CHAPTER 10—CRIMES RELATED TO FAMILY VIOLENCE, STALKING, AND SEXUAL ASSAULT; CRIMES MOTIVATED BY BIAS OR PREJUDICE—PART I: STATUTES AND CASE LAW

(Tex. Code Crim. Proc. arts. 2.211, 42.013, and 42.014;
Tex. Penal Code Title 5 and §§ 25.03, 25.11
28.03-28.06, 30.05, 33.07, 36.06,
42.062, 42.07, 42.072, and 46.04;
18 U.S.C. §§ 2261, 2261A, and 2262)

Note: 2013 legislative changes are noted in red.

Summary:

Crimes that are often associated with family violence include stalking, assault (including by strangulation), sexual assault, homicide, criminal trespass, criminal mischief, harassment, and terroristic threat. For some offenses (e.g., family violence assault), proof of family violence is an element of the crime so a judgment of conviction will necessarily contain a finding that the defendant committed family violence. For offenses under Texas Penal Code Title 5 that do not have family violence as an element, if the evidence establishes that the offense involved family violence, the court must include a finding of family violence in the judgment. A finding of family violence in a judgment or order, whether in a civil or criminal case, has various potential collateral consequences. After a defendant who was on active duty military status is convicted of or placed on deferred adjudication probation for a family violence offense, the court clerk must send written notice of the conviction or probation to the staff judge advocate or provost marshall of the military installation to which the defendant is assigned.

Federal law makes it a federal felony crime to travel in interstate commerce to commit domestic violence, stalk another, engage in cyberstalking, or to violate a protective order. These federal criminal stalking offenses are gender-neutral and apply without regard to the relationship between the victim and the offender.

Subchapter A
Finding of Family Violence or Bias or Prejudice as the Motivation for a Crime: Requirements and Collateral Consequences

10.1 Finding required.

For some criminal offenses, family violence is an element of the crime[1] so that the judgment of conviction will implicitly contain a finding of family violence. For offenses under Texas Penal Code Title 5[2] in which family violence is not an element of the crime, if the evidence establishes at trial that the offense involved family violence, the court must enter an explicit finding that the defendant committed family violence in the judgment of conviction.[3]

- If family violence is not an element of the crime, even if a jury is the fact-finder, the family violence finding is made by the court.[4]

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[1] For instance, Tex. Penal Code § 22.01(b-1); Tex. Penal Code § 22.02(b)(1).

[2] *Garcia-Hernandez v. State*, No. 05-08-00735-CR, 2009 Tex. App. Lexis 2177 (Tex. App.—Dallas, Mar. 31, 2006, no pet.). In the appeal of an assault conviction, because the record affirmatively showed the assault involved family violence, the appellate court had the authority to reform the judgment to include the required finding of family violence.

Smelley v. State, No. 09-05-256 CR, 2006 Tex. App. Lexis 6583 (Tex. App.—Beaumont 2006, pet. ref'd). In a prosecution for assault, because the law requires that court enter a finding of family violence if the defendant was convicted, because the defendant knew the victim was his mother-in-law, and because the finding did not enhance punishment, the defendant had sufficient notice of the finding to satisfy due process.

Fullylove v. State, No. 13-0-169-CR, 2001 Tex. App. Lexis 8009 (Tex. App.—Corpus Christi, Nov.29, 2001, no pet.). In a prosecution for harassment, an offense under Penal Code Title 9, the court was not authorized to, and did not, make a finding of family violence in the judgment, because that type of finding is limited to offenses under Penal Code Title 5.

[3] *Othman v. State*, No. 14-09-444-CR, 2010 Tex. App. Lexis 5746 (Tex. App.—Houston [14th Dist.] July 22, 2010, no pet.) (mem. op.). In the judgment of conviction for aggravated assault with a deadly weapon, a separate, specific finding of family violence under Tex. Code Crim. Proc. art. 42.013 was required. The trial court's judgment which listed the offense as "Aggravated Assault-Family Member" was reformed to conform with Tex. Code Crim. Proc. art. 42.013 so that it properly reflected the defendant was convicted of aggravated assault with a deadly weapon under Tex. Penal Code § 22.02(b)(1) with a finding of family violence.

[4] *Morimoto v. State*, No. 2-04-272-CR, 2005 Tex. App. Lexis 2906 (Tex. App.—Fort Worth, April 4, 2005, pet ref'd). In a Class A misdemeanor assault prosecution, the trial court did not have to submit the family violence issue to the jury because the court did not increase the sentence beyond the statutory maximum.

Accord: *Pierce v. State*, No. 04-02-00749-CR, 2003 Tex. App. Lexis 9799 * 17 (Tex. App.—San Antonio, Nov. 19, 2003, pet. ref'd); *Rodriguez v. State*, No. 01-05-00589-CR, 2006 Tex. App. Lexis 6416 (Tex. App.—Houston [1st Dist.] July 20, 2006). In prosecution for Class A assault, after the jury convicted the defendant of Class C assault by

- A judgment's lack of a family violence finding is not conclusive; in a subsequent proceeding, the state may use extrinsic evidence to prove that the prior conviction was for an offense that involved family violence.[5]

- The finding of family violence is one, but not the only, method of proving that an offense involved family violence.[6]

- A court's finding of family violence does not violate a defendant's Sixth Amendment rights.[7]

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contact, the trial court did not err in entering a finding of family violence because the finding was supported by the evidence, did not conflict with the jury verdict, and did not enhance punishment for the underlying offense.

[5] *Goodwin v. State*, 91 S.W.3d 912 (Tex. App.—Fort Worth 2002, no pet.). Although the trial court did not make a finding of family violence in a prior assault judgment, in a separate assault prosecution, the state could use extrinsic evidence to prove the prior case was a family violence assault.

Manning v. State, 112 S.W.3d 740 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). In a family violence assault prosecution, a conviction that predated the effective date of Tex. Penal Code § 22.01(b)(2) could be used to enhance the sentence and extrinsic evidence could be used to prove family violence element of prior conviction in a subsequent proceeding.

Mitchell v. State, 102 S.W.3d 772 (Tex. App—Austin 2003, pet. ref'd). In a prosecution for family violence assault, the state was entitled to use extrinsic evidence to prove up family violence element of prior conviction being used to enhance punishment.

Accord: *Anderson v. State*, No 05-08-00864-CR, 2009 Tex. App. Lexis 8640 (Tex. App—Dallas, Nov. 10, 2009, no pet.); *King v. State*, No. 03-01-00531-CR, 2003 Tex. App. Lexis 8499 (Tex. App.—Austin, Oct. 2, 2003, pet. ref'd); *Manuel v. State*, No. 01-04-00282-CR, 2005 Tex. App. Lexis 3502 (Tex. App.—Houston [1st Dist. May 5, 2005, pet. ref'd); *Merrell v. State*, 2009 Tex. App. Lexis 5518 (Tex. App.-Houston [14th Dist.] July 16, 2009, no pet.); *Salguero v. State*, No. 01-01-00508-CR, 2002 Tex. App. Lexis 9104 (Tex. App.—Houston [1st Dist.] Dec. 19, 2002, pet. ref'd*); Stoker v. State*, No. 03-02-00137-CR, 2003 Tex. App. Lexis 1704 (Tex. App.—Austin, Feb. 21, 2003, no pet.); *Walker v. State,* No. 14-02-00716-CR, 2003 Tex. App. Lexis 4304 (Tex. App.—Houston [14th Dist.], May 22, 2003, pet. ref'd).

See *Crawford v. State*, No. 12-05-00293-CR, 2006 Tex. App. Lexis 6520 (Tex. App.—Tyler, July 26, 2006, no pet.). In a prosecution for felony family violence assault, where the state was unable to prove its enhancement paragraph by showing either that the court had made a finding of family violence or that the prior assault involved family violence, the judgment had to be reformed to reflect a conviction for a Class A, rather than a felony, assault.

[6] *State v. Eakins*, 71 S.W.3d 443 (Tex. App.—Austin 2002, no pet.). A finding of family violence under Tex. Code Crim. Proc. art. 42.013 is an additional method, not the only method, for proving a previous conviction for family assault.

[7] *Henderson v. State*, 208 S.W.3d 593 (Tex. App.—Austin 2006, pet. ref'd). The court's entry of a finding of family violence did not affect the defendant's sentence and so did not violate his Sixth Amendment rights.

- A caption in a charging instrument that includes the words "family violence" provides sufficient notice to the defendant that the state intends to seek a finding of family violence.[8]

(Tex. Code Crim. Proc. art. 42.013**)**

10.2 Family violence defined.

For offenses against the person, "family violence" means:

(1) an act by a member of a family or household[9] against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;

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[8] *Butler v. State*, 162 S.W.3d 727 (Tex. App.—Fort Worth 2005) aff'd 189 S.W.3d 299 (Tex. Crim. App. 2006). In a prosecution for family violence assault, information's caption of "assault family violence" coupled with defendant's own knowledge that the victim was his fiancée and the mother of his child was sufficient notice that the state would seek a finding of family violence.

Morimoto v. State, No. 2-04-272-CR, 2005 Tex. App. Lexis 2906 (Tex. App.—Fort Worth, April 14, 2005, pet. ref'd). In a misdemeanor assault prosecution, the charging instrument's caption provided the defendant sufficient notice that the state intended to seek a finding of family violence.

Thomas v. State, 150 S.W.3d 887 (Tex. App.—Dallas 2004), *cert.* denied 74 US 3207 (2005). In an assault prosecution, the court was required to make family violence finding base on the evidence. The defendant had sufficient notice that the state intended to seek a finding of family violence because the record established that defendant knew the victim was his ex-wife and mother of his child.

Smelley v. State, No. 09-05-256 CR, 2006 Tex. App. Lexis 6583 (Tex. App.—Beaumont 2006, pet. ref'd). In a prosecution for assault, because the law requires that court enter a finding of family violence if the defendant was convicted, because the defendant knew the victim was his mother-in-law, and because the finding did not enhance punishment, the defendant had sufficient notice of the finding to satisfy due process.

But see, *Ex parte Quintero*, No. 03-08-00463-CR, 2009 Tex. App. Lexis 117 (Tex. App.—Austin, Jan. 8, 2009, no pet.). In a writ of habeas corpus after a conviction for family violence assault, although charging instrument listed the offense as family violence assault and the judgment contained finding of family violence, the admonishment and waiver of rights signed by the pro se defendant did not mention family violence so the defendant was entitled to habeas corpus relief.

[9] *Word v. State*, No. 11-03-00403-CR 2005 Tex. App. Lexis 3256 (Tex. App.—Eastland Apr. 28, 2005) aff'd 206 S.W.3d 646 (Tex. Crim. App. 2006). In a family violence assault prosecution, evidence that the defendant "stayed" at the victim's home multiple nights per week and paid her bills was sufficient to establish defendant and victim were members of the same household.

Hernandez v. State, 280 S.W.3d 384 (Tex. App.—Amarillo 2008, no pet.). In a family violence assault prosecution, evidence that defendant and victim were living together at time of offense was sufficient to support finding of family violence.

(2) abuse, as that term is defined by Tex. Fam. Code § 261.001(C), (E) and (G), by a member of a family or household toward a child of the family or household;

OR

(3) dating violence, which is an act by an individual that is:[10]

- against another individual with whom that person has or has had a dating relationship;

  AND

- intended to result in physical harm, bodily injury, assault, or sexual assault;

  OR

- a threat that reasonably places the individual in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself.

  (Tex. Code Crim. Proc. art. 42.103; Tex. Fam. Code § 71.004; Tex. Fam. Code § 72.0021)

10.3 Mandatory fee for probation for offenses against the person.

If a court sentences a defendant to community supervision probation for an offense under Tex. Penal Code Title 5, the court ***must*** assess a $100 fee against the defendant to be paid to a family violence center that receives state or federal funds and is located in the county where the court is located.

(Tex. Code Crim. Proc. art. 42.12(h)(11))

10.4 Collateral consequences.

A finding of family violence against a party (in the pending or in a prior lawsuit, whether civil or criminal), has multiple possible collateral consequences.

[10] *Scott v. State*, No. 14-06-00860-CR, 2007 Tex. App. Lexis 9273 (Tex. App.—Houston [14th] Nov. 29, 2007, pet. ref'd). In a prosecution for family violence assault where defendant had dated the victim, it was not error to use a prior assault judgment with a finding of family violence that did not specify the familial relationship to elevate the offense from a misdemeanor to felony.

In the family law context (divorce or suits affecting the parent-child relationship), such a finding adversely impacts that party's claim to be granted:

- joint managing conservatorship;
- sole or managing conservatorship;
- possessory conservatorship;
- unsupervised access to a child;
- unrestricted electronic communications with a child;

OR

- on-going custody of or access to a child in the face of a request to modify an order to change custody of or restrict access to a child.

A party in a divorce suit who is found to have committed family violence against a spouse may also be required to pay spousal maintenance.

A finding of family violence in a protective order or in a criminal judgment against a defendant may also adversely affect the defendant's right to:

- hold a concealed weapon permit;
- obtain or keep an occupational license issued by the state (e.g., teaching, plumbing, nursing, etc.);[11]
- obtain bail;

OR

- obtain permanent residency or citizenship.

