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Criminal Law

Kerry P. FitzGerald

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CRIMINAL LAW

*Kerry P. FitzGerald**

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* Kerry P. FitzGerald, private practice, Dallas, Texas. B.A., Southern Methodist University, 1963; L.L.B., University of Texas Law School, 1966.

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I. INTRODUCTION

These materials will highlight the most significant recent judicial decisions and the 1997 legislative provisions which amend the Texas Penal Code (Penal Code). A scattering of judicial decisions is included, but the emphasis is on the legislation itself.

II. GENERAL PROVISIONS UNDER CHAPTER 1

This section discusses several recent decisions dealing with the general provisions set out in chapter 1 of the Penal Code. In *Morton v. State*,¹ the appellant contested the jurisdiction of the court in a case involving a false statement on a license application in violation of the Texas Racing Act. The appellant argued that the provisions of the Texas Racing Act were found in article 179e of the Texas Revised Civil Statutes² and not in the Penal Code, and therefore, his conduct could not constitute a criminal offense. The court rejected the argument, holding that "section 1.03 of the Texas Penal Code provides that any conduct which is defined in a statute as an offense constitutes an offense under the meaning of the penal code."³

In *Hall v. State*,⁴ the appellant claimed the evidence was insufficient to support a jury's finding of the use of a deadly weapon, after he pled guilty to involuntary manslaughter. The court held that evidence that the appellant had consumed a substantial quantity of beer, driven his truck seventy miles per hour in a forty mile per hour speed zone, run a stop sign and collided with another vehicle, killing one of the occupants, constituted ample proof that he was acting in a reckless manner.⁵ The court also held that appellant's "truck, as used by him, became capable of causing death or serious bodily injury in the manner of its use," within the

1. 935 S.W.2d 904 (Tex. App.—San Antonio 1996, no pet.).

2. See TEX. REV. CIV. STAT. ANN. art. 179e, § 14.06 (Vernon Supp. 1997).

3. *Morton*, 935 S.W.2d at 906 (citing TEX. PEN. CODE ANN. § 1.03 (Vernon 1994)).

4. 935 S.W.2d 852 (Tex. App.—San Antonio 1996, no pet.).

5. See *id.* at 854.

terms of section 1.07(a) of the Texas Penal Code.⁶

In *State v. Nailor*,⁷ the State appealed the trial court's order granting a motion to suppress in a driving while intoxicated (DWI) prosecution. The evidence showed that a Holiday Inn security officer observed the defendant motorist driving erratically in the motel's parking garage. On one occasion, the defendant almost hit an employee. A police officer called to the scene observed the defendant outside of his vehicle in the parking lot, administered several sobriety tests, and arrested the defendant for DWI. The trial court granted the motion to suppress, finding that the Holiday Inn parking garage was not a public place.⁸ The Court of Appeals, relying on the definition of a public place under section 1.07(a)(40) of the Texas Penal Code, held that the garage was a public place as contemplated by the law.⁹ The court stated that the fact that the lot was "wide and open" as opposed to being enclosed was irrelevant.¹⁰ The court also stated that a place can be public even though an entrance fee is required.¹¹

III. MULTIPLE PROSECUTIONS UNDER CHAPTER 3

Chapter 3 of the Penal Code was modified in two significant ways. First, the courts can now run sentences concurrently or consecutively in sexual assault cases. Second, the defendant's right to severance was restricted.

Section 3.03(b) of the Penal Code¹² was amended to expand upon the types of offenses for which a court can run sentences concurrently or consecutively. Originally, the subsection applied to convictions only under

6. *Id.* (citing TEX. PEN. CODE ANN. § 1.07(a)(17)(B)(Vernon 1994)).

7. 949 S.W.2d 357 (Tex. App.—San Antonio 1997, no pet. h.).

8. *See id.* at 358.

9. *See id.* at 359.

10. *See id.*

11. *See id.*

12. Section 3.03(b) provides as follows:

(b) If the accused is found guilty of more than one offense arising out of the same criminal episode, the sentences may run concurrently or consecutively if each sentence is for a conviction of:

(1) an offense:

(A) under Section 49.08; or

(B) for which a plea agreement was reached in a case in which the accused was charged with more than one offense under Section 49.08; or

(2) an offense:

(A) under Section 21.11, 22.011, 22.021, 25.02, or 43.25 committed against a victim younger than 17 years of age at the time of the commission of the offense regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of more than one section; or

(B) for which a plea agreement was reached in a case in which the accused was charged with more than one offense listed in Paragraph (A) committed against a victim younger than 17 years of age at the time of the commission of the offense regardless of whether the accused is charged with violations of the same section more than once or is charged with violations of more than one section.

TEX. PEN. CODE ANN. § 3.03(b) (Vernon Supp. 1998).

section 49.08 of the Penal Code. Under the amendment, convictions for sexual assaults under sections 21.11 (Indecency With a Child),¹³ 22.011 (Sexual Assault),¹⁴ 22.021 (Aggravated Sexual Assault),¹⁵ 25.02 (Prohibited Sexual Conduct),¹⁶ and 43.25 (Sexual Performance by a Child),¹⁷ or

13. Section 21.11, Indecency with a Child, provides as follows:

(a) A person commits an offense if, with a child younger than 17 years and not his spouse, whether the child is of the same or opposite sex, he:

(1) engages in sexual contact with the child; or

(2) exposes his anus or any part of his genitals, knowing the child is present, with intent to arouse or gratify the sexual desire of any person.

(b) It is an affirmative defense to prosecution under this section that the actor:

(1) was not more than three years older than the victim and of the opposite sex; and

(2) did not use duress, force, or a threat against the victim at the time of the offense.

(c) An offense under Subsection (a)(1) is a felony of the second degree and an offense under Subsection (a)(2) is a felony of the third degree.

Id. § 21.11 (Vernon 1994).

14. *See infra* notes 51-54.

15. *See infra* note 55 and accompanying text.

16. Section 25.02 provides as follows:

(a) An individual commits an offense if he engages in sexual intercourse or deviate sexual intercourse with a person he knows to be, without regard to legitimacy:

(1) his ancestor or descendant by blood or adoption;

(2) his stepchild or stepparent, while the marriage creating that relationship exists;

(3) his parent's brother or sister of the whole or half blood;

(4) his brother or sister of the whole or half blood or by adoption; or

(5) the children of his brother or sister of the whole or half blood or

by adoption.

(b) For purposes of this section:

(1) "Deviate sexual intercourse" means any contact between the genitals of one person and the mouth or anus of another person with intent to arouse or gratify the sexual desire of any person.

(2) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

(c) An offense under this section is a felony of the third degree.

TEX. PEN. CODE ANN. § 25.02 (Vernon 1994).

17. Section 43.25 provides, in part, as follows:

(a) In this section:

(1) "Sexual performance" means any performance or part thereof that includes sexual conduct by a child younger than 18 years of age.

(2) "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.

(3) "Performance" means any play, motion picture, photograph, dance, or other visual representation that can be exhibited before an audience of one or more persons.

(4) "Produce" with respect to a sexual performance includes any conduct that directly contributes to the creation or manufacture of the sexual performance.

(5) "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do any of the above.

(6) "Simulated" means the explicit depiction of sexual conduct that creates the appearance of actual sexual conduct and during which a person

the same offenses for which a plea agreement was reached will now subject the defendant to either concurrent or consecutive sentences at the discretion of the court.

Section 3.04, governing severance, has been amended to provide that a defendant's right to severance under section 3.04 of the Penal Code does not apply to a prosecution for offenses described under section 3.03(b)(2) "unless the court determines that the defendant or the state would be unfairly prejudiced by a joinder of offenses, in which event the judge may order the offenses to be tried separately or may order other relief as justice requires."¹⁸

Two recent decisions have discussed these "multiple prosecution" provisions.

In *Gaffney v. State*,¹⁹ the defendant was tried simultaneously on four indictments involving robbery and aggravated kidnapping on the first victim and aggravated robbery and aggravated kidnapping on the second victim. The appellate court found the evidence factually insufficient as to an aggravated kidnapping conviction.²⁰ On motion for rehearing, the defendant complained that the appellate court should have granted new trials in all of the cases when the court reversed any one of the charges for which he was simultaneously tried and convicted.²¹ The appellate court held that if the defendant had wished to preclude the jury from hearing the evidence in the other offenses, he had the right under section 3.04 of the Penal Code to have those offenses severed and tried separately and that when he failed to object to the consolidation of indictments, he con-

engaging in the conduct exhibits any uncovered portion of the breasts, genitals, or buttocks.

