NO. 505452

IN THE

COUNTY COURT AT LAW NUMBER ONE

OF

TRAVIS COUNTY, TEXAS

STEVEN LEE DRAKE, APPELLANT

THE STATE OF TEXAS, APPELLEE

On Appeal From the Municipal Court, City of Austin

Travis County, Texas

Cause Number 3425508

Attorney for Appellee
Jeff Moore
Assistant City Attorney
Municipal Court
Austin, Texas
Attorney for the State
Bar. No. 14350250

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES: PAGE(S)

MUNICIPAL CODE:

RULES:

STATUTES:

NO. 505452

IN THE

COUNTY COURT AT LAW NUMBER ONE

OF

TRAVIS COUNTY, TEXAS

STEVEN LEE DRAKE, APPELLANT

THE STATE OF TEXAS, APPELLEE

On Appeal From the Municipal Court, City of Austin

Travis County, Texas

Cause Number 3425508

BRIEF FOR APPELLEE

TO THE HONORABLE JUDGE J. DAVID PHILLIPS:

COMES NOW Jeff Moore, Assistant City Attorney, representing the State in the aforementioned and styled case, respectfully submits the following brief :

SUMMARY OF THE ARGUMENT

POINT OF ERROR NUMBER ONE: This point of error was not presented in Appellant's Motion for New Trial. This point of error is not preserved for review, because it is multifarious, and because it was not presented in Appellant's Motion for New Trial. Additionally, the United States Supreme Court has addressed the constitutionality of prohibiting signs in the public right of way. In *Members of City Council v. Taxpayers for Vincent*, the United States Supreme Court, upheld Los Angeles' ordinance which prohibited signs in the public right of way.

POINT OF ERROR NUMBER TWO: This point of error was presented in Appellant's Brief and Motion for New Trial. Nonetheless, it should be overruled, because when Appellant finally requested a jury shuffle, the State had already commenced its voir dire examination. Thus, the request was untimely. In addition, immediately prior to allowing the State to begin its voir dire examination, the Judge inquired whether there were any motions from the State or Appellant. Both the State and Appellant indicated they had no motions. Alternatively, the State argues Appellant waived the jury shuffle, at this point.

POINT OF ERROR NUMBER THREE: In Appellant's Motion for New Trial, Appellant contended the opening paragraph and application paragraph were misleading. In Appellant's Brief, Point of Error Number Three only addresses the application paragraph.

> **Opening Paragraph**: The State contends the opening paragraph has not been preserved for review, for two reasons. In Appellant's Motion for New Trial, he stated the opening paragraph was "misleading." However, he did not indicate how it was misleading. The Government Code requires that the "basis of the errors [must be] set forth in the defendant's motion for new trial." Secondly, when appellant does not brief a ground of error it will not be reviewed on appeal.
>
> **Application Paragraph**: The State contends the application paragraph has not been preserved for review, for one reason. In Appellant's Motion for New Trial, he stated the application paragraph was "misleading." However, he did not indicate how it was misleading. The Government Code requires that the "basis of the errors [must be] set forth in the defendant's motion for new trial." If Appellant has preserved review, it should nonetheless be overruled, because the charge submitted to the jury was proper. It provided all relevant sections and definitions. But, more importantly, it tracked the charging instrument. Furthermore, the point of error should be overruled because, Appellant's requested instruction differed drastically from the charging instrument, and it did not provide on what basis the jury could convict the defendant.

POINT OF ERROR NUMBER FOUR: This point of error was not presented in Appellant's Motion for New Trial. This point of error is not preserved for review, because it is multifarious, and because it was not presented in Appellant's Motion for New Trial.

POINT OF ERROR NUMBER THREE, AS CONTAINED IN MOTION FOR NEW TRIAL: This point of error was presented in Appellant's Motion for New Trial, but it is not included in Appellant's brief. The State contends, to preserve review on appeal, the point of error must be contained in Appellant's Motion for New Trial and Brief. "Where appellant does not brief ground of error, it will not be reviewed on appeal." If reviewable, based on the definitions of sign and advertising, the State contends the cross did fall within the sign ordinance.

ARGUMENT

STATE'S RESPONSE TO POINT OF ERROR NUMBER ONE

In Point of Error Number One, in Appellant's Brief, Appellant contends the "trial court erred in denying Appellant's Motions to Quash Numbers 3 and 4 because the sign ordinance of the City of Austin, Texas is vague and overbroad facially and 'as applied.'" Brief for Appellant at 8. For the following reasons, this Point of Error should be overruled.

