**Opinion issued October 13, 2011.**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-10-00425-CR**

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**ISREAL HUDGINS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 182nd District Court**
**Harris County, Texas**
**Trial Court Case No. 1204840**

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## MEMORANDUM OPINION

A jury convicted appellant, Isreal Hudgins, of murder and assessed punishment at 75 years' confinement.[1] In three issues, Hudgins contends that the

[1] *See* TEX. PENAL CODE ANN. §19.02(b) (West 2011).

application portion of the trial court's jury charge contains reversible error and that he received ineffective assistance of counsel.

We affirm the trial court's judgment.

## Background

The complainant, John Brown, was shot and killed in his apartment in Houston, Texas. Police officers responding to the shooting found the complainant's apartment in a state of disarray, and, scattered throughout the apartment, they discovered more than 150 grams of crack cocaine and $8,000 in cash. Additional evidence was collected by police at the apartment, including fingerprints, fired cartridge casings, and bullet fragments.

As a result of the police investigation into the complainant's death, Hudgins became a murder suspect and was taken into custody. He admitted in a recorded statement that he and two accomplices, Irvin Williams and Darryl Pierre, planned to rob the complainant. In that statement, Hudgins claimed that he drove Williams and Pierre to the complainant's apartment and remained in the car while, armed with guns, they committed the robbery. Hudgins heard three gunshots before Williams and Pierre returned to the car, carrying an additional gun and an unknown amount of cash. They told Hudgins they shot the complainant. Hudgins then drove Williams and Pierre away from the crime scene and received $800 in payment.

Hudgins's indictment alleged that he murdered the complainant by intentionally or knowingly causing the complainant's death or by committing an act clearly dangerous to human life with the intent to seriously injury the complainant. *See* TEX. PENAL CODE ANN. § 19.02(b)(1), (b)(2) (West 2011). The indictment did not charge Hudgins with any offense other than murder; it omitted any mention of the potential offenses of aggravated robbery, felony murder, and capital murder.

In voir dire and opening statements, the State presented its theory of the case in a manner consistent with Hudgins's own statement: Hudgins planned the robbery of the complainant with Williams and Pierre, he knew Williams and Pierre had guns, he waited in the car while Williams and Pierre went into the complainant's apartment, he heard three gunshots, he was told by Williams and Pierre that they had shot the complainant, and then he and the other men split the cash taken from the complainant's apartment. At trial, the State called numerous witnesses to establish Hudgins's guilt. Among the witnesses called by the State was Kenneth Broussard, an inmate incarcerated with Hudgins and Williams. Before trial, Broussard wrote the prosecutor and offered information about an alleged jailhouse murder confession by Hudgins. When called at trial, however, Broussard stated that he did not want to testify and could not remember whether Hudgins actually admitted to entering the apartment and killing the complainant or

whether he had fabricated such a conversation with Hudgins. He eventually testified that he lied in his correspondence with the prosecutor to curry favor in the defense of his own unrelated robbery charge. To impeach Broussard, the State called David Worley, an investigator with the prosecutor's office who interviewed Broussard. Broussard told Worley that Hudgins admitted to having a plan to rob the complainant and that Hudgins actually entered the complainant's apartment and shot him. Several other police officers and investigators also testified about the investigation giving rise to the murder charges against Hudgins.

At the close of evidence, the trial court and the parties discussed the jury charge, which authorized the jury to convict Hudgins of murder under any of these theories:

> (1) Hudgins intentionally or knowingly caused the death of the complainant by shooting him with a firearm;
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> (2) Williams and Pierre intentionally or knowingly caused the death of the complainant and Hudgins, with the intent to promote or aid the commission of the offense, solicited, encouraged, directed, aided, or attempted to aid Williams and/or Pierre to commit the offense;
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> (3) Hudgins and Williams and/or Pierre entered into an agreement to commit the felony offense of aggravated robbery of the complainant, and, while in the course of committing such aggravated robbery, Williams and/or Pierre intentionally or knowingly caused the death of the complainant, and the murder was committed in furtherance of the conspiracy and was an offense that Hudgins should have anticipated as a result of carrying out the conspiracy;
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> (4) Hudgins intended to cause serious bodily injury to the complainant and did cause the death of the complainant by

