

Lesser Included Offenses

<p>Capital Murder (Penal Code §19.03)</p>	<p>First Degree Murder (§19.02) Second Degree Murder (§19.02(d)) Manslaughter (Penal Code §19.04) Criminally Negligent Homicide (§19.05) Aggravated Assault (§22.02)</p>	<p><u>Cantu v. State</u>, 939 S.W.2d 627 (Tex. Crim. App. 1997)(murder). <u>Laird v. State</u>, 933 S.W.2d 707 (Tex. App.-Houston [14th Dist.] 1996 pet. ref'd) (murder, manslaughter). <u>Travis v. State</u>, 921 S.W.2d 559 (Tex. App.-Beaumont 1996, no pet.)(second degree murder).</p>
<p>Murder (Penal Code §19.02)</p>	<p>Second Degree Murder Sudden passion from adequate cause Defendant's burden by preponderance at punishment (§19.02(d)) Manslaughter (§19.04) Aggravated Assault (§22.02)</p>	<p><u>Moore v. State</u>, 969 S.W.2d 4 (Tex. Crim. App. 1998)(second degree murder). <u>Gonzales v. State</u>, 942 S.W.2d 80 (Tex. App.-Houston[1st Dist.] 1997, pet. ref'd) (second degree murder). <u>Coit v. State</u>, 629 S.W.2d 263 (Tex. App.-Dallas 1982, pet. ref'd)(second degree murder, manslaughter, aggravated assault). <u>Hunter v. State</u>, 647 S.W.2d 657 (Tex. Crim. App. 1983)(criminally negligent</p>
<p>Manslaughter (Penal Code §19.04)</p>	<p>Aggravated Assault Reckless serious bodily injury Use/exhibit of deadly weapon (§22.02)</p>	<p>See, <u>Branham v. State</u>, 583 S.W.2d 782 (Tex. Crim. App. 1979)(criminally negligent homicide). Compare Penal Code §19.04, 22.01 with 22.02.</p>
<p>Criminally Negligent Homicide (Penal Code §19.05)</p>		<p>Assault is not a lesser included because it requires a higher culpable mental state. <u>Bayona v. State</u>, 544 S.W.2d 155 (Tex. Crim. App. 1976).</p>
<p>Intoxication Manslaughter (Penal Code §49.03)</p>	<p>Intoxication Assault (§49.07). Driving While Intoxicated (§49.04)</p>	<p>Cf. <u>Aguirre v. State</u>, 928 S.W.2d 759 (Tex. App.-Houston[14th Dist.] 1996, no pet.) Public intoxication is not a lesser included offense of DWI. <u>State v. Houth</u>, 845 S.W.2d 853 (Tex. Crim. App. 1992)</p>
<p>Aggravated Kidnapping (1st degree, Penal Code §20.40)</p>	<p>Aggravated Kidnapping (2nd degree) Defendant proves safe release of victim by a preponderance of evidence (§20.04). Aggravated Assault (§22.02). Kidnapping (2nd degree, §20.03) Abduction (3rd degree, §20.03). Unlawful restraint Restrain and expose to harm (§20.02(c)(2)).</p>	<p><u>Roberts v. State</u>, 795 S.W.2d 842 (Tex. App.-Beaumont 1990, no pet.)(aggravated assault). <u>Rogers v. State</u>, 687 S.W.2d 337 (Tex. Crim. App. 1985)(kidnapping). <u>Blalock v. State</u>, 847 S.W.2d 461 (Tex. App.-Houston [1st Dist.] 1993, pet. ref'd) (felony& misdemeanor unlawful restraint). See, <u>Schweikle v. State</u>, 915 S.W.2d 17 (Tex. Crim. App. 1996)(unlawful restraint). See, e.g., <u>Thornton v. State</u>, 699 S.W.2d 918 (Tex. App.-Houston [1st Dist.] 1985, no pet.)(2nd degree aggravated kidnapping).</p>
<p>Aggravated Sexual Assault (Penal Code §22.021)</p>	<p>Sexual Assault (§22.011) Indecency with a Child (§21.11) Assault (§22.01(1)) Assault (§22.01(3))</p>	<p><u>Chavis v. State</u>, 807 S.W.2d 375 (Tex. App.-Houston [14th Dist.] 1991, pet. ref'd) (sexual assault). <u>Cunningham v. State</u>, 726 S.W.2d 151 (Tex. Crim. App. 1987)(indecency with a child). <u>Gottlich v. State</u>, 822 S.W.2d 734 (Tex. App.-Fort Worth 1992, pet. ref'd)(indecency with a child determined on a case by case basis), overruled on other grounds, <u>Curry v. State</u>, 861 S.W.2d 479 (Tex. App.-Fort Worth 1993, pet. ref'd).</p>

