IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0197-17

DONDRE JOHNSON, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE SECOND COURT OF APPEALS TARRANT COUNTY

YEARY, J., filed a concurring opinion.

CONCURRING OPINION

Today the Court reverses the opinion of the court of appeals and remands the cause for further proceedings. For the reasons expressed at length herein, I concur in that result. But I cannot join the Court's opinion because of its construction of Section 7.02(a)(2) of the Penal Code. TEX. PENAL CODE § 7.02(a)(2). As I understand its opinion, the Court holds that Appellant may be found criminally responsible for the conduct of his wife under this provision even though his wife lacked any intent to commit theft. Majority Opinion at 9–11.

This strikes me as a mistake.

The Court rejects the proposition that Section 7.02(a)(2) "require[s] evidence of the other person's intent" because such a requirement "finds no support in the text" of that provision. *Id*. at 10. I disagree. There is ample language in Chapter 7 of the Penal Code, including Section 7.02(a)(2), to indicate that a person is not ordinarily susceptible to being found vicariously responsible for the criminal conduct of another unless and until that other person has actually committed an offense. And an offense is not complete unless it includes any statutorily required element of culpable intent.

Section 7.01(a) of the Texas Penal Code provides that a person is criminally responsible as a "party to an offense if *the offense is committed* by his own conduct" or "by the conduct of another for which he is criminally responsible[.]" TEX. PENAL CODE § 7.01(a) (emphasis added). It further provides that a person who is not a primary actor may nevertheless be found guilty as a "party" if he is "criminally responsible for *an offense committed by* the conduct of another[.]" TEX. PENAL CODE § 7.02(a) (emphasis added). One such theory of vicarious criminal responsibility is that the person "solicits, encourages, directs, aids, or attempts to aid the other person *to commit the offense*[.]" TEX. PENAL CODE § 7.02(a)(2) (emphasis added). Moreover, when the 1974 Penal Code was promulgated, it was not intended to "substantially change the prior complicity test" codified in earlier penal codes. TEX. PENAL CODE § 7.02 practice cmt. (West 1974). Previous penal codes made it abundantly clear that a full-blown offense had to actually be committed, by *somebody*, before *anyone*—whether primary actor or abettor—could be convicted. *See* V.A.P.C. art. 65 (1925)

("All persons are principals who are guilty of acting together *in the commission of an offense*."); art. 66 (providing for the conviction of one who encourages "an offense" that is "*actually committed* by one or more persons"); art. 67 (providing for the conviction of one who aids in "the commission of an offense"); art. 69 (providing for the conviction of one who "advises or agrees to *the commission of an offense* and who is present *when the same is committed*") (all emphasis added).

Thus, contrary to the Court's assertion today, the language of "Section 7.01 provides that one may be charged as a party to the commission of an offense if he is criminally responsible for the conduct of another *who perpetrates the offense*." TEX. PENAL CODE § 7.01 practice cmt. (West 1974) (emphasis added). And unless she had the requisite culpable mental state, Appellant's wife cannot have committed the theft offense in this case.[1] That being so, Appellant cannot be held criminally responsible for any non-culpable acquisitive conduct on her part—at least not under Section 7.02(a)(2). To the extent that the Court finds the evidence legally sufficient to support Appellant's guilt as a party under *that* provision, I cannot join its opinion today.

On the other hand, the Court may legitimately reach the same result by applying Section 7.02(a)(1). *See* TEX. PENAL CODE § 7.02(a)(1) (specifically providing for vicarious criminal responsibility for a person who, with requisite intent, causes "an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense"). I

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[1] Indeed, Appellant's wife cannot have even committed attempted theft without the requisite culpable mental state. TEX. PENAL CODE § 15.01(a).

write further to explain why, on *that* basis, I agree with the Court's ultimate conclusion that the evidence is legally sufficient.

I. BACKGROUND

A. Facts

Appellant was convicted of two counts of theft of money in an amount between $1,500 and $20,000, a state jail felony. TEX. PENAL CODE § 31.03(e)(5). The Second Court of Appeals held the evidence to be legally insufficient to support Appellant's conviction on both counts and entered a judgment of acquittal. *Johnson v. State*, 513 S.W.3d 190, 201 (Tex. App.—Fort Worth 2016).

Evidence at his trial demonstrated that Appellant and his spouse, Rachel Hardy, operated the Johnson Family Mortuary ("mortuary" or "funeral home"). Appellant handled the mortuary's day-to-day operations, including, among other things, speaking with clients, negotiating contracts, delegating duties among the various employees, and transporting remains.[2] The mortuary itself, however, was owned by Hardy, and she primarily managed its financial affairs because she was the sole person authorized on the mortuary's bank account. For years, the mortuary's funds were commingled with the couple's personal funds and funds from Hardy's separate tax business. Bill-paying was sporadic and, beginning in 2014, the mortuary's rent payments were either late or never received. In addition, the mortuary

[2] While discussing Appellant's role in transporting remains, one detective testified that Appellant claimed: "[I]f you request Johnson, you're going to get Johnson." Additionally, Appellant oversaw about ninety-nine percent of the transportation of the bodies for cremation.

retained bodies for months before cremating them, leaving the mortuary with a negative reputation within the industry.[3]

In Texas, every funeral home is required to have a registered Funeral Director in Charge ("FDIC") who is responsible for managing day-to-day operations and obtaining death certificates and other legal documents that the Texas Electronic Registration system ("TER") requires for a cremation.[4] In February of 2014, Appellant hired Michael Pierce to act as the mortuary's FDIC. Pierce attended only one funeral service and, in April of 2014, became suspicious that the mortuary had been performing funeral services without his supervision in violation of state regulations. Pierce formally submitted his resignation to the Texas Funeral Service Commission in May of 2014, requesting that the commission remove him from the TER.[5] However, somebody with the mortuary repeatedly used Pierce's number and password for the TER system, even after Pierce had resigned his position, to apply for the necessary legal documents required for a cremation.[6]

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[3] Multiple crematoriums required the mortuary to pay up front, and at least one required that the mortuary provide the necessary paperwork before it would store any bodies after the mortuary left a five year old boy in the crematorium's cooler for five months.

