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**The Court's Charge:  
Was it Right? Did it Hurt?**

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## **Introduction**

Appellate jury charge issues come in many forms. From lesser included offenses to unanimity and proper mental state definitions, the type of problems that can come up in a court's charge vary depending on the offense, the defense, and the evidence. One thing that is constant is the importance of the court's charge to the jury and on appeal. Since charge issues may be brought up on appeal for the first time, they are often fertile ground for appellate review.

In an attempt to focus this broad issue, this paper surveys the Texas Court of Criminal Appeal opinions from 2015 and 2016 that deal with jury charge issues. Along with analyzing the Court's opinions, the legal analysis and Court's holdings are cited to give appellate practitioners tips and points for reviewing their own cases for potential charge issues.

### **State v. Ambrose: Did it Hurt?**

In *State v. Ambrose*, 487 S.W.3d 587 (Tex. Crim. App. 2016), the Court of Criminal Appeals looked at whether egregious harm analysis is the proper standard for jury charge error at a motion for new trial<sup>1</sup>.

In a motion for new trial, the trial court made a finding of fact that there was jury charge error because the jury should have been instructed as to the accomplice-witness rule. The trial court also found that Ambrose was egregiously harmed by this lack of the instruction. The State appealed. Without deciding that there was jury charge error, the Fourth Court disregarded the trial court's harm analysis and found that Ambrose was not harmed by the lack of the accomplice-witness instruction. Ambrose petitioned and argued to the CCA that the Fourth Court should have deferred to the trial court's harm finding, but the CCA disagreed.

The CCA only briefly looks at accomplice witness law and then, like the Fourth Court, assumes that there was a jury charge error. The court applies the Almanza framework to decide whether Ambrose was harmed by the jury charge. The Court points to a 2006 CCA opinion which held that Almanza is the proper harm standard even when it is the trial court that finds there was jury charge error. *Igo v. State*, 210 S.W.3d 645 (Tex. Crim. App. 2006). *Id.* at 594.

The court looks at policy and reasoning behind Texas Code Criminal Procedure Article 36.19 and requiring preservation because the law wants to encourage the timely correction of any potential trial errors. The court does not want to encourage defendants to sit on trial charge issues that misdirect the jury and then raise the issue in a motion for new trial. *Id.* at 595.

Ambrose argued that applying the Almanza standard would be inconsistent with the appellate court deferring to trial court's findings. But the CCA did not find the two standards to be inconsistent because a harm analysis under Almanza is not the sort of factual findings that a court of review usually defers. Instead, the court found that this harm analysis is a mixed question of law and fact to which deference is only given some of the time. In Ambrose's case, even though the trial court labeled its findings "findings of fact," the analysis was actually a mixed question of law and fact, and the court's review did not turn on an evaluation of witness credibility or demeanor in Ambrose's case. *Id.* at 596. For example, the trial court did not make any factual determinations on the credibility of witness Ramirez, who, the trial court found, was offered transactional immunity in exchange for her testimony.

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<sup>1</sup> This was an eight judge unanimous opinion written by Judge Alcala. Judge Yearly did not participate.

Once the CCA reaffirmed the logic of *Igo* and cemented Almanza as the proper harm standard, the CCA performed their harm analysis, which affirmed the Fourth Court’s finding of no egregious harm. Even though they affirmed the Fourth Court’s ultimate finding, they focused on the record differently. Instead of looking for evidence of Ambrose’s intent, the CCA looked for evidence tending to connect her to the offense—which is what Texas Code Criminal Pro. Article 38.14 requires—only that there is some non-accomplice evidence connecting the accused to the offense. *Id.* at 597-98.

Practice points from *Ambrose*:

- If jury charge error is the reason the trial court is granting a new trial, then make sure the trial court applies the proper harm analysis. Put another way: when deciding if a trial court abused its discretion in granting or denying a motion for new trial, look at whether the court applied the proper harm standard.
- The *Almanza* harm standard is alive and well. Make sure any harm analysis uses the proper standard as provided by *Almanza*.
- In *Ambrose*, the CCA did not have to defer to the trial court’s findings. But if the harm analysis in your case turned on the credibility of a witness, then the reviewing court may have to defer and this analysis could be different.

### **Kent v. State: Was it Right?**

*Kent v. State*, 483 S.W.3d 557 (Tex. Crim. App. 2016) dealt with a theft case with four identified complainants and Kent was charged with stealing over \$200,000 pursuant to one scheme or continuing course of conduct. The State petitioned to the CCA after getting reversed by the 14<sup>th</sup> Court of Appeals based on a finding of harmful jury charge error.<sup>2</sup>

The State argued that the original jury charge was right because aggregate theft is one offense and each separate transaction did not require unanimity, and even if not right, it did not hurt because the defense did not depend on separating out each transaction from the aggregate. The appellant argued that the jury charge was wrong because each theft is a distinct unit of prosecution and that just because the State can aggregate the theft amounts, the jury still has to be unanimous as to each separate theft transaction that supports the aggregated amount.

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<sup>2</sup> Unanimous opinion written by Judge Johnson.

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