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**

WALKER, J., filed a dissenting opinion in which YEARY, J., joined.

DISSENTING OPINION

The Court's majority opinion today holds that a jury does not need to come to a unanimous decision about whether the predicate offenses for a section 71.02 prosecution were committed. I conclude otherwise, and I respectfully dissent. I also disagree with a conclusion reached by the majority, that Texas's Engaging in Organized Criminal Activity statute, section 71.02, is a "circumstances surrounding the conduct" type of offense.

Section 71.02

The issue in this case is essentially how to construe section 71.02 of the Penal Code, entitled Engaging in Organized Criminal Activity. That statute provides:

> (a) 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:

TEX. PENAL CODE Ann. § 71.02(a) (West 2011 & Supp. 2017). The statute then has a large laundry list of offenses. *Id.* § 71.02(a)(1)-(18). If the person "commits," then the engaging offense is one category higher than the most serious committed offense (e.g., a third degree felony predicate offense leads to a second degree felony section 71.02 offense). *Id.* § 71.02(b). If the person "conspires," then the engaging offense is the same category as the most serious conspired offense. *Id.* § 71.02(c). This has the same effect of raising the category of the offense, since conspiracy is normally one category lower than the conspired offense. *See id.* § 15.02(d).

Section 71.02 is Not a Circumstances Type of Offense

Appellant argues that when there are multiple offenses alleged, the jury must be unanimous in regard to the particular predicate offense. Theft and money laundering were the offenses in this case, so Appellant's position is that the jury had to be unanimous that he committed theft, unanimous that he committed money laundering, or both.

The majority's opinion holds the opposite–that the "commit one or more of the following" is simply the manner and means of committing the offense, and therefore the jury does not need to be unanimous about particular alleged predicate offenses. Instead, the jury simply has to be unanimous that any alleged listed offense was committed. On its way to this conclusion, the opinion holds that section 71.02 is a "circumstances-surrounding-the-conduct" type of offense, where the

required circumstance is the existence of a combination.

I disagree with that construction of the statute that the gravamen of the engaging statute is the existence of a combination. I believe that the offense cannot be a circumstances-surrounding-the-conduct offense, with the required circumstance being the existence of a combination, because the statute itself allows for conviction where the intent is to *establish* a combination (meaning the combination does not exist at the time of the conduct). As I read the statute, it does not matter whether a combination exists at the time of the predicate offense. What matters is the intent of the defendant when he commits the predicate offense. The statute also seems to authorize a conviction even if no combination is ever established, as long as the defendant had the intent to establish, maintain, or participate in one when he committed the predicate offense.

To illustrate how the statute should operate, take for example a defendant who, after watching The Godfather and The Godfather Part II far too many times, has delusions of grandeur as the Don of a Mafia family. Needing funds to establish his criminal empire, he plans and then executes a bank robbery. However, he is arrested before he can do anything with the funds stolen from the bank. The way I read section 71.02, this defendant is subject to prosecution under section 71.02 because he is a person that, with the intent to establish a combination, committed robbery. If section 71.02 was a circumstances-type of offense and requires the existence of a combination, then this defendant is not subject to section 71.02 because there was no combination at the time he robbed the bank, even though he fully intended to create a combination.

The majority opinion's construction of section 71.02 as a circumstances-surrounding-the-conduct type of offense, with the necessary circumstance being the existence of a combination, adds an element to the offense which does not exist. The Legislature could not have intended this result.

Indeed, if the offense was truly meant to be a circumstances-surrounding-the-conduct offense, the Legislature would have written it to say: "A person commits an offense if, *while establishing, maintaining, or participating in a combination* . . . , the person commits or conspires to commit one or more of the following . . . ." This, the Legislature did not do.

The only way to construe section 71.02 is as a "nature of conduct" type of offense. The offense is committing another offense while harboring a particular intent. The defendant, committing one of the listed offenses, must specifically intend to establish, maintain, or participate in a combination, the combination's profits, or as a member of a criminal street gang.

Unanimity is Required as to Section 71.02 Predicate Offenses

On top of my disagreement with the majority's premise that the offense is of the circumstances-surrounding-the-conduct type, I also disagree with the ultimate conclusion that the jury need not be unanimous as to the predicate offense.

I believe the statute simply upgrades the predicate offense if a specific intent to establish, maintain, or participate in a combination is found. The "offense" of violating section 71.02 is similar to an enhancement of the predicate offense instead of being a distinct offense. But instead of increasing the range of punishment for committing a listed offense like the usual enhancement statutes,[1] it raises the degree of that offense because of the defendant's intent.

The most natural way to read the statute is to follow the statute, that:

> A person commits an offense if:
> (1) with the intent to establish, maintain, or participate in a combination
> (2) he commits or conspires to commit one (or more) of the listed offenses

Stated thusly, it is apparent that there are really only two elements of the offense, namely:

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[1] *See* TEX. PENAL CODE Ann. §§ 12.42, 12.425, 12.47 (West 2011 & Supp. 2017).

(1) Specific Intent + (2) Predicate Offense.

Under the majority's reading of the statute, the predicate offense is mere manner and means. I disagree. Justice Scalia's concurring opinion in *Schad* helps illustrate the problem:

> As the plurality observes, it has long been the general rule that when a single crime can be committed in various ways, jurors need not agree on the mode of commission. That rule is not only constitutional, it is probably indispensable in a system that requires a unanimous jury verdict to convict. When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her. While that seems perfectly obvious, it is also true, as the plurality points out, that one can conceive of novel "umbrella" crimes (a felony consisting of either robbery or failure to file a tax return) where permitting a 6-to-6 verdict would seem contrary to due process.