[11] Many occupational licensing agencies require proof of good character before issuing the license and may try to revoke a previously issued license if the licensee is convicted of a crime of moral turpitude. Family violence offenses may be classified as crimes of moral turpitude. See, *Ludwig v. State*, 969 S.W.2d 22, 29 (Tex. App.—Fort Worth 1998, pet. ref'd). A conviction for the misdemeanor offense of violation of a protective order will be considered a crime of moral turpitude when the underlying, uncharged offense is one of family violence or the direct threat of family violence.

10.4.1 Divorce/SAPCR.

10.4.1.1 Spousal maintenance.

A party in a divorce who was been convicted of, or served a deferred adjudication probation[12] for, an offense that is an act of family violence can be ordered to pay maintenance to the victim-spouse if the violence occurred within two years before the divorce was filed or while the divorce was pending. The order can:

- last up to three years or, if the receiving spouse or a dependent child is incapable of gainful employment, until the spouse or child overcomes the impediment to employment;

  AND

- be awarded in the amount of:

  - up to $2500 per month;

    OR

  - up to 20 percent of the payor spouse's monthly income.

(Tex. Fam. Code § 8.051-8.055)

10.4.1.2 Joint managing conservatorship.

A finding of family violence:

- destroys the presumption (set out in Tex. Fam. Code § 153.131) that the parents should be joint managing conservators of the child,

  AND

- precludes the appointment of the abusive party as a joint managing conservator of the child.

(Tex. Fam. Code § 153.004(b))

[12] *Guillot v. Guillot*, No. 01-06-01039-CV, 2008 Tex. App. Lexis 4831 (Tex. App.—Houston, June 26, 2008, no pet.). Spousal maintenance properly awarded based on family violence assault that resulted in a deferred adjudication probation.

10.4.1.3 Sole or managing conservatorship.

A finding of family violence creates a rebuttable presumption that it is not in the child's best interest:

- to appoint the abusive parent as sole or managing conservator,

  OR

- to appoint the abusive parent as the conservator with the right to determine the child's primary residence.

(Tex. Fam. Code § 153.004(b))

10.4.1.4 Unsupervised visitation.

A finding of family violence creates a rebuttable presumption that it is not in the best interest of the child for the abusive parent to have unsupervised visitation with the child.

(Tex. Fam. Code § 153.004(e))

10.4.1.5 Possessory conservatorship.

If there is a finding of family violence, the presumption that the non-managing conservator party should be appointed possessory conservator (set out in Tex. Fam. Code § 153.191) does not apply unless the court finds that access to the child by that party:

- will not endanger the child;

  AND

- can occur without endangering the child or any other victim of the family violence.

(Tex. Fam. Code § 153.004(d))

10.4.1.6 Limited access to a child.

A finding of family violence creates a rebuttable presumption that it is not in the best interests of the child for the child to have unsupervised visitation with the abusive party.

(Tex. Fam. Code § 153.004(e))

10.4.1.7 Limited access to a child with recent violence.

If there has been a finding of family violence within the preceding two years, the court may not allow the abusive party to have access to the child unless the court:

- finds that the access will not endanger the child's physical health or emotional welfare;
- finds that the access is in the child's best interest;

AND

- renders an order of possession that protects the safety of the child and any other person who has been a victim of the abusive party (which may include restrictions on visitation, exchange of the child, abstention from intoxicants, and completion of counseling).

(Tex. Fam. Code § 153.004(d))

10.4.1.8 Limited electronic communication with a child.

If there has been a finding of family violence, the court can award periods of electronic communication with a child only if the parties mutually agree to such access in a written document that specifies all restrictions relating to family violence or supervised visitation that are legally required to be in a possession order.

(Tex. Fam. Code § 153.015)

10.4.1.9 Modification of a child custody order.

If a party to a child custody order is convicted or placed on deferred adjudication for a crime of child abuse or family violence, the entry of the judgment is a material and substantial change that justifies modifying a child custody order to change conservatorship or access to a child to conform with Tex. Fam. Code § 153.004(d).

(Tex. Fam. Code §§ 153.103-153.104)

10.4.2 Possession of firearms.

If a party is found to have committed family violence in a civil protective order case or in a criminal judgment, the party is prohibited from possessing a firearm and is ineligible for a concealed handgun license:

- if the finding is in a protective order issued after a due process hearing, for the duration of the protective order (i.e., up to two years);

  OR

- if the finding is in a criminal judgment (misdemeanor or felony), the prohibition lasts until the conviction is expunged or set aside, or the defendant is pardoned with his civil liberties restored by the jurisdiction where he was convicted.[13]

NOTE: The court must admonish a defendant convicted of a family violence offense or who is the subject of a protective order proceeding that the entry of the conviction for the family violence offense or the entry of the protective order against him triggers a federal prosecution against him or her under 18 U.S.C. § 922 or under Tex. Penal Code § 46.064 if that individual is found to be in possession of a firearm at a subsequent time.

(18 U.S.C. §§ 921(a)(20) and 922(g); Tex. Penal Code § 46.04; Tex. Gov't Code §§ 411.171)

10.4.3 Occupational licenses.

A finding of family violence in a civil or criminal judgment may be used against a party seeking an occupational license from a state licensing agency. Licensing agencies may condition issuance or renewal of occupational licenses upon showing of good character. A conviction for a crime of moral turpitude may prevent a showing of the required good character.[14] Licensing agencies routinely

[13] The federal ban on firearms possession in 18 U.S.C. § 922(g) does not explicitly state that the ban is permanent and, in fact, it can be lifted in certain instances. In the Act's definition section at 18 U.S.C. 921(a)(20), the ban on firearms possession can be lifted in three circumstances: if the defendant is pardoned (and the pardon contains a specific restoration of civil liberties)[13]; if the conviction is expunged; or if the defendant has his civil rights restored. See *Beecham v. United States*, 511 U.S. 368 (1994).

[14] *Ludwig v. State*, 969 S.W.2d 22, 29 (Tex. App.—Fort Worth 1998, pet. ref'd). A conviction for the misdemeanor offense of violation of a protective order will be considered a crime of moral turpitude when the underlying, uncharged offense is one of family violence or the direct threat of family violence.

review the criminal history of licensees for past or recent criminal convictions or deferred adjudication probations to evaluate good character for licensing purposes. A finding of family violence may be cited by the licensing agency as a basis for a finding of lack of good character that merits denial or revocation of an occupational license.

(Tex. Occ. Code Ch. 53)

10.4.4 Bail.

A finding of family violence may be used:

- in a bail hearing, to justify holding the accused for an additional 24 to 48 hours;

  OR

- to impose stay-away orders and other restrictions as a condition of bond.

(Tex. Code Crim. Proc. art. 17.29 Tex. Code Crim. Proc. art. 17.291; Tex. Code Crim. Proc. art. 17.40)

10.4.5 Immigration issues.

10.4.5.1 Adjustment of immigration status.

Multiple criminal convictions or a conviction for a crime of moral turpitude render an immigrant ineligible for adjustment of immigration status (e.g., from obtaining lawful permanent residency) or citizenship.

(8 U.S.C. § 1182(a))

10.4.5.2 Removal (denial of lawful admission or deportation).

A criminal conviction for a domestic violence offense subjects the immigrant defendant to removal or denial of entry.

10.4.5.3 Admonishments.

The court should timely admonish a defendant convicted of a family violence offense or who is the subject of a protective order proceeding that the entry of the conviction for the family violence offense or the entry of the protective order against him may affect his immigration status. The

court should further inform the defendant that the conviction or deferred adjudication probation or a violation of a protective order could result in deportation or make it impossible for the defendant to obtain legal alien status.

(8 U.S.C. § 1227(a)(2)(E))

10.4.6 Military.

After a defendant is convicted of, or placed of deferred adjudication probation for, a crime that constitutes family violence, the clerk shall send notice of the conviction or probation to the staff advocate general or the provost marshall of the military installation to which the defendant is assigned.

(Tex. Code Crim. Proc art. 42.0182)

10.5 Required finding in crimes motivated by bias or prejudice.

Under the James Byrd, Jr. Hate Crimes Act, if at the guilt/innocence phase of the trial, the trier-of-fact determines, beyond a reasonable doubt,[15] that the defendant selected the crime victim or victim's property based on bias or prejudice against a group identified by race, color, disability, religion, national origin or ancestry, age, gender or sexual preference, the court must include that finding in the judgment and sentence.[16]

(Tex. Code Crim. Proc art. 42.014)

A finding that the crime was motivated by bias or prejudice against an identified group is necessary to support a request for enhanced punishment under Tex. Penal Code § 12.47. The enhancement increases the punishment to that of the next highest category of offenses. But for two categories, the enhancement is limited:

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[15] *Ex parte Boyd*, 58 S.W.3d 134 (Tex. Crim. App. 2001). The trier-of-fact (in this case, the jury) must decide, using the beyond a reasonable doubt standard whether the crime was motivated by bias or prejudice under Tex. Code Crim. Proc art. 42.014. Citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the court held that it is unconstitutional for a legislature to remove from the jury the assessment of facts [other than the fact of a prior conviction] that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

[16] *Brenneman v. State*, 45 S.W.3d 729 (Tex. App.—Corpus Christi 200, no pet.). In a prosecution for assault, Tex. Code Crim. Proc. art. 42.014 was not void for vagueness and the finding that the defendant committed the crime due to bias against homosexuals was proper.

- For Class A misdemeanor offenses, the enhanced punishment is to a minimum of 180 days in jail, rather than to a felony (this exception does not apply if the motivation for the offense was the victim's disability).

- For non-capital first degree felonies, there is no increased punishment. (Tex. Penal Code § 12.47)

When a request for such a finding is made, the clerk of the court must report whether the request was granted and whether the finding was included in the judgment of the case.

(Tex. Code Crim. Proc. art. 2.211)

Subchapter B
Offenses against the person
(Tex. Penal Code Title 5)

10.6 Homicide (Penal Code Chapter 19).

Criminal homicide includes murder, capital murder, manslaughter, and criminally negligent homicide. Causing the death of another person is:

- **First degree felony murder** if the act is committed:
  - intentionally or knowingly to cause a death;

    OR

  - in the course of an attempt to cause serious bodily injury that involves an act clearly dangerous to human life;[17]

    OR

  - in the course of committing or attempting to commit a felony crime.

- **Second degree felony murder** if the act is committed:
  - intentionally or knowingly to cause a death;

    OR

  - in the course of an attempt to cause serious bodily injury that involves an act clearly dangerous to human life;

    OR

  - in the course of committing a felony while under the immediate influence of a sudden passion arising from an adequate cause.

    (Tex. Penal Code § 19.02)

[17] *Gil v. State*, No. 05-03-1622-CR and 05-03-1623-CR, 2004 Tex. App. Lexis 9028 (Tex. App.—Dallas, Oct. 13, 2004, pet. ref'd). In a prosecution for stalking and attempted capital murder, evidence that the defendant threatened, pushed, and shot the victim (his wife) was legally and factually sufficient to establish the offenses.

- **Second degree felony manslaughter** occurs if the homicide results from an act that is reckless.

  (Tex. Penal Code § 19.04)

- **State jail felony criminally negligent homicide** if the death is caused by criminally negligent conduct.

  (Tex. Penal Code § 19.05)

Finding of family violence: For any degree of the offense**,** the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household **or** a person with whom the defendant shared a dating relationship. (Tex. Code Crim. Proc. art. 42.013)

NOTE: In a homicide prosecution when the relationship between the defendant and the deceased is a material issue, evidence of prior domestic violence is admissible under Tex. Code Crim. Proc. art. 38.36(a) and Tex. R. Evid. 404(b).[18]

10.7 Unlawful restraint (Penal Code §§ 20.01 and 20.02).

10.7.1 Class A misdemeanor unlawful restraint.

Unless the defendant was a relative of a child under 14 years old and the restraint was committed with the sole intent to obtain lawful custody of the child, it is an offense for:

- a person, which includes an individual, association, or corporation
- intentionally or knowingly
- to restrain, which means acting to restrict a person's movements as to
  - substantially interfere with the person's liberty

    OR

  - move the person from place to place[19]

[18] *Garcia v. State*, 201 S.W.3d 695 (Tex. Crim. App. 2006). TRE 404(b) does not block the admission of all relationship evidence.

OR

- confine the person[20]

- another person

- without consent, which means the restraint is accomplished by:

  - force, intimidation, or deception

    OR

  - by any means, including the victim's agreement, if the victim is:

    - a child under 14 years of age;

      OR

    - an incompetent person for whom consent to restrain has not been obtained;

      OR

    - a child between the ages of 14 and 17 years who is taken outside the state **and** outside of a 120-mile radius of the child's home without consent of parent, guardian, or person or institution acting as a parent.

      (Tex. Penal Code § 20.02(a-b))

10.7.2 State jail felony unlawful restraint.

It is a state jail felony to unlawfully restrain a child under 17 years of age.

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[19] *Mendoza v. State*, No. 07-06-0200-CR, 2007 Tex. App. Lexis 8275 (Tex. App.—Amarillo Oct. 18, 2007, no pet.). In a prosecution for aggravated kidnapping, evidence that the defendant lured the victim (his girlfriend) into his car by false representations and without her consent drove to another county was sufficient to establish restriction of victim's liberty and prove the lesser offense of unlawful restraint.

