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Article

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On the evening of September 22, 1977, Betty Lynn Bennett, her husband and their three children were having a barbecue outside of their trailer home in a trailer park in Carrizo Springs, Texas. Their neighbor Bill Rankin was also present. Sometime during the course of the meal, Joyce Lee Lewis Garrett drove up and asked to join them. Sarah, a child of the Bennetts, saw a rifle in Joyce Garrett's car. Garrett told her that it was loaded and that she wanted to shoot Rankin because he had shot her dog. Nonetheless, Garrett was allowed to join the group.

Sarah and her mother left the party and entered the trailer in order to do the dishes. An argument broke out between Garrett and Rankin about the dog that had been shot. Garrett returned to her car and removed her rifle. She leaned over the trunk of the car and pointed the rifle towards the trailer. Rankin was facing the trailer, with his back turned to Garrett. As Sarah and her mother watched from the doorway of their mobile home, Garrett fired. The bullet struck Betty Bennett in the head, killing her. At trial, the jury convicted Joyce Garrett of murder. In *Garrett v. Texas*[1] the Court of Criminal Appeals reversed

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1. Garrett v. State, 749 S.W.2d 784 (Tex. Crim. App. 1986).

the conviction, holding that the evidence was insufficient to support a finding of guilt; Joyce Garrett was acquitted.[2]

Garrett's disturbing outcome is the most egregious in a series of decisions promulgated by the Texas Court of Criminal Appeals during the past decade.[3] The result is the product of a sufficiency of evidence analysis in which appellate courts compare the evidence presented to the jury charge alone.[4] Such a sufficiency review exceeds the constitutional safeguards announced by the United States Supreme Court.[5] While a state may provide greater rights than those protected by the federal constitution, doing so in this situation represents poor policy and ill-conceived law. This article will explore various methods for analyzing sufficiency of evidence and trace the evolution of Texas cases culminating in *Garrett*. Finally, the authors will suggest an alternative analysis that is consistent with constitutional due process and avoids the pitfalls of the current scheme.

I. CONSTITUTIONAL BASIS OF SUFFICIENCY ANALYSIS

The United States Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt.[6] The

2. *Id.* at 787-88.

3. *See, e.g.*, Stephens v. State, 717 S.W.2d 338 (Tex. Crim. App. 1986); *Garrett*, 749 S.W.2d 784; Fain v. State, 725 S.W.2d 200 (Tex. Crim. App. 1986); Williams v. State, 696 S.W.2d 896 (Tex. Crim. App. 1985); Boozer v. State, 717 S.W.2d 608 (Tex. Crim. App. 1984); Ortega v. State, 668 S.W.2d 701 (Tex. Crim. App. 1983); Benson v. State, 661 S.W.2d 708 (Tex. Crim. App. 1982).

4. In preparing this article, the authors attempted to contact personnel from other state courts about their methods of sufficiency analysis. Although by no means comprehensive, the responses suggest that the Texas method of comparing the evidence to the charge as given to the jury is unique. Most states seem to employ a method similar to California's. The substantive portion of the letter to this author from Michael Willemsen, Staff Attorney for Justice Allen E. Broussard of the California Supreme Court follows:

> The problem you raise arises in a somewhat different context in California practice. Judges in California generally instruct as to the abstract principles of law, and do not instruct on how those principles apply to the evidence. Thus one cannot compare the evidence to the judge's charge. Whether the instructions are correct or complete must, of course, be assessed in light of the complaint and the evidence. Incorrect or incomplete instructions is error, reversible if it is reasonably probable that the error contributed to the result.
>
> The cases you cited [*Benson*, 661 S.W.2d 708; *Garrett*, 749 S.W.2d 784.] appear to be ones in which the court's instructions explained only one theory of guilt, and the evidence instead supported a different theory. In such a case error is clear; prejudice depends on an assessment of the whole record. Your letter speaks of imperfect charges leading to an "acquittal." If, however, there is sufficient evidence to sustain the verdict on any theory, even one on which the jury was not instructed, the reversal would lead to a new trial, not to an acquittal. In other words, the judge's charge to the jury does not amend the indictment or information (he can only do this by express order).

5. *See, e.g.*, Jackson v. Virginia, 443 U.S. 307, 309 (1979) (explaining *In Re* Winship, 397 U.S. 358 (1970)).

6. *Id.*

due process guaranteed by the fourteenth amendment presupposes that no person shall be made to suffer "the onus of a criminal conviction except upon sufficient proof."[7] It is from this proposition that the sufficiency of evidence analysis has emerged. The standard for appellate review of the evidence 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."[8]

All errors occurring during criminal prosecutions which are not "sufficiency error" may be categorized as "trial error."[9] Trial error is well illustrated by *Messer v. State*.[10] In *Messer*, a cocaine possession case, the State and defense entered into an agreed stipulation of evidence. The consent for stipulation, however, was not approved and signed by the trial court as required by law.[11] The appellant argued that because the consent for stipulation was unsigned, the stipulation could not be considered as evidence. Without the stipulation, there was no evidence that the substance possessed by Messer was cocaine.

On original submission, the Court of Criminal Appeals agreed with Messer and ordered an acquittal. Upon rehearing, however, the State persuaded the court that the failure to comply with the statute regarding stipulated evidence was trial error rather than a failure by the State to produce sufficient evidence. The court distinguished the two types of error, holding that trial error represents a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect rather than a failure of proof of guilt.[12]

The distinction between trial error and sufficiency of evidence error is essential because of the consequences which the Constitution attaches to a finding of insufficiency. When the appellate court determines that the evidence is insufficient to support the conviction, the double jeopardy clause prevents retrial;[13] the defendant must be acquitted. The Supreme Court has deemed it irrelevant that a reviewing court rather

7. *Id.* at 316.

8. *Id.* at 319 (emphasis in original).

9. Burks v. United States, 437 U.S. 1, 14-17, (1978); *See also* Greene v. Massey, 437 U.S. 19, 21-22 (1978).

10. 729 S.W.2d 694 (Tex. Crim. App. 1986).

11. *See* TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon 1977). Stipulated testimony in a felony case may be either oral or written; however, the consent to the stipulation must be executed in writing and must have the trial court's approval in writing. Lewis v. State, 647 S.W.2d 753, 755 (Tex. App.—Austin 1983, no pet. Tex. Crim. App. 1983). Note, however, that the requirements of art. 1-15 do not apply in misdemeanor cases. Martin v. State, 745 S.W.2d 411, 412 (Tex. App.—Dallas 1988, pet. ref'd).

