

2016

**TEXAS
CRIMINAL
PATTERN
JURY
CHARGES**

**Crimes against Persons
& Property**

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Crimes against Persons & Property

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Crimes against Persons & Property

Prepared by the
COMMITTEE
on
PATTERN JURY CHARGES—CRIMINAL
of the
STATE BAR OF TEXAS



Austin 2016

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The State Bar of Texas is proud to present *Texas Criminal Pattern Jury Charges—Crimes against Persons & Property*. This latest volume—the fourth of the new, reorganized series—is the product of hundreds of hours of work and analysis by a dedicated group of attorneys, legal scholars, and judges. It will be an invaluable resource for Texas judges and lawyers.

The members of the Texas Criminal Pattern Jury Charges Committee deserve the gratitude of the bench and bar for their generous contribution of time and expertise. It is only because of their commitment to their profession and its ideals that the State Bar can offer its members such an outstanding publication.

A handwritten signature in black ink that reads "Frank C. Stevenson". The signature is written in a cursive style.

Frank Stevenson
President, State Bar of Texas



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PREFACE

The Pattern Jury Charges Committee—Criminal was first formed in 2005 with the goal of drafting criminal instructions in plain language. The Committee was challenged with addressing both the need to state the law in statutory terms and the need to provide charges in language juries could understand. To this end, the Committee designed an outline for the charges that explicitly states the relevant statutes and legal definitions and then applies the law to the facts in commonsense language. Each section is clearly identified, and the format was designed to enhance readability for the jury.

When an effective template was developed, the Committee drafted the first volume: *Texas Criminal Pattern Jury Charges—Intoxication and Controlled Substances*. The Committee was then able to produce four more volumes at a rapid pace. However, the evolutionary nature of the process resulted in some issues with the organization. For example, to make the first volume a complete, stand-alone set of instructions, a general charge, special instructions, and punishment instructions were included with the charges on driving while intoxicated, possession, and the like. In the original *Crimes against Persons* volume, chapters on transferred intent and party liability were included to make the volume more useful, but those instructions—like the general charge, special instructions, and punishment instructions—apply in trials for other crimes than just those covered in that volume.

As the Committee's leadership began planning for additional material, it became clear that a better organization of the charges would improve the value of the series enormously. To accomplish this, the Committee began to both update and reorganize the series for greater utility and greater potential for expansion. The Committee therefore took content from various volumes of the original series and added new subject matter to create the new *Texas Criminal Pattern Jury Charges*. This volume is the fourth and final in that series. It combines updated model jury instructions from the previous *Crimes against Persons* and *Property Crimes* volumes with new instructions on capital murder, money laundering, credit card abuse, and aggravated sexual assault of a child. Additional material is also included in the chapter regarding sexual offenses, addressing issues like jury unanimity, the state's election of particular incidents, and instructions on the meaning of "on or about" in the allegation of the offense date.

As with the initial set of volumes, the Committee has provided a significant amount of material on the underlying law to aid practitioners in using the charges. This varies from the style of the civil charges. But precisely because the Committee's approach is significantly different from that of more traditional criminal charges, the Committee felt it was important to ensure the attorney had all the information needed to use the charges with confidence.

This work could not have been completed without the commitment, dedication, and experience of many Committee members, both past and present. In particular, the Committee would like to thank Alan Levy for his leadership as the Committee's inaugural

PREFACE

chair and to Judge Cathy Cochran for her participation and support as liaison to the Texas Court of Criminal Appeals until her retirement from the Committee. We are also indebted to numerous other lawyers and judges who read the drafts and offered ideas for improvement—ranging from matters of substantive law to those having to do with style, format, and utility. In addition, we would like to thank the staff of TexasBarBooks, who provide invaluable support and assistance in bringing these volumes to print.

Finally, the Committee would like to express its profound gratitude to Professor George Dix, whose dedication and contributions to this Committee from its earliest days have made this project possible. The Committee came to rely on his hard work, insightfulness, and leadership as the Committee's chair. Not only that, his sense of humor and wit both enlivened and enlightened our discussions, and for this and more, the Committee remains in his debt.

—Wendell Odom, Jr., *Chair*, and Emily Johnson-Liu, *Vice-Chair*

INTRODUCTION

1. PURPOSE OF PUBLICATION

The purpose of this volume is to assist the bench and bar in preparing the court's charge in jury cases. It provides general instructions for the guilt/innocence stage of the trial concerning crimes against persons and property. The jury instructions are suggestions and guides to be used by a trial court if they are applicable and proper in a specific case. Of course, the exercise of professional judgment by the attorneys and the judge is necessary in every case.

2. SCOPE OF PATTERN CHARGES

A charge should conform to the pleadings and evidence of the particular case. Occasions will arise for the use of instructions not specifically addressed herein. Even for the specific instructions that are addressed in this volume, trial judges and practitioners should recognize that the Committee may have erred in its perceptions and that its recommendations may be affected by future appellate decisions and statutory changes.

3. PRINCIPLES OF STYLE

a. *Basic philosophy.* This volume embodies the Committee's recommendation that several basic and reasonable changes can and should be made to how juries are instructed in criminal trials. Although they are the result of long and careful consideration by members drawn from the bench, prosecutors' offices, defense practice, and academia, the jury instructions in this volume have no official status. Appellate courts are unlikely to regard trial judges' refusal to use the Committee's jury instructions as reversible error. These instructions will be used, then, only if trial judges are willing to exercise their considerable discretion to adopt them in particular cases.

b. *Simplicity.* Criminal litigation by its nature often raises difficult questions for juries to resolve. Compound that difficulty with the current practice of drafting instructions almost verbatim from the statutes, occasionally inherently ambiguous themselves, and an onerous task lies ahead of juries. The Committee concluded that plain language in criminal jury instructions is both desirable and permissible and has therefore sought to be as brief as possible and to use language that is simple and easy to understand.

c. *Bracketed material.* Several types of bracketed material appear in the jury instructions. In a bracketed statement such as "[indictment/information], the user must choose between the terms or phrases within the brackets. The choices are separated by forward slash marks. Optional phrases may also be indicated by the use of brackets. For example, in the phrase "use [or attempted use] of unlawful force, the user must decide whether to include the bracketed phrase. In a bracketed statement such as "[name of accomplice]," the user is to substitute the name of the accomplice rather than retaining the bracketed material verbatim. Material such as "[include if applicable: .]" and

“*[describe purpose]*” provides guidelines for completing the finished jury instruction and should not be retained verbatim in the document.

d. *Use of masculine gender.* For simplicity, the jury instructions in this volume use masculine pronouns. These pronouns are not enclosed in brackets, but the user should, when drafting jury instructions for a particular case, replace the pronouns with feminine versions wherever appropriate. The jury instructions in this volume do, however, use disjunctive pairs of masculine and feminine pronouns when the identity of a person will not be known at the time the instructions are given to the jury (for example, “have your foreperson sign his or her name”).

4. COMMENTS AND CITATIONS OF AUTHORITY

The discussions and comments accompanying each jury instruction provide a ready reference to the law that serves as a foundation for the instruction. The primary authorities cited in this volume are the Texas Penal Code, the Texas Code of Criminal Procedure, and Texas case law.

5. USING THE PATTERN CHARGES

For general guidelines on drafting a criminal jury charge, refer to the section titled “Quick Guide to Drafting a Jury Charge,” which follows this introduction. For matters specific to any instruction included in this volume, refer to the commentary in chapter 1 of *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*, any general commentary that begins the chapter containing the instruction in question, and the commentary specific to and following the instruction itself. Finally, preparation of a proper charge requires careful legal analysis and sound judgment.

6. DOWNLOADING AND INSTALLING THE DIGITAL PRODUCT

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7. FUTURE RÉVISIONS

The contents of the jury instructions depend on the underlying substantive law relevant to the case. The Committee expects to publish updates as needed to reflect changes and new developments in the law.

QUICK GUIDE TO DRAFTING A JURY CHARGE

The Main Charge

Examine the indictment to determine the relevant Texas Penal Code provisions.

Compare the language of the offense or offenses charged in the indictment with the language of the relevant Penal Code provisions. In general, the indictment should track the statutory language, alleging all the elements of a particular offense or offenses.

For each count in the indictment, determine what the elements of the offense are. Even if the indictment does not allege all the elements of an offense, the jury charge must do so. If the indictment alleges *more* than the Penal Code provision requires, it may be possible to omit the unnecessary language in the jury charge.

With few exceptions, all offenses require both forbidden **conduct** and one or more **culpable mental states**. Some offenses also require a certain **result**—for example, homicide, which requires that the defendant's **conduct** cause a **result**, death (*see* Tex. Penal Code § 19.01). Still other offenses include a **circumstance surrounding conduct**. For example, aggravated assault of a public servant under Tex. Penal Code § 22.02(b)(2)(B) requires that the person assaulted be a public servant, a **circumstance surrounding conduct**, as well as requiring the forbidden **conduct** and a proscribed **result**.

For each offense you submit to the jury, then, you must ask:

1. What is the forbidden **conduct**?
2. Does the offense require a certain **result**?
3. Does the offense include one or more **circumstances surrounding conduct**?

Next determine what **culpable mental states** are required to commit the offense. A **culpable mental state** may be required as to **conduct**, a **result**, a **circumstance surrounding conduct**, or all these elements. For example, in the case of aggravated assault of a public servant, when bodily injury is alleged, the defendant must intentionally, knowingly, or recklessly cause a **result**, bodily injury. The statute also requires, however, that the state prove that the defendant *knew* the victim was a public servant—a **circumstance surrounding conduct**. In most cases, the statutory provision itself will indicate which **culpable mental states** apply, but sometimes case law will dictate that a **culpable mental state** not expressly included in the statute is also required. Finally, you must be careful to confine each **culpable mental state** to the element to which it applies. For example, in the case of injury to a child, the relevant **culpable mental states** apply to the **result**, not the **conduct** (*see* Tex. Penal Code § 22.04(a); *Haggins v. State*, 785 S.W.2d 827 (Tex. Crim. App. 1990)).

Many offenses may be committed in more than one statutory manner. For example, injury to a child may be committed by either an affirmative act—for example, hitting the child—or by an omission—for example, failing to provide medical care (*see* Tex. Penal Code § 22.04(a)). For each offense in the indictment, you must ask whether the state has alleged alternative statutory theories of how the offense was committed. If so, you will submit these theories to the jury in the disjunctive. The jurors must be unanimous that the state has proved the offense, but they need not be unanimous about the specific statutory manner. Do *not*, however, submit a theory to the jury if it (1) is not alleged in the indictment or (2) is not supported by the evidence adduced at trial.

- Other offenses define distinct statutory acts or results, and the jury must be unanimous on the specific act or result. For example, simple assault may be committed by causing bodily injury or by threatening another with imminent bodily injury (*see* Tex. Penal Code § 22.01(a)(1), (2)). These are separate and distinct criminal acts, so the jury must be unanimous about which act the defendant committed. You should not submit these acts in the disjunctive unless you also inform the jury that it must be unanimous about one specific act.
- If the indictment contains multiple counts, determine whether the state is seeking a conviction on each count or has alleged them in the alternative—for example, capital murder under Tex. Penal Code § 19.03 in the first count and murder under Tex. Penal Code § 19.02 in the second count. The jury must not be allowed to convict the defendant for two offenses when one is a lesser included offense of the other.

Determine which unanimity instruction to give. In general, the rule is that when the state is alleging that the defendant committed *one* offense in one of two or more ways, the jury need not be unanimous—for example, sexual assault by penetration with the penis *or* a finger. In contrast, when the state is alleging that the defendant committed *one* of two or more acts, each of which could constitute a separate offense, the jury must be unanimous as to which act was committed—for example, sexual assault by penetration of the sexual organ *or* the anus of the victim (*see* Tex. Penal Code § 22.011(a)(1)(A)).

Defensive Matters and Lesser Included Offenses

On request, determine if any **defenses** or **affirmative defenses** apply in the case. If so, include them, taking care to explain to the jury which party has the burden of proof.

On request, determine if any lesser included offense instructions should be given. Ask the party who is requesting the lesser included offense instruction to explain what evidence raises that instruction.

Use of Evidence Instructions and Special Instructions

On request, give a limiting instruction if extraneous offenses or bad acts have been introduced. Be careful to specifically identify the particular purpose for which the evidence was offered. *Do not* give a laundry-list instruction—for example, ‘intent, knowledge, scheme, plan, opportunity, or motive.

Determine if any special instructions, such as an instruction on accomplice witnesses or on the law of parties, should be given.

Determine if any special issue instructions, such as a deadly weapon finding, should be included in the guilt/innocence phase instructions.

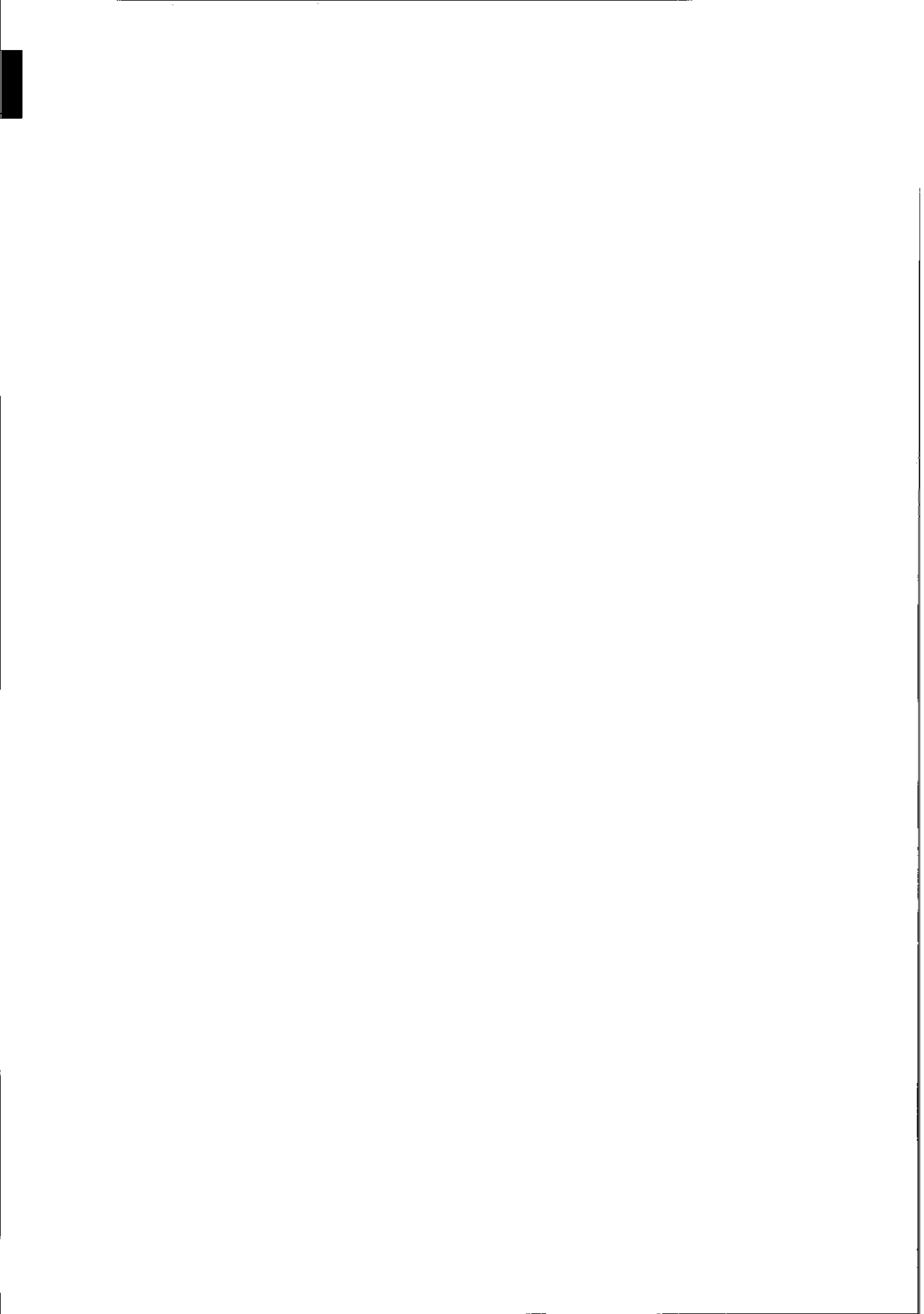
Putting the Charge Together

Give general instructions to be included in every case and, if applicable, an instruction on the defendant’s failure to testify.

If multiple defendants are on trial, give a complete set of instructions for each defendant.

- Attach appropriate verdict forms. There should be one verdict form for each separate count or indictment that is submitted to the jury.

Submit the proposed charge to each party for objections or special requests and modify the charge if appropriate.



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CPJC 80.1 Instructions where Victim is Unborn Child

The homicide offenses require proof that the accused caused the death of “an individual.” “Individual” is defined by Tex. Penal Code § 1.07(a)(26) as including “an unborn child at every state of gestation from fertilization until birth. If the indictment alleges the victim of the charged offense was an unborn child, the instructions must incorporate that specification of the charging instrument. Often this will require that the application portion of the instruction specify that the defendant must be proved to have caused the death of “an unborn child of [*name of mother*] while that unborn child was in gestation of [*name of mother*]. This sort of description of this kind of victim in the charging instrument is apparently adequate to provide the accused with the required notice. *Lawrence v. State*, 240 S.W.3d 912, 916–17 (Tex. Crim. App. 2007).

Section 1.07(a)(49) further defines “death, as applied to an unborn child, as “the failure to be born alive. This definition would be properly included in a homicide case in which the victim is an unborn child.

CPJC 80.2 Instruction—Murder—Knowingly or Intentionally**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of murder. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally or knowingly caused the death of [name] by shooting [name] with a gun*].

Relevant Statutes

A person commits an offense if the person intentionally or knowingly causes the death of an individual.

To prove that the defendant is guilty of murder, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant caused the death of an individual; and
2. the defendant did this intentionally or knowingly.

[Include the following if an instruction on causation is appropriate but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person's conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue concerning concurrent causation.]

A person causes the death of another if, but for the person's conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of murder.

Definitions

Intentionally Causing the Death of an Individual

A person intentionally causes the death of an individual if the person has the conscious objective or desire to cause that death.

Knowingly Causing the Death of an Individual

A person knowingly causes the death of an individual if the person is aware that his conduct is reasonably certain to cause that death.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], caused the death of [name] [*insert specific allegations, e.g., by shooting [name] with a gun*]; and
2. the defendant did this either intentionally or knowingly.

[Include the following if the jury was instructed in the relevant statutes unit on concurrent causation.]

The state has the burden of proving that the defendant caused the death of [name]. To prove that the defendant caused the death of [name], the state must show, beyond a reasonable doubt, that either—

1. [concurrent cause] did not contribute to causing the death of [name]; or
2. [concurrent cause] was clearly insufficient, by itself, to cause the death of [name]; or
3. the conduct of the defendant was clearly sufficient to cause the death of [name] regardless of [concurrent cause].

[Continue with the following.]

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Murder is prohibited by and defined in Tex. Penal Code § 19.02. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

Several court of criminal appeals decisions suggest that a defendant acts with the culpable mental state required for this kind of murder if, with “a conscious disregard for life,” the defendant intentionally engages in high-risk activity such as initiating a gunfight with police officers. *Blansett v. State*, 556 S.W.2d 322, 325–26 (Tex. Crim. App. 1977) (relying on *People v. Gilbert*, 408 P.2d 365, 373 (Cal. 1965), *rev’d on other grounds*, 388 U.S. 263 (1967)); *Dowden v. State*, 758 S.W.2d 264 (Tex. Crim. App. 1988) (reaffirming *Blansett*).

Blansett and *Dowden* were sufficiency-of-the-evidence cases. Apparently no effort has been made to incorporate what might be their ‘holding’ into jury instructions permitting conviction for intentional murder on a theory of intentionally engaging in activity involving a high risk to human life. The Committee was not certain about the current significance of these decisions but concluded that they should not be incorporated into jury instructions on intentional murder.

CPJC 80.3 Instruction—Murder—Intent to Cause Serious Bodily Injury**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of murder. Specifically, the accusation is that the defendant, with intent to cause serious bodily injury, committed an act clearly dangerous to human life [*insert specific allegations, e.g., by stabbing [name] in the neck with a knife*], which caused the death of [*name*].

Relevant Statutes

A person commits an offense if the person intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual.

To prove that the defendant is guilty of murder, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant committed an act clearly dangerous to human life; and
2. this act caused the death of an individual; and
3. the defendant had the intent to cause serious bodily injury.

[Include the following if an instruction on causation is appropriate but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person's conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue concerning concurrent causation.]

A person causes the death of another if, but for the person's conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of murder.

Definitions*Intent to Cause Serious Bodily Injury*

A person intends to cause serious bodily injury to another if it is the person's conscious objective or desire to cause the serious bodily injury to another.

Bodily Injury

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

Serious Bodily Injury

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], committed an act clearly dangerous to human life [*insert specific allegations, e.g., by stabbing [name] in the neck with a knife*]; and
2. the defendant's act caused the death of [name]; and
3. the defendant intended to cause serious bodily injury.

[Include the following if the jury was instructed in the relevant statutes unit on concurrent causation.]

The state has the burden of proving that the defendant caused the death of [name]. To prove that the defendant caused the death of [name], the state must show, beyond a reasonable doubt, that either—

1. [concurrent cause] did not contribute to causing the death of [name]; or
2. [concurrent cause] was clearly insufficient, by itself, to cause the death of [name]; or

3. the conduct of the defendant was clearly sufficient to cause the death of [*name*] regardless of [*concurrent cause*].

[Continue with the following.]

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Murder is prohibited by and defined in Tex. Penal Code § 19.02. The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “serious bodily injury” is from Tex. Penal Code § 1.07(a)(46).

CPJC 80.4 Instruction—Murder (Felony Murder)

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of murder. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., committed the offense of injury to a child by intentionally, knowingly, or recklessly causing bodily injury by hitting the child victim with a blunt object, and in the course of and in furtherance of the commission of this offense committed an act clearly dangerous to human life, hitting the child victim with the blunt object, that caused the death of the child*].

Relevant Statutes

A person commits an offense if the person commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

[*Insert statutes based on specific felony allegations, e.g., A person commits the offense of felony injury to a child if he intentionally, knowingly, or recklessly, by an act, causes bodily injury to a child fourteen years old or younger.*]

To prove that the defendant is guilty of murder, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant committed or attempted to commit a felony, other than manslaughter; and
2. in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt of that felony, the defendant committed or attempted to commit an act clearly dangerous to human life; and
3. the act clearly dangerous to human life caused the death of an individual.

[*Insert specific felony alleged in the indictment, e.g., Injury to a child*] is a felony other than manslaughter.

[*Include the following if an instruction on causation is appropriate but no issue of concurrent causation is raised by the facts.*]

A person causes the death of another if, but for the person's conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue concerning concurrent causation.]

A person causes the death of another if, but for the person's conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of murder.

Definitions

[Include definition(s) of the felony or felonies alleged in the indictment, such as the following.]

Felony Injury to a Child

The felony of "injury to a child" has four elements. The elements are that—

1. the defendant engaged in an act;
2. the defendant by this act caused bodily injury to another person;
3. the person injured was a child fourteen years old or younger; and
4. the defendant intentionally, knowingly, or recklessly caused bodily injury to the child.

Intentionally Causing Bodily Injury

A person intentionally causes bodily injury to another if it is the person's conscious objective or desire to cause the bodily injury to another.

Knowingly Causing Bodily Injury

A person knowingly causes bodily injury to another if the person is aware that the person's conduct is reasonably certain to cause the bodily injury to another.

Recklessly Causing Bodily Injury

A person recklessly causes bodily injury to another if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person's action will cause bodily injury to another. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Bodily Injury

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

Attempt to Commit a Felony

A person attempts to commit a felony when, with specific intent to commit the felony, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the felony intended.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], committed or attempted to commit [insert specific felony, e.g., injury to a child by intentionally, knowingly, or recklessly causing bodily injury] [insert specific allegations, e.g., by hitting [name], a child fourteen years old or younger, with a blunt object]; and
2. in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt of [insert specific felony, e.g., injury to a child], the defendant committed or attempted to commit an act clearly dangerous to human life [insert specific act, e.g., by hitting [name] with a blunt object]; and
3. the act clearly dangerous to human life caused the death of [name].

You are instructed that [insert specific felony alleged in the indictment, e.g., injury to a child] is a felony other than manslaughter.

[Include the following if the jury was instructed in the relevant statutes unit on concurrent causation.]

The state has the burden of proving that the defendant caused the death of [name]. To prove that the defendant caused the death of [name], the state must show, beyond a reasonable doubt, that either—

1. [concurrent cause] did not contribute to causing the death of [name]; or
2. [concurrent cause] was clearly insufficient, by itself, to cause the death of [name]; or
3. the conduct of the defendant was clearly sufficient to cause the death of [name] regardless of [concurrent cause].

[Continue with the following.]

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

[Include the following if applicable.]

This case alleges that the defendant committed or attempted to commit multiple felonies. You need not be unanimous about which of the named felonies constitutes the felony referred to in elements 1 and 2 listed above, as long as every juror finds that the state has proved, beyond a reasonable doubt, that the defendant committed “a felony.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

The court of criminal appeals has determined that the underlying felony for a felony murder conviction and the act that constitutes ‘an act clearly dangerous to human life’ under Texas Penal Code section 19.02(b)(3) can be the same act. *Johnson v. State*, 4 S.W.3d 254, 258 (Tex. Crim. App. 1994) (defendant’s felony murder conviction was properly predicated on offense of injury to a child, in violation of Penal Code section 22.04, even though defendant’s acts of hitting child victim with deadly weapon, which formed offense of injury to a child, were same acts relied on by state to prove defen-

dant's commission of "an act clearly dangerous to human life" under felony murder provision). The court in *Johnson* expressly disavowed "our overly broad statement in *Garrett* that in order to support a conviction under the felony murder provision, '[t]here must be a showing of felonious criminal conduct other than the assault causing the homicide.'" *Johnson*, 4 S.W.3d at 258 (quoting *Garrett v. State*, 573 S.W.2d 543, 546 (Tex. Crim. App. 1978)). *Garrett* was limited to the proposition that a conviction for felony murder will not stand when the underlying felony is manslaughter or a lesser included offense of manslaughter.

Whether a felony is a lesser included offense of manslaughter is determined by applying Texas Code of Criminal Procedure article 37.09. An intentional and knowing aggravated assault, in violation of Penal Code sections 22.01(a)(1) and 22.02(a), is not a lesser included offense of manslaughter and therefore can serve as the predicate offense for a felony murder. *Lawson v. State*, 64 S.W.3d 396 (Tex. Crim. App. 2001). The court of criminal appeals held that felony DWI, in violation of Penal Code section 49.02, is not a lesser included offense of manslaughter and therefore can be the underlying felony in a felony-murder prosecution. *Lomax v. State*, 233 S.W.3d 302 (Tex. Crim. App. 2007).

In that same case, the court held that the felony-murder statute itself plainly dispenses with a culpable mental state. *Lomax*, 233 S.W.3d at 304–07 (reversing in part *Rodriguez v. State*, 548 S.W.2d 26 (Tex. Crim. App. 1977)). Whether the underlying felony requires a culpable mental state depends on that felony itself; felony DWI plainly dispenses with proof of a culpable mental state. *Lomax*, 233 S.W.3d at 304 n.6, 307.

The court of criminal appeals held that when an indictment for felony murder alleges multiple predicate felonies, the specifically named felonies are not elements about which a jury must be unanimous, but rather the named felonies constitute the manner or means that make up the "felony" element of felony murder. *White v. State*, 208 S.W.3d 467 (Tex. Crim. App. 2006) (where evidence showed that appellant caused victim's death during high-speed chase with police, jury need not be unanimous about whether defendant committed state-jail felony of unauthorized use of a vehicle or state-jail felony of evading arrest or detention in vehicle). The *White* court further held that due process was not violated by dispensing with unanimity because the two underlying felonies in that case were "basically morally and conceptually equivalent." *White*, 208 S.W.3d at 469 (citing *Jefferson v. State*, 189 S.W.3d 305, 313–14 (Tex. Crim. App. 2006) (Cochran, J., concurring)).

Venue is appropriate either in the county in which the act occurred or the county in which the victim died. See Tex. Code Crim. Proc. art. 13.07. The above charge assumes that the case is being charged where the felony occurred. If the case is brought where the victim died, and this is a different county than that in which the act occurred, the first and third paragraphs of the application of law to facts unit should be modified.

The definition of ‘bodily injury’ is provided in Penal Code section 1.07(a)(8). The culpable mental states are detailed in Penal Code section 6.03.

The Committee has not provided a definition of “act clearly dangerous to human life” because it could find no definitive decision approving one. *But see Depauw v. State*, 658 S.W.2d 628, 634–35 (Tex. App.—Amarillo 1983, pet. ref’d) (rejecting argument that instruction on such a definition is required because of risk that juries will uncritically find acts that actually caused death to be ‘clearly dangerous to human life’). The *Depauw* court noted that ‘an act clearly dangerous to human life is one that creates a substantial risk of death.’ *Depauw*, 658 S.W.2d at 634. A minority of the Committee wished to define “act clearly dangerous to human life” in the instruction.

CPJC 80.5 Murder—Sudden Passion—Comment on Punishment Stage Instruction

Legislative Background. Before 1993, a killing that would otherwise be murder was reduced to voluntary manslaughter if the facts showed what was often called “sudden passion. Legislation enacted that year retained former sudden-passion law but made it a potential issue for the sentencing stage of a murder trial. Acts 1993, 73d Leg., R.S., ch. 900, § 1.01 (S.B. 1067), eff. Sept. 1, 1994. A defendant convicted of murder now may raise and prove, at the punishment phase of the trial, that he acted in sudden passion. If the defendant is successful, the murder—otherwise a first-degree felony—becomes a second-degree felony and the punishment is assessed on that basis. Tex. Penal Code § 19.02(d).

The instruction at CPJC 80.6, then, is to be used at the punishment stage of a murder prosecution if submission of the defendant’s contention of sudden passion is appropriate.

Need to Submit. Clearly the punishment stage instructions should address sudden passion only if it is raised by the evidence. The court of criminal appeals explained:

[B]efore a defendant is allowed a jury instruction on sudden passion, he must prove that there was an adequate provocation, that a passion or an emotion such as fear, terror, anger, rage, or resentment existed, that the homicide occurred while the passion still existed and before there was reasonable opportunity for the passion to cool; and that there was a causal connection between the provocation, the passion, and the homicide.

A jury should receive a sudden passion charge if it is raised by the evidence, even if that evidence is weak, impeached, contradicted, or unbelievable. However, the evidence cannot be so weak, contested, or incredible that it could not support such a finding by a rational jury.

McKinney v. State, 179 S.W.3d 565, 569 (Tex. Crim. App. 2005) (citation omitted) (applying *Trevino v. State*, 100 S.W.3d 232 (Tex. Crim. App. 2003)).

This appears to mean that a sudden-passion instruction should be given if the evidence is such that a reasonable jury could find all elements of sudden passion proved by a preponderance of the evidence.

Unanimity. The jury must be unanimous on sudden passion. *Sanchez v. State*, 23 S.W.3d 30, 34 (Tex. Crim. App. 2000) (“Article 37.07, § 3(c), requires unanimity with respect to the jury’s preliminary vote on sudden passion. ’). This means the instruction cannot simply permit assessment of punishment for a first-degree felony on the lack of a finding of sudden passion. The instruction must require a unanimous determination that the defendant failed to prove sudden passion. *E.g. Swearingen v. State*, 270

S.W.3d 804, 812 (Tex. App.—Austin 2008, pet. ref'd) (“Because the charge conditioned the first-degree felony punishment range on only a failure to find sudden passion unanimously rather than a unanimous negative finding on the issue, the charge was erroneous.”).

Submission by Special Issue. One court of appeals held that a trial judge errs in refusing to submit a special issue on sudden passion. *Curry v. State*, 222 S.W.3d 745, 752–53 (Tex. App.—Waco 2007, pet. ref'd). The Austin court of appeals held that refusal to submit the matter as a special issue is not, itself, error. It acknowledged, however, that “there may be good reasons for trial courts to submit sudden passion by a special issue. See *Swearingen*, 270 S.W.3d at 811. The Committee concluded that, whether required or not, submission of the matter by a special issue is best practice.

Adherence to Statutory Framework. Some members of the Committee believed that the statutory framework was sufficiently awkward that jury instructions can and should take considerable liberty with that framework. Under the explicit terms of the statute, a defendant has the opportunity to prove ‘he caused the death [of the victim] under the immediate influence of sudden passion arising from an adequate cause.’” Tex. Penal Code § 19.02(d). Section 19.02 provides definitions of the terms *adequate cause* (section 19.02(a)(1)) and *sudden passion* (section 19.02(a)(2)). These definitions arguably, however, do not carefully distinguish the concepts being defined. The requirements that the “cause’ be “provocation’ and that it be “by the person killed or another acting with the person killed,” for example, appear in the definition of sudden passion rather than that of adequate cause. Perhaps most importantly, section 19.02(a)(2)’s definition of sudden passion simply uses, without definition, the term *passion*.

The case law makes clear that a defendant’s case for reduction of a murder to a second-degree felony requires proof of a certain impact on the defendant’s mind, i.e., actual ‘passion.’” Further, it suggests that the appellate courts have derived a definition of the term *actual passion* from the definition of adequate cause in section 19.02(a)(1). E.g. *McKinney*, 179 S.W.3d at 570 (“There is no evidence that the verbal taunting and physical pushing by [the victim] produced a degree of anger, rage, resentment, or terror in Appellant, sufficient to render his mind incapable of cool reflection.”); *Trevino*, 100 S.W.3d at 241 (“The mere fact that a defendant acts in response to the provocation of another is not sufficient to warrant a charge on sudden passion. Instead, there must be some evidence that the defendant was under the immediate influence of sudden passion.”); *Havard v. State*, 800 S.W.2d 195, 217 (Tex. Crim. App. 1989) (“For a claim of fear to rise to the level of sudden passion, there must be evidence that the defendant’s state of mind rendered him incapable of cool reflection.”). Actual passion appears to be defined in the case law as a condition rendering the mind incapable of cool reflection.

This definition is implicit in the statutory language. The term *adequate cause* means a cause that would commonly produce a degree of anger, rage, resentment, or terror in

a person of ordinary temper, sufficient to render the mind incapable of cool reflection. It seems to follow that *actual passion* must mean “a degree of anger, rage, resentment, or terror rendering the mind incapable of cool reflection.” This definition is, however, nowhere explicitly set out in the statutes.

The appellate case law also demands proof that the defendant acted on the adequate provocation before the passage of sufficient time for the passions of a reasonable person to ‘cool. *Johnson v. State*, 815 S.W.2d 707, 712 (Tex. Crim. App. 1991) (“[E]ven if the jury did believe the taunts were sufficient to provoke appellant initially, a rational factfinder could still determine that appellant continued to inflict the injuries leading to his wife’s death long after ‘sudden passion’ would have subsided in a person of ordinary temper.”). See also *Bufkin v. State*, 207 S.W.3d 779, 783 (Tex. Crim. App. 2006) (in sudden passion situation, “the State might claim that the killing occurred a day later, after the passion should have cooled”). This requirement that the defendant act on the provocation before such a cooling period passes, like the definition of actual passion, is not explicitly stated as a requirement in section 19.02.

The Committee considered an approach that some members favored as, in their view, more carefully distinguishing the questions put to juries and providing definitions more effectively focusing on those questions. Under this approach, the basic issue would be put as follows:

To establish sudden passion, the defendant must prove, by a preponderance of the evidence, three elements. The elements are that—

1. the defendant killed the victim in a state of passion; and
2. this state of passion was the direct result of adequate cause and provocation; and
3. the defendant acted under the immediate influence of that adequate cause and provocation.

The jury would then be given several definitions:

Passion

“Passion” means a degree of anger, rage, resentment, or terror rendering the mind incapable of cool reflection.

Adequate Cause and Provocation

“Adequate cause and provocation” means provocation by the individual killed or another acting with the person killed that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

CPJC 80.6 Instruction—Murder—Sudden Passion

You have found the defendant, [*name*], guilty of murder. It is now your duty to assess punishment. The defendant contends he committed the murder under the immediate influence of sudden passion arising from an adequate cause. Before you assess punishment, you must determine whether the defendant has proved this contention.

Relevant Statutes

A defendant convicted of murder may raise the issue of whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. This is called the doctrine of “sudden passion.”

If the defendant proves that he acted under the influence of sudden passion, this offense is punishable by—

1. a term of imprisonment for no less than two years and no more than twenty years, or
2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than \$10,000.

If the defendant does not prove that he acted under the influence of sudden passion, this offense is punishable by—

1. a term of imprisonment for no less than five years and no more than ninety-nine years or for life, or
2. a term of imprisonment for no less than five years and no more than ninety-nine years or for life and a fine of no more than \$10,000.

You must all agree on whether the defendant has proved that he acted under the influence of sudden passion.

Burden of Proof

The burden is on the defendant to prove, by a preponderance of the evidence, that he acted under the influence of sudden passion.

Definitions*Sudden Passion*

“Sudden passion” means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed, which

passion arises at the time of the offense and is not solely the result of former provocation.

Adequate Cause

“Adequate cause” means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

Preponderance of the Evidence

The term “preponderance of the evidence” means the greater weight and degree of the credible evidence.

Application of Law to Facts

You must determine whether the defendant has proved, by a preponderance of the evidence, that he acted under the immediate influence of sudden passion arising from an adequate cause.

You must all agree on whether the defendant has proved sudden passion before you may assess punishment.

Your resolution of this issue will determine which of the two verdict forms you will use. If you all agree the defendant has proved sudden passion, use the first verdict form, titled “Verdict—Defendant Has Proved Sudden Passion.” If you all agree the defendant has not proved sudden passion, use the second verdict form, titled “Verdict—Defendant Has Not Proved Sudden Passion.”

If you all agree the defendant has proved, by a preponderance of the evidence, that he acted under the influence of sudden passion, you are to determine and state in your verdict—

1. a term of imprisonment for no less than two years and no more than twenty years, or
2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than \$10,000.

If you all agree the defendant has not proved, by a preponderance of the evidence, that he acted under the influence of sudden passion, you are to determine and state in your verdict—

1. a term of imprisonment for no less than five years and no more than ninety-nine years or for life, or

2. a term of imprisonment for no less than five years and no more than ninety-nine years or for life and a fine of no more than \$10,000.

**VERDICT—DEFENDANT HAS PROVED
SUDDEN PASSION**

We, the jury, having found the defendant, [name], guilty of the offense of murder, all agree that the defendant has proved that he acted under the influence of sudden passion. We assess the defendant’s punishment at: (select one)

_____ confinement by the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ confinement by the Texas Department of Criminal Justice for a term of _____ years and a fine of \$ _____.

Foreperson of the Jury

Printed Name of Foreperson

**VERDICT—DEFENDANT HAS NOT
PROVED SUDDEN PASSION**

We, the jury, having found the defendant, [name], guilty of the offense of murder, all agree the defendant has not proved that he acted under the influence of sudden passion. We assess the defendant’s punishment at: (select one)

_____ confinement by the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ confinement by the Texas Department of Criminal Justice for a term of _____ years and a fine of \$ _____.

_____ confinement by the Texas Department of Criminal Justice for life and no fine.

_____ confinement by the Texas Department of Criminal Justice for life and a fine of \$ _____.

Foreperson of the Jury

Printed Name of Foreperson

COMMENT

The definition of "sudden passion" is based on Tex. Penal Code § 19.02(a)(2). The definition of "adequate cause" is based on Tex. Penal Code § 19.02(a)(1). The role of sudden passion in criminal liability for murder is addressed in Tex. Penal Code § 19.02(d).

Legally Justified Conduct as Adequate Cause. The court of criminal appeals has held that conduct constituting a legally permissible response to the defendant's illegal behavior cannot constitute adequate cause:

The evidence clearly indicates that appellant initiated the entire criminal episode which led to the deceased's death and that the deceased shot appellant in an attempt to prevent the aggravated kidnapping of Lockard. See V.T.C.A. Penal Code § 20.04(a)(2). Under §§ 9.32 and 9.33, supra, the deceased was justified in using deadly force in defense of himself and a third person, specifically Lockard. We will not consider the deceased's justified actions as an adequate cause for appellant's illegal acts. To so hold would allow criminals a justifiable reason for killing their victims who rightly seek to protect themselves or others from criminal activity. Thus, we hold that the deceased's actions in shooting appellant did not constitute adequate cause from which sudden passion may arise.

Harris v. State, 784 S.W.2d 5, 10 (Tex. Crim. App. 1989) (citations omitted).

CPJC 80.7 General Comments on Capital Murder

Capital murder as defined in Tex. Penal Code § 19.03 can be committed in multiple ways. The Committee has drafted instructions for six of the ways most commonly charged in Texas practice.

All capital murders—with the exception of murders committed in the course of committing certain specified offenses—must be based upon an intentional or knowing killing of an individual, as section 19.03(a) requires proof that the accused committed murder as defined in section 19.02(b)(1). The provision for capital murder committed in the course of committing certain offenses specified in section 19.03(a)(2) requires proof that the accused killed an individual intentionally.

Section 19.03(a)(2) is often assumed to require the causing of death in connection with the commission of, or attempt to commit, a felony. However, in some limited situations, the offense the defendant must be proved to have been committing or attempting to commit can be a misdemeanor. *See* Tex. Penal Code § 22.07(b), (d) (providing that certain terroristic threat offenses are misdemeanors). Therefore, capital murder under section 19.03(a)(2) is referred to in this chapter as murder in the course of committing a specified offense.

CPJC 80.8 Instruction—Capital Murder—Murder of Peace Officer or Fireman

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of capital murder. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally or knowingly caused the death of [name], a peace officer acting in the lawful discharge of an official duty, by shooting [name] with a gun, and the defendant knew that [name] was a peace officer.*]

Relevant Statutes

A person commits an offense if the person intentionally or knowingly causes the death of a [peace officer/fireman] who is acting in the lawful discharge of an official duty and who the person knows is a [peace officer/fireman].

To prove that the defendant is guilty of capital murder, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant intentionally or knowingly caused the death of an individual; and
2. the individual was a [peace officer/fireman]; and
3. the individual was acting in the lawful discharge of an official duty; and
4. the defendant knew the individual was a [peace officer/fireman].

[Include the following if an instruction on causation is appropriate but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person's conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue concerning concurrent causation.]

A person causes the death of another if, but for the person's conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of capital murder.

Definitions

Intentionally Causing the Death of an Individual

A person intentionally causes the death of an individual if the person has the conscious objective or desire to cause that death.

Knowingly Causing the Death of an Individual

A person knowingly causes the death of an individual if the person is aware that his conduct is reasonably certain to cause that death.

Peace Officer

“Peace officer” includes [*specify, e.g., police officers of an incorporated city, town, or village and reserve municipal police officers who hold a permanent peace officer license*].

Knows an Individual is a [Peace Officer/Fireman]

A person knows an individual is a [peace officer/fireman] if the person is aware that the person is a [peace officer/fireman].

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], intentionally or knowingly caused the death of [*name*] [*insert specific allegations, e.g., by shooting [name] with a gun*];
2. [*name*] was a [peace officer/fireman];
3. [*name*] was acting in the lawful discharge of an official duty; and
4. the defendant knew [*name*] was a [peace officer/fireman].

[Include the following if the jury was instructed in the relevant statutes unit on concurrent causation.]

The state has the burden of proving that the defendant caused the death of [name]. To prove that the defendant caused the death of [name], the state must show, beyond a reasonable doubt, that either—

1. [concurrent cause] did not contribute to causing the death of [name];
2. [concurrent cause] was clearly insufficient, by itself, to cause the death of [name]; or
3. the conduct of the defendant was clearly sufficient to cause the death of [name] regardless of [concurrent cause].

[Continue with the following.]

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, all of the four elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Murder of a peace officer or fireman is prohibited by and defined in Tex. Penal Code § 19.03(a)(1). The definition of “peace officer” is from Tex. Penal Code § 1.07(a)(36). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

Definition of “In the Lawful Discharge of an Official Duty.” The court of criminal appeals has noted that—

the case law from this Court plainly holds that, for purposes of Section 19.03(a)(1) of the Penal Code, an officer acts in the lawful discharge of his official duties so long as he is on duty and in uniform; the fact that he may be effectuating an unconstitutional arrest, or a lawful arrest in an improper or unlawful manner, does not mean he is not acting in the lawful discharge of an official duty.

Ruiz v. State, No. AP-75,968, 2011 WL 1168414, at *2 (Tex. Crim. App. Mar. 2, 2011) (unpublished). See also *Montoya v. State*, 744 S.W.2d 15, 29–30 (Tex. Crim. App. 1987).

The court of criminal appeals has concluded that the statutory phrase is not unconstitutionally vague and appears to have held that a trial court did not err in failing to define it. *Mays v. State*, 318 S.W.3d 368, 388–89 (Tex. Crim. App. 2010) (“[T]he phrase ‘lawful discharge of an official duty’ is not statutorily defined, but it does have an ordinary meaning that jurors can apply using their own common sense.”).

The court’s definition of the phrase is perhaps counterintuitive, given that under this definition an officer can be acting “in the lawful discharge of an official duty” even if the officer is conducting an unlawful arrest or search. Some members of the Committee believed an instruction simply providing the statutory language would sometimes fail to convey to jurors the true state of the applicable law.

Nevertheless, the Committee concluded that the *Mays* discussion indicated the court’s view that an instruction attempting to embody that definition would not be appropriate. Consequently, the instruction contains no such definition.

Specification of Lawful Duty. The charging instrument probably need not specify the lawful duty the victim was discharging at the time the victim was killed. See *Moreno v. State*, 721 S.W.2d 295, 299 (Tex. Crim. App. 1986); *Aranda v. State*, 640 S.W.2d 766, 770 (Tex. App.—San Antonio 1982). Nevertheless, capital murder indictments sometimes do so. If in a specific case this is done, the application of law to facts unit of the instruction should incorporate that specification. Cf. *Nethery v. State*, 692 S.W.2d 686, 704 (Tex. Crim. App. 1985) (instruction required prosecution to prove deceased was “acting in the lawful discharge of an official duty, namely: investigation of a parked vehicle while the said J.T. McCarthy was on radio patrol”).

CPJC 80.9 Instruction—Capital Murder—Murder in the Course of Committing a Specified Offense**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of capital murder. Specifically, the accusation is that the defendant intentionally caused the death of [name] [*insert specific allegations, e.g., by shooting [name] with a gun, and the defendant was in the course of committing or attempting to commit the offense of robbery of [name]*].

Relevant Statutes

A person commits an offense if the person intentionally causes the death of an individual in the course of committing or attempting to commit [kidnapping/burglary/robbery/aggravated sexual assault/arson/obstruction or retaliation/terroristic threat].

To prove that the defendant is guilty of capital murder, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant intentionally caused the death of an individual; and
2. this was done in the course of committing or attempting to commit [kidnapping/burglary/robbery/aggravated sexual assault/arson/obstruction or retaliation/terroristic threat].

[Include the following if an instruction on causation is appropriate but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person's conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue concerning concurrent causation.]

A person causes the death of another if, but for the person's conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of capital murder.

Definitions*Intentionally Causing the Death of an Individual*

A person intentionally causes the death of an individual if the person has the conscious objective or desire to cause that death.

[Include definition(s) related to the offense(s) defendant was committing or attempting to commit, such as the following.]

Robbery

A person commits robbery if, in the course of committing or attempting to commit theft and with intent to obtain or maintain control of the property, the person either—

1. intentionally, knowingly, or recklessly causes bodily injury to another; or
2. intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

In the Course of Committing or Attempting to Commit Theft

“In the course of committing or attempting to commit theft” means conduct that occurs in an attempt to commit, during the commission of, or in immediate flight after the attempt or commission of theft.

Theft

A person commits theft if—

1. the person appropriates property;
2. this appropriation was unlawful, in that it was without the property owner’s effective consent, and
3. the person did this with intent to deprive the owner of the property.

Attempt to Commit Theft

A person attempts to commit theft if the person, with the specific intent to commit theft, does an act amounting to more than mere preparation that tends but fails to effect a theft.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally caused the death of [name] [insert specific allegations, e.g., by shooting [name] with a gun]; and
2. this was done in the course of committing or attempting to commit [kidnapping/burglary/robbery/aggravated sexual assault/arson/obstruction or retaliation/terroristic threat].

[Include the following if the jury was instructed in the relevant statutes unit on concurrent causation.]

The state has the burden of proving that the defendant caused the death of [name]. To prove that the defendant caused the death of [name], the state must show, beyond a reasonable doubt, that either—

1. [concurrent cause] did not contribute to causing the death of [name];
2. [concurrent cause] was clearly insufficient, by itself, to cause the death of [name]; or
3. the conduct of the defendant was clearly sufficient to cause the death of [name] regardless of [concurrent cause].

[Continue with the following.]

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Murder in the course of committing a specified offense is prohibited by and defined in Tex. Penal Code § 19.03(a)(2). The definition of “intentionally causing the death of an individual” is based on Tex. Penal Code § 6.03(a).

Defining “In the Course of Committing or Attempting to Commit [Listed Offense].” The Committee’s instruction includes no definition of “in the course of committing or attempting to commit [listed offense].” This is despite the inclusion of a definition of the term “in the course of committing theft” as that term is used in robbery. ‘In the course of committing theft’ is statutorily defined (in Tex. Penal Code § 29.01(1)), while the Penal Code contains no definition of “in the course of committing or attempting to commit [one of the offenses listed in Texas Penal Code section 19.03(a)(2)].” The Committee does not believe the courts have authority to develop and provide juries with a definition of the term used in section 19.02(a)(2) along the lines of the somewhat similar term used and defined in the robbery statutes.

Unanimity as to Specified Offense. If the charging instrument alleges in the alternative more than one of the specified offenses, the instructions need not require the jury to be unanimous as to the specified offense. *See, e.g. Kitchens v. State*, 823 S.W.2d 256, 257–58 (Tex. Crim. App. 1991) (en banc) (where indictment alleged murder committed in the course of committing or attempting to commit aggravated sexual assault or robbery, instructions did not have to require unanimity on either aggravated sexual assault or robbery).

CPJC 80.10 Instruction—Capital Murder—Murder for Remuneration**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of capital murder. Specifically, the accusation is that the defendant intentionally or knowingly caused the death of [name] [*insert specific allegations, e.g., by shooting [name] with a gun, and the defendant caused the death of [name] for [remuneration/the promise of remuneration] from [name].*]

Relevant Statutes

A person commits an offense if the person intentionally or knowingly causes the death of an individual for [remuneration/the promise of remuneration].

To prove that the defendant is guilty of capital murder, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant intentionally or knowingly caused the death of an individual; and
2. this was done for [remuneration/the promise of remuneration].

[Include the following if an instruction on causation is appropriate but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person's conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue concerning concurrent causation.]

A person causes the death of another if, but for the person's conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of capital murder.

Definitions*Intentionally Causing the Death of an Individual*

A person intentionally causes the death of an individual if the person has the conscious objective or desire to cause that death.

Knowingly Causing the Death of an Individual

A person knowingly causes the death of an individual if the person is aware that his conduct is reasonably certain to cause that death.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly caused the death of [name] [*insert specific allegations, e.g., by shooting [name] with a gun*]; and
2. this was done for [remuneration/the promise of remuneration] from [name].

[Include the following if the jury was instructed in the relevant statutes unit on concurrent causation.]

The state has the burden of proving that the defendant caused the death of [name]. To prove that the defendant caused the death of [name], the state must show, beyond a reasonable doubt, that either—

1. [*concurrent cause*] did not contribute to causing the death of [name];
2. [*concurrent cause*] was clearly insufficient, by itself, to cause the death of [name]; or
3. the conduct of the defendant was clearly sufficient to cause the death of [name] regardless of [*concurrent cause*].

[Continue with the following.]

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Murder for remuneration is prohibited by and defined in Tex. Penal Code § 19.03(a)(3). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

Defining Remuneration. The court of criminal appeals addressed the meaning of remuneration for purposes of reviewing the sufficiency of the evidence in two leading cases, *Beets v. State*, 767 S.W.2d 711 (Tex. Crim. App. 1987) (opinion on rehearing), and *Rice v. State*, 805 S.W.2d 432, 434–35 (Tex. Crim. App. 1991).

Together, *Beets* and *Rice* establish that although proof of a “promise of remuneration” may be sufficient, it is not necessary. Evidence failing to show a promise may nevertheless prove that the defendant acted “for remuneration” within the meaning of the statute.

Whether a murder is committed “for remuneration” depends on the murderer’s mental state. The issue is whether the murderer acted “in the expectation of receiving some benefit or compensation.” *Rice*, 805 S.W.2d at 434 (quoting *Beets*, 767 S.W.2d at 735).

On rehearing in *Beets*, contrary to the majority’s position on initial submission, the court held that—

[T]he definition of “remuneration” does not mandate the narrow construction requiring salary, payment, or reward paid to an agent by his principal as in a strict murder for hire situation. Remunerate encompasses a broad range of situations, including compensation for loss or suffering and the idea of a reward given or received because of some act.

Beets, 767 S.W.2d at 734.

Rice established that the expected benefit cannot be too intangible. Thus proof that the defendant killed the victim primarily because the victim was a “snitch” but secondarily because killing the victim would assure the defendant’s continuing receipt of the benefits of membership in a prison gang was insufficient. More specifically, proof that

the defendant expected an increase in status within the gang would not have been sufficient because such an increase in status “is too intangible to satisfy the remuneration element.” *Rice*, 805 S.W.2d at 435.

Jury instructions have sometimes included definitions of remunerations. In *Speer v. State*, 890 S.W.2d 87, 91 (Tex. App.—Houston [1st Dist.] 1994, pet. ref’d), for example, the jury was told:

Remuneration means a pecuniary reward given or received because of some act. The act must be done for the purpose of receiving some benefit. The focus is on the defendant’s state of mind and the State is obligated to offer evidence which establishes beyond a reasonable doubt the defendant’s intent or state of mind as related to an expectation of remuneration.

At least one court of appeals has, however, stated that “the trial court should not have given any definition of the term. See *Neumuller v. State*, 953 S.W.2d 502, 511 (Tex. App.—El Paso 1997, pet. ref’d) (holding that it is unnecessary to define remuneration in charge). *Reister v. State*, No. 08-01-00373-CR, 2003 WL 21291035, at *17 (Tex. App.—El Paso June 5, 2003, pet. ref’d) (not designated for publication).

Arguably, a definition of remuneration or “for remuneration” might include one or both of two aspects of the case law. First, it might make clear that the state need not prove the defendant acted pursuant to an agreement by someone to compensate the defendant if the defendant killed the victim. Rather, the state’s case can be based on proof the defendant expected to reap a benefit from the victim’s death, as by collecting life insurance proceeds. The disagreement among the judges in *Beets* suggests this is not necessarily clear from the statutory language.

Second, the definition might make clear that under *Rice* some anticipated benefits are too “intangible” to satisfy the statutory requirement. But *Rice*’s discussion does not provide a clear standard for determining how “tangible” an anticipated benefit or advantage must be. More specifically, it is not clear *Rice* justified the instruction given in *Speer* that the benefit or advantage be “pecuniary.”

Given the absence of a statutory definition of remuneration, the lack of case law authorization for providing juries a definition, and the difficulty of articulating the apparent requirements of the case law, however, the Committee included no definition in the instruction.

CPJC 80.11 Instruction—Capital Murder—Murder by Employing Another to Kill for Remuneration

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of capital murder. Specifically, the accusation is that the defendant intentionally or knowingly caused the death of [name] [*insert specific allegations, e.g., by employing [name] for [remuneration/the promise of remuneration] to cause the death of [name] by shooting [name] with a gun.*]

Relevant Statutes

A person commits an offense if the person intentionally or knowingly causes the death of an individual by employing another to cause the death for [remuneration/the promise of remuneration].

To prove that the defendant is guilty of capital murder, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant intentionally or knowingly caused the death of an individual; and
2. the death was caused by employing another to cause the death for [remuneration/the promise of remuneration].

[Include the following if an instruction on causation is appropriate but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person's conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue concerning concurrent causation.]

A person causes the death of another if, but for the person's conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of capital murder.

Definitions

Intentionally Causing the Death of an Individual

A person intentionally causes the death of an individual if the person has the conscious objective or desire to cause that death.

Knowingly Causing the Death of an Individual

A person knowingly causes the death of an individual if the person is aware that his conduct is reasonably certain to cause that death.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly caused the death of [name]; and
2. the defendant caused the death of [name] by employing [name] for [remuneration/the promise of remuneration] to cause the death of [name] [insert specific allegations, e.g., by shooting [name] with a gun].

[Include the following if the jury was instructed in the relevant statutes unit on concurrent causation.]

The state has the burden of proving that the defendant caused the death of [name]. To prove that the defendant caused the death of [name], the state must show, beyond a reasonable doubt, that either—

1. [concurrent cause] did not contribute to causing the death of [name];
2. [concurrent cause] was clearly insufficient, by itself, to cause the death of [name]; or
3. the conduct of the defendant was clearly sufficient to cause the death of [name] regardless of [concurrent cause].

[Continue with the following.]

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Murder by employing another to kill for remuneration is prohibited by and defined in Tex. Penal Code § 19.03(a)(3). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

CPJC 80.12 Instruction—Capital Murder—Murder of More than One Person**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of capital murder. Specifically, the accusation is that the defendant intentionally or knowingly caused the death of [name] [*insert specific allegations, e.g., by shooting [name] with a gun*] and intentionally or knowingly caused the death of [name] [*insert specific allegations, e.g., by stabbing [name] with a knife*], and both murders were committed [during the same criminal transaction/pursuant to the same scheme or course of conduct].

Relevant Statutes

A person commits an offense if the person intentionally or knowingly causes the death of an individual and murders more than one person [during the same criminal transaction/pursuant to the same scheme or course of conduct].

To prove that the defendant is guilty of capital murder, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant intentionally or knowingly caused the death of an individual; and
2. the defendant intentionally or knowingly caused the death of another individual; and
3. both murders were committed [during the same criminal transaction/pursuant to the same scheme or course of conduct].

[Include the following if an instruction on causation is appropriate but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person's conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue concerning concurrent causation.]

A person causes the death of another if, but for the person's conduct operating either alone or concurrently with another cause, the death of the other

would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of capital murder.

Definitions

Intentionally Causing the Death of an Individual

A person intentionally causes the death of an individual if the person has the conscious objective or desire to cause that death.

Knowingly Causing the Death of an Individual

A person knowingly causes the death of an individual if the person is aware that his conduct is reasonably certain to cause that death.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly caused the death of [name] [insert specific allegations, e.g., by shooting [name] with a gun];
2. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly caused the death of [name] [insert specific allegations, e.g., by stabbing [name] with a knife]; and
3. both murders were committed [during the same criminal transaction/pursuant to the same scheme or course of conduct].

[Include the following if the jury was instructed in the relevant statutes unit on concurrent causation.]

The state has the burden of proving that the defendant caused the death of [name]. To prove that the defendant caused the death of [name], the state must show, beyond a reasonable doubt, that either—

1. [concurrent cause] did not contribute to causing the death of [name];

2. [concurrent cause] was clearly insufficient, by itself, to cause the death of [name]; or
3. the conduct of the defendant was clearly sufficient to cause the death of [name] regardless of [concurrent cause].

[Continue with the following.]

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, all three elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Murder of more than one person is prohibited by and defined in Tex. Penal Code § 19.03(a)(7). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

Under the statute, one murder must be committed intentionally or knowingly as demanded by Tex. Penal Code § 19.02(b)(1). The additional killing or killings do not appear to have to be murder under section 19.02(b)(1), but can be murder under sections 19.02(b)(2) or (3). The practice is to allege that both or all killings were intentional or knowing, so the instruction is so drafted. If the indictment alleges the additional killings are murder for a reason other than being intentional or knowing, the instruction must be modified to accommodate this.

Transferred Intent in Texas Penal Code Section 19.03(a)(7) Situations. Applying transferred intent to section 19.03(a)(7) situations may require modification of the instructions to comply with the holding of *Ex parte Norris*, 390 S.W.3d 338 (Tex. Crim. App. 2012). To meet section 19.03(a)(7) requirements, the state must prove one of two things. First, it may prove the defendant had the intent to kill at least two other persons. Second, it may prove the defendant engaged in two or more “discrete instances of conduct, each committed with the intent to kill another person. In the second situation, the state’s evidence can be sufficient even if the defendant during each of the instances of conduct intended to kill the same person. This would be the case, for example, if during the first instance of conduct the defendant intended to kill

a particular person but did not succeed in killing that person, unintentionally killing another individual instead, and then during the second instance of conduct intended to kill the same particular person targeted during the first instance of conduct and succeeded in doing so.

Need for Unanimity on Predicate Murder Victim. Ordinarily, the indictment for section 19.03(a)(7) murder will identify one victim as the predicate victim, that is, the victim who must be proved to have been killed in a murder as provided for in section 19.02(b)(1). This predicate victim will be distinguished from the additional victim who must have been murdered by the defendant during the same transaction, scheme, or course of conduct. If the indictment alleges more than one additional victim, the jury must find that at least one was murdered, but it need not unanimously agree on which one. In the event that the indictment alleges the defendant simply killed three or more persons during the same transaction, scheme, or course of conduct, *Saenz v. State*, 451 S.W.3d 388 (Tex. Crim. App. 2015), holds that the jury instructions must require the jury to unanimously agree on one victim as the predicate victim although the jurors need not agree on which of the other victims named in the indictment is the additional victim triggering section 19.03(a)(7).

CPJC 80.13 Instruction—Capital Murder—Murder of Individual under Ten Years of Age**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of capital murder. Specifically, the accusation is that the defendant intentionally or knowingly caused the death of [name], an individual under ten years of age, [insert specific allegations, e.g., by shooting [name] with a gun].

Relevant Statutes

A person commits an offense if the person intentionally or knowingly causes the death of an individual under ten years of age.

To prove that the defendant is guilty of capital murder, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant intentionally or knowingly caused the death of an individual; and
2. the individual was under ten years of age.

[Include the following if an instruction on causation is appropriate but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person's conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue concerning concurrent causation.]

A person causes the death of another if, but for the person's conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of capital murder.

Definitions

Intentionally Causing the Death of an Individual

A person intentionally causes the death of an individual if the person has the conscious objective or desire to cause that death.

Knowingly Causing the Death of an Individual

A person knowingly causes the death of an individual if the person is aware that his conduct is reasonably certain to cause that death.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly caused the death of [name] [*insert specific allegations, e.g., by shooting [name] with a gun*]; and
2. [name] was under ten years of age.

[Include the following if the jury was instructed in the relevant statutes unit on concurrent causation.]

The state has the burden of proving that the defendant caused the death of [name]. To prove that the defendant caused the death of [name], the state must show, beyond a reasonable doubt, that either—

1. [concurrent cause] did not contribute to causing the death of [name];
2. [concurrent cause] was clearly insufficient, by itself, to cause the death of [name]; or
3. the conduct of the defendant was clearly sufficient to cause the death of [name] regardless of [concurrent cause].

[Continue with the following.]

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Murder of an individual under ten years of age is prohibited by and defined in Tex. Penal Code § 19.03(a)(8). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

The instruction does not require the state prove any awareness by the defendant of the age of the victim. Section 19.03(a)'s incorporation of section 19.02(b)(1) means the killing must be intentional or knowing. Does this apply not only to the causing of death but also to the required circumstance that the victim be under ten years of age?

