**REVISIONS**

**TO**

**LESSER-INCLUDED OFFENSES**

**in light of *Sandoval v. State***, No. AP-77,081, 2022 WL 17484313, at \*26-27

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# CPJC 5.1  Determining If Uncharged Offense is a Lesser for Submission to the Jury

Comment

When and how to submit to juries the option of convicting defendants of crimes not explicitly charged in the indictment, information, or complaint has proven quite troublesome for Texas courts as well as courts in other jurisdictions. One major area of controversy concerns how a court determines whether to submit an uncharged offense.

How should a trial court determine whether an instruction on an uncharged offense may or should be given? As a general rule, this is determined under a two-step analysis. *E.g., State v. Meru*, 414 S.W.3d 159, 162–63 (Tex. Crim. App. 2013).

The first step of this analysis is to determine if the uncharged offense is a lesser included offense of the charged offense under article 37.09(1) of the Texas Code of Criminal Procedure, a prerequisite for submission. Tex. Code Crim. Proc. art. 37.09(1). The analysis requires a comparison of (1) the elements of the charged offense as alleged in the charging instrument with (2) the elements of the uncharged offense.

Under *Hall v. State*, 225 S.W.3d 524 (Tex. Crim. App. 2007), this comparison is done using a cognate-pleading approach. The court of criminal appeals explained this approach:

An offense is a lesser-included offense of another offense, under Article 37.09(1) of the Code of Criminal Procedure, if the indictment for the greater-inclusive offense either: 1) alleges all of the elements of the lesser-included offense, or 2) alleges elements plus facts (including descriptive averments, such as non-statutory manner and means, that are alleged for purposes of providing notice) from which all of the elements of the lesser-included offense may be deduced. Both statutory elements and any descriptive averments alleged in the indictment for the greater-inclusive offense should be compared to the statutory elements of the lesser offense. If a descriptive averment in the indictment for the greater offense is identical to an element of the lesser offense, or if an element of the lesser offense may be deduced from a descriptive averment in the indictment for the greater-inclusive offense, this should be factored into the lesser-included-offense analysis in asking whether all of the elements of the lesser offense are contained within the allegations of the greater offense.

*Ex parte Watson*, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009) (op. on reh’g) (citations omitted).

*Meru* developed this further:

[T]he elements of the lesser-included offense do not have to be pleaded in the indictment if they can be deduced from facts alleged in the indictment. In this situation, the functional-equivalence concept can be employed in the lesser-included-offense analysis. When utilizing functional equivalence, the court examines the elements of the lesser offense and decides whether they are “functionally the same or less than those required to prove the charged offense.”

*Meru*, 414 S.W.3d at 162.

This analysis has been applied in a number of recent decisions. *Meru*, 414 S.W.3d at 164 (criminal trespass was not lesser included offense of burglary because entry element of criminal trespass [requiring intrusion of whole body] does not require same or less proof than entry for burglary [alleged without specification and thus under statutory definition requiring intrusion of: (1) any part of the body or (2) any physical object connected with the body] and there were no facts alleged in indictment that would allow entry element of criminal trespass to be deduced); *Wortham v. State*, 412 S.W.3d 552 (Tex. Crim. App. 2013) (reckless injury to a child and criminally negligent injury to a child by act were lesser included offenses of knowing or intentional injury to a child by act); *Cavazos v. State*, 382 S.W.3d 377 (Tex. Crim. App. 2012) (manslaughter was lesser included offense of murder based on act committed with intent to cause serious bodily injury, resulting in death); *Rice v. State*, 333 S.W.3d 140 (Tex. Crim. App. 2011) (reckless driving was not lesser included offense of aggravated assault with deadly weapon, i.e., a motor vehicle, because aggravated assault as pled did not require proof that defendant drove the motor vehicle as required for reckless driving).

