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## Criminal Law

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# CRIMINAL LAW

by  
Jim Darnell\*

## I. DEFENSES

### A. *Self-Defense*

The Texas Court of Criminal Appeals and the courts of appeals addressed the self-defense issue at length over the past year. In *Dyson v. State*<sup>1</sup> the court of criminal appeals ruled on the extent to which the person who instigates an altercation may use deadly force. Dyson was convicted of attempted voluntary manslaughter after the court denied his requested instructions on the law of self-defense<sup>2</sup> and the use of deadly force.<sup>3</sup> The court of criminal appeals affirmed the trial court's ruling<sup>4</sup> on the basis that Dyson intentionally provoked the difficulties with the victim.<sup>5</sup> While provocation is normally a question of fact and is included in the court's charge as a limitation on self-defense,<sup>6</sup> the court indicated that the defendant's intent was crucial in determining whether provocation had been established as a matter of law.<sup>7</sup> Dyson's testimony not only showed that he initially provoked the fight, but also that he went home twice only to return with a gun, that he shot his gun in the direction of his brother's refuge, and that he held his father at gunpoint throughout the incident. This evidence precluded any instruction on abandonment.<sup>8</sup> Dyson's firing at two approaching police officers, whom he had mistaken for his brother, was, therefore, a continuation of the altercation that he had earlier provoked.<sup>9</sup>

While a defendant's provocation of a fight precludes the issue of self-defense,<sup>10</sup> an unsupported charge on provocation will result in reversal.<sup>11</sup> In

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1. 672 S.W.2d 460 (Tex. Crim. App. 1984).

2. See Tex. Penal Code Ann. § 9.31 (Vernon 1974), for the requirements for the use of self-defense.

3. See *id.* § 9.32 (Vernon Supp. 1985), for the requirements for justifiable use of deadly force.

4. 672 S.W.2d at 465.

5. *Id.* at 463.

6. *Id.*; *Semaire v. State*, 612 S.W.2d 528, 530 (Tex. Crim. App. 1982); see P. McCLUNG, JURY CHARGES FOR TEXAS CRIMINAL PRACTICE 330-34 (1983).

7. 672 S.W.2d at 464.

8. *Id.* at 465.

9. *Id.* at 462.

10. TEX. PENAL CODE ANN. § 9.31(b)(4) (Vernon 1974).

11. *Williamson v. State*, 672 S.W.2d 484, 487 (Tex. Crim. App. 1984).

*Williamson v. State*<sup>12</sup> the court of criminal appeals held that evidence that the victim and defendant argued after the defendant told the victim to leave his house did not justify a provocation issue.<sup>13</sup> The court stated that a jury should not be instructed on provoking the difficulty unless self-defense is an issue and evidence shows that the deceased committed the first assault.<sup>14</sup> Further, to have a pretext for inflicting bodily injury upon the deceased, the defendant must have committed some act or used some words intended and calculated to bring on the difficulty.<sup>15</sup> While the evidence sufficiently justified a charge on the right of self-defense, the additional instruction on provocation limited that right and required reversal.<sup>16</sup>

Two other courts in the survey period addressed the propriety of instructing the jury on self-defense. In *Bennett v. State*<sup>17</sup> the Texarkana court of appeals commented on instructing the jury on self-defense<sup>18</sup> and defense of a third person<sup>19</sup> when the evidence only supported an instruction on self-defense. The court ruled that the added instruction only served to confuse the jury and improperly limited defendant's right to self-defense.<sup>20</sup> On the other hand, in *Romero v. State*<sup>21</sup> the Houston court held that failure to instruct the jury on the use of deadly force limited the right of self-defense available to a potential rape victim.<sup>22</sup> The trial court instructed the jury on the law of self-defense, but did not submit the requested instruction on the use of deadly force.<sup>23</sup>

Evidence requiring an instruction on self-defense<sup>24</sup> may preclude submission of the lesser offense of voluntary manslaughter<sup>25</sup> in a murder prosecution.<sup>26</sup> In *Oliva v. State*<sup>27</sup> the Corpus Christi court of appeals distinguished the elements of self-defense and voluntary manslaughter; the latter requires that the defendant acted under the immediate influence of sudden passion arising from an adequate cause.<sup>28</sup> Fear alone is insufficient to show sudden passion, although terror may be "sufficient to render the mind incapable of cool reflection."<sup>29</sup> The evidence reflected that Oliva, the victim, and several

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12. 672 S.W.2d 484 (Tex. Crim. App. 1984).

13. *Id.* at 487.

14. *Id.*

15. *Id.* at 486.

16. *Id.* at 487; see *Stanley v. State*, 625 S.W.2d 320 (Tex. Crim. App. 1981).

17. 673 S.W.2d 396 (Tex. App.—Texarkana 1984, pet. granted).

18. See TEX. PENAL CODE ANN. § 9.31 (Vernon 1974).

19. See *id.* § 9.33, for the requirements of defense of a third person.

20. 673 S.W.2d at 397.

21. 663 S.W.2d 121 (Tex. App.—Houston [1st Dist.] 1983, pet. ref'd).

22. *Id.* at 122.

23. *Id.* The trial court apparently submitted two and one-half pages of instructions to the jury on the law of self-defense without instructing the jury that TEX. PENAL CODE ANN. § 9.32(3)(B) (Vernon Supp. 1985) authorized the use of deadly force to prevent the imminent commission of rape or aggravated rape.

