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Chuck Miller

Lisa Dotin

Kathryn Holland

CRIMINAL LAW

*Judge Chuck Miller**
*Lisa Dotin***
*Kathryn Holland****

THIS Article addresses substantive criminal law. First, the Article discusses recent and significant amendments to the Penal Code by the Texas legislature. Most of these new amendments were effective September 1, 1991, and no case law interpreting them has yet been delivered. Second, this article compiles particularly important decisions of the Texas Court of Criminal Appeals, delivered from October 1990 to November 1991, that will have a pervasive impact on the trial of criminal cases in Texas. They provide an excellent recapitulation of established legal principles, reaffirm established caselaw that had come into question or fallen into disuse, or establish new precedent. The cases are set out by topic, in the general order in which they occur in the evolution of a criminal case.

This Article does not encompass legislative developments and case law on criminal procedure, nor does it include legislative developments and the extant substantive criminal law on confessions and search and seizure. Therefore, this Article should be read in conjunction with the Survey Article by Kerry Fitzgerald addressing Pretrial, Trial, and Appellate Procedure and the Survey Article by Ronald Goranson addressing the Law on Confessions and Search and Seizure. Additionally, the Goranson Survey Article encompasses victims' rights legislation.

I. LEGISLATIVE CHANGES IN THE PENAL CODE

This portion presents recent changes in the Penal Code. These amendments have changed definitions of particular crimes.

A. Criminal Homicide

In Chapter 19, Criminal Homicide, the legislature amended section 19.06,[1] evidence in prosecutions for murder and voluntary manslaughter, to admit evidence of acts of family violence committed by the deceased against the defendant if defense of self or another[2] is raised by the defendant. Also,

* Judge Chuck Miller, B.A., SMU; J.D., SMU; Judge, Court of Criminal Appeals.
** Lisa Dotin, B.A., SMU; J.D., University of Texas; Attorney, Court of Criminal Appeals.
*** Kathryn Holland, B.B.A., Texas Christian University; J.D. candidate, University of Texas; Intern, Court of Criminal Appeals.

1. TEX. PENAL CODE ANN. § 19.06(b) (Vernon Supp. 1992).
2. *Id.* § 9.31-.33.

expert opinion (explaining, for instance, the battered wife syndrome) based upon those acts is admissible.[3]

B. Assaultive Offenses

In Chapter 22, Assaultive Offenses, the legislature amended section 22.011[4], Sexual Assault, to delete the words "who is not the spouse of the actor."[5] Thus, sexual assault between a married man and woman may now be prosecuted. The old doctrine of spousal immunity that applied unless the couple was separated or divorcing[6] is dead. The only restriction to such prosecution is that there must be a "showing of bodily injury or the threat of bodily injury,"[7] which section 1.07 defines as "physical pain, illness, or any impairment of physical condition."[8]

C. Fraud

In Chapter 32, Fraud, the legislature amended section 32.21,[9] forgery, to add license, title, permit, or similar document[10] to the list of things for which it is a second degree felony to pass off as genuine when they are not. Therefore, it is now a second degree felony for an underage college student to use a fake ID to get into a bar.

D. Organized Crime

In Chapter 71, Organized Crime, the legislature amended sections 71.01[11] and 71.02[12] in a knee-jerk attempt to put something on the books to answer the problem of street gangs. A street gang is defined in section 71.01 as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities."[13] Section 71.02, Engaging In Organized Criminal Activity, makes it a crime for a "combination" of persons to collaborate in carrying on criminal activities[14] and adds "as a member of a criminal street gang"[15] to the definition of "combination." Organizations that trespass at abortion clinics or nuclear reactors, as well as girl scouts that sell cookies in "no solicitation" neighborhoods are rescued from this definition of crime by section 71.02 which specifically names the crimes for which collaboration therein becomes an offense.[16] These are basically drug, gun,

3. *Id.* § 19.06(b)(2).
4. *Id.* § 22.011
5. *Id.* § 22.011 (Vernon 1989).
6. *Id.* § 22.011(c)(2).
7. *Id.* § 22.011(g) (Vernon Supp. 1992).
8. *Id.* § 1.07(a)(7).
9. *Id.* § 32.21.
10. *Id.* § 37.01(1)(c).
11. *Id.* § 71.01.
12. *Id.* § 71.02.
13. *Id.* § 71.01(d).
14. *Id.* § 71.02(a).
15. *Id.*
16. *Id.* § 71.02(a)(1)-(9).

gambling and sex crimes, as well as some aggravated felonies.[17]

II. PRE-TRIAL AREAS

In the pre-trial area, cases from the Court of Criminal Appeals address: the independent nature of the Texas Constitution apart from the Fourth Amendment to the United States Constitution, attachment of double jeopardy in a non-jury trial, guidelines necessary for the requirement of informant identity disclosure, the steps required to challenge an indictment under recent amendments to the Texas Constitution, and contempt. All of the cases establish workable rules or principles to be followed in the future.

A. Search and Seizure

1. Article I, Section 9 of the Texas Constitution and the Fourth Amendment of the United States Constitution: Separate Construction Required

Heitman v. State[18] begins with the conclusion, "[t]oday we reserve for ourselves the power to interpret our own constitution."[19] The Court of Criminal Appeals overruled caselaw mandating that interpretation of Texas' search and seizure law be automatically done in harmony with constructions placed on the Fourth Amendment by the U.S. Supreme Court.[20] Of course, the Texas Constitution "cannot subtract from the rights guaranteed by the United States Constitution,"[21] and in a footnote the court noted that the Supreme Court's interpretation of a Fourth Amendment claim is *permissive* authority when considering a parallel claim under article I, section 9.[22] This case was remanded to the court of appeals to re-analyze the article I, section 9 claim.[23] Also in a footnote the court said that merely citing article I, section 9 in a brief will not preserve error on appeal.[24] There must be argument and/or authority as to why the urged construction of article I, section 9 should be adopted. Also, article I, section 9 should be treated as a separate ground from the Fourth Amendment or the entire lumped ground may be held multifarious on appeal.[25]

B. Jeopardy: When It Attaches In A Non-Jury Trial Under The Texas Constitution

Under federal law in a jury trial, jeopardy clearly attaches when a jury is empaneled and sworn, and before the defendant pleads to the indictment.[26] However, federal law is unclear in this area in a non-jury trial, so in *Torres v.*

17. *Id.*
18. 815 S.W.2d 681 (Tex. Crim. App. 1991).
19. *Id.* at 682.
20. *Id.* at 690.
21. *Id.*
22. *Id.* at 690 n.22.
23. *Id.*
24. *Id.* at 690 n.23.
25. *Id.*
26. Downum v. United States, 372 U.S. 734 (1963).

State[27] the Court of Criminal Appeals interpreted Texas constitutional law[28] and determined that jeopardy attaches when both sides have announced ready and the defendant pleads to the indictment or information in a non-jury trial.[29] This case also contains a good discussion of when the doctrine of manifest necessity allows retrial even where jeopardy has attached.[30] There is no manifest necessity in this situation where, in the first trial, the State moved to amend the indictment after jeopardy attached because they could not prove their pleadings.[31] The motion was denied when the defendant objected over article 28.10(a),[32] so the judge "dismissed the case for want of prosecution" when the State did not come forward with any evidence.[33] In this second indictment, alleging the same crime in a manner the State could prove, the defendant successfully raised this pre-trial plea in bar due to double jeopardy.[34]

C. *Informant Disclosure: Tests And Procedure Under Texas Rule of Criminal Evidence 508*

In *Bodin v. State*[35] police found drugs during a search of the defendant's apartment pursuant to a warrant that was based on confidential informant information. In a pre-trial motion to suppress evidence and to disclose the informant's identity, the facts showed that the informant, at the direction of the police and with police money, entered the defendant's apartment and bought drugs. Based on this the warrant was obtained a few hours later using the confidential informant's rendition of the "buy" as the source of the probable cause. The defendant testified that the drugs were left by a man named James a few hours before the search. The trial court overruled the motion to suppress without an in camera hearing,[36] and the court of appeals affirmed using the pre-rules criteria and saying the "record lacked evidence to show that the informer participated in the offense, was present at the time of the offense or arrest, or was a material witness."[37] The court of appeals further found that only the State could request an in camera hearing[38] and that the trial court properly found that the "informer could not provide testimony necessary to a fair determination of guilt."[39]

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27. 805 S.W.2d 418 (Tex. Crim. App. 1991).

