OFFICE OF STATE PROSECUTING ATTORNEY
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Statutory Construction Update
2017-2018 Term

Texas Court of Criminal Appeals
For the 85th Texas Legislature

The Office of State Prosecuting Attorney has exclusive jurisdiction in the Court of Criminal Appeals. Therefore, we thoroughly review its decisions, including all statutory construction cases. Recognizing that most legislators are busy enacting law, this update provides a concise chronicle of the Court of Criminal Appeals' most recent cases to advise you of the judiciary's binding interpretation of criminal statutory law.

"When faced with a challenge to a prior judicial construction of a statute, we have long recognized that prolonged legislative silence or inaction following a judicial interpretation implies that the Legislature has approved of the interpretation. 'We presume the Legislature intends the same construction to continue to apply to a statute when the Legislature meets without overturning that construction.'"

State v. Colyandro, 233 S.W.3d 870, 877-78 (Tex. Crim. App. 2007)

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I. Constitutionality

A. Separation of Powers

Amended TEX. HEALTH & SAFETY CODE § 841.082

(a) Before entering an order directing a person's [outpatient] civil commitment, the judge shall impose on the person requirements necessary to ensure the person's compliance with treatment and supervision and to protect the community. The requirements shall include:
(3) prohibiting the person's possession or use of alcohol, inhalants, or a controlled substance;'
[(4)] requiring the person's participation in and compliance with the sex offender treatment program [a specific course of treatment] provided by the office and compliance with all written requirements imposed by the [case manager or otherwise by the] office;

Amended TEX. HEALTH & SAFETY CODE § 841.085
Criminal Penalty; Prosecution of Offense

(a) A person commits an offense if, after having been adjudicated and civilly committed as a sexually violent predator under this chapter, the person violates a civil commitment requirement imposed under Section 841.082(a)(1), (2), (4), or (5) [Section 841.082].
(b) An offense under this section is a felony of the third degree.

Vandyke v. State, 538 S.W.3d 561 (Tex. Crim. App. 2017):

The 84th Legislature's retroactive exclusion of participation and compliance with sex-offender-treatment required by TEX. HEALTH & SAFETY CODE § 841.082(a)(3) from TEX. HEALTH & SAFETY CODE § 841.085's criminal prohibitions, *via* S.B. 746, signed by Governor Abbott, does not violate separation of powers. Thus, S.B. 746's amendments did not usurp the Governor's clemency power. "Repealing laws and decriminalizing conduct has always been part of the Legislature's delegated power. The Legislature has not assumed the power to grant clemency because decriminalizing conduct through the use of legislative amendments is not and has never been part of the executive's discretionary authority to forgive the legal consequences flowing from a conviction."

B. Equal Protection: Bigamy Enhancement

TEX. PENAL CODE § 22.011
Sexual Assault

(a) A person commits an offense if:
. . .
(2) the person intentionally or knowingly:
(A) causes the penetration of the anus or sexual organ of a child by any means;
(B) causes the penetration of the mouth of a child by the sexual organ of the actor;
(C) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;
(D) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or
(E) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor.

(f) An offense under this section is a felony of the second degree, except that an offense under this section is a *felony of the first degree if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section 25.01*.

Estes v. State, 546 S.W.3d 691 (Tex. Crim. App. 2018):

There is a rational basis for applying the Penal Code Section 22.011(f)'s "bigamy" enhancement to the conduct of a married person. "Just as the Supreme Court did, the Legislature could rationally conclude that to be a married man or woman is to project the kind of 'stability' and 'safe haven' that many children find comfort in. It could rationally conclude that one who has solemnly sworn to 'forsake all others' might be perceived, at least by some parents, as being less likely to make sexual advances upon their children. And it could rationally see fit to declare that one who would enjoy this marital perception of trustworthiness will be punished all the more severely if he uses it to groom, and then sexually abuse, a child."

