NEW CHAPTER

WEAPONS OFFENSES

CJPC 46.1 General Comments on Weapons Offenses

In 2021, the Texas legislature enacted the Firearm Carry Act of 2021. This legislation significantly changed much of chapter 46 of the Texas Penal Code. With this legislation, the legislature sought to reaffirm that "[t]he Second Amendment of the United States Constitution protects an individual right to keep and bear arms, and to possess a firearm connected with service in a militia, and to use that firearm for traditionally lawful purposes, such as self-defense within the home." Firearm Carry Act of 2021, 87th Leg., R.S., ch. 809, § 2 (H.B. 1927), eff. Sept. 1, 2021.

This legislative intent is in line with current jurisprudence on the Second Amendment from the U.S. Supreme Court, where the Court has held that the Second Amendment guarantees the individual right to possess and carry weapons. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008); *see McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (expressing importance of inherent right of self-defense as foundation for Second Amendment right). The Court also held that the Second Amendment right applies to handguns because they are the most preferred firearm in the nation to keep and use for protection of one's home and family. The Court held that citizens must be permitted to use handguns for the core lawful purpose of self-defense. *McDonald*, 561 U.S. at 767–68. The Court has held that the right to "bear arms" refers to the right to wear, bear, or carry upon the person, in the clothing, or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person. *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2133–34 (2022). The definition of "bear" naturally encompasses public carry. *Bruen*, 142 S. Ct. at 2134.

In following *Bruen*, federal courts have issued decisions that could impact upon the validity of some prosecutions under chapter 46 of the Penal Code. The Fifth Circuit court of appeals declared unconstitutional the federal statute that prohibits the possession of firearms by a person subject to a domestic violence restraining order. *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023) (declaring 18 U.S.C. § 922(g)(8) to be unconstitutional). The court in *Rahimi* held that this particular federal statute fell outside the class of firearm regulations permitted by the Second

Amendment. *Rahimi*, 61 F.4th at 460–61. A court could use the reasoning of *Bruen* and *Rahimi* to declare unconstitutional the Texas statute that prohibits the carrying of a firearm by a person who is subject to a protective order. *See* Tex. Penal Code § 46.04(c); *see also* Tex. Penal Code § 46.02(a–7) (which incorporates the offense under section 46.04(c)). The court in *Rahimi* reaffirmed that the Supreme Court's recent decisions do not cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings. *Rahimi*, 61 F.4th at 452 (citing *Heller*, 554 U.S. at 626–27). The *Rahimi* court further stated it did not wish to cast doubt on firearm restrictions that are imposed during criminal proceedings prior to conviction. *Rahimi*, 61 F.4th at 452 n.6.

A federal district court has recently construed the holdings of the Supreme Court in *Heller* and *Bruen* and held that section 46.02(a)(2)(A) violates the Second Amendment to the extent that it prohibits law-abiding eighteen-to-twenty-year-olds from carrying a handgun for self-defense outside the home. *Firearms Policy Coalition, Inc. v. McCraw*, 623 F. Supp. 3d 740 (N.D. Tex. 2022, appeal withdrawn). In doing so, the court disagreed with prior decisions of the Fifth Circuit court of appeals that had held to the contrary (pre-*Bruen*). *See National Rifle Ass'n v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013). The Committee has not provided instructions for the offenses created by section 46.04(c) or section 46.02(a)(2)(A). Second Amendment jurisprudence is a rapidly developing area of the law. Practitioners and judges should keep watch over Second Amendment decisions.

Even though the legislature intended to create "constitutional carry" or "permitless carry" in Texas, the legislature continues to prohibit the possession of firearms by several individuals. Firearm Carry Act of 2021, 87th Leg., R.S., ch. 809, §§ 3, 4 (H.B. 1927), eff. Sept. 1, 2021. The legislature has in fact expanded the number of handgun offenses. In that regard, Texas courts have consistently upheld such regulations on the right to keep and bear arms. *Ex parte Williams*, 786 S.W.2d 781, 782–83 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd) (citing *Masters v. State*, 685 S.W.2d 654, 655 (Tex. Crim. App. 1985) (rejecting challenge to previous version of section 46.02) ; *Roy v. State*, 552 S.W.2d 827, 830 (Tex. Crim. App. 1977), *overruled on other grounds by Boget v. State*, 74 S.W.3d 23 (Tex. Crim. App. 2002)); *see also Ex parte Lee*, 617 S.W.3d 154, 166–68 (Tex. App.—Houston [1st Dist.] 2020, pet. ref'd) (possession of firearm by gang member in vehicle); *Jordan v. State*, 56 S.W.3d 326, 330–31 (Tex. App.—Houston [1st Dist.] 2001, pet.

ref'd) (challenge to section 46.04); *Ford v. State*, 868 S.W.2d 875, 878 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd) (short-barrel shotgun case).

Section 46.02. Section 46.02 of the Penal Code now contains the following offenses:

- carrying a handgun by a person younger than twenty-one years of age (section 46.02(a)(2)(A)) [as noted above, a state court could hold this statute to be unconstitutional under *Bruen*];
- carrying a handgun by a person who has been convicted of an offense under sections 22.01(a)(1) (assault), 22.05 (deadly conduct), 22.07 (terroristic threat), 42.01(a)(7) (disorderly conduct), or 42.01(a)(8) (disorderly conduct) (section 46.02(2)(B));
- carrying a handgun in a motor vehicle or watercraft (section 46.02(a–1));
- carrying a location-restricted knife by a person younger than eighteen years of age (section 46.02(a–4)) [the only non-handgun offense that remains in section 46.02];
- carrying a handgun and displaying it in plain view of another person in a public place (section 46.02(a–5));
- carrying a handgun by an intoxicated person (section 46.02(a–6));
- carrying a handgun by a person who was prohibited from possessing a firearm under section 46.04(a) (possession of a firearm by a felon) (section 46.02(a–7));
- carrying a handgun by a person who was prohibited from possessing a firearm under section 46.04(b) (possession of a firearm by a person who has been convicted of class A misdemeanor assault against a member of the person's family or household) (section 46.02(a–7));
- carrying a handgun by a person who was prohibited from possessing a firearm under section 46.04(c) (possession of a firearm by a person who is subject to a protective order) (section 46.02(a–7)) [as noted above, a state court could hold this statute to be unconstitutional under *Bruen*].

For these last three offenses, the Legislature has expressed a preference for prosecuting the defendant under section 46.02(a-7) if the offense can be prosecuted under that subsection, as well as section 46.04. *See* Tex. Penal Code § 46.02(a-8);*see also* Tex. Penal Code § 46.02(e)

(establishing greater punishment than section 46.04 if prosecuted under section 46.02(a-7)). As noted more fully below, the Committee has taken that into account in choosing which instructions to provide.

Section 46.04. Section 46.04 of the Penal Code now contains the following offenses:

- possession of a firearm—at any location—by a person who has been convicted of a felony (section 46.04(a)(1));
- possession of a firearm—at a location other than the premises where the person lives—by a person who has been convicted of a felony (section 46.04(a)(2));
- carrying on or about one's person a handgun in a motor vehicle or watercraft if the person is a member of a criminal street gang (section 46.04(a–1));
- possession of a firearm by a person who has been convicted of class A misdemeanor assault involving a member of the person's family or household (section 46.04(b));
- possession of a firearm by a person who is subject to a particular protective order or bond condition (section 46.04(c)) [as noted above, a state court could hold this statute to be unconstitutional under *Bruen*].

Definition of Firearm. Section 46.01(3) defines a "firearm" as—

> any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use. *"Firearm" does not include a firearm that may have, as an integral part, a folding knife blade or other characteristics of weapons made illegal by* [*chapter 46*] *and that is:*
>
> *(A) an antique or curio firearm manufactured before 1899; or*
>
> *(B) a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition.*

Tex. Penal Code § 46.01(3) (emphasis added). The Committee confronted the issue of whether a trial judge should instruct the jury on the italicized portion of the definition and ultimately concluded that a trial judge is required to give that portion of the definition only if a fact issue is

raised concerning the antique or curio exemption from the definition. Presumably, the state would not file the charge or the charge would be dismissed if the evidence was clear that the antique or curio exemption applied.

In other contexts, the court of criminal appeals has held that the trial court is obliged to include in the jury charge statutory definitions that affect the meaning of elements of the crime, but the charge must also be tailored to the facts presented at trial. Thus, the trial court must submit to the jury only the portions of the statutory definition that are supported by the evidence. To do otherwise is error. *Burnett v. State*, 541 S.W.3d 77, 84 (Tex. Crim. App. 2017) (dealing with definition of "intoxicated"). *See also Ouellette v. State*, 353 S.W.3d 868, 870 (Tex. Crim. App. 2011) (citing *Alvarado v. State*, 704 S.W.2d 36 (Tex. Crim. App. 1985)); *Omoruyi v. State*, 528 S.W.3d 691, 695 (Tex. App.—Texarkana 2017, no pet.). This would lend further support for a trial judge to avoid instructing the jury on the antique or curio exemption unless a fact issue had been raised regarding the application of that exemption to the defendant's case.

The Committee also confronted the issue of whether the "antique or curio" exemption to the definition of a "firearm" constitutes an affirmative defense. Section 46.05 of the Penal Code outlines the offense of possession of certain prohibited weapons. Section 46.05(d)(1) provides, "It is an affirmative defense to prosecution . . . that the actor's conduct was incidental to dealing with a short-barrel firearm or tire deflation device solely as an antique or curio." No other provision in chapter 46 identifies an affirmative defense related to antique or curio weapons. Nevertheless, there is language in some court decisions suggesting that the "antique or curio" exemption in the definition of "firearm" is likewise an affirmative defense. *Hutchings v. State*, 333 S.W.3d 917, 921 (Tex. App.—Texarkana 2011, pet. ref'd) (possession of firearm by felon) (citing *Cantu v. State*, 802 S.W.2d 1, 2 (Tex. App.—San Antonio 1990, pet. ref'd) (possession of prohibited weapon—short-barrel firearm)).

However, the court of criminal appeals has held that only the legislature can establish defenses and affirmative defenses to criminal offenses, and only those defenses and affirmative defenses entitle defendants to defensive and affirmative defensive instructions in jury charges. *Giesberg v. State*, 984 S.W.2d 245, 250 (Tex. Crim. App. 1998). Because the authority to establish what constitutes a defense rests solely with the legislature, a defense that is not recognized by the legislature as either a defense or as an affirmative defense does not warrant a separate instruction. *Giesberg*, 984 S.W.2d at 250–51.

Based on this language, and section 2.04 of the Penal Code, the Committee concluded that the "antique or curio" exemption in the definition of "firearm" is not a defense or an affirmative defense. *See* Tex. Penal Code § 2.04(a) ("An affirmative defense in this code is so labeled by the phrase: 'It is an affirmative defense to prosecution . . . .'"); Tex. Penal Code § 2.03(a) ("A defense to prosecution for an offense in this code is so labeled by the phrase: 'It is a defense to prosecution . . . .'"). *See also* Tex. Penal Code § 2.02(a) ("An exception to an offense in this code is so labeled by the phrase: 'It is an exception to the application of . . . .'").

Courts have routinely held that, in a prosecution of possession of a firearm by a felon, the state is not required to prove that a firearm is not an antique or curio firearm or replica thereof. *Hutchings*, 333 S.W.3d at 921 (citing *Jackson v. State*, 575 S.W.2d 567, 569 (Tex. Crim. App. 1979) (prosecution of possession of prohibited weapon—short-barrel firearm)). Courts have instead held that the defendant has the burden of proving that a gun was an antique as defined in the Penal Code. *McIlroy v. State*, 188 S.W.3d 789, 798 (Tex. App.—Fort Worth 2006, no pet.) (prosecution of possession of firearm by a felon) (citing *Cantu*, 802 S.W.2d at 2 (prosecution of possession of prohibited weapon—short-barrel firearm)). However, the court of criminal appeals has held that a defensive issue that goes no further than to merely negate an element of the offense alleged by the state in its indictment does not place a burden of proof on a defendant to establish it. The burden of proof is on the state to prove those allegations. *Giesberg*, 984 S.W.2d at 250.

In a prosecution of the offense of possession of a firearm by a felon, for example, the state is required to prove beyond a reasonable doubt that the defendant possessed a "firearm." *See, e.g.*, Tex. Penal Code § 46.04(a). That could suggest that the state is required to disprove the "antique or curio" exemption in the definition of "firearm." Courts have consistently held that not to be the case if the exemption was not raised by the evidence. *See Bollinger v. State*, 224 S.W.3d 768, 776 (Tex. App.—Eastland 2007, pet. ref'd) (citing *Jackson*, 575 S.W.2d at 569); *McIlroy*, 188 S.W.3d at 797–98 (citing *Jackson*, 575 S.W.2d at 569; *Cantu*, 802 S.W.2d at 2). *See also Wright v. State,* 582 S.W.2d 845, 846 (Tex. Crim. App. 1979) (state not required to disprove "antique or curio" exemption in prosecution for aggravated assault); *Riddick v. State*, 624 S.W.2d 709, 711 (Tex. App.—Houston [14th Dist.] 1981, no pet.) (same holding in aggravated robbery case).

The San Antonio court of appeals has held that the definition of "firearm" furnishes a defendant with the chance to show that the weapon in his case is an antique and, therefore, cannot

be characterized as a firearm. Thus, he cannot be validly charged with possession of a firearm since the gun is not a firearm. In that particular case, there had been alteration to the alleged antique firearm, but witnesses could not say when the alteration occurred, even though the gun possibly was manufactured before 1899. The court of appeals held that the defendant did not meet his burden to show that the gun in his case was not a firearm. The court concluded that a "firearm manufactured before 1899 is not an antique *under the terms of the statute*, if it has been altered after 1899." *Cantu*, 802 S.W.2d at 2.

Based on the foregoing case law and statutory provisions, the Committee has concluded that the "antique or curio" exemption in the definition of "firearm" should not be treated as a defense or an affirmative defense for purposes of the jury charge. In most cases, there will be no need to include the exemption in the definition of "firearm." A trial judge should definitely include the *entire* definition of "firearm" if the "antique or curio" exemption has been raised by the evidence. But there is no statutory mechanism by which to place the burden of proof for the exemption on the defendant. As a defensive issue in general, the state would bear the burden of proof to prove that the defendant possessed a "firearm" beyond a reasonable doubt and to disprove beyond a reasonable doubt the application of the exemption—if a fact issue is raised as to whether the exemption applies. Other than advising a trial court to instruct the jury on the full definition of "firearm" (including the antique or curio exemption), the Committee has not chosen to instruct the jury further on the jury's finding of a "firearm."

The Committee also confronted the issue of whether the jury should be charged on the phrase "other characteristics of weapons made illegal by chapter 46." A version of this phrase has been part of the exclusion from the definition from "firearm" since the adoption of the 1974 Penal Code. *Scott v. State*, 571 S.W.2d 893, 895 (Tex. Crim. App. 1978) (holding that, while the definition of "firearm" excluded from the definition those antiques or curios manufactured before 1899, it did not automatically exclude all firearms made before that date). The phrase, however, has never been definitively construed. The Committee concluded that this portion of the exclusion of the definition of "firearm" should not be provided to the jury. Jurors and practitioners would not be able to apply it in a given case.

Thus, the Committee has presented the definition of "firearm" in the following way:

A "firearm" means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily

convertible to that use.

[*Include the following if applicable*.]

"Firearm" does not include a firearm that may have, as an integral part, a folding knife blade and that is:

1. an antique or curio firearm manufactured before 1899; or

2. a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition.

