PDR NO. 13-0874

COURT APPEAL NO. **02-11-00335-CV**

IN THE TEXAS
SUPREME COURT
AT AUSTIN, TEXAS

C.H.
Petitioner

VS.

THE STATE OF TEXAS
Respondent

PETITION FOR REVIEW
OF THE OPINION OF THE
SECOND COURT OF APPEALS OF
THE STATE OF TEXAS

BLAKE R. BURNS
115 North Henderson Street
Fort Worth, Texas 76102-1940
(817) 870-1544 FAX 870-1589
State Bar No. 24066989

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, C.H., Petitioner and files this his Petition for Discretionary Review of the decision of the Second Court of Appeals.

LIST OF INTERESTED PARTIES

JUDGES:
The Honorable Judge Jean Boyd
323rd Criminal District Court of Tarrant County, Texas

TRIAL COUNSEL:

The Honorable Ronald Huseman, Counsel for the State
State Bar No. 24036816
2701 Kimbo Rd.
Fort Worth, Texas 76111

The Honorable Vicky Foster, Counsel for the State
State Bar No. 07308170
2701 Kimbo Rd.
Fort Worth, Texas 76111

The Honorable Candace Taylor
State Bar No. 00797542
902 S. Jennings
Ft. Worth, Texas 76104

The Honorable Felipe Calzada
Counsel for Respondent
State Bar No. 24003592
2724 Kimbo Rd.
Fort Worth, Texas 76111

APPELLATE COUNSEL:

Blake R. Burns, Appellate Counsel for Defense
115 North Henderson Street
Fort Worth, Texas 76102

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases: **Page**

Statutes and Constitutional Provisions

STATEMENT OF THE CASE

Appellant, C.H. was the juvenile respondent in the current case. A Petition Regarding a Child Engaged in Delinquent Conduct was filed against him on March 23, 2011. (C.R. p. 16). The petition was approved by the Grand Jury on April 20, 2011 alleging C.H. had committed the offense of murder and subjecting him to determinate sentencing. (C.R. p. 59).

After jury trial, C.H. was adjudicated for the offense of murder, and sentenced to 30 years in the Texas Youth Commission with the possibility of transfer to the Institutional Division of the Texas Department of Criminal Justice. (C.R. p. 120). Appellant gave timely notice of appeal on August 26, 2011. (C.R. p. 151). The trial court destroyed the jury questionnaires shortly after trial. (Supp. C.R. p. 10).

STATEMENT OF FACTS

On February 26, 2011, Javontae Brown and his girlfriend Tanisha got into an argument. (R.R. Vol 4, p. 170). Shortly afterward, Eric Robinson, Tanisha's brother, came by the apartment to pick his sister up. (R.R. Vol 4, p. 168). When Jevontae saw Eric pull up to the house, he pointed at pistol at him and began yelling threats toward Eric. (R.R. Vol 4, p. 175). Tanisha then got in the car with Eric and the two drove away. (R.R. Vol 4, p. 175).

Later on that day, both Jevontae and Eric met up at the Green Fields in Como, each bringing a handful of friends with them. (R.R. Vol. 4, p. 192 - 194). Among Eric's friends was Mercedes Smith, the victim in the current case. (R.R. Vol. 4, p. 192). The two groups met up and a shootout ensued, but no one was harmed. (R.R. Vol. 4, p. 196, 199).

Even later that afternoon, Mercedes Smith was driving past the Community Center in Como. (R.R. Vol. 5, p. 79 - 80). Smith saw Jevontae and C.H. (Appellant) sitting

outside the community center. (R.R. Vol. 5, p. 81). At that point, Smith stopped the car, put it in reverse toward C.H. and Jevontae, and pointed a pistol out of the window. (R.R. Vol. 5, p. 85). Gunfire ensued and Mercedes Smith was struck in the back of the head, killing him instantly. (R.R. Vol. 5, p. 89 - 90).

PROCEDURAL HISTORY

On September 12, 2013, the Second Court of Appeals affirmed the judgment of the trial court. *In the Matter of C.H., a Minor Child*, 02-11-00035. Appellant did not file a motion for rehearing.

ISSUES PRESENTED

1. The Court of Appeals erred in holding that the jury questionnaires are not part of the record when they are relied on by the State to demonstrate racially neutral reasons for exercising strikes after a *Batson* challenge.
2. The Court of Appeals erred in holding that trial

counsel did not preserve error on appeal for his *Brady* objections, and by holding the error harmless when he was not permitted to question officers about the alleged third party confession tape that was not turned over.

3. The Court of Appeals erred in holding that the trial court's failure to include a self defense instruction in the application paragraph of the jury charge was harmless error.

SUMMARY OF THE ARGUMENT

1. The state relied on the jury questionnaires to provide racially neutral reasons for exercising their peremptory strikes. The trial court ordered the questionnaires destroyed immediately after trial, as per their policy, preventing Appellant from having a complete record on appeal. Appellant should be entitled to a new trial because of the destroyed record.

2. Appellant requested all *Brady* material in a pre

trial discovery motion. At trial, it was revealed that detectives failed to turn over a taped interview of a third party who allegedly had confessed to the crime. The trial court also forbid trial counsel from inquiring about the confession in front of the jury. Appellant should be entitled to a new trial so that he can present this evidence to a jury.

3. The trial court included a definition for self defense in the jury charge, but did not include an instruction for the jury in the application paragraphs of the charge, thereby preventing the jury from applying it. Appellant should be entitled to a new trial because the jury would have likely acquitted him, had the charge been properly drafted.

REASONS FOR REVIEW

POINT OF ERROR NUMBER ONE

THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF STATE OR FEDERAL LAW THAT HAS

NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT OF APPEALS WHEN IT HELD THAT JURY QUESTIONNAIRES ARE NOT PART OF THE RECORD ON APPEAL.

THE OPINION

The Second Court of Appeals affirmed the trial court's judgment, holding that the jury questionnaires are were not timely requested as an exhibit, and therefore Appellant is not entitled to a new trial as a result of their destruction. It held that the questionnaires were absent from the record not because of the trial court's actions, but because Appellant did not timely ensure that the questionnaires were included in the record by offering them into evidence at the Batson hearing. The Court of Appeals further held that the destruction of the documents happened after the trial court lost jurisdiction.

LAW

This decision is in conflict with decisions made in other jurisdictions in civil matters.

Rule 34.6(f) of the Texas Rules of Appellate Procedure reads as follows:

An appellant is entitled to a new trial under the following circumstances:

(1) if the appellant has timely requested a reporter's record;

(2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or - if the proceedings were electronically recorded - a significant portion of the recording has been lost or destroyed or is inaudible;

(3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and

(4) if the lost, destroyed or inaudible portion of the reporter's record cannot be replaced by agreement of the parties, or the lost or destroyed exhibit cannot be replaced either by agreement of the

parties of with a copy determined by the trial court to accurately duplicate with reasonable certainty the original exhibit.

The Family Code provides that in juvenile justice cases, the requirements governing an appeal are as in civil cases generally. In re L.D.C., 400 S.W.3d 572, 574-75(Tex. 2013). Every court in the United States that has decided the issue has held that jury questionnaires are as much part of the voir dire process as oral questioning. *See In re South Carolina Press Ass'n*, 946 F.2d 1037, 1041 (4th Cir. 1991) (applying the presumption of access to jury questionnaires, thereby including them as part of the court proceedings); *United States v. McDade*, 929 F. Supp. 815, 817 n.4 (E.D. Pa. 1996) (finding that *Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984)* "encompass[es] all voir dire questioning – both oral and written"); *Copley Press, Inc. v. Superior Court*, 278 Cal. Rptr. 443, 451 (Cal. Ct. App. 1991) ("The fact that the questioning of jurors was largely done in

written form rather than orally is of no constitutional import."); *Stephens Media, LLC v. Eighth Judicial Dist. Court,* 221 P.3d 1240, 1249 (Nev. 2009) ("[T]he use of juror questionnaires does not implicate a separate and distinct proceeding . . . . [It is] merely a part of the overall voir dire process."); *In re Newsday, Inc. v. Goodman,* 552 N.Y.S.2d 965, 967 (N.Y. App. Div. 1990) ("[Q]uestionnaires completed by the petit jurors in this criminal action were an integral part of the *voir dire* proceeding."); *Forum Commc'ns Co. v. Paulson,* 752 N.W.2d 177, 185 (N.D. 2008) (holding that use of jury questionnaires "serves as an alternative to oral disclosure of the same information in open court"); *State ex rel. Beacon Journal Publ'g Co. v. Bond,* 781 N.E.2d 180, 188 (Ohio 2002) ("Because the purpose behind juror questionnaires is merely to expedite the examination of prospective jurors, it follows that such questionnaires are part of the voir dire process.").

FACTS

During the voir dire stage of the trial, prosecutors exercised peremptory strikes on the only two black panel members within striking range. (R.R. Vol. 2 p. 152). Trial counsel for Appellant issued a *Batson* challenge to the State's strikes. Prosecutors referenced the jury questionnaires as their racially neutral reason for striking these jurors.

The trial court ordered the jury questionnaires to be destroyed. (Supp. C.R. p. 10). It is the policy of the court to do this at the conclusion of every trial. (Supp. C.R. p. 10). This policy of the court deprives Respondents of the opportunity to preserve them for appeal.

ARGUMENT

The trial court had no authority to destroy the voir dire questionnaires because they are just as much a part of the record as the transcript of the oral voir dire questioning. Destroying these amounts to a destruction of a portion of the record which entitles

Appellant to a new trial under the Family Code and Rule 34.6(f). The record will show that the Reporters Record in this case was timely requested, the questionnaires were ordered to be destroyed by the court through no fault of Appellant, and that that portion of the record is necessary for the appeal's resolution to rebut the State's racially neutral reasons for exercising their strikes, and cannot be replaced by agreement of the parties.

