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Criminal Procedure: Trial and Appeal

Trent Gaither

Rainey Rainey

CRIMINAL PROCEDURE: TRIAL AND APPEAL

by

Trent Gaither and Ron Rainey***

CONSTITUTIONAL principles, statutes, and case law relating to criminal procedure envelop more issues and nuances than any Survey article can hope to cover. The issues pervade all aspects of any criminal case and the nuances sometimes appear to turn more on the facts of the given case than on prior authority. Even a cursory review of recent decisions, however, provokes one conclusion: The Texas Rules of Criminal Procedure are not "rules" in the truest sense of the word, but rather principles and guidelines to be examined, expanded, or constricted in application to a given set of facts and circumstances as the diligent and cautious trial lawyer deems appropriate. In most instances, there is no single standard, no single application. The principles espoused by the judiciary are, in a very real sense, confined only by the restraints of the creative lawyer's imagination. It is the hope of the authors that this article will provide a base from which those creative thoughts may spring.

I. SEARCHES, ARRESTS, AND CONFESSIONS

In *Eisenhaur v. State*[1] the Texas Court of Criminal Appeals finally took the long anticipated step of holding that, for purposes of search and seizure, article 1, section 9 of the Texas Constitution is in all respects the same as the fourth amendment to the United States Constitution.[2] As expected, the court did not unanimously agree in its analysis of the issue; however, the net result of the decision requires that Texas henceforth follow the "totality of circumstances" test set forth in *Illinois v. Gates*.[3] Meanwhile, in *Stanton v.*

* B.B.A., University of Texas; J.D., University of Houston. Attorney at Law, Haynes Fullenweider, Houston, Texas.

** B.A., University of Texas at Arlington; J.D., University of Houston; Attorney at Law, Haynes & Fullenweider, Houston, Texas.

1. 754 S.W.2d 159 (Tex. Crim. App. 1988).

2. *Id.* at 164. The court stated:

> In this area, the laws and constitution of the State of Texas impose no greater restrictive standard, leaving the Texas Courts free to follow the lead of the Supreme Court of the United States. There being no binding authority to the contrary, today's opinion is made to stay in step with the Federal Constitutional model for probable cause determination.

Id.

3. 462 U.S. 213 (1983). The test requires a reviewing court to determine if the totality of

State[4] the court found the totality of the circumstances insufficient to support a search and seizure that resulted in a conviction for aggravated robbery. In *Stanton* police arrested Tony Sastaita for the robbery of a local restaurant. During interrogation, Sastaita implicated defendant Stanton in the crime and identified him from a photograph. Sastaita also revealed Stanton's first name, his place of residence, and a description of his car. Several hours later, a police officer saw what he believed to be Stanton's car parked in the driveway of a residence. As the result of a stakeout, police arrested Stanton in the parked car when he left the residence. Upon arrest, Stanton confessed to the armed robbery. On appeal, Stanton argued that his warrantless arrest was unlawful and thereby tainted his subsequented confession. The state argued that the police had lawfully arrested Stanton without a warrant because Stanton was "escaping" as that term is used in article 14.04 of the Texas Code of Criminal Procedure.[5] In rejecting the state's position, the court held that "escape" as used in article 14.04 necessarily entails some aspect of fleeing.[6] That is, the state must produce some evidence that the defendant knowingly made an effort to elude the police.[7]

In *Williams v. State*[8] an unidentified woman reported a suspicious truck. Subsequently, the officers saw a truck fitting the description with defendant Williams standing nearby. The police officers approached the truck, looked inside, and saw about an inch of the stock of a rifle protruding from beneath a towel in the cab. One of the officers lifted the towel and discovered a stack of guns that he immediately seized. Police later determined that the guns had been stolen. The state relied on the plain view doctrine to validate the search and seizure. The court held that the plain view doctrine did not apply because it was not "immediately apparent" to the police officers that the guns were evidence of any crime.[9] Absent this factor, police did not have probable cause to seize the weapons.[10]

In *Crosby v. State*[11] the court discussed whether an administrative search may include the search of a dressing room in a nightclub.[12] The defendant,

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the circumstances provided a substantial basis for probable cause prior to both warrantless and warrant seizures of persons or property.

4. 743 S.W.2d 233 (Tex. Crim. App. 1988).

5. TEX. CODE CRIM. PROC. ANN. art. 14.04 (Vernon 1977) states:
Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

6. 743 S.W.2d at 236-37.

7. *Id.* at 236 ("The mere fact of driving away from one's own house in the morning a day or so after the offense, without more, is not sufficient to show escape in terms of the statues").

8. 743 S.W.2d 642 (Tex. Crim. App. 1988).

9. *Id.* at 644.

10. *Id.* The court cited Coolidge v. New Hampshire, 403 U.S. 433 (1971), as dispositive of the case. *Coolidge* set forth three circumstances that must be satisfied before the plain view doctrine applies: (1) the officers must lawfully be on the premises; (2) the officers must inadvertently discover the incriminating evidence, and (3) it must be "immediately apparent" to the officers that the evidence is related to a crime. 743 S.W.2d at 644; *see also* White v. State, 729 S.W.2d 737 (Tex. Crim. App. 1987) (similar rendition of test).

11. 750 S.W.2d 768 (Tex. Crim. App. 1987).

12. *Id.* at 770.

Crosby, was performing at a Dallas nightclub, which was licensed to sell alcoholic beverages by the Texas Alcohol Beverage Commission.[13] During a routine inspection for liquor violations, police officers went backstage and entered Crosby's private dressing room. There the officers discovered cocaine and a .45 Colt automatic pistol. The court found that the defendant had a reasonable expectation of privacy by virtue of his private dressing area.[14] The police officers exceeded the scope of any legitimate search authorized by the administrative inspection provisions of the Texas Alcoholic Beverage Code; the court held that the search violated both article 1, section 9 of the Texas Constitution and the fourth amendment of the United States Constitution.[15]

In *Vicknair v. State*[16] a police officer stopped the defendant because of a cracked taillight on the defendant's car. The officer asked the defendant for his driver's license, but the defendant did not have one. The officer then arrested the defendant and subsequently discovered over five pounds of marijuana in plain view in the car. The Texas Court of Criminal Appeals on motion for rehearing held that a damaged taillight, not so significantly cracked as to present a safety hazard, did not constitute an equipment violation under traffic regulation rules.[17] Consequently, the court found the initial detention of the accused unlawful and suppressed evidence recovered in a subsequent search of the vehicle.[18]

Green v. State[19] similarly dealt with the propriety of an investigatory stop. A police officer, observed defendant Green's car parked in a cafeteria parking lot. A woman parked her car beside Green's and entered the passenger side of his car. She left Green's car about two minutes later and drove away in her own car. A second car then pulled up. The driver of the second car got out and entered Green's car. Suspicious, the police officer approached, searched the car, and found cocaine in a blue bag inside a shaving kit on the floor of the car. The court reversed the conviction and held that the police officer improperly detained the defendant because the events he observed were as consistent with innocent activity as with criminal activity.[20]

In *Jones v. State*[21] a police officer responded to a dispatch call regarding a suspicious black male wearing a gray T-shirt. The dispatch did not indicate why the black male was suspicious or that a crime had taken place. Upon arriving, the officer confronted the defendant and noticed that he was very nervous. The defendant was carrying a blanket that he placed on the ground

13. TEX. ALCO. BEV. CODE ANN. § 101.04 (Vernon 1977) states: "By accepting a license or permit, the holder consents that the commission, an authorized representative of the commission, or a peace officer may enter the licensed premises at any time to conduct an investigation or inspect the premises for the purpose of performing any duty imposed by this code."