24. See TEX. PENAL CODE ANN. §§ 9.31, .32 (Vernon 1974 & Supp. 1985) (§ 9.32 amended 1983).

25. See *id.* § 19.04 (Vernon 1974), for the elements of voluntary manslaughter.

26. *Oliva v. State*, 663 S.W.2d 656, 659 (Tex. App.—Corpus Christi 1983, no pet.).

27. 663 S.W.2d 656 (Tex. App.—Corpus Christi 1983, no pet.).

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

29. *Id.* § 19.04(c). For a discussion of the differences between fear and terror, see Daniels

others were using cocaine and drinking liquor late one night. Oliva testified that the victim bragged about previously shooting someone and that the victim ultimately threatened him. The victim pulled out a gun, a struggle ensued, and a shot went off. Oliva obtained control of the pistol and fired at the victim; Oliva, however, denied intending to kill him. After reviewing the evidence, the court distinguished voluntary manslaughter and self-defense.<sup>30</sup> The court found no evidence of acts by the deceased that instantaneously enraged or terrorized the mind of the accused, but rather the appellant's testimony, if believed, showed that he acted in self-defense.<sup>31</sup> The deceased, the court stated, was the one who acted with sudden passion.<sup>32</sup>

In *Williams v. State*<sup>33</sup> the El Paso court of appeals extended the right of self-defense to property crimes. The defendant had been charged with criminal mischief<sup>34</sup> arising from a fight between rival factions of a janitorial crew. The defendant and his compatriots were armed with pipes when they moved into a parking lot to face the rival group. After hearing discussion concerning a gun, the defendant attacked several individuals whom he thought were trying to get a gun. One of these individuals got into a car and tried to run over the defendant, but got stuck on an embankment. Unaware that the vehicle was immobilized, the defendant beat it with his pipe out of rage and a concern for his personal safety. The trial court denied defendant's requested instruction on self-defense. The court of appeals reversed, holding that self-defense is an available defense in property crimes involving force.<sup>35</sup> The court distinguished *Johnson v. State*,<sup>36</sup> because the offense alleged in that case was carrying a handgun on premises licensed for the sale of alcoholic beverages.<sup>37</sup> The court of criminal appeals in *Johnson* held that the necessity defense<sup>38</sup> was available, but an instruction on self-defense was inap-

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v. State, 645 S.W.2d 459, 460 (Tex. Crim. App. 1983). While fear alone is not sudden passion, "heated words" may be sufficient to show sudden passion. *Ortiz v. State*, 577 S.W.2d 246, 250 (Tex. Crim. App. 1979).

30. 663 S.W.2d at 658.

31. *Id.* at 659.

32. *Id.* at 659; cf. *Daniels v. State*, 645 S.W.2d 459, 459 (Tex. Crim. App. 1983) (fear of death insufficient to warrant sudden passion); *Lucky v. State*, 495 S.W.2d 919, 922 (Tex. Crim. App. 1973) (victim's familiarity with defendant's wife sufficient for sudden passion requirement); *McGee v. State*, 473 S.W.2d 11, 14 (Tex. Crim. App. 1971) (threats insufficient to constitute sudden passion).

33. 671 S.W.2d 704 (Tex. App.—El Paso 1984, no pet.).

34. Under TEX. PENAL CODE ANN. § 28.03 (Vernon Supp. 1985) a person commits criminal mischief when, without consent of the owner, he intentionally or knowingly damages the owner's property or tampers with property and causes pecuniary loss or inconvenience.

35. 671 S.W.2d at 706.

36. 638 S.W.2d 636 (Tex. App.—El Paso 1982), *aff'd*, 650 S.W.2d 414 (Tex. Crim. App. 1983). The defendant in *Johnson*, after having problems with the victim during a dice game and while aware that the victim carried a loaded pistol and shotgun, borrowed a pistol from his girlfriend after entering a bar in which the victim was drinking. A fight ensued, the victim was killed, and several bar patrons were injured. The defendant was charged with unlawfully carrying a handgun on premises licensed for the sale of alcoholic beverages, in violation of TEX. PENAL CODE ANN. § 46.02(c) (Vernon 1974).

37. 671 S.W.2d at 705-06.

38. See TEX. PENAL CODE ANN. § 9.22 (Vernon 1974). The necessity defense is available when the actor reasonably believes that his conduct is necessary to avoid harm and avoidance of that harm outweighs the harm sought to be prevented by law. *Id.*

propriate.<sup>39</sup> *Johnson* involved a passive, completed offense separate and apart from the altercation,<sup>40</sup> whereas *Williams* concerned defensive actions in direct response to an attack, and the actions constituted the elements of the alleged offense.<sup>41</sup>

### B. Necessity

In *Johnson* the court of criminal appeals extended the necessity defense<sup>42</sup> to carrying a handgun onto premises licensed for selling alcoholic beverages.<sup>43</sup> During the past year the court further extended its application to situations normally addressed by the right of self-defense. In *Thomas v. State*<sup>44</sup> the court of criminal appeals held that the necessity defense applied to aggravated robbery.<sup>45</sup> A police officer was beaten, and his pistol, flashlight, and shotgun were taken. The defendant testified that the officer hit him in the head without provocation. The officer then drew his gun, and the defendant and his brother struggled to take it. The court reasoned that the defendant's testimony raised the issue of necessity<sup>46</sup> since the harm was imminent, avoiding death or injury outweighed the harm caused by the theft of the officer's gun, and no apparent legislative purpose would exclude the justification under the circumstances.<sup>47</sup> As a result of this opinion and because the language of the necessity defense is so general, practitioners should request an instruction on necessity when virtually any other offense would also be applicable. Unless the court of criminal appeals or the legislature severely limits the scope of section 9.22 of the Penal Code,<sup>48</sup> this section should apply in any case in which evidence of justification is presented.

