NO. 01-24-00889-CR

IN THE COURT OF APPEALS

FOR THE

FIRST DISTRICT OF TEXAS

HOUSTON, TEXAS

JARON BRYCE MORGAN, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

BRIEF FOR THE APPELLANT

TRIAL COURT CAUSE NUMBER 22CR0690
IN THE 122ND DISTRICT COURT OF
GALVESTON COUNTY, TEXAS

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ORAL ARGUMENT REQUESTED

LIST OF PARTIES

Presiding Judge	Honorable Jeth Jones
Appellant	Jaron Bryce Morgan
Appellee	The State of Texas
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CITATION TO THE RECORD

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IN THE

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HOUSTON, TEXAS

JARON BRYCE MORGAN, Appellant

v.

THE STATE OF TEXAS, Appellee

Appealed from the 122ND District Court
of Galveston County, Texas
Cause No. 22CR0690

BRIEF FOR APPELLANT

TO THE HONORABLE COURT OF APPEALS:

Now comes Jaron Bryce Morgan, by and through his attorney of record Joel H. Bennett, of Sears, Bennett, & Gerdes, LLP, and files this brief.

STATEMENT OF THE CASE

Appellant was charged by indictment with Murder.

CR-8. Appellant pled not guilty to the charge and a trial by jury began on November 4, 2024. CR-167; RR2—4-5. Appellant was also tried for the charge of Aggravated Assault arising out of the same incident; Appellant pled not guilty to that charge and was found not guilty by the jury and is not a subject of this appeal. RR2-5-6; RR6-4. After hearing the evidence and argument of counsel, the jury found Appellant "guilty" of Murder as alleged in the indictment. RR6-4-5, CR-191. Appellant elected to have the Jury assess punishment. CR-101. After hearing evidence and argument of counsel on the issue of punishment, the Jury sentenced Appellant to twenty-seven (27) years in the Texas Department of Criminal Justice—Institutional Division. CR-199; RR7-210. Judgment and Sentence was entered and signed on November 12, 2024, as well as the Trial Court's Certification of Defendant's Right to Appeal. CR—200-204, 205. Notice of Appeal was timely filed on the same day. CR—209.

APPELLANT'S FIRST ISSUE

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING APPELLANT'S REQUEST FOR THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER.

STATEMENT OF FACTS

Appellant was charged by indictment with Murder, alleging he did "intentionally or knowingly cause the death of an individual, namely Dvonte Sutton, by shooting Dvonte Sutton with a firearm". CR-8.

Priscilla Bahena was the girlfriend of Dvonte Sutton. RR3-41. She and Dvonte lived next door to her parents. RR3-43. Appellant and Dvonte were friends; they would hang out all of the time. RR3-43-44. She did not like Appellant and would not hang out with just Dvonte and Appellant. RR3-44, 47. She and Dvonte would argue about his addiction; he used pills, but she did not know what kind of pills. RR3-48. Dvonte had gone to rehab for his addiction; she did not know he was using drugs after he got out of rehab. RR3-49.

Dvonte was hanging out with Appellant on the night of March 4 and morning of March 5, 2022, but she was at home asleep. RR3-50. Dvonte came home sometime in the morning with McDonald's to eat; not sure what time, maybe 7 am. RR3-51. Priscilla had walked next door to check on her mother and while she was walking back, she saw Appellant in a car. RR-51. McKenzie was with him.

RR3-52. She walked up to the car and told Appellant that he had to leave and he left. RR3-52. She went inside her house and Appellant came back; the front door was open and she heard Appellant and Dvonte outside. RR3-53. They were having a disagreement. RR3-53. She went outside and a few seconds after she got outside, Appellant pulled a gun. RR3-53. She started screaming that she was going to call the police and then called the police. RR3-53.

