No. 24-

IN THE

Supreme Court of the United States

AARON YORK DEAN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND COURT OF APPEALS OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does *Grey v. State*, 298 S.W.3d 644 (Tex. Crim. App. 2009) violate the Due Process and Equal Protection clauses of the United States Constitution by allowing the State to submit a lesser-included offense to the jury merely by requesting it while the defendant must show some evidence in the record suggesting that defendant is guilty, if he is, of only the lesser-included offense?

Does *Grey v. State*, 298 S.W.3d 644 (Tex. Crim. App. 2009) violate the Fifth Amendment's requirement of a grand jury indictment and the Sixth Amendment's requirement of notice of the charges by allowing the State to add a lesser-included charge at the conclusion of trial merely on request?

PARTIES TO THE PROCEEDING

Aaron York Dean, Petitioner

State of Texas, Respondent

STATEMENT OF RELATED CASES

There are no related cases.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Aaron York Dean respectfully petitions for a writ of certiorari to review the Opinion and Judgment of the Second Court of Appeals of Texas below:

OPINIONS BELOW

The postcard opinion of the Texas Court of Criminal Appeals is *Dean v. State*, No. PD-0200-24, 2024 Tex. Crim. App. LEXIS 394. (App. 1-36). The opinion issued by the Court of Appeals of Texas, Second District, Fort Worth is *Dean v. State*, No. 02-22-00322-CR (Tex. App. – Fort Worth Feb. 15, 2024, pet. ref'd) (mem. op.; not designated for publication). (App. 37).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. sec. 1257(a). The Texas Court of Criminal Appeals denied review on May 15, 2024 making this petition timely under Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put

in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution, Amendment 14, Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

INTRODUCTION

Petitioner, a police officer, was dispatched to investigate an open residence in the early morning hours of October 12, 2019. Working his way around the home, he came to an open window in the back. He and the resident came face-to-face with guns drawn on each other. Petitioner, defending himself and his partner, intentionally shot the resident and was indicted for murder, an intentional act. At the conclusion of the trial evidence, the prosecutors requested and received a lesser-included manslaughter instruction charging a reckless act, over Dean's numerous objections. The prosecution cited and the trial court relied on a decision from the Texas Court of Criminal Appeals, *Grey v. State*, 298 S.W.3d 644 (Tex. Crim. App. 2009), which allows prosecutors, but not defendants, to obtain a lesser-included instruction at the close of the evidence merely by requesting it while a defendant must point to evidence in the record showing that, if the defendant is guilty, the defendant is guilty only of the lesser-included. Dean was acquitted of murder but convicted of the lesser-included manslaughter and sentenced to 11 years, 10 months and 12 days in prison. The Second Court of Appeals of Texas affirmed in all respects. The Texas Court of Criminal Appeals refused discretionary review.

BACKGROUND

THE INCIDENT

Dean, a Fort Worth, Texas police officer, was dispatched on a call in the early morning hours of October 12, 2019. 25 RR 70. Officer Carol Darch was dispatched

as an assist unit. *Id.* Officers were dispatched to 1203 East Allen Avenue in Fort Worth on an "open structure" call. 25 RR 71. The officers approached the decedent's residence and noticed that the front porch light was on and that doors were open in the front of the house. 25 RR 77. Officers believed that it was odd for the house to be in that condition at that time of night. 25 RR 80. The house appeared to have been burglarized. *Id.*; 25 RR 88. The house looked "ransacked." 27 RR 59. Personal property was seen outside the residence like a burglary was in progress. 25 RR 160. After looking in the front door of the residence, the officers went around the side of the house. 25 RR 89. The officers then went to the back of the house to inspect the residence. 27 RR 62. While officers were in the backyard of the residence, the decedent went to her purse and "grabbed out" a gun. 24 RR 69. She got pretty close to the window with the gun. 24 RR 71. While in the back yard of the residence, Petitioner saw a silhouette in a window of the residence. 27 RR 70. He stepped back, drew his weapon and pointed it at the figure. 27 RR 71. He called out to the silhouette in the window to "put up your hands, show me your hands, show me your hands." 27 RR 76. He then realized that he was looking down the barrel of a gun. *Id.* The gun was pointed directly at him. 27 RR 77. He intentionally fired a single shot from his duty weapon. 27 RR 76. He then realized that he had shot the person in the window. *Id.* An eleven-year-old who was present inside the residence explained that the deceased pointed her gun and the police shot her. He further explained that the police told the deceased to put her hands up, that she didn't do it, and she was then shot by the police. Dean's assist officer testified that shooting at a person through a window is an act clearly dangerous to human life. 25 RR 120. She testified that deadly force is

always met with deadly force and that Fort Worth police officers are trained to stop a threat. 25 RR 140, 162, 163.

TRIAL COURT PROCEEDINGS

On October 18, 2019, a complaint was filed in the 297th Judicial District Court of Tarrant County charging Dean with murder in violation of Texas Penal Code sec. 19.02. CR 19. Dean had been arrested and posted bond. CR 20. Dean retained counsel. CR 31. 47.

Dean was indicted by a Tarrant County grand jury on December 20, 2019, for the offense of murder. CR 9. Specifically, the indictment alleged that on or about October 12, 2019, in Tarrant County, Texas that Dean did intentionally or knowingly cause the death of an individual, Atatiana Jefferson, by shooting Atatiana Jefferson with a deadly weapon, a firearm. CR 9. A second paragraph in the indictment charged that Dean, with intent to cause serious bodily injury to Jefferson, committed an act clearly dangerous to human life, namely, shooting her with a deadly weapon, again a firearm, and thereby caused her death. *Id.*

After jury selection, the case proceeded to trial on the merits on December 6, 2022. 25 RR 1. After eight days of trial and lengthy deliberations, a jury convicted Dean of the lesser-included offense of manslaughter on December 15, 2022. 30 RR 8. The case proceeded to an immediate punishment hearing and the jury sentenced Dean to 11 years, 10 months and 12 days in the state penitentiary on December 20, 2022. CR 569.

Notice of appeal was timely given. CR 577.

PROCEEDINGS IN THE TEXAS APPELLATE COURTS

On appeal, Dean raised several arguments including whether the jury should have been instructed on the lesser-included charge of manslaughter. This argument included complaints that *Grey v. State* allows the prosecution to sidestep the constitutional requirement of a grand jury indictment, that *Grey v. State* violates equal protection by allowing the prosecution to obtain a lesser-included instruction on a lower threshold than the defense, and that *Grey v. State* violates due process by depriving defendants of notice of all charges and the ability to challenge the indictment pretrial.

After briefing, the Court of Appeals of Texas, Second District, Fort Worth held oral argument on December 5, 2023, and issued an opinion on February 15, 2024, denying all of Dean's arguments.

Dean timely sought discretionary review in the Texas Court of Criminal Appeals. One of Dean's proposed questions for review was whether *Grey v. State* should be overruled. Dean's petition for discretionary review was refused on May 15, 2024.

THE STATE'S LESSER-INCLUDED MANSLAUGHTER INSTRUCTION

Appellant was charged with murder. CR 9. He testified that he intentionally defended himself and his partner by shooting the Atatiana Jefferson. 27 RR 76-77. After both sides rested, the State requested an instruction on the lesser-included offense of manslaughter.

29 RR 4. Appellant lodged numerous objections to this instruction. 29 RR 6-11. They were overruled. 29 RR 11. Appellant was acquitted of murder but convicted of manslaughter. 30 RR 8, CR 569. On appeal, Dean raised this issue again. His complaints on appeal about the lesser-included manslaughter instruction included that the record contained no evidence supporting the charge, that he was deprived of an indictment including this charge and of notice of all the charges against him, and that this deprived him of due process and equal protection because the prosecution had to meet a lower burden than the defense for a lesser-included instruction while sidestepping other statutory and constitutional provisions. The court of appeals relied on *Grey v. State*, 298 S.W.3d 644 (Tex. Crim. App. 2009) to overrule Appellant's points. The Texas Court of Criminal Appeals refused Dean's petition for discretionary review on this and other points.

STANDARD OF REVIEW

Because this petition involves the interpretation of federal constitutional law and prior holdings of this Court, the standard of review is de novo. *See Salve Regina College v. Russell*, 499 U.S. 225, 231–32 (1991).

