Cumulative Case Note Update for *Baker's Texas Handbooks* 2012 Edition

from decisions of the
Texas Court of Criminal Appeals
through March 2012

Compiled by Lang Baker

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Case Note Updates for
Baker's Texas Penal Code Handbook

Title 1 - Introductory Provisions

Chapter 2 Burden of proof

Sec. 2.03 Defense

A defense subject to the doctrine of confession and avoidance is one in which a defendant admits allegations but pleads additional facts that deprive the admitted facts of an adverse legal effect. As for "admitting" conduct under the doctrine of confession and avoidance, it is sufficient that the defendant point to defensive evidence, originating in his own statements, such that a trier of fact could reasonably infer that each element of the offense has been satisfied. Cornet v State (January 25, 2012, PD-1067-10)

RULES

There is nothing in Section 2.03 or Chapter 9 that limits justification defenses to intentional or knowing crimes. The plain language of 2.03 and 9.02 makes justification a defense to prosecutions generally, not just to particular offenses. Nothing in the Penal Code indicates the legislature intended Chapter 9 justifications to merely result in a lesser conviction than would otherwise have been possible. Alonzo v State (September 14, 2011, PD-1494-10)

Chapter 3 Multiple Prosecutions

Sec. 3.03 Sentences for Offenses Arising Out of Same Criminal Episode

CONSTRUCTION

Sec. 3.03(b)(2)(B) does not authorize a trial judge to order consecutive sentences when a defendant is originally charged with multiple sexual offenses but pleads guilty, pursuant to a plea bargain, to multiple nonsexual offenses. The 1997 amendments to Secs. 3.03(b)(2)(A) & (B) dealing with deferred adjudication for sex offenders authorize a trial judge to cumulate sentences when a defendant has been formally found guilty of or "entered into a plea bargain for two or more of certain specified sex offenses occurring in the same criminal episode" [quoting bill analysis]. The statute does not authorize a trial judge to cumulate sentences when a defendant has not been found guilty of multiple specified sexual offenses, or when he has entered into a plea bargain for nonsexual offenses, regardless of the charges in the original indictment. Nguyen v State (February 8, 2012, PD-0260-11 & PD-0261-11)

Title 2 - General Principles of Criminal Responsibility

Chapter 7 Criminal Responsibility for Conduct of Another

Subchapter A Complicity

Sec. 7.02 Criminal Responsibility for Conduct of Another

CHARGE

Jury charge was not defective for failure to require jury to unanimously agree on whether def was guilty as a party or guilty as primary actor. Where evid is compelling that accused is guilty of every constituent element of alleged penal offense, either as a principal actor or under some theory of party liability, but there remains evidentiary play with respect to his precise role in that offense, it would be plainly absurd to require jury to acquit accused unless it can unanimously determine his status as a principal actor or a party and, if the latter, what his exact party accountability might be. Leza v State (October 12, 2011, AP-76,157)

Chapter 9 Justification Excluding Criminal Responsibility

Subchapter A General Provisions

Sec. 9.02 Justification as a Defense

NOTES

There is nothing in Section 2.03 or Chapter 9 that limits justification defenses to intentional or knowing crimes. The plain language of 2.03 and 9.02 makes justification a defense to prosecutions generally, not just to particular offenses. Nothing in the Penal Code indicates the legislature intended Chapter 9 justifications to merely result in a lesser conviction than would otherwise have been possible. Alonzo v State (September 14, 2011, PD-1494-10)

Subchapter C Protection of Persons

Sec. 9.31 Self-Defense

CONSTRUCTION

An assertion of a Chapter 9 justification defense is an assertion that the defendant's actions were justified. An assertion that a defendant acted recklessly is an assertion that the defendant was aware of and consciously disregarded a substantial and unjustifiable risk in gross deviation from the standard of care that an ordinary person would have exercised in those same circumstances. A fact-finder therefore cannot find that a defendant acted recklessly and in self-defense. But that does not mean that a defendant cannot argue self-defense when charged with an offense whose requisite mental state is recklessness. The opposite is true: by arguing self-defense, a defendant is arguing that his actions were justified, and therefore he did not act recklessly. Alonzo v State (September 14, 2011, PD-1494-10)

The Penal Code does not require that a defendant intend the death of an attacker in order to be justified in using deadly force in self-defense. The self-defense provisions in the Penal Code focus on the actor's motives and on the level of force used, not on the outcome of that use of force. If the actor reasonably believed that the force was necessary to protect himself against another's unlawful use of force, and the amount of force actually used was permitted by the circumstances, Sections 9.31 and 9.32 apply, regardless the actual result of the force used. Alonzo v State (September 14, 2011, PD-1494-10)

charge

CHARGE ERROR

In conv for manslaughter on pros for murder, trial court's supplemental instruction advising jury that it could consider lesser-included offenses under murder count if it believed def acted in self-defense was erroneous; jury should have been instructed that if state had not disproved self-defense beyond a reasonable doubt, they were to acquit def of all charges in murder count. Alonzo v State (September 14, 2011, PD-1494-10)

Sec. 9.32 Deadly Force in Defense of Person

CONSTRUCTION

In 2007 the legislature made significant amendments to the self-defense statute, including adding provisions that allow a person, under certain circumstances, to stand his ground while defending himself and that, under certain circumstances, create a presumption that a defendant's conduct was reasonable. Morales v State (November 9, 2011, PD-1155-10)

The "no duty to retreat" provisions of 9.32(c) and (d) are not all-encompassing. By their language, they do not apply if the defendant provoked the person against whom force or deadly force was used or if the defendant was engaged in criminal activity at the time. But when these provisions do apply, the defendant has no duty to retreat. When these provisions do not apply, the failure to retreat may be considered in determining whether a defendant reasonably believed that his conduct was immediately necessary to defend himself or a third person. In such cases, the prosecutor may argue the failure to retreat as a factor in determining whether the defendant's conduct really was immediately necessary. Or if a fact issue is raised regarding the applicability of the provisions that specifically negate a duty to retreat, the prosecutor can argue that the facts do not satisfy the provisions and then argue the failure to retreat as a factor relevant to the defensive issue. Morales v State (November 9, 2011, PD-1155-10)

No language in the current self-defense statutes calls for determining, as a general matter, whether a duty to retreat exists. There are only provisions that say, under specified circumstances, that a person is not required to retreat. Morales v State (November 9, 2011, PD-1155-10)

With the 2007 amendments, the Legislature added provisions that required the jury to presume that deadly force was reasonable under certain circumstances. Morales v State (November 9, 2011, PD-1155-10)

Title 3 - Punishments

Chapter 12 Punishment

Subchapter D Exceptional Sentences

Sec. 12.42 Penalties for Repeat and Habitual Felony Offenders

PRIOR CONV FROM ANOTHER JURISDICTN

Def's prior sex-offense convictions under the Uniform Code of Military Justice qualified as "conviction[s] under the laws of another state," thus requiring an automatic life sentence under 12.42(c)(2)(B)(v). Rushing v State (October 5, 2011, PD-0773-10)

"State" in 12.42(c)(2)(B)(v) refers to a part of the United States. Therefore, under Government Code Section 311.005(7), the meaning of "state" in 12.42(c)(2)(B)(v) "includes": (1) "any state, district, commonwealth, territory, and insular possession of the United States" and (2) "any area subject to the legislative authority of the United States." Rushing v State (October 5, 2011, PD-0773-10)

Title 5 - Offenses Against the Person

Chapter 19 Criminal Homicide

Sec. 19.03 Capital Murder

evidence sufficient

CONNECT DEF TO OFFENSE

In conv for capital murder of def's 2-year-old daughter, evid was suff where evid showed def had the opportunity to inflict the fatal injuries as she was child's primary care-giver when these injuries were inflicted; def told police several times that only she would "spank" or "hit" child; def also stated to police several times that neither X nor any of the other children hit victim; pictures of the numerous bruises on victim for which def took sole responsibility. Jury could reasonably infer from this evid, including def's pattern of abuse of victim, that def caused victim's fatal injuries, and could also reasonably infer that def was referring to victim's fatal injuries when she told her sister during their cell-phone conversation that she "did it." Lucio v State (September 14, 2011, AP-76,020)

Chapter 21 Sexual Offenses

Sec. 21.02 Continuous Sexual Abuse of Young Child or Children

NOTES

Sec. 21.02(e) prevents state from mixing a Sec. 21.02 count with a count for a discrete sexual offense that could have served as part of the Sec. 21.02 count. The discrete sexual offense must either be charged in the alternative, fall outside the time period for the Sec. 21.02 count, or be submitted as a lesser-included offense. Soliz v State (October 5, 2011, PD-0117-11)

Sec. 21.02(e) does not create an exception to the normal rule that the trial judge determines whether a lesser offense should be submitted to the jury. No merit to claim that phrase "considered by the trier of fact to be" requires the jury to deliberate on whether a submitted lesser offense is in fact a lesser-included offense of the crime charged. Soliz v State (October 5, 2011, PD-0117-11)

Sec. 21.11 Indecency with a Child

ELEMENTS

The gravamen of the offense of indecency with a child by exposure is the act of exposure. The allowable unit of prosecution for the offense is the act of exposure, not the number of children present, and consequently, the child-victim's name is not a necessary element of proof. Harris v State (November 9, 2011, PD-0945-10)

JEOPARDY

Def's right against double jeopardy was violated when he was convicted on three counts of indecency with a child by exposure that resulted from a single act of exposure. Harris v State (November 9, 2011, PD-0945-10)

Chapter 22 Assaultive Offenses

Sec. 22.011 Sexual Assault

In pros for aggravated sexual assault of child by digital penetration it was error to refuse charge on medical-care defense under 22.021(d) [referencing 22.011(d)] where evidence raised the issue and defense evid amounted to a concession of the elements of the offense. Cornet v State (January 25, 2012, PD-1067-10)

CHARGE DEFENSE

The medical-care defense is available when the accused, a layperson with respect to medical science, is attempting to ascertain information regarding the existence of a relevant medical fact. It is the nature of the "conduct," not the occupation of the actor, that characterizes the availability of the defense; the availability of the defense is not limited to health-care professionals. Also, the defense is not intended to protect "medical treatment" alone; the medical-care defense may be raised by evidence supporting a "mere" medical inspection. Cornet v State (January 25, 2012, PD-1067-10)

The doctrine of confession and avoidance applies to the medical-care defense, such that a defendant attempting to claim the defense must "essentially admit" to each element of sexual assault, including digital penetration of the victim's sexual organ. Penetration occurs when there is "tactile contact beneath the fold of complainant's external genitalia"; it is not inaccurate "to describe [conduct] as a penetration, so long as [the] contact with [the complainant's] anatomy could reasonably be regarded by ordinary English speakers as more intrusive than contact with her outer vaginal lips." [Quoting Vernon v. State, 841 S.W.2d 407, 409 (Tex. Crim. App. 1992).] Cornet v State (January 25, 2012, PD-1067-10)

DEFENSES

Sec. 22.02 Aggravated Assault

In pros for aggravate assault, variance between allegation and proof did not render evid insufficient, where state alleged def caused serious bodily injury by hitting victim with his hand or by twisting her arm with his hand, and victim testified def threw her against the wall and that hitting the wall caused her to fall to the floor and break her arm. Because the variance involved a non-statutory allegation that did not affect the allowable unit of prosecution, it could not render the evidence legally insufficient to support a conviction. Johnson v State (March 21, 2012, PD-0068-11)

EVIDENCE SUFFICIENT

Title 7 - Offenses Against Property

Chapter 29 Robbery

Sec. 29.03 Aggravated Robbery

charge included offense

In pros for aggravated robbery it was error to deny charge on included offense of theft, where after stealing nail gun def fled scene and went into an apartment, where he remained for five to twenty minutes, during which time he hid the nail gun and changed clothes; he eventually exited the apartment and walked to another part of the complex, where he conversed with a group of individuals for five to ten minutes; on his way back to the apartment he spotted X and pulled a knife. This was sufficient to raise a fact question concerning whether def's use of the knife occurred in the course of or in immediate flight from the theft. The fifteen to thirty minute delay and the intervening activities, including def's act of leaving the apartment, could rationally be interpreted as evidence that he was no longer fleeing from the theft. Sweed v State (October 19, 2011, PD-0273-10)

ERROR TO DENY INCLUDED OFFENSE CHARGE

Chapter 30 Burglary And Criminal Trespass

Sec. 30.02 Burglary

A defendant's testimony that he lacked intent to commit a felony when entering another's property is sufficient to support a criminal trespass instruction. Direct evidence of defendant's lack of intent to commit theft when entering another's home, such as defendant's testimony, is not necessary to support a criminal trespass instruction. Court must consider all of the evidence admitted at trial, not just the direct evidence of a defendant's intent. A victim's testimony about what defendant said to her can be affirmative evidence of defendant's lack of intent and thereby supported a lesser-included-offense instruction. Goad v State (November 9, 2011, PD-0435-11)

INCLUDED OFFENSES

charge included offense

In pros for burglary of habitation it was error to deny charge on included offense of criminal trespass. Victim's testimony that def had told her that he was at her house to look for his dog, argued with her for several minutes because he believed she was being unreasonable, and entered her home only fifteen minutes later was affirmative evidence directly germane to whether def lacked intent to commit theft; it would permit a rational jury to believe that def was only looking for his dog when he entered her home and therefore support a criminal trespass instruction. Goad v State (November 9, 2011, PD-0435-11)

ERROR INCLUDED OFFENSE CHARGE

Chapter 31 Theft

Sec. 31.01 Definitions

deception

In conv for theft evid was suff to prove def intentionally or knowingly issued drafts without intent to honor them. Def owned and operated car-leasing business that acted as intermediary between car dealerships and customers; when a leasing agreement was reached, general manager of def's business would issue a sight draft to car dealership, to be paid later out of business's bank account; in March 2005 def closed business's bank accounts and withdrew balances; short time later the business ceased operations and five car dealerships were left with worthless drafts. Jury was charged on lack of consent if induced by deception and on law of parties. Circ evid was suff to prove def authorized the transfer of title of automobiles knowing that he would be unable or unwilling to satisfy the issued drafts, where def was owner and controlling partner of the business, he controlled all financial aspects of the business, he alone conducted banking on behalf of the business, he alone was notified when money was wired into the business's bank account, and he was solely responsible for paying due drafts; and evid showed numerous occurrences of insufficient funds in the year preceding the close of the business, that def requested the withdrawal of all funds despite knowing of outstanding drafts, that def bounced checks to cover dishonored drafts, and that def authorized general manager to sign drafts, but not to sign checks to satisfy the drafts. Wirth v State (March 21, 2012, PD-1054-11)

EVIDENCE SUFFICIENT

Where state in pros for theft unnecessarily pled that the theft was by deception but provided no proof of deception, evidence was insufficient to support a conviction. Geick v State (October 5, 2011, PD-1734-10)

EVIDENCE INSUFF

A claim of theft made in connection with a contract requires proof of more than an intent to deprive the owner of property and subsequent appropriation of the property. State must also prove the appropriation was a result of a false pretext, or fraud, and evid must show def intended to deprive the owner of the property at the time the property was taken. In reviewing sufficiency of the evidence court should look at events occurring before, during and after commission of the offense and may rely on actions of defendant which show an understanding and common design to do the prohibited act. Wirth v State (March 21, 2012, PD-1054-11)

PROOF

Sec. 31.02 Consolidation of Theft Offenses

The simplicity of the statutory elements of theft hides the complexity of the overall scheme. 31.02 explains that the current theft statute was meant to encompass what had previously been a dozen or more distinct offenses. The comprehensive nature of the statute becomes apparent in the definitions offered to explain the terms of the basic offense. In 31.01 and 31.03 there are three ways in which appropriation can be unlawful, two ways to appropriate, three types of property, and three ways to deprive. When pled, all of these definitions become the elements of latent, more specific offenses encompassed within the general theft statute. As a general rule, the state is under no obligation to plead these more specific offenses, but if the state unnecessarily chooses between statutory alternatives, it must prove what it pled. The state is free to turn a theft charge into a more specific charge of theft by deception, but doing so has consequences. Geick v State (October 5, 2011, PD-1734-10)

NOTES

Sec. 31.03 Theft

The simplicity of the statutory elements of theft hides the complexity of the overall scheme. 31.02 explains that the current theft statute was meant to encompass what had previously been a dozen or more distinct offenses. The comprehensive nature of the statute becomes apparent in the definitions offered to explain the terms of the basic offense. In 31.01 and 31.03 there are three ways in which appropriation can be unlawful, two ways to appropriate, three types of property, and three ways to deprive. When pled, all of these definitions become the elements of latent, more specific offenses encompassed within the general theft statute. As a general rule, the state is under no obligation to plead these more specific offenses, but if the state unnecessarily chooses between

PROOF

statutory alternatives, it must prove what it pled. The state is free to turn a theft charge into a more specific charge of theft by deception, but doing so has consequences. Geick v State (October 5, 2011, PD-1734-10)

PROOF OF INTENT TO DEPRIVE

A claim of theft made in connection with a contract requires proof of more than an intent to deprive the owner of property and subsequent appropriation of the property. State must also prove the appropriation was a result of a false pretext, or fraud, and evid must show def intended to deprive the owner of the property at the time the property was taken. In reviewing sufficiency of the evidence court should look at events occurring before, during and after commission of the offense and may rely on actions of defendant which show an understanding and common design to do the prohibited act. Wirth v State (March 21, 2012, PD-1054-11)

Chapter 32 Fraud

Subchapter C Credit

Sec. 32.31 Credit Card Abuse

CONSTRUCTION

The plain meaning of the words "uses" and "presents" as used in the statute includes some overlap in meaning such that someone can, with the same conduct, both use and present a credit card, and neither word requires consummation of the transaction to support a jury finding that a defendant "used" a debit card. Clinton v State (December 14, 2011, PD-0119-11)

