meant "care, custody, control and management of that drug." *Id.*

Thus, the Court found that any harm caused by the joint-possession instruction was ameliorated by the State's repeated emphasis of the correct statutory definition of possession. *Id.* See *Gelinas v. State,* 398 S.W.3d 703, 709-10 (Tex. Crim. App. 2013) (considering the parties' arguments containing correct statements of law to weigh against an egregious-harm finding caused by an erroneous instruction).

Following that line of reasoning, this case is the complete opposite. As stated, there was a direct shift of attention to the joint possession instruction. This was intended to cover for the State's failure to account for the presence and involvement of the passenger. In the absence of the joint possession language, a jury would certainly pause in determining how it was to distinguish culpability between Defendant and passenger with equal links to the methamphetamine when passenger involvement was never discussed. The likely result would be a not guilty finding based on the State's failure to meet its burden. Especially given the moderation the jury showed in convicting of possession only, despite repetitive testimony of how many methamphetamine highs are in eleven grams of the drug (clearly intended to convince the jury of intent to deliver).

CONCLUSION

There can be no doubt that Defendant suffered "some harm" as a result of the trial court's **error** in supplementing non-statutory joint possession language to the statutory definition of possession. The State's laser focus in its argument on the joint possession language served to direct attention to it and signal/reinforce the court's opinion about a question the jury likely would have discussed in the absence of testimony

regarding the female passenger's proximity and access to the contraband in question -- How can we know Defendant possessed the methamphetamine when the passenger had the same links as Defendant to the contraband? Include the joint possession instruction and the question is answered, hampering Defendant's defense in relying on the jury to find reasonable doubt in the absence of such language. As a result, this case should be reversed and remanded for a new trial.

PRAYER

Appellant prays that the Court, after consideration of the briefing and the record, finds error and "some harm," thereby reversing and remanding the case back to the 405th District Court of Galveston County, Texas for a new trial on the merits.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this the 9th day of December 9, 2024, a true and correct copy of this Anders brief and certificate of counsel has been served on the State of Texas, by and through the electronic service manager on Rebecca Klaren, Galveston County Assistant District Attorney.

/s/ Jeffrey J. Smith
Jeffrey J. Smith

CERTIFICATE OF COMPLIANCE

I hereby certify that the word limit as prescribed in Texas Rules of Appellate Procedure 9.4 has not been exceeded by this Appellant Brief which consists of 7,424 words.

/s/ Jeffrey J. Smith
Jeffrey J. Smith

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