Trial

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IV. TRIAL

by

Arch C. McColl*

Voir Dire; Guilt-Innocence Phase Evidence; Punishment Phase Evidence; Judicial and Prosecutorial Misconduct; Jury Charge

A. Voir Dire

In Pogue v. State the court clerk had mistakenly called the name of a juror whom the defendant had struck by peremptory challenge from the list of veniremen. Although the trial court had already excused the remaining veniremen at the time defense counsel called the error to his attention, the jurors had not yet been sworn. The court of criminal appeals held that the trial court committed reversible error by allowing the juror to serve. Thus, absent a showing of bad faith, defense counsel is sufficiently diligent if he advises the trial court of such an error before the jury is sworn.

In Brattie v. State the defendant, convicted of capital murder, complained that during voir dire the trial court had improperly prohibited questioning about the veniremen's understanding of the phrase "criminal acts of violence." The court, however, affirmed the conviction, holding that jurors "are supposed to know the ordinary meaning of words which are simple in themselves." The court explained its holding by stating that the legislature did not define "criminal acts of violence"; thus, the phrase falls within the statutory provision that words and phrases which are not defined are to be "understood in their usual acceptation in common language."

Therefore it would be paradoxical for the Legislature to presume that members of a panel know the meanings of such terms of 'reasonable doubt,' 'criminal acts of violence,' 'sound memory and discretion,' and

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465. The court's statement that "no bad faith is contended or shown," id. at 370, implies that a different result would have been reached if the record had reflected that defense counsel knew of the mistake before the remainder of the panel had been excused, but said nothing until afterward:
466. To obtain a clearer appellate record, the court recommended that counsel mark through the peremptorily struck name and place beside it the number of the strike being exercised. Id. at 370 n.1. The court also quoted with approval Munson v. State, 34 Tex. Crim. 498, 31 S.W. 387 (1895), in which the court stated that upon counsel's discovery of the mistake, the following motions were advisable: to withdraw the plea; to discharge the jury; and to draw another jury panel. 553 S.W.2d at 369.
467. If the mistake is discovered after the jury is sworn, error is present only if the record reflects that the juror was prejudiced against the defendant. Acosta v. State, 522 S.W.2d 528 (Tex. Crim. App. 1975). Presumably, such disqualifying "prejudice" would be the same as that which satisfies a challenge for cause under Tex. CODE CRIM. PROC. ANN. art. 35.16 (Vernon Supp. 1978).
469. Id. at 404 (quoting Joubert v. State, 136 Tex. Crim. 219, 222, 124 S.W.2d 368, 369 (1939) (emphasis added)).
470. 551 S.W.2d at 404.
471. TEX. CODE CRIM. PROC. ANN. art. 3.01 (Vernon 1977).
on the other hand for the Court to hold that a trial court has abused its discretion in not allowing a defendant to inquire of each member of the panel as to his or her understanding of such terms.\textsuperscript{472}

As a matter of legislative construction, however, it does not follow that because the legislature intended undefined terms to be "understood in their usual acceptance in common language," that it also conclusively presumed that everyone accurately understands such usage. Further, as a practical matter, because a potential juror is "supposed to know" the common meaning of legal terms does not mean that he actually does. If a venireman cannot be questioned about his understanding of certain terms either in the abstract or as applied to certain hypothetical situations, the presumption of understanding is conclusive. Consequently, there is no protection for the defendant against (1) the juror who misunderstands the definition of the phrase;\textsuperscript{473} (2) the juror who has no definite understanding as to the meaning of the term and is thus more receptive to the legal standards of his fellow jurors;\textsuperscript{474} or (3) the juror who understands the concept but cannot apply it according to law.\textsuperscript{475} Indeed, it is clear that, whether considered in the abstract\textsuperscript{476} or as applied to particular facts,\textsuperscript{477} such broad, albeit "simple," terms as "criminal acts of violence" are subject to differing interpretations, even by reasonable men.

Yet in Texas the defendant is entitled to a unanimous jury verdict.\textsuperscript{478} Since each juror may apply these broad phrases to particular facts based upon his individual perspective, to cut off an inquiry into each potential juror's understanding by what appears to be an irrebuttable\textsuperscript{479} presumption may violate

\textsuperscript{472} 551 S.W.2d at 404 (emphasis added). The court also emphasized the fact that such questioning could consume enormous amounts of time. Id. at 405.

\textsuperscript{473} In approving an extended inquiry into a prospective juror's understanding of the phrase "religious or conscientious scruple" against the death penalty, the Supreme Court in Witherspoon v. Illinois, 391 U.S. 510 (1968), stated:

The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors. Any layman...[might] say he has scruples if he is somewhat unhappy about death sentences...[Thus] a general question as to the presence of...reservation (or scruples) is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases.

\textsuperscript{474} Id. at 516 n.9. The term "scruples," while used in the Code of Criminal Procedure, is not defined. Hence, under the logic of the court in Brattle, a venireman need not be queried at length about his understanding of the word "scruples" because it is not defined by the legislature and thus is presumably "simple in itself."

\textsuperscript{475} Cf. People v. Gainer, 19 Cal. 3d 835, 566 P.2d 997, 139 Cal. Rptr. 861 (1977) ("Allen" or "dynamite" jury charge held unconstitutional because it urged minority jurors to consider their own status as dissenters, a consideration both rationally and legally irrelevant to the issue of guilt).

\textsuperscript{476} Cf. Witherspoon v. Illinois, 391 U.S. 510, 514 n.7 (1968) (suggestion that a juror who objects to capital punishment could still subordinate his personal views and abide by his oath to obey law).

\textsuperscript{477} The classic question which often reveals a juror's misunderstanding of the abstract principle, "proof beyond a reasonable doubt," is: "If the proof of crime required proof beyond a reasonable doubt of five elements and the State sufficiently proved four, would that satisfy in your mind, the requirement of proof beyond a reasonable doubt?"

\textsuperscript{478} The phenomenon of the "hung" jury is one obvious example of laymen disagreeing on the application of "proof beyond a reasonable doubt" based on their individual perspectives.