28. "No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be put on trial for the same offense, after a verdict of guilty or not guilty in a court of competent jurisdiction." TEX. CONST. art. I, § 14.

29. 805 S.W.2d at 420-21.

30. *Id.* at 422.

31. *Id.*

32. TEX. CRIM. PROC. CODE ANN. art. 28.10(a) (Vernon 1989) (cannot amend after trial commences if defendant objects).

33. 805 S.W.2d at 419.

34. *Id.* at 421.

35. 807 S.W.2d 313 (Tex. Crim. App. 1991).

36. *Id.* at 315.

37. *Id.* The court refers to the fact that the defendant was arrested for the drugs the police found, not the drugs the informant bought.

38. *Id.*

39. *Id.* at 316.

The Court of Criminal Appeals in reviewing the law relating to informer's identity, noted that Texas Rule of Criminal Evidence 508[40] is radically different from its closest federal counterpart, Federal Rule of Evidence 501.[41]

40. TEX. R. CRIM. EVID. 508. Identity of Informer

(a) Rule of privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who may claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except that the privilege shall not be allowed if the state objects.

(c) Exceptions.

(1) *Voluntary disclosure; informer a witness.*

No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the public entity.

(2) *Testimony on merits.* If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issues of guilt, innocence and the public entity invokes the privilege, the judge shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if he finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose his identity, the judge on motion of the defendant shall dismiss the charges to which the testimony would relate and the judge may do so on his own motion. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the public entity. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera, at which no counsel or party shall be permitted to be present.

(3) *Legality of obtaining evidence.* If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, he may require the identity of the informer to be disclosed. The judge shall, on request of the public entity, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the public entity.

41. FED. R. EVID. 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Then the court held that Texas rule 508 is broader than the pre-rule law because it only requires informant testimony that is necessary to a fair determination of guilt.[42] Now, in determining the amount of proof needed to show "necessary to a fair determination of the issues of guilt"[43] and in order to disclose the informant's identity, the defendant need only make a "plausible showing of how the informer's information may be important."[44] This showing, however, must be more than "mere conjecture or speculation"[45] and must potentially be a significant aid to the defendant.[46] In *Bodin* the defendant needed to know if the informant was "James", who the defendant said brought the drugs into the apartment and who the police said brought drugs out of the apartment after a buy. If so, the informant clearly had information necessary to a fair determination of guilt.

Also, under a plain reading of the rule an in camera hearing is not contingent on the State's request, but rather becomes necessary once the defendant shows that the informant's testimony is necessary to a fair determination of guilt and the State invokes the privilege.[47]

D. Validity of Indictment: Pre-Trial Objection To Charging Instrument Is Absolutely Necessary To Any Future Challenge To The Charging Instrument's Validity

The misdemeanor information in *Studer v. State*[48] was "fundamentally" defective for failure to allege an element of the offense of indecent exposure,[49] but was covered by the 1985 amendments to article V, section 12 of the Texas Constitution[50] and article 1.14, V.A.C.C.P.[51] The amendment to the constitution stated that the presentment of an information/indictment vests the trial court with jurisdiction, and that the legislature can regulate informations/indictments by statute.[52] Article 1.14(b) said that any defect of either form or substance in an information/indictment must be objected to "before the date on which the trial on the merits commences" or it is waived.[53] The question raised was whether a charging instrument that did not contain all of the elements of an offense was nonetheless an information/indictment under the new article V, section 12, and was therefore not defective.[54] The Court of Criminal Appeals, after extensively researching legislative history and the interplay among the above laws determined that errors of substance, such as a missing element, no longer invalidated an in-

42. 807 S.W.2d at 318.
43. TEX. R. CRIM. EVID. 508(c)(2).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 319.
48. 799 S.W.2d 263 (Tex. Crim. App. 1990).
49. *Id.* at 272-73.
50. TEX. CONST. art. V, § 12.
51. TEX. CRIM. PROC. CODE ANN. art. 1.14 (Vernon Supp. 1992).
52. TEX. CONST. art. V, § 12(b).
53. TEX. CRIM. PROC. CODE ANN. art. 1.14(b) (Vernon Supp. 1992).
54. 799 S.W.2d at 265.

formation/indictment.[55] The doctrine of fundamental error in informations/indictments was therefore severely diluted, if not inferentially abolished. Further, failure to object at pre-trial waived such error.[56] As to whether there is *any* minimum requirement for a piece of paper to be an information/indictment, the court held only that since the piece of paper in this case "was, on its face, an information as contemplated by Art. V, § 12," it conveyed jurisdiction in the trial court.[57] A copy of the information was appendixed to the opinion.[58]

Rodriguez v. State[59] is an evading arrest case similar to *Studer*[60]. The statutory element omitted here was that the defendant knew the peace officer was attempting to arrest him. The court held that this was an information under article V, section 12[61] even though an element of the offense was missing.[62] Thus failure to object at pre-trial waived all error. As to the minimum requirements of an information under article V, section 12, the court noted only that this was "on its face" an information and therefore was "not 'fundamentally defective' and it did invest the trial court with jurisdiction."[63] A copy of the information was appendixed to the opinion.[64]

Ex Parte Gibson[65] was the same as *Studer*[66] and *Rodriguez*,[67] except that this was a post-conviction article 11.07, V.A.C.C.P.[68] writ challenging the validity of a post-article V, section 12 indictment for retaliation that did not allege a date of offense (year of alleged commission date was missing). Noting that the instrument was "issued by a grand jury, filed with the district clerk and purports to charge"[69] the defendant with retaliation, the court said it was clearly "on its face . . . an indictment . . . as contemplated by Art. V., § 12(b)."[70] Thus, the failure to allege a date of offense was no longer fundamental error and that failure to object at trial waived error.[71]

E. Contempt: Summary Punishment Sometimes Inappropriate In Direct Contempt

Generally, direct contempt happens in the judge's presence while constructive contempt happens, at least partially, out of the judge's presence.[72]

55. *Id.* at 271.
56. *Id.* at 273.
57. *Id.*
58. *Id.* at 285.
59. 799 S.W.2d 301 (Tex. Crim. App. 1990).
60. 799 S.W.2d 263.
61. TEX. CONST. art. V, § 12.
62. 799 S.W.2d at 303.
63. *Id.*
64. *Id.* at 303-04.
65. 800 S.W.2d 548 (Tex. Crim. App. 1990).
66. 799 S.W.2d 263.
67. 799 S.W.2d 301.
68. TEX. CRIM. PROC. CODE ANN. art. 11.07 (Vernon 1977 & Supp. 1992).
69. 800 S.W.2d at 551.
70. *Id.*
71. *Id.*
72. *Ex parte* Daniels, 722 S.W.2d 707, 709 (Tex. Crim. App. 1987).

In *Ex parte Knable*[73] the applicant, Knable, was held in contempt after representing some defendants in an injunction proceeding. It seems that Mr. Knable is not a lawyer. Upon discovery of this fact, the trial judge, without any notice or hearing to Knable, adjudged him in contempt and ordered his arrest. While in many direct contempt situations an applicant is not entitled to notice and a hearing as he would be in a constructive contempt situation,[74] this rule does not apply unless along with the direct contempt there is a need for immediate penal vindication of the dignity of the court.[75] Once the urgency or emergency caused by the direct contempt abates, the judge's power to punish without due process notice and a hearing also abates.[76] Thus, the judgment of contempt here was set aside.[77]

III. TRIAL AREAS

In the past year, the Texas Court of Criminal Appeals had the opportunity to interpret cases involving the Texas Rules of Criminal Evidence that became effective September 1, 1986 and are just now reaching the appellate level. The court examined the new rules in light of the Federal Rules of Evidence and also compared the reasoning of the new rules to their predecessors. Another development in recent caselaw has been the attention given to the jury charge as it is measured against the sufficiency of the evidence at trial. The court has also examined particular fact situations to determine what evidence is sufficient to meet the definitions in the Penal Code of serious bodily injury, fair market value, and theft of trade secrets. Specific crimes have been addressed by the court, and particular attention has been paid to the area of sexual abuse of children. One case dealt with a court's ability to allow a non-victim child witness to testify through closed circuit television, and the other dealt with the admissibility of expert testimony regarding a child's behavior.