A. Point of Error Number One Was Not Contained in Motion For New Trial:

Texas Government Code section 30.00742 (b) provides, "appellate court shall determine each appeal from a municipal court of record conviction on the basis of the errors that are set forth in the defendant's **motion for new trial**, and that are presented in the transcript and statement of facts prepared from the proceedings leading to the conviction." TEX. GOV'T CODE ANN. § 30.00742 (b) (Vernon Supp. 1998) (emphasis added). *See also*, *Ex parte Spring*, 586 S.W.2d 482, 484 (Tex. Crim. App. [Panel Op.] 1978) and *Martinez v. State*, 744 S.W.2d 224, 228 (Tex. App. - Houston [14th Dist.] 1987, pet. ref'd, untimely filed). ("Appeals are determined by the appellate court solely on the basis of errors assigned in a motion for new trial as presented in a transcript and statement of facts prepared in the municipal court." *Ex parte Spring*, 586 S.W.2d at 484.)

Even constitutional errors may be waived. In *Curry v. State*, the defendant raised similar constitutional questions concerning Article 37.071 of the Code of Criminal Procedure. 910 S.W.2d 490, 496 (Tex. Crim. App. 1995). There, the defendant contended Article 37.071 was "unconstitutional as applied to [defendant] because of vagueness and uncertainty, thereby

violating the Fourteenth Amendment to the Constitution of the United States, and the Due Course of law provisions of the Texas Constitution." 910 S.W.2d at 496. The Court of Criminal Appeals stated, "[b]ecause no specific, timely objection was made, these points of error were not preserved for our review." 910 S.W.2d at 496. *Citing*, *Garcia v. State*, 887 S.W.2d 846, 861 (Tex. Crim. App. 1994), *cert. denied*, _ U.S. __, 115 S. Ct. 1317, 131 L.Ed. 2d 198 (1995).

The State does acknowledge defendants charged by complaint in municipal court may raise alleged defects in the complaint for the first time on appeal. *Huynh v. State*, 901 S.W.2d 480, 481 (Tex. Crim. App. 1995). However, *Huynh* dealt with whether a defective complaint invests the trial court with jurisdiction. It stands for the proposition that if a complaint does not allege all the elements of an offense, the complaint is not a valid charging instrument, and it does not invoke the jurisdiction of the municipal court. 901 S.W.2d at 481. Here, Appellant does not argue whether all essential elements were alleged. Instead, he attacks the constitutionality of the ordinance. It is the State's position, to preserve review, such an argument should have been included in Appellant's Motion for New Trial.

To further illustrate this point, one should consider a very similar case which raised very similar issues. In *Purnell v. State*, the court of appeals reviewed a case where the defendant was convicted, in Houston's Municipal Court, of violating Houston's sign ordinance. 921 S.W.2d 432 (Tex. App. -- Houston [1st Dist.] 1996, pet. ref'd). There the defendant raised nearly identical arguments. Purnell contended Houston's sign ordinance was facially vague, overbroad, a prior restraint on free speech, and violated due process. 921 S.W.2d at 434. During the appeal, Purnell filed three separate briefs. *Id.* Purnell's original brief contained five points of error. *Id* at 435. His motion for new trial only contained four points of error. *Id.* The court

initially noted that "[a]ppeals from municipal courts of record are governed by the Government Code." At 434. Additionally, "it is clear that only appellant's original brief raising five points of error was considered." At 434 - 435. The court went on to state, "[t]he Government Code also requires that a point of error must have been raised in a motion for new trial in the municipal court in order to be considered on appeal." At 435. Since, Purnell only raised the first four points of error in his motion for new trial, he failed to preserve his fifth point of error for review. *Id.* His fifth point of error was the due process argument. A constitutional argument. Furthermore, in Point of Error Number One, Appellant raised a facial challenge to the ordinance and also alleged the complaint provided insufficient notice. The court stated "Appellant appears to mix an attack on the facial constitutionality of the ordinance with an attack on the complaint for not giving sufficient notice. Only the former has been preserved for review by its inclusion as a ground in appellant's motion for new trial in municipal court." 921 S.W.2d at 435.

Here, Appellant raises similar constitutional concerns. However, Appellant's Motion for New Trial never raised Point of Error Number One. (Transcript 00108). Since, Appellant did not present Point of Error Number One in his Motion for New Trial, Appellant has failed to preserve this point of error for review.