The Court of Criminal Appeals remanded the case to the court of appeals so it could determine whether the "strict scrutiny" standard of review is applicable to subsection (f) and, if so, whether subsection (f) would withstand the heightened standard of review.

C. First Amendment Overbreadth & Vagueness: Threatening & Harassing in Violation of a Court Order

TEX. PENAL CODE § 25.07

Violation of Certain Court Orders or Conditions of Bond in Family Violence, Child Abuse or Neglect, Sexual Assault or Abuse, Stalking, or Trafficking Case

(a) A person commits an offense if, in violation of . . . an order issued under Chapter 7A, Code of Criminal Procedure, an order issued under Article 17.292, Code of Criminal Procedure, an order issued under Section 6.504, Family Code, Chapter 83, Family Code, if the temporary ex parte order has been served on the person, Chapter 85, Family Code, or an order issued by another jurisdiction as provided by Chapter 88, Family Code, the person knowingly or intentionally:

. . .

(2) communicates:

(A) directly with a protected individual or a member of the family or household in a *threatening or harassing manner*;

Wagner v. State, 539 S.W.3d 298 (Tex. Crim. App. 2018):

The statute is narrowly drawn. "By its terms, the statute applies only in the very limited context of situations where, at the time of the challenged conduct, a defendant was actively subject to one of these seven types of judicial conditions or orders in a family violence, sexual abuse, stalking, or trafficking case that expressly prohibited him from communicating in threatening or harassing manner with a protected person."

The statute is not vague. "[P]ursuant to the common meanings of the statutory terms, a person of ordinary intelligence would

understand that, if he has been enjoined from communicating in a harassing manner towards a particular person through one of the specified types of protective orders . . ., then this statute prohibits him from intentionally or knowingly sending information or messages to, or speaking to, the protected person in a manner that would persistently disturb, bother continually, or pester another person."

"[W]e conclude that the statute does not have a substantial number of unconstitutional applications judged in relation to its plainly legitimate sweep, and thus is not overbroad in violation of the First Amendment. The statute will almost always govern matters of private concern between specified individuals; it is not directed at the general populous or matters of public concern. The First Amendment does not protect communications that invade substantial privacy interests."

II. Code of Criminal Procedure

A. Pretrial Notice for Motion to Suppress

TEX. CODE CRIM. PROC. art. 28.01
Pretrial

Sec. 1. The court may set any criminal case for a pre-trial hearing before it is set for trial upon its merits, and direct the defendant and his attorney, if any of record, and the State's attorney, to appear before the court at the time and place stated in the court's order for a conference and hearing. The defendant must be present at the arraignment, and his presence is required during any pre-trial proceeding. The pre-trial hearing shall be to determine any of the following matters:

(6) Motions to suppress evidence--When a hearing on the motion to suppress evidence is granted, the court may determine the merits of said motion on the motions themselves, or upon opposing affidavits, or upon oral testimony, subject to the discretion of the court;

Sec. 2. When a criminal case is set for such pre-trial hearing, any such preliminary matters not raised or filed seven days before the hearing will not thereafter be allowed to be raised or filed, except by permission of the court for good cause shown; provided that the defendant shall have sufficient notice of such hearing to allow him not less than 10 days in which to raise or file such preliminary matters. The record made at such pre-trial hearing, the rulings of the court and the exceptions and objections thereto shall become a part of the trial record of the case upon its merits.

State v. Velasquez, 539 S.W.3d 289 (Tex. Crim. App. 2018):

TEX. CODE CRIM. PROC. art. 28.01 governs pretrial hearings, not pretrial hearings held on the day a case set for the trial on the merits. Therefore, formal notice under Article 28.01 is required only when the trial court designates a separate pretrial hearing.

B. Appeal from Order Granting Shock Community Supervision

TEX. CODE CRIM. PROC. art. 42A.755 (formerly 42.12 § 23(b))
Revocation of Community Supervision

(e) "The right of the defendant to appeal for a review of the conviction and punishment, as provided by law, shall be accorded the defendant at the time he is placed on community supervision."

