IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0061-16

KELVIN LYNN O'BRIEN, Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FIRST COURT OF APPEALS
HARRIS COUNTY**

ALCALA, J., filed a concurring opinion.

CONCURRING OPINION

I respectfully concur with this Court's judgment that upholds the conviction for engaging in organized criminal activity against Kelvin Lynn O'Brien, appellant. I do not join this Court's majority opinion because I reach my conclusion through a more direct analysis that avoids discussion of topics neither argued or briefed by the parties nor necessary to the disposition of this case. Examining the plain statutory language as a whole, I conclude

that the State may obtain a conviction for engaging in organized criminal activity by alleging alternative predicate offenses as long as those predicate offenses are, as in this case, the same grade felony or misdemeanor offense. Because the plain language of the statute adequately resolves the instant appeal without consideration of extra-textual matters, I respectfully concur with but do not join this Court's majority opinion.

This Court's precedent requires us to permit a conviction for engaging in organized criminal activity[1] based on disjunctive pleadings of alternative predicate offenses. Because the construction used in the instant statute parallels the felony-murder statute[2] that this Court has interpreted as not requiring unanimity as to a predicate felony offense, this Court essentially has already decided that the Legislature did not intend to require jury unanimity as to the predicate offense for engaging in organized criminal activity. In *White v. State*, this Court held that, "when an indictment alleges multiple felonies in a prosecution under [the felony-murder statute], these specifically named felonies are not elements about which a jury must be unanimous. These felonies constitute the manner or means that make up the 'felony' element of [that statute]." *White v. State*, 208 S.W.3d 467, 469 (Tex. Crim. App. 2006). The felony-murder statute at issue in *White* stated,

> A person commits an offense if he commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt,

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1 *See* TEX. PENAL CODE § 71.02.

2 *See* TEX. PENAL CODE § 19.02(b)(3).

> he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

Id. at 467. Under the plain language in the felony-murder statute, the State was required to prove a "felony" offense but not a specific felony offense. *Id.* at 468 ("[T]he prohibited conduct about which a jury must be unanimous is that the defendant commit a 'felony,' and not one specific felony out of a combination of felonies."). This Court held that, because of that statutory language, the State was permitted to allege various felony offenses in the disjunctive as alternative manner and means that did not have to be unanimously found by a jury. *Id*. Similarly, here, the instant statute for engaging in organized criminal activity states,

> A person commits an offense if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, the person commits or conspires to commit one or more of the following: [enumerated predicate offenses].

See TEX. PENAL CODE § 71.02(a). Thus, like the felony-murder statute's construction of "commits . . . a felony," the engaging in organized crime statute includes the phrase "commits . . . one or more of the following [offenses]."

For engaging in organized criminal activity, the plain language would obviously require unanimity as to the predicate offense if the State had pleaded only one of the enumerated offenses as the predicate offense of engaging in organized criminal activity. But what if the indictment alleges more than one predicate offense, as here? The pertinent question in this case is the significance of the phrase "or more of the following," as it appears

in the engaging in organized criminal activity statute. I agree with the State that this phrase would be rendered meaningless if the State were required to prove each of the alleged predicate offenses with a unanimous verdict. The only logical reading of the plain language of the phrase "or more of the following" is that the Legislature intended to permit the State to prove engaging in organized criminal activity based upon the commission of a predicate offense committed in any of the alternative ways listed in the statute and that the jury did not have to unanimously agree about which of these alternative predicate offenses was committed by a defendant. Accordingly, the enumerated predicate offenses in the statute constitute alternative manner and means by which a defendant can commit the offense of engaging in organized criminal activity. Because jury unanimity is not required as to distinct manner and means, I conclude, therefore, that the plain language of the engaging in organized criminal activity statute clearly permits a conviction based on alternative predicate offenses. *See Jefferson v. State*, 189 S.W.3d 305, 311-12 (Tex. Crim. App. 2006) ("[W]hen the statute in question establishes different modes or means by which the offense may be committed, [jury] unanimity is generally not required on the alternate modes or means of commission.").

Appellant essentially argues that permitting a conviction for engaging in organized criminal activity without requiring unanimity as to the predicate offense seems "contrary to due process" given the broad range of enumerated predicate offenses (*e.g.*, gambling to capital murder). There are two flaws with appellant's position. First, as this Court's majority

opinion points out, here the two offenses that were pleaded in the alternative were both first-degree felonies involving the unlawful treatment of property—theft and money laundering. Second and perhaps more importantly, appellant fails to consider the statute as a whole, as required by this Court's precedent. *See Yazdchi v. State*, 428 S.W.3d 831, 837 (Tex. Crim. App. 2014). The punishment range for engaging in organized criminal activity is dependent on the punishment classification of the highest predicate offense found by the jury.[3] Given the plain statutory language prescribing the punishment range for engaging in organized criminal activity, it is clear that the jury must unanimously determine any predicate offenses on which it relies as alternative manner and means if they are not the same grade misdemeanor or felony. Here, the two predicate offenses that the jury was permitted to find in the disjunctive were both first-degree felonies and thus, under the plain language of the statute, appellant would be sentenced to the same punishment range regardless of which predicate offense had been found by the jury. Appellant has made no argument to explain how there could be a due process violation under the circumstances here where the two predicate offenses alleged are both first-degree felonies involving property.[4]

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[3] TEX. PENAL CODE § 71.02(b). Subsection (b) provides, "Except as provided in Subsections (c) and (d), an offense under this section is one category higher than the most serious offense listed in Subsection (a) that was committed, and if the most serious offense is a Class A misdemeanor, the offense is a state jail felony, except that the offense is a felony of the first degree punishable by imprisonment in the Texas Department of Criminal Justice" under specified circumstances.

[4] I do not foreclose the possibility that there could be a due process violation for offenses of the same grade that are wholly incomparable, such as murder and first-degree theft. But any discussion of that type of situation would be advisory given that this case involves only property-type offenses that are felonies of the same grade.

Giving effect to the entire statute, it is apparent that the Legislature did not intend to require jury unanimity as to each alleged predicate offense underlying engaging in organized criminal activity when, as here, all the predicate offenses are the same class of felony or misdemeanor. Because I conclude that the plain language of this statute resolves appellant's arguments and because this Court's precedent in *White* supports the view that there is no due process violation here, I concur with but do not join this Court's judgment.

Filed: May 2, 2018

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