A. Jury Selection

1. Restatement Of Trial And Appellate Test: Batson Revisited

The *Batson* prohibition against racially motivated peremptory strikes calls for a shifting burden of proof/production/persuasion.[78] *Williams v. State*[79] is a good restatement of the appellate role in reviewing the trial court's decision using the clearly erroneous standard and considering the evidence in the light most favorable to the trial court's ruling. First the defendant has the burden of *proof* to establish a prima facie case of purposeful discrimination

73. *Ex parte* Knable, No. 71,248 (Tex. Crim. App. Nov. 6, 1991).
74. Taylor v. Hayes, 418 U.S. 488, 496 (1974).
75. *Id.* at 497 n.6.
76. *Ex parte Knable*, slip op. at 3-4.
77. *Id.* slip op. at 5.
78. In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court required "trial courts to be sensitive to the racially discriminatory use of peremptory challenge." *Id.* at 99. *See also* Keeton v. State, 749 S.W.2d 861 (Tex. Crim. App. 1988).
79. 804 S.W.2d 95 (Tex. Crim. App. 1991), *cert. denied*, 111 S.Ct. 2875 (1991).

during voir dire;[80] if the defendant does so, then the State has the burden of *production* to come forth with race neutral explanations;[81] if the State does so, then the defendant has the burden of *persuasion* to rebut the explanations so "that it can be rationally inferred that [the State] engaged in purposeful racial discrimination."[82]

2. *No Harmless Error In Denial Of A Proper Voir Dire Question*

In *Nunfio v. State*[83] the Court of Criminal Appeals held that if the defense is not allowed to ask a proper question of a prospective venireman, the harmless error rule of Texas Rule of Appellate Procedure 81(b)(2)[84] will not apply, and thus automatic reversible error will occur.[85] A proper question is any question that seeks to discover a juror's views on an issue applicable to the case.[86] The disallowance of the question denies the "defendant the ability to intelligently exercise his peremptory challenges,"[87] rendering a harm analysis impossible and "fruitless."[88]

3. *Voir Dire Error: How To Preserve It*

The general principles governing voir dire start with the premise that the trial judge's discretion allows for the imposition of reasonable time limits on the period allowed for questioning of each venire person.[89] However, the limit of this discretion is at the point where the benefit of time limits is achieved "at the risk of denying to a party on trial a substantial right."[90] This translates into determining whether the questioning party was denied the opportunity to ask a proper question.[91] The questioning party must proffer a proper question, which is defined as one which seeks to determine a venireperson's views on an issue applicable to the case,[92] and obtain an adverse ruling on his request to ask those question(s).[93] However, a question that is "so broad in nature as to constitute a 'global fishing expedition' is not proper."[94]

Caldwell v. State[95] is a good recapitulation of the law of enforced time

80. *Id.* at 97.
81. *Id.*
82. *Id.* at 101.
83. 808 S.W.2d 482 (Tex. Crim. App. 1991).
84. TEX. RULE APP. P. 81(b)(2).
85. 808 S.W.2d at 485.
86. *Id.* at 484.
87. *Id.* at 485.
88. *Id.*
89. Allridge v. State, 762 S.W.2d 146, 163 (Tex. Crim. App. 1988), *cert. denied*, 489 U.S. 1040 (1989).
90. Smith v. State, 703 S.W.2d 641, 645 (Tex. Crim. App. 1985), quoting Carter v. State, 100 Tex. Crim. 247, 272 S.W. 477 (1925).
91. 703 S.W.2d at 645.
92. *Id.* at 644.
93. Caldwell v. State, No. 70,846, slip op. at 4 (Tex. Crim. App. Oct. 16, 1991). *See also* Cockrum v. State, 758 S.W.2d 577, 584 (Tex. Crim. App. 1988), *cert. denied* 489 U.S. 1072 (1989).
94. *Caldwell*, slip op. at 3. *See also Smith v. State*, 703 S.W.2d at 645.
95. No. 70,846, slip op. at 4 (Tex. Crim. App. Oct. 16, 1991).

limits in voir dire with a twist. This was individual voir dire in a capital murder case with a 30 minute per venireperson limit. There was no general objection to the 30 minute limit per venireperson set by the judge, but the defense did object to the limit as to one juror. After his time was exhausted, the defendant only requested to ask about special issue number three, but did not proffer any specific question(s). His request was about a general area, so the court had no way of knowing whether or not the questioning might have been global or irrelevant.[96] He did not proffer any specific questions, and did not obtain any adverse rulings on them. Thus no error was preserved.[97]

B. Jury Charge: "Reasonable Doubt" Defined And Mandated In Every Jury Charge; Standard Of Review Of Sufficiency Questions Made Uniform

After lengthy discussion in *Geesa v. State*,[98] the court changed the standard of review of sufficiency of the evidence in circumstantial evidence cases and then adopted the federal definition of reasonable doubt for use in jury charges.[99] Essentially the "outstanding reasonable hypothesis analytical construct" was used in circumstantial evidence cases (but not in direct evidence cases) to overturn jury verdicts where there was any reasonable hypothesis, other than the guilt of the defendant, that explained the facts.[100] Now the verdict will withstand a sufficiency challenge in either a direct or a circumstantial evidence case if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, considering the evidence in the light most favorable to the prosecution. To clarify this area of the law, the court formally mandated an instruction on reasonable doubt so that juries could be deemed rational in their decision making.[101]

> "A reasonable doubt is a doubt based upon reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your personal affairs."[102]

The court did not say what the effects of not complying with this purely prospective rule would be; perhaps sufficiency will be reviewed using the disavowed analytical construct or maybe an *Almanza v. State*,[103] jury charge error analysis will be performed. In a footnote, the court also suggests telling the venire panel the meaning of the two lesser burdens of proof, preponderance of the evidence and clear and convincing evidence, in order that they

96. *Id.* slip op. at 4.
97. *Id.*
98. No. 290-90 (Tex. Crim. App. Nov. 6, 1991).
99. *Id.* slip op. at 1.
100. *Id.* slip op. at 6.
101. *Id.* slip op. at 11-13. *See also* Hankin v. State, 646 S.W.2d 191, 203 n.6 (Tex. Crim. App. 1983) (opinion on rehearing).
102. *Id.* slip. op. at 13.
103. 686 S.W.2d 157 (Tex. Crim. App. 1984).

may more fully understand the definition of reasonable doubt.[104]

C. Witnesses

1. Confidential Communication Privilege Under Rule 504(2)(a): Privilege Not To Be Called As A Witness Against Spouse

In *Johnson v. State*[105] defendant's spouse voluntarily testified at a pre-trial hearing on motion to suppress concerning the voluntariness of the consensual search of their residence. During direct, while testifying as to the consent issue, the wife asserted the privilege not to testify against her husband at trial. On cross the State, over objection, questioned her regarding matters extraneous to the consent to search issue, and elicited testimony that was incriminating to the defendant. At trial the State, again over objection, called the wife and forced her to claim the privilege in front of the jury, in violation of Texas Rule of Criminal Evidence 513(b).[106] Then the State introduced, over objection, the wife's pre-trial testimony, including the incriminating evidence. Rule 513(b) mandates that privilege claims should be kept from the knowledge of the jury "to the extent practicable."[107] The court ruled that the State's reason for not following the rule, so that the jury would understand why the wife's pre-trial testimony was read rather than live, was inadequate.[108] The "mere assertion"[109] that the jury will better understand the State's trial tactics is an insufficient reason to violate rule 513(b).[110]

Additionally, it was error for the trial court to admit during the trial on the merits the wife's pre-trial testimony because it was error to allow it to be elicited by the State in the pre-trial hearing in the first place.[111] The bases for this conclusion are rule 104(a),[112] which waives the rules of evidence except those about privilege in motions to suppress and rule 504(2)(a), which says a testifying spouse is "subject to cross examination as provided in rule 610(b)."[113] Rule 610(b) allows a witness to "be cross-examined on any matter relevant to any issue in the case."[114] Relevancy is defined under rule 401 as evidence "having any tendency to make the existence of any fact that is of consequence" more or less probable.[115] Since the limited issue at the pre-trial was consent to search, the State's cross examination as to extraneous matters did not go to a fact of consequence and was not therefore rele-