[4] *See* TEX. OCC. CODE § 651.403 ("A funeral establishment shall designate to the [Texas Funeral Service Commission] a funeral director in charge . . . [who] is directly responsible for the funeral directing and embalming business."); TEX. HEALTH & SAFETY CODE § 193.002 ("A person in charge of interment . . . shall obtain and file the death certificate.").

[5] Pierce was not removed from the system until July of 2014.

[6] Both Appellant and his wife completed a certification course called "Understanding and Using the Texas Electronic Register." Further, John Nganga, who had previously served as a kind of provisional funeral director for the mortuary, testified that he had taught Appellant how to operate the TER system.

On July 15, 2014, after the mortuary repeatedly failed to make timely rent payments, Jim Labenz, the landlord, visited the mortuary to determine whether the premises had been abandoned. Labenz and his partners were struck by a foul odor upon arrival and proceeded to the back of the funeral home to inspect the premises further. They discovered several bodies, some of which had not been embalmed or refrigerated, in various stages of decomposition. In total, they found eight bodies—six adults and two infants—inside the mortuary. The first body, later identified as Chewe Mwangilwa, was fully embalmed and laid out in the viewing room with the proper paperwork required to be transported outside the country. The second body, identified as Patricia Baptiste, was found in the embalming room but was not fully embalmed. Three more bodies were discovered in body bags in the mortuary's garage. They were identified as the bodies of Karen Jones, Helen Jones, and Debra Whitney. The sixth body, identified as that of Victoria Vasquez, was found in an open casket, dressed in preparation for a funeral service, but otherwise decomposing. The two infants' remains were found in a cremation casket and a plastic bin, respectively. Both had decomposed and liquified. They were identified by the medical examiner's office to be the remains of Malaysia Biscoe and Titus Harrison. In addition to the bodies, several sets of ashes were discovered and sent off to the medical examiner's office for identification.

The State charged Appellant in a two-count indictment with theft of money in an amount of $1,500 or more, but less than $20,000, based upon the mortuary's handling of four

of the bodies. *See* TEX. PENAL CODE § 31.03(e)(5).[7] Count One charged Appellant with theft of money from Margaret Francois, who paid $1,500 for the cremation of Patricia Baptiste. On July 1, 2014 Francois met with Appellant to have Baptiste's body cremated and the ashes sent to Baltimore, Maryland. After the meeting, someone at the mortuary attempted to enter a report of death through the TER, using Pierce's FDIC number. This attempt proved unsuccessful when the system rejected Pierce's number. One week later, on July 7, 2014,[8] Francois tendered to Appellant a cashier's check for $1,500, made out to the Johnson Family Mortuary, with the words "Patricia Baptiste cremation" written on the memo line. The check was deposited into the mortuary's business account that day by Hardy. Baptiste's remains, however, were never cremated, and Labenz found her body in the mortuary's embalming room. Appellant later told authorities that Baptiste's remains were not cremated because he was waiting for an additional payment from Francois so that her brother could view the cremation.[9]

Count Two charged Appellant with aggregated theft of money, pursuant to the same scheme or continuing course of conduct, from eight different complainants: Michelle Jones-

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[7] At the time the offense was committed, theft of property valued at $1,500 but less than $20,000 was a state jail felony. TEX. PENAL CODE § 31.03. In 2015, the Legislature amended the statute so that, to constitute a state jail felony, the value of the property stolen must be at least $2,500 but less than $30,000. Acts of June 20, 2015, 84th Leg., ch. 1251, § 10, p. 4213, eff. Sept. 1, 2015.

[8] Francois and Appellant agreed to wait until after the July 4th holiday to finalize the contract.

[9] Francois disputed this at trial, testifying that, although she had made the request from her brother to view the cremation, she quickly abandoned the idea once Appellant informed her that the viewing would entail an additional cost.

McElhanon, Tony Jones, Connie Mabry, Little Texas,[10] Eric Jones, and Lana Adewusi, who all contributed a total of $3,025 for the full funeral service arrangements of Karen Jones; Desiree Williams, who paid $300 for the funeral and cremation of the infant Titus Harrison; and Fred Jones, who paid $2,800 for the wake, funeral, and cremation of Helen Jones. TEX. PEN. CODE § 31.09. The wake and funeral services were conducted for both Karen Jones and Helen Jones, whereas only a funeral service was held for Titus Harrison. However, none of these bodies was cremated.

B. Procedural History

A jury convicted Appellant on both theft counts and assessed punishment at two years in a state jail facility, in addition to a $10,000 fine, on each count. Among his other complaints on appeal, Appellant challenged the sufficiency of the evidence to prove each count. In a 2–1 decision, the court of appeals held the evidence insufficient to support both counts and acquitted Appellant without reaching the merits of his other claims. *Johnson*, 513 S.W.3d at 201. The State petitioned this Court for discretionary review, arguing that the court of appeals failed to conduct a proper sufficiency analysis in that it failed to measure the evidence against a hypothetically correct jury charge and failed to view the evidence in the light most favorable to the verdict.

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[10] "Little Texas" was the name used to refer to "Little Texas Car Dealership," which was owned by Tony Jones. Count Two of the indictment listed this particular complainant only as Little Texas. It is not immediately clear from the record why Count Two alleged Tony Jones and Little Texas as separate complainants.

II. STANDARD OF REVIEW

In a legal sufficiency analysis, the relevant inquiry on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (citing *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972)). We held in *Malik v. State* that the evidence is to be measured against "the elements of the offense as defined by the hypothetically correct jury charge for the case." 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A hypothetically correct jury charge, we explained, "is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id*.