12. *Messer*, 729 S.W.2d at 699-700.

13. *Burks*, 437 U.S. at 16; *Greene*, 437 U.S. at 24.

than a trial court determines the evidence to be inadequate. "If the District Court had so held in the first instance, as the reviewing court said it should have done, a judgment of acquittal would have been entered and, of course, petitioner could not be retried for the same offense."[14] Double jeopardy may also prevent retrial for lesser included offenses.[15]

The double jeopardy clause is not triggered when the reversal is due to "trial error." The Supreme Court in *Burks v. United States*[16] carefully distinguished reversals caused by trial error from those resulting from evidentiary insufficiency:

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g. incorrect receipt or rejection of evidence, incorrect instructions or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.[17]

Reversal for trial error, therefore, does not preclude another trial. Confusion of these two distinct concepts by Texas appellate courts has led to unmerited acquittals. The failure to make this distinction has also led the Court of Criminal Appeals to mischaracterize the trial error of a flawed jury charge as evidentiary insufficiency.

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14. *Burks*, 437 U.S. at 10-11.

15. *Garrett*, 749 S.W.2d at 791. On rehearing, the court withdrew the portion of the opinion holding that Garrett could not be retried for a lesser included offense arising from the shooting of Bennett. The court concluded that this holding, and similar holdings in other cases, was advisory because the issue of double jeopardy was not actually at issue unless and until Garrett was subsequently charged with some lesser included offense. *Id.* at 804 (op. on reh'g). Nevertheless, the latest word from the high court, albeit advisory, is that such retrials are not permitted. *Id.* at 791. The Dallas Court of Appeals has heeded the advice of the Court of Criminal Appeals. In *Ex parte* Stephens, 753 S.W.2d 208 (Tex. App.—Dallas 1988, pet. filed), the court of appeals held that Stephens' prosecution for rape was barred by his prior appellate acquittal for aggravated rape. Stephens' 1983 rape conviction for aggravated rape was reversed and acquittal ordered because of insufficient evidence of the aggravating element. Stephens v. State, 683 S.W.2d 23 (Tex. App.—Dallas 1984), *aff'd*, 717 S.W.2d 338 (Tex. Crim. App. 1986). *See infra* text accompanying notes 61-69 for a discussion of *Stephens*. It is beyond the scope of this article to analyze whether the Dallas Court of Appeals' holding in *Ex parte* Stephens is correct.

16. 437 U.S. 1 (1978).

17. *Id.* at 15 (*quoted in Messer*, 729 S.W.2d at 699-700); *See also Ex parte* Duran, 581 S.W.2d 683, 684 (Tex. Crim. App. 1979); Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. CHI. L. REV. 365, 370 (1964).

II. Evolution of Texas Cases

A. The Progenitors: Benson *and* Ortega

The sufficiency analysis employed in *Garrett* represents a recent extension of a line of cases originating with *Benson v. State*.[18] *Benson* was a case of first impression regarding the felony offense of retaliation. The applicable statute provided that it is an offense if one "intentionally or knowingly harms or threatens to harm another . . . in retaliation for . . . the service of another . . . as a witness."[19] The evidence showed that Searlee Benson broke into the house where his ex-wife was staying in order to persuade her to drop pending assault charges. The trial court charged the jury that a "person commits the offense of retaliation if he intentionally or knowingly harms or threatens to harm another by an unlawful act *in retaliation for or on account of the service of another as a witness*."[20] Benson was convicted.

On appeal, the Court of Criminal Appeals dealt with the issue of whether "this 'private citizen complainant', who had not testified in any official proceeding, [is] a 'witness' as that term is used in the Retaliation statute."[21] The court concluded that in this context the private citizen complainant was not a witness. Consequently, when the evidence was compared with the charge, the court found *no* evidence that Benson coerced a witness. The court deemed the evidence insufficient and acquitted the defendant.

On the State's second motion for rehearing, the State argued that the reviewing court must look to the indictment exclusively and not to the charge in order to measure sufficiency. The court disagreed and found the indictment alone to be inadequate as a measure for sufficiency challenges.[22] Without citing any authority, the court stated, "we hold that when a charge is correct for the theory of the case presented we review the sufficiency of the evidence in a light most favorable to the verdict by comparing the evidence to the indictment *as incorporated into the charge*."[23] The court denied the second motion for rehearing.

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18. 661 S.W.2d 708 (Tex. Crim. App. 1982).

19. Act of June 14, 1973, ch. 399, § 1, 1973 Tex. Gen. Laws 883, 945 (codified at TEX. PENAL CODE ANN. § 36.06 (Vernon 1974), *amended by* Act of June 19, 1983, ch. 558, § 4, 1983 Tex. Gen. Laws 3237, 3238 (codified at TEX. PENAL CODE ANN. § 36.06 (Vernon Supp. 1989). The 1983 amendment cured the *Benson* problem by adding the category "prospective witness" as a protected class.

20. *Benson*, 661 S.W.2d at 710 (emphasis in original).

21. *Id.*

22. *See infra* text accompanying notes 53-59.

23. *Benson*, 661 S.W.2d at 715 (emphasis in original).

The court utilized the *Benson* analysis in *Ortega v. State*.[24] The State prosecuted Mike Ortega for credit card abuse. The statute under which he was charged prohibits the use of a credit card with the intent to fraudulently obtain property *or* services.[25] The indictment alleged that Ortega "intentionally and knowingly with intent to fraudulently obtain property *and* services from Ninfa Escobedo, did use and present a credit card."[26]

The application paragraph of the charge[27] instructed the jury that if they find beyond a reasonable doubt that Mike Ortega did "with intent to fraudulently obtain property *and services* ******** present a credit card that had not been issued to him, they will find appellant guilty as charged."[28] In reviewing the sufficiency of the evidence on appeal, the court held that the State must demonstrate the culpable mental state of intent to obtain both property *and* services. The court found this requirement met by the demonstration that the defendant had attempted to purchase clothing with the credit card. The court further held that the employee's acts of receiving and processing the papers necessary for a credit transaction constituted services fraudulently obtained.[29]

On rehearing, Judge Campbell reexamined the culpable mental state that the court on original submission held was required. While conceding that the clerk's labor was a service, the tribunal held that the evidence was insufficient "to show such labor or service was the intended object of appellant's desire . . . . The steps taken to extend him credit were merely incidental to the transaction."[30] Thus, the evidence did not demonstrate an intent to procure services. Because the charge required "services" as well as "goods" to be proven, the State failed to present sufficient proof; therefore, the court ordered an acquittal.

