Chapter 19 Criminal Homicide

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CPJC 19.1 Instructions where Victim Is Unborn Child

The homicide offenses require proof that the accused caused the death of “an individual.” “Individual” is defined by Tex. Penal Code § 1.07(a)(26) as including “an unborn child at every state of gestation from fertilization until birth.” If the indictment alleges the victim of the charged offense was an unborn child, the instructions must incorporate that specification of the charging instrument. Often this will require that the application portion of the instruction specify that the defendant must be proved to have caused the death of “an unborn child of [*name of mother*] while that unborn child was in gestation of [*name of mother*].” This sort of description of this kind of victim in the charging instrument is apparently adequate to provide the accused with the required notice. Lawrence v. State, 240 S.W.3d 912, 916–17 (Tex. Crim. App. 2007), cert. denied, 553 U.S. 1007 (2008).

Section 1.07(a)(49) further defines “death,” as applied to an unborn child, as “the failure to be born alive.” This definition would be properly included in a homicide case in which the victim is an unborn child.

CPJC 19.2 Instruction—Murder—Knowingly or Intentionally

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of murder.

Relevant Statutes

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

[Include the following if an instruction on causation is appropriate
but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person’s conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue
concerning concurrent causation.]

A person causes the death of another if, but for the person’s conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Definitions

Intentionally Causing the Death of an Individual

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

Knowingly Causing the Death of an Individual

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

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

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

2. the defendant did this either intentionally or knowingly.

[Include the following if the jury was instructed in the
relevant statutes unit on concurrent causation.]

3 a. [*concurrent cause*] did not contribute to causing the death of [*name*]; or

 b. [*concurrent cause*] was clearly insufficient, by itself, to cause the death of [*name*]; or

 c. the conduct of the defendant was clearly sufficient to cause the death of [*name*] regardless of [*concurrent cause*].

[Continue with the following.]

You must all agree on elements [1 and 2 / 1, 2, and 3] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or [both/more] of elements [1 and 2 / 1, 2, and 3] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, [both of the two / all three] elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

Murder is prohibited by and defined in Tex. Penal Code § 19.02. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

Several court of criminal appeals decisions suggest that a defendant acts with the culpable mental state required for this kind of murder if, with “a conscious disregard for life,” the defendant intentionally engages in high-risk activity such as initiating a gunfight with police officers. Blansett v. State, 556 S.W.2d 322, 325–26 (Tex. Crim. App. 1977) (relying on People v. Gilbert, 408 P.2d 365, 373 (Cal. 1965), rev’d on other grounds, 388 U.S. 263 (1967)); Dowden v. State, 758 S.W.2d 264 (Tex. Crim. App. 1988) (reaffirming Blansett and holding that the defendant caused the officer’s death, even though the officer was shot by a fellow officer during gun battle occurring when defendants raided a jail facility to free a prisoner).

Blansett and Dowden were sufficiency-of-the-evidence cases. Apparently no effort has been made to incorporate what might be their “holding” into jury instructions permitting conviction for intentional murder on a theory of intentionally engaging in activity involving a high risk to human life. The Committee was not certain about the current significance of these decisions but concluded that they should not be incorporated into jury instructions on intentional murder.

CPJC 19.3A Instruction—Murder—Intent to Cause Serious Bodily Injury

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of murder.

Relevant Statutes

A person commits the offense of murder if the person intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual.

[Include the following if an instruction on causation is appropriate
but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person’s conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue
concerning concurrent causation.]

A person causes the death of another if, but for the person’s conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Definitions

Intent to Cause Serious Bodily Injury

A person intends to cause serious bodily injury to another if it is the person’s conscious objective or desire to cause the serious bodily injury to another.

Bodily Injury

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

Serious Bodily Injury

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

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], committed an act clearly dangerous to human life [*insert specific allegations, e.g.*, by stabbing [*name*] in the neck with a knife]; and

2. the defendant’s act caused the death of [*name*]; and

3. the defendant intended to cause serious bodily injury.

[Include the following if the jury was instructed in the
relevant statutes unit on concurrent causation.]

4. a. [*concurrent cause*] did not contribute to causing the death of [*name*]; or

 b. [*concurrent cause*] was clearly insufficient, by itself, to cause the death of [*name*]; or

 c. the conduct of the defendant was clearly sufficient to cause the death of [*name*] regardless of [*concurrent cause*].

[Continue with the following.]

You must all agree on elements [1, 2, and 3 / 1, 2, 3, and 4] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements [1, 2, and 3 / 1, 2, 3, and 4] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the [three/four] elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

Murder is prohibited by and defined in Tex. Penal Code § 19.02. The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “serious bodily injury” is from Tex. Penal Code § 1.07(a)(46).

New CPJC 19.3B Instruction—Murder—Intentional/Knowing or Intent to Cause Serious Bodily Injury

LAW SPECIFIC TO THIS CASE

Accusation

The state accuses the defendant of having committed the offense of murder by one of two alternative manners.

Relevant Statutes

A person commits the offense of murder if the person (1) intentionally or knowingly causes the death of an individual or (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual.

[Include the following if an instruction on causation is appropriate
but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person’s conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue
concerning concurrent causation.]

A person causes the death of another if, but for the person’s conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Definitions

Intentionally Causing the Death of an Individual

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

Knowingly Causing the Death of an Individual

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

Intent to Cause Serious Bodily Injury

A person intends to cause serious bodily injury to another if it is the person’s
conscious objective or desire to cause the serious bodily injury to another.

Bodily Injury

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

Serious Bodily Injury

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

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, [two / three] elements. The elements are that—

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

2. a. the defendant did this intentionally or knowingly; or

b. the defendant intended to cause serious bodily injury and

 committed an act clearly dangerous to human life that caused the death of [*name*].

*[Include the following if the jury was instructed in the relevant statutes unit
on concurrent causation.]*

3.a. [*concurrent cause*] did not contribute to causing the death of [*name*]; or

b. [*concurrent cause*] was clearly insufficient, by itself, to cause the death of [*name*]; or

 c. the conduct of the defendant was clearly sufficient to cause the death of [*name*] regardless of [*concurrent cause*].

*[Continue with the following.]*

You must all agree on elements 1 and 2 [and 3] listed above, but you do not have to agree on which of elements 2.a or 2.b [or which of elements 3.a, 3.b, or 3.c] that the state may have proven beyond a reasonable doubt.

If you all agree the state has failed to prove beyond a reasonable doubt, one or more of elements [1 and 2 */* 1, 2, and 3], you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the [two */* three] elements listed above, you must find the defendant “guilty.”

CPJC 19.4 Instruction—Murder (Felony Murder)

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of murder.

Relevant Statutes

A person commits the offense of murder if the person commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

[*Insert statutes based on specific felony allegations, e.g.*, A person commits the offense of felony injury to a child if he intentionally, knowingly, or recklessly, by an act, causes bodily injury to a child fourteen years old or younger.]

