



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTON
ATTORNEY GENERAL**

January 30, 1989

Honorable Curtis Tunnell
Executive Director
Texas Historical Commission
P. O. Box 12276
Austin, Texas 78711

LO-89-7

Dear Mr. Tunnell:

You ask whether theft from an Indian burial ground constitutes an offense under section 31.03 of the Penal Code. You provide the following information:

I have received numerous reports that the systematic looting of American Indian cemeteries is taking place in Northeast Texas and other regions of the state. Law enforcement officials seem reluctant to investigate under this statute because the incidents are being perpetrated on private property with the permission of the property owner, and the graves are not marked with tombstones as is frequently found in a non-Indian cemetery.

Whether a particular action constitutes a crime depends on the existence of all of the elements of the crime charged. We cannot resolve such issues in the opinion process. We can, however, review some penal provisions that might be applicable to the situation you describe. The grave or corpse of an Indian would be treated the same as any other grave or corpse for purposes of these statutes.

Section 31.03 of the Penal Code provides that the offense of theft is committed upon proof of the following elements (in so far as is pertinent to your inquiry):

(a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of the property.

(b) Appropriation of property is unlawful if:

(1) it is without the owner's effective consent;

Penal Code § 31.03.

The grade of the offense of theft committed for the most part is determined by the value of the property taken; however, subsection (e)(4)(B) of section 31.03 of the Penal Code provides that an offense under this section is

a felony of the third degree if:

. . . .

regardless of value, the property is stolen from the person of another or from a human corpse or grave;

The Practice Commentary following section 31.03 makes the following observations:

Theft from a corpse or grave is deemed particularly offensive and is made a third-degree felony, . . . In some instances there will be no 'owner' of property in a grave. In that event, however, the conduct usually will be cognizable under Section 42.10 (abuse of corpse).

Section 42.10 of the Penal Code addresses the matter of the abuse of a corpse and provides in pertinent part:

(a) A person commits an offense if, not authorized by law, he intentionally or knowingly:

(1) disinters, disturbs, removes, dissects, in whole or in part, carries away, or treats in a seriously offensive manner a human corpse;

. . . .

(b) An offense under this section is a Class A misdemeanor.

The Practice Commentary following section 42.10 states:

Subsection (a)(1) is the heart of the offense and is aimed principally at grave robbing and corpse desecration. It also forbids dissection, adding to the redundant 'in whole or in part,' if 'not authorized by law,' whatever that means.¹

Section 42.09 of the Penal Code makes it an offense to desecrate a venerated object. Section 42.09 provides in pertinent part:

(a) A person commits an offense if he intentionally or knowingly desecrates:

. . . .

(2) a place of worship or burial; or

. . . .

(b) For purposes of this section, 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

(c) An offense under this section is a Class A misdemeanor.

A review of section 31.03 as well as the other statutes that make it an offense to disturb a corpse or a grave

1. Article 4587(d), V.T.C.S. provides:

(d) For the purpose of aiding prosecutions under Section 42.10, Penal Code, the board [Anatomical Board of the State of Texas] shall adopt rules clearly stating what activities related to the dissection of human bodies are authorized by the board.

reflect that a culpable mental state of "intentionally" or "knowingly" is an essential element necessary to be proven in order to constitute a violation.² A recent case, Mullinax v. State, 756 S.W.2d 40 (Tex. App. - Texarkana, 1988, no pet.), reflects the necessity of a case-by-case resolution of the facts where a culpable mental state is an element of an offense. In Mullinax the defendant was convicted of the offense of desecrating a grave. The defendant contended that he was not aware that the property had ever been used for burial purposes. On appeal the court found that the evidence was insufficient to support the finding of a culpable mental state on the part of the defendant, reversed the conviction, and ordered the cause remanded to the trial court for entry of a judgment of acquittal. In Mullinax, the court stated:

In judging the sufficiency of the evidence, we must determine whether, viewing the evidence in the light most favorable to the verdict, a rational trier of fact could have found all of the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 465 (Tex. 1979). Wilson v. State, 654 S.W.2d 465 (Tex. Crim. App. 1933).

2. Section 6.03 of the Penal Code defines culpable mental states. Section 6.03 provides in pertinent part:

(a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

(b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

One essential element of the offense was that Mullinax intentionally defaced, damaged or mistreated the cemetery in a way that he knew would seriously offend persons aware of his actions. Since there is no direct evidence of Mullinax's intent other than his own exculpatory explanations, proof of a mental state necessary to support the conviction must consist of circumstantial evidence. Dillon v. State, 574 S.W.2d 92 (Tex. Crim. App. [Panel Op.] 1978). That being the case, the evidence must exclude every reasonable hypotheses except that Mullinax possessed the required culpable mental state. Johnson v. State, 673 S.W.2d 190, 195 (Tex. Crim. App. 1984).

[1] The gist of the offense defined in Section 42.09(a) is a purposeful act of disfigurement to a place of burial with the intent to cast it in a bad light or to offend the sensibilities of those who honor it. The statute does not make criminal those acts which are undertaken as the proper exercise of a claimed right, for in such cases there is no criminal intent. If a person is acting under a claim of right, albeit illfounded, he is not guilty of an intentional desecration. If the act is not legally justified, it may constitute a civil trespass or other civil wrong which can be redressed by civil remedies, but it is not a crime.

[2,3] Having carefully reviewed the evidence in the record, we find that all other reasonable hypotheses have not been excluded, and the evidence is insufficient to show the necessary mental state on the part of Mullinax in his actions with respect to the cemetery. (Footnote omitted.)

Mullinax v. State, 756 S.W.2d at 42.

Honorable Curtis Tunnell
January 30, 1989
Page 6

We trust that the foregoing review of statutes relating to offenses concerning theft from graves, disturbance of a human corpse, and desecration of a cemetery will be of some assistance to you in determining whether crimes may have been committed in the situations you describe.

Yours very truly,



Tom G. Davis
Assistant Attorney General
Opinion Committee

APPROVED: Sarah Woelk, Chief
Letter Opinion Section

TGD/SW/bc

Ref.: RQ-1624
ID# 5248