\textsuperscript{479} If there is no opportunity to rebut the presumption that jurors understand certain legal terms, the presumption is, of course, conclusive against the defendant. The court's opinion implies that the trial court would not commit reversible error if it refused to allow counsel to ask such questions of the jurors at a hearing on a motion for a new trial.
due process and the right to a truly unanimous verdict.\(^{480}\)

In *Collins v. State*\(^{481}\) the defendant complained that the trial court improperly limited his voir dire examination of a prospective juror. The trial court had refused to permit defense counsel to ask the juror whether she could believe that a policeman ""was telling a wilfull falsehood from that witness stand.""\(^{482}\) On direct examination by the State the prospective juror answered that she would judge the police officer’s testimony by the same criteria she would apply to any other witness. The court of criminal appeals affirmed the conviction, holding that because the defendant not only had an unused peremptory challenge at the conclusion of the jury selection, but also was allowed to ask that question of almost all the other prospective jurors, no harm was shown.

Significantly, however, the defendant in *Collins* was assessed the death penalty, a penalty ""different . . . than any other . . . in both its severity and finality.""\(^{483}\) Arguably, where a policeman is a material witness whose testimony may lead to the imposition of death, a juror’s unwillingness to disbelieve his testimony may have as significant an impact on the ultimate outcome of the trial as the juror who is predisposed to inflict the death penalty. Further, since it is reversible error to refuse to allow the defense counsel to show bias on the part of the policeman which may cause him to shade his testimony,\(^{484}\) the defendant should be allowed to determine whether such evidence of bias would have any impact on a particular juror or whether the juror would automatically reject the impeaching evidence. Otherwise, the absolute right to impeach the testimony of a police officer would be a hollow one.\(^ {485}\)

*Moore v. State*\(^ {486}\) raised a variety of voir dire issues. The defendant in *Moore* complained that prospective jurors were called to the bench for ""excuses"" in the presence of the other potential jurors. Moreover, those offering excuses were not called in the order in which their names appeared on the juror list, thus violating article 35.20.\(^ {487}\) The court, however, affirmed the conviction. Since the defendant failed to object to the procedure and could not show that the remaining prospective jurors had heard the questions propounded, any error was waived.

\(^{480}\) Although the court relied heavily on Joubert v. State, 136 Tex. Crim. 219, 124 S.W.2d 368 (1939), for the proposition that jurors are supposed to know the meaning of simple terms, *Joubert* dealt with the court’s charge to the jury. Arguably, the presumption that jurors know the meaning of such terms is valid only if those veniremen who misunderstand the terms are eliminated.

\(^{481}\) 548 S.W.2d 368 (Tex. Crim. App. 1977).

\(^{482}\) Id. at 371. In Brown v. United States, 358 F.2d 543, 545 (D.C. Cir. 1964), Judge (now Chief Justice) Burger stated that when there is important testimony from an official witness, a query into the prospective juror’s inclination to give more or less credence to the witness ""is not only appropriate, but should be given if requested."


\(^{485}\) *Cf.* Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (right to present defensive evidence is "fundamental" under the sixth amendment).

\(^{486}\) 542 S.W.2d 664 (Tex. Crim. App. 1976).

\(^{487}\) TEX. CODE CRIM. PROC. ANN. art. 35.20 (Vernon 1966) states, ""[I]n selecting the jury from the persons summoned, the names of such persons shall be called in the order in which they appear upon the list furnished the defendant.""
A significant holding in Moore is that challenges for cause which are not based on any specific statutory provision are allowable where circumstances show that the juror "is incapable or unfit to serve on the jury." One prospective juror stated that because she had two children, no husband, and was not paid when she was not at work, she could not "keep her mind on the case" because she would be worrying about having to pay her bills. The court held that the statutory list does not prescribe the exclusive basis of challenge for cause and that "any juror who is going to be preoccupied by personal problems so that she could not be fair is incapable or unfit to serve on the jury."

Another significant holding in Moore is that in a capital murder prosecution the State may challenge for cause a venireman who is unable to consider the minimum punishment for the lesser included offense of murder. The prosecutor had explained to the prospective juror that if the State failed to prove capital murder, the lesser included offense of murder carried a minimum penalty of two years. When the prospective juror expressed her antipathy to such a minor penalty for murder, the State successfully challenged her for cause. The court of criminal appeals held that under the statute the State could challenge for cause any prospective juror who had a bias or prejudice against any phase of the law upon which the State was entitled to rely. The fact that the defendant expressly waived objection to the juror because of her bias did not call for a different result.

The court, however, admitted that "it is difficult to see why the State would challenge the prospective juror on the basis stated." Indeed, it is inconceivable that the State would sincerely object to a venireman because of his opposition to a minimum punishment. In fact, the prosecutor uses what is actually a defensive challenge for cause as a sham device to avoid using a peremptory challenge. Thus an unequal situation arises under which the defendant is prohibited from challenging for cause jurors unable to give the maximum penalty of death while the State is allowed to challenge for cause jurors unable to give the minimum punishment.

At the close of the voir dire examination of one prospective juror in Moore, defense counsel stated, "We'll submit the juror"; to which, the trial court responded, "Overruled." Noting that it was doubtful whether such a remark could be construed as a challenge for cause, the court held that, in any case, defendant failed to draw the court's attention to any of the grounds urged on appeal. Further, the fact that the prospective juror was merely uncertain as to whether he would change his vote if opposed by the other jurors did not show sufficient cause for challenge.

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488. Id. art. 35.16(a) (Vernon Supp. 1978) states, "[a] challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury."
489. Id. arts. 35.16(a)(1)-(10).
490. 542 S.W.2d at 669.
491. TEX. CODE CRIM. PROC. ANN. art. 35.16(b)(3) (Vernon 1966).
492. 542 S.W.2d at 670.
493. Id.
494. Id. at 670-71. The court cited with approval Orange v. State, 76 Tex. Crim. 194, 173 S.W.297 (1915), where in answer to a similar question the juror stated, "I'm afraid and believe it might" and the defense challenge for cause was overruled.
Nevertheless, one juror's consideration of another's opinion as to guilt has been held to be highly improper. Because such improper consideration may result in imposition of the death penalty, equivocal answers should be considered sufficient to support a challenge for cause. As the Supreme Court noted in Witherspoon v. Illinois, "unless the venireman states unambiguously that he would vote his conscience even if his position were opposed by eleven other jurors, it simply cannot be assumed that that is his position." 

In affirming a conviction for capital murder in Boulware v. State, the court of criminal appeals held that because the defendant failed to object to an improper exclusion of veniremen at trial, he could not assert the error on appeal. This holding, however, may conflict with Davis v. Georgia, which held that if a single venireman is improperly excluded, any subsequent imposed death penalty cannot stand.

