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Court of Criminal Appeals Summaries Nov. 2021 – May 2022

CCA Summaries November 2021

Justification defenses

Rodriguez v. State, 629 S.W.3d 229 (Tex. Crim. App. 2021)

Held: A defendant is entitled to a justification defense despite flatly denying the offense's requisite mental state if that intent can be inferred from his admitted actions.

Rodriguez was charged with murdering Rick Sells. Rodriguez was tailgating after a Cowboys game with his brothers and some others, including Sells, when a fight broke out. Rodriguez testified to the following version of events. He saw one of his brothers get sucker punched and then attacked by multiple people. Rodriguez tried to intervene but was hit several times and knocked down twice. He retrieved a gun from a vehicle, drew it on someone he believed was involved in the attack, and told that person to leave. Rodriguez then grabbed Sells, who was kneeling on and punching his brother. Rodriguez put Sells in a headlock and put the gun to his neck. Sells then jerked away and Rodriguez felt someone pulling at his arm. The gun "went off," mortally wounding Sells. Rodriguez was "in shock." Importantly, although Rodriguez agreed the gun would not have gone off had his finger not been on the trigger, he maintained that he never had any intent to kill anyone. Rather, he retrieved the gun because he feared he or his brothers would be severely injured and had been unable to defend his brother with his fists. At the charge conference, Rodriguez requested instructions on self-defense, defense of a third person, and necessity. All were denied. He was found guilty of murder.

The court of appeals affirmed. It reviewed the rejection of these three defenses together because they are all confession-and-avoidance defenses. Citing multiple recent cases from the CCA, the court held that a confession-and-avoidance defense is appropriate only when the defendant's evidence essentially admits to every

element of the offense and interposes a justification for conduct that would otherwise be a crime. Not only did appellant repeatedly deny the culpable mental state for murder, he "refused to take ownership of the lethal act." This latter point, the court held, distinguished this case from *Martinez v. State*, 775 S.W.2d 645 (Tex. Crim. App. 1989). In *Martinez*, the CCA said a defendant is not disqualified from self-defense to murder when he admits to voluntary conduct and ultimate responsibility for the death but denies the intent to kill. *Id*. at 647. The CCA has both cited *Martinez* as a case that "ignored the confession and avoidance doctrine altogether," *Juarez v. State*, 308 S.W.3d 398, 403 (Tex. Crim. App. 2010), and favorably in support of the proposition that "[a]dmitting to the conduct does not necessarily mean admitting to every element of the offense." *Gamino v. State*, 537 S.W.3d 507, 512 (Tex. Crim. App. 2017).

The CCA reversed in what is fairly called a sizable shift in the doctrine. The Court acknowledged that the defenses at issue are justifications, and that, "Logically, one cannot both justify and deny conduct[,]" "conduct" being defined as the act/omission plus culpable mental state. *See* TEX. PENAL CODE § 1.07 (a)(10). "Thus the Penal Code implies that the evidence must support, or at least not negate, the act and accompanying mental state that the defense seeks to justify." This makes it sound like Rodriguez would lose, as his version of events specifically denied intent to kill and thus the charged offense. But the key word is "evidence." The focus on evidence rather than the defense presented makes all the difference.

In modern confession-and-avoidance cases, the question in close cases has been whether the defendant essentially admitted in plain language the elements of the offense despite equivocation. *See Juarez*, 308 S.W.3d at 405 ("Though Juarez denied biting Officer Burge intentionally, knowingly, or recklessly he had also admitted that he bit Officer Burge to get Officer Burge off of him because Officer Burge was causing him to suffocate."); *Gamino*, 537 S.W.3d at 511-12 (defendant denied State's version of events supporting aggravated assault by threat but said he drew his firearm, held it at his side, and told complainants to "get back"). A defendant is entitled to a justification instruction in such cases because his defense was ultimately "yes, but." After *Rodriguez*, what the defendant was trying to say no longer matters. The question now is whether, despite consistent denials of one or more elements, a rational jury could convict him based on what facts he

admitted. This is based entirely on the jury's prerogative as factfinder to infer a fact despite a defendant's complete denial of it.

Turning to the case at hand, the CCA had no problem concluding that the jury could infer the intent to kill from the admitted acts of retrieving a gun and pointing it at the victim. The CCA put it bluntly: "If such testimony will support a conviction, then it also satisfies the confession-and-avoidance requirement." Now, any testimony explaining why you did an act that admittedly resulted in injury will support a justification defense regardless of how complete your denial of the requisite mental state is. Overall, this reformulation of confession and avoidance presents a workable standard for judges and advocates. It also honors the jury's prerogative to assess the weight and credibility of the evidence. But it is not confession and avoidance in any meaningful sense.

Judges Yeary and Walker concurred without opinion.

The CCA remanded for a harm analysis. This might get interesting. Defendants deserve a new trial when the denial of a requested instruction causes "some harm." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). Under the previous version of confession and avoidance, failure to instruct on such a defense was rarely harmless because its omission left the jury without a vehicle by which to acquit a defendant who had admitted to all the elements of the offense. *Rogers v. State*, 550 S.W.3d 190, 192 (Tex. Crim. App. 2018). That rationale does not apply when the defendant makes an explicit, complete denial of intent. In this case, Rodriguez was entitled to the justification instructions because the jury could ignore his denial of the core element of murder—intent to kill. In order to apply any of the defenses, then, the jury had to believe he was justified in committing the murder he said he did not commit and lied to them about. What rational jury would do that? This may be a perfect example of theoretical, rather than actual, harm. *See id*. at 191 ("'Some harm' means actual harm and not merely a theoretical complaint."). It gets more complicated when, as in this case, the jury had multiple lesser-included offenses that matched Rodriguez's "justified accident" defense but convicted him of murder. Had he instead been convicted of manslaughter, the absence of a self-defense instruction on his theory of the case would have been harmful. *See Alonzo v. State*, 353 S.W.3d 778, 783 (Tex. Crim. App. 2011) (making

self-defense applicable to unintentional results). But that does not make it more likely that he was harmed for its absence on the murder charge.

Maciel v. State, PD-0753-20, __ S.W.3d __, 2021 WL 4566518 (Tex. Crim. App. Oct. 6, 2021)

Held: A defendant is entitled to a necessity instruction if the defensive evidence could support a conviction and she claims necessity.

Maciel presents an interesting twist on *Rodriguez* without mentioning *Rodriguez* or *Martinez*, the case undergirding it. Maciel was charged with driving while intoxicated. She was found in the driver's seat of a running car stopped in a lane of traffic. The engine was smoking and Maciel was trying to get it in gear when an officer told her to stop. She was arrested. The State's theory of the case was that Maciel drove her and her brother from an area bar when the car, her ability to drive, or both gave out. She told a different version of events at trial, which formed the basis for her appeal. Maciel said her brother had been driving because she knew she was too drunk. She claimed he suddenly got sick to his stomach and threw up, and she switched seats with him solely for the purpose of driving the car into a nearby parking lot. When asked if she was "operating" the vehicle, she said "no" because she could not get it to move. The trial court denied her request for a necessity instruction.

As in *Rodriguez*, the court of appeals affirmed. By denying operation, it held, she denied committing DWI. As in *Rodriguez*, the CCA reversed—this time unanimously. But *Maciel* goes further than *Rodriguez* in two important ways.