PRAYER

The case should be remanded for new trial because the trial court was made aware that the Respondent was making a *Batson* challenge, and that the defense of the peremptory strikes given by the State involved the jury questionnaires. The trial court was clearly placed on notice and should never have ordered the records destroyed, especially as part of a general policy. The trial court has deprived Appellant of his due process rights to pursue a constitutionally based *Batson* challenge under the Sixth Amendment of the United

States Constitution and the due course of law provisions of the Texas Constitution, which provides greater protection that the due process provisions of the Sixth Amendment of the federal constitution.

POINT OF ERROR NUMBER TWO
THE COURT OF APPEALS ERRED WHEN IT HELD THAT APPELLANT DID NOT REQUEST A COPY OF AN INTERVIEW TAPE WITHHELD FROM APPELLANT IN VIOLATION OF *BRADY*.

OPINION

The Court of Appeals held that Appellant failed to preserve his error concerning withheld *Brady* material.

LAW

To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if they are not apparent from the context of the request, objection, or motion. Tex.R.App.Pro 33.1(a).

Brady does not require any exercise of bad faith by

the prosecution for the suppression to be considered a violation of due process. *Kyles v. Whitley,* 514 U.S. 419, 432 (1995). The prosecutor remains responsible for disclosing evidence favorable to the defendant regardless of any failure by the police to bring favorable evidence to the prosecutor's attention. *Id.* at 421.

Impeachment evidence also falls within the *Brady* rule and is also considered to be evidence favorable to an accused. *United States v. Bagley,* 473 U.S. 667, 676 (1985). The Court reasoned that this evidence, if disclosed and used effectively, could make the difference between conviction and acquittal. *Id.*

The Federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense, regardless of the application of any rules of evidentiary admissibility. *Holmes v. South Carolina,* 547 U.S. 319, 324 (2006).

FACTS

Adult co-defendant (Javontae Brown) had allegedly confessed to committing the crime, and confided in a cell mate (Eric Jaubert) that Brown planned to pin all the blame on his juvenile co-defendant (Appellant). (R.R. Vol. 5 p. 230 - 231). Appellant filed his request for discovery and *Brady* material on April 7, 2011. (C.R. p. 26). On April 25, 2011, defense counsel was provided with this information and provided with the cell mate's name. (C.R. p. 61 - 62). During the defendant's questioning of Detective Waters, defense counsel was made aware that there was an audio and videotaped interview of Jaubert, in which he discussed Brown's confession. (R.R. Vol. 5 p. 230). According to Detective Waters, she turned over these tapes to the District Attorney's office on April 20, 2011, at 9:53 A.M. *Id.* Defense counsel never received a copy of this tape, nor were they notified of its existence. (R.R. Vol. 5 p. 228). Futhermore, trial counsel was prohibited from asking Detective Waters about the content of the interview. (R.R. Vol. 5, p. 226-227).

ARGUMENT

Clearly, evidence of a third party confession is material in any case. If the jury had been shown this taped interview, there is a probability sufficient to undermine confidence in the outcome. The jury may have believed that Brown did in fact commit the crime, but intended to blame the juvenile co-defendant because he was under the impression that the juvenile would be subject to far less severe punishment than an adult would be. At the very least, it would have provided valuable ammunition for the cross examination of detectives who were ignoring this evidence to pursue an unfounded case against Appellant. If this tape was disclosed to defense counsel and used effectively, it very well could have made the difference between conviction and acquittal, and therefore Appellant is entitled to relief due to this violation of *Brady*.

The right to present a complete defense under *Holmes* is violated when evidentiary rules "infring[e] upon a weighty interest of the accused," or are

"disproportionate to the purposes they are designed to serve." *Holmes* 547 U.S. at 324.

In the present case, during defense counsel's cross examination of Detective Waters, the homicide detective assigned to the case, counsel attempted to solicit testimony from the Detective about statements made by one of Appellant's co-defendants. (R.R. Vol. 5, p. 226). The State's objection to relevance was apparently sustained after a conference at the bench and defense counsel proceeded by making an offer of proof. (R.R. Vol. 5, p. 227). Outside the presence of the jury, Waters testified that she spoke to Eric Jaubert, who was the cellmate of Javontae Brown, one of Appellant's adult co-defendants. (R.R. Vol. 5, p. 229 - 230). Waters testified that Jaubert told her that Brown had confessed to the murder, and that he was going to pin the responsibility for the killing on his juvenile co-defendant (Appellant). (R.R. Vol. 5, p. 230 - 231). Waters further testified that she found Jaubert's claim to be "somewhat credible." (R.R. Vol. 5, p. 230). After

the offer of proof, the State renewed its objection, and the trial court sustained. (R.R. Vol. 5, p. 232).

The exclusion of this evidence clearly warrants reversal under the Supreme Court's 3 prong test. First, this evidence was undoubtedly critical to the defense. The testimony excluded concerned a third party confession to the crime, and an explanation as to why other witnesses involved may have been testifying that Appellant was the shooter (i.e., the belief that the juvenile would only be facing juvenile as opposed to criminal punishment). By Detective Waters's own admission, this testimony bore sufficient indicia of reliability when she testified that Jaubert's information seemed "somewhat credible" to her. (R.R. Vol. 5, p. 230). The Detective had no specific reason to doubt the validity of Jaubert's claims. He was Brown's cell mate, the statement was a statement against Brown's own interest, and Jaubert even provided Waters with a motive for Brown to lie about Appellant's degree of involvement. As for the last prong of the

test, the interest supporting exclusion of the evidence was not substantially important, it was nonexistent. The State's objection to relevance was sustained. Relevant evidence is defined by the Texas Rules of Evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tex. Rules Evid. Rule 401. A third party confession certainly has a tendency to make a fact of consequence more or less probable. As a result, the Court of Appeals should reverse based on the fact that the trial court's exclusion of this testimony constituted a violation of Appellant's right to present a complete defense under the Due Process Clause and the Sixth Amendment of the United States Constitution.

PRAYER

This case should be remanded to the trial court for a new trial because of the violations stemming from the

failure to turn over the exculpatory interview tape. Respondent's trial counsel timely requested it, but it was never turned over. Clearly, being prevented from presenting or even questioning police officers concerning a third party confession at the very least, could have been the difference between conviction and acquittal.

POINT OF ERROR NUMBER THREE
THE COURT OF APPEALS ERRED WHEN IT HELD THAT APPELLANT DID NOT SUFFER HARM FROM THE TRIAL COURT'S FAILURE TO INCLUDE A SELF DEFENSE INSTRUCTION IN THE APPLICATION PARAGRAPH OF THE JURY CHARGE.

OPINION

The trial court's failure to include a jury instruction on self-defense constituted harmless error.

LAW

The trial judge has the duty to instruct the jury on the law applicable to the case even if defense counsel fails to object to exclusions in the charge.

Vega v. State, 394 S.W.3d 514, 518-19 (Tex.Crim.App. 2013). But Article 36.14 does not impose a duty on a trial judge to instruct the jury *sua sponte* on unrequested defensive issues. *Id.*

The abstract paragraphs of the jury charge serve as a glossary to help the jury understand the meaning of concepts and terms used in the application paragraphs of the charge. *Plata v. State*, 926 S.W.2d 300, 302 (Tex.Crim.App. 1996), overruled on other grounds by *Malik v. State*, 953 S.W.2d 234 (1997). An abstract charg on a theory of law that is not applied to the facts does not authorize the jury to act upon that theory. *Hutch v. State*, 922 S.W.2d 166, 172 (Tex.Crim.App. 1996).

FACTS

The court's jury charge included a definition of self-defense along with other definitions given in the jury charge. (R.R. Vol. 6, p. 12). There is no mention of self-defense in the application paragraph. (R.R.

Vol. 6, p. 14 - 15). At trial, Damionn Armstead, Mercedes Smith's cousin, testified that the Smith pointed a gun at Appellant and words were exchanged. (R.R. Vol. 5, p. 86). Armstead further testified, that if Appellant had not shot Smith, Smith would have shot Appellant. (R.R. Vol. 5, p. 108).

ARGUMENT

The trial court in this case has a duty to instruct the jury on all relevant issues raised by the evidence, including self-defense. The trial court did instruct the jury on the issue but failed to include it in the application paragraph, thus preventing the jury from acting upon the theory. The fact that the State's own witness, Damionn Armstead, testified that Appellant had to fire in self-defense demonstrates that the error probably caused the rendition of an improper judgment. It is difficult to imagine that prosecutors would be able to refute the self-defense claim beyond a reasonable doubt when their chief eye witness

explicitly claims the Defendant acted in self-defense.

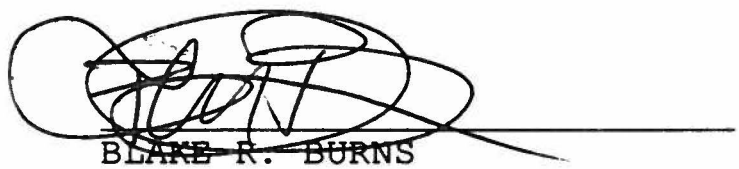
PRAYER

This case should be remanded to the trial court for a new trial due to the clear violation of Appellant's due process rights to have the jury properly instructed on the self-defense issue. Clearly, the trial court understood that the evidence presented at trial raised the issue of self-defense, or it would not have included the issue at all in the jury charge. Its failure to include the self-defense issue in the application paragraphs of the jury charge prevented the jury from considering it. Due to the testimony of Damionn Armstead, there is a high probability Appellant would have been acquitted of this offense had the jury charge been properly prepared.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays this Honorable Court to grant this Petition for Review and after a full review hereon that the Court enter an order setting aside the conviction and to remand the case for a new trial so that the Appellant may receive a fair and just adjudication hearing, and further relief to which he may be justly entitled.