### C. Renunciation

The Dallas court clearly stated the elements of the renunciation defense<sup>49</sup> in *Chennault v. State*.<sup>50</sup> Although the discussion centered on the prosecutor's closing argument rather than an instruction to the jury, the court discussed the defense at length. The mere fact that completion of the offense

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39. 650 S.W.2d at 416.

40. *Id.*

41. 671 S.W.2d at 706.

42. See TEX. PENAL CODE ANN. § 9.22 (Vernon 1974).

43. 650 S.W.2d at 414.

44. 678 S.W.2d 82 (Tex. Crim. App. 1984).

45. *Id.* at 84-85.

46. TEX. PENAL CODE ANN. § 9.22 (Vernon 1974) (footnote omitted) provides that:  
Conduct is justified if:

(1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;

(2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law prescribing the conduct; and

(3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

47. 678 S.W.2d at 84.

48. TEX. PENAL CODE ANN. § 9.22 (Vernon 1974).

49. See *id.* § 15.04.

50. 667 S.W.2d 299 (Tex. App.—Dallas 1984, pet. ref'd).

becomes more difficult or apprehension becomes more likely, as a result of circumstances not present or apparent at its inception, and the offense is thereby abandoned, will not constitute renunciation.<sup>51</sup> In *Chennault* the defendant feared that he had been set up or "spotted to the police" and attempted to back out of his agreement with the undercover officer/hit man. The court held that the defendant's actions did not constitute renunciation.<sup>52</sup> Penal Code sections 15.04(c)(1) and (2)<sup>53</sup> are not the only possible means of involuntary, and thereby ineffective, renunciation.<sup>54</sup> The court adopted the practice commentary of Penal Code section 15.04<sup>55</sup> in holding that the intent of the statute requires repentance or a change of heart before a renunciation is voluntary.<sup>56</sup>

#### D. Mistake of Fact

In *Knowles v. State*<sup>57</sup> a bondsman was arrested, charged, and convicted of theft of bond money over \$200 and under \$10,000.<sup>58</sup> Knowles contended that he received the payment from a Mrs. Griffith to be used against a bond for a prospective client from Virginia. When the bondsman appeared at the sheriff's office to post the bond, he learned of another \$10,000 bond from Maryland. The sheriff's office's records did not reflect that the Virginia bond was ever posted, while Knowles's business records reflected that it was posted. The court denied his requested charge to the jury on mistake of fact<sup>59</sup> and the court of appeals affirmed, holding that Knowles's failure to testify specifically that the bond was posted precluded an issue on mistake of fact. The court of criminal appeals reversed and held that the defendant's business records adequately established his mistaken opinion that the bond was posted, that he remained liable, and, if the jury believed the records, that he was entitled to the money received.<sup>60</sup> The defendant was, therefore, entitled to a charge on mistake of fact.<sup>61</sup>

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51. TEX. PENAL CODE ANN. § 15.04(c)(1) (Vernon 1974).

52. 667 S.W.2d at 303.

53. TEX. PENAL CODE ANN. §§ 15.04(c)(1), (2) (Vernon 1974) provide that:

(c) Renunciation is not voluntary if it is motivated in whole or in part:

(1) by circumstances not present or apparent at the inception of the actor's course of conduct that increase the probability of detection or apprehension or that make more difficult the accomplishment of the objective; or

(2) by a decision to postpone the criminal conduct until another time or to transfer the criminal act to another but similar objective or victim.

54. 667 S.W.2d at 304.

55. Searcy & Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. § 15.04 (Vernon 1974).

56. 667 S.W.2d at 304. Under the facts of this attempted murder-for-hire case, the court stated that if the defendant had a reason for the renunciation other than not wanting the victim dead, then the renunciation would be involuntary and, therefore, ineffectual. *Id.*

57. 672 S.W.2d 478 (Tex. Crim. App. 1984).

58. See TEX. PENAL CODE ANN. § 31.03(d)(4)(A) (Vernon Supp. 1985).

59. See *id.* § 8.02 (Vernon 1974). A defendant may raise the mistake of fact defense when he formed a reasonable belief, by mistake, about a matter of fact and that mistaken belief negates the required culpability for the crime. *Id.*

60. 672 S.W.2d at 480.

61. *Id.*

### E. Intoxication

In *Witherspoon v. State*<sup>62</sup> the defense counsel advanced a rather unique contention when faced with a charge of burglary of a habitation with intent to commit rape.<sup>63</sup> The trial court instructed the jury that voluntary intoxication did not constitute a defense to the commission of a crime.<sup>64</sup> On appeal the defendant contended that he could not have had the specific criminal intent to commit rape since he was too intoxicated on alcohol and various types of drugs. The court held that voluntary intoxication is not a defense to a crime requiring specific intent.<sup>65</sup>

## II. PRESUMPTIONS

### A. Obscenity

The court of criminal appeals expanded upon its earlier opinions<sup>66</sup> regarding the constitutionality of Penal Code section 43.23(e) and (f).<sup>67</sup> The first major obscenity opinion of the year, however, sidestepped the issue. In Judge Clinton's opinion in *Goodman v. State*<sup>68</sup> the court held that no rational trier of fact could have found that two ticket sellers had promoted obscene films merely by exhibiting them.<sup>69</sup> The court specifically stated that persons who merely sell tickets behind a counter are not exhibiting a film.<sup>70</sup> The court opined, therefore, that if the ticket sellers did not exhibit the films, they certainly can not be adjudged guilty of promoting them.<sup>71</sup>

The court, however, did address the constitutional issues in *Shealy v. State*.<sup>72</sup> The defendant, a store clerk at an adult bookstore, sold an allegedly obscene magazine to an undercover Houston police officer. The court of appeals reversed the conviction due to an improper jury instruction whereby

62. 671 S.W.2d 143 (Tex. App.—Houston [1st Dist.] 1984, no pet.).