The meaning of the *Ortega* case is difficult to ascertain. *Ortega* may be read as a case very similar to *Benson v. State*. In both cases, it may be argued that the court faced a case of first impression—the exegesis of a penal statute for which the elements were unclear. The court rejected the State's interpretation of the elements and set out a different standard for those elements. Alternatively, *Ortega* may be read as a clerical error gone awry. By replacing the statutory "or" with the

24. 668 S.W.2d at 707.

25. TEX. PENAL CODE ANN. §32.31(b) (Vernon 1974).

26. *Ortega*, 668 S.W.2d at 703 (emphasis altered).

27. The application paragraph is that part of the charge which applies the law of the case to the facts elicited at trial.

28. *Ortega*, 668 S.W.2d at 706-07 (emphasis in original).

29. *Id.* at 704-05.

30. *Id.* at 706.

charged "and," the burden put upon the State was increased beyond that required by the statute. Interpreted this way, the case is a harbinger of the ill-conceived analysis of *Garrett v. State*.

B. The Progeny: Boozer *and* Garrett

The concepts introduced in *Benson* and *Ortega* were mentioned in other cases subsequently handed down by the Court of Criminal Appeals.[31] The next major modification of the jurisprudence in this area, however, was set out in *Boozer v. State*.[32] Terry Lynn Boozer was accused of burglary. Although the opinion provides a scant summary of the evidence presented at trial, it appears that much of the evidence came from a possible accomplice. Consequently, under the law, the State was required to corroborate the accomplice witness testimony.[33] The trial court charged the jury that the witness was an accomplice as a matter of law and that they, therefore, must find independent evidence to support the accomplice's story.[34] The jury apparently did so, finding Boozer guilty.

On appeal, Boozer contended that the corroboration evidence was insufficient. The high court ultimately agreed and reversed the conviction. The State also pressed the point on appeal that based upon the trial evidence, the witness was not an accomplice in spite of the charge. The court responded that the sufficiency of the evidence must be measured by the charge that was given.[35] Citing *Benson*, the court stated, "It follows that if evidence does not conform to the instruction given, it is insufficient as a matter of law to support the only verdict of 'guilty'

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31. *See, e.g.*, Stephens v. State, 717 S.W.2d 338 (Tex. Crim. App. 1986); Williams v. State, 696 S.W.2d 896 (Tex. Crim. App. 1985).

32. 717 S.W.2d 608 (Tex. Crim. App. 1984).

33. TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979):

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

34. *Boozer*, 717 S.W.2d at 609.

35. *Id.* at 610.

which was authorized."[36] The State acquiesced to this charge by failing to object.[37]

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36. *Id.* at 611. The court cites a number of articles from the Code of Criminal Procedure as support for the proposition that evidence is insufficient when the proof does not comport with the jury instructions. *See, e.g.*, Tex. Code Crim. Proc. Ann. art. 1.15 (Vernon 1979) ("No person can be convicted of a felony except upon the verdict of a jury duly rendered . . . ."); *id.* at art. 36.13 (". . . the jury is the exclusive judge of the facts, but it is bound to receive the law from the court and be governed thereby."); *id.* at art. 38.04 (". . . . [t]he jury, in all cases, is the exclusive judge of the facts proved . . . ."); *id.* at art. 36.14 ("The judge shall . . . deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case . . . ."); *id.* at art. 38.03 (Vernon Supp. 1989) ("All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt."); *id.* at art. 37.07, § 2(a) (Vernon 1979) ("In all criminal cases . . . which are tried before a jury on a plea of not guilty, the judge shall . . . first submit to the jury the issue of guilt or innocence . . . ."); *id.* at art. 37.07, § 1(a) ("The verdict in every criminal action must be general."); *id.* at art. 37.07, § 1(b) ("If the plea is not guilty, they [the jury] must find that the defendant is either guilty or not guilty. . . ."); *id.* at art. 37.01 ("A 'verdict' is a written declaration by a jury of its decision of the issue submitted to it in the case."); *id.* at art. 37.12 ("On each verdict of acquittal or conviction, the proper judgment shall be entered immediately."); *id.* at art. 42.01 § 1 (Vernon Supp. 1989) ("A judgment is the written declaration of the court . . . showing the conviction or acquittal of the defendant. . . . [T]he judgment should reflect: (4) Whether the case was tried before a jury or a jury was waived; (5) The submission of the evidence, if any; (6) In cases tried before a jury that the jury was charged by the court; (7) The verdict or verdicts of the jury . . .; (8) In the event of a conviction that the defendant is adjudged guilty of the offense as found by the verdict of the jury. . . ."); *id.* at art. 1.04 (Vernon 1979)("No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of law of the land."); *id.* at art. 40.03 ("New trials . . . shall be granted . . . for the following causes, and for no other; (9) Where the verdict is contrary to law and evidence. A verdict is not contrary to the law and evidence, within the meaning of this provision, where the defendant is found guilty of an offense of inferior grade to, but of the same nature as, the offense proved.")[article 40.03 *repealed by* Act of August 26, 1985, ch. 685, § 1, 1985 Tex. Gen. Laws 2472.]

