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CRIMINAL LAW

by

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I. CULPABLE MENTAL STATE

THE Penal Code requires a culpable mental state for all offenses unless plainly dispensed with in the definition of the offense.[1] The culpable mental states defined in the Penal Code are intentional, knowing, reckless, and criminal negligence.[2] These provisions apply to all offenses whether in the Penal Code or not.[3] In *Honeycutt v. State*[4] the court of criminal appeals considered these provisions in connection with a municipal ordinance that created the offense of negligent collision. The ordinance required only simple negligence and required no proof of intent to damage property.[5] The court of criminal appeals held that the culpable mental state requirements of the Penal Code were fully applicable to the ordinance because only a statute that is enacted by the state or federal legislature can exempt an offense from coverage under the Penal Code.[6] The court concluded, therefore, that offenses created by municipal ordinances must include one of the four mental states prescribed by section 6.02(a).[7] Since a mental state of simple negligence does not comply with section 6.02, and the definition did not plainly dispense with any mental state, any charging instrument under the ordinance must, at a minimum, allege a culpable mental state of recklessness.[8]

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1. TEX. PENAL CODE ANN. § 6.02(b) (Vernon 1974).

2. *Id.* § 6.03.

3. *Id.* § 1.03(b).

4. 627 S.W.2d 417 (Tex. Crim. App. 1981).

5. *Id.* at 418. The ordinance provided that proof of lack of intent to collide with another vehicle or property was no defense to the offense. *Id.*

6. *Id.* at 422-23.

7. *Id.* at 424. Because the court concluded that the complaint was fundamentally defective for failure to allege one of the culpable mental states required by § 6.02(b), the court declared the complaint void without ruling on the validity of the ordinance. *Id.* at 422.

8. *Id.* at 424. TEX. PENAL CODE ANN. § 6.02(c) (Vernon 1974) states: "If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b) of this section, intent, knowledge, or recklessness suffices to establish criminal responsibility."

II. DEFENSES

Chapters 8[9] and 9[10] of the Texas Penal Code provides the statutory defenses and affirmative defenses, respectively, to criminal liability. These include insanity,[11] self-defense,[12] defense of another,[13] and mistake.[14] The effect of these defenses varies from negation of a culpable mental state, the mens rea, as is the case with mistake of fact,[15] to justification of otherwise criminal conduct as in the case of self-defense.[16] There are other defenses, including the defense of accident, that are not statutory, but rather derive from common law precedent.[17]

A. Self-Defense

One of the most familiar defenses the Texas Penal Code provides is that of self-defense.[18] Self-defense is not available, however, when the defendant provokes the unlawful use of force by another.[19] The issue of whether a defendant loses his right to self-defense by provoking the difficulty typically arises when the defendant arms himself and seeks out the victim. If the court submits a provocation charge to the jury when the right to self-defense is at issue, the defendant is generally entitled to a companion charge on his right to arm himself to seek an amicable resolution of differences with the victim, if the evidence supports such an instruction.[20]

One court of appeals found that the duty of the trial court to instruct the jury on a defendant's right to arm himself in conjunction with a charge on provoking the difficulty is inapplicable when the defendant requests the provocation charge. In *Banks v. State*,[21] a murder case, the court held that it was not reversible error for the trial court to refuse a right-to-arm charge because the appellant invited any error by requesting a charge on provocation of the difficulty.[22] Although the evidence supported a provocation

9. TEX. PENAL CODE ANN. §§ 8.01-.07 (Vernon 1974 & Supp. 1982-1983).
10. *Id.* §§ 9.01-.63.
11. *Id.* § 8.01.
12. *Id.* § 9.31.
13. *Id.* § 9.33.
14. *Id.* §§ 8.02-.03.
15. *Id.* § 8.02(a) provides: "It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense."
16. *Id.* § 9.02 provides: "It is a defense to prosecution that the conduct in question is justified under this chapter." This chapter includes § 9.31, which defines self-defense. *Id.* § 9.31.
17. *See, e.g.*, Garcia v. State, 605 S.W.2d 565 (Tex. Crim. App. 1980) (persons cannot be criminally punished for acts, omissions, and possessions done involuntarily); Dockery v. State, 542 S.W.2d 644 (Tex. Crim. App. 1975) (homicide may be accidental under 1974 Penal Code if not result of voluntary conduct).
18. TEX. PENAL CODE ANN. § 9.31 (Vernon 1974).
19. *Id.* § 9.31(b) provides: "The use of force against another is not justified . . . if the actor provoked the other's use or attempted use of unlawful force . . . ."
20. Gassett v. State, 587 S.W.2d 695 (Tex. Crim. App. 1979); Young v. State, 530 S.W.2d 120 (Tex. Crim. App. 1975).
21. 624 S.W.2d 762 (Tex. Ct. App.—Houston [14th Dist.] 1981, pet. granted).
22. *Id.* at 764.

instruction, the court reasoned that had the appellant not sought to limit his right to self-defense, the failure of the trial court to tell the jury of the appellant's right to go armed to settle his differences with the decedent would not have been error.[23] In addition, the court found no evidence in the record to support the appellant's claim to a right to arm himself to seek a peaceful resolution of the dispute.[24]

The concurrence by Justice Morse is more persuasive. Justice Morse opined that the evidence raised the issue of provocation and the appellant was fully within his right to request such a charge.[25] He agreed with the majority, however, that the evidence was insufficient to show that appellant armed himself with intentions of amicably settling his differences with the deceased.[26]

Crawford v. State[27] illustrates the problems that may occur when the defenses of self-defense and defense of another are combined. One of the requirements for the use of deadly force in self-defense is that "a reasonable person in the actor's situation would not have retreated."[28] The trial court in *Crawford* combined a charge on self-defense and defense of a third person such that it required appellant to retreat if he could reasonably do so before he would be entitled to his defense of another charge.[29] The court of appeals held that the law of retreat did not apply to appellant because it would have the anomalous effect of requiring a person who sees a third party under unlawful attack, and who believes his intervention is immediately necessary, to walk away if he can reasonably do so without injury to himself, leaving the third party to fend for himself.[30] The law of retreat applies only to the third party.

B. Mistake of Fact

Mistake of fact constitutes a defense to criminal responsibility to the extent that it negates the necessary mens rea of the offense.[31] The defense requires a reasonable belief on the part of the defendant. The definition of a reasonable belief was considered in *Mata v. State*.[32] The appellant was

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23. *Id.*
24. *Id.* at 765.
25. *Id.* at 767 (Morse, J., concurring). Justice Morse stated:
> If the evidence raised both issues, appellant had a right to have complete proper instructions which peculiarly applied to the facts pertinent to his defense. It doesn't appear that appellant is estopped or invited error by being willing to accept the "bitter" (limitation of his right of self defense if shown the difficulty was provoked by appellant) in order to get the "sweet" (right of appellant to bear arms in amicably "seeking an explanation").

Id.
26. *Id.*
27. 629 S.W.2d 165 (Tex. Ct. App.—Waco 1982, no pet.).
28. TEX. PENAL CODE ANN. § 9.32(2) (Vernon 1974).
29. 629 S.W.2d at 167.
30. *Id.* at 168-69.
31. TEX. PENAL CODE ANN. § 8.02(a) (Vernon 1974).
32. 627 S.W.2d 838 (Tex. Ct. App.—San Antonio 1982, no pet.).

convicted of involuntary manslaughter.[33] While he and the decedent were playing with their guns, the appellant took every other round out of the cylinder of his pistol, leaving three rounds in the gun. Although he thought that the hammer of the pistol was on an empty chamber and that the gun was not cocked, when he pointed the gun at the decedent and pulled the trigger, the gun discharged, killing the decedent. The court found that "an ordinary and prudent man who does not know the exact position of three live rounds in the cylinder of a gun and who pulls back on the trigger or hammer of the gun, cannot conceivably believe that the gun is incapable of firing."[34]