B. Guilt-Innocence Phase Evidence

In Hayter v. State the court of criminal appeals reversed a conviction for burglary because hearsay evidence was improperly admitted. The defendant claimed that he was in a car with the complainant because he had heard from numerous employees at work that a woman waited in the parking lot almost daily and seduced passers-by. The State called to the stand an investigator who had been assigned to determine the accuracy of this story. The investigator testified that he had talked to fourteen employees at the company. He was then asked if he had found "anything to indicate" that there was a woman on the parking lot. Defense counsel's objection to this question as calling for hearsay evidence was overruled. On appeal, the State argued that the investigator was simply testifying to "negative results"; the testimony was analogized to that received when one who examines books or documents is allowed to testify that they do not contain certain information.

In holding the testimony inadmissible, the court stated:

Although A may testify that he has examined business records and that the records do not contain certain entries, B's testimony based on information he received from A that no such entries are contained in the records is not firsthand information; it is clearly hearsay and would not be admissible. Although the State might have introduced testimony of any or all fourteen employees that they had observed the parking lot at relevant times and that they had not seen the complainant on the parking lot, [the investigator's] testimony based on information he

496. 391 U.S. 510 (1968).
497. Id. at 515 n.9.
499. But cf. Jiminez v. Estelle, 557 F.2d 506 (5th Cir. 1977) (federal habeas corpus relief available upon a showing of incompetence of counsel where failure to object to introduction of evidence constituted waiver under state law).
500. 429 U.S. 122 (1976) (per curiam).
received from the fourteen employees that the complainant had not been on the parking lot was not firsthand information; it is clearly hearsay and is not admissible.503

Walls v. State504 reversed a conviction for robbery by firearms because evidence of an extraneous offense was improperly admitted. Although the victim of the robbery made a positive identification of the defendant, a police officer was also allowed to testify that four days later he arrested the defendant immediately after he had robbed another citizen in a similar manner. While this testimony was arguably admissible to show the context of the arrest, the court of criminal appeals held that the extraneous offense had no "legal relevance"505 to the crime with which the defendant was charged.

In United States v. Pariente506 the Fifth Circuit reversed a conviction for transporting aliens because the prosecutor, among other things,507 commented on the defendant's failure to call his wife to the stand. The court noted that such comment is not always reversible error.508 Nevertheless, the court balanced "the action of the prosecutor against the weight of the evidence";509 because in the instant case the evidence was circumstantial, the error could not be considered harmless.

In affirming the conviction for barratry in Edwards v. State,510 the court of criminal appeals adopted specific requirements for the admissibility of tape recordings in criminal trials.511 Although the court recognized that the admissibility of tape recordings is discretionary with the trial court, in order to be admissible the tape recording must meet a seven-prong test which includes: (1) a showing that the recording device was capable of taking testimony; (2) a showing that the operator of the device was competent; (3) establishing the authenticity and correctness of the recording; (4) a showing that no changes, additions, or deletions have been made; (5) a showing of the manner of the preservation of the recording; (6) identifying the speakers; and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement.512 The court, however, noted that many of these requirements could be inferred from the testimony.513

503. 541 S.W.2d at 437.
505. Id. at 41.
506. 558 F.2d 1186 (5th Cir. 1977).
507. The prosecutor also alluded to a "sworn statement" by a co-defendant who had pleaded guilty. The statement had been ruled inadmissible but was used by the prosecutor in an attempt to impeach the defendant. Id. at 1189.
508. See, e.g., United States v. Seay, 432 F.2d 395 (5th Cir. 1970) (prosecutor's comment on failure of defendant's spouse to testify accompanied by an instruction to the jury was not error where the evidence of guilt was substantial). But cf. San Fratello v. United States, 340 F.2d 560 (5th Cir. 1965) (comment on failure of defendant's spouse to testify was reversible error where she was forced to claim her privilege against self-incrimination).
511. Although the court recognized that in the past it had not established what constituted a proper foundation for the admissibility of sound recording, it also noted that such recordings had generally been admitted. See Thrush v. State, 515 S.W.2d 122 (Tex. Crim. App. 1974); Yates v. State, 509 S.W.2d 600 (Tex. Crim. App.), cert. denied, 419 U.S. 996 (1974); Hutson v. State, 164 Tex. Crim. 24, 296 S.W.2d 245 (1956).
512. 551 S.W.2d at 733.
513. For example, the court stated:

If a person who is in a position to hear a conversation testifies that he made a tape
In *Jackson v. State* the court reversed a conviction for robbery by firearms because defensive evidence was erroneously excluded. In support of his theory of misidentification the defendant attempted to introduce the testimony of a citizen who had erroneously identified the defendant as the perpetrator of a crime which was later discovered to have been committed by a third party. The offense for which the defendant had been misidentified and the instant offense occurred within one month of each other. The court held that the excluded testimony was highly relevant to the defensive theory "because it tended to prove not only that [the defendant] had been misidentified, but that his identity had been previously confused with John Lewis, the person who confessed to the offense charged in the case at bar." Relying on *Holt v. United States*, the court concluded that where the identity of the defendant is an important issue, evidence showing that a person resembling the defendant was committing similar crimes at about the same time and that one person had mistakenly identified the defendant is admissible. In stating this general proposition, the court emphasized that the time period involved was "not too remote," "nor too weak in probative quality."

Likewise, in *Montemayor v. State* the court reversed a conviction for aggravated assault upon a peace officer because defensive evidence was improperly excluded. Relying upon a theory of self defense codified in the Penal Code, the defendant testified that the police officer had twice assaulted him on the day of the alleged offense. During cross-examination the officer admitted that he knew Oscar Antu but denied that he had ever been in a fight with him. The defendant was denied the opportunity to call Antu to the stand to rebut this testimony; out of the presence of the jury, however, Antu testified that the officer had beaten him without provocation in the Maverick County Jail. The court of criminal appeals held that it was error to exclude such testimony, stating:

> It is fundamental that when a witness in a criminal case testifies about a specific fact or event, and that fact or event is more than a very minor detail of his testimony, then the opposing side may present evidence to rebut the testimony. Such impeachment goes directly to the credibility recording of that conversation and that he had listened to the tape recording and found it to coincide with what he heard the parties say, it goes without saying that the recording device was 'capable of taking testimony' and that the 'operator of the device was competent.'