The verb "present" can be defined several ways, but the most relevant definition states that to "present" means "to bring or present in the presence of someone." The word, as commonly used, presumes that the action will be done to or for another individual, who indirectly receives the action. Applying this definition to the word "presents" as used in the debit-card statute, the defendant must physically show or provide the card to an individual or for another individual, such as swiping a card for a store clerk, but presentment does not require any subsequent result, such as the consummation of the transaction. Clinton v State (December 14, 2011, PD-0119-11)

To "use" can mean to carry out a purpose or action by means; to make instrumental to an end or process; to apply to advantage; to turn to account; to utilize. Unlike "present," the word "use" does not require the presence of another individual to receive the action; however, the definition does not necessarily preclude another individual's presence either. Applying this definition to the word "uses" to interpret the meaning of the word in the debit-card statute, the defendant must employ, utilize, or place the card into service in or out of the presence of another individual, but it does not require any subsequent action such as consummation of action. Clinton v State (December 14, 2011, PD-0119-11)

EVIDENCE SUFFICIENT

In pros for debit-card abuse, evid was suff to prove def "used" the card, as alleged. Because the dictionary definitions of "use" and "present" do not depend on obtaining of a benefit, the plain language of the statute makes apparent that an individual need only have utilized the card for the intended purpose of obtaining a benefit. Evidence showed that def "used" the card when she swiped it through the card reader for the purpose of purchasing cigarettes; failure to consummate transaction did not render evid insuff to prove debit card abuse by "use" of card. Clinton v State (December 14, 2011, PD-0119-11)

Subchapter D Other Deceptive Practices

Sec. 32.48 Simulating Legal Process

NOTES

Evid was suff to support conviction for simulating legal process where evid showed def intended for victim to submit to authority of the document in violation of 32.48, and based on text of the document and circumstances surrounding the event, it was reasonable that a similarly situated person in victim's position would believe that it was a legal document. Runningwolf v State (March 7, 2012, PD-0997-10)

Title 10 - Offenses Against Public Health, Safety and Morals

Chapter 46 Weapons

Sec. 46.04 Unlawful Possession of Firearm by Felon (was 46.05)

If def had status of a felon at the time he possessed the firearm, a conviction for unlawful possession of a firearm by a felon is not later rendered void if the predicate felony conviction is subsequently set aside. Ex parte Jimenez (February 8, 2012, AP-76,575) **CONSTRUCTION**

Chapter 49 Intoxiction and Alcoholic Beverage Offenses

Sec. 49.01 Definitions

Erroneous submission of "synergistic effect" jury charge in DWI prosecution was not harmless. Def was harmed by the additional "synergistic effect" instruction, where at a minimum it emphasized state's evidence of combination by suggesting a specific mode of action (susceptibility) through which use of a "medication or drug" together with use of alcohol could produce intoxication. Barron v State (November 9, 2011, PD-1770-10)

Charge in DWI case reflected the law as it applied to evid at trial, where charge included both theory of intoxication by alcohol and theory of intoxication by drug or a combination of drug and alcohol, and there was circ evid from which a rational juror could have found def had consumed a drug, where officer testified def showed signs of having consumed a central nervous system depressant, that both alcohol and certain drug are central nervous system depressants, such a drug was found in car, and def refused a blood test. Ouellette v State (October 12, 2011, PD-1722-10) **CHARGE**

Sec. 49.04 Driving While Intoxicated

In pros for DWI it was error to charge jury on definition of "operate." Charge constituted a comment on weight of the evidence. In defining the term "operate" as "to exert personal effort to cause the vehicle to function," the trial court selected one definition of a statutorily undefined, common term that the jury could have selected in assessing the evidence and instructed the jury that they "must be governed by" that definition. Although the definition was an appropriate definition for an appellate court to apply in assessing suff of evid to support the "operate" element, instructing the jurors as to that definition in instant case impermissibly guided their understanding of the term. The jury should have been free to assign that term "any meaning which is acceptable in common parlance." The definition emphasized evidence tending to show "personal effort" toward causing the vehicle to function over evidence that would tend to show "merely preparatory attempts to start the motorcycle," which jury could have reasonably decided did not constitute "operating." Although charge did not "pluck out" any specific piece of evidence for special attention, it did improperly focus the jury on the type of evidence that would support a finding that def was operating his motorcycle. Whether def was operating his motorcycle was a question of fact to be resolved by the jury. Because trial court improperly impinged on jury's fact-finding authority by limiting jurors' understanding of what evidence could constitute "operating," it erred by defining that term in its charge to the jury. Kirsch v State (January 25, 2012, PD-0245-11) **CHARGE**

Chapter 481: Controlled Substances Act

Subchapter D. Offenses and Penalties

Notes for Penalty Group Topics

CONSTRUCTION

The qualitative elements of a penalty group 4 codeine offense are a mitigating factor, or an exception, to the offense of possession of penalty group 1 codeine. The qualitative elements of penalty group 4 essentially describe codeine cough syrup. Miles v State (December 7, 2011, PD-1708-08 and PD-1709-08)

INDICTMENT

Where indictment and jury charge failed to allege a specific codeine offense, court looked to the totality of the trial record to identify the particular offense for which def was tried, and concluded he was tried for possession of penalty group 1 codeine, not penalty group 3 or 4 codeine. Indictment and jury charge failed to include the following essential elements: the negation of penalty groups 3 and 4, and the qualitative elements of penalty group 4. Miles v State (December 7, 2011, PD-1708-08 and PD-1709-08)

EVIDENCE INSUFF

Evidence was insufficient to support conviction for possession of controlled substance Penalty Group 1 codeine, where state failed to prove element that the codeine was "not listed in Penalty Group 3 or 4." Miles v State (December 7, 2011, PD-1708-08 and PD-1709-08)

PROOF

Where def was tried for poss of penalty group 1 codeine, the hypothetically correct jury charge required state to prove the essential element of penalty group 1, that the codeine was "not listed in Penalty Group 3 or 4." To prove this element, state could show that (1) the concentration of the codeine was more than 1.8 grams of codeine per 100 milliliters, or (2) the codeine was not combined with active nonnarcotic ingredients in recognized therapeutic amounts or in sufficient proportion to confer on the compound valuable medicinal qualities other than those possessed by the codeine alone. Miles v State (December 7, 2011, PD-1708-08 and PD-1709-08)

481.129 Offense: Fraud

CONSTRUCTION

Sec. 481.129(a)(5) is an example of overlapping statutory provisions. The language in subsection (A) ("misrepresentation, fraud, forgery, deception, or subterfuge") is broad and would seem to encompass virtually every action that would fall under subsections (B) or (C). To interpret "use of a fraudulent prescription form" [481.129(a)(5)(B)] or "use of a fraudulent oral or telephonically communicated prescription" [481.129(a)(5)(C)] in a way that does not overlap with subsection (A)'s "fraud" would require doing great violence to the plain language of the statute. Avery v State (February 29, 2012, PD-0864-11)

The fact that terms in 481.129(a)(5)(B) and (C) overlap with 481.129(a)(5)(A) does not render any of the subsections meaningless. While subsection (A) is broad enough to encompass most fraudulent attempts to obtain controlled substances, the other subsections allow the state, if it chooses, to draft a more specific charge that allows the trial court to craft a better and more informative jury instruction, and that provides more notice to def regarding the specific act on which the charge is based. Treating overlapping statutory provisions as mutually exclusive would impinge on the state's discretion in determining what charge to bring. Avery v State (February 29, 2012, PD-0864-11)

The fact that subsections of Section 481.129(a)(5) overlap in some circumstances does not change the State's burden of proving the statutory manner and means that it actually charged. Avery v State (February 29, 2012, PD-0864-11)

Sec. 481.075 describes the "Official Prescription Program" used for prescribing Schedule II controlled substances and, as such, was not directly applicable to instant Schedule III prosecution under 481.129(a)(5)(B). Nonetheless, it can be used as a tool to help understand other, applicable statutes. Sec. 481.075(a) states that a prescription for a Schedule II controlled substance should be recorded on an official prescription form. This comports with the common usage of the word "form." Prescription information should be recorded on a prescription form to create a completed prescription. The information that is written on the form is not the form itself. As 481.075(e) says, "Each official prescription form or electronic prescription used to prescribe a Schedule II controlled substance must contain [certain information]." This section describes the written information that must be written on the form at the time it is used. The written information becomes part of the completed prescription, not a part of the form. Avery v State (February 29, 2012, PD-0864-11)

From language of Sec. 481.129(c), (f) and (g) it is obvious that the legislature intended that the distinction between a prescription and a prescription form be legally relevant: In a scheme in which the illegal possession or delivery of a prescription is punished more or less severely depending on the Schedule of the prescribed controlled substance, the illegal possession or delivery of a prescription form receives the highest

level of punishment. This would seem to flow from the prescription form's potential to become a prescription for any type of prescribable controlled substance. Avery v State (February 29, 2012, PD-0864-11)

"Prescription form" refers to a pre-printed form designed to have prescription information written on it. The Legislature intended for there to be a legal distinction between prescription forms and completed prescriptions. Avery v State (February 29, 2012, PD-0864-11)

Sec. 481.129(a)(5)(B) applies to situations where an individual knowingly possesses, obtains, or attempts to possess or obtain a controlled substance or an increased quantity of a controlled substance through use of a fraudulent prescription form. The writing on the form is not an element of that offense. Avery v State (February 29, 2012, PD-0864-11)

EVIDENCE INSUFF

Evid was insuff to support conv under 481.129(a)(5)(B) for attempting to obtain a controlled substance "through use of a fraudulent prescription form," where evid showed def fraudulently altered information that was handwritten on a legitimate prescription form. While the evidence would have supported a conviction had state charged def using other statutory manner and means that were available, the evidence did not support a conviction for the offense that was actually charged. Avery v State (February 29, 2012, PD-0864-11)

Transportation Code

Chapter 724. Implied Consent

Subchapter E. Admissibility of Evidence

Sec. 724.064. Admissibility in Criminal Proceeding of Specimen Analysis

EVID OF BLOOD TEST

No hard-and-fast rule sets the outer limit of time between stopping an apparently intoxicated driver and the existence of probable cause that evidence of intoxication will still be found within that person's blood. The ultimate criteria in determining the evaporation of probable cause are not found in case law, but in reason and common sense. The likelihood that the evidence sought is still available and in the same place is a function, not just of the watch or the calendar, but of the particular variables in the case: (1) the type of crime - short-term intoxication versus long-term criminal enterprise or conspiracy; (2) the suspect - "nomadic" traveler, "entrenched" resident, or established ongoing businessman; (3) the item to be seized - "perishable and easily transferred" (evanescent alcohol, a single marijuana cigarette) or of "enduring utility to its holder" (a bank vault filled with deeds, a "meth lab," or a graveyard corpse); and (4) the place to be searched - a "mere criminal forum of convenience or secure operational base." Crider v State (November 16, 2011, PD-0592-10)

Alcohol in a person's bloodstream disappears quite rapidly, thus the facts cited to support probable cause to search for alcohol in a DWI suspect's bloodstream become stale quite rapidly. Blood-alcohol levels are usually described in terms of blood-alcohol content (BAC). BAC refers to the concentration of alcohol in the blood, measured in grams of alcohol for every one hundred milliliters of blood volume. Hypothetically, a person whose blood had one gram of alcohol for every one hundred milliliters of blood would have a BAC of 1 and a blood-alcohol concentration of 1% ("weight per volume"). This is hypothetical because a person with a BAC of 1 would literally be pickled in alcohol. A person whose blood contains 0.10 grams of alcohol for every one hundred milliliters of blood will have a BAC of 0.10 (a more realistic and typical situation). Every hour, the "average" person eliminates somewhere between 0.015 and 0.020 grams of alcohol for every one-hundred milliliters of blood. In other words, a BAC of 0.10 will go down by 0.015 to 0.020 every hour in an average person. Assuming that a suspect did not drink after being stopped by an officer, at least "some" evidence of alcoholic "intoxication" (defined as 0.08 BAC) should still be in his blood system four hours later because it takes at least four hours for the average person to eliminate 0.08 grams of alcohol (per one hundred milliliters of blood) at a rate of 0.02 grams of alcohol (per one hundred milliliters of blood) per hour. Put simply, it takes four hours of hourly 0.02 BAC decreases to make a BAC of 0.08 drop to zero. Crider v State (November 16, 2011, PD-0592-10)

The higher the level of intoxication at the time of the stop, the longer some evidence of alcoholic intoxication would remain in the blood. For example, if the average person's blood-alcohol level were twice the limit of legal intoxication, with a BAC of 0.16 at the time he were stopped, his level would be approximately 0.08 four hours later, and some level of alcohol would still be in his blood up to seven to eight hours later. But it would be exceedingly unlikely that a person who was tested some 24 hours after he ceased drinking would register any detectable level of alcohol in his blood. (This would correspond to an initial blood-alcohol content of 0.48, six times the legal limit and nearly lethal.) Crider v State (November 16, 2011, PD-0592-10)

ERROR TO ADMIT

It was error to deny motion to suppress blood alcohol evid seized under search warrant where affidavit was insufficient to show probable cause because there could have been a twenty-five-hour gap between the time the officer first stopped def and the time he obtained a search warrant for blood. The affidavit did not contain sufficient facts within its four corners to establish probable cause

that evidence of intoxication would be found in def's blood at the time the search warrant was issued. Crider v State (November 16, 2011, PD-0592-10)

Case Note Updates for
Baker's Texas Criminal Procedure Handbook

Chapter 1 General Provisions

Art. 1.04. Due Course of Law

various due process claims

RULES

In order to be entitled to relief for due process violation based on pre-indictment delay, a defendant must demonstrate that the delay: 1) caused substantial prejudice to his right to a fair trial, and 2) was an intentional device used to gain a tactical advantage over the accused. In Ibarra v State, 11 S.W.3d 189 (Tex. Crim. App. 1999), the court effectively left open the possibility that the state may commit a due-process violation for reasons other than to gain a tactical advantage, but did not specify which reasons constitute "bad faith purposes." State v Krizan-Wilson (December 14, 2011, PD-1485-10)

The issue of whether state intentionally delayed prosecution in order to gain a tactical advantage over def, or otherwise prejudice her, is an application of law to fact, and trial court ruling on the issue is reviewed under an abuse of discretion standard, which will be upheld as long as it is supported by the record. State v Krizan-Wilson (December 14, 2011, PD-1485-10)

During hearing on motion to dismiss indictment for pre-indictment delay that denied def due process, def had burden to prove that state's delay was an intentional device used to gain a tactical advantage. It is not enough for def to argue that trial court may have disbelieved each and every witness that testified that state had no negative intentions for the delay; def must still present positive proof of such an improper purpose. State v Krizan-Wilson (December 14, 2011, PD-1485-10)

In order to establish a due-process violation from pre-indictment delay, def has the burden of proving both prejudice and that an intentional delay was designed to give the state a tactical advantage. State v Krizan-Wilson (December 14, 2011, PD-1485-10)

NOT ERROR

Habeas corpus relief denied on claim def was denied due process when TDCJ placed sex-offender conditions on his parole, where no process was due to def because his computerized criminal-history file, corroborated by police agency records, showed he had prior sex-offense convictions from another state that qualified under Texas sex-offender registration law. Ex parte Warren (September 28, 2011, AP-76,435)

NOT ERROR: pre-indictment delay

Where def failed to prove that state's 23-year pre-indictment delay in murder case was for the purpose of gaining a tactical advantage over def or for some other impermissible purpose, def failed to establish the second prong of the due-process analysis and it was error for trial court to grant motion to dismiss. Although def showed significant prejudice as a result of the state's delay, the second prong of the two-part analysis cannot be established by fulfilling the first; proving delay and prejudice does not prove bad faith. State v Krizan-Wilson (December 14, 2011, PD-1485-10)

Art. 1.24. Public Trial

NOTES

Defendant's Sixth Amendment right to public trial was violated by exclusion of his family members from jury voir dire. Although trial court identified two interests in closure of voir dire that could have been sufficient to override his right to a public trial in the abstract (jury-panel contamination and courtroom security), trial court failed to articulate any substantive "threat" to either of those interests in def's case and failed to supply findings specific enough that a reviewing court could determine that closure of courtroom during def's voir dire was warranted; also, it did not satisfy its obligation to consider all reasonable alternatives to closure. Steadman v State (March 7, 2012, PD-1356-10)

When a Sixth Amendment violation of the right to public trial has been established, defendant is not required to prove specific prejudice in order to obtain relief for a violation of this right. Steadman v State (March 7, 2012, PD-1356-10)

Right to Counsel

Right to Representation bhy Counsel

rules on right to counsel

RULES ON RIGHT TO COUNSEL: SPECIFIC SETTINGS

Under Montejo v Louisiana, 556 US 778 (2009), the Fifth Amendment right to interrogation counsel is triggered by the Miranda warnings that police must give before beginning any custodial questioning. The Sixth Amendment right to trial counsel is triggered by judicial arraignment or Article 15.17 magistration. Both the Fifth and Sixth Amendment rights to counsel apply to post-magistration custodial interrogation, but each is invoked and waived in exactly the same manner: under the Fifth Amendment prophylactic Miranda rules. Pecina v State (January 25, 2012, PD-1095-10)

Once formal adversary proceedings begin, the Sixth Amendment right to counsel applies in exactly the same way as the Fifth Amendment right applies to custodial interrogation. Thus, Miranda warnings serve the arrestee's interests in both the Fifth and Sixth Amendment rights to counsel during custodial interrogations conducted after a person has been formally charged. Because the "doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver," [quoting Montejo v Louisiana, 556 US 778 (2009)] both the Fifth and Sixth Amendment rights to interrogation counsel are fully encompassed by the Fifth Amendment Miranda doctrine. Pecina v State (January 25, 2012, PD-1095-10)

