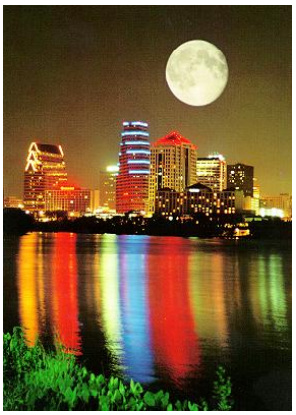

One Fabulous Skyline

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Vol. 6, No. 10 - March 16, 1998

- APPELLANT'S NAME: Aaron Dewayne Proctor and Jonathan L. Lemell
- FFENSE: Aggravated Robbery
- COURT OF APPEALS: Eastland 1996
- C/A CITATION: Unpublished
- C/A RESULT: Convictions Reversed - Acquittals Ordered
- COUNTY: Harris
- CRIM. APPEALS No. 1012-96
- DATE OF OPINION: March 11, 1998
- JUDGE: Mansfield, J.
- DISPOSITION: Court of Appeals Reversed - Convictions Affirmed

Case Note: This week's "appellate orbit" winner (the first two time winner), and the saga of Proctor and Lemell seems to never end. In April 1982, Appellant and another (Proctor) were charged in separate but identical indictments with the capital murder of Wing K. Lew (paragraph one of each indictment); the murder of Wing K. Lew by intentionally causing his death (paragraph two); the murder of Wing K. Lew by intending to cause serious bodily injury to him (paragraph three); aggravated robbery by threatening or placing Yit Oi Lew (Wing K. Lew's wife) in fear of imminent bodily injury or death (paragraph four); and aggravated robbery by causing serious bodily injury to Wing K. Lew (paragraph five). The two causes were consolidated for trial. Just before trial, the State affirmatively announced that it was abandoning counts one through three and five, and was proceeding to trial against each defendant on count four. Pursuant to their abandonment announcement, the State went to the jury only on count four, and both defendants were convicted. The Court of Appeals reversed the convictions "because of trial error." Proctor and Lemell v. State; No. A14-82-872-CR (Tex.App. - Houston [14th] 1985, pet. granted)(unpublished). In January 1988, Proctor and Lemell were reindicted on three counts in separate, but again identical, indictments. Each of these indictments included a count charging aggravated robbery by causing serious bodily injury to Wing K. Lew, the same charge previously alleged against the defendants in the fifth paragraph of each of the 1982 indictments. In November 1988, the pair were again jointly tried, and this time only the count alleging aggravated robbery by causing serious bodily injury to Wing K. Lew was submitted to the jury. Again, the jury found them guilty. After punishment deliberations began, a motion for instructed verdict (guilt/innocence) was submitted, claiming for the first time that the prosecution for aggravated robbery was barred by limitations because the reindictment was more than five years after the offenses and the statute of limitations was five years. Holding that the State's 1982 abandonment of counts one through three and five were "tantamount to an acquittal," the Court of Appeals reversed the case on double jeopardy grounds. Proctor and Lemell v. State; No. 11-88-150-CR (Tex.App. - Eastland 1988, pet. granted)(unpublished). Holding that so long as the State "affirmatively abandons" counts before jeopardy attaches, they remain available for prosecution, the Court of Criminal Appeals reversed the decision of the Court of Appeals, and remanded the case for consideration of Appellant's

limitations claim. Proctor and Lemell v. State, 841 S.W.2d 1 (Tex.Cr.App. 1992). On remand, the Court of Appeals held that Appellant had waived his limitations claim by not objecting prior to trial. Lemell v. State, No. 11-88-150-CR (Tex.App. - Eastland 1993, pet. granted)(unpublished). In November of 1995, their convictions were reversed for the second time. Lemell was reversed in an opinion by Judge Maloney which held that the State has the burden of proving that the offense was committed within the period of limitations and that, where the indictment alleged a date which, on its face, was outside the statute of limitations for the offense on which the State went to the jury, and the indictment did not allege any tolling of the statute, the evidence is insufficient. See Lemell v. State, 915 S.W.2d 486 (Tex.Cr.App. 1995)(see Greenwood & Schulman, Vol. 3, No. 30; November 6, 1995). Proctor was reversed two weeks later "in light of" Lemell. See Proctor v. State, 915 S.W.2d 490 (Tex.Cr.App. 1995)(see Greenwood & Schulman, Vol. 3, No. 32; November 20, 1995). The cases were remanded to the Court of Appeals "to determine whether the evidence that the offense was committed within the limitations period was sufficient."

