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CRIMINAL LAW

by

*Shirley W. Butts**

I. INSUFFICIENCY OF THE EVIDENCE

Two cases decided by the United States Supreme Court during the survey period, *Burks v. United States*¹ and *Greene v. Massey*,² created a sensation in the legal community. The Court held in these cases that when the evidence introduced at trial is found by a reviewing court to be legally insufficient to sustain a guilty verdict, the double jeopardy clause precludes a retrial of the defendant. This decision is important in state criminal proceedings because the double jeopardy prohibition of the fifth amendment applies to the states through the fourteenth amendment.³ The Court stated in *Burks* that the purposes of the double jeopardy clause would be negated if the government was given a second opportunity to obtain a conviction of the defendant.

The Court was careful to distinguish reversal based on insufficiency of the evidence and reversal based on trial error. Allowing retrial to correct trial error is still permitted because such a reversal does not indicate that the government failed to prove its case, nor does it imply anything concerning the guilt or innocence of the defendant. Rather, a reversal for trial error is a determination that a defendant has been convicted through a judicial process that is defective in some fundamental respect.⁴ The failure of the prosecution at trial to submit sufficient evidence of guilt, however, demonstrates that the prosecution has been given a fair opportunity to offer all the proof it could assemble, and that proof is determined to be so lacking that as a matter of law a jury could not have returned a guilty verdict.⁵ The Texas Court of Criminal Appeals has applied the decisions of *Burks* and *Greene* in several recent cases.⁶

Even though further prosecution is barred when there is insufficient evidence to support a conviction, the Supreme Court has not addressed the

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1. 437 U.S. 1 (1978).

2. 437 U.S. 19 (1978).

3. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

4. 437 U.S. at 15.

5. *Id.* at 16-17.

6. *Johnson v. State*, 571 S.W.2d 4 (Tex. Crim. App. 1978) (court noted that TEX. CODE CRIM. PROC. ANN. art. 44.25 (Vernon 1975) is unconstitutional to the extent it conflicts with *Burks* and *Greene*); *Damron v. State*, 570 S.W.2d 933 (Tex. Crim. App. 1978); *Ayers v. State*, 570 S.W.2d 926 (Tex. Crim. App. 1978).

issue of whether a defendant could be retried for a lesser included offense.⁷ The Texas Court of Criminal Appeals has used this argument in several cases to allow a retrial when the court found the evidence insufficient to prove the conviction, but sufficient to prove a lesser charge.⁸

One area in Texas criminal law in which insufficient evidence presents problems is cases involving the use of a knife. The Texas courts have been unable to determine when a knife, especially a pocketknife, should be classified as a deadly weapon,⁹ thus aggravating the crime and permitting conviction of a higher degree offense. In *Harris v. State*¹⁰ the complaining witness was cut with defendant's knife during a robbery, yet the court found the evidence regarding the manner of its use or intended use to be insufficient to show that the knife was capable of causing death or serious bodily injury. Noting that a pocketknife with a four-inch blade is not a deadly weapon per se, the court held that this knife was not a deadly weapon and reversed the aggravated robbery conviction for insufficient evidence of use of a deadly weapon.¹¹ A similar holding resulted in *Alvarez v. State*,¹² in which the police officer's testimony that the defendant swung at him at a distance of three to four feet with a linoleum knife was determined not to be sufficient evidence to establish that the knife was a deadly weapon. In another aggravated robbery case, the court in *Limuel v. State*¹³ reiterated that a knife is not a deadly weapon per se and employed the definition of a deadly weapon as the standard to determine the aggravating factor of the deadliness of a knife when possible punishment is enhanced by that factor. Contrary to *Alvarez* and *Harris*, the court concluded that the manner in which the knife was used and the wound inflicted were sufficient to classify the knife as a deadly weapon.

Although not mentioned in any of these cases, under the *Burks* and *Greene* holdings a court should acquit the defendant of the aggravated offense when insufficient proof is made of the aggravating factor. Thus, in cases such as aggravated rape, aggravated robbery, or aggravated assault,

7. 437 U.S. at 25 n.7.

8. *Rogers v. State*, 575 S.W.2d 555, 559 (Tex. Crim. App. 1979) (evidence was insufficient to prove aggravated rape, but the court noted that the Supreme Court had not precluded retrial for a lesser offense); *Moss v. State*, 574 S.W.2d 542, 545 (Tex. Crim. App. 1978).

9. A deadly weapon is defined as "anything . . . designed . . . for the purpose of inflicting death or serious bodily injury; or . . . anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE ANN. § 1.07(a)(11) (Vernon 1974).

10. 562 S.W.2d 463 (Tex. Crim. App. 1978).

11. The dissent disagreed, arguing: "If a knife with a four-inch blade is not capable of producing serious bodily injury or death, why are there so many bodies in our cemeteries as a result of injuries received from such a weapon?" *Id.* at 467. The dissent further suggested that the manner of the use of a knife with a four-inch blade is not the appropriate test under TEX. PENAL CODE ANN. § 46.01(7) (Vernon 1974), which provides that "[k]nife' means any bladed hand instrument that is capable of inflicting serious bodily injury or death by cutting or stabbing a person with the instrument."

12. 566 S.W.2d 612 (Tex. Crim. App. 1978).

13. 568 S.W.2d 309 (Tex. Crim. App. 1978).

when the knife is not proven to be a deadly weapon, adequate grounds exist to dismiss the defendant on this offense.

Insufficiency of evidence also occurred in a prosecution for driving while intoxicated. In *Ford v. State*¹⁴ the defendant's truck was found resting fifteen to twenty feet off the highway in a quadrant between the highway and a private road. The court rejected the state's argument that the highway includes all of the area between the paved portion of the road and the fence against which the truck rested. The court concluded that the evidence was insufficient to support the conviction. Unlike the knife cases, the court reversed the conviction and ordered any further prosecution dismissed, citing *Burks* and *Greene*.

II. FUNDAMENTAL ERROR

Because fundamental error may be raised for the first time on appeal, during the survey period a number of convicted defendants have obtained a retrial or acquittal upon appeal to the Texas Court of Criminal Appeals. The court has continued to reverse convictions based upon fundamentally defective indictments or informations, and even has been tagged during this survey period by one of its members as the "fundamental error" court.¹⁵ Many of the allegedly fundamental defects involved an element of the offense that had not been stated in the indictment or information. For example, in *Ex parte Forgason*¹⁶ the robbery conviction was reversed because the indictment failed to describe the personal property taken by the defendant. In *Richard v. State*¹⁷ a sufficient description of the appropriated property was omitted from the theft information, and the conviction was reversed. In *Shaw v. State*¹⁸ the conviction was reversed because the charge to the jury was based on a different subsection of the Penal Code than the charge in the indictment. The court in *Shaw* held that this constituted fundamental error by authorizing a conviction of burglary not alleged in the indictment.

The court has limited the expanding definition of fundamental error in instances of an incorrect indictment or information by adhering to the standard set forth in *American Plant Food Corp. v. State*.¹⁹ In that case the court stated that "[i]f the charge alleges an offense was committed by the defendant, then it is sufficient in law to support a verdict of guilty if one be rendered thereon. If it does not so allege, then it is utterly insufficient and any conviction based thereon is void."²⁰ This language was subsequently relied on in *Rhodes v. State*²¹ in refusing to reverse the defendant's conviction.

14. 571 S.W.2d 924 (Tex. Crim. App. 1978).

15. *Cleland v. State*, 575 S.W.2d 296, 299 (Tex. Crim. App. 1978).

16. 567 S.W.2d 517 (Tex. Crim. App. 1978).

17. 563 S.W.2d 626 (Tex. Crim. App. 1978).

18. 557 S.W.2d 305 (Tex. Crim. App. 1977).

19. 508 S.W.2d 598, 602, 603 (Tex. Crim. App. 1974). See also *Rhodes v. State*, 560 S.W.2d 665, 670 (Tex. Crim. App. 1978).

20. 508 S.W.2d at 603.

