

JURY CHARGES

DEXTER E. GILFORD, *Austin*
Law Office of Dexter Gilford

State Bar of Texas
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CHAPTER 17

I. INTRODUCTION

Despite the prominent role that jury instruction practice serves in the criminal trial, it is a practice that is governed by just less than a dozen or so statutes and rarely any constitutional provisions. However, the matters on which a trial court might instruct the jury are many. The present discussion will address some of the more general issues that arise in the context of jury instruction practice including matters on which the court must instruct, those on which it should instruct upon request, the various analyses that the trial court is to undertake to determine when a particular jury instruction should be given, the applicable standards of appellate review governing jury charge error, and the pertinent harm analysis that is conducted on a finding of jury charge error. By necessity, then, there are issues that arise in jury instruction practice which are here given only broad and general treatment for purposes brevity's sake and in order to address such a broad topic in a single discussion. Still, there are other important jury instruction issues for discussion which have been completely omitted for the same reasons. For a full treatment, there are several excellent treatises which, when read together, form a comprehensive resource for resolution of just about any issue that may arise in the context of jury instruction practice.¹

The present discussion will address the basic process of assembling a jury charge, general charging considerations including content and format, pertinent appellate standards of review for error and harm, and, finally, specific matters for which jury instruction may be appropriate. Finally, because of the much more specialized nature of jury instruction practice pertaining to the trial of capital cases, this discussion is limited to the jury instruction practice in non-capital cases.

II. PROCEDURE GOVERNING ASSEMBLY AND GIVING OF COURT'S CHARGE

The procedure governing the assembly and giving of the court's charge is found in Chapter 36 of the Code of Criminal Procedure—specifically, articles 36.13 through 36.19, which set forth the basic law governing the court's charge in both the guilt/innocence and punishment phases of trial, covering all features of the process including assembly of the charge, taking and handling of objections and special requests to the charge, and, finally, the standard of review to govern jury charge error.² With respect to punishment jury instructions, any discussion of jury instruction practice must also consider the specific requirements of article 37.07.³

The basic procedure governing the court's giving of its jury instructions can be thought of as involving 3 general steps: (1) the court's assembly of a proposed or draft charge that it intends to deliver and read to the jury, (2) the court's conducting of the charge conference to hear objections to the charge and requests for matters for

¹See *e.g.*, Dix & Dawson, TEX. CRIMINAL PRACTICE AND PROCEDURE §§ 36.01, *et. seq.* (West's 2002); McCormick, Blackwell & Blackwell, TEX. CRIMINAL FORMS AND TRIAL MANUAL §§ 96.01, *et. seq.* (West's 2002); Teague, TEX. CRIM. PRACTICE GUIDE §§ 101.01, *et. seq.* (Mathew Bender 2001).

²TEX. CODE CRIM. PROC. ARTS. 36.13-19.

³TEX. CODE CRIM. PROC. ART. 37.07.

inclusion in the charge by both the state and the defendant, and, finally, (3) assembling the final charge, and (4) delivering and reading to the jury the final charge.⁴

After the final charge has been assembled and before closing arguments are given, the court is to read its final charge to the jury. The court is permitted to give supplemental instruction but it may only do so in several limited, enumerated circumstances.⁵ Should there be any supplemental instructions given by the court-by reason either of the receipt of additional evidence or in response to a jury's question—the above-described process is to be repeated giving both sides an opportunity for objection, comment and requests for inclusion. In this regard, the process closely resembles assembly of the jury charge by committee and can the process can usefully be viewed in such terms. A general description of the process is given below.

A. General Charge Considerations for the Court

Article 36.13 provides that “the jury is the exclusive judge of the facts, but it is bound to receive the law from the court and be governed thereby.”⁶ Similarly, Article 36.14 provides that the judge is bound to instruct the jury on “the law applicable to the case.”⁷ However, the trial court is not given unfettered discretion in fashioning its instructions. Rather, it must insure that its instructions, while accurately setting forth the law, do not violate the basic proviso that the jury alone is the judge of the facts of the case.⁸

The limitations on the court's discretion in fashioning jury instructions is set forth in Article 26.14 which provides in part that the trial court is to ensure that it does “not express[] any opinion as to the weight of the evidence, not sum[] up the testimony, [or] discuss[] the facts...using any argument in [its] charge calculated to arouse the sympathy or excite the passions of the jury.”⁹

B. Basic Procedure Governing Giving of Court's Instructions

1. When Is A Charge to the Jury Required?

⁴TEX. CODE CRIM. PROC. ART. 36.13-.19.

⁵See TEX. CODE CRIM. PROC. ART. 36.16.

⁶TEX. CODE CRIM. PROC. ART. 36.13. See e.g., *Pickens v. State*, 921 S.W.2d 774, 776-77 (Tex. App.—El Paso 1996, *no pet.*) (in jury trial, issue of deadly weapon was an affirmative finding that the jury alone and not the judge was to make).

⁷TEX. CODE CRIM. PROC. ART. 36.14.

⁸TEX. CODE CRIM. PROC. ART. 36.13.

⁹TEX. CODE CRIM. PROC. ART. 36.14. See *Atkinson v. State*, 923 S.W.2d 21, 25 (Tex. Crim. App. 1996) (“A jury instruction which identifies evidence requiring special jury consideration under the law, and which sets out the law governing such consideration, does not violate the article 36.14 prohibition against judicial comment so long as it does not intimate that the jury should resolve any fact question in a certain way or that any of the evidence bearing upon such fact question should be given greater weight or credibility than other evidence bearing upon the same question.”).

A court must give instructions in all felony jury trials and in misdemeanor trials conducted in courts of record: Article 36.14 provides that “in each felony case and in each misdemeanor case tried in a court of record, the judge, shall...deliver to the jury...a written charge distinctly setting forth the law applicable to the case...”¹⁰

2. Time for Assembling the Charge: At Any Time Prior to Argument

The court is bound to instruct the jury on “the law applicable to the case.”¹¹ The Code of Criminal Procedure requires the court to assemble its charge with input from both the state and the defendant.¹² After the close of evidence but before final argument, the court will begin the process of assembling and delivering the charge which will include conducting a charge conference. After hearing objections and requests for matters to be included by both parties, the court will assemble the final charge incorporating or excluding requested matters.¹³ In practice, the assembly of the charge is likely to have already begun some time prior to final argument with the court having gotten some input from state and defense attorneys concerning matters for inclusion (and exclusion from the charge) such that by the close of evidence, most of the matters that will be included in the court’s charge will have already been decided upon.

Articles 36.14 and 36.16 set the time limits for *delivery* of the court’s charge and come closest to setting any temporal limits on the assembly-confer-assembly character of the charge process; these articles do not purport to set any time limits or, indeed, even address how early the process for assembling the charge may begin. Rather, article 36.14 states simply that “in each felony case and in each misdemeanor case tried in a court of record, the judge shall, before the argument begins, deliver to the jury...a written charge distinctly setting forth the law applicable to the case...”¹⁴ Presumably, the court may begin assembly of the charge at any time prior to its delivery to the jury.

There is no provision prohibiting this practice which, presumably, is followed in courts throughout the state. In practice, the template for the charge will usually be prior court charges in similar offenses involving similar facts and will usually be accessible from the court’s administrative coordinator or reporter. In many jurisdictions, the same

¹⁰TEX. CODE CRIM. PROC. ART. 36.14. Article 36.14 excludes from the charge requirement cases in which there has been a plea of guilt entered where the jury has been waived. Thus, if the defendant pleads guilty to a jury, the court would still be required to instruct the jury.

¹¹TEX. CODE CRIM. PROC. ART. 36.14.

¹²TEX. CODE CRIM. PROC. ART. 36.14. The statutes governing objections and special requested instructions appear to treat the parties differently with respect to their ability to bring objections and/or special requested instructions to the court’s attention. Article 36.14 appears to give only defendants the right to make “objections” to the court’s charge providing that the “defendant or his counsel shall have a reasonable time to examine” the charge and make objections. However, article 36.15 appears to permit both parties to request special instructions providing that “counsel on both sides” shall have an opportunity to present special written instructions. TEX. CODE CRIM. PROC. ART. 36.15. However, this distinction is of no practical import given the fact that both objections and special requested instructions can be used to accomplish the same thing, *i.e.*, bring to the court’s attention matters believed improperly included in the court’s charge as well as matters improperly excluded from the court’s charge.

¹³*See generally* TEX. CODE CRIM. PROC. ART. 36.14, 36.16.

¹⁴TEX. CODE CRIM. PROC. ART. 36.14.

jury charges have been in use for many years and are based on sample charges that can be easily found in the leading Texas treatise on criminal forms.¹⁵

3. Charge Process: Assembling Draft Charge: Objections and Special Requested Instructions

Once the court has prepared the charge that it intends to deliver to the jury, the defendant and the state will have an opportunity for providing input in the assembly of the court's charge by means of either an objection or by means of a special requested instruction. As noted earlier, the draft charge will usually be based on previous charges given in similar cases, the judge's own experience in trying cases, and suggestions gathered throughout the process from the state and the defendant informally based on the evidence and testimony presented at trial. This process stage in the process is best viewed of in terms of properly requesting matters for inclusion in the charge and, for defendants, preserving error for jury charge error.

(a) *Opportunity for Input in Fashioning the Court's Charge: Objections and Special Requested Instructions*

Both the state and the defendant have an opportunity to have some input in the final charge delivered to the jury. That is, both have a right to review the proposed charge and at least comment—by way of objection or special requested instruction—on the final charge to the jury.¹⁶ This provision is mandatory and a court cannot deprive the defendant of the right to review the charge.¹⁷ The Code of Criminal Procedure provides that “[a]ll objections to the charge and to the refusal of special charges shall be made at the time of the trial.”¹⁸

A defendant may object to a court's charge in one or both of two ways: by means of objection and, given the statutory explication of special requested instructions, by means of the special requested instruction.¹⁹ Further, the objection or requested instruction may take one of two substantive forms: objecting to matters included in the instruction or matters omitted from the jury charge.²⁰ Before reading the charge to the jury, the “defendant or his counsel shall have a reasonable time to examine the same and he shall present his objections thereto in writing, distinctly specifying each ground of objection.”²¹ Likewise, “[b]efore the court reads his charge to the jury, counsel on both sides shall have a reasonable time to present written instructions and ask that they be given to the jury.” Despite the requirement that special requested instructions and objections be written, both statutes are satisfied if

¹⁵See McCormick, Blackwell & Blackwell, TEX. CRIMINAL FORMS AND TRIAL MANUAL §§ 96.01, *et. seq.*

¹⁶TEX. CODE CRIM. PROC. ARTS. 36.14, 36.15.

¹⁷See *e.g.*, TEX. CODE CRIM. PROC. ARTS. 36.15.

¹⁸TEX. CODE CRIM. PROC. ART. 36.19.

¹⁹TEX. CODE CRIM. PROC. ARTS. 36.14, 36.15.

²⁰See *generally* TEX. CODE CRIM. PROC. ARTS. 36.14, 36.15.

²¹TEX. CODE CRIM. PROC. ART. 36.14.

they are dictated to the court reporter.²² Further, given the statutes treatment of requested instructions and objections, both appear to be interchangeable in terms of constituting a means of bringing jury instruction error to the trial court's attention.²³ The defendant may choose one or the other and may choose to present all of his instructions and objections in the formal form of an "objection" or conversely as a special requested instruction given the special definitions broad set forth in the statutes.²⁴

(b) *Court's Duties Upon Receipt of Objections and Special Requested Charges: Incorporate or*

The court may respond to objections and special requested instructions in one of several ways: it may simply do nothing and deliver the charge as initially drafted, it may amend or modify its charge but not incorporate the requested charge or objection, or it may incorporate the charge or respond to the objection.²⁵ Article 36.14 does not specifically address the court's duty to rule on the objections as does Article 36.15 with respect to special requested instructions,²⁶ the statute makes clear that the court's action taken with respect to properly made objections to its charge (and special requested instructions) by incorporating, amending or modifying its charge will be treated as tantamount to expressly ruling on them for appellate purposes.²⁷ Indeed, as article 36.15 provides, "[w]hen the defendant has leveled objections to the charge or has requested instructions or both, and the court thereafter modifies his charge and rewrites the same and in so doing does not respond to objections or requested charges, or any of them, then the objections or requested charges shall not be deemed to have been waived by the party making requested the same, but shall be deemed to continue to have been urged by the party making or requesting the same unless the contrary is shown by record."²⁸

²²"The requirement that the objections to the court's charge be in writing will be complied with if the objections are dictated to the court reporter in the presence of the court and the state's counsel, before the reading of the court's charge to the jury." TEX. CODE CRIM. PROC. ART. 36.14. Similarly, with respect to special requested charges, "[t]he requirement that the instructions be in writing is complied with if the instructions are dictated to the court reporter in the presence of the court and the state's counsel, before the reading of the court's charge to the jury." *Id.*

²³TEX. CODE CRIM. PROC. ART. 36.14: With respect to objections, "[s]aid objections may embody errors claimed to have been committed in the charge, as well as errors claimed to have been committed by omissions therefrom or in failing to charge upon issues arising from the facts..." With respect to special requested instructions, article 36.15 provides that "[t]he defendant may, by a special requested instructions, call the trial court's attention to error in the charge, as well as omissions therefrom..." TEX. CODE CRIM. PROC. ART. 36.15.