First, it breaks with the pattern in *Martinez* and *Rodriguez* of inferring confession of a denied element from an admitted element. In those cases, the defendant sufficiently admitted to the voluntary act required by the offense but the intent to kill, which he denied, had to be inferred from that act. That is, the defendant in those murder prosecutions admitted enough of the requisite act to permit inference of the requisite mental state. DWI is not a classic "act plus intent" offense because it has no mental state. TEX. PENAL CODE § 49.04(a) ("A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place."). Maciel admitted being intoxicated in a motor vehicle in a public place but denied "operating" it. Unlike the inferences of intent from act in *Rodriguez* and *Martinez*, "operation" cannot be inferred from the other elements of the offense. To whatever extent the jury's ability to infer admission of a denied element was

based on a defendant's admission of other elements, Maciel shows that is no longer the case.

Second, the inference model of entitlement applies even when the jury is not really called upon to make an inference. In entitlement cases like this, the issue isn't whether the jury could infer driving from the surrounding circumstances. *See*, *e.g.*, *Murray v. State*, 457 S.W.3d 446, 449-50 (Tex. Crim. App. 2015) (affirming conviction because a rational jury could conclude Murray drove drunk to where he was found parked). This is because 1) the jury gets to decide what "operating" means and its definition needn't include driving, *Kirsch v. State*, 357 S.W.3d 645, 652 (Tex. Crim. App. 2012), and 2) Maciel's theory of the case depended on the jury believing she had *not* driven the car to the point at which the officer found her. What the jury had to do to make necessity work was define "operating" to include her admitted acts but not her definition of the term. This is not inference of some ultimate fact from subsidiary facts despite a defendant's denial. Instead, it was a disagreement over the legal significance of undisputed facts. The CCA presumably understands the distinction; its conclusion that any testimony that supports conviction supports confession and avoidance means the distinction makes no difference. The rule is the rule.

And that's why this holding is even less satisfactory to traditionalists than *Rodriguez*. Maciel denied the only element that mattered in a way that lent itself to a viable alternative defensive strategy. As the CCA says, "[Maciel] was essentially saying that *if* she was operating a motor vehicle, it was only for the purpose of necessity." (Emphasis added). Yet it said the State's focus on that denial was "unreasonable." Apparently, a defendant can attempt to have her cake and eat it, too, at least for entitlement. Maybe the harm analysis is where practical considerations like the odds against a jury rewarding that attempt become reasonable.

Finally, it is worth noting the opinion repeatedly says Maciel was entitled based on the "defensive evidence." This focus on defensive evidence rather than the evidence as a whole was presumably an oversight attributable to the facts of the case, as it would unfairly prevent entitlement when a defendant's proper confession and avoidance to police was admitted by the State.

Judge Newell joined but wrote separately to suggest the CCA perform harm analyses itself rather than remanding because "there is little 'legal analysis'" for a court of appeals to perform in the first instance.

Lozano v. State, PD-1319-19, __ S.W.3d __, 2021 WL 4695809 (Tex. Crim. App. Oct. 6, 2021)

Held: A defendant is not entitled to a self-defense instruction unless some evidence shows his subjective belief that his use of force was necessary.

This case functions as a coda of sorts for *Rodriguez*, as it sets the limit on what the jury can provide a defendant through its ability to determine weight and credibility.

Lozano nearly hit a woman in a bar parking lot with his truck. He stopped and glared at her, which led to her friends confronting Lozano verbally. Things escalated. Hinojos, the victim, threw an open beer can through Lozano's open passenger-side window. Lozano retrieved a gun from a bag as Hinojos walked around to the driver's side. Hinojos swung at Lozano multiple times through the window, possibly striking him. Lozano shot him three times and then fled to Mexico. Hinojos died that night. Lozano never said anything during the confrontation, nor did he give a statement to police or testify at his murder trial. None of the evidence regarding the events came from him. He received an instruction on self-defense but it erroneously instructed the jury on retreat. He did not object. Lozano was convicted of murder.

Lozano argued on appeal that he was egregiously harmed by the charge error. The State countered that he was not entitled to any instruction on self-defense because entitlement has both an objective and subjective component. Not only did Hinojos's actions not reasonably warrant deadly force, the State argued, there was no evidence that Lozano subjectively believed they did. The court of appeals rejected this despite agreeing, in its harm analysis, that the evidence supporting self-defense was "relatively weak." It rested entitlement on the statutory presumption that the actor's belief that deadly force is necessary is reasonable if the actor had reason to believe the victim was unlawfully and with force attempting to enter his truck. *See* TEX. PENAL CODE § 9.32(b)(1)(A). The court found egregious harm and reversed for a new trial.

A unanimous CCA agreed with the State and reversed. When Section 9.32(a)(2) says a person is justified in using deadly force if he reasonably believes that deadly force is immediately necessary to protect himself against another's use or attempted use of deadly force, the "reasonably believes" language contains subjective and objective components. First, the defendant must harbor that belief. Second, the jury must determine that his belief is objectively reasonable under the circumstances. There is, as the court of appeals noted, a presumption of reasonableness under certain circumstances. However, that presumption is predicated on the defendant harboring a subjective belief. TEX. PENAL CODE § 9.32(b) ("The actor's belief under Subsection (a)(2) that the deadly force was immediately necessary as described by that subdivision is presumed to be reasonable if . . ."). As such, it cannot supply the subjective belief. Although it might make sense to assume a defendant holds a belief the law presumes is objectively reasonable, human experience shows it is not necessarily so. People do all kinds of things for all kinds of reasons.

In the absence of direct evidence of Lozano's subjective belief, there must be something from which a jury could infer the defendant harbored it. The evidence need not come from the defendant; any relevant testimony about the defendant's acts and words at the time of the offense will do. In *Smith v. State*, 676 S.W.2d 584 (Tex. Crim. App. 1984), for example, multiple witnesses said Smith told the victim (who was holding a gun) he did not want to fight before the victim engaged Smith and was stabbed in the process. This case had nothing like that. The facts of the offense could support a belief in the need for self-defense, thoughtless overreaction, or intentional escalation. Because nothing about the event points to Lozano's subjective belief, deadly-force self-defense was not raised by the evidence.

There are two curiosities with this case. First, it seems strange to conclude that an erroneous instruction in the charge is harmless because it should not have been in the charge. It would have been easier to say the complaint is moot. Yet, the CCA performed a complete harm analysis the upshot of which is lack of entitlement rendered the error harmless. This is invariably true when it comes to justification defenses. The result might be different if the error had been in an unwarranted instruction on a general principle like causation or voluntariness. Such an error might constitute an improper comment on the weight of the evidence that harms the defendant.

The second curiosity comes in comparing this case to *Rodriguez* or *Maciel*. Rodriguez testified and explained why he did what he did but was adamant that what he did was not murder. Maciel testified and said what she was doing was necessary but did not meet the definition of DWI. The CCA said both were entitled to justification defenses regardless of their denials because the jury could supply their confessions from the facts admitted to. Lozano never lied to the jury about either his mental state or acts but the CCA said he was not entitled because his silence before and during trial prevented the jury from knowing his thought process. Strictly from an entitlement perspective, a defendant is better off denying the charged offense and either justifying a lesser one or arguing in the alternative than he is silently accepting the facts of the offense and arguing justification to the jury. But if the jury can infer a confession despite explicit denials that amount to lies, why can't it infer a subjective belief from uncontested facts like it does intent in countless prosecutions? It may be the former is closer than the latter to the traditional practice surrounding confession and avoidance, which the CCA purports to honor. Given how far the Court has shifted from its earlier expressions of the doctrine, however, the distinction is now less easy to justify.

