

Checklist for DWI Charges

Abstract Instructions: Offense, Definitions, Other Statutes ☞CPJC 49.2 & 49.3

- Include all elements of the offense (including any wrongly omitted from information)
- Check § 49.01 definitions & 1.07 (a)(40) “public place”
- Don’t define “operate” (*Kirsch*, 357 SW3d 645 (CCA ’12)) or “normal use” (*Murphy*, 44 SW3d 656 (3rd ’01))
- When statute defines substance as a controlled substance, the instruction, “[Alprazolam] is a controlled substance,” is authorized. *Black*, 491 SW2d 428,431 (CCA ’73), *overruled on other grounds*; *Cleveland*, 2020 WL 2059912 (Dallas 2020).

Issues Affecting Entire Instruction: Tailoring to the Pleading & Proof ☞CPJC 49.1

Pleading

- If *charging instrument* narrows intoxication theory (loss of use or >.08) or intoxicant (*e.g.*, alcohol only), limit the application paragraph respectively. *Rodriguez*, 18 SW3d 228 (CCA ’00); *Crenshaw*, 378 SW3d 460 (CCA ’12) (>.08 definition *not* in application paragraph didn’t improperly expand allegation of only loss of use)
 - Synergistic effect instruction doesn’t improperly expand allegation. *Gray*, 152 SW3d 125 (CCA ’04) (caution: not deciding whether it is improper comment), but concurrent-cause instruction does. *Otto*, 273 SW3d 171 (CCA ’08)
- Remove any unnecessarily pled immaterial allegations (*e.g.*, BAC >.15 “*at the time of the offense*”). *Ramjattansingh*, 548 SW3d 540 (CCA’18)

Proof

- If the *evidence* raises only one intoxication theory or intoxicant, limit the charge (definitions, abstract, application) respectively. *Burnett*, 541 SW3d 84 (CCA ’17) (submit only portions of “intoxicated” definition supported by the evidence)
 - Lack of retrograde extrapolation or inference of intoxication at time of driving may prohibit submission of .08 BAC. *Kirsch*, 306 SW3d 738 (CCA ’10).
 - Submission of drug as intoxicant was justified when identified drug was found in driver’s vehicle & produced the same symptoms of intoxication that the driver exhibited. *Ouellette*, 353 SW3d 870 (CCA ’11)

APPLICATION PARAGRAPH (most important part)

- Include all elements (including any wrongly omitted from the information)
- Include converse: “Unless you so find . . . you will find the defendant not guilty.”

- Consider whether enhancers are submitted at guilt or punishment
 - only *jurisdictional* priors (*i.e.*, felony DWI) are submitted at guilt. *Oliva*, 548 SW3d 518 (CCA '18); State must stipulate to jurisdictional priors if defense offers. *Tamez*, 11 SW3d 198 (CCA '00). Charge on existence & effect of any stipulations. *Martin*, 200 SW3d 635 (CCA'06); ⚡ CPJC 49.21
 - .15 BAC may be punishment issue or harmless when given at punishment. *Do*, 634 SW3d 883 (CCA '21)

Defensive Instructions & Voluntary Act

- Δ doesn't have to confess to "operating" before evidence raises a necessity defense; inferential evidence is enough. *Maciel*, 631 SW3d 720 (CCA '21)
- PC § 6.01(a) Voluntary Act instruction is not justified by testimony driver accidentally took the wrong pill. *Farmer*, 411 SW3d 901(CCA '13).

Improper Comments on Weight of Evidence

- Do not instruct on inferences or effect on guilt from refusal to submit breath/blood sample. *Bartlett*, 270 SW3d 147 (CCA '08)
- Limiting BAC results to showing only consumption of alcohol and not alcohol concentration was improper comment. *Kirsch*, 306 SW3d 738 (CCA '10)
- PC § 8.04 (a) "Voluntary intoxication is not a defense to a crime" is not impermissible comment. *Woodman*, 491 SW3d 424 (14th '16)

Sua Sponte Instructions

- Art. 38.23 instruction required if there is affirmative evidence of contested factual issue dispositive to lawfulness of police conduct in obtaining evidence. *Contreras*, 312 SW3d 566 (CCA '10); *Madden*, 242 SW3d 514 (CCA '07); ⚡ CPJC 4.1 et seq.
Not a fact issue: Whether facts add up to reasonable suspicion/probable cause
Fact issue: Did the officer reasonably believe the vehicle lacked a license tag (he testified he saw no tag but video shows it was present). *Chambers*, 663 SW3d 1 (CCA '22)
- Art. 38.22, § 7, when raised by the evidence. *Oursbourn*, 259 SW3d 159 (CCA '08)
- Art. 38.22, § 6, if parties litigate voluntariness of D's statement. *Id.* ⚡ CPJC 3.3

Offenses which are NOT Lesser-included offenses of DWI (CCP art. 37.09):

- Public Intoxication. TEX. PENAL CODE § 49.02(d)
- DUI. TEX. ALCO. BEV. CODE § 106.041(g)
- Reckless Driving. *Wagner*, 720 SW2d 827 (6th '86)
- Fail to maintain single lane. *Hewitt*, 734 SW2d 745 (2nd '87); *Houth*, 845 SW2d 853 (CCA '92) (double jeopardy case)