REASONS FOR GRANTING THE WRIT

Does *Grey v. State*, 298 S.W.3d 644 (Tex. Crim. App. 2009) violate the Due Process and Equal Protection clauses of the United States Constitution by allowing the State to submit a lesser-included offense to the jury merely by requesting it while the defendant must show some evidence in the record suggesting that defendant is guilty, if he is, of only the lesser-included offense?

For many years, Texas applied the same standard to requests from both the prosecution and the defense for lesser-included offense instructions to the jury. A request for a lesser-included instruction required both that the offense was a lesser-included offense of the charged offense and that there was some evidence in the record showing that, if the defendant was guilty, he was guilty only of the lesser-included offense. Now, the prosecution may get a lesser-included question merely by asking for one—assuming, of course, the offense is a lesser-included of the charged offense—while the defense must still show that the record contains some evidence showing that the defendant is guilty, if he is, of just the lesser-included. Dean asks this Court to grant this petition and determine if this violates the Due Process and Equal Protection clauses of the United States Constitution.

The Due Process clause of the Fifth Amendment requires all persons to receive due process of law: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. "[N] or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. XIV, § 1. "[N]or [shall a State] deny to any person within its

jurisdiction the equal protection of the laws." *Id.* These concepts manifest themselves throughout criminal law.

The prosecution must disclose favorable evidence. *Brady v. Maryland*, 373 U.S. 83 (1953). The prosecution must disclose impeaching evidence. *Giglio v. United States*, 405 U.S. 150 (1972). Such evidence must be preserved. *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). A defendant has the right to compulsory process to facilitate presentation of a defense. *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920 (1967). A defendant cannot be convicted on false or perjured testimony. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Defendants must receive transcripts of prior proceedings when needed for an effective defense or ab appeal. *Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971). "Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant." *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). A defendant may not be tried on an indictment handed up by a grand jury from which persons of that defendant's race have been purposefully excluded. *Hernandez v. Texas*, 347 U.S. 475, 482, 74 S.Ct. 667, 98 L.Ed.2d 866 (1954). Nor may a defendant be tried by a petit jury from which certain races were systematically excluded. *Strauder v. West Virginia*, 100 U.S. 303, 310, 25 L.Ed. 664 (1880). Or by a jury when the prosecution has exercised race-based preemptory challenges. *Batson v. Kentucky*, 476 U.S. 79, 97–98, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Under the *Royster-Rosseau* line of cases from the Texas Court of Criminal Appeals, a lesser-included

instruction was appropriate only when (1) the requested offense was a lesser-included offense of the charged offense and (2) some evidence in the record would permit a jury to rationally find that, if the defendant was guilty, he was guilty only of the lesser-included offense. *Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993); *Royster v. State*, 622 S.W.2d 442 (Tex. Crim. App. 1981) (plurality op. on reh'g). This applied to both the prosecution and the defense. *Arevalo v. State*, 943 S.W.2d 887 (Tex. Crim. App. 1997). In 2009, this changed.

After decades under the *Royster-Rosseau* line of cases, the Texas Court of Criminal Appeals decided *Grey v. State*, 298 S.W.3d 644 (Tex. Crim. App. 2009) in 2009. *Grey* removed for the State only the requirement under the *Royster-Rosseau* line of cases that the record contain some evidence suggesting that, if the defendant is guilty, he is guilty only of the lesser-included. Instead, the State may have a lesser-included instruction merely by asking—provided, of course, the requested offense is a lesser-included of the charged offense: "The common-law rule established in *Arevalo* is based on flawed premises, places undue burdens on the prosecutor, and results in an illogical remedy. Consequently, we overrule *Arevalo*." *Grey*, 298 S.W.3d at 651.

But what is the flawed premise applying the requirement of some evidence suggesting guilt of only the lesser-included to the State and defense? That a lesser-included instruction "must not constitute an invitation to the jury to reach an irrational verdict." *Arevalo*, 943 S.W.2d at 890 (quoted in *Grey*, 298 S.W.3d at 649). This premise is flawed because "[i]f the lesser offense is viewed in isolation, a jury's verdict would be rational so long as

the lesser offense is included in the charging instrument and supported by legally sufficient evidence." *Grey*, 298 S.W.3d at 649. Except that misses the point of the second prong—that there must be some evidence suggesting that, if the defendant is guilty at all, he is only guilty of the lesser-included. Nonetheless, *Grey* found that this requirement placed undue burdens on prosecutors. Those burdens? Having to make choices about what charges to bring: "It is the State, not the defendant, that chooses what offense is to be charged." *Id.* at 650. And forcing the State to choose means they might make the wrong choice:

> If the prosecutor believes the evidence for the charged offense is strong but also believes that the jury ought to be able to consider the lesser-included offense, then abandoning the charged offense as a remedy for the dilemma created by *Arevalo* would be overkill. And the decision on whether to abandon the charged offense would itself pose a dilemma because the prosecutor would not want to effectuate an abandonment unnecessarily.

Id. at 651. Moreover, allowing lesser-included offenses improves the odds of the State's securing a conviction: "When, in the prosecutor's judgment, submission of the lesser-included offense will enhance the prospects of securing an appropriate criminal conviction for a defendant who is in fact guilty, society's interests are best served by allowing the submission." *Id.* Now, the prosecutor can avoid having to make a tough decision: "And the decision on whether to abandon the charged offense would itself pose a dilemma because the prosecutor would not want to effectuate an abandonment unnecessarily." *Id.* But tough

tactical decisions are what trial lawyers make every day—it's part and parcel of trying cases. *Arevalo's* logic dances around the most important question: whether there's evidence suggesting guilt of the lesser-included offense.

As the name implies, lesser-included offenses have something less than the charged offense. It could be a lower mens rea or perhaps fewer elements or lower thresholds. Nonetheless, due process requires sufficient evidence to convict of that offense. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). And a grand jury must first hand up an indictment charging the offense. Yet while the record need not contain any evidence for the State to request a lesser-included—much less evidence suggesting that if the defendant he is guilty only of the lesser-included offense—it must for the defense.

Dean asks this Court to grant certiorari and determine if *Grey v. State* violates the Due Process and Equal Protection Clause of the United States Constitution by allowing the State to obtain a lesser-included jury instructions simply by requesting when the defendant must show that the record contains evidence suggesting that, if the defendant is guilty, he is guilty only of the lesser-included.

Does *Grey v. State*, 298 S.W.3d 644 (Tex. Crim. App. 2009) violate the Fifth Amendment's requirement of a grand jury indictment and the Sixth Amendment's requirement of notice of the charges by allowing the State to add a lesser-included charge at the conclusion of trial merely on request?

The requirement of an indictment in a felony criminal case is clear. U.S. CONST. Amend. V ("No person shall

be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury[.]"). A defendant must "be informed of the nature and cause of the accusation[.]" U.S. CONST. Amend. VI. An indictment does so when it plainly and succinctly states the essential facts supporting the charged offense. *United States v. Resendiz–Ponce*, 549 U.S. 102, 127 S.Ct. 782, 789, 166 L.Ed.2d 591, 600 (2007). "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed. 590 (1974). Reference to the statute under which the defendant is charged "accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence" generally suffices. *United States v. Hess*, 124 U.S. 483, 487 (1888). The intent required should also be alleged. *United States v. Davis*, 336 F.3d 920, 922–23 (9th Cir. 2003); *United States v. Fischetti*, 450 F.2d 34, 39 (5th Cir. 1971).

In this case, the grand jury handed up an indictment charging Dean with murder. The indictment alleged that Dean committed murder one of two ways: Either he intentionally or knowingly caused the death of Atatiana Jefferson by shooting her with a firearm or he intentionally or knowingly committed an act clearly dangerous to human life with intent to cause serious bodily injury by shooting Atatiana Jefferson with a firearm causing her death. At the conclusion of the case, the State, citing *Grey v. State*, requested a lesser-included instruction on manslaughter. With numerous objections spanning six pages of the

record, Dean objected to the manslaughter charge. The trial court overruled these objections and included the lesser manslaughter charge. The jury acquitted Dean of murder but convicted him of manslaughter and sentenced him to eleven years, ten months and twelve days. Dean was convicted and sentenced for an offense for which no grand jury handed up an indictment and of which he had no notice he would be facing. Rather, he was convicted of an offense that, while similar to the charged offenses, was markedly different in a critical way.

