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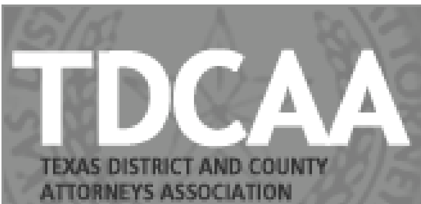

Weekly Case Summaries - October 10, 2008

October 10, 2008

Texas Court of Criminal Appeals
Texas Courts of Appeals

Texas Court of Criminal Appeals

Landrian v. State

read opinion

10/8/2008 : Cite No. PD-1561-07

Issue: Did the trial court err when it submitted a jury charge that required the jury unanimously to agree that the defendant either intentionally and knowingly caused bodily injury while using a deadly weapon or recklessly caused serious bodily injury?

Holding: No. The essence of the offense is "causing bodily injury." The jury did not have to be unanimous on the aggravating factors of whether it was a serious bodily injury or whether the appellant used a deadly weapon.

Concurring: Judge Price concurred and was joined by Judge Meyers. He wrote that it seemed doubtful that the gravamen of aggravated assault is merely bodily injury. Pointing out that the Legislature has defined aggravated assault and simple assault in different statutory provisions, he cautioned against concluding that the gravamen of aggravated assault is either serious bodily injury, or else bodily injury plus the use or exhibition of a deadly weapon. If the elements are pled alternatively in the indictment, the jury must be instructed that it must unanimously find one or the other (or both) before it may convict. Judge Womack, with Presiding Judge Keller and Judge Keasler joining,

pointed out in his concurrence that there was no possibility of a non-unanimous verdict for the offense as it was alleged. Citing TPC §1.07 (a)(17)(B), he wrote that if half of the jury believed the defendant caused serious bodily injury, then they also necessarily believed that a deadly weapon was used.

read concurring opinion

Commentary: This is the next in what has become a long line in the court's jurisprudence on jury unanimity. Perhaps better than any other case, this decision reveals why the jury should not have to be unanimous as to the "manner and means" or "alternate theories" of committing the same offense. Some witnesses in this case testified that the defendant threw a bottle at the victim for no apparent reason (perhaps believing that the victim was part of a fight in which the defendant and another had been involved, or perhaps intending to hit someone else with the bottle). In other words, the defendant intentionally and knowingly caused bodily injury to the victim with a bottle that was used in a deadly manner. Other witnesses testified that the defendant hit his intended victim in the head with the bottle and that some of the glass from the broken bottle must have struck the actual victim in the eye. In other words, the defendant recklessly caused serious bodily injury to the victim with the bottle that put out the victim's eye. Frankly, both versions of the facts could not be true. But the defendant should not be allowed to escape prison because the jurors could not agree as to the manner in which the defendant committed the aggravated assault of the victim.

Texas Courts of Appeals

Roberts v. State - 4th COA

read opinion

10/1/2008 : Cite No. 04-08-00393-CR : Notice of Appeal

Issue: Mary Roberts appealed the denial of her motion for rehearing. The appellant claimed that her Statement of Inability to Afford Counsel served as notice of her intent to file an appeal.

Holding: The 4th Court of Appeals withdrew its opinion of August 27, 2008, and substituted this opinion and judgment to address Roberts's arguments. Roberts filed a Statement of Inability to Afford Counsel; however the word appeal was never mentioned in the document. The court still held that Roberts's statement was not a sufficient notice of appeal. The document must in some manner allude to the desire to appeal. Roberts' document did not. For a more complete discussion of *Roberts v. State*, please see, **"There's something about Mary..."** as published in the May-June 2008 issue of *The Texas Prosecutor*.

Commentary: One wonders how a licensed attorney could make such a mistake as not filing a proper notice of appeal. But--after reading the story--it starts to make a little more sense.

