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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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PD-_____
APP. CT. CAUSE NO. 13-15-00600-CR

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

WILLIAM ROGERS,

PETITIONER,

VS.

THE STATE OF TEXAS,

RESPONDENT.

On Appeal in Trial Court Cause No. 2013-4-5466
In the 24th Judicial District Court of Refugio County, Texas
The Hon. Joergen "Skipper" Koetter, Judge Presiding.

PETITION FOR DISCRETIONARY REVIEW

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May 19, 2017

ORAL ARGUMENT REQUESTED

FILED IN
COURT OF CRIMINAL APPEALS

May 22, 2017

ABEL ACOSTA, CLERK

IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38.1(a), the parties to the suit are as follow:

APPELLANT	**WILLIAM ROGERS**
APPELLEE	**THE STATE OF TEXAS**
TRIAL JUDGE	**HON. SKIPPER KOETTER**
STATE'S ATTY AT TRIAL:	**HON. RAYMOND J. HARDY** **HON. REID MANNING** Assistant District Attorneys Refugio County Courthouse Refugio, TX 78377
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STATE'S APPELLATE ATTY:	**HON. ROBERT LASSMAN** 24th Judicial District Attorney DeWitt County Courthouse 307 N. Gonzales Cuero, Texas 77954
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PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, **WILLIAM ROGERS,** Petitioner in this matter and respectfully submits this PETITION FOR DISCRETIONARY REVIEW arising from the judgment of the 13th Judicial District Court of Appeals' decision affirming the conviction imposed in the trial court after a jury convicted him of the offense of "Burglary of a Habitation," a First Degree Felony.

This appeal originally arises from the 24th Judicial District Court of Refugio County, Texas, the Honorable Joergen "Skipper" Koetter, Judge Presiding, in District Court Cause Number 2013-4-5466, in which the Petitioner, WILLIAM ROGERS, was the Defendant and the State of Texas was the Plaintiff.

I.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner respectfully requests that this Honorable Court of Criminal Appeals grant review and allow him the opportunity to argue his case before the Court of Criminal Appeals. Petitioner believes that this matter requires that the Court of Criminal Appeals ask his counsel questions regarding the facts and circumstances in this case in order to adequately present his grounds for review. Petitioner believes it to be essential that he, through his counsel, be allowed to interact with the Court of Criminal Appeals to explain his position and interpretation of the cases relied upon.

II.

STATEMENT OF THE CASE

Petitioner was charged in two indictments after an incident that occurred at the alleged victim's home. In Tr. Ct. Cause No. 2013-4-5466, Petitioner was charged with "Burglary of a Habitation." Petitioner elected to go to trial before a

jury. After evidence and argument was presented by both parties to the jury, Petitioner was found guilty and convicted of "Burglary of a Habitation." The convicting jury sentenced Petitioner to forty (40) years in the Texas Department of Criminal Justice-Institutional Division, a fine and court costs.

III.

STATEMENT OF PROCEDURAL HISTORY

Appellant was formally charged with Burglary of a Habitation by written indictment filed with the Refugio County District Clerk on, or about, April 9, 2013. [CR-5466-8].

On, or about, November 30, 2015, this cause proceeded to trial with Cause No. 2013-4-5468, and an Assistant Refugio County District Attorney read the indictment aloud to the jury, but only Paragraph B of Count I. Appellant entered a plea of "Not Guilty." [RR-IX-6-7].

Appellant's trial continued until December 3, 2015, when the jury delivered a verdict of "Guilty" as to Count I, Paragraph B. [RR-XII-95-96].

On, or about, December 3, 2015, the punishment phase of the trial began. [RR-XIII-1]. Both sides presented evidence to the jury and rested and closed. [RR-XIII-37]. The jury assessed forty (40) years imprisonment in the Texas Department of Criminal Justice. [RR-XIII-38; CR-5466-294].

The Trial Court indicated in its "Trial Court's Certification of Defendant's

Right of Appeal" that this matter was not a plea bargain case, and that Appellant has the right to appeal. [CR-5466-326].

Appellant's Notice of Appeal was timely filed. [CR-5466-298].