Most likely it does not. The court of criminal appeals has indicated it will ordinarily not apply a prescribed culpable mental state to those elements that do not distinguish criminal from innocent behavior. *McQueen v. State*, 781 S.W.2d 600 (Tex. Crim. App. 1989). The age of the victim distinguishes behavior constituting capital murder from that constituting murder under section 19.02. Moreover, some of section 19.03(a)'s subdivisions require a culpable mental state in addition to the requirement that the killing be intentional or knowing; the lack of any such demand in section 19.03(a)(8) suggests the legislature intended no such culpable mental state.

Finally, Texas courts have been generally reluctant to read crimes designed to protect children as requiring awareness of the victim's status as a child or age. *See Fleming v. State*, 455 S.W.3d 577, 582 (Tex. Crim. App. 2014). They will almost certainly follow this approach with regard to section 19.03(a)(8).

CPJC 80.14 Instruction—Manslaughter**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of manslaughter. Specifically, the accusation is that the defendant [*insert specific allegations, e.g.,* recklessly caused the death of [*name*] by operating his motor vehicle at an unreasonable speed].

Relevant Statutes

A person commits an offense if the person recklessly causes the death of an individual.

To prove that the defendant is guilty of manslaughter, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant caused the death of an individual; and
2. the defendant did this recklessly.

[Include the following if an instruction on causation is appropriate but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person's conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue concerning concurrent causation.]

A person causes the death of another if, but for the person's conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of manslaughter.

Definitions*Recklessly Causing the Death of an Individual*

A person recklessly causes the death of an individual if—

1. there is a substantial and unjustifiable risk that his conduct will cause that death;
2. this risk is of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint; and
3. the person is aware of but consciously disregards that risk.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], caused the death of [name] [*insert specific allegations, e.g., by operating his motor vehicle at an unreasonable speed*]; and
2. the defendant did this recklessly.

[Include the following if the jury was instructed in the relevant statutes unit on concurrent causation.]

The state has the burden of proving that the defendant caused the death of [name]. To prove that the defendant caused the death of [name], the state must show, beyond a reasonable doubt, that either—

1. [*concurrent cause*] did not contribute to causing the death of [name]; or
2. [*concurrent cause*] was clearly insufficient, by itself, to cause the death of [name]; or
3. the conduct of the defendant was clearly sufficient to cause the death of [name] regardless of [*concurrent cause*].

[Continue with the following.]

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Manslaughter is prohibited by and defined in Tex. Penal Code § 19.04.

CPJC 80.15 Instruction—Criminally Negligent Homicide**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of criminally negligent homicide. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., caused the death of [name] by criminal negligence by operating his motor vehicle at an unreasonable speed*].

Relevant Statutes

A person commits an offense if the person causes the death of an individual by criminal negligence.

To prove that the defendant is guilty of criminally negligent homicide, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant caused the death of an individual; and
2. the defendant did this by criminal negligence.

[Include the following if an instruction on causation is appropriate but no issue of concurrent causation is raised by the facts.]

A person causes the death of another if, but for the person's conduct, the death of the other would not have occurred.

[Include the following if the facts raise an issue concerning concurrent causation.]

A person causes the death of another if, but for the person's conduct operating either alone or concurrently with another cause, the death of the other would not have occurred, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the person was clearly insufficient.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of criminally negligent homicide.

Definitions

Causing the Death of an Individual by Criminal Negligence

A person causes the death of an individual by criminal negligence if—

1. there is a substantial and unjustifiable risk that his conduct will cause that death;
2. this risk is of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint; and
3. the person ought to be aware of that risk.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], caused the death of [name] [*insert specific allegations, e.g., by operating his motor vehicle at an unreasonable speed*]; and
2. the defendant did this by criminal negligence.

[Include the following if the jury was instructed in the relevant statutes unit on concurrent causation.]

The state has the burden of proving that the defendant caused the death of [name]. To prove that the defendant caused the death of [name], the state must show, beyond a reasonable doubt, that either—

1. [*concurrent cause*] did not contribute to causing the death of [name]; or
2. [*concurrent cause*] was clearly insufficient, by itself, to cause the death of [name]; or
3. the conduct of the defendant was clearly sufficient to cause the death of [name] regardless of [*concurrent cause*].

[Continue with the following.]

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Criminally negligent homicide is prohibited by Tex. Penal Code § 19.05. The definition of “causing the death of an individual by criminal negligence” is based on Tex. Penal Code § 6.03(d).



CHAPTER 81	KIDNAPPING AND RELATED OFFENSES	
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CPJC 81.1 Statutory Framework

Chapter 20 of the Texas Penal Code creates three major offenses. In order of increasing seriousness, these are unlawful restraint, kidnapping, and aggravated kidnapping.

Unlawful restraint under section 20.02(a) consists of restraining the victim; the term *restrain* is defined in section 20.01(1). Tex. Penal Code §§ 20.01(1), 20.02(a). Kidnapping (under section 20.03(a)) and aggravated kidnapping (under section 20.04(a)) consist of abducting the victim; *abduct* is defined in section 20.01(2) as including restraining the victim. See Tex. Penal Code §§ 20.01(2), 20.03(a), 20.04(a).

The use of the term *restrain* in the definition of *abduct* means that all three crimes include the same subelements of *restrain*: (1) restricting the victim's movements by moving or confining the victim, (2) interfering substantially with the victim's liberty, and (3) doing this "without consent. Kidnapping requires proof of these three matters plus a fourth element: acting with the intent to use one of the two methods specified in section 20.01(2) to prevent the victim's liberation. Aggravated kidnapping requires proof of these four matters plus a fifth element: acting with intent to accomplish one of the six objectives specified in section 20.04(a).

All three offenses require that the restraint of the victim be 'without consent. In certain circumstances when the victim is a child, this requirement is essentially rendered meaningless by section 20.01(1)(B) (providing that in situations covered, restraint is without consent if accomplished by any means, including acquiescence of the victim). The instructions in this chapter address only other situations, all of which are covered by the provision in section 20.01(1)(A) that restraint is without consent if accomplished by force, intimidation, or deception.

CPJC 81.2 Defining “Restrain” and “Abduct”

The initial question faced by the Committee was how closely the jury instructions should follow the statutory framework. This also put into issue how much of the sometimes overlapping statutory language should be included in the instructions and how the statutory language should be presented.

Traditionally, jury instructions define the charged offenses as requiring restraint or abduction. The instructions then provide definitions of those terms.

The Committee concluded that this approach fails to provide juries with convenient and comprehensive lists of the actual elements of the major Texas Penal Code chapter 20 offenses. As a result, the instructions in this chapter define the offenses in a manner that incorporates the statutory definitions of “restraint” and “abduct.”

Texas pleading law confirms the wisdom of this approach. A kidnapping indictment alleging simply that the accused ‘restrain[ed]’ the victim fails to provide required notice. The defendant is entitled to have the state plead whether it will show—in terms of the subelements of restraint—that the defendant moved the victim or confined him. *Reynolds v. State*, 723 S.W.2d 685, 686 (Tex. Crim. App. 1986). That the subelements of restraint are of such significance that at least some of them must be specified in the charging instrument suggests they should also be explicitly identified as constituent elements of the offense in the jury instructions.

Should or must the jury instructions include the terms *restrain* and (for kidnapping) *abduct*? Or would it be permissible—and, if so, also desirable—to avoid use of these terms and put the matter to juries in terms of the constituent subelements?

Unlawful restraint, for example, could be defined without reference to the term *restrain* by setting out the subelements of restraint as defined in Penal Code section 20.01(1). Thus the offense would be defined as consisting of restricting a person’s movements by movement or confinement. No mention would be made of the term *restrains* as used in the basic definition of the offense set out in section 20.02(a) (“A person commits an offense if he intentionally or knowingly restrains another person.”). This approach would arguably simplify the instructions.

The Committee decided, however, that the terms *restrain* and *abduct* are quite central to the legislature’s meaning of the offenses. Further, the legislature has made them elements of the offenses. Consequently, those terms are incorporated into the instructions’ statements of the elements of the offenses.

Submission of a lesser included offense would be facilitated by the Committee’s approach. Kidnapping consists of four of the five elements of aggravated kidnapping, and unlawful restraint consists of three of the four elements of kidnapping. This should make quite clear to jurors the relationship between the three major chapter 20 offenses.

CPJC 81.3 Defining Required Culpable Mental States

The major Texas Penal Code chapter 20 offenses create a particular problem with regard to instructing juries on the required culpable mental states. These offenses are a specific example of the general difficulty with culpable mental state analysis under the Code. See further discussion at CPJC 1.7 in *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*.

The chapter 20 offenses require proof that the accused intentionally or knowingly restrained another or, under kidnapping, abducted another. As explained in CPJC 81.1, restrain and abduct (by incorporating restraint) are defined so as to effectively create three subelements: (1) restricting the victim's movement by moving or confining the victim, (2) interfering substantially with the victim's liberty, and (3) doing this "without consent."

To which of these subelements do the required culpable mental states—intent or knowledge—apply? The statutory language is not definitive. In fact, it is less definitive than that of some other offenses, since the question is how the basic requirements of unlawful restraint and kidnapping (in Penal Code sections 20.02(a) and 20.03(a)) apply to the subelements of restrain as set out in a different statutory provision—section 20.01(1). Case law has not addressed the matter.

The Committee was confident the courts would apply the requirement of intent or knowledge to the first subelement, restricting the victim's movement by moving or confining the victim. This subelement defines the basic conduct constituting the chapter 20 offenses, which appear to be primarily "nature of conduct" offenses. The central role played by movement or confinement in the definition of the offenses suggests that the required culpable mental states apply to that requirement.

With regard to the lack of consent subelement, the Committee noted that under section 20.01(1)—except in those cases in which the victim is a child—"without consent" is defined as requiring that the restraint be "accomplished by force, intimidation, or deception." Tex. Penal Code § 20.01(1)(A). This definition necessarily—although implicitly rather than explicitly—requires awareness that force, intimidation, or deception is being used. Essentially, this subelement contains its own culpability requirement. Consequently, there is no need for the general requirement of intent or knowledge to apply to this element. The Committee concluded that the courts would not apply the required culpable mental state to lack of consent, so defined.

Most members of the Committee were confident that the offenses would not require proof that the defendant intended his conduct to interfere substantially with the victim's liberty, or at least knew it would do so. They relied on the objective statement of the subelement in the statute. Moreover, restraint of another without consent is wrongful and unlawful even if that restraint does not interfere substantially with the victim's

liberty. Thus this subelement does not serve to distinguish lawful from innocent conduct, and therefore—as discussed in CPJC 1.7—the culpable mental state prescribed for the offense is unlikely to extend to this subelement.

CPJC 81.4 Restriction of Movement “Incident to” Other Offenses

Courts and legislatures in many states have addressed whether there is or should be a limit on the application of kidnapping-like crimes to situations in which the defendants’ movement or seizing of the victims is in some sense incidental to other offenses, such as murder, robbery, or sexual assault.

Some courts have held that conduct literally covered by kidnapping-like offenses that is incidental to such other offenses is not also kidnapping, at least in the absence of evidence that it increased the risk to the victims or otherwise distinguished the situations from “usual” murders, robberies, or sexual assaults.

The court of criminal appeals in *Hines v. State*, 75 S.W.3d 444 (Tex. Crim. App. 2002), rejected any such interpretation of the Texas Penal Code chapter 20 offenses, at least ‘as a matter of law.’ In *Hines*, the court of appeals had held that Hines’s restraint of his victim in the course of a robbery was not sufficient to give rise to an aggravated kidnapping as well as a robbery. Under Penal Code section 20.01(1), it held, “to ‘interfere substantially’ means more than a ‘temporary confinement or slight movement which is part and parcel of the commission or attempted commission of another substantive criminal offense.’” *Hines*, 75 S.W.3d at 446 (quoting *Hines v. State*, 40 S.W.3d 705, 713–14 (Tex. App.—Houston [14th Dist.] 2001)).

Rejecting this analysis, the court of criminal appeals first made clear that—

there is nothing in the Texas statute that even *suggests* that it is necessary for the State to prove that a defendant moved his victim a certain distance, or that he held him a specific length of time before he can be found guilty of kidnapping. In fact, we have consistently held that under the kidnapping statute, there is no specific time requirement for determining whether a restraint has taken place.

Hines, 75 S.W.3d at 447–48.

It then added:

There is also nothing in the statute indicating that the Legislature intended to bar the prosecution of a kidnapping that is part and parcel of another offense. Clearly the Legislature did not intend for every crime which involves a victim whose liberty has been interfered with to turn into a kidnapping. It is up to the jury to distinguish between those situations in which a substantial interference with the victim’s liberty has taken place and those situations in which a slight interference has taken place. This can be established by looking at all of the circumstances surrounding the offense. There is, however, no *per se* bar to a kidnapping prosecution for conduct that occurs during the commission of another offense.

Hines, 75 S.W.3d at 448. *Accord Reyes v. State*, 84 S.W.3d 633, 636–37 (Tex. Crim. App. 2002) (*Hines*, as applied to capital murder conviction, permitted finding that defendant committed kidnapping as well as murder).

Under *Hines*, whether a restriction of liberty during a non–chapter 20 crime permits conviction for a chapter 20 crime, as well as the other offense, depends on whether ‘a substantial interference with the victim’s liberty has taken place. *Hines*, 75 S.W.3d at 448.

Hines does not make clear whether the trier of fact may or perhaps must consider the interference with the victim’s liberty arising from (or perhaps necessarily involved in) the non–chapter 20 crime and ask whether there was an incrementally additional substantial interference with the victim’s liberty.

Is a defendant entitled to have the jury instructed regarding the analysis necessary under *Hines* to determine whether restriction of the victim’s movements during robberies, sexual assaults, and other crimes gives rise to a chapter 20 offense?

Hines and other cases on the issue involve challenges to the sufficiency of the evidence. Nothing indicates that defendants have ever sought such instructions or that the need for or propriety of them has been before the appellate courts.

The Committee does not recommend an instruction for these situations, on the rationale that this would constitute a prohibited comment on the evidence.

Such an instruction, if permissible and desirable, might be worded along the following lines:

If you have found the defendant guilty of the offense of [*insert specific offense, e.g. robbery*], you may have found that the defendant in the course of committing that offense interfered with [*name*]’s liberty. If you have so found, you may consider this in deciding whether, for purposes of [unlawful restraint/kidnapping/aggravated kidnapping] the state has proved the defendant interfered substantially with [*name*]’s liberty.

If you determine that the defendant did not substantially interfere with [*name*]’s liberty beyond what was [necessarily] involved in the commission of the [*insert specific offense, e.g. robbery*], you may find that the defendant did not interfere substantially with [*name*]’s liberty and thus did not commit [unlawful restraint/kidnapping/aggravated kidnapping] in addition to committing [*insert specific offense, e.g. robbery*].

CPJC 81.5 Defining “Abduct” in Terms of Intent Accompanying Restraint

The definition of “abduct” may give rise to some doubt about what the state must prove the defendant actually did and what is sufficient for the state to prove the defendant intended to do.

Regarding Texas Penal Code section 20.01(2)(A), the court of criminal appeals has explained:

[T]he State is not required to prove that the defendant actually secreted or held another. Instead the State must prove that the defendant restrained another with the specific intent to prevent liberation by secreting or holding the person. The offense of kidnapping is legally completed when the defendant, at any time during the restraint, forms the intent to prevent liberation by secreting or holding another in a place unlikely to be found.

Laster v. State, 275 S.W.3d 512, 521 (Tex. Crim. App. 2009) (citing *Brimage v. State*, 918 S.W.2d 466, 475–76 (Tex. Crim. App. 1994)).

The same analysis undoubtedly applies to section 20.01(2)(B). As a result, kidnapping does not require proof that the defendant actually did anything beyond what is required for unlawful restraint. Kidnapping does require that the defendant, as he “restrain[ed]” the victim, have had the intention to prevent the victim’s liberation and specifically intended to do so by either secreting or holding the victim in a secret place or by using or threatening to use deadly force.

The Committee had some concern whether the definition of the distinguishing element of kidnapping in the instructions made *Laster*’s holding adequately clear. It could not, however, draft reasonably precise language better conveying *Laster*’s law.

CPJC 81.6 “Safe Release” Punishment Issue in Aggravated Kidnapping Prosecutions

“Safe Release” Generally. A defendant convicted of aggravated kidnapping may, at the punishment stage of the trial, undertake to prove that he voluntarily released the victim in a safe place. If this is proved, the offense of which the defendant was convicted becomes and is punishable as a second-degree felony rather than a first-degree felony. Tex. Penal Code § 20.04(d).

If the jury is assessing punishment, whether the defendant has proved “safe release” is a question for the jury under appropriate instructions. *Williams v. State*, 851 S.W.2d 282, 288 (Tex. Crim. App. 1993) (per curiam); *Wright v. State*, 571 S.W.2d 24 (Tex. Crim. App. 1978).

Defining “Voluntarily.” The term *voluntarily* is not defined in the statutes. In *Brown v. State*, 98 S.W.3d 180 (Tex. Crim. App. 2003), discussing the sufficiency of the evidence for the jury to reject Brown’s contention that he proved voluntary safe release, the court held that the term was ambiguous: ‘We decide that the legislatively undefined term ‘voluntarily’ in Section 20.04(d) is ambiguous primarily because it is susceptible to different meanings, some of which would support holding that appellant’s release of the victim was voluntary and some of which would support a contrary decision.’ *Brown*, 98 S.W.3d at 183.

Brown adopted “a narrow interpretation of ‘voluntarily’ in Section 20.04(d) such as the absence ‘of rescue by the police [or others] or escape by the [kidnap] victim.’” *Brown*, 98 S.W.3d at 188. In *Ballard v. State*, 193 S.W.3d 916 (Tex. Crim. App. 2006), the court approved of the court of appeals’s imposition of a requirement that “in order to trigger § 20.04(d), an accused must have performed some overt and affirmative act that informs the victim that he has been fully released from captivity.” *Ballard*, 193 S.W.3d at 919.

Neither *Brown* nor *Ballard* addressed the wisdom, necessity, or permissibility of instructing juries on the case law’s definition of “voluntarily.” However, *Clark v. State*, 190 S.W.3d 59 (Tex. App.—Amarillo 2005, no pet.), found no error in the trial judge’s refusal to define either “voluntarily” or “safe place.”

The Committee concluded that a trial judge might properly include the case law’s definition of “voluntarily.” Most members believed, however, that given the risk that this would be a comment on the evidence, the definition should not be included if the defendant objects.

Defining “Release[] in a Safe Place.” The case law contains a list of considerations frequently relied on by the courts of appeals in reviewing the sufficiency of the evidence supporting rejection of defendants’ contentions that victims were released in safe places. This case law could be used to formulate a definition of

'release[] in a safe place' or to suggest an approach to applying the statutory phrase.

This list was first set out in *Williams v. State*, 718 S.W.2d 772, 774 (Tex. App.—Corpus Christi 1986), *rev'd in part on other grounds*, 851 S.W.2d 282. It has been repeatedly used. *See, e.g. Morales v. State*, No.03-09-00477-CR, 2010 WL 3058623, at *2 (Tex. App.—Austin Aug. 3, 2010, pet. ref'd) (not designated for publication); *Woods v. State*, 301 S.W.3d 327, 331–32 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *Clark v. State*, 190 S.W.3d 59, 62 (Tex. App.—Amarillo 2005, no pet.); *McLaren v. State*, 104 S.W.3d 268, 273 (Tex. App.—El Paso 2003, no pet.), *on remand from* 95 S.W.3d 282 (Tex. Crim. App. 2003); *Harrell v. State*, 65 S.W.3d 768, 772–73 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd); *Rodriguez v. State*, 766 S.W.2d 360, 361 (Tex. App.—Texarkana 1989, pet. ref'd).

In *Ballard*, the court of criminal appeals noted the appellant's reliance on the courts of appeals's use of this analysis. *Ballard*, 193 S.W.3d at 919. It did not, however, comment on the matter.

In 1978, the court of criminal appeals found no error in a trial judge's refusal to define "safe place." *Wright*, 571 S.W.2d at 25 ("[S]afe place' is a phrase commonly understood and an issue of fact, and the charge need not define it for the jury."). *Accord Clark*, 190 S.W.3d 59 (no error in trial judge's refusal to define either "voluntarily" or "safe place").

The Committee considered a proposal to include in the instructions the following definition:

Safe Place

Whether a place in which a kidnapper releases the victim is a safe place is determined by (among other factors) the following:

- the remoteness of the location;
- the proximity of authorities or persons who could aid or assist;
- the time of day;
- climatic conditions;
- the condition of the victim;
- the character of the location or surrounding neighborhood; and
- the victim's familiarity with the location or surrounding neighborhood.

The Committee concluded, however, that any jury instruction embodying this approach would be a prohibited comment on the evidence.

The above list is, of course, a useful guide to considerations counsel may urge to juries faced with applying the statute. It is also an important part of appellate review of juries' rejection of defendants' safe-release contentions. It is not, however, a permissible part of jury instructions.

Unanimity. The instructions require juries to be unanimous about whether defendants have proved voluntary safe release. Although this has not been addressed in the case law, the Committee saw no legal or logical reason why the general rule of unanimity should not be applied here.

CPJC 81.7 Instruction—Unlawful Restraint**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of unlawful restraint. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally or knowingly restrained [name] by restricting the movements of [name] without [name]’s consent by force, intimidation, or deception so as to interfere substantially with [name]’s liberty by moving [name] from one place to another or by confining [name]*].

Relevant Statutes

A person commits an offense if the person intentionally or knowingly restrains another person.

To prove that the defendant is guilty of unlawful restraint, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant intentionally or knowingly restrained another person by restricting the person’s movements, by either—
 - a. moving the other person from one place to another; or
 - b. confining the other person; and
2. this was accomplished by force, intimidation, or deception and thus was without consent; and
3. the defendant interfered substantially with the other person’s liberty.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of unlawful restraint.

Definitions*Restraint without Consent*

Restraint of another is “without consent” if it is accomplished by force, intimidation, or deception.

Intentionally Restricting Another's Movements

A person intentionally restricts another's movements by moving the other from one place to another or by confining the other if the person has the conscious objective or desire to restrict the other's movements and to do so by moving the other from one place to another or by confining that other person.

Knowingly Restricting Another's Movements

A person knowingly restricts another's movements by moving the other from one place to another or by confining the other if the person is aware that he is restricting the other's movements and doing so by moving the other from one place to another or by confining that other person.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly restrained [name] by restricting his movements, by either—
 - a. moving [name] from one place to another; or
 - b. confining [name]; and
2. this was accomplished by force, intimidation, or deception and thus was without consent; and
3. the defendant interfered substantially with [name]'s liberty.

You must all agree on elements 1, 2, and 3 listed above, but you do not have to agree on the method of restraint listed in elements 1.a and 1.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant "guilty."

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Unlawful restraint is prohibited by and defined in Tex. Penal Code § 20.02. The definition of “without consent” is based on Tex. Penal Code § 20.01(1)(A).

CPJC 81.8 Instruction—Kidnapping**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of kidnapping. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally or knowingly abducted [name] by restricting the movements of [name] without [name]’s consent by force, intimidation, or deception so as to interfere substantially with [name]’s liberty by moving [name] from one place to another or by confining [name] with the intent to prevent [name]’s liberation by secreting or holding [name] in a place where [name] was not likely to be found or by using or threatening to use deadly force*].

Relevant Statutes

A person commits an offense if the person intentionally or knowingly abducts another person.

To prove that the defendant is guilty of kidnapping, the state must prove, beyond a reasonable doubt, that the defendant abducted another person. This requires proof of four elements. The elements are that—

1. the defendant intentionally or knowingly restrained another person by restricting the person’s movements, by either—
 - a. moving the other person from one place to another; or
 - b. confining the other person; and
2. this was accomplished by force, intimidation, or deception and thus was without consent; and
3. the defendant interfered substantially with the other person’s liberty; and
4. the defendant did this with the intent to prevent the other person’s liberation, by either—
 - a. secreting or holding the other person in a place where he was not likely to be found; or
 - b. using or threatening to use deadly force.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of kidnapping.

Definitions*Restraint without Consent*

Restraint of another is “without consent” if it is accomplished by force, intimidation, or deception.

Deadly Force

“Deadly force” means force that is intended or known by the person using it to cause death or serious bodily injury or force that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Intentionally Restricting Another’s Movements

A person intentionally restricts another’s movements by moving the other from one place to another or by confining the other if the person has the conscious objective or desire to restrict the other’s movements and to do so by moving the other from one place to another or by confining that other person.

Knowingly Restricting Another’s Movements

A person knowingly restricts another’s movements by moving the other from one place to another or by confining the other if the person is aware that he is restricting the other’s movements and doing so by moving the other from one place to another or by confining that other person.

Intent to Prevent Liberation

A person restrains another with intent to prevent that other person’s liberation by either secreting or holding the other person in a place where that other person is not likely to be found or using or threatening to use deadly force if the person has the conscious objective or desire to prevent the other person’s liberation by either of these methods.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly restrained [name] by restricting his movements, by either—
 - a. moving [name] from one place to another; or
 - b. confining [name]; and
2. this was accomplished by force, intimidation, or deception and thus was without consent; and
3. the defendant interfered substantially with [name]’s liberty; and
4. the defendant did this with the intent to prevent [name]’s liberation, by either—
 - a. secreting or holding [name] in a place where he was not likely to be found; or
 - b. using or threatening to use deadly force.

You must all agree on elements 1, 2, 3, and 4 listed above, but you do not have to agree on the method of restraint listed in elements 1.a and 1.b above or on the intent listed in elements 4.a and 4.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Kidnapping is prohibited by and defined in Tex. Penal Code § 20.03. The definition of “without consent” is based on Tex. Penal Code § 20.01(1)(A). The definition of “deadly force” is from Tex. Penal Code § 9.01(3).

CPJC 81.9 Instruction—Aggravated Kidnapping**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of aggravated kidnapping. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally or knowingly abducted [name] by restricting the movements of [name] without [name]’s consent by force, intimidation, or deception so as to interfere substantially with [name]’s liberty by moving [name] from one place to another or by confining [name] with the intent to prevent [name]’s liberation by secreting or holding [name] in a place where [name] was not likely to be found or by using or threatening to use deadly force and with the intent to [*insert specific allegations, e.g., hold [name] for ransom or reward*]*].

Relevant Statutes

A person commits an offense if the person intentionally or knowingly abducts another person.

To prove that the defendant is guilty of aggravated kidnapping, the state must prove, beyond a reasonable doubt, that the defendant abducted another person with two particular intents. This requires proof of five elements. The elements are that—

1. the defendant intentionally or knowingly restrained another person by restricting the person’s movements, by either—
 - a. moving the other person from one place to another; or
 - b. confining the other person; and
2. this was accomplished by force, intimidation, or deception and thus was without consent; and
3. the defendant interfered substantially with the other person’s liberty; and
4. the defendant did this with the intent to prevent the other person’s liberation, by either—
 - a. secreting or holding the other person in a place where he was not likely to be found; or
 - b. using or threatening to use deadly force; and

5. the defendant did this with the intent to [*insert objective(s) as listed in Texas Penal Code section 20.04(a)(1)–(6), i.e. hold the other person for ransom or reward; use the other person as a shield or hostage; facilitate the commission of a felony or the flight after the attempt or commission of a felony; inflict bodily injury on the other person; abuse the other person sexually; terrorize the other person or a third person; interfere with the performance of any governmental or political function*].

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of aggravated kidnapping.

Definitions

Restraint without Consent

Restraint of another is “without consent” if it is accomplished by force, intimidation, or deception.

Deadly Force

“Deadly force” means force that is intended or known by the person using it to cause death or serious bodily injury or force that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Intentionally Restricting Another’s Movements

A person intentionally restricts another’s movements by moving the other from one place to another or by confining the other if the person has the conscious objective or desire to restrict the other’s movements and to do so by moving the other from one place to another or by confining that other person.

Knowingly Restricting Another’s Movements

A person knowingly restricts another’s movements by moving the other from one place to another or by confining the other if the person is aware that he is restricting the other’s movements and doing so by moving the other from one place to another or by confining that other person.

Intent to Prevent Liberation

A person restrains another with intent to prevent that other person’s liberation by either secreting or holding the other person in a place where that other

person is not likely to be found or using or threatening to use deadly force if the person has the conscious objective or desire to prevent the other person's liberation by either of these methods.

Intent to Hold Another Person for Ransom or Reward

A person has an intent to hold another person for ransom or reward if the person has the conscious objective or desire to hold the other person for ransom or reward.

[Insert additional definitions as required, depending on the intent relied on by the state.]

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly restrained [name] by restricting his movements, by either—
 - a. moving [name] from one place to another; or
 - b. confining [name]; and
2. this was accomplished by force, intimidation, or deception and thus was without consent; and
3. the defendant interfered substantially with [name]'s liberty; and
4. the defendant did this with the intent to prevent [name]'s liberation, by either—
 - a. secreting or holding [name] in a place where he was not likely to be found; or
 - b. using or threatening to use deadly force; and
5. the defendant did this with the intent to [insert objective(s) as listed in Texas Penal Code section 20.04(a)(1)–(6), i.e. hold [name] for ransom or reward; use [name] as a shield or hostage; facilitate the commission of a felony or the flight after the attempt or commission of a felony; inflict bodily injury on [name]; abuse [name] sexually; terrorize [name] or a third person; interfere with the performance of any governmental or political function].

You must all agree on elements 1, 2, 3, 4, and 5 listed above, but you do not have to agree on the method of restraint listed in elements 1.a and 1.b above or on the intent listed in elements 4.a and 4.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, 4, and 5 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Aggravated kidnapping is prohibited by and defined in Tex. Penal Code § 20.04. The definition of ‘without consent’ is based on Tex. Penal Code § 20.01(1)(A). The definition of ‘deadly force’ is from Tex. Penal Code § 9.01(3).

CPJC 81.10 Instruction—Aggravated Kidnapping by Deadly Weapon**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of aggravated kidnapping. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally or knowingly abducted [name] by restricting the movements of [name] without [name]’s consent by force, intimidation, or deception so as to interfere substantially with [name]’s liberty by moving [name] from one place to another or by confining [name] with the intent to prevent [name]’s liberation by secreting or holding [name] in a place where [name] was not likely to be found or by using or threatening to use deadly force and used or exhibited a deadly weapon, [a firearm/[other deadly weapon]]*], during the commission of the offense].

Relevant Statutes

A person commits an offense if the person intentionally or knowingly abducts another person and uses or exhibits a deadly weapon during the commission of the offense.

To prove that the defendant is guilty of aggravated kidnapping, the state must prove, beyond a reasonable doubt, that the defendant abducted another person with a particular intent and used or exhibited a deadly weapon. This requires proof of five elements. The elements are that—

1. the defendant intentionally or knowingly restrained another person by restricting the person’s movements, by either—
 - a. moving the other person from one place to another; or
 - b. confining the other person; and
2. this was accomplished by force, intimidation, or deception and thus was without consent; and
3. the defendant interfered substantially with the other person’s liberty; and
4. the defendant did this with the intent to prevent the other person’s liberation, by either—
 - a. secreting or holding the other person in a place where he was not likely to be found; or

- b. using or threatening to use deadly force; and
5. the defendant used or exhibited a deadly weapon during the commission of the offense.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of aggravated kidnapping.

Definitions

Restraint without Consent

Restraint of another is “without consent” if it is accomplished by force, intimidation, or deception.

Deadly Force

“Deadly force” means force that is intended or known by the person using it to cause death or serious bodily injury or force that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Intentionally Restricting Another’s Movements

A person intentionally restricts another’s movements by moving the other from one place to another or by confining the other if the person has the conscious objective or desire to restrict the other’s movements and to do so by moving the other from one place to another or by confining that other person.

Knowingly Restricting Another’s Movements

A person knowingly restricts another’s movements by moving the other from one place to another or by confining the other if the person is aware that he is restricting the other’s movements and doing so by moving the other from one place to another or by confining that other person.

Intent to Prevent Liberation

A person restrains another with intent to prevent that other person’s liberation by either secreting or holding the other person in a place where that other person is not likely to be found or using or threatening to use deadly force if the person has the conscious objective or desire to prevent the other person’s liberation by either of these methods.

Deadly Weapon

“Deadly weapon” means—

1. a firearm; or
2. anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or
3. anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Firearm

“Firearm” means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

[Include the following if raised by the evidence.]

“Firearm” does not include a firearm that may have, as an integral part, a folding knife blade or other characteristics of weapons made illegal by chapter 46 of the Texas Penal Code and that is—

1. an antique or curio firearm manufactured before 1899, or
2. a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly restrained [name] by restricting his movements, by either—
 - a. moving [name] from one place to another; or
 - b. confining [name]; and
2. this was accomplished by force, intimidation, or deception and thus was without consent; and
3. the defendant interfered substantially with [name]’s liberty; and
4. the defendant did this with the intent to prevent [name]’s liberation, by either—

- a. secreting or holding [*name*] in a place where he was not likely to be found; or
 - b. using or threatening to use deadly force; and
5. the defendant used or exhibited a deadly weapon, [a firearm/[*other deadly weapon*]], during the commission of the offense.

You must all agree on elements 1, 2, 3, 4, and 5 listed above, but you do not have to agree on the method of restraint listed in elements 1.a and 1.b above or on the intent listed in elements 4.a and 4.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, 4, and 5 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Aggravated kidnapping is prohibited by and defined in Tex. Penal Code § 20.04. The definition of “without consent” is based on Tex. Penal Code § 20.01(1)(A). The definition of “deadly force” is from Tex. Penal Code § 9.01(3). The definition of “deadly weapon” is from Tex. Penal Code § 1.07(a)(17).

For a discussion of some of the concerns with the definition of “deadly weapon” and for an alternate definition, see CPJC 85.5 in this volume.

**CPJC 81.11 Instruction—Aggravated Kidnapping—Safe Release
Punishment Issue**

You have found the defendant, [*name*], guilty of aggravated kidnapping. It is now your duty to assess punishment. Before you assess punishment, however, you must address a preliminary question. The range of punishments from which you must choose the defendant's punishment depends on your answer to that question.

You must determine whether the defendant has proved, by a preponderance of the evidence, that he voluntarily released [*name*], the victim, in a safe place.

Relevant Statutes

If the defendant proves that he voluntarily released the victim in a safe place, this offense is punishable by—

1. a term of imprisonment for no less than two years and no more than twenty years, or
2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than \$10,000.

If the defendant does not prove that he voluntarily released the victim in a safe place, this offense is punishable by—

1. a term of imprisonment for no less than five years and no more than ninety-nine years or for life, or
2. a term of imprisonment for no less than five years and no more than ninety-nine years or for life and a fine of no more than \$10,000.

You must all agree on whether the defendant has proved that he voluntarily released [*name*] in a safe place.

Burden of Proof

The burden is on the defendant to prove, by a preponderance of the evidence, that he voluntarily released the victim in a safe place.

Definitions*Preponderance of the Evidence*

The term "preponderance of the evidence" means the greater weight and degree of the credible evidence.

[The following may be included but should not be given if the defendant objects.]

Voluntarily Released

The defendant voluntarily released the victim only if the defendant performed some overt and affirmative act that informed the victim he was fully released from captivity. Voluntary release has not occurred if authorities rescued the victim or if the victim escaped.

Application of Law to Facts

You must determine whether the defendant has proved, by a preponderance of the evidence, that he voluntarily released [name], the victim, in a safe place.

You must all agree on whether the defendant has proved this before you may assess punishment.

Your resolution of this issue will determine which of the two verdict forms you will use. If you all agree the defendant has proved that he voluntarily released the victim in a safe place, use the first verdict form, titled "Verdict—Defendant Has Proved Safe Release of Victim." If you all agree the defendant has not proved that he voluntarily released the victim in a safe place, use the second verdict form, titled "Verdict—Defendant Has Not Proved Safe Release of Victim."

If you all agree the defendant has proved, by a preponderance of the evidence, that he voluntarily released the victim in a safe place, you are to determine and state in your verdict—

1. a term of imprisonment for no less than two years and no more than twenty years, or
2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than \$10,000.

If you all agree the defendant has not proved, by a preponderance of the evidence, that he voluntarily released the victim in a safe place, you are to determine and state in your verdict—

1. a term of imprisonment for no less than five years and no more than ninety-nine years or for life, or
2. a term of imprisonment for no less than five years and no more than ninety-nine years or for life and a fine of no more than \$10,000.

**VERDICT—DEFENDANT HAS PROVED
SAFE RELEASE OF VICTIM**

We, the jury, having found the defendant, [name], guilty of the offense of aggravated kidnapping, all agree that the defendant has proved that he voluntarily released [name], the victim, in a safe place. We assess the defendant's punishment at: (select one)

_____ confinement by the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ confinement by the Texas Department of Criminal Justice for a term of _____ years and a fine of \$_____.

Foreperson of the Jury

Printed Name of Foreperson

**VERDICT—DEFENDANT HAS NOT PROVED
SAFE RELEASE OF VICTIM**

We, the jury, having found the defendant, [name], guilty of the offense of aggravated kidnapping, all agree that the defendant has not proved that he voluntarily released [name], the victim, in a safe place. We assess the defendant's punishment at: (select one)

_____ confinement by the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ confinement by the Texas Department of Criminal Justice for a term of _____ years and a fine of \$_____.

_____ confinement by the Texas Department of Criminal Justice for life and no fine.

_____ confinement by the Texas Department of Criminal Justice for life and a fine of \$_____.

Foreperson of the Jury

Printed Name of Foreperson

COMMENT

Aggravated kidnapping is prohibited by and defined in Tex. Penal Code § 20.04. The role of voluntary release in a safe place in criminal liability is addressed in Tex. Penal Code § 20.04(d).

[Chapters 82 and 83 are reserved for expansion.]

CHAPTER 84 SEXUAL OFFENSES

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I. Issues Relating to Sexual Offenses

CPJC 84.1 General Comments Regarding Sexual Offenses

Defining “On or About.” It is well-settled that the state is not required to prove that an offense was committed on the exact date alleged in the indictment. *Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997). The state is likely entitled to an instruction informing the jurors of this law. This is usually accomplished with an instruction that the state is not bound by the date alleged in the indictment and may prove that the offense occurred on any date as long as it was before the presentment of the indictment and within the statute of limitations. *Sledge*, 953 S.W.2d at 256. In some instances, however, an instruction on this relaxed meaning of “on or about” can ‘present[] the jury with a much broader chronological perimeter [around possible offense dates] than is permitted by law. *Taylor v. State*, 332 S.W.3d 483, 488 (Tex. Crim. App. 2011). Sometimes, the date of presentment of the indictment and the statute of limitations are not the only limits that the jury should consider.

One such additional limitation is in Tex. Penal Code § 8.07(b), which provides that, except under very limited circumstances, a person cannot be prosecuted for offenses committed before he was seventeen years old. When the proof of the offense at trial includes acts that the defendant committed before he turned seventeen, any relaxed definition of ‘on or about’ must include a limitation that the jury cannot convict the defendant for conduct committed before he was seventeen. *Taylor*, 332 S.W.3d at 488.

Also, a number of courts of appeals have held that a jury charge on the non-binding nature of dates alleged in the indictment for continuous sexual abuse of a young child must limit the jury’s consideration of offense dates to conduct occurring after September 1, 2007, the effective date of Tex. Penal Code § 21.02, the continuous-sexual-abuse-of-a-young-child statute. *Martin v. State*, 335 S.W.3d 867, 874–75 (Tex. App.—Austin 2011, pet. ref’d); *Gonzales v. State*, No. 04-14-00100-CR, 2015 WL 5037692 (Tex. App.—San Antonio Aug. 26, 2015, pet. ref’d) (not designated for publication).

The expanded definition of “on or about” and the more common limitations on this expanded definition are set out in the instructions in this chapter. These instructions reflect the fact that, for most prosecutions of aggravated sexual assault of a child, sexual assault of a child, continuous sexual abuse of a young child, and indecency with a child, there is no statute of limitations. Tex. Code Crim. Proc. art. 12.01(1)(B), (D), (E). For other prosecutions that are still governed by a statute of limitations, the following definition should be given instead:

The indictment alleges that the offense was committed on or about [date]. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed before [date of indictment], the date the

indictment was filed. But the offense cannot be so far back in time that it is outside the statute of limitations period—a particular amount of time required for a case to be indicted or prosecution will be barred. The statute of limitations for [offense] is [insert specific statute of limitations, e.g. ten years past the child's eighteenth birthday]. [Include if raised by the evidence: Also, you may not convict the defendant for any conduct committed before the defendant turned seventeen years old.]

Election and Incident Unanimity. When the state charges the defendant with a single count of a sex offense but the evidence at trial includes multiple instances when the defendant committed that same sex offense, the state is required at the close of its evidence to elect which instance or incident the state will rely upon for conviction, as long as the defense requests such an election. *Phillips v. State*, 193 S.W.3d 904, 909 (Tex. Crim. App. 2006). One of the reasons behind this requirement for election is that it is a way “to ensure unanimous verdicts; that is, all of the jurors agreeing that one specific incident, which constituted the offense charged in the indictment, occurred.” *Phillips*, 193 S.W.3d at 910. If the defense does not request an election, all of the incidents offered at trial will be double-jeopardy barred. *Dixon v. State*, 201 S.W.3d 731, 735 (Tex. Crim. App. 2006).

If the defense requests the state to elect, the trial court should require such an election when the state rests its case-in-chief. *Phillips*, 193 S.W.3d at 909–10. The Committee’s recommended language for such an instruction in the jury charge is included in several instructions in this chapter under the heading “State’s Election of a Particular Incident.”

In drafting the language to describe the particular incident that the state has elected, it is important to remember the prohibition in the Code of Criminal Procedure against “expressing any opinion as to the weight of the evidence,” “summing up the testimony,” and “discussing the facts.” Tex. Code Crim. Proc. art. 36.14. The instructions should not assume the truth of a contested fact—namely, that the incident actually occurred. See, e.g. *Ortiz v. State*, No. 11-10-00303-CR, 2012 WL 760804, at *2 (Tex. App.—Eastland Mar. 8, 2012, pet. ref’d) (not designated for publication); *Bonner v. State*, No. 10-09-00120-CR, 2010 WL 3503858, at *10 (Tex. App.—Waco Sept. 8, 2010, pet. ref’d) (not designated for publication); *Vickery v. State*, No. 2-04-422-CR, 2005 WL 2244730, at *6 (Tex. App.—Fort Worth Sept. 15, 2005, pet. ref’d) (not designated for publication).

Ensuring a Unanimous Verdict. Even if the defense does not request the state to elect a particular incident, evidence of multiple incidents that could all constitute one count in the indictment can still present the danger of a nonunanimous verdict. *Phillips*, 193 S.W.3d at 913. As the court explained in *Phillips*:

Six jurors could convict on the basis of one incident and six could convict on another (or others). While each of the incidents presented may constitute the commission of a sexual abuse offense, the jury must agree on one distinct incident in order to render a unanimous verdict.

Phillips, 193 S.W.3d at 913. The requirement of a unanimous verdict in Texas “means that the jury must ‘agree upon a single and discrete incident that would constitute the commission of the offense alleged.’” *Cosio v. State*, 353 S.W.3d 766, 771 (Tex. Crim. App. 2011) (quoting *Stuhler v. State*, 218 S.W.3d 706, 717 (Tex. Crim. App. 2007)). When each of the multiple incidents individually establishes a different offense or unit of prosecution, it is the trial court’s responsibility to ensure unanimity by instructing the jury in the charge that its verdict must be unanimous as to a single incident of the offense among those presented in evidence. *Cosio*, 353 S.W.3d at 772; *Ansari v. State*, No. 04-14-00728-CR, 2015 WL 4638286, at *2 (Tex. App.—San Antonio Aug. 5, 2015, no pet.) (designated for publication). One recent court of appeals decision refers to this instruction on unanimity as an ‘incident-unanimity instruction.’ *Ansari*, 2015 WL 4638286, at *3.

Incident-unanimity instructions are not required for the offense of continuous sexual abuse of a young child. Tex. Penal Code § 21.02(d). Under section 21.02(d), the jury is not required to be unanimous about which specific acts of sexual abuse the defendant committed. The legislature created that offense in large part due to the issues generated by prosecution of discrete offenses and evidence of a continuing pattern of sexual abuse. *Price v. State*, 434 S.W.3d 601, 608 (Tex. Crim. App. 2014) (citing *Dixon v. State*, 201 S.W.3d 731, 737 (Tex. Crim. App. 2006) (Cochran, J., concurring)).

For the other offenses in this chapter, however, an incident-unanimity instruction should be given when there is evidence of multiple incidents of conduct, each of which would constitute the same count in the indictment.

Incident Identification. Some members of the Committee suggested that perhaps jurors should be asked to specify a particular incident in their verdict form as a way of ensuring unanimity. See *Martinez v. State*, 225 S.W.3d 550, 555 (Tex. Crim. App. 2007) (approving of submission of separate verdict forms when the state had alleged separate offenses in a single count of indictment as a way “to ensure that each allegation is decided unanimously”). Because the Code of Criminal Procedure requires that “[t]he verdict in every criminal action must be general” and the court of criminal appeals indicated that an instruction on unanimity “should permit the jury to return a general verdict, which would permit all incidents to be jeopardy-barred, the Committee concluded that current law does not support the practice of asking the jury to return a separate verdict on each of the incidents offered in evidence. See Tex. Code Crim. Proc. art. 37.07; *Cosio*, 353 S.W.3d at 776.

Instructions under Code of Criminal Procedure Article 38.37, Section 1: Other Acts Against the Same Child Victim. In trials for certain offenses (including sexual assault, aggravated sexual assault, and indecency with a child where the victim is under the age of seventeen), evidence of “other crimes, wrongs, or acts” that the defendant committed against the same child as the victim alleged in the indictment are admissible to show “(1) the state of mind of the defendant and the child; and (2) the previous and subsequent relationship between the defendant and the child. Tex. Code Crim. Proc. art. 38.37, § 1. In practice, jury instructions under this article are typically patterned after the limiting instructions for extraneous acts admitted under Tex. R. Evid. 404(b). See, e.g. *Ex parte Pruitt*, 233 S.W.3d 338, 343 n.3 (Tex. Crim. App. 2007); *Bargas v. State*, 252 S.W.3d 876, 900 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *Ware v. State*, 62 S.W.3d 344, 352 (Tex. App.—Fort Worth 2001, pet. ref’d). In many ways, article 38.37, section 1, may not seem to warrant a limiting instruction. Its terms expand the permissible purposes for which extraneous offense evidence may be admitted, and it specifies that such evidence is admissible “[n]otwithstanding Rules 404 and 405, Texas Rules of Evidence.” Tex. Code Crim. Proc. art. 38.37, § 1. At the same time—in contrast to article 38.37, section 2 (discussed below)—section 1 does not go so far as to say that such evidence may be admitted for the purpose of determining “the character of the defendant and acts performed in conformity with the character of the defendant. The absence of this language in section 1 suggests that the limitation in Tex. R. Evid. 404 still applies to section 1 evidence, and that such evidence is not admissible solely to prove that the defendant acted in conformity with his character trait on a particular occasion. When evidence is admissible for one purpose but not another, the trial court is required, on request, to so instruct the jury. See Tex. R. Evid. 105. Some courts of appeals have indicated that, on request, the defendant would be entitled to a limiting instruction in the jury charge under article 38.37, section 1. See *Rivera v. State*, 233 S.W.3d 403, 406 (Tex. App.—Waco 2007, pet. ref’d); *Graves v. State*, 176 S.W.3d 422, 433 (Tex. App.—Houston [1st Dist.] 2004, pet. struck). As with other limiting instructions, however, a trial court may not be required to give a limiting instruction under article 38.37 if the defense did not request a contemporaneous instruction at the time the evidence was introduced. See *Delgado v. State*, 235 S.W.3d 244, 251 (Tex. Crim. App. 2007); *Hammock v. State*, 46 S.W.3d 889, 895 (Tex. Crim. App. 2001); *Beam v. State*, 447 S.W.3d 401, 406–07 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (finding no error from lack of limiting instruction under article 38.37, where defendant failed to request a limiting instruction at the time evidence was admitted).

The Committee’s recommended language for an instruction under article 38.37, section 1, is included in several instructions in this chapter under the heading “Evidence of Wrongful Acts Defendant Possibly Committed.”

Instructions under Code of Criminal Procedure Article 38.37, Section 2: Offenses Against Other Child Victims. In 2013, the legislature redesignated the former section 2 as section 1(b) and added the current sections 2 and 2–a, which for

the first time made evidence of extraneous offenses against a noncomplaining child victim admissible under article 38.37. Acts 2013, 83d Leg., R.S., ch. 387, §§ 2, 3 (S.B. 12); *Fahrni v. State*, 473 S.W.3d 486, 494 (Tex. App.—Texarkana 2015, pet. ref'd). As mentioned above, it also authorized the admission of such evidence “for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.” Tex. Code Crim. Proc. art. 38.37, § 2(b).

At the present time, however, neither the statute nor case law sets out how the jury should be instructed under this section. The statute does indicate that before such evidence is introduced, the trial court is to conduct a hearing to determine whether the proffered evidence will “support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt. Tex. Code Crim. Proc. art. 38.37, § 2–a. Consequently, at the very least, the jury should be instructed that they must first find the extraneous offense occurred beyond a reasonable doubt. Other than this provision, however, the statute gives little indication of what the jury should be told about the use of this evidence. Also, the court of criminal appeals has not ruled on what kind of jury instruction is required.

Several courts of appeals have recently held that while article 38.37, section 2, removes the prohibition on specific instances of conduct and on offering conduct evidence to show conformity to a particular character trait on a particular occasion, the statute does not lessen the state’s burden of proof to support a conviction. *Bezerra v. State*, 485 S.W.3d 133, 140 (Tex. App.—Amarillo 2016, pet. ref'd); *Robisheaux v. State*, 483 S.W.3d 205, 212–13 (Tex. App.—Austin 2016, pet. ref'd); *Baez v. State*, 486 S.W.3d 592, 600 (Tex. App.—San Antonio 2015, pet. ref'd); *Harris v. State*, 475 S.W.3d 395, 402–03 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). While enlarging the scope of admissible testimony, the statute “leaves untouched the amount or degree of proof required for conviction.” *Baez*, 486 S.W.3d at 600 (quoting *McCulloch v. State*, 39 S.W.3d 678, 684 (Tex. App.—Beaumont 2001, pet. ref'd), interpreting present article 38.37, section 1). “The general rule that an accused may not be tried for some collateral crime or for being a criminal generally” (*Williams v. State*, 662 S.W.2d 344, 346 (Tex. Crim. App. 1983)), is frequently enforced through Tex. R. Evid. 404, which effectively keeps such evidence from being admitted at trial. But regardless of what evidence is admitted, the federal due process clause still requires the state to prove beyond a reasonable doubt every fact necessary to constitute the crime *with which the defendant is charged*. *In re Winship*, 397 U.S. 358, 364 (1970). Proof that the defendant committed a separate crime or even that he is generally a criminal is not sufficient to convict the defendant of the offense alleged in the indictment. Even if the evidence makes it more likely that the defendant acted in conformity on the occasion for which he is on trial, ‘more likely’ is not the same as proof beyond a reasonable doubt. As one court of appeals explained it, “Article 38.37, section 2, as an evidentiary rule, allows the State to introduce evidence of extraneous offenses only to support the theory that [the defendant] committed the *charged offense*.” *Distefano v. State*, No. 14-

14-00375-CR, 2016 WL 514232, at *9 (Tex. App.—Houston [14th Dist.] Feb. 9, 2016, pet. ref'd).

Other parts of the jury instructions and even the verdict form tell the jury that the defendant is on trial for the offense(s) alleged in the indictment and that they can find the defendant guilty only if all of the elements are proven beyond a reasonable doubt. These instructions were sufficient for one court of appeals to conclude that the jury instructions did not entitle the jury to convict the defendant for the extraneous offense admitted under article 38.37, section 2. *Distefano*, 2016 WL 514232, at *9.

Because article 38.37, section 2, is based on federal rules of evidence 413 and 414, the experience in the federal courts may be instructive. *See* Senate Committee on Criminal Justice, Bill Analysis, Tex. S.B. 12, 83d Leg., R.S. (2013). Several federal cases demonstrate a practice of reiterating to jurors—hand-in-hand with the admission of evidence under Fed. R. Evid. 413—that the defendant is on trial for the offenses charged and not for any extraneous offenses. *See, e.g. United States v. Lewis*, 796 F.3d 543, 548 (5th Cir. 2015) (“You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crimes charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment[.]”); *United States v. Erramilli*, 788 F.3d 723, 731 (7th Cir. 2015) (“Keep in mind that the defendant is on trial here for abusive sexual contact, not for the other crimes. ’”).

The pattern jury charges in the Eighth Circuit go further:

You have heard evidence that the defendant may have previously committed another offense of [sexual assault/child molestation]. The defendant is not charged with this other offense. You may consider the evidence of such other acts of [sexual assault/child molestation] for its tendency, if any, to show the defendant’s propensity to engage in [sexual assault/child molestation] [as well as its tendency, if any, to determine whether the defendant committed the acts charged in the Indictment. Remember, the defendant is on trial only for the crime charged. *You may not convict a person simply because you believe he may have committed similar acts in the past.*

Eighth Circuit Criminal Pattern Jury Inst. § 2.08A “Defendant’s Prior Similar Acts in Sexual Assault and Child Molestation Cases (Fed. R. Evid. 413 and 414)” (emphasis added); *see also United States v. Summage*, 575 F.3d 864, 878 (8th Cir. 2009) (trial court instructed the jury to “[r]emember that the defendant was not charged in this case with committing crimes in Georgia and [the jury could not] automatically find the defendant guilty of any crime alleged in this case simply because [it] believe[d] the evidence relating to the alleged molestation in Georgia”); *United States v. Batton*, 602 F.3d 1191, 1199–1200 (10th Cir. 2010) (commenting, where trial court instructed jury that the defendant “may not be convicted of the crimes charged in the Indictment if

you were to find only that he committed other crimes at some other time, that the instructions “emphasize with clarity that no matter what other crimes [the defendant] may have committed, the jury must find him guilty of the crime alleged in the indictment”).

Given the lack of controlling Texas law on point, the Committee was deeply divided on how best to instruct jurors regarding article 38.37, section 2, evidence. The Committee, for instance, considered whether—as part of a larger instruction on this kind of evidence—to include the following admonition to jurors:

You may not convict the defendant solely because you believe he may have committed separate offenses at some other time.

While many Committee members believed such an instruction was appropriate, others had reservations about instructions that went beyond the language of the statute. Still others were concerned that, even if it proved helpful in some instances, a boilerplate jury instruction might give false assurance that jurors were using the evidence only for permissible purposes.

The instruction that the majority of the Committee ultimately decided on is included in several instructions in this chapter under the heading ‘Evidence of Another Offense Defendant Possibly Committed.

II. Continuous Sexual Abuse of Young Child or Children

CPJC 84.2 Instruction—Continuous Sexual Abuse of Young Child or Children

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of continuous sexual abuse of a young child or young children. Specifically, the accusation is that the defendant [*insert specific allegations*].

Relevant Statutes

A person commits an offense if—

1. during a period that is thirty or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and
2. at the time of the commission of each of the acts of sexual abuse, the actor is seventeen years old or older and the victim is a child younger than fourteen years old.

To prove that the defendant is guilty of continuous sexual abuse of a young child or young children, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant committed two or more acts of sexual abuse; and
2. these acts of sexual abuse were committed during a period that is thirty or more days in duration; and
3. at the time of commission of each of the acts of sexual abuse the defendant was seventeen years old or older; and
4. at the time of commission of each of the acts of sexual abuse the victim was a child younger than fourteen years old.

[Modify the following language as needed if other acts of sexual abuse as provided for in Texas Penal Code section 21.02(c) are alleged.]

Indecency with a child is an act of sexual abuse if the state proves, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant engaged in sexual contact with another person by—
 - a. any touching of the anus or any part of the genitals of the person; or
 - b. any touching of any part of the body of the person with the anus, breast, or any part of the genitals of the defendant; and
2. the other person was a child younger than seventeen years old; and
3. the defendant did this with the intent to arouse or gratify the sexual desire of any person.

Burglary is an act of sexual abuse if the state proves, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant entered a habitation; and
2. the owner did not effectively consent; and
3. the defendant had the intent to commit aggravated kidnapping, with the intent to violate or abuse the victim sexually; indecency with a child; sexual assault; or aggravated sexual assault.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of continuous sexual abuse of a young child or young children.

Definitions

Intent to Arouse or Gratify Sexual Desire

A person acts with intent to arouse or gratify sexual desire if it is the person's conscious objective or desire to gratify sexual desire.

[Select one of the following. Choose the second option if there is evidence of any conduct before September 1, 2007. Choose the third option if the victim turned fourteen before the date of the indictment.]

On or about

The indictment alleges that the offense of continuous sexual abuse of a young child was committed between on or about [date] and on or about [date]. The state is not required to prove that the alleged offense happened between those exact dates. It is sufficient if the state proves that the offense was committed before [date of indictment], the date the indictment was filed.

[or]

On or about

The indictment alleges that the offense of continuous sexual abuse of a young child was committed between on or about [date] and on or about [date]. The state is not required to prove that the alleged offense happened between those exact dates. But you may not convict the defendant of continuous sexual abuse of a young child for any acts of sexual abuse that may have occurred before September 1, 2007, the date that law went into effect, or after [date of indictment], the date the indictment was filed.

[or]

On or about

The indictment alleges that the offense of continuous sexual abuse of a young child was committed between on or about [date] and on or about [date]. The state is not required to prove that the alleged offense happened between those exact dates. But you may not convict the defendant of continuous sexual abuse of a young child for any acts of sexual abuse that occurred before September 1, 2007, the date that law went into effect, or after [insert date of the day preceding the child's fourteenth birthday], when [name] was already fourteen.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, during a period between on or about [date] and on or about [date], committed two or more of the following alleged acts of sexual abuse:

[Insert detailed allegations; modify the following language as needed if other acts of sexual abuse as provided for in Texas Penal Code section 21.02(c) are alleged.]

The first alleged act of sexual abuse is that the defendant engaged in sexual contact with another person. Sexual contact is an act of sexual abuse if the state proves, beyond a reasonable doubt, three elements. The elements are that—

- a. the defendant engaged in sexual contact with another person by—
 - i. any touching of the anus or any part of the genitals of the person; or
 - ii. any touching of any part of the body of the person with the anus, breast, or any part of the genitals of the defendant; and
- b. the other person was a child younger than fourteen years old; and
- c. the defendant did this with the intent to arouse or gratify the sexual desire of any person.

The second alleged act of sexual abuse is that the defendant committed burglary. Burglary is an act of sexual abuse if the state proves, beyond a reasonable doubt, three elements. The elements are that—

- a. the defendant entered a habitation; and
- b. the owner did not effectively consent; and
- c. the defendant had the intent to commit aggravated kidnapping, with the intent to violate or abuse the victim sexually; indecency with a child; sexual assault; or aggravated sexual assault; and

[Continue with the following.]

2. these acts were committed during a period that was thirty or more days in duration; and

3. at the time of commission of each of the acts of sexual abuse the defendant was seventeen years old or older; and

4. at the time of commission of each of the acts of sexual abuse the victim was a child younger than fourteen years old.

You must all agree on elements 1, 2, 3, and 4 listed above.

With regard to element 1, you need not all agree on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. You must, however, all agree that the defendant committed two or more acts of sexual abuse.

With regard to element 2, you must all agree that at least thirty days passed between the first and last acts of sexual abuse committed by the defendant.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

[Select one of the following.]

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

[or]

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must next consider whether the defense of minimal age difference applies.

Minimal Age Difference

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he was of a minimal age difference from [*name*].

Relevant Statutes

A person’s conduct that would otherwise constitute the offense of indecency with a child is not an offense if—

1. the person was not more than five years older than—
 - a. the child, if the offense is alleged to have been committed against only one child; or
 - b. the youngest child, if the offense is alleged to have been committed against more than one child; and
2. the person did not use duress, force, or a threat against the child at the time of the commission of any of the acts of sexual abuse alleged.

Burden of Proof

The burden is on the defendant to prove, by a preponderance of the evidence, that the affirmative defense of minimal age difference applies.

Definitions

Preponderance of the Evidence

The term “preponderance of the evidence” means the greater weight and degree of the credible evidence.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved, by a preponderance of the evidence, that his conduct was covered by the affirmative defense of minimal age difference.

To decide this issue, you must determine whether the defendant has proved, by a preponderance of the evidence, two elements. The elements are that—

1. the defendant was not more than five years older than [name]; and
2. the defendant did not use duress, force, or a threat against [name] at the time of the offense.

If you all agree the defendant has proved, by a preponderance of the evidence, both of the two elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of continuous sexual abuse of a young child or young children, and you all agree the defendant has not proved, by a preponderance of the evidence, both elements 1 and 2 listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Continuous sexual abuse of a young child or children is prohibited by and defined in Tex. Penal Code § 21.02.

Duration of Period of Crime. Perhaps the major ambiguity in the statute is the meaning of the requirement that two or more acts of sexual abuse be committed “during a period that is 30 or more days in duration.” Tex. Penal Code § 21.02(b)(1).

The California statute requires three or more acts “over a period of time, not less than three months in duration.” Cal. Penal Code § 288.5(a). The California pattern jury instructions tell juries that this means the prosecution must prove that “[t]hree or more months passed between the first and last acts. This has been judicially approved: “[T]he prosecution need not prove the exact dates of the predicate sexual offenses in order to satisfy the three-month element. Rather, it must adduce sufficient evidence to support a reasonable inference that at least three months elapsed between the first and last sexual acts. *People v. Mejia*, 65 Cal. Rptr. 3d 776, 785 (Cal. Ct. App. 2007).

At least one Texas court appears to have assumed that the Texas statutory language has a similar meaning. In *Williams v. State*, 305 S.W.3d 886, 889 (Tex. App.—Texarkana 2010, no pet.), the court assumed that the statute requires proof of the commission of two or more acts of sexual abuse ‘over a span of thirty days or more.’ The jury instruction in this case included the following:

[I]n order to find the defendant guilty of the offense of continuous sexual abuse of a young child, you must agree unanimously that the defendant, during a period that is 30 or more days in duration beginning on or after September 1, 2007, through on or about January 30, 2008, committed two or more acts of sexual abuse.

Williams, 305 S.W.3d at 892.

In *Smith v. State*, 340 S.W.3d 41, 51 (Tex. App.—Houston [1st Dist.] 2011, no pet.), the Houston court of appeals found error in the jury instructions because, when read literally, the application paragraph permitted a conviction if the jury believed any two or more acts of sexual abuse had occurred between the dates alleged in the indictment. The court held that the application paragraph should have required the jury to find the acts occurred at least thirty days apart, but the court also found the error did not result in egregious harm. *Smith*, 340 S.W.3d at 53.

With regard to pleading requirements, the only litigation of any significance seems to be *State v. Espinoza*, No. 05-09-01260-CR, 2010 WL 2598982, at *8 (Tex. App.—Dallas Aug. 25, 2010, pet. ref’d) (not designated for publication), upholding an indictment described as alleging that ‘on or about and between’ January 1 and August 24, 2008, Espinoza did—

during a period that was 30 or more days in duration, when the defendant was 17 years of age or older, commit two or more acts of sexual abuse against [A.E.], a child younger than 14 years of age, hereinafter called complainant, namely by the contact and penetration of the complainant’s female sexual organ by the defendant’s sexual organ, and by the contact between defendant’s hand and complainant’s genitals with the intent to arouse and gratify the sexual desire of defendant, and by contact between the hand of the complainant and the genitals of the defendant with the intent to arouse and gratify the sexual desire of the defendant, and by the penetration of the

complainant's female sexual organ by the defendant's finger, and by the contact and penetration of the complainant's anus by the defendant's sexual organ, and by the contact and penetration of the complainant's female sexual organ by the defendant's mouth.

