CASE NOS. 07-22-00303-CR; 07-22-00304-CR; 07-22-00305-CR

IN THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS
AT AMARILLO

TORREY LYNNE HENDERSON,
AMARA RIDGE,
JUSTIN ROYCE THOMPSON

V.

THE STATE OF TEXAS.

On appeal from County Court at Law of Cooke County, Texas
In case nos. CR20-65983; CR20-65984; CR20-65985
The Honorable John M. Morris Presiding

APPELLANTS' REPLY BRIEF

Savannah Kumar (Lead Counsel)

Brian Klosterboer

Edgar Saldivar

Adriana Piñon

ACLU Foundation of Texas, Inc.

Emerson Sykes*

Brian Hauss*

American Civil Liberties Union Foundation, Inc.

Additional counsel on following page

ORAL ARGUMENT REQUESTED

Sorsha Huff

Deandra Grant Law

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Introduction

The State's response brief is not grounded in the statutory text of Section 42.03(a)(1) or the case law interpreting it. Rather, the State's brief is based on layers of speculation about every element of the offense that no rational factfinder could find beyond a reasonable doubt. The evidence is insufficient to show that Appellants knowingly and intentionally rendered any passageway "impassable" or "unreasonably inconvenient or hazardous" or that they lacked legal privilege or authority to be on the passageway. Since the evidence is insufficient to prove a violation under Section 42.03(a)(1), this Court should reverse the judgments of the trial court and order judgments of acquittal for all three Appellants.

But even if the State's evidence had been sufficient to determine Appellants' guilt, which it was not, reversible errors in the jury charge and during voir dire are independent reasons to reverse Appellants' convictions.

I. The evidence in the record is insufficient to show that Appellants obstructed any passageway.

Contrary to the State's assertion, Appellants are not asking this Court to become "a thirteenth juror" or re-weigh evidence. State's Br. at 17. Instead, even considering the trial record in the light most favorable to the verdict, Appellants contend that no rational trier of fact could find beyond a reasonable doubt that the three Appellants themselves knowingly and intentionally rendered any passageway

"impassable" or "unreasonably inconvenient or hazardous." Tex. Penal Code § 42.03(a)(1).

The State's theory of this case is based on layered speculations and suspicions about Appellants' alleged connection to other unnamed marchers, Appellants' locations and actions during a peaceful march, and pure conjecture—with no evidentiary support—of Appellants' state of mind during the march. While the legal sufficiency review offers deference to the jury, that deference is not boundless. Triers of fact are "not permitted to come to conclusions based on mere speculation or factually unsupported presumptions." *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). It is well established that "the jury is not permitted to draw conclusions based on speculation because doing so is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012); *Spillman v. State*, No. PD-0695-20, 2022 WL 946347, at *2 (Tex. Crim. App. Mar. 30, 2022) (cleaned up) (deference to the jury is balanced "with [the court's] duty to ensure the evidence 'actually supports a conclusion that the defendant committed the crime that was charged.'"); *Hacker v. State*, 389 S.W.3d 380, 873-74 (Tex. Crim. App. 2013) (rejecting sufficiency of the evidence where it was merely "suspicion linked to other suspicion"); *Riles v. State*, No. 02-19-00421-CR, 2021 WL 4319600, at *7 (Tex. App.—Fort Worth Sept. 23,

2021) (mem. op.) ("we cannot defer to facts that weren't proven nor to inferences that aren't reasonable").

A. The State acknowledges that there is no evidence that Appellants themselves actually obstructed a passageway.

i. Per the text of Section 42.03(a)(1) and the U.S. Constitution, Appellants cannot be held criminally responsible for the acts of unidentified others simply because they were among the leaders of PRO Gainesville.

The State acknowledges there is insufficient evidence that Appellants themselves actually obstructed a passageway, which is why the State's argument on appeal hinges on the faulty and unsubstantiated premise that Appellants can be held criminally liable under Section 42.03(a)(1) for the actions of unidentified others simply because Appellants were leaders of PRO Gainesville. Instead of pointing to any evidence where Appellants themselves committed an act of obstruction,[1] the State only cites to instances where other unnamed individuals briefly stopped on California Street or continuously walked along the passageway. *See infra* Section I(A)(ii). While those actions of unnamed individuals still fall short of the statute's clear requirement that a passageway must be "impassable" or "unreasonably inconvenient or hazardous" to sustain a conviction under Section 42.03(a)(1),

[1] The State falsely claims that other "marchers' movement into the street was the result of the Appellants leadership, ultimately blocking the entire lane of westbound traffic on California Street," State's Br. at 6, but this allegation is wholly unsupported by any evidence in the record.

evidence relating to the actions of unnamed others is also legally insufficient to support Appellants' convictions.