Following briefing in this case, the Honorable 13th Court of Appeals denied oral argument and considered Petitioner's appeal by submission. The Honorable 13th Court of Appeals issued an opinion on, or about, March 9, 2017, affirming Appellant's conviction in Tr. Ct. Cause No. 2013-4-5466; App. Cause No. 13-15-00600-CR and vacating and dismissing the conviction in Tr. Ct. Cause No. 2013-4-5468; Cause No. 13-15-00601-CR.[1]

A motion for rehearing was timely filed on, or about, March 24, 2017. Petitioner's motion for rehearing was denied on, or about, April 19, 2017.

IV.

GROUNDS FOR REVIEW

In accordance with Rule 68.4 of the Texas Rules of Appellate Procedure, Petitioner presents the following grounds for review:

GROUND FOR REVIEW NUMBER ONE:

Did the 13th Court of Appeals err in failing to determine whether the trial court's refusal of Petitioner's requested jury instruction was error before addressing harm?

[1] Petitioner was also indicted in a separate indictment with Aggravated Assault made the basis of the appeal in Cause No. 13-15-00601-CR with Aggravated Assault; the conviction in Cause No. 13-15-00601-CR was vacated and dismissed on double jeopardy grounds by the 13th Court of Appeals.

GROUND FOR REVIEW NUMBER TWO:

Is general harm resulting from the absence of an instruction still "some harm" requiring reversal for a new trial?

GROUND FOR REVIEW NUMBER THREE:

Did the 13th Court of Appeals err in the analysis of "harm" in this case and in finding any error harmless?

V.

ARGUMENT

GROUND FOR REVIEW NUMBER ONE:

Did the 13th Court of Appeals err in failing to determine whether the trial court's refusal of Petitioner's requested jury instruction was error before addressing harm?

The Honorable 13th Court of Appeals recognized that appellate review of a claim of charge error is a two-step process, first determining whether error exists, and then considering whether the error was harmful. *Rogers v. State*, 13-15-00600-CR and 13-15-00601-CR, page 3, (Tex. App.—Corpus Christi, opinion issued on March 9, 2017). However, it appears unclear whether the opinion addresses whether or not the complained of jury instruction refusals were indeed error. The language in the opinion includes the following examples: "***Assuming that the trial court erred*** in refusing to give the instructions on self-defense and necessity, we ***conclude that the error, if any,*** was harmless." *Rogers v. State*, 13-15-00600-CR

and 13-15-00601-CR, page 4, (Tex. App.—Corpus Christi, opinion issued on March 9, 2017)(*emphasis added*). "Based on this record, we conclude ***that the error in refusing the charges, if any***, was harmless." *Rogers v. State*, 13-15-00600-CR and 13-15-00601-CR, page 7, (Tex. App.—Corpus Christi, opinion issued on March 9, 2017)(*emphasis added*). As Petitioner's appeal resulted in a published opinion, Appellant requested that the Honorable 13th Court of Appeals leave no ambiguity as to whether the failure to include the requested instructions was error on the part of the Trial Court.

As the Honorable 13th Court of Appeals did not make a clear and unambiguous finding of error, Appellant requests this Honorable Court of Criminal Appeals evaluate, analyze and find that the Trial Court erred in refusing Petitioner's requested jury instruction utilizing the two-step process that first requires determining whether error exists. *Phillips v. State*, 463 S.W.3d 59, 64-65 (Tex. Crim. App. 2015); *see also Rogers v. State*, 13-15-00600-CR and 13-15-00601-CR, page 3, (Tex. App.—Corpus Christi, opinion issued on March 9, 2017).

As presented in the following grounds for review, Petitioner's previous briefing and argument, the Trial Court erred in refusing the requested additions to the jury charge in his cases.

GROUND FOR REVIEW NUMBER TWO:

Is harm that generally results from the absence of an instruction still "some harm" requiring reversal for a new trial?

The Honorable 13th Court of Appeals noted in its March opinion, that Appellant preserved the jury instruction error for review. *See Rogers v. State*, 13-15-00600-CR and 13-15-00601-CR, page 4, (Tex. App.—Corpus Christi, opinion issued on March 9, 2017). Where a party preserves an alleged error, an appellate court must reverse if the error caused him to suffer "some harm." *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013); *see also Rogers v. State*, 13-15-00600-CR and 13-15-00601-CR, page 3, (Tex. App.—Corpus Christi, opinion issued on March 9, 2017).

