Jury Selection and Charging Issues in Criminal Cases

Brazoria County Bar Association
CLE luncheon – September 10, 2021

prepared and presented by

Michelle Townsend
SBN: 24049295

Assistant District Attorney
Brazoria County District Attorney's Office
111 E. Locust, Suite 408A
Angleton, Texas 77515
Telephone: (979) 864-1230
MTownsend@brazoria-county.com

Born and raised in Texas, Michelle received her bachelor's degree from Rice University and J.D. from South Texas College of Law. During her last semester of law school Michelle clerked for Justice Tim Taft of the First Court of Appeals and, prior to taking her final exams, sat for and passed the State Bar examination.

Upon graduation, Michelle began her legal career as a civil litigator with Taunton, Snyder, & Parish. Since leaving TSP, Michelle has worked as both a prosecutor and sole practitioner. Michelle has represented both the State and those accused and convicted in the State's County and District courts, the intermediate courts of appeals, and the Court of Criminal Appeals in all levels of cases, including multiple capital murders where the death penalty was assessed. While in private practice, Michelle served as a Judge for the municipal court of the City of Angleton.

Michelle is a member of the Brazoria County Bar Association, the Texas Bar College, and is Board Certified in Criminal Law. Throughout her career, Michelle has committed herself to the betterment of our profession, instructing fellow attorneys in numerous CLEs on a wide array of topics and serving as an instructor for several years at the Houston Police Department Cadet Academy. Michelle is an avid researcher and even now, as she serves Brazoria County as an Assistant District Attorney, she is frequently sought out by other attorneys in the office to advise them on legal issues. Michelle is currently running to serve the citizens of Brazoria County as the next Judge of the 149th District Court.

I. An Attorney's Role in Jury Selection

"The voir dire process is designed to insure, to the fullest extent possible, that an intelligent, alert, disinterested, impartial, and truthful jury will perform the duty assigned to it." *Armstrong v. State*, 897 S.W.2d 361, 363 (Tex. Crim. App. 1995) (per curiam).

A. ***Shuffling the Panel*** – TEX. CODE CRIM. PROC. ANN. art. 35.11; *Chappell v. State*, 850 S.W.2d 508 (Tex. Crim. App. 1993)

Only one is permitted and either side can request it.

No reason for shuffle needs be given and exercising a jury shuffle does not, standing alone, raise a *Batson* claim. *Ladd v. State*, 3 S.W.3d 547, 563 n.9 (Tex. Crim. App. 1999)).

However, a shuffle might be considered in connection with use of peremptory challenges if the race of potential jurors is known to counsel prior to counsel's request for a shuffle. *Miller–El v. Cockrell*, 537 U.S. 322, 346 (2003).

B. ***Questioning the Panel***

1. Time Limits: *Ratliff v. State*, 690 S.W.2d 597 (Tex. Crim. App. 1985)

Reasonable time limitation varies by case and the amount of time allotted is not, by itself, conclusive.

Factors considered:

1. whether the defendant's voir dire examination reveals an attempt to prolong the voir dire;
2. whether the questions that the defendant was not permitted to ask members of the venire were proper voir dire questions; and
3. the defendant was not permitted to examine jurors who served on the jury.

2. Areas of Proper Inquiry: *Barajas v. State*, 93 S.W.3d 36 (Tex. Crim. App. 2002)

   The propriety of a particular question is left to the trial court's discretion, reviewed for abuse of discretion, and that discretion is abused only when a proper question about a proper area of inquiry is prohibited.

   A question is proper if it seeks to discover a juror's views on an issue applicable to the case.

   An otherwise proper question is impermissible, however, if it attempts to commit the juror to a particular verdict based on particular facts.

   A voir dire question that is so vague or broad in nature as to constitute a global fishing expedition is not proper and may be prevented by the trial judge.

3. Commitment Questions: *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001).

   Commit a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact.

   Proper vs. Improper – A Three Step Process:
   1. Is the question a commitment question;
   2. Could a possible answer to the question produce a valid challenge for cause; and
   3. Does the question include facts, and only those facts, that lead to a valid challenge for cause?

