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**CRIMINAL PROCEDURE—Joinder Of Offenses—
Fundamental Error When Rule Against Misjoinder
Violated By Charging More Than One Non-Property
Offense In Same Indictment Resulting
In Multiple Convictions.**

Fortune v. State,
745 S.W.2d 364 (Tex. Crim. App. 1988).

Harvey C. Fortune was charged by separate counts in a single indictment with the crimes of burglary with intent to commit sexual assault¹ and aggravated sexual assault.² The trial court convicted Fortune of both crimes,³ and the jury returned sentences of fifteen years for the burglary offense and thirty years for the offense of aggravated sexual assault.⁴ The trial judge ordered the sentences to run consecutively.⁵ The Beaumont Court of Appeals affirmed the burglary conviction and reversed the conviction for aggravated sexual assault, holding that the State was prohibited from obtaining multiple convictions because the indictment charged more than one offense arising

1. *Fortune v. State*, 699 S.W.2d 706, 706-07 (Tex. App.—Beaumont 1985), *aff'd*, 745 S.W.2d 364 (Tex. Crim. App. 1988). The burglary was of the home of Marvin Beard. *Id.* at 707. *See generally* State's Brief on Merits at 3, *Fortune v. State*, 745 S.W.2d 364 (Tex. Crim. App. 1988)(No. 0031-86)(facts of case detailed). Beard and his wife awoke to find Fortune at the foot of their bed, holding a wooden pole and a kitchen knife. *Id.* Fortune threatened the Beard's children (who were also in the room) and struck Beard with the pole. *Id.* *See generally* TEX. PENAL CODE ANN. § 30.02 (Vernon 1974)(elements of offense of burglary with intent to commit felony).

2. *Fortune*, 699 S.W.2d at 707. The aggravated assault charge resulted from the use and exhibition of a knife during the sexual assault in a manner capable of causing serious bodily injury or death. *Id.* *See generally* State's Brief on Merits at 3, *Fortune v. State*, 745 S.W.2d 364 (Tex. Crim. App. 1988)(No. 0031-86)(outlines facts of case). The defendant ordered the victim and her husband to remove their clothes and, at knife point, forced the victim to perform oral sex on him. *Id.* *See generally* TEX. PENAL CODE ANN. § 22.021 (Vernon Supp. 1988)(elements of offense of aggravated sexual assault outlined).

3. *Fortune*, 699 S.W.2d at 707. The defendant was convicted for both the sexual assault and the burglary. *Id.* The defendant made no objection to the joinder of offenses in a single indictment, nor did he make a motion to sever or to require the State to elect one offense with which to proceed. *Id.*

4. *Id.* The defendant's objection to multiple sentences just prior to the punishment phase was overruled by the trial judge. *Id.*

5. *Fortune v. State*, 699 S.W.2d 706, 707 (Tex. App.—Beaumont 1985), *aff'd*, 745 S.W.2d 364 (Tex. Crim. App. 1988). Offering no explanation, the trial judge denied the defendant's request that the sentences run concurrently. *Id.*

from the same transaction.⁶ The court of criminal appeals granted the State's petition for discretionary review.⁷ Held — *Affirmed*. Error is fundamental when the rule against misjoinder is violated by charging more than one non-property offense in the same indictment resulting in multiple convictions.⁸

Early Texas courts of appeals decisions recognized the common-law practice of joining, in a single indictment,⁹ offenses¹⁰ which arose out of the same transaction.¹¹ The objective of joinder,¹² that is, the practice of charging

6. See *Fortune v. State*, 745 S.W.2d 364, 365-66 (Tex. Crim. App. 1988)(only one conviction may be obtained when multiple offenses arising from same transaction joined in single indictment). The court of appeals set aside the sexual assault conviction, based on recent court of criminal appeals decisions in *Drake v. State* and *Ex parte Siller*. See *id.* at 366. Compare *Drake v. State*, 686 S.W.2d 935, 944 (Tex. Crim. App. 1985)(error waived if multiple convictions result when offenses arising from different transactions joined in single indictment and no objection made at trial to misjoinder) with *Ex parte Siller*, 686 S.W.2d 617, 620 (Tex. Crim. App. 1985)(only one conviction valid when indictment charges multiple offenses arising from same transaction). The court of appeals requested that the court of criminal appeals reconsider the *Siller* decision and agree that the proper interpretation of article 37.07 of the Texas Code of Criminal Procedure, which mandates circumstances under which separate verdicts and sentences shall be returned, would require affirmation of the two convictions in *Siller* as well as the two convictions in *Fortune*. *Fortune*, 699 S.W.2d at 708. See generally TEX. CODE CRIM. PROC. ANN. art. 37.07, §§ 1(c), 2(c) (Vernon 1981)(mandates when separate verdicts and sentences must be returned in multiple prosecutions).

7. *Fortune*, 745 S.W.2d at 366.

8. *Id.* at 369-70.

9. See TEX. CODE CRIM. PROC. ANN. art. 21.01 (Vernon 1966)(definition of indictment). An indictment, or charging instrument, is a written statement from the grand jury which accuses the person named therein of an act or omission which is declared by law to be an offense. *Id.* Each distinct offense charged in an indictment is a "count." *Boren v. State*, 23 Tex. App. 28, 33, 4 S.W. 463, 464 (1887).

10. See *Hirshfield v. State*, 11 Tex. Ct. App. 207, 214 (1881)(offense defined as act or omission proscribed by statutory law). In *Hirshfield*, the court reasoned that "same offense" really meant a criminal transaction because in many cases, an offense actually consisted of several acts. *Id.* For various other definitions of the term "offense", see, e.g., *Paxton v. State*, 151 Tex. Crim. 324, 325, 207 S.W.2d 876, 876 (1948)(same offense if same transaction, same facts, same evidence); *Ratcliff v. State*, 118 Tex. Crim. 616, 618, 38 S.W.2d 326, 327 (1931)(same offense if acts occur at same time and place); *Coon v. State*, 97 Tex. Crim. 645, 647, 263 S.W. 914, 915 (1924)(one offense if based on same criminal act); *Aven v. State*, 95 Tex. Crim. 155, 163, 253 S.W. 521, 525 (1923)(same offense if one intent and volition); *Flynn v. State*, 47 Tex. Crim. 26, 28, 83 S.W. 206, 207 (1904)(offense one continuous transaction).

11. See, e.g., *Dalton v. State*, 4 Tex. Ct. App. 333, 334 (1878)(two-count indictment charging both theft of horse and theft of gelding not error); *Weathersby v. State*, 1 Tex. Ct. App. 643, 645 (1877)(no error charging theft and illegal branding in same indictment); *Waddell v. State*, 1 Tex. Ct. App. 720, 721 (1877)(different offenses may be charged in same indictment).

12. See *Jackson v. State*, 131 Tex. Crim. 287, 289, 98 S.W.2d 193, 194 (1936)(no error in charging desertion of wife and desertion and failure to support child in single indictment);

two or more offenses against one defendant in separate counts¹³ of a single indictment, is twofold: to avoid the burden of multiple trials;¹⁴ and to increase the likelihood of obtaining a conviction.¹⁵ Though the practice of joinder allowed the State to charge multiple offenses arising from the same transaction in a single indictment, the State was allowed to obtain only one conviction.¹⁶ This practice, known as the carving doctrine,¹⁷ permitted the State to charge as many offenses as necessary to convict the defendant, but allowed only one conviction to be “carved” from a criminal transaction.¹⁸

When the common-law practice of joinder was first codified in the Code of Criminal Procedure (CCP) in 1879, article 443 provided that an indictment could include as many counts charging the same offense as the prosecuting attorney thought necessary to convict the defendant.¹⁹ Though courts were

Weathersby v. State, 1 Tex. Ct. App. 643, 643, 645 (1877)(offenses of theft and illegal branding properly charged in same indictment).

13. See *Boren v. State*, 23 Tex. Ct. App. 28, 33, 4 S.W. 463, 464 (1887)(definition of count). “Count,” as used by the grand jury, is a part of an indictment which alleges a distinct crime. *Id.*

14. *Id.* at 33-34, 4 S.W. at 464. By charging more than one count in a single indictment, the burden of multiple trials can be avoided for both the State and the defendant. *Id.*

15. *Crawford v. State*, 31 Tex. Crim. 51, 54, 19 S.W. 766, 767 (1892)(purpose of alleging several counts in single indictment is to increase chances of conviction). It was proper to charge all felonies which made up the offense defendant allegedly committed in a single indictment because the purpose was not to obtain multiple convictions, but to give the prosecutor the advantage of adapting to potential variances of evidence. *Id.*; see also *Hawthorne v. State*, 62 Tex. Crim. 114, 115, 136 S.W. 776, 777 (1911)(proper to charge multiple counts for offenses growing from same transaction to increase chance of conviction).

