08-13-00115-CR

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IN THE EIGHTH COURT OF APPEALS
EL PASO, TEXAS

CRAIG GRAHAM

Appellant

versus

THE STATE OF TEXAS,

Appellee

A DIRECT APPEAL OF A CRIMINAL CASE FROM THE 384TH JUDICIAL DISTRICT COURT OF EL PASO COUNTY, TEXAS

APPELLANT'S OPENING BRIEF

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IDENTITY OF PARTIES AND COUNSEL

As required by Texas Rule of Appellate Procedure 38.1(a), the following are parties and counsel to the trial court's judgment:

1. Craig A. Graham: Defendant-Appellant, currently incarcerated in the William P. Clements Unit of the Texas Department of Criminal Justice, in Amarillo, Texas.

2. Mr. Thomas S. Hughes: Trial Counsel for Defendant-Appellant

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6. Honorable Patrick M. Garcia: Trial judge

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PRELIMINARY STATEMENT

In this Opening Brief, the Appellant, Craig Graham, will be referred to as "Mr. Graham" or "Appellant." The Appellee, the State of Texas, will be referred to as the "State" or the "Appellee." The trial judge presiding over both phases of the trial, the Honorable Patrick M. Garcia, will be referred to as the "Trial Court." Citations to the Clerk's Record will be abbreviated as "C.R.," followed by the appropriate page number. Citations to the Reporter's Record will be abbreviated as "R.R.," followed by the appropriate Volume number (abbreviated as "Vol") and page number.

This Court has jurisdiction over the instant appeal pursuant to Article V of the Texas Constitution and Texas Rule of Appellate Procedure 25.2(a)(2) and Texas Code of Criminal Procedure Annotated Article 44.02. Pursuant to Texas Rule of Appellate Procedure 26.2, the Notice of Appeal in this case was timely filed within thirty days of April 12, 2013. *See* Notice of Appeal, C.R. 163 *and* Amended Notice of Appeal, C.R. 173.

STATEMENT OF THE CASE

A. Nature of the Case

This is a direct appeal from a sentence and conviction imposed by the 384th Judicial District Court of El Paso County, Texas (hereinafter "District Court" or "trial court") after a bifurcated jury trial as to the guilt and innocence phase and the punishment phase. Specifically, Mr. Graham appeals the legal and factual sufficiency of the evidence used to convict him of murder. He also appeals the charge of capital murder given to the jury based on the doctrine of transferred intent.

Mr. Graham first appeals the legal sufficiency of the evidence, arguing that none of the evidence established the requisite *mens rea* to support a conviction of murder, and thus, capital murder. Mr. Graham also argues the factual evidence is insufficient to support a conviction of murder, as Mr. Graham neither brought a weapon to the club in question nor did he initiate the gunfire.

Mr. Graham next appeals the instruction of capital murder given to the jury based on the doctrine of transferred intent. Pursuant to statute and caselaw, Mr. Graham asserts the facts of his case do not fall within the scope of the doctrine of transferred intent. As such, a charge of capital murder was inappropriate for this case and may have influenced the jury's determination of guilt for murder.

Based on the foregoing, Mr. Graham respectfully requests this Honorable Court set aside the Judgment and Sentence, and remand for a new jury trial.

B. Course of Proceedings and Disposition Below

On or about April 5, 2012, a Grand Jury indicted Mr. Graham, alleging two counts. Count I was for Capital Murder, and Cout II was for Unlawful Possession of a Firearm by Felon. C.R. p. 3-4. Mr. Graham entered a plea of Not Guilty and elected a bifurcated trial. The guilt and innocence trial commenced on April 8, 2013 and lasted for four days. On April 12, 2013, the jury returned a verdict of Guilty for two counts of murder. C.R. p. 141. On April 15, 2013, the punishment portion of the trial commenced. The jury returned two ninety-nine (99) year sentences, running concurrently. The Trial Court entered the Judgment on April 12, 2013, to which Mr. Graham timely filed a notice of appeal. C.R. p. 144.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Graham believes the issues are sufficiently clear such that oral argument is not necessary.