It is also not necessary for the state to prove that a firearm is operable. *Hutchings*, 333 S.W.3d at 922 (citing *Wright v. State*, 582 S.W.2d 845, 847 (Tex. Crim. App. 1979) (in proving use or exhibition of deadly weapon, where alleged deadly weapon is firearm, state need not prove firearm operational); *Walker v. State*, 543 S.W.2d 634, 637 (Tex. Crim. App. 1976) (.45 automatic pistol is "firearm," even if clip and firing pin missing); *Lewis v. State*, 852 S.W.2d 667, 669 (Tex. App.—Houston [14th Dist.] 1993, no pet.) (in prosecution for unlawful possession of firearm, not necessary for state to prove weapon operational)). *See also Bollinger*, 224 S.W.3d at 775–76; *Grantham v. State,* 116 S.W.3d 136, 144 (Tex. App.—Tyler 2003, pet. ref'd); *Thomas v. State*, 36 S.W.3d 709, 711 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd). The fact that a gun is unloaded is also not a defense. *Christopher v. State*, 819 S.W.2d 173, 177 (Tex. App.—Tyler 1991, pet. ref'd) (citing *Davis v. State*, 179 S.W. 702, 703 (Tex. Crim. App. 1915); *Steele v. State*, 166 S.W. 511 (Tex. Crim. App. 1914); *Caldwell v. State*, 106 S.W. 342, 344 (Tex. Crim. App. 1907)).

Possession or Carrying of a Firearm by a Felon. As noted above, two different statutes now make possession or carrying of a firearm by a felon an offense—section 46.02(a–7) and section 46.04(a). As is the case with most offenses under section 46.02, a person cannot commit an offense under section 46.02(a–7) if he is on his own premises or premises under his control, or if he is inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control. Tex. Penal Code § 46.02(a–7). By contrast, a person can commit an offense under section 46.04(a) at the premises where he lives if the offense is committed before the fifth anniversary of the person's release from confinement for the prior felony conviction or release from supervision for the prior felony conviction. Tex. Penal Code § 46.04(a)(1). Traditionally, prosecution of a defendant under section 46.04(a) has been one of the more common charges under chapter 46, but that will almost certainly change after the enactment of sections 46.02(a–7) and 46.02(a–8). Therefore, the Committee has provided an instruction for a violation of section

46.02(a–7) for a felon who has been alleged to carry a handgun away from his premises (see CJPC 46.2), and the Committee has provided an instruction for a violation of section 46.04(a) for a felon who has been alleged to possess a firearm at the premises where he lives during the appropriate time period(see CPJC 46.3).

To obtain a valid conviction under section 46.04(a), the state must prove the defendant's felony status at the time that he possessed the firearm. *Ex parte Jimenez*, 361 S.W.3d 679, 683 (Tex. Crim. App. 2012) (citing *State v. Mason*, 980 S.W.2d 635, 641 (Tex. Crim. App. 1998)). Therefore, if the defendant had the status of a felon at the time that he possessed the firearm, the conviction under section 46.04(a) is not void, even if the predicate felony conviction is subsequently set aside. *Ex parte Jimenez*, 361 S.W.3d at 683; *see also Matew v. State*, 655 S.W.3d 291, 301–02 (Tex. App.—Corpus Christi–Edinburg 2022, pet. filed) (also holding that jury charge need not state that the predicate conviction has to be "final"); *cf. Cuellar v. State*, 70 S.W.3d 815, 820 (Tex. Crim. App. 2002) (case in which defendant's prior felony conviction had been set aside at the time of the firearm-possession offense).

The predicate felony offense can also be a state jail felony because the legislature's intent was that any felony could be the predicate felony for an offense under section 46.04(a). *Tapps v. State*, 294 S.W.3d 175, 177–82 (Tex. Crim. App. 2009). The date of the prior felony conviction is not an element of the offense. Therefore, if the prior felony conviction occurred before the legislature amended section 46.04(a) to allow any felony conviction to be the predicate felony, that does not matter, as long as the defendant was a felon at the time that he possessed the firearm. *State v. Mason*, 980 S.W.2d 635, 640 (Tex. Crim. App. 1998).

Instruction on the Correct Time Period.

With regard to section 46.04(a), judges and practitioners should be aware of a concern if the state has incorrectly pleaded the offense. The statute prohibits a felon from possessing a firearm before the fifth anniversary of the defendant's release from confinement or the defendant's release from supervision under community supervision, parole, or mandatory supervision. Tex. Penal Code § 46.04(a)(1) (at any location). The statute also prohibits a felon from possessing a firearm after the fifth anniversary of the defendant's release from confinement or the defendant's release from supervision under community supervision, parole, or mandatory supervision. Tex. Penal Code § 46.04(a)(2) (away from defendant's home).

When a Texas statute lists more than one method of committing an offense or definition of

an element of an offense, and the indictment alleges some, but not all, of the statutorily listed methods or definitions, the state is limited to the methods and definitions alleged. *Herron v. State*, 625 S.W.3d 144, 152 (Tex. Crim. App. 2021); *Ramjattansingh v. State*, 548 S.W.3d 540, 546 (Tex. Crim. App. 2018). "The state may not rely on any other statutorily listed methods or definitions it did not plead in the indictment." *Root v. State*, 615 S.W.3d 920, 927 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd). These holdings have been applied to prosecutions under section 46.04(a) when the state has chosen whether to allege that the defendant possessed the firearm before the fifth anniversary of the defendant's release or after the fifth anniversary of the defendant's release. *See Saldana v. State*, 418 S.W.3d 722, 726 (Tex. App.—Amarillo 2013, no pet.) (defendant was charged only under section 46.04(a)(1), so conviction could not be upheld based on proof that defendant violated section 46.04(a)(2)); *Fagan v. State*, 362 S.W.3d 796, 799–800 (Tex. App.—Texarkana 2012, pet. ref'd) (same); *Macias v. State*, 136 S.W.3d 702, 705–06 (Tex. App.—Texarkana 2004, no pet.) (same).

The problem can occur even in situations in which the state has alleged the incorrect event under subsection (a)(1). In *Wood v. State*, the state alleged one alternative event—the fifth anniversary of the defendant's release from *confinement*—but the evidence at trial proved a different alternative event—the fifth anniversary of the defendant's release from *parole supervision*. The court of appeals held that, when an unlawful-possession indictment alleges one (and only one) alternative statutory timeframe element, but the evidence at trial proves another, the variance is material, and the evidence is thus insufficient to support his conviction for the offense alleged in the indictment. *Wood v. State*, 636 S.W.3d 83, 85 (Tex. App.—Fort Worth 2021, no pet.).

In *Wood*, the court of appeals held that the state was free to list multiple alternative timeframe elements in the defendant's indictment; it could have alleged that he possessed a weapon before the fifth anniversary of his release from confinement and of his release from parole supervision. For that matter, the state was free to "throw everything at the wall" and charge the defendant with possessing a weapon after his conviction and before the fifth anniversary of his release from confinement and his release from supervision under community supervision, parole, and mandatory supervision. But the state instead alleged only one alternative timeframe element: "release from confinement following [the defendant's] conviction." This was the only statutory timeframe element "'authorized by the indictment' and included in the hypothetically correct jury

charge—the charge by which the sufficiency of the evidence is measured." *Wood*, 636 S.W.3d at 90.

In *Wood*, the state offered no evidence that the defendant possessed any or all of the five relevant weapons before the fifth anniversary of his release from confinement following his conviction. Instead, the state offered evidence of a statutory timeframe element not alleged in the defendant's indictment: release from parole supervision. Because the variance between the release-from-confinement indictment allegation and the release-from-parole-supervision evidence offered at trial was material, the evidence was legally insufficient to support the defendant's conviction for the offense alleged in his indictment. *Wood*, 636 S.W.3d at 90.

It is possible that the state might not allege a relevant time period under either subsection (a)(1) or (a)(2) if the defendant is alleged to have possessed the firearm within five years after being convicted of the felony. The period during which firearm possession by a felon is forbidden begins on the date of conviction (the date one is "convicted of a felony"). The minimum period that a felon will be prohibited from possessing a firearm—assuming the felon is released from confinement or supervision on the date of conviction or is never confined—is five years from the date of conviction. "The date of release from confinement is not necessary when the alleged possession occurs within five years of the date of conviction because the period of prohibition extends for this duration in any event." *Tapps v. State*, 257 S.W.3d 438, 445 (Tex. App.—Austin 2008), *aff'd on other grounds*, 294 S.W.3d 175 (Tex. Crim. App. 2009).

The plain meaning of section 46.04(a) "clearly sets out a time period for commission of the offense that *begins with conviction* and extends five years beyond the defendant's release from confinement, community supervision, parole, or mandatory supervision, 'whichever date is later.'" *Martinez v. State*, 986 S.W.3d 779, 780 (Tex. App.—Dallas 1999, no pet.). The phrase "whichever date is later" in section 46.04(a)(1) conveys the meaning that a convicted felon is prohibited from possessing a firearm until five years after his release from confinement, unless he serves community supervision, parole, or mandatory supervision after or in lieu of confinement, in which case the prohibition continues until five years after his release from supervision. *State v. Hoffman*, 999 S.W.2d 573, 575 (Tex. App.—San Antonio 1999, no pet.).

It should be assumed that reasoning from the above authority would apply to other chapter 46 offenses in which possession of a weapon is prohibited during a certain time period. Based on the above authority, the Committee has provided instructions that require the jury to find

that the state has proved that the defendant possessed the weapon during the relevant statutory time period—as alleged by the state in the indictment. The Committee has taken this approach with CPJC 46.2 through 46.6.

The relevant statutory time periods for the offenses are set forth in the relevant statutes unit of each instruction and prefaced by the instruction language "Choose only what was pleaded by the state".

Possession or Carrying of a Handgun with a Prior Conviction for Assault.

There are three potential possibilities for charging a person who is in possession of a handgun after having been previously convicted of an assault. A person commits an offense under section 46.02(a)(2)(B) if he intentionally, knowingly, or recklessly carries on or about his person a handgun and, at the time of the offense, has been convicted of an offense under section 22.01(a)(1) of the Penal Code, which was committed in the five-year period preceding the date that the charged offense was committed, and the person is not on the person's own premises or premises under the person's control or inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control. A person commits an offense under section 46.04(b) if he possesses a firearm after having been convicted of the class A misdemeanor offense of assault under section 22.01, which was committed against a member of the person's family or household, and the possession of the firearm occurs before the fifth anniversary of the later of the date of the person's release from confinement following conviction of the assault or the date of the person's release from community supervision following conviction of the assault. A person commits an offense under section 46.02(a–7) if he intentionally, knowingly, or recklessly carries on or about his person a handgun and is not on the person's own premises or premises under the person's control or inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control if, at the time of the offense, the person was prohibited from possessing a firearm under section 46.04(b).

The Committee has provided an instruction for all three of these offenses. The Committee has provided an instruction for a violation of section 46.02(a–7) for a person who has been previously convicted of a domestic assault and has been alleged to carry a handgun away from his premises (CJPC 46.4), a violation of section 46.04(b) for a person who has been convicted of a domestic assault and has been alleged to possess a firearm at the premises where he lives during the appropriate time period (CJPC 46.5), and a violation of section 46.02(a)(2)(B) for a person alleged to have carried a handgun after having been previously convicted of an assault (CJPC 46.6).

It should be noted that the prior convictions for assault involved for these three offenses are different. The prior conviction for assault mentioned in section 46.02(a)(2)(B) is restricted to an assault under section 22.01(a)(1) (intentionally, knowingly, or recklessly causing bodily injury to another person). The prior conviction for assault mentioned in section 46.04(b) and section 46.02(a–7) is not restricted to a particular subsection of section 22.01, but it must have been committed against a member of the person's family or household, and it must have been a class A misdemeanor assault. Currently, there are three class A misdemeanor assaults under section 22.01:

- intentionally, knowingly, or recklessly causing bodily injury to another person (Tex. Penal Code § 22.01(a)(1), (b));
- intentionally or knowingly causing physical contact with an elderly or disabled person when the defendant knew or should have reasonably believed that the other person regarded the contact as offensive or provocative (Tex. Penal Code §22.01(a)(3), (c)(1));
- intentionally or knowingly threatening a pregnant person with imminent bodily injury or causing physical contact with a pregnant person when the defendant knew or should have reasonably believed that the other person regarded the contact as offensive or provocative, and the defendant committed the assault in order to force the pregnant person to have an abortion (Tex. Penal Code § 22.01(a)(2), (a)(3), (c)(3)).

In the instructions for sections 46.04(b) and 46.02(a–7), the Committee has used only the definition for assault under section 22.01(a)(1).

A person commits an offense under section 46.04(b) of the Penal Code if the person possesses a firearm and has been convicted of an offense under section 22.01 (assault), which is punishable as a class A misdemeanor and involved "a member of the person's family or household." Tex. Penal Code § 46.04(b). The terms "family," "household," and "member of a household" have the meaning assigned by chapter 71 of the Family Code. Tex. Penal Code § 46.04(d).

> "Family" includes individuals related by consanguinity or affinity, as determined under Sections 573.022 and 573.024, Government Code, individuals who are former spouses of each other, individuals who are the parents of the same child, without regard to marriage, and a foster child and foster parent, without regard to whether those individuals reside together.

Tex. Fam. Code § 71.003. "'Household' means a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other." Tex. Fam. Code § 71.005. "'Member of a household' includes a person who previously lived in a household." Tex. Fam. Code § 71.006.

For the instruction for the offense under section 46.04(b), the Committee has included these definitions, as well as the definitions of "affinity" or "consanguinity" from the Government Code provisions that are referenced in section 71.003 of the Family Code (see CPJC 46.5). *Cf. Hudson v. State*, 179 S.W.3d 731, 739–40 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (in assault-of-family-member prosecution, it was error not to define "affinity" and "consanguinity" when Family Code definition of "family" was given to jury).

A person commits an offense under section 46.02(a–7) if the person "intentionally, knowingly, or recklessly carries on or about his or her person a handgun" and "at the time of the offense, was prohibited from possessing a firearm under" section 46.04(b). Tex. Penal Code § 46.02(a–7)(1), (a–7)(3). For the offense under section 46.02(a–7), the Committee questioned whether the definitions of "family," "household," and "member of a household" from chapter 71 of the Family Code are applicable. There is no provision in section 46.02 that is similar to section 46.04(d). Nevertheless, since section 46.02(a–7) references section 46.04(b), the Committee thought it best to incorporate the Family Code definitions that are applicable to section 46.04(b).

Limiting Instruction as to Prior Conviction.

Evidence that a defendant prosecuted under section 46.04(a) has a prior felony conviction can only be considered for the purpose of the element of whether the defendant was a felon at the time that he allegedly possessed the firearm. A limiting instruction to that effect may be warranted based on rule 105(a) of the Texas Rules of Evidence—that the court on request should restrict consideration of evidence to its proper scope—and rule 404(b)(1)—that prior bad acts cannot be considered for purposes of character conformity. Also, such a limiting instruction may be warranted based on case law. In a decision decided before the adoption of the Federal Rules of Evidence, the U.S. Supreme Court recognized that evidence of a defendant's prior crimes is generally recognized to have potentiality for prejudice, and while it may be admissible for reasons such as when a prior conviction is an element of the crime, a defendant's interests are protected by

limiting instructions that the prior conviction be used for no other purpose. *Spencer v. Texas*, 385 U.S. 554, 560–61 (1967).

In *Old Chief v. United States*, 519 U.S. 172, 185 (1996), the Supreme Court acknowledged this same potential for prejudice, particularly in the context of a felon-in-possession trial. If the government can be forced to accept a stipulation to the element of a prior conviction, perhaps, on request, a trial court would also be required to instruct the jury not to consider a prior conviction for purposes of character conformity generally. In a similar context—felony DWI—the court of criminal appeals suggested that a limiting instruction should be given. *Martin v. State*, 200 S.W.3d 635, 639 (Tex. Crim. App. 2006) ("This separate paragraph would also instruct the jury to find that the jurisdictional prior convictions may not be used for any other purpose in determining the guilt of the defendant on the charged occasion.").