14. 750 S.W.2d at 778.

15. *Id.* at 780.

16. 751 S.W.2d 180 (Tex. Crim. App. 1986).

17. *See* TEX. REV. CIV. STAT. ANN. art. 6701(d), § 111 (Vernon 1977).

18. 751 S.W.2d at 187.

19. 744 S.W.2d 313 (Tex. App.—Dallas 1988, no pet.).

20. *Id.* at 314 (citing Johnson v. State, 658 S.W.2d 623, 626 (Tex. Crim. App. 1983)).

21. 746 S.W.2d 281 (Tex. App.—Houston [1st. Dist.] 1988, no pet.).

while searching for identification. The blanket fell open, and the police officer observed a video cassette recorder. The officer arrested the defendant for suspicion of burglary. The officer then found other items in the blanket and called the dispatcher to inquire whether any one had recently reported a burglary. The defendant voluntarily offered to take the officer to the house he had burglarized. The court held that the evidence should have been suppressed by the trial court because the officer had made an initial unlawful arrest.[22] Further, the defendant's confession also should have been suppressed because the state failed to prove that the the illegal arrest did not affect the statement.[23]

In *Carver v. State*[24] a motel owner notified police that a person he suspected of previously damaging one of his rooms had returned and rented another room at the motel. After placing the room under surveillance for several hours, the police informed the owner that they were powerless but that he had the right to request the defendant, Carver, to leave the room. The owner called Carver and asked him to leave, which he did. As he was leaving, the police approached and asked him for identification. One of the police officers noticed a capped-off length of pipe on the floor board of Carver's vehicle. Thinking that the object was a pipe bomb, the officer called in the bomb squad. After removing from the pipe from the car, the bomb squad discovered that it was empty. Without explanation, the police then opened the locked trunk of the vehicle and discovered a second length of capped-off pipe in a bag. Inside this pipe, the bomb squad officers discovered methamphetamine. The appellate court held that the initial detention was proper pursuant to the articulable suspicion test.[25] The court, however, reversed the conviction because the search should have ended when police determined that the pipe found on the floor of the vehicle was not illegal.[26]

In *Commander v. State*[27] the defendant was convicted of carrying a prohibited weapon—a knife—after being arrested for public intoxication in a private residential driveway. The court reversed the conviction and held that the driveway was not "public" as defined by the Texas Penal Code.[28] Therefore, the detention and arrest were illegal and tainted the subsequent search that produced the prohibited weapon.[29]

Two significant cases addressed whether the court may admit statements

22. *Id.* at 284.
23. *Id.* at 286 (citing Brown v. Illinois, 422 U.S. 590, 602 (1975)).
24. 746 S.W.2d 869 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).
25. *Id.* at 871 (citing Terry v. Ohio, 392 U.S. 1 (1968)). Under the articulable suspicion test, temporary detention of a defendant does not require a prior determination of probable cause. Rather, a court determines the reasonableness of a temporary detention in light of specific and articulable facts known to the detaining officer at the time of detention. 746 S.W.2d at 870-71.
26. *Id.* at 871.
27. 748 S.W.2d 270 (Tex. App.—Houston [14th Dist.] 1988, no pet.).
28. *Id.* at 271. TEX. PENAL CODE ANN. § 1.07(29) (Vernon 1979) defines public place as "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."
29. 748 S.W.2d at 271.

or confessions made after proper initial detention. In *Meek v. State*[30] the defendant's estranged wife implicated him as an arson suspect. Based on this information, the fire investigator arranged to interview the defendant. He brought the defendant into his office, placed him in handcuffs, and generally intimidated him. Not surprisingly, the defendant confessed. At trial the investigator testified that he never read the defendant his *Miranda* rights because he never considered the defendant a suspect during the interview. The court of appeals, however, did not accept that testimony and reversed the conviction, holding that the statements were inadmissable because they arose from custodial interrogation without the requisite constitutional warnings.[31]

In contrast the police in *Maixner v. State*[32] read defendant Maixner, a murder suspect, his rights immediately upon arriving at the police station following his arrest. Maixner nevertheless expressed a desire to discuss the murder. Not believing their good fortune, the police officers terminated the conversation and told Maixner he was free to leave. Maixner refused and insisted upon telling the police officers about his involvement in the murder. The court held the confession admissible.[33]

II. PRETRIAL PROCEDURE

A. Charging Instruments

In *Whitehead v. State*[34] the defendant was convicted of felony theft of timber. Defendant Whitehead's pretrial motion to quash alleged that the indictment failed to describe the number or kind of timber that Whitehead allegedly stole and the indictment failed to allege that the $10,000 total value was calculated by aggregating the values of the stolen property.[35] The trial court overruled his motion, and the court of appeals affirmed.[36] The court of criminal appeals overruled the court of appeals and reversed the conviction.[37] The court held that the state may obtain a single conviction for felony theft by aggregating the values of property taken pursuant to a continuing course of conduct. Such aggregation, however, is an element of the offense that must be included in the indictment.[38] In *Gengnagel v. State*[39] the defendant was convicted of indecent exposure pursuant to section 21.08

30. 747 S.W.2d 30 (Tex. App.—El Paso 1988, pet. granted).
31. *Id.* at 31.
32. 753 S.W.2d 151 (Tex. Crim. App. 1988).
33. *Id.* at 157-58.
34. 745 S.W.2d 374 (Tex. Crim. App. 1988).
35. TEX. PENAL CODE ANN. § 31.09 (Vernon 1974) states: "When amounts are obtained in violation of this chapter pursuant to one scheme or continuing course of conduct, whether from the same or several sources, the conduct may be considered as one offense and the amounts aggregated in determining the grade of the offense."
36. Whitehead v. State, 710 S.W.2d 645, 658 (Tex. App.—Beaumont 1986), *rev'd*, 745 S.W.2d 374 (Tex. Crim. App. 1988).
37. 745 S.W.2d 374 (Tex. Crim. App. 1988).
38. *Id.* at 376. In reaching this determination, the court relied on the general rule that the state must plead everything it intends to prove. *See* Harrell v. State, 643 S.W.2d 686 (Tex. Crim. App. 1982); Vincent State, 626 S.W.2d 536 (Tex. Crim. App. 1981).
39. 748 S.W.2d 227 (Tex. Crim. App. 1988).

of the Texas Penal Code.[40] The court of criminal appeals reversed the conviction, finding that the information did not inform the defendant of the nature of his alleged recklessness.[41] In so holding, the court stated that article 21.15 of the Texas Code of Criminal Procedure[42] requires specific allegations of acts and circumstances that indicate that the accused was aware of the risk that another person would be offended by his act and that the accused acted in conscious disregard of that risk.[43] A more significant impact of this decision may be that because the court found the charging instrument fundamentally defective, consequently, the defendant's failure to raise the defect in a motion to quash prior to trial did not waive the error for review.

