



January 1996

Crimianl Law

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Recommended Citation

Rob Kepple, *Crimianl Law*, 49 SMU L. REV. 839 (1996)
<https://scholar.smu.edu/smulr/vol49/iss4/9>

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CRIMINAL LAW

*Rob Kepple**

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I. INTRODUCTION

THIS Article addresses the changes made to the Penal Code by the 74th Legislature. The 74th Legislative Session was the first opportunity for the Legislature to make revisions to the new Penal Code, which became effective September 1, 1994. Perhaps the most notable amendments are those to Chapter 12 which alter the punishments for repeat offenders who commit state jail felonies, and the amendments to Chapter 46 which are part of the concealed handgun legislation. In general, the legislature exercised restraint in amending the new Code as practitioners become familiar with the 1994 reenactment.

II. AN OVERVIEW OF TEXAS PENAL CODE CHANGES

Most of the Texas Penal Code changes discussed are effective September 1, 1995; that is, they are effective for offenses occurring on or after September 1, 1995. Generally, an offense is committed before the effective date of the change if any element of the offense occurs before the effective date.

A. SENTENCES FOR OFFENSES ARISING OUT OF THE SAME EPISODE

The legislature created an exception to the rule that sentences for two or more offenses arising out of the same criminal episode and prosecuted in a single criminal action must run concurrently.¹ If the defendant is convicted of multiple offenses of intoxication manslaughter² arising out of the same criminal episode, the court may "stack" the punishments.³ In addition, the court may order the punishments for intoxication manslaughter convictions that arise out of the same criminal episode to run consecutively if a plea agreement was reached in the cases.⁴

1. TEX. PENAL CODE ANN. § 3.03 (Vernon Supp. 1996).

2. *Id.* § 49.08 (Vernon 1994).

3. *Id.* § 3.03(b)(1) (Vernon Supp. 1996).

4. *Id.* § 3.03(b)(2).

B. AGE AFFECTING CRIMINAL RESPONSIBILITY

The legislature amended the Penal Code to conform with changes in the Family Code regarding the certification of juveniles to stand trial as adults.⁵ For conduct occurring on or after January 1, 1996, juveniles FOURTEEN years of age or older may stand trial as adults for the "violation of a penal statute that is, or is a lesser included offense of, a capital felony, an aggravated controlled substance felony, or a felony of the first degree."⁶

C. SELF DEFENSE

In 1994, the legislature abolished the common law right to arm oneself and seek a peaceful resolution defense⁷ if the actor was carrying a weapon in violation of section 46.02 of the Texas Penal Code.⁸ The legislature further limited this common law right to exclude situations in which the actor seeks an explanation from or discussion with another person concerning their differences if the actor is possessing or transporting a weapon in violation of section 46.05 of the Texas Penal Code.⁹

D. DEADLY FORCE IN DEFENSE OF PERSON

The legislature deleted the requirement that an actor retreat, if a reasonable person in the actor's situation would have retreated, before the actor uses deadly force against a person who is committing the offense of unlawful entry into the habitation of the actor.¹⁰ The actor still must be justified in using force under section 9.31 of the Texas Penal Code, and still must reasonably believe that the deadly force is immediately necessary to protect himself against another's use or attempted use of unlawful deadly force, or to prevent another's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.¹¹

E. PUNISHMENTS

1. State Jail Felony Punishments

The basic state jail felony punishment range of 180 days to two years in a state jail remains unchanged.¹² However, effective January 1, 1996, the legislature changed the punishment ranges for state jail felons with prior

5. TEX. FAM. CODE ANN. § 54.02(a)(2) (Vernon Supp. 1996) (effective Jan. 1, 1996).

6. TEX. PENAL CODE ANN. § 8.07(a)(6) (Vernon Supp. 1996) (effective Jan. 1, 1996). For all other felonies, the law regarding the court's ability to certify juveniles 15 years of age or older to stand trial as adults remains unchanged. TEX. FAM. CODE ANN. § 54.02(a) (Vernon Supp. 1996).

