

**PROCESS ERROR BY REFUSING THE REQUESTED CHARGE ON
MURDER, WHICH WAS A LESSER INCLUDED OFFENSE IN THIS
CASE. U.S. CONST., AMEND. XIV.**

The evidence at trial raised the lesser included offense of murder because there was evidence that, if believed, would authorize the jury to find that Applicant engaged in consensual sexual conduct with complainant at some time before he fought with her and killed her. There was evidence from which the jury could have found that Applicant had a romantic relationship with complainant, that she allowed him into her home that night, that she engaged in sexual intercourse with him and that they had a disagreement which escalated into violence when Jack Shadbolt called or appeared up at the house.

The erroneous denial of the requested lesser offense option, as raised by the evidence, automatically constitutes "some harm" under this Court's applicable standard, calling for reversal of Applicant's conviction. This ruling summarily deprived Applicant of any vehicle for which he could have benefitted from this, his only defense..

Applicant's counsel presented a timely request for the jury to be charged on the lesser included offense murder. (RR. 28, 4) The court refused the request, and the case was submitted to the jury only on the theory of capital murder as an intentional killing in the course of aggravated sexual assault. Tex. Penal Code § 19.03 (a)(2). (CR 1., 161-166). The error was thus properly preserved for review. See **Boles v. State**, 598 S.W.2d 274, 278

(Tex. Crim. App. 1980); Art. 36.15, V.A.C.C.P. Because murder, as defined by the Penal Code in the abstract, is a lesser included offense of capital murder, and because there was evidence at trial which, if believed, would permit a rational jury to find that the sexual intercourse between Applicant and complainant was consensual rather than assaultive, but that he did later fight with her and kill her, due process requires that the jury should have been given the opportunity to convict Applicant of the offense of intentional murder. Tex. Penal Code § 19.02 (Vernon). A refusal of this requested charge, denied Applicant his statutory right to this instruction under Art. 36.14, V.A.C.C.P. This, in turn, denied Applicant his due process and due course of law rights to be convicted only upon proof beyond a reasonable doubt of every element of the offense. U.S. CONST., AMEND. V, XIV. See *Beck v. Alabama*, 447 U.S. 625, 635, 100 S.Ct. 2382, 2388 (1980).

Two-Part Test for Instruction on Lesser Included Offense

The determination whether a defendant is entitled to his requested instruction of a lesser offense is a two-step process, based upon the elements of the offenses and the facts of the case. See *Moore v. State*, 969 S.W.2d 4, 12 (Tex. Crim. App. 1998) First, the requested lesser offense must be one that is included within the elements of the charged offense as defined by state law. Second, the offense is a lesser included one if it is raised by the evidence at trial so that a defendant is entitled to an instruction giving the jury the option of convicting him for that lesser offense. *Id.*

- 1) Murder is a Lesser Included Offense of Capital Murder in the Abstract.

Art. 37.09, V.A.C.C.P. sets out the scheme for determining whether a particular offense is in the abstract, a lesser included offense of another, and when conviction for the lesser can be had upon indictment for the greater. The pertinent provision in this case is subsection 1 of the statute, which states that an offense is a lesser included one if, "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged". *Id.* This Court has held that murder is a lesser included offense of capital murder according to the statutory definition. *Moore v. State*, 969 S.W.2d at 12.

2.) **Murder Was Raised by the Evidence in This Case Which Negated the Aggravating Element of Sexual Assault.**

The second part of the test, the "raised by the evidence" requirement, has long been a part of Texas law, even without reference to constitutional protections. Since the 1800's it has been the rule that a defendant is entitled to an instruction on all defensive issues raised by the evidence, regardless of whether the evidence supporting the defensive theory is contradicted.

The "raised by the evidence" requirement is met if there is evidence from any source that negates or refutes the aggravating element of the greater offense (in Applicant's case, sexual assault) and if without that element, the evidence shows the defendant is guilty only of the other, lesser offense (in Applicant's case, murder). In such a case, the jury must be given the option of convicting a defendant of the lesser offense rather than being left with the sole option of acquitting the Defendant entirely of any offense, when jurors are convinced

he has committed a crime, or convicting him of an offense (especially a capital offense) when they have a reasonable doubt whether he committed the aggravating offense, at all.

This Court must make that determination viewing the evidence in the light most favorable to Applicant, and must give him the benefit of all reasonable inferences from the evidence, without regard to whether that evidence is credible, controverted or in conflict with other evidence. See **Rousseau v. State**, 855 S.W.2d 666, 673 (Tex. Crim. App. 1992); **Havard v. State**, 800 S.W.2d 195, 216 (Tex. Crim. App. 1989).

