No. 01-24-00559-CR

In the Court of Appeals
for the 1st Court of Appeals District
Houston, Texas

Brisby Ray Brown,
Appellant,
v.
The State of Texas,
Appellee.

On Appeal from the 180th Judicial District Court
Harris County, Texas
Hon. DeSean Jones, Judge Presiding
In Cause No. 1802317

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

Mr. Brown was charged with two different kinds of aggravated assault in a four-paragraph indictment [CR 36]. Tex. Penal Code § 22.02(a)(2) (West 2022). The first paragraph alleged an assault by bodily injury as the predicate offense for the aggravated assault [CR 36]. Tex. Penal Code §§ 22.01(a)(1) , 22.02(a)(2) (West 2022) . The remaining paragraphs alleged assaults by threat with different purported deadly weapons [CR 36]. Tex. Penal Code §§ 22.01(a)(2), 22.02(a)(2) (West 2022) .

Mr. Brown pleaded not guilty, but a jury convicted him [CR 273] [4 RR 56–57]. Following punishment arguments, the jury assessed punishment at eight years' imprisonment [CR 273] [4 RR 71].

This appeal followed.

STATEMENT REGARDING ORAL ARGUMENT

This appeal is based on the application of settled law to the facts adduced at trial. Appellant does not request oral argument but would welcome the opportunity should the Court determine argument would be helpful to its deliberations and decision.

Issue Presented

1. **Jury Charge—Unanimity.** Both the Federal and Texas Constitutions guarantee the right to a unanimous jury verdict with respect to every element of the charged offense. Based on the jury charge which only required unanimity on the ultimate decision, the State encouraged and invited a non-unanimous verdict as to whether an aggravated assault was predicated on two separate offenses with different elements. Was Brown denied his right to a unanimous verdict?

STATEMENT OF FACTS

Calvin Ray Stone told the jury he has lived at 4507½ Tommye Street for 44 years [2 RR 254–55]. He said that Appellant Brisby Ray Brown's mother had lived across the street from him for about six years until she passed away [2 RR 257]. He knew Brown by the name of Ray-Ray, but didn't get along with him, he said "I just didn't bother him. I didn't fool with him." [2 RR 263–64].

On the day in question, Stone told the jury that he woke up at 4 a.m. when his wife was going to work [2 RR 266]. He asked her to leave him some money for church [2 RR 266]. She left money on the night stand, put her purse in the bed with him, and he noticed her purple 9mm firearm was in the purse [2 RR 267–68]. He said he went back to sleep, woke up at 10 a.m., and went to church [2 RR 269]. When he got home he started washing his breakfast dishes and while he was at the sink he heard a loud boom on the front door [2 RR 270]. He said he went to do the door and saw Brown kicking it [2 RR 270].

According to Stone, Brown was exclaiming, "I ain't trippin', I ain't trippin,' oh, hoe, ass nigga." [2 RR 270] Stone said he weighed approximately 297 pounds and tried to hold the door against Brown's kicking [2 RR 270][3 RR 30]. Stone said he tried to call 9-1-1, but he would "hit nine, he would knock me off the door. I'll get back on the door. I hit nine again, he busted my lip. Blood dripping

on my screen. I couldn't see." [2 RR 271] He said Brown kicked the door in, but did not rush in the house, but went back outside [3 RR 31–32]. When Brown stepped away from the front door [2 RR 271] Stone "looked out the door and he was grabbing the gas can off my porch and he started sprinkling gas around the front of my porch." [2 RR 273] Brown poured the gas in front of the steps and it smelled [3 RR 45]. Stone retrieved the firearm from the purse on the bed [2 RR 274].