(7) "Deviate sexual intercourse" has the meaning defined by Section 43.01.

(b) A person commits an offense if, knowing the character and content thereof, he employs, authorizes, or induces a child younger than 18 years of age to engage in sexual conduct or a sexual performance. A parent or legal guardian or custodian of a child younger than 18 years of age commits an offense if he consents to the participation by the child in a sexual performance.

(c) An offense under Subsection (b) is a felony of the second degree.

(d) A person commits an offense if, knowing the character and content of the material, he produces, directs, or promotes a performance that includes sexual conduct by a child younger than 18 years of age.

(e) An offense under Subsection (d) is a felony of the third degree.

(f) It is an affirmative defense to a prosecution under this section that:

(1) the defendant, in good faith, reasonably believed that the child who engaged in the sexual conduct was 18 years of age or older;

(2) the defendant was the spouse of the child at the time of the offense;

(3) the conduct was for a bona fide educational, medical, psychological, psychiatric, judicial, law enforcement, or legislative purpose; or

(4) the defendant is not more than two years older than the child.

Id. § 43.25(a)-(f).

18. TEX. PEN. CODE ANN. § 3.04(c) (Vernon Supp. 1998).

19. 940 S.W.2d 682 (Tex. App.—Texarkana, 1996, pet. ref'd).

20. *See id.* at 686.

21. *See id.*

sented to a single trial.²²

In *State v. Weaver*,²³ the State appealed the trial court's severance of twenty-four complainants from a theft indictment which alleged that the defendant intended to deprive thirty-two complainants of their property pursuant to a single scheme or continuing course of conduct, which involved snail farming. The court reviewed the provisions of section 31.09 of the Penal Code relevant to aggregation in a theft case and ultimately held that only one theft offense was alleged, and that Penal Code section 3.02 did not apply, and therefore the trial court's order severing the majority of the complainants from the case, which ultimately reduced the charge to a state jail felony, was improper.²⁴

IV. CHAPTER 9—JUSTIFICATION EXCLUDING CRIMINAL RESPONSIBILITY

Prior section 9.01 of the Penal Code defined the terms "custody" and "escape."²⁵ The amendments to section 9.01(1) and (2) eliminated these definitions and adopted the definitions assigned by section 38.01 of the Penal Code,²⁶ thereby considerably expanding the meaning of both terms.

In *Rivera v. State*,²⁷ a case involving a prosecution for possession of a deadly weapon in a penal institution under section 46.10 of the Penal Code, the court rejected the State's argument that the defense of neces-

22. *See id.*

23. 945 S.W.2d 334 (Tex. App.—Houston [1st Dist.] 1997, pet. granted).

24. *See id.* at 335-36. *See also* *Crum v. State*, 946 S.W.2d 349 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd).

25. Prior section 9.01(1) and (2) provided as follows:

(1) "Custody" means:

(A) Under arrest by a peace officer; or

(B) under restraint by a public servant pursuant to an order of a court.

(2) "Escape" means unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period, but does not include a violation of conditions of community supervision or parole, or following leave that is part of an intermittent sentence.

Act effective Jan. 1, 1974, 63rd Leg., R.S., ch. 399, § 1, 1973 Gen. Laws 883 (amended 1993) (current version at TEX. PEN. CODE ANN. § 9.01 (Vernon Supp. 1998)).

26. Section 38.01 (definitions) provides as follows:

In this chapter:

(1) "Custody" means:

(A) under arrest by a peace officer or under restraint by a public servant pursuant to an order of a court of this state or another state of the United States; or

(B) under restraint by an agent or employee of a facility that is operated by or under contract with the United States and that confines persons arrested for, charged with, or convicted of criminal offenses.

(2) "Escape" means unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period or leave that is part of an intermittent sentence, but does not include a violation of conditions of community supervision or parole other than conditions that impose a period of confinement in a secure correctional facility.

TEX. PEN. CODE ANN. § 38.01(1)-(2) (Vernon Supp. 1998).

27. 948 S.W.2d 365, 370 (Tex. App.—Beaumont 1997, no pet. h.).

sity was not available to individuals charged under section 46.10. The court noted that even the prison policy prohibited the correctional officer in this case from intervening in the disturbance.²⁸ The court concluded that under circumstances in which an inmate is attacked by another inmate, "an inmate would naturally find it 'immediately necessary' to grab any implement available to assist him in what is apparently the daily prison ritual of survival of the fittest."²⁹ Thus, when properly raised by the evidence, the defense of necessity is available to a defendant in a prosecution under section 46.10.

V. PUNISHMENTS UNDER TITLE 3, CHAPTER 12

The Texas Legislature made two substantial amendments to the punishment provisions in chapter 12. First, general changes were made to provisions governing penalties for repeat felony offenders. Second, harsher penalties are now available for crimes against protected groups.

Section 12.42, Penalties for Repeat and Habitual Felony Offenders, still provides that if it is shown at a first-degree felony trial that the defendant has previously been convicted of a felony, the punishment range will be confinement for life, or for any term of not less than fifteen nor more than ninety-nine years and an optional fine up to \$10,000.³⁰

In addition, as amended, section 12.42(c)(2) imposes a mandatory life sentence if the defendant is convicted of one of a number of specified offenses and the defendant has previously been convicted of an offense under specified provisions of the Penal Code or similar criminal laws of sister states.³¹ This section visits harsh penalties on sexual offenders and

28. *See id.* at 367.

29. *Id.* at 370.

30. *See* TEX. PEN. CODE ANN. § 12.42(c)(1) (Vernon Supp. 1998).

31. Section 12.42(c)(2) provides as follows:

(c)(2) A defendant shall be punished by imprisonment in the institutional division for life if:

(A) the defendant is convicted of an offense:

(i) under Section 22.021 or 22.011, Penal Code;

(ii) under Section 20.04(a)(4), Penal Code, if the defendant committed the offense with the intent to violate or abuse the victim sexually; or

(iii) under Section 30.02, Penal Code, punishable under Subsection (d) of that section, if the defendant committed the offense with the intent to commit a felony described by Subparagraph (i) or (ii) or a felony under Section 21.11 or 22.011, Penal Code; and

(B) the defendant has been previously convicted of an offense:

(i) under Section 43.25 or 43.26, Penal Code;

(ii) under Section 21.11, 22.011, 22.021, or 25.02, Penal Code;

(iii) under Section 20.04(a)(4), Penal Code, if the defendant committed the offense with the intent to violate or abuse the victim sexually;

(iv) under Section 30.02, Penal Code, punishable under Subsection (d) of that section, if the defendant committed the offense with the intent to commit a felony described by Subparagraph (ii) or (iii); or

(v) under the laws of another state containing elements that are substantially similar to the elements of an offense listed in Subparagraph (i), (ii), (iii), or (iv).

TEX. PEN. CODE ANN. § 12.42(c)(2) (Vernon Supp. 1998).

child molesters. Most of these new provisions were transferred from subsection (d) of this same section.

Newly amended section 12.42(d) now comprises one paragraph, which provides that "[if] it is shown on the trial of a felony offense other than a state jail felony . . . that the defendant has previously been convicted of two felony offenses, and the second previous felony conviction [was] for an offense that occurred subsequent to the first previous conviction having become final," the punishment range is life, or any term of years between twenty-five and ninety-nine.³²

The Legislature also added new section 12.42(g). This section provides that "a defendant has been previously convicted of an offense under Subsection (d)(2)(B) if the defendant was [found] guilty of the offense or [pled guilty or no contest] in return for a grant of deferred adjudication."³³ The provision seeks to dispense with the niceties differentiating between prison sentences, probated sentences and deferred adjudication. Whether this subsection is valid or not,³⁴ it certainly signals the temperament of the Legislature which favors stringent enhancement of punishments.

Section 12.47 now provides that "if the judge or jury [depending upon which is setting punishment], makes an affirmative finding [that the defendant intentionally selected the victim primarily because of the defendant's bias or prejudice against a group under article 42.014 of the Code of Criminal Procedure,] in the punishment phase of the trial of an offense other than a first degree felony or a Class A misdemeanor, the punishment for the offense is increased to the punishment prescribed for the next higher category of offense."³⁵ In the case of a Class A misdemeanor, the minimum prison term is increased to 180 days.³⁶

VI. CRIMINAL INSTRUMENTS AND INTERCEPTION OF WIRE OR ORAL COMMUNICATION UNDER CHAPTER 16

The Legislature changed laws governing offenses dealing with the interception of wire or oral communication. Chapter 16 was amended both to expand the proscribed conduct and to provide new affirmative defenses for employees of communication carriers.