[*Insert specific felony alleged in the indictment, e.g.*, Injury to a child] is a felony other than manslaughter.

[Include the following if an instruction on causation is appropriate
but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person’s conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue
concerning concurrent causation.]

A person causes the death of another if, but for the person’s conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Definitions

[Include definition(s) of the felony or felonies alleged in the
indictment, such as the following.]

Felony Injury to a Child

The felony of “injury to a child” has four elements. The elements are that—

1. the defendant engaged in an act;

2. the defendant by this act caused bodily injury to another person;

3. the person injured was a child fourteen years old or younger; and

4. the defendant intentionally, knowingly, or recklessly caused bodily injury to the child.

Intentionally Causing Bodily Injury

A person intentionally causes bodily injury to another if it is the person’s conscious objective or desire to cause the bodily injury to another.

Knowingly Causing Bodily Injury

A person knowingly causes bodily injury to another if the person is aware that the person’s conduct is reasonably certain to cause the bodily injury to another.

Recklessly Causing Bodily Injury

A person recklessly causes bodily injury to another if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person’s action will cause bodily injury to another. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.

Bodily Injury

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

Attempt to Commit a Felony

A person attempts to commit a felony when, with specific intent to commit the felony, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the felony intended.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], committed or attempted to commit [*insert specific felony, e.g.*, injury to a child by intentionally, knowingly, or recklessly causing bodily injury] [*insert specific allegations, e.g.*, by hitting [*name*], a child fourteen years old or younger, with a blunt object]; and

2. in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt of [*insert specific felony, e.g.*, injury to a child], the defendant committed or attempted to commit an act clearly dangerous to human life [*insert specific act, e.g.*, by hitting [*name*] with a blunt object]; and

3. the act clearly dangerous to human life caused the death of [*name*].

You are instructed that [*insert specific felony alleged in the indictment, e.g.*, injury to a child] is a felony other than manslaughter.

[Include the following if the jury was instructed in the
relevant statutes unit on concurrent causation.]

4. a. [*concurrent cause*] did not contribute to causing the death of [*name*]; or

 b. [*concurrent cause*] was clearly insufficient, by itself, to cause the death of [*name*]; or

 c. the conduct of the defendant was clearly sufficient to cause the death of [*name*] regardless of [*concurrent cause*].

[Continue with the following.]

You must all agree on elements [1, 2, and 3 / 1, 2, 3, and 4] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements [1, 2, and 3 / 1, 2, 3, and 4] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the [three/four] elements listed above, you must find the defendant “guilty.”

[Include the following if applicable.]

This case alleges that the defendant committed or attempted to commit multiple felonies. You need not be unanimous about which of the named felonies constitutes the felony referred to in elements 1 and 2 listed above, as long as every juror finds that the state has proved, beyond a reasonable doubt, that the defendant committed “a felony.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

The court of criminal appeals has determined that the underlying felony for a felony murder conviction and the act that constitutes “an act clearly dangerous to human life” under Texas Penal Code section 19.02(b)(3) can be the same act. Johnson v. State, 4 S.W.3d 254, 258 (Tex. Crim. App. 1999) (defendant’s felony murder conviction was properly predicated on offense of injury to a child, in violation of Penal Code section 22.04, even though defendant’s acts of hitting child victim with deadly weapon, which formed offense of injury to a child, were same acts relied on by state to prove defendant’s commission of “an act clearly dangerous to human life” under felony murder provision). The court in Johnson expressly disavowed “our overly broad statement in Garrett that in order to support a conviction under the felony murder provision, ‘[t]here must be a showing of felonious criminal conduct other than the assault causing the homicide.’ ” Johnson, 4 S.W.3d at 258 (quoting Garrett v. State, 573 S.W.2d 543, 546 (Tex. Crim. App. 1978)). Garrett was limited to the proposition that a conviction for felony murder will not stand when the underlying felony is manslaughter or a lesser included offense of manslaughter.

Whether a felony is a lesser included offense of manslaughter is determined by applying Texas Code of Criminal Procedure article 37.09. The court of criminal appeals has strictly construed the lesser-included analysis and found several offenses not to constitute lesser included offenses of manslaughter for purposes of the felony-murder statute. For example, an intentional and knowing aggravated assault, in violation of Penal Code sections 22.01(a)(1) and 22.02(a), is not a lesser included offense of manslaughter and therefore can serve as the predicate offense for a felony murder. Lawson v. State, 64 S.W.3d 396 (Tex. Crim. App. 2001). “Because the victim’s status as a child is necessarily an element of the offenses of injury to a child and child endangerment, and that element is not within (or deducible from) the statutory elements of manslaughter, the offenses of injury to a child and child endangerment are never lesser-included offenses of manslaughter for the purpose of the felony-murder statute’s manslaughter exclusion.” Fraser v. State, 583 S.W.3d 564, 565 (Tex. Crim. App. 2019). Felony DWI, in violation of Penal Code section 49.02, is not a lesser included offense of manslaughter and therefore can be the underlying felony in a felony-murder prosecution. Lomax v. State, 233 S.W.3d 302 (Tex. Crim. App. 2007).

The court has also held that the felony-murder statute itself plainly dispenses with a culpable mental state. Lomax, 233 S.W.3d at 304–07 (reversing in part Rodriquez v. State, 548 S.W.2d 26 (Tex. Crim. App. 1977)). Whether the underlying felony requires a culpable mental state depends on that felony itself; felony DWI plainly dispenses with proof of a culpable mental state. Lomax, 233 S.W.3d at 304 n.6, 307.

The court of criminal appeals held that when an indictment for felony murder alleges multiple predicate felonies, the specifically named felonies are not elements about which a jury must be unanimous, but rather the named felonies constitute the manner or means that make up the “felony” element of felony murder. White v. State, 208 S.W.3d 467 (Tex. Crim. App. 2006) (where evidence showed that appellant caused victim’s death during high-speed chase with police, jury need not be unanimous about whether defendant committed state-jail felony of unauthorized use of a vehicle or state-jail felony of evading arrest or detention in vehicle). The White court further held that due process was not violated by dispensing with unanimity because the two underlying felonies in that case were “basically morally and conceptually equivalent.” White, 208 S.W.3d at 469 (citing Jefferson v. State, 189 S.W.3d 305, 313–14 (Tex. Crim. App. 2006) (Cochran, J., concurring)).

Venue is appropriate either in the county in which the act occurred or the county in which the victim died. See Tex. Code Crim. Proc. art. 13.07. The above charge assumes that the case is being charged where the felony occurred. If the case is brought where the victim died, and this is a different county than that in which the act occurred, the first and third paragraphs of the application of law to facts unit should be modified.