16. See *Wright v. State*, 17 Tex. Ct. App. 152, 159 (1884)(conviction obtained for criminal transaction bars second conviction); *Quitow v. State*, 1 Tex. Ct. App. 47, 53 (1876)(only one conviction can be obtained from criminal transaction).

17. See generally Comment, *The Texas Carving Doctrine*, 6 AM. J. CRIM. L. 57, 57-60 (1978)(discussion of carving doctrine).

18. *Quitow*, 1 Tex. Ct. App. at 53-54. The court ruled that a theft of horse, saddle, and bridle was one offense and one transaction and reasoned that the prosecutor could carve as large an offense as he wished, but could obtain only one conviction per transaction. *Id.*; see also *Wright*, 17 Tex. Ct. App. at 159 (only one conviction permitted per transaction). The court held that once a prosecutor “carved” a transaction and obtained a conviction, a second conviction could not be obtained for the same offense. *Id.* The court based its holding on the well established criminal law principle called the carving doctrine. *Id.* But see *Ex parte McWilliams*, 634 S.W.2d 815, 822 (Tex. Crim. App.)(carving doctrine abandoned because no statutory or constitutional basis for doctrine), cert. denied, 459 U.S. 1036 (1982); Carruthers & Torti, *Texas and What Was the Doctrine of Carving*, 7 T. MARSHALL L. REV. 253, 253-61 (1982)(analysis of abandonment of carving doctrine in *Ex parte McWilliams*). See generally Steele, *A Review of the Jeopardy Defense in Texas*, 12 TEX. TECH L. REV. 393, 423-28 (1981)(discussion of Texas carving doctrine); Comment, *The Texas Carving Doctrine*, 6 AM. J. CRIM. L. 57, 57-60, 66-79 (1978)(carving doctrine in relation to single criminal transaction).

19. TEX. CODE CRIM. PROC. art. 433 (1879)(repealed 1895)(currently codified at TEX. CODE CRIM. PROC. ANN. art. 21.24 (Vernon 1966 and Supp. 1988)). Article 433 (renumbered as article 469 in 1895) read as follows: “An indictment or information may contain as many

unclear as to whether "transaction" under the carving doctrine had the same meaning as "same offense" under the CCP,²⁰ they continued to adhere to the carving doctrine and allowed only one conviction per criminal transaction.²¹ If the court determined that the alleged counts, charged in a single indictment, arose from different transactions, however, the indictment was deemed to be improperly joined, and therefore, subject to an objection on the ground of misjoinder.²²

The joinder article, now article 21.24 of the CCP, as revised in 1965, allowed joinder in an indictment so long as no more than one offense was charged.²³ Following the enactment, Judge Onion of the Texas Court of

counts, charging the same offense, as the attorney who prepares it may think necessary to insert, and an indictment or information shall be sufficient if any one of its counts be sufficient." *Id.* See generally Comment, *Joinder of Offenses Under Article 21.24 of the Texas Code of Criminal Procedure: A Return to the Common Law?*, 17 TEX. TECH L. REV. 949, 949-51 (1986)(presents historical development of article 21.24 and its predecessors).

20. See, e.g., *Jackson v. State*, 131 Tex. Crim. 287, 288, 98 S.W.2d 193, 194 (1936)(multiple offenses may be charged in same indictment so long as similar in nature, related to same transaction, and differing only in degree); *Eaves v. State*, 115 Tex. Crim. 460, 461, 29 S.W.2d 339, 340 (1929)(transaction may consist of several acts committed by one individual); *Dill v. State*, 35 Tex. Crim. 240, 242, 33 S.W. 126, 126 (1895)(offense means same criminal transaction); see also *Crawford v. State*, 31 Tex. Crim. 51, 54-55, 19 S.W. 766, 767 (1892)(multiple offenses charged in same indictment presumed to be same transaction). When multiple felonies are charged in the same indictment, they are presumed to be a part of the same transaction, sustained by the same evidence. *Id.* Therefore, only one conviction can be obtained for the guilty intent which connected the offenses and made them one. *Id.*; *Adams v. State*, 16 Tex. Ct. App. 162, 170 (1884)(one transaction if acts occur at same time and place). See generally Comment, *The Dual Meaning of One Offense*, 20 BAYLOR L. REV. 218, 218-28 (1968)(discusses various meanings of one offense).

21. See, e.g., *Monroe v. State*, 146 Tex. Crim. 239, 241, 172 S.W.2d 699, 700 (1943)(indictment charging more than one felony may result in only one conviction); *Wimberly v. State*, 94 Tex. Crim. 1, 2, 249 S.W. 497, 497 (1923)(conviction for both counts of two-count indictment fundamental error); *Day v. State*, 62 Tex. Crim. 527, 529, 138 S.W. 123, 124 (1911)(no error in refusing to quash three-count indictment so long as only one conviction obtained); see also *Crawford*, 31 Tex. Crim. at 55, 19 S.W. at 767 (error to obtain multiple convictions from single transaction). In *Crawford*, the court reversed appellant's convictions for two counts under a single indictment, holding that when two or more felonies were charged in the same indictment, there could be only one conviction because they were presumed to be merely parts of the same transaction. *Id.*

22. *Campbell v. State*, 163 Tex. Crim. 545, 549, 294 S.W.2d 125, 128 (1956)(indictment which charges separate and distinct offenses arising from different transactions may be subject to objection on grounds of misjoinder). See generally DAWSON & DIX, TEXAS CRIMINAL PROCEDURE 268-69 (1984)(misjoinder when offenses charged in single indictment not part of same transaction).

23. Compare Act of May 27, 1965, ch. 722, § 1, 1965 Tex. Gen. Laws 407 (currently codified at TEX. CODE CRIM. PROC. ANN. art. 21.24 (Vernon 1966)) amended by Act of May 24, 1973, ch. 399, § 2, 1973 Tex. Gen. Laws 968-69 (currently codified at TEX. CODE CRIM. PROC. ANN. art. 21.24 (Vernon Supp. 1988))(indictment could contain multiple counts charging same offense but only one offense) with TEX. CODE CRIM. PROC. ANN. art. 417 (1925)(re-

Criminal Appeals pointed out that if "offense" were understood to mean "criminal offense" instead of "transaction," indictments charging more than one criminal offense would be misjoined under article 21.24.²⁴

The court of criminal appeals first interpreted the meaning of "offense," as used in article 21.24 of the CCP, soon after the effective date of the 1965 code, in *Vannerson v. State*.²⁵ In *Vannerson*, the court upheld a conviction based on a three-count indictment, ruling article 21.24 of the CCP did not prohibit charging multiple offenses when they were based upon a single incident, act, or transaction.²⁶ Following the *Vannerson* decision, the court continued to uphold convictions based on multi-count indictments when the offenses arose from the same transaction and resulted in only one conviction.²⁷

pealed 1965)(indictment could contain as many counts charging same offense as necessary to convict). The 1965 revision provided that:

An indictment, information or complaint may contain as many counts charging the same offense as the attorney who prepares it, acting in good faith, may think necessary to insert, but may not charge more than one offense. An indictment or information shall be sufficient if any one of its counts be sufficient.

TEX. CODE CRIM. PROC. ANN. art. 21.24 (1965)(amended 1973). The predecessor to the 1965 revision read: "An indictment or information may contain as many counts, charging the same offense, as the attorney who prepares it may think necessary to insert. An indictment or information shall be sufficient if any one of its counts be sufficient." TEX. CODE CRIM. PROC. ANN. art. 417 (1925)(repealed 1965).

24. See Onion, *Special Commentary*, TEX. CODE CRIM. PROC. ANN. art. 21.24 (Vernon 1966). Judge Onion pointed out: "If the word 'offense' used herein is interpreted to mean 'criminal offense' as opposed to 'transaction,' then an indictment cannot allege more than one offense even if the offenses grew out of the same transaction" *Id.* Judge Onion contended that, although a defendant could commit the criminal offense of possessing narcotics and the criminal offense of selling narcotics as part of the same transaction, the offenses could not be properly joined in a single indictment if the term "offense" in article 21.24 were interpreted to mean "criminal offense." *Id.*

25. 408 S.W.2d 228, 229 (Tex. Crim. App. 1966, no pet.)(offense as used in article 21.24 permits charging all offenses based on same transaction).

