STATE OF LOUISIANA	*	**NO. 2017-KA-0556**
VERSUS	*	**COURT OF APPEAL**
ELIJAH MEALANCON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 519-430, SECTION "L"
Honorable Franz Zibilich, Judge
* * * * * *
Judge Regina Bartholomew-Woods
* * * * * *

(Court composed of Judge Daniel L. Dysart, Judge Regina Bartholomew-Woods, Judge Terrel J. Broussard, Pro Tempore)

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AFFIRMED
OCTOBER 18, 2017

The State appeals the March 7, 2017 judgment of the trial court granting the motion to quash as to counts two, five, nine, and sixteen filed by Defendant, Elijah Mealancon. For the reasons that follow, we affirm the judgment of the trial court.

BACKGROUND

On August 25, 2011, the State charged Defendant by bill of information with one count of theft over five hundred dollars ($500) and one count of theft over fifteen hundred dollars ($1,500). On February 6, 2013, the State entered a *nolle prosequi* on both counts. On February 28, 2014, the State reinstituted the case and charged Defendant by bill of information with one count of contracting without a license, four counts of misapplication of payments, four counts of exploitation of the infirmed, and five counts of unauthorized use of a movable, violations of La. R.S. 37:2160, 14:202, 14:93.4, and 14:68, respectively.

Defendant appeared for arraignment on April 21, 2014, and entered a plea of not guilty as to all charges. On December 1, 2015, Defendant filed a motion to quash the bill of information, which the court granted as to counts seven

(unauthorized use of a movable) and eighteen[1] (contracting without a license), on December 17, 2015.

On March 7, 2016, and October 17, 2016, Defendant filed motions to quash, which the court denied on October 20, 2016. On November 28, 2016, Defendant filed a motion for a bill of particulars and on January 12, 2017, again filed a motion to quash the bill of information. On January 24, 2017, the court deferred ruling on all counts and ordered the State to file a bill of particulars as to counts two, five, nine, and sixteen (the only four charges at issue in this appeal), which it did on February 13, 2017.

On February 21, 2017, Defendant again filed a motion to quash the counts at issue on the grounds that the bill of particulars insufficiently alleged the offenses charged, and prescription.[2] On March 7, 2017, the court denied the motion to quash on the grounds of prescription, but granted it for all four counts on the grounds that the bill of particulars failed to allege elements of the offense. Defendant sought writs on the denial of the motion on the grounds of prescription, which this Court ultimately denied on May 3, 2017. *State v. Mealancon*, 2017-K-0318 (La.App. 4 Cir. 5/3/17) (unpub.). On June 5, 2017, Defendant sought review in the Louisiana Supreme Court where his writ application is currently pending.

[1] Several counts charge only the co-defendant of Defendant.

[2] La. C.Cr.P. arts. 532(5) and (7). Defendant conceded that count two had not prescribed, so the motion to quash on the grounds of prescription involved only counts five, nine, and sixteen.

On June 30, 2017, the State filed an appeal in this Court in response to the trial court's ruling that quashed the four counts at issue.[3] Defendant filed his appellee brief in response on August 15, 2017.[4]

DISCUSSION

The State asserts that the trial court erred in quashing counts two, five, nine, and sixteen, arguing that it should be allowed to meet its burden of proof at trial. The State further argues that a motion to quash is not the proper vehicle for a Defendant to raise a substantive defense.

Louisiana Code of Criminal Procedure art. 532 provides, in relevant part:

> A motion to quash may be based on one or more of the following grounds:
>
> > (1) The indictment fails to charge an offense which is punishable under a valid statute.
> >
> > . . .
> >
> > (4) The district attorney failed to furnish a sufficient bill of particulars when ordered to do so by the court. In such case the court may overrule the motion if a sufficient bill of particulars is furnished within the delay fixed by the court.
> >
> > (5) A bill of particulars has shown a ground for quashing the indictment under Article 485.