The State argues, without supporting case law, that Appellants should be held criminally liable for unidentified people even though those unidentified people acted contrary to Appellants' clear instructions to stay on the sidewalk, RR7.161:6-13, and despite a lack of evidence that those unidentified people were even part of PRO Gainesville or that Appellants knew them. RR7.78:13-17 (Chief Phillips testifying that "nobody was ever specifically identified as being PRO Gainesville or not, except obviously we know who the leadership was"). But the State's theory of liability here is contrary to the text of Section 42.03(a)(1) and U.S. Supreme Court precedent. The text of Section 42.03(a)(1) makes clear that "a person commits [the] offense" if the person "intentionally, [or] knowingly" obstructs a passageway "regardless of… whether the obstruction arises from his acts alone or from his acts and the acts of others." Section 42.03(a)(1) makes clear that others' actions alone cannot be the basis for criminal liability.[2]

[2] Section 42.03(a)(1) differs significantly from the text of Section 42.02 (the riot statute), which provides that being part of an "assemblage of seven or more persons," constitutes a violation when the conduct of other members of the group results in a certain set of outcomes. Tex. Penal Code § 42.02. The relevant statute here has no such language, and Appellants were not charged with violating the riot statute. Under Section 42.03(a)(1), outcomes resulting from the actions of group members cannot be the basis to find individuals guilty unless the individual had a direct role in causing the obstruction and possessed the necessary mens rea.

Furthermore, the U.S. Supreme Court established in *Claiborne* that in the First Amendment context, civil liability "may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982); *see Doe v. McKesson*, No. 17-30864, 2023 WL 4044558, at *9 (5th Cir., June 16, 2023) ("[T]he First Amendment does not allow the government to hold a protest leader liable anytime a protestor does something unlawful. Rather, liability must be tailored such that there is a sufficiently close relationship between the leader's actions and the protestor's unlawful conduct.").

Far from having any intent to advance illegal aims or encouraging others to commit unlawful acts, Appellants acted within the bounds of the law and repeatedly urged others to do so, too. *See infra* Section II(D). Appellants consistently prioritized public safety and worked with law enforcement to ensure they could exercise their First Amendment rights in a peaceful and lawful way. RR7.228:13-17; Defs'Ex.5. In fact, the State's brief quotes Appellant Thompson's testimony that he "met with law enforcement…on several occasions and the goal was to make sure that we were…following all the rules to make sure that we were doing everything correct."

State's Br. at 9 (citing RR7.167-68).[3] Appellant Thompson also gave a speech before the march instructing people to stay on the sidewalks, indicating he did not intend for people to walk in the street. RR7.161:6-13. A defense witness testified: "I was with [Appellants] at enough leadership meetings that I know they never intended to create a public hazard of any kind to hurt anyone. Safety was always a part of what we did." RR7.228:13-17. Likewise, Appellants testified that rather than believing they were engaging in any illegal activity, they simply believed they were following the instructions of law enforcement. RR7.241:13-24; RR7.170:18-20.

The State clings to the theory that Appellants are criminally responsible for the actions of others without offering any legal basis for such a premise or any evidence to show that Appellants intended to encourage others to commit unlawful acts.[4] Appellants' convictions should accordingly be reversed.

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[3] The State claims that "Appellant Thompson admonished the crowd not to break the law and stay on the sidewalks, yet he felt that because of the advice of counsel he could ignore the instructions of law enforcement." State's Br. at 8. Appellant Thompson testified that he was aware of a "right to protest"—not that he intentionally sought to ignore law enforcement in any way. *Id.* at 9; RR7.167:23-24.

[4] Without record evidence, the State's response claims that "[a]fter the State concluded its evidence, the Appellants testified without any affirmative defenses being presented and admitted the elements of the offense during cross exam." State's Br. at 13. This is clearly rebutted by the record as Appellants have never admitted to any material elements of the obstruction offense.

The State also makes unfounded accusations against Appellants, claiming they "had no regard for the needs of the public, instead they acted solely out of their own interests" and that Appellants believed "that the First Amendment allows

ii. The State fails to point to evidence demonstrating that Appellants actually obstructed a passageway.

A conviction under Section 42.03(a)(1) requires actual obstruction by the defendant, rather than obstruction arising only from the acts of others. Tex. Penal Code § 43.03(a)(1). In response, the State misattributes three instances of alleged obstruction to Appellants. State's Br. at 4-13. These instances are: (1) "a young man with a bicycle" and a "young lady with a long rifle" whose presence on the street caused a driver to pause on California Street, State's Br. at 4-5, neither of whom were ever identified, let alone prosecuted; (2) "marchers' movement into the street" at around Red River Street, State's Br. at 6-7; and (3) "the obstruction near the courthouse" at the intersection of California Street and Dixon Street. State's Br. at 12. The evidence is insufficient to show that Appellants are responsible for—or even participated in—these alleged obstructions, and finding otherwise would require deferring to unproven facts or impermissibly stacking inference upon inference.

Contrary to the State's assertion, the evidence does not and cannot show that Appellants were involved in the first alleged obstruction where an unidentified biker and armed person caused a driver to pause for no longer than a minute and a half. Appellants' Br. at 23 fn.4. There is no trace of any of the Appellants in the testimony the State quotes in describing that obstruction, State's Br. at 4-5, nor are they

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for the breaking of a law." *Id.* at 24. These personal attacks are inflammatory and unsupported by the record.

identified in the video clip the State points to, State'sEx.1 1:22:30-1:23:07. In fact, when GPD Captain Garner was asked "[w]ho stopped the traffic," the testimony went as followed:

Q: Did Amara Ridge?