Section 31.03 of the Texas Penal Code reads: "A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of [the] property." TEX. PENAL CODE § 31.03(a). Appropriate means "to acquire or otherwise exercise control over property . . . ." TEX. PENAL CODE § 31.01(4)(B). "An appropriation of property is considered unlawful if it is without the owner's effective consent" and consent is ineffective if it is induced by deception or coercion. TEX. PENAL CODE §§ 31.03(b)(1), 31.01(3). The Code goes on to define "deception" to mean, among other things, "promising performance that is likely to affect the judgment of another in the transaction and that the actor does not intend to perform or knows will not be performed." TEX. PENAL CODE § 31.01(1)(E). However, the State must produce evidence beyond a simple failure to perform the promise in issue to prove

the intent of the promisor at the time the promise was made. *See id*. ("[F]ailure to perform the promise in issue without other evidence . . . is not sufficient[.]"). Finally, the owner need not be deprived of the property permanently; a deprivation occurs when the property is withheld "for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner." TEX. PENAL CODE § 31.01(2)(A).

III. ANALYSIS

A. Count One

1. Theft of Money versus Theft of a Check

Count One alleged that Appellant "unlawfully appropriat[ed], by acquiring or otherwise exercising control over property, to wit: money . . . with intent to deprive the owner, Margaret Francois, of the property." The court of appeals believed the allegation of "money" was fatal to the State's case because it concluded that, at trial, the State produced evidence only that a check was appropriated, not cash money. *Johnson*, 513 S.W.3d at 196, 199. Relying upon *Orr v. State*, 836 S.W.2d 315 (Tex. App.—Austin 1992), the court of appeals explained that the State had to produce evidence that Appellant endorsed, cashed, or otherwise negotiated the check to convict him for the theft of money. *Johnson*, 513 S.W.3d at 196, 199. The evidence, according to the court of appeals, failed to show Appellant could have exercised any control over the money because he was not a signatory on the mortuary's bank account and the check was made out to the mortuary instead of

Appellant. *Id*. at 199.[11] Because Appellant could not have endorsed the check, the court of appeals explained, it followed that Francois's check held "no significant value except to the funeral home." *Id.* Instead, the court of appeals concluded, "[w]hen Appellant possessed the check, he did not possess the $1,500[,]" but "'was in possession of a piece of paper worth, at the most, pennies.'" *Id*. (quoting *Heimlich v. State*, 988 S.W.2d 382, 385 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd)).

This analysis is supportable, insofar as it goes. In a case involving proof of a stolen check, our jurisprudence has been clear: When the State alleges the theft of money but the evidence produced at trial shows instead that the property was a check, there must be additional evidence that the check was also endorsed, cashed or negotiated. *See Lieske v. State*, 131 S.W. 1126, 1126–27 (Tex. Crim. App. 1910) (finding a fatal variance between an indictment alleging the unlawful acquisition of United States currency and the evidence when the State produced only a check); *Wimer v. State*, 48 S.W.2d 296, 303 (Tex. Crim. App. 1932) (distinguishing *Lieske* and finding no fatal variance because the evidence produced by the State demonstrated that the defendant deposited the check into a personal bank account); *Orr*, 836 S.W.2d at 317–19 (stating that this Court's jurisprudence "recognize[s] the distinction between proof that a defendant merely obtained a check as opposed to proof that the defendant obtained the check, endorsed it, and cashed or otherwise negotiated it" and

[11] The court of appeals acknowledged, however, that "[h]ad the check been made out to Appellant, and had he negotiated the check, he obviously would have exercised control over the money." *Johnson v. State*, 513 S.W.3d at 196 (citing TEX. PENAL CODE § 31.01(4)(B)).

reversing a defendant's conviction for theft of "cash money"). Consequently, had Francois's check never been cashed or deposited, on the basis of controlling precedent from this Court, I would agree with the court of appeals that the evidence in Appellant's case would have been insufficient to support a finding that *he* appropriated "money" as alleged in Count One.[12]

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[12] The dissenting opinion in the court of appeals would have held that "when [A]ppellant exercised control over [Francois's] check, he also exercised control over the money it represented, either on the mortuary's behalf or his own behalf." *Johnson*, 513 S.W.3d at 203. This view is inconsistent with the cases cited above. Controlling precedents from this Court make clear that the mere possession of a check, however unlawful, is insufficient to support a conviction for the theft of money. *See Lieske v. State*, 131 S.W. 1126, 1126–27 (Tex. Crim. App. 1910); *Wimer v. State*, 48 S.W.2d 296, 303 (Tex. Crim. App. 1932). In *Jackson v. State*, we noted that a check could be the instrumentality by which a defendant acquires the underlying money that the check represents. 646 S.W.2d 225, 226 (Tex. Crim. App. 1983). But it is the *use* of the check to obtain the money, not the *possession* of the check, that determines whether the evidence sufficiently demonstrates that a defendant exercised control over money. *See id*. ("The check was the instrumentality by which appellant received the cash. The use of a check does not render the evidence insufficient."). On the facts of this case, it was Hardy, not Appellant, who endorsed the check, and it was deposited into a business account over which Appellant had no signatory authority. Although a State's witness testified that none of the $1,500 that the check represented was spent on Baptiste's cremation, and the money was instead used for personal expenses, there was no evidence presented that Appellant was the individual who spent the money. There was no evidence to suggest that Appellant personally used the check to obtain control over the money. To adopt the dissenting opinion's view based on these facts would be tantamount to overruling our earlier precedent.