Respectfully submitted,



BLAKE R. BURNS
115 North Henderson St.
Fort Worth, Texas 76102
(817) 870-1544 FAX 870-1589
State Bar No. 24066989

CERTIFICATE OF COMPLIANCE

I hereby certify that this document contains 3745 words.

BLAKE R. BURNS
115 North Henderson St.
Fort Worth, Texas 76102
(817) 870-1544 FAX 870-1589
State Bar No. 24066989

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition For Review was mailed postage prepaid to the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711, and to Charles "Chuck" Mallin, with the Appellate Section of the Tarrant County District Attorney's Office, 4th Floor, 401 W. Weatherford Street, Fort Worth, Texas 87196 on this the 28th day of October, 2013.

BLAKE R. BURNS

NO. 94259-J

IN THE MATTER	§	IN THE JUVENILE COURT
OF	§	323RD JUDICIAL DISTRICT
CHRIS PAUL HUBBARD, III. **AKA: CHRISTOPHER PAUL HUBBARD, JR.**	§	TARRANT COUNTY, TEXAS

JUDGMENT

IN THE MATTER OF **CHRIS PAUL HUBBARD, III., AKA: CHRISTOPHER PAUL HUBBARD, JR.**, born on the **26TH DAY OF AUGUST, 1994.**

ON THIS THE **3RD DAY OF AUGUST, 2011**, in this Court there was called a hearing for consideration of the matters in the above styled and numbered cause, wherein by proper petition, the respondent, **CHRIS PAUL HUBBARD, III., AKA: CHRISTOPHER PAUL HUBBARD, JR.**, was alleged to have engaged in delinquent conduct, namely, **MURDER.**

After due notice had been served on all parties for the time required by law, came and appeared the petitioner by its Assistant District Attorneys, **RONALD HUSEMAN** and **VICKI FOSTER**, and announced ready for such hearing. And thereupon, also came the child, who appeared in person with Attorneys, **CANDACE TAYLOR AND FELIPE CALZADA**, and his parent(s)/guardian(s), **DONNA HUBBARD**, also being present and on the **3RD DAY OF AUGUST, 2011**, announced ready for such hearing, and a jury was duly selected, impaneled and sworn,

Court's Minutes
Transaction # 83

who having the evidence submitted and having been duly charged by the Court, retired to consider their verdict and afterward on the **8TH DAY OF AUGUST, 2011,** returned into Court in due form of law the following answer to the question recited in said charge which was received by the Court and now entered upon the minutes of the Court:

SPECIAL ISSUE NUMBER ONE:

Do you find from the evidence beyond a reasonable doubt that the Respondent **CHRISTOPHER PAUL HUBBARD, JR.,** on or about the **26TH DAY OF FEBRUARY, 2011,** in the County of Tarrant and State of Texas, engaged in delinquent conduct by committing the offense of **MURDER** as hereinbefore defined?

ANSWER: We do or We do not.

ANSWER OF THE JURY: **We do**.

It appearing to the Court that the question(s) listed above was properly signed by the Presiding Juror, **VERLYN SALZAR,** it is considered by the Court that **CHRISTOPHER PAUL HUBBARD, JR.,** is adjudged to have engaged in delinquent conduct within the meaning of Title 3 of the Texas Family Code.

VERDICT OF THE JURY

We, the Jury, find that the Juvenile Respondent, **CHRISTOPHER PAUL HUBBARD, JR.,** engaged in delinquent conduct in Paragraph(s) **ONE AND TWO** of the petition for the offense(s) of **MURDER,**

Section(s) 19.02 of the Texas Penal Code, which is a **FELONY**, and the date of offense(s) was the **26TH DAY OF FEBRUARY, 2011.**

SIGNED on this the 11 day of August, 2011.

JUDGE OF THE 323RD DISTRICT COURT
TARRANT COUNTY, TEXAS

COMMITMENT
TEXAS YOUTH COMMISSION

NO. 94259-J

IN THE MATTER	}{	IN THE 323RD DISTRICT
OF	}{	COURT OF
CHRIS PAUL HUBBARD, III. **AKA: CHRISTOPHER PAUL HUBBARD, JR.**	}{	TARRANT COUNTY, TEXAS

BE IT REMEMBERED that on the 3RD DAY OF AUGUST, 2011, came on to be heard the above styled and numbered cause. And after due notice had been served on all parties for the time required by law, came and appeared the petitioner by its District Attorney, **RONALD HUSEMAN AND VICKI FOSTER**. And thereupon also came the child who appeared in person with **CANDACE TAYLOR AND FELIPE CALZADA**, Attorneys for the child and **DONNA HUBBARD**, parent(s)/guardian(s) of the child, and all parties announced ready for such hearings; and thereupon the Jury, after hearing the pleadings of all the parties and hearing the evidence and argument of counsel, finds that the child engaged in delinquent conduct as alleged in the Petition, in violation of Section 19.02 of the Texas Penal Code. The Jury also finds that the child is in need of rehabilitation and that the protection of the public and the child requires that the disposition be made. The Jury also finds that said child at the time of this hearing was 16 years of age having been born on the 8-26-94.

Court's Minutes
Transaction # 84

The Court finds that it is in the child's best interest to be placed outside the child's home. The Court also finds that reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home and the child, in the child's home, cannot be provided the quality of care and the level of support and supervision that the child needs to meet the conditions of probation.

It further appears to the Court that the best interest of the child and the best interest of society will be served by committing **CHRIS PAUL HUBBARD, III., AKA: CHRISTOPHER PAUL HUBBARD, JR.,** TO THE CARE, CUSTODY AND CONTROL OF THE TEXAS YOUTH COMMISSION for the following reason: the child needs a highly structured environment with constant supervision and control.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the said **CHRIS PAUL HUBBARD, III., AKA: CHRISTOPHER PAUL HUBBARD, JR.,** IS HEREBY committed to the care, custody and control of the TEXAS YOUTH COMMISSION in accordance with Article 61.084, V.A.T.H.R.C. for a term of **30 YEARS**, to be served in the custody of the Texas Youth Commission with a possible transfer to the Institutional Division of the Texas Department of Criminal Justice.

The Jury affirmatively finds that the Respondent used or exhibited a deadly weapon, to-wit: a firearm, during the commission of the offense or during the immediate flight therefrom.

The Court further finds that the child has been continuously detained in custody in a secure detention facility for this offense since 2/27/11. It is ordered that **CHRIS PAUL HUBBARD, III., AKA: CHRISTOPHER PAUL HUBBARD, JR.**, be given credit on his sentence in cause number **94259-J** for the time spent in custody since **2/27/11** in connection with the conduct for which he was adjudicated through the date that **CHRIS PAUL HUBBARD, III., AKA: CHRISTOPHER PAUL HUBBARD, JR.** is transferred to a Texas Youth Commission facility. The child is ORDERED to be placed in the CUSTODY OF THE CHIEF JUVENILE PROBATION OFFICER pending transportation to the proper Texas Youth Commission Facility. Prior orders, if any, of Child Support and/or Restitution are hereby terminated. The Clerk of this Court will furnish the child a copy of this order, taking receipt therefore.

The child's thumbprint is affixed to this Order in compliance with Section 54.04 (j) of the Texas Family Code.

SIGNED on this the 11 day of August, 2011.

SJB 8-11-11

JUDGE, 323RD JUDICIAL DISTRICT

8/11/11

CAUSE NO. 94259-J11

IN THE MATTER	{}	IN THE 323rd DISTRICT
OF	{}	COURT OF
CHRISTOPHER PAUL HUBBARD, JR.	{}	TARRANT COUNTY, TEXAS

COURT'S CHARGE

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you on special issues consisting of specific questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and of the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice, or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court; that is, what you have seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win and then try to answer the questions accordingly. Simply answer the questions from the evidence introduced before you and do not discuss or concern yourselves with the effect of your answers.

5. Your verdict must be unanimous. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys, and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time would have been wasted.

The presiding juror or any other juror who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

In this case, CHRISTOPHER PAUL HUBBARD JR. is alleged to be a child who had engaged in delinquent conduct. He stands charged by Petition with a violation of Section 19.02 of the Texas Penal Code, alleged to have been committed on or about the 26th day of February, 2011, in Tarrant County, Texas.

CHRISTOPHER PAUL HUBBARD JR. has denied the allegations in the Petition.

You are instructed that "child" means a person who is ten years of age or older and under seventeen years of age.

You are instructed that "delinquent conduct" is conduct that violates a penal law of this state punishable by imprisonment, if the child was an adult, and that Section 19.02 of the Penal Code is a penal law of this state punishable by imprisonment.

Our law provides that a person commits the offense of murder if he intentionally or knowingly causes the death of an individual or with the intent to cause serious bodily injury to another, commits an act clearly dangerous to human life which causes the death of an individual.

A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.

A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

"Deadly weapon" is a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or seriously bodily injury; or anything that in the manner of its use or intended use is capable of causing death or 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.

"Act" means a bodily movement, whether voluntary or involuntary and includes speech.

"Individual" means a human being who has been born and is alive.

"Actor" means a person whose criminal responsibility is in issue in a criminal action.

You are instructed that our law provides that a Respondent may testify in his own behalf if he chooses to do so. This, however, is a right accorded to a Respondent, and in the event he chooses not to testify, that fact cannot be taken as a circumstance against him.

