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"More is Lesser" Defense Instructions

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I. Introduction: The Basics

Under Texas Penal Code § 2.03(c), a defensive issue is "not submitted to the jury unless evidence is admitted supporting the defense."[1] As an added requirement, the defendant must request the desired instruction while pointing to this specific evidence or face forfeiture; the trial court is not obligated to raise defensive instructions *sua sponte* where the instruction is not the law applicable to the case.[2]

As a trial judge turned appellate judge, I was surprised to find that the facts in each case are often the driving force behind my legal analysis. In my experience, I find that even "purely" legal questions regarding defensive instructions always harken back to the facts. As a result, I would advise appellate and trial attorneys to exercise extra effort in demonstrating why a defensive instruction is necessary or proper on the facts of the instant case. Legal arguments are important only insofar as they reflect the applicable law based on the facts. In the following cases, I hope to demonstrate why "pure legal inquiry" should be regarded as "pure legal inquiry into the facts," and, as a result, why appellate lawyers should use a fact-based approach to persuade the court.

II. Lesser-Included Offenses

The provision for lesser-included offense instructions is found in Article 37 of the Texas Code of Criminal Procedure.[3] It generally provides that a defendant's entitlement to a jury instruction on a lesser-included offense is a two-step inquiry.[4] The initial step is *mostly*[5] a legal one. It asks simply whether the proposed offense is legally a lesser-included offense of the charged offense.[6]

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[1] TEX. PENAL CODE § 2.03(c).
[2] *Williams v. State*, No. PD-0477-19, 2021 WL 2132167 (Tex. Crim. App. May 26, 2021), *reh'g denied* (Aug. 24, 2022); *Tolbert v. State*, 306 S.W.3d 776, 780 (Tex. Crim. App. 2010); *Posey v. State*, 966 S.W.2d 57, 61–62 (Tex. Crim. App. 1998). Defensive instructions should not be confused with the law applicable to the case. A trial court must instruct the jury on the law applicable to the case and failure to do so is error. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).
[3] TEX. CODE CRIM. P. 37.09.
[4] *Id.*; *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007).
[5] *Hernandez v. State*, 631 S.W.3d 120 (Tex. Crim. App. 2021).
[6] *Hall*, 225 S.W.3d at 535.

This is done by "compar[ing] the statutory elements of the alleged lesser offense and the statutory elements and any descriptive averments in the indictment."[7]

> A lesser-included offense is one that:
>
> (1) [] is established by proof of the same or less than all the facts required to establish the commission of the offense charged;[8]
> (2) [] differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
> (3) [] differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or

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[7] *Ritcherson v. State,* 568 S.W.3d 667, 670–71 (Tex. Crim. App. 2018); *see Hernandez*, 631 S.W.3d at 123 ("This step is satisfied if the elements and any descriptive averments in the charging instrument include all the elements of the proposed lesser, without regard to the facts of a given case.").

[8] In the past, litigants before the Court of Criminal Appeals have argued that § 37.09(1) designates as a lesser offense, an offense that the State also proved at trial, regardless of the facts required. The court has been clear that this is not so. *See Hall*, 225 S.W.3d at 534 (holding that the pleadings approach is the proper analysis for determining lesser-included offenses). Quoting *Day*, the court wrote:

> For instance, the State may prove more than is legally required by also proving a different offense than the charge offense just because of the facts in the particular case. The constitutional validity of Article 37.09 rests in part on its reference to the offense charged and to the restricted or reduced culpability of the lesser included offense as compared to the offense charged. . . Otherwise a defendant could be convicted of offense[s] not subsumed in the charged offense but shown by the evidence presented. That is why a lesser included offense is defined with reference to the facts "required" to establish the charged offense rather than to facts presented at trial.

Id. (quoting *Jacob v. State*, 892 S.W.2d 905, 908 (Tex. Crim. App. 1995)). For instance, the State may charge a defendant with aggravated assault and prove at trial that the defendant discharged a firearm at the complainant, while in city limits. However, aggravated assault does not require either the discharging of a firearm or that the defendant was in city limits. That the State proved those facts is of no consequence as they were not required. *Id.* In fact, the State may charge the defendant for discharging a firearm in city limits in addition to the assault.

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