This Court of Appeals has previously opined that the absence of an instruction on a confession-and-avoidance defense such as a self-defense or justification "is generally harmful because its omission leaves the jury without a vehicle by which to acquit a defendant who has admitted to all the elements of the offense." *Cornet v. State*, 417 S.W.3d 446, 451 (Tex. Crim. App. 2013). *Rogers v. State*, 13-15-00600-CR and 13-15-00601-CR, page 6, (Tex. App.—Corpus Christi, opinion issued on March 9, 2017). Clearly, this Honorable Court of Criminal Appeals recognizes that, generally, harm results from the failure to give an instruction. If so, why is that not "some harm" requiring reversal? If generally

"some harm" results from the failure to give an instruction, and that harm is recognized by this Honorable Court of Criminal Appeals, how can "some harm" be rendered "harmless" through more evaluation of the entire record?

According to the Honorable 13th Court of Appeals, Petitioner preserved the complained of alleged error, and thus Petitioner asks this Honorable Court of Criminal Appeals to review the proceedings in this case to consider whether or not the general rule is applicable in this case. Further, when should, and in what circumstances should an appellate court review a case above and beyond the harm that has been recognized to occur when a trial court refuses a requested instruction, applying a more detailed case by case analysis? More succinctly, is leaving a jury without a vehicle by which to acquit a defendant who has admitted to all the elements of the offense, no longer harmful? Ultimately, that harm results when a trial court decides, on its own, to leave a defendant without the vehicle to acquit a defendant who uses a strategy based upon the defenses allowed him by law.

The standards for inclusion of defensive instructions is clear. A trial court is required to submit a jury charge that sets out the law applicable to the case. TEX.CODE CRIM. PROC. ANN. art. 36.14. A trial court is required to instruct the jury on statutory defenses, affirmative defenses, and justifications when they are raised by the evidence and requested by the defendant. *Walters v. State,* 247 S.W.3d 204, 208-09 (Tex. Crim. App. 2007). A defendant is entitled to an

instruction on self-defense if the issue is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense. *Ferrel v. State,* 55 S.W.3d 586, 591 (Tex. Crim. App. 2001). If appellate courts are allowed to look beyond the refusal itself and evaluate the record to justify the jury's decision to convict, what defendant can meaningfully appeal the refusal of jury instructions? If a defendant denied a required instruction is acquitted, he does not appeal and the State cannot appeal, thus there is no need for review. If a defendant is convicted, and seeks to appeal a trial court judge's refusal of an instruction that is ***required*** if the issue is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense, how can he win? Surely in that set of circumstances, there will be *some* evidence to support the jury's decision to convict, unless there is a true question of legal sufficiency. Allowing further analysis beyond the refusal of a required instruction, allows an appellate court to place themselves in the seats of the jurors, and from the cold record, make their own factual conclusions and judgments about what the jury believed based solely on their independent analysis of the state of the record. This kind of analysis allows courts of appeal to become the "13th juror" and decide that the jurors refused to acquit on an affirmative defense that was never charged to the jury for

consideration. That is entirely the problem presented in this appeal. When the instruction and question is put to a jury on a defensive issue and they convict, it is reasonable to conclude that they impliedly overruled the question of self-defense or necessity as in this case. When they do not get the charge, they are left without a vehicle to acquit a defendant.

GROUND FOR REVIEW NUMBER THREE:

Did the 13th Court of Appeals err in the analysis of "harm" in this case and in finding any error harmless?

The opinion in this case acknowledged that "Appellant admitted to committing aggravated assault in his testimony…". *Rogers v. State*, 13-15-00600-CR and 13-15-00601-CR, page 6-7, (Tex. App.—Corpus Christi, opinion issued on March 9, 2017); *see also id.*, page 5 ("By this testimony, appellant essentially admitted to the offense of aggravated assault."). Because Petitioner preserved the error, the Court of Appeals was required to reverse if there was some harm.

Citing *Reeves*, the Honorable 13th Court of Appeals evaluated Petitioner's preserved error for harm by looking at the entire jury charge, the state of the evidence, the arguments of counsel, and any other relevant information in the record. *Reeves*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

In response to the opinion of the Honorable 13th Court of Appeals, Petitioner presents the following. As for the jury charge, and as argued *supra.*, despite a

proper request for instructions on self-defense and necessity, neither charge in these cases contained a defensive instruction of any sort. As also argued *supra.,* the absence of any defensive instructions was harmful because the missing instructions left the jury without a vehicle by which to acquit Appellant. Clearly, if the instructions were warranted, the Trial Court erred, and the charge was erroneous. This factor should weigh in Petitioner's favor.

