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CRIMINAL LAW

*Shirley Baccus-Lobel**

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DURING the Survey period, the Texas Court of Criminal Appeals issued a number of decisions, although the term overall was not remarkable. A consistent theme during this time period is the imposition of increasingly stringent barriers to reconsideration of results achieved in the trial courts.

I. DOUBLE JEOPARDY

In *Ex parte Bauder*,¹ the Court of Criminal Appeals revisited its decision in *Bauder v. State*,² in which the court held that the double jeopardy provision of the Texas Constitution may be interpreted more broadly than the similar protection embodied in the Fifth Amendment to the United States Constitution.³

Appellant Bauder was charged with driving while intoxicated. His second trial ended in a mistrial after the prosecutor questioned the arresting officer and elicited extraneous misconduct by the appellant. Before the third trial, the appellant filed a pretrial application for writ of habeas

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1. 974 S.W.2d 729 (Tex. Crim. App. 1998) (en banc).

2. 921 S.W.2d 696 (Tex. Crim. App. 1996) (en banc).

3. *See id.* at 699.

corpus and claimed further prosecution was barred under the Texas and United States Constitutions. The trial court found that the prosecutor deliberately elicited the extraneous misconduct evidence in order to prejudice the appellant but also found that the testimony was not intended to provoke a mistrial.

The court of appeals affirmed.⁴ It found no jeopardy bar as a consequence of the mistrial and concluded that the Texas Constitution accorded no greater protection than the Fifth Amendment's Double Jeopardy Clause.⁵ The Court of Criminal Appeals disagreed and remanded the case for consideration of the state constitutional claim that a subsequent prosecution was jeopardy-barred.⁶ On remand, the appellate court applied the standard it believed the court had enunciated—that a subsequent trial was barred only if the mistrial was in fact necessary and the prosecutorial conduct either intended to provoke a mistrial or consciously disregarded the risk that a mistrial would result.⁷ The court of appeals concluded that a subsequent trial was not barred because the trial court was not required, under the circumstances, to grant the motion for mistrial.⁸

Once the case returned to the Court of Criminal Appeals on petition for discretionary review the decision of the appellate court was again reversed.⁹ The court held that the appellate court had applied an incorrect standard of review by concluding “that it must determine ‘whether any reasonable view of the record supports not granting the mistrial.’”¹⁰ The critical question, the court observed, “is not the correctness of the ruling granting the mistrial,” but rather “whether the defendant truly consented to the mistrial.”¹¹ Thus, the court reasoned that the appellate court must instead determine whether the appellant was “required to move for a mistrial because the prosecutor deliberately or recklessly crossed ‘the line between legitimate adversarial gamesmanship and manifestly improper methods’” that rendered trial before the jury unfair to such a degree that no judicial admonishment could have cured it.¹²

II. THE ACCOMPLICE WITNESS RULE

In *Blake v. State*,¹³ the Court of Criminal Appeals applied the accomplice witness rule to juvenile cases, overruling its previous decisions in

4. See *Bauder v. State*, 880 S.W.2d 502, 503 (Tex. App.—San Antonio 1994, pet. granted).

5. See *id.*

6. See *Bauder*, 921 S.W.2d at 698.

7. See *Bauder v. State*, 936 S.W.2d 19, 20 (Tex. App.—San Antonio 1996, pet. granted).

8. See *id.* at 22.

9. See *Bauder*, 974 S.W.2d at 732.

10. *Id.* at 731 (quoting *Bauder*, 936 S.W.2d at 22).

11. *Id.* at 731-32.

12. *Id.* at 732 (citing *Bauder*, 721 S.W.2d at 700) (footnote omitted).

13. 971 S.W.2d 451 (Tex. Crim. App. 1998) (en banc).

*Komurke v. State*¹⁴ and *Villarreal v. State*.¹⁵ The accomplice witness rule is a creature of statute; it is mandated neither by common law nor the United States Constitution.¹⁶ The rule provides in pertinent part: "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."¹⁷

In abolishing the exception to the accomplice witness rule that had been created for juvenile cases, the court in *Blake* reviewed in detail the permutations of that rule as well as its evolution in juvenile cases.¹⁸ Most of the case law involving juvenile accomplice witnesses evolved in the context of sexual offenses involving children. Initially, child participants involved in unlawful sexual behavior with adults were treated as accomplices.¹⁹ The "conclusion that children could be accomplices led to the remarkable result that male juvenile victims who were sodomized by pedophiles, and had sufficient discretion to understand that such an act was wrong, were considered accomplices in the perpetration of their own abuse."²⁰ The court noted further that "[t]his put boys in a catch-22; they were presumed accomplices, and to prove otherwise they had to prove they struggled against their attackers, but generally there were no witnesses as to the assault to corroborate their testimony."²¹ On the other hand, "[t]he results in cases involving female juvenile victims apparently depended on the crime with which the defendant was charged."²² But, "[i]n cases where the victim was a relative, it was common for the prosecutor to elect to charge the defendant with incest instead of statutory rape. If the victim failed to prove that her 'participation' was due to threats, duress, or undue influence, she was an accomplice as a matter of

14. 562 S.W.2d 230 (Tex. Crim. App. 1978) (en banc).

15. 708 S.W.2d 845 (Tex. Crim. App. 1986) (en banc).

16. See *Blake*, 971 S.W.2d at 454 & n.6. Corroboration of an accomplice's testimony is not required under federal law or the federal constitution. See *id.* (citing *Brown v. Collins*, 937 F.2d 175 (5th Cir. 1991); *United States v. Restrepo*, 994 F.2d 173 (5th Cir. 1993); *United States v. Hayes*, 49 F.3d 178 (6th Cir. 1995); *Harrington v. Nix*, 983 F.2d 872 (8th Cir. 1993); *United States v. Necoechea*, 986 F.2d 1273 (9th Cir. 1993)).

17. TEX. CODE CRIM. PROC. ANN. art. 38.4 (Vernon 1979).

18. See *Blake*, 971 S.W.2d at 455-61. An accomplice is a blameworthy participant who could be prosecuted for the same offense as the defendant, or a lesser included offense. See *id.* at 454-55. It is irrelevant whether the person is actually charged and prosecuted for the offense. See *id.* at 455. Where the evidence leaves little or no doubt that the individual was involved in the offense, the witness is an accomplice as a matter of law and the court must so instruct the jury. See *id.* Alternatively, where "the evidence presented . . . is conflicting, and it is not clear whether the witness is an accomplice, the jury must initially determine whether the witness is an accomplice as a matter of fact." *Id.*

19. See *Blake*, 971 S.W.2d at 453.

20. *Id.* at 456.

21. *Id.* at 456 n.20.

22. *Id.* at 456 n.18. For example, statutory rape victims were not considered accomplices. See, e.g., *Soliz v. State*, 163 Tex. Crim. 508, 293 S.W.2d 662 (1956); *Lacey v. State*, 137 Tex. Crim. 87, 127 S.W.2d 890 (1939).

law.”²³ It is the presumed status of juveniles as accomplices, predicated upon their participation in unlawful sexual conduct and their ability to form the requisite criminal intent, that led to this anomalous treatment of child victims as accomplices. In *Hinson v. State*,²⁴ for example, the court overturned the defendant’s conviction because the juvenile he sodomized was an accomplice and the juvenile’s testimony was uncorroborated.

In *Komurke v. State*,²⁵ the defendant argued that his conviction for sodomy should be overturned because the evidence established that his alleged victim was an accomplice as a matter of law and that the trial court erred in failing to so instruct the jury. The court held that a juvenile under a certain age could not be prosecuted and thus could not be an accomplice or the subject of the accomplice witness rule.²⁶ In *Villarreal v. State*,²⁷ a capital murder case, the defendant urged that the trial court had erred in refusing to give an accomplice witness instruction with respect to an eleven-year-old witness who testified for the State. The court held that the juvenile witness could not have been prosecuted (due to her age), and therefore, “it necessarily follow[ed] that she could not have been an accomplice witness.”²⁸

The court in *Blake* believed that in *Villarreal*, no evidence was presented that the juvenile was involved in the crime except for the defendant’s testimony that she had asked him “whether he was too ‘chicken’ to kill the victim.”²⁹ This absence of blameworthiness distinguished *Villarreal* from the court’s earlier decision in *Harris v. State*,³⁰ in which the court found error in the trial court’s failure to instruct the jury so that it could determine whether a fifteen-year-old witness was an accomplice. The tension between the line of cases represented by *Villarreal*

23. *Id.* In one case the Court of Appeals held that the “underage daughter-victim was an accomplice because she appeared sufficiently strong-willed to resist.” See *Blake*, 971 S.W.2d at 456 n.18 (citing *Wilson v. State*, 393 S.W.2d 918, 920 (Tex. Crim. App. 1965)). “In another case [the court] overturned an incest conviction where the defendant had forced his stepdaughter-victim to have sex with him while she was between the ages of ten and fifteen because the victim did not make an outcry and had therefore ‘consented,’ even though she testified she said nothing due to fear of her stepfather.” *Id.* (citing *Wilson v. State*, 147 Tex. Crim. 653, 184 S.W.2d 141 (1944)).

24. 152 Tex. Crim. 159, 211 S.W.2d 750 (1948).

25. 562 S.W.2d 230 (Tex. Crim. App. 1978).

26. See *id.* at 234. In reviewing application of the accomplice witness rule in juvenile cases, the court in *Komurke* relied upon the 1967 amendments to Article 30 of the Penal Code, which provided: “No person may be convicted of any offense except perjury, which was committed before he was 15 years of age; and for perjury only when it appears by proof that he had sufficient discretion to understand the nature and obligation of an oath.” *Id.* at 233. *Komurke* overturned the court’s earlier decision in *Slusser*, which concluded that juveniles could be treated as accomplices if they possessed the requisite intent, since Article 30 of the Penal Code at that time provided that a child between the ages of 9 and 13 could not be criminally prosecuted for an offense unless the child “had discretion sufficient to understand the nature and illegalities of the act.” *Id.* (citing *Slusser v. State*, 155 Tex. Crim. 160, 232 S.W.2d 727 (1950)).

27. 708 S.W.2d 845, 847 (Tex. Crim. App. 1986) (en banc).

28. *Id.* at 848.