Stone claimed that he returned to the door with the gun and "fired through the screen, fired a shot to let him know I had a gun." [2 RR 275] He believed this was necessary to advise Brown to stay away from him. Stone explained he wished to convey, "You done kicked my door down. Stay away." [2 RR 275] Stone said that Brown responded by pulling Stone's mailbox "up out of the ground," walked back to the porch, opened the screen door, threw it, and hit Stone, standing on the porch, in the face with it [2 RR 276, 281]. According to Stone, "[h]e busted my lip wide open with it." [2 RR 282] Stone said that the metal part of the mailbox struck him on the bottom lip, that he felt pain, and bled [2 RR 283]. After being struck by the mailbox, Stone shot Brown once in the chest or stomach area [2 RR 283]. Stone explained that in shooting Brown in the chest area from a short distance he did not want to kill or cause serious bodily injury, just to stop him [2 RR 284].

But Stone said that Brown then went down the steps to retrieve the lid from a barbecue pit, opened the screen door, "and he threw it in there." [2 RR 284] Stone claimed that he sustained a deep cut in his arm from this and felt pain as a result [2 RR 284–85]. He immediately shot Brown in the stomach and chest area another time, but Brown "still opened the screen door and started coming towards me again," so he shot him again [2 RR 286]. Stone then called 9-1-1 [2 RR 287].

Stone clarified that they were about four feet apart when these exchanges occurred, with him standing in front of the front door and Brown standing at the top step [3 RR 10–11].

Houston Police Officer Jose Gutierrez responded to the scene and saw Brown "face down at the base of the stairs leading up to the porch and there was like a pool of blood right underneath him." [2 RR 164–65]. He testified that the mailbox portrayed in an exhibit was made of "some kind of metal," which, based on his training and experience, could cause serious bodily injury if used to strike someone [2 RR 170]. He gave similar testimony with respect to the barbecue grill lid [2 RR 164].

Gutierrez testified that Stone "appeared panicked" and that another officer retrieved a pink or purple 9mm handgun from a bedroom [2 RR 174]. Gutierrez said that Stone had lacerations to his

mouth and he believed he saw some bruising on Stone's arm [2 RR 177].

He agreed that there did not appear to be any blood on the handle of the grill and that nothing on the mailbox indicated blood was found where someone would hold it [2 RR 187–88]. He said he did not take any photos suggesting Stone's arms were bruised and agreed that there was no evidence from his investigation indicating bruising on Stone's arms or injuries consistent with someone being hit while assuming a defensive posture [2 RR 190].

Houston police detective Ryan Cook testified that he also responded to the scene, but he observed an abrasion to Stone's arm [2 RR 204]. He testified he spoke with Brown at the Harris County Jail, who allegedly told him he went to Stone that day to remind him who he was so Stone would not call the police on him anymore [2 RR 210].

Detective Cook did not find Brown credible because Brown, who was in custody and apparently *Mirandized*, went off topic and did not answer questions directly [2 RR 212]. Additionally, Brown's statement did not "go" with what Cook observed on the scene six months earlier [2 RR 207, 212]. Cook did not smell gas at the scene [2 RR 214. Cook explained that Brown told him "he immediately stepped onto the property and was shot for no reason, when the blood was all the way up to the doorstep." [2 RR 212]. Detective

Cook admitted that what Stone told him did not match his observations either, but he did not necessarily agree that called Stone's credibility into question [2 RR 214–16].

Cook believed the mailbox post was ripped from the ground, but agreed there was no documentation of a hole or dirt for the jury to see where it had been taken from [2 RR 230]. He did not observe any indentations on the door consistent with someone having banged or kicked it, though he believed the damage on the door was consistent with someone banging and kicking it [2 RR 239, 242]. He admitted that no one canvassed the area for other witnesses [2 RR 231]. He insisted that the location of found shell casings was consistent with having been shot from the front door inside the closed patio, despite them being found outside the enclosed patio and appearing about 25 feet away from the house [2 RR 234, 239–40, 250][3 RR 101–02, 104]. He did not know which gas can was allegedly used to pour as he did not pursue that information [2 RR 235–36]. He could point to no drip pattern suggesting someone being shot in one area and running towards or away from a shooter [2 RR 247]. He conceded he did not do further investigation beyond Stone's statements because what he saw "felt consistent." [2 RR 233–34]

During closing argument, the State referred the jury to the charge, drawing their attention to "all those or(s) between those

paragraphs" and telling them that though they had to unanimously decide that Brown committed an aggravated assault with a deadly weapon against Stone, that "you don't all necessarily have to agree on the way that the defendant committed this aggravated assault." [4 RR 17–18] The State specifically argued that some jurors could believe that the aggravated assault was committed by threat while others could believe it was committed by causing bodily injury [4 RR 18–19].