104. *Geesa*, slip op. at 12, n.11. *See* Hankins v. State, 646 S.W.2d 191, n.6 (Tex. Crim. App. 1983) (opinion on rehearing).
105. 803 S.W.2d 272 (Tex. Crim. App. 1990), *cert. denied*, 111 S.Ct. 2914 (1991).
106. TEX. R. CRIM. EVID. 513(b).
107. *Id.*
108. 803 S.W.2d at 283.
109. *Id.*
110. *Id.*
111. *Id.* at 284.
112. TEX. R. CRIM. EVID. 104(a). The same rule, that testifying in a preliminary matter does not open up the testifier for cross examination as to other matters, specifically applies to the accused under rule 104(d).
113. *Id.* 504(2)(a).
114. *Id.* 610(b).
115. *Id.* 401.

vant.[116] "The cross examination, at a pre-trial hearing on a motion to suppress evidence, of a witness spouse who retains her privilege to not testify at trial, must be limited to those questions that are of direct consequence to the matter to be determined at that hearing."[117]

2. *Confrontation of a Witness & Closed Circuit T.V.*

The trial court allowed a non-victim child witness in *Gonzales v. State*,[118] a child abuse case, to testify via closed circuit T.V. There was no statutory authority to do so in article 38.071, V.A.C.C.P.[119] The Court of Criminal Appeals held that even in the absence of statutory authority, as a matter of judicial discretion, a trial judge may allow a child witness to testify from another room, and in the presence of only a representative of the State, over a live two way television hookup to the courtroom where the defendant, judge, and jury are.[120] The judge here first found that: (1) the system was necessary to protect the child witness's welfare; (2) that without the procedure she would be incapable of testifying in front of the defendant; and (3) if she were forced to testify in front of the defendant it would create or increase severe trauma.[121] Saying that the right to confrontation is not absolute face-to-face confrontation under either the U.S. or Texas Constitution,[122] the court found that face-to-face confrontation may therefore give way to competing interests such as shielding a child from the trauma of the courtroom.[123] Though there must be State public policy in favor of protecting child witnesses in such situations as the case at bar, the Court of Criminal Appeals was fully capable of making this public policy determination.[124] Finding that such public policy applied in this case, and relying on the case specific findings of the necessity of using closed circuit T.V. in order to protect the child, the procedure, and the conviction, were affirmed.[125]

D. Evidence

1. *Admissibility Of Reports Prepared By Law Enforcement Agencies Under Texas Rules of Criminal Evidence 803(6) and (8)*

Cole v. State[126] deals with the admissibility of the hearsay results of a chemical test performed by a DPS chemist who was absent at trial, pursuant to Texas Rules of Criminal Evidence 803(6)[127] and 803(8).[128] All parties

116. 803 S.W.2d at 284.
117. *Id.*
118. No. 365-90 (Tex. Crim. App. Sept. 18, 1991).
119. TEX. CRIM. PROC. CODE ANN. art. 38.071 (Vernon Supp. 1992).
120. *Gonzales*, slip op. at 19.
121. *Id.* slip op. at 6-7.
122. *Id.* slip op. at 14.
123. *Id.* slip op. at 14-15.
124. *Id.* slip op. at 17.
125. *Id.* slip op. at 19.
126. No. 1179-87 (Tex. Crim. App. Nov. 14, 1990)(MRH granted July 3, 1991).
127. TEX. R. CRIM. EVID. 803(6) (the business records exception to the hearsay rule).
128. *Id.* 803(8) (records and reports of public agencies or offices exception to the hearsay rule).

conceded that the trial testimony met the requirements of rule 803(6) because the supervisor of the absent chemist, who was also the custodian of the records, testified. Rather, the question was whether rule 803(8)'s prohibition against admission of hearsay "matters observed by police and other law enforcement personnel"[129] applied and if so which rule governs.[130]

Under the predecessor to rule 803(6), article 3737(e) V.A.T.S,[131] the report was admissible as an exception to the hearsay rule. Noting this, the Court of Criminal Appeals found that under federal interpretation of the identical federal rule of evidence to our rule 803(8), chemists employed by police were law enforcement personnel.[132] Still, not all reports of police agencies are prohibited under judicial interpretation of rule 803(8). If made by law enforcement personnel and for purposes unconnected with a criminal case, or in a routine non-adversarial setting, the reports may be admissible.[133] Here, however, the tests were performed on items collected as part of a specific criminal investigation to evaluate the results of that investigation. Furthermore, and most importantly, the tests were not prepared for purposes independent of specific litigation, nor were they ministerial objective observations of an unambiguous factual nature. Thus, rule 803(8) prohibited their admission as hearsay; so the actual chemist had to testify to get the test results in evidence.[134] Whenever evidence is admissible under rule 803(6) but is inadmissible under rule 803 (8), the latter controls. To hold otherwise would emasculate the latter rule.[135]

2. *Admissibility of Pen Packets: Easier Now Under Texas Rules of Criminal Evidence 901 & 902*

The court in *Reed v. State*[136] held that copies of a judgment and sentence of a previous conviction contained in a penitentiary packet from the Texas Department of Criminal Justice Institutional Division (TDCJID) no longer have to be certified by the clerk of the convicting court.[137] The pen packets are admissible under Texas Rules of Criminal Evidence 901(a) & (b)(7)[138] "Public Records and Reports" and also under rule 902(4)[139] "Certified Cop-

129. *Id.*

130. *Cole v. State*, slip op. at 2.

131. Repealed by Texas Rules of Evidence, eff. Sept. 1, 1983 (Acts 1939, 46th Leg., § 1); Texas Rules of Evidence, eff. Sept. 1, 1986 (acts 1985, 69th Leg., ch. 685, § 9(b)).

132. *Cole v. State*, slip op. at 7.

133. *Id.* slip op. at 8.

134. *Id.* slip op. at 18.

135. In dicta there are broad pronouncements that since our rules of evidence are patterned after the federal rules, federal cases should be consulted for the meaning of those rules unless the Texas rule clearly departs in language from its federal counterpart. In West's Federal Criminal Code and Rules, beginning at page 209, there are extensive notes of the advisory committee following each rule of federal evidence. These notes were before the Court of Criminal Appeals when it promulgated the Texas rules and may also be consulted when the Texas and Federal rule are identically worded (as is often the case). *Id.* slip op. at 4-5.

136. 811 S.W.2d 582 (Tex. Crim. App. 1991).

137. *Id.* at 585.

138. TEX. R. CRIM. EVID. 901(a) & (b)(7).

139. TEX. R. CRIM. EVID. 902(4).

ies of Public Records" if certified by the TDCJID record clerk.[140] All pre-rules prior caselaw is overruled.