29. See *Blake*, 971 S.W.2d at 457 & n.22.

30. 645 S.W.2d 447, 454 (Tex. Crim. App. 1983).

on the one hand and *Harris* on the other was resolved in *Blake*, where the court expressly held:

[T]he juvenile justice exception to the accomplice witness rule—that juveniles who are blameworthy participants in crimes are unilaterally exempt from the accomplice witness rule—is not supported by the decisions of this Court, is not supported by current statute, and is contrary to the purpose of the accomplice witness rule.³¹

Accordingly, the court expressly overruled contrary decisions and abolished the juvenile exception to the accomplice witness rule: “The testimony of juveniles who could potentially be subject to State-sanctioned punishment is now subject to the accomplice witness rule, in the same manner as the testimony of adults.”³² Carefully read, the court reasoned, neither its decision in *Villarreal* (which involved no evidence of the juvenile’s participation in the crime) nor its decision in *Harris* (which held that any person indicted for the same offense is an accomplice as a matter of law, irrespective of age) is inconsistent with the court’s ruling in *Blake*.³³ Furthermore, the court observed that the earlier case law exemplified by *Komurke* “no longer serves the purpose which it once did, namely to allow the uncorroborated testimony of juvenile victims of sexual assault to convict adult assailants,” since extensive changes in the Penal Code “make it clear that children are not accomplices of their attackers.”³⁴

The *Blake* court also observed that “[l]egal bars to prosecution did not remove accomplice status for purposes of the accomplice witness rule.”³⁵ In this regard, the decision in *Blake* reveals an interesting statutory evolution with respect to persons exempt from prosecution. The court noted, “[f]or example, under the 1925 Penal Code, the prosecution of relatives and servants of the defendant was barred . . . provided that ‘[t]he following cannot be accessories; [t]he husband or wife of the offender, his brothers and sisters, his relations in the ascending or descending line by consanguinity or affinity, or his domestic servants.’”³⁶ This legislative bar to prosecution of relatives lending aid to a person other than as a principle (that is, as an accessory) embodies a value which no longer enjoys the status of codification, with the exception of marital privilege. In any event, the court had previously rejected the argument that this bar to prosecution of a relative as an accessory also precluded the person’s designation as an accomplice witness.³⁷

31. *Blake*, 971 S.W.2d at 458.

32. *Id.* at 459.

33. *See id.*

34. *Id.* at 458 (citing TEX. PEN. CODE ANN. § 21.11 (Indecency with a Child) § 22.011 (Sexual Assault), § 22.021 (Aggravated Sexual Assault) (Vernon 1994)).

35. *Id.* at 459.

36. *Blake*, 971 S.W.2d at 459-60 (quoting TEX. PEN. CODE ANN. art. 78 (Vernon 1925)).

37. *See id.* at 460 (discussing *Turner v. State*, 117 Tex. Crim. 434, 37 S.W.2d 747 (1931)).

Blake is significant not only because it does away with the juvenile exception to the witness accomplice rule but also because it makes a strong statement about that rule. "The heart of the accomplice witness rule is the legislature's inherent suspicion and belief in the untrustworthiness of the accomplice's testimony."³⁸ The court went on to observe that: "[t]he rule's roots can be traced to common law, where interested parties were precluded from testifying in both criminal and civil cases—'fear of perjury was the reason for this rule.'"³⁹ "The United States Supreme Court recognized that the basis of such rules was to set aside a class of persons who were more likely to commit perjury than other witnesses."⁴⁰ The *Blake* court explained the underlying principle behind the distrust of accomplice testimony:

This suspicion and fear of perjury is not without reason. Accomplices often strike bargains with the [S]tate, where the prosecutor agrees to a favorable sentencing recommendation in exchange for the accomplice's testimony against another person. . . . In addition, those accused of crimes tend to try to place the responsibility for the commission of the crime on the other participants while downplaying their own participation, often in order to avoid the consequences of criminal acts. For these reasons, and to protect the criminal defendant in each case, the legislature has determined that uncorroborated testimony of an accomplice is not enough to support a criminal conviction.⁴¹

Given the compelling considerations underlying the accomplice witness rule, the court held: "There is no reason to suppose the testimony of blameworthy juveniles potentially subject to punishment by the State is any less suspect than the testimony of blameworthy adults."⁴²

III. POWER AND AUTHORITY OF THE COURTS

A. AUTHORITY TO ORDER PAYMENT OF COURT COSTS

In *Busby v. State*,⁴³ the Court of Criminal Appeals considered the limits on the district court's authority to impose certain alleged "court costs" as a condition of community supervision. Appellant had entered pleas of guilty to five indictments which charged misapplication of fiduciary property. His punishment in each case was ten years of incarceration; the punishment was suspended for ten years and the appellant was placed on community supervision for that period. In one of the cases, a condition of community supervision was imposed which required the appellant to pay court costs, including a \$230,695.21 reimbursement to the county for the cost of the attorney *pro tem* appointed to represent the State after the

38. *Id.*

39. *Id.* (citing *Benson v. United States*, 146 U.S. 325, 335, 13 S. Ct. 60 (1892)).

40. *Id.* (citing *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920 (1967) (rejecting the federal rule that co-defendants were only competent witnesses for the state)).

41. *Blake*, 971 S.W.2d at 460.

42. *Id.*

43. 984 S.W.2d 627 (Tex. Crim. App. 1998) (en banc).

district attorney recused himself.⁴⁴ The court of appeals held that the district court had no authority to order the appellant to pay those costs.⁴⁵ The Court of Criminal Appeals granted the State's petition for discretionary review and affirmed the court of appeals.⁴⁶

Noting that Texas courts have no inherent authority to grant probation, the court observed that the judicial authority to grant probation has two sources.⁴⁷ First, the Texas Constitution confers upon courts having original jurisdiction of criminal actions "the power, after conviction, to suspend the imposition or execution of sentence and to place the defendant upon probation and to reimpose such sentence, under such conditions as the Legislature may prescribe."⁴⁸ "The other source of authority to grant probation is the general legislative power itself,"⁴⁹ which has been exercised to give the courts authority to suspend sentences. Pursuant to either source of power "the granting of probation is completely subject to legislative regulation."⁵⁰ Thus, the court concluded that a probation condition requiring reimbursement of payments to the attorney *pro tem* must have a statutory basis.⁵¹

The State argued that article 42.12 of the Code of Criminal Procedure provided that authority, because it permits the courts to "impose any reasonable condition that is designed to protect or restore the community"⁵² The Court of Criminal Appeals rejected this argument, because a more specific provision of the Code states that: "A judge may not order a defendant to make any payments as a term or condition of community supervision, except for fines, court costs, restitution to the victim, and other conditions related personally to the rehabilitation of the defendant or otherwise expressly authorized by law."⁵³ The court likewise rejected the State's alternative argument that reimbursement for costs of the attorney *pro tem* was authorized as a legitimate cost of court.⁵⁴ Such costs include payment to the attorney appointed to represent the indigent defendant.⁵⁵ Thus, according to the State's argument, attorney *pro tem* costs also may be assessed as a cost of court since the attorney *pro tem* "shall receive compensation in the same amount and manner" as counsel

44. For the distinction between an attorney *pro tem* (who replaces the holder of the prosecutor's office) and a special prosecutor (who works with the office-holder), see generally *State v. Rosenbaum*, 852 S.W.2d 525, 528 (Tex. Crim. App. 1993) (opinion of Clinton, J.). *Id.* at 628 n.2.

45. See *Busby v. State*, 951 S.W.2d 928, 931 (Tex. App.—Austin 1997, pet. granted).

46. See *Busby*, 984 S.W.2d at 628, 631.

47. See *id.* at 628.

48. *Id.* (quoting TEX. CONST. art. IV, § 11(A)).

49. *Id.* at 629 (the general legislative power is created in article III, § 1 of the Texas Constitution).

50. *Id.*

51. See *Busby*, 984 S.W.2d at 629.

52. *Id.* (quoting TEX. CODE CRIM. PROC. ANN. art. 42.12 (Vernon Supp. 1999)).

53. *Id.* (quoting TEX. CODE CRIM. PROC. ANN. art. 42.12, § 11(b) (Vernon Supp. 1999)).

54. See *id.* at 630.

55. See *id.* & n.9 (quoting TEX. CODE CRIM. PROC. ANN. art. 26.05(d) (providing that payments for appointed counsel may be included as costs of court)).

appointed to represent an indigent person.⁵⁶ The court rejected the State's argument, observing:

The public policy of having the defendant bear the cost of the defense attorney is a familiar part of our legal system. A public policy of having defendants reimburse the state for the costs of the prosecuting attorney would be a novelty, one which we will not impute to the legislature on such tenuous statutory language as that which the state has presented.⁵⁷

B. REVIEW OF THE RECORD ON APPEAL

In *Cain v. State*,⁵⁸ the court revisited its decision in *Clewis v. State*,⁵⁹ in which it held for the first time that the appellate courts could undertake a factual review of elements of the offense in order to determine whether the evidence presented was sufficient to sustain a conviction.⁶⁰ This factual review could be undertaken without the previous requirement that the evidence must be viewed "in the light most favorable to the prosecution" and the court could set aside verdicts which were "contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust."⁶¹ Prior to *Clewis*, appellate courts examined the record in challenges to sufficiency of the evidence to sustain the conviction only for the legal constitutional sufficiency of the evidence under the standard set forth in *Jackson v. Virginia*.⁶²

In *Cain*, the appellant was convicted of having violated the civil rights of a prisoner. The court of appeals reversed the conviction,⁶³ and the Court of Criminal Appeals granted the State's petition for discretionary review, vacated the judgment, and remanded the case for consideration of sufficiency of the evidence under *Jackson v. Virginia*.⁶⁴ The court of appeals again reversed after determining that although the evidence was legally (constitutionally) sufficient, it nevertheless was factually insufficient to support the conviction.⁶⁵ The Court of Criminal Appeals granted the State's petition for discretionary review to consider the question of whether the court of appeals applied the correct standard in evaluating the factual sufficiency of the evidence. After having reviewed in some detail the evidence adduced at trial, the court found that the court of appeals had failed to accord sufficient deference to the jury's verdict in

56. See *Busby*, 984 S.W.2d at 631 (quoting TEX. CODE CRIM. PROC. ANN. art. 2.07(c) (Vernon Supp. 1999)).

57. *Id.* at 631.

58. 958 S.W.2d 404 (Tex. Crim. App. 1997) (en banc).

59. 922 S.W.2d 126 (Tex. Crim. App. 1996) (en banc).

60. See *id.* at 132.

61. *Id.* at 129.

62. 443 U.S. 307, 99 S. Ct. 2781 (1979, pet. granted).

63. *Cain v. State*, No. 12-93-00155-CR (Tex. App.—Tyler Apr. 28, 1995) (not designated for publication) (pet. granted).