As she made the 911 call, she saw Dvonte laying on the ground. RR3-55. She ran next door to her mother's house and when her mother came out, her mother started covering his wounds. RR3-55. When she first walked out, she saw a swing or two and then the gun was out. RR3-55. They were initially standing and then they were both on the ground fighting for the gun when he pulled it out. RR3-56. Priscilla said that the gun was pulled out from somewhere on his side, she did not know if it was in his pocket or waistband. RR3-56. The prosecutor asked her if Dvonte ever got his hands on the gun; she answered, "They -- all I know is Jaron and Dvonte both had it when -- because he was -- I guess he was trying to -- he was

pushing it away." RR3-56. Appellant was trying to point it at his body. RR3-56. At this point, they were both on the ground on their sides; on the side of her house, there is a step below causing one of them to be higher up; they were at an angle. RR3-57. Priscilla was between the truck and the white car pictured in State's Exhibit # 3. RR3-58, RR8-13. Appellant's and Dvonte's bodies are laying on the ground. RR3-59.

Prior to Dvonte's death, Appellant and Dvonte were hanging out for about 2-3 days. RR3-67. She knew Appellant had a hotel room somewhere. RR3-68. She was coming back from her mother's house when she first saw Appellant. RR3-70. She told Appellant that he had to leave. RR3-70. Appellant did not get out of the vehicle at that time; he just left. RR3-71. Appellant came back within about 5 minutes; he just made the block and came back. RR3-71. She was inside when Appellant came back. RR3-71. When she came inside, she told Dvonte that Appellant was outside and she told him to leave; she believes that Dvonte went outside to check to see if Appellant had left. RR3-71-72.

When Appellant came back, Dvonte was outside and she

was inside. RR3-72. She heard a commotion/arguing/a fight; she does not know how long they were fighting before she went outside. RR3-72. In her video statement, Priscilla told the police that the first time she saw the gun was when it was up in the air. RR3-72. She re-affirmed that the first time she saw the gun it was in the air. RR3-72. Appellant then asked how she knew where the gun was pulled from if the first time she saw it, it was in the air. RR3-73. Priscilla answered she did not remember her statement that clearly. RR3-73.

When Priscilla came out of the house, she stayed between two vehicles and stayed there during the fight. RR4-17. At one point, she could not see what was happening because they fell. RR4-17. Priscilla admitted she told the police that she did not see the gun until it was in the air. RR4-18. When asked if McKenzie also tried to grab the gun, Priscilla said that she did not try to grab the gun but tried to grab Appellant's arm. RR4-18. Priscilla then said that maybe she grabbed at the gun too. RR4-18.

Dvonte had hold of the gun; they both had hold of it. RR4-19. Dvonte never had the gun by himself. RR4-

19. Priscilla admitted that they were fighting for a time before she got outside and she would not know what happened before she walked out. RR4-20-21.

After refreshing memory with her prior statement, Priscilla admitted that she told the police that Dvonte was holding the gun for a few seconds. RR4-23. When she came outside, Dvonte and Appellant were fighting near where the # 3 evidence marker is located. RR4-31, RR8-23. Priscilla testified you can hear the gunshot on the 911 call. RR4-37.

McKenzie McBrayer was dating Appellant at the time of this incident. RR4-44. Appellant hung out with Dvonte a lot. RR4-44-45. All three of them were deep into addiction. RR4-45. Dvonte and Appellant were best friends. RR4-45. She would see Dvonte almost every day. RR4-46. She was with Dvonte and Appellant for the few days leading up to his death at a hotel in Texas City. RR4-46. They had taken meth and pills that day/night. RR4-47.

Dvonte left the hotel after some of Appellant's money went missing. RR4-49. Dvonte and Appellant argued about the missing money. RR4-50. Appellant accused

Dvonte of taking the money; they (Appellant and Dvonte) were both mad when Dvonte left. RR4-50. Appellant could be quick to get upset when he was high on meth.RR4-52. They also left the hotel and went to Dvonte's. RR4-53. Appellant and Dvonte were arguing on the phone about the money on the way over there. RR4-53.

McKenzie knew Appellant had a gun in the vehicle. RR4-54. She told the police in her statement that Appellant told Dvonte that he was coming over there and he was going to get his money. RR4-60. Appellant drove to Dvonte's house. RR4-60. At this point, Ms. McBrayer began refusing to answer questions. RR4-60.