The dissent in the court of appeals also suggested it would have found Appellant criminally responsible for the offense under Section 7.23(a) of the Penal Code, which states that "[a]n individual is criminally responsible for conduct that *he* performs in the name of or in behalf of a corporation or association to the same extent as if the conduct were performed in his own name or behalf." *Johnson*, 513 S.W.3d at 203 (quoting TEX. PENAL CODE § 7.23(a)) (emphasis added). But, as I have stated above, Appellant's appropriation of the check did not constitute an appropriation of the underlying money because Appellant did not use the check to acquire the money. Because Appellant's conduct on his own behalf did not amount to an appropriation of money, it follows that his conduct on behalf of the corporation was also not an appropriation of money. Section 7.23(a) simply prevents defendants from insulating themselves from liability for offenses they personally commit by hiding behind the veil of a corporate entity. *See, e.g.*, *Littlefield v. State*, 586 S.W.2d 534, 535–36 (Tex. Crim. App. 1979) (applying Section 7.23(a) and finding no reversible error in a case revoking the defendant's probation where the defendant signed an automobile lease on behalf of a

Similarly, I would have agreed that Appellant could not himself have exercised control over the money when the check was deposited because the uncontested evidence showed that he was not a signatory on the mortuary's business account and could not lawfully endorse the check.[13] Nevertheless, consistent with our precedents, Appellant could have been convicted of the theft of money, as alleged in the indictment, if a jury could rationally have found him liable as a party to Hardy's act of depositing the check into the mortuary's business account.

2. Appellant's Liability as a Party Under Section 7.02(a)

The State argued at trial that Appellant was guilty of stealing money by virtue of his having been a party to Hardy's appropriation of money by depositing Francois's check

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corporation and subsequently failed to make the lease payments). Thus, Section 7.23(a) can provide no independent basis for vicarious criminal responsibility on the facts of this case.

[13] Judge Walker takes the view that the check may be treated the same as money for sufficiency-of-the-evidence purposes so long as the State shows it was negotiated by *someone*. But he cites no case in which we have ever so held, and it does not stand to reason. Because Appellant could not have negotiated the check, since he was not the designated payee, nor did he even attempt to cash or otherwise negotiate it, he cannot have appropriated the money that the check promised to pay. While he briefly acquired and exercised control over the check itself, he neither acquired nor exercised control over the money itself. Judge Walker cites two theft cases for the proposition that a check is the same as money. Concurring Opinion at 7–9. Neither case supports that proposition. In *Simmons v. State*, 109 S.W.3d 469 (Tex. Crim. App. 2003), the property alleged to have been stolen was itself two checks, and the issue in the case was how to ascertain their value for purposes of determining the level of the offense. In *Cooper v. State*, 509 S.W.2d 865 (Tex. Crim. App. 1974), the Court's opinion failed to describe exactly what property was alleged in the indictment to have been stolen, but the evidence showed theft of both cash and an unendorsed check from a company's till. Again, the issue was how to assign a value to the check for purposes of proving the value of the property specifically alleged to have been stolen—whatever it was. Neither *Simmons* nor *Cooper* can fairly be read to support Judge Walker's view that, so long as it is negotiated by *someone*, a check will be regarded as the same as money for purposes of proving up an indictment that alleged the theft of money. The fact remains that, under our holding in *Wimer*, a check is not the same as money unless and until the thief "in fact received the money on the check he obtained." 48 S.W.2d at 303.

pursuant to Penal Code Section 7.02(a)(2). *See* TEX. PENAL CODE § 7.02(a)(2) (establishing a rule of party liability where a defendant, with the intent to facilitate an offense, "solicits, encourages, directs, aids, or attempts to aid [another] person to commit the offense"). The jury charge instructed the jury that it could convict Appellant under this theory of party liability. It was the State's theory at trial that, when Hardy deposited the $1,500 and "'did something with the money,' it [was] proper to infer that the 'something' she did was to appropriate the money . . . intending that the body [would] not be cremated." *Johnson*, 513 S.W.3d at 197. Further, Appellant, acting as an employee of the mortuary, was complicit in the offense because he knew at the time the check was deposited that he would not perform the cremation.

The court of appeals concluded that the evidence was insufficient to support a verdict under Count One of the indictment under this theory, noting that the State failed to produce any evidence demonstrating that Hardy possessed any intention or knowledge that the mortuary would fail to perform Baptiste's cremation as promised. *Id*. 198–99.[14] Instead, the evidence showed that Hardy had withdrawn herself from the mortuary's daily operations and was not involved with, and did not know of, whatever services Appellant promised Francois that the mortuary would perform when he received the check. *Id*. at 197–98. Consequently, the court of appeals determined, Appellant could not be found liable under the law of parties

[14] Throughout its opinion, the court of appeals cited Section 7.02(a) generally, instead of specifically citing Subsection 7.02(a)(2). The State's theory at trial focused solely on Appellant's potential liability under Section 7.02(a)(2). The court of appeals, likewise, reviewed the evidence against Section 7.02(a)(2) exclusively, despite citing Section 7.02(a) broadly in its analysis.

because there was no evidence of an offense committed by Hardy for which Appellant could have been found criminally responsible as a party. *Id*. at 199. Again, the court of appeals' analysis is supportable, insofar as it goes.

Section 7.02(a) of the Penal Code provides multiple theories of criminal responsibility under which a defendant may be found guilty as a party. The court of appeals considered Appellant's criminal responsibility only with respect to Section 7.02(a)(2), which requires evidence of an offense committed by another in conjunction with evidence that the defendant facilitated the commission of the offense. But that is not the only theory of criminal responsibility contained in Section 7.02(a) of the Penal Code. Under Section 7.02(a)(1), a defendant is criminally responsible for an offense if, while "acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person *to engage in conduct* prohibited by the definition of the offense." TEX. PENAL CODE § 7.02(a)(1) (emphasis added). This provision embodies a separate theory of party liability when another person is not shown to be guilty and is thus innocent in law of any offense, but the defendant caused the innocent person to engage in an act that, when combined with the defendant's criminal intent, constitutes an offense.

It is true that Appellant's jury was not explicitly instructed with respect to this specific theory of criminal responsibility. But *Malik* requires us to measure sufficiency of the evidence against the hypothetically correct jury charge, not the actual charge the jury was given. If party liability was a theory advanced by the State at trial or was in the jury charge, and the State's evidence was sufficient to establish Appellant's guilt as a party under Section

7.02(a)(1), then failing to include that theory of party liability in our sufficiency analysis would unnecessarily restrict the State's theories of liability. *Malik*, 953 S.W.2d at 240.