The definition of “bodily injury” is provided in Penal Code section 1.07(a)(8). The culpable mental states are detailed in Penal Code section 6.03.

The Committee has not provided a definition of “act clearly dangerous to human life” because it could find no definitive decision approving one. A court does not err in refusing to instruct the jury on a term left undefined by the legislature if the terms have a common and ordinary meaning. See Depauw v. State, 658 S.W.2d 628, 634–35 (Tex. App.—Amarillo 1983, pet. ref’d) (holding that the term “act clearly dangerous to human life” is not a special or technical term which a jury is incapable of understanding absent court instruction, so the court did not err in refusing to instruct the jury on that term). In addition, the court of criminal appeals has distinguished *acts*, for which a person can be liable for felony murder, from *omissions*,for which one cannot,and practitioners are cautioned to be mindful of the distinction. *See* Rodriguez v. State, 454 S.W.3d 503 (Tex. Crim. App. 2014, on reh’g, Feb. 25, 2015).

CPJC 19.5 Murder—Sudden Passion—Comment on Punishment Stage Instruction

Legislative Background. Before 1993, a killing that would otherwise be murder was reduced to voluntary manslaughter if the facts showed what was often called “sudden passion.” Legislation enacted that year retained former sudden-passion law but made it a potential issue for the sentencing stage of a murder trial. Acts 1993, 73d Leg., R.S., ch. 900, § 1.01 (S.B. 1067), eff. Sept. 1, 1994. A defendant convicted of murder now may raise and prove, at the punishment phase of the trial, that he acted in sudden passion. If the defendant is successful, the murder—otherwise a first-degree felony—becomes a second-degree felony and the punishment is assessed on that basis. Tex. Penal Code § 19.02(d).

The instruction at CPJC 19.6, then, is to be used at the punishment stage of a murder prosecution if submission of the defendant’s contention of sudden passion is appropriate.

Need to Submit. Clearly the punishment stage instructions should address sudden passion only if it is raised by the evidence. The court of criminal appeals explained:

[B]efore a defendant is allowed a jury instruction on sudden passion, he must prove that there was an adequate provocation, that a passion or an emotion such as fear, terror, anger, rage, or resentment existed, that the homicide occurred while the passion still existed and before there was reasonable opportunity for the passion to cool; and that there was a causal connection between the provocation, the passion, and the homicide.

A jury should receive a sudden passion charge if it is raised by the evidence, even if that evidence is weak, impeached, contradicted, or unbelievable. However, the evidence cannot be so weak, contested, or incredible that it could not support such a finding by a rational jury.

McKinney v. State, 179 S.W.3d 565, 569 (Tex. Crim. App. 2005) (citation omitted) (applying Trevino v. State, 100 S.W.3d 232 (Tex. Crim. App. 2003)).

This appears to mean that a sudden-passion instruction should be given if the evidence is such that a reasonable jury could find all elements of sudden passion proved by a preponderance of the evidence.

Unanimity. The jury must be unanimous on sudden passion. Sanchez v. State, 23 S.W.3d 30, 34 (Tex. Crim. App. 2000) (“Article 37.07, § 3(c), requires unanimity with respect to the jury’s preliminary vote on sudden passion.”). This means the instruction cannot simply permit assessment of punishment for a first-degree felony on the lack of a finding of sudden passion. The instruction must require a unanimous determination that the defendant failed to prove sudden passion. E.g., Swearingen v. State, 270 S.W.3d 804, 812 (Tex. App.—Austin 2008, pet. ref’d) (“Because the charge conditioned the first-degree felony punishment range on only a failure to find sudden passion unanimously rather than a unanimous negative finding on the issue, the charge was erroneous.”).

Submission by Special Issue. One court of appeals held that a trial judge errs in refusing to submit a special issue on sudden passion. Curry v. State, 222 S.W.3d 745, 752–53 (Tex. App.—Waco 2007, pet. ref’d). The Austin court of appeals held that refusal to submit the matter as a special issue is not, itself, error. It acknowledged, however, that “there may be good reasons for trial courts to submit sudden passion by a special issue.” See Swearingen, 270 S.W.3d at 811. The Committee concluded that, whether required or not, submission of the matter by a special issue is best practice.

Adherence to Statutory Framework. Some members of the Committee believed that the statutory framework was sufficiently awkward that jury instructions can and should take considerable liberty with that framework. Under the explicit terms of the statute, a defendant has the opportunity to prove “he caused the death [of the victim] under the immediate influence of sudden passion arising from an adequate cause.” Tex. Penal Code § 19.02(d). Section 19.02 provides definitions of the terms adequate cause (section 19.02(a)(1)) and sudden passion (section 19.02(a)(2)). These definitions arguably, however, do not carefully distinguish the concepts being defined. The requirements that the “cause” be “provocation” and that it be “by the person killed or another acting with the person killed,” for example, appear in the definition of sudden passion rather than that of adequate cause. Perhaps most importantly, section 19.02(a)(2)’s definition of sudden passion simply uses, without definition, the term passion.

The case law makes clear that a defendant’s case for reduction of a murder to a se-cond-degree felony requires proof of a certain impact on the defendant’s mind, i.e., actual “passion.” Further, it suggests that the appellate courts have derived a definition of the term actual passion from the definition of adequate cause in section 19.02(a)(1). E.g., McKinney, 179 S.W.3d at 570 (“There is no evidence that the verbal taunting and physical pushing by [the victim] produced a degree of anger, rage, resentment, or terror in Appellant, sufficient to render his mind incapable of cool reflection.”); Trevino, 100 S.W.3d at 241 (“The mere fact that a defendant acts in response to the provocation of another is not sufficient to warrant a charge on sudden passion. Instead, there must be some evidence that the defendant was under the immediate influence of sudden passion.”); Havard v. State, 800 S.W.2d 195, 217 (Tex. Crim. App. 1989) (“For a claim of fear to rise to the level of sudden passion, there must be evidence that the defendant’s state of mind rendered him incapable of cool reflection.”). Actual passion appears to be defined in the case law as a condition rendering the mind incapable of cool reflection.

This definition is implicit in the statutory language. The term adequate cause means a cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. It seems to follow that actual passion must mean “a degree of anger, rage, resentment, or terror rendering the mind incapable of cool reflection.” This definition is, however, nowhere explicitly set out in the statutes.

The appellate case law also demands proof that the defendant acted on the adequate provocation before the passage of sufficient time for the passions of a reasonable person to “cool.” Johnson v. State, 815 S.W.2d 707, 712 (Tex. Crim. App. 1991) (“[E]ven if the jury did believe the taunts were sufficient to provoke appellant initially, a rational factfinder could still determine that appellant continued to inflict the injuries leading to his wife’s death long after ‘sudden passion’ would have subsided in a person of ordinary temper.”). See also Bufkin v. State, 207 S.W.3d 779, 783 (Tex. Crim. App. 2006) (in sudden passion situation, “the State might claim that the killing occurred a day later, after the passion should have cooled”). This requirement that the defendant act on the provocation before such a cooling period passes, like the definition of actual passion, is not explicitly stated as a requirement in section 19.02.