Specifically, the court held the indictment provided sufficient notice despite the state's failure to allege dates for specific acts of sexual abuse. *Espinoza*, 2010 WL 2598982, at *9.

Definition of "Act of Sexual Abuse." Texas Penal Code section 21.02 provides in part:

(c) For purposes of this section, "act of sexual abuse" means any act that is a violation of one or more of the following penal laws:

- (2) indecency with a child under Section 21.11(a)(1), if the actor committed the offense in a manner other than by touching, including touching through clothing, the breast of a child

Tex. Penal Code § 21.02(c)(2). This definition is that of indecency with a child under section 21.11(a)(1), omitting those portions that provide for it to be committed 'by touching, including touching through clothing, the breast of a child. Tex. Penal Code § 21.02(c)(2).

Sexual Abuse by Burglary. Regarding sexual abuse by burglary, the statute leaves a number of matters unclear. Section 21.02 provides in part:

(c) For purposes of this section, "act of sexual abuse" means any act that is a violation of one or more of the following penal laws:

- (5) burglary under Section 30.02, if the offense is punishable under Subsection (d) of that section and the actor committed the offense with the intent to commit an offense listed in Subdivisions (1)–(4)

Tex. Penal Code § 21.02(c)(5). Does this mean that burglary by entering and committing an offense or by remaining concealed cannot constitute an act of sexual abuse? If the offense the defendant intended to commit is one that under Penal Code section 30.02(d), subdivisions (1)–(4), has additional requirements, do those apply? For example, must an aggravated kidnapping intended by the defendant be one that the defendant intends to involve violation or abuse of the victim sexually?

Affirmative Defense. As the affirmative defense of minimal age difference is defined in Penal Code section 21.02, it includes elements in addition to those reflected in the charge:

1. The defendant must not have been required to register for life as a sex offender under chapter 62 of the Code of Criminal Procedure.
2. The defendant must not have been a person with a reportable conviction or adjudication under chapter 62 of the Code of Criminal Procedure for an offense under Penal Code section 21.02 or the acts described in section 21.02(c).

The Committee believed that generally there would be no dispute about whether the evidence showed these matters. Thus they could generally be resolved by the trial judge as a matter of law. This avoids the need for the very complex charge that would be required for submission of those matters to the jury.

A very unusual case could arise in which the trial judge determines that the evidence clearly fails to show one or more of these elements of the affirmative defense but the defendant nevertheless seeks jury submission of the defense. The Committee did not address whether, under those circumstances, the defendant would be entitled to jury submission under a charge requiring the defendant to prove the contested elements. *See* Tex. Penal Code § 2.04(c) (affirmative defense is to be submitted to the jury if “evidence is admitted supporting the defense”).

Note that the age element of the affirmative defense of minimal age difference in Penal Code section 21.02(g) is five years, whereas the age difference in the parallel defense in section 21.11(b) is three years, and the elements concerning registration under chapter 62 of the Code of Criminal Procedure vary slightly as well. *See* CPJC 84.7 for the elements of the defense based on Penal Code section 21.11(b).

Texas Code of Criminal Procedure Article 38.37, Sections 1 and 2. Although not common, evidence could be introduced in a continuous-sexual-abuse-of-a-young-child prosecution of another sex offense other than those alleged in the indictment. In such a case and at the defense request, an instruction under Texas Code of Criminal Procedure article 38.37, sections 1 and 2, would be warranted. *See* CPJC 84.1 for further discussion.

III. Indecency with Child

CPJC 84.3 Instruction—Indecency with Child by Contact—Touching by Defendant

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of indecency with a child. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., with the intent to arouse and gratify the sexual desire of [name], engaged in sexual contact by touching the vagina of [name], a child younger than seventeen years old*].

Relevant Statutes

A person commits an offense if the person, with the intent to arouse or gratify the sexual desire of any person, engages in sexual contact with a child younger than seventeen years old by either—

1. any touching of the anus, breast, or any part of the genitals of the child; or
2. any touching of any part of the body of the child with the anus, breast, or any part of the genitals of a person.

Sexual contact or touching may be through clothing.

The offense is committed whether the child is of the same or opposite sex as the person engaging in sexual contact.

To prove that the defendant is guilty of indecency with a child, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant engaged in sexual contact with another person by—
 - a. any touching of the anus, breast, or any part of the genitals of the person; or
 - b. any touching of any part of the body of the person with the anus, breast, or any part of the genitals of the defendant; and
2. the other person was a child younger than seventeen years old; and
3. the defendant did this with the intent to arouse or gratify the sexual desire of any person.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of indecency with a child.

Definitions*Intent to Arouse or Gratify Sexual Desire*

A person acts with intent to arouse or gratify sexual desire if it is the person's conscious objective or desire to gratify sexual desire.

[Select one of the following.]

On or about

The indictment alleges that the offense was committed on or about *[date]*. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed before *[date of indictment]*, the date the indictment was filed.

[or, if raised by the evidence]

On or about

The indictment alleges that the offense was committed on or about *[date]*. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed after *[date of defendant's seventeenth birthday]*, the date of the defendant's seventeenth birthday, and before *[date of indictment]*, the date the indictment was filed.

[Include if raised by the evidence and requested by the defense.]

Evidence of Wrongful Acts Defendant Possibly Committed

During the trial, you heard evidence that the defendant may have committed wrongful acts against *[name]* not charged in the indictment. *[If requested, include description of specific acts.]* The state offered the evidence to show the state of mind of the defendant and the child *[and/or]* the previous and subsequent relationship between the defendant and the child. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit the wrongful act against *[name]*. Those of you who believe the defendant did the wrongful act may consider it.

Even if you do find that the defendant committed a wrongful act, you may consider this evidence only for the limited purpose[s] described above. You may not consider this evidence to prove that the defendant is a bad person and for this reason was likely to commit the charged offense. In other words, you should consider this evidence only for the specific, limited purpose[s] described above. To consider this evidence for any other purpose would be improper.

[Include if raised by the evidence and requested by the defense.]

Evidence of Another Offense Defendant Possibly Committed

During the trial, you heard evidence that the defendant may have committed [an offense/offenses] [against *[name of extraneous victim]*]/other than the one he is currently accused of in the indictment]. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit [the offense[s] against *[name of extraneous victim]*]/the other offense[s]]. Those of you who believe the defendant committed [that offense/those offenses] may consider it.

You may consider this evidence for any bearing this evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant. Even if you consider it, however, the defendant is not on trial for any offenses not alleged in the indictment. You must determine if the state proved all the elements for the offense alleged in the indictment.

[Include if raised by the evidence and requested by the defense.]

State's Election of a Particular Incident

The state has offered evidence of more than one incident to prove indecency with a child as alleged in the indictment. The state is required to choose one of those incidents for you to consider in deciding whether it has met its burden of proof on that particular occasion. The incident that the state has chosen is [*insert specific incident, e.g. the first sexual contact to her vagina that [name] testified that she remembered*]. This is the only incident for which the defendant is on trial [in this case/in count *[number]*]. You are to confine your deliberations to deciding whether the defendant is guilty or not guilty of indecency with a child on that particular occasion. You cannot find the defendant guilty of indecency with a child based on an occurrence at any other time or place other than the incident that the state has chosen.

Also, you may not consider evidence of any other incident for any purpose unless you find, beyond a reasonable doubt, that such incident occurred. Even then, you may consider it only for the specific, limited purpose of determining [*insert limited purpose, e.g., the defendant's intent*].

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], engaged in sexual contact by [*insert specific allegations, e.g., touching the vagina of [name]*];
2. [*name*] was a child younger than seventeen years old; and
3. the defendant did this with the intent to arouse or gratify [*name*]'s sexual desire.

[Select one of the following. Choose the second option if incident unanimity has been raised by the evidence and there has been no request for election.]

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must [find the defendant “guilty”/proceed to consider whether the defense of [*insert defense, e.g., minimal age difference; marriage*] applies].

[or]

The state has presented evidence of more than one incident to prove indecency with a child as alleged [in the indictment/in count [*number*]]. To reach a guilty verdict [in this case/in count [*number*]], you must all agree that the state has proved elements 1, 2, and 3 listed above, and you must also all agree that these elements occurred in the same incident. While it is permissible for you all to agree on more than one incident, to reach a guilty verdict in the case, you must all agree that these elements occurred in the same incident or incidents.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, the three elements listed above, and you all agree on the same incident or incidents when these elements occurred, you must [find the defendant “guilty”/proceed to consider whether the defense of [*insert defense, e.g., minimal age difference; marriage*] applies].

[Include defense if raised by the evidence; see CPJC 84.7 and CPJC 84.8. Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Indecency with a child by contact is prohibited by and defined in Tex. Penal Code § 21.11(a)(1). The offense presents several basic issues that must be resolved to draft jury instructions for this offense.

Formulation of Elements of Offense. Indecency with a child by contact as defined in Texas Penal Code section 21.11 poses the same question as a number of other offenses: To what extent, if any, should the jury charge incorporate into the definition of the offense what in the statute is a definition of a term?

Specifically, should the statutory definition of “sexual contact” be incorporated into the elements of the offense, although it does not appear as part of the “basic” statutory definition in section 21.11(a)(1)?

Unless the definition of “sexual contact” is incorporated into the elements, the statement of the crime itself does not explicitly contain any culpable mental state. Moreover, that statement does not explicitly state what the real conduct constituting the offense is—“touching.”

The court of criminal appeals has held that the intent to arouse or gratify sexual desire, although contained in the definition of “sexual contact,” is nevertheless an element of the offense that must be pleaded in the indictment. This is apparently necessary not simply to provide notice but to charge the offense of indecency with a child. *Victory v. State*, 547 S.W.2d 1 (Tex. Crim. App. 1976). See also *Duwe v. State*, 642 S.W.2d 804, 805 (Tex. Crim. App. 1982) (applying *Victory*).

The Committee decided that the instructions would most clearly present the elements of the offense if the instructions incorporated the substance of sexual contact into the definition of the offense.

Culpable Mental State—Case Law. The case law reflects considerable uncertainty about what culpable mental state is required by this offense.

In *McMillan v. State*, 926 S.W.2d 809 (Tex. App.—Eastland 1996, pet. ref'd), for example, the court of appeals assumed the trial court erred in refusing to add the words “intentionally and knowingly” to the jury charge immediately before the phrase ‘engage in sexual contact with E.M. But the error, although preserved, was held harmless. The charge did require the jury to find that the defendant acted with the intent to arouse or satisfy his sexual desire. “The jury could not have found such an intent unless it believed that appellant knowingly or intentionally engaged in sexual contact with the complainant. *McMillan*, 926 S.W.2d at 811.

In *Rodriguez v. State*, 24 S.W.3d 499, 501 (Tex. App.—Corpus Christi 2000, pet. ref'd), the indictment alleged the defendant did ‘with the intent to arouse or gratify [his] sexual desire, intentionally or knowingly engage in sexual contact with [child’s name] by touching the breast of [child], a child younger than seventeen years of age, and not the spouse of [appellant] with [his] hand.’ In the jury charge, the application paragraph told the jury that it was to convict if it found beyond a reasonable doubt that the defendant acted “with intent to arouse or gratify the sexual desire of said defendant, intentionally or knowingly.’ *Rodriguez*, 24 S.W.3d at 502. The jury was given the full statutory definitions of “intentionally” and ‘knowingly.’

Relying heavily on *Caballero v. State*, 927 S.W.2d 128 (Tex. App.—El Paso 1996, pet. ref'd), *Rodriguez* concluded that indecency with a child is a “conduct offense, “requiring proof of the defendant’s intent to engage in proscribed contact.” *Rodriguez*, 24 S.W.3d at 502. The court found error apparently in two aspects of the charge. First, the charge permitted conviction on proof that the accused acted intentionally or knowingly, without also requiring proof that he acted with intent to arouse or gratify his sexual desires. Second, the charge did not make clear that intentionally or knowingly applied to the “nature of conduct” element. Error was not preserved, however, and since egregious harm was not caused the error was not reversible.

The Corpus Christi court of appeals found a jury charge erroneous for the first of the two reasons relied on in *Rodriguez* but concluded the record failed to show the necessary egregious harm. *Cavazos v. State*, No. 13-04-075-CR, 2005 WL 2008417, at *2 (Tex. App.—Corpus Christi Aug. 22, 2005, no pet.) (not designated for publication) (charge permitted conviction on proof the defendant “with the intent to arouse or gratify the sexual desire of said defendant, intentionally or knowingly engage[d] in sexual contact by touching the genitals of [the child]”).

Caballero and *Washington v. State*, 930 S.W.2d 695 (Tex. App.—El Paso 1996, no pet.), addressed cases in which the indictment did not allege and the charge did not require proof that the accused acted intentionally or knowingly. Rather, the charge told the jury it must find the defendant acted with intent to arouse or gratify sexual desire. In both cases, the claimed error was in giving the juries definitions of intent that

referred to results as well as nature of conduct. Both defendants apparently argued that this might have misled the jury in understanding intent to arouse or gratify sexual desire. Neither case found error. *Washington* explained that under the charge “the jury could not have found him guilty simply on the basis that he had a conscious objective or desire to touch J.R.H.’s penis, or on the basis that he intended some result other than sexual gratification.” *Washington*, 930 S.W.2d at 700. The court added, “[I]t seems superfluous to provide any definition of ‘intentionally’ in the jury charge.” *Washington*, 930 S.W.2d at 700.

Washington reaffirmed that indecency by contact is a “nature of conduct” offense. *Washington*, 930 S.W.2d at 699. But at no point did the court suggest that this meant that somehow the offense requires a culpable mental state regarding the conduct.

The Dallas court of appeals found no fundamental error in the trial court’s failure to limit a charge’s definition of intentionally and knowingly to those parts of the statutory definition that applied the terms to “nature of conduct” elements. The application paragraph of the charge required the jury to find that the defendant “intentionally or knowingly engage[d] in sexual contact with C.L.,” and this “limited the applicable mental states to the appropriate conduct element. *Battaglia v. State*, No. 05-06-00798-CR, 2007 WL 4098905, at *2 (Tex. App.—Dallas Nov. 19, 2007, no pet.) (not designated for publication).

This uncertainty is somewhat surprising in light of *Clark v. State*, 558 S.W.2d 887 (Tex. Crim. App. 1977). *Clark* squarely held that an indictment for indecency with a child need not allege any culpable mental state beyond that of “with the intent to arouse or gratify the sexual desire of any person. *Clark*, 558 S.W.2d at 890–91. This was apparently on the ground that Penal Code section 6.02 does not apply or require anything more. If no such mental state need be alleged, it follows that none is required for proof of guilt.

At least one leading source recommends that a charging instrument for the offense allege a culpable mental state. 7 Michael J. McCormick et al., *Texas Practice Series, Criminal Forms and Trial Manual* § 6.4 (11th ed. 2005) (recommending ‘A.B. did then and there intentionally and knowingly engage in sexual contact with C.D.’). Clearly such a culpable mental state is sometimes alleged, perhaps on the assumption that this is required by section 6.02.

In summary, the case law—despite *Clark*—sometimes assumes that indecency with a child by contact requires that the defendant act knowingly or intentionally with regard to sexual contact in addition to acting “with the intent to arouse or gratify the sexual desire of any person. The courts do not provide a rationale for this assumption.

Culpable Mental State—Committee Conclusions. No culpable mental state is expressly required by the basic statutory provision creating and defining the offense. Tex. Penal Code § 21.11(a)(1). That provision, however, uses the term *sexual contact*,

which is then defined by section 21.11(c) as requiring ‘the intent to arouse or gratify the sexual desire of any person. Tex. Penal Code § 21.11(c).

A culpable mental state is required by Penal Code section 6.02 only ‘[i]f the definition of an offense does not prescribe a culpable mental state. Tex. Penal Code § 6.02(b). The Committee concluded that the definition of the offense of indecency with a child by contact includes the statutory definition of sexual contact and thus does prescribe a culpable mental state. Consequently, no additional culpable mental state is required by section 6.02.

Sometimes the offense is pleaded by alleging that the accused acted intentionally or knowingly. The above instructions are drafted on the assumption that this is not required and should not be pleaded.

The crime does, of course, require proof that the accused acted ‘with the intent to arouse or gratify the sexual desire of [some] person. Tex. Penal Code § 21.11(c). Whether to include some or all of the statutory definition of intent has troubled the courts. The Committee concluded that the better course would be to include a definition of the entire statutory culpable mental state, using and applying the statutory definition of intent. This is reflected in the above instructions.

Touching. The essence of the offense, of course, is the act of ‘touching.’ The Penal Code provides no definition of that act.

In at least one case, the trial court has made some effort to define this term. In *Pleasant v. State*, No. 03-04-00691-CR, 2005 WL 3330352, at *3 (Tex. App.—Austin Dec. 9, 2005, pet. ref’d) (not designated for publication), the trial court instructed the jury:

“Sexual contact” means any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person. Sexual contact or touching may be through clothing and does not require skin-to-skin contact but does include a perception by a sense of feeling.

This instruction was held not to be error, although Pleasant’s objection was apparently to the statement that the touching could be through clothing because the statutory provision to that effect did not apply to the case. The court of appeals held that the instruction essentially and permissibly incorporated the law as stated in *Resnick v. State*, 574 S.W.2d 558 (Tex. Crim. App. 1978), a public lewdness case.

Whether *Pleasant* actually approved of a charge explaining touching in terms of a sense of feeling is not clear. The Committee concluded that no such effort to explain the term should be made in the instructions. How such an explanation should be formulated is unclear. *Resnick* seemed to regard touching as requiring that the defendant perceive by the sense of touching. *Resnick*, 574 S.W.2d at 560. In *Deason v. State*, 786 S.W.2d 711 (Tex. Crim. App. 1990), *overruled on other grounds by Gipson v. State*,

844 S.W.2d 738, 741 (Tex. Crim. App. 1992), the court seemed to read *Resnick* as requiring that the victim perceive the touching: “[T]here is no evidence that the complainant felt the appellant touch her genitals. In fact, the evidence is replete with evidence to the contrary.” *Deason*, 786 S.W.2d at 715. Even if using case law to develop a definition might be appropriate, the existing case law does not provide a firmly established definition.

Anus vs. Buttocks. There is authority that insofar as the offense is defined to include the touching of the victim’s anus, this must be distinguished from the touching of the buttocks. See *Wright v. State*, 693 S.W.2d 734, 735 (Tex. App.—Dallas 1985, pet. ref’d) (“Nowhere does the Code criminalize the touching of the buttocks. Instead, the touching of the ‘anus’ is specified. We cannot accept the State’s contention that the two words are analogous.”). One court has commented that “the State was required to prove beyond a reasonable doubt that [the defendant] touched complainant’s anus, not just the surrounding area. *Pryor v. State*, 719 S.W.2d 628, 630 (Tex. App.—Dallas 1986, pet. ref’d). Testimony may be sufficient to show touching of the buttocks but not touching of the anus. *Alberts v. State*, No. 06-09-00058-CR, 2009 WL 4724302, at *3 (Tex. App.—Texarkana Dec. 11, 2009, no pet.) (not designated for publication) (testimony that defendant “touched his penis to [complainant’s] butt” and when asked, “Did he attempt to do anything with his penis, complainant replied, “No, just touched it there, would not permit a rational jury to find beyond a reasonable doubt that defendant’s penis contacted complainant’s anus as alleged in the indictment).

Perhaps in such cases the term *anus* might be defined so as to make clear that touching of the buttocks is not sufficient. No case appears to address whether such a definition is ever required or permissible, or how an instruction might acceptably define the term *anus*.

Jury Unanimity. Application of the requirement of jury unanimity to indecency by contact was addressed in *Pizzo v. State*, 235 S.W.3d 711 (Tex. Crim. App. 2007).

Section 21.11(a)(1), *Pizzo* held, creates three separate offenses: (1) touching the anus, (2) touching the breast, and (3) touching the genitals. *Pizzo*, 235 S.W.3d at 719. If the jury instructions submit these as alternatives, those instructions must make clear that the jury is to be unanimous on which alternative the jury relies on for conviction.

CPJC 84.4 Instruction—Indecency with Child—Touching by Victim**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of indecency with a child. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., with the intent to arouse and gratify the sexual desire of [the defendant/[name]], caused [name of child], a child younger than seventeen years old, to engage in sexual contact by causing [name of child] to touch the genitals of [the defendant/[name]/another person].*

Relevant Statutes

A person commits an offense if the person, with the intent to arouse or gratify the sexual desire of any person, causes a child younger than seventeen years old to engage in sexual contact by any touching of any part of the body of the child with the anus, breast, or any part of the genitals of a person.

Sexual contact or touching may be through clothing.

The offense is committed whether the child is of the same or opposite sex as the other person involved in the sexual contact.

To prove that the defendant is guilty of indecency with a child, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant caused a child to engage in sexual contact by causing the child to touch, with any part of the child's body, the anus, breast, or any part of the genitals of [the defendant/[name]/another person]; and
2. the child was younger than seventeen years old; and
3. the defendant did this with the intent to arouse or gratify the sexual desire of any person.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of indecency with a child.

Definitions

Intent to Arouse or Gratify Sexual Desire

A person acts with intent to arouse or gratify sexual desire if it is the person's conscious objective or desire to gratify sexual desire.

[Select one of the following.]

On or about

The indictment alleges that the offense was committed on or about *[date]*. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed before *[date of indictment]*, the date the indictment was filed.

[or, if raised by the evidence]

On or about

The indictment alleges that the offense was committed on or about *[date]*. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed after *[date of defendant's seventeenth birthday]*, the date of the defendant's seventeenth birthday, and before *[date of indictment]*, the date the indictment was filed.

[Include if raised by the evidence and requested by the defense.]

Evidence of Wrongful Acts Defendant Possibly Committed

During the trial, you heard evidence that the defendant may have committed wrongful acts against *[name]* not charged in the indictment. *[If requested, include description of specific acts.]* The state offered the evidence to show the state of mind of the defendant and the child *[and/or]* the previous and subsequent relationship between the defendant and the child. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit the wrongful act against *[name]*. Those of you who believe the defendant did the wrongful act may consider it.

Even if you do find that the defendant committed a wrongful act, you may consider this evidence only for the limited purpose[s] described above. You may not consider this evidence to prove that the defendant is a bad person and for this reason was likely to commit the charged offense. In other words, you

should consider this evidence only for the specific, limited purpose[s] described above. To consider this evidence for any other purpose would be improper.

[Include if raised by the evidence and requested by the defense.]

Evidence of Another Offense Defendant Possibly Committed

During the trial, you heard evidence that the defendant may have committed [an offense/offenses] [against *[name of extraneous victim]*]/other than the one he is currently accused of in the indictment]. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit [the offense[s] against *[name of extraneous victim]*]/the other offense[s]]. Those of you who believe the defendant committed [that offense/those offenses] may consider it.

You may consider this evidence for any bearing this evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant. Even if you consider it, however, the defendant is not on trial for any offenses not alleged in the indictment. You must determine if the state proved all the elements for the offense alleged in the indictment.

[Include if raised by the evidence and requested by the defense.]

State's Election of a Particular Incident

The state has offered evidence of more than one incident to prove indecency with a child as alleged in the indictment. The state is required to choose one of those incidents for you to consider in deciding whether it has met its burden of proof on that particular occasion. The incident that the state has chosen is [*insert specific incident, e.g., the first time that [name] testified that she remembered touching the defendant's genitals*]. This is the only incident for which the defendant is on trial [in this case/in count *[number]*]. You are to confine your deliberations to deciding whether the defendant is guilty or not guilty of indecency with a child on that particular occasion. You cannot find the defendant guilty of indecency with a child based on an occurrence at any other time or place other than the incident that the state has chosen.

Also, you may not consider evidence of any other incident for any purpose unless you find, beyond a reasonable doubt, that such incident occurred. Even then, you may consider it only for the specific, limited purpose of determining [*insert limited purpose, e.g., the defendant's intent*].

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], engaged in sexual contact by [insert specific allegations, e.g., causing [name of child] to touch the genitals of the defendant]; and
2. [name] was a child younger than seventeen years old; and
3. the defendant did this with the intent to arouse or gratify [name]’s sexual desire.

[Select one of the following. Choose the second option if incident unanimity has been raised by the evidence and there has been no request for election.]

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must [find the defendant “guilty”/proceed to consider whether the defense of [insert defense, e.g., minimal age difference; marriage] applies].

[or]

The state has presented evidence of more than one incident to prove indecency with a child as alleged [in the indictment/in count [number]]. To reach a guilty verdict [in this case/in count [number]], you must all agree that the state has proved elements 1, 2, and 3 listed above, and you must also all agree that these elements occurred in the same incident. While it is permissible for you all to agree on more than one incident, to reach a guilty verdict in the case, you must all agree that these elements occurred in the same incident or incidents.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, the three elements listed above, and you all agree on the same incident or incidents when these elements occurred, you must [find the defendant “guilty”/proceed to con-

sider whether the defense of [*insert defense, e.g., minimal age difference; marriage*] applies].

[Include defense if raised by the evidence; see CPJC 84.7 and CPJC 84.8. Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Indecency with a child by contact is prohibited by and defined in Tex. Penal Code § 21.11(a)(1). It is generally accepted that indecency with a child by contact can occur if the accused is shown to have caused the child to touch the defendant. *E.g. Haney v. State*, 977 S.W.2d 638, 648 (Tex. App.—Fort Worth 1998, pet. ref'd), *abrogated in part on other grounds by Howland v. State*, 990 S.W.2d 274 (Tex. Crim. App. 1999) (“[T]he evidence presented to the jury is more than sufficient to support a jury finding that appellant ‘caused’ R.H. to ‘touch the genitals of the defendant.’”).

Under Texas Penal Code section 21.11(a)(1), “[a] person commits an offense if, with a child younger than 17 years of age, the person causes the child to engage in sexual contact. Tex. Penal Code § 21.11(a)(1).

If the charged offense used the definition of sexual contact in Penal Code section 21.01(2), “any touching of the anus, breast, or any other part of the genitals of another person, the offense could be committed by causing a child to touch the anus, breast, or genitals of the accused (or anyone else). *See* Tex. Penal Code § 21.11(a)(1). Touching by a child clearly can constitute sexual contact under this definition.

Section 21.11, however, has its own definition:

(c) In this section, “sexual contact” means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person:

- (1) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child; or
- (2) any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person.

Tex. Penal Code § 21.11(c). Only that part of the definition in section 21.11(c)(2) could apply to causing a child to touch another person. It needs to be somewhat strained to cover the situation, since it defines sexual contact in terms of conduct by someone other than the child.

This situation is the result of 2001 legislation. *See* Acts 2001, 77th Leg., R.S., ch. 739, § 2 (S.B. 932), eff. Sept. 1, 2001. As this bill came out of the senate committee, it added to section 21.11 language permitting conviction for causing a child to engage in sexual contact. (It also made provision for liability for causing a child to expose himself.) It also made the general definition of sexual contact in section 21.01 inapplicable to section 22.11 and created a new definition of sexual contact for section 21.11.

The definition of sexual contact in section 21.11 was structured differently than the definition in section 21.01. The section 22.11 definition explicitly defined the conduct as including touching through clothing, but this was not facilitated by the difference in structure.

In summary, sexual contact as defined for section 21.11 seems to include a touching by a child of another person. How should the instructions make clear that—to use a common example—a “touching of any part of the body of a child with any part of the genitals of a person” includes “causing [a child] to touch the genitals of the [person]”? The offense as often pleaded does not seem to come within the statutory language. For this reason, the first element as set out in the application of law to facts unit of the instruction does not correspond exactly to the first element as set out in the relevant statutes unit.

CPJC 84.5 Instruction—Indecency with Child—Exposure by Defendant**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of indecency with a child. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., with the intent to arouse and gratify the sexual desire of [name], exposed his [genitals/anus], knowing [name], a child younger than seventeen years old, was present*].

Relevant Statutes

A person commits an offense if the person, with the intent to arouse or gratify the sexual desire of any person, exposes any part of the person's [genitals/anus], knowing a child younger than seventeen years old is present.

The offense is committed whether the child is of the same or opposite sex as the person engaging in exposure.

To prove that the defendant is guilty of indecency with a child, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant exposed any part of his [genitals/anus]; and
2. the defendant did this with the intent to arouse or gratify the sexual desire of any person; and
3. the defendant knew another person was present; and
4. the other person present was a child younger than seventeen years old.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of indecency with a child.

Definitions*Intent to Arouse or Gratify Sexual Desire*

A person acts with intent to arouse or gratify sexual desire if it is the person's conscious objective or desire to gratify sexual desire.

Knew Another Person Was Present

A person knows another person is present if the person is aware that such a person is present.

[Select one of the following.]

On or about

The indictment alleges that the offense was committed on or about *[date]*. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed before *[date of indictment]*, the date the indictment was filed.

[or, if raised by the evidence]

On or about

The indictment alleges that the offense was committed on or about *[date]*. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed after *[date of defendant's seventeenth birthday]*, the date of the defendant's seventeenth birthday, and before *[date of indictment]*, the date the indictment was filed.

[Include if raised by the evidence and requested by the defense.]

Evidence of Wrongful Acts Defendant Possibly Committed

During the trial, you heard evidence that the defendant may have committed wrongful acts against *[name]* not charged in the indictment. *[If requested, include description of specific acts.]* The state offered the evidence to show the state of mind of the defendant and the child *[and/or]* the previous and subsequent relationship between the defendant and the child. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit the wrongful act against *[name]*. Those of you who believe the defendant did the wrongful act may consider it.

Even if you do find that the defendant committed a wrongful act, you may consider this evidence only for the limited purpose[s] described above. You may not consider this evidence to prove that the defendant is a bad person and for this reason was likely to commit the charged offense. In other words, you should consider this evidence only for the specific, limited purpose[s]

described above. To consider this evidence for any other purpose would be improper.

[Include if raised by the evidence and requested by the defense.]

Evidence of Another Offense Defendant Possibly Committed

During the trial, you heard evidence that the defendant may have committed [an offense/offenses] [against [*name of extraneous victim*]/other than the one he is currently accused of in the indictment]. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit [the offense[s] against [*name of extraneous victim*]/the other offense[s]]. Those of you who believe the defendant committed [that offense/those offenses] may consider it.

You may consider this evidence for any bearing this evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant. Even if you consider it, however, the defendant is not on trial for any offenses not alleged in the indictment. You must determine if the state proved all the elements for the offense alleged in the indictment.

[Include if raised by the evidence and requested by the defense.]

State's Election of a Particular Incident

The state has offered evidence of more than one incident to prove indecency with a child as alleged in the indictment. The state is required to choose one of those incidents for you to consider in deciding whether it has met its burden of proof on that particular occasion. The incident that the state has chosen is [*insert specific incident, e.g., the first act of exposure that [name] testified that she remembered*]. This is the only incident for which the defendant is on trial [in this case/in count [*number*]]. You are to confine your deliberations to deciding whether the defendant is guilty or not guilty of indecency with a child on that particular occasion. You cannot find the defendant guilty of indecency with a child based on an occurrence at any other time or place other than the incident that the state has chosen.

Also, you may not consider evidence of any other incident for any purpose unless you find, beyond a reasonable doubt, that such incident occurred. Even then, you may consider it only for the specific, limited purpose of determining [*insert limited purpose, e.g., the defendant's intent*].

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], exposed [any part of] his [genitals/anus]; and
2. the defendant did this with the intent to arouse or gratify the sexual desire of any person; and
3. the defendant knew [name] was present; and
4. [name] was a child younger than seventeen years old.

[Select one of the following. Choose the second option if incident unanimity has been raised by the evidence and there has been no request for election.]

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must [find the defendant “guilty”/proceed to consider whether the defense of [insert defense, e.g., minimal age difference; marriage] applies].

[or]

The state has presented evidence of more than one incident to prove indecency with a child as alleged [in the indictment/in count [number]]. To reach a guilty verdict [in this case/in count [number]], you must all agree that the state has proved elements 1, 2, 3, and 4 listed above, and you must also all agree that these elements occurred in the same incident. While it is permissible for you all to agree on more than one incident, to reach a guilty verdict in the case, you must all agree that these elements occurred in the same incident or incidents.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, the three elements listed above, and you all agree on the same incident or incidents when these elements occurred, you must [find the defendant “guilty”/proceed to con-

sider whether the defense of [*insert defense, e.g., minimal age difference; marriage*] applies].

[Include defense if raised by the evidence; see CPJC 84.7 and CPJC 84.8. Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Indecency with a child by exposure by the defendant is prohibited by and defined in Tex. Penal Code § 21.11(a)(2)(A).

Culpable Mental State. The argument that no culpable mental state is required for this offense by Texas Penal Code section 6.02 is stronger than is the similar argument for indecency by contact under section 21.11(a)(1). The explicit terms of section 21.11(a)(2) require proof that the offender acted “with intent to arouse or gratify the sexual desires of any person. Tex. Penal Code § 21.11(a)(2).

Nevertheless, current practice appears often to be to allege that the accused acted intentionally or knowingly. *Castillo v. State*, No. 07-04-0488-CR, 2005 WL 2076613, at *1 (Tex. App.—Amarillo Aug. 29, 2005, no pet.) (not designated for publication) (alleging defendant ‘did then and there, with the intent to arouse or gratify the sexual desire of said defendant, intentionally or knowingly expose the defendant’s genitals, knowing that B.F., a child younger than 17 years and not the defendant’s spouse, was present’). *Accord Martinez v. State*, 212 S.W.3d 411, 415 (Tex. App.—Austin 2006, pet. ref’d).

Identity of Child. One court of appeals has held that an indictment for this offense need not specify the name of the child who was present. *Yanes v. State*, 149 S.W.3d 708 (Tex. App.—Austin 2004, pet. ref’d). If this is correct, and the state fails to specify the name of the child, the application of law to facts unit of the instructions does not need to include the name of the child shown to be present.

General practice, however, seems to be to identify the child by name. If this is pleaded, it most likely must be incorporated into the application unit of the instructions.

CPJC 84.6 Instruction—Indecency with Child—Exposure by Child**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of indecency with a child. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., with the intent to arouse and gratify the sexual desire of [name], caused [name], a child younger than seventeen years old, to expose the child's [genitals/anus].*].

Relevant Statutes

A person commits an offense if the person, with the intent to arouse or gratify the sexual desire of any person, causes a child younger than seventeen years old to expose any part of the child's [genitals/anus].

The offense is committed whether the child is of the same or opposite sex as the person causing the child to expose himself.

To prove that the defendant is guilty of indecency with a child, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant caused a child to expose any part of the child's [genitals/anus]; and
2. the defendant did this with the intent to arouse or gratify the sexual desire of any person; and
3. the person exposed was a child younger than seventeen years old.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of indecency with a child.

Definitions*Intent to Arouse or Gratify Sexual Desire*

A person acts with intent to arouse or gratify sexual desire if it is the person's conscious objective or desire to gratify sexual desire.

[Select one of the following.]

On or about

The indictment alleges that the offense was committed on or about [date]. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed before [date of indictment], the date the indictment was filed.

[or, if raised by the evidence]

On or about

The indictment alleges that the offense was committed on or about [date]. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed after [date of defendant's seventeenth birthday], the date of the defendant's seventeenth birthday, and before [date of indictment], the date the indictment was filed.

[Include if raised by the evidence and requested by the defense.]

Evidence of Wrongful Acts Defendant Possibly Committed

During the trial, you heard evidence that the defendant may have committed wrongful acts against [name] not charged in the indictment. *[If requested, include description of specific acts.]* The state offered the evidence to show the state of mind of the defendant and the child [and/or] the previous and subsequent relationship between the defendant and the child. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit the wrongful act against [name]. Those of you who believe the defendant did the wrongful act may consider it.

Even if you do find that the defendant committed a wrongful act, you may consider this evidence only for the limited purpose[s] described above. You may not consider this evidence to prove that the defendant is a bad person and for this reason was likely to commit the charged offense. In other words, you should consider this evidence only for the specific, limited purpose[s] described above. To consider this evidence for any other purpose would be improper.

[Include if raised by the evidence and requested by the defense.]

Evidence of Another Offense Defendant Possibly Committed

During the trial, you heard evidence that the defendant may have committed [an offense/offenses] [against [*name of extraneous victim*]/other than the one he is currently accused of in the indictment]. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit [the offense[s] against [*name of extraneous victim*]/the other offense[s]]. Those of you who believe the defendant committed [that offense/those offenses] may consider it.

You may consider this evidence for any bearing this evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant. Even if you consider it, however, the defendant is not on trial for any offenses not alleged in the indictment. You must determine if the state proved all the elements for the offense alleged in the indictment.

[Include if raised by the evidence and requested by the defense.]

State's Election of a Particular Incident

The state has offered evidence of more than one incident to prove indecency with a child as alleged in the indictment. The state is required to choose one of those incidents for you to consider in deciding whether it has met its burden of proof on that particular occasion. The incident that the state has chosen is [*insert specific incident, e.g., the first act of exposure that [name] testified that she remembered*]. This is the only incident for which the defendant is on trial [in this case/in count [*number*]]. You are to confine your deliberations to deciding whether the defendant is guilty or not guilty of indecency with a child on that particular occasion. You cannot find the defendant guilty of indecency with a child based on an occurrence at any other time or place other than the incident that the state has chosen.

Also, you may not consider evidence of any other incident for any purpose unless you find, beyond a reasonable doubt, that such incident occurred. Even then, you may consider it only for the specific, limited purpose of determining [*insert limited purpose, e.g., the defendant's intent*].

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], caused a child, [name], to expose any part of [name]'s [genitals/anus]; and
2. the defendant did this with the intent to arouse or gratify the sexual desire of any person; and
3. [name] was a child younger than seventeen years old.

[Select one of the following. Choose the second option if incident unanimity has been raised by the evidence and there has been no request for election.]

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must [find the defendant “guilty”/proceed to consider whether the defense of [insert defense, e.g., minimal age difference; marriage] applies].

[or]

The state has presented evidence of more than one incident to prove indecency with a child as alleged [in the indictment/in count [number]]. To reach a guilty verdict [in this case/in count [number]], you must all agree that the state has proved elements 1, 2, and 3 listed above, and you must also all agree that these elements occurred in the same incident. While it is permissible for you all to agree on more than one incident, to reach a guilty verdict in the case, you must all agree that these elements occurred in the same incident or incidents.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, the three elements listed above, and you all agree on the same incident or incidents when these elements occurred, you must [find the defendant “guilty”/proceed to consider whether the defense of [insert defense, e.g., minimal age difference; marriage] applies].

[Include defense if raised by the evidence; see CPJC 84.7 and CPJC 84.8. Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Indecency with a child by exposure by the child is prohibited by and defined in Tex. Penal Code § 21.11(a)(2)(B).

CPJC 84.7 Instruction—Indecency with Child—Affirmative Defense of Minimal Age Difference

[Insert instructions for underlying offense.]

Minimal Age Difference

You have heard evidence that, when the defendant *[insert specific conduct constituting offense]*, he was of a minimal age difference from *[name]*.

Relevant Statutes

A person's conduct that would otherwise constitute the offense of indecency with a child is not an offense if—

1. the person was not more than three years older than the victim; and
2. the person was of the opposite sex of the victim; and
3. the person did not use duress, force, or a threat against the victim at the time of the offense.

Burden of Proof

The burden is on the defendant to prove, by a preponderance of the evidence, that the affirmative defense of minimal age difference applies.

Definitions*Preponderance of the Evidence*

The term “preponderance of the evidence” means the greater weight and degree of the credible evidence.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved, by a preponderance of the evidence, that his conduct was covered by the affirmative defense of minimal age difference.

To decide this issue, you must determine whether the defendant has proved, by a preponderance of the evidence, three elements. The elements are that—

1. the defendant was not more than three years older than *[name]*; and
2. the defendant was of the opposite sex of *[name]*; and

3. the defendant did not use duress, force, or a threat against [name] at the time of the offense.

If you all agree the defendant has proved, by a preponderance of the evidence, each of the three elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of indecency with a child, and you all agree the defendant has not proved, by a preponderance of the evidence, all three of elements 1, 2, and 3 listed above, you must find the defendant “guilty.”

COMMENT

Affirmative Defense. Texas Penal Code section 21.11(b) provides an affirmative defense if the contact was consensual and the defendant was not more than three years older than the victim and of the opposite sex of the victim. This affirmative defense, known traditionally as the “boyfriend defense,” will not protect homosexual contact or indecency even when the contact or exposure is consensual and the defendant is not more than three years older than the victim. The Committee notes that Penal Code section 21.06, which criminalized homosexual conduct, was held unconstitutional by the U.S. Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003). The *Lawrence* court held that criminalizing voluntary “deviate sexual intercourse” violated the “right to privacy” protected by substantive due process, enshrined in the Due Process Clause of the Fourteenth Amendment. This case may give rise to a defense argument that the boyfriend defense must, as a matter of constitutional law, apply to both homosexual and heterosexual contact or exposure.

Additional Elements of Defense. As the affirmative defense of minimal age difference is defined in Penal Code section 21.11, it includes elements in addition to those reflected in the charge:

- (3) at the time of the offense [the defendant]:
 - (A) was not required under Chapter 62, Code of Criminal Procedure, to register for life as a sex offender; or
 - (B) was not a person who under Chapter 62 had a reportable conviction or adjudication for an offense under this section.

Tex. Penal Code § 21.11(b)(3). The Committee believed that generally there would be no dispute about whether the evidence showed these matters. Thus they could generally be resolved by the trial judge as a matter of law. This avoids the need for the very complex charge that would be required for submission of those matters to the jury.

A very unusual case could arise in which the trial judge determines that the evidence clearly fails to show one or more of the elements of the affirmative defense but

the defendant nevertheless seeks jury submission of the defense. The Committee did not address whether, under those circumstances, the defendant would be entitled to jury submission under a charge requiring the defendant to prove the contested elements. *See* Tex. Penal Code § 2.04(c) (affirmative defense is to be submitted to the jury if “evidence is admitted supporting the defense”).

Note that the age element of the affirmative defense of minimal age difference in Penal Code section 21.02(g) is five years, whereas the age difference in the parallel defense in section 21.11(b) is three years, and the elements concerning registration under chapter 62 of the Code of Criminal Procedure vary slightly as well. *See* CPJC 84.2 for the elements of the defense based on Penal Code section 21.02(g).

CPJC 84.8 Instruction—Indecency with Child—Affirmative Defense of Marriage

[Insert instructions for underlying offense.]

Marriage

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he was the spouse of [*name*].

Relevant Statutes

A person's conduct that would otherwise constitute the offense of indecency with a child is not an offense if the person was the spouse of the child at the time of the offense.

Burden of Proof

The burden is on the defendant to prove, by a preponderance of the evidence, that the affirmative defense of marriage applies.

Definitions

[If there is a fact question concerning the existence of a marriage, the following definition should be modified to cover the facts at issue.]

Spouse

“Spouse” means a person to whom a person is legally married.

Preponderance of the Evidence

The term “preponderance of the evidence” means the greater weight and degree of the credible evidence.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved, by a preponderance of the evidence, that his conduct was covered by the affirmative defense of marriage.

To decide this issue, you must determine whether the defendant has proved, by a preponderance of the evidence, that he was the spouse of [*name*] at the time of the offense.

If you all agree the defendant has proved this defense by a preponderance of the evidence, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of indecency with a child, and you all agree the defendant has not proved this affirmative defense by a preponderance of the evidence, you must find the defendant “guilty.”

COMMENT

Legislation in 2009 removed that element of the offense consisting of proof that the victim was not the defendant’s spouse and made the spousal relationship an affirmative defense. Tex. Penal Code § 21.11(b–1). This change applies at the trial for an offense committed on or after the effective date of the legislation. Acts 2009, 81st Leg., R.S., ch. 260, § 2 (H.B. 549), eff. Sept 1, 2009.

IV. Sexual Assault

CPJC 84.9 Instruction—Sexual Assault of Adult by Force or Violence

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of sexual assault. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally or knowingly caused the penetration of the female sexual organ of [name] by placing his sexual organ in the female sexual organ of [name] without the consent of [name], in that the defendant compelled [name] to submit or participate by the use of physical force or violence.*]

Relevant Statutes

A person commits an offense if the person intentionally or knowingly causes the penetration of the sexual organ of another person by any means without that other person's consent.

Penetration of another person's sexual organ is without consent if the person compels the other person to submit or participate by the use of physical force or violence.

To prove that the defendant is guilty of sexual assault, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant intentionally or knowingly caused the penetration of the sexual organ of another person by any means; and
2. this penetration was without the consent of that other person because the defendant used physical force or violence, and by this physical force or violence the defendant forced the other person to submit or participate.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of sexual assault.

Definitions

Intentionally Causing Penetration

A person intentionally causes the penetration of the sexual organ of another person by his sexual organ if the person has the conscious objective or desire to cause that penetration.

Knowingly Causing Penetration

A person knowingly causes the penetration of the sexual organ of another person by his sexual organ if the person is aware that his conduct is reasonably certain to cause that penetration.

[Include if raised by the evidence and requested by the defense.]

State's Election of a Particular Incident

The state has offered evidence of more than one incident to prove sexual assault as alleged in the indictment. The state is required to choose one of those incidents for you to consider in deciding whether it has met its burden of proof on that particular occasion. The incident that the state has chosen is [*insert specific incident, e.g., the first act of intercourse that [name] testified that she remembered*]. This is the only incident for which the defendant is on trial [in this case/in count [*number*]]. You are to confine your deliberations to deciding whether the defendant is guilty or not guilty of sexual assault on that particular occasion. You cannot find the defendant guilty of sexual assault based on an occurrence at any other time or place other than the incident that the state has chosen.

Also, you may not consider evidence of any other incident for any purpose unless you find, beyond a reasonable doubt, that such incident occurred. Even then, you may consider it only for the specific, limited purpose of determining [*insert limited purpose, e.g., the defendant's intent*].

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], intentionally or knowingly caused the penetration of the sexual organ of [*name*] by [*insert specific allegations, e.g., placing his sexual organ in the female sexual organ of [name]*]; and

2. this penetration was without the consent of [name] because the defendant used physical force or violence, and by that physical force or violence compelled [name] to submit or participate.

[Select one of the following. Choose the second option if incident unanimity has been raised by the evidence and there has been no request for election.]

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty.”

[or]

The state has presented evidence of more than one incident to prove sexual assault as alleged [in the indictment/in count [number]]. To reach a guilty verdict [in this case/in count [number]], you must all agree that the state has proved elements 1 and 2 listed above, and you must also all agree that these elements occurred in the same incident. While it is permissible for you all to agree on more than one incident, to reach a guilty verdict in the case, you must all agree that these elements occurred in the same incident or incidents.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, the two elements listed above, and you all agree on the same incident or incidents when these elements occurred, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Sexual assault is prohibited by and defined in Tex. Penal Code § 22.011. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

Lack of Consent. The crime of sexual assault, as defined in the basic statutory provision, requires that the conduct occur “without [the victim’s] consent.” See Tex. Penal Code § 22.011(a)(1). Section 22.011(b) provides that “[a] sexual assault under Subsection (a)(1) is without consent of the other person” in eleven specified situations. See Tex. Penal Code § 22.011(b).

Some members of the Committee believed that the list of situations in subsection (b) is not exclusive. Consequently, they concluded, the state is entitled to rely simply on section 22.011(a)(1) and have the jury told only that the state must prove that the conduct occurred without the victim’s consent.

A majority of the Committee concluded otherwise. In their view, the statute—perhaps somewhat awkwardly—means that the prohibited conduct is without the victim’s consent *only* if the state proves one of the subsection (b) situations applies.

Definitions of Culpable Mental States. The instruction provides specific definitions of ‘intent’ and ‘knowledge’ as they apply to the one element involved—penetration.

Rather than determine whether the penetration element is a “nature of conduct” element or “result” element, the instruction attempts to define the culpable mental states in a way that is consistent with either characterization of the penetration element.

Culpable Mental State Concerning Lack of Consent. A major concern for the Committee was whether the charge should require a culpable mental state regarding either lack of consent or the specific statutory manner in which lack of consent would be proved. Traditional Texas practice of charging juries in the language of the statute obscured this issue. The approach taken by the Committee requires that it be addressed and resolved.

The Committee recognized that this is important not only for purposes of the jury charge on the offense but also because it affects the availability of a charge on mistake of fact. If no culpable mental state is required regarding lack of consent, a defendant’s evidence that the defendant believed the victim consented will never create a right to a charge on mistake of fact.

Mechanically, the question is whether the requirement in Penal Code section 22.011(a)(1) that the accused act intentionally or knowingly applies to the element “without [the other] person’s consent.”

Some case law suggests the offense requires a culpable mental state regarding lack of consent. In *Rubio v. State*, 607 S.W.2d 498 (Tex. Crim. App. 1980), the court of criminal appeals held that under a prior statute the state may introduce evidence of extraneous sexual assaults against a sexual assault defendant who places the victim’s consent in issue. The court referred to *Rubio* with approval in *Casey v. State*, 215 S.W.3d 870, 880 (Tex. Crim. App. 2007).

The *Rubio* analysis seems to assume that sexual assault requires some awareness regarding the victim's lack of consent. Evidence of extraneous assaults would be relevant only if the charged crime required proof of awareness of lack of consent.

Rubio did not address how the then-current statute might have imposed such a requirement. Further, of course, it did not address the current statute.

The Committee was split on the matter. A majority, however, concluded that if faced directly with the issue, the court of criminal appeals would hold that no culpable mental state is required regarding lack of consent.

The major consideration in the majority's reasoning was that some of the specific statutory ways of showing lack of consent, set out in Penal Code section 22.011(b), impose requirements of culpable mental states. Others do not. This suggests that the legislature intended those ways of showing lack of consent not explicitly requiring culpable mental states to have none.

The above charge covers situations in which the state has chosen to prove lack of consent by proving that the accused compelled the victim to submit or participate by the use of physical force or violence under section 22.011(b)(1). No culpable mental state is explicitly required by section 22.011(b)(1), so the charge requires none.

Defining “Penetration” and “Sexual Organ.” The Penal Code does not define either “penetration” or “sexual organ.” In assessing sufficiency-of-the-evidence claims, appellate courts have repeatedly found that the requirement of penetration for sexual assault and aggravated sexual assault is met by evidence of touching “beneath the fold of the [female] external genitalia since vaginal penetration is not required, but only penetration of the ‘female sexual organ.’” *Steadman v. State*, 280 S.W.3d 242, 247–48 (Tex. Crim. App. 2009); *Vernon v. State*, 841 S.W.2d 407, 409 (Tex. Crim. App. 1992); *Allen v. State*, 37 S.W. 429, 429 (1896) (“The slightest entry, however, even an entry between the labia of the pudendum, would constitute a rape. ’). At one time, jurors could be so instructed. *Flannery v. State*, 117 S.W.2d 1111, 1114 (1938) (approving of instruction ‘that the slightest penetration of the body of the female by the sexual organ of the male is sufficient; it is unnecessary that the penetration should be perfect; nor that there should be an entering of the vagina or rupture of the hymen; the entering of the vulva or labia is sufficient’).

The court of criminal appeals in 2015, however, held that it was error to define “penetration” and “female sexual organ.” *Green v. State*, 476 S.W.3d 440 (Tex. Crim. App. 2015). In *Green*, the trial court defined ‘penetration’ as something that—

occurs so long as contact with the female sexual organ could reasonably be regarded by ordinary English speakers as more intrusive than contact with the outer vaginal lips and is complete, however slight, if any. Touching beneath the fold of the external genitalia amounts to penetration within the meaning of the aggravated sexual assault statute.

Green, 476 S.W.3d at 446–47. The instructions also defined “female sexual organ” to include not just the vagina but also the external structures. In reviewing these definitions, the court of criminal appeals indicated that they “accurately described the common meanings of the terms.” *Green*, 476 S.W.3d at 446. The court nonetheless held it was error to provide the jury with nonstatutory definitions because nonstatutory definitions are not considered “law applicable to the case” for purposes of Code of Criminal Procedure article 36.14. *Green*, 476 S.W.3d at 445. While terms that have acquired particular legal meanings should be defined for jurors, the court rejected the state’s argument that the terms *penetration* and *female sexual organ* had acquired any technical meaning, reiterating that inclusion of nonstatutory definitions may constitute an improper comment on the weight of the evidence. *Green*, 476 S.W.3d at 445–46.

Even though some members of the Committee believed that definitions could assist the jurors in clarifying that penetration of the vaginal canal was not required, in light of *Green*, the Committee agreed that neither ‘penetration’ nor ‘sexual organ’ should be further defined. While the instruction “Penetration, if any, is complete, however slight,” is not as detailed as the one found to be error in *Green*, the Committee believed that this instruction also lacks a statutory basis in the current Penal Code and should not be given.

**CPJC 84.10 Instruction—Sexual Assault of Adult by Force or Violence
or by Threat of Force or Violence****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of sexual assault. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally or knowingly caused the penetration of the female sexual organ of [name] by placing his sexual organ in the female sexual organ of [name] without the consent of [name], in that the defendant compelled [name] to submit or participate by the use of physical force or violence, or compelled [name] to submit or participate by threatening to use physical force or violence against [name], and [name] believed that the defendant had the present ability to execute the threat*].

Relevant Statutes

A person commits an offense if the person intentionally or knowingly causes the penetration of the sexual organ of another person by any means without that other person's consent.

Penetration of another person's sexual organ is without consent if—

1. the person compels the other person to submit or participate by the use of physical force or violence; or
2. the person compels the other person to submit or participate by threatening to use physical force or violence against the other person and the other person believes that the person has the present ability to execute the threat.

To prove that the defendant is guilty of sexual assault, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant intentionally or knowingly caused the penetration of the sexual organ of another person by any means; and
2. this penetration was without the consent of that other person because the defendant either—
 - a. compelled the other person to submit or participate by the use of physical force or violence; or

- b. compelled the other person to submit or participate by threatening to use physical force or violence against the other person and the other person believed that the defendant had the present ability to execute the threat.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of sexual assault.

Definitions

Intentionally Causing Penetration

A person intentionally causes the penetration of the sexual organ of another person by his sexual organ if the person has the conscious objective or desire to cause that penetration.

Knowingly Causing Penetration

A person knowingly causes the penetration of the sexual organ of another person by his sexual organ if the person is aware that his conduct is reasonably certain to cause that penetration.

[Include if raised by the evidence and requested by the defense.]

State's Election of a Particular Incident

The state has offered evidence of more than one incident to prove sexual assault as alleged in the indictment. The state is required to choose one of those incidents for you to consider in deciding whether it has met its burden of proof on that particular occasion. The incident that the state has chosen is *[insert specific incident, e.g., the first act of intercourse that [name] testified that she remembered]*. This is the only incident for which the defendant is on trial *[in this case/in count [number]]*. You are to confine your deliberations to deciding whether the defendant is guilty or not guilty of sexual assault on that particular occasion. You cannot find the defendant guilty of sexual assault based on an occurrence at any other time or place other than the incident that the state has chosen.

Also, you may not consider evidence of any other incident for any purpose unless you find, beyond a reasonable doubt, that such incident occurred. Even

then, you may consider it only for the specific, limited purpose of determining [*insert limited purpose, e.g., the defendant's intent*].

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], intentionally or knowingly caused the penetration of the sexual organ of [*name*] by [*insert specific allegations, e.g., placing his sexual organ in the female sexual organ of [name]*]; and

2. this penetration was without the consent of [*name*] because the defendant either—

- a. used physical force or violence, and by that physical force or violence compelled [*name*] to submit or participate; or
- b. threatened to use physical force or violence against [*name*], [*name*] believed that the defendant had the present ability to execute the threat, and by this threat the defendant compelled [*name*] to submit or participate.

You must all agree on elements 1 and 2 listed above, but you do not have to agree on the form of absence of consent listed in elements 2.a and 2.b above.

[Select one of the following. Choose the second option if incident unanimity has been raised by the evidence and there has been no request for election.]

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements above, you must find the defendant “guilty.”

[or]

The state has presented evidence of more than one incident to prove sexual assault as alleged [in the indictment/in count [*number*]]. To reach a guilty verdict [in this case/in count [*number*]], you must all agree that the state has proved elements 1 and 2 listed above, and you must also all agree that these elements occurred in the same incident. While it is permissible for you all to

agree on more than one incident, to reach a guilty verdict in the case, you must all agree that these elements occurred in the same incident or incidents.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, the two elements listed above, and you all agree on the same incident or incidents when these elements occurred, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Sexual assault is prohibited by and defined in Tex. Penal Code § 22.011. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

Threatening to Use Force or Violence. The charge does not define “threatening” because the law provides no definition. See the discussion in the Comment to CPJC 85.2.

CPJC 84.11 Instruction—Sexual Assault of Child**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of sexual assault. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally or knowingly caused the penetration of the sexual organ of [name], a child, by placing his sexual organ in the female sexual organ of [name]*].

Relevant Statutes

A person commits an offense if the person intentionally or knowingly causes the penetration of the sexual organ of a child by any means.

To prove that the defendant is guilty of sexual assault, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant intentionally or knowingly caused the penetration of the sexual organ of another person by any means; and
2. the other person was a child.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of sexual assault.

Definitions*Intentionally Causing Penetration*

A person intentionally causes the penetration of the sexual organ of another person by his sexual organ if the person has the conscious objective or desire to cause that penetration.

Knowingly Causing Penetration

A person knowingly causes the penetration of the sexual organ of another person by his sexual organ if the person is aware that his conduct is reasonably certain to cause that penetration.

Child

A child is a person younger than seventeen years old.

[Select one of the following.]

On or about

The indictment alleges that the offense was committed on or about *[date]*. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed before *[date of indictment]*, the date the indictment was filed.

[or, if raised by the evidence]

On or about

The indictment alleges that the offense was committed on or about *[date]*. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed after *[date of defendant's seventeenth birthday]*, the date of the defendant's seventeenth birthday, and before *[date of indictment]*, the date the indictment was filed.

[Include if raised by the evidence and requested by the defense.]

Evidence of Wrongful Acts Defendant Possibly Committed

During the trial, you heard evidence that the defendant may have committed wrongful acts against *[name]* not charged in the indictment. *[If requested, include description of specific acts.]* The state offered the evidence to show the state of mind of the defendant and the child *[and/or]* the previous and subsequent relationship between the defendant and the child. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit the wrongful act against *[name]*. Those of you who believe the defendant did the wrongful act may consider it.

Even if you do find that the defendant committed a wrongful act, you may consider this evidence only for the limited purpose[s] described above. You may not consider this evidence to prove that the defendant is a bad person and for this reason was likely to commit the charged offense. In other words, you should consider this evidence only for the specific, limited purpose[s] described above. To consider this evidence for any other purpose would be improper.

[Include if raised by the evidence and requested by the defense.]

Evidence of Another Offense Defendant Possibly Committed

During the trial, you heard evidence that the defendant may have committed [an offense/offenses] [against [*name of extraneous victim*]/other than the one he is currently accused of in the indictment]. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit [the offense[s] against [*name of extraneous victim*]/the other offense[s]]. Those of you who believe the defendant committed [that offense/those offenses] may consider it.

You may consider this evidence for any bearing this evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant. Even if you consider it, however, the defendant is not on trial for any offenses not alleged in the indictment. You must determine if the state proved all the elements for the offense alleged in the indictment.

[Include if raised by the evidence and requested by the defense.]

State's Election of a Particular Incident

The state has offered evidence of more than one incident to sexual assault of a child as alleged in the indictment. The state is required to choose one of those incidents for you to consider in deciding whether it has met its burden of proof on that particular occasion. The incident that the state has chosen is [*insert specific incident, e.g., the first act of sexual intercourse that [name] testified that she remembered*]. This is the only incident for which the defendant is on trial [in this case/in count [*number*]]. You are to confine your deliberations to deciding whether the defendant is guilty or not guilty of sexual assault of a child on that particular occasion. You cannot find the defendant guilty of sexual assault of a child based on an occurrence at any other time or place other than the incident that the state has chosen.

Also, you may not consider evidence of any other incident for any purpose unless you find, beyond a reasonable doubt, that such incident occurred. Even then, you may consider it only for the specific, limited purpose of determining [*insert limited purpose, e.g., the defendant's intent*].

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly caused the penetration of the sexual organ of [name] by [insert specific allegations, e.g., placing his sexual organ in the female sexual organ of [name]]; and
2. [name] was at the time a child.

[Select one of the following. Choose the second option if incident unanimity has been raised by the evidence and there has been no request for election.]

You must all agree on elements 1 and 2 listed above.

If you all agree that the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must [find the defendant “guilty”/proceed to consider whether the defense of [insert defense, e.g., minimal age difference; marriage; medical care] applies].

[or]

The state has presented evidence of more than one incident to prove sexual assault as alleged [in the indictment/in count [number]]. To reach a guilty verdict [in this case/in count [number]], you must all agree that the state has proved elements 1 and 2 listed above, and you must also all agree that these elements occurred in the same incident. While it is permissible for you all to agree on more than one incident, to reach a guilty verdict in the case, you must all agree that these elements occurred in the same incident or incidents.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, the two elements listed above, and you all agree on the same incident or incidents when these elements occurred, you must [find the defendant “guilty”/proceed to consider whether the defense of [insert defense, e.g., minimal age difference; marriage; medical care] applies].

[Include defense if raised by the evidence; see CPJC 84.12 through CPJC 84.14. Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Sexual assault of a child is prohibited by and defined in Tex. Penal Code § 22.011(a)(2)(A). The definition of “child” for purposes of sexual assault is based on Tex. Penal Code § 22.011(c)(1). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

CPJC 84.12 Instruction—Sexual Assault of Child—Affirmative Defense of Minimal Age Difference

[Insert instructions for underlying offense.]

Minimal Age Difference

You have heard evidence that, when the defendant *[insert specific conduct constituting offense]*, he was of a minimal age difference from *[name]*.

Relevant Statutes

A person's conduct that would otherwise constitute the offense of sexual assault of a child is not an offense if—

1. the person was not more than three years older than the child; and
2. the child was fourteen years old or older.

Burden of Proof

The burden is on the defendant to prove, by a preponderance of the evidence, that the affirmative defense of minimal age difference applies.

Definitions*Preponderance of the Evidence*

The term “preponderance of the evidence” means the greater weight and degree of the credible evidence.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved, by a preponderance of the evidence, that his conduct was covered by the affirmative defense of minimal age difference.

To decide this issue, you must determine whether the defendant has proved, by a preponderance of the evidence, two elements. The elements are that—

1. the defendant was not more than three years older than *[name]*; and
2. *[name]* was fourteen years old or older.

If you all agree the defendant has proved, by a preponderance of the evidence, both of the two elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of sexual assault of a child, and you all agree the defendant has not proved, by a preponderance of the evidence, both elements 1 and 2 listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

As the affirmative defense of minimal age difference is defined in Texas Penal Code section 22.011, it includes several elements in addition to those reflected in the charge:

1. The defendant must not have been required to register for life as a sex offender and must not have been a person with a conviction for sexual assault that is reportable under chapter 62 of the Code of Criminal Procedure.
2. The victim must not have been a person the defendant was prohibited from marrying, purporting to marry, or living with under Penal Code section 25.01.