37. *Boozer*, 717 S.W.2d at 612. It is unclear whether there is authority for a State objection. Article 36.14 of the Code of Criminal Procedure provides for objections to the jury charge. However, it provides only for objections by the accused: "Before said charge is read to the jury, the defendant or his counsel shall have a reasonable time to examine the same and he shall present his objections thereto in writing, distinctly specifying each ground of objection." TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 1988). It appears that the trial court need not give the State an opportunity to review and object to the charge. Judge Clinton suggests, however, that the State does have the right and duty to object:

> While it is true that Article 36.14, V.A.C.C.P., provides for objections by an accused only, the Court has found it 'elementary that the State has the right to have issues in its favor submitted properly,' Berry v. State, 80 Tex. Crim. 87, 88, 188 S.W. 997, 998 (1916), and has made it the duty of a trial court to submit issues 'on the theory of the State's contention' raised by the evidence, Flewellen v. State, 83 Tex. Crim. 568, 575, 204 S.W. 657, 661 (1917). *See also* Cantu v. State, 170 Tex. Crim. 375, 378, 341 S.W.2d 451, 452 (1960) and Jaggers v. State, 104 Tex. Crim. 174, 177, 283 S.W. 527, 528 (1926). Surely a trial court would not be in error if it afforded the prosecutor an opportunity to be heard regarding defects in the charge. [citations corrected]

Boozer, 717 S.W.2d at 614 n. 1 (Clinton, J., concurring in the denial of the State's motion for leave to file motion for rehearing.)

Judge Clinton's conclusion that the trial court would not err in allowing the State time to review the charge and in receiving its objections begs the question. It is equally apparent under

In *Boozer*, the court faced a markedly different situation from those confronted in *Benson* and *Ortega*. In *Benson* and *Ortega*, the court enacted a change in substantive law.[38] It was this new interpretation that gave rise to the sufficiency problem. *Boozer*, however, does not alter the court's position on accomplice testimony. Unlike Benson and Ortega, the State did not attempt to convict Boozer based upon an incorrect statutory theory. The emphasis in *Boozer* shifted from statutory interpretation to strict reliance on the charge given to the jury.

The court carried its close *Boozer* scrutiny of the jury charge to extreme in *Garrett v. State*.[39] In order to convict Joyce Garrett of murder, the State was required to prove that she intended to shoot Betty Lynn Bennett. That intent, under the law of transferred intent, could be proved by showing that Garrett intended Rankin's death.[40] The case was apparently tried under this theory. The application paragraph of the charge, however, did not incorporate the theory of transferred intent. Under the authority of *Benson*, *Ortega*, and *Boozer*, the court compared the evidence to the application paragraph and found insufficient evidence of Garrett's intent to kill Bennett. The court reached this conclusion notwithstanding the definition of transferred intent in the paragraph immediately following the application paragraph.[41]

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article 36.14 that the trial court would also "not err" if it *refused* the prosecutor the opportunity to object.

The Court of Criminal Appeals has yet to face a case where the prosecutor did in fact object to the charge which placed a heavier burden on the State. In *Ortega*, the court gave some indication of its position in such a situation:

> And if the record reflects the prosecutor has pursued this course [objecting] to protect his lawful obligations, but the trial court has nevertheless refused the amendment to the indictment or submission of the requested charge, and the evidence is found insufficient to support the verdict *because of* the trial court's errors in this regard, those reviewable rulings of the trial court found erroneous by the appellate court constitute trial error,' and the State is free to pursue another prosecution.

Ortega, 668 S.W.2d at 705 n. 10. The court leaves to speculation how an objection can transmute sufficiency error into trial error.

38. *See supra* text accompanying notes 18-30.

39. 749 S.W.2d 784. See *supra* text accompanying note 1, for a factual recitation.

40. TEX. PENAL CODE ANN. § 6.04(b)(2) (Vernon 1974).

41. The court's rationale, relegated to a footnote, was:

> We are not persuaded that because the court's charge abstractly defined transferred intent in a paragraph appearing immediately after the paragraph applying the law of murder to the facts of the case ... the jury was therefore authorized to convict appellant upon that theory. In no way can the application paragraph (which begins, incidentally: "Now bearing in mind the *foregoing* instructions ...") be construed to refer to the abstract definition, so even "reading the charge as a whole," ...would not inform the jury that it could convict appellant on that theory. Mere juxtaposition does not amount to authorization.

Garrett, 749 S.W.2d at 789 n. 6.

Although citing to *Benson* and *Ortega*, the *Garrett* court further distorted the importance of the charge in a sufficiency analysis. With each decision, the court has moved further away from a broad, rational evaluation of sufficiency which incorporated the theory of the case and towards a narrow examination of the application paragraph. On rehearing in *Garrett*, the court denied that its focus was on the application paragraph alone. The court deems the relevant inquiry to be whether the matter was "effectively presented" in the charge. Without elaboration, the court held that the theory of transferred intent was not effectively presented despite the recitation of the abstract principle of law in the paragraph immediately below the application paragraph.[42]

III. THEORY OF THE CASE

A. Introduction

In initiating the sufficiency of evidence review in *Benson*, the Court of Criminal Appeals established "theory of the case" as the touchstone of a correct charge. "[W]hen a charge is correct for the theory of the case presented we review the sufficiency of the evidence in a light most favorable to the verdict by comparing the evidence to the indictment as incorporated into the charge."[43] Without explanation, the court abandoned the specific reference to theory of the case in *Ortega* as well as subsequent cases. *Fain v. State*,[44] however, resurrected this language.

In *Fain*, appellant raised the issue of sufficiency of evidence to support the enhancement paragraphs.[45] In effect, the charge required the

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42. *Id.* at 802-03 n. 2 (op. on reh'g).

43. *Benson*, 661 S.W.2d at 715.

44. 725 S.W.2d 200 (Tex. Crim. App. 1986).

45. The indictment alleged as enhancement paragraphs, the following:

> And the grand jurors aforesaid do further present that before the commission of the aforesaid offense in the First Paragraph by the said Clifton Eugene Fain, to wit: on the 27th day of April A.D., 1977 in the 10th Judicial District Court of Galveston County, Texas in Cause Number 34,111, the said Clifton Eugene Fain was convicted of the felony offense of False Imprisonment. And the grand jurors aforesaid do further present that before the commission of *each of the aforesaid offenses in the First and Second Paragraphs* by the said Clifton Eugene Fain, to wit: on the 26th day of September A.D. 1972 in the 54th District Court of McLennan County, Texas in Cause Number 72-201-C, the said *Clifton Eugene Fain was convicted of the felony offense of Rape.* Against the peace and dignity of the State.

