April 2, 2014

SCOTUS
STATUTORY PROHIBITION AGAINST GUN POSSESSION[1]

By those convicted of domestic violence offenses, Second Amendment issue ducked by the Supremes

"the only difference between a dead woman and a battered woman is the presence of the gun"

United States v. Castleman, Sotomayor, (March 26, 2014), As might be expected when this opinion opens with the foregoing quote: the requirement of force was satisfied by the degree of force that supported a common law battery conviction—offensive touching. Applying that definition of physical force, respondent's conviction qualified as a misdemeanor crime of domestic violence where he had plead guilty to having intentionally or knowingly caused bodily injury to the mother of his child, and the knowing or intentional causation of bodily injury necessarily involved the use of physical force. It takes less to qualify as force in a domestic situation due to the dynamics of the situation. "Domestic Violence" is a term of art encompassing acts that one might not characterize as violent in a nondomestic context. The Second Amendment issue was ducked as being inadequately briefed.

UNANIMITY: JURY CHARGE
NO EGREGIOUS ERROR FOUND

Despite ADA repeatedly arguing no agreement on what def allegedly did required

Jourdan v. State, Publish, 4-21-14, Price , unanimous.NO. PD-0446-13, Conviction for agg sexual asslt wherein the appellant either penetrated the CW with his penis, his finger or touched his sexual organ to hers. Prosecutor repeatedly argued from voir dire until closing argument that the jurors did not agree on what the defendant did as long as they each believed that the defendant did one of those bad things. No objection ever lodged and appellate lawyer writing on charge error. Not egregious harm penile penetration and penile touching close enough that if you did one you did the other. (I can see that penetration involves touching but not the other way). Digital penetration different from either penile penetration or touching but not egregious error because his defense was I beat her up but did not rape her not you have indicted it wrong. Jury rejected his defense that I paid her for a blow job and then I came too fast and she refused to refund any of the purchase price so I beat her pretty severely. It appears TCCA rejected this defense as well. Conviction affirmed despite possibility of non-unanimous verdict. Janet's two cents: object to the charge and put on the record when you are arguing the charge HOW a non-unanimous verdict hurts your case. Mention the 14th Amendment that you are concerned that the jury will convict your guy for being a bad dude [which he might actually be] rather than being guilty of an actual specific crime and that 12 jurors agree which crime that is.

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[1] *18 U.S.C. section 922(g)(9)it shall be unlawful for any person who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped in interstate or foreign commerce.*

REFORMED J/S TO LESSER THAT NO ONE REQUESTED OR WANTED *Bowen*[2] on steroids
Attempted tampering with evidence

Thornton v. State, Price, Keller concurrence, Cochran dissent, Alcala dissent. Client charged with evidence tampering on the theory of concealment for dropping his crack pipe. He did a bad job because one of the cops saw him do it and he concealed nothing. He had priors and got a bunch of time for this.[3] Court of Appeals found evidence insufficient on the tampering charge but declined to reform the judgment as to attempted tampering. HELD by the TCCA: no error waiver by state in failing to request a lesser at trial. *Bowen* clearly establishes if reformation of a j/s to a lesser is supported by the evidence it does not matter whether either party requested a lesser or if one was given. Reformation by an appellate court should be limited to those circumstances in which the commission of the lesser conviction can be established from facts the jury actually found. Appellate court must ask: (1) in the course of convicting the appellant of the greater offense, must the jury have necessarily have found every element necessary to convict the appellant for the lesser-included offense; and (2) conducting a sufficiency review, is there sufficient evidence to support the lesser. Reformation is necessary to avoid the "unjust" result of an acquittal (or God Forbid a Windfall!!) with a guilty guy. Although not every act of discarding an object evinces intent to impair the availability of that object as evidence in a later investigation or proceeding—this one does because the crack pipe in question was small and the sun was coming up. "Palming" of the pipe evidences intent to conceal even if it does not actually constitute actual concealment. Keller's concurrence—palming is concealment under the statute. Cochran's dissent says this is a class C paraphernalia case – the act of abandoning contraband demonstrates prior possession of it not its concealment. And she cites a bunch of cases from other jurisdictions to get there. Alcala's dissent does not agree with reformation in this case because in an attempted offense specific intent is required no specific intent to conceal every found by the jury in this case. At least, remand for a new trial on attempted tampering so that a jury can find these facts rather than an appellate court.

INEFFECTIVE ASSISTANCE OF COUNSEL
FAILURE TO INTRODUCE EVIDENCE OF VOLUNTARY INTOXICATION AT PUNISHMENT
And the TCCA gets there without that issue being specifically raised by the writ lawyer and without an affidavit from trial counsel to explain his/her strategy[4]

Ex parte Michael Dee Howard, No AP-76,809, publish, Keller majority one page opinion remanded for a new punishment hearing on IAC grounds due to trial counsel not introducing evidence at punishment of voluntary intoxication induced insanity, Keasler filed a scathing dissenting opinion in which he faults the majority for not giving trial counsel an opportunity to

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[2] Bowen v. State*, 374 S. W. 3d 427, 431-32 (Tex. Crim. App. 2012) reformation of the judgment is proper when, although the evidence is insufficient as to some element of the charged offense, the State has nevertheless proved all the elements of a lesser included offense beyond a reasonable doubt. Over-ruled prior case law holding that to do the jury must have been charged on a lesser or a lesser must have been requested.*

[3] *45 years for something as Cochran's dissent points out should be a class c paraphernalia charge.*

[4] *This is interesting because I can think of some reasons why you might not want the jury to know your client is a drunk in addition to being a really mean SOB.*

explain his strategic considerations (or appreciable lack thereof), citing the abundant extraneous misconduct evidence for the proposition that evidence of voluntary intoxication induced insanity would not have made a difference, and the fact that this point was not raised in the iac habeas despite the fact that the counsel on same was board certified. (the TCCA essentially raised this point on their own).

DNA TESTING

To discover entitlement to must look only at evidence presented at trial—not newly discovered evidence

Holberg v. State, No. AP-77,023, Price, Publish , 4-2-14, TCCA affirmed the order denying post conviction dna testing. Ugly case, where robbery was what elevated the murder to a cap murder. The defense wanted the dna on the dead guy's wallet tested. This court will not consider post trial evidence when deciding whether or not the appellant has carried her burden to establish by a preponderance of the evidence that she would not have been convicted had exculpatory results been obtained through DNA testing. The court assumed without deciding that there would have been biological material on the wallet in question and that the absence of her dna there would have helped her but in this case a large amount of the decedents prescription pain meds also had been taken. Therefore the robbery could be shown even if she did not touch the dead guy's wallet –and use that money to buy more drugs. Not mentioned is the idea that it might have shown someone else was involved.