In this case, the Respondent has chosen not to testify, and you're instructed that you cannot and must not refer to, allude to, comment on, or discuss that fact through your deliberations or take it into consideration for any purposes whatsoever as a circumstance against him.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt as to whether respondent has engaged in delinquent conduct by committing the offense of murder, then you will find him not delinquent.

A person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force.

The use of force against another is not justified in response to verbal provocation alone. The use of force against another is not justified if the person provoked the other's use or attempted use of unlawful force. The use of force against another is not justified if the person sought an explanation from or discussion with the other person while carrying an unlawful weapon.

A person is justified in using deadly force against another if he would be justified in using force against the other, and if a reasonable person in the actor's situation would not have retreated; and when and to the degree he reasonably believes the deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force.

"Reasonable belief" means a belief that would be held by an ordinary and prudent person in the same circumstances as the actor.

"Deadly force" means force that is intended or known by the actor to cause death or serious bodily injury, or in the manner of its use or intended use is capable of causing death or serious bodily injury.

Each party to an offense may be charged with commission of the offense.

All persons are parties to an offense who are guilty of acting together in the commission of the offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids or attempts to aid the other person to commit the offense.

Mere presence alone will not constitute one a party to an offense.

You are the exclusive judges of the facts proved, of the credibility of the witnesses, and the weight to be given their testimony, but you must be governed by the law you shall receive in these written instructions.

Now, if you find from the evidence beyond a reasonable doubt that on or about the 26th day of February, 2011, in the County of Tarrant and State of Texas, CHRISTOPHER PAUL HUBBARD JR., either acting alone or as a party, intentionally or knowingly caused the death of an individual, MERCEDES SMITH, by shooting MERCEDES SMITH with a deadly weapon, to wit, a firearm, or that CHRISTOPHER PAUL HUBBARD JR., acting alone or as a party, intended to cause serious bodily injury to MERCEDES SMITH and committed an act clearly dangerous to human life that caused the death of an individual, MERCEDES SMITH, namely, shooting him with a deadly weapon, to wit, a firearm, which caused the death of MERCEDES SMITH, then you will find that the Respondent CHRISTOPHER PAUL HUBBARD JR. is a child who has engaged in delinquent conduct by committing murder and so say by your verdict, but if you do not so find, or if you have a reasonable doubt thereof, you will say by your verdict that CHRISTOPHER PAUL HUBBARD JR. is not a child who has engaged in delinquent conduct.

SPECIAL ISSUE NUMBER ONE:

Do you find from the evidence beyond a reasonable doubt that the Respondent CHRISTOPHER PAUL HUBBARD JR., on or about the 26th day of February, 2011, in the County of Tarrant and State of Texas, engaged in delinquent conduct by committing the offense of murder as hereinbefore defined?

ANSWER: We do or We do not.

YOUR ANSWER: We do

After you retire to the jury room, you will select your presiding juror, and you will then deliberate upon your answers to the questions asked.

It is the duty of the presiding juror:

a) To preside during your deliberations;
b) To see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this case;
c) To communicate with the Court in writing any matter on which you desire further instructions;
d) To vote on the issues;
e) To write your answers to the issues in the spaces provided; and
f) To certify to your verdict in the space provided for the presiding juror's signature.

During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

After you have retired to consider your verdict, no one has any authority to communicate with you except the bailiff or the Judge of the Court. You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the Court of this fact.

When you have answered all the foregoing issues which you are required to answer under the instructions of the Court, you will advise the bailiff at the door of the jury room that you have reached a verdict, and then you will return into Court with your verdict.

Jean Hudson Boyd
JUDGE PRESIDING

CERTIFICATE

We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror if unanimous.)

PRESIDING JUROR'S SIGNATURE

CAUSE NO. 323-94259-J-11

IN THE MATTER	IN THE JUVENILE COURT
OF	323RD JUDICIAL DISTRICT
CHRISTOPHER PAUL HUBBARD JR.	TARRANT COUNTY, TEXAS

CHARGE OF THE COURT ON DISPOSITION

MEMBERS OF THE JURY:

You have found that the Juvenile-Respondent, CHRISTOPHER PAUL HUBBARD JR., has engaged in delinquent conduct in that he committed the offense of murder as alleged in the Petition.

It is now your duty to determine whether there should be a disposition in the case, and if so, what that disposition should be. Your findings on special issues and your verdicts must all be unanimous.

Under our law, you may sentence the Juvenile-Respondent to commitment in the Texas Youth Commission with a possible transfer to the Institutional Division of the Texas Department of Criminal Justice for any term of years not to exceed 40 years for the offense of murder.

If you sentence the Juvenile-Respondent for a term of 10 years or less, you may place the Juvenile-Respondent on probation as an alternative to committing the Respondent to the Texas Youth Commission with a possible transfer to the Institutional Division of the Texas Department of Criminal Justice.

If you place the Juvenile-Respondent on probation under this provision, the Court shall prescribe the period of probation for a term not to exceed 10 years.

Court's Minutes
Transaction # 78

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11

If you place the Juvenile-Respondent on probation, the terms and conditions of probation will be determined by this Court, and you are not to concern yourselves with the conditions of probation that will be set by this Court in the event you place the Juvenile-Respondent on probation.

If you sentence the Juvenile-Respondent to a commitment for a term of years, the length of time that the Juvenile-Respondent will remain in the custody of the Texas Youth Commission and whether he will be transferred to the Institutional Division of the Texas Department of Criminal Justice will be determined at a later date.

If the Juvenile-Respondent is transferred to the Institutional Division of the Texas Department of Criminal Justice, the length of time he will remain in the Institutional Division of the Texas Department of Criminal Justice will be determined within the law's limits by the Texas Board of Pardons and Paroles.

You are not to concern yourselves with these matters in the event you sentence the Juvenile-Respondent to a term of years.

Before you arrive at your disposition verdict in this case, you must answer Special Issue Number One based upon the evidence you have heard and seen in this courtroom in the adjudication and disposition hearings in this case.

SPECIAL ISSUE NUMBER ONE:

Do you find from the evidence beyond a reasonable doubt that the Juvenile-Respondent, CHRISTOPHER PAUL HUBBARD JR., is in need of rehabilitation or that the protection of the public or the Juvenile-Respondent requires that a disposition be made in this case?

ANSWER: "We do" or "We do not".

YOUR ANSWER: We do

If you have answered Special Issue Number One "We Do", then proceed on to the Verdict Form. If you have answered Special Issue Number One "We Do Not", simply sign the Certificate and skip the Verdict Form.

In arriving at your verdict as to disposition, it will not be proper to fix your verdict by lot, chance, or any other method than by a full, fair, and free exercise of the opinion of the individual jurors under the evidence admitted before you at the adjudication and disposition hearings in this case.

After you have arrived at your verdict as to disposition, use the form attached hereto by having the presiding juror sign his or her name to the form that conforms to your verdict.

Susan Weedon Boyd
JUDGE PRESIDING

VERDICT FORM

QUESTION NUMBER ONE:

WE, THE JURY, having found that the Juvenile-Respondent, CHRISTOPHER PAUL HUBBARD JR., engaged in delinquent conduct as alleged in the Petition, to wit, murder, sentence him to the Texas Youth Commission for 30 (Any term not to exceed 40 years.)

QUESTION NUMBER TWO:

Do you find from the evidence beyond a reasonable doubt that on the 26th day of February, 2011, in Tarrant County, Texas, that Christopher Paul Hubbard Jr. used or exhibited a deadly weapon during the commission of the conduct or during the immediate flight from the commission of the conduct?

ANSWER: We do or We do not. YOUR ANSWER: we do

If you have sentenced the Juvenile-Respondent to a commitment in the Texas Youth Commission for a term of not more than 10 years, do you place the Juvenile/Respondent on probation as an alternative to committing the Juvenile-Respondent to the Texas Youth Commission?

ANSWER: We do or We do not. YOUR ANSWER: we do not

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-11-00335-CV

In the Matter of C.H., A Minor Child	§	From the 323rd District Court
	§	of Tarrant County (323-94259J-11)
	§	September 12, 2013
	§	Opinion by Justice Dauphinot

JUDGMENT

This court has considered the record on appeal in this case and holds that there was no error in the trial court's judgment. It is ordered that the judgment of the trial court is affirmed.

SECOND DISTRICT COURT OF APPEALS

By _____
Justice Lee Ann Dauphinot

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-11-00335-CV

IN THE MATTER OF C.H., A MINOR CHILD

FROM THE 323RD DISTRICT COURT OF TARRANT COUNTY

OPINION

A jury found Appellant C.H. delinquent for committing murder and assessed his disposition at thirty years' confinement in the Texas Youth Commission with a possible transfer to the Institutional Division of the Texas Department of Criminal Justice.[1] The trial court adjudicated Appellant delinquent and entered a commitment order in accordance with the jury's verdict. Appellant does not challenge the sufficiency of the evidence. Instead, in his seven issues,

[1]*See* Tex. Fam. Code Ann. § 54.04(d)(3)(A) (West Supp. 2012).

Appellant raises voir dire, evidentiary, and jury charge complaints. Because we hold that the trial court did not reversibly err, we affirm the trial court's judgment.

I. Statement of Facts

A. The Offense

Eric Robinson (Robinson) got into a disagreement with his sister's boyfriend, Javontae Brown, outside Brown's home. Later that morning, Robinson and Brown spoke on the phone and agreed to meet up for a fist fight. Robinson waited at the agreed-upon site with his brother, Mercedes Smith, and his cousin, Dammion Armstead, but Brown did not show up. Shortly afterward, an incident involving a gun happened between Smith and Brown at another location.