Shortt v. State, 539 S.W.3d 321 (Tex. Crim. App. 2018):

"Given our apparent willingness to read Section 23(b) [(now TEX. CODE CRIM. PROC. art. 42A.755)] to embrace an appeal of the conditions of community supervision from an original judgment that suspends *imposition* of sentence, thereby 'placing the defendant on community supervision,' there is no compelling reason we should not also be willing to construe it to authorize an appeal of the conditions of community supervision from a later order granting 'shock' community supervision—an order that suspends the *execution* of sentence, but just as assuredly 'places the defendant on community supervision.'"

"The appeal from the order granting 'shock' community supervision is independent of the appeal from the original written judgment—a separate appeal of the order suspending the *execution* of the sentence, with its own appellate timetable, but subject to being consolidated with the appeal from the original written judgment."

C. Appeal from Amended Order Granting Shock Community Supervision

TEX. CODE CRIM. PROC. art. 44.01
Appeal by State

(a) The state is entitled to appeal an order of a court in a criminal case if the order:

. . .

(2) arrests or modifies a judgment;

State v. Hanson, PD-0948-17 (Tex. Crim. App. 2018):

An amended order granting shock community supervision "modifies a judgment" within the meaning of TEX. CODE CRIM. PROC. art. 44.01(a)(2). Therefore, the State may file a timely notice of appeal from that order.

III. Government Code

A. Recusal of a Judge Means No Authority to Act Unless Good Cause is Shown

TEX. GOV'T CODE § 24.002
Assignment of Judge or Transfer of Case on Recusal

If a district judge determines on the judge's own motion that the judge should not sit in a case pending in the judge's court because the judge is disqualified or otherwise should recuse himself or herself, the judge shall enter a recusal order, request the presiding judge of that administrative judicial region to assign another judge to sit, and take no further action in the case except for good cause stated in the order in which the action is taken. A change of venue is not necessary because of the disqualification of a district judge in a case or proceeding pending in the judge's court.

Ex parte Thuesen, 546 S.W.3d 145 (Tex. Crim. App. 2017):

"The plain language of [Government Code] Section 24.002 does not define any condition that would reverse a district judge's discharge from the case once a recusal order has been signed. In other words, once a district judge signs an order recusing himself or herself under the statute, the recused judge no longer has any judicial authority to take any action or sign any orders in the case. The statute provides only one exception: the recused judge may sign an order in the case if that order contains within it a statement of 'good cause.'"

"'[G]ood cause' . . . means 'a substantial reason amounting in law to a legal excuse for failing to' comply with the statute's requirement to 'take no further action in the case.'" A statement "must articulate the nature of the exigency that necessitates that the recused judge, in lieu of the judge with actual judicial authority over the case, [to] render the particular order at issue."

IV. Penal Code

A. Aggravated Assault Requires no Mental State as to Serious Bodily Injury

TEX. PENAL CODE § 6.04
Causation: Conduct and Results

(b) A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that:
(1) a different offense was committed; or

TEX. PENAL CODE § 8.02
Mistake of Fact

(a) It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense.

TEX. PENAL CODE § 22.01
Assault

(a) A person commits an offense if the person:
(1) intentionally, knowingly, or recklessly causes bodily injury to another . . .

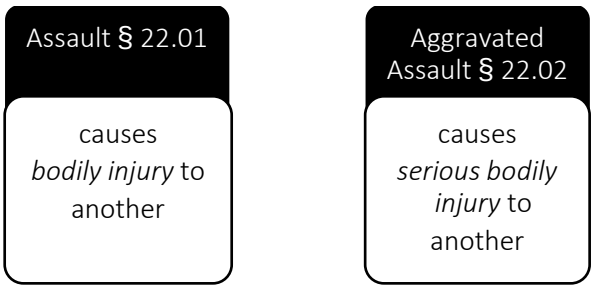
TEX. PENAL CODE § 22.02
Aggravated Assault

(a) A person commits an offense if the person commits assault as defined in § 22.01 and the person:
(1) causes serious bodily injury to another . . .