*Id.*


515. *Id.* at 352.

516. 342 F.2d 163 (5th Cir. 1965) (citing Commonwealth v. Murphy, 282 Mass. 593, 185 N.E. 486 (1933)).

517. 551 S.W.2d at 353. The court could have cited Chambers v. Mississippi, 410 U.S. 284 (1973), in which identity was hotly contested and the defendant was not allowed to present evidence that another person committed the crime. The Supreme Court stated that "nothing is more fundamental than the right of the Defendant to present evidence in his own behalf." *Id.* at 302.


519. *Tex. Pen. Code Ann.* § 9.31(a) (Vernon 1974). That section provides: "[a] person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force."
of the witness, a factor that in many cases may critically affect the outcome of the prosecution.\footnote{520}

In addition, the court stated that "the right to impeach the prosecution's witnesses is also one aspect of the Sixth Amendment right of confrontation."\footnote{521}

In \textit{Robinson v. State}\footnote{522} the court of criminal appeals reversed a conviction for capital murder because of the improper admission of evidence that a state witness had taken and passed a polygraph test. The state sought to justify the admission on the grounds that the defendant had "opened the door" to the evidence by showing a part of a plea bargain agreement; thus the state argued it was entitled to show the remainder of the agreement, namely, the taking and passing of a polygraph test. The court rejected that argument noting that the purpose of article 38.24\footnote{523} is to dispel a "false impression" from the jury's hearing only part of a conversation or a writing. But the very reason that evidence of a polygraph examination is not normally\footnote{524} admissible is because of its unreliability.

Therefore, the state was asking the court to permit it to dispel a purportedly false impression by evidence of the witness' having taken an unreliable test. Significantly, the court also held that because the trial court had ruled out of the presence of the jury that evidence of the polygraph examination would be admissible if the defendant inquired about the plea bargain, it was not necessary for the defendant to object in the presence of the jury when such testimony was offered.\footnote{525}

In \textit{Presswood v. State}\footnote{526} the court reversed a conviction for the possession of marijuana because the evidence was insufficient to connect the defendant with the marijuana found in his car. The court stated that the only evidence in the record tending to establish possession was that the defendant was the driver of the automobile; the record failed to reflect how long the defendant had been in possession and control of the automobile or who owned the automobile.

Affirming a conviction for robbery by assault in \textit{Carter v. State},\footnote{527} the court construed the husband and wife privilege to apply only "to utterances and not acts."\footnote{528} Through the testimony of a police officer the State developed the fact that the defendant's wife had identified him from a composite picture appearing in the newspaper; on the basis of her identification the police officer had assembled a photographic lineup from which the complainant identified the defendant. The majority distinguished \textit{Davis v. State},\footnote{529} which had held that it was improper for the State to prove that the

\footnote{520}{543 S.W.2d at 94.}
\footnote{521}{\textit{Id.} (citing Davis v. Alaska, 415 U.S. 308 (1974); Napue v. Illinois, 360 U.S. 264 (1954)).}
\footnote{522}{550 S.W.2d 54 (Tex. Crim. App. 1977).}
\footnote{524}{Evidence regarding polygraph examinations is not always inadmissible. When the defendant erroneously states that he passed a polygraph test, the state may impeach his testimony by showing that he did not. Lucas v. State, 479 S.W.2d 314 (Tex. Crim. App. 1972).}
\footnote{525}{\textsc{Tex. Code Crim. Proc. Ann. art. 40.09, § 6(d)(3).}
\footnote{526}{548 S.W.2d 398 (Tex. Crim. App. 1977).}
\footnote{527}{550 S.W.2d 282 (Tex. Crim. App. 1977).}
\footnote{528}{\textit{Id.} at 286.}
\footnote{529}{160 Tex. Crim. 138, 268 S.W.2d 152 (1954).}
defendant’s wife had actively participated in securing witnesses to refute his testimony. In *Davis* the court concluded that the wife’s active participation in the State’s case was “tantamount to a denial by her of the truthfulness of Appellant’s testimony.” 530 Thus, the jury received the impression that the wife would refute the testimony if she were allowed to testify. 531 The majority contrasted the instant case because the wife’s identification of the composite in the newspaper was not used in any manner “to show [the defendant’s] participation [in the crime].” 532

In *Clark v. State* 533 the court of criminal appeals granted habeas corpus relief to a petitioner who had been viewed in his prison clothes by members of the jury panel who later served on his actual jury. The petitioner had timely objected 534 before jury selection had begun, and the court held that his right to the presumption of innocence had been violated.

In *Raley v. State* 535 a conviction for embezzlement was reversed by the court of criminal appeals because a transcript from a previous trial containing a material witness’s testimony was improperly admitted. In order to admit the transcript of the testimony of an absent witness into evidence, in derogation of the defendant’s right of confrontation, the State must lay the proper predicate. 536 The court held that the state had failed to lay this predicate because it failed to make a good faith effort to obtain the witness’s presence at trial. Since the previous trial the witness had moved to North Carolina; the State, however, had not requested the trial court to issue a summons to compel the attendance of the witness. 537 Thus, because the

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530. *Id.* at 140, 268 S.W.2d at 152.

Neither husband nor wife shall, in any case, testify as to communications made by one to the other while married. Neither husband nor wife shall, in any case, after the marriage relation ceases, be made witnesses as to any communication made while the marriage relation existed except in a case where one or the other is on trial for an offense and a declaration or communication made by the wife to the husband or by the husband to the wife goes to exculpate or justify the offense. The husband and wife may, in all criminal actions, be witnesses for each other, but except as hereinafter provided, they shall in no case testify against each other in a criminal prosecution.

532. 550 S.W.2d at 285. The dissent, on the other hand, pointed out that in *Johigan v. State*, 482 S.W.2d 209, 211 (Tex. Crim. App. 1972), the court held that “it is reversible error for the State to show that the defendant’s wife is assisting in the prosecution of the case, even though she has not testified.” 550 S.W.2d at 286.
534. In *Estelle v. Williams*, 425 U.S. 501 (1976), the United States Supreme Court held that the ultimate considerations in this type of case are whether the accused was compelled to stand trial in prison garb and did his failure to object sufficiently negate the presence of compulsion necessary to establish a constitutional violation.