C. *Voluntary Intoxication*

Voluntary intoxication is not a defense to criminal liability,[35] but it may be used to mitigate punishment when such intoxication induces temporary insanity.[36] In *Schenk v. State*[37] the court of appeals found that the trial court did not err in refusing a punishment charge on voluntary intoxication.[38] The evidence showed that the appellant had taken drugs and alcohol on the date of the offense. No evidence showed that the appellant was ever intoxicated from his imbibing, or that he was driven to temporary insanity. The court concluded that without such evidence no charge on voluntary intoxication was required.[39]

D. *Accident*

Accident is not a statutory defense. Rather, it is created by case law and results from a lack of voluntary conduct. *Withers v. State*[40] explores the application of the accident defense to the offense of involuntary manslaughter. While the appellant was repairing his pistol, his dog jumped into his lap. When he pushed the dog away with the hand holding the gun, the gun discharged, killing Mrs. Withers. The court reasoned that because appellant loaded and cocked the pistol, and pushed the dog out of his lap when the gun discharged, no evidence existed demonstrating that the appellant's conduct was involuntary.[41] If the conduct causing death is not involuntary, there is no accident defense.[42]

III. ATTEMPT

Section 15.01 of the Texas Penal Code is the general criminal attempt

33. *See* TEX. PENAL CODE ANN. § 19.05(a)(1) (Vernon 1974).
34. 627 S.W.2d at 840 (footnote omitted).
35. TEX. PENAL CODE ANN. § 8.04(a) (Vernon 1974).
36. *Id.* § 8.04(b).
37. 624 S.W.2d 757 (Tex. Ct. App.—Fort Worth 1981, no pet.).
38. *Id.* at 757-58.
39. *Id.* at 758.
40. 631 S.W.2d 595 (Tex. Ct. App.—El Paso), *aff'd*, 642 S.W.2d 486 (Tex. Crim. App. 1982).
41. *Id.* at 597.
42. *Id.*

statute. It requires both the specific intent to commit an offense and an act sufficiently serious to manifest that intent.[43] In *Robinson v. State*[44] the court of appeals in San Antonio considered whether attempted voluntary manslaughter is a lesser included offense of attempted murder.[45] Reasoning that voluntary manslaughter arises only by way of a defense that reduces the offense of murder, the majority found that it is impossible to satisfy the specific intent element required of murder and, at the same time, anticipate raising the defensive elements of voluntary manslaughter.[46] Accordingly, the court held that attempted voluntary manslaughter does not exist as a lesser included offense of attempted murder.[47]

Justice Butts concurred in the affirmance because, as the majority noted, no evidence supported a charge on attempted voluntary manslaughter.[48] She dissented, however, on the issue of the existence of attempted voluntary manslaughter.[49] Because voluntary manslaughter may encompass an intentional murder, it meets the intent element for attempt, and the provoking circumstances only mitigate the malicious character of that intent whether or not death occurs.[50] When the evidence raises a charge of attempted voluntary manslaughter and the defendant requests such a charge, a trial court's refusal of the charge creates a potential denial of the right to a fair trial.[51]

In addition to the specific intent to commit an offense, the defendant must commit "an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended."[52] In *Gibbons v. State*[53] the court of criminal appeals found the evidence insufficient to prove such an act for attempted theft.[54] Gibbons, an attorney, was charged with attempted theft by negotiating an invalid workers' compensation claim. The evidence adduced at trial showed that appellant continued negotiation of a workers' compensation claim after the client's death, without informing the insurer. He obtained a claim form from the insurance company, but never completed it or submitted it to the Industrial Accident Board for approval. The insurance agent with whom appellant dealt testi-

43. TEX. PENAL CODE ANN. § 15.01(a) (Vernon Supp. 1982-1983) provides: "A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended."

44. 630 S.W.2d 394 (Tex. Ct. App.—San Antonio 1982, pet. ref'd).

45. The appellant claimed that the trial court erred in refusing to instruct the jury on the lesser included offense of attempted voluntary manslaughter.

46. *Id.* at 402.

47. *Id.* at 403.

48. *Id.* at 405 (Butts, J., concurring).

49. *Id.* at 403-04. Although the majority addressed the existence of the offense of attempted voluntary manslaughter in a dictum, the majority's holding was limited to the narrower issue of whether attempted voluntary manslaughter is a lesser included offense of attempted murder. *Id.* at 402-03.

50. *Id.* at 404.

51. *Id.* at 405.

52. TEX. PENAL CODE ANN. § 15.01(a) (Vernon Supp. 1982-1983).

53. 634 S.W.2d 700 (Tex. Crim. App. 1982).

54. *Id.* at 707.

fied that in another case the appellant tried to bribe him in order to obtain a more favorable settlement. The court found significant the lack of any evidence indicating that the appellant intended to submit the claim form for payment and held that the appellant's acts did not advance beyond mere preparation.[55]

IV. CAPITAL MURDER

The United States Supreme Court delivered an important capital murder decision last term in *Enmund v. Florida*.[56] Enmund was sentenced to death for two murders his accomplices committed during a robbery while Enmund waited in a getaway car. Enmund was convicted under the felony murder rule that allowed his conviction as a party even though he did not kill, attempt to kill, or intend to kill.[57] The Court used the analysis set out in *Coker v. Georgia*,[58] in which it held that the death penalty constituted cruel and unusual punishment for the offense of rape.[59] Finding that only nine jurisdictions allow the imposition of the death penalty for participation in a robbery in which an accomplice commits a murder, that no one in the last twenty-five years has been executed for such conduct, and that only three persons are presently sentenced to die in similar cases, the Court determined that these factors weighed heavily in finding the death penalty disproportionate under the eighth amendment.[60] Based upon these statistical findings, the lack of any deterrent value the death penalty would have on one who has no intent to kill, and the fact that retributive ends are not served where the punishment is not tailored to a criminal's culpability, the Court held that imposition of the death sentence on Enmund violated the eighth amendment.[61]

Enmund will have little direct impact in Texas because only intentional murders, not felony murders, committed during a robbery or certain other crimes may be punished by the death penalty.[62] While the United States Supreme Court was limiting application of capital punishment, however, the Houston [1st District] court of appeals was liberalizing the burden of proof with regard to intent in capital murder cases in *Dowden v. State*.[63] In *Dowden* the appellant went to a police station with the intention of freeing his brother. During an ensuing armed confrontation with three police officers, one of the policemen was killed by a shot fired by his fellow officer. Appellant was sentenced to life imprisonment for this killing. Rely-

55. *Id.*
56. 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).
57. *Id.* at 3371-72, 73 L. Ed. 2d at 1143-44.
58. 433 U.S. 584 (1977).
59. *Id.* at 598-99.
60. 102 S. Ct. at 3372-74, 73 L. Ed. 2d at 1146-50.
61. *Id.* at 3377-79, 73 L. Ed. 2d at 1152-54.
62. TEX. PENAL CODE ANN. § 19.03(a) (Vernon 1974) provides: "A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and . . . (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson . . . ."
63. 638 S.W.2d 85 (Tex. Ct. App.—Houston [1st Dist.] 1982, pet. granted).

ing on *People v. Gilbert*,[64] the court held that the act of engaging in the shootout established the appellant's intent to kill.[65] The court held further that the fact that the deceased officer was shot by another officer does not constitute a sufficient intervening cause of death to relieve appellant of liability, because it was highly probable that the appellant's intentional actions would result in death.[66]

In *Cruz v. State*[67] the Corpus Christi court of appeals explored the relationship between a murder and an aggravating felony under section 19.03(a)(2).[68] The evidence showed that appellant killed his housemate and was in possession of the decedent's watch when he was arrested approximately twenty-four hours later. The court found that such evidence was insufficient to prove capital murder in the course of committing or attempting to commit a robbery.[69] The court held that the state must prove that the killing occurred during appellant's conduct of obtaining or maintaining control over the deceased's watch.[70] The court reasoned from the evidence that it was just as likely the appellant took the watch as an afterthought as that he killed the decedent in order to obtain the watch.[71]

V. MURDER

The submission of lesser included offenses to the jury is one of the main issues that arises in murder prosecutions. The decision to submit involves a twofold determination: (1) whether the offense in question is a lesser included offense; and (2) whether it is raised by the evidence.[72] Voluntary manslaughter is a lesser included offense of murder and must be submitted when the evidence creates the issue.[73] The court of appeals at Austin in *Holloman v. State*[74] found no evidence of adequate cause to support a voluntary manslaughter charge.[75] In *Holloman* the appellant was driving from Houston to Austin, ran out of gas, and pulled into a roadside park

64. 63 Cal. 2d 690, 47 Cal. Rptr. 909, 408 P.2d 265 (1965), *rev'd on other grounds*, 388 U.S. 263 (1967) (conviction of defendant for the death of accomplice, holding that intent to kill can be inferred from defendant's wanton conduct in disregard for human life).