²⁴"...[I]n no event shall it be necessary for the defendant or his counsel to present any special requested charges to preserve or maintain any error assigned to the charge..." TEX. CODE CRIM. PROC. ART. 36.14.

²⁵*See generally* TEX. CODE CRIM. PROC. ARTS. 36.14, 36.15.

²⁶"The court shall give or refuse these charges." TEX. CODE CRIM. PROC. ART. 36.15.

²⁷"Compliance with this Article is all that is necessary to preserve, for review, the exceptions and objections presented to the charge and any amendment or modification thereof." *See also* TEX. CODE CRIM. PROC. ART. 36.14.

²⁸TEX. CODE CRIM. PROC. ART. 36.15.

If the court accepts a special requested instruction and incorporates into its charge it should do so without giving any indication that it was a requested charge or that it was made by either party.²⁹ Likewise, the trial court should not read jury charges requested and denied to the jury.³⁰ Although no such similar provision is contained in article 36.15 governing objections, presumably the court is likewise prohibited from instructing a jury that a particular charge was objected to by either party.

The court has a duty upon request to provide a correct statement of the law even if the defendant makes an instruction that may be erroneous.³¹ In this regard, the benefit of the doubt is given to the defendants and the law will err on the side of ensuring that the defendant is given a correct statement of the law. If brought to the trial court's attention, it has a duty to provide a correct statement of the law concerning the subject which the defendant's erroneous instruction or objection pertained. In this regard, a defendant's objection need not be in perfect form in order to preserve the matter for appellate review.³²

©) *Assembly of Final Charge and Final Additional Opportunity to Object*

The court may respond to objections and special requested instructions in one of several ways: it may simply do nothing and deliver the charge as initially drafted, it may amend or modify its charge but not incorporate the requested charge or objection, or it may incorporate the charge or respond to the objection.³³ Article 36.16 provides that “[a]fter the judge shall have received the objections to his main charge, together with any special charges offered, he may make such changes in his main charge as he may deem proper...and thereupon the judge shall read his charge to the jury as finally written, together with any special charges given...”³⁴ Prior to delivering the charge to the jury, and after receipt of the parties' objections and/or special requested instructions, the court will either amend, incorporate or modify its charges to comply with the objections or requested instructions or deliver the draft.

The defendant will have one final opportunity to review and voice objections or special requested charges prior to delivery and reading of the charge to the jury.³⁵ However, the defendant (the state is not mentioned here) or his counsel shall have the opportunity to present their objections thereto” in the same manner in which initial objections are made pursuant to article 36.15.³⁶ The defendant's failure to make any further objections will not

²⁹TEX. CODE CRIM. PROC. ART. 36.15.

³⁰*Id.*

³¹*See Chapman v. State*, 921 S.W.2d 694 (Tex. Crim. App. 1996) (although defendant's requested instruction misstated the law, request was sufficient to put trial court on notice to objection to its charge and error preserved for appellate review).

³²*See Stone v. State*, 703 S.W.2d 652, 655 (Tex. Crim. App. 1986).

³³*See generally* TEX. CODE CRIM. PROC. ARTS. 36.14, 36.15.

³⁴TEX. CODE CRIM. PROC. ART. 36.16.

³⁵*Id.*

³⁶TEX. CODE CRIM. PROC. ART. 36.16. No mention is made of any ability on the part of the state to request special instructions. However, given the broad means conferred on the state to complain of matters contained in the

forfeit or waive previously-made, properly made objections. Conversely, properly made objections are preserved. Curiously, the code does not make explicit that the failure to allow the time to make such objections is reviewable as is the case with supplementary instructions.

(d) Delivery of Final Charge

After the final charge has been reviewed by counsel, the court “shall read his charge tot the jury as finally written...”³⁷ The charge is to be read before final argument begins.³⁸ With just three exceptions, this should be the last time prior to verdict that the court will have any official contact with the jury concerning instructions or its verdict. Article 36.16 provides that “[a]fter the argument begins no further charge shall be given to the jury unless required by the improper argument of counsel or the request of the jury, or unless the judge shall, in his discretion, permit the introduction of other testimony.”³⁹

(e) Certification of the Court’s Charge

Once the final charge is given, it shall be certified by the judge along with all specials requested instructions and objections and filed among the papers in the cause.⁴⁰

(f) Delivery of the Charge to the Jury

The jury may take to their jury room the charges given by the court after the same have been filed. They shall not be permitted to take with them any charge or part thereof which the court has refused to give.⁴¹

(g) Supplemental Instructions

Once the final charge has been read and final argument has began, the court’s authority to further instruct the jury is limited. Article 36.16 provides that “[a]fter argument begins no further charge shall be given to the jury unless required by the improper argument of counsel or the request of the jury, or unless the judge shall, in his discretion, permit the introduction of other testimony...”⁴²

Construing these limitations may not be as simple as they appear. For example, article 36.16 expressly provides the trial court the authority to give supplemental instructions if on “the request of the jury.”⁴³ However, in doing so the court must be careful to ensure that it does not violate the proviso that it instruct the jury on “the law applicable to the case” and refrain from “expressing any opinion as to the weight of the evidence,...summing up the

court’s charge as well as draw the court’s attention to matters omitted from the court’s charge by means of the objection procedure, this distinction is of little practical importance.

³⁷TEX. CODE CRIM. PROC. ART. 36.16.

³⁸See generally TEX. CODE CRIM. PROC. ARTS. 36.14 - .16.

³⁹TEX. CODE CRIM. PROC. ARTS. 36.16.

⁴⁰TEX. CODE CRIM. PROC. ARTS. 36.17.

⁴¹TEX. CODE CRIM. PROC. ARTS. 36.18.

⁴²TEX. CODE CRIM. PROC. ARTS. 36.16.

⁴³TEX. CODE CRIM. PROC. ARTS. 36.16.

testimony, [or] discussing any facts...’⁴⁴ In *Rich v. State*, an unpublished opinion, the trial court’s giving of a supplemental instruction was found to be error because it was found to have done so with respect to a factual, as opposed to a legal, matter.⁴⁵ There, the defendant filed an unsworn application for community supervision and at trial presented no supporting evidence or testimony.⁴⁶ The trial court’s instructions did not include any instructions concerning community supervision.⁴⁷ Both the state and the defendant addressed the issue in their arguments with the defendant suggesting that the defendant was eligible but was not requesting community supervision and with the state responding that the defendant was not eligible.⁴⁸ Both arguments misleading assumed that the jury election had been properly filed.⁴⁹ During deliberations, obviously confused by both the defendant’s and state’s closing argument references to community supervision and the lack of any instructions concerning community supervision, the jury sent 2 questions to the court asking whether the defendant was eligible for community supervision based on a felony conviction and what “filing” an application for community supervision meant.⁵⁰ The trial court responded that there was no proof that the defendant was eligible for community supervision before it.⁵¹ On appeal, the court of appeals held that the court’s instruction amounted to a supplemental instruction on a factual matter not required by law and, therefore, was error.⁵² However, the court found that the defendant was not harmed by the supplemental instruction because in view of what appeared to be the misleading arguments of both the defendant and prosecutor concerning community supervision during closing argument, the court’s instruction was more “curative” than prejudicial and that the court needed to “refocus” the jury after the two arguments both of which incorrectly assumed that the application for community supervision had been properly filed and was legally before the jury for its consideration.⁵³

Rich v. State and similar cases appear to apply what appears to be the appellate court’s general treatment of almost any communication with the jury as a supplemental instruction.⁵⁴ In this regard, the rule is that if the

⁴⁴*Id.* See also TEX. CODE CRIM. PROC. ARTS. 36.13 which provides that “[u]nless otherwise provided in this Code, the jury is the exclusive judge of the facts, but it is bound to receive the law from the court and be governed thereby.”

⁴⁵ ___ S.W.3d ___, 2005 WL 1489614 (Tex. App.–Austin June 23, 2005, *pet. history unavailable*) (*Not designated for publication*).

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.*

⁵⁴See *Daniell v. State*, 848 S.W.2d 145, 147 (Tex. Crim. App. 1993).

instruction could be given in the original charge, it may be given as a supplemental instruction.⁵⁵ Applying this rule ensures that the trial court does not run afoul of article 36.14's proviso that it instruct only on "the law applicable to the case."⁵⁶

(h) *Further Instructions Necessitated: Additional Opportunity for Objection*

Should the court decide to give additional jury instructions, the defendant or his counsel shall have the right to present objections in the same manner as with his initial charge.⁵⁷ The Code of Criminal Procedure makes explicit that the failure to provide "a reasonable time to examine the charge and specify the ground of objection shall be subject to review in the trial court or in the appellate court."⁵⁸

(I) *Court's Ability to Correct Its Own Charge*

The Code of Criminal Procedure makes clear that with the exception of 3 enumerated circumstances, the trial court is not to give any additional charges.⁵⁹ However, is there a basis upon which a court can *sua sponte* issue additional instructions? The Court of Criminal Appeals and various courts of appeal have been very strict in the giving of supplemental instructions holding that the giving of such instructions must be based on a preliminary enumerated exception.⁶⁰ However, several courts of appeals has found that a trial court has authority to give such supplemental instructions as it may deem necessary to correct a charge it believes to be erroneous at any time before verdict withdraw.⁶¹

Further, at least one court of appeals has held that the giving of improper supplemental instructions violated the defendant's right to counsel.⁶²

III. REVIEW OF ERROR IN JURY CHARGE ON APPEAL

There is good reason that many law school professors teach remedies in first year contracts prior to teaching substantive contract law. Borrowing from this approach, it might be useful for any discussion of jury charge practice to consider appellate treatment of complained of error in a court's charge. This discussion should address any preservation requirements, the standard of review on appeal and the application of the harmless error doctrine.

A. Preservation of Jury Charge Error

⁵⁵*Allaben v. State*, 418 S.W.2d 517, 521 (Tex. Crim. App. 1967).

⁵⁶TEX. CODE CRIM. PROC. ARTS. 36.14.

⁵⁷TEX. CODE CRIM. PROC. ARTS. 36.16.

⁵⁸TEX. CODE CRIM. PROC. ARTS. 36.19.

⁵⁹TEX. CODE CRIM. PROC. ARTS. 36.19.

⁶⁰*See e.g., Garza v. State*, 55 S.W.3d 74, 77 (Tex. App.—Corpus Christi 2001, *pet. ref'd.*) (court's supplemental charge erroneously given where none of article 36.16's prerequisites established).

⁶¹*See Morlett v. State*, 656 S.W.2d 603, 606 (Tex. App.—Corpus Christi 1983, *no pet.*); *Seals v. State*, 90 S.W.3d 422, 424 (Tex. App.—Eastland 2002, *pet. ref'd.*).

⁶²*See e.g., Garza v. State*, 55 S.W.3d at 77.