7. See *Banks v. State*, 656 S.W.2d 446 (Tex. Crim. App. 1983).

8. TEX. PENAL CODE ANN. § 46.02 (Vernon 1994 & Supp. 1996); *Id.* § 9.31(b)(5) (Vernon 1994) (amended 1995).

9. *Id.* § 46.05 (Vernon 1994); *Id.* § 9.31(b)(5)(B) (Vernon Supp. 1996).

10. *Id.* § 9.32(b).

11. TEXAS PENAL CODE ANN. § 9.32 (Vernon Supp. 1996).

12. *Id.* § 12.35 (Vernon 1994).

felony convictions. If the state proves that a person convicted of a state jail felony has two prior final state jail felony convictions, that person will be punished for a third degree felony.¹³ If the state proves that a person convicted of a state jail felony has previously been finally convicted of two felonies of any type, and the second previous conviction is for an offense that occurred subsequent to the first previous conviction having become final, the defendant shall be punished for a second degree felony.¹⁴ This new enhancement provision replaces the provision that apparently allowed the state to enhance state jail felony convictions to the habitual criminal punishment range of twenty-five to ninety-nine years or life.¹⁵

The legislature also amended the state jail felony law with regard to the ability of a court to punish state jail felonies as misdemeanors and with regard to conditions of community supervision. A court that convicts a person of a state jail felony may punish that person for a Class A misdemeanor, and not for a Class B misdemeanor.¹⁶ If the court places the defendant on community supervision, it may order that the defendant serve up to ninety days in the county jail, or not less than ninety days or more than 180 days in a state jail as a condition of the community supervision.¹⁷ If the court places the defendant on community supervision for delivery of a controlled substance or marijuana, the court may order that the defendant serve not less than ninety days or more than one year in a state jail as a condition of community supervision.¹⁸ Finally, the legislature amended the law which requires a court to automatically suspend all state jail felony sentences, to provide that the court must automatically suspend a state jail felony sentence *only* if the defendant has not previously been convicted of a felony.¹⁹

2. *Punishment for Repeat Sex Offenders*

The legislature introduced into the Penal Code an automatic life sen-

13. *Id.* § 12.42(a)(1) (Vernon Supp. 1996). This is the so-call "loop-out" provision that was designed to provide an enhancement out of the state jail system for persons who continued to commit nothing but state jail felonies.

14. *Id.* § 12.42(a)(2).

15. *Id.* § 12.42(d). The amendments to § 12.42(a)(2), (d) address this issue, which has caused litigation. The Texas Court of Criminal Appeals resolved a conflict in the lower courts by ruling that the state could not habitualize state jail felonies. *State v. Mancuso*, No. 604-95, 1996 WL 71519 (Tex. Crim. App. Feb. 21, 1996). *Compare*, *State v. Mancuso*, 903 S.W.2d 386 (Tex. App.—Houston [1st Dist.] 1995, pet. granted) (State may not enhance state jail felony convictions to habitual range under § 12.42(d)) *with* *State v. Thompson*, No. 14-94-01192-CR (Tex. App.—Houston [14th Dist.] Oct. 26, 1995, pet. filed) (not designated for publication) (State may enhance state jail felony conviction to habitual punishment range under § 12.42(d)).

16. TEX. PENAL CODE ANN. § 12.44(a) (Vernon Supp. 1996). The amendment to this section also deletes a court's ability to punish a third degree felony as a Class A misdemeanor. *Id.*

17. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 15(c)-(d) (Vernon Supp. 1996).

18. *Id.* § 15(d).