Montejo means that a defendant's invocation of his right to counsel at his Article 15.17 hearing says nothing about his possible invocation of his right to counsel during later police-initiated custodial interrogation. The magistration hearing is not an interrogation event. An uncharged suspect may invoke his Fifth Amendment right to counsel (and a defendant who has been arraigned may invoke his Sixth Amendment right to counsel) for purposes of custodial interrogation when the police or other law-enforcement agents approach him and give him his Miranda warnings. That is the time and place to either invoke or waive the right to counsel for purposes of police questioning. Pecina v State (January 25, 2012, PD-1095-10)

Effective Assistance of Counsel

EFFECTIVE ASSISTANCE OF COUNSEL: THE RULES

Counsel's performance is deficient if it is shown to have fallen below an objective standard of reasonableness. The constitutionally appropriate level of reasonableness is defined by the practices and expectations of the legal community and prevailing professional norms therein. In situations in which the law is not clear, counsel should advise a client that pending criminal charges may carry a risk of other serious consequences. When a serious consequence is truly clear, however, counsel has an equally clear duty to give correct advice. Both failure to provide correct information and providing incorrect information violate that duty. Ex parte Moussazadeh (February 15, 2012, AP-74,185 & AP-76,439)

denial of effective assistance of counsel

advice of counsel

Def was denied effective assistance of counsel at guilty plea, where the parole-eligibility consequences of his plea could have been easily determined by reading the applicable statute, and counsel provided incorrect advice. The portion of his sentence that must be served before he becomes eligible for parole was double the portion that he was led to believe he must serve. Based on his affidavit court concluded that he would not have pled guilty if he had known the actual time he would have to serve, and thus prejudice was shown. Record supported habeas court's findings of fact and conclusions of law; habeas corpus relief granted. Ex parte Moussazadeh (February 15, 2012, AP-74,185 & AP-76,439)

Chapter 2 General Duties of Officers

Art. 2.01. Duties of District Attorneys

POWERS OF DISTRICT ATTORNEY

Our criminal laws are numerous, and some of them are quite broad. It is not infrequently the case that an act that violates one penal statute may violate another statute as well. When statutory provisions overlap in this way, there is no inherent reason to infer that the Legislature intended them to be mutually exclusive. A legislature may decide that overlap is in some ways desirable; it allows prosecutors the discretion to charge the offense that they believe is most descriptive of a particular action, or that has the most appropriate penalty range for a particular action. Avery v State (February 29, 2012, PD-0864-11)

Chapter 4 Courts and Criminal Jurisdiction

Art. 4.01. What Courts Have Criminal Jurisdiction

GENERAL RULES ON JURISDICTION

"Jurisdiction" is typically used to refer to "the power of a court to hear a controversy and make decisions that are legally binding on the parties involved," also commonly referred to as "subject-matter jurisdiction." Jurisdiction, then, is vested in the actual judicial body, the court. "Authority," on the other hand, may be used to refer to the power of an individual - the judge who presides over the court - to act under that grant of jurisdiction. A lack of authority, therefore, is not always co-extensive with a lack of jurisdiction; a judge's lack of authority to act in a particular manner will not necessarily call into doubt the court's jurisdiction over the particular case. A trial court must derive its jurisdiction from either the Texas Constitution or legislative enactments. After a trial court has lost plenary jurisdiction, it may nonetheless re-acquire "limited" jurisdiction to perform specific functions as authorized by statute or as instructed on remand by a higher court. State v Holloway (March 7, 2012, PD-0324-11)

Chapter 11 Habeas Corpus

Art. 11.07. Procedure After Conviction Without Death Penalty

RULES

For a factual basis of a claim to be "unavailable" under 11.07 Sec. 4(a)(1), it must meet the reasonable diligence requirement of Sec. 4(c); reasonable diligence suggests at least some kind of inquiry has been made into the matter of the issue. Ex parte Miles (February 15, 2012, AP-76,488 & AP-76,489)

To obtain habeas corpus relief on a claim of involuntary plea resulting from deficient advise of counsel, an applicant must meet both prongs of the Strickland standard: (1) counsel's performance was deficient; and (2) that a probability exists, sufficient to undermine confidence in the result, that the outcome would have been different but for counsel's deficient performance. In the context of involuntary plea, the "different outcome" is choosing not to plead and instead choosing to go to trial. Ex parte Moussazadeh (February 15, 2012, AP-74,185 & AP-76,439)

RELIEF DENIED

Conviction for unlawful possession of a firearm by a felon was not rendered void by subsequent action that set aside and dismissed the charge in the predicate felony conviction used to prove def's felony status. Habeas corpus relief denied. Ex parte Jimenez (February 8, 2012, AP-76,575)

RELIEF DENIED: parole & mandatory supervis'n

Habeas corpus relief denied on claim def was denied due process when TDCJ placed sex-offender conditions on his parole, where no process was due to def because his computerized criminal-history file, corroborated by police agency records, showed he had prior sex-offense convictions from another state that qualified under Texas sex-offender registration law. Ex parte Warren (September 28, 2011, AP-76,435)

relief granted

RELIEF GRANTED

Habeas relief granted on subsequent application under 11.07 for actual innocence claim, where (1) state violated Brady (police reports that identified other potential suspects for the shooting), and (2) that newly available Brady evidence combined with other newly available evid (expert testimony on gunshot-residue analysis used at trial was no longer reliable, recantation of eyewitness in original trial, and recently identified source of previously unknown fingerprint [details in opinion]) established that def was actually innocent. Ex parte Miles (February 15, 2012, AP-76,488 & AP-76,489)

Def's actual innocence claim met requirements of 11.07 Sec. 4(a)(1), where def's claim relied on evidence of two undisclosed police reports (Brady error), eyewitness's recantation of his in-court identification of def as the shooter, the identification of the source of previously unknown fingerprint, and expert witness's affidavit stating that her trial testimony on gunshot-residue analysis was incorrect, in addition to facts discovered during the investigation of the "new" evidence. Record supported conclusion that the factual bases for the claim were unavailable and not ascertainable through the exercise of reasonable diligence on or before date def filed his first applications. Ex parte Miles (February 15, 2012, AP-76,488 & AP-76,489)

ASSISTANCE OF COUNSEL ISSUES

Def was denied effective assistance of counsel at guilty plea, where the parole-eligibility consequences of his plea could have been easily determined by reading the applicable statute, and counsel provided incorrect advice. The portion of his sentence that must be served before he becomes eligible for parole was double the portion that he was led to believe he must serve. Based on his affidavit court concluded that he would not have pled guilty if he had known the actual time he would have to serve, and thus prejudice was shown. Record supported habeas court's findings of fact and conclusions of law; habeas corpus relief granted. Ex parte Moussazadeh (February 15, 2012, AP-74,185 & AP-76,439)

Art. 11.071. Procedure in Death Penalty Case

Sec. 2: counsel

Applicant is not entitled to hybrid representation under Article 11.071. Medina v State (October 12, 2011, WR-75,835-01)

Sec. 4: filing of applicat'n

There is no requirement that habeas corpus applications plead evidence, but there are clear statutory requirements for habeas corpus applications to allege the facts which must be proved by evidence. Medina v State (October 12, 2011, WR-75,835-01)

An application for a writ of habeas corpus, whether filed under 11.07 or 11.071, must contain sufficient specific facts that, if proven to be true, might entitle the applicant to relief. A Texas writ application must be complete on its face. It must allege specific facts so that anyone reading the writ application would understand precisely the factual basis for the legal claim. CCA's official form, required to be used in all non-death-penalty applications for a writ of habeas corpus, explicitly states that an applicant must "briefly summarize the facts supporting each ground" for habeas relief. The application may, and frequently does, also contain affidavits, associated exhibits, and a memorandum of law to establish specific facts that might entitle the applicant to relief. Medina v State (October 12, 2011, WR-75,835-01)

While under Article 11.07 a document that does not contain specific factual contentions is not a true writ application and is dismissed without prejudice to refile, that is not always possible under Article 11.071, which contains strict time limits for filing a writ application. Medina v State (October 12, 2011, WR-75,835-01)

An application under 11.071 must contain both legal claims and factual contentions. The fact issues that must be resolved under 11.071 sec. 9 are those contained within the writ application and the State's controverting answer. Without specific facts, factual contentions, and factual issues set out in the application, the convicting court has nothing to resolve. Medina v State (October 12, 2011, WR-75,835-01)

Applicant, because of his counsel's intentional refusal to plead specific facts that might support habeas-corpus relief, did not have his "one full and fair opportunity" to present his constitutional or jurisdictional claims in accordance with the procedures of 11.071. Not full because he was entitled to one bite at the apple, i.e., one application, and the document filed was not a proper writ application. Not fair because his opportunity, through no fault of his own, was intentionally subverted by his habeas counsel. Medina v State (October 12, 2011, WR-75,835-01)

Sec. 4A: untimely applicat'n

Purported application for writ of habeas corpus in death penalty case was not in fact a habeas corpus application under 11.071, where it did not set out specific facts or contain any exhibits, affidavits, or a memorandum of law that alleged any specific facts. Court therefore appointed new counsel, and set a new filing date pursuant to 11.071, Sec. 4A(b)(3). Medina v State (October 12, 2011, WR-75,835-01)

Under unique and extraordinary circumstances of instant case, involving not habeas counsel's lack of competence but his misplaced desire to challenge established law (requiring habeas application to contain specific fact allegations) at the peril of his client, court (1) concluded that under 11.071, Sec. 4A(a), counsel failed to file a cognizable writ application, (2) pursuant to Sec. 4A(b)(3) appointed new counsel to represent applicant and established a new filing date for the application to be filed in the convicting court, and (3) held original habeas counsel in contempt of court and entered an order denying him compensation under Sec. 2A. Medina v State (October 12, 2011, WR-75,835-01)

Sec. 5: subsequent applicat'n

Subsequent application for writ of habeas corpus under 11.071 dismissed as an abuse of the writ without considering the merits of the claims, where court reviewed the application and found that applicant failed to satisfy the requirements of Article 11.071, Sec. 5(a). Ex parte Williams (November 23, 2011, WR-50,662-03)

Art. 11.072. Procedure in Community Supervision Case

NOTES

An applicant's live, sworn testimony can be a basis for upholding a trial court's decision to grant relief in an 11.072 habeas proceeding. Ex parte Garcia (September 14, 2011, PD-1658-10)

Chapter 12 Limitation

CONSTRUCTION

Statutes of limitations are the primary guarantee used to protect citizens from stale criminal charges that impair those citizens' abilities to defend themselves. However, such statutes are not the only redress the accused have against extended charging delays; "the Due Process Clause [of the Fifth Amendment] has a limited role to play in protecting against oppressive delay." [Quoting United States v. Lovasco, 431 U.S. 783, 789 (1977).] State v Krizan-Wilson (December 14, 2011, PD-1485-10)

Chapter 26 Arraignment

Art. 26.13. Plea of Guilty

knowing & voluntary plea

KNOWING & VOLUNTARY PLEA: GENERAL RULES

Counsel's advice can provide assistance so ineffective that it renders a guilty plea involuntary. A guilty plea is not knowing or voluntary if made as a result of ineffective assistance of counsel. A defendant's decision to plead guilty when based upon erroneous advice of counsel is not done voluntarily and knowingly. Ex parte Moussazadeh (February 15, 2012, AP-74,185 & AP-76,439)

To obtain habeas corpus relief on a claim of involuntary plea resulting from deficient advise of counsel, an applicant must meet both prongs of the Strickland standard: (1) counsel's performance was deficient; and (2) that a probability exists, sufficient to undermine confidence in the result, that the outcome would have been different but for counsel's deficient performance. In the context of involuntary plea, the "different outcome" is choosing not to plead and instead choosing to go to trial. Ex parte Moussazadeh (February 15, 2012, AP-74,185 & AP-76,439)

KNOWING & VOLUNTARY PLEA: FACTORS

Ex parte Evans, 690 S.W.2d 274 (Tex. Crim. App. 1985), and Ex parte Moussazadeh, 64 S.W.3d 404 (Tex. Crim. App. 2001), were incorrect, and court disavowed them to the extent that they (1) require parole-eligibility misinformation to form an essential part of the plea agreement in order to make a showing of an involuntary plea that resulted from ineffective assistance of counsel, based upon such misinformation and (2) fail to appropriately recognize the distinction between parole eligibility and parole attainment. Ex parte Moussazadeh (February 15, 2012, AP-74,185 & AP-76,439)

When deciding whether to accept or reject a plea offer, a defendant will likely consider the actual minimum amount of time he will spend incarcerated. In order to properly consider his options, a defendant needs accurate information about the law concerning parole eligibility. Ex parte Moussazadeh (February 15, 2012, AP-74,185 & AP-76,439)

KNOWING & VOLUNTARY PLEA: REVIEW

On a claim of involuntary plea resulting from deficient advise of counsel, the standard for the analysis of harm under the Strickland protocol may be stated generally as "but for the erroneous advice of counsel, the applicant would not have plead guilty." Ex parte Moussazadeh (February 15, 2012, AP-74,185 & AP-76,439)

KNOWING & VOLUNTARY PLEA: REVERSIBLE ERROR

Def was denied effective assistance of counsel at guilty plea, where the parole-eligibility consequences of his plea could have been easily determined by reading the applicable statute, and counsel provided incorrect advice. The portion of his sentence that must be served before he becomes eligible for parole was double the portion that he was led to believe he must serve. Based on his affidavit court concluded that he would not have pled guilty if he had known the actual time he would have to serve, and thus prejudice was shown. Record supported habeas court's findings of fact and conclusions of law; habeas corpus relief granted. Ex parte Moussazadeh (February 15, 2012, AP-74,185 & AP-76,439)

Chapter 27 The Pleading in Criminal Actions

Art. 27.05. Defendant's Special Plea

RULES ON DOUBLE JEOPARDY

Def's decision to elect is purely strategic and may be waived or forfeited. He may choose not to elect so that state is jeopardy-barred from prosecuting on any of offenses that were in evidence. Punishment would then also be limited to charged offense only, and, given the jeopardy bar, there is no possibility that def would receive an additional stacked sentence, based on any of the offenses in evidence, down the line. But at the same time, def would need to consider that state would be permitted to proceed under several incidents of criminal conduct, as opposed to just one (or however many counts state proceeds on), which may increase state's chances of obtaining a conviction. Also, def would not be entitled to a limiting instruction concerning jury's consideration of extraneous offenses. A def's decision to elect or not elect is a strategic choice made after weighing the above considerations. And while an election may ensure jury unanimity, guaranteeing unanimity is ultimately the responsibility of the trial judge because the judge must instruct the jury on the law applicable to the case. The trial judge is therefore obligated to submit a charge that does not allow for the possibility of a non-unanimous verdict. This means that even when state is not required to elect, trial judge must craft a charge that ensures that jury's verdict will be unanimous based on the specific evidence presented in the case. To guarantee unanimity in this context, jury must be instructed that it must unanimously agree on one incident of criminal conduct (or unit of prosecution), based on the evidence, that meets all of the essential elements of the single charged offense beyond a reasonable doubt. Such an instruction should not refer to any specific evidence in the case and should permit the jury to return a general verdict. For double jeopardy purposes, the trial judge's charge will not alter the effect on a defendant who chose not to elect. Because it will be impossible to determine which particular incident of criminal conduct that the jury was unanimous about, state will be jeopardy-barred from later prosecuting def for any of offenses

presented at trial. Cosio v State (September 14, 2011, PD-1435-10)

PUNISHMENT

When the same conduct violates two different statutory provisions, the two offenses are the same for double jeopardy purposes if one offense contains all of the elements of the other. In Texas, courts focus on the elements alleged in the charging instruments, so two offenses with different statutory elements may be the same for double jeopardy purposes if, as charged, they require proof of the same facts. Impermissible multiple punishment occurs when the same criminal act is punished twice under two distinct statutory provisions and the Legislature intended the conduct be punished only once. Zuliani v State (November 2, 2011, PD-0884-11 and PD-0885-11)

Chapter 28 Motions, Pleadings and Exceptions

Art. 28.01. Pre-Trial

pre-trial hearing

rules

specific sections

Sec. 1(6) motions to suppress

Def adequately preserved complaint for appeal, that constitutional county judge (X) erred in appointing a local municipal-court judge (Y) to preside in her place over def's motion to suppress hearing and that she should have granted his later request that she conduct another suppression hearing, where his motion to set aside Y's orders on the motions to suppress was his first opportunity to obtain a ruling from an individual (X) who unquestionably had authority to rule for the court; and X did rule on the merits of def's motion to set aside the order denying the motion to suppress. When X ruled on the merits of def's motion to set aside the earlier rulings on the motions to suppress, she issued a timely and specific ruling from which def could later appeal. Even if Y's unauthorized orders on the motions to suppress were merely voidable, not void, def challenged Y's authority in a timely manner in the trial court and obtained an appealable ruling thereon. Lackey v State (March 7, 2012, PD-1621-10)

A ruling denying a motion to suppress evidence constitutes an interlocutory order, and a trial court may reexamine its ruling on a motion to suppress at any time prior to or during trial. Lackey v State (March 7, 2012, PD-1621-10)

It was not error for trial court to re-open hearing on motion to suppress shortly after trial commenced, to hear additional evidence outside jury's presence in support of its pretrial denial of the def's motion. Trial court had the discretionary authority to reopen the hearing on def's motion to suppress, even mid-trial, to allow state to present additional evidence in support of trial court's initial, interlocutory ruling to deny the motion. It was not error for court of appeals to consider that testimony in affirming trial court's ultimate ruling on the suppression motion. Black v State (February 15, 2012, PD-1551-10)

