The Texas Prosecutor

The official journal of the Texas District and County Attorneys Association

May–June 2022 • Volume 52, Number 3

"It shall be the primary duty of all prosecuting attorneys ... not to convict, but to see that justice is done."
Art. 2.01, Texas Code of Criminal Procedure

Capital murder in the death of a 5-week-old fetus

"I never thought anyone would believe me." As Amanda Luna cried and shook in the back of the courtroom following her ex-husband's conviction for capital murder and aggravated assault, she just kept repeating that sentence: "I never thought anyone would believe me."

By Elizabeth Howard (left) & Kortney Williams
Senior Assistant District Attorneys in Ector County

But they did believe her. We believed her. As the two of us sat next to Amanda, we thought about all the months of preparation that led us to this point and the importance of the experts that allowed us to obtain justice in this case.

Background

Amanda and Joel Luna were married for about 18 years. They met as teenagers in East Texas, and from the beginning their relationship was volatile. Starting when Amanda was pregnant with their first child, Joel was physically and emotionally abusive and often had affairs with other women. During a fight, Joel's go-to move was to strangle Amanda to get her to be quiet. Amanda, like many domestic violence victims, learned to walk on eggshells around her husband and to try to keep him happy. In 2016, after moving from East Texas to South Texas, the family moved to Odessa. At first, things were relatively peaceful, but in January 2018 everything changed.

Amanda had lost contact with her family, as Joel cut her off from them to exert control over her. However, that January Amanda decided to take her children back to East Texas to visit her sister for a few weeks. What should have been a joyous family reunion instead revealed betrayal, as Amanda's sister proudly told Amanda that she had been hav-

Continued on page 24

Mandatory *Brady* training

We have been very fortunate that through support from the Foundation and the Criminal Justice Section of the State Bar, TDCAA has been able to produce excellent online *Brady* training.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

As you know, it is mandatory that a prosecutor take a *Brady* course approved by the Court of Criminal Appeals within 180 days of taking on the job, and then take a refresher every four years. 2022 is the year that many people will need that refresher, so **Gregg Cox**, TDCAA's Assistant Training Director, is working on our next version of that training. It should be available toward the end of the summer, so stay tuned! ❇

Recent gifts to the Foundation*

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* gifts received between December 4, 2021, and April 1, 2022

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Austin, TX 78701 • www.tdcaa.com

About *The Texas Prosecutor*

Published bimonthly by TDCAA through legislative appropriation to the Texas Court of Criminal Appeals. Subscriptions are free to Texas prosecutors, staff, and TDCAA members.

Table of Contents

Let us be more than just prosecutors for the moment

A recent Reuters article sounded the alarm about the state of our profession:

By Jack Roady
TDCAA Board President & Criminal District Attorney in Galveston County

Prosecutor offices across the country are facing a crippling shortage of lawyers due to dramatic declines in hiring and retention.[1] The article cites crushing caseloads, lack of trial opportunities (only made worse by the COVID pandemic), low salaries compared to private practice, burnout, and declining public opinion of the profession as all contributing to the problem.

I'm certain the news comes as no surprise to many of us, as we are daily grappling with the fallout of these conditions. In fact, TDCAA's Long Range Planning Committee has identified recruitment and retention as one of the biggest challenges we face. Prosecutor offices are fighting battles on multiple fronts.

A current case in point: Among all the urgent matters competing for our attention has been news that a proposal is hurtling our way that could permanently alter our profession—and for the worse. Since September 2021, the State Bar's Committee on Disciplinary Rules and Referenda has been promoting an amendment to Rule 3.09. The amendment would dramatically increase ethical obligations for prosecutors, and at least as originally proposed, create a practically impossible requirement that prosecutors report, investigate, and litigate potentially exculpatory matters for the lifetime of their careers, even after they are no longer working as prosecutors. This change would not only further discourage new lawyers from entering our profession, but also give veteran prosecutors serious cause to consider leaving it altogether.

Shannon Edmonds's regular Interim Update emails do a great job of narrating the evolution of this issue, so I commend them to your reading for further detail.[2] The details of the Rule 3.09 proposal are not the point of this column. Rather, as I looked back on months of discussions among prosecutors to coordinate a response to the proposed rule change, I was struck by just how much time, research, and mental and emotional energy they poured into this issue—all for the sake of the good of our profession.

A committee of prosecutors formed to respond to the State Bar's proposal. The committee drafted multiple letters to the State Bar and engaged in numerous discussions internally about how best to confront what many believe is the latest attack on our profession. When the State Bar recently held a virtual hearing on the proposed rule change, a number of elected and assistant prosecutors testified. They presented a collectively cogent argument as to why the proposed changes were detrimental, duplicative, and downright impossible to implement in the real world. None of this testimony was off-the-cuff—it was apparent that the speakers had put much thought and preparation into this meeting beforehand.

Those serving on the committee and those who prepared and testified at the hearing had plenty of other demands weighing on them. Like prosecutors all over the country, they are shouldering overwhelming caseloads, made even more burdensome by COVID court closures. These same prosecutors also have obligations to the offices and personnel they lead, as well as to the demands of the communities they serve—and not to mention their own families. Yet they took precious time—a lot of time—away from these things to focus on a task that for many of us would have been just another irrelevant distraction.

Some of the men and women working so hard on this issue are nearing the end of their careers. Why then, with the finish line in not-too-distant view, would they invest so heavily in something that likely won't be their professional concern much longer?

Time and again, I see people in our profession set aside their personal needs and demands because they are committed to "guarding the trust." A trust is, of course, something of value given into the care of another, to be tended and stewarded for the benefit of someone else. Being a good trustee means we labor not just for the present but for the long term as well. Hyacinthe Loyson, a 19th Century French theologian, offered the following in a sermon about a person's call to be faithful in our work, though the immediate benefit of our labor may not be apparent: "These trees which he plants, and under whose shade he shall never sit—he loves them for themselves, and for the sake of his children and his children's children, who are to sit beneath the shadow of their spreading boughs."[3]

While managing our day-to-day demands, we also have to keep an eye focused on the future and keep a hand ready to tend it well. We must effectively meet the tyranny of the urgent, but as public servants our responsibility goes far beyond that. The people in whose name we serve have entrusted us with an incredible amount of authority so that we might preserve the peace and dignity of the State. The strength of the justice system turns on public trust, and public trust turns on just how well we exercise that authority, now and in the years to come. We must carefully guard what has been committed to our trust—that is, this profession which alone bears the responsibility to see that justice is done. We have a duty to preserve, protect, and improve all that it means to be a prosecutor, for the sake of those who have gone before us and for those who will come after us.

So, let us be more than just prosecutors for the moment. Let's keep planting and tending trees for the sake of those who will sit beneath the shadow of their spreading boughs, even long after we are gone. Though at times it may seem an overwhelming and impossible task, the stakes are just too high to ignore. Our profession is worth it. ❇

Endnotes

[1] www.reuters.com/legal/transactional/prosecutors-wanted-district-attorneys-struggle-recruit-retain-lawyers-2022-04-12.

[2] They are archived at www.tdcaa.com/legislative.

[3] 1870, The Family and the Church: Advent Conferences of Notre-Dame, Paris, 1866-7, 1868-9, Reverend Father Hyacinthe (Late Superior of the Barefoot Carmelites of Paris), Edited by Leonard Woolsey Bacon, Lecture Fourth, December 23, 1866, Fatherhood, Start Page 106, Quote Page 113, G. P. Putnam & Son, New York.

An update on Rule 3.09

On April 6, the State Bar Committee on Disciplinary Rules and Referenda (CDRR) held a public hearing over Zoom on proposed amendments to Disciplinary Rule of Professional Conduct 3.09, Special Responsibilities of a Prosecutor.

By Rob Kepple
TDCAA Executive Director in Austin

As I noted in the last edition of this journal, many prosecutors have questioned the need for such a rule, given that the legislature has chosen to regulate this area of prosecutor conduct with the Michael Morton Act and amendments to Texas Government Code §81.072, which provides that a prosecutor or former prosecutor may face a grievance for a *Brady* violation that causes a wrongful conviction. Nonetheless, the CDRR published proposed amendments in the March edition of the *Texas Bar Journal* and set a hearing.

A number of prosecutors testified at the hearing, including: **Mike Jimerson**, County and District Attorney in Rusk County; **Jack Roady**, Criminal District Attorney in Galveston County and TDCAA Board President; **C. Scott Brumley**, County Attorney in Potter County; **Brian Middleton**, District Attorney in Fort Bend County; **Bobby Bland**, former District Attorney in Ector County, **Kim Ogg**, District Attorney in Harris County; **Lee Hon**, Criminal District Attorney in Polk County; **Philip Mack Furlow**, District Attorney in Dawson, Gaines, Garza, and Lynn Counties; **Doug Norman**, Assistant District Attorney in Nueces County; **Erik Kalenak**, Assistant District Attorney in Midland County; and **Tillman Roots**, Assistant Criminal District Attorney in Comal County.

Generally, prosecutors testified that a rule requiring disclosure of newly discovered credible and material evidence of a wrongful conviction is OK, as long as the good faith exception that appears in the model rule comments is moved into the body of the rule. On the other hand, the proposed duties to investigate and remedy are not workable. In addition, prosecutors were strongly opposed to the "cradle to grave" provision—once you have been a prosecutor, you will for the rest of your bar card's life have a duty to enforce all ethical, constitutional, and statutory provisions relating to exculpatory and mitigating evidence. That breathtakingly broad rule is not replicated in any state.

In addition to Texas district and county attorneys, all four United States Attorneys for Texas penned a letter in opposition to the changes. **Brit Featherston**, the U.S. Attorney for the Eastern District of Texas, testified to express concerns. **Judge Barbara Hervey** of the Court of Criminal Appeals and representatives from the Office of the Attorney General also raised issues concerning investigation and remedy and the cradle-to-grave provisions. Finally, city attorneys echoed those concerns and asked that they be exempted from the new provisions entirely. You can see the comments and letters submitted to the committee and watch the entire proceeding at www.texasbar.com/AM/Template.cfm?Section=cdrr&Template=/cdrr/vendor/participate.cfm.

As part of the work on this issue, TDCAA Research Attorney **Stephanie Huser** put together some very useful documents. The first is a comprehensive spreadsheet of the other states that have adopted some form of the American Bar Association's Model Rule 3.8. (Find it at our website.) Second, to further explore the issue of exonerations and the national database that was discussed by the CDRR, she created a one-page infographic on exonerations, which is on the opposite page. It is interesting to visualize the causes of wrongful convictions and subsequent exonerations. Since the Michael Morton Act took

TEXAS WRONGFUL CONVICTIONS

This infographic represents an overall picture of the causes of wrongful convictions in Texas.*
It also examines the issue in the post-Michael Morton Act era.

TOTAL EXONERATIONS SINCE 1989

SINCE 1989

2,984

Total Exonerations in UNITED STATES

SINCE 1989

395

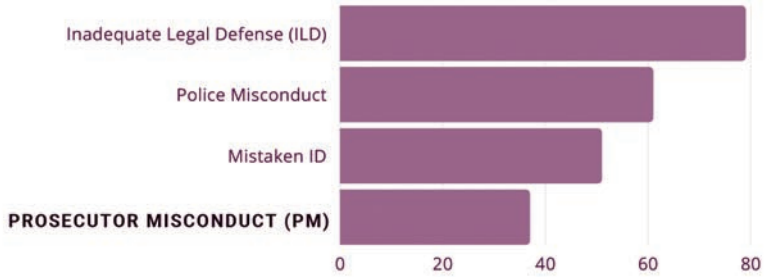
Total Exonerations in TEXAS

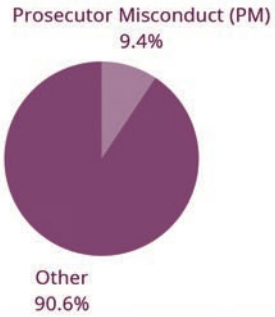
SINCE 1989

37

TEXAS Attributed to "Prosecutor Misconduct" (PM)

How does PM stack up against other factors?





CHANGE IN TEXAS EXONERATIONS SINCE 2014

2014 represents the year the Michael Morton Act was adopted and set Texas apart by expanding discovery rights.

FOR ALL CONVICTIONS

Total Exonerations: 395
Exonerations with PM as a Contributing Factor: 37
Exonerations with ILD as a Contributing Factor: 79

9.4% PM ATTRIBUTED TO CONVICTION
As opposed to 20% ILD

FOR CONVICTIONS: 2014-2021

Total Exonerations: 114
Exonerations with PM as a Contributing Factor: 1**
Exonerations with ILD as a Contributing Factor: 20

0.8% PM ATTRIBUTED TO CONVICTION
As opposed to 17.5% ILD

* All data came from the National Registry for Exonerations and can be found at: https://www.law.umich.edu/special/exoneration/Pages/about.aspx
** Courtney Hayden case, more information at: https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5270

effect in 2014, exonerations based on *Brady* violations have been far outpaced by exonerations because of an ineffective defense.

TDCAA awards

Each year at the Annual Criminal & Civil Law Conference, we recognize those in the profession who have stood out. As part of the work of the 2022 Long Range Planning (LRP) Committee led by Bill Helwig, Criminal District Attorney in Yoakum County, the committee reviewed TDCAA's awards and how winners are chosen. The new long-range plan has not been adopted quite yet, but one change we anticipate is to the nomination processes for the State Bar Criminal Justice Section Prosecutor of the Year and TDCAA's Lone Star Awards. In the past, nominations were generated by the TDCAA Nominations Committee. That has worked pretty well, but it occurred to the LRP Committee that we may be missing some great nominations from the general membership. There certainly is no downside to getting more nominations for the Nominations Committee to review. I am sure the LRP Committee will develop a more formalized nomination process, but in the meantime here are the criteria for these two awards:

It occurred to the LRP Committee that we may be missing some great nominations from the general membership. There certainly is no downside to getting more nominations for the Nominations Committee to review.

The State Bar Criminal Justice Section Prosecutor of the Year Award is a broad award for outstanding service to the criminal justice system. This award should be given to a prosecutor who improves the quality of justice through leadership and/or efforts to shape public policy.

This award, although designated by the State Bar as a "practitioner of the year award," contemplates that a prosecutor may also be recognized for a body of work or activities that may span more than a single year. It is reserved for a person who has demonstrated a devotion to the profession and who aspires to be a true example of a "minister of justice." Although this is an award given by the Criminal Justice Section, by tradition TDCAA has been asked to forward a nomination directly to the Section.

The terms should be read expansively to include all efforts to improve the criminal jurisprudence of the state, whether it be through developing novel theories of prosecution through trial and appellate advocacy, creating and implementing innovative investigation and prosecution techniques, affecting positive change at the Texas Legislature, making significant contributions to the profession of prosecution through training and support of other prosecutors, or spearheading new programs and services in the community at large.

The Lone Star Award is designed to recognize significant efforts of a prosecutor, including a civil practitioner, who demonstrates excellence through trial advocacy, appellate advocacy, or other government representation that a person in a district or county attorney office may perform. This award is targeted to those whose work may otherwise go largely unnoticed around the state, but who advances justice in the community. It should honor a prosecutor who has distinguished him or herself in the last year.

If you have a great nomination, feel free to let me know so I can forward it to the Nominations Committee!

Mental health book gains attention

Recently, a Harris County law librarian wrote a short review of a TDCAA publication, *Mental Health Law for Prosecutors* (written by four Harris County ADAs), on the library's blog (www.harriscountylawlibrary.org/ex-libris-juris/2021/6/9/latest-amp-greatest-mental-health-law-for-prosecutors). The law library's post was picked up by the American Association of Law Libraries in a daily email digest sent to law librarians across the country. Kudos to authors **Bradford Crockard, Jeff Matovich, Erica Robinson Winsor**, and **Gilbert Sawtelle** for the well-deserved recognition! TDCAA used grant funds from the Court of Criminal Appeals to mail copies of the book to all prosecutor offices in summer 2020. Additional copies are available for purchase on the TDCAA website at www.tdcaa.com/product/mental-health-law-for-prosecutors-2020.

Recruitment and retention

As your offices ramp up from the COVID-19 shutdowns, we have heard from quite a few of you who have job openings. It has been slow going filling those positions. The TDCAA Long Range Planning Committee has been looking at the issue, and I am sure that the TDCAA Diversity, Recruitment, & Retention Committee will play a big role in future efforts. As a starting point, check out the work done by TDCAA Assistant Training Director **Gregg Cox** on page 10 compil-

ing the contact information for Texas law school career offices. My experience with these folks has been that they are enthusiastic when prosecutors reach out, and they have been more than happy to introduce you to students who may want to be prosecutors.

One hiring method that has worked in a couple offices: hiring a qualified graduate right out of law school as an intern on a student bar card until the graduate passes the bar. Harris County has historically done that with what was called the "pre-commit" program. After all, our profession may be at a competitive disadvantage by not hiring until the potential assistant gets bar results.

Congratulations, Steve Lupton

Congratulations to **Steve Lupton**, an assistant DA in the 452nd Judicial District Attorney's Office, on his retirement after 40 years of practicing law, including 28 as a prosecutor. Steve served as an ADA in a couple offices before being elected district attorney in San Angelo for eight years.

Steve offers some great advice for retiring elected prosecutors: Do what he did and become an assistant county or district attorney. I think Steve tried private practice for a short time but missed the public service aspect of a prosecutor job—without some of the administrative headaches that come with the corner office!

Take care, Steve. ❇

Deadline for the Investigator Section scholarship is July 31

The Investigator section of TDCAA offers two $1,000 scholarships each year to dependents of TDCAA members.

The first is awarded at the February Investigator Conference and is open only to dependents of members of the Investigator Section. The second is awarded at the Annual Conference in September. This scholarship is open to all dependents of TDCAA members.

The eligibility requirements are simple: Students must be under legal guardianship of a current TDCAA member, less that 25 years of age, and currently enrolled in an accredited college, university, or vocational-technical school in the United States as of the application deadline. The student also must have a cumulative high school or college grade point average of at least 3.0 or equivalent. The student must also write an essay of no more than two pages in response to an essay prompt.

The scholarship committee selects a recipient about a month before each conference, and each are encouraged to appear or make a video to be presented at each conference; however, it is not a prerequisite. The scholarship application is posted on the TDCAA website (search for "scholarship"), or you may contact any TDCAA Investigator Section Board member, and we will be happy to provide an application. ❇

Help for filling vacant attorney positions

TDCAA's Long-Range Planning Committee met in Austin in March to talk about the next five years (and beyond) for the association.

By Gregg Cox
TDCAA Assistant Training Director in Austin

One thing that everyone had on their minds, no matter how big or small their offices are, was their difficulties in filling vacant attorney positions.

To help prosecutor offices match with potential employees, we have compiled the following information to share.

Many offices have vacancies that need to be filled now. Most Texas law schools go beyond just serving students to also provide career services to recent graduates and other alumni. The career services offices allow employers to post positions, at no cost, on their online job boards that students and alumni can search. Posting a position with the school may give you immediate access to an already licensed attorney who is searching for a job. In the school-specific information summarized below, we have included information about how to contact those career services offices and post positions.