64. See *Cain*, 958 S.W.2d at 405.

65. *Cain v. State*, No. 12-93-00155-CR (Tex. App.—Tyler Sept. 30, 1996, pet. granted) (not designated for publication).

conducting its review.⁶⁶

The Court of Criminal Appeals began its analysis of the court of appeals' decision (which found that "the verdict was so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust"),⁶⁷ by noting the constitutional jurisdictional limitations upon its own power of review.⁶⁸ The court pointed to the Texas Constitution's "factual conclusivity clause" which provides that "the decision of [the courts of appeals] shall be conclusive on all questions of fact brought before them on appeal or error."⁶⁹ The court noted that "[t]his clause operates as a jurisdictional limitation on this Court, so that we are without jurisdiction to 'pass upon the weight and preponderance of the evidence or 'unfind' a vital fact.'"⁷⁰ Recognizing that its "inability to decide questions of fact precludes de novo review of courts of appeals' factual decisions," the court concluded that the lower court's decision was nevertheless reviewable for the "purely legal" determination of "[w]hether the correct rule of law was applied."⁷¹

The court decided that the court of appeals had incorrectly applied the standard of review because "it was not deferential to the jury's determination of witness credibility, it ignored the evidence supporting the jury's guilty verdict, and considered only the evidence that could be interpreted as favoring the defense theory of the case."⁷² In particular, the court challenged the court of appeals' analysis of the weight to accord contradictory testimonial evidence, a matter "within the sole province of the jury, because it turns on an evaluation of credibility and demeanor."⁷³ This analysis is somewhat confusing, however, since the purpose of a factual sufficiency review, as held in *Clewis* and acknowledged by the court in *Cain*, is to determine "without the prism of 'in the light most favorable to the prosecution' "⁷⁴ whether the verdict is so against the weight of the evidence as to constitute a miscarriage of justice.⁷⁵

The court of appeals had previously discounted the testimony of the victim in conducting its factual sufficiency review largely because the complainant admitted a degree of intoxication that concededly made it difficult for him to remember the events of the previous evening when appellant, the arresting constable, had struck him. In the view of the Court of Criminal Appeals, however, this factor did not "definitively

66. See *Cain*, 958 S.W.2d at 407-09.

67. *Cain v. State*, No. 12-93-00155-CR (Tex. App.—Tyler Sept. 30, 1996, pet. granted) (not designated for publication).

68. See *Cain*, 958 S.W.2d at 408 (quoting *Cain v. State*, No. 12-93-00155 CR (Tex. App.—Tyler Sept. 30, 1996, pet. granted) (not designated for publication)).

69. *Id.* at 408 (quoting TEX. CONST. art. V, § 6).

70. *Id.* (citing *Combs v. State*, 643 S.W.2d 709, 716 (Tex. Crim. App. 1982)).

71. *Id.*

72. *Id.*

73. *Cain*, 958 S.W.2d at 408-09.

74. *Id.* (citing *Clewis*, 922 S.W.2d at 129).

75. See *id.* at 406-407.

favor or contradict the jury's verdict."⁷⁶ The court found it "equally plausible that the victim's story, although 'confused' [was] true and credible."⁷⁷ Since the victim's testimony did not weigh definitively in favor of, or against, appellant's guilt, the determination was within the exclusive province of the jury, and the court of appeals was required to defer to the jury's finding.⁷⁸ Accordingly, the Court of Criminal Appeals held that the lower tribunal had applied the *Clewis* standard of review incorrectly and remanded the cause for proceedings not inconsistent with its opinion.⁷⁹

C. JURISDICTION OF MAGISTRATES

In *Davis v. State*,⁸⁰ the Court of Criminal Appeals sought to distinguish a court's jurisdiction from a judge's authority to act. Appellant pleaded guilty to possession of a controlled substance before a magistrate and was placed on probation pursuant to a plea agreement. Subsequently, the district court revoked the appellant's probation and sentenced him to confinement. On appeal, the appellant argued that the revocation was invalid because the order which placed him on probation was void due to the fact that the district judge's order referring the case to the magistrate was not signed until after the plea of guilty before the magistrate. Appellant argued on appeal, and the court of appeals agreed, that since the order of referral was untimely, jurisdiction had not been conferred upon the magistrate to preside over the plea proceeding. The Court of Criminal Appeals granted the State's petition for discretionary review and reversed the judgment of the court of appeals.⁸¹

The Texas Government Code provides for criminal law magistrates in Tarrant County and elsewhere.⁸² Accordingly, district judges are authorized to refer certain types of cases to magistrates pursuant to an order of referral.⁸³ The district court may reject, modify or correct the magistrate's actions; if it takes no action, the magistrate's action becomes the decree of the trial court.⁸⁴ Appellant in *Davis* made no objection to the defect in the trial court's proceeding and the State argued that the appellant therefore had waived any error. Appellant contended that this argument could be presented for the first time on appeal because it was a jurisdictional claim. The court of appeals agreed that the error could be raised at any time since the authority of the magistrate to preside was jurisdictional under *Spindler v. State*.⁸⁵

76. *Id.* at 409

77. *Id.*

78. *See id.*

79. *See Cain*, 958 S.W.2d at 410.

80. 956 S.W.2d 555 (Tex. Crim. App. 1997) (en banc).

81. *See id.* at 556.

82. TEX. GOV'T CODE ANN. § 54.651 *et seq.* (Vernon 1998).

83. TEX. GOV'T CODE ANN. § 54.656 & 54.657 (Vernon 1998).

84. TEX. GOV'T CODE ANN. § 54.662 (Vernon 1998).

85. *See Davis v. State*, 928 S.W.2d 289, 290 (Tex. App.—Fort Worth 1996, pet. granted) (citing *Spindler v. State*, 740 S.W.2d 789 (Tex. Crim. App. 1987)).

The State argued that *Spindler* was no longer binding given a subsequent amendment to the Texas Constitution which provides that “[t]he presentment of an indictment or information to a court invests the court with jurisdiction of the cause.”⁸⁶ The State reasoned “that since the indictment invests jurisdiction in the district court for which the magistrate acts, once vested, the district court’s jurisdiction cannot be defeated by irregularities in the manner in which the case was referred to the magistrate.”⁸⁷ The Court of Criminal Appeals agreed and distinguished between the jurisdiction of courts and the authority of judges, holding: “Strictly speaking then, jurisdiction encompasses only the power of the tribunal over the subject matter and the person.”⁸⁸ The court pointed out that the term “jurisdiction” is often misapplied, and quoted article V, Section 1 of the Texas Constitution, which explains that:

The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioner’s Court, in courts of the Justices of the Peace, and in other such courts as may be provided by law. The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.⁸⁹

Thus, the court reiterated the reasoning in *Ex parte George* and stated that: “[j]urisdiction, in its narrow sense, is something possessed by courts, not by judges. . . . The judge is merely an officer of the court, like the lawyers, the bailiff and the court reporter. . . . He is not the court itself.”⁹⁰

Having agreed with the State’s position, the court was careful to add the caveat that

[I]t is incorrect to suggest that the authority of the judge presiding over the case has no bearing on the validity of the proceeding [for] [t]his Court has explained that a judgment is not immune from jurisdictional challenge simply because an indictment has been returned; the judge must also have authority to preside over the case.⁹¹

The court noted, for example, that “a judge’s disqualification arising from a constitutional or statutory provision ‘affects jurisdiction’ and renders the proceeding a nullity.”⁹²

Although the Court of Criminal Appeals in *Spindler* held that the magistrate’s authority in a case was jurisdictional,⁹³ the court in *Davis* expressly “disavow[ed] that characterization” and held that the untimely

86. *Davis*, 956 S.W.2d at 557 (quoting TEX. CONST. art. V, §12).

87. *Id.*

88. *Id.* at 558.

89. *See id.* at 557 (quoting TEX. CONST. art. V, §1).

90. *Davis*, 956 S.W.2d at 557-58 (quoting *Ex parte George*, 913 S.W.2d 523 (Tex. Crim. App. 1995)).

91. *Id.* at 558 (citing *Johnson v. State*, 869 S.W.2d 347, 349 n.5 (Tex. Crim. App. 1994)).

92. *Id.* (citing *Lee v. State*, 555 S.W.2d 121 (Tex. Crim. App. 1977)).

93. *See Spindler*, 740 S.W.2d at 793.

referral order did not divest the court of jurisdiction to hear the matter.⁹⁴ Because “the magistrate merely acts as a surrogate for the judge,”⁹⁵ and because the magistrate’s acts are binding only if adopted by the referring court,⁹⁶ the irregularity is not a fatal jurisdictional defect. Accordingly, an objection is required in order for the matter to be raised on appeal. In sum, “jurisdiction was not effected and the order placing Appellant on probation was not void even though a procedural irregularity arose due to the untimeliness of the referral order.”⁹⁷

D. JURISDICTION: CHARGING INSTRUMENT

Just as *Davis* considered a conviction that is “voidable, but not void” (for lack of jurisdiction),⁹⁸ the court in *Duron v. State*⁹⁹ revisited the question whether jurisdiction is conferred by “an accusatory pleading which only purported to be, but was not in fact, an ‘indictment or information’ as defined in the Texas Constitution.”¹⁰⁰ As *Davis* noted and as *Duron* recognizes,¹⁰¹ it is the indictment which confers jurisdiction upon the court. One view of the issue is that a charging instrument which fails to state an offense is not an indictment, and therefore, cannot trigger the jurisdiction of the court.¹⁰² The Court of Criminal Appeals, however, has not engaged in such a strict construction.

The failure of the charging instrument to fully set forth an offense was, for a time, considered a fundamental defect which rendered the judgment of conviction based upon the defective “indictment” void (as opposed to merely voidable, a challenge requiring an objection in the trial court in order to raise the error on appeal).¹⁰³ The judgment, if based upon a void charging instrument, could be attacked for the first time in collateral proceedings and on appeal.¹⁰⁴ “[T]he constitutional requirement of an ‘indictment’ meant an indictment that was pleaded under the practice at the time the Constitution of 1876 was adopted—that is, one that had all the essential elements.”¹⁰⁵

In 1985 the Legislature, in an attempt to assure that convictions were not reversed due to defects not objected to prior to trial, mandated “that convictions not be reversed on account of any pleading defects which

94. *Davis*, 956 S.W.2d at 559.

95. *Id.* at 557 (citing *Kelly v. State*, 724 S.W.2d 42 (Tex. Crim. App. 1987)).

96. The magistrate’s actions are deemed to have been adopted if the trial court does not alter them. *See id.* at 560 n.4 (quoting TEX. GOV’T CODE ANN. § 54.652 (Vernon 1998)).

97. *Id.* at 560.

98. *Id.* at 559.

99. 956 S.W.2d 547 (Tex. Crim. App. 1997) (en banc).

100. *Id.* at 548.

101. *See id.* at 552 (Mansfield, J., concurring).

102. *See id.* at 552.

103. *See id.* at 553-54.

104. *See Duron*, 956 S.W.2d at 553-54 (Womack, J., concurring) (citing *Standley v. State*, 517 S.W.2d 538, 541 (Tex. Crim. App. 1975); *White v. State*, 1 Tex. App. 211, 215 (1876) (burglary indictment failed to state elements of the theft)).