[20] *Mazumder v. State*, No. 05-04-01866-CR, 2006 Tex. App. Lexis 5235 (Tex. App.—Dallas, June 20, 2006, pet. ref'd). In a prosecution for unlawful restraint, the defendant was not entitled to an instruction on necessity defense because he did not admit to the offense and because there was no evidence that he restrained his victim (his girlfriend) in her house to prevent imminent harm to her. The victim's statements to her daughter and to police immediately after the defendant released her were admissible.

(Tex. Penal Code § 20.02(c)(1))

10.7.3 Third degree felony unlawful restraint.

It is a third degree felony to unlawfully restrain a person if:

- the defendant recklessly exposes the restrained person to a substantial risk of serious bodily injury;

  OR

- the person restrained is a public servant;

  OR

- the defendant is in custody when the restraint occurs.

(Tex. Penal Code § 20.02(c)(2))

10.7.4 Finding of family violence.

For any degree of the offense**,** the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. (Tex. Code Crim. Proc. art. 42.013)

10.7.5 Affirmative defense.

It is an affirmative defense that:

- the person restrained was a child older than 14 but younger than 17 years of age;

  AND

- the restraint did not occur due to force, intimidation, or deception;

  AND

- the defendant was not more than three years older than the restrained child.

(Tex. Penal Code § 20.02(e))

10.8 Kidnapping (Penal Code §§ 20.03-20.04).

10.8.1 Third degree felony kidnapping.

There are two manner and means to commit the offense.

10.8.1.1 First manner and means-secreting.

The elements of the offense are:

- a person, which includes an individual, association, or corporation
- intentionally or knowingly
- abducts[21] (which means to restrain a person with intent to prevent liberation) another person by
- secreting or holding the person in a place where the person is not likely to be found.[22]

10.8.1.2 Second manner and means-deadly force.

The elements of the offense are:

- a person, which includes an individual, association, or corporation
- intentionally or knowingly
- abducts[23] (which means to restrain a person with intent to prevent liberation) another person by

[21] *Mayer v. State*, 274 S.W.3d 898 (Tex. App.—Amarillo 2008), aff'd *Mayer v. State*, 2010 Tex. Crim. App. Lexis 100 (Tex. Crim. App., Mar. 24, 2010). In an aggravated kidnapping prosecution, the defendant was not entitled to jury charge on lesser included offense of unlawful restraint because the evidence proved, rather than negated, that the defendant abducted his wife.

[22] *Rios v. State*, 230 S.W.3d 252 (Tex. App.—Waco 2007, pet. ref'd). In a prosecution for aggravated kidnapping, evidence that the defendant restrained his girlfriend in a car was sufficient to prove he held her in a place where she was unlikely to be found.

[23] *Mayer v. State*, 274 S.W.3d 898 (Tex. App.—Amarillo 2008), aff'd *Mayer v. State*, 2010 Tex. Crim. App. Lexis 100 (Tex. Crim. App., Mar. 24, 2010). In an aggravated kidnapping prosecution, the defendant was not entitled to jury

- using or threatening to use deadly force.[24]

(Tex. Penal Code § 20.03)

10.8.2 First degree felony aggravated kidnapping.

There are eight ways to commit the offense.

10.8.2.1 First manner and means-ransom.

The elements of the first degree felony offense are:

- a person, which includes an individual, association, or corporation,
- intentionally or knowingly
- abducts another person with the intent to
- hold the person for ransom or reward.

10.8.2.2 Second manner and means-use as hostage.

The elements of the first degree felony offense are:

- a person, which includes an individual, association, or corporation,
- intentionally or knowingly
- abducts another person with the intent to

charge on lesser-included offense of unlawful restraint because the evidence proved, rather than negated, that the defendant abducted his wife.

[24] *Kenny v. State*, 292 S.W.3d 89 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). In a prosecution for kidnapping, evidence that the defendant assaulted and placed a rope around his victim's neck that briefly interfered with victim's ability to breath and threatened to torture the victim (his girlfriend) was sufficient to establish the defendant used deadly force to kidnap the victim.

- use the person as a shield or hostage.[25]

10.8.2.3 Third manner and means-flight from felony.

The elements of the first degree felony offense are:

- a person, which includes an individual, association, or corporation,
- intentionally or knowingly
- abducts another person with the intent to
- facilitate the commission of, or flight from, a felony or attempt to commit a felony.

10.8.2.4 Fourth manner and means-inflict bodily injury.

The elements of the first degree felony offense are:

- a person, which includes an individual, association, or corporation,
- intentionally or knowingly
- abducts another person with the intent to
- inflict bodily injury on the person.[26]

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[25] *Jenkins v. State*, 248 S.W.3d 291 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). In a prosecution for aggravated kidnapping, evidence that the defendant broke into his former girlfriend's apartment and held several people at gunpoint was sufficient to show that the defendant took hostages as that term is used in Penal Code. 20.04.

Solis v. State, No. 01-02-01069-CR, NO. 01-02-01070-CR, 2004 Tex. App. Lexis 2717 (Tex. App.—Houston [1st Dist.] Mar. 25, 2004, no pet.). In an aggravated kidnapping prosecution, the defendant's 4- year- old son could not acquiesce to being held hostage by defendant who had a gun in one hand and son in his lap during standoff with police after the defendant had shot another person.

[26] *Girdy v. State*, 175 S.W.3d 877 (Tex. App.—Amarillo 2005, pet. ref'd). In an aggravated kidnapping prosecution, evidence that the defendant poked the victim (his girlfriend) with a knife, threatened to kill her, and forced her into his car was sufficient to established his intent to inflict bodily injury.

Mason v. State, 905 S.W.3d 570 (Tex. Crim. App. 1995). In a murder prosecution, the evidence established that the defendant kidnapped the victim (his wife), whom he restrained with bonds and gags, placed in his car trunk, and drove to a remote location before killing her.

10.8.2.5 Fifth manner and means-sexually abuse.

The elements of the first degree felony offense are:

- a person, which includes an individual, association, or corporation,
- intentionally or knowingly
- abducts another person with the intent to
- sexually abuse or violate the person.[27]

10.8.2.6 Sixth manner and means-terrorize.

The elements of the first degree felony offense are:

- a person, which includes an individual, association, or corporation,
- intentionally or knowingly
- abducts another person with the intent to
- terrorize the person or a third person.

10.8.2.7 Seventh manner and means-interference with government function.

The elements of the first degree felony offense are:

- a person, which includes an individual, association, or corporation,

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Stephenson v. State, 255 S.W.3d 652 (Tex. App.—Fort Worth 2008, pet ref'd). In a prosecution for aggravated kidnapping, aggravated assault, and retaliation, evidence that the defendant burned the victim (his girlfriend) with a torch, assaulted her, locked her in trunk, and threatened her children was sufficient to support conviction.

Flores v. State, No. 11-06-00088-CR, 2007 Tex. App. Lexis 5670 (Tex. App.—Eastland, July 19, 2007, no pet.). In a capital murder prosecution, there was sufficient evidence to support jury finding that the defendant had kidnapped his girlfriend before he shot her because the evidence showed that the defendant approached the victim with a shotgun, shot at officers trying to rescue her, and continued to restrain her until she died.

[27] *LaPointe v. State*, 196 S.W.3d 831 (Tex. App.—Austin 2006), aff'd *La Pointe v. State*, 2007 Tex. Crim. App. Lexis 505 (Tex. Crim. App., Apr. 25, 2007). In an aggravated kidnapping, sexual assault, and assault family violence prosecution, the defendant was not entitled to use evidence of his victim's (the mother of his child) sexual history or alleged mental illness nor was he entitled to exclude evidence of sexual assault of victim during the kidnapping just because that assault occurred in another county.

- intentionally or knowingly
- abducts another person with the intent to
- interfere with the performance of a governmental function

10.8.2.8 Eighth manner and means-deadly weapon.

The elements of the first degree felony offense are:

- a person, which includes an individual, association, or corporation,
- intentionally or knowingly
- abducts another person
- exhibits a deadly weapon during the abduction.[28]

10.8.3 Second degree felony aggravated kidnapping.

If the defendant proves by a preponderance of the affirmative evidence that the aggravated kidnapping ended with the voluntary release of the abducted person, the offense is a second degree felony.[29]

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[28] *Walker v. State*, No. 14-05-00692-CR, 2006 Tex. App. Lexis 7104 (Tex. App.—Houston [14th Dist.], Aug. 10, 2006, pet. ref'd). In an aggravated kidnapping prosecution, evidence that the defendant threatened his girlfriend with a gun and forced her to go with him in his car was legally and factually sufficient to support conviction.

[29] *Ballard v. State*, 161 S.W.3d 269 (Tex. App.—Texarkana 2005) aff'd 193 S.W.3d 916 (Tex. Crim. App. 2006). In an aggravated kidnapping prosecution, the defendant was not entitled to lesser punishment because leaving his victim (his girlfriend) alone in a car with opportunity to escape was not the functional equivalent of releasing her in a safe place.

Cooks v. State, 169 S.W.3d 288 (Tex. App.—Texarkana 2005, pet. ref'd). In an aggravated kidnapping prosecution, the defendant was not entitled to mitigation of punishment for voluntarily releasing the victim (his girlfriend) because he took her to the hospital for medical care because the defendant had gun and tried to prevent the victim from speaking to hospital staff, who rescued her.

Patterson v. State, 121 S.W.3d 22 (Tex. App.—Houston [1st Dist.] 2003 pet. ref'd). In an aggravated kidnapping prosecution, the defendant was entitled to have punishment reduced to lesser felony because although he premised release of children upon wife's promise she had not called the police, "voluntary release" can include a release premised upon the act of another.

(Tex. Penal Code § 20.04)

10.8.4 Finding of family violence.

For any degree of the offense**,** the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household **or** a person with whom the defendant shared a dating relationship. (Tex. Code Crim. Proc. art. 42.013)

10.8.5 Affirmative defense.

It is an affirmative defense that the defendant:

- did not couple the abduction with the intent to use or to threaten to use deadly force;

  AND

- was a relative of the person abducted;

  AND

- had the sole intent of assuming lawful control of the victim.[30]

10.9 Trafficking of persons (Penal Code Chapter 20A).

10.9.1 Forced labor or services defined.

[30] *Lugo v. State*, 923 S.W.2d 598 (Tex. App.—Houston [1st Dist.] 1995, no pet.). In a prosecution for kidnapping, despite the fact that the defendant was the biological parent and had a valid birth certificate for the child, the defendant was not entitled to a jury instruction based on mistake of fact based on his believe he was the parent of the abducted child and so was entitled to assert control of the child.

In re SAP, No. 07-06-0045-CV**,** 2007 Tex. App. Lexis 7523 (Tex. App.—Amarillo, Sept. 14, 2007, no pet.). In a prosecution for kidnapping, the defendant was not guilty of kidnapping for keeping child from visiting father when he had not performed required drug tests because the defendant was the sole managing conservator of the alleged victim (her child) and had authority to condition father's supervised visits with the child based on the results of his drug and alcohol tests.

Rider v. State, No. 04-08- 00542-CR, 2009 Tex. App. Lexis 8840 (Tex. App.—San Antonio, Nov. 18, 2009, no pet.). In a kidnapping prosecution, the defendant had the burden of proof on the affirmative defenses available under Tex. Penal Code § 20.03(b).

As of September 1, 2011, the definition of forced labor or services is another's labor or services, other than labor or services that constitute sexual conduct, obtained through the actor's use of force, fraud, or coercion except for labor or services that constitute sexual conduct.[31] An example of this offense is forcing an undocumented person to work as a domestic by threatening to report the person to immigration authorities.[32]

(Tex. Penal Code § 20A.01(2))

10.9.2 Manner and means.

The elements of the offense are:

- a person
- knowingly
- traffics, which means to transport, entice, recruit, harbor, provide, or otherwise obtain a person by any means,
- another person with the intent that the other person will engage in forced labor or services

OR

- benefits from trafficking, including by knowingly receiving forced labor or services of another person

OR

[31] Prior to September 1, 2011, the definition was labor or services obtained by: (1) causing or threatening to cause bodily or creating a belief that bodily injury will occur; (2) restraining or threatening to restrain a person or creating a belief that restraint will occur; (3) knowingly destroying, concealing, removing, confiscating, or withholding, or threatening any of these actions, government records, identifying information, or personal property; (4) threatening the person with an abuse of the law or legal process; threatening to report a person to immigration or other law enforcement officials, (5) extorting or blackmailing a person; (6) exerting financial control or using a person as security for a debt; or (7) causing, by any means, a belief that a person will be subject to serious harm or restraint if the person does not provide the labor or services.

[32] *Ramos v. State*, No. 13-06-00646-CR, 2009 Tex. App. Lexis 7837 (Tex. App.—Corpus Christi, Oct. 8, 2009, no pet.). In a prosecution for trafficking of a person, the defendant forced the victim, an undocumented worker, to work as the defendant's maid without pay under threat of reporting the victim to immigration authorities.