In *Ortiz v. State*, the court of criminal appeals held that a bodily injury assault (Penal Code § 22.01(a)(1)) is not a lesser-included offense of family-violence assault by occlusion (Penal Code § 22.01(d)(2)(B)). 623 S.W.3d 804, 807-808 (Tex. Crim. App. 2021). The court explained that the statutory language of occlusion assault only permits a specific injury: impeding normal breathing or blood circulation. Because assault by causing a bodily injury other than impeding breath or circulation is established by different or additional facts than those required to establish occlusion assault, it cannot be a lesser.

In addition to a comparison of elements, a unit-of-prosecution analysis may sometimes be required. This is because a lesser offense will not be included in a greater charged offense if it is an extraneous crime that the defendant could be prosecuted for in addition to the charged offense. Thus, in *Hernandez v. State*, a charged offense that the defendant penetrated the child victim’s mouth with his penis did not include as lesser included offenses claims that he touched the child’s torso with his penis or touched her vagina with his hand. 631 S.W.3d 120, 122 (Tex. Crim. App. 2021) (citing Campbell v. State, 149 S.W.3d 149, 155-56 (Tex. Crim. App. 2004)). These are all separately prosecutable crimes and thus cannot be considered “included” in the charged offense.

If the uncharged offense is a lesser included offense under the analysis above, the court must reach the second step of the analysis. This second step focuses on the evidence before the jury and asks whether, under this evidence, a rational jury could find that, if the defendant is guilty, he is guilty only of the lesser included offense. *See Meru*, 414 S.W.3d at 162–63; *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011).

The court of criminal appeals explained further what is needed for a case to present the necessary contested fact question as to whether the defendant, if guilty, is guilty only of the lesser included offense:

“Anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge.” *Bignall v. State*, 887 S.W.2d 21, 23 (Tex.Crim.App.1994). Although this threshold showing is low, “it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather, there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted.” *Skinner v. State*, 956 S.W.2d 532, 543 (Tex.Crim.App.1997). Accordingly, we have stated that the standard may be satisfied if some evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations.

*Sweed*, 351 S.W.3d at 68.

If the state, on the other hand, seeks submission of a lesser included offense, the court need not apply the second step of the analysis outlined above. In the event that the uncharged offense is a lesser included offense of the charged crime, that uncharged offense should be submitted without reference to the state of the evidence in the particular case if requested by the state. *Grey v. State*, 298 S.W.3d 644 (Tex. Crim. App. 2009).

The rationale for this, *Grey* explained, is the state’s charging discretion:

[T]he State can abandon an element of the charged offense without prior notice and proceed to prosecute a lesser-included offense. If the State can abandon the charged offense in favor of a lesser-included offense, there is no logical reason why the State could not abandon its unqualified pursuit of the charged offense in favor of a qualified pursuit that includes the prosecution of a lesser-included offense in the alternative.

*Grey*, 298 S.W.3d at 650.

**Requirement to Request Lesser and Specify Evidence Raising the Issue**

A trial court is not required to instruct on a lesser-included instruction in absence of a party’s request for such an instruction. *Williams v. State*, 662 S.W.3d 452, 455 (Tex. Crim. App. 2021) (citing *Posey v. State*, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998)). For the defendant to complain about the failure to charge the jury on a lesser-included offense, the defense must have adequately requested the lesser. This is an exception to the general framework of *Almanza v. State*—which permits even unpreserved complaints in the jury charge to be considered on appeal, albeit under a less favorable harm standard. *Almanza,* 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).

In some instances, a request for the instruction may be all that is required, particularly where it is clear to the trial court and opposing counsel why the defense believes he is entitled to submission of a lesser. But when it is not clear and particularly when the trial court asks the defense to specify what evidence shows he is guilty only of the lesser, a defendant will forfeit that issue on appeal if he fails to direct the judge to particular evidence. *Williams*, 662 S.W.3d at 463.