A: No, she did not.

Q: Did Torrey Henderson?

A: No, she did not.

Q: Did Justin Thompson?

A: No, he did not.

. . .

Q: Did you see them tell the people who did stop traffic to stop traffic?

A: I did not see that.

RR6.188:3-16.

And, even if Appellants had any connection with those unidentified individuals in some indirect way, the driver testified that she slowed down and stopped her car for only "twenty seconds to a minute and a half" for the protesters to go "all the way across the road," RR7.55:10; 56:25-57:1. Such a momentary obstruction or inconvenience is insufficient to sustain a conviction of "obstructing" a passageway. *See Sherman v. State*, 626 S.W.2d 520, 526 (Tex. Crim. App. 1981) (en banc); *infra* Section I(b).

For the second alleged obstruction, the State again claims without any basis that "[t]he marchers' movement into the street was the result of Appellants' leadership," State's Br. at 6, and claims the sidewalk was perfectly accessible to marchers. The video clip the State cites, State'sEx.1 at 1:26:15-1:27:27, does not have Appellants in it at all, let alone any evidence that Appellants led others into the street. Instead, the clip clearly shows that the sidewalk was narrowed by metal bars, State'sEx.1 at 1:26:47, which pushed protesters onto the shoulder of the street and left them unable to step back onto the sidewalk due to a long pool of water blocking the way. The State also cites testimony by Investigator Greer that Appellant Thompson was "at the rear," rather than leading the marchers in any direction. The State also points to a photo, State'sEx.3, showing Appellant Ridge and Appellant Henderson in the street, but makes no effort to explain how the photo reveals any obstruction because none is evident in that exhibit. Further, the State does not counter Appellants' argument that the photo simply shows Appellants mid-stride, in broad daylight, with no vehicles behind them being obstructed in any way. Appellants' Br. at 25. The photo communicates nothing about the length of time Appellants were in the street and does not show any actual obstruction occurring or caused by Appellants Ridge or Henderson. *Id.* In short, the State fails to present any argument based on this evidence that Appellants actually rendered California Street

impassable or unreasonably inconvenient or hazardous, as required by Section 42.03(a)(1).

As for the third alleged obstruction, the State also fails to explain how Appellants' actions violate Section 42.03(a)(1). The State argues that the group blocked an intersection by crossing the street while there was an "orange or red hand sign," rather than a green sign to cross. State's Br. at 12. However, the State does not identify any Appellant specifically as crossing during an "orange or red hand sign." *Id.*[5] The State also has no response to Appellants' argument that Appellants appeared to walk continuously across an empty street while being escorted back to the courthouse by officers at the end of their march and therefore did not make the passageway impassable or unreasonably inconvenient or hazardous, and certainly did not knowingly or intentionally do so. Appellant Thompson testified: "I remained on the sidewalk until I noticed that officers were – appeared to be escorting us in an orderly fashion back to the courthouse." RR7.170:18-20; *see infra* Section I(C).

[5] Throughout its brief, rather than putting forth any evidence that Appellants' actions met the elements of obstruction, the State merely points to evidence that would indicate, at most, that Appellants may have violated sections of the Texas Transportation Code that they were not charged with, such as Section 552.001(c), which prohibits entering a roadway at a "red or steady yellow signal" or Section 552.005 which prohibits "crossing at a point other than crosswalk." Tex. Transp. Code § 552.001(c); § 552.005. These statutes, unlike Tex. Penal Code Section 42.03(a)(1), have fine-only penalties of under $200 and cannot be conflated with 42.03(a)(1). Tex. Transp. Code § 542.401.

Critically, the State also does not challenge Appellants' central contention that the trial record shows that Appellants were continuously moving along a passageway throughout the eleven minutes of their peaceful march. *See infra* Section I(B); Appellants' Br. at 15-20. The record is bare of any evidence establishing that Appellants obstructed a passageway. Instead, the record shows that Appellants exercised their First Amendment rights by calmly walking along a public street and sidewalk in a safe and orderly way. Because the State cannot prove beyond a reasonable doubt that each of the Appellants engaged in obstruction within the meaning of Section 42.03(a)(1), the evidence is legally insufficient to convict Appellants.

B. The State fails to address the text of Section 42.03(a)(1) and the case law requiring a passageway to be rendered "impassable" or "unreasonably inconvenient or hazardous" to sustain Appellants' convictions, instead erroneously conflating Section 42.03(a)(1) and Section 42.03(a)(2) and relying on case law applying an inapplicable statute.

In the State's view, simply stepping foot onto a passageway constitutes an obstruction under Section 42.03(a)(1), which is in direct conflict with the text of Section 42.03(b) and the case law requiring a passageway to be rendered "impassable" or "unreasonably inconvenient or hazardous" to sustain Appellants' convictions. The word "obstruct" is clearly defined by the statute itself as "to render impassable or to render passage unreasonably inconvenient or hazardous." Tex.