105. *Id.* at 554 (citing *Williams v. State*, 12 Tex. App. 395 (1882) (footnote omitted)).

were not called to the attention of the court prior to trial.”¹⁰⁶ However, the argument arose that a defective charging instrument was not actually an indictment or information protected by the new legislation.¹⁰⁷ In *Studer v. State*,¹⁰⁸ the Court of Criminal Appeals held “that the constitutional mandate that an indictment ‘charge an offense’ does not mean ‘that each element of the offense must be alleged’ ”¹⁰⁹ The court in *Duron* recognized that *Studer* stood for the proposition that the pleading need not actually charge commission of an offense to constitute an indictment or information under the Texas Constitution.¹¹⁰ Choosing a middle ground, the *Duron* court held “that a written instrument is an indictment or information under the Constitution if it accuses someone of a crime with enough clarity and specificity to identify the penal statute under which the State intends to prosecute, even if the instrument is otherwise defective.”¹¹¹

The particular argument raised in *Duron* was that the allegations of indecency with a child¹¹² specified a form of sexual contact between the appellant and the child which was outside the statutory definition of sexual conduct. The court emphatically rejected this argument, stating that the case did “not involve a charging instrument which [was] even arguably defective on account of its failure to include one or more allegations necessary to give notice of the statutory offense with which the defendant was charged.”¹¹³

In an interesting aside, the court pointed to the importance of preserving a defendant’s constitutional right to have a grand jury determine

106. *Id.* at 548 (citing TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 1999)). The statute provides in pertinent part:

If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other post-conviction proceeding.

Id.

Judge Womack observed in his concurrence that this legislation, which accompanied the 1985 constitutional amendment, was “specifically intended to undo the doctrine of the fundamentally defective indictment. . . .” *Id.* at 554 (citing TEX. CONST. article V, Section 12(b)). The article states:

An indictment is a written instrument presented to a court by a grand jury charging a person with the commission of an offense. An information is a written instrument presented to a court by an attorney for the State charging a person with the commission of an offense. The practice and procedures relating to the use of indictments and informations, including their contents, amendment, sufficiency, and requisites, are as provided by law. The presentation of an indictment or information to a court invests the court with jurisdiction of the cause.

Id.

107. *See id.* at 548-49.

108. 799 S.W.2d 263, 272 (Tex. Crim. App. 1990) (en banc).

109. *Duron*, 956 S.W.2d at 549 (quoting *Studer*, 799 S.W.2d at 272).

110. *See id.* at 549.

111. *Id.* at 550-51.

112. *See* TEX. PEN. CODE ANN. § 1.11(a)(1) (Vernon 1994).

113. *Duron*, 956 S.W.2d at 551.

whether there is probable cause to believe he has committed a particular offense.¹¹⁴ The court recognized that this right would be seriously undermined if the court were to "allow a written instrument to stand as an indictment even when it does not contain enough information to point to the offense charged"¹¹⁵

IV. APPEAL

The Court of Criminal Appeals in *Curry v. State*¹¹⁶ reiterated its holding in *Malik v. State*¹¹⁷ that the sufficiency of the evidence to sustain a conviction is determined in accordance with "the hypothetically correct jury charge for the case,"¹¹⁸ as opposed to the actual charge given to the jury. In *Curry*, the appellants were convicted of aggravated kidnapping. The court of appeals reversed the conviction because the State amended the indictment after the trial had begun. The court of appeals also addressed the question whether the evidence was sufficient to support the conviction and concluded that the record did not contain evidence that the appellant had abducted the victim by using (or threatening to use) deadly force, as the indictment had alleged prior to its amendment. The court of appeals found the evidence sufficient, however, when assessed in light of the "theory of the offense submitted to the jury through the court's charge."¹¹⁹ The appellant's petition for discretionary review challenged this conclusion. The Court of Criminal Appeals granted the petition, vacated the court of appeals' judgment and remanded the case for reconsideration of the appellant's sufficiency claim in light of *Malik*.¹²⁰

In *Gomez v. State*,¹²¹ the Court of Criminal Appeals revisited a recent decision, *Melendez v. State*,¹²² in which it held that trial exhibits in a case are part of the court reporter's notes, and therefore, are included in the statement of facts.¹²³ The issue becomes important when a determination must be made as to whether the appellant included portions of the record in the designation of the contents of the record on appeal or, conversely, when the impact of that designation is affected by the fact that a portion of the record is lost or destroyed.

In *Gomez*, the appellant urged on appeal that because the exhibits from his trial had been inadvertently destroyed, he was entitled to a reversal of his conviction.¹²⁴ Upon further analysis, the *Gomez* court deter-

114. *See id.* at 550-51 (citing TEX. CONST. art. I, § 10 & art. V, § 12).

115. *Id.* at 550.

116. 975 S.W.2d 629 (Tex. Crim. App. 1998) (en banc).

117. 953 S.W.2d 234, 239 (Tex. Crim. App. 1997) (en banc).

118. *Curry*, 975 S.W.2d 630 (quoting *Malik*, 953 S.W.2d at 240).

119. *Curry v. State*, 966 S.W.2d 203, 207 (Tex. App.—El Paso 1998, pet. granted).

120. *See Curry*, 975 S.W.2d at 630.

121. 962 S.W.2d 572 (Tex. Crim. App. 1998) (en banc).

122. 936 S.W.2d 287 (Tex. Crim. App. 1996) (en banc).

123. *Id.* at 292.

124. TEX. R. APP. P. 34.6(f). The rule now provides that an appellant is entitled to a new trial if he has requested the record, an important exhibit or portion of the record has been lost or destroyed through no fault of the appellant, the exhibit or record portion is

mined that its "initial conclusion in *Melendez* was erroneous for two reasons: (1) it failed to adequately distinguish between original exhibits and copies of exhibits; and (2) it failed to apply an harmless error analysis to the lost exhibits before granting a new trial."¹²⁵

The *Gomez* court held that "original exhibits are not part of the statement of facts, but are part of the transcript, if so designated by the trial or appellate court."¹²⁶ Further, the court concluded that its review of the case was not hindered by the lost or destroyed exhibits and that, accordingly, the missing portion of the record caused no harm to the appellant.¹²⁷

A forceful dissent in *Gomez* complained that "[t]he majority errs in reaching the merits of appellant's ground for review because the issue was decided in *Melendez v. State*, which holds trial exhibits are part and parcel of the court reporter's notes and constitute part of the statement of facts."¹²⁸ The dissent also accused the majority of having reopened the issue "because *Melendez* is unfavorable to their partisan agenda of reaching results which favor the State."¹²⁹ In the dissent's opinion, appellant had "properly and timely requested a complete appellate record" and was entitled to a reversal because the exhibits had been inadvertently destroyed and could not be copied or replaced.¹³⁰ In addition, the dissent believed the majority disingenuously ignored the fact that although the appellant did not request inclusion of the exhibits in the transcript, the appellant clearly requested inclusion of the exhibits in the statement of facts (specifically citing appellant's designation and including it in the record).¹³¹ The majority found that the appellant had not specifically requested inclusion of the exhibits and therefore could not complain of their absence on appeal.¹³² The dissent also challenged the court's harmless error analysis as a profound departure from precedent by stating that "[t]his court has consistently held when an appellant's record is incomplete through no fault of his own, he need not demonstrate any harm and is entitled to a *per se* reversal of his conviction."¹³³

The dissent bemoaned the majority's about-face:

The issue presented in this case, was decided only one year ago in *Melendez* when we held exhibits are part of the statement of facts. Today, the majority attempts to distinguish *Melendez* as not providing for the inclusion of original exhibits in the statement of facts.

"necessary to the appeal's resolution" (Rule 34.6(f)(3)), and the parties cannot agree on a complete record.

125. *Gomez*, 962 S.W.2d at 574.

126. *Id.* at 575-76.

127. *See id.* at 576.

128. *Id.* at 577 (citation omitted).

129. *Id.*

130. *Gomez*, 962 S.W.2d at 577-78. The dissent accused the majority of having not only deprived appellant of the holding in *Melendez* but also of having analyzed appellant's position under the old rules in order to deprive him of the benefit of the new rules. *See id.*

131. *See id.*

132. *See id.* at 576.

133. *Id.* at 583.

However, both the Rules . . . and the customs of those engaged in the practice of law dictate otherwise. There is simply no support in law for the majority's conclusion.¹³⁴

Equally critical of the second aspect of the court's decision in *Gomez* (in which it concludes original exhibits are not part of the statement of facts), the dissent stated:

Likewise, the majority ignores case law holding the presentation of a partial record renders a sufficiency of the evidence consideration impossible. Instead, the majority finds the absence of the original exhibits from appellant's record to be 'harmless' thus, indicating sufficiency of the evidence review in Texas does not require review of the evidence.¹³⁵

Again, the dissent accused the majority of having chosen "to bulldoze the existing law simply to reach a result which benefits the State."¹³⁶

In a criminal case, the State may appeal a pretrial order granting a motion to suppress evidence, including a confession.¹³⁷ In *State v. Taft*,¹³⁸ the trial court granted the defendant's motion to suppress oral statements he made in conjunction with a polygraph examination.

The State appealed this ruling and the court of appeals reversed. The court of appeals believed the statements had been excluded prematurely, before the State actually sought to introduce them and before the trial court could evaluate the proffer in context.¹³⁹ The State nevertheless sought discretionary review in the Court of Criminal Appeals, urging that the court of appeals had failed to consider the State's right to appeal a suppression order.

The Court of Criminal Appeals reiterated its holding in *State v. Roberts*¹⁴⁰ that the State may not appeal a trial court ruling which merely excludes evidence. The *Roberts* court refused to interpret the Code of Criminal Procedure Article 44.01 to permit the appeal of any pretrial order that excluded evidence, fearing that such an interpretation would not only greatly expand pretrial appeals but also unduly restrict the trial court's exercise of discretion.¹⁴¹

In *Taft*, the trial court granted a motion to "suppress" statements the defendant made during a polygraph examination, concluding that admission of the evidence would have been more prejudicial than probative.¹⁴² Thus, the order pertained to "evidence that was 'excluded' because of its prejudicial nature, not evidence that was 'suppressed' because it was ille-

134. *Gomez*, 962 S.W.2d at 584.

135. *Id.*

136. *Id.*

137. TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(5) (Vernon Supp 1999).

138. 958 S.W.2d 842 (Tex. Crim. App. 1998) (en banc).

139. *See State v. Taft*, 926 S.W.2d 613, 615 (Tex. App.—Corpus Christi 1996, pet. granted).

140. 940 S.W.2d 655 (Tex. Crim. App. 1996) (en banc).

141. *See id.* at 659-60.

142. TEX. CRIM. EVID. 403.

gally obtained."¹⁴³ Since the order was not appealable, the court of appeals was without jurisdiction to decide the appeal. Accordingly, the court vacated the judgment and remanded the case with instructions to dismiss the appeal for lack of jurisdiction.

V. HEARSAY

In *Johnson v. State*,¹⁴⁴ the Court of Criminal Appeals held that a prior written statement of a surviving victim was inadmissible hearsay and that the trial court erred in having admitted the statement as a prior recollection recorded exempt from the hearsay exclusion.¹⁴⁵ The court concluded that the erroneous admission of the hearsay statement required reversal of this capital murder conviction in which the death penalty was imposed.