Ms. McBrayer did state that after they got to Dvonte's house, he came outside. RR4-62. At some point, Priscilla came outside too. RR4-62. She and Appellant left the residence, circled the block, and came back. RR4-63. Appellant was wearing a black hoodie and he had a gun inside the hoodie when he got out. RR4-63-64. After Appellant got out of the car, they started fighting. RR4-64. She told law enforcement that Appellant was wearing gloves so he would not leave any marks on Dvonte. RR4-64. Ms. McBrayer refused to answer

any more questions. RR4-66. The trial court admonished her about contempt of court if she refuses to testify. RR4-76. She still refused to testify or answer questions. RR4-77.

Lauren Early is a patrol officer with the Dickinson Police Department. RR5-9. She met with some Galveston Sheriff's Department deputies who had stopped Appellant and Ms. McBrayer. RR5-12. She collected a magazine for a firearm that was collected from Appellant's pocket. RR5-14. Appellant was pulled out of one of the other officer's vehicle and Appellant asked her to let him smoke a cigarette and she told him no. RR5-17. Appellant said in front of her, "It was not supposed to go down like that." RR5-18.

State's Exhibit # 59 contains Appellant's statement to the police. Appellant made the following statements during his interview (the times noted is approximately at the end of the noted statement):

- Appellant and Dvonte had been friends for a while; they had been in fist fights before but this just escalated. 9:18

- Dvonte called and said he wanted to hang out again and that is when I realzed he took my money. He had been the only one around so I called him. 13:55
- I didn’t want any of this to get out of hand like it did. 14:21
- I love that dude. 14:48
- During the phone call, Appellant accused him of taking the money. 15:45
- It made me mad that he would steal from me. 17:00
- I went to pick him up and a fight started, with words. 18:26
- I don’t remember how it started, he hit me, boom, boom, and I am on the ground. He is steady hitting me. 19:02
- I tried to roll over on my stomach. 19:08
- The pistol was there and we both grabbed for it at the same time. 19:12
- It was in our hands at the same time, 19:21

- And it just went off. 19:25
- The police asked Appellant if Dvonte hit him and he said yes, he was on top of me and I tried to roll over and we both noticed the pistol was on the ground or the grass. 19:40
- We tussled over it for a minute. 19:48
- After the shot went off, I did not know what to do. I love him, still do, like a brother. 20:06
- The police asked Appellant where the pistol was, and Appellant said in a holster on his waistband. 20:21
- Appellant said that they were fighting over it and it went off and then he just took off. 22:01
- Appellant pulled up on the street and he was walking out; they were going to pick him up. 26:02
- Appellant did not walk to the door. The fight started closer to the street. Dvonte got on top of him and they ended up near the fence. 26:39
- The gun went off one time. 27:24

- The officer asked Appellant to go to the point the gun was on the ground, what happens? They both reached for it. 27:37
- Appellant rolled over and Dvonte was on his (Appellant's) back. 27:48
- Appellant grabbed for the gun and Dvonte grabbed for it at the same time; the front of Dvonte's body was on Appellant. 28:10
- The argument started before they got there, started on the phone. 29:23
- The officers tell Appellant that Dvonte is dead. 43:18
- Appellant said that was my brother, loved that dude. 44:13
- Appellant said that the shooting was not on purpose. 47:40
- Appellant said he did not go there with the intention to kill that man. 47:47
- The officers asked where Appellant had the holster and Appellant said he did not have it in a holster; it was in his hoodie. 56:23

- Appellant said he usually carried it around in the holster in the front pocket of his hoodie. 56:38

Dr. Darshan Phatak is an assistant medical examiner with Harris County. RR5-78. State's Exhibit # 62 is a photograph showing a scrape on the deceased face and a stapled gunshot wound on the left side of the neck that is partially surrounded by stippling. RR5-83. To solely see stippling, the range of fire would be between 1-3 feet from the body when the gun was discharged. RR5-84. You could have a muzzle imprint or soot with closer shots. RR5-84.