Penal Code § 42.03(b). The text of the statute makes clear that simply stepping onto a passageway or moving along a passageway does not meet the Penal Code's definition of obstruction.

The Court of Criminal Appeals made clear in *Sherman v. State* that "what is prohibited is the rendering impassable or the rendering unreasonably inconvenient or hazardous the free ingress or egress to the struck premises" and that causing a momentary obstruction or inconvenience is insufficient to sustain a conviction of "obstructing" a passageway. 626 S.W.2d 520, 526 (Tex. Crim. App. 1981) (en banc); *see also Morrison v. State*, 71 S.W.3d 821, 826 (Tex. App.—Corpus Christi Edinburg 2002, no pet.) (citing a treatise interpreting Section 42.03 to find that "no violation of the statute is proven by evidence that shows the defendant only caused a slower passage or momentarily impeded progress.") The State does not address *Sherman* or the text of Section 42.03 but instead claims that "[t]here is no statutory defense to obstructing a highway or passageway based on the Appellants 'continuously marching'" since "[m]arching on a main thoroughfare through a community is an obstruction to vehicular traffic." State's Br. at 18. This overbroad interpretation of Section 42.03 is only supported by the testimony of a lay witness at trial, Sergeant Jones, who hypothesized that "[e]very time one of them walked out in the roadway it was an obstruction violation" and "theoretically those could have been separate counts." RR6.138:17-25. This erroneous interpretation squarely

conflicts with Texas precedent establishing that an obstruction violation only occurs where a passageway is rendered "impassable" or "unreasonably inconvenient or hazardous," because interpreting the statute more broadly "would subject virtually every mail carrier and delivery person to prosecution on a daily basis." *Morrison*, 71 S.W.3d at 826. As *Morrison* recognized, "[t]his would be an absurd result which [courts] must avoid." *Id.*

The State ignores the entire section of Appellants' opening brief citing *Sherman* and its progeny to show no Texas court has ever interpreted the obstruction statute to apply to those causing a momentary stoppage, which Appellants here did not cause, let alone to apply to those who, like Appellants, moved continuously without causing any stoppage. Appellants' Br. at 15-20. The State puts forward no reason to ignore clearly established precedent that "there is *no* probable cause to arrest under [Section 42.03] without a showing that the individual actually 'render[ed] [passage] impassable or . . . render[ed] passage unreasonably inconvenient or hazardous.'" *Herrera v. Acevedo*, No. 21-20520, 2022 WL 17547449, at *1 (5th Cir. Dec. 9, 2022) (cleaned up).

Without addressing the binding case law interpreting Section 42.03(a)(1) — the only statute that Appellants were charged with violating—the State relies solely on a case interpreting Section 42.03(a)(2) that does not provide any basis for Appellants' conviction. Throughout its brief, the State uses language from Section

42.03(a)(2), which focuses solely on disobeying a "reasonable request or order to move . . . to prevent obstruction of a highway." But this unindicted offense is not relevant to this case and cannot be used to establish the sufficiency of Appellants' convictions. *See* CR 6.

The State relies on *Hardy v. State*, 281 S.W.3d 414 (Tex. Crim. App. 2009), but does not explain how it is relevant to this case and apparently does not realize it only supports Appellants' arguments. State's Br. at 20. *Hardy* was a case "of first impression" dealing with convictions for disobeying a reasonable order or request to move under Section 42.03(a)(2) where "no actual obstruction [under Section 42.03(a)(1)] actually occurred." 281 S.W.3d at 414. *Hardy* concluded that even a conviction under Section 42.03(a)(2) requires "that any potential obstruction must be capable of rendering the highway impassable or to render passage unreasonably inconvenient or hazardous." *Id*. at 424. In *Hardy*, appellants did not comply after local officials read them a notice instructing them to remove their tents from a "right of way" area on the side of the street to "prevent interference with traffic, and protect the safety of the traveling public." *Id.* at 416. Still, concluding that no potential obstruction existed, the Texas Court of Criminal Appeals affirmed the court of appeals' reversal of appellants' convictions and judgments of acquittal. *Id.* at 424-25. The Court of Criminal Appeals in *Hardy* cautioned lower courts against confusing the language and standards of actual obstruction under Section 42.03(a)(1)

and failure to obey a reasonable request or order to move under Section 42.03(a)(2), explaining that "Section (a)(1) is unambiguously intended to criminalize actual obstruction of a public passageway, thus § (a)(2)(A) cannot mean the same thing if we, as directed, give effect to each part of the statute." *Id*. Because the appellants in *Hardy* were convicted under Section 42.03(a)(2), it has no bearing on this case; but even if it did, it would support Appellants' argument that convictions cannot be sustained as obstruction where there is no showing of the predicate: rendering a passageway impassable or unreasonably inconvenient or hazardous.