Under La. C.Cr.P. art. 485,

> If it appears from the bill of particulars furnished under Article 484, together with any particulars appearing in the indictment, that the offense charged in the indictment was not committed, or that the defendant did not commit it, or that there is a ground for quashing the indictment, the court may on its own motion, and on motion of the defendant shall, order that the indictment be quashed unless the defect

[3] The State's brief indicates that "[t]he only counts at issue in the instant appeal are counts 5, 9, and 16." However, the sole assignment of error states that the trial court erred in quashing counts 2, 5, 9, and 16.

[4] As this case remains in a pretrial posture, this opinion provides no recitation of the facts of the offenses as charged.

> is cured. The defect will be cured if the district attorney furnishes, within a period fixed by the court and not to exceed three days from the order, another bill of particulars which either by itself or together with any particulars appearing in the indictment so states the particulars as to make it appear that the offense charged was committed by the defendant, or that there is no ground for quashing the indictment, as the case may be.

A district court's decision on a motion to quash under La. C.Cr.P. 485 is solely a question of law, should not defer to any factual findings, and therefore requires *de novo* review. *State v. Schmolke*, 2012-0406, p. 4 (La.App. 4 Cir. 1/16/13), 108 So.3d 296, 299.

The State charged Defendant with four counts under La. R.S. 14:202(A), relative to the misapplication of contractor funds, which provides as follows:

> No person, contractor, subcontractor, or agent of a contractor or subcontractor, who has received money on account of a contract for the construction, erection, or repair of a building, structure, or other improvement, including contracts and mortgages for interim financing, shall knowingly fail to apply the money received as necessary to settle claims for material and labor due for the construction or under the contract.

Accordingly, the State must prove the following elements: "(1) the existence of a contract to construct, erect, or repair a building, structure, or other improvement; (2) the receipt of money on the contract; and (3) a knowing failure to apply the money received as necessary to settle claims for material and labor due under the contract." *State v. Cohn*, 2000-0313, p. 7 (La. 4/3/01), 783 So.2d 1269, 1275.

A review of the bill of information reveals the bases for the State's charges as to each of the relevant counts. With regard to count two, the State alleged that Defendant "did fail to apply money received from Mary Scales ("Scales") on account of a contract for the construction, erection, or repair of a building, structure, or other improvement to settle claims for material." As to count five, the State alleged that Defendant "did fail to apply money received from Margaret

Banks ("Banks") on account of a contract for the construction, erection, or repair of a building, structure, or other improvement to settle claims for material." As to count nine, the State alleged that Defendant "did fail to apply money received from Bernadette Foy-Richardson ("Richardson") on account of a contract for the construction, erection, or repair of a building, structure, or other improvement to settle claims for material." Lastly, as to count sixteen, the State alleged that Defendant "did fail to apply money received from Gloria Vincent ("Vincent") on account of a contract for the construction, erection, or repair of a building, structure, or other improvement to settle claims for material."

In Defendant's motion for a bill of particulars, he asked the State to describe the "claims for material and labor due" to which he failed to apply money received from the alleged victims. In response, the State described the initial contractual obligations for construction:

> a. Scales – the defendant was to do the following labor/supply the following materials: ceramic tile in bathroom and kitchen, install medicine cabinet, toilet, tub and vanity, replace windows, refurbish floors or replace hardwood flooring, wiring for HVAC units, baseboards and trim, kitchen cabinets, counter top and sinks, four A/C and heating units, lighting fixtures and ceiling fans (see arrest warrant under Item Number E-18763-13)[5]
> b. Banks – the defendant was to do the following labor/supply the following materials: leveling and debris removal and installation of electrical, plumbing and HVAC (see arrest warrant under Item Number D-42686-11)[6]
> c. Richardson – the defendant was to do the following labor/supply the following materials: the defendant was hired to be the victim's project manager and oversee the construction of the project with his partner, McLaughlin.