The gunshot entered the body on the left side of the neck just above the clavicle; the bullet went through the clavicle, left lung, left 7th rib in the back, and then out of his back. RR5-86. The bullet trajectory was downward through the body, front to back, and no lateral deviation from left to right. RR5-89. Depending upon how the decedent was shot, the bullet is going straight on. RR5-89. If the decedent was standing, the shooter was at a much higher position; if he is leaning over, then it could be he was seated in a chair and leaned

over. RR5-89. The State asked if it was possible that he was on his knees and someone was above him; the doctor said that was possible. RR5-89. The cause of death was a gunshot wound of the neck through the torso. RR5-97. The doctor testified that he cannot tell the decedent's exact position when he was shot; he could say whether it is consistent or inconsistent with a given scenario. RR5-101. The State again asked if it would be consistent with him kneeling and an individual standing over him and the doctor agreed. RR5-101.

Appellant requested the lesser included offenses of Manslaughter and Criminally Negligent Homicide be included in the Charge of the Court. The State objected to both instructions and the trial court denied both requests. RR4-121, 130.

SUMMARY OF ARGUMENT

The trial court erred in overruling Appellant's requested instruction for the lesser-included offense of Manslaughter. The instruction was proper as both the law and facts support the instruction under the *Aguilar/Rousseau* test.

ARGUMENT AND AUTHORITIES

The trial court erred in denying Appellant's request for the lesser included offense of Manslaughter. Appellant specifically requested the lesser included instruction and the trial court denied the request. Manslaughter is a lesser included offense and the evidence supported the instruction.

Regarding jury charge issues, the first determination is to find whether or not error exits. *Ngo v. State, 175 S.W.3d 738, 743-44 (Tex. Crim. App. 2005)*. If error is found, then the type of harm that must be shown must be determined. The degree of harm necessary for reversal depends on whether the appellant preserved the error by objection. Under *Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)*, jury charge error requires reversal when the defendant has properly objected to the charge and we find "some harm" to his rights. Appellant objected to the absence of the lesser included offense of manslaughter and preserved this error.

To determine if an instruction on a lesser included offense is warranted, the courts apply the two step test

under *Aguilar/Rousseau*. The first step is to determine whether the required proof of the alleged offense includes the lesser offense. If the question is answered in the affirmative, then there is a factual inquiry to determine if any evidence would support a finding that if a defendant is guilty, he/she would only be guilty of the lesser offense.

"Courts apply the *Aguilar/Rousseau* test to determine whether an instruction on a lesser-included offense should be given to the jury. *Hall v. State, 225 S.W.3d 524, 535–36 (Tex. Crim. App. 2007); McKinney v. State, 207 S.W.3d 366, 370 (Tex. Crim. App. 2006); Rousseau v. State, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993)*. First, the court determines if the proof necessary to establish the charged offense also includes the lesser offense. *Hall, 225 S.W.3d at 535–36." Cavazos v. State, 382 S.W.3d 377, 382-383 (Tex. Crim. App 2012)*.

The first step is a question of law. Under *Tex. Code Crim. Proc. 37.09* defines when an offense is a lesser-included offense. Under this section, an offense is a lesser included offense if "(1) it is established

by proof of the same or less than all the facts required to establish the commission of the offense charged;" or "(3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission." *Tex. Code Crim. Proc. 37.09*.

The Court of Criminal Appeals has long held that Manslaughter can be a lesser included offense of Murder. "We hold that voluntary manslaughter is a lesser included offense of murder under Code of Criminal Procedure Article 37.09(3), for the reasons stated in *Johnson v. State, 815 S.W.2d 707 (Tex. Crim. App. 1991)*." *Moore v. State, 969 S.W.2d 4, 9-10 (Tex. Crim. App. 1998)*. Additionally, the only difference between murder and manslaughter is the mental state required. *Ross v. State, 861 S.W.2d 870, 875 (Tex. Crim. App. 1992) (en banc)*.

The elements in the indictment are as follows:

- Appellant
- Intentionally or knowingly
- Caused the death of the deceased.

The elements of manslaughter are:

- Appellant
- recklessly
- Caused the death of the deceased.