Soon thereafter, Robinson, Armstead, Smith, and two other cousins of Robinson's met with Brown, Appellant, and others at the Green Fields, a park in the Como neighborhood of Fort Worth, to fight. When Robinson began walking toward the opposing group, another man in the group began shooting at Robinson. Smith began to shoot at that group, and then everyone returned to their respective cars and drove off, uninjured.

Smith's fiancée testified that about 1:30 or 2:00 p.m. that day, she saw Appellant, Brown, and another man unloading guns from the trunk of a black Monte Carlo and walking toward a dumpster near the Como community center. She called Smith and told him what she had seen. She then went to visit Smith in person, and they were together until about 3:30 p.m.

Sometime later that afternoon, Smith, Armstead, and Ashton Robinson (Ashton), another cousin, were driving past the Como community center in a Chevy Equinox SUV when they saw Brown and Appellant, armed, outside. Ashton saw Brown holding a handgun up to his chest and standing behind the dumpster. Ashton saw Appellant run toward the back of the property, grab an assault rifle, and run up the hill toward the sidewalk and street. Ashton testified that Appellant shot into the Equinox at his cousins and him repeatedly, killing Smith, but that Brown, although he carried a pistol, never fired a shot.

Armstead testified that he, Smith, and Ashton left their uncle's garage that afternoon and drove down Horne Street. Armstead spotted Appellant standing near the dumpster. As they passed Appellant, Armstead could see that Appellant had "a long gun, like a rifle," with the barrel pointed up. Armstead also saw Brown standing by the dumpster, but he testified that he never saw a gun in Brown's hand during the entire incident. However, Armstead also admitted that he had told the police that Brown had a handgun, shot a couple of times, and ran across the street. Armstead further testified that he had seen the revolver in Brown's hand. Armstead maintained, however, that he never saw Brown with a "long gun" or "big gun."

Smith, who was driving, held a gun in his hand, cocking it on top of the steering wheel as he drove in the vicinity of the community center and the neighboring convenience store. After Armstead told Smith that Appellant had a gun and to keep driving, Smith instead put the car in reverse, backed up to

Appellant and Brown's location, and pointed his gun at Appellant. Armstead testified that Appellant and Brown could not see the gun but also admitted that he really did not know whether they could see it. He maintained that they could not have seen the gun before Smith backed up. Armstead testified that Smith tried to show his gun to Appellant and Brown but that they started shooting before he could get close enough. Armstead admitted that he had not told the police that Smith had backed the car up but insisted that he had told the police that Smith had a gun.

Detective Sarah Waters of the Fort Worth Police Department testified that Armstead told her

> that as they were turning the corner[, Smith] pulled the gun out and cocked it, so that aroused some concern. [Detective Waters] said, what did he do with the gun? And [Armstead] said he held it up and showed it to them to let them know he had a gun for protection.
>
> [Detective Waters] said, did he point it at them? Did he hold it out the window? And [Armstead's] response was no. If he had pointed at them, I figure he would have squoze (sic) one off, meaning he would have shot at them. All he did was hold it up . . . .

Detective Waters further testified that Armstead had told her that "[Smith] held the gun up, just up inside the car, it was not pointed out, it was just held up inside the car, never pointed out the window, never pointed at anyone."

Armstead testified that Appellant and Smith exchanged angry words and that then Appellant began shooting. But Armstead also testified that he did not remember them exchanging words. Instead, Appellant just opened fire when Mercedes backed up; "gunfire was spoken." Smith was shot in the back of the

head and died instantly. Armstead heard about six or seven rapidly fired rounds before returning fire. Appellant and Brown left the scene together.

The evidence conflicted regarding whether Appellant or Brown shot Smith. Smith's cousins testified that Appellant shot Smith. An eyewitness who was in the parking lot of the nearby convenience store testified that he heard repeated firing, "more than three or five" rounds, and that he saw the gunman "centered up in the middle of the street." The witness had seen the gunman before but did not know his name. The witness testified that the shooter was not in the courtroom (Appellant was in the courtroom). The witness also said that he saw Appellant get in the front seat of the same car that the shooter got in after the incident. The witness further testified that he never saw Appellant with a gun.

Within hours of the murder, the convenience store manager told the police that he was outside when the shooting occurred, that Appellant was shooting the rifle during the murder, and that he handed it to Brown during the gun battle. At trial, the manager testified that he heard shots from inside the store and went outside to find out what was happening. He testified that he saw Appellant and Brown "jump" in a car, with Brown carrying the rifle, and leave. The store manager testified that he did not see the shooting and that he had told the prosecutor that he was afraid to testify. He also testified without objection that he had heard "on the street" and told the police that Appellant had shot several times and that then Appellant and Brown had switched guns and continued shooting.

Homicide Detective Thomas Wayne Boetcher of the Fort Worth Police Department testified that the store manager had told him that he had seen Appellant shooting a rifle at "something down the street." Detective Boetcher also testified that the store manager told him that Appellant then gave the rifle to Brown, who also shot it. Detective Boetcher further testified that the store manager had not indicated that he was scared of retaliation.

Similarly, a female eyewitness, Felicia Houston, told police about a month after Smith's death that both Brown and Appellant were shooting. At trial, she testified that she could not remember whether Appellant had a gun but that she had seen Brown shoot a long gun repeatedly. She admitted that she had identified Appellant in a photo lineup and had told the police that "he was shooting, then ran and got in a car with [another man]." She also testified, however, that even in the photo lineup, it was Brown she associated with the "big gun."

Detective Waters testified that Houston had told her that she had seen Appellant shooting and that in the photo lineups, Houston had identified Appellant and Brown as shooters and Brown as the shooter of the "big gun."

Robinson testified that Houston was Brown's neighbor and had seen some of the events of his altercation with Brown that began that morning.

The jury also saw a black-and-white surveillance video from the convenience store taken at the time of the shooting. It partially captured the shooting.

Fifteen .30 shell casings from a .30 assault rifle were found at the scene. Four nine-millimeter casings were also found. The bullet that killed Smith was changed upon firing, and Victoria Lynn Kujala, Senior Forensic Scientist, Firearms, and Tool Mark Examiner at the Fort Worth Police Department Crime Laboratory, testified that she could not say with certainty that it matched the casings, but she also testified that it was consistent with a .30 caliber bullet and that it and a .30 caliber bullet recovered from the Chevy Equinox were fired from the same gun.

B. Procedural Facts

During voir dire, the State exercised peremptory challenges on the two black veniremembers in the strike zone, and Appellant raised a *Batson*[2] challenge to both. As to one of the venire members struck, the State responded that the panel member had initially said that she could not sit in judgment of another individual and that although she later changed that answer, that alone was a cause for striking her. Additionally, the prosecutor stated that on her jury questionnaire, the veniremember had written that her mother had been arrested for possession of a controlled substance, and "[t]hat would indicate that she may hold that against the State, she's probably not going to be very happy with the State when her mother has been through this process as a Defendant." And also on the questionnaire, in ranking the purpose of the judicial system, "she was

[2]*Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986).

supposed to give a ranking to rehabilitation, deterrence, or punishment," but "[s]he wasn't able to fill out the form correctly, and also she checked, she put an "X" by deterrence." The State's attorney took that "to mean that she thinks that deterrence is the most important aspect of punishment in the criminal justice [system], and so that's a race-neutral reason why [he] wanted to strike her as well."

As for the other challenged venire member, the State's attorney pointed out that the jury questionnaire asked about unpleasant experiences with the police, and contended, "She said her daughter was arrested for speeding and tickets and nonpayment, so the race-neutral reason that I struck her was because she's going to hold that against the State." Additionally, "on question number 24, she ranked deterrence as the number one goal of the criminal justice system or the punishment, and that's another race-neutral reason why she was struck."

The trial court implicitly overruled Appellant's *Batson* challenges.[3] Appellant offered no evidence to rebut the State's explanations for the strikes. When he tried to have the jury questionnaires made part of the appellate record about six months after the trial ended, he learned that they had apparently been destroyed after trial.

[3] *See id.* at 96–98, 106 S. Ct. at 1723–25; *see also* Tex. R. App. P. 33.1(a); *Thomas v. Long*, 207 S.W.3d 334, 339–40 (Tex. 2006); *Montanez v. State*, 195 S.W.3d 101, 105 (Tex. Crim. App. 2006).

More than three months before trial started, the State filed a notice of potential *Brady*[4] material concerning a conversation that Detective Waters had with the cellmate of co-defendant Brown. The notice states that Detective Waters had informed the State "that a fellow inmate of [Brown] was saying that [Brown] claimed to have been involved in a murder and that he was going to blame or 'pin' responsibility for the crime on the '16 yr old' who also participated in the murder." The notice further states that the State "learned a few days later that the fellow inmate was possibly a person named Eric Jaubert." The notice also states that Detective Waters had said that she was going to investigate this matter.

When Detective Waters testified at trial, Appellant asked her on cross-examination if she had spoken with Jaubert. The State objected on relevance grounds. After an off-the-record discussion, the trial court allowed Appellant to make an offer of proof outside the presence of the jury. Detective Waters acknowledged when asked that Jaubert had made a "vague reference" to a plan by Brown to "pin" the shooting on Appellant. She stated that the information Jaubert gave the police was "somewhat credible, but sketchy" in that it was "very minimal." The State objected to testimony about Jaubert's statements, and the trial court sustained the objection.

[4] *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97 (1963).

The trial court's jury charge included self-defense in the abstract portion but did not include self-defense in the application paragraph. The jury charge included both abstract and application paragraphs on the law of parties.