Murder in Texas as charged in this indictment required intentionally or knowingly causing death or intentionally causing serious bodily injury with an act clearly dangerous to human life resulting in death. Tex. Pen. Code § 19.02(b). The offense of conviction—manslaughter—however, required only death by reckless conduct. Tex. Pen. Code § 19.04(a) ("A person commits an offense if he recklessly causes the death of an individual."). These are very different standards. On the one hand, a person acts intentionally "when it is his conscious objective or desire to engage in the conduct or cause the result." Tex. Pen. Code § 6.03(a). A person acts knowingly "when he is aware that his conduct is reasonably certain to cause the result." *Id.* § 6.03(b). On the other hand, a person acts recklessly "when he is aware of but consciously disregards a substantial and unjustifiable risk that . . . the result will occur." *Id.* § 6.03(c). And disregarding that risk is a "gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." *Id.*

Until the charge conference, Dean had no notice that he would be facing a manslaughter charge with only

a reckless mens rea. The indictment had alleged only intentional or knowing acts by Dean. The evidence at trial showed only an intentional act by Dean. No grand jury ever found probable cause to believe Dean acted recklessly. Nothing gave Dean notice that he would be on trial for manslaughter.[1] The petit jury heard no evidence of reckless acts by Dean. The State obtained this jury instruction at the conclusion of the evidence. Yet Dean stands convicted of manslaughter. Dean asks this Court to grant certiorari and determine if this violated Dean's Fifth Amendment right to a grand jury indictment and Sixth Amendment right to notice of the charges against him.

1. Though not germane to this petition, *Grey v. State* also allows the State to sidestep two important Texas procedural safeguards. Texas Code of Criminal Procedure imposes a heightened pleading requirement for reckless acts requiring the State to "allege, with reasonable certainty, the act or acts relied upon to constitute recklessness or criminal negligence, and in no event shall it be sufficient to allege merely that the accused, in committing the offense, acted recklessly or with criminal negligence." Tex. Code Crim. Proc. art. 21.15. *Grey* also effectively eliminates the 10-day notice requirement for amending an indictment. *See* Tex. Code Crim. Proc. art. 28.10.

CONCLUSION AND PRAYER

For the reasons stated in this petition, the Second Court of Appeals of Texas decided an important federal question in a way that conflicts with relevant decisions of this Court. Petitioner asks this Court to grant certiorari, reverse the Opinion of the Second Court of Appeals of Texas, and sustain Petitioner's objections to the lesser-included manslaughter charge in the trial court.

Respectfully submitted,

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August 13, 2024

APPENDIX

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APPENDIX A — MEMORANDUM OPINION IN THE COURT OF APPEALS, SECOND APPELLATE DISTRICT OF TEXAS AT FORT WORTH, DELIVERED FEBRUARY 15, 2024

IN THE COURT OF APPEALS
SECOND APPELLATE DISTRICT OF TEXAS
AT FORT WORTH

No. 02-22-00322-CR

AARON YORK DEAN,

Appellant,

v.

THE STATE OF TEXAS.

Delivered February 15, 2024

On Appeal from the 396th District Court
Tarrant County, Texas
Trial Court No. 1616871D

Before Kerr, Bassel, and Walker, JJ.
Memorandum Opinion by Justice Kerr

MEMORANDUM OPINION

In the early morning hours of Saturday, October 12, 2019, Appellant Aaron York Dean—a white Fort Worth Police Officer—shot and killed Atatiana Jefferson, an African American woman, while responding to an open-

structure call at her home. A Tarrant County grand jury indicted Dean for murder. Dean twice moved to change venue, first arguing that so great a prejudice existed against him in Tarrant County that he could not obtain a fair and impartial trial and then additionally arguing that a dangerous combination existed against him by influential persons in Tarrant County by reason of which he could not expect a fair trial. The trial court denied both motions.

The case proceeded to trial in December 2022. The trial court charged the jury on murder and the lesser-included offense of manslaughter along with two justification defenses. The jury found Dean guilty of manslaughter and assessed his punishment at 11 years, 10 months, and 12 days in prison. The trial court sentenced him accordingly.

Dean raises four points on appeal: (1) the trial court erred by instructing the jury on the lesser-included offense of manslaughter; (2) the trial court abused its discretion by not changing the trial's venue because there existed a dangerous combination against him by influential persons in Tarrant County; (3) the trial court erred by not changing the trial's venue because the State's controverting affidavits filed in response to his first venue motion were insufficient as a matter of law; and (4) the trial court erroneously instructed the jury on reasonable belief. Because the trial court did not err or abuse its discretion by not granting Dean's request to change venue and because it did not err in instructing the jury, we will affirm Dean's conviction in this case, with all its levels of tragedy.

Appendix A

I. Background

Jefferson lived with her then-eight-year-old nephew Z.C. (Zeke)[1] and her mother in Jefferson's mother's house in Fort Worth.[2] In the early morning hours of October 12, 2019, Jefferson and Zeke were playing video games in one of the home's bedrooms. The home's front and side doors were open because Jefferson and Zeke had burned hamburgers earlier that evening and were trying to clear out the smoke.

Around 2:00 a.m., a neighbor saw that the front and side doors to the home were open and that the home's lights were on. The neighbor was concerned and called the Fort Worth Police Department's non-emergency number. Dean and fellow Fort Worth Police Officer Carol Darch were dispatched to the home on an open-structure call.

As Dean and Officer Darch approached the home, they noticed that its front and side doors were open, but the storm doors in those same doorways were closed. They looked inside the house, and both thought that the home appeared to have been burglarized. Dean and Officer Darch then went around the side of the home to the backyard. Dean opened the gate to the backyard, entered the backyard, and shined his flashlight around. Officer Darch followed. Neither Dean nor Officer Darch announced their presence.

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1. We use an alias to refer to Z.C. *See* Tex. R. App. P. 9.10(a)(3).

2. At the time of the shooting, Jefferson's mother was in the hospital due to poor health.

As Dean entered the backyard, he turned to face the house. Officer Darch followed behind him with her back toward his. Meanwhile, Jefferson heard a noise coming from the backyard. She took a handgun out of her purse and approached a window facing the backyard.

Dean testified that he saw an adult's silhouette in the window. He then yelled, "[P]ut your hands up, show me your hands." He further testified that he saw the barrel of a gun pointed at him and that he fired a single shot at the silhouette as he yelled the commands. Officer Darch heard Dean yelling commands and quickly turned around. As she turned, she heard the shot. She testified that she never saw a firearm pointed out of the window but recalled seeing Jefferson's face with eyes "as big as saucers" through the window. Jefferson died as a result of Dean's shooting her in the torso.

Dean was arrested on October 14, 2019, and a grand jury indicted him for Jefferson's murder just over two months later.

In November 2021, Dean moved to change venue, arguing that there existed so great a prejudice against him in Tarrant County that he could not obtain a fair and impartial trial there. *See* Tex. Code Crim. Proc. Ann. art. 31.03(a)(1). Dean's motion was supported by his affidavit, along with the affidavits from two Tarrant County residents. The State objected to Dean's venue motion and, in support of that objection, filed three controverting affidavits stating that Dean and the other two affiants were not credible in their claims that Dean could not obtain a fair and impartial trial in Tarrant County.

Judge David C. Hagerman, the then-presiding judge over the case, heard the motion over three days in May 2022. Judge Hagerman found that while the news media's coverage of the incident was pervasive and prejudicial, it was not inflammatory. He denied the motion.

Dean later successfully moved to recuse Judge Hagerman from the case. The presiding judge of the Eighth Administrative Judicial Region then transferred the case to the 396th District Court.

In November 2022, Dean renewed his venue motion with a supplemental motion. In that motion, Dean maintained his argument that there existed so great a prejudice against him in Tarrant County that he could not obtain a fair trial. *See id.* He further alleged that there existed a dangerous combination against him by influential persons in Tarrant County such that he could not expect a fair trial. *See id.* art. 31.03(a)(2).

Judge George Gallagher, the presiding judge of the 396th District Court, heard Dean's supplemental venue motion over two days in mid-November 2022. During the hearing, Dean presented evidence from five witnesses and offered into evidence media clips and news articles about the shooting. Judge Gallagher deferred his ruling until after jury selection, which began on November 28, 2022. After the jury was seated, the trial court heard arguments from the parties regarding Dean's supplemental venue motion. The trial court denied the motion, and the case proceeded to trial in Tarrant County.