26. See *id.* at 229. The indictment contained two counts of forgery and one count of passing a forged instrument. *Id.* The court interpreted the new statute to allow prosecutors to charge several ways to commit one offense, and to charge multiple offenses which arose from a single incident, act, or transaction. *Id.* Because only one charge was submitted to the jury, the conviction was affirmed. *Id.*

27. See, e.g., *Crocker v. State*, 573 S.W.2d 190, 197 (Tex. Crim. App. [Panel Op.] 1978, no pet.)(no error in refusing to require election between counts of castration and disfigurement alleged in same indictment because acts were one transaction and jury instructed to convict on only one count); *Beaupre v. State*, 526 S.W.2d 811, 816 (Tex. Crim. App.)(court found no error in multi-count indictment but reformed lower court judgment and sentence to show conviction of only one count), *cert. denied*, 423 U.S. 1037 (1975); *Hicks v. State*, 508 S.W.2d 400, 403 (Tex. Crim. App. 1974, no pet.)(although article 21.24 prohibits charging more than one offense no prohibition against charging multiple offenses arising from single incident or transaction); see also *Ex parte Easley*, 490 S.W.2d 570, 571 (Tex. Crim. App. 1972, no pet.)(error to obtain multiple convictions from multi-count indictment). The court stated that

In 1973, the Texas Penal Code was revised to incorporate a chapter devoted to multiple prosecutions.²⁸ To eliminate the confusion created by the use of "offense" and "transaction,"²⁹ the State Bar Committee on Revision of the Penal Code proposed that the broad term "criminal episode" be used

article 21.24 had long been interpreted as allowing as many counts as necessary to convict a defendant in one indictment; but reversed one of two convictions resulting from the single indictment, holding it was error to convict on more than one count. *Id.*; see also *Hughes v. State*, 455 S.W.2d 303, 305 (Tex. Crim. App. 1970, no pet.) (single conviction resulting from two-count indictment upheld). The *Hughes* court affirmed the defendant's murder conviction, holding it was not error to refuse to quash indictment charging both murder and the unlawful carrying of a pistol in a single indictment. *Id.* at 304-05. See generally *Foreman & Jones, Indictments Under the New Texas Penal Code*, 15 HOUS. L. REV. 1, 16-17 (1977) (interprets article 21.24 revision to allow the additional method of joining property offenses as defined in chapter 3 of the Penal Code).

28. See TEX. PENAL CODE ANN. §§ 3.01-3.04 (Vernon 1974) (delineates circumstances when multiple prosecutions permissible).

Section 3.01. Definition.

In this chapter, 'criminal episode' means the repeated commission of any one offense defined in Title 7 of this code (Offenses Against Property).

§ 3.02. Consolidation and Joinder of Prosecutions

(a) A defendant may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode.

(b) When a single criminal action is based on more than one charging instrument within the jurisdiction of the trial court, the state shall file written notice of the action not less than 30 days prior to the trial.

(c) If the judgment of guilt is reversed, set aside, or vacated, and a new trial ordered, the state may not prosecute in a single criminal action in the new trial any offense not joined in the former prosecution unless evidence to establish probable guilt for that offense was not known to the appropriate prosecuting official at the time the first prosecution commenced.

§ 3.03. Sentences for Offenses Arising Out of Same Criminal Episode.

When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, sentence for each offense for which he has been found guilty shall be pronounced. Such sentences shall run concurrently.

§ 3.04. Severance

(a) Whenever two or more offenses have been consolidated or joined for trial under Section 3.02 of this code, the defendant shall have a right to a severance of the offenses.

(b) In the event of severance under this section, the provisions of Section 3.03 of this code do not apply, and the court in its discretion may order the sentences to run either concurrently or consecutively.

Id.

29. See STATE BAR COMMITTEE ON REVISION OF THE PENAL CODE, TEXAS PENAL CODE, A PROPOSED REVISION (FINAL DRAFT, 1970) 26 (Committee comments trace history of inconsistent definitions of offense and transaction). The Committee reported that Texas courts had interpreted "same offense" to mean the same "criminal transaction." *Id.* The courts had interpreted "criminal transaction," at various times, to mean: "all acts committed at the same time and place"; "one act"; "one act and one volition"; "one continuous transaction"; and "all offenses involving the same evidence, facts, and elements." *Id.*

to delineate circumstances in which offenses could properly be joined.³⁰ The Committee also proposed a corresponding revision to article 21.24 of the CCP titled "Joinder of Certain Offenses."³¹ The legislature adopted the term "criminal episode," but instead of broadly defining "criminal episode" to mean all conduct incident to the accomplishment of a criminal objective, chapter 3 of the Penal Code, as enacted, narrowly defined criminal episode as the repeated commission of a single property offense.³² The corresponding revision to article 21.24 of the CCP consequently allowed joinder of offenses arising from the same criminal episode as defined in chapter 3 of the revised Penal Code.³³

30. *Id.* at 25-26. The relevant portions of the proposal include:

Section 3.01. Chapter Definition

In this chapter, unless the context requires a different definition, "criminal episode" means all conduct, including criminal solicitation and criminal conspiracy, incident to the attempt or accomplishment of a single criminal objective, even though the harm is directed toward or inflicted upon more than one person.

§ 3.02. Compulsory Joinder of Prosecutions for Offenses Arising Out of Same Criminal Episode.

(a) A defendant may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode.

Id.

31. *Id.* at 365. The relevant portions of the proposal provided: "Art. 21.24(a). Two or more offenses may be joined in a single indictment, information, or complaint, with each offense stated in a separate count, if the offenses arise out of the same criminal episode." *Id.* Subsection (b) permitted as many paragraphs as necessary for each count, but no paragraph could charge more than one offense. *Id.* Subsection (c) provided that a count would be sufficient if any one of its paragraphs were sufficient, and a charging instrument would be sufficient if any one of its counts were sufficient. *Id.*

32. *Compare* Act of May 24, 1973, ch. 399, § 1, 1973 Tex. Gen. Laws 891 (currently codified at TEX. PENAL CODE ANN. § 3.01 (Vernon 1974) *amended by* Act of May 22, 1987, ch. 387, § 1, 1987 Tex. Gen. Laws 1900 (currently codified at TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1988))(criminal episode means repeated commission of single property offense) *with* STATE BAR COMMITTEE ON REVISION OF THE PENAL CODE, TEXAS PENAL CODE, A PROPOSED REVISION (FINAL DRAFT, 1970) 365 (criminal episode means all conduct incident to single criminal objective). Section 3.01, as enacted, defines criminal episode as the repeated commission of a single property offense. TEX. PENAL CODE ANN. § 3.01 (Vernon 1974)(*amended* 1987). Section 3.02 allows a defendant to be prosecuted, in a single criminal action, for offenses arising from the same criminal episode. *Id.* § 3.02. Section 3.03 mandates that when multiple offenses are prosecuted in a single action, and the defendant is found guilty for more than one offense, the sentences shall be pronounced for each conviction. *Id.* § 3.03. Section 3.03 also mandates that sentences for the multiple convictions pursuant to chapter 3 of the Penal Code shall run concurrently. *Id.* Section 3.04 allows a defendant the right to sever offenses joined or consolidated for trial under section 3.02. *Id.* § 3.04.

33. TEX. CODE CRIM. PROC. ANN. art. 21.24 (Vernon 1966)(*amended* 1973). The article, as enacted, provides that multiple offenses may be joined in a single indictment, in separate counts, so long as the offenses arise from the "same criminal episode, as defined in Chapter 3 of the Penal Code." *Id.*; *see also* TEX. PENAL CODE ANN. § 3.01 (Vernon 1974)(*amended* 1987)(defines criminal episode as repeated commission of any property offense).

