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CRIMINAL LAW

by

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I. DEFENSES

A. Self-Defense

THE Texas Court of Criminal Appeals and the Fort Worth court of appeals during the Survey period addressed the extent of deadly force that a person may use in self-defense.[1] In *Phelen v. State*[2] the court of criminal appeals disapproved the defendant's proposed charge to the jury that if the right to shoot in self-defense existed, the defendant had the right to continue to shoot until the danger to his life had passed.[3] Prior to passage of the 1974 Penal Code[4] such an instruction was proper if warranted by the facts.[5] The court relied heavily on the 1974 Penal Code's requirement that a person retreat if a reasonable person in the actor's situation would do so,[6] and held that such a charge is no longer proper.[7] The court also concluded that the requested instruction merely repeated the instructions actually given to the jury.[8]

In a case of first impression in Texas the Forth Worth court of appeals set limits on the admissibility of expert testimony concerning the battered wo-

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1. See TEX. PENAL CODE ANN. §§ 9.31 (Vernon 1974), 9.32 (Vernon Supp. 1986) for the statutory requirements of the self-defense claim.

2. 683 S.W.2d 440 (Tex. Crim. App. 1984).

3. *Id.* at 445.

4. TEX. PENAL CODE ANN. §§ 1.01-71.05 (Vernon 1974 & Supp. 1986).

5. *See, e.g.*, Conn v. State, 158 S.W.2d 503, 506 (Tex. Crim. App. 1941) (continued shooting justified so long as defendant reasonably believed life or person in danger); Boaz v. State, 89 Tex. Crim. 515, 231 S.W. 790, 794 (1920) (defendant could shoot until danger passed). *But cf.* Goodman v. State, 134 Tex. Crim. 280, 282, 114 S.W.2d 885, 886 (1983) (no right to instruction on continued shooting unless actual danger present of serious bodily injury).

6. *See* TEX. PENAL CODE ANN. § 9.32(2) (Vernon Supp. 1986).

7. 683 S.W.2d at 445.

8. *Id.* The court instructed the jury that:

> When a person is attacked with an unlawful deadly weapon, or he reasonably believes he is under attack or attempted attack with unlawful deadly force, and there is created in the mind of such person a reasonable expectation or fear of death or serious bodily injury, then the law excuses or justifies such person in resorting to deadly force *by any means at his command* to the degree that he reasonably believes immediately necessary, viewed from his standpoint at the time, to protect himself from such attack or attempted attack . . . .

Id. (emphasis by the court). Justice Teague pointed out in his dissent the impact an instruction or lack thereof may have on a juror. *Id.* at 446 (Teague, J., dissenting).

man syndrome. The defendant in *Fielder v. State*[9] testified that she was a battered wife and that after several years of abuse she killed her husband in self-defense. The court approved the trial court's exclusion of expert testimony regarding the battered woman syndrome and the reasons for the defendant's failure to leave the abusive relationship prior to the incident that lead to the victim's death.[10] In a previous case the court of criminal appeals held that expert testimony was admissible to show an accused's state of mind at the time of the offense.[11] In *Fielder*, however, the psychiatrist never examined the defendant and never reviewed the facts of the case. The court concluded that the expert was incapable of rendering an opinion as to the defendant's state of mind.[12] Relying solely upon the defendant's statutory duty to retreat if at all possible,[13] the court limited its inquiry to the immediate situation and disregarded the defendant's reasons for not leaving the relationship earlier.[14] The court held that a claim of self-defense does not in and of itself raise the issues of the defendant's prior batterings or her reasons for remaining in such a relationship.[15] The court required that a defendant identify herself as a battered woman before the trial court may admit expert testimony on the battered woman syndrome.[16]

B. Insanity

In *Nethery v. State*[17] the court of criminal appeals reviewed the trial court's charge to the jury on temporary insanity caused by intoxication.[18] The defendant was charged with capital murder for the fatal shooting of a Dallas police officer. In support of his temporary insanity defense the defendant offered testimony that he had been drinking and had smoked a marijuana cigarette. The trial court charged the jury that "[e]vidence of temporary insanity caused by intoxication may be introduced by the actor in mitigation of the penalty attached to the offense for which he is being tried. 'Intoxication' means disturbance of mental or physical capacity resulting from the introduction of any substance into the body."[19] The trial court

9. 683 S.W.2d 565 (Tex. App.—Fort Worth 1985, no pet.).

10. *Id.* at 593, 596.

11. McClure v. State, 575 S.W.2d 564 (Tex. Crim. App. 1979). The *McClure* court admitted the testimony pursuant to TEX. PENAL CODE ANN. § 19.06 (Vernon 1974). 575 S.W.2d at 567.

12. 683 S.W.2d at 591.

13. *See* TEX. PENAL CODE ANN. § 9.32(2) (Vernon Supp. 1986).

14. 683 S.W.2d at 593, 596.

15. *Id.* at 592. The court recognized that a battered woman would not respond as a reasonable person would in self-defense. The court nonetheless concluded that testimony on the battered woman syndrome is irrelevant absent proof that the defendant is in fact a battered woman. *Id.* at 592-93.

16. *Id.* at 595. Identifying the defendant as a battered woman is essential to outweigh the prejudicial effect of such testimony. *Id.*

17. 692 S.W.2d 686 (Tex. Crim. App. 1985) (en banc).

18. *Id.* at 711-12; *see* TEX. PENAL CODE ANN. § 8.04 (Vernon 1974) (defining intoxication as a disturbance in mental or physical capacity as a result of taking a substance into the body).