65. 638 S.W.2d at 91-92.

66. *Id.*

67. 629 S.W.2d 852 (Tex. Ct. App.—Corpus Christi 1982, pet. ref'd).

68. TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 1974). For the text of the section, see *supra* note 62.

69. 629 S.W.2d at 859-60.

70. *Id.*

71. *Id.*

72. *See* Watson v. State, 605 S.W.2d 877 (Tex. Crim. App. 1980) (opinion on rehearing); Dywood v. State, 157 Tex. Crim. 266, 248 S.W.2d 479 (1952).

73. Medlock v. State, 591 S.W.2d 485, 486 (Tex. Crim. App. 1979). TEX. PENAL CODE ANN. § 19.04(a) (Vernon 1974) provides: "A person commits an offense if he causes the death of an individual under circumstances that would constitute murder . . . except that he caused the death under the immediate influence of sudden passion arising from an adequate cause."

74. 633 S.W.2d 939 (Tex. Ct. App.—Austin 1982, pet. ref'd).

75. *Id.* at 946-47. TEX. PENAL CODE ANN. § 19.04(c) (Vernon 1974) provides: " 'Adequate cause' means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection."

where the decedent and his girlfriend were camping. The appellant awoke the decedent and asked him where he could get some gas. When the decedent told the appellant to leave him and his girlfriend alone, an argument ensued, and the appellant shot the decedent in the face. The court concluded that the charge on voluntary manslaughter was properly refused because the decedent's refusal to assist the appellant and the resulting argument were insufficient to show adequate cause.[76]

In *Coit v. State*[77] the court of appeals considered whether aggravated assault[78] is a lesser included offense of murder under section 19.02(a)(2).[79] In *Coit* the appellant beat his wife to death after a domestic argument. The evidence indicated that the couple fought frequently during their twelve-year marriage. The appellant testified that although the deceased attacked him, he had no intention of killing her or causing her serious bodily injury. At trial the appellant requested and was refused a charge on aggravated assault. The court of appeals found that both aggravated assault and murder require intent to commit serious bodily injury, and that murder additionally required an act clearly dangerous to human life that causes death.[80] Since aggravated assault can be established by less than all of the facts necessary to prove murder, the court concluded that it is a lesser included offense of murder.[81]

The *Coit* court's analysis of the sufficiency of the evidence to support an aggravated assault charge is most interesting. Although the appellant denied any intention to cause the decedent serious bodily injury, the court found that the medical examiner's evidence of six severe blows to the victim's head, all capable of causing death, was sufficient to support a finding of intent to cause serious bodily injury.[82] The court concluded, however, that the evidence indicated that the appellant's acts were not clearly dangerous to human life because the decedent died of a beating inflicted by means not normally calculated to cause death.[83]

VI. INVOLUNTARY MANSLAUGHTER

Causing the death of another by recklessness constitutes involuntary manslaughter.[84] The court of criminal appeals considered whether aggravated assault is a lesser included offense of involuntary manslaughter in

76. 633 S.W.2d at 946.

77. 629 S.W.2d 263 (Tex. Ct. App.—Dallas 1982, pet. ref'd).

78. TEX. PENAL CODE ANN. § 22.02 (Vernon 1974 & Supp. 1982-1983).

79. *Id.* § 19.02(a)(2) (Vernon 1974) provides: "A person commits an offense if he . . . (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual . . . ."

80. 629 S.W.2d at 265.

81. *Id.*

82. *Id.*

83. *Id.* at 265-66. The court noted that in a murder case, when a deadly weapon per se is not used, aggravated assault is deemed to be raised. *Id.*

84. TEX. PENAL CODE ANN. § 19.05(a)(1) (Vernon 1974) provides: "A person commits an offense if he: (1) recklessly causes the death of an individual . . . ."

Neff v. State.[85] In *Neff* the appellant, originally indicted for murder, was convicted of the lesser included offense of aggravated assault. Following the appellant's successful motion for new trial, he was indicted and convicted of involuntary manslaughter. Appellant claimed that double jeopardy barred his trial and conviction for involuntary manslaughter because his first conviction on aggravated assault acted as an acquittal for all greater offenses.[86] Since aggravated assault requires a greater culpable mental state, intent, or knowledge,[87] than does involuntary manslaughter, which requires only recklessness,[88] the court held that aggravated assault is not a lesser included offense of involuntary manslaughter.[89] The court, therefore, found that the second trial did not violate double jeopardy provisions.[90]

VII. AGGRAVATED KIDNAPPING

Pursuant to section 20.04 of the Texas Penal Code the abduction of a person is elevated to aggravated kidnapping if the abduction is accompanied by an intent to terrorize the person abducted or a third person.[91] The court of appeals in *Garza v. State*[92] addressed a challenge to the sufficiency of the evidence to prove the appellant's intent to terrorize the kidnapping victim. The state contended that proof of the victim's fright established the intent to terrorize. The court rejected this claim, noting that the fear shown by the victim is not unique to the particular crime because it is a natural incident of being a crime victim.[93] The court stated that every offense of kidnapping would be transformed to aggravated kidnapping if the victim's own fear was sufficient evidence of the intent to terrorize.[94]

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85. 629 S.W.2d 759 (Tex. Crim. App. 1982).

86. TEX. CRIM. PROC. CODE ANN. art. 37.14 (Vernon 1981) provides: "[I]f a defendant, prosecuted for an offense which includes within it lesser offenses, be convicted of an offense lower than that for which he is indicted, and a new trial be granted him . . . the verdict upon the first trial shall be considered an acquittal of the higher offense . . . ."

87. TEX. PENAL CODE ANN. § 22.02 (Vernon 1974 & Supp. 1982-1983). *Id.* § 6.03(a) (Vernon 1974) provides:

> A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> (b) A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

88. *Id.* § 19.05(a). *Id.* § 6.03(c) provides:

> A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care than an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

89. 629 S.W.2d at 760.

90. *Id.*

91. TEX. PENAL CODE ANN. § 20.04(a)(5) (Vernon 1974).

92. 632 S.W.2d 823 (Tex. Ct. App.—Dallas 1982, pet. granted).

93. *Id.* at 830-31.

94. *Id.* at 831.

Noting that the pertinent mental state is that of appellant, the court held that the victim's mental state, alone is not evidence of appellant's intent.[95]

VIII. AGGRAVATED ASSAULT

One of the most common forms of aggravated assault[96] is an assault with a deadly weapon.[97] Questions concerning sufficiency of proof often arise when a knife is used because a knife is not a deadly weapon per se.[98] In *Beller v. State*[99] the evidence introduced at trial showed that appellant swung a knife at the complainant, but the knife was not introduced or further described.[100] The court held that when no other testimony concerning the knife was introduced, the evidence was insufficient to prove that the knife was a deadly weapon.[101] The interesting feature of this case is that the opinion by Judge Dally remands the case for a new trial.[102] As noted in a concurrence by Judge Odom, when a reversal is based solely on lack of sufficient evidence to support the jury's verdict, a judgment of acquittal must be entered.[103]

IX. TERRORISTIC THREATS

In *Dues v. State*[104] the court of criminal appeals discussed the relevance of the actual fear of an intended victim to the issue of the defendant's intent to make terroristic threats.[105] The court held that the prosecutor's remark during voir dire that the victim's reaction rather than the defendant's intent was the important factor, was reversible error.[106] The court noted that it is unnecessary that the victim be placed in fear of imminent serious bodily injury.[107] The court stated that although it is immaterial that the accused had the capability or the intention to carry out his threat, he must at least have the conscious objective to place the victim in imminent fear of such injury.[108]