Units of prosecution

Ramos v. State, PD-0788-20, __ S.W.3d __, 2021 WL 4889096 (Tex. Crim. App. Oct. 20, 2021)

Held: A double jeopardy multiple punishments analysis compares the two offenses of conviction, not one offense to an offense included in the other.

Ramos was convicted of continuous sexual abuse, which is defined as the commission of at least two predicate acts of sexual abuse against a child younger than 14 years of age during a period of at least 30 days' duration. TEX. PENAL CODE § 21.02(b). He was also convicted in the same trial of prohibited sexual conduct, defined in relevant part as engaging in sexual intercourse with a person the actor knows to be his stepchild. TEX. PENAL CODE § 25.02(a)(2). The only conduct alleged was between Ramos and his stepdaughter within the same time period. On appeal, he claimed punishment for both offenses violated the Double Jeopardy Clause. The court of appeals began by noting that, under *Blockburger v. U.S.*, 284 U.S. 299 (1932), Ramos could be punished for both offenses because they were not the "same"; each had an element the other did not. Texas uses this test as merely a starting presumption, however. In *Ervin v. State*, 991 S.W.2d 804 (Tex. Crim. App.

1999), the CCA came up with eight factors for a court to consider when deciding whether the Legislature intended multiple punishments arising out of the same conduct. Applying the fifth and sixth factors, which hinge on the gravamina of the two offenses, the court of appeals held the presumption permitting multiple punishments was rebutted. Considering the elements alleged in the charging instrument, the court held that aggravated sexual assault by penetration, which was a predicate offense for continuous sexual abuse, was based on the same conduct alleged under the prohibited sexual conduct charge. "When the two charges stem from the impermissible overlap of the same underlying instances of sexual conduct against the same victim during the same time period, the record shows a double jeopardy violation."

The CCA reversed. It reviewed all eight *Ervin* factors but gave special attention, as is usually the case, to the offenses' gravamina. The court of appeals mischaracterized the gravamina of each offense because it focused too narrowly on what they had in common in this case—sexual intercourse. As for prohibited sexual conduct, this focus ignored that the offense is not conduct-oriented but circumstance-oriented; the intercourse was illegal only because Ramos knew it was his stepdaughter. It made a similar mistake with continuous sexual abuse, focusing on the predicate sexual abuse instead of the fact that the offense criminalizes a pattern of predicates over time. The mistake made with continuous sexual abuse was more profound because much of the court of appeals's analysis compared prohibited sexual conduct to the predicate aggravated assault rather than the offense of conviction, continuous sexual abuse. This mistaken view has some facial appeal. One cannot be convicted of both continuous sexual abuse and one of its listed predicates in the same period, TEX. PENAL CODE § 21.02(e), so it makes sense that one also should not be convicted of an offense that is "the same" as one of those predicates. However, a multiple punishments analysis—ultimately a legislative-intent inquiry—requires comparison of the offenses of conviction. When properly viewed, there was little to rebut the presumption that multiple punishments are permitted.

Judges Hervey and Walker concurred without opinion.

Hernandez v. State, PD-0790-20, __ S.W.3d __, 2021 WL 4448306 (Tex. Crim. App. Sept. 29, 2021)

Held: A legally distinct criminal act can never be included within the offense charged.

To be entitled to a lesser-included offense, a defendant must satisfy the two-part *Hall* test. First, the requested offense must be a lesser-included offense as a matter of law. *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007). This analysis includes consideration of the pleadings but not the evidence adduced at trial. *Id*. at 535-36. The CCA has been clear on this latter point. *See*, *e.g.*, *Wortham v. State*, 412 S.W.3d 552, 557 (Tex. Crim. App. 2013) ("[S]uch evidence comes into play only in the second prong of the test."). Importantly, the elemental and factual pleadings in the indictment are compared to the *statutory* elements of the proposed lesser offense. *Ex parte Watson*, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009) (op. on reh'g). Second, there must be sufficient evidence to permit a rational jury to conclude the defendant is guilty only of the lesser offense. *Hall*, 225 S.W.3d at 536. So what happens when evidence that is irrelevant at Step 1 but decisive in the defendant's favor at Step 2 shows the "lesser" is actually a different offense altogether?

Hernandez led his 10-year-old victim to a storage shed where, according to her, he put his penis in her mouth. Hernandez was indicted for aggravated sexual assault of a child by penetrating the child's mouth with his sexual organ. His trial testimony matched what he told police: neither her mouth nor her face touched his penis, but he touched her sexual organ with his hand and hugged her while naked, during which his penis touched her body. At the charge conference, Hernandez asked for a lesser-included instruction on indecency with a child by contact. His requests were denied. The jury convicted Hernandez of the indicted offense.

The court of appeals reversed. The State conceded, and the court agreed, that indecency with a child by contact can be a lesser-included offense of aggravated sexual assault of a child based on comparison of its elements to the indictment. Once established as a lesser, the court of appeals had no problem concluding that Hernandez's testimony supported it and only it. It found harm based on the questionable "*Saunders* presumption" that the jury might have had a reasonable doubt but convicted Hernandez anyway because it believed he did *something* and

had no choices other than guilt as charged or acquittal. *See Masterson v. State*, 155 S.W.3d 167, 171 (Tex. Crim. App. 2005) (explaining *Saunders v. State*, 913 S.W.2d 564 (Tex. Crim. App. 1995)).

A unanimous CCA reversed because the requested offense, while satisfying *Hall*, was nonetheless a separate offense. It acknowledged that "rote application" of *Hall*—doing what it and subsequent cases repeatedly say to do—fails to distinguish extraneous offenses from included ones because it forecloses consideration of the relevant evidence until it is too late. A few pre-*Hall* cases made the point that a requested offense is not included within the charged offense if it is a distinct criminal act. *See*, *e.g.*, *Campbell v. State*, 149 S.W.3d 149, 155 (Tex. Crim. App. 2004) (possession of a lesser amount of different methamphetamine than charged is not a lesser-included offense). That point was lost in *Hall* and its progeny. The CCA did not say where this consideration fits in relation to the *Hall* test, but it explained how a trial court can approach and decide the issue: allowable unit of prosecution. Determining the allowable unit of prosecution—a staple of double jeopardy and unanimity analyses—of the offenses at issue will tell you whether one is included in the other.

The application in this case was straightforward. The unit of prosecution for aggravated assault is penetration; an offender can be charged for each distinct penetration of the victim even in a single episode. The unit of prosecution for indecency by contact is every contact. In a given case, the contact a defendant makes with his penis or hand incident to penetration is a lesser-included offense (and thus cannot result in a second conviction, *see Aekins v. State*, 447 S.W.3d 270, 281 (Tex. Crim. App. 2014)). But contact between his penis and a victim's stomach can never be included within penetration of her mouth with it. They are separate offenses and can result in separate convictions.