In this case, the surviving witness had given the police a detailed account of the circumstances leading up to the murder of his friend and the witness' escape immediately after the murder. At trial, however, the surviving victim had a curious change of heart and became completely non-cooperative. The State's efforts to elicit from the witness any facts related to the murder were unavailing. The witness was shown his previous statement and finally conceded that his recollection of events was better at the time he prepared the statement than at the time of trial. On the other hand, he also claimed that he could not remember any of the events in question.

At the State's urging, the trial court admitted a written statement by the surviving victim as a past recollection recorded. The defendant opposed the offer on the ground that it denied his right of confrontation under the U.S. Constitution,¹⁴⁶ the Texas Constitution,¹⁴⁷ and the Texas Code of Criminal Procedure.¹⁴⁸

The *Johnson* court noted that the predicates for admission of a recorded past recollection are: (1) the witness had first-hand knowledge, (2) the written statement is an original made at or near the time of the event, (3) the witness does not presently recall the event, and (4) the witness

143. *Taft*, 958 S.W.2d at 843.

144. 967 S.W.2d 410 (Tex. Crim. App. 1998).

145. *See id.* at 416-17. Certain matters are not excluded by the hearsay rule, even though the declarant is available as a witness, including recorded recollections. Texas Rule of Criminal Evidence 803(5) provides:

Recorded Recollection. A memorandum or record concerning a matter about which a witness once had personal knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly, unless the circumstances of preparation cast doubt on the document's trustworthiness. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

146. *See* U.S. CONST. amend. VI.

147. *See* TEX. CONST. art. I, § 10.

148. *Johnson*, 967 S.W.2d at 416 (quoting TEX. CODE CRIM. PROC. ANN. art. 1.05. (Vernon 1981)).

attests to the accuracy of the written statement at trial.¹⁴⁹ The court found no evidence to support the requirement of first-hand knowledge, because the witness offered no testimony regarding the basis for his statement.¹⁵⁰ Nor was there sufficient evidence to satisfy the additional predicate of accuracy, because the witness never attested to the correctness of the statement.¹⁵¹ The written statement was received in evidence and contained references to an extraneous murder and other highly prejudicial matters, so the court's harmless error analysis led to reversal of the conviction, for the court was "unable to say with fair assurance that the erroneous admission of [the surviving witness'] statement did not influence the jury or that its admission did not affect appellant's substantial rights."¹⁵²

VI. LESSER INCLUDED OFFENSE

In *Moore v. State*,¹⁵³ the Court of Criminal Appeals considered whether the trial court had improperly refused a jury charge on voluntary manslaughter as a lesser included offense of capital murder. The appellant was convicted of capital murder and sentenced to death.

At the guilt or innocence phase of the trial, the State and the appellant each called one eyewitness. The accounts of the two eyewitnesses were markedly different. The State's eyewitness, after spending several hours at a club where the appellant and the victim also were present, observed the murder victim in a confrontation with the appellant. According to the eyewitness's testimony, after the confrontation ended and as the victim left in a car from the club's parking lot, the appellant fired into the car with a rifle, killing both occupants. In contrast to the testimony of the State's eyewitness, the appellant's half brother described a serious confrontation instigated by the victim, whose behavior was not merely offensive but threatening to the appellant. According to the appellant's witness, this direct confrontation was followed by an attempt by the victim to hit the appellant with the car the victims were driving.

The appellant sought a lesser included offense instruction on voluntary manslaughter which, at the time of these offenses, provided that: "[a] person commits an offense if he causes the death of an individual under circumstances that would constitute murder . . . except that he caused the death under the immediate influence of sudden passion arising from an

149. *See id.* The court considered the "assertion of the statement's accuracy in the acknowledgment line of a written memorandum or [a previous acknowledgment under oath]" and emphasized that "[n]o statement should be allowed to verify itself, especially by boilerplate language routinely added by police, lawyers, or others experienced in litigation." *Id.* (citing 4 LOUISELL & MUELLER, FEDERAL EVIDENCE §§ 445, 628-29 (4th ed. 1980)).

150. *See id.*

151. *See id.*

152. *Id.* at 417.

153. 969 S.W.2d 4 (Tex. Crim. App. 1998).

adequate cause.”¹⁵⁴

The first determination to be made in considering whether a lesser included offense instruction is appropriate is whether the lesser included offense is in fact part of the proof necessary to establish the offense alleged.¹⁵⁵ Second, the evidence must be evaluated to determine whether it would permit a rational determination that the defendant is guilty only of the lesser offense.¹⁵⁶ Thus, there must be some evidence from which a reasonable jury could acquit the defendant of the greater offense and convict him of the lesser. In deciding whether to give the lesser included offense instruction “[t]he court may not consider whether the evidence is credible, controverted, or in conflict with other evidence.”¹⁵⁷

In addressing the appellant’s contention that the trial court erred in refusing to instruct the jury on the lesser included offense of voluntary manslaughter, the court referred to its previous plurality decision in *Bradley v. State*.¹⁵⁸ In *Bradley*, the plurality held that “murder had an unwritten, implied element of lack of passion, on which the jury did not have to be charged unless evidence raised the issue.”¹⁵⁹ In addition, “the State has the burden to disprove sudden passion beyond a reasonable doubt to convict for murder, and the burden to prove the existence of sudden passion beyond a reasonable doubt to convict for voluntary manslaughter.”¹⁶⁰ Based on this logic, the plurality in *Bradley* ordered the appellant acquitted because the proof was sufficient to have established murder, but there was no evidence of sudden passion sufficient to sustain a conviction of voluntary manslaughter.¹⁶¹ Subsequent cases failed to resolve the issue.¹⁶² Noting that plurality opinions are of limited precedential value, the *Johnson* court expressly overruled the *Bradley* plurality and held that “voluntary manslaughter is a lesser included offense to murder.”¹⁶³

The court in *Moore* also overruled its previous decision in *Ojeda v. State*,¹⁶⁴ in which it held that the issue of voluntary manslaughter was not raised by “an objective recitation of acts—appellant was hit and he responded,”¹⁶⁵ as this was insufficient to show sudden passion because

154. *Id.* at 8 (quoting TEX. PEN. CODE ANN. § 19.04 (Vernon 1994)). This was the definition of voluntary manslaughter under the Penal Code for offenses committed before September 1, 1994. For offenses committed after that date, sudden passion is an issue to be considered at the punishment phase of a murder trial. See TEX. PEN. CODE ANN. § 19.02(d) (Vernon 1993).

155. *See id.* at 8.

156. *See id.*

157. *Id.* (citing *Havard v. State*, 800 S.W.2d 195, 216 (Tex. Crim. App. 1998)).

158. 688 S.W.2d 847 (Tex. Crim. App. 1985) (en banc).

159. *Id.* at 851 n.5.

160. *Id.* at 851.

161. *See id.* at 853.

162. *See Johnson v. State*, 815 S.W.2d 707 (Tex. Crim. App. 1991); *State v. Lee*, 818 S.W.2d 778 (Tex. Crim. App. 1991).

163. *Johnson*, 969 S.W.2d at 9-10.

164. 712 S.W.2d 742 (Tex. Crim. App. 1986).

165. *Moore*, 969 S.W.2d at 11 (quoting *Ojeda*, 712 S.W.2d at 744).

there was no direct evidence as to the appellant's frame of mind at the time. In rejecting *Ojeda's* insistence upon "direct evidence" of the defendant's state of mind, the court in *Moore* "reaffirm[ed]" that "sudden passion is essentially a culpable mental state" which does not require direct evidence beyond the "acts and circumstances of the offense."¹⁶⁶

VII. JURY INSTRUCTIONS

In *Posey v. State*,¹⁶⁷ the Court of Criminal Appeals considered whether trial courts have a duty *sua sponte* to instruct the jury on defensive issues. In this case, the owner of a 1998 black Jaguar had left it parked at the airport; subsequently, the appellant was found driving the same automobile when it was stopped by the police because the car's registration sticker had expired. The appellant could produce neither a license nor proof of insurance. He claimed that a person he had just met gave him permission to drive the Jaguar, and his cousin and another acquaintance corroborated this statement.

On appeal, the appellant complained for the first time that the trial court *sua sponte* should have instructed the jury on the defense of mistake of fact (e.g., that he was mistaken in his alleged beliefs that he had permission to drive the car or in that the person who gave him permission had the authority to authorize his use of the car). The appellant requested no such instruction at trial, nor did he object to the court's failure to so instruct the jury. Applying the court's opinion in *Almanza v. State*,¹⁶⁸ the court of appeals reversed the conviction and remanded for a new trial, having concluded that the appellant was "egregiously harmed" by the absence of a mistake of fact instruction.¹⁶⁹ The Court of Criminal Appeals granted the State's petition for discretionary review "to decide whether *Almanza* applies to the omission in the jury charge of defensive issues that have not been properly preserved by defendant's request or objection."¹⁷⁰

In *Almanza*, the court considered the effect of a failure to request an instruction or to object to an instruction given in the trial court.¹⁷¹ The Court of Criminal Appeals acknowledged the continuing validity of *Al-*

166. *Id.* at 10. The court also observed that evidence "relevant to proving up adequate cause is not used up or limited to that element; it may also be relevant to proving sudden passion." *Id.* at 11.

167. 966 S.W.2d 57 (Tex. Crim. App. 1998).

168. 686 S.W.2d 157, 160-74 (Tex. Crim. App. 1984).

169. See *Posey v. State*, 916 S.W.2d 88 (Tex. App.—Houston [1st Dist.] 1996, pet. granted).

170. *Posey*, 966 S.W.2d at 60.

171. *Almanza* also expressly considered article 36.19 of the Code of Criminal Procedure, which provides that error in the jury charge shall not result in reversal if the requirements of the rules (articles 36.14, 36.15, 36.17, and 36.18) have not been met *unless* the error was "calculated to injure the rights of the defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial." *Almanza*, 686 S.W.2d at 160. Article 36.14, for example, requires that a defendant object in writing to errors in the court's charge as an essential predicate to any complaint on appeal. TEX. CODE CRIM. PRO. art. 36.14.

manza but also made clear that defensive issues must be presented to the trial court in order to be raised on appeal.¹⁷² Unlike the court of appeals, which had determined that the trial court committed reversible error by failing *sua sponte* to instruct on the defensive issue mistake of fact, the Court of Criminal Appeals concluded that the duty *sua sponte* to submit a charge applied only to the law “applicable to the case.”¹⁷³ The court in *Posey* concluded that defensive issues are not “applicable to the case” within the meaning of article 36.14 “unless the defendant timely requests the issue or objects to the omission of the issue in the jury charge.”¹⁷⁴ The court rejected the contention that its holding “effectively overrule[d] *Almanza*,” stating “[w]hen *Almanza* speaks of ‘errors’ of commission and omission in the court’s charge, it speaks of issues upon which a trial court has a duty to instruct without request or objection from either party . . . or issues that have been timely brought to the trial court’s attention.”¹⁷⁵

VIII. EXPERT TESTIMONY

The Texas Court of Criminal Appeals decided important issues with respect to expert testimony during the Survey period. In *Nenno v. State*¹⁷⁶ the court considered whether to apply the general principles enunciated by the court in *Kelly v. State*¹⁷⁷ and by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁷⁸ with respect to scientific evidence and expert testimony proffered under both the Texas Rules of Criminal Evidence 702 and the Federal Rules of Evidence 702, to “nonscientific expert testimony (i.e. that involving technical

172. See *Posey*, 966 S.W.2d at 60-62.

173. *Id.* at 62. The Code of Criminal Procedure imposes upon the trial courts the duty to instruct the jury on the law “applicable to the case.” *Id.* (citing TEX. CODE CRIM. PROC. ANN. art. 36.14).