The court distinguished an information that fails to allege *acts* demonstrating recklessness from an information that fails to allege the acts with reasonable certainty that constitute recklessness.[44] The court held that article 21.15 of the Texas Code of Criminal Procedure when combined with section 21.98 of the Texas Penal Code requires that acts demonstrating recklessness or criminal negligence become elements of the offense.[45]

DeVaughn v. State[46] involved an attempted burglary in which the defendant allegedly entered a habitation and committed theft without the effective consent of the owner. The defendant, by way of pretrial motion to quash, complained that the indictment failed to provide adequate notice for him to prepare a defense because it failed to allege the elements of burglary, including a description of the property that the defendant allegedly had stolen and the name of the owner of the property. The court of criminal appeals held that when the state alleges burglary by way of an actually completed theft the state must, upon proper request, provide specific information regarding

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40. TEX. PENAL CODE ANN. § 21.08(a) (Vernon 1974) states: "A person commits an offense if he exposes his anus or any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act."

41. 748 S.W.2d at 228. The charging information alleged, in part, that defendant:

> did then and there expose to Kenneth Gore, his genitals with intent to arouse and gratify the sexual desire of the defendant, and the said defendant did so recklessly and in conscious disregard of whether another person was present who would be offended and alarmed by such act, to-wit: exposition of his genitals by the defendant to complainant.

Id. The information closely tracked the indecent exposure statute. *See* TEX. PENAL CODE ANN. § 21.08(a) (Vernon 1979).

42. TEX. CODE CRIM. PROC. ANN. art. 21.15 (Vernon 1977) provides:

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

43. 748 S.W.2d at 230.

44. *Id.* at 229.

45. The court's analysis in *Gengnagel* may apply to any offense in the Texas Penal Code or other criminal statute that requires recklessness or criminal negligence as an element of the offense.

46. 749 S.W.2d 62 (Tex. Crim. App. 1988).

the property allegedly stolen.[47] The court's opinion implies that if the prosecution had been for unlawful entry with intent to commit theft, then more specific pleading would not have been required.[48] Nevertheless, having determined that the indictment failed to provide sufficient notice, the court remanded the case to the court of appeals to determine whether the trial court's error had an impact on the defendant's ability to prepare a defense and, if so, how great an impact.[49]

In DWI cases, the information must specify the defendant's particular manner and means of intoxication. The court of criminal appeals in *Garcia v. State*[50] found that the type of intoxicant used by a defendant is an element of the offense that the state must specify to satisfy its burden of proof.[51] Previously, in *Solis v. State*,[52] the San Antonio court of appeals similarly held that the state must specify, if asked to do so in a timely manner, which definition of "intoxicated"[53] it intends to prove. The San Antonio court in *Ray v. State*[54] subsequently limited *Solis* by holding that, although the state must specify the manner and means of intoxication, a pleading is not insufficient unless it affects the defendant's ability to prepare a defense.[55] The court also held that, when the record does not include a statement of facts, the reviewing court need not evaluate the prejudicial result.[56] Consequently, in *Walker v. State*[57] the San Antonio court summarily confirmed a conviction of driving while intoxicated because the appellant to failed bring the statement of facts forward on appeal.[58]

B. Former Jeopardy

In *Strickland v. State*[59] the court considered whether double jeopardy arose as a result of the trial court's sua sponte granting of a mistrial over the defendant's objection. The trial granted the mistrial because one of the impaneled and sworn jurors moved out of the county before the trial con-

47. *Id.* at 71.

48. *Id.* (citing Nichols v. State, 494 S.W.2d 830 (Tex. Crim. App. 1973)).

49. 749 S.W.2d at 71 (citing Adams v. State, 707 S.W.2d 900, 903 (Tex. Crim. App. 1986)).

50. 747 S.W.2d 379 (Tex. Crim. App. 1988).

51. *Id.* at 381.

52. 742 S.W.2d 873 (Tex. App.—San Antonio 1987, pet. granted).

53. TEX. REV. CIV. STAT. ANN. art 67011-1 (Vernon Supp. 1989) defines "intoxication" as: "(A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or (B) having an alcohol concentration of 0.10 or more." The court in *Solis* apparently separated subsections (A) and (B) into two distinct categories: loss of faculties and alcohol concentration of greater than 0.10. Query: Does not the loss of faculties provision of subpart (A) envision two ways of losing faculties, that is, loss of normal *mental* or *physical* faculties. Perhaps only time will tell.

54. 749 S.W.2d 939 (Tex. App.—San Antonio 1988, no pet.).

55. *Id.* at 942.

56. *Id.*

57. 751 S.W.2d 268 (Tex. App.—San Antonio 1988, no pet.).

58. *Id.* at 269.

59. 741 S.W.2d 551 (Tex. App.—Dallas 1988, no pet.).

cluded. The court then held a second trial before a jury of twelve, and the defendant was convicted.

The appellate court reversed the conviction because the grant of a mistrial was not of "manifest necessity."[60] Rather the trial court should have utilized one of two various alternatives.[61] If the juror was disabled, the trial court should have continued the trial with eleven jurors pursuant to the provisions of article 36.29 of the Texas Code of Criminal Procedure.[62] If the juror was not disabled, the trial court should have advised the defendant that the trial would continue with twelve jurors unless the defendant agreed to proceed with eleven jurors or asked for mistrial.[63]

In *State v. Herrera*[64] the state appealed from a grant of habeas corpus relief based upon theories of double jeopardy and collateral estoppel. The El Paso court of appeals held that the defendant, who was acquitted of deadly assault on a peace officer, could not be tried for capital murder of a peace officer.[65] Herrera was charged with both offenses, and the prosecutor elected to try the deadly assault case first. The defendant was acquitted. The court held that since deadly assault on a peace officer can be a lesser offense to capital murder, the acquittal on the lesser offense operated as an acquittal on the greater.[66]

In *Ex Parte Stevens*[67] the state tried the defendant first for aggravated rape and later for the lesser included offense of rape, both arising from the same incident. The Dallas court of appeals held that acquittal of the greater offense of aggravated rape precludes prosecution for a lesser included offense for which the defendant could have been convicted during the original trial, even though the latter was not specifically alleged in the first indictment.[68]

C. Speedy Trial

The Texas Court of Criminal Appeals rejected the Speedy Trial Act[69] in *Meshell v. State*.[70] In *Branscum v. State*[71] the Amarillo court of appeals considered whether a twenty-two-year delay between the date of an offense and the trial denied the accused his rights under both (1) the United States and Texas Constitutions and (2) the Texas Speedy Trial Act. Pursuant to *Meshell*, the court rejected the Speedy Trial Act, but reversed the conviction[72] based on the four-factor test of *Barker v. Wingo*.[73]

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60. *Id.* at 552.
61. *Id.* at 553.
62. TEX. CODE CRIM. PROC. ANN. art 32.69 (Vernon 1977).
63. 741 S.W.2d at 553.
64. 754 S.W.2d 795 (Tex. App.—El Paso 1988, no pet.).
65. *Id.* at 797.
66. *Id.* (citing Parker v. State, 626 S.W.2d 738 (Tex. Crim. App. 1982); Ex parte Gutierrez, 600 S.W.2d 933 (Tex. Crim. App. 1980)).
67. 753 S.W.2d 208 (Tex. App.—Dallas 1988, no pet.).
68. *Id.* at 212 (citing Ex Parte Neilson, 131 U.S. 176 (1889); Privett v. State, 635 S.W.2d 746, 752 (Tex. App.—Houston [1st Dist.] 1982, no pet.)).
69. TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 1(1) (Vernon 1977).
70. 739 S.W.2d 246 (Tex. Crim. App. 1987) (Texas Speedy Trial Act unconstitutional).
71. 750 S.W.2d 892 (Tex. App.—Amarillo 1988, no pet.).
72. *Id.* at 894-895.