# CPJC 5.2 Approaches to Submission of a Lesser Included Offense

*Acquit-First and Reasonable-Efforts Approaches*

At one time, there was considerable disagreement about whether a jury was required to reach a definitive vote on the greater offense before it could find a defendant guilty of a lesser-included one. Must the jury all agree the defendant was “not guilty” of the charged offense before returning a “guilty” verdict on a lesser offense (the so-called “acquit-first” approach to lessers)? Or may the jury make a reasonable effort at unanimously finding the defendant “guilty” or “not guilty” as to the greater but go on to a “guilty” verdict on the lesser if those efforts failed (the so-called “reasonable efforts” approach to lessers)? The court of criminal appeals in *Sandoval* *v. State* held that Code of Criminal Procedure Art. 37.08 requires the acquit-first approach. No. AP-77,081, 2022 WL 17484313, at \*26-27 (Tex. Crim. App. Dec. 7, 2022). Article 37.08 is entitled “Conviction of lesser included offense” and provides:

In a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense.

Tex. Code Crim. Proc. art. 37.08. Agreeing with an intermediate court of appeals, *Sandoval* read this language to say that “a unanimous finding of guilt on a lesser-included offense necessarily requires a unanimous acquittal on the higher offense.” 2022 WL 17484313, at \*26 (quoting *Harris v. State*, 287 S.W.3d 785, 790-91 (Tex. App.—Houston [1st Dist.] 2009, no pet.). In other words, “a conviction on a lesser-included offense would necessarily be a verdict of acquittal on the greater offense, not simply a situation where the jury could not agree on the greater offense.” *Id*. The fact that a conviction on a lesser constitutes an acquittal of the greater as a matter of statutory law further reinforced the court’s decision to adopt the acquit-first approach. *See* Tex. Code Crim. Proc. art. 37.14. That approach had been sanctioned in numerous decisions dating from 1909 to as recently as Boyett v. State, 692 S.W.2d 512 (Tex. Crim. App. 1985). It was only dicta inBarrios v. State, 283 S.W.3d 348, 353 (Tex. Crim. App. 2009), that undermined that approach by suggesting it would be better practice to submit an “unable to agree” instruction consistent with reasonable efforts. *Sandoval* disavowed this aspect of *Barrios* and held, “a jury must be required to agree on an acquittal of the greater offense before it can return a conviction on a lesser-included offense.” 2022 WL 17484313, at \*28. Capital murder has a specific instruction on lesser-included offenses that differs from the wording of Art. 37.08. It provides, “If the jury or, when authorized by law, the judge does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.” Tex. Penal Code § 19.03(c). This language does not suggest an acquit-first approach like Art. 37.08, but since whatever permission to convict on a lesser that § 19.03(c) grants applies to both the jury and the judge, it is doubtful it authorizes a jury’s nonunanimous verdict before convicting of the lesser. Although no court has construed the language of § 19.03(c) in this context, the Committee believed it would likely be interpreted in harmony with (rather than contradiction to) Art. 37.08, resulting in an acquit-first approach for the offense of capital murder, as any other offense.

*Whether to Sequence the Jury’s Consideration of Greater and Lesser Offenses*

*Sandoval* assumed without deciding that the jury should be expressly told that it could consider greater and lesser included offenses in any order. 2022 WL 17484313, at \*28. This kind of express instruction combined with an acquit-first instruction makes up the *modified* acquit-first approach. under Texas law But the court of criminal appeals has recognized that the jury charge is read in its entirety before deliberations and thus this kind of sequencing instruction does not prohibit jurors from considering guilt as to the lesser before deciding on a verdict on the greater. *Barrios*, 283 S.W.3d at 353; *Sandoval*, 2022 WL 17484313, at \*25, 29. The California Criminal Jury Instruction, which exemplifies the modified acquit-first approach, expressly informs jurors of their ability to consider the offenses in any order:

If all of you find that the defendant is not guilty of a greater charged crime, you may find (him/her) guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. . . . It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.