The only difference in Appellant's indictment for murder and the offense of Manslaughter is the mens rea element. This clearly falls within the provision of *Tex. Code Crim. Proc. 37.09(3)*. It cannot be disputed that step one of the *Aguilar/Rousseau* is met.

The second step of the *Aguilar/Rousseau* test is to consider whether there is some evidence that would permit a rational jury to find that, if the appellant is guilty, he is guilty only of the lesser offense. *Hall*, *225 S.W.3d at 536*; *Mathis v. State*, *67 S.W.3d 918, 925 (Tex. Crim. App. 2002)*. This second step is a question of fact and is based on the evidence presented at trial. A defendant is entitled to an instruction on a lesser-included offense if some evidence from any source raises a fact issue on whether he is guilty of only the lesser, regardless of whether the evidence is weak, impeached,

or contradicted. *Bell v. State, 693 S.W.2d 434, 442 (Tex. Crim. App. 1985)"*. *Cavazos v. State, 382 S.W.3d 377, 383 (Tex. Crim. App 2012)*.

Step two requires a factual inquiry into the evidence presented at trial. In Appellant's case, the relevant evidence was presented by the persons who were present, namely, Priscilla Bahena, Mckenize McBrayer, and Appellant. Appellant did not testify but the State introduced his video statement made to the police after he was arrested. If any amount of evidence more than a scintilla would support the lesser included offense, the trial court is required to instruction the jury on that alternative.

The evidence before the jury clearly contains evidence that Appellant did not intentionally or knowingly shoot Dvonte. The evidence is undisputed that Appellant and Dvonte were in a fight. Ms. McBrayer testified that Appellant was wearing a black hoodie and he had a gun inside the hoodie when he got out. After Appellant got out of the car, they started fighting. At the beginning of the fight, both Appellant and Dvonte were standing up. Then Appellant and Dvonte fall to the

ground and are laying on the ground. At some point in the fight, a gun is seen.

This is where the stories diverge. According to Priscilla, she either saw Appellant pull out the gun, or as she admitted telling the police, she first saw the gun in the air. If she first saw the gun in the air, she could not have seen anyone pull it out or determine if the gun fell out during the struggle. Appellant's statement was that Dvonte hit him several times and then Appellant is on the ground. Dvonte is on top of him and steady hitting Appellant. Appellant tried to roll over onto his stomach. At that point, they both saw the pistol and grabbed for it. They both had hold of the pistol and it just went off.

These statements alone are sufficient evidence that contradict the indictment that Appellant intentionally or knowingly shot Dvonte.

During Priscilla's testimony she said, "They—all I know is Jaron [Appellant] and Dvonte both had it when--...". Priscilla then catches herself and does not finish her statement. It appears that she was about to say all I know is Jaron and Dvonte both had it when 'it

went off'. At a minimum, this is a reasonable inference from the evidence. This would be completely consistent with Appellant's description of the event. Priscilla clearly stumbles and stutters trying to finish her statement. Priscilla then says they were both on the ground on their sides. This is also consistent with what Appellant said happened.

Appellant made a number of statements which contradict the intentional and knowing element of the indictment and would support a finding of recklessness. Those statements include: I didn't want any of this to get out of hand like it did; I love that dude; The pistol was there and we both grabbed for it at the same time; it was in our hands at the same time, it just went off, and they tussled over the gun.

Appellant said that the shooting was not on purpose. This directly contradicts the mens rea of the indictment of an intentional or knowing shooting. Could the jury have found that carrying a gun, being involved in a fight, and wrestling over the gun to be reckless? Certainly, but they were never given that option. The trial court erred in forcing the jury to choose between

an all or nothing verdict.

"In *Saunders v. State*, *840 S.W.2d 390 (Tex. Crim. App. 1992)*, this Court held that a lesser included offense may be raised if evidence either affirmatively refutes or negates an element establishing the greater offense, or the evidence on the issue is subject to two different interpretations, and one of the interpretations negates or rebuts an element of the greater." *Schweinle v. State*, *915 S.W.2d 17, 19 (Tex. Crim. App. 1996)*.