III. PROCEDURAL ASPECTS OF TRIAL

A. *Voir Dire*

The most significant issue relating to the voir dire stage of criminal trial proceedings revolved around the United States Supreme Court ruling in *Batson v. Kentucky*[74] and its Texas counterpart embodied in article 35.261 of the Texas Code of Criminal Procedure.[75] The Texas Court of Criminal Appeals opinion in *Keeton v. State*[76] represents an exhaustive analysis of how *Batson* is to be applied in Texas jurisprudence.[77] Judge Miller reviewed a variety of decisions from other jurisdictions relating to *Batson's* application around the country and ultimately approved a conceptional analysis of several of those opinions in applying both procedural and substantive aspects of *Batson* to a particular case.

A reading of *Keeton* establishes some general principles in relation to *Batson*. First, whether the prosecutor exercises challenges in a racially discriminating manner is not to be judged by an objective test; rather, the trial judge must assess the explanations both objectively and subjectively with a view toward the voir dire examination as a whole.[78] Second, five articulated factors weigh heavily against the legitimacy of any race-neutral explanation. These factors are:

1) an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically;
2) no examination or only a perfunctory examination of the challenged juror;
3) disparate examination of the challenged juror, i.e., questioning

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73. 407 U.S. 514 (1972). The primary factors a court must consider are: (1) length of delay between the time an accused is formerly accused or arrested and trial; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial or made a demand for a trial; (4) prejudice to the defendant resulting from the delay. *Id.* at 531.

74. 476 U.S. 79 (1986).

75. TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon Supp. 1989) provides:

> (a) After the parties have delivered their lists to the clerk under Article 35.26 of this code and before the Court has impaneled the jury, the defendant may request the court to dismiss the array and call a new array in the case. The court shall grant the motion of a defendant for dismissal of the array if the court determines that the defendant is a member of an identifiable racial group, that the attorney representing the state exercised peremptory challenges for the purpose of excluding persons from the jury on the basis of their race, and that the defendant has offered evidence of relevant facts that tend to show that challenges made by the attorney representing the state were made for reasons based on race. If the defendant establishes a prima facie case, the burden then shifts to the attorney representing the state to give a racially neutral explanation for the challenges. The burden of persuasion remains with the defendant to establish purposeful discrimination.
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> (b) If the court determines that the attorney representing the state challenged prospective jurors on the basis of race, the court shall call a new array in the case.

76. 749 S.W.2d 861 (Tex. Crim. App. 1988).

77. It should be noted that *Keeton* did not address the question of the application of article 35.261 of the Code of Criminal Procedure. The statutory enactment was not yet in effect at the time the *Keeton* case went to trial. It is unlikely, however, that the application of *Batson* is going to differ significantly from the provisions of the codification.

78. 749 S.W.2d at 866.

challenged venireperson as to evoke a certain response without asking the same question of other panel members;
4) the reason given for the challenge is unrelated to the facts of the case; and
5) disparate treatment where there is no difference between responses given and unchallenged venirepersons.[79]

Third, the trial court is to examine reasons given by the prosecutor for exercising challenges.[80] These reasons are then to be evaluated in light of other circumstances and the court's own knowledge of trial tactics to determine whether the reasons given by the prosecutor are contrived in order to avoid admitting discrimination.[81] Finally, it is clear that the defendant is allowed to offer evidence in support of his *Batson* motion.[82] In reviewing the trial court's decision, appellate courts will not invoke a "clearly erroneous" or "abuse of discretion" standard. Rather, the focus will be on whether purposeful discrimination was established through the record. In review, the appellate court will consider the evidence in the light most favorable to the trial court's rulings and determine if the record supports the rulings.[83]

In a related case, *Levy v. State*,[84] the Fourteenth District Court of Appeals, considered whether a trial court must enter specific findings of fact and conclusions of law pursuant to a *Batson* hearing. The court concluded that, while doing so may be the better practice, *Batson* does not require a trial court to enter specific findings and conclusions if it determines that the state did not purposefully discriminate based on race.[85] In *Miller-El v. State*,[86] a pre-*Batson* case, the prosecutor directed ten of his fourteen peremptory challenges at black venirepersons, striking ten of the eleven originally on the panel. Although the prosecutor left one black person on the jury, the court of criminal appeals held that the defendant had raised the issue of purposeful discrimination[87] and abated the appeal to permit the trial court to conduct a full hearing pursuant to *Keeton*.[88]

In other significant voir dire issues, the past year may be remembered as the year of the misleading hypothetical. In *Lane v. State*,[89] a capital murder case, the prosecutor used a hypothetical situation to try to explain to the venirepersons the difference between "intentionally" for purposes of determining guilt and "deliberate" in answering the first special issue supporting

79. *Id.* (quoting Slappy v. State, 503 So. 2d 350 (Fla. Dist. Ct. App. 1987)).
80. *Id.* at 867.
81. *Id.*
82. *Id.* at 868.
83. *Id.* at 870.
84. 749 S.W.2d 176 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).
85. *Id.* at 179. The court also noted that the Texas Court of Criminal Appeals has construed *Batson* to require a trial court to make findings of fact and conclusions of law if the trial court determines that a defendant has established purposeful racial discrimination. *Id.* (citing DeBlanc v. State, 732 S.W.2d 640, 642 (Tex. Crim. App. 1987); Williams v. State, 731 S.W.2d 563, 564 (Tex. Crim. App. 1987); Keeton v. State, 724 S.W.2d 58, 66 (Tex. Crim. App. 1987)).
86. 748 S.W.2d 459 (Tex. Crim. App. 1988).
87. *Id.* at 460.
88. 749 S.W.2d 861 (Tex. Crim. App. 1988).
89. 743 S.W.2d 617 (Tex. Crim. App. 1987).

the death penalty.[90] The hypothetical involved the armed robbery of a convenience store in which the robber fired a shot into the ceiling and the bullet ricocheted and killed a convenience store clerk. The prosecutor characterized this hypothetical as an example of a deliberate killing pursuant to section 19.02 of the Texas Penal Code.[91] The court held that the hypothetical represented a blatant misstatement of the law of capital murder.[92] Consequently, the explanation created a false distinction between the terms "intentional" and "deliberate." Furthermore, the state used the same hypothetical with each juror who admitted difficulty in making a distinction between the two terms. Consequently, the inaccuracy of the hypothetical could only have confused the juror's common sense impression of intentional and deliberate conduct, forcing a reversal of the conviction.[93] In the later case of *Morrow v. State*[94] the court was again confronted with the almost identical hypothetical as that in *Lane*, with the same result.[95] In *Felder v. State*[96] the "shooting into the ceiling" hypothetical was again used by the prosecutor, but was held not to be the controlling issue. In this case, defense counsel through his voir dire examination established that a venireperson could not distinguish between "intentional" and "deliberate" killings. The venireperson could not conceive of any case in which, if he found the accused guilty of murder, he would not also answer "yes" to the question of "deliberate."[97] The court of criminal appeals held that the defendant's challenge for cause should have been sustained.[98] Additionally, *Felder v. State* can be cited for the proposition that a potential juror who cannot honestly say that he would not consider parole when deciding on punishment for the accused, if found guilty, is subject to exclusion upon proper challenge.[99]

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90. Article 37.071 of the Texas Code of Criminal Procedure requires that, in a death case, the jury be submitted three special issues, the first of which is "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." TEX. CODE CRIM. PROC. ANN. art 37.071(b)(1) (Vernon Supp. 1989).