[5] The arrest warrant referred to is for the crime of theft and also lists the work for which the contract was entered.

[6] This arrest warrant is not contained in the record.

d. Vincent – the defendant was to construct a new home (See arrest warrant under Item Number G-16222-13)[.[7]]

Defendant also asked the State to describe the alleged acts or omissions demonstrating that he knowingly failed to apply money on outstanding claims. The state responded as follows:

a. Scales – only sheetrock was hung, but no other work was completed on the house; the defendant failed to complete the work as outlined above and as stated in the contract.
b. Banks – the exterior of the home was painted two different colors and there are two different sidings on the structure; partial installation of sheetrock was done; the defendant failed to complete work as outlined above and stated in the contract.
c. Richardson – the defendant failed to complete work as outlined above and as stated in the contract. The defendant made payments to McLaughlin but only bare studs and minor plumbing work was done; the defendant failed to complete work as outlined above and as stated in the contract
d. Vincent – the defendant hired McLaughlin to perform the work on the home and some work was completed; the defendant failed to complete work as outlined above and as stated in the contract.

From the allegations supplied by the State in the Bill of Particulars, it appears that the State maintained that Defendant entered into four construction contracts, received money for them, and failed to complete the work on each of them.

In a *per curiam*,[8] the district court explained that "[t]his statute was intended to deter contractors from knowingly failing to pay subcontractors or materialmen, as such failure may result in their claims being filed against the owner's property

[7] The referenced arrest warrant is for the crime of theft and states the same information provided above, as well as, the payment schedule, sources of the money, and the victim's authorization to defendant to use the money for the contracted work.

[8] In considering Defendant's writ application regarding the district court's denial of the motion to quash counts five, nine, and sixteen on the grounds of prescription (*Mealancon*, 2017-K-0318),

which is why the statute is located in the 'offenses against property' section of the Revised Statutes."

The district court further explained:

> This court pretermits consideration of elements one and two. Clearly however, the State has failed to provide any argument or evidence, direct or circumstantial, proving the third necessary element, that the defendant knowingly failed to apply money received on the contract to settle a claim for material or labor.
>
> Quite simply, in the case at bar there have been no claims to settle by anyone providing material or labor.
>
> Because there is not a scintilla of evidence before this Court of a third-party claim of any kind for labor or materials expended under the contract in any of the counts charged against the defendant, the third necessary element of La. R.S. 14:202 has not even been alleged by the state.
>
> Therefore the counts charging the defendant with violations of La. R.S. 14:202 (counts 2, 5, 9, and 16) must be quashed.

The State's brief does not challenge the district court's conclusion that it failed to allege the third element of the offense, nor does it argue that the district court's interpretation of the statute is misguided. In fact, the State does not address the district court's ruling at all. However, at the hearing on the motion to quash, the State did offer the unsupported suggestion that the third element requiring "[unsettled] claims for material and labor due" may be interpreted to include a property owner's initial complaint to the district attorney's office that the work was not completed. Although the district court did not entertain this argument, it appears meritless for the following reasons.

First, "[t]he articles of [the Criminal Code] cannot be extended by analogy so as to create crimes not provided for [therein]; however, in order to promote

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the district court issued a *Per Curiam* at this Court's request, dated April 21, 2017, in which it stated the reasons that it partially granted Defendant's motion to quash on alternate grounds.

justice and to effect the objects of the law, all of its provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." La. R.S. 14:3.