***Rodriguez v. State*,** 538 S.W.3d 632 (Tex. Crim. App. 2018):

Rodriquez was charged with aggravated assault—causing serious bodily injury—for injuring the complainant's knee during a bar fight. A doctor testified that the degree of injury suffered (*i.e.* serious) was not reasonably foreseeable.

The Court of Criminal Appeals held that Rodriguez was not entitled to a transferred intent instruction for assault (requiring bodily injury under TEX. PENAL CODE § 22.01(a)(1)) to aggravated assault (requiring serious bodily injury under TEX. PENAL CODE § 22.02(a)(1)) in the jury charge. The Court reasoned that the Legislature did not attach a mental state to serious bodily injury. If an element of an offense does not have a mental state, then there is no intent (mental state) to transfer to that element. "Transferred intent" requires a transfer to another mental state.



The Court also held that, because transferred intent was not applicable, no mistake-of-fact instruction was required. "Mistake of fact" applies only when there is a mental state to negate.

B. Deadly Force Self-Defense Versus Threat of Deadly Force Self-Defense

TEX. PENAL CODE § 9.04
Threat as Justifiable Force

The threat of force is justified when the use of force is justified by this chapter. For purposes of this section, a threat to cause death or serious bodily injury by the production of a weapon or otherwise, as long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute the use of deadly force.

TEX. PENAL CODE § 9.31
Self-Defense

(a) Except as provided in Subsection (b), a person is justified in using force against another when and *to the degree the actor reasonably believes the force is immediately necessary* to protect the actor against the other's use or attempted use of unlawful force. The actor's belief that the force was immediately necessary as described by this subsection is presumed to be reasonable if the actor:
(1) knew or had reason to believe that the person against whom the force was used:
(A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;
(B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or
(C) was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery;

TEX. PENAL CODE § 9.32
Deadly Force in Defense of Person

(a) A person is justified in using *deadly force* against another:
(1) if the actor would be justified in using force against the other under Section 9.31; and
(2) when and to the degree the actor reasonably believes the *deadly force* is immediately necessary:
(A) to protect the actor against the other's use or attempted use of unlawful deadly force; or
(B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

Gamino v. State, 537 S.W.3d 507 (Tex. Crim. App. 2017):

When the evidence supports it, a defendant, by requesting the inclusion of self-defense in the jury charge, is entitled to "Threat as Justifiable Force," even when charged with aggravated assault with a deadly weapon. In other words, a defendant's use of a deadly weapon, which entitles him to a "Deadly Force in Defense of Person" instruction under TEX. PENAL CODE § 9.32, does not disqualify him from also receiving a threat-only-based instruction under TEX. PENAL CODE § 9.04. For purposes of Section 9.04, the evidence must show that "he produced his gun for the limited purpose of creating an apprehension that he would use deadly force if necessary."

C. Habitual Felony Enhancement Requires Out-of-State Prior Convictions to be "Final" According to Texas Law

TEX. PENAL CODE § 12.42
Penalties for Repeat and Habitual Offenders on Trial for First, Second, or Third Degree Felony

(d) Except as provided by Subsection (c)(2) or (c)(4), if it is shown on the trial of a felony offense other than a state jail felony punishable under Section 12.35(a) that the defendant has previously been *finally convicted* of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years. A previous conviction for a state jail felony punishable under Section 12.35(a) may not be used for enhancement purposes under this section.