21. 560 S.W.2d 665 (Tex. Crim. App. 1978).

tion where the appeal was based on an indictment that allegedly did not identify the personal property stolen.²² The court indicated that every alleged defect in an indictment is not grounds for automatic reversal unless a timely and proper objection is made. A defendant cannot "sand bag" the judicial process by failing to raise an objection to the indictment at trial and then later raise the objection on appeal. Noting that to allow such action would frustrate the judicial process, the court in *Rhodes* held that a defect in the description of personal property is not fundamental error unless the description is so deficient as to be no description at all.²³ Hence, the description in *Rhodes* of "wall paneling of the value of over Fifty (\$50) Dollars" and the description "one ring" in *Cox v. State*²⁴ were held sufficient absent a timely motion to quash the indictment.²⁵

In *Smith v. State*,²⁶ another fundamental error case, the jury convicted the defendant of aggravated robbery. Although the indictment was properly drafted, in applying the law to the facts the trial court, in addition to permitting the jury to find the defendant guilty under the allegations of the indictment, also allowed the jury to convict the defendant on grounds not alleged in the indictment. The Texas Court of Criminal Appeals held that the additional grounds of conviction in the charge to the jury that were not contained in the indictment constituted fundamental error.²⁷

III. STATUTORY CONSTRUCTION

In interpreting a criminal civil rights statute, the Fifth Circuit stated in *United States v. Hayes*:²⁸ "We adhere to the accepted practice among federal courts in construing a federal criminal statute where specific terms are left undefined. We give those terms their common law meaning."²⁹ The court stated that a statute passed by Congress providing penalties "if death results" can not be construed to mean "if death was intended." To hold otherwise would make a mockery of the statute. The court determined

22. TEX. CODE CRIM. PROC. ANN. art. 21.09 (Vernon Pam. Supp. 1966-78) requires that an indictment identify stolen personal property by name, kind, number, and ownership.

23. 560 S.W.2d at 671.

24. 560 S.W.2d 675 (Tex. Crim. App. 1978).

25. Other fundamental error cases decided during this survey period are *Ex parte McCurdy*, 571 S.W.2d 31 (Tex. Crim. App. 1978) (criminal mischief); *Ex parte Walters*, 566 S.W.2d 622 (Tex. Crim. App. 1978) (credit card abuse); *Chance v. State*, 563 S.W.2d 812 (Tex. Crim. App. 1978) (culpable mental state omitted); *Ex parte Canady*, 563 S.W.2d 266 (Tex. Crim. App. 1978) (robbery).

26. 570 S.W.2d 958 (Tex. Crim. App. 1978).

27. Other robbery cases decided during the survey period in which the court reversed the conviction because the trial court's charge authorized conviction on a theory not alleged in the indictment are *Cleland v. State*, 575 S.W.2d 296 (Tex. Crim. App. 1978); *Edmond v. State*, 566 S.W.2d 609 (Tex. Crim. App. 1978); *Davis v. State*, 557 S.W.2d 303 (Tex. Crim. App. 1977). Cases in other areas that were reversed for the same kind of fundamental error are *Whitlow v. State*, 567 S.W.2d 522 (Tex. Crim. App. 1978) (burglary); *West v. State*, 567 S.W.2d 515 (Tex. Crim. App. 1978) (criminal trespass); *Peoples v. State*, 566 S.W.2d 640 (Tex. Crim. App. 1978) (revocation of probation proceeding); *Bradley v. State*, 560 S.W.2d 650 (Tex. Crim. App. 1978) (theft); *Cole v. State*, 556 S.W.2d 343 (Tex. Crim. App. 1977) (negligent collision).

28. 589 F.2d 811 (5th Cir. 1979).

29. *Id.* at 821.

that Congress was fully cognizant of the principle of legal causation when it passed the law, and thus the statute had to be followed as written.³⁰

In *Braudrick v. State*³¹ the defense counsel used an innovative theory in contending that the voluntary manslaughter conviction obtained on an indictment charging murder was based on insufficient evidence. Arguing that the voluntary manslaughter statute³² contains one more element than the murder statute,³³ the defense claimed that the prosecutor had failed to prove the additional element, namely, that the death must result from "the immediate influence of sudden passion arising from an adequate cause."³⁴ The court, however, held that such a fact is not an element of voluntary manslaughter, but is instead a defense to murder that reduces the offense to voluntary manslaughter. Consequently, the prosecution need not prove the passion factor beyond a reasonable doubt to establish voluntary manslaughter, unless this factor is raised by the evidence. The court in *Braudrick* determined that when the evidence raises the voluntary manslaughter defense, the trial judge is bound to instruct the jury on the lesser included offense. This may frustrate some defense counsel who attempt every available means to avoid a conviction under an indictment for murder when no lesser offense is included as an alternative. The reason is that defense counsel will now have to be concerned with avoiding a conviction for voluntary manslaughter if this element is raised as a defense to the murder allegation.

The Texas Court of Criminal Appeals upheld as constitutional certain criminal provisions of the Texas Securities Act.³⁵ The statute was held not to be vague and indefinite merely because the words "security" and "material fact" are not defined.

A recent amendment to the Texas Constitution³⁶ gave the Texas Court of Criminal Appeals authority to issue extraordinary writs, including writs of mandamus, to protect its jurisdiction or enforce its judgments. In *Thomas v. Stevenson*³⁷ the court concluded that it had the power under this new amendment to issue a writ of mandamus to compel a speedy trial.

30. *Id.*

31. 572 S.W.2d 709 (Tex. Crim. App. 1978).

32. TEX. PENAL CODE ANN. § 19.04 (Vernon 1974).

33. *Id.* § 19.02 (Vernon 1974).

34. *Id.* § 19.04(a) (Vernon 1974). The court determined that the negative of this element is implied in the statute dealing with murder. 572 S.W.2d at 710.

35. *Morgan v. State*, 557 S.W.2d 512 (Tex. Crim. App. 1977). The court construed TEX. REV. CIV. STAT. ANN. art. 581—29(C)(3) (Vernon Supp. 1978-79), which imposes criminal liability upon any person who shall,

[i]n connection with the sale, offering for sale or delivery of, the purchase, offer to purchase . . . directly or indirectly . . . knowingly make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

36. TEX. CONST. art. V, § 5.

37. 561 S.W.2d 845 (Tex. Crim. App. 1978).

IV. ENTRAPMENT

One of the most noteworthy opinions rendered by the Texas Court of Criminal Appeals during the survey period is *Langford v. State*,³⁸ which establishes the test for entrapment in Texas. The court recognized that there are two general tests for entrapment used by the various states, one subjective and the other objective. In comparing the two tests the court stated that the subjective test requires two inquiries: first, whether there was an inducement on the part of the state, and second, whether the defendant showed any predisposition to commit the offense. The objective test only focuses on the nature of the police activity involved without regard to the criminal tendencies of the defendant. The subjective test was consistently followed in Texas until the enactment of the present entrapment statute.³⁹ The new Texas statute does not specifically define which test is to be used. To determine the test applicable under the new statute, the court compared the Texas statute to other statutes nationwide. The court noted that the Texas statute omitted the provision "the offense would be committed by a person not otherwise disposed to commit it."⁴⁰ This led the court to conclude that since the above provision is the basis of the subjective test, the legislature intended to adopt the objective test for entrapment. The actual standard was then stated to be that once it is determined that there is an indictment, the trial court only has to consider the nature of the police activity involved, without reference to the predisposition of the particular defendant.⁴¹

V. DURESS

The facts in most cases preclude the use of duress as a defense; in *Duson v. State*,⁴² however, the opportunity did arise. In this case the defendant was convicted of driving while intoxicated and contended that because of the threats made on him to leave an establishment, he was compelled by force to drive. The court rejected this argument, noting that the defendant voluntarily became intoxicated and there was no evidence of "force or threat of force" to leave the premises by means of driving an automobile.

38. 571 S.W.2d 326 (Tex. Crim. App. 1978).

39. TEX. PENAL CODE ANN. § 8.06 (Vernon 1974).

40. 571 S.W.2d at 329. The court noted that the Texas statute was derived from the New York entrapment statute, which included the language omitted from the Texas statute. See N.Y. PENAL LAW § 40.05 (McKinney 1975).

41. 571 S.W.2d at 331. The United States Supreme Court has held that the essence of entrapment under federal law is the predisposition of the accused rather than intolerable government conduct. *Hampton v. United States*, 425 U.S. 484 (1976). Prior to *Hampton* the Fifth Circuit had allowed an entrapment defense based on the conduct of law enforcement officials. *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971). The Fifth Circuit, however, has apparently reversed this decision in *United States v. Benavidez*, 558 F.2d 308 (5th Cir. 1977). See Steele, *Criminal Law and Procedure (I. Substantive Law)*, *Annual Survey of Texas Law*, 32 Sw. L.J. 427, 429 (1978), for a thorough discussion of the applicable federal law on entrapment.