Like the general preservation requirements governing the admission and exclusion of evidence contained in the Rules of Evidence⁶³ and case law and the Rules of Appellate Procedure⁶⁴ the Code of Criminal Procedure sets forth the procedure governing preservation of jury charge error be the matter complained of an instruction omitted from the charge or one of a matter included for which objection was properly made.⁶⁵

Preservation is important especially in the context of jury instructions because it is different than in most contexts. In most contexts the general rule is that absent an objection, there is no appellate review. However, in the context of jury charge error, a complaint concerning jury charge error may still be considered on appeal absent a properly preserved objection or special requested instruction.⁶⁶ This does not mean that preservation law is not important because unlike in most contexts whether there was an objection rather affects the harm standard that the appellate court will apply if there is any error found.⁶⁷ In this regard, one important matter to remember is that all jury charge error is review able on appeal.

In 3 separate and, in some ways, redundant, provisions, the Code of Criminal Procedure provides for a relatively simple means of preserving error for appellate review: Before the charge is read to the jury.⁶⁸

1. The defendant must preserve complaints concerning the jury charge by means of an objection or special requested instruction;⁶⁹
2. The objection or special requested instruction must be in writing or dictated to the court reporter;⁷⁰
3. The objection must “distinctly specify[] each ground of objection” or special requested instruction.⁷¹

The rules give the defendant the option of pursuing complaints and requests concerning the court’s charge in writing or by dictating them to the court reporter in the presence of the court and the state.⁷² The Code of Criminal Procedure provides that “[a]ll objections to the charge and to the refusal of special charges shall be made at the time

⁶³TEX. EVID. R. 103 (a).

⁶⁴TEX. R. APP. PROC. 33.1.

⁶⁵TEX. CODE CRIM. PROC. ARTS. 36.14-.16.

⁶⁶*See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).

⁶⁷*Id.* at 171.

⁶⁸TEX. CODE CRIM. PROC. ARTS. 36.14, 36.15. *See e.g., Rojas v. State*, 662 S.W.2d 466, 469 (Tex. App.–Corpus Christi 1983, *pet. ref’d.*) (defendant’s special requested instructions presented after the charge has been read to the jury is deliberating not timely made and cannot be considered on appeal).

⁶⁹TEX. CODE CRIM. PROC. ARTS. 36.14, 36.15.

⁷⁰TEX. CODE CRIM. PROC. ARTS. 36.14, 36.15.

⁷¹TEX. CODE CRIM. PROC. ARTS. 36.14, 36.15.

⁷²TEX. CODE CRIM. PROC. ARTS. 36.14, 36.15.

of the trial.”⁷³ The objection “may embody errors claimed to have been committed in the charge, as well as errors claimed to have been committed by omissions therefrom or in failing to charge upon issues arising from the facts...”⁷⁴ Likewise, a special requested instruction may “call the trial court’s attention to error in the charge, as well as omissions therefrom...”⁷⁵ The requirement that the objection and, presumably the special requested instruction” “distinctly specify[]” its basis has been construed fairly strictly.

In order to properly preserve objections and requested instructions for appellate review, unlike instances involving the reception or exclusion of evidence, the defendant need not obtain or pursue a matter to the point of a written or oral adverse ruling.⁷⁶ Instead, merely filing distinctly specified written objections or dictating them to the court reporter is sufficient to preserve the error as the appellate court may simply consider the court’s certified charge and determine which of the objections or special requested charges were granted or denied. In this regard, with respect to objections, article 36.14 provides that “[c]ompliance with the provisions of this Article is all that is necessary to preserve, for review, the exceptions and objections presented to the charge and any amendment or modifications thereof.”⁷⁷ With respect to special requested instructions, “[a]ny special requested charges which is granted shall be incorporated in the main charge and shall be treated as a part thereof...[and] when “the defendant has not levelled objection to the charge or has requested instructions or both, and the court, thereafter modifies his charge and rewritten the same and in so doing does not respond to objections, or requested charges, or any of them, then the objections or requested charges shall not be deemed to have ben waived by the party making or requesting the same, but shall be deemed to have been urged by the party making or requesting the same unless the contrary is shown by the record...”⁷⁸ Finally, once the final charge is given, “no further exception or objection shall be required of the defendant in order preserve any objections or exceptions theretofore made.”⁷⁹

There is a separate question as to the level of specificity required to satisfy articles 36.14 - .17’s preservation requirements. In short, especially in the context of submitted written objections and special requested instructions, the defendant must bring the court’s attention specifically to the objection and special requested instruction. A defendant cannot simply file a plethora of objections with the trial court without specifically directing its attention to a particular objection that it will later raise on appeal and have the objection considered preserved. *Arana v.State* illustrates the court’s treatment of the specificity requirement in the context of written objections and special

⁷³TEX. CODE CRIM. PROC. ART. 35.19.

⁷⁴TEX. CODE CRIM. PROC. ART. 36.14.

⁷⁵TEX. CODE CRIM. PROC. ART. 36.15.

⁷⁶TEX. EVID. R. 103 (a); TEX. R. APP. PROC. 33.1.; see *Vasquez v. State*, 919 S.W.2d 433 (Tex. Crim. App. 1995).

⁷⁷TEX. CODE CRIM. PROC. ART. 35.14.

⁷⁸TEX. CODE CRIM. PROC. ART. 35.15.

⁷⁹TEX. CODE CRIM. PROC. ART. 35.16.

requested instructions.⁸⁰ There, the defendant submitted an 8 page proposed jury charge which included an instruction concerning the failure of the defendant to testify and limiting consideration of impeachment evidence.⁸¹ At the charge conference, the court worked from the state's charge and took the defendant's objections and requests paragraph by paragraph and provision by provision.⁸² At the end of the conference, the defendant simply submitted his own charge but did not have any discussion concerning or otherwise specifically identify each provision later complained of on appeal.⁸³ The court of appeals found that the defendant had not complied with article 36.15's specificity in objection requirement.⁸⁴ The court held that "where article 36.15 provides that requested instructions will not be deemed waived when the trial court revises a charge without responding to them, we believe this pertains to specific provisions which the defendant present in a manner that fairly apprises the court that the defendant is proposing something different from or in addition to that which is under consideration."⁸⁵ In short, the court seemed to have viewed the defendant's conduct as evasive at best given the fact that the court conducted a charge conference at which discussion was had concerning the charge and, given the opportunity, the defendant did not bring his complaints concerning the charge to the trial court's attention. The appellate court considered his written objection as "buried within his eight page proposed jury charge and ...not among the matters...raised during the charge conference."⁸⁶ Finding that the court had no "reason to suspect that any additional differences existed" the court found he had not preserved error.

The requirement that the defendant be afforded an opportunity to review the charge for objections and special requested instructions is not specific does not have any specific basis for appeal in articles 35.14 or 36.15. However, at least in the context of supplementary instructions, In addition to objections and special requested instructions, article 35.16 provides that the failure to afford the defendant "a reasonable time to examine the charge and specify the ground of objection shall be subject to review either in the trial court or in the appellate court."⁸⁷ Presumably, this also applies to initial opportunities to review the charge and make objections and request special charges since it would make little sense to provide for appellate review in the one context and not the other. In either event, the difference in treatment is likely to be of little practical import because article 36.19 which governs the standard of review on appeal applies to violation of any requirement of articles 36.14-36.18.

B. Standard of Review on Appeal

⁸⁰1 S.W.3d 824 (Tex. App.–Houston [14th Dist.], 1999, *pet. ref'd.*).

⁸¹1 S.W.3d at 828.

⁸²*Id.*

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.* at 829.

⁸⁷TEX. CODE CRIM. PROC. ART. 35.16.

Texas Rule of Appellate Procedure 44.2 provides the basic standard of appellate review for non-constitutional error directing appellate courts to disregard “any error, defect, irregularity, or variance that does not affect substantial rights.”⁸⁸ With respect to jury charge error, Article 36.19 provides in part that:

Whenever it appears by the record in any criminal action upon appeal that any requirement of Articles 36.14, 36.15, 36.16, 36.17, and 36.18 has been disregarded, the judgement shall not be reversed unless the error appearing from the record was calculated to injure the rights of the defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial.”

Further, in a provision made ineffectual by *Almanza*⁸⁹, Article 36.19 provides that “[a]ll objections to the charge and to the refusal of special charges shall be made at the time of the trial.”⁹⁰

To what extent, if any, does Texas Rule of Appellate Procedure 44.2 impose a different standard of review for non-constitutional jury charge error? This question of particular import because with the exceptions most jury charge complaints will be considered of non-constitutional dimension. The question has been resolved by *Almanza v. State*.⁹¹ In *Almanza v. State*, the Court of Criminal Appeals, construing and interpreting article 36.19 statutory standard of harm, determined that it would retain the authority to hear any jury charge complaint but would apply a stricter standard of harm if the defendant failed to preserve error.⁹² The *Almanza* court required it to first determine whether the complained of charge error was preserved. If the error was preserved, then the appellant need only show that the complained of erroneous charge or denied requested instruction caused “some harm”.⁹³ If the defendant failed to preserve the error, he would have to meet the higher standard of “egregious harm” caused by the complained of error.⁹⁴

On appeal, the appellate court will consider whether in light of the entire court’s charge, the evidence and testimony admitted at trial, the issues that were contested, the argument of both parties and any other relevant information that can be discerned from the record whether the objected to charge or the failure to charge harmed the defendant under the appropriate “some” or “egregious” harm standard.⁹⁵

IV. GUILT/INNOCENCE JURY INSTRUCTIONS: THE LAW APPLICABLE TO THE CASE

⁸⁸TEX. R. APP. PROC. 44.2 (b).

⁸⁹686 S.W.2d at 171 (unobjected to error may be reviewed on appeal under “egregious harm” standard).

⁹⁰TEX. CODE CRIM. PROC. ART. 35.19.

⁹¹686 S.W.2d 157 (Tex. Crim. App. 1984).

⁹²*Id.*

⁹³TEX. CODE CRIM. PROC. ART. 36.14.

⁹⁴*Id.* at 171.

⁹⁵*Id.*

One useful way to view the jury charge practice is in terms of two things: (1) those matters which the judge must instruct on even without request and (2) those matters on which it must give an instruction on request as opposed to those that are merely discretionary. Any such consideration must bear in mind the appellate treatment of jury charge error which though always subject to review may in many cases be found harmless.

A. The Court’s Duty to Charge the Jury on “The Law Applicable to the Case”

Article 36.14 imposes on the trial court the responsibility of instructing the jury on “the law applicable to the case.”⁹⁶ Unless punishment is before the court, this will require the court to prepare and deliver 2 sets of instructions, one for the guilt/innocence phase of the trial and one for the punishment phase of the trial.⁹⁷ If a particular instruction constitutes “law applicable to the case”, the trial court has a duty to instruct the jury on the law applicable to the case *sua sponte* without need for any request on the part of the defendant.⁹⁸ With regard to “law applicable to the case”, the defendant’s failure to request such an instruction (or object to its omission) does not preclude appellate review but, rather, affects only the harm analysis that will be applied on appeal should jury charge error be found.⁹⁹

1. Form of the Court’s Charge

Every charge, whether in the guilt/innocence or punishment phases of the trial must include both an abstract statement of the law as well as an application paragraph that applies statements of law to the case. The abstract portion of the charge generally sets out the applicable principles of law.¹⁰⁰ The abstract portion of the charge is then followed with a specific application of the abstract law to the facts in a separate paragraph.¹⁰¹ The application paragraph must apply the law to the facts and require that the jury find each element of the offense by proof beyond a reasonable doubt. In applying the law to the facts, a charge that tracks the indictment or information is normally sufficient.¹⁰²

⁹⁶*Id.*

⁹⁷*See* TEX. CODE CRIM. PROC. ARTS. 36.14, 37.07.

⁹⁸*See* TEX. CODE CRIM. PROC. ART. 36.19.

⁹⁹*See Almanza v. State*, 686 S.W.2d 157 (unobjected to error reviewed for “egregious harm” while objected to error reviewed for “some harm”).

¹⁰⁰*See e.g., Finley v. State*, 527 S.W.2d 553 (Tex. Crim. App. 1975).

¹⁰¹*Id.*

¹⁰²*See e.g., Cumbie v. State*, 578 S.W.2d 732 (Tex. Crim. App. 1979) *overruled on other grounds by Almanza v. State*, 686 S.W.2d 157 (1984). However, failure to track the indictment is not error where the substituted language sufficiently comports with and is equivalent to the statute and allegations in the indictment. *See Thomas v. State*, 605 S.W.2d 290 (Tex. Crim. App. 1980).