B. <u>Multifarious Point of Error</u>:

Secondly, Appellant's Point of Error Number One raises several constitutional concerns. Appellant contends that the sign ordinance is vague, overbroad facially and "as applied." Such arguments are multifarious. Normally, when multiple legal theories are presented in a single point of error, it is multifarious and presents nothing for appellate review. *See, Martinets v. State*, 884 S.W.2d 185, 189 (Tex. App. -- Austin 1994, no pet.); and *Thomas v. State*, 723

S.W.2d 696, 697 (Tex. Crim. App. 1986). Furthermore, "attorneys, when briefing constitutional questions, should carefully separate federal and state issues and provide substantive analysis or argument on each." *Martinets v. State*, 884 S.W.2d at 188.

At first glance, one might argue the Texas Rules of Appellate Procedure are inapplicable to an appeal from a municipal court to a county court at law. However, the Texas Government Code clearly states, "a defendant's brief on appeal from a municipal court of record must present points of error in the manner required by law for a brief on appeal to the court of appeals." TEX. GOV'T CODE ANN. § 30.00749 (a) (Vernon Supp. 1998). Furthermore, the Rules of Appellate Procedure provide Appellant's brief "must contain a clear and concise argument for the contentions made. ..." TEX. R. APP. PROC. ANN. 38.1 (h) (Pamph. 1998).

C. ***Members of City Council v. Taxpayers for Vincent***:

Third, the constitutionality of prohibiting signs in a public right of way has already been addressed by the United States Supreme Court. In *Members of City Council v. Taxpayers for Vincent*, the United States Supreme Court, considered Los Angeles' ordinance which prohibited the posting of signs on public property. 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984). In considering whether Los Angeles' sign ordinance violated the First Amendment freedom of speech, the Court applied the *United States v. O'Brien,* four part test. 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed. 2d 672 (1968). That test provides:

> a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 104 S. Ct. at 2128 - 2129.

Applying the ordinance to the *O'Brien* test, the Court noted, it "is well settled that the state may legitimately exercise its police powers to advance esthetic values." 104 S. Ct. at 2129. Second, "[t]he problem addressed by this ordinance -- the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property -- constitutes a **significant substantive evil** within the City's power to prohibit." (Emphasis added) 104 S. Ct. at 2130. Third, the Court stated, "[t]he text of the ordinance is neutral -- indeed it is silent -- concerning any speaker's point of view." 104 S. Ct. at 2128. And finally, whether the ordinance was "substantially broader than necessary to protect the City's interest in eliminating visual clutter," the Court stated "[b]y banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy." 104 S. Ct. at 2130.

The Court then considered the test for speech in a public forum. This reasonable time, place, manner restriction test provides "[t]he government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed. 2d 736 (1983). In *Members of City Council*, the Court stated, "Appellee's reliance on the public forum doctrine [was] misplaced. They fail to demonstrate the existence of a traditional right of access respecting such items as utility poles for purposes of their communication." *Members of City Council*, 104 S.Ct. at 2133. Nevertheless, "[g]iven our analysis of the legitimate interest served by the ordinance, its viewpoint neutrality, and the availability of alternative channels of communication, the ordinance is certainly constitutional as applied to appellees under this standard." 104 S.Ct. at 2134. In finding alternative channels of communication available, the

court pointed out, the Los Angeles ordinance "does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property [was] prohibited." 104 S.Ct. at 2132 - 33.

Here, the Austin's sign ordinance passes the same *O'Brien* four part test. The United States Supreme Court has held the state may legitimately exercise its police powers to advance esthetic values. *Members of City Council*, 104 S.Ct. at 2129. Second, "accumulation of signs posted on public property -- constitutes a **significant substantive evil** within the City's power to prohibit." (Emphasis added) 104 S. Ct. at 2130. Third, as in Los Angeles, the Austin sign ordinance is content neutral. "The ordinance is neutral -- indeed it is silent -- concerning any speaker's point of view." 104 S. Ct. at 2128.

The ordinance in question states,

> [n]o person shall, either directly or indirectly, cause or authorize a sign to be installed, used, or maintained on any utility pole, traffic signal pole, traffic signal controller box, tree, public bench, street light, or other structure located on or over any public property or public right-of-way, located within the city's planning jurisdiction, except as authorized by this article. AUSTIN, TEX. CODE § 13-2-864 (a) (1992).

This section is silent to the type of speech. It is content - neutral. And fourth, the ordinance prohibits the clutter of signs in public right of ways. As in Los Angeles, "[b]y banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy." *Members of City Council*, 104 S.Ct. at 2130.