During the charge conference, the State requested that the trial court instruct the jury on the lesser-included offense of manslaughter. Dean objected to its inclusion in the charge on several grounds, but the trial court overruled Dean's objections and instructed the jury on manslaughter.

The charge also included a self-defense instruction. In conjunction with that defense, the trial court defined "reasonable belief" as "a belief that would be held by an ordinary and prudent person in the same circumstances as the actor." Although this definition tracked that found in Section 1.07(a)(42) of the Texas Penal Code, *see* Tex. Penal Code Ann. § 1.07(a)(42), Dean objected to it, arguing that the reasonableness of an accused's belief must be viewed from his viewpoint at the time he acted. The trial court overruled Dean's objection.

The jury found Dean guilty of manslaughter.

Dean has timely appealed. He raises four points, two challenging the trial court's denial of his venue-change motions and two alleging jury-charge error. We address the two venue points first because doing so aids in our disposition of the appeal.

II. Dean's First Venue-Change Motion

In his third point, Dean argues that the trial court erred by denying his first venue-change motion because the State's three controverting affidavits filed in response to his motion were insufficient as a matter of law. Dean

contends that all three affidavits were legally deficient because they failed to attack his credibility and that of his fellow affiants or to attack their "means of knowledge" as Texas Code of Criminal Procedure Article 31.04 requires. *See* Tex. Code Crim. Proc. Ann. art. 31.04. Dean acknowledges that his argument is foreclosed by existing Texas Court of Criminal Appeals' precedent—*Burks v. State*, 876 S.W.2d 877 (Tex. Crim. App. 1994), and *Cockrum v. State*, 758 S.W.2d 577 (Tex. Crim. App. 1988)—but presents it to us to preserve it for review by that court. Dean complains that the Court of Criminal Appeals has interpreted Article 31.04 "to impose a much lower requirement for controverting affidavits" that is contrary to the statute's plain language.

The United States and Texas Constitutions guarantee a criminal defendant a fair trial by an impartial jury. *See* U.S. Const. amend. VI; Tex. Const. art. I, § 10. "[W]hen a defendant demonstrates his inability to obtain an impartial jury or a fair trial at the place of venue," a venue change is proper and consistent with due-process principles. *Hathorn v. State*, 848 S.W.2d 101, 109 (Tex. Crim. App. 1992).

Article 31.03(a) of the Texas Code of Criminal Procedure provides that a trial court may grant a change of venue if the defendant establishes that "there exists in the county where the prosecution is commenced so great a prejudice against him that he cannot obtain a fair and impartial trial" or "there is a dangerous combination against him instigated by influential persons, by reason of which he cannot expect a fair trial." Tex. Code Crim.

Proc. Ann. art. 31.03(a). A defendant seeking a venue change must file a written motion supported by his own affidavit and the affidavits of at least two credible county residents asserting that the defendant cannot receive a fair trial in that county due to either prejudice or a combination of influential persons against him. *See id.* "If the defendant's motion is proper on its face, he is entitled to a change of venue as a matter of law, unless the State properly challenges the defendant's motion." *Janecka v. State*, 937 S.W.2d 456, 467 (Tex. Crim. App. 1996).

The State may challenge the defendant's motion by attacking the defendant's affiants' credibility or their "means of knowledge" through an "affidavit of a credible person." Tex. Code Crim. Proc. Ann. art. 31.04. "The purpose of [an Article 31.04] controverting affidavit is to provide a form of pleading [that] establishes that there is a factual dispute in need of resolution." *Burks*, 876 S.W.2d at 890. If the controverting affidavit suffices to create a fact issue, the trial court must hold a hearing on the motion. *See* Tex. Code Crim. Proc. Ann. art. 31.04; *Burks*, 876 S.W.2d at 890. But if the controverting affidavit fails on its face to meet either of Article 31.04's requirements, the defendant is entitled to a change of venue as a matter of law. *Janecka*, 937 S.W.2d at 467.

Here, Dean's first venue motion alleged that because of the considerable publicity and extensive media coverage generated by the case, there existed so great a prejudice against him in Tarrant County that he could not obtain a fair and impartial trial. As Article 31.03 requires, Dean supported these allegations with his own affidavit and

two affidavits from Tarrant County residents. The State responded by objecting to Dean's motion and submitting controverting affidavits from three individuals: Reverend William T. Glynn, Michael P. Heiskell, and David Keltner.[3]

Dean contends that all three affidavits are facially insufficient. He asserts that Reverend Glynn's and Heiskell's affidavits are conclusory because neither man explained how Dean and his affiants lacked adequate knowledge or why they lacked credibility. He also faults Reverend Glynn and Heiskell for equating support of Dean's position with bias in his favor. Dean describes Keltner's affidavit as "the least sufficient" of the three because "[i]t wholly omits even conclusory statements about [Dean]'s affiants." Dean further complains that Keltner conclusorily stated that Dean could get a fair trial and "fail[ed] to either challenge the credibility of the affiants or the basis of their opinions."

In *Cockrum*, the Court of Criminal Appeals held that the following affidavit language satisfied Article 31.04:

> My name is _____ and I am a resident of Bowie County, Texas. I have read the affidavits in support of Defendant's Motion for Change of Venue in this cause. The affiants of said affidavits are not credible as they are prejudiced to said Defendant and their means

3. Reverend Glynn is the pastor of Mount Olive Missionary Baptist Church in Fort Worth, and Heiskell and Keltner are practicing Tarrant County attorneys.

> of knowledge are not sufficient to support and justify the statements contained therein.

758 S.W.2d at 582. In *Burks*, the Court of Criminal Appeals noted that the controverting affidavit in that case was identical to the *Cockrum* affidavits' wording and thus held that the affidavit sufficed to create a factual dispute requiring a hearing. 876 S.W.2d at 890.

Here, Reverend Glynn's and Heiskell's affidavits each state their names and that they are Tarrant County residents. Reverend Glynn's affidavit further states in relevant part as follows:

> I have read the affidavits that have been filed in this case in support of the defendant's motion for change of venue. . . . The defendant's affiants are not credible because they are biased in favor of the defendant and lack an adequate means of knowledge to support their statements, including the statements that the defendant cannot obtain a fair and impartial trial.

Heiskell's affidavit has virtually identical language.

The language in Reverend Glynn's and Heiskell's affidavits is substantively identical to that approved by the Court of Criminal Appeals in *Burks and Cockrum*. *See Burks*, 876 S.W.2d at 890; *Cockrum*, 758 S.W.2d at 582; *see also Busby v. State*, 990 S.W.2d 263, 267 (Tex. Crim. App. 1999) ("Article 31.04 has remained unchanged since *Cockrum* was decided in 1988 and was reaffirmed by

Burks in 1994. Moreover, the State may well have relied upon our interpretation in *Cockrum* in determining how to proceed on the venue motion. Hence, even if we believed that appellant's interpretation necessarily followed from the language in Article 31.04 (which we do not), we would find that the interests underlying the doctrine of *stare decisis* are weighty enough, in the present case, to adhere to our decision in *Cockrum*.").

We note that as an intermediate appellate court, we cannot reject or alter Court of Criminal Appeals' precedent. *See Wiley v. State*, 112 S.W.3d 173, 175 (Tex. App.-Fort Worth 2003, pet. ref'd). We therefore conclude and hold that under *Burks* and *Cockrum*, Reverend Glynn's and Heiskell's controverting affidavits sufficed under Article 31.04 to advise the trial court that a factual dispute existed requiring the trial court's resolution. *See Burks*, 876 S.W.2d at 890; *Cockrum*, 758 S.W.2d at 582. Because Article 31.04 requires that the State file only one sufficient controverting affidavit, we need not address Keltner's affidavit. *See* Tex. Code Crim. Proc. Ann. art. 31.04 ("The credibility of the *persons* making affidavit for change of venue, or their means of knowledge, may be attacked by *the affidavit* of a credible *person*." (emphases added)); *see also* Tex. R. App. P. 47.1. We overrule Dean's third point.