While the State asserts that *Lauderback v. State* is the appellate case most on point here, State's Br. at 25-26, it never cites to *Lauderback* to advance its argument that continuous marching constitutes obstruction. This is unsurprising because the jury in *Lauderback*, just as in *Hardy*, convicted the appellant of violating Section 42.03(a)(2) rather than Section 42.03(a)(1), making it inapplicable to the case at bar. 789 S.W.2d 343, 345 (Tex. App.—Fort Worth 1990). The State does not attempt to explain how the unique factual situation in *Lauderback*, where a woman was instructed to move out of the street three times while she was stopped in a lane of traffic with a "sign on the back of [her] wheelchair that prevented her from seeing traffic and prevented approaching traffic from seeing her," has any bearing on Appellants' conviction under Section 42.03(a)(1). *Id*. Unlike the appellant in *Lauderback* who triggered a "number of calls [to the police] that appellant was

causing an obstruction," *id.,* Appellants here were continuously moving and did not render any passageway "impassable" or "unreasonably inconvenient or hazardous."

C. The State fails to show that Appellants had the requisite mens rea to support the conviction.

Even if the evidence had revealed that Appellants' actions resulted in obstruction, the evidence remains legally insufficient to prove that Appellants knowingly and intentionally rendered any passageway "impassable" or "unreasonably inconvenient or hazardous." In attempting to establish that Appellants had the requisite mens rea under Section 42.03(a)(1), the State overwhelmingly relies on audio evidence containing the traditional protest chant, "Whose streets? Our streets", to prove that Appellants had the mens rea of intentionally obstructing the passageway. State's Br. at 21. The State cites no evidence at all to prove that Appellants knew their actions could amount to the obstruction of any passageway, and the State does not respond to Appellants' arguments that Appellants were following the guidance of officers and did not render any passageways unreasonably inconvenient, or at all dangerous. Appellants' Br. at 28-29.

There is no evidence that Appellants even uttered the phrase "Whose streets? Our streets," let alone that it has any bearing on Appellants' state of mind.[6] *See*

[6] The State also points to audio about "shut[ting] down" the street, State's Br. at 21, but again there is no testimony in the record indicating that any

RR6.123:14-21. The trial court only allowed this chant to be heard by the jury because it was specifically *not* "held out by the state as evidence of intent to obstruct traffic." RR7.121:9-18. The State's use of this chant to try to establish mens rea on appeal plainly contradicts the trial court's ruling. Moreover, the only Appellant to whom the State attributes the chant is Appellant Henderson, but the record evidence does not show she actually participated in the chant. RR7.15:1-11. Instead, the record indicates only that the chanting began shortly after Investigator Greer made eye contact with Appellant Henderson. *Id.* The words of unidentified others cannot be the basis for proving that Appellants had the requisite mens rea under Section 42.03(a)(1).

Appellants chanted this or had a role in advocating for any street to be shut down. *See* RR6.126:22-25.

The State also hints in other parts of its brief that Appellants have the requisite mens rea because certain Appellants were instructed to get off the roadway but disobeyed those instructions. However, "disobeying a reasonable request or order to move issued by a person the actor knows to be or is informed is a peace officer" is a violation under Section 42.03(a)(2), not a component of the mens rea requirement of Section 42.03(a)(1). Furthermore, Appellant Henderson, the sole Appellant accused of ignoring an order to move, testified unequivocally that she did not tell Investigator Greer "no" to getting out of the street, RR7.242:2, and she was not even in the street when he made eye contact with her. RR7.171:9-13.

Finally, in its conclusion, the State offers a baseless theory that Appellants "blocked traffic by crossing and displaying a firearm to obstruct a vehicle in the lane of travel," because they "were not achieving the reaction they had hoped for either from the attendees or the people holding opposite views." State's Br. at 44. There is nothing in the record that substantiates this theory, and it was not offered at trial.

Even if Appellants had joined the crowd in chanting the phrase "Whose streets? Our streets," this chant is irrelevant in showing whether Appellants intended to do anything, let alone obstruct a passageway. The chant commonly refers to the nature of public streets as belonging to the people in a democracy and being traditional public fora for First Amendment activity. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). At most, the chant alludes to the use of public streets as part of the "privileges, immunities, rights, and liberties of citizens." *Id*. In no way does the chant suggest an intent by Appellants to take any particular action, and it does not prove that Appellants had the mens rea to obstruct any passageway as Section 42.03(a)(1) requires. The State does not contest the Court of Appeals' holding in *McQueen v. State* that "unspecified conduct that is criminalized because of its result requires culpability as to that result," because the State cannot meet its burden to prove beyond a reasonable doubt that Appellants intended to obstruct a passageway and knew they were obstructing it. 781 S.W.2d 600, 603 (Tex. Crim. App. 1989). Interpreting the chant as evidence of intent to obstruct would require impermissibly deferring to complete speculation. *See Hooper*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007).