Despite the changes in article 21.24 of the CCP and chapter 3 of the Penal Code, the Texas Court of Criminal Appeals continued to uphold single convictions for non-property offenses based on multi-count indictments.³⁴ Decisions which mentioned the revisions did so in dicta, without addressing whether non-property offenses could be properly joined,³⁵ or interpreted the changes to merely prohibit *multiple convictions* for non-property offenses rather than *joinder* of non-property offenses.³⁶

In 1983, the court of criminal appeals addressed the 1973 revision of the CCP for the first time in *Meeks v. State*.³⁷ Writing for the majority, Judge Miller stated that the revision did not prohibit the previous method of joining property or non-property offenses arising from the same transaction, but instead provided the additional method of joining property offenses arising from the same or different transactions.³⁸ The use of the word "may" in the

34. See, e.g., *Koah v. State*, 604 S.W.2d 156, 161 (Tex. Crim. App. [Panel Op.] 1980, no pet.)(no error in multi-count indictment for securities violations when offenses arose from same transaction); *Thomas v. State*, 621 S.W.2d 158, 163 (Tex. Crim. App. [Panel Op.] 1980, no pet.)(indictment may contain as many counts as necessary to meet evidence); *Garcia v. State*, 574 S.W.2d 133, 134 (Tex. Crim. App. [Panel Op.] 1978, no pet.)(indictment charging multiple offenses of murder and aggravated assault allowed if only one conviction obtained).

35. See *Patterson v. State*, 581 S.W.2d 696, 697 (Tex. Crim. App. [Panel Op.] 1979, no pet.)(court questioned joinder of two non-property offenses in single indictment). Although the court affirmed a single conviction obtained from a two-count indictment, in a footnote, the court mentioned that the indictment, which charged both possession of a firearm by a felon and possession of marijuana, appeared to be improperly joined because they were not property offenses. *Id.* at 697 n.1.

36. See *Santoscoy v. State*, 596 S.W.2d 896, 902 (Tex. Crim. App. [Panel Op.] 1980, no pet.)(multiple convictions allowed only when joining property offenses). In *Santoscoy*, the appellant was convicted for ten counts of delivering a controlled substance charged in a single indictment. *Id.* at 898. While reversing the appellate opinion on other grounds, the court noted that article 21.24 of the CCP allowed only one conviction per indictment, except for property offenses, as defined in Chapter 3 of the Penal Code. *Id.* at 902; see also *Garcia*, 574 S.W.2d at 134 (rule prohibiting multiple convictions from one indictment abolished for property offenses).

37. 653 S.W.2d 6, 11 (Tex. Crim. App. 1983). In *Meeks*, the defendant was charged in a single indictment with breaking and entering a car, credit card abuse, and theft. *Id.* at 8. The theft charge was dismissed. *Id.* The court interpreted article 21.24 as permitting joinder of property offenses arising from different transactions in addition to the previously permissible method of joining property or non-property offenses arising from a single transaction. *Id.* at 11.

38. *Meeks*, 653 S.W.2d at 11. The court held that the 1965 version of article 21.24 of the CCP established the rule allowing joinder of offenses arising from the same act, incident, or transaction. *Id.* Rather than prohibiting that type of joinder, the court ruled the 1973 version of article 21.24 added an additional means of allowing joinder of offenses — joinder of property offenses regardless of whether they arose from single or multiple criminal transactions. *Id.* The court reasoned that use of the word "may" in the statute meant that joinder of property offenses was not the sole means to join offenses. *Id.* Compare Act of May 24, 1973, ch. 399, § 2, 1973 Tex. Gen. Laws 968-69 (currently codified at TEX. CODE CRIM. PROC. ANN.

statute, the court reasoned, meant that joinder of property offenses was an optional, rather than the sole, means to join offenses.³⁹

Less than two years later, however, in *Drake v. State*⁴⁰ and *Ex parte Siller*,⁴¹ the court of criminal appeals concluded that the revision of article 21.24 of the CCP provided that joinder of property offenses was the sole method of permissible joinder.⁴² Judge Clinton, writing for the court in *Drake*, criticized the *Meeks* court for ignoring the legislature's intent to eliminate the authority to join non-property offenses arising from the same transaction by replacing the terms "offense" and "criminal transaction" with the

art. 21.24 (Vernon Supp. 1988))(offenses may be joined if they arise from same criminal episode as defined in chapter 3 of Penal Code) with Act of May 27, 1965, ch. 722, § 1, 1965 Tex. Gen. Laws 407 (currently codified at TEX. CODE CRIM. PROC. ANN. art. 21.24 (Vernon 1966))(amended 1973)(indictment may contain multiple counts charging same offense but cannot charge more than one offense). See generally TEX. PENAL CODE ANN. § 3.01 (Vernon 1974)(amended 1987)(criminal episode means repeated commission of property offense).

39. *Meeks*, 653 S.W.2d at 11.

40. 686 S.W.2d 935 (Tex. Crim. App. 1985). In *Drake*, the defendant was charged in a single indictment with attempted murder, two counts of attempted capital murder, deadly assault, felony theft, and burglary of a building. *Id.* at 936. All charges were dropped prior to submission to the jury except the two attempted capital murder charges. *Id.* The defendant was convicted of both charges and received cumulative sentences of 25 years. *Id.* at 937. The Waco Court of Appeals affirmed the convictions, overruling appellant's complaint that the trial court erred in obtaining two convictions based on a single indictment because the defendant had waived error by not objecting at trial. *Id.* The court of criminal appeals granted petition for discretionary review to determine whether the court of appeals was correct in overruling appellant's complaint. *Id.* The court of criminal appeals affirmed the appellate court ruling that error was waived when the defendant did not object at trial because the multiple convictions were for offenses which arose from different, rather than the same, transactions. *Id.* at 945.

41. 686 S.W.2d 617 (Tex. Crim. App. 1985)(decided same day as *Drake*). In *Siller*, the defendant was charged in a two-count indictment of having sexual intercourse with a female younger than fourteen years and engaging in sexual contact with the same female. *Id.* at 618. He was convicted of both offenses and received concurrent sentences. The Fort Worth Court of Appeals affirmed the convictions. The appellant sought relief from the court of criminal appeals through a writ of habeas corpus which challenged the multiple conviction for offenses arising from the same criminal transaction and charged in a single indictment. *Id.* The court of criminal appeals affirmed the conviction for the aggravated rape and vacated the conviction for indecency with a child. *Id.* at 620.

42. See *Drake*, 686 S.W.2d at 940 (intent of revised article 21.24 to limit joinder of offenses arising from same criminal episode as defined in chapter 3 of Penal Code); *Siller*, 686 S.W.2d at 619 (article 21.24 only permits joinder of property offenses). The court acknowledged that previous interpretations of article 21.24 followed the common-law practice of multiple-count indictments, resulting in one conviction. *Drake*, 686 S.W.2d at 941. The court reasoned, however, that the precise wording of the 1973 revision replaced the terms "offense" and "criminal transaction" with the new term "criminal episode," as defined in chapter 3 of the Penal Code. *Id.* at 940. The court concluded that the legislature had eliminated the authority to charge multiple non-property offenses arising from the same transaction. *Id.* at 943.

new, narrowly defined term, "criminal episode."⁴³ Judge Clinton found no support for the *Meeks* contention that use of the word "may" in the statute meant that the joinder of property offenses was an optional, rather than the sole, means of joinder.⁴⁴ Although the indictment violated the rule against misjoinder, the *Drake* court upheld the multiple convictions, reasoning that, when the offenses arise from different transactions, a defendant waives error by failing to object to the misjoinder prior to trial.⁴⁵

The *Siller* court agreed with the holding in *Drake* that joinder of non-property offenses violates the rule against misjoinder.⁴⁶ In *Siller*, however, the multiple convictions resulted from misjoined offenses arising from the same transaction as opposed to different transactions.⁴⁷ The court rejected the State's argument that following the abandonment of the carving doctrine in 1982, there was no longer any prohibition against obtaining multiple con-

43. *Drake*, 686 S.W.2d at 942-43. In an appendix to the opinion, Judge Clinton documented the history of article 21.24. *Id.* at 945-49. He concluded that the revision eliminated authority to charge more than one non-property offense in a single indictment. *Id.* at 943. Judge Clinton criticized the *Meeks* court for ignoring the legislative intent of the 1973 revision to eradicate the previous terms "offense" and "criminal transaction" and replace these terms with a limited definition of criminal episode. *Id.* at 942-43. Judge Clinton stated that legislation such as revised article 21.24 overrules prior contrary statutory law. *Id.* at 943. The legislature specifically rejected the permissive joinder of offenses suggested by the *Meeks* court when the State Bar Committee's broad definition of "criminal episode" was replaced with the revised Penal Code's narrow definition. *Id.* Compare STATE BAR COMMITTEE ON REVISION OF THE PENAL CODE, TEXAS PENAL CODE, A PROPOSED REVISION (FINAL DRAFT, 1980) 25 (proposed definition of criminal episode was conduct incident to single criminal objective regardless whether harm directed toward one or more persons) with TEX. PENAL CODE ANN. § 3.01 (1973)(amended 1987)(defines criminal episode as repeated commission of any single property offense).