Whether the ordinance is a reasonable time, place and manner restriction, the Austin ordinance passes this test as well. Again, the "accumulation of signs posted on public property -- constitutes a significant substantive evil within the City's power to prohibit." *Members of City*

Council, 104 S.Ct. at 2130. The Austin City ordinance is content neutral. And third, the ordinance allowed alternative channels of communication. Nothing in the ordinance prevented the Appellant from handing out literature. In fact, Appellant acknowledges he did in fact hand out literature. Brief for Appellant at 35. Nothing in the sign ordinance prevented the Appellant from speaking on the issue. Again, Appellant acknowledges, he talked to people "if they voluntarily stopped and wanted to talk to him." Brief for Appellant at 35. And, nothing would have prevented the Appellant from picketing, from walking with a cross on the public right--of--way.

Since, the point of error was not presented in Appellant's Motion for New Trial; is multifarious; and United States Supreme Court has upheld a similar ordinance in *Members of City Council v. Taxpayers for Vincent*, Point of Error Number One should be overruled.

STATE'S RESPONSE TO POINT OF ERROR NUMBER TWO

In Point of Error Number Two, in Appellant's Brief, Appellant complains he was denied a jury shuffle, under Texas Code of Criminal Procedure Article 35.11. Consequently, Appellant argues this requires a reversal. It is the State's position Appellant had waived the jury shuffle. Alternatively, when the request was finally made it was untimely, because the State had already commenced its voir dire examination. *See*, *Williams v. State*, 719 S.W.2d 573 (Tex. Crim. App. 1986).

According to Texas Code of Criminal Procedure Article 35.11, a defendant, or his attorney, or counsel for the State has the right to demand that the trial judge shuffle the names of the prospective jurors. TEX. CODE CRIM. PROC. ANN. art. 35.11 (Vernon Supp. 1998). This provision gives the parties to a case an absolute right to a jury shuffle upon a timely demand. *Wilkerson v. State*, 681 S.W.2d 29, 30 (Tex. Crim. App. 1984) and *Latham v. State*, 656 S.W.2d 478, 479 (Tex. Crim. App. 1983). A jury shuffle cannot take place, however, until it first is determined precisely which persons will constitute the jury panel and they are seated in the courtroom. *Yanez v. State*, 677 S.W.2d 62, 68 (Tex. Crim. App. 1984). Furthermore, both parties have the right to view the entire jury panel in proper sequence and then have the names shuffled. *Davis v. State*, 782 S.W.2d 211, 214 (Tex. Crim. App. 1989); *Williams*, 719 S.W.2d at 575; and *Stark v. State*, 657 S.W.2d 115, 116 (Tex. Crim. App. 1983).

The issue presented is when is the demand for a jury shuffle timely. Article 35.11 is silent on this issue. In *Williams,* the Court of Criminal Appeals stated, to "be timely the motion to shuffle must be presented or urged prior to the commencement of the voir dire examination of

the jury panel assigned to the case." 719 S.W.2d at 575. "A motion to shuffle that is urged after the commencement of the voir dire examination of the assigned jury panel is untimely and may be summarily overruled by the trial court." *Id.*

In *Williams*, the Court of Criminal Appeals reviewed several cases to determine when voir dire commences. In the end, the Court adopted and added to Judge Sam Houston Clinton's concurring opinion in *Yanez v. State*, 677 S.W.2d 62, 71 (Tex. Crim. App. 1984). The Court stated,

> (a)s earlier noted, Article 35.11, *supra*, is silent as to when the demand or motion to shuffle must be presented. Judicial decisions have made clear that the demand should be urged before voir dire examination begins. Today we adopt and add to Judge Clinton's concurring opinion in *Yanez*. After the jurors have been qualified, and after the trial court has made its introductory or preliminary remarks, etc., to the jury panel for the case, we hold that the voir dire examination for the purpose of Article 35.11, *supra*, begins when the State is recognized by the court to commence the voir dire examination and actually starts that examination. *Williams*, 719 S.W.2d at 577.