C. ***Striking Prospective Jurors***

Challenges for Cause: TEX. CODE CRIM. PROC. ANN. art. 35.16; *Hicks v. State*, 606 S.W.3d 308 (Tex. App.—Houston [1st Dist.] 2020, pet. ref'd):

Article 35.16(a): a challenge for cause is an objection made to a particular juror, alleging some fact which renders the juror incapable or unfit to serve on the jury. A challenge for cause may be made by either the state or the defense for any one of the following reasons:

1. that the juror is **not a qualified voter** in the state and county under the Constitution and laws of the state; provided, however, the failure to register to vote shall not be a disqualification;
2. That the juror has been **CONVICTED** of **MISDEMEANOR THEFT OR A FELONY**;
3. That the juror is **UNDER INDICTMENT** or other legal accusation (**INFORMATION**) for **MISDEMEANOR THEFT OR A FELONY**;
4. That the juror is **INSANE**;
5. That the juror has such defect in the organs of feeling or hearing, or such **bodily or mental defect** or disease as to render the juror unfit for jury service, or that the juror is legally blind and the court in its discretion is not satisfied that the juror is fit for jury service in that particular case;
6. That the juror is a **witness** in the case;
7. That the juror served on the **grand jury** which found the indictment;
8. That the juror served on a **petit jury** in a former trial of the same case;
9. That the juror has a **bias or prejudice** in favor of or against the defendant;
10. That from hearsay, or otherwise, there is established in the mind of the juror such a conclusion as to the (**predetermination of**) **guilt or innocence** of the defendant as would influence the juror in finding a verdict;
11. That the juror **cannot read or write**.

Additional Grounds of Challenge for Cause by the State – TEX. CODE CRIM. PROC. ANN. art. 35.16(b)

1. the juror has conscientious scruples regarding the infliction of the punishment of death for crime, in a capital case, where the State is seeking the death penalty;
2. is related within the third degree by blood or marriage (degree of consanguinity or affinity determined under Chapter 573, Government Code) to the defendant; and
3. has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment. *Gardner v. State*, 306 S.W.3d 274 (Tex. Crim. App. 2009)).

Additional Grounds of Challenge for Cause by the Defense – TEX. CODE CRIM. PROC. ANN. art. 35.16(c)

1. the juror is related within the third degree by blood or marriage (see again Chapter 573, Government Code), to the person injured by the commission of the offense, or to any prosecutor in the case; and
2. has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the

offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefore.

Note: that relation to the trial judge does not provide a ground for challenge for cause of prospective jurors akin to those provided by close relation to the defendant, a victim, or any prosecutor

Failure to question a prospective juror on a subject constitutes a forfeiture of the right to complain thereafter. *See Ex parte Perez*, 525 S.W.3d 325, 339 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (stating that "challenge to a juror based on a non-absolute disqualification, such as county residence, is a forfeitable right, not a waivable right" and all party has to do forfeit such challenge is "remain silent").

Counsel is obligated to ask specific questions of the venire to determine whether a challenge for cause of a prospective juror exists.

Objecting to the Trial Court's Denial of a Challenge for Cause:
Buntion v. State, 482 S.W.3d 58, 83 (Tex. Crim. App. 2016)

To preserve a complaint about the trial court's denial of a challenge for cause, the defendant must show that he was harmed because he was forced to use a peremptory strike to remove the venire person and that he suffered a detriment from the loss of that peremptory strike:

1. identify the juror with specificity and state the basis for cause;
2. use every peremptory strike;
3. ask for additional peremptory strikes; and
4. if refused, or not given a sufficient number, specifically identify the objectionable juror who would not have sat on the jury had the trial court granted the challenge for cause or an additional peremptory challenge to strike the objectionable juror.

The defendant must make the proper challenge before the panel is sworn. *Credille v. State*, 925 S.W.2d 112, 115 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd)

Peremptory Challenges: TEX. CODE CRIM. PROC. ANN. art. 35.1

A challenge made to a juror "without assigning any reason therefor"

Peremptory Strikes and the Equal Protection Clause:

a. *Prima facie* showing of purposeful discrimination by objecting party
b. The burden of production shifts to the other party to offer a race- or gender-neutral explanation for the strike
c. The trial court determines whether purposeful discrimination has been shown.