ISSUES PRESENTED

I. WHETHER MR GRAHAM IS ENTITLED TO A NEW TRIAL UNDER THE LAW BECAUSE THE EVIDENCE WAS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT A MURDER CONVICTION?

II. WHETHER MR. GRAHAM IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT COMMITTED MATERIAL ERROR BY WRONGLY INSTRUCTING THE JURY ON CAPITAL MURDER WHEN CAPITAL MURDER WAS INAPPLICABLE TO THE FACTS OF THIS CASE PURSUANT TO THE ROBERTS STANDARD?

STATEMENT OF FACTS

On the night of January 14, 2012, several individuals, the defendant Craig Graham included, went to Fussion Nightclub (the "Club") for an evening of socialization. Prior to being allowed to enter the Club, all individuals were searched for weapons. Mr. Graham arrived at the Club with several companions: Dulce Cazeres; Sandra; and 'Speed.'[1] All were searched and admitted. R.R. Vol. 4, p. 198 (testimony that all individuals are searched prior to entry). R.R. Vol. 5, p. 33; 98. While at the Club, Mr. Graham did not stay with his original companions. R.R. Vol. 4, p. 260. Nor did he depart with them. R.R. Vol. 4, p. 233.

During the course of the evening, an altercation began between an individual and a group of people. It first started at the bar, at which Leah Morgan was talking with Jabril Ndaman (referred to throughout the trial as "African Mike" or "Mike").

[1] The witnesses did not always know the given names or last names for other involved individuals. R.R. V. 4, p. 227.

R.R. Vol. 4, p.118; 175; 202. While engaged in conversation, Gabriel McCastler began making eye contact with Ms. Morgan and touching her hand. R.R. Vol. 4, p. 176; 203. R.R. Vol. 5, p. 14; 37-40. When Mike became aware of the situation, he demanded McCastler stop immediately. R.R. Vol. 4, p. 176; 203. The situation escalated, yelling ensued, and Mike removed his jacket in preparation to fight and defend himself. R.R. Vol. 4, p. 119; 176; 217. McCastler was at the Club with a large group of people, including Myron O'Leary, Kevin Loflan, Chettisa Williams, Shawn Whitehurst, Tyrone Head, Tristan Ball, Preston Brown, Rico Bynum, Robert Whitaker, Dwayne Meyers, Lawrence Primus, and Damien Bailey.[2] When the altercation between Mike and McCastler began to escalate, several of McCastler's companions took aggressive stances and prepared to fight. R.R. Vol. 4, p. 43-47. At this point, Mike went to seek assistance from bouncers and his friend, Mr. Graham, whom he saw earlier. R.R. Vol. 4, p. 176; 205. When the situation continued to escalate, Mike went outside to cool down and smoke a cigarette and the bouncers intervened and escorted the other individuals from the club. R.R. Vol. 4, p. 121; 176-77; 207-08. However, all individuals were ultimately readmitted to the club. R.R. Vol. 4, p. 182. R.R. Vol. 5, p. 17.

After reentry, the group appeared to stay away from Mike and Ms. Morgan. However, Mr. Graham noticed several members still making hostile overtures

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[2] Though all of these individuals don't necessarily know each other by name, their groups of friends overlap.

towards Mike. Mr. Graham warned Mike of the potential trouble. R.R. Vol. 4, p. 172 ("And Craig came up to me and told me, Hey, don't back them.[3] Those are the guys you have a problem with."). At closing time, all patrons exited through one exit in the back of the building, onto the street. R.R. Vol. 4, p. 183. While exiting, Mike heard one of his companions[4] state "Those guys have a knife," (referring to McCastler's individuals and his group). In response, someone (possibly Mr. Graham) stated, "[T]hey're bringing a knife to a gunfight." All individuals hearing this laughed, believing it to be a joke and a quote from a movie. R.R. Vol. 4, p. 186 ("[W]e all laughed because it was like a quote out of a movie. That's exactly what it was. Nobody thought – I did not think it would escalate to probably the way it did.").