A trial court may, but is not required to, resolve a motion to suppress evidence in a pretrial hearing under Art. 28.01. In essence, a pretrial motion to suppress evidence is nothing more than a specialized objection to the admissibility of that evidence. A pretrial ruling on such a motion is interlocutory in nature. As such, it should be regarded as just as much the subject of reconsideration and revision as any other ruling on the admissibility of evidence under Rule 104, which a trial court may revisit at its discretion at any time during the course of a trial. To the extent that Art. 36.02 may be said to circumscribe a trial court's authority to reopen a hearing on a motion to suppress, it should be construed according to its terms: Art. 36.02 restricts the trial court's discretion to reopen a hearing on a motion to suppress only to the extent that it prohibits further evidence of any kind once the parties have concluded their arguments of the "cause"; that is to say, the trial itself. Black v State (February 15, 2012, PD-1551-10)

In cases in which the trial court is never asked, or is asked but declines, to exercise its discretionary authority to reopen suppression hearing, appellate review of its ruling on motion to suppress is ordinarily limited to evidence presented at the pretrial hearing: the evidence that was before the court at the time of its decision. Exception: If the parties consensually broach the suppression issue again before the factfinder at trial, the reviewing court should also consider evidence adduced before the factfinder at trial in its review of trial court's ruling on the motion to suppress. Corollary rule: If at any time before conclusion of final arguments at trial, the trial court exercises its discretionary authority to reopen the suppression hearing, the reviewing court should also consider whatever additional evidence is in the record bearing on the propriety of trial court's ultimate ruling on the motion to suppress. Black v State (February 15, 2012, PD-1551-10)

When reviewing the ruling on a suppression motion, trial judge's determination of facts, if supported by the record, is afforded almost total deference. Regardless of whether the judge granted or denied the motion, appellate courts view the evidence in the light most favorable to trial judge's ruling. The prevailing party is afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. A trial court's application of the law of search and seizure to the facts is reviewed de novo. The trial judge's ruling will be sustained if

that ruling is reasonably supported by the record and is correct on any theory of law applicable to the case. State v Weaver (September 28, 2011, PD-1635-10)

Chapter 35 Formation of the Jury

Art. 35.16. Reasons for Challenge for Cause

preserving issue

When a defendant has been granted one additional peremptory challenge, he must show that trial court erroneously denied his challenges for cause to two veniremembers to demonstrate harm. Gonzales v State (September 28, 2011, AP-76,176)

PRESENTING ISSUE

no error in ruling on challenge for cause

subsection (a)

It was not error for trial court not to allow def to question venire person prior to her being struck for cause under 35.16(a)(10). After state questioned panel member, trial court had the discretion to clarify her position by asking further questions; once clarified, however, any further questioning was proscribed by statute. No merit to def's claim that it was unconstitutional under Witherspoon v. Illinois, 391 U.S. 510 (1968), and Wainwright v. Witt, 469 U.S. 412 (1985), to prevent him from attempting to rehabilitate a potential juror who had qualms against the death penalty, where she was not discharged because of her opposition to the death penalty, but rather because she clearly indicated that her conclusion as to def's guilt or innocence would influence her verdict. Devoe v State (December 14, 2011, AP-76,289)

subsec (a)(10)

subsection (c)

It was not error to deny challenge for cause:

: on claim panel member could not afford def's right to remain silent and would shift burden of proof to def on issue of future dangerousness in capital case, where her statements were based on a misunderstanding of the law, which was overcome when the law was explained to her and her understanding of the law as to those issues was corrected. Gonzales v State (September 28, 2011, AP-76,176)

: on claim panel member's answers on death-penalty special issues would be affected by her feelings on parole, where she testified she understood how parole law worked when state explained it to her, and affirmed she could be fair. Gonzales v State (September 28, 2011, AP-76,176)

subsec (c) capital punishment issues

Art. 35.17. Voir Dire Examination

jury voir dire rules

Inquiry into a prospective juror's understanding of what proof beyond a reasonable doubt means constitutes a proper question regardless of whether the law specifically defines that term. The jury's ability to apply the correct standard of proof remains an issue in every criminal case. Fuller v State (March 28, 2012, PD-0779-11)

LIMITING QUESTIONS BY DEFENSE

error in jury voir dire

It was error to refuse to allow def to ask members of venire panel whether they understood that the standard of proof beyond a reasonable doubt constituted a level of confidence under the law that was higher than both the preponderance of the evidence and the clear and convincing evidence standards. No merit to state's claim def's inquiry was insuff to present error; although def did not expressly propose asking veniremembers specifically whether they could follow the law by regarding the reasonable doubt standard as the highest standard recognized under the law, the question he did propose was sufficiently specific that it cannot fairly be characterized as inciting a "global fishing expedition." Def clearly proffered a question that was at least relevant to, if not altogether dispositive of, a legitimate defensive challenge for cause. Case remanded to court of appeals for harm analysis. Fuller v State (March 28, 2012, PD-0779-11)

LIMITING QUESTIONS BY DEFENSE

Art. 35.261. Peremptory Challenges Based on Race Prohibited

RULES

Batson challenges do not apply to peremptory strikes based upon religion; by definition, a religious belief (unlike race or gender) is a subscription to a set of beliefs and convictions. Strikes based on personal belief have long been recognized as appropriate and are, in fact, the foundation of the entire voir dire process. Devoe v State (December 14, 2011, AP-76,289)

Chapter 36 The Trial Before the Jury

Art. 36.27. Jury May Communicate With Court

RULES

Although it will usually constitute a comment on the weight of the evidence for a trial court to focus on a particular piece of evidence in its initial charge to the jury, a trial court's answer to a question a jury asks during deliberations will not necessarily constitute an improper comment on the weight of the evidence. Lucio v State (November 9, 2011, PD-0659-10)

Although the trial court ordinarily provides instructions to the jury in their entirety before the jury retires to deliberate, the court may give further written instructions upon the jury's written request for additional guidance regarding applicable law. When the trial court responds substantively to a question the jury asks during deliberations, that communication essentially amounts to a supplemental jury instruction, and the trial court must follow the same rules for impartiality and neutrality that generally govern jury instructions. Lucio v State (November 9, 2011, PD-0659-10)

Because a trial court's answer to a jury's question must comply with the same rules that govern charges, the trial court, as a general rule, must limit its answer to setting forth the law applicable to the case; it must not express any opinion as to the weight of the evidence, sum up the testimony, discuss the facts, or use any response calculated to arouse the sympathy or excite the passions of the jury. Lucio v State (November 9, 2011, PD-0659-10)

The general rule that prohibits the court from singling out a particular piece of evidence in its instructions to the jury given prior to jury deliberations does not necessarily apply when the court merely responds to the jury's question concerning a subject identified by the jury alone. Lucio v State (November 9, 2011, PD-0659-10)

NO ERROR

Trial court did not improperly comment on the weight of the evidence in its answer to question from jury during deliberations, where answer provided a correct statement of the law without expressing any opinion as to the weight of the evidence or assuming the existence of a disputed fact. Lucio v State (November 9, 2011, PD-0659-10)

Chapter on Jury Argument

State's Jury Argument

presenting issue

WHEN IS NO OBJECTION

Nothing preserved for review on complaint that trial court erred in failing to grant a new trial, "where prosecutor [X] threw one or more boxes of live rounds of ammunition into the jury box prior to the jury retiring to consider punishment," where def did not object to the prosecutor's conduct or request an instruction to disregard when the conduct occurred, but instead moved for a mistrial after the jury had already retired to begin its deliberations. In so doing, def failed to object at the earliest opportunity. Devoe v State (December 14, 2011, AP-76,289)

Rules

RULES ON COMMENT ON FAILURE OF DEFENDANT TO TESTIFY

Prosecutors often argue at the punishment phase of trial that a defendant is not deserving of leniency or a probated sentence because he has not taken responsibility for his actions, shown remorse, or both. In a case in which the defendant does not testify either type of statement could constitute an impermissible comment on the failure to testify. Randolph v State (November 23, 2011, PD-0404-10)

Remorse and responsibility are two entirely different concepts. Remorse is the feeling of sorrow or self-reproach, accompanied by guilt, while responsibility is the act of accepting accountability. One who does not accept responsibility would not, under normal circumstances, express remorse. But one can accept responsibility without expressing remorse. Randolph v State (November 23, 2011, PD-0404-10)

One can accept responsibility by pleading guilty. Thus, the defense may fairly argue, during punishment, that the defendant has accepted responsibility by pleading guilty. Conversely, a defendant may expressly deny responsibility by putting on an alibi defense or asserting that the result was an accident. Thus, the prosecution may fairly argue, during the guilt or punishment stage, that the defendant denied responsibility because he testified to an alibi or he claimed that the deceased died as the result of an accident. Simply pleading not guilty and demanding that the State prove its case neither accepts nor denies

responsibility. Thus, the State could not argue, at either the guilt or punishment stage, that the defendant denied responsibility for the crime simply because he pled not guilty. That would be an impermissible comment on the failure to testify. Randolph v State (November 23, 2011, PD-0404-10)

A comment on the defendant's failure to show remorse is generally not proper if the defendant testifies at the guilt stage and presents some defense, but does not testify at the punishment phase. Randolph v State (November 23, 2011, PD-0404-10)

Comments about the failure to testify are permissible if they are a "fair response" to the defendant's claims or assertions. Likewise, if evidence in the record supports the prosecutor's remarks, there is no error. Randolph v State (November 23, 2011, PD-0404-10)

A punishment-stage remark on the defendant's failure to accept responsibility may be fair game if the defendant, in his guilt-stage testimony, denied responsibility for his actions or for the crime. Randolph v State (November 23, 2011, PD-0404-10)

Court overruled Swallow v State, 829 S.W.2d 223 (Tex.Crim.App. 1992), to the extent that it conflated the two distinct concepts of responsibility and remorse and implied that, even when a defendant testifies at the guilt stage and expressly denies responsibility for the criminal offense, the prosecutor cannot comment on that trial testimony during the punishment phase. The prosecutor may comment on any testimony given by the defendant in the guilt stage, and, if the defendant expressly or impliedly denies criminal responsibility during that testimony, the prosecutor may comment on that denial. Randolph v State (November 23, 2011, PD-0404-10)

Argument not error

State's punishment stage jury arg*, that def was not worthy of probation because he had not taken responsibility for the crime, was not comment on def's failure to testify at punishment stage, where it explicitly referred to def's alibi testimony at guilt stage and did not mention any lack of remorse. By testifying that he was not the person who committed this aggravated robbery, def expressly denied responsibility for the crime, so state was entitled to comment on that denial of responsibility at either the guilt or punishment stage. Randolph v State (November 23, 2011, PD-0404-10)

NOT COMMENT ON FAILURE OF DEFENDANT TO TESTIFY

state's argument harmless error

Jury arg* commenting on def's failure to testify was harmless beyond a reasonable doubt where: (1) To extent that trial court erred, it erred only in failing to sustain objection to that part of summation directing jury to consider def's lack of present, in-court remorse; the error was isolated, and was embedded within a legitimate argument that invited jury to draw an inference of lack of remorse at time of offense, an inference based on evidence at trial; improper portion of jury arg (def's apparent lack of courtroom remorse) was never repeated or emphasized. A jury legitimately invited to consider apparent remorselessness at time of offense was not likely to have been substantially prejudiced by an additional comment on his present lack of remorse; evidence against def was substantial, if not overwhelming. (2) It was harmless as to punishment where def received minimum punishment for offense. Snowden v State (September 28, 2011, PD-1524-10)

NO HARM

Chapter on Jury Charge

presenting issue

All alleged jury-charge error must be considered on appellate review regardless of preservation in the trial court. First, court determines whether the jury instruction is erroneous. Second, if error occurred, then an appellate court must analyze that error for harm. The issue of error preservation is not relevant until harm is assessed because the degree of harm required for reversal depends on whether the error was preserved. Kirsch v State (January 25, 2012, PD-0245-11)

Where def framed his point of error as follows: "The jury charges contain egregious error since they allowed for convictions that were not unanimous," it included two legally significant components for purposes of analysis: jury charge error and a state constitutional and statutory unanimity violation. The constitutional component is subject to the constitutional harm standard under Rule 44.2(a) when it is properly preserved by a timely and specific objection at trial, but when the constitutional issue has not been properly preserved, reviewing court addresses charge error harm under Almanza v. State. Where def forfeited the constitutional unanimity component of his complaint about jury charge, his convictions were subject to reversal if the error was egregious and created such harm that his trial was not fair or impartial. Def's general request that state elect as to the "counts" did not preserve the criminal conduct constitutional unanimity component of his allegation for appellate review; the request failed to put state or trial judge on notice that def was demanding that state, due to the numerous instances of sexual criminal conduct presented at trial, choose among the particular incidents that it wanted to rely on to convict def; nor did def object to the charges at the charge conference on the basis that they allowed for non-unanimous verdicts. Because def forfeited his constitution-based jury charge claim, he was not entitled to a harm analysis under Rule 44.2(a), but

PRESENTING ISSUE: REVIEW ON APPEAL

the charge error must still be reviewed for egregious harm under Almanza. Cosio v State (September 14, 2011, PD-1435-10)

NO OBJECTN

Charge error is never forfeitable by a defendant's failure to object at trial; failure to properly object to charge error controls only the type of harm analysis that will be applied. Cosio v State (September 14, 2011, PD-1435-10)

general rules for charge

COMMENT ON WEIGHT OF EVIDENCE

An instruction, albeit facially neutral and legally accurate, may nevertheless constitute an improper comment on the weight of the evidence. Kirsch v State (January 25, 2012, PD-0245-11)

jury charge on offense

RULES

There are several ways in which non-unanimity issues arise, and there are three variations that may result in non-unanimous verdicts as to a particular incident of criminal conduct that comprises the charged offense. Non-unanimity may result in each of these situations when the jury charge fails to properly instruct the jury, based on the indicted offense(s) and specific evidence in the case, that its verdict must be unanimous. (1) When state presents evidence demonstrating the repetition of the same criminal conduct, but the actual results of the conduct differed. For example, if state charges def with theft of one item and evidence shows that def had in fact stolen two of the same items, the jury's verdict may not be unanimous as to which of the two items def stole. To ensure a unanimous verdict in this situation, jury charge would have to make clear that jury must be unanimous about which of the two items was the subject of the single theft. (2) When state charges one offense and presents evidence that def committed the charged offense on multiple but separate occasions. Each of the multiple incidents individually establishes a different offense or unit of prosecution. The charge, to ensure unanimity, would need to instruct jury that its verdict must be unanimous as to a single offense or unit of prosecution among those presented. (3) When state charges one offense and presents evidence of an offense, committed at a different time, that violated a different provision of the same criminal statute. To ensure unanimity in this situation, charge would need to instruct jury that it has to be unanimous about which statutory provision, among those available based on the facts, def violated. Cosio v State (September 14, 2011, PD-1435-10)

Court of appeals was correct in holding that charges in instant case allowed for possibility that jury rendered non-unanimous verdicts. Jury could have relied on separate incidents of criminal conduct, which constituted different offenses or separate units of prosecution, committed by def to find him guilty in counts upheld by court of appeals. The standard, perfunctory unanimity instruction at the end of each charge did not rectify the error. The jury may have believed that it had to be unanimous about the offenses, not the criminal conduct constituting the offenses. Cosio v State (September 14, 2011, PD-1435-10)

Def's decision to elect is purely strategic and may be waived or forfeited. He may choose not to elect so that state is jeopardy-barred from prosecuting on any of offenses that were in evidence. Punishment would then also be limited to charged offense only, and, given the jeopardy bar, there is no possibility that def would receive an additional stacked sentence, based on any of the offenses in evidence, down the line. But at the same time, def would need to consider that state would be permitted to proceed under several incidents of criminal conduct, as opposed to just one (or however many counts state proceeds on), which may increase state's chances of obtaining a conviction. Also, def would not be entitled to a limiting instruction concerning jury's consideration of extraneous offenses. A def's decision to elect or not elect is a strategic choice made after weighing the above considerations. And while an election may ensure jury unanimity, guaranteeing unanimity is ultimately the responsibility of the trial judge because the judge must instruct the jury on the law applicable to the case. The trial judge is therefore obligated to submit a charge that does not allow for the possibility of a non-unanimous verdict. This means that even when state is not required to elect, trial judge must craft a charge that ensures that jury's verdict will be unanimous based on the specific evidence presented in the case. To guarantee unanimity in this context, jury must be instructed that it must unanimously agree on one incident of criminal conduct (or unit of prosecution), based on the evidence, that meets all of the essential elements of the single charged offense beyond a reasonable doubt. Such an instruction should not refer to any specific evidence in the case and should permit the jury to return a general verdict. For double jeopardy purposes, the trial judge's charge will not alter the effect on a defendant who chose not to elect. Because it will be impossible to determine which particular incident of criminal conduct that the jury was unanimous about, state will be jeopardy-barred from later prosecuting def for any of offenses presented at trial. Cosio v State (September 14, 2011, PD-1435-10)

jury charge errors

CHARGE ON OFFENSE: ERRORS

In pros for DWI it was error to charge jury on definition of "operate." Charge constituted a comment on weight of the evidence. In defining the term "operate" as "to exert personal effort to cause the vehicle to function," the trial court selected one definition of a statutorily undefined, common term that the jury could have selected in assessing the evidence and instructed the jury that they "must be governed by" that definition. Although the definition was an appropriate definition for an appellate court to apply in assessing suff of evid to support the "operate" element, instructing the jurors as to that definition in instant case impermissibly guided their understanding of the term. The jury should have been free to assign that term "any meaning which is acceptable in common parlance." The definition emphasized evidence tending to show "personal effort" toward causing the vehicle to function over evidence that would tend to show "merely preparatory attempts to start the motorcycle," which jury could have reasonably decided did not constitute "operating." Although charge did not "pluck out" any specific piece of evidence for special attention, it did improperly focus the jury on the type of evidence that would support a finding that def was operating his motorcycle. Whether def was operating his motorcycle was a question of fact to be resolved by the jury. Because trial court improperly impinged on jury's fact-finding authority by limiting jurors' understanding of what evidence could constitute "operating," it erred by defining that term in its charge to the jury. Kirsch v State (January 25, 2012, PD-0245-11)

