

The offense of “evading arrest” does not criminalize the evasion of a police officer, it criminalizes obstruction of a lawful governmental operation. [In the Matter of D.X.S.](13-5-9)

On October 3, 2013, the Corpus Christi-Edinburg Court of Appeals concluded that appellant’s continuous act of fleeing, even though multiple officers were in pursuit, constituted a single charge of “evading arrest.”

¶ 13-5-9. **In the Matter of D.X.S.**, MEMORANDUM, No. 13-12-00446-CV, 2013 WL 5522722 (Tex.App.—Corpus Christi-Edinburg, 10/3/13).

Facts: Appellant’s mother called 911 requesting police assistance, stating “[M]y 14-year-old son which [sic] is bipolar is out of control.” Two peace officers responded, Officer Brian Hamlin and Officer Barry Hope. Officers Hamlin and Hope repeatedly attempted to convince appellant to “tell his side of the story” and to move into the living room, away from the many potential weapons in the kitchen. As the struggle intensified, appellant began to resist and broke free of the officers, leading them on a lengthy pursuit that culminated with the necessity of five officers working together to hand cuff appellant.

Appellant was charged with one count of assault against a public servant, a third-degree felony, two counts of resisting arrest, a class A misdemeanor, and two counts of evading arrest, a class A misdemeanor. See TEX. PENAL CODE ANN. §§ 22.01(b)(1), 38.03(a), 38.04(b) (West 2011). Appellant requested a jury trial and the case was submitted to the jury on five special issues. Specifically, for each count, the jury was asked whether it found appellant guilty of delinquent conduct because the evidence showed beyond a reasonable doubt that he committed the alleged offense. After the jury found appellant delinquent on each count, the trial court placed him on probation.

By his second issue, appellant contends that he could not be adjudicated for two acts of evading arrest or detention. Specifically, by special issue two, the jury was asked whether appellant evaded arrest from Officer Hope and by special issue three, the jury was asked whether appellant evaded arrest from Officer Hamlin. The record is clear that though both of these peace officers pursued appellant, the incident involved a single pursuit and arrest.

Adjudications of delinquency in juvenile cases are based on the criminal standard of proof. See TEX. FAM.CODE ANN. § 54.03(f) (West Supp.2012). In evaluating appellant’s argument, we apply criminal law. See *In re R.S.C.*, 940 S.W.2d 750, 751–52 (Tex.App.-El Paso 1997, no pet.) (stating delinquency proceedings are quasi-criminal in nature and that juveniles are entitled to many of the constitutional protections that are afforded to adult criminal defendants).

Held: Affirmed as Modified

Memorandum Opinion: The Fifth Amendment provides that “[n]o person shall be ... subject for the same offense to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V. “The United States Supreme Court has concluded that the Fifth Amendment offers three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense .” Ex parte Cavazos, 203 S.W.3d 333, 336 (Tex.Crim.App.2006) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Lopez v. State*, 108 S.W.3d 293, 295–96 (Tex.Crim.App.2003)). At issue here is whether appellant received multiple punishments for the same offense.

Generally, a second prosecution is permitted when “each offense requires proof of an element that the other offense does not.” *Watson v. State*, 900 S.W.2d 60, 62 (Tex.Crim.App.1995) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). The Blockburger test is not applicable when, as here, we are addressing multiple violations of a single statutory provision. *Vineyard v. State*, 958 S.W.2d 834, 837 (Tex.Crim.App.1998) (citing *Ex Parte Rathmell*, 717 S.W.2d 33, 35 (Tex.Crim.App.1986)).

Under these circumstances, we apply a different analysis. When a defendant’s conduct allegedly violates the same statute multiple times, we must determine whether the conduct constitutes more than one offense under the statute. See *Ex Parte Cavazos*, 203 S.W.3d at 336. This determination is necessary because, although our state courts are bound by United States Supreme Court decisions interpreting the scope of double jeopardy, the determination of what constitutes an offense is largely a matter of state law. *Iglehart v. State*, 837 S.W.2d 122, 127 (Tex.Crim.App.1992) (en banc), disapproved on other grounds, *Bailey v. State*, 87 S.W.3d 122, 128 (Tex.Crim.App.2002). If we determine that a defendant’s conduct comprises but a single offense, “our inquiry is ended, as a successive prosecution for the same offense after [defendant’s] earlier conviction would be a prima facie violation of the double jeopardy clause.” *Id.*

Whether a defendant’s conduct constitutes one or more offenses under a statute depends on the legislature’s intent and not on the principle of double jeopardy. See *Ex parte Hawkins*, 6 S.W.3d 554, 556 (Tex.Crim.App.1999) (en banc); *Iglehart*, 837 S.W.2d at 128. The legislature “defines whether offenses are the same ... by prescribing the ‘allowable unit of prosecution,’ which is a ‘distinguishable discrete act that is a separate violation of the statute.’” *Ex Parte Hawkins*, 6 S.W.3d at 556 (quoting *Sanabria v. United States*, 437 U.S. 54, 69–70 (1978)). When the statute is silent on the allowable unit of prosecution, we look to the gravamen of the offense. *Jones v. State*, 323 S.W.3d 885, 889 (Tex.Crim.App.2010).

The offense of “evading arrest” criminalizes obstruction of a lawful governmental operation. See TEX. PENAL CODE ANN. § 38.04. The gravamen of “evading arrest” is the evasion of an arrest, as opposed to evasion of a police officer. *Rodriguez v. State*, 799 S.W.2d 301, 302–03 (Tex.Crim.App.1990) (en banc); see also *Alejos v. State*, 555 S.W.2d 444, 449 (Tex.Crim.App.1977). Appellant fled his home, and officers pursued him until his ultimate

capture. We conclude that appellant's continuous act of fleeing constitutes a single charge of "evading arrest" even though multiple officers were in pursuit of appellant. See *Hobbs v. State*, 175 S.W.3d 777, 780–81 (Tex.Crim.App.2005).

The question remaining is which counts of conviction should be deleted and which retained. "The Supreme Court has directed that when a defendant is convicted in a single criminal action of two offenses that are the 'same' for double jeopardy purposes, the remedy is to vacate one of the convictions." *Landers v. State*, 957 S.W.2d 558, 559 (Tex.Crim.App.1997), overruled on other grounds by *Ex parte Cavazos*, 203 S.W.3d at 338 (citing *Ball v. United States*, 470 U.S. 856, 864–65 (1985)). In making that determination, we retain the conviction for the "most serious" offense and set aside the other conviction. *Ex parte Cavazos*, 203 S.W.3d at 337; see also *In the Matter of A.W.B.*, No. 07–08–0345–CV, 2010 WL 364250, at *2 (Tex.App.-Amarillo Feb. 2, 2010, no pet.). "[T]he 'most serious' offense is the offense of conviction for which the greatest sentence was assessed." *Ex parte Cavazos*, 203 S.W.3d at 338. When the offenses and punishments are identical, we may uphold the conviction for the first offense listed in the indictment and vacate the conviction for the second offense alleged. *Lopez v. State*, 80 S.W.3d 624, 629 (Tex.App.-Fort Worth 2002), *aff'd* on other grounds, 108 S.W.3d 293 (Tex.Crim.App.2003). Under *Lopez*, we may do so without performing a harm analysis.

Because the two offenses and punishments in this instance are identical, we will retain special issue number two, but vacate special issue number three. See *id.* We sustain appellant's second issue.

Conclusion: We vacate special issue three on double-jeopardy grounds. As modified, we affirm the trial court's delinquency order placing appellant on probation.