CPJC 81.7 Texas Penal Code Section 6.01(b) and Voluntary Possession

Section 6.01 says, in full,

(a) A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession.

(b) Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.

(c) A person who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act.

While the law surrounding Subsection (a) has been well-developed for many years, Subsection (b) did not receive a definitive interpretation from the court of criminal appeals until *Ramirez-Memije v. State*, 444 S.W.3d 624 (Tex. Crim. App. 2014). The result parallels what is accepted in voluntary conduct cases. That is, 1) the instruction is rarely required because voluntariness is a low hurdle, and 2) the actual disagreement between the parties is usually more properly addressed by the requisite mental state.

Ramirez-Memije was charged with fraudulent possession of identifying information under Texas Penal Code § 32.51(b), which prohibits possession of an item of identifying information of another person without the other person’s consent or effective consent and with the intent to harm or defraud. He was the middleman in a credit-card skimming operation run through a restaurant; Ramirez-Memije shuttled a skimmer between a waiter who ran customers’ cards through it and another man who directed the operation. At trial, Ramirez-Memije claimed he did not know what the skimming device was or what, if anything, was stored within it. He was denied an instruction on voluntary possession. The court of appeals reversed, but the court of criminal appeals ultimately held he was not entitled to one.

The primary argument for entitlement was that Section 6.01(b) requires “knowingly obtain[ing] or receiv[ing] the thing possessed” and “the thing possessed” must be the thing possession of which is criminalized. In Ramirez-Memije’s case, “the thing possessed” would have been the identifying information stored on the skimmer rather than the skimmer itself. This is a reasonable view of Section 6.01(b); the inclusion of “knowledge” suggests some overlap with the mental state required by Section 6.02 and the offense. But the court of criminal appeals drew the line distinguishing knowing possession from voluntary possession differently. It was undisputed that Ramirez-Memije knowingly received and transferred the skimming device. This, the court held, was enough to satisfy the requirement of voluntary possession. *Ramirez-Memije*, 444 S.W.3d at 628. That does not mean that the focus of possession was moved from the data to the skimmer. Rather, it means the data was voluntarily possessed because his conduct included the voluntary possession of its container. This parallels the case law governing voluntary acts. *Farmer v. State*, 411 S.W.3d 901, 907 (Tex. Crim. App. 2013) (“All that is necessary to satisfy Section 6.01(a) of the Texas Penal Code is that the commission of the offense *included* a voluntary act.”) (emphasis in original); *see also Robinson v. State*, 466 S.W.3d 166, 174 (Tex. Crim. App. 2015) (Keller, P.J., concurring) (“[I]n the ‘act’ and ‘possession’ contexts, voluntariness is a very minimal requirement.”). Ramirez-Memije’s claim that he did not know what was in the skimmer goes to the *mens rea* of the offense, not voluntariness. *Ramirez-Memije*, 444 S.W.3d at 628. The court offered this helpful example dealing with the transportation of drugs:

[I]f a defendant were arrested while transporting a package for a friend and police determined that the package contained marijuana, the defendant could claim at trial that he did not know what the package contained, that he did not know the package contained marijuana, or that he thought the package contained oregano, and that he did not knowingly or intentionally possess marijuana. The jury would then have to decide whether to believe his claim that he did not have the requisite mens rea for the possession of marijuana offense. The defendant could not, however, claim that his possession of the package filled with marijuana was an involuntary act because he knowingly accepted the package from his friend.

*Id*.

The court also offered an example of a situation that might require an instruction on voluntary possession. “If there was evidence that the skimmer had been slipped into [Ramirez-Memije]’s bag without his knowledge, then there may be a question of voluntary possession and [Ramirez-Memije] may have been entitled to an instruction regarding the requirement of a voluntary act.” *Id*. The court did not elaborate further, but the applicability of a voluntary possession instruction to a “slipped into my bag” scenario could depend on timing, *i.e.*, whether the defendant was already in control of his bag.

If the skimmer had been slipped into Ramirez-Memije’s bag without his knowledge while the bag was in his possession, he should have a claim that he did not voluntarily possess it. This is where the second half of Subsection (b)—“or is aware of his control of the thing for a sufficient time to permit him to terminate his control”—comes in. The question for the jury would be whether the State proved Ramirez-Memije had control of the bag (that contained the device that contained the data) for long enough after the “slipping in” for him to discover the device and dispossess himself of it. If so, his continued control made his possession voluntary. *See*, *e.g.*, *Overstreet v. State*, No. 02-14-00235-CR, 2015 WL 2266384, at \*2 (Tex. App.—Fort Worth May 14, 2015, no pet.) (not designated for publication) (“Although there was evidence that Appellant’s friend Gilbert owned the gun and had accidentally left it in Appellant’s car, the jury was free to believe that in the time between dropping Gilbert off in south Dallas and stopping at the gas station in Arlington, Appellant became aware of the gun in his car and chose not to terminate his control over it.”).

It is not clear what would happen if the device were slipped into his bag before he took possession of it. If the holding of *Ramirez-Memije* is taken to its logical conclusion, it should not matter how many containers separate the defendant from the contraband. If he “knowingly obtains or receives” his bag (which contains the skimmer that contains the data), that should satisfy the requirement of a voluntary act. As with the facts of his case, his defense of (double) lack of knowledge would go to the requisite *mens rea*. Again, the court of criminal appeals did not elaborate on its “slipping in” hypothetical, and its marijuana hypothetical does not answer this question.

What is relatively clear is that this law should be incorporated into the application portion of the instructions. The “voluntariness” requirement could be regarded as simply part of the definition of the conduct required—possession—which would most likely not require incorporation into the application provision. However, because it is part of an element the State must prove beyond a reasonable doubt, lack of voluntariness is thus, practically speaking, a “ground of defense in a penal law” that “has the procedural and evidentiary consequences of a defense.” See Tex. Penal Code § 2.03(e). Consequently, a jury instruction is appropriate if, and only if, evidence has been admitted that supports it. See Tex. Penal Code § 2.03(c). And, if the jury is instructed on the matter, it must be told the state has the burden of proving voluntariness beyond a reasonable doubt. See Alford v. State, [866 S.W.2d 619](http://www.TexasBarCLE.com/CLE/PMCasemaker.asp?table=caselaw&volume=866&edition=S.W.2d&page=619), 624 n.8 (Tex. Crim. App. 1993).

 Because the substance of the requirement of voluntariness is considerably less complex than that of many defenses, however, the Committee concluded that when voluntariness is raised, it can be adequately covered by adding the statutory languagein the application portion of the instructionsas a final element of the state’s case.

This defensive contention that otherwise-proved possession was not voluntary is provided for in the instruction at CPJC 41.8 for class B misdemeanor possession of marijuana. It could be raised in prosecutions for the other possessory offenses covered in this chapter, of course. If it is, it should be worked into the applicable offense instruction as it is worked into the marijuana instruction at CPJC 41.8.