The jury returned a verdict of "guilty to aggravated assault with a deadly weapon." [4 RR 56] At the punishment phase, the State offered all evidence and exhibits from the guilt phase and they proceeded to arguments [4 RR 58]. The jury assessed punishment at eight years' confinement in prison [4 RR 71]. The Reporter's Record contains no record of pronouncement of sentence in Brown's presence, though the docket sheet's typed recitations suggest that sentence was pronounced [4 RR 72] [CR 332].

At the time of filing this brief, Appellant has a pending motion to abate the appeal on file, suggesting the Court abate the appeal for pronouncement of sentence on the record before deciding this case. The State filed a reply document expressing its confidence in this Court's jurisdiction and its opposition to an abatement.

Summary of the Argument

Issue One

The court's inclusion of two separate aggravated assault offenses in the same jury charge, connected in the disjunctive and without offense-specific unanimity instructions, authorized a non-unanimous verdict. Both Texas and Federal law require unanimous verdicts in criminal cases, but the jury charge enabled the jury to convict if they all believed some variety of aggravated assault occurred, with no requirement that the unanimous decision be based on acts involving either a threat or a bodily injury.

The indictment alleged four distinct aggravated assaults in one count, including an aggravated assault based on causing injury and three aggravated assaults based on conveying a threat. Because assaults based on threats and assaults based on bodily injury are separate offenses, they require unanimous verdicts for a conviction under the law.

In light of the charge, the evidence, and the arguments that explicitly enabled and encouraged a non-unanimous verdict, the erroneous jury charge caused Brown's defense egregious harm.

ARGUMENT

Issue One

1. The jury charge erroneously allowed the jury to return a non-unanimous verdict.

The court's guilt phase charge instructed the jury on aggravated assault based on two separate predicate assault offenses—assault by threat and assault with bodily injury. However, the court did not instruct the jury that it must be unanimous concerning which assault, if any, the State proved beyond a reasonable doubt.

This was error because, though they both involve the use of a deadly weapon to "aggravate" the charge, assault by threat and assault with bodily injury are different offenses with different elements on which the jury must be unanimous.

The court's failure to require the jury to agree unanimously on one or another assault denied Brown his right to a unanimous jury verdict under the Sixth Amendment, incorporated against the State under the Fourteenth Amendment.

A review of the evidence, arguments, and charge will lead this court to agree that the court's failure to require unanimity caused egregious harm to Brown's defense.

1.1. Standard of Review for Jury Charge Error without an objection.

Review of jury-charge error is a two step process: first, the reviewing court must decide whether error exists; second, it must review any error for harm. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005); *Almanza v. State*, 686 S.W.2d 157, 174 (Tex. Crim. App. 1984) (op. on reh'g) (observing that "finding error in the court's charge begins—not ends—the inquiry").

Because there was no objection at trial to this unanimity issue, the error is reviewed under the "egregious harm" standard. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). The record must reflect that Brown suffered actual harm from the charge error. *Ngo*, 175 S.W.3d at 750. An error causing egregious harm affects "the very basis of the case, deprive the defendant of a valuable right, or vitally affect a defensive theory." *Id.* In making this determination, the court considers the record as a whole, including the entire charge, contested issues, the weight of probative evidence, and counsel's arguments. *Almanza*, 686 S.W.2d at 171.

Brown argues that this was constitutional error, but the Court of Criminal Appeals has decided that *Almanza's* "egregious harm" standard applies since there was no objection at trial. *Jimenez v. State*, 32 S.W.3d 233, 239 (Tex. Crim. App. 2000).