With respect to traditional recruiting on campus, some people think that only large prosecutor offices have the resources to participate in on-campus interviews (OCIs). It may surprise you to learn that most law schools now support virtual interviews, which allow employers to meet and interview students and recent graduates without having to be physically present at the law school. Smaller offices may find that this option provides opportunities that didn't exist even a few years ago. Additionally, when you sign up to participate in a recruiting program as an employer, most schools provide a résumé collection service.

Below is general information about the timing of OCIs and recruiting periods for each of the Texas law schools, along with links to their websites. We have also included information on a couple of public interest career fairs. This article was written in April 2022, so check the law schools' webpages for any updates as the dates for OCIs and recruiting programs draw nearer (and in future years). Recruiting efforts for third-year students are mostly focused on the summer and fall, but registration to participate in most of those programs is already open or will open very soon. If you are interested in participating, you should act now.

University of Texas School of Law

On-campus interviews are held in the spring, summer, and fall. Interviews can be done virtually using the Flo Recruit platform. Registration for summer interviews (August 1–5) and fall interviews (October 3–7) may already be open. Employers should contact the school directly if interested in participating. Find more information at https://law.utexas.edu/career/employers and https://law.utexas.edu/career/interview-programs/interview-program-type/oci. Prosecutors may post current positions on UT's job board at https://law.utexas.edu/career/employers/job-posting-policy.

Texas Tech Law School

On-campus interviews for 2022 will be conducted August 10–19, September 14–23, and October 12–21. The school offers virtual interviews using a variety of platforms including Zoom, Teams, Skype, and Go-To-Meeting. Employer registration to participate in interviews is open now, and Tech will collect résumés and send them to employers who sign up. Information about signing up for interviews is at www.depts.ttu.edu/law/careers/employers/conduct-interviews.php. Prosecutors may post a current position on TTU's job board at www.depts.ttu.edu/law/careers/employers/post-a-job.php.

Baylor Law School

On-campus interviews for 3Ls and alumni will be August 18–19 and November 3–4. Virtual interviews are on August 17 and will be conducted using the Flo Recruit platform. Employers can register to participate at www.baylor.edu/law/careerdevelopment/index.php?id=933935. Prosecutors may post a current position on Baylor's job board by following the instructions at www.baylor.edu/law/careerdevelopment/index.php?id=933934.

Southern Methodist University's Dedman Law School

On-campus interviews are held August 1–12 with virtual interviews through Flo Recruit on August 4 and August 8–12. Employer registration is open now and closes July 5. The school will also do in-person interviews in Houston on August 5, and employer registration is open now. Fall interviews will be October 3–7, and employer registration is open now. More information is at www.smu.edu/Law/Career-Services/Employers/OnCampusRecruiting. Prosecutors may post a position on the SMU job board at www.smu.edu/Law/Career-Services/Employers/PostingJobsResumeCollection.

University of Houston Law Center

Houston has not updated its on-campus interview information for all of 2022. The first round of OCIs will happen August 1–5, and registration is open now. Two additional rounds of OCIs will take place later in 2022, and the dates are to be determined. More information is at www.law.uh.edu/career/employer/oncampus.asp. Prosecutors may post a position on their job board at www.law.uh.edu/career/employer/posting.asp.

Texas A&M Law School

The first session of OCIs will be August 1–12, and the deadline for an employer to register is June 26. The second session will be October 3–7, and the deadline to register is September 4. Information about how to register as an employer is at https://law.tamu.edu/current-students/employers/on-campus-interviews. Prosecutors may post a position on their job board at https://law.tamu.edu/current-students/employers/post-a-job-or-internship.

Saint Mary's School of Law

On-campus interviews are not a scheduled event at St. Mary's. Instead, the school has fall and spring recruitment programs where officials help connect students and employers for interviews. The fall recruitment program will be in August, September, and October. Information about how to participate in the recruitment program is at https://law.stmarytx.edu/career-strategy/for-employers. Information about posting on the job board is on the same page.

South Texas College of Law in Houston

South Texas also has fall and spring recruitment programs instead of scheduled on-campus interviews. Fall recruitment is in August and September. Information about how to participate as an employer is at www.stcl.edu/student-services/career-resources/career-resources-2/#employers. Prosecutors may post a position on their job board on that same page.

Thurgood Marshall School of Law at Texas Southern University

The career services website doesn't have a lot of information, but the link for employers is www.tsulaw.edu/career/employers.html.

University of North Texas Dallas College of Law

The office of career and professional development has information about recruitment and a Symplicity link for employer job postings at www.untdallas.edu/lawschool/students/ocpd.php.

Career fairs

If you can participate in only one on-campus interview event, consider the Public Service Career Fair hosted by the University of Texas School of Law. It is the largest such event in the state, and students from all Texas law schools are allowed to participate. It is held in February with virtual interviews through the Flo Recruit platform. Employer registration for next year should open in October. More information is at https://law.utexas.edu/career/interview-programs/public-service-career-fair.

You may also consider posting on the Equal Justice Works Career Fair website. This group caters specifically to public interest employers and will hold a career fair with virtual interviews later in 2022. Registration will open May 17, and information about how to participate is at www.equaljusticeworks.org/conference-and-career-fair/for-attendees/for-employers. ❇

If you can participate in only one on-campus interview event, consider the Public Service Career Fair hosted by the University of Texas School of Law. It is the largest such event in the state, and students from all Texas law schools are allowed to participate.

Introducing the Key Personnel–Victim Services Board

At 2021's Key Personnel & Victim Assistance Coordinator Conference, board elections were held for the South-Central (Regions 4 & 8) and East (Regions 5 & 6) Areas.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

Sara Bill with the County & District Attorney's Office in Aransas County was elected as the South-Central Area representative, and Teri Rose of the County Attorney's Office in Chambers County was elected as the East Area representative. Katie Etringer Quinney of the 81st District Attorney's Office was elected as Chair.

Recent appointments to the Board include Lori Zinn as the West Area (Regions 1 & 2) Representative; Casey Hendrix (Region 6) and Dana Bettger (Region 8) as the Designated VAC Representatives; and Meredith Gross (Region 6) as the Designated KP Representative.

The KP–VS Board assists in preparing and developing training and educational programs. Regional representatives serve as a point of contact for their region. Below I have included an introduction and photos of the 2022 Board.

Katie Etringer Quinney, Board Chair

Katie Etringer Quinney, Chair

I have been the VAC for the 81st since January 2017, when I left my profession of over 10 years in medical marketing to pursue my passion as a victim advocate. A member of my family was a victim of a crime in 2006 and upon completion of prosecution of that case, I felt the need to make a difference. I started by participating in victim impact panels; I am a founding Board Member for the Children's Alliance of South Texas, a Child Advocacy Center, since 2012, and I have testified before the Corrections Committee of the House of Representatives on behalf of my family and other victims whom I have served. Since coming to work for the DA's Office, I have helped numerous victims of felony crimes across the five counties of the district, including the victims of the tragic mass shooting in Sutherland Springs. I am proud to say that I have presented at several TDCAA events, sat on the KP–VS Board since November 2019, and currently serve as the Chair.

Ebonie Daniels, North Central Area (Region 3 & 7) Board Representative

This is my second year as a member of the KP–VS Board for Region 3 and 7. I have worked for Wichita County for almost two years. I was also a VAC in Washington State. Victim advocacy is near and dear to my heart. I have been able to apply my experience and knowledge in Wichita County to better serve victims and to partner with the community. I look forward to continuing serving on the TDCAA KP–VS board and assisting new and old VACs in any way I can.

Ebonie Daniels, North Central Area Board Rep

Casey Cave Hendrix, Designated VAC Representative from Region 6

I graduated from the University of North Texas with a master's degree in rehabilitation counseling. I am a nationally credentialed advocate and I have been designated to be a Comprehensive Victim Intervention Specialist. I am honored to work for a boss who cares deeply about helping victims, Collin County District Attorney Greg Willis, and I am currently assigned as a VAC in our Crimes Against Children Division. In the past I have assisted in all divisions within our office, including Felony Trial Team and our Domestic Violence Unit. I am looking forward to serving as the Designated VAC Representative for Region 6.

Casey Cave Hendrix, Region 6 VAC Rep

Dana Bettger, Designated VAC Representative from Region 8

I am a new TDCAA KP–VS Board member for Region 8. I have been a victim advocate for 22 years working with victims of crime. Throughout the years I have always felt that community networking, training, and sharing resources and knowledge with other agencies and professionals are a very important part of our profession. Not only does it benefit the victim and families we work with but also each other. I currently work at the Bell County District Attorney's Office and manage the Victim Services Section. I am very excited and want to say thank you for the opportunity to be able to serve as a board member for the KP–VS Board and I am looking forward to being able to learn from and share knowledge with each of you.

Dana Bettger, Region 8 VAC Rep

Adina Morris, Designated KP Representative from Region 7

Hello everyone, I am one of the designated KP representatives on the KP–VS Board. I have been employed with the Palo Pinto District Attorney's Office (Region 7) for 12 years, serving as the VAC and for the last five years as the VAC and Office Administrator. I previously served on the board in 2015–2016, and as the Chair on the TDCAA KP–VS Board for 2017. It is an honor to be a representative on the board again.

Adina Morris, Region 7 KP Rep

Teri Rose, East Area (Region 5 & 6) Representative

I am the newly elected KP–VS Board member for Regions 5 and 6. I have been working in the County Attorney's Office in Chambers County for eight years and currently serve as the executive assistant and VAC for our office. I moved into the position of VAC beginning in 2021 and have utilized my new position to expand the victims assistance resources throughout our office and county. I am truly grateful for the opportunity to serve on the board and excited to assist in planning future conferences.

Teri Rose, East Area Board Rep

Lori Zinn, West Area (Region 1 & 2) Representative

I am the newly elected KP–VS Board member for Regions 1 & 2. I have been working in the County & District Attorney's Office in Lamb County for seven years and have served as the VAC for our office for six years. Our previous VAC, Laney Dickey, continues to inspire me to excel and

Lori Zinn, West Area Board Rep

serve our victims well. Our office strives to empower victims and seek justice for them. I am truly grateful and excited to once again serve on the board and look forward to meeting many of you.

Meredith Gross, ACP, Region 6 KP Board Rep

Meredith Gross, ACP, Designated KP Representative from Region 6

I have the honor of serving as the designated KP Representative Board Member for Region 6. I have been with the Rockwall County Criminal District Attorney's Office for 15 years. In that time, I have held many positions in our office and am currently the Senior Administrative Coordinator, serving as paralegal and assistant to our District Attorney, First Assistant, and Civil Division Chief. Additionally, I supervise all staff, including the clerks, VACs, Discovery, and Trial Support Divisions. I hold advanced paralegal certifications in Trial Practice and Criminal Litigation, and I was recently inducted into the Texas Board of Legal Specialization for Criminal Law. I am grateful for the opportunity to serve on the TDCAA Board and excited to assist in planning training opportunities.

Cynthia Jahn, CLA, PVAC, Board Training Committee Liaison

Cynthia L. Jahn, CLA, PVAC, KP–VS Board Training Committee Liaison

I have been a member of the TDCAA KP–VS Board for several years and was fortunate enough to serve as the first president for the VAC Board when it was created in 2000. I currently represent the Board as the Training Committee Liaison and am honored to serve the TDCAA membership as a Board member and trainer. I have worked for this office for 31 years, serving under the administration of four different DAs. I am proud that over the years my office has continuously worked toward being victim-centered, striving to provide the best possible services to victims in our community. Our program has continued to grow over the years, and we currently have 57 people serving in our Victim Assistance Unit. I am excited to continue my work with TDCAA to train service providers and serve victims.

Sara A. Bill, South Central Area (Regions 4 & 8) Representative

Sara Bill, South Central Area Board Rep

I am the newly elected KP–VS Board member for Regions 4 & 8. I am also the victim assistance coordinator for Aransas County in Rockport. I have worked as a VAC and Director of Victim Services for 22 years serving Calhoun, Victoria, and Williamson Counties before joining Aransas County in September 2021. I developed victim service policies and procedures at each agency and am very proud of the advancements to ensure victims' rights are afforded. I am truly grateful for the opportunity to serve on the KP–VS Board and am excited to assist with planning future conferences.

Amber Dunn, immediate past Chair

Amber Dunn, immediate past Board Chair

I started working for the Denton County District Attorney's Office after completing an internship here in the Family Violence Division my last semester in college at the University of North Texas. I then worked my way up to the position I hold now. I am blessed to serve this office and have served it for over 21 years. I consider it an honor to be a Felony VAC for the last 13 years, and I hope to continue serving the victims of Denton County for many more years to come. I have been a member of the KP–VS Board for several years and in 2021, I was the elected Chair of the Board; this year I am in an ex officio position as the immediate past chair. I am also a member of the newly formed Denton County Sexual Assault Response Team (SART). I am looking forward to seeing how this team approach with SART will better help our victims of Denton County.

Required notification of scheduled court proceedings

Crime victims have a number of rights as set out in Texas Code of Criminal Procedure (CCP) Chapter 56A. Prosecutor offices are charged with affording crime victims their rights along with the requirement to provide several notifications as set out in Subchapter J (Required Notifications by Attorney Representing the State).

In this article, I will specifically cover CCP Art. 56A.452, the required duty a prosecutor's office has to crime victims regarding notification of any scheduled court proceedings, changes in the schedule, and the filing of a request for continuance of trial setting; I'll include a few tips from of our KP–VS Board members on how their offices comply with this statute.

I hear questions about the requirements all the time from VACs across the state: What if we cannot reach the victim by phone? What if the mailing address has changed? Our caseloads are huge, and the court dockets are forever changing, so how can we accomplish this task?

The answer is communication—the act of giving, receiving, and sharing information. Communication is a basic human need. During this difficult time in their lives, many crime victims are just waiting for communication from someone in the criminal justice system. Unfortunately, due to the mere nature of the system, by the time the prosecutors have received the case, it may have been quite a while since crime victims have heard from anyone about the case. Victim assistance coordinators' (VACs) communication with crime victims builds an important rapport. VACs' continued communication throughout the pending case will, we hope, assist victims with resources and services and lead to victim cooperation down the road at court time.

During the pending stages of the case, victim assistance coordinators contact crime victims to ask:

- What is the victim's current address and contact information?
- Is the victim willing to cooperate and testify?
- What does the victim want to happen with the case? VACs talk with victims about their wishes for case disposition but make no promises on an outcome of the case; and
- Does the crime victim request notification of future court settings and case information?

Once we have the answers to these four questions, VACs should then offer referrals and resource information and discuss the victim information packet that they will soon receive by mail. VACs should then mail the information packet to the victim to comply with CCP Art. 56A.451. Simply mailing a victim information packet to the last known address is not always an ideal practice. If VACs cannot reach a victim by phone, go ahead and mail a packet with a cover letter that includes the VAC's name, address, and phone number, and document any attempts to reach the victim by phone.

All information gathered during VACs' interactions with crime victims should be relayed with their prosecution team, whether it be by email, the office database, or a note for the case file. Check with your office to see what form of documentation the prosecution team suggests.

To meet notification requirements, many prosecutor offices have specific procedures in place to comply with CCP Art. 56A.452. TDCAA's Key Personnel–Victim Services Board members were gracious to share their offices' procedures and tips on how to comply with the statute.

During this difficult time in their lives, many crime victims are just waiting for communication from someone in the criminal justice system.

Lori Zinn in Lamb County

Working in a small office helps because prosecutors will usually inform me if they have made an offer in the case involving a victim. I work closely with both court coordinators to set hearings and plea dates. When I speak with victims where felony charges are filed, I inform them that we have a docket the second Thursday of the month and they are free to call the day after for any updates if they do not hear from me first.

Ebonie Daniels in Wichita County

Court administrators usually send the docket for each court the week before, and I go through that to see what is upcoming. After grand jury, I always contact the victims and I sign them up for VINElink and keep record of their PIN numbers. I also keep an Excel spreadsheet of cases that I need to maintain track of and follow up with the victims. The "tasks" function in Outlook is very helpful as well. I create a task if I need to follow up or complete something for the victim.

Casey Cave Hendrix in Collin County

When I speak with victims the first time, I give them a rundown of what they will see when they pull up the case online. I explain what announcements, appearances, and status hearings are; in

Collin County there might three or four of those hearings before prosecutors know if the case will be set for trial or not. I also inform victims that there will be periods of waiting, and that is normal. If they question anything they see on the docket or are asked to be at a hearing from someone other than our office, then I tell them to please reach out.

The biggest thing is transparency and explaining the "unknown" parts upfront—that allows the nervousness that surrounds hearings and court dates to ease a bit.

Dana Bettger in Bell County

In our office, the VACs have their own dockets in Excel with their cases on it that they keep track of. It has all the cases that require notification by law and the ones that victims want to be notified of. We have many cases that do not require notification, but victims want to be notified. This Excel document allows us to check our own docket and update it as needed. We also receive notices from the court that allow us to update our dockets daily. We sort our docket by date, and that way have the most recent cases that need notification on the top and can check a week or two ahead of time.

The biggest thing is transparency and explaining the "unknown" parts upfront–that allows the nervousness that surrounds hearings and court dates to ease a bit.

As each VAC receives a new case, we add them to our dockets. (I assign cases by DA number, not courts or prosecutors.) Same goes for when a defendant has been sentenced—we delete them off our docket. This has worked great for us and keeps cases current and updated.

Teri Rose in Chambers County

The system that works best for me is simply notes on the outside of the file. After docket call, those files are brought to me instead of filed away. I then contact the victims and inform them of the case's status, or I will sign them up for the victims' options class we have. I am currently the only VAC in our office so a simple system keeps everything organized.

Amber Dunn in Denton County

We notify our victims at many different stages throughout the process. We start by reaching out to sexual assault victims with a letter once we get the case and it is in our Intake Division where it is prepared to go before the grand jury. We then call the victim if it ends up being no-billed, or we send a victim packet for them to fill out and return to us if the case gets true-billed and the defendant is indicted. This packet also includes a Crime Victim's Compensation application.

At this point, prosecutors bring us cases as they start working on them to have us contact the victims to get their feelings on the cases. After they are contacted by phone, they might need a meeting where the victim, or victim's family in a death case, come in and meet us in person as we discuss the case in more detail.

Finally, the day comes where it is set either for a plea hearing or a jury trial, and we then contact the victim about that date. We VACs accompany the victim or their family to the courtroom. I personally keep track of things set on the dockets by writing it down in my calendar in pencil unless I know for sure that the victim or the victim's family is going to be here; then it is written in red. If the note is in pencil, I make one more call closer to the date to check in and find out if the victim or their family wants to be here and give a statement. We also let victims know that they can follow along on the internet to watch for the upcoming court settings and if they have any questions, they are always welcome to call. Our victims always have my contact information if they ever want to call or email me in between our normal notifications.

Adina Morris in Palo Pinto County

At the beginning of the month, I run a docket for the month, and at that point I check the cases scheduled to see who I need to contact. I can run these myself, but in your office you may have to request it.