42. 559 S.W.2d 807 (Tex. Crim. App. 1977).

VI. PARTIES TO CRIMES

In a case in which the defendant's criminal responsibility is based solely upon being a party to the offense, the proper jury instruction on the law of parties is that " 'mere presence alone will not make a person a party to an offense.' "43 In *Guzman v. State*⁴⁴ the defendant, whose criminal liability was based upon being a party to burglary at a habitation, requested a jury charge on circumstantial evidence. Following *Ransonette v. State*,⁴⁵ which held that a charge based on the law of parties (called the law of principles at that time) was sufficient when direct evidence showed that the two defendants were acting together, the Texas Court of Criminal Appeals held that the refusal to give a circumstantial evidence charge was not error.⁴⁶ Although Texas does follow the minority rule requiring a circumstantial evidence charge, the prosecutor's case in *Guzman* did not rest entirely upon circumstantial evidence and the circumstantial evidence charge therefore was not required.⁴⁷

In *Romo v. State*,⁴⁸ a case in which both the appellant and another were charged with murder, the trial court failed to apply the law of parties to the facts. The court's charge was based on the defendant's culpability as a primary actor,⁴⁹ but there was no evidence to support that theory. A divided court affirmed the conviction, holding that the omission of a parties charge did not constitute fundamental error, because the defendant neither requested such a charge nor objected to its omission.⁵⁰ This was a five-to-four decision with a strong dissent by Presiding Judge Onion, in which he stressed that the shooting was done by the other defendant and the jury was instructed that they could find that Romo did the actual shooting, applying the law to the facts as if Romo was the principal actor. After a detailed analysis of section 7.02(a)(2) of the Texas Penal Code,⁵¹ the dissent concluded that fundamental error was committed because the charge failed to apply the law under which the accused was prosecuted.⁵²

In the capital murder case of *Blansett v. State*⁵³ the Texas Court of

43. *Guzman v. State*, 567 S.W.2d 188, 190 (Tex. Crim. App. 1978).

44. *Id.*

45. 550 S.W.2d 36 (Tex. Crim. App. 1976).

46. Two other cases decided during the survey period, *Loving v. State*, 559 S.W.2d 363 (Tex. Crim. App. 1977), and *Garza v. State*, 573 S.W.2d 536 (Tex. Crim. App. 1978), followed the *Ransonette* rule.

47. 567 S.W.2d at 190.

48. 568 S.W.2d 298 (Tex. Crim. App. 1978).

49. *Id.* at 299.

50. *Id.* at 303. The majority noted that had the defendant requested a charge on the law of parties or objected to its omission, the trial court would have committed fundamental error by refusing to so instruct the jury. The reasoning in *Romo* was followed in *Pitts v. State*, 569 S.W.2d 898 (Tex. Crim. App. 1978), in which the four dissenting justices in *Romo* again dissented.

51. TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 1974) provides: "A person is criminally responsible for an offense committed by the conduct of 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."

52. 568 S.W.2d at 308.

53. 556 S.W.2d 322 (Tex. Crim. App. 1977).

Criminal Appeals upheld a conviction based upon a charge permitting the jury to find criminal responsibility for the acts of the appellant's co-defendant. The record in the case reflects that appellant Blansett was not shown to have fired a shot, although he and the co-defendant both had guns at a jail shoot-out at which a police officer was accidentally shot by another officer. Reasoning that the death would not have occurred but for the acts of the co-defendant and Blansett, the court reaffirmed its prior holding in *Livingston v. State*⁵⁴ that section 7.02 does apply to capital murder cases.⁵⁵ Blansett was thus held criminally responsible for the acts of another.

VII. ATTEMPTS

Three noteworthy points in the attempt area developed during the survey period. First, specific intent to commit an offense need not be alleged in an attempt indictment. Second, the legislature did not amend the statutes concerning attempts to possess or deliver a controlled substance. Third, the legal community is still waiting for an attempted robbery case to determine whether or not that offense exists under the Penal Code.

In *Dovalina v. State*,⁵⁶ which upheld the validity of an indictment for the attempted capital murder of a police officer, Judge Onion's dissent stated that under the 1974 Penal Code one of the elements necessary to establish criminal attempt is a specific intent to commit an offense.⁵⁷ If this requirement ever became established after the adoption of the new Penal Code, it is no longer in effect.

The appellant in *Dovalina* urged that the indictment was fundamentally defective because the specific intent to commit the offense of capital murder was not alleged therein. The indictment alleged that the appellant "unlawfully, knowingly and intentionally [attempted] to cause the death of [the officer] by cutting and stabbing him with a knife and by shooting him with a gun."⁵⁸ The majority held that attempt is a word of more comprehensive meaning than intent and includes the latter. Thus, attempt may be substituted for intent.⁵⁹

54. 542 S.W.2d 655 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977).

55. 556 S.W.2d at 325-27. For a definition of causation in criminal cases, see TEX. PENAL CODE ANN. § 6.04(a) (Vernon 1974).

56. 564 S.W.2d 378 (Tex. Crim. App. 1978).

57. *Id.* at 386; see TEX. PENAL CODE ANN. § 15.01(a) (Vernon 1974).

58. 564 S.W.2d at 379.

59. *Id.* at 380. The Code Construction Act, TEX. REV. CIV. STAT. ANN. art. 5429b-2, §§ 2.01, 3.03 (Vernon Supp. 1978-79), and TEX. CODE CRIM. PROC. ANN. art. 21.17 (Vernon 1974) were used by the court in constructing this indictment. These provisions basically provide that words are to be constructed according to common usage, and that the exact words used in a statute to define an offense need not be used in the indictment.

On original submission, *Telfair v. State*, 565 S.W.2d 522 (Tex. Crim. App. 1978), was reversed because an allegation of specific intent to commit the offense of murder was omitted from the indictment. The state's motion for rehearing was granted, and relying on *Dovalina*, the conviction was affirmed. The indictment alleged that the appellant "intentionally and knowingly attempt[ed] to cause the death of [four persons] by shooting them with a gun." *Id.* at 524.

Although there has been a legislative session since certain controlled substances cases⁶⁰ held that attempt offenses may not be charged under the Controlled Substances Act,⁶¹ the Texas Legislature has not amended the law to include these offenses. Hence, when zealous district and county attorneys cause such charging instruments to issue, the Texas Court of Criminal Appeals continues to reverse and dismiss the convictions.⁶² Conspiracy to possess or deliver controlled substances are likewise not covered by the present law.⁶³ Furthermore, the criminal attempt and the criminal conspiracy provisions of the Texas Penal Code do not apply to the Controlled Substances Act.⁶⁴

It may be that the Texas Legislature has effectively eliminated the offenses of attempted robbery⁶⁵ and attempted aggravated robbery.⁶⁶ Since the enactment of the new Penal Code no attempt convictions based on the felonies of either robbery or aggravated robbery have been reviewed. The provision for attempted aggravated robbery, however, remains in the capital murder statute, and indictments continue to be returned using the words of that statute.⁶⁷

VIII. COMPETENCY AND INSANITY

The Texas Supreme Court ruled in *State v. Addington*⁶⁸ that the proper standard of proof to be used in indefinite civil commitment cases is preponderance of the evidence. Although a person faced with indefinite civil commitment to a hospital for treatment may demand submission of special issues as to his mental illness, the jury instruction in *Addington* stating that the State's burden of proof on each special issue was by "clear and convincing evidence" was not error since the jury found the defendant mentally ill under a stricter standard than required. Surprisingly, the court of civil appeals had held that the standard of "beyond a reasonable doubt" was required.⁶⁹

In criminal competency hearings before a jury the burden of proof required is by a preponderance of the evidence.⁷⁰ When a criminal defendant asserts the defense of insanity, he has the burden of proving his insanity by a preponderance of the evidence.⁷¹

In *Ex parte Hagans*⁷² the court held that the jury's consideration of both

60. *E.g.*, *Moore v. State*, 545 S.W.2d 140 (Tex. Crim. App. 1976).