III. Dean's Supplemental Venue-Transfer Motion

Dean argues in his second point that the trial court erred by denying his supplemental venue-transfer motion because there was sufficient evidence developed of the

existence of a "dangerous combination" of "influential persons" in Tarrant County. *See* Tex. Code Crim. Proc. Ann. art. 31.03(a)(2). Dean contends that the Tarrant County District Attorney's Office, led by then-Tarrant County District Attorney Sharen Wilson, treated this case differently by deviating from office protocol when investigating and prosecuting it. He additionally contends that Betsy Price, the Fort Worth mayor at the time of the shooting, and the then-Interim Police Chief Edwin Kraus made incorrect statements about the case in the days immediately following the shooting that were repeated by Jefferson's family's attorney; by national, state, and local politicians and leaders; and by broadcast and print media. Dean posits that a dangerous combination of people in Tarrant County—namely, Wilson, Price, and Kraus—when mixed with the ongoing, widespread media coverage of this case and "the already inflamed local and national tensions caused by the Amber Guyger trial and [the] George Floyd murder," made it impossible for him to have a fair trial in Tarrant County.[4]

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4. In September 2018, Guyger, an off-duty white Dallas police officer, shot Botham Jean, a black man, inside his apartment after mistaking his apartment for hers and him for an intruder. *See Guyger v. State*, No. 05-19-01236-CR, 2021 WL 5356043, at *1-2 (Tex. App.-Dallas Nov. 17, 2021, pet. ref'd) (not designated for publication). Guyger was convicted of Jean's murder. *Id.* at *1. Derek Chauvin, a white Minneapolis police officer, was convicted of murdering George Floyd, a black man, while arresting him in May 2020. *See State v. Chauvin*, 989 N.W.2d 1, 13-15 (Minn. Ct. App. 2023), *review denied* (July 18, 2023), *cert. denied*, 144 S. Ct. 427 (U.S. 2023).

Appendix A

A. Applicable law and standard of review

As noted, a trial court may grant a defendant's request for a venue change if the defendant establishes that "there exists in the county where the prosecution is commenced so great a prejudice against him that he cannot obtain a fair and impartial trial" or "there is a dangerous combination against him instigated by influential persons, by reason of which he cannot expect a fair trial." *Id.* art. 31.03(a). The defendant bears the burden to prove either of these bases for a venue change. *See DeBlanc v. State*, 799 S.W.2d 701, 704 (Tex. Crim. App. 1990).

We review a trial court's decision to deny a venue-change request for an abuse of discretion. *Freeman v. State*, 340 S.W.3d 717, 724 (Tex. Crim. App. 2011); *Gonzalez v. State*, 222 S.W.3d 446, 449 (Tex. Crim. App. 2007). Under this standard, we defer to the trial court, which is in the best position to resolve issues involving conflicts in testimony and to evaluate witness credibility. *Gonzalez*, 222 S.W.3d at 452. If the trial court's decision is within the zone of reasonable disagreement, we will affirm it. *See Freeman*, 340 S.W.3d at 724; *Gonzalez*, 222 S.W.3d at 449.

B. Dean's motion and supporting evidence

Dean supplemented his motion to change venue in November 2022, nearly a year after filing his first venue motion. In his supplemental venue motion, Dean maintained that because of the extensive and prejudicial publicity and media coverage generated by the case, he could not receive

a fair and impartial trial in Tarrant County. *See* Tex. Code Crim. Proc. Ann. art. 31.03(a)(1). He additionally argued that he could not expect a fair trial in Tarrant County because influential persons there—namely, Price and Kraus—had instigated a dangerous combination against him by making comments early on that were repeated by the media. *See id.* art. 31.03(a)(2). Specifically, Dean claimed that "[i]n their dangerous combination," Price and Kraus "(1) touted the purported strength of evidence against . . . Dean, (2) made evidentiary representations, (3) discoursed on various prosecution theories, and (4) essentially eliminated any defense available to . . . Dean for the benefit of the prospective jury panel population in Tarrant County."

The trial court heard Dean's supplemental venue-change motion over two days in mid-November 2022. At the hearing, Dean presented testimony from five witnesses—Price; Kraus; Robert Huseman, a former Tarrant County Assistant District Attorney; Fort Worth City Councilmember Chris Nettles; and Dr. Jeanine Galusha, a neuropsychologist—and offered into evidence numerous news articles and media clips related to the shooting.[5]

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5. The bulk of Dean's venue-related evidence was offered and admitted during the hearing on his first venue-change motion. With the majority of that evidence, Judge Hagerman stated that he was admitting it for purposes of that hearing only, and he ruled on the motion before the case was transferred to Judge Gallagher's court. Judge Gallagher stated at the start of the hearing on Dean's supplemental motion that he was "aware that . . . the Defense believed that it had not been able to present all [its] evidence [on

Kraus testified that he was immediately called to the scene of the shooting in the early morning hours of Saturday, October 12, 2019. He received briefings there from his officers. Huseman—the Chief of the DA's Office's Law Enforcement Investigation (LEI) team at the time of the shooting—also went to the scene, as was standard protocol.[6]

In Huseman's capacity as LEI team chief, he was the lead investigator and prosecutor in officer-involved shootings in Tarrant County and presented those cases to the grand jury. Wilson requested that Huseman meet with her on October 14, 2019, the Monday morning following the shooting.[7] Huseman and three other DA's Office employees—including the Chief of the Criminal Division—met with Wilson in her office that morning. During the meeting, Wilson asked Huseman and the others to leave the room while she took a call from Kraus on her cell phone, telling them to come back in 15 minutes. When they returned, Wilson had finished the call.

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the first venue motion], and [he] was going to allow the Defense to continue to present whatever evidence that [it] wanted to present." But at no point did Dean request Judge Gallagher to judicially notice the earlier venue proceedings, and Dean did not re-offer the exhibits from the first hearing into evidence. We therefore consider only the evidence admitted at the hearing on Dean's supplemental venue motion.

6. At the time of the hearing, Huseman was no longer employed by the DA's Office and was in private practice.

7. Wilson was still the DA at the time this case was tried.

A Fort Worth Police Department detective prepared an arrest-warrant affidavit, and on the evening of October 14, he and Huseman were present when a Tarrant County district court judge signed Dean's arrest warrant. Kraus was not present. Kraus testified that he did not direct any of his officers to prepare Dean's arrest warrant but told them to follow the evidence and "make whatever determination they needed to make." Kraus did not recall speaking to Wilson about the offense before Dean's arrest, but he and Huseman confirmed that it was not unusual for the police department to call the DA's Office to discuss cases.

Dean was arrested the same day the warrant was signed. Huseman testified that in officer-involved shootings, the DA's Office's routine practice was to present the case to a grand jury before the officer was arrested and that office protocol was that the DA's Office would not make a recommendation to the grand jury in cases in which the officer had not been arrested. To deviate from that policy, an arrest was required. Huseman agreed that Dean's arrest in this case caused a deviation from office policy.

On October 14 and 15, 2019, Kraus and Price, along with Fort Worth City Manager David Cooke, briefed the press on the investigation's status. Before each briefing, Kraus briefed Price. Both Kraus and Price testified that the briefings' purpose was to update the public on the case's status and that they intended to convey correct and accurate information. During the press conferences, Price had stated that a firearm found in Jefferson's home

was "irrelevant." Kraus admitted, however, that a few facts were incorrectly presented at the press conferences, notably, that Dean was responding to a welfare check rather than an open-structure call and that Jefferson's having a firearm was irrelevant.

Price testified that the shooting was a tragic situation and was thus an important event in Fort Worth. In her opinion, the case had a racial aspect because it involved a white police officer and an African American female. She admitted that many people in Fort Worth's African American community saw the case as racial, "[b]ut not as a whole. There were a lot of people who didn't see it as racial." Price agreed that the mayor, chief of police, and district attorney, as well as state senators, state representatives, county commissioners, and United States representatives, were influential people.

Price recalled that Kraus and Cooke had briefed her before the October 14 and 15 press briefings and that Kraus continued to brief her on the case thereafter. She did not recall speaking to Wilson about the case and was not aware of whether her then-chief of staff and current Fort Worth Mayor Mattie Parker had communicated with Wilson.

Huseman testified that the DA's Office presented the case to the grand jury on December 20, 2019. By that time, another prosecutor had been assigned to the case, but Huseman had not been told that he was off the case. That prosecutor and Wilson went into the grand-jury room before the case was presented to the grand jury. Huseman

remained in the waiting area outside the grand-jury room and was not in the room when prosecutors presented the case. The grand jury returned a true bill of indictment. After that, Huseman was not involved in the case.