19. 692 S.W.2d at 711.

refused, however, to instruct the jury on the correct definition of insanity.[20] The court of criminal appeals upheld the trial court's decision, concluding that the facts did not entitle the defendant to a jury charge on temporary insanity due to intoxication.[21] Both courts relied upon the testimony of an eyewitness and the slain officer's partner that the defendant did not act or appear intoxicated at any time.[22]

C. *Accident*

In *Davis v. State*[23] a Houston court of appeals held that accident is no longer a criminal defense in Texas.[24] The defendant had been convicted of negligent homicide. While distinguishing accident and mistake of fact, the court held that an instruction on accident would be subsumed by an instruction that the jury should acquit the defendant if the jury had a reasonable doubt that he voluntarily engaged in the act that he was accused of having committed.[25]

D. *Entrapment*

In *Soto v. State*[26] the court of criminal appeals faced the question of what level of police involvement constitutes entrapment. Soto and his police-informant girlfriend were together when she made a phone call to an undercover narcotics officer of the Austin Police Department. The girlfriend asked the defendant to "score" for her friend, the narcotics officer. Soto then agreed to provide the officer with one gram of heroin if the officer would buy a second gram for Soto's use. Soto testified that he only "scored" for the officer because of his sexual relationship with his girlfriend and because she asked him to do it. The trial court rejected Soto's contention and concluded that he made the purchase to obtain heroin for himself.[27] Justice Odom, writing for the majority, also noted that Soto's girlfriend was not a law enforcement agent[28] and thus the evidence failed to meet the two-part

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20. *Id.* The insanity statute, TEX. PENAL CODE ANN. § 8.01(a) (Vernon 1974) provided at the time of trial that:

> It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of mental disease or defect, either did not know that his conduct was wrong or was incapable of conforming his conduct to the requirement of the law he allegedly violated.

The legislature has since amended the statute in order to narrow the confines of the insanity defense. *See id.* § 8.01(a) (Vernon Supp. 1986).

21. *Nethery*, 692 S.W.2d at 711-12.

22. *Id.* The court held that the agility displayed by the defendant in his attempt to evade capture refuted his claim of intoxication. *Id.*

23. 692 S.W.2d 185 (Tex. App.—Houston [1st Dist.] 1985, no pet.).

24. *Id.* at 189.

25. *Id.*; *see* TEX. PENAL CODE ANN. § 6.01(a) (Vernon Supp. 1986) (an offense is committed when a person voluntarily engages in the misconduct).

26. 681 S.W.2d 602 (Tex. Crim. App. 1984).

27. *Id.* at 604.

28. *Id.* Justice Odom's statement seems to conflict directly with the language of the Penal Code. *See* TEX. PENAL CODE ANN. § 8.06 (Vernon 1974), which provides that the term law enforcement agent includes not only personnel of governmental agencies but "any person acting in accordance with instructions from such agencies." *Id.*

defense of entrapment enunciated in *Rangel v. State*.[29] Justice Clinton argued in dissent that the issue whether Soto's girlfriend was a law enforcement agent was not properly before the court.[30] As Justice Miller pointed out in his separate dissenting opinion, the majority avoided the real issue before the court.[31] Justice Miller viewed that issue as being whether the informant's conduct raised the issue of entrapment.[32] The majority ignored the evidence of the government's inducement and the state's burden of proof.[33] Justice Miller concluded that the decision in *Soto* will encourage police ignorance of informant activities in order to secure convictions.[34]

The Fort Worth court of appeals reached a similar conclusion in *Gobin v. State*.[35] An informant introduced the defendant Gobin to an undercover narcotics agent who later arranged a purchase of amphetamines from the defendant. At trial for delivery of a controlled substance[36] Gobin claimed entrapment and testified that the informant, who lived with him, threatened to cut off Gobin's supply of drugs and to stop paying his share of the rent if Gobin did not sell amphetamines to the undercover police officer. Applying the *Rangel* test,[37] the court found that no police officer instructed the informant to threaten Gobin and that the informant had not used such methods in previous cases.[38] The court thus concluded that neither threat was sufficient to raise the defense of entrapment.[39]

II. PRESUMPTIONS

A. Burglary/Theft

Over the past year courts again wrestled with the presumption/circumstance/inference of guilt from unexplained possession of recently stolen property. In *Sutherlin v. State*[40] the court of criminal appeals established a remote possession exception to the presumption.[41] The defend-

29. 585 S.W.2d 695 (Tex. Crim. App. 1979). The court must find a specific instruction by the police to the informant, or general control arising from repeated use of the informant. *Id.* at 699. In *Rangel* the court concluded that "the quest . . . is to determine the degree of police involvement and to judge whether that involvement provided only the opportunity for the criminal mind to commit the offense." *Id.*

30. 681 S.W.2d at 605 (Clinton, J., dissenting). Justice Clinton also dissented from the court's finding that the evidence did not support a finding that Soto's girlfriend was a law enforcement agent. Specifically, Justice Clinton pointed out that the officer and the girlfriend had worked together for some time and that she had set up scores from her mother with him. *Id.* at 608.

31. *Id.* at 609 (Miller, J., dissenting).

32. *Id.*

33. *Id.* at 613.

34. *Id.* at 614.

35. 690 S.W.2d 702 (Tex. App.—Fort Worth 1985, no pet.).

36. *See* TEX. REV. CIV. STAT. ANN. art. 4476-15, § 4.03 (Vernon Supp. 1986) (defines delivery and sets out penalties and punishment for delivery of a controlled substance).

37. *See supra* note 29.

38. 690 S.W.2d at 705.

39. *Id.*

40. 682 S.W.2d 546 (Tex. Crim. App. 1984).

41. *Id.* at 548.

ant was charged with theft[42] of a bulldozer after Navarro County sheriff's deputies discovered the bulldozer in the possession of an individual to whom the defendant had loaned it. The state presented no evidence that defendant participated in or knew of the theft and relied completely upon the presumption of guilt arising from possession.[43] The court indicated that recent unexplained possession of stolen property is normally sufficient to convict the possessor of the theft of the property.[44] Remote possession of stolen property, however, requires other facts connecting the defendant with the theft in order to support a conviction.[45] After noting that the question of recent possession is normally one of fact, the court concluded that possession of stolen property five months after the theft, without any other evidence of guilt, was remote as a matter of law.[46] The court thus reversed the conviction.[47]

The Fort Worth court of appeals reiterated an earlier opinion[48] that a trial court commits fundamental error by instructing a jury that possession of recently stolen property mandates a presumption that the "person either knew it was stolen, should have known it was stolen, or stole it himself."[49] In *Blakeley v. State*[50] the defendant was arrested for possession of a recently stolen Oldsmobile and charged with unauthorized use of a motor vehicle.[51] The court of appeals determined that the defendant's exclusive, unexplained possession of the recently stolen automobile was just one of the factors that the trial court should have considered before an inference of guilt was justified.[52]