When oath is made by the party using [prior testimony taken under oath, where the opportunity for cross-examination was present] that the witness resides outside the State; or that since his testimony was taken, the witness had died, or that he had removed beyond the limits of the State, or that he has been prevented from attending the court through the act or agency of the other party, or by the act or agency of any person whose object was to deprive the defendant of the benefit of the testimony; or that by reason of age or bodily infirmity, such witness cannot attend.

The court also cited *Barber v. Page*, 390 U.S. 719 (1968), for the proposition that a witness is not "unavailable" for the purposes of the introduction of prior testimony unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial. 548 S.W.2d at 36.
537. Under *Tex. Code Crim. Proc. Ann.* art. 24.28, § 4 (Vernon Supp. 1978), the court could have issued a summons to compel attendance since North Carolina at that time had
State had not made the requisite good faith effort, the transcript was not admissible.

In *Cavender v. State* the court reversed a conviction for murder because the prosecutor asked an improper question of the defendant. On cross-examination of the defendant the prosecutor asked him whether he had told his mother that he had stabbed and raped the deceased and that his mother had relayed that information to his uncle. Upon defendant’s objection to the source of this question, the prosecutor responded that he had all the “real evidence in the file that counsel needs.” In fact, out of the presence of the jury the prosecutor explained that the basis for his question was that the husband of the deceased said that one of his sisters told another that the defendant had killed the deceased. The court held that the basis of the question was hearsay several times removed. Thus, the question, together with the indication that the prosecutor had hard evidence of such admission, was harmful.

In *United States v. Cooke* the Fifth Circuit reversed a conviction for mail fraud. Evidence of a civil consent decree which prohibited the defendant from doing certain acts related to selling securities was admitted by the trial court. In the decree, however, the defendant had neither admitted nor denied any wrongdoing. The Government argued that the injunctive decree was admissible under federal rule 404(b) as evidence of a common scheme to perpetrate fraud on investors. The court stated that even if rule 404(b) applied the evidence was inadmissible under rule 403 because the probative value was greatly outweighed by the prejudicial impact in an “entirely circumstantial and largely uncorroborated case.”

Upon similar reasoning the court of criminal appeals in *Mallicote v. State* reversed a murder conviction because evidence of an extraneous offense was erroneously admitted. The State introduced evidence that the appellant was intoxicated at the time of the killing. In order to prove the effect of alcohol on the defendant the State introduced evidence over the objection of the defense, that two and one-half years earlier the defendant while intoxicated had pointed a gun at the victim’s brother. The court, relying on *Albrecht v. State*, held that the probative value of the evidence adopted provisions of the Uniform Act to secure the attendance of witnesses from without the state. The Act also provides for the payment of compensation to nonresident witnesses. *Id.* § 4(b).

539. *Id.* at 603.
540. 557 F.2d 1149 (5th Cir. 1977).
541. FED. R. EVID. 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

542. *Id.* 403 states: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

543. 557 F.2d at 1155.
of the extraneous offense, if any, was far outweighed by its potentiality for improper, unjustified, and inflammatory inferences against the accused.

Jiminez v. Estelle\textsuperscript{546} involved a federal habeas corpus proceeding in which it was claimed that the defense counsel's failure to object to certain evidence in state court constituted a waiver of that right. The State contended that because the issue of the alleged impropriety of the evidence had been waived, it was not cognizable on habeas corpus. Although as a general rule federal habeas review is barred by a state procedural waiver, there is, nonetheless, an exception to this rule enunciated in Wainwright v. Sykes.\textsuperscript{547} Despite the state procedural waiver, relief is available to the federal petitioner upon a showing of "cause" and "prejudice." The Fifth Circuit held that the "incompetence of the trial counsel in the state court" may fall within this exception.\textsuperscript{548}

C. Punishment Phase Evidence

In Aaron v. State\textsuperscript{549} evidence of extraneous offenses not alleged in the indictment was introduced at the punishment phase of a trial for burglary in the form of letters contained inside a penitentiary packet. Although the letters referred to final convictions, which are proper subjects for consideration at the punishment stage of the trial,\textsuperscript{550} proof of such convictions may not be shown by mere references in letters. Rather, such proof must be introduced through judgments upon which sentences can be based. The error was held to be harmful and the court reversed.

In Gibson v. State\textsuperscript{551} a conviction for driving while intoxicated was reversed on the ground that the jury, rather than the trial court, assessed the appellant's punishment. Prior to trial the defendant filed written motions asking for probation and requested that the court assess punishment. The trial court instead submitted the issue of punishment to the jury. In reversing, the court of criminal appeals noted that although article 37.07 of the Code of Criminal Procedure\textsuperscript{552} is ambiguously worded, the defendant should not be required to have the jury assess his application for probation in every jury trial. It is the responsibility of the trial court to assess punishment. The jury may only assess punishment in cases where the defendant has invoked the statutory right afforded by article 37.07; in the present case the defendant had not made this election. This case makes uniform the procedure in both felony and misdemeanor courts where probation is requested.\textsuperscript{553}

In Kincheloe v. State\textsuperscript{554} the court of criminal appeals affirmed a conviction for possession of a firearm by a felon over the defendant's double jeopardy objection. The defendant asserted that a murder conviction, used

\textsuperscript{546} 557 F.2d 506 (5th Cir. 1977).
\textsuperscript{547} 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977).
\textsuperscript{548} 557 F.2d at 511.
\textsuperscript{549} 546 S.W.2d 277 (Tex. Crim. App. 1976).
\textsuperscript{551} 549 S.W.2d 741 (Tex. Crim. App. 1977).
\textsuperscript{552} TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (Vernon Supp. 1978).
\textsuperscript{553} Id. art. 42.12 (Vernon 1966) provides the procedure for probation in felony cases.
\textsuperscript{554} 553 S.W.2d 364 (Tex. Crim. App. 1977).
as an element in the charged offense to show a prior conviction for a violent felony, had been used in the same manner in a prior conviction for enhancement purposes. The defendant contended that because the murder conviction had been used in the prior conviction for enhancement it could not be used again for the same purpose in the instant case. Relying on Hill v. State, the court of criminal appeals held without elaboration that using the murder conviction as an element of both the instant offense and the prior offense did not violate the double jeopardy clause of the Constitution.