19. *Id.* § 15(a).

tence for repeat sex offenders.²⁰ A defendant convicted of aggravated sexual assault;²¹ aggravated kidnapping with the intent to violate or abuse the victim sexually;²² or burglary with the intent to commit sexual assault,²³ aggravated sexual assault, indecency with a child,²⁴ or aggravated kidnapping with the intent to violate or abuse the victim sexually, shall be punished by life in prison if: (1) the defendant has two prior final felony convictions, and (2) one of the prior convictions is for sexual performance by a child,²⁵ possession or promotion of child pornography,²⁶ indecency with a child, sexual assault, aggravated sexual assault, prohibited sexual conduct,²⁷ aggravated kidnapping with the intent to violate or abuse the victim sexually, or burglary with the intent to commit any of these offenses except sexual performance by a child or possession or promotion of child pornography.²⁸ Furthermore, a defendant sentenced to life in prison under this provision must serve thirty-five calendar years before becoming eligible for parole.²⁹ The Board of Pardons and Parole may grant parole only upon a two-thirds majority vote of the entire Board, after the Board reviews a report by the Texas Department of Criminal Justice on the probability that the inmate would commit additional offenses if released.³⁰

3. *Use of Juvenile Adjudications for Enhancement*

Effective January 1, 1996, an adjudication in juvenile court that a child engaged in delinquent conduct constituting a felony for which the child is committed to the Texas Youth Commission on a direct sentence, probation revocation or as part of a determinate sentence, is a final felony conviction for enhancement purposes.³¹ However, the juvenile adjudication may not be used under section 12.42(d) of the Texas Penal Code to enhance a defendant to habitual status or to an automatic life sentence as a repeat sex offender.³²

4. *Penalties for Repeat Misdemeanor Offenders*

The legislature gave courts the ability to assess fines in misdemeanor cases in which the punishment range is enhanced with a prior conviction. If it is shown in the trial of a Class A misdemeanor that the defendant has before been convicted of a Class A or a felony, the punishment is ninety

20. TEX. PENAL CODE ANN. § 12.42(d) (Vernon Supp. 1996).

21. *Id.* § 22.021 (Vernon 1994 & Supp. 1996).

22. *Id.* § 20.04(a)(4) (Vernon 1994).

23. *Id.* § 22.011 (Vernon 1994 & Supp. 1996).

24. *Id.* § 21.11 (Vernon 1994).

25. TEX. PENAL CODE ANN. § 43.25 (Vernon 1994).

26. *Id.* § 43.26 (Vernon 1994 & Supp. 1996).

27. *Id.* § 25.02 (Vernon 1994).

28. *Id.* § 12.42(d) (Vernon Supp. 1996).

29. TEX. CODE CRIM. PROC. ANN. art. 42.18, § 8(b)(2) (Vernon Supp. 1996).

30. *Id.* § 7(g).

31. TEX. PENAL CODE ANN. § 12.42(f) (Vernon Supp. 1996).

32. *Id.*

days to one year, and now includes an optional maximum fine of \$4,000.³³ If it is shown on the trial of a Class B misdemeanor that the defendant has before been convicted of a Class A, Class B, or any felony, punishment is thirty days to 180 days, and now includes an optional maximum fine of \$2,000.³⁴

F. AGGRAVATED KIDNAPPING

The legislature expanded the aggravated kidnapping statute to include an abduction in which the actor uses or exhibits a deadly weapon during the commission of the offense.³⁵

G. ASSAULT

The legislature added a number of enhancement provisions, based on various assault victim classifications. A Class A misdemeanor assault will be punished as a third degree felony if the offense is committed against a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or if in retaliation or on account of an exercise of official power or performance of an official duty as a public servant.³⁶ A Class A misdemeanor assault will be punished as a state jail felony if it is shown that the defendant has two or more prior convictions for assaults against a family member.³⁷ Finally, a Class C assault will be punished as a Class A misdemeanor assault if it was committed against an elderly or disabled individual.³⁸

H. SEXUAL ASSAULT

The legislature added two new types of sexual assault. First, an offense is committed if an actor is a mental health care provider who causes a patient or former patient to submit to or participate in sexual conduct described by the sexual assault statute,³⁹ by exploiting the patient's or former patient's emotional dependency on the actor.⁴⁰ In addition, it is an offense if the actor is a clergyman who causes a person to submit to or participate in sexual conduct described by the sexual assault statute,⁴¹ by

33. *Id.* § 12.43(a).