The failure to apply the law to the facts is not constitutional error but rather only a violation of state procedural law.¹⁰³ Moreover, in many cases, the failure to do so will be harmless if the charge, read in its entirety, can be said to have adequately guided the jury's deliberations.¹⁰⁴

In addition to the abstract and application portions of the charge, most jury charges follow a general pattern consisting of:

- (1) A commencement including a caption, salutation, and statement of the offense charged, the county of its alleged commission, the date of the alleged offense and the defendant's plea to the charge;
- (2) Identification of the statute alleged to have been violated;¹⁰⁵
- (3) Any definitions of words or phrases defined by statute or in case law;¹⁰⁶
- (4) Culpable mental states¹⁰⁷;
- (5) Law of parties if applicable;
- (6) Lesser included offenses;
- (7) Defenses and affirmative defenses;
- (8) Evidentiary instructions.
- (9) Affirmative findings;¹⁰⁸
- (10) Reasonable doubt and presumption of innocence;
- (11) Concluding instructions;¹⁰⁹ and
- (12) Verdict form[s].

2. Content of the Court's Charge

The trial court is required to instruct the jury on "the law applicable to the case" which will entail instructing the jury on the offense alleged and any of its statutory definitions, presumptions and inferences, *etc.*, evidentiary matters such as the effect to be given certain evidence or testimony, special instructions such as the consideration of evidence illegally obtained, and other general considerations that are to guide the jury's deliberations. One court has defined "the law applicable to the case" as including:

- (1) the legal provisions under which the cause is being prosecuted;

¹⁰³See *Barrera v. State*, 982 S.W.2d 415, 417 (Tex. Crim. App. 1998).

¹⁰⁴See also *Murphy v. State*, 44 S.W.3d 656, 661 (Tex. App.—Austin 2001, *no pet.*); *Moore v. State*, 82 S.W.3d 399, 408 (Tex. App.—Austin 2002, *pet.ref'd.*).

¹⁰⁵See TEX. PEN. CODE § 1.03 (a).

¹⁰⁶See *Holley v. State*, 766 S.W.2d 254 (Tex. Crim. App. 1989).

¹⁰⁷Such instructions might include those pertaining to consideration of confessions, accomplice witness testimony, extraneous offenses, or impeachment evidence, the legality of arrest or search, affirmative findings, presumptions, *etc.* See *e.g., Ex Parte Ross*, 702 S.W.2d 650 (Tex. Crim. App. 1986).

¹⁰⁸For example, use of a deadly weapon.

¹⁰⁹Such instructions might include those pertaining to the failure to testify, indictment not evidence, jury as judges of facts, jury not to discuss matters not in evidence, *etc.*

- (2) the legal principles which govern criminal trials in general such as the burden of proof and presumption of innocence;
- (3) the legal theories presented at trial on which an instruction is necessary or proper such as the law of parties and defenses; and
- (4) evidentiary instructions which are necessary or proper based on evidence actually offered and admitted in evidence.¹¹⁰

With respect to words or phrases not statutorily defined, trial courts are not required to provide any further instructions as it is presumed that the jury knew and applied the common and ordinary meaning to words included in the jury charge.¹¹¹

B. Elements of the Offense Charged

The Court must instruct the jury as to the element of each offense submitted to it, any statutory definitions that affects the meaning of an element. The elements of the offenses are easy to determine as they are set forth in the corresponding penal code provision. Definitions may be taken from the penal code general definitions¹¹² or, as in the case of sexual assault offenses, found in the beginning of that chapter of the Penal Code providing more specific introductory definitions applicable to those offenses.¹¹³ Once the elements are determined, the court must ensure that it instructs the jury to find that each element has been proven by the evidence by proof beyond a reasonable doubt. In charging the offense, the trial court has 2 basic parameters within which it must fashion its charge on the elements: First, it should charge only on those offenses alleged in the indictment or information.¹¹⁴ Second, in charging the offense the court must ensure that it sets out only that portion of the statute that applies to the offense with which the defendant is charged and supported by the evidence.¹¹⁵

In defining terms, words or phrases in its charge the court should only define those that are set forth in a statute or required by law to be defined.¹¹⁶ Words or phrases having no statutory definition need not be defined and are left to the jury's common understanding of those terms.¹¹⁷

1. Charging the Appropriate Mental State

¹¹⁰See *Bryant v. State*, 135 S.W.3d 130 (Tex. App.–Waco 2004) *reversed* __ S.W.3d __ 2005 WL 765840 (Tex. Crim. App. 2005).

¹¹¹See *Martinez v. State*, 924 S.W.2d 693, 698 (Tex. Crim. App. 1998).

¹¹²TEX. PEN. CODE § 1.07.

¹¹³TEX. PEN. CODE § 21.01.

¹¹⁴*Armstead v. State*, 573 S.W.2d 231 (Tex. Crim. App. 1978).

¹¹⁵See *Dowden v. State*, 537 S.W.2d 5 (Tex. Crim. App. 1976). However, if the judge improperly instructs on a phase of the law not alleged in the indictment or supported by the evidence, in order to be reversible error, the instruction will at a minimum have to have been included in the application paragraph as well as the abstract portion of the jury charge. See e.g., *Toler v. State*, 546 S.W.2d 290 (Tex. Crim. App. 1977).

¹¹⁶See *Holley v. State*, 766 S.W.2d 254 (Tex. Crim. App. 1989).

¹¹⁷*Russell v. State*, 665 S.W.2d 771, 780 (Tex. Crim. App. 1983).

With the exception of the rare offense,¹¹⁸ every offense contains either an expressly stated culpable mental state or one imposed by a catchall provision in the penal code.¹¹⁹ The charge must instruct the jury on the culpable mental state and the failure to do so is error because to omit the culpable mental state is to omit an element of the offense.¹²⁰

The Penal Code provides for 4 levels of culpable mental states arranged in varying degrees of culpability and defines each—intentional, knowing, recklessness, or criminal negligence.¹²¹ With respect to each of the four definitions, each is defined in two distinct terms—with respect to the conduct engaged in as well as to the results of the conduct.¹²² That is, each culpable mental state has a corresponding definition that will apply it to the conduct or the result according to the type of offense.¹²³ Thus it is that offenses can be defined in terms of whether they are a result of conduct or conduct offense with respect to the culpable mental state. If they are a result of conduct offense, then the state must prove that the defendant intended to cause a particular result; if the offense is a conduct offense then the state need only prove the defendant intended to engage in the conduct with the corresponding degree of culpability. The distinctions between the culpable mental states is sometimes slight.¹²⁴

With respect to conduct elements, a culpable mental state may apply to the nature of the conduct, the result of the conduct and circumstances surrounding the conduct. The court’s charge must be careful to confine the appropriate mental or culpable state to the specific conduct element required to be proven in the offense otherwise it will lessen the state’s burden of proof. This is not always easy to do. In this regard, the court must distinguish between to what the mental state will apply—the conduct or the result. This is not always easy to do. In some cases, it is clear that the culpable mental state is confined either to the conduct or the result and in other cases it is not so easy. For example, with respect to the offense of Injury to a Child, the statute requires showing that the defendant intentionally or knowingly...caused to a child...serious bodily injury.”¹²⁵ In this case, the elements could be charged such that the culpable mental states of intentional and knowing could be read to apply to engaging in the conduct or to

¹¹⁸Driving while intoxicated is one such offense. See TEX. PEN. CODE § 49.01, *et. seq.*

¹¹⁹See TEX. PEN. CODE § 6.01 (c): “If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with with any mental element.”

¹²⁰See *e.g.*, *Price v. State*, 923 S.W.2d 214 (Tex. App.—Eastland 1996, *pet. ref’d.*).

¹²¹TEX. PEN. CODE § 6.03.

¹²²*Id.*

¹²³For example, with respect to intentional, the Penal Code provides that “[a] person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to *engage in the conduct or cause the result.*” TEX. PEN. CODE § 6.03 (a) (*emphasis supplied*).

¹²⁴See *e.g.*, *Koah v. State*, 604 S.W.2d 156, 160 n.1 (Tex. Crim. App. 1980) (“The formulated distinction between intentional and knowing, as to results, is thus between desiring a result and being reasonably certain that it will occur.”).

¹²⁵Tex. Pen. Code § 22.04.

the result of causing serious bodily injury. The Court of Criminal Appeals has found that the injury to a child statue is a result of conduct offense, that is, that the defendant must have intended or known that the result would result from her conduct.¹²⁶ In doing so, the court conducted an analysis of the statute and concluded that while the legislature did not specify the type of conduct that would constitute the offense it had specified a result.¹²⁷ In this regard, the courts must look to the legislative intent in determining whether the offense is a result or a conduct type offense to determine whether it must confine the culpable mental state to the conduct or to the result.¹²⁸

In some cases, the court may improperly define the culpable mental states and also fail to limit it to the result of conduct in the application paragraph as in *Alvarado v. State*. However, if the court properly limits the culpable mental state in the definition paragraph but fails to do so in the application paragraph, the court may find that the correct instruction, when read as a whole, saved it from being erroneous because the “charge both racks the statute and includes language that directs the jury to consider appellant’s culpable mental state in regard to the result of his conduct” and that the “culpable mental states are properly limited to result [in the definition paragraph].”¹²⁹

Under *Almanza*, any error analysis will depend on whether the error in charging concerning the culpable mental state was objected to or not.¹³⁰ Again, harm will be assessed considering the jury charge as a whole, the evidence and testimony presented, the argument of counsel and the issues in the case.¹³¹ If there was an objection, “some harm” must be shown. Given the lack of ability to communicate with juror’s concerning their deliberations this will sometimes be difficult.¹³² However, where it can be discerned the courts are likely to give effect to it. For example, a juror’s note as to whether a culpable mental state applied to the conduct or the result left unanswered was found to be evidence of some harm warranting reversal because it showed that the jury “did not understand whether injury to a child is a conduct or result offense.”¹³³

¹²⁶See *Alvarado v. State*, 704 S.W.2d 36 (Tex. Crim. App. 1985).

¹²⁷*Id.* at 39.

¹²⁸See *Kelly v. State*, 748 S.W.2d 236, 238 (Tex. Crim. App. 1988) (injury to an elderly person is a result of conduct of offense); see also *Turner v. State*, 805 S.W.2d 423, 430 (Tex. Crim. App. 1991) (capital murder is a result of conduct offense); *Martinez v. State*, 763 S.W.2d 413, 419 (Tex. Crim. App. 1988) (murder is a result of conduct offense); *Hererra v. State*, 915 S.W.2d 94 (Tex. App.–San Antonio, 1996, *no pet.*) (obstruction of justice is a result of conduct type offense); *Caballero v. State*, 927 S.W.2d 128 (Tex. App.–El Paso 1996, *pet. ref’d*) (indecency with a child not a result of conduct type of offense).

¹²⁹See *Morales v. State*, 853 S.W.2d 583, 584 (Tex. Crim. App. 1993).

¹³⁰686 S.W.2d 171-72.

¹³¹*Id.*

¹³²*Id.*

¹³³See *Westfield v. State*, 782 S.W.2d 951, 954 (Tex. App.–Austin, 1990, *pet. ref’d*).

In showing egregious harm, often a prosecutor’s arguments highlighting and relying upon the lessened standard of culpable mental state will suffice to show the requisite egregious harm.¹³⁴ However, it is difficult to draw any general conclusions concerning the “egregious harm” showings further than “[t]he cases affirming conviction finding no egregious harm tend to be cases in which there is no evidence that the error in jury instructions had any effect on the jury’s deliberations or verdict.”¹³⁵

C. Miscellaneous Issues

1. Law of Parties

A defendant may be held criminally responsible for his own conduct or that of another for which he is criminally responsible.¹³⁶ Excluding corporate liability, one may be held criminally responsible for the conduct of another under on either of four theories: (1) acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in an offense, (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directly aids, or attempts to a the other person to commit the offense, (3) having a legal duty to prevent commission fo the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission fo the offense, and (4) if, in attempting to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.¹³⁷

Although, the defendant ha a right to have the jury instructed on the specific theory of party liability applicable to his case, the defendant has the burden of requesting a more specific application of the theory of party liability.¹³⁸ The failure to make such a request will affect the appellate court’s treatment of whether there was “some harm” caused by the error under *Almanza*.