Section 16.03 has been amended to expand the proscribed conduct involving interception of wire or oral communication.³⁷ Now a person violates the law if the person "knowingly installs or uses a pen register or trap and trace device to record or decode electronic or other impulses for

32. *Id.* § 12.42(d).

33. *Id.* § 12.42(g).

34. This section appears to have referred to old subsection (d)(2)(B) without recognizing that the language was transferred to subsection (c)(2).

35. TEX. PEN. CODE ANN. § 12.47 (Vernon Supp. 1998). *See also* TEX. CODE CRIM. PROC. ANN. art. 42.014 (Vernon Supp. 1998).

36. *See id.*

37. *See* TEX. PEN. CODE ANN. § 16.03(a) (Vernon Supp. 1998).

the purpose of identifying telephone numbers dialed or otherwise transmitted on a telephone line.”³⁸

Previously, an exception to such a violation was a court order obtained under article 18.21 of the Code of Criminal Procedure.³⁹ The amendment⁴⁰ provides an affirmative defense to prosecution for officers, employees or agents of communications common carriers. The defense is available for such actors who are protecting property of the carrier or are in the course of cooperating with law enforcement.⁴¹ Similar protection is available to agents of “lawful enterprises” when protection of property is part of a service offering of the enterprise that does not involve gathering of information for law enforcement (unless it is related to the theft of communication or information services offered by the enterprise).⁴² The thrust of the amendment is to place the burden of proof upon the actor, not upon the prosecution.

The amendment to section 16.04 likewise makes it an affirmative defense to prosecution that certain conduct was authorized by a provider, user, or addressee or intended recipient of the wire or electronic communication.⁴³ The amendment eliminates the exception and inserts an affirmative defense.⁴⁴

38. *Id.*

39. Prior section 16.03(a) provided as follows:

(a) Except as authorized by a court order obtained under Article 18.21, Code of Criminal Procedure, or in an emergency under the circumstances described and permitted under that article, a person commits an offense if he knowingly installs or utilizes a pen register or trap and trace device to record telephone numbers dialed from or to a telephone instrument.

TEX. PEN. CODE ANN. § 16.03(a) (Vernon 1994).

40. Section 16.03(c) now provides as follows:

(c) It is an affirmative defense to prosecution under Subsection (a) that the actor is:

(1) an officer, employee, or agent of a communications common carrier and the actor installs or uses a device or equipment to record a number dialed from or to a telephone instrument in the normal course of business of the carrier for purposes of:

(A) protecting property or services provided by the carrier; or

(B) assisting another who the actor reasonably believes to be a peace officer authorized to install or use a pen register or trap and trace device under Article 18.21, Code of Criminal Procedure;

(2) an officer, employee, or agent of a lawful enterprise and the actor installs or uses a device or equipment while engaged in an activity that:

(A) is a necessary incident to the rendition of service or to the protection of property of or services provided by the enterprise; and

(B) is not made for the purpose of gathering information for a law enforcement agency or private investigative agency, other than information related to the theft of communication or information services provided by the enterprise; or

(3) a person authorized to install or use a pen register or trap and trace device under Article 18.21, Code of Criminal Procedure.

TEX. PEN. CODE ANN. § 16.03(c) (Vernon Supp. 1998).

41. *See id.* § 16.03(c)(1).

42. *See id.* § 16.03(c)(2).

43. *See id.* § 16.04(e) (Vernon Supp. 1998).

44. *See id.*

The amendment to section 16.05⁴⁵ makes it a criminal offense for electronic communications service providers to knowingly⁴⁶ divulge the contents of the communication to someone other than the intended recipient. Once again, the amendment provides an affirmative defense for those authorized by federal or state law, or “to a person employed, authorized, or whose facilities are used to forward the communication,” or “to a law enforcement agency if the contents reasonably appear to involve the commission of a crime.”⁴⁷ A violation of section 16.05 that “involves a scrambled or encrypted radio communication is a state jail felony”⁴⁸ unless the crime is “committed for a tortious or illegal purpose or to gain a benefit,” in which event the offense is a misdemeanor.⁴⁹

VII. KIDNAPPING AND UNLAWFUL RESTRAINT UNDER CHAPTER 20

The heading of chapter 20 has been changed from “Kidnapping and False Imprisonment” to “Kidnapping and Unlawful Restraint.”

Section 20.02, which proscribes unlawful restraint, changes the offense from an automatic felony of the third degree to a Class B Misdemeanor “unless the person restrained was a child younger than 14 years of age, in which event the crime is a Class A misdemeanor; or [unless] the actor recklessly exposed the victim to a substantial risk of serious bodily injury, in which event the crime is a [third-degree felony].”⁵⁰

VIII. ASSAULTIVE OFFENSES UNDER CHAPTER 22

The modifications to section 22.01 were in the nature of housekeeping efforts to clean up the organizational context rather than to change the substance.

The amendment to section 22.011 added a provision that criminalizes conduct when a person intentionally or knowingly “causes the mouth of a child to contact the anus or sexual organ of another person.”⁵¹

45. *See id.* § 16.05(b).

46. This provision is limited to the culpable mental state of “knowingly” alone.

47. TEX. PEN. CODE ANN. § 16.05(c) (Vernon Supp. 1998).

48. *Id.* § 16.05(d).

49. Section 16.05(e) provides as follows:

(e) If committed for a tortious or illegal purpose or to gain a benefit, an offense under Subsection (b) that involves a radio communication that is not scrambled or encrypted:

(1) is a Class A misdemeanor if the communication is not a public land mobile radio service communication or a paging service communication; or

(2) is a Class C misdemeanor if the communication is a public land mobile radio service communication or a paging service communication.

Id. § 16.05(e).

50. *Id.* § 20.02(c).

51. Section 22.011(a) provides as follows:

(a) A person commits an offense if the person:
(1) intentionally or knowingly:

The amendment to section 22.011(b)⁵² expanded the instances in which a sexual assault under subsection (a)(1) is considered “without the consent of the other person” to include not only an actor who is a mental health services provider but also a health care services provider.⁵³

Section 22.011(c)(3) was added to define the meaning of “health care services provider” to include a physician, a chiropractor, a licensed vocational nurse, a physical therapist, a physician assistant, and a registered

(A) causes the penetration of the anus or female sexual organ of another person by any means, without that person’s consent;

(B) causes the penetration of the mouth of another person by the sexual organ of the actor without that person’s consent; or

(C) causes the sexual organ of another person, without that person’s consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or

(2) intentionally or knowingly:

(A) causes the penetration of the anus or female sexual organ of a child by any means;

(B) causes the penetration of the mouth of a child by the sexual organ of the actor;

(C) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;

(D) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or

(E) *causes the mouth of a child to contact the anus or sexual organ of another person, including the actor.*

Id. § 22.011(a) (emphasis added).

52. Section 22.011(b) provides as follows:

(b) A sexual assault under Subsection (a)(1) is without the consent of the other person if:

(1) the actor compels the other person to submit or participate by the use of physical force or violence;

(2) the actor compels the other person to submit or participate by threatening to use force or violence against the other person, and the other person believes that the actor has the present ability to execute the threat;

(3) the other person has not consented and the actor knows the other person is unconscious or physically unable to resist;

(4) the actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it;

(5) the other person has not consented and the actor knows the other person is unaware that the sexual assault is occurring;

(6) the actor has intentionally impaired the other person’s power to appraise or control the other person’s conduct by administering any substance without the other person’s knowledge;

(7) the actor compels the other person to submit or participate by threatening to use force or violence against any person, and the other person believes that the actor has the ability to execute the threat;

(8) the actor is a public servant who coerces the other person to submit or participate;

(9) *the actor is a mental health services provider or a health care services provider who causes the other person, who is a patient or former patient of the actor, to submit or participate by exploiting the other person’s emotional dependency on the actor; or*

(10) the actor is a clergyman who causes the other person to submit or participate by exploiting the other person’s emotional dependency on the clergyman in the clergyman’s professional character as spiritual adviser.