44. *Drake*, 686 S.W.2d at 942.

45. *Drake v. State*, 686 S.W.2d 934, 944-45 (Tex. Crim. App. 1985). The court of appeals had determined that the appellant's convictions involved two distinct offenses against two different people. *Id.* at 937. The appellant had not objected to the misjoined indictment at trial, but instead raised the issue for the first time on appeal. The court of appeals ruled that the appellant had waived the error by not moving to quash the indictment at trial. *Id.* The court held he could not object to misjoinder of offenses arising from different transactions, or multiple convictions resulting from the misjoinder, for the first time on appeal. *Id.* at 945.

46. See *Ex parte Siller*, 686 S.W.2d 617, 619 (Tex. Crim. App. 1985)(multiple prosecutions allowed for repeated commission of property offenses only). The *Siller* court referred to its analysis in *Drake* of legislative history concerning joinder of offenses. *Id.*; see also *Drake v. State*, 686 S.W.2d 935, 939-44 (Tex. Crim. App. 1985)(analysis and interpretation of legislative history pertaining to permissible joinder of offenses).

47. See *Ex parte Siller*, 686 S.W.2d at 620 (only one conviction may be obtained from misjoined indictment when offenses part of same transaction). The *Siller* court found no authority to obtain multiple convictions for offenses arising from the same transaction and charged in a single indictment. *Id.* The court affirmed the conviction for aggravated rape and vacated the conviction for indecency with a child. *Id.*

victions for offenses arising from the same transaction.⁴⁸ Finding no authority specifically permitting multiple convictions, the *Siller* court ruled that when multiple convictions were obtained from a misjoined indictment for non-property offenses arising from the same transaction, the error was fundamental and could be raised for the first time on appeal.⁴⁹ When the court of criminal appeals granted the State's petition for discretionary review in *Fortune v. State*,⁵⁰ it did so to clarify the distinction concerning preservation of error for misjoinder of non-property offenses arising from the same and different transactions.⁵¹

48. *See id.* at 618-20 (State argued no prohibition against multiple convictions for offenses arising from same transaction after carving doctrine abandoned). The court rejected the State's argument, however, because it found no statute permitting multiple convictions for offenses arising from the same transaction. *Id.* at 620; *see also Ex parte McWilliams*, 634 S.W.2d 815, 822 (Tex. Crim. App.) (carving doctrine abandoned because encourages crime and lacks statutory or constitutional basis), *cert. denied*, 459 U.S. 1036 (1982). In *McWilliams*, the court reasoned that, under the carving doctrine, a defendant suffered no more if he kidnapped, raped, robbed, and murdered a victim, than if he committed only one of those offenses against a victim. *Id.* *See generally Carruthers & Torti, Texas and What Was the Doctrine of Carving*, 7 T. MARSHALL L. REV. 253, 256-61 (1982) (analysis of carving doctrine and abandonment in *Ex parte McWilliams*).

49. *Siller*, 686 S.W.2d at 620. The court rejected the State's argument that the legislative intent in adding sections 1(c) and 2(c) to article 37.07 of the CCP was to allow multiple convictions for non-property offenses joined in a single indictment. *Id.* at 619-20; *see also TEX. CODE CRIM. PROC. ANN.* art. 37.07, §§ 1(c), 2(c) (Vernon 1981) (separate verdicts and sentences returned when offenses consolidated for prosecution pursuant to chapter 3 of Penal Code). Section 1(c) was added in 1973 in conjunction with Penal Code revisions and reads:

If the charging instrument contains more than one count or if two or more offenses are consolidated for trial pursuant to Chapter 3 of the Penal Code, the jury shall be instructed to return a finding of guilty or not guilty in a separate verdict as to each count and offense submitted to them.

Id. § 1(c) (emphasis added). Section 2(c), also added in conjunction with the 1973 Penal Code revisions, mandates that sentences be assessed on each guilty count. *Id.* § 2(c); *see also TEX. PENAL CODE ANN.* § 3.03 (Vernon 1974) (multiple convictions obtained when prosecutions consolidated to chapter 3 of Penal Code must run concurrently). The court rejected the suggestion that section 1(c) be read to mandate separate verdicts (and separate sentences per section 2(c)) when the indictment charged multiple counts or when offenses were consolidated pursuant to Chapter 3 of the Penal Code. *See Siller*, 686 S.W.2d at 619-20. Although the court found no statute which prohibited multiple convictions for offenses, the court ruled it was:

enough that our appellate courts have uniformly held before and after article 433 was inserted in the revision of the code of criminal procedure in 1879 that multiple convictions may not be had on two or more counts in a single indictment alleging offenses arising out of the same transaction.

Siller, 686 S.W.2d at 620; *see also Drake*, 686 S.W.2d at 944 (courts lacks authority to convict and sentence for more than one offense per indictment).

50. 745 S.W.2d 364 (Tex. Crim. App. 1988).

51. *See id.* at 366. The court granted the State's petition for review of four issues: 1) whether appellant's two offenses were the "same transaction" per *Siller* and *Drake*; 2) at what

In *Fortune v. State*, the court reevaluated the *Meeks* holding that the 1973 version of article 21.24 of the CCP provided an additional, rather than the sole, means of joining offenses in an indictment.⁵² Judge Miller, writing for the court, reasoned that the *Meeks* court had ignored legislative intent to limit rather than to expand permissible joinder when the court interpreted article 21.24.⁵³ Although the *Fortune* court did not expressly overrule *Meeks*, the court held that a proper interpretation of article 21.24 of the

point, if ever, a defendant must object to misjoinder to preserve error; 3) whether *Siller* had been decided incorrectly, at least in context of instant case; and 4) whether the court's interpretation of article 37.07, section 1(c) of the CCP was correct. *Id.*; see also *Holcomb v. State*, 745 S.W.2d 903, 905 (Tex. Crim. App. 1988)(decided same day as *Fortune*). The court granted review to determine whether the court of appeals erred in upholding two convictions for offenses charged in one indictment. *Id.* The appellant was charged in a single indictment with aggravated sexual assault and aggravated robbery. *Id.* at 904. He was convicted of both offenses and received concurrent 35-year sentences. *Id.* In *Holcomb*, the appellant had not demanded an election, nor did he object at trial to the multiple convictions or sentences. *Holcomb v. State*, 696 S.W.2d 190, 193 (Tex. App.—Houston [1st Dist.] 1985), *rev'd*, 745 S.W.2d 903 (Tex. Crim. App. 1988). The court of appeals affirmed the convictions, reasoning that because the offenses resulted from different transactions, appellant waived error by not objecting at trial to the misjoinder and multiple convictions. *Id.* The court of criminal appeals, granting appellant's petition for discretionary review, affirmed the conviction for aggravated sexual assault and dismissed the conviction for aggravated robbery. *Holcomb*, 745 S.W.2d at 905, 908. The court held that misjoinder arising from different transactions should be treated the same as that arising from the same transaction, and the error was fundamental. *Id.* Therefore, the error could be raised for the first time on appeal. *Id.* at 908.

52. See *Fortune v. State*, 745 S.W.2d 364, 367-68 (Tex. Crim. App. 1988)(questioned reasoning in *Meeks* and interpreted article 21.24 to provide sole method of joining offenses). *But see Meeks v. State*, 653 S.W.2d 6, 11 (Tex. Crim. App. 1983)(revised article 21.24 allows joinder of property offenses arising from different transactions as additional means to join offenses).