3. *Character Evidence Per Texas Rule of Criminal Evidence 405*

Texas Rule of Criminal Evidence 405,[141] Methods of Proving Character, allows proof of a character trait (such as truth and veracity) by either reputation or opinion testimony. Prior to the rules of evidence, reputation testimony had to be based on what people in the community thought and said, and not on specific instances of the accused's conduct.[142] *Hernandez v. State*[143] holds that this doctrine carries over into the new rule 405.[144] The Court of Criminal Appeals reversed because the two deputies who testified, over objection, about the defendant's reputation relied solely on conversations consisting of complaints about prior bad acts of public intoxication and disorderly conduct. They had talked to others in the community, but the conversations were about specific bad acts the defendant had done and not what people thought about the defendant's truthfulness, peacefulness, law abidingness, etc., and thus was NOT a basis for proof of character by testimony that he had a bad reputation in the community for these character traits.[145]

4. *Hearsay*

a. *Admission Of Co-conspirator Statement Under Texas Rule of Criminal Evidence 801(e)(2)(E).*

Meador v. State[146] and *Deeb v. State*[147] deal with the co-conspirator exception to the hearsay rule Texas Rule of Criminal Evidence 801(e)(2)(E).[148] Recognizing first that this exception to the hearsay rule is not limited to prosecutions for conspiracy but is rather a rule of evidence applicable to any offense, the court in *Meador* found that the statement was not made in furtherance of the conspiracy.[149] This case involved a conversation between two co-conspirators of the defendant. However, the two were snitching for the police who set up the conversation solely for one to elicit incriminating statements concerning the defendant from the other. Thus the "in furtherance of the conspiracy" prong of rule 801(e)(2)(E) was not met.[150]

In *Deeb* the "during the course of the conspiracy" prong was not met

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140. 811 S.W.2d at 587.
141. TEX. R. CRIM. EVID. 405.
142. *See* Wagner v. State, 687 S.W.2d 303 (Tex. Crim. App. 1984).
143. 800 S.W.2d 523 (Tex. Crim. App. 1990).
144. *Id.* at 525.
145. *Id.* The deputies did not attempt to give character evidence in the nature of an (their) opinion.
146. 812 S.W.2d 330 (Tex. Crim. App. 1991).
147. 815 S.W.2d 692 (Tex. Crim. App. 1991).
148. TEX. R. CRIM. EVID. 801(e)(2)(E). " A statement is not hearsay if . . . it is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."
149. 812 S.W.2d at 334.
150. *Id.*

where the statements between a co-conspirator of the defendant and a third party occurred after the conspiracy had been thwarted but before its ends were accomplished.[151] The defendant had hired the co-conspirator to kill a woman and was to pay him from the proceeds of an insurance policy on the woman of which the defendant was the beneficiary. When the statements were made the woman was very much alive, the co-conspirator had not yet been paid, (because he had killed the wrong woman), the insurance policy had lapsed, and he was in the Texas Department of Corrections on another charge. Thus, the Court of Criminal Appeals held that the conspiracy had been terminated.[152] Such termination can occur due to either success or failure, and this was clearly terminated by failure.

5. Sufficiency

a. The General Test Of Sufficiency: Evidence Is Measured Against Court's Charge.

The long standing rule that sufficiency of the evidence will be measured by comparing the evidence in the light most favorable to the State to the court's charge was reaffirmed in *Arceneaux v. State*[153] despite the recent attacks on its continued viability. That part of the charge authorizing conviction is not subject to the doctrine of surplusage in an indictment, which says that some of the wording may be ignored in determining sufficiency.[154] This is true for the "application paragraph" where the law is applied to the facts, and other portions of the charge if they "[authorize] a conviction."[155]

b. Application Paragraph of the Charge Is Becoming The SOLE Yardstick By Which To Measure Sufficiency.

The State got a conviction for robbery under the law of parties in *Jones v. State*[156] and the defendant appealed contending that the evidence was insufficient because the application paragraph authorized his conviction only as a primary actor. The charge included an abstract charge on the law of parties, but it was placed *after* the "application" paragraph (the paragraph mandated by article 36.14, V.A.C.C.P. "distinctly setting forth the law applicable to the case"[157]). Since the application paragraph did not reference the law of parties or apply the law of parties to the facts, the Court of Criminal Appeals found that the evidence, when measured against the application paragraph, was insufficient.[158]

Several things need to be noted here. First, there was no objection to the charge, thus the State was in effect deemed to have accepted the higher burden of proving guilt without the help of the law of parties surprising the

151. 815 S.W.2d at 697.
152. *Id.*
153. 803 S.W.2d 267, 269 (Tex. Crim. App. 1990).
154. *Id.* at 271.
155. *Id.*; *see also* Reeves v. State, 806 S.W.2d 540 (Tex. Crim. App. 1990).
156. 815 S.W.2d 667 (Tex. Crim. App. 1991).
157. TEX. CRIM. PROC. CODE ANN. art. 36.14 (Vernon Supp. 1992).
158. 815 S.W.2d at 670.

prosecutor since he had proceeded on a law of parties basis from voir dire on.[159] Second, the application paragraph began "[n]ow bearing in mind the foregoing instructions . . . ,"[160] and thus the jury was affirmatively instructed to decide the case without considering the law of parties which came after the application of the law to the facts.[161] However, the case holding does not rest on this detail.

c. Sufficient Proof Of Serious Bodily Injury

Webb v. State[162] presents a good summary of when an injury constitutes serious bodily injury and when it constitutes merely bodily injury.[163] In this aggravated robbery case evidence of serious bodily injury was insufficient where the complainant was struck in the head with a rock and suffered a broken jaw necessitating an overnight hospital stay and surgery a few days later.[164] There was, however, no medical evidence introduced and no evidence at all of continuing effects of the injury or of permanent disfigurement. Since serious bodily injury under section 1.07(a)(34) of the Penal Code[165] means injury that (1) created "a substantial risk of death,"[166] or (2) causes "serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member,"[167] the State could only prevail under the first condition. The court reiterated that substantial risk of death is different "in kind, and not merely in degree" from bodily injury.[168] The injury itself must create a substantial risk of death, as opposed to some hypothetical or mere possibility that the bodily injury created a substantial risk of death. These injuries did not amount to a substantial risk of death even though the police officer expert witness testified that the rock as used here could create a substantial risk of death.

d. Fair Market Value Can Be The Regular Price, Even If The Sale Price Is Lower

In *Keeton v. State*,[169] a theft case, the defendant stole an item that regularly sold for more than $750, but which was on sale that day for less than $750. Section 31.08(a)(1) of the Penal Code defines value as "the fair market value of the property . . . at the time and place of the offense."[170] The Court of Criminal Appeals held that fair market value is not restricted to the price marked at the store on the day of the offense. Rather, other places in the

159. *Id.* at 668.
160. *Id.* at 669.
161. *Id.* (this explains the two concurring judges' votes).
162. 801 S.W.2d 529 (Tex. Crim. App. 1990).
163. *Id.* at 532-33.
164. *Id.* at 533.
165. TEX. PENAL CODE ANN. § 1.07(a)(34) (Vernon 1974).
166. *Id.*
167. *Id.*
168. 801 S.W.2d at 532, quoting Moore v. State, 739 S.W.2d 347, 352 (Tex. Crim. App. 1987).
169. 803 S.W.2d 304 (Tex. Crim. App. 1991).
170. TEX. PENAL CODE ANN. § 31.08(a)(1) (Vernon 1989).

general locale and at least the county may be considered.[171] Thus a "defendant is free to rebut a store price as representative of fair market value by showing that such . . . price was inflated by that store as evidenced by the price of the item" at other similar stores.[172] "Likewise, the State may present evidence showing the price charged at other stores, and argue that the sale price was low and did not reflect fair market value" in the general locale.[173] Here, a Montgomery Ward's employee testified that although the item was temporarily on sale, its fair market value was really the regular price. Thus, the trier of fact was free to believe fair market value here was more than $750.[174]

e. Theft of Trade Secrets

Schalk v. State[175] is a case of first impression involving the downloading to a disk of some Texas Instruments (TI) computer programs and their subsequent removal or theft from TI by two departing employees. Under section 31.05(a)(4) of the Penal Code, a trade secret is "the whole or any part of any scientific or technical information, design, process, procedure, formula or improvement that has value and that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes."[176] What measures need be taken to insure trade secret status? The court said that absolute secrecy is not required, and in this case the security at TI combined with employment agreements, restricted computer access, prohibition against disclosure of these programs, and limited disclosure of the programs to agencies selected by TI, were sufficient evidence of the trade secret status of the programs.[177]

6. Evidence Of The Crime's Impact On The Victim & His Mother Admissible At The Punishment Phase Of The Trial

Stavinoha v. State[178] is a pre-rules of evidence case; however, it discusses relevancy and article 37.07, section 3(a) V.A.C.C.P. which now allows, as permitted by the Texas Rules of Criminal Evidence, evidence "as to any matter the court deems relevant to sentencing."[179]

Evidence of the circumstances of the offense itself is admissible at the punishment phase of a trial. Victim impact evidence may be admissible at the punishment phase as a circumstance of the offense, so long as that "evidence 'has some bearing on the defendant's personal responsibility and moral guilt.' "[180] In *Stavinoha* the defendant, a priest, was convicted of sexual as-