Judicial Council of California Criminal Jury Instructions (2014 ed.) CALCRIM No. 3517.

Barrios, at least in dicta, supports the giving of an express instruction that jurors consider the offenses in any order. In its penultimate discussion of what may be “a better practice,” which *Sandoval* identified as *dicta*, the court assumed that the instructions should “make[] clear to the jury that, at its discretion, it may consider the lesser-included offenses before making a final decision as to the greater offense.” Barrios, 283 S.W.3d at 353. This appears to assume the jury will have to make a final decision as to the charged offense, apparently before voting on the lesser included offense. But the instruction must make clear that before making that final decision on the charged offense, the jurors may read the instructions about the lesser included offenses and, of course, discuss these as possible alternatives to the charged offense. Jurors, in other words, may consider in deciding how to vote on the charged offense that a “not guilty” verdict on that offense will move their analysis to whether the defendant should be convicted of a lesser offense. Discussion of this before an up-or-down vote on the charged offense, the instructions should make clear, is permissible.

*Benefit-of-the-doubt Instruction*

In 1883, the predecessor of the court of criminal appeals explained, “Where an offense consists of different degrees, a charge giving the defendant the benefit of a reasonable doubt between the degrees would be proper, and it would be error ordinarily in such case to refuse such a charge when requested.” *McCall v. State*, 1883 WL 8927, at \*7 (Tex. App. 1883).

an acquit-firstthe disposition of the greater offense would already have been decided upon and thus there is nothing to compare the lesser-included offense to by the time the jury reaches the benefit-of-the-doubt instruction, rendering it

*Barrios* found meaning in the instruction given that the jury would hear the entire charge before deliberating, but it also suggested that it would have even more meaning under a reasonable efforts approach. Now that *Sandoval* has disavowed that approach, it is unclear how the court will view the benefit-of-the-doubt instruction. Several Committee members believed it reintroduced the reasonable efforts idea in a different form. The invitation to opt for the lesser in case of doubt might obfuscate that jurors must first all agree there is reasonable doubt on the charged offense. Other members saw it as a specific application of how the presumption of innocence (and onus on the state to prove its allegation) applies in this context. That is, even when jurors are convinced beyond a reasonable doubt that some offense has occurred, they are still required to find in the defendant’s favor on a lesser-included offense. a benefit-of-the-doubt

Committee’s Modified Acquit-First Approach. The Committee believed that the jury should be told early in the instructions that the case presents it with the task of addressing more than the charged offense, as is reflected in the second sentence of the Law Specific to This Case.

The Committee’s instruction embodies *Sandoval*’s decision that the acquit-first approach is the law in Texas by statute, *i.e*., the jury should be told it may return a verdict of “guilty” of a lesser included offense only after unanimously finding it cannot convict the defendant of the greater offense.

Previous versions of the pattern jury charges included both acquit-first and reasonable-efforts approaches. *Sandoval*, however, held that neither a reasonable-efforts approach nor letting the defendant decide on the approach was compatible with Texas law. 2022 WL 17484313, at \*28 (“the plain language of Article 37.08 bars an ‘unable to agree’ instruction—precluding the ‘unable to agree’ [also called reasonable efforts] and ‘optional’ approaches.”). The Committee has thus removed its draft instructions on reasonable efforts.

*Sandoval* assumed without deciding that a *modified* acquit-first approach and benefit-of-the-doubt instruction were required. The modified approach requires the jury be expressly told it can consider, just not render a verdict on, the offenses in any order. In keeping with this approach, the Committee continues to recommend telling juries that despite a limitation on *voting* for a conviction on a lesser included offense, the jurors are free to discuss or consider all of the offenses covered in the instructions at any time during their deliberations.

The instructions also continue traditional Texas practice of adding a “benefit-of-the-doubt” instruction. Most or all of the substance of this may be covered by other portions of the instruction. But without further guidance from the court of criminal appeals, the Committee thought the better course was to include the provision.