D. The State fails to show that Appellants lacked legal authority to use the passageway.

Because a violation under Section 42.03(a)(1) requires a person to act "without legal privilege or authority," the State argues that Appellants lacked any

privilege to walk on California Street. Setting aside whether simply stepping onto a street can be construed as "obstruction," which Appellants deny, the State does not address, let alone counter, Appellants' arguments that the First Amendment gives marchers the privilege to peacefully walk along California Street to exercise traditional free speech rights without a permit. Further, the State's evidence that Appellants never had permission to walk along this historic downtown passageway is contradictory and cannot be legally sufficient to prove that Appellants used the street without privilege. The State also attempts to sidestep, but cannot rebut, Appellants' remaining First Amendment arguments.

The State does not challenge Appellants' evidence and well-settled law establishing they have a First Amendment right to peacefully march on a public street without a permit. The Supreme Court has repeatedly recognized the basic rule "that a street . . . is a quintessential forum for the exercise of First Amendment rights." *Packingham v. North Carolina*, 137 U.S. 98, 104 (2017). Indeed, streets "immemorially . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague*, 307 U.S. 496 at 515.

The State erroneously suggests that Appellants were privileged to use the sidewalk, but not the street. State's Br. at 5. Although the State raises testimony about the movement of marchers between sidewalk and street, the legal distinction

that the State tries to draw fails because neither the First Amendment nor Section 42.03(a)(1) differentiate between sidewalks and streets as public fora. The Supreme Court makes clear that streets and sidewalks are equally public fora for free speech purposes. Both "public streets *and* sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 480, 480 (1988) (emphasis added). Just as Captain Garner acknowledged that "[a]nyone can walk on the sidewalk" and protest without permission, RR6.182:19-24, the First Amendment allows anyone to likewise walk on the street and protest without a permit. Indeed, the text of the Texas obstruction statute makes no distinction between a street and sidewalk. *See* Tex. Penal Code § 42.03(a)(1) (applying equally to any "highway, street, sidewalk . . . to which the public or a substantial group of the public has access").

Even under the State's erroneous theory that Appellants only had the legal privilege to march on the sidewalk, the trial record clearly shows that Appellants were granted permission to walk in the street by local authorities. Captain Garner testified that while at the scene, GPD officers in fact did allow the group "to stay" on California Street to avoid stepping in water. RR6.165:14-19 (emphasis added).[7]

[7] As noted in Appellants' opening brief (fn. 3), Appellants were not charged with "disobey[ing] a reasonable request or order to move" under Section 42.03(a)(2), but even if they were, the evidence in the record is insufficient to prove Appellants were ordered to move and refused.

GPD officers tacitly permitted Appellants to walk on California Street by accompanying them on their march. RR6.137:4-10. The GPD was "ready for them to march" that day, RR6.163:13-16, and officers walked along with them, appearing to escort them at points. *See* RR6.137:4-7; RR6.164:21-24; RR7.138:17-19; Defs'Ex.3; RR7.120:20-23. Given the uncontroverted evidence of the GPD officers' voluntary facilitation, guidance, and accompaniment of the group's march, no rational juror could find that Appellants lacked the legal privilege or authority to walk along California Street. The uncontested evidence of GPD's tacit consent of marchers on California Street, as well as GPD's explicit permission of marchers on the sidewalk right next to it, makes the State's evidence legally insufficient to prove that Appellants lacked the legal privilege or authority to march along both passageways in this historic downtown area.

Instead of challenging Appellants' arguments, the State presents a red herring argument that the First Amendment is not a defense to unlawful conduct because the State can "regulate the time, place and manner of exercise." State's Br. at 23. First, Appellants do not bring a facial challenge and, thus, do not question the State's interest in regulating passageways. Appellants instead challenge the State's application of Section 42.03(a)(1) to their peaceful march. Second, contrary to the State's suggestion, Appellants have never asserted that expressive activity absolves unlawful conduct. Rather, Appellants contend that the State's ability to regulate

passageways must allow for some free speech activity in public spaces. *See* Appellants' Br. at 27 (citing *Sherman*, 626 S.W.2d at 526 (explaining that "[b]y requiring that passage be severely restricted or completely blocked before a prosecution under this statute would lie we give ample breathing room for the exercise of First Amendment rights")).

To support its misplaced argument, the State cites passages from *Lauderback*, 789 S.W.2d at 343, but as explained above, *see supra* I(b), *Lauderback* involves a separate and unindicted provision of the Penal Code. Further, *Lauderback* supports Appellants' argument about ensuring room for First Amendment rights when balancing the State's interests by not holding that the government may trample free expression rights any time it cites a "public interest" *Id*. at 347. *Lauderback*'s holding is thus consistent with giving "ample breathing room" for First Amendment rights as explained in *Sherman*, 626 S.W.2d at 526.[8]

The State also implies, without legal or evidentiary support, that Appellants could have obtained a permit for this march, "which they had earlier" done. State's

[8] Dicta in *Lauderback* also bolsters Appellants' argument that they had a legal privilege to peacefully walk on California Street. In explaining the obstruction statute generally, the court noted that, under Section 42.03(a)(1), the privilege "refers to the right to obstruct a passageway, not to whether a person may *use a passageway* if they do not create an obstruction," signaling that a person has a privilege to walk on a street if they do not create an obstruction as defined by Section 42.03(a)(1) and further debunking the State's apparent strict liability interpretation. *Id*. at 345 (emphasis added).