In this case, several portions of testimony as well as physical evidence, if believed, negated Applicant's commission of sexual assault. Additionally, there was evidence which, if believed, supported a finding that Applicant was guilty only of an intentional murder. See **Rousseau**, 855 S.W.2d at 673.

Physical Evidence, Scientific Evidence, Expert Testimony.

In this case, there was forensic evidence of the presence of spermatozoa and DNA evidence that Applicant had had sexual intercourse with complainant at a time within 72 hours of her autopsy, conducted on the afternoon of her death. However, as argued previously the affirmative forensic and expert testimony also raised the possibility that the sexual conduct was consensual. The scientific and physical evidence thus negated sexual assault as an aggravating factor because it did not prove that the act of sexual intercourse was non-consensual (RR 20, 111-117), nor that the act of sexual intercourse occurred

contemporaneously^{2b} with the killing (RR 22, 69-75), nor that the person who engaged in sexual intercourse with complainant was the same person who had killed her. (RR 23, 70-72, 167-168,172-179)

Hughes' testimony also negated a sexual assault and raised the defensive issue of consensual sex as it supported an inference of a romantic relationship between Applicant and complainant. Hughes told the jury that she met Applicant and complainant together at a convenience store, away from their neighborhood, shortly before the Valentine's Day murder, when complainant was separated and living apart from her husband, Jack Shadbolt. (RR, 24, 221-222). Applicant reiterates that the jurors could reasonably infer from Hughes' testimony (even though they were prevented from knowing precisely that complainant had asked Hughes not to tell anyone she had seen the two of them together) that complainant had wanted this relationship with Applicant kept secret, especially from her husband. It is instructive that the jurors wanted to review Hughes' testimony when they were deliberating Applicant's guilt.

The record reflects that the jury retired to deliberate Applicant's guilt at 11:35 A.M.

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In the 1987 autopsy report, the M.E. recorded that he observed "numerous" spermatozoa in the semen in the vaginal and rectal samples recovered during the autopsy. The witness who testified from the M.E.'s report said the relative "freshness" of those samples, especially in the rectal sample that would have degraded more quickly because of the presence of bacteria, indicated to him that the sexual intercourse had taken place fairly recently, although he did not disagree with the defense suggestion of a time-frame of 72 hours. (RR, 22, 67-69). In 2000, Applicant's DNA was "matched" to the suspect DNA extracted from the anal sample of the complainant. (RR, 22, 108). By the time of trial, in 2003, Applicant was included as a contributor of the vaginal sample, as well. (RR, 22, 212-213).

on December 5, at the close of arguments. The jurors left for lunch at 12 noon and returned at 12:50 P.M. to continue deliberations. In a note file-marked 1:05 P.M. the jurors asked the trial court, "Is it possible to see a transcript of Darlene Hughes's testimony?" (CR 1, 173). Neither the docket sheet nor the reporter's record reflects whether the jury was provided with a "transcript", although there is a blank Harris County form response in the record which is designed to answer such a request. The form is filled in with Applicant's name and cause number and is signed by the trial court. However, it bears a file stamp of December 10 (the date Applicant's punishment verdict was returned) and has no time notation nor any information in the blanks to be filled in by the jurors. (CR 1, 171) Applicant points out this note only as an indication that the jurors, in deliberating Applicant's guilt, were obviously considering the substance of Hughes' testimony, which concerned only the existence, or not, of a relationship between complainant and Applicant, before she was killed.

Both prosecutors' arguments recognized that the defensive theory of consensual sex between Applicant and complainant was raised by the evidence of Hughes' testimony and the forensic evidence showing no sexual trauma. The prosecutors argued that the jurors shouldn't accept the defense theory of consensual sex (RR 25, 9, 14-17), that Applicant "wanted them to believe" that the sex was consensual because Applicant had had a "relationship" with complainant.

3.) Murder Was Raised by the Evidence in This Case Which Showed Applicant Was Guilty Only of Murder.

In this case there was evidence, as stated earlier herein, that the sex act and the act of

killing the Complainant were two separate and distinct acts. Acts that did not necessarily happen in the course of each other being committed. This alone raised the lesser included offense of murder. Also, in this case, there was evidence supporting an inference that even though Applicant had not sexually assaulted complainant, he had intentionally killed her that night so that he was guilty only of murder, not capital murder. If the sexual intercourse between them was consensual, there was still an inference raised by the evidence, the "freshness" of the semen samples recovered at autopsy and complainant's partial nudity, the intercourse happened during the same morning hours but only thereafter, Applicant fought with complainant, became enraged by her rejection of him, and used objects at hand to bludgeon and stab her to death.