> intentionally or knowingly committing an act clearly dangerous to human life;
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> (5) Williams and/or Pierre intended to cause serious bodily injury to the complainant and did cause the death of the complainant by intentionally or knowingly committing an act clearly dangerous to human life, and Hudgins, with the intent to promote or assist the commission of the offense, solicited, encouraged, directed, aided or attempted to aid Williams and Pierre to commit the offense; or
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> (6) Hudgins and Williams and/or Pierre entered into an agreement to commit the felony offense of aggravated robbery of the complainant, and, while in the course of committing such aggravated robbery, Williams and/or Pierre intended to cause seriously bodily injury to the complainant and did cause the death of the complainant by intentionally or knowingly committing an act clearly dangerous to human life, and the murder was committed in furtherance of the conspiracy and was an offense that Hudgins should have anticipated as a result of carrying out the conspiracy.

Hudgins objected to the trial court's jury charge on several grounds. His trial counsel objected that language in the abstract portions of the charge concerning conspiracy would "obfuscate the issues for the jury and in itself [would] also constitute a comment on the weight of the evidence [and] allow the jury to convict [Hudgins] on the theory of . . . conspiracy to commit murder" and that there was no evidence that Hudgins was "guilty of any conspiracy to commit murder even though it might be argued that ample evidence has been submitted to support the charge of aggravated robbery." Trial counsel also requested the omission of the application paragraphs and other portions of the charge addressing a conspiracy between Hudgins, Williams, and Pierre for the same reasons. He

further objected that there was no evidence to support a submission inquiring whether Hudgins had intentionally or knowingly caused the complainant's death. Finally, trial counsel requested a submission on the lesser offense of aggravated robbery. His objections and requests, however, were overruled or denied.

**Jury Charge**

In two issues, Hudgins contends that his conviction should be reversed because the charge submitted to the jury violated his due process rights by erroneously allowing the jury to find Hudgins guilty of murder based on conduct not statutorily defined as murder or alleged in the indictment. Specifically, in his first issue, Hudgins argues that the trial court erred by instructing the jury, in the third application paragraph, that it could find him guilty based on conduct amounting to capital murder, rather than the charged offense of murder. In his second issue, Hudgins argues that the trial court erred by authorizing the jury, in the third and sixth application paragraphs, to convict him of the unindicted offense of felony murder.

The trial court's charge must fully instruct the jury on the law applicable to the case and apply that law to the facts adduced at trial. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007); *see also Gray v. State*, 152 S.W.3d 125, 127 (Tex. Crim. App. 2004). To determine whether the trial court's charge contains reversible error, we first decide whether error exists. *Middleton v. State*, 125

S.W.3d 450, 453 (Tex. Crim. App. 2003). If we conclude that it does, we examine whether the error harmed the defendant. *Id.*; *see* TEX. CODE CRIM. PROC. ANN. art. 36.19 (West 2006) ("Whenever it appears by the record in any criminal action upon appeal that any requirement of Articles 36.14, 36.15, 36.16, 36.17 and 36.18 has been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial.").

## I. Capital Murder Submission

Hudgins first argues that the trial court's jury charge contains reversible error because it instructed the jury that it could find him guilty based on conduct amounting to capital murder, rather than the indicted offense of murder.[2] Hudgins asserts that this error deprived him of his due process right to notice of the charges against him and the opportunity to prepare a defense. The State responds that any error in the submission of a capital murder charge is harmless because capital murder includes additional elements of proof that murder does not, thereby increasing the State's burden and benefitting Hudgins.