The Committee believed that generally there would be no dispute about whether the evidence showed these matters. Thus they could generally be resolved by the trial judge as a matter of law. This avoids the need for the very complex charge that would be required for submission of those matters to the jury.

A very unusual case could arise in which the trial judge determines that the evidence clearly fails to show one or more of these elements of the affirmative defense but the defendant nevertheless seeks jury submission of the defense. The Committee did not address whether, under those circumstances, the defendant would be entitled to jury submission under a charge requiring the defendant to prove the contested elements. *See* Tex. Penal Code § 2.04(c) (affirmative defense is to be submitted to the jury if “evidence is admitted supporting the defense”).

CPJC 84.13 Instruction—Sexual Assault of Child—Affirmative Defense of Marriage

[Insert instructions for underlying offense.]

Marriage

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he was the spouse of [*name*].

Relevant Statutes

A person's conduct that would otherwise constitute the offense of sexual assault of a child is not an offense if the person was the spouse of the child at the time of the offense.

Burden of Proof

The burden is on the defendant to prove, by a preponderance of the evidence, that the affirmative defense of marriage applies.

Definitions

[If there is a fact question concerning the existence of a marriage, the following definition should be modified to cover the facts at issue.]

Spouse

“Spouse” means a person to whom a person is legally married.

Preponderance of the Evidence

The term “preponderance of the evidence” means the greater weight and degree of the credible evidence.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved, by a preponderance of the evidence, that his conduct was covered by the affirmative defense of marriage.

To decide this issue, you must determine whether the defendant has proved, by a preponderance of the evidence, that he was the spouse of [*name*] at the time of the offense.

If you all agree the defendant has proved this defense by a preponderance of the evidence, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of sexual assault of a child, and you all agree the defendant has not proved this affirmative defense by a preponderance of the evidence, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

The affirmative defense of marriage to sexual assault of a child is provided for in Tex. Penal Code § 22.011(e)(1). The definition of “spouse” for purposes of the affirmative defense of marriage is based on Tex. Penal Code § 22.011(c)(2).

CPJC 84.14 Instruction—Sexual Assault of Child—Medical Care Defense

[Insert instructions for underlying offense.]

Medical Care Defense

You have heard evidence that, when the defendant [*insert specific conduct, e.g., penetrated [name]’s sexual organ with his hand*], he was providing medical care for [*name*].

Relevant Statutes

A person’s conduct that would otherwise constitute the offense of sexual assault of a child is not an offense if—

1. the conduct consisted of medical care;
2. the medical care was for the child; and
3. the conduct did not include any contact between the child’s anus or sexual organ and the defendant’s or another person’s mouth, anus, or sexual organ.

Burden of Proof

The defendant is not required to prove the medical care defense. Rather, the state must prove, beyond a reasonable doubt, that the medical care defense does not apply to the defendant’s conduct.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant’s conduct was not justified by the medical care defense.

To decide this issue, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the conduct was not medical care; or
2. the medical care was not for the child; or
3. the conduct included contact between the child’s anus or sexual organ and the defendant’s or another person’s mouth, anus, or sexual organ.

You must all agree that the state has proved, beyond a reasonable doubt, at least one of the three elements listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, all three elements listed above, you must find the defendant “not guilty.”

If you all agree that the state has proved, beyond a reasonable doubt, each of the elements of the offense of sexual assault of a child, and you all agree the state has proved, beyond a reasonable doubt, at least one of the three elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

The defense of medical care to sexual assault is provided for in Tex. Penal Code § 22.011(d).

The doctrine of confession and avoidance applies to the defense of medical care. To be entitled to jury submission of the defense, the defendant must admit to every element of the offense, including both the act and the culpable mental state, then offer additional facts raising the defense as a justification for that conduct. *Cornet v. State*, 417 S.W.3d 446, 451 (Tex. Crim. App. 2013).

A trial court should not exclude the defense simply because the defendant is not a health-care professional or lacks any medical training. *Cornet v. State*, 359 S.W.3d 217, 222 (Tex. Crim. App. 2012).

CPJC 84.15 Instruction—Sexual Assault of Impaired Victim**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of sexual assault. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally or knowingly caused the penetration of the female sexual organ of [name] by placing his sexual organ in the female sexual organ of [name] without the consent of [name], in that [name] did not consent and the defendant knew [name] was physically unable to resist*].

Relevant Statutes

A person commits an offense if the person intentionally or knowingly causes the penetration of the sexual organ of another person by any means without that other person's consent.

Penetration of another person's sexual organ is without consent if the other person has not consented and the person knows the other person is physically unable to resist.

To prove that the defendant is guilty of sexual assault, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant intentionally or knowingly caused the penetration of the sexual organ of another person by any means; and
2. the other person did not consent; and
3. the other person was physically unable to resist; and
4. the defendant knew the other person was physically unable to resist.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of sexual assault.

Definitions

Intentionally Causing Penetration

A person intentionally causes the penetration of the sexual organ of another person by his sexual organ if the person has the conscious objective or desire to cause that penetration.

Knowingly Causing Penetration

A person knowingly causes the penetration of the sexual organ of another person by his sexual organ if the person is aware that his conduct is reasonably certain to cause that penetration.

Knowing Another Person Is Physically Unable to Resist

A person knows another person is physically unable to resist if the person is aware that the other person is physically unable to resist.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly caused the penetration of the sexual organ of [name] by [insert specific allegations, e.g., placing his sexual organ in the female sexual organ of [name]]; and
2. [name] did not consent; and
3. [name] was physically unable to resist; and
4. the defendant knew [name] was physically unable to resist.

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Sexual assault of an impaired victim is prohibited by and defined in Tex. Penal Code § 22.011(b)(3). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

Case Law Exposition of “Physically Unable to Resist.” In *Elliott v. State*, 858 S.W.2d 478 (Tex. Crim. App. 1993), the court of criminal appeals arguably modified the plain meaning of the statutory terms defining this type of sexual assault. Elliott challenged his conviction of capital murder committed in the course of sexual assault on the basis that the evidence failed to support the state’s allegation that the victim was so impaired by alcohol and cocaine as to be physically unable to resist. The evidence showed the victim was not unconscious, but the parties differed on the degree of impairment proved. The court addressed the contention that “the evidence is insufficient to establish the State’s theory of lack of consent to the sexual intercourse between appellant and the victim.” *Elliott*, 858 S.W.2d at 480. Under the statute then in effect, “A sexual assault is without consent of the other person if the other person has not consented and the actor knows the other person is physically unable to resist.” *Elliott*, 858 S.W.2d at 480. Elliott argued that the evidence failed to establish that the victim had been rendered ‘physically unable to resist.’ *Elliott*, 858 S.W.2d at 480. The court rejected this.

Beginning with the meaning of the statutory standard, the court explained:

[W]e are not inclined to be strict in construing the meaning of “physically unable to resist” in § 22.011(b)(3). We hold that where assent in fact has not been given, and the actor knows that the victim’s physical impairment is such that resistance is not reasonably to be expected, sexual intercourse is ‘without consent’ under the sexual assault statute.

Elliott, 858 S.W.2d at 485 (citations omitted). Applying this, the court added:

[T]he jury could have found that because of the effects of her intoxication, [the victim] could not reasonably have been expected to resist her assailants, and that appellant knew and took advantage of this fact.

[A] rational jury could have discounted the opinions of [the witnesses] as inconsistent with all the other evidence, and concluded beyond a reasonable doubt that appellant knew [the victim’s] physical impairment was such that resistance was not reasonably to be expected. The evidence was not lacking on this account.

Elliott, 858 S.W.2d at 485. *Elliott* appears to still be good law. See *Casey v. State*, 160 S.W.3d 218, 223–24 (Tex. App.—Austin 2005), *rev’d on other grounds*, 215 S.W.3d 870 (Tex. Crim. App. 2007).

The Committee considered whether *Elliott* constituted an interpretation of the statutory language that should be communicated to jurors in the jury charge. One possible construction of the case is that *Elliott* purported to give the statutory language a meaning quite different from what can be gleaned from the language itself and thus should be reflected in jury charges. This might mean that the third and fourth elements of the offense would be defined as follows:

3. the other person was so physically impaired that resistance was not to be expected; and
4. the defendant knew the other person was so impaired.

A majority of the Committee, however, construed *Elliott* as a sufficiency-of-the-evidence case that did not affect the propriety of instructing juries in the language of the statute.

V. Aggravated Sexual Assault

CPJC 84.16 General Comments on Aggravated Sexual Assault

Aggravated sexual assault can be committed in four basic ways. They include—

1. sexual assault of an adult victim (seventeen or older) without consent and with an aggravating factor (such as serious bodily injury, a deadly weapon, a date-rape drug, or disabled victim);
2. sexual assault of a child fourteen to under seventeen years old with an aggravating factor;
3. sexual assault of a child younger than fourteen (which, if committed with an aggravating factor, increases the minimum sentence to twenty-five years); and
4. sexual assault of a child younger than six (which increases the minimum sentence to twenty-five years even without an aggravating factor).

Instructions are provided for each of these four different ways of committing aggravated sexual assault. For the last three ways of committing the offense, the state is not required to prove that the conduct constituting the offense is without the victim's consent. *See* Tex. Penal Code § 22.021(a)(1)(B).

CPJC 84.17 Instruction—Aggravated Sexual Assault of Adult**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of aggravated sexual assault. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally or knowingly caused the penetration of the female sexual organ of [name] by placing his sexual organ in the female sexual organ of [name] without the consent of [name], in that the defendant compelled [name] to submit or participate by the use of physical force or violence*] and [*insert specific aggravating factor, e.g., in the same criminal episode caused serious bodily injury to [name]*].

Relevant Statutes

A person commits an offense if the person intentionally or knowingly causes the penetration of the sexual organ of another person by any means without that other person's consent and [*insert specific aggravating factor, e.g., causes serious bodily injury to another person in the same criminal episode*].

Penetration of another person's sexual organ is without consent if the person compels the other person to submit or participate by the use of physical force or violence.

To prove that the defendant is guilty of aggravated sexual assault, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant intentionally or knowingly caused the penetration of the sexual organ of another person by any means; and
2. this penetration was without the consent of that other person because the defendant used physical force or violence, and by this physical force or violence the defendant forced the other person to submit or participate; and

[Select one or more of the following.]

3. the defendant caused serious bodily injury to [the victim/another person] during the same criminal episode.

[or]

3. the defendant attempted to cause the death of [the victim/another person] during the same criminal episode.

[or]

3. the defendant by acts or words placed the victim in fear that death, serious bodily injury, or kidnapping would be imminently inflicted on any person.

[or]

3. the defendant, by words or acts occurring in the presence of the victim, threatened to cause the death, serious bodily injury, or kidnapping of any person.

[or]

3. the defendant used or exhibited a deadly weapon in the course of the same criminal episode.

[or]

3. the defendant acted in concert with another person who, during the course of the same criminal episode, committed sexual assault of the same victim.

[or]

3. the defendant administered or provided flunitrazepam to the victim of the offense with the intent of facilitating the commission of the offense.

[or]

3. the other person was an elderly individual or disabled individual.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of aggravated sexual assault.

Definitions*Intentionally Causing Penetration*

A person intentionally causes the penetration of the sexual organ of another person by his sexual organ if the person has the conscious objective or desire to cause that penetration.

Knowingly Causing Penetration

A person knowingly causes the penetration of the sexual organ of another person by his sexual organ if the person is aware that his conduct is reasonably certain to cause that penetration.

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Serious Bodily Injury

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

[Select one of the following.]

On or about

The indictment alleges that the offense was committed on or about *[date]*. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed before *[date of indictment]*, the date the indictment was filed. But the offense cannot be so far back in time that it is outside the statute of limitations period—a particular amount of time required for a case to be indicted or prosecution will be barred. The statute of limitations for aggravated sexual assault is ten years.

[or, if no limitations period under Texas Code of Criminal Procedure article 12.01(1)(C)]

On or about

The indictment alleges that the offense was committed on or about [date]. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed before [date of indictment], the date the indictment was filed.

[Include if raised by the evidence and requested by the defense.]

State's Election of a Particular Incident

The state has offered evidence of more than one incident to prove aggravated sexual assault as alleged in the indictment. The state is required to choose one of those incidents for you to consider in deciding whether it has met its burden of proof on that particular occasion. The incident that the state has chosen is [insert specific incident, e.g., the first act of sexual intercourse that [name] testified that she remembered]. This is the only incident for which the defendant is on trial [in this case/in count [number]]. You are to confine your deliberations to deciding whether the defendant is guilty or not guilty of aggravated sexual assault on that particular occasion. You cannot find the defendant guilty of aggravated sexual assault based on an occurrence at any other time or place other than the incident that the state has chosen.

Also, you may not consider evidence of any other incident for any purpose unless you find, beyond a reasonable doubt, that such incident occurred. Even then, you may consider it only for the specific, limited purpose of determining [insert limited purpose, e.g., the defendant's intent].

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly caused the penetration of the sexual organ of [name] by [insert specific allegations, e.g., placing his sexual organ in the female sexual organ of [name]]; and

2. this penetration was without the consent of [name] because the defendant used physical force or violence, and by that physical force or violence compelled [name] to submit or participate; and

3. *[insert appropriate third element from Texas Penal Code section 22.021(a)(2), e.g., the defendant caused serious bodily injury to [name] during the course of the same criminal episode].*

[Select one of the following. Choose the second option if incident unanimity has been raised by the evidence and there has been no request for election.]

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

[or]

The state has presented evidence of more than one incident to prove aggravated sexual assault as alleged [in the indictment/in count *[number]*]. To reach a guilty verdict [in this case/in count *[number]*], you must all agree that the state has proved elements 1, 2, and 3 listed above, and you must also all agree that these elements occurred in the same incident. While it is permissible for you all to agree on more than one incident, to reach a guilty verdict in the case, you must all agree that these elements occurred in the same incident or incidents.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, the three elements listed above, and you all agree on the same incident or incidents when these elements occurred, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Aggravated sexual assault is prohibited by and defined in Tex. Penal Code § 22.021. The definitions of culpable mental states are derived from Tex. Penal Code

§ 6.03. The definition of ‘bodily injury’ is from Tex. Penal Code § 1.07(a)(8). The definition of “serious bodily injury” is from Tex. Penal Code § 1.07(a)(46).

Culpable Mental State Regarding “Aggravating” Element. The above instruction does not require a culpable mental state regarding the additional element elevating sexual assault under Texas Penal Code section 22.011 to aggravated sexual assault under section 22.021. None is explicitly required by section 22.021.

In addition, one of the alternative aggravating elements does contain an explicit requirement of a culpable mental state. Tex. Penal Code § 22.021(a)(2)(A)(vi) (requiring administration of flunitrazepam to have been “with the intent of facilitating the commission of the offense”). This persuaded the Committee that the legislature intended culpable mental states regarding aggravating elements only where it explicitly provided them.

Definition of “Criminal Episode.” The instruction contains no definition of the term *criminal episode*.

In *Burns v. State*, 728 S.W.2d 114 (Tex. App.—Houston [14th Dist.] 1987, pet. ref’d), the court of appeals held that the definition of criminal episode in chapter 3 of the Penal Code did not apply to aggravated sexual assault. Rejecting what apparently was a contention that the lack of a definition made the offense unenforceable, the court explained:

We hold that for purposes of Section 22.011 and 22.021, the ‘criminal episode’ commences when the attacker in any way restricts the victim’s freedom of movement and it ends with the final release or escape of the victim from the attacker’s control. We further hold that the use or exhibition of a weapon *at any time* during this period will elevate the crime to an aggravated status.

Burns, 728 S.W.2d at 116.

Burns did not consider the jury charge. The Eastland court of appeals, however, has held that a trial judge did not err in refusing to instruct the jury on *Burns*’s definition of criminal episode. *Dodgen v. State*, 924 S.W.2d 216 (Tex. App.—Eastland 1996, pet. ref’d).

CPJC 84.18 Instruction—Aggravated Sexual Assault of Child between Fourteen and Seventeen

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of aggravated sexual assault of a child. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally or knowingly caused the penetration of the female sexual organ of [name] by placing his sexual organ in the female sexual organ of [name], a child then under seventeen years of age, and [insert specific aggravating factor, e.g., in the same criminal episode caused serious bodily injury to [name]].*].

Relevant Statutes

A person commits an offense if the person intentionally or knowingly causes the penetration of the sexual organ of a child younger than seventeen years of age and [*insert specific aggravating factor, e.g., causes serious bodily injury in the course of the same criminal episode.*].

To prove that the defendant is guilty of aggravated sexual assault of a child, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant intentionally or knowingly caused the penetration of the sexual organ of another person by any means; and
2. the other person was at the time a child younger than seventeen years of age; and

[Select one or more of the following.]

3. the defendant caused serious bodily injury to [the victim/another person] during the same criminal episode.

[or]

3. the defendant attempted to cause the death of [the victim/another person] during the same criminal episode.

[or]

3. the defendant by acts or words placed the victim in fear that death, serious bodily injury, or kidnapping would be imminently inflicted on any person.

[or]

3. the defendant, by words or acts occurring in the presence of the victim, threatened to cause the death, serious bodily injury, or kidnapping of any person.

[or]

3. the defendant used or exhibited a deadly weapon in the course of the same criminal episode.

[or]

3. the defendant acted in concert with another person who, during the course of the same criminal episode, committed sexual assault of the same victim.

[or]

3. the defendant administered or provided flunitrazepam to the victim of the offense with the intent of facilitating the commission of the offense.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of aggravated sexual assault of a child.

Definitions

Intentionally Causing Penetration

A person intentionally causes the penetration of the sexual organ of another person by his sexual organ if the person has the conscious objective or desire to cause that penetration.

Knowingly Causing Penetration

A person knowingly causes the penetration of the sexual organ of another person by his sexual organ if the person is aware that his conduct is reasonably certain to cause that penetration.

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Serious Bodily Injury

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

[Select one of the following.]

On or about

The indictment alleges that the offense was committed on or about *[date]*. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed before *[date of indictment]*, the date the indictment was filed.

[or, if raised by the evidence]

On or about

The indictment alleges that the offense was committed on or about *[date]*. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed after *[date of defendant's seventeenth birthday]*, the date of the defendant's seventeenth birthday, and before *[date of indictment]*, the date the indictment was filed.

[Include if raised by the evidence and requested by the defense.]

Evidence of Wrongful Acts Defendant Possibly Committed

During the trial, you heard evidence that the defendant may have committed wrongful acts against *[name]* not charged in the indictment. *[If requested, include description of specific acts.]* The state offered the evidence to show the state of mind of the defendant and the child *[and/or]* the previous and subsequent relationship between the defendant and the child. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit the wrongful act against *[name]*. Those of you who believe the defendant did the wrongful act may consider it.

Even if you do find that the defendant committed a wrongful act, you may consider this evidence only for the limited purpose[s] described above. You may not consider this evidence to prove that the defendant is a bad person and for this reason was likely to commit the charged offense. In other words, you should consider this evidence only for the specific, limited purpose[s] described above. To consider this evidence for any other purpose would be improper.

[Include if raised by the evidence and requested by the defense.]

Evidence of Another Offense Defendant Possibly Committed

During the trial, you heard evidence that the defendant may have committed [an offense/offenses] [against *[name of extraneous victim]*]/other than the one he is currently accused of in the indictment]. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit [the offense[s] against *[name of extraneous victim]*]/the other offense[s]]. Those of you who believe the defendant committed [that offense/those offenses] may consider it.

You may consider this evidence for any bearing this evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant. Even if you consider it, however, the defendant is not on trial for any offenses not alleged in the indictment. You must determine if the state proved all the elements for the offense alleged in the indictment.

[Include if raised by the evidence and requested by the defense.]

State's Election of a Particular Incident

The state has offered evidence of more than one incident to prove aggravated sexual assault of a child as alleged in the indictment. The state is required to choose one of those incidents for you to consider in deciding whether it has met its burden of proof on that particular occasion. The incident that the state has chosen is [*insert specific incident, e.g., the first act of sexual intercourse that [name] testified that she remembered*]. This is the only incident for which the defendant is on trial [in this case/in count *[number]*]. You are to confine your deliberations to deciding whether the defendant is guilty or not guilty of aggravated sexual assault of a child on that particular occasion. You cannot find the defendant guilty of aggravated sexual assault of a child based on an occurrence at any other time or place other than the incident that the state has chosen.

Also, you may not consider evidence of any other incident for any purpose unless you find, beyond a reasonable doubt, that such incident occurred. Even then, you may consider it only for the specific, limited purpose of determining [*insert limited purpose, e.g., the defendant's intent*].

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], intentionally or knowingly caused the penetration of the sexual organ of [*name*] by [*insert specific allegations, e.g., placing his sexual organ in the female sexual organ of [name]*]; and
2. [*name*] was at the time a child younger than seventeen years of age; and
3. [*insert appropriate third element from Texas Penal Code section 22.021(a)(2), e.g., the defendant caused serious bodily injury to [name] during the course of the same criminal episode*].

[Select one of the following. Choose the second option if incident unanimity has been raised by the evidence and there has been no request for election.]

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must [find the defendant “guilty”/proceed to consider whether the defense of medical care applies].

[or]

The state has presented evidence of more than one incident to prove aggravated sexual assault of a child as alleged [in the indictment/in count [*number*]]. To reach a guilty verdict [in this case/in count [*number*]], you must all agree that the state has proved elements 1, 2, and 3 listed above, and you must also all agree that these elements occurred in the same incident. While it is permissible for you all to agree on more than one incident, to reach a guilty verdict in the

case, you must all agree that these elements occurred in the same incident or incidents.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, the three elements listed above, and you all agree on the same incident or incidents when these elements occurred, you must [find the defendant “guilty”/proceed to consider whether the defense of medical care applies].

*[Insert defense if raised by the evidence; see CPJC 84.21. Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—
General, Evidentiary & Ancillary Instructions.]*

COMMENT

Aggravated sexual assault is prohibited by and defined in Tex. Penal Code § 22.021. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “serious bodily injury” is from Tex. Penal Code § 1.07(a)(46).

CPJC 84.19 Instruction—Aggravated Sexual Assault of Child under Fourteen

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of aggravated sexual assault of a child. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally or knowingly caused the penetration of the female sexual organ of [name] by placing his sexual organ in the female sexual organ of [name], a child then under fourteen years of age*] [*insert aggravating factor if alleged for twenty-five-year minimum sentence, e.g., and in the same criminal episode caused serious bodily injury to [name]*].

Relevant Statutes

A person commits an offense if the person intentionally or knowingly causes the penetration of the sexual organ of a child younger than fourteen years of age.

To prove that the defendant is guilty of aggravated sexual assault of a child, the state must prove, beyond a reasonable doubt, [two/three] elements. The elements are that—

1. the defendant intentionally or knowingly caused the penetration of the sexual organ of another person by any means; and
2. the other person was at the time a child younger than fourteen years of age [; and/.]

[Include one or more of the following from Texas Penal Code section 22.021(a)(2) if pled.]

3. the defendant caused serious bodily injury to [the victim/another person] during the same criminal episode.

[or]

3. the defendant attempted to cause the death of [the victim/another person] during the same criminal episode.

[or]

3. the defendant by acts or words placed the victim in fear that death, serious bodily injury, or kidnapping would be imminently inflicted on any person.

[or]

3. the defendant, by words or acts occurring in the presence of the victim, threatened to cause the death, serious bodily injury, or kidnapping of any person.

[or]

3. the defendant used or exhibited a deadly weapon in the course of the same criminal episode.

[or]

3. the defendant acted in concert with another person who, during the course of the same criminal episode, committed sexual assault of the same victim.

[or]

3. the defendant administered or provided flunitrazepam to the victim of the offense with the intent of facilitating the commission of the offense.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of aggravated sexual assault of a child.

Definitions

Intentionally Causing Penetration

A person intentionally causes the penetration of the sexual organ of another person by his sexual organ if the person has the conscious objective or desire to cause that penetration.

Knowingly Causing Penetration

A person knowingly causes the penetration of the sexual organ of another person by his sexual organ if the person is aware that his conduct is reasonably certain to cause that penetration.

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Serious Bodily Injury

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

[Select one of the following.]

On or about

The indictment alleges that the offense was committed on or about *[date]*. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed before *[date of indictment]*, the date the indictment was filed.

[or, if raised by the evidence]

On or about

The indictment alleges that the offense was committed on or about *[date]*. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed after *[date of defendant's seventeenth birthday]*, the date of the defendant's seventeenth birthday, and before *[date of indictment]*, the date the indictment was filed.

[Include if raised by the evidence and requested by the defense.]

Evidence of Wrongful Acts Defendant Possibly Committed

During the trial, you heard evidence that the defendant may have committed wrongful acts against *[name]* not charged in the indictment. *[If requested, include description of specific acts.]* The state offered the evidence to show the state of mind of the defendant and the child *[and/or]* the previous and subsequent relationship between the defendant and the child. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit the wrongful act against *[name]*. Those of you who believe the defendant did the wrongful act may consider it.

Even if you do find that the defendant committed a wrongful act, you may consider this evidence only for the limited purpose[s] described above. You may not consider this evidence to prove that the defendant is a bad person and for this reason was likely to commit the charged offense. In other words, you should consider this evidence only for the specific, limited purpose[s] described above. To consider this evidence for any other purpose would be improper.

[Include if raised by the evidence and requested by the defense.]

Evidence of Another Offense Defendant Possibly Committed

During the trial, you heard evidence that the defendant may have committed [an offense/offenses] [against *[name of extraneous victim]*/other than the one he is currently accused of in the indictment]. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit [the offense[s] against *[name of extraneous victim]*/the other offense[s]]. Those of you who believe the defendant committed [that offense/those offenses] may consider it.

You may consider this evidence for any bearing this evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant. Even if you consider it, however, the defendant is not on trial for any offenses not alleged in the indictment. You must determine if the state proved all the elements for the offense alleged in the indictment.

[Include if raised by the evidence and requested by the defense.]

State's Election of a Particular Incident

The state has offered evidence of more than one incident to prove aggravated sexual assault of a child as alleged in the indictment. The state is required to choose one of those incidents for you to consider in deciding whether it has met its burden of proof on that particular occasion. The incident that the state has chosen is *[insert specific incident, e.g., the first act of sexual intercourse that [name] testified that she remembered]*. This is the only incident for which the defendant is on trial [in this case/in count *[number]*]. You are to confine your deliberations to deciding whether the defendant is guilty or not guilty of aggravated sexual assault of a child on that particular occasion. You cannot find the defendant guilty of aggravated sexual assault of a child based on an occurrence at any other time or place other than the incident that the state has chosen.

Also, you may not consider evidence of any other incident for any purpose unless you find, beyond a reasonable doubt, that such incident occurred. Even then, you may consider it only for the specific, limited purpose of determining [*insert limited purpose, e.g., the defendant's intent*].

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, [two/three] elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], intentionally or knowingly caused the penetration of the sexual organ of [*name*] by [*insert specific allegations, e.g., placing his sexual organ in the female sexual organ of [name]*]; and
2. [*name*] was at the time a child younger than fourteen years of age [; and/.

[Include if pled.]

3. [*insert appropriate third element from Texas Penal Code section 22.021(a)(2), e.g., the defendant caused serious bodily injury to [name] during the course of the same criminal episode*].

[Select one of the following. Choose the second option if incident unanimity has been raised by the evidence and there has been no request for election.]

You must all agree on elements [1 and 2/1, 2, and 3] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, [one or both of elements 1 and 2/one or more of elements 1, 2, and 3] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, [both of the two elements/each of the three elements] listed above, you must [find the defendant “guilty”/proceed to consider whether the defense of medical care applies].

[or]

The state has presented evidence of more than one incident to prove aggravated sexual assault of a child as alleged [in the indictment/in count [*number*]]. To reach a guilty verdict [in this case/in count [*number*]], you must all agree that the state has proved elements [1 and 2/1, 2, and 3] listed above, and you

must also all agree that these elements occurred in the same incident. While it is permissible for you all to agree on more than one incident, to reach a guilty verdict in the case, you must all agree that these elements occurred in the same incident or incidents.

If you all agree the state has failed to prove, beyond a reasonable doubt, [one or both of elements 1 and 2/one or more of elements 1, 2, and 3] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, [both of the two elements/each of the three elements] listed above, and you all agree on the same incident or incidents when these elements occurred, you must [find the defendant “guilty”/proceed to consider whether the defense of medical care applies].

[Insert defense if raised by the evidence; see CPJC 84.21. Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges— General, Evidentiary & Ancillary Instructions.]

COMMENT

Aggravated sexual assault is prohibited by and defined in Tex. Penal Code § 22.021. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “serious bodily injury” is from Tex. Penal Code § 1.07(a)(46).

CPJC 84.20 Instruction—Aggravated Sexual Assault of Child under Six**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of aggravated sexual assault of a child. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally or knowingly caused the female sexual organ of [name], a child then under six years of age, to contact the defendant's sexual organ*].

Relevant Statutes

A person commits an offense if the person intentionally or knowingly causes the sexual organ of a child younger than six years of age to contact the sexual organ of another person, including himself.

To prove that the defendant is guilty of aggravated sexual assault of a child, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant intentionally or knowingly caused his sexual organ to contact the sexual organ of another person; and
2. the other person was, at the time, a child younger than six years of age.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of aggravated sexual assault of a child.

Definitions*Intentionally Causing Contact*

A person intentionally causes his sexual organ to contact the sexual organ of another person if it is his conscious objective or desire to cause that contact.

Knowingly Causing Contact

A person knowingly causes his sexual organ to contact the sexual organ of another person if he is aware that his conduct is reasonably certain to cause that contact.

[Select one of the following.]

On or about

The indictment alleges that the offense was committed on or about *[date]*. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed before *[date of indictment]*, the date the indictment was filed.

[or, if raised by the evidence]

On or about

The indictment alleges that the offense was committed on or about *[date]*. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed after *[date of defendant's seventeenth birthday]*, the date of the defendant's seventeenth birthday, and before *[date of indictment]*, the date the indictment was filed.

[Include if raised by the evidence and requested by the defense.]

Evidence of Wrongful Acts Defendant Possibly Committed

During the trial, you heard evidence that the defendant may have committed wrongful acts against *[name]* not charged in the indictment. *[If requested, include description of specific acts.]* The state offered the evidence to show the state of mind of the defendant and the child *[and/or]* the previous and subsequent relationship between the defendant and the child. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit the wrongful act against *[name]*. Those of you who believe the defendant did the wrongful act may consider it.

Even if you do find that the defendant committed a wrongful act, you may consider this evidence only for the limited purpose[s] described above. You may not consider this evidence to prove that the defendant is a bad person and for this reason was likely to commit the charged offense. In other words, you should consider this evidence only for the specific, limited purpose[s] described above. To consider this evidence for any other purpose would be improper.

[Include if raised by the evidence and requested by the defense.]

Evidence of Another Offense Defendant Possibly Committed

During the trial, you heard evidence that the defendant may have committed [an offense/offenses] [against [*name of extraneous victim*]/other than the one he is currently accused of in the indictment]. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit [the offense[s] against [*name of extraneous victim*]/the other offense[s]]. Those of you who believe the defendant committed [that offense/those offenses] may consider it.

You may consider this evidence for any bearing this evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant. Even if you consider it, however, the defendant is not on trial for any offenses not alleged in the indictment. You must determine if the state proved all the elements for the offense alleged in the indictment.

[Include if raised by the evidence and requested by the defense.]

State's Election of a Particular Incident

The state has offered evidence of more than one incident to prove aggravated sexual assault of a child as alleged in the indictment. The state is required to choose one of those incidents for you to consider in deciding whether it has met its burden of proof on that particular occasion. The incident that the state has chosen is [*insert specific incident, e.g., the first time that [name] testified that she remembered the defendant's sexual organ contacting her sexual organ*]. This is the only incident for which the defendant is on trial [in this case/in count [*number*]]. You are to confine your deliberations to deciding whether the defendant is guilty or not guilty of aggravated sexual assault of a child on that particular occasion. You cannot find the defendant guilty of aggravated sexual assault of a child based on an occurrence at any other time or place other than the incident that the state has chosen.

Also, you may not consider evidence of any other incident for any purpose unless you find, beyond a reasonable doubt, that such incident occurred. Even then, you may consider it only for the specific, limited purpose of determining [*insert limited purpose, e.g., the defendant's intent*].

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly caused his sexual organ to contact the sexual organ of [name]; and
2. [name] was at the time a child younger than six years of age.

[Select one of the following. Choose the second option if incident unanimity has been raised by the evidence and there has been no request for election.]

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must [find the defendant “guilty”/proceed to consider whether the defense of medical care applies].

[or]

The state has presented evidence of more than one incident to prove sexual assault as alleged [in the indictment/in count [number]]. To reach a guilty verdict [in this case/in count [number]], you must all agree that the state has proved elements 1 and 2 listed above, and you must also all agree that these elements occurred in the same incident. While it is permissible for you all to agree on more than one incident, to reach a guilty verdict in the case, you must all agree that these elements occurred in the same incident or incidents.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, and you all agree on the same incident or incidents when these elements occurred, you must [find the defendant “guilty”/proceed to consider whether the defense of medical care applies].

[Insert defense if raised by the evidence; see CPJC 84.21. Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Aggravated sexual assault is prohibited by and defined in Tex. Penal Code § 22.021. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

Another form of aggravated sexual assault of a child is committed when the defendant causes contact between a child's sexual organ and the mouth, anus, or sexual organ of someone other than the defendant. See Tex. Penal Code § 22.021(a)(1)(B)(iii). In that event, the following elements can be substituted in the relevant statutes unit of the instruction:

To prove that the defendant is guilty of aggravated sexual assault of a child, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant intentionally or knowingly caused contact between the sexual organs of two other people; and
2. one of those people was, at the time, a child younger than six years of age.

Similarly, the definitions of the culpable mental states would be as follows:

Intentionally Causing Contact

A person intentionally causes contact between the sexual organs of two other people if it is his conscious objective or desire to cause that contact.

Knowingly Causing Contact

A person knowingly causes contact between the sexual organs of two other people if he is aware that his conduct is reasonably certain to cause that contact.

CPJC 84.21 Instruction—Aggravated Sexual Assault of Child—Medical Care Defense

[Insert instructions for underlying offense.]

Medical Care Defense

You have heard evidence that, when the defendant [*insert specific conduct, e.g., penetrated [name]’s sexual organ with his hand*], he was providing medical care for [*name*].

Relevant Statutes

A person’s conduct that would otherwise constitute the offense of aggravated sexual assault of a child is not an offense if—

1. the conduct consisted of medical care;
2. the medical care was for the child; and
3. the conduct did not include any contact between the child’s anus or sexual organ and the defendant’s or another person’s mouth, anus, or sexual organ.

Burden of Proof

The defendant is not required to prove the medical care defense. Rather, the state must prove, beyond a reasonable doubt, that the medical care defense does not apply to the defendant’s conduct.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant’s conduct was not justified by the medical care defense.

To decide this issue, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the conduct was not medical care;
2. the medical care was not for the child; or
3. the conduct included contact between the child’s anus or sexual organ and the defendant’s or another person’s mouth, anus, or sexual organ.

You must all agree that the state has proved, beyond a reasonable doubt, at least one of the three elements listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, all three elements listed above, you must find the defendant “not guilty.”

If you all agree that the state has proved, beyond a reasonable doubt, each of the elements of the offense of aggravated sexual assault of a child, and you all agree the state has proved, beyond a reasonable doubt, at least one of the three elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

The defense of medical care to aggravated sexual assault is provided for in Tex. Penal Code § 22.021(d).

The doctrine of confession and avoidance applies to the defense of medical care. To be entitled to jury submission of the defense, the defendant must admit to every element of the offense, including both the act and the culpable mental state, then offer additional facts raising the defense as a justification for that conduct. *Cornet v. State*, 417 S.W.3d 446, 451 (Tex. Crim. App. 2013).

A trial court should not exclude the defense simply because the defendant is not a health-care professional or lacks any medical training. *Cornet v. State*, 359 S.W.3d 217, 222 (Tex. Crim. App. 2012).



CHAPTER 85 ASSAULTIVE OFFENSES

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I. Assault

CPJC 85.1 Instruction—Assault by Causing Bodily Injury

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of assault. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally, knowingly, or recklessly caused bodily injury to [name] by striking [name] with a stick, slapping him with his hand, or kicking him with his foot*].

Relevant Statutes

A person commits an offense if the person intentionally, knowingly, or recklessly causes bodily injury to another.

To prove that the defendant is guilty of assault, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant caused bodily injury to another; and
2. the defendant—
 - a. intended to cause the bodily injury;
 - b. had knowledge that he would cause the bodily injury; or
 - c. was reckless about whether he would cause the bodily injury.

[Include the following if raised by the evidence.]

It does not matter that the other person allegedly injured was the defendant's spouse.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of assault.

Definitions

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Intentionally Causing Bodily Injury

A person intentionally causes bodily injury to another if it is the person's conscious objective or desire to cause the bodily injury to another.

Knowingly Causing Bodily Injury

A person knowingly causes bodily injury to another if the person is aware that the person's conduct is reasonably certain to cause the bodily injury to another.

[Include the following if recklessness is pleaded.]

Recklessly Causing Bodily Injury

A person recklessly causes bodily injury to another if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person's action will cause bodily injury to another. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], caused bodily injury to [name] by [insert specific allegations, e.g.,
 - a. striking [name] with a stick; or
 - b. slapping [name] with his hand; or
 - c. kicking [name] with his foot]; and
2. the defendant did this either—
 - a. intending to cause the injury to [name]; or
 - b. knowing that the injury to [name] would be caused; or
 - c. with recklessness about whether the injury to [name] would be caused.

You must all agree on elements 1 and 2 listed above [include if applicable: , but you do not have to agree on the method of causing bodily injury listed in elements 1.a, 1.b, and 1.c above].

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Assault by causing bodily injury is prohibited by and defined in Tex. Penal Code § 22.01(a)(1). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8).

Jury Unanimity in Assault Cases. In *Landrian v. State*, 268 S.W.3d 532 (Tex. Crim. App. 2008), the court of criminal appeals addressed jury unanimity in some assault cases. Unanimity was not required, *Landrian* held, when a jury in an aggravated assault case was told it could convict on proof that either—

1. the defendant caused bodily injury to the victim by using a deadly weapon (a bottle); or
2. the defendant caused serious bodily injury to the victim by throwing a bottle in the victim’s direction.

Both theories described a single crime—causing bodily injury to the victim by an act—and differed only with regard to aggravating matters, i.e., using a deadly weapon or causing bodily injury that is serious. Unanimity is not required regarding such aggravating matters. *Landrian*, 268 S.W.3d at 538–39.

The analysis suggested that unanimity would be required if the jury were permitted to convict on more than one of the three alternatives set out in Texas Penal Code section 22.02(a)—causing bodily injury, threatening bodily injury, or causing offensive physical contact. *Landrian*, 268 S.W.3d at 540.

In *Landrian*, some witnesses testified that Landrian struck the victim with a beer bottle. Apparently, the state did not rely on the possibility that this proved aggravated assault under the first alternative. Rather, the state relied on proof of a single “act” by the defendant consisting of throwing a beer bottle. It offered that this act could give rise to aggravated assault either because the bottle (1) was a deadly weapon and was used to cause bodily injury or (2) was used to cause bodily injury that was serious.

Landrian may not apply, then, and unanimity may be required if the alternative theories submitted to the jury rely on different though related actions by the defendant,

e.g., “cracking” the victim on his head with a beer bottle or throwing a beer bottle in the victim’s direction.

Culpable Mental State. Assault by causing bodily injury is clearly a “result type” offense, and the culpable mental state must apply to the required result—the occurrence of bodily injury. Must the culpable mental state also apply to the conduct—for example, striking with a stick? The above instruction assumes it does not apply. The statute defining the crime does not even mention the conduct, and the need for some conduct is created only by implication and by Penal Code section 6.01.

It is very unlikely that a defendant would be proved to have had the intent to cause the result of injury but the facts raise some question whether the defendant intended the conduct that caused the injury.

Injury to Spouse. The statute awkwardly defines the offense as causing injury “to another, including the person’s spouse. Tex. Penal Code § 22.02(a)(1). Rather than complicating the definition with this additional phrase, the instruction offers a specific statement that would effectively implement what the legislature must have intended. This statement may be included if the evidence raises the possibility that the injured victim was the defendant’s spouse. It should not be included in other situations.

CPJC 85.2 Instruction—Assault by Threat**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of assault. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally or knowingly threatened [name] with imminent bodily injury*].

Relevant Statutes

A person commits an offense if the person intentionally or knowingly threatens another with imminent bodily injury.

To prove that the defendant is guilty of assault, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant threatened another with imminent bodily injury; and
2. the defendant did this intentionally or knowingly.

[Include the following if raised by the evidence.]

It does not matter that the other person allegedly threatened was the defendant's spouse.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of assault.

Definitions*Bodily Injury*

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Intentionally Threaten Another with Imminent Bodily Injury

A person intentionally threatens another with imminent bodily injury if it is the person's conscious objective or desire to cause the other person to fear imminent bodily injury.

Knowingly Threaten Another with Imminent Bodily Injury

A person knowingly threatens another with imminent bodily injury if the person is aware that the person's conduct is reasonably certain to cause the other person to fear imminent bodily injury.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], threatened [name] with imminent bodily injury; and
2. the defendant did this intentionally or knowingly.

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Assault by threat is prohibited by and defined in Tex. Penal Code § 22.01(a)(2). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8).

Definition of “Imminent.” Texas criminal law provides no definition of “imminent,” and none is included in the instruction.

Threat—Various Uses in Penal Code. The term *threat* is used in a number of other offenses in addition to assault and aggravated assault. When defining *threat* in instructions for other offenses, this should be kept in mind. For instance, the word *threat* is used in defining disorderly conduct (Tex. Penal Code § 42.01(a)(4)), robbery (Tex. Penal Code § 29.02(a)(2)), sexual assault (Tex. Penal Code § 22.011(b)(2)), theft (Tex. Penal Code § 1.07(a)(9)), obstruction or retaliation (Tex. Penal Code § 36.06(a)), harassment (Tex. Penal Code § 42.07(a)(2)), and stalking (Tex. Penal Code § 42.072(a)).

Threat as Assault—Generally. Texas law remains unclear about certain key aspects of the crime of assault by threat.

As the court of criminal appeals pointed out in *Schmidt v. State*, 232 S.W.3d 66, 67–69 (Tex. Crim. App. 2007) (discussing the meaning of threat in the offense of retaliation), Texas criminal law leaves somewhat unclear what constitutes threatening as required for this type of assault. See *Schmidt*, 232 S.W.3d at 68 (“We do not reach the issue, left open by our opinion in [*Olivas v. State*, 203 S.W.3d 341, 349 (Tex. Crim. App. 2006)], of whether or not a victim must perceive the threat”). See also *Dobbins v. State*, 228 S.W.3d 761, 766 n.6 (Tex. App.—Houston [14th Dist.] 2007, pet. ref’d, untimely filed) (noting that *Olivas* suggests that the ‘complainant need not have perceived the threat in order for an offense to have occurred’).

As *Schmidt* and *Olivas* suggest, the requirement that the defendant be proved to have “threaten[ed] another” is so unclear that, as applied to some sets of facts, it may be unconstitutionally vague.

This ambiguity raises at least four questions regarding the meaning of this type of assault:

1. Must the victim have perceived the threat?
2. Must the victim have been put in fear of imminent bodily injury?
3. Must the defendant have intended the victim to be put in fear of imminent bodily injury or otherwise have a culpable mental state concerning that consequence?
4. Must the defendant’s conduct meet some ‘objective’ requirement? Specifically, must the defendant have engaged in verbal or physical actions that would have created a fear of imminent bodily injury in a reasonable person under the circumstances?

In *Olivas*, the court of criminal appeals held that the proof in a prosecution for assault by using a firearm, if it required the victim to perceive the threat, did not require that the victim perceive the exact threat communicated by the defendant. *Olivas*, 203 S.W.3d at 350–51. Thus the proof was sufficient when the defendant threatened the victim by shooting at her with a firearm but the victim perceived that the defendant was threatening her by throwing rocks at her.

The Waco court of appeals read *Olivas* as establishing that the proof must show that the defendant’s conduct was such as would portend an immediate threat of danger to a person of reasonable sensibilities. *Whiddon v. State*, No. 10-06-00085-CR, 2007 WL 416373, at *3 (Tex. App.—Waco Feb. 7, 2007, no pet.) (not designated for publication). Whether the complainant was actually put in fear is relevant but not necessarily controlling.

The State Bar Committee in its 1970 report recommended that this type of assault be defined as requiring that the accused “intentionally or knowingly cause another to

fear imminent bodily injury.” See State Bar Committee on Revision of the Penal Code, *Texas Penal Code: A Proposed Revision* § 22.01(a)(2) (Final Draft Oct. 1970). The threat terminology used instead by the legislature was apparently first suggested by the Legislative Committee of the Texas District & County Attorneys’ Association.

Most likely, the terminology was intended to change prior law, which had been that a verbal threat alone could not constitute assault.

Almost certainly, the term *threat* was not intended to have the same content as the State Bar Committee’s proposed language. Similarly, the term was quite likely intended to dispense with the need for the prosecution to prove actual putting in fear. It might, however, have been intended to include the culpable mental state required by the State Bar Committee’s suggestion—essentially the intent to put the victim in fear.

A number of Texas courts have construed the statute to require this. The Fort Worth court of appeals stated:

Texas Penal Code section 22.01(a)(2) defines the offense of assault by threat as occurring when a person ‘intentionally or knowingly threatens another with imminent bodily injury.’ Aggravated assault by threat is a nature-of-conduct offense. Accordingly, our focus is not on a victim’s perception of the defendant’s behavior; rather, we look at the acts and culpability of the defendant, that is, whether the defendant intended to cause or knowingly ‘cause[d] in the victim a reasonable apprehension of imminent bodily injury.’

In re S.B., 117 S.W.3d 443, 450 (Tex. App.—Fort Worth 2003, no pet.) (citations omitted).

In *Whiddon*, the Waco court of appeals appeared to assume that assault requires proof that the defendant at least knew his actions would place the complainant in fear of imminent bodily injury. *Whiddon*, 2007 WL 416373, at *2. See also *Black v. State*, No. 2-05-388-CR, 2006 WL 2507325, at *3 (Tex. App.—Fort Worth Aug. 31, 2006, pet. ref’d) (not designated for publication) (“Aggravated assault by threat is a ‘nature of conduct offense’ that can be committed only by knowingly or intentionally causing the victim to reasonably apprehend imminent bodily injury because of a communicated threat.”); *Fitzgerald v. State*, No. 11-04-00250-CR, 2006 WL 246277, at *4 (Tex. App.—Eastland Feb. 2, 2006, no pet.) (not designated for publication) (citations omitted) (“Assault by threat under Section 22.01(a)(2) is a ‘nature-of-conduct’ offense unlike assault under [Penal Code section 22.01(a)(1)] where a defendant actually causes bodily injury. The focus is not on a victim’s perception but upon whether a defendant intentionally or knowingly caused the victim a reasonable apprehension of imminent bodily injury.”).

Some of these statements of what section 22.01(a)(2) requires fail to recognize that although the statute might not require proof that the victim was actually put in fear, it

might demand that the state prove the defendant intended the victim to be put in fear or at least was aware that his conduct was reasonable certain to put the victim in fear.

In any case, if any of the four questions above are answered “yes,” a defendant would seem to have a right to have the jury instructed on this point.

Definitions of “Threat” in Instruction. The members of the Committee differed in opinion on the extent to which the Committee should attempt to define terms if the statutes do not provide clearly applicable definitions. (See CPJC 1.5 in *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*.) Therefore the instructions do not offer a definition of the term *threat*. However, should a particular fact situation make a definition desirable, the Committee offers three possible definitions of threat—actually, of threatening another with bodily injury.

The first defines the offense simply in terms of conduct reasonably likely to produce fear:

Threaten Another with Imminent Bodily Injury

A person threatens another with imminent bodily injury if the person uses words or engages in conduct that individually or in combination would produce a fear of imminent bodily injury in a reasonable person.

The second would add a requirement that the victim experience a fear of imminent bodily injury:

Threaten Another with Imminent Bodily Injury

A person threatens another with imminent bodily injury if the person both—

1. uses words or engages in conduct that individually or in combination would produce a fear of imminent bodily injury in a reasonable person; and
2. causes fear of imminent bodily injury in another person.

The third would define threat in terms of words or conduct indicating an intention without reference to the likely impact:

Threaten Another with Imminent Bodily Injury

A person threatens another with imminent bodily injury if the person uses words or engages in conduct that indicate an intention to cause imminent bodily injury to another person.

Culpable Mental State. Explaining the culpable mental state required for this offense is difficult because of the uncertainty about what constitutes the required

threat. The above instruction's provisions assume that the thrust of the crime is acting with at least knowledge that one's actions will put another in fear.

These definitions may be inadequate, but it is difficult to tell. In one recent case, a court of appeals addressed at length the sufficiency of the evidence to show the defendant intentionally or knowingly threatened the complainant. Yet at no point did the court ever articulate in understandable terms precisely what the proof required. *Dobbins*, 228 S.W.3d at 765.

Texas courts might find persuasive the approach of the U.S. Supreme Court in *Elonis v. United States*, 135 S. Ct. 2001 (2014), construing a federal statute as criminalizing the transmission in interstate commerce "any communication containing any threat to injure the person of another." 18 U.S.C. § 875(c). Although silent concerning any culpable mental state, the Court read one into the statute. It further assumed that either purpose (or "intent") or knowledge would suffice and did not reach whether recklessness would be enough. *Elonis*, 135 S. Ct. at 2013. Thus, it is clear that under the federal statute the prosecution must prove the accused acted at least either "for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Elonis*, 135 S. Ct. at 2012. This means the state must prove that the defendant at least knew that a reasonable person would foresee that the statement would be interpreted by those to whom the statement was communicated as a serious expression of an intent to inflict bodily injury on another.

CPJC 85.3 Instruction—Assault by Offensive Touching**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of assault. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally or knowingly caused physical contact with [name] by touching [name] with the defendant's hand when the defendant knew and should reasonably have believed that [name] would regard the contact as offensive and provocative*].

Relevant Statutes

A person commits an offense if the person intentionally or knowingly causes physical contact with another and the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

To prove that the defendant is guilty of assault, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant caused physical contact with another person; and
2. the defendant did this intentionally or knowingly; and
3. the defendant either—
 - a. knew the other person would regard the contact as offensive or provocative; or
 - b. should reasonably have believed the other person would regard the contact as offensive or provocative.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of assault.

Definitions*Intentionally Causing Physical Contact with Another*

A person intentionally causes physical contact with another person if it is the person's conscious objective or desire to cause such physical contact.

Knowingly Causing Physical Contact with Another

A person knowingly causes physical contact with another person if the person is aware that the person's conduct is reasonably certain to cause such physical contact.

Knowing Contact with Another Will Be Offensive or Provocative

A person knows that another person will regard physical contact as offensive or provocative if the person is aware that the other person is reasonably certain to regard that physical contact as offensive or provocative.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], caused physical contact with [name];
2. the defendant did this intentionally or knowingly; and
3. the defendant either—
 - a. knew [name] would regard this physical contact as offensive or provocative; or
 - b. should reasonably have believed that [name] would regard this physical contact as offensive or provocative.

You must all agree on elements 1, 2, and 3 listed above, but you do not have to agree on the culpable mental state listed in elements 3.a and 3.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Assault by offensive touching is prohibited by and defined in Tex. Penal Code § 22.01(a)(3). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

Definitions. The law provides no definition of “physical contact,” “offensive,” or “provocative.”

Culpable Mental State. This offense seems clearly to require a two-part culpable mental state. One part requires that the causing of physical contact be intentional or knowing. The other involves a culpable mental state concerning the offensiveness of the contact.

Need to Prove Victim Found Contact Offensive or Provocative. Whether the offense requires proof that the victim actually regarded the contact as offensive or provocative is not clear from the statute or the case law.

Victim Spouse of Defendant. Texas Penal Code section 22.01(a)(3), unlike the other portions of section 22.01(a), does not contain language explicitly stating that the victim may be the defendant’s spouse. Certainly this does not mean that there is a ‘spousal exception’ to this type of assault. But by making this language explicit, the instruction goes beyond the statutory language. This would be of particular importance if a jury is instructed on several types of assault. The charge should not contain language suggesting that only the other types of assault lack a “spousal exemption.”

II. Aggravated Assault

CPJC 85.4 Instruction—Aggravated Assault by Causing Serious Bodily Injury

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of aggravated assault. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally, knowingly, or recklessly caused serious bodily injury to [name] by shooting him with a gun.*]

Relevant Statutes

A person commits an offense if the person intentionally, knowingly, or recklessly causes serious bodily injury to another.

To prove that the defendant is guilty of aggravated assault, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant caused serious bodily injury to another; and
2. the defendant did this intentionally, knowingly, or recklessly.

[Include the following if raised by the evidence.]

It does not matter that the other person allegedly injured was the defendant's spouse.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of aggravated assault.

Definitions

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Serious Bodily Injury

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Intentionally Causing Bodily Injury

A person intentionally causes bodily injury to another if it is the person’s conscious objective or desire to cause the bodily injury to another.

Knowingly Causing Bodily Injury

A person knowingly causes bodily injury to another if the person is aware that the person’s conduct is reasonably certain to cause the bodily injury to another.

Recklessly Causing Bodily Injury

A person recklessly causes bodily injury to another if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person’s action will cause bodily injury to another. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], caused serious bodily injury to [name] by [insert specific allegations, e.g., shooting [name] with a gun]; and
2. the defendant did this—
 - a. intending to cause bodily injury; or
 - b. knowing that he would cause bodily injury; or
 - c. with recklessness about whether he would cause bodily injury.

You must all agree on elements 1 and 2 listed above, but you do not have to agree on the culpable mental states listed in elements 2.a, 2.b, and 2.c above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Aggravated assault by causing serious bodily injury is prohibited by and defined in Tex. Penal Code § 22.02(a)(1). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “serious bodily injury” is from Tex. Penal Code § 1.07(a)(46).

Culpable Mental State as Required by Statute. The required culpable mental state for aggravated assault by causing serious bodily injury presents a particular problem for practice. Must the instruction require the state to prove the defendant was at least reckless about whether serious bodily injury would result?

As a theoretical matter, aggravated assault under Texas Penal Code section 21.02 almost certainly requires no culpable mental state beyond that required by simple assault under section 22.01. Section 22.02(a), defining the offense, contains no requirement of a culpable mental state. It does, however, require that the accused have “commit[ted] assault as defined in § 22.01.” Section 22.01(a) requires culpable mental states. An aggravated assault by causing serious bodily injury will usually incorporate assault under section 22.01(a)(1), which requires at least recklessness about whether bodily injury will be caused.

A culpable mental state is probably not created by Penal Code section 6.02(b). That statute applies only if “the definition of an offense does not prescribe a culpable mental state.” Section 22.02(a), by incorporating section 22.01, probably does prescribe a culpable mental state. Consequently, section 6.02(b) does not apply.

This is consistent with what appears to be the general pattern of the Texas Penal Code. Under that pattern, a culpable mental state is often not required regarding an element (such as causing serious bodily injury) that transforms an offense into an aggravated form of that offense.

Robbery by causing bodily injury, for example, requires proof of at least recklessness concerning the causing of that bodily injury. See Tex. Penal Code § 29.02(a)(1). See also CPJC 86.1 in this volume. But aggravated robbery by causing serious bodily

injury, under section 29.03(a)(1), apparently does not require any culpable mental state concerning the seriousness of the bodily injury that the perpetrator must cause. See *Chandler v. State*, 855 S.W.2d 38, 41 (Tex. App.—Fort Worth 1993, no pet.) (“[A]ggravated robbery contains the same minimum culpable mental states as simple robbery.”).

Aggravated sexual assault under Penal Code section 22.021 provides the same results. Section 22.021(a) essentially restates the elements of sexual assault under section 22.011 rather than requiring proof of the commission of sexual assault under section 22.011. But section 22.021(b) then sets out what further must be proved to establish aggravated sexual assault. Those aggravating factors, for the most part, do not contain a culpable mental state. So if sexual assault is aggravated sexual assault under section 22.021(b)(i) because the perpetrator caused serious bodily injury, the state need not show that the causing of this serious bodily injury was intentional, knowing, reckless, or even negligent.

Effect of Pleading Practices. Indictments for aggravated assault by causing serious bodily injury often allege that the defendant “intentionally, knowingly, [or] recklessly caused serious bodily injury.” This is quite likely to be construed as unnecessarily but nevertheless effectively alleging that the defendant must have been at least reckless about not only whether bodily injury would result from his action but also whether that bodily injury would be serious.

In such cases, current law probably requires that the jury be instructed that the pleaded culpable mental state must apply to the seriousness of the injury.

In *Reed v. State*, 117 S.W.3d 260 (Tex. Crim. App. 2003), the aggravated assault indictment alleged that Reed intentionally and knowingly caused bodily injury to the victim and used a deadly weapon during the commission of the assault. The jury charge required proof that the accused intentionally, knowingly, or recklessly caused bodily injury. This was held to be error. The jury charge permitted conviction of “an offense”—recklessly causing bodily injury—that is allowed under the statute but which was not alleged in the indictment. *Reed*, 117 S.W.3d at 263–64. *But see Brown v. State*, No. PD-0701-04, 2005 WL 1398609, at *4 (Tex. Crim. App. June 15, 2005) (per curiam) (not designated for publication) (dismissing review over three dissenters’ objection that the case, “[u]nlike *Reed* raises an unencumbered opportunity to consider whether a lesser culpable mental state must be alleged in the indictment to merit inclusion in the jury charge”).

Reed suggests that if the charging instrument pleads a more rigorous culpable mental state than is required by the statute, the trial judge must instruct the jury in terms of the charging instrument rather than the statute.

An indictment could, of course, allege that the defendant both (1) acted with at least recklessness about whether bodily injury would be caused and (2) in fact caused serious bodily injury. This is apparently seldom or never done under current practice.

Consequently, it is questionable whether a jury charge limiting the state's burden of proof to that imposed by the statutory criminal law will often be used or even be appropriate in actual practice.

The above instruction, as is the case with all instructions, should be modified to correspond to the charging instrument.

**CPJC 85.5 Instruction—Aggravated Assault by Using or Exhibiting
Deadly Weapon in Causing Bodily Injury****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of aggravated assault. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally, knowingly, or recklessly caused bodily injury to [name] and during the commission of this assault used or exhibited a deadly weapon, an automobile, that in the manner of its use and intended use was capable of causing death and serious bodily injury.*]

Relevant Statutes

A person commits an offense if the person intentionally, knowingly, or recklessly causes bodily injury to another and uses or exhibits a deadly weapon during the commission of the assault.

To prove that the defendant is guilty of aggravated assault, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant caused bodily injury to another; and
2. the defendant acted with intent to cause bodily injury, with knowledge that he would cause bodily injury, or with recklessness concerning whether he would cause bodily injury; and
3. the defendant used or exhibited a deadly weapon during the alleged assault.

[Include the following if raised by the evidence.]

It does not matter that the other person allegedly injured was the defendant's spouse.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of aggravated assault.

Definitions

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Intentionally Causing Bodily Injury

A person intentionally causes bodily injury to another if it is the person’s conscious objective or desire to cause the bodily injury to another.

Knowingly Causing Bodily Injury

A person knowingly causes bodily injury to another if the person is aware that the person’s conduct is reasonably certain to cause the bodily injury to another.

Recklessly Causing Bodily Injury

A person recklessly causes bodily injury to another if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person’s action will cause bodily injury to another. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.

Deadly Weapon

“Deadly weapon” means—

1. a firearm; or
2. anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or
3. anything actually used by the defendant in a manner making it capable of causing death or serious bodily injury; or
4. anything that the defendant intended to use in a manner that if so used would make it capable of causing death or serious bodily injury.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], caused bodily injury to [name];
2. the defendant did this—
 - a. intending to cause bodily injury; or
 - b. knowing that he would cause bodily injury; or
 - c. with recklessness about whether he would cause bodily injury; and
3. the defendant, during the alleged assault, used or exhibited a [insert alleged deadly weapon], a deadly weapon.

You must all agree on elements 1, 2, and 3 listed above, but you do not have to agree on the culpable mental states listed in elements 2.a, 2.b, and 2.c above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Aggravated assault by using or exhibiting a deadly weapon is prohibited by and defined in Tex. Penal Code § 22.02(a)(2). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “deadly weapon” is from Tex. Penal Code § 1.07(a)(17).

Introductory Note on Charging Offense. Indictments for this form of felony assault are of at least two types. This means that an instruction correct for some cases may not—because of the pleading—be appropriate for other cases. The above instruction, as is the case with all instructions, should be modified to correspond to the charging instrument.

Charging Instrument with Weapon Allegation. The statute does not require that the deadly weapon have been used to cause the bodily injury that is alleged as another element of the offense. Nevertheless, some indictments do allege that the weapon was so used:

[The defendant] intentionally and knowingly use[d] a deadly weapon, to-wit: a knife that in the manner of its use and intended use was capable of causing death and serious bodily injury and did then and there intentionally and knowingly cause bodily injury to [the victim] by stabbing [her] with said deadly weapon.

Cepeda v. State, No. 04-05-00205-CR, 2006 WL 704439, at *2 (Tex. App.—San Antonio Mar. 22, 2006, no pet.) (not designated for publication).

Other indictments, however, follow the pattern of the statute that the weapon was so used:

[The defendant] intentionally, knowingly, and recklessly cause[d] bodily injury to [the victim] by kicking [the victim] about the head with Defendant's foot, and the said Defendant did then and there use and exhibit a deadly weapon, during the commission of said assault, to-wit: a foot, that in the manner of its use and intended use was capable of causing death and serious bodily injury.

Meza v. State, No. 08-02-00077-CR, 2003 WL 21761705, at *2 (Tex. App.—El Paso July 31, 2003, pet. ref'd) (mem. op., not designated for publication).

Reference to “the Assault” in Instructions. Defendants may, of course, challenge whether the state has proved that an assault occurred. Thus any reference in the instructions to “the assault” may violate the spirit if not the letter of the prohibition against commenting on the evidence.

Use or Exhibition of Deadly Weapon. The court of criminal appeals has explained:

“[U]sed a deadly weapon” during the commission of the offense means that the deadly weapon was employed or utilized in order to achieve its purpose. Whereas “exhibited a deadly weapon” means that the weapon was consciously shown or displayed during the commission of the offense.

Patterson v. State, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989), *reaffirmed by Coleman v. State*, 145 S.W.3d 649, 652–55 (Tex. Crim. App. 2004).

In CPJC 3.7 of *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*, the material on submission of a deadly weapon special issue addresses the possibility that “use” might be defined:

A definition might incorporate the substance of the following:

A person “uses a deadly weapon during the commission of a felony offense or in immediate flight from the commission” if the person in any way employs the deadly weapon to facilitate commission of the felony or escape from its commission. A person’s mere possession of a deadly weapon, if the person intends

this possession to facilitate the felony or escape, may constitute use of that deadly weapon.

The Committee decided, however, not to recommend a definition of either “use” or ‘exhibit’ in the instruction. In most cases, jurors’ common-sense understanding of those terms should suffice to permit their proper application. Further, the case law does not provide clear and complete definitions of them for the exceptional situations in which general understanding might not suffice.