171. 803 S.W.2d at 305.
172. *Id.* at 306.
173. *Id.*
174. *Id.*
175. No. 665-89 (Tex. Crim. App. Oct. 2, 1991).
176. TEX. PENAL CODE ANN. art. 31.05(a)(4) (Vernon 1989).
177. *Schalk*, slip op. at 30.
178. 808 S.W.2d 76 (Tex. Crim. App. 1991).
179. TEX. CRIM. PROC. CODE ANN. art. 37.07, § 3(a) (Vernon Supp. 1992).
180. Miller-El v. State, 782 S.W.2d 892, 896 (Tex. Crim. App. 1990), quoting Booth v. Maryland, 482 U.S. 496, 502 (1987).

sault of a nine year old. At the punishment stage the State, over objection, called the mother of the victim and a psychologist who had examined both her and the victim to testify about the effects the sexual assault had on both the nine year old and on the mother. The Court of Criminal Appeals said the jury "could rationally hold [the defendant] morally accountable for the psychological trauma"[181] to both victim and mother, "and for the consequences of that trauma,"[182] for example having to move, and going to counseling. This was because the defendant as parish priest had used that position to gain the trust of both mother and victim, and thus could have easily anticipated the impact the betrayal of that trust would have on both mother and child. This evidence had a bearing on the defendant's personal responsibility and his moral guilt and was therefore admissible.[183] This case is important because of the admissibility of the effects on the mother, as the effects on the victim were probably admissible anyway under *Miller-El v. State*.[184]

7. *The Definitive Word On Relevancy and Admission of Extraneous Offenses Under Texas Rules of Evidence 401, 402, 403, & 404*

For its pure impact on general admissibility of evidence, *Montgomery v. State*[185] is the most important case to come out since the rules of criminal evidence were promulgated in 1985. It begins with general principles about Texas Rules of Criminal Evidence 401,[186] relevancy, Rule 402,[187] admissibility, and Rule 404(b),[188] extraneous offenses. Extraneous offense evidence is admissible at least under the relevancy test where it "makes more or less probable" an evidentiary fact that leads to an elemental fact, or "makes more or less probable" defensive evidence that undermines an elemental fact. Even if it passes the relevancy test it must then pass the rule 403 prejudice test.[189] The case then discusses the role of the trial judge[190] and the appellate courts.[191] The Court of Criminal Appeals reversed this case based on erroneous admission of an extraneous act.[192]

The procedure in the trial court is as follows: the State (proponent) seeks to introduce evidence of "other crimes, wrongs or acts" and the defendant

181. 808 S.W.2d at 79.
182. *Id.*
183. *Id.*
184. 782 S.W.2d 892.
185. 810 S.W.2d 372 (Tex. Crim. App. 1991) (opinion on rehearing).
186. TEX. R. CRIM. EVID. 401. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable . . ."
187. *Id.* 402. "All relevant evidence is admissible, except as otherwise provided . . ."
188. *Id.* 404(b). "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." The evidence may be admissible if it has relevance apart from this showing.
189. *Id.* 403. "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, or needless presentation of cumulative evidence." *See Montgomery*, 810 S.W.2d at 387.
190. 810 S.W.2d at 387-90.
191. *Id.* at 390-93.
192. *Id.* at 375.

(opponent) objects ("not relevant" or "extraneous offense/conduct" are sufficient objections). The State (proponent) must satisfy the trial judge that the evidence "has relevance apart from its tendency 'to prove character of a person in order to show that he acted in conformity therewith' "[193] by articulating the purpose of the evidence.[194] The trial judge determines if the evidence tends to establish some elemental fact (e.g. identity or intent), to establish some evidentiary fact leading inferentially to an elemental fact (e.g. motive, opportunity or preparation), to rebut a defensive theory (i.e. showing an absence of mistake or accident), or has some other logical relevance.[195] If the trial judge is persuaded of the evidence's relevance beyond character traits, he should rule it admissible under rule 404, be prepared to give a limiting instruction to the jury limiting its consideration to the purpose articulated by the proponent,[196] and, only if requested by the opponent, move on to the rule 403 test.[197] At this juncture a separate objection on the rule 403 grounds of unfair prejudice,[198] confusion, misleading, delay or cumulation is necessary to preserve error. If such an objection is made and the trial judge must decide if probative value is substantially outweighed by the danger of prejudice, delay, or another factor, a presumption arises that relevant evidence is more probative than prejudicial.[199] There is no burden on either party here, rather the trial judge has a duty to weigh and, in keeping with the aforementioned presumption, he should admit evidence in close cases.[200] The weighing process under rule 403 uses many factors including: 1) how compelling (similar) is the evidence? 2) how strong is the State's case without it? 3) how much does it promote a guilty verdict based on emotion? 4) how much trial time will be spent diverting the jury from the indicted offense? 5) how great is the State's need for this evidence (is there other strong evidence available, or is this fight over an uncontested issue)?[201]

The procedure in the appellate court is as follows: on appeal the trial judge's rulings on rule 404 relevance and rule 403 balancing will be reviewed on an abuse of discretion standard;[202] the courts will not make a *de novo* review.[203] That is, appellate courts must recognize that the decision making process cannot be wholly objectified, but rather will be done by the trial judge using his own life experiences or perceptions as exemplary of common experience. Where reasonable persons would disagree about such perception, the trial court's discretionary ruling should stand. However, merely conducting a balancing test or merely not acting arbitrarily is not enough.[204]

193. *Id.* at 387, quoting TEX. R. CRIM. EVID. 404(b).
194. *Id.*
195. *Id.* at 387-88.
196. *Id.* at 388.
197. *Id.*
198. If you object here due to unfair prejudice you may have waived an appellate complaint of undue delay, or any of the other factors.
199. 810 S.W.2d at 389.
200. *Id.*
201. *Id.* at 390.
202. *Id.* at 391.
203. *Id.*
204. *Id.*

Moreover, when one or more relevant criterion (the factors including 1 thru 5 above), viewed objectively either leads to the conclusion that or reasonably contributes to a risk that the balancing test should have come out the other way, the appellate court should find error.[205] The trial judge has no right to be wrong if admitted evidence appears to the appellate court to be substantially more prejudicial, confusing, delaying than probative, even giving due deference to the trial court's decision.[206] Here, considering many of the above factors, the Court of Criminal Appeals found that the trial judge abused his discretion in admitting evidence of extraneous conduct.[207]

8. *Preservation Of Error: Texas Rule of Criminal Evidence 103(a)(1), Texas Rule of Appellate Procedure 52, Running Objections And The Like*

Ethington v. State[208] is an excellent recapitulation of the steps necessary to preserve error when the trial judge overrules an objection and admits the complained of evidence. The Court of Criminal Appeals first summarized the requirements for single objections[209] contained in Texas Rule of Criminal Evidence 103(a)(1)[210] and Texas Rule of Appellate Procedure 52[211] (timeliness, specificity, and obtaining a ruling). Then the court fully described and sanctioned running objections while disavowing the civil preservation of error doctrine that once a first objection is overruled to a line of testimony, the objecting party may assume further objections to additional testimony along those same lines will also be overruled and therefore need not object further in order to preserve error.[212] Moreover, the court pointed out that error may also be preserved under Appellate rule 52(b) that allows objections to evidence to be made out of the presence of the jury.[213] Although not stated in the opinion, the traditional method of preserving error in this fashion is for the objector to say, "Your Honor, based on your reasons for overruling this objection, may I have a running objection to this line of questioning of this witness?"