The Committee considered an approach that some members favored as, in their view, more carefully distinguishing the questions put to juries and providing definitions more effectively focusing on those questions. Under this approach, the basic issue would be put as follows:

To establish sudden passion, the defendant must prove, by a preponderance of the evidence, three elements. The elements are that—

1. the defendant killed the victim in a state of passion; and

2. this state of passion was the direct result of adequate cause and provocation; and

3. the defendant acted under the immediate influence of that adequate cause and provocation.

The jury would then be given several definitions:

Passion

“Passion” means a degree of anger, rage, resentment, or terror rendering the mind incapable of cool reflection.

Adequate Cause and Provocation

“Adequate cause and provocation” means provocation by the individual killed or another acting with the person killed that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

CPJC 19.6 Instruction—Murder—Sudden Passion

You have found the defendant, [*name*], guilty of murder. It is now your duty to assess punishment. The defendant contends he committed the murder under the immediate influence of sudden passion arising from an adequate cause. Before you assess punishment, you must determine whether the defendant has proved this contention by a preponderance of the evidence.

Relevant Statutes

A defendant convicted of murder may raise the issue of whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. This is called the doctrine of “sudden passion.”

If the defendant proves that he acted under the influence of sudden passion, this offense is punishable by—

1. any term of imprisonment for no less than two years and no more than twenty years, or

2. any term of imprisonment for no less than two years and no more than twenty years and a fine of no more than $10,000.

If the defendant does not prove that he acted under the influence of sudden passion, this offense is punishable by—

1. any term of imprisonment for no less than five years and no more than ninety-nine years or for life, or

2. any term of imprisonment for no less than five years and no more than ninety-nine years or for life and a fine of no more than $10,000.

You must all agree on whether the defendant has proved that he acted under the influence of sudden passion.

Burden of Proof

The burden is on the defendant to prove, by a preponderance of the evidence, that he acted under the influence of sudden passion.

Definitions

Sudden Passion

“Sudden passion” means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed, which passion arises at the time of the offense and is not solely the result of former provocation.

Adequate Cause

“Adequate cause” means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

Preponderance of the Evidence

The term “preponderance of the evidence” means the greater weight of credible evidence presented in this case. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

Application of Law to Facts

You must determine whether the defendant has proved, by a preponderance of the evidence, that he acted under the immediate influence of sudden passion arising from an adequate cause.

You must all agree on whether the defendant has proved sudden passion before you may assess punishment.

Your resolution of this issue will determine which of the two verdict forms you will use. If you all agree the defendant has proved sudden passion, use the first verdict form, titled “Verdict—Defendant Has Proved Sudden Passion.” If you all agree the defendant has not proved sudden passion, use the second verdict form, titled “Verdict—Defendant Has Not Proved Sudden Passion.”

If you all agree the defendant has proved, by a preponderance of the evidence, that he acted under the influence of sudden passion, you are to determine and state in your verdict—

1. any term of imprisonment for no less than two years and no more than twenty years, or

2. any term of imprisonment for no less than two years and no more than twenty years and a fine of no more than $10,000.

If you all agree the defendant has not proved, by a preponderance of the evidence, that he acted under the influence of sudden passion, you are to determine and state in your verdict—

1. any term of imprisonment for no less than five years and no more than ninety-nine years or for life, or

2. any term of imprisonment for no less than five years and no more than ninety-nine years or for life and a fine of no more than $10,000.

VERDICT—DEFENDANT HAS PROVED
SUDDEN PASSION

We, the jury, having found the defendant, [*name*], guilty of the offense of murder, all agree that the defendant has proved that he acted under the influence of sudden passion. We assess the defendant’s punishment at: (select one)

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_\_\_\_ (2–20) years and no fine.

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_\_\_\_ (2–20) years and a fine of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_ ($10,000 or less).

Foreperson of the Jury

Printed Name of Foreperson

VERDICT—DEFENDANT HAS NOT
PROVED SUDDEN PASSION

We, the jury, having found the defendant, [*name*], guilty of the offense of murder, all agree the defendant has not proved that he acted under the influence of sudden passion. We assess the defendant’s punishment at: (select one)

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_\_\_\_ (5–99) years and no fine.

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_\_\_\_ (5–99) years and a fine of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_ ($10,000 or less).

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for life and no fine.

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for life and a fine of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_ ($10,000 or less).

Foreperson of the Jury

Printed Name of Foreperson

COMMENT

The definition of “sudden passion” is based on Tex. Penal Code § 19.02(a)(2). The definition of “adequate cause” is based on Tex. Penal Code § 19.02(a)(1). The role of sudden passion in criminal liability for murder is addressed in Tex. Penal Code § 19.02(d).

Legally Justified Conduct as Adequate Cause. The court of criminal appeals has held that conduct constituting a legally permissible response to the defendant’s illegal behavior cannot constitute adequate cause:

The evidence clearly indicates that appellant initiated the entire criminal episode which led to the deceased’s death and that the deceased shot appellant in an attempt to prevent the aggravated kidnapping of Lockard. See V.T.C.A. Penal Code § 20.04(a)(2). Under §§ 9.32 and 9.33, supra, the deceased was justified in using deadly force in defense of himself and a third person, specifically Lockard. We will not consider the deceased’s justified actions as an adequate cause for appellant’s illegal acts. To so hold would allow criminals a justifiable reason for killing their victims who rightly seek to protect themselves or others from criminal activity. Thus, we hold that the deceased’s actions in shooting appellant did not constitute adequate cause from which sudden passion may arise.

Harris v. State, 784 S.W.2d 5, 10 (Tex. Crim. App. 1989) (citations omitted).

Defining “Preponderance of the Evidence.” The Penal Code does not define “preponderance of the evidence.” While terms left undefined by the legislature should generally remain so in the charge, there is an exception for terms that have a known and established legal meaning. See Medford v. State, 13 S.W.3d 769, 772 (Tex. Crim. App. 2000) (inappropriate for jurors to apply own definitions of “arrest”). The court of criminal appeals has not determined whether “preponderance of the evidence” qualifies under this exception, but it long ago upheld an insanity instruction defining preponderance as “the greater weight of credible testimony.” McGee v. State, 238 S.W.2d 707, 716 (Tex. Crim. App. 1950) (op. on reh’g). Unlike the more common “reasonable doubt” standard—which it is better not to attempt to define, Paulson v. State, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000)—further explanation of the term “preponderance” may be of appreciable help to jurors. See Murff v. Pass, 249 S.W.3d 407, 411 (Tex. 2008) (per curiam) (finding no error in judge’s explanations to counter venire’s confusion between clear-and-convincing and preponderance standards). The “greater weight” or “greater weight and degree” definitions have long been used in both civil and criminal jury charges. See, e.g., Harrell v. State, 65 S.W.3d 768, 772 n.2 (Tex. App.—Houston [14th Dist.] 2001, pet. ref’d) (voluntary release in safe place of kidnapping victim); Watts v. State, 680 S.W.2d 667, 672 (Tex. App.—Fort Worth 1984, pet. ref’d) (defense of insanity); Benton v. State, 107 S.W. 837, 838 (Tex. Crim. App. 1908) (jury charge on former jeopardy). That definition is part of the instruction on preponderance of the evidence required in civil cases. Tex. R. Civ. P. 226a (defining preponderance as “the greater weight of credible evidence presented in this case” and explaining that a fact must be “more likely true than not true” to be proved by a preponderance). The Committee thus concluded it would not be error to define the term for jurors and may frequently be helpful.