Ex parte Pue, No. WR-85,447-01 (Tex. Crim. App. 2018):

"Unless a more specific *Texas* statute applies, Texas courts should follow Texas Penal Code § 12.42, requiring that a defendant be 'finally convicted' of the alleged prior offense before punishment can be enhanced. And the determination of whether a defendant has been 'finally convicted' for enhancement purposes under section 12.42 is to be made in accordance with Texas law."

D. Double Jeopardy: Attempted Capital Murder & Criminal Solicitation of Capital Murder

TEX. PENAL CODE § 15.01
Criminal Attempt

(a) A person commits an offense if, with specific *intent to commit an offense, he does an act amounting to more than mere preparation* that tends but fails to effect the commission of the offense intended.

. . .

(d) An offense under this section is one category lower than the offense attempted, and if the offense attempted is a state jail felony, the offense is a Class A misdemeanor.

TEX. PENAL CODE § 15.03
Criminal Solicitation

(a) A person commits an offense if, *with intent that a capital felony* or felony of the first degree be committed, he requests, commands, or attempts to *induce another to engage in specific conduct* that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission.

. . .

(d) An offense under this section is:
(1) a felony of the first degree if the offense solicited is a capital offense; or

TEX. PENAL CODE § 19.03
Capital Murder

(a) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and:

. . .

(3) the person commits the murder for *remuneration or the promise of remuneration* or employs another to commit the murder for remuneration or the promise of remuneration;

. . .

(b) An offense under this section is a capital felony.

Bien v. State, PD-0365/66-16 (Tex. Crim. App. 2018):

"There is no express provision that a person who is subject to prosecution for criminal solicitation and criminal attempt may be prosecuted under either or both sections. Nothing clearly indicates a legislative intent to impose multiple punishments." Therefore, double jeopardy is violated when the criminal attempt element of "more than mere preparation" is the employment of another to kill the victim and the act used to satisfy solicitation is the intent to kill the same victim under circumstances known to constitute capital murder. "[T]he 'belief in the circumstances surrounding the conduct' aspect of criminal solicitation is the functional equivalent of the intent to commit capital murder in attempted capital murder."

E. Definition of "Intoxicated"

TEX. PENAL CODE § 49.01
Definitions

(2) "*Intoxicated*" means:
(A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or
(B) having an alcohol concentration of 0.08 or more.

Burnett v. State, 541 S.W.3d 77 (Tex. Crim. App. 2017):

The entire definition of "intoxicated" in TEX. PENAL CODE § 49.01(2)(A) cannot be included in the jury charge without sufficient evidence to support each theory of intoxication. Because the evidence did not show that the defendant was intoxicated by means of any substance other than alcohol, it was error to include "a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance" in the jury charge. The charge was not "law applicable to the case," as required.

F. Prior DWI for Class A DWI is a Punishment Issue

TEX. PENAL CODE § 49.04
Driving While Intoxicated

(a) A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.
(b) Except as provided by Subsections (c) and (d) and Section 49.09, an offense under this section is a Class B misdemeanor, with a minimum term of confinement of 72 hours.

TEX. PENAL CODE § 49.09
Enhanced Offenses and Penalties

(a) Except as provided by Subsection (b), an offense under Section 49.04, 49.05, 49.06, or 49.065 is a Class A misdemeanor, with a minimum term of confinement of 30 days, if it is shown on the trial of the offense that the person has previously been convicted one time of an offense relating to the operating of a motor vehicle while intoxicated, an offense of operating an aircraft while intoxicated, an offense of operating a watercraft while intoxicated, or an offense of operating or assembling an amusement ride while intoxicated.

TEX. CODE CRIM. PROC. art. 36.01
Order of Proceeding at Trial

(a) A jury being impaneled in any criminal action, except as provided by Subsection (b) of this article, the cause shall proceed in the following order:
1. The indictment or information shall be read to the jury by the attorney prosecuting. When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07.