E. *Burden of Proof In Defenses: State Has Burden Of Persuasion, Not Production, Against A Defense*

In *Saxton v. State*[214] the defendant was convicted of murder after raising self-defense under section 9.32 of the Penal Code.[215] The court had properly charged the jury under section 2.03 of the Penal Code[216] that a reasonable

205. *Id.* at 392-93.
206. *Id.* at 393.
207. *Id.* at 397.
208. No. 736-88 (Tex. Crim. App. Nov. 6, 1991).
209. *Ethington*, slip op. at 5.
210. TEX. R. CRIM. EVID. 103(a)(1).
211. TEX. R. APP. PROC. 52.
212. *Ethington*, slip op. at 6-7.
213. *Id.* at 7.
214. 804 S.W.2d 910 (Tex. Crim. App. 1991).
215. TEX. PENAL CODE ANN. § 9.32 (Vernon Supp. 1992).
216. *Id.* § 2.03(d) (Vernon 1974).

doubt on the issue resulted in an acquittal.[217] The court of appeals reversed due to insufficient evidence to rebut the defense of self defense because the State produced no evidence to refute appellant's claim of self defense and "all of the evidence is uncontradicted and is consistent with self-defense."[218] The Court of Criminal Appeals affirmed the conviction holding that the State has no burden of production to refute a defense, only one of persuasion so that the jury resolves the defensive issue against the defendant beyond a reasonable doubt.[219] This may be accomplished, among other ways, by persuading the jury, as the sole judges of the credibility of the witnesses, to simply reject the defensive testimony. The guilty verdict here shows that they did just that.

F. The Inherent Power Of A Court To Make Probation Conditions

Trial courts have wide ranging authority and inherent power to impose conditions of probation that are reasonably related to the treatment of the probationer and the protection of the general public.[220] This authority and power includes forced participation in programs set up under the Standards promulgated by the Texas Department of Criminal Justice - Community Justice Assistance Division (TDCJCJAD) (formerly Texas Adult Probation Commission).[221] Specifically in *Fielder v. State*[222] a Court Residential Treatment Center was set up under those Standards, though no specific statutory authority exists for creation of such a creature.[223] Even though the legislature under article 42.12 section 6(e), V.A.C.C.P.,[224] set up a similar program of Community Rehabilitation Centers, which the defendant was not statutorily eligible to attend, the Court of Criminal Appeals ruled that the legislature did not preclude TDCJCJAD from setting up the residential treatment centers that incidently the defendant was, under the Standards, eligible to attend.[225]

G. Specific Crimes and Specialty Law

1. Sexual Abuse Of A Child, Chapter 22, V.A.P.C.

a. Admissibility Of Expert Testimony Under Texas Rule of Criminal Evidence 702

Texas Rule of Criminal Evidence 702 allows a qualified expert to give a professional opinion if his "specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue."[226] In *Duckett v.*

217. 804 S.W.2d at 911.
218. *Id.* at 912.
219. *Id.* at 913.
220. TEX. CRIM. PROC. CODE ANN. art. 42.12, § 1 (Vernon Supp. 1992).
221. Standards for Adult Probation in Texas (1988).
222. 811 S.W.2d 131 (Tex. Crim. App. 1991).
223. *Id.* at 133.
224. TEX. CRIM. PROC. CODE ANN. art. 42.12 § 6(e) (Vernon Supp. 1992).
225. 811 S.W.2d at 134.
226. TEX. R. CRIM. EVID. 702.

State[227] the Court of Criminal Appeals extensively discussed rule 702 saying, "[t]he threshold determination for admitting expert testimony"[228] is whether the "specialized knowledge" will assist the jury per rule 702. A good test for this determination is "the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject."[229] Under rule 702 the jury does not have to be qualified to intelligently and to the best possible degree determine the particular issue without benefit of the expert witnesses' specialized knowledge.[230] Even though an expert's insight might be of some benefit to the jury, if it is not testimony found outside the common perspective of a layperson's knowledge, it is not specialized knowledge.[231]

Coupled with rule 702 expert testimony in this case must be an analysis under rules 402,[232] relevancy, and 403,[233] prejudice substantially outweighs probative value. Expert testimony may often amount to bolstering, but that alone does not bar its admission.[234] Rather, the effect of the bolstering must be weighed in terms of the prejudice substantially outweighing probative value. Additionally, the testimony may embrace the ultimate issue to be determined by the jury.[235] The State can ask if the child's behavior is consistent with abuse, but it may not ask the expert if in his opinion the child is telling the truth since that almost per se violates rule 403.[236] The trial court has discretion whether to allow a witness to testify; thus on appellate review the judge's decisions on the above tests and criteria will cause a reversal only if they amount to an abuse of discretion.[237] Finally, each case involving expert testimony must be decided on its own facts.

In this case a Department of Human Services social worker, who admittedly qualified as an expert, testified as an expert per Texas Rule of Criminal Evidence 702, on the dynamics of intrafamily child sexual abuse. The social worker essentially described the "Child Sexual Abuse Syndrome" and pointed out that this child complainant had experienced the classic phases of an abuse incident and its aftermath. Previously, the fact that the child victim had given contradictory statements was brought out by the defense. Most courts do not allow specific testimony as substantive evidence of abuse, but do allow it to rehabilitate a victim's credibility for example to explain a child-victim's post trauma behavior as a common reaction to sexual abuse where it would otherwise appear impeaching.[238] Thus, the trial court did

227. 797 S.W.2d 906 (Tex. Crim. App. 1990).
228. *Id.* at 910.
229. *Id.*, quoting Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1951).
230. 797 S.W.2d at 911.
231. *Id.*
232. TEX. R. CRIM. EVID. 402.
233. TEX. R. CRIM EVID. 403.
234. 797 S.W.2d at 918.
235. *Id.* at 917.
236. *Id.* at 920.
237. *Id.*
238. *Id.* at 912.

not abuse its discretion in deciding that there was compliance with rules 702, 402, and 403.

2. *Violation Of The Texas Securities Act, Article 581-29(C)(1), V.A.C.S.: Prior Con-Game Is A Material Fact That Should Be Disclosed*

It is a violation of Texas' Blue Sky Laws to fail to disclose a material fact in selling securities.[239] *Bridewell v. State*[240] holds that a fact is material if "it would have assumed actual significance in the deliberation of a reasonable investor, in that it would have been viewed as significantly altering the total mix of available information used in deciding whether to invest."[241] The Court of Criminal Appeals held that prior con-games were a material fact.[242] Here the defendant presented a fairly straight up oil deal to an investor, but failed to disclose that he had, in prior deals with other investors, spent investor funds for personal use and used fake documents to explain lack of investment return. In other words, although there was no evidence that the defendant otherwise defrauded this investor, he did so by failing to disclose that he had defrauded other investors in the past.[243] There were no Fifth Amendment problems here and the State was allowed to bring in the defrauded investors to prove up those frauds before the jury.[244]

3. *Deadly Weapon Finding Under Article 42.12 Section 3g(a): Anything, Including Hands, Can Be A Deadly Weapon*

In *Mixon v. State*,[245] a murder case, the indictment alleged that the defendant caused the death of decedent by strangling her with "an unknown object."[246] The medical testimony was that some unknown object put pressure on the neck causing asphyxiation, and that the object could have been a hand, arm, shoe, or something else. Therefore, the unknown object was properly alleged to be a deadly weapon because "in the manner of its use" it was capable of causing death per section 1.07 (a)(11)(B) of the Penal Code.[247] The Court of Criminal Appeals adopted the court of appeals' opinion holding that there was proper notice and sufficient evidence to uphold the affirmative finding of a deadly weapon, to wit "an unknown object."[248]

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239. TEX. REV. CIV. STAT. ANN. art. 581-29(c)(1) (Vernon 1964 & Supp. 1992).

240. 804 S.W.2d 900 (Tex. Crim. App. 1991).

241. *Id.* at 904.

242. *Id.*

243. *Id.* at 906.

244. *Id.* at 906-07. The indictment from the Dallas grand jury is attached to the published opinion as an example.

245. 804 S.W.2d 107 (Tex. Crim. App. 1991).

246. *Id.* at 108.

247. TEX. PENAL CODE ANN. § 1.07(a)(11)(B) (Vernon 1974) ("anything that in the manner of its use . . . is capable of causing death").

248. 804 S.W.2d at 108. *See also* Johnson v. State, 815 S.W.2d 707 (Tex. Crim. App. 1991).