61. TEX. REV. CIV. STAT. ANN. art. 4476—15 (Vernon 1976).

62. *Ex parte Russell*, 561 S.W.2d 844 (Tex. Crim. App. 1978).

63. *Ex parte Lopez*, 549 S.W.2d 401 (Tex. Crim. App. 1977).

64. Title 4 of the Texas Penal Code applies only to Penal Code provisions. *Baker v. State*, 457 S.W.2d 627 (Tex. Crim. App. 1977).

65. TEX. PENAL CODE ANN. § 29.02 (Vernon 1974).

66. *Id.* §§ 19.03(a)(2), 29.03.

67. *Id.* § 19.03(a)(2).

68. 557 S.W.2d 511 (Tex. 1977); *see State v. Turner*, 556 S.W.2d 563 (Tex. 1977), *cert. denied*, 435 U.S. 929 (1978).

69. 546 S.W.2d 105 (Tex. Civ. App.—Beaumont), *rev'd*, 557 S.W.2d 511 (1977).

70. TEX. CODE CRIM. PROC. ANN. art. 46.02, § 1(b) (Vernon 1979).

71. TEX. PENAL CODE ANN. § 8.01(a) (Vernon 1974).

72. 558 S.W.2d 457 (Tex. Crim. App. 1977).

the defendant's competency to stand trial and his insanity was a denial of due process because the defendant was entitled to a separate hearing on the question of competency to stand trial.⁷³ The rationale is that a competency determination should be "uncluttered by evidence of the offense itself."⁷⁴ The court reaffirmed the standard of legal competency established in *Dusky v. United States*,⁷⁵ which considers "whether the accused has sufficient ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him."⁷⁶

Before the 1977 amendment to article 46.02 of the Code of Criminal Procedure,⁷⁷ a court was not required to halt trial proceedings on its own motion to determine a defendant's competence unless evidence came before it creating in the judge's mind reasonable grounds to doubt the defendant's competency.⁷⁸ Amended article 46.02, which commands the court to conduct a competency hearing if evidence of the defendant's incompetency is brought to the court's attention from any source, does not set the standard of proof necessary before a trial must be interrupted. The court held in *Johnson v. State*⁷⁹ that, as before the amendment, the bona fide doubt test applies, and any evidence from any source will not suffice.⁸⁰

The Texas Court of Criminal Appeals in *Graham v. State*⁸¹ and the Fifth Circuit Court of Appeals in *United States v. Kessa*⁸² agreed that uncontradicted testimony of defense experts stating that the defendant was insane at the time of the offense is not conclusive of insanity. Questions of credibility and weight are to be considered by the trier of facts, and it is not necessary that the prosecution rebut the expert testimony. The trier of fact may determine the issue of insanity from all of the evidence.

A defendant is entitled to a defensive instruction on every issue raised by the evidence regardless of whether it is strong, feeble, unimpeached, or contradicted, even if the trial court is of the opinion that the testimony is not entitled to belief.⁸³ *Warren v. State*⁸⁴ held that a defendant's assertion

73. In determining that this procedure denied the appellant due process the court relied on *Pate v. Robinson*, 383 U.S. 375 (1966), in which the Supreme Court held that a trial court should hold a competency hearing whenever the evidence raises a bona fide doubt as to the defendant's competency to stand trial.

74. 558 S.W.2d at 461.

75. 362 U.S. 402 (1960).

76. 558 S.W.2d at 461 (citing *Dusky v. United States*, 362 U.S. 402 (1960)). See *Martin v. Estelle*, 546 F.2d 177 (5th Cir.), cert. denied, 431 U.S. 971 (1977), for a discussion of the *Dusky* legal competency standard. See also *Thomas v. State*, 562 S.W.2d 240 (Tex. Crim. App. 1978), which also adopts the *Dusky* standard.

77. TEX. CODE CRIM. PROC. ANN. art. 46.02 (Vernon 1979).

78. *Bonner v. State*, 520 S.W.2d 901 (Tex. Crim. App. 1975).

79. 564 S.W.2d 707 (Tex. Crim. App. 1977).

80. See *Dinn v. State*, 570 S.W.2d 910 (Tex. Crim. App. 1978); *Ex parte Long*, 564 S.W.2d 760 (Tex. Crim. App. 1978) (both cases follow the *Johnson* interpretation of art. 46.02).

81. 566 S.W.2d 941 (Tex. Crim. App. 1978).

82. 562 F.2d 959 (5th Cir. 1977), cert. denied, 434 U.S. 1075 (1978).

83. *Hunt v. State*, 492 S.W.2d 540 (Tex. Crim. App. 1973).

84. 565 S.W.2d 931 (Tex. Crim. App. 1978).

of insanity does not deprive him of the right to an additional jury charge based on self-defense, if self-defense is raised by the evidence. The court in *Warren* distinguished entrapment defense cases, which have held that an entrapment defense is not available to one who denies he committed the offense; the entrapment defense necessarily assumes that the act charged was committed.⁸⁵ No such absolute inconsistency exists between the defenses of insanity and self-defense.⁸⁶

IX. THEFT

Prosecutors, judges, and some defense counsel were pleased by the consolidation of theft offenses in section 31.02 of the Penal Code.⁸⁷ The intent of the consolidation is clear: "theft is a single offense with a uniform culpable mental state, a uniform result, uniform penalties, and uniform defenses, all of which focus on culpability rather than, as under prior law, whether the state is pursuing the defendant under the appropriate label."⁸⁸ The restructured theft statute, however, is not as efficient as desired. Difficulties have arisen in drafting charging instruments and in giving jury instructions. These problems were exacerbated by the definition of theft contained in the 1975 amendment to section 31.03 of the Penal Code,⁸⁹ under which two methods of committing theft exist, each containing four or more elements.⁹⁰ Failure to set forth all the necessary elements in the charging instrument will result in fundamental error.⁹¹ Further, the court is required to instruct the jury as to each element of the offense charged.⁹² Failure to so instruct the jury is fundamental error.

In *Bradley v. State*,⁹³ in which the defendant was convicted of theft, the trial court failed to state in its charge that taking without the owner's consent is one element of theft. The trial court, however, did refer to the indictment, which contained the omitted element. The court of criminal appeals reversed the conviction, holding that when an element of a crime is not contained in the charge to the jury, a reference to that element "as set forth in the indictment" will not rectify an otherwise incomplete charge.

85. *See, e.g.*, *Canales v. State*, 496 S.W.2d 614 (Tex. Crim. App. 1973).

86. 565 S.W.2d at 933.

87. TEX. PENAL CODE ANN. § 31.02 (Vernon 1974). This section provides:

Theft as defined in Section 31.03 of this code constitutes a single offense superseding the separate offenses previously known as theft, theft by false pretext, conversion by a bailee, theft from the person, shoplifting, acquisition of property by threat, swindling, swindling by worthless check, embezzlement, extortion, receiving or concealing embezzled property, and receiving or concealing stolen property.

88. Searcy & Patterson, *Practice Commentary*, 3 TEX. PENAL CODE ANN. 266 (Vernon 1974).

89. TEX. PENAL CODE ANN. § 31.03 (Vernon Supp. 1978-79).

90. *Hughes v. State*, 561 S.W.2d 8 (Tex. Crim. App. 1978). Prior to the 1975 amendments there were four different possible sets of elements.

91. *Peoples v. State*, 566 S.W.2d 640 (Tex. Crim. App. 1978).

92. *Rider v. State*, 567 S.W.2d 192 (Tex. Crim. App. 1978). *See* TEX. PENAL CODE ANN. § 31.03 (Vernon Supp. 1978-79).

93. 560 S.W.2d 650 (Tex. Crim. App. 1978).