The Committee could find no published cases addressing the issue of whether the jurors should be given a limiting instruction on their consideration of a defendant's prior felony conviction in a prosecution under section 46.04(a). In unpublished opinions, the courts of appeals have been somewhat skeptical of a requirement for such a jury instruction. *See, e.g., Villarreal v. State*, No. 03-16-00684-CR, 2017 WL 5985494, at *9 (Tex. App.—Austin Dec. 1, 2017, no pet.) (mem. op.) (finding no case law requiring a limiting instruction on element of the prior conviction in felon-in-possession trial). One case cited older precedent that an instruction limiting a jury's consideration of certain evidence is generally not required when the evidence is admissible to prove a main fact in the case—such as an element. *Warren v. State*, No. 05-99-00321-CR, 2001 WL 15967, at *1 (Tex. App.—Dallas Jan. 9, 2001, no pet.) (mem. op., not designated for publication) (citing *Porter v. State*, 709 S.W.2d 213, 215 (Tex. Crim. App. 1986) (finding defendant forfeited issue on appeal by failing to ask for limiting instruction when evidence was offered)).

Even if an instruction is not strictly required, it is prudent for a trial court to give such an instruction on request, preferably when the evidence is offered, and probably again in the jury charge. Reviewing courts routinely point to such instructions as limiting the prejudice from otherwise admissible evidence. Also, the instruction should be appropriately worded. It would be erroneous, for example, to instruct the jury that they could consider the prior conviction for jurisdictional purposes only and not for purposes of guilt. *See Russel v. State*, 425 S.W.3d 462, 467 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd).

When evidence regarding the prior conviction is admitted into evidence, and again during the final charge to the jury, the trial judge could give an instruction like the following to limit the jury's consideration of that evidence:

> With respect to the evidence admitted in this case concerning the defendant having been previously convicted of a felony, if he was, you are instructed that such evidence cannot be considered by you in any manner as proving or tending to prove that the defendant was in possession of a firearm on or about the date alleged by the state.

This instruction would be appropriate in any chapter 46 prosecution in which the defendant is charged with possessing or carrying a weapon that is prohibited because the defendant had a particular prior conviction.

Carrying a Handgun in a Motor Vehicle by a Gang Member.

The Committee has provided an instruction for the offense of carrying a handgun by a member of a criminal street gang (CJPC 46.7). That offense had been in section 46.02(a–1)(C) of the Penal Code, but it is now in section 46.04(a–1) of the Penal Code. *See* Firearm Carry Act of 2021, 87th Leg., R.S., ch. 809, §§ 22, 24 (H.B. 1927), eff. Sept. 1, 2021. A person commits the offense if he is a member of a criminal street gang and intentionally, knowingly, or recklessly carries on or about his person a handgun in a motor vehicle or watercraft. Tex. Penal Code § 46.04(a–1). "Member" is not defined in the Penal Code, but "criminal street gang" is defined as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities." Tex. Penal Code § 71.01(d).

The language of the former section 46.02(a–1)(C) and the current section 46.04(a–1) is essentially the same; therefore, any construction of the previous statute would apply to the current statute. The court of criminal appeals has recently held that the unlawful carrying of a weapon by a gang member requires proof that the defendant was continuously or regularly committing gang crimes. The court of criminal appeals adopted and applied the holding from *Ex parte Flores* in that, to be a member of a "criminal street gang," an individual (1) must be one of three or more persons with a common identifying sign, symbol, or identifiable leadership and (2) must also continuously or regularly associate in the commission of criminal activities. *Martin v. State*, 635 S.W.3d 672, 673 (Tex. Crim. App. 2021); *see Ex parte Flores*, 483 S.W.3d 632, 637 (Tex. App.—

Houston [14th Dist.] 2016, pet. ref'd) (upholding constitutionality of statute);*see also Ex parte Lee*, 617 S.W.3d 154, 159 (Tex. App.—Houston [1st Dist.] 2020, pet. ref'd) (same).

In *Martin*, the court also determined that the term "member," when read together with the definition of "criminal street gang," indicates that "a gang 'member' must be one of the three or more persons who continuously or regularly associate in the commission of criminal activities." "Therefore, a person is a 'member' of a criminal street gang only when the gang member is 'one of the three or more persons who continuously or regularly associate in the commission of criminal activities' based on reading both terms ('member' and 'criminal street gang') *together as opposed to separately*." *Martin*, 635 S.W.3d at 677. In *Martin*, the court held that the evidence was insufficient to support the defendant's conviction because there was no evidence from which the jury could find that the defendant was aware of any criminal activities on the part of the gang of which he was a member. *Martin*, 635 S.W.3d at 680. In its instruction, the Committee has required the jury to find both that (1) the defendant was a member of a criminal street gang, and (2) the defendant, as a member of that criminal street gang, continuously or regularly associated in the commission of criminal activities with members of that criminal street gang.

Additional Instructions under Section 46.02.

The Committee has also provided instructions for carrying a handgun in a motor vehicle in violation of section 46.02(a-1)(2)(A) (CPJC 46.8), carrying a handgun and displaying it in plain view of another person in a public place in violation of section 46.02(a–5) (CJPC 46.9), and carrying a handgun by an intoxicated person in violation of section 46.02(a–6) (CJPC 46.10). [It should be noted that, under section 46.02, the term "intoxicated" is not defined. Although the term is defined in section 46.06, the Committee has chosen not to provide a definition in the instruction.]

In *State v. Villanueava*, 672 S.W.3d 189, 193–94 (Tex. App.—Fort Worth 2023, no pet.), the court held that section 46.02(a–1) and section 46.02(a–6) are *in pari materia*, but that they do not conflict.. Section 46.02(a–1) prohibits a person from carrying a handgun in a motor vehicle if he is engaged in criminal activity at the time. Section 46.02(a–6) prohibits a person from carrying a handgun while he is intoxicated, but it includes the typical language from most section 46.02 offenses that the offense cannot be committed if the defendant is in his vehicle. *Villanueva*, 672 S.W.3d at 191–92. The question arose in *Villanueva* as to whether the defendant should be prosecuted under section 46.02(a–1) if he was committing the offense

of driving while intoxicated. *Villanueva*, 672 S.W.3d at 191. The court noted that section 46.02(a–1) has elements that are in addition to those of section 46.02(a–6), including a *mens rea* and the element of the criminal activity, such as operating a motor vehicle while intoxicated. *Villanueva*, 672 S.W.3d at 193–94. Under section 46.02(a–6), it may not be an offense if an intoxicated person is simply inside his vehicle in possession of a handgun. "It may become a violation of section 46.02(a–1) if that intoxicated person, with the requisite *mens rea* for unlawful possession of the firearm, operates that vehicle while in possession of a handgun." *Villanueva*, 672 S.W.3d at 194. The court allowed the prosecution under section 46.02(a–1) to go forward. *Villanueva*, 672 S.W.3d at 194.Section 46.03.

Section 46.03 is not restricted to handguns or firearms but also prohibits the possession of location-restricted knives, clubs, or any other prohibited weapon from section 46.05(a). The focus of section 46.03 is on the place where such weapons cannot be possessed. Those locations are:

- the physical premises of a school (section 46.03(a)(1));
- the grounds or building where a school-sponsored activity is being conducted (section 46.03(a)(1));
- a school's passenger transportation vehicle (section 46.03(a)(1));
- the premises of a polling place on election day or during early voting (section 46.03(a)(2));
- the premises of a court or offices used by the court (section 46.03(a)(3));
- the premises of a racetrack (section 46.03(a)(4));
- the secured area of an airport (section 46.03(a)(5));
- within 1,000 feet of a place of execution on an execution date (section 46.03(a)(6));
- the premises of a liquor-licensed business (section 46.03(a)(7));
- the premises where a sporting or interscholastic event is taking place (section 46.03(a)(8));
- the premises of a correctional facility (section 46.03(a)(9));
- the premises of a civil commitment facility (section 46.03(a)(10));
- the premises of a hospital or nursing facility (section 46.03(a)(11));
- the premises of a mental hospital (section 46.03(a)(12));
- an amusement park (section 46.03(a)(13));
- in the room where a government open meeting is being held (section 46.03(a)(14)).

Under most circumstances, it is not a defense to prosecution under section 46.03 that the person possessed a handgun and was licensed to carry the handgun. Tex. Penal Code § 46.03(f). Nevertheless, section 46.03 also contains specific offenses for handgun license holders, prohibiting such persons from (1)carrying and displaying a handgun on the premises of an institution of higher education (section 46.03(a-2)); (2)carrying a handgun on the premises of a private or independent institution of higher education, on the grounds where an institution-sponsored activity is conducted, or the institution's passenger transportation vehicle (section 46.03(a-3)); and (3)carrying a concealed handgun on a campus of an institution of higher education (section 46.03(a-4)).

Prior to September 1, 2021, section 46.035 of the Penal Code contained several offenses for handgun license holders. That statute was repealed in 2021. Firearm Carry Act of 2021, 87th Leg., R.S., ch. 809, § 26(10) (H.B. 1927), eff. Sept. 1, 2021. In 2021, other bills made amendments to section 46.035, which technically have survived past September 1, 2021, but the Committee is treating section 46.035 as having been repealed. With respect to section 46.03, the Committee has presented an instruction for the offense of possession of a handgun on liquor-licensed premises in violation of section 46.03(a)(7) (see CJPC 46.11).

Culpable Mental State—General Considerations.

Chapter 46 contains both offenses that include no culpable mental states and offenses that attach a mental state to one element but not others. Whether any (or more) are required depends on the application of the relevant statutes and case law.

Section 6.02 of the Penal Code sets up the basic rules for the (statutory) requirement of a culpable mental state:

> (a) Except as provided in Subsection (b), a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engage in conduct as the definition of the offense requires.

> (b) If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.
>
> (c) If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b), intent, knowledge, or recklessness suffices to establish criminal responsibility.

Tex. Penal Code § 6.02.

Section 6.03 of the Penal Code provides the definitions of the culpable mental states that apply in criminal cases in Texas—intentional, knowing, reckless, and criminally negligent. It should be noted that the definition for "intentionally" does not have an application to the circumstances of the conduct, and the definitions for "recklessly" and "criminal negligence" do not have applications to the nature of the conduct. From these definitions, the court of criminal appeals has divided offenses into three categories based on the offense-defining statute's gravamen or focus: "result of conduct," "nature of conduct," or "circumstances of conduct" offenses. "Result-of-conduct offenses concern the product of certain conduct. Nature-of-conduct offenses are defined by the act or conduct that is punished, regardless of any result that might occur. [C]ircumstances-of-conduct offenses prohibit otherwise innocent behavior that becomes criminal only under specific circumstances." *Robinson v. State*, 466 S.W.3d 166, 170 (Tex. Crim. App. 2015);*see Campbell v. State*, 664 S.W.3d 240, 243–44 (Tex. Crim. App. 2022).

The relevant case law is discussed at length in CPJC 6.7 but the central cases and rules at play are *Robinson v. State*, 466 S.W.3d 166 (Tex. Crim. App. 2015) (when there is no mental state provided in a "circumstances" offense, the one required by section 6.02 attaches to the circumstance, not to any prohibited conduct);*McQueen v. State*, 781 S.W.2d 600 (Tex. Crim. App. 1989) (a "circumstances" offense with a mental state previously construed to apply to prohibited conduct should also apply to the circumstances if grammatically tenable); *Celis v. State*, 416

S.W.3d 419 (Tex. Crim. App. 2013) (a conduct-oriented offense with a mental state attached to the conduct is "compelling evidence" that another is unnecessary, but one might yet be required the offense also the "circumstances" type); *Uribe v. State*, 573 S.W.2d 819 (Tex. Crim. App. 1978) (when a conduct-oriented offense already has a mental state attached to the conduct, it does not need one added to a circumstance that enhanced but did not create a separate offense); *White v. State*, 509 S.W.3d 307 (Tex. Crim. App. 2017) (complete offenses that have a mental state attached to the gravamen do not need another for an enhancement provision); and *Aguirre v. State*, 22 S.W.3d 463, 475–76 (Tex. Crim. App. 1999) (outlining factors used when determining if an offense needs another mental state).

Culpable Mental State—Possession and Carrying.

Most offenses in chapter 46 of the Texas Penal Code expressly require a culpable mental state, but the main offenses in section 46.04—subsections (a), (b), and (c)—do not expressly require any culpable mental state. Based on section 6.02 of the Penal Code, courts have uniformly required at least the culpable mental states of "intentional" and "knowing" for an offense under section 46.04. *Doyle v. State*, 631 S.W.2d 732, 734–35 (Tex. Crim. App. 1982); *Hazel v. State*, 534 S.W.2d 698, 700 (Tex. Crim. App. 1976); *Tew v. State*, 551 S.W.2d 375, 376 (Tex. Crim. App. 1977).

There is no indication that the legislature intended to dispense with a culpable mental state altogether for the relevant offenses under section 46.04. The Committee has chosen to include those culpable mental states in a charge for an offense under section 46.04, and it has applied those culpable mental states to the defendant's conduct of "possessing" the firearm. In short, based on the above discussion, a majority of the Committee believes that possession of a firearm by a felon is a nature-of-conduct offense.

The Texarkana court of appeals has upheld the following definitions of the culpable mental states given in a prosecution for possession of a firearm by a felon:

Intentionally Possessed a Firearm

A person intentionally possesses a firearm if the person has the conscious objective or desire to possess the firearm.

Knowingly Possessed a Firearm

A person knowingly possesses a firearm if the person is aware that he possesses a firearm. *Holiness v. State*, No. 06-21-00039-CR, 2021 WL 4483516, at *4 (Tex. App.—Texarkana, Oct. 1, 2021, no pet.) (not designated for publication). As opposed to merely quoting the relevant language from section 6.02, these definitions mirror the manner in which the Committee has typically defined culpable mental states.

There is very little, if any, other construction of the correct nature of the culpable mental states for chapter 46 offenses. Even when the controlling statute does not provide a culpable mental state, the Committee has chosen to define the applicable culpable mental states in relation to the conduct of "carrying" or "possessing" or "going with."

Culpable Mental State—the Defendant's Status

A more difficult question involves whether a culpable mental state should apply to the defendant's status as a felon under sections 46.04(a) and 46.02(a–7) or his status as an individual with a prior conviction for assault under sections 46.02(a)(2)(B), 46.02(a–7), and 46.04(b). "Because criminal liability under the statute turns upon the status of a person being a felon and because it is this status that makes the otherwise innocent conduct of possessing a firearm criminal, the statute prescribes a 'circumstances' offense." *Ex parte Woods*, 664 S.W.3d 260, 263 (Tex. Crim. App. 2022); *see also Dorsey v. State*, 623 S.W.3d 825, 835–36 (Tex. App.—Houston [1st

Dist.] 2019), *pet. ref'd per curiam on other grounds*, 662 S.W.3d 451 (Tex. Crim. App. 2021) (citing *Stevenson v. State*, 499 S.W.3d 842, 851 (Tex. Crim. App. 2016) (statute criminalizing violations of sexually violent predator civil-commitment orders was circumstances-surrounding-conduct offense because violation arose only by circumstance that person had been adjudicated a predator and civilly committed)).

In construing the offense of carrying a handgun in a motor vehicle by a gang member under current section 46.04(a–1), the court of criminal appeals reaffirmed that, where otherwise innocent behavior becomes criminal because of the circumstances under which it is done, a culpable mental state is required as to those surrounding circumstances. *Martin*, 635 S.W.3d at 678–79 (citing *McQueen*, 781 S.W.2d at 603; *McClain v. State*, 687 S.W.2d 350 (Tex. Crim. App. 1985)). Possession of a firearm at one's home or in public is typically innocent behavior, especially after passage of the Firearm Carry Act of 2021. Under section 46.04(a), such possession can become illegal if the defendant is a felon at the time that he possessed the firearm. Under sections 46.02(a)(2)(B) and 46.04(b), such possession can become illegal if the defendant has a prior conviction for certain types of assault.

The federal statutes that prohibit possession of a firearm by a felon provide that it is unlawful for certain individuals to possess firearms and that anyone who "*knowingly* violates" the first provision shall be fined or imprisoned for up to ten years. *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019) (citing 18 U.S.C. §§ 922(g), 924(a)(2)). The U.S. Supreme Court has held that the word "knowingly" applies both to the defendant's conduct and to the defendant's status. To convict a defendant, the government therefore must show that the defendant knew that he possessed a firearm and also that he knew that he had the relevant status when he possessed it. *Rehaif*, 139 S. Ct. at 2194. In other words, the Supreme Court views the federal offense as both a

nature-of-conduct offense and a circumstances-of-conduct offense.