Councilmember Nettles testified that he successfully ran for Fort Worth City Counsel in 2021 on a platform of seeking justice for Jefferson. In June 2021, he hand-delivered a letter addressed to the DA's Office and to the then-presiding judge over Dean's case requesting that they expedite Dean's trial. Councilmember Nettles's visit to the courthouse to deliver the letter, along with the letter's contents, was publicized by the media. Councilmember Nettles further testified that he did not believe that he had a consensus from his fellow city councilmembers regarding those actions.

Lastly, Dean presented testimony from Dr. Galusha, a neuropsychologist who specializes in forensic psychology. She testified regarding the primacy effect, confirmation bias, belief persistence, source-memory error, group polarization, and predecisional distortion. Dr. Galusha explained that these principles had been applied to the impact of pretrial media on jurors, and she opined that the more pretrial publicity that potential jurors hear about a case, the more of an impact that publicity will have on their memories and the more it can increase their bias. She further explained that because of the primacy effect, pretrial publicity might hold more weight with a juror than the evidence presented at trial. She additionally explained that pretrial media publicity could increase the potential for bias in jurors, oftentimes "outside of

[their] conscious awareness" such that an instruction to disregard pretrial publicity would be ineffective. Dr. Galusha opined that the publicity in this case seemed to be emotional, which tends to create a stronger memory and bias toward that information; was "largely negative" toward Dean; and was "pretty extensive and pervasive across different platforms." She admitted, however, that she had not studied potential jurors in Tarrant County or the types of media that they had consumed.

The trial court deferred ruling until after jury selection. Two hundred people were summoned for the jury. After no-shows and potential jurors excused by the parties' agreement, 190 potential jurors remained. Of those remaining, 109 indicated that they had "read something, heard something, or seen something about" this case.

The trial court conducted individual voir dire on those 109 potential jurors. Forty-eight of them were excused due to their answers. From the 142 total remaining potential jurors,[8] the trial court was able to seat 12 jurors and two alternates. Of those seated on the jury, only three had indicated that they had heard about Dean's case.[9]

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8. The trial-court judge's venire list indicated that 143 potential jurors were left after the individual voir dire.

9. In its brief, the State arrived at the same conclusion: only three of the 12 jurors had indicated to the trial court that they had heard about the case. During oral argument, however, the State informed us that it believed that five of the 12 had heard about the case. But after reviewing the record, we believe that the State's initial calculation was correct.

After the jury was seated, the trial court heard arguments on Dean's supplemental venue motion and denied it.

C. Analysis

Dean argues that the trial court abused its discretion by not granting his venue-change request because sufficient evidence established that a dangerous combination of influential persons existed in Tarrant County such that he could not expect to receive a fair trial in the county. Dean contends that he met this burden "by showing that the motives of the dangerous combination were widely broadcast in the media to the citizens of Tarrant County." Dean specifically points to the DA's Office's deviation from office protocol and to comments Price and Kraus made at press conferences immediately following the shooting: that Dean was conducting a welfare check rather than responding to an open-structure call at the time of the shooting and that the fact that a handgun was found next to Jefferson's body was "irrelevant."[10] Dean claims that he "was harmed by the circulation of the comments and opinions of the participants in the dangerous combination."

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10. During the venue hearing, Kraus explained how a welfare check differs from an open-structure call: with "a welfare check, you're going out to see if somebody is okay, to check on the status of that person," but with "[a]n open structure, you're not sure why the structure is open." Because of that difference, the two types of calls are handled differently. Kraus agreed that it would have been erroneous to state that Dean had been dispatched on a welfare check that night.

"The basis for sustaining a change of venue challenge based on a dangerous combination 'comes not from a widely held prejudice but from the actions of a small but influential or powerful group who are likely to influence in some manner the way in which the trial proceeds.'" *Ryser v. State*, 453 S.W.3d 17, 36 (Tex. App.-Houston [1st Dist.] 2014, pet. ref'd) (quoting 42 George E. Dix & John M. Schmolesky, *Texas Practice Series: Criminal Practice & Procedure* § 30:11 (3d ed. 2011)). We recognize that Price, Kraus, and Wilson are influential persons, and we recognize that the media's coverage related to the shooting, Jefferson, and the trial continued from the shooting in October 2019 through Dean's trial in December 2022. Even so, Dean did not show that Price, Kraus, and Wilson acted in a way that amounted to a "dangerous combination" so that he could not expect a fair trial in Tarrant County.

Dean suggests that his quick arrest after the shooting and the DA's Office's deviation from its standard procedure of presenting an officer-involved-shooting case to a grand jury before an arrest are evidence of a dangerous combination. But Dean's swift arrest and the DA's Office's presentation of his case to the grand jury thereafter do not show a dangerous combination. *Cf. Myers v. State*, 177 S.W. 1167, 1169 (Tex. Crim. App. 1915) (concluding that proof that defendant was promptly arrested, a grand jury reconvened, and the case set for "hearing" five days after indictment showed only that "officials acted promptly in what they considered [to be] the performance of their duty" and not a dangerous combination within the meaning of the statute). Nor does

the evidence show that Wilson, Kraus, and Price acted improperly in pursuing Dean's arrest and prosecuting the case. According to Kraus, the officers with the Fort Worth Police Department prepared the arrest warrant but did not do so at his direction. Rather, he "simply directed them to follow the evidence and make whatever determination they needed to make." After that, the DA's Office presented the case to the grand jury. According to Huseman, Dean's arrest before the case was presented to the grand jury would have allowed the DA's Office to deviate from its policy of not making a recommendation to the grand jury in officer-involved-shooting cases.[11]

Dean additionally argues that Price's and Kraus's comments to the press in the days following the shooting—specifically, that Dean was conducting a welfare check rather than responding to an open-structure call and that Jefferson's having a gun was irrelevant—which were repeated by other influential persons and the media, were evidence of a "dangerous combination." While these statements may have influenced the views of some, nothing indicates that Price's and Kraus's statements "created a coercive governmental force that could influence the trial proceedings to obtain a conviction without regard to [Dean]'s constitutional right to a fair and impartial jury." *Ryser*, 453 S.W.3d at 36 (citing *Cortez v. State*, 69 S.W. 536, 538 (Tex. Crim. App. 1902)). First, Tarrant County is a large, populous county. *See id.* (noting Harris County's large size in analyzing dangerous-combination argument).

11. We do not know what happened during the grand-jury proceedings here because grand-jury proceedings are secret. *See generally* Tex. Code Crim. Proc. Ann. arts. 20A.201-.205.

Just over half of the potential jurors had heard of the case, and after individual voir dire to ferret out bias created by the media coverage, over 140 potential jurors remained. And although Dr. Galusha testified about the impact of pretrial media on jurors generally, she admitted that she had not studied potential jurors in Tarrant County or the types of media they had consumed. Second, over three years elapsed between Price's and Kraus's statements and Dean's trial. During that time, intervening events occurred that dominated the news cycle and people's lives, namely the COVID-19 pandemic and the 2020 presidential election. *Cf. id.* (noting that the fact that case had been "off the radar" for many months between press conference held by district attorney, mayor, and police chief and the beginning of trial "counsel[ed] against a view that influential people were acting to impede the fair-trial process"). Moreover, as time went on, the media correctly reported that Dean had been dispatched on an open-structure call and also that Zeke had told a forensic interviewer immediately after the shooting that Jefferson had raised her handgun and pointed it at the window.

In sum, although the media coverage in this case was intense and the DA's Office deviated from its standard practices in officer-involved-shooting cases, the trial court could have reasonably concluded that Dean failed to show a dangerous combination against him that was led by influential persons such that he could not expect a fair trial in Tarrant County. *See Buntion v. State*, 482 S.W.3d 58, 73-74 (Tex. Crim. App. 2016) (holding trial court did not abuse its discretion by denying venue motion based on media attention stemming from district attorney's erroneous

statement to a newspaper that defendant would be released on "mandatory parole" if he received a life sentence in his capital murder trial where witnesses testified that they were unaware of any dangerous combination and affidavits offered by the defendant in support of the motion contained mere conclusory allegations that the district attorney's false statement prejudiced the defendant and constituted a dangerous combination working to deny him a fair trial). *But cf. Cortez*, 69 S.W. at 538 (concluding that a dangerous combination of influential persons existed where 60 to 70 influential people, along with the county commissioners' court, contributed financially to hunt for and arrest defendant and no local attorney would agree to defend him but many volunteered to prosecute). To the extent that the evidence could have supported a contrary conclusion, under the governing standard of review we hold that the trial court's decision was within the zone of reasonable disagreement and thus within the trial court's discretion. We overrule Dean's second point.