HARMLESS ERROR

Charge error that permitted non-unanimous verdict did not cause egregious harm even though nothing in charge militated against conclusion that charge permitted non-unanimous verdict, where: (1) neither of the parties nor trial judge added to the charge errors by telling jury that it did not have to be unanimous about the specific instance of criminal conduct in rendering its verdicts; and (2) victim's testimony detailed each of the four incidents and the various separate instances of criminal conduct involved in each incident; her testimony was not impeached; defense was that def did not commit any of the offenses and that there was reasonable doubt as to each of the four incidents because victim was not credible and the practical circumstances surrounding the incidents of criminal conduct did not corroborate victim's testimony; defense was essentially of the same character and strength across the board; jury was not persuaded that def did not commit the offenses or that there was any reasonable doubt; had jury believed otherwise, they would have acquitted def on all counts. On this record it was logical to suppose that jury unanimously agreed that def committed all of the separate instances of criminal conduct during each of the four incidents. It is thus highly likely that the jury's verdicts were, in fact, unanimous. Accordingly, actual harm was not shown and def was not denied a fair and impartial trial. Cosio v State (September 14, 2011, PD-1435-10)

Where def framed his point of error as follows: "The jury charges contain egregious error since they allowed for convictions that were not unanimous," it included two legally significant components for purposes of analysis: jury charge error and a state constitutional and statutory unanimity violation. The constitutional component is subject to the constitutional harm standard under Rule 44.2(a) when it is properly preserved by a timely and specific objection at trial, but when the constitutional issue has not been properly preserved, reviewing court addresses charge error harm under Almanza v. State. Where def forfeited the constitutional unanimity component of his complaint about jury charge, his convictions were subject to reversal if the error was egregious and created such harm that his trial was not fair or impartial. Def's general request that state elect as to the "counts" did not preserve the criminal conduct constitutional unanimity component of his allegation for appellate review; the request failed to put state or trial judge on notice that def was demanding that state, due to the numerous instances of sexual criminal conduct presented at trial, choose among the particular incidents that it wanted to rely on to convict def; nor did def object to the charges at the charge conference on the basis that they allowed for non-unanimous verdicts. Because def forfeited his constitution-based jury charge claim, he was not entitled to a harm analysis under Rule 44.2(a), but the charge error must still be reviewed for egregious harm under Almanza. Cosio v State (September 14, 2011, PD-1435-10)

An egregious harm determination must be based on a finding of actual rather than theoretical harm. For actual harm to be established, the charge error must have affected the very basis of the case, deprived the defendant of a valuable right, or vitally affected a defensive theory. When assessing harm based on the particular facts of the case, court considers: (1) the charge; (2) the state of the evidence, including contested issues and the weight of the probative evidence; (3) the parties' arguments; and (4) all other relevant information in the record. Cosio v State (September 14, 2011, PD-1435-10)

Chapter 37 The Verdict

Art. 37.071. Procedure in Capital Case

evidence sufficient

EVIDENCE SUFFICIENT FUTURE DANGER

Evid was suff to support finding of future dangerousness, where def's argument centered on the weight that should be given to his "pristine" behavioral record while incarcerated. While good behavior in prison is a factor to consider, it does not preclude a finding of future dangerousness. Devoe v State (December 14, 2011, AP-76,289)

Evid was legally suff to prove future dangerousness, over claim evid showed def was dangerous only to her own children, whom def would not have access to if she received life without parole, where evid showed def brutally murdered her defenseless two-year-old child, which was preceded by def abusing and brutalizing this child over the course of approximately two months, combined with the previous removal by CPS of all of her children from her home and evidence of her misbehavior in the county jail. Lucio v State (September 14, 2011, AP-76,020)

evidence

EVIDENCE OF PRIOR CRIMINAL CONDUCT

For notice of unadjudicated extraneous misconduct to be "reasonable" for purposes of Section 3(g) of Article 37.07, and hence, Article 37.071, Section 2(a)(1), it must include the date on which and the county in which the extraneous misconduct occurred and the name of the alleged victim of the extraneous misconduct. Leza v State (October 12, 2011, AP-76,157)

CHARGE

No merit to contention that jury should be given special-issue charge at guilt stage of capital case to determine if imposition of death penalty is justified. Leza v State (October 12, 2011, AP-76,157)

PUNISHMENT

In pros for capital murder, it was not error to deny def's motion for trial court to enter judgment of life in prison after jury returned punishment verdict requiring death penalty; trial court has no authority to enter a judgment notwithstanding verdict in criminal cases. Lucio v State (September 14, 2011, AP-76,020)

REVIEW

While good behavior in prison is a factor to consider, it does not preclude a finding of future dangerousness. Court of Criminal Appeals can review the objective evidence of future dangerousness, but it does not engage in reviewing the jury's normative decision on mitigation. Devoe v State (December 14, 2011, AP-76,289)

Chapter 42 Judgment and Sentence

Art. 42.03. Pronouncing Sentence; Time; Credit for Time Spent in Jail Between Arrest and Sentence or Pending Appeal

PRESENCE OF DEF

Court of appeals erred in holding that trial court, after properly exercising its authority to grant a motion for reconsideration or reduction of sentence (construed as a motion for new trial on punishment), had authority to modify original sentence without a hearing and outside presence of the parties; cause remanded for new punishment hearing. State v Davis (October 5, 2011, PD-0042-11)

42.03 sec. 1(a) provides that, in a felony case, the sentence must be pronounced in the presence of the defendant, and caselaw has established that the State must also be present on such an occasion. State v Davis (October 5, 2011, PD-0042-11)

Where trial court granted new trial on punishment and then assessed new punishment, but the new or modified sentence was not orally pronounced, trial court's procedure for imposing that sentence violated 42.03 sec. 1(a). Without an oral pronouncement, state was not physically present at the sentencing and did not have opportunity to hear or respond to imposition of modified sentence. Once trial court granted def's motion to reconsider, it was then required to hold a new punishment hearing in open court in presence of the parties. Cause remanded under 44.29(b) for new hearing on punishment. State v Davis (October 5, 2011, PD-0042-11)

Art. 42.12. Community Supervision

Sec. 4. Probation from Jury

CONSTRUCTION

There is nothing in Article 42.12 that states, or even suggests, that jury must assess a sentence that equals the minimum period of community supervision, the maximum period, or any particular period in between. The jury does not determine the period of community supervision. It assesses the sentence and recommends that the trial judge place def on community supervision. Judge must follow that recommendation, but he has discretion to determine appropriate period of supervision, as long as it is within minimum and maximum statutory periods. Mayes v State (September 14, 2011, PD-1633-10)

PROBATION FROM JURY - VERDICT

Jury's initial verdict was not illegal or improper, as declared by trial judge, where jury assessed minimum period of confinement and recommend probation; was error to rule verdict was improper on basis that minimum period of probation for offense was greater than period of confinement assessed by jury. Jury initially returned verdict sentencing def to two years confinement with a recommendation for probation. Although minimum community supervision period for offense was five years, jury properly returned a verdict within the sentencing range of two to twenty years. Because supervision is not a part of the sentence, def could receive a sentence of two years, and trial judge could place him on community supervision for the minimum term of five years (or for any greater period up to ten years). Jury was properly instructed on the pertinent law, and it followed that law. Initial jury verdict of a sentence of two years with a recommendation of community supervision was legal, and trial judge should have accepted it. Mayes v State (September 14, 2011, PD-1633-10)

Sec. 11. Conditions of Probation

CONSTRUCTION

For sex offenders, 42.12 Sec. 11(i) specifies that conditions may include supervision according to the offense-specific standards of practice adopted by the Council on Sex Offender Treatment, which includes use of polygraph exams. Polygraph exams serve to establish treatment progress, to determine honesty and openness to treatment, to monitor compliance with the treatment program, and to deter and prohibit similar conduct while in treatment. Leonard v State (March 7, 2012, PD-0551-10)

An award of community supervision is not a right, but a contractual privilege, and conditions thereof are terms of the contract entered into between trial court and defendant. Therefore, conditions not objected to are affirmatively accepted as terms of the contract. Thus, by entering into the contractual relationship without objection, a defendant affirmatively waives any rights encroached upon by the terms of the contract. Leonard v State (March 7, 2012, PD-0551-10)

Sec. 23. Revocation of Probation

CONSTRUCTION

Even though revocation of community supervision may result in defendant's loss of liberty, a revocation hearing does not involve findings of guilt; rather it is a forum in which judge decides whether defendant has broken the contract he made with the court after a determination of guilt has already been made. While the rules of evidence and procedure generally apply to revocation hearings, evidence not normally admissible at a trial can be presented to the judge at a revocation hearing. And, because the judge is not determining guilt, the standard of proof is lower than in a criminal trial; the State must prove by a preponderance of the evidence that the conditions of community supervision were violated. Leonard v State (March 7, 2012, PD-0551-10)

evidence at revocation

EVIDENCE: polygraph

Where polygraph exams taken by def were used only for treatment purposes, and he showed deception on five of the exams and was discharged from the treatment program, and due to his unsuccessful completion of the treatment program his community supervision was revoked: while the polygraph results may have been used as "evidence" in the revocation hearing, it was as evidence only that def did not comply with or progress in the treatment program and not as evidence of guilt of the original offense. Leonard v State (March 7, 2012, PD-0551-10)

Most of the problems usually associated with admissibility of polygraph exam results are not present in a community-supervision revocation hearing. In such an administrative hearing, polygraph results are not used to establish guilt of original offense, there is no jury to be confused or to overvalue the results, and the judge is not deciding guilt. Leonard v State (March 7, 2012, PD-0551-10)

Even generally inadmissible facts or data may be used by an expert in forming an opinion, as long as the facts or data are of a type reasonably relied upon by other experts in the field. Polygraph exams are reasonably relied upon by experts in sex offender psychotherapy. As such, Rule 703 permits expert witness to rely on polygraph results in forming his expert opinion that def on probation in sex offense case should be discharged from the sex offender treatment program. Leonard v State (March 7, 2012, PD-0551-10)

While Rule 703 allows experts to rely on inadmissible evidence in forming an opinion, Rule

705 dictates whether the basis for the opinion is disclosed to the court. Rule 705(a) allowed expert witness in instant case to disclose that def's failed polygraphs were the basis for his opinion. Rule 703 allowed expert witness to testify, "I discharged the defendant because I felt that he was being dishonest," and under Rule 705(a), he may add, "I felt he was being dishonest because he failed the mandated polygraph exams." Leonard v State (March 7, 2012, PD-0551-10)

In a community-supervision revocation hearing, where there is no jury, polygraph results may be admissible as the basis for an expert opinion under Rules 703 and 705(a). Leonard v State (March 7, 2012, PD-0551-10)

Because adjudication hearings are administrative proceedings, in which there is no jury and the judge is not determining guilt of the original offense, the results of polygraph exams are admissible in revocation hearings if such evidence qualifies as the basis for an expert opinion under Rules 703 and 705(a). Leonard v State (March 7, 2012, PD-0551-10)

Chapter 43 Execution of Judgment

NOTES

Def's claim that death penalty was unconstitutional based on Texas's lethal injection protocol was not ripe for review where his execution was not imminent. The method in which the lethal injection is currently administered is not determinative of the way it will be administered at the moment of def's execution. Gonzales v State (September 28, 2011, AP-76,176)

Chapter 44 Appeal and Writ of error

Art. 44.01. Appeal by state

(a)(5) - granting motion to suppress

CONSTRUCTION

Art. 44.01(a)(5) permits appeals by the state of "an order" that meets the statutory requirements. An oral ruling is not "an order" for the purposes of establishing the decision of the trial court, precisely because of the fallibility of human memory. Further, without "an order," appeals court has no evidence of the required finality of a ruling; an oral ruling is subject to change after further discussion or presentation of contrary law or precedent; only a writing suffices. If a trial court refuses to, or simply does not, enter a written order, the state's right to appeal a pretrial ruling could be stymied, but the statute states that the state may appeal "an order," and precedent requires that an order be in writing. State v Sanavongxay (January 25, 2012, PD-1809-10)

STATE MAY NOT APPEAL OR APPEAL DISMISSED

Where state sought to appeal exclusion of evidence by trial court, but there was no written order from which to appeal, the court of appeals correctly held that it had no jurisdiction over state's appeal. There was no order from which to appeal, that is, no writing that memorialized the trial court's informal notations on the motion to suppress or the trial judge's oral explanation of her non-ruling. State v Sanavongxay (January 25, 2012, PD-1809-10)

Art. 44.29. Effect of Reversal

REMANDED UNDER (c)

On appeal after retrial of punishment stage in capital case, no merit to claim trial court lacked jurisdiction to hold punishment hearing after federal district court granted habeas corpus relief by setting aside sentence in original conviction. Because the federal court order set aside or invalidated the sentence, trial court's jurisdiction was restored as to the issue of punishment, and trial court had no choice but to conduct a trial on punishment; under 44.29(c) it was required to commence a new punishment hearing "as if a finding of guilt had been returned." Gonzales v State (September 28, 2011, AP-76,176)

Chapter 45 Justice and Municipal Courts

Subchapter C. Procedings in Justice Court

Art. 45.103. Warrant Without Complaint

Art. 15.03(a)(3) permits a magistrate to issue an arrest warrant "where he is specially authorized" by some other provision of the Code of Criminal Procedure to do so. Art. 45.103 constitutes just such a special statutory authorization, allowing a justice of the peace to issue an arrest warrant for any offense she has jurisdiction to try that is committed within her "view." Black v State (February 15, 2012, PD-1551-10)

No merit to contention that in determining the source for an issuing magistrate's finding of probable cause, trial and reviewing courts are bound by the four corners of the arrest warrant itself. [Def argued that because the arrest warrant issued by justice of the peace in instant case (for failure to appear), on its face identified the source of probable cause as the clerk's defective complaint, the four-corners rule prohibited the trial court from measuring the adequacy of probable cause against any other source of information.] Four corners rule does not apply to review of face of the warrant itself; under Art. 45.103 justice of the peace may issue an arrest warrant for any offense she has jurisdiction to try that is committed within her "view." Black v State (February 15, 2012, PD-1551-10)

Fact that arrest warrant issued by justice of the peace for failure to appear, on its face purported to rely for its probable cause upon defective complaint, did not mean that issuing magistrate could not rely upon the authority provided by Art. 45.103 to issue an arrest warrant for any offense she has jurisdiction to try that is committed within her "view." Black v State (February 15, 2012, PD-1551-10)

45.103: warrant without complaint

It was not error for court of appeals to go beyond the face of the arrest warrant and rely on testimony of justice of the peace at hearing on motion to suppress, as sufficient to establish probable cause to issue def's arrest warrant, at least for the offense of failure to appear, which JP testified was committed in her presence. Black v State (February 15, 2012, PD-1551-10)

It was not error for trial court to deny motion to suppress over challenge to probable cause to support issuance of arrest warrant for offense of failure to appear issued by justice of the peace, on claim of no probable cause for warrant due to defective accompanying complaint, where there was testimony from issuing magistrate that def's failure to appear was committed in her presence. Warrant properly issued under Art. 45.103. Black v State (February 15, 2012, PD-1551-10)

Chapter 48 Pardon and Parole

Case Notes for Chapter 48

While the general eligibility rules for parole may change over time, the eligibility rules remain the same for a given conviction. Likewise, an inmate who was eligible for mandatory release at the time of the offense remains eligible for mandatory release on that conviction, even if that offense subsequently becomes eligible for only discretionary mandatory release. Ex parte Moussazadeh (February 15, 2012, AP-74,185 & AP-76,439)

The statutes that govern the punishment of a particular offense control the issue of parole eligibility and are not subject to alteration, absent legislative amendment. Even in the event of a legislative amendment making a law more stringent, an applicant is subject only to the law governing parole eligibility at the time the offense was committed. Parole attainment, on the other hand, is not governed by statute and is granted at the discretion of the parole board. Ex parte Moussazadeh (February 15, 2012, AP-74,185 & AP-76,439)

Chapter 62. Sex Offender Registration Program

Habeas corpus relief denied on claim def was denied due process when TDCJ placed sex-offender conditions on his parole, where no process was due to def because his computerized criminal-history file, corroborated by police agency records, showed he had prior sex-offense convictions from another state that qualified under Texas sex-offender registration law. Ex parte Warren (September 28, 2011, AP-76,435)

CONSTRUCTION

The Illinois offense of Contributing to the Sexual Delinquency of a Child is "substantially similar" to the Texas offense of Indecency with a Child and constitutes an offense that qualifies a parolee for sex-offender conditions under Art. 62.002(5)(H). Ex parte Warren (September 28, 2011, AP-76,435)

Chapter 64. DNA Testing

Art. 64.04. Finding

Where def filed motion for DNA testing and convicting court purported to grant def a new trial, convicting court lacked jurisdiction to order a new trial on the basis of its Art. 64.04 finding, and court of appeals should not have addressed question of sufficiency of evidence to support that finding. The convicting court lacked jurisdiction to grant a new trial either under: (1) the regulatory scheme that governs motions for new trial generally; (2) independently, under the provisions of Chapter 64 itself; or (3) somehow "implicitly," as a necessary corollary to the renewed, but limited, jurisdiction that Chapter 64 does confer. State v Holloway (March 7, 2012, PD-0324-11)

Where convicting court's plenary jurisdiction to entertain a motion for new trial lapsed, at the latest, when the appellate record was filed in original conviction, it had no jurisdiction on basis of Rule 21 to grant a new trial of original conviction during its consideration of post-conviction DNA motion. State v Holloway (March 7, 2012, PD-0324-11)

The jurisdictional purpose of Chapter 64 is to provide deserving applicants with a mechanism for post-conviction DNA testing and a favorable finding on the record if justified by that testing; it does not include any other remedy or form of relief in the convicting court. Permitting the convicting court to grant a new trial would conflict with the plainly expressed jurisdictional purpose of Chapter 64. State v Holloway (March 7, 2012, PD-0324-11)

The proper and exclusive vehicle for obtaining judicial relief from a felony conviction on the basis of a favorable finding under Art. 64.04 is a post-conviction application for writ of habeas corpus returnable to Court of Criminal Appeals under Art. 11.07 or Art. 11.071. Not every favorable finding under 64.04 will necessarily lead to post-conviction habeas corpus relief. Under 11.07 the Court of Criminal Appeals has exclusive jurisdiction to decide which felony applicants should obtain relief on the basis of a claim of actual innocence and which should not. Nothing in Chapter 64 divests that court of its otherwise exclusive jurisdiction whenever a favorable finding is made under 64.04. State v Holloway (March 7, 2012, PD-0324-11)

CONSTRUCTION

On def's PDR of decision of court of appeals on state's appeal, reversing order for new trial granted by convicting court after ruling in def's favor under Art. 64.04, it was error for court of appeals to address state's challenge to trial court's Art. 64.04 finding. Because 64.04 does not itself provide def with any remedy, trial court lacked jurisdiction to order new trial and therefore court of appeals's opinion on sufficiency of evidence to support trial court's favorable 64.04 finding was advisory in nature. Resolution of such a question should await such time as an applicant may seek post-conviction habeas corpus relief. State v Holloway (March 7, 2012, PD-0324-11)

Texas Rules of Appellate Procedure

Section Two. Appeals from Trial Court Judgments and Orders

Rule 21. New Trials in Criminal Cases.