Under the Texas Penal Code, one commits the offense of murder if he:

(1) intentionally or knowingly causes the death of an individual;

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[2] Although the trial court's error in submitting a capital murder submission is challenged as a part of his first issue presented, Hudgins does not discuss this issue first in the argument section of his brief. We follow the order listed in his issues presented, and address the capital murder submission first.

> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
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> (3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, . . . he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

TEX. PENAL CODE ANN. § 19.02(b). The offense of murder is elevated to the offense of capital murder if the person commits the murder, as defined by section 19.02(b)(1), in the course of committing a felony (such as robbery). *See* TEX. PENAL CODE ANN. § 19.03(2) (West 2011).

Hudgins was charged with murder under sections 19.02(b)(1) and (b)(2); as previously noted, the indictment made no mention of felony murder, capital murder, aggravated robbery, or any other potential offenses. At the conclusion of the case, the jury was authorized by the trial court's charge to convict Hudgins of murder under six alternative theories. The third application paragraph instructed the jury:

> If you find from the evidence beyond a reasonable doubt that the defendant, Isreal Hudgins, and Irvin Williams and/or Darryl Pierre entered into an agreement to commit the felony offense of aggravated robbery of [the complainant], and pursuant to that agreement, if any, they did carry out their conspiracy and that in Harris County, Texas, on or about the 9th day of March, 2008, while in the course of committing such aggravated robbery of [the complainant], Irvin Williams and/or Darryl Pierre intentionally or knowingly caused the death of [the complainant] by shooting [him] with a deadly weapon,

> namely a firearm, and the murder of [the complainant] was committed in the furtherance of the conspiracy and was an offense that the defendant should have anticipated as a result of carrying out the conspiracy.

Because this paragraph authorized a guilty finding if the jury concluded the murder was committed while in the course of an aggravated robbery, the State agrees that it erroneously described the unindicted offense of capital murder. *See* TEX PENAL CODE ANN. §19.03(2) (West 2011) (explaining that capital murder is murder as defined by section 19.01(b)(1) and intentionally committed in the course of committing robbery); *Howard v. State*, 650 S.W.2d 460, 464 (Tex. App.—Houston [14th Dist.] 1982), *aff'd*, 667 S.W.2d 524 (Tex. Crim. App. 1984) (holding that "if one intentionally or knowingly causes the death of an individual in the course of committing or attempting to commit aggravated robbery, he is guilty of capital murder just as if such killing occurred while in the course of committing or attempting to commit robbery"); *see also Montoya v. State*, 810 S.W.2d 160, 164–65 (Tex. Crim. App. 1989) (discussing similar language used in capital murder jury charge). Assuming error per the State's agreement, we consider whether the submission of an unindicted offense is reversible error.

Neither the United States Supreme Court nor the Texas Court of Criminal Appeals has yet described the erroneous submission of an unindicted offense as an error for which reversal is automatic. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 148–49, 126 S. Ct. 2557, 2564 (2006); *see also Daniels v. State*, 754

S.W.2d 214, 222 (Tex. Crim. App. 1988) (observing that jury-charge errors do not result in automatic reversal). Thus, we must review the trial court's error for harmlessness. *See Trejo v. State*, 280 S.W.3d 258, 261 (Tex. Crim. App. 2009). The standard for assessing harm from jury-charge errors depends on whether the defendant objected to the charge at trial. *Jimenez v. State*, 32 S.W.3d 233, 237 (Tex. Crim. App. 2007). Although Hudgins objected to the charge on various other grounds, he failed to object that the charge included a capital murder submission. When a defendant fails to make a proper objection to the submission of an unindicted offense, we will reverse only if the error is fundamental or so egregiously harmful that the defendant has not had a "fair and impartial trial." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984); *see Trejo*, 280 S.W.3d at 261. Errors that result in egregious harm are those that affect the very basis of the case, deprive the defendant of a valuable right, vitally affect a defensive theory, or make the case for conviction or punishment clearly and significantly more persuasive. *Almanza*, 686 S.W.2d at 171. Under an egregious harm analysis, we examine "the entire jury charge, the state of the evidence, including the contested issues and weight of the probative evidence, the arguments of counsel, and any other relevant information revealed by the record of the trial as a whole." *Warner v. State*, 245 S.W.3d 458, 461 (Tex. Crim. App. 2008).