Likewise, in *Rider v. State*⁹⁴ the charge to the jury was argued to be defective for failure to properly define theft. The defendant was convicted of burglary, one of the elements of which is intent to commit theft or a felony. Since in this case the State alleged that the defendant intended to commit theft, it was necessary that the jury be instructed as to the elements of that crime. Failure to include these elements in the charge was reversible error.⁹⁵

The indictment must not only allege the elements of an offense, but must also state the value of the stolen property when the stolen property value is the basis of punishment. In *Peoples v. State*⁹⁶ the defendant was convicted of third degree felony theft, an offense requiring that the stolen property be of a value of at least \$200, but less than \$10,000. The indictment, however, failed to allege the value of the stolen property, and the judgment was reversed.⁹⁷

While a conviction cannot stand if based upon less than all the elements of an offense, the conviction will be upheld in some instances if the facts represent elements of a greater crime that includes the lesser offense charged. Thus, in *Neely v. State*⁹⁸ the defendant was convicted of unauthorized use of a motor vehicle. The defendant argued that under the facts he could only be convicted of theft. The court found the elements of the two offenses to be the same except that in theft there is the added element of intent to deprive a person of property. The court then reasoned that since the lesser offense could be proved by the same or less facts than are necessary to prove theft, the lesser offense is included in the greater. Facts thus sufficient to sustain a conviction for theft will also sustain a conviction for unauthorized use of a motor vehicle.⁹⁹

In *Tucker v. State*¹⁰⁰ section 31.09 of the Penal Code,¹⁰¹ which provides for the aggregation of the amounts obtained in thefts pursuant to a single scheme, was applied in conjunction with the consolidated theft statute.¹⁰² The indictment in *Tucker* charged the defendant with third degree felony theft,¹⁰³ alleging that the defendant committed two acts of theft at different times, each having a value of less than \$200, but having an aggregate value in excess of \$200. The indictment also alleged that all property was ob-

94. 567 S.W.2d 192 (Tex. Crim. App. 1978).

95. The court also discussed the 1975 amendments to § 31.03 of the Penal Code. The statute had been changed from prohibiting "obtaining" another's property to prohibiting "appropriating" another's property. The court found that the two terms had essentially the same meaning. 567 S.W.2d at 196. See also *Jackson v. State*, 571 S.W.2d 1 (Tex. Crim. App. 1978); *Tucker v. State*, 556 S.W.2d 823 (Tex. Crim. App. 1977) (post-amendment indictment alleging defendant "unlawfully obtained" instead of "appropriated" was not fundamental error).

96. 566 S.W.2d 640 (Tex. Crim. App. 1978).

97. *Id.* at 641.

98. 571 S.W.2d 926 (Tex. Crim. App. 1978).

99. *Id.* at 928.

100. 556 S.W.2d 823 (Tex. Crim. App. 1977).

101. TEX. PENAL CODE ANN. § 31.09 (Vernon 1974).

102. *Id.* § 31.03; see notes 87-88 *supra* and accompanying text.

103. Third degree felony theft is chargeable if the defendant has stolen property valued at \$200 or more but less than \$10,000. TEX. PENAL CODE ANN. § 31.03(d)(4) (Vernon 1974).

tained in one scheme and a continuing course of conduct. Upholding the conviction, the court held that the allegation was sufficient under sections 31.03 and 31.09, even though the source of the theft was not identified and the nature of the scheme was not described.¹⁰⁴

In *Carrillo v. State*¹⁰⁵ the court held that the members of the board of a water district are without authority to consent to or to ratify the payment of public funds to an individual that is not made in return for goods and services.¹⁰⁶ The court in *Carrillo* reasoned that the power of the water board, a governmental agency, is analogous to that of the board of directors of a corporation, which has no authority to consent to the theft of corporate funds. Consequently, the board's ratification of payment to the defendant was void, and the defendant was precluded from relying on the defense of consent.

X. FORGERY

Now that the 1974 Penal Code has defined forgery to include any writing that purports "to be the act of another,"¹⁰⁷ problems have arisen in proving a forgery charge. To sustain a conviction for passing a forged check there must be proof that the check was actually forged. In order to prove that a check is forged, the proof must show that the purported maker did not authorize the defendant or another to make the check.¹⁰⁸ Another problem of proof in a forgery case is the necessary element of intent to defraud or harm. Since the burden is on the State to prove every necessary element of the offense, the State must prove the defendant had knowledge that the instrument was forged.¹⁰⁹ Such intent may be shown by circumstantial evidence, including evidence that the defendant in endorsing the check used an incorrect address, evidence that false information was given about the maker of the check, or evidence of a fictitious maker or payee.¹¹⁰

In *United States v. Boss*,¹¹¹ a forgery case, the defendant's argument that the indictment was insufficient was rejected. The Fifth Circuit termed "hypertechnical" the defendant's contention that there was reversible error because the indictment alleged that payroll checks were forged when, in fact, the evidence showed forgery of sight drafts. The court held that the discrepancy was insignificant and that the defendant was fairly apprised of the charge facing him.

XI. WELFARE FRAUD

In *Jones v. State*¹¹² the court held that the defendant could not be prose-

104. 556 S.W.2d at 826.

105. 566 S.W.2d 902 (Tex. Crim. App. 1978).

106. TEX. CONST. art. III, § 52(a).

107. TEX. PENAL CODE ANN. § 32.21 (Vernon 1974).

108. *Id.* § 32.21(a)(1)(A)(i); see *Payne v. State*, 567 S.W.2d 4 (Tex. Crim. App. 1978).

109. *Pfleging v. State*, 572 S.W.2d 517 (Tex. Crim. App. 1978).

110. *Id.* at 519.

111. 562 F.2d 967 (5th Cir. 1977).

112. 552 S.W.2d 836 (Tex. Crim. App. 1977).

cuted under the general theft provisions of section 31.03 of the Penal Code¹¹³ when the specific acts of which the defendant was accused were also proscribed by section 34 of the Public Welfare Act of 1941.¹¹⁴ In 1977 the Public Welfare Act of 1941 was amended.¹¹⁵ The court in *Ex parte Mangrum*¹¹⁶ found that the effect of the 1977 amendment was to provide that offenses deleted thereby are now chargeable as theft under section 31.03 of the Penal Code.¹¹⁷

The court in *Mangrum* also discussed the lack of a savings clause in the Welfare Act. The defendant was charged with the offense prior to the amendment, but was convicted after its passage. The appellant alleged that at the time of her conviction there was no valid statute under which to prosecute her for welfare fraud. The appellant supported the argument by a common law rule that states that in the absence of a savings clause the repeal of a criminal statute acts as a bar to prosecution for earlier violations of that statute. The court disagreed with the contention, holding that the legislature intended that the amendments to the Welfare Act should operate prospectively and that an offense committed prior to the amendment should be prosecuted under the statute as it existed at the time of the offense.

XII. BURGLARY

As in the other areas of criminal law, a major problem in burglary cases is that indictments continue to be fundamentally defective in not alleging the essential elements of the crime charged. Accordingly, the failure in a burglary indictment to allege an intent to commit a felony or theft is a fundamental error.¹¹⁸ An indictment for attempted burglary, however, is not defective for failure to allege the constituent elements of the offense attempted. Hence, in *Prodon v. State*¹¹⁹ the court upheld an attempted burglary conviction even though the indictment did not allege that the attempt was made with intent to commit either a theft or a felony.

As is the case with faulty indictments, difficulties continue to be encountered in charges to the jury. A charge to the jury is fundamentally defective if the indictment alleges burglary under section 30.02(a)(3) of the Penal Code and the court defines burglary according to a different subsection of the burglary statute. In such instances the effect is to charge the jury with a form of burglary not alleged in the indictment and erroneously to authorize a conviction on an improper theory.¹²⁰

In a burglary prosecution the State has the burden of proving the allega-

113. TEX. PENAL CODE ANN. § 31.03 (Vernon 1974).

114. 1941 Tex. Gen. Laws ch. 562, § 34, at 924.

115. TEX. REV. CIV. STAT. ANN. art. 695c (Vernon Supp. 1978-79).

116. 564 S.W.2d 751 (Tex. Crim. App. 1978).

117. TEX. PENAL CODE ANN. § 31.03 (Vernon 1974).

118. *Ex parte Nixon*, 571 S.W.2d 32 (Tex. Crim. App. 1978).

119. 555 S.W.2d 451 (Tex. Crim. App. 1977).

120. *Whitow v. State*, 567 S.W.2d 522 (Tex. Crim. App. 1978); *Shaw v. State*, 557 S.W.2d 305 (Tex. Crim. App. 1977).

tions of ownership and lack of consent contained in the indictment. A variance between the allegation and the proof of ownership and lack of consent is grounds for reversal. Because the indictment in *Araiza v. State*¹²¹ stated that the property was owned by the father, reversible error occurred when only the wife and son testified as to the lack of consent.