Sara A. Bill in Aransas County

After cases are submitted to our office and entered into our system, they are given to me to make initial contact with victims by telephone. If I am unable to make contact, I send a letter asking them to contact me. The initial contact is to introduce myself, provide the victim a status of the case and possible outcomes, and gather their thoughts and views on the matter. At this time, I discuss the Victim Information Package, Victim Impact Statement, and Crime Victims' Compensation. I also inquire how they would like to receive the documents and future communications (via mail or email).

After a case has been indicted (felony) or a complaint has been filed (misdemeanor), the case is again given to me to notify victims. I will send out the Victim Information Package. This serves a dual purpose: Victims receive informa-

tion about their rights, the impact statement, and compensation, and my cover letter informs them of upcoming court hearings. I use this same process when cases are disposed.

My procedures for continuing to keep victim informed is to track the court dockets. I usually send hearing notices after the cases have been reset. Additionally, I encourage victims to call or email me for status updates. This helps me maintain contact with victims who require more frequent contact. Both work with paper and paperless practices.

Victim services consultations

As TDCAA's Victim Services Director, my primary responsibility is to assist elected prosecutors, VACs, and other prosecutor staff in providing support services for crime victims in their jurisdictions. I am available to provide training and technical assistance via phone, by email, in person, or by Zoom. I can tailor individual training and group trainings specifically for your needs. The training and assistance are free of charge. Are you a new VAC? This training would be perfect for you!

To schedule a free consultation, please email me at Jalayne.Robinson @tdcaa.com. Many offices across Texas are taking advantage of this free victim services training—here are some photos from recent training sessions. ❇

TOP PHOTO: In the County Attorney's Office in Karnes County (left to right): Molly Groesbeck, Assistant County Attorney; Jalayne Robinson, TDCAA Director of Victim Services; Jennifer Dillingham, County Attorney; and Bonnie Ramirez, Victim Assistance Coordinator. SECOND PHOTO FROM TOP: In the Criminal District Attorney's Office in Jackson County (left to right): Diane Merritt, Victim Assistance Coordinator, and Jalayne Robinson, TDCAA Director of Victim Services. THIRD PHOTO: In the District Attorney's Office in Angelina County (left to right): Donna Krise, Victim Assistance Coordinator, and Jalayne Robinson, TDCAA Director of Victim Services. ABOVE: In the Criminal District Attorney's Office in Bexar County (left to right): Jalayne Robinson, TDCAA Director of Victim Services; Amanda Vasquez, Victim Advocate; James R. Lloyd II, Victim Advocate; Olivia Cardenas, Crime Victim Liaison; Ashley Munguia, Victim Advocate; Breanna Buentello, Crime Victim Liaison; Ann-Marie Emmett, Crime Victim Liaison; Griselda Palacios, Crime Victim Liaison; Cristina Perron, Crime Victim Liaison; Romelia Esquivel, Victim Advocate; Destiny Gonzalez, Victim Advocate; Jordan Ramos, Crime Victim Liaison; Cristina Lopez, Crime Victim Liaison; Alex Ornelas, Victim Advocate; Cyndi Jahn, Director of Victim Services; and Meli Powers, Chief of Family Violence Division.

A DWI trial? I think I remember how to do that

Well, we are finally selecting misdemeanor jury panels and working through the really serious felony offenses where the defendant is in jail.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

We're back in the courtroom, and DWI trials are back on!

The title of this column may sound very familiar. All of us are a little rusty at picking juries and trying cases, and some of us are new enough in our jobs that we don't have a lot of trial experience under our belts yet. So, for both new prosecutors and the old dogs remembering old tricks, I want to tell everyone about some DWI trial help coming your way.

Prosecuting DWI course

First, TDCAA will present a new course called Prosecuting DWI in five cities this summer:

- June 8 in Rockwall,
- June 10 in New Braunfels and Tyler, and
- June 17 in Richmond and Lubbock.

The training starts with a lesson on finding the trial's theme, motivation, and sincerity. Then it moves on to the very special issues in jury selection for the impaired driving case. We will then explore defending SFSTs and at the same time using them offensively for a change. Finally, we will discuss the most common suppression issues in DWI cases.

Prosecuting DWI is designed to follow up TDCAA's Prosecutor Trial Skills Course (PTSC), which is geared toward prosecutors with less than 18 months of experience. Prosecuting DWI will go deeper than PTSC, which covers every part of the job and every kind of case. If you are new to the profession and have not yet attended our Prosecutor Trial Skills Course, you should still attend Prosecuting DWI—my guess is that trying DWIs is probably on your plate, and you'll need the information we present. I would also recommend it to experienced and even very experienced prosecutors. DWI cases and impaired driving cases always pop up, and this short course will be the perfect refresher. In addition, the format of this class is very discussion-oriented, and we could use your experience.

Other reasons to attend: The course is free. It will be available in most areas of the state. Attendees will receive free books. You need to be there! Registration is already open at www.tdcaa.com/training.

Register quickly, too—space in each city is limited, so when we run out of seats, registration will close.

Helpful publications

Thanks to our DWI Resource Prosecutor Grant through the Texas Department of Transportation (TxDOT), you have recently received a few books in the mail. Late last year we mailed out Diane Beckham's excellent update of *Traffic Stops*. It is a simple guide to suppression issues arising from a traffic stop, which covers almost all DWIs. It is designed for both prosecutors and officers, so if you know an inexperienced officer who is about to testify in one of your cases, lend this book to him or her. If you happen to have an extra copy from our PTSC course or a regional DWI school, just go ahead and give the officer the book.

In the last couple months, every prosecutor office received two small-format books by John

Kwasnoski, longtime friend of TDCAA and Professor Emeritus of Forensic Physics at Western New England University. They are called *Preparing Your Crash Case for Trial* and *Courtroom Success*. They supplement Chapter Two of TDCAA's *Intoxication Manslaughter* book, and they too are made for prosecutors and officers. Most Texas prosecutors use well-trained officers as crash reconstruction experts, so we wanted to make sure these excellent resources are available for prosecutors preparing witnesses for this most difficult testimony. I once heard a speaker at a national prosecutor training declare, "DNA is the single most difficult thing to present to a jury." I silently scoffed and immediately muttered to the person next to me, "Guess he never presented crash reconstruction." There is no more difficult science or testimony to present to a jury. These short and direct little books help. Please find them and use them.

The last publication you received was TDCAA's *Warrants Manual*. With nearly every jurisdiction in the state obtaining search warrants for blood in intoxication cases, this book is essential. TDCAA does not mandate or even recommend a particular warrant, but the book helps you review your local templates, procedures, training, and instruction. It is another great resource, and it would be a shame if you never took it out of the box or off the shelf.

TDCAA.com's DWI Resources

Finally, please keep an eye on the DWI Resources page at TDCAA.com/resources/dwi. Jessica Frazier, an ACDA in Comal County, revises the DWI Caselaw Update twice a year, and we are constantly adding other resources to the page. One new item I am very happy to have on the site is a continually updated list of every drug recognition expert (DRE) in Texas.[1] Thanks to the new Texas DRE State Coordinator, Carlos Champion, it is now much easier for prosecutors to find a DRE when they need one.

Also on the DWI Resources page are hours and hours of training videos. If you have not found them yet, go hunt down two 20-minute videos of the best impaired driving prosecutors in Texas selecting a jury for a DWI case; they're called "Jury Selection in DWI Prosecution" and "Special Issues in Jury Selection in DWI Prosecution." If you have been picking DWI juries, I promise your skills will improve if you watch these videos and implement their advice.

Conclusion

Trying DWI cases is not easy: There are no "lay down" DWI cases, and many jurors have committed this offense—or their friends and family have. My hope is to put help at prosecutors' fingertips when they deal with this most difficult task. You just have to take the help.

I hope to see lots of you in June! ❇

Endnote

[1] www.tdcaa.com/wp-content/uploads/Public-DRE-List-3-10-22.xlsx

Trying DWI cases is not easy: There are no "lay down" DWI cases, and many jurors have committed this offense–or their friends and family have. My hope is to put help at prosecutors' fingertips when they deal with this most difficult task. You just have to take the help.

A question of 'seriousness' for the jury

In *Monty Python and the Holy Grail*, King Arthur cuts off the Black Knight's arm, but the latter declares, "It's just a flesh wound."

By Clint Morgan
Assistant District Attorney in Harris County

Imagine if, among the other charges he faced at the end of the movie, Arthur was tried for aggravated assault of the Black Knight. Would the Black Knight's conclusory, lay opinion statements that his injuries weren't serious entitle Arthur to an instruction on the lesser-included of misdemeanor assault?

In *Wade v. State*,[1] a case of aggravated assault by causing serious bodily injury, the defendant bit off the complainant's earlobe and then testified that, in his opinion, the resulting disfigurement was not "serious." Was that enough to entitle the defendant to a lesser-included instruction on misdemeanor assault? The Court of Criminal Appeals's opinion engages in a lot of hedging, but at the end of the day I think the answer is: Yes. If I were prosecuting *State v. Pendragon*, I'd let Arthur have the lesser.

Ear chomping as self-defense

Robert Eric Wade was charged with aggravated assault by causing serious bodily injury: "by biting off ... [Taylor] Sughrue's earlobe." The indictment alleged Wade used or exhibited a deadly weapon: his teeth.

The story begins with Wade going to visit his ex-wife.[2] The State's witnesses said that the ex-wife's boyfriend, Taylor Sughrue, got intoxicated and laid down on a bed. Wade got upset with his ex-wife so he went into the bedroom, laid on top of the sleeping Sughrue, and bit his earlobe off.

Wade's version of events is that he was in a dating relationship with his ex-wife, but he went to her house on the day in question and found Sughrue there. An altercation ensued. Sughrue put Wade in a headlock, and Wade bit off Sughrue's earlobe in self-defense, as one does.

By the time paramedics arrived, Sughrue had largely stopped bleeding. He walked himself to the ambulance for treatment and went to the hospital. Doctors could not reattach the earlobe. Sughrue received 11 stitches and was discharged the same day.

On cross-examination, the prosecutor asked the defendant whether he agreed he caused "serious bodily injury" to the victim. Wade admitted to biting off the earlobe, but he did not think it was serious bodily injury. On re-direct, Wade said that if he did not know what Sughrue looked like before the injury, he wouldn't notice it.[3]

Sughrue had a different perspective. He considers himself permanently disfigured. He showed jurors his ear at trial, and the State admitted pictures of the ear at the time of the injury and as it had healed. The Court of Criminal Appeals's opinions includes pictures, if you're curious. The pictures, after healing, look like you'd imagine a lobeless ear to look.

Based on his opinion testimony that the injury wasn't "serious," Wade requested an instruction on the lesser-included offense of misdemeanor assault. The trial court denied the request. Wade was convicted—with a deadly weapon-finding—and sentenced to five years, but the sentence was suspended.

Reversal in the Third Court

On appeal, Wade claimed the evidence was insufficient to show Sughrue suffered "serious bodily injury." He also complained about the trial court's failure to submit the lesser-included to the jury. The Third Court, relying on another earlobe case from the Seventh Court, held the evidence was sufficient to support the conviction.[4]

But the Third Court also held that Wade was entitled to the lesser-included instruction. Wade's opinion that Sughrue's injury wasn't "serious" was enough evidence to allow the jury to find Wade guilty only of misdemeanor assault.

The Third Court rejected the State's argument that the jury's deadly-weapon finding negated this issue entirely. That was because neither the indictment nor the jury instruction alleged aggravated assault by using a deadly weapon. The State's only theory of liability involved causing serious bodily injury.

Is a conclusory opinion more than a scintilla of evidence?

The State petitioned for discretionary review, asking whether a "defendant's conclusory lay opinion about the severity of a victim's injury" was sufficient to create a "valid, rational alternative," thus entitling a defendant to an instruction on a lesser-included. The State also petitioned for review of the Third Court's deadly-weapon ruling.

The Court of Criminal Appeals denied review of the deadly-weapon ruling but granted review and, in a 5–4 decision, affirmed the Third Court's ruling. But while the Third Court's ruling, the State's PDR, and Wade's briefing neatly framed the issue as being about whether Wade's testimony alone entitled him to a lesser, the Court of Criminal Appeals's majority muddied the matter, stating its opinion would address whether Wade's testimony "combined with other evidence introduced at trial" entitled Wade to the lesser.[5]

Writing for the majority, Judge Newell began with the basics of lesser-included law. A lesser-included offense is one that is:

- established by the same or fewer facts than the charged offense,
- differs from the charged offense only by requiring showing of a less serious injury, or
- differs from the charged offense only by requiring a lesser mental state.[6]

While the State is entitled to a jury instruction on any lesser-included offense it wants,[7] a defendant is entitled to an instruction on a lesser only if there is evidence "establishing that, if the defendant is guilty, he is guilty of only the lesser offense."[8] The Court of Criminal Appeals has described this as a requirement that the evidence provide the jury "a valid, rational alternative to the charged offense."[9]

The normal standard for a defendant to be entitled to a lesser-included is that there must be "more than a scintilla" of evidence to support it.[10] Near the beginning of the analysis section, Judge Newell remarks matter-of-factly that the Third Court was correct to conclude that Wade's testimony was, on its own, more than a scintilla.[11]

The "valid rational alternative" test

Why, then, does the opinion go on? The State argued that, considering the undisputed evidence about Sughrue's missing earlobe, Wade's opinion that losing an earlobe was not "serious" did not create a "valid, rationale alternative." The rest of the opinion addresses this issue.

While requiring the evidence to present a "valid, rational alternative" sounds like a limitation on a defendant's ability to get a lesser-included using incredible evidence, Judge Newell seems to have held it is not: "The 'valid rational alternative' test merely enhances [the guilty-of-only-the-lesser-offense] prong of the test for determining whether a defendant is entitled to an instruction on a lesser-included offense. It is not an invitation for reviewing courts to weigh the strength or credibility of the evidence in the record."[12]

The test, then, for determining whether a defendant charged with aggravated assault was entitled to a lesser-included instruction involves seeing if there is evidence that "cast reasonable doubt" on a conviction for aggravated assault, but not on a conviction for misdemeanor assault. Here, the aggravating element was causing serious bodily injury, rather than a regular injury.

A question of fact, not a question of law

The current Penal Code defines serious bodily injury as an injury "that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[13] The State's theory was that Sughrue's loss of an earlobe was a serious permanent disfigurement.

There was no dispute that Sughrue was permanently disfigured, but who determines whether that disfigurement was "serious?" Citing some sufficiency cases that pre-date the current Penal Code, Judge Newell held that whether a particular injury is "serious" is a fact question.[14] Then, citing some more recent cases where courts had determined the evidence was legally insufficient to show that a permanent disfigurement was "serious," Judge Newell held that jurors could look at an instance of permanent disfigurement and conclude it was not "serious."

There was no dispute that Sughrue was permanently disfigured, but who determines whether that disfigurement was "serious?"

Judge Newell reasoned that because courts have held the seriousness of an injury could be established by opinion testimony from complainants, a defendant's opinion that the injury wasn't serious could create a valid, rational alternative. Although there had been no trial objection to Wade's opinion testimony, Judge Newell looked at whether Wade's opinion was "appropriate under the facts of this case." It was, because all Wade's opinion did was describe, in lay terms, his observation of the same evidence the jury saw. Judge Newell then discusses in detail how Wade's opinion related to the evidence in the case. Because this was evidence casting doubt on the seriousness of the injury, Wade was entitled to an instruction on the lesser offense.

Two dissents

There were two dissenting opinions, and Judge Keel dissented without opinion. Presiding Judge Keller, joined by Judge Yeary, dissented because she did not believe there was a factual dispute in the case. The only question was whether the injury was "serious," and "the meaning of a statutory element of a criminal offense is an issue of law, subject to *de novo* review."[15] Presiding Judge Keller pointed to the recent case of *Maciel v. State*,[16] where the Court held that a defendant who explicitly said she did not "operate" a vehicle nonetheless confessed to operating the vehicle because her confessed actions met the legal definition of operation. Presiding Judge Keller would have held that the undisputed facts here amounted to serious bodily injury.

Judge Slaughter dissented and advocated for a charmingly clear rule: "Losing the entirety of a named body part ... because of an assault constitutes 'serious permanent disfigurement' *per se*."[17] Even without adopting that rule, she would have rejected Wade's claim because his "conclusory testimony issuing a blanket denial of the seriousness of the victim's injury does not rationally refute the fact evidence showing that the victim's disfigurement was both serious and permanent."[18]

Takeaways

Except for a few Mike Tyson fans hoping to lure Iron Mike out of retirement and back into the ring, most Texas prosecutors probably won't appreciate letting a defendant get a misdemeanor instruction for biting off a body part. It's understandable to want to fight against lesser-included instructions in a case like this. But *Wade* is more evidence—in the unlikely event we needed it—that the Court of Criminal Appeals has a *very* permissive approach to giving lesser-included instructions.[19]

There are two ways a prosecutor could look at this case. Because of all the hedging the decision engages in—particularly its extensive discussion of how the facts related to Wade's opinion—a prosecutor could, in good faith, argue *Wade* is a fact-bound nothingburger.

But I read this opinion as announcing a fairly clear rule: A conclusory lay opinion that a statutory element was not met is enough to entitle a defendant to a lesser-included instruction. There may be exceptions to this rule if the opinion is outlandish or refuted by objective evidence—e.g., a defendant testifying that in his opinion a 6-year-old victim wasn't a "child." But considering how appeals normally go after a defendant has been denied a lesser-included instruction, I would weigh my options carefully before opposing one.

Presiding Judge Keller is correct that ordinarily, whether undisputed facts meet a legal definition is a question of law for the court to decide. *Wade* makes the question of seriousness purely a question for the jury, at least as it applies to requests for lesser-includeds. After *Wade*, any time the difference between a lesser and greater offense is one of degree, opposing a lesser-included instruction is a risky path.

Could the State get around this by alleging aggravated assault by using a deadly weapon? The Court of Criminal Appeals did not directly address that, but I don't see why the logic of *Wade* wouldn't extend to those cases as well. Indeed, the deadly-weapon question may be more susceptible to this problem than the serious-bodily-injury question. Assessing whether something (other than firearms, which are *per se* deadly weapons)[20] is a deadly weapon requires looking at how serious the potential injuries resulting from its use might be. Asking what sort of injury an object is *capable* of causing almost invites the sort of conclusory opinions like Wade's. You might think swinging a long sword near another person would render it a deadly weapon, but if the Black Knight says Excalibur is capable of causing only flesh wounds, we're back to giving Arthur the lesser. ❇

Wade makes the question of seriousness purely a question for the jury, at least as it applies to requests for lesser-includeds. After Wade, any time the difference between a lesser and greater offense is one of degree, opposing a lesser-included instruction is a risky path.

Endnotes

[1] ____ S.W.3d ____, No. PD-0157-20, 2022 WL 1021056 (Tex. Crim. App. April 6, 2022).

[2] *Wade v. State*, 594 S.W.3d 804, 808 (Tex. App.–Austin 2020).