- traffics another person, or benefits from such trafficking, when the trafficked person engages in prostitution (or promoting or compelling prostitution)

  OR

- engages in sexual conduct with a trafficked and prostituted person

  OR

- traffics a child, or benefits from such trafficking of a child, with intent to use the child in forced service or labor or receives a benefit from trafficking of a child

  OR

- traffics a child, or benefits from the child trafficking, and causes the trafficked child to engage in or become the victim of continuous sexual abuse, indecency with a child, sexual assault, aggravated sexual assault, prostitution, promotion of prostitution, sexual performance by a child, employment harmful to a child or possession or promotion of child pornography.

NOTE: Victims of human trafficking have a right to use an official pseudonym in all proceedings and records relating to the offense. See Tex. Code Crim. Proc. art. 57D.02.

(Tex. Penal Code § 20A.02)

10.9.3 Degrees felony trafficking of persons; venue.

The offense is a second degree felony unless it involves the forced labor or service involves a child victim or the offense results in the death of the person being trafficked, in which case it is a felony of the first degree.[33]

Venue lies either in the county where the offense was committed or in any county through which the victim was improperly taken.

[33] *Buggs v. State*, Nos. 05-07-0676-CR, 05-0-0677-CR, 05-07-00749-CR (Tex. App.—Dallas, Feb. 29, 2008, pet. ref'd). In a prosecution for trafficking of persons, aggravated kidnapping, and compelling prostitution, evidence was factually sufficient to support jury's finding that the defendant took minor female to his residence, physically abused her, restrained her movement, had her engage in prostitution and took her earnings as the jury was the sole arbiter of the credibility of the witnesses.

(Tex. Penal Code § 20A.02(b); Tex. Code Crim. Proc. art. 13.12)

10.9.4 Finding of family violence.

For any degree of the offense**,** the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household **or** a person with whom the defendant shared a dating relationship. (Tex. Code Crim. Proc. art. 42.013)

10.10 Assault and family violence assault (Penal Code § 22.01).

10.10.1 Class C assault—by threat or offensive contact.

There are two ways to commit the offense.

10.10.1.1 First manner and means—threat.

The elements of the offense are:

- a person (the defendant)
- intentionally or knowingly
- threatens bodily injury to
- another person, including the defendant's spouse.

NOTE: For purposes of a jury charge, assault by threat and assault by injury are separate offenses.[34]

(Tex. Penal Code § 22.01(a)(2))

10.10.1.2 Second manner and means—offensive contact.

The elements of the offense are:

- a person (the defendant)
- intentionally or knowingly
- caused physical contact with

[34] *Dolkart v. State*, 197 S.W.3d 887 (Tex. App.—Dallas 2006, pet. ref'd).

- another person, including the defendant's spouse,
- when the defendant knows or should reasonably believe that the other person will regard the contact as offense or provocative.

(Tex. Penal Code § 22.01(a)(3))

10.10.2 Class A assault with bodily injury.

The elements of the offense are:

- a person (the defendant)
- intentionally, knowingly, or recklessly[35]
- causes bodily injury[36] to
- another person, including the defendant's spouse.

(Tex. Penal Code § 22.01(a)(1))

10.10.3 Class A assault by threat or offensive contact (with elderly or disabled person).

The elements of the offense are:

- a person

[35] *Williams v. State*, 216 S.W.3d 44 (Tex. App.—Waco 2007, no pet.). In a family violence assault prosecution, the defendant was entitled to acquittal after the victim (his wife) recanted and there was no evidence establishing the defendant intentionally, knowingly, or recklessly committed an assault by pulling the victim's hair as she attempted to drive away.

[36] *Bufkin v. State*, 207 S.W.3d 779 (Tex. Crim. App. 2006). In a prosecution for family violence assault, the defendant was entitled to a defensive jury instructions because consent is a defense if the bodily injury is not serious and at trial the victim recanted her allegations that the defendant struck her without provocation in the face and bit her on her body and testified that the defendant struck her in self-defense and the bites were consensual "love bites."

White v. State, 201 S.W.3d 233 (Tex. App.—Fort Worth 2006, pet. ref'd). In a prosecution for family violence assault, the defendant was not entitled to a jury charge on defense of a third person based on his assertion that he struck the victim (his wife) to protect her because she endangered herself by interfering with his driving.

- intentionally, knowingly, or recklessly
- threatens imminent bodily injury to[37]

OR

- causes offensive or provocative physical contact with
- another person who is elderly or disabled.

(Tex. Penal Code § 22.01(a)(2) and (c))

10.10.4 Finding of family violence.

For any degree of the foregoing assaultive offenses**,** the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. (Tex. Code Crim. Proc. art. 42.013)

10.10.5 Second degree felony *family violence* assault—prior conviction *and* strangulation.

The elements of the offense are:

- a person (the defendant)
- who has been previously convicted
  - by being adjudged guilty

    OR

  - by being placed on deferred adjudication probation after entering a plea of guilt or *nolo contendere*

    OR

[37] *Olivas v. State*, 203 S.W.3d 341 (Tex. Crim. App. 2006). In an aggravated assault by threat and stalking prosecution, evidence that the victim (the defendant's ex-girlfriend) noticed two popping sounds as if rocks had hit her truck after the defendant shot at her was sufficient to should she perceived the threat at the time the assault occurred.

- by being convicted in another state of an offense that has substantially the same elements as the following crimes of family violence: assault; homicide; indecency with a child; or continuous violence against the family;

- intentionally, knowingly, or recklessly

- causes bodily injury to

- another person who is a member of the defendant's family or household, or with whom the defendant had a dating relationship (as defined in the Texas Family Code),

AND

- during the assault, impeded the victim's normal breathing or circulation of blood by

  - applying pressure to the victim's throat

  OR

  - blocking the victim's nose or mouth.

  (Tex. Penal Code § 22.01(b-1) and (f))

10.10.6 Third degree felony *family violence* assault—prior conviction *or* strangulation.

There are two ways to commit a third degree felony aggravated family violence assault.

10.10.6.1 First manner and means--prior conviction.

The elements of the offense are:

- a person (the defendant)

- intentionally, knowingly, or recklessly

- causes bodily injury to

- another person who is a member of the defendant's family or household, or with whom the defendant had a dating relationship (as defined in the Texas Family Code)

- when the defendant has been previously convicted

  - by being adjudged guilty

    OR

  - by being placed on deferred adjudication probation after entering a plea of guilt or *nolo contendere*

    OR

  - by being convicted in another state

- of an offense that has substantially the same elements as the following crimes of family violence: assault; homicide; indecency with a child; or continuous violence against the family.

  (Tex. Penal Code § 22.01(b)(2)(A) and (f))

10.10.6.2 Second manner and means--strangulation.

The elements of the offense are:

- a person (the defendant)

- intentionally, knowingly, or recklessly

- causes bodily injury to

- another person (the victim) who is a member of the defendant's family or household, or with whom the defendant had a dating relationship (as defined in the Texas Family Code)

  AND

- during the assault, the defendant impeded the victim's normal breathing or circulation of blood by

  - applying pressure to the victim's throat

OR

- blocking the victim's nose or mouth.

(Tex. Penal Code § 22.01(b)(2)(B))

10.10.7 Reckless mental state

10.10.7.1 Charging instrument.

If the information or indictment alleges the culpable mental state of "recklessness," the charging instrument must allege with reasonable certainty the act or acts relied upon to constitute the "recklessness"; a charging instrument is insufficient if it just alleges the accused acted "recklessly" in committing an offense. (Tex. Code Crim. Proc. art. 21.15)

10.10.7.2 Jury charge.

The culpable mental states are defined in Tex. Penal Code § 6.03 and those definitions should be used in the jury charge. Because assault is a result-oriented crime, "recklessly" should be defined in the jury charge as:

> "A person acts recklessly or is reckless with respect to the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." (Tex. Penal Code § 6.03(c)

10.11 Aggravated assault (Penal Code § 22.02).

10.11.1 Second degree aggravated assault.

There are two ways of committing the offense.

10.11.1.1 First manner and means--serious bodily injury.

The elements of the offense are:

- a person (the defendant)
- intentionally, knowingly, or recklessly

- causes serious bodily injury to
- another person, including the defendant's spouse.

(Tex. Penal Code § 22.02(a)(1))

10.11.1.2 Second manner and means--deadly weapon.

The elements of the offense are:

- a person
- intentionally, knowingly, or recklessly
- exhibits a deadly weapon[38] during the assault of
- another person.

(Tex. Penal Code § 22.02(a)(2))

10.11.1.3 Finding of family violence.

For either manner and means of the foregoing assaultive offenses**,** the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. (Tex. Code Crim. Proc. art. 42.013)

10.11.2 First degree felony *family violence* aggravated assault.

The elements of the offense are:

- a person (the defendant)
- intentionally, knowingly, or recklessly

[38] *Rogers v. State*, 28 S.W.3d 725 (Tex. App.—Texarkana 2001, pet. ref'd). In a prosecution for aggravated assault by threat, the defendant, who shot into his girlfriend's car without hitting her, was not entitled to a jury instruction on deadly conduct because that offense is not a lesser-included offense of aggravated assault by threat.

- causes serious bodily injury to

AND

- exhibits a deadly weapon during the assault of
- another person who is
  - a member of the defendant's family or household[39]

OR

  - a person with whom the defendant shared a dating relationship.[40]

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[39] *Perez v. State*, No. 03-08-715-CR, 2009 Tex. App. Lexis 8963 (Tex. App.—Austin, Nov. 20, 2009, no pet.). In a prosecution for aggravated assault of a family member with a deadly weapon, evidence that the defendant fractured his pregnant wife's wrist by beating or kicking her was sufficient to support the conviction.

[40] *Childress v. State*, 285 S.W.3d 544 (Tex. App.—Waco 2009, pet. ref'd). In a prosecution for aggravated assault and dating violence assault, the dating violence assault was not a lesser-included offense of the aggravated assault because the former is not established by proof of the same or less than all the facts required to establish the commission of the aggravated assault. Evidence that the defendant and victim had a sexual relationship and were dating coupled with evidence that defendant set the victim on fire was sufficient to support the convictions.

Williams v. State, No. 01-08-872-CR, 2009 Tex. App. Lexis 8387 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). In a prosecution for dating relationship aggravated assault with a deadly weapon, victim's testimony that the defendant (her boyfriend) beat her with a deadly weapon was sufficient to support deadly weapon finding even though weapon itself was never found.

Cepeda v. State, No. 04-04-205-CR, 2006 Tex. App. Lexis 2143 (Tex. App.—San Antonio Mar. 22, 2006, no pet.). In a prosecution for aggravated assault with a deadly weapon, the defendant was not entitled to jury instruction on lesser included offense because the knife used to stab the victim (the defendant's wife) was *per se* a deadly weapon.

Grover v. State, No. 14.04-672-CR, 2005 Tex. App. Lexis 10821 (Tex. App.-Houston [14th Dist.], Dec. 15, 2005, pet ref'd). In a prosecution for family violence aggravated assault by threat with a deadly weapon, although the victim (the defendant's wife) recanted at trial, evidence of the size and shape of the knife the defendant used to threaten his family supported deadly weapon finding.

Godfrey v. State, No. 14-04-670-CR, 2005 Tex. App. Lexis 4050 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). In a prosecution for aggravated assault with a deadly weapon, the defendant's verbal threats, the distance between the defendant and the victim (a household member), and the witnesses' description of the knife supported the jury's finding that the defendant used a knife as a deadly weapon..

Dotson v. State, No. 12-06-123-CR, 2007 Tex. App. Lexis 4399 (Tex. App.—Tyler, June 6, 2007, pet. ref'd). In a prosecution for aggravated assault with a deadly weapon, the victim's (the defendant's girlfriend) testimony that defendant cut her face with a knife, coupled with description of the knife, was sufficient to support a deadly weapon finding.

(Tex. Penal Code § 22.02(b)(1))

10.11.3 Notice to military officials.

If the defendant who is convicted or given a deferred adjudication probation for an offense under Texas Penal Code Title 5 or for an offense that constitutes family violence under Texas Family Code 71.004 is on active-duty status with the United States military, the clerk of the court must send written notice of the conviction or the deferred adjudication probation to the staff judge advocate or provost marshall of the military installation where the defendant is assigned.

(Tex. Code Crim. Proc. art. 42.0182)

10.12 Sexual assault and aggravated sexual assault (Penal Code §§ 22.011 and 22.021).

10.12.1 Definitions.

- **Child** means a person under 17 years of age.
- **Spouse** means a person who is legally married to another person.
- **"Without consent"** means the act occurred because:
  - of the use of physical force or violence;

    OR

  - of threats to use force or violence (against the victim or another person) when the victim believed the actor has the present ability to execute the threat;

    OR

  - the victim was unconscious or otherwise unable to resist;

    OR

  - the victim lacked the mental capacity to appraise or resist the act;

OR

- the victim was unaware of the act;

OR

- the victim, without consent, ingested an incapacitating substance;

OR

- the victim was under the control or influence of a:
  - public servant;

    OR

  - mental health services provider;

    OR

  - clergyman;

    OR

  - residential treatment provider or employee.

    (Tex. Penal Code § 22.011(b-c); Tex. Penal Code § 22.021 (b-c))

10.12.2 Second degree felony sexual assault.

There are eight ways to commit felony sexual assault.

10.12.2.1 First manner and means.

The elements of the offense are: (1) a person (the defendant) (2) intentionally or knowingly (3) without the victim's consent (4) causes the penetration of the victim's anus or mouth (5) by any means.