A Houston court of appeals overturned a burglary conviction based upon circumstantial evidence in *McKibben v. State*.[53] An officer of the Village Police Department observed a car parked in the back of an unlighted church parking lot. The officer determined the vehicle was not stolen, but nonetheless conducted a search of the vehicle. After spotting several bullets in the car, the officer left the area, circled, and set up surveillance. The vehicle left the lot shortly thereafter and the officer pulled the car over for failure to signal a turn properly. The officer arrested the defendant, a passenger, for public intoxication and unlawfully carrying a weapon.[54] Another search of the vehicle failed to reveal any further evidence of criminal activity. The next day another officer, investigating a burglary near the church, searched the vehicle and allegedly found several items of jewelry belonging to the

42. *See* TEX. PENAL CODE ANN. § 31.03 (Vernon Supp. 1986) (a person commits theft if he appropriates property with the intent to deprive the owner of such property).
43. 682 S.W.2d at 548.
44. *Id.* at 549.
45. *Id.*
46. *Id.* at 549-50.
47. *Id.*
48. *See* Roberts v. State, 672 S.W.2d 570 (Tex. App.—Fort Worth 1984, no pet.).
49. Blakeley v. State, 692 S.W.2d 206, 209 (Tex. App.—Fort Worth 1985, no pet.).
50. 692 S.W.2d 206 (Tex. App.—Forth Worth 1985, no pet.).
51. TEX. PENAL CODE ANN. § 31.07 (Vernon 1974).
52. 692 S.W.2d at 209.
53. 687 S.W.2d 513 (Tex. App.—Houston [14th Dist.] 1985, no pet.).
54. The officer arrested the driver for driving without a license. *Id.* at 514.

complainant. The caretaker of the burglarized home testified, however, that she had been through the house twelve hours after the defendant's arrest and the vehicle's confiscation, and all was in order at the residence.[55] The state relied on the defendant's presence at the scene of the burglary and his joint possession of recently stolen property as sufficient circumstances of his guilt.[56] The state presented no evidence to support the assertion that the defendant ever entered the burglarized premises. The court of appeals held that the defendant's possession of recently stolen goods, if in fact he had possession, was only a permissible inference of guilt[57] and was not sufficient to sustain a conviction for burglary.[58]

The Beaumont court of appeals held in *Lewis v. State*[59] that entry into an unoccupied house during daytime did not trigger the presumption of intent to commit theft, which might have been triggered by nighttime entry.[60] The defendant was discovered hiding inside the house but without any property associated with the home in his possession. The case was remanded to the trial court for submission to a jury on a criminal trespass charge.[61]

III. SPECIFIC PENAL CODE PROVISIONS

A. Capital Murder and Murder

In *Showery v. State*[62] the El Paso court of appeals addressed the issue of murder of a newborn infant. The trial court convicted Dr. Raymond Showery, an El Paso physician specializing in abortions, of murder on evidence that an aborted fetus appeared to be breathing before the defendant placed the placenta over the newborn's head and plunged it into a bucket of water.[63] Showery challenged the constitutionality of his prosecution due to the court's incorporation of an allegedly overbroad Family Code definition of "born alive" in the jury charge.[64] The court rejected Showery's argument

55. *Id.* at 514-16. At the time the burglary was discovered, the house had been ransacked and a window had been broken.

56. *Id.* at 516.

57. *Id.* The court explained that a permissible inference of guilt does not relieve the state of its burden of proving each element of a crime beyond a reasonable doubt. *Id.*

58. *Id.* at 517. The court noted the absence of any prior case that holds unexplained possession of stolen property alone sufficient to sustain a burglary conviction. *Id.*

59. 694 S.W.2d 615 (Tex. App.—Beaumont 1985, pet. filed).

60. *See* Moss v. State, 574 S.W.2d 542, 544 (Tex. Crim. App. 1978) (entry through window at nighttime supports presumption of theft). *But cf.* Warren v. State, 641 S.W.2d 579, 582 (Tex. App.—Dallas 1982) (intent to steal established by early morning entry through window), *pet. dism'd*, 652 S.W.2d 779 (Tex. Crim. App. 1983).

61. 694 S.W.2d at 616; *see* TEX. PENAL CODE ANN. § 30.05 (Vernon Supp. 1986).

62. 690 S.W.2d 689 (Tex. App.—El Paso 1985, no pet.).

63. *Id.* at 695. Witnesses testified that the fetus's rib cage was expanding before the physician placed the placenta over its face. After the fetus was submerged in a bucket of water, air bubbles rose. Testimony identified these bubbles as "breathing bubbles." *Id.*

64. *Id.* at 69. TEX. FAM. CODE ANN. § 12.05(b) (Vernon Pam. Supp. 1986) provides that:

> "[B]orn alive" means the complete expulsion or extraction from its mother of a product of conception, irrespective of the duration of pregnancy, which, after such separation, breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, definite movement of voluntary mus-

that prosecution for murder of a newborn requires a resolution of the viability issue.[65] The court held that the Penal Code and Family Code require findings of live birth and actual life at the time of the alleged murder to support a criminal prosecution.[66] Thus the court refused to hold that the legislature had indirectly enacted a criminal abortion statute.[67] While the opinion is well-reasoned in its approach to the problem, the court should not sidestep the issue of viability of an aborted fetus. The author hopes that if the case is ultimately decided by either the Texas Court of Criminal Appeals or the United States Supreme Court, some guidance might be given in order to prevent a spate of abortion/killing trials.

The Texas courts continued to refine and revise the proper jury instructions in a murder[68] prosecution wherein the lesser included offense of voluntary manslaughter[69] is an issue. In *Bradley v. State*[70] the Texas Court of Criminal Appeals observed that sudden passion[71] is not a defense to murder.[72] The court went on to hold, however, that when the evidence raises the issue of sudden passion, its negation becomes an implied element[73] of murder that the state must refute beyond a reasonable doubt.[74] The divided court[75] concluded that evidence of self-defense[76] will not entitle a defendant to a charge on voluntary manslaughter unless evidence shows that the accused acted under the "immediate influence of sudden passion arising from an adequate cause."[77]

The courts of appeals have split in their holdings on the state's burden in

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cles, whether or not the umbilical cord has been cut or the placenta is attached; each product of such birth is considered born alive.

65. 690 S.W.2d at 692.

66. *Id.* at 694.

