Trial court’s error in providing supplemental instruction to the jury which allowed the jury to reach a verdict based on a non-unanimous finding did not require reversal. [In the Matter of M.I.S.](16-3-5)

On May 19, 2016, the Houston Court of Appeals (1st Dist.) held that instructions which told the jury to answer “we do not” if it could not unanimously find that juvenile used or exhibited a deadly weapon during the aggravated robbery did not require reversal because the juvenile did not elect for the jury to determine punishment and the record shows that the trial court did not consider a deadly weapon finding in connection with the punishment actually assessed.

¶ 16-3-5. **In the Matter of M.I.S.**, No. 01-14-00684-CV, --- S.W.3d ----, 2016 WL 2944148 [Tex.App.—Houston (1st Dist.), 5/19/2016]

**Facts:** Around nine in the evening in October 2013, Orlando Caval waited in a Marshall’s store parking lot for his wife, who worked at the store. He sat inside his car in a lighted area near the store entrance. As he waited, another car pulled into the parking space on the passenger side of Caval’s car. The female driver and the two male passengers, one wearing a hoodie sweatshirt with the hood pulled up, attracted Caval’s attention. Caval rolled down his window, and the driver asked Caval for directions. In an effort to assist them, Caval began to search for a location on his cell phone. While Caval was looking at his phone, the passenger wearing the hoodie, later identified as M.I.S., exited the car and headed for Caval’s car door. M.I.S. tried to open the door, but it was locked. Caval told M.I.S. to wait while Caval continued to search for directions.

M.I.S. went back to the other car and returned with a shotgun. He pushed the gun’s barrel through the open window and held it, with his finger on the trigger, no more than 12 inches from Caval’s head. The female driver then ordered Caval to leave his wallet and walk away from the car. As Caval walked away from his car and toward the store, he heard both cars drive away.

Caval called 9–1–1. A police officer arrived, and Caval described the three individuals involved. The day after the robbery, a witness identified Brenda Flores as a suspect. Sergeant S. Ashmore, the lead investigator in the case, proceeded to the district attorney’s office to secure a warrant for Flores’s arrest. On his way home from the district attorney’s office, Sergeant Ashmore overheard some “radio traffic” about a burglary in progress nearby and headed to the scene. When Sergeant Ashmore arrived, he found that officers had taken M.I.S., Flores, and Neiman Gasper into custody for suspected commission of that burglary.

Sergeant Ashmore transported the three suspects to a police substation. He placed M.I.S. in a juvenile holding area while he conducted separate interviews with Flores and Gasper. Both Flores and Gasper identified M.I.S. as the gunman in the Caval carjacking. Later that day, Sergeant Ashmore showed Caval a photo array containing images of six men. Caval selected the photo of M.I.S. from the array and identified him as the person who held the gun to Caval’s head. Caval recounted that he was “very positive” of the identification. He also identified the other two assailants from photo arrays.

At trial, Caval testified that M.I.S. held the shotgun during the incident. The jury also heard testimony, however, that Gasper lied to police in stating that M.I.S. held the gun. On the witness stand, Gasper testified that he was the one who had the gun:

Q. So on October 20th of 2013, you told Sergeant Ashmore that [M.I.S.], in Petitioner’s Exhibit 149, which you were looking at the time, is the person who carjacked the man with the red car, right?

A. I was lying.

Q. Oh okay. So why is it that you were lying?

A. Just talking.

Q. You were pissed off?

A. No, I was just talking. I was high.

Q. So who did carjack the man in the red car?

A. I jacked him.

Q. So you had the gun that day?

A. Yep.

Q. And this is what you looked like that day, Petitioner’s Exhibit 121?

A. I don’t know. Look like me.

The jury also heard testimony that the shotgun belonged to Brenda Flores.