4. *Preemption: OSHA Does Not Preempt State Prosecution For "On The Job" Criminally Negligent Homicide*

In *Sabine Consolidated, Inc. v. State*[249] two Sabine employees were killed when the construction trench in which they were working collapsed. Alleging a failure to act in the face of a duty to act, Sabine was charged with negligent homicide under section 19.07 of the Penal Code.[250] The duty to act was alleged to be imposed by the Texas Occupational Safety Act (TOSA), V.A.C.S. article 5182a, section 3,[251] to maintain a reasonably safe workplace for employees. The defendant argued that the federal Occupational Safety & Health Act (OSHA)[252] preempted state law in this fact scenario, and thus state prosecution was barred. The Court of Criminal Appeals held that there was no express preemption of state criminal laws in OSHA,[253] and went on to analyze the doctrines of implied preemption and preemption by conflict and found no OSHA preemption of enforcement of state criminal laws.[254] The same result would obtain even if the State had relied on a duty to act imposed by OSHA instead of TOSA.

5. *DWI Videotapes: Can't Play The Part Where Defendant Asks For Attorney*

In *Hardie v. State*[255] the defendant was arrested for DWI, put on videotape, and given his warnings about taking the breath test[256] before being questioned. At the beginning of the tape he invoked his right to counsel by saying, "I am to wait until the lawyer . . . appears."[257] At trial he objected to the State's playing the audio portion of the tape including this statement. The Court of Criminal Appeals found that invocation of one's right to counsel may indeed be construed adversely to a defendant and may improperly be considered an inference of guilt.[258] The harmless error rule of Texas Rule of Appellate Procedure 81(b)(2)[259] applies,[260] but under the facts of the case the error was not harmless[261] under the analysis approach mandated by *Harris v. State*.[262]

IV. POST TRIAL AND APPEAL AREAS

In this area the court has addressed procedural requirements regarding

249. 806 S.W.2d 553 (Tex. Crim. App. 1991).
250. TEX. PENAL CODE ANN. § 19.07 (Vernon 1989).
251. TEX. LAB. CODE ANN. art. 5182a, § 3 (Vernon 1987).
252. 29 U.S.C. §§ 651-78 (1988 & Supp. I 1989).
253. 806 S.W.2d at 558.
254. *Id.* at 558-59.
255. 807 S.W.2d 319 (Tex. Crim. App. 1991).
256. TEX. REV. CIV. STAT. ANN. art. 67011-5 (Vernon Supp. 1992).
257. 807 S.W.2d at 323.
258. *Id.* at 322 (overruling Jamail v. State, 787 S.W.2d 380 (Tex. Crim. App. 1990), *cert. denied* 111 S.Ct. 148 (1990)).
259. TEX. R. APP. P. 81(b)(2).
260. 807 S.W.2d at 322.
261. *Id.*
262. 790 S.W.2d 568 (Tex. Crim. App. 1989).

what the State and the defendant are required to do to raise and preserve error for appellate review. Two cases deal with the State's right to appeal under article 44.01, V.A.C.C.P. and what situations constitute appropriate grounds for appeal.

A. State's Right to Appeal

1. What Is An Appealable Order Under Article 44.01, V.A.C.C.P.

One of the orders the State is entitled to appeal under article 44.01, V.A.C.C.P. is an order that "dismisses an indictment, information, or complaint or any portion of an indictment, information, or complaint."[263] In *State v. Moreno*[264] the trial judge granted a motion to quash and signed an order quashing the information. The Court of Criminal Appeals held that although this was not specifically a dismissal, the order in essence terminated the proceedings and therefore, so that the legislative intent behind the article could be effectuated, this was a dismissal and the State could appeal.[265] The effect of the order is what controls. Also, it was of no moment that the State could amend the information if they wanted to.[266] The holding is that a trial court effectively terminates and in effect "dismisses" the prosecution against an accused when the effect of its order forces any alteration of the information before trial on the merits and the State is not willing to comply with that order.[267] The same rules apply for indictments and complaints.

2. What Is A Ruling On A Question Of Law, Such That The State May Cross Appeal Under Article 44.01(c), V.A.C.C.P.

In *Armstrong v. State*[268] the defendant was convicted of burglary and appealed. During the bench trial the judge ruled against the validity of an enhancement count. Specifically the judge found that in the prior conviction used for enhancement the judge did not have a statement of facts of the magistrate's hearing before him when he reviewed the actions of the magistrate and signed the judgment of conviction. Therefore, the judge found that the Dallas County Magistrate's Act[269] had not been complied with and "as a matter of law . . . the conviction could not be used for enhancement" and proceeded to find "not true" for that count.[270] Article 44.01(c), V.A.C.C.P.[271] says that the State can appeal a ruling on a question of law if the defendant is convicted and he appeals. The Court of Criminal Appeals said that although the factual findings must be taken as is, if the trial judge then applies them to the law and makes a conclusion of law the State may

263. TEX. CRIM. PROC. CODE ANN. art. 44.01(a)(1) (Vernon Supp. 1992).
264. 807 S.W.2d 327 (Tex. Crim. App. 1991).
265. *Id.* at 334.
266. *Id.* at 333.
267. *Id.* at 334.
268. 805 S.W.2d 791 (Tex. Crim. App. 1991).
269. TEX. GOV'T. CODE ANN. § 54.501-.516 (Vernon 1988).
270. 805 S.W.2d at 793.
271. TEX. CRIM. PROC. CODE ANN. art. 44.01 (Vernon Supp. 1992).

appeal that ruling.[272] Here, taking as true that the original convicting judge did not have a statement of facts, the question of whether this amounted to non-compliance with the Magistrate's act was a question of law. Also, if it were non-compliance, whether this rendered the conviction void was also a question of law.[273] Therefore, the State could appeal all but the factual findings. It is unfortunate for the State that the finding of "not true" was an acquittal that invoked jeopardy and so they could not retry him using that enhancement count.[274]

B. Adequacy of Brief: Waiver Of Texas Constitutional Error Due To Inadequacy Of Its Treatment In The Brief

The appellant in *DeBlanc v. State*[275] complained that his rights under article I, section 10 of the Texas Constitution[276] were violated, but in his brief he presented neither argument nor authority specifically directed to the Texas Constitution. The Court of Criminal Appeals said that the issue was therefore inadequately briefed and refused to address it.[277] Though the necessity of separately providing substantive analysis or argument for each Texas constitutional ground urged has been suggested since *McCambridge v. State*[278] this case marks a change in treatment of that necessity from request to requirement.[279] Error at trial may be preserved by simple invocation of the applicable provisions of the Texas Constitution. There is a difference between preservation of error in trial and adequacy of presentation of that error on appeal.

C. Probation Revocation: Due Diligence In Arresting Probationer - What It Is And Who Must Raise It (In Both Deferred Adjudication and Regular Probation)

In both deferred adjudication probation and regular probation, the trial court has jurisdiction to adjudicate guilt or revoke probation as long as the motion to adjudicate or revoke has been filed and the arrest warrant has been issued prior to the expiration of the probationary period.[280] Additionally, if the period has expired before the defendant is arrested and *IF* the defendant raises the issue (here by written motion), the State has the burden of showing due diligence in arresting him.[281] Where the State in such a situation makes no showing of diligence, the trial court should dismiss the motion to re-

272. 805 S.W.2d at 793.
273. *Id.*
274. *Id.*
275. 799 S.W.2d 701 (Tex. Crim. App. 1990), *cert. denied*, 111 S.Ct. 2912 (1991).
276. TEX. CONST. art. I, § 10.
277. 799 S.W.2d at 706.
278. 712 S.W.2d 499, 501 n.9 (Tex. Crim. App. 1986), *cert. denied*, 110 S.Ct. 1936 (1990).
279. 799 S.W.2d at 706.
280. TEX. CRIM. PROC. CODE ANN. art. 42.12, § 3d (Vernon 1979 & Supp. 1992).
281. Prior v. State, 795 S.W.2d 179 (Tex. Crim. App. 1990).

voke.[282] In *Langston v. State*[283] and *Rodriguez v. State*[284] the State introduced no evidence that the defendant was hiding except that he failed to report to his probation officer and showed no evidence of attempts to find the defendant. Though not part of the opinions, one defendant was arrested when he made a court appearance in another case and the other was arrested apparently when he went to Department of Public Safety to renew his driver's license.

282. Rodriguez v. State, 804 S.W.2d 516, 517-18 (Tex. Crim. App. 1991).
283. 800 S.W.2d 553 (Tex. Crim. App. 1990).
284. 804 S.W.2d 516.

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