Br. at 26. This is another red herring because the State does not rebut evidence in the record that Appellants had previously been denied permits at the sole discretion of the police chief and local officials.[9] The Supreme Court has held that a municipality cannot "require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be disseminate[d]." *Cox v. State of La.*, 379 U.S. 536, 557 (1965); *see also Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150–51 (1969) (holding that such an ordinance "is an unconstitutional censorship or prior restraint upon the enjoyment of those [First Amendment] freedoms."). The Court has made clear "that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Shuttlesworth*, 394 U.S. at 150. Thus, Appellants were free to exercise their First Amendment rights without a permit and no rational juror could find that their peaceful march violated Section 42.03(a)(1).

[9] *See* Appellants' Br. at 35-37; RR7.168:25-169:3; RR7.70:9-16.

II. The jury charge contains reversible errors that the State fails to address.

A. The State's response brief does not address three critical jury charge errors.

Appellants identify four errors in the jury charge that further necessitate reversal of their convictions. Appellants' Br. 2-3 (Points of Error 6-9); *id.* at 38-57. Instead of responding to Appellants' arguments, the State entirely ignores three points of error that are supported by binding case law and firmly grounded in the trial record.

The State's failure to address these arguments is perplexing since its brief initially references all four errors highlighted by Appellants' brief. *See* State's Br. at 27 (listing Points of Error 6-9). But instead of responding to these four distinct errors, the State simply asserts in conclusory terms: "The jury charge did not contain reversible error." *Id*. For the sixth point of error—that the jury charge improperly included instructions on Section 42.03(a)(2), which was not charged in the Information—the State does not respond *at all* to Appellants' arguments. The only comment the State makes remotely related to this error is that "Appellants never made any effort to quash the complaint and information." State's Br. at 28. But Appellants do not challenge the information itself; rather, Appellants challenge the jury charge that improperly cites and misquotes from the information, which was reversible error that caused egregious harm. *See* Appellants' Br. at 38-45.

Similarly, the State fails to respond to Appellants' seventh point of error that the trial court did not tailor the appropriate mens rea to the conduct at issue. *See id.* at 45-50. The State's only response to this error is that "[t]he culpable mental state of the Appellants was demonstrated in the sufficiency arguments addressed in response to Appellants' Point of Error I." State's Br. at 28. The jury charge error regarding the appropriate mens rea is distinct from the insufficiency of evidence for the mens rea required for a hypothetically correct jury charge, and the State fails to respond to any of the case law cited by Appellants showing how this error necessitates reversal of the convictions below.

For the eighth point of error—that the jury charge deprived Appellants of their right to a unanimous verdict—the State's only response is that "Appellants were charged with violating a single offense under the Texas Penal Code for obstructing a highway or passageway. How they committed the act did not change the level of the offense nor the punishment for the violation." State's Br. at 28. Once again, the State refuses to respond to any of Appellants' arguments for how the jury charge erroneously allowed for non-unanimity based on the actions of others and not Appellants themselves. *See* Appellants' Br. at 50-54. In fact, the State's presentation of three instances of alleged obstruction in its response, State's Br. at 2-13, highlights that jury members were presented with multiple alleged instances of obstruction without receiving proper instructions that they must reach a unanimous verdict and

agree on a "single, specific criminal act that the defendant committed." (citing *Ngo v. State*, 175 S.W.3d 738, 748 (Tex. Crim. App. 2005) (en banc)). Without clear instruction on unanimity and with the State introducing evidence about three separate criminal acts, it would have been impossible for the jury to reach a unanimous decision about the specific criminal act(s) each Appellant allegedly committed. *See Francis v. State*, 36 S.W.3d 121, 125 (Tex. Crim. App. 2000) (en banc) ("The unanimity requirement is undercut when a jury risks convicting the defendant on different acts, instead of agreeing on the same act for conviction").

For all the jury charge errors highlighted by Appellants, the State also falsely claims that "there was no timely objection to the charge." *Id.* at 29. This misstatement ignores Appellants' clear citations to timely objections on points of error 7 and 9 during the charging conference. *See* Appellants' Br. at 48 (citing to RR7.92:16-93:7) and 54 (citing to RR7.93:9-11). While Appellants acknowledge that points of error 6 and 8 were not objected to during the charging conference, they articulate why these errors nonetheless amount to egregious harm that necessitate reversal of Appellants' convictions. *See* Appellants' Br. at 44-45 (collecting cases) and Br. at 54 (citing *Ngo*, 175 S.W.3d at 752).

B. The First Amendment instruction provided to the jury was legally incorrect, confusing, and timely objected to.

The only jury charge issue that the State substantively addresses is the "First Amendment instruction" that was timely objected to and articulated as Appellants'

ninth point of error. *See* Appellants' Br. at 54-57. As explained above, the State incorrectly suggests that Appellants did not timely object to the inclusion of this incorrect and confusing jury instruction, but trial counsel clearly objected during the charging conference and described this instruction as "prejudicial and confusing." RR7.93:8-17. Because trial counsel timely objected to this instruction, Appellants only need show "some harm" to the rights of Appellants. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g).