63. See TEX. PENAL CODE ANN. § 30.02(d)(1) (Vernon 1974).

64. See *id.* § 8.04(a).

65. 671 S.W.2d at 144.

66. *Davis v. State*, 658 S.W.2d 572 (Tex. Crim. App. 1983) (court considered constitutionality of statutory presumption that possessor of obscene material has knowledge of its content); *Skinner v. State*, 652 S.W.2d 773 (Tex. Crim. App. 1983) (court held evidence insufficient to convict despite statutory presumption). See Schmolesky, *Criminal Law, Annual Survey of Texas Law*, 38 SW. L.J. 497, 511-16 (1984), for a discussion of these cases.

67. TEX. PENAL CODE ANN. §§ 43.23(e), (f) (Vernon Supp. 1985) provide that:

- (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 the same.

These statutory sections must be read in conjunction with *id.* § 2.05 (Vernon 1974), which sets forth the consequences of a presumption under Texas criminal law.

68. 667 S.W.2d 135 (Tex. Crim. App. 1984).

69. *Id.* at 137.

70. *Id.*

71. *Id.*; see also *Knighton v. State*, 666 S.W.2d 386, 388-89 (Tex. App.—Houston [1st Dist.] 1984, pet. ref'd) (proof that defendant sold tickets was insufficient to establish guilt).

72. 675 S.W.2d 215 (Tex. Crim. App. 1984).

the defendant was presumed by statute to have knowledge of the content and character of the promoted material.<sup>73</sup> The court, however, failed to determine whether the error was harmless.<sup>74</sup> The court of criminal appeals held that the mere fact that the clerk sold the magazine and must have seen the allegedly objectionable cover established neither that the content of the magazine was obscene nor that the clerk was aware of the content.<sup>75</sup> The jury could invoke the presumption of knowledge of the material's contents<sup>76</sup> and find the defendant guilty solely by finding that she sold the magazine to the officer.<sup>77</sup> The court concluded that harmless error can never exist when the first amendment to the United States Constitution<sup>78</sup> and article 1, section 8 of the Texas Constitution<sup>79</sup> protect the promoted material and the trial court instructs the jury that the prosecution may establish through the use of the statutory presumption that the accused had knowledge of the content and character of the promoted material.<sup>80</sup> A jury charge on the presumption in any case would constitute reversible error when either the first amendment or the Texas Constitution protects the allegedly obscene material.<sup>81</sup> The court of criminal appeals' final decision in *Hoyle v. State*<sup>82</sup> and an earlier court of appeals decision in *Kramer v. State*<sup>83</sup> support this reasoning.

### B. Burglary

In *Roberts v. State*<sup>84</sup> the Fort Worth court of appeals struck down as unconstitutional the long standing Texas rule that unexplained possession of recently stolen property invokes a presumption or inference of guilt in a prosecution for burglary.<sup>85</sup> The trial court had charged the jury that:

A presumption of a defendant's guilt of a burglary sufficient to sustain a

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73. See TEX. PENAL CODE ANN. § 43.23(e) (Vernon Supp. 1985).

74. See *Hall v. State*, 661 S.W.2d 101, 102 (Tex. Crim. App. 1983), wherein the majority held that if the evidence is sufficient to prove culpability without applying the presumption, the error is harmless.

75. 675 S.W.2d at 216.

76. See TEX. PENAL CODE ANN. § 43.23(e) (Vernon Supp. 1985).

77. 675 S.W.2d at 217.

78. U.S. CONST. amend. I.

79. TEX. CONST. art. I, § 8.

80. 675 S.W.2d at 217.

81. *Id.* The future legal battleground may be the limits to which either the federal or state constitution allegedly protects obscene material. Under the court's reasoning, if the material were not protected, use of the presumption would not necessarily be error.

82. 672 S.W.2d 233 (Tex. Crim. App. 1984). The court of criminal appeals originally decided this case on December 2, 1983, and held that the § 43.23(e) presumption had been unconstitutionally applied. On February 22, 1984, the court withdrew the opinion and decided that the presumption was not necessary to support the conviction and such error was, therefore, harmless. On May 23, 1984, the defendant sought a stay of the court's mandate to petition the United States Supreme Court for writ of certiorari. The court of criminal appeals reversed its February decision, however, and issued the present opinion in its place.

83. 661 S.W.2d 283 (Tex. App.—Houston [1st Dist.] 1983, pet. ref'd).

84. 672 S.W.2d 570 (Tex. App.—Fort Worth 1984, no pet.).