Id. § 22.011(b) (emphasis added).

53. See *id.* § 22.011(b)(9).

nurse or an advanced practice nurse designated under various licensing provisions.⁵⁴

Section 22.021 was amended to add the provision that a person commits an offense if the person intentionally or knowingly "causes the mouth of a child to contact the anus or sexual organ of another person, including the actor."⁵⁵ Section 22.041 added as a defense subsection (g),⁵⁶ which provides that

[it is now a] defense to prosecution under subsection (c) [which proscribes an act or omission which places a child younger than 15 years in imminent danger of death, bodily injury or physical or mental impairment] that the act or omission enables the child to practice for or participate in an organized athletic event and that appropriate safety

54. Section 22.011(c)(3) provides as follows:

(3) "Health care services provider" means:

(A) a physician licensed under the Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes);

(B) a chiropractor licensed under Chapter 94, Acts of the 51st Legislature, Regular Session, 1949 (Article 4512b, Vernon's Texas Civil Statutes);

(C) a licensed vocational nurse licensed under Chapter 118, Acts of the 52nd Legislature, 1951 (Article 4528c, Vernon's Texas Civil Statutes);

(D) a physical therapist licensed under Chapter 836, Acts of the 62nd Legislature, Regular Session, 1971 (Article 4512e, Vernon's Texas Civil Statutes);

(E) a physician assistant licensed under the Physician Assistant Licensing Act (Article 4495b-1, Vernon's Texas Civil Statutes); or

(F) a registered nurse or an advanced practice nurse licensed under Chapter 7, Title 71, Revised Statutes.

Id. § 22.011(c)(3).

55. *Id.* § 22.021.

56. Section 22.041 provides as follows:

(a) In this section, "abandon" means to leave a child in any place without providing reasonable and necessary care for the child, under circumstances under which no reasonable, similarly situated adult would leave a child of that age and ability.

(b) A person commits an offense if, having custody, care, or control of a child younger than 15 years, he intentionally abandons the child in any place under circumstances that expose the child to an unreasonable risk of harm.

(c) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of death, bodily injury, or physical or mental impairment.

(d) Except as provided by Subsection (e), an offense under Subsection (b) is:

(1) a state jail felony if the actor abandoned the child with intent to return for the child; or

(2) a felony of the third degree if the actor abandoned the child without intent to return for the child.

(e) An offense under Subsection (b) is a felony of the second degree if the actor abandons the child under circumstances that a reasonable person would believe would place the child in imminent danger of death, bodily injury, or physical or mental impairment.

(f) An offense under Subsection (c) is a state jail felony.

(g) *It is a defense to prosecution under Subsection (c) that the act or omission enables the child to practice for or participate in an organized athletic event and that appropriate safety equipment and procedures are employed in the event.*

TEX. PEN. CODE ANN. § 22.041 (Vernon Supp. 1998) (emphasis added).

equipment and procedures are employed in the event.⁵⁷

Three cases recently discussed chapter 22 offenses in more detail.

In *Mateo v. State*,⁵⁸ the court reviewed whether the State needs to prove that the defendant knew the age of a child in a trial for aggravated assault of a child. In *Mateo*, the appellant pled guilty to an indictment alleging aggravated sexual assault of a child. Pursuant to a plea bargain, punishment was set at five years confinement. The appellant preserved his right to appeal the court's order overruling his motion to quash the indictment.⁵⁹

The indictment alleged that the appellant "intentionally and knowingly cause[d] his sex organ to contact and penetrate the female sex organ of [the complainant] and the said [complainant] was then and there a child younger than 14 years of age and not the spouse of the said [appellant]." ⁶⁰ The appellant complained that the indictment did not allege that the appellant knew the complainant was a child. Appellant conceded it was not necessary to allege or prove that he knew the child was younger than 14.⁶¹

The Penal Code provides that a person commits an aggravated sexual assault if he intentionally or knowingly "causes the penetration of the . . . female sexual organ of a child by any means" or "causes the sexual organ of a child to contact [the] . . . sexual organ of another person, including the actor," and if "the victim is younger than 14 years of age."⁶²

The court initially observed that the Legislature rejected a proposed mistake of fact defense to prosecutions based on sexual activity with children when it passed the Penal Code in 1973.⁶³ The court also recognized that in 1983 the Legislature determined that offenses such as rape, aggravated rape, rape of a child, sexual abuse, aggravated sexual abuse and sexual abuse of a child were assaultive, not sexual, in nature and thus their classification as sexual offenses only confused the situation.⁶⁴ The statutes were, therefore, repealed and the legislature created the offenses of sexual assault and aggravated sexual assault.⁶⁵ Based upon the legislative history of these Penal Code sections and the decisions construing them, the court held that the State need not prove the defendant's knowledge of the complainant's age in a prosecution involving an adult's sexual conduct with a child.⁶⁶

In *Herbst v. State*,⁶⁷ the appellant challenged the felony conviction for

57. *Id.* § 22.041(g).

58. 935 S.W.2d 512 (Tex. App.—Austin 1996, no pet.).

59. *See id.* at 513 n.2.

60. *Id.*

61. *See id.*

62. TEX. PEN. CODE ANN. § 22.021(a)(1)(B)(i), (a)(1)(B)(iii), (a)(2)(B) (Vernon Supp. 1998).

63. *See Mateo*, 935 S.W.2d at 513.

64. *See id.* at 514.

65. *See id.*

66. *See id.*

67. 941 S.W.2d 371, 372 (Tex. App.—Beaumont 1997, no pet.).

endangering a child under Penal Code section 22.041(b), arguing that the evidence was legally insufficient to prove the appellant abandoned the child under circumstances that exposed the child to an unreasonable risk of harm. The facts showed that the appellant placed the three week old baby on the side of a well-traveled, but very dark roadway at approximately 10:00 p.m. The baby was strapped into an infant car seat and clothed in a dress and diaper. When the baby was subsequently taken to the hospital, the child had many insect bites covering exposed areas of the body. The court found the evidence sufficient, emphasizing that the express language of section 22.041 requires the appellate court to review the circumstances through the eyes of a "reasonable, similarly situated adult" and not based upon "any subjective intent or knowledge on the part of appellant."⁶⁸

In *Cook v. State*,⁶⁹ the court reviewed the legal sufficiency of the evidence to prove terroristic threats under section 22.01 of the Penal Code. The appellant argued that the telephone threats would not support a finding that the appellant intended to place anyone in fear of "imminent serious bodily injury."⁷⁰ The appellant argued that because his messages were conditional threats of future harm and were left on the victim's voice mail when the victim was out of town, they could not be considered imminent.

The court, in analyzing the term "imminent serious bodily injury," emphasized that the conduct becomes criminal when the defendant makes a threat of violence with the intent to place the victim in fear of imminent serious bodily injury.⁷¹ It is not necessary that the victim or anyone else be actually placed in fear of imminent serious bodily injury. It is sufficient if the defendant, by his threat, "sought as a desired reaction, to place a person in fear of imminent serious bodily injury."⁷² The court found that the evidence supported the judgment of conviction.⁷³

IX. OFFENSES AGAINST THE FAMILY UNDER CHAPTER 25

Several modifications were made to chapter 25, which governs offenses against family.

Section 25.07, by modification, eliminated subsection (a)(4) which proscribed conduct directed specifically toward a person who was a member of the family or household including following the person that was reasonably likely to harass or annoy.⁷⁴ The penalty provisions of section

68. *Id.* at 373.

69. 940 S.W.2d 344 (Tex. App.—Amarillo 1997, pet. ref'd).

70. *Id.* at 347.

71. *See id.*

72. *Id.*

73. *See id.* at 348.

74. Former § 25.07(a)(4) made it an offense to engage "in conduct directed specifically toward a person who is a member of the family or household, including following the person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass that person." Act effective Sept. 1, 1983, 68th Leg. R.S., ch. 631, 1983 Tex. Gen. Laws 4049, (amended 1997) (current version at TEX. PEN. CODE ANN. § 25.07 (Vernon Supp. 1998)).