CCA Summaries February 2022

State v. Lerma, __ S.W.3d __, PD-0075-19 (Tex. Crim. App. Nov. 24, 2021)

Held: A trial court may dismiss a case for failure to disclose a confidential informant's identity pursuant to TEX. R. EVID. 508 based on law enforcement's deception.

Lerma was charged with capital murder. The issue was whether the underlying shooting plausibly arose out of a drug deal involving a confidential informant (CI) months earlier. The Hays County Narcotics Task Force (Task Force) relied on a CI to conduct a controlled drug buy from Joel Espino. Espino and his roommate Andrew Alejandro were narcotics dealers. Three months later, Lerma and several co-defendants allegedly attempted to rob Espino and Alejandro. During the attempted robbery, Alejandro shot and killed Espino and wounded two alleged robbers. Alejandro was the only person to fire a weapon during the incident. Lerma was presumably charged with the capital murder of Espino as a party. *See* TEX. PENAL CODE § 7.02(a)(1) ("A person is criminally responsible for an offense committed by the conduct of another if[] acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense[.]").

During pretrial discovery for the capital murder trial, Lerma's defense counsel learned of the CI. The defense came to suspect Espino might have been the CI and so requested the CI's identity. Its theory: Alejandro learned Espino was a CI and used the (fortuitous) attempted robbery to kill his snitch roommate. The State claimed privilege not to disclose the CI's identity under TEX. R. EVID. 508. This case is about one of its exceptions: "In a criminal case, this privilege does not apply if the court finds a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence." TEX. R. EVID. 508(c)(2)(A).

The lead-up to this appeal did not go well for the State. After its mandamus petition was withdrawn following an agreement to an *in camera* hearing, the Task Force's story changed. Although the prosecutor was initially under the impression the Task Force officers would cooperate, he was then told the CI's identity had not been recorded—no one knew it. Those officers testified *in camera* to this failure to

follow basic policies and procedures. The trial court found that to be incredible. After Lerma's counsel filed a motion to dismiss the capital murder case—the remedy under Rule 508(c)(2)(A)—the State disclosed an e-mail in which the Task Force commander, who had testified that he did not know the CI's identity, knew the CI's identity but would not disclose it. The trial court granted the motion to dismiss.

The court of appeals reversed. It followed *Bodin v. State*, 807 S.W.2d 313 (Tex. Crim. App. 1991), which explained "the amount of proof necessary for the defendant to show that testimony may be necessary to a fair determination of guilt or innocence" as required by Rule 508. *Id*. at 318. "The informer's potential testimony must significantly aid the defendant[,] and mere conjecture or supposition about possible relevancy is insufficient." *Id*. "Since the defendant may not actually know the nature of the informer's testimony, however, he or she should only be required to make a plausible showing of how the informer's information may be important." *Id*. "Evidence from any source, but not mere conjecture or speculation, must be presented to make the required showing that the informer's identity must be disclosed." *Id*. The court of appeals reviewed the record and concluded there was no evidence of "a reasonable probability" the CI could give testimony "necessary to a fair determination of guilt or innocence": "the allegedly exculpatory theory is 'mere conjecture or supposition about possible relevancy' and does not support the trial court's order."

The CCA reversed. It also cited *Bodin*, but its analysis differed because it relied heavily on a presumptive inference rather than evidence *per se*. The CCA listed the evidence before the trial court:

> 1) there was an informant who was involved in a controlled buy with Espino; 2) Espino was not charged as a result of the controlled buy; 3) Espino was shot and killed by Alejandro, his fellow drug dealer; 4) the State, through the Task Force, vehemently and vigorously fought to prevent disclosure of any information relating to the informant; 5) after the parties agreed to the in camera hearing, the Task Force suddenly forgot who the informant was and failed to document any information relating to the informant; 6) the Task Force's own policies and procedures require documentation; 7) nevertheless, during the in

> camera hearing, the Task Force officers all testified that the defense theory was possible that the informant had told Alejandro of the controlled buy and Alejandro used the robbery as an opportunity to kill Espino; and 8) after the hearing, an e-mail was disclosed showing that the Task Force's commander did, in fact, know who the informant was and that he would fight to prevent disclosure.

Put another way, the record showed the basic facts (1-3) and the Task Force's efforts—including deceit—to prevent disclosure (4-8). The CCA's analysis focused on the Task Force's behavior: its deception justified the finding of incredibility which, combined with their strong resistance, supported the conclusion that the CI must have information affecting the capital murder case. This conclusion was based on the rationale behind spoliation instructions in civil practice, *i.e.*, a party who has deliberately destroyed evidence is presumed to have done so because the evidence was unfavorable to its case. Viewed this way, the CCA held, "there was a plausible showing that the informant *may* have had information necessary to a fair determination of Appellee's guilt or innocence."

Presiding Judge Keller, joined by Judges Yeary and McClure, dissented on four grounds. First, if Espino was the CI, he can't "give testimony necessary to a fair determination of guilt or innocence" because he's dead. Second, if there had been another CI in addition to Espino—two CIs in one controlled buy would be unlikely—Rule 508 contemplates a CI who can shed light on the case in which he was a CI, which would be the drug case. Third, the defense theory of the CI's value is too speculative to support the trial court's ruling. Fourth, if the State had exculpatory information, it already had a duty to disclose it under *Brady v. Maryland*, 373 U.S. 83 (1963), and TEX. CODE CRIM. PROC. art. 39.14. The majority responded to this last point by saying Rule 508 is not limited by its terms to exculpatory information. That is true and, as the majority pointed out, the CCA had previously treated the potential inculpatory nature of the CI's testimony as a harm issue. *See Anderson v. State*, 817 S.W.2d 69, 73 (Tex. Crim. App. 1991).

Reliance on *Anderson* is questionable. Assuming *Anderson* was correct on its own terms, that case had a harm analysis; the non-disclosure was reviewed as trial error after Anderson's conviction. This case is a State's appeal from a trial court dismissal pursuant to a rule of evidence; no harm analysis was conducted. If the inculpatory

potential of the CI's testimony is relevant only to harm, its value was ignored in this case. Whatever *Anderson*'s value, it does not explain why a defendant is entitled to greater relief for the failure to disclose inculpatory evidence under a rule of evidence than under statutory and constitutional discovery law.

Hall v. State, __ S.W.3d __, No. AP-77,062 (Tex. Crim. App. Dec. 8, 2021)

Held: Being given permission and access by a government agency to request consensual conversation with a represented defendant, without more, does not make one a government agent for Sixth Amendment purposes.

Hall was convicted of capital murder and sentenced to death. He raised several issues in his direct appeal to the CCA, but the most interesting was his challenge to the admission of a Comedy Central video during his punishment phase.

Hall was housed in the Brazos County Detention Center (BCDC) while awaiting trial. During that time, Comedy Central comedian Jeffrey Ross obtained permission to film a special there. Comedy Central agreed to pay any additional staffing and extraordinary expenses relating to filming, but there was otherwise no agreed payment. Inmates were permitted to attend the filming contingent upon good behavior. Additionally, Comedy Central was permitted to photograph or record any inmate who signed a release form. Ross and his crew entered housing pods, mingled with inmates, and recorded conversations with them. Hall was filmed chatting with Ross and as an audience member at the special. The recording the State subpoenaed from Comedy Central shows Hall making multiple comments that arguably evinced a lack of remorse for having committed capital murder. The redacted video admitted at the punishment phase was nine minutes long.