Further, with respect to Petitioner's reliance on self-defense and necessity, the record supports that Appellant's trial counsel attempted to rely on and urge self-defense and necessity during the *voir dire* and during Appellant's testimony but was shut down by the Trial Court. *see* [RR-VIII-13-15];[RR-XI-139-142]. The attempt to rely on a self-defense/necessity justification was also made clear in Petitioner's testimony at trial. This is important because, in the analysis of this case, the Honorable 13th Court of Appeals noted that appellant's trial counsel did not rely on either defense concluding that the error in refusing to charge the jury was harmless. Appellant asks that this finding be reconsidered and evaluated in light of the reality of what the Trial Court's rulings did. In *Gonzales v. State*, the State argued that the appellant could not receive a self-defense instruction because she denied a role in the stabbing. In rejecting this argument, the 14th District Court of Appeals noted that the arguments of counsel were not evidence and recognized that it would come as no surprise that appellant denied a role in the stabbing during

closing arguments. *Gonzales v. State*, 474 S.W.3 345, 350 (Tex. App.—Houston [14th Dist.] 2015). The 14th Court of Appeals wrote, "By that time, the trial court had already denied her requested instruction on self-defense. If the charge did not allow for a justification defense appellant could not reasonably argue to the jury that she did the stabbing and still expect to be acquitted." *id*. Here the same logic should apply. Petitioner's counsel was forbidden by the Trial Court to discuss justification during *voir dire* and during Petitioner's testimony. Ultimately, the Trial Court excluded the requested defensive instructions. Appellant's trial counsel was forced to work with the rulings of the Trial Court, much as the appellant's counsel in *Gonzales*. Despite the Trial Court's rulings, Petitioner still managed to present enough evidence during the trial to warrant inclusions of the instructions he requested which appear to have been acknowledged by the Honorable 13th Court of Appeals. Put simply, regardless of the Trial Court's rulings attempting to exclude any self-defense or necessity during Petitioner's trial, the evidence still warranted the instructions requested by Petitioner. This factor should weigh in Petitioner's favor.

With respect to the evidence at trial, the Honorable 13th Court of Appeals acknowledged that, "The weight of the evidence for appellant's guilt, even if not overwhelming, suggests that the jury would not have accepted claims of self-defense or necessity." *Rogers v. State*, 13-15-00600-CR and 13-15-00601-CR,

page 6, (Tex. App.—Corpus Christi, opinion issued on March 9, 2017). A defendant is entitled to an instruction on self-defense if the issue is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense. *Ferrel v. State,* 55 S.W.3d 586, 591 (Tex.Crim.App.2001). Appellant requests reconsideration of the contested issues and the weight of the probative evidence in light of the fact that the analysis of this factor seems to address the credibility of Petitioner's defense, something even a Trial Court may not do when deciding whether to grant the requested instruction or issues. Petitioner also urges that such weighing of the probative evidence for purposes of harm results in speculating what the jury would have decided. The reality is that it cannot be guessed what a jury would have done had the requested instructions or issues been included in the jury charge.

Looking at the evidence in these cases through the eyes of Appellant and his testimony is what he requested through his instructions. The Trial Court precluded the jury from even considering it. Appellant believes that this factor weighs in his favor.

Finally, as for the sentences in these cases, it cannot be denied that there were other factors that could have, and likely did, play a part in the amount of time assessed against Petitioner. First, having found Petitioner culpable without the

benefit of considering self-defense or justification, the jury was charged with assessing punishment for a first and second degree felony. The punishment range for the 1st degree felony included a potential sentence of life in prison. Further, a prior California conviction was introduced during Appellant's punishment hearing. Also, the record demonstrates that the alleged victim testified about his injuries and the impact following the incident made the basis of the two charges. [RR-XIII-7-10]; [RR-X-47-48].

In short, the jury could have determined punishment based upon the injuries suffered by the alleged victim, the previous conviction, the impact of the alleged victim's life, or the punishment ranges alone. Blameworthiness is not the only factor that results in the determination of punishment. Appellant believes this factor weighs in his favor as well.

VI.