II. Voir Dire

A. Jury Questionnaires

In his first three issues, Appellant complains about the destruction of the jury questionnaires. In his first issue, he contends that the rules of appellate procedure require that he receive a new trial because a significant exhibit or portion of the record has been lost or destroyed.[5] Jury questionnaires are not included in the list of items required by rule 34.6 of the rules of appellate procedure to be included in the appellate record.[6] Additionally, the record does not show that Appellant took any timely step below to ensure that the jury questionnaires would be included in the trial record and therefore in the appellate record before us; that is, he did not offer the jury questionnaires into evidence.[7] Further, even though, as the State candidly concedes, the prosecutor discussed the answers of the two veniremembers in the *Batson* hearing, neither Appellant

[5]*See* Tex. R. App. P. 34.6(f).

[6]*See* Tex. R. App. P. 34.6(a)(1) ("[T]he reporter's record consists of the court reporter's transcription of so much of the proceedings, and any of the exhibits, that the parties to the appeal designate.").

[7]*See Vargas v. State*, 838 S.W.2d 552, 556–57 (Tex. Crim. App. 1992) (holding that jury questionnaires could not be considered by an appellate court in evaluating a *Batson* claim because they were never before the trial court).

nor the trial court referred to information from the questionnaires, and there is no indication that the parties and the trial court considered the questionnaires themselves to be a significant part of the *Batson* evidence.[8] Consequently, even if the questionnaires had not been destroyed, because they were neither admitted nor treated as evidence in the *Batson* hearing, we would not consider them in this case.[9]

Finally, even if we were to consider as *Batson* evidence that small portion of the questionnaires referred to by the prosecutor in the *Batson* hearing,[10] Appellant's delay in requesting that the questionnaires be made part of the appellate record would foreclose any right he might have to a new trial based on a lost exhibit. Rule 34.6(b) of the appellate rules of procedure provides that "[*a*]*t or before the time for perfecting the appeal*, the appellant must request in writing that the official reporter prepare the reporter's record."[11] While supplementation of the record is allowed,[12] subsection (f) requires that an appellant seeking a new

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[8]*See Cornish v. State*, 848 S.W.2d 144, 145 (Tex. Crim. App. 1993) (noting that "defense counsel specifically referred to the juror information cards for the purposes of a comparison analysis and the trial court replied that, '(t)he cards will speak for themselves,'" concluding that the parties and trial judge treated the cards "as a significant part of the [*Batson*] evidence," and therefore holding that the juror information cards could be considered on appeal).

[9]*See Vargas*, 838 S.W.2d at 556.

[10]*See Cornish*, 848 S.W.2d at 145.

[11]*See* Tex. R. App. P. 34.6(b)(1) (emphasis added).

[12]*See* Tex. R. App. P. 34.6(d).

trial based on a lost or destroyed portion of the reporter's record must have first *timely* requested a reporter's record and "*without the appellant's fault*, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed."[13] In Appellant's original request for a reporter's record, he asked that "a transcript of all proceedings therein, including all pretrial hearings, opening statements, trial testimony and hearings, and post-trial matters in question and answer form as a Reporter's Record be prepared." He did not ask for the jury questionnaires. Appellant did not specifically request that the record be supplemented with the jury questionnaires in the trial court until February 29, 2012, more than six months after the trial ended and after appeal was perfected.[14] Thus, even if we were to treat that portion of the questionnaires referred to by the prosecutor in the *Batson* hearing as a *Batson* exhibit and therefore part of the trial court record, it would not be a timely requested exhibit.[15] Appellant would therefore not be entitled to a new trial under the appellate rules based on the destruction of the jury questionnaires.[16] We overrule Appellant's first issue.

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[13]*See* Tex. R. App. P. 34.6(f)(1)–(2) (emphasis added).

[14]*See* Tex. R. App. P. 34.6(b), (f)(1)–(2); *Piotrowski v. Minns*, 873 S.W.2d 368, 370 (Tex. 1993) ("At every stage of the proceedings in the trial court, litigants must exercise some diligence to ensure that a record of any error will be available in the event that an appeal will be necessary.").

[15]*See* Tex. R. App. P. 34.6(b), (f)(1)–(2); *Piotrowski*, 873 S.W.2d at 370.

[16]*See id.*

In Appellant's second issue, he contends that the destruction of the juror questionnaires constituted a violation of due process under both the federal and Texas constitutions. Appellant does not contend that rule 34.6(f), which we held above does not entitle him to a new trial, is unconstitutional. He also did not raise these contentions below. Because the destruction of the documents happened after the trial court lost jurisdiction, however, we will address the issue in the interest of justice.

Although juvenile delinquency proceedings are civil in nature, the child is entitled to due process and fair treatment because the proceedings may result in the child being deprived of liberty.[17] Even though a juvenile does not have a right to a jury under the federal constitution and may not have such a right under the state constitution,[18] the legislature has given a right to jury trials to juveniles.[19] Because Texas has chosen to grant that right, it must also act in accordance with due process.[20]

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[17]*In re J.R.R.*, 696 S.W.2d 382, 383 (Tex. 1985); *In re T.L.K.*, 316 S.W.3d 701, 702 (Tex. App.—Fort Worth 2010, no pet.).

[18]*See McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 91 S. Ct. 1976, 1986 (1971) (holding that juvenile has no federal constitutional right to jury trial in adjudicative phase); *In re R.R.*, 373 S.W.3d 730, 730 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (holding that juvenile has no state constitutional right to jury trial).

[19]*See* Tex. Fam. Code Ann. § 54.03(b) (West Supp. 2012).

[20]*See M.L.B. v. S.L.J.*, 519 U.S. 102, 110–11, 117 S. Ct. 555, 561 (1996) (recognizing that although the federal constitution guarantees no right to appellate review, it is fundamental that once a state affords that right, it must be

Voir dire plays a key role in ensuring the right to an impartial jury by allowing the parties to identify and exclude undesirable jurors.[21] "[C]ounsel must be diligent in eliciting pertinent information from prospective jurors during voir dire in an effort to uncover potential prejudice or bias, and counsel has an obligation to ask questions calculated to bring out information that might indicate a juror's inability to be impartial."[22] Counsel must therefore "not rely on written questionnaires to supply" material data.[23]

Appellant does not challenge appellate rule 34.6(f), the rule put in place by the judiciary for handling record disputes, and we have already held that under that rule, he is not entitled to a new trial. Appellant's lack of diligence during voir dire, especially during the *Batson* hearing, placed him outside that rule's protections. Because Appellant does not challenge the procedures in place and

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kept free of unreasoned distinctions that can only impede open and equal access to the courts); *Evitts v. Lucey*, 469 U.S. 387, 401, 105 S. Ct. 830, 839 (1985) ("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."); *In re K.L.*, 91 S.W.3d 1, 5–6 & n.16 (Tex. App.—Fort Worth 2002, no pet.) (citing both *M.L.B.* and *Evitts* for proposition that statutory right to appointed counsel in parental termination cases embodies right to effective counsel).

[21]*Bancroft v. State*, No. 02-10-00040-CR, 2011 WL 167070, at *2 (Tex. App.—Fort Worth Jan. 20, 2011, pet. ref'd) (mem. op., not designated for publication) (citing *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S. Ct. 2222, 2230 (1992)).

[22]*Id.*

[23]*Id.*

because it is not the procedures imposed by the State of Texas but Appellant's failure to timely avail himself of them that resulted in his predicament, we overrule his second issue.

In his third issue, Appellant contends that the destruction of the juror questionnaires violated the public's First Amendment right to access. Even if Appellant has standing to raise this challenge,[24] which we do not hold, he does not challenge section 54.08 of the family code, which allows the trial court to eliminate or restrict the public's access to juvenile trials in some instances,[25] nor does he point to any evidence from the record that this jury trial was closed to the public. Finally, again, the questionnaires are absent from the record not because of the trial court's actions but because Appellant did not timely ensure that the questionnaires were included in the record by offering them into evidence at the *Batson* hearing. We therefore overrule Appellant's third issue.[26]

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[24]*See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471, 472, 102 S. Ct. 752, 758–59 (1982); *Bonilla v. State*, No. 05-11-01489-CR, 2012 WL 6178254, at *3–4 (Tex. App.—Dallas Dec. 12, 2012, no pet.) (not designated for publication).

[25]*See* Tex. Fam. Code Ann. § 54.08 (West 2008).

[26]*See Ibarra v. State*, No. 05-09-01063-CR, 2011 WL 5042081, at *5 (Tex. App.—Dallas Oct. 25, 2011, no pet.) (not designated for publication) (holding that Ibarra was not entitled to a new trial under rule 34.6(f) and not reaching his constitutional complaints because of that holding).

B. *Batson* Challenges

In his fourth issue, Appellant contends that the trial court erred by overruling his *Batson* challenges.[27] The *Batson* hearing played out as follows:

> [Appellant's Trial Counsel]: Prior to them coming in, we'd like racially-neutral reasons as to why 21 and 28 were stricken. We'll make a *Batson* challenge at this time.
>
> THE COURT: All right.
>
> [Prosecutor]: Judge, she has yet to make a prima facie showing, judge.
>
> [Appellant's Trial Counsel]: There were—my client is African-American, Your Honor. The two available jurors of his race were within the strike zone. Both were stricken. The State exercised peremptory challenges on both of the African-American jurors within the strike range. We feel that [Appellant] is entitled to a jury of his peers.
>
> THE COURT: What numbers were those?
>
> [Appellant's Trial Counsel]: Twenty-one and twenty-eight.
>
> THE COURT: All right. Do you wish to respond?
>
> [Prosecutor]: Yeah, I do, Judge. As far as Juror Number 21, as far as the questionnaire, not to mention what she initially, during the voir dire in the questioning, she said she couldn't sit in judgment of another individual. Now, she later changed that, but that alone was the cause for me to strike her, a reason for me to strike her, other than her race. But there is more. On her jury questionnaire, in response to question 16, she says that her mother has been arrested for possession of controlled substance. That would indicate that she may hold that against the State, she's probably not going to

[27] *See Goode v. Shoukfeh*, 943 S.W.2d 441, 444 (Tex. 1997) (extending *Batson's* reach to civil cases); *C.E.J. v. State*, 788 S.W.2d 849, 852–58 (Tex. App.—Dallas 1990, writ denied) (holding that *Batson* applies to juvenile delinquency proceedings).

be very happy with the State when her mother has been through this process as a Defendant.