[3] Judge Slaughter's dissent includes an excerpt of the relevant testimony. See *Wade*, 2022 WL 1021056, at *14.

[4] *Wade*, 594 S.W.3d at 812-13 (discussing *Sizemore v. State*, 387 S.W.3d 824 (Tex. App.–Amarillo 2012, pet. ref'd)).

[5] *Wade*, 2022 WL 10621056, at *1.

[6] Tex. Code Crim. Proc. Art. 37.09. For a description of how this works in practice, see *Hall v. State*, 225 S.W.3d 524 (Tex. Crim. App. 2007).

[7] See *Grey v. State*, 298 S.W.3d 644, 648-49 (Tex. Crim. App. 2009).

[8] *Wade*, 2022 WL 10621056, at *3.

[9] *Hall*, 225 S.W.3d at 535.

[10] Scintilla is Latin for "spark" and is related to scintillate. In property law, the legal use of the word goes back centuries. Texas courts use the term when describing the quantum of evidence necessary to defeat certain motions for summary judgment or when dealing with sufficiency review. While there's not much in the criminal caselaw parsing out what is and what isn't a scintilla of evidence, there are hundreds of civil cases on the subject.

[11] *Wade*, 2022 WL 1021056, at *4.

[12] I quote this at length because I do not know what it means. For an alternative to be "rational," the evidence supporting it must have some minimal levels of strength and credibility. Judge Newell's extensive discussion of how Wade's opinion fit in with the physical evidence suggests *some* concern for strength and credibility.

[13] Tex. Penal Code §1.07(46).

[14] *Wade*, 2022 WL 1021056, at *6 n.33 (citing cases from 1947, 1940, and 1921). Before the current Penal Code was adopted in 1974, there was no statutory definition of "serious bodily injury."

[15] *Id*. at *11 (Keller, P.J., dissenting).

[16] 631 S.W.3d 720, 725 (Tex. Crim. App. 2021).

[17] *Wade*, 222 WL 1021056, at *13 (Slaughter, J., dissenting).

[18] *Ibid*.

[19] See, e.g., *Bullock v. State*, 509 S.W.3d 921, 927 (Tex. Crim. App. 2016) (holding defendant charged with theft entitled to lesser-included of attempted theft despite defendant's testimony denying attempted theft).

[20] Tex. Penal Code §1.07(17)(a).

Capital murder in the death of a 5-week-old fetus (cont'd from the front cover)

ing an affair with Joel since they were both teenagers. Amanda confronted Joel about the affair, and he confirmed it—and callously brushed it off.

At that moment, for the first time in their relationship, Amanda decided she was finished with Joel forever. She asked for a divorce and began a relationship with someone new. However, over the next few months, family and friends would tell her that she "needed to do everything she could to keep her family together." In late April 2018, after Joel's continual pleas, Amanda decided to move with her children back to Odessa to be with him, but before she did, she informed Joel that she believed she was pregnant and that the child was not his. He assured her that they would make it work and to come home.

The assault

After Amanda and the children arrived in Odessa, the family spent time together going shopping and out to eat, and life seemed relatively stable. One night, as Amanda and Joel were eating dinner out, Joel told Amanda he wished he could have both her and the girlfriend who had been living with him while Amanda was away. At that, Amanda left the restaurant and walked home.

On Sunday, April 29, Amanda took a pregnancy test and confirmed her pregnancy to Joel. He stated that he wasn't going to raise another man's child, making it clear that she would have to have an abortion if she wanted to stay married. That night Joel and Amanda went out in an attempt at normalcy. While watching Joel at a local strip club, Amanda decided that she could not move past his affairs or his treatment of her, and she said she wanted to leave. Both intoxicated, they drove home arguing and arrived sometime around midnight. Amanda walked into the house first and locked Joel out, telling him to leave. She instructed her 14-year-old daughter, Nicole, to keep the door locked and not allow Joel inside, but Joel came in through a bedroom window. Amanda told the children—Nicole, Josh (age 15), and April (5), to pack their belongings immediately and prepare to leave. Joel told her that she was not "fucking taking his kids" and pinned her to a wall. Amanda got away and began throwing things at an advancing Joel. During the next few minutes Joel chased Amanda around the house and strangled her twice on their bed, on one occasion causing her to black out, which Nicole witnessed. The fight ended in the living room with Amanda on the ground and Joel on top of her. Joel put his knee in the center of Amanda's stomach and repeatedly yelled that he was going to "fucking kill that baby." Joel continued to drive his knee into Amanda's stomach until Amanda heard a popping noise and was unable to breathe. Joel got off of her and dragged her to their bedroom. Amanda called out for Nicole to call 911, but Joel took her phone away and told her to go to sleep. For the next 36 hours Amanda lay in excruciating pain in her bedroom while Joel refused to allow anyone to call for help.

Joel finally left for work on Tuesday morning, and Nicole was finally able to call 911. When Amanda arrived at the hospital, Nurse Practitioner Chris Ackerman noticed that something was very wrong with her and ordered tests immediately. These tests confirmed that Amanda was between five and six weeks pregnant, that her unborn child was alive, and that there was a serious injury to Amanda's pancreas. She was rushed into surgery where Dr. Richard Ellison saved her life. Amanda told both NP Ackerman and Dr. Ellison exactly what happened to her: that Joel strangled her, put his knee in her stomach, and yelled that he was going to kill her baby.

Amanda was hospitalized for six weeks and underwent a number of other procedures as a result of her injuries. While at the hospital, Amanda gave statements about the assault to both medical professionals and the police department. Ultimately, Amanda suffered a "traumatic miscarriage" and lost her child.

The charging decision

When our office first received this case, there was no doubt that Joel Luna had committed aggravated assault. But could we charge him with the murder of Amanda's unborn child if she was at only five weeks' gestation? Yes. Texas Penal Code §19.03 states that a person commits the offense of capital murder if the person intentionally or knowingly causes the death of an individual and the person murders an individual under 10 years

of age. The Texas Penal Code further defines an individual as "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth" in §1.07(26).

The next question was, could we prove it at trial? That was a much larger issue. Because Amanda's pregnancy was only five to six weeks along, proving that Joel actually did cause the death of her child would be difficult. However, Dr. Ellison left us a voicemail where he explained that Amanda's injuries most likely did cause the child's death, but he would not definitively say so on the witness stand. With that, we felt like we had enough to at least submit the case to a grand jury. We presented both charges to a grand jury and secured two signed indictments, one for aggravated assault (of Amanda) and one for capital murder (of her unborn child).

Pretrial preparation

For three years, through multiple defense attorneys and a pandemic, Joel Luna sat in the Ector County Jail. For about the first six months after his arrest, Amanda continued to have contact with him via phone, mail, and regular visits. But with the passage of time, physical separation, and new friends who helped Amanda realize the extent of Joel's abuse, she finally broke off their relationship permanently in January 2019. Joel quickly rebuffed all plea negotiations, though one of his defense attorneys generously offered to have us dismiss the capital murder charge and then he would let us try the aggravated assault (insert eye roll here). We proceeded to prepare for a trial in the summer of 2021.

The first time we met Amanda in person, she was extremely shy and a little shell-shocked. She was terrified of Joel and, understandably, did not really want to testify against him. At one point during our initial interview, we asked if she had any questions for us, and her only question was, "ls it my fault that he did this to me?" The amount of manipulation that Joel put Amanda through was evident in that one question.

We met with Amanda and her daughter Nicole on multiple occasions leading up to trial, and each time we were struck by their strength one moment and their complete insecurity the next. Initially, Amanda would not allow law enforcement or the DA's Office speak to her children. However, after our initial pretrial meeting with her, she informed us that Nicole was ready to talk about what she had witnessed. Nicole was understandably angry at her father and was firmly in support of her mother, and she recognized that what her dad had done was wrong. Partially because of the trauma of witnessing her father almost kill her mother and partially because it had been more than two years since the offenses occurred, it took multiple meetings with Nicole for her to remember everything that happened that night. While Nicole remembered many events clearly, there were several gaps in her timeline. Nicole was, however, able to clearly recall the majority of what she witnessed.

We reached out to several doctors to see if we could find an obstetrician or gynecologist willing to more firmly testify about the cause of death for Amanda's unborn child. Each time, we met with resistance to say much because Amanda had been only five or six weeks pregnant at the time. The doctors we spoke to explained that prior to about 12 weeks of pregnancy, it was difficult to distinguish between a miscarriage and what we believed was murder.

However, both the doctor and the nurse practitioner who saved Amanda's life in the hospital were much more confident when we spoke to them, stating that Amanda was pregnant when she arrived at the hospital, that it was a viable pregnancy, and that the combination of injuries, surgery, and medications had a catastrophic impact on the unborn baby, resulting it what they referred to as a "traumatic miscarriage." After many hours of speaking to Dr. Ellison on the phone and in person and hearing him describe the effects of these interventions—Amanda's myriad injuries, the surgery to save her life, and the medications prescribed to her—on her unborn child, we felt confident that Dr. Ellison could show that jury that Joel caused the child's death beyond a reasonable doubt.

As we got closer to the trial date, we also decided that it would be vitally important to consult and call a domestic violence expert. We reached out to Safe Place of the Permian Basin, our local women's shelter, and Judy Drury, an incredibly gifted counselor, who has worked with victims of domestic violence for more than 20 years. She was more than willing to testify as an expert at trial.

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The trial

We began jury selection on November 15, 2021, with the understanding that we needed a jury of people who could understand the dynamics of domestic violence relationships, follow the law regarding the Penal Code's definition of an individual, be able to convict someone of capital murder even if that murder was of an unborn child, and conceive of a scenario where jurors could assess someone probation for the offense of first-degree aggravated assault (surprisingly, Joel did not have any prior criminal history, so he was probation-eligible).

We concentrated on committing everyone to the definition of "individual" including an unborn child at two minutes, two weeks, or two months of gestation and surprisingly did not have a single juror balk at this definition. We also had to ensure that the jury understood that Joel's hands, feet, and knee could be considered deadly weapons, which we did by presenting them with photos of different implements (a pillow, a foot, a bat, etc.) to get them talking. We discussed the "manner of its use" part of the deadly weapon definition. Getting them to understand and agree with the range of punishment however, especially regarding probation, was slightly more difficult, and we lost a few favorable jurors to the defense lawyer's questions, but eventually we felt confident we had been able to keep enough of them to see that justice was done in this case.

Our strategy with regard to witnesses was first to protect Amanda as much as possible, as she was terrified to even be in the same room as Joel.

Our strategy with regard to witnesses was first to protect Amanda as much as possible, as she was terrified to even be in the same room as Joel. Prior to calling her as a witness, we called Judy Drury, our domestic violence expert. Judy testified about the cycle of violence, the power and control in domestic violence relationships, and the strategies perpetrators use to manipulate their victims. She explained to the jury why victims often stay with or return to their abusers, why they often conceal the abuse or defend their abusers, and the coping mechanisms that victims use when talking about their abuse. Judy said that the most dangerous time for a woman in a domestic violence relationship is when she tries to leave.

This testimony was absolutely critical because, although she knew almost nothing about the case and had never met Amanda, almost everything Judy testified about was mirrored in Amanda's testimony. In fact, we could see the jury react when Amanda later testified about something that sounded like what Judy had said about domestic violence. For example, Amanda talked about how she blamed herself for the abuse Joel inflicted on her throughout their marriage, her repeatedly reconciling with him (even after he was arrested), and how Joel kept her isolated from friends and family. Judy Drury had explained all of these things prior to Amanda's testimony, teaching the jury about domestic violence relationships before Amanda said a word on the stand. In this way, we kept the jurors from discounting Amanda and the severity of the abuse.

Following Judy's testimony, we called Amanda to testify. She had a panic attack outside the courtroom, and it took both of us going out into the hallway, reassuring her that Joel could no longer hurt her, that we believed her, and that she was strong enough to testify, to get her to the witness stand. Once she got on the stand, she was a rock star. She recounted the horrifying events in incredible detail. Texas Code of Criminal Procedure Art. 38.371 allowed us to present not only the abuse from April 29, 2018, but also the 18 years of abuse Joel had committed against her. She bravely withstood cross-examination from an excellent defense attorney and stayed firm in the truth of what happened that night.

The last witness we put on was Dr. Richard Ellison, the surgeon who saved Amanda's life the night she went to the emergency room. Dr. Ellison was vital to our case to explain how Amanda's injury was life-threatening, as well as how Joel was ultimately responsible for the death of her unborn child. Dr. Ellison is a former military doctor who served two tours in Iraq and two tours in Afghanistan as a combat surgeon, who was wounded several times in combat, and who left the military only when the building he was in blew up. Dr. Ellison is a no-nonsense surgeon, and he testified in a straightforward, blunt manner. Dr. Ellison first discussed Amanda's injuries, explaining that her pancreas had basically been split in half by her backbone. A brief anatomy lesson: The pancreas is located in the middle of the torso, behind the intestines, liver, and lots of other organs. It is closer to the spine than the belly button. If a person were to press down on your bellybutton, your organs would shift out of the way to avoid trauma, similar to the way the filling in a beanbag chair shifts when you sit on it. The pancreas, however, can't move out of the way.

Dr. Ellison explained that the force on Amanda's stomach from Joel's knee was so strong that essentially all of her other organs shifted out of the way and his knee pinned her pancreas against her spine, cutting it in half. Dr. Ellison, the combat surgeon, said that the only times he'd seen a pancreas injury anywhere close to Amanda's was when someone had been blown up, stabbed, shot in the back, or in a car accident where the person broke his back and the broken back cut the pancreas. Dr. Ellison even stated that someone could have beaten Amanda with a baseball bat and not caused such severe injuries. Without the emergency surgery he performed, Amanda would have died. He testified that he was amazed she was still alive at all by the time she reached the hospital.

Regarding her unborn child, Dr. Ellison testified that the trauma alone would have catastrophic consequences on a fetus. He stated that the pancreas injury alone could have caused Amanda's baby to die, but add to that the surgery, anesthesia, and medications she had to take for more than a month, and there was almost no possible way her child could have survived. Dr. Ellison also testified that Amanda's baby was alive prior to the surgery and that she suffered a "traumatic miscarriage" almost certainly caused by her injuries and subsequent treatment. (Our favorite moment of the trial—other than the guilty verdict—was when Amanda got to meet and talk to the doctor who saved her life. She and Dr. Ellison hugged and bonded over their mutual love of motorcycles, and it will probably stand out as a highlight of both of our careers.)

The defendant's testimony

After the doctor's testimony, the State rested, and the defense called Joel Luna to the stand. He testified that Amanda was the aggressor that night and that he put his hands and knee on her only to restrain her. He said she had thrown a knife at his face, and magically the knife flew like a throwing star and the tip barely cut him on the forehead. He also testified that he never knew she was pregnant and only put his knee on her stomach to hold her down because she was hitting him, something Amanda and her daughter Nicole vehemently denied. Like many abusers, Joel attempted to gaslight Amanda: She was crazy, she was lying, he didn't have an affair with her sister because he only slept with her once, she told him not to call an ambulance, and on and on it went.

Under cross-examination, Joel could not explain why he would put his knee directly into his wife's stomach to hold her down. He admitted that he was not in fear for his life when he caused her nearly fatal injuries and killed her unborn child, and he kept insisting that he simply "assisted" Amanda to the ground. He could not explain why he never called 911 to get her some help and continually denied abusing her. The defense called no other witnesses and rested.

The guilty verdict

We argued to the jury that Joel absolutely knew that Amanda was pregnant—why else would he assault her in that manner?—and that he was guilty of capital murder. The jury agreed. They convicted Joel Luna of both capital murder, which resulted in an automatic life sentence without parole, and sentenced him to 36 years for the assault on Amanda.

The turning point in this trial was the testimony of Judy Drury and Dr. Ellison, who expertly explained both the personal suffering and the medical trauma that Amanda went through. Without them, and a team of help along the way, we never would have been able to see justice done for Amanda and her unborn child. We believed her, and the jury believed her, and now Joel Luna will spend the rest of his life behind bars where he belongs. ❇

Our favorite moment of the trial–other than the guilty verdict–was when Amanda got to meet and talk to the doctor who saved her life. She and Dr. Ellison hugged and bonded over their mutual love of motorcycles, and it will probably stand out as a highlight of both of our careers.

Autism in the courtroom

Calling victims of sexual abuse to the stand to talk about their trauma is always challenging, especially when a victim is a child.

By Janna Oswald
Assistant District Attorney in Harris County and a Chief in the Crimes Against Children Division

Everyone reacts to trauma differently, and every child witness reacts differently to taking the stand. It is our duty as prosecutors to reduce any additional trauma that testifying might cause. Prosecutors must have a complete picture of every child witness, including any mental health or disability diagnoses, to help that child better navigate court testimony.

When it came time to call a traumatized 12-year-old girl to testify against the man who had sexually abused her for over a year, I had the usual challenges of such a case: How do I make sure this child is ready to explain what she endured? Would facing him re-traumatize her? I also had to consider another factor: how the girl's autism might affect her testimony and how a jury would perceive her.

Autism statistics

The Centers for Disease Control and Prevention now puts the rate of autism at 1 in 44 children—a number that has doubled from 1 in 88 in 2008. In Houston, that number, along with any count of adults, is probably low, given a diverse population that includes refugees and immigrants who often go undiagnosed. The disorder causes varying degrees of difficulties with social interaction and communication. It also can include limited interests, repetitive behaviors, and sometimes debilitating sensitivity to sound, light, or textures.

While others debate causes and therapies, it is clear that institutions including the criminal justice system should be prepared to encounter more people with autism, given the explosion in diagnoses. Studies show people with the disorder aren't more likely to commit crimes, but like those with other disabilities, they can be more vulnerable to predators of various kinds. Children with autism, like all children, can be victims of both physical and sexual abuse. However, as opposed to typical children, their social deficits may more greatly affect their ability to outcry, how the investigation is handled, and ultimately how the case is prosecuted.

What prosecutors should know

At the Harris County District Attorney's Office, we recognize the "spectrum" of Autism Spectrum Disorder; some children are only mildly affected while others are severely impaired. We also know the symptoms of autism can get muddled with those of trauma. Many of our victims are dealing with various levels of trauma, so it is important for prosecutors handling child abuse cases to be trained in the dynamics of sexual abuse trauma, not only to convey those concepts to the jury but also so that they can better interact with victims.

Prosecutors also rely on the expertise of our office's social workers, who often accompany us in our meetings with child victims. In the case of children with autism or other disabilities, they check whether the child has a formal diagnosis and a safety or behavioral plan in place, and they identify the supports or aids that the child may need for the prosecution interview and court settings.

Our social workers' practices may include:

- interviewing the child in a neutral location that is warm but not filled with toys and other distractions, such as a child-friendly room at the courthouse, and asking if the child wants a caregiver or support staff to be present;
- eliminating noise and other sensory input;
- keeping interviews short, avoiding abstract statements, and asking direct questions;

- minimizing interruptions as the child tells his or her story. Otherwise, he or she might get confused or upset, and it may be difficult to get back on track;
- speaking slowly and using simple language. If talking doesn't work, the prosecutor can write the question down or draw it; and
- paying attention to nonverbal signals for further information if the child cannot answer effectively verbally. These might include facial expressions, gesturing, or other body language the child is using to answer. If the response remains unclear, decide whether to press on or come back to the question.