Testimony is disputed as to whether further words were exchanged between McCastler's group of friends and either Mike or Mr. Graham. R.R. Vol. 5, p. 61 (O'Leary stating the 'guy with the nice jacket' (identified as Mike) was still arguing with some of O'Leary's group across the street). R.R. Vol. 4, p. 190-91 (Mike stating after he exited the club he left with 'Rico' and did not see either Mr. Graham or the gunshots). *See also* R.R. Vol. 5, p. 126-30. (Shenae Portee-Brigman, a witness uninvolved with either group, stated she sees --but cannot hear-

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[3] The State elicited from Mr. Ndaman ("Mike") that this phrase means "Don't have your back turned to them." R.R. Vol. 4, p. 179.

[4] Mike was unsure who stated this. R.R. Vol. 4, p. 183-84 ("What I first heard was somebody saying, Those guys have a knife. I don't know exactly who said that.").

- two people on one side of the street apparently arguing with a group of people on the other side of the street after the club closed). After exiting the club, people were still milling about in the parking lot and on the street. Mr. O'Leary, Mr. Brown, Mr. Bailey, Mr. McCastler, and among others, were in the parking lot deciding where to go next. R.R. Vol. 5, p. 22.

The situation unexpectedly escalated when Tyler Head discharged a weapon completely into the air. R.R. Vol. 5, p. 23; p. 194-95. Witnesses both heard the shots and saw the flashes of light from the gun. R.R. Vol. 5, p. 23. It is contested as to where Mr. Head got his weapon. Mr. Head's friends (including his designated driver, Ms. Williams) stated they have no idea where he got a gun from. R.R. Vol. 5, p. 30; 83; 94. However, another witness remembers seeing someone fitting Mr. Head's description get a gun from a black SUV, a vehicle identical to the vehicle Mr. Head arrived in. R.R. Vol. 5, p. 154; 175-76.

Within a matter of seconds after Mr. Head finished firing his weapon, witnesses heard a second set of shots. R.R. Vol. 5, p. 24; 31; 88; 140. Mr. Graham had returned fire, using a gun handed to him by an individual named 'Banger.' Though Banger has yet to be found, witnesses recalled seeing a car playing very loud music. R.R. Vol. 5, p. 152-56. An individual wearing a "bandana on his face ran to the passenger side, reached in the back seat, [and] grabbed a gun" before driving off. R.R. Vol. 5, p. 152. *See also* R.R. Vol. 7, p. 44 (in which a bouncer

describes the same car). The cross-fire unfortunately ended with two fatalities: that of Preston Brown and Damien Bailey. R.R. Vol. 5, p. 25-28.

Late in the day on January 15, 2012, Mr. Graham was picked up for questioning. R.R. Vol. 6, p. 9. Upon being questioned, Mr. Graham cooperated completely with the El Paso Police Department. R.R. Vol. 6, p. 9; 23. He explained, in the course of a videotaped confession, that he believed he was acting in self-defense. Mr. Graham, was, however, indicted by a Grand Jury and this trial ensued.

SUMMARY OF THE ARGUMENT

There exist select circumstances in which the law mandates that a defendant must be granted a new trial. This Honorable Court is presented with the unique situation in which the remedy as to both issues on appeal is the grant of a new trial. Namely, the evidence simply does not support a murder conviction and the Trial Court erred in charging the jury.

Evidence must be both legally and factually sufficient to support a jury's verdict. Here, however, the evidence is neither. Murder (and hence, capital murder) is a 'result of conduct' offense, requiring the culpable mental state relate to the result of the conduct (i.e., causing a person's death). To be convicted of murder, Mr. Graham had to have the requisite intent to cause the deaths of Damien Bailey and Preston Brown. The evidence shows, however, that Mr. Graham had, *at most*,

the intent to fight some individuals. Mr. Graham did not, through his words or actions, demonstrate the intent to kill anyone. Rather, his actions demonstrated instead he was, perhaps, reckless, in defending himself against a perceived attack. Further, the facts and testimony as to the events surrounding the actual exchanged gunfire between Mr. Head and Mr. Graham are conflicting. It is clear, however, that Mr. Graham did not bring a weapon at the Club nor did he initiate gunfire. He did not fire the gun with the intent to kill anyone. Simply put, the evidence does not support a charge of murder.