For the purposes of determining the appropriate culpable mental state, the court of criminal appeals has never expressly confronted the issue of what type of offense is set forth in section 46.04(a). The court has also never expressly confronted whether a culpable mental state applies to the defendant's status as a felon. Even though the statute does not expressly include any culpable mental state, the Committee is convinced that a culpable mental state must apply to the defendant's conduct of possessing the firearm—as set forth in the previous section. A defendant should not be convicted of possessing a firearm if he did not do so intentionally, knowingly, or recklessly. Thus, the offense of possession of a firearm by a felon would be a nature-of-conduct type of offense. Based on the controlling and persuasive case law presented above, it seems likely that the court of criminal appeals would also hold that possession of a firearm by a felon is additionally a circumstances-of-the-conduct offense.

The Committee has reached a similar conclusion with regard to narcotics-possession cases. See CPJC 81.5 (applying the required culpable mental state to both the act of possession and the nature of the thing possessed).

In most circumstances, a defendant's knowledge or awareness of his status as a felon, or his status as a person with a prior assault conviction, would not be challenging for the state to prove. If the defendant had the status of a felon at the time that he possessed the firearm, a conviction for unlawful possession of a firearm by a felon would still be valid, even if the predicate felony conviction was subsequently set aside. *Ex parte Jimenez*, 361 S.W.3d at 683–84; *see also Ex parte Carner*, 364 S.W.3d 896, 898 (Tex. Crim. App. 2012). The Committee has applied the "knowing" and "reckless" culpable mental states to the defendant's status as a felon for the instruction for the offense under section 46.04(a) and to the defendant's status a person with a prior

assault conviction for the instruction for the offense under section 46.04(b).

Contrary to the offenses under section 46.04, offenses under section 46.02 do require a culpable mental state. *See* Tex. Penal Code § 46.02(a)(1), (a–7)(1). In keeping with repeated holdings that the presence of one mental state is "compelling evidence" another is not required, and in the absence of further guidance from reviewing courts, the Committee would not recommend a culpable mental state being applied to the defendant's age or location, such as in sections 46.02(a)(2)(A) or 46.02(a)(3).

However, applying this line of case law to the offense of possession of a firearm by a felon would lead to the unusual circumstance of the state being required to prove the defendant's culpable mental state regarding his status as a person with a particular prior conviction when the state is prosecuting the defendant under section 46.04(a) or section 46.04(b) (where there is no culpable mental state provided by the legislature), but not being required to prove the defendant's culpable mental state regarding his status as a person with a particular prior conviction when the state is prosecuting the defendant under section 46.02(a–7) or section 46.02(a)(2)(B) (where there is a culpable mental state provided by the legislature). Section 46.02(a–7) incorporates section 46.04, which—based on the above discussion—the Committee has found to be both a nature-of-conduct offense and a circumstances-of-the-conduct offense.

A majority of the Committee has, therefore, concluded that an offense under section 46.02(a–7) is also both a nature-of-conduct offense and a circumstances-of-conduct offense. Thus, for offenses under both section 46.04 and section 46.02(a–7), the Committee has applied the "knowing" and "reckless" culpable mental states to the defendant's status as a felon and his status as an individual with a prior assault conviction. For similar reasons, the Committee has also applied a culpable mental state to the defendant's status as an individual with a prior assault conviction

under section 46.02(a)(2)(B).

Section 46.02(a–6)—the offense of carrying a handgun while intoxicated—does not expressly require a culpable mental state. There is no construction of this statute or any other similar statute. Nevertheless, it seems likely that a reviewing court would not require a culpable mental state for this offense. *Cf. Lomax*, 233 S.W.3d at 304–05 & n.6 (felony murder with felony DWI as the predicate felony does not have a culpable mental state); *Perez v. State*, 11 S.W.3d 218, 221 (Tex. Crim. App. 2000) (felony DWI does not have a culpable mental state). The Committee has not provided a culpable mental state for this particular offense.

Culpable Mental State—Location of Offense.

Section 46.03(a)(7) provides, "A person commits an offense if the person intentionally, knowingly, or recklessly possesses or goes with a firearm . . . on the premises of a business that has a permit or license issued under [several chapters of the] Alcoholic Beverage Code, if the business derives 51 percent or more of its income from the sale or service of alcoholic beverages for on-premises consumption, as determined by the Texas Alcoholic Beverage Commission under Section 104.06, Alcoholic Beverage Code." If that determination has been made under section 104.06, the business is required to display a sign at the entrances to the business, notifying persons of that fact. *See* Tex. Alco. Bev. Code § 104.06(c). This sign

> must give notice in both English and Spanish that it is unlawful for a person licensed under [the] subchapter to carry a handgun on the premises. The sign must appear in contrasting colors with block letters at least one inch in height and must include on its face the number "51" printed in solid red at least five inches in height. The sign shall be displayed in a conspicuous manner clearly visible to the public.

Tex. Gov't Code § 411.204(c). This requirement does not apply if the business also has a food and beverage certificate. *See* Tex. Gov't Code § 411.204(e).

In *Uribe v. State*, mentioned above, the defendant was prosecuted for the offense of

unlawfully carrying a weapon under section 46.02(a) of the Penal Code as it existed at the time, and the class A misdemeanor offense was raised to a felony of the third degree if it occurred on any premises licensed or issued a permit by this state for the sale or service of alcoholic beverages. *Uribe*, 573 S.W.2d at 821. In *Uribe*, the defendant claimed that the indictment did not properly allege the third-degree felony because it did not allege that the defendant was aware that the premises upon which he carried the weapon was authorized to sell or serve alcohol. The court of criminal appeals rejected this argument, holding that the offense, as defined in subsection (a), already defined an offense that was complete unto itself, and that boosting the level of that offense to a third-degree felony offense under subsection (c) did not require a culpable mental state beyond that contained in subsection (a). *Uribe*, 573 S.W.2d at 821–22.

In *Uribe*, the court of criminal appeals contrasted section 46.02 with what is now section 46.03, a provision that made it an offense to carry a firearm on certain specified premises. Because section 46.03 made it an offense for a person to carry a firearm *only* if he did so on those specific premises, it was clear that the entry onto the premises was an element that required a culpable mental state. By comparison, because section 46.02(a) made it a complete offense to carry certain weapons anywhere, there was no apparent intent on the legislature's part to impose an additional culpable mental state with respect to the circumstance surrounding conduct that made it a felony. *Uribe*, 573 S.W.2d at 821–22.

Even more so, after the passage of the Firearm Carry Act of 2021, the possession of a handgun is generally a legal act in the state of Texas. In the context of section 46.03(a)(7), the otherwise innocent conduct becomes criminal only when the defendant possesses the handgun on the premises of a business licensed for alcoholic beverages. *Cf. Ex parte Woods*, 664 S.W.3d at 263–64; *Martin*, 635 S.W.3d at 678–79; *White,* 509 S.W.3d at 309–10 (citing *Uribe* with continued

approval); *Huff v. State*, 678 S.W.2d 236, 239 (Tex. App.—Corpus Christi–Edinburg 1984, no pet.) (relying upon *Uribe* and suggesting that, for the offense of possession of a firearm on specific premises, a culpable mental state attached to the entry onto the particular premises, as opposed to possession of the weapon).

The Committee has decided that a culpable mental state applies to the defendant's conduct of possessing or going with a firearm under section 46.03(a)(7). The offense is a nature-of-conduct offense. Based on the discussion above, the Committee has decided that a culpable mental state also applies to the location of the offense being on the premises of a business licensed for the sale or service of alcoholic beverages. The offense is also a circumstances-of-the-conduct offense. Section 46.03(a)(7) prohibits the possession of a firearm

> on the premises of a business that has a permit or license issued under Chapter 25, 28, 32, 69, or 74, Alcoholic Beverage Code, if the business derives 51 percent or more of its income from the sale or service of alcoholic beverages for on-premises consumption, as determined by the Texas Alcoholic Beverage Commission under Section 104.06, Alcoholic Beverage Code . . .

Tex. Penal Code § 46.03(a)(7).

The Committee struggled with determining to what portions of this provision a culpable mental state should apply. The sign required by section 104.06(c) of the Alcoholic Beverage Code and section 411.024(c) of the Government Code should include the fact that the business derives at least 51 percent of its income from the sale or service of alcoholic beverages for on-premises consumption. Thus, a majority of the Committee chose the following language to define the culpable mental states as they apply to the location of the offense:

Knowingly on the Premises of a Business Licensed for the Sale or Service of Alcoholic Beverages for On-Premises Consumption

A person is knowingly on the premises of a business licensed for the sale or service of

alcoholic beverages for on-premises consumption if he is aware that he is on the premises of a business, which is licensed for or has a permit for the sale or service of alcoholic beverages for on-premises consumption, and which derives 51 percent or more of its income from the sale or service of alcoholic beverages.

Recklessly on the Premises of a Business Licensed for the Sale or Service of Alcoholic Beverages for On-Premises Consumption

A person is recklessly on the premises of a business licensed for the sale or service of alcoholic beverages if the person is aware of the substantial and unjustifiable risk that he is on the premises of a business, which is licensed for or has a permit for the sale or service of alcoholic beverages for on-premises consumption, and which derives 51 percent or more of its income from the sale or service of alcoholic beverages, but consciously disregards that risk, and the risk is 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 of the circumstances, as viewed from the person's standpoint.

A minority of the Committee felt that the language "and which derives 51 percent or more of its income from the sale or service of alcoholic beverages" in the body of these two definitions should not be included.

It should be noted that section 46.15(m) makes it a defense to prosecution under section 46.03 that the defendant—

> (2) personally received from the owner of the property, or from another person with apparent authority to act for the owner, notice that carrying a firearm or other weapon on the premises or other property, as applicable, was prohibited; and
>
> (3) promptly departed from the premises or other property.

Tex. Penal Code § 46.15(m).

Section 46.15(o) further provides:

> (o) A person may provide notice that firearms and other weapons are prohibited under Section 46.03 on the premises or other property, as applicable, by posting a sign at each entrance to the premises or other property that:
>
> (1) includes language that is identical to *or substantially similar to* the following: "Pursuant to Section 46.03, Penal Code (places weapons prohibited), a person may not carry a firearm or other weapon on this property";
>
> (2) includes the language described by Subdivision (1) in both English and Spanish;
>
> (3) appears in contrasting colors with block letters at least one inch in height; and
>
> (4) is displayed in a conspicuous manner clearly visible to the public.

Tex. Penal Code § 46.15(o).

This sign is at least similar to the sign required by section 104.06(c) of the Alcoholic Beverage Code and section 411.024(c) of the Government Code for businesses licensed to sell or serve alcoholic beverages for on-premises consumption. Section 46.15(n) further provides that a defendant cannot rely on the defense in section 46.15(m) if the sign permitted by section 46.15(o) "was posted prominently at each entrance to the premises" or the defendant "knew that carrying a firearm or other weapon on the premises or other property was prohibited." Tex. Penal Code § 46.15(n). Therefore, if a defendant with a firearm on liquor-licensed premises knew or had been made aware beforehand that carrying a firearm on the premises was prohibited, he would not be able to rely upon a defense to prosecution, even if, after arriving on the premises, he was personally notified that carrying a firearm was prohibited and left the premises upon receiving that notification. It is not clear what effect, if any, this defense, and the nonapplicability of the defense, would have on a determination of the culpable mental state for the offense.

Premises.

Chapter 46 of the Texas Penal Code contains several different definitions of the word "premises," and trial judges and parties should endeavor to use the correct definition in the jury charge—if one applies.

Under section 46.02, "premises" includes real property and a recreational vehicle that is being used as living quarters, regardless of whether that use is temporary or permanent. Tex. Penal Code § 46.02(a–2). "Recreational vehicle" means a motor vehicle primarily designed as temporary living quarters or a vehicle that contains temporary living quarters and is designed to be towed by a motor vehicle. The term includes a travel trailer, camping trailer, truck camper, motor home, and horse trailer with living quarters. Tex. Penal Code § 46.02(a–2). The word "premises" in section 46.02 has been broadly construed to include both residential and business property. Section 46.02 allows a person to carry a handgun on any real property that is his own property or that he controls, whether it be a residence, a business, or even a vacant lot. *Chiarini v. State*, 442 S.W.3d 318, 320 (Tex. Crim. App. 2014) (defendant was allowed to carry handgun in common area of condominium complex, which he co-owned).

The "definition" of "premises" in section 46.02 is not really a definition. The statute just states what "premises" includes. "Includes" is a term of enlargement and not of limitation or exclusive enumeration, and use of the term does not create a presumption that components not expressed are excluded. Tex. Gov't Code § 311.005(13). For offenses under section 46.02, the first part of the "definition" of "premises" should be used. The Committee also recommended that the portion regarding a "recreational vehicle" or other similar vehicle should ordinarily be included in the instruction (instead of only if it is specifically raised by the evidence) because it may inform what other similar kinds of property may be included within the meaning of "premises."

Under section 46.03, "premises" means a building or a portion of a building. The term does not include any public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area. Tex. Penal Code § 46.03(c)(4). This is the same definition of "premises" that was used in the now repealed section 46.035. *See* Tex. Penal Code § 46.035(f)(3) (repealed). Based on this definition, it is clear that the possession of a firearm on a street, sidewalk, or parking lot, or even in a parking garage—which may well be a building—is not a violation of section 46.03. *Dupree v. State*, 433 S.W.3d 788, 792 (Tex. App.—Texarkana 2014, no pet.). Under most circumstances for offenses under section 46.03, the entire definition should be used, including the clarifying second sentence.

Section 46.03 includes the offense of possession of a weapon on the premises of a business that has a permit or license for selling or serving alcoholic beverages. *See* Tex. Penal Code § 46.03(a)(7). In previous prosecutions of this offense, courts have allowed the use of the definition of "premises" from section 11.49(a) of the Texas Alcoholic Beverage Code. *Terry v. State*, 877 S.W.2d 68, 70 (Tex. App.—Houston [1st Dist.] 1994, no pet.) (citing *Richardson v. State*, 823 S.W.2d 773 (Tex. App.—Fort Worth 1992, no pet.)); *see Baltimore v. State*, 608 S.W.3d 864, 867 & n.2 (Tex. App.—Waco 2020), *vacated on other grounds*, 631 S.W.3d 727 (Tex. Crim. App. 2021). In the Alcoholic Beverage Code, "premises" is very broadly defined as the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person. Tex. Alco. Bev. Code § 11.49(a).

Since the word "premises" is defined in section 46.03, that is the definition that should be used for offenses under that statute, and that is the definition that the Committee has used in the instruction for the offense under section 46.03(a)(7). *See Cummins v. State*, No. 06-17-00010-CR, 2017 WL 2664442, at *2–3 (Tex. App.—Texarkana June 21, 2017, no pet.) (not designated for publication) (trial court did not err in instructing jurors on definition of "premises" from section 46.02 and did not err in omitting definition from section 11.49).

Section 46.04 does not include a definition of the word "premises," and there is no definition that applies to the entire chapter or the entire Penal Code. *See Lucas v. State*, 791 S.W.2d 35, 64 (Tex. Crim. App. 1989). Nevertheless, the "premises at which the person lives" does not include the person's motor vehicle. *Sharif v. State*, 640 S.W.3d 636, 643 (Tex. App.—Houston [14th Dist.] 2022, no pet.); *Nesbit v. State*, 720 S.W.2d 888, 891 (Tex. App.—Austin 1986, no pet.); *Senters v. State*, 648 S.W.2d 30 (Tex. App.—Dallas 1983, pet. ref'd). In prosecutions under chapter 46.04, some trial judges have provided jurors with a definition of the word "premises." *Sharif*, 640 S.W.3d at 644–45 (trial judge defined the term as "a building or a portion of a building," which almost exactly matched the commonly understood meaning of the term). Since the legislature has not defined the term for prosecutions under chapter 46.04, the Committee has chosen not to define the term. It should be noted that a prosecution under section 46.02(a–7), which incorporates a violation of section 46.04, is still a prosecution under section 46.02, and for those offenses, the Committee has used the "definition" of "premises" from section 46.02(a–2).