Id. at 201. (emphasis added)

The charge to the jury asked them to find that:

> *such last named conviction of Rape, if any, occurred and the judgment thereon became final prior to the commission of the offense for which the said defendant was convicted, if he was, in Cause Number 72-201 in the 54th Judicial District Court of McLennan County, Texas*, and that said convictions, if any, in said Cause Number 72-201-c for Rape and in Cause Number 34,111 for False Imprisonment, as aforesaid, occurred, and

jury to find the logically impossible fact that the defendant was convicted of a prior offense before that prior offense had occurred. The court ignored the appellant's sufficiency claim holding that "the claim as presented did not constitute a valid claim of insufficient evidence."[46] Hearkening back to *Benson*, the court reasoned that, "no one maintains that the trial court's instruction was 'correct for the theory of the case presented.' Instead in setting out his insufficient evidence claim . . . appellant showed that the trial court's instruction was manifestly incorrect."[47]

Thus, Fain was hoist with his own petard. The gravamen of his sufficiency claim provided the appellate court with the necessary framework for a waiver analysis. The court was prepared to reconsider this claim as charging error. In this form, however, the error was subject to an *Almanza*[48] analysis and, consequently, was held harmless.

If *Fain* is correct, then *Garrett* must be reexamined. The court made clear in *Garrett* that the theory of the case was transferred intent.[49] Further, the opinion made clear that transferred intent was not effectively presented in the charge.[50] The court avoided the question of whether the charge was correct for the theory of the case and concluded that the evidence when compared to the charge was insufficient.[51] If the State's theory of the case in *Garrett* was that Garrett shot Bennett while intending to shoot Rankin, and the charge failed to incorporate the theory of transferred intent, then how could the charge be correct for the theory of the case presented?

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that the judgments therein became final prior to the commission of the offense of Rape for which you have found the defendant guilty;

Id. at 202. (emphasis in original)

46. *Id.*

47. *Id.*

48. Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1984).

49. *Garrett*, 749 S.W.2d at 788.

50. *Id.* at 802-03 n. 2 (op. on reh'g).

51. In his concurring opinion in *Fain*, Judge Clinton offers a reason why the charge is incorrect in *Fain* and, perhaps, correct in *Garrett*:

> [I]n failing to require proper sequence of offenses, the charge authorized punishment as an habitual 'on a theory not only not available under the indictment, but also not viable under the law. The only verdict of true which the jury was authorized to find was premised upon a finding of facts which do not fully establish habitual status' under Sec. 12.42(d), supra. It would be anomalous to measure the sufficiency of evidence against an authorization that reduces the State's burden of proof from that which is minimally required under the law, rather than increases it, as in *Boozer*, *Williams* and *Ortega*.

Fain, 725 S.W.2d at 204 (Clinton, J., concurring in part and dissenting in part.). In *Garrett*, as in *Boozer*, *Williams* and *Ortega*, the jury charge increased, rather than decreased, the State's burden of proof. Judge Clinton's distinction starts with the premise that *Fain* involves a reduction of the State's burden. Fain's charge appears, however, to *increase* the State's burden in that it sets out a proof requirement that could *never* be met. *See supra* text accompanying note 46.

B. What is "Theory of the Case"?

Traditionally, reviewing courts in Texas analyzed sufficiency challenges by comparing the evidence presented in the case to the statutory elements of the offense.[52]

> Many cases discuss sufficiency without reference to either the indictment or the charge. Rather they discuss the elements of the offense and whether the evidence supports the statutory elements. A charge should contain the statutory elements so that the conviction is based on the law and on the jury's determination of the evidence as applied to that law.[53]

Benson, however, says that the statutory elements alone are not a proper litmus test for sufficiency. Rather, the court mandates a recognition of the interaction between the indictment, proof and charge.[54]

The Court of Criminal Appeals has advocated this holistic, trial-oriented approach over the State's contentions that the evidence should be compared to the indictment alone. The indictment fails as a satisfactory standard for sufficiency analysis for several reasons. Initially, the indictment by its purpose is directed to the trial court and the defendant rather than the jury. The charging document serves to give the court jurisdiction over the case.[55] The indictment also satisfies due process requirements by putting the defendant on notice of the crime for which he is charged.[56] In addition, the indictment only sets out the statutory elements of the offense and, consequently, fails to incorporate issues of law essential to a complete sufficiency analysis, such as accomplice testimony,[57] transferred intent[58] or the law of parties.[59] This problem

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52. *See, e.g., Benson*, 661 S.W.2d at 715. Interviews with former briefing attorneys of Texas appellate courts reveal that their instructions from the judges when dealing with a sufficiency challenge, was to photocopy the statute setting out the offense and read the statement of facts to look for evidence on each statutory element. *See also supra* note 4.

53. *Benson*, 661 S.W.2d at 715.

54. *See id. Benson* implies that the "theory of the case" includes the indictment, proof *and* the charge. The circularity of this reasoning is apparent. The charge is correct for the theory of the case—which is the charge—when it properly encompasses the charge—which is the theory of the case.

55. *See id.* at 713; American Plant Food Corp. v. State, 508 S.W.2d 598, 603 (Tex. Crim. App. 1974).

56. *See, e.g., Benson*, 661 S.W.2d at 713; Sattiewhite v. State, 600 S.W.2d 277, 282 (Tex. Crim. App. 1979)(op. on reh'g).

57. *See, e.g., Boozer*, 717 S.W.2d at 610 n.4.

58. *See, e.g., Garrett*, 749 S.W.2d at 784.

59. *See, e.g.*, Staten v. State, No. 05-86-00903-CR (Tex. App.—Dallas Aug. 17, 1987, pet. ref'd). Although *Staten* is an unpublished opinion which under rule 90 of the Rules of Appellate Procedure has no precedential value, it is instructive in the application of the *Garrett* formula to the law of parties. In *Staten*, the Dallas court found the evidence insufficient to show that Staten caused the victim's death by shooting him with a handgun. The evidence showed instead that Staten's companion shot the victim in the course of a robbery in which Staten participated.

of underinclusion also prevents the elements of the offense, as set out in the statute, from serving as the measure of evidentiary sufficiency.