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95. *Id.* at 831-32.
96. TEX. PENAL CODE ANN. § 22.02 (Vernon 1974 & Supp. 1982-1983).
97. *Id.* § 22.02(a)(4) (Vernon Supp. 1982-1983).
98. Limuel v. State, 568 S.W.2d 309 (Tex. Crim. App. 1978); Windham v. State, 530 S.W.2d 111 (Tex. Crim. App. 1975).
99. 635 S.W.2d 739 (Tex. Crim. App. 1982).
100. *Id.* at 740.
101. *Id.*
102. *Id.* at 741.
103. *Id.* (Odom, J., concurring); *see* Greene v. Massey, 437 U.S. 19 (1978) (on appeal of murder case, once a reviewing court has determined that evidence introduced at trial was insufficient to sustain verdict, second trial precluded); Burks v. United States, 437 U.S. 1 (1978) (double jeopardy clause of fifth amendment precludes second trial once reviewing court determines that evidence was insufficient to sustain jury's verdict).
104. 634 S.W.2d 304 (Tex. Crim. App. 1982).
105. One of the bases prescribed by TEX. PENAL CODE ANN. § 22.07 (Vernon Supp. 1982-1983) for convicting a defendant for the offense of making terroristic threats is threatening "to commit any offense involving violence to any person or property with intent to . . . place any person in fear of imminent serious bodily injury." *Id.*
106. 634 S.W.2d at 305.
107. *Id.* at 305-06.
108. *Id.*

X. AGGRAVATED ROBBERY

The court established a high standard of evidence to show serious bodily injury[109] in *Black v. State*,[110] an aggravated robbery case, holding that a gunshot wound to the leg requiring surgery did not show a substantial risk of death or serious permanent disfigurement.[111] Despite testimony of the complainant that his leg required two or three months to heal and that he was unable to return to work, the court found that, in the absence of hospital records or testimony from a doctor or nurse who treated the wound, no evidence showed that the victim was unable to walk after leaving the hospital or that he suffered permanent damage to his leg.[112]

XI. BURGLARY

In *Lewis v. State*[113] the court found the evidence insufficient to support a conviction of burglary of a habitation[114] with intent to commit aggravated assault.[115] In *Lewis* the evidence indicated that the complainant found the appellant inside the complainant's home. The appellant fled the home after swinging a hammer at the complainant's head.[116] Although the court held that the appellant's use or possession of a deadly weapon is not an essential element of the offense of burglary of a habitation with intent to commit aggravated assault,[117] the court concluded that evidence regarding the hammer was relevant to a determination of whether intent to assault existed at the time of the entry.[118]

In *Sample v. State*[119] the court held that misdemeanor reckless damage or destruction[120] is not a lesser included offense of the burglary of a coin-operated machine.[121] The court found that the former requires proof of an additional element of damage or destruction to the owner's property.[122] The court held that the phrase breaking and entering in the burglary of-

109. TEX. PENAL CODE ANN. § 1.07(a)(34) (Vernon 1974) defines serious bodily injury as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

110. 637 S.W.2d 923 (Tex. Crim. App. 1982).

111. *Id.* at 925-26.

112. *Id.* at 926.

113. 638 S.W.2d 148 (Tex. Ct. App.—El Paso 1982, pet. ref'd).

114. TEX. PENAL CODE ANN. § 30.02(a) (Vernon 1974).

115. 638 S.W.2d at 152.

116. Two days later, the complainant again found the appellant in his home, whereupon appellant fired a double-barrel shotgun twice, striking the complainant in the arm. The appellant was charged with two counts of burglary of a habitation and one count of attempted murder. *Id.* at 149-50.

117. 638 S.W.2d at 151. The term deadly weapon is defined in TEX. PENAL CODE ANN. § 1.07(a)(11) (Vernon 1974).

118. 638 S.W.2d at 151-52.

119. 629 S.W.2d 86 (Tex. Ct. App.—Dallas 1981, no pet.).

120. TEX. PENAL CODE ANN. § 28.04(a) (Vernon 1974) provides: "A person commits an offense if, without the effective consent of the owner, he recklessly damages or destroys property of the owner."

121. 629 S.W.2d at 87-88.

122. *Id.* at 88.

fense[123] does not require proof of actual damage or destruction of the property, but is of a technical nature, such as the lifting of the latch.[124]

In *Taylor v. State*[125] the court held that a separate culpable mental state, apart from the intent to commit a burglary, is not required to raise a burglary from a second to a first degree felony under section 30.02(d) of the Texas Penal Code.[126] The court relied on *Bilbrey v. State*,[127] in which the court of criminal appeals held that proof of a separate culpable mental state is not required to elevate the offense of robbery to aggravated robbery when, as here, the defendant exhibited a deadly weapon during the commission of a robbery.[128] The court concluded that because the aggravating circumstances of the burglary offense are analogous to those of robbery, a separate culpable mental state is not essential to enhance a burglary offense to first degree under section 30.02.[129]

In *Ortega v. State*[130] the court held that the admission of an extraneous burglary to prove the appellant's intent to commit theft was reversible error when the identity of the defendant was not an issue.[131] In *Ortega* a police officer stopped the appellant for a traffic violation and discovered that there was an outstanding warrant for the appellant's arrest in a burglary case. Pursuant to the arrest the officer searched the appellant's vehicle and discovered a clock radio shown to be stolen during a burglary committed subsequent to the one for which the warrant had been issued. During the trial for the first burglary the owner of the clock radio testified regarding the second burglary and identified the clock radio. The court of criminal appeals found that the evidence regarding the first burglary was sufficient for the jury to infer intent to commit theft and, since the appellant offered no evidence to rebut such inference, the admission of testimony with respect to the subsequent burglary constituted a reversible error.[132]

In *White v. State*[133] the court held that in conjunction with a charge of burglary,[134] the definition of habitation[135] includes an unenclosed structure.[136] The burglarized structure was an attached garage that had no door. The court noted that although a structure must be enclosed to constitute a building within the meaning of section 30.01(2),[137] no such re-

123. TEX. PENAL CODE ANN. § 30.03(a) (Vernon 1974).
124. 629 S.W.2d at 87-88.
125. 632 S.W.2d 697 (Tex. Ct. App.—Fort Worth 1982, pet. ref'd).
126. TEX. PENAL CODE ANN. § 30.02 (Vernon 1974).
127. 594 S.W.2d 754 (Tex. Crim. App. 1980).
128. *Id.* at 758-59.
129. 632 S.W.2d at 699.
130. 626 S.W.2d 746 (Tex. Crim. App. 1981).
131. *Id.* at 748-49.
132. *Id.* at 749.
133. 630 S.W.2d 340 (Tex. Ct. App.—Houston [1st Dist.] 1982, no pet.).
134. TEX. PENAL CODE ANN. § 30.02(a)(1) (Vernon 1974).
135. *Id.*
136. 630 S.W.2d at 342.
137. TEX. PENAL CODE ANN. § 30.01(2) (Vernon 1974).

quirement exists for a habitation.[138]

XII. ALCOHOLIC BEVERAGE CODE

The Alcoholic Beverage Code prohibits anyone authorized to sell beer from permitting lewd or vulgar acts on the premises where the beer is sold.[139] Although public lewdness is defined in section 21.07 of the Texas Penal Code,[140] the Alcoholic Beverage Code fails to define the term vulgar. The court in *Wishnow v. State*[141] held that section 104.01 of the Alcoholic Beverage Code[142] is unconstitutional insofar as it permits one to be convicted for a vulgar act.[143] The court based its opinion on a finding that the term vulgar is unconstitutionally vague.[144]

XIII. THEFT AND FRAUD OFFENSES

A. Indictments

In a long awaited opinion the en banc court of criminal appeals held on rehearing in *Thomas v. State*[145] that a theft indictment may not be quashed for its failure to state exactly the type of "lack of effective consent" or type of "owner" it alleges.[146] Even though those terms have multiple statutory definitions,[147] they do not apply to an act or omission of the defendant and are thus not subject to a motion to quash.[148] Consistent with the general rule set forth in *Thomas*, as subsequently clarified by the court of criminal appeals in *Ferguson v. State*,[149] the Dallas court of appeals held in *Coleman v. State*[150] that the term "appropriate"[151] in a theft indictment does go to an act or omission of the defendant.[152] Indictments