Second, capital murder never should have been at issue in this case. Though two individuals died, the intent was never present for two individuals to die. Even if intent to harm or kill Mr. Head was present, that intent can only transfer to one innocent bystander--not two. The Trial Court incorrectly instructed the jury on the doctrine of transferred intent over repeated objections by Mr. Graham's counsel. Even when presented with the seminal case on point, *Roberts v. State*, the Trial Court still persisted in administering the instruction as to capital murder based on transferred intent. This alone is sufficient to warrant a new trial. However, when considered in conjunction with the fact that neither the legal nor factual evidence was sufficient to support a murder conviction, it is evident Mr. Graham deserves a new trial, and he respectfully requests this Court provide that remedy.

ARGUMENT AND AUTHORITIES

I. MR. GRAHAM IS ENTITLED TO A NEW TRIAL UNDER THE LAW BECAUSE THE EVIDENCE WAS LEGALLY AND FACTUALLY INSUFFICIENT, WARRANTING A MURDER CONVICTION INAPPROPRIATE.

A defendant must be granted a new trial "when the verdict is contrary to the law and the evidence." Tex.R.App.P. § 21.3(h) (V.T.C.A. 2013). In determining whether the evidence presented is legally sufficient to support a conviction, the reviewing court examines all of the evidence in the light most favorable to the verdict. *Hughen v. State*, 265 S.W.3d 473, 484 (Tex.App. 2008) *aff'd*, 297 S.W.3d 330 (Tex.Crim.App. 2009). Further, the reviewing court must "determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* In reviewing a challenge to the factual sufficiency of the evidence, this Court must "consider all of the evidence in a neutral light and ask whether the evidence introduced to support the verdict, though legally sufficient, is nevertheless so weak or so against the great weight of the evidence as to render the jury's verdict clearly wrong and manifestly unjust." *Gamboa v. State*, 296 S.W.3d 574, 578 (Tex.Crim.App. 2009). *See also Johnson v. State*, 23 S.W.3d 1, 11 (Tex.Crim.App. 2000) (adopting the complete civil factual sufficiency standard of review).

In *Hughen,* the Texarkana Court of Appeals examined the issue of whether evidence was sufficient to support a conviction for attempted murder. *Hughen*, 265

S.W.3d at 484. Defendant-Appellant Jeffrey Hughen was arrested and charged with attempted murder after following his girlfriend, Nina Batts, to the house of two men, Barry Milhollon and Eric Graham. *Id.* at 484. Hughen, intoxicated and irate, demanded Batts come out of the house. *Id.* She refused, and Milhollon and Graham attempted to peaceably intervene. *Id.* Hughen appeared to calm down for a short period of time. *Id.* However, when Milhollon and Graham left Hughen, he again began pounding on the door and demanding Batts come outside. *Id.* When she complied, Hughen hit Batts and then put a knife to her throat. *Id.* Milhollon again attempted to intervene, only to be stabbed in the throat by Hughen. *Id.* It took Graham, another neighbor, and two police officers to sufficiently subdue Hughen. *Id.* at 485. After a jury trial and conviction for attempted murder, Hughen appealed, contesting that "the evidence [was] insufficient because it [did] not show that he had a specific intent to kill the victim, as required by statute." *Id.*

To determine the legal sufficiency of the evidence, the Court examined the elements of the crime of attempted murder as found in the Texas Penal Code: "(1) a person, (2) with the specific intent to cause the death of another, (3) does an act amounting to more than mere preparation, (4) but fails to effect the death of the other individual." *Id.* The Court found that the evidence showed Hughen followed Batts, brought a knife with him, and then proceeded to beat her and hold the knife to her throat. *Id.* Hughen's actions amounted to more than mere preparation yet

failed to cause the death of Batts. Thus, the Court affirmed the judgment as to the legal sufficiency of the evidence, finding, that a "rational jury could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 486.