It should also be noted that section 46.11 of the Penal Code, which enhances punishment for offenses committed within a weapon-free school zone, contains its own definition of the word "premises." *See* Tex. Penal Code § 46.11(c)(1) (utilizing the definition from section 481.134 of the Health and Safety Code); Tex. Health & Safety Code § 481.134(a)(4) ("'Premises' means real property and all buildings and appurtenances pertaining to the real property."). In the typical circumstance, this definition of the word "premises" should be provided to the jury at the guilt/innocence stage. *See Niles v. State*, 555 S.W.3d 562, 570 (Tex. Crim. App. 2018) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)); *see also Alleyne v. United States*, 570 U.S. 99, 107–17 (2013) (also extending the definition of an element of an offense to include those facts that increase the mandatory minimum punishment for the offense).

Carrying vs. Possession.

The various offenses under chapter 46 contain different verbs for the act of having a weapon. Most subsections of section 46.02 make it an offense if the person "carries on or about his or her person." Tex. Penal Code § 46.02(a), (a–1), (a–4), (a–7); *see also* Tex. Penal Code § 46.04(a–1).

Subsections (a–5) and (a–6) criminalize "carrying" without the explicit requirement that the carrying be "on or about" the defendant's person. Tex. Penal Code § 46.02(a–5), (a–6).

Most subsections of section 46.03 make it an offense if the person "possesses" or "goes with" a particular weapon. Tex. Penal Code § 46.03(a). Subsections (a–2), (a–3), and (a–4) criminalize "carrying" a handgun without the explicit requirement that the carrying be "on or about" the defendant's person. Tex. Penal Code § 46.03(a–2)–(a–4). Most subsections under section 46.04 make it an offense to "possess" a firearm. Tex. Penal Code § 46.04(a) –(c). Section 46.05 criminalizes "possession," as well as the "manufacture," "transportation," "repair," or "sale" of a prohibited weapon. Tex. Penal Code § 46.05. Section 46.10 criminalizes both "carrying on or about [one's] person" and "possession" of a deadly weapon. Tex. Penal Code § 46.10(a). Case law has construed these various verbs differently and not necessarily according to their common and ordinary meaning.

In contrast to the definition of possession that applies in the Controlled Substances Act, the phrase "carry on or about [the] person" has acquired no technical or particular meaning legislatively or otherwise. "In order to give effect to the entire phrase it is necessary to construe 'carry' to denote an element of asportation." *Christian v. State*, 686 S.W.2d 930, 933 (Tex. Crim.

App. 1985); *see Freeman v. State*, 864 S.W.2d 757, 759 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). Notwithstanding the use of the verb "carry" in a statute, courts have not construed the statute to require that the handgun be moved from one place to another. The statute requires only a particular form of possession: carrying on or about the person, which includes the interior of one's vehicle. The weapon need not be "carried" independently of the carrying implicit in the presently accepted meaning of "on or about the person." *Contreras v. State*, 853 S.W.2d 694, 696 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (citing *Tijerina v. State*, 578 S.W.2d 415, 416 (Tex. Crim. App. 1979); *Hazel v. State,* 534 S.W.2d 698, 700 (Tex. Crim. App. 1976); *Turner v. State*, 744 S.W.2d 318, 319 (Tex. App.—Dallas 1988, pet. ref'd); *Linvel v. State*, 629 S.W.2d 94 (Tex. App.—Dallas 1981, no pet.)); *see also McCraw v. State*, 117 S.W.3d 47, 56 (Tex. App.—Fort Worth 2003, pet. ref'd) (for carrying a handgun in one's vehicle, evidence must establish that defendant was aware that the handgun was inside the vehicle).

The words "about the person" must mean near by, close at hand, convenient of access, and within such distance of the party that the party could, without materially changing his position, get his hand on it. *Freeman*, 864 S.W.2d at 759 (citing *Courtney v. State*, 424 S.W.2d 441 (Tex. Crim. App. 1968); *Wagner v. State*, 188 S.W. 1001, 1002 (Tex. Crim. App. 1916)). In *Freeman,* the jury charge provided that "[t]he term 'about,' as used in the phrase 'about his person,' . . . means nearby, close at hand, convenient of access, and within such distance of the party so having it as that such party could, without materially changing his position, get his hands on it." *Freeman*, 864 S.W.2d at 760; *see Harkness v. State*, 139 S.W.3d 4, 5 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (jury was given same instruction).

In *Cintron v. State*, the defendant claimed that the phrase "about the person" was vague and should have been defined in the jury charge in accordance with how the phrase was defined in *Freeman* and other cases. However, the El Paso court of appeals noted that the trial court is not required to define a term or phrase that is not statutorily defined. Only if the term or phrase does not have a common and ordinary meaning that jurors can be fairly presumed to know and apply must a definition be supplied. The court of appeals held that the phrase carries a common and ordinary meaning that the typical juror would be able to grasp and understand without ambiguity. Since there was no statutory definition, the court was not compelled to provide one. *Cintron v. State*, No. 08-05-00176-CR, 2006 WL 2516516, at *4 (Tex. App.—El Paso Aug. 31, 2006) (not designated for publication); *cf. Ex parte Williams*, 786 S.W.2d 781, 783 (Tex. App.—Houston [1st

Dist.] 1990, pet. ref'd, orig. proceeding) (holding that term "on or about" is not unconstitutionally vague) (citing *Wagner v. State*, 188 S.W. 1001, 1002 (Tex. Crim. App. 1916); *Burkes v. State*, 693 S.W.2d 747, 751 (Tex. App.—Houston [14th Dist.] 1985, pet. ref'd)).

As contrasted with cases involving "carrying," in cases involving "possession" of a handgun or other weapon, courts analyze the sufficiency of the evidence under the rules adopted for cases involving possession of a controlled substance. *Belle v. State*, 543 S.W.3d 871, 875 (Tex. App.—Houston [14th Dist.] 2018, no pet.);*see Greer v. State*, 436 S.W.3d 1, 5 (Tex. App.—Waco 2014, no pet.) (citing *Bates v. State*, 155 S.W.3d 212, 216 (Tex. App.—Dallas 2004, no pet.)). This includes the use of "affirmative links" showing the defendant's connection to the firearm. *Barlow v. State*, 586 S.W.3d 17, 23–24 (Tex. App.—Beaumont 2019, pet. ref'd). Thus, "[t]o obtain a conviction for possession of a firearm, the State must show that the accused not only exercised actual care, control, or custody of the firearm, but also that he was conscious of his connection with it and that he possessed it knowingly." *Swapsy v. State,* 562 S.W.3d 161, 164–65 (Tex. App.—Texarkana 2018, no pet.) (citing *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995)).

The Committee has chosen not to provide definitions of these various terms, as they are not defined within the relevant statutes.

Defenses.

Chapter 46 contains numerous defenses, and most of those defenses are found in section 46.15 of the Penal Code. Section 46.15 provides that several of the statutes that create offenses "do not apply" in particular situations. Courts have uniformly treated these nonapplicability provisions in section 46.15 as defenses. *Illingworth v. State*, 156 S.W.3d 662, 664 (Tex. App.—Fort Worth 2005, no pet.); *Moosani v. State*, 866 S.W.2d 736, 738 (Tex. App.—Houston [14th Dist.] 1993, pet. denied); *cf. Tafel v. State*, 524 S.W.3d 687, 689 (Tex. App.—Waco 2016, pet. ref'd) (treating a nonapplicability provision under the now-repealed section 46.035 as a defense).

It should be remembered that a defendant charged with an offense under chapter 46 can be entitled to an instruction on a defense that is not set forth in chapter 46. For example, the court of criminal appeals has held that the necessity defense can apply to the offense of possession of a firearm by a felon, as well as to the offense of unlawfully carrying a weapon. *Vasquez v. State*, 830 S.W.2d 948, 950 (Tex. Crim. App. 1992) (citing *Johnson v. State*, 650 S.W.2d 414 (Tex. Crim. App. 1983), *overruled on other grounds by Boget v. State*, 74 S.W.3d 23 (Tex. Crim. App. 2002)); *Armstrong v. State*, 653 S.W.2d 810 (Tex. Crim. App. 1983); *see generally Hazel v. State,* 534

S.W.2d 698 (Tex. Crim. App. 1976); *see, e.g., Shugart v. State*, 32 S.W.3d 355, 364 (Tex. App.—Waco 2000, pet. ref'd) (allowing for defense of necessity in prosecution for possession of a weapon in a penal institution); *Rios v. State*, 1 S.W.3d 135, 137 (Tex. App.—Tyler 1999, pet. ref'd) .

There is also authority suggesting that self-defense may apply in a chapter 46 prosecution. *Dearborn v. State*, 420 S.W.3d 366, 372 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (citing *Vasquez v. State*, 830 S.W.2d 948 (Tex. Crim. App. 1992)); *see Flores v. State*, No. 13-08-00539-CR, 2009 WL 3136163, at *3 (Tex. App.—Corpus Christi–Edinburg Oct. 1, 2009, pet. ref'd) (mem. op.) (not designated for publication) (defendant was entitled to self-defense instruction in prosecution for possession of a deadly weapon in a penal institution; defendant possessed razor only long enough to cut the victim, and immediately thereafter, flushed it down the toilet; without defendant's use of force, there would have been no possession-of-a-deadly-weapon charge); *Johnson v. State*, 638 S.W.2d 636, 638–39 (Tex. App.—El Paso 1982, no pet.), *overruled on other grounds by Boget v. State*, 74 S.W.3d 23 (Tex. Crim. App. 2002) (defendant was entitled to jury charges on defenses of necessity and self-defense to a charge of carrying a weapon on liquor-licensed premises; defendant "was not already in possession of the weapon," but they "acquired it at the last reasonable opportunity to do so and did not fire it until the assault was well under way").

Most of the defenses in chapter 46 apply to specific persons who have a particular occupation or position. One of the generally applicable defenses to prosecution under section 46.02 is the traveling defense from section 46.15(b)(2). The traveling defense has existed since 1871. "'Traveling' has never been defined by statute, and the precise meaning of the term has been the subject of much debate." *Birch v. State*, 948 S.W.2d 880, 882 (Tex. App.—San Antonio 1997, no pet.) (citing *Ayesh v. State*, 734 S.W.2d 106, 108 (Tex. App.—Austin 1987, no pet.)). In fact, the decisions have been described as being in a state of "hopeless confusion." *Birch*, 948 S.W.2d at 882 (citing *Smith v. State,* 630 S.W.2d 948, 951 (Tex. Crim. App. 1982)); *see also Illingworth v. State*, 156 S.W.3d 662, 665–66 (Tex. App.—Fort Worth 2005, no pet.); *Soderman v. State*, 915 S.W.2d 605, 609–10 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd, untimely filed).

After the passage of the Firearm Carry Act of 2021, most persons cannot be prosecuted for the general offense of carrying a handgun. Therefore, the Committee has chosen not to include an instruction on the traveling defense. In the past, courts have also allowed for certain nonstatutory, common-law defenses to the offense of carrying a handgun. *See Bergman v. State*, 90 S.W.3d 855, 857–58 (Tex. App.—San Antonio 2002, no pet.) (defense of carrying handgun from home to work

and then back home); *Moosani*, 866 S.W.2d at 738 ; *Aguilar v. State*, 710 S.W.2d 779 (Tex. App.—San Antonio 1986, no pet.) (temporary possession defense); *Bohn v. State*, 651 S.W.2d 274, 277 (Tex. App.—Dallas 1983, no pet.). After the passage of the Firearm Carry Act of 2021, it is doubtful that such defenses will have any further usefulness in a chapter 46 prosecution. The Committee has chosen not to provide an instruction for any of these defenses.

After the passage of the Firearm Carry Act of 2021, there is also no longer a need for an individual to obtain a handgun license, but section 46.15(b)(6) provides for the defense. The Committee has provided an instruction for that defense for those offenses to which it is applicable.

As noted in the discussion above regarding culpable mental states, one of the newer defenses to prosecution under section 46.03 is that the person (1) carried a handgun on the prohibited premises or property, (2) received personal notice from the owner or someone acting for the owner that carrying a firearm on the property was prohibited, and (3) promptly departed from the property. Tex. Penal Code § 46.15(m). However, that defense does not apply if each entrance to the property contained a notice that firearms were prohibited or the person knew that carrying a firearm on the property was prohibited. Tex. Penal Code § 46.15(n), (o). The Committee chose not to provide instructions regarding these varying circumstances based on the belief that such circumstances would rarely show up in a prosecution under section 46.03.

The Waco court of appeals has construed the now-repealed section 46.035, noting that the statute did "not apply if the actor was not given effective notice under Section 30.06." *Tafel v. State*, 524 S.W.3d 687, 689 (Tex. App.—Waco 2016, pet. ref'd) (citing Tex. Penal Code § 46.035(i) (repealed)). The court held that section 46.035(i) was a defense, not an exception. *Tafel*, 524 S.W.3d at 689 (citing Tex. Penal Code § 2.03(e) ("A ground of defense in a penal law that is not plainly labeled in accordance with this chapter has the procedural and evidentiary consequences of a defense.")). The facts in the case showed that the defendant was aware of the written sign prohibiting him from carrying a handgun to the meetings, and the defendant also received oral notice that he was prohibited from carrying a handgun to the meetings. *Tafel*, 524 S.W.3d at 691.

Normally, it is *not* a defense to prosecution under section 46.03 that the defendant possessed a handgun and was licensed to carry a handgun under chapter 411, subchapter H of the Texas Government Code. Tex. Penal Code § 46.03(f). However, section 46.15(p) provides that section 46.03(a)(7) does not apply to a person who (1) carried a handgun on the liquor-licensed

premises, (2) held a license to carry the handgun, and (3) was not given effective notice under sections 30.06 or 30.07 of the Penal Code or section 411.204 of the Government Code. Tex. Penal Code § 46.15(p). Therefore, in the instruction on the offense of possession of a handgun on liquor-licensed premises, the Committee has included the defense from section 46.15(p).

Voluntariness of Possession or Carrying.

Section 6.01 of the Penal Code provides:

> (a) A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession.
>
> (b) Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.
>
> (c) A person who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act.

As explained in previous sections, the law surrounding subsection (a) has been well-developed for many years. Subsection (b), however, did not receive a definitive interpretation from the court of criminal appeals until *Ramirez-Memije v. State*, 444 S.W.3d 624 (Tex. Crim. App. 2014). The result parallels what is accepted in voluntary conduct cases. That is, (1) the instruction is rarely required because voluntariness is a low hurdle, and (2) the actual disagreement between the parties is more properly addressed by the requisite mental state.

Ramirez-Memije was charged with fraudulent possession of identifying information under Texas Penal Code section32.51(b), which prohibits possession of an item of identifying information of another person without the other person's consent or effective consent and with the intent to harm or defraud. He was the middleman in a credit-card skimming operation run through a restaurant; Ramirez-Memije shuttled a skimmer between a waiter who ran customers' cards through it and another man who directed the operation. At trial, Ramirez-Memije claimed he did not know what the skimming device was or what, if anything, was stored within it. He was denied

an instruction on voluntary possession. The court of criminal appeals ultimately held he was not entitled to one.

Ramirez-Memije's primary argument for entitlement to the instruction was that section 6.01(b) requires "knowingly obtain[ing] or receiv[ing] the thing possessed" and "the thing possessed" must be the thing possession of which is criminalized. In Ramirez-Memije's case, "the thing possessed" would have been the identifying information stored on the skimmer rather than the skimmer itself. This is a reasonable view of section 6.01(b); the inclusion of "knowledge" suggests some overlap with the mental state required by section 6.02. But the court of criminal appeals drew the line at distinguishing knowing possession from voluntary possession differently. It was undisputed that Ramirez-Memije knowingly received and transferred the skimming device. This, the court held, was enough to satisfy the requirement of voluntary possession. *Ramirez-Memije*, 444 S.W.3d at 628. That does not mean that the focus of possession was moved from the data to the skimmer. Rather, it means the data was voluntarily possessed because the defendant's conduct *included* the voluntary possession of its container.