138. 630 S.W.2d at 342.
139. TEX. ALCO. BEV. CODE ANN. § 104.01(6) (Vernon Supp. 1982-1983).
140. TEX. PENAL CODE ANN. § 21.07 (Vernon 1974).
141. 638 S.W.2d 83 (Tex. Ct. App.—Houston [1st Dist.] 1982, pet. granted).
142. TEX. ALCO. BEV. CODE ANN. § 104.01(6) (Vernon Supp. 1982-1983).
143. 638 S.W.2d at 84.
144. *Id.*
145. 621 S.W.2d 158 (Tex. Crim. App. 1981) (on rehearing).
146. *Id.* at 161.
147. For all theft prosecutions under ch. 31 of the Penal Code, effective consent is specially defined in TEX. PENAL CODE ANN. § 31.01(4) (Vernon 1974), which sets out nine ways of showing a lack of effective consent. Owner is defined generally in TEX. PENAL CODE ANN. § 1.07(24) (Vernon 1974), which sets forth three distinct types.
148. 621 S.W.2d at 164.
149. 622 S.W.2d 846 (Tex. Crim. App. 1981) (on rehearing). The court held that the term "deliver" in an indictment for delivery of heroin was subject to a motion to quash since the term involves the defendant's central act that constitutes the criminal conduct. *Id.* at 851; *cf.* Phelps v. State, 623 S.W.2d 936 (Tex. Crim. App. 1981) (term "possess" does not go to an act or omission of defendant).
150. 629 S.W.2d 126 (Tex. Ct. App.—Dallas 1981), *aff'd*, 643 S.W.2d 124 (Tex. Crim. App. 1982).
151. "Appropriate" is defined in TEX. PENAL CODE ANN. § 31.01(5) (Vernon Supp. 1982-1983): "(A) to bring about a transfer or purported transfer of title to or other nonpossessory interest in property, whether to the actor or another; or (B) to acquire or otherwise exercise control over property other than real property."
152. 629 S.W.2d at 127.

for appropriation are therefore subject to a motion to quash if they fail to set out the manner or means of appropriation.

The recent holding in *Jones v. State*,[153] requiring a credit card abuse indictment to allege that the defendant used the credit card without the effective consent of the cardholder, does not apply in prosecutions under Penal Code section 21.31(b)(4),[154] which generally proscribes the theft of a credit card with intent to use it.[155] The court of criminal appeals concluded in *Ex parte Williams*[156] that no allegations as to the name of the cardholder or the effective consent of the cardholder are necessary in prosecutions for theft with intent to use under section 32.31(b)(4), since the cardholder's lack of effective consent is not an element of the offense.[157] Furthermore, the Houston [14th District] court of appeals confirmed in *Harris v. State*[158] that indictments for fraudulent use of a credit card are not fundamentally defective for failure to name the party to whom the card was presented, and thus will not be overturned for that omission.[159]

B. Sufficiency of Evidence

A number of instructive opinions were handed down during the survey period dealing with the sufficiency of evidence in theft prosecutions. The court of criminal appeals held in *Casey v. State*[160] that if a theft is alleged under Penal Code section 31.03(b)(1)[161] the state must establish that the defendant was involved in the initial appropriation from the owner.[162] In this case the indictment alleged a theft under section 31.03(b)(1), which proscribes the appropriation of property without the owner's effective consent. The proof at trial, however, showed a theft under section 31.03(b)(2), which proscribes the appropriation of stolen property known to have been stolen by another.[163] Thus, if the evidence establishes only a transfer of stolen property and fails to show that the defendant was involved in the initial appropriation from the owner, the state must charge the defendant under section 31.03(b)(2), or, as in *Casey*, the conviction will be reversed.[164] To hold otherwise would create the possibility that an innocent person could be convicted of theft. As the court noted, a good faith purchaser of property, not knowing that the property was stolen, could know-

153. 611 S.W.2d 87, 89-90 (Tex. Crim. App. 1981) (en banc).
154. TEX. PENAL CODE ANN. § 32.31(b)(4) (Vernon 1974).
155. *Id.*
156. 622 S.W.2d 876 (Tex. Crim. App. 1981).
157. *Id.* at 877.
158. 629 S.W.2d 805 (Tex. Ct. App.—Houston [14th Dist.] 1982, no pet.).
159. *Id.* at 806-07; *see* Stribling v. State, 542 S.W.2d 418 (Tex. Crim. App. 1976).
160. 633 S.W.2d 885 (Tex. Crim. App. 1982).
161. TEX. PENAL CODE ANN. § 31.03(b)(1) (Vernon Supp. 1982-1983) provides: "(b) Appropriation of property is unlawful if: (1) it is without the owners effective consent . . . ."
162. 633 S.W.2d at 887.
163. TEX. PENAL CODE ANN. § 31.03(b)(2)(Vernon Supp. 1982-1983) provides: "(b) Appropriation of property is unlawful if . . . (2) the property is stolen and the actor appropriates the property knowing it was stolen by another."
164. 633 S.W.2d at 887; *see* Cooper v. State, 537 S.W.2d 940, 944 (Tex. Crim. App. 1976).

ingly and intentionally exercise control over property with the intent to deprive the owner of it without the owner's effective consent.[165]

In *Manley v. State*[166] the court of criminal appeals, sitting en banc, had its first opportunity to construe the term "abscond" in the presumed intent section of the statute governing theft of service.[167] Penal Code section 31.04(b) presumes an intent to avoid payment for a service if "the actor abscond[s] without paying for the service in circumstances where payment is ordinarily made immediately upon rendering of the service, as in hotels, restaurants, and comparable establishments."[168] Because the Penal Code does not define the term "abscond," the court, pursuant to the Code Construction Act,[169] considered the common usage definitions of the word. These definitions consistently include hiding or concealing oneself clandestinely to avoid payment or legal process.[170] The defendant in *Manley* was a restaurant customer who was dissatisfied with his meal and requested a price adjustment from the waitress. The waitress left his table to confer with the owner concerning the request. When she failed to return within five minutes the defendant went to the cash register and simply left his printed business card, which contained his name, business address, and his business and home telephone numbers. On the reverse side of the card he wrote: "Call me when you decide."[171] The defendant then left the restaurant with his three young children. No evidence showed that the restaurant had made any attempt to contact the defendant thereafter. The court held that such conduct could not constitute absconding so as to permit the presumption of intent to avoid payment.[172] Because the evidence was insufficient to establish the requisite intent, the case was reversed.[173]

In another theft of services case the court of criminal appeals reaffirmed the rule of *Cortez v. State*[174] that when the indictment alleges theft of service by "deception" through the issuance of a bad check,[175] proof that the check was issued subsequent to the performance of the services is not sufficient.[176] In *Gibson v. State*[177] the court noted that under section

165. 633 S.W.2d at 887.

166. 633 S.W.2d 881 (Tex. Crim. App. 1982).

167. TEX. PENAL CODE ANN. § 31.04(b) (Vernon Supp. 1982-1983).

168. *Id.*

169. TEX. REV. CIV. STAT. ANN. art. 5429b—2, § 2.01 (Vernon Supp. 1982-1983).

170. 633 S.W.2d at 883; *see* Snyder v. St. Paul Mercury Indem. Co., 191 S.W.2d 107, 110 (Tex. Civ. App.—Galveston 1945, writ ref'd w. o. m.) (construed the term to mean " 'to hide oneself; to retire from the public view; generally used of persons in debt, or criminals eluding the law . . . ; to go away hurriedly and secretly." *Id.* (quoting 1 OXFORD ENGLISH DICTIONARY 35 (1933)).

171. 633 S.W.2d at 883.

172. *Id.*

173. *Id.* The dissent deemed the evidence sufficient without the presumption, expressing the view that a customer is not entitled to set the price of a meal just because he is dissatisfied with it. *Id.* at 884.

174. 582 S.W.2d 119 (Tex. Crim. App. 1979).

175. *See* TEX. PENAL CODE ANN. § 31.06 (Vernon 1974).

