

Jury Unanimity in Criminal Cases

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Over the past decade, the Court of Criminal Appeals has addressed numerous complex jury unanimity charge issues. To avoid charge error of this sort, it is important to be able to identify the two areas where unanimity becomes an issue.

In criminal cases, jurors must reach a unanimous verdict about which crime the defendant committed.¹ “This means that the jury must ‘agree upon a single and discrete incident that would constitute the commission of the offense alleged.’”² The jury is not, however, required to unanimously agree about the specific manner and means of how the offense was committed.³ So when the charging instrument alleges differing manner and means in the conjunctive in separate paragraphs under a single count, the jury may be instructed on the manner and means in the disjunctive.⁴ The jury is then permitted to render a general guilty verdict if the evidence is sufficient to support any of the theories of criminal liability.⁵ Thus, in many cases, whether the unanimity requirement has been violated turns on whether a single statute defines separate offenses or provides different manner and means of committing a single offense. Distinguishing between the two is also important for purposes of double jeopardy, which prohibits a person from being convicted or punished twice for the same offense.⁶

Categorizing criminal statutes generally boils down to the “focus” or “gravamen” of the offense.⁷ When the focus is the result, then each result constitutes a separate offense.⁸ And when the conduct is the focus, then each type of conduct constitutes a separate

¹ *Landrian v. State*, 268 S.W.3d 532, 535-36 (Tex. Crim. App. 2008).

² *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)).

³ *Young v. State*, 341 S.W.3d 417, 422 (Tex. Crim. App. 2011).

⁴ *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991); *Martinez v. State*, 225 S.W.3d 550, 554 (Tex. Crim. App. 2007) (separate offenses need to be alleged in separate counts while differing manner and means of commission need to be alleged in separate paragraphs).

⁵ *Kitchens*, 823 S.W.2d at 258.

⁶ *Huffman v. State*, 267 S.W.3d 902, 905-06 (Tex. Crim. App. 2008).

⁷ *Id.* at 907.

⁸ *Id.*; *Young*, 341 S.W.3d at 424.

offense.⁹ Finally, when the gravamen is the circumstances surrounding the conduct, then the differing types of conduct constitute separate manners and means of committing a single offense.¹⁰

In *Stuhler v. State*, the Court of Criminal Appeals addressed the offense of Injury to a Child in Penal Code Section 22.04(a), which is defined as causing, by act or omission, “serious bodily injury,” “serious mental deficiency, impairment, or injury,” or “bodily injury” to a child under fourteen.¹¹ The Court held that each type of injury, divided according to kind and degree, constitutes a separate offense.¹² Thus, as the result-oriented offense, unanimity as to the specific injury caused is required.¹³ However, when considering the same statute in *Jefferson v. State*, the Court held that unanimity is not required as to whether the specific injury was caused by an act or omission, which the Court declared to be the conduct element of the offense.¹⁴

The Court has identified several statutes that contain different manners and means of commission. For instance, under the felony murder statute in Penal Code Section 19.02(b)(3), a jury does not have to agree on the felony to support the underlying “felony” element.¹⁵ With the exception of manslaughter, any felony offense may be used to support a first-degree felony-murder conviction.¹⁶ Similarly, a jury need not agree on the underlying theories that support a conviction for capital murder under Penal Code Section 19.03.¹⁷ The caveat with both is that the case must involve the same victim.¹⁸ The Court has held that the following offenses provide different manners and means of commission: (1) failure to comply with sex-offender registration requirements (Code of Criminal Procedure Articles 62.055(a), 62.102(a));¹⁹ (2) failure to stop and render aid

⁹ *Id.*; *Young*, 341 S.W.3d at 424.

¹⁰ *Id.*; *Young*, 341 S.W.3d at 424.

¹¹ 218 S.W.3d at 718-19.

¹² *Id.*

¹³ *Id.* at 718-19.

¹⁴ 189 S.W.3d 305, 306, 312 (Tex. Crim. App. 2006); *see also Villanueva v. State*, 227 S.W.3d 744, 748-49 (Tex. Crim. App. 2007) (double jeopardy forbids two convictions for injury to a single child on the basis that death resulted from both an act and omission).

¹⁵ *White v. State*, 208 S.W.3d 467, 468-69 (Tex. Crim. App. 2006).

¹⁶ *Id.*; TEX. PENAL CODE 19.02(b)(3).