Other developments under the burglary statute took place in *Moss v. State*,¹²² in which the court recognized that burglary of a building can be a lesser included offense of burglary of a habitation. If a defendant is convicted of burglary of a habitation, but the appellate court can only find facts to support a conviction for burglary of a building, a conviction of the lesser charge may be sustained. In such an instance the problem arises as to the correctness of the penalty assessed by the trial court. On this issue the *Moss* court overruled an earlier decision in *Jones v. State*,¹²³ in which the court had determined that since the range of punishment for the lesser offense was the same as for the greater offense, the punishment originally assessed by the trial court was proper. In *Moss*, however, the court reasoned that it was improper to assume the trial court would have assessed the same penalty for the lesser offense. The correct procedure in such an instance is to remand the case for reassessment of punishment.

XIII. ROBBERY

As demonstrated in other areas, the Texas Court of Criminal Appeals was concerned throughout the survey period with fundamental error in the trial court's charge. The most common error in instructing juries in robbery and aggravated robbery is the failure to set out all of the methods of committing the offense when the indictment alleges only one. On this basis, the court in *Jones v. State*¹²⁴ struck down an aggravated robbery conviction because the court's charge had authorized a conviction for either of two different modes of the crime when only one method was alleged. The charge thus erroneously authorized a conviction under a theory not charged in the indictment.¹²⁵

Similar discrepancies are sufficient for a reversal of a conviction based on a guilty plea. In *Reid v. State*¹²⁶ the defendant was indicted for robbery under section 29.02(a)(1) of the Texas Penal Code.¹²⁷ The only evidence against him was a written judicial confession that tracked the words of section 29.02(a)(2).¹²⁸ The court found that this was not the same offense as that alleged in the indictment and the confession was thereby insufficient to support the conviction.

121. 555 S.W.2d 746 (Tex. Crim. App. 1977).

122. 574 S.W.2d 542 (Tex. Crim. App. 1978).

123. 532 S.W.2d 596 (Tex. Crim. App. 1976).

124. 566 S.W.2d 939 (Tex. Crim. App. 1978).

125. See *Davis v. State*, 557 S.W.2d 303 (Tex. Crim. App. 1977); *Robinson v. State*, 553 S.W.2d 371 (Tex. Crim. App. 1977).

126. 560 S.W.2d 99 (Tex. Crim. App. 1978).

127. TEX. PENAL CODE ANN. § 29.02(a)(1) (Vernon 1974).

128. *Id.* § 29.02(a)(2).

Section 29.02 of the Texas Penal Code¹²⁹ brought dramatic changes to the robbery laws in this state. The new statute is broader than prior law because it applies anytime violence is used or threatened "in the course of committing theft."¹³⁰ Many a defendant may be surprised to find that under the new Penal Code he committed robbery when he thought the offense was theft. For example, a shoplifter who scuffles with a person following the actual taking of the property has committed robbery.¹³¹ Moreover, a person who attempts theft or attempts robbery will find that his encounter with an officer a few minutes later during which he strikes the officer results in robbery or aggravated robbery charges being filed. Hence, even though the defendant was unsuccessful in obtaining any property, the "empty pocket" plea is to no avail.

A variance between the allegations in an indictment and the proof will not always lead to a reversal. In *Sidney v. State*¹³² the court held that an indictment for aggravated robbery may properly allege conjunctively in one count that the robbery was effected by the use and exhibition of a deadly weapon and by the infliction of serious bodily injury. In such an instance allegation and proof of either of the two methods of aggravation will support a conviction.

Finally, the court of criminal appeals held that theft may be a lesser included offense of aggravated robbery when the proof of facts in a particular case included proof of theft.¹³³ The court was divided on this issue with a strongly reasoned dissent arguing that theft can never be a lesser included offense of aggravated robbery.

XIV. HOMICIDE

The Supreme Court of the United States invalidated as unconstitutional the Ohio death penalty statute in *Lockett v. Ohio*.¹³⁴ The defendant was the "wheel-woman," an accomplice aiding the persons who committed the murder of a pawnbroker. Under the Ohio statute, the death sentence must be imposed unless the trial judge found by a preponderance of the evidence that: (1) the victim induced or facilitated the offense; (2) it was unlikely that Lockett would have committed the offense but for the fact that she was under duress, coercion, or strong provocation; or (3) the offense was primarily the product of her psychosis or mental deficiency.¹³⁵ In a plurality opinion the Court concerned itself with the lack of mitigating

129. *Id.* § 29.02 provides: "(a) A person commits an offense if, in the course of committing theft . . . and with intent to obtain or maintain control of the property, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death."

130. Searcy & Patterson, *Practice Commentary*, 3 TEX. PENAL CODE ANN. 48 (Vernon 1974).

131. *Ulloa v. State*, 570 S.W.2d 954 (Tex. Crim. App. 1978).

132. 560 S.W.2d 679 (Tex. Crim. App. 1978).

133. *Campbell v. State*, 571 S.W.2d 161 (Tex. Crim. App. 1978).

134. 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); see *Bell v. Ohio*, 98 S. Ct. 2981, 57 L. Ed. 2d 1010 (1978).

135. 98 S. Ct. at 2959, 57 L. Ed. 2d at 982-83.

factors that might be considered by a jury in assessing punishment. While recognizing that parties to a crime may be made equally responsible, the Court determined that the sentencer must be able to consider mitigating factors such as the defendant's character or record and any of the circumstances surrounding the offense proffered by the defendant as the basis for a sentence less than death. Justice White concurred in the judgment because he found the imposition of the death penalty on one lacking the intent to kill to be disproportionate to the severity of the crime. Not surprisingly, Justice Marshall asserted in a separate concurring opinion his continuing belief that the death penalty is, under all circumstances, cruel and unusual. While *Lockett* found undue restraint of the jury in its considerations to be harmful, earlier death penalty cases invalidated statutes for lack of such restraint.¹³⁶

The issue of excluding potential jurors opposed to the death penalty continues to plague the Texas courts. In two recent decisions¹³⁷ the court of criminal appeals held that when a juror states that his opposition to the death penalty would affect his deliberations on the submitted fact issues, he may be properly challenged for cause and excused by the court under section 12.31(b) of the Penal Code.¹³⁸ In *Witherspoon v. State*¹³⁹ the United States Supreme Court found that the exclusion of a potential juror opposed to the death penalty is only permitted when the venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal.¹⁴⁰ The Texas Court of Criminal Appeals in *Bodde v. State*¹⁴¹ determined that a prospective juror may be disqualified under either section 12.31(b) of the Texas Penal Code¹⁴² or under the mandate of *Witherspoon*;¹⁴³ disqualification under both methods is unnecessary.¹⁴⁴

Article 43.14 of the Code of Criminal Procedure,¹⁴⁵ providing for execution under the death penalty by intravenous injection of a lethal substance, was declared constitutional in *Ex parte Granviel*.¹⁴⁶ The defendant had been sentenced to death by electrocution, the method authorized prior to

136. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972).

137. *Hovila v. State*, 562 S.W.2d 243 (Tex. Crim. App. 1978); *Shippy v. State*, 556 S.W.2d 246 (Tex. Crim. App. 1977), cert. denied, 434 U.S. 935 (1978).

138. TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974). See also *Duffy v. State*, 567 S.W.2d 197 (Tex. Crim. App. 1978); *Brock v. State*, 556 S.W.2d 309 (Tex. Crim. App. 1977); *Freeman v. State*, 556 S.W.2d 287 (Tex. Crim. App. 1977), cert. denied, 434 U.S. 1088 (1978); *Burns v. State*, 556 S.W.2d 270 (Tex. Crim. App.), cert. denied, 434 U.S. 935 (1977).

139. 391 U.S. 510 (1968).

140. *Id.* at 522 n.21. The Texas courts have found the state death penalty statute to be consistent with the *Witherspoon* decision. *Moore v. State*, 542 S.W.2d 664 (Tex. Crim. App. 1976), cert. denied, 431 U.S. 949 (1977); *Hovila v. State*, 532 S.W.2d 293 (Tex. Crim. App. 1975).

141. 568 S.W.2d 344 (Tex. Crim. App. 1978).

142. TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974).

143. *Bodde v. State*, 568 S.W.2d 344, 348 (Tex. Crim. App. 1978).