That is exactly the scenario that is presented in Appellant's case. The evidence—however weak or contradicted-raised the issue that the shooting was reckless instead of intentional or knowing. Appellant was entitled to the lesser included instruction of manslaughter. The facts of this case clearly meet both steps of the *Aguilar/Rousseau* test.

At trial the State relied heavily on *Cavazos v. State*, *382 S.W.3d 377, 383 (Tex. Crim. App 2012)*. The problem with that is the facts of *Cavazos* are vastly different than Appellant's case. In *Cavazos*, the defendant was in a verbal altercation with the deceased,

which also included indecent exposure and throwing a cup at a person. The defendant in that case then pulled out a gun and shot the person twice. Several days later, that defendant made a statement that he did not mean to shoot anyone.

The *Cavazos* case is materially distinguishable from Appellant's case. First, there is no dispute in *Cavazos* that the defendant pulled out the gun. Secondly, there is no dispute that the defendant—by his own volition-fired the gun twice at the victim and killed him. Third, there was no struggle over the gun in *Cavazos*.

In this case, there was clearly a struggle involving the gun and both Appellant and Dvonte had their hands on the gun. Both Appellant and Dvonte were in a fight and they both fell to the ground. Priscilla and Appellant both stated that Appellant and Dvonte were laying on the ground when the gun went off. The stippling on a portion Dvonte's neck is consistent with this description as the minimum distance the firearm could have been was 12 inches from Dvonte. This is well within the description given by Appellant that they were both wrestling over the gun when it went off.

Interestingly, the State argued during the charge conference that Appellant was not entitled to the lesser offense of Criminally Negligent Homicide, citing *Jackson v. State, 248 S.W.3d 369 (Tex. App-Houston [1ST Dist.] 2007, pet. ref'd)*. The State argued, "Specifically, this case has a similar fact pattern to the case that we have here." RR5-123-124. Appellant agrees that there are a number of similarities to that case and Appellant's case, with the main distinguishing fact being that in *Jackson*, the defendant admitted he pulled out the gun. Appellant's position is that the gun ended up on the ground during the fight as opposed to being intentionally drawn.

The *Jackson* case actually shows that Appellant was entitled to the manslaughter charge. In *Jackson*, the defendant was charged with murder. He *requested and received the lesser included offense of manslaughter* and *was convicted of the lesser included offense of manslaughter instead of murder*. The State unknowingly admitted that Appellant was entitled to the lesser included offense of manslaughter by admitting that the fact pattern of *Jackson* was similar to Appellant's.

The facts of *Jackson* are that the defendant and the deceased were in an argument over money. The defendant approached the deceased and pulled out a gun prior to being hit by the deceased. According to the defendant in that case, the deceased grabbed at the gun, the two men struggled, and the gun fired. None of the other witnesses saw the deceased and the defendant struggling over the gun.

The facts of Appellant's case are even stronger in support of the manslaughter charge. In Appellant's case, there is evidence that the gun was not pulled and pointed at the deceased prior to any fight. The evidence included that the gun was on the ground after Appellant was knocked to the ground by Dvonte. After being knocked to the ground by Dvonte, the two struggled over the gun and the gun discharged. In *Jackson*, only the defendant claimed there was a struggle for the gun. In Appellant's case, there is no dispute that there was a struggle for the gun.

Appellant was entitled to the charge of manslaughter. If pulling a gun and pointing it at a person and then struggling over the gun can be reckless,

then possession a gun, having it end up on the ground and struggling over the gun when it discharges certainly, and more persuasively, shows such acts could be recklessness.

Since the trial court erred in failing to properly instruct the jury on the lesser included offense of manslaughter, and Appellant timely objected to this omission, the case must be reversed on a showing of "some harm".

"[T]he harm from denying a lesser offense instruction stems from the potential to place the jury in the dilemma of convicting for a greater offense in which the jury has reasonable doubt or releasing entirely from criminal liability a person the jury is convinced is a wrongdoer." *Masterson v. State, 155 S.W.3d 167, 171 (Tex. Crim. App. 2005)*. Ordinarily, if the absence of a charge on the lesser-included offense left the jury with the sole option either to convict the defendant of the charged offense or to acquit him, some harm exists. *Saunders v. State, 913 S.W.2d 564, 571 (Tex. Crim. App. 1995)." Ransier v. State, 594 S.W.3d 1, 13 (Tex. App. 2019), rev'd and remanded, 670*

S.W.3d 646 (Tex. Crim. App. 2023)(on other grounds).