Sufficiency might also be judged by measuring the evidence presented to "what manifestly the State believed, however erroneously, was the theory of the offense it had proven presumably as gleaned from its presentation of the evidence at trial."[60] This method requires a reviewing court to compare 'the evidence to the evidence' in order to determine sufficiency. Besides this tautology, however, the method also cedes broad control over the appeal to the State. Permitting the trial evidence to suggest the theory under which the State tried the case encourages "ex post facto" reasoning to support the conviction. Theoretically, under this method the courts could affirm convictions founded upon conspiracy or attempt without those offenses being charged. Such an approach was rejected by the court of criminal appeals in *Stephens v. State*.[61]

Haron Stephens was charged with aggravated rape.[62] The jury found him guilty of this offense but the appellate court held the evidence of the aggravating element insufficient as a matter of law. The court reversed the conviction and ordered an acquittal. On the State's petition for discretionary review, the court of criminal appeals agreed that the evidence was insufficient. By Stephens' admission, he was guilty of rape. However, there was no evidence that he was present in the room when the three other men who raped complainant threatened

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Although there was plentiful evidence to show Staten's culpability as a party to the offense of murder, the application paragraph of the charge did not authorize the jury to convict under this theory. Because there was no evidence proving that Staten committed the murder as set out in the application paragraph, the appellate court, following *Garrett*, reversed the conviction and ordered an acquittal.

60. Judge Clinton in his *Fain* dissent sets up a straw man as a standard for the "theory of the case" only to knock it down by analyzing the hypothetical given by the court in *Benson*:

> Undercutting this argument, however, is the analogy drawn at the very end of the opinion in *Benson*. There it was asserted that when a burglary indictment alleged the specific intent to commit theft, 'and the State proved an unlawful appropriation from the owner,' while the charge only authorized conviction on a theory of theft by receiving stolen property, a reviewing court would be bound to find the evidence insufficient as a matter of law. '[footnote and citation omitted] Manifestly, under this hypothetical, the theory of the case presented' by the evidence would be theft by taking, rather than by receiving stolen property. Nevertheless, in spite of its earlier pronouncement, the Court concluded the evidence would be measured against the charge.

Fain, 725 S.W.2d at 203-204 (Clinton, J., concurring in part and dissenting in part).

61. 717 S.W.2d 338 (Tex. Crim. App. 1986).

62. The crime was allegedly committed on December 23, 1981, when the crime was rape, not sexual assault. *See* Act of June 14, 1973, ch. 399, § 1, 1973 Tex. Gen. Laws 883, 916, *amended by* Act of April 30, 1981, ch. 96, § 1, 1981 Tex. Gen. Laws 203, *repealed by* Act of June 19, 1983, ch. 977, § 12, 1983 Tex. Gen. Laws 5321 (recodified as aggravated sexual assault at TEX. PENAL CODE ANN. § 22.021 (Vernon Supp. 1989)).

her with serious bodily injury.[63] Even as a party to the offense, Stephens could not be guilty, the court ruled, because he did not aid and abet the threats of the principals.

The State argued that the conviction could be sustained because the evidence was sufficient under a theory of cause and result[64] or conspiracy.[65] The court rejected these arguments, holding:

> The jury was not charged under these sections and so was not authorized to convict under either theory. In the absence of a charge under 6.04(b)(1) [cause and result] or 7.02(b) [conspiracy], the court of appeals was correct: it was necessary for the State to prove that appellant aided, encouraged, or committed every element of the offense. Absent those charges there was no authority by which to transform appellant's intent to commit rape to an "intent to promote or assist the commission of the offense" of aggravated rape.[66]

Thus, while the court apparently concedes that the evidence suggests alternate theories of criminal culpability, the court rejects them as a means to sustain the conviction. Such theories were not the focus of the State at trial.

The court also has rejected the prosecution's attempts to "refine" the trial theory during the appeals process. On the first rehearing of *Benson*,[67] the State's attorney contended that the State presented sufficient evidence to support the indictment allegation that Benson intended to commit the offense of retaliation—so long as the court narrowed "retaliation" to the alternative theory that the intended victim was an informant rather than a witness. The court noted:

> While the State today advances a provocative argument, it is apparent that the State also acquiesced at trial to the court's unnecessary limitation of the legal theory in issue, to one which was not established by that party's evidence. Thus, as a procedural matter, we believe the State's complaint is behindhand: the trial is over, the verdict in, the proverbial damage done.[68]

Appellate argument, therefore, is not the source for theory of the case.

In *Stephens*, the court also suggested that the theory of the case was presented by the charge alone. Since "the State requested no special charges and made no objections to the court's charge we may only

63. The rape statutes provided that rape was aggravated when the victim was compelled to submit by threats of death, serious bodily injury or kidnapping. *Id.*

64. *See* TEX. PENAL CODE ANN. § 6.04(b)(1) (Vernon 1974).

65. *See id.* at § 7.02(b).

66. *Stephens*, 717 S.W.2d at 340.

67. 661 S.W.2d 708.

68. *Id.* at 712. The State "acquiesced" by failing to object to the charge. *See supra* note 37.

assume therefore that the charge adequately represented the theory of guilt upon which the State prosecuted appellant."[69]

The *Stephens* approach to sufficiency review, however, seems to stand the *Benson* review upon its head. *Benson* held that the charge was the measure for sufficiency when it represented the theory of the case presented. Theory of the case was discerned by examining the indictment, proof *and* the charge.[70] *Stephens*, however, would make the theory of the case whatever the charge said it was. Thus, every charge would be correct. Every charge would per se set out the theory of the case because every charge would be the theory of the case.

C. Summary

Although theory of the case nominally exists in Texas jurisprudence[71], the phrase's utility within sufficiency of the evidence analysis raises many questions. *Fain* suggests the concept's continuing vitality.[72] Inexplicably, theory of the case, born in *Benson*, was ignored in *Garrett*.[73] Along the way, the benchmarks suggested by the Court of Criminal Appeals to replace theory of the case have proven unsatisfactory.[74] The court, recognizing this problem, continually stretched for an alternative, and in doing so, overlooked the fundamental issue that no single component *can* be satisfactory. "The charge together with the proof and the indictment reflects the State's theory of the offense."[75]

By dropping the theory of the case language in *Garrett*, without modifying its reliance upon the charge, the Court of Criminal Appeals creates sufficiency error out of trial error. Rather than recognizing that the faulty charge was *incorrect* for the theory of the case and, accordingly, reversing and remanding for new trial, the *Garrett* court acquitted appellant after focusing solely on the charge as a measure for sufficiency; a charge that was arguably unsound for the theory of Garrett's trial. The court errs in losing sight of *Benson*.