176. 582 S.W.2d at 121.

177. 623 S.W.2d 324 (Tex. Crim. App. 1981) (on rehearing).

31.01(2)[178] the deception must be such as is likely to affect the judgment of another in the transaction.[179] Quoting from *Cortez*, the court reaffirmed the principle that any deception occurring after the other person has completed performance of the service allegedly stolen will not meet the requirement. Once the other person has completed the performance of his obligation in the transaction, his judgment in what he has already completed cannot be retrospectively affected.[180]

A frequently prosecuted circumstantial theft theory involves the defendant's possession of stolen property.[181] In *Perkins v. State*[182] the court of appeals had occasion to assess the state's specific burden of proof in cases in which a defendant supplied a reasonable explanation for his possession of stolen property. As stated by the court of criminal appeals a decade ago in *Huff v. State*,[183] if the defendant has a reasonable and sufficient explanation to rebut the inference that he stole the property in his possession, and the evidence fails to show that his explanation is false, then his conviction cannot stand.[184] The defendant in *Perkins*, who allegedly stole a motorcycle, explained to a police officer at the time of his arrest that he had innocently purchased the stolen vehicle. His testimony at trial regarding the purchase was detailed and corroborated. The state produced no evidence that he was connected with the actual theft of the motorcycle several days earlier. The state, in its attempt to show that it had satisfied its burden to refute the defendant's explanation, alleged that falsity could be inferred from the defendant's alleged attempted flight just prior to his arrest, the vagueness of his initial explanation regarding his purchase of the vehicle, and certain contradictions and inconsistencies in the defense testimony. The court considered the state's evidence in a light most favorable to the appealing defendant's innocence, and concluded that the state's circumstantial evidence did not exclude every reasonable hypothesis other than guilt.[185] The court therefore reversed the conviction.[186]

In *Anthony v. State*[187] the court of criminal appeals appears to have made a conviction for the unauthorized use of a motor vehicle[188] rather difficult for the state to obtain when the state has no direct evidence that the defendant actually operated the vehicle. The defendant in this case was seen by a Houston police officer seated behind the wheel of a parked car. When the officer drove past the defendant got out of the car and began to walk away. A subsequent check of the officer's hot sheet revealed

178. TEX. PENAL CODE ANN. § 31.01(2) (Vernon 1974).
179. 623 S.W.2d at 326.
180. *Id.* at 325.
181. The unexplained possession of recently stolen property is a sufficient basis to sustain a conviction for theft. Barnes v. State, 520 S.W.2d 401, 403 (Tex. Crim. App. 1975).
182. 630 S.W.2d 298 (Tex. Ct. App.—Houston [1st Dist.] 1981, pet. ref'd).
183. 492 S.W.2d 532 (Tex. Crim. App. 1973).
184. 630 S.W.2d at 302; *see* McElyea v. State, 599 S.W.2d 828 (Tex. Crim. App. 1980).
185. 630 S.W.2d at 301.
186. *Id.* at 303.
187. 628 S.W.2d 151 (Tex. Ct. App.—Houston [14th Dist.] 1982, no pet.).
188. *See* TEX. PENAL CODE ANN. § 31.07 (Vernon 1974).

the car to be stolen. The defendant fled from the scene and was apprehended with the assistance of other officers. The officers searched the defendant and found keys to the car in his pocket. The officer testified that the hood of the car was hot and that the motor could not have been off more than a couple of minutes. No witness, however, testified that he saw the defendant actually operate the car. Using the circumstantial evidence rule,[189] the court of appeals found that such evidence did not exclude every other reasonable hypothesis and thus reversed.[190]

The sufficiency of evidence of the value of stolen property was the subject of several court of appeals opinions during the survey period. In *Cantu v. State*[191] the court applied the rule that a property owner can testify as to his opinion regarding the value of his property even though he could not testify as to the value of like property belonging to another.[192] In order to prove the fair market value of the property at the time and place of the offense, or the replacement cost within a reasonable time thereafter, the state is entitled under section 31.08(a) to rely exclusively on the owner's opinion regarding the value of his property, or the price for which he would have been willing to sell it.[193] In *Cantu* the owner of the allegedly stolen automobile testified that he would not sell the car for less than $450. Two defense expert witnesses testified that the car would have been worth no more than fifty to seventy-five dollars. The court concluded that while evidence on the precise value of the vehicle was conflicting, the jury was entitled to rely on the owner's testimony regarding the value of his property.[194] The evidence was thus sufficient to show that the value of the automobile exceeded $200.[195]

This rule did not extend to spouses, however, in *Houston v. State*.[196] The court of appeals held in that case that the husband of the property owner was not qualified to give an opinion of the fair market value of his wife's property.[197] The indictment alleged that seven pieces of jewelry were stolen and that their combined value was greater than $200. Most of the items belonged to the wife. The husband's testimony, however, was the only evidence used to establish fair market value of the items. Because he had no knowledge[198] of the fair market value of his wife's jewelry, and

189. For circumstantial evidence to be sufficient, it must exclude every other reasonable hypothesis except the guilt of the accused. *See* Plunkett v. State, 580 S.W.2d 815, 821 (Tex. Crim. App. 1979); Easley v. State, 564 S.W.2d 742, 749 (Tex. Crim. App. 1978); Stogsdill v. State, 552 S.W.2d 481, 486 (Tex. Crim. App. 1977).

190. 628 S.W.2d at 153.

191. 625 S.W.2d 56 (Tex. Ct. App.—San Antonio 1981, no pet.).

192. *Id.* at 58.

193. TEX. PENAL CODE ANN. § 31.08(a) (Vernon 1974).

194. 625 S.W.2d at 58. The court relied on Thomas v. State, 605 S.W.2d 290 (Tex. Crim. App. 1980), and Daniels v. State, 600 S.W.2d 813 (Tex. Crim. App. 1980).

195. 625 S.W.2d at 58.

196. 626 S.W.2d 7 (Tex. Ct. App.—Corpus Christi), *remanded mem.*, 640 S.W.2d 605 (Tex. Crim. App. 1982).

197. 626 S.W.2d at 8.

198. A person other than the owner of property can testify as to that property's value only if he has knowledge of its fair market value. *Id.*; *see* Collier v. State, 474 S.W.2d 240, 241 (Tex. Crim. App. 1972).

since his testimony as to the value of his jewelry showed its value to be less than $200, the court found the evidence insufficient.[199]

Sweeney v. State[200] demonstrates that the state must introduce evidence of the property's value at the time of the offense. In *Sweeney* the only evidence as to value was the owner's testimony that the stolen property had cost $700 and that he had financed the cost. The state presented no testimony as to the age or condition of the property, or how long it had been since the complainant had purchased it. The evidence was thus insufficient to show that the property's value at the time of the offense was over $200, as alleged in the indictment.[201]

XIV. CONTROLLED SUBSTANCES ACT

One of the most significant enactments of the 67th Legislature's "War on Drugs" package was the passage of the bill prohibiting the sale and possession of drug paraphernalia.[202] Before the act's effective date[203] owners of two head shops in the Dallas/Fort Worth area filed suit to enjoin enforcement of the statute.[204] They claimed, inter alia, that the statute was void for vagueness.[205] The Texas legislation is largely based on the Model Drug Paraphernalia Act,[206] which has been widely adopted throughout the country. Three federal courts of appeals faced with statutory enactments similar to the Model Drug Paraphernalia Act have held them constitutional.[207] Only one circuit has found such legislation unconstitutional.[208] The federal district court in *Atkins v. Clements*[209] held that the Texas statute is narrowly drawn in that it clearly defines conduct proscribed in terms of specific intent and actual or constructive knowledge.[210] The court stated that the statute avoids vagueness by requiring the definition of drug paraphernalia to include subjective intent for illegal drug abuse on the part of

199. 626 S.W.2d at 8.

200. 633 S.W.2d 354 (Tex. Ct. App.—Houston [14th Dist.] 1982, pet. ref'd).

201. *Id.* at 356.