25.07 were also altered so that an offense under this section is a Class A misdemeanor unless it is shown at trial that the defendant was convicted two or more times or had violated the protective order by committing assault or stalking, in which event the offense is a third-degree felony, not a state jail felony.⁷⁵

Section 25.09 of the Penal Code is an entirely new criminal offense. This section provides that “[a] person commits an offense if the person advertises in the public media that the person will place a child for adoption or will provide or obtain a child for adoption.”⁷⁶ The provision is not applicable to a licensed child-placing agency so identified in the advertisement.⁷⁷ This is a Class A misdemeanor “unless the person has been convicted previously under this section, in which event the offense is a felony of the third degree.”⁷⁸

X. ARSON, CRIMINAL MISCHIEF AND OTHER PROPERTY DAMAGE OR DESTRUCTION UNDER CHAPTER 28

Section 28.02 of the Penal Code governing arson was amended as to punishment only, adding a provision making the offense a first-degree felony if it is shown that “the actor committed the offense knowing that the property intended to be damaged or destroyed was a place of worship.”⁷⁹

Another section that has been amended as to punishment is section 28.03(b).⁸⁰ It provides that it is “a Class C misdemeanor if . . . the amount of the pecuniary loss is less than \$50” (changed from \$20).⁸¹ It is “a Class B misdemeanor if the amount of the pecuniary loss is \$50 or more but less than \$500.”⁸² It is “a state jail felony if the amount of pecuniary loss is . . . \$1,500 or more but less than \$20,000 or less than \$1,500 if the property damaged or destroyed is a habitation and if the damage or destruction is caused by a firearm or explosive weapon.”⁸³ New subsection (g) provides that the terms “firearm” and “explosive weapon” have the meanings assigned by section 46.01 of the Penal Code.⁸⁴

75. Section 25.07(g) provides as follows:

(g) An offense under this section is a Class A misdemeanor unless it is shown on the trial of the offense that the defendant has previously been convicted under this section two or more times or has violated the protective order by committing an assault or the offense of stalking, in which event the offense is a third degree felony.

TEX. PEN. CODE ANN. § 25.07 (Vernon Supp. 1998).

76. *Id.* § 25.09(a).

77. *See id.* § 25.09(b).

78. *Id.* § 25.09(c).

79. *Id.* § 28.02(d)(2).

80. *See id.* § 28.03(b)(4).

81. *Id.* § 28.03(b)(1)(A).

82. *Id.* § 28.03(b)(2).

83. *Id.* § 28.03(4)(A)-(B).

84. *See id.* § 28.03(g).

Newly created section 28.08 defines the offense of graffiti.⁸⁵ This section criminalizes conduct in which a person intentionally or knowingly makes markings on the tangible property of the owner with aerosol paint or an indelible marker and without the owner's consent.⁸⁶ The punishment range is from a Class B misdemeanor to a first-degree felony depending upon the amount of loss.⁸⁷ The section addresses aggregation of value "pursuant to one scheme or continuing course of conduct."⁸⁸ The offense is an automatic state jail felony if the marking is made on one of several different types of places including a place of worship or human burial.⁸⁹

XI. ROBBERY UNDER CHAPTER 29

In *Hernandez v. State*,⁹⁰ the court reviewed the sufficiency of the evidence to support the conviction for aggravated robbery by examining the distinctions between serious bodily injury and bodily injury. A person commits aggravated robbery if he causes serious bodily injury to another in the course of a robbery.⁹¹ The appellant was charged with stabbing the victim in the abdomen area with a knife.

The court first reviewed the applicable definitions. Serious bodily injury means an "injury that creates a substantial risk of death or that

85. *See id.* § 28.08(a).

86. *See id.*

87. Section 28.08(b) provides as follows:

(b) Except as provided by Subsection (d), an offense under this section is:

(1) a Class B misdemeanor if the amount of pecuniary loss is less than \$500;

(2) a Class A misdemeanor if the amount of pecuniary loss is \$500 or more but less than \$1,500;

(3) a state jail felony if the amount of pecuniary loss is \$1,500 or more but less than \$20,000;

(4) a felony of the third degree if the amount of pecuniary loss is \$20,000 or more but less than \$100,000;

(5) a felony of the second degree if the amount of pecuniary loss is \$100,000 or more but less than \$200,000; or

(6) a felony of the first degree if the amount of pecuniary loss is \$200,000 or more.

Id. § 28.08(b).

88. *Id.* § 28.08(c). The full subsection provides as follows:

When more than one item of tangible property, belonging to one or more owners, is marked in violation of this section pursuant to one scheme or continuing course of conduct, the conduct may be considered as one offense, and the amounts of pecuniary loss to property resulting from the marking of the property may be aggregated in determining the grade of the offense.

Id.

89. *See id.* 28.08(d). The full subsection provides as follows:

An offense under this section is a state jail felony if the marking is made on a place of worship or human burial, a public monument, or a community center that provides medical, social, or educational programs and the amount of the pecuniary loss to real property or to tangible personal property is less than \$20,000.

Id.

90. 946 S.W.2d 108 (Tex. App.—El Paso 1997, no pet.).

91. *See* TEX. PEN. CODE ANN. § 29.03(a)(1) (Vernon 1994).

causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."⁹² Bodily injury means "physical pain, illness, or any impairment of physical condition."⁹³ Whether an injury qualifies as serious bodily injury must be examined on a case by case basis.⁹⁴ A medical expert testified that the wound potentially could have been life threatening if other co-existing conditions were present, but none were in this case. The court concluded that bodily injury cannot be elevated to serious bodily injury "by postulating potential complications which are not in evidence."⁹⁵ On the basis of the testimony of the expert and the victim that the victim was stabbed, underwent surgery, and was ordered by his doctor to stay home from work for six weeks, the court found that the record contained no testimony that the victim's injury created a substantial risk of death.⁹⁶

Further, the court rejected the State's argument that the victim's one-inch laceration to the abdomen constituted evidence of a serious permanent disfigurement.⁹⁷ The court emphasized that there must be evidence of "some significant cosmetic deformity caused by the injury," and the record was void of any such evidence.⁹⁸ In addition, the court found no evidence of protracted impairment of a member or organ, or any evidence that the victim was restricted in any particular physical activity.⁹⁹ The period of recuperation was found insufficient to elevate bodily injury to serious bodily injury.¹⁰⁰

XII. BURGLARY AND CRIMINAL TRESPASS UNDER CHAPTER 30

Section 30.05, of the Penal Code which governs the offense of criminal trespass, was amended to add another type of notice in the form of "the placement of identifying purple paint marks on trees or posts on the property" provided that the marks assume a specific form at particular placements.¹⁰¹

Newly enacted section 30.06 specifically deals with trespass by a holder

92. *Id.* § 1.07(a)(46).

93. *Id.* § 1.07(a)(8).

94. *See Hernandez*, 946 S.W.2d at 111.

95. *Id.* at 112.

96. *See id.* at 112-13.

97. *See id.* at 113.

98. *Id.*

99. *See id.*

100. *See id.*

101. TEX. PEN. CODE ANN. § 30.05(b)(2)(D) (Vernon Supp. 1998). The full subsection provides as follows:

(2) "Notice" means:

(A) oral or written communication by the owner or someone with apparent authority to act for the owner;

(B) fencing or other enclosure obviously designed to exclude intruders or to contain livestock;

(C) a sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden;

of a license to carry a concealed handgun.¹⁰² “A license holder commits an offense if [he] carries a handgun . . . on property of another without effective consent” and receives notice that entry with a weapon was forbidden and fails to depart.¹⁰³ A breach of this section constitutes a Class A misdemeanor.¹⁰⁴

XIII. THEFT UNDER CHAPTER 31

Section 31.03(f) of the Penal Code was amended to enhance the punishment in an additional circumstance. Theft now includes any instance when “the actor was in a contractual relationship with government at the time of the offense and the property appropriated came into the actor’s

(D) *the placement of identifying purple paint marks on trees or posts on the property, provided that the marks are*

(i) *vertical lines of not less than eight inches in length and not less than one inch in width;*

(ii) *placed so that the bottom of the mark is not less than three feet from the ground or more than five feet from the ground; or*

(iii) *placed at locations that are readily visible to any person approaching the property and no more than;*

(a) *100 feet apart on forest land; or*

(b) *1,000 feet apart on land other than forest land; or*

(E) *the visible presence on the property of a crop grown for human consumption that is under cultivation, in the process of being harvested, or marketable if harvested at the time of entry.*

Id. § 30.05(b)(2) (emphasis added).

102. Section 30.06 provides as follows:

(a) A license holder commits an offense if the license holder:

(1) carries a handgun under the authority of Article 4413(29ee), Revised Statutes, on property of another without effective consent; and

(2) received notice that:

(A) entry on the property by a license holder with a concealed handgun was forbidden; or

(B) remaining on the property with a concealed handgun was forbidden and failed to depart.