53. *Fortune*, 745 S.W.2d at 367-68. Judge Miller, who also wrote the *Meeks* opinion, agreed with the reasoning in *Drake* that the legislative purpose for the 1973 revision to article 21.24 of the CCP was to ensure recognition that the interpretation of offense in *Vannerson* was incorrect. *Id.* at 367; see also *Vannerson v. State*, 408 S.W.2d 228, 229 (Tex. Crim. App. 1966, no pet.)(article 21.24 permits joinder of more than one offense in single indictment). Following the reasoning in *Drake*, Judge Miller opined that the legislature rejected the proposed definition of criminal episode in favor of the Penal Code's narrow definition to move away from the transaction concept previously adhered to by courts. *Fortune*, 745 S.W.2d at 367. Compare STATE BAR COMMITTEE ON REVISION OF THE PENAL CODE, TEXAS PENAL CODE, A PROPOSED REVISION (FINAL DRAFT, 1970) 25 (criminal episode broadly defined as conduct incident to criminal objective) with TEX. PENAL CODE ANN. § 3.01 (Vernon 1974)(amended 1987)(criminal episode narrowly defined as repeated commission of property offenses). Section 3.01, as proposed, defined criminal episode as: "all conduct, including criminal solicitation and criminal conspiracy, incident to the attempt or accomplishment of a single criminal objective, even though the harm is directed toward or inflicted upon more than one person." STATE BAR COMMITTEE ON REVISION OF THE PENAL CODE, TEXAS PENAL CODE, A PROPOSED REVISION (FINAL DRAFT, 1970) 25. The adopted definition of "criminal episode" was "the repeated commission of any one offense defined in Title 7 of this code (Offenses Against Property)." TEX. PENAL CODE ANN. § 3.01 (Vernon 1974)(amended 1987). *But see* TEX. PENAL

CCP and chapter 3 of the Penal Code limited joinder of offenses in a single indictment to the repeated commission of any one property offense.⁵⁴

The court also addressed the distinction created in *Drake* and *Siller* as to when a defendant must object to joinder of multiple non-property offenses in a single indictment to preserve error.⁵⁵ Because article 21.24 does not distinguish between offenses arising from the same or different transactions, the court ruled joinder of non-property offenses is prohibited, regardless of the number of transactions involved.⁵⁶ Recognizing the long adhered to common-law doctrine of one conviction per indictment, the court held that any additional conviction resulting from the same indictment is void.⁵⁷ As a

CODE ANN. § 3.01 (Vernon Supp. 1988)(permits joinder of offenses committed pursuant to same transaction). In 1987, the legislature amended this section to read as follows:

In this chapter, "criminal episode" means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:

- (1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or
- (2) the offenses are the repeated commission of the same or similar offenses.

Id.

54. See *Fortune*, 745 S.W.2d at 367 (joinder permissible only when offenses are repeated commission of property offenses). After interpreting article 21.24 to limit joinder to the repeated commission of property offenses, Judge Miller enumerated when joinder is *not* allowed in a single indictment: 1) when more than one non-property offense is alleged; 2) when statutorily different property offenses are alleged; or 3) when one property and one non-property offense are alleged. *Id.* He concluded his interpretation by noting that multiple allegations of the same offense, in different paragraphs, are allowed in a single indictment. *Id.* Compare *Fortune*, 745 S.W.2d at 370 (fundamental error to join non-property offenses in single indictment) with *MEEKS*, 653 S.W.2d at 11 (joinder of non-property offenses allowed in single indictment).

55. See *Fortune v. State*, 745 S.W.2d 364, 369-70 (Tex. Crim. App. 1988)(addresses distinction between *Drake* and *Siller*). Compare *Drake v. State*, 686 S.W.2d 935, 945 (Tex. Crim. App. 1972, no pet.)(objection to multiple convictions based on single indictment must be raised at trial or error is waived when offenses arise from different transactions) with *Ex parte Siller*, 686 S.W.2d 617, 622 (Tex. Crim. App. 1985)(multiple convictions for offenses arising from single transaction and charged in single indictment require reversal even if error not raised at trial).

56. See *Fortune*, 745 S.W.2d at 368 (article 21.24 does not distinguish between offenses arising from same or different transactions). The court concluded that because there was no statutory or judicial reason to distinguish between misjoinder of offenses arising from same transactions and misjoinder of offenses arising from different transactions, the consequences should be the same for all misjoined indictments. *Id.*

57. See *id.* at 369-70 (because State has no authority to obtain multiple convictions from single indictment, such convictions void); see also *Siller*, 686 S.W.2d at 620 (no authority for multiple convictions). The *Siller* court acknowledged that no statute prevents multiple convictions for offenses charged in a single indictment. *Id.* The court vacated the second conviction, however, on common-law precedent that multiple convictions could not be obtained for offenses arising from the same transaction and charged in a single indictment. *Id.* But see TEX. PENAL CODE ANN. § 3.03 (Vernon 1974)(allows multiple convictions for offenses joined pur-

result, the court concluded that obtaining multiple convictions for non-property offenses joined in a single indictment is fundamental error and may be raised for the first time on appeal, regardless of the number of transactions involved.⁵⁸

Judge Campbell, joined by Judge McCormick, dissented from the majority opinion, questioning the authority on which the court based its holding that the error was fundamental.⁵⁹ Judge Campbell opined that the legislature clearly expressed its intent to eliminate the concept of fundamental error in charging instruments through its 1985 passage of article 1.14(a) of the CCP, which no longer recognizes fundamental error.⁶⁰ Judge Campbell predicted that defendants will never object to misjoinder until they appeal, thus ensuring an automatic reversal of multiple convictions.⁶¹

The *Fortune* court's holding that joinder of non-property offenses in a single indictment is misjoinder contradicts over one hundred years of precedent

suant to Chapter 3 of Penal Code). When the Penal Code was revised in 1973, chapter 3 included a section allowing "Sentences for Offenses Arising Out of Same Criminal Episode." *Id.* The section reads: "When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, sentence for each offense for which he has been found guilty shall be pronounced. Such sentences shall run concurrently." *Id.*

58. *Fortune*, 745 S.W.2d at 370. When based on a single indictment, multiple convictions violated the common-law rule of one conviction per indictment regardless of the number of transactions. *Id.* The court overruled that portion of *Drake* which held that joinder of offenses arising from different transactions must be objected to at trial or error would be waived. *Id.* When an indictment is misjoined, a defendant has three options: 1) object to the indictment; 2) force the State to elect which offense it will proceed with at trial; or 3) make no objection or motion to quash and raise for first time on appeal. *Id.* at 368.

59. *Fortune v. State*, 745 S.W.2d 364, 371 (Tex. Crim. App. 1988)(Campbell, J., dissenting).

60. *See id.* (legislature eliminated concept of fundamental error with enactment of revised article 1.14 of CCP); TEX. CODE CRIM. PROC. ANN. art. 1.14 (Vernon Supp. 1988). Section (a) allows a criminal defendant to waive any right other than a jury trial in a capital felony. *Id.* art. 1.14(a). Section (b) (added in 1985) provides that if a defendant does not object to any error, irregularity, or defect of form or substance in the indictment before trial, the right to object is waived and cannot be raised on appeal or at other postconviction proceedings. *Id.* art. 1.14(b). Judge Campbell acknowledged that *Fortune* was not affected by the revision because the offenses had occurred prior to December 1, 1985, the effective date for article 1.14(b), but contended that the statute clearly indicated legislative intent to move away from the concept of fundamental error. *Fortune*, 745 S.W.2d at 371. *See generally* Dix, *Texas Charging Instrument Law: The 1985 Revisions and the Continuing Need for Reform*, 38 BAYLOR L. REV. 1, 34-36 (1986)(intent of revision is to eliminate fundamental defects and require pre-trial objections to all defects in indictments).

61. *Fortune*, 745 S.W.2d at 372. Judge Campbell reasoned that any intelligent lawyer will not object to the indictment, nor will the lawyer force an election. *Id.* The result, he predicted, will be that, in reality, misjoinder under article 21.24 of the CCP will exist only on appeal. *Id.*

upholding the validity of such indictments.⁶² The court misused legislative intent to support its holding by failing to address recent code revisions relevant to the issues in *Fortune*.⁶³ The court's interpretation of legislative intent for revising article 21.24 of the CCP is incomplete because it ignored a subsequent amendment to the chapter 3 Penal Code definition of criminal episode.⁶⁴ Following *Drake and Siller*, in 1987, the legislature broadened the Penal Code definition of criminal episode to include all conduct incident to the accomplishment of a criminal objective.⁶⁵ The revised definition of criminal episode closely resembles the definition proposed by the State Bar Committee in 1970, indicating the legislature's intent to allow joinder of non-property offenses.⁶⁶ As a result, the aspect of the *Fortune* holding proscribing joinder of non-property offenses will have no effect on indictments

62. See, e.g., *Meeks v. State*, 653 S.W.2d 6, 11 (Tex. Crim. App. 1983)(conviction based on indictment charging theft, credit card abuse, and breaking and entering car upheld); *Jackson v. State*, 131 Tex. Crim. 287, 289, 98 S.W.2d 193, 194 (1936)(no error in charging desertion and failure to support child and desertion of wife in single indictment); *Weathersby v. State*, 1 Tex. Ct. App. 643, 643-45 (1877)(offenses of theft and illegal branding properly charged in same indictment).

