

“More is Lesser” Defense Instructions

2023 ROBERT O. DAWSON CONFERENCE ON CRIMINAL
APPEALS

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PRESENTER: HON. JESSE F. MCCLURE III

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Disclaimers and
Hints...

I do not speak for the Court.

I am not trying to predict the future.

Read the underlined words; let the rest
wash over you.

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Overview

- Lesser-Included Offenses
 - 2-step inquiry: Is it a lesser included? Was it raised?
- Case illustrations
- Self-defense
- Miscellaneous other instructions
 - Necessity
 - Concurrent Causation
 - Art. 38.23

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Lesser-Included Offenses

- Statutory basis found in Tex. Code Crim. P. Art. 37.

- Art. 37.09 provides:

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;
- (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
- (4) [] consists of an attempt to commit the offense charged or an otherwise included offense.

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Lesser-Included Offenses

- Whether a defendant is entitled to an instruction on a lesser-included offense is a unique combination of facts and law.
- The defendant must point to specific evidence raising the lesser included, but the burden is low.
- The defendant is required to produce “anything more than a scintilla of evidence” demonstrating that if the defendant is guilty, he is *guilty only* of the lesser offense.

Lesser-Included Offenses

- All of this amounts to a 2-step inquiry:
 - Step 1 - Legal question: is the offense actually a lesser included of the charged offense?
 - Step 2- Fact question: Was the lesser-included offense raised by specific evidence in the record, providing a rational basis on which the jury could reject the greater offense and find the defendant guilty only of the lesser?

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