10.12.2.2 Second manner and means.

The elements of the offense are: (1) a person (the defendant) (2) intentionally or knowingly (3) without the victim's consent (4) causes the person's sexual organ (5) to penetrate the victim's mouth.

10.12.2.3 Third manner and means.

The elements of the offense are: (1) a person (the defendant) (2) intentionally or knowingly (3) without the consent of the victim[41] (4) causes the victim's sexual organ (5) to contact or penetrate (6) another person's (including the defendant's) mouth, anus, or sexual organ.

10.12.2.4 Fourth manner and means.

The elements of the offense are: (1) a person (the defendant) (2) intentionally or knowingly (3) causes (4) the penetration of the anus or sexual organ of a child (5) by any means.

10.12.2.5 Fifth manner and means.

The elements of the offense are: (1) a person (the defendant) (2) intentionally or knowingly (3) causes (4) the penetration of a child's mouth (5) by the defendant's sexual organ.

10.12.2.6 Sixth manner and means.

The elements of the offense are: (1) a person (the defendant) (2) intentionally or knowingly (3) causes (4) contact between or penetration of a child's sexual organ and (5) the mouth, anus, or sexual organ of any person, including the defendant.

10.12.2.7 Seventh manner and means.

The elements of the offense are: (1) a person (the defendant) (2) intentionally or knowingly (3) causes (4) contact between a child's anus and (5) the mouth, anus, or sexual organ of any person, including the defendant.

10.12.2.8 Eighth manner and means.

The elements of the offense are: (1) a person (the defendant) (2) intentionally or knowingly (3) causes (4) contact between a child's mouth and (5) the mouth, anus, or sexual organ of any person, including the defendant.

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[41] *Messenger v. State*, No. 02-070270-CR, 2008 Tex. App. Lexis 4357 (Tex. App.—Fort Worth 2008, no pet.). In an aggravated sexual assault prosecution, evidence that victim (the defendant's step-daughter) was asleep at the time of the assault was sufficient to prove the element of lack of consent.

(Tex. Penal Code § 22.011(a))

10.12.2.9 Finding of family violence.

For any manner and means of the foregoing assaultive offenses**,** the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. (Tex. Code Crim. Proc. art. 42.013)

10.12.3 First degree aggravated sexual assault (Tex. Penal Code § 22.021).

There are six ways to commit an aggravated sexual assault.

10.12.3.1 First manner and means.

The elements of the offense are: (1) a person (the defendant) (2) in the commission of a sexual assault (3) causes serious bodily injury to another or attempts to cause the death of the victim or another person.

10.12.3.2 Second manner and means.

The elements of the offense are: (1) a person (the defendant) (2) in the commission of a sexual assault (3) causes the victim to fear, or threatens, that death, serious bodily injury, or kidnapping of any person is imminent.

10.12.3.3 Third manner and means.

The elements of the offense are: (1) a person (the defendant) (2) in the commission of a sexual assault (3) uses or exhibits a deadly weapon.[42]

10.12.3.4 Fourth manner and means.

The elements of the offense are: (1) a person (the defendant) (2) in the commission of a sexual assault (3) acts in concert with a person committing a sexual assault.

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[42] *Davis v. State*, No. 05-05-01694-CR, 2007 Tex. App. Lexis 352 (Tex. App.—Dallas, Jan. 8, 2007, no pet.). In a prosecution for aggravated sexual assault, although the victim (the defendant's wife) recanted at trial, her statements to witnesses immediately after the assault were admissible as excited utterances; the baseball bat used in the assault was a deadly weapon.

10.12.3.5 Fifth manner and means.

The elements of the offense are: (1) a person (the defendant) (2) in the commission of a sexual assault (3) facilitates the assault by administering rohyponol, gamma hydroxybutyrate, or ketamine to the victim.

10.12.3.6 Sixth manner and means.

The elements of the offense are: (1) a person (the defendant) (2) in the commission of a sexual assault (3) assaults a person who is under 14 years of age, **or** elderly, **or** disabled.

(Tex. Penal Code § 22.021)

10.12.3.7 Finding of family violence.

For any manner and means of the foregoing assaultive offenses**,** the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. (Tex. Code Crim. Proc. art. 42.013)

10.13 Continuous sexual abuse of a child (Penal Code § 21.02).

This offense is a first degree felony.

10.13.1 Elements.

The elements of the offense are:

- a person over 17 years of age
- commits two or more acts of sexual abuse
- of a child under the age of 14 years, regardless of how many victims are abused,
- within any continuous 30-day period.

10.13.2 Sexual abuse defined.

Sexual abuse means an act that violates one or more of the following Texas Penal Code sections:

- 20.04(a)(4) (aggravated kidnapping with intent to sexually abuse);
- 20A.02(a)(7-8) (trafficking of persons involving sexual conduct by a child)
- 21.11(a)(1) (indecency with a child);
- 22.011 (sexual assault);
- 22.021 (aggravated sexual assault);
- 30.02 (burglary with intent to commit sexual assault);
- 43.05(a)(2) (compelling prostitution involving a child)
- 43.25 (sexual performance by a child).

10.13.3 Requirements for "continuous" offense.

- the assaults may have the same or different victims;
- the jury must find that at least two of the alleged assaults occurred within one continuous 30-day period;
- if more than two assaults are alleged, the jury does not have to agree which specific two assaults occurred;
- to separately convict the defendant of one of the assaults alleged to be part of the continuous conduct, the separate assault must be:
    - alleged in the alternative;
    - have occurred outside the 12-month period;

      OR

    - be a lesser included offense.

10.13.4 Affirmative defense.

It is an affirmative defense that the defendant:

- was not more than five years older than the youngest victim;
- did not use duress, force, or threats;

AND

- was not required to register as a sexual offender and did not have a reportable offense for a sexual offense.

(Tex. Penal Code § 21.02(a))

10.13.5 Finding of family violence.

For either manner and means of the foregoing offense**,** the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. (Tex. Code Crim. Proc. art. 42.013)

10.14 Injury to a child or to an elderly or disabled person (Penal Code § 22.04).

10.14.1 Elements of the offense.

A person commits an offense if the person:

- intentionally, knowingly, recklessly, or with criminal negligence
- causes by act or omission
  - serious bodily injury,
  - serious mental deficiency, impairment, or injury,

    OR

  - bodily injury
- to a child, elderly individual, or disabled individual.

10.14.2 Family violence victim's defense.

It is a defense that the defendant was a victim of family violence; did not cause the injury; and that the defendant did not believe he or she could prevent the perpetrator of family violence from injuring the child or elderly or disabled individual.[43]

(Tex. Penal Code § 22.04(l)(2)(B))

10.14.3 Penalty ranges.

- **First degree felony.** Intentional or knowing conduct that results in serious bodily injury or serious mental deficiency, impairment, or injury;

- **Second degree felony.** Reckless conduct that results in a serious bodily injury or serious mental deficiency, impairment, or injury;

- **Third degree felony.** Intentional or knowing conduct that results in bodily injury.

(Tex. Penal Code § 22.04)

10.14.4 Finding of family violence.

For either manner and means of the foregoing offense, the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. (Tex. Code Crim. Proc. art. 42.013)

10.15 Abandoning or endangering a child (Penal Code § 22.041).

10.15.1 Abandonment defined.

Abandonment of a child means leaving a child in any place without providing reasonable and necessary care for the child under circumstances under which no reasonable, similarly situated adult would leave a child of that age or ability.

[43] **NOTE**: Tex. Penal Code § 22.04(l)(2)(B) was added in 2005 so it was not an available defense in the following case: *Chapa v. State*, 747 S.W.2d 561 (Tex. App.—Amarillo 1988, pet. ref'd). In a prosecution for injury to a child, the evidence was sufficient to convict defendant, who was the victim's managing conservator, based on the failure to seek medical attention for her niece who had been repeatedly beaten by defendant's husband, who also sometimes beat defendant.

(Tex. Penal Code § 22.041(a))

10.15.2 Elements of the offense.

There are two ways to commit the offense.

10.15.2.1 First manner and means.

The elements of the offense are**:** (1) a person (2) intentionally (3) abandons (4) a child for whom the person has care, custody, or control (5) in any place (6) under circumstances that expose the child to an unreasonable risk of harm.

(Tex. Penal Code § 22.041(b))

10.15.2.2 Second manner and means.

The elements of the offense are: (1) a person (2) intentionally knowingly, recklessly, or with criminal negligence (3) by act or omission (4) engages in conduct (5) that places a child younger than 15 years of age (6) in imminent danger of death, bodily injury, or physical or mental impairment.

(Tex. Penal Code § 22.041(c))

10.15.3 Presumption of danger.

There is a presumption that the child was placed in imminent danger of death, bodily injury, or physical or mental impairment if the actions of the defendant caused the child to be exposed to methamphetamine or a controlled substance in Penalty Group I, Section 481.102, Tex. Health & Safety Code.

(Tex. Penal Code § 22.041(c-1))

10.15.4 Penalty ranges.

An offense under this statute is a:

- state jail felony for:
    - abandonment with intent to return to the child;

OR

- abandonment that places a child under 15 years in imminent danger of death, bodily injury, or physical or mental impairment;

- third degree felony for abandonment without the intent to return to the child;

- second degree felony for abandonment of a child under 15 years by a person having care, custody or control of a child under circumstances that a reasonable person would believe would place the child in imminent danger of death, bodily injury, or physical or mental impairment.

(Tex. Penal Code § 22.041(d-f))

10.15.5 Defense.

It is a defense that the person's conduct was to allow a child to practice for or to participate in an athletic event.

(Tex. Penal Code § 22.041(g))

10.15.6 Exception.

It is an exception to this statute that the person voluntarily delivered the child to a designated emergency infant care provider under Tex. Fam. Code § 262.302.

(Tex. Penal Code § 22.041(h))

10.15.7 Finding of family violence.

For either manner and means of the foregoing offense**,** the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. (Tex. Code Crim. Proc. art. 42.013)

10.16 Deadly conduct (Penal Code § 22.05).

10.16.1 Class A misdemeanor deadly conduct.

The elements of the offense are:

- a person
- recklessly
- engages in conduct that places the victim
- in imminent danger of serious bodily injury.[44]

(Tex. Penal Code § 22.05(a))

10.16.2 Third degree felony deadly conduct.

The elements of the offense are:

- a person
- knowingly
- with recklessness disregard of occupancy
- discharges a firearm in the direction of
  - one or more individuals

    OR

  - a habitation, building, or vehicle.[45]

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[44] *Kingsbury v. State*, 14 S.W.3d 405 (Tex. App.—Waco 2000, no pet.). In a prosecution for terroristic threat and deadly conduct, evidence that the defendant threatened to burn his house up with the victim (his wife) inside and tried to set the victim on fire was sufficient to support the convictions.

Williams v. State, No. 10-03-132-CR, 2004 Tex. App. Lexis 8742 (Tex. App.—Waco, Sept. 29, 2004, pet. ref'd). In a prosecution for deadly conduct, evidence that the defendant used his car to intentionally bump the victim's (his ex-wife) car into oncoming traffic was sufficient to prove the crime because causing someone to lose control of a vehicle and send the vehicle into oncoming traffic lane is sufficient proof of imminent danger of serious bodily injury.

[45] Tex. Penal Code § 30.01 defines these terms.

> **Building** means any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.
>
> **Habitation** is a structure or vehicle adapted for the overnight accommodation of persons.

(Tex. Penal Code § 22.05(b))

10.16.3 Recklessness presumed.

Whether or not the defendant believed the firearm to be loaded, recklessness and danger are presumed if the defendant knowingly pointed the firearm at or in the direction of another.

(Tex. Penal Code § 22.05(c))

10.16.4 Finding of family violence.

For either manner and means of the foregoing offense**,** the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. (Tex. Code Crim. Proc. art. 42.013)

10.17 Terroristic threat (Penal Code § 22.07).

10.17.1 Elements of the offense.

A person commits an offense if the person:

- threatens to commit any offense involving violence
- to any person or property
- with intent to
- place any person in fear of imminent serious bodily injury.[46]

(Tex. Penal Code § 22.07(a))

Vehicle includes any device in, on, or by which any person or property is or may be propelled, moved, or drawn in the normal course of commerce or transportation, except such devices as are classified as habitation.

[46] *Cook v. State*, 940 S.W.2d 344 (Tex. App.—Amarillo 1997, pet. ref'd). In a prosecution for terroristic threat, evidence was sufficient to support conviction even though the threats by defendant were left on the victim's voicemail when the victim (a former employee of the defendant) was out of town.

10.17.2 Level of offense.

A terroristic threat is a Class A misdemeanor.

(Tex. Penal Code § 22.07(c))

10.17.3 Finding of family violence.

For either manner and means of the foregoing offense, the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. (Tex. Code Crim. Proc. art. 42.013)

Subchapter C
Offenses Against the Family
(Tex. Penal Code Title 6)

10.18 Interference with child custody (Penal Code § 25.03).

This offense is a state jail felony. There are three ways to commit the crime.