Applying the above standard to this case, we conclude that no egregious harm accrued to Hudgins as a result of the error in the jury charge. The charge first explained that Hudgins was charged with murder and then went on to give the abstract law regarding the offense of murder in accordance with sections 19.02(b)(1) and 19.02(b)(2) of the Penal Code. *See* TEX. PENAL CODE ANN. § 19.02(b)(1) (defining murder as "intentionally or knowingly caus[ing] the death of an individual"), (b)(2) (defining murder as "intend[ing] to cause serious bodily injury and intentionally or knowingly committing an act clearly dangerous to human life that cause[d] the death of an individual"). But, consistent with a charge for capital murder, the third application paragraph erroneously instructs the jury that it can only find Hudgins guilty of murder if it finds that the murder was committed while in the course of committing an aggravated robbery. The charge thus required the State to prove not only all of the elements of murder as alleged in the indictment, but also additional elements establishing the commission of an aggravated robbery. This error increased the State's burden; it did not relieve the State of proving any element of the indicted offense of murder. A jury charge error that increases the State's burden by requiring the State to prove additional elements does not egregiously harm Hudgins; it benefits him. *See Watson v. State*, 693 S.W.2d 938, 941–42 (Tex. Crim. App. 1985).

The record also does not demonstrate that Hudgins was deprived of notice of the charges against him or was inadequately prepared to defend against the State's factual theory that he, Williams, and Pierre planned to rob the complainant and that the murder of the complainant occurred during that aggravated robbery. The record reflects that Hudgins knew that such would be the State's theory; that theory, after all, was consistent with his own recorded account of the events giving rise to the complainant's death. Most importantly, however, the jury did not actually convict Hudgins of capital murder, making this case distinct from those acknowledging fundamental error in the submission of an unindicted offense. *See, e.g.*, *Woodard v. State*, 322 S.W.3d 648, 658–59 (Tex. Crim. App. 2010) (noting that unobjected-to and unwaived submission of unindicted offense in jury charge followed by conviction of that offense meets egregious harm standard); *Almanza*, 686 S.W.2d at 173 (noting that "due process would be violated *per se* by convicting a person for murder when he had been indicted for a totally different offense such as robbery"). The jury returned a verdict that Hudgins was guilty of murder, not capital murder, and the trial court rendered judgment in accordance with the jury's verdict.

Accordingly, we overrule Hudgins's first issue.

## II. Felony Murder Submission

Hudgins next argues that he was denied due process of law because the third and sixth application paragraphs erroneously authorized the jury to find him guilty of a conspiracy to commit felony murder even though felony murder was not alleged in the indictment. We disagree.

The third and sixth application paragraphs, respectively, authorized a conviction if the jury found:

> Hudgins and Williams and/or Pierre entered into an agreement to commit the felony offense of aggravated robbery of [the complainant], and pursuant to that agreement, . . . they did carry out their conspiracy and . . . Irvin Williams and/or Pierre intentionally or knowingly caused the death of [the complainant] by shooting [him] with a deadly weapon, namely a firearm, and the murder of [the complainant] was committed in furtherance of the conspiracy and was an offense that [Hudgins] should have anticipated as a result of carrying out the conspiracy; or
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> …
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> Hudgins and Williams and/or Pierre entered into an agreement to commit the felony offense of aggravated robbery of [the complainant], and pursuant to that agreement, . . . they did carry out their conspiracy and . . . Irvin Williams and/or Pierre intended to cause serious bodily injury to [the complainant], and did cause the death of [the complainant] by intentionally or knowingly committing an act clearly dangerous to human life, namely, by shooting [him] with a deadly weapon, namely a firearm, and the murder of [the complainant] was committed in furtherance of the conspiracy and was an offense that the defendant should have anticipated as a result of carrying out the conspiracy. . . .