In response to question number 20, she said her mother has been arrested for drug addiction, and then second, using me as two-in-two, K-2. I don't know what that means, but it indicates she couldn't fill out the forms correctly. That's another thing, another race-neutral reason I struck her. And also, in response to question number four, rank the highest purpose of the judicial system, she couldn't—she was supposed to give a ranking to rehabilitation, deterrence, or punishment. She wasn't able to fill out the form correctly, and also she checked, she put an "X" by deterrence, and I would take that to mean that she thinks that deterrence is the most important aspect of punishment in the criminal justice [system], and so that's a race-neutral reason why I wanted to strike her as well.

THE COURT: All right.

[Prosecutor]: As far as number 28, in response to her questionnaire, in response to question number 16: "Have you ever or someone—have you or someone close to you ever had an unpleasant experience with the police"? If yes, please describe, and she says yes, so she's had an unfavorable or unpleasant experience with the police. She said her daughter was arrested for speeding and tickets and nonpayment, so the race-neutral reason that I struck her was because she's going to hold that against the State, and also, on question number 24, she ranked deterrence as the number one goal of the criminal justice system or the punishment, and that's another race-neutral reason why she was struck.

THE COURT: All right.

[Appellant's trial counsel]: Thank you, Your Honor.

THE COURT: All right. All right. We'll call in the panel and I'll seat this jury and we'll go to lunch.

As the Texas Court of Criminal Appeals has explained,

A *Batson* challenge to a peremptory strike consists of three steps. First, the opponent of the strike must establish a *prima facie* showing of racial discrimination. Second, the proponent of the strike must articulate a race-neutral explanation. Third, the trial court must

> decide whether the opponent has proved purposeful racial discrimination.
>
> The trial court's ruling in the third step must be sustained on appeal unless it is clearly erroneous. Because the trial court's ruling requires an evaluation of the credibility and demeanor of prosecutors and venire members, and because this evaluation lies peculiarly within the trial court's province, we defer to the trial court in the absence of exceptional circumstances.[28]

Appellant did nothing in the trial court to satisfy his burden to show that the race-neutral explanations were a pretext for discrimination.[29] He only thanked the trial court after the State offered race-neutral explanations for its peremptory challenges of black veniremembers. We note that it is at this point—voir dire—that Appellant potentially could have effectively and timely relied on the contents of the jury questionnaires to help satisfy his burden and ask that they be made part of the record, not more than six months after the trial ended. Because Appellant has not shown that the trial court's ruling was clearly erroneous, we overrule his fourth issue.

III. Evidentiary Issues

A. *Brady* Issue

In his fifth issue, Appellant contends that the State failed to turn over material evidence in violation of *Brady*. Appellant filed his *Brady* motion on April 7, 2011. At trial, he complained that he had never received the name of the

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[28] *Grant v. State*, 325 S.W.3d 655, 657 (Tex. Crim. App. 2010) (citations omitted).

[29] *See Johnson v. State*, 68 S.W.3d 644, 649 (Tex. Crim. App. 2002).

cellmate. During his offer of proof, he appeared to concede that he had received the name, during his offer of proof, but he then reneged. Appellant now concedes that on April 25, 2011, about two and one-half weeks after he filed his *Brady* motion and more than three months before trial, he received the State's notice of potential *Brady* material and the name of the potential *Brady* witness. That notice provides that Brown's fellow inmate, possibly named Jaubert, had reported that Brown was claiming to have been involved in a murder and planned to place the responsibility for the crime on the "16 yr old" who also participated in the murder. That notice also provides that Detective Waters intended to investigate further.

Detective Waters testified in Appellant's offer of proof that she had videotaped the Jaubert interview and had given the State a copy on April 20. The prosecutor stated on the record that he had "a real good inventory of all the disks [he had] been provided, and [he had] not been provided the interview with Eric Jaubert, either." Detective Waters apologized. The prosecutor then objected to the information "coming in," and the trial court sustained his objection and ordered that "[n]one of this is to be brought up in front of the jury." After the trial court ordered a recess, Appellant stated,

> I'm sorry. I just—regarding my offer of proof, I believe I need to put how I would have handled things differently if I would have received this evidence. I would have subpoenaed Eric Jaubert, or, at a minimum, would have interviewed him myself. I object strenuously to not being allowed to inquire into Detective Waters about this matter.

Later, Appellant again requested that he be allowed "to ask this detective in front of this jury, isn't it true that you never provided anyone the name of Javontae Brown's cell mate?" The prosecutor again referred to the State's April 25, 2011 *Brady* notice, filed in the clerk's record and including a certificate of service that he had sent it to Appellant's counsel by mail, email, and/or fax.

Appellant contends on appeal that the State violated *Brady* by failing to disclose and to turn over to him the videotaped police interview with Jaubert. But Appellant never raised that complaint below. To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if they are not apparent from the context of the request, objection, or motion.[30] If a party fails to do this, error is not preserved, and the complaint is waived.[31] Further, the complaint on appeal must be the same as that presented in the trial court.[32] An appellate court cannot reverse based on a complaint not raised in the trial court.[33] Because Appellant's complaint on appeal differs from his complaint below and is untimely by being first raised on appeal, it is forfeited.[34]

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[30]Tex. R. App. P. 33.1(a).

[31]*Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991) (op. on reh'g).

[32]*See Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997).

[33]*Id.*

[34]*See* Tex. R. App. P. 33.1(a); *Bushell*, 803 S.W.2d at 712; *In re A.C.*, 48 S.W.3d 899, 905 (Tex. App.—Fort Worth 2001, pet. denied) (holding complaint

Additionally, we note that Appellant did not request a continuance so that he might watch the video, and the video is not in the appellate record. Thus, even had he preserved his *Brady* claim, Appellant could not satisfy his burden of showing a reasonable probability that earlier disclosure of the video would have changed the outcome of the trial.[35] We overrule Appellant's fifth issue.

B. Detective Waters's Testimony Concerning Jaubert's Interview

In his sixth issue, Appellant contends that the trial court abused its discretion by excluding Detective Waters's testimony that Jaubert had told her that Brown had stated that he was going to pin the murder on Appellant. As to the trial court's sustaining of the State's relevance objection, we agree with Appellant that evidence that Brown had allegedly admitted to shooting Smith was relevant. Yet, as Detective Waters pointed out in her excluded testimony, "He didn't say he was the only one shooting." Further, other evidence had already been admitted that Brown had shot Smith, and again, the jury charge contained a charge on the law of parties.

Appellant's contention that the exclusion violated his constitutional right to present a defense was not raised below and was therefore forfeited.[36] In the interest of justice, however, we note that our sister court has addressed a very

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made first in A.C.'s first amended motion for new trial when he had notice of the issue before trial and during both phases was untimely).

[35]*See A.C.*, 48 S.W.3d at 905.

[36]*See* Tex. R. App. P. 33.1(a); *Bushell*, 803 S.W.2d at 712.

similar case. In *Hidrogo v. State*[37], Hidrogo had been convicted of capital murder for killing a man while burglarizing the man's home. Another man, Eddie, admitted his involvement in the burglaries. Hidrogo offered evidence that Brian, Eddie's brother, had confessed that he was involved with Eddie in the murder. But the evidence consisted of text messages ostensibly sent from a phone belonging to Ryleigh LeFlame to Hidrogo's niece. LeFlame's texts stated that Brian had told her "that he was there that day and he shot the dude." Hidrogo attempted to get the contents of the text messages admitted into evidence through various witnesses who had read them, but not through LeFlame. The Eastland Court of Appeals held,

> First, we note that the courts . . . recognized that a defendant has a fundamental right to present evidence of a defense as long as the evidence is relevant and is not excluded by an established rule of procedure or evidence designed to assure fairness and reliability. The Court in *Chambers* determined that the hearsay rule may not be applied mechanistically to defeat the ends of justice. The Court held that Chambers was denied a fair trial by the exclusion of hearsay that constituted a declaration against penal interest (though Mississippi had no hearsay exception for declarations against penal interest at that time) and bore persuasive assurances of trustworthiness. In the present case, the text messages were double hearsay, and the proposed testimony of Clark and others who read the messages bore no such assurance of trustworthiness.
>
> Second, the application of the hearsay rule to the present case did not deny appellant the opportunity to present his defense. Had appellant sought to introduce Brian's out-of-court statements through LeFlame, the evidence would have been admissible under Tex.R. Evid. 803(24) as statements against interest. The trial court

[37]*Hidrogo v. State*, 352 S.W.3d 27 (Tex. App.—Eastland 2011, pet. ref'd), *cert. denied*, 133 S. Ct. 194 (2012).