Here, Appellant had indicated he might exercise his right to a jury shuffle. Appellant had filed two written motions requesting such a shuffle. The first motion filed April 4, 1996. (Transcript 00132). The second motion filed February 19, 1998. (Transcript 00091). Additionally, prior to the jury panel being brought in the courtroom, Appellant indicated he might request a jury shuffle. However, he wished to see the panel seated first. This is consistent with the right to view the entire jury panel seated, in a proper sequence, prior to exercising a jury shuffle. *Davis v. State*, 782 S.W.2d 211, 214 (Tex. Crim. App.1989) and *Stark v. State*, 657 S.W.2d 115, 116 (Tex. Crim. App. 1983). Both the State and the Court, were well aware Appellant may desire a jury shuffle. However, when the jury panel was seated in the courtroom,

and prior to recognizing the State to begin its voir dire examination, the Court inquired as to whether there were any motions from either party. Both the State and Appellant indicated there were none. The State's position is Appellant, at this point, waived the jury shuffle.

The case then proceeded, by the Court recognizing the State, and allowing the State to begin its voir dire examination. The State then began speaking to the jury panel. In Appellant's words, "the prosecution immediately began to speak to the jury." (Brief for Appellant at 42). At this point, Appellant's request for a jury shuffle was untimely, because the State had in fact commenced its voir dire examination.

In *Williams*, the Court of Criminal Appeals held the defendant's motion to shuffle the jury panel was timely made. In that particular case, the motion was made after the judge's introductory remarks, but prior to the prosecutor being recognized, by the judge, to commence its voir dire examination. Here, not only had the judge recognized the State, but the State had in fact begun its examination, albeit briefly.

Point of Error Number Two should be overruled because Appellant waived its right to a jury shuffle. Alternatively, when the request for a jury shuffle was finally made it was untimely.

STATE'S RESPONSE TO POINT OF ERROR NUMBER THREE

In Appellant's Motion for New Trial, Appellant raised two issues concerning the jury charge. One contained in the opening paragraph and the other contained in the final paragraph - the application paragraph. (Transcript 00108). In Appellant's brief, Appellant only addresses the application paragraph. Brief for Appellant at 43- 46. The State contends the charge, as submitted to the jury, was proper. Appellant did not preserve any error, because in the Motion for New Trial there is no indication of how these paragraphs were misleading. Furthermore, Appellant's requested instruction told the jury how to acquit defendant, but it did not provide on what basis the jury could convict the defendant.

A. Opening Paragraph

In Appellant's Motion for New Trial, Appellant states "(t)he opening paragraph was misleading and was timely objected to." (Transcript 00108). Texas Government Code section 30.00742 (b) provides, "appellate court shall determine each appeal from a municipal court of record conviction on the **basis of the errors that are set forth** in the defendant's **motion for new trial**, and that are presented in the transcript and statement of facts prepared from the proceedings leading to the conviction." TEX. GOV'T CODE ANN. § 30.00742 (b) (Vernon Supp. 1998) (emphasis added). *See also*, *Ex parte Spring*, 586 S.W.2d 482, 484 (Tex. Crim. App. [Panel Op.] 1978) and *Martinez v. State*, 744 S.W.2d 224, 228 (Tex. App. - Houston [14th Dist.] 1987, pet. ref'd, untimely filed). In Appellant's Motion for New Trial, he simply claims the paragraph is misleading. There is no "basis" as to how it is misleading. It is the State's position, since Appellant did not indicate how the paragraph was misleading, Appellant waived

this error, if any.

Secondly, the source of contention was how to title the offense. Many titles were purposed by the State and Appellant. The State even purposed to title the offense as it is captioned in the city code -- "Placement of Signs on Utility Poles or in Public Right - of - Way." AUSTIN, TEX. CODE § 13-2-864 (1992). In the end, "Placement of Signs within a Public Right - of - Way," was agreed upon.

Third, this Point of Error regarding the opening paragraph has not been included in his brief. "Where Appellant does not brief ground of error, it will not be reviewed on appeal." *Combs v. State*, 652 S.W.2d 804, 807 (Tex. App. -- Houston [1st Dist.] 1983, no pet.); *Hutchins v. State*, 650 S.W.2d 412, 413 (Tex. Crim. App. 1983); and *Lacey v. State*, 653 S.W.2d 528, 530 (Tex. App. -- Corpus Christi 1983, pet. ref'd).

Point of Error, as it pertains to the opening paragraph, should be overruled because the "basis" of error was not contained in Appellant's Motion for New Trial; and because this point of error was not included in Appellant's brief, and thus preserves nothing for review.

B. Application Paragraph

In Appellant's Motion for New Trial, Appellant states "(t)he application paragraph was misleading and was timely objected to." (Transcript 00108). Again, Texas Government Code section 30.00742 (b) provides appeals are determined upon the basis of the errors that are set forth in the defendant's motion for new trial, and that are presented in the transcript and statement of facts. TEX. GOV'T CODE ANN. § 30.00742 (b) (Vernon Supp. 1998). In Appellant's Motion for New Trial, there is no indication or "basis" as to how the application paragraph is misleading. Again, since Appellant did not indicate how the application paragraph

was misleading, Appellant waived this error, if any.