Although the state is not required to plead that it will rely on a theory of party liability at trial,¹³⁹ the trial court must instruct on party liability in order for the state to rely on it as a basis for conviction.¹⁴⁰ In determining whether a party instruction should be submitted, the court “should first remove from consideration the acts and conduct of the non-defendant actor[s]. Then, if the evidence of the conduct of the defendant then on trial would be sufficient, in and

¹³⁴See e.g., *Sneed v. State*, 803 S.W.2d 833, 836 (Tex. App.–Dallas 1991, *pet. ref’d*), *overruled on other grounds by Cook v. State*, 884 S.W.2d 485 (Tex. Crim. App. 1994); see also *Banks v. State*, 819 S.W.2d 676, 679, 679 (Tex. App.–San Antonio 1998, *pet. ref’d*).

¹³⁵See DIX & DAWSON, TEX. CRIMINAL PRACTICE & PROCEDURE §36.17.

¹³⁶TEX. PEN. CODE § 7.02.

¹³⁷TEX. PEN. CODE § 7.03.

¹³⁸See *Chatman v. State*, 846 S.W.2d 329, 330.

¹³⁹See *Pitts v. State*, 569 S.W.2d 898, 900 (Tex. Crim. App. 1978).

¹⁴⁰See *Dowden v. State*, 753 S.W.2d 264, 268 (Tex. Crim. App. 1988).

of itself, to sustain the conviction, no submission on the law of [parties] is *required*...On the other hand, if the evidence introduced upon the trial of the cause shows, or raises an issue, that the conduct of the defendant then upon trial is not sufficient, in and of itself, to sustain a conviction, the State's case rests upon the law of [parties] and is dependent, at least in part, upon the conduct of another. In such a case, the law of [parties] must be submitted and made applicable to the facts of the case."¹⁴¹ Conversely, it is error to charge on the law of parties if the evidence shows that the defendant committed the offense but there is insufficient evidence to support responsibility as a party.¹⁴² However, if there is sufficient evidence of both, charging on a party should be given with application paragraph authorizing conviction on either ground.¹⁴³

Once the court determines that a party instruction must be given, the trial court must apply the appropriate theory of the law of parties defined in the abstract portion of the charge in the application paragraph.¹⁴⁴ In this regard, the application portion of the jury instruction should, at least, (1) identify the conduct of the person whom the state alleges was the primary actor, the identify of the primary actor and (2) identify the types of assistance the state contends imposes criminal responsibility on the defendant.¹⁴⁵

In distinction to the treatment of culpable mental states, it appears that inclusion of the law of parties in the application paragraph is required. In *Campbell v. State*, the appellate court found that it was error to fail to apply the law of parties relied upon for conviction in the application portion of the charge although it was included in the definition paragraph where the defendant made an objection at trial.¹⁴⁶ Likewise, there is likely to be a finding of "some harm" were the court failed to give a party instruction in the application paragraph and the party theory was the one most argued by the state.¹⁴⁷ However, where there is no trial objection, pursuant to *Almanza v. State's* "egregious harm" standard, a general statement on party liability applicable to the case in the definition portion of the charge sufficiently instructs the jury to allow it to properly apply the law of parties despite its failure to apply the theory of party liability in the application paragraph.¹⁴⁸

2. Requirement of Voluntary Conduct

Section 6.01 of the Penal Code provides that "[a] person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession." The provision was intended to cover the and replace the

¹⁴¹*Brown v. State*, 716 S.W.2d 939, 944 (Tex. Crim. App. 1986) (*emphasis supplied*); *McCuin v. State*, 505 S.W.2d 827, 830 (Tex. Crim. App. 1974).

¹⁴²*Id.*

¹⁴³*Id.*

¹⁴⁴*See Walker v. State*, 823 S.W.2d 247, 248 (Tex. Crim. App.).

¹⁴⁵*Jayson v. State*, 651 S.W.2d 803, 808 (Tex. Crim. App. 1983); *see also Johnson v. State*, 739 S.W.2d 299, 303 (Tex. Crim. App. 1987).

¹⁴⁶*Campbell v. State*, 910 S.W.2d 475, 479 (Tex. Crim. App. 1995).

¹⁴⁷*See Johnson v. State*, 739 S.W.2d 299, 303 (Tex. Crim. App. 1987).

¹⁴⁸*See Campbell v. State*, 910 S.W.2d at 479.

preceding statutory defense of accident.¹⁴⁹ If there is evidence admitted supporting the instruction, the court should instruct the jury on the issue of voluntariness.¹⁵⁰ As with other jury instructions, the failure to request an instruction would likely be review able on appeal but would be subject to harmless error analysis.¹⁵¹

3. Objectives of Penal Code

The Penal Code sets forth its general objectives in § 1.02.¹⁵² Some of the objectives, in the appropriate case, might be seen as helpful in forming the basis for jury argument in guilt/innocence and punishment. However, because these objectives are not considered “the law applicable to the case”, their inclusion in the court’s charge is seen as discretionary.¹⁵³ Any such instruction “is simply informational that the judge may...find to be helpful to the jury.”¹⁵⁴ However, the Court of Criminal Appeals did not that it found “no logic in the proposition that such an instruction would constitute a comment on the weight of the evidence or invite the jury to speculate on matters outside the record.”¹⁵⁵

4. Transferred Intent

Pursuant to Texas Penal Code § 6.04 (b), Texas’ “transferred intent” statute, a defendant can be held responsible for conduct that harms a person other than the person he intended to harm.¹⁵⁶ Although there is no requirement that the state plead its intent to rely upon the theory of transferred intent in its charging instrument,¹⁵⁷ the court should submit both a definition and application of transferred intent in its court charge if there is sufficient evidence to support its submission. Under the theory of transferred intent, because it expands the state’s ability to

¹⁴⁹“The Court of Criminal Appeals held that the defense of accident did not survive the enactment of the 1974 Penal code. The circumstances that were previously encompassed within the defense of accident are included in the requirement of the 1974 Penal Code that there must be voluntary conduct for there to be criminal liability.” *Dix & Dawson*, TEXAS CRIMINAL PRACTICE AND PROCEDURE § 36.45.

¹⁵⁰*See e.g., Brown v. State*, 955 S.W.2d 276 (Tex. Crim. App. 1997); *see also Butler v. State*, 981 S.W.2d 849, 856 (Tex. App.–Houston [1st Dist.] 1998, *pet. ref’d.*); *Payne v. State*, 33 S.W.3d 374, 376 (Tex. App.–Houston [1st Dist.] 2000, *pet. ref’d.*) (“[T]he voluntariness of the appellant’s actions in firing the gun was the appellant’s primary defense; he was entitled to have the jury rule upon that defense and was harmed in not having the requested instruction submitted to the jury.”).

¹⁵¹*See Butler v. State*, 981 S.W.2d at 856 (error in refusing defendant’s requested charge on voluntariness harmless were state relied on two alternative theories of committing murder that were not affected by the voluntariness issue).

¹⁵²TEX. PEN. CODE § 1.02.

¹⁵³*Cane v. State*, 698 S.W.2d 138, 140 (Tex. Crim. App. 1985).

¹⁵⁴*Id.*

¹⁵⁵*Id.*

¹⁵⁶TEX. PEN. CODE § 6.04 (b) provides that “[a] person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that...a different offense was committed or a different person or property was injured, harmed, or otherwise affected.”

¹⁵⁷*Garcia v. State*, 791 S.W.2d 279, 280 (Tex. App.–Corpus Christi 1990, *pet. ref’d.*).

obtain a conviction, failure to submit it can rarely harm the defendant.¹⁵⁸ Moreover, on appeal should the defendant complain of the insufficiency of the evidence on a theory that there was a failure to apply the law of transferred intent in its application portion, under *Malik v. State*, the appellate court will review the evidence under a hypothetically correct jury charge that would have applied the theory of transferred intent in the jury charge.¹⁵⁹

5. Burden of Proof

Both the presumption of innocence and the requirement that a conviction cannot be had except of each element by proof beyond a reasonable doubt constitute the burden of proof in criminal cases.¹⁶⁰ Since 2000, there has been no requirement that a trial court submit the familiar *Geesa v. State* instruction setting forth the definition of reasonable doubt.¹⁶¹ Prior to 2000, the burden of proof along with the *Geesa* definition was required to be given in all criminal cases, even without request or objection.¹⁶² The failure to do so, whether objected to or not, constituted reversible error without consideration as to harm.¹⁶³ The current state of the law apparently still requires that the burden of proof be set forth however it need not but may contain a definition.¹⁶⁴

6. Defenses

Chapters 8 and 9 sets forth the basic defenses and affirmative defenses.¹⁶⁵ While statutory defenses may constitute “the law applicable to the case”, by statute, the court need not instruct the jury as to defenses or affirmative defenses unless “evidence is admitted supporting” them is admitted during the trial.¹⁶⁶ However, once such evidence is admitted at trial, the trial court must instruct on the defense or affirmative defense.¹⁶⁷ With respect to a defense, the court must instruct the jury “that a reasonable doubt on the issue requires that the defendant be acquitted.”¹⁶⁸ With respect to affirmative defenses, the trial court is to instruct the jury that “the defendant must

¹⁵⁸See e.g., *Garrett v. State*, 642 S.W.2d 779, 781 (Tex. Crim. App. 1982) (failure to submit theory of transferred intent in application paragraph did not harm defendant because failure to do so actually left state with a greater burden of proof).

¹⁵⁹953 S.W.2d 234 (Tex. Crim. App. 1997).

¹⁶⁰TEX. PEN. CODE § 2.01; TEX. CODE CRIM. PROC. Art. 38.03. See also *In Re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068, 1071 (1970).

¹⁶¹*Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000).

¹⁶²820 S.W.2d 154, 162 (Tex. Crim. App. 1991).

¹⁶³*Reyes v. State*, 938 S.W.2d 718 (Tex. Crim. App. 1996) *overruled by Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000).

¹⁶⁴The Court of Criminal Appeals noted that it would not be error to submit a definition of reasonable doubt on agreement between the state and the defendant. *Paulson v. State*, 28 S.W.2d at 573.

¹⁶⁵TEX. PEN. CODE §§ 8.01, 9.01 *et. seq.*

¹⁶⁶TEX. PEN. CODE §§ 2.03, 2.04.

¹⁶⁷See e.g., *Arnold v. State*, 742 S.W.2d 10 (Tex. Crim. App. 1987).

¹⁶⁸TEX. PEN. CODE §§ 2.03 (d).

prove the affirmative defense by a preponderance of the evidence.”¹⁶⁹ The various Chapter 8 and 9 Penal Code provisions setting forth the various defenses and affirmative defenses—insanity, mistake of fact, mistake of law, duress, entrapment, defense of self, others and property—are accompanied by a designation as to whether they are defenses or affirmative defenses.¹⁷⁰

In terms of entitlement to defensive instructions, it is now well-established law that the defendant is entitled to an instruction only on those defenses and affirmative defenses that are statutorily enumerated.¹⁷¹ Prior to 1974, Texas law was fairly generous to defendants in terms of instructions on defense theories with the only limitation being that the his entitlement was limited only on “every issue raised by the evidence regardless of whether it is strong, feeble, unimpeached, or uncontradicted, and even if the trial court is of the opinion that the testimony is not entitled to belief.”¹⁷² Under this approach, a defendant could obtain an instruction on alibi.¹⁷³

However, it is now pretty clearly settled that such instructions are not required and, indeed, disapproved. In *Williams v. State*, the Court of Criminal Appeals found that a defendant was not entitled to instruction on accident in view of the recent enactment of the Penal Code § 6.01's requirement of a voluntary act.¹⁷⁴ This approach later gained its ...statement in that “if the alleged defensive theory merely negates an element of the offense, then, no affirmative charge must be given.”¹⁷⁵ Under this formulation, a number of traditionally approved defensive instructions were disapproved.¹⁷⁶ In short, if the defense is not a statutorily-enumerated defense, then there is no requirement that the court give a charge on the issue.