10.18.1 First manner and means.

The elements of the offense are: (1) a person (2) takes or retains (3) a child under 18 years of age (4) when the person knows that the taking or retention violates the express terms of a judgment or order (including a temporary or foreign[47] order) that disposes of the child's custody. [48]

[47] *Perry v. State*, 727 S.W.2d 781 (Tex. App.—Austin 1987, pet. ref'd). In a prosecution for interference with child custody, the defendant's violation of a Missouri custody decree violated Tex. Penal Code § 25.03(a)(1).

[48] *Cabrera v. State*, 647 S.W.2d 654 (Tex. Crim. App. 1983). In a prosecution for interference with child custody, the evidence was insufficient to convict the defendant because the custody order was not specific enough to put the defendant on notice that she had lost custody or that taking the child would be a crime.

Garcia v. State, 172 S.W.3d 270 (Tex. App.—El Paso 2005, no pet.). In a prosecution for interference with child custody, despite having legal custody of as the child's managing conservator, the defendant could be convicted of the offense for failing to allow the possessory conservator access to the child as required by the court order.

10.18.2 Second manner and means.

The elements of the offense are: (1) a person (2) takes or retains (3) a child under 18 years of age (4) if the person has not been awarded custody of the child by a court of competent jurisdiction or knows that a suit for divorce or a civil suit or application for habeas corpus has been filed and takes the child out of the court's geographic jurisdiction without the court's permission and with the intent to deprive the court of jurisdiction over the child;.[49]

10.18.3 Third manner and means.

The elements of the offense are: (1) a person (2) takes or retains a child younger than 18 years of age (3) outside the United States with intent to deprive a person entitled to possession of a child of that possession or access and without the permission of that person.

10.18.4 Affirmative defenses and exception.

It is an affirmative defense that: (1) the taking or retention of the child was pursuant to a valid order providing for possession of or access to the child; or (2) the retention of the child was due to circumstances beyond the actor's control and the actor promptly provided notice or made reasonable attempts to provide notice of those circumstances to the other person entitled to possession of or access to the child.

Family violence exception. It is not interference with child custody if the person was entitled to possession of or access to the child and was fleeing commission or attempted commission of family violence, as defined in Tex. Fam. Code § 71.004, against the child or the person.

NOTE: A child taken to avoid family violence is not a "missing child" within the meaning of Tex. Code Crim. Proc. 63.001(3).

(Tex. Penal Code § 25.03)

[49] *Charlton v. State*, No. 05-05-1043-CR, 2008 Tex. App. Lexis 1989 (Tex. App.—Dallas, Mar. 19, 2008, no pet.). In a prosecution for interference with child custody, evidence that the defendant took child out of Texas without the father's or a court's permission was sufficient to support the conviction.

10.19 Continuous violence against the family (Penal Code § 25.11).

This offense is a third degree felony. The elements of the offense are:

- a person (the defendant)
- engages in conduct that constitutes an assault with bodily injury
  - of a family or household member

    OR

  - of a person with whom the defendant had a dating relationship
- two or more times
- during a period of less than 12 months.

10.19.1 Purpose.

The statute allows simultaneous prosecution of multiple assaults with bodily injury charged in one indictment and provides for a greater penalty upon conviction than is available for a single incidence of assault. By charging multiple assaults under this statute, the state is able to increase the possible sentence in cases where unadjudicated offenses are not available to enhance the penalty for a single incidence of assault with bodily injury.

10.19.2 Establishing the continuous nature of the offense.

- the type of family violence is limited to assaults with bodily injury;
- the assaults may have the same or different victims;
- the jury must find that at least two of the alleged assaults occurred within one continuous 12-month period;
- if more than two assaults are alleged, the jury does not have to agree which specific two assaults occurred;
- to separately convict the defendant of one of the assaults alleged to be part of the continuous conduct, the separate assault must be:

- alleged in the alternative;
- have occurred outside the 12-month period;

  OR

- be a lesser included offense.

  (Tex. Penal Code 25.11)

Subchapter D
Offenses Against Property
(Tex. Penal Code Title 7)

10.20 Criminal mischief (property damage provisions) (Penal Code § 28.03).

There are three ways to commit the offense.

10.20.1 First manner and means.

The elements of the offense are: (1) a person (2) intentionally or knowingly (3) damages or destroys the tangible property of the owner.[50]

10.20.2 Second manner and means.

The elements of the offense are: (1) a person (2) intentionally or knowingly (3) tampers with the tangible property of the owner and causes pecuniary loss or substantial inconvenience to the owner or a third person.

10.20.3 Third manner and means.

The elements of the offense are: (1) a person (2) intentionally or knowingly (3) makes markings (such as inscriptions, slogans, drawings, or paintings) on the tangible property of the owner.

(Tex. Penal Code § 28.03(a))

10.20.4 Penalty ranges.

The penalty range depends on the value of the damaged property:

- Under $50 — Class C misdemeanor
- $50-less than $500 — Class B misdemeanor
- $500-less than $1,500 — Class A misdemeanor
- $1,500-less than $20,000 — State jail felony
- $20,000-less than $100,000 — Third degree felony

[50] *Jaimes v. State*, No. 03-03-257-CR, 2004 Tex. App. Lexis 775 (Tex. App.—Austin, Jan. 29, 2004, no pet.). In a prosecution for criminal mischief, evidence that the defendant caused between $500 and $1500 in damages by running his pickup truck into his ex-wife's car was sufficient to support conviction.

- $100,000-less than $200,000 Second degree felony
- $200,000 or more First degree felony

(Tex. Penal Code § 28.03(b))

10.20.5 Interest in property not a defense.

The fact that the defendant in a criminal mischief case had an interest in the affected property is **NOT** a defense if another person also has an interest in the property that the defendant was not entitled to abridge.

(Tex. Penal Code § 28.05)

10.21 Criminal trespass (Penal Code § 30.05).

10.21.1 Class B misdemeanor criminal trespass.

The elements of the offense are:

- a person (the defendant)
- enters or remains on or in property of another[51]
- intentionally, knowingly, or recklessly (implied culpable mental state)[52]
- without effective consent[53]
- after the defendant had
    - notice that entry was forbidden[54]

[51] *Brown v. State*, No. 06-09-18-CR, 2009 Tex. App. Lexis 6485 (Tex. App.—July 31, 2009, no pet.). In a prosecution for criminal trespass, evidence that the defendant remained on his father-in-law's property after being told to leave at least twice was sufficient to support a conviction, even though the defendant did not verbally refuse to leave and eventually left the property before law enforcement arrived.

[52] *Holloway v. State*, 583 S.W.2d 376 (Tex. Crim. App. 1979). In a prosecution for criminal trespass, the defendant was convicted based on evidence that he entered his father-in-law's house without consent and demanded to know where his estranged wife was. The conviction was reversed for failure to include a culpable mental state in the jury charge. The culpable mental state of intentionally, knowingly, or recklessly, although set out in Tex. Penal Code § 30.05, is implied in Tex. Penal Code § 6.05.

[53] *Davis v. State*, 799 S.W.2d 398 (Tex. App.—El Paso 1990, pet. ref'd). In a prosecution for criminal trespass, there was no implied consent by virtue of the marital relationship that gave the defendant the right to enter his estranged wife's apartment that she had rented after their separation, to which he did not have a key, and where he had never lived.

OR

- received notice to depart but failed to do so.[55]

(Tex. Penal Code § 30.05(a))

10.21.2 Class A misdemeanor criminal trespass.

It is a Class A misdemeanor to commit a trespass:

- in a habitation or shelter center;
- while carrying a deadly weapon;

OR

- on a Superfund site or on or in a critical facility.

(Tex. Penal Code § 30.05(d))

10.22 Exploitation of a child, an elderly person, or a disabled person (Penal Code § 32.53).

10.22.1 Definition of "exploitation."

"Exploitation" means the illegal or improper use of a child, elderly person, or disabled individual (or the person's resources), for monetary or personal benefit, profit, or gain.

10.22.2 Elements of the third degree felony offense.

A person commits an offense if the person:

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[54] *Bradley v. State*, No. 07-05-281-CR, 2007 Tex. App. Lexis 2128 (Tex. App.—Amarillo, Mar. 20, 2007, no pet.). In a prosecution for criminal trespass, evidence showed that the defendant was present at his ex-girlfriend's property after being warned to keep off so it was sufficient to support a conviction.

[55] *Jackson v. State*, No. 14-03-945-CR. 2005 Tex. App. Lexis 3631 (Tex. App.—Houston [14th Dist.], May 5, 2005, no pet.). In a prosecution for criminal trespass, evidence that defendant refused to leave his estranged wife's apartment, where he had never lived and for which he had never paid rent, after arguing with her was sufficient to support the conviction.

- intentionally, knowingly, or recklessly
- causes the exploitation
- of a child, elderly individual, or disabled individual.

(Tex. Penal Code § 32.53)

10.23 Online harassment (Penal Code § 33.07).

10.23.1 Third degree felony online harassment.

The elements of the offense are:

- a person
- uses the name or persona of another person (the victim)
- to create a web page on or to post one or more messages
- on a commercial social networking site
- without obtaining the victim's consent

AND

- with intent to harm, defraud, intimidate, or threaten any person.

(Tex. Penal Code § 33.07(a))

10.23.2 Class A misdemeanor online harassment.

The elements of the offense are:

- a person
- sends an electronic mail message, text message, or similar communication
- that references a name, domain address, phone number, or other item of identifying information belonging to any person (the victim)
- without obtaining the victim's consent;

AND

- with intent to cause a recipient of the communication to reasonably believe that the victim authorized or transmitted the communication;

AND

- with the intent to harm or defraud any person.

Enhancement: This offense becomes a third degree felony if the defendant intended to solicit a response by emergency personnel.

(Tex. Penal Code § 33.07(b))

10.23.3 Definitions.

For purposes of this offense:

- **Commercial social networking site** means any business, organization, or other similar entity operating a website that permits persons to become registered users for the purpose of establishing personal relationships with other users through direct or real-time communication with other users or the creation of web pages or profiles available to the public or to other users. The term does not include an electronic mail program or a message board program.

- **Identifying information** means information that alone or in conjunction with other information that consists of:

  - personal identifiers (including a person's name, Social Security number, date of birth, or government-issued identification number);

  - unique biometric data (fingerprint, voice print, retina or iris image);

  - unique electronic identification number, address, routing code, or financial institution account number;

  - telecommunication identifying information or access device.

  (Tex. Penal Code § 32.51; Tex. Penal Code § 33.07(f))

Subchapter E
Offenses Against Public Administration
(Tex. Penal Code Title 8)

10.24 Tampering with witness (Penal Code § 36.05)

10.24.1 Elements

The prosecution must establish that the defendant:

(1) with intent to influence the witness
   a. offered, conferred, or agreed to confer
   b. any benefit on a a witness or prospective
   c. in an official proceeding, or

(2) coerced a witness or prospective witness in an official proceeding:
   a. to testify falsely;
   b. to withhold any testimony, information, document or thing;
   c. to elude legal process summoning him to testify or supply evidence;
   d. to absent himself from an official proceeding to which he was legally summoned; or
   e. to abstain from, discontinue, or delay the prosecution of another.

For offenses committed on or after September 1, 2013- For the purposes of this section, a person is considered to coerce a witness or prospective witness if the person commits an act of family violence as defined by Tex. Fam. Code §71.004, that is perpetrated, in part, with the intent to cause the witness's or prospective witness's unavailability or failure to comply.

(Tex. Penal Code § 36.05(a)), (Tex. Penal Code § 36.05(e)

10.24.2 Level of offense

10.24.2.1 This offense is a

- third degree felony; or
- if the official proceeding is a criminal case, this offense is the same category as the most serious offense charged in that criminal case.
- If the most serious offense is a capital felony, this offense is a first degree felony.

- **For offenses committed on or after September 1, 2013-**
  - If the underlying official proceeding involves family violence as defined by Tex. Family Code §71.004, an offense under this section is the greater of:
    - A felony of the third degree; or
    - The most serious offense charged in the criminal case.
  - If the underlying official proceeding involves family violence as defined by Tex. Family Code §71.004, and it is shown at the trial of the offense that the defendant has previously been convicted of an offense involving family violence under the laws of this state or another state, an offense under this section is the greater of:
    - A felony of the second degree; or
    - The most serious offense charged in the criminal case.

(Tex. Penal Code § 36.05(d)), (Tex. Penal Code § 36.05(e))

10.24.3 Evidence admissible in prosecution for tampering with a witness or prospective witness involving family violence.

10.24.3.1 For offenses committed on or after September 1, 2013, each party may offer testimony or other evidence of all relevant facts and circumstances that assist the trier of fact in determining whether the actor's conduct coerced the witness or prospective witness including the nature of the relationship between the actor and the witness or prospective witness.
(Tex. Code Crim. Proc. art. 38.48)

10.24.3.2 The 83rd Legislature codified the principle of forfeiture by wrongdoing by adding Tex. Code Crim. Proc. art. 38.49, which states that

10.24.3.2.1 A party to a criminal case who wrongfully procures the unavailability of a witness or prospective witness:

- May not benefit from the wrongdoing by depriving the trier of fact of relevant evidence and testimony, AND
- Forfeits the right to object to the admissibility of evidence or statements based on the unavailability of the witness as provided by Tex. Code Crim. Proc. art. 38.49 through forfeiture by wrongdoing.