67. *Id.* The defendant argued that the state had extended "homicide sanctions on behalf of a nonviable fetus not constitutionally cognizable as a victim." *Id.* The court noted, however, that the defendant's allegedly criminal conduct occurred after the fetus exhibited signs of life and that the infant was alive at the time of the defendant's acts. The defendant was thus properly tried for murder. *Id.*

68. *See* TEX. PENAL CODE ANN. § 19.02 (Vernon 1974). A person commits murder in one of three ways. One, he intentionally or knowingly causes an individual to die; two, he intends to cause only serious injury to an individual but his actions cause the death of an individual; or three, he causes the death of someone while attempting to commit, committing, or fleeing from a felony. *Id.*

69. *See id.* § 19.04. A person commits voluntary manslaughter if he causes the death of another person in the circumstances involved in § 19.02 of the Code except that he was under the influence of sudden passion arising from an adequate cause. *Id.*

70. 688 S.W.2d 847 (Tex. Crim. App. 1985).

71. *See* TEX. PENAL CODE ANN. § 19.04 (Vernon 1974) (sudden passion means passion directly caused by the individual killed or by someone associated with the individual killed).

72. 688 S.W.2d at 849.

73. *See* TEX. PENAL CODE ANN. § 1.07(a)(13) (Vernon 1974) (four elements of an offense are the forbidden conduct, the required culpability, the required result, and the contradiction of any exception to the offender).

74. 688 S.W.2d at 851.

75. Justice Clinton wrote the opinion in which three justices joined. *Id.* at 847. Three other justices concurred only in the result. *Id.* at 853.

76. *See supra* notes 1-16 and accompanying text.

77. 688 S.W.2d at 852; *see also* Moore v. State, 694 S.W.2d 528, 530 (Tex. Crim. App. 1985), in which the court found that the failure properly to instruct the jury on voluntary manslaughter was not reversible error.

refuting the element of sudden passion. In an opinion written after *Bradley* the El Paso court of appeals held that the state need not disprove sudden passion with the same conclusiveness that it must provide any positive element of murder.[78] In *Gold v. State*[79] the defendant appealed his murder conviction on grounds that the state had not disproven sudden passion beyond a reasonable doubt.[80] The court held that in contrast to a murder case in which the state fails to prove an affirmative element, if the state fails to disprove sudden passion beyond a reasonable doubt when raised by the defense, the jury may still reach a murder verdict by rejecting the defendant's sudden passion testimony.[81] The court's standard of review showed a complete acceptance of the jury's authority to reject the defendant's sudden passion claim.[82] Any other approach, the court noted, would render the jury's verdict purely advisory and would in some cases "place an impossible burden on the state."[83] The jury's rejection of the defendant's sudden passion claim did not supply a missing affirmative element.[84] Whether this reasoning will withstand the teachings of *Bradley* remains to be seen. This issue will probably be determined in the near future since the Austin court of appeals has yet another treatment of sudden passion. In *Huffman v. State*[85] the trial court found the defendant guilty of murder. The defendant asserted in defense that he acted under the influence of sudden passion. The court held that when a defendant raises the sudden passion defense, "the State must prove the absence of such influence beyond a reasonable doubt in order to establish murder."[86]

A Houston court of appeals held in *Slaton v. State*[87] that when the evidence raises the defensive issue of suicide, the court should so instruct the jury.[88] Slaton was charged with the murder of his live-in boyfriend, who after falling from a seventh floor balcony, had been found by Houston police. An eyewitness who earlier stated that the deceased had fallen accidentally testified that Slaton pushed the decedent from the balcony during an argument. Several other witnesses testified as to the decedent's suicidal tendencies. The court found a high probability that the decedent had committed suicide and reversed the conviction based on the trial court's refusal to submit that defense to the jury.[89] The court ruled in the defendant's favor even

78. Gold v. State, 691 S.W.2d 760, 762-63 (Tex. App.—El Paso 1985, no pet.).

79. 691 S.W.2d 760 (Tex. App.—El Paso 1985, no pet.).

80. The state had proved the elements of murder and the defense had conceded the issue. *Id.* at 762-63. The defendant's sudden passion claim, however, raised the issue of voluntary manslaughter. *Id.*

81. The court held that failure to prove an affirmative element precludes the jury's right to supply the element not proven by the state simply by rejecting the defendant's testimony. *Id.* at 762.

82. *Id.* at 763.

83. *Id.*

84. *Id.*

85. 691 S.W.2d 726 (Tex. App.—Austin 1985, no pet.).

86. *Id.* at 730.

87. 685 S.W.2d 773 (Tex. App.—Houston [1st Dist.] 1985, pet. ref'd).

88. *Id.* at 775.

89. *Id.*

though the objection at trial did not specifically address the same issue as the point of appeal.[90]

In *Stewart v. State*[91] the court of criminal appeals again declined to require the trial court to define "deliberately" in its charge to the jury.[92] The court held that "deliberately" was taken and understood in its normal usage.[93] The court reiterated that "deliberately" and "intentionally"[94] or "knowingly"[95] are not linguistically equivalent.[96] In the absence of any evidence to the contrary, however, the court refused to assume that the jury had construed the words as equivalents.[97] The court may have created an insurmountable problem for defendants. Obtaining the necessary evidence will require the defense attorney to inquire into the various subconscious and learned thought processes that the jurors used in arriving at their decision, a difficult if not impossible task.

In *Thomas v. State*[98] the court of criminal appeals, sitting en banc, overruled a line of cases[99] that held pointing a loaded pistol at another person sufficient to indicate that a person should be aware that his actions create a risk of "such a nature and degree that . . . it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint."[100] Courts often allowed a charge on criminally negligent homicide based solely on the defendant's pointing a loaded gun at another person.[101] The majority opinion in *Thomas* however, enunciated a new totality of the circumstances test.[102]

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90. *Id.* At trial, defense counsel had objected to the court's charge on the basis that it did not specifically instruct the jury to acquit if they found the defendant was attempting to prevent suicide or had a reasonable doubt as to whether or not he was attempting to prevent suicide. *Id.*

91. 686 S.W.2d 118 (Tex. Crim. App. 1985).

92. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07(1)(b)(1) (Vernon Supp. 1986) (court shall submit to the jury the issue of whether the defendant deliberately caused the death of another); Esquivel v. State, 595 S.W.2d 516, 525 (Tex. Crim. App. 1980) (counsel could not ask prospective jurors for their definitions of "deliberately"); King v. State, 553 S.W.2d 105 (Tex. Crim. App. 1977) (not necessary to define common words to a jury).