(b) For purposes of this section, a person receives notice if the owner of the property or someone with apparent authority to act for the owner provides notice to the person by oral or written communication.

(c) in this section:

(1) “Entry” has the meaning assigned by Section 30.05(b).

(2) “License holder” has the meaning assigned by Section 46.035(f).

(3) “Written communication” means:

(A) a card or other document on which is written language identical to the following: “Pursuant to Section 30.06, Penal Code (trespass by a holder of license to carry a concealed handgun), a person licensed under Article 4413(29ee), Revised Statutes (concealed handgun law), may not enter this property with a concealed handgun;” or

(B) a sign posted on the property that:

(i) includes the language described by Paragraph (A) in both English and Spanish;

(ii) appears in contrasting colors with block letters at least one inch in height; and

(iii) is displayed in a conspicuous manner clearly visible to the public.

Id. § 30.06.

103. *Id.* § 30.06(a).

104. *See id.* § 30.06(d).

custody, possession, or control by virtue of the contractual relationship."¹⁰⁵

Section 31.03(c) was discussed at length in *Ballard v. State*.¹⁰⁶ In this theft case, the State offered testimony concerning four similar theft transactions to prove the defendant's criminal intent. The charged offense occurred in 1993, and three of the extraneous offenses were committed within one year of that date. The fourth offense occurred five years previously. The defendant argued on appeal that section 31.03(c) of the Penal Code (which required showing that the extraneous transactions be "recent") rather than Texas Criminal Evidence Rule 404(b)¹⁰⁷ governed the admissibility of the fourth extraneous offense. The appellate court concluded that the specific statute (section 31.03(c)) controlled over the general rule in theft cases, citing section 311.026 of the Texas Government Code.¹⁰⁸ Ultimately however, the court concluded the error was harmless.¹⁰⁹

XIV. FRAUD UNDER CHAPTER 32

Newly enacted section 32.23 criminalizes conduct in which a person intentionally manufactures or advertises a counterfeit mark or an item or service that "bears or is identified by a counterfeit mark [or] the person knows or should have known bears or is identified by a counterfeit mark."¹¹⁰ This section contains an aggregation provi-

105. *Id.* § 31.03(f).

106. *See Ballard v. State*, 945 S.W.2d 902 (Tex. App.—Beaumont, 1997, no pet. h.).

107. *See* TEX. R. CRIM. EVID. 404(b).

108. *See* TEX. GOV'T CODE ANN. § 311.026 (Vernon 1988).

109. *See Ballard*, 945 S.W.2d at 905.

110. Section 32.23(a)-(c) provides as follows:

(a) In this section:

(1) "Counterfeit mark" means a mark that is identical to or substantially indistinguishable from a protected mark the use or production of which is not authorized by the owner of the protected mark.

(2) "Identification mark" means a data plate, serial number, or part identification number.

(3) "Protected mark" means a trademark or service mark or an identification mark that is:

(A) registered with the secretary of state;

(B) registered on the principal register of the United States Patent and Trademark Office;

(C) registered under the laws of another state; or

(D) protected by Section 16.30, Business & Commerce Code, or by 36 U.S.C. Section 371 et seq.

(4) "Retail value" means the actor's regular selling price for a counterfeit mark or an item or service that bears or is identified by a counterfeit mark, except that if an item bearing a counterfeit mark is a component of a finished product, the retail value means the actor's regular selling price of the finished product on or in which the component is used, distributed, or sold.

(5) "Service mark" has the meaning assigned by Section 16.01, Business & Commerce Code.

(6) "Trademark" has the meaning assigned by Section 16.01, Business & Commerce Code.

sion¹¹¹ and the punishment range¹¹² varies from a Class C misdemeanor to a first-degree felony depending upon the retail value of the item or service.

Section 32.41(f) was amended to provide that if “the check or similar sight order [in question] was for a child support payment . . . under a court order, the offense is a Class B misdemeanor.”¹¹³

The offense of securing the execution of document by deception was expanded.¹¹⁴ The offense now includes a person who, with intent to defraud or harm another by deception, “causes or induces a public servant

(b) A person commits an offense if the person intentionally manufactures, displays, advertises, distributes, offers for sale, sells, or possesses with intent to sell or distribute a counterfeit mark or an item or service that:

- (1) bears or is identified by a counterfeit mark; or
- (2) the person knows or should have known bears or is identified by a counterfeit mark.

(c) A state or federal certificate of registration of intellectual property is prima facie evidence of the facts stated in the certificate.

TEX. PEN. CODE ANN. § 32.23(a)-(c) (Vernon Supp. 1998).

111. Section 32.23(d) provides as follows:

(d) For the purposes of Subsection (e), when items or services are the subject of counterfeiting in violation of this section pursuant to one scheme or continuing course of conduct, the conduct may be considered as one offense and the retail value of the items or services aggregated in determining the grade of offense.

Id. § 32.23(d).

112. Section 32.23(e) provides as follows:

(e) An offense under this section is a:

- (1) Class C misdemeanor if the retail value of the item or service is less than \$20;
- (2) Class B misdemeanor if the retail value of the item or service is \$20 or more but less than \$500;
- (3) Class A misdemeanor if the retail value of the item or service is \$500 or more but less than \$1,500;
- (4) state jail felony if the retail value of the item or service is \$1,500 or more but less than \$20,000;
- (5) felony of the third degree if the retail value of the item or service is \$20,000 or more but less than \$100,000;
- (6) felony of the second degree if the retail value of the item or service is \$100,000 or more but less than \$200,000; or
- (7) felony of the first degree if the retail value of the item or service is \$200,000 or more.

Id. § 32.23(e).

113. *Id.* § 32.41(f).

114. Section 32.46(a) provides as follows:

A person commits an offense if, with intent to defraud or harm any person, he, by deception:

- (1) causes another to sign or execute any document affecting property or service or the pecuniary interest of any person; or
- (2) *causes or induces a public servant to file or record any purported judgment or other document purporting to memorialize or evidence an act, an order, a directive, or process of:*
 - (A) *a purported court that is not expressly created or established under the constitution or the laws of this state or of the United States;*
 - (B) *a purported judicial entity that is not expressly created or established under the constitution or laws of this state or of the United States; or*
 - (C) *a purported judicial officer of a purported court or purported judicial entity described by Paragraph (A) or (B).*

TEX. PEN. CODE ANN. § 32.46(a) (Vernon Supp. 1998) (emphasis added).

to file or record any purported judgment or other document purporting to memorialize or evidence an act, an order, a directive, or process of” a purported court, judicial entity or judicial officer of a purported court or purported judicial entity “not expressly created or established under the constitution or the laws of this state or of the United States.”¹¹⁵ A violation of section 32.46(a)(2) is a state jail felony.¹¹⁶

New legislation also created the offense of simulating legal process. The Penal Code provides that a person commits an offense

if the person recklessly causes to be delivered to another any document that simulates a summons, complaint, judgment, or other court process with the intent to:

- (1) induce payment of a claim from another person; or
- (2) cause another to:
 - (A) submit to the putative authority of the document; or
 - (B) take any action or refrain from taking any action in response to the document, in compliance with the document, or on the basis of the document.¹¹⁷

This offense is a Class A misdemeanor unless it is shown that the defendant has previously been convicted of a violation of this section, in which event it is a state jail felony.¹¹⁸

Refusal to execute release of a fraudulent lien or claim is now an offense under newly enacted section 32.49.¹¹⁹ It is an offense if a person, with intent to defraud or harm another, “holds a purported lien or claim asserted against real or personal property . . . that is fraudulent” and after receiving specifically prescribed notice “requesting the execution of a release of the fraudulent lien or claim, refuses to execute the release.”¹²⁰ This offense is a Class A misdemeanor.¹²¹

Newly enacted section 32.49¹²² (Deceptive Preparation and Marketing of Academic Product) proscribes conduct in which a person, “with intent to make a profit, . . . prepares, sells, offers or advertises for sale, or delivers to another . . . an academic product when the person knows or should . . . have known, that [the recipient] intends [to utilize] the academic product to satisfy an academic requirement.”¹²³ The statute provides certain defenses including conduct taken by an employee of an institution of higher learning and conduct including tutorial and editing assistance.¹²⁴

115. *Id.* § 32.46(a).