M.I.S. raised no objection to the court’s charge to the jury, which contained two questions. Question 1 asked for a finding of guilt or innocence on the aggravated robbery charge. It instructed the jury to find that M.I.S. engaged in delinquent conduct if, beyond a reasonable doubt, it unanimously concluded either that:

[M.I.S.] ... while in the course of committing theft of property owned by ORLANDO CAVAL and with intent to obtain and maintain control of the property, intentionally OR knowingly threatened OR placed ORLANDO CAVAL in fear of imminent bodily injury OR death, and [M.I.S.] did then and there use or exhibit a deadly weapon, to wit: A FIREARM

or alternatively, that:

BRENDA FLORES AND/OR NEIMAN GASPER, did then and there unlawfully, while in the course of committing theft of property owned by ORLANDO CAVAL and with intent to obtain and maintain control of the property, intentionally OR knowingly threaten OR place ORLANDO CAVAL in fear of imminent bodily injury OR death, and BRENDA FLORES AND/OR NEIMAN GASPER did then and there use OR exhibit a deadly weapon, to wit: A FIREARM, and that the respondent, [M.I.S.], with the intent to promote or assist the commission of the offense of AGGRAVATED ROBBERY, solicited, encouraged, directed, aided or attempted to aid to the other person or persons to commit the offense of AGGRAVATED ROBBERY, then you will find the respondent did engage in delinquent conduct of the offense of AGGRAVATED ROBBERY as charged in the petition.

Question 1 thus allowed the jury to affirmatively find that M.I.S. had committed the offense of aggravated robbery either as a primary actor or under the law of parties.

Question 2 asked the jury:

Do you find from the evidence beyond a reasonable doubt that the respondent [M.I.S.] did then and there use or exhibit a deadly weapon, namely a firearm, during the commission of or during the immediate flight from the commission of the aggravated robbery alleged in the petition?

After the jury retired to deliberate, it reported that it was

Hopelessly deadlocked on Question No. 2.

A, should we leave it blank; B, say deadlocked?”

In response, the trial court instructed the jury to refer to the general instruction concerning a unanimous verdict.

After the jury resumed deliberations the next day, the State moved the trial court to withdraw Question 2; M.I.S. moved for a mistrial. The trial court denied both motions. The State then asked for a supplemental instruction in connection with Question 2, which read:

You are further instructed that if you cannot unanimously agree on an answer to this question, then you will state in your answer for Question No. 2, “We do not.”

Over M.I.S.’s objection, the trial court submitted this supplemental instruction. Fifteen minutes later, the jury returned its verdict, finding M.I.S. guilty of aggravated robbery and answering “we do not” to whether it found that M.I.S. used or exhibited a deadly weapon. A poll of the jury revealed that the 12 jurors unanimously found M.I.S. guilty of aggravated robbery in response to Question 1, and one out of the 12 jurors refused to find that M.I.S. had used or exhibited a deadly weapon in response to Question 2.

M.I.S. contends that the supplemental instruction to Question 2—which told the jury to answer “we do not” if it could not unanimously find that M.I.S. used or exhibited a deadly weapon during the aggravated robbery—allowed the jury to reach a verdict based on a non-unanimous finding and caused harmful error.

**Held:** Affirmed

**Opinion:** Texas Family Code section 54.03(c) requires that “[j]ury verdicts under this title must be unanimous.” TEX. FAM.CODE ANN. § 54.03(c) (West 2014); In re L.D.C., 400 S.W.3d at 573. To meet the jury unanimity requirement, the jury must agree that the defendant committed one specific crime. Landrian v. State, 268 S.W.3d 532, 535 (Tex.Crim.App.2008). The jury need not, however, find that the defendant committed that crime in one specific way or even with one specific act. Id.; see Leza v. State, 351 S.W.3d 344, 357 (Tex.Crim.App.2011) (explaining that alleged theories of culpability as principal or party are merely alternate methods or means by which defendant committed one charged offense, which does not require juror unanimity); Martinez v. State, 129 S.W.3d 101, 103 (Tex.Crim.App.2004) (explaining that unanimity requirement is not violated when jury is instructed on alternative theories, or manner and means, of committing same offense); Kitchens v. State, 823 S.W.2d 256, 258 (Tex.Crim.App.1991) (jury need not reach unanimous agreement on preliminary factual issues that underlie verdict, such as manner and means by which one offense was committed); see also Richardson v. United States, 526 U.S. 813, 817, 119 S.Ct. 1707, 1710, 143 L.Ed.2d 985 (1999) (noting by example that disagreement about means of offense of robbery “would not matter so long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force”).