93. 686 S.W.2d at 122.

94. TEX. PENAL CODE ANN. § 6.03(a) (Vernon 1974) (a person acts with intent when he has a conscious objective).

95. TEX. PENAL CODE ANN. § 6.03(b) (Vernon 1974) (a person acts knowingly when he is aware of the nature of his conduct).

96. 686 S.W.2d at 121.

97. *Id.* at 122.

98. 699 S.W.2d 845 (Tex. Crim. App. 1985).

99. *See* Schoelman v. State, 644 S.W.2d 727, 734 (Tex. Crim. App. 1983) (court relied on pointing of loaded weapon to raise criminally negligent homicide); Giles v. State, 617 S.W.2d 690, 691 (Tex. Crim. App. 1981) (criminally negligent homicide offense raised when defendant pointed a loaded gun); London v. State, 547 S.W.2d 27, 29 (Tex. Crim. App. 1977) (accidental discharge of a weapon constituted criminally negligent homicide); Dockery v. State, 542 S.W.2d 644, 648-49 (Tex. Crim. App. 1976) (evidence that defendant raised himself up off floor and gun that he was holding discharged indicated criminally negligent homicide). The court held all of these findings overbroad. 699 S.W.2d at 851.

100. TEX. PENAL CODE ANN. § 6.03(d) (Vernon 1974) (criminal negligence results when a person ought to be aware of a risk that his conduct may cause).

101. 699 S.W.2d at 849-50; *see* TEX. PENAL CODE ANN. § 19.07 (Vernon 1974) (criminally negligent homicide is a class A misdemeanor).

102. 699 S.W.2d at 850.

The type of weapon, the defendant's knowledge of weapons, evidence that he pointed the weapon at another person, and evidence that a third party or other factor may have caused the weapon to discharge are all factors that the judge must now consider in determining whether a jury charge on criminally negligent homicide is warranted.[103] The mere pointing of a loaded weapon is no longer sufficient to warrant such a charge.[104]

The majority opinion sparked two rather strong dissents. Judge Clinton argued that the majority opinion ignored legislative intent.[105] The judge asserted that the language of section 6.03(d) of the Penal Code clearly indicates the legislature's desire to dissuade a person from pointing a loaded gun at another.[106] The judge thus characterized the majority opinion as a "blunder of policy that seriously undermines legislative considerations of that which is in the public interest."[107]

Judge Teague also strongly disagreed with the majority opinion on the basis of legislative intent. He noted that the majority opinion appeared to forbid a criminally negligent homicide instruction anytime the state shows that the defendant is even minimally familiar with firearms.[108] The judge then stated that "[i]f this is the law, then the law is truly an ass, and such flies in the face of not only what the legislature of this State has mandated, but what this court has held in the past."[109]

B. Theft

In *McClain v. State*[110] the Texas Court of Criminal Appeals addressed the appropriation[111] requirement of the theft statute.[112] The defendants were charged with the theft of gold chains. The stipulated evidence established that neither defendant participated in the initial appropriation of the chains. In an unpublished opinion the court of appeals reversed the conviction,[113] relying upon *Casey v. State*.[114] *Casey* required participation in the initial appropriation.[115] The court of criminal appeals reversed the lower courts and held that such participation was not required.[116] The court traced the development of the theft statute and acknowledged that acquisitive conduct may

103. *Id.*
104. *Id.* at 849-52.
105. *Id.* at 856 (Clinton, J., dissenting).
106. *Id.*
107. *Id.* at 858.
108. *Id.* at 861 (Teague, J., dissenting).
109. *Id.*
110. 687 S.W.2d 350 (Tex. Crim. App. 1985).
111. TEX. PENAL CODE ANN. § 31.03(b) (Vernon Supp. 1986) (defining when appropriation is unlawful).
112. *Id.* § 31.03 (defining theft as unlawful appropriation of property with the intent to deprive the owner thereof).
113. 687 S.W.2d at 351.
114. 633 S.W.2d 885 (Tex. Crim. App. 1982).
115. *Id.* at 886.
116. *McClain*, 687 S.W.2d at 355. The court of criminal appeals expressly overruled *Casey*. *Id.*

be irrelevant to the crime of theft.[117] The essence of theft, the court stated, is in depriving the owner of his property without his consent.[118] The statute thus requires only that a person exercise control over property with the knowledge that his control is without the owner's consent and the intent to deprive the owner of the property.[119] The court concluded that how the actor got the property is inconsequential to appropriation.[120]

In *Reed v. State*[121] the Beaumont court of appeals held that failure to turn over gasoline sales proceeds from a service station to the station's lessor constitutes theft of money. Under similar facts the Corpus Christi court of appeals had held that discrepancies between the amount of gasoline sales reported to the pumps' lessor and the amount registered on the gasoline pumps constituted theft of gasoline rather than money.[122] The Beaumont court refused to follow the Corpus Christi court's decision and held that the defendant had misappropriated money that belonged to the lessor.[123]

C. *Bribery*

Two significant decisions during the survey period dealt with the offense of bribery.[124] In *McCallum v. State*[125] the Texas Court of Criminal Appeals reversed a jury bribing conviction.[126] The defendant allegedly gave a glass of champagne to a juror as consideration for her vote in a civil proceeding.[127] The defendant paid for several bottles of champagne for the juror and her friends during an evening at a fashionable Dallas nightclub. No mention was made of the civil case that was in a weekend recess.[128] As the statute existed at the time of the alleged offense, it required that consideration pass to the bribe's recipient for his or her actions in a judicial or administrative proceeding.[129] The court construed consideration to require a

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117. *Id.* at 353.

118. *Id.* The court characterized previous emphasis on the manner of acquisition as misleading. *Id.*

119. The court pointed to the consolidations of previous offenses such as theft and receiving stolen property into a single offense as an unambiguous declaration by the legislature that mode of acquisition no longer constitutes an element of theft. *Id.* n.10.

120. *Id.* at 355. "Appropriate" means any exercise of control over the property in question. *See* TEX. PENAL CODE ANN. § 31.01(5)(B) (Vernon 1974).

121. 685 S.W.2d 73 (Tex. App.—Beaumont 1984, no pet.).