1.2 The Sixth Amendment right to a jury trial, incorporated against the states by the Fourteenth Amendment, includes a right to a unanimous jury verdict on every element. The Texas Constitution also guarantees unanimous jury verdicts in felony cases.

The Sixth Amendment right to a jury trial requires that a conviction "rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 505, 510 (1995). More recently, the Court held that the Sixth Amendment right to a jury trial requires that jury verdicts for serious offenses be unanimous. *Ramos v. Louisiana*, 590 U.S. 83, 91–92 (2020). This right is incorporated against the States by the Fourteenth Amendment. *Ramos*, 590 U.S. at 93.

Accordingly, the Sixth Amendment right to a jury trial requires criminal convictions for serious offenses to follow only a unanimous jury determination that the accused is guilty of every element of the crime with which he is charged. *Ramos*, 590 U.S. at 88, 90–91, 93; *Gaudin*, 515 U.S. at 509–10; U.S. Const. amends. VI, XIV.

The Texas Constitution has long been recognized to give defendants a right to a unanimous jury in felonies. *See Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005) (citing Tex. Const. art. V, § 13.)

1.2.1 The Jury must be unanimous with respect to elements, but not necessarily with respect to the means used to commit an element.

Elements of crimes are those things that must be stated in the indictment and proved to a jury beyond a reasonable doubt. *United States v. O'Brien*, 560 U.S. 218, 224 (2010); *Richardson v. United States*, 526 U.S. 813, 817 (1999); *Almendares-Torres v. United States*, 523 U.S. 224, 239 (1998).

A jury must be unanimous with respect to each element, but the "jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of a crime." *Richardson*, 526 U.S. 817 (citing *Schad v. Arizona*, 501 U.S. 624, 631–32 (1991) (plurality op.); *Anderson v. United States*, 170 U.S. 481, 499–501 (1898)).

The legislature decides what the elements of offenses are. *O'Brien*, 560 U.S. at 225. Whether the legislature has made something an element or means of committing an element is a question of statutory interpretation, subject to constitutional restraints. *Richardson*, 526 U.S. at 818–20; *O'Brien*, 560 U.S. at 225.

In Texas, the Legislature has specified that the "elements of [an] offense" are: 1) the forbidden conduct; 2) the required culpability; 3) any required result; and 4) the negation of any exception to the offense. Tex. Penal Code § 1.07(a)(22). "Conduct" means "an act or

omission and its culpable mental state." *Id.*, Tex.Penal Code § 1.07(a)(10). "Culpability" also means the culpable mental state. *See Celis v. State*, 416 S.W.3d 419, 430 (Tex. Crim. App. 2013) (construing the phrase "kind of culpability" in the mistake-of-fact statute, Tex. Penal Code § 8.02(a) to mean "culpable mental state.").

1.3 The charged offenses contain different elements on which the jury must be unanimous.

Our Code of Criminal Procedure provides that two or more offenses may be joined in a single indictment, with each offense alleged in a separate count if the offenses arise from the same incident. Tex. Code Crim. Proc. art. 21.24(a). "[a] count may contain as many separate paragraphs charging the same offense as necessary, but no paragraph may charge more than one offense." Tex. Code Crim. Proc. art. 21.24(b). Under longstanding Texas law, the jury must agree unanimously that the defendant committed one specific statutory crime. *Landrian v. State*, 268 S.W.3d 532, 535–36 (Tex. Crim. App. 2008).

The indictment charged Brown with aggravated assault in four paragraphs [CR 36]; Tex. Penal Code §§ 22.01(a)(1) & (2), 22.02(a)(2) (West 2022). The first paragraph alleged an assault by bodily injury as the predicate offense for the aggravated assault [CR 36]. Tex. Penal Code §§ 22.01(a)(1), 22.02(a)(2) (West 2022). The remaining paragraphs alleged assault by threat with different

purported deadly weapons [CR 36]. Tex. Penal Code §§ 22.01(a)(2), 22.02(a)(2) (West 2022). Each of the assault-by-threat paragraphs alleged use of a different deadly weapon including, in turn, gasoline, a mailbox, and a barbecue lid [CR 36].