Oliva v. State, 548 S.W.3d 518 (Tex. Crim. App. 2018):

"[A]lthough the statutory language is ambiguous, various factors suggest that the legislature intended that § 49.09(a) prescribe a punishment issue." "If . . . the legislature had Article 36.01 in mind when it enacted § 49.09, then it would seem probable that the legislature intended the status of a particular § 49.09 enhancement to depend on whether it is jurisdictional. Under that reasoning, § 49.09(a), the single-prior-conviction provision elevating DWI to a Class A misdemeanor, prescribes a punishment issue because it is not jurisdictional." Therefore, evidence to satisfy prior offense element under 49.04, 49.05, 49.06, or 49.065 cannot be admitted until the punishment phase.

G. Continuous Sex Abuse Unsupportable by Out-of-State Offenses

TEX. PENAL CODE § 21.02
Continuous Sexual Abuse of Young Child or Children

(b) A person commits an offense if:

(1) during a period that is 30 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

Lee v. State, 537 S.W.3d 924 (Tex. Crim. App. 2017):

Under Section TEX. PENAL CODE § 21.02(b), the act of abuse must be a violation of one of the enumerated Texas penal laws at the time it is committed for it to be one of the "two or more acts." A perpetrator cannot commit an act that "is a violation" of Texas law outside of Texas. Out-of-state offenses, therefore, cannot be used to sustain a conviction for continuous sex abuse.

H. Organized Criminal Activity Manner and Means

TEX. PENAL CODE § 71.02
Engaging in Organized Criminal Activity

(a) A person commits an offense if, with the *intent to establish, maintain, or participate* in a combination or in the profits of a combination or *as a member of a criminal street gang*, the person commits or conspires to commit one or more of the following:
(1) murder, capital murder, arson, aggravated robbery, robbery, burglary, *theft*, aggravated kidnapping, kidnapping, aggravated assault, aggravated sexual assault, sexual assault, continuous sexual abuse of young child or children, solicitation of a minor, forgery, deadly conduct, assault punishable as a Class A misdemeanor, burglary of a motor vehicle, or unauthorized use of a motor vehicle;

. . .

(10) *any offense under Chapter 34, 35, or 35A*;

O'Brien v. State, 544 S.W.3d 376 (Tex. Crim. App. 2018):

The enumerated offenses for organized criminal activity when committed as a "combination" are different manners and means of committing the offense so long as the applicable enumerated offenses are "morally and conceptually equivalent." Therefore, when the jury charge authorizes the jury to convict based on either theft or money laundering as the underlying offenses, the jury does not have to reach a unanimous verdict as to either. So, six jurors could find that theft was committed, while the other six could find that money laundering was committed. Finally, theft and money laundering can be "morally and conceptually equivalent." There must be a "temporal connection or nexus" between the money laundering and the criminal activity (i.e., theft). Notably, the two offenses share the same value ladder and are first-degree felonies.

Zuniga v. State, PD-0174-17 (Tex. Crim. App. 2018):

TEX. PENAL CODE § 71.02's elements "intent to establish, maintain, or participate" do not apply to engaging in organized criminal activity as a member of a "criminal street gang." "As a matter of grammar and logic, the statute's intent clause applies only to the phrase that immediately follows it—'in a combination or in the profits of a combination[.]'"

"[W]e interpret the word 'as' in the phrase 'as a member of a criminal street gang' as requiring proof that the defendant was acting 'in the role, capacity, or function of' a gang member at the time of the offense."

I. Possession of Child Pornography: Timing of Making of Image & Lewdness

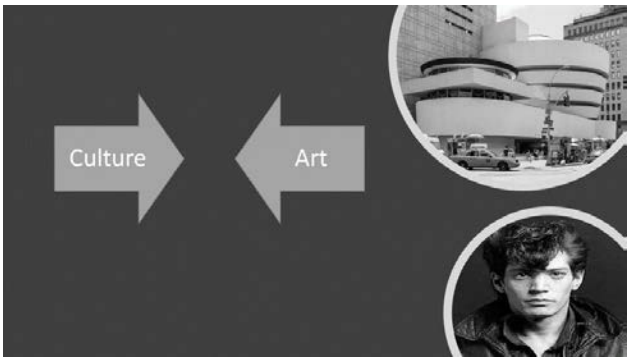
TEX. PENAL CODE § 43.25
Sexual Performance by a Child

(a)(2) "Sexual conduct" means sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or *lewd exhibition of the genitals*, the anus, or any portion of the female breast below the top of the areola.