Neither of these paragraphs instructed the jury to consider whether Hudgins was guilty of the unindicted offense of felony murder as defined by the Penal

Code. *See* TEX. PENAL CODE ANN. §19.02(b)(3) (providing that person commits felony murder if he "commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual"). Rather, these paragraphs combined underlying theories of murder with an alternative "party liability" charge under section 7.02(b) of the Penal Code. *See* TEX. PENAL CODE ANN. §7.02(b) (West 2011). Party liability contemplates that conspirators to a felony are criminally responsible for felonies committed by other conspirators in furtherance of the conspiracy if the other felonies should have been anticipated. *See id.*; *see also Woodard*, 322 S.W.3d at 649. The language used in the third and sixth application paragraphs tracks the language used in section 7.02(b) providing that:

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

TEX. PENAL CODE ANN. §7.02(b). "It is well accepted that the law of parties may be applied to a case even though no such allegation is contained in the indictment." *Montoya*, 810 S.W.2d at 165; *see Marble v. State*, 85 S.W.3d 287, 287 (Tex. Crim. App. 2002).

Accordingly, we overrule Hudgins's second issue.

**Ineffective Assistance of Counsel**

In his third issue, Hudgins argues that his trial counsel was ineffective because he failed to request that the trial court instruct the jury that evidence presented by the State to impeach Broussard was not substantive evidence of guilt.

To establish ineffective assistance of counsel, Hudgins must show, by a preponderance of the evidence, (1) that his counsel's representation fell below the objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability that, but for his counsel's deficient representation, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064 (1984); *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). Appellate review of counsel's representation is highly deferential; we presume counsel's decisions fell within the wide range of reasonable and professional assistance. *Bone*, 77 S.W.3d at 833; *Mallet v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001); *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). To rebut the presumption of reasonable assistance, allegations of ineffectiveness must be firmly founded in the record. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). The record is best developed by collateral attack, such as a motion for new trial. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998). An appellate court may not reverse a conviction for

ineffective assistance of counsel when counsel's acts or omissions may have been based on sound trial strategy and the record contains no specific explanation for counsel's decisions. *Bone*, 77 S.W.3d at 830.

The record does not reflect a specific reason why Hudgins's counsel did not request a limiting instruction during the State's presentation of impeachment evidence. According to Hudgins, we should conclude that this failure was an oversight, and not strategic, because counsel noted during the charge conference that neither Broussard's testimony nor the State's impeachment evidence was evidence of guilt. But, Hudgins did not file a motion for new trial alleging ineffective assistance of counsel, so no evidence explaining counsel's trial strategy was developed. *Cf. Ex Parte Varelas*, 45 S.W.3d 627, 632 (Tex. Crim. App. 2001) (concluding that counsel's performance was deficient based on post-conviction affidavit from counsel clarifying that challenged omission was not result of trial strategy). Courts have recognized as reasonable strategy the decision not to request a limiting instruction in order to avoid reminding the jury of incriminating evidence. *See, e.g., Garcia v. State*, 887 S.W.2d 862, 881 (Tex. Crim. App. 1994); *Beheler v. State*, 3 S.W.3d 182, 186 (Tex. App.—Fort Worth 1999, no pet.). Absent record evidence regarding counsel's strategy, we cannot speculate as to whether a valid strategy existed, and thus Hudgins cannot rebut the strong presumption of reasonable assistance.

Accordingly, we overrule Hudgins's third issue.

## Conclusion

We hold that there is no reversible error in the trial court's jury charge. We also hold that Hudgins was not denied effective assistance of counsel. We affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Justices Jennings, Sharp, and Brown.

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