7. Comment on Weight to Be Accorded Evidence

Usually does not involve written instructions. By statute¹⁷⁷ and perhaps by constitutional considerations, in giving its charge to the jury, the trial court is prohibited from “expressing any opinion as to the weight of the evidence,...summing up the testimony, discussing the facts or suing any argument in his charge calculated to arouse the sympathy or excite the passions of the jury.” While not an instruction, this forms a limitation on the court’s ability

¹⁶⁹TEX. PEN. CODE §§ 2.04 (d).

¹⁷⁰See generally, TEX. PEN. CODE §§ 8.01, 9.01 *et. seq.*

¹⁷¹See also *Moore v. State*, 143 S.W.3d 305, 315-16 (Tex. App.–Waco 2004, *pet. ref’d.*).

¹⁷²See *Warren v. State*, 565 S.W.2d 931, 933-34 (Tex. Crim. App. 1978).

¹⁷³See *e.g.*, *Jones v. State*, 398 S.W.2d 753, 754 (Tex. Crim. App. 1966).

¹⁷⁴630 S.W.2d 640, 644 (Tex. Crim. App. 1982).

¹⁷⁵*Sanders v. State*, 707 S.W.2d 78, 81 (Tex. Crim. App. 1986).

¹⁷⁶See *e.g.*, *Geisberg v. State*, 984 S.W.2d 245 (Tex. Crim. App. 1998) (defendant not entitled to instruction on alibi); see also *Willis v. State*, 790 S.W.2d 307, 314 (Tex. Crim. App. 1990) (defendant not entitled to instruction on good faith purchase in theft case); *Villareal v. State*, 821 S.W.2d 682, 683 (Tex. App.–San Antonio 1991, *pet. ref’d.*) (defendant not entitled to instruction on alibi);

¹⁷⁷TEX. CODE CRIM. PROC. ARTS. 36.14, see also 38.05 which contains a similar prohibition applicable to contexts outside of the jury charge.

to formulate its charge and respond to inquiries. In this regard, the rationale upon which the prohibition is based is that jurors “are prone to size with alacrity upon any conduct or language of the trial judge which they interpret as shedding light upon his view of the weight of the evidence, or the merits of the issues involved.”¹⁷⁸ Such comments can take several forms several of which are worth mentioning. In some cases the comment can, on first blush, appear relatively innocuous but on closer inspection but clearly expressing the court’s certainty of guilt.¹⁷⁹ In others, equally as seemingly innocuous, the comment can come in the form of a ruling.¹⁸⁰ Still, in other cases, the comment can expressly single out a particular piece of evidence or testimony for comment. For example, an instruction concerning the evidence of flight, although instructing the jury that it could only consider it if it believed the testimony beyond a reasonable doubt, constituted an impermissible comment on the weight of the testimony because it “impermissibly singled out evidence of flight in such a way that the jury could have given it heightened consideration.”¹⁸¹ However, under *Almanza*, the court concluded that the error was harmless because it merely communicated an inference of which the jury was already aware and that it merely reminded them that such an inference must be proven beyond a reasonable doubt.

Still other improper comments on the weight to be accorded the evidence can take the form of references to witnesses such as the complainant. In *Casey v. State*, the court of appeals found that a trial court’s reference to the complainant in the court’s charge as “the victim of the offense” was an improper comment on the weight of the evidence.¹⁸²

Finally, trial court’s routinely give the statutory instruction that the jury “is the exclusive judge of the facts proved, and of the weight to be given to the testimony.”¹⁸³ Giving instructions past this concerning witness credibility, even seemingly neutral, is to tread on thin ice.¹⁸⁴

¹⁷⁸*Jones v. State*, 788 S.W.2d 834, 836 (Tex. App.–Dallas 1990, *no pet.*).

¹⁷⁹*Id.* (court’s instructions to jurors that they would be reaching the punishment phase of trial the following day constituted a comment on the weight of the evidence).

¹⁸⁰*See Bachus v. State*, 803 S.W.2d 402, 405 (Tex. App.–Dallas, 1991, *pet. ref’d.*) (court’s finding that there was evidence to support a conspiracy in presence of jury in ruling on hearsay statement constituted a comment on the weight of the evidence).

¹⁸¹*Geisberg v. State*, 945 S.W.2d 120, 124 (Tex. App.–Houston [1st Dist.] 1996) *affirmed* 984 S.W.2d 245 (Tex. Crim. App. 1998).

¹⁸²160 S.W.3d 218, 230 (Tex. App.–Austin 2005, *no pet.*).

¹⁸³TEX. CODE CRIM. PROC. ART. 38.04.

¹⁸⁴*See Slaughter v. State*, 809 S.W.2d 949, 950 (Tex. App.–Beaumont 1991)(in case where defendant testified instruction that the “existence or nonexistence of a bias, interest, or other motive” on the part of a witness was improper given the risk that the jury would interpret the instruction to refer to the defendant alone and have the tendency to discredit only his testimony); *see also Runnels v. State*, 860 S.W.2d 545, 548 (Tex. App.–Beaumont 1993, *pet. ref’d.*).

A trial court does not comment on the weight of the evidence by giving an instruction concerning a particular piece of evidence if the evidence admitted at trial requires a particular finding as a matter of law or requires the court to call the jury's attention to certain evidence.¹⁸⁵

Similarly, a trial court will not be held to have commented on the weight of the evidence if its instruction tracks the full statutory language even without considering whether evidence supports the full statutory language.¹⁸⁶

8. Causation

Causation is an element of the offense and the court must so instruct the jury. However, in many cases, the state must prove that the defendant's conduct caused some result either in harm or damage to a person or property. In such cases, there may be an issue of causation that arises.

Texas Penal Code § 6.04 provides that “[a] person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.” If the evidence raises an adequate concurrent cause and an issue regarding t]he actor's conduct as a sufficient cause, the court shelled instruct the jury on concurrent causes.”

However, the Court of Criminal Appeals has noted that there is a distinction between a concurrent cause and an alternative cause in which an instruction is required in the former case while none is required in the latter cause because an alternative cause is not a statutory defense but rather simply negates the element that the defendant caused the harm or injury.¹⁸⁷ In such cases, it is not clear whether an instruction on concurrent causes set forth in section 6.04 will suffice or no instruction at all is necessary.¹⁸⁸

9. Necessity

Texas Penal Code § 9.22 provides a defense justifying otherwise criminal conduct: it provides, in part that “[c]onduct is justified...if the actor reasonably believes the conduct is immediately necessary to avoid imminent harm[,] the desirability an d urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by he law prescribing the conduct[,]...and a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.” When raised by the evidence, the court should instruct the jury on the defense.¹⁸⁹ Several courts of appeal have held that the defendant must admit

¹⁸⁵See *Atkinson v. State*, 923 S.W.2d 21, 24-25 (Tex. Crim. App. 1996).

¹⁸⁶*Castillo v. State*, 2005 WL 1294461 (Tex. App.–Houston [14th Dist.] 2005, *pet. ref'd.*) (no error in the trial court's instructing the jury conveying the full statutory language concerning self-defense including portion concerning verbal provocation even though there was no evidence of verbal provocation introduced at trial).

¹⁸⁷*Barnette v. State*, 709 S.W.2d 650, 652 (Tex. Crim. App. 1986).

¹⁸⁸See *e.g.*, *Mills v. State*, 802 S.W.2d 400, 405 (Tex. App.–Houston [1st Dist.] 1991, *pet. ref'd.*) (jury instruction not required for alternative causation because issue adequately covered in concurrent causation instruction that is part of a the elements of the offense. See also *Drapkin v. State*, 781 S.W.2d 710, 711 (Tex. App.–Texarkana 1989, *pet. ref'd.*).

¹⁸⁹*Williams v. State*, 630 S.W.2d 640, 643 (Tex. Crim. App. 1982).

the conduct forming the basis of the offense before he will be entitled to an instruction on necessity.¹⁹⁰ The Court of Criminal Appeals has not definitively ruled on the issue but did deny a claim of ineffective assistance of counsel for failing to request a jury instruction on necessity because he did not establish he was entitled to such an instruction where he had denied committing the offense.¹⁹¹

10. Mistake of Fact

Upon inspection it is clear that the mistake of fact defense, unlike other defenses, negates an element of the defense—the culpable mental state. If it were not statutorily prescribed, under the rule of the defendant would not be entitled to a statutory instruction. However, because it is statutorily prescribed, when evidence is admitted supporting the defense, the trial court should instruct on the defense of mistake of fact.¹⁹²

When faced with a request for a mistake of fact instruction, if some evidence is admitted that could support the defense it should be submitted; irrespective of how weak the evidence is. That is, the trial court is prohibited from assessing the credibility or weight of the evidence admitted supporting the defense. In *Granger v. State*, the trial court denied a defendant's mistake of fact instruction in a murder case alleging that he did not know that a car was occupied when he fired a gun into it finding that his belief was not reasonable.¹⁹³ The Court of Criminal Appeals found that the trial court had erred and that it was for a jury and not the trial court to decide that issue. However, it is clear that the mistake of fact defense is not available to apply to other defenses or affirmative defenses.¹⁹⁴

V. PUNISHMENT PHASE JURY INSTRUCTIONS

In the context of non-capital offenses, the punishment phase of trial will either result in the imposition of a sentence of incarceration or a probated sentence. There are several statutes that are pertinent to issues of punishment contained in the Code of Criminal Procedure and Penal Code. Where applicable, the various sources of instructions constitute “the law applicable to the case” on which the judge must instruct the jury. Article 37.07 provides that after the evidentiary portion of the punishment trial that “the court shall give such additional written instructions as may be necessary and the order of procedure and the rules governing the conduct of the trial shall be the same as are applicable on the issue of guilt or innocence.”¹⁹⁵ Presumably, then, the procedures set forth in Chapter 36 governing the assembly and delivery of the jury charge are applicable in the charge the court will give at punishment.¹⁹⁶ Thus, a defendant should be afforded an opportunity to object and/or make special requested instructions and an opportunity to review the court's proposed charge before it is submitted to the jury. In short,

¹⁹⁰See *Hagens v. State*, 979 S.W.2d 788, 794 (Tex. App.—Houston [14th Dist.] 1998, *pet. ref'd.*).

¹⁹¹*Young v. State*, 991 S.W.2d 835 (Tex. Crim. App. 1999).

¹⁹²See *Miller v. State*, 815 S.W.2d 582, 585 (Tex. Crim. App. 1991).

¹⁹³3 S.W.3d 36 (Tex. Crim. App. 1999).

¹⁹⁴See *e.g.*, *Lugo v. State*, 923 S.W.2d 598 (Tex. App.—Houston [1st Dist.] 1995, *pet. ref'd.*).

¹⁹⁵TEX. CODE CRIM. PROC. ART. 37.07 § 3 (b).

¹⁹⁶See TEX. CODE CRIM. PROC. ARTS. 36.14-19.

these provisions would pertain to the range of punishment, mitigation of punishment, community supervision, parole and consideration of extraneous offenses. Each are discussed separately below.

A. Community Supervision

If the defendant is eligible for community supervision and has properly raised the issue before the jury, the court must instruct the jury concerning community supervision.¹⁹⁷ As with other jury instruction error, the failure to submit a charge on community supervision will not preclude appellate consideration but rather will consider the standard for assessing harm pursuant to *Almanza*.

However, assessing harm for failure to give community supervision instruction can sometimes be difficult with several cases simply pursuing the option that a community supervision instruction has what one leading commentator has noted a “gravitational influence on the length of any prison sentence assessed...”¹⁹⁸ That is, the presence of a jury instruction would likely have had an effect in influencing the jury to consider a lesser sentence of imprisonment because it “directs the jury to consider the lowest punishment allowed by law.”¹⁹⁹ However, in other cases, some courts have considered a sentence of imprisonment at or more than 10 years to be indicative that the jury would not have assessed probation in either event given the sentence returned.²⁰⁰

In addition to the instruction on community supervision, the trial courts has discretion to instruct the jury on the general conditions of probation contained in the Code of Criminal Procedure.²⁰¹ However, the failure to so instruct the jury is not error.²⁰²

How will appellate courts treat the trial court’s misstatement of the law concerning a defendant’s eligibility for community supervision? In *Hobyl v. State*, the court instructed the jury that it had authority to suspend the defendant’s sentence even though he was not eligible for community supervision due to a previous state jail conviction.²⁰³ The appellate court found that there was no error because although the defendant was not eligible for community supervision, the instruction was a correct statement of the law concerning the judge’s option to sentence him to community supervision; to hold otherwise, the court reasoned, would be to mislead the jury.²⁰⁴

B. Parole/Good Conduct Time

¹⁹⁷See *Trevino v. State*, 577 S.W.2d 242, 243 (Tex. Crim. App. 1979).