85. *Id.* at 580; see *Walden v. State*, 165 Tex. Crim. 196, 198, 305 S.W.2d 354, 355-56 (1957). But see *Scott v. State*, 35 Tex. Crim. 11, 13, 36 S.W. 276, 277 (1896), in which the court held that the jury might be authorized to convict, in a proper case, upon the single fact of possession of recently stolen property, but a charge to the jury that they could do so would be a charge upon the weight of the testimony.



conviction may arise from a defendant's possession of property stolen or taken in a recent burglary. However, in the prosecution for burglary, to warrant such an inference or presumption of guilt from the circumstances of possession alone, such possession must be personal, must be recent, must be unexplained, and must involve a distinct and conscious assertion of right to the property by a defendant.<sup>86</sup>

The court of appeals extensively reviewed the law concerning the presumption/inference of guilt from unexplained possession of recently stolen property<sup>87</sup> and concluded that the trial court can make no proper jury charge thereon.<sup>88</sup> The court stated that when the court instructs the jury that it may presume guilt from certain facts alone, that instruction is inescapably a comment on the weight of the evidence and removes from the defendant any hope he may have to require the state to produce the evidence of his guilt.<sup>89</sup> The court concluded that unexplained possession of recently stolen property may only be considered a circumstance of guilt to be applied in determining the sufficiency of the evidence on appeal and that the jury should never be instructed on the inference or presumption of guilt.<sup>90</sup>

### III. SPECIFIC PENAL CODE PROVISIONS

#### A. *Burglary—Intent*

In *Robles v. State*<sup>91</sup> the court of criminal appeals addressed the intent requirement for burglary of a habitation with intent to commit theft. Robles allegedly forced his way into the home of Richard Merrill, president of First City National Bank. Once inside, Robles played a tape recording explaining that he was part of a group and that Mr. Merrill would be taken to the bank to withdraw a sum of money. While the tape played, Mrs. Merrill called the police and Robles was arrested. The court concluded that the evidence clearly showed that the defendant entered the habitation with the intent to obtain money from First City National Bank.<sup>92</sup> The question then became whether the requisite intent for burglary with intent to commit theft<sup>93</sup> is an intent to appropriate property from within the burglarized premises. The court held that the burglary statute<sup>94</sup> does not require an intent to steal property from within the burglarized premises and that the state need only prove that the unlawful entry was made to further the commission of a theft.<sup>95</sup> The court did not hold that an entry with intent to commit a wholly unconnected theft would be sufficient, but that the entry and theft in this

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86. 672 S.W.2d at 577-78.

87. *Id.* at 578-80.

88. *Id.* at 579.

89. *Id.*

90. *Id.* at 580; *see Hardesty v. State*, 656 S.W.2d 73, 77 (Tex. Crim. App. 1983) (jury may draw an inference of guilt, but can not presume it).

91. 664 S.W.2d 91 (Tex. Crim. App. 1984).

92. *Id.* at 92.

93. See TEX. PENAL CODE ANN. § 30.02 (Vernon 1974), which states the elements for the commission of a burglary.

94. *Id.*

95. 664 S.W.2d at 94.

case were sufficiently interconnected to support a guilty verdict.<sup>96</sup>

### B. *Theft and Related Offenses*

In *Sanders v. State*<sup>97</sup> the court of criminal appeals determined that misdemeanor theft of property worth five dollars or more but less than twenty dollars<sup>98</sup> is not a lesser included offense of theft from a person.<sup>99</sup> The Code of Criminal Procedure states that a lesser included offense occurs if "it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission."<sup>100</sup> On original submission the court held that the misdemeanor offense was a lesser included offense since the only difference was a less serious injury or risk of injury to the same person.<sup>101</sup> The court ruled on rehearing that value must be shown for the lesser offense while none is necessary for theft from a person.<sup>102</sup> Misdemeanor theft was not, therefore, a lesser included offense.

In *Ortega v. State*<sup>103</sup> the court of criminal appeals limited the definition of services<sup>104</sup> contained in the credit card abuse statute.<sup>105</sup> The defendant allegedly intentionally and knowingly used a Sears credit card fraudulently to obtain property and services, knowing that the cardholder had not consented to its use. While the services of the Sears clerk in extending credit were "labor," the labor was not the desire of the defendant's transaction.<sup>106</sup> The court held that the extension of credit did not in and of itself constitute a service as defined.<sup>107</sup> Since the indictment alleged "property and services," the proof was insufficient and an acquittal was entered.<sup>108</sup>

### C. *Capital Murder and Murder*

The United States Court of Appeals for the Fifth Circuit and the court of criminal appeals both addressed the impact of *Enmund v. Florida*<sup>109</sup> on the

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96. *Id.*

97. 664 S.W.2d 705 (Tex. Crim. App. 1984).

98. See TEX. PENAL CODE ANN. § 31.03(d)(2)(A) (Vernon Supp. 1985).

99. 664 S.W.2d at 708-09; see TEX. PENAL CODE ANN. § 31.03(d)(4)(B) (Vernon 1974).

100. TEX. CODE CRIM. PROC. ANN. art. 37.09(2) (Vernon 1979).

101. 664 S.W.2d at 707.

102. *Id.* at 709. Compare Judge Clinton's dissenting opinion in *Sanders*, in which he reviewed the elements of theft and determined that value was not an element. Judge Clinton reasoned, therefore, that misdemeanor theft should be considered a lesser included offense of theft from a person. *Id.* at 712 (Clinton, J., dissenting).

103. 668 S.W.2d 701 (Tex. Crim. App. 1984).

104. See TEX. PENAL CODE ANN. § 31.01(7) (Vernon 1974) (service includes labor and professional service, utility, transportation, lodging, restaurant, entertainment, and property rental).

105. *Id.* § 32.31 (Vernon 1974).

106. 668 S.W.2d at 706.

107. *Id.* The court pointed out that if clothing had been purchased and tailoring alterations sought as well, then the defendant would have obtained both property and services as alleged. *Id.*

108. *Id.* at 707.