Hall raised several objections to the admission of the video. The most noteworthy was that the State, working through BCDC, violated the Sixth Amendment by allowing Ross to elicit incriminating statements without Hall's counsel present. *See generally Massiah v. United States*, 377 U.S. 201 (1964); *Rubalcado v. State*, 424 S.W.3d 560 (Tex. Crim. App. 2014). This claim turned on whether the person who elicited the statements, Ross, was a government agent. Although there is no comprehensive test for agency, and it need not be an explicit *quid pro quo*, "the informant must at least have some sort of agreement with, or act under

instructions from, a government official." This includes State orchestration of situations in which the defendant is likely to make incriminating statements in the presence of someone who has agreed to tell the State what he hears. *See United States v. Henry*, 447 U.S. 264 (1980) (right to counsel violated when the informant was placed in a cell with Henry with instructions not to initiate conversation or inquire directly about the offense but "to be alert to any statements" made). The record showed nothing like this. There was no explicit agreement between BCDC and Ross to collect incriminating statements, nor evidence BCDC orchestrated interactions between Ross and Hall with the hopes Hall would incriminate himself. Ross acted as a comedian filming a special, not a government agent.

Avalos v. State, 635 S.W.3d 660 (Tex. Crim. App. 2021)

Held: Intellectually disabled adults can be sentenced to life without parole without the sort of "individualized sentencing" hearing provided to death-eligible adults and life-without-parole juveniles.

Avalos pleaded guilty to two counts of capital murder—killing five women over several years—after the State waived the death penalty. The result was mandatory life without the possibility of parole. TEX. PENAL CODE § 12.31(a)(2). He had preserved the right to challenge that sentence on the ground he is intellectually disabled. His argument, later followed by an *en banc* court of appeals, was as follows: 1) The Eighth Amendment prohibits the execution of intellectually disabled persons, *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); 2) juveniles are sufficiently like intellectually disabled persons to render them categorically exempt from the death penalty, *Roper v. Simmons*, 543 U.S. 551, 571 (2005); 3) because life without parole is the most serious punishment a juvenile can receive, it cannot be imposed without the same "individualized sentencing" hearing adults receive when the State seeks the death penalty, *Miller v. Alabama*, 567 U.S. 460, 489 (2012); 4) the same result is required for intellectual disability because of its parity with youth. Three justices dissented. They pointed out that *Miller* was based on the idea that the inability to consider a juvenile offender's youth prevented consideration of his most salient mitigation argument: lack of, and potential for, intellectual growth. This concern is inapplicable with the intellectually disabled.

The CCA agreed with the dissent and reinstated Avalos's punishments. "As the Supreme Court itself explained in *Roper*, 'the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.'" "In contrast to the juvenile offender, the intellectually disabled offender's condition is not transient precisely *because* of his condition, and thus he represents a greater long-term *continuing* threat to society. His diminished capacity to control impulses, to communicate, to abstract from his mistakes and learn from his experience is a fixed attribute that makes him a greater, not a lesser, danger to society." In short, "[a]n intellectually disabled capital murderer may be, as the United States Supreme Court has concluded, categorically less *culpable* for his offense than the ordinary adult capital murderer, and therefore insulated from the death penalty; but he is no less dangerous for it[.]" As that will not change over time, there is no compelling reason to require a hearing that applies to juveniles because of their ability to grow and mature.

Judges Hervey, Richardson, and Newell concurred without comment.

Judge Walker dissented without comment.

Holder v. State, __ S.W.3d __, PD-0026-21 (Tex. Crim. App. Feb. 2, 2022)

Held: Error in failing to suppress evidence that was excludable only under TEX. CODE CRIM. PROC. art. 38.23 is reviewed for harm under the standard for non-constitutional error regardless of the nature of the law violated to obtain the evidence.

During Holder's trial for capital murder, the trial court admitted evidence of his cell-site location information (CSLI) to establish his whereabouts the week of the murder. The CCA held the evidence was obtained in violation of Article I, Section 9, of the Texas Constitution and remanded for a harm analysis. *Holder v. State*, 595 S.W.3d 691, 704 (Tex. Crim. App. 2020). That was easier said than done.

Unlike the Fourth Amendment, Article I, Section 9 has been interpreted to not include an implicit exclusionary remedy. As a result, the only means of exclusion is Art. 38.23(a), which says, "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of

the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." On remand, the court of appeals assessed harm using the "harmless beyond a reasonable doubt" standard for constitutional errors, TEX. R. APP. P. 44.2(a). Although this tracked what the CCA did in *Love v. State*, 543 S.W.3d 835 (Tex. Crim. App. 2016), *i.e.*, applying Rule 44.2(a) to evidence that should have been excluded under Art. 38.23, the court acknowledged Judge Hervey's concurrence in *Dixon v. State*, 595 S.W.3d 216 (Tex. Crim. App. 2020), which said *Love* was wrong because violation of a statute (Art. 38.23) results in statutory error. The court of appeals could not conclude beyond a reasonable doubt that the error did not contribute to the jury's verdict. The State asked the CCA to settle the matter.

A unanimous CCA reversed. When Art. 38.23 is the basis for exclusion, the erroneous failure to exclude is statutory regardless of the nature of the law violated to obtain the evidence. It remanded for harm analysis under Rule 44.2(b), which requires reviewing courts to disregard errors that "do[] not affect substantial rights."

This rule makes sense in this case; although the law violated to obtain the evidence was the Texas Constitution, exclusion depends upon the statute because there is no inherent constitutional exclusionary rule. Application is slightly more complicated in a case like *Love*, which applied Art. 38.23 to a Fourth Amendment violation. Love objected to the admission of his cell-phone information, including CSLI, on state and federal constitutional and statutory grounds. Had he invoked only the Fourth Amendment, the CCA would have had to decide whether the officers' conduct fell within the "good faith" exception to exclusion for reliance on a statute. *See Illinois v. Krull*, 480 U.S. 340, 349 (1987). Love also invoked Art. 38.23, however. Article 38.23(b) explicitly limits the "good faith" exception to the statutory exclusionary remedy to "objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause." Love, like Holder, had to rely on a Texas statute to exclude evidence obtained in violation of a constitution that would not have been excluded by that constitution. The only difference is that the constitution in *Love* otherwise had an exclusionary remedy. In both cases, the harm analysis should be that for statutory violations.

Rubio v. State, __ S.W.3d __, PD-0234-20 (Tex. Crim. App. Jan. 26, 2022)

Held: Trial judges may grant leave of court to permit the filing of an amended motion for new trial after overruling an initial motion if the amendment is filed within 30 days of the sentence being imposed in open court.

Rubio was convicted of capital murder and sentenced to life without parole. He filed a form motion for new trial (MNT) the day the verdict was rendered. It was promptly overruled, but new counsel for Rubio filed a motion for leave to file an amended MNT along with that motion, including specific grounds and eleven exhibits. A hearing on the amended motion was held over the State's objection. Rubio's MNT was denied, but evidence adduced at the hearing formed part of his ineffective assistance argument on appeal. The court of appeals held that it could not consider that evidence because the amended MNT was untimely and the State objected. Rubio petitioned.