This parallels the case law governing voluntary acts. *Farmer v. State*, 411 S.W.3d 901, 907 (Tex. Crim. App. 2013) ("All that is necessary to satisfy Section 6.01(a) of the Texas Penal Code is that the commission of the offense *included* a voluntary act."); *see also Robinson v. State*, 466 S.W.3d 166, 174 n.1 (Tex. Crim. App. 2015) (Keller, P.J., concurring) ("[I]n the 'act' and 'possession' contexts, voluntariness is a very minimal requirement."). Ramirez-Memije's claim that he did not know what was in the skimmer goes to the *mens rea* of the offense, not voluntariness. *Ramirez-Memije*, 444 S.W.3d at 628. The court offered this helpful example dealing with the transportation of drugs:

> [I]f a defendant were arrested while transporting a package for a friend and police determined that the package contained marijuana, the defendant could claim at trial that he did not know what the package contained, that he did not know the package contained marijuana, or that he thought the package contained oregano, and that he did not knowingly or intentionally possess marijuana. The jury would then have to decide whether to believe his claim that he did not have the requisite mens rea for the possession of marijuana offense. The defendant could not, however, claim that his possession of the package filled with marijuana was an involuntary act because he knowingly accepted the package from his friend.

Ramirez-Memije, 444 S.W.3d at 628.

The court also offered an example of a situation that might require an instruction on voluntary possession. "If there was evidence that the skimmer had been slipped into [Ramirez-Memije]'s bag without his knowledge, then there may be a question of voluntary possession and [Ramirez-Memije] may have been entitled to an instruction regarding the requirement of a voluntary act." *Ramirez-Memije*, 444 S.W.3d at 628. The court did not elaborate further, but the applicability of a voluntary possession instruction to a "slipped into my bag" scenario could depend on whether the defendant was already in control of his bag.

If the skimmer had been slipped into Ramirez-Memije's bag without his knowledge while the bag was in his possession, he should have a claim that he did not voluntarily possess it. But for that claim to be successful, he would have to contend with the second half of subsection (b): "is aware of his control of the thing for a sufficient time to permit him to terminate his control." The question for them would be whether Ramirez-Memije had control of the bag (that contained the device that contained the data) for long enough after the "slipping in" for him to discover the device and dispossess himself of it such that his continued control made his possession voluntary. *See*, *e.g.*, *Overstreet v. State*, No. 02-14-00235-CR, 2015 WL 2266384, at *2 (Tex. App.—Fort Worth May 14, 2015, no pet.) (mem. op.) (not designated for publication) ("Although there was evidence that Appellant's friend Gilbert owned the gun and had accidentally left it in Appellant's car, the jury was free to believe that in the time between dropping Gilbert off in south Dallas and stopping at the gas station in Arlington, Appellant became aware of the gun in his car and chose not to terminate his control over it.").

It is not clear what would happen if the device were slipped into his bag before he took possession of it or even whether the timing matters. Taking the holding of *Ramirez-Memije* to its logical conclusion, it should not matter how many containers separate the defendant from the contraband. If he "knowingly obtains or receives" his bag (which contains the skimmer that contains the data), that should satisfy the requirement of a voluntary act. As with the actual facts of his case, his defense of (double) lack of knowledge would go to the requisite *mens rea*. Again, the court of criminal appeals did not elaborate on its "slipping in" hypothetical, and its marijuana hypothetical does not answer this question. But given the brevity of *Ramirez-Memije* and without an explanation why the "slipped into my bag" scenario could differ, the Committee could not

predict when and whether courts might extend the logic of *Ramirez-Memije* beyond its facts and the transporting-your-friend's-package hypothetical.

What is relatively clear is that this law should be incorporated into the application unit of the instructions. The "voluntariness" requirement could be regarded as simply part of the definition of the conduct required—possession—which would most likely not require incorporation into the application provision. However, because it is part of an element the state must prove beyond a reasonable doubt, lack of voluntariness is thus, practically speaking, a "ground of defense in a penal law that . . . has the procedural and evidentiary consequences of a defense." *See* Tex. Penal Code § 2.03(e). Consequently, a jury instruction is appropriate if, and only if, evidence has been admitted that supports it. *See* Tex. Penal Code § 2.03(c). And, if the jury is instructed on the matter, it must be told the state has the burden of proving voluntariness beyond a reasonable doubt. *See Alford v. State*, 866 S.W.2d 619, 624 n.8 (Tex. Crim. App. 1993).

Because the substance of the requirement of voluntariness is considerably less complex than that of many defenses, however, the Committee concluded that when voluntariness is raised, it can be adequately covered by adding the statutory language in the application unit of the instructions as a final element of the state's case.

CJPC 46.2 Instruction—Carrying a Handgun by a Felon Away from His Home or Motor Vehicle— Second-Degree Felony

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of carrying and possession of a handgun while having been previously convicted of a felony offense.

Relevant Statutes

A person commits the offense of carrying a handgun by a felon if he intentionally, knowingly, or recklessly carries a handgun on or about his person and, at the time of the offense, he had been convicted of a felony, and the person possessed the firearm after the fifth anniversary of [the later date of] [*choose only what was pleaded by the state*: the person's release from confinement following the conviction of the felony offense/[or] the person's release from supervision under community supervision, parole, or mandatory supervision for the felony offense], and the person was not [*choose only what was pleaded by the state*: on his own premises/on premises under the person's control/inside of or directly en route to a motor vehicle [or watercraft] that was owned by the person or under the person's control].

Definitions

Firearm

A "firearm" means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

[*Include the following if applicable*.]

"Firearm" does not include a firearm that may have, as an integral part, a folding knife blade and that is:

1. an antique or curio firearm manufactured before 1899; or
2. a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition.

[*Continue with the following.*]

Handgun

A "handgun" means any firearm that is designed, made, or adapted to be fired with one hand.

Possession

"Possession" means actual care, custody, control, or management.

Premises

"Premises" includes real property and a recreational vehicle that is being used as living quarters, regardless of whether that use is temporary or permanent.

Intentionally Carrying a Handgun on or about His Person

A person intentionally carries a handgun on or about his person if the person has the conscious objective or desire to carry a handgun on or about his person.

Knowingly Carrying a Handgun on or about His Person

A person knowingly carries a handgun on or about his person if the person is aware that he is carrying a handgun on or about his person.

Recklessly Carrying a Handgun on or about His Person

A person recklessly carries a handgun on or about his person if the person is aware of the substantial and unjustifiable risk that he is carrying a handgun on or about his person.

Knowing that the Person Has Been Convicted of a Felony Offense

A person knows that he has been convicted of a felony offense if the person is aware that he has a prior conviction for a felony offense.

Reckless about whether the Person Has Been Convicted of a Felony Offense

A person is reckless about whether he has been convicted of a felony offense if the person is aware of the substantial and unjustifiable risk that he has a prior felony conviction but consciously disregards that risk, and the risk is 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 of the circumstances, as viewed from the person's standpoint.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], possessed and carried a handgun on or about his person;
2. the defendant did this either intentionally, knowingly, or recklessly;

3. at the time of the possession of the handgun, the defendant had been convicted of the felony offense of [*offense*] on [*date*], in [*cause number*], in [*court*], in [*county*] County, Texas;
4. at the time of the possession of the handgun, the defendant knew that, or was reckless about whether, he had been convicted of a felony offense; and
5. the defendant possessed the handgun after the fifth anniversary of [the later of] [*include only that which the state has pleaded*:

the defendant's release from confinement following the conviction of the felony offense/[or] the defendant's release from supervision under community supervision, parole, or mandatory supervision for the felony offense] and,at the time the defendant possessed and carried the handgun, he was not [*include only that which the state has pleaded*: on his own premises/on premises under his control/ inside of or directly en route to a motor vehicle or watercraft that was owned by the defendant or under his control].

You must all agree on the elements 1 through 5 listed above.

If you all agree that the state has failed to prove, beyond a reasonable doubt, any one of elements 1 through 5 listed above, you must find the defendant "not guilty."

If you all agree that the state has proved, beyond a reasonable doubt, all five of the elements listed above, you must find the defendant "guilty."

[Include the following if the evidence raises the defense.]

If you all agree that the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must next consider whether the defendant is not guilty because he carried a handgun license.

Handgun-License Defense

The offense of illegally carrying a handgun does not apply to a person who is carrying (1) a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code; and (2) a handgun that is concealed or in a holster.

Burden of Proof

The defendant is not required to prove the handgun-license defense. Rather, the state must prove, beyond a reasonable doubt, that the handgun-license defense does not apply to the defendant's conduct.

Application of Law to Facts

To decide whether the handgun-license defense applies, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the defendant was not carrying a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code; or
2. the defendant was carrying a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code, but the handgun that the defendant was carrying was not concealed and was not in a holster.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, elements 1 and 2 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of carrying a handgun while having been previously convicted of a felony offense, and you all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "guilty."

[*Insert any other instructions raised by the evidence. Then continue with the verdict form found in CJPC 2.1, the general charge*.]

COMMENT

The offense of carrying and possession of a handgun away from a person's house or motor vehicle while having been previously convicted of a felony offense is prohibited by and defined in Tex. Penal Code § 46.02(a–7). The definition of "firearm" is from Tex. Penal Code § 46.01(3). The definition of "handgun" is from Tex. Penal Code § 46.01(5). The definition of "possession" is from Tex. Penal Code § 1.07(a)(39). The definition of "premises" is from Tex. Penal Code § 46.02(a–2). The definitions of "intentionally," "knowingly," and "recklessly" are from Tex. Penal Code § 6.03. The handgun-license defense is provided for in Tex. Penal Code § 46.15(b)(6).

CJPC 46.3 Instruction—Possession of a Firearm by a Felon at His Home—Third-Degree Felony

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of possession of a firearm while having been previously convicted of a felony offense.

Relevant Statutes

A person commits the offense of possession of a firearm while having been previously convicted of a felony offense if he intentionally, knowingly, or recklessly possesses a firearm and, at the time of the offense, the person had been convicted of a felony offense, and the person possessed the firearm before the fifth anniversary of the [*choose only what was pleaded by the state*: date of the person's release from confinement following conviction of the felony offense/the person's release from supervision under community supervision, parole, or mandatory supervision for the felony offense].

Definitions

Firearm

A "firearm" means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

[*Include the following if applicable*.]

"Firearm" does not include a firearm that may have, as an integral part, a folding knife blade and that is:

1. an antique or curio firearm manufactured before 1899; or
2. a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition.

[*Continue with the following.*]

Possession

"Possession" means actual care, custody, control, or management.

Premises

"Premises" includes real property and a recreational vehicle that is being used as living quarters, regardless of whether that use is temporary or permanent.

Intentionally Possessing a Firearm

A person intentionally possesses a firearm if the person has the conscious objective or desire to possess a firearm.

Knowingly Possessing a Firearm

A person knowingly possesses a firearm if the person is aware that he is possessing a firearm.

Recklessly Possessing a Firearm

A person recklessly possesses a firearm if the person is aware of the substantial and unjustifiable risk that he is possessing a firearm but consciously disregards that risk, and the risk is 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 of the circumstances, as viewed from the person's standpoint.

Knowing that the Person Has Been Convicted of a Felony Offense

A person knows that he has been convicted of a felony offense if the person is aware that he has a prior conviction for a felony offense.

Reckless about whether the Person Has Been Convicted of a Felony Offense

A person is reckless about whether he has been convicted of a felony offense if the person is aware of the substantial and unjustifiable risk that he has a prior felony conviction but consciously disregards that risk, and the risk is 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 of the circumstances, as viewed from the person's standpoint.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], possessed a firearm;
2. the defendant did this either intentionally, knowingly, or recklessly;
3. at the time of possession of the firearm, the defendant had been convicted of the felony offense of [*offense*] on [*date*], in [*cause number*], in [*court*], in [*county*] County, Texas;
4. at the time of the possession of the firearm, the defendant knew that, or was reckless about

whether, he had been convicted of a felony offense; and

5. the defendant possessed the firearm before the fifth anniversary of the [later of] [*include only that which the state has pleaded*:

the defendant's release from confinement following the conviction of the felony offense/[or] the defendant's release from supervision under community supervision, parole, or mandatory supervision for the felony offense].

You must all agree on the elements 1 through 5 listed above.

If you all agree that the state has failed to prove, beyond a reasonable doubt, any one of elements 1 through 5 listed above, you must find the defendant "not guilty."

If you all agree that the state has proved, beyond a reasonable doubt, all five of the elements listed above, you must find the defendant "guilty."

[*Insert any other instructions raised by the evidence. Then continue with the verdict form found in CJPC 2.1, the general charge*.]

COMMENT

The offense of possession of a firearm by a felon at his home is prohibited by and defined in Tex. Penal Code § 46.04(a). The definition of "firearm" is from Tex. Penal Code § 46.01(3). The definition of "premises" is from Tex. Penal Code § 46.02(a-2). The definitions of "intentionally," "knowingly," and "recklessly" are from Tex. Penal Code § 6.03.

CJPC 46.4 Instruction – Carrying a Handgun with a Prior Domestic Assault Conviction – Away from the Defendant's Home, Vehicle, or Watercraft—Third-Degree Felony

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of possession and carrying of a handgun while having a prior conviction for domestic assault.

Relevant Statutes

A person commits the offense of carrying a handgun while having a prior conviction for domestic assault if he intentionally, knowingly, or recklessly carries a handgun on or about his person, and the defendant was not [*choose only what was pleaded by the state*: on his own premises/on premises under his control/inside of or directly en route to a motor vehicle [or watercraft] that was owned by the defendant or under his control], and at the time of the offense, the defendant had been convicted of the misdemeanor offense of assault that involved a member of the defendant's family or household, and the defendant possessed the handgun before the fifth anniversary of the [later of] [*choose only what was pleaded by the state*: the date of the defendant's release from confinement following conviction for the assault/ [or]the date of the defendant's release from community supervision following conviction for the assault].

Definitions

Affinity

Two individuals are related to each other by affinity if they are married to each other or the spouse of one of the individuals is related by consanguinity to the other individual, and the ending of a marriage by divorce or the death of a spouse ends relationships by affinity created by that marriage unless a child of that marriage is living, in which case the marriage is considered to continue as long as a child of that marriage lives.

Consanguinity

Two individuals are related to each other by consanguinity if one is a descendant of the other or they share a common ancestor, and an adopted child is considered to be a child of the adoptive parent for this purpose.

Family

"Family" includes (1) individuals related by consanguinity or affinity, (2) individuals who are former spouses of each other, (3) individuals who are the parents of the same child, without regard to marriage, and (4) a foster child and foster parent, without regard to whether those individuals reside together.

Firearm

A "firearm" means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

[*Include the following if applicable*.]

"Firearm" does not include a firearm that may have, as an integral part, a folding knife blade and that is:

1. an antique or curio firearm manufactured before 1899; or
2. a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition.

[*Continue with the following*.]

Handgun

A "handgun" means any firearm that is designed, made, or adapted to be fired with one hand.

Household

"Household" means a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other.

Member of a Household

"Member of a household" includes a person who previously lived in a household.

Possession

"Possession" means actual care, custody, control, or management.

Premises

"Premises" includes real property and a recreational vehicle that is being used as living quarters, regardless of whether that use is temporary or permanent.

Intentionally Carrying a Handgun on or about His Person

A person intentionally carries a handgun on or about his person if the person has the conscious objective or desire to carry a handgun on or about his person.

Knowingly Carrying a Handgun on or about His Person

A person knowingly carries a handgun on or about his person if the person is aware that he is carrying a handgun on or about his person.

Recklessly Carrying a Handgun on or about His Person

A person recklessly carries a handgun on or about his person if the person is aware of the substantial and unjustifiable risk that he is carrying a handgun on or about his person, but consciously disregards that risk, and the risk is 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 of the circumstances, as viewed from the person's standpoint.

Knowing that the Person Has Been Convicted of the Class A Misdemeanor Offense of Assault Involving a Member of the Person's Family or Household

A person knows that he has been convicted of the class A misdemeanor offense of assault involving a member of the person's family or household if the person is aware that he has a prior conviction for the offense of class A misdemeanor assault involving a member of the person's family or household.