122. Sanchez v. State, 645 S.W.2d 491 (Tex. App.—Corpus Christi, no pet.).

123. *Reed*, 685 S.W.2d at 75.

124. A person commits bribery when he intentionally or knowingly offers, confers, or agrees to confer, or solicits, accepts, or agrees to accept from a public servant, official, or voter any benefit as a result of such consideration made to or for the public servant, official, or voter. TEX. PENAL CODE ANN. § 36.02 (Vernon Supp. 1986).

125. 686 S.W.2d 132 (Tex. Crim. App. 1985).

126. *Id.* at 139.

127. *Id.* at 136.

128. *Id.* at 136-39.

129. TEX. PENAL CODE ANN. § 36.02(a) (Vernon 1974). At the time of the offense the statute provided that:

> (a) A person commits an offense if he offers, confers or agrees to confer any benefit on a public servant, party official, or voter:
>
> (1) with intent to influence the public servant or party official in a specific exercise of his official powers or a specific performance of his official duties; or

bilateral agreement[130] to take certain action. The court could find no such evidence,[131] and therefore, reversed the conviction.[132]

In *Martinez v. State*[133] the Austin court of appeals sought to distinguish the *McCallum* opinion. The defendant police officer was charged with accepting a bribe in lieu of issuing a ticket to a motorist.[134] The defendant asked for and received $150 from the motorist, who testified that he thought he was paying his fines.[135] The defendant argued against the existence of a bilateral agreement[136] if the motorist had not intended the money as a bribe.[137] The court distinguished *McCallum* on the basis that the *McCallum* indictment alleged conferring a benefit while the evidence only showed the offer of such benefit.[138] In *Martinez* the defendant was charged with soliciting, agreeing to accept, and accepting a benefit.[139] Proof of solicitation alone supported the conviction,[140] since the offense of bribery is complete when the solicitation is made.[141]

D. Unlawfully Carrying a Weapon

During the Survey period the court of criminal appeals addressed the term "carrying" as it is used in the statute defining the offense of unlawfully carrying a weapon.[142] In *Christina v. State*[143] the police arrested the defendant in a car parked on the side of a Dallas street. The defendant was sitting behind the wheel of the vehicle with the engine running. The officer ran a warrants check, determined that the defendant had an outstanding traffic warrant, and arrested him. The post-arrest inventory of the vehicle revealed nun-

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(2) with intent to influence the voter not to vote or to vote in a particular manner.

Id. This section of the Penal Code was amended in 1983. *See id.* § 36.02(a)(2) (Vernon Supp. 1986).

130. 686 S.W.2d at 135-36.

131. *Id.* at 139. Note that following the weekend break the civil jury returned a $165,000 verdict against the defendant who allegedly offered the bribe.

132. *Id.*

133. 696 S.W.2d 930 (Tex. App.—Austin 1985, no pet.).

134. *Id.* at 931.

135. *Id.* at 932.

136. *See McCallum*, 686 S.W.2d at 136.

137. 696 S.W.2d at 932.

138. *Id.*

139. *Id.*

140. *Id.* at 933.

141. TEX. PENAL CODE ANN. § 36.02(a)(1) (Vernon Supp. 1986) provides:

(a) A person commits an offense if he intentionally or knowingly offers, confers or agrees to confer on another, or solicits, accepts, or agrees to accept from another;

(1) any benefit as consideration for the recipient's decision, opinion, recommendation, note, or other exercise of discretion as a public servant, party official, or voter . . . .

142. *See* TEX. PENAL CODE ANN. § 46.02 (Vernon 1974) (offense of unlawfully carrying a weapon occurs when a person recklessly, knowingly, or intentionally carries on or about his person a handgun, illegal knife, or club).

143. 686 S.W.2d 930 (Tex. Crim. App. 1985).

chucks under the driver's seat.[144] The only question presented to the court of criminal appeals was whether the defendant was in possession of the nun-chucks. The defendant asked the court to equate carrying with the element of possession prescribed in the possessory offenses of the Controlled Substances Act.[145] Possession, as defined in the Texas Penal Code, means "actual care, custody, control, or management,"[146] while carrying has not been accorded a technical legal meaning.[147] The court refused to assign carrying a technical meaning, but did acknowledge that it contained an element of asportation.[148] The majority concluded that the jury had sufficient facts to determine that the defendant transported the nun-chucks on or about his person.[149]

E. Engaging in Organized Criminal Activity

Two courts of appeals addressed the organized criminal activity statutes[150] during the course of 1985. In *Nickerson v. State*[151] a Houston court of appeals analyzed the mens rea element of the statutes.[152] The defendant argued that the organized criminal activity statutes specifically exclude any mens rea requirement[153] and are thus unconstitutional.[154] While it is not a defense that one or more members of the combination are not criminally responsible for the underlying illegal conduct,[155] the court held a mens rea

144. *Id.* at 931. A nun-chuck is a swinging type of club composed of two clubs connected by a chain. *Id.*

145. *Id.* at 932; *see* TEX. REV. CIV. STAT. ANN. art. 4476-15 (Vernon Supp. 1986).

146. TEX. PENAL CODE ANN. § 1.07(a)(28) (Vernon 1974).

147. 686 S.W.2d at 933.

148. *Id.* Asportation means the moving of an object from one place to another. BLACK'S LAW DICTIONARY 147 (4th ed. 1968).

149. 686 S.W.2d at 934.

150. *See* TEX. PENAL CODE ANN. §§ 71.01-.05 (Vernon Supp. 1986).

151. 686 S.W.2d 294 (Tex. App.—Houston [14th Dist.] 1985, pet. ref'd).

152. TEX. PENAL CODE ANN. § 71.02 (Vernon Supp. 1986) provides:

> (a) A person commits an offense if with the intent to establish, maintain, or participate in a combination or in the profits of a combination, he commits or conspires to commit one or more of the following:
>
> (1) murder, capital murder, arson, aggravated robbery, robbery, burglary, theft, aggravated kidnapping, kidnapping, aggravated assault, or forgery;
>
> (2) any felony gambling offense;
>
> (3) promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution;
>
> (4) unlawful manufacture, transportation, repair, or sale of firearms or prohibited weapons;
>
> (5) unlawful manufacture, delivery, dispensation or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance drug, or dangerous drug through forgery, fraud, misrepresentation, or deception;
>
> (6) any unlawful wholesale promotion or possession of any obscene material or obscene device with the intent to wholesale promote the same; or
>
> (7) any unlawful employment, authorization or inducing of a child younger than 17 years of age in an obscene sexual performance.