The court of criminal appeals in Robinson v. State reversed a conviction for capital murder because the trial judge refused to allow the defendant to elicit testimony from a psychologist at the punishment stage of the trial. The record showed that the psychologist would have testified that in his opinion it was improbable that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Because the jury must be allowed to consider “all relevant evidence” at the punishment stage of the trial, the exclusion of such evidence was improper and reversible error.

In the capital murder case of Ghouison v. State a notebook cover bearing the defendant’s fingerprints was held to be admissible without the contents at the guilt-innocence stage to link the defendant to the alleged get-away car in which the notebooks were found. The contents, which included statements of intense hatred and proposed acts of violence against white people generally, were then held to be admissible at the punishment stage under article 37.07(1)(a) of the Code of Criminal Procedure. Further, the court held that the State was entitled to introduce the testimony at the punishment stage of the trial of two psychiatrists who had interviewed the defendant ex parte, although no issue of insanity or competency had been raised by the defendant. The court reasoned that if the defendant had testified that he could be rehabilitated, then such testimony would have been admissible in rebuttal. Therefore, the court “perceive[d] no reason why

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559. 548 S.W.2d at 66 (citing Jurek v. Texas, 428 U.S. 262 (1976)).
562. The court cited Jurek v. Texas, 428 U.S. 262 (1976), which, in construing TEX. CODE CRIM. PROC. ANN. art. 37.07(1)(a) (Vernon Supp. 1978), stated that “all possible relevant information about the individual defendant” should be presented to the jury. 428 U.S. at 276. Nevertheless, the court of criminal appeals acknowledged that “[t]he notebook in the instant case does not purport to be a personal communication by or to either of appellants.” 542 S.W.2d at 398. Moreover, the opinion did not reveal that the defendant had even read the notebook or whether he subscribed to the stated philosophy. At the punishment stage of a trial, if books which are not shown to have been read by the defendant, but which are taken from the alleged get-away car are admissible, may books from the defendant’s personal library which are shown to have been read by him be introduced as well? See Stanley v. Georgia, 394 U.S. 557 (1969) (private possession of otherwise illegal films or reading material cannot be a crime).
563. “Counsel for appellants were not advised of the interviews nor were they present during them.” 542 S.W.2d at 400.
higher constitutional standards should be imposed for the admission of such testimony when the State is presenting its case-in-chief than is required for rebuttal testimony.\textsuperscript{564}

The defense counsel's objection to the testimony, however, was apparently based on the sixth amendment guarantee of effective assistance of counsel rather than the fifth amendment protection against self-incrimination.\textsuperscript{565} Had the fifth amendment question been raised, the issue would have turned on whether the privilege survives after a verdict of guilty has been returned by a jury but before punishment has been assessed. At least one federal court\textsuperscript{566} has held that where the defendant neither requests a psychiatric exam on the issue of "dangerousness" nor seeks to introduce testimony on that issue, he may not under the fifth amendment be compelled to participate in a psychiatric exam to determine dangerousness for the punishment phase of trial.

The fifth amendment issue was raised in \textit{Livingston v. State},\textsuperscript{567} which affirmed a capital murder conviction. The court rejected the argument that the introduction of psychiatric testimony at the punishment stage of the trial violated the defendant's fifth amendment privilege against self-incrimination. Noting that the psychiatrists did not testify at the guilt stage,\textsuperscript{568} the majority of the court relied on language in \textit{United States v. Williams}\textsuperscript{569} to sustain admissibility of the testimony.

\textit{Williams}, however, dealt with the rebuttal testimony of a psychiatrist introduced at the guilt stage of the trial where the defendant had raised the issue of insanity. By contrast, in \textit{Livingston} neither the issue of incompetency nor insanity was raised. Further, the court of criminal appeals characterized the psychiatrists' description of the defendant as a "momentary, unfavorable characterization."\textsuperscript{570} That description is as follows: "[T]hat the
Appellant was a sociopathic personality, an antisocial type, who had no regard for another person’s life or property, no remorse, that his condition would not improve and he would remain a continuing threat to society.”

It is difficult to understand the characterization of such testimony as a “momentary unfavorable characterization.” More importantly, it is clear that the position of the court of criminal appeals is that the fifth amendment does not protect defendants from elicitation of such testimony at the punishment stage of the trial; this is true even where the testimony is based on court ordered interviews with the defendant and the defendant has raised no issue of insanity or incompetency nor offered psychiatric testimony on the issue of his dangerousness. The question has not been resolved by the United States Supreme Court.

D. Judicial and Prosecutorial Misconduct

In Kincade v. State a conviction for disorderly conduct was overturned because the trial judge made several comments improper under the terms of article 38.05. The judge had castigated the appellant’s counsel in front of the jury for misleading and deceiving the jury and the court about certain facts related to the arrest. The court of criminal appeals held that the judge’s remarks were such as to be reasonably calculated to benefit the State and, in turn, prejudice the defendant’s rights.

In Elizondo v. State an improper jury argument resulted in reversal of a conviction for delivery of heroin. The prosecutor, who had testified at trial, told the jury “you do not pay me enough to come up here and perjure myself and lie on the stand.” The court held that because the statement was made repeatedly, and because it was “one of the primary thrusts” of the closing
argument, the error was reversible. Such argument, the court stated, "conveys to the juror that the prosecutor has a basis for his conclusion in addition to the evidence they have before them." An improper argument also led to reversal of a voluntary manslaughter conviction in \textit{Dunbar v. State}. The district attorney stated to the jury that "the fact that you have things in [the charge to the jury] on self defense and voluntary manslaughter, doesn't mean that the court believes that is what happened." In holding that the prosecutor's reference to the trial court's belief was improper, the court reaffirmed the four categories of argument held permissible in \textit{McClory v. State}: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; or (4) a plea for law enforcement.

In \textit{Cook v. State}, an appeal from a conviction of heroin possession, the court again reversed for improper prosecutorial argument. The heroin had been discovered in the car the defendant and his brother were driving when they were arrested for shoplifting. The defendant's brother, who had previously been tried and convicted for possession, testified that he alone had possessed the heroin and that the defendant did not know of its presence. The prosecutor argued that the defendant's brother had "not got one thing to lose" by so testifying because under \textit{North Carolina v. Pearce}, the brother, whose appeal was pending, could not receive any greater punishment if retried than the seven and a half year sentence he had been assessed at his first trial. In reversing the appellant's conviction, the court of criminal appeals stated:

A statement by counsel of what purports to be the law when same is not contained in the court's charge is improper argument. The error here was further compounded when the prosecutor's argument was an \textit{incorrect} statement of the law and such error in the statement of the law was to the obvious detriment of the appellant.