The time to file and amend a MNT is governed by TEX. R. APP. P. 21.4. It says, in full:

> (a) *To File*. The defendant may file a motion for new trial before, but no later than 30 days after, the date when the trial court imposes or suspends sentence in open court.
>
> (b) *To Amend*. Within 30 days after the date when the trial court imposes or suspends sentence in open court but before the court overrules any preceding motion for new trial, a defendant may, without leave of court, file one or more amended motions for new trial.

In *Moore v. State*, the CCA held that a defendant may not file an amended MNT *after* the 30-day limit, even with leave of court, if the State objects. 225 S.W.3d 556, 558 (Tex. Crim. App. 2007). This case asks whether leave to file an amended motion can be granted *before* the 30-day limit but *after* an initial motion is overruled *and* over objection. The CCA held it can.

The holding of this case is easy enough to remember, even if it rarely arises. What is important is the rationale. The majority's approach asked whether Rule 21.4(b) explicitly precludes what Rubio did. It does not. From the majority's point of view, the fact that Rule 21.4(b) details what can be done within 30 days without leave of court if no preceding MNT has been overruled has no bearing on what can be done

with leave of court regardless of whether a preceding MNT has been overruled. In other words, the majority looked for a limitation on trial-court discretion and found none. The majority noted that this is consistent with the trend in the CCA's cases on motions for new trial, which "has been to recognize a trial court's discretionary authority to rule on motions for new trial." It appears that, so long as the trial court does not act beyond its plenary power, its discretionary authority will be limited only by explicitly prohibitive statutes and rules.

Presiding Judge Keller, joined by Judges Hervey and Keel, approached the issue differently: a trial court's post-judgment power is inherently limited and must be conferred by statute or rule. "It is not enough to say that Rule 21.4 does not preclude the filing of an amended motion for new trial under the circumstances presented in this case. For the trial court to have authority to grant a new trial in this case, Rule 21.4 would have to authorize the filing of an amended motion under the circumstances before us, and it clearly does not." If the majority is correct that the trial court can ignore the "before the court overrules any preceding motion" part of Rule 21.4(b), she argues, it should also be able to ignore the 30-day requirement so long as leave of court is sought. As *Moore* held to the contrary on that point, the majority's reasoning is unsustainable.

Shumway v. State, __ S.W.3d __, PD-0108-20 (Tex. Crim. App. Feb. 2, 2022)

Held: The corpus delicti rule does not apply when a defendant provides a well-corroborated confession to a sexual offense committed against a child who was incapable of outcry and that did not result in perceptible harm.

The corpus delicti rule is a common-law rule designed to prevent convictions based solely on the defendant's uncorroborated out-of-court confession. When someone is tried and executed based only on his confession to murder and the alleged victim turns up alive, it is awkward for everyone. *See Salazar v. State*, 86 S.W.3d 640, 644 (Tex. Crim. App. 2002) (referencing such cases). The rule thus requires evidence (other than the confession) that the crime itself occurred. The corroborating evidence need not independently prove the crime; it must simply make the occurrence of the crime more probable than it would be without it. Moreover, the confession can be used to give the other evidence context and meaning. *See Kugadt v. State*, 44 S.W. 989, 996 (1898) (cited in *Shumway*) ("In other words, in

the establishment of the corpus delicti, the confessions are not to be excluded, but are to be taken in connection with the other facts and circumstances in evidence.").

As one might imagine, this can cause problems with child sex crimes. Those crimes often leave no physical evidence, and the victims are often too young to relate what happened. In such a case, *Miller v. State*, the CCA carved out an exception for "closely related" crimes—similar in type and close in time—when the defendant's extrajudicial confession to one of them could be corroborated. 457 S.W.3d 919, 920 (Tex. Crim. App. 2015) (four counts of aggravated sexual assault of a child, a three-month-old, were corroborated because one count was substantiated by his semen on the floor by the changing table). In this case, the CCA took the next step.

Shumway was convicted of multiple counts of indecency with a child. He confessed to his bishop that he touched the genital region of a seventeen-month-old girl (the child of friends) with his hands, tongue, and penis. He gave a more detailed confession to his wife. He even offered her an explanation: he resented her for leaving him to watch the children and going to lunch with her friends that weekend, and letting the child run around in a diaper. His wife remembered those details of that weekend. She also remembered Shumway fasting and being withdrawn that weekend, as though he was having some sort of "spiritual experience with God or something." However, a forensic physical exam revealed nothing, and the victim was considered pre-verbal and so was not interviewed.

The court of appeals affirmed. It pointed to the evidence of the details surrounding the confessions and corroboration of the details surrounding the offense to satisfy the corpus delicti rule. The CCA affirmed, but on different grounds. It held the rule was not satisfied because, although there was evidence of opportunity and behavior suggesting a guilty conscience, there was no independent evidence of the touching itself. Viewing the opportunity and behavioral evidence in light of the confession did not change that.

So the CCA created the "incapable of outcry" exception. "We recognize a discrete exception to strict application of the corpus delicti rule for cases in which a defendant provides a well-corroborated confession to a sexual offense that was committed against a child who was incapable of outcry and that did not result in perceptible harm." It applied neatly to this case. In addition to the nature of the

offense and victim, Shumway made repeated, consistent confessions the non-offense details of which were corroborated.

Judge Yeary concurred with a note referring to his concurrence in *Miranda v. State*, 620 S.W.3d 923, 930 (Tex. Crim. App. 2021), in which he suggested jettisoning the corpus delicti rule rather than "extending, yet again, a court-invented common-law exception to [a] court-invented common-law doctrine[.]"

Judge Slaughter concurred to express her view that, if asked in the appropriate case, the CCA should abolish the corpus delicti rule. If the rationale for the rule's creation hundreds of years ago was to protect against involuntary confession due to coercion or mental illness, its continuing value should be assessed in light of developments in the law surrounding confessions. The suspect's state of mind is one of many factors courts now consider when evaluating the voluntariness of confessions. Moreover, several jurisdictions have noted the rule is ineffective against the more common wrongful-conviction scenario involving confessions—individuals confessing to crimes committed by someone else. Instead of adding new exceptions on a case-by-case basis, the Court should abandon the rule.

Pugh v. State, __ S.W.3d __, PD-1053-19 (Tex. Crim. App. Jan. 26, 2022)

Held: A computer animation that accurately depicts the scientifically reliable testimony of the sponsoring witness is not inadmissible because it depicts a human being.

Pugh killed a man in a bar parking lot with his truck. At his murder trial, the State introduced three video animations depicting the State's theory of where the victim was standing in relation to Pugh's truck and how the truck ran him over. These videos can be viewed at https://www.txcourts.gov/cca/media/. The three exhibits showed separate long-distance views—a bird's eye view, a northeast view, and a southeast view—of a truck accelerating across a parking lot, striking, and then running over a human figure. The two views in which the figures' details would be apparent show none: the figure is empty-handed, stationary, and lacks facial features. Nor does the figure move independently or react when the truck hits it. It effectively looks like a mannequin getting hit and run over by a truck.