Aggravated Assault (Penal Code §22.02)	Assault (§22.01(1), (3)) Deadly Conduct (§22.05) Resisting Arrest (§38.03)	<u>Bell v. State</u> , 693 S.W.2d 434 (Tex. Crim. App. 1985)(reckless conduct assault). <u>Sutton v. State</u> , 548 S.W.2d 697 (Tex. Crim. App. 1977)(resisting arrest). <u>See Burkholder v. State</u> , 660 S.W.2d 540 (Tex. Crim. App. 1983)(assault).
Indecency with a child ((Penal Code §21.11(a)(2))	Indecent Exposure (§21.08)	<u>Briceno v. State</u> , 580 S.W.2d 842 (Tex. Crim. App. 1979).
Arson (1 st degree). Bodily injury or death ((Penal Code 28.02(d)(1))	Arson (2 nd degree, §28.02(d))	Bodily injury must result from arson and not some independent action of arsonist. <u>See, Wilson v. State</u> , 541 S.W.2d 174 (Tex. Crim. App. 1976). Criminal mischief is not a lesser included of arson. <u>Prejean v. State</u> , 704 S.W.2d 119 (Tex. App.-Houston [1 st Dist.] 1986, no pet.).
Aggravated Robbery (Penal Code §29.03)	Robbery (§29.02) Aggravated Assault (§22.02) Theft (§31.03) Assault (§22.01) Unauthorized Use of a Motorized Vehicle (§31.07)	<u>Watson v. State</u> , 605 S.W.2d 877 (Tex. Crim. App. 1979)(aggravated assault). <u>Campbell v. State</u> , 571 S.W.2d 161 (Tex. Crim. App. 1978)(theft). <u>McElhanev v. State</u> , 899 S.W.2d 15 (Tex. App.-Tyler 1995, pet. ref'd)(robbery, assault). <u>Teague v. State</u> , 789 S.W.2d 380 (Tex. App.-Houston [1 st Dist. 1990, pet. ref'd) (unauthorized use of a motor vehicle).
Robbery (Penal Code §29.02)	Theft (§31.03) Theft from a Person (§31.03(e)(4)(B)) Assault (§22.01)	<u>Parr v. State</u> , 658 S.W.2d 620 (Tex. Crim. App. 1983)(theft). <u>Earls v. State</u> , 650 S.W.2d 858 (Tex. App.-Houston [14 th Dist.] 1982)(theft from a person), <u>aff'd</u> 707 S.W.2d 82 (Tex. Crim. App. 1986). <u>See, McElhanev v. State</u> , 899 S.W.2d 15 (Tex. App. Tyler 1995, pet. ref'd)
Burglary with the intent to commit felony other than theft (Penal Code §30.02(d))		Aggravated assault not lesser of burglary with intent to commit aggravated assault. <u>Jacob v. State</u> , 892 S.W.2d 905 (Tex. Crim. App. 1995).
Burglary of a habitation (Penal Code §30.02(c)(2))	Burglary of a building (§30.02(c)(1)) Criminal Trespass (§30.05)	<u>Roberson v. State</u> , 549 S.W.2d 749 (Tex. Crim. App. 1977)(criminal trespass), overruled on other grounds, <u>Cole v. State</u> 578 S.W.2d 127 (Tex. Crim. App. 1979). <u>Jones v. State</u> , 532 S.W.2d 596 (Tex. Crim. App. 1976)(burglary of a building).
Burglary of a Building ((Penal Code §30.02(c)(1))	Criminal Trespass (§30.03)	<u>Aguilar v. State</u> , 682 S.W.2d 556 (Tex. Crim. App. 1985)(criminal trespass).
Burglary of Vehicles (Penal Code §30.04)		Criminal trespass is not a lesser included of burglary of a vehicle. <u>Williams v. State</u> , 805 S.W.2d 596 (Tex. Crim. App. 1980); <u>Thomas v. State</u> , 919 S.W.2d 810 (Tex. App.-Houston [14 th Dist.] 1996, pet ref'd); <u>Cadiuex v. State</u> , 711 S.W.2d 92 (Tex. App.-Austin 1986).
Sexual Assault (Penal Code §22.011)	Assault (§22.01)	<u>Cruice v. State</u> , _S.W.3d _ (Tex. App. Houston [14 th Dist.] 2000) 14-96-01362 CR

- When considering whether to request a lesser included instruction, weigh in the possibility of the jury returning a not guilty because it did not have any vehicle for a guilty verdict.
- Request an attempting instruction for the indicted offense as it is always a lesser included.
- In a sexual assault case, ask the judge for a simple assault instruction if the evidence shows there were no threats of or bodily injury.
- In an indecency with a child by contact case, request a simple assault instruction under §22.01 (a)(3) see Cruice.
- If your client is convicted of a state jail felony, file a motion for the judge to set aside that conviction and enter a judgment for a Class A misdemeanor. See attached motion.
- If your client has been charged with any enhancements such as: a deadly weapon, a hate crime, violation of a drug-free zone, or a violation of weapon-free zone, request an instruction for the alleged offense without the enhancement. See, Apprendi v. New Jersey 120 S.Ct. 2348 (2000). Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.
- In a theft case, if evidence is presented that the value of the item or amount of money taken was less than the "charged value or amount", you are entitled to lesser included jury charge.
- In a drug possession case, if evidence is presented that your client was knowingly in possession of an amount less than the aggregate "charged weight", you are entitled to a lesser included jury charge.
- In a drug distribution case, if evidence is presented that your client merely possessed the narcotics without the intent to distribute or without the distribution, then you are entitled to a lesser included offense jury charge.
- In ALL trials, be able to articulate an Article 37.09 analysis. This article provides for a more liberal application of the lesser included offenses.