CPJC 19.7 General Comments on Capital Murder

Capital murder as defined in Tex. Penal Code § 19.03 can be committed in multiple ways. The Committee has drafted instructions for six of the ways most commonly charged in Texas practice.

All capital murders—with the exception of murders committed in the course of committing certain specified offenses—must be based upon an intentional or knowing killing of an individual, as section 19.03(a) requires proof that the accused committed murder as defined in section 19.02(b)(1). The provision for capital murder committed in the course of committing certain offenses specified in section 19.03(a)(2) requires proof that the accused killed an individual intentionally.

Section 19.03(a)(2) is often assumed to require the causing of death in connection with the commission of, or attempt to commit, a felony. However, in some limited situations, the offense the defendant must be proved to have been committing or attempting to commit can be a misdemeanor. See Tex. Penal Code § 22.07(b), (d) (providing that certain terroristic threat offenses are misdemeanors). Therefore, capital murder under section 19.03(a)(2) is referred to in this chapter as murder in the course of committing a specified offense.

CPJC 19.8 Instruction—Capital Murder—Murder of Peace Officer or Fireman

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of capital murder.

Relevant Statutes

A person commits the offense of capital murder if the person intentionally or knowingly causes the death of an individual who is a [peace officer/fireman] acting in the lawful discharge of an official duty and who the person knows is a [peace officer/fireman].

[Include the following if an instruction on causation is appropriate

but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person’s conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue

concerning concurrent causation.]

A person causes the death of another if, but for the person’s conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Definitions

Intentionally Causing the Death of an Individual

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

Knowingly Causing the Death of an Individual

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

Peace Officer

“Peace officer” includes [*specify, e.g.*, police officers of an incorporated city, town, or village and reserve municipal police officers who hold a permanent peace officer license].

Knows an Individual is a [Peace Officer/Fireman]

A person knows an individual is a [peace officer/fireman] if the person is aware that the person is a [peace officer/fireman].

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

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

2. [*name*] was a [peace officer/fireman];

3. [*name*] was acting in the lawful discharge of an official duty; and

4. the defendant knew [*name*] was a [peace officer/fireman].

[Include the following if the jury was instructed in the

relevant statutes unit on concurrent causation.]

5. a. [*concurrent cause*] did not contribute to causing the death of [*name*];

 b. [*concurrent cause*] was clearly insufficient, by itself, to cause the death of [*name*]; or

 c. the conduct of the defendant was clearly sufficient to cause the death of [*name*] regardless of [*concurrent cause*].

[Continue with the following.]

You must all agree on elements [1, 2, 3, and 4 / 1, 2, 3, 4, and 5] of the offense of capital murder listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements [1, 2, 3, and 4 / 1, 2, 3, 4, and 5] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, all of the [four/five] elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

Murder of a peace officer or fireman is prohibited by and defined in Tex. Penal Code § 19.03(a)(1). The definition of “peace officer” is from Tex. Penal Code § 1.07(a)(36). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

Definition of “In the Lawful Discharge of an Official Duty.” The court of criminal appeals has noted that—

the case law from this Court plainly holds that, for purposes of Section 19.03(a)(1) of the Penal Code, an officer acts in the lawful discharge of his official duties so long as he is on duty and in uniform; the fact that he may be effectuating an unconstitutional arrest, or a lawful arrest in an improper or unlawful manner, does not mean he is not acting in the lawful discharge of an official duty.

Ruiz v. State, No. AP-75,968, 2011 WL 1168414, at \*2 (Tex. Crim. App. Mar. 2, 2011) (unpublished) (citing Montoya v. State, 744 S.W.2d 15, 29–30 (Tex. Crim. App. 1987); Guerra v. State, 771 S.W.2d 453, 460–61 (Tex. Crim. App. 1988); Hughes v. State, 897 S.W.2d 285, 297–98 (Tex. Crim. App. 1994)).

The court of criminal appeals has concluded that the statutory phrase is not unconstitutionally vague and appears to have held that a trial court did not err in failing to define it. Mays v. State, 318 S.W.3d 368, 389 (Tex. Crim. App. 2010) (“[T]he phrase ‘lawful discharge of an official duty’ is not statutorily defined, but it does have an ordinary meaning that jurors can apply using their own common sense.”).

The court’s definition of the phrase is perhaps counterintuitive, given that under this definition an officer can be acting “in the lawful discharge of an official duty” even if the officer is conducting an unlawful arrest or search. Some members of the Committee believed an instruction simply providing the statutory language would sometimes fail to convey to jurors the true state of the applicable law.

Nevertheless, the Committee concluded that the *Mays* discussion indicated the court’s view that an instruction attempting to embody that definition would not be appropriate. Consequently, the instruction contains no such definition.

Specification of Lawful Duty. The charging instrument probably need not specify the lawful duty the victim was discharging at the time the victim was killed. See Moreno v. State, 721 S.W.2d 295, 299 (Tex. Crim. App. 1986); Aranda v. State, 640 S.W.2d 766, 770 (Tex. App.—San Antonio 1982). Nevertheless, capital murder indictments sometimes do so. If in a specific case this is done, the application of law to facts unit of the instruction should incorporate that specification. Cf. Nethery v. State, 692 S.W.2d 686, 704 (Tex. Crim. App. 1985) (instruction required prosecution to prove deceased was “acting in the lawful discharge of an official duty, namely: investigation of a parked vehicle while the said J.T. McCarthy was on radio patrol”).

CPJC 19.9 Instruction—Capital Murder—Murder in the Course of Committing a Specified Offense

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of capital murder.

**Relevant Statutes**

A person commits the offense of capital murder if the person intentionally causes the death of an individual in the course of committing or attempting to commit [kidnapping/burglary/robbery/aggravated sexual assault/arson/obstruction or retaliation/terroristic threat].

[Include the following if an instruction on causation is appropriate

but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person’s conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue

concerning concurrent causation.]