Appellant's case squarely fits within the reasoning expressed by the Courts of this State. The trial court's refusal to instruct the jury on the offense of manslaughter gave the jury the only options of complete exoneration or guilty of murder. The jury should have been given the option of deciding whether or not Appellant was guilty of a reckless killing versus and intentional or knowing killing.

The Court of Criminal Appeals held in *Saunders v. State*, *913 S.W.2d 564, 571 (Tex. Crim. App. 1995)*:

> "Like the court of appeals in *Gonzalez*, appellant relies upon cases from this Court in which we have consistently found "some" harm in the failure of the trial court to charge on a lesser included offense simply by virtue of the fact that this error kept the jury from considering whether the defendant may have been guilty of that lesser offense. Appellant argues that this view of harm is consistent with the position taken by the United States Supreme Court in *Beck v. Alabama*, *447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)*.

In *Beck* the Supreme Court acknowledged the possibility that a jury, believing the defendant to have committed some crime, but given only the option to convict him of a greater offense, may have chosen to find him guilty of that greater offense, rather than to acquit him altogether, even though it had a reasonable doubt he really committed the greater offense. *Id., 447 U.S. at 634, 100 S.Ct. at 2388, 65 L.Ed.2d at 401*.

"It is true that, without specifically articulating this as the rationale, we have routinely found "some" harm, and therefore reversed, whenever the trial court has failed to submit a lesser included offense that was requested and raised by the evidence—at least where that failure left the jury with the sole option either to convict the defendant of the greater offense or to acquit him. E.g., *Moreno v. State*, supra at 641; *Gibson v. State, 726 S.W.2d 129, 133 (Tex. Crim. App. 1987); Hayes v. State, 728 S.W.2d 804, 810 (Tex. Crim. App. 1987); Mitchell v. State, 807 S.W.2d 740, 742 (Tex. Crim. App. 1991)*. In each of

> these cases we essentially recognized that "some" harm occurs because the jury was not permitted to fulfill its role as factfinder to resolve the factual dispute whether the defendant committed the greater or lesser offense. That the evidence the defendant was "guilty only" of the lesser included offense may not have been compelling was no more a consideration in our analysis of harm than it was in deciding that the trial court erred in failing to give the instruction in the first place. Given the rationale of *Beck*, this is hardly an inappropriate criterion for assessing harm."

Appellant was denied a fair trial by the trial court's error. Appellant was denied the right to apply the facts to all of the applicable law for a fair determination of the events.

For all the foregoing reasons, Appellant's First Issue should be sustained, the case be reversed, and the case remanded for further proceedings consistent with this Court's opinion.

APPELLANT'S SECOND ISSUE

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING APPELLANT'S REQUEST FOR THE

LESSER INCLUDED OFFENSE OF CRIMINALLY NEGLIGENT HOMICIDE.

STATEMENT OF FACTS

No additional statement of facts is necessary. The factual recitation for the First Issue is incorporated for this issue for all purposes.

SUMMARY OF ARGUMENT

The trial court erred in overruling Appellant's requested instruction for the lesser-included offense of Criminally Negligent Homicide. The instruction was proper as both the law and facts support the instruction under the *Aguilar/Rousseau* test.

ARGUMENT AND AUTHORITIES

Much of the applicable law and facts are articulated in Appellant's First Issue. Criminally Negligent Homicide differs from the murder indictment only by the mens rea of the offense.

The elements in the indictment are as follows:

- Appellant
- Intentionally or knowingly
- Caused the death of the deceased.

The elements of criminally negligent homicide are:

- Appellant
- By criminal negligence
- Caused the death of the deceased.

The only difference in Appellant's indictment for murder and the offense of Criminally Negligent Homicide is the mens rea element. This clearly falls within the provision of *Tex. Code Crim. Proc. 37.09(3)*. It cannot reasonably be disputed that step one of the *Aguilar/Rousseau* is met.