153. *Id.* § 71.03(1) provides: "It is no defense to prosecution under section 71.02 of this code that: (1) one or more members of the combination are not criminally responsible for the object offense . . . ."

154. 686 S.W.2d at 297.

155. TEX. PENAL CODE ANN. § 71.03(1) (Vernon Supp. 1986).

requirement to be present.[156] The prosecution must show the defendant's intent to establish, maintain, or participate in a combination or the profits thereof.[157] The defendant must therefore know of the criminal activity of the group to have the requisite mens rea.[158]

In *Abbett v. State*[159] the Corpus Christi court of appeals expanded the mens rea requirement. The trial court had convicted the defendant of engaging in organized criminal activity for conspiring unlawfully to deliver metamphetamine. The defendant challenged the sufficiency of the evidence used to convict him. The court pointed out that "conspire to commit" means that a person agrees with others that one or more of them will commit the offense and someone actually will perform an overt act in pursuance of the agreement.[160] An agreement constituting conspiracy may be inferred from the acts of the parties.[161] The court found sufficient evidence of an agreement to deliver metamphetamines[162] but insufficient evidence to show that the agreement was made with the intent to "establish, maintain or participate in a combination or in the profits of a combination."[163] The court also failed to find evidence that the defendant and four or more others[164] collaborated[165] to sell metamphetamines.[166] The court placed a heavy burden on the state to show not only a conspiracy and the requisite intent, but also an agreement among five or more people to work together to commit criminal activity. The double intent requirement adds a significant element to the state's burden of proof.

III. VEHICULAR OFFENSES

In *Allen v. State*[167] the court of criminal appeals clarified the requirements of the driving while license suspended statute.[168] A Dallas police officer stopped the defendant after seeing the defendant drive his pickup truck off the road. The defendant's license was under a mandatory suspension for

156. 686 S.W.2d at 297.
157. *Id; see* TEX. PENAL CODE ANN. § 71.02(a) (Vernon Supp. 1986).
158. 686 S.W.2d at 297.
159. 694 S.W.2d 534 (Tex. App.—Corpus Christi 1985, no pet.).
160. *Id.* at 540; *see* TEX. PENAL CODE ANN. § 71.01(b) (Vernon Supp. 1986) ("conspires to commit" includes an agreement with one or more persons to engage in the offensive conduct and the performance of an overt act).
161. 694 S.W.2d at 541.
162. *Id.*
163. *Id.*
164. TEX. PENAL CODE ANN. § 71.01(a) (Vernon Supp. 1986) provides:
> (a) "Combination" means five or more persons who collaborate in carrying on criminal activities, although:
> (1) participants may not know each other's identity;
> (2) membership in the combination may change from time to time; and
> (3) participants may stand in a wholesaler-retailer or other arm's-length relationship in illicit distribution operations.

165. The court reasoned that "collaborating" meant working together with others in specified criminal activities. 694 S.W.2d at 541.
166. *Id.*
167. 681 S.W.2d 38 (Tex. Crim. App. 1985).
168. *See* TEX. REV. CIV. STAT. ANN. art. 6687b, § 34 (Vernon 1977) (requirements for conviction are driving privilege revoked or suspended and driving while license suspended).

driving while intoxicated. The state had suspended the defendant's license for the same offense on a previous occasion. The defendant's license, however, had expired over four years before the alleged driving with a suspended license occurred. The court held that the state must show either that the accused had an unexpired license that was suspended at the time of the alleged offense or that the defendant's license had been suspended prior to its normal expiration date and remained suspended from the expiration date until the date of the alleged offense.[169] Pursuant to the latter requirement the state attempted to cumulate the current and previous suspensions by showing a string of convictions for driving while intoxicated.[170] The court pointed out, however, that the driving while license suspended statute did not provide for cumulation of consecutive DWI convictions.[171] The court reversed the driving while license suspended conviction since the driver's license could not have been suspended because he had no license at the time of the DWI convictions.[172]

In a rather controversial opinion the Fort Worth court of appeals upheld the driving while intoxicated statute[173] against a number of constitutional challenges. In *Forte v. State*[174] the DWI statute was challenged on the ground that it reduced the prosecutor's burden of proof and created a conclusive presumption of intoxication by defining "intoxicated" as an alcohol concentration exceeding .10.[175] The statute withstood this constitutional attack because the state must prove the alcohol concentration beyond a reasonable doubt.[176] A constitutional challenge based upon the amendatory act's caption was also overruled.[177] Specifically the defendant argued that the statute did not provide fair notice because the caption did not include the statement providing for the admissibility at trial of evidence of the defendant's failure to take a chemical test.[178] The court ruled that there is no constitutional requirement for the caption of an amendatory act to set out the exact changes contained therein. The caption must only give fair and reasonable notice to a reader of the contents of the bill.[179] Finally, the court held that the definition of public place[180] contained in the Texas Penal Code and applicable to the DWI statute did not render the statute unconstitu-

169. 681 S.W.2d at 40.
170. *Id.*
171. *Id.* at 41; *cf.* TEX. REV. CIV. STAT. ANN. art. 6687b, § 24 (Vernon 1977) wherein cumulation is specifically provided for driving while license suspended convictions and suspensions.
172. 681 S.W.2d at 41.
173. *See* TEX. REV. CIV. STAT. ANN. art. 6701*l*-1 (Vernon Supp. 1986) (intoxication means having an alcohol concentration of .10 or more in blood).
174. 686 S.W.2d 744 (Tex. App.—Fort Worth 1985, pet. granted).
175. *Id.* at 746; *see* TEX. REV. CIV. STAT. ANN. art. 6701*l*-1(a)(2)(B) (Vernon Supp. 1986).
176. 686 S.W.2d at 749.
177. *Id.* at 749.
178. *Id.* at 748.
179. *Id.* at 749.
180. TEX. PENAL CODE ANN. § 1.07(a)(29) (Vernon Supp. 1986) provides: " 'Public place' means any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops."

tional.[181] Although the term was broader than under the prior statute,[182] the court held that the term is sufficiently specific to provide reasonable notice of what constitutes a public place.[183] The court's decision is rendered controversial, however, by its holding that a person has a right to consult with an attorney prior to submitting to blood, urine, or breath tests.[184] While the court held that the consultation cannot be used to unreasonably delay the testing,[185] the police must nonetheless inform the suspect of his right to counsel prior to administration of the test.[186] The Texas Court of Criminal Appeals has granted a petition in the case.