Further, the Court found the evidence to be factually sufficient to support his conviction. Notably, the Court found "how events developed [was] largely uncontested." *Id.* at 485. The evidence showed Hughen went to the house with a lockblade knife, enraged and prepared to fight. *Id.* at 486. However, no one else involved had a weapon. *Id.* During the fight, Hughen made statements to Graham stating he was going to kill Batts and Graham. *Id.* Further, Hughen made specific "statements to the police to the effect that he would kill both Batts and her lover if he caught them together, by stabbing them in the throat." *Id.* The verdict was thus consistent with both the law and the evidence.

Hughen is instructive as to this issue, particularly when the facts are juxtaposed next to the facts of the instant case. The evidence in the instant case is neither legally nor factually sufficient to support the elements of the alleged crime.

A. The Evidence Presented Does Not Support the Essential Elements of the Crime of Murder Beyond a Reasonable Doubt.

Even in examining the evidence in the light most favorable to the verdict, the evidence simply does not support the essential elements of the crime for which Mr. Graham was convicted. Both murder and capital murder require a specific intent to kill to be convicted of murder. TEX. PENAL CODE ANN. § 19.02(b)(1)

(V.T.C.A. 2013) ("A person commits an offense if he intentionally or knowingly causes the death of an individual."). TEX. PENAL CODE ANN. § 19.03(a) ("A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) . . . ."). However, the evidence presented does not support the necessary *mens rea* for a murder conviction.

The State, in both opening and closing argument, asked the jury to find Mr. Graham's intent through his actions. However, Mr. Graham's actions do not prove he intentionally and knowingly caused the deaths of Preston Brown and Damien Bailey. First, Mr. Graham's friends and companions attested to his normal state of mind and his state of mind on the night of January 14 and morning of January 15, 2012. *See* R.R. Vol. 4, p. 211 (Mike stating, "Craig is always protective of all his friends. He watches out for everybody."); R.R. Vol. 4, p. 263 (Ms. Cazares stating she believed Mr. Graham didn't have the intent to shoot anyone or kill anyone that night).

Second, Mr. Graham's actions demonstrate his lack of mental culpability. For example, the State relied upon text messages between Mr. Graham and Dulce Cazares to show Mr. Graham's intent that night. R.R. Vol. 4, p. 252-256; *See also* R.R. Vol. 10, Exh. 67-74. However, the only thing evident from the text messages is that Mr. Graham intended, at a maximum, to engage in a physical fight with the

individuals, not cause the death of any individual. *See* R.R. Vol. 10, Exh. 74 ("Yeah after beat these niggas up").

Further, Mr. Graham was not in possession of a weapon prior to or upon leaving the Club. R.R. Vol. 4, p. 188 (Mike stating Mr. Graham did not have a gun or say anything about a gun). R.R. Vol. 4, p. 258-59 (Dulce stating Mr. Graham did not have a gun and all were searched prior to entering the Club.). Again, the State emphasized the phrase "They brought knives to a gunfight," as 'proof' that Mr. Graham had a gun and had intent to use that gun to harm or kill someone. This alleged 'proof' fails. There was never definitive testimony that Mr. Graham absolutely made that statement. R.R. Vol. 4, p. 184-85. Additionally, the individuals who believed they heard Mr. Graham say that also believe the phrase is from a movie. R.R. Vol. 4, p. 186. ("[W]e all laughed because it was like a quote out of a movie. That's exactly what it was. Nobody thought – I did not think it would escalate to probably the way it did.").[5]

What his actions do show is Mr. Graham went to the Club with companions but separated from them shortly afterwards. He saw a situation develop with his friend Mike, and he continued to keep an eye on that situation. When he saw hostile overtures continuing to be made towards Mike, Mr. Graham warned him to be careful. Mr. Graham also heard the group had weapons, namely, a knife.

[5] Upon cross-examination, Mike further state he believed it was from a 1988 movie. R.R. Vol. 4, p. 194. He further stated he "have never seen [Mr. Graham] with a gun." R.R. Vol. 4, p. 195.