The Legislature defined the crime of assault by setting out "three separate and distinctive assaultive crimes." *Landrian v. State*, 268 S.W.3d 532, 536 (Tex. Crim. App. 2008). "Subsection (1)—"bodily injury" assault is a result-oriented assaultive offense and normally a Class A misdemeanor. Subsection (2) is conduct-oriented, focusing upon the act of making a threat, regardless of any result that threat might cause. It is normally a Class C misdemeanor." *Id.*

In *Landrian*, the Court found that three appellate courts had correctly held that simple "'bodily injury' assault is a separate and distinct crime from simple assault by threat." For that reason, "aggravated assault under each distinct assaultive crime is a separate crime: aggravated assault with the underlying crime of assault by causing bodily injury and aggravated assault with the underlying crime of assault by threat. The first is a result-oriented offense and the second is a conduct-oriented offense." *Landrian*, 268 S.W.3d at 540 (internal citations omitted).[1]

[1] This holding is not affected by the recent *Floyd* decision, in which the Court of Criminal Appeals construed the aggravated robbery statute in accordance with a prior aggravated robbery double jeopardy case to allow underlying assaultive

Here, the court's charge instructed the jury that the person commits assault if the person either causes bodily injury *or* threatens another with bodily injury [CR 256]. The charge then told the jury that, "[a] person commits aggravated assault, as hereinbefore defined, and he uses or exhibits a deadly weapon during the commission of the assault." [CR 256]. The application paragraphs then instructed the jury that if it found from the evidence beyond a reasonable doubt that Brown committed an offense based on any of the charged theories submitted, then it will find him guilty of aggravated assault, as charged in the indictment [CR 257–58].

1.4 Because the jury was not required to be unanimous about its verdict and was allowed to choose from at least two offenses, the jury charge denied Brown his right to a unanimous jury.

"When the State charges different criminal acts, regardless of whether those acts constitute violations of the same or different statutory provisions, the jury must be instructed that it cannot return a guilty verdict unless it unanimously agrees upon the commission of

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conduct to be manners and means of committing the single offense of aggravated robbery. *Floyd v. State*, __ S.W.3d __, No. PD-0148-23 (Tex. Crim. App. Nov. 13, 2024). The Court's analysis focused solely on the unique character of aggravated robbery. In her concurrence, Presiding Judge Keller distinguished this analysis from the established law applicable to "the assault statute, in which three methods of committing assault are set forth in independent subsections." *Floyd v. State*, __ S.W.3d __, No. PD-0148-23, at *5 (Tex. Crim. App. Nov. 13, 2024) (Keller, P.J., concurring) (slip op.).

any of those criminal acts." *Ngo v. State*, 175 S.W.3d 738, 744 (Tex. Crim. App. 2005).

The jury charge contains the word "unanimous" twice. First, it mentions that the foreperson must certify the verdict "when you have unanimously agreed upon a verdict." Then, at the end of the charge, it states that "[y]our verdict must be by a unanimous vote of all members of the jury." [CR 264–65] This is insufficient. These generic unanimity requirements do not "apprise the jurors that they had to be unanimous on which incident of criminal conduct" they believe beyond a reasonable doubt. *Arrington v. State*, 451 S.W.3d 834, 841 (Tex .Crim. App. 2015).

The jury was *not* instructed that it must unanimously agree on the commission of an aggravated assault predicated either upon a threat or an injury. This was error as the charge (and the arguments) allowed the jury to mix and match elements with deadly weapons. *Ngo*, 175 S.W.3d at 744. The charge allowed the jury to treat elements of separate crimes that should require unanimity as manners and means, which do not.