Roberts v. State - 4th COA

read opinion

10/8/2008 : Cite No. 04-07-00616-CR : Legal and Factual Insufficiency

Issue: Ted Roberts presented five issues on appeal. He contended that the trial court erred in denying his motion for new trial, that **TPC §31.03** was unconstitutionally vague and overbroad as applied, that evidence supported his defense of mistake of law, that the trial court erred in failing to quash the indictments, and that evidence was legally and factually insufficient to support his conviction.

Holding: After reviewing all of the appellant's issues on appeal, the 4th Court of Appeals affirmed the trial court. For a more complete discussion of *Roberts v. State*, please see **"There's something about Mary..."** as published in the May-June 2008 issue of *The Texas Prosecutor*.

Commentary: Except maybe for the attack upon the constitutionality of Section 31.03 (which the court of appeals handles in an excellent manner), I am not sure that you will ever come across the legal issues raised in this appeal. But this opinion and the accompanying story will help you realize how this particular class of criminal thinks. If you ever have to deal with an individual accused like this, you might just know how to proceed.

McClure v. State - 6th COA

read opinion

10/3/2008 : Cite No. 06-08-00024-CR : Extraneous Offenses

Issue: Did the trial court err by admitting testimony of the defendant's confession to extraneous offenses during the punishment phase?

Holding: No. The defendant's custodial confession to an officer about dealing drugs was admissible during the punishment phase of trial. CCP art. 37.07 does not require the State to provide, nor the trial court to first hear, additional corroborating evidence before the extrajudicial confession to these extraneous offenses.

Commentary: This decision follows the holdings of other similar cases, such as the lack of any need to corroborate an accomplice to an extraneous offense. The opinion also makes very clear that proof beyond a reasonable doubt for an extraneous offense is a very different concept from proof beyond a reasonable doubt for an actual conviction.

Fernandez v. State - 6th COA

read opinion

10/3/2008 : Cite No. 06-08-00007-CR : *In pari materia*

Issue: Under the doctrine of *in pari materia*, did the trial court violate the defendant's due process rights when it convicted her of a felony when the facts supporting her conviction were more appropriately prosecuted under the misdemeanor statute?

Holding: No. This rule of statutory construction is not applied to statutes that cover different situations and were apparently not intended to be considered together. Here, the two statutes cover different situations. TPC §22.041(b) could cover an unlimited set of facts where it is shown that a child has been abandoned and mandates that the abandonment be under circumstances in which no reasonable, similarly situated adult would leave a child. In contrast, TPC §22.10 applies only to leaving a child in a vehicle and may be violated in a few short minutes. Additionally, §22.041(b) requires that the child be exposed to an unreasonable risk of harm, but §22.10 requires no finding of harm or danger to the child.

Commentary: I have rarely, if ever, seen a defendant's in *pari materia* argument prevail on appeal. But this opinion is as good as any in presenting a faithful treatment of the doctrine. And this gem of a defendant did a lot more than just leave a child in a vehicle. What was she doing while she left this baby in her locked vehicle on a hot day? Shoplifting. She should consider her probated sentence to be a gift.

Gonzales v. State - 7th COA

read opinion

10/3/2008 : Cite No. 07-07-0302-CR : Aggravating Factors

Issue: Is the State allowed to prosecute for each victim kidnapped and not for the number of aggravating factors that might be present?

Holding: Yes. The court determined that aggravated kidnapping was a result-oriented offense and concluded that the allowable unit of prosecution for the offense of aggravated kidnapping related to the abduction of a victim. The State alleged only one victim and sought only a single conviction, with a number of aggravating factors serving only as a different manner and means of committing the crime. The trial court did not err in instructing the jury that it could consider all of the aggravating factors alleged by the State and return a general verdict of guilty for the single criminal count of aggravated kidnapping.

Commentary:	This decision is undeniably correct, but the differing aggravating factors are not set out. And the analysis is not as clear as in the leading decisions from the Court of Criminal Appeals on the issue of jury unanimity. You should look instead to those decisions for the best treatment as to how to look at these cases.

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