Pugh objected to the animations pretrial and again at trial when the State offered them at the end of its case-in-chief. He argued that the probative value of the exhibits was substantially outweighed by the prejudicial effect because "there is no way to know for sure what the alleged victim was doing or purporting to be doing and/or exactly where the alleged victim was." The trial court overruled the objection but instructed the jury that, "The animation is a visualization of the expert's opinion . . . admitted for the sole purpose of aiding the jury and understanding the events, if any, which happened and may be considered by the jury only to the extent that the jury believes beyond a reasonable doubt that other evidence introduced by the State supports the events as depicted in the animation."

After Pugh was convicted of murder, he argued that "[a]ny staged, re-enacted criminal acts or defensive issues involving human beings are impossible to duplicate in every minute detail and are therefore inherently dangerous, offer little in substance and the impact of re-enactments is too highly prejudicial to insure (sic) the State or the defendant a fair trial[,]" quoting *Miller v. State*, 741 S.W.2d 382, 388 (Tex. Crim. App. 1987). He also said the details (or lack thereof) surrounding the victim had no basis in the record or contradicted his testimony. Finally, he said the testimony about his truck's movements was adequately set forth by testimony, making the animations unnecessary. The court of appeals affirmed. Its analysis broke down thus: the animation was based on objective data, did not attempt to portray the victim's actions prior to the impact, depicted the impact from a distance, and showed nothing gruesome.

Pugh raised the same arguments in his petition. They were rejected in a comprehensive review of how the admissibility of computer animations as demonstrative evidence should be approached. In short, "a trial court does not abuse its discretion to admit a demonstrative computer animation, used to illustrate the otherwise scientifically reliable testimony of a witness, if the animation: 1) is authenticated, 2) is relevant, and 3) has probative value that is not substantially outweighed by the danger of unfair prejudice." How these sub-inquiries play out with demonstrative evidence is unique.

"Authentication," in the demonstrative context, means that the animation accurately reflects what the exhibit is offered to demonstrate, *i.e.*, the testimony

or documentary evidence the proponent used to create it. *See* TEX. R. EVID. 901(a). This means it does not have to reflect the opponent's testimony.

"Relevance," in this context, means "its value in illustrating other admitted evidence and rendering that evidence more comprehensible to the trier of fact." The usual test for relevance, TEX. R. EVID. 401, does not apply because demonstrative evidence has no independent probative value. By their nature, they must demonstrate facts already in evidence.

The basic factors for unfair prejudice under Rule 403 are the same. However, due to the unique nature of demonstrative evidence, this is where claims that the exhibit is inaccurate go—not in "authenticity" or "relevance." Courts should weigh any inaccuracies, variations of scale, and distortions of perspective against the degree to which the judge thinks that the exhibit will assist the trier of fact, keeping in mind that discrepancies in these details go to weight rather than admissibility. With visual evidence, courts should pay attention to whether the evidence's gruesomeness, level of detail, perspective, or other "potential inappropriate emotional effect" make it "overly inflammatory." Also, the time it takes to develop the evidence is irrelevant because demonstrative evidence is based directly on the substantive proof of the underlying offense already admitted.

Looking more closely at the facts of this case, the animations were admissible. They were authenticated by the sponsoring witness, an accident reconstructionist, who affirmed the videos fairly and accurately reflected the opinion he had drawn from available information. [Pugh never challenged the qualifications of the reconstructionists or the reliability of the software and techniques used to create the animations, but they were testified to.] The exhibits were relevant because they made the array of evidence underlying them more digestible. As explained in the opinion (and on the stand), the animation was based on the physical descriptions and measurements of the scene, tire tracks, acceleration patterns, medical evidence of types and degree of injury, and DNA "placement" on certain parts of Pugh's truck. Although the jury could have understood the State's theory by listening to the testimony and viewing the photos and other exhibits, the animation made it clear in a concise form.

The Rule 403 analysis went smoothly, too. As just explained, the probative value (as that term is understood in the demonstrative evidence context) was apparent.

There was no risk of unfair prejudice because the animation was the least gruesome depiction of the victim admitted into evidence. The animation also accurately reflected all the objective evidence—placement of the buildings, the truck's location and movements, etc. The reconstructionist explained the objective evidence behind every decision reflected in the animations, which each lasted only a few seconds. And the State's need for it tracked the relevance analysis: however duplicative it was of testimony (by necessity), it illustrated the State's case more forcefully and clearly.

Pugh's specific argument about animation of human beings was more interesting. After the CCA dispensed with the idea that it had created a *per se* bar to recreations of human behavior in *Miller*, *supra*, it explained why none of Pugh's concerns materialized in this case. In a given case, software with a sophisticated physics engine could be used to create an animation with a life-like human figure that reacts realistically to impact with a vehicle. In that case, there would be much more room for fights over whether the movements depicted were based on objective evidence or speculation. There would also be an increased likelihood the animation would be more gruesome and therefore impact the jury in some irrational yet indelible way. This case is the opposite of that. Its purpose was limited to illustrating where the reconstructionist believed the victim was standing when struck and how his body moved under the truck. The victim's avatar was not shown walking and its limbs did not move even after the impact. The lack of realism in that regard, and absence of any claim to have knowledge of the "missing" details, is what invalidated Pugh's argument that animated depictions of human behavior are inherently speculative.

Judge Walker concurred. He emphasized that computer-generated animations "are vastly more persuasive than other demonstratives like diagrams or charts[,]" and that defense counsel should seek expert assistance to combat this. He also believes indigent defendants are entitled to funds to procure such an expert under TEX. CODE CRIM. PROC. arts. 26.05(d) and 26.052(l) (providing reimbursement for costs of experts) by making the proper showing under *Ake v. Oklahoma*, 470 U.S. 68 (1985). If sufficient money is not available, he suggests using Rule 403 to keep the State's animation out "to level the playing field": "If the funds provided to an indigent defendant are simply not enough to match the resources put into the prosecution's animation, exclusion may be the prudent choice."

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Ratliff v. State, __ S.W.3d __,PD-0545-20 (Tex. Crim. App. March 16, 2022)

Held: An offense report that omits facts not directly relevant to the alleged offense is not false for purposes of tampering with a governmental record; the "hot pursuit" theory of exigent circumstances requires continuity in pursuit from the inception of probable cause.

Llano police officer Grant Harden had an exchange with the complainant, Cory Nutt, as Harden sped out of their RV park on the way to a call. Because Harden believed Nutt to be intoxicated in public (and he failed to identify himself when asked), Harden initiated another encounter with Nutt after he returned from his call over twenty minutes later. There was disagreement over whether Nutt was outside his trailer when Harden confronted him the second time. Harden called for backup. Two officers and Ratliff, the chief, responded. It is unclear whether Ratliff arrived with or after the other two. Ultimately, Nutt was in his trailer when officers approached and told him to exit. He refused and denied consent to enter. After a "stand-off" that lasted at least fourteen minutes—the length of the body cam footage—Ratliff and another officer stepped just inside the trailer, handcuffed Nutt, and arrested him for public intoxication (PI).