At this investigative stage, we rely on the forensic interview to evaluate the case and meet with the child only when absolutely necessary for further evaluation or trial preparation. Minimizing the number of people to whom a victim has to recount the abuse is almost always in the best interest of the child.

Testifying in court

However, many of our cases go to trial, and that means the child will need to testify. Some people believe a prosecutor can play the child's forensic interview at trial in place of testimony, but the rules of hearsay dictate that the forensic interview rarely comes in as evidence in trial.

Closed-circuit testimony can be allowed, but a high threshold must be met at a hearing for this to occur. Therefore, in almost all instances the child must testify in open court before the jury, judge, and defendant. As with cases involving any child, children with autism should become familiar with the prosecutor handling the case, as well as the courthouse, courtroom, and other officers of the court before trial.

With every case, we want to educate jurors on the dynamics of sexual abuse and how trauma can affect a victim. We explain that all people react to trauma differently so that they understand that a child testifying may not react exactly how they might expect. This is especially important in cases involving children with autism.

In a case I tried with a 12-year-old girl with autism as the victim, I spoke with the complainant's mother and therapist before meeting with the girl so that I knew how to communicate with her most effectively. I asked what was going on with her in school and life to help better build a rapport and see for myself how to ask her questions in a way that she would respond best.

At trial, I not only educated the jurors on sexual abuse, but I also put experts in the autism spectrum on the stand to explain the dynamics involved with children with autism. Psychiatrists and behavioral therapists can serve as such witnesses; whoever diagnosed autism in that particular child would be an appropriate witness to testify about specifically about how the disorder manifests in him or her. Another option would be a licensed clinician from one of the 70 Children's Advocacy Centers located across the state. I also called the girl's mother and therapist to the stand to help the jury understand how autism affected her both at the time she was being abused and now, when she was going to testify before them.

By the time she took the stand, the jurors had a thorough understanding of autism—and more particularly of this girl. I wanted to allow them to listen to just her and the truth about the abuse she suffered without being distracted by their unfamiliarity with her disability.

For my line of questioning, I changed my cadence to be more rigid. I also asked far more direct and blunt questions, as opposed to a softer approach I take with most complaining witnesses. She understood and responded better, and she was clearly more comfortable answering those types of questions.

The jury did listen to her, in her refreshingly matter-of-fact and sometimes monotone voice, and believed every word. Jurors found her abuser guilty of continuous sexual abuse of a child and sentenced him to 35 years in prison. The complainant is now a well-adjusted teenager with an amazing family and plenty of friends.

By the time the child victim took the stand, the jurors had a thorough understanding of autism–and more particularly of this girl. I wanted to allow them to listen to just her and the truth about the abuse she suffered without being distracted by their unfamiliarity with her disability.

Conclusion

With the explosion in autism diagnoses, it's said that everyone knows someone who knows someone with autism. When handling a case with a victim or witness with autism, prosecutors should be ready to educate themselves and jurors about the disorder. With better education and compassion, we can handle these cases more effectively, allowing us to see justice done. ❇

An introduction to Autism Sensory Kits

There are days when I wonder which part of my life more defines me: parenting or prosecuting.

By Anne M. Jackson
Assistant County Attorney in Bell County (and recently, Assistant Criminal District Attorney in McLennan County)

Each has to do with applying rules to facts on a case-by-case basis and providing consequences to deter bad behavior and reward the good. Over the last 20 years, Autism Spectrum Disorder (ASD) has descended on both worlds and caused me to think about things from the perspective of a mind much different from mine. This article attempts to describe how autism informs my decisions as a prosecutor and has inspired me to share my family's autism journey with colleagues in the criminal justice system.

Why should prosecutors care about autism?

Autism affects only 1–2 percent of the population, so why should prosecutors and police officers be concerned about it? According to the Center for Disease Control (CDC)'s Autism and Developmental Disabilities Monitoring (ADDM) Network, approximately 1 in 44 children were identified with autism spectrum disorder in 2018. ASD is reported to occur in all racial, ethnic, and socioeconomic groups and is more than four times more common among boys than girls. During a study period of 2009–2017 (according to reports from parents), approximately 1 in 6 (17 percent of) children aged 3–17 years were diagnosed with a developmental disability. These disabilities included autism, attention-deficit/hyperactivity disorder, blindness, and cerebral palsy. The same CDC website states that people with ASD are *seven times more likely to come into contact with law enforcement*. In other words, as prosecutors, we *will* meet someone with autism. It's just a matter of time.

An autism intervention team

In April 2015, juvenile probation officer Chelsea Carnes reached out to an autism parent I know with a good question: "How do I help children in the juvenile justice system who exhibit characteristics of autism?" Chelsea had several children in her caseload who appeared to be on the autism spectrum, but she had no autism-specific resources at her disposal to help these kids successfully complete probation. That autism parent, Susie Marek, works for a nonprofit in Belton named Heart of Central Texas Independent Living Center (HOCTIL). Susie knew I was a prosecutor—and the mother of a teenage son on the autism spectrum—so she invited me into the conversation. The three of us decided to meet later that month for a conversation and to invite a few friends and colleagues familiar with autism.

At that meeting, we frequently found ourselves using the words "escalation" and "de-escalation" as parents told stories of autism meltdowns and crises. We then turned our attention to the need to intervene in these situations in meaningful ways as parents *and* professionals, so we brainstormed whom to invite to our next meeting and what to call our new group. What resulted is a ensemble of concerned juvenile probation officers, police officers, educators, licensed professional counselors, board-certified behavioral analysts, attorneys, autism parents, and local nonprofit leaders meeting monthly to address gaps in our criminal justice system for individuals with autism.

One of the first things we discussed was that no one enters the criminal justice system without interaction with police officers. This began our quest to meet with local officers to see what they knew about autism. We began calling ourselves the Bell County Autism Intervention Team (BAIT) and in partnership with HOCTIL, we created a "three R" mission statement. With respect to autism, we aspire to:

- train first responders to *recognize* the signs,
- empower families to implement an appropriate *response*, and

• equip communities with therapeutic autism-specific *resources*.

Sometime in 2016, retired police officer (and super grandparent) John Jennings brought to a BAIT meeting a big blue duffel bag full of items which he called an Autism Sensory Kit (an ASK bag). John had been researching ways to help his grandchild and the law enforcement community he loves so much. He found a little plastic box of sensory items being used in Pennsylvania, which seemed like a good idea, but he feared it would not have a lasting impact on law enforcement. His experience was that police officers learn best when they have access to a reliable, professional tool. John also recognized that these sensory items would be a great hands-on resource with which to teach others about autism. John utilized a bag large enough to be visible in a patrol car and to accommodate a bath towel or weighted blanket. The acronym "ASK" is embroidered on the bag and has a dual purpose: No. 1, to prevent the bag from being repurposed, and No. 2, to generate interest. When someone sees the blue bag, they might "ask" about it.

John donated a couple of fully stocked ASK bags to our team. The bags are full of sensory-friendly and fidget items, including noise-cancelling headphones, a ball cap, sunglasses, a large plush towel, a dry-erase board with markers, communication and picture cards, fidget spinners, Rubik's Cubes, Pop-Its, and a tablet or computer of some type. These items are helpful when first responders interact with individuals with autism because people with autism often have different types of sensory and physical sensitivity. These sensitivities can be mild or severe and are often exacerbated when something unexpected happens or there is a disruption in routine, such as a car wreck, witnessing a domestic violence assault, or being lost.

As a prosecutor and a mother, I did not initially realize the utility of the ASK bag. I was in the midst of trying to ensure that my autistic son passed his classes and graduated from high school. I was focused on grades and academics! I underestimated the value and power of using a real thing (like a fidget) to enter the world of someone who has autism. I also was not quite sure how to put the bag in the hands of people who might use it.

Seeing a need

BAIT loved the idea of the ASK Bags in 2016, but we realized that crucial to distributing this helpful resource was *training* about what autism looks like and ways to de-escalate an autism crisis. The idea remained stagnant until 2020 when two important things happened:

1) In July 2020, Sergeant Teresa Phelps of the Bell County Sheriff's Office (BSCO) asked me to speak to a CIT (Crisis Intervention Training) class about autism.

2) Between 2015 and 2020, Dawn Owens, Chief Juvenile Probation Officer at Bell County Juvenile Services, saw a growing need for the juvenile justice system and law enforcement to better understand youth with ASD and IDD (intellectual and developmental disabilities). (More about the education and resource efforts in the juvenile system in the sidebar "Intervening with juveniles with autism," on page 35.)

At the height of COVID in July 2020, I was in sweats and a T-shirt working from home. My oldest son Tres (Michael Leslie Jackson III) was home from college. Tres was diagnosed with Asperger's Syndrome (a form of autism) in 2010. At the age of 20, Tres's attempt to study computer programming at Texas State Technical College (TSTC) went poorly because when COVID struck, TSTC decided to teach all classes online. Tres, like many of us, learns best in an in-person, multi-sensory environment, so online classes were difficult and Tres was back at our house with little to do.

Just before heading to teach my first CIT class, I realized that Tres is like "State's Exhibit A" in a jury trial to prove autism beyond a reasonable doubt. I threw on a business jacket and told Tres to find a clean shirt. We headed to the sheriff's office to share our story, each not quite knowing what the other would say to the police officers in the CIT audience. The class went so well that we taught it for BCSO several times. I later utilized what I learned at TDCAA's Train the Trainer course to create a PowerPoint, and I named our presentation "Autism and Law Enforcement."

Just before heading to teach my first Crisis Intervention Training class, I realized that my son Tres is like "State's Exhibit A" in a jury trial to prove autism beyond a reasonable doubt.

What we teach

In the class, Tres explains that he is the oldest of three sons, a "military brat," a public high school graduate,[1] a "gamer," an employee, a recently licensed driver, and an "autism ambassador." Tres talks plainly about:

• how people with autism communicate differently,

- how sensory integration issues result in stimming. "Stimming" is short for self-stimulatory behavior: repetitive self-soothing behaviors that go beyond what is culturally acceptable. For example, nail biting, pacing, and hair twirling can be acceptable in the United States, but hand flapping, spinning, jumping, rocking back and forth, lining up objects, and repetition of words and phrases are not. Most people "stim" in subtle ways, but autistic stimming is usually more extreme in type, quantity, and obviousness of the behavior.
- how hyper-attending to restricted interests (trains when he was younger, graphic novels when he was a teenager, video games as a young adult) is soothing and helps him learn,
- how literal thinking and an inability to see beyond the present moment keeps him from understanding what happens next or the consequences of his actions,
- what he has learned from Applied Behavioral Analysis (ABA), specifically equine therapy,
- why it is difficult to make and keep friends,
- what he learned as a teenager about emotional regulation, self-control, and conflict resolution from the Explorer Program at the Belton Police Department,
- the importance of an understanding employer,
- his reasoning behind behaviors that sometimes led to his mother (me) calling the police, and
- his fear that people who look and act like him will be misunderstood and hurt by police officers.

Near the end of the presentation, we talk about some crises in our family, some of which involved calling 911 when Tres ran away after heated arguments with family members. In one example, I describe talking to dispatch and realizing that in that moment, I was giving away control of my special-needs son to strangers who may or may not know anything about autism. I was inviting police officers to assist in a crisis they might not well understand—and it was terrifying. I felt I had to do it in case my son *was* violent and willing to run away from home, but I was also worried that if officers became loud, used metaphors or abstract language, touched him, or expected him to act like the adult he appears to be (but often does not function as), his confusion or resistance could result in injuries or a fight—escalation instead of de-escalation. Our presentation aims to prevent these things with all ASD or IDD youth and adults. These are the reasons a 22-year-old spends countless hours with his mother talking to strangers about some of the darkest moments of his life.

Feedback after our class has been overwhelmingly positive, but reactions from students throughout the three-hour session are an evolution of acceptance. During the first 30 minutes, Tres and I see lots of crossed arms, bodies leaned back in chairs, and skeptical facial expressions. As Tres talks and shares his life story, officers lean forward, open up their body posture, nod their heads, and smile. By the end of the class, officers frequently shake Tres's hand and begin conversations about video games or Tres's knife collection. Some have told him that he is one of the best "instructors" they have ever had. What we have learned from this evolution during class is that many officers have never had a class about autism, so in the beginning of our presentation, there is skepticism and uncertainty. Once officers hear about and see autism in Tres and his mother, there is anger—which evolves into relief. We have heard statements such as, "I've been an officer for many years and I knew nothing about autism. Now I get it," and "Looking back, I've arrested and thrown autistic people in jail. I have been part of the problem. Now I can be part of the solution."

Feedback after our class has been overwhelmingly positive, but reactions from students throughout the three-hour session are an evolution of acceptance.

The McLennan County DA's Office makes a difference

Interest in training to improve interactions with people with autism continued in other law enforcement departments in Central Texas. In April 2021, retired Police Chief Lydia Alvarado was refining a CIT class at McLennan College Emergency Services Education Center (MCESEC). Waco Police Officer Bradley DeLange, who has a bachelor's degree in psychology and a master's degree in human services counseling, assisted Chief Alvarado in teaching the initial classes. When Officer DeLange later took over the CIT classes at MCESEC, he showed an intense interest in autism and continued to incorporate Tres's and my "Autism and Law Enforcement" class into his instruction. Based on that interest, Dawn gave Officer DeLange an ASK bag for his own use as a patrol officer on the streets in Waco. Within days of having the ASK bag in his patrol car, Officer DeLange used it to connect with ASD

and IDD citizens in crisis. (More on that in a moment.)

I shared Officer DeLange's ASK bag success stories with McLennan County Criminal District Attorney Barry Johnson and then-First Assistant Nelson Barnes. Barry and Nelson offered to use asset forfeiture funds to purchase 100 ASK Bags for the Waco Police Department. When I told Officer DeLange about this generous offer, he accepted on behalf of the Waco PD and asked for the "Autism and Law Enforcement" class to be part of fall in-service training for every officer in the department.

Armed with my boss' support and a police department receptive to training about autism, I called Killeen Police Sergeant Tyler McEowen, who was also interested in the autism training. As a result, both the Waco and Killeen Police Departments implemented the "Autism and Law Enforcement" class as part of their mandatory fall "in service" training. From September 2021 to February 2022, Tres taught 27 classes (each at least 2½ hours long) to more than 400 police officers, 24 of them with me and three with his board-certified behavioral analyst Kristen Tindell, BCBA, LPC. After these classes, the McLennan County DA's Office gave 100 ASK bags to Waco PD while a grant obtained by the Bell County Juvenile Probation Department purchased and distributed 105 ASK bags to 12 different law enforcement agencies all over Texas.

ASK bag success stories

In the fall of 2021, Officer DeLange was dispatched to a call involving a mother whose 6-year-old son was refusing to buckle his seatbelt. Officer DeLange found the mother in the driver's seat of an SUV with her head in her hands. There was 9-year-old in the back seat and a 6-year-old boy (let's call him Alex) in the third row. When Officer DeLange asked how he could help the visibly distraught mother, she began to unravel. She explained that Alex suffers from Oppositional Defiant Disorder (ODD) and Attention-Deficit/Hyperactivity Disorder (ADHD), and that she was recently divorced because Alex's father could not deal with the incredible amount of work required to care for Alex. She had just spent two hours trying to buckle Alex's seat belt so she could retrieve her third child from daycare. Mom the caregiver was experiencing a crisis.

Armed with his educational background and informed by experiences Tres and I have talked about, Officer DeLange speculated that Alex was exhibiting signs of undiagnosed autism. As he spoke to Alex, he observed context clues, such as a chewed-on necklace around Alex's neck, a fidget spinner in the seat beside him, and the child's highly specific and intense interest in Halo-Reach (a videogame). Officer DeLange returned to his patrol car and found his ASK bag, from which he retrieved a chewy tube and a fidget spinner. With Alex's mother's permission, Officer DeLange gave Alex a healthy, safe object designed

Left to right: Barry Johnson, Criminal DA in McLennan County; Anne Jackson, ACA and author of this article; Tres Jackson, Anne's son and co-presenter on autism; and Officer Bradley DeLange of the Waco Police Department, with a cache of ASK bags. Mr. Johnson used asset forfeiture funds to purchase 100 bags for the Waco PD.

for oral fixation. He then told Alex that if he "buckled up," he would give him a new fidget spinner. Upon hearing these words, Alex immediately buckled his seat belt. At the end of this 15-minute interaction about a chewy toy, fidget spinner, and Halo, Alex was compliant and asked his mother if Officer DeLange could come over to play video games sometime. Mom broke down in tears again, thanking the officer for being the first person to take time to listen to, understand, and *not judge* her family. She commended him for jumping into her world and connecting with her special-needs child.

During another shift, a fellow officer with over 15 years of patrol experience called Officer DeLange as DeLange arrived at work. This veteran officer asked DeLange to skip roll call and join him at the home of an autism family. On scene, police officers were greeted at the door by a 6-foot-6, 240-pound 18-year-old man wearing only an adult diaper. (Let's call him Jack.) Jack communicated through grunts and physically grabbing a person's arm to guide him or her around the home. Officer DeLange placed his ASK bag on the kitchen table, hoping its contents would pull Jack's attention away from his mother and thereby provide the officers an opportunity to talk to her. Jack's mom told the officers that she was at her wits' end. Her son's routine had been interrupted so he became aggressive with her, and she had visible bruises from the assault. When she called Child Protective Services (CPS) for help, CPS told her to call the police, as CPS didn't have any available resources to respond immediately.

Children for whom communication is not an instinct and who lack the ability to make inferences from context will rarely relate a "story" to a stranger. People with autism also have poor insight into their own behavior, as well as the behavior of others. All of these things are core deficits of ASD.

As officers spoke with the mother, Jack unpacked the ASK bag and playfully put the hat, stocking cap, and sunglasses on Officer DeLange, as if DeLange was a life-size police dress-up doll. As Jack rearranged the hats and sunglasses on Officer DeLange, Jack calmed down and allowed the officers to discuss with his mother the routine disruption that had spiraled out of control and into a crisis. Officers also noticed Jack's aversion to fluorescent lights. When Officer DeLange asked the mother if Jack was sensitive to bright light, she said she did not know, but Jack often went around the house turning off light switches. Officers changed a florescent lightbulb to create a dimmer atmosphere and immediately noticed a positive change in Jack's behavior. Officers were aware of potential light sensitivity and sensory integration issues because each had attended the class Tres and I taught.

By the end of the call, Jack was quietly and peacefully sitting on the living room floor. His mother explained through tears that she was afraid to call police because the last time she called 911 (in a different city), police officers yelled at and handcuffed her son. Although her son had struck her repeatedly and she could not defend herself from him alone, she was terrified to call 911 for help.