IV. The Trial Court's Manslaughter Jury Submission

In his first point, Dean contends that the trial court erred by submitting the lesser-included offense of manslaughter to the jury. He argues that the State should have been required to satisfy both prongs of the so-called *Royster-Rosseau* test[12] that a defendant must meet to

12. The Court of Criminal Appeals "established a two-pronged test for determining when a trial judge should submit to the jury a lesser-included offense that is requested by the defendant" in the *Royster-Rosseau* line of cases. *Grey v. State*, 298 S.W.3d 644, 645 & n.1 (Tex. Crim. App. 2009); *see also Rousseau*

prove his entitlement to an instruction on a lesser-included offense: (1) the requested offense is a lesser-included offense of the charged offense and (2) some evidence in the record would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense. *See Grey*, 298 S.W.3d at 645; *Bullock v. State*, 509 S.W.3d 921, 924-25 (Tex. Crim. App. 2016). Dean acknowledges that under *Grey*, the State—unlike a defendant—need not satisfy the second prong of the *Royster-Rosseau* test when it requests a lesser-included-offense instruction, *see Grey*, 298 S.W.3d at 645, and that we are bound by the Court of Criminal Appeals' precedent. He nevertheless challenges *Grey*'s viability to preserve the argument for presentation to the Court of Criminal Appeals. He alternatively contends that *Grey* does not apply here and that *Grey*, as applied, constructively deprived him of notice of the charges against him and violated his due-process and equal-protection rights.

We must review "all alleged jury-charge error . . . regardless of preservation in the trial court." *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). In reviewing a jury charge, we first determine whether error occurred; if not, our analysis ends. *Id.*

Grey instructs that when the State requests the submission of a lesser-included offense, it need not show that "some evidence must exist in the record that would permit a jury rationally to find that if the defendant is

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v. State, 855 S.W.2d 666, 672-73 (Tex. Crim. App. 1993); *Royster v. State*, 622 S.W.2d 442, 446 (Tex. Crim. App. 1981) (plurality op. on reh'g).

guilty, he is guilty only of the lesser offense." 298 S.W.3d at 645 (quoting *Rousseau*, 855 S.W.2d at 673). The requested offense must be merely a lesser-included offense of the charged offense. *See id.; see also Bullock,*509 S.W.3d at 924; *Rousseau*, 855 S.W.2d at 672-73. Here, as Dean concedes, manslaughter is a lesser-included offense of murder, the charged offense. *SeeCavazos v. State*, 382 S.W.3d 377, 384 (Tex. Crim. App. 2012). Under *Grey*, the trial court thus properly granted the State's request to include manslaughter in the jury charge.

Dean maintains, however, that *Grey* is inapplicable here because unlike *Grey*, this case does not involve a "neat and tidy lesser[-]included[-]offense scenario" because this case involves self-defense and because the *mens rea* of the lesser-included offense of manslaughter (recklessness) does not fit within the *mens rea* of the charged offense of murder (intentionally or knowingly).[13] The Court of Criminal Appeals' holding in *Grey* did not turn on the case's facts or the specific lesser-included offense requested there. 298 S.W.3d at 646-51. Rather, the court analyzed the state of the law and its precedent related to the submission of lesser-included offenses

13. Dean also asserts that it was improper to submit both murder and manslaughter along with his self-defense and defense-of-third-person defenses to the jury. Justification defenses apply to both murder and manslaughter. *See Alonzo v. State*, 353 S.W.3d 778, 781-82 (Tex. Crim. App. 2011). This is true regardless of whether the State or the defense requested the inclusion of manslaughter in the charge. *Id.* at 780 (noting that determining which party requested the inclusion of manslaughter was "irrelevant for our analysis").

without reference to the case's facts. *Id.* In doing so, the court articulated a clear rule: "the State is not bound by the second prong of the *Royster-Rousseau* test." *Id.* at 645. The only reference to the case's facts was to illustrate the detrimental consequences of requiring the State to meet both prongs of the *Royster-Rousseau* test. *Id.* at 650. We are thus unpersuaded by Dean's attempts to distinguish *Grey*.

Dean further argues that the State's failure to include manslaughter in the indictment deprived him of notice that he had allegedly committed a reckless act. He contends that this failure violated his constitutional and statutory rights to notice of the charges against him.

Both the Texas and United States Constitutions grant criminal defendants the right to fair notice of the charged offense. *See* U.S. Const. amend. VI; Tex. Const. art. 1, § 10; *State v. Zuniga*, 512 S.W.3d 902, 906 (Tex. Crim. App. 2017). A charging instrument is sufficient if it provides enough notice to allow the accused to prepare a defense. *See Zuniga*, 512 S.W.3d at 906 (citing *Curry v. State*, 30 S.W.3d 394, 398 (Tex. Crim. App. 2000)). "Toward that end, Chapter 21 of the Texas Code of Criminal Procedure governs charging instruments and provides legislative guidance concerning the requirements and adequacy of notice." *Id.* (citing *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004); *Ferguson v. State*, 622 S.W.2d 846, 849-50 (Tex. Crim. App. 1981) (op. on reh'g)).

Dean claims that the indictment—which charged him with murder only—did not provide him with notice that

he had acted recklessly because it did not comply with Article 21.15 of the Code of Criminal Procedure. Article 21.15 requires that the State allege the act or acts relied upon to constitute recklessness whenever recklessness is a part or element of the charged offense, or it is charged that the accused acted recklessly in the commission of an offense:

> Whenever recklessness . . . enters into or is a part or element of any offense, or it is charged that the accused acted recklessly . . . in the commission of an offense, the complaint, information, or indictment in order to be sufficient in any such case must allege, with reasonable certainty, the act or acts relied upon to constitute recklessness . . . , and in no event shall it be sufficient to allege merely that the accused, in committing the offense, acted recklessly. . . .

Tex. Code Crim. Proc. Ann. art. 21.15. But Article 21.15 "does not apply in this situation because the indictment [alleged murder but] did not include manslaughter, which was a lesser-included offense" of murder. *Ramos v. State*, 407 S.W.3d 265, 270 (Tex. Crim. App. 2013).

Here, the indictment charged Dean with murder for the shooting death of Jefferson on October 12, 2019. As noted, Article 21.15 did not apply to Dean's indictment because it charged the offense of murder, and it did not include the lesser-included offense of manslaughter or any other offense that implicated recklessness. *See id.* Even

so, the indictment "still put [Dean] on notice regarding the specific offense of manslaughter" because he was charged with murder and "the events surrounding the [shooting death of Jefferson on October 12, 2019] were unique." *Id.* at 271. We hold that the State's indictment for murder provided Dean sufficient notice to prepare a defense for the charged offense of murder and the lesser-included offense of manslaughter. *See id.; see also Zuniga*, 512 S.W.3d at 906.

Finally, Dean argues that *Grey* "offends due process and equal protection by lowering the burden for the State to obtain a lesser-included instruction while keeping in place a higher burden for a defendant to obtain such an instruction," which "puts the State on more advantageous footing." He asserts that "[a] criminal defendant is entitled to a level playing field" and points out that "[o]ur jurisprudence is replete with examples where due process and equal protection ensure that criminal defendants are not victimized by the prosecution." Dean explains that his defense "was built on his acting intentionally in self-defense" and that "[a]dding a charge after the close of the evidence that lower[ed] the *mens rea* . . . fundamentally alter[ed] the nature" of the charge he had to defend against.

In *Grey*, the Court of Criminal Appeals explained the rationale behind, and the justification for, allowing the State to obtain a lesser-included-offense charge without satisfying the second prong of the *Royster-Rousseau* test:

> If the lesser offense is viewed in isolation, a jury's verdict would be rational so long as

the lesser offense is included in the charging instrument and supported by legally sufficient evidence. The "guilty-only" prong of the *Royster-Rousseau* test requires, however, that we view the rationality of the lesser offense, not in isolation, but in comparison to the offense described in the charging instrument. But why should we make that comparison? The answer must be that the State is entitled to pursue the charged offense and, therefore, is entitled to receive a response from the jury on whether the defendant is guilty of the charged offense. Is the defendant similarly entitled to a response from the jury on the charged offense? The answer to that question is clearly no. It is the State, not the defendant, that chooses what offense is to be charged. In fact, the State can abandon an element of the charged offense without prior notice and proceed to prosecute a lesser-included offense. If the State can abandon the charged offense in favor of a lesser-included offense, there is no logical reason why the State could not abandon its unqualified pursuit of the charged offense in favor of a qualified pursuit that includes the prosecution of a lesser-included offense in the alternative.