The following chart summarizes the differences between the approaches:

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|  | **Modified Acquit First (CPJC 5.3)** | **Reasonable Effort**  |
| Similarities | Jury can discuss offenses in any order | Jury can discuss offenses in any order |
|  | Jury must resolve any reasonable doubt (as to which offense defendant is guilty of) in favor of the lesser | Jury must resolve any reasonable doubt (as to which offense defendant is guilty of) in favor of the lesser |
|  | The legal significance of conviction for lesser is acquittal of greater | The legal significance of conviction for lesser is acquittal of greater |
| Difference | Before convicting on lesser, jury must unanimously acquit on greater | Jury must address the greater first, but if after all reasonable efforts, the jury is unable to reach a unanimous verdict on greater, it can convict on lesser |

*Verdict Form Order*

A majority of the Committee recommends that the “not guilty” alternative be the first verdict presented to the jury, consistent with the Committee’s general practice. Others would have opted for an exception, on the view thatthe instructions direct the jury to make decisions in a particular order, and that the verdict formsshould be presented to the jury in the order in which those decisions need to be made.

# CPJC 5.3 Instruction—Lesser Included Offense—Acquit First of Greater Offense

LAW SPECIFIC TO THIS CASE

[Insert relevant instructions for specific offense.
The following example is for the offense of murder under
Texas Penal Code section 19.02(b)(1).]

The state accuses the defendant of having committed the offense of murder. You will also be asked in further detail below to consider the lesser-included offenses of manslaughter and criminally negligent homicide.

Relevant Statutes

[Insert relevant statutes and definitions units from charged and
lesser included offenses. In the following example, the charged
offense is murder, under Texas Penal Code section 19.02(b)(1), and
the lesser included offenses are manslaughter, under Texas Penal
Code section 19.04, and criminally negligent homicide, under
Texas Penal Code section 19.05.]

A person commits the offense of murder if the person intentionally or knowingly causes the death of an individual.

A person commits the offense of manslaughter if the person recklessly causes the death of an individual.

A person commits the offense of criminally negligent homicide if the person causes the death of an individual by criminal negligence.

Definitions

Intentionally Causing the Death of an Individual

A person intentionally causes the death of an individual if the person has the conscious objective or desire to cause that death.

Knowingly Causing the Death of an Individual

A person knowingly causes the death of an individual if the person is aware that his conduct is reasonably certain to cause that death.

Recklessly Causing the Death of an Individual

A person recklessly causes the death of an individual if—

1. there is a substantial and unjustifiable risk that his conduct will cause that death;

2. this risk is of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person’s standpoint; and

3. the person is aware of but consciously disregards that risk.

Causing the Death of an Individual by Criminal Negligence

A person causes the death of an individual by criminal negligence if—

1. there is a substantial and unjustifiable risk that his conduct will cause that death;

2. this risk is of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person’s standpoint; and

3. the person ought to be aware of that risk.

Application of Law to Facts

[Include relevant application of law to facts unit from charged offenses.
In the following example, the charged offense is murder, under Texas
Penal Code section 19.02(b)(1), and the lesser included offenses are
manslaughter, under Texas Penal Code section 19.04, and criminally
negligent homicide, under Texas Penal Code section 19.05.]

Although the state has charged the defendant with the offense of murder, you may find the defendant not guilty of that charged offense but guilty of any lesser included offense. In this case, the offenses of manslaughter and criminally negligent homicide are lesser included offenses of the charged and greater offense of murder.

You may discuss the three offenses in any order you choose, starting with the offense of murder or the offense of manslaughter or the offense of criminally negligent homicide.

Before you may find the defendant guilty of either manslaughter or criminally negligent homicide, however, you must first find him “not guilty” of murder.

Before you may find the defendant guilty of criminally negligent homicide, you must find him “not guilty” of murder and manslaughter.