Autism and prosecution

While prosecuting felonies in Bell and McLennan Counties, I came across cases where children and adults on the autism spectrum were crime victims, witnesses, or suspects. In many of these cases, criminal justice professionals misunderstood them. The language used by patrol officers, detectives, medical doctors, trained forensic interviewers, nurses, and lawyers was often inadequate to reach into the minds and experiences of these neuro-diverse citizens to retrieve information relevant to trauma and the elements of an offense (often indecency with or sexual assault of a child). Children for whom communication is not an instinct and who lack the ability to make inferences from context will rarely relate a "story" to a stranger. People with autism also have poor insight into their own behavior, as well as the behavior of others. All of these things are core deficits of ASD.

The same is true for suspects with ASD. I once had case of aggravated sexual assault of a child in which a judge ruled an oral and written confession to be involuntary after two detectives questioned a young man with autism for over three hours as he sat in the corner of a small room. The detectives sat between him and the door to exit. He denied the offense 16 times but eventually repeated words stated by the officers so that the questioning would end. My experience as an autism parent prompted me to ask our indigent defense office and mental health court professionals to assist the young man's defense attorney in evaluating him for autism. At the age of 28, the young man was diagnosed with autism, which provided a basis of understanding for the counterintuitive behavior that led detectives to unfair interrogation techniques and erroneous conclusions.

Conclusion

Whether and how people affected by autism share their diagnoses and stories is a very personal decision. Tres has given our family permission to be transparent and openly discuss his diagnosis, struggles, and success. In our classes, we do not tell people about autism—we *show* people autism. We have been told that this is why our presentation resonates with our audience. We will continue to share it as many times and as much as we can.

If you have questions about the ASK bags or my and Tres's presentation, please email us at bellautisminterventionteam@gmail.com, or check out the Facebook page, "Bell County Autism Intervention Team." ❇

Editor's note: The author would like to thank Officer Bradley DeLange, Dawn Owens, and Kristi Tindell for their contributions to this article.

Endnote

[1] My spouse and I began seeking a diagnosis for Tres when he failed to use words at age 2. We utilized Early Childhood Intervention (ECI) until he qualified for speech therapy through public schools at age 3. That same year, a developmental pediatrician "ruled out" autism. Just before Tres turned 11, he was diagnosed with Asperger's Syndrome (a form of autism). Tres attended a Head Start Program at age 4 and was mainstreamed into general education classrooms from K–12 grades where he received speech and occupational therapy, and until high school, accommodations on state-required standardized tests. He proudly graduated from Belton New Tech High School in 2018.

Intervening with juveniles with autism

At the same time Tres and I began teaching "Autism and Law Enforcement" to local law enforcement, my friend and colleague, Dawn Owens, Assistant Director of Juvenile Probation in Bell County, saw a continued need for the juvenile justice system to work with law enforcement to understand youth with Autism Spectrum Disorder and IDD (intellectual and developmental disabilities). Her probation officers were recognizing that inadequate interfacing with this population exacerbated and escalated already difficult situations and caused these youths to accrue more criminal charges and technical violations of probation, often pushing them farther into both the juvenile and adult criminal justice systems. Juvenile probation officers also observed that when these youths were detained in pre-adjudication facilities, incidents of aggressive behaviors and rates of restraint increased when direct care staff were unfamiliar with the most appropriate intervention strategies. (Strategies that are best for those with ASD and IDD differ from traditional cognitive behavioral approaches.) In addition, when placement outside the home was necessary, locating facilities that specialize in serving youth with ASD or IDD was very difficult—which also contributes to pushing this special population farther into criminal justice systems.

Dawn observed that from 2014–2019, Bell County Juvenile Services (BCJS) experienced an increase in juveniles with ASD and IDD characteristics entering the juvenile justice system. Oftentimes, these children did not carry a formal diagnosis because their caregivers or schools did not seek appropriate assessments or accept diagnoses suggested by medical or mental health professionals. Juvenile justice professionals oftentimes did not have an accurate paper trail detailing the educational and behavioral backgrounds of the youth entering their care. BCJS also received a pattern of referrals for assault family violence in which the caregiver or parent was unable to control the youth's behavior and had no known resources to access for help. The caregiver often felt his or her only option was to call police, which resulted in the child's arrest and placement in a detention facility.

Following significant challenges with several cases involving undiagnosed youth with ASD characteristics and IDD, in October 2019, BCJS sought grant funding from the Texas Juvenile Justice Department to develop and implement a continuum of care, beginning with prevention and early intervention to divert ASD and IDD youth to community supports and services. BCJS uses the "Checklist for Autism Spectrum Disorder" (CASD) during the initial intake process for *every* youth who enters its system.[1]

In cooperation with BAIT, BCJS allocated specific grant funds for the development and distribution of ASK Bags to provide police officers with tools and strategies to de-escalate situations on the scene and in the field. ❇

Endnote

[1] This checklist is available for purchase at https://stoeltingco.com/Psychological-Testing/Checklist-for-Autism-Spectrum-Disorder-CASD~10032.

A defendant may deny, but he may not flatly deny

We prosecutors are loathe to agree to the inclusion of defensive instructions in jury charges where we do not feel that they are justified by the facts.

By Jason Bennyhoff
Assistant District Attorney in Fort Bend County

Nowhere is our righteous indignation more aroused than when a defendant raises a confession and avoidance defense but has not confessed his guilt to the offense. Naturally, our first instinct is to fight such a defensive instruction in the jury charge.

This instinct, while logical, is becoming less appropriate because the Texas Court of Criminal Appeals is taking a more expansive view of what constitutes a sufficient "confession" to satisfy that prong of the confession and avoidance doctrine. This article will review that doctrine and the continuing evolution, and one might say, erosion of the confession prong of the doctrine.

What is the confession and avoidance doctrine?

The doctrine applies to "justification"-type defenses wherein a defendant must confess his guilt (this is the confession part) and then argue that he should nonetheless not be convicted because his conduct was justified in some respect (this is the avoidance—for example, "I acted out of necessity"). Justification defenses include necessity, self-defense, and the Good Samaritan defense.[1] The doctrine does not apply to defensive issues wherein the defendant simply seeks to negate an element of the offense.[2]

The Court of Criminal Appeals has defined the confession prong of the confession and avoidance doctrine in two ways:

1) the defendant must admit all of the elements of the charged offense; or

2) when "the defendant's defensive evidence essentially admits to every element of the offense, including the culpable mental state."[3]

However, as we shall see below, what constitutes an admission has been expanded beyond the bare dictionary definition of that word, and the source of the evidence constituting an admission is now perhaps irrelevant.

The confession prong

Though it is beyond the scope of this article, the confession and avoidance doctrine has a long history in English and American jurisprudence.[4] For our purposes, suffice it to say the doctrine has evolved and expanded beyond its limited origins. While it was originally entirely separate and distinct from scenarios in which a defendant denied an element or elements of an offense, it has expanded to encompass some such scenarios, and in point of fact, as the Court of Criminal Appeals has succinctly put it, the Texas courts' application of the doctrine has been "somewhat inconsistent."[5]

Stemming from its origins as a discrete doctrine with limited application, the Court of Criminal Appeals long held that a defendant who denied any element of a charged offense was not entitled to a defensive instruction on a confession and avoidance defense. However, even in those days, as the Court has since acknowledged, it sometimes simply "ignored the confession and avoidance doctrine altogether."[6]

Recognizing its own inconsistent application of the confession prong, the Court sought to bring some clarity to the issue in *Juarez v. State*.[7]

In *Juarez*, the appellant was charged with aggravated assault on a peace officer for biting the officer on the hand. Juarez admitted biting the officer, and he "both admitted to and denied the culpable mental state ..." when he testified that he accidentally bit the officer because he thought he was suffocating when the officer was on top of him.[8] Juarez requested a necessity instruction, which the trial court denied because the defendant had denied the culpable mental state.

The Tyler Court of Appeals held that the trial court erred in holding that Juarez was not entitled to a necessity instruction because he had not admitted to every element of the offense; it also held that a defendant need not admit every element of the offense, but that a defendant can be entitled to a justification defense if he "sufficiently admits conduct underlying the offense."[9]

The Court of Criminal Appeals held that the court of appeals was incorrect when it concluded that Juarez's admission to the act (of biting the officer) was enough to satisfy the confession and avoidance doctrine: "As our decisions make clear, the doctrine requires an admission to the conduct, which includes both the act or omission and the requisite mental state."[10] The Court went on, however, to affirm the Tyler Court's holding that the trial court erred by refusing to include the necessity instruction:

> [W]e have rendered two different interpretations of the confession and avoidance doctrine's requirements. Historically in necessity defense cases, we have said that a defendant must admit to the conduct. We made this assertion in cases in which the defendant testified and explicitly denied the conduct, either by denying the act or the culpable mental state or both. But in our most recent discussion of the doctrine in *Shaw v. State*, we expanded the admission requirement and said that a defendant's defensive evidence must admit to the conduct. Whether the confession and avoidance doctrine requires the former or the latter is not necessary to our resolution of this case because Juarez testified and a factfinder could reasonably infer from his testimony that he bit Officer Burge intentionally, knowingly, or recklessly. We will leave it for a future necessity defense case to decide whether the confession and avoidance doctrine requires a defendant's own admission.

The doctrine of confession and avoidance applies to the Penal Code's necessity defense. As a result, a defendant cannot flatly deny the charged conduct—the act or omission and the applicable culpable mental state. Because it can reasonably be inferred from Juarez's testimony that he intentionally, knowingly, or recklessly bit Officer Burge, the trial judge erred in refusing Juarez's request for a necessity instruction.[11]

Where does *Juarez* leave us?

The Court of Criminal Appeals' holding in *Juarez* can fairly be said to have clarified that if a defendant's own admission to the elements of the offense appears in the record, that admission will satisfy the confession prong even if it is equivocal; the jury need only be able to reasonably infer the admission.

However, the Court's opinion in *Juarez* did not answer all of the questions that had been raised about the expansion of the confession prong. *Juarez* would lead one to wonder just how equivocal a defendant's admission could be—could he equivocate about the commission of the offense entirely, or perhaps about only one element? Could a defendant equivocate only about the culpable mental state rather than the actus reus of the offense? The Court explicitly left unanswered the question of whether a defendant's own admission was required to satisfy the confession prong or whether the admission could come from "the defendant's defensive evidence."[12]

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After *Juarez*

Since 2020, the Court of Criminal Appeals has touched on the confession prong of the confession and avoidance doctrine in several cases of interest. The first is *Ebikam v. State*,[13] an unpublished opinion; although its precedential value is thus removed, it is rather fascinating because it again seeks to clarify the questions left open by *Juarez* and gives us some insight into the thinking of the Court's judges, which was rather splintered and wide-ranging on these questions.

In *Ebikam*, the five-judge majority opinion (in which three of the judges joined but wrote a separate concurring opinion) recognized that it needed to address "an apparent conflict in our cases about whether [the confession and avoidance doctrine] requires an admission of every element of the charged offense or something less than that."[14] The Court clarified the degree of admission necessary thusly:

> A flat denial of the conduct in question will foreclose an instruction on a justification defense ... [b]ut an inconsistent or implicit concession of the conduct will meet the requirement. Consequently, although one cannot justify an offense that he insists he did not commit, he may equivocate on whether he committed the conduct in question and still get a justification instruction."[15]

This opinion is further complicated by the fact that three of the judges who joined in the majority also wrote a concurring opinion saying that they did not believe the defendant had carried his burden to establish his entitlement to a self-defense instruction.

The Court applied that reasoning in *Ebikam* by holding that the defendant was not required to confess the manner and means of the assault to be entitled to a self-defense instruction, but it remanded the case to the court of appeals to determine whether the defendant's defensive theory foreclosed his commission of the assault or justified it under self-defense. At trial, the defendant conceded only to trying to close the door on the complainant when the complainant tried to enter their apartment. This majority holding again left open the ultimate question: Was the defendant's evidence enough of a concession to justify the inclusion of a self-defense instruction?

This opinion is further complicated by the fact that three of the judges who joined in the majority also wrote a concurring opinion saying that they did not believe the defendant had carried his burden to establish his entitlement to a self-defense instruction.[16] *Ebikam* is also of note because the dissent, in which two judges joined, argued that a defendant should be able to "flatly deny" the charged conduct and still get a defensive instruction if it is raised by the evidence in any fashion.[17]

On remand, the San Antonio Court of Appeals held that the defendant's partial concession was enough to entitle him to a self-defense instruction and that he was harmed by the lack of that instruction.[18]

In sum, *Ebikam* seems to leave the larger questions of *Juarez* unanswered, but again indicates a Court of Criminal Appeals seemingly willing to take an expansive view of the confession prong of the doctrine.

In *Rodriguez*, a 2021 published opinion, the Court of Criminal Appeals appeared to come together to resolve the expansion of the confession prong.[19] In *Rodriguez*, the Court again noted the rather confused nature of its prior confession jurisprudence when it wrote that "[t]he traditional confession-and-avoidance formulation is that the defendant must admit to 'all elements of the charged offense.' ... However, that formulation has been rephrased and even seemingly undermined."[20] The Court then recited its prior jurisprudence on the various scenarios in which it had held that a defendant had sufficiently confessed without expressly admitting to all of the elements of the offense, and it then held that these precedents were correctly decided and that they all ultimately stood for the proposition that "in a case of conflicting evidence and competing inferences, the instruction should be given."[21] Applying that logic to Rodriguez's case, the Court held that his admission to being involved in a melee which resulted in the victim's death by a gunshot fired from a gun in Rodriguez's hand was sufficient to satisfy the confession prong of the confession and avoidance doctrine, though the State argued that Rodriguez's testimony denied both the act and the culpable mental state.

So where does this jurisprudence leave us?

The Court of Criminal Appeals seems to have ultimately come down on the side of an expansive view of the confession prong. The Court's holdings indicate that if the defendant's admissions, even conflicting or equivocating, do not foreclose the commission of the offense, the instruction should be given and the jury should be allowed to resolve any conflicts. This seems to answer the question of just how much of an admission the defendant must make, which the *Juarez* opinion implicitly left unanswered. However, the Court has still not resolved the question explicitly left unanswered in *Juarez*, which is whether the "confession" requires the defendant's own admission.

Though this question has not been squarely addressed by the Court of Criminal Appeals, there is precedent from which one could infer that the defendant's own admission is not re-

quired. Generally, a "defendant is entitled to an instruction on every defensive issue raised by the evidence, regardless of whether the evidence is strong, feeble, unimpeached, or contradicted, and even when the trial court thinks the testimony is not worthy of belief."[22] Further, there is long-standing precedent that the source of the evidence is irrelevant.[23] The Court of Criminal Appeals recently reiterated these general rules in confession and avoidance cases, further confirming their continuing viability in this context.[24] Therefore, prosecutors would be well served to be cautious about contesting the inclusion of a confession and avoidance defensive instruction where the admission is not the defendant's own but the evidence otherwise potentially raises a confession and avoidance defense.[25]

Conclusion

Recent jurisprudence on the confession and avoidance doctrine dictates that trial courts should err on the side of letting juries resolve factual conflicts and ambiguities in deciding whether to give defensive instructions. That being the case, Texas prosecutors should be aware of the Court's recent pronouncements in this area and be cautious about contesting the inclusion of such defensive instructions. There is perhaps no more disappointing feeling than earning a hard-won and just conviction, only to see it overturned on appeal due to charge error. Luckily, though the law allows defensive theories instructions to be included in the charge even where they are conflicting or have dubious factual support, this is oftentimes fertile ground for final argument. Likewise, juries are not inclined to leave their common sense at home, and so prosecutors with good cases, good final arguments, and fair juries will usually find the inclusion of such instructions not just harmless but even helpful in reaching their sought-after verdict. We prosecutors should be cautious in crafting our jury charges and leave incredulity for our final arguments. ❇

Endnotes

[1] *Juarez v. State*, 308 S.W.3d 398, 402 (Tex. Crim. App. 2010) (so holding and applying in necessity defense (Tex. Pen. Code §9.22)); see, e.g., *Shaw v. State*, 243 S.W.3d 647, 659 (Tex. Crim. App. 2007) (applying confession and avoidance doctrine to Good Samaritan defense (Tex. Pen. Code §22.04(k))); *Cornet v. State*, 359 S.W.3d 217, 225 (Tex. Crim. App. 2012) (applying to medical care defense in Tex. Pen. Code §22.021(d)); *Ex parte Nailor*, 149 S.W.3d 125, 132-34 (Tex. Crim. App. 2004) (applying to self-defense in Tex. Pen. Code §9.31); see generally, Tex. Pen. Code Ch. 9 (Justification Excluding Criminal Responsibility).

[2] *Juarez*, 308 S.W.3d at 402 (confession and avoidance doctrine does not apply to the affirmative defense of mistake of fact).

[3] *Shaw*, 243 S.W.3d at 659.

[4] See *Juarez* at 402–03.

[5] *Id*. at 403.

[6] *Id*., citing *Martinez v. State*, 775 S.W.2d 645, 647 (Tex. Crim. App. 1989) (holding that the defendant was entitled to a self-defense instruction despite his denial of the mens rea element of the offense by claiming that he did not intend to kill the victim).

[7] *Juarez*, 308 S.W.3d at 403-06.

[8] *Id*. This portion is in quotations because this rendition of the facts is rather dubious–in fact the appellant was asked specifically if he engaged in the conduct intentionally, knowingly, or recklessly, and he denied acting in any of those mental states. But it illustrates that the Court of Criminal Appeals took a rather expansive view of the facts (and perhaps is reflective of the Court's notion of fair play: Though it is unstated here, it is perhaps only fair that if the jury can disbelieve the appellant's denial of the culpable mental state to his detriment to find him guilty, the jury should also be able to disbelieve the appellant's denial of the culpable mental state to his benefit to find in his favor on a justification defense).

[9] *Juarez v. State*, No. 12-08-0009-CR, 2009 WL 768595 at *4 (Tex. App.–Tyler Mar. 25, 2009) (mem. op., not designated for publication) *aff'd, Juarez*, 308 S.W.3d 398.

[10] *Id*. at 404.

[11] *Id*. at 405–06 (internal citations omitted).

[12] *Id*. at 406.

[13] *Ebikam v. State*, No. PD-1199-18, 2020 WL 3067581

(Tex. Crim. App. Jun. 10, 2020) (mem. op., not designated for publication).

[14] *Id*. at *1.

[15] *Id*. at *3.

[16] *Id*. at *4-6, Newell, J. concurring (joined by Judges Richardson and Slaughter).

[17] *Id*. at *5-6.

[18] *Ebikam v. State*, No. 04-18-00215-CR, 2020 WL 6470383 at *1-2 (Tex. App.–San Antonio, Nov. 4, 2020) (pet. ref'd) (mem. op, not designated for publication).

[19] *Rodriguez v. State*, 629 S.W.3d 229, 231 (Tex. Crim. App. 2021).

[20] *Id*. at 231-32 (internal citations omitted).

[21] *Id*. at 233.

[22] *Walters v. State*, 247 S.W.3d 204, 209 (Tex. Crim. App. 2007).

[23] *Smith v. State*, 676 S.W.2d 584, 586-87 (Tex. Crim. App. 1984).