A person causes the death of another if, but for the person’s conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Definitions

Intentionally Causing the Death of an Individual

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

[Include definition(s) related to the

 offense(s) defendant was committing or attempting to commit, such as the following.]

Robbery

A person commits of offense of robbery if, in the course of committing or attempting to commit theft and with intent to obtain or maintain control of the property, the person either—

1. intentionally, knowingly, or recklessly causes bodily injury to another; or

2. intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

In the Course of Committing or Attempting to Commit Theft

“In the course of committing or attempting to commit theft” means conduct that occurs in an attempt to commit, during the commission of, or in immediate flight after the attempt or commission of theft.

Theft

A person commits the offense of theft if—

1. the person appropriates property;

2. this appropriation was unlawful, in that it was without the property owner’s effective consent, and

3. the person did this with intent to deprive the owner of the property.

Attempt to Commit Theft

A person attempts to commit theft if the person, with the specific intent to commit theft, does an act amounting to more than mere preparation that tends but fails to effect a theft.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

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

2. this was done in the course of committing or attempting to commit [kidnapping/burglary/robbery/aggravated sexual assault/arson/obstruction or retaliation/terroristic threat].

[Include the following if the jury was instructed in the

relevant statutes unit on concurrent causation.]

3. a. [*concurrent cause*] did not contribute to causing the death of [*name*];

b. [*concurrent cause*] was clearly insufficient, by itself, to cause the death of [*name*]; or

 c. the conduct of the defendant was clearly sufficient to cause the death of [*name*] regardless of [*concurrent cause*].

[Continue with the following.]

You must all agree on elements [1 and 2/ 1, 2, and 3] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or [both/more] of elements [1 and 2 / 1, 2, and 3] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, [both of the two/all three] elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

Murder in the course of committing a specified offense is prohibited by and defined in Tex. Penal Code § 19.03(a)(2). The definition of “intentionally causing the death of an individual” is based on Tex. Penal Code § 6.03(a).

Defining “In the Course of Committing or Attempting to Commit [**Listed Offense**].” The Committee’s instruction includes no definition of “in the course of committing or attempting to commit [listed offense].” This is despite the inclusion of a definition of the term “in the course of committing theft” as that term is used in robbery. “In the course of committing theft” is statutorily defined (in Tex. Penal Code § 29.01(1)), while the Penal Code contains no definition of “in the course of committing or attempting to commit [one of the offenses listed in Texas Penal Code section 19.03(a)(2)].” The Committee does not believe the courts have authority to develop and provide juries with a definition of the term used in section 19.02(a)(2) along the lines of the somewhat similar term used and defined in the robbery statutes.

Unanimity as to Specified Offense. If the charging instrument alleges in the alternative more than one of the specified offenses, the instructions should inform the jury they do not have to be unanimous as to the specified offense. See, e.g., Gardner v. State, 306 S.W.3d 274, 302 (Tex. Crim. App. 2009) (“The jury charge properly set out the underlying felonies of burglary and retaliation in the disjunctive, and the jury did not need to be unanimous concerning which felony appellant was in the course of committing.”) (citing Kitchens v. State, 823 S.W.2d 256, 257–58 (Tex. Crim. App. 1991) (en banc)).

CPJC 19.10 Instruction—Capital Murder—Murder for Remuneration

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of capital murder.

Relevant Statutes

A person commits the offense of capital murder if the person intentionally or knowingly causes the death of an individual for [remuneration/the promise of remuneration].

[Include the following if an instruction on causation is appropriate

but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person’s conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue

concerning concurrent causation.]

A person causes the death of another if, but for the person’s conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Definitions

Intentionally Causing the Death of an Individual

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

Knowingly Causing the Death of an Individual

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

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

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

2. this was done for [remuneration/the promise of remuneration] from [*name*].

[Include the following if the jury was instructed in the

relevant statutes unit on concurrent causation.]

3. a. [*concurrent cause*] did not contribute to causing the death of [*name*];

 b. [*concurrent cause*] was clearly insufficient, by itself, to cause the death of [*name*]; or

 c. the conduct of the defendant was clearly sufficient to cause the death of [*name*] regardless of [*concurrent cause*].

[Continue with the following.]

You must all agree on elements [1 and 2 / 1, 2, and 3] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or [both/more] of elements [1 and 2 / 1, 2, and 3] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, [both of the two/all three] elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

Murder for remuneration is prohibited by and defined in Tex. Penal Code § 19.03(a)(3). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

Defining Remuneration. The court of criminal appeals addressed the meaning of remuneration for purposes of reviewing the sufficiency of the evidence in two leading cases, Beets v. State, 767 S.W.2d 711 (Tex. Crim. App. 1987) (opinion on rehearing), and Rice v. State, 805 S.W.2d 432, 434–35 (Tex. Crim. App. 1991).

Together, Beets and Rice establish that although proof of a “promise of remuneration” may be sufficient, it is not necessary. Evidence failing to show a promise may nevertheless prove that the defendant acted “for remuneration” within the meaning of the statute.

Whether a murder is committed “for remuneration” depends on the defendant’s mental state. The issue is whether the defendant acted “in the expectation of receiving some benefit or compensation.” Rice, 805 S.W.2d at 434 (quoting Beets, 767 S.W.2d at 735).

On rehearing in Beets, contrary to the majority’s position on initial submission, the court held that—

[T]he definition of “remuneration” does not mandate the narrow construction requiring salary, payment, or reward paid to an agent by his principal as in a strict murder for hire situation. Remunerate encompasses a broad range of situations, including compensation for loss or suffering and the idea of a reward given or received because of some act.

Beets, 767 S.W.2d at 734.

Rice established that the expected benefit cannot be too intangible. Thus proof that the defendant killed the victim primarily because the victim was a “snitch” but secondarily because killing the victim would assure the defendant’s continuing receipt of the benefits of membership in a prison gang was insufficient. More specifically, proof that the defendant expected an increase in status within the gang would not have been sufficient because such an increase in status “is too intangible to satisfy the remuneration element.” Rice, 805 S.W.2d at 435.

Jury instructions have sometimes included definitions of remunerations. In Speer v. State, 890 S.W.2d 87, 91 (Tex. App.—Houston [1st Dist.] 1994, pet. ref’d), for example, the jury was told:

Remuneration means a pecuniary reward given or received because of some act. The act must be done for the purpose of receiving some benefit. The focus is on the defendant’s state of mind and the State is obligated to offer evidence which establishes beyond a reasonable doubt the defendant’s intent or state of mind as related to an expectation of remuneration.

At least one court of appeals has, however, held that it is unnecessary to define remuneration in the charge. Neumuller v. State, 953 S.W.2d 502, 511 (Tex. App.—El Paso 1997, pet. ref’d); see also Reister v. State, No. 08-01-00373-CR, 2003 WL 21291035, at \*17 (Tex. App.—El Paso June 5, 2003, pet. ref’d) (not designated for publication).