To find the defendant guilty of murder, you must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], caused the death of [name] [insert specific allegations, e.g., by shooting [name] with a gun]; and

2. the defendant did this either intentionally or knowingly.

You must all agree on elements 1 and 2 listed above. If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty” of murder and so indicate on the attached verdict form, titled “Verdict—Guilty of Murder.”

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty” of murder. You may then determine whether the state has proved, beyond a reasonable doubt, the lesser included offenses of manslaughter or criminally negligent homicide.

To find the defendant guilty of manslaughter, you must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], caused the death of [name] [insert specific allegations, e.g., by shooting [name] with a gun]; and

2. the defendant did this recklessly.

You must all agree on elements 1 and 2 listed above. If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty” of manslaughter and so indicate on the attached verdict form, titled “Verdict—Guilty of Manslaughter.”

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty” of manslaughter.

To find the defendant guilty of criminally negligent homicide, you must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], caused the death of [name] [insert specific allegations, e.g., by shooting [name] with a gun]; and

2. the defendant did this by criminal negligence.

You must all agree on elements 1 and 2 listed above. If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty” of criminally negligent homicide and so indicate on the attached verdict form, titled “Verdict—Guilty of Criminally Negligent Homicide.”

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty” of criminally negligent homicide.

If you believe from the evidence, beyond a reasonable doubt, that the defendant is guilty of either murder or manslaughter, but you have a reasonable doubt about which of these offenses he is guilty of, you must resolve that doubt in the defendant’s favor. In that situation, you must find him guilty of the lesser offense of manslaughter.

Similarly, if you believe from the evidence, beyond a reasonable doubt, that he is guilty of either manslaughter or criminally negligent homicide, but you have a reasonable doubt about which of those offenses he is guilty of, you must resolve that doubt in the defendant’s favor. In that situation, you must find him guilty of the lesser offense of criminally negligent homicide. Of course, if you have a reasonable doubt about whether he is guilty of any of these three offenses, you must acquit the defendant and find him “not guilty.”

[Insert any other instructions raised by the evidence.]

 OF ANY OF THESE OFFENSES

 of any of these offenses

VERDICT—GUILTY OF MURDER

We, the jury, find the defendant, [name], guilty of murder, as charged in the indictment.

 Foreperson of the Jury

 Printed Name of Foreperson

VERDICT—GUILTY OF MANSLAUGHTER

We, the jury, find the defendant, [name], not guilty of murder as charged in the indictment, but guilty of the lesser offense of manslaughter.

 Foreperson of the Jury

 Printed Name of Foreperson

VERDICT—GUILTY OF CRIMINALLY NEGLIGENT HOMICIDE

We, the jury, find the defendant, [name], not guilty of murder as charged in the indictment, and not guilty of the lesser offense of manslaughter, but guilty of the lesser offense of criminally negligent homicide.

 Foreperson of the Jury

 Printed Name of Foreperson

 [Continue with punishment instructions as needed.]

# ~~CPJC 5.4 [deleted] Instruction—Lesser Included Offense—Reasonable Effort~~

# CPJC 22.10 Comments on Injury to a Child and Lesser-Included Offenses

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# CPJC 22.11 Instruction—First Degree Felony Serious Bodily Injury to Child by Act with Second-Degree Injury as a Lesser Included Offense

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of intentional or knowing injury to a child. You will also be asked in further detail below to consider the lesser-included offense of reckless injury to a child.

Relevant Statutes

 A person commits the offense of intentional or knowing injury to a child if he intentionally or knowingly by an act causes serious bodily injury to a child.

A person commits the offense of reckless injury to a child if he recklessly by an act causes serious bodily injury to a child.

Definitions

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Serious Bodily Injury

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Intentionally Causing Serious Bodily Injury

A person intentionally causes serious bodily injury to a child if the person has the conscious objective or desire to cause that serious bodily injury to the child.

Knowingly Causing Serious Bodily Injury

A person knowingly causes serious bodily injury to a child if the person is aware that his conduct is reasonably certain to cause that serious bodily injury to the child.