However, Mr. Graham did not initiate or escalate the situation. Instead, Mr. Head initiated gunfire, and almost immediately after, Mr. Graham returned that gunfire, believing he was acting in self-defense.

In addition to legal insufficiency, the evidence is also factually insufficient.

B. <u>The Evidence is Facually Insufficient to Support a Conviction for Murder</u>.

In the instant case, even if the evidence was legally sufficient, the evidence did not factually support a conviction of murder. Namely, the verdict was unsupported or contrary to the evidence presented. Graham was charged with capital murder, and ultimately convicted of two counts of the lesser included offense of murder. C.R. 144-45. However, the facts support, at most, the lesser included offense of manslaughter. *See Ortiz v. State*, No. 06-98-00280-CR, 1999 WL 1054694, at *1 (Tex.App.Ct. Nov. 23, 1999) (not designated for publication) (supporting a conviction for manslaughter upon the defendant firing shots into a crowd after a heated confrontation).

Though not designated for publication, the facts of *Ortiz* are instructive when examining the factual insufficiencies as to a charge of murder in the instant case. Paco Ortiz was a passenger in a car which was involved in a confrontation with a crowd of young Hispanics. *Ortiz*, 1999 WL 1054694 at *1. The car circled the crowd repeatedly, heated words were exchanged, and beer bottles thrown at the car. *Id.* Eventually, gunfire erupted. *Id.* Conflicting testimony existed as to whether

Ortiz was responding to gunfire from an unknown member of the crowd or whether he was firing randomly into the crowd. *Id.* Whether this was a gang incident was also undetermined, though testimony existed supporting both positions. *Id.* During the incident, a member of the crowd was shot and killed by the same type of gun Ortiz used. *Id.* Though tried for murder, a jury convicted Ortiz on the lesser included offense of manslaughter and sentenced him to twenty (20) years imprisonment. *Id.* Ortiz appealed based on the trial court's denial of his "request for a jury instruction on defense of a third person," as well as denial of his request for "an instruction on the issue of criminally negligent homicide."[6] *Id.*

The evidence presented in Ortiz demonstrated that "Ortiz was shooting at an individual in the crowd who was shooting at the car, and also that he was attempting to protect his cousin." There was no evidence to show the victim was involved in returning or initiating fire. Further, "[t]here was no evidence that he had a gun or that one was found near his body." Testimony also existed that the victim "did not have a gun and that he had not fired at the car." Ortiz, on the other hand, admitted to loading the gun, understanding how it worked, and aiming and firing his pistol at the person firing from the crowd. The court found that Ortiz's

[6] The court reviewed Ortiz's claims pursuant to the *Almanza* standard, in which any harm caused by a jury charge, "regardless of the degree, is sufficient to require reversal of the conviction." Ortiz, at *1 (citing the standard of *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1984) (opinon on state's motion for rehearing). Though *Almanza* has been superseded by Tex. Code Crim. Pro. Ann. Art. 36.19, requiring a showing of harm, there is sufficient enough harm in the charge to Mr. Graham to warrant reversal of the conviction. *See* Tex. Code of Crim. Pro. Art. 36.19 (V.T.C.A. 2013).

actions far exceeded those in which instructions on criminally negligent homicide was typically appropriate. Rather, "[e]vidence that the defendant knows a gun is loaded, that he is familiar with guns and their potential for injury, and that he points a gun at another indicates that he is aware of a risk of injury or death involving use of the gun." *2. *See also Gadsden. v. State*, 915 S.W.2d 620, 622 (Tex.App.1996); *Thomas v. State*, 699 S.W.2d 845, 852 (Tex.Crim.App.1985). The actions of Ortiz fell squarely within the ambit of manslaughter, and the appellate court affirmed the judgment.