91. Apparently, the prosecutor attempted to bring the hypothetical within subsection (2), and (3) of § 19.02, which provides:

> (2) A person commits an offense if he:
>
> (3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

TEX. PENAL CODE ANN. § 19.02 (Vernon 1974). The prosecutor, however, characterized the conduct as capital murder when it could not conceivably be construed as conduct supporting capital murder.

92. 743 S.W.2d. at 627.

93. *Id.*

94. 753 S.W.2d 372 (Tex. Crim. App. 1988).

95. *Id.* at 376; *see also* Gardner v. State 730 S.W.2d 675 (Tex. Crim. App. 1987) (improper hypothetical used to demonstrate difference between "intentional" and "deliberate" murder).

96. 758 S.W.2d 760 (Tex. Crim. App. 1988).

97. *Id.* at 769.

98. *Id.* at 770.

99. *Id.* at 766.

Nichols v. State[100] does not break any new legal ground, but does provide insight into the distinction and preservation of error in "qualified"[101] versus "disqualified"[102] jurors. In this case, the trial judge sua sponte excused a prospective juror because he was apparently preoccupied by his employment and his upcoming wedding. The question of whether the trial court erred and, if so, whether the error was reversible, depended on whether the juror in question was a "qualified" juror or a "disqualified" juror. If the former, the defendant must show harm by the fact the state exhausted its peremptory challenges and, except for the court's action, the juror would have served.[103] If the latter, harm is shown only when the defendant establishes that he was tried by a jury to which he had a legitimate objection.[104] The court held that the trial court erred in excluding the juror in question on its own motion, but because the juror's preoccupation with other matters made him subject to a challenge for cause, the juror fell within the "disqualified" juror category.[105] Thus, in order to establish harm, the appellant must show that he was either forced to exercise a peremptory strike to prevent a disqualified juror from sitting or that he was forced to accept an objectionable juror in the prospective juror's place.[106] In this case, the defendant failed to show any harm resulting from the trial court's error.

B. Evidentiary Matters

Re-enactment Videotape. In *Miller v. State*[107] the court of criminal appeals held that a videotape re-enactment of an automobile ride in a murder case was admissible because it showed only the route taken and did not actually show any re-enacted criminal activity.[108] In so holding, the court distinguished the case of *Lopez v. State*,[109] in which the Fort Worth court of appeals reversed a conviction for aggravated delivery of marijuana because of the improper admission of a videotape re-enactment of the criminal offense.

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100. 754 S.W.2d 185 (Tex. Crim. App. 1988).

101. A "qualified" juror is one who is not subject to a challenge for cause pursuant to the requirements of art. 35.16 of the Code of Criminal Procedure. *See* Rougeau v. State, 738 S.W.2d 651, 661 (Tex. Crim. App. 1987); Goodman v. State, 701 S.W.2d 850, 856 (Tex. Crim. App. 1985).

102. A "disqualified" juror is one who is properly subject to a challenge for cause. The court noted that it is axiomatic that the trial judge should never sua sponte excuse a prospective juror unless the juror is absolutely disqualified from serving on a jury. 754 S.W.2d at 193. The requirements for absolute disqualification are set forth in art. 35.19 of the Texas Code of Criminal Procedure, which provides generally that no juror should be impaneled who has been convicted of theft or any felony, that is under indictment or other legal accusation for theft or any felony, or is insane.

103. 754 S.W.2d at 193 (citing Bell v. State, 724 S.W.2d 780, 795-96 (Tex. Crim. App. 1986)).

104. *Id.*

105. *Id.* at 194.

106. *Id.*

107. 741 S.W.2d 382 (Tex. Crim. App. 1987).

108. *Id.* at 388.

109. 651 S.W.2d 413, 416 (Tex. App.—Fort Worth 1983), *rev'd on other grounds*, 664 S.W.2d 85 (Tex. Crim. App. 1985)).

Doctrine of Curative Admissibility.[110] In *Nehman v. State*[111] the state introduced the defendant's confession, but deleted exculpatory portions that raised the issue of self-defense. The defendant objected, claiming that the written confession was obtained in violation of his right to counsel and should not have been admitted into evidence.[112] The objections were overruled, and the entire confession was introduced when Nehman took the stand during the guilt-innocence phase of the trial. The state's argument on appeal was that even if the judge had erred in admitting the inculpatory parts of the defendant's statement, the defendant had cured that error by introducing the entire statement. In rejecting the state's argument, the court cited an exception to the general rule that error is not waived if the defendant puts on the same kind of evidence "only to *rebut, destroy, or explain* the effect of the evidence."[113] In *Parker v. State*[114] the First District Court of Appeals held in a DWI case that the denial of the jury's request to view a videotape, properly admitted into evidence, denied the defendant a fair and impartial trial.[115]

In *Fielder v. State*[116] the court of criminal appeals, for the first time in Texas, permitted expert psychological testimony in a case where the "battered wife syndrome" defense was raised. The court reasoned that the expert established through her testimony that the average lay person had no basis for understanding the conduct of a woman who endured an abusive relationship.[117] Indeed, the state, in its cross-examination of the defendant, sought to capitalize on the apparent incongruity of one who stayed in a relationship in which she was continually and repeatedly subjected to physical, mental, and psychological abuse from her spouse. The court held that the expert testimony was relevent to the issues of the trial if it could help the trier of fact to reconcile the incongruity.[118]

In *Rutledge v. State*[119] the court of criminal appeals construed the proper use of "have you heard" questions. A witness was called as a punishment witness for the defendant. On direct examination, he testified only to his own personal knowledge of the defendant and not to the defendent's general reputation in the community. On cross-examination, the state proceeded to ask whether the witness had heard of various extraneous acts involving the

110. "Curative admissibility" is used by reviewing courts when they have found error in admitting evidence over timely objection. The court then determines whether the defendant presented the same evidence or testimony to which he previously objected. If so, the error is considered "cured" by the defendant's action of putting the testimony or evidence before the trier of fact. *See* Sweeten v. State, 693 S.W.2d 454, 456 (Tex. Crim. App. 1985).

111. 742 S.W.2d 102 (Tex. App.—Fort Worth 1987, no pet.).

112. *See* Nehman v. State, 721 S.W.2d 319, 323 (Tex. Crim. App. 1986) (prior opinion in same case).

113. 742 S.W.2d at 103 (emphasis in original) (quoting Sweeten v. State, 693 S.W.2d 454, 456 (Tex. Crim. App. 1985)).

114. 745 S.W.2d 934 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd).

115. *Id.* at 937.

116. 756 S.W.2d 309 (Tex. Crim. App. 1988).