> permitted Leonard Stockinger to testify that he was at LeFlame's house and heard Brian admit to being present when the victim was murdered. According to Stockinger, Brian said he was with Eddie and appellant at the time of the offense, but Brian did not say he shot the victim—only that he spit on the victim. However, there was no such hearsay exception available for the testimony of witnesses such as Clark and her mother because they did not hear Brian's out-of-court statements; they merely read LeFlame's text messages about Brian's statements and attempted to testify regarding the content of LeFlame's out-of-court statements. Appellant was not denied the ability to present a defense; he could have called LeFlame as a witness. We hold that the trial court did not abuse its discretion in excluding the hearsay testimony regarding the text messages.[38]

Similarly, in the case before us, Appellant did not call Jaubert as a witness; he instead attempted to get Jaubert's evidence of Brown's alleged statements before the court through the testimony of Detective Waters even though she described Jaubert's information as "somewhat credible," "sketchy," "not enough to be fleshed out," "very minimal," and "vague innuendo" and described Jaubert as "very strange." Jaubert's information does not bear persuasive indicia of trustworthiness, its exclusion did not prevent Appellant from presenting a defense, and the trial court did not abuse its discretion by excluding it. We overrule Appellant's sixth issue.

IV. Jury Charge

In his seventh issue, Appellant contends that the trial court erred by omitting his claim of self-defense from the application paragraph in the jury charge. The abstract section of the jury charge provides,

[38] *Id.* at 30 (citations omitted).

> A person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force.
>
> The use of force against another is not justified in response to verbal provocation alone. The use of force against another is not justified if the person provoked the other's use or attempted use of unlawful force. The use of force against another is not justified if the person sought an explanation from or discussion with the other person while carrying an unlawful weapon.
>
> A person is justified in using deadly force against another if he would be justified in using force against the other, and if a reasonable person in the actor's situation would not have retreated; and when and to the degree he reasonably believes the deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force.
>
> "Reasonable belief" means a belief that would be held by an ordinary and prudent person in the same circumstances as the actor.
>
> "Deadly force" means force that is intended or known by the actor to cause death or serious bodily injury, or in the manner of its use or intended use is capable of causing death or serious bodily injury.
>
> The application paragraph does not mention or allude to self-defense at all.

At trial, Appellant did not lodge an objection to the charge. As the Supreme Court of Texas recently explained,

> The Family Code provides that in juvenile justice cases, (t)he requirements governing an appeal are as in civil cases generally. In civil cases, unobjected-to charge error is not reversible unless it is fundamental, which occurs only in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas. Fundamental error is reversible if it probably caused the rendition of an improper judgment (or) probably prevented the appellant from properly presenting the case to the court of appeals. But . . . a juvenile proceeding is not

> purely a civil matter. It is quasi-criminal, and . . . general rules requiring preservation in the trial court . . . cannot be applied across the board in juvenile proceedings. In criminal cases, unobjected-to charge error is reversible if it was egregious and created such harm that his trial was not fair or impartial, considering essentially every aspect of the case. If, for example, [i]t is . . . highly likely that the jury's verdicts . . . were, in fact, unanimous, unobjected-to charge error is not reversible.[39]

The Supreme Court of Texas chose not to decide whether the civil standard or *Almanza*[40] applies to jury charge error in juvenile cases, noting that in the case before it, the application of either standard would not result in a reversal.[41] We therefore follow several other intermediate courts in applying the *Almanza* standard of review for unpreserved jury charge error.[42]

As the Texas Court of Criminal Appeals recently reaffirmed,

> The trial judge is ultimately responsible for the accuracy of the jury charge and accompanying instructions. . . . The trial judge has the duty to instruct the jury on the law applicable to the case even if defense counsel fails to object to inclusions or exclusions in the charge. But Article 36.14 imposes no duty on a trial judge to instruct

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[39] *In re L.D.C.*, 400 S.W.3d 572, 574–75 (Tex. 2013) (*L.D.C. II*) (citations and internal quotation marks omitted).

[40] *Almanza v. State*, 686 S.W.2d 157, 171–72 (Tex. Crim. App. 1985) (op. on reh'g).

[41] *L.D.C. II.*, 400 S.W.3d at 575–76.

[42] *See In re L.D.C.*, 357 S.W.3d 124, 132 (Tex. App.—San Antonio 2011) *rev'd*, L.D.C. *II*; *In re A.C.*, No. 11-09-00164-CV, 2011 WL 3925516, at *6 (Tex. App.—Eastland Sept. 8, 2011, pet denied) (mem. op. on reh'g); *In re A.E.B.*, 255 S.W.3d 338, 350 (Tex. App.—Dallas 2008, pet. dism'd); *In re K.W.G.*, 953 S.W.2d 483, 488 (Tex. App.—Texarkana 1997, pet. denied). *But see In re A.A.B.*, 110 S.W.3d 553, 555–60 (Tex. App.—Waco 2003, no pet.) (applying the civil standard).

> the jury *sua sponte* on unrequested defensive issues because an unrequested defensive issue is not the law applicable to the case. A defendant cannot complain on appeal about the trial judge's failure to include a defensive instruction that he did not preserve by request or objection: he has procedurally defaulted any such complaint.
>
> However, if the trial judge does charge on a defensive issue (regardless of whether he does so *sua sponte* or upon a party's request), but fails to do so correctly, this is charge error subject to review under *Almanza*. If there was an objection, reversal is required if the accused suffered "some harm" from the error. If no proper objection was made at trial, a reversal is required only if the error caused "egregious harm."[43]

In the case before us, the trial court sua sponte included the law of self-defense in the abstract portion of the charge. But the trial court failed to apply the abstract instruction to the facts of the case. "[H]aving undertaken on its own to charge the jury on this issue, the trial court in this case signaled that self-defense was the law applicable to the case."[44] Therefore, the omission of the law of self-defense from the application portion of the charge is error.[45]

Appellant contends that the omission of the law of self-defense from the application paragraph deprived him of a fair and impartial trial, causing him egregious harm. But as the Texas Court of Criminal Appeals reaffirmed in *Vega*, to determine whether a defendant suffered egregious harm under *Almanza*, we

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[43]*Vega v. State*, 394 S.W.3d 514, 518–19 (Tex. Crim. App. 2013) (citations and most internal quotations omitted).

[44]*Barrera v. State*, 982 S.W.2d 415, 416 (Tex. Crim. App. 1998) (citations and internal quotation marks omitted).

[45]*See id.*

must consider the jury charge, the evidence, including the weight of probative evidence, contested issues, jury argument, and any other relevant information in the record.[46]

The evidence shows that Smith and his group had already faced off an opposing group including Brown and Appellant at least once that day. The evidence also shows that Brown and Appellant appeared to be preparing for a gunfight around two hours before the shooting, as they were seen unloading weapons near the dumpster by the community center.

There is no direct evidence that Appellant or Brown saw Smith pointing a gun at them before he was killed with a bullet from an assault rifle. Armstead testified that Appellant and Brown could not see the gun but also admitted that he did not know whether they had seen it. He maintained that they could not have seen the gun before Smith backed the Equinox up and that Smith tried to show it to them but was killed before he could get close enough to demonstrate his own weapon.

Appellant did not call any witnesses, and in addition to self-defense law in the abstract portion, the jury charge included both abstract and application paragraphs on the law of parties.

Appellant's theory of the case was that he was an innocent bystander at the scene of Smith's murder and that he had been mistakenly identified as the

[46]*Vega*, 394 S.W.3d at 521.

shooter. Appellant's counsel explicitly told the jury during closing arguments that Appellant was not claiming self-defense:

> [R]eally, if I were representing Javontae Brown, I would be arguing self-defense, but [the prosecutor] indicated—I expect they're going to argue self-defense. How could he be defending himself if he wasn't involved? Javontae Brown, probably a real good self-defense argument. [Appellant]? No. He wasn't involved.

As our sister court in Austin has explained,

> Self-defense, like other chapter nine defenses, justifies conduct that would otherwise be criminal. In other words, the defendant must "admit" violating the statute under which he is being tried, then offer a statutory justification for his otherwise criminal conduct. Thus, a defendant is not entitled to a jury instruction on self-defense if, through his own testimony or the testimony of others, he claims that he did not perform the assaultive acts alleged, or that he did not have the requisite culpable mental state, or both.[47]

The State explained the law of self-defense in its closing argument and argued that it was not applicable because

> We have absolutely no proof from any source that [Appellant] or Javontae Brown saw a gun in Mercedes[Smith's] hand. Dammion [Armstead] was vague about how that gun was handled. He also said that the window was partially up or partially down. We have no proof from any source that those two fellows [Appellant and Brown] saw that gun. None. We also know this: They had a rifle. Again, a rifle is used to hit targets at long-range, not for self-defense.
>
> Did they provoke the fight? Well, the fight was going on all day long.

[47] *VanBrackle v. State*, 179 S.W.3d 708, 715 (Tex. App.—Austin 2005, no pet.) (citations omitted); *see also Ex parte Nailor*, 149 S.W.3d 125, 132–33 (Tex. Crim. App. 2004) (holding that because Nailor's testimony and closing argument focused on the theory of accident, denying the mental state required for assault, he was not entitled to self-defense instruction).

> Did Mercedes Smith fire a gun? No. There is nothing in the ballistics, there is nothing in the chart at the scene of the crime that will support that Mercedes Smith fired a weapon, or, for that matter, that he even displayed a weapon that was seen by [Appellant] and Vontae [Brown], so I'll urge you to disregard self-defense, no matter how much they proclaim it.

Based on all the above, we hold that the trial court's omission of the law of self-defense from the application paragraph was harmless error. We overrule Appellant's seventh issue.

V. Conclusion

Having overruled Appellant's seven issues, we affirm the trial court's judgment.

LEE ANN DAUPHINOT
JUSTICE

PANEL: DAUPHINOT, WALKER, and MEIER, JJ.

DELIVERED: September 12, 2013