Here, the jury charge authorized the jury generally to convict Appellant under the law of parties, instructing the jury that:

> All persons are parties to an offense who are guilty of acting together in the commission of an offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

The abstract instructions then set out the vicarious criminal liability theory contained in Section 7.02(a)(2), but not that which is contained in Section 7.02(a)(1). The application paragraph then authorized the jury to convict Appellant as a party under Section 7.02(a)(2), if it found that, "by acting with the intent to promote or assist the commission of the offense, [he] solicited, encouraged, directed or aided Rachel Jelanni Hardy to commit the offense[.]" It did not expressly include the specific language of criminal responsibility as a party described in Section 7.02(a)(1).

Even so, the jury's verdict in this case constituted an implicit finding that Appellant was criminally responsible as a party under Section 7.02(a)(1). Before Appellant could be found criminally responsible as a party under Section 7.02(a)(2), the jury would have been required to find that Hardy committed the offense, and that Appellant purposefully facilitated her commission of it.[15] On the particular facts of this case, a jury that would find Appellant

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[15] The jury was authorized to convict Appellant either as a primary actor or as a party under Section 7.02(a)(2). We cannot know for sure under which theory the jury actually convicted appellant, but as long as the evidence will support one or the other, a reviewing court is obliged to declare the evidence to be legally sufficient. *E.g.*, *Rabbani v. State*, 847 S.W.2d 555, 558–59 (Tex.

criminally responsible as a party under Section 7.02(a)(2) would also have necessarily found him criminally responsible under Section 7.02(a)(1). The theory of vicarious criminal responsibility described under Section 7.02(a)(1) is essentially subsumed by the theory of vicarious criminal responsibility under Section 7.02(a)(2). The only meaningful difference between the two is simply that, under Section 7.02(a)(1), the jury would not be required to find Hardy herself to be liable for the theft. It would only need to find that Appellant either "cause[d] or aid[ed]" her to commit the culpable act—depositing the check from Francois—while he himself harbored the requisite intent. TEX. PENAL CODE § 7.02(a)(1). A jury verdict that Appellant was criminally responsible as a party under Section 7.02(a)(2) would encompass all of the essential facts necessary to find him criminally responsible as a party under Section 7.02(a)(1). So long as the evidence was sufficient to support such a finding, there is no impediment to our concluding that the evidence is legally sufficient.[16]

Crim. App. 1992).

[16] Because the jury thus essentially found Appellant criminally responsible under Section 7.02(a)(1), we are not confronted with the situation in which he was convicted on the basis of a theory never submitted to the jury. Thus, there is no potential due process impediment to our considering Section 7.02(a)(1)'s theory of vicarious criminal responsibility in our legal sufficiency analysis in the guise of *Malik*'s hypothetically correct jury charge. *See Wooley v. State*, 273 S.W.3d 260, 268–72 (Tex. Crim. App. 2008) (an appellate court violates an appellant's right to due process when it holds the evidence to be legally sufficient on the basis of a legal theory not submitted to the jury).

In any event, "[a] reviewing court's limited determination on sufficiency review . . . does not rest on how the jury was instructed." *Musacchio v. United States*, 136 S. Ct. 709, 715 (2016). Even if it could be said that Section 7.02(a)(1) was not, for all intents and purposes, "submitted to the jury" in this case, it would not affect the hypothetically correct jury charge for purposes of a legal sufficiency analysis. Since *Wooley*, we have made it clear that the hypothetically correct jury charge remains unaffected by an imperfection in the way the law of parties was submitted to the jury. *See Adames v. State*, 353 S.W.3d 854, 861–62 (Tex. Crim. App. 2011) (a jury charge that included a

I would hold that the evidence in this case should be weighed against a hypothetically correct jury charge that includes the theory of party liability contained in Penal Code Section 7.02(a)(1). Measured against that theory of party liability, I conclude that Appellant could rationally have been found liable as a party under Section 7.02(a)(1) if the evidence demonstrated that: (1) he caused or aided Hardy, an innocent or nonresponsible person, to appropriate the money by depositing Francois's check; (2) he did so while harboring an intent to deprive Francois of the money; and (3) the appropriation was unlawful because it was based on deception, in that Appellant had no intention to—or was at least reasonably certain he would not—perform the services Francois bargained for at the time he accepted her check.

"general instruction on the law of parties," but which failed to require the jury to find a capital defendant to have intended to facilitate his co-defendant's commission, not only of the underlying felony, but also of the murder itself would not limit the appellate court's understanding of the hypothetically correct jury charge for purposes of determining legal sufficiency of the evidence); *Garza Vega v. State*, 267 S.W.3d 912, 915–16 (Tex. Crim. App. 2008) (where the jury charge abstractly defined the law of parties under both Section 7.02(a)(2) and Section 7.02(b) of the Penal Code, but only included the former theory in the application paragraph, the appellate court should nevertheless properly include the Section 7.02(b) theory of parties liability in its hypothetically correct jury charge for purposes of evaluating legal sufficiency). "All that a defendant is entitled to on a sufficiency challenge is for the court to make a 'legal' determination whether the evidence is strong enough to reach a jury at all." *Musacchio*, 136 S. Ct. at 715.