117. *Id.* at 321.

118. *Id.*

119. 749 S.W.2d 50 (Tex. Crim. App. 1988).

defendant. The Dallas court of appeals relied on *Livingston v. State*[120] in affirming the conviction, finding that the witness' testimony encompassed "a broad range of character traits, going so far as to infer general good character."[121] The court of criminal appeals reversed the punishment phase of the trial, implicitly overruling *Livingston* in the process.[122]

One of the more intriguing opinions relating to evidentiary issues is that of *Zani v. State*,[123] which involved the use of hypnotically enhanced testimony. The case involved a murder of a convenience store clerk where there was no eye witness to the shooting, forcing the state to rely on circumstantial evidence. One witness, however, allegedly saw someone in the store near the time of the shooting, but could describe that individual only as a white male. While under hypnosis, the witness gave a description of a man he saw behind the counter of the store. Following hypnosis, the witness picked Zani's picture out of a photo spread. At trial, the witness testified that he was positive that Zani was the man he had seen in the store. The defense objected to the hypnotically induced testimony as not being scientifically reliable. Following a pretrial suppression hearing, the trial court decided the testimony was sufficiently reliable to be submitted to the jury for consideration, with the fact of hypnosis going solely to the weight the jury might choose to assign it.

Relying on the U. S. Supreme Court opinion of *Rock v. Arkansas*,[124] the court of criminal appeals refused to hold that hypnotically induced testimony was per se inadmissible.[125] Most of the majority opinion concerns factors to be considered by both the trial court and the reviewing court in determining whether hypnotically enhanced testimony is sufficiently reliable to be admissible under the facts and circumstances of a particular case.[126]

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120. 589 S.W.2d 395 (Tex. Crim. App. 1979).

121. Rutledge v. State, 693 S.W.2d 681, 683 (Tex. App.—Dallas 1985), *rev'd in part*, 749 S.W.2d 50 (Tex. Crim. App. 1988).

122. Rutledge v. State, 749 S.W.2d 50, 53 (Tex. Crim. App. 1988). Although the court did not specifically overrule *Livingston*, it pointed out that *Livingston* relied upon and followed law announced in Childs v. State, 491 S.W. 2d 907 (Tex. Crim. App. 1973). *Childs* was explicitly overruled by the court in Ward v. State, 591 S.W.2d 810 (Tex. Crim. App. 1978).

123. 758 S.W.2d 233 (Tex. Crim. App. 1988).

124. 107 S. Ct. 2704, 2711, 97 L. Ed. 2d 37, 49 (1987).

125. Apparently, but for the decision in *Rock v. Arkansas*, the court of criminal appeals would have adopted a *per se* exclusionary rule. After a lengthy discussion of decisions from other jurisdictions regarding the issue, Judge Clinton, writing for the majority, stated:

> [W]e would likely follow those jurisdictions which have fashioned a rule of *per se* exclusion of any evidence not documented or otherwise memorialized as the product of prehypnotic memory. The recent opinion of the Supreme Court of the United States in *Rock v. Arkansas*, however, has rendered such a position untenable.

Zani, 758 S.W.2d at 242 (citation omitted).

126. Regarding this threshold issue, the court held:

> Factors involved in determining trustworthiness of hypnotic recall include, but are not limited to . . . : "the level of training in the clinical uses and forensic applications of hypnosis by the person performing the hypnosis; the hypnotist's independence from law enforcement investigators, prosecution, and defense; the existence of a record of any information given or known by the hypnotist concerning the case prior to the hypnosis session; the existence of a written or recorded account of the facts as the hypnosis subject remembers them prior to undergoing hypnosis; the creation of recordings of all contacts between the hyp-

Another issue raised in *Zani* concerned proper procedures for conducting pretrial hearings. At the hearing in *Zani* the trial court allowed the state to present evidence in support of admitting the hypnotically enhanced testimony, but would not allow the defendant to call his expert witness. The court of criminal appeals held it an abuse of discretion to hear testimony from only one side.[127] The trial court, however, did allow the defendant's expert to testify to the jury during the trial itself, thus the trial court's error was not dispositive of any issue presented on appeal.

Several cases from various courts addressed issues related primarily to child abuse type cases. In 1987, the court of criminal appeals in *Long v. State*[128] held a portion of article 38.071 of the Texas Code of Criminal Procedure[129] unconstitutional in that it deprived the defendant of his right of confrontation under the sixth and fourteenth amendments to the United States Constitution and article I, section 10 of the Texas Constitution.[130] The portion had allowed the state to introduce a videotaped statement by a child in an abuse case. Since the *Long* decision, the appellate courts have disagreed as to whether the introduction of the videotape[131] is harmful per se, thus automatically calling for reversal, or whether it is subject to harm analysis.[132] The court of criminal appeals settled the dispute in *Mallory v. State*.[133] In *Mallory* the court cited the United States Supreme Court's decisions in *Harrington v. California*,[134] *Chapman v. California*,[135] and *Delaware v. Van—Arvsall*[136] for the proposition that "the constitutionally improper

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notist and the subject; the presence of persons other than the hypnotist and the subject during any phase of the hypnosis session, as well as the location of the session; the appropriateness of the induction and memory retrieval techniques used; the appropriateness of using hypnosis for the kind of memory loss involved; and the existence of any evidence to corroborate the hypnotically-enhanced testimony."

Id. at 243-44 (quoting People v. Romero, 745 P.2d 1003, 1017 (Colo. 1987)). Additionally, the court held that if the trial court, after reviewing the totality of the circumstances, should find by clear and convincing evidence that the testimony was trustworthy and that the proceedings did not substantially impair the ability of the opponent to fairly test the witness's recall by cross-examination, the judge *may* admit the testimony. *Id.* at 244.

127. *Id.* at 244-45.

128. 742 S.W.2d 302 (Tex. Crim. App. 1987).

129. TEX. CODE CRIM. PROC. ANN. art. 38.071, § 2(a) (Vernon Supp. 1989) provides:

> The recording of an oral statement of the child made before the indictment is returned or the complaint has been filed is admissible into evidence if the court makes a determination that the factual issues of identity or actual occurrence were fully and fairly inquired into in a detached manner by a neutral individual experienced in child abuse cases that seeks to find the truth of the matter.

130. The court held that the admission of a child witness' videotaped statement violated the defendant's right to cross-examination and confrontation as well as his due process rights. 742 S.W.2d at 318-20.

131. *See, e.g.*, Foty v. State, 755 S.W.2d 195, 196 (Tex. App.—Houston [14th Dist.] 1988, no pet.).

132. *See, e.g.*, Offor v. State, 749 S.W.2d 946 (Tex. App.—Austin 1988, no pet.); Verell v. State, 749 S.W.2d 197 (Tex. App.—Fort Worth 1988, pet. ref'd); Amescua v. State, 751 S.W.2d 709 (Tex. App.—San Antonio 1988, no pet.).

133. 752 S.W.2d 566 (Tex. Crim. App. 1988).

134. 395 U.S. 250 (1969).

135. 386 U.S. 18 (1967).