CONCLUSION AND PRAYER

WHEREFORE, for the reasons set forth above, Petitioner submits that the 13th Court of Appeals erred in affirming Petitioner's conviction for Burglary of a Habitation. Petitioner prays that the Court of Criminal Appeals grant this Petition for Discretionary Review; allow Petitioner to brief the issues raised in this brief and allow oral argument. Following the briefing and oral argument, Petitioner respectfully prays that this Honorable Court reverse and render the sentence below

and/or reverse and remand this case to the 13th Court of Appeals for further proceedings, or to the Trial Court for a new trial. Petitioner further prays for general relief, and any other relief she is entitled to in law or in equity.

Respectfully Submitted,

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By: 

_____

Luis A. Martinez
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ATTORNEY FOR PETITIONER
WILLIAM ROGERS

VII.

CERTIFICATE OF COMPLIANCE

In accordance with Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned, Luis A. Martinez, I hereby certify that the number of words in the above Petition for Discretionary Review, excluding those matters listed in Rule 9.4(i)(3), is 3, 023 words.

_____
Luis A. Martinez

VIII.

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing document was served upon the persons below in the manner indicated on this 19th day of May, 2017, pursuant to the Texas Rules of Appellate Procedure.

_____
Luis A. Martinez

Via E-Mail: rclassman1@sbcglobal.net
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Appendix

1. Opinion of the 13th Court of Appeals in 13-15-00600-CR and 13-15-601-CR; *Rogers v. State*, issued on March 9, 2017.

2. Judgment in *Rogers v. State* in Cause No. 13-15-600-CR.

APPENDIX 1

NUMBER 13-15-00600-CR
NUMBER 13-15-00601-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

WILLIAM ROGERS, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 24th District Court of
Refugio County, Texas.

OPINION

Before Justices Contreras, Benavides, and Longoria
Opinion by Justice Longoria

Appellant William Rogers challenges his convictions for burglary of a habitation, a first-degree felony, and aggravated assault, a second-degree felony. *See* TEX. PENAL CODE ANN. §§ 30.02, 22.02(a)(2) (West, Westlaw through 2015 R.S.). We affirm in part and vacate in part.

I. BACKGROUND

On the afternoon of February 14, 2013, appellant left work and drove to the house of Sandra and David Watson. Sandra and appellant had been having an affair for at least a year prior to that date. It is undisputed that David returned to the house while appellant was still present and a fight ensued in which appellant shot David in the genitals with a pistol he obtained from inside the house. The State indicted appellant for one count of burglary of a habitation (Count 1), alleging that appellant committed the felony of aggravated assault against David while in his residence. *See id.* § 30.02(a)(3). Under a separate cause number, the State indicted appellant for aggravated assault of David with a deadly weapon (Count 2). *See id.* § 20.02(a)(2). The case was tried to a jury.

Appellant and David testified to very different versions of their altercation. Appellant's version is that Sandra asked him to go to the house that day to feed her cats. David returned to the house, and appellant hid in a closet intending to wait until he had a chance to leave without being seen. David found appellant there and backed him into a large safe located at the back of the closet while brandishing a knife. Even though appellant admittedly had his own firearm with him, he grabbed a gun that was resting on top of the safe and extended it towards David. Appellant testified that David grabbed the gun, and appellant simultaneously fired.

David, in contrast, testified that he returned from work and went into the closet to change clothes without knowing anyone was there. Appellant then "stood up, called me a MF, and a bullet went off, a gun went off." The two men then grappled with each other throughout several rooms in the house but disagreed substantially about the precise sequence of events after the shooting. They also disagreed on how the struggle ended.

According to David, his gun jammed and he fled across the front lawn to a neighbor's house as appellant fired at him from the front porch. According to appellant, David hid behind some trees in the front yard and shot at appellant as he fled back to his truck, which was parked down the street.

Following the close of evidence, appellant submitted requested jury charges on the theories of self-defense and necessity. *See* TEX. PENAL CODE ANN. §§ 9.31, 9.32, 9.22 (West, Westlaw through 2015 R.S.). The trial court refused to give either charge. The jury returned a verdict of guilty on both counts. After a punishment trial, the jury imposed concurrent sentences of imprisonment for forty years on Count 1 and twenty years on Count 2. Appellant argues two issues on appeal: (1) the trial court erred by refusing to instruct the jury on self-defense and necessity, and (2) punishing him on both counts violates the constitutional protection against double jeopardy.

