
MEMORANDUM

TO: JUDGES TRYING CRIMINAL CASES
FROM: DEBORAH SELDEN AND INTERNS JOSH SCHNEIDER, PETER CHICKRIS, AND MARY MARTIN
SUBJECT: 10/08/08 COURT OF CRIMINAL APPEALS OPINION
DATE: 11/10/08
CC: JACK THOMPSON

***Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].**

COCHRAN, J., *delivered the opinion of the Court, in which KELLER, P.J., and JOHNSON, HERVEY, and HOLCOMB, JJ., joined.* PRICE, J., *filed a concurring opinion in which MEYERS, J., joined.* WOMACK, J., *filed a concurring opinion in which KELLER, P.J., and KEASLER, J., joined.*

FACTS: A jury convicted defendant of aggravated assault. The court of appeals reversed and remanded for a new trial. Finding that the jury did not have to be unanimous on aggravating factors of whether the injury was a “serious” bodily injury or whether the defendant used a deadly weapon, the Court of Criminal Appeals reversed the judgment of the court of appeals and remanded the case to address defendant’s remaining points of error.

JURY CHARGE—CAPITAL MURDER—AGGRAVATING FACTORS--UNANIMITY

Aggravated assault is a result-oriented offense and its gravamen is “causing bodily injury.” The jury in such a case does not have to be unanimous on the aggravating factors of whether it was a “serious” bodily injury or whether the defendant used a deadly weapon to commit the offense. It is sufficient for the jury charge to require the jury to unanimously find that defendant caused bodily injury to the complainant. ***Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].**

JURY—UNANIMITY—ONE OFFENSE

A jury must reach a unanimous verdict and must agree that the defendant committed one specific crime. That does not mean, however, that the jury must unanimously find that the defendant committed that crime in one specific way or even with one specific act. ***Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].**

LEGISLATIVE DISCRETION—DEFINING CRIMES—DUE PROCESS LIMITATIONS

The Legislature's considerable discretion in defining crimes and the manner in which those crimes can be committed is limited only by the due process provision of the state and federal constitutions. *Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].

ACTUS REUS—AGGRAVATED ASSAULT—RESULT-ORIENTED OFFENSE

The *actus reus* for “bodily injury” aggravated assault is “causing bodily injury.” The precise act or nature of conduct in this result-oriented offense is inconsequential. What matters is that the conduct is done with the required culpability to affect the *result* the legislature has specified. *Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].

AGGRAVATED ASSAULT—ACTUS REUS-THREE CULPABLE MENTAL STATES

The *actus reus* of aggravated assault must be accompanied by a culpable mental state. In its “bodily injury” assault subsection, the legislature stated that any of three culpable mental states suffices: intentionally, knowingly, or recklessly causing bodily injury. *Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].

AGGRAVATED ASSAULT—INTENTIONAL V. KNOWING- CONCEPTUALLY EQUIVALENT

There is no indication that the legislature intended for an “intentional” bodily injury assault to be a separate crime from a “knowing” bodily injury assault or that offenses differ from a “reckless” bodily injury assault. All three culpable mental states are strung together in a single phrase within a single subsection of the statute and result in the same punishment. In other words, they are conceptually equivalent. *Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].

AGGRAVATED ASSAULT—SIMPLE V. SERIOUS BODILY INJURY—INCREASED PENALTY

Aggravated assault increases the penalty for simple “bodily injury” assault if the victim suffers a significantly greater degree of bodily harm-serious bodily injury - rather than mere bodily injury. The type of injury does not vary, only the degree of the injury. *Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].

AGGRAVATED ASSAULT--JURY CHARGE—UNANIMITY—AGGRAVATING FACTORS

The legislature has evinced no intent that jurors need be unanimous about which aggravating factor or element that they find either the severity of the injury or manner in which the defendant caused the injury. It is still the same single criminal act and still the same single

bodily injury to the victim. *Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].

AGGRAVATED ASSAULT—MANNER—DEADLY WEAPON--INCREASED PENALTY

Aggravated assault also increases the penalty for simple “bodily injury” assault if the defendant's manner of committing that assault increases the likelihood of death or serious bodily injury because he used or exhibited a deadly weapon during the assault. *Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].

AGGRAVATED ASSAULT—TWO WAYS OF COMMISSION

Aggravated assault may be committed in only two ways: 1) by causing serious bodily injury or 2) by using or exhibiting a deadly weapon during the commission of the assault. Each of these methods involves the use of a deadly weapon. The first way necessarily implies the use of a deadly weapon, which is “anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.” The second way specifies the use of a deadly weapon. *Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].

AGGRAVATED ASSAULT—NOTICE—DEADLY WEAPON ALLEGED IN INDICTMENT

An allegation that a defendant committed aggravated assault gives him notice that the deadly nature of the weapon alleged in the indictment would be an issue at trial and that the State may seek an affirmative finding on the use of the weapon. *Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].

AGGRAVATED ASSAULT—NOTICE—DEADLY WEAPON ALLEGED IN INDICTMENT

The aggravated assault statute defines two or more circumstances or factors by which the defendant's punishment for a specific criminal act is increased; therefore, the defendant may be convicted if each juror concludes that at least one of the aggravating factors or elements exist. *Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].

SIMPLE ASSAULT—DEFINITION—3 DISTINCT OFFENSES

The statutory definition of simple assault sets out three distinct criminal offenses: 1) bodily injury assault; 2) assault by threat; and 3) offensive contact assault. Simple “bodily injury” assault is a separate and distinct crime from simple assault by threat. *Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].

ASSAULT—AGGRAVATING FACTORS—ELEVATED PUNISHMENT

Once the underlying type of assault is defined, then either of the aggravating factors set out in the Penal Code may elevate that distinct assaultive crime to a second-degree felony. The aggravating factors or elements are simply the way in which the simple assault becomes a more serious offense. *Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].

AGGRAVATED ASSAULT—DIFFERENT AGGRAVATING FACTORS—SAME GRAVAMEN

Under the one aggravating factor, defendant need not have caused serious bodily injury, but he must have used a deadly weapon to cause bodily injury. The second aggravating factor describes how a defendant caused a bodily injury and modifies the verb “caused.” Under each theory, the gravamen of the offense was the same. *Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].

AGGRAVATED ASSAULT—TWO CRIMES—RESULT / CONDUCT ORIENTED CRIMES

The legislature created two separate criminal offenses in defining “bodily injury” assault and assault by threat. The focus of the two subsections is different: the first is a result-oriented offense intended to punish the defendant for causing bodily injury; the other is a conduct-oriented offense intended to punish a defendant for engaging in threatening behavior. The legislature also assigned different punishment ranges to the two offenses. *Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].

MURDER—POSSIBLE DISJUNCTIVE SUBMISSION—MENTAL STATES

U.S. Supreme Court has noted that a state may draft a murder statute that allows for the disjunctive submission of different culpable mental states, such as “premeditated murder” and “felony murder,” because a legislature might reasonably find that the two offenses are morally equivalent alternatives. *Landrian v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1615-06, 10/08/08].