109. 458 U.S. 782 (1982). In *Enmund* the United States Supreme Court held that the eighth amendment to the United States Constitution prohibited imposition of the death pen-

Texas death penalty statutes.<sup>110</sup> In *Skillern v. Estelle*<sup>111</sup> the Fifth Circuit held that *Enmund* merely limited application of the death penalty to those defendants who intended or contemplated that the intended offense would result in a death.<sup>112</sup> The court specifically held that an accused may be convicted of capital murder<sup>113</sup> under the Texas law of parties and criminal responsibility<sup>114</sup> even though the killing occurred in the course of an offense that the defendant did not intend.<sup>115</sup> As capital murder is not automatically punishable by death,<sup>116</sup> the law of criminal responsibility may be constitutionally applied.<sup>117</sup> The court held that the first question posed to the jury at sentencing, whether the defendant's conduct that caused the death of the deceased was committed deliberately with the reasonable expectation that the death of the deceased or another would result,<sup>118</sup> sufficiently directed the jury to consider the defendant's conduct.<sup>119</sup> The court stated, however, that an additional instruction that the Texas law of criminal responsibility could not supply the requisite intent, as well as an instruction requiring that the nontriggerman defendant have had a reasonable expectation that death would result, would be preferable.<sup>120</sup> Since none was requested, the error was not preserved.<sup>121</sup>

In *Kelly v. State*<sup>122</sup> the court of criminal appeals held that *Enmund* did not mandate that the defendant specifically intend to kill the victim named in the indictment.<sup>123</sup> *Kelly* also imposed the death penalty upon a defendant who "anticipates and contemplates that life will be taken or that lethal force will be employed."<sup>124</sup> The court also hinted that the law of criminal responsibility could provide the intent requirement of the first punishment

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alty on a nontriggerman defendant, who was waiting outside the victims' home and was apparently unaware of the plan to rob and murder the victim, absent proof that he killed, attempted to kill, or intended or contemplated that life would be taken. *Id.* at 801.

110. TEX. PENAL CODE ANN. § 19.03(a) (Vernon Supp. 1985); TEX. CODE CRIM. PROC. ANN. § 37.071 (Vernon Supp. 1985). Section 19.03(a) states that a person commits capital murder if he (1) murders a police officer or fireman who was in the line of duty; (2) commits murder in the course of kidnapping, burglary, rape, or arson; (3) commits murder for remuneration; (4) commits murder while escaping from a penal institution; or (5) commits murder while incarcerated in a penal institution. TEX. PENAL CODE ANN. § 19.03(a) (Vernon Supp. 1985).

111. 720 F.2d 839 (5th Cir. 1983).

112. *Id.* at 846.

113. See TEX. PENAL CODE ANN. § 19.03 (Vernon Supp. 1985).

114. See *id.* §§ 7.01, .02 (Vernon 1974).

115. 720 F.2d at 846.

116. The sentence is either life imprisonment or death, depending upon the jury's answers to the three questions set forth in TEX. CODE CRIM. PROC. ANN. § 37.071 (Vernon Supp. 1985).

117. 720 F.2d at 847.

118. See TEX. CODE CRIM. PROC. ANN. § 37.071(b)(1) (Vernon Supp. 1985).

119. 720 F.2d at 848.

120. *Id.*; cf. *Sanne v. State*, 609 S.W.2d 762, 773-75 (Tex. Crim. App. 1980) (trial court has wide discretion in admitting or excluding evidence at punishment phase).

121. 720 F.2d at 848.

122. 669 S.W.2d 720 (Tex. Crim. App. 1984).

123. *Id.* at 724.

124. *Id.*

question.<sup>125</sup>

The court of criminal appeals changed the law of felony-murder during the survey period in *Murphy v. State*.<sup>126</sup> Prior to 1984, courts had always followed the merger doctrine that prohibited conviction for felony-murder if the same act that constituted the underlying felony offense caused the death of the victim.<sup>127</sup> While paying lip service to the merger doctrine,<sup>128</sup> the majority in *Murphy* held that the underlying felony of arson<sup>129</sup> and the fire that killed the deceased were somehow separate events.<sup>130</sup> The court stated that the defendant's setting a habitation on fire and the resulting homicide were not one and the same, because the appellant attempted to destroy a house to collect the insurance money, which is a property offense, and in the furtherance of this offense the deceased was killed.<sup>131</sup>

#### D. Forgery

The Dallas court of appeals in *McGee v. State*<sup>132</sup> greatly extended the definition of "pass" as used in forgery statutes.<sup>133</sup> The court of appeals, citing dicta in an earlier case,<sup>134</sup> held that pass does not mean a "completed pass."<sup>135</sup> The defendant contended on appeal that the pass was incomplete since the cashier did not accept the altered money order. The court held that pass means to offer the forged instrument and does not require a showing that the defendant actually received consideration in exchange.<sup>136</sup> The question will ultimately become one of degree. If an individual attempts to pass a forged instrument and the cashier refuses to take it,<sup>137</sup> will a pass still have occurred? If so, is attempted forgery by passing the instrument an offense chargeable under the laws of the state of Texas?

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125. *Id.* at 724 n.6.

126. 665 S.W.2d 116 (Tex. Crim. App. 1983); *see also* TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 1984) (felony murder statute).

127. *See* Garrett v. State, 573 S.W.2d 543, 545-46 (Tex. Crim. App. 1978) (merger doctrine is an exception to the felony murder rule and states that the underlying assault and the act resulting in murder are one and the same).

128. 665 S.W.2d at 119. Judge Teague clearly sets out the doctrine in his dissent. *Id.* at 120 (Teague, J., dissenting).