34. *Id.* § 12.43(b).

35. *Id.* § 20.04(b).

36. TEX. PENAL CODE ANN. § 22.01(b) (Vernon Supp. 1996).

37. *Id.* § 22.01(b).

38. *Id.* § 22.01(c). An elderly individual means a person 65 years of age or older. *Id.* § 22.04(c)(2) (Vernon 1994). A disabled individual "means a person older than 14 years of age who by reason of age or physical or mental disease, defect, or injury is substantially unable to protect himself from harm or to provide food, shelter, or medical care for himself." *Id.* § 22.04(c)(3).

39. That conduct is causing the penetration of the anus or female sexual organ by any means, causing the penetration of the mouth of another with the sexual organ of the actor, or causing the sexual organ of another person to contact the mouth, anus, or sexual organ of another. TEX. PENAL CODE ANN. § 22.011(a)(1) (Vernon 1994).

40. *Id.* § 22.011(b)(9) (Vernon Supp. 1996). The legislature did not offer a definition of "exploiting" in the statute.

41. *See supra* note 39.

exploiting the other person's emotional dependency on the actor in the actor's professional character as a spiritual advisor.⁴²

I. AGGRAVATED SEXUAL ASSAULT

A sexual assault is now an aggravated sexual assault if the victim is a person sixty-five years of age or older.⁴³

J. VIOLATION OF A PROTECTIVE ORDER OR MAGISTRATE'S ORDER

The legislature created a new type of protective order called a Magistrate's Order for Emergency Protection.⁴⁴ This new type of protective order may be issued by a magistrate upon a person's arrest for a stalking offense or a family violence-related offense, and is good for thirty days.⁴⁵ Thus, the legislature amended the Penal Code to provide that the violation of such an order is a Class A misdemeanor.⁴⁶ In addition, the legislature amended the penalty provisions of the penal statute to provide that a third conviction for violation of a protective order or magistrate's order is a state jail felony.⁴⁷

K. BURGLARY

The legislature expanded the definition of burglary of a habitation to include not just entering with the *intent* to commit a felony, but also entering a habitation and actually committing a felony or attempting to commit a felony.⁴⁸

L. THEFT

1. *The Value Ladder*

The legislature amended the value ladder by changing the "break" between Class C and Class B misdemeanor theft of property. A theft of property is a Class C misdemeanor if the value of the property stolen is less than \$50, unless the property is stolen by issuing or passing a check or similar sight order in violation of section 31.06 of the Texas Penal Code (*i.e.*, a "hot" check), in which event it is a Class C misdemeanor if the value of the property is less than \$20.⁴⁹ A theft of property is a Class B misdemeanor if the value of the property is \$50 or more but less than \$500, or \$20 or more but less than \$500 if the defendant stole the property

42. TEX. PENAL CODE ANN. § 22.011(b)(10) (Vernon Supp. 1996).

43. *Id.* § 22.021(a)(2)(C).

44. TEX. CODE CRIM. PROC. ANN. art. 17.292 (Vernon Supp. 1996) (effective June 14, 1995). Section 42.07(a)(7) of the Penal Code, referenced in art. 17.292, has been moved to § 42.071 of the Penal Code. TEX. PENAL CODE ANN. § 42.071 (Vernon Supp. 1996). Article 17.292 applies to § 42.07 of the Penal code as a revision of § 42.07(a). *See* TEX. GOV'T CODE ANN. § 311.027 (Vernon Supp. 1996).

45. TEX. CODE CRIM. PROC. ANN. art. 17.292 (Vernon Supp. 1996).

46. TEX. PENAL CODE ANN. § 25.07(a) (Vernon Supp. 1996).

47. *Id.* § 25.07(g).