Recklessly Causing Serious Bodily Injury

A person recklessly causes serious bodily injury to a child if—

1. there is a substantial and unjustifiable risk that his conduct will cause that serious bodily injury to the child;

2. this risk is of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person’s standpoint; and

3. the person is aware of but consciously disregards that risk.

Application of Law to Facts

Although the state has charged the defendant with the offense of intentional or knowing injury to a child, you may find the defendant not guilty of that charged offense but guilty of a lesser included offense. In this case, the offense of reckless injury to a child is a lesser included offense of the charged and greater offense of intentional or knowing injury to a child.

You may discuss the two offenses in any order you choose, starting with the offense of intentional or knowing injury to a child or the offense of reckless injury to a child.

[

Before you may find the defendant guilty of reckless injury to a child, however, you must first find him “not guilty” of intentional or knowing injury to a child.

[Continue with the following.]

To find the defendant guilty of intentional or knowing injury to a child, you must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], [*insert act, e.g.*, struck [*name*] with his fist];

2. the defendant [*insert act, e.g.*, by striking [*name*] with his fist] caused bodily injury to [*name*];

3. [*name*] was a child fourteen years old or younger;

4. the injury caused to [*name*] was serious bodily injury; and

5. the defendant—

a. intended to cause serious bodily injury to [name]; or

b. knew he would cause serious bodily injury to [name].

You must all agree on elements 1 through 5 listed above, but you do not have to agree on the culpable mental states listed in elements 5.a and 5.b above.

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must find the defendant “guilty” of intentional or knowing injury to a child and so indicate on the attached verdict form, titled “Verdict—Guilty of Intentional or Knowing Injury to a Child.”

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 5 listed above, you must find the defendant “not guilty” of intentional or knowing injury to a child. You may then determine whether the state has proved, beyond a reasonable doubt, the lesser included offense of reckless injury to a child.

To find the defendant guilty of reckless injury to a child, you must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], [*insert act, e.g.*, struck [*name*] with his fist];

2. the defendant [*insert act, e.g.*, by striking [*name*] with his fist] caused bodily injury to [*name*];

3. [*name*] was a child fourteen years old or younger;

4. the injury caused to [*name*] was serious bodily injury; and

5. the defendant was reckless about whether he would cause serious bodily injury to [*name*].

You must all agree on elements 1 through 5 listed above.

If you all agree that the state has proved, beyond a reasonable doubt, all five elements listed above, you must find the defendant “guilty” of reckless injury to a child and so indicate on the attached verdict form, titled “Verdict—Guilty of Reckless Injury to a Child.”

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 5 listed above, you must find the defendant “not guilty” of reckless injury to a child.

If you believe from the evidence, beyond a reasonable doubt, that the defendant is guilty of either intentional or knowing injury to a child on the one hand or reckless injury to a child on the other, but you have a reasonable doubt about which of these offenses he is guilty, you must resolve that doubt in the defendant’s favor. In that situation, you must find him guilty of the lesser offense of reckless injury to a child. Of course, if you have a reasonable doubt about whether he is guilty of intentional or knowing injury to a child and you have a reasonable doubt about whether he is guilty of reckless injury to a child, you must acquit the defendant and find him “not guilty.”

[Insert any other instructions raised by the evidence.]

 OF EITHER OF THESE OFFENSES.

 of either of these offenses

VERDICT—GUILTY OF INTENTIONAL OR KNOWING
INJURY TO A CHILD

We, the jury, find the defendant, [*name*], guilty of intentional or knowing injury to a child, as charged in the indictment.

* Foreperson of the Jury
* Printed Name of Foreperson

VERDICT—GUILTY OF RECKLESS
INJURY TO A CHILD

We, the jury, find the defendant, [*name*], guilty of the lesser offense of reckless injury to a child.

* Foreperson of the Jury
* Printed Name of Foreperson