Reckless about whether the Person Has Been Convicted of the Class A Misdemeanor Offense of Assault Involving a Member of the Person's Family or Household

A person is reckless about whether he has been convicted of the class A misdemeanor offense of assault involving a member of the person's family or household if the person is aware of the substantial and unjustifiable risk that he has a prior conviction for the class A misdemeanor offense of assault involving a member of the person's family or household but consciously disregards that risk, and the risk is 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 of the circumstances, as viewed from the person's standpoint.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, seven elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], possessed and carried a handgun on or about his person;
2. the defendant did this either intentionally, knowingly, or recklessly;
3. at the time of the carrying of the handgun, the defendant had been convicted of the class A

misdemeanor offense of assault causing bodily injury on [*date*], in [*cause number*], in [*court*], in [*county*] County, Texas;

4. the assault involved a member of the defendant's family or household;
5. at the time of the carrying of the handgun, the defendant knew that, or was reckless about whether, he had a prior conviction for the class A misdemeanor offense of assault involving a member of the defendant's family or household;
6. the defendant carried the handgun before the fifth anniversary of [the later of] [*choose only that which the state has pleaded*:

the date of the defendant's release from confinement following the conviction for the assault/[or] the date of the defendant's release from community supervision following conviction for the assault]; and

7. at the time that the defendant carried the handgun, the defendant was not [*choose only that which the state has pleaded*: on his own premises/on premises under his control/ inside of or directly en route to a motor vehicle or watercraft that was owned by the defendant or under his control].

You must all agree on the elements 1 through 7 listed above.

If you all agree that the state has failed to prove, beyond a reasonable doubt, any one of elements 1 through 7 listed above, you must find the defendant "not guilty."

If you all agree that the state has proved, beyond a reasonable doubt, all seven of the elements listed above, you must find the defendant "guilty."

[Include the following if the evidence raises the defense.]

If you all agree that the state has proved, beyond a reasonable doubt, each of the seven elements listed above, you must next consider whether the defendant is not guilty because he carried a handgun license.

Handgun-License Defense

The offense of illegally carrying a handgun does not apply to a person who is carrying (1) a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code; and (2) a handgun that is concealed or in a holster.

Burden of Proof

The defendant is not required to prove the handgun-license defense. Rather, the state must

prove, beyond a reasonable doubt, that the handgun-license defense does not apply to the defendant's conduct.

Application of Law to Facts

To decide whether the handgun-license defense applies, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the defendant was not carrying a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code; or
2. the defendant was carrying a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code, but the handgun that the defendant was carrying was not concealed and was not in a holster.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, elements 1 and 2 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of carrying a handgun while having a prior conviction for domestic assault, and you all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "guilty."

[*Insert any other instructions raised by the evidence. Then continue with the verdict form found in CJPC 2.1, the general charge*.]

COMMENT

The offense of carrying a handgun with a prior domestic assault conviction away from the person's home, vehicle, or watercraft is prohibited by and defined in Tex. Penal Code § 46.02(a–7). The definition of "affinity" is from Tex. Gov't Code § 573.024. The definition of "consanguinity" is from Tex. Gov't Code § 573.022. The definition of "family" is from Tex. Fam. Code § 71.003. The definition of "firearm" is from Tex. Penal Code § 46.01(3). The definition of "handgun" is from Tex. Penal Code § 46.01(5). The definition of "household" is from Tex. Fam. Code § 71.005. The definition of "member of a household" is from Tex. Fam. Code § 71.006. The definition of "possession" is from Tex. Penal Code § 1.07(a)(39). The definition of "premises" is

from Tex. Penal Code § 46.02(a–2). The definitions of "intentionally," "knowingly," and "recklessly" are from Tex. Penal Code § 6.03. The handgun-license defense is provided for in Tex. Penal Code § 46.15(b)(6).

CJPC 46.5 Instruction—Possession of a Firearm with a Prior Domestic Assault Conviction – At the Defendant's Home or Motor Vehicle—Class A Misdemeanor

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of possession of a firearm while having a prior conviction for domestic assault.

Relevant Statutes

A person commits the offense of possession of a firearm while having a prior conviction for domestic assault if he intentionally, knowingly, or recklessly possesses a firearm and, at the time of the offense, he had been convicted of the class A misdemeanor offense of assault that involved a member of the defendant's family or household, and the defendant possessed the firearm before the fifth anniversary of the [later of] [*choose only what was pleaded by the state*: the date of the defendant's release from confinement following conviction for the assault/[or] the date of the defendant's release from community supervision following conviction for the assault].

Definitions

Affinity

Two individuals are related to each other by affinity if they are married to each other or the spouse of one of the individuals is related by consanguinity to the other individual, and the ending of a marriage by divorce or the death of a spouse ends relationships by affinity created by that marriage unless a child of that marriage is living, in which case the marriage is considered to continue as long as a child of that marriage lives.

Consanguinity

Two individuals are related to each other by consanguinity if one is a descendant of the other or they share a common ancestor, and an adopted child is considered to be a child of the adoptive parent for this purpose.

Family

"Family" includes (1) individuals related by consanguinity or affinity, (2) individuals who are former spouses of each other, (3) individuals who are the parents of the same child, without regard to marriage, and (4) a foster child and foster parent, without regard to whether those individuals

reside together.

Firearm

A "firearm" means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

[*Include the following if applicable*.]

"Firearm" does not include a firearm that may have, as an integral part, a folding knife blade and that is:

1. an antique or curio firearm manufactured before 1899; or

2. a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition.

[*Continue with the following*.]

Household

"Household" means a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other.

Member of a Household

"Member of a household" includes a person who previously lived in a household.

Possession

"Possession" means actual care, custody, control, or management.

Intentionally Possessing a Firearm

A person intentionally possesses a firearm if the person has the conscious objective or desire to possess the firearm.

Knowingly Possessing a Firearm

A person knowingly possesses a firearm if the person is aware that he is possessing a firearm.

Recklessly Possessing a Firearm

A person recklessly possesses a firearm if the person is aware of the substantial and unjustifiable risk that he is possessing a firearm but consciously disregards that risk, and the risk is 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 of the circumstances, as viewed from the person's standpoint.

Knowing that the Person Has Been Convicted of the Class A Misdemeanor Offense of Assault

Involving a Member of the Person's Family or Household

A person knows that he has been convicted of the class A misdemeanor offense of assault involving a member of the person's family or household if the person is aware that he has a prior conviction for the class A misdemeanor offense of assault involving a member of the person's family or household.

Reckless about whether the Person Has Been Convicted of the Class A Misdemeanor Offense of Assault Involving a Member of the Person's Family or Household

A person is reckless about whether he has been convicted of the class A misdemeanor offense of assault involving a member of the person's family or household if the person is aware of the substantial and unjustifiable risk that he has a prior conviction for the class A misdemeanor offense of assault involving a member of the person's family or household but consciously disregards that risk, and the risk is 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 of the circumstances, as viewed from the person's standpoint.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, six elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], possessed a firearm;
2. the defendant did this either intentionally, knowingly, or recklessly;
3. at the time of possessing the firearm, the defendant had been convicted of the class A misdemeanor offense of assault on [*date*], in [*cause number*], in [*court*], in [*county*] County, Texas;
4. the assault involved a member of the defendant's family or household;
5. at the time of possessing the firearm, the defendant knew that, or was reckless about whether, he had a prior conviction for the class A misdemeanor offense of assault involving a member of the defendant's family or household; and
6. the defendant carried the handgun before the fifth anniversary of the [later of] [*choose only that which the state has pleaded*:

the date of the defendant's release from confinement following the conviction for the assault/[or] the date of the defendant's release from community supervision following conviction for the

assault].

You must all agree on the elements 1 through 6 listed above.

If you all agree that the state has failed to prove, beyond a reasonable doubt, any one of elements 1 through 6 listed above, you must find the defendant "not guilty."

If you all agree that the state has proved, beyond a reasonable doubt, all six of the elements listed above, you must find the defendant "guilty."

[*Insert any other instructions raised by the evidence. Then continue with the verdict form found in CJPC 2.1, the general charge*.]

COMMENT

The offense of possession of a firearm with a prior domestic assault conviction at the defendant's home or motor vehicle is prohibited by and defined in Tex. Penal Code § 46.04(b). The definition of "affinity" is from Tex. Gov't Code § 573.024. The definition of "consanguinity" is from Tex. Gov't Code § 573.022. The definition of "family" is from Tex. Fam. Code § 71.003. The definition of "firearm" is from Tex. Penal Code § 46.01(3). The definition of "household" is from Tex. Fam. Code § 71.005. The definition of "member of a household" is from Tex. Fam. Code § 71.006. The definition of "possession" is from Tex. Penal Code § 1.07(a)(39). The definitions of "intentionally," "knowingly," and "recklessly" are from Tex. Penal Code § 6.03.

CPJC 46.6 Instruction—Carrying a Handgun with a Prior Conviction for Assault—Class A Misdemeanor

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of carrying a handgun while having a prior conviction for assault.

Relevant Statutes

A person commits the offense of carrying a handgun while having a prior conviction for assault if he intentionally, knowingly, or recklessly carries a handgun on or about his person and, at the time of the offense, he had been convicted of the misdemeanor offense of assault causing bodily injury, and the assault was committed in the five-year period preceding the date that the charged offense was allegedly committed, and the defendant was not [*choose only what was pleaded by the state*: on his own premises/on premises under his control/inside of or directly en route to a motor vehicle [or watercraft] that was owned by the defendant or under his control].

Definitions

Firearm

A "firearm" means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

[*Include the following if applicable*.]

"Firearm" does not include a firearm that may have, as an integral part, a folding knife blade and that is:

1. an antique or curio firearm manufactured before 1899; or

2. a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition.

[*Continue with the following*.]

Handgun

A "handgun" means any firearm that is designed, made, or adapted to be fired with one hand.

Premises

"Premises" includes real property and a recreational vehicle that is being used as living quarters, regardless of whether that use is temporary or permanent.

Intentionally Carrying a Handgun on or about His Person

A person intentionally carries a handgun on or about his person if the person has the conscious objective or desire to carry a handgun on or about his person.

Knowingly Carrying a Handgun on or about His Person

A person knowingly carries a handgun on or about his person if the person is aware that he is carrying a handgun on or about his person.

Recklessly Carrying a Handgun on or about His Person

A person recklessly carries a handgun on or about his person if the person is aware of the substantial and unjustifiable risk that he is carrying a handgun on or about his person.

Knowing that the Person Has Been Convicted of the Misdemeanor Offense of Assault by Causing Bodily Injury

A person knows that he has been convicted of the misdemeanor offense of assault by causing bodily injury if the person is aware that he has a prior conviction for the offense of assault by causing bodily injury.

Reckless about whether the Person Has Been Convicted of the Misdemeanor Offense of Assault by Causing Bodily Injury

A person is reckless about whether he has been convicted of the misdemeanor offense of assault by causing bodily injury if the person is aware of the substantial and unjustifiable risk that he has a prior conviction for the misdemeanor offense of assault by causing bodily injury but consciously disregards that risk, and the risk is 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 of the circumstances, as viewed from the person's standpoint.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, six elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], carried a handgun on or about his person;
2. the defendant did this either intentionally, knowingly, or recklessly;

3. at the time of the carrying of the handgun, the defendant had been convicted of the misdemeanor offense of assault by causing bodily injury on [*date*], in [*cause number*], in [*court*], in [*county*] County, Texas;
4. at the time of the carrying of the handgun, the defendant knew that, or was reckless about whether, he had been convicted of the misdemeanor offense of assault by causing bodily injury;
5. the prior assault was committed in the five-year period preceding the date that the defendant carried the handgun; and
6. at the time that the defendant carried the handgun, he was not [*choose only that which the state has pleaded*: on his own premises/on premises under his control/ inside of or directly en route to a motor vehicle or watercraft that was owned by the defendant or under his control].

You must all agree on the elements 1 through 6 listed above.

If you all agree that the state has failed to prove, beyond a reasonable doubt, any one of elements 1 through 6 listed above, you must find the defendant "not guilty."

If you all agree that the state has proved, beyond a reasonable doubt, all six of the elements listed above, you must find the defendant "guilty."

[Include the following if the evidence raises the defense.]

If you all agree that the state has proved, beyond a reasonable doubt, each of the six elements listed above, you must next consider whether the defendant is not guilty because he carried a handgun license.

Handgun-License Defense

The offense of illegally carrying a handgun does not apply to a person who is carrying (1) a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code; and (2) a handgun that is concealed or in a holster.

Burden of Proof

The defendant is not required to prove the handgun-license defense. Rather, the state must prove, beyond a reasonable doubt, that the handgun-license defense does not apply to the defendant's conduct.

Application of Law to Facts

To decide whether the handgun-license defense applies, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the defendant was not carrying a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code; or
2. the defendant was carrying a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code, but the handgun that the defendant was carrying was not concealed and was not in a holster.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, elements 1 and 2 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of carrying a handgun while having a prior conviction for assault, and you all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "guilty."

[*Insert any other instructions raised by the evidence. Then continue with the verdict form found in CJPC 2.1, the general charge*.]

COMMENT

The offense of carrying a handgun with a prior conviction for assault is prohibited by and defined in Tex. Penal Code § 46.02(a)(2)(B). The definition of "firearm" is from Tex. Penal Code § 46.01(3). The definition of "handgun" is from Tex. Penal Code § 46.01(5). The definition of "premises" is from Tex. Penal Code § 46.02(a–2). The definitions of "intentionally," "knowingly," and "recklessly" are from Tex. Penal Code § 6.03. The handgun-license defense is provided for in Tex. Penal Code § 46.15(b)(6).

CJPC 46.7 Instruction—Carrying a Handgun in a Motor Vehicle by a Member of a Criminal Street Gang—Class A Misdemeanor

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of carrying a handgun in a motor vehicle as a member of a criminal street gang.

Relevant Statutes

A person commits the offense if he, as a member of a criminal street gang, intentionally, knowingly, or recklessly carries a handgun on or about his person while in a motor vehicle.

Definitions

Criminal Street Gang

"Criminal street gang" means three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.

Firearm

A "firearm" means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

[*Include the following if applicable*.]

"Firearm" does not include a firearm that may have, as an integral part, a folding knife blade and that is:

1. an antique or curio firearm manufactured before 1899; or
2. a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition.

[*Continue with the following*.]

Handgun

A "handgun" means any firearm that is designed, made, or adapted to be fired with one hand.

Intentionally Carrying a Handgun on or about His Person

A person intentionally carries a handgun on or about his person if the person has the conscious objective or desire to carry a handgun on or about his person.

Knowingly Carrying a Handgun on or about His Person

A person knowingly carries a handgun on or about his person if the person is aware that he is carrying a handgun on or about his person.

Recklessly Carrying a Handgun on or about His Person

A person recklessly carries a handgun on or about his person if the person is aware of the substantial and unjustifiable risk that he is carrying a handgun on or about his person but consciously disregards that risk, and the risk is 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 of the circumstances, as viewed from the person's standpoint.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], carried a handgun on or about his person;
2. the defendant did this either intentionally, knowingly, or recklessly;
3. at the time of carrying of the handgun, the defendant was in a motor vehicle;
4. the defendant was a member of a criminal street gang; and
5. as a member of that criminal street gang, the defendant continuously or regularly associated in the commission of criminal activities with members of that criminal street gang.

You must all agree on the elements 1 through 5 listed above.

If you all agree that the state has failed to prove, beyond a reasonable doubt, any one of elements 1 through 5 listed above, you must find the defendant "not guilty."

If you all agree that the state has proved, beyond a reasonable doubt, all five of the elements listed above, you must find the defendant "guilty."

[Include the following if the evidence raises the defense.]

If you all agree that the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must next consider whether the defendant is not guilty because he carried a handgun license.

Handgun License Defense

The offense of illegally carrying a handgun does not apply to a person who is carrying (1) a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code; and (2) a handgun that is concealed or in a holster.

Burden of Proof

The defendant is not required to prove the handgun-license defense. Rather, the state must prove, beyond a reasonable doubt, that the handgun-license defense does not apply to the defendant's conduct.