In *State v. Deselle*, 509 So.2d 809, 811 (La.App. 1 Cir. 1987), the First Circuit Court of Appeal interpreted La. R.S. 14:202(A) similarly to the district court here, holding that "[w]e feel that the statute is intended to deter contractors from *knowingly* failing to pay subcontractors, materialmen, etc., as such failure may result in their claims being filed against the owner's property." (Emphasis added). Accordingly, the *Deselle* court held that the statute did not contemplate a property owner's claim for nonperformance and reversed the defendant's conviction finding no outstanding claims against him for the materials or labor used in the construction work performed. *Id.*

Likewise, in *State v. Spears*, 39,302, p. 11 (La.App. 2 Cir. 3/17/05), 896 So.2d 1280, 1286-87, the court found that La. R.S. 14:202 was intended to prohibit a contractor from taking money from a property owner and intentionally failing to pay the labor and material expenses incurred on that job. "He must apply enough of the funds received from the owner as is necessary to discharge all the labor and material bills on that job, so the paying owner will not be subject to liens by laborers or materialmen." *Id.*

Although the Louisiana Supreme Court reversed the appellate decision finding sufficient evidence to uphold the conviction, it apparently agreed with that portion of the appellate court's interpretation of the statute, holding that the third element of the offense (as stated above) was sufficiently proven by the existence of six liens for unpaid labor and supplies involved in the construction and evidence

that the property owners were forced to settle the liens themselves. *State v. Spears*, 2005-0964, p. 4 (La. 4/4/06), 929 So.2d 1219, 1223. Furthermore, on remand for consideration of the remaining assignments of error, including the ambiguity of the statute, the Second Circuit held that "[a] plain reading of the activity proscribed by the statute is sufficiently narrow and gives adequate notice to those who would engage in such conduct." *State v. Spears*, 39,302, p. 6 (La.App. 2 Cir. 9/27/06), 940 So.2d 135, 141.

In *Schmolke*, 108 So.3d at 301-02, unlike the present case, this Court found as sufficient bases the following allegations contained in the bill of particulars to withstand a motion to quash: (1) the existence of a construction contract between the owner and the defendant; (2) that the defendant received money on the contract; and (3) that the defendant failed to pay the charges of two subcontractors, who placed liens against the homeowner's property.[9]

Based on the foregoing, the State's interpretation of the statute at issue fails to conform to that of Louisiana courts or that intended by the legislature.

"[T]he court must accept as true the facts contained in the bill of information, as well as the bill of particulars and decide whether or not a crime has been charged." *Schmolke* at p. 3, 108 So.3d at 298 (*quoting State v. Lagarde*, 1995-1497 p. 2 (La.App. 4 Cir. 4/3/96), 672 So.2d 11025, 1103. "The question of factual guilt or innocence is not before the court at a hearing on the motion to quash." *Id.*

> Essentially, the inquiry is whether any conceivable set of the facts as alleged in the bill of information together with those specified in the bill of particulars (when particulars have been provided) if "found credible by the trier of fact" can support a conviction. *State v. Advanced Recycling, Inc.*, 02–1889, pp. 9–10 (La.4/14/04), 870 So.2d

[9] Although this Court also found, *sua sponte*, that the requisite "knowing" element had not been alleged by the State, it remanded the case to allow the State to amend the bill appropriately, as that issue had not yet been urged or argued by either party.

> 984, 989. And support for a conviction, of course, requires that any reasonable trier of fact considering the evidence in the light most favorable to the prosecution could conclude that every element of the offense charged has been proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *see also Lagarde*, 672 So.2d at 1104.

Id. at 299.

In the instant case, the district court's ruling was based strictly on the State's failure to allege any third-party "claims" which Defendant failed to pay, knowingly or otherwise. Even if the statute contemplated unpaid claims by the property owner, the State nonetheless failed to allege that the property owners submitted to Defendant any claims for payment.

The district court in this case considered the facts alleged in the bills of information and particulars as true and found that the State failed to allege facts required to satisfy one of the essential elements of the crime with which Defendant is charged, and which is the subject in this appeal. The district court did not err in its finding or its ruling, therefore the State's assignment of error is meritless.

CONCLUSION

The district court did not err in finding that the State failed to allege facts adequate to satisfy an essential element of the charges at issue. Accordingly, the district court's ruling granting Defendant's motion to quash counts two, five, nine, and sixteen is affirmed.

AFFIRMED