136. 475 U.S. 673 (1986).

denial of a defendant's opportunity to impeach a witness for bias, like other confrontation clause errors, is subject to harmless-error analysis."[137] In adopting this principle, the court stated: "[A] violation of such a right does not invariably tarnish the truth finding process to the extent that automatic reversal is called for in every case. Therefore, . . . a harmless error analysis is necessary and appropriate."[138] Although the court relied extensively on the *Chapman* rationale, it determined the *Chapman* discretion was no longer available and the test for harmless error was provided in the Texas Rules of Appellate Procedure.[139] The court went on to note that harmless error analysis was a progressive process.[140] First, the appellate court must find that error exists.[141] Second, if an error is discovered, the appellate court is obligated to reverse the judgment below unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment imposed.[142] If the appellate court cannot make that determination beyond a reasonable doubt, it is required to reverse the judgment.[143]

In *Tolbert v. State*[144] the court of criminal appeals faced another *Long* scenario. Unlike *Long*, however, the case had been tried to the court and not a jury. In affirming the conviction, the court relied on the generally accepted presumption that, when the trial court acts as trier of fact, it will disregard any inadmissible evidence.[145] Thus, it was incumbent upon the defendant to show that the trial court considered the inadmissible evidence in reaching the verdict or in determining punishment.[146]

In another child abuse case, *Kirkpatrick v. State*[147] the Dallas court of appeals held that expert testimony may not directly bolster the testimony of a child victim.[148] The court relied on the rule that a witness may not give an opinion as to the truth or falsity of other testimony.[149] In *Russell v. State*,[150] however, the court of criminal appeals held that, if expert testimony was

137. 752 S.W.2d at 569 (citing Chapman v. California, 386 U.S. 18 (1967)).

138. *Id.* at 569.

139. TEX. R. APP. P. 81(b)(2) provides that a judgment shall be reversed if the record reveals error "unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment."

140. 752 S.W.2d at 569.

141. *Id.*

142. *Id.* at 570.

143. *Id.* at 569-70.

144. 743 S.W.2d 631 (Tex. Crim. App. 1988).

145. *Id.* at 633; *see also* Morgan v. State, 692 S.W.2d 877, 879 (Tex. Crim. App. 1985) (presumption that court as trier of fact disregards inadmissible evidence).

146. *See* Tamminen v. State, 653 S.W.2d 799, 803 (Tex. Crim. App. 1983).

147. 747 S.W.2d 833 (Tex. App.—Dallas 1987, pet. ref'd).

148. *Id.* at 836.

149. *See* Avala v. State, 352 S.W.2d 955, 956 (Tex. Crim. App. 1962). The court did note, however, that expert testimony was proper regarding the general behavioral traits of child victims such as delay in reporting the incident, recantation, truancy, embarrassment, running away from home, and inconsistent versions of abuse. This type of testimony explains to the jurors that such behavior, which might otherwise be attributed to inaccuracy or falsification, is typical of the class of victims and does not necessarily indicate a lack of credibility. 747 S.W.2d at 835-36.

150. 749 S.W.2d 77 (Tex. Crim. App. 1988).

admitted in the trial, the trial court should have avoided including an instruction in the jury charge drawing attention to that particular evidence.[151] The court reasoned that such an instruction constituted a comment on the weight of the evidence because it had a tendency to single out certain testimony and to comment on it.[152]

Alexander v. State[153] involved the admission of extraneous acts in a case involving an aggravated sexual assault of a child. The trial court justified the admission of the extraneous acts by finding the acts sufficiently similar in nature to demonstrate a continuing scheme or course of conduct and unnatural attention displayed by the defendant to young girls of tender ages. Consequently, the trial court found the probative effect of the evidence outweighed the prejudicial effect. Further, the trial court included an instruction to the jury limiting consideration of these acts only in determining scheme, design or course of conduct of a defendant.[154] The Eastland court of appeals affirmed the conviction, relying on *McDonald v. State*[155] and *Johnston v. State*.[156] Both of those cases, however, were expressly overruled in *Boutwell v. State*.[157] Thus, the court of criminal appeals remanded the case to the court of appeals to review the facts pursuant to *Boutwell*.[158]

C. *The Jury Charge*

In *Rose v. State*[159] the court of criminal appeals rewrote its opinion holding the parole jury charge unconstitutional.[160] The *Rose* story is extremely convoluted.[161] So many opinions concurred in part as well as dissented that to tell exactly what was decided is somewhat difficult. It is clear, however, that (1) the parole charge is unconstitutional[162] and (2) in reviewing a *Rose* error, appellate courts should apply the harm analysis required by rule

151. *Id.* at 80. The instruction in *Russell* stated: "You are instructed that you are not bound by the testimony offered by a witness qualified as an expert. You may give it the weight to which you find it is entitled and may weigh such testimony with all other evidence offered in this case." *Id.* at 77.

152. *Id.* at 78 (citing Chambers v. State, 700 S.W.2d 597 (Tex. Crim. App. 1985)).

153. 753 S.W.2d 401 (Tex. Crim. App. 1988).

154. *Id.* at 402.

155. 513 S.W.2d 44 (Tex. Crim. App. 1974).

156. 418 S.W.2d 522 (Tex. Crim. App. 1967).

157. 719 S.W.2d 164 (Tex. Crim. App. 1985).

158. 753 S.W.2d at 402.

159. 752 S.W.2d 529 (Tex. Crim. App. 1987).

160. The statutory parole charge is embodied in TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4 (Vernon 1977). In essence, it informs the jury of some of the aspects of parole and the effects of parole and good time on the sentence imposed in a given case.

161. When *Rose* was initially decided by the court of criminal appeals, the general consensus was that the parole charge violated the due process clause of the Texas Constitution, (TEX. CONST. art. I, § 19), and that error would be judged according to Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1984). The court, however, on its own motion for rehearing, subsequently determined that the parole charge violated the separation of powers clause, and the due course of law provisions, TEX. CONST. art. II, §§ 1, 13, 19 and that the *Almanza* standard was inappropriate. Rose v. State, 752 S.W.2d at 552 (Justice Campbell writing opinion on court's own motion for rehearing).

162. 752 S.W.2d at 537.

81(b)(2) of the Texas Rules of Appellate Procedure.[163] In reaching the latter conclusion, the court rejected the argument that the harm analysis should follow the procedure set out in *Almanza v. State*.[164] Under *Almanza*, if the trial court overrules a proper objection or a proper instruction, reversal is required if there is "some harm to the accused from the error."[165] *Almanza* further instructed that several factors will determine the actual degree of harm, including the jury charge as a whole, the state of the evidence, argument of counsel, and any other relevant information revealed by the entire trial record.[166] Perhaps the most significant distinction between harm analysis pursuant to rule 81 and that of *Almanza* relates to the burden of proof. Under *Almanza*, the burden is on the defendant to demonstrate harm.[167] Rule 81 places the burden on the state to demonstrate that the error was harmless.[168] As noted by the First District Court of Appeals in *Herring v. State*, few appellants can show harm from a jury charge error.[169] Therefore, placing the burden on appellants will usually be fatal to their claim.[170] For purposes of the harm analysis, the *Rose* opinion provides some guidelines as to what should be considered. Among these are whether the trial court in addition to the parole charge also gave a curative instruction, the facts of the case generally, and the criminal record of the accused.[171]