[24] See, e.g., *Jordan v. State*, 593 S.W.3d 340, 343 (Tex. Crim. App. 2020) (noting self-defense is a confession and avoidance defense and reiterating that a defendant is entitled to any defensive instruction raised by the evidence, though the defendant did testify in that case).

[25] See *Smith*, 676 S.W.2d at 586-87 (self-defense instruction warranted though defendant did not testify, but court did not examine confession and avoidance doctrine implications directly); *Roark v. State*, No. 01-19-00428-CR, 2020 WL 5823152 at *3-7 (Tex. App.–Houston [1st Dist.] Oct. 1, 2020, no pet.) (mem. op., not designated for publication) (examining Court of Criminal Appeals' holdings on confession and avoidance issue and holding that there was evidence in the record, though the defendant did not testify, from which the jury could have found all the elements of the offense and the defensive theory to be true and that the trial court erred by not giving a necessity instruction).

Using the Tax Code to go after gas thieves

Gas thieves, in Texas? Unfortunately, yes. It is a major problem nationwide that has steadily grown in Texas in recent years.

By Steve Fawcett
Assistant Criminal District Attorney in Dallas County

Some of you are already very familiar with these criminals, but for those unfamiliar, these thieves make a living breaking into gas pumps to install card skimming devices (aka "gas skimming") and return later to collect the card data of hundreds of unsuspecting victims who happened to use their credit or debit cards to fill up their tanks. The thieves then re-encode the stolen data onto gift cards, which they use to purchase diesel fuel fraudulently. This stolen diesel is resold at truck stops and construction sites, typically for a dollar less than market price. Some of the criminals even own and operate their own trucking companies, saving substantial overhead. Recently, these groups have evolved and are now tampering with the pumps directly (i.e., cutting the pulser, which controls the dispenser's electronic display of the volume and cost of the fuel that's dispensed) to gain unfettered access to the fuel, costing gas stations millions.

Why should we care?

These thieves victimize hundreds of Texans each time they successfully place a skimming device on a pump. Some of you have been victims yourselves: Ever notice your card was used at a gas station you know you never visited? Worse, some victims may get their checking or savings account cleaned out if they used a debit card. In addition to the victims whose card data is stolen, the gas stations suffer too. Many of these stations are local family-owned businesses. Cutting the pulser takes that gas pump out of service, and the part needed to repair is not manufactured locally. This means the gas pumps can be broken for months.

There is also a serious safety concern on Texas roads. These criminals transport large quantities of diesel fuel with uninspected, "homemade" auxiliary tanks attached to their vehicles. In one case, an Irving officer observed diesel leaking onto the roadway during a traffic stop. Texans should not wait for a disastrous accident to take this threat seriously.

How are we tackling the problem?

Prosecutors have used various offenses in the Penal Code to successfully prosecute gas thieves, particularly in Smith County.[1] Breaking into the pumps to install a skimming device is unlawful interference of an electronic communication, a second-degree felony.[2] This is a precursor crime for engaging in organized criminal activity, a first degree, if you can connect three or more defendants together.[3] Some agencies charge possession of the skimming devices or auxiliary tanks as criminal instruments.[4] Law enforcement can extract the data from the skimming devices. Each name, card number, and ZIP code is an "item" under the Fraudulent Use or Possession of Identifying Information statute.[5] Offenders often possess more than 50 items, which is a first-degree felony under §32.51. If caught with re-encoded cards, offenders can be charged with Fraudulent Use and Possession of Credit or Debit Cards.[6] Further, defendants may also be charged with state jail Credit or Debit Card Abuse[7] or Theft.[8]

Or, prosecutors can use the Tax Code to see justice done against these perpetrators.

How can prosecutors use the Tax Code?

Motor fuel taxes are governed by Chapter 162 of the Texas Tax Code. There are 36 specified ways to commit a crime under this chapter, as outlined in Tex. Tax Code §162.403, including a "catch-all" provision that makes it a second-degree felony to "evade or attempt to evade in any manner a tax imposed on motor fuel by this chapter."[9] The

punishment for the 36 listed offenses vary from Class C tickets to second-degree felonies,[10] and prosecutors must prove the defendant acted intentionally or knowingly.[11] Venue is any county where the tax violation took place or Travis County,[12] and the statute of limitations for felonies under Chapter 162 of Tax Code is seven years.[13] The most common tax violations that the Dallas County White Collar Crime Division has successfully indicted defendants for are transporting motor fuel[14] without a cargo manifest or shipping document[15] and the catch-all provision mentioned above, both of which are second-degree felonies. As with Penal Code §16.02, felony tax offenses are now precursors for Engaging in Organized Crime.[16]

Let's first address transporting motor fuel without a cargo manifest or shipping document. The Texas Comptroller's Office uses cargo manifests and shipping documents to track motor fuel transportation for tax purposes, i.e., how much fuel is in transit, where it came from, and where it's going. Legitimate motor fuel transporters obtain these documents from the fuel distributors, and both the Comptroller's Office and Texas peace officers are allowed to stop vehicles transporting motor fuel to inspect these documents and ensure compliance.[17] Anyone using a "transport vehicle" must obtain the documents.[18] The Tax Code defines transport vehicles as "a vehicle designed *or used* to carry motor fuel over *a public highway*"[19] (emphasis added). Three important carve-outs: A person does not need either a cargo manifest or shipping document if transporting:

1) your own motor fuel for personal consumption,[20]

2) 10 gallons or less,[21] or

3) on private property and not a public highway.[22]

These exceptions are easy to overcome: Officers can describe the defendant driving off with the stolen motor fuel on a public highway. Gas station clerks provide a printout showing the card used and amount of motor fuel purchased by the defendant (hundreds of gallons is normal; I've never seen less than 10).[23] Officers or detectives can confirm the card was fraudulent by contacting the true cardholder, proving the defendant did not own the motor fuel and was required to provide shipping documents or manifests. The Comptroller's Office then confirms what we already know—that that office has no records that the defendant applied for proper paperwork—and we have a second-degree felony.

In many ways, prosecuting defendants for motor fuel tax violations is easier than for offenses in the Penal Code. The defendant either has the proper paperwork for a tax offense or he does not, and prosecutors do not have to track down a bunch of victims of credit card abuse as they would for some Penal Code offenses.

The catch-all tax evasion provision is not as clear cut, which is a strength, as it allows prosecutors to show the judge or jury the entire scope of the scheme with expert testimony from the Comptroller's Office or the newly opened Financial Crimes Intelligence Center (FCIC).[24] Texas tax on motor fuel is called a backup tax. Gas stations purchase fuel from refineries, or middlemen, and the 20 cents per gallon tax[25] is paid up front.[26] The gas station *shall* pass that tax onto the ultimate consumer and separate the sales price from the tax imposed.[27] These gas thieves are committing, or attempting, tax evasion when they use re-encoded cards. The thief is not the ultimate consumer paying the tax. Instead, the unsuspecting victim of credit card abuse is paying that tax. Second, the thieves are reselling the fuel for below market price. Did they pass the backup tax onto the buyer and provide a receipt separating the sales price from the tax imposed? Of course not. Any of these methods—regardless of the amount of actual tax evaded or attempted to evade—equals a second-degree felony.

Why use the Tax Code?

In many ways, prosecuting defendants for motor fuel tax violations is easier than for offenses in the Penal Code. The defendant either has the proper paperwork for a tax offense or he does not, and prosecutors do not have to track down a bunch of victims of credit card abuse as we would for some Penal Code offenses.

Also, criminals are wising up. Dallas County cases from 2019 and 2020 often involved defendants caught with a whole stack of re-encoded cards, picking up second- and first-degree felonies under Penal Code §32.315. They also were brazen enough to carry ledgers, multiple cell phones, skimming devices, and other tools of the trade alongside them. Not so much anymore. They now diversify their duties. The offender putting skimming devices on pumps is leaving his computer and tools in his hotel room. A separate criminal creates the re-encoded cards, and he outsources the job of using the cards to purchase diesel to various other defendants who are colloquially known as "runners." The runners are now clever enough to carry only the cards they intend to use that day, which is typically fewer than five cards.

Recently, Dallas police arrested a defendant after he was caught using a re-encoded card to purchase diesel and offloading the fuel into trucks at a nearby truck stop. His only Penal Code

offenses were credit card abuse and credit card fraud (§32.315, under five items), both state jail felonies. But with the help of the Tax Code, the Comptroller's Office charged him with two motor fuel tax violations under §§162.403(31) and (34)—transport without cargo manifest and shipping docs and tax evasion. He opted for an open plea. His attorney tried downplaying the offenses, but through expert testimony from the Comptroller's Office and from hard-working Dallas police officers, the whole scope of the crime was revealed, and the judge sentenced him to 10 years in prison.[28]

Similar success came from another defendant who purchased diesel with re-encoded cards. An eyewitness called 911, thinking the defendant was stealing fuel out of trucks. Grand Prairie police showed up, arrested him for suspected theft, and found re-encoded cards in his truck, along with a nearly full auxiliary tank. The defendant denied stealing fuel but admitted to fueling the trucks up. The defendant named the people he worked with, including another truck driver caught the same night; the people who provided him with the cards; and those who paid him for each delivery. Dallas County successfully indicted him with the second-degree tax evasion cases, as well as a first-degree engaging in organized tax evasion. Texas v. Burgostorres, No. F2000537 (283rd Jud. Dist. Ct., Dallas County, July 9, 2021) (pled to J).[29]

Conclusion

The problem of gas thieves is not going away, especially with the price of gas continuing to rise. Texas prosecutors have successfully gone after them through the Penal Code and should continue to do so. I hope this article will raise awareness that the Tax Code is another tool in the prosecutor's toolbox. Texas prosecutors should consider it when making charging decisions, as it might allow us to indict defendants with second-degree tax offenses that could serve as a predicate for a first-degree engaging in organized crime. ❇

Endnotes

[1] See, e.g., LouAnna Campbell, "Austin man sentenced to life in prison for involvement in gas pump skimmer operation," *Tyler Morning Telegraph*, Feb. 6, 2019, https://tylerpaper.com/news/local/austin-man-sentenced-to-life-in-prison-for-involvement-in-gas-pump-skimmer-operation/article_fd57bae8-2a56-11e9-8e09-230aeca073ef.html (life in prison for engaging in organized crime, to wit: Unlawful Interception of Electronic Communication (Tex. Penal Code §16.02)); Sariah Bonds, "Man gets 65 years for gas-skimming operation in Tyler," KLTV, Mar. 2, 2022, www.kltv.com/2022/03/02/man-found-guilty-gas-skimming-operation-tyler/ (65 years for Unlawful Interception of Electronic Communication (Tex. Penal Code §16.02)).

[2] Tex. Penal Code §16.02; note that many counties, such as the Smith County DA's Office, will also charge defendants with §16.01 for mere possession of a skimming device, as the device itself has no other legitimate purpose.

[3] Tex. Penal Code §71.02(18).

[4] Tex. Penal Code §16.01.

[5] Tex. Penal Code §32.51.

[6] Tex. Penal Code §32.315.

[7] Tex. Penal Code §32.31.

[8] Tex. Penal Code §31.03.

[9] Tex. Tax Code §162.403(34).

[10] Tex. Tax Code §162.405.

[11] Tex. Tax Code §162.404(a).

[12] Tex. Tax Code §162.407.

[13] Tex. Code Crim. Proc. Art. 12.01(3)(C).

[14] Tex. Tax Code §162.001(42) ("Motor fuel" means gasoline, diesel fuel, gasoline blended fuel, compressed natural gas, liquefied natural gas, and other products that are offered for sale, sold, used, or capable of use as fuel for a gasoline-powered engine or a diesel-powered engine).

[15] Tex. Tax Code §162.403(31) ("transports motor fuel for which a cargo manifest or shipping document is required to be carried without possessing or exhibiting on demand by an officer authorized to make the demand a cargo manifest or shipping document containing the information required to be shown on the manifest or shipping document").

[16] Tex. Penal Code §71.02(19).

[17] Tex. Tax Code §162.009.

[18] Tex. Tax Code §162.004(a).

Continued in the pink box on page 45

Introducing Justice, the DA Cat

It is Monday morning in Brownsville. I am running late, struggling with my mask, and fielding emails and phone calls from agencies and defense attorneys.

By Edward A. Sandoval
Administrative First Assistant District Attorney in Cameron County

I make it to my desk, get my computer going, and who decides to make an appearance? None other than El Gato Negro himself, the Cameron County District Attorney's Office resident purr-alegal, Justice the Cat.

You see, I am his early morning snack dealer, and he stops by on the regular to make sure he gets his kibble. He is rather demanding about timely snack time; after all, he does reside in the office full time—he keeps his litter box in the executive restroom, has taken to sleeping on our elected DA's sofa, and spends his late afternoons either walking around giving the staff various snide looks ("Why are you here? I have naps to take") or sitting at the window watching pigeons.

Besides being the king of cat swagger (he is being raised by dozens of attorneys and staff), his purrs are a welcome break to the weight of being prosecutors. It is common for folks fresh from processing a particularly heinous case to seek him out for a scratch or a pet. On one occasion, a paralegal walked into my office asking, "Where is the cat? I just need a cuddle." Despite being a cat, he embraces his duties. He basks in the love and dutifully makes biscuits on any staff member in need of a smile. In addition, the presence of our purr-alegal has helped with the added stress of the pandemic. It is surprising how far a cuddle with a cat can go when we have lived in a socially-distanced society for two years.

Justice fancies himself a fashion afficionado. He has a collar for every occasion, and he enjoys wearing bow ties, unless it is his red tie day to match our District Attorney, Luis V. Saenz. He embraces the holiday spirit by dressing up for the season, including being our office's most recent Santa Claus and revealing that he is the real Batcat for Halloween.

ABOVE: Justice the DA Cat in his red tie, which happens to match one his elected District Attorney, Luis V. Saenz, wears regularly. BELOW: Justice "helping" get work done.

Where the cat came from

It seems that Justice has won the lost-kitty lottery. Assistant DA Stephanie Franke was on her way back from lunch on a hot summer day when she noticed someone throw a kitten out of a car window. She stopped and picked up the injured black fuzzball, who was about four weeks old. She brought him back to the office and gave him a little first aid to check him out. He was very emaciated and we did not think he was going to make it.

Truth be told, it was a very rough first few days, but he pulled through. Everyone in the office lent a hand to help him adjust and recover from his injuries. A number of folks even pooled money to have him seen and treated by a veterinarian. Slowly but surely, Justice started putting on weight, regrowing fur, and developing a personality. Because of the love and support we provided him and the interest we all had in his well-being, Mr. Saenz decided that he would be staying with our office.

Since then, Justice has made himself at home. During the week, you can find him just about anywhere in the office, and on weekends he'll go home with various staffers for "field trips." He regularly forces his way into meetings, often looking diligently engaged, and lays in the room while we're staffing cases. But Justice is not all purrs and cuddles, nor is he merely an office cat. He contributes to our mission. He has a social media presence that uses lighthearted messages

to raise awareness about important community and criminal justice issues. He frequently leaves notes on Facebook reminding our neighbors to be safe during the holidays, not drink and drive, and of course be kind to four-legged friends. His local celebrity has taken on a life of its own, and it is not uncommon for Mr. Saenz to be approached in public by strangers asking about the well-being of Justice, El Gato Negro.

Find him on Instagram @justiceccdacat. ❇

[19] Tex. Tax Code §162.001(61).

[20] Tex. Tax Code §162.004(h) ("This section does not apply to motor fuel that is delivered into the fuel supply tank of a motor vehicle"); see also Tex. Tax Code §162.001(43) ("Motor fuel transporter" means a person who transports gasoline, diesel fuel … or any other motor fuel … outside the bulk transfer/terminal system by means of a transport vehicle. … The term does not include a person who: (B) exclusively transports gasoline, diesel fuel … or any other motor fuel to which the *person retains ownership* while the fuel is being transported by the person (emphasis added)).

[21] Tex. Tax Code §162.1025(d).

[22] See Tex. Tax Code §162.001(61).

[23] This is often an issue. The officers always get the printout but typically do not have time to get a signed and notarized business records affidavit. The front desk clerk may not stick around, so it is important to ask detectives and/or officers to get the name, date of birth, and contact information for the clerk so that you can find and subpoena him or her for trial if you cannot secure a business records affidavit.

[24] Adam Colby, Director and Chief Intelligence Coordinator, and Sr. Investigator Jeff Roberts are both potential expert witnesses in any gas skimming-related trial and work at the Texas Financial Crimes Intelligence Center (FCIC), located at 100 N. Broadway, #400, Tyler, TX 75702; www.tdlr.texas.gov/fcic. Email the center at TXFCIC@smith-county.com, or contact Investigator Roberts directly at 903/590-4980.

[25] Tex. Tax Code §162.102 (gasoline); Tex. Tax Code §162.202 (diesel).

[26] For this reason, and unless a case involves dyed diesel (no tax paid upfront), these cases do not require restitution. Even so, tax evasion still occurs because the backup tax is specifically designed to be passed on and paid for by the ultimate consumer buying gas at the pump.

[27] Tex. Tax Code §162.1025(a) and (b).

[28] *Texas v. Morenomuriel*, Nos. F2082003 and F2082004 (204th Jud. Dist. Ct., Dallas County, Nov. 2, 2021).

[29] *Texas v. Burgostorres*, No. F2000537 (283rd Jud. Dist. Ct., Dallas County, July 9, 2021) (pled to J).

Softening the corpus delicti rule

"This cannot be what the law intended," I thought to myself—can a confessed child molester get away with abusing an infant, just because the child is incapable of outcry?

By Brittany Hansford
Assistant District Attorney in Montgomery County

Prosecutors accustomed to handling sexual abuse cases know that DNA evidence and injuries aren't always found during medical examinations. The absence of physical evidence is not surprising and certainly not a barrier to successful prosecution. Typically, we receive cases after a child has made an outcry that something happened, and we go forward in the pursuit of justice. However, what happens when the defendant is the only one who tells?

The facts

In September 2016, Bradley Shumway told a bishop at his church that while he and his wife were babysitting some friends' children, he took the friends' 17-month-old daughter into his bedroom, pulled down her diaper, and touched her genitals with his hands, tongue, and penis. Later that month, Shumway told his wife the same thing but in even greater detail. He explained that while his wife was outside on the back patio talking to their daughter, he took the victim into the master bedroom and placed her on the bed. He confessed to touching the infant because he was "curious whether it would give him an erection." He told his wife that he stopped using his mouth on the child's genitals because of the foul smell of the diaper. Later on, he said he was touching the child with his hand and "realized he was doing something very wrong."

Shumway provided his wife with explanations for his behavior, saying he felt like she was neglecting him when she went to lunch with her friends, leaving him to care for all the children. He blamed her for being "irresponsible" because she did not put shorts back on the infant after a diaper change.

Because of the amount of detail Shumway relayed to his wife, she was able to corroborate nearly all of the circumstances leading up to and following the crime. She recalled going to eat with a friend the weekend they were babysitting, the friend's name, and the restaurant. She remembered leaving the shorts off the little girl because they were too small for the child. She recalled being outside on the back patio having a 15–20-minute conversation with her daughter that weekend, and she recalled her husband being inside with the victim during that conversation. She also remembered that afterwards, he was fasting and he seemed withdrawn.