Where convicting court's plenary jurisdiction to entertain a motion for new trial lapsed, at the latest, when the appellate record was filed in original conviction, it had no jurisdiction on basis of Rule 21 to grant a new trial of original conviction during its consideration of post-conviction DNA motion. State v Holloway (March 7, 2012, PD-0324-11)

NOTES

Rule 21.9 Effect of Granting

While CCA has previously held that a trial court may not grant a new trial solely on the issue of punishment, the reasoning for that rule no longer stands, and a trial court may indeed grant a new trial on punishment. Although 44.29(b) CCP still does not explicitly authorize trial courts to grant new trials only as to punishment, it does not prohibit them from doing so, and it speaks only to the authority of the appellate courts. 44.29(b) does not limit the impact of Rule 21. Following the 2007 amendments of Rule 21, trial courts have the authority to grant a new trial on punishment. State v Davis (October 5, 2011, PD-0042-11)

Although def's motion was entitled "Motion for Reconsideration or Reduction of Sentence," trial court's order granting the motion was functionally indistinguishable from granting of a new trial on punishment. Trial court's order reduced and reformed def's sentence to a term of twelve years but left his plea unchanged. By granting the motion, trial court placed the parties in the position of proceeding to sentencing, meaning actual effect of trial court's order granting motion was to grant a new trial on punishment. Because the motion was timely filed and actual effect of order granting that motion was functionally equivalent to granting a new trial on punishment, trial court had authority to set aside original sentence, and the modified judgment of trial court was not void. (But was error for trial court to modify the judgment without complying with requirements of 42.03 sec. 1(a) CCP; cause remanded for new punishment hearing.) State v Davis (October 5, 2011, PD-0042-11)

NOTES

Rule 33. Preservation of Appellate Complaints.

Rule 33.1 Preservation; How Shown

Def adequately preserved complaint for appeal, that constitutional county judge (X) erred in appointing a local municipal-court judge (Y) to preside in her place over def's motion to suppress hearing and that she should have granted his later request that she conduct another suppression hearing, where his motion to set aside Y's orders on the motions to suppress was his first opportunity to obtain a ruling from an individual (X) who unquestionably had authority to rule for the court; and X did rule on the merits of def's motion to set aside the order denying the motion to suppress. When X ruled on the merits of def's motion to set aside the earlier rulings on the motions to suppress, she issued a timely and specific ruling from which def could later appeal. Even if Y's unauthorized orders on the motions to suppress were merely voidable, not void, def challenged Y's authority in a timely manner in the trial court and obtained an appealable ruling thereon. Lackey v State (March 7, 2012, PD-1621-10)

ISSUE PRESERVED

Rule 34. Appellate Record.

Rule 34.6 Reporter's Record

No merit to claim def was entitled to new trial under Rule 34.6(f)(4), on claim that certain portions of audio of def's recorded statement to police were inaudible. Those portions of court reporter's record were not "lost or destroyed" for purposes of Rule 34.6(f); nothing was missing from reporter's record. Lucio v State (September 14, 2011, AP-76,020)

34.6(f) lost or destroyed record

Rule 44. Reversible Error.

Rule 44.2 Reversible Error in Criminal Cases

Rule 44.2(a): constitutional error

The harmless-error inquiry under Rule 44.2(a) should adhere strictly to the question of whether the error committed in a particular case contributed to the verdict obtained in that case. Court of Criminal Appeals expressly disavowed the first and last Harris [Harris v State, 790 S.W.2d 568 (Tex. Crim. App. 1989)] factors: (1) the source of the error and (2) whether declaring the error harmless would encourage repeat performances by the State. The remaining Harris factors - the nature of the error (e.g., erroneous admission or exclusion of evidence, objectionable jury argument, etc.), whether it was emphasized by the State, the probable implications of the error, and the weight the jury would likely have assigned to it in the course of its deliberations - remain viable considerations in deciding whether trial error of a constitutional dimension contributed to the conviction or punishment in many cases. But they are not exclusive considerations in any particular case; many other considerations may logically serve to inform a proper harm analysis in a given case. On the other hand, not every remaining Harris factor will invariably have logical application with respect to every conceivable constitutional error that may be subject to an analysis for harm. At bottom, an analysis for whether a particular constitutional error is harmless should take into account any and every circumstance apparent in the record that logically informs an appellate determination whether "beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment." Snowden v State (September 28, 2011, PD-1524-10)

NOTES 44.2(a)

Section Five. Proceedings in the Court of Criminal Appeals

Rule 68. Discretionary Review With Petition.

Rule 68.7 Court of Appeals Clerk's Duties

On July 12, 2011, Rule 50 was abolished, and Rule 68.7 was amended to provide that an appellate court must send the appellate record to Court of Criminal Appeals within 15 days of receiving notice that a petition for discretionary review has been filed. Once that 15-day period elapses, an appellate court loses authority to issue an opinion. Ex parte Nyabwa (March 28, 2012, PD-0073-12 through PD-0075-12)

Where court of appeals's second opinion in case was issued more than 15 days after petitions for discretionary review were filed, it was untimely and therefore unauthorized under Rule 68.7. Accordingly, the court had no jurisdiction to issue that opinion. Court of Criminal Appeals ordered second opinion withdrawn, and the original judgment and opinion of the court of appeals was reinstated. Ex parte Nyabwa (March 28, 2012, PD-0073-12 through PD-0075-12)

NOTES

Rule 79. Rehearings.

Rule 79.2 Contents

Under Rule 79.2(d) Court of Criminal Appeals, on its own initiative, may reconsider a prior denial of habeas corpus relief. In instant application court reconsidered, on its own initiative, the claim raised in applicant's prior application for writ of habeas corpus, granted relief on claim in prior application, and dismissed instant application. Ex parte Moussazadeh (February 15, 2012, AP-74,185 & AP-76,439)

NOTES

Case Note Updates for
Baker's Texas Criminal Evidence Handbook

Chapter 15 Arrest Under Warrant

Art. 15.03. Magistrate May Issue Warrant or Summons

NOTES

Art. 15.03(a)(3) permits a magistrate to issue an arrest warrant "where he is specially authorized" by some other provision of the Code of Criminal Procedure to do so. Art. 45.103 constitutes just such a special statutory authorization, allowing a justice of the peace to issue an arrest warrant for any offense she has jurisdiction to try that is committed within her "view." Black v State (February 15, 2012, PD-1551-10)

Art. 15.17. Duties of Arresting Officer and Magistrate

RULES

Under Montejo v Louisiana, 556 US 778 (2009), the Fifth Amendment right to interrogation counsel is triggered by the Miranda warnings that police must give before beginning any custodial questioning. The Sixth Amendment right to trial counsel is triggered by judicial arraignment or Article 15.17 magistration. Both the Fifth and Sixth Amendment rights to counsel apply to post-magistration custodial interrogation, but each is invoked and waived in exactly the same manner: under the Fifth Amendment prophylactic Miranda rules. Pecina v State (January 25, 2012, PD-1095-10)

Once formal adversary proceedings begin, the Sixth Amendment right to counsel applies in exactly the same way as the Fifth Amendment right applies to custodial interrogation. Thus, Miranda warnings serve the arrestee's interests in both the Fifth and Sixth Amendment rights to counsel during custodial interrogations conducted after a person has been formally charged. Because the "doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver," [quoting Montejo v Louisiana, 556 US 778 (2009)] both the Fifth and Sixth Amendment rights to interrogation counsel are fully encompassed by the Fifth Amendment Miranda doctrine. Pecina v State (January 25, 2012, PD-1095-10)

Montejo means that a defendant's invocation of his right to counsel at his Article 15.17 hearing says nothing about his possible invocation of his right to counsel during later police-initiated custodial interrogation. The magistration hearing is not an interrogation event. An uncharged suspect may invoke his Fifth Amendment right to counsel (and a defendant who has been arraigned may invoke his Sixth Amendment right to counsel) for purposes of custodial interrogation when the police or other law-enforcement agents approach him and give him his Miranda warnings. That is the time and place to either invoke or waive the right to counsel for purposes of police questioning. Pecina v State (January 25, 2012, PD-1095-10)

Chapter on Non-Statutory Arrest under Warrant Issues

arrest warrants

RULES

The four corners rule applies not to a review of the face of the warrant itself, but to a review of the accompanying affidavit or complaint that purports to supply the probable cause necessary to issue the warrant. Unlike the situation with a warrant affidavit, which must supply probable cause before it may validly serve to support the issuance of a warrant, there is no requirement that the face of the warrant itself identify the source for the issuing magistrate's finding of probable cause. Black v State (February 15, 2012, PD-1551-10)

No merit to contention that in determining the source for an issuing magistrate's finding of probable cause, trial and reviewing courts are bound by the four corners of the arrest warrant itself. [Def argued that because the arrest warrant issued by justice of the peace in instant case (for failure to appear), on its face identified the source of probable cause as the clerk's defective complaint, the four-corners rule prohibited the trial court from measuring the adequacy of probable cause against any other source of information.] Four corners rule does not apply to review of face of the warrant itself; under Art. 45.103 justice of the peace may issue an arrest warrant for any offense she has jurisdiction to try that is committed within her "view." Black v State (February 15, 2012, PD-1551-10)

Fact that arrest warrant issued by justice of the peace for failure to appear, on its face purported to rely for its probable cause upon defective complaint, did not mean that issuing magistrate could not rely upon the authority provided by Art. 45.103 to issue an arrest warrant for any offense she has jurisdiction to try that is committed within her "view." Black v State (February 15, 2012, PD-1551-10)

It was not error for court of appeals to go beyond the face of the arrest warrant and rely on testimony of justice of the peace at hearing on motion to suppress, as sufficient to establish probable cause to issue def's arrest warrant, at least for the offense of failure to appear, which JP testified was committed in her presence. Black v State (February 15, 2012, PD-1551-10)

It was not error for trial court to deny motion to suppress over challenge to probable cause to support issuance of arrest warrant for offense of failure to appear issued by justice of the peace, on claim of no probable cause for warrant due to defective accompanying complaint, where there was testimony from issuing magistrate that def's failure to appear was committed in her presence. Warrant properly issued under Art. 45.103. Black v State (February 15, 2012, PD-1551-10)

ARREST WARRANT VALID

Chapter on Non-Statutory Search and Seizure Issues

consent to search

The scope of a search by consent is usually defined by its expressed object. A person is free to limit the scope of the consent that he gives. If police rely on consent as the basis for a warrantless search, they have no more authority than they have apparently been given by the consent. It is therefore important to take account of any express or implied limitations or qualifications attending that consent which establish the permissible scope of the search in terms of such matters as time, duration, area, or intensity. On the other hand, a person's silence in the face of an officer's further actions may imply consent to that further action. The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness: what would the typical reasonable person have understood by the exchange between the officer and the suspect? Therefore, a court reviewing the totality of the circumstances of a particular police-citizen interaction does so without regard for the subjective thoughts or intents of either the officer or the citizen. In Texas, the "clear and convincing" burden requires the prosecution to show the consent given was positive and unequivocal and there must not be duress or coercion, actual or implied. State v Weaver (September 28, 2011, PD-1635-10)

RULES ON CONSENT EXCEPTION

search not authorized by consent

It was not abuse of discretion for trial judge to grant motion to suppress on finding that search of van exceeded scope of def's consent, where record, viewed in light most favorable to trial judge's ruling, supported implicit fact finding that van was parked in a protected, non-public area of business premises rather than in a parking lot open to the public, and record supported trial judge's legal conclusion that officers had worn out their welcome and lingered beyond scope of def's consent before initiation of dog sniff of def's van. Officers had finished looking for the specific individual (original basis for consent) and had achieved the ostensible purpose of their entry, and def unequivocally said "No" to a further search of his van. State v Weaver (September 28, 2011, PD-1635-10)

NOT WITHIN SCOPE OF CONSENT

what is a search

The occupant of a business establishment enjoys the same constitutional right to be free from unreasonable searches as does the occupant of a private residence. But business and commercial premises are not as private as residential premises, and consequently there are various police investigative procedures which may be directed at such premises without the police conduct constituting a Fourth Amendment search. Police, although motivated by an investigative purpose, are as free as the general public to enter premises "open to the public," when they are open to the public. Officers are then entitled to note objects in plain view, or examine merchandise as a customer would. For actions not to constitute a Fourth Amendment search, the officer must remain in that portion of the premises which is open to the public. State v Weaver (September 28, 2011, PD-1635-10)

RULES ON WHAT IS A SEARCH

searches with and without warrants

rules on affidavit for search warrant

Imprecision with respect to time of events described in search warrant affidavit is not by itself fatal; it becomes fatal when a court cannot ascertain whether or not the information is stale. No merit to claim that def's attack on sufficiency of search warrant affidavit was not based on staleness but on specificity. Jones v State (March 28, 2012, PD-0674-11 through PD-0676-11)

No hard-and-fast rule sets the outer limit of time between stopping an apparently intoxicated driver and the existence of probable cause that evidence of intoxication will still be found within that person's blood. The ultimate criteria in determining the evaporation of probable cause are not found in case law, but in reason and common sense. The likelihood that the evidence sought is still available and in the same place is a function, not just of the watch or the calendar, but of the particular variables in the case: (1) the type of crime - short-term intoxication versus long-term criminal enterprise or conspiracy; (2) the suspect - "nomadic" traveler, "entrenched" resident, or established ongoing businessman; (3) the item to be seized - "perishable and easily transferred" (evanescent alcohol, a single marijuana cigarette) or of "enduring utility to its holder" (a bank vault filled with deeds, a "meth lab," or a graveyard corpse); and (4) the place to be searched - a "mere

RULES ON STALE INFO

criminal forum of convenience or secure operational base." Crider v State (November 16, 2011, PD-0592-10)

Alcohol in a person's bloodstream disappears quite rapidly, thus the facts cited to support probable cause to search for alcohol in a DWI suspect's bloodstream become stale quite rapidly. Blood-alcohol levels are usually described in terms of blood-alcohol content (BAC). BAC refers to the concentration of alcohol in the blood, measured in grams of alcohol for every one hundred milliliters of blood volume. Hypothetically, a person whose blood had one gram of alcohol for every one hundred milliliters of blood would have a BAC of 1 and a blood-alcohol concentration of 1% ("weight per volume"). This is hypothetical because a person with a BAC of 1 would literally be pickled in alcohol. A person whose blood contains 0.10 grams of alcohol for every one hundred milliliters of blood will have a BAC of 0.10 (a more realistic and typical situation). Every hour, the "average" person eliminates somewhere between 0.015 and 0.020 grams of alcohol for every one-hundred milliliters of blood. In other words, a BAC of 0.10 will go down by 0.015 to 0.020 every hour in an average person. Assuming that a suspect did not drink after being stopped by an officer, at least "some" evidence of alcoholic "intoxication" (defined as 0.08 BAC) should still be in his blood system four hours later because it takes at least four hours for the average person to eliminate 0.08 grams of alcohol (per one hundred milliliters of blood) at a rate of 0.02 grams of alcohol (per one hundred milliliters of blood) per hour. Put simply, it takes four hours of hourly 0.02 BAC decreases to make a BAC of 0.08 drop to zero. Crider v State (November 16, 2011, PD-0592-10)

The higher the level of intoxication at the time of the stop, the longer some evidence of alcoholic intoxication would remain in the blood. For example, if the average person's blood-alcohol level were twice the limit of legal intoxication, with a BAC of 0.16 at the time he were stopped, his level would be approximately 0.08 four hours later, and some level of alcohol would still be in his blood up to seven to eight hours later. But it would be exceedingly unlikely that a person who was tested some 24 hours after he ceased drinking would register any detectable level of alcohol in his blood. (This would correspond to an initial blood-alcohol content of 0.48, six times the legal limit and nearly lethal.) Crider v State (November 16, 2011, PD-0592-10)

probable cause

Affidavit* supported search warrant, over claim it was based on stale info, where it suggested a continuing criminal operation even though it was imprecise as to timing of events it described. Affiant had "recently" received info from one of at least two informants; after "recently" receiving that info, he used a second informant to conduct a controlled buy, which made that info even more recent; affiant believed drugs were "currently" on the premises; affidavit established maximum time frame as prior 10 months; the controlled buy, combined with the previous information from at least two informants that drugs were being sold from the address, was sufficient to establish probable cause that a continuing drug business was being operated from the residence, a secure operational base. Jones v State (March 28, 2012, PD-0674-11 through PD-0676-11)