§ 549.01 Sufficiency of the Evidence / Limitations: Having been instructed by the Court of Criminal Appeals to determine whether the evidence was sufficient, and having been told that the State has the burden of proving that the offense was committed within the period of limitations and that, where the indictment alleged a date which, on its face, was outside the statute of limitations for the offense on which the State went to the jury, and the indictment did not allege any tolling of the statute, the evidence is insufficient, the Court of Appeals (not surprisingly) found that the evidence was insufficient and ordered acquittals. The Court of Criminal Appeals then granted the State's petitions for discretionary review in these two cases to reconsider its prior holdings "that the State, as part of its burden of proof in a criminal prosecution, must always prove beyond a reasonable doubt that the prosecution is not limitations-barred, even if the defendant does not raise the issue."

Holding: Because a defendant may waive his limitations defense . . . we see no logic in requiring the State, in every case, to disprove a defense that the defendant may not bother to raise. Since there was no limitations issue raised until the punishment stage of Appellants' trial, the State had no burden to prove beyond a reasonable doubt that the prosecution was not limitations-barred.

Notes: Judge Overstreet filed a dissenting opinion in which he says he finds the "majority's newly-inspired analysis is . . . poorly reasoned." He stated that his main concern, however, is the "majority's changing of the rules midstream on appeal." He argued that to reject long standing case law in formulating a new rule and then apply it retroactively violates the Ex Post Facto Clause of the United States Constitution. Judge Meyers also filed a dissenting opinion, in which he was joined by Judge Price, and in which he argued that the majority's decision to reject "nearly a century of precedent" because it has become unworkable is not supported by the case law, because the majority cites only two cases, twenty-five years apart ("Two random cases delivered twenty-five years past, in the midst of case law spanning one hundred years consistently holding to the contrary do not strike me as indicating the prevailing rule is so 'unworkable' as to compel a radical change"). He cited at least a dozen precedential cases that have been overruled in "recent months" and argued that the "Court's opinion shifts the burden on the issue of limitations from the State to the defendant."

Comment: (David A. Schulman) This, brothers and sisters is legal "mumbo-jumbo" at its absolute worst. Regardless of how you cut it, for more than one hundred (100) years, the law has been that proving that the crime occurred within the period of limitations was an element of the offense. See Donald v. State, 306 S.W.2d 360 (Tex.Cr.App. 1957)("whenever the offense is subject to limitation, the charging instrument must show that it was committed within the period of limitation and that if the date alleged shows the offense to be barred by limitation, "the indictment, information, or complaint so alleging is bad"), citing cases back to 1895 for that proposition. Now, suddenly, as I see it, this opinion means that the State doesn't have to prove that element if the defendant doesn't object in time. Surprisingly, in its original decision, the Court addressed the right to object issue vis-a-vis its discussion of Studer v. State, 799 S.W.2d 263 (Tex.Cr.App. 1990), holding that even

though the failure to object waived any defect in the indictment, the failure to object did not relieve the State of its burden of proof. This is entirely consistent with post-Studer law, in that, while the failure to object to a missing element in the indictment will waive any charging instrument error, it will not relieve the State of its duty to prove the missing element. That this Court's opinion tries to make it look like this is a logical decision, nothing could be further than true. It is clear that this opinion could stand for the proposition that, if the defendant doesn't object to the absence in a charging instrument of any element of an offense, the State doesn't have to prove it. As Judge Meyers puts it, "Go figure." Don't be confused, however, that this has anything to do with stare decisis. The manner in which the Court abandoned the old case law in favor of this holding is an acceptable method of doing so. It is not the manner of the Court's action to which I object. It is the logic (or lack thereof) behind it.