Similar to the facts of *Ortiz*, Mr. Graham was responding to gunshots fired by Tyler Head after a heated confrontation in the nightclub. The uncontroverted evidence shows Mr. Head did have a gun which he discharged. The evidence also shows that Mr. Graham did not bring a weapon to the Club with him (as distinguishable from the facts of *Hughen*). Mr. Graham's actions illustrate that, at most, he was aware of the risk of death or injury that might result from firing a gun into a crowd. As a former Marine, Mr. Graham understood how a gun worked, and admittedly fired his gun into the crowd towards Mr. Head. However, Mr. Graham's jury received three choices: capital murder, murder, and manslaughter. As discussed, supra, the evidence failed to support Mr. Graham possessed the requisite intent to support a conviction of murder or capital murder. Further, the factual evidence only supports, at most, reckless behavior.

However, even if the evidence was factually and legally sufficient, the court erred in instructing the jury as to capital murder. Not only was the doctrine of transferred intent inapplicable here, precluding a capital murder charge, but the jury may have been unduly influenced by having an erroneous third option from which to choose.

II. GRAHAM IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT COMMITTED MATERIAL ERROR BY WRONGLY INSTRUCTING THE JURY ON CAPITAL MURDER WHEN CAPITAL MURDER WAS INAPPLICABLE TO THE FACTS OF THIS CASE.

Pursuant to § 21.9 of Texas Rules of Appellate Procedure, a "court must grant a new trial when it has found a meritorious ground for new trial." (V.T.C.A. 2013). Grounds for a new trial include "when the court has misdirected the jury about the law or has committed some other material error likely to injure the defendant's rights." Tex.R.App.Pro. § 21.3(a) (V.T.C.A. 2013). If the charging instrument to the jury includes an erroneous charge, then that constitutes grounds for a new trial. TEX. CRIM. PROC. CODE. ANN. Art. 36.19 (V.T.C.A. 2013).In the instant case, the jury was erroneously instructed as to capital murder and the doctrine of transferred intent. C.R. p. 134-135; Section VIII and IX.

A. Transferred Intent May be Used to Support a Charge of Capital Murder Only if There Exists Proof of Intent to Kill the Same Number of Persons who Actually Died.

Recently, the Court of Criminal Appeals addressed and clarified the circumstances in which the doctrine of transferred intent can support a charge of

capital murder which alleges the deaths of multiple persons during the same criminal transaction. *Roberts v. State*, 273 S.W.3d 322 (Tex.Crim.App. 2008). In *Roberts*, multiple attackers, Defendant-Appellant Sheldon Roberts ("Roberts") included, broke into an apartment and shot several of the occupants, whom they knew. *Id.* at 324. During the attack, three victims died, including Virginia Ramirez, a woman in the early stages of pregnancy. *Id.* Roberts was convicted by a jury of capital murder under two indictments, one which alleged the "death of a pregnant woman and her embryo and the other alleging the death of more than one person." *Id.* Roberts received life sentences for both convictions, which the court of appeals affirmed on appeal. *Id.* The Court of Criminal Appeals, however, then granted review as to whether the court of appeals erred:

> (1) By holding that the evidence was both legally and factually sufficient to support the jury's verdict;
> (2) In holding that the charge did not contain a material variance or lack a required culpable mental state.

Id. at 325. The Court affirmed the court of appeals as to the first issue, finding the evidence both legally and factually sufficient to support the verdict. *Id.* However, the Court reversed as to the second issue. *Id.* at 331.

To determine whether the jury charge lacked a required culpable mental state, the Court examined the application of the doctrine of transferred intent in prior caselaw as construed against the statutory definitions. *Id.* at 328-29. Murder, as a 'result of a conduct' offense, "requires that the culpable mental state related to

the result of the conduct, i.e., the causing of the death." *Id.* (internal quotations omitted). Further, capital murder is a "result-of-conduct oriented offense; the crime is defined in terms of one's objective to produce, or a substantial certainty of producing, a specified result, i.e. the death of the named decedent." *Id.* at 329. (citations omitted). Thus, to be guilty of murder (and, as such, capital murder), the Defendant must have intentionally and knowingly caused the death beyond a reasonable doubt. The court clarified the doctrine of transferred intent, holding:

> Transferred intent may be used as to a second death to support a charge of capital murder that alleges the deaths of more than one individual during the same criminal transaction only if there is proof of intent to kill the *same number of persons* who actually died. (emphasis added).

Id. at 331 (emphasis added).