¹⁷ *Kitchens*, 823 S.W.2d at 257-58; *Martinez v. State*, 129 S.W.3d 101, 103 (Tex. Crim. App. 2004).

¹⁸ *Kitchens*, 823 S.W.2d at 257-58; *see also Huffman*, 267 S.W.3d at 905.

¹⁹ *Young*, 341 S.W.3d at 427-28.

(Transportation Code Section 550.021(a));²⁰ and, (3) aggravated assault (Penal Code Section 22.02).²¹ Each of these statutes set out differing manners and means, but the focus of the statutes are not the same. While felony murder, capital murder, and aggravated assault are result-oriented offenses,²² failure to comply with sex-offender registration requirements and failure to stop and render aid are offenses that focus on the circumstances surrounding the conduct.²³

Conversely, the Court has concluded that other statutes contain multiple separate offenses. In *Pizzo v. State*, for example, the Court held that Penal Code Section 21.11's offense of indecency with a child by contact, defined in Section 21.01(2), provides three separate offenses.²⁴ The Court reached the same conclusion regarding aggravated sexual assault, defined in Penal Code Section 22.021(a)(1)(B)(i)-(iv), in *Vick v. State*;²⁵ each subsection criminalizes a separate type of sexually assaultive conduct with a child.²⁶ And in *Ngo v. State*, the Court concluded that Penal Code Section 32.31(b), defining the offense of credit and debit card abuse, lists eleven separate offenses.²⁷ In cases involving these statutes, the focus is on the nature of the conduct, and the jury must therefore be unanimous about the specific provision (distinguished according to conduct) the defendant violated.²⁸

Unanimity issues also arise when the defendant is charged with one offense in a single count and the State presents evidence that the defendant committed that offense on multiple occasions. The seminal case addressing this situation is *Francis v. State*.²⁹ Francis was charged with one count of indecency with a child, and the State presented four separate incidents constituting that offense.³⁰ The court's charge permitted a non-unanimous verdict because it authorized the jury to convict Francis if it found he was guilty of either of the two incidents supported by the evidence; thus, there was no consensus among jurors as to which of the two incidents were relied upon for a

²⁰ *Huffman*, 267 S.W.3d at 904, 908 (the prescribed unit of prosecution is "each victim, each accident").

²¹ *Landrian*, 268 S.W.3d at 538-39.

²² *Huffman*, 267 S.W.3d at 905.

²³ *Id.* at 907-08; *Young*, 341 S.W.3d at 427.

²⁴ 235 S.W.3d 711, 719 (Tex. Crim. App. 2007).

²⁵ 991 S.W.2d at 832-33 (Tex. Crim. App. 1999).

²⁶ *Id.* at 833.

²⁷ *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005).

²⁸ *Cosio*, 353 S.W.3d at 772; *Huffman*, 267 S.W.3d at 906-07.

²⁹ 36 S.W.3d 121 (Tex. Crim. App. 2000) (on reh'g).

³⁰ *Id.* at 122.

conviction.³¹ Following *Francis*, the Court of Criminal Appeals has repeatedly found charge error on this basis.³²

The ability to recognize unanimity issues is crucial for trial judges because they have a duty, independent of an election request by the defense,³³ to guarantee that the jury renders a unanimous verdict.³⁴ Therefore, the judge “must craft a charge that ensures that the jury’s verdict will be unanimous based on the specific evidence presented in the case.”³⁵ To avoid commenting on the weight of the evidence, the charge cannot reference the specific evidence but instead must inform the jury that it must agree on a particular incident of criminal conduct.³⁶

³¹ *Id.* at 124-25.

³² *Ngo*, 175 S.W.3d at 745-49; *Pizzo*, 235 S.W.3d at 719; *Cosio*, 353 S.W.3d at 774; *see also Phillips v. State*, 193 S.W.3d 904, 912-13 (Tex. Crim. App. 2006) (trial court erred in failing to force the State to elect, upon request, the acts of sexual assault upon which it wanted to convict).

³³ *See Cosio*, 353 S.W.3d at 775-76 (discussing the benefits and drawbacks of the defendant’s right to elect).

³⁴ *Id.* at 776; *Martinez*, 225 S.W.3d at 555.

³⁵ *Cosio*, 353 S.W.3d at 776.

³⁶ *Id.*