Deadly Weapon. The statutory definition of “deadly weapon” has given the appellate courts considerable difficulty. *E.g. Alexander v. State*, No. 03-07-00711-CR, 2008 WL 2736900 (Tex. App.—Austin July 9, 2008, no pet.) (not designated for publication); *McCain v. State*, 22 S.W.3d 497 (Tex. Crim. App. 2000) (proof that item was deadly weapon need not include proof that defendant intended by using it to cause death or serious bodily injury).

The instruction offers an alternative that attempts to rephrase the statutory provisions in a way that makes them more understandable. For a definition of “deadly weapon” that conforms more closely to the statute, see CPJC 81.10 and CPJC 86.4 in this volume.

“[D]uring the Commission of the Assault.” In *Johnson v. State*, 271 S.W.3d 756, 759 (Tex. App.—Waco 2008, pet. ref’d), the indictment alleged that Johnson caused bodily injury to Genco “by striking [her] with a hand, and the defendant did then and there use or exhibit a deadly weapon, to-wit: a piece of glass, during the commission of said assault.” Johnson argued the evidence showed that his use of the piece of glass occurred only after he had completed the causing of injury by striking. The court agreed with his general statement of the law:

Because the focus of the offense remains on the result and because the statute requires that a deadly weapon be used or exhibited ‘during the commission of the assault, the evidence must show that the defendant used or exhibited the weapon at some point at or before the offense is complete (i.e., at or before the time the complainant sustains bodily injury).

Johnson, 271 S.W.3d at 761. But it found that the evidence showed a second and later blow that also injured the victim, and that during this second blow Johnson used the piece of glass.

III. Injury to Child, Elderly Individual, or Disabled Individual

CPJC 85.6 General Comments on Injury to a Child, Elderly Individual, or Disabled Individual

The issues posed by *Thompson v. State*, 236 S.W.3d 787 (Tex. Crim. App. 2007), concerning transferred intent and mistake of fact are addressed elsewhere in this series. This chapter makes no effort to incorporate any aspect of *Thompson* in the instructions. See chapter 4, “Transferred Intent, in *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions* for a discussion of these issues.

Culpable Mental State. The case law indicates that the explicitly required culpable mental state in Texas Penal Code section 22.04 applies only to the result—the injury to the victim. *E.g. Alvarado v. State*, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985). Under this approach, it would not apply to the conduct by which the evidence shows the defendant caused the injury. This is probably of no practical consequence, since it is very unlikely the evidence would show that a defendant intended injury but not the conduct by which he caused that injury, e.g., striking with his fist.

When the indictment alleges serious bodily injury, must the culpable mental state apply to the seriousness of the injury as well as to its occurrence? The case law does not address this. *Thompson*, 236 S.W.3d 787, and other decisions seem to assume that it does. Certainly the statutory framework suggests this is so, since the statute makes elaborate provision for grading the offenses depending on the injuries inflicted and the culpable mental states with which the defendant acted.

Defenses. Texas Penal Code section 22.04 provides for several defenses and affirmative defenses specific to this offense or, in some situations, specific to this offense as charged in some specific ways:

1. medical care by or under the direction of a physician (defense) (section 22.04(k)(1));
2. emergency medical care (defense) (section 22.04(k)(2));
3. religious treatment (affirmative defense) (section 22.04(l)(1));
4. family violence (affirmative defense) (section 22.04(l)(2));
5. minimal age difference (affirmative defense) (section 22.04(l)(3)); and
6. “notice” defense to failure to act (affirmative defense) (section 22.04(i)).

The defenses of medical care by a physician and emergency medical care are worked into the elements of the offense in the instruction at CPJC 85.7. This seemed the most economical way to provide for them. Both defenses are quite simple; they are both just “defenses” (rather than affirmative defenses), and providing a separate unit

of the instructions for them seemed to be unnecessary. The three affirmative defenses that apply to section 22.04 generally—religious treatment, family violence, and minimal age difference—are provided for separately; see CPJC 85.10 through CPJC 85.12. The affirmative defense of notice applies only to the offense of serious bodily injury to a child by omission when the duty is created by an assumption of care, and therefore that defense is included only in the instruction at CPJC 85.8.

Injury to Elderly or Disabled Individual. The following instructions are written for fact situations involving a child. The instructions may be modified for fact situations covered by Texas Penal Code section 22.04 involving an elderly or disabled individual by substituting the appropriate definitions from the statute.

Offense Involving Institutional Care Facility. The following instructions may be modified for fact situations involving an owner, operator, or employee of an institutional care facility, as governed by Texas Penal Code section 22.04(a-1), by substituting the appropriate definitions from the statute.

CPJC 85.7 Instruction—Serious Bodily Injury to Child by Act**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of injury to a child by act. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally, knowingly, recklessly, or with criminal negligence caused serious bodily injury to [name], a child fourteen years old or younger, by striking [name] with his fist.*]

Relevant Statutes

A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence by an act causes serious bodily injury to a child.

A person intentionally causes serious bodily injury to a child if the person has the conscious objective or desire to cause that serious bodily injury to the child.

A person knowingly causes serious bodily injury to a child if the person is aware that his conduct is reasonably certain to cause that serious bodily injury to the child.

A person recklessly causes serious bodily injury to a child if—

1. there is a substantial and unjustifiable risk that his conduct will cause that serious bodily injury to the child;
2. this risk is of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint; and
3. the person is aware of but consciously disregards that risk.

A person causes serious bodily injury to a child with criminal negligence if—

1. there is a substantial and unjustifiable risk that his conduct will cause that serious bodily injury to the child;
2. this risk is of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint; and

3. the person ought to be aware of that risk.

To prove that the defendant is guilty of injury to a child by act, the state must prove, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant engaged in an act; and
2. the defendant by this act caused bodily injury to another person; and
3. the person injured was a child fourteen years old or younger; and
4. the bodily injury caused was serious bodily injury; and
5. the defendant—
 - a. intended to cause serious bodily injury to the child; or
 - b. knew he would cause serious bodily injury to the child; or
 - c. was reckless about whether he would cause serious bodily injury to the child; or
 - d. was criminally negligent about whether he would cause serious bodily injury to the child.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of injury to a child.

Definitions

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Serious Bodily Injury

“Serious bodily injury” means injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], struck [name] with his fist;
2. the defendant [insert act, e.g., by striking [name] with his fist caused injury to [name]];
3. [name] was a child fourteen years old or younger;
4. the injury caused to [name] was serious bodily injury; and
5. the defendant—
 - a. intended to cause serious bodily injury to [name]; or
 - b. knew he would cause serious bodily injury to [name]; or
 - c. was reckless about whether he would cause serious bodily injury to [name]; or
 - d. was criminally negligent about whether he would cause serious bodily injury to [name].

You must all agree on elements 1 through 5 listed above, but you do not have to agree on the culpable mental states listed in elements 5.a, 5.b, 5.c, and 5.d above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 5 listed above, you must find the defendant “not guilty.”

[Select one of the following.]

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must find the defendant “guilty.”

[or]

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must next consider whether the defense of [reasonable medical care under the direction of a physician/emergency medical care administered in good faith] applies.

[Include one of the following if raised by the evidence. If other defenses are raised by the evidence, include the appropriate instructions; see CPJC 85.10 through CPJC 85.12.]

Reasonable Medical Care

You have heard evidence that, when the defendant committed the act of [*insert act, e.g., striking [name] with his fist*], he believed that his conduct was reasonable medical care occurring under the direction of or by a licensed physician.

Relevant Statutes

A person's conduct that would otherwise constitute the crime of injury to a child is not a criminal offense if the act consisted of reasonable medical care occurring under the direction of or by a licensed physician.

Burden of Proof

The defendant is not required to prove that the defense of reasonable medical care applies to this case. Rather, the state must prove, beyond a reasonable doubt, that the defendant's act was not reasonable medical care occurring under the direction of or by a licensed physician.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's act was not reasonable medical care occurring under the direction of or by a licensed physician.

To decide the issue of reasonable medical care, you must decide whether the state has proved, beyond a reasonable doubt, that the act of [*insert act, e.g., striking with the fist*] was not reasonable medical care occurring under the direction of or by a licensed physician.

[*or*]

Emergency Medical Care

You have heard evidence that, when the defendant committed the act of [*insert act, e.g., striking [name] with his fist*], he believed that his conduct was emergency medical care administered in good faith and with reasonable care by a person not licensed in the healing arts.

Relevant Statutes

A person's conduct that would otherwise constitute the crime of injury to a child is not a criminal offense if the act consisted of emergency medical care administered in good faith and with reasonable care by a person not licensed in the healing arts.

Burden of Proof

The defendant is not required to prove that the defense of emergency medical care applies to this case. Rather, the state must prove, beyond a reasonable doubt, that the defendant's act was not emergency medical care administered in good faith and with reasonable care by a person not licensed in the healing arts.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's act was not emergency medical care administered in good faith and with reasonable care by a person not licensed in the healing arts.

To decide the issue of emergency medical care, you must decide whether the state has proved, beyond a reasonable doubt, that the act of [*insert act, e.g., striking with the fist*] was not emergency medical care administered in good faith and with reasonable care by a person not licensed in the healing arts.

[Continue with the following.]

If you all agree the state has failed to prove, beyond a reasonable doubt, at least one of these matters, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of injury to a child, and you all agree the state has proved, beyond a reasonable doubt, that the defendant did not act to provide [reasonable/emergency] medical care, you must find the defendant "guilty."

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Injury to a child and other offenses are prohibited by and defined in Tex. Penal Code § 22.04. The definitions of culpable mental states are derived from Tex. Penal

Code § 6.03. The definition of ‘bodily injury’ is from Tex. Penal Code § 1.07(a)(8). The definition of ‘serious bodily injury’ is from Tex. Penal Code § 1.07(a)(46).

The defense of medical care by or under the direction of a physician is provided for in Tex. Penal Code § 22.04(k)(1). The defense of emergency medical care is provided for in Tex. Penal Code § 22.04(k)(2).

**CPJC 85.8 Instruction—Serious Bodily Injury to Child by Omission—
Duty Created by Assumption of Care, Custody, or Control
with “Notice” Defense**

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of injury to a child by omission. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., after having assumed care, custody, or control of [name], a child fourteen years old or younger, intentionally, knowingly, or recklessly caused serious bodily injury to [name] by failing to provide medical care to [name]*].

Relevant Statutes

A person commits an offense if the person intentionally, knowingly, or recklessly by omission causes serious bodily injury to a child.

A person’s omission that causes serious bodily injury to a child may constitute an offense only if the person has assumed care, custody, or control of the child. A person assumes care, custody, or control of a child if the person by act, words, or course of conduct acts so as to cause a reasonable person to conclude that the person has accepted responsibility for protection, food, shelter, and medical care for the child.

A person intentionally causes serious bodily injury to a child if the person has the conscious objective or desire to cause that serious bodily injury to the child.

A person knowingly causes serious bodily injury to a child if the person is aware that his conduct is reasonably certain to cause that serious bodily injury to the child.

A person recklessly causes serious bodily injury to a child if—

1. there is a substantial and unjustifiable risk that his conduct will cause that serious bodily injury to the child;
2. this risk is of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person’s standpoint; and

3. the person is aware of but consciously disregards that risk.

To prove that the defendant is guilty of injury to a child by omission, the state must prove, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant—
 - a. assumed care, custody, or control of another person; and
 - b. therefore had a duty to provide medical care to that person; and
 - c. failed to provide such medical care; and
2. the defendant by this failure caused bodily injury to the other person; and
3. the person injured was a child fourteen years old or younger; and
4. the bodily injury caused was serious bodily injury; and
5. the defendant—
 - a. intended to cause serious bodily injury to the child; or
 - b. knew he would cause serious bodily injury to the child; or
 - c. was reckless about whether he would cause serious bodily injury to the child.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of injury to a child.

Definitions

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Serious Bodily Injury

“Serious bodily injury” means injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant—
 - a. assumed care, custody, or control of [name];
 - b. therefore had a duty to provide medical care to [name]; and
 - c. failed to provide such medical care;
2. the defendant, in [county] County, Texas, on or about [date], by this failure to provide medical care caused injury to [name];
3. [name] was a child fourteen years old or younger;
4. the bodily injury caused was serious bodily injury; and
5. the defendant—
 - a. intended to cause serious bodily injury to [name];
 - b. knew he would cause serious bodily injury to [name]; or
 - c. was reckless about whether he would cause serious bodily injury to [name].

You must all agree on elements 1 through 5 listed above, but you do not have to agree on the culpable mental states listed in elements 5.a, 5.b, and 5.c above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 5 listed above, you must find the defendant “not guilty.”

[Select one of the following.]

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must find the defendant “guilty.”

[or]

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must next consider whether the affirmative defense of notice applies.

Notice

You have heard evidence that, before the defendant failed to provide medical care for [name], he gave notice that he would no longer provide care.

Relevant Statutes

A person's conduct that would otherwise constitute the crime of injury to a child by omission is not a criminal offense if—

1. the defendant in person notified the child that the defendant would no longer provide protection, food, shelter, and medical care for the child; and
2. the defendant notified in writing that the defendant would no longer provide protection, food, shelter, and medical care for the child either—
 - a. the parents or person other than the defendant acting in loco parentis to the child; or
 - b. the Department of Family and Protective Services; and
3. the written notice contained the name and address of the defendant, the name and address of the child, the type of care provided by the defendant, and the date the care was discontinued; and
4. this was done before the injury to [name] occurred.

Burden of Proof

The burden is on the defendant to prove, by a preponderance of the evidence, that the affirmative defense of notice applies.

Definitions

Person Acting In Loco Parentis

The term “person acting in loco parentis” means a person acting in the place of a parent.

Preponderance of the Evidence

The term “preponderance of the evidence” means the greater weight and degree of the credible evidence.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved that his conduct was covered by the defense of notice.

To decide the issue, you must determine whether the defendant has proved, by a preponderance of the evidence, four elements. The elements are that—

1. the defendant notified in person [*name*] that the defendant would no longer provide protection, food, shelter, and medical care for [*name*];
2. the defendant notified in writing that the defendant would no longer provide protection, food, shelter, and medical care for [*name*] either—
 - a. the parents or person other than the defendant acting in loco parentis to [*name*]; or
 - b. the Department of Family and Protective Services;
3. the written notice contained the name and address of the defendant, the name and address of [*name*], the type of care provided by the defendant, and the date the care was discontinued; and
4. this was done before the injury to [*name*] occurred.

If you all agree the defendant has proved, by a preponderance of the evidence, all four elements of the affirmative defense of notice listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of injury to a child, and you all agree the defendant has not proved, by a preponderance of the evidence, all four elements of the affirmative defense of notice listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Injury to a child and other offenses are prohibited by and defined in Tex. Penal Code § 22.04. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “serious bodily injury” is from Tex. Penal Code § 1.07(a)(46).

“Notice” Defense. A special defense to this manner of committing the offense of injury to a child is provided in Texas Penal Code section 22.04:

(i) It is an affirmative defense to prosecution under Subsection (b)(2) that before the offense the actor:

- (1) notified in person the child, elderly individual, or disabled individual that he would no longer provide any of the care described by Subsection (d); and
- (2) notified in writing the parents or person other than himself acting in loco parentis to the child, elderly individual, or disabled individual that he would no longer provide any of the care described by Subsection (d); or
- (3) notified in writing the Department of Protective and Regulatory Services [now the Department of Family and Protective Services] that he would no longer provide any of the care set forth in Subsection (d).

(j) Written notification under Subsection (i)(2) or (i)(3) is not effective unless it contains the name and address of the actor, the name and address of the child, elderly individual, or disabled individual, the type of care provided by the actor, and the date the care was discontinued.

Tex. Penal Code § 22.04(i), (j). The instruction includes a provision for use if this defense is raised.

The definition of “in loco parentis” is based on the discussion in *Rey v. State*, 280 S.W.3d 265, 269 (Tex. Crim. App. 2009). The issue in *Rey* concerned the scope of the requirement for ‘custody, care, or control’ in Tex. Penal Code § 22.041 (abandoning or endangering a child) and held that one acting in loco parentis has greater responsibilities than one “who has at least temporary ‘care, custody, or control.’” *Rey*, 280 S.W.3d at 269.

**CPJC 85.9 Instruction—Serious Bodily Injury to Child by Omission—
Duty Created by Parental Relationship****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of injury to a child by omission. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., being a parent of [name], a child fourteen years old or younger, intentionally, knowingly, or recklessly caused serious bodily injury to [name] by failing to provide medical care to [name]*].

Relevant Statutes

A person commits an offense if the person intentionally, knowingly, or recklessly by omission causes serious bodily injury to a child.

A person's omission that causes serious bodily injury to a child may constitute an offense only if the person is the parent of the child and the omission violates a duty the person has as a parent.

The parent of a child has the statutory duty—

1. of care, control, protection, and reasonable discipline of the child; and
2. to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education.

A person intentionally causes serious bodily injury to a child if the person has the conscious objective or desire to cause that serious bodily injury to the child.

A person knowingly causes serious bodily injury to a child if the person is aware that his conduct is reasonably certain to cause that serious bodily injury to the child.

A person recklessly causes serious bodily injury to a child if—

1. there is a substantial and unjustifiable risk that his conduct will cause that serious bodily injury to the child;
2. this risk is of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint; and

3. the person is aware of but consciously disregards that risk.

To prove that the defendant is guilty of injury to a child by omission, the state must prove, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant—
 - a. was the parent of another person; and
 - b. therefore had a duty to provide medical care to that person; and
 - c. failed to provide such medical care; and
2. the defendant by this failure caused bodily injury to the other person; and
3. the person injured was a child fourteen years old or younger; and
4. the bodily injury caused was serious bodily injury; and
5. the defendant—
 - a. intended to cause serious bodily injury to the child; or
 - b. knew he would cause serious bodily injury to the child; or
 - c. was reckless about whether he would cause serious bodily injury to the child.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of injury to a child.

Definitions

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Serious Bodily Injury

“Serious bodily injury” means injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant—
 - a. was the parent of [*name*];
 - b. therefore had a duty to provide medical care to [*name*]; and
 - c. failed to provide such medical care;
2. the defendant, in [*county*] County, Texas, on or about [*date*], by this failure to provide medical care caused bodily injury to [*name*];
3. [*name*] was a child fourteen years old or younger;
4. the bodily injury caused was serious bodily injury; and
5. the defendant—
 - a. intended to cause serious bodily injury to [*name*];
 - b. knew he would cause serious bodily injury to [*name*]; or
 - c. was reckless about whether he would cause serious bodily injury to [*name*].

You must all agree on elements 1 through 5 listed above, but you do not have to agree on the culpable mental states listed in elements 5.a, 5.b, and 5.c above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 5 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Injury to a child and other offenses are prohibited by and defined in Tex. Penal Code § 22.04. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “serious bodily injury” is from Tex. Penal Code § 1.07(a)(46).

CPJC 85.10 Instruction—Injury to Child—Affirmative Defense of Religious Treatment

[Insert instructions for underlying offense.]

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must next consider whether the affirmative defense of religious treatment applies.

Religious Treatment

You have heard evidence that, when the defendant [*insert charged act or omission*], he [acted/failed to act] based on religious treatment.

Relevant Statutes

A person's conduct that would otherwise constitute the crime of injury to a child is not a criminal offense if—

1. the act or omission was based on treatment; and
2. the treatment was in accordance with the tenets and practices of a recognized religious method of healing; and
3. the religious method of healing had a generally accepted record of efficacy.

Burden of Proof

The burden is on the defendant to prove, by a preponderance of the evidence, that the affirmative defense of religious treatment applies.

Definitions*Preponderance of the Evidence*

The term “preponderance of the evidence” means the greater weight and degree of the credible evidence.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved, by a preponderance of the evidence, that his conduct was covered by the affirmative defense of religious treatment.

To decide this issue, you must determine whether the defendant has proved, by a preponderance of the evidence, three elements. The elements are that—

1. the act or omission was based on treatment;
2. the treatment was in accordance with the tenets and practices of a recognized religious method of healing; and
3. the religious method of healing had a generally accepted record of efficacy.

If you all agree the defendant has proved, by a preponderance of the evidence, each of the three elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of injury to a child, and you all agree the defendant has not proved, by a preponderance of the evidence, all three elements of the affirmative defense of religious treatment listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Affirmative Defense—Religious Treatment under Section 22.04(l)(1). Texas Penal Code section 22.04 includes the following affirmative defense:

- (l) It is an affirmative defense to prosecution under this section:
 - (1) that the act or omission was based on treatment in accordance with the tenets and practices of a recognized religious method of healing with a generally accepted record of efficacy[.]

Tex. Penal Code § 22.04(l)(1).

CPJC 85.11 Instruction—Injury to Child—Affirmative Defense of Minimal Age Difference

[Insert instructions for underlying offense.]

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must next consider whether the affirmative defense of minimal age difference applies.

Minimal Age Difference

You have heard evidence that, when the defendant [*insert charged conduct*], he was close in age to the victim.

Relevant Statutes

A person's conduct that would otherwise constitute the crime of injury to a child is not a criminal offense if—

1. the person was not more than three years older than the victim at the time of the offense; and
2. the victim was a child at the time of the offense.

Burden of Proof

The burden is on the defendant to prove, by a preponderance of the evidence, that the affirmative defense of minimal age difference applies.

Definitions*Child*

“Child” means a person fourteen years old or younger.

Preponderance of the Evidence

The term “preponderance of the evidence” means the greater weight and degree of the credible evidence.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved, by a preponder-

ance of the evidence, that his conduct was covered by the affirmative defense of minimal age difference.

To decide this issue, you must determine whether the defendant has proved, by a preponderance of the evidence, two elements. The elements are that—

1. the defendant was not more than three years older than [name], the victim, at the time of the offense; and
2. [name] was a child at the time of the offense.

If you all agree the defendant has proved, by a preponderance of the evidence, both of the two elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of injury to a child, and you all agree the defendant has not proved, by a preponderance of the evidence, both of the two elements of the affirmative defense of minimal age difference listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Affirmative Defense. Texas Penal Code section 22.04 includes the following affirmative defense:

- (1) It is an affirmative defense to prosecution under this section:

- (3) that:

- (A) the actor was not more than three years older than the victim at the time of the offense; and
- (B) the victim was a child at the time of the offense.

Tex. Penal Code § 22.04(1)(3).

The instruction assumes that section 22.04(1)(3)(B)—requiring that the victim be a child—is an element of the affirmative defense. Perhaps it need not be. It may be intended to limit the defense to prosecutions for injury to a child, in which case the victim’s status would have been determined in the finding that the elements of the offense were proved. On the other hand, if the prosecution was for injury to a disabled individual, the defense might apply if the victim was both disabled and a child. In that

situation, having the age of the victim as an element of the offense would serve a purpose.

CPJC 85.12 Instruction—Injury to Child—Affirmative Defense of Family Violence

[Insert instructions for underlying offense.]

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must next consider whether the affirmative defense of family violence applies.

Family Violence

You have heard evidence that, when the defendant failed to [*insert charged omission*], he did not believe that an effort to prevent [*name*] from committing the offense of injury to a child would have an effect.

Relevant Statutes

A person's conduct that would otherwise constitute the crime of injury to a child by omission is not a criminal offense if—

1. the person did not by his own act cause serious bodily injury; serious mental deficiency, impairment, or injury; or bodily injury to the child; and
2. the person was a victim of family violence committed by another who is also charged with an offense against the child under title 5 of the Texas Penal Code; and
3. the person did not reasonably believe at the time of the omission that an effort to prevent the other, also charged with an offense against the child, from committing the offense would have an effect; and
4. there is no evidence that on the date prior to the offense proved in this case the person was aware of an incident of injury to the child and failed to report the incident.

Burden of Proof

The burden is on the defendant to prove, by a preponderance of the evidence, that the affirmative defense of family violence applies.

Definitions

Family Violence

The term “family violence” means an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the family member in fear of imminent physical harm, bodily injury, assault, or sexual assault.

Preponderance of the Evidence

The term “preponderance of the evidence” means the greater weight and degree of the credible evidence.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved, by a preponderance of the evidence, that his conduct was covered by the affirmative defense of family violence.

To decide this issue, you must determine whether the defendant has proved, by a preponderance of the evidence, four elements. The elements are that—

1. the defendant did not cause serious bodily injury; serious mental deficiency, impairment, or injury; or bodily injury;
2. the defendant was a victim of family violence committed by [name], who is also charged with [specify offense charged] against another person, [name];
3. the defendant did not reasonably believe at the time of the omission that an effort to prevent [name] from committing the offense against [name] would have an effect; and
4. there is no evidence that on the date prior to the offense proved in this case the defendant was aware of an incident of injury to [name] and failed to report the incident.

If you all agree the defendant has proved, by a preponderance of the evidence, each of the four elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of injury to a child, and you all agree the defendant has

not proved, by a preponderance of the evidence, each of the four elements of the affirmative defense of family violence listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Affirmative Defense. Texas Penal Code section 22.04(l)(2) provides for an affirmative defense for the situation in which the defendant, who is charged with failing to prevent another from injuring the victim, claims abuse of the defendant by the person who injured the victim by his or her own hand. The provision is as follows:

- (l) It is an affirmative defense to prosecution under this section:
 - (2) for a person charged with an act of omission causing to a child, elderly individual, or disabled individual a condition described by Subsection (a)(1), (2), or (3) that:
 - (A) there is no evidence that, on the date prior to the offense charged, the defendant was aware of an incident of injury to the child, elderly individual, or disabled individual and failed to report the incident; and
 - (B) the person:
 - (i) was a victim of family violence, as that term is defined by Section 71.004, Family Code, committed by a person who is also charged with an offense against the child, elderly individual, or disabled individual under this section or any other section of this title;
 - (ii) did not cause a condition described by Subsection (a)(1), (2), or (3); and
 - (iii) did not reasonably believe at the time of the omission that an effort to prevent the person also charged with an offense against the child, elderly individual, or disabled individual from committing the offense would have an effect[.]

Tex. Penal Code § 22.04(l)(2). The requirement in section 22.04(l)(2)(B)(ii) that the defendant prove he or she “did not cause a condition described by Subsection (a)(1), (2), or (3)” is problematic. Those subsections describe ‘(1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; [and] (3) bodily injury.’ Tex. Penal Code § 22.04(a)(1)–(3). What section 22.04(l)(2)(B)(ii) seems to mean is that the defendant must prove that the injuries—the conditions described by subsections (a)(1), (2), and (3)—were caused by the affirmative actions of the person the defendant claims is his abuser rather than by any affirmative actions (as contrasted with omissions) of the defendant.

The legislature apparently meant to create an affirmative defense for the defendant who failed to intervene to prevent *a family member* from causing the injury when the defendant was the victim of family violence inflicted by *the family member* and did not believe that an effort to prevent *the family member* from causing the harm would have an effect.

Family Violence. The definition of family violence, as required by Tex. Penal Code § 22.04(l)(2)(B), is derived from Tex. Fam. Code § 71.004. This section of the Family Code includes other elements, such as dating violence, that may need to be added to the definition in this instruction if facts concerning the definition are at issue.

CPJC 85.13 Instruction—Endangering Child by Act**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of endangering a child. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally, knowingly, recklessly, or with criminal negligence engaged in conduct that placed [name], a child younger than fifteen years old, in imminent danger of death, bodily injury, or physical or mental impairment, by striking [name] with his hand while [name] was holding [name]*].

Relevant Statutes

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 fifteen years old in imminent danger of death, bodily injury, or physical or mental impairment.

To prove that the defendant is guilty of endangering a child, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant engaged in conduct; and
2. this conduct placed another person in imminent danger of death, bodily injury, or physical or mental impairment; and
3. the defendant acted intentionally, knowingly, recklessly, or with criminal negligence; and
4. the defendant's conduct was not a voluntary delivery of the child to a designated emergency infant care provider.

A person acts intentionally as required by this offense if the person had the conscious objective or desire to engage in the conduct that constitutes the crime.

A person acts knowingly as required by this offense if the person was aware that his conduct was the conduct constituting the crime.

[Include the following if raised by the evidence.]

Presumption of Prohibited Conduct

The law provides for a presumption that you may wish to apply in this case. This presumption can apply only if you find that the state has proved, beyond a reasonable doubt, that the defendant possessed [or in any way introduced into the body of any person] the controlled substance methamphetamine in the presence of the child.

If you find that the state has proved, beyond a reasonable doubt, that the defendant possessed [or in any way introduced into the body of any person] the controlled substance methamphetamine in the presence of the child, then you may infer from this that the defendant engaged in conduct that placed the child in imminent danger of death, bodily injury, or physical or mental impairment. You are not, however, required to infer or find this from the fact that the defendant possessed [or in any way introduced into the body of any person] the controlled substance methamphetamine in the presence of the child.

If you have a reasonable doubt whether the defendant possessed [or in any way introduced into the body of any person] the controlled substance methamphetamine in the presence of the child, the presumption does not arise or apply. In that case, you will not consider this presumption for any purpose.

If you conclude you cannot apply the presumption or you choose not to apply it, you must still consider whether—without reference to the presumption—the state has proved, beyond a reasonable doubt, that the defendant engaged in conduct that placed the child in imminent danger of death, bodily injury, or physical or mental impairment.

In any case, if you apply this presumption and conclude by using this presumption that the state has proved the defendant engaged in conduct that placed the child in imminent danger of death, bodily injury, or physical or mental impairment, you must still find without using this presumption that the state has proved the remaining elements that it must prove. These remaining elements are that (1) the defendant acted intentionally, knowingly, recklessly, or with criminal negligence, and (2) the defendant's conduct was not a voluntary delivery of the child to a designated emergency infant care provider.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of endangering a child.

Definitions*Bodily Injury*

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Serious Bodily Injury

“Serious bodily injury” means injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Designated Emergency Infant Care Provider

“Designated emergency infant care provider” means—

1. an emergency medical services provider;
2. a hospital; or
3. a child-placing agency licensed by the Department of Family and Protective Services that—
 - a. agrees to act as a designated emergency infant care provider; and
 - b. has on staff a person who is licensed as a registered nurse and who will examine and provide emergency medical services to a child taken into possession by the agency.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], [insert specific allegations, e.g., struck [name] with his hand while [name] was holding [name]];
2. this conduct placed [name] in imminent danger of death, bodily injury, or physical or mental impairment;
3. the defendant acted intentionally, knowingly, recklessly, or with criminal negligence; and
4. the defendant’s conduct was not a voluntary delivery of [name] to a designated emergency infant care provider.

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Endangering a child by act is prohibited by and defined in Tex. Penal Code § 22.041(c). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “serious bodily injury” is from Tex. Penal Code § 1.07(a)(46). The definition of “designated emergency infant care provider” is derived from Tex. Fam. Code § 262.301.

Required Culpable Mental State. The major question in drafting an instruction for this section of the Penal Code is whether the required culpable mental states (intentionally, knowingly, recklessly, or with criminal negligence) apply only to the “nature of conduct” element. They may also apply to what is in effect a “result of conduct” element—that the child was in fact exposed to an unreasonable risk of harm.

In *Walker v. State*, 95 S.W.3d 516, 520–21 (Tex. App.—Fort Worth 2002, pet. ref’d), the court of appeals indicated:

The language of section 22.041(c) is unambiguous and expresses a clear legislative intent that a person commits the offense of child endangerment if he intentionally or knowingly ‘engages in conduct’ that places a child in imminent danger of death, bodily injury, or physical or mental impairment. The statute does not require proof that the person intend or know that his conduct places the child in such imminent danger. *Contreras v. State*, 54 S.W.3d 898, 905–06 (Tex. App.—Corpus Christi 2001, no pet.). To interpret the statute in such a manner would require us to give it a meaning its language does not support.¹ We refuse to do this.

1. We recognize that the Austin Court of Appeals has noted in dicta that endangering a child is a ‘result of conduct’ crime. *Millsagle v. State*, 81 S.W.3d 895, 897 n.1 (Tex. App.—Austin 2002, pet. filed). In reaching this

conclusion, however, we believe the court ignored the plain language of the statute and mistakenly relied on *Beggs v. State*, a decision of the court of criminal appeals interpreting a different statute. *Id.* see *Beggs v. State*, 597 S.W.2d 375, 377 (Tex. Crim. App. [Panel Op.] 1980). In *Beggs*, the court of criminal appeals construed the predecessor to section 22.04, the injury to a child statute, in light of the statute's legislative history. 597 S.W.2d at 377. Because section 22.04 and section 22.041(c) are separate and distinct offenses, *Beggs* and its rationale is inapplicable.

In *Teeter v. State*, No. 05-06-00309, 2007 WL 510356, at *5 n.1 (Tex. App.—Dallas Feb. 20, 2007, no pet.) (not designated for publication), the Dallas court of appeals noted that the Fifth Circuit has indicated that the courts of appeals are split on the issue. *Teeter*, however, concluded: “The statute does not require proof that the defendant intentionally, knowingly, recklessly, or with criminal negligence desires to place a child in imminent danger and creates that danger by his conduct.” *Teeter*, 2007 WL 510356, at *5.

Under the approach of *Walker* and *Teeter*, the offense is a ‘nature of conduct’ offense and the required culpable mental state applies to the conduct element—the unspecified act or omission that places the child in danger.

The problem with the analysis accepted in *Walker* and *Teeter* is that it may not be provided for in Penal Code section 6.03, which defines the ‘culpable mental states.’”

Under *Walker* and *Teeter*, any of the four culpable mental states distinguished in section 6.03 can apply to the “nature of conduct” element of section 22.041(c). Subsections 6.03(a) and 6.03(b) make provision for intentionally and knowingly to apply to “the nature of the conduct.” Subsections 6.03(c) and 6.03(d), in contrast, make no such provision but set out definitions that assume those culpable mental states apply only to “circumstances surrounding [the] conduct” or “the result of [the] conduct.”

There is an argument that the legislature could not have intended that a crime be interpreted in a manner that requires a definition for which no provision is made in section 6.03.

If section 22.041(c) is construed to mean that the culpable mental states apply only to the “result of conduct” element—that the child be placed in danger—then section 6.04 can be applied to the offense. The definitions of all four culpable mental states contain provisions for them to apply to “the result of [the] conduct” elements.

The case law does not address this problem with implementing the approach accepted in *Walker* and *Teeter*.

Under the Model Penal Code, recklessness and criminal negligence are defined in ways that do not distinguish among kinds of elements. Thus those culpable mental states should be applicable to conduct elements as well as others. See Model Penal Code § 2.02 (Proposed Official Draft 1962).

The above instruction assumes that the *Walker-Teeter* approach is the appropriate one. It provides a relatively meaningless definition of intentionally and knowingly as applied to the conduct. It then simply ignores that recklessness and criminal negligence cannot be used despite the statutory language.

A strong argument can be made that the *Millslagle* dicta by the Austin court of appeals was correct. The focus of the crime is clearly not on what the accused did or did not do. Rather, it is on the result—the placing of the child in danger.

Following the approach of the *Millslagle* dicta would make sound policy sense. It would also avoid the embarrassment of assuming the legislature made a mistake, either in the definition of this offense or in the definitions of recklessness and criminal negligence.

CPJC 85.14 Instruction—Abandoning Child—State Jail Felony**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of abandoning a child. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., having custody, care, or control of [name], a child younger than fifteen years old, intentionally abandoned [name] in a place under circumstances that exposed [name] to an unreasonable risk of harm, and the abandonment was not a voluntary delivery of [name] to a designated emergency infant care provider*].

Relevant Statutes

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

Such abandonment is not an offense if it consists of a voluntary delivery of the child to a designated emergency infant care provider.

To prove that the defendant is guilty of abandonment of a child, the state must prove, beyond a reasonable doubt, seven elements. The elements are that—

1. the defendant intentionally abandoned a child by intentionally leaving that child in any place without providing reasonable and necessary care for the child; and
2. the child was younger than fifteen years old; and
3. the defendant had, at the time, custody, care, or control of the child; and
4. no reasonable, similarly situated adult would have left a child of that child's age and ability under the circumstances existing at the time; and
5. the circumstances of the abandonment exposed the child to an unreasonable risk of harm; and
6. the defendant was aware of the circumstances of the abandonment; and
7. the abandonment was not a voluntary delivery of the child to a designated emergency infant care provider.

A person is aware of the circumstances of an abandonment when the person knows that those circumstances exist.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of abandonment of a child.

Definitions

Abandon

“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.

[Include the following if raised by the evidence.]

Custody, Care, or Control

A person has assumed custody, care, or control of a child if the person has by act, words, or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility for protection, food, shelter, and medical care for the child.

[Include the following if raised by the evidence.]

Designated Emergency Infant Care Provider

“Designated emergency infant care provider” means—

1. an emergency medical services provider;
2. a hospital; or
3. a child-placing agency licensed by the Department of Family and Protective Services that—
 - a. agrees to act as a designated emergency infant care provider; and
 - b. has on staff a person who is licensed as a registered nurse and who will examine and provide emergency medical services to a child taken into possession by the agency.

Intentionally Leaving a Child in Any Place

A person intentionally leaves a child in a place if the person has the conscious objective or desire to leave the child in that place.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, seven elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally abandoned [name], a child, by intentionally leaving [name] in any place without providing reasonable and necessary care for [name];
2. [name] was younger than fifteen years old;
3. the defendant had, at the time, custody, care, or control of [name];
4. no reasonable, similarly situated adult would have left a child of [name]’s age and ability under the circumstances;
5. the circumstances of the abandonment exposed [name] to an unreasonable risk of harm;
6. the defendant was aware of the circumstances of the abandonment; and
7. the defendant’s abandonment of [name] was not a voluntary delivery of [name] to a designated emergency infant care provider.

You must all agree on elements 1 through 7 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 7 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the seven elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

The term *abandon* is defined in Tex. Penal Code § 22.041(a). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “designated emergency infant care provider” is derived from Tex. Fam. Code § 262.301.

Statutory Scheme. The statutory scheme is somewhat confusing. If the state simply alleges the elements as set out in Texas Penal Code section 22.041(b), the offense is a state jail felony. Section 22.041(d)(1) suggests that a state jail felony offense requires proof of intent to return. In fact, however, the only way to distinguish the third-degree felony offense under section 22.041(d)(2) is to treat the third-degree felony offense as requiring proof that at the time of the abandonment the defendant did not have the intent to return for the child.

If the state alleges the section 22.041(b) elements and no intent to return, then under section 22.041(d)(2) the offense is a third-degree felony.

If the state alleges the section 22.041(b) elements and that the abandonment was done under the circumstances set out in section 22.041(e) (ones ‘that a reasonable person would believe would place the child in imminent danger of death, bodily injury, or physical or mental impairment’), the offense is a second-degree felony.

Definition of “Custody, Care, or Control.” Section 22.041 contains no definition of the phrase *custody, care, or control of a child*. Section 22.04, “Injury to a Child, Elderly Individual, or Disabled Individual,” contains a provision—section 22.04(d)—setting out when a person has assumed ‘care, custody, or control’ of a person protected by that section.

In *Rey v. State*, 280 S.W.3d 265 (Tex. Crim. App. 2009), the court of criminal appeals announced:

The purpose of both § 22.04 and § 22.041 is protection of vulnerable individuals. We may reasonably conclude that the clear, unambiguous language that defines “care, custody, and control’ in § 22.04 is equally applicable to the same phrase in § 22.041, the immediately following statute. We hold that the proper meaning of the phrase ‘custody, care, or control’ in § 22.041(b) is the same as that of § 22.04(d): ‘the actor has assumed care, custody, or control if he has by act, words, or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility for protection, food, shelter, and medical care for a child

Rey, 280 S.W.3d at 268. *Rey* was not a jury instruction case, so it raises the question of whether the holding applies to the jury instructions. Of course, in a section 22.04 case the statutory definition is included in the instructions. There seems no reason to believe the same would not be the case in a section 22.041(b) prosecution under *Rey*.

Approach of These Instructions. To assure that all the required circumstances were in the elements of the offense, the Committee inserted the elements of “abandons” into the statement of the offense but included the statutory term *abandons*. Thus the offense basically requires proof that the defendant intentionally abandoned a child by intentionally leaving that child in any place.

The literal terms of the statute purport to require for the state jail felony that the defendant have abandoned the child with intent to return for the child. *See* Tex. Penal Code § 22.041(d)(1). This provision is, however, a negative element that does not impose a meaningful obligation on the state. This is because the third-degree felony offense requires proof that the defendant lacked the intent to return for the child. The legislature could not have meant to require acquittal of a defendant if the state fails to show either lack of intent to return or intent to return.

CPJC 85.15 Instruction—Abandoning Child—Third-Degree Felony**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of abandoning a child. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., having custody, care, or control of [name]*], a child younger than fifteen years old, intentionally abandoned [*name*] in a place without the intent to return for the child and under circumstances that exposed [*name*] to an unreasonable risk of harm, and the abandonment was not a voluntary delivery of [*name*] to a designated emergency infant care provider].

Relevant Statutes

A person commits an offense if, having custody, care, or control of a child younger than fifteen years old, he intentionally abandons the child in any place, without intent to return for the child, under circumstances that expose the child to an unreasonable risk of harm.

Such abandonment is not an offense if it consists of a voluntary delivery of the child to a designated emergency infant care provider.

To prove that the defendant is guilty of abandonment of a child, the state must prove, beyond a reasonable doubt, eight elements. The elements are that—

1. the defendant intentionally abandoned a child by intentionally leaving that child in any place without providing reasonable and necessary care for the child; and
2. the child was younger than fifteen years old; and
3. the defendant had, at the time, custody, care, or control of the child; and
4. no reasonable, similarly situated adult would have left a child of that child's age and ability under the circumstances existing at the time; and
5. the defendant at the time of the abandonment did not intend to return for the child; and
6. the circumstances of the abandonment exposed the child to an unreasonable risk of harm; and

7. the defendant was aware of the circumstances of the abandonment;
and

8. the abandonment was not a voluntary delivery of the child to a designated emergency infant care provider.

A person is aware of the circumstances of an abandonment when the person knows that those circumstances exist.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of abandonment of a child.

Definitions

Abandon

“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.

[Include the following if raised by the evidence.]

Custody, Care, or Control

A person has assumed custody, care, or control of a child if the person has by act, words, or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility for protection, food, shelter, and medical care for the child.

[Include the following if raised by the evidence.]

Designated Emergency Infant Care Provider

“Designated emergency infant care provider” means—

1. an emergency medical services provider;
2. a hospital; or
3. a child-placing agency licensed by the Department of Family and Protective Services that—
 - a. agrees to act as a designated emergency infant care provider;
 - and

- b. has on staff a person who is licensed as a registered nurse and who will examine and provide emergency medical services to a child taken into possession by the agency.

Intentionally Leaving a Child in Any Place

A person intentionally leaves a child in a place if the person has the conscious objective or desire to leave the child in that place.

Did Not Intend to Return for the Child

A person does not intend to return for a child if the person does not have the conscious objective or desire to return for the child.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, eight elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally abandoned [name], a child, by intentionally leaving [name] in any place without providing reasonable and necessary care for [name];
2. [name] was younger than fifteen years old;
3. the defendant had, at the time, custody, care, or control of [name];
4. no reasonable, similarly situated adult would have left a child of [name]'s age and ability under the circumstances;
5. the defendant at the time of the abandonment did not intend to return for [name];
6. the circumstances of the abandonment exposed [name] to an unreasonable risk of harm;
7. the defendant was aware of the circumstances of the abandonment; and
8. the defendant's abandonment of [name] was not a voluntary delivery of [name] to a designated emergency infant care provider.

You must all agree on elements 1 through 8 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 8 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the eight elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

The term *abandon* is defined in Tex. Penal Code § 22.041(a). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “custody, care, or control” is from Tex. Penal Code § 22.04(d). The definition of “designated emergency infant care provider” is derived from Tex. Fam. Code § 262.301.

CPJC 85.16 Instruction—Abandoning Child—Second-Degree Felony**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of abandoning a child. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., having custody, care, or control of [name]*], a child younger than fifteen years old, intentionally abandoned [*name*] in a place under circumstances that exposed [*name*] to an unreasonable risk of harm and which a reasonable person would believe would place [*name*] in imminent danger of death, bodily injury, or physical or mental impairment, and the abandonment was not a voluntary delivery of [*name*] to a designated emergency infant care provider].

Relevant Statutes

A person commits an offense if, having custody, care, or control of a child younger than fifteen years old, he intentionally abandons the child in any place under circumstances that expose the child to an unreasonable risk of harm and which a reasonable person would believe would place the child in imminent danger of death, bodily injury, or physical or mental impairment.

Such abandonment is not an offense if it consists of a voluntary delivery of the child to a designated emergency infant care provider.

To prove that the defendant is guilty of abandonment of a child, the state must prove, beyond a reasonable doubt, eight elements. The elements are that—

1. the defendant intentionally abandoned a child by intentionally leaving that child in any place without providing reasonable and necessary care for the child; and
2. the child was younger than fifteen years old; and
3. the defendant had, at the time, custody, care, or control of the child; and
4. no reasonable, similarly situated adult would have left a child of that child's age and ability under the circumstances existing at the time; and
5. the circumstances were ones under which a reasonable person would believe would place the child in imminent danger of death, bodily injury, or physical or mental impairment; and

6. the circumstances of the abandonment exposed the child to an unreasonable risk of harm; and

7. the defendant was aware of the circumstances of the abandonment; and

8. the abandonment was not a voluntary delivery of the child to a designated emergency infant care provider.

A person is aware of the circumstances of an abandonment when the person knows that those circumstances exist.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of abandonment of a child.

Definitions

Abandon

“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.

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

[Include the following if raised by the evidence.]

Custody, Care, or Control

A person has assumed custody, care, or control of a child if the person has by act, words, or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility for protection, food, shelter, and medical care for the child.

[Include the following if raised by the evidence.]

Designated Emergency Infant Care Provider

“Designated emergency infant care provider” means—

1. an emergency medical services provider;

2. a hospital; or
3. a child-placing agency licensed by the Department of Family and Protective Services that—
 - a. agrees to act as a designated emergency infant care provider; and
 - b. has on staff a person who is licensed as a registered nurse and who will examine and provide emergency medical services to a child taken into possession by the agency.

Intentionally Leaving a Child in Any Place

A person intentionally leaves a child in a place if the person has the conscious objective or desire to leave the child in that place.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, eight elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally abandoned [name], a child, by intentionally leaving [name] in any place without providing reasonable and necessary care for [name];
2. [name] was younger than fifteen years old;
3. the defendant had, at the time, custody, care, or control of [name];
4. no reasonable, similarly situated adult would have left a child of [name]'s age and ability under the circumstances;
5. the circumstances were ones under which a reasonable person would believe would place [name] in imminent danger of death, bodily injury, or physical or mental impairment;
6. the circumstances of the abandonment exposed [name] to an unreasonable risk of harm;
7. the defendant was aware of the circumstances of the abandonment; and
8. the defendant's abandonment of [name] was not a voluntary delivery of [name] to a designated emergency infant care provider.

You must all agree on elements 1 through 8 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 8 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the eight elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

The term *abandon* is defined in Tex. Penal Code § 22.041(a). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “custody, care, or control” is from Tex. Penal Code § 22.04(d). The definition of “designated emergency infant care provider” is derived from Tex. Fam. Code § 262.301.

IV. Deadly Conduct

CPJC 85.17 Instruction—Deadly Conduct—Recklessness

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of deadly conduct. Specifically, the accusation is that the defendant [*insert specific allegations, e.g.,* recklessly engaged in conduct that placed [*name*] in imminent danger of serious bodily injury].

Relevant Statutes

A person commits an offense if he recklessly engages in conduct that places another in imminent danger of serious bodily injury.

To prove that the defendant is guilty of deadly conduct, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant engaged in certain conduct; and
2. this conduct placed another person in imminent danger of serious bodily injury; and
3. the defendant acted recklessly.

To prove that the defendant acted recklessly, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. there was a substantial and unjustifiable risk that the defendant's conduct would place another person in imminent danger of serious bodily injury; and
2. this risk was of such a nature and degree that its disregard constituted a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the defendant's viewpoint; and
3. the defendant was aware of but consciously disregarded this risk.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of deadly conduct.

Definitions

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Serious Bodily Injury

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

[Include presumption of danger and recklessness if raised by the evidence; see CPJC 85.20.]

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], engaged in certain conduct, specifically [*describe conduct*];
2. this conduct placed [name] in imminent danger of serious bodily injury; and
3. the defendant acted recklessly.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Deadly conduct is prohibited by and defined in Tex. Penal Code § 22.05. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The defini-

tion of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “serious bodily injury” is from Tex. Penal Code § 1.07(a)(46).

Definition of Offense. The definition of the offense of deadly conduct presents a problem that affects the definitions of many offenses in the Texas Penal Code. The statute requires that the defendant act “recklessly” but does not make clear whether that culpable mental state applies to (1) the conduct, (2) the result of placing another in imminent danger of serious bodily injury, or (3) both.

The above instruction assumes that recklessness applies only to the result of placing another in imminent danger of serious bodily injury.

Acts Constituting Recklessness. Article 21.15 of the Texas Code of Criminal Procedure requires that if recklessness “enters into or is a part or element of any offense” or when a charging instrument alleges the accused acted recklessly, the complaint, information, or indictment to be sufficient in any such case must allege, with reasonable certainty, the act or acts relied on to constitute recklessness, and in no event shall it be sufficient to allege merely that the accused, in committing the offense, acted recklessly.

The case law does not make clear what precisely is required by this provision, either generally or in deadly conduct cases in particular.

If details are alleged in an effort to comply with this requirement, Texas tradition suggests that those detailed allegations must be incorporated into the application of law to facts unit of the jury instructions.

CPJC 85.18 Instruction—Deadly Conduct—Discharge of Firearm in Direction of Individuals**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of deadly conduct. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., knowingly discharged a firearm in the direction of one or more individuals*].

Relevant Statutes

A person commits an offense if the person knowingly discharges a firearm at or in the direction of one or more individuals.

To prove that the defendant is guilty of deadly conduct, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant discharged a firearm at or in the direction of one or more individuals; and
2. the defendant acted knowingly.

To prove that the defendant acted knowingly, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant was aware that he was discharging a firearm; and
2. the defendant was aware that he was discharging the firearm at or in the direction of one or more individuals.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of deadly conduct.

Definitions*Firearm*

“Firearm” means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], discharged a firearm at or in the direction of one or more individuals; and
2. the defendant did this knowingly.

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Deadly conduct is prohibited by and defined in Tex. Penal Code § 22.05. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “firearm” is from Tex. Penal Code § 46.01(3).

CPJC 85.19 Instruction—Deadly Conduct—Discharge of Firearm in Direction of Habitation, Building, or Vehicle**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of deadly conduct. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., knowingly discharged a firearm at or in the direction of a habitation, building, or vehicle and was reckless about whether the habitation, building, or vehicle was occupied*].

Relevant Statutes

A person commits an offense if the person knowingly discharges a firearm at or in the direction of a habitation, building, or vehicle and is reckless about whether the habitation, building, or vehicle is occupied.

To prove that the defendant is guilty of deadly conduct, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant discharged a firearm at or in the direction of a habitation, building, or vehicle; and
2. the defendant did this knowingly; and
3. the defendant was reckless about whether the habitation, building, or vehicle was occupied.

A person acts knowingly with respect to the nature of his conduct when he is aware of the nature of his conduct.

To prove that the defendant knowingly discharged a firearm, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant was aware that he was discharging a firearm; and
2. the defendant was aware that the discharge of the firearm was at or in the direction of a habitation, building, or vehicle.

A person acts recklessly with respect to circumstances surrounding his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint.

To prove that the defendant was reckless about whether the habitation, building, or vehicle was occupied, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. there was a substantial and unjustifiable risk that the habitation, building, or vehicle was occupied; and
2. this risk was of such a nature and degree that its disregard constituted a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the defendant's viewpoint; and
3. the defendant was aware of and consciously disregarded this risk.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of deadly conduct.

Definitions

Firearm

“Firearm” means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

Habitation

“Habitation” means a structure or vehicle that is adapted for the overnight accommodation of persons.

Each separately secured or occupied portion of a structure or vehicle that is adapted for the overnight accommodation of persons is a habitation.

Each structure appurtenant to or connected with a structure or vehicle that is adapted for the overnight accommodation of persons is a habitation.

Building

“Building” means any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.

Vehicle

“Vehicle” includes any device in, on, or by which any person or property is or may be propelled, moved, or drawn in the normal course of commerce or transportation, except such devices as are classified as “habitations.”

[Include presumption of danger and recklessness if raised by the evidence; see CPJC 85.20.]

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], discharged a firearm at or in the direction of a habitation, building, or vehicle;
2. the defendant discharged the firearm knowingly; and
3. the defendant was reckless about whether the habitation, building, or vehicle was occupied.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Deadly conduct is prohibited by and defined in Tex. Penal Code § 22.05. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “firearm” is from Tex. Penal Code § 46.01(3). The definition of “habitation” is from Tex. Penal Code § 30.01(1). The definition of “building” is from Tex. Penal Code § 30.01(2). The definition of “vehicle” is from Tex. Penal Code § 30.01(3).

A cross-reference to the instruction for the presumption of danger and recklessness is included (see CPJC 85.20) because it may apply to the recklessness required about

whether the habitation, building, or vehicle is occupied. It does not, however, seem well-suited to application to this means of committing the crime.

CPJC 85.20 Instruction—Deadly Conduct—Presumption of Danger and Recklessness

[Insert instructions for underlying offense.]

Presumption of Danger and Recklessness

The law provides for a presumption that you may wish to apply in this case. This presumption can apply only if you find the state has proved, beyond a reasonable doubt, that the defendant knowingly pointed a firearm (regardless of whether he believed the firearm to be loaded) at or in the direction of another person.

If you find the state has proved, beyond a reasonable doubt, that the defendant knowingly pointed a firearm at or in the direction of another person, then you may infer from this fact either (1) the victim was placed in imminent danger of serious bodily injury or (2) the defendant was reckless, or both. You are not, however, required to infer or find either or both of these things even if you find that the defendant knowingly pointed a firearm at or in the direction of another person.

If you have a reasonable doubt whether the defendant knowingly pointed a firearm at or in the direction of another person, the presumption does not arise or apply. In that case, you will not consider this presumption for any purpose.

If you conclude you cannot apply the presumption or you choose not to apply it, you must still consider whether—without reference to the presumption—the evidence proves beyond a reasonable doubt that (1) the victim was placed in imminent danger of serious bodily injury and (2) the defendant was reckless.

If you apply this presumption, you may conclude that the state has proved danger and recklessness. If you do decide to apply the presumption to show the state has proved danger and recklessness, you must still find, beyond a reasonable doubt, that the state has proved that (1) the defendant engaged in the conduct alleged and (2) this conduct caused the victim to be placed in danger.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Instructing on Presumption. The above instruction attempts to set out the presumption in Texas Penal Code section 22.05(c) in light of the effect on the remainder of section 22.05.

This instruction goes considerably beyond existing practice, which seems to be to simply give the jury the substance of section 2.05 in virtually the language of the statute. *Bellamy v. State*, 742 S.W.2d 677, 686 & n.1 (Tex. Crim. App. 1987) (Miller, J., joined by Teague and Campbell, J.J., concurring) (“[A] form instruction containing § 2.05 as written in the Penal Code does not comply with the mandate of § 2.05, but it would be better than nothing.”).

The alternative offered in the instruction more closely follows the approach apparently used in practice.

A major question in phrasing the instruction is whether to explicitly tell the jury that the presumed fact is in fact ‘presumed. If the drafter believes this should be done, the approach used in *Naranjo v. State*, 217 S.W.3d 560, 569 (Tex. App.—San Antonio 2006, no pet.) (concerning a different statutory presumption), could be used to redraft the “application” portion of the instruction somewhat as follows:

If you find the state has proved, beyond a reasonable doubt, that the defendant knowingly pointed a firearm at or in the direction of another person, then you may infer from this fact that it is presumed, and you may find either or both that (1) the victim was placed in imminent danger of serious bodily injury and (2) the defendant was reckless. You are not, however, required to infer or find either or both of these things from the fact that the defendant pointed a firearm at or in the direction of another person.

Section 2.05 does direct that the jury is to be instructed ‘in terms of the presumption as follows ” Tex. Penal Code § 2.05(a)(2). Given the phraseology of what follows this command, however, the statute can reasonably be read as not making mandatory the use of the phrase “is presumed.”

Arguably, use of such terminology is likely to increase the risk that the jury will construe the instruction as directing or at least permitting what the case law terms a “mandatory presumption.”

An instruction under section 2.05 is probably essential to the constitutionality of application of the presumption in section 22.05(c). See *Neely v. State*, 193 S.W.3d 685, 687 (Tex. App.—Waco 2006, no pet.) (instruction on section 22.05(c) told jury to apply an unconstitutional mandatory presumption, where the instruction did not include the substance of section 2.05(a)(2)).

The instruction offers an additional statement making clear to the jury that it need not find the defendant not guilty if it concludes it cannot or should not apply the presumption. In that event, it should decide whether without reference to any presumption the state has proved the elements that could be “presumed” if the presumption applied.

Constitutionality of Applying Presumption. The presumption appears to be applicable in all cases in which the jury could find the triggering facts. Nevertheless, some Committee members believe that trial judges need to be alert to the possibility that as applied in a particular case, the presumption may be unconstitutional.

A statutory permissive presumption applied in a criminal prosecution is irrational and hence unconstitutional unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. *Leary v. United States*, 395 U.S. 6, 36 (1969). See *Bellamy*, 742 S.W.2d at 685 (presumption in section 31.03(c)(3) was unconstitutional as applied in case); *Gersh v. State*, 714 S.W.2d 80, 82 (Tex. App.—Dallas 1986) (presumption in section 28.03(c) was unconstitutionally applied in case), *pet. ref’d*, 738 S.W.2d 287 (Tex. Crim. App. 1987) (“[W]e have reviewed the record and agree with the Court of Appeals opinion. We believe that they reached the correct result for the correct reasons.”).

Before including the presumption, trial judges must address whether recklessness and danger can be said with substantial assurance to flow more likely than not from proof that the defendant knowingly pointed a firearm at or in the direction of another. This might not be the case if the firearm was in fact not loaded, the defendant believed the firearm to be not loaded, or both.

In some situations, the presumption might be constitutionally applied to assist the jury in deciding either recklessness or danger, but not both.

CPJC 85.21 Instruction—Terroristic Threat**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of terroristic threat. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., threatened to commit an offense involving violence to a person, namely, aggravated assault on [name], with intent to place [name] in fear of imminent serious bodily injury*].

Relevant Statutes

A person commits an offense if he threatens to commit an offense involving violence to any person or property with intent to place any person in fear of imminent serious bodily injury.

To prove that the defendant is guilty of terroristic threat, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant threatened to commit an offense; and
2. the offense the defendant threatened to commit involved violence to a person or property; and
3. the defendant made the threat with the intent to place a person in fear of imminent serious bodily injury.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of terroristic threat.

Definitions*Intent to Place a Person in Fear of Imminent Serious Bodily Injury*

A person intends to place another person in fear of imminent serious bodily injury if the person has the conscious objective or desire to cause the other person to be placed in such fear.

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Serious Bodily Injury

“Serious bodily injury” means injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], threatened to [insert specific allegations, e.g., commit aggravated assault on [name]];
2. [insert specific allegations, e.g., the aggravated assault on [name]] the defendant threatened to commit involved violence to a person or property; and
3. the defendant made the threat with the intent to place [name] in fear of imminent serious bodily injury.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Terroristic threat is prohibited by and defined in Tex. Penal Code § 22.07. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “serious bodily injury” is from Tex. Penal Code § 1.07(a)(46).

See *Peavy v. State*, No. 14-01-01180-CR, 2002 WL 31769393, at *4 (Tex. App.—Houston [14th Dist.] Dec. 12, 2002, pet. ref’d) (not designated for publication), for a discussion of a jury charge in a case involving terroristic threat.

V. Consent Defense to Certain Assaultive Crimes

CPJC 85.22 General Comments

Consent can be a defense to assault, aggravated assault, or deadly conduct in two situations. In one, the victim must have known that the conduct on which the prosecution is based was a risk of his occupation, recognized medical treatment, or a scientific experiment conducted by recognized methods. Tex. Penal Code § 22.06(a)(2).

The more common situation is that in which the defendant argues that he did not cause or threaten serious bodily injury and thus comes within section 22.06(a)(1). The instruction at CPJC 85.23 addresses only this more frequently encountered scenario.

As one court critically noted, whether consent bars conviction may turn not on the defendant's "intent" but on whether the conduct actually caused serious bodily injury. *Miller v. State*, 312 S.W.3d 209, 214 n.2 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd).

An instruction on consent is required if the evidence tends to show words or conduct by the complainant that a jury could construe as indicating that the complainant wished to provoke the defendant. This raises an issue about whether the complainant consented to the defendant's assaultive actions within the meaning of section 22.06.

In one case, for example, the court of criminal appeals noted:

[I]t is undisputed that the complainant used abstract language of consent when she told the appellant, in response to appellant's threat, to "go ahead," "come on," "slap me, 'hit me, 'do it, or some combination of words to that effect. If she meant what she said to be taken literally, then obviously she would have given her 'effective consent' to be struck. Whether she meant it literally was a question of fact for the jury to resolve, of course, and a full and proper jury instruction was required.

Allen v. State, 253 S.W.3d 260, 267 (Tex. Crim. App. 2008) (absence of instruction on burden of proof regarding consent did not cause egregious harm).

In another case, an eighteen-year-old complainant—

repeatedly shouted expletives at his parents, such as "take your G.D. money and 'f' yourself with it. He then bowed up in close proximity to [his father, the defendant] and, in a threatening tone, taunted him, saying "What the 'f,' man. I'm going to—you going to hit me, man? Are you going to hit me? What the 'f,' man."

Miller, 312 S.W.3d at 211. The complainant next kicked and punched the defendant in his side and charged him. The defendant then punched the complainant in the face. On these facts, "the evidence indicates [the complainant] may have genuinely desired to

provoke his father to hit him. Thus refusal of an instruction on consent was error. *Miller*, 312 S.W.3d at 212.

In a case in which the defendant was charged with assault by biting the complainant, testimony that the bite marks on the complainant were a result of consensual sexual activity required an instruction on consent. *Bufkin v. State*, 207 S.W.3d 779, 784 (Tex. Crim. App. 2006).

CPJC 85.23 Instruction—Defense of Consent

[Insert instructions for underlying offense.]

If you all agree the state has proved, beyond a reasonable doubt, each of the [number] elements listed above, you must next consider whether the state has proved that the defendant did not believe [name] had effectively consented to the defendant's conduct.

Consent

You have heard evidence that, when the defendant *[insert specific conduct constituting offense, e.g., struck [name] with his fist]*, he believed that [name] had effectively consented to this.

Relevant Statutes

A person's use of force against another is not a criminal offense if the other person effectively consented or the person reasonably believed the other person consented and the conduct did not threaten or inflict serious bodily injury.

Therefore the state must prove, beyond a reasonable doubt, that either—

1. both that—
 - a. the other person did not effectively consent; and
 - b. the defendant did not reasonably believe the other person had consented; or
2. the defendant's conduct threatened or inflicted serious bodily injury.

[Include the following if raised by the evidence.]

Consent is not effective if the person giving it is, by reason of youth, mental disease or defect, or intoxication, unable to make reasonable decisions and the defendant knows this.

Consent is not effective if it is induced by force, threat, or fraud.

Burden of Proof

The defendant is not required to prove consent. Rather, the state must prove, beyond a reasonable doubt, that the defense of consent does not apply to the defendant's conduct.