Arguably, a definition of remuneration or “for remuneration” might include one or both of two aspects of the case law. First, it might make clear that the state need not prove the defendant acted pursuant to an agreement by someone to compensate the defendant if the defendant killed the victim. Rather, the state’s case can be based on proof the defendant expected to reap a benefit from the victim’s death, as by collecting life insurance proceeds. The disagreement among the judges in Beets suggests this is not necessarily clear from the statutory language.

Second, the definition might make clear that under Rice some anticipated benefits are too “intangible” to satisfy the statutory requirement. But Rice’s discussion does not provide a clear standard for determining how “tangible” an anticipated benefit or advantage must be. More specifically, it is not clear Rice justified the instruction given in Speer that the benefit or advantage be “pecuniary.”

Given the absence of a statutory definition of remuneration, the lack of case law authorization for providing juries a definition, and the difficulty of articulating the apparent requirements of the case law, however, the Committee included no definition in the instruction.

CPJC 19.11 Instruction—Capital Murder—Murder by Employing Another to Kill for Remuneration

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of capital murder.

Relevant Statutes

A person commits the offense of capital murder if the person intentionally or knowingly causes the death of an individual by employing another to cause the death for [remuneration/the promise of remuneration].

[Include the following if an instruction on causation is appropriate

but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person’s conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue

concerning concurrent causation.]

A person causes the death of another if, but for the person’s conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Definitions

Intentionally Causing the Death of an Individual

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

Knowingly Causing the Death of an Individual

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

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], intentionally or knowingly caused the death of [*name*]; and

2. the defendant caused the death of [*name*] by employing [*name*] for [remuneration/the promise of remuneration] to cause the death of [*name*] [*insert specific allegations, e.g.*,by shooting [*name*] with a gun].

[Include the following if the jury was instructed in the

relevant statutes unit on concurrent causation.]

3. a. [*concurrent cause*] did not contribute to causing the death of [*name*];

 b. [*concurrent cause*] was clearly insufficient, by itself, to cause the death of [*name*]; or

 c. the conduct of the defendant was clearly sufficient to cause the death of [*name*] regardless of [*concurrent cause*].

[Continue with the following.]

You must all agree on elements [1 and 2/ 1, 2, and 3] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or [both/more] of elements [1 and 2/1, 2, and 3] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, [both of the two/all three] elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

Murder by employing another to kill for remuneration is prohibited by and defined in Tex. Penal Code § 19.03(a)(3). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

CPJC 19.12 Instruction—Capital Murder—Murder of More than One Person

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of capital murder.

Relevant Statutes

A person commits the offense of capital murder if the person intentionally or knowingly causes the death of an individual and murders more than one person [during the same criminal transaction/during different criminal transactions but pursuant to the same scheme or course of conduct].

[Include the following if an instruction on causation is appropriate

but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person’s conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue

concerning concurrent causation.]

A person causes the death of another if, but for the person’s conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Definitions

Intentionally Causing the Death of an Individual

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

Knowingly Causing the Death of an Individual

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

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

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

2. the defendant, in [*county*] County, Texas, on or about [*date*], intentionally or knowingly caused the death of [*name(s)*] [*insert specific allegations, e.g.*, by stabbing [*name(s)*] with a knife]; and

3. [both/all] murders were committed [during the same criminal transaction/during different criminal transactions but pursuant to the same scheme or course of conduct].

[Include the following if the jury was instructed in the

relevant statutes unit on concurrent causation.]

4. a. [*concurrent cause*] did not contribute to causing the death of [*name*];

 b. [*concurrent cause*] was clearly insufficient, by itself, to cause the death of [*name*]; or

 c. the conduct of the defendant was clearly sufficient to cause the death of [*name*] regardless of [*concurrent cause*].

[Continue with the following.]

You must all agree on elements [1, 2, and 3/ 1, 2, 3, and 4] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements [1, 2, and 3 / 1, 2, 3, and 4] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, all [three/four] elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

Murder of more than one person is prohibited by and defined in Tex. Penal Code § 19.03(a)(7). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

Under the statute, one murder must be committed intentionally or knowingly as demanded by Tex. Penal Code § 19.02(b)(1). The additional killing or killings do not appear to have to be murder under section 19.02(b)(1) but can be murder under sections 19.02(b)(2) or (3). The practice is to allege that both or all killings were intentional or knowing, so the instruction is so drafted. If the indictment alleges the additional killings are murder for a reason other than being intentional or knowing, the instruction must be modified to accommodate this.

Transferred Intent in Texas Penal Code Section 19.03(a)(7) Situations.  Applying transferred intent to section 19.03(a)(7) situations may require modification of the instructions to comply with the holding of Ex parte Norris, 390 S.W.3d 338 (Tex. Crim. App. 2012). A person is criminally responsible for causing a result if the only difference between what 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. Tex. Penal Code § 6.04(b); Norris, 390 S.W.3d at 339–40 (discussing transferred intent). To meet section 19.03(a)(7) requirements, the state must prove one of two things. First, it may prove the defendant had the intent to kill at least two other persons. Second, it may prove the defendant engaged in two or more “discrete instances of conduct,” each committed with the intent to kill another person. In the second situation, the state’s evidence can be sufficient even if the defendant during each of the instances of conduct intended to kill the same person. This would be the case, for example, if during the first instance of conduct the defendant intended to kill a particular person but did not succeed in killing that person, unintentionally killing another individual instead, and then during the second instance of conduct intended to kill the same particular person targeted during the first instance of conduct and succeeded in doing so.

Need for Unanimity on Predicate Murder Victim. The commission of at least one murder in addition to the predicate murder, is the aggravating circumstance required by section 19.03(a)(7). Ordinarily, the indictment for section 19.03(a)(7) murder will identify one victim as the predicate victim, that is, the victim who must be proved to have been killed in a murder as provided for in section 19.02(b)(1). This predicate victim will be distinguished from the additional victim who must have been murdered by the defendant during the same transaction, scheme, or course of conduct. If the indictment alleges more than one additional victim, the jury must find that at least one person in addition to the predicate victim was murdered, but it need not unanimously agree on which additional person. In Saenz v. State, 451 S.W.3d 388 (Tex. Crim. App. 2015), the jury charge made it possible for the jurors to convict without agreeing that any one particular person was murdered by the defendant. Saenz holds that the jury instructions must require the jury to unanimously agree on one victim as the predicate victim, even though the jurors need not agree on which of the other victims named in the indictment is the additional victim triggering section 19.03(a)(7). Saenz, 451 S.W.3d at 391–92. Thus, for example, even if the indictment alleges that the defendant killed two or more persons during the same transaction, scheme, or course of conduct, the jury charge must require that the jury be unanimous as to the predicate victim.