As noted in Appellant's First Issue, the second step is a factual inquiry. The facts are articulated in detail above. The sole distinction between recklessness and criminal negligence is the perception or failure to perceive the substantial and unjustified risk. "Involuntary manslaughter requires a finding that defendant was aware of the risk but consciously disregarded it; criminally negligent homicide requires a finding that defendant ought to have been aware of the risk but failed to perceive it." *Venhaus v. State*, *950 S.W.2d 158, 162 (Tex. App. 1997)(citations omitted)*.

"Involuntary manslaughter and criminally negligent homicide are mutually exclusive lesser-included offenses of murder. *Saunders v. State*, *913 S.W.2d 564, 572 (Tex. Crim. App. 1995)(en banc)*." *Venhaus v. State*, *950 S.W.2d 158, 162 (Tex. App. 1997)*.

The Austin Court of Appeals discussed the appropriateness of the lesser offense of criminally negligent homicide in *Navarro v. State*, *863 S.W.2d 191, 204 (Tex. App. 1993)*. The court held:

> "Thus, criminal negligence means the actor should have been aware of the risk surrounding his conduct but failed to perceive it. *Dowden*, *758 S.W.2d at 270*.
>
> ...
>
> "Certainly before a charge on this lesser included offense is required, the record must contain evidence showing an unawareness of the risk. *Mendieta v. State*, *706 S.W.2d 651, 653 (Tex. Crim. App. 1986)*."

Navarro v. State, *863 S.W.2d 191, 204 (Tex. App. 1993)*.

The evidence in Appellant's case included his

statement to the police. The evidence before the jury was that Appellant and Dvonte saw the gun on the ground, both reached for it, and it discharged. McKenize McBrayer testified that Appellant had the gun with him when he got out the car. Appellant and Dvonte were in an argument on the phone while Appellant was traveling to Dvonte's house. The evidence supports a finding that Appellant failed to perceive the risk of bringing a gun with him while he was in a verbal altercation with Dvonte. The risk that the verbal altercation could turn physical, which did occur, then lead to Appellant and Dvonte falling to the ground. It is undisputed that both of them fell to the ground and were laying on the ground prior to the gun being seen. The struggle over the gun started after they fell to the ground and the gun was dislodged from where it was located.

This is the key fact that distinguishes Appellant's case from *Jackson*, supra, and *Navarro*, and other similar cases. In both of those cases, the defendant pulled the firearm and pointed it at the deceased. Appellant's case is factually and functionally different. The facts before the jury included evidence that the gun was not

voluntarily produced but rather fell out during the fight between Appellant and Dvonte which caused the gun to be found by both to be laying on the ground. At which time, both parties reached for and then struggled over the gun.

The evidence at trial clearly supported the charge of criminally negligent homicide. There was more than a scintilla of evidence that Appellant's actions and mental state failed to perceive the risk of possessing a firearm when he got out of the vehicle.

The harm standard of review and the analysis of the harm is the same as in Appellant's First Issue. Appellant objected to the absence of the lesser included instruction of criminally negligent homicide. Therefore, he must only show "some harm". The jury was presented with an all or nothing dilemma. Under this scenario, the Courts of Texas have found harm as articulated above.

For all the foregoing reasons, Appellant's Second Issue should be sustained, the case be reversed, and the case remanded for further proceedings consistent with this Court's opinion.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, the Appellant, Jaron Bryce Morgan, prays that the Judgment of the Trial Court be reversed and remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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__/s/ Joel H. Bennett_____

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CERTIFICATE OF SERVICE

I hereby certify that Appellant's Brief has been served upon the Galveston County Criminal District Attorney's Office on this the 30th day of June, 2025 by email to rebecca.klaren@co.galveston.tx.us.

__/s/ Joel H. Bennett_____
Joel H. Bennett

Certificate of Compliance

In compliance with TRAP 9.4(i), I certify that the word count in this reply brief is approximately 6420 words.

__/s/ Joel H. Bennett_____
Joel H. Bennett