Definitions

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Serious Bodily Injury

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Reasonable Belief

“Reasonable belief” means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that consent does not apply to the defendant’s conduct.

To decide the issue of consent, you must determine whether the state has proved, beyond a reasonable doubt, either—

1. both that—
 - a. [name] did not effectively consent; and
 - b. the defendant did not reasonably believe [name] consented; or
2. the conduct threatened or inflicted serious bodily injury.

You must all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you all agree the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [insert specific offense], and you all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

The defense of consent is provided for in Tex. Penal Code § 22.06. The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “serious bodily injury” is from Tex. Penal Code § 1.07(a)(46).



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CPJC 86.1 Instruction—Robbery by Causing Injury**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of robbery. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., while in the course of committing theft of property owned by [name] and with the intent to obtain and maintain control of the property, intentionally, knowingly, or recklessly caused bodily injury to [name] by stabbing [name] with a knife*].

Relevant Statutes

A person commits robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, the person intentionally, knowingly, or recklessly causes bodily injury to another.

To prove that the defendant is guilty of robbery, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant intentionally, knowingly, or recklessly caused bodily injury to another; and
2. the defendant did this in the course of committing theft; and
3. the defendant had the intent to obtain or maintain control of the property that was the subject of the theft.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of robbery.

Definitions*Bodily Injury*

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Intentionally Causing Bodily Injury

A person intentionally causes bodily injury to another if it is the person’s conscious objective or desire to cause the bodily injury to another.

Knowingly Causing Bodily Injury

A person knowingly causes bodily injury to another if the person is aware that the person's conduct is reasonably certain to cause the bodily injury to another.

Recklessly Causing Bodily Injury

A person recklessly causes bodily injury to another if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person's action will cause bodily injury to another. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Course of Committing Theft

Conduct is engaged in "in the course of committing theft" if that conduct was engaged in during an attempt to commit, during the commission of, or in immediate flight after the attempt or commission of theft.

Attempt to Commit Theft

Conduct is engaged in during an attempt to commit theft if at the time of the conduct the person has the intent to commit theft and engages in an act pursuant to that intent amounting to more than mere preparation to commit theft.

Theft

Theft is a criminal offense requiring proof that—

1. the person appropriated property of another;
2. that appropriation was unlawful; and
3. the person did this with the intent to deprive the owner of the property.

[Insert other definitions related to theft as necessary, depending on the facts.]

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally, knowingly, or recklessly caused bodily injury to [name] [insert specific allegations, e.g., by stabbing [name] with a knife]; and
2. the defendant did this in the course of committing theft of property owned by [name]; and
3. the defendant had the intent to obtain or maintain control of the property that was the subject of the theft.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Robbery is prohibited by and defined in Tex. Penal Code § 29.02. The definition of ‘course of committing theft’ is from Tex. Penal Code § 29.01(1). The definition of “attempt to commit theft” is based on Tex. Penal Code § 15.01(a). The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “theft” is based on Tex. Penal Code § 31.03(a).

Effect of State’s Failure to Plead Recklessness. Although recklessness is sufficient under the statute, indictments sometimes (and perhaps almost always) allege only intent or knowledge. If this is the case, the above instructions should be modified so that conviction cannot rest on evidence that the defendant recklessly caused the injury.

Intent to Obtain or Maintain Control of Property. A major question is to what extent, if any, the jury charge should reflect the interpretation given by Texas courts to the requirement that a robber act with intent to obtain or maintain control of the property that is the subject of the theft. The plain language of Texas Penal Code section 29.02 strongly suggests that the person must have the intent to obtain or maintain control of the property at the time the person engages in the assaultive conduct that is part of robbery—the act causing injury, putting the victim in fear, or constituting the threat. In the context of review for evidence sufficiency, however, the court of criminal

appeals held in *White v. State*, 671 S.W.2d 40 (Tex. Crim. App. 1984), that this is not the case.

White was convicted of aggravated robbery, alleged to have been committed by using a firearm to inflict serious bodily injury. The evidence showed that White's codefendant, Sherlock, grabbed a purse from McCoy and tried—unsuccessfully—to remove it from her grasp. Sherlock abandoned the effort and fled to a car in which White was sitting. One Duncan, a bystander, pursued him. When Sherlock reached the car, White shot the pursuing Duncan with a gun.

Convicted of aggravated robbery, White argued that he inflicted injury on Duncan only after Sherlock had abandoned the purse they were trying to steal. Thus the evidence failed to show he caused the injury to Duncan with the firearm with the intent to obtain or maintain control of the property. Rejecting this, the court explained:

The element 'intent to obtain or maintain control of the property' in Sec. 29.02, supra, "deals with the robber's state of mind regarding the property" involved in the theft or attempted theft, and not his state of mind in the assaultive component of the offense of aggravated robbery. *Ex parte Santelana*, 606 S.W.2d 331, 333 (Tex. Cr. App. 1980). Therefore, violence accompanying an escape immediately subsequent to an attempted theft can constitute robbery under Sec. 29.02, supra.

White, 671 S.W.2d at 42. Applying this, the court held:

A rational trier of fact could have concluded beyond a reasonable doubt that appellant knew his companion was in the course of committing theft and that appellant fired the shot in order to aid Sherlock's immediate flight after the theft failed.

White, 671 S.W.2d at 43. The court noted that a similar result had been reached six years earlier in *Ulloa v. State*, 570 S.W.2d 954 (Tex. Crim. App. 1978), although *Ulloa* did not provide a detailed explanation.

The *White* analysis was reaffirmed by the court of criminal appeals in 1995:

In *White* we held the 'intent to obtain or maintain control of the property' deals with the robber's state of mind regarding the theft or attempted theft, and not the assaultive component of robbery. 671 S.W.2d at 42. There is no requirement that appellant retain the intent to control property when the assaultive act is committed; the required violence may occur after the offender has abandoned the theft and is escaping. *Id.*

Lawton v. State, 913 S.W.2d 542, 552 (Tex. Crim. App. 1995), *overruled on other grounds by Mosley v. State*, 983 S.W.2d 249, 264 (Tex. Crim. App. 1998).

The *White-Lawton* analysis has been followed by the courts of appeals. *E.g. Hicks v. State*, No. 05-06-01120-CR, 2007 WL 1064327, at *2 (Tex. App.—Dallas Sept. 26, 2007, pet. ref'd, untimely filed) (not designated for publication) ("[T]he State was not

required to prove appellant retained the intent to deprive at the time he engaged in the assaultive conduct with a deadly weapon.”). *See also Candelaria v. State*, 776 S.W.2d 741, 742–43 (Tex. App.—Corpus Christi 1989, pet ref’d); *Morgan v. State*, 703 S.W.2d 339 (Tex. App.—Dallas 1985, no pet.) (robbery based on struggle with store employees after defendant threw down coats he was trying to steal); *Yarbrough v. State*, 656 S.W.2d 200 (Tex. App.—Austin 1983, no pet.) (when discovered in victim’s van taking toolbox, defendant put down toolbox and tried to jump out of van, following which struggle ensued).

The rule is apparently that if all other requirements are met, the state need prove only that the defendant had the intent to obtain or maintain control of the property at some time during the course of committing theft or attempted theft. There appears to be no case law addressing whether this may or should be reflected in the jury charge. No justification appears for instructing juries in the plain language of the statute.

Defendants, of course, would not be harmed by ignoring the *White-Lawton* analysis in instructing the jury. This would simply mean that juries would be told to determine guilt-innocence under standards stricter than those that will be applied on appeal to determine the sufficiency of the evidence to support a conviction.

Conceptually, however, this is impossible to justify. And if on appeal robbery law protects members of the community from force or threats made in flight from an abandoned attempt to commit theft, the community is also entitled to whatever additional protection will come from having juries informed that such circumstances constitute robbery.

CPJC 86.2 Instruction—Robbery by Threat**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of robbery. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., while in the course of committing theft of property owned by [name] and with the intent to obtain and maintain control of the property, intentionally or knowingly threatened or placed [name] in fear of imminent bodily injury or death*].

Relevant Statutes

A person commits robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, the person intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

To prove that the defendant is guilty of robbery, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant intentionally or knowingly either—
 - a. threatened another with imminent bodily injury or death; or
 - b. placed another in fear of imminent bodily injury or death; and
2. the defendant did this in the course of committing theft; and
3. the defendant had the intent to obtain or maintain control of the property that was the subject of the theft.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of robbery by threat.

Definitions*Intentionally Threaten*

A person intentionally threatens another when the person has the conscious objective or desire to engage in conduct constituting a threat.

Knowingly Threaten

A person knowingly threatens another when the person is aware that the person's conduct constitutes a threat.

Intentionally Place in Fear

A person intentionally places another in fear when the person has the conscious objective or desire to place the other person in fear.

Knowingly Place in Fear

A person knowingly places another in fear when the person is aware that the person's conduct is reasonably certain to cause fear in the other.

Bodily Injury

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

Course of Committing Theft

Conduct is engaged in "in the course of committing theft" if that conduct was engaged in during an attempt to commit, during the commission of, or in immediate flight after the attempt or commission of theft.

Theft

Theft is a criminal offense requiring proof that—

1. the person appropriated property of another;
2. that appropriation was unlawful; and
3. the person did this with the intent to deprive the owner of the property.

*[Insert other definitions related to theft as necessary,
depending on the facts.]*

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly—

- a. threatened [*name*] with imminent bodily injury or death; or
 - b. placed [*name*] in fear of imminent bodily injury or death; and
2. the defendant did this in the course of committing theft of property owned by [*name*]; and
 3. the defendant had the intent to obtain or maintain control of the property that was the subject of the theft.

You must all agree on elements 1, 2, and 3 listed above, but you do not have to agree on whether element 1 is proved by the method listed in element 1.a or 1.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Robbery is prohibited by and defined in Tex. Penal Code § 29.02. The definition of “course of committing theft” is from Tex. Penal Code § 29.01(1). The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “theft” is based on Tex. Penal Code § 31.03(a).

Threat and “Placing in Fear.” The above instruction separates as alternatives threatening another and placing another in fear. The case law has recognized these as alternatives. *Vaughn v. State*, 634 S.W.2d 310, 312 (Tex. Crim. App. 1982) (“The offense may be committed by either threatening or by actually placing the complainant in fear of bodily injury.”). It has not, however, developed the difference between them.

The legislature may have intended robbery by threat to require no actual demonstrated impact on the victim. The second alternative, then, might be different insofar as it places no limits on what the defendant must have done but instead focuses on proof that the defendant’s conduct resulted in putting the victim in fear.

Threat—Objective Standard? One discussion in the case law suggests that the court of criminal appeals has construed the term *threat* in the current statute as requiring that the defendant’s conduct not only produce fear in the victim but also that it meet a minimal objective standard. Thus the conduct arguably must have been such as

would cause the necessary fear in a reasonable person. *Devine v. State*, 786 S.W.2d 268 (Tex. Crim. App. 1989), appeared to read this objective requirement of prior law into the 1974 Penal Code.

If this is good current law, it is arguable that the jury charge should provide the jury with this standard. This would probably most appropriately be accomplished by a definition of the terms *threatens* or *puts in fear*.

The contents of the crime of robbery by threat were addressed at length by Judge Clinton for the court in *Devine*. Specifically, *Devine* stated:

When a robbery is effected by threats of bodily injury or placing another in fear, that fear must be of such nature as in reason and common experience is likely to induce a person to part with his property against his will. *Cranford v. State*, 377 S.W.2d 957, 958 (Tex. Cr. App. 1964). Although *Cranford* was decided under the former penal code, its language has since been applied in context of § 29.02(a)(2), *supra*, in *Green v. State*, 567 S.W.2d 211 (Tex. Cr. App. 1978).

Under former art. 1408, *supra*, this Court has held “that to constitute the crime of robbery, there must be violence, or intimidation of such character that the injured party is put in fear.” *Cranford v. State*, *supra* at 958. “The fear must arise from the *conduct of the accused however, rather than the mere temperamental timidity of the victim*. *Id.* at 959 (emphasis added). We may reasonably conclude that, as under former art. 1408, for purposes of § 29.02, *supra*, some conduct on the part of the perpetrator is necessary to place the complainant in fear.

Devine, 786 S.W.2d at 270–71. In *Devine* itself, the court reversed the conviction:

Although Cox [the victim] testified that he was afraid and believed he would be killed if he did not give appellant the money, the record is devoid of any evidence that he was placed in fear of imminent bodily injury by any intentional or knowing *conduct* of appellant, as required by *Cranford v. State*, *supra*.

Devine, 786 S.W.2d at 271.

Apparently, *Devine* held that the evidence did not show a sufficiently explicit threat and the state’s evidence—although it showed that the victim Cox was put in fear—failed to show that *Devine*’s conduct was sufficient to generate such fear in a reasonable person.

Lower courts, often citing *Devine*, have reviewed robbery-by-threat convictions to determine if the state’s proof showed threats sufficient to place a reasonable person in fear. *E.g. Montez v. State*, No. 07-07-0193-CR, 2008 WL 55113, at *1 (Tex. App.—Amarillo Jan. 4, 2008, no pet.) (not designated for publication) (“It is sufficient to con-

stitute robbery if the accused places the complainant in fear of bodily injury to the degree that reason and common experience will induce the complainant to part with his property against his will. Thus, we must determine whether the conduct of appellant was sufficient to place a reasonable person in fear of imminent bodily injury.”); *Moralez v. State*, No. 04-06-00033-CR, 2006 WL 3085714, at *2 (Tex. App.—San Antonio Nov. 1, 2006, no pet.) (not designated for publication) (“We find that the combination of Moralez’s violent actions and his threatening, abusive language was sufficient to place a reasonable person in fear of imminent bodily injury or death.”); *Mason v. State*, No. 10-05-00053-CR, 2006 WL 348578, at *2 (Tex. App.—Waco Sept. 20, 2006, pet. ref’d) (not designated for publication) (“[W]e hold that a rational trier of fact could have found that Mason’s ‘words and conduct were sufficient to place a reasonable person in [Mendoza’s] circumstances in fear of imminent bodily injury.’”).

Case law addressing the need for a jury charge is limited to two decisions of the Texarkana court of appeals. In *Kizzee v. State*, No. 06-02-00035-CR, 2003 WL 283831, at *4 (Tex. App.—Texarkana Feb. 11, 2003, no pet.) (not designated for publication), the defendant contended the trial court erred—

by denying his proposed jury instruction that would have directed the jury on how to determine whether a victim’s fear was reasonable. His proposed instruction was based on *Welch v. State*, 880 S.W.2d 225 (Tex. App.—Austin 1994, no pet.), in which the Third Court of Appeals held that, for purposes of reviewing legal sufficiency of a robbery conviction on appeal, the evidence of the victim’s fear “must be of such nature as in reason and common experience is likely to induce a person to part with his property against his will. The victim’s fear may not arise merely from some temperamental timidity, but must result from some conduct of the perpetrator.” *Id.* at 226 (citations omitted).

Distinguishing *Welch* and other decisions as involving review for evidence sufficiency, *Kizzee* found no authority that a jury charge was required. Without discussing whether logic required such a charge, the court found no error.

Kizzee was followed in another appeal involving the same appellant. *Kizzee v. State*, No. 06-02-00038-CR, 2003 WL 283824, at *2 (Tex. App.—Texarkana Feb. 11, 2003, no pet.) (not designated for publication).

“Conditional” Threats. If a threat is otherwise sufficient to constitute robbery, it is not rendered insufficient because it is conditional. *Green v. State*, 567 S.W.2d 211 (Tex. Crim. App. [Panel Op.] 1978) (“If you don’t give me the money, I’m going to cave your head in” was a sufficient threat).

The conditional nature of a threat may, however, bear on whether it is a threat of sufficiently imminent harm. In *Pitte v. State*, 102 S.W.3d 786 (Tex. App.—Texarkana 2003, no pet.), the court explained:

Pitte contends the evidence is insufficient to show that Venzant was threatened with imminent harm as required by statute because the threat allegedly made by him was conditional rather than imminent.

Threats of future harm may not be sufficient to reasonably place another in fear of imminent bodily injury or death. *See Devine v. State*, 786 S.W.2d 268, 270 (Tex. Crim. App. 1989). Under certain circumstances, however, threats that may sound conditional or speak of future harm can satisfy the element of robbery. *See Green v. State*, 567 S.W.2d 211 (Tex. Crim. App. [Panel Op.] 1978). When examining a conditional threat to determine whether it involves future harm or imminent harm, the courts will consider the remoteness of the occurrence of the condition and the present capability of the accused to carry out the threat. *Devine v. State*, 786 S.W.2d at 270; *Green v. State*, 567 S.W.2d at 211.

Pitte, 102 S.W.3d at 792 (footnote omitted).

“Imminent” Bodily Injury or Death. Any threat must be of “imminent” bodily injury or death, and the fear instilled must be similar. The statutes provide no definition of “imminent.”

Judge Clinton’s opinion in *Devine* stated: “[A]n offense involving threats of ‘future’ bodily injury was intended to be theft, not robbery. Ergo, consistently with this apparent intent, we construe ‘imminent’ bodily injury in § 29.02(a)(2), supra, to require a present, not a future threat.” *Devine*, 786 S.W.2d at 270.

A jury charge could be formulated that would simply inform the jury that a threat of harm to be inflicted in the future (or a fear of harm that would occur only in the future) is not sufficient. Whether such a charge would be helpful and, if so, permissible is not clear. Consequently, the Committee did not recommend that the charge attempt such a definition of “imminent.”

Unanimity. The Committee found no controlling case law on whether a jury must be unanimous about whether the defendant committed the offense by threatening the victim or placing the victim in fear. It concluded that the court of criminal appeals would most likely conclude these are not separate offenses on which unanimity is required but rather alternative ways of committing what is widely regarded as the single offense of robbery by threat.

CPJC 86.3 Instruction—Aggravated Robbery by Causing Serious Bodily Injury**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of aggravated robbery. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., while in the course of committing theft of property owned by [name] and with the intent to obtain and maintain control of the property, intentionally, knowingly, or recklessly caused serious bodily injury to [name] by stabbing [name] with a knife.*]

Relevant Statutes

A person commits aggravated robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, the person intentionally, knowingly, or recklessly causes bodily injury to another and this bodily injury is serious bodily injury.

To prove that the defendant is guilty of aggravated robbery, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant intentionally, knowingly, or recklessly caused bodily injury to another; and
2. the bodily injury was serious bodily injury; and
3. the defendant did this in the course of committing theft; and
4. the defendant had the intent to obtain or maintain control of the property that was the subject of the theft.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of aggravated robbery.

Definitions*Bodily Injury*

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Serious Bodily Injury

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Intentionally Causing Bodily Injury

A person intentionally causes bodily injury to another if it is the person’s conscious objective or desire to cause the bodily injury to another.

Knowingly Causing Bodily Injury

A person knowingly causes bodily injury to another if the person is aware that the person’s conduct is reasonably certain to cause the bodily injury to another.

Recklessly Causing Bodily Injury

A person recklessly causes bodily injury to another if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person’s action will cause bodily injury to another. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.

Course of Committing Theft

Conduct is engaged in “in the course of committing theft” if that conduct was engaged in during an attempt to commit, during the commission of, or in immediate flight after the attempt or commission of theft.

Theft

Theft is a criminal offense requiring proof that—

1. the person appropriated property of another;
2. that appropriation was unlawful; and
3. the person did this with the intent to deprive the owner of the property.

*[Insert other definitions related to theft as necessary,
depending on the facts.]*

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally, knowingly, or recklessly caused bodily injury to [name] [*insert specific allegations, e.g. by stabbing [name] with a knife*]; and
2. this bodily injury was serious bodily injury; and
3. the defendant did this in the course of committing theft of property owned by [name]; and
4. the defendant had the intent to obtain or maintain control of the property that was the subject of the theft.

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Aggravated robbery is prohibited by and defined in Tex. Penal Code § 29.03. The definition of “course of committing theft” is from Tex. Penal Code § 29.01(1). The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “serious bodily injury” is from Tex. Penal Code § 1.07(a)(46). The definition of “theft” is based on Tex. Penal Code § 31.03(a).

The Committee concluded that no culpable mental state is required regarding the aggravating element elevating robbery to aggravated robbery. Thus the above charge requires only the culpable mental state necessary for robbery.

CPJC 86.4 Instruction—Aggravated Robbery by Threat and Use or Exhibition of Deadly Weapon

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of aggravated robbery. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., while in the course of committing theft of property and with the intent to obtain and maintain control of the property, intentionally or knowingly threatened and placed [name] in fear of imminent bodily injury or death and used or exhibited a deadly weapon, a firearm*].

Relevant Statutes

A person commits aggravated robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, the person intentionally or knowingly threatens or places another in fear of imminent bodily injury or death and uses or exhibits a deadly weapon.

To prove that the defendant is guilty of aggravated robbery, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant intentionally or knowingly either—
 - a. threatened another with imminent bodily injury or death; or
 - b. placed another in fear of imminent bodily injury or death; and
2. the defendant did this in the course of committing theft; and
3. the defendant had the intent to obtain or maintain control of the property that was the subject of the theft; and
4. the defendant used or exhibited a deadly weapon.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of aggravated robbery.

Definitions

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Intentionally Threaten

A person intentionally threatens another when the person has the conscious objective or desire to engage in conduct constituting a threat.

Knowingly Threaten

A person knowingly threatens another when the person is aware that the person’s conduct constitutes a threat.

Intentionally Place in Fear

A person intentionally places another in fear when the person has the conscious objective or desire to place the other person in fear.

Knowingly Place in Fear

A person knowingly places another in fear when the person is aware that the person’s conduct is reasonably certain to cause fear in another.

Course of Committing Theft

Conduct is engaged in “in the course of committing theft” if that conduct was engaged in during an attempt to commit, during the commission of, or in immediate flight after the attempt or commission of theft.

Theft

Theft is a criminal offense requiring proof that—

1. the person appropriated property of another;
2. that appropriation was unlawful; and
3. the person did this with the intent to deprive the owner of the property.

*[Insert other definitions related to theft as necessary,
depending on the facts.]*

Deadly Weapon

“Deadly weapon” means—

1. a firearm; or
2. anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or
3. anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Firearm

“Firearm” means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

[Include the following if raised by the evidence.]

“Firearm” does not include a firearm that may have, as an intergral part, a folding knife blade or other characteristics of weapons made illegal by chapter 46 of the Texas Penal Code and that is—

1. an antique or curio firearm manufactured before 1899, or
2. a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], intentionally or knowingly either—
 - a. threatened [*name*] with imminent bodily injury or death; or
 - b. placed [*name*] in fear of imminent bodily injury or death; and
2. the defendant did this in the course of committing theft of property owned by [*name*]; and
3. the defendant had the intent to obtain or maintain control of the property that was the subject of the theft; and
4. the defendant used or exhibited a deadly weapon, a firearm.

You must all agree on elements 1, 2, 3, and 4 listed above, but you do not have to agree on whether element 1 is proved by the method listed in 1.a or 1.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Aggravated robbery is prohibited by and defined in Tex. Penal Code § 29.03. The definition of “course of committing theft” is from Tex. Penal Code § 29.01(1). The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “theft” is based on Tex. Penal Code § 31.03(a). The definition of “deadly weapon” is from Tex. Penal Code § 1.07(a)(17). The definition of “firearm” is from Tex. Penal Code § 46.01(3).

For a discussion of some of the concerns with the definition of ‘deadly weapon’ and for an alternate definition, see CPJC 85.5 in this volume.

CPJC 86.5 Instruction—Aggravated Robbery by Threatening Person Sixty-Five or Older or Disabled Person**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of aggravated robbery. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., while in the course of committing theft of property and with the intent to obtain and maintain control of the property, intentionally or knowingly threatened [name], a [person sixty-five years old or older/disabled person]*].

Relevant Statutes

A person commits aggravated robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, the person intentionally or knowingly threatens or places a [person sixty-five years old or older/disabled person] in fear of imminent bodily injury or death.

To prove that the defendant is guilty of aggravated robbery, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant intentionally or knowingly either—
 - a. threatened another with imminent bodily injury or death; or
 - b. placed another in fear of imminent bodily injury or death; and
2. the person threatened or placed in fear was a [person sixty-five years old or older/disabled person]; and
3. the defendant did this in the course of committing theft; and
4. the defendant had the intent to obtain or maintain control of the property that was the subject of the theft.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of aggravated robbery.

Definitions

Intentionally Threaten

A person intentionally threatens another when the person has the conscious objective or desire to engage in conduct constituting a threat.

Knowingly Threaten

A person knowingly threatens another when the person is aware that the person's conduct constitutes a threat.

Intentionally Place in Fear

A person intentionally places another in fear when the person has the conscious objective or desire to place the other person in fear.

Knowingly Place in Fear

A person knowingly places another in fear when the person is aware that the person's conduct is reasonably certain to cause fear in the other.

Bodily Injury

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

Disabled Person

A "disabled person" is an individual with a mental, physical, or developmental disability who is substantially unable to protect himself from harm.

Course of Committing Theft

Conduct is engaged in "in the course of committing theft" if that conduct was engaged in during an attempt to commit, during the commission of, or in immediate flight after the attempt or commission of theft.

Theft

Theft is a criminal offense requiring proof that—

1. the person appropriated property of another;
2. that appropriation was unlawful; and

3. the person did this with the intent to deprive the owner of the property.

*[Insert other definitions related to theft as necessary,
depending on the facts.]*

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly—
 - a. threatened [name] with imminent bodily injury or death; or
 - b. placed [name] in fear of imminent bodily injury or death; and
2. [name] was a [person sixty-five years old or older/disabled person]; and
3. the defendant did this in the course of committing theft of property owned by [name]; and
4. the defendant had the intent to obtain or maintain control of the property that was the subject of the theft.

You must all agree on elements 1, 2, 3, and 4 listed above, but you do not have to agree on whether element 1 is proved by the method listed in 1.a or 1.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Aggravated robbery is prohibited by and defined in Tex. Penal Code § 29.03. The definition of “course of committing theft” is from Tex. Penal Code § 29.01(1). The

definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “theft” is based on Tex. Penal Code § 31.03(a).

[Chapters 87–89 are reserved for expansion.]

CHAPTER 90	ARSON	
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CPJC 90.1 Arson Generally

Culpable Mental States. Tex. Penal Code § 28.02 distinguishes three major ways in which arson can be committed. Under Tex. Penal Code § 28.02(a), the offense consists of starting a fire or causing an explosion with intent to destroy or damage specified property. Under Tex. Penal Code § 28.02(a-1), added in 2005, it consists of starting a fire or causing an explosion while manufacturing a controlled substance and damaging specified property. Under Tex. Penal Code § 28.02(a-2), added in 2009, it consists of starting a fire or causing an explosion and either injuring another person or damaging or destroying the building of another.

Determining the culpable mental states required by arson under section 28.02(a) presents a problem. Specifically, the Committee was unsure whether under section 28.02(a) juries should be instructed that the state must prove that the defendant had a culpable mental state regarding the basic conduct of starting the fire or causing the explosion.

Section 28.02(a-1) explicitly requires that the defendant recklessly start the fire or cause the explosion. Section 28.02(a-2) explicitly requires that the defendant intentionally do this. Section 28.02(a), however, contains neither requirement.

The obvious possible source of a culpable mental state would be Tex. Penal Code § 6.02(c). This section, however, applies only if the definition of the offense “does not prescribe a culpable mental state. Section 28.02(a) prescribes a requirement of proof that the accused intended to destroy or damage specified property. This would seem to render section 6.02(c) inapplicable.

The difference in terminology between subsections (a) and both (a-1) and (a-2) further suggests that the legislature did not intend a culpable mental state with regard to the conduct specified in subsection (a).

Perhaps, however, the ‘specific’ intent required by section 28.02(a)—but not subsections (a-1) or (a-2)—implicitly requires a culpable mental state regarding the conduct. The requirement that the person intend to destroy or damage the property probably means to destroy or damage that property by means of the fire or explosion. It is virtually and perhaps literally impossible to intend to damage an item of property by means of a fire one starts or an explosion one causes unless one intends to start that fire or cause that explosion.

Another way to put this is to note that if the evidence shows the defendant started a fire ‘accidentally’ (that is, without being even reckless about whether he was starting a fire), the evidence necessarily fails to show he had the intent to damage the property *by means of that fire*.

Essentially, intent to start the fire or cause the explosion is necessarily included in the requirement of proof that the defendant intended by means of the fire or explosion to destroy or damage the property.

This would explain why the legislature wrote subsections (a-1) and (a-2) differently without revising subsection (a). Neither subsection (a-1) nor subsection (a-2) requires intent to destroy or damage the property or any real equivalent. Thus these crimes do not have subsection (a)'s implicit requirement of an intentional burning and therefore need an explicit culpable mental state for the fire or explosion. As a result, the legislature may have believed it necessary to explicitly provide for the kind of mental state element implicitly required in subsection (a).

Case law does not unequivocally address the matter. Much of it, however, appears to assume that arson by fire under subsection (a) requires that the fire be intentionally set. *See, e.g. Baugh v. State*, 776 S.W.2d 583, 585-86 (Tex. Crim. App. 1989) (reversing conviction where there was "no direct evidence that appellant intentionally set the fire" and "the evidence circumstantially supports the inference that the fire started as a result of accident rather than arson"); *Faulk v. State*, 608 S.W.2d 625, 627 (Tex. Crim. App. 1980) (state must prove not just fire but that fire had incendiary origin); *Romo v. State*, 593 S.W.2d 690, 693-94 (Tex. Crim. App. 1980) (appellant precluded from alleging for first time on appeal that indictment failed to allege implied culpable mental state that fire was intentionally or knowingly started), *overruled on other grounds by Wagner v. State*, 687 S.W.2d 303, 313 n.7 (Tex. Crim. App. 1984); *Adrian v. State*, 587 S.W.2d 733, 734 (Tex. Crim. App. 1979) (requiring evidence that someone designedly set fire to establish corpus delicti of arson); *Massey v. State*, 226 S.W.2d 856, 859 (Tex. Crim. App. 1950) (requiring testimony showing that fire was incendiary in origin).

Much of the confusion may be due to *Miller v. State*, 566 S.W.2d 614, 618-19 (Tex. Crim. App. [Panel Op.] 1978), in which a panel of the court of criminal appeals uncritically assumed that arson under the 1974 Penal Code was the same—or at least required the same intentional starting of the fire—as arson under the earlier statutes. *Miller* led the courts to uncritically conclude, in applying the requirement that an out-of-court confession be corroborated, that arson by fire under section 28.02(a) requires proof that the fire was intentionally set. *See Adrian*, 587 S.W.2d at 735. *Beltran v. State*, 593 S.W.2d 688 (Tex. Crim. App. 1980), however, recognized that the intent the state must prove—and that "cannot be inferred from the mere act of burning"—is "the specific intent to damage or destroy the [property]." *Beltran*, 593 S.W.2d at 689.

The Committee decided to draft instructions for section 28.02(a) arson with an option—in brackets—for including a requirement that starting the fire or causing the explosion be at least reckless.

If the intent to destroy or damage the target property implicitly imposes a requirement that starting the fire or causing the explosion be intentional, this might be made most clear by an instruction defining the required culpable mental state in those terms. The Committee was concerned, however, that such a definitional instruction would go beyond the statutory language defining arson and thus be unacceptable.

**CPJC 90.2 Instruction—Arson of Building, Habitation, or Vehicle
within Limits of Incorporated City or Town**

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of arson. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. started a fire by lighting a match and throwing it on scrub brush with the intent to destroy or damage any building, habitation, or vehicle, with knowledge that it was within the limits of an incorporated city*] [./,]

[Include the following if alleged in the indictment.]

and [a person suffered bodily injury or death by reason of the commission of the offense/the property the defendant intended to damage or destroy was a habitation/the property the defendant intended to damage or destroy was a place of assembly or worship].

Relevant Statutes

A person commits an offense if the person [intentionally/knowingly/recklessly] [starts a fire, regardless of whether the fire continues after ignition/causes an explosion], with intent to destroy or damage any building, habitation, or vehicle, knowing that it is within the limits of an incorporated city or town.

To prove that the defendant is guilty of arson, the state must prove, beyond a reasonable doubt, [three/four] elements. The elements are that—

1. the defendant [intentionally/knowingly/recklessly] [started a fire/caused an explosion]; and
2. the defendant [started the fire/caused the explosion] with the intent to destroy or damage a [building/habitation/vehicle]; and
3. the defendant knew that the [building/habitation/vehicle] was within the limits of an incorporated city or town [./; and]

[Include the following element if pleaded.]

4. a person suffered bodily injury or death by reason of the commission of the offense.

[or]

4. the property the defendant intended to damage or destroy was a habitation.

[or]

4. the property the defendant intended to damage or destroy was a place of assembly or worship.

Statutory Defense

It is a defense to prosecution under this arson statute that before [starting the fire/causing the explosion] a person obtained a permit or other written authorization granted in accordance with a city ordinance, if any, regulating fires and explosions.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of arson.

Definitions

Intentionally [Start a Fire/Cause an Explosion]

A person intentionally [starts a fire/causes an explosion] when the person has the conscious objective or desire to [start the fire/cause an explosion].

Knowingly [Start a Fire/Cause an Explosion]

A person knowingly [starts a fire/causes an explosion] when the person is aware that he is [starting the fire/causing an explosion].

Recklessly [Start a Fire/Cause an Explosion]

A person recklessly [starts a fire/causes an explosion] when the person is aware of but consciously disregards a substantial and unjustifiable risk that the person is [starting the fire/causing an explosion].

With Intent to Destroy or Damage

A person intends to destroy or damage any [building/habitation/vehicle] when it is the person's conscious objective or desire to destroy or damage such [building/habitation/vehicle].

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Building

“Building” means any structure or enclosure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.

Habitation

“Habitation” means a structure or vehicle that is adapted for the overnight accommodation of persons.

If a structure or vehicle is a habitation, each separately secured or occupied portion of the structure or vehicle is also a habitation.

Habitation also includes, in addition to a structure or vehicle itself adapted for the overnight accommodation of persons—

1. each structure connected with the adapted structure or vehicle; and
2. each structure near and related to the use and enjoyment of the adapted structure.

Property

“Property” means real property; tangible or intangible personal property, including anything severed from land; or a document, including money, that represents or embodies anything of value.

Vehicle

“Vehicle” includes any device in, on, or by which any person or property is or may be propelled, moved, or drawn in the normal course of commerce or transportation.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, [three/four] elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], [intentionally/knowingly/recklessly] [started a fire/caused an explosion] [insert specific allegations, e.g., by lighting a match and throwing it on scrub brush]; and

2. the defendant [started the fire/caused the explosion] with the intent to destroy or damage a [building/habitation/vehicle] [at/a] [*insert specific address of building or habitation or description of vehicle*]; and

3. the defendant knew that the [building/habitation/vehicle] was within the limits of an incorporated city or town [./; and]

[Include the following element if pleaded.]

4. [name] suffered bodily injury in the form of [*describe injury*] by reason of the arson.

[or]

4. [name] died by reason of the arson.

[or]

4. the property the defendant intended to damage or destroy, [*describe property*], was a habitation.

[or]

4. the property the defendant intended to damage or destroy, [*describe property*], was a place of assembly or worship.

You must all agree on elements 1, 2, [and 3/3, and 4] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, [and 3/3, and 4] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the [three/four] elements listed above, you must find the defendant “guilty.”

[Include the following if a defense to Texas Penal Code section 28.02(a)(2)(A) has been submitted to the jury under Texas Penal Code section 28.02(c).]

If you all agree the state has proved, beyond a reasonable doubt, each of the [three/four] elements listed above, you must next consider whether the state has proved that there is a city ordinance in the incorporated town or city regarding fires and explosions but that the defendant failed to obtain [a permit/written authorization] before [starting the fire/causing the explosion] in accordance with this city ordinance.

To decide the issue of obtaining [a permit/written authorization], you must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. there is a city ordinance that regulates fires and explosions and grants such [permits/written authorization] in the incorporated town or city listed in the accusation; and
2. before [starting the fire/causing the explosion] described in the accusation—
 - a. the defendant did not obtain [a permit/written authorization]; or
 - b. the permit was not granted in accordance with the city ordinance.

You must all agree the state has proved, beyond a reasonable doubt, both elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of arson, and you all agree the state has proved, beyond a reasonable doubt, both elements 1 and 2 listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Arson is prohibited by and defined in Tex. Penal Code § 28.02. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “building” is from Tex. Penal Code § 28.01(2). The definition of “habitation” is from Tex. Penal Code § 28.01(1). The definition of “property” is from Tex. Penal Code § 28.01(3). The definition of “vehicle” is from Tex. Penal Code § 28.01(4).

This instruction is for use when the defendant has been charged with violating Tex. Penal Code § 28.02(a)(2)(A). The defense listed in Tex. Penal Code § 28.02(c) is a defense only to prosecution under section 28.02(a)(2)(A). Pursuant to section 2.03, once this defense is properly raised, the burden of disproving it beyond a reasonable

doubt is on the state. However, the defense is not to be submitted to the jury unless evidence is admitted supporting it.

CPJC 90.3 Instruction—Arson of Building, Habitation, or Vehicle**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of arson. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. started a fire by lighting a match and throwing it on scrub brush with the intent to destroy or damage any building, habitation, or vehicle, with knowledge that it was located on property belonging to another*] [./,]

[Include the following if alleged in the indictment.]

and [a person suffered bodily injury or death by reason of the commission of the offense/the property the defendant intended to damage or destroy was a habitation/the property the defendant intended to damage or destroy was a place of assembly or worship].

Relevant Statutes

A person commits an offense if the person [intentionally/knowingly/recklessly] [starts a fire, regardless of whether the fire continues after ignition/causes an explosion], with intent to destroy or damage any building, habitation, or vehicle—

1. knowing that it is insured against damage or destruction; or
 2. knowing that it is subject to a mortgage or other security interest; or
 3. knowing that it is located on property belonging to another; or
 4. knowing that it has located within it property belonging to another;
- or
5. when the person is reckless about whether the burning or explosion will endanger the life of some individual or the safety of the property of another.

To prove that the defendant is guilty of arson, the state must prove, beyond a reasonable doubt, [three/four] elements. The elements are that—

1. the defendant [intentionally/knowingly/recklessly] [started a fire/caused an explosion]; and

2. the defendant [started the fire/caused the explosion] with the intent to destroy or damage a [building/habitation/vehicle]; and

[Select one of the following.]

3. the defendant knew that the [building/habitation/vehicle] was insured against damage or destruction [./; and]

[or]

3. the defendant knew that the [building/habitation/vehicle] was subject to a mortgage or other security interest [./; and]

[or]

3. the defendant knew that the [building/habitation/vehicle] was located on property belonging to another [./; and]

[or]

3. the defendant knew that the [building/habitation/vehicle] had located within it property belonging to another [./; and]

[or]

3. the defendant was reckless about whether the burning or explosion would endanger the life of some individual or the safety of the property of another [./; and]

[Include the following element if pleaded.]

4. a person suffered bodily injury or death by reason of the commission of the offense.

[or]

4. the property the defendant intended to damage or destroy was a habitation.

[or]

4. the property the defendant intended to damage or destroy was a place of assembly or worship.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of arson.

Definitions*Intentionally [Start a Fire/Cause an Explosion]*

A person intentionally [starts a fire/causes an explosion] when the person has the conscious objective or desire to [start the fire/cause an explosion].

Knowingly [Start a Fire/Cause an Explosion]

A person knowingly [starts a fire/causes an explosion] when the person is aware that he is [starting the fire/causing an explosion].

Recklessly [Start a Fire/Cause an Explosion]

A person recklessly [starts a fire/causes an explosion] when the person is aware of but consciously disregards a substantial and unjustifiable risk that the person is [starting the fire/causing an explosion].

With Intent to Destroy or Damage

A person intends to destroy or damage any [building/habitation/vehicle] when it is the person's conscious objective or desire to destroy or damage such [building/habitation/vehicle].

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Building

“Building” means any structure or enclosure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.

Habitation

“Habitation” means a structure or vehicle that is adapted for the overnight accommodation of persons.

If a structure or vehicle is a habitation, each separately secured or occupied portion of the structure or vehicle is also a habitation.

Habitation also includes, in addition to a structure or vehicle itself adapted for the overnight accommodation of persons—

1. each structure connected with the adapted structure or vehicle; and
2. each structure near and related to the use and enjoyment of the adapted structure.

Property

“Property” means real property; tangible or intangible personal property, including anything severed from land; or a document, including money, that represents or embodies anything of value.

Vehicle

“Vehicle” includes any device in, on, or by which any person or property is or may be propelled, moved, or drawn in the normal course of commerce or transportation.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, [three/four] elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], [intentionally/knowingly/recklessly] [started a fire/caused an explosion] [*insert specific allegations, e.g. by lighting a match and throwing it on scrub brush*]; and
2. the defendant [started the fire/caused the explosion] with the intent to destroy or damage a [building/habitation/vehicle] [at/a] [*insert specific address of building or habitation or description of vehicle*]; and

[*Select one of the following.*]

3. the defendant knew that the [building/habitation/vehicle] was insured against damage or destruction [./; and]

[*or*]

3. the defendant knew that the [building/habitation/vehicle] was subject to a mortgage or other security interest [./; and]

[*or*]

3. the defendant knew that the [building/habitation/vehicle] was located on property belonging to another [./; and]

[or]

3. the defendant knew that the [building/habitation/vehicle] had located within it property belonging to another [./; and]

[or]

3. the defendant was reckless about whether the burning or explosion would endanger the life of some individual or the safety of the property of another [./; and]

[Include the following element if pleaded.]

4. [name] suffered bodily injury in the form of [describe injury] by reason of the arson.

[or]

4. [name] died by reason of the arson.

[or]

4. the property the defendant intended to damage or destroy, [describe property], was a habitation.

[or]

4. the property the defendant intended to damage or destroy, [describe property], was a place of assembly or worship.

You must all agree on elements 1, 2, [and 3/3, and 4] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, [and 3/3, and 4] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the [three/four] elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Arson is prohibited by and defined in Tex. Penal Code § 28.02. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of ‘bodily injury’ is from Tex. Penal Code § 1.07(a)(8). The definition of “building” is from Tex. Penal Code § 28.01(2). The definition of “habitation” is from Tex. Penal Code § 28.01(1). The definition of “property” is from Tex. Penal Code § 28.01(3). The definition of “vehicle” is from Tex. Penal Code § 28.01(4).

This instruction is for use when the defendant has been charged with violating Tex. Penal Code § 28.02(a)(2)(B)–(F).

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CPJC 90.4 Instruction—Arson on Open-Space Land**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of arson. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. started a fire that was not a controlled burning with the intent to destroy or damage any vegetation, fence, or structure on open-space land*] [./,]

[Include the following if alleged in the indictment.]

and [a person suffered bodily injury or death by reason of the commission of the offense/the property the defendant intended to damage or destroy was a habitation/the property the defendant intended to damage or destroy was a place of assembly or worship].

Relevant Statutes

A person commits an offense if the person [intentionally/knowingly/recklessly] [starts a fire, regardless of whether the fire continues after ignition/causes an explosion], with intent to destroy or damage any vegetation, fence, or structure on open-space land. It is not an offense if the [fire/explosion] was a part of the controlled burning of open-space land.

To prove that the defendant is guilty of arson, the state must prove, beyond a reasonable doubt, [three/four] elements. The elements are that—

1. the defendant [intentionally/knowingly/recklessly] [started a fire/caused an explosion]; and
2. the defendant [started the fire/caused the explosion] with the intent to destroy or damage any vegetation, fence, or structure on open-space land; and
3. the [fire/explosion] was not a part of the controlled burning of open-space land [./; and]

[Include the following element if pleaded.]

4. a person suffered bodily injury or death by reason of the commission of the offense.

[or]

4. the property the defendant intended to damage or destroy was a habitation.

[or]

4. the property the defendant intended to damage or destroy was a place of assembly or worship.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of arson.

Definitions

Intentionally [Start a Fire/Cause an Explosion]

A person intentionally [starts a fire/causes an explosion] when the person has the conscious objective or desire to [start the fire/cause an explosion].

Knowingly [Start a Fire/Cause an Explosion]

A person knowingly [starts a fire/causes an explosion] when the person is aware that he is [starting the fire/causing an explosion].

Recklessly [Start a Fire/Cause an Explosion]

A person recklessly [starts a fire/causes an explosion] when the person is aware of but consciously disregards a substantial and unjustifiable risk that the person is [starting the fire/causing an explosion].

With Intent to Destroy or Damage

A person intends to destroy or damage any [vegetation/fence/structure] when it is the person's conscious objective or desire to destroy or damage such [vegetation/fence/structure].

Open-Space Land

“Open-space land” means real property that is undeveloped for the purpose of human habitation.

Controlled Burning

A “controlled burning” means the burning of unwanted vegetation with the consent of the owner of the property on which the vegetation is located and in such a manner that the fire is controlled and limited to a designated area.

Owner

“Owner” means a person who has—

1. title to the property; or
2. possession of the property, whether lawful or not; or
3. a greater right to possession of the property than the defendant.

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Habitation

“Habitation” means a structure or vehicle that is adapted for the overnight accommodation of persons.

If a structure or vehicle is a habitation, each separately secured or occupied portion of the structure or vehicle is also a habitation.

Habitation also includes, in addition to a structure or vehicle itself adapted for the overnight accommodation of persons—

1. each structure connected with the adapted structure or vehicle; and
2. each structure near and related to the use and enjoyment of the adapted structure.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, [three/four] elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], [intentionally/knowingly/recklessly] [started a fire/caused an explosion] [*insert specific allegations, e.g. by lighting a match and throwing it on scrub brush*]; and

2. the defendant [started the fire/caused the explosion] with the intent to destroy or damage any vegetation, fence, or structure on open-space land; and

3. the [fire/explosion] was not a part of the burning of unwanted vegetation with the consent of [name], the owner of the property on which the vegetation was located, and limited to a designated area; and the [burning/explosion] was not done in such a manner that the fire was controlled and limited to a designated area [./; and]

[Include the following element if pleaded.]

4. [name] suffered bodily injury in the form of [describe injury] by reason of the arson.

[or]

4. [name] died by reason of the arson.

[or]

4. the property the defendant intended to damage or destroy, [describe property], was a habitation.

[or]

4. the property the defendant intended to damage or destroy, [describe property], was a place of assembly or worship.

You must all agree on elements 1, 2, [and 3/3, and 4] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, [and 3/3, and 4] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the [three/four] elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1. the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Arson is prohibited by and defined in Tex. Penal Code § 28.02. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “open-space land” is from Tex. Penal Code § 28.01(5). The definition of “controlled burning” is from Tex. Penal Code § 28.01(6). The definition of “owner” is from Tex. Penal Code § 1.07(a)(35). The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “habitation” is from Tex. Penal Code § 28.01(1).

This instruction is for use when the defendant has been charged with violating Tex. Penal Code § 28.02(a)(1). The arson statute does not proscribe controlled burning on open-space land, so the exception in Tex. Penal Code § 28.02(b) must be specifically negated in the indictment and the prosecution must prove beyond a reasonable doubt at trial that the defendant’s conduct does not fall within the exception. *See* Tex. Penal Code § 2.02.

CPJC 90.5 Instruction—Arson While Manufacturing Controlled Substance

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of arson while manufacturing drugs. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. recklessly caused an explosion while manufacturing methamphetamine, a controlled substance*].

Relevant Statutes

A person commits an offense if the person recklessly [starts a fire/causes an explosion] while [manufacturing/attempting to manufacture] a controlled substance and the [fire/explosion] damages any building, habitation, or vehicle.

To prove that the defendant is guilty of arson, the state must prove, beyond a reasonable doubt, [three/four] elements. The elements are that—

1. the defendant recklessly [started a fire/caused an explosion]; and
2. the defendant was [manufacturing/attempting to manufacture] a controlled substance; and
3. the [fire/explosion] damaged a [building/habitation/vehicle] [./; and]

[Include the following element if pleaded.]

4. a person suffered bodily injury or death by reason of the commission of the offense.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of arson while manufacturing a controlled substance.

Definitions

Recklessly [Start a Fire/Cause an Explosion]

A person recklessly [starts a fire/causes an explosion] when the person is aware of but consciously disregards a substantial and unjustifiable risk that the

person is [starting the fire/causing an explosion]. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint.

Bodily Injury

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

Building

“Building” means any structure or enclosure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.

Habitation

“Habitation” means a structure or vehicle that is adapted for the overnight accommodation of persons.

If a structure or vehicle is a habitation, each separately secured or occupied portion of the structure or vehicle is also a habitation.

Habitation also includes, in addition to a structure or vehicle itself adapted for the overnight accommodation of persons—

1. each structure connected with the adapted structure or vehicle; and
2. each structure near and related to the use and enjoyment of the adapted structure.

Property

“Property” means real property; tangible or intangible personal property, including anything severed from land; or a document, including money, that represents or embodies anything of value.

Vehicle

“Vehicle” includes any device in, on, or by which any person or property is or may be propelled, moved, or drawn in the normal course of commerce or transportation.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, [three/four] elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], recklessly [started a fire/caused an explosion]; and
2. the defendant [started the fire/caused the explosion] while [manufacturing/attempting to manufacture] [name of controlled substance], a controlled substance; and
3. the [fire/explosion] damaged a [building/habitation/vehicle] [./; and]

[Include the following element if pleaded.]

4. [name] suffered bodily injury in the form of [describe injury] by reason of the arson.

[or]

4. [name] died by reason of the arson.

You must all agree on elements 1, 2, [and 3/3, and 4] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, [and 3/3, and 4] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the [three/four] elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Arson is prohibited by and defined in Tex. Penal Code § 28.02. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “building” is from Tex. Penal Code § 28.01(2). The definition of ‘habitation’ is from Tex. Penal Code § 28.01(1). The definition of “property” is from Tex. Penal Code § 28.01(3). The definition of “vehicle” is from Tex. Penal Code § 28.01(4).

This instruction is for use when the defendant has been charged with violating Tex. Penal Code § 28.02(a–1). Arson under that section is a state jail felony unless it is aggravated under Tex. Penal Code § 28.02(e) by proof that injury or death was caused, which makes it a third-degree felony.

The instruction requires no culpable mental state concerning damage to the property or—if the offense is aggravated—injury or death. The Committee was persuaded that the required culpable mental state, recklessness, was intended to apply only to the nature-of-conduct element of starting a fire or causing an explosion. Essentially, the offense imposes strict liability regarding the causing of property damage and—if the offense is aggravated—the causing of injury or death.

CPJC 90.6 Instruction—Arson with Reckless Damage**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of arson. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. intentionally started a fire by lighting a match and throwing it on scrub brush and in so doing recklessly damaged an apartment building of another*].

Relevant Statutes

A person commits an offense if the person intentionally starts a fire or causes an explosion and in so doing recklessly damages or destroys a building belonging to another or recklessly causes another person to suffer bodily injury or death.

To prove that the defendant is guilty of arson, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant intentionally [started a fire/caused an explosion]; and

[Select one of the following.]

2. in [starting the fire/causing the explosion], the defendant was reckless regarding whether he would [damage/destroy] a building belonging to another; and

3. the defendant [damaged/destroyed] a building belonging to another.

[or]

2. in [starting the fire/causing the explosion], the defendant was reckless regarding whether another person would suffer [bodily injury/death], and

3. another person [suffered bodily injury/died].

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of arson.

Definitions

Intentionally [Start a Fire/Cause an Explosion]

A person intentionally [starts a fire/causes an explosion] when the person has the conscious objective or desire to [start the fire/cause an explosion].

Recklessly [Damage/Destroy] a Building

A person recklessly [damages/destroys] a building belonging to another when the person is aware of but consciously disregards a substantial and unjustifiable risk that the person will [damage/destroy] the building of another. The risk of [damage/destruction] must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Recklessly Cause Another Person to Suffer [Bodily Injury/Death]

A person recklessly causes another person to suffer [bodily injury/death] when the person is aware of but consciously disregards a substantial and unjustifiable risk that the person will cause [bodily injury/death]. The risk of [injury/death] must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Bodily Injury

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

Building

"Building" means any structure or enclosure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.

Habitation

"Habitation" means a structure or vehicle that is adapted for the overnight accommodation of persons.

If a structure or vehicle is a habitation, each separately secured or occupied portion of the structure or vehicle is also a habitation.

Habitation also includes, in addition to a structure or vehicle itself adapted for the overnight accommodation of persons—

1. each structure connected with the adapted structure or vehicle; and
2. each structure near and related to the use and enjoyment of the adapted structure.

Property

“Property” means real property; tangible or intangible personal property, including anything severed from land; or a document, including money, that represents or embodies anything of value.

Vehicle

“Vehicle” includes any device in, on, or by which any person or property is or may be propelled, moved, or drawn in the normal course of commerce or transportation.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally [started a fire/caused an explosion]; and

[Select one of the following.]

2. the defendant was reckless regarding whether the [fire/explosion] he caused would [damage/destroy] a building belonging to [name]; and
3. a building belonging to [name] was [damaged/destroyed].

[or]

2. the defendant was reckless regarding whether the [fire/explosion] he caused would [injure/kill] [name]; and
3. [name] was [injured/killed].

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Arson is prohibited by and defined in Tex. Penal Code § 28.02. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “bodily injury” is from Tex. Penal Code § 1.07(a)(8). The definition of “building” is from Tex. Penal Code § 28.01(2). The definition of “habitation” is from Tex. Penal Code § 28.01(1). The definition of “property” is from Tex. Penal Code § 28.01(3). The definition of “vehicle” is from Tex. Penal Code § 28.01(4).

This instruction is for use when the defendant has been charged with violating Tex. Penal Code § 28.02(a–2). Unlike Tex. Penal Code §§ 28.02(a) and 28.02(a–1), section 28.02(a–2) specifically requires that the fire be started (or explosion caused) “intentionally.” See Tex. Penal Code § 28.02(a–2). This section was added in 2009 to relieve prosecutors from having to prove the specific intent to do damage.



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CPJC 91.1 Burglary Generally; Culpable Mental States

How the elements of the basic alternative ways of committing burglary are best distinguished and separated depends in part on what if any culpable mental states are required regarding the various elements.

The Committee was split on the culpable mental states required. The case law is somewhat contradictory. In *Day v. State*, 532 S.W.2d 302, 305 n.1 (Tex. Crim. App. 1975), the court of criminal appeals announced: “[W]e hold that to constitute the offense of burglary by [entering and] committing a felony or theft, the proof must show that the entry was either knowingly or intentionally done.” *Day* found this requirement in Tex. Penal Code § 6.02(b).

But in *Sylvester v. State*, 615 S.W.2d 734, 735 (Tex. Crim. App. [Panel Op.] 1981), the court held a jury charge in a prosecution for burglary by entry with intent not fundamentally defective for failing to require a culpable mental state other than intent to commit the target offense.

Dictum in *DeVaughn v. State*, 749 S.W.2d 62, 64–65 (Tex. Crim. App. 1988), indicated that all three types of burglary set out in Tex. Penal Code § 30.02(a) require—in addition to any culpable mental state explicitly required—that the defendant be proved to have acted intentionally or knowingly. *DeVaughn* did not undertake to explain how that result could be reconciled with the terms of section 6.02.

The matter was more recently addressed in *McIntosh v. State*, 297 S.W.3d 536, 550 (Tex. App.—Houston [1st Dist.] 2009, pet. ref’d) (opinion on petition for discretionary review), explicitly involving jury instructions on burglary by entry with intent to commit assault. All members of the court agreed that this type of burglary requires a culpable mental state applied to the entry element.

The *McIntosh* majority nevertheless held—relying on *Sylvester*—that the jury need not be so instructed because somehow this culpable mental state is “subsumed into” the necessary intent to commit an offense. *McIntosh*, 297 S.W.3d at 543. Justice Alcala disagreed and would have held that instructions must include this culpable mental state. She found that on the facts of the case the error in the jury instructions did not cause the egregious harm necessary for relief. *McIntosh*, 297 S.W.3d at 544–50.

Whether section 6.02(b) applies may differ based on the ways in which burglary can be committed. Most significantly, there may be differences between burglary by entering with intent to commit an offense (under Tex. Penal Code § 30.02(a)(1)) and burglary by entering and committing or attempting to commit an offense (under Tex. Penal Code § 30.02(a)(3)). Burglary by entering with intent to commit an offense arguably prescribes a culpable mental state within the meaning of section 6.02(b), and thus the section 6.02(b) requirement might be inapplicable. Burglary by entering and committing an offense arguably does not so prescribe a culpable mental state and thus does trigger section 6.02(b).

The Committee concluded that section 6.02(b) applies to all three types of burglary, and under section 6.02(c) this requires intent, knowledge, or recklessness. There seems to be no basis on which the legislature could have made a distinction between the ways of committing the offense, and thus it must not have intended any such distinction.

A majority of the Committee also concluded that, as with criminal trespass, the required culpable mental state applies only to the nature of conduct element of entry. This application poses the same problems as those in criminal trespass, and thus the burglary instructions are—in this regard—nearly identical to the trespass instructions.

As with trespass, a minority of the Committee believed the culpable mental state applies to other elements, most importantly the requirement that the place entered be what is required by the applicable portion of the statute. Thus, in their view, the instructions should require that the defendant be proved to have been at least reckless about whether the place entered was a building (or a portion of a building) not at the time open to the public or a habitation.

In any case, the Committee concluded the instructions should include explicit reference to the culpable mental state required by section 6.02. *McIntosh* and perhaps *Sylvester* may be authority for the proposition that a trial judge does not err in refusing to explicitly incorporate this reference into the instructions, but the better practice is to specifically set it out.

CPJC 91.2 Note on Definition of “Habitation”

The definition of “habitation” in Tex. Penal Code § 30.01(1)(B) includes within that term “each structure appurtenant to or connected with [a] structure or vehicle [adapted for the overnight accommodation of persons].” This definition applies to both burglary and criminal trespass.

The Committee concluded that for purposes of both burglary and criminal trespass, the definition in the instructions should not use the phrase *appurtenant to*. That phrase is not widely understood, at least as it is used in the statute.

Jones v. State, 690 S.W.2d 318 (Tex. App.—Dallas 1985, pet. ref’d), upheld a conviction of burglary of a habitation based on entry into an unheated garage unconnected to the house. The court explained:

Because the term “appurtenant” is not defined in the statute, we must construe it according to its generally accepted usage. “Appurtenant” is defined in Black’s Law Dictionary 94 (rev. 5th ed. 1979) as “belonging to; accessory or incident to; adjunct, appended or annexed to. A thing is ‘appurtenant’ to something else when it stands in relation of an incident to a principal and is necessarily connected with the use and enjoyment of the latter.” Under this definition, the garage can be said to be “appurtenant to” the residence here. It is “necessarily connected with the use and enjoyment” of the house, and it is secondary or “incident to” the principal building, the house.

Jones, 690 S.W.2d at 319 (citations omitted). *Jones* was followed and applied in *Mitchell v. State*, No. 14-95-01074-CR, 1998 WL 350516, at *1–2 (Tex. App.—Houston [14th Dist.] June 25, 1998) (not designated for publication) (storage shed in yard was appurtenant to habitation).

The instructions define “habitation” without the phrase *appurtenant to* and in terms taken from *Jones*.

CPJC 91.3 Instruction—Burglary of Building by Entry with Intent to Commit Offense**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of burglary. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. intentionally, knowingly, or recklessly without the consent of [name]*], the owner, entered a building or a portion of a building not then open to the public with intent to commit theft].

Relevant Statutes

A person commits an offense if the person intentionally, knowingly, or recklessly and without the effective consent of the owner enters a [building/portion of a building] not then open to the public with intent to commit a felony, theft, or an assault.

To prove that the defendant is guilty of burglary, the state must prove, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant intentionally, knowingly, or recklessly entered a place; and
2. the place entered was a [building/portion of a building]; and
3. the [building/portion of the building] was not then open to the public; and
4. the owner of the [building/portion of the building] did not effectively consent to this entry; and
5. the defendant intended to commit a felony, theft, or an assault.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of burglary.

Definitions*Building*

“Building” means any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.

Owner

“Owner” means a person who has—

1. title to the property; or
2. possession of the property, whether lawful or not; or
3. a greater right to possession of the property than the defendant.

Possession

“Possession” means actual care, custody, control, or management.

Enter a Place

“Enter a place” means to intrude into the place either (1) any part of the body or (2) any physical object connected with the body.

Effective Consent

“Consent” means assent in fact, whether express or apparent.

Consent to an entry is effective if both—

1. it is given by—
 - a. the owner; or
 - b. a person not the owner but who is legally authorized to act for the owner; or
 - c. a person not the owner but who is believed by the defendant to be legally authorized to act for the owner; and
2. it is neither—
 - a. induced by force, threat, or fraud; nor
 - b. given by a person who by reason of youth, mental disease or defect, or intoxication is known by the defendant to be unable to make reasonable decisions.

Intentionally Enter a Place

A person intentionally enters a place when the person has the conscious objective or desire to enter the place.

Knowingly Enter a Place

A person knowingly enters a place when the person is aware that the person is entering the place.

Recklessly Enter a Place

A person recklessly enters a place when the person is aware of but consciously disregards a substantial and unjustifiable risk that the person is entering the place. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

With Intent to Commit a Felony, Theft, or an Assault

A person intends to commit a felony, theft, or an assault when the person has the conscious objective or desire to commit the felony, theft, or assault.

[Insert definitions appropriate for offense intended at the time of entry, which might include, among others, the following.]

Theft

Theft is a criminal offense requiring proof that—

1. the person appropriated property of another; and
2. that appropriation was unlawful; and
3. the person did this with the intent to deprive the owner of the property.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally, knowingly, or recklessly entered a place, specifically [insert specific address]; and
2. the place entered was a [building/portion of a building] owned by [name]; and
3. the [building/portion of the building] was not then open to the public; and

4. [name], the owner of the [building/portion of the building], did not effectively consent to this entry; and

5. the defendant intended to commit a felony, theft, or an assault.

You must all agree on elements 1, 2, 3, 4, and 5 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, 4, and 5 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Burglary is prohibited by and defined in Tex. Penal Code § 30.02. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “building” is from Tex. Penal Code § 30.01(2). The definition of “owner” is from Tex. Penal Code § 1.07(a)(35). The definition of “possession” is from Tex. Penal Code § 1.07(a)(39). The definition of “enter a place” is from Tex. Penal Code § 30.02(b). The definition of “consent” is from Tex. Penal Code § 1.07(a)(11). Theft is prohibited by and defined in Tex. Penal Code § 31.03.

CPJC 91.4 Instruction—Burglary of Building by Entry and Commission of Offense**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of burglary. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. intentionally, knowingly, or recklessly without the consent of [name], the owner, entered a building or a portion of a building not then open to the public and committed theft*].

Relevant Statutes

A person commits an offense if the person intentionally, knowingly, or recklessly and without the effective consent of the owner enters a [building/portion of a building] not then open to the public and [commits/attempts to commit] a felony, theft, or an assault.

To prove that the defendant is guilty of burglary, the state must prove, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant intentionally, knowingly, or recklessly entered a place; and
2. the place entered was a [building/portion of a building]; and
3. the [building/portion of the building] was not then open to the public; and
4. the owner of the [building/portion of the building] did not effectively consent to this entry; and
5. the defendant [committed/attempted to commit] a felony, theft, or an assault.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of burglary.

Definitions

Building

“Building” means any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.

Owner

“Owner” means a person who has—

1. title to the property; or
2. possession of the property, whether lawful or not; or
3. a greater right to possession of the property than the defendant.

Possession

“Possession” means actual care, custody, control, or management.