Whether a less-than-perfect jury instruction presents trial error in the case is a distinct question. In *Adames*, we recognized that a due process claim of lack of notice stemming from an imperfect jury charge is distinct from a due process claim that the evidence is legally insufficient. 353 S.W.3d at 859. Any such deficiency in the jury charge is essentially a matter of trial error, not legal sufficiency, and might, under appropriate circumstances, lead to a new trial, but not to an acquittal. *See id*. at 860 ("This is a case of jury-charge error distinct from evidentiary insufficiency; appellant was convicted on a theory, guilt as a party, that was not presented to the jury, as opposed to a charge for which he was never tried."); *see also Musacchio*, 136 S. Ct. at 715 n.2 (leaving open the question of whether "an erroneous jury instruction" may still lead to "reversible error" even when "the evidence was sufficient to support a conviction"). We are not presented with such circumstances here.

i.) ***Appropriation***. In the Penal Code, "appropriation" means "to acquire or otherwise exercise control over property[.]" TEX. PENAL CODE § 31.01(4)(B). When the property is a check, an appropriation of the underlying money the check represents occurs when the check is endorsed, cashed, or otherwise negotiated. *See Lieske*, 131 S.W. at 1126–27; *Wimer*, 48 S.W.2d at 303. At trial, the State produced evidence that Francois's check was delivered to Appellant and then endorsed by Hardy and deposited into the mortuary's business account. Evidence also demonstrated that the funds were not spent on anything related to Baptiste's cremation. The State stipulated that Hardy was the sole signatory on the mortuary's business account, and testimony from the bank representative confirmed that only Hardy could withdraw and transfer funds from the account. Because Hardy controlled the account, she exercised control over the money located within the account, which included the $1,500 once Francois's check was deposited. If Hardy was "an innocent or nonresponsible person" in contemplation of Section 7.02(a)(1), then Appellant may be liable to the extent that he "cause[d] or aid[ed]" her act of appropriating the money.

The terms "innocent" and "nonresponsible person" are not defined in the 1974 Penal Code. In construing code provisions, however, we may consider "former statutory provisions[.]" TEX. GOV'T CODE § 311.023(4). Every previous penal code in Texas, beginning in 1857, and culminating with Article 68 of the 1925 Penal Code, has included, without any substantive change, a provision that read:

> If any one by employing a child *or other person who cannot be punished* to commit an offense, or by any means, such as laying poison where it may be taken and with intent that it shall be taken, or by preparing any other means by

> which a person may injure himself and with intent that such person shall thereby be injured, or by an other indirect means cause another to receive injury to his person or property, the offender by the use of such indirect means becomes a principle.

V.A.P.C. art. 68 (1925) (emphasis added). *See also* O.C. art. 217 (1857), P.C. art. 77 (1879, 1895, 1911). Although Section 7.02(a)(1) of the 1974 Penal Code does not carry forward this precise language, the practice commentary to Section 7.02 makes clear that it was nonetheless meant to be "a codification and clarification of [former Article 68] regarding complicity in an offense committed by an innocent or non-responsible agent." TEX. PENAL CODE § 7.02(a) practice cmt. (West 1974). Thus, the case law interpreting the language of the former articles enlightens our understanding of what the terms "innocent" and "nonresponsible person" mean as they appear in Section 7.02(a)(1) today.

In *Doss v. State*, a defendant proposed to sell two cows to a prospective buyer. 2 S.W. 814, 814 (Tex. Ct. App. 1886). The buyer and the defendant walked to an open prairie, where the defendant identified two cows he claimed to own and sold them to the buyer. *Id*. at 814–15. After the defendant left, the buyer and his son drove the cows from the prairie and onto their property. *Id*. at 815. Later, it was shown that the cows did not belong to the defendant but were, instead, the property of another person. *Id*. In affirming the defendant's conviction for theft, the Court explained that, although the defendant did not personally take the cows (the property alleged to have been stolen) from their lawful owner, he nonetheless caused a person, without any knowledge of the defendant's fraudulent intent, to take possession of the animals and permanently deprive the owner of his property. *Id*. at 815–16.

Under what was then Article 77 of the 1879 penal code, a defendant need not have personally appropriated the property; it was enough that he caused *any person who did not know it was unlawful* to appropriate the property. *Id*.

Since *Doss* was decided, this Court, relying on successor provisions in subsequent penal codes, has repeatedly upheld convictions for theft in cases in which the defendant caused another person, unaware of the criminal nature of the acts, to appropriate property belonging to someone other than the defendant. *See Houston v. State*, 265 S.W. 585, 585–86 (Tex. Crim. App. 1924) (holding that a defendant was properly charged with theft when he purported to sell a bale of cotton that was not his even though it was the buyer who removed it from the cotton yard); *Wade v. State*, 29 S.W.2d 377, 379 (Tex. Crim. App. 1930) (holding that a defendant is liable for theft if, with a fraudulent purpose, he directs an innocent agent to secure a car on the defendant's behalf). In 1942, this Court declared, with respect to the offense of theft, that "[i]f [a] defendant fraudulently procured a person innocent of any fraudulent intent to take the property for him, it is a taking through an innocent agent, and a taking by an innocent agent is a taking by [the] defendant." *Spivey v. State*, 164 S.W.2d 668, 672 (Tex. Crim. App. 1942) (citations omitted). Therefore, the terms "innocent" and "nonresponsible person," as those terms are used in Section 7.02(a)(1), include persons who are unaware that their conduct is unlawful.[17]

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[17] The terms also include persons who, while potentially harboring culpable intent and therefore aware that their conduct is unlawful, are nevertheless incapable of being punished, such as children. The language in the 1856 penal code on the law of parties with respect to innocent persons stated: "If any one, by employing a *child* or other person, who cannot be punished, to commit an offense . . . by any . . . indirect means . . . the offender, by the use of such indirect means,

Thus, under Section 7.02(a)(1), Hardy need not have been aware of any criminal intent on Appellant's part to defraud Francois before Appellant may be held liable for her acquisitive conduct in depositing Francois's check. So long as the evidence shows that Appellant "cause[d] or aid[ed]" Hardy's appropriation of Francois's money by depositing her check, and that Appellant himself "act[ed] with the kind of culpability required for" theft, he may be convicted of stealing Francois's money. TEX. PENAL CODE § 7.02(a)(1). For Appellant to have acted with the kind of culpability required for purposes of assigning party liability under Section 7.02(a)(1), the evidence must also show that he intended to deprive Francois of her money, and that he caused her to relinquish it by deception, promising a performance of services that he never intended to honor, such that the appropriation of her money was "unlawful." In my view, the evidence presented at trial adequately supports both inferences.