Second, the charge as submitted to the jury was proper. Appellant's requested charge differs substantially from the charging instrument -- the complaint. The purpose of a jury charge is to inform the jury of the applicable law and guide them in its application of the case. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). This charge did that. It provided all relevant sections of the code and definitions. (Transcript 00099 - 00105).

The application paragraph, in particular, is that portion of the charge which authorizes the jury to act, and which authorizes conviction. *McFarland v. State*, 928 S.W.2d 482, 515 (Tex. Crim. App. 1996) and *Hutch,* 922 S.W.2d at 172. Generally, the application paragraph should track the charging instrument. To do otherwise, risks prejudicial error, because it would authorize the jury to convict on a theory not alleged in the charging instrument. Again, this charge tracked the complaint.

The Court of Criminal Appeals has stated, the "trial court's charge to the jury generally should correspond to the allegations in the indictment." *Jackson v. State*, 633 S.W.2d 897, 899 (Tex. Crim. App. [Panel Op.] 1982). Furthermore, the Court has stated, trial court's charge, which authorized jury to convict defendant of an offense not alleged in the indictment, constituted prejudicial error. *Jackson v. State*, 578 S.W.2d 748 (Tex. Crim. App. [Panel Op.] 1979). In a footnote, the court stated "[i]t would seem much easier when submitting the charge to the jury to correctly charge the jury by following the allegations of the indictment." 578 S.W.2d at 749 n.2.

In *Martinez v. State*, the court of appeals stated, "[w]hile it is the best practice to track the indictment in the application clause of the charge, no error occurs if different language is used

that is equivalent to the indictment and that comports with the legal theory sought to be described." 645 S.W.2d 329, 330 (Tex. App. -- Corpus Christi 1982, no pet.). Here, the application paragraph tracked the complaint. Appellant's requested instruction differed drastically from the complaint. The requested instruction read, "[i]f you **do not** believe... ." (Emphasis added) (Transcript 00135). And concluded, "you will acquit the defendant and say by your verdict 'not guilty.'" (Transcript 00136). The requested instruction read in its entirety, does not allow the jury to convict. It most certainly tells the jury how to acquit the defendant, but it does not provide how to convict the defendant.

The Court of Criminal Appeals stated, "[a] correct application paragraph would have read as follows : Therefore, if you believe from the evidence beyond a reasonable doubt that the Defendant ... then you will find the defendant guilty. If you do not so believe, or if you have a reasonable doubt thereof, then you will find the defendant not guilty." *Andrews v. State*, 652 S.W.2d 370, 374 - 75 n. * (Tex. Crim. App. 1983). This type of application paragraph is not in the negative and it gives the jury options. Appellant's requested charge, was in the negative, and there were no options for the jury.

Point of Error Number Three, as it pertains to the application paragraph, should be overruled because: (1) the "basis" of error was not contained in Appellant's Motion for New Trial; (2) the charge as submitted to jury was proper, because it provided all relevant code sections and definitions and it tracked the charging instrument; and (3) Appellant's requested instruction told the jury how to acquit the defendant, but it did not provide or "authorize" on what basis a jury could convict the defendant.

STATE'S RESPONSE TO POINT OF ERROR NUMBER FOUR

In Appellant's Brief, Point of Error Number Four, Appellant contends case should be reversed due to prosecutorial misconduct. Brief for Appellant at 47 - 49. This Point of Error was never presented in Appellant's Motion for New Trial. (Transcript 00108).

A. <u>Point of Error Number Four Was Not Contained in Motion For New Trial</u>:

Texas Government Code section 30.00742 (b) provides appeals are determined upon the basis of the errors that are set forth in the defendant's motion for new trial, and that are presented in the transcript and statement of facts. TEX. GOV'T CODE ANN. § 30.00742 (b) (Vernon Supp. 1998). Appellant never presented this point of error, thus nothing is presented for review. *See*, *Ex parte Spring*, 586 S.W.2d 482, 484 (Tex. Crim. App. [Panel Op.] 1978); *Martinez v. State*, 744 S.W.2d 224, 228 (Tex. App. - Houston [14th Dist.] 1987, pet. ref'd, untimely filed); and *Purnell v. State*, 921 S.W.2d 432, 435 (Tex. App. -- Houston [1st Dist.] 1996, pet. ref'd).