129. *See* TEX. PENAL CODE ANN. § 28.02 (Vernon Supp. 1985) (arson is committed when a person starts a fire or causes an explosion without the owner's consent and with intent to destroy the building).

130. 665 S.W.2d at 119.

131. *Id.*

132. 667 S.W.2d 295 (Tex. App.—Dallas 1984, no pet.).

133. *Id.* at 295-96; *see* TEX. PENAL CODE ANN. § 32.21 (Vernon 1974) (stating that "forge" means to, among other things, pass a writing that is forged).

134. Landry v. State, 583 S.W.2d 620, 622-23 (Tex. Crim. App. 1979) (stating that "pass" means to offer the forged instrument and does not require a showing that the defendant actually received consideration).

135. 667 S.W.2d at 296.

136. *Id.*

137. In *McGee* the defendant passed the forged instrument to a cashier at a local credit union. Upon noticing that the numerals were different, the cashier presented the check to a supervisor. At that time the defendant was seen hurrying out of the credit union.

*E. False Report to a Peace Officer*

The court of criminal appeals in *McGee v. State*<sup>138</sup> addressed the extent to which an individual can be prosecuted for filing a claim of police misconduct. The defendant, who had been arrested for driving while intoxicated, signed a sworn affidavit that a Dallas police officer accosted him. The officer testified that he accidentally struck the defendant in the forehead with his clipboard in trying to remove the defendant from his van. The defendant stated that the officer pushed him against a police car, hit him in the stomach and chest four or five times, hit him in the head with a flashlight, and choked him. The officer who took the affidavit admitted to scratching out some of the defendant's original words and that the defendant had not supplied all the written material used in the affidavit. Moreover, a physician testified that a blow from a blunt instrument like a flashlight, and not a clipboard, had probably caused the knot on the defendant's head. Although the defendant testified that the officer had beaten him both at the scene of the arrest and at the police station, his affidavit reflected that the altercation occurred at the scene of the arrest.<sup>139</sup>

Because the prosecution in this case resulted from an allegedly false claim of police misconduct, it had to be reconciled with the rights of assembly, petition, and redress of grievances.<sup>140</sup> This requirement gave the state a greater burden of proof.<sup>141</sup> The state must prove that the defendant made the statements in bad faith and not to obtain action on a valid grievance. The state's evidence must not only show what happened and the defendant's opportunity to perceive those facts, but also that the defendant perceived the facts as they existed.<sup>142</sup> The court held that the evidence in this case fell far short of the requisite level of proof.<sup>143</sup> Not only did the defendant's affidavit closely parallel his testimony, but medical evidence and the officer's testimony also supported portions of defendant's testimony.<sup>144</sup>

The court of criminal appeals took a strong stand in favor of an individual's freedoms of petition and assembly in *McGee*. Deciding otherwise under these facts would have drastically affected the filing of valid com-

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138. 671 S.W.2d 892 (Tex. Crim. App. 1984).

139. The defendant further testified that he had been awake for 35 hours when he signed the affidavit and that the blow to the head had affected him.

140. See Tex. Const. art. I, § 27, which provides that: "The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress or grievances or other purposes, by petition, address or remonstrance."

141. 671 S.W.2d at 895. If prosecutions under TEX. PENAL CODE ANN. § 37.08 (Vernon 1974) do not involve reports of official misconduct, proving that the defendant knew that the facts did not occur as reported would only require a showing that the defendant knew "that the circumstances surrounding his conduct existed." 671 S.W.2d at 895. An inference arising from proof of what actually happened together with proof of the defendant's opportunity to observe what happened could show the defendant's culpable mental state. *Id.* at 895.

142. 671 S.W.2d at 895.

143. *Id.* at 896.

144. The court stated that the only major discrepancy was the scene of the alleged altercation. *Id.* at 895.

plaints with the internal affairs divisions of local law enforcement agencies. For this stand, the court is to be applauded.

### F. Gambling

The court of criminal appeals in *Henderson v. State*<sup>145</sup> more clearly defined gambling paraphernalia.<sup>146</sup> Henderson was charged with possessing "line sheets" on several professional football games. These sheets reflected only the teams involved in each game and left space for the individual to fill in the line on each game, which the defendant had done. No evidence was presented that the defendant placed a bet on any of the games. The court originally affirmed the conviction for possession of gambling paraphernalia,<sup>147</sup> but on rehearing adopted Judge Clinton's original dissent.<sup>148</sup> The issue in *Henderson* was whether a bettor to whom the line was communicated committed an offense by noting the line numbers on a piece of paper and putting it in his pocket. By reducing the line to writing for his own information to help in deciding on which team he will place a bet, the court reasoned that a putative bettor does not thereby create gambling paraphernalia, because in his hands the line sheets are not a means of carrying on bookmaking.<sup>149</sup> With this opinion the court redirected the statute toward "the exploitative gambler and his minions,"<sup>150</sup> for whom it was intended.

## IV. MISCELLANEOUS CRIMINAL STATUTES

### A. Texas Alcoholic Beverage Code

In *Wishnow v. State*<sup>151</sup> the court of criminal appeals struck down as unconstitutionally vague the portion of the Alcoholic Beverage Code that prohibited lewd and vulgar entertainment on the premises of a beer retailer.<sup>152</sup> Alcoholic Beverage Code section 104.01(6) provides that no authorized beer retailer may permit lewd or vulgar acts on the retailer's premises.<sup>153</sup> This statute is virtually identical to previous statutes held unconstitutional for the same reasons.<sup>154</sup> The court held that since the legislature did not define "lewd or vulgar," the statute was impermissibly vague in describing acts of entertainment that a beer retailer may not permit.<sup>155</sup>

145. 661 S.W.2d 721 (Tex. Crim. App. 1983).