IV. Looking Towards A Solution

A. The Hint: Fain v. State

Fain v. State[76] suggests a workable framework for resolving the evidentiary questions of *Garrett*. It does so by resurrecting a concept

69. *Stephens*, 717 S.W.2d at 341. *See supra* note 37.
70. *See Benson*, 661 S.W.2d at 715.
71. *See id*; *Fain*, 725 S.W.2d at 202.
72. *See Fain*, 725 S.W.2d at 202.
73. 749 S.W.2d 784.
74. *See supra* text accompanying notes 52-70.
75. *Benson*, 661 S.W.2d at 715.
76. 725 S.W.2d 200.

abandoned since *Benson*, the theory of the case. In *Fain*, the court of criminal appeals recognized that the charge failed to reflect the theory of the case. The *Fain* court refused to address the defendant's insufficiency of the evidence claim.

> In the instant case, no one maintains that the trial court's instruction was 'correct for the theory of the case presented.' Instead, in setting forth his insufficient evidence claim for the Court of Appeals, appellant showed that the trial court's instruction was manifestly incorrect. Appellant's claim as presented did not constitute a valid claim of insufficient evidence. The Court of Appeals did not err in addressing instead the predicate claim of jury charge error.[77]

The court then turned to the defendant's claim of charging error. The defendant did not object at trial; therefore, under *Almanza v. State*[78], the error must cause egregious harm to be reversible. Finding no such harm the court overruled the error and affirmed the conviction.

By hearkening back to *Benson*, the Court of Criminal Appeals in *Fain* returned to a proper sufficiency of the evidence standard. The problem, however, lies in *Fain*'s application of the standard. The Court of Criminal Appeals completely overlooked defendant's claim of insufficiency of evidence point by reducing the issue to charging error. The court recognized that since the *Fain* charge does not comport with the theory of the case, the judges need not compare the evidence to it. The court erred, however, by refusing to analyze the evidentiary sufficiency at all. Because the Constitution mandates sufficiency analysis,[79] the Court of Criminal Appeals' failure to consider these points works an injustice upon an appellant.[80]

B. The Model: A Suggested Solution

Having illustrated the *Fain* problem of incorrect application of a valid standard, the next logical step is to suggest an alternative. When the actual charge is correct for the theory of the case presented, as divined from the indictment and the proof presented at trial, it should be

77. *Id.* at 202.

78. 686 S.W.2d 157.

79. *Jackson*, 443 US 307, 316 (1979).

80. As stated previously, the sustaining of a sufficiency point entitles an appealing defendant to an acquittal. Thus, courts are required to address a sufficiency point of error even when reversing and remanding on some other point. *See* Thompson v. State, 621 S.W.2d 624, 627 (Tex. Crim. App. 1981); Hooker v. State, 621 S.W.2d 597, 598-99 (Tex. Crim. App. 1980); Swabado v. State, 597 S.W.2d 361, 364 (Tex. Crim. App. 1980). The court of criminal appeals recognized in *Boozer* that sufficiency must be addressed even if it agreed with the State's argument that the error was trial error. *Boozer*, 717 S.W.2d at 611 n. 6. Nevertheless, the court ignores this precept in *Fain*.

the measure for the sufficiency analysis. When, however, the actual charge is incorrect, it must be reconstructed to give the court an accurate benchmark for its analysis. The basis for reconstruction must be the theory of the case as espoused by *Benson*. This hypothetical charge allows a reviewing court to evaluate evidentiary sufficiency of the case, giving due consideration to burdens which would not be met if the measure were the indictment[81] or the statutory elements[82] alone.

Viewed this way, *Fain* presented no actual evidentiary sufficiency problem. The indictment, and presumably the evidence presented at trial, adequately set out and proved the two prior offenses.[83] The problem arose when the jury charge did not accurately reflect this theory. The alternative method does not overlook Fain's sufficiency claim, but rather compares the evidence to a hypothetically perfect charge, reflecting what actually transpired at trial.

In comparing the evidence to a hypothetically correct charge, a court would openly acknowledge that the actual charge was in some manner erroneous. Charging error may entitle a defendant to a new, error-free trial.[84] A flawed charge represents trial error[85], requiring a remand rather than an acquittal as dictated when the evidence is insufficient.[86] Under the suggested analysis, *Fain* would raise a question of reconciling the actual charge with the hypothetically correct charge.[87]

Fain illustrates a chief difficulty of treating these issues as charging error alone. Any analysis must be governed by the Court of Criminal Appeals opinion in *Almanza v. State*.[88] *Almanza* sets a standard for reviewing the harm arising from an incorrect charge. If the defendant objected to a charging error, then a reversal arises upon a demonstration by the defendant of *some* actual harm.[89] If, however, the defendant fails to object, his burden is to show egregious harm leading to a

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81. See *supra* text accompanying notes 54-59.

82. See *supra* text accompanying note 52.

83. *See supra* note 43.

84. *See, e.g.*, Woods v. State, 749 S.W.2d 246, 248-49 (Tex. App.—Fort Worth 1988, no pet.); Nugent v. State, 749 S.W.2d 595, 599 (Tex. App.—Corpus Christi 1988, no pet.).

85. The Supreme Court specifically has categorized incorrect instructions as trial error rather than sufficiency error. *See Burks*, 437 U.S. at 14 n.8; Hopt v. People, 104 U.S. 631, 634-635 (1881).

86. See *supra* text accompanying notes 12-17, for a discussion of the distinctions between trial error and sufficiency error.

87. Appellant Fain raised a point of error attacking the charging error separate from his sufficiency point; the court addressed it separately, albeit unsatisfactorily.

88. 686 S.W.2d 157.

89. *Id.* at 171.

denial of a fair and impartial trial.[90] Few defendants meet this burden.[91]

Applying *Almanza* to the issues arising in *Fain* presents the accused with a dilemma. Expecting a defendant in a criminal case to object to a charge that is favorable to him, albeit incorrect, is unrealistic. The jury could, conceivably, follow the court's specific instructions and acquit, thereby making unnecessary any appeal. In *Fain*, for instance, had the jury faithfully applied the instructions, it would have found the enhancement paragraph not true.[92] Defendants appear unlikely to apprise the court of such errors. It is patently unfair to expect defendants to choose between erasing a favorable error at trial and shouldering a nearly impossible burden on appeal.