48. *Id.* § 30.02(d)(2).

49. *Id.* § 31.03(e)(1).

by issuing a hot check.⁵⁰

In addition, the legislature changed the value ladder for the theft of livestock. The theft of less than ten head of cattle, horses, or exotic livestock or fowl⁵¹ valued at less than \$20,000, or less than 100 head of sheep, swine, or goats, or any part thereof valued at less than \$20,000, is a state jail felony.⁵² The theft of ten or more head of cattle, horses, or exotic livestock or fowl valued at less than \$100,000, or 100 or more head of sheep, swine, or goats having a value of less than \$100,000, is a third degree felony.⁵³

2. *Theft of Pesticides*

An actor who purchases or receives from any source other than a licensed retailer or distributor of pesticides a state-limited-use pesticide or a restricted-use pesticide is presumed to know the pesticide is stolen if the actor: (1) fails to record the name, address, and physical description of the seller, (2) fails to record a complete description of the pesticide, and (3) fails to obtain from the seller a signed warranty alleging a right to possess the pesticide.⁵⁴

M. PRESUMPTION FOR THEFT BY CHECK

The legislature created a presumption of theft of property if: (1) the actor stops a check, (2) the owner demands return of the property or payment, and (3) the actor does not return the property or pay within ten days.⁵⁵ In addition, the legislature standardized the language that must be included in a demand for the payment of a check returned for insufficient funds:

This is a demand for payment in full for a check or order not paid because of a lack of funds or insufficient funds. If you fail to make payment in full within ten days after the date of receipt of this notice, the failure to pay creates a presumption for committing an offense, and this matter may be referred for criminal prosecution.⁵⁶

N. THEFT OF CABLE SERVICE

The legislature made it an offense if, without the permission of the cable service provider and with the intent to intercept cable transmissions, the actor: (1) intercepts or decodes cable transmissions, (2) attaches

50. *Id.* § 31.03(e)(2).

51. Exotic livestock is defined at TEX. AGRIC. CODE ANN. § 142.001(4) (Vernon Supp. 1996). Exotic fowl is defined at TEX. AGRIC. CODE ANN. § 142.001(5) (Vernon Supp. 1996).

52. TEX. PENAL CODE ANN. § 31.03(e)(4) (Vernon Supp. 1996).

53. *Id.* § 31.03(e)(5).

54. *Id.* § 31.03(c)(8) (Vernon Supp. 1996).

55. *Id.* § 31.06(f). For cases discussing the application and constitutionality of presumptions under Texas law, see *Green v. State*, 893 S.W.2d 536 (Tex. Crim. App. 1995); *Willis v. State*, 790 S.W.2d 307 (Tex. Crim. App. 1990); *Bellamy v. State*, 742 S.W.2d 677 (Tex. Crim. App. 1987).

56. TEX. PENAL CODE ANN. § 31.06(b)(3) (Vernon Supp. 1996).

decoding equipment to the cable service, (3) possesses equipment designed to intercept, descramble or decode cable transmissions, or (4) tampers or modifies cable television equipment.⁵⁷ The statute also presumes a person intentionally or knowingly used a cable interception device or authorized the cable connection if an unauthorized cable television connection is present on the premises used or occupied by that person,⁵⁸ unless the person accused shows by a preponderance of the evidence that the unauthorized device or connection may be attributed to the conduct of another.⁵⁹ Finally, a person commits an offense if, for remuneration, the person manufactures, imports into the State, exports out of the State, distributes or sells any device or the plans for such a device or system with the intent to aid in the commission of a cable interception offense described above.⁶⁰

O. INSURANCE FRAUD

The legislature created the offense of insurance fraud involving health, property or casualty insurance. A person now commits an offense if, with intent to deceive the insurer, the person prepares or presents a claim that contains false or misleading information that is material to the claim.⁶¹ The statute sets out a number of examples that are considered material to a claim, such as whether the health care was provided, the nature of the services provided, and the diagnosis made.⁶² A person also commits an offense if, with intent to deceive the insurer, the person solicits, offers, pays, or receives a benefit in connection with furnishing health care goods or services for which a claim is submitted.⁶³ The punishment depends on the value of services in question, as well as on the standard theft value ladder.⁶⁴