	Barbecue lid	Mailbox	Gasoline
Threat	Threat with barbecue lid	Threat with mailbox	Threat with gasoline

injury	Injury with barbecue lid	Injury with mailbox	

1.5 The error is reversible as egregious harm.

Egregious harm is shown when errors "affect 'the very basis of the case,' 'deprive the defendant of a valuable right,' or 'vitally affect a defensive theory.' *Ngo*, 175 S.W.3d at 750 (quoting *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996)). Reviewing courts "may consider" the charge itself, the state of the evidence, arguments of counsel, and any other relevant information revealed by the trial record. *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996).

As in *Ngo*, Brown was deprived of the "valuable right" to a unanimous jury verdict. "[L]ike the jury charge in *Ngo*, this is not a case in which the jury charge is simply missing an important word—"unanimously." As in *Ngo*, the State told the jury in closing argument that it did not have to agree whether appellant committed assault by threat or bodily injury assault." *Dolkart v. State*, 197 S.W.3d 887, 894 (Tex. App.—Dallas 2006) (pet. ref'd).

Based on the prosecutor's closing argument, it is very likely the jury's verdict was non-unanimous. Specifically, the State highlighted the plenitude of disjunctive "ors" in the charge, giving the jury a road map to follow to a non-unanimous verdict:

You notice all those or(s) between those paragraphs? What that means is that when you go back there and deliberate, you all – all 12 of you – have to unanimously decide that the defendant committed an aggravated assault with a deadly weapon against Mr. Calvin Stone. However, what those *or(s)* signify is that you don't all necessarily have to agree on the way that the defendant committed this aggravated assault.

So out of the 12 of you, three of you could say – could say that you believe that the State has proven beyond a reasonable doubt that the defendant committed an aggravated assault against Mr. Stone by causing bodily injury when he threw the mailbox at him and it struck him. And then another three of you could say that you believe that the State has proven this case beyond a reasonable doubt, but that this aggravated assault was committed by threatening Mr. Stone with imminent bodily injury and you believe that the State has proven that with the gasoline. Another three of you could say that you believe that the State has proven the case beyond a reasonable doubt, but you believe the prong that says threatened with imminent bodily injury with the mailbox. And the last three of you could say that you believe the case was proven beyond a reasonable doubt, but that the way the assault was committed was by threatening Calvin Stone with imminent bodily injury with the metal barbecue put lid. So, out of the 12 of you then, in that example, you all don't agree on the manner in which this aggravated assault is committed, but you all agree in that example that an aggravated assault with a deadly weapon was committed against Mr. Stone beyond a reasonable doubt. And so what those instructions say is that essentially at that point you would be instructed to

> find the defendant guilty of aggravated assault with a deadly weapon. [4 RR 17–19]

The State reviewed the elements with the jury, describing them as the *location*, *date* and *defendant* before returning to arguments that the alleged implements in this case were deadly weapons [4 RR 19]. Then the argument returned to Stone's alleged bodily injuries before assaying the threat allegations, when the State renewed its invitation to a fractured verdict: "Now I want to talk to you about the next couple of paragraphs that use the word threatened. Because remember you don't all have to agree that I've proven that first paragraph that starts with the word *now*. You all just have to agree that I've proven at least one of those paragraphs with the allegations and the elements." [4 RR 20–21] (emphasis in original)

The paragraph referred to starting with the word "now" was the application paragraph for the bodily injury allegation which ends with "or" before the charge moves on to the threat application paragraphs [CR 257]. So the State re-upped its encouragement for the jury to pick and choose between the different offenses and elements and then reinforced the message. The prosecutor reiterated, saying, "So at the end of the day when you go back there and deliberate, just to recap, if you don't all agree on which paragraph the State has proven to you beyond a reasonable doubt, but you all agree that the State has proven at least one of those paragraphs to

you beyond a reasonable doubt, then you would find the defendant guilty." [4 RR 22]

The defense argument did not mention unanimity [4 RR 26–48]. It started from the premise that the State was allowing Stone to "get away with murder" by acting like the victim [4 RR 26]. From there, the defense focused on reasonable doubt, attacking the credibility of the witnesses, the reliability of the police investigation, and highlighting the inconsistencies between the testimony, the State's theory and the physical evidence. Towards the close of the argument, the defense highlighted the "question of self defense" in the jury charge and noted that it was something that needed to be addressed only if they got beyond reasonable doubt [3 RR 41]. Then, the defense reminded the jury that there was no duty to retreat and that Stone would not have been justified in using deadly force if he wasn't actually in danger, and that Brown was allowed to respond to the "warning shot" if he felt his life was in danger [4 RR 43].