Although *Fain* demonstrates that the Court of Appeals will apply *Almanza* in such cases, the opinions of the court suggest at least two alternatives which may be more equitable. Judge Clinton, in a concurring and dissenting opinion to *Fain*, indicates that the court should ignore *Almanza* in these type cases. "[T]here are some errors so egregious that [a review for egregious harm under the standard laid down in *Almanza v. State* (cite omitted)] will not save them."[93] In effect, Clinton calls for a denial of *Almanza* since *Almanza* does not acknowledge a category of egregious harm per se.[94] Hearkening back to pre-*Almanza*, he labels such problems as automatically reversible "fundamental error."[95] "A trial that was fundamentally unfair at the time it took place, because the jury was not compelled to perform its constitutionally required role, can not be rendered fundamentally fair in retrospect by what amounts to nothing more than appellate review of sufficiency of the evidence."[96] The Court of Criminal Appeals, however, has appeared unwilling to retract the scope of *Almanza* and to carve out this specific charging error exception.[97]

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90. *Id.*

91. *See, e.g.*, Mercado v. State, 718 S.W.2d 291, 295 (Tex. Crim. App. 1986); Kucha v. State, 686 S.W.2d 154, 156 (Tex. Crim. App. 1985). Both appellants failed to show egregious harm; thus, the court affirmed the convictions despite error in the charges.

92. *Fain*, 725 S.W.2d at 206 (Teague, J., dissenting). Judge Teague characterizes the jury in *Fain* as "a 'run-away' jury that chose to ignore the trial judge's instructions."

93. *Id.* at 204 (Clinton, J., concurring in part & dissenting in part).

94. *See Almanza*, 686 S.W.2d at 171. The United States Supreme Court has also recognized that few errors are automatically reversible.

95. *Fain*, 725 S.W.2d at 205 (Clinton, J., concurring in part & dissenting in part).

96. *Id.* (quoting Rose v. Clark, 478 U.S. 570, 590 (1986)(Blackmun, J., dissenting)).

97. It should be noted that the court has recently recognized a type of charging error which requires a harm analysis under rule 81 of the Rules of Appellate Procedure rather than under *Almanza*.

Another alternative suggested, perhaps unwittingly, by the court permits a circumvention of *Almanza*'s egregious harm standard. In *Ortega*, the Court of Criminal Appeals included a footnote hinting that the problem lies not with the charge but with the jury. "The most readily apparent harm to appellant . . . is that he has been convicted of a crime by the jury's disregard of a proof failure; in other words, had the jury assiduously followed the court's instructions which authorized them to convict, appellant would have been acquitted."[98]

Thus, a correct solution to the defendant's dilemma may be the recognition that the problem ultimately lies not with the faulty charge, but rather with the jury's unwillingness to obey its instructions. The *Almanza* dilemma, therefore, disappears as the issue becomes expressed as jury misconduct; an error outside the purview of *Almanza*.[99]

V. Reevaluating *Garrett*: A Modest Proposal

Not surprisingly, applying the alternative analysis to *Garrett* would alter the result. As the Court of Criminal Appeals' opinion makes clear, the case was presented upon a theory of transferred intent.[100] Comparing this theory of the case to the actual jury charge presented reveals the charge's inadequacy as a proper measure for sufficiency. *Benson* requires the charge to be this measure only when it is correct for the theory of the case presented by the evidence and the indictment.[101]

Since the actual charge is unsatisfactory as a sufficiency of evidence standard, a reviewing court must create a hypothetically correct charge incorporating the indictment and the proof.[102] By employing this sufficiency analysis, the court gives the defendant her full due process protections. An appellate court may look to a hypothetically correct charge because sufficiency of the evidence is to be judged not by what this particular jury concluded, but rather by what any rational trier of fact would decide. With their heavy reliance upon the actual charge, the *Garrett* court misapplies the constitutional safeguards promulgated by the Supreme Court in *Jackson v. Virginia*.[103] Judge

98. *Ortega*, 668 S.W.2d at 703 n. 6. *See Fain*, 725 S.W.2d at 206 (Teague, J., dissenting); *see also supra* text accompanying note 88.

99. This is not to suggest the absence of a harm analysis. No error, including jury misconduct, leads to reversal of a conviction unless it is harmful. TEX. R. APP. P. 81(b). This harm analysis begins with the presumption that the error is harmful. The State must overcome this presumption by showing that the error was harmless beyond a reasonable doubt.

100. *See supra* text accompanying notes 39-41.

101. *Benson*, 661 S.W.2d at 715.

102. *See supra* text accompanying notes 50-52.

103. 443 U.S. 307 (1979).

McCormick effectively highlights this objection in his dissenting opinion in *Benson*:

> [T]he majority is in error when it asserts that a reviewing court is to judge the sufficiency of the evidence by looking at how the court charged the jury. This erroneous assertion is based on the false premise that when an appellate court is reviewing the sufficiency of the evidence it is looking to determine whether this particular jury was correct in the verdict it reached. That is not the premise on which sufficiency of the evidence is to be determined. The purpose of an examination as to sufficiency of the evidence is not to determine whether this particular jury erred in their verdict, but whether "a rational trier of fact" could have found the essential elements of the offense beyond a reasonable doubt.[104]

In Joyce Garrett's case the evidence appears to be sufficient under a theory of transferred intent as would be incorporated into a hypothetically correct charge. Thus, the case presents no insufficiency problem meriting acquittal.

A reviewing court, however, must grapple with the inconsistencies between the charge delivered and the model charge. According to the approach hinted at in *Ortega*, the jury acted improperly by failing to follow the court's instructions.[105] Having found harmful[106] jury misconduct, the *Garrett* court would remand for an error-free trial rather than acquit.

VI. CONCLUSION

In an aberration to traditional sufficiency analysis, the Court of Criminal Appeals has acquitted defendants by confusing trial error with sufficiency error. This problem is an affront to due process and to the public respect for the criminal justice system. The alternative analysis advocated in this article seeks to protect the legitimate rights of the defendant as well as the societal interest in insuring that the guilty are punished according to law.

104. *Benson*, 661 S.W.2d at 717-18 (McCormick, J., dissenting).

105. *See supra* note 92, for Judge Teague's colorful characterization of the "run-away" jury.

106. The *Garrett* court does not develop the facts under a Rule 81 harm analysis. See *supra* note 97. However, the presumption of harm, with no State rebuttal, would require reversal as harmful error.