In addition, the prosecutor had stated that criminal trials unfortunately "are not quests for truth and justice" but are merely "methods used by persons to escape the consequences of their acts." The court ruled that the harm caused by this statement was not removed by an instruction to disregard in light of the prosecutor's continued remarks along the same vein.

\textit{Note}: The court distinguished Jones v. State, 520 S.W.2d 755 (Tex. Crim. App. 1975), in which the court had found an almost identical jury argument to be improper but harmless error, because in Jones defense counsel had invited the error. 545 S.W.2d at 455.

1. \textit{Id.} at 455-56.
3. \textit{Id.} at 383.
5. In \textit{McClory} the prosecutor made an almost identical remark and in overruling the objection, the trial court compounded the error by stating, "he didn't say I did; he said I didn't [believe it]. Overruled." \textit{Id.} at 933. Because the trial court in \textit{Dunbar} overruled the objection without comment, \textit{Dunbar} suggests that the court of criminal appeals has created a per se reversible error for such prosecutorial comment whenever objection is made and overruled.
8. 540 S.W.2d at 710.
9. \textit{Id.}
10. \textit{Id.}
In *Bouchillion v. State*\(^9\) the court held that the prosecutor did not commit reversible error by telling the jury in closing argument that it could not weigh the defendant’s failure to testify in his own behalf against him.\(^9\) That argument, the court stated, was merely a paraphrase of the court’s charge.

In *Gholson v. State*\(^9\) the defendant appealed a capital murder conviction for slaying a police officer. Because the prosecutor had stated, “God bless those officers who died in the line of duty like him [the deceased], and their families,”\(^9\) the defendant contended that *Lopez v. State*\(^9\) required a mistrial. In *Lopez* the court held that an instruction to disregard was insufficient to cure an unsupported comment by a prosecutor that eleven officers had been killed in America during the time the case was in trial. The court of criminal appeals distinguished the statement in the present case because unlike the comment in *Lopez*, it was not a plea to punish the defendant in order to stop a wave of police killings or to impose punishment for the commission of other similar crimes.

In addition, the defendant argued that a mistrial should have been granted because the prosecutor had stated, without support, “I don’t recall when the last person was electrocuted. I do know this that since the last person was [executed] there has been a hundred percent increase in crime.”\(^9\) The court held that although the argument\(^9\) was improper,\(^9\) it was cured by the trial court’s prompt instruction to disregard.\(^6\)

In *Thornton v. State*,\(^6\) a prosecution for possession of marijuana, the defense counsel in argument stressed the State’s failure to call witnesses who were present at the transaction in which the defendant was arrested. In


\(^9\) Such a statement was held harmless error in *Hardy v. State*, 496 S.W.2d 635, 638 (Tex. Crim. App. 1973). *But see* *Easterling v. State*, 168 Tex. Crim. 219, 325 S.W.2d 138 (1959) (prosecutor’s statement, “He, the Defendant, does not have to explain anything to anybody,” held reversible error).

The United States Supreme Court has granted certiorari to determine if an instruction by the trial court that the jury should not take into account the defendant’s failure to testify emphasizes that fact to the defendant’s detriment, rather than provides him protection. *Lakeside v. Oregon*, (1978) U.S. S. CT. BULL. (CCH) B71, granting cert. to 277 Ore. 569, 561 P.2d 612 (1977). *See also* *Lockett v. Ohio*, (1978) U.S. S. CT. BULL. (CCH) B71, granting cert. to 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976) (prosecutor’s statement to effect that evidence against defendant was uncontroverted and unrefuted did not constitute improper comment on defendant’s failure to testify). Clearly, if the trial court cannot make such a statement, the prosecutor cannot do so. In any event, the argument could be made that the district attorney’s comment was in bad faith because it is inconceivable that such a statement was made for any other purpose but to call to the jury’s attention the defendant’s failure to testify.


\(^6\) *Id.* at 398.


\(^6\) 542 S.W.2d at 399.

\(^6\) *Id.*

\(^9\) Presumably this argument was made at the punishment stage although the opinion does not clearly reflect this.

\(^9\) An argument by a prosecutor that crime is on the increase has been upheld as a proper plea for law enforcement. *Cunningham v. State*, 484 S.W.2d 906 (Tex. Crim. App. 1972). In *Gholson*, however, the court ruled that the statement in question went beyond such an assertion. 542 S.W.2d at 399.

\(^6\) The court distinguished *White v. State*, 492 S.W.2d 488 (Tex. Crim. App. 1973), where the prosecutor argued that 60% of the crime in Dallas County could be attributed to narcotics because “unlike the instant case, the defendant’s objection to the argument was overruled and no instruction was given to disregard.” 542 S.W.2d at 399.

response, the prosecutor stated that the witnesses were in the penitentiary "on this same offense." Further, he related a pre-trial conversation that he had held with the defense counsel concerning whether the witnesses would appear. At that time, however, nothing in the record indicated whether the witnesses were in fact serving time or whether the conversation had taken place. The court of criminal appeals reversed, stating that while the prosecutor may go outside the record to meet an argument of counsel which is also outside the record, defense counsel’s argument was not beyond the record. Consequently, the prosecutor, by injecting unsworn and inadmissible facts, prejudiced the defendant by revealing that other persons who were severally indicted for the same offense had been convicted.602

In McClure v. State603 the court of criminal appeals reversed a conviction for murder where the prosecutor during the guilt stage of the trial repeatedly referred to the range of punishment; he argued that the defendant should not be convicted of manslaughter because that offense carried a much lighter sentence. The court found the fact that the jury was asked to consider "the amount of punishment rather than the facts" to be harmful.604

An allegation of improper argument was also raised in Ramirez v. State,605 a robbery by firearms case in which $20,000 worth of property was stolen. The prosecutor, in speaking to the jury, contended that "[the defendant] that plans that kind of a robbery . . . is . . . engaged in big business, and . . . he’s got some connection some place."606 The court held that it was a reasonable deduction from the evidence that the defendant had a place where he planned to sell the stolen goods. Therefore, the statement was within the proper scope of argument.607