116. *See id.* § 32.46(c).

117. *Id.* § 32.48(a).

118. *See id.* § 32.48(e)-(f).

119. *See id.* § 32.49(a)-(b).

120. *Id.*

121. *See id.* § 32.49(c).

122. The Legislature mistakenly numbered two Penal Code provisions with the same section 32.49.

123. TEX. PEN. CODE ANN. § 32.49(b) (Vernon Supp. 1998).

124. *See id.* Subsections (d), (e), and (f) provide as follows:

(d) It is a defense to prosecution under this section that the actor’s conduct consisted solely of action taken as an employee of an institution of higher

"An offense under this section is a Class C misdemeanor."¹²⁵

XV. COMPUTER CRIMES UNDER CHAPTER 33

Section 33.01 of the Penal Code expands upon the definition of terms used in the chapter on computer crimes, adding a definition for "aggregate amount."¹²⁶

The Legislature simplified the offense of breach of computer security by retaining only subsection (a) of section 33.02, and eliminating prior subsection (b).¹²⁷ The revision substantially increases the potential penalties well beyond the previous maximum of a third-degree felony, to a first-degree felony.¹²⁸

education in providing instruction, counseling, or tutoring in research or writing to students of the institution.

(e) It is a defense to prosecution under this section that the actor's conduct consisted solely of offering or providing tutorial or editing assistance to another person in connection with the other person's preparation of an academic product to satisfy the other person's academic requirement, and the actor does not offer or provide substantial preparation, writing, or research in the production of the academic product.

(f) It is a defense to prosecution under this section that the actor's conduct consisted solely of typing, transcribing, or reproducing a manuscript for a fee, or of offering to do so.

Id. § 32.49.

125. *Id.* § 32.49(g).

126. Section 33.01(2) provides:

(2) "Aggregate amount" means the amount of:

(A) any direct or indirect loss incurred by a victim, including the value of money, property, or service stolen or rendered unrecoverable by the offense; or

(B) any expenditure required by the victim to verify that a computer, computer network, computer program, or computer system was not altered, acquired, damaged, deleted, or disrupted by the offense.

TEX. PEN. CODE ANN. § 33.01 (Vernon Supp. 1998).

127. *See id.* § 33.02(a)(2). ("A person commits an offense if the person knowingly accesses a computer, computer network, or computer system without the effective consent of the owner."). *Id.*

128. Section 33.02(b) and (d) provide as follows:

(b) An offense under this section is a Class B misdemeanor unless in committing the offense the actor knowingly obtains a benefit, defrauds or harms another, or alters, damages, or deletes property, in which event the offense is:

(1) a Class A misdemeanor if the aggregate amount involved is less than \$1,500;

(2) a state jail felony if:

(A) the aggregate amount involved is \$1,500 or more but less than \$20,000; or

(B) the aggregate amount involved is less than \$1,500 and the defendant has been previously convicted two or more times of an offense under this chapter;

(3) a felony of the third degree if the aggregate amount involved is \$20,000 or more but less than \$100,000;

(4) a felony of the second degree if the aggregate amount involved is \$100,000 or more but less than \$200,000; or

(5) a felony of the first degree if the aggregate amount involved is \$200,000 or more.

....

XVI. TELECOMMUNICATIONS CRIMES UNDER CHAPTER 33(A)

New legislation creates detailed criminal offenses defined as unauthorized use of telecommunications service, manufacture, possession or delivery of unlawful telecommunications device, theft of telecommunications service and publication of telecommunications access device, under sections 33(A).02 to 33(A).05 of the Penal Code.¹²⁹ The punishment ranges from misdemeanors to first-degree felonies.¹³⁰ A special provision authorizes the attorney general, upon appropriate request by a prosecuting attorney, to assist in the investigation or prosecution of any such offense.¹³¹

XVII. BRIBERY AND CORRUPT INFLUENCE UNDER CHAPTER 36

Section 36.05(a)(5) of the Penal Code was modified to include criminal conduct directed at a "witness or prospective witness in an official proceeding . . . to abstain from, discontinue or delay the prosecution of another," not simply another "witness."¹³²

XVIII. PERJURY AND OTHER FALSIFICATION UNDER CHAPTER 37

The section dealing with false reports to peace officers or law enforcement employees was amended to tighten up the language of the offense and to expand the reach of the proscription. Section 37.08 of the Penal Code criminalizes false statements made not only to peace officers conducting criminal investigations but also to "any employee of a law enforcement agency that is authorized by the agency to conduct the investigation and that the actor knows is conducting the investigation."¹³³

(d) A person who [is] subject to prosecution under this section and any other section of this code may be prosecuted under either or both sections.

Id. § 33.02(b), (d).

129. *See id.* §§ 33(A).02-.05.

130. *See id.*

131. *See* TEX. PEN. CODE ANN. § 33(A).06 (Vernon Supp. 1998).

132. Section 36.05(a) provides as follows:

(a) A person commits an offense if, with intent to influence the witness, he offers, confers, or agrees to confer any benefit on a witness or prospective witness in an official proceeding or coerces a witness or prospective witness in an official proceeding:

- (1) to testify falsely;
- (2) to withhold any testimony, information, document, or thing;
- (3) to elude legal process summoning him to testify or supply evidence;
- (4) to absent himself from an official proceeding to which he has been legally summoned; or
- (5) to abstain from, discontinue, or delay the prosecution of *another*.

Id. § 37.08(a) (emphasis added).

133. Section 37.08(a) provides as follows:

(a) A person commits an offense if, with intent to deceive, he knowingly makes a false statement that is material to a criminal investigation and makes the statement to:

Section 37.09 was expanded to encompass tampering with or fabricating physical evidence when a person knows that an offense has been committed.¹³⁴ Prior law was limited to those situations in which a person knew that an investigation or official proceeding was pending or in progress. In addition, section 37.09(d)(2) provides that a person commits an offense if the person observes human remains under circumstances under which a reasonable person would believe an offense has been committed and should realize that a law enforcement agency is not aware of the existence of or location of the remains but nevertheless fails to report the existence and location of the remains to a law enforcement agency.¹³⁵ The punishments attached to the various forms of criminal behavior were also modified in this section.¹³⁶

Newly enacted section 37.101 of the Penal Code addresses the fraudulent filing of financing statements. The section provides that a person commits an offense if the person "knowingly presents for filing or causes to be presented for filing a financing statement that the person knows: (1) is forged; (2) contains a material false statement; or (3) is groundless."¹³⁷ The various forms of criminal conduct constitute a Class A misdemeanor through a second-degree felony.¹³⁸

The offense of impersonating a public servant was expanded by new legislation. The offense now includes any person who "knowingly purports to exercise any function of a public servant or of a public office, including that of a judge and court, and the position or office through which he purports to exercise a function of a public servant or public office has no lawful existence under the constitution or laws of this state or of the United States."¹³⁹ The offense is a third-degree felony.¹⁴⁰

Newly enacted section 37.13 of the Penal Code (Record of a Fraudulent Court) provides that a person commits a criminal offense

(1) a peace officer conducting the investigation; or

(2) any employee of a law enforcement agency that is authorized by the agency to conduct the investigation and that the actor knows is conducting the investigation.

Id. § 37.08(a).

134. Section 37.09(d) provides as follows:

(d) A person commits an offense if the person:

(1) knowing that an offense has been committed alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation of or official proceeding related to the offense; or

(2) observes human remains under circumstances in which a reasonable person would believe that an offense had been committed, knows or reasonably should know that a law enforcement agency is not aware of the existence of or location of the remains, and fails to report the existence of and location of the remains to a law enforcement agency.

Id. § 37.09(d).

135. *See id.* § 37.09(d)(2).

136. *See id.* § 37.09(c).

137. *Id.* § 37.101(a).

138. *See id.* § 37.101(b).

139. *Id.* § 37.11(a).