Batson v. Kentucky – race
J.E.B. v. Alabama – gender

After *Georgia v. McCollum*, 505 U.S. 42 (1992) defendants, as well as the prosecution, may not engage in purposeful discrimination in violation of the equal protection clause during jury selection, *i.e.*, either side must be prepared to provide a non-discriminatory, neutral explanation for strikes.

II. An Attorney's Role in Jury Instruction

The charge authorizes a conviction by setting forth the law applicable to the case, as determined by the allegations in the information or indictment and the evidence presented at trial.

A. ***The Trial Court's Duty***: TEX. CODE CRIM. PROC. ANN. art. 36.14

A trial court shall deliver to the jury a written charge distinctly setting forth the law applicable to the case.

1. Mental States: TEX. PENAL CODE ANN. 6.03

   The type of offense (result of conduct, nature of conduct, circumstances of conduct) informs the portion(s) of section 6.03 that must be included.

   Certain offenses fall into more than one category. *Young v. State*, 341 S.W.3d 417 (Tex. Crim. App. 2011).

2. Law of Parties: TEX. PENAL CODE ANN. 7.01-.02

   Requires participation before, during, and/or after or actions by the defendant that show an understanding and common design to commit the offense; mere

presence is not enough (*Burdine v. State*, 719 S.W.2d 309 (Tex. Crim. App. 1986); *Thompson v. State*, 697 S.W.2d 413 (Tex. Crim. App. 1985)).

The instruction should be given whenever there is sufficient evidence to support a jury verdict that the defendant is criminal responsible under the law of parties (*Ransom v. State*, 920 S.W.2d 288 (Tex. Crim. App. 1994)).

To convict a defendant as a party, the charge must apply the law of parties to the specific evidence in jury charge's application paragraph. Inclusion in the abstract portion alone of the charge is insufficient. *Biggins v. State*, 824 S.W.2d 179 (Tex. Crim. App. 1992).

3. Other scenarios:

Instruction Required Regardless of Request:
Sometimes, the evidence will raise an issue and the trial judge must instruct the jurors accordingly, regardless of whether a specific instruction was requested.

Examples: TEX. CODE CRIM. PROC. ANN. arts. 38.075 (jailhouse-snitch), 38.14 (accomplice witness).

Instruction Required Upon Request:
Examples:

a. Affirmative Finding of Deadly Weapon:

Guthrie-Nail v. State, 506 S.W.3d 1, 4 (Tex. Crim. App. 2015)

To be submitted as a special issue to the jury, there must be some evidence suggesting the weapon was a deadly weapon *per se* or otherwise a deadly weapon and that it was used or exhibited to facilitate the associated felony.

b. Limiting Instructions: TEX. R. EVID 105

Objections to the admission of evidence and requests for evidence to be considered only in a limited capacity must be made at the earliest possible opportunity (*Hammock v. State*, 46 S.W.3d 889 (Tex. Crim. App. 2001)).

Instructions in the jury charge can restrict consideration of the objected-to evidence or evidence of limited permissible use to its proper scope.

B. ***Properly Singling Out Evidence***

There are three specific circumstances in which a trial court may single out a particular item of evidence in the jury instruction without signaling to the jury an impermissible view of the weight (or lack thereof) of that evidence:

1. When the law directs that a certain degree of weight, or a particular or limited significance, attach to a specific category or item of evidence.

   Example A: TEX. CODE CRIM. PROC. ANN. art. 38.14, requiring the testimony of an accomplice to be corroborated before it can support a conviction.

   Example B: TEX. R. Evid. 105 limiting instruction, restricting the jury's consideration of particular evidence to certain purposes.

2. When the Legislature has expressly required the trial court to call particular attention to specific evidence in the jury charge.

   Example: TEX. PENAL CODE ANN. 22.05(c) statutorily authorized presumptions of the deadly conduct statute which provide that recklessness and danger may each be presumed if a person knowingly points a firearm at or in the direction of another.

3. When the admissibility of evidence is contingent upon certain predicate facts that are up to the jury to decide.

   Example: Voluntariness of Statements (*Oursbourn v. State*, 259 S.W.3d 159 (Tex. Crim. App. 2008))

   The theory of involuntariness asserted determines whether and what type of an instruction may be appropriate. It is incumbent upon the defendant to articulate his theory of involuntariness.