. . . .

The cautious approach for the prosecutor to take would be—or at least should be—to request the lesser-included offense. Allowing

> submission of lesser offenses when requested by the prosecutor would serve at least two important interests. First, society has an interest in convicting and punishing people who are guilty of crimes. When, in the prosecutor's judgment, submission of the lesser-included offense will enhance the prospects of securing an appropriate criminal conviction for a defendant who is in fact guilty, society's interests are best served by allowing the submission. Second, the prosecutor has "the primary duty . . . not to convict, but to see that justice is done." Even if the prosecutor believes in a given case that he will secure a conviction on the charged offense if the only alternative is acquittal, he might also believe that the jury should be given the option to decide whether a conviction on the lesser offense is more appropriate.

Grey, 298 S.W.3d at 649-51 (footnotes omitted).

We have recently rejected a complaint that allowing the submission of an uncharged lesser-included offense violated a defendant's due-process rights. *See Villarreal v. State*, No. 02-19-00405-CR, 2021 WL 1323414, at *2-3 (Tex. App.-Fort Worth Apr. 8, 2021, pet. ref'd) (mem. op., not designated for publication). We do so again here. *See id.* And, based on *Grey*'s rationale, we cannot see how including an uncharged lesser-included offense violates a defendant's equal-protection rights. *See Downs v. State*, 244 S.W.3d 511, 518 (Tex. App.-Fort Worth 2007, pet. ref'd) (explaining that to prevail on an equal-protection claim,

"the party complaining must establish two elements: (1) the party was treated differently than other similarly situated parties; and (2) the party was treated differently without a rational basis by the government" and that under the first element, "it is axiomatic that the Equal Protection Clause does not require things different in fact be treated in law as though they were the same").

Again, as an intermediate appellate court, we are in no position to reject or alter the precedent of the Court of Criminal Appeals. *See Wiley*, 112 S.W.3d at 175. We are therefore bound by *Grey*'s holdings that "the State can abandon an element of the charged offense without prior notice and proceed to prosecute a lesser-included offense" and that it may do so without showing that a rational jury could find the defendant guilty of only the lesser offense. 298 S.W.3d at 645, 650-51. The trial court thus did not err by including the lesser-included offense of manslaughter in the jury charge. *See id.*

We overrule Dean's first point.

V. The Trial Court's Reasonable-Belief Jury Instruction

In his fourth and final point, Dean asserts that the trial court erroneously instructed the jury on "reasonable belief " in conjunction with his self-defense and defense-of-a-third-person defenses. The trial court instructed the jury that "reasonable belief " means "a belief that would be held by an ordinary and prudent person in the same circumstances as the actor." This definition is virtually identical to that in Penal Code Section 1.07(a)(42). *See* Tex.

Penal Code Ann. § 1.07(a)(42) ("'Reasonable belief' means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor.").

Dean objected to this definition, pointing out that the self-defense statute uses the phrase "reasonably believes" rather than "reasonable belief" and arguing that the definition of "reasonable belief" would direct "the jury to consider the self-defense issue from the standpoint of a reasonable and prudent person in the same circumstances as the actor" rather than "from the circumstances of the actor alone," which Dean claimed the statute and caselaw require. He thus requested that the trial court instruct the jury that the reasonableness of the defendant's belief should be viewed from the defendant's viewpoint alone at the time he acted. The trial court overruled Dean's objections and denied his requested instruction.

A trial court must instruct the jury on the law applicable to the case. Tex. Code Crim. Proc. Ann. art. 36.14. The Penal Code provides that deadly force used in self-defense or in defense of another is a defense to prosecution for manslaughter if using that force is "justified." *See* Tex. Penal Code Ann. §§ 9.02 ("It is a defense to prosecution that the conduct in question is justified under this chapter."); 9.31-.33 (setting forth substantive requirements for establishing claim of self-defense or defense of third person). Section 9.31 provides that, subject to certain exceptions, a person is justified in using force against another "when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or

attempted use of unlawful force." *Id.* § 9.31(a). A person is justified in using deadly force against another if he would be justified in using force against the other under Section 9.31 and, as relevant here, "when and to the degree the actor reasonably believes the deadly force is immediately necessary . . . to protect the actor against the other's use or attempted use of unlawful deadly force." *Id.* § 9.32(a)(1), (a)(2)(A). Regarding defense of a third person, a person is justified in using deadly force against another to protect a third person if (1) "under the circumstances as the actor reasonably believes them to be, the actor would be justified under" Section 9.32 in using deadly force to protect himself against the unlawful deadly force "he reasonably believes to be threatening the third person he seeks to protect," and (2) "the actor reasonably believes that his intervention is immediately necessary to protect the third person." *Id.* § 9.33.

Dean contends that the reasonable-belief standard in Sections 9.31, 9.32, and 9.33 differs from the definition in Section 1.07(a)(42). According to Dean, the definition of "reasonable belief" in Section 1.07 is "based on the concept of the ordinary and prudent man in the same circumstances as the actor," while self-defense and defense of a third person—which hinge on what the actor "reasonably believes"—are "based on the actor's belief in the situation." In other words, in measuring whether an actor's belief was reasonable in a self-defense or defense-of-a-third-person case, the statute requires that a jury be instructed to assess the reasonableness of the defendant's belief from the defendant's standpoint alone, not from the standpoint of an "ordinary and prudent person in the same situation." We disagree.

First, the fact that Section 1.07 defines "reasonable belief" while Sections 9.31, 9.32, and 9.33 use the phrase "reasonably believes" is of no moment because "[t]he definition of a term in this code applies to each grammatical variation of the term." Tex. Penal Code Ann. § 1.07(b). Second, the Court of Criminal Appeals has expressly stated that "[a] 'reasonable belief' in [the self-defense] context is defined as 'one that would be held by an ordinary and prudent man in the same circumstances as the actor.'" *Braughton v. State*, 569 S.W.3d 592, 606 (Tex. Crim. App. 2018) (quoting Tex. Penal Code Ann. § 1.07(a)(42)). The Court of Criminal Appeals concluded that using Section 1.07(a)(42)'s definition in the jury instructions correctly instructed the jury on the law of self-defense. *See id.* at 606-07.

We have likewise held that when a defendant asserts self-defense, his rights are fully preserved and the jury charge is proper when it (1) states that a defendant's conduct is justified if he reasonably believed that the deceased was using or attempting to use unlawful deadly force against the defendant, and (2) correctly defines "reasonable belief." *Bundy v. State*, 280 S.W.3d 425, 430 (Tex. App.-Fort Worth 2009, no pet.). We concluded that the correct definition of "reasonable belief" is the definition provided in Section 1.07(a)(42). *See id.* at 430-31. And we are not alone in this conclusion. *See*, *e.g.*, *Buford v. State*, 606 S.W.3d 363, 371 (Tex. App.-Houston [1st Dist.] 2020, no pet.) (holding that the trial court properly instructed the jury on self-defense and correctly defined "reasonable belief" pursuant to Section 1.07(a)(42), thus instructing the jurors on the law applicable to the case).

We conclude and hold the trial court did not err by including Section 1.07(a)(42)'s definition of "reasonable belief" in conjunction with Dean's self-defense and defense-of-a-third-person defenses and thus correctly instructed the jury on those defenses. We overrule Dean's fourth point.

VI. Conclusion

Having overruled all four of Dean's points, we affirm the trial court's judgment.

/s/ Elizabeth Kerr
Elizabeth Kerr, Justice

Do Not Publish
Tex. R. App. P. 47.2(b)

Delivered: February 15, 2024

APPENDIX B — OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS, FILED MAY 15, 2024

OFFICIAL NOTICE FROM COURT
OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

Case No. 02-22-00322-CR
Tr. Ct. No. 1616871D PD-0200-24

5/15/2024 COA

AARON YORK DEAN,

Appellant.

On this day, the Appellant's petition for discretionary review has been refused.

JUDGE WALKER DID NOT PARTICIPATE

/s/
Deana Williamson, Clerk

2ND COURT OF APPEALS CLERK
401 W. BELKNAP, STE 9000
FORT WORTH, TX 76196
* DELIVERED VIA E-MAIL *