140. *See id.* § 37.11(b).

if the person makes, presents, or uses any document or other record with:

(1) knowledge that the document or other record is not a record of a court created under or established by the constitution or laws of this state or of the United States; and

(2) the intent that the document or other record be given the same legal effect as a record of a court created under or established by the constitution or laws of this state or of the United States.¹⁴¹

The offense can be anywhere from a Class A misdemeanor to a third degree felony, depending upon the prior criminal record of the defendant.¹⁴² Subsection (c) enables prosecution of conduct which may also constitute an offense under sections 32.48 or 37.10 of the Penal Code.¹⁴³

XIX. ABUSE OF OFFICE UNDER CHAPTER 39

Section 39.04 of the Penal Code (Violations of the Civil Rights of Person in Custody; Improper Sexual Activity with Person in Custody) was expanded to criminalize the conduct of an official or employee of a correctional facility or a peace officer who intentionally “engages in sexual intercourse or deviate sexual intercourse with an individual in custody.”¹⁴⁴ This newly created criminal offense is a state jail felony.¹⁴⁵ The Texas Attorney General has concurrent jurisdiction with law enforcement agencies to investigate violations of section 39.04 of the Penal Code that involve serious bodily injury or death.¹⁴⁶

XX. DISORDERLY CONDUCT AND RELATED OFFENSES UNDER CHAPTER 42

Section 42.071, the “Stalking Law” was repealed.¹⁴⁷ The new section 42.072 has been substantially revised.¹⁴⁸ This section provides that a person commits the criminal offense of stalking

if the person, on more than one occasion and pursuant to the same scheme or course of conduct . . . knowingly engages in conduct . . . that . . . the actor knows or reasonably believes the other person will regard as threatening . . . bodily injury or death . . . or . . . that an offense will be committed against the other person’s property; . . . causes the other person . . . to be placed in fear of bodily injury or death or fear that an offense will be committed against the other person’s property; and . . . would cause a reasonable person to fear . . . bodily injury or death or that an offense would be committed against the other person’s property.¹⁴⁹

141. *Id.* § 37.13(a).

142. *See id.* § 37.13(b).

143. *See id.* § 37.13(c).

144. *Id.* § 39.04(a)(2).

145. *See id.* § 39.04(b).

146. *See id.* § 39.04(d).

147. *See id.* § 42.071.

148. *See id.* § 42.072.

149. *Id.* § 42.072(a).

Stalking is a Class A misdemeanor, and if the actor has been previously convicted under this section, it becomes a third-degree felony.¹⁵⁰

XXI. PUBLIC INDECENCY UNDER CHAPTER 43

Section 43.26 of the Penal Code remained largely the same, other than an expansive definition of the "visual material" which is the subject matter of the child pornography. The definition attempted to incorporate every type of computer image available.¹⁵¹

XXII. WEAPONS UNDER CHAPTER 46

Section 46.02 was amended to eliminate all defensive matters relating to the unlawful carrying of weapons. Newly amended section 46.15 of the Penal Code has been expanded to incorporate all defenses previously listed under section 46.02.¹⁵²

In *Birch v. State*,¹⁵³ where the appellant was convicted of unlawfully carrying a handgun, the court readdressed the traveling defense. The court emphasized that in reviewing the availability of this defense, appellate courts generally consider distance, time and mode of travel.¹⁵⁴ Appellant, a carpenter, drove from his home in Bexar County to his girlfriend's house fifty-five miles away in San Marcos for her birthday dinner, spent the night, and returned early the next morning, driving directly to his job site so as not to be late for work. Appellant worked all day, ate, consumed several beers at the job site before driving home, a distance of about ten miles, and began his trip home when he was stopped by the police.

The court of appeals observed that the traveling defense is available only if the accused had a legitimate, non-contrived purpose for carrying the weapon, took a practical route, did not unduly or unreasonably deviate from the route, and did not carry the weapon habitually.¹⁵⁵ The court found that the traveling defense was raised by the evidence and that the defensive instruction should have been submitted to the jury.¹⁵⁶

150. *See id.* § 42.072(b).

151. Section 43.26(b)(3) provides:

(3) "Visual material" means:

(A) any film, photograph, videotape, negative, or slide or any photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide; or

(B) any disk, diskette, or other physical medium that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method.

Id. § 43.26(b)(3).

152. *See id.* § 46.15 (amending TEX. PEN. CODE ANN. § 46.02 (Vernon 1994)).

153. 948 S.W.2d 880 (Tex. App.—San Antonio 1997, no pet. h.).

154. *See id.* at 882.

155. *See id.* at 884.

156. *See id.* at 885.

XXIII. INTOXICATION AND ALCOHOLIC BEVERAGES OFFENSES UNDER CHAPTER 49

In *Williams v. State*,¹⁵⁷ the defendant complained of the multiple use of his two prior DWI convictions to render the DWI prosecution a felony. The court, after comparing the similarity of the DWI statute to the felony theft statute, held that the prosecution may reuse prior DWI convictions to elevate the offense of DWI to a felony.¹⁵⁸

XXIV. PURCHASE AND CONSUMPTION OF ALCOHOL BY MINOR

A minor commits an offense if he purchases an alcoholic beverage.¹⁵⁹ A minor does not commit an offense, however, if he purchases the alcoholic beverage under the immediate supervision of a commissioned peace officer who is engaged in enforcing the provisions of the Alcoholic Beverage Code.¹⁶⁰

In the text the Code was further amended to provide that [a] minor may possess an alcoholic beverage:

(1) while in the course and scope of the minor's employment if the minor is an employee of a licensee or permittee and the employment is not prohibited by the code;

(2) if the minor is in the presence of an adult parent, guardian, or spouse, or other adult to whom the minor has been committed by a court; or

(3) if the minor is under the immediate supervision of a commissioned peace officer engaged in enforcing the provisions of this code.¹⁶¹

Consumption of alcohol by a minor is also a crime.¹⁶² "It is an affirmative defense to prosecution that the beverage was consumed in the visible presence of the minor's adult parent, guardian, or spouse."¹⁶³

XXV. DRIVING UNDER THE INFLUENCE OF ALCOHOL BY A MINOR

"A minor commits an offense if the minor operates a motor vehicle in a public place while having any detectable amount of alcohol in the minor's system."¹⁶⁴ A first offense is generally a Class C misdemeanor.¹⁶⁵ In addition, "[a] person who takes a child into custody and who has reasonable grounds to believe that the child has been operating a motor vehicle in a public place while having any detectable amount of alcohol in the child's

157. 946 S.W.2d 886 (Tex. App.—Waco 1997, no pet. h.).

158. *See id.* at 895-99.

159. *See* TEX. ALCO. BEV. CODE ANN. § 106.02(a) (Vernon Supp. 1998).

160. *See id.*

161. *Id.* § 106.02(b)(5).

162. *See id.* § 106.04(a).

163. *Id.* § 106.04(b).

164. *Id.* § 106.041(a).

165. *See id.* § 106.041(b).

system may . . . take the child to a place to obtain a specimen of the child's breath or blood [and] perform intoxilyzer processing and videotaping of the child in an adult processing office of a police department."¹⁶⁶ Concurrence of an attorney is not required if the request to give the specimen and the child's response is videotaped.¹⁶⁷ Certain information must be provided by the officer before requesting a specimen.¹⁶⁸

XXVI. CIGARETTES AND TOBACCO PRODUCTS

"A person commits an offense if the person, with criminal negligence . . . sells, gives, or causes to be sold or given a cigarette or tobacco product to someone who is younger than [eighteen] years of age; or . . . sells, gives, or causes to be sold or given a cigarette or tobacco product to another person who intends to deliver it to someone who is younger than [eighteen] years of age."¹⁶⁹

"Each person who sells cigarettes or tobacco products at retail or by vending machine shall post a sign in a location that is conspicuous to all employees and customers and that is close to the place at which the cigarettes or tobacco products may be purchased."¹⁷⁰ The sign must include specific language provided by statute.¹⁷¹

Newly enacted legislation provides that an individual who is younger than eighteen years of age commits an offense if he "(1) possesses, purchases, consumes or accepts a cigarette or tobacco product; or (2) falsely represents himself or herself to be [eighteen] years of age or older by displaying proof of age that is false, [or] fraudulent."¹⁷² An exception to this criminal prescription exists if the cigarette or tobacco product is possessed in the presence of an adult parent, guardian or a spouse of the individual.¹⁷³

166. TEX. FAM. CODE ANN. § 52.02(c) (Vernon Supp. 1998).

167. See *id.* § 52.02(d).

168. See TEX. TRANS. CODE ANN. § 724.015 (Vernon Supp. 1998).

169. TEX. HEALTH & SAFETY CODE ANN. § 161.082(a) (Vernon Supp. 1998).

170. *Id.* § 161.084(a).

171. See *id.* § 161.084(b).

172. *Id.* § 161.252(a).

173. See *id.* § 161.252(b).