In *Lambert v. State*, defendant was convicted in Houston's Municipal Court of a class C assault. 908 S.W.2d 53 (Tex. App. -- Houston [1st Dist.] 1995, no pet.). There the defendant's motion for new trial alleged improper prosecutorial argument. 908 S.W.2d at 54. However, in defendant's appellant brief, defendant alleged two new arguments -- insufficient evidence and improper jury instruction. *Id.* at 54. The court stated,

> [f]or an appellant to preserve a point of error on an appeal from a municipal court, he must raise the identical point in his motion for new trial. ... As noted above, the grounds in appellant's motion for new trial (improper prosecutorial argument) are not the same as those raised on appeal (insufficient evidence and improper jury instruction). The county court on appeal held that appellant failed to preserve his points of error by not asserting them as grounds for new trial. We agree with the holding below. 908 S.W.2d at 54.

B. Multifarious Point of Error:

Second, in Point of Error Number Four, Appellant raises several issues of prosecutorial misconduct. As stated earlier, several cases clearly state by combining more than one contention in a single point of error, appellant risks rejection on grounds that nothing will be presented for review. *See, Martinets v. State*, 884 S.W.2d 185, 189 (Tex. App. -- Austin 1994, no pet.); *Thomas v. State*, 723 S.W.2d 696, 697 (Tex. Crim. App. 1986); and *Dunn v. State*, 951 S.W.2d 478, 480 (Tex. Crim. App. 1997).

In *Euziere v. State*, defendant asserted over 13 improper statements were made by prosecutor, in a single point of error. 648 S.W.2d 700, 703 (Tex. Crim. App. 1983). The Court of Criminal Appeals held, this ground of error was multifarious and thereby defendant failed to preserve anything for review. 648 S.W.2d at 703.

In *Lindley v. State*, a single point of error singled out three specific portions of prosecutor's argument at punishment stage. Each argument was attacked as comment on matters outside the record. The court stated the point of error was multifarious, and thus failed to properly preserve any error. 736 S.W.2d 267, 275 (Tex. App. -- Fort Worth 1987, pet. ref'd untimely filed).

Here, Appellant argues the State compared Appellant to the Ku Klux Klan. Perhaps a better choice of a group could have been made to illustrate a point. But, there was never a comparison of the two. This group was used to explain the reasonable, time, place, manner restrictions. In that, this group could not hold a parade on Mopac or IH-35, on a Friday, during rush hour, to voice their views. The State can impose reasonable time, place, manner restrictions, as long as the regulation used is content - neutral. Thus, no matter how offensive

one finds a particular group, you cannot deny them their speech. However, reasonable time, place, and manner restrictions may be imposed. There was no attempt to compare the two. There was no attempt to show Appellant tried to hold a parade on Mopac or IH - 35, on a Friday, at 5:00 o'clock, in the afternoon. There was no comparison between the two groups.

Next, Appellant argues prosecutor improperly questioned Appellant about other criminal charges. The State contends Appellant opened the door. In his own direct testimony, Appellant testified to having "no other charges." This left a false impression with the jury that the Appellant had never been charged for anything else. The State is entitled to cross-exam on this particular point. Furthermore, on redirect, counsel elicited another charge from Appellant, which the State was unaware of.

Appellant also argues prosecutor engaged in misconduct by questioning Appellant about using alternative means of communication. In *Members of City Council v. Taxpayers for Vincent*, the United States Supreme Court reviewed Los Angeles' sign ordinance. 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984). There the Court considered the reasonable time, place, manner restrictions test. This test provides "[t]he government may enforce reasonable time, place, and manner regulations as long as the restrictions are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed. 2d 736 (1983). Although the Court stated, "Appellee's reliance on the public forum doctrine is misplaced." *Members of City Council*, 104 S.Ct. at 2133. The Court in a footnote, did state "whether a particular piece of personal property or real property owned or controlled by the government is in fact a 'public forum' may blur at the edges.'" 104 S.Ct. 2134 n. 32. Given that

a fact issue may arise as to whether a certain area is considered a public forum, it was appropriate to consider alternative means of communication. Additionally, since Appellant contended he was denied his right of free speech, it was important to demonstrate to the jury, that the Appellant did have other modes of communication available. This is effective cross examination on that particular point.

In conclusion, Point of Error Number Four should be overruled because this Point of Error was not presented in Appellant's Motion for New Trial, and because it is a multifarious argument which presents nothing for review.