63. See TEX. CODE CRIM. PROC. ANN. art. 1.14 (Vernon Supp. 1988)(eliminated concept of fundamental error as to defects in indictments). Article 1.14, as amended in 1985, requires that all objections to indictment errors, whether for form or substance, be made prior to trial. *Id.* The article became effective on December 1, 1985. Act of May 25, 1985, ch. 577, § 3, 1985 Tex. Gen. Laws 2196; see also TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1988)(defines criminal episode). Chapter 3 of the Penal Code, which deals with multiple prosecutions, was revised in 1987 to include a broader definition of criminal episode that includes all conduct pursuant to a single criminal objective. *Id.* The section applies to all indictments returned for offenses which occur after September 1, 1987. Act of May 22, 1987, ch. 387, § 4, 1987 Tex. Gen. Laws 1900 (currently codified at TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1988)).

64. See *Fortune v. State*, 754 S.W.2d 364, 367 (Tex. Crim. App. 1988)(holding based on interpretation that article 21.24 permits joinder only in criminal episodes as defined in chapter 3 of Penal Code). The *Fortune* court, however, did not acknowledge the fact the legislature broadened the definition of criminal episode in section 3.01 of the Penal Code in 1987. See *id.* Compare TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1988)(criminal episode means all conduct pursuant to single criminal objective) with TEX. PENAL CODE ANN. § 3.01 (Vernon 1974)(amended 1987)(criminal episode means repeated commission of property offense).

65. Compare TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1988)(criminal episode defined as all conduct pursuant to single criminal objective) with TEX. PENAL CODE ANN. § 3.01 (Vernon 1974)(amended 1987)(criminal episode defined as repeated commission of property offense).

66. Compare TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1988)(defines criminal episode as all offenses committed pursuant to same criminal transaction) with STATE BAR COMMITTEE ON REVISION OF THE PENAL CODE, TEXAS PENAL CODE, A PROPOSED REVISION (FINAL DRAFT, 1970) 25 (defines criminal episode as all conduct pursuant to same criminal transaction). Section 3.01, in its entirety, reads as follows:

Section 3.01. Definition

In this chapter, "criminal episode" means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:

returned for non-property offenses committed after September 1, 1987, the date the broadened definition of criminal episode which permits joinder of non-property offenses became effective.⁶⁷

The *Fortune* court's authority for ruling that multiple convictions may be obtained only pursuant to section 3.03 of the Penal Code is questionable.⁶⁸ The court bases its decision on *Siller*, which reasoned that the legislature's failure to prohibit multiple convictions was not sufficient justification to permit multiple convictions.⁶⁹ The *Siller* reasoning, however, appears to be premised on nothing more than the now abandoned common-law doctrine of carving.⁷⁰

(1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or

(2) the offenses are the repeated commission of the same or similar offenses.

TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1988). The proposed (but rejected) definition of criminal episode for inclusion in the 1973 revision of the Penal Code read as follows: "In this chapter, unless the context requires a different definition, 'criminal episode' means all conduct, including criminal solicitation and criminal conspiracy, incident to the attempt or accomplishment of a single criminal objective, even though the harm is directed toward or inflicted upon more than one person." STATE BAR COMMITTEE ON REVISION OF THE PENAL CODE, TEXAS PENAL CODE, A PROPOSED REVISION (FINAL DRAFT, 1970) 25.

67. See Act of May 22, 1987, ch. 387, § 3, 1987 Tex. Gen. Laws 1900 (currently codified at TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1988))(effective date September 1, 1987). The act specifically provides that the revision applies only to offenses committed after the effective date. *Id.*

68. See *Fortune v. State*, 745 S.W.2d 364, 369 (Tex. Crim. App. 1988)(multiple convictions can be obtained only for repeated commission of property offenses).

69. *Id.* at 369; see also *Ex parte Siller*, 686 S.W.2d 617, 620 (Tex. Crim. App. 1985)(rejected State's argument that multiple convictions should be permitted because they were not specifically prohibited). The *Siller* court acknowledged that the State was correct in its argument that there was no statutory prohibition for multiple convictions arising from the same transaction. *Id.* The court ruled, however, that the lack of statutory prohibition was not a sufficient reason to allow multiple convictions. *Id.*

70. *Id.* The court adhered to the one conviction per transaction rule, reasoning:

It is enough that our appellate courts have uniformly held before and after article 433 was inserted in the revision of the code of criminal procedure in 1897 that multiple convictions may not be had on two or more counts in a single indictment alleging offenses arising out of the same transaction.

Id. In the cases where the court of criminal appeals held that only one conviction could be obtained per indictment, the decision was based on the common-law doctrine of carving which allowed only one conviction per transaction. See, e.g., *Crawford v. State*, 31 Tex. Crim. 51, 56, 19 S.W. 766, 767 (1892)(reversed one of two convictions arising from single transaction); *Wright v. State*, 17 Tex. Ct. App. 152, 159 (1884)(only one conviction could be carved from one transaction); *Quitow v. State*, 1 Tex. Ct. App. 47, 53-54 (1876)(prosecutor could carve as many offenses from single transaction as necessary, but only one conviction allowed). But see *Ex parte McWilliams*, 634 S.W.2d 815, 822 (Tex. Crim. App.)(carving doctrine abandoned because no statutory or constitutional basis), *cert. denied*, 459 U.S. 1036 (1982). See generally Carruthers & Torti, *Texas and What Was the Doctrine of Carving*, 7 T. MARSHALL L. REV. 253, 253-61 (1982)(analysis of carving doctrine and abandonment in *Ex parte McWilliams*);

Section 3.03 of the Penal Code allows the State to obtain multiple convictions for offenses arising from the same criminal episode.⁷¹ Because the broadened definition of criminal episode now permits joinder of non-property offenses, section 3.03 of the Penal Code will permit multiple convictions for non-property offenses arising from the same criminal episode and joined in a single indictment.⁷² The portion of *Fortune* proscribing multiple convictions, therefore, will have no effect on indictments returned for non-property offenses occurring after September 1, 1987 which are joined in a single indictment pursuant to chapter 3 of the Penal Code.⁷³

As Judge Campbell pointed out in his dissent, the *Fortune* court ignored the intent of the legislature as evidenced by the recent revision of article 1.14 of the CCP pertaining to errors in indictments.⁷⁴ Article 1.14 of the CCP, as revised in 1985, was not applicable to *Fortune* because the offenses occurred before the effective date of the revision.⁷⁵ The article as revised, however, clearly indicates the legislature's intent to eliminate the distinction between fundamental and non-fundamental error.⁷⁶ The statutory requirement that

Comment, *Joinder of Offenses Under Article 21.24 of the Texas Code of Criminal Procedure: A Return to the Common Law?* 17 TEX. TECH L. REV. 949, 956-57 (1986)(discussion of abandonment of carving doctrine).

71. TEX. PENAL CODE ANN. § 3.03 (Vernon 1974)(allows multiple convictions for offenses arising from same criminal episode). "When the accused is found guilty of more than one offense arising out of the same criminal action, sentence for each offense for which he has been found guilty shall be pronounced. Such sentences shall run concurrently." *Id.*

72. See TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1988)(criminal episode means all conduct pursuant to same criminal objective); TEX. PENAL CODE ANN. § 3.03 (Vernon 1974)(permits multiple convictions for offenses arising from same criminal episode).

73. See *Fortune v. State*, 745 S.W.2d 364, 370 (Tex. Crim. App. 1988)(proscribes multiple convictions for non-property offenses charged in single indictment); see also TEX. PENAL CODE ANN. § 3.03 (Vernon 1974)(allows multiple convictions for offenses arising from same criminal episode); TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1988)(criminal episode means all conduct pursuant to criminal objective). Section 3.01 is effective for all indictments returned on offenses occurring after September 1, 1987. Act of May 22, 1987, ch. 387, § 3, 1987 Tex. Gen. Laws 1900.

74. See *Fortune v. State*, 745 S.W.2d 364, 371 (Tex. Crim. App. 1988)(Campbell, J., dissenting)(revision manifests legislative intent to disfavor concept of fundamental error); see also TEX. CODE CRIM. PROC. ANN. art. 1.14 (Vernon Supp. 1988)(errors not raised pre-trial waived).

75. See *Fortune*, 745 S.W.2d at 371 (Judge Campbell acknowledged *Fortune* offenses occurred before effective date of revised article 1.14); see also Act of May 25, 1985, ch. 577, § 3, 1985 Tex. Gen. Laws 2196-97 (revision to article 1.14 of CCP effective December 1, 1985).