Enter a Place

“Enter a place” means to intrude into the place either (1) any part of the body or (2) any physical object connected with the body.

Effective Consent

“Consent” means assent in fact, whether express or apparent.

Consent to an entry is effective if both—

1. it is given by—
 - a. the owner; or
 - b. a person not the owner but who is legally authorized to act for the owner; or
 - c. a person not the owner but who is believed by the defendant to be legally authorized to act for the owner; and
2. it is neither—
 - a. induced by force, threat, or fraud; nor
 - b. given by a person who by reason of youth, mental disease or defect, or intoxication is known by the defendant to be unable to make reasonable decisions.

Intentionally Enter a Place

A person intentionally enters a place when the person has the conscious objective or desire to enter the place.

Knowingly Enter a Place

A person knowingly enters a place when the person is aware that the person is entering the place.

Recklessly Enter a Place

A person recklessly enters a place when the person is aware of but consciously disregards a substantial and unjustifiable risk that the person is entering the place. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

[Insert definitions appropriate for offense committed or attempted after entry, which might include the following.]

Theft

Theft is a criminal offense requiring proof that—

1. the person appropriated property of another; and
2. that appropriation was unlawful; and
3. the person did this with the intent to deprive the owner of the property.

Attempt to Commit Theft

Conduct is engaged in during an attempt to commit theft if at the time of the conduct the person has the intent to commit theft and engages in an act pursuant to that intent amounting to more than mere preparation to commit theft.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally, knowingly, or recklessly entered a place, specifically [insert specific address]; and
2. the place entered was a [building/portion of a building] owned by [name]; and
3. the [building/portion of the building] was not then open to the public; and
4. [name], the owner of the [building/portion of the building], did not effectively consent to this entry; and
5. the defendant [committed/attempted to commit] a felony, theft, or an assault.

You must all agree on elements 1, 2, 3, 4, and 5 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, 4, and 5 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Burglary is prohibited by and defined in Tex. Penal Code § 30.02. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “building” is from Tex. Penal Code § 30.01(2). The definition of “owner” is from Tex. Penal Code § 1.07(a)(35). The definition of “possession” is from Tex. Penal Code § 1.07(a)(39). The definition of “enter a place” is from Tex. Penal Code § 30.02(b). The definition of “consent” is from Tex. Penal Code § 1.07(a)(11). Theft is prohibited by and defined in Tex. Penal Code § 31.03.

CPJC 91.5 Instruction—Burglary of Habitation by Entry with Intent to Commit Offense**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of burglary. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. intentionally, knowingly, or recklessly without the consent of [name]*], the owner, entered a habitation with intent to commit theft].

Relevant Statutes

A person commits an offense if the person intentionally, knowingly, or recklessly and without the effective consent of the owner enters a habitation with intent to commit a felony, theft, or an assault.

To prove that the defendant is guilty of burglary, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant intentionally, knowingly, or recklessly entered a place; and
2. the place entered was a habitation; and
3. the owner of the habitation did not effectively consent to this entry; and
4. the defendant intended to commit a felony, theft, or an assault.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of burglary.

Definitions*Habitation*

“Habitation” means a structure or vehicle that is adapted for the overnight accommodation of persons.

If a structure or vehicle is a habitation, each separately secured or occupied portion of the structure or vehicle is also a habitation.

Habitation also includes, in addition to a structure or vehicle itself adapted for the overnight accommodation of persons—

1. each structure connected with the adapted structure or vehicle; and
2. each structure near and related to the use and enjoyment of the adapted structure.

Owner

“Owner” means a person who has—

1. title to the property; or
2. possession of the property, whether lawful or not; or
3. a greater right to possession of the property than the defendant.

Possession

“Possession” means actual care, custody, control, or management.

Enter a Place

“Enter a place” means to intrude into the place either (1) any part of the body or (2) any physical object connected with the body.

Effective Consent

“Consent” means assent in fact, whether express or apparent.

Consent to an entry is effective if both—

1. it is given by—
 - a. the owner; or
 - b. a person not the owner but who is legally authorized to act for the owner; or
 - c. a person not the owner but who is believed by the defendant to be legally authorized to act for the owner; and
2. it is neither—
 - a. induced by force, threat, or fraud; nor
 - b. given by a person who by reason of youth, mental disease or defect, or intoxication is known by the defendant to be unable to make reasonable decisions.

Intentionally Enter a Place

A person intentionally enters a place when the person has the conscious objective or desire to enter the place.

Knowingly Enter a Place

A person knowingly enters a place when the person is aware that the person is entering the place.

Recklessly Enter a Place

A person recklessly enters a place when the person is aware of but consciously disregards a substantial and unjustifiable risk that the person is entering the place. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

With Intent to Commit a Felony, Theft, or an Assault

A person intends to commit a felony, theft, or an assault when the person has the conscious objective or desire to commit the felony, theft, or assault.

[Insert definitions appropriate for offense intended at the time of entry, which might include, among others, the following.]

Theft

Theft is a criminal offense requiring proof that—

1. the person appropriated property of another; and
2. that appropriation was unlawful; and
3. the person did this with the intent to deprive the owner of the property.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally, knowingly, or recklessly entered a place, specifically [insert specific address]; and

2. the place entered was a habitation owned by [name]; and
3. [name], the owner of the habitation, did not effectively consent to this entry; and
4. the defendant intended to commit a felony, theft, or an assault.

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Burglary is prohibited by and defined in Tex. Penal Code § 30.02. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “habitation” is from Tex. Penal Code § 30.01(1). The definition of ‘owner’ is from Tex. Penal Code § 1.07(a)(35). The definition of “possession” is from Tex. Penal Code § 1.07(a)(39). The definition of ‘enter a place’ is from Tex. Penal Code § 30.02(b). The definition of ‘consent’ is from Tex. Penal Code § 1.07(a)(11). Theft is prohibited by and defined in Tex. Penal Code § 31.03.

CPJC 91.6 Instruction—Burglary of Building by Entry with Intent to Commit Offense or Entry and Commission of Offense**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of burglary. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. intentionally, knowingly, or recklessly without the consent of [name], the owner, entered a building or a portion of a building not then open to the public with intent to commit theft or committed theft*].

Relevant Statutes

A person commits an offense if the person intentionally, knowingly, or recklessly and without the effective consent of the owner enters a [building/portion of a building] not then open to the public either (1) with intent to commit a felony, theft, or an assault; or (2) commits or attempts to commit a felony, theft, or an assault.

To prove that the defendant is guilty of burglary, the state must prove, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant intentionally, knowingly, or recklessly entered a place; and
2. the place entered was a [building/portion of a building]; and
3. the [building/portion of the building] was not then open to the public; and
4. the owner of the [building/portion of the building] did not effectively consent to this entry; and
5. either—
 - a. the defendant intended to commit a felony, theft, or an assault; or
 - b. the defendant committed or attempted to commit a felony, theft, or an assault.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of burglary.

Definitions

Building

“Building” means any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.

Owner

“Owner” means a person who has—

1. title to the property; or
2. possession of the property, whether lawful or not; or
3. a greater right to possession of the property than the defendant.

Possession

“Possession” means actual care, custody, control, or management.

Enter a Place

“Enter a place” means to intrude into the place either (1) any part of the body or (2) any physical object connected with the body.

Effective Consent

“Consent” means assent in fact, whether express or apparent.

Consent to an entry is effective if both—

1. it is given by—
 - a. the owner; or
 - b. a person not the owner but who is legally authorized to act for the owner; or
 - c. a person not the owner but who is believed by the defendant to be legally authorized to act for the owner; and
2. it is neither—
 - a. induced by force, threat, or fraud; nor
 - b. given by a person who by reason of youth, mental disease or defect, or intoxication is known by the defendant to be unable to make reasonable decisions.

Intentionally Enter a Place

A person intentionally enters a place when the person has the conscious objective or desire to enter the place.

Knowingly Enter a Place

A person knowingly enters a place when the person is aware that the person is entering the place.

Recklessly Enter a Place

A person recklessly enters a place when the person is aware of but consciously disregards a substantial and unjustifiable risk that the person is entering the place. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

With Intent to Commit a Felony, Theft, or an Assault

A person intends to commit a felony, theft, or an assault when the person has the conscious objective or desire to commit the felony, theft, or assault.

[Insert definitions appropriate for offense intended at the time of entry or committed after entry, which might include, among others, the following.]

Theft

Theft is a criminal offense requiring proof that—

1. the person appropriated property of another; and
2. that appropriation was unlawful; and
3. the person did this with the intent to deprive the owner of the property.

Attempt to Commit Theft

Conduct is engaged in during an attempt to commit theft if at the time of the conduct the person has the intent to commit theft and engages in an act pursuant to that intent amounting to more than mere preparation to commit theft.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally, knowingly, or recklessly entered a place, specifically [insert specific address]; and
2. the place entered was a [building/portion of a building] owned by [name]; and
3. the [building/portion of the building] was not then open to the public; and
4. [name], the owner of the [building/portion of the building], did not effectively consent to this entry; and
5. either—
 - a. the defendant intended to commit [insert specific offense, e.g. theft]; or
 - b. the defendant [committed/attempted to commit] [insert specific offense, e.g. theft].

You must all agree on elements 1, 2, 3, 4, and 5 listed above, but you do not have to agree on element 5.a or 5.b listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, 4, and 5 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Burglary is prohibited by and defined in Tex. Penal Code § 30.02. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of ‘building’ is from Tex. Penal Code § 30.01(2). The definition of ‘owner’ is from Tex. Penal Code § 1.07(a)(35). The definition of ‘possession’ is from Tex. Penal Code § 1.07(a)(39). The definition of ‘enter a place’ is from Tex. Penal Code § 30.02(b).

The definition of “consent” is from Tex. Penal Code § 1.07(a)(11). Theft is prohibited by and defined in Tex. Penal Code § 31.03.

CPJC 91.7 Statutory Framework of Criminal Trespass

Tex. Penal Code § 30.05(a) creates essentially two ways of committing the offense of criminal trespass: (1) entry after notice that entry is forbidden and (2) remaining (and thus failing to depart) after receiving notice “to depart.”

While not immediately apparent from the face of section 30.05(a), conceptually, notice that entry was forbidden can apply only to commission of the offense by entry. Similarly, notice to depart can apply only to commission of the offense by remaining on or in covered property.

The apparent simplicity of the basic definition of the offense somewhat obscures the complexity of the crime. The Committee undertook the drafting of instructions for two common applications of the provision: criminal trespass by entering a building and by remaining in a building.

CPJC 91.8 Lesser Included Offense Analysis and Relationship between Trespass and Burglary

The Committee accepted that sound policy requires that criminal trespass often be a lesser included offense of burglary. This was the apparent assumption of *Salazar v. State*, 284 S.W.3d 874 (Tex. Crim. App. 2009), holding that the allegation that premises were a habitation was the functional equivalent of an allegation that the accused had notice that entry was forbidden, so that criminal trespass was a lesser included offense of burglary of a habitation.

There are some potential problems with lesser included offense analysis. In criminal trespass, for example, entry requires an intrusion of the entire body. Tex. Penal Code § 30.05(b)(1). In burglary, entry occurs with the insertion of any part of the body or a physical object connected with the body. Tex. Penal Code § 30.02(b). Proof that a defendant entered for purposes of burglary, then, does not necessarily establish that the defendant entered for purposes of criminal trespass.

Insofar as possible, however, the Committee concluded that criminal trespass will be construed by the courts in a manner that makes it available as a lesser included offense in burglary prosecution, and it approached the task of drafting the instructions with this in mind.

CPJC 91.9 Culpable Mental State Analysis of Criminal Trespass

Under Tex. Penal Code § 6.02(b) a culpable mental state is required, and under Tex. Penal Code § 6.02(c) it is intent, knowledge, or recklessness. *West v. State*, 567 S.W.2d 515, 516 (Tex. Crim. App. 1978) (“Although Sec. 30.05, supra, does not prescribe a culpable mental state, we hold that a culpable mental state of intentionally, knowingly, or recklessly is required by Sec. 6.02, supra.”).

Neither *West* nor any other decision addresses those elements to which the required culpable mental state applies.

The Committee decided that the culpable mental state applies only to the basic ‘nature of conduct’ element: entry or remaining. Tex. Penal Code § 6.03(c), however, contains no provision for applying recklessness to nature of conduct elements. *West*, however, states (without explanation) that recklessness will suffice. *West*, 567 S.W.2d at 516. The instructions therefore contain a definition of ‘recklessly entering a place’ based on those definitions explicitly included in section 6.03(c).

Some members of the Committee believed the culpable mental state also applies to the elements consisting of proof that the place entered be of a specific kind (for example, a building or a habitation) and that it be the property ‘of another.’ The Committee was also split on whether the culpable mental state applies to that circumstance requiring proof that effective consent was lacking. A minority of the Committee members believed that appropriate blameworthiness would be assured only if awareness of these matters is required.

A majority, however, concluded otherwise. The majority’s conclusion that the culpable mental state required does not apply to lack of consent relied in large part on the notice provision, which seems to reflect a legislative intent to impose an objective standard regarding notice and lack of consent. The instructions therefore contain no requirement of proof of awareness that the defendant did not have effective consent.

CPJC 91.10 Terminology: “Of Another” and “Ownership”

The Committee found one difference between the terminology in criminal trespass and in burglary particularly troublesome. Burglary, under Tex. Penal Code § 30.02, implicitly requires that the entered place be owned by another. It does not so describe the place entered but rather requires that the entry be “without the effective consent of the owner.” Criminal trespass, in contrast, explicitly requires the place entered to be proved to be that ‘of another.’ The phrase *of another* is not defined. Criminal trespass also requires that the entry or remaining be “without consent” but does not specify that the owner must not consent.

Property, whether real or personal, is to be described in a charging instrument in terms of the owner. Tex. Code Crim. Proc. art. 21.09. Apart from the requirements of charging the offense of criminal trespass, then, the requirement to adequately describe the property that is the subject of the offense demands specification of the owner. The pleading, if not the Penal Code provision, is likely to interject ownership into the litigation.

If in a criminal trespass case the state relies on notice under Tex. Penal Code § 30.05(b)(2)(A), the concept of “owner” is explicitly interjected into the case by the Penal Code itself. Particularly if the state relies on notice under section 30.05(b)(2)(A), the term *owner* probably must be defined if the jury is instructed on that section.

The Committee decided that including a definition of the term *of another* would be inappropriate.

CPJC 91.11 Instruction—Criminal Trespass by Entering Building**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of criminal trespass. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. intentionally, knowingly, or recklessly and without effective consent entered the building of another, [name], with notice that entry was forbidden*].

Relevant Statutes

A person commits an offense if the person intentionally, knowingly, or recklessly enters a building of another without effective consent and the person had notice that the entry was forbidden.

To prove that the defendant is guilty of criminal trespass, the state must prove, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant intentionally, knowingly, or recklessly entered a place; and
2. the place entered was a building; and
3. the building was of another; and
4. the defendant did not have effective consent to this entry; and
5. the defendant had notice that the entry was forbidden.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of criminal trespass.

Definitions*Building*

“Building” means any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.

Entry

“Entry” means the intrusion of the entire body.

Notice

“Notice” means—

1. oral or written communication by the owner or someone with apparent authority to act for the owner; or
2. fencing or other enclosure obviously designed to [exclude intruders/contain livestock]; or
3. a sign or signs posted [on the property/at the entrance to the building], reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

Effective Consent

“Consent” means assent in fact, whether express or apparent.

Consent to an entry is effective if both—

1. it is given by—
 - a. the owner; or
 - b. a person not the owner but who is legally authorized to act for the owner; or
 - c. a person not the owner but who is believed by the defendant to be legally authorized to act for the owner; and
2. it is neither—
 - a. induced by force, threat, or fraud; nor
 - b. given by a person who by reason of youth, mental disease or defect, or intoxication is known by the defendant to be unable to make reasonable decisions.

Owner

“Owner” means a person who has—

1. title to the property; or
2. possession of the property, whether lawful or not; or
3. a greater right to possession of the property than the defendant.

Possession

“Possession” means actual care, custody, control, or management.

Intentionally Enter a Place

A person intentionally enters a place when the person has the conscious objective or desire to enter the place.

Knowingly Enter a Place

A person knowingly enters a place when the person is aware that the person is entering the place.

Recklessly Enter a Place

A person recklessly enters a place when the person is aware of but consciously disregards a substantial and unjustifiable risk that the person is entering the place. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], intentionally, knowingly, or recklessly entered a place, specifically [*insert specific address*]; and
2. the place entered was a building; and
3. the building was of another, [*name*]; and
4. the defendant did not have effective consent to this entry; and
5. the defendant had notice that the entry was forbidden.

You must all agree on elements 1, 2, 3, 4, and 5 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, 4, and 5 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Criminal trespass is prohibited by and defined in Tex. Penal Code § 30.05. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “building” is from Tex. Penal Code § 30.01(2). The definition of “entry” is from Tex. Penal Code § 30.05(b)(1). The definition of “notice” is from Tex. Penal Code § 30.05(b)(2). The definition of “owner” is from Tex. Penal Code § 1.07(a)(35). The definition of “possession” is from Tex. Penal Code § 1.07(a)(39). The definition of “consent” is from Tex. Penal Code § 1.07(a)(11).

**CPJC 91.12 Instruction—Criminal Trespass by Entering Habitation—
Class A Misdemeanor****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of criminal trespass. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. intentionally, knowingly, or recklessly and without effective consent entered the habitation of another, [name], with notice that entry was forbidden*].

Relevant Statutes

A person commits an offense if the person intentionally, knowingly, or recklessly enters a habitation of another without effective consent and the person had notice that the entry was forbidden.

To prove that the defendant is guilty of criminal trespass, the state must prove, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant intentionally, knowingly, or recklessly entered a place; and
2. the place entered was a habitation; and
3. the habitation was of another; and
4. the defendant did not have effective consent to this entry; and
5. the defendant had notice that the entry was forbidden.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of criminal trespass.

Definitions*Habitation*

“Habitation” means a structure or vehicle that is adapted for the overnight accommodation of persons.

If a structure or vehicle is a habitation, each separately secured or occupied portion of the structure or vehicle is also a habitation.

Habitation also includes, in addition to a structure or vehicle itself adapted for the overnight accommodation of persons—

1. each structure connected with the adapted structure or vehicle; and
2. each structure near and related to the use and enjoyment of the adapted structure.

Entry

“Entry” means the intrusion of the entire body.

Notice

“Notice” means—

1. oral or written communication by the owner or someone with apparent authority to act for the owner; or
2. fencing or other enclosure obviously designed to [exclude intruders/contain livestock]; or
3. a sign or signs posted [on the property/at the entrance to the building], reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

Effective Consent

“Consent” means assent in fact, whether express or apparent.

Consent to an entry is effective if both—

1. it is given by—
 - a. the owner; or
 - b. a person not the owner but who is legally authorized to act for the owner; or
 - c. a person not the owner but who is believed by the defendant to be legally authorized to act for the owner; and
2. it is neither—
 - a. induced by force, threat, or fraud; nor
 - b. given by a person who by reason of youth, mental disease or defect, or intoxication is known by the defendant to be unable to make reasonable decisions.

Owner

“Owner” means a person who has—

1. title to the property; or
2. possession of the property, whether lawful or not; or
3. a greater right to possession of the property than the defendant.

Possession

“Possession” means actual care, custody, control, or management.

Intentionally Enter a Place

A person intentionally enters a place when the person has the conscious objective or desire to enter the place.

Knowingly Enter a Place

A person knowingly enters a place when the person is aware that the person is entering the place.

Recklessly Enter a Place

A person recklessly enters a place when the person is aware of but consciously disregards a substantial and unjustifiable risk that the person is entering the place. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally, knowingly, or recklessly entered a place, specifically [insert specific address]; and
2. the place entered was a habitation; and
3. the habitation was of another, [name]; and
4. the defendant did not have effective consent to this entry; and
5. the defendant had notice that the entry was forbidden.

You must all agree on elements 1, 2, 3, 4, and 5 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, 4, and 5 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Criminal trespass is prohibited by and defined in Tex. Penal Code § 30.05. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “habitation” is from Tex. Penal Code § 30.01(1). The definition of “entry” is from Tex. Penal Code § 30.05(b)(1). The definition of “notice” is from Tex. Penal Code § 30.05(b)(2). The definition of “owner” is from Tex. Penal Code § 1.07(a)(35). The definition of “possession” is from Tex. Penal Code § 1.07(a)(39). The definition of “consent” is from Tex. Penal Code § 1.07(a)(11).

CPJC 91.13 Instruction—Criminal Trespass by Remaining in Building**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of criminal trespass. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. intentionally, knowingly, or recklessly and without effective consent remained in the building of another, [name], and received notice to depart but failed to depart*].

Relevant Statutes

A person commits an offense if the person intentionally, knowingly, or recklessly remains in a building of another without effective consent and the person received notice to depart but failed to do so.

To prove that the defendant is guilty of criminal trespass, the state must prove, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant intentionally, knowingly, or recklessly remained in a place; and
2. the place was a building; and
3. the building was of another; and
4. the defendant did not have effective consent to the remaining; and
5. the defendant received notice to depart but failed to do so.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of criminal trespass.

Definitions*Building*

“Building” means any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.

Entry

“Entry” means the intrusion of the entire body.

Notice

“Notice” means—

1. oral or written communication by the owner or someone with apparent authority to act for the owner; or
2. fencing or other enclosure obviously designed to [exclude intruders/contain livestock]; or
3. a sign or signs posted [on the property/at the entrance to the building], reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

Effective Consent

“Consent” means assent in fact, whether express or apparent.

Consent to an entry is effective if both—

1. it is given by—
 - a. the owner; or
 - b. a person not the owner but who is legally authorized to act for the owner; or
 - c. a person not the owner but who is believed by the defendant to be legally authorized to act for the owner; and
2. it is neither—
 - a. induced by force, threat, or fraud; nor
 - b. given by a person who by reason of youth, mental disease or defect, or intoxication is known by the defendant to be unable to make reasonable decisions.

Owner

“Owner” means a person who has—

1. title to the property; or
2. possession of the property, whether lawful or not; or
3. a greater right to possession of the property than the defendant.

Possession

“Possession” means actual care, custody, control, or management.

Intentionally Remain in a Place

A person intentionally remains in a place when the person has the conscious objective or desire to remain in the place.

Knowingly Remain in a Place

A person knowingly remains in a place when the person is aware that the person is remaining in the place.

Recklessly Remain in a Place

A person recklessly remains in a place when the person is aware of but consciously disregards a substantial and unjustifiable risk that the person is remaining in the place. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally, knowingly, or recklessly remained in a place, specifically [insert specific address]; and
2. the place was a building; and
3. the building was that of another, [name]; and
4. the defendant did not have effective consent to this remaining; and
5. the defendant had notice to depart but failed to do so.

You must all agree on elements 1, 2, 3, 4, and 5 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, 4, and 5 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Criminal trespass is prohibited by and defined in Tex. Penal Code § 30.05. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “building” is from Tex. Penal Code § 30.01(2). The definition of “entry” is from Tex. Penal Code § 30.05(b)(1). The definition of “notice” is from Tex. Penal Code § 30.05(b)(2). The definition of “owner” is from Tex. Penal Code § 1.07(a)(35). The definition of “possession” is from Tex. Penal Code § 1.07(a)(39). The definition of “consent” is from Tex. Penal Code § 1.07(a)(11).

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CPJC 92.1 Statutory Framework

Pleading Requirements. “The simplicity of the statutory elements of theft hides the complexity of the overall scheme.” *Geick v. State*, 349 S.W.3d 542, 546 (Tex. Crim. App. 2011).

The Texas theft statute, like many Penal Code provisions, combines in one offense what traditionally have been different crimes. *See* Tex. Penal Code § 31.02. As a result, the statute is—as *Geick* noted—relatively complex. Any set of instructions drafted to cover many or all of these crimes will inevitably contain a great deal of law that is inapplicable to a particular situation. Any and perhaps most theft prosecutions invoke only a few portions of the statute. The instructions ideally should give the jury only those portions invoked by the charging instrument and the evidence. This would require a number of different instructions for different types of cases.

Tex. Penal Code § 31.03 covers what are arguably five distinguishable situations. These are—

1. theft by taking without consent;
2. theft by taking with consent obtained by deception (“false pretenses’ -type theft);
3. theft by taking with consent obtained by coercion (“extortion”-type theft);
4. theft by exercising control beyond the scope of consent given by the owner (“embezzlement’ -type theft); and
5. theft by receiving property acquired by another through theft (“receiving stolen property’ -type theft).

Pleading requirements to some extent create a continuing need to distinguish at least some of the different types of theft. The specificity with which theft must be pleaded was addressed in *Geter v. State*, 779 S.W.2d 403 (Tex. Crim. App. 1989). *Geter* stated:

[I]n a theft prosecution where the State relies upon a defendant’s act or omission to negate consent pursuant to § 31.01(4), the indictment must allege which of the statutory negatives vitiated consent, or the indictment will be subject to a timely motion to quash for lack of notice.

Geter, 779 S.W.2d at 407 (citing previous version of Tex. Penal Code § 31.01).

Geter apparently means that if a charging instrument alleges only that the appropriation was “unlawful” or that it was “without the owner’s effective consent’ and the defendant moves to quash it, the state must specify its intent to rely on any theory that involves some act or omission by the accused rendering consent ineffective. As a practical matter, this seems to mean that on demand by the defense, charges in false-pretenses-type theft and extortion-type theft, distinguished above, must be pleaded.

Geick held that if the state pleads a theft committed by deception, it must prove that manner of committing theft. Proof of theft committed in another statutory way cannot support a conviction. *Geick's* discussion might be read as assuming the state need not plead theft by deception. This was not at issue in the case, however, and neither the briefs nor the opinion even cited *Geter*. *Geter* and the need to plead theft by deception or coercion remain effective law.

Instructions Not Included. This chapter does not include instructions for two of the five kinds of theft distinguished above:

Theft by Exercising Control beyond the Scope of Consent Given. Situations involving embezzlement-type theft, as distinguished above, are often prosecuted not as theft but as misapplication of fiduciary property as prohibited by Tex. Penal Code § 32.45. In the Committee's view this eliminates the need for a theft instruction addressing this situation. See chapter 93 of this volume for discussion and an instruction for misapplication of fiduciary property.

Theft by Receipt or Possession of Stolen Property. Texas Penal Code section 31.03 provides for a statutorily distinguished method of committing theft that is, in effect, receiving or possessing stolen property. This is the receiving-stolen-property-type theft distinguished above.

Tex. Penal Code § 31.03(b) provides three ways in which the state can plead and prove that appropriation of property is unlawful. The first is the most commonly used and specifies that appropriation of property is unlawful if "it is without the owner's effective consent." Tex. Penal Code § 31.03(b)(1). Appropriation of property is unlawful if "the property is stolen and the actor appropriates the property knowing it was stolen by another." Tex. Penal Code § 31.03(b)(2). This can be pleaded. See *Jones v. State*, 979 S.W.2d 652, 653 n.1 (Tex. Crim. App. 1998) (setting out such allegations). But a conviction for receipt or simple possession of stolen property can also be sought under a charging instrument alleging unlawful appropriation of property.

The court of criminal appeals has held that theft invoking Penal Code section 31.03(b)(2) is "merely a subset" of theft under an allegation that the property was appropriated without the owner's effective consent. Evidence that will support a conviction under a charging instrument invoking section 31.03(b)(2) will also support conviction under a charging instrument invoking only the more general provision in section 31.03(b)(1), that is, pleading that the appropriation was without the owner's effective consent. *Chavez v. State*, 843 S.W.2d 586, 588 (Tex. Crim. App. 1992) (relying on *McClain v. State*, 687 S.W.2d 350 (Tex. Crim. App. 1985)).

Under *Chavez*, the state is disadvantaged by unnecessarily pleading a receipt or possession of stolen property case as invoking section 31.03(b)(2). A conviction for theft under section 31.03(b)(1) is supported by unexplained possession of recently stolen property. But a conviction under a charging instrument invoking section 31.03(b)(2) requires proof that the defendant appropriated the property knowing it was

stolen. In such a case, evidence of the defendant's unexplained possession of recently stolen property is not necessarily sufficient proof of the theft. *Naranjo v. State*, 217 S.W.3d 560, 571 (Tex. App.—San Antonio 2006, no pet.) (“When, as here, the State specifically pleads in the indictment that the accused committed theft by receiving property knowing it was stolen by another and this allegation is incorporated in the court’s charge, ‘unexplained possession of recently stolen property is not sufficient proof of theft.’”) (quoting *Chavez*, 843 S.W.2d at 588–89).

Ultimately the state never has any reason to plead a receipt or possession of stolen property case other than as under the general theft provisions. Moreover, it always has some reason not to do so. Undoubtedly for this reason, appellate cases invoking section 31.03(b)(2) are rare.

Since there is seldom or never a satisfactory reason for a charging instrument to allege this sort of theft, the Committee did not attempt to draft an instruction for these situations.

Culpable Mental State. The Committee considered whether theft requires any culpable mental state in addition to the intent to deprive the owner of property. Most significant, perhaps, is whether in some or all situations the state must prove the defendant was aware that the appropriation of the property was unlawful, as, for example, by proving that the defendant was aware the owner had not consented.

Committee members were divided on the issue. The court of criminal appeals, in what is arguably dictum, has indicated that awareness is required. *McClain*, 687 S.W.2d at 354 (relying on Tex. Penal Code § 6.03(b)). The basis for this requirement of awareness would seem to be Tex. Penal Code § 6.02(b), which applies only “[i]f the definition of an offense does not prescribe a culpable mental state. All ways of committing theft under section 31.03 require the intent to deprive the owner of the property.

Some awareness is required in certain situations in which the state’s theory of guilt invokes specific definitions of terms used in Tex. Penal Code § 31.03(a). If the state contends the appropriation was unlawful because the defendant engaged in deception to get consent, under Tex. Penal Code § 31.01(1)(E), for example, the definition of this kind of deception requires proof that the defendant did not intend to perform as promised or knew he would not so perform. Some members of the Committee thought this suggested the legislature did not intend an overlapping demand for proof of awareness that the appropriation was, in a general sense, unlawful.

A majority of the Committee concluded that theft requires no culpable mental state beyond intent to deprive, except when the state relies on a particular statutory provision that incorporates a mental element. In all other situations, however, the majority believed there is no basis in the Penal Code for requiring any culpable mental state other than the intent to deprive.

CPJC 92.2 Instruction—Theft

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of theft. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. unlawfully appropriated, by acquiring or otherwise exercising control over, property, specifically [[insert description, e.g. gold coins] owned by [name] with a value of \$[amount] or more/[insert other basis for grade of offense from Texas Penal Code section 31.03(e)–(f), e.g. a driver’s license]]*], with intent to deprive the owner of the property].

Relevant Statutes

A person commits an offense if the person unlawfully appropriates property with intent to deprive the owner of the property and [the value of the property is \$[amount] or more but less than \$[amount]/*insert other basis for grade of offense from Texas Penal Code section 31.03(e)–(f), e.g. the property was a driver’s license*]].

To prove that the defendant is guilty of theft, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant appropriated property; and
2. the appropriation was unlawful; and
3. the defendant intended to deprive the owner of the property; and
4. [the value of the property was \$[amount] or more/*insert other basis for grade of offense from Texas Penal Code section 31.03(e)–(f), e.g. the property was a driver’s license*]].

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of theft.

Definitions*Appropriate Property*

A person appropriates property if the person—

1. acquires the property; or

2. otherwise exercises control over the property; or
3. brings about a transfer or purported transfer of title or any other nonpossessory interest in the property, whether that transfer or purported transfer is to the defendant or another.

Owner

“Owner” means a person who has—

1. title to the property; or
2. possession of the property, whether lawful or not; or
3. a greater right to possession of the property than the defendant.

Possession

“Possession” means actual care, custody, control, or management.

Intent to Deprive of Property

A person has the intent to deprive another of property if the person has the conscious objective or desire to—

1. withhold the property from the owner permanently; or
2. withhold the property from the owner for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner; or
3. restore the property only on payment of reward or other compensation; or
4. dispose of the property in a manner that makes recovery of the property by the owner unlikely.

Property

“Property” means—

1. [tangible/intangible] personal property [including anything severed from land]; or
2. real property; or
3. a document, including money, that represents or embodies anything of value.

Unlawful Appropriation

Appropriation of property is unlawful if—

1. it is without the consent of [the owner/a person legally authorized to act for the owner]; or
2. it is with such consent but that consent is ineffective.

Consent Rendered Ineffective by Deception

Consent to the appropriation of property is rendered ineffective if the defendant engaged in deception and by this deception induced that consent. The defendant engaged in deception if—

[Include only those means of deception supported by the evidence.]

1. the defendant created or confirmed by words or conduct a false impression of law or fact that was likely to affect the judgment of another in the transaction and the defendant did not believe this impression of law or fact to be true; or
2. the defendant failed to correct a false impression of law or fact that was likely to affect the judgment of another in the transaction, the defendant previously created or confirmed this false impression, and the defendant did not believe this impression of law or fact to be true; or
3. the defendant prevented another from acquiring information likely to affect that person's judgment in the transaction; or
4. the defendant promised performance that was likely to affect the judgment of another in the transaction and the defendant either did not intend to perform or knew that he would not perform; or
5. the defendant sold or otherwise transferred or encumbered property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment was or was not valid or was or was not a matter of official record.

Intent That Promise Not Be Performed

A person does not intend to perform a promise if the person does not have the conscious objective or desire to perform the promise.

Knowledge That Promise Would Not Be Performed

A person knows he will not perform a promise if he is reasonably certain that he will not perform the promise.

Proof of Deceptive Promise to Perform

The defendant's lack of intent to perform or knowledge that he would not perform a promised act cannot be proved simply by evidence that the defendant failed to perform. Other evidence of intent or knowledge is required.

Consent Rendered Ineffective by Coercion

Consent to the appropriation of property is rendered ineffective if the defendant engaged in coercion and by this coercion induced that consent. The defendant engaged in coercion if the defendant threatened—

*[Include only those types of coercion
supported by the evidence.]*

1. to commit an offense; or
2. to inflict bodily injury in the future on the person threatened or another; or
3. to accuse a person of any offense; or
4. to expose a person to hatred, contempt, or ridicule; or
5. to harm the credit or business repute of any person; or
6. to take or withhold action as a public servant, or to cause a public servant to take or withhold action.

A threat can be communicated in any manner.

Value of Property

The value of property is the fair market value at the time of the appropriation.

Application of Law to Fact

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], appropriated property, specifically [insert specific allegations, e.g. gold coins

owned by [name]] by acquiring or otherwise exercising control of the property; and

2. the appropriation was unlawful because [*insert specific basis for appropriation's being unlawful, e.g. [name], the owner, did not consent to the appropriation*]; and

3. the defendant intended to [*insert specific acts, e.g. dispose of the property in a manner that would have made recovery by the owner unlikely*] and thus deprive [name], the owner, of the property; and

4. [the value of the property was \$[amount] or more/[*insert other basis for grade of offense from Texas Penal Code section 31.03(e)–(f), e.g. the property was a driver's license*]].

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Theft is prohibited by and defined in Tex. Penal Code § 31.03. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of ‘appropriate’ is from Tex. Penal Code § 31.01(4). The definition of “deprive” is from Tex. Penal Code § 31.01(2). The definition of “property” is from Tex. Penal Code § 31.01(5). The definition of ‘deception’ is from Tex. Penal Code § 31.01(1). The definition of “value of property” is from Tex. Penal Code § 31.08(a)(1). The definition of “owner” is from Tex. Penal Code § 1.07(a)(35). The definition of ‘possession’ is from Tex. Penal Code § 1.07(a)(39). The definition of “effective consent” is from Tex. Penal Code § 31.01(3). The definition of “coercion” is from Tex. Penal Code § 1.07(a)(9).

CPJC 92.3 Instruction—Theft by Exercising Control without Consent**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of theft. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. unlawfully appropriated, by acquiring or exercising control over, property, specifically [[insert description, e.g. gold coins] owned by [name] with a value of \$[amount] or more/[insert other basis for grade of offense from Texas Penal Code section 31.03(e)–(f), e.g. a driver’s license]]*], without the consent of the owner, and with intent to deprive the owner of the property].

Relevant Statutes

A person commits an offense if the person unlawfully appropriates property with intent to deprive the owner of the property and [the value of the property is \$[amount] or more but less than \$[amount]/[insert other basis for grade of offense from Texas Penal Code section 31.03(e)–(f), e.g. the property was a driver’s license]].

To prove that the defendant is guilty of theft, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant appropriated property; and
2. the appropriation was without the consent of the owner and thus unlawful; and
3. the defendant intended to deprive the owner of the property; and
4. [the value of the property was \$[amount] or more/[insert other basis for grade of offense from Texas Penal Code section 31.03(e)–(f), e.g. the property was a driver’s license]].

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of theft.

Definitions*Appropriate Property*

A person appropriates property if the person—

1. acquires the property; or
2. otherwise exercises control over the property; or
3. brings about a transfer or purported transfer of title or any other nonpossessory interest in the property, whether that transfer or purported transfer is to the defendant or another.

Owner

“Owner” means a person who has—

1. title to the property; or
2. possession of the property, whether lawful or not; or
3. a greater right to possession of the property than the defendant.

Possession

“Possession” means actual care, custody, control, or management.

Knowing That Owner Had Not Consented

A person knows the owner of property did not consent to the person’s acquisition of that property when the person is aware that the owner did not consent.

Intent to Deprive of Property

A person has the intent to deprive another of property if the person has the conscious objective or desire to—

1. withhold the property from the owner permanently; or
2. withhold the property from the owner for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner; or
3. restore the property only on payment of reward or other compensation; or
4. dispose of the property in a manner that makes recovery of the property by the owner unlikely.

Property

“Property” means—

1. [tangible/intangible] personal property [including anything severed from land]; or
2. real property; or
3. a document, including money, that represents or embodies anything of value.

Value of Property

The value of property is the fair market value at the time of the appropriation.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], appropriated property, specifically [*insert specific allegations, e.g. gold coins owned by [name]*] by acquiring or otherwise exercising control of the property; and
2. the appropriation was unlawful because [name], the owner, did not consent; and
3. the defendant intended to [*insert specific acts, e.g. dispose of the property in a manner that would have made recovery by the owner unlikely*] and thus deprive [name], the owner, of the property; and
4. [the value of the property was \$[amount] or more/[*insert other basis for grade of offense from Texas Penal Code section 31.03(e)–(f), e.g. the property was a driver’s license*]].

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Theft is prohibited by and defined in Tex. Penal Code § 31.03. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “appropriate” is from Tex. Penal Code § 31.01(4). The definition of “deprive” is from Tex. Penal Code § 31.01(2). The definition of “property” is from Tex. Penal Code § 31.01(5). The definition of “value of property” is from Tex. Penal Code § 31.08(a)(1). The definition of “owner” is from Tex. Penal Code § 1.07(a)(35). The definition of “possession” is from Tex. Penal Code § 1.07(a)(39). The definition of “effective consent” is from Tex. Penal Code § 31.01(3).

CPJC 92.4 Instruction—Theft by Exercising Control with Consent Obtained by Deception**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of theft. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. unlawfully appropriated, by acquiring or exercising control over, property, specifically [[insert description, e.g. gold coins] owned by [name] with a value of \$[amount] or more/[insert other basis for grade of offense from Texas Penal Code section 31.03(e)–(f), e.g. a driver’s license]]*], without the effective consent of the owner, by deception, and with intent to deprive the owner of the property].

Relevant Statutes

A person commits an offense if the person unlawfully appropriates property with intent to deprive the owner of the property and [the value of the property is \$[amount] or more but less than \$[amount]/[insert other basis for grade of offense from Texas Penal Code section 31.03(e)–(f), e.g. the property was a driver’s license]].

To prove that the defendant is guilty of theft, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant appropriated property; and
2. the appropriation was unlawful because deception by the defendant rendered ineffective any consent by the owner to that appropriation; and
3. the defendant intended to deprive the owner of the property; and
4. [the value of the property was \$[amount] or more/[insert other basis for grade of offense from Texas Penal Code section 31.03(e)–(f), e.g. the property was a driver’s license]].

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of theft.

Definitions

Appropriate Property

A person appropriates property if the person—

1. acquires the property; or
2. otherwise exercises control over the property; or
3. brings about a transfer or purported transfer of title or any other nonpossessory interest in the property, whether that transfer or purported transfer is to the defendant or another.

Owner

“Owner” means a person who has—

1. title to the property; or
2. possession of the property, whether lawful or not; or
3. a greater right to possession of the property than the defendant.

Possession

“Possession” means actual care, custody, control, or management.

Intent to Deprive of Property

A person has the intent to deprive another of property if the person has the conscious objective or desire to—

1. withhold the property from the owner permanently; or
2. withhold the property from the owner for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner; or
3. restore the property only on payment of reward or other compensation; or
4. dispose of the property in a manner that makes recovery of the property by the owner unlikely.

Property

“Property” means—

1. [tangible/intangible] personal property [including anything severed from land]; or
2. real property; or
3. a document, including money, that represents or embodies anything of value.

Consent Rendered Ineffective by Deception

Consent to the appropriation of property is rendered ineffective if the defendant engaged in deception and by this deception induced that consent. The defendant engaged in deception if—

[Include only those means of deception supported by the evidence.]

1. the defendant created or confirmed by words or conduct a false impression of law or fact that was likely to affect the judgment of another in the transaction and the defendant did not believe this impression of law or fact to be true; or
2. the defendant failed to correct a false impression of law or fact that was likely to affect the judgment of another in the transaction, the defendant previously created or confirmed this false impression, and the defendant did not believe this impression of law or fact to be true; or
3. the defendant prevented another from acquiring information likely to affect that person's judgment in the transaction; or
4. the defendant promised performance that was likely to affect the judgment of another in the transaction and the defendant either did not intend to perform or knew that he would not perform; or
5. the defendant sold or otherwise transferred or encumbered property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment was or was not valid or was or was not a matter of official record.

Intent That Promise Not Be Performed

A person does not intend to perform a promise if the person does not have the conscious objective or desire to perform the promise.

Knowledge That Promise Would Not Be Performed

A person knows he will not perform a promise if he is reasonably certain that he will not perform the promise.

Proof of Deceptive Promise to Perform

The defendant's lack of intent to perform or knowledge that he would not perform a promised act cannot be proved simply by evidence that the defendant failed to perform. Other evidence of intent or knowledge is required.

Value of Property

The value of property is the fair market value at the time of the appropriation.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], appropriated property, specifically [insert specific allegations, e.g. gold coins owned by [name]] by acquiring or otherwise exercising control of the property; and
2. the appropriation was unlawful because deception by the defendant, namely [insert specific basis for appropriation's being unlawful, e.g. the defendant's creation, by words that the defendant did not believe to be true, of a false impression of fact likely to affect the judgment of [name] in the transaction], rendered ineffective any consent by the owner to that appropriation; and
3. the defendant intended to [insert specific acts, e.g. dispose of the property in a manner that would have made recovery by the owner unlikely] and thus deprive [name], the owner, of the property; and
4. [the value of the property was \$[amount] or more/[insert other basis for grade of offense from Texas Penal Code section 31.03(e)–(f), e.g. the property was a driver's license]].

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Theft is prohibited by and defined in Tex. Penal Code § 31.03. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “appropriate” is from Tex. Penal Code § 31.01(4). The definition of “deprive” is from Tex. Penal Code § 31.01(2). The definition of “property” is from Tex. Penal Code § 31.01(5). The definition of “deception” is from Tex. Penal Code § 31.01(1). The definition of “value of property” is from Tex. Penal Code § 31.08(a)(1). The definition of “owner” is from Tex. Penal Code § 1.07(a)(35). The definition of “possession” is from Tex. Penal Code § 1.07(a)(39). The definition of “effective consent” is from Tex. Penal Code § 31.01(3).

**CPJC 92.5 Instruction—Theft by Exercising Control with Consent
Obtained by Coercion****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of theft. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. unlawfully appropriated, by acquiring or exercising control over, property, specifically* [[*insert description, e.g. gold coins*] owned by [*name*] with a value of \$[*amount*] or more/[*insert other basis for grade of offense from Texas Penal Code section 31.03(e)–(f), e.g. a driver’s license*]], without the effective consent of the owner, by coercion, and with intent to deprive the owner of the property].

Relevant Statutes

A person commits an offense if the person unlawfully appropriates property with intent to deprive the owner of the property and [the value of the property is \$[*amount*] or more but less than \$[*amount*]/[*insert other basis for grade of offense from Texas Penal Code section 31.03(e)–(f), e.g. the property was a driver’s license*]].

To prove that the defendant is guilty of theft, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant appropriated property; and
2. the appropriation was unlawful because coercion by the defendant rendered ineffective any consent by the owner to that appropriation; and
3. the defendant intended to deprive the owner of the property; and
4. [the value of the property was \$[*amount*] or more/[*insert other basis for grade of offense from Texas Penal Code section 31.03(e)–(f), e.g. the property was a driver’s license*]].

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of theft.

Definitions*Appropriate Property*

A person appropriates property if the person—

1. acquires the property; or
2. otherwise exercises control over the property; or
3. brings about a transfer or purported transfer of title or any other nonpossessory interest in the property, whether that transfer or purported transfer is to the defendant or another.

Owner

“Owner” means a person who has—

1. title to the property; or
2. possession of the property, whether lawful or not; or
3. a greater right to possession of the property than the defendant.

Possession

“Possession” means actual care, custody, control, or management.

Intent to Deprive of Property

A person has the intent to deprive another of property if the person has the conscious objective or desire to—

1. withhold the property from the owner permanently; or
2. withhold the property from the owner for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner; or
3. restore the property only on payment of reward or other compensation; or
4. dispose of the property in a manner that makes recovery of the property by the owner unlikely.

Property

“Property” means—

1. [tangible/intangible] personal property [including anything severed from land]; or
2. real property; or
3. a document, including money, that represents or embodies anything of value.

Consent Rendered Ineffective by Coercion

Consent to the appropriation of property is rendered ineffective if the defendant engaged in coercion and by this coercion induced that consent. The defendant engaged in coercion if the defendant threatened—

[Include only those types of coercion supported by the evidence.]

1. to commit an offense; or
2. to inflict bodily injury in the future on the person threatened or another; or
3. to accuse a person of any offense; or
4. to expose a person to hatred, contempt, or ridicule; or
5. to harm the credit or business repute of any person; or
6. to take or withhold action as a public servant, or to cause a public servant to take or withhold action.

A threat can be communicated in any manner.

Value of Property

The value of property is the fair market value at the time of the appropriation.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], appropriated property, specifically [insert specific allegations, e.g. gold coins owned by [name]] by acquiring or otherwise exercising control of the property; and

2. the appropriation was unlawful because coercion by the defendant, namely [*insert specific basis for appropriation's being unlawful, e.g. the defendant's threat to expose [name] to ridicule*], rendered ineffective any consent by the owner to that appropriation; and

3. the defendant intended to [*insert specific acts, e.g. dispose of the property in a manner that would have made recovery by the owner unlikely*] and thus deprive [*name*], the owner, of the property; and

4. [the value of the property was \$[*amount*] or more/[*insert other basis for grade of offense from Texas Penal Code section 31.03(e)–(f), e.g. the property was a driver's license*]].

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Theft is prohibited by and defined in Tex. Penal Code § 31.03. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “appropriate” is from Tex. Penal Code § 31.01(4). The definition of “deprive” is from Tex. Penal Code § 31.01(2). The definition of “property” is from Tex. Penal Code § 31.01(5). The definition of “value of property” is from Tex. Penal Code § 31.08(a)(1). The definition of “owner” is from Tex. Penal Code § 1.07(a)(35). The definition of “possession” is from Tex. Penal Code § 1.07(a)(39). The definition of “effective consent” is from Tex. Penal Code § 31.01(3). The definition of “coercion” is from Tex. Penal Code § 1.07(a)(9).

CPJC 92.6 Instruction—Aggregated Theft**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of theft. The accusation is that the defendant, pursuant to one scheme or continuing course of conduct, committed multiple thefts of property with an aggregated value of more than \$[*amount*]. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. unlawfully appropriated property, specifically*] [*insert description, e.g. money*] owned by [*name*] pursuant to one scheme and continuing course of conduct and the total value of the property appropriated was more than \$[*amount*].

Relevant Statutes

A person commits an offense if the person commits multiple thefts pursuant to one scheme or continuing course of conduct, whether from the same or several sources, and the aggregated value of the property appropriated in those thefts exceeds \$[*amount*].

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

To prove that the defendant is guilty of theft, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant appropriated property; and
2. the appropriation was unlawful; and
3. the defendant intended to deprive the owner of the property; and
4. the value of the property exceeded \$[*amount*].

To prove that the defendant is guilty of aggregated theft, the state must prove, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant appropriated property; and
2. the appropriations were pursuant to one scheme or continuing course of conduct; and
3. the appropriations were unlawful; and
4. the defendant intended to deprive the [owner/owners] of the property; and

5. the value of the property appropriated exceeded \$[amount].

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of theft.

Definitions

Appropriate Property

A person appropriates property if the person—

1. acquires the property; or
2. otherwise exercises control over the property; or
3. brings about a transfer or purported transfer of title or any other nonpossessory interest in the property, whether that transfer or purported transfer is to the defendant or another.

Owner

“Owner” means a person who has—

1. title to the property; or
2. possession of the property, whether lawful or not; or
3. a greater right to possession of the property than the defendant.

Possession

“Possession” means actual care, custody, control, or management.

Intent to Deprive of Property

A person has the intent to deprive another of property if the person has the conscious objective or desire to—

1. withhold the property from the owner permanently; or
2. withhold the property from the owner for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner; or
3. restore the property only on payment of reward or other compensation; or

4. dispose of the property in a manner that makes recovery of the property by the owner unlikely.

Property

“Property” means—

1. [tangible/intangible] personal property [including anything severed from land]; or
2. real property; or
3. a document, including money, that represents or embodies anything of value.

Unlawful Appropriation

Appropriation of property is unlawful if—

1. it is without the consent of [the owner/a person legally authorized to act for the owner]; or
2. it is with such consent but that consent is ineffective.

Consent Rendered Ineffective by Deception

Consent to the appropriation of property is rendered ineffective if the defendant engaged in deception and by this deception induced that consent. The defendant engaged in deception if—

*[Include only those means of deception
supported by the evidence.]*

1. the defendant created or confirmed by words or conduct a false impression of law or fact that was likely to affect the judgment of another in the transaction and the defendant did not believe this impression of law or fact to be true; or
2. the defendant failed to correct a false impression of law or fact that was likely to affect the judgment of another in the transaction, the defendant previously created or confirmed this false impression, and the defendant did not believe this impression of law or fact to be true; or
3. the defendant prevented another from acquiring information likely to affect that person’s judgment in the transaction; or

4. the defendant promised performance that was likely to affect the judgment of another in the transaction and the defendant either did not intend to perform or knew that he would not perform; or

5. the defendant sold or otherwise transferred or encumbered property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment was or was not valid or was or was not a matter of official record.

Intent That Promise Not Be Performed

A person does not intend to perform a promise if the person does not have the conscious objective or desire to perform the promise.

Knowledge That Promise Would Not Be Performed

A person knows he will not perform a promise if he is reasonably certain that he will not perform the promise.

Proof of Deceptive Promise to Perform

The defendant's lack of intent to perform or knowledge that he would not perform a promised act cannot be proved simply by evidence that the defendant failed to perform. Other evidence of intent or knowledge is required.

Consent Rendered Ineffective by Coercion

Consent to the appropriation of property is rendered ineffective if the defendant engaged in coercion and by this coercion induced that consent. The defendant engaged in coercion if the defendant threatened—

[Include only those types of coercion supported by the evidence.]

1. to commit an offense; or
2. to inflict bodily injury in the future on the person threatened or another; or
3. to accuse a person of any offense; or
4. to expose a person to hatred, contempt, or ridicule; or
5. to harm the credit or business repute of any person; or

6. to take or withhold action as a public servant, or to cause a public servant to take or withhold action.

A threat can be communicated in any manner.

Value of Property

The value of property is the fair market value at the time of the appropriation.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date] through [date], appropriated property as follows:

Date of Appropriation	Property Appropriated	Owner of Property	Value of Property
[date]	[property description]	[name]	[\$amount]
[date]	[property description]	[name]	[\$amount]

[Repeat as needed.]

2. the appropriations were pursuant to one scheme or continuing course of conduct; and

3. the appropriations were unlawful; and

4. the defendant intended to deprive the [owner/owners] of the property; and

5. the value of the property appropriated exceeded \$[amount].

You must all agree on elements 1, 2, 3, 4, and 5 listed above, but you do not have to agree on the specific appropriations listed in element 1 above as long as you all agree that the state has proved enough of the listed appropriations that the aggregated value of the property proved to have been appropriated meets the amount required by element 5.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, 4, and 5 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Aggregated theft is prohibited by and defined in Tex. Penal Code § 31.09. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “appropriate” is from Tex. Penal Code § 31.01(4). The definition of “deprive” is from Tex. Penal Code § 31.01(2). The definition of “property” is from Tex. Penal Code § 31.01(5). The definition of “deception” is from Tex. Penal Code § 31.01(1). The definition of “value of property” is from Tex. Penal Code § 31.08(a)(1). The definition of “owner” is from Tex. Penal Code § 1.07(a)(35). The definition of “possession” is from Tex. Penal Code § 1.07(a)(39). The definition of “effective consent” is from Tex. Penal Code § 31.01(3). The definition of “coercion” is from Tex. Penal Code § 1.07(a)(9).

Separate Offense. Texas Penal Code section 31.09 creates an offense separate from the individual thefts that are aggregated to constitute this offense. Tex. Penal Code § 31.09. In a prosecution under section 31.09, the definition of theft as set out in Tex. Penal Code § 31.03 is obviously essential. Nevertheless, the instructions should be clear that the charged offense is aggregated theft as defined in section 31.09.

Instructions should be in terms of aggregated theft under section 31.09 only if the charging instrument alleges that the individual thefts were committed pursuant to one scheme or continuing course of conduct. *Thomason v. State*, 892 S.W.2d 8, 12 (Tex. Crim. App. 1994).

When the state has explicitly alleged several thefts as constituting the charged aggregated theft, it need not prove all those thefts. This is the case even if the allegations do not detail specific values of the items of property that are the subjects of each individual theft. The state must, however, prove thefts of property of sufficient values to meet the amount specified in the charging instrument. *Lehman v. State*, 792 S.W.2d 82 (Tex. Crim. App. 1990) (overruling prior cases).

After *Lehman*, the court of criminal appeals made clear that the individual thefts aggregated to form the charged aggregated theft need not be alleged in the charging instrument. The defendant is nevertheless entitled to notice regarding those individual

thefts. *State v. Moff*, 154 S.W.3d 599 (Tex. Crim. App. 2004); *Kellar v. State*, 108 S.W.3d 311 (Tex. Crim. App. 2003). This somewhat complicates the task of formulating the jury instructions, because it may be necessary or at least appropriate to incorporate into those instructions specific claims by the state—that is, specific claims concerning the individual aggregated thefts—that are not reflected in the charging instrument. The application of law to facts unit of the instructions, in other words, might not be sufficient if it merely tracks the charging instrument.

What jury unanimity requires also affects how the instructions are best formulated. Some members of the Committee concluded—as discussed below—that unanimity requires (or should require) unanimous jury findings of guilt on each theft that is included in the offense. This suggests that the instructions would be best structured to submit the aggregated thefts one by one.

The Committee decided, however, that such individual submission is neither necessary nor appropriate. Consequently, the instructions do not address the specifics of the aggregated thefts until the application of law to facts unit. That part of the instructions does not provide for one-by-one submission of the aggregated thefts. Rather, it lists those aggregated thefts in summary form.

The Committee's instructions provide for the specific description of the individual thefts by date, property involved, owner, and value. In some situations, other approaches may be preferable. For example, all the claimed thefts may involve property of the same sort and owned by the same person, in which case the better approach might be not to specify either the property or the owner.

Of course, only those individual thefts supported by the evidence should be listed and thus submitted. A claimed individual theft should be submitted, in other words, only if the trial judge determines that the record contains evidence from which a reasonable jury could conclude that all elements of theft are proved beyond a reasonable doubt regarding that claimed theft.

Limitations and Venue. In some unusual cases, accommodation will have to be made in the instructions for specific aspects of limitations and venue law as that law applies to aggregated theft. Venue lies in any county in which any of the thefts to be aggregated was committed:

The general venue provision of Article 13.18 provides that if “venue is not specifically stated, the proper county for the prosecution of offenses is that in which the offense was committed.” When several thefts are aggregated into a single offense under Section 31.09, the proper county for prosecution under the “plain” language of Article 13.18 is any county in which the individual thefts or any element thereof occurred.

State v. Weaver, 982 S.W.2d 892, 893 (Tex. Crim. App. 1998).

Regarding limitations, the court of criminal appeals has explained:

Article 12.01(4)(A) of the Texas Code of Criminal Procedure provides a five-year limitations period for theft (and aggregated theft). And the limitations period for aggregated theft begins to run on the date of the last theft, i.e., the end date of the “scheme or continuing course of conduct” in question. *Graves v. State*, 795 S.W.2d 185, 186 (Tex. Crim. App. 1990).

Tita v. State, 267 S.W.3d 33, 35 n.1 (Tex. Crim. App. 2008).

Defining “Scheme or Continuing Course of Conduct.” One case has held that jury instructions should not contain definitions of the critical terms of section 31.09: “pursuant to one scheme or continuing course of conduct.” *Sendejo v. State*, 676 S.W.2d 454, 456 (Tex. App.—Fort Worth 1984, no pet.) (“[N]either ‘scheme’ nor ‘pursuant to a continuing course of conduct’ need be defined by the trial court. These are terms of common understanding.”). The Committee concluded that *Sendejo* was correct. Further, any definition would likely be a prohibited comment on the evidence.

Unanimity. The instruction does not require jury unanimity on the state’s proof that each theft counted towards whether the required total amount has been established. In *Kent v. State*, 483 S.W.3d 557 (Tex. Crim. App. 2016), the court of criminal appeals held that unanimity on individual thefts is not mandatory:

[U]nanimity requires that the jurors agree that the threshold amount has been reached and that all the elements are proven for each specific instance of theft that the individual juror believes to have occurred. Every instance of theft need not be unanimously agreed upon by the jury.

Kent, 483 S.W.3d at 562.

CPJC 92.7 Instruction—Theft of Services**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of theft of services. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. by deception, threat, or false token intentionally or knowingly secured performance of a service, namely spa services, of the value of \$[amount], from [name], knowing that the service was provided only for compensation and with intent to avoid payment for the service*].

Relevant Statutes

A person commits an offense if, with intent to avoid payment for a service that the person knows is provided only for compensation, the person intentionally or knowingly secures performance of the service by deception, threat, or false token, and the value of the service is \$[amount] or more but less than \$[amount].

To prove that the defendant is guilty of theft of services, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant intentionally or knowingly secured performance of a service by deception, threat, or false token; and
2. the defendant knew the service was provided only for compensation; and
3. the defendant intended to avoid payment for the service; and
4. the value of the service so secured was \$[amount] or more.

Presumption

Under certain circumstances, the law creates a presumption that the defendant had the intent to avoid payment for services. A presumption is a conclusion the law permits you to reach if certain other facts exist.

Therefore, you may find the state has proved the defendant had the intent to avoid payment—the third element specified above—if you find the state has proved, beyond a reasonable doubt, that either—

1. the defendant absconded without paying for the service in circumstances in which payment is ordinarily made immediately upon rendering of

the service, as in hotels, campgrounds, recreational vehicle parks, restaurants, and comparable establishments; or

2. the defendant expressly refused to pay for the service in circumstances in which payment is ordinarily made immediately upon rendering of the service, as in hotels, campgrounds, recreational vehicle parks, restaurants, and comparable establishments.

The facts giving rise to the presumption must be proved beyond a reasonable doubt. If you have a reasonable doubt about the existence of one or more facts giving rise to the presumption, the presumption fails and you are not to consider the presumption for any purpose.

Even if the prosecution has proved the facts giving rise to the presumption beyond a reasonable doubt, you are not required to find that the state has proved the defendant had the intent to avoid payment.

Whether or not the presumption applies, the state must prove, beyond a reasonable doubt, the other three elements of the offense.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of theft of services.

Definitions

Service

The term “service” includes—

1. labor and professional services; and
2. telecommunication, public utility, or transportation services; and
3. lodging, restaurant service, and entertainment; and
4. the supply of a motor vehicle or other property for use.

Intentionally or Knowingly Secure Performance of a Service by Deception

The defendant secured performance of a service by deception if the defendant engaged in deception and by this deception induced the performance of a service. The defendant engaged in deception if—

[Include only those means of deception supported by the evidence.]

1. the defendant created or confirmed by words or conduct a false impression of law or fact that was likely to affect the judgment of another in the transaction and the defendant did not believe this impression of law or fact to be true; or
2. the defendant failed to correct a false impression of law or fact that was likely to affect the judgment of another in the transaction, the defendant previously created or confirmed this false impression, and the defendant did not believe this impression of law or fact to be true; or
3. the defendant prevented another from acquiring information likely to affect that person's judgment in the transaction; or
4. the defendant promised performance that was likely to affect the judgment of another in the transaction and the defendant either did not intend to perform or knew that he would not perform; or
5. the defendant sold or otherwise transferred or encumbered property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment was or was not valid or was or was not a matter of official record.

A person intentionally secures performance of a service by deception if it is the person's conscious objective to secure the performance of the service by deception.

A person knowingly secures performance of a service by deception if the person is aware the person is securing the performance of the service by deception.

Knowing a Service Is Provided Only for Compensation

A person knows a service is provided only for compensation if the person is aware that the service is provided only for compensation.

Intent to Avoid Payment for Services

A person intends to avoid payment for services if the person has the conscious objective of avoiding the payment for the services.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], by deception, threat, or false token intentionally or knowingly secured performance of a service, namely [insert specific allegations, e.g. spa services], from [name]; and
2. the defendant knew the service was provided only for compensation; and
3. the defendant intended to avoid payment for the service; and
4. the value of the service so secured was \$[amount] or more.

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Theft of service is prohibited by and defined in Tex. Penal Code § 31.04. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “deception” is from Tex. Penal Code § 31.01(1). The definition of “service” is from Tex. Penal Code § 31.01(6).

Services Obtained by Deception. Tex. Penal Code § 31.04(a) provides for several quite different ways of committing the offense of theft of services. The Committee addressed the instructions appropriate for what it regarded as the primary form of the offense: obtaining services by deception, as defined in Tex. Penal Code § 31.04(a)(1).

Under section 31.04(a)(1), the deception must be the means by which the services are secured. Thus deception—such as presenting as good an insufficient-funds check—after the service is rendered is not sufficient. *Gibson v. State*, 623 S.W.2d 324 (Tex. Crim. App. 1980); *Cortez v. State*, 582 S.W.2d 119 (Tex. Crim. App. 1979).

Imprisonment for Debt. Convictions permissible under this offense may be limited by the constitutional prohibition against imprisonment for debt. Article I, section 18, of the Texas Constitution provides: “No person shall ever be imprisoned for debt.”

In *Colin v. State*, 168 S.W.2d 500 (Tex. Crim. App. 1943), the court of criminal appeals held that article I, section 18, would not necessarily be violated by a conviction under the “hot check” statute even if the check were given for a preexisting debt. Conviction was permissible when—but only when—the facts showed “an intent to defraud.” Colin’s conviction was reversed because the record failed to contain facts showing the required intent to defraud.