ii.) ***Intent to Deprive***. To deprive a person of their property means "to withold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner." TEX. PENAL CODE § 31.01(2)(A). It is axiomatic that, in a contractual relationship, one party agrees to give up something of value in exchange for something of value in return. In exchange for Appellant's

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becomes a principal." O.C. art. 217 (1856) (emphasis added). The term "child" was included in each subsequent re-codification of the penal code in 1879, 1895, 1911 (all as Article 77) and 1925 (as Article 68). When the penal code was again re-codified in 1974, the term "child" was removed and the terms "innocent" and "non-responsible person" were added. TEX. PENAL CODE § 7.02(a)(1). However, the practice commentary to the 1974 Penal Code indicates that the new terms were not meant to alter the law and, instead, incorporated the term "child" from the previous iterations of Article 217. TEX. PENAL CODE § 7.02(a) practice cmt. (West 1974).

promise to cremate and deliver Baptiste's remains for burial in Maryland, Francois agreed to pay, and thus allow Appellant to permanently deprive her of, money (specifically, $1,500 in the form of a check). The evidence demonstrates that Appellant and Francois had a meeting of the minds with regard to at least that much. Therefore, the evidence was sufficient to show that Appellant intended to deprive Francois of the money when he received the check on the promise that the mortuary would perform the cremation.

iii.) ***Unlawfulness of the Appropriation: Appellant's Intent not to Perform***. "Theft cases involving unfulfilled contractual obligations present special problems with sufficiency of the evidence." *Taylor v. State*, 450 S.W.3d 528, 536 (Tex. Crim. App. 2014). To successfully prosecute a defendant for theft in these circumstances, the State must produce evidence that the appropriation of the property was "unlawful" because it was induced by deception. *Wirth v. State*, 361 S.W.3d 694, 697 (Tex. Crim. App. 2012). On the facts of this case, the relevant statutory definition of "deception" is "promising performance that is likely to affect the judgment of another in the transaction and that the actor *does not intend to perform or knows will not be performed*." TEX. PENAL CODE § 31.01(1)(E) (emphasis added). The court of appeals believed that the record failed to show any evidence of an intent on the part of Appellant "not to perform the cremation at the time Appellant accepted the check." *Johnson*, 513 S.W.3d at 198–99.

I disagree. The evidence produced at trial shows that Francois contacted Appellant on July 1, almost two months after Pierce first submitted his resignation as FDIC to the TER, and the mortuary attempted to enter a report of death for Baptiste that same day, using

Pierce's FDIC number. The attempt was unsuccessful because Pierce's information had already been removed from the TER system. Additionally, evidence showed that Appellant completed a course on the TER system and handled the mortuary's day-to-day responsibilities (including those required of an FDIC), which a reasonable jury could conclude meant that Appellant was aware that the TER system rejected the report of death for Baptiste and understood that the remaining cremation services could not be performed until the report of death was entered.[18] Nonetheless, Appellant proceeded to meet with Francois one week later, on July 7, and negotiated the payment for Baptiste's cremation. The evidence further showed that the check was deposited with Hardy's endorsement that same day. As the dissent in the court of appeals explained, "proof of a culpable mental state almost invariably depends upon circumstantial evidence." *Johnson*, 513 S.W.3d at 202 (citing *Montgomery v. State*, 198 S.W.3d 67, 87 (Tex. App.—Fort Worth 2006, pet. ref'd)). The fact that Appellant continued to negotiate with Francois after the TER rejected the report of death for Baptiste, knowing the impact such a rejection has on the funeral process, is sufficient circumstantial evidence for a reasonable jury to conclude beyond a reasonable doubt that Appellant did not intend to cremate Baptiste at the time he accepted Francois's check.

Moreover, incorporating Section 7.02(a)(1) into the hypothetically correct jury charge, and measuring the sufficiency of the evidence with that provision in mind, I conclude that

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[18] No evidence exists in the record indicating that Appellant or the mortuary ever contacted or attempted to contact another FDIC for purposes of reestablishing the mortuary's account in the TER.

the evidence was sufficient to support Appellant's conviction on Count One. It shows that, "acting with the kind of culpability required" to establish theft, Appellant "cause[d] or aid[ed]" Hardy to appropriate Francois's money by depositing her check. Consequently, I agree that the court of appeals erred by holding the evidence to be insufficient as to Count One of the indictment, and I concur in the Court's judgment to reverse the court of appeals' judgment as to that count.

B. Count Two

In Count Two, the State charged Appellant with aggregated theft, in that he "did then and there unlawfully appropriate, by acquiring or otherwise exercising control over property, to-wit: money . . . with intent to deprive the owners . . . of the property [which was] obtained pursuant to one scheme or continuing course of conduct."[19] In total, eight complainants were listed in Count Two, relating to Appellant's failure to cremate three bodies: Karen Pearl Jones, Titus Harrison, and Helen Jones. The court of appeals reasoned that the evidence was insufficient to convict Appellant because, "[i]n every situation covered by Count Two, Appellant performed [at least] part of the contract." *Id*. at 201. "Memorial services and wakes were held for Karen Pearl Jones and Helen Jones. . . . [and] a funeral service was held for [Titus Harrison]." *Id*. Therefore, while Appellant's conduct was certainly unconscionable, the court of appeals concluded, "the State failed to prove an intent to perform only part of the

[19] *See* TEX. PENAL CODE § 31.09 (permitting the aggregation of theft offenses for purposes of determining the grade of offense when they are committed "pursuant to one scheme or continuing course of conduct"). Here, the State alleged theft in the aggregate of at least $1,500, making the offense charged in Count Two a state jail felony. *See* note 7, *ante*.

services contracted for *at the time Appellant received the money . . . .*" *Id*. (emphasis added).