   How Should the Instruction Read?

   1. General voluntariness instruction – TEX. CODE CRIM. PROC. ANN. art. 38.22, § 6

      "unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof."

2. General warnings instruction – TEX. CODE CRIM. PROC. ANN. art. 38.22, §§ 2 & 3

   Sets out the requirements of section 2 or 3 and asks the jurors to decide whether all those requirements were met.

3. "Specific" Exclusionary-rule instruction – TEX. CODE CRIM. PROC. ANN. art. 38.23

   The jurors are told exactly what evidence is in question and asked to decide the admissibility of that evidence.

A judicial instruction that singles out a particular piece of evidence, and does not serve one of these authorized purposes, constitutes an impermissible comment on the weight of the evidence.

Impermissible Comments on the Weight of Evidence: Examples

Singling out evidence, even admissible evidence. *See*, *e.g.*, *Bartlett v. State*, 270 S.W.3d 147 (Tex. Crim. App. 2008); *Hess v. State*, 224 S.W.3d 511 (Tex. App.—Fort Worth 2007, pet. ref'd).

Defining words or phrases not defined by the statute under which the defendant is charged. *See*, *e.g.*, *Kirsch v. State*, 357 S.W.3d 645 (Tex. Crim. App. 2012).

C. ***Lesser-Included Offenses***

Royster–Rousseau test: *Rousseau v. State*, 855 S.W.2d 666 (Tex. Crim. App. 1993); *Royster v. State*, 622 S.W.2d 442 (Tex. Crim. App. 1981) (plurality op.):

1. The proof for the offense charged includes the proof necessary to establish the lesser-included offense; and
2. Some evidence must exist in the record that would permit a jury to rationally find that if the defendant is guilty, he is guilty only of the lesser offense.

Requests by the Defense

a. Must meet both prongs of the *Royster–Rousseau* test
b. "Anything more than a scintilla" is enough evidence to properly request an instruction on a lesser-included offense.

The defendant now **must** point to **specific** evidence that negates the greater offense and raises the lesser-included offense. *See Williams v. State*, No. PD-0477-19, 2021 WL 2132167, (Tex. Crim. App. May 26, 2021).

Requests by the Prosecution

The State properly requests an instruction on a lesser-included by setting out on the record the specific evidence that supports its submission. *Grey v. State*, 298 S.W.3d 644 (Tex. Crim. App. 2009).

Strategic Decisions: "All or Nothing"

1. Not requesting instructions on lesser-included offenses is a valid trial strategy. *Tolbert v. State*, 306 S.W .3d 776 (Tex. Crim. App. 2010); *see also Haynes v. State*, 273 S.W.3d 183 (Tex. Crim. App. 2008) (Johnson, J., concurring) ("Regardless of which side chooses to 'go for broke,' it may be a valid strategic choice from which neither side should be rescued.").
2. However, the trial court may, in its discretion, include an instruction on a lesser-included offense whenever a particular view of the evidence would support a conviction of the lesser-included offense as a valid, rational alternative to the charged offense even if neither party requests the instruction and even over objection by either party. *Grey*, 298 S.W.3d 644; *Humphries v. State*, 615 S.W.2d 737 (Tex. Crim. App. 1981); *Ford v. State*, 38 S.W.3d 836 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

Amount and Type of Evidence Required:

1. A "scintilla" of evidence is all that is necessary to support a lesser-included instruction.
2. The credibility of the evidence is not at issue and the evidence can be weak, incredible, impeached, or unbelievable.
3. Direct evidence that the defendant is guilty only of the lesser is not necessary and evidence supporting inclusions of the instruction on the lesser offense does not have to come from the defendant.

D. ***Defenses and Justifications***: Chapters 8 & 9 of the Penal Code

Defenses and Affirmative Defenses – The Same Yet Different

How They are the Same:

1. The State is not required to negate the existence of a defense or affirmative defense; and
2. The issue not submitted unless evidence was admitted supporting its existence.

How They Differ:

1. Defense: the charge shall instruct that a reasonable doubt on the issue requires that the defendant be acquitted.
2. Affirmative Defense: the charge shall instruct that the defendant must prove the affirmative defense by a preponderance of evidence.