¹⁹⁸Dix & Dawson, TEXAS CRIMINAL PRACTICE AND PROCEDURE § 36.58.

¹⁹⁹See *Snow v. State*, 697 S.W.2d 663, 665 (Tex. App.–Houston [1st Dist.] 1985, *no pet.*).

²⁰⁰See *Mercado v. State*, 615 S.W.2d 225, 228 (Tex. Crim. App. 1981).

²⁰¹TEX. CODE CRIM. PROC. ARTS. 42.12 § 11.

²⁰²See *e.g.*, *Wade v. State*, 951 S.W.2d 886, 893 (Tex. App.–Waco 1997, *pet.ref’d.*).

²⁰³152 S.W.3d 624 (Tex. App.–Houston [1st Dist.] 2004, *pet. disc. rev. granted* 06/08/05).

²⁰⁴*Id.*

In non-capital cases alleged to have been committed on or after 1989, the trial court is required to give an instruction to the jury concerning good conduct time and parole.²⁰⁵ The statutory parole/good conduct credit instruction is “the law applicable to the case” and the court must instruct the jury concerning it.²⁰⁶ Depending on the particular case, the court is to give the jury one of three statutorily-enumerated instructions²⁰⁷ that inform the jury how to compute parole eligibility so that they do not consider the issue of punishment under any misconceptions about how parole and good conduct time credit operate.

Because parole and good conduct time operate differently if a deadly weapon is involved, a trial court should give two parole instructions to the jury—one setting forth the parole/good conduct laws as it relates to an affirmative finding and one setting forth the formula in the event that a negative finding is returned.²⁰⁸ Although it may be error, at least one court of appeals has held that only giving an instruction based on an affirmative finding is not egregiously harmful where there was no objection at trial.²⁰⁹

Also, although the parole/good conduct time formula changes over time and the statute may reflect the current treatment, the court should instruct the jury as to the current formula and modify that set out in the statute if it is incorrect.²¹⁰ The court reasoned that the parole instruction given with its stricter formula should have had the effect of reducing rather than increasing the sentence assessed by the jury.

In some cases, a defendant’s parole eligibility will be calculated without regard for good conduct time. IS giving the instruction error with respect to good conduct time because it is misleading as applied in that defendant’s particular case. For the most part, courts of appeal have rejected this argument. good conduct time will not benefit a particular defendant, for example, in the case of aggravated robbery because it neither advances the date on which he will be parole eligible and nor may he be released on mandatory release upon serving the sentence reduced by good conduct time. Thus, in such cases, the statutory instruction is misleading as applied to that particular defendant. However, courts of appeal have not viewed favorably on such arguments. In *Martinez v. State*, the court found that the instruction could not have been misleading because it did not mention mandatory release.²¹¹ In *Edwards v. State*, the court found no error in submitting the instruction in such situations because, in its view, it could not be error,

²⁰⁵TEX. CODE CRIM. PROC. ART.37.07 § 4.

²⁰⁶*Luces v. State*, 72 S.W.3d 355, 363 n. 18 (Tex. Crim. App. 2002).

²⁰⁷The statute sets forth one instruction to govern case involving Code of Criminal Procedure § 3g/deadly weapon offenses with possible punishments greater than 60 years, non 3g offenses with possible punishment greater than 60 years and non-3g offenses with possible punishment less than 60 years. TEX. CODE CRIM. PROC. ART.37.07 § 4 (a)-(c).

²⁰⁸*See Hill v. State*, 913 S.W.2d 581 (Tex. Crim. App. 1996).

²⁰⁹*Allen v. State*, 951 S.W.2d 925 (Tex. App.—San Antonio 1997, *pet.ref’d*).

²¹⁰*See Clarke v. State*, 928 S.W.2d 709, 722-23 (Tex. App.—Fort Worth 1996, *pet.ref’d*).

²¹¹969 S.W.2d 497 (Tex. App.—Austin 1998, *no pet.*).

even if misleading, because a trial court cannot err in instructing the jury after properly following a statute.²¹² Few courts have thus far held that a jury instruction that discussed reduction of sentence by good conduct time in a case in which the same was statutorily prohibited was error.²¹³ However, it found the error harmless. On the other hand, a trial court does not err in giving the jury a supplemental instruction that does more adequately explain the effect of the law to the defendant's particular case.²¹⁴

Failure to give the instruction is error but is subject to the *Almanza* "some harm"/"egregious harm" inquiry based upon whether an objection was raised in the trial court. However the harm analyses, as one commentator has observed, seem to "imply that a failure to give the mandatory parole and good conduct instruction can never be harmful."²¹⁵ The courts base their analysis on the rather "simplistic" approach that because parole instructions are designed increase jury sentences, their inclusion benefits the state and, conversely, always detriment the defendant. Thus, their exclusion cannot harm the defendant.²¹⁶ Still other courts of appeal have found that the parole/good conduct time instruction actually benefits the defendant.²¹⁷ However, ever determining and, indeed, establishing how the lack of a parole instruction may or may not have influenced a jury is "totally speculative"²¹⁸ and without the ability to interview particular jurors or review jury notes indicating that it took the lack of the instruction into consideration, defendants will have a difficult time showing either "some" or "egregious" harm.²¹⁹ Showing harm is also made more difficult by the fact that the parole instruction itself instructs the jury not to consider how parole would operate—a fact that would require the courts to assume that the jurors did not follow their instructions.²²⁰

²¹²10 S.W.2d 699, 702-03 (Tex.App.–Houston [14th Dist.] 1999).

²¹³See *Jimenez v. State*, 992 S.W.2d 633 (Tex.App. Houston [1st Dist.] 1999) *aff'd* by 32 S.W.2d 233 (Tex. Crim. App. 2000) (affirmed holding that *Almanza* correct standard of review). See also *Shavers v. State*, 985 S.W.2d 284, 291 (Tex.App.–Beaumont 1999, *pet.ref'd.*).

²¹⁴*Hyde v. State*, 970 S.W.2d 81, 88 (Tex.App.–Austin 1998, *pet. ref'd.*).

²¹⁵Dix & Dawson, TEXAS CRIMINAL PRACTICE AND PROCEDURE § 36.65.

²¹⁶See *e.g.*, *Roberts v. State*, 849 S.W.2d 407, 410 (Tex.App.–Folrt Worth 1993, *pet. ref'd.*); *Grigsby v. State*, 833 S.W.2d 573, 575-76 (Tex.App.–Dallas 1992, *pet.ref'd.*).

²¹⁷See *e.g.*, *Myres v. State*, 866 S.W.2d 673, 674 (Tex.App.–Houston [1st Dist.] 1993, *pet. ref'd.*) (instruction could benefit the defendant because if jury learns that a defendant might serve more time before parole eligibility it might assess less time); see *Parker v. State*, 2004WL 2113050 (*Not designated for publication*) (parole/good conduct credit designed to increase sentences therefore omission usually not reversible error).

²¹⁸Dix & Dawson, TEXAS CRIMINAL PRACTICE AND PROCEDURE § 36.65.

²¹⁹See *e.g.* *Ramos v. State*, 831 S.W.2d 10, 18 (Tex. App.–El Paso 1992, *pet. ref'd.*); *Kucel v. State*, 907 S.W.2d 890, 895 (Tex. App.–Houston [1st Dist.] 1995, *pet. ref'd.*) (note from juror shows it took parole instruction in consideration during deliberation on punishment).

²²⁰See *e.g.*, *Williams v. State*, 975 S.W.2d 375 (Tex.App.–Waco 1998, *pet.ref'd.*) (although defendant received 20 years in case where jury given instruction that omitted phrase that good conduct time will not be considered in determining parole eligibility no harm shown because presumed that jury followed the trial court's instructions).

Finally, the failure to give an instruction can be waived if in response to the court's inquiry as to whether he had any objections he announced "No objection" was read to be an affirmative waiver of the right to complain on appeal concerning the lack of a parole instruction. Thus, even under *Almanza*, there was no review.²²¹ This treatment seems to be applied in any case in which there can be said to have been an affirmative response to the trial court's inquiry.²²² The Court of Criminal Appeals has held that an affirmative denial of any objections to the court's charge is tantamount to a failure to object.²²³ However, an appellate court can still review the unobjected to error with the failure to object affecting the standard of harm under which the complained of error will be assessed under *Almanza*.²²⁴

C. Reasonable Doubt Instruction Concerning Extraneous Offenses Submitted at Punishment

Proof of a defendant's prior extraneous offenses, whether resulting in conviction or not, are the cornerstone of the prosecution's case in the punishment phase of criminal trials. Article 37.07 provides in part that "evidence may be offered by the state...as to any matter the court deems relevant to sentencing, including but not limited to...any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act."²²⁵

If extraneous offenses are admitted in the punishment phase of the trial, the instruction is "the law of the case" and the defendant has a right to have the court instruct the jury on the beyond a reasonable doubt standard of proof. In *Huizar v. State*, the Court of Criminal Appeals has held that the defendant has a *sua sponte* right to the instruction even absent any such request.²²⁶

The question of whether the punishment phase beyond a reasonable doubt instruction was constitutionally required was also settled in *Huizar*. In *Huizar*, the defendant failed to request the instruction at trial and on appeal, finding error in the trial court's failure to so instruct the jury, the court of appeals conducted a harm analysis under Texas Rule of Appellate Procedure 44.2 applicable to constitutional error as opposed to that of *Almanza* applicable to non-constitutional error.²²⁷ The Court of Criminal Appeals reversed and remanded to the court of appeals for a harm analysis finding that it had erred in applying the constitutional standard of rule 44.2 and should have applied the

²²¹See *Ly v. State*, 943 S.W.2d 218, 221 (Tex. App.–Houston [1st Dist.] 197, *no pet.*).

²²²See *Moore v. State*, 2004 WL 2538266 (Tex. App.–Houston [1st Dist.] 2004, *no pet.*) (*Not designated for publication*).

²²³See *Bluitt v. State*, 137 S.W.3d 51, 53 (Tex. Crim. App. 2004).

²²⁴*Id.*

²²⁵TEX. CODE CRIM. PROC. ART. 37.07§ 3 (g).

²²⁶12 S.W.3d 479, 481 (Tex. Crim. App. 2000).

²²⁷*Id.* at 481.

Almanza standard applicable to non-constitutional error.²²⁸ The Court of Criminal Appeals found that the article 37.07 proof beyond a reasonable doubt instruction was not constitutionally required but rather was purely a matter of statutory requirement.²²⁹ Thus, the Court held, *Almanza*'s non-constitutional error was applicable and, because the defendant had failed to request the instruction, remanded to the court of appeals to determine whether the failure to give the instruction caused "egregious harm" to the defendant.²³⁰

D. Failure to Testify/Privilege Against Self-Incrimination

It is settled that the defendant retains her privilege against self-incrimination in the punishment phase of trial and the jury cannot constitutionally draw an adverse inference from the failure to testify.²³¹ Such an instruction is "the law applicable to the case" and the judge should so instruct the jury even absent a request from the defendant.²³²

Because the instruction implements the privilege against self-incrimination, the failure to give such an instruction will be analyzed as constitutional error under Texas Rule of Appellate Procedure 44.2 (a) applicable to constitutional error instead of the *Almanza* standard of assessing harm for non-constitutional error.²³³

There remains the related question of whether the defendant is required to object in order to preserve the matter for review since *Almanza* does not govern. In *Vargas v. State*, the court of appeals found that the defendant was required to both object to the omission of the instruction and obtain an adverse ruling in order to entitle him to review on appeal.²³⁴

VI. SUBMISSION OF OFFENSES AND ALTERNATE MEANS OF COMMITTING AN OFFENSE: THE UNANIMITY REQUIREMENT AND THE MOTION TO ELECT

The state's ability to seek and obtain more than one conviction in a single indictment can and does at times give rise to significant issues implicating the defendant's constitutional and statutory rights to a unanimous jury.²³⁵ These issues are usually addressed within the context of what might be referred to as the law governing "elections" and the defendant's right to compel an election. If the defendant has a right to compel an election, on the particular facts of a case, then the trial court's ability to submit alternative means of committing a single offense are greatly impacted. Specifically, if the unanimity requirement warrants an election, the trial court has 3 basic options with

²²⁸*Id.* at 482-83.