144. *Id.*

145. TEX. CODE CRIM. PROC. ANN. art. 43.14 (Vernon 1979). See generally 9 ST. MARY'S L.J. 359 (1977).

146. 561 S.W.2d 503 (Tex. Crim. App. 1978).

the 1977 amendment of the article. The court rejected the argument that the amendment violated the ex post facto prohibition because it found that the method of imposition, rather than the penalty itself, was involved.¹⁴⁷ The fact that death by intravenous injection has never been constitutionally authorized as a means of execution in the United States did not render it cruel and unusual punishment in violation of the eighth amendment.¹⁴⁸ Furthermore, the possibility that the prisoner might experience pain during the execution process did not make the method cruel and unusual.¹⁴⁹ The court also determined that the statute was not unconstitutionally vague for failing to specify the exact substances to be injected and the procedures to be used.¹⁵⁰ Specificity in the statute is only required as to the question of what specific conduct constitutes a criminal offense and not as to a statement of the general manner of execution.¹⁵¹

Several cases concerning intent were considered by the Texas Court of Criminal Appeals during the survey period. In *Wilder v. State*,¹⁵² in which the homicide was committed by a co-defendant during the course of a robbery, the law of parties¹⁵³ was applied to the "wheel-man" defendant, even though the defendant alleged lack of requisite intent for the capital murder offense.¹⁵⁴ In *Williams v. State*¹⁵⁵ the defendant was charged under section 19.02(a)(1) of the Penal Code.¹⁵⁶ The court rejected the allegation that the doctrine of transferred intent¹⁵⁷ is applicable only to sections 19.02(a)(2) and (3) and not to intentional and knowing homicide under section 19.02(a)(1).¹⁵⁸ *Garrett v. State*¹⁵⁹ reaffirmed that mens rea of the

147. *Id.* at 511.

148. *Id.* at 510.

149. *Id.*

150. *Id.* at 514.

151. *Id.* at 513.

152. No. 57,848 (Tex. Crim. App. Jan. 31, 1979).

153. TEX. PENAL CODE ANN. § 7.01 (Vernon 1974) abolishes the distinction between principals and accomplices and imposes various responsibility for the crime committed.

154. TEX. PENAL CODE ANN. § 19.03 (Vernon 1974).

155. 567 S.W.2d 507 (Tex. Crim. App. 1978).

156. TEX. PENAL CODE ANN. § 19.02(a) (Vernon 1974) provides three methods for committing murder:

(a) a person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in the 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.

157. *Id.* § 6.04. Section 6.04(b)(2) provides that if the defendant intends to kill a specific person, but unintentionally kills another, he is guilty of murder.

158. 567 S.W.2d at 509.

159. 573 S.W.2d 543 (Tex. Crim. App. 1978). This decision is about as close as the Texas Court of Criminal Appeals has come to recognizing the merger doctrine. The court held that a murder prosecution could not be based upon the felony of aggravated assault on the deceased. The felony murder rule calls for transfer of intent from the underlying felony to the act causing the homicide. The underlying felony must be independent of the homicide,

underlying felony is sufficient for conviction in a felony murder case.¹⁶⁰

Although solicitation of capital murder¹⁶¹ was proved in a prosecution, a conviction under capital murder, a greater offense, was upheld.¹⁶² The difference between the crimes is that in solicitation of capital murder, commission of the murder is not necessary.¹⁶³ Where elements of both offenses are present, the state may choose to proceed under either indictment.¹⁶⁴

Two decisions during this survey period concerned issues submitted to the jury in capital murder cases. In *Warren v. State*¹⁶⁵ the court considered the types of mitigating and aggravating factors bearing on the special issue pertaining to the probability that the defendant will commit future criminal acts of violence sufficient to constitute a threat to society.¹⁶⁶ Psychiatric testimony as to the defendant's mental state, evidence that the accused lacked respect for human life, and evidence of past acts of violence were cited as relevant to the inquiry.¹⁶⁷ In *Warren* the evidence was insufficient to support the affirmative finding of aggravating factors because of a lack of evidence of past violence, a lack of evidence that violence was intended during the burglary underlying the capital murder charge, and a lack of evidentiary predictions of future violence.¹⁶⁸

*Molandes v. State*¹⁶⁹ held that the constitutional right to a unanimous verdict in felony cases extended only to verdicts returned adverse to the interests of the accused.¹⁷⁰ If a favorable verdict is returned, however, unanimous agreement among the jurors is unnecessary.¹⁷¹ Under article 37.071 of the Code of Criminal Procedure, a court is required to charge that as to the special issues submitted in a capital murder case the jury may not answer any issue "no" unless at least ten jurors concur in the negative vote.¹⁷² The *Molandes* court found the provision innured to the accused's benefit because it resulted in a favorable verdict of life imprisonment

and voluntary manslaughter (a statutory exception) and aggravated assault would necessarily merge into the homicide.

160. *Id.* at 545.

161. TEX. PENAL CODE ANN. § 15.03 (Vernon 1974).

162. *Brown v. State*, 561 S.W.2d 484 (Tex. Crim. App. 1978).

163. *Id.* at 488.

164. *Id.*

165. 562 S.W.2d 474 (Tex. Crim. App. 1978).

166. TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon Supp. 1978-79). In another case concerning this special issue provision of "dangerousness," a federal district court denied the right of presence of counsel during a compelled psychiatric examination. *Smith v. Estelle*, 445 F. Supp. 647 (N.D. Tex. 1977). The court, however, found that defense counsel was not notified of the psychiatrist's appointment, did not receive a copy of the psychiatrist's letter, and that the psychiatrist's name was intentionally omitted from the witness list. These factors were sufficient to find that the defendant's right to effective assistance of counsel was denied by lack of the right of effective cross-examination and of the right to gather additional expert psychiatric testimony. *Id.* at 661.

167. 562 S.W.2d at 476.

168. *Id.*

169. 571 S.W.2d 3 (Tex. Crim. App. 1978).

170. *Id.* at 4.

171. *Id.*

172. TEX. CODE CRIM. PROC. ANN. art. 37.071(d)(2) (Vernon Supp. 1978-79).

rather than a verdict of death.¹⁷³

Trial testimony in murder cases received attention during this survey period. The United States Supreme Court in the 1976 decision of *Doyle v. Ohio*¹⁷⁴ declined to determine the permissibility of allowing the State to cross-examine a defendant as to his failure to relate his exculpatory version of the facts at preliminary hearings.¹⁷⁵ The issue was expressly presented and affirmatively answered by the court of criminal appeals in *Franklin v. State*.¹⁷⁶ The court reasoned that unless the prosecution was given leeway in the area of impeachment cross-examination, the truth-seeking function of a trial might be thwarted by a defendant's presenting a defense that could only be ineffectively challenged.¹⁷⁷ The court in *Burns v. State*¹⁷⁸ held that the prohibition against spouses testifying against each other¹⁷⁹ does not prohibit a spouse from testifying against the spouse's co-defendant if the co-defendant is tried separately.¹⁸⁰ While the wife is not allowed to perjure herself when she is called to testify by her defendant husband, she is not required to testify against him. Therefore, any evidence obtained from the wife in the separate trial of the co-defendant may not be used against the husband in his trial, nor may it be used as impeachment evidence in the trial against anyone other than the wife.¹⁸¹

XV. SEX OFFENSES

Section 21.09 of the Texas Penal Code,¹⁸² which concerns statutory rape, was declared constitutional in *Ex parte Groves*.¹⁸³ In an unusual action by the court of criminal appeals, jurisdiction of this application for a writ of habeas corpus was granted although the remedy of appeal was available. The court rejected the First Circuit's reasoning in *Meloon v. Helgemoe*,¹⁸⁴ which held the New Hampshire statutory rape statute unconstitutional on the ground that it denied equal protection. Denying the merit of the appellant's equal protection claim, the court disavowed its own language in *Finley v. State*,¹⁸⁵ which construed the definition of "sexual intercourse" as making it impossible for a woman to be the perpetrator of rape. In *Groves* the court held that both statutory rape and rape may be committed by either sex, thereby creating no discrimination.¹⁸⁶ This interpretation is

173. 571 S.W.2d at 4.

174. 426 U.S. 610 (1976).

175. *Id.* at 616 n.6.

176. No. 57,348 (Tex. Crim. App. May 24, 1978).

177. *Id.*

178. 556 S.W.2d 270 (Tex. Crim. App.), *cert. denied*, 434 U.S. 935 (1977).