174. *Id.* The court also distinguished its previous decision in *Williams v. State*, which held the trial court erred in failing *sua sponte* to instruct on the defensive issue of “release in a safe place” during the punishment phase of an aggravated kidnapping prosecution, because at that time the degree of offense was based upon this factor. *Id.* at 62 (citing *Williams v. State*, 851 S.W.2d 282, 284, 287 (Tex. Crim. App. 1993)). “*Williams* was based on prior V.T.C.A. Penal Code, Section 20.04(b), which provide[d] that aggravated kidnapping is a first degree felony unless the actor voluntarily releases the victim alive and in a safe place in which event the offense is a second degree felony.” *Posey*, 966 S.W.2d at 63. The court further noted that “V.T.C.A., Penal Code, Section 20.04(d) now requires the defendant to raise and prove [that issue].” *Id.* The dissent remarked upon the majority’s “notable effort attempting to dismiss or somehow distinguish *Williams*,” and concluded that “[t]hey might as well overrule it because it can’t be distinguished.” *Id.* at 75.

175. *Id.* at 61 n.9. A concurring opinion warned of “the confusion that will ensue” because the court’s *Posey* opinion “directly contradicts the basis of *Almanza*’s reasoning.” *Id.* at 68 (Womack, J. concurring). The dissent, characterizing the majority’s decision as a holding that “a defensive issue does not become ‘applicable to the case’ until a jury charge on the issue is requested by the defendant[,]” warned that the decision “stands in stark contrast to recent precedent which rejects the notion that parties are responsible for ensuring that the charge embodies their respective ‘theories of the case.’” *Posey*, 966 S.W.2d at 71 (quoting *Malik*, 953 S.W.2d 234 (Tex. Crim. App. 1997) (Meyers, J., dissenting)).

176. 970 S.W.2d 549 (Tex. Crim. App. 1998).

177. 824 S.W.2d 568 (Tex. Crim. App. 1992) (en banc).

178. 509 U.S. 579, 113 S. Ct. 2786 (1993).

or other specialized knowledge).”¹⁷⁹

In *Kelly* the court held:

Rule 702 [which permits expert testimony if scientific, technical, or other specialized knowledge will assist the trier of fact] required the satisfaction of a three-part reliability test before novel scientific evidence would be admissible: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question.¹⁸⁰

The court later applied these standards to all scientific evidence in *Hartman v. State*.¹⁸¹ The *Nenno* court concluded with a “qualified ‘yes,’” that the *Kelly* and *Daubert* standards would apply to nonscientific expert testimony.¹⁸² Stressing that the standards are flexible, the court indicated that the factors enunciated in *Kelly* and *Daubert* may or may not apply to the context presented, but the court made no attempt “to develop a rigid distinction between ‘hard’ science, ‘soft’ sciences, or nonscientific testimony.”¹⁸³

In *Nenno*, testimony regarding the appellant’s future dangerousness was admitted at the punishment phase of his capital murder trial, at which he was sentenced to death. An expert witness from the FBI’s behavioral science unit, who specialized in the study of victimization of children, testified that the appellant was a pedophile and that pedophiles are difficult to rehabilitate. The appellant complained that the expert’s testimony failed to satisfy *Kelly*’s reliability test and, further, that designating the testimony as that of an “expert” unduly influenced the jury.¹⁸⁴ Applying deliberately flexible standards, the court concluded that the reliability of the expert’s testimony was sufficiently shown.¹⁸⁵

In *Schutz v. State*,¹⁸⁶ a decision made prior to that in *Nenno*, the Court of Criminal Appeals adopted a more rigorous analysis. The appellant, convicted of the aggravated sexual assault of his six-year-old daughter, complained that the trial court erred in admitting expert testimony regarding the credibility of the child. The Court of Criminal Appeals agreed, reversed the judgment of the court of appeals and remanded the cause to that court so that it could conduct a harmless error analysis. The court concluded that expert testimony which directly commented upon the truthfulness of a witness was not testimony which assisted the jury in

179. 970 S.W.2d at 560.

180. *Id.* (citing *Kelly*, 824 S.W.2d at 573). In *Daubert*, the Court held that Rule 702 required that scientific evidence be both relevant and reliable, the latter evaluation requiring determinations of whether the theory or technique is generally accepted in the concerned scientific community and has been tested, published and subjected to peer review, as well as consideration of the potential or known rate of error. *See Daubert*, 509 U.S. at 589-90.

181. 946 S.W.2d 60, 62-63 (Tex. Crim. App. 1997) (en banc).

182. 970 S.W.2d at 560.

183. *Id.*

184. *See id.* at 559-60.

185. *See id.* at 562.

186. 957 S.W.2d 52 (Tex. Crim. App. 1997) (en banc).

making its determinations but, rather, usurped the jury's role.¹⁸⁷ The case involved expert psychological testimony regarding indicia that the child's testimony and "memory" had been manipulated, and also expert testimony about fantasy and indicia that the child's testimony was based on reality as opposed to fantasy.

The court reviewed much of the burgeoning jurisprudence on the subject throughout the country, pointing out that "[a]t least one court has noted that there is a 'fine but essential' line between helpful expert testimony and impermissible comments on credibility."¹⁸⁸ The court observed: "Because we have never addressed the manipulation/fantasy question under the Rules, we look to other jurisdictions for guidance in drawing this 'fine line.' Such guidance is especially appropriate here because the rules of evidence in Texas and most other states are patterned after the Federal Rules of Evidence."¹⁸⁹

The court then canvassed the treatment of this question in various jurisdictions and concluded that "[m]ost jurisdictions specifically addressing expert testimony concerning manipulation [or] fantasy have held the particular testimony involved to be an impermissible comment on a witness' credibility."¹⁹⁰ The court noted, for example, that the Massachusetts Supreme Court "upheld the exclusion of a defense psychologist's testimony that 'the mother's animosity could have influenced the child to make false accusations of sexual abuse.'"¹⁹¹ The Court of Criminal Appeals apparently approved of the Massachusetts court's conclusion that such an opinion "would have impermissibly intruded on the function of the jury to assess the credibility of the child witness."¹⁹²

Similarly, the Court of Criminal Appeals observed that in *State v. Erickson*¹⁹³ the Minnesota Court of Appeals upheld the exclusion of expert testimony about "learned memory" offered in support of the defense theory that the child witness "had been coerced and suggestively interviewed."¹⁹⁴ The Court of Criminal Appeals also mentioned the New Jersey Supreme Court's distinction between commentary on the credibility of the child witness, which was inappropriate, and "expert testimony [offered] to explain the coercive or suggestive propensities of interviewing techniques employed" which should be admitted if sufficiently reliable.¹⁹⁵ Conversely, the court noted that some jurisdictions held manipulation testimony admissible.¹⁹⁶ For example, the Seventh Circuit has held "that an expert witness did not invade the province of the jury

187. *See id.* at 59.

188. *Id.* at 60 (citing *State v. Myers*, 382 N.W. 2d 91, 98 (Iowa 1986)).

189. *Id.* (footnotes omitted).

190. *Id.*

191. *Shutz*, 957 S.W.2d at 60-61 (citing *Commonwealth v. Trowbridge*, 647 N.E.2d 413, 419 (Mass. 1995)).

192. *Id.* at 61.

193. 454 N.W.2d 624 (Minn. Ct. App. 1990).

194. *Shutz*, 957 S.W.2d at 61 (citing *Erickson*, 454 N.W.2d at 628).

195. *Id.* (citing *State v. Michaels*, 642 A.2d 1372 (N.J. 1994)).

196. *See id.* at 62.

where his testimony 'merely dealt with his opinion that [the complainant's] allegations were probably fabricated and were the product of parental and therapeutic suggestion.'"¹⁹⁷

Having canvassed the decisions with respect to expert testimony in this area, the court concluded: "Most courts addressing the issue of capacity have not favored the admission of such evidence. . . . According to these courts, absent a recognized mental disorder or deviant mental condition, an expert witness may not testify to the jury about another witness' mental capacity for truth-telling."¹⁹⁸ Following this exhaustive evaluation of the case law from other jurisdictions, the Court of Criminal Appeals opined: "We are convinced that the concept of truthfulness properly includes mental capacity as well as moral disposition. . . . [A]ttempting to distinguish moral and mental truthfulness raises unanswerable questions about human nature."¹⁹⁹ Acknowledging that "psychologists and others in the mental health profession have much expertise in the area of human behavior that can be of assistance to a fact-finder," the court nevertheless rejected "'expert testimony on truthfulness,' . . . in part [due to] a belief that psychology is not an exact science but involves much uncertainty and is often subjective."²⁰⁰ The court also cautioned against "permitting experts to draw conclusions that rest on both expert and lay knowledge."²⁰¹

In the court's view, "evidence of manipulation and fantasy, whether relating to mental capacity or moral disposition, should be analyzed under the same rules that govern evidence of truthful or untruthful character."²⁰² The court pointed out, for example, that under the rules of evidence, "a party may attack a witness' or other declarant's general capacity or disposition to tell the truth[, and] [t]he other party may respond to such an attack with evidence supporting that person's general capacity or disposition for truthfulness."²⁰³ The court noted further that "evidence relating to capacity, fantasy, or manipulation is presented in the form of expert testimony, such evidence must also assist the trier of fact"²⁰⁴ Such testimony, the court continued, "must meet the proper tests for scientific reliability, and the testimony must reflect information outside the general knowledge of lay persons. And, such testimony may be excluded under Rule 403 if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice"²⁰⁵

Notwithstanding its extensive discussion of the authorities in this complex area, the court made clear its own position: "[E]vidence that a person's allegations are the result of manipulation or fantasy is inadmissible.

197. *Id.* (citing *Doe By and Through G. S. v. Johnson*, 52 F.3d 1448, 1463 (7th Cir. 1995)).

198. *Id.* at 65 (citing *State v. Oliver*, 372 S.E.2d 256, 260 & N.2 Ga. Ct. App. 1988)).

199. *Shutz*, 957 S.W.2d at 68.