P. EVADING ARREST OR DETENTION

The legislature amended the evading arrest statutes to reflect a growing concern for evading offenses involving motor vehicle chases. Intentionally fleeing from a person the actor knows is a peace officer attempting to lawfully arrest or detain the actor continues to be a Class B misdemeanor.⁶⁵ That conduct, however, is (1) a Class A misdemeanor if the actor uses a vehicle while in flight, (2) a State jail felony if the actor uses a vehicle while in flight and the actor has been previously convicted under

57. *Id.* § 31.13(a)(b). An offense under this section is a Class B misdemeanor, unless the crime is committed for remuneration, in which case it is a Class A misdemeanor. *Id.* § 31.12(h).

58. *Id.* § 31.12(d).

59. *Id.* § 31.12(e).

60. TEX. PENAL CODE ANN. § 31.13 (Vernon Supp. 1996). An offense under this section is a Class A misdemeanor. *Id.* § 31.13(d).

61. *Id.* § 35.02.

62. *Id.* § 35.02(c).

63. *Id.* § 35.02(b).

64. TEX. PENAL CODE ANN. § 35.02(d) (Vernon Supp. 1996).

65. *Id.* § 38.04(b).

this section, (3) a third degree felony if another person suffers serious bodily injury as a direct result of the officer's attempt to apprehend the actor while in flight, and (4) a second degree felony if another person suffers death as a direct result of the officer's attempt to apprehend the actor while in flight.⁶⁶ A person who is subject to prosecution under both this section and another law may be prosecuted under either,⁶⁷ which means that the aggravated assault statutes and the felony murder rule⁶⁸ can be used in the appropriate circumstances.

Q. STALKING

The legislature moved the stalking law out of the Harassment statute⁶⁹ and into its own Penal Code section.⁷⁰ In addition, the legislature deleted the requirement that the State prove as an element of the offense that at least one of the stalking incidents occurred after the stalking victim reported a prior incident of stalking conduct to a law enforcement agency.⁷¹

R. WEAPONS OFFENSE

1. *Discharge of Firearm in Certain Municipalities*

It is now a Class A misdemeanor to recklessly discharge a firearm inside the corporate limits of a municipality of 100,000 persons or more.⁷²

2. *Unlawful Carrying Weapons*

However, the legislature did amend the Unlawful Carrying Weapons statute to authorize additional persons to carry a handgun, illegal knife or club. Those people now authorized include: (1) a personal protection officer licensed under the Private Investigator Act who is providing personal protection,⁷³ (2) the holder of an alcoholic beverage permit or the employee of the holder if the actor is supervising the operation of the permitted premises,⁷⁴ and, (3) on or after January 1, 1996, a person licensed to carry a concealed handgun if the license is for the category of gun being carried and the gun is concealed.⁷⁵

3. *Places Weapons Prohibited*

Effective May 30, 1995, the legislature expanded the places where weapons are prohibited to include any grounds or building on which an

66. *Id.* § 38.04(b).

67. *Id.* § 38.04(d).

68. *Id.* § 19.02(b)(3).

69. TEX. PENAL CODE ANN. § 42.07 (Vernon Supp. 1996).

70. *Id.* § 42.071.

71. *Id.* § 42.071.

72. *Id.* § 42.12.

73. *Id.* § 46.02(b)(7).