While the issue of prosecutorial references to organized crime was only suggested in Ramirez, it was directly confronted in Dexter v. State.608 In that case the defendant appealed a conviction for commercial obscenity, alleging prosecutorial misconduct. During the selection of the jury the prosecutor asserted that the State would prove that a "syndicate" owned and operated the theater where the film in question was shown. In response, the defendant secured a court order forbidding the prosecution from making any references to "syndicate," "organized crime" or "Mafia." After the trial began, however, the prosecutors brought into the courtroom a file cabinet, one side of which displayed a five and one-half by eight and one-half inch white sign on which was written in prominent red letters the words "organized crime." Moreover, during the jury argument, the prosecutor again attempted to connect the appellant with "organized crime." The court

604. Id. at 393.
606. Id. at 633.
607. Id. at 634. The court cited Pecina v. State, 516 S.W.2d 401 (Tex. Crim. App. 1974). Arguably, the doctrine of Alejandro v. State, 493 S.W.2d 230 (Tex. Crim. App. 1973) (reference to facts not in record nor inferable therefrom improper), might apply to Ramirez if references to organized crime were improper; in Ramirez the "big business" and having a "connection" could reasonably have been interpreted by the jury as being linked to organized crime.
rejected the argument that defense counsel failed to preserve error because he moved for a mistrial when the cabinet was introduced rather than making an objection and asking for an instruction. The court stated that "[a] motion requesting the court to instruct the jury to disregard the sign on the file cabinet would not have cured the injury" and reversed the conviction.

Similarly, in *Stimack v. Texas* the Fifth Circuit reversed a conviction because of prosecutorial references to organized crime. The prosecutor introduced himself on voir dire as a member of the "organized crime division" and in closing argument referred to the evidence as presenting "the tip of an iceberg." Additionally, during the trial several jurors received telephone calls from a male who identified himself as counsel for the defense and stated that if the jury did not return a verdict of "not guilty" they would be killed by the Mafia. The jurors testified that these two factors caused them to view the petitioner more severely than they would have otherwise. The court held that although it was "true that the evidence against [the] petitioners was strong," the two factors "in combination, may well have produced just such a synergistic effect as the jurors related and the trial court discerned."

**E. Jury Charge**

During the current survey period several convictions were overturned because the trial court's charge to the jury authorized convictions on theories not contained in the indictments. Thus, in *Peoples v. State* the court of criminal appeals reversed a conviction for forgery by passing because the trial court failed to charge the jury on the element of passing. The trial court did instruct the jury on the issue of "making" a writing such that it purports to be the act of another; the crime of "passing," however, does not require that the accused himself make the forged instrument or that it be made by one for whom he is criminally responsible. Since the trial court failed to apply the law of the offense alleged in the indictment, the court held that fundamental error had been committed.

In *Morter v. State* the defendant appealed a conviction for the offense of injury to a child. The indictment alleged that the accused had caused "serious bodily injury" to the child, whereas the charge allowed a conviction for serious bodily injury as well as "serious physical deficiency or impairment" or "deformity." Because the charge authorized the jury to

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609. *Id.* at 428.
610. 548 F.2d 588 (5th Cir. 1977).
611. *Id.* at 589.
612. *Id.* at 895.
614. *Id.* at 895.
616. "Serious bodily injury" is defined 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." *Tex. Penal Code Ann.* § 1.07(a)(34) (Vernon 1974).
617. *Id.* § 22.04 provides that "a person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, engages in conduct that causes serious bodily injury,
convict on theories other than those alleged in the indictment, the error was held to be fundamental.

Similarly, in Long v. State the court reversed a conviction for theft because the charge authorized conviction for an offense not alleged in the indictment. The court noted that there are four possible ways to commit theft under the Penal Code. The indictment in this instance alleged that the defendant obtained and exercised control over the property without the effective consent of the owner. The charge to the jury, however, authorized a conviction for obtaining and exercising control over the property knowing that the property was stolen.

A conviction for aggravated assault was reversed in Sutton v. State because the trial court did not submit a charge to the jury on the lesser included offense of resisting arrest. The defendant was charged with aggravated assault for striking a police officer as he attempted to arrest the defendant. Because resisting arrest is a lesser included offense of aggravated assault and the evidence was sufficient to raise that issue, the court held that defendant was entitled to an appropriate instruction on resisting arrest.

In Shippy v. State the defendant contended on appeal from a capital murder conviction that the trial court erred in declining to submit a circumstantial evidence charge at the punishment stage of his trial. He argued that he was entitled to such a charge on the issue of the probability that he would commit "future acts of violence constituting a continuing threat to society." Relying on the opinion in Stocks v. State, the court of criminal appeals determined that a charge on circumstantial evidence is necessary only when the "main facts essential to guilt" are circumstantial. Since in

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619. The charge permitted the jury to convict if they found that the defendant had engaged in any of the conduct prohibited in the statute. The court refused to hold that "serious bodily injury" encompasses "serious physical deficiency or impairment" or "deformity" because the former term is statutorily defined while the latter is not. 551 S.W.2d at 718.

620. Apparently the error was not an assigned error on appeal. See TEX. CODE CRIM. PROC. ANN. art. 40.09, § 13 (Vernon 1965).


622. See TEX. PEN. CODE ANN. § 31.03 (Vernon 1974); Ex parte Cannon, 546 S.W.2d 266 (Tex. Crim. App. 1976).

623. TEX. PEN. CODE ANN. § 31.03(b)(1) (Vernon 1974).

624. Id. § 31.03(b)(2) (formerly known as “receiving stolen property”).

625. Id. § 22.02(a)(2).


627. TEX. PEN. CODE ANN. § 38.03(a) (Vernon 1974).

628. TEX. CODE CRIM. PROC. ANN. art. 37.09(1) (Vernon Supp. 1978) provides: "An offense is a lesser included offense if: (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." The court found that the facts required to show a violation of § 38.03 were the same ones necessary to demonstrate the commission of aggravated assault. 548 S.W.2d at 699.

629. The court held that the issue was raised even though the arresting officer did not advise the defendant that he was making an arrest. It was sufficient that the jury could have reasonably believed that an arrest was being attempted; in this case the police officer testified that he grabbed the defendant and attempted "to make an apprehension for disorderly conduct." 548 S.W.2d at 700.


632. 147 Tex. Crim. 164, 179 S.W.2d 305 (1943).