In *Elias v. State*[187] the San Antonio court of appeals specified the proper instructions that a court should give a jury in a prosecution for failure to stop and render aid.[188] The defendant argued that the indictment should have included the words "shall immediately stop such vehicle at the scene of such accident or as close thereto as possible."[189] The court reasoned that the elements of the offense were: [1] a driver of a vehicle [2] involved in an

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181. 686 S.W.2d at 751.

182. The prior DWI statute applied to public roads, highways, streets, alleys, and beaches. *See* Act of June 13, 1979, ch. 682, § 3, 1979 Tex. Gen. Laws 1608, 1609, *amended by* Act of June 16, 1983, ch. 303, § 3, 1983 Tex. Gen. Laws 1568, 1574.

183. 686 S.W.2d at 750-51.

184. *Id.* at 754.

185. *Id.*

186. The court adopted the right to counsel test adopted by Minnesota in *Prideaux v. State*, 310 Minn. 405, 247 N.W.2d 385, 394-95 (1976). The Minnesota case was based on a statutory right rather than a constitutional right. 686 S.W.2d at 754.

187. 693 S.W.2d 584 (Tex. App.—San Antonio 1985, no pet.).

188. *See* TEX. REV. CIV. STAT. ANN. art. 6701d, §§ 38(a), (b) (Vernon 1977), 40 (Vernon Supp. 1986). Section 38(a) provides:

> The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of said accident until he has fulfilled the requirements of Section 40. Every such stop shall be made without obstructing traffic more than is necessary.

Id. art. 6701d, § 38(a) (Vernon 1977). Section 38(b) provides:

> Any person failing to stop or to comply with said requirements under such circumstances shall upon conviction be punished by imprisonment in the penitentiary not to exceed five (5) years or in jail not exceeding one (1) year or by fine not exceeding Five Thousand ($5,000.00) Dollars, or by both such fine and imprisonment.

Id. art. 6701d, § 38(b). Section 40 provides:

> The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give his name, address and the registration number of the vehicle he is driving and the name of his motor vehicle liability insurer, and shall upon request and if available exhibit his operator's, commercial operator's, or chauffeur's license to the person struck or the driver or occupant or a person attending any vehicle colliding with and shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.

Id. art. 6701d, § 40 (Vernon Supp. 1986).

189. 693 S.W.2d at 587; *see* TEX. REV. CIV. STAT. ANN. 6701(D), § 38(a) (Vernon Supp. 1986).

accident [3] resulting in injury or death of any person [4] intentionally and knowingly [5] fails to stop and render reasonable assistance."[190] Although the statute plainly states that the driver must stop at the scene of the accident or as close as possible, the court overruled the point of error because it was not an element of the offense.[191] The defendant also argued that in applying the law to the facts the court's instructions should have included the disputed wording. The court ruled that not only was the omission of the wording not fundamental error,[192] but it was not error at all.[193] If a defendant properly requests instructions on stopping as close to the accident as possible, he should be entitled to have the jury so instructed. The court's denial of the instruction takes away a defense clearly enunciated in the statute.[194]

V. MISCELLANEOUS CRIMINAL STATUTES

A. Texas Alcoholic Beverage Code

The Texas Court of Criminal Appeals, in *Cotton v. State*,[195] upheld a challenge to the constitutionality of a portion of the Alcoholic Beverage Code. Section 61.71(a)(6) of the Alcoholic Beverage Code provided that: "The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee: . . . sold, served or delivered beer to a person showing evidence of intoxication . . . ."[196] The defendant argued that "person showing evidence of intoxication" was so overbroad that it might allow an overzealous police officer to use its proscription as a subterfuge for the arrest of a licenseholder.[197] The court agreed and held the statute unconstitutional.[198] The court compared the statute's language to other similar statutes that had passed constitutional muster.[199] The court concluded that "a person showing evidence of intoxication"[200] included not only those persons who are intoxicated but also individuals who are not intoxicated but might show some of the symptoms of intoxication.[201] The court stated that "common experience teaches us that each symptom may be demonstrated by the intoxicated or the abstemious, the soused or the so-

190. *Id.* at 586 (quoting Steen v. State, 640 S.W.2d 912, 915 (Tex. Crim. App. 1982)).
191. 693 S.W.2d at 587.
192. *Id.* at 588. See the applicable fundamental error rules enunciated in Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).
193. 693 S.W.2d at 588.
194. *See* TEX. REV. CIV. STAT. ANN. art. 6701d, § 38(a) (Vernon 1977).
195. 686 S.W.2d 140 (Tex. Crim. App. 1985).
196. TEX. ALCO. BEV. CODE ANN. § 61.17(a)(6) (Vernon 1978).
197. 686 S.W.2d at 141.
198. *Id.* at 141, 143. The wording of subsection (6) has since been amended. *See* TEX. ALCO. BEV. CODE ANN. § 61.71(a)(6) (Vernon Supp. 1986).
199. 686 S.W.2d at 141, 143; *see* Campos v. State, 623 S.W.2d 657 (Tex. Crim. App. 1981) (analyzing TEX. ALCO. BEV. CODE ANN. § 101.63(a) (Vernon 1978) and Alexander v. State, 630 S.W.2d 355 (Tex. App.—Houston [1st Dist.] 1982, no pet.) (analyzing TEX. PENAL CODE ANN. § 42.08 (Vernon 1974) (amended 1985)).
200. TEX. ALCO. BEV. CODE ANN. § 61.77 (Vernon Supp. 1986).
201. 686 S.W.2d at 142.

ber."[202] The majority concluded that a retail dealer licensee could only guess at the standard of criminal responsibility under the statute.[203]

202. *Id.* at 143. The court continued:
Similarly, since alcohol breath is "evidence of intoxication," if while receiving a patron's order for a second beer the tavern owner detects the odor of the first on the customer's breath, is it or is it not a violation of § 61.71(a)(6) for the licensee to consummate the sale of the second beer?
Id.

203. *Id.*