The State once again hangs its hat solely on *Lauderback*, *see* State's Br. at 31, which only involves the failure to obey a reasonable request or order to move under Section 42.03(a)(2), making its jury instructions largely inapplicable to Section 42.03(a)(1). What is more, *Lauderback* does not actually support the jury instruction urged by the State.

The jury instruction given by the trial court states: "It is not a defense to the charge of obstructing a highway or passageway that the defendant is involved in a demonstration or protest." CR.110. This language is not found in *Lauderback* or the jury instructions to which it refers. In fact, the jury instruction is at odds with the *Lauderback* court's careful balancing of First Amendment rights with the ability of police to order people to vacate a passageway when protest activity renders such a passageway "impassable" or "unreasonably inconvenient or hazardous." 789 S.W.2d at 346. *Lauderback* underscores the consideration courts give to free speech

rights when yielding to state interests. *Id*. at 347. Here, the First Amendment instruction did not give the jury the opportunity to consider Appellants' free speech rights. Instead, this jury instruction is legally erroneous and confusing, and the State provides no analysis or support for why this instruction was needed or why the jury could be instructed to disregard Appellants' free speech activities.[10]

For the foregoing reasons, the errors in the jury charge, both individually and in cumulative effect, necessitate reversal of the convictions below.

III. The State fails to address the evidence firmly found in the trial record showing ineffective assistance of counsel during voir dire.

The State completely fails to address the evidence in the trial record showing ineffective assistance of counsel during voir dire that deprived Appellants of their right to a fair and impartial trial. Instead, the State contends that because "it cannot and has not been shown that trial counsel had no rational reason" for not challenging biased jurors, counsel's inaction was not ineffective. State's Br. at 33. But the State's brief misapprehends the law in this area and ignores critical facts explained in Appellants' assertion of ineffective assistance of counsel. Far from a more generalized allegation of ineffective assistance of counsel that is disfavored on direct appeal, there is specific evidence in the record below that trial counsel's failure to

[10] The State's response also ignores the statutory defense provided by Section 42.04, which is explained in Appellants' opening brief. *See* Appellants' Br. at 56.

seek additional peremptory strikes and object more vigorously to a seated juror who had unequivocally predetermined Appellants' guilt before trial began was not based on any rational trial strategy. Instead, trial counsel stated on the record that "I didn't have her notes written down" when the court asked for objections on venireperson 9. RR6.93:8-9. The court also stated "I don't have those notes on mine for her" either, RR6.93:13-14, and Appellant Thompson tried to interrupt the court to state on the record: "She was the one that said she couldn't make make [sic] up her mind but she was already aware and she had already made an opinion in her head." RR6.93:10-12. But the court overruled the Appellant's objection. Trial counsel did not seek any additional peremptory strikes and allowed this unequivocally biased juror to be empaneled based on an admission on the record that she "didn't have her notes written down" and not on any rational trial strategy.

The State agrees that the proper measure of attorney performance is reasonableness under prevailing professional norms. *See* State's Br. at 36-37 (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). Appellants have established, and it is reflected in the record, RR6.93:8-9, that trial counsel's performance fell below an objective standard of professional competence when trial counsel failed to take and maintain critical notes on a flagrantly biased venireperson. Appellants' Br. at 64-67. Even after recognizing the strong presumption in favor of counsel rendering adequate assistance, the identified act of lacking notes on a clearly biased

venireperson is outside the wide range of professionally competent assistance in a criminal case, and there is a reasonable probability that Appellants were prejudiced because of this deficient performance. *See Strickland*, 466 U.S. at 690.

Failing to ask for additional peremptory strikes to cure a court's failure to strike a juror for cause constituted ineffective assistance of counsel, since the decision irreparably "tainted the jury." *See Suarez v. State*, No. 07-01-0378-CR, 2003 WL 77088, at *1 (Tex. App.—Amarillo Jan. 7, 2003, no pet.) (not designated for publication). Trial counsel's failure to ask for additional peremptory strikes deprived Appellants of their right to a fair and impartial trial with unequivocally biased jury members empaneled against them. There is no reasonable trial strategy that could justify trial counsel keeping jurors on the panel who had clearly expressed predetermined bias against Appellants. Appellants' claim of ineffective assistance is not "built of retrospective speculation;" it is "firmly founded in the record." *See Bone v. State*, 77 S.W.3d 828 (Tex. Crim. App. 2002). Trial counsel's actions and inactions during voir dire were sufficient to "undermine confidence in the outcome." *See Strickland*, 466 U.S. at 694.

This Court should reverse Appellants' convictions because the evidence is insufficient to support conviction under Section 42.03(a)(1). However, even if this Court finds the evidence to be sufficient to support conviction, it should still reverse

Appellants' convictions or remand back to the trial court due to the jury charge errors articulated above or the ineffective assistance of counsel during voir dire.