STATE'S RESPONSE TO POINT OF ERROR NUMBER THREE AS CONTAINED IN MOTION FOR NEW TRIAL

In Appellant's Motion for New Trial, point of error number three, Appellant contended "the evidence did not establish that the crosses were 'signs.'" (Transcript 00108). This point of error is not presented in Appellant's Brief. For the following reasons, this Point of Error should be overruled.

A. Point of Error Not Briefed:

Where Appellant does not brief ground of error, it will not be reviewed on appeal. *Combs v. State*, 652 S.W.2d 804, 807 (Tex. App. -- Houston [1st Dist.] 1983, no pet.). In *Hutchins v. State*, a claim that a particular exhibit was not the best evidence was not subject to being reviewed on appeal because it was not briefed by the defendant. 650 S.W.2d 412, 413 (Tex. Crim. App. 1983). In *Lacey v. State*, defendant alleged that the evidence was insufficient to sustain the conviction. This point of error was not briefed, and no argument advanced. The court concluded nothing was presented for review. 653 S.W.2d 528, 530 (Tex. App. -- Corpus Christi 1983, pet. ref'd).

Again, the State would direct attention to *Lambert v. State*. 908 S.W.2d at 53. There the defendant was convicted in Houston's Municipal Court of class C misdemeanor assault. The defendant appealed. In defendant's motion for new trial, he alleged improper prosecutorial argument. 908 S.W.2d at 54. In defendant's appellant brief, he raised two new points of error. Defendant alleged evidence was insufficient to support conviction and improper jury instruction. 908 S.W.2d at 54.

It is the State's contention to preserve an issue for review, the issue must be presented in

the motion for new trial and in appellant's brief. In *Lambert*, the court did not consider the improper prosecutorial argument, even though it was contained in the motion for new trial. Because, it was not presented in appellant's brief. Likewise, the two new arguments - insufficient evidence and improper jury instruction, were not considered. Because, they were not presented in the motion for new trial. 908 S.W.2d at 54. In the court's words, "[f]or an appellant to to preserve a point of error on an appeal from a municipal court, he must raise the identical point in his motion for new trial." 908 S.W.2d at 54.

Here, Appellant has not presented the issue of whether a cross is a sign. Thus, nothing is preserved for review.

B. <u>Ordinance</u>:

Second, the city ordinance is very broad. The term "sign" is defined as,

> **any** surface, display, design, or device visible from public right-of-way on which letters, illustrations, designs, figures, or symbols are painted, printed, stamped, raised, projected, outlined, or attached **in any manner whatsoever** so that the same is used for advertising purposes. The term 'sign' **includes the supporting structure of the sign**. (Emphasis added). AUSTIN, TEX. CODE § 13-2-850 (1992).

The term "advertising means to seek, attract, or direct the attention of the public to any goods, services, or merchandise whatsoever, or to publish messages designed to inform or persuade the public." AUSTIN, TEX. CODE § 13-2-850 (1992). Although, Appellant may not have been trying to direct attention to any goods, services or merchandise. He was attempting "to inform or persuade the public." AUSTIN, TEX. CODE § 13-2-850 (1992). He was attempting to persuade those who may have turned into the parking lot. In Appellant's words, Appellant "was attempting to induce persons to refrain from purchasing the services of the abortion clinic."

Brief for Appellant at 23. This is persuasion. This is advertising. And, when this is combined with the definition of a sign, which uses the word **any**, to define it. A cross falls within the definition of a sign. And accordingly, falls within the sign ordinance.

In conclusion, Point of Error Number Three, as contained in the motion for new trial, should be overruled, because it was not presented in Appellant's brief, and because the cross does fall within the broad confines of the sign ordinance.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State of Texas respectfully prays that the judgment and sentence entered in the Austin Municipal Court be affirmed.

Respectfully submitted,

CITY ATTORNEY'S OFFICE
700 E. 7th Street
P.O. Box 2135
Austin, Texas 78768-2135

512/499-2155 Telephone Number
512/499-3080 Facsimile Number

BY: _____
Jeff Moore
Assistant City Attorney
Texas Bar No. 14350250

ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellee's Brief has been hand delivered to Judge John Vasquez, and has been sent by certified mail, return receipt requested, to Appellant, through his attorney, Mr. Jerald C. Finney, P.O. Box 1346, Austin, Texas 78767-1346, on this the 5th day of August, 1998.

Jeff Moore
Attorney for the State