CPJC 19.13 Instruction—Capital Murder—Murder of Individual
under Ten Years of Age

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of capital murder.

Relevant Statutes

A person commits the offense of capital murder if the person intentionally or knowingly causes the death of an individual under ten years of age.

[Include the following if an instruction on causation is appropriate
 but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person’s conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue

concerning concurrent causation.]

A person causes the death of another if, but for the person’s conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Definitions

Intentionally Causing the Death of an Individual

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

Knowingly Causing the Death of an Individual

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

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

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

2. [*name*] was under ten years of age.

 [Include the following if the jury was instructed in the

relevant statutes unit on concurrent causation.]

3. a. [*concurrent cause*] did not contribute to causing the death of [*name*];

 b. [*concurrent cause*] was clearly insufficient, by itself, to cause the death of [*name*]; or

 c. the conduct of the defendant was clearly sufficient to cause the death of [*name*] regardless of [*concurrent cause*].

[Continue with the following.]

You must all agree on elements [1 and 2/ 1, 2, and 3] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or [both/more] of elements [1 and 2/ 1, 2, and 3] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, [both of the two/all three] elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

Murder of an individual under ten years of age is prohibited by and defined in Tex. Penal Code § 19.03(a)(8). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

The instruction does not require the state prove any awareness by the defendant of the age of the victim. Section 19.03(a)’s incorporation of section 19.02(b)(1) means the killing must be intentional or knowing. Does this apply not only to the causing of death but also to the required circumstance that the victim be under ten years of age?

Most likely it does not. See Johnson v. State, 967 S.W.2d 848, 849–50 (Tex. Crim. App. 1998) (en banc) (rejecting appellant’s argument that he should not be guilty of indecency with a child unless he knew the victim was under the age of seventeen). “Given [the] case law and legislative tradition running squarely against appellant’s notion that the State must prove his knowledge of the victim’s age, and given the failure of the legislature to specifically require such knowledge when it required knowledge of the victim’s presence, appellant’s position must fail.” Roof v. State, 665 S.W.2d 490, 492 (Tex. Crim. App. 1984) (en banc). Thus, even though some of section 19.03(a)’s subdivisions require a culpable mental state in addition to the requirement that the predicate killing be intentional or knowing; the lack of any such demand in section 19.03(a)(8) suggests the legislature intended no such culpable mental state.

Finally, Texas courts have been generally reluctant to read crimes designed to protect children as requiring awareness of the victim’s status as a child or age. See Fleming v. State, 455 S.W.3d 577, 582 (Tex. Crim. App. 2014). They will almost certainly follow this approach with regard to section 19.03(a)(8). See also White v. State, 509 S.W.3d 307, 313 (Tex. Crim. App. 2017) (“[W]hen it comes to the protection of children, we have frequently declined to impose a culpable mental state upon a circumstance-surrounding-conduct element of the offense in the absence of an express assignment of such a mental state—even when it was a circumstance that elevated the level of the offense.”)

CPJC 19.14 Instruction—Capital Murder—Murder of Individual
Ten or Older but Younger than Fifteen Years of Age

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of capital murder.

Relevant Statutes

A person commits the offense of capital murder if the person intentionally or knowingly causes the death of an individual ten years of age or older but younger than fifteen years of age.

[Include the following if an instruction on causation is appropriate
 but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person’s conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue

concerning concurrent causation.]

A person causes the death of another if, but for the person’s conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Definitions

Intentionally Causing the Death of an Individual

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

Knowingly Causing the Death of an Individual

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

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

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

2. [*name*] was at least ten but younger than fifteen years of age.

 [Include the following if the jury was instructed in the

relevant statutes unit on concurrent causation.]

3. a. [*concurrent cause*] did not contribute to causing the death of [*name*];

 b. [*concurrent cause*] was clearly insufficient, by itself, to cause the death of [*name*]; or

 c. the conduct of the defendant was clearly sufficient to cause the death of [*name*] regardless of [*concurrent cause*].

[Continue with the following.]

You must all agree on elements [1 and 2/1, 2, and 3] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or [both/more] of elements [1 and 2/ 1, 2, and 3] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, [both of the two/all three] elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

Murder of an individual older than ten but younger than fifteen years of age is prohibited by and defined in Tex. Penal Code § 19.03(a)(9). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

Regarding the defendant’s knowledge of the age of the victim, see the comment to CPJC 19.13.

CPJC 19.15 Instruction—Manslaughter

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of manslaughter.

Relevant Statutes

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

[Include the following if an instruction on causation is appropriate
but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person’s conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue
concerning concurrent causation.]

A person causes the death of another if, but for the person’s conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Definitions

Recklessly Causing the Death of an Individual

A person recklessly causes the death of an individual if—

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

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

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

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], caused the death of [*name*] [*insert specific allegations, e.g.*, by operating his motor vehicle at an unreasonable speed]; and

2. the defendant did this recklessly.

[Include the following if the jury was instructed in the
relevant statutes unit on concurrent causation.]

3. a. [*concurrent cause*] did not contribute to causing the death of [*name*]; or

 b. [*concurrent cause*] was clearly insufficient, by itself, to cause the death of [*name*]; or

 c. the conduct of the defendant was clearly sufficient to cause the death of [*name*] regardless of [*concurrent cause*].

[Continue with the following.]

You must all agree on elements [1 and 2/ 1, 2, and 3] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or [both/more] of elements [1 and 2/1, 2, and 3] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, [both of the two/ all three] elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

Manslaughter is prohibited by and defined in Tex. Penal Code § 19.04.

CPJC 19.16 Instruction—Criminally Negligent Homicide

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of criminally negligent homicide.

Relevant Statutes

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

[Include the following if an instruction on causation is appropriate
but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person’s conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue
concerning concurrent causation.]

A person causes the death of another if, but for the person’s conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Definitions

Causing the Death of an Individual by Criminal Negligence

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

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

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

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

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], caused the death of [*name*] [*insert specific allegations, e.g.*, by operating his motor vehicle at an unreasonable speed]; and

2. the defendant did this by criminal negligence.

[Include the following if the jury was instructed in the
relevant statutes unit on concurrent causation.]

3. a. [*concurrent cause*] did not contribute to causing the death of [*name*]; or

 b. [*concurrent cause*] was clearly insufficient, by itself, to cause the death of [*name*]; or

 c. the conduct of the defendant was clearly sufficient to cause the death of [*name*] regardless of [*concurrent cause*].

[Continue with the following.]

You must all agree on elements [1 and 2/ 1, 2, and 3] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or [both/more] of elements [1 and 2/ 1, 2, and 3] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, [both of the two/all three] elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

Criminally negligent homicide is prohibited by Tex. Penal Code § 19.05. The definition of “causing the death of an individual by criminal negligence” is based on Tex. Penal Code § 6.03(d).