²²⁹*Id.* In *Huizar*, the Court of Criminal Appeals reaffirmed a prior holding finding that the punishment phase beyond a reasonable doubt instruction was not constitutionally required but rather was a matter of statutory requirement only. *Fields v. State*, 1 S.W.3d 687 (Tex. Crim. App. 1999). *Fields* did not address the specific question of whether the trial court was required to give the instruction *sua sponte*, *i.e.*, absent a request from the defendant.

²³⁰*Id.* at 484-85.

²³¹*See Mitchell v. U.S.*, 526 U.S. 314, 325-37, 119 S.Ct. 1307 (1999); *see also Carruth v. State*, 42 S.W.3d 129, 137 (Tex. Crim. App. 2001).

²³²*Durham v. State*, 153 S.W.3d 289 (Tex. App.–Beaumont 2004, *pet. ref'd.*).

²³³*Id.*

²³⁴2004 WL 3017679 (Tex. App.–El Paso 2004, *no pet.*).

²³⁵TEX. CONST. ART. V, § 13; TEX. CODE CRIM. PROC. ART. 36.29.

respect to charging the jury: submit the alternative theories in the conjunctive, instruct the jury that it must be unanimous as to a single act forming the basis of the conviction, or require the state to elect and submit only a single offense.

This issue is practical and contemporary interest because the Court of Criminal Appeals appears to still view it as one warranting continued granting of discretionary review.²³⁶ Further, the Court's opinions, until now, while providing basic guidelines have failed to answer several basic questions left unanswered or unaddressed in previous opinions that fully explicate the analysis governing jury unanimity in the context of alternative theories of committing an offense and separate offenses.

It is well-settled that the state may allege as many alternate means of committing a single offense in separate paragraphs of a single count in an indictment in order to meet the contingencies of proof at trial.²³⁷ It is also well-settled that while it may allege alternate theories of liability in the conjunctive that the trial court may submit the alternate theories to the jury in its charge in the disjunctive on which the jury may return a general verdict of guilt.²³⁸

However, the defendant's constitutional and statutory right to a unanimous verdict may be implicated if, under the auspices of submitting alternative means of committing an offense it submits what is tantamount to separate offenses upon which the jury is entitled to return a general verdict of guilt. Without a special verdict, there exists the possibility that half of the jury were in agreement on one offense with the other half in agreement as to the other offense thereby violating the unanimity requirement. In some cases, it is easy to determine what constitutes a separate offense. In other cases it is not so easy because, as will be discussed, even alternative theories can constitute separate offenses under some circumstances.

If the proof at trial shows the commission of separate offenses, they must be submitted separately with each requiring its own verdict.²³⁹ The defendant must move the court to require the state to elect on which offense it will rely for conviction. Otherwise, the defendant may seek the court to instruct the jury that it must be unanimous with respect to which of the separate offenses the defendant is guilty or it may submit the offenses in the conjunctive requiring unanimity as to both offenses.²⁴⁰

Determining what constitutes separate offenses is difficult and, indeed, determining the exact requirements of the unanimity requirement is sometimes difficult. The Court of Criminal Appeals' opinions offer some guidance that may suffice to cover the usual case but its explication on the issue leaves many unanswered questions as to the exactly what constitutes an offense, and the basis of its decisions. These leading cases will be discussed briefly.

²³⁶See *e.g.*, *Ngo v. State*, ___ S.W.3d ___. 2005 WL 600353 (Tex. Crim. App. 2005).

²³⁷*Hathorn v. State*, 848 S.W.2d 101, 113 (Tex. Crim. App. 1992); See TEX. CODE CRIM. PROC. ART. 21.24.

²³⁸*Vasquez v. State*, 665 S.W.2d 484, 486-87 (Tex. Crim. App. 1984).

²³⁹TEX. CODE CRIM. PROC. ART. 37.07 (a), (c).

²⁴⁰See generally, DIX & DAWSON, TEX. CRIMINAL PRACTICE AND PROC. §§ 30.41, *et. seq.*

In *Kitchens v. State*, the defendant was indicted for commission of Capital Murder.²⁴¹ In a single count, the state alleged that the defendant had committed murder during the course of robbery, kidnaping and aggravated sexual assault. The trial court submitted all three alternative theories of guilty in an indictment calling for one general verdict. On appeal, the defendant argued that submitting the alternative theories violated his right to jury unanimity because “some jurors may have found him guilty of murder in the course of aggravated sexual assault while other may have found him guilty of murder in the course of robbery.” In short, the defendant contended that though appearing to be merely alternative means of committing the offense, each actually constituted separate and distinct offenses. The Court of Criminal Appeals found that the submitting the alternative means for a single general verdict did not violate the defendant’s right to a unanimous verdict because they were “alternate theories of committing the same offense” which could be submitted to the jury in the disjunctive.²⁴² Without any discussion as to why the offenses were alternate theories of committing the same offense, the court affirmed the defendant’s conviction.²⁴³ Invoking language from a Supreme Court opinion, the Court suggested that alternative theories of committing the same offense constituted “preliminary factual matters” on which there is no constitutional requirement that the jury agree.²⁴⁴

Kitchens left unanswered many questions. First, to what extent was its decision based purely on analysis of the statutory structure, *i.e.*, by considering that the legislature had chosen to include each of the “murder in the course of commission” offenses in a single subsection of the Capital Murder statute as opposed to setting forth each offense in separate subsections?²⁴⁵ This is important because if the subsection is viewed as addressing all of the “murder in the course of commission” theories of committing Capital Murder, then the question arises whether “murder in the course of committing escape”—a similar means of committing Capital Murder set forth in its own separate subsection—could be submitted in the disjunctive with the other murder in the course of committing offenses and withstand a unanimity objection.²⁴⁶ If such an instruction would violate the unanimity requirement, then *Kitchens* failed to address the significance of statutory structure. Finally, if statutory structure is important, why is it important to the question of jury unanimity? In this regard, under *Kitchens*, can all theories of committing Capital Murder be submitted in the disjunctive and not violate the unanimity requirement?

Secondly, to what extent is *Kitchens* premised on the unique nature of capital murder which, unlike assaultive offenses, can necessarily not be repeated once effected. *Kitchens* did not address the issue. Finally, what is a

²⁴¹823 S.W.2d 256 (Tex. Crim. App. 1991).

²⁴²*Id.* at 258.

²⁴³*Id.*

²⁴⁴*Id.*

²⁴⁵*See* TEX. PEN. CODE § 19.03.

²⁴⁶*See* TEX. PEN. CODE § 19.03 (a) (4).

“preliminary factual matter” and why is robbery and sexual assault, two completely distinct acts “preliminary”, especially since each constitute offenses themselves? *Kitchens* neither answered nor addressed these issues.

In *Francis v. State*, the Court of Criminal Appeals reversed a conviction holding that a general verdict violated the defendant’s right to a unanimous jury verdict.²⁴⁷ There, the state alleged in a single count indictment indecency with a child.²⁴⁸ At trial, the evidence showed four distinct acts (touching the genitals and touching the breasts) each constituting a violation of the indecency with a child statute that occurred on two different occasions.²⁴⁹ On neither occasion were both of the distinct acts alleged to have occurred.²⁵⁰ At trial the defendant requested the court compel the state to elect which offense it would rely for conviction.²⁵¹ Alternatively, the defendant requested the trial court instruct the jury to find him guilty of both acts of indecency. The trial court denied the defendant’s request and the jury returned a general verdict of guilt.²⁵² On appeal, the Court of Criminal Appeals reversed the defendant’s conviction holding that submitting both acts violated the defendant’s right to a unanimous jury verdict.²⁵³ The Court found that the proof showed “two separate offenses” and that there “was never a single incident alleged” in the indictment.²⁵⁴ Consequently, charging the jury in the disjunctive violated the defendant’s right to a unanimous verdict because six members of the jury could have believed him innocent of the one act and guilty of the other with the other six believing just the opposite.²⁵⁵ Significant to our discussion, the court found that the two acts of breast-touching and genital touching were two different offenses.²⁵⁶

Understanding *Francis* may be made simpler by the fact that the two acts occurred at two distinct times. However, *Francis* does not emphasize this distinction but rather emphasizes that they were two separate acts. When considered with *Kitchens*, the *Francis* court’s conclusion that the two separate means of committing sexual contact—an element of the offense of indecency with a child—is equally applicable to robbery and sexual assault which also constitute two separate acts. The *Francis* court does not address this question. *Francis* also does not address the statutory structure of the offense of Indecency with a Child which sets out both alternative theories in a single subsection of the Penal Code.

²⁴⁷36 S.W.3d 121 (Tex. Crim. App. 2000).

²⁴⁸*Id.* at 122-23.

²⁴⁹*Id.*

²⁵⁰*Id.*

²⁵¹*Id.*

²⁵²*Id.*

²⁵³*Id.* at 125.

²⁵⁴*Id.*

²⁵⁵*Id.*

²⁵⁶*Id.*

Most recently, the Court of Criminal Appeals had occasion to revisit the issue in *Ngo v. State*, in which the court affirmed a court of appeals reversal of a conviction for violation of the requirement of jury unanimity.²⁵⁷ In *Ngo*, the defendant was indicted in a single count for committing credit card abuse.²⁵⁸ The indictment alleged three alternative theories of committing the offense each of which are set out in separate Penal Code subsections—presenting, stealing and receiving a credit card.²⁵⁹ The trial court submitted a charge setting forth all three alternative theories in the disjunctive allowing the jury to return a single general verdict of guilt on either of the theories in a single general verdict.²⁶⁰ The Court of appeals’ holding that this violated the unanimity requirement was affirmed by the Court of Criminal Appeals. The Court of Criminal Appeals held that the jury must be instructed that it cannot return a guilty verdict unless it unanimously agrees that the defendant committed one of the criminal acts and that it cannot return a general verdict. In short, the Court found that “unanimity requires that the jury agree that the defendant committed the same, single specific criminal act.”²⁶¹ The Court further found that the state could not rely upon a “laundry list” of different acts and the trial court allow individual jurors to pick which of the list on which it wished to base its conviction.²⁶² Finally, the Court sought to identify a distinction between those matters that constitute the “specific actus reus element of the crime” and those which are “but the means to the commission of the specific actus reus element.”²⁶³

Notwithstanding attempts to do so, the *Ngo* court did not resolve several issues left open by both *Francis* and *Kitchens*. Specifically, what renders the kidnaping and sexual assaults in *Kitchens* “the means to the commission of the specific *actus reus*” of Capital Murder while rendering the touching of breasts and genitals the specific *actus reus* element in *Francis*. Further, while *Ngo* did involve several distinct acts which each independently could constitute the offense of credit card abuse, under *Kitchens* if there is no requirement for agreement as to whether the defendant murdered the deceased during a sexual assault or during a robbery, it is difficult to understand how the jury must agree whether the defendant presented or received the credit card in *Ngo*.

Utilizing the *Francis* distinction, the *Ngo* court might note that the actual theft of the credit card necessarily occurred at some prior and distinct time and thus emphasize the distinct temporal aspect of the holding. However, the court does note this distinction.

Finally, *Ngo* also does not discuss the extent to which, if any, statutory structure and legislative intent to define separate offenses should factor in the court’s analysis. Would the holding in *Ngo* have differed had the

²⁵⁷ ___ S.W.3d ___. 2005 WL 600353 (Tex. Crim. App. 2005).

²⁵⁸ *Id.*

²⁵⁹ *Id.* See TEX. PEN. CODE § 32.31.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

legislature set forth each alternative theory in a single subsection as opposed to in the separate subsections of Penal Code § 32.31? *Ngo* leaves many of these questions unanswered.

At best, when read together, the temporal and the separate act distinction seems to be the most reliable gauge of what unanimity would require. That is, if the alternative means each constitute a separate and distinct act that could, independently, constitute the offense, then unanimity requires either election, conjunctive submission of the alternative theories, or an instruction requiring unanimity as to the distinct act constituting the offense.