After that charge was dropped, Nutt approached the district attorney's office about his treatment and what he called an illegal arrest. The State viewed the body-cam footage and charged Ratliff with official oppression stemming from the warrantless entry and arrest. *See* TEX. PENAL CODE § 39.03(a) ("A public servant acting under color of his office or employment commits an offense if he: (1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful; [or] (2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful[.]"). The State also charged Ratliff with tampering with a governmental record because the offense report he signed off on as chief was false by its omission or misrepresentation of the arrest—it mentioned nothing about entering Nutt's trailer or handcuffing him therein. *See* TEX. PENAL CODE § 37.10(a)(5) ("A person commits an offense if he . . . makes,

presents, or uses a governmental record with knowledge of its falsity[.]"). Ratliff was convicted of all charges and the court of appeals affirmed.

The CCA reversed the tampering conviction but affirmed the official oppression convictions. Its lead tampering analysis was based on the meaning of the word "false." The State's theory was that the offense report was false by virtue of the omission of key facts surrounding the arrest, which it alleged was done to conceal its illegality. The CCA rejected this view of falsity. Regardless of what was omitted from the report, there was no evidence what was in it was false. "It is difficult to conceive of someone being convicted of falsifying a governmental record when nothing in the record is, in fact, false." It held the evidence insufficient. The court went further, addressing the alleged manner and means of falsity: "omitting or misrepresenting." It noted that an omission is not an offense unless there is a legal duty to act. *See* TEX. PENAL CODE § 6.01(c). As there is no statute or code that prescribes the content for a PI offense report, all that was required was the facts that led the officer to believe he had probable cause. The court went even further, saying there was "no evidence that any facts relating to the offense were false or intentionally omitted from the report with the intent to deceive[,]" or that Ratliff attempted to create a false impression. "Quite [to] the contrary," it held, Ratliff "personally prepared and provided copies of the Llano Police Department's video footage of Nutt's arrest to the prosecutor."

The court did, however, held Ratliff knew his conduct omitted from the report was unlawful. The analysis focused exclusively on its unlawfulness. The jury was instructed in accordance with TEX. CODE CRIM. PROC. art 14.05 that an officer may not enter a residence to make an arrest without consent or exigent circumstances. It was also told that exigent circumstances include:

> 1. providing aid or assistance to persons whom law enforcement reasonably believes are in need of assistance; or 2. protecting police officers from persons whom they reasonably believe to be present, armed, and dangerous; or 3. preventing the destruction of evidence or contraband; or 4. where the officer is in immediate and continuous pursuit of a person for a felony offense.

The only option it deemed applicable was "hot pursuit," which the majority discounted because there was no continuity in pursuit. Although the offense report

showed Harden made his determination that Nutt may be a danger to himself or others after speaking to him the second time, the majority focused on the initial encounter; there was no continuity because Harden left the scene after facts giving rise to PI first arose. Alternatively, if there was continuity of pursuit, PI is a Class C misdemeanor and the jury charged limited the "hot pursuit" exception to felonies.

Judge Keel concurred without comment.

Presiding Judge Keller, joined by Judges Yeary and Slaughter, concurred and dissented. She agreed that the evidence was insufficient to prove tampering. She would have acquitted Ratliff of official oppression, as well. Because Art. 14.05 does not specify what constitutes exigent circumstances and there was no binding law defining "hot pursuit," Ratliff could not know it did not apply. Additionally, whether "hot pursuit" would justify entry into a home for a misdemeanor was unsettled at the time, as acknowledged when the Supreme Court recently settled it in *Lange v. California*, 141 S. Ct. 2011 (June 23, 2021). It does not matter that the jury charge limited "hot pursuit" to felonies because the sufficiency of the evidence is governed by the hypothetically correct charge. Again, without settled guidance, Ratliff could not know his conduct was unlawful.

Although the entire CCA agrees with the outcome on the tampering charge, the analysis presents some analytical curiosities. First, it is unclear why the majority addressed the factual averments in the tampering indictment as though they were statutory manners and means. The State alleged omission and misrepresentation to give notice of how what was contained in the report Ratliff signed off on, although true in the abstract, was false. Having held that the "falsity" inquiry applies to what is in the report rather than what is left out, there was no need to address the "omission/duty" issue. It is enough that the State cannot enlarge the definition of "false" through its factual averments, which would not be part of the hypothetically correct jury charge. *See Johnson v. State*, 364 S.W.3d 292, 298, 299 n.47 (Tex. Crim. App. 2012) (non-statutory allegations that do affect notice or the unit of prosecution are immaterial).

Second, it is also unclear why the majority focused on the lack of evidence of Ratliff's intent to deceive. That is not an element of the offense of conviction. [The intent to defraud or harm turns what is normally a Class A into a state-jail felony, TEX. PENAL CODE § 37.10(c)(1), but the jury rejected that.] Moreover, there was

evidence to support such an intent. Although its analysis of the official oppression charges does not address Ratliff's knowledge, his conviction cannot be affirmed without it. If, as the court implicitly holds, Ratliff knew the warrantless entry and arrest violated Nutt's rights, that is good reason to leave the details of the arrest out of the report. The fact that he did not also interfere with the investigation by withholding the video does not prove otherwise.

If the majority's rationales are reordered slightly and integrated, however, a different picture emerges. In most cases—a few statutory exceptions are listed in the opinion—there is no reason to require that an offense report include anything other than the facts that gave the officer probable cause to believe that offense was committed. If those facts are true, there is no "falsity." If there are omissions that render those facts misleading, that might be enough to prove the offense report is "false" in this context as in false testimony claims. *See Ex Parte Robbins*, 360 S.W.3d 446, 462 (Tex. Crim. App. 2011) ("Generally, when we have held that testimony is false because it creates a false impression, the witness omitted or glossed over pertinent facts."). Time will tell.

As for the official oppression convictions, a larger problem unmentioned by anyone is why the jury was asked to decide the lawfulness of anything. Whether a given set of facts presents exigent circumstances is a question of law. The jury, while "the exclusive judge of the facts," "is bound to receive the law from the court and be governed thereby." TEX. CODE CRIM. PROC. art. 36.13. If legal determinations were within the jury's province, they would be ill-equipped to make them. As the CCA said in the context of an Art. 38.23 question on reasonable suspicion,

> The jury, however, is not an expert on legal terms of art or the vagaries of the Fourth Amendment. It cannot be expected to decide whether the totality of certain facts do or do not constitute "reasonable suspicion" under the law. That would require a lengthy course on Fourth Amendment law. Even many experienced lawyers and judges disagree on what constitutes "reasonable suspicion" or "probable cause" in a given situation. It is the trial judge who decides what quality and quantum of facts are necessary to establish "reasonable suspicion."

Madden v. State, 242 S.W.3d 504, 511 (Tex. Crim. App. 2007). The same is true here. The trial court did its best to provide a bite-size summary of exigent circumstances, but that is all it could be. Treatises have been written about each of the four types set out in the charge. If it were possible to pin down the state of the law at the time of the alleged offense, the trial court should have done so and instructed the jury to determine whether Ratliff was aware of it. Doing so would not have impinged on the jury's prerogative because Ratliff's knowledge of the law in effect at the time would still be a—the—question of fact for it to decide. So, although Presiding Judge Keller was correct that the hypothetically correct charge would not have limited the jury the way it did, they should not have considered lawfulness at all. And, consonant with her view of that offense, had the trial court been asked to instruct the jury on the lawfulness of Ratliff's conduct, it might have concluded that there was no clear answer. This would have led to a directed verdict.