200. *Id.* at 69.

201. *Id.*

202. *Id.* (footnote omitted).

203. *Id.* (citing TEX. R. CRIM. EVID. 608(a) (footnote omitted)).

204. *Shutz*, 957 S.W.2d at 70 (citing TEX. R. CRIM. EVID. 702).

205. *Id.* (citing TEX. R. CRIM. EVID. 403).

Such evidence never assists the jury because the jury is just as capable as the expert of drawing the conclusions involved."²⁰⁶ In evaluating the case before it, the court distinguished between the testimony about fantasy and about manipulation offered by both experts. The court concluded that one expert's testimony "that the complainant did not exhibit the traits of manipulation" did not "constitute a direct comment upon the truth of the complainant's allegations."²⁰⁷ The same expert's testimony about fantasy, however, was considered improper. Since the expert "equated fantasizing with lying[, h]er testimony that the complainant had not exhibited any evidence of fantasizing was therefore a direct comment on the truthfulness of the complainant's allegations."²⁰⁸ The second expert commented directly upon the witness' truthfulness in the context of both fantasy and manipulation and, accordingly, the court held that the testimony should have been excluded.²⁰⁹

In *Weatherred v. State*,²¹⁰ a case involving a capital murder conviction and sentence of life imprisonment, the Court of Criminal Appeals remanded for reconsideration in light of its *Nenno* decision.²¹¹ The court of appeals ruled that the trial court erroneously excluded expert testimony regarding photo bias and eyewitness identification and accordingly reversed the conviction and remanded for a new trial.²¹² The Court of Criminal Appeals remanded the case for an evaluation of the admissibility of the expert testimony in light of *Nenno's* standards for "admission of expert testimony in the 'soft' sciences, that is, 'fields of study aside from the hard sciences, such as the social sciences or fields that are based primarily upon experience and training as opposed to the scientific method.'"²¹³

IX. SELF-DEFENSE

In *Smith v. State*, the Court of Criminal Appeals granted review "to resolve some conflicts in [its] opinions on that aspect of the law of self-defense known as the doctrine of provocation or provoking the difficulty."²¹⁴ The appellant raised self-defense at his murder trial and the jury was instructed both on self-defense and the law on provocation. The court of appeals affirmed the appellant's conviction of involuntary manslaughter.²¹⁵ The appellant contended in finding evidence of provocation

206. *Id.* at 70-71 (footnote omitted) (emphasis added).

207. *Id.* at 73.

208. *Id.*

209. *See Shutz*, 957 S.W.2d at 73.

210. 975 S.W.2d 323 (Tex. Crim. App. 1998).

211. *See Nenno*, 970 S.W.2d 549.

212. *See Weatherred v. State*, 963 S.W.2d 115 (Tex. App.—Beaumont 1998, pet. granted).

213. *Weatherred*, 975 S.W.2d at 323-24.

214. 965 S.W.2d 509, 511 (Tex. Crim. App. 1998).

215. *See Smith v. State*, 932 S.W.2d 304 (Tex. App.—Houston [14th Dist.] 1996, pet. granted).

that the court of appeals failed to follow decisions of the Court of Criminal Appeals. Nevertheless, the court affirmed.

Visiting the issue of provocation for the first time in a decade, the Court of Criminal Appeals recognized that the doctrine remains somewhat uncertain.²¹⁶ The doctrine of provocation is rooted in the common law, codified in the Penal Code,²¹⁷ and acts as a limitation upon self-defense. In commenting upon it, the court observed:

A charge on provocation is required when there is sufficient evidence (1) that the defendant did some act or used some words which provoked the attack on him, (2) that such act or words were reasonably calculated to provoke the attack, and (3) that the act was done or the words were used for the purpose and with the intent that the defendant would have a pretext for inflicting harm upon the other.²¹⁸

The court in *Smith* found there was sufficient evidence to satisfy the first element of provocation; that is, that the defendant did or said something which caused the deceased to attack him. Viewing the evidence "most favorably to giving the instruction establishes that the appellant was arguing loudly late at night with [another] in the victim's home, which caused the victim to intervene and warn the appellant to cease."²¹⁹ When he did not, the victim attacked him.

The appellant contended that the court of appeals' decision conflicted with its decision in *Stanley v. State*.²²⁰ Although it rejected the notion that its decision conflicted with the one in *Stanley*, the Court of Criminal Appeals nevertheless concluded that "Stanley was wrongly decided" due to "an incorrect application of the law to the facts."²²¹ In *Stanley*, the court found "no evidence that the appellant made any motion, spoke any words, or performed any act at the time which caused the deceased to first attack the appellant thereby furnishing the appellant with a pretext for killing the deceased."²²²

In *Stanley*, an altercation between the defendant and the victim culminated in the deceased's attack upon the defendant, who then killed the victim. The source of the altercation was the defendant's lie to the victim about a land purchase and the victim's confrontation of the appellant regarding that lie. There was also evidence in *Stanley* that the defendant had attempted to obtain a firearm and had made a statement threatening to kill the victim a few hours before the altercation. The court in *Stanley* concluded that the evidence "show[ed] that the deceased's attack on the appellant was unprovoked."²²³

216. See *Smith*, 965 S.W.2d at 513.

217. TEX. PEN. CODE ANN. § 9.31(b)(4) (Vernon 1996).

218. *Smith*, 965 S.W.2d at 513.

219. *Id.* at 514-15.

220. 625 S.W.2d 320 (Tex. Crim. App. 1981).

221. *Smith*, 965 S.W.2d at 515.

222. *Id.* (citing *Stanley*, 625 S.W.2d at 323).

223. *Id.* (citing *Stanley*, 625 S.W.2d at 323).

The Court of Criminal Appeals rejected the result in *Stanley* and stated that provocation exists even where there is no "conclusive evidence as to what the act or words which caused the provocation actually were."²²⁴ It is not necessary, the court reasoned, for the jury to be able "to put its hands on the particular act or words which resulted in the attack. Rather, the jury must merely be able to find that there was some provoking act or words. This protects the defendant's right of self-defense, while adhering to the principle of the law of provocation."²²⁵ The court reasoned:

The jury [in *Stanley*] could have properly inferred that the defendant's act of lying caused the confrontation and that defendant's words which preceded the attack on the defendant by the deceased were the cause of the attack, even though we do not know what these words were, when coupled with the facts that defendant had a few hours earlier attempted to obtain a handgun and stated that he was going to kill the victim.²²⁶

The court concluded that "such a scenario presents the classic case of provoking the difficulty."²²⁷

The appellant asserted that the lower court's decision also conflicted with the decision in *Williamson v. State*,²²⁸ in which the court concluded that the evidence was insufficient to support provocation. Again, as in *Stanley*, the court stated that its decision had "encroached on the jury's province as fact-finder in *Williamson*."²²⁹ In *Williamson*, the defendant informed his roommate he would have to move out because he could not afford to feed him. This angered the roommate who acted as though he would attack the defendant. The defendant then confronted the roommate and accused him of being a burglar, at which point the victim attacked the defendant and was killed. "Upon reconsideration of *Williamson*, in light of the principles we have highlighted today, we see that there was sufficient evidence from which a jury could properly find that the defendant did some act that provoked the difficulty."²³⁰

In order to ensure "that a defendant will not lose his right of self-defense over acts or words which cause an unwarranted attack[,] "the second element which must be established to support provocation is that the defendant's acts or words must have been "reasonably calculated to provoke the attack."²³¹ The court concluded that the evidence in *Smith*, viewed in a light favorable to a charge on provocation, showed that the appellant was engaged in an argument with another person when the victim intervened and in effect warned the appellant (even displaying a knife for effect at one point) that continued argument would "have a volatile effect on the victim such that the victim might, and probably would, have

224. *Id.*

225. *Id.*

226. *Smith*, 965 S.W.2d at 516.

227. *Id.*

228. 672 S.W.2d 484 (Tex. Crim. App. 1984).

229. 965 S.W.2d at 517.

230. *Id.*

231. *Id.*

attacked the appellant to make good on his warning;"²³² and the appellant nevertheless "continued the abusive language towards [the person], and the victim consequently attacked the appellant."²³³ This continued argument by the appellant, the court reasoned, "could have been found by the jury under the circumstances to have been reasonably calculated to cause an attack by the victim."²³⁴

Finally, the provocation doctrine requires that the defendant perform the provoking acts or speak the provoking words intending to create a pretext for killing the victim but without such an intent, the defendant does not lose his right of self-defense.²³⁵ This question of intent is one for the jury.²³⁶ The court stated that "[t]he question of whether an act or words were reasonably calculated to cause an attack is a question of fact for the jury to resolve."²³⁷

The court concluded that "[t]he evidence [in *Smith*] supports the conclusion that the appellant continued to argue with [the person] knowing it would elicit an attack from the victim."²³⁸ The court then reasoned as follows:

This poses the question: What was the intent of the appellant in continuing to verbally abuse [the person]? It could have been to continue the argument for its own sake, regardless of the probability of further intervention from the deceased, or it could have been to continue the argument to inspire the deceased to attack the appellant so that the appellant would have a pretext for killing the deceased.²³⁹

The court concluded that the record revealed evidence which would support the jury's finding of intent: "the appellant was agitated that the victim had left him at the night club;" the appellant argued "with the victim about a matter involving a crack cocaine pipe;" and "appellant continued to argue with [the person] . . . after knowing that it excited the victim and would likely result in an attack."²⁴⁰

The appellant also argued in *Smith* that the provocation charge was improper because the evidence simply conflicted as to who was the first aggressor, a matter which does not warrant a charge on provocation.²⁴¹ The appellant relied upon *Dirck v. State*²⁴² "for the proposition that a charge on provocation should not be given if the evidence merely conflicts as to who made the first attack."²⁴³ The court of appeals believed evidence was not conflicting and showed only that the victim was the first

232. *Id.* at 517.

233. *Id.* at 517-18.

234. *Smith*, 965 S.W.2d at 518.

235. *See id.*

236. *See id.*

237. *Id.* at 517 (citing *Garcia v. State*, 522 S.W.2d 203, 206 (Tex. Crim. App. 1975)).

238. *Id.* at 519.

239. *Smith*, 965 S.W.2d at 519.

240. *Id.* at 519.

241. *See id.*

242. 579 S.W.2d 198 (Tex. Crim. App. 1979).