II. REQUESTED JURY INSTRUCTIONS

Appellant argues in his first issue that the trial court erred when it refused his requested jury instructions on self-defense and necessity.

A. Standard of Review

Appellate courts review a claim of charge error through a two-step process; first determining whether error exists, and then considering whether the error was harmful. *Phillips v. State*, 463 S.W.3d 59, 64–65 (Tex. Crim. App. 2015). Preservation of error does not become an issue until the second step of the analysis, where it dictates the degree of harm necessary to warrant reversal. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

When, as here, the defendant preserves the alleged error, we must reverse if the error caused him to suffer "some harm." *Id.* Reversal is required "as long as the error is not harmless." *Id.* (quoting *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g)). Nevertheless, the record must reveal that the defendant suffered "some actual, rather than merely theoretical, harm from the error." *Elizondo v. State*, 487 S.W.3d 185, 205 (Tex. Crim. App. 2016) (internal quotation marks omitted). Courts evaluate harm by looking at the entire jury charge, the state of the evidence, the arguments of counsel, and any other relevant information in the record. *Reeves*, 420 S.W.3d at 816.

B. Analysis

Assuming that the trial court erred in refusing to give the instructions on self-defense and necessity, we conclude that the error, if any, was harmless. We evaluate the record to determine if the record shows "some harm" because appellant preserved error by submitting proposed instructions on both issues. *See id.*

Regarding the jury charge as a whole, the court submitted separate charges to the jury for each count. Both charges instructed the jury to find appellant guilty of the indicted offenses if it believed the State proved their essential elements beyond a reasonable doubt. Neither charge contained a defense of any sort.

Regarding the arguments of counsel, appellant's counsel did not rely on either self-defense or justification as part of appellant's defense. Counsel informed the jury in his opening statement of the identity of each defense witness and stated in general terms what their testimony would include. In his closing statement, counsel highlighted the inconsistencies between the two versions of events, but again did not argue that appellant

acted in self-defense or that his actions were necessary to avoid a greater harm. That appellant's counsel did not rely on either defense suggests that the error in refusing to charge the jury was harmless. *See Cornet v. State*, 417 S.W.3d 446, 454–55 (Tex. Crim. App. 2013).

We examine the contested issues and the weight of the probative evidence under the third factor. *See id.* at 453. Appellant testified that he shot David after David backed him into a closet while brandishing a knife. By this testimony, appellant essentially admitted to the offense of aggravated assault. *See* TEX. PENAL CODE ANN. § 22.02(a). Thus, the contested issue was not whether appellant committed aggravated assault but whether he had a justification to excuse the shooting. Appellant's description of the circumstances surrounding the shooting is arguably evidence that raises the defenses of self-defense or necessity, but neither appellant nor his counsel relied on either defense as a justification before the jury.

Furthermore, the weight of the other probative evidence was against appellant. The State introduced significant physical evidence recovered from David's house such as shell casings, firearms, spent rounds recovered from the walls, a knife with blood on it, and photographs of blood stains throughout the house. Some of the evidence could support either version of events, but some of it supported David's version. To take one example, appellant argued that David left the house before him and shot at him from behind a tree in his front yard, but there was no evidence of any spent shell casings from that area. By contrast, three shell casings were recovered from near the door on the front porch, supporting David's statement that he ran across the yard while appellant stood on the front porch and fired at him. Furthermore, there was a lack of blood in areas where

appellant stated he and David moved during the struggle even though David was bleeding profusely, supporting the truth of David's version of events. The weight of the evidence for appellant's guilt, even if not overwhelming, suggests that the jury would not have accepted claims of self-defense or necessity. *See Gonzales v. State*, 474 S.W.3d 345, 353 (Tex. App.—Houston [14th Dist.] 2015, pet ref'd).

Other relevant information supports that the jury felt appellant bore substantial blame for the events inside David's house. The punishment range for Count 1, a first-degree felony, was imprisonment for anywhere between five and ninety-nine years or life. *See* TEX. PENAL CODE ANN. § 12.32(a) (West, Westlaw through 2015 R.S.). The punishment range for Count 2, a second-degree felony, was imprisonment for anywhere from two to twenty years. *See id.* § 12.33(a) (West, Westlaw through 2015 R.S.). The jury sentenced appellant to forty years on Count 1 and twenty years on Count 2. Even though the jury rejected the State's request to impose a life sentence on Count 1, the jury's decision to impose a sentence substantially above the minimum for Count 1 and which was the maximum available for Count 2 "indicates that the jury believed that appellant was significantly blameworthy." *See Gonzales*, 474 S.W.3d at 353.