Application of Law to Facts

To decide whether the handgun-license defense applies, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the defendant was not carrying a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code; or
2. the defendant was carrying a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code, but the handgun that the defendant was carrying was not concealed and was not in a holster.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, elements 1 and 2 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of carrying a handgun in a motor vehicle, and you all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "guilty."

[*Insert any other instructions raised by the evidence. Then continue with the verdict form found in CJPC 2.1, the general charge*.]

COMMENT

The offense of carrying a handgun in a motor vehicle by a member of a criminal street gang is prohibited by and defined in Tex. Penal Code § 46.04(a–1). The definition of "firearm" is from Tex. Penal Code § 46.01(3). The definition of "handgun" is from Tex. Penal Code § 46.01(5). The definition of "premises" is from Tex. Penal Code § 46.02(a–2). The definitions of "intentionally,"

"knowingly," and "recklessly" are from Tex. Penal Code § 6.03. The handgun-license defense is provided for in Tex. Penal Code § 46.15(b)(6).

CJPC 46.8 Instruction—Carrying a Handgun in a Motor Vehicle—ClassA Misdemeanor]

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of carrying a handgun in a motor vehicle.

Relevant Statutes

A person commits the offense of carrying a handgun in a motor vehicle if he intentionally, knowingly, or recklessly carries a handgun on or about his person while in a motor vehicle that is owned by the person or under the person's control if the person is engaged in criminal activity, other than a class C misdemeanor that is a violation of a law or ordinance regulating traffic or boating.

Definitions

Firearm

A "firearm" means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

[*Include the following if applicable*.]

"Firearm" does not include a firearm that may have, as an integral part, a folding knife blade and that is:

1. an antique or curio firearm manufactured before 1899; or
2. a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition.

[*Continue with the following*.]

Handgun

A "handgun" means any firearm that is designed, made, or adapted to be fired with one hand.

Intentionally Carrying a Handgun on or about His Person

A person intentionally carries a handgun on or about his person if the person has the conscious objective or desire to carry a handgun on or about his person.

Knowingly Carrying a Handgun on or about His Person

A person knowingly carries a handgun on or about his person if the person is aware that he is carrying a handgun on or about his person.

Recklessly Carrying a Handgun on or about His Person

A person recklessly carries a handgun on or about his person if the person is aware of the substantial and unjustifiable risk that he is carrying a handgun on or about his person but consciously disregards that risk, and the risk is 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 of the circumstances, as viewed from the person's standpoint.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], carried a handgun on or about his person;
2. the defendant did this either intentionally, knowingly, or recklessly;
3. at the time of carrying of the handgun, the defendant was in a motor vehicle that was owned by the defendant or under the defendant's control; and

4. the defendant was committing the offense of [*offense*], which was not a class C misdemeanor that is a violation of a law or ordinance regulating traffic or boating.

You must all agree on the elements 1 through 4 listed above.

If you all agree that the state has failed to prove, beyond a reasonable doubt, any one of elements 1 through 4 listed above, you must find the defendant "not guilty."

If you all agree that the state has proved, beyond a reasonable doubt, all four of the elements listed above, you must find the defendant "guilty."

[Include the following if the evidence raises the defense.]

If you all agree that the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must next consider whether the defendant is not guilty because he carried a handgun license.

Handgun-License Defense

The offense of illegally carrying a handgun does not apply to a person who is carrying (1) a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code; and (2) a handgun that is concealed or in a holster.

Burden of Proof

The defendant is not required to prove the handgun-license defense. Rather, the state must prove, beyond a reasonable doubt, that the handgun-license defense does not apply to the defendant's conduct.

Application of Law to Facts

To decide whether the handgun-license defense applies, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the defendant was not carrying a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code; or
2. the defendant was carrying a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code, but the handgun that the defendant was carrying was not concealed and was not in a holster.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, elements 1 and 2 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of carrying a handgun in a motor vehicle, and you all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "guilty."

[*Insert any other instructions raised by the evidence. Then continue with the verdict form found in CJPC 2.1, the general charge*.]

COMMENT

The offense of carrying a handgun in a motor vehicle is prohibited by and defined in Tex. Penal Code § 46.02(a–1)(2)(A). The definition of "firearm" is from Tex. Penal Code § 46.01(3). The definition of "handgun" is from Tex. Penal Code § 46.01(5). The definition of "premises" is from Tex. Penal Code § 46.02(a-2). The definitions of "intentionally," "knowingly," and

"recklessly" are from Tex. Penal Code § 6.03. The handgun-license defense is provided for in Tex. Penal Code § 46.15(b)(6).

CJPC 46.9 Instruction—Carrying a Handgun in Plain View—Class A Misdemeanor

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of carrying a handgun in plain view.

Relevant Statutes

A person commits the offense of carrying a handgun in plain view if the person carries the handgun and intentionally displays the handgun in plain view of another person in a public place, and the handgun was not carried in a holster.

Definitions

Firearm

A "firearm" means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

[*Include the following if applicable*.]

"Firearm" does not include a firearm that may have, as an integral part, a folding knife blade and that is:

1. an antique or curio firearm manufactured before 1899; or
2. a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition.

[*Continue with the following*.]

Handgun

A "handgun" means any firearm that is designed, made, or adapted to be fired with one hand.

Public Place

"Public place" means any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

Intentionally Display a Handgun

A person intentionally displays a handgun if the person has the conscious objective or desire to

display a handgun.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], carried a handgun;
2. the defendant intentionally displayed the handgun in plain view of [*name of other person*];
3. the defendant was in a public place when he displayed the handgun; and
4. at the time that the defendant displayed the handgun, the handgun was not in a holster.

You must all agree on the elements 1 through 4 listed above.

If you all agree that the state has failed to prove, beyond a reasonable doubt, any one of elements 1 through 4 listed above, you must find the defendant "not guilty."

If you all agree that the state has proved, beyond a reasonable doubt, all four of the elements listed above, you must find the defendant "guilty."

[Include the following if the evidence raises the defense.]

If you all agree that the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must next consider whether the defendant is not guilty because he carried a handgun license.

Handgun-License Defense

The offense of illegally carrying a handgun does not apply to a person who is carrying (1) a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code; and (2) a handgun that is concealed or in a holster.

Burden of Proof

The defendant is not required to prove the handgun-license defense. Rather, the state must prove, beyond a reasonable doubt, that the handgun-license defense does not apply to the defendant's conduct.

Application of Law to Facts

To decide whether the handgun-license defense applies, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the defendant was not carrying a license to carry a handgun that was issued under

chapter 411, subchapter H, of the Texas Government Code; or

2. the defendant was carrying a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code, but the handgun that the defendant was carrying was not concealed and was not in a holster.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, elements 1 and 2 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of carrying a handgun in plain view, and you all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "guilty."

[*Insert any other instructions raised by the evidence. Then continue with the verdict form found in CJPC 2.1, the general charge*.]

COMMENT

The offense of carrying a handgun in plain view is prohibited by and defined in Tex. Penal Code § 46.02(a–5). The definition of "firearm" is from Tex. Penal Code § 46.01(3). The definition of "handgun" is from Tex. Penal Code § 46.01(5). The definition of "public place" is from Tex. Penal Code § 1.07(a)(40). The definition of "intentionally" is from Tex. Penal Code § 6.03(a). The handgun-license defense is provided for in Tex. Penal Code § 46.15(b)(6).

CJPC 46.10 Instruction—Carrying a Handgun while Intoxicated—Class A Misdemeanor

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of carrying a handgun while being intoxicated.

Relevant Statutes

A defendant commits the offense of carrying a handgun while being intoxicated if he carries a handgun while he is intoxicated, and the defendant is not on his own property or property under his control, is not on private property with the consent of the owner of that property, is not inside of or directly en route to a motor vehicle or watercraft that is owned by the defendant or under the defendant's control, and is not inside of or directly en route to a motor vehicle or watercraft with the consent of the owner or operator of the vehicle or watercraft.

Definitions

Firearm

A "firearm" means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

[*Include the following if applicable*.]

"Firearm" does not include a firearm that may have, as an integral part, a folding knife blade and that is:

1. an antique or curio firearm manufactured before 1899; or
2. a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition.

[*Continue with the following*.]

Handgun

A "handgun" means any firearm that is designed, made, or adapted to be fired with one hand.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, six elements.

The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], carried a handgun;
2. the defendant was intoxicated at the time that he carried the handgun;
3. the defendant was not on his own property or property under his control;
4. the defendant was not on private property with the consent of the owner of that property;
5. the defendant was not inside of or directly en route to a motor vehicle or watercraft that was owned by the defendant or under the defendant's control; and
6. the defendant was not inside of or directly en route to a motor vehicle or watercraft with the consent of the owner or operator of the vehicle or watercraft.

You must all agree on the elements 1 through 6 listed above.

If you all agree that the state has failed to prove, beyond a reasonable doubt, any one of elements 1 through 6 listed above, you must find the defendant "not guilty."

If you all agree that the state has proved, beyond a reasonable doubt, all six of the elements listed above, you must find the defendant "guilty."

[Include the following if the evidence raises the defense.]

If you all agree that the state has proved, beyond a reasonable doubt, each of the six elements listed above, you must next consider whether the defendant is not guilty because he carried a handgun license.

Handgun-License Defense

The offense of illegally carrying a handgun does not apply to a person who is carrying (1) a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code; and (2) a handgun that is concealed or in a holster.

Burden of Proof

The defendant is not required to prove the handgun-license defense. Rather, the state must prove, beyond a reasonable doubt, that the handgun-license defense does not apply to the defendant's conduct.

Application of Law to Facts

To decide whether the handgun-license defense applies, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the defendant was not carrying a license to carry a handgun that was issued under

chapter 411, subchapter H, of the Texas Government Code; or

2. the defendant was carrying a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code, but the handgun that the defendant was carrying was not concealed and was not in a holster.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, elements 1 and 2 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of carrying a handgun while being intoxicated, and you all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "guilty."

[*Insert any other instructions raised by the evidence. Then continue with the verdict form found in CJPC 2.1, the general charge*.]

COMMENT

The offense of carrying a handgun while being intoxicated is prohibited by and defined in Tex. Penal Code § 46.02(a–6). The definition of "firearm" is from Tex. Penal Code § 46.01(3). The definition of "handgun" is from Tex. Penal Code § 46.01(5). The handgun-license defense is provided for in Tex. Penal Code § 46.15(b)(6).

CJPC 46.11 Instruction—Possession of a Firearm on Liquor-Licensed Premises—Third-Degree Felony

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of possession of or going with a firearm on liquor-licensed premises.

Relevant Statutes

A person commits the offense of possession of a firearm on liquor-licensed premises if he intentionally, knowingly, or recklessly possesses or goes with a firearm on the premises of a business that has a [permit/license] issued under chapter [25/28/32/69/74] of the Texas Alcoholic Beverage Code, if the business derives 51 percent or more of its income from the sale or service of alcoholic beverages for on-premises consumption, as determined by the Texas Alcoholic Beverage Commission under section 104.06 of the Texas Alcoholic Beverage Code.

Definitions

Firearm

A "firearm" means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

[*Include the following if applicable.*]

"Firearm" does not include a firearm that may have, as an integral part, a folding knife blade and that is:

1. an antique or curio firearm manufactured before 1899; or
2. a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition.

[*Continue with the following.*]

Handgun

A "handgun" means any firearm that is designed, made, or adapted to be fired with one hand.

Possession

"Possession" means actual care, custody, control, or management.

Premises

"Premises" means a building or a portion of a building. The term does not include any public or private driveway, street, sidewalk, or walkway, parking lot, parking garage, or other parking area.

Intentionally Possessing or Going with a Firearm

A person intentionally possesses or goes with a firearm if the person has the conscious objective or desire to possess or go with a firearm.

Knowingly Possessing or Going with a Firearm

A person knowingly possesses or goes with a firearm if the person is aware that he is possessing or going with a firearm.

Recklessly Possessing or Going with a Firearm

A person recklessly possesses or goes with a firearm if the person is aware of the substantial and unjustifiable risk that he is possessing or going with a firearm but consciously disregards that risk, and the risk is 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 of the circumstances, as viewed from the person's standpoint.

Knowingly on the Premises of a Business Licensed for the Sale or Service of Alcoholic Beverages for On-Premises Consumption

A person is knowingly on the premises of a business licensed for the sale or service of alcoholic beverages for on-premises consumption if he is aware that he is on the premises of a business that is licensed for or has a permit for the sale or service of alcoholic beverages for on-premises consumption and that derives 51 percent or more of its income from the sale or service of alcoholic beverages.

Recklessly on the Premises of a Business Licensed for the Sale or Service of Alcoholic Beverages for On-Premises Consumption

A person is recklessly on the premises of a business licensed for the sale or service of alcoholic beverages if the person is aware of the substantial and unjustifiable risk that he is on the premises of a business that is licensed for or has a permit for the sale or service of alcoholic beverages and that derives 51 percent or more of its income from the sale or service of alcoholic beverages but consciously disregards that risk, and the risk is 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 of the circumstances, as viewed from the person's standpoint.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], possessed or went with a firearm on the premises of [*name of business*];
2. the defendant did this either intentionally, knowingly, or recklessly;
3. [*name of business*] was a business that had a [permit/license] under chapter [25/28/32/69/74] of the Texas Alcoholic Beverage Code;
4. [*name of business*] derived 51 percent or more of its income from the sale or service of alcoholic beverages for on-premises consumption, as determined by the Texas Alcoholic Beverage Commission under section 104.06 of the Texas Alcoholic Beverage Code; and
5. the defendant knew that, or was reckless about whether, he was on the premises of a business licensed for the sale or service of alcoholic beverages for on-premises consumption and that derives 51 percent or more of its income from the sale or service of alcoholic beverages.

You must all agree on the elements 1 through 5 listed above.

If you all agree that the state has failed to prove, beyond a reasonable doubt, any one of elements 1 through 5 listed above, you must find the defendant "not guilty."

If you all agree that the state has proved, beyond a reasonable doubt, all five of the elements listed above, you must find the defendant "guilty."

[Include the following if the evidence raises the defense.]

If you all agree that the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must next consider whether the defendant is not guilty because he carried a handgun license.

Handgun-License Defense

The offense of possessing a firearm on liquor-licensed premises does not apply to a person who (1) was carrying a handgun on the premises; (2) holds a license to carry a handgun issued under chapter 411, subchapter H, of the Texas Government Code; and (3) was not given effective notice under [*include all that are applicable*: section 30.06 of the Texas Penal Code/section 30.07

of the Texas Penal Code/section 411.204 of the Texas Government Code].

Burden of Proof

The defendant is not required to prove the handgun-license defense. Rather, the state must prove, beyond a reasonable doubt, that the handgun-license defense does not apply to the defendant's conduct.

Application of Law to Facts

To decide whether the handgun-license defense applies, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the defendant was carrying a firearm other than a handgun;
2. the defendant was not carrying a license to carry a handgun that was issued under chapter 411, subchapter H, of the Texas Government Code;
3. the defendant was given effective notice under [*include all that are applicable*: section 30.06 of the Texas Penal Code/section 30.07 of the Texas Penal Code/ section 411.204 of the Texas Government Code].

You must all agree that the state has proved, beyond a reasonable doubt, either element 1, 2, or 3 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, element 1, 2, and 3 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of possession of a weapon on liquor-licensed premises, and you all agree the state has proved, beyond a reasonable doubt, either element 1, 2, or 3 listed above, you must find the defendant "guilty."

[*Insert any other instructions raised by the evidence. Then continue with the verdict form found in CJPC 2.1, the general charge*.]

COMMENT

The offense of possession of a weapon on liquor-licensed premises is prohibited by and defined in Tex. Penal Code § 46.03(a–7). The definition of "firearm" is from Tex. Penal Code § 46.01(3). The definition of "handgun" is from Tex. Penal Code § 46.01(5). The definition of "possession" is from Tex. Penal Code § 1.07(a)(39). The definition of "premises" is from Tex.

Penal Code § 46.03(c)(4). The definitions of "intentionally," "knowingly," and "recklessly" are from Tex. Penal Code § 6.03. The handgun-license defense is provided for in Tex. Penal Code § 46.15(p).