Schad v. Arizona, 501 U.S. 624, 649-50 (1991) (Scalia, J., concurring) (citations omitted). What the plurality pointed out was that "nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction." *Id.* at 633 (plurality op.).

I think our "Engaging" statute is one of those "umbrella" crimes described by Justice Scalia or a generic "Crime" as described by the *Schad* plurality. It covers everything from murder to misdemeanor gambling to a Tax Code felony, so long as those offenses are committed with the specific intent to establish, maintain, or participate in a combination. Permitting a non-unanimous verdict may run into due process problems if the separate predicates are dissimilar like Justice Scalia's robbery and failure to file a tax return examples. The majority's holding, that the jury does not need to be unanimous regarding the particular predicate offenses, is not supportable as a general, blanket proposition.

However, as the burning and killing example illustrates, there are times when the separate theories are not so separate, and the jury not coming to a unanimous agreement would not necessarily be a problem. Sticking with the example, if half of the jury found beyond a reasonable doubt that the defendant killed his victim and then burned the victim's body, and half of the jury found beyond a reasonable doubt that the defendant killed the victim by burning her, the jury is nevertheless unanimous on the ultimate matter that the defendant killed the victim. However, *Schad*, in which Justice Scalia gave the examples, was a first degree murder case. *Id.* at 628. The theories of murder were both premeditated murder and felony murder, and the issue was whether the jury had to be unanimous as to the theory. *Id.* at 630. The statute in this case is not like murder–it is an "umbrella" offense which acts like an enhancement based on why the offense was committed.

Additionally, even though the majority already holds that the jury does not need to be unanimous as to the predicate offenses, it nevertheless engages in *Schad* analysis to reach the holding that the theft and money laundering in this case are both morally and conceptually equivalent. The majority's analysis in this regard is hedging its bets: in case it is wrong about whether the predicate offenses need unanimous verdicts as a general rule of law, at least the predicates in *this case* do not. As far as the actual analysis about why the offenses are morally and conceptually equivalent, I am unsure if the majority's reasoning is sound. Essentially, the reasoning is: (1) the offenses are connected because the money laundering is laundering the proceeds of the theft; (2) they are both first degree felonies in this case. This is nowhere near the same as the kill-and-burn/burn-and-kill example given by Justice Scalia.

I also pause to consider the possible implications of a non-unanimous jury when the trial moves to the punishment phase. Suppose, for example, a defendant is charged under section 71.02

based on predicate offenses of second degree felony aggravated assault and Class A misdemeanor offering a gift to a public servant under section 36.09. If the jury does not need to be unanimous as to the predicate offense, the defendant could be found guilty beyond a reasonable doubt by eleven of the jurors as to the misdemeanor, while one juror could have found him guilty beyond a reasonable doubt as to the second degree felony. Under section 71.02(b), the grade of the defendant's engaging offense is one greater than the most serious offense that was committed, which would mean his engaging offense is a first degree felony if the verdict in which only one juror believed he was guilty of aggravated assault equates to a finding that the offense of aggravated assault was committed. At punishment, then, the jury would be limited to considering a first degree felony punishment range of five to ninety-nine years, or life, even though eleven of those jurors found that the defendant committed what would have been a Class A misdemeanor normally subject to a year in the county jail.

Another reason the majority's conclusion is problematic is that it would also have the effect of indirectly abrogating *Ngo v. State*, 175 S.W.3d 738 (Tex. Crim. App. 2005). In *Ngo*, the defendant was charged with credit card abuse under three statutorily different criminal acts: (1) stealing a credit card; (2) receiving a credit card, knowing that it had been stolen, and acting with the intent to use it; (3) presenting a credit card with the intent to obtain a benefit fraudulently, knowing the use was without the effective consent of the cardholder. *Id.* at 744. The jury was given a general instruction that it must be unanimous in finding the defendant guilty of the general offense of credit card abuse, instead of being instructed that it must be unanimous on at least one of the three separate acts. *Id.* at 745. We held that this was error and the jury must have been told that it needed to be unanimous on at least one of the three alleged acts. *Id.*

Credit card abuse is covered by Penal Code section 32.31, in Chapter 32 of the Penal Code. TEX. PENAL CODE Ann. § 32.31 (West 2016 & Supp. 2017). Chapter 32 felonies are part of the laundry list under section 71.02. TEX. PENAL CODE Ann. § 71.02(a)(8) (West 2011 & Supp. 2017). If multiple theories of credit card abuse under section 32.31 are the predicate offenses for a section 71.02 engaging in criminal activity case, the majority position arguably would allow a non-unanimous verdict about which of those acts of credit card abuse were committed, even though we held the opposite in *Ngo*.

Thus, in regard to the heart of the issue–whether the jury must be unanimous that the particular predicate offense was committed, or whether the jury simply must be unanimous that "one or more of the following" listed offenses was committed–I conclude that the jury must be unanimous that the particular predicate offense was committed. Therefore, in this case there was error because the jury instructions allowed for a non-unanimous verdict.

Conclusion

In conclusion, I do not join the majority's opinion because I disagree that the offense is a circumstances-surrounding-the-conduct type of offense. Additionally, I would hold that, for the purposes of section 71.02, the jury needs to be unanimous about which predicate offense was committed. I would reverse the court of appeals and remand to that court for a harm analysis under *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984). Because the Court does not do so, I respectfully dissent.

Filed: May 2, 2018
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