Twenty-five years later, in *Rhodes v. State*, 441 S.W.2d 197, 198 (Tex. Crim. App. 1969), the court upheld a conviction for a crime consisting of obtaining services at a hotel and departing with the intent not to pay for those services. It explained: “[I]t is not the non-payment of the services which is punishable, but it is the act of departure with the intent not to pay for such services which is denounced by the statute as an offense. *Rhodes* cited *Colin* but made no reference to *Colin*’s apparent requirement of intent to defraud.

Rhodes suggests that any constitutionally required intent to defraud need not exist at the time the services are obtained. What is required under *Colin* remains somewhat unclear.

Dispute Regarding Payment Due. Evidence that the defendant disputed the quality of the services provided or the amount due for those services apparently goes to whether the state has proved the required culpable mental state.

In *Manley v. State*, 633 S.W.2d 881, 882–84 (Tex. Crim. App. 1982) (opinion on motion for rehearing), the proof showed that the defendant was dissatisfied with meals served in a restaurant and he requested adjustment of the bill. When the waitress did not return immediately, he left the premises. He did, however, leave his business card with his phone number and a note: “Call me when you decide.” A split court held that the evidence failed to support proof of the “presumed intent” without explaining precisely how.

Definition of “False Token.” There is no statutory definition of the term “false token.” In one unreported case it was defined by the following: “‘False token’ is a thing or object or document which is used as a means to defraud and which is of such character that, were it not false, it would commonly be accepted as what it obviously appears and purports to be.” *Middleton v. State*, Nos. 14-07-00946-CR, 14-07-00947-CR, 2009 WL 196063, at *5 (Tex. App.—Houston [14th Dist.] Jan. 29, 2009, pet. ref’d) (not designated for publication) (appellant did not dispute definition and did not deny that checks involved fell within definition).

Definition of “Abscond.” The presumption in Tex. Penal Code § 31.04(b) applies if the evidence shows the defendant “absconded without paying for the service. No statutory definition of “abscond” is provided. *Manley* held the presumption inapplicable and indicated that “abscond” as used in Tex. Penal Code § 31.04(b)(1) requires proof that the defendant left ‘clandestinely’ or “secretly.” *Manley*, 633 S.W.2d at 882–83.

The Committee believed current law prohibits incorporation of *Manley's* definition in the jury instructions.

CPJC 92.8 Instruction—Unauthorized Use of Vehicle**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of unauthorized use of a vehicle. Specifically, the accusation is that the defendant, without the effective consent of the owner, [name], intentionally or knowingly [insert specific allegations, e.g. operated another's motor-propelled vehicle].

Relevant Statutes

A person commits an offense if the person intentionally or knowingly operates another's motor-propelled vehicle without the effective consent of the owner.

To prove that the defendant is guilty of unauthorized use of a vehicle, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant intentionally or knowingly operated a motor-propelled vehicle owned by another; and
2. the owner of the vehicle did not effectively consent to the defendant's operation of the vehicle; and
3. the defendant knew the owner did not effectively consent to the defendant's operation of the vehicle.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of unauthorized use of a vehicle.

Definitions*Intentionally Operate Motor-Propelled Vehicle Owned by Another*

A person intentionally operates a motor-propelled vehicle owned by another if the person has the conscious desire to operate a motor-propelled vehicle that the person is aware is owned by another.

Knowingly Operate Motor-Propelled Vehicle Owned by Another

A person knowingly operates a motor-propelled vehicle owned by another if the person is aware that the person is operating a motor-propelled vehicle that the person is aware is owned by another.

Knowing Owner Did Not Effectively Consent to Operation of Vehicle

A person knows the owner does not effectively consent to the person's operation of the owner's vehicle if he is aware that the owner does not effectively consent to this operation of the vehicle.

Owner

"Owner" means a person who has—

1. title to the property; or
2. possession of the property, whether lawful or not; or
3. a greater right to possession of the property than the defendant.

Possession

"Possession" means actual care, custody, control, or management.

Effective Consent of Owner

Consent is effective consent of the owner if both—

1. the consent is given by the owner or a person legally authorized to act for the owner; and
2. the consent is not rendered ineffective because—
 - a. it was induced by deception or coercion; or
 - b. it was given by a person the defendant knew was not legally authorized to act for the owner; or
 - c. it was given by a person who by reason of youth, mental disease or defect, or intoxication is known by the defendant to be unable to make reasonable property dispositions; or
 - d. it was given by a person who by reason of advanced age is known by the defendant to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly operated a motor-propelled vehicle owned by [name]; and
2. [name], the owner of the vehicle, did not effectively consent to the defendant's operation of the vehicle; and
3. the defendant knew [name], the owner, did not effectively consent to the defendant's operation of the vehicle.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Unauthorized use of a vehicle is prohibited by and defined in Tex. Penal Code § 31.07. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definition of “owner” is from Tex. Penal Code § 1.07(a)(35). The definition of “possession” is from Tex. Penal Code § 1.07(a)(39). The definition of “effective consent” is from Tex. Penal Code § 31.01(3).

Texas Penal Code section 31.07(a) requires that the offense of unauthorized use of a vehicle be committed intentionally or knowingly. Tex. Penal Code § 31.07(a). The elements to which this culpable mental state applies have been addressed by the case law:

In *McQueen*, this Court held that a culpable mental state applies to both the “operate a motor-propelled vehicle” and the “without the effective consent of the owner” elements of the offense.

Bruno v. State, 845 S.W.2d 910, 912 (Tex. Crim. App. 1993) (citing *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989)).

Because the defendant's awareness of the lack of consent is frequently a major issue in these prosecutions, the Committee concluded that knowledge of this circumstance is appropriately set out in the instructions as a distinguishable element of the offense.

No definition of the critical term *operate* is included. *Denton v. State*, 911 S.W.2d 388 (Tex. Crim. App. 1995), appeared to formulate a definition of the term as it is used in Tex. Penal Code § 31.07(a) and in Tex. Penal Code § 49.04 (driving while intoxicated). A driving while intoxicated instruction incorporating this definition, however, was held a prohibited comment on the weight of the evidence. *Kirsch v. State*, 357 S.W.3d 645, 652 (Tex. Crim. App. 2012). *Kirsch's* rationale and holding undoubtedly apply to prosecutions under section 31.07(a), and therefore no definition of "operate" is included in these instructions.

This instruction may be modified for use in cases involving the unauthorized use of a boat or airplane. *See* Tex. Penal Code § 31.07(a).

CPJC 92.9 Interest in Property as Defense

Statutory Basis. The Committee struggled with two aspects of a pair of statutory provisions relating to property offenses. First, the Committee members disagreed on whether either or both of them is a legal basis for, or at least evidence of implicitly provided for, substantive “defenses.” Second, the Committee members disagreed on whether and how to explain the substance of these provisions—whatever they mean—to juries.

The Committee’s division was so great and the support for the alternative positions so questionable that ultimately the Committee decided simply to explain the members’ concerns and avoid recommending any particular approach.

The first of the two provisions is in chapter 28 of the Texas Penal Code. That chapter addresses criminal mischief, arson, and other crimes involving damage to or destruction of property. The provision is as follows:

§ 28.05. Actor’s Interest in Property

It is no defense to prosecution under this chapter that the actor has an interest in the property damaged or destroyed if another person also has an interest that the actor is not entitled to infringe.

Tex. Penal Code § 28.05.

The second provision is in chapter 31. That chapter addresses theft and other offenses involving interference with possession of property. The specific provision at issue is as follows:

§ 31.10. Actor’s Interest in Property

It is no defense to prosecution under this chapter that the actor has an interest in the property or service stolen if another person has the right of exclusive possession of the property.

Tex. Penal Code § 31.10.

Both statutes explicitly address what is not a defense to the covered crimes. What divided the Committee was in part whether the statutes implicitly address what is a defense to those offenses.

Section 28.05 and Chapter 28 Offenses. Chapter 28 offenses generally require that the property damaged, destroyed, or placed at risk have had an “owner” who was not the accused. *E.g.*, Tex. Penal Code § 28.03(a) (criminal mischief defined as involving property “of the owner”). Under section 28.05, conviction is not precluded by evidence showing that the accused had an interest of some sort in the property, as long as in addition the evidence shows another person had an interest in the property that the accused was not entitled to infringe.

Under Tex. Penal Code § 28.06(e), the accused in a prosecution for a chapter 28 crime has the right to show that although, because of section 28.05, he has no defense, he did have a ‘legal interest’ in the property damaged or destroyed and the value of that interest. If this is proved, his interest is given effect by deducting it from the amount of loss.

Perhaps, in light of this, it might be argued that section 28.05 implicitly recognizes or assumes the existence of a defense. This defense would provide that a defendant is not guilty of a chapter 28 offense if the evidence shows that both (1) the defendant had an interest in the property and (2) no other person had an interest in the property that the defendant had no right to infringe. In most and perhaps all situations, however, this seems to be adequately accommodated by the elements of the various chapter 28 offenses.

The Committee concluded, therefore, that section 28.05 does not have sufficient practical significance to justify efforts to fashion a jury instruction for it.

Possible “Defense” of “Joint Ownership” to Theft. Penal Code section 31.10, in contrast to section 28.05, may have considerable current importance. Some members of the Committee concluded that section 31.10 continues a significant aspect of long-standing pre-1974 Texas theft law. Thus, they reasoned, it implicitly provides for what the court of criminal appeals in *Thomas v. State*, 621 S.W.2d 158, 163–64 (Tex. Crim. App. 1981) (opinion on motion for rehearing), called the ‘defense’ of “joint ownership” to theft and related crimes.

The 1856 Texas Penal Code was clear that the taking of property of which a theft defendant ‘be part owner’ was not theft “unless the person from whom it is taken be wholly entitled to the possession at the time. Tex. Penal Code art. 752 (1856). This remained statutory law until the 1974 revision of the Penal Code. Before this revision, article 752 of the 1856 Code had been continued as the following:

Art. 1417. Theft by part owner.—If the person accused of theft be part owner of the property, the taking does not come within the definition of theft, unless the person from whom it is taken be wholly entitled to the possession at the time.

Under the pre-1974 statutory language, Texas followed the common-law rule: a part owner did not—in fact, *could* not—commit theft of jointly owned property unless that part owner took it from someone who under the applicable law was entitled to exclusive possession at least as against the taker. *E.g. Fairy v. State*, 18 Tex. Ct. App. 314 (1885) (part owner of horse, saddle, and bridle could not commit theft of that property by taking it from one who purchased it from the other part owner, because sale did not extinguish his interest and purchaser was not wholly entitled to possession of the property); *Bell v. State*, 7 Tex. Ct. App. 25 (1879) (sharecropper entitled to half of crop when crop was gathered did not commit theft by pulling up and taking portion of crop before division of it); *Connell v. State*, 2 Tex. Ct. App. 422 (1877) (tenants with claim

to cotton committed theft of it from employer when employer was lawfully entitled to possession of the cotton, even against claims of tenants).

Many American jurisdictions have abandoned the common-law position. Doing so had been recommended by the Model Penal Code when the Texas Penal Code was revised in the early 1970s. The Model Penal Code proposed implementing a new approach by putting the theft offenses in terms requiring that the situations involve “property of another.” *E.g.*, Model Penal Code § 223.2(1) (Official Draft 1985) (theft by unlawful taking or disposition). Property of another would then be defined as “includ[ing] property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor has an interest in the property.” Model Penal Code § 223.0(7) (Official Draft 1985).

The 1970 proposed redraft of the Texas Penal Code developed by the State Bar Committee on Revision of the Penal Code (the “Penal Code Committee”) recommended the substance of the Model Penal Code’s approach. It did not, however, adopt the Model Penal Code’s use and definition of the term “property of another.” Rather, the Penal Code Committee proposed implementing the Model Penal Code’s approach by replacing article 1417 with a provision—section 31.09 of the 1970 proposal—permitting conviction of theft of property in which the accused has an interest “if another person also has an interest that the [accused] is not entitled to infringe. Specifically, proposed section 31.09 would have provided the following:

It is no defense to prosecution under this chapter that the actor has an interest in the property or services stolen if another person also has an interest that the actor is not entitled to infringe.

State Bar Committee on Revision of the Penal Code, Texas Penal Code § 31.09 (Final Draft, Oct. 1970). This was substantively identical to the Penal Code Committee’s proposed section 28.05, so the committee would have applied the same law in prosecutions for chapter 28 offenses as in those for chapter 31 crimes.

Both proposed provisions—proposed sections 28.05 and 31.09—obviously drew on the language of the Model Penal Code’s definition of property of another. Conviction was permitted under both, despite evidence that the defendant had an interest in the property, if another person had an interest in it and the defendant was “not entitled to infringe” that other person’s interest. The Penal Code Committee used the Model Penal Code’s language but substituted the term *entitled* for the Model Penal Code’s term *privileged*.

Article 1417 and its predecessors were awkwardly phrased in terms of what was not theft (“taking” of property by a person who “be part owner”) qualified by an exception (“unless the person from whom it is taken be wholly entitled to the possession at the time”). Substantively, however, they addressed what was theft—taking of property by a part owner from another part owner who was at the time wholly entitled to possession of the property.

Perhaps in an effort to follow the style of the predecessor provisions, the Penal Code Committee drafted its section 31.09 in a somewhat similar format. Both proposed sections 28.05 and 31.09 were put in terms of what would not be a defense.

The legislature did not, however, adopt the Penal Code Committee's approach. What became the adopted version of the committee's section 31.09—renumbered as section 31.10—appeared in The Legislative Committee of the Texas District & County Attorneys Association, *Texas Penal Code, A Proposed Revision* (n.d.). The prosecutors' draft kept the Penal Code Committee's approach of beginning the provision by a statement that proof that a defendant has an interest in the property "is no defense. It dramatically changed the final clause, which qualified the initial proposition. Specifically, the prosecutors' recommendation modified the Penal Code Committee's provision as follows:

It is no defense to prosecution under this chapter that the actor has an interest in the property or service stolen if another person ~~also has an interest that the actor is not entitled to infringe~~ has the right of exclusive possession of the property.

The legislature adopted the provision as modified by the prosecutors' committee.

Section 28.05—referring to property in which a person other than the defendant "has an interest that the [defendant] is not entitled to infringe"—was enacted as recommended by the Penal Code Committee. What became section 31.10 was modified to reject that language. The resulting difference between sections 28.05 and 31.10 may reflect a legislative intent to give evidence that the defendant had an interest in the property a different substantive significance in prosecutions for chapter 31 crimes.

Some members of the Committee concluded that this history of section 31.10 reflects a legislative intent to continue pre-1974 law by—perhaps awkwardly—retaining the substance of pre-1974 article 1417. The legislature, in the Committee's view, rejected the Model Penal Code approach as embodied in the Penal Code Committee's proposed section 31.09. Instead it adopted language so close to that in former article 1417 that this language must be read as continuing the substance of the former provision.

A leading 1974 commentary on the then newly enacted 1974 Penal Code took the view that section 31.10 restated prior article 1417 of the previous Penal Code. "Explanatory Comment" to Section 31.10, *Branch's Texas Annotated Penal Statutes* (3d ed. 1974).

Case law reviewed by the Committee was quite unsatisfactory and inconclusive. Several appellate discussions of theft liability for what was apparently partnership property did not even acknowledge section 31.10. See *Thurman v. State*, 62 S.W.3d 248 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Wright v. State*, No. 14-99-00042-CR, 2001 WL 253468 (Tex. App.—Houston [14th Dist.] Mar. 15, 2001, no pet.) (not designated for publication).

Dicta in *Thomas*, 621 S.W.2d at 163–64, commented that the “defense” of “joint title or joint possession” is available regardless of how the state proves the complainant is the owner of the property. It added that under section 31.10 ‘a defendant’s joint ownership may be ineffective.’ By this, it apparently meant that the defendant can be convicted if the evidence shows another person has the right of exclusive possession.

Some members of the Committee concluded that, as the *Thomas* discussion indicated, section 31.10 implicitly provides for a defense to all chapter 31 offenses precluding conviction if the evidence shows the defendant “ha[d] an interest in the property, unless another person had an interest in the property giving that other person “the right of exclusive possession of the property.”

Other members of the Committee disagreed that section 31.10 establishes or acknowledges a defense of joint ownership. They reasoned that a statutory provision focusing on and phrased in terms of what is *not* a defense is not a sufficiently sound basis for determining what *is* a statutory defense. Section 31.10, in their view, is best read as merely emphasizing that the law imposes no bar to conviction in situations in which both the accused and another have interests in the property and the other person has the right of exclusive possession. Whether there is liability in other situations—specifically when another person has an interest in the property but does not have the right of exclusive possession—should be determined by applying the law from other provisions of the Penal Code.

Those members of the Committee concluding that under section 31.10 Texas theft law includes a joint-owner “defense” believed this would be best incorporated in jury instructions by modifying the definition of theft in those cases in which the evidence raises the possibility of joint ownership. The spirit and probably the letter of section 2.03 require that the burden be placed on the state. Essentially, in such cases the state must prove the defense inapplicable.

This position could be implemented by modifying the relevant statutes unit of the theft instruction as follows. Corresponding changes, of course, would also have to be made in the application of law to facts unit.

Relevant Statutes

A person commits an offense if the person unlawfully appropriates property with intent to deprive the owner of the property and the value of the property is \$[amount] or more but less than \$[amount].

A person who has an interest in property cannot be convicted of theft of that property unless another person had the right of exclusive possession of the property.

To prove that the defendant is guilty of theft, the state must prove, beyond a reasonable doubt, ~~four~~ five elements. The elements are that—

1. the defendant appropriated property; and
2. the appropriation was unlawful; and
3. either—
 - a. the defendant had no interest in the property; or
 - b. another person had the right of exclusive possession of the property; and
34. the defendant intended to deprive the owner of the property; and
45. the value of the property was \$[*amount*] or more.

CPJC 92.10 Instruction—Defense of Mistake of Fact

[Insert instructions for underlying offense.]

If you all agree the state has proved, beyond a reasonable doubt, each of the [number] elements listed above, you must next consider whether the state has proved that the defendant did not make a mistake of fact constituting a defense.

Mistake of Fact

You have heard evidence that, when the defendant appropriated the property owned by [name], the defendant believed he was the owner of that property.

Relevant Statutes

A person's conduct that would otherwise constitute the crime of theft is not a criminal offense if the person through mistake formed a reasonable belief about a matter of fact and the mistaken belief negated the kind of culpability required for commission of the offense.

Burden of Proof

The defendant is not required to prove that he made a mistake of fact. Rather, the state must prove, beyond a reasonable doubt, that the defendant did not make a mistake of fact constituting a defense.

Definitions*Reasonable Belief*

“Reasonable belief” means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved the defendant did not make a mistake of fact constituting a defense.

To decide the issue of mistake of fact, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the defendant did not believe he was the owner of the property; or

2. the defendant's belief that he was the owner of the property was not reasonable.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of theft, and you all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "guilty."

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

The defense of mistake of fact is provided for in Tex. Penal Code § 8.02(a). The definition of "reasonable belief" is based on Tex. Penal Code § 1.07(a)(42).

Theft cases sometimes raise claims by defendants that they are entitled to exoneration because they believed the property at issue belonged to them. The Committee concluded that, under existing theft law, such claims if they are specifically reflected in the jury instructions would be addressed by the addition of a section on mistake of fact based on Tex. Penal Code § 8.02(a).

Theft does not explicitly require that the property be owned by another or that the defendant be proved to have been aware of ownership by another. It does, however, explicitly require proof of intent to deprive 'the owner,' obviously someone other than the accused, of the property. This implicitly requires proof the defendant believed someone else was the owner. Evidence that the defendant mistakenly believed he owned the property, then, may negate the necessary proof of this intent to deprive.



CHAPTER 93	MISAPPLICATION OF FIDUCIARY PROPERTY	
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CPJC 93.1 General Comments

Misapplication of fiduciary property is of considerable importance because it is often used—rather than theft—to prosecute what traditionally was regarded as embezzlement.

Two leading discussions of this offense, considered below, are in Judge Miller's opinions in two court of criminal appeals cases involving five codefendants convicted in a joint trial: *Casillas v. State*, 733 S.W.2d 158 (Tex. Crim. App. 1986) (affirming convictions of defendants Casillas, Luna, and Aguilar), and *Amaya v. State*, 733 S.W.2d 168 (Tex. Crim. App. 1986) (reversing convictions of defendants Amaya and Hernandez for insufficiency of evidence). *Casillas* is clearly an opinion of the court of criminal appeals. The precedential significance of the *Amaya* opinion is less clear, as it was joined by only four of the eight judges participating in the case.

Several issues complicated the task of drafting an instruction for this offense.

Defining “Fiduciary.” The statutory definition of “fiduciary” in Tex. Penal Code § 32.45(a)(1), insofar as it goes beyond specific examples (trustee, guardian, etc.), is largely circular: “any person acting in a fiduciary capacity.” Tex. Penal Code § 32.45(a)(1)(C). The Committee concluded that given the central role this term plays in defining the offense, a somewhat more elaborate definition is both desirable and permissible.

In *Coplin v. State*, 585 S.W.2d 734 (Tex. Crim. App. [Panel Op.] 1979), the jury instruction appears (this is not made explicit) to have given the jury only the statutory definition. The court noted Coplin's complaints related to this and responded:

Complaint is next made that the jury charge is vague and confusing because it fails to define the following crucial terms: “fiduciary property”, ‘commercial bailee’, “trustee”, ‘guardian’, “administrator”, ‘executor’, “conservator”, “receiver” and “managing partner.” Coplin also contends that ‘fiduciary’ is not completely defined.

We have examined the charge. It defines the offense and applies the facts to the law. It defines the terms fiduciary, joint venturer, misapply, owner, benefit and property. The charge properly submits the case to the jury in accordance with the statute. We note that “trustee”, ‘guardian’, ‘administrator’, ‘executor’, ‘conservator’, and “receiver” are not essential terms in a prosecution under Section 32.45(a)(1)(B). No error is shown.

Coplin, 585 S.W.2d at 735–36.

Coplin can be read as holding (or at least strongly suggesting) that a defendant has no right to anything beyond the statutory definition.

In *Showery v. State*, 678 S.W.2d 103 (Tex. App.—El Paso 1984, pet. ref'd), the defendant challenged the constitutionality of the statutory provision defining a fiduciary as “any other person acting in a fiduciary capacity.” The court responded:

While not directly addressing a constitutional challenge, the Court of Criminal Appeals was called upon to evaluate the scope of that subsection in *Coplin v. State*, 585 S.W.2d 734 (Tex. Crim. App. 1979). There the defendant asserted that the (a)(1)(B) provision had to be narrowly construed as applying only to an individual associated with the specific fiduciaries enumerated in the preceding subsection. The court declined such a restricted interpretation, finding (a)(1)(B) to have a plain meaning, subject to normal usage and applicable to anyone acting in a fiduciary capacity of trust (other than a commercial bailee). Even in the absence of a specific constitutional objection, surely the Court of Criminal Appeals would not adopt such an open view of the language if the result were impermissibly vague.

Showery, 678 S.W.2d at 107.

Neither *Coplin* nor *Showery* addressed whether a definition would be desirable or permissible.

At least one trial judge has concluded that a definition is both desirable and permissible, and a court of appeals has suggested it was permissible. In *Walls v. State*, No. 01-99-00714-CR, 2001 WL 83548 (Tex. App.—Houston [1st Dist.] Feb. 1, 2001, pet. ref'd, untimely filed) (not designated for publication), the defendant contended the trial court erred in refusing to give his requested definition of “fiduciary.” The court noted that the trial judge had given the statutory definition and held under *Coplin* that this was sufficient. It added—

[W]e note that in addition to the statutory definition of “fiduciary,” the trial court included the following definition:

A ‘Fiduciary’ is a person who has a duty, created by his own undertaking, to act primarily for another person’s benefit in matters connected to that undertaking. An individual acts in a fiduciary capacity when he receives money, contracts a debt, or handles property not belonging to him, not for his benefit, but for another person’s benefit. The transaction is conducted for the benefit of another person to whom the actor stands in a relation implying and necessitating great confidence and trust and a high degree of good faith.

This definition, paraphrased from Black’s Law Dictionary 564 (5th ed. 1979), is a correct statement of the law. No further definition was required.

Walls, 2001 WL 83548, at *8.

The *Walls* court's comment that the instruction given in that case was 'a correct statement of the law' was confirmed by *Berry v. State*, 424 S.W.3d 579 (Tex. Crim. App. 2014), construing the term *fiduciary* for purposes of appellate review of the evidence:

[T]he plain meaning of a fiduciary is one "who is required to act for the benefit of another person on all matters within the scope of their relationship. Black's Law Dictionary 702 (9th ed. 2009); see also Webster's New International Dictionary 845 (3d ed. 2002) (defining adjective of fiduciary as "holding, held, or founded in trust or confidence"). An individual who acts as a fiduciary is further defined as "one who owes to another the duties of good faith, trust, confidence and candor," or, "[o]ne who must exercise a high standard of care in managing another's money or property." Black's Law Dictionary 702 (9th ed. 2009). A fiduciary relationship may additionally be described as 'existing when one person justifiably reposes confidence, faith, and reliance in another whose aid, advice, or protection is sought in some matter,' or when "good conscience requires one to act at all times for the sole benefit and interest of another with loyalty to those interests." Webster's New International Dictionary 845 (3d ed. 2002).

Berry, 424 S.W.3d at 583 (footnote omitted).

Walls makes clear that at least one trial judge was dissatisfied with the statutory provisions alone. While the appellate court observed that the more extensive definition given was "a correct statement of the law," *Walls*, 2001 WL 83548, at *8, it did not comment on the propriety of the giving of that more extensive definition to the jury.

The Committee concluded that the basic approach taken in *Walls* is desirable and not precluded by *Coplin* or other case law. Consequently, it recommends a definition based on the *Walls* instruction.

Definition of "Commercial Bailee." The term *commercial bailee* is not defined in the Texas Penal Code or elsewhere in the statutes. Charging instruments for this offense commonly allege, in the language of the statute, that the defendant acted "in a fiduciary capacity, but not as a commercial bailee." See Tex. Penal Code § 32.45(a)(1)(C). Even if the term is not addressed by the evidence, it is often put before the jury in the instructions by inclusion of the statutory definition of "fiduciary."

In discussing the term *commercial bailee*, the court in *State v. Hart*, 342 S.W.3d 659 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd), noted—

The word "commercial bailee" is not defined in the Penal Code. However, the ordinary meaning of "bailee" is a 'person to whom goods are committed in trust and who has a temporary possession [of the goods] for the purposes of the trust. See *Talamantez v. State*, 790 S.W.2d 33, 36 (Tex. App.—San Antonio 1990, pet. ref'd). The ordinary meaning of a "bail-

ment, the acceptance of goods by a bailee, is ‘a delivery of personal property by a bailor to a bailee for specific purposes under an express or implied agreement of the parties that when those purposes are accomplished the property will be returned to the bailor, kept until he reclaims it, or disposed of according to the agreement. *See id.* The adjective ‘commercial’ means that the bailee accepts bailments of goods for a fee or as a part of his business. *See id.*

Hart, 342 S.W.3d at 667–68.

Likewise, in *Talamantez v. State*, 790 S.W.2d 33 (Tex. App.—San Antonio 1990, pet. ref’d), the court opined—

Appellant’s claim that he could not tell whether he was exempted from the statute as a commercial bailee is meritless. The word bailee has a common usage found in Webster’s: “the person to whom goods are committed in trust and who has a temporary possession and a qualified property in them for the purposes of the trust. ‘Bailment,’ the acceptance of the bailee by these goods, is defined as “a delivery of personal property by a bailor to a bailee for specific purposes under an express or implied agreement of the parties that when those purposes are accomplished the property will be returned to the bailor, kept until he reclaims it, or disposed of according to the agreement. The adjective “commercial,” used in the statute, means the bailee performs this function for a fee or otherwise as part of his business.

Talamantez, 790 S.W.2d at 36.

This term is not one of general usage, yet there is unlikely to be any dispute about its meaning. Thus the Committee included a definition based on the case discussions. This definition should not be an impermissible comment on the evidence and may make clear to juries that there is no further definition that might somehow be relevant and helpful.

Defining “Substantial Risk of Loss.” The term *substantial risk of loss* is not defined by statute. Case law has, however, addressed it to some extent.

The court of criminal appeals discussed the meaning of the term in *Bynum v. State*, 767 S.W.2d 769 (Tex. Crim. App. 1989):

We will assess the appellant’s vagueness challenge of the phrase “substantial risk of loss” in light of his conduct. The appellant contends that the phrase is not defined in § 32.45, is not a commonly used phrase, nor is the phrase used elsewhere in the law. We note that the appellant neither objected to the charge on this ground nor was a specially requested charge submitted with a proposed definition of a “substantial risk of loss.”

In *Casillas v. State*, 733 S.W.2d 158 (Tex. Crim. App. 1986), the Court cited the Amarillo Court of Appeals' decision in [*Bynum v. State*, 711 S.W.2d 321, 164 (Tex. App.—Amarillo 1986)], and ultimately concluded that:

The *Bynum* discussion of substantial risk of loss comports with that of the Model [Penal] Code: a “real possibility” of loss is one, we believe, that exists but does not rise to the level of a substantial certainty. It need not have to be “unlikely” that the property will be recovered, but the risk of loss does have to be a positive possibility; we conclude that the risk must be, at least, more likely than not.

Although this Court did not review the constitutionality of § 32.45 in *Casillas*, *supra*, our discussion of the meaning of substantial risk of loss is notable. The record clearly reveals that if the appellant had not been constantly reminded and confronted with the diversion of checks, [the victim] would not have recovered those funds. In general, the phrase “substantial risk of loss” is neither vague nor arbitrary. Moreover, when applied to the conduct of the appellant, as shown in the record, the phrase is not arbitrary or vague at all. The appellant’s contention that the phrase “substantial risk of loss” is vague as applied to him is without merit.

Bynum, 767 S.W.2d at 774–75 (some citations omitted).

Bynum might be read as adopting a specialized definition of the term to save the statute from at least possible constitutional vagueness.

Some members of the Committee believed that, under *Bynum*, the term has taken on a specialized meaning that can and should be given to juries. The Committee considered a proposal to include a definition as follows:

A substantial risk of loss exists if loss is more likely than not.
There need not be a substantial certainty that loss will occur.

A majority of the Committee concluded that the discussion in *Bynum* and any definition in that discussion addressed analysis for appellate review of evidence sufficiency. This majority was persuaded that a definition such as that proposed would be inappropriate and might well be a prohibited comment on the evidence.

Culpable Mental State Analysis. Tex. Penal Code § 32.45(b) provides that the offense must be committed “intentionally, knowingly, or recklessly.” The statute, like many in the Penal Code, does not make clear to which elements this culpable mental state applies.

The required culpable mental state clearly applies to the basic conduct element of the offense: misapplying the property. Does it also apply to the subelements brought into play by section 32.45(a)(2)’s definitions of “misapply”? For example, if the state’s theory is that the defendant misapplied the property by using it contrary to an agree-

ment, must the defendant be proved to have been at least aware of the agreement? Must the defendant be aware that the agreement did not permit the use made of the property?

Judge Miller's discussion in *Amaya v. State*, 733 S.W.2d 168 (Tex. Crim. App. 1986), suggests that awareness of these matters is required.

In *Amaya*, the state contended that misapplication occurred because the defendants used certain grant money, first, in a manner that violated a grant agreement between the Mexican American Council for Economic Progress and the federal government's Office of Economic Opportunity and, second, by making a loan that violated certain Small Business Administration (SBA) regulations. The court of appeals had upheld the convictions on the first theory. Judge Miller's opinion rejected this on the ground that the evidence was not sufficient:

We agree with *Amaya* that the record does not demonstrate that he had knowledge of the provisions in the agreement; Hernandez's knowledge was also not demonstrated although such knowledge is circumstantially shown for the other three appellants.

Amaya, 733 S.W.2d at 171. If the state's theory is that the defendant misapplied the property by using it contrary to an agreement, the *Amaya* analysis assumes the defendant must be proved to have been at least aware of the agreement. The Committee agreed that this was a sound reading of the Penal Code provision.

Regarding the state's second theory in *Amaya* (that the misapplication occurred because the use of the property violated certain SBA regulations), Judge Miller's opinion is less clear. Insofar as the state's theory was that the defendants were primary actors, he seems to have concluded that the charged offense did not require knowledge of the law violated:

We believe that the evidence amply shows *Amaya's* and Hernandez's awareness of the source of the money and their active participation in the disposition of the money. They are charged, just as the other appellants, with knowledge of the legal restrictions imposed on use of the money. The jury was adequately instructed on the defenses of mistake of fact and mistake of law, and on the definition of 'intentionally.'

Amaya, 733 S.W.2d at 173. The opinion seems to indicate that knowledge of "law"—unlike knowledge of the restrictions imposed by an agreement—need not be proved. The defendant is "charged with" such knowledge. See *Amaya*, 733 S.W.2d at 174.

Regarding the state's theory that the defendants in *Amaya* were parties to the offense, Judge Miller's opinion suggested that the state had to prove knowledge of the law and that it failed to do so:

While *Amaya* and Hernandez are charged with knowledge of the law as primary actors, we cannot hold them accountable as parties without

some indication that they knew they were assisting in the commission of an *offense*. Otherwise, criminal complicity would extend to all those who perform acts that happen to assist in a criminal undertaking, even though there was no knowledge that a crime was being assisted. We require a higher level of complicity from those we denote parties than those we denote primary actors, because the former are performing acts that are not illegal in and of themselves; the acts only attract criminal liability because of the result they are directed to, the commission of a crime. The conduct of primary actors is a crime in and of itself, and we hold such actors liable whether they realize they are breaking the law or not.

We find that the State failed to show that Amaya and Hernandez knew the criminality of the conduct they assisted, sufficiently to show that they acted with intent to promote or assist in the commission of an offense as required by § 7.02.

Amaya, 733 S.W.2d at 174–75.

In *Casillas v. State*, 733 S.W.2d 158 (Tex. Crim. App. 1986), the companion case to *Amaya*, the opinion—unlike the *Amaya* opinion clearly that of the court—announced the affirmance of the convictions of three codefendants of Amaya and Hernandez, apparently as primary actors. The state was held to have proved misappropriation by dealing with the money contrary to a law—the SBA regulation. The court did not discuss whether the state had to prove any awareness of that “law” or that the actions violated it.

The Committee concluded that the *Amaya* opinion was incorrect insofar as it might suggest that awareness of the law prescribing the use of the property is not required by section 32.45(b). If the state relies on the theory that the defendant misapplied the property because the defendant used it in violation of a “law,” then in the Committee’s view the state must prove that the defendant was at least reckless concerning that law. This means it must prove that the defendant was aware of at least a risk that the law proscribed the use the defendant made of the property.

The instruction is drafted to implement this position. The position is reflected in the definitions of “intentionally misapply property,” “knowingly misapply property,” and “recklessly misapply property.”

Penal Code section 8.03(a) does provide: “It is no defense to prosecution that the actor was ignorant of the provisions of any law after the law has taken effect. Tex. Penal Code § 8.03(a). The Committee concluded that this does not apply where proper culpable mental state analysis means awareness of a provision of “law” is required by the culpable mental state required by the offense at issue. A claim of ignorance of the law in such a situation is not an assertion of a “defense” within the meaning of section 8.03(a). It is an argument that the state has not met part of its burden of proof.

Mistake of “Fact” and Misapplication of Fiduciary Property. As discussed above, Judge Miller’s opinion in *Amaya* suggested that if the state relies on misapplication by dealing with the property contrary to a law, a mistake-of-fact instruction is not available if the defense produces evidence that the defendant misunderstood the law and, as a result, believed the use of the property was not contrary to that law. The Committee concluded that any such suggestion is incorrect.

The Committee concluded—as explained above—that in such situations the state must prove the defendant was at least reckless about whether the defendant’s use of the property was contrary to the “law.” In such situations, that law becomes a “fact” within the meaning of Tex. Penal Code § 8.02(a), and an instruction under that provision should be given.

In *Amaya* itself, for example, if the defense evidence was simply that Amaya never heard of the SBA regulation, this would be a claim of mere ignorance and not mistake. Section 8.03(a) would apply. The instructions defining the elements of the charged offense should make clear that the state must prove the defendant was at least aware of a risk that some such law existed and prohibited what he did with the property. But the defense would not be entitled to any instruction focusing the jury’s attention on the defense contention that the state’s proof failed in this regard.

In contrast, if the defense evidence was that Amaya consulted the SBA regulations and misconstrued them as permitting what he did with the property, section 8.02 would be triggered. The defense would be entitled to an instruction in effect calling the jury’s attention to this aspect of the case and the possibility that the defense evidence “negated” that aspect of recklessness referring to awareness of the law.

Awareness of Risk of Loss. One element of the offense requires proof that the misapplication of the property be done “in a manner that involves substantial risk of loss to the owner of the property or the person for whose benefit the property is held.” Tex. Penal Code § 32.45(b). This element is a “result of conduct” element. A substantial risk of loss must have developed as a consequence of the defendant’s misapplication, although no actual loss need have occurred.

Some members of the Committee believed that the required culpable mental state applies to this element. Thus in the view of these members the state must prove the defendant was at least aware of a risk that the misapplication of the property would create a substantial risk of loss. They reasoned that this is consistent with a general policy of construing a required culpable mental state as applicable to those elements that distinguish criminal from innocent behavior. Misapplying fiduciary property without causing a risk of loss is perhaps immoral, but it is not criminal. Causing a risk of loss separates innocent from criminal conduct.

These Committee members found some support in *Casillas*. In a footnote discussion the court stated:

[T]he Model [Penal] Code authors note that Texas is one of the few states that grades the offense as a felony if the property involved exceeds a certain amount. They also note that there is 'at least one' jurisdiction (Texas) that allows conviction based merely on a *mens rea* of recklessness for all elements of the crime, including the risk of loss. See [Model Penal Code and Commentaries, § 224.13 (ALI 1980),] pp. 358–9, 363. We conclude that Texas is comparatively "tough" on misapplication offenses.

Casillas, 733 S.W.2d at 163 n.5. *Casillas* appeared to assume the correctness of the observation by the Model Penal Code authors.

As discussed above, however, a majority of the Committee concluded that Texas courts will read the culpable mental state prescribed by section 32.45(b) as applicable only to the nature of conduct element of the offense. Thus the offense does not require awareness that a risk of loss will develop. Particularly given how the culpable mental state applies to the conduct element, the culpable mental state so construed reasonably serves to assure blameworthiness without imposing an impractical and inappropriate burden on the prosecution.

CPJC 93.2 Instruction—Misapplication of Fiduciary Property**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of misapplication of fiduciary property. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. intentionally, knowingly, or recklessly misapplied property, namely, money of the value of \$[amount] or more but less than \$[amount] owned by [name], that he held as a fiduciary, in a manner that involved substantial risk of loss to [name], the owner, by dealing with that property contrary to the agreement under which the defendant held the property by using the money to purchase liquor for the defendant's personal consumption*].

Relevant Statutes

A person commits an offense if he intentionally, knowingly, or recklessly misapplies [property he holds as a fiduciary/property of a financial institution] in a manner that involves substantial risk of loss to [the owner of the property/a person for whose benefit the property is held].

To prove that the defendant is guilty of misapplication of fiduciary property, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant intentionally, knowingly, or recklessly misapplied property; and
2. the defendant held the property as a fiduciary; and
3. the misapplication involved a substantial risk of loss to [the owner of the property/a person for whose benefit the property was held]; and
4. the value of the misapplied property was \$[amount] or more.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of misapplication of fiduciary property.

Definitions

Fiduciary

A “fiduciary” is a person who creates by his own undertaking a duty to act primarily for another individual’s benefit in that undertaking. This occurs when the person receives money, contracts a debt, or handles property not belonging to him, not for his benefit, but for another individual’s benefit. The transaction must be conducted for the benefit of another individual to whom the person stands in a relation implying and necessitating great confidence and trust and a high degree of good faith.

Among those who may be fiduciaries are—

1. a trustee, guardian, administrator, executor, conservator, and receiver;
2. an attorney in fact or agent appointed under a durable power of attorney as provided by chapter XII of the Texas Probate Code; and
3. an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary.

“Fiduciary” does not include a commercial bailee [unless the commercial bailee is a party in a motor fuel sales agreement with a distributor or supplier].

Commercial Bailee

A “bailee” is a person to whom another gives temporary possession of property for a specific purpose under an agreement that when the purpose is accomplished the property will be returned, kept until claimed, or disposed of in a specified way. A person is a commercial bailee if that person acts as a bailee for a fee or otherwise as part of the person’s business.

Misapply Property

A person who is a fiduciary misapplies property held as a fiduciary if the person deals with that property contrary to—

1. an agreement under which the fiduciary holds the property; or
2. a law prescribing the custody or disposition of the property.

Law

“Law” means the constitution or a statute of this state or of the United States, a written opinion of a court of record, a municipal ordinance, an order of a county commissioners court, or a rule authorized by and lawfully adopted under a statute.

Intentionally Misapply Property

A person intentionally misapplies property the person holds as a fiduciary if the person has the conscious objective or desire to deal with the property contrary to—

1. the agreement under which the person holds the property as a fiduciary; or
2. a law prescribing the custody or disposition of the property the person holds as a fiduciary.

Knowingly Misapply Property

A person knowingly misapplies property the person holds as a fiduciary if the person is aware that his dealing with the property is contrary to—

1. the agreement under which the person holds the property as a fiduciary; or
2. a law prescribing the custody or disposition of the property the person holds as a fiduciary.

Recklessly Misapply Property

A person recklessly misapplies property the person holds as a fiduciary if the person is aware of but consciously disregards a substantial and unjustifiable risk that his dealing with the property is contrary to—

1. the agreement under which he holds the property as a fiduciary; or
2. a law prescribing the custody or disposition of the property the person holds as a fiduciary.

The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.

Application of Law to Facts

You must decide whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally, knowingly, or recklessly misapplied property owned by [name] by [insert specific allegations, e.g. dealing with that property, namely money, contrary to the agreement under which the defendant held the property by using the money to purchase liquor for the defendant's personal consumption]; and
2. the defendant held that property as a fiduciary; and
3. the misapplication was done in a manner that involved a substantial risk of loss to [name], the owner of the property; and
4. the value of the misapplied property was \$[amount] or more.

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Misapplication of fiduciary property is prohibited by and defined in Tex. Penal Code § 32.45.



CHAPTER 94	CREDIT CARD OR DEBIT CARD ABUSE	
CPJC 94.1	General Comments on Credit Card or Debit Card Abuse	433
CPJC 94.2	Instruction—Credit Card or Debit Card Abuse	434



CPJC 94.1 General Comments on Credit Card or Debit Card Abuse

Unanimity. The offense created and defined by Tex. Penal Code § 32.31 can be committed in a wide variety of ways, including stealing a credit card, receiving a stolen card, or fraudulently possessing a card. Special care is required if the indictment sets out a variety of these alternatives in a single count of the indictment. The court of criminal appeals has held that these alternatives are different offenses and not just manners and means of committing the same offense. *Ngo v. State*, 175 S.W.3d 738, 744 (Tex. Crim. App. 2005). Consequently, the jury must be instructed that they have to be unanimous about which of these criminal acts the defendant committed. *Ngo*, 175 S.W.3d at 744. Further discussion of the issue of juror unanimity regarding alternatives submitted to the jury is set out in *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions* at CPJC 1.9.

Use or Present the Credit Card of Another. The instruction at CPJC 94.2 covers the most commonly prosecuted form of the offense, addressed in Tex. Penal Code § 32.31(b)(1)(A).

The offense prescribes several culpable mental states: intent to obtain a benefit fraudulently, knowledge that the card was not issued to him, and knowledge that he lacks the consent of the owner. Therefore, no additional culpable mental state is required by section 6.02(b).

CPJC 94.2 Instruction—Credit Card or Debit Card Abuse**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of credit card or debit card abuse. Specifically, the accusation is that the defendant, with intent to fraudulently obtain a benefit, [*insert specific allegations, e.g., used a credit card with knowledge that the card had not been issued to the defendant and with knowledge that the card was not being used with the effective consent of the cardholder, [name]*].

Relevant Statutes

A person commits an offense if the person, with intent to obtain a benefit fraudulently, presents or uses a credit card or debit card with knowledge that the card, whether expired or not expired, has not been issued to him and is not used with the effective consent of the cardholder.

To prove that the defendant is guilty of credit card or debit card abuse, the state must prove, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant presented or used a credit card or debit card;
2. the credit or debit card was not issued to the defendant;
3. the cardholder had not effectively consented to the defendant's presentation or use of the card;
4. the defendant knew both that—
 - a. the card was not issued to the defendant; and
 - b. the cardholder had not effectively consented to the defendant's presentation or use of the card; and
5. the defendant had the intent to obtain a benefit fraudulently.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of credit card or debit card abuse.

Definitions

Benefit

“Benefit” means anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested.

Consent

“Consent” means assent in fact, whether express or apparent.

Effective Consent

Consent is effective if both—

1. it is given by—
 - a. the cardholder; or
 - b. a person not the cardholder but who is legally authorized to act for the cardholder; or
 - c. a person not the cardholder but who is believed by the defendant to be legally authorized to act for the cardholder; and
2. it is neither—
 - a. induced by force, threat, or fraud; nor
 - b. given by a person who by reason of youth, mental disease or defect, or intoxication is known by the defendant to be unable to make reasonable decisions.

Intent to Obtain a Benefit Fraudulently

“Intent to obtain a benefit fraudulently” means the conscious objective or desire to obtain a benefit fraudulently.

Knew that the Card Was Not Issued to the Defendant

“Knew that the card was not issued to the defendant” means that the defendant was aware that the card was not issued to the defendant.

Knew that the Cardholder Had Not Effectively Consented to the Defendant's Presentation or Use of the Card

“Knew that the cardholder had not effectively consented to the defendant’s presentation or use of the card” means that the defendant was aware that the defendant’s presentation or use of the card was without the effective consent of the cardholder.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], presented or used a [credit/debit] card;
2. the [credit/debit] card was not issued to the defendant;
3. the cardholder, [name], had not effectively consented to the defendant’s presentation or use of the card;
4. the defendant knew both that—
 - a. the card was not issued to the defendant; and
 - b. [name] had not effectively consented to the defendant’s presentation or use of the card; and
5. the defendant had the intent to obtain a benefit fraudulently.

You must all agree on elements 1 through 5 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 5 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, all five of the elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Credit card or debit card abuse is prohibited by and defined in Tex. Penal Code § 32.31. The definition of “benefit” is from Tex. Penal Code § 1.07(a)(7). The definition of “consent” is from Tex. Penal Code § 1.07(a)(11). The definition of “effective

consent' is based on Tex. Penal Code § 1.07(a)(19). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.



CHAPTER 95	FRAUDULENT USE OR POSSESSION OF IDENTIFYING INFORMATION	
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CPJC 95.1 General Comments on Fraudulent Use or Possession of Identifying Information

Tex. Penal Code § 32.51(b) provides that this offense can be committed in three different ways. The instructions in this chapter address the most commonly charged method under section 32.51(b)(1).

Culpable Mental State. The offense requires the intent to harm or defraud another. Thus it prescribes a culpable mental state, and section 6.02(b) does not apply. Consequently, the only culpable mental state required is the prescribed intent to harm or defraud another.

Defining “Item of Identifying Information.” Section 32.51(b)(1) defines the offense as taking any of the prescribed actions with an item of identifying information. Further, under section 32.51(c), the offense is graded by the number of items of identifying information involved in the defendant’s action.

“Identifying information” is defined in Tex. Penal Code § 32.51(a)(1). “Item of identifying information, however, is not defined.

In *Cortez v. State*, 469 S.W.3d 593 (Tex. Crim. App. 2015), the court concluded the statutory language was ambiguous enough to justify use of extra-textual sources to construe it:

[T]he statutory language is ambiguous because the word “item” is statutorily undefined and it is reasonably susceptible to more than one understanding in this context. [O]n the one hand, the word “item” could be understood as referring to each piece of information that identifies a person, but, on the other hand, it could be understood as a thing that contains a group of information that identifies a person, such as a single driver’s license.

Cortez, 469 S.W.3d at 598–99. After consulting extra-textual sources, the court announced:

[W]e conclude that the phrase “item of identifying information” refers to any single piece of personal, identifying information enumerated in the definition of “identifying information” that alone or in conjunction with other information identifies a person, as opposed to a thing that may contain a group of pieces of information identifying a person, such as a license, credit card, or document.

Cortez, 469 S.W.3d at 602.

Cortez held specifically that the trial court did not err in failing in the instructions to define an item of identifying information as a thing containing a group of information. *Cortez* did not address whether a trial court should or could define the term as the case held the law intended it.

It is hard to understand how statutory language could be unclear enough to permit an appellate court to use extra-textual sources to define it but clear enough for juries to apply it without a definition.

Nevertheless, the Committee decided that, given the court of criminal appeals' reticence to endorse the use of nonstatutory definitions in jury instructions, the term *item of identifying information* should not be defined.

If such a definition were given, however, *Cortez* suggests the critical term might be defined as follows:

“Item of identifying information” means a piece of identifying information. One document or thing can contain several items of identifying information.

CPJC 95.2 Instruction—Fraudulent Use or Possession of Identifying Information—State Jail Felony**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of fraudulent use or possession of identifying information. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., without the consent of [name], possessed identifying information of [name], specifically name and date of birth*], with intent to harm or defraud another.

Relevant Statutes

A person commits an offense if the person, with the intent to harm or defraud another, obtains, possesses, transfers, or uses an item of identifying information of another person without the other person's consent.

To prove the defendant is guilty of fraudulent use or possession of identifying information, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant obtained, possessed, transferred, or used an item of identifying information of another person without the consent of the other person; and
2. the defendant had the intent to harm or defraud another.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of fraudulent use or possession of identifying information.

Definitions*Identifying Information*

“Identifying information” means information that alone or in conjunction with other information identifies a person, including a person's—

1. name and date of birth;
2. unique biometric data, including the person's fingerprint, voice print, or retina or iris image;

3. unique electronic identification number, address, routing code, or financial institution account number;
4. telecommunication identifying information or access device; and
5. social security number or other government-issued identification number.

Telecommunication Access Device

“Telecommunication access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another telecommunication access device may be used to—

1. obtain money, goods, services, or other thing of value; or
2. initiate a transfer of funds other than a transfer originated solely by paper instrument.

Possession

“Possession” means actual care, custody, control, or management.

Consent

“Consent” means assent in fact, whether express or apparent.

Harm

“Harm” means anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.

Intent to Harm or Defraud Another

“Intent to harm or defraud another” means the conscious objective or desire to harm or defraud another.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], [insert specific allegations, e.g., possessed identifying information of [name], specifically name and date of birth, without the consent of [name]]; and

2. the defendant had the intent to harm or defraud another.

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Fraudulent use or possession of identifying information is prohibited by and defined in Tex. Penal Code § 32.51. The definition of “identifying information” is from Tex. Penal Code § 32.51(a)(1). The definition of “telecommunication access device” is from Tex. Penal Code § 32.51(a)(2). The definition of “possession” is from Tex. Penal Code § 1.07(a)(39). The definition of “consent” is from Tex. Penal Code § 1.07(a)(11). The definition of “harm” is from Tex. Penal Code § 1.07(a)(25).

CPJC 95.3 Instruction—Fraudulent Use or Possession of Identifying Information—Third-, Second-, or First-Degree Felony**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of fraudulent use or possession of identifying information. Specifically, the accusation is that the defendant, with intent to harm or defraud another, [*insert specific allegations, e.g.,* possessed [five or more but less than ten/ten or more but less than fifty/fifty or more] items of identifying information, specifically name, date of birth, and social security number, of [*names*], without the consent of those persons].

Relevant Statutes

A person commits an offense if the person, with the intent to harm or defraud another, obtains, possesses, transfers, or uses [five or more/ten or more/fifty or more] items of identifying information of other persons without the other persons' consent.

To prove the defendant is guilty of fraudulent use or possession of identifying information as accused by the state, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant obtained, possessed, transferred, or used items of identifying information of another person or other persons;
2. the other person[s] did not consent to the defendant's possession, transfer, or use of [his/their] identifying information;
3. the defendant had the intent to harm or defraud another; and
4. the number of items of identifying information that the defendant obtained, possessed, transferred, or used totaled [five/ten/fifty] or more.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of fraudulent use or possession of identifying information.

Definitions

Identifying Information

“Identifying information” means information that alone or in conjunction with other information identifies a person, including a person’s—

1. name and date of birth;
2. unique biometric data, including the person’s fingerprint, voice print, or retina or iris image;
3. unique electronic identification number, address, routing code, or financial institution account number;
4. telecommunication identifying information or access device; and
5. social security number or other government-issued identification number.

Telecommunication Access Device

“Telecommunication access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another telecommunication access device may be used to—

1. obtain money, goods, services, or other thing of value; or
2. initiate a transfer of funds other than a transfer originated solely by paper instrument.

Possession

“Possession” means actual care, custody, control, or management.

Harm

“Harm” means anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.

Consent

“Consent” means assent in fact, whether express or apparent.

Intent to Harm or Defraud Another

“Intent to harm or defraud another” means the conscious objective or desire to harm or defraud another.

Presumption of Intent to Harm or Defraud Another

The law provides for a presumption that you may wish to apply in this case. This presumption can apply only if you find the state has proved, beyond a reasonable doubt, that the defendant possessed the identifying information of three or more persons.

If you find the state has proved, beyond a reasonable doubt, that the defendant possessed the identifying information of three or more persons, then you may infer from this fact that the defendant had the intent to harm or defraud another. You are not, however, required to infer or find this even if you find that the defendant possessed the identifying information of three or more persons.

If you have a reasonable doubt whether the defendant possessed the identifying information of three or more persons, the presumption does not arise or apply. In that case, you will not consider this presumption for any purpose.

If you conclude you cannot apply the presumption or you choose not to apply it, you must still consider whether—without reference to the presumption—the evidence proves beyond a reasonable doubt that the defendant intended to harm or defraud another.

If you apply this presumption, you may conclude that the state has proved intent to harm or defraud another. If you do decide to apply the presumption to show the state has proved intent to harm or defraud another, you must still find, beyond a reasonable doubt, that the state has proved the defendant obtained, possessed, transferred, or used [fifty/ten/five] or more items of identifying information of other persons and that the defendant did this without the consent of the other persons.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], [obtained/possessed/transferred/used] items of identifying information of other persons as follows:

[List items alleged as identifying information and alleged other persons, such as the following.]

<u>Items Alleged as Identifying Information</u>	<u>Alleged Other Persons</u>
[name and date of birth]	[name of person 1]
[social security number]	[name of person 1]
[name and date of birth]	[name of person 2]
[social security number]	[name of person 2]
[name and date of birth]	[name of person 3]
[name and date of birth]	[name of person 4]
[social security number]	[name of person 4]

[Continue with the following.]

2. the other persons did not consent to the defendant’s [possession/transfer/use] of their identifying information;
3. the defendant had the intent to harm or defraud another; and
4. the number of items of identifying information that the defendant [obtained/possessed/transferred/used] totaled [five/ten/fifty] or more.

You must all agree on elements 1, 2, 3, and 4 listed above, but you do not have to agree on the specific items listed in element 1 above as long as you all agree that the state has proved enough of the listed items that the number of items totaled [five/ten/fifty] or more.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, or 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Fraudulent use or possession of identifying information is prohibited by and defined in Tex. Penal Code § 32.51. The definition of “identifying information” is from Tex. Penal Code § 32.51(a)(1). The definition of “telecommunication access device” is from Tex. Penal Code § 32.51(a)(2). The definition of “possession” is from Tex. Penal Code § 1.07(a)(39). The definition of “consent” is from Tex. Penal Code § 1.07(a)(11). The definition of “harm” is from Tex. Penal Code § 1.07(a)(25). The presumption of intent to harm or defraud another is provided for by Tex. Penal Code § 32.51(b–1)(1). For a detailed discussion of the constitutional implications of presumptions in favor of the state, see CPJC 7.1 in *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*.

CHAPTER 96	MONEY LAUNDERING	
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CPJC 96.1 General Comments on Money Laundering

Tex. Penal Code § 34.02(a) specifies that the accused must be proved to have acted ‘knowingly.’ *Delay v. State*, 465 S.W.3d 232, 246–48 (Tex. Crim. App. 2014), made clear that knowingly applies not only to the nature of conduct element (under section 34.02(a)(1), the acquiring or maintaining an interest in, concealing, possessing, transferring or transporting funds) but also the circumstance element requiring proof that the funds were the proceeds of criminal activity. This demands satisfactory evidence that the defendant knew enough about the criminal law to be aware that the funds were acquired or derived from, produced or realized through, or used in the commission of conduct constituting a felony criminal offense.

This must be reconciled with section 34.02(a–1): “Knowledge of the specific nature of the criminal activity giving rise to the proceeds is not required to establish a culpable mental state under this section. Section 34.02(a–1) appears to address not what awareness of law is required but rather the specificity of the factual knowledge that must be proved. If the state’s theory is that the funds were the proceeds of felony theft, for example, section 34.02(a–1) means the state need not prove the defendant was aware of precisely how the theft was committed. It must, however, prove the defendant knew that the manner in which the funds were produced or used violated the criminal prohibition against felony theft or another felony offense.

Under *Delay*, this offense then requires some knowledge of the criminal law. But the knowledge required concerns the criminal law covering the manner in which the funds were produced, derived, or used. The offense does not require any awareness of section 34.02—the criminal law making it a crime to acquire or maintain an interest in, conceal, possess, transfer, or transport funds the person knows are the proceeds of criminal activity. *Delay*, 465 S.W.3d at 247 n.55.

In the instruction at CPJC 96.2, this reading of *Delay* is implemented by the third element of the offense and the definition of “knew funds were the proceeds of criminal activity.”

CPJC 96.2 Instruction—Money Laundering**INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of money laundering. Specifically, the accusation is that the defendant [*insert specific allegations, e.g. knowingly acquired funds of the value of \$300,000 or more, which constituted the proceeds of theft of property in the amount of \$2,500 or more, a criminal activity*].

Relevant Statutes

A person commits an offense if the person knowingly acquires or maintains an interest in, conceals, possesses, transfers, or transports the proceeds of criminal activity.

To prove that the defendant is guilty of money laundering, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant knowingly acquired or maintained an interest in, concealed, possessed, transferred, or transported funds;
2. the funds were the proceeds of criminal activity;
3. the defendant knew the funds were the proceeds of criminal activity; and
4. the value of the funds was \$[*amount*] or more.

The state need not show the defendant had knowledge of the specific nature of the criminal activity giving rise to the proceeds.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of money laundering.

Definitions*Criminal Activity*

“Criminal activity” means any offense [, including any preparatory offense,] that is—

1. classified as a felony under the laws of this state or the United States; or
2. punishable by confinement for more than one year under the laws of another state.

[Insert definition and elements of felony offense from which funds are alleged to be the proceeds, such as theft.]

Theft

Theft of property in the amount of \$2,500 or more is a felony under the laws of this state. A person commits theft if—

1. the person appropriates property;
2. this appropriation was unlawful, in that it was without the property owner's effective consent; and
3. the person did this with intent to deprive the owner of the property.

Funds

“Funds” includes—

1. coin or paper money of the United States or any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issue;
2. United States silver certificates, United States Treasury notes, and Federal Reserve System notes;
3. an official foreign bank note that is customarily used and accepted as a medium of exchange in a foreign country and a foreign bank draft; and
4. currency or its equivalent, including an electronic fund, a personal check, a bank check, a traveler's check, a money order, a bearer negotiable instrument, a bearer investment security, a bearer security, a certificate of stock in a form that allows title to pass on delivery, or a stored value card as defined by Texas Business & Commerce Code section 604.001.

Proceeds

“Proceeds” means funds acquired or derived directly or indirectly from, produced through, realized through, or used in the commission of an act [or conduct that constitutes an offense under Texas Tax Code section 151.7032].

Knowingly Acquiring or Maintaining an Interest in, Concealing, Possessing, Transferring, or Transporting Funds

“Knowingly acquiring or maintaining an interest in, concealing, possessing, transferring, or transporting funds” means the person is aware he is acquiring or maintaining an interest in, concealing, possessing, transferring, or transporting funds.

Knew Funds Were the Proceeds of Criminal Activity

“Knew funds were the proceeds of criminal activity” means the person was aware that the funds were acquired or derived directly or indirectly from, produced through, realized through, or used in the commission of what the person was aware was criminal activity.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], knowingly acquired funds;
2. the funds were the proceeds of criminal activity, in particular [insert specific allegations, e.g., theft of property in the amount of \$2,500 or more];
3. the defendant knew the funds were the proceeds of criminal activity; and
4. the value of the funds was [amount, e.g., \$300,000] or more.

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, all four of the elements listed above, you must find the defendant “guilty.”

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]

COMMENT

Money laundering is prohibited by and defined in Tex. Penal Code § 34.02. The definition of “criminal activity” is from Tex. Penal Code § 34.01(1). The definition of ‘funds’ is from Tex. Penal Code § 34.01(2). The definition of “proceeds” is from Tex. Penal Code § 34.01(4). The definitions of culpable mental states are derived from Tex. Penal Code § 6.03.

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Following are the tables of contents of the most recent editions of the *Texas Criminal Pattern Jury Charges* series. The practitioner may also be interested in the civil *Texas Pattern Jury Charges* series. Please visit <http://texasbarbooks.net/texas-pattern-jury-charges/> for more information.

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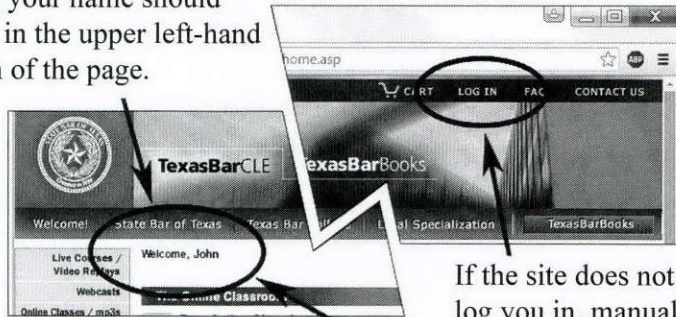
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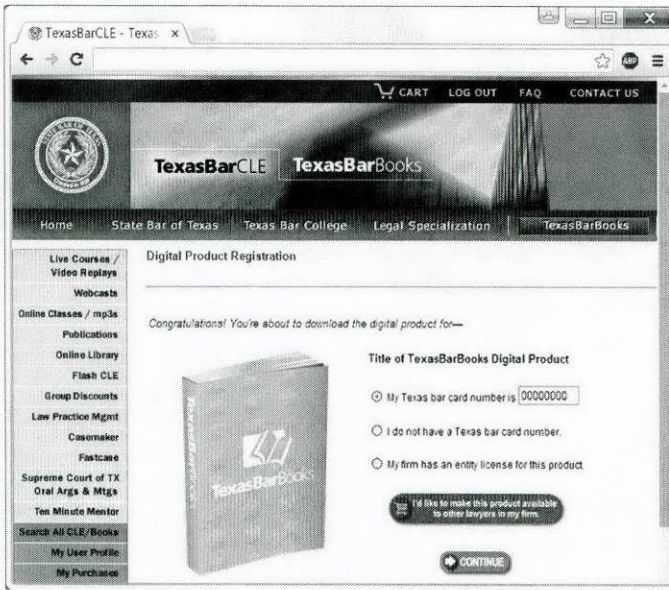


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