146. See Tex. Penal Code Ann. § 47.01(5) (Vernon 1974), which defines gambling paraphernalia as "any book, instrument, or apparatus by means of which bets have been or may be recorded or registered; any record, ticket, certificate, bill, slip, token, writing, scratch sheet, or other means of carrying on bookmaking, wagering pools, lotteries, numbers, policy, or similar games."

147. 661 S.W.2d at 724.

148. *Id.* at 726.

149. *Id.* at 725.

150. *Id.*

151. 671 S.W.2d 515 (Tex. Crim. App. 1984).

152. *Id.* at 517; see TEX. ALCO. BEV. CODE ANN. § 104.01(6) (Vernon Supp. 1985).

153. TEX. ALCO. BEV. CODE ANN. § 104.01(6) (Vernon Supp. 1985).

154. See *Courtemanche v. State*, 507 S.W.2d 545, 546-47 (Tex. Crim. App. 1974); *Irven v. State*, 138 Tex. Crim. 368, 370, 136 S.W.2d 608, 609 (1940).

155. 671 S.W.2d at 517.

*B. Property Code*

During the survey period two courts discussed the proof that is required to support a conviction for misapplication of construction trust funds.<sup>156</sup> In *Gonzales v. State*<sup>157</sup> the Corpus Christi court of appeals set forth the elements of the offenses as follows: (1) a trustee who (2) directly or indirectly with intent to defraud (3) retains, uses, disburses, misapplies, or otherwise diverts (4) any trust funds (5) without first paying and satisfying all obligations of the trustee (6) to those the statute protects is guilty of misapplying construction trust funds.<sup>158</sup> The question in *Gonzales* was the sufficiency of the evidence to prove an intent to defraud, because unless a defendant concedes his intent to defraud it must be proven circumstantially. The court found proof of all the requisite elements except the intent to defraud because the state presented no evidence of any false statement or deceptive practice.<sup>159</sup> The payment of a check to the subcontractor apparently was stopped because of a dispute over whether it was in fact due. The court reversed the conviction because these facts did not establish fraud.<sup>160</sup>

In another construction fraud case, *McElroy v. State*,<sup>161</sup> a sharply divided Dallas court of appeals held that the state failed to show the necessary intent to defraud.<sup>162</sup> Numerous exhibits reflected that the construction funds were used for purposes other than labor, materials, or reasonable overhead on the project.<sup>163</sup> The state, however, failed to show the balance on the defendant's three checking accounts prior to the project and did not trace the source of the funds from the project to other uses. The state also failed to show that all deposits in the business accounts came from the project owners. The state produced checks to payees that did not appear connected to the construction project, but failed to show the ultimate disposition of those funds.<sup>164</sup> While the state must show that the defendant made payments for purposes other than the construction project, it must also show an intent to defraud.<sup>165</sup> The court held that the state did not prove that the defendant had given the proceeds to a person unauthorized to receive them.<sup>166</sup> The state failed to prove that the payees received the money from the checks and that they did not merely cash the defendant's checks and pay him the

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156. See TEX. REV. CIV. STAT. ANN. art. 5472(e) (Vernon Supp. 1983) (repealed 1983). The statute has been re-enacted as part of the TEX. PROP. CODE ANN. §§ 162.001-.033 (Vernon Supp. 1984).

157. 670 S.W.2d 413 (Tex. App.—Corpus Christi 1984, no pet.).

158. *Id.* at 415.

159. *Id.*

160. *Id.*

161. 667 S.W.2d 856 (Tex. App.—Dallas 1984, pet. granted).

162. *Id.* at 862. Justice Storey wrote the majority opinion, in which two other justices joined. Both Justice Akin and Justice Whitham filed concurring opinions, and both Justice Guillot and Justice Sparling wrote dissenting opinions.

163. *Id.* at 860.

164. For instance, one check was written to B & B Liquor. The defendant testified that the check was to cover his company's payroll checks cashed at the store.

165. *Id.*; see Construction Payments and Loan Receipts Act, ch. 323, § 2, 1967 Tex. Gen. Laws 770, repealed by Act of June 19, 1983, ch. 576, § 6, 1983 Tex. Gen. Laws 576, 577.

166. 667 S.W.2d at 861.

money.<sup>167</sup> The state must affirmatively prove that the contractor actually applied the value of the check to a forbidden purpose, thus intending to deprive subcontractors and materialmen of their compensation.<sup>168</sup> The court also held that the state must negate the statutory exception of legal overhead, which it failed to do.<sup>169</sup> A heavy burden is placed, therefore, on the state<sup>170</sup> in future prosecutions under this statute or its successors.<sup>171</sup>

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167. *Id.* at 862.

168. *Id.* at 863.

169. *Id.*; see TEXAS PENAL CODE ANN. §§ 2.02 (definition of an exception), 2.03 (definition of a defense) (Vernon 1974).

170. Justice Whitham, in his concurring opinion, expressed his view that TEX. REV. CIV. STAT. ANN. art. 5472(e) (Vernon Supp. 1983) (repealed 1983) was unconstitutionally vague for failure to define "reasonable overhead" or "reasonable overhead directly related to such construction contract." 667 S.W.2d at 868 (Whitham, J., concurring).

171. TEX. PROP. CODE ANN. §§ 162.001-.033 (Vernon Supp. 1985).