179. TEX. CODE CRIM. PROC. ANN. art. 38.11 (Vernon 1979).

180. 556 S.W.2d at 282.

181. *Id.*

182. TEX. PENAL CODE ANN. § 21.09 (Vernon 1974).

183. 571 S.W.2d 888 (Tex. Crim. App. 1978).

184. 564 F.2d 602 (1st Cir. 1977).

185. 527 S.W.2d 553 (Tex. Crim. App. 1975) (construing TEX. PENAL CODE ANN. § 21.02 (Vernon 1974 & Supp. 1978-79)).

186. Section 21.01(3) "merely defines what 'sexual intercourse' is; it does not purport to define the 'actual perpetrator' of the intercourse." 571 S.W.2d at 892.

consistent with the Code Construction Act, which provides that words of one gender include the other gender.¹⁸⁷ The differences between rape, which requires force, threat, or fraud, and statutory rape, which is often a consensual conduct offense, are striking. The same construction for each statute in *Groves* may have been hasty, but is interesting.

The Texas Court of Criminal Appeals has yet to define "the same criminal episode" language used in the rape statutes. Its closest encounter has been to state that an indictment alleging the defendant "knowingly and intentionally during the course of the same criminal episode, caused serious bodily injury" means that the criminal episode referred to is the act of *sexual intercourse* with the complaining witness.¹⁸⁸

Article 21.15 of the Code of Criminal Procedure¹⁸⁹ requires that the act or acts relied upon to constitute recklessness must be alleged with reasonable certainty. In a lewdness prosecution brought under section 21.07 of the Penal Code¹⁹⁰ the information was found to be fatally defective for failure to allege this necessary element of the offense.¹⁹¹ The information did not allege that the act was committed in a public place and whether the defendant was reckless as to the presence of another who would be offended or alarmed by the act. Similarly, an indictment charging aggravated promotion of prostitution was fatally defective for failing to allege the essential element of "knowingly," the culpable mental state.¹⁹²

XVI. CONTROLLED SUBSTANCES

Unless the Texas Legislature amends the law, there will be no attempt crimes in the area of controlled substances. Presently there is no offense of attempted delivery of a controlled substance,¹⁹³ nor attempted possession of a controlled substance.¹⁹⁴

The commissioner of health may add substances to the schedules provided for under the Texas Controlled Substances Act.¹⁹⁵ Once a substance is added to a schedule, it can no longer be classified as a dangerous drug and the penalty provisions of the Dangerous Drug Act have no application.¹⁹⁶ The commissioner has no authority to add substances to the penalty group in the Controlled Substances Act. Consequently, as was recently held in cases involving phentermine¹⁹⁷ and diazepam,¹⁹⁸ if the substance is added to a schedule but not already included in a penalty

187. TEX. REV. CIV. STAT. ANN. art. 5429b—2, § 2.02(c) (Vernon Supp. 1978-79).

188. *Ex parte* Smith, 571 S.W.2d 22, 23 (Tex. Crim. App. 1978).

189. TEX. CODE CRIM. PROC. ANN. art. 21.15 (Vernon Supp. 1978-79).

190. TEX. PENAL CODE ANN. § 21.07 (Vernon 1974).

191. *Brown v. State*, 568 S.W.2d 471 (Tex. Crim. App. 1977).

192. *Chance v. State*, 563 S.W.2d 812 (Tex. Crim. App. 1978).

193. *Brown v. State*, 568 S.W.2d 137 (Tex. Crim. App. 1978).

194. *Ex parte* Russell, 561 S.W.2d 844 (Tex. Crim. App. 1978).

195. TEX. REV. CIV. STAT. ANN. art. 4476—15, § 2.09 (Vernon 1976).

196. *Id.* art. 4476—14, § 2(a).

197. *Riddle v. State*, 560 S.W.2d 642 (Tex. Crim. App. 1977).

198. *Henderson v. State*, 560 S.W.2d 645 (Tex. Crim. App. 1977).

group, there can be no penalty for its possession or delivery under the Controlled Substances Act.

The specific burden of proof provisions of section 5.10 of the Controlled Substances Act¹⁹⁹ prevail over the traditional rule that the prosecution must negate the exception provided under section 4.04(a) of the Act. For example, the indictment in *Threlkeld v. State*²⁰⁰ was found to be sufficient even though it failed to allege that the defendant's possession of cocaine was not pursuant to a valid prescription, since it is not required that the indictment contain allegations negating the exception.

There is no provision in the Controlled Substances Act for appealing an order that grants a conditional discharge for a first offense violation.²⁰¹ Nor can a conditional discharge entered under section 4.12 of the Act²⁰² be appealed as a criminal conviction because the trial court does not actually convict the defendant.²⁰³

In order to allege a felony, rather than a misdemeanor, the indictment must allege either that the delivery of marihuana was for remuneration or state the quantity delivered.²⁰⁴ Traces of marihuana in a pipe, two roach clips, and a germinated seed will not support a conviction for possession of marihuana.²⁰⁵ Unless the amount of marihuana possessed is of a usable quantity, it does not constitute marihuana within the meaning of the statute. In contrast, 3.2 milligrams (.00011286 of an ounce) of cocaine is a sufficient amount to support a conviction for possession of cocaine.²⁰⁶

XVII. JUVENILE DELINQUENCY

Jurisdiction of a felony court in a juvenile case cannot attach unless the juvenile court that first ordered the transfer obtains valid jurisdiction of the cause.²⁰⁷ Failure of a certification summons to state that the purpose of the hearing is to consider discretionary transfer to the district court deprives the juvenile court of jurisdiction.²⁰⁸ Furthermore, the "adult" district court does not acquire valid jurisdiction unless that court first affords the juvenile an examining trial as provided in the statute.²⁰⁹ Although this requirement is mandatory,²¹⁰ it may be validly waived by the juvenile²¹¹ even though the examining trial furnishes another opportunity to have the

199. TEX. REV. CIV. STAT. ANN. art. 4476—15, § 5.10 (Vernon 1976).

200. 558 S.W.2d 472 (Tex. Crim. App. 1977). See also *Rodriquez v. State*, 561 S.W.2d 4 (Tex. Crim. App. 1978).

201. TEX. REV. CIV. STAT. ANN. art. 4476—15, § 4.12 (Vernon 1976).

202. *Id.*

203. *George v. State*, 557 S.W.2d 787 (Tex. Crim. App. 1977).

204. *Harris v. State*, 565 S.W.2d 66 (Tex. Crim. App. 1978). For cases considering insufficiency of evidence of possessions, see *Ayers v. State*, 570 S.W.2d 926 (Tex. Crim. App. 1978); *Harrison v. State*, 555 S.W.2d 736 (Tex. Crim. App. 1977).

205. *Moore v. State*, 562 S.W.2d 484 (Tex. Crim. App. 1978).

206. *Kent v. State*, 562 S.W.2d 855 (Tex. Crim. App. 1978).

207. *Grayless v. State*, 567 S.W.2d 216 (Tex. Crim. App. 1978).

208. *Id.* at 219.

209. TEX. FAM. CODE ANN. § 54.02(c) (Vernon 1975).

210. *Ex parte Menafee*, 561 S.W.2d 822, 829 (Tex. Crim. App. 1977).

211. *Criss v. State*, 563 S.W.2d 942, 945 (Tex. Crim. App. 1978).

criminal proceedings against the juvenile terminated and the jurisdiction of the juvenile court resumed.²¹² Moreover, an indictment returned by a grand jury is void after the district court has concluded an examining trial resulting in a remand to juvenile court jurisdiction.²¹³ Once jurisdiction of the juvenile court attaches, the court will retain jurisdiction after appeal even though the juvenile has reached seventeen years of age at the time of the last transfer hearing.²¹⁴

Confusion over service in juvenile proceedings was reduced by the Texas Supreme Court during the survey period; the record must affirmatively reflect that the juvenile was served with a summons.²¹⁵ Furthermore, the juvenile may not waive personal service of summons.²¹⁶

212. *Id.* at 944.

213. *Ex parte* LeBlanc, No. 58,575 (Tex. Crim. App. Feb. 2, 1979).

214. *R.E.M. v. State*, 569 S.W.2d 613 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.).

215. *In re* W.L.C., 562 S.W.2d 454 (Tex. 1978).

216. *In re* D.W.M., 562 S.W.2d 851 (Tex. 1978).