The facts of the case also make it very likely the jury's verdict was non-unanimous. Stone's testimony did not align with all the physical evidence, and it is extremely unlikely all twelve jurors believed all of his testimony. The evidence presented of what actually occurred was chaotic, contested, and subject to different interpretations. The defensive attack on the shoddy investigation highlighted, among other things, the bizarre and unexplained presence of shell casings

25 feet away from the alleged scene of the shooting [2 RR 234, 239–40, 250][3 RR 101–02, 104] as well as the lack of blood on the alleged deadly weapons [2 RR 187–88]. And Detective Cook agreed that none of the statements matched objective observations from the scene [2 RR 207, 212, 214–16].

In this unanimity vacuum, inclusion of self-defense charge language further increased the likelihood the jury reached a non-unanimous verdict—some jurors could have believed that different allegations were justified by self defense while others were not.

Based on the evidence, some jurors easily could have believed that an assault causing bodily injury occurred when Stone's lip was bloodied during the initial alleged attempts to kick his door in [2 RR 270–71], that he then retrieved the gun, went outside, and shot Brown from a different location, and that the threatened assaults never occurred.

Some jurors could have easily disbelieved Stone's description of how everything happened, believing (again, consistent with the physical evidence) that the shooting was from a different location and in response to threats, but that the bodily injury arose from justified self-defense in response to the shooting. After all, Detective Cook testified that Brown told him that he was immediately shot for no reason [2 RR 212].

This is, then, unlike cases like *Cosio* and *Arrington* with less complex evidentiary narratives. In those cases, the juries decided credibility contests, making a binary choice between a complainant's accusations and a defendant's denials. In both cases there was no faulty jury argument and the obvious decisions to believe the accusers militated against finding harm *See Cosio v.* State, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011) (finding no harm from the state of the evidence since the jury would have acquitted on all counts had it believed the defendant); *Arrington v. State*, 451 S.W.3d 834, 843 (Tex. Crim. App. 2015) (observing that inconsistencies in the complainant's testimony alone would not support egregious harm since the jury's conviction on six counts meant they found her credible).

Ultimately, what this Court *does* know is that the jury charge did not require a unanimous decision and the State's argument specifically invited and endorsed a non-unanimous verdict as the easiest path to a "unanimous" verdict "authorized" by the law and the court's charge. Add in the mixed nature of the evidence including major discrepancies between Stone's testimony and the physical evidence, and it becomes unlikely that the twelve jurors were unanimous in their interpretation of the facts.

Given the State's repeated encouragement to mix and match elements and manners and means as authorized by the court's

charge, without any meaningful pushback from defense counsel addressing unanimity, there is no reason to conclude the jury, which deliberated for over three hours [4 RR 55–56], did anything but come to a non-unanimous verdict. A review of the charge, the evidence, and the arguments, compel a conclusion that the harm in this case was not theoretical, but real.

Based on this record, Brown was deprived of the "valuable right" to a unanimous verdict. The errors in the court's charge violated his constitutional and statutory rights to trial with a unanimous verdict and caused him to suffer "egregious harm." Brown is entitled to a new trial where the jury will be required to acquit if there can be no agreement on the State's theory of liability. *Ngo v. State*, 175 S.W.3d 738, 752 (Tex. Crim. App. 2005).

PRAYER

Mr. Brisby Brown prays that this Honorable Court reverse the trial court's judgment and remand him for a new trial at which the

State's theories of liability are appropriately presented to the jury for a unanimous decision to acquit or convict.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document contains 5,131 words, according to Microsoft Word, exclusive of the sections excepted by Tex. R. App. P. 9.4(i)(1).

/s/Michael S. Falkenberg
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