243. *Smith*, 965 S.W.2d at 519.

aggressor, despite the appellant's claim that the evidence showed he was the first aggressor. The Court of Criminal Appeals, on the other hand, concluded that both the court of appeals and the appellant were incorrect because although "there was conflicting evidence about who made the first attack, the evidence was not merely in conflict about who made the first attack."²⁴⁴

In conclusion, the court overruled the appellant's ground for review even though "the jury's finding the appellant guilty of the lesser included offense of voluntary manslaughter on a charge of murder means that they in fact rejected the provocation claim by the State, and the appellant's claim of self-defense."²⁴⁵ The court concluded that the jury rationally could have found every element of provocation beyond a reasonable doubt and that accordingly the trial court properly submitted the issue to the jury:

It is neither our responsibility nor our role to decide if the evidence actually established that the appellant provoked the difficulty with the intent to harm the deceased. That question is properly within the province of the jury as judge of credibility and finder of fact. We hold merely that the evidence was sufficient to allow the jury to pass on the issue.²⁴⁶

X. CAPITAL MURDER

In *Ex parte Robert James Tennard*,²⁴⁷ the Court of Criminal Appeals again considered whether the record in question established the existence of mental retardation and if so, whether that evidence was submitted in a manner which enabled the jury to accord mitigating effect to the evidence in the case of youthful incarceration and mental retardation.²⁴⁸

A capital murder prosecution requires the submission of two special issues to the jury: (1) "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;" and (2) "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."²⁴⁹ A failure to provide the jury with a means to give effect to mitigating evidence violates the standards enunciated by the United States Supreme Court in *Penry v. Lynaugh*.²⁵⁰

244. *See id.*

245. *Id.*

246. *Id.* at 519-20.

247. 960 S.W.2d 57 (Tex. Crim. App. 1997) (en banc).

248. The case was before the court on Tennard's post-conviction application for writ of *habeas corpus*. The *habeas corpus* petition was brought pursuant to Article 11.07, V.A.C.C.P., after the court affirmed Tennard's conviction and sentence on direct appeal and the Supreme Court had denied his petition for a writ of *certiorari*. *See Tennard v. State*, 802 S.W.2d 678 (Tex. Crim. App. 1990).

249. TEX. CODE CRIM. PROC. ANN. arts. 37.071(b)(1), (2).

250. 492 U.S. 302, 109 S. Ct. 2934 (1989).

The court in *Ex parte Tennard* first described the applicant's participation in the brutal murder of two neighbors in their home during a robbery, as well as the circumstances of a particularly brutal felony rape for which the applicant had been convicted and was on parole at the time he committed the murders. The court then observed that the sole evidence proffered on "mental retardation" was a Texas Department of Correction record from the period of his incarceration for the rape conviction which indicated, without elaboration, that he had an IQ of sixty-seven. The only other evidence applicant offered was his age (twenty-two at the time he committed the offense) and the fact that most of his formative years were spent in incarceration. The court rejected the applicant's contention that the special issues failed to give the jury a vehicle to give mitigating effect to these matters.

As a threshold matter, the court determined that evidence of the applicant's low IQ score "standing alone" did not prove mental retardation.²⁵¹ In fact, the court found no evidence in the record that the applicant was mentally retarded:²⁵²

"According to the American Association on Mental Retardation (AAMR), a person is considered to be mentally retarded only when there is evidence of: (1) subaverage general intellectual functioning, (2) concurrent deficient and adaptive behavior, and (3) onset during the early development."²⁵³ The court evaluated the claim of mental retardation in light of these standards and observed that "'mental retardation' means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period."²⁵⁴ Moreover, the court continued, "'person with mental retardation' means a person determined by a physician or psychologist licensed in this state or certified by the department to have subaverage general intellectual functioning with deficits in adaptive behavior."²⁵⁵

The court did state, however, that even if evidence of the "applicant's low IQ somehow falls within *Penry*'s definition of mental retardation,"²⁵⁶ the applicant was not entitled to relief under *Penry* because there was no "'reasonable likelihood that the jury ha[d] applied the challenged instruction[s] in a way that prevent[ed] the consideration of constitutionally relevant evidence."²⁵⁷ In contrast, *Penry* presented evidence that his mental retardation diminished his ability to control his conduct and conform it to the requirements of the law and therefore, the special issues placed these mitigating qualities beyond the effective reach of the jury. In *Tennard*'s case, however, the court found:

251. *See Ex parte Tennard*, 960 S.W.2d at 61.

252. *See id.* at 62.

253. *Id.*

254. *Id.* (quoting TEX. HEALTH & SAFETY CODE ANN. § 591.003(13) (Vernon 1992)).

255. *Id.* (quoting TEX. HEALTH & SAFETY CODE ANN. § 591.003(16) (Vernon 1992)).

256. *Ex parte Tennard*, 960 S.W.2d at 61.

257. *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367-71 (1993)).

[T]here is no evidence applicant's low IQ rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or that his low IQ rendered him unable to learn from his mistakes or diminished his ability to control his impulses or to evaluate the consequences of his conduct.²⁵⁸

The court thus reasoned that "there was no danger, as in *Penry*, that the jury would have given any mitigating qualities of the evidence of applicant's low IQ only aggravating effect in answering special issue two."²⁵⁹

The dissent responded that the court's ruling offended an "unbroken line of cases since the Supreme Court's decision in *Penry*" in which the Court of Criminal Appeals "has held [that] evidence of mental retardation cannot be adequately considered within the statutory punishment issues."²⁶⁰ The dissent believed that "the majority ignore[d] [this settled precedent] to reach a desired result."²⁶¹ The dissent emphasized that "[w]hen the evidence raises a fact issue concerning the defendant's mental retardation, the defendant is 'entitled to an instruction empowering the jury to assess a penalty less than death, notwithstanding affirmative answers to the special issues, as a 'reasoned moral response' to the fact of his mental retardation."²⁶²

The dissent continued its criticism, stating that "[w]hat the majority has done, in clear contravention of established precedent, is weigh the sufficiency of applicant's mitigating evidence and establish a legal threshold a defendant must meet to be entitled to a *Penry* instruction."²⁶³ In the dissent's view this offended precedent:

This court has long held that it will not weigh mitigating evidence. A defendant is entitled to an instruction on every mitigating issue raised by the evidence, regardless of whether the evidence is strong or weak, unimpeached or contradicted and regardless of whatever the trial judge may think about the credibility of the offense.²⁶⁴

The dissent also observed that "[i]n *Penry*, the Supreme Court acknowledged that an IQ score of seventy or below classifies an individual as 'mentally retarded.'"²⁶⁵ "Accordingly, under the prior decisions of both the United States Supreme Court and this court, the applicant's IQ of sixty-seven is presumptive of his mental retardation and the majority's holding that there is 'no evidence in this record that applicant is mentally retarded' is simply wrong."²⁶⁶ The dissent also challenged the majority's conclusion that "there is a nexus requirement between the evidence of the applicant's mental retardation and his moral culpability," because

258. *Id.* at 62.

259. *Id.*

260. *Id.* at 67 (Baird, J., dissenting).

261. *Ex parte Tennard*, 960 S.W.2d at 67.

262. *Id.* at 67-68 (quoting *Rios v. State*, 846 S.W.2d 310, 315 (Tex. Crim. App. 1992)).

263. *Id.* at 70.

264. *Id.* (citing *Arnold v. State*, 742 S.W.2d 10, 13 (Tex. Crim. App. 1987)).

265. *Id.* at 71 (citing *Penry*, 492 U.S. at 308 n.1).

266. *Ex parte Tennard*, 960 S.W.2d at 71.

“this conclusion flies in the face of established precedent of this State.”²⁶⁷ The dissent conceded that the court’s decisions applying *Penry* have ordinarily required a “nexus between the mitigating evidence and culpability for the crime,”²⁶⁸ but not “a nexus between mental retardation and the capital offense.”²⁶⁹

XI. OFFER OF PROOF

In *Warner v. State*,²⁷⁰ the Court of Criminal Appeals held that the defendant had not preserved for appeal the issue of whether evidence of post-traumatic stress disorder was improperly excluded. The defendant was charged with aggravated kidnapping, aggravated assault, and arson. Before trial, the state filed a motion *in limine* to preclude evidence of treatment for any stress disorder until the court had determined relevance outside the presence of the jury. At a hearing on the motion, appellant objected to the motion *in limine* and advised the trial court that “he intended to offer evidence at the guilt/innocence stage that he had been a veteran of the Vietnam War, that he suffered ‘post-traumatic stress disorder’ (PTSD), and that he had received counseling for that disorder.”²⁷¹ Relying on *Cowles v. State*,²⁷² the appellant argued that the evidence “was admissible to prove that he had not had the specific intent necessary to commit the offenses of aggravated kidnapping and arson.”²⁷³

The trial court granted the State’s motion *in limine* and also found that evidence of PTSD, although admissible at the punishment stage, would not be admissible at the guilt or innocence stage. The appellant did not offer the evidence in question and subsequently was found guilty. His argument regarding the exclusion of this evidence was later rejected by the court of appeals.²⁷⁴ The appellant’s petition for discretionary review was granted by the Court of Criminal Appeals which, upon consideration, dismissed the petition as improvidently granted, because the issue had not been preserved for review. The court added the caveat that “dismissal must not be construed as approval of the reasoning or holding of the Court of Appeals.”²⁷⁵

The court found that the appellant had not preserved the issue for review, because he had not “define[d] ‘post-traumatic stress disorder’ for

267. *Id.* at 72.

268. *Id.* (quoting *Lackey v. State*, 819 S.W.2d 111, 141 n.10 (Tex. Crim. App. 1989)).

269. *Id.*

270. 969 S.W.2d 1 (Tex. Crim. App. 1998) (en banc).

271. *Id.* at 1.

272. 510 S.W.2d 608 (Tex. Crim. App. 1974).

273. *Warner*, 969 S.W.2d at 1. The court in *Cowles* “recognized that evidence of a defendant’s abnormal mental condition falling short of legal insanity is admissible whenever that evidence is relevant to the issue of whether he had the mental state that is a necessary element of the crime charged.” *Id.* at 1 n.1 (citing *Cowles v. State*, 510 S.W.2d at 610).

274. *See Warner v. State*, 944 S.W.2d 812, 815-16 (Tex. Crim. App.—Austin 1997, pet. granted).

275. *Warner*, 969 S.W.2d at 2 (citing *Tompkins v. State*, 888 S.W.2d 825 (Tex. Crim. App. 1994)).

the court or explain[ed] how he intended to prove that he suffered from the disorder . . . [nor did he] explain how evidence of PTSD would be relevant to the question of specific intent.”²⁷⁶ In these circumstances, the court concluded, no sufficient offer of proof had been made.²⁷⁷ The court then stated that an adequate “offer of proof may be in question-and-answer form, or it may be in the form of or a concise statement by counsel” which “include[s] a reasonably specific summary of the evidence offered” and a statement of “the relevance of the evidence unless the relevance is apparent, so that the court can determine whether the evidence is relevant and admissible.”²⁷⁸

276. *Id.* at 1-2.

277. *See id.* at 2. In ruling that the error had not been preserved, the court noted: “Texas Rule of Criminal Evidence 103(a)(2) provides that error may not be predicated upon a ruling which excludes evidence unless a substantial right of a party is affected and the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which questions were asked.” *Id.*

278. *Id.* (citing *Love v. State*, 861 S.W.2d 899, 901 (Tex. Crim. App. 1993)).