What They Are:

1. Insanity – TEX. PENAL CODE ANN. § 8.01
   Affirmative defense
   Did not know conduct was wrong as result of severe mental disease or defect at time of offense

2. Mistake of Fact – TEX. PENAL CODE ANN. § 8.02
   Defense
   Applies only to culpable mental state not all elements
   Defendant may still be convicted of a lesser included offense of which he would be guilty if the fact were as he believed

3. Mistake of Law – TEX. PENAL CODE ANN. § 8.03
   Ignorance of the law is *no defense*
   Affirmative defense only if defendant was acting in reasonable reliance on narrow category of written statements and interpretations and, even then, the defendant may still be convicted of a lesser included offense of which he would be guilty if the law were as he believed

4. Intoxication – TEX. PENAL CODE ANN. § 8.04
   Voluntary intoxication is *no defense* to the commission of crime.
   The instruction on voluntary intoxication may be requested when there is evidence from any source that might lead a jury to conclude that the defendant's intoxication somehow excused his actions.
   There is no *sua sponte* duty to instruct on the issue, but judge may do so, even over a defendant's objection
   Temporary insanity caused by intoxication may be offered as mitigation in punishment.

5. Duress – TEX. PENAL CODE ANN. § 8.05
   Affirmative defense
   Engaged in proscribed conduct by threat of imminent death or serious bodily injury to himself or another – all levels of offenses
   Engaged in proscribed conduct by force or threat of force – misdemeanor offenses only

6. Entrapment – TEX. PENAL CODE ANN. § 8.06

Defense
Engaged in the conduct charged because (1) he was induced to do so by a law enforcement agent (2) using persuasion or other means (3) likely to cause persons to commit the offense.
Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.
If the defendant denies that he committed the offense, he will not be entitled to an entrapment instruction. *Norman v. State*, 588 S.W.2d 340 (Tex. Crim. App. 1979). A defendant introducing positive evidence that he did not commit the act also places in jeopardy an instruction on the entrapment defense. *Becker v. State*, 840 S.W.2d 743 (Tex. App.—Houston [1st Dist.] 1992, no pet.).

7. Age – TEX. PENAL CODE ANN. § 8.07
   Bar to prosecution as an adult
   If the defendant is a youthful offender whose offenses straddle his 17th birthday, a limiting instruction instructing the jurors to only consider acts committed after the defendant's 17th birthday is proper. *Taylor v. State*, 332 S.W.3d 483 (Tex. Crim. App. 2011).

8. Child with Mental Illness, Disability, or Lack of Capacity – TEX. PENAL CODE ANN. § 8.08

<u>Justifications</u> – Admit It to Get It

1. Public Duty – TEX. PENAL CODE ANN. § 9.21

2. Protection of Property – TEX. PENAL CODE ANN. § 9.41 (One's Own), 9.42 (Deadly Force), 9.43 (Third Person's Property)

3. "Others" – TEX. PENAL CODE ANN. § 9.44 (Devices to Protect Property), 9.51-.53 (Law Enforcement justifications dealing with arrest, search, preventing escape from custody, maintaining security in correctional facilities), and 9.61-.63 (Justifications for use of force, "but not deadly force," for special relationships, *i.e.*, parent-child, educator-student, guardian-incompetent)

4. Necessity – TEX. PENAL CODE ANN. § 9.22
   Proof of imminent harm is required – *e.g.*, proof of specific threats by a person who has committed violent acts against the threatened person might raise the defense of necessity in a prosecution of the threatened person for carrying a handgun (*Armstrong v. State*, 653 S.W.2d 810 (Tex. Crim. App. 1983)) but generalized fear of crime or presence in a "high-crime area" is insufficient (*Roy v. State*, 552 S.W.2d 827 (Tex. Crim. App. 1977)).

5. Self-Defense – TEX. PENAL CODE ANN. § 9.31 (Oneself), 9.32 (Deadly Force), 9.33 (Defense of Third Person), 9.34 (Protection of Life & Health, *i.e.*, prevent suicide or infliction of SBI to self by another)
   A defendant bears the burden of *production* of some evidence supporting the justification of self-defense.
   When a defendant introduces evidence to support a claim of self-defense, the State bears the burden of *persuasion* to disprove it and does so by proving its case beyond a reasonable doubt. *Zuliani v. State*, 97 S.W.3d 589 (Tex. Crim. App. 2003); *Saxton v. State*, 804 S.W.2d 910 (Tex. Crim. App. 1991); *Dyson v. State*, 672 S.W.2d 460 (Tex. Crim. App. 1984).