It is true that the mere failure to perform a contract, standing alone, does not amount to theft under Texas law. *See* TEX. PENAL CODE § 31.01(1)(E) ("[F]ailure to perform the promise in issue without other evidence . . . is insufficient."). However, in *Taylor v. State*, this Court explained:

> [T]he fact that partial or even substantial work has been done on a contract will not invariably negate either the intent to deprive or the deception necessary to establish the unlawfulness of the initial appropriation. A [defendant] still may be convicted of theft under circumstances . . . in which a rational fact-finder could readily conclude that he *never* intended, even at the outset, to perform fully or satisfactorily on the contract, and always harbored the requisite intent or knowledge to deceive his customer and thereby deprive him of the value of at least a substantial portion of the property thus unlawfully obtained.

Taylor, 450 S.W.3d at 537 (emphasis in original). Although the court of appeals was correct that the evidence shows Appellant performed part of the contracts at issue in Count Two, I disagree with its conclusion that the State failed to provide any, much less sufficient, evidence that Appellant intended not to perform other parts of the contracts—specifically, the cremation services—at the time he accepted the money.

Four of the complainants listed in the indictment testified at Appellant's trial: Margaret Francois (Count One), and Michelle Jones-McElhanon, Desiree Williams, and Fred Jones (Count Two). All four testified that they contracted for funeral services, which included a cremation, and that Appellant delayed in delivering the ashes as promised. Both

Williams and Jones-McElhanon testified that they did eventually receive cremains,[20] but both later discovered that the cremains were not those of their family member. Fred Jones and Margaret Francois testified that they never received any cremains at all and were given various excuses by Appellant as to why the cremains were delayed.

The court of appeals believed that the only fact this evidence fairly demonstrated was that "the family members expected the funeral home to do its job in a workman-like and timely manner, and it did not do so." *Johnson*, 513 S.W.3d at 201. But this inference is not the only inference a jury could have rationally drawn from the complainants' testimony. A rational jury could well have believed, from the testimony given, not only that Appellant failed to complete his contractual obligations to cremate the bodies in a workman-like and timely manner, but also that Appellant never expected to perform the cremations and return the ashes to their respective families as promised *in the first place*. In fact, the State presented two additional witnesses, not named in the indictment, whose testimony served to reinforce this alternative inference.

The first witness, Nakia Davis, testified that she contacted Appellant in January of 2014 to arrange a cremation and funeral service for her father, Larry Ray Davis. She requested that most of her father's cremains be placed at the Dallas-Forth Worth National Cemetery while the rest be given to her and her family. The funeral service was performed, and Appellant purported to bring Larry Ray Davis's cremains to the cemetery for interment.

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[20] "Cremains" are defined as "[a]shes remaining after the cremation of a corpse." WEBSTER'S II NEW COLLEGE DICTIONARY 266 (1999).

However, Davis later learned that her father was not actually cremated until February 21, well after his funeral had taken place. Thus, the remains interred at the Dallas-Fort Worth National Cemetery could not have been those of her father. The second witness, Felicia Braxton, testified that she contacted Appellant after her mother, Aundrea Marie Jones, died on February 8, 2014. A funeral service was held on February 15, 2014, and Braxton was informed that she would receive her mother's cremains in three days. She did not receive any cremains until weeks later, however, and in July of 2014 Braxton discovered that the ashes she had eventually received were those of Opal Mae Anderson, who had died on December 8, 2012. Both Braxton and Davis testified that they had been forced to contact Appellant multiple times before they received the incorrect cremains.

The Penal Code specifically contemplates that Davis's and Braxton's testimony be available as evidence to prove a culpable mental state in contractual obligations: "[E]vidence that the [defendant] has previously participated in recent transactions other than, but similar to, that which the prosecution is based is admissible for the purpose of showing knowledge or intent and the issues of knowledge or intent are raised by the [defendant's] plea of not guilty." TEX. PENAL CODE § 31.03(c)(1). Although it was possible for the jury to conclude otherwise, the additional testimony from Davis and Braxton offered to corroborate the testimony of the complainants that Appellant constantly delayed in cremating and delivering cremains was enough for a rational jury to find that Appellant never intended to perform the specific cremation services—that he would cremate and deliver the ashes of the loved one to the client he contracted with—at the time he took the money. *See Jackson*, 443 U.S. at 319

(requiring the State to present enough evidence for a fact finder to find every element of an offense was committed beyond a reasonable doubt). I am not convinced, nor has Appellant argued, that the complainants in this case would have paid Appellant any amount of money to cremate their relatives' bodies if they were not to receive the cremains as requested.

Even assuming that Appellant intended to conduct the other services he promised, then, a rational jury would be justified in concluding that he never intended to cremate the bodies as promised. Moreover, the value of the cremation services was sufficient to support a finding that property of enough value was unlawfully appropriated to satisfy the statutory requisite for a state jail felony—at least $1,500. Although Michelle Jones-McElhanon paid a total of $3,025 for funeral services for Karen Jones, she testified that Appellant itemized the services for her and charged her $1,000 for the cremation. Desiree Williams testified that Appellant charged her $300 for the cremation of the infant, Titus Harrison. Fred Jones was charged $2,800 for funeral services for Helen Jones. While he did not testify that Appellant itemized the cost of cremation for him, a print-out of the mortuary's web site was introduced into evidence showing that the least expensive cremation service for the body of an adult cost $500. From this combination of evidence, the jury could rationally have concluded that Appellant charged at least $1,800 for the cremation of the three bodies alleged in Count Two of the indictment. Thus, even if we limit the value of property unlawfully appropriated to the cost of the cremation services alone—services which the evidence adequately demonstrated Appellant did not intend to perform—the amount satisfies the minimum required to support his conviction for a state-jail felony.

IV. CONCLUSION

For the reasons stated above, I agree that the evidence was legally sufficient to support Appellant's conviction on both Counts One and Two in the indictment. Accordingly, I concur in the Court's judgment to reverse the judgment of the court of appeals and remand the cause to the court of appeals to resolve Appellant's remaining points of error on direct appeal.

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