TEX. PENAL CODE § 43.26
Possession of Child Pornography

(a) A person commits an offense if:
(1) the person knowingly or intentionally possesses, or knowingly or intentionally accesses with intent to view, visual material that visually depicts a child younger than 18 years of age *at the time the image of the child* was made who is engaging in sexual conduct, including a child who engages in sexual conduct as a victim of an offense under Section 20A.02(a)(5), (6), (7), or (8); and
(2) the person knows that the material depicts the child as described by Subdivision (1).

State v. Bolles, 541 S.W.3d 28 (Tex. Crim. App. 2017):



In 2014, Bolles took a "zoomed-in" photo of the genitals of a seven-year-old girl that appeared in a full-body photo taken by famous photographer Robert Mapplethorpe in the 1970's. The full-body photo was named after the child depicted: "Rosie." It has been displayed in the Guggenheim.

The Court of Criminal Appeals decided two issues:

1. Did the zoomed-in photo depict a child under 18 at the time it was made given that Rosie is now middle-aged?
2. Was the zoomed-in photo "lewd" without regard to the status of the original?

A digital "image re-creation does not reset the date that the original image of that same underage child 'was made,' such that the newly created image is no longer of a child under the age of 18. The manipulation of an existing image of a child is simply the creation of a different piece of visual material *of that child at that age* . . . The age of the child at the time the image is made will always stay the same." (emphasis in original).

The Court of Criminal Appeals also adopted a list of factors to decide what is "lewd" under TEX. PENAL CODE § 43.25(a)(2):

1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
4) whether the child is fully or partially clothed, or nude;
5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Finally, considering these factors, the Court held: "The act of image manipulation combined with the particular composition of the edited image—i.e., a close-up of the child's genital area—resulted in the creation of a different image that constitutes the 'lewd exhibition' of a child's genitals."

V. Transportation Code

A. Driving on the Improved Shoulder & the Fog-Line

TEX. TRANSP. CODE § 545.058:

(a) An operator *may drive on an improved shoulder to the right of the main traveled portion of a roadway* if that operation is necessary and may be done safely, but only:

(1) to stop, stand, or park;

(2) to accelerate before entering the main traveled lane of traffic;

(3) to decelerate before making a right turn;

(4) to pass another vehicle that is slowing or stopped on the main traveled portion of the highway, disabled, or preparing to make a left turn;

(5) to allow another vehicle traveling faster to pass;

(6) as permitted or required by an official traffic-control device; or

(7) to avoid a collision.

TEX. TRANSP. CODE § 541.302:

(6) "Improved shoulder" means a paved shoulder.

. . .

(15) "*Shoulder" means* the portion of a highway that is:

(A) adjacent to the roadway;

(B) designed or ordinarily used for parking;

(C) distinguished from the roadway by different design, construction, or marking; and

(D) not intended for normal vehicular travel.

State v. Cortez, 534 S.W.3d 198 (Tex. Crim. App. 2018):

Is the fog-line part of the roadway, improved shoulder, or neither for purposes of determining a violation of TEX. TRANSP. CODE § 545.058? The momentary touching of the fog-line with a vehicle's tires is not necessarily driving on the "improved shoulder" sufficient to prove reasonable suspicion of a violation of TEX. TRANSP. CODE § 545.058. "'[D]riving is an exercise in controlled weaving. It is difficult enough to keep a straight path on the many dips, rises, and other undulations built into our roadways.'"