Tex. Code Crim. Proc. art. 38.49(a)

10.24.3.2.2 Evidence and statements related to a party that engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of a witness or prospective witness are admissible and may be used by the offering party to make a showing of forfeiture by wrongdoing, subject to Tex. Code Crim. Proc. art. 28.01 and Tex. R. Evid. 104.

Tex. Code Crim. Proc. art. 38.49(b)

10.24.3.2.3 The court shall determine, out of the presence of the jury, whether forfeiture by wrongdoing occurred by a preponderance of the evidence.

Tex. Code Crim. Proc. art. 38.49(c)

10.24.3.2.4 The offering party is not required to show that:

- The actor's sole intent was to wrongfully cause the witness's or prospective witness's unavailability;
- The actions of the actor constituted a criminal offense; OR
- Any statements offered are reliable.

Tex. Code Crim. Proc. art. 38.49(d)

10.24.3.2.5 A conviction for an offense under Tex. Penal Code § 36.05 or Tex. Penal Code § 36.06 creates a presumption of forfeiture by wrongdoing under Tex. Code Crim. Proc. art. 38.49.

Tex. Code Crim. Proc. art. 38.49(e)

10.24.3.2.6 This section does not affect the admissibility of character evidence under the Texas Rules of Evidence or other law.

Tex. Code Crim. Proc. art. 38.49(f)

10.24.3.3 For more information regarding forfeiture by wrongdoing and the case law supporting it, please see section 11.16 of this benchbook.

10.25 Third degree felony obstruction or retaliation (Penal Code § 36.06).

There are two ways to commit this offense.

10.25.1 First manner and means.

The elements of the offense are: (1) a person (2) intentionally or knowingly (3) harms or threatens to harm (4) another person (5) by an unlawful act (6) in retaliation for, or on account of, the service or status of another as a public servant, witness,[56] prospective witness,[57] informant, **or** a person who has reported or intends to report a crime.[58]

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[56] *Hartfield v. State*, 28 S.W.3d 69 (Tex. App.—Texarkana 2000, pet ref'd). In a prosecution for murder and retaliation, evidence that the defendant publicly threatened to kill his wife if he ever got out of jail for sexual assault charge she had brought against him and that he subsequently strangled her after he was acquitted was sufficient to prove the crime of retaliation.

[57] *Schmidt v. State*, 232 S.W.3d 66 (Tex. Crim. App. 2009). In a prosecution for retaliation, evidence that the defendant struck the victim (his girlfriend) in retaliation for her services as a prospective witness was sufficient to show that the defendant threatened to harm the victim while he was actually hitting her. The beating that the victim sustained was enough to show that she felt threatened. The threat of harm and the actual harm can arise from the same act and occur simultaneously; the threat need not precede the initial harm.

Busby v. State, No. 08-04-155-CR, 2005 Tex. App. Lexis 4636 (Tex. App.—El Paso, June 16, 2005, no pet.). In a prosecution for retaliation, evidence that the defendant struck the victim (his common-law wife) after she admitting speaking to a detective who was investigating the defendant and after she told the defendant she could not provide him an alibi was sufficient to prove the crime.

McNeely v. State, No. 05-98-879-CR, 1999 Tex. App. Lexis 7863 (Tex. App.—Dallas, Oct. 22, 1999, pet. ref'd). In a prosecution for retaliation, evidence that the defendant's threat to kill his common-law wife after he was arrested for assaulting her, which was overheard by a jailer while the defendant was talking on the telephone to someone, was sufficient to prove the crime even though the wife could not remember the threat.

Archuleta v. State, No. 05-96-1880-CR, 1998 Tex. App. Lexis 1731 (Tex. App.—Dallas, Mar. 20, 1998, pet. ref'd). In a prosecution for retaliation, the defendant's threat to burn down her ex-boyfriend's home (which subsequently burned) after she was arrested for burglary of his home was sufficient to convict her of retaliation.

Johnston v. State, 917 S.W.2d 135 (Tex. App.—Fort Worth 1996, pet. ref'd). In a prosecution for retaliation as a habitual criminal, the defendant's threat to blow his son's head off if the son called parole officer again after the son had reported prior threat to parole officer was sufficient to convict; however prosecutor's failure to disclose arrest warrant for son was reversible error.

10.25.2 Second manner and means.

The elements of the offense are: (1) a person (2) intentionally or knowingly (3) harms or threatens to harm (4) another person (5) by an unlawful act (6) to prevent or delay the service of another (7) as a public servant, witness, prospective witness, informant, **or** a person who has reported or intends to report a crime.

(Tex. Penal Code § 36.06(a))

10.26 False statement regarding child custody determination made in a foreign country (Penal Code §37.14).

A person commits a third degree felony offense if the person:

- knowingly
- makes or causes to be made
- a false statement relating to a child custody determination (as defined in Texas Family Code § 152.102) made in a foreign country
- and the false statement is made during a hearing held under Texas Family Code Chapter 152 or Chapter 153, Subchapter I.

(Tex. Penal Code § 37.14)

Stephenson v. State, 255 S.W.3d 652 (Tex. App.—Fort Worth 2008, pet ref'd). In a prosecution for aggravated kidnapping, aggravated assault and retaliation, evidence that the defendant burned the victim (his girlfriend) with a torch (which was deadly weapon), assaulted her, locked her in trunk, and threatened her children was sufficient to support convictions.

Plascencia v. State, Nos. 05-08-242-CR and 05-08-243-CR, 2009 Tex. App. Lexis 8546 (Tex. App.—Dallas, Nov. 5, 2009, no. pet.). In a prosecution for sexual assault of a child and retaliation, evidence that the defendant threatened to kill his wife and minor stepdaughter (the victim) after he was arrested for sexually assaulting the stepdaughter by placing his penis in her vagina was sufficient to prove both offenses.

[58] *Hart v. State*, No. 06-04-50-CR, 2004 Tex. App. Lexis 11439 (Tex. App.—Texarkana, Dec, 21, 2004, pet. ref'd). In a prosecution for retaliation, evidence that the defendant called the victim (his elderly, blind aunt) from jail and threatened to assault her because she reported his criminal trespass to the police was sufficient to support the conviction.

Blaylock v. State, No. 05-03-617-CR, 2004 Tex. App. Lexis 9440 (Tex. App.—Dallas, Oct. 27, 2004, no pet.). In a prosecution for retaliation, violation of a protective order, and assault, evidence that the defendant hit and pulled the hair of his live-in girlfriend after she reported his violation of the protective order to the police was sufficient to establish retaliation and assault.

10.27 Interference with an emergency telephone call (Penal Code § 42.062).

10.27.1 Class A misdemeanor interference with an emergency telephone call.

There are two ways to commit this offense.

10.27.1.1 First manner and means.

The elements of the offense are: (1) a person (2) knowingly (3) prevents or interferes with (4) another individual's ability to place an emergency telephone call[59] **or** to request assistance in an emergency from (5) a law enforcement agency, a medical facility, **or** another agency or entity that provides for safety.

10.27.1.2 Second manner and means.

The elements of the offense are: (1) a person (2) recklessly (3) renders unusable (4) a telephone (5) that would otherwise be used by another

[59] *Jackson v. State*, 287 S.W.3d 346 (Tex. App.—Houston [14th Dist.] 2009, no pet.). In a prosecution for interference with emergency telephone call, evidence that the defendant knocked the telephone out of the hand of his live-in girlfriend's hand after she had announced intention to call police to get him to leave the residence was sufficient to convict.

In re JAG, No. 03-05-4-CV, 2006 Tex. App. Lexis 3531 (Tex. App.—Austin, Apr. 28, 2006, no pet.). In a prosecution for interfering with emergency telephone call, evidence that police officer found grandmother upset and at the scene the grandmother admitted being intimidated by juvenile and having fled her home to call 911 after the juvenile disconnected her first 911 call was sufficient to prove offense.

Nolen v. State, No. 13-08-526-CR, 2009 Tex. App. Lexis 9054 (Tex. App.—Corpus Christi, Nov. 24, 2009, no pet.). In a prosecution for interfering with emergency telephone call, evidence that the defendant broke into his estranged wife's house, was enraged, caused the wife to fear for her safety, and grabbed telephone out of her hands before she could dial 911 was sufficient to convict.

Vinson v. State, 221 S.W.3d 256 (Tex. App.—Houston [14th Dist.] 2006, rev'd on other grounds 252 S.W.3d 336 (Tex. Crim. App. 2008). In a prosecution for interference with an emergency telephone call and assault, evidence from responding police officer that he responded to a "hang-up 911" call and at the scene the defendant's girlfriend stated the defendant had assaulted her and knocked the telephone out of her hand when she tried to call 911 was sufficient to prove interference with emergency call offense.

But see, *Matlock v. State*, No. 12-05-413-CR, 2006 Tex. App. Lexis 6753 (Tex. App.—Tyler, July 31, 2006, no pet.). In a prosecution for interference with an emergency telephone call, evidence was insufficient to establish the emergency nature of the call even though the defendant entered his estranged wife's apartment through a window and grabbed the telephone from her hand after she dialed 911 because there was no direct evidence that the wife was afraid of the defendant.

person (6) to place an emergency telephone call **or** to request assistance in an emergency from (7) a law enforcement agency, a medical facility, **or** another agency or entity that provides for safety.

10.27.2 State jail felony interference with an emergency telephone call.

If the defendant has previously been convicted of interfering with an emergency telephone call, the subsequent offense is a state jail felony.

10.28 Harassment (Penal Code § 42.07).

10.28.1 Class B misdemeanor harassment.

There are six ways to commit this offense.[60]

10.28.1.1 First manner and means—obscenity.

The elements of the offense are: (1) a person (2) with intent to (3) annoy,[61]alarm, abuse, torment, **or** embarrass (4) another person (5) communicates (by telephone, in writing, or by electronic communication) a comment, request, suggestion, or proposal that is obscene.[62]

10.28.1.2 Second manner and means—threat.

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[60] *Garcia v. State*, 212 S.W.3d 877 (Tex. App.—Austin 2006, no pet.). In a prosecution for aggravated assault with a deadly weapon, family violence felony assault, violation of a protective order, and endangering a child, Penal Code § 25.07 is not facially overbroad or void for vagueness because it prohibits harassing communications. The restriction on speech was limited to the parties subject to the order and necessary due to prior violent or criminal conduct. The term harass in the statute includes a course of conduct directed at a specific person or persons causing or tending to cause substantial distress that has no legitimate purpose.

[61] *Karenev v. State,* 2009 Tex. Crim. App. 961 (Tex. Crim. App. 2009), on remand 2009 Tex. App. Lexis 7533 (Tex. App.—Fort Worth, Sept. 24, 2009). In a prosecution for harassing estranged wife, the defendant could not raise unconstitutionality of statute for first time on appeal; on remand, evidence that the emails, which concerned the divorce settlement were, at least, annoying ,was sufficient to support the conviction.

Smallwood v. State, No. 02-02-438-CR, 2003 Tex. App. Lexis 7167 (Tex. App.—Fort Worth Aug. 21, 2003, no pet.). In a prosecution for harassment, evidence that the defendant called her children's stepmother seven times in one day ranting and using foul language was sufficient to establish the calls annoyed the stepmother, and proving the crime.

[62] *Rendon v. State*, No. 03-07-616-CR, 2008 Tex. App. Lexis 8139 (Tex. App.—Austin, Oct. 24, 2008, no pet.). In a prosecution for harassment, evidence that the defendant left a recorded telephone message for her stepmother stating that the stepmother was a whore who could only charge fifty cents and used the standard euphemism for sexual intercourse was sufficient to prove the offense.

The elements of the offense[63] are: (1) a person (2) with intent to (3) annoy, alarm, abuse, torment, **or** embarrass (4) another person (the recipient) (5) threatens (by telephone, in writing, or by electronic communication), in a manner likely to alarm the recipient (6) to inflict bodily injury[64] **or** to commit a felony against the recipient or the family, household member, or property of the recipient.

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[63] *Davidson v. State*, No. 08-03-34-CR, 2005 Tex. App. Lexis 371 (Tex. App.—El Paso, Jan. 19, 2005, no pet.). In a prosecution for harassment by making threatening and harassing calls to ex-wife, evidence that the content of the calls was vulgar and contained threats to file felony charges against ill son was sufficient to prove the victim was alarmed, annoyed, and terrified, thus proving the crime.

White v. State, No.01-05-514-CR, 2006 Tex. App. Lexis 4463 (Tex. App.—Houston [1st Dist.] pet. ref'd). In a prosecution for harassment of ex-wife with repeated telephone calls, evidence that the defendant called incessantly (up to 2 calls per minute and 329 over eight days) and would not stop when asked was sufficient to prove the offense.

McBride v. State, No. 01.-6-400-CR, 2008 Tex. App. Lexis 3937 (Tex. App.—Houston [1st Dist.] pet. ref'd). In a prosecution for harassment of ex-girlfriend by repeated telephone calls, unwanted gifts, and other communications, evidence that the defendant continued to call and attempt to communicate with the victim after being repeatedly asked to stop was sufficient to prove the offense.