76. See TEX. CODE CRIM. PROC. ANN. art. 1.14 (Vernon Supp. 1988)(requires all defects in indictments be objected to pre-trial or defendant waives error). Section (b), added to article 1.14 in 1985, states that all error of form or substance must be made prior to trial or the right to object is waived. *Id.* art. 1.14(b). See generally Dix, *Texas Charging Instrument Law: The 1985 Revisions and the Continuing Need for Reform*, 38 BAYLOR L. REV. 1, 34-43 (1986)(purpose of reform was to eliminate fundamental defects and require all indictment defects be raised before trial).

objections to all defects be raised before trial, or the error is waived, indicates that multiple convictions resulting from misjoined offenses would be upheld if the misjoined indictment is not objected to before trial regardless of the court's mandate in *Fortune*.⁷⁷

Fortune may cause additional confusion because there are now conflicting court of criminal appeals decisions concerning joinder.⁷⁸ Although the majority in *Fortune* questioned the reasoning of the *Meeks* court, which held that article 21.24 of the CCP allowed joinder of non-property as well as property offenses, *Meeks* was not expressly overruled.⁷⁹

While the court may have intended to create a bright-line rule outlining permissible joinder of offenses, the *Fortune* decision will most likely result in confusion for the lower courts and prosecutors.⁸⁰ To determine whether an indictment is affected by *Fortune*, the State and the courts will have to closely scrutinize the date or dates on which the non-property offenses were allegedly committed, because the *Fortune* ruling will affect only those indictments returned for non-property offenses occurring prior to September 1, 1987.⁸¹ Non-property offenses occurring after September 1, 1987 may be properly joined in a single indictment and the State may obtain multiple

77. See TEX. CODE CRIM. PROC. ANN. art. 1.14 (Vernon Supp. 1988)(addresses rights defendant may waive and requirement to preserve error). Section (a) allows a criminal defendant to waive any right other than a jury trial in capital felony. *Id.* art. 1.14(a). Section (b) (added in 1985) provides that if a defendant does not object to any error, irregularity or defect of form or substance in the indictment before trial, the right to object is waived, and cannot be raised on appeal or other postconviction proceeding. *Id.* art. 1.14(b).

78. Compare *Fortune v. State*, 745 S.W.2d 364, 367 (Tex. Crim. App. 1988)(article 21.24 only allows joinder of repeated commission of property offenses) with *Meeks v. State*, 653 S.W.2d 6, 11 (Tex. Crim. App. 1983)(article 21.24 permits joinder of non-property offenses arising from same transaction as well as joinder of repeated commission of property offenses).

79. See *Fortune*, 745 S.W.2d at 367-68 (criticized *Meeks* court interpretation of article 21.24 as permitting joinder of non-property offenses). Although the *Meeks* decision was criticized for not considering legislative intent, the *Fortune* court did not overrule the contradictory interpretation. See *id.*; see also *Meeks*, 653 S.W.2d at 11 (article 21.24 permits joinder of non-property offenses as well as property offenses).

80. Compare *Fortune v. State*, 745 S.W.2d 364, 370 (Tex. Crim. App. 1988)(fundamental error to join non-property offenses in single indictment) with *Meeks v. State*, 653 S.W.2d 6, 11 (Tex. Crim. App. 1983)(joinder of non-property offenses allowed in single indictment). See generally TEX. CODE CRIM. PROC. ANN. art. 21.24 (Vernon Supp. 1988)(allows joinder of offenses from same criminal episode as defined in Penal Code); TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1988)(defines criminal episode as offenses committed pursuant to transaction, plan or scheme).

81. Compare Act of May 22, 1987, ch. 387, §§ 1-3, 1987 Tex. Gen. Laws 1900 (currently codified at TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1988)(criminal episode defined as conduct incident to accomplishment of criminal objective) with TEX. PENAL CODE ANN. § 3.01 (Vernon 1974)(amended 1987)(criminal episode means repeated commission of property offenses). The 1987 revision became effective September 1, 1987, and, therefore, applies only to offenses occurring after the effective date. Act of May 22, 1987, ch. 387, §§ 1-3, 1987

convictions from the joined indictment.⁸²

If the indictment for non-property offenses which occurred prior to September 1, 1987 has not yet been returned, non-property offenses should be charged in separate indictments or be subject to an objection for misjoinder (and an automatic reversal on appeal if the misjoined indictment results in multiple convictions).⁸³ If the indictment has been returned for non-property offenses committed before September 1, 1987, but the case has not been tried, the State could choose to re-indict the defendant and correct the misjoinder violation by charging each non-property offense in a separate indictment.⁸⁴ A riskier option is to proceed with the indictment containing misjoined non-property offenses and seek conviction on only one offense.⁸⁵ The State could also argue that the *Meeks* court, not the *Fortune* court, was correct in its interpretation that article 21.24 allowed joinder of property or non-property offenses, because *Meeks* was never expressly overruled.⁸⁶

If a misjoined indictment, returned for non-property offenses which occurred prior to September 1, 1987, has already been tried and resulted in just one conviction, it appears from *Fortune* that the misjoinder error will be considered harmless.⁸⁷ If, however, the misjoined indictment resulted in multiple convictions, the defendant will be entitled to automatic reversal on

Tex. Gen. Laws 1900. Offenses which occurred prior to the effective date are governed by the 1973 version of section 3.01, which remains in effect for that purpose. *Id.*

82. See TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1988)(criminal episode means all conduct pursuant to same criminal objective); TEX. PENAL CODE ANN. § 3.03 (Vernon 1974)(permits multiple convictions for offenses arising from same criminal episode). Section 3.01 became effective September 1, 1987, and is, therefore, applicable to offenses occurring after the effective date. Act of May 22, 1987, ch. 387, §§ 1-3, 1987 Tex. Gen. Laws 1900.

83. See *Fortune v. State*, 745 S.W.2d 364, 370 (Tex. Crim. App. 1988)(indictment misjoined if more than one non-property offense charged and requires automatic reversal of multiple convictions).

84. *Id.* at 368. The *Fortune* court noted that the State may charge multiple non-property offenses in separate indictments (one offense per indictment) and consolidate the offenses in one trial with the defendant's consent. *Id.*

85. See *id.* (discussing possible consequences if misjoinder not corrected before trial). Judge Miller, writing for the *Fortune* court, noted that a defendant had three options when the State violated the misjoinder rule: 1) object that the indictment is misjoined (which should result in the court either quashing the indictment or forcing the State to elect a single count); 2) file motion requesting State to elect single count to prosecute (which should be granted by the court); or, 3) do nothing during trial and raise the misjoinder issue for the first time on appeal. *Id.* The court of criminal appeals has upheld single convictions obtained from misjoined indictments. See *Ex parte Siller*, 686 S.W.2d 617, 620 (Tex. Crim. App. 1985)(upheld first and vacated second conviction based on single indictment).

86. Compare *Fortune*, 745 S.W.2d at 367 (21.24 allows joinder of property offenses only) with *Meeks v. State*, 653 S.W.2d 6, 11 (Tex. Crim. App. 1983, no pet.)(21.24 allows joinder of non-property offenses as well as property offenses).

87. See *Fortune v. State*, 745 S.W.2d 364, 368 (Tex. Crim. App. 1988)(court ruled misjoinder harmless if results in only one conviction); see also *Ex parte Siller*, 686 S.W.2d 617, 620

all but one conviction, even if no objection was made to the misjoinder at trial, because the error will be fundamental.⁸⁸

In *Fortune*, the court of criminal appeals contradicts court decisions from the past one hundred years allowing joinder of non-property offenses. The decision to ignore precedent is based on an incomplete interpretation of legislative intent which expressly allows joinder of non-property offenses occurring after September 1, 1987. Furthermore, the court's continued refusal to permit the State to obtain multiple convictions because of the long recognized common-law rule allowing only one conviction per offense is nothing more than a retreat into the carving doctrine which was ostensibly abandoned in 1982. The decision is even less clear because the court neglected to expressly overrule its contrary decision in *Meeks*. Although its impact may be relatively short-lived because of recent statutory revisions, the aftermath of *Fortune* will be confusion. For the next several years, court rulings concerning joinder of non-property offenses will vary drastically, based simply on whether the offenses occurred before or after September 1, 1987.

Virginia Coyle

(Tex. Crim. App. 1985)(upheld first and vacated second conviction based on single indictment).

88. *Fortune*, 745 S.W.2d at 370 (multiple convictions from single indictment void and error may be raised first time on appeal).