To support a charge of capital murder, the numbers of intended deaths much match the number of actual deaths. As the *Roberts* court illustrated, if a defendant intended to kill Joe and Bob but instead killed Joe and Lou, a defendant had two intents to kill and either one or both of those intents can be transferred.[7] *Id.* Here, because Roberts only intended to kill Ms. Ramirez, and succeeded in doing so, he could not then be held accountable for a second death – the death of the embryo—which he never intended. *Id.* "Lacking knowledge of the embryo's existence,

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[7] This reasoning was further affirmed in the case of *Ex Parte Norris*, 390 S.W.3d 338, 339 (Tex.Crim.App.2012) ("[T]he law of transferred intent applies to establish the multiple-murders theory of capital murder when a defendant kills his intended victim and inadvertently kills a bystander.").

appellant could not form a separate specific intent to kill the embryo, as is required by statute." *Id.*

The circumstances in the instant case fall squarely within the ambit of the *Roberts* decision. As discussed, Mr. Graham did not have the requisite intent for murder. Assuming arguendo he did, however, there existed only intent to harm or kill one person-- Mr. Head. Mr. Head initiated gunfire and Mr. Graham responded. Mr. Graham was not responding to any other perceived threat or initiating any other confrontation. Because there was only one intent, Mr. Graham could only, at most, be held liable for the death of one innocent bystander. However, even in that scenario, the doctrine of transferred intent was still inapplicable to this case, as Mr. Graham did not kill Mr. Head.

Further, Mr. Graham's trial counsel objected vehemently and repeatedly to the applicability of the transferred intent doctrine. R.R. Vol. 6, p. 92-101 (motion for direct verdict as to capital murder); R.R. Vol. 9, p. 8-9 (objecting to the charge including separate punishment separately for the deaths of Damien Bailey and Preston Brown). As a threshold matter, there can be no doubt this issue was preserved for review. *See* TEX.CRIM. PRO. CODE ANN. Art. 36.19 (V.T.C.A. 2013) ("All objections to the charge . . . shall be made at the time of trial.").

B. Pursuant to Texas Code of Criminal Procedure Art. 36.19, the Trial Court Erred in Charging the Jury as to Capital Murder and Transferred Intent, Causing Harm to Mr. Graham.

Pursuant to Texas Code of Criminal Procedure Article 36.19, a judgment shall be reversed if error in the charge to the jury either "injure[d] the rights of the defendant," or demonstrates that "the defendant has not had a fair and impartial trial." TEX. CRIM. PROC. CODE. ANN. Art. 36.19 (V.T.C.A. 2013). See also *Krajcovic v. State*, 351 S.W.3d 523, 530 (Tex.App.Ct. 2011), *petition for discretionary review granted* (Jan. 25, 2012), *rev'd*, 393 S.W.3d 282 (Tex.Crim.App.2013) ("Error in the charge, if timely objected to in the trial court, requires reversal if the error was calculated to injure the rights of the defendant, which means no more than that there must be *some* harm to the accused from the error.") (emphasis in original; citations omitted).

In the instant case, Mr. Graham's rights were injured when he was charged with capital murder and the jury was instructed as to the law on capital murder and transferred intent. C.R. Though the jury did not find Mr. Graham guilty of capital murder, there is no way to know what the jury would have decided had they been properly instructed in the law. Any assumption Mr. Graham was not harmed by this invades the jury's province to apply the facts to the correct law. Thus, this Honorable Court should exercise discretion to order a new trial.

PRAYER FOR RELIEF

Based upon the foregoing arguments and legal authority, the Appellant, Craig A. Graham, respectfully requests that this Honorable Court this Honorable Court set aside the Judgment and Sentence, remand for a new trial, and grant any such other and further relief as this Honorable Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(1). Further, this brief complies with the type-face and type-style requirements of Texas Rule of Appellate Procedure 9.4 because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14-point Times New Roman Font.

Robert L. Sirianni, Jr., Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of October, 2013, a true and correct copy of the foregoing has been furnished by U.S. mail this thirtieth (30th) day of October, 2013 to:

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