74. TEX. PENAL CODE ANN. § 46.02(b)(7).

75. *Id.* § 46.02(b)(7) amended by Act of May 24, 1995, 74th Leg., R.S. ch. 998, § 3, 1995 Tex. Gen. Laws 5006, 5007.

activity sponsored by a school or educational institution is conducted.⁷⁶ The legislature also expanded the defenses to prosecution under this section to allow a personal protection officer to carry a weapon into the secured area of an airport⁷⁷ and to allow a security guard to carry a weapon on the premises of a racetrack.⁷⁸ However, it is not a defense to prosecution under section 46.03 that the actor possessing a handgun was licensed to carry the handgun.⁷⁹

4. *Unlawful Carrying of Handgun by License Holder*

Effective January 1, 1996, license holders may carry a concealed handgun. Also effective as of that date are a number of Penal Code offenses relating to how and where the license holder may carry the weapon. It is an offense for a license holder to intentionally fail to conceal the handgun.⁸⁰ A license holder also commits an offense if the license holder intentionally, knowingly, or recklessly carries a licensed handgun: (1) on a liquor licensed premise if the business derives fifty-one percent or more of its income from the sale of alcohol from on-premises consumption;⁸¹ (2) on premises where a high school, collegiate, or professional sporting event or interscholastic event is taking place, unless the holder is a participant and the handgun is used in the event;⁸² (3) on the premises of a correctional facility;⁸³ (4) on the premises of a licensed hospital or nursing home, unless the holder has written permission;⁸⁴ (5) in an amusement park;⁸⁵ (6) on the premises of a church, synagogue, or other established place of religious worship;⁸⁶ (7) at any meeting of a governmental entity;⁸⁷ and (8) while intoxicated.⁸⁸

The offenses listed above are Class A misdemeanors, with the exception of carrying the weapon on an alcohol-licensed premise or on the premises of a correctional facility which are third degree felonies.⁸⁹ In

76. *Id.* § 46.03(a)(1).

77. *Id.* § 46.03(d)(5).

78. *Id.* § 46.03(g).

79. TEX. PENAL CODE ANN. § 46.03(f) (Vernon Supp. 1996).

80. *Id.* § 46.035(a).

81. *Id.* § 46.035(b)(1).

82. *Id.* § 46.035(b)(2).

83. *Id.* § 46.035(b)(3).

84. TEX. PENAL CODE ANN. § 46.035(b)(4) (Vernon Supp. 1996).

85. *Id.* § 46.035(b)(5). An amusement park is defined as a permanent indoor or outdoor facility or park where amusement rides are available for use by the public that is located in a county with a population of more than one million, encompasses at least 75 acres in surface area, is enclosed with access only through controlled entries, is open for operation more than 120 days in each calendar year, and has security guards on the premises at all times. The term does not include any public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area.

Id. § 46.035(f)(1).

86. *Id.* § 46.035(b)(6).

87. *Id.* § 46.035(c).

88. TEX. PENAL CODE ANN. § 46.035(d) (Vernon Supp. 1996).

89. *Id.* § 46.035(g).

addition, for the purposes of this section of the Penal Code, "premises" is defined as a building or a portion of a building. The term does not include any public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area.⁹⁰

5. *Unlawful Transfer of Certain Weapons*

The legislature amended the law concerning the transfer of weapons to prohibit a person from selling, renting, leasing, loaning, or giving a handgun to any person knowing that the person is under an active protective order.⁹¹

6. *Penalty If Offense Committed Within Weapon-Free Zone*

If an actor commits a weapons offense under Chapter 46 of the Penal Code, the punishment is increased to the next punishment range if it is shown beyond a reasonable doubt that the offense occurred at a place the actor knew was (1) within 300 feet of the premises of a school,⁹² or (2) on a premise where an official school function or event sponsored or sanctioned by the University Interscholastic League is taking place.⁹³ This enhancement does not apply to offenses under section 46.03(a)(1) of the Texas Penal Code.⁹⁴

7. *Making a Firearm Accessible to a Child*

A person commits a Class C misdemeanor if a child gains access to a readily dischargeable firearm and the person with criminal negligence failed to secure the firearm or left the firearm in a place in which the person knew or should have known the child would gain access.⁹⁵ It is a Class A misdemeanor if the person commits this offense and the child discharges the firearm and causes death or serious bodily injury to himself or another.⁹⁶