The evidence reasonably raises the following possibilities, which, based upon the charge provided to the jury, to convict Applicant only of capital murder or to acquit him entirely, could not be fairly considered. His only vehicle to present his defense to the jury was removed from him when the Court denied his request for the lesser included offense charge. His right to present a defense was violated.

On the morning of Valentine's Day, after engaging in sexual intercourse as part of the romantic relationship developing in secret, did Applicant and complainant begin to argue about the future of their relationship? Was it going to be anything other than sexual? Was it going to continue in secret? Was it going to continue at all? Had Jack Shadbolt found out what was going on? Had anyone discovered their relationship, other than Hughes? Was this

their first sexual experience? Did complainant find that experience unsavory and give Applicant an excuse to end their relationship? Did Applicant perceive that his sexual performance had failed to meet Complainant's standards (so that she became a "snotty bitch" who "thought she was better than everybody?") Did Applicant think that complainant did not want to be seen with him so that she could decide whether to end their relationship and claim that it had never happened? Did Applicant then fly into a rage which resulted in complainant's death?

These inferences are raised by the evidence, including Stryjek's testimony that when she asked Applicant what kind of person complainant was, Applicant told her that she was "a snotty bitch" who "thought she was better than everybody" and that "he hated her". (RR, 24, 73-74). The evidence of consensual sex, supported by the evidence of a secret romantic relationship and the lack of sexual trauma, together with the other evidence of the violent killing, Applicant's later denigration of complainant to Stryjek, constitute evidence from which the jury could reasonably find that Applicant was guilty only of the intentional murder of complainant, that is murder, not capital murder.

Applicant's request for an option of murder also takes into account the testimony of Llamas, the most specific evidence that Applicant killed complainant. Llamas testified that Applicant told her he killed complainant, that when he went to her house to have sex with her, "she didn't want to". It is a reasonable inference from the evidence that Llamas added the "rape" characterization, because it was in her own interest to do so. If Llamas had hoped

to gain any benefit for her testimony, she had to implicate Applicant in the commission of a capital murder, not a simple murder. The record demonstrates that Llamas was no stranger to the kind of evidence required to obtain a death penalty and the evidence the government needed to cut "deals" in a capital case. As previously noted, Llamas' motives to testify in this case remain questionable. Given the absence of any physical or other evidence of a sexual assault, the State required Llamas' testimony to convict Applicant of capital murder. The jury in this case should have been given the option of returning a verdict of murder alone, if they thought Llamas was embellishing or exaggerating Applicant's statements in order to enhance the value of her own testimony.

The jury is free to believe or disbelieve all or part of any witness's testimony. It is a reasonable inference in this case that even if Applicant did make these alleged statements to Llamas while seducing her, that the statements were exaggerations and distortions of the events leading to complainant's death. If the jury had only believed part of Llamas' testimony in which Applicant implicated himself in the killing of complainant, they could still have found him guilty only of murder.

The Erroneous Denial of a Lesser Offense Option Raised by the Evidence Constitutes "Some Harm" and Mandates Reversal.

The rule finding "some harm from denial of a lesser offense raised by the evidence" is necessary and appropriate. It is the risk of harm in such situations that constitutes a due process violation, so that it is only the "some harm" rule that fully protects a defendant's due process rights in a capital case. In cases like Applicant's (where no lesser included offense

options were submitted to the jury), the trial court's refusal to submit a lesser included offense of murder, as raised by the evidence, always amounts to at least "some harm" under this Court's opinions in **Arline v. State**, 721 S.W.2d 348 (Tex. Crim. App. 1986) and **Almanza v. State**, 686 S.W.2d 157 (Tex. Crim. App. 1984). See **Gonzalez v. State**, 733 S.W.2d 589, 591 (Tex. App. – San Antonio 1987) **pet. ref'd.**, 762 S.W.2d 583 (Tex. Crim. App. 1988).

Appellant argues that the rule in **Gonzalez** is the only one consistent with a defendant's constitutional due process right to a fair trial, (See **Beck v. Alabama**, *supra*) and with this Court's holdings. In **Beck**, a death penalty case, the United States Supreme Court recognized the special nature of the error in omitting entirely from the charge a lesser offense that was raised by the evidence, and considered its effect upon a jury of laypersons:

"Moreover, it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction – in this context or any other – precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. When one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction."

Beck, 447 at 635 (citing **Keeble v. United States**, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973) (Final emphasis in opinion)).

Applicant submits that although in theory, the jury in this case, following the court's charge, simply found Applicant guilty of capital murder, as instructed, and stopped, the