202. H.B. 733, 1981 Tex. Gen. Laws, ch. 277, at 742 (amending TEX. REV. CIV. STAT. ANN. art. 4476--15 (Vernon 1976)). Several sections of the Controlled Substances Act were amended by H.B. 733, to wit: TEX. REV. CIV. STAT. ANN. art. 4476--15, §§ 1.02(8), 1.02(29), 4.07, 5.03(a), 5.15 (Vernon Supp. 1982-1983).

203. The Governor signed the bill on June 1, 1981, and the bill became effective on September 1, 1981. 1981 Tex. Gen. Laws, ch. 277, at 746.

204. Atkins v. Clements, 529 F. Supp. 735 (N.D. Tex. 1981). A head shop is a business that sells drug paraphernalia.

205. Plaintiff's claim was based generally on U. S. CONST. amends. I, XIV. *See* Grayned v. City of Rockford, 408 U.S. 104, 108-14 (1972).

206. The MODEL DRUG PARAPHERNALIA ACT (1979) was prepared and issued by the U.S. Department of Justice.

207. Hejira Corp. v. McFarlane, 660 F.2d 1356, 1367 (10th Cir. 1981); Brache v. County of Westchester, 658 F.2d 47, 54 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1643, 71 L. Ed. 2d 874 (1982); Casbah, Inc. v. Thone, 651 F.2d 551, 559-64 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1642, 71 L. Ed. 2d 874 (1982).

208. *See* Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 932 (6th Cir. 1980), *vacated mem.*, 451 U.S. 1013 (1981).

209. 529 F. Supp. 735 (N.D. Tex. 1981).

210. *Id.* at 744.

the possessor or seller.[211] The court overruled the plaintiff's equal protection claim by concluding that the legislation has sufficient standards to guard against arbitrary, erratic, and discriminatory arrests and prosecutions.[212] The court also ruled against the plaintiff's substantive due process claim on the grounds that a rational relation exists between the banning of drug paraphernalia and the legitimate state interest in curbing drug abuse, which the court found to be epidemic.[213]

A number of cases were decided in state courts during the survey period on the issue of "affirmative link," which is the fundamental requirement for sufficiency of circumstantial evidence in possessory offenses. Generally, to establish unlawful possession of a controlled substance, the state must prove: (1) that the accused exercised care, control, and management over the contraband; and (2) that the accused knew the matter possessed was contraband.[214] In *Miller v. State*[215] the arresting officer was told by an undisclosed informant that a man fitting the defendant's description was at a filling station selling marijuana out of the trunk of an automobile, which was described in detail. When several officers arrived at that location they observed the defendant walking toward the vehicle with keys in his hand. A search of the locked vehicle revealed a quantity of LSD and marijuana. In holding the evidence insufficient to show an affirmative link, the court of appeals noted that the record was silent as to whether the filling station was open or closed, whether other keys to the car existed, whether other persons were present, whether the defendant had been seen driving the car, whether the defendant had parked the car, or if the defendant had parked the car, when he had done so.[216] Further, the defendant was not shown to have been under the influence of drugs at the time, or to have made an incriminating statement at the time of arrest. The state elicited testimony that the defendant was the owner of the vehicle, but the evidence was found to be hearsay and therefore of no probative value.[217] The court concluded that the defendant's presence at the service station a short distance from the car, with keys to the car in his hand, was insufficient to link him affirmatively to the contraband that was seized from the car.[218] In so holding, the court reiterated the rule that "possession" means more than being at the scene; it involves the exercise of dominion and control over the item allegedly possessed.[219]

Another court of appeals held in *Baltazar v. State*[220] that the defendant's

211. *Id.*
212. *Id.*
213. *Id.* at 744-45.
214. *See* Ayers v. State, 570 S.W.2d 926, 928 (Tex. Crim. App. 1978).
215. 627 S.W.2d 235 (Tex. Ct. App.—San Antonio 1981, pet. ref'd).
216. *Id.* at 237.
217. *Id.* at 236; *see* Cherb v. State, 472 S.W.2d 273, 279 (Tex. Crim. App. 1971).
218. 627 S.W.2d at 237. *But cf.* McGaskey v. State, 451 S.W.2d 486, 487 (Tex. Crim. App. 1970) (conviction for possession of narcotics upheld when defendant was sitting alone in a car that contained contraband in the glove compartment).
219. 627 S.W.2d at 237; *see* Payne v. State, 480 S.W.2d 732, 734 (Tex. Crim. App. 1972).
220. 638 S.W.2d 130 (Tex. Ct. App.—Corpus Christi 1982, no pet.).

ready access to a substance is not enough, standing alone, to establish the affirmative link.[221] During an inventory search of the defendant's car the police found cocaine in an envelope in a small box on the dashboard. The defendant was the only person in the car when the police stopped him, although nothing indicated that he had sole access to the car.[222] Further, the state presented no evidence as to how long the vehicle had been in the defendant's possession[223] nor to indicate that the defendant was under the influence of the drug at the time of his arrest.[224] No other quantity of the substance was found on his person,[225] nor were his fingerprints found on the envelope in which the officers discovered the cocaine.[226] The court held that although the location of the substance in the vehicle made it convenient to the defendant and rendered it readily accessible to him, this one circumstantial link was not sufficient to exclude with any degree of certainty every other reasonable hypothesis except the defendant's unlawful possession.[227]

In *Mendoza v. State*[228] the court of criminal appeals held that the general rule requiring the state to negate statutory exceptions to an offense does not apply to indictments or informations under the Dangerous Drug Act.[229] Although Penal Code section 2.02(b)[230] does require the state to negate exceptions, section 12 of the Dangerous Drug Act expressly provides that charging instruments brought under the Act need not negate any exception, excuse, proviso, or exemption set out in the Act.[231] The court found an analogous rule in *Threlkeld v. State*,[232] which held that indictments or information under the Controlled Substances Act need not negate any statutory exception.[233]

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221. *Id.* at 132.

222. Evidence of joint possession has been deemed sufficient. *See, e.g.*, Payne v. State, 480 S.W.2d 732, 734 (Tex. Crim. App. 1972).

223. Length of possession of an automobile in which a controlled substance is found is an element that can help provide an affirmative link. *See* Hahn v. State, 502 S.W.2d 724, 725 (Tex. Crim. App. 1973).

224. Whether a defendant is under the influence of a controlled substance at the time of arrest is another factor to consider. *See* Presswood v. State, 548 S.W.2d 398, 400 (Tex. Crim. App. 1977).

225. The fact that the defendant had a small quantity of marijuana on his person when arrested was a contributing factor to the finding of an affirmative link in Powell v. State, 502 S.W.2d 705, 709 (Tex. Crim. App. 1974).

226. Yet another factor in establishing an affirmative link is the presence of the defendant's fingerprints on the contraband. *See* Harvey v. State, 487 S.W.2d 75, 78 (Tex. Crim. App. 1972).

227. 638 S.W.2d at 132.

228. 636 S.W.2d 198 (Tex. Crim. App. 1982).

229. *Id.* at 200. TEX. REV. CIV. STAT. ANN. art. 4476—14 (Vernon 1976 & Supp. 1982-1983).

230. TEX. PENAL CODE ANN. § 2.02(b) (Vernon 1974).

231. TEX. REV. CIV. STAT. ANN. art. 4476—14, § 12 (Vernon 1976). This section further provides that the burden of proof on any such exception shall be upon the defendant. *Id.*

232. 558 S.W.2d 472 (Tex. Crim. App. 1977).

233. *Id.* at 473. The *Threlkeld* court relied on a provision similar to § 12 of the Dangerous Drugs Act: TEX. REV. CIV. STAT. ANN. art. 4476—15, § 5.10(a) (Vernon 1976).