The court of criminal appeals held in *Reyes v. State*[172] that, in order to support a deadly weapon finding when the defendant is prosecuted on the basis of the law of parties, there must be a specific finding by the trier of fact that the accused personally used or exhibited a deadly weapon.[173] In *Woodfox v. State*[174] the court of criminal appeals held that the defendant need not testify nor put on any evidence to be entitled to an instruction on a defensive issue of mistake of fact.[175] The rule is reasserted that, when a defensive theory is raised by evidence *from any source* and a charge is properly requested, it must be submitted to the jury.[176] In *Johnson v. State*[177] the court of criminal appeals held that when evidence raises an issue as to whether appellant was guilty under the law of parties pursuant to section 7.02 of the Texas Penal Code,[178] it is error for the trial judge not to explicitly apply the law of

163. *Id.* at 555; *see supra* note 139.
164. 686 S.W.2d 157 (Tex. Crim. App. 1984).
165. *Id.* at 171.
166. *Id.*
167. *Id.* at 171; *see* LaPoint v. State, 750 S.W.2d 180, 191 (Tex. Crim. App. 1986); Herring v. State, 752 S.W.2d 169, 173 (Tex. App.—Houston [1st Dist.] 1988), *rev'd*, 758 S.W.2d 283 (Tex. Crim. App. 1988)); *see also* TEX. CODE CRIM. PROC. Ann. art. 36.19 (Vernon 1974).
168. Herring v. State, 752 S.W.2d at 173-74.
169. *Id.* at 174.
170. *Id.* at 173.
171. *Rose*, 752 S.W.2d at 554-55.
172. 741 S.W.2d 414 (Tex. Crim. App. 1987).
173. *Id.* at 432-33; *see* Travelstead v. State, 693 S.W.2d 400, 402 (Tex. Crim. App. 1985).
174. 742 S.W.2d 408 (Tex. Crim. App. 1987).
175. *Id.* at 409.
176. *Id.* (emphasis added); *see* Sanders v. State, 707 S.W.2d 78, 80 (Tex. Crim. App. 1986); Gavia v. State, 488 S.W.2d 420, 421 (Tex. Crim. App. 1972).
177. 739 S.W.2d 299 (Tex. Crim. App. 1987).
178. The statute provides: "A person is criminally responsible for an offense committed by

parties to the facts of a particular case.[179]

In *Kelly v. State*[180] injury to an elderly individual pursuant to section 22.04 of the Penal Code was found to be a result offense and thus the jury charge must apply the culpable mental state to the result of the alleged conduct.[181] Although the statute appears to impose strict liability, the court ruled that the mental state of the defendant applies to the conduct of the defendant that caused the result.[182]

IV. APPEALS

The First District Court of Appeals in *Jiles v. State*[183] held that oral notice of appeal could, in some cases, be sufficient to invoke the jurisdiction of an appellate court. Timely notice of appeal was orally given but neither the appellant nor his attorney signed a written notice of appeal. Relying on rule 83 of the Texas Rules of Appellate Procedure[184] the court held that the failure could be characterized as a "defect of form" thus dismissal of the appeal was not required.[185] Indeed, the court implicitly ruled that, as a practical matter, the failure of the defendant's attorney to file a written motion for appeal would likely be ineffective assistance of counsel,[186] pursuant to the U.S. Supreme Court ruling in *Evitts v. Lucey*.[187]

In *Ex Parte Lopez*[188] the court of criminal appeals held that an indigent defendant is entitled to appointed counsel upon remand to a court of appeals. In this case, the petitioner alleged that his court-appointed counsel on appeal withdrew from the case upon receiving notice of the reversal by the court of appeals. Apparently, the accused was never informed of his attorney's withdrawal. Ultimately, because the state of the record was unclear,

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another if . . . acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense . . . ." TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 1974).

179. 739 S.W.2d at 305.

180. 748 S.W.2d 236 (Tex. Crim. App. 1988).

181. *Id.* at 239; *see also* Beggs v. State, 597 S.W.2d 375 (Tex. Crim. App. 1980) (injury-to-child statute is not strict liability law), Alvarado v. State, 704 S.W.2d 36 (Tex. Crim. App. 1985) (injury-to-child statute is not strict liability law).

182. Kelly v. State, 748 S.W.2d at 238-39.

183. 751 S.W.2d 620 (Tex. App.—Houston [1st Dist.] 1988, no pet.).

184. TEX. R. APP. P. 83 provides:

> A judgment shall not be affirmed or reversed or an appeal dismissed for defects or irregularities in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities . . . except that in criminal cases late filing of the transcript or statement of facts may be permitted on a showing that otherwise the appellant may be deprived of effective assistance of counsel.

185. 751 S.W.2d at 622. The court noted that Shute v. State, 744 S.W.2d 96 (Tex. Crim. App. 1988), upon which the state relied, held that the court of appeals did not err in dismissing that cause for lack of jurisdiction. The court, however, noted that there was no discussion in *Shute* as to whether the court of appeals had other options other than dismissal. Thus, the court concluded that other options were available. 751 S.W.2d at 621.

186. 751 S.W.2d at 621-22.

187. 469 U.S. 387, 390-91 (1985) (lawyer who failed to file "Statement of Appeal," as required by Kentucky procedural rule deprived defendant of his sixth amendment right to counsel and constituted ineffective assistance of counsel on appeal).

188. 745 S.W.2d 29 (Tex. Crim. App. 1988).

the court remanded to the appellate court for further proceedings.[189] The court of criminal appeals further clarified and perhaps expanded the role of the trial lawyer in the appellate process in *Ex Parte Axel*.[190] The facts were a classic example of the natural ambiguity of the attorney-client relationship that arises at the conclusion of a trial. Although the accused in *Axel* informed his retained counsel that he desired to appeal his conviction, the attorney neither filed a notice of appeal nor filed a motion to withdraw.[191] The court held that the trial court has the discretion to, but no duty or responsibility to, inform a defendant of his right to appeal.[192] That duty rests with the trial counsel. Whether retained or appointed, trial counsel maintains an obligation and responsibility to consult with and fully inform his client concerning the meaning and effect of the court's judgment; the client's right to appeal from that judgment; the necessity of giving notice of appeal; and taking other steps to pursue an appeal.[193] The trial counsel should also express his professional judgment as to possible grounds and merit for appeal.[194] The ultimate decision to appeal, however, belongs to the client.[195] The court also noted that, should trial counsel not intend to represent the accused on appeal, the attorney should file a written notice of appeal signed by the defendant reflecting the desire of the defendant to appeal, along with a contemporaneous motion to withdraw showing good cause.[196]

189. *Id.* at 29-30. Although perhaps overstated, the practical impact of the court's holding in this case is that the appellate lawyer is duty bound to his client through the appellate process through the issuance of the mandate, and not just until the brief is filed in the appellate court.

190. 757 S.W.2d 369 (Tex. Crim. App. 1988).

191. *See* Ward v. State, 740 S.W.2d 794, 797 (Tex. Crim. App. 1987).

192. 757 S.W.2d at 371. In a hearing called by the trial court, the attorney testified that he did not give notice of appeal after sentencing because he never intended to file an appeal and there was no need to file a motion to withdraw because the case had been concluded. The defendant testified that he had attempted to contact his counsel about the appeal but did not receive a reply. *Id.*

193. *Id.* at 374.

194. *Id.*

195. *Id.*

196. *Id.*