STALE INFORMAT'N

search under warrant error

deficient affidavit

It was error to deny motion to suppress blood alcohol evid seized under search warrant where affidavit was insufficient to show probable cause because there could have been a twenty-five-hour gap between the time the officer first stopped def and the time he obtained a search warrant for blood. The affidavit did not contain sufficient facts within its four corners to establish probable cause that evidence of intoxication would be found in def's blood at the time the search warrant was issued. Crider v State (November 16, 2011, PD-0592-10)

DEFICIENT AFFIDAVIT: LACK OF PROBABLE CAUSE FOR TIME

Right of Compulsory Process

A trial court is required to make an inquiry into the reasonableness of a witness's assertion of the Fifth Amendment privilege against self-incrimination, overruling Ross v State, 486 S.W.2d 327 (Tex. Cr. App. 1972). Walters v State (December 7, 2011, PD-0064-11 and PD-0065-11)

COMPULSORY PROCESS & FIFTH AMENDMENT

no error

No merit to claim trial court's refusal to compel testimony from a defense witness based on her invocation of her Fifth Amendment rights without a determination of a reasonable basis for "a real and substantial fear of prosecution" violated def's rights to due process and due course of law, where record showed trial court's inquiry into the reasonableness of witness's invocation of her Fifth Amendment privilege was sufficient to establish the risk of incrimination. Walters v State (December 7, 2011, PD-0064-11 and PD-0065-11)

NO ERROR: WITNESS INVOKES FIFTH

Chapter 38 Evidence In Criminal Actions

Art. 38.071. Testimony of Child Who is Victim of Offense

CONSTITUTIONALITY

Videotape procedures set out in 38.071 Sec. 2, including use of written interrogatories in lieu of live testimony and cross-examination, do not satisfy Sixth Amendment rights of confrontation and cross-examination. Coronado v State (September 14, 2011, PD-0644-10)

Art. 38.072. Hearsay Statement of Child Abuse Victim

CONSTRUCTION

Art. 38.072 sec. 2(b)(2) charges trial court with determining reliability based on "the time, content, and circumstances of the statement;" it does not charge trial court with determining reliability of the statement based on credibility of outcry witness. The only task it assigns trial court is to determine whether, based on the time, content, and circumstances of the statement, the outcry is reliable. The trial court would be within its discretion at a 38.072 hearing to disallow as irrelevant a line of questioning that addressed the biases or memory of the outcry witness but not the time, content, and circumstances of the outcry. The narrow range of discretion that 38.072 allows a trial court means that the credibility of outcry witness is not a relevant issue at a hearing to determine admissibility of an outcry. A hearing in which the sought-after cross-examination would be necessarily irrelevant does not provide an adequate opportunity for cross-examination such that testimony from the hearing is admissible at a trial on the merits. Sanchez v State (December 14, 2011, PD-0086-11)

Because an Art. 38.072 hearing provides a defendant with an inadequate opportunity to cross-examine an outcry witness's credibility, admitting testimony from a 38.072 hearing at a trial when the witness is unavailable violates the Sixth Amendment. Sanchez v State (December 14, 2011, PD-0086-11)

Other Case Notes on Discovery (following Chapter 39)

Failure to Disclose Favorable Evidence

PRESENTING ISSUE

Where def raised Brady-error claim on appeal but material on which def relied was not in appellate record, point of error overruled without prejudice to pursue the claim by habeas corpus. Leza v State (October 12, 2011, AP-76,157)

Failure to assert Brady-error during trial did not waive issue, where defense counsel discovered audio portion of videotape after completion of final arguments and after jury had retired to deliberate, but was not aware at that time of the substance of the audio (and its exculpatory nature), so grounds for a Brady-error objection had yet to become apparent. Also, def could not then re-open the case in order to get the audio into evidence because doing so would have been contrary to Art. 36.02: introduction of evidence after the conclusion of closing arguments is prohibited. Pena v State (September 28, 2011, PD-0852-10)

Motion for new trial hearing reflected that Brady complaint (regarding exculpatory audio portion of videotape) was preserved for review, even though word "Brady" was not specifically used, where trial court and state were both aware of the purported error. State's failure to provide the audio recording dominated the motion hearing, and all parties (court, state, and defense) made references to "material" and "exculpatory" evidence as well as the possible appellate implications if the facts alleged by def were proven to be true. The Brady issue was sufficiently clear from the record, and when the trial judge denied motion for new trial, he was implicitly ruling on the Brady claim. Pena v State (September 28, 2011, PD-0852-10)

REVERSIBLE ERROR PRESENTED BY FAILURE TO DISCLOSE EVIDENCE

Where state provided def with videotape without the audio, and audio portion of videotape was favorable evidence material to def's case, state's failure to disclose it violated def's constitutional right under Brady v. Maryland, 373 U.S. 83 (1963). State failed to disclose audio portion even though requested by def; audio portion was unknown to def because state said videotape did not have audio; although def may have known of his exculpatory statements on the recording, he was unaware the audio recording existed. The audio recording was material because it would have substantiated his defense; it was both exculpatory and impeachment evid, and undermined confidence in trial outcome; disclosure would have altered both defense and state trial strategies. Had it been disclosed, it was reasonably probable that outcome of trial would have been different. While audio portion of videotape may have been hearsay, it would have been admissible under Rule 107, where state introduced and relied upon visual portion of videotape to prove its case. Pena v State (September 28, 2011, PD-0852-10)

Chapter on Confession of Defendant (Art. 38.22)

presenting issue

ISSUE NOT PRESERVED

Objection that not all voices on recording of def's statement could be identified failed to preserve any voluntariness, lack-of-warning, or illegal-arrest claims relating to admissibility of the recorded statement. Also, a listener could clearly hear on recording def being informed of her Miranda rights and def stating that she understood them, and see def signing a "waiver" of those rights before police began to question her; her subsequent course of conduct was also consistent with a waiver of these rights. Lucio v State (September 14, 2011, AP-76,020)

rules on confession

RULES: WARNINGS

In deciding the admissibility of a statement under the booking-question exception to requirement for Miranda warnings, a trial court must determine whether the question asked at booking reasonably relates to a legitimate administrative concern, applying an objective standard. An appellate court reviews this determination de novo, as its resolution generally will not turn on an evaluation of credibility and demeanor. However, if a determination requires resolution of disputed facts, an appellate court must defer to the trial court's findings as to those facts if supported by the record and review de novo whether the question was, objectively, reasonably related to an administrative interest. Alford v State (February 8, 2012, PD-0225-11)

In ruling on a claim of a booking-question exception to requirement for Miranda warnings, a trial court must examine whether, under the totality of the circumstances, a question asked at booking is reasonably related to a legitimate administrative concern. In that regard, the government has a legitimate interest in identification and storage of an inmate's property. Alford v State (February 8, 2012, PD-0225-11)

RULES: RIGHT TO COUNSEL

Under Montejo v Louisiana, 556 US 778 (2009), the Fifth Amendment right to interrogation counsel is triggered by the Miranda warnings that police must give before beginning any custodial questioning. The Sixth Amendment right to trial counsel is triggered by judicial arraignment or Article 15.17 magistration. Both the Fifth and Sixth Amendment rights to counsel apply to post-magistration custodial interrogation, but each is invoked and waived in exactly the same manner: under the Fifth Amendment prophylactic Miranda rules. Pecina v State (January 25, 2012, PD-1095-10)

Once formal adversary proceedings begin, the Sixth Amendment right to counsel applies in exactly the same way as the Fifth Amendment right applies to custodial interrogation. Thus, Miranda warnings serve the arrestee's interests in both the Fifth and Sixth Amendment rights to counsel during custodial interrogations conducted after a person has been formally charged. Because the "doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver," [quoting Montejo v Louisiana, 556 US 778 (2009)] both the Fifth and Sixth Amendment rights to interrogation counsel are fully encompassed by the Fifth Amendment Miranda doctrine. Pecina v State (January 25, 2012, PD-1095-10)

Montejo means that a defendant's invocation of his right to counsel at his Article 15.17 hearing says nothing about his possible invocation of his right to counsel during later police-initiated custodial interrogation. The magistration hearing is not an interrogation event. An uncharged suspect may invoke his Fifth Amendment right to counsel (and a defendant who has been arraigned may invoke his Sixth Amendment right to counsel) for purposes of custodial interrogation when the police or other law-enforcement agents approach him and give him his Miranda warnings. That is the time and place to either invoke or waive the right to counsel for purposes of police questioning. Pecina v State (January 25, 2012, PD-1095-10)

not error to admit confession

INTOXI-CATION

No merit to claim def's heroin intoxication rendered his waiver of Miranda rights involuntary. Any tendency that the influence of heroin may have had to overbear his will to resist waiving his Miranda rights was due to no causative action on the part of the police, and therefore could not serve to undermine the voluntariness of his subsequent statements for Fifth Amendment purposes. Leza v State (October 12, 2011, AP-76,157)

No merit to contention def's waiver of Miranda rights and statutory rights under 38.22 was not knowing and intelligent because he was under influence of heroin at time of waiver, where trial court could reject testimony of def's expert on the issue and credit testimony of officers that def was awake and alert, appeared to comprehend the warnings and the questions propounded to him, and was coherent and appropriate in his responses; and that in light of their prior experience in dealing with heroin users, def did not appear to be under its influence at all, much less to the extent that he could not comprehend the proceedings. Leza v State (October 12, 2011, AP-76,157)

Record supported trial court's conclusion that def's waiver of his 38.22 rights was voluntary, over claim his waiver was not knowing and intelligent due to his heroin intoxication, where officer who read def his rights and conducted bulk of interrogation testified that she used no force or threats with def,

that he did not seem to her to be at all intoxicated, and that his ongoing cooperation in the interrogation appeared to her to be wholly voluntary; trial judge reviewed recording of interrogation and could measure officer's perceptions with respect to voluntariness of def's waiver for himself; even def's expert acknowledged that, at least by the time def ultimately admitted his role in the offense, several hours into the interview, he "was not intoxicated and impaired in judgment and decision making." Trial court could rationally conclude that def's heroin intoxication, if any, at beginning of interview when his statutory rights were read to him and interrogation began, was not so acute as to overcome his capacity to resist reasonable, non-coercive tactics by the police to persuade him to waive his statutory rights. Leza v State (October 12, 2011, AP-76,157)

WARNINGS

It was not error to admit def's statements under the booking-question exception to Miranda, where record undisputedly showed that, as def was being booked into the jail, officer asked him if the non-contraband item discovered in the patrol car (flash drive) belonged to him. Upon confirming that it did, officer gave the item to facility personnel, who placed it with def's personal property for safekeeping. The totality of the circumstances objectively showed that officer's questions were reasonably related to a legitimate administrative concern, the identification and storage of an inmate's property. Alford v State (February 8, 2012, PD-0225-11)

WAIVER OF RIGHTS

Fact that none of interrogating officers expressly informed def that subject of interrogation would be, not the traffic infraction for which he was arrested, but the capital murder of which he was suspected, was insufficient, as a matter of law, to render his waiver of Miranda rights and statutory rights under 38.22 either involuntary or insufficiently informed. Def was expressly informed that "anything" he said may be used against him, and interrogating officers said and did nothing that could reasonably have deceived him into believing otherwise. It became obvious to def immediately after warnings were administered that interrogators had no interest in questioning him about the traffic warrant and wanted only to elicit a statement about the murder. It was inconceivable that def could have been tricked into thinking that the warnings that had just been read to him, and which he had just acknowledged, applied only to questioning about traffic infractions, about which the police displayed no interest at all. Leza v State (October 12, 2011, AP-76,157)

right to counsel

RIGHT TO COUNSEL WAIVED

It was not error to deny motion to suppress statements to police during custodial interrogation at a hospital after a magistrate had given def his Article 15.17 rights, over claim of denial of right to counsel, where def never invoked his right to interrogation counsel after police gave him Miranda warnings. No merit to claim def had invoked both his Fifth and Sixth Amendment rights to counsel when he asked the magistrate for an appointed attorney but also said that he wanted to talk to the police who were standing outside the hospital room. [Facts of case: There were two separate events: magistration followed by a custodial interrogation. Judge gave def his Article 15.17 warnings in Spanish and def told her, "I want a lawyer, but I also want to speak with the Arlington Police." In her opinion, def asked for appointment of a trial attorney, but he wanted to talk to the police who were standing right outside the hospital door. She did not believe that def invoked his right to counsel for purposes of custodial interrogation. As a neutral magistrate, acting in her judicial capacity, she concluded that def was willing to talk to the police officers without counsel. The detectives then entered and gave def his Miranda warnings in Spanish three separate times. At no time did he hesitate, invoke his right to an attorney at that interview, or ask the officers to stop their questioning. The officers concluded that he freely, voluntarily, and intelligently waived his right to counsel during their questioning. Nothing in the record contradicted their conclusion.] Pecina v State (January 25, 2012, PD-1095-10)

38.22 Sec. 2: Written Confession Issues

RULES

A claim that a purported waiver of the statutory rights in 38.22 is involuntary need not be predicated on police overreaching. Circumstances unattributable to the police that nevertheless adversely impact an accused's ability to resist reasonable police entreaties to waive his statutory rights, such as intoxication, are "factors" in the voluntariness inquiry, though they are usually not enough, by themselves, to render a statement inadmissible under 38.22. Leza v State (October 12, 2011, AP-76,157)

Waiver of 38.22 rights may be inferred from actions and words of the person interrogated. While such implied waivers are not to be preferred, it is within a trial court's discretion to rely upon an implied waiver whenever totality of the circumstances, as reflected by the recording of the oral statement, supports it. Leza v State (October 12, 2011, AP-76,157)

witness' privilege against self-incrimination

RULES

When def claims his testimony at trial was violation of right to remain silent, the issue is not whether def made a knowing, intelligent, and voluntary waiver of his privilege to remain silent; the critical inquiry is whether he voluntarily testified or whether he was "coerced" to testify against his will. Johnson v State (January 25, 2012, PD-0527-11)

NO ERROR

Def's choice to testify at punishment stage was voluntary and his Fifth Amendment right to remain silent was not violated. There was no direct record evidence that def took the stand because he feared trial court would penalize him for remaining silent, and record did not show def was confronted with a penalty situation by implication. Court's question to defense counsel ("Your client doesn't want to testify?") could not be interpreted as a threat; court's second statement ("In all candor, I would kind of like to know what he's been doing for the last 18 years." [Def was arrested in Florida and returned for trial 18 years after he fled while free on bond following indictment.]) was a request to offer mitigating evidence rather than an implied threat of punishment. Record showed def and his counsel perceived an opportunity to offer mitigating evidence in the hope of leniency at sentencing. (Also def invoked his right to remain silent in the guilt phase, and was thus aware of his right, and def made no objection to being called to the stand or to the questions asked.) Johnson v State (January 25, 2012, PD-0527-11)

Chapter on Right of Confrontation

rules

CROSS EXAMINAT'N

Many cases that look at Rule 804(b)(1) objections do not consider whether a party had an opportunity for cross-examination, but instead whether a party had a "similar motive" for cross-examination at an earlier proceeding. While Rule 804(b)(1) and the Sixth Amendment may be similar in theme, they are jurisprudentially distinct in both scope and consequence. Sixth Amendment requirements include whether party had an adequate opportunity for cross-examination. Sanchez v State (December 14, 2011, PD-0086-11)

Art. 38.072 sec. 2(b)(2) charges trial court with determining reliability based on "the time, content, and circumstances of the statement;" it does not charge trial court with determining reliability of the statement based on credibility of outcry witness. The only task it assigns trial court is to determine whether, based on the time, content, and circumstances of the statement, the outcry is reliable. The trial court would be within its discretion at a 38.072 hearing to disallow as irrelevant a line of questioning that addressed the biases or memory of the outcry witness but not the time, content, and circumstances of the outcry. The narrow range of discretion that 38.072 allows a trial court means that the credibility of outcry witness is not a relevant issue at a hearing to determine admissibility of an outcry. A hearing in which the sought-after cross-examination would be necessarily irrelevant does not provide an adequate opportunity for cross-examination such that testimony from the hearing is admissible at a trial on the merits. Sanchez v State (December 14, 2011, PD-0086-11)

Because an Art. 38.072 hearing provides a defendant with an inadequate opportunity to cross-examine an outcry witness's credibility, admitting testimony from a 38.072 hearing at a trial when the witness is unavailable violates the Sixth Amendment. Sanchez v State (December 14, 2011, PD-0086-11)

EXCEPTIONS TO RIGHT

Content of constitutional rights to confrontation and cross-examination do not depend upon the type of crime charged or the fragility of the witnesses; all accused citizens are entitled to the full protection of the constitution. Direct and personal cross-examination, with counsel's ability to ask follow-up questions, is essential "to tease out the truth" at trial. There is no "balancing" the defendant's constitutional right of confrontation and cross-examination against other social policies, even compelling ones. Coronado v State (September 14, 2011, PD-0644-10)

denial of right of confrontation, error

ERROR: ADMISSION OF EVID

In pros for indecency with a child and aggravated sexual assault of a child, it was violation of Sixth Amendment right of confrontation to allow reading to jury of outcry witness's testimony from a pre-trial hearing. A pre-trial hearing under 38.072 sec. 2(b)(2) is intended only to determine reliability of complainant's out-of-court statement; therefore, def's opportunity for cross-examining the outcry witness at such a hearing is inadequate to allow admission of the hearing testimony at trial. Sanchez v State (December 14, 2011, PD-0086-11)