The absence of an instruction on a confession-and-avoidance defense such as a self-defense or justification "is generally harmful because its omission leaves the jury without a vehicle by which to acquit a defendant who has admitted to all the elements of the offense." *Cornet*, 417 S.W.3d at 451. Given the circumstances of this case, we conclude that general rule is not applicable here. *See id.* ("Although generalities may be instructive, they cannot substitute for the record-specific analysis for harm that must be conducted in each case."). Appellant admitted to committing aggravated assault in his

testimony, but did not expressly or implicitly rely on self-defense or justification as part of his case. That appellant did not rely on either defense strongly suggests that the error was harmless.[1] *See id.* at 455 (holding that error in refusing to give a defensive instruction was harmless in part because appellant did not invoke the defense in voir dire or in his opening statement). The state of the evidence was also against the jury accepting either defense. *See Gonzales*, 474 S.W.3d at 353. Finally, the sentences imposed by the jury indicates that it considered appellant to be significantly blameworthy. *See id.* Based on this record, we conclude that the error in refusing the charges, if any, was harmless. We overrule appellant's first issue.

III. DOUBLE JEOPARDY

Appellant argues in his second issue that punishing him on both counts violates the constitutional protection against double jeopardy. *See* U.S. CONST. amend. V.

A. Applicable Law

There are three distinct types of double jeopardy claims: (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense

[1] We note that appellant's counsel apparently wanted to raise the issues of self-defense and necessity. At the beginning of trial, the court granted the State's motion in limine which provided, in relevant part, that appellant could not discuss any of the laws relating to "justification, necessity, apparent danger, self-defense, deadly force in defense of person, mutual combat, or consent to use of force" without first receiving the court's permission. Appellant's counsel asked the trial court to revisit its ruling just before voir dire because the evidence might raise self-defense or necessity. The trial court replied: "No. You cannot talk to the jury about anything that would constitute a self-defense or justification for the actions of your client."

Later, during counsel's direct examination of appellant, counsel asked about his state of mind after shooting David: "And you just told the jury what happened then, knife and shot going off. What is your brain telling you?" Before appellant could answer, the trial court summoned counsel to the bench for an unrecorded conference. Following a recess, the trial court told counsel on the record but outside the presence of the jury that appellant could not claim self-defense because he had provoked the difficulty by going to the Watson home knowing that Sandra was not there but that David could return. The court instructed counsel that "you may not venture off into anything that alludes to or invades the province of self-defense." While appellant's counsel might have wanted to make the issues part of his defense, we must examine the record for harm as it is and not how it might look if the trial court had made different rulings. Appellant does not argue on appeal that the granting of the State's motion in limine was error.

after a conviction; and (3) multiple punishments for the same offense. *Bigon v. State*, 252 S.W.3d 360, 369 (Tex. Crim. App. 2008). A multiple punishments claim can arise in two contexts. Relevant here is the lesser-included offense context, where the same conduct is punished twice, once for the basic conduct and a second time for the same conduct plus more. *Id.* at 370.

Courts begin a multiple-punishments analysis by determining whether the two offenses are the same under the *Blockburger* test. *Id.* (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). "Under the *Blockburger* test, two offenses are not the same if one requires proof of an element that the other does not." *Id*. The Texas Court of Criminal Appeals's cognate-pleadings approach allows double-jeopardy claims even when offenses are not the same under a strict application of the *Blockburger* test if the pleadings alleged the same "facts required." *Shelby v. State*, 448 S.W.3d 431, 436 (Tex. Crim. App. 2014).