The challenged instruction specifically directed the jury to answer “no” if it could not find unanimously that M.I.S. used or exhibited a deadly weapon during the aggravated robbery. We agree with M.I.S. that the trial court erred in directing a verdict based upon a non-unanimous answer.

M.I.S. contends that the error was harmful because he would have been entitled to a mistrial. But this contention assumes that Question 2 affected the jury’s adjudication of delinquency for having committed the offense of aggravated robbery. On this record, it did not.

First, M.I.S. concedes that he could be adjudicated delinquent for the crime of aggravated robbery based on an affirmative response to Question 1, standing alone. A person commits robbery if, in the course of committing theft and with intent to obtain or maintain control of the property being stolen, such person (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. TEX. PENAL CODE ANN. § 29.02 (West 2011). That person commits aggravated robbery if he or she “uses or exhibits a deadly weapon” during the robbery. Id. § 29.03(a)(2). “A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.” Id. § 7.01(a). “A person is criminally responsible for an offense committed by the conduct of another if ... acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.” Id. § 7.02(a)(2). “Each party to an offense may be charged with commission of the offense.” Id. § 7.01(b). Question 1 contains all of the elements necessary to support a finding that M.I.S. committed aggravated robbery.

Second, M.I.S. has not shown that the supplemental instruction, which focused solely on Question 2, had any harmful influence on the jury’s answer to Question 1, the guilt-innocence question. The jury was polled after the verdict; each juror individually confirmed that the jury’s verdict to Question 1 was unanimous. M.I.S. contends that the jury’s answers are in conflict because the overwhelming evidence at trial was that M.I.S. used or exhibited the shotgun; the jury’s negation of that in answer to Question 2, he contends, calls into question the jury’s answer to Question 1. But the jury could answer Question 1 affirmatively for M.I.S. either as the primary actor or as a party. Although most of the evidence at trial supported a finding that M.I.S. used the shotgun during the commission of the robbery, Gasper recanted his statement implicating M.I.S. and testified that he held the shotgun during the robbery. Because the court charged the jury on the law of parties, a juror could find that M.I.S. committed aggravated robbery either as the person who used or exhibited the firearm or as an accomplice. The jury need not have been unanimous as to the manner in which he committed the offense, that is, whether he was a primary actor or a party to the offense. See Leza, 351 S.W.3d at 357.

Finally, although the record does not elucidate Question 2’s intended purpose, it does show that the jury’s answer to Question 2 did not affect the disposition or punishment based on the finding of delinquency. Because M.I.S. did not elect for the jury to determine punishment, the jury’s answer to Question 2 did not affect any punishment determination. See TEX. FAM.CODE ANN. § 54.04(a) (West Supp.2015) (requiring disposition hearing to “be separate, distinct, and subsequent to” adjudication hearing). The record also shows that the trial court did not consider a deadly weapon finding in connection with the punishment actually assessed. In its order of commitment to the Texas Juvenile Justice Department, the trial court left blank the box provided for a deadly weapon finding and the space for the type of weapon used.

**Conclusion:** Accordingly, we hold that the trial court’s error in providing supplemental instruction to the jury does not require reversal. TEX.R.APP. P. 44.2; see L.D.C., 400 S.W.3d at 575–56 (applying both criminal and civil standards to conclude that error did not warrant reversal).