XV. WEAPONS

The courts decided several issues on evidentiary aspects of weapons cases during the survey period. In *Linvel v. State*[234] the Dallas court of appeals considered the question of whether asportation of a weapon was a necessary factual element of the state's proof in a prosecution for unlawful carrying of a weapon.[235] While this precise issue appears never to have been expressly determined, the language of Penal Code section 46.02, which proscribes the carrying of certain weapons,[236] and that of a line of old cases under former penal statutes,[237] seemed to indicate that some degree of moving a weapon from one place to another was necessary for a conviction. The court, however, found sufficient authority in two recent cases[238] to conclude that asportation is not required in order to uphold a conviction for unlawfully carrying a weapon.[239]

Another court of appeals decided the issue of whether in a prohibited weapons prosecution under section 46.06(a)(3),[240] a short barrel firearm may be proven to be a firearm without the introduction of evidence showing its capability of being fired. Citing cases involving prosecutions for carrying a handgun,[241] the court in *Campbell v. State*[242] determined that proof that the weapon was a short barrel firearm and that the defendant was in possession of such a weapon creates a prima facie case for the state.[243] The prosecution need not show the weapon capable of firing unless such an issue is raised by the evidence.[244] Generally, therefore, the defendant has the burden of showing that the weapon is not capable of firing to overcome the state's prima facie case.[245]

XVI. OBSCENITY

During the survey period considerable controversy existed over the definition and application of the term "patently offensive," as set out in section 43.21 of the Penal Code.[246] The term is defined therein as "so offensive on

234. 629 S.W.2d 94 (Tex. Ct. App.—Dallas 1981, no pet.).
235. *See* TEX. PENAL CODE ANN. § 46.02 (Vernon 1974).
236. *Id.*
237. *See* Henson v. State, 134 Tex. Crim. 472, 116 S.W.2d 393 (1938); Davis v. State, 91 Tex. Crim. 156, 237 S.W. 925 (1922); Guy v. State, 74 Tex. Crim. 620, 170 S.W. 303 (1914); Hicks v. State, 66 Tex. Crim. 176, 145 S.W. 938 (1912).
238. Tijerina v. State, 578 S.W.2d 415 (Tex. Crim. App. 1979); Hazel v. State, 534 S.W.2d 698 (Tex. Crim. App. 1976).
239. 629 S.W.2d at 96.
240. TEX. PENAL CODE ANN. § 46.06(a)(3) (Vernon Supp. 1982-1983).
241. Johnson v. State, 571 S.W.2d 170 (Tex. Crim. App. 1978); Tolbert v. State, 157 Tex. Crim. 101, 246 S.W.2d 896 (1952).
242. 633 S.W.2d 592 (Tex. Ct. App.—Amarillo 1982, pet. ref'd).
243. *Id.* at 594.
244. *Id.* at 594-95.
245. *Id.* The court also found support in Walker v. State, 543 S.W.2d 634 (Tex. Crim. App. 1976), an aggravated robbery case wherein it was concluded that a .45 caliber pistol that was missing a firing pin and clip when found by police was nevertheless a firearm under TEX. PENAL CODE ANN. § 46.01(3) (Vernon 1974). 633 S.W.2d at 595.
246. TEX. PENAL CODE ANN. § 43.21(a)(4) (Vernon Supp. 1982-1983).

its face as to affront current community standards of decency."[247] In *Red Bluff Drive-In, Inc. v. Vance*[248] the Fifth Circuit stated that a court must draw the line between protected expressions and punishable obscenity at the limits of a community's tolerance, rather than in accordance with standards of propriety and taste.[249] In so holding, the Fifth Circuit was primarily relying on language used in *Smith v. United States*,[250] in which the United States Supreme Court held that juries must apply contemporary standards in accordance with their own understanding of the tolerance of the average person in their community, and that juries must be so instructed.[251] It was thus left up to the Texas courts to determine whether the term "decency" requires the depicted conduct to be judged on the minimum standard of conduct the community is willing to tolerate, or the impermissible standard of propriety and taste.[252] In *Andrews v. State*[253] the Houston [1st District] court of appeals held that an instruction to a jury on the basis of community standards of decency, as set out in the statute, constituted reversible error.[254] In *Stonelake v. State*[255] the same court struck down the statute as unconstitutional, at least insofar as it permits the fact finder to judge the material on the basis of community standards of decency.[256] Three other courts of appeals agreed that juries should be given an instruction limiting the community standard to that of tolerance, but otherwise refused to hold the statute unconstitutional.[257]

One court was presented with the question of the constitutionality of the presumptions created by section 43.23(e) and (f).[258] In *Garcia v. State*[259] the court of appeals found a rational connection between the fact to be proved and the ultimate fact to be presumed,[260] pursuant to the rules set

247. *Id.*
248. 648 F.2d 1020 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1264, 71 L. Ed. 2d 453 (1982).
249. 648 F.2d at 1029.
250. 431 U.S. 291 (1977).
251. *Id.* at 305. Section 43.21(a)(4) has not been judicially construed by the United States Supreme Court or by the court of criminal appeals. Although this section was considered by the Fifth Circuit in *Red Bluff*, the court declined to rule on its constitutionality, applying the abstention doctrine. 648 F.2d at 1028-29.
252. 648 F.2d at 1029.
253. 639 S.W.2d 4 (Tex. Ct. App.—Houston [1st Dist.] 1982, pet. ref'd).
254. *Id.* at 9.
255. 638 S.W.2d 619 (Tex. Ct. App.—Houston [1st Dist.] 1982, pet. granted).
256. *Id.* at 621-22.
257. Porter v. State, 638 S.W.2d 249 (Tex. Ct. App.—Fort Worth 1982, pet. granted); Tyree v. State, 638 S.W.2d 245 (Tex. Ct. App.—Fort Worth 1982, pet. granted); Garcia v. State, 633 S.W.2d 611 (Tex. Ct. App.—El Paso 1982, no pet.).
258. TEX. PENAL CODE ANN. § 43.23(e), (f) (Vernon Supp. 1982-1983) provides:
(e) A person who promotes or wholesale promotes obscene material or an obscene device or possesses the same with intent to promote or wholesale promote it in the course of his business is presumed to do so with knowledge of its content and character.
(f) A person who possesses six or more obscene devices or identical or similar obscene articles is presumed to possess them with intent to promote same.
259. 633 S.W.2d 611 (Tex. Ct. App.—El Paso 1982, no pet.).
260. *Id.* at 615.

forth in *Leary v. United States*.[261] The court further held[262] that, since the trial court herein had charged the jury under this statute as a permissive presumption, the statute did not violate the mandatory criminal presumption prohibition of *Sandstrom v. Montana*.[263]

In *Acevedo v. State*[264] the court held that one who serves concessions at a theater where obscene films are being shown, and one who stands in the general vicinity of the movie projector, absent any showing of other activity on their part, cannot be found guilty as parties[265] to the exhibition of obscene materials.[266] The court concluded that the conduct denounced by the statute does not include that which is merely incidental to the exhibition of obscenity.[267] The intent of the statute is to fix criminal responsibility with those who have a financial stake in the enterprise, and not those who function merely as employees.[268]

261. 395 U.S. 6 (1969). The Court invalidated a federal statutory presumption that knowledge of illegal importation may be inferred from simple possession of marijuana. The opinion stated that no rational connection existed between the fact proved and the ultimate fact presumed. The inference was arbitrary in light of common experience. *Id.* at 33-34, 53.

262. 633 S.W.2d at 615.

263. 442 U.S. 510 (1979); *see* TEX. PENAL CODE ANN. § 2.05 (Vernon Supp. 1982-1983).

264. 633 S.W.2d 856 (Tex. Crim. App. 1982).

265. *See* TEX. PENAL CODE ANN. § 7.02 (Vernon 1974).

266. 633 S.W.2d at 859-60. Indictment was under former TEX. PENAL CODE ANN. § 43.23(a)(1) (Vernon 1974) (amended by 1979 Tex. Gen. Laws, ch. 778, § 2, at 1974).

267. 633 S.W.2d at 859. The legislative history strongly supports this conclusion. *See, e.g.*, 1897 Tex. Gen. Laws, ch. 116, at 160, 10 H. GAMMEL, LAWS OF TEXAS 1214 (1898), amended by 1943 Tex. Gen. Laws, ch. 35, at 38, which provided a specific exemption for theater employees.

268. 633 S.W.2d at 859. Curiously, in the companion case of Goocher v. State, 633 S.W.2d 860 (Tex. Crim. App. 1982), the court affirmed the conviction for the same offense of a defendant who was shown from the facts in the opinion to be nothing more than the ticket seller at a theater where obscene films were being exhibited.