Appellant did not raise double jeopardy at trial. Because of the fundamental nature of double-jeopardy protections, a double-jeopardy claim may be raised for the first time on appeal if: (1) the undisputed facts show that the double-jeopardy violation is clearly apparent on the face of the record; and (2) enforcement of the usual rules of procedural default serves no legitimate state interest. *Langs v. State*, 183 S.W.3d 680, 687 (Tex. Crim. App. 2006). A double-jeopardy claim is clearly apparent on the face of the record "if resolution of the claim does not require further proceedings for the purpose of introducing additional evidence in support of the double-jeopardy claim." *Ex parte Denton*, 399 S.W.3d 540, 544 (Tex. Crim. App. 2013). If the claim is clearly apparent, no legitimate state interest is served by enforcing the usual rules of procedural default. *Id.*

B. Analysis

Appellant argues that punishing him for both counts essentially punishes him twice for assaulting David. The State responds that the convictions do not violate double jeopardy because appellant committed several distinct aggravated assaults against David. We agree with appellant.

Applying the *Blockburger* analysis, the Texas Court of Criminal Appeals has held that "a defendant may not be punished for both a burglary with the commission of a felony during the burglary and the underlying felony itself." *Duran v. State*, 492 S.W.3d 741, 745 (Tex. Crim. App. 2016); *see Langs v. State*, 183 S.W.3d 680, 686 (Tex. Crim. App. 2006) (reaching the same holding). The Court reasoned that while burglary requires proof of illegal entry, a fact which is not required to prove the underlying felony, the State must nonetheless prove all the elements of the underlying felony to prove the burglary. *Langs*, 183 S.W.3d at 686. "Thus, the felony offense would not require proof of an additional element that the burglary offense does not also require." *Id.*

In this case, the State alleged under Count 1 that appellant gained entrance to David's house without his consent and committed aggravated assault against him there. Under Count 2, the State alleged that appellant committed aggravated assault with a deadly weapon by causing David bodily injury by shooting him with a handgun. The State argues that appellant is not being punished twice for the underlying felony because he committed a separate and distinct aggravated-assault offense against David. *See Sanchez v. State*, 269 S.W.3d 169, 170 (Tex. App.—Amarillo 2008, pet. ref'd) (observing that double jeopardy is not violated when "separate and distinct offenses occur in the same transaction"). We disagree. It is true that the application paragraph for Count 1

does not specify the way in which appellant committed aggravated assault, but the jury charges for both counts required the jury to find that appellant committed aggravated assault in the same manner: using or exhibiting a deadly weapon while causing bodily injury to David. As in *Langs*, even though Count 1 required proof of illegal entry when Count 2 did not, Count 2 did not require proof of any fact not also required to prove Count 1. *See* 183 S.W.3d at 686. We reject the State's argument.

We conclude that a double jeopardy violation is apparent on the face of the record because punishing appellant under both counts clearly subjects him to multiple punishments for the same offense. *See id.*; *see also Rangel v. State*, 179 S.W.3d 64, 72 (Tex. App.—San Antonio 2005, pet. ref'd) (sustaining a double-jeopardy issue under similar facts). When a double jeopardy violation is apparent on the face of the record, no legitimate state interest is served by enforcing the usual rules of procedural default. *See Ex parte Denton*, 399 S.W.3d at 544. Appellant has preserved his double jeopardy claim for our review.

When a defendant has been convicted of two offenses which are the "same" for double jeopardy purposes, the appropriate remedy is to affirm the conviction on the most serious offense and vacate the other. *Duran*, 492 S.W.3d at 745. The most serious offense "is the offense of conviction for which the greatest sentence was assessed." *Ex parte Cavazos*, 203 S.W.3d 333, 338 (Tex. Crim. App. 2006). Appellant received a forty-year sentence on Count 1 and a twenty-year sentence on Count 2. Count 1 is the most serious offense and should be retained. *See id.*

We sustain appellant's second issue.

IV. CONCLUSION

We vacate and dismiss Count 2 (appellate cause No. 13-15-00601-CR) and affirm the trial court's judgment on Count 1 (appellate cause No. 13-15-00600-CR).

NORA L. LONGORIA
Justice

Publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
9th day of March, 2017.

APPENDIX 2

THE THIRTEENTH COURT OF APPEALS

13-15-00600-CR

WILLIAM ROGERS
v.
THE STATE OF TEXAS

On Appeal from the
24th District Court of Refugio County, Texas
Trial Cause No. 2013-4-5466

JUDGMENT

THE THIRTEENTH COURT OF APPEALS, having considered this cause on appeal, concludes that the judgment of the trial court should be AFFIRMED. The Court orders the judgment of the trial court AFFIRMED.

We further order this decision certified below for observance.

March 9, 2017