Shumway's fasting was significant. He and his wife were both deeply religious. As part of their spiritual practices, they would occasionally fast from food for a period of time to reconnect with God through focused prayer. Along with fasting, the couple practiced the spiritual discipline of confessing their sins to others in the church to obtain forgiveness from God. It was the practice of confession that first pressed Shumway to admit the crimes to his bishop, and it was the observed fasting after the assault that suggested to his wife that something significant may have occurred.

After Shumway's admission, a sexual assault nurse examiner performed a physical examination of the victim and found no evidence of injury. She was unable to collect any physical evidence due to the untimeliness of the exam, which was almost two months after the crime. Even in acute (i.e., immediate) sexual assault exams, injury and DNA are rare, but after a lengthy delay, they become practically nonexistent.[1]

To make the case even more heinous, decades earlier the defendant had told his wife about molesting another infant when the couple lived in Utah. That child, whom they were babysitting, was also in diapers and was preverbal. That case was never reported to authorities.

Knowing that I was dealing with a man who is likely to continue to abuse children, I had to start by delving into the corpus delicti doctrine.

What the doctrine says

The corpus delicti doctrine is a common law rule stating that other evidence tending to show that a crime was committed must corroborate an extrajudicial confession. Recent Court of Criminal Appeals decisions required corroborating evidence, independent of the confession, that showed the "essential nature" of the offense committed. The amount of detail Shumway's wife was able to corroborate gave me the tools I needed to forge ahead, but I also knew the "essential nature" of this type of offense is typically not proven without an outcry, DNA, or an injury. I believed this case could shape the law in Texas, for better or for worse. We pushed onward.

Chief Prosecutor Nancy Hebert and I picked a jury and put on our evidence in May 2018. The defense came prepared with a bench memorandum arguing for an acquittal under the corpus delicti doctrine, but Judge Patty Maginnis allowed the case to go to the jury, which eventually found the defendant guilty of two counts of indecency with a child. During the punishment phase, the court heard about the defendant's prior molestation of another infant, and the judge handed him two 20-year sentences and ordered that the sentences be served consecutively. After the sentence was pronounced, Shumway appealed, claiming that the evidence was insufficient to support a conviction because it did not satisfy the corpus delicti doctrine.

The law and appellate arguments

On appeal, we argued that our evidence was sufficient to meet the corpus delicti rule, or, in the alternative, that an exception should be made in cases like this in which a victim is incapable of outcry. In arguing that our evidence was sufficient, we highlighted these tenets of the rule:

- The Texas corpus delicti rule requires only that the independent evidence tends to prove—not that it fully prove—the corpus delicti.[2] (Corpus delicti in Latin means "body of the crime," meaning concrete evidence of a crime, such as a corpse.)
- The amount of evidence required to corroborate the accused's out-of-court statement is not great. As long as there is some evidence that makes the crime "more probable than it would be without the evidence, the essential purposes of the rule have been served." [3]

We argued that the defendant freely and voluntarily confessed his guilt—on multiple occasions—because of his guilty conscience and his religious upbringing, and that no persuasion or coercion was used to prompt his confessions. His multiple confessions were credible and consistent, and they were corroborated in many respects by his wife's independent recollections. Under the circumstances, any reasonable person would conclude that the defendant sexually assaulted the victim; hence, the evidence satisfied the corpus delicti rule.

In an alternative argument, we leaned into the law regarding the appellate court's discretion to recognize exceptions to a common law rule—exceptions that other states have already recognized. The "corpus delicti rule is a common law, judicially created doctrine,"[4] so Texas courts are free to recognize exceptions to the rule when warranted. In support of the argument for a newly recognized exception—specifically, permitting the use of a trustworthy confession to establish the corpus delicti in a case of sexual misconduct perpetrated against a victim incapable of outcry—we discussed the original purpose of the rule and how this proposed exception would not increase concerns about the guilt of self-confessed defendants. For example, one purpose of the corpus delicti rule is to avoid convicting a defendant who has invented a crime to escape oppressive police interrogation. That concern is completely absent in a case like this, in which there was no police interrogation at all. The defendant's volunteered confessions were trustworthy because they resulted from his religious convictions and his guilty conscience, rather than any persuasion from police, and because they were highly corroborated by his wife's independent recollections.

In sum, we argued that when a rule operates to prevent prosecution for a grievous crime, without serving any countervailing purpose, it is

The defendant's volunteered confessions were trustworthy because they resulted from his religious convictions and his guilty conscience, rather than any persuasion from police, and because they were highly corroborated by his wife's independent recollections.

time for the rule to be adjusted.[5] The State's evidence in our case unquestionably established the defendant's guilt beyond a reasonable doubt. Moreover, in a case where any rational juror could easily have found the essential elements of the crime beyond a reasonable doubt, there is no reason to reverse the conviction because the State relied heavily upon the defendant's voluntary, corroborated, extrajudicial confession to prove that a crime occurred.[6]

To supplement our argument that an exception should be created, we gave examples of other states carving out similar exceptions. The Supreme Court of Colorado has abrogated the common-law rule, in part because it operated to encourage sexual violence against the most vulnerable members of society—those who cannot complain of the sexual misconduct perpetrated against them:

> We are troubled that the rule works to bar convictions in cases involving the most vulnerable victims, such as infants, young children, and the mentally infirm. We are also aware that the rule operates disproportionately in cases where no tangible injury results, such as in cases involving inappropriate sexual contact, or where criminal agency is difficult or impossible to prove, such as in cases involving infanticide or child abuse. Indeed, in Colorado, LaRosa's case is not the first of its type in which the rule has been invoked to bar conviction for sexual assault against a young child. Because the rule may operate to obstruct justice, we conclude that abandoning it will do more good than harm.[7]

The Supreme Court of Kansas also carved out an exception to the common-law corpus delicti rule, permitting a trustworthy confession to establish the corpus delicti of a crime "when the nature and circumstances of that crime are such that it did not produce a tangible injury."[8] That court cited Colorado's *LaRosa* in noting that the corpus delicti rule obstructed society's interest in prosecuting sex crimes committed against infants, which may leave no tangible evidence of injury:

> More pertinent to this case, applying the formal corpus delicti rule to crimes involving inappropriate sexual contact "seems especially troublesome" because the contact "often produces no tangible injury." *[State v.] Mauchley*, 67 P.3d [477], at 484–85 [(Utah 2003)]. The difficulty is compounded when, as in this case, the young victims are unable to qualify as witnesses who could present evidence of the corpus delicti independent of the confession. See *[State v.] McGill*, 50 Kan.App.2d [208] at 236–37, 328 P.3d 554 [2014)] (discussing various jurisdictions' efforts to apply the rule to cases with no tangible injury) (Stegall, J., concurring).[9]

Texas courts should recognize that the traditional corpus delicti rule should not permit the sexual assault of nonverbal infants and create an appropriate exception.

In discussing the harm caused by the formal rule, the Colorado Supreme Court held that in cases in which the "nature and circumstances of [a] crime are such that it did not produce a tangible injury," it will now recognize an alternative to independent proof of the corpus delicti: "That alternative route is a trustworthy confession or admission to crimes that do not naturally or obviously produce a tangible injury easily susceptible to physical proof."[10]

In conclusion, we argued that Texas courts should likewise act to protect the vulnerable from those who would prey upon infants incapable of complaining of the sordid crimes committed against them. The defendant's detailed, corroborated confessions to his bishop and his wife—motivated by his guilt and unprompted by any inquiries of authorities—are as trustworthy as confessions get. In addition, the punishment stage testimony shows that the defendant has repeatedly acted upon his predilection for sexual conduct with infants. To any extent that the outmoded common law might require his vindication and effectively encourage him to continue victimizing infants as uncomplaining sex objects, that law should be changed. Texas courts should recognize that the traditional corpus delicti rule should not permit the sexual assault of nonverbal infants and create an appropriate exception.

The outcome

The Court of Criminal Appeals held that our evidence was insufficient to satisfy the formal corpus delicti rule because there was no independent evidence of the "essential nature" of the crime (sexual touching). However, the

Court agreed the facts of the case justified an exception. "When sufficient evidence exists in the record to support the conviction for a sexual offense with no perceptible harm against a pre-verbal child victim and a defendant's confession is sufficiently corroborated, the failure to satisfy the corpus delicti rule should not bar conviction."[11]

The Court recognized that crimes against children often involve victims who lack the ability to outcry and typically do not cause perceptible harm. "Failing to recognize an exception to the corpus delicti rule under such circumstances would result in the inability to prosecute such crimes despite the existence of a voluntary, reliable, and corroborated confession. Because the record contains evidence sufficiently corroborating facts in the appellant's confessions, the corpus delicti rule should not bar his convictions."[12]

The Court recognized a narrow exception when the confessed conduct is committed against a child incapable of outcry and constitutes a sexual offense that did not result in perceptible harm. Otherwise, "strict application of the corpus delicti rule would seem to render some crimes—such as indecent contact with a child—unprovable when committed against infant children."[13]

In our case, the Court found the defendant's confession was sufficiently corroborated by the following evidence we developed in trial:

1) Shumway watched the child at a time consistent with his confession;

2) his wife took the child's shorts off for a portion of the weekend;

3) his wife left Shumway with the child while she was in the backyard with her daughter; and

4) his wife left Shumway to watch the children while she met with friends for lunch that weekend.

In addition, the State presented evidence that Shumway was fasting after the target weekend (which signaled some internal religious turmoil); he was emotionally withdrawn after that weekend (which also indicated that something had occurred); and he confessed consistently and voluntarily to two separate individuals (neither of whom held coercive powers of the State over him).[14]

The takeaway

If you are preparing for trial on a case with a confession to sexual conduct with a victim incapable of outcry, I recommend reviewing the case with the following questions in mind:

- To whom did the defendant confess?
- Was the confession voluntary?
- Are the circumstances surrounding the confession corroborated?
- Was the confessed conduct a sexual offense that did not result in perceptible harm?
- Was the victim incapable of outcry?

When developing the record in trial, it is always important to lay a good foundation for appellate arguments. Go into detail with witnesses about circumstances showing that the confession was voluntary, especially if the confession was to law enforcement. Make sure to cover every detail that can possibly be corroborated. In our case, Shumway's wife testified to the date, the county, the existence of the child, the fact that she and her husband babysat that weekend, the access the defendant had to the victim when she was outside with her daughter, that the child not wearing shorts, and the fasting after the fact. Every detail mattered. When Shumway confessed to his wife, he also informed her that he confessed to the bishop as well. His wife then recalled Shumway's visit to the bishop and his subsequent fasting, both events which Shumway did not explain at the time but which made perfect sense after his confession. It was clear to his wife that Shumway was attempting to deal with guilt from something he had done, something which was very troubling to him spiritually.

When developing the record in trial, it is always important to lay a good foundation for appellate arguments. Go into detail with witnesses about circumstances showing that the confession was voluntary, especially if the confession was to law enforcement. Make sure to cover every detail that can possibly be corroborated.

It is important to have a sexual assault nurse examiner explain why a sexual offense did not result in perceptible harm. Ask questions about the likelihood of injury, the likelihood of leaving DNA, whether this was an acute or non-acute exam, how that affects those likelihoods, and the quick-healing properties of the genital region. In addition, discuss the nature of the confessed conduct: touching versus penetration, over the clothes or under the clothes, and the expectation of injuries resulting from that conduct. Even penetration is not likely to cause injury, much less touching.

In conclusion

The wife of the defendant was of paramount importance in prosecuting the case against her then-husband. She is a strong, extremely elo-

quent person and a survivor. I think it is important to remember that the impact of one person's crime goes beyond the defendant and the victim; it touches and creates burdens for others as well. A wife and children will now live without a husband and father (though that result is what justice demands).

Lastly, and most importantly, never stop pursuing what is right. Chief Nancy Hebert repeatedly emphasized perspective when evaluating this case. The law needs to make sense. The law should protect a defendant's rights, but it should also protect our community, especially those most vulnerable. When I got this case, I knew I had to try it despite the apparent rigidity of the traditional corpus delicti rule. I refused to believe that protecting defendants' rights requires not pursuing justice for innocent children. There is a fine line here. As attorneys, we may not ethically bring a proceeding or assert an issue without a good faith basis for doing so. But we can make good-faith arguments that the existing law should be extended, modified, or even reversed. We sensed a softening in contemporary applications of the corpus delicti rule and believed that this case merited exploring it further.

If you come across a case that is righteous but would require rethinking the way things have been done in the past, talk to someone about it. Things change over time and the law is no exception.

If you come across a case that is righteous but would require rethinking the way things have been done in the past, talk to someone about it. Things change over time and the law is no exception. The law must adapt along with the world we are living in. I am very thankful that my office allowed me to pursue this case though we were not certain the law would be construed favorably to our facts. Sometimes that is the only way to spark change. We achieved that change, and so many kids in Texas are now safer as a result. ❇

Endnotes

[1] Joyce A. Adams, Karen J. Farst, and Nancy D. Kellogg, Interpretation of Medical Findings in Suspected Child Sexual Abuse: An Update for 2018, *Journal of Pediatric and Adolescent Gynecology* (2018), Vol. 31, Issue 3 (finding that most sexually abused children will not have signs of genital or anal injury, especially when examined nonacutely. A recent study reported that only 2.2 percent (26 of 1160) of sexually abused girls examined nonacutely had diagnostic physical findings, whereas among those examined acutely, the prevalence of injuries was 21.4 percent (73 of 340).)

[2] *Criner v. State*, 868 S.W.2d 29, 30 (Tex. App.–Beaumont 1994, pet. ref'd).

[3] *Id*. (quoting *Gribble v. State*, 808 S.W.2d 65, 72 (Tex. Crim. App. 1990)); accord *Bordman v. State*, 56 S.W.3d 63, 72 (Tex. App.–Houston [14th Dist.] 2001, pet. ref'd).

[4] *Carrizales v. State*, 414 S.W.3d 737, 740 (Tex. Crim. App. 2013); see, e.g., *Miller v. State*, 457 S.W.3d 919, 927 (Tex. Crim. App. 2015) (recognizing the "closely connected crime exception" to the corpus delicti rule).

[5] See, e.g., *State v. Mauchley*, 67 P.3d 477, 487–88 (Utah 2003) (holding that "additional procedural and constitutional safeguards that have been recognized since the rule's inception make the [corpus delicti] rule unnecessary").

[6] See and cf. *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991) (holding that the same standard of proof should be used in assessing the sufficiency of either direct or circumstantial evidence, and that the "exclusion of outstanding reasonable hypothesis" analysis should no longer be used in cases relying upon circumstantial evidence).

[7] *People v. LaRosa*, 293 P.3d 567, 575 (Colo. 2013) (footnotes omitted).

[8] *State v. Dern*, 362 P.3d 566, 583 (Kansas 2015).

[9] *Id*. at 579.

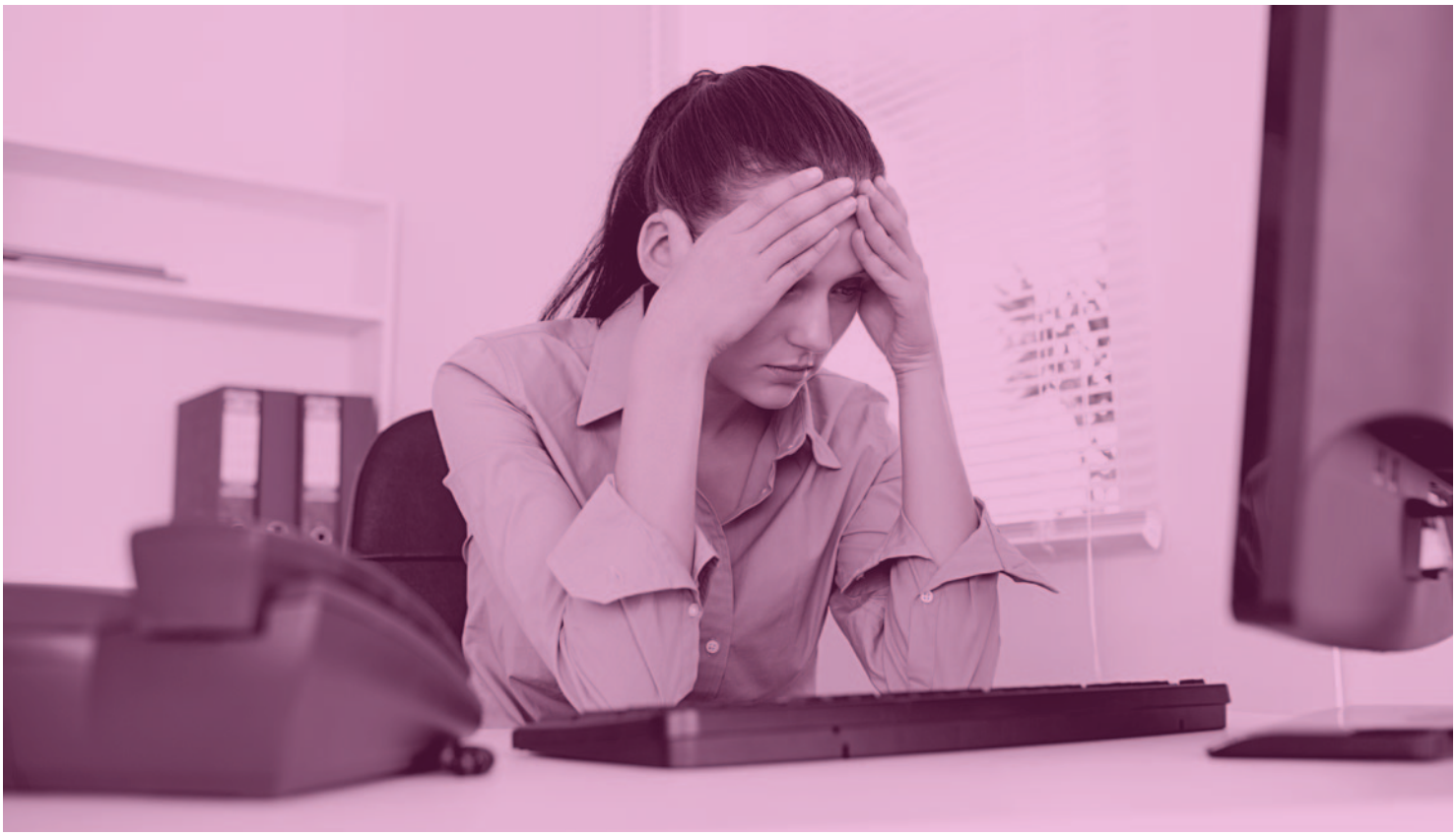
[10] *Id*.

[11] *Shumway v. State*, No. PD-0108-20, 2022 WL 301737, at *1 (Tex. Crim. App. Feb. 2, 2022).

[12] *Id*.

[13] *Id*. at *8.

[14] *Id*. at *10.



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