It is an affirmative defense to a prosecution for this offense that the child's access to the firearm: (1) was supervised by a person older than eighteen and was for hunting, sporting or other lawful purposes,⁹⁷ (2) consisted of a lawful defense by the child of people or property,⁹⁸ (3) was gained by entering the property in violation of the Penal Code,⁹⁹ or (4) occurred during a time when the actor was engaged in an agricultural enterprise.¹⁰⁰ In addition, a peace officer may not arrest a person for an

90. *Id.* § 46.035(f)(3).

91. *Id.* § 46.06(5).

92. *Id.* § 46.11(a)(1).

93. TEX. PENAL CODE ANN. § 46.11(a)(2) (Vernon Supp. 1996).

94. *Id.* § 46.11(b).

95. *Id.* § 46.13(b).

96. *Id.* § 46.13(e).

97. *Id.* § 46.13(c)(1).

98. TEX. PENAL CODE ANN. § 46.13(c)(2) (Vernon Supp. 1996).

99. *Id.* § 46.13(c)(3).

100. *Id.* § 46.13(c)(4). The statute does not provide a definition for "agricultural enterprise."

offense under this section before the seventh day after the offense if the actor is a member of the child's family and the child suffered serious bodily injury or death.¹⁰¹

8. *Nonapplicability to Peace Officers*

The legislature amended the Penal Code to provide that section 46.02 and section 46.03 do not apply to peace officers, whether the officer is on or off duty.¹⁰²

S. DRIVING WHILE INTOXICATED

In a non-substantive revision of the Penal Code, the legislature throughout the Code deleted the word "driving" in the offense of "operating a motor vehicle in a public place" while intoxicated.¹⁰³

The minimum term of confinement for a second driving while intoxicated conviction was increased from fifteen to thirty days.¹⁰⁴ The enhancement statutes were also amended to provide for the enhancement of driving while intoxicated convictions with prior intoxication assault and intoxication manslaughter convictions.¹⁰⁵ Finally, the legislature restated by statute that proof of culpable mental state is not required in prosecutions under Chapter 49.¹⁰⁶

T. ENGAGING IN ORGANIZED CRIMINAL ACTIVITY

The legislature reenacted the offense of participating in a combination or in the profits of a combination as a member of a criminal street gang.¹⁰⁷ A "criminal street gang" is defined as three or more persons having a common identifying sign or identifiable leadership who continuously or regularly associate in the commission of criminal activities.¹⁰⁸

III. CONCLUSION

Although the 74th Legislature made significant changes to the Penal Code in the area of state jail felony punishments and concealed weapons laws, the Legislature demonstrated restraint by minimizing amendments while practitioners become familiar with the 1994 reenactment. As time passes and the strengths and shortfalls of the 1994 Code become apparent, and as appellate courts interpret the new provisions, the author anticipates that once again the Penal Code will be amended with increasing frequency.

101. *Id.* § 46.13(f).

102. *Id.* § 46.15.

103. *See, e.g.*, TEX. PENAL CODE ANN. § 49.04(a) (Vernon Supp. 1996). This change was made as part of the State's continuing statutory revision program under Chapter 323, Government Code. S.B. 959. The bill that accomplished this change stated the purpose of the bill was to codify without substantive change. *Id.* §1.01, S.B. 959.

104. TEX. PENAL CODE ANN. § 49.04(a).

105. *Id.* § 49.09(c).

106. *Id.* § 49.11; *see* *Hardie v. State*, 588 S.W.2d 936 (Tex. Crim. App. [Panel Op.] 1975); *Ex parte Ross*, 522 S.W.2d 214 (Tex. Crim. App. 1975), *cert. denied*, 423 U.S. 1018 (1979).

107. TEX. PENAL CODE ANN. § 71.02(a) (Vernon Supp. 1996).

108. *Id.* § 71.01(d).