Gillenwaters v. State, No. 03-04-77-CR, 2007 Tex. App. Lexis 8525 (Tex. App.—Austin, Oct. 25, 2007, pet. ref'd). In a prosecution for harassment of ex-wife, evidence that the defendant called ex-wife's work place repeatedly for 7 straight hours, and up to 40 times an hour during that period, and did not stop after being requested to do so was sufficient to prove the offense.

Owen v. State, No. 06-07-153-CR, 2008 Tex. App. Lexis 2315 (Tex. App.—Texarkana, Mar. 4, 2008, no pet.). In a prosecution for harassment, evidence that the defendant repeated called ex-girlfriend and told ex-girlfriend that he would continue to telephone her mother until the mother had a heart attack was sufficient to prove the offense.

Haigood v. State, 814 S.W.3d 262 (Tex. App.—Austin 1991, pet. ref'd). In a prosecution for harassment of ex-wife by repeated telephone calls, evidence that the defendant called his ex-wife 26 times in 8 minutes and ignored her repeated requests to stop calling was sufficient to prove the offense. Because the calls were received in Travis County, the offense occurred in that county.

Chatmon v. State, No. 14.97-1422-CR, 1999 Tex. App. Lexis 7643 (Tex. App.—Houston [14th Dist.] no pet.). In a prosecution for harassment, evidence that the defendant called his aunt who was in Texas and threatened to kill her and her family was sufficient to prove the offense occurred in Texas because call was received in the state.

But see, *Kramer v. State*, 605 S.W.2d 861 (Tex. Crim. App 1980). In a prosecution for harassment, the evidence was insufficient to prove offense because the offending communication, sent to the wife of the defendant's former boyfriend, could not be tied to the defendant as the only connection was a typewritten name on the letter that was the same as the defendant's first name.

[64] *Estep v. State*, No. 05-940584-CR, 1997 Tex. App. Lexis 3056 (Tex. App.—Dallas, June 12, 1997, pet. ref'd). In prosecution for harassment, evidence that the defendant telephoned the mother of his child and told her she was going to die when she reported his child abuse to the authorities was sufficient to prove the crime.

10.28.1.3 Third manner and means—false report.

The elements of the offense are: (1) a person (2) with intent to (3) annoy, alarm, abuse, torment, **or** embarrass (4) another person (5) conveys, in a manner reasonably likely to alarm the recipient, a report the defendant knows to be false that another person is dead or has suffered a serious bodily injury.

10.28.1.4 Fourth manner and means—repeated telephone calls.

The elements of the offense are: (1) a person (2) with intent to (3) annoy, alarm, abuse, torment, **or** embarrass (4) another person (5) causes another person's telephone to ring repeatedly **or** makes the repeated telephone communications anonymously **or** in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

10.28.1.5 Fifth manner and means.

The elements of the offense are: (1) a person (2) with intent to (3) annoy, alarm, abuse, torment, **or** embarrass (4) another person (5) makes a telephone call and intentionally fails to hang up or disengage the connection **or** knowingly permits a telephone under the person's control to be used by another to commit the offense of harassment.

10.28.1.6 Sixth manner and means.

The elements of the offense are: (1) a person (2) with intent to (3) annoy, alarm, abuse, torment, **or** embarrass (4) another person (the recipient) (5) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.[65]

10.28.2 Class A misdemeanor harassment.

The offense of harassment is a Class A misdemeanor if the defendant has a prior conviction for that offense.

(Tex. Penal Code § 42.07)

[65] *Scott v. State*, Nos. PD-1069-09 and PD-1070-09, 2010 Tex Crim. App. Lexis 1249 (Tex. Crim. App., Oct. 6, 2010). In prosecution for harassment of ex-wife by leaving repeated voice messages, the criminal portion of defendant's conduct (repeated use of telephone to inflict emotional distress by invading another's privacy) did not implicate free speech and was not shown to be unduly vague as to defendant's conduct.

10.29 Stalking (Penal Code § 42.072).

10.29.1 Third degree felony stalking.

There are three ways to commit this offense. [66]

10.29.1.1 First manner and means.

The elements of the offense are: (1) a person (the defendant) (2) on more than one occasion **AND** (3) pursuant to the same scheme or course of conduct[67] that is directed specifically at another person (the stalking victim) (4) knowingly (5) engages in conduct[68] that (6) the defendant knows or reasonably[69] believes the stalking victim will regard as

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[66] *Woodson v. State*, 191 S.W.3d 280 (Tex. App.—Waco 2006, pet. ref'd). In a prosecution for stalking, the statute was not unconstitutionally vague.

Accord, *Sisk v. Sisk*, 74 S.W.3d 893 (Tex. App.—Fort Worth 2002, no pet.); *State v. Seibert*, 156 S.W.3d 32 (Tex. App.—Dallas 2004, no pet.); *Lewis v. State*, 88 S.W.3d 383 (Tex. App.—Fort Worth 2002, pet. ref'd); *Battles v. State*, 45 S.W.3d 694 (Tex. App.—Tyler 2001, no pet.); *Clements v. State*, 19 S.W.3d 82 (Tex. App.—Austin 2003, pet. ref'd.)

[67] *Battles v. State*, 45 S.W.3d 694 (Tex. App.—Tyler 2001, no pet.). In a prosecution for stalking, element of "conduct" includes speech within the definition of acts. The stalking statute is not facially invalid for failure to define the phrase "pursuant to the same scheme or course of conduct." Between the Penal Code's definition of conduct and the commonly understood meaning of "scheme" and "pursuant to," the statute gives a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited.

[68] *State v. Seibert*, 156 S.W.3d 32 (Tex. App.—Dallas 2004, no pet.). In a prosecution for stalking, Tex. Penal Code § 42.072 is not unconstitutionally vague because the word "following" as used in the statute was not so broad as to encompass non-criminal activities.

Soto v. State, No. 08-05-0227-CR, 2007 Tex. App. Lexis 9321 (Tex. App.—El Paso, Nov. 29, 2007, no pet.). In a prosecution for stalking, evidence that the defendant went to places where he knew the victim would be and engaged in conduct he knew would place her in fear (following her, making inappropriate comments, and grabbing her) was sufficient to prove he followed her and committed the offense.

Medellin v. State, No. 08-04-363-CR, 2006 Tex. App. Lexis 7867 (Tex. App.—El Paso, Aug. 31, 2006, no pet.). In a prosecution for stalking, the jury charge did not have to contain the phrase "by following the victim" because that phrase describes a manner of committing crime and is not a required element of the offense.

[69] *Sisk v. Sisk*, 74 S.W.3d 893 (Tex. App.—Fort Worth 2002, no pet.). In a prosecution for violation of protective order by stalking, evidence that the defendant followed victim (his ex-wife), knew of the protective order, and knew the victim had made complaints to the police about him was sufficient to establish that he knew or reasonably believed the victim would regard his following her as a threat of bodily injury.

Woodson v. State, 191 S.W.3d 280 (Tex. App.—Waco 2006, pet. ref'd). In a prosecution for stalking, the statute was not unconstitutionally vague because it incorporated the "reasonable person" standard or because the statute does not require the course of conduct be completed within a specific period of time.

threatening and that would cause a reasonable person to fear either (7) bodily injury or death to the stalking victim,[70] bodily injury or death to a member of the stalking victim's family or household or to an individual

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Martinez v. State, No. 03-04-495-CR, 2005 Tex. App. Lexis 7476 (Tex. App.—Austin, Sept. 9, 2005, pet. ref'd). In a prosecution for stalking, the defendant's knowledge that a reasonable person would perceive his conduct as threatening was inferred from his conduct. The defendant followed the victim repeatedly and telephoned repeatedly her to state that he was watching and videotaping her.

[70] *Mollett v. State*, No. 05-08-728-CR, 2009 Tex. App. Lexis 2178 (Tex. App.—Dallas, Mar. 31, 2009, pet. ref'd). In a prosecution for stalking, evidence that on multiple occasions the defendant threatened to kill the victim (who had dated the defendant briefly) was sufficient to support a conviction for a third degree felony.

Sheffield v. State, No. 06-07-00116-CR, 2008 Tex. App. Lexis 3517 (Tex. App.—Texarkana, May 21, 2008, no pet.). In a prosecution for stalking, evidence that the defendant left several threatening messages on victim's (his ex-girlfriend) telephone answering machine and banged on door of her workplace was legally and factually sufficient to support the conviction.

Lewis v. State, No. 09-06-047-CR, 2007 Tex. App. Lexis 6097 (Tex. App.—Beaumont, Aug. 1, 2007, no pet.). In a prosecution for stalking, evidence that over a span of several years, the defendant trespassed on victim's (ex-girlfriend) property, beat on walls and doors of her residence, threatened to kill her, and pushed her was factually sufficient to prove the offense.

Kahara v. State, No. 01-05-00414-CR, 2006 Tex. App. Lexis 10984 (Tex. App.—Houston [1st Dist.] Dec. 21, 2006, no pet.). In a prosecution for stalking, evidence that the defendant vandalized the victim (his ex-girlfriend) vehicle, repeatedly drove by the victim's house, followed her, and demanded she talk to him, was legally and factually sufficient to prove the offense.

Thomas v. State, No. 13-03-655-CR, 2005 Tex. App. Lexis 5990 (Tex. App.—Corpus Christi July 28, 2005, no pet.). In a prosecution for stalking, evidence that over the span of 24 years, the defendant continually followed, threatened, assaulted, made harassing telephone calls, and imposed unwanted attention on the victim (his ex-wife) was legally and factually sufficient to prove the offense.

Criswell v. State, No. 08-03-090-CR, 2004 Tex. App. Lexis 1502 (Tex. App.—El Paso, Feb. 12, 2004, no pet.). In a stalking prosecution, evidence that the defendant made 34 calls to the victim's (his ex-wife) residence over 2 days, followed the victim, and waited outside her home was factually sufficient to prove the offense.

Allen v. State, 218 S.W.3d 905 (Tex. App.—Beaumont 2007, no pet.). In a prosecution for stalking, the jury could have reasonably found that evidence that the defendant had called the victim (his girlfriend) hundreds of times shortly before she spent the night with him was probative of her fear of him and that he had subjective awareness that his conduct caused the victim to fear bodily injury by him.

Marston v. State, No. 11-05-358-CR, 2007 Tex. App. Lexis 8671 (Tex. App.—Eastland, Nov.1, 2007, pet. ref'd). In a stalking prosecution, evidence that the defendant made repeated telephone calls to the victim (his ex-girlfriend), attempted to break into her house, and violated a protective order was sufficient to prove the offense.

Gil v. State, No. 05-03-1622-CR and 05-03-1623-CR, 2004 Tex. App. Lexis 9028 (Tex. App.—Dallas, Oct. 13, 2004, pet. ref'd). In a prosecution for stalking and attempted capital murder, evidence that the defendant threatened, pushed, and shot the victim (his wife) was legally and factually sufficient to establish the offenses.

with whom the stalking victim has a dating relationship; **or** that an offense will be committed against the stalking victim's property.

10.29.1.2 Second manner and means.

The elements of the offense are: (1) a person (2) on more than one occasion **AND** (3) pursuant to the same scheme or course of conduct that is directed specifically at another person (the stalking victim) (4) knowingly (5) engages in conduct that (6) causes the stalking victim or a member of the stalking victim's household or family or an individual with whom the stalking victim has a dating relationship (7) to fear bodily injury or death **or** that an offense will be committed against the stalking victim's property.

10.29.1.3 Third manner and means.

The elements of the offense are: (1) a person (2) on more than one occasion **AND** (3) pursuant to the same scheme or course of conduct that is directed specifically at another person (the stalking victim) (4) knowingly (5) engages in conduct that (6) would cause a reasonable person to fear (7) bodily injury or death of (8) the stalking victim, of the stalking victim's family or household, or of an individual with whom the stalking victim has a dating relationship **or** to fear that an offense will be committed against the stalking victim's property.

NOTE: If more than one manner and means of stalking are pled, the application paragraph of the jury charge must set out each element of a particular manner and means in the conjunctive.[71]

(Tex. Penal. Code § 42.072(a))

10.29.2 Second degree felony stalking.

A stalking offense is second degree felony if the evidence proves that the defendant has a prior stalking conviction. The state may prove its enhancement allegation with proof of stalking convictions from other jurisdictions. The "same

[71] *Ploeger v. State*, 189 S.W.3d 799 (Tex. App.—Houston [1st Dist.] 2006, no pet.). In a stalking prosecution, the trial court committed reversible error when it failed to charge the elements, set out in Tex. Penal Code § 42.072(a)(1-3) in the conjunctive.

scheme or course of conduct" can include an act or all of the acts that constitute stalking under Texas Penal Code § 42.072.

(Tex. Penal Code § 42.072(b))

10.29.3 Venue.

Stalking may be prosecuted in any county in which an element of the offense occurred.

(Tex. Code Crim. Proc. § 13.36)

10.29.4 Evidence admissible in stalking prosecution.

With regard to whether the defendant's conduct would cause a reasonable person to experience fear, testimony is admissible as to all relevant facts and circumstances, including any existing or previous relationship between the defendant and the victim, a member of the victim's family or household, or an individual with whom the victim has a dating relationship. This section does not affect the admissibility of character evidence under the Texas Rules of Evidence or other law.

(Tex. Code Crim. Pro. § 38.46)

10.29.5 Interstate stalking statute.

See Subchapter G, infra.