Chapter on Sufficiency of Evidence Rules

general rules

ROLE OF APPEALS COURT

The task in conducting a sufficiency review is not to determine which offense def should or could have been charged with; it is to determine whether a rational fact finder could have found beyond a reasonable doubt that def was guilty of the elements of the offense with which she was actually charged. Avery v State (February 29, 2012, PD-0864-11)

An appellate court's belief that a def's actions more closely resemble an uncharged offense than the offense actually charged is not a legitimate basis for an acquittal. Sufficiency of evidence is reviewed by comparing the evidence adduced at trial to the elements of the offense actually charged. Avery v State (February 29, 2012, PD-0864-11)

Both the state and federal standards for review of suff of evid draw the elements of the offense (against which suff of evid is measured) from the hypothetically correct jury charge for the case. They diverge, however, in distinguishing between (1) "substantive elements," the only elements to be used in a Jackson v. Virginia analysis, and (2) Gollihar's [Gollihar v S, 46/243 (2001)] "elements of the offense as defined by the hypothetically correct jury charge." The hypothetically correct jury charge may include elements that must be plead in the charging instrument under Texas procedural rules, such as the manner and means of an offense, but which lie outside of the Texas Penal Code and are not "substantive elements as defined by state law" for purposes of a Jackson review. Adames v State (October 5, 2011, PD-1126-10)

ROLE OF INDICTMENT

When state unnecessarily pleads a statutory definition that narrows the manner and means in which an offense may be committed, that definition is "the law as authorized by the indictment" and thus the allegation must be proved beyond a reasonable doubt. Geick v State (October 5, 2011, PD-1734-10)

FACTUAL SUFFIC'NCY

Court of Criminal Appeals does not review the factual sufficiency of the evidence to support a jury's finding on the elements of a criminal offense that the State is required to prove beyond a reasonable doubt. Lucio v State (September 14, 2011, AP-76,020)

VARIANCE AND SURPLUSAGE

Variances can be classified into three categories, depending upon the type of allegation that the state has pled in its charging instrument but failed to prove at trial. (1) A variance involving statutory language that defines the offense always renders the evidence legally insufficient to support the conviction (i.e. such variances are always material). (2) A variance involving a non-statutory allegation that describes an "allowable unit of prosecution" element of the offense may or may not render the evidence legally insufficient, depending upon whether the variance is material (i.e. such variances are sometimes material). (3) Other types of variances involving immaterial non-statutory allegations do not render the evidence legally insufficient. Johnson v State (March 21, 2012, PD-0068-11)

Texas Rules of Evidence

Article I. General Provisions

Rule 103. Rulings of Evidence

excluding evidence

It was not error to exclude testimony of expert witness, on claim she would have testified about how def's being a battered woman affected her ability to make voluntary statement to police (on issue of voluntariness of statement) where claim on appeal as to what testimony would have been did not comport with proffered testimony at trial; also, relevance was marginal and exclusion, if error, was harmless. Lucio v State (September 14, 2011, AP-76,020)

ISSUE NOT PRESERVED

Rule 104. Preliminary Questions

Evidence has no relevance if it is not authentically what its proponent claims it to be. Rule 901(a) defines authentication as a "condition precedent" to admissibility of evidence that requires the proponent to make a threshold showing that would be "sufficient to support a finding that the matter in question is what its proponent claims." Whether the proponent has crossed this threshold as required by Rule 901 is one of the preliminary questions of admissibility contemplated by Rule 104(a). Tienda v State (February 8, 2012, PD-0312-11)

The trial court should admit proffered evidence "upon, or subject to the introduction of evidence sufficient to support a finding of" [Rule 104(b)] authenticity under Rule 901. The ultimate question of whether an item of evidence is what its proponent claims then becomes a question for the fact-finder (the jury in a jury trial). In performing its Rule 104 gate-keeping function, the trial court itself need not be persuaded that the proffered evidence is authentic. The preliminary question for the trial court to decide is simply whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the evidence he has proffered is authentic. Tienda v State (February 8, 2012, PD-0312-11)

RULES

Rule 105. Limited Admissibility

105(a) admission of evidence

Where trial court did not err in admitting extraneous offense evidence as same-transaction contextual evidence, no limiting instructions at time evid was admitted were required. Also, even though not required, trial court included in jury charge a limiting instruction on extraneous-offense evidence. Devoe v State (December 14, 2011, AP-76,289)

105(a) ADMISSION OF EVID RULES

Article IV. Relevancy and Its Limits

Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

construction

When the identity of the perpetrator can be established by circumstantial evidence only, identity is a contested issue even if the defense rests with the State, puts on no evidence, and raises no defensive theories. Devoe v State (December 14, 2011, AP-76,289)

RULES: 404(b) SPECIFIC SITUATIONS

not error to admit

In pros for capital murder of A and B in Jonestown, during same criminal transaction under 19.03(a)(7)(A), it was not error to overrule rule 404 objection to admission of evid of other offenses pertaining to (1) theft of gun from W, (2) aggravated assault of X in Llano, (3) killing of Y in Marble Falls, and (4) robbery of Z in Pennsylvania. Def did not rest between the incidents, and the charged offense would make little sense without the extraneous offenses. The evidence showed def went to homes and establishments where he knew certain women would be found (with the exception of Z), specifically women with whom he had a personal relationship; def deliberately stole a gun from the home of his friend W; after threatening X with the gun and shooting it inside her home, he stole her truck and one of her credit cards; he then drove her truck to location in Marble Falls where witnesses saw def with the gun when he used it in an attempt to kill one person and in the murder of Y; all witnesses testified that no one else ever fired or possessed the gun; def was seen fleeing Marble Falls alone in X's stolen blue truck, and that very truck was present at the Jonestown crime scene of capital murder on trial. This, along with ballistics evidence and DNA evidence, created more circumstantial evidence to establish the identity of def as A's and B's killer. The abandonment of X's blue truck and the theft of another person's white Saturn were also part of this continuing episode,

NOT ERROR TO ADMIT context of offense

and theft of Z's blue Hyundai occurred during def's flight from the instant offense as he attempted to travel to his mother's home in New York. Devoe v State (December 14, 2011, AP-76,289)

Article VII. Opinions and Expert Testimony

Rule 702. Testimony by Experts

RULES

Expert testimony does not have to be based upon science at all; by its terms, Rule 702, by applying to "technical or other specialized knowledge," permits even nonscientific expert testimony. Morris v State (December 7, 2011, PD-0796-10)

Whether a field of study is legitimate and whether the subject matter is within the scope of that field are questions that are capable of being resolved as a general matter, so that courts can take judicial notice of the reliability (or unreliability) of the type of evidence at issue. Taking judicial notice of reliability usually requires that a trial court somewhere has examined and assessed the reliability of the evidence. Morris v State (December 7, 2011, PD-0796-10)

A field of expertise is not required to incorporate a scientific study or empirical data. Accepted areas of expert testimony may involve the gaining of specialized knowledge through experience or personal research: the behavior of gangs, the behavior of drug dealers, or whether injuries could have been made by a particular weapon. Morris v State (December 7, 2011, PD-0796-10)

RULES: RELIABLE TEST

The focus of reliability analysis is to determine whether evid has its basis in sound scientific methodology such that testimony about "junk science" is weeded out. Expert testimony in field of psychology pertaining to reliability of eyewitness identifications is a "soft science." Consequently, to establish its reliability, proponent must establish "(1) the field of expertise involved is a legitimate one, (2) the subject matter of the expert's testimony is within the scope of that field, and (3) the expert's testimony properly relies upon or utilizes the principles involved in that field." This analysis is "merely an appropriately tailored translation of the Kelly test to areas outside of hard science." As such, the "general principles announced in Kelly (and Daubert) apply, but the specific factors outlined in those cases may or may not apply depending upon the context. [quoting Nenno v S, 970/549 (1998)] Tillman v State (October 5, 2011, PD-0727-10)

Relevance is "a looser notion than reliability" and is "a simpler, more straightforward matter to establish." The relevance inquiry is whether evidence "'will assist the trier of fact' and is sufficiently tied to the facts of the case." Hence, to be relevant, the expert "must make an effort to tie pertinent facts of the case to the scientific principles which are the subject of his testimony." [quoting Jordan v S, 928/550 (1996)] Tillman v State (October 5, 2011, PD-0727-10)

RULES: psychology

Psychology is a legitimate field of study and the study of the reliability of eyewitness identification is a legitimate subject within the area of psychology. Tillman v State (October 5, 2011, PD-0727-10)

RULES: sexual molestat'n

The legitimacy of "grooming" as a subject of expert testimony has been established sufficiently to be judicially noticed. Grooming as a phenomenon exists and a law enforcement-official with a significant amount of experience with child sex abuse cases may be qualified to talk about it. Nenno v State, 970 S.W.2d 549 (Tex. Crim. App. 1998), recognized the experience-based study of "the behavior of offenders who sexually victimize children" as a legitimate field of expertise, and the subject matter of "grooming" is within the scope of the field of studying the behavior of people who sexually victimize children. Also, expert grooming testimony is useful to the jury. Morris v State (December 7, 2011, PD-0796-10)

Grooming evidence is, at its most basic level, testimony describing the common behaviors of child molesters and whether a type of evidence is consistent with grooming. A person can, through his experience with child-sex-abuse cases gain superior knowledge regarding the grooming phenomenon. Grooming evidence has been received by courts from numerous types of experts - which include psychiatrists, psychologists, therapists, and social workers - and also includes some people who work in law enforcement. Morris v State (December 7, 2011, PD-0796-10)

error

ERROR TO EXCLUDE

Testimony of def's expert on eyewitness identification properly relied upon and utilized the principles involved in the relevant field of psychology, where his extensive resume reflected his status as a scientist and consultant in the field: he is a professor of psychology, he has researched eyewitness-related issues for over 40 years, he has conducted experiments in the area, he leads the Eyewitness Identification and Research Laboratory, he assisted the Department of Justice in creating a publication on eyewitness-identification procedures, he is on the editorial board of the Law and Human Behavior journal, and he has been on national television to discuss eyewitness identification studies. He used this extensive experience and knowledge to opine about the identification procedures in instant case. He expressed familiarity with the literature and many relevant studies in the area and applied the relevant concepts to the hypotheticals presented. No merit to state's contention the testimony was not reliable because witness provided only "generic

testimony" and "general studies" where his testimony involved more than mere generalities; although some references to studies and experts were of a general nature, he articulately described specifics when asked to do so. Tillman v State (October 5, 2011, PD-0727-10)

Testimony of def's expert on eyewitness identification was relevant where witness tied the relevant facts of the case to the scientific principles about which he testified, and testified to a hypothetical set of facts that mirrored the procedure employed in instant case. Tillman v State (October 5, 2011, PD-0727-10)

Testimony of def's expert on eyewitness identification would assist the trier of fact. While jurors might have their own notions about reliability of eyewitness identification, that does not mean they would not be aided by the studies and findings of a trained psychologist on the issue. Additional explanation of eyewitness-identification theories may help guide jury in its understanding of the standards in the area. More importantly, since state was allowed to inform jury, via officer's testimony, that there was nothing unusual about identification procedures in this case, def's expert's testimony was necessary to provide jury with a more balanced picture of reliability of these procedures. Tillman v State (October 5, 2011, PD-0727-10)

An eyewitness-identification expert will not necessarily assist the trier of fact in every case. However, jury in instant case should have had benefit of testimony of def's expert on eyewitness identification because eyewitness identification was crucial to state's case and identification procedure employed was not usual. A total of six separate photo spreads were shown to the witnesses, each showing six persons. Def was in the last of the photo spreads. Neither witness could identify def in the six photo spreads. Just twelve days later, witnesses viewed a live line-up. Of the five individuals in the lineup, def was only one who had been in the previously viewed photo spreads, and def was only one who was cleanly shaven. One witness identified def, but other could only tentatively identify him. This procedure was out of the ordinary, as it involved many layers of suggestiveness. Consequently, in this case, it was imperative that jury be exposed to full spectrum of possible implications resulting from that suggestiveness in order to have a full understanding of the subject. Tillman v State (October 5, 2011, PD-0727-10)

It was abuse of discretion to exclude testimony of eyewitness-identification expert witness that was reliable and relevant, and could have aided jury in its consideration of eyewitness identification testimony in instant case, where identification procedures were not usual. Tillman v State (October 5, 2011, PD-0727-10)

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

Rule 705(a) - Disclosure of Bases for Opinion

RULES

In a community-supervision revocation hearing, where there is no jury, polygraph results may be admissible as the basis for an expert opinion under Rules 703 and 705(a). Leonard v State (March 7, 2012, PD-0551-10)

NO ERROR

While Rule 703 allows experts to rely on inadmissible evidence in forming an opinion, Rule 705 dictates whether the basis for the opinion is disclosed to the court. Rule 705(a) allowed expert witness in instant case to disclose that def's failed polygraphs were the basis for his opinion. Rule 703 allowed expert witness to testify, "I discharged the defendant because I felt that he was being dishonest," and under Rule 705(a), he may add, "I felt he was being dishonest because he failed the mandated polygraph exams." Leonard v State (March 7, 2012, PD-0551-10)

Because adjudication hearings are administrative proceedings, in which there is no jury and the judge is not determining guilt of the original offense, the results of polygraph exams are admissible in revocation hearings if such evidence qualifies as the basis for an expert opinion under Rules 703 and 705(a). Leonard v State (March 7, 2012, PD-0551-10)

Notes related to rules under Article VII including decisions from before adoption of Rules of Evidence

polygraph evidence

RULES

Where polygraph exams taken by def were used only for treatment purposes, and he showed deception on five of the exams and was discharged from the treatment program, and due to his unsuccessful completion of the treatment program his community supervision was revoked: while the polygraph results may have been used as "evidence" in the revocation hearing, it was as evidence only that def did not comply with or progress in the treatment program and not as evidence of guilt of the original offense. Leonard v State (March 7, 2012, PD-0551-10)

Most of the problems usually associated with admissibility of polygraph exam results are not present in a community-supervision revocation hearing. In such an administrative hearing, polygraph results are not used to establish guilt of original offense, there is no jury to be confused or to overvalue the results, and the judge is not deciding guilt. Leonard v State (March 7, 2012, PD-0551-10)

Even generally inadmissible facts or data may be used by an expert in forming an opinion, as long as the facts or data are of a type reasonably relied

upon by other experts in the field. Polygraph exams are reasonably relied upon by experts in sex offender psychotherapy. As such, Rule 703 permits expert witness to rely on polygraph results in forming his expert opinion that def on probation in sex offense case should be discharged from the sex offender treatment program. Leonard v State (March 7, 2012, PD-0551-10)

In a community-supervision revocation hearing, where there is no jury, polygraph results may be admissible as the basis for an expert opinion under Rules 703 and 705(a). Leonard v State (March 7, 2012, PD-0551-10)

NO ERROR

While Rule 703 allows experts to rely on inadmissible evidence in forming an opinion, Rule 705 dictates whether the basis for the opinion is disclosed to the court. Rule 705(a) allowed expert witness in instant case to disclose that def's failed polygraphs were the basis for his opinion. Rule 703 allowed expert witness to testify, "I discharged the defendant because I felt that he was being dishonest," and under Rule 705(a), he may add, "I felt he was being dishonest because he failed the mandated polygraph exams." Leonard v State (March 7, 2012, PD-0551-10)

Because adjudication hearings are administrative proceedings, in which there is no jury and the judge is not determining guilt of the original offense, the results of polygraph exams are admissible in revocation hearings if such evidence qualifies as the basis for an expert opinion under Rules 703 and 705(a). Leonard v State (March 7, 2012, PD-0551-10)

Article IX. Authentication and Identification

Rule 901. Requirement of Authentication or Identification

RULES

Evidence has no relevance if it is not authentically what its proponent claims it to be. Rule 901(a) defines authentication as a "condition precedent" to admissibility of evidence that requires the proponent to make a threshold showing that would be "sufficient to support a finding that the matter in question is what its proponent claims." Whether the proponent has crossed this threshold as required by Rule 901 is one of the preliminary questions of admissibility contemplated by Rule 104(a). Tienda v State (February 8, 2012, PD-0312-11)

The trial court should admit proffered evidence "upon, or subject to the introduction of evidence sufficient to support a finding of" [Rule 104(b)] authenticity under Rule 901. The ultimate question of whether an item of evidence is what its proponent claims then becomes a question for the fact-finder (the jury in a jury trial). In performing its Rule 104 gate-keeping function, the trial court itself need not be persuaded that the proffered evidence is authentic. The preliminary question for the trial court to decide is simply whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the evidence he has proffered is authentic. Tienda v State (February 8, 2012, PD-0312-11)

If the trial court's ruling that a jury could reasonably find proffered evidence authentic is at least "within the zone of reasonable disagreement," a reviewing court should not interfere. Tienda v State (February 8, 2012, PD-0312-11)

Courts and legal commentators have reached a virtual consensus that, although rapidly developing electronic communications technology often presents new and protean issues with respect to the admissibility of electronically generated, transmitted and/or stored information, including information found on social networking web sites, the rules of evidence already in place for determining authenticity are at least generally "adequate to the task." Tienda v State (February 8, 2012, PD-0312-11)

The best or most appropriate method for authenticating electronic evidence will often depend upon the nature of the evidence and the circumstances of the particular case. Tienda v State (February 8, 2012, PD-0312-11)

NOT ERROR TO ADMIT EVIDENCE

It was not error to admit electronic content obtained from MySpace during guilt and punishment phases of trial over def's complaints that state did not prove that he was responsible for creating and maintaining the content of the MySpace pages by merely presenting the photos and quotes from the website that tended to relate to him, where the internal content of the MySpace postings (photographs, comments, and music, details in opinion) was sufficient circumstantial evidence to establish a prima facie case such that a reasonable juror could have found that they were created and maintained by def. Tienda v State (February 8, 2012, PD-0312-11)