E. ***Article 38.23 Instruction*s**: TEX. CODE CRIM. PROC. ANN. art. 38.23

Required when:

1. When the evidence heard by the jury raises an *issue of fact*;
2. The evidence on that fact is *affirmatively contested*; and
3. That contested factual issue is *material* to the lawfulness of the challenged conduct in obtaining the evidence.

   Thus, a defendant's right to the submission of jury instructions under Article 38.23(a) is limited to disputed issues of fact that are material to his claim of a constitutional or statutory violation that would render evidence inadmissible. *Madden v. State*, 242 S.W.3d 504 (Tex. Crim. App. 2007).

   The State's burden of proving the legality of obtaining evidence in the face of an article 38.23 challenge if the issue is tried and submitted to the jury is <u>beyond a reasonable doubt</u>. *Johnson v. State*, 226 S.W.3d 439 (Tex. Crim. App. 2007); *Lalande v. State*, 676 S.W.2d 115 (Tex. Crim. App. 1984).

Sample 38.23 Instruction:

You are instructed that no evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

You are further instructed that our law permits the stop and detention of a motorist by a peace officer without a warrant when the officer has reasonable suspicion to believe that a traffic offense has been committed.

By the term "reasonable suspicion," as used herein, is meant specific articulable facts which, when taken together with rational inferences from those facts, would warrant a man of reasonable caution to believe that an offense has been or is being committed. Speeding is an offense against the law.

Therefore, bearing in mind these instructions, if you find from the evidence that, on the occasion in question, Officer Law did not have a reasonable suspicion to believe that the defendant was driving at a speed greater than 55 miles per hour on a portion of the highway with a posted speed limit of 55 miles per hour immediately prior to the stop, or if you have a reasonable doubt thereof, you will disregard any and all evidence obtained as a result of the defendant's detention by the officer and you will not consider such evidence for any purpose whatsoever.

However, if you find from the evidence that, on the occasion in question, Officer Law did have a reasonable suspicion to believe that the defendant was driving at a speed greater than 55 miles per hour on a portion of the highway with a posted speed limit of 55 miles per hour immediately prior to the stop, then you may consider the evidence obtained by the officer as a result of the detention.

Appropriate Instructions on Defensive Issues

The theory must be found in the Penal Code and the instruction derived from the Code. *Walters v. State*, 247 S.W.3d 204 (Tex. Crim. App. 2007); *Giesberg v. State*, 984 S.W.2d 245 (Tex. Crim. App. 1998).

Every issue raised by the evidence, weak or strong, contradicted or unimpeached, and regardless of the credibility of the defense or the source of the evidence must be submitted. *Hamel v. State*, 916 S.W.2d 491 (Tex. Crim. App. 1996).

Examples of defensive theories that should not be submitted to the jury: accident (*Williams v. State*, 630 S.W.2d 640 (Tex. Crim. App. 1982)), good faith (*Sanders v. State*, 707 S.W.2d 78, 81 (Tex. Crim. App. 1986)), alternative cause (*Barnetet v. State*, 709 S.W.2d 650 (Tex. Crim. App. 1986)).

Instructing on Multiple Defensive Issues

Every defense is viewed independently.

A defendant is entitled to the submission of every defense, affirmative defense, or justification raised by the evidence, even if the defense might be inconsistent with other defenses.

Examples: permissible to instruct on self-defense and necessity (*Bowen v. State*, 62 S.W.3d 226 (Tex. Crim. App. 2005); *Hamel v. State*, 916 S.W.2d 491 (Tex. Crim. App. 1996); *Thomas v. State*, 678 S.W.2d 82 (Tex. Crim. App. 1984)); self-defense and a lesser-included offense with a *mens rea* other than intentional and knowingly (*Alonzo v. State*, 353 S.W.3d 778 (Tex. Crim. App. 2011)).