IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-1124-19

TERRI REGINA LANG, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD COURT OF APPEALS
BURNET COUNTY

WALKER, J., delivered the opinion of the Court, in which KELLER, P.J., and HERVEY, RICHARDSON, NEWELL, KEEL, and SLAUGHTER, JJ., joined. MCCLURE, J., concurred in the result. YEARY, J., filed a dissenting opinion.

O P I N I O N

Appellant Terri Regina Lang was convicted of organized retail theft (ORT). This Court subsequently found the evidence insufficient to support Appellant's ORT conviction and remanded the case to the Third Court of Appeals to determine whether the judgment of conviction should be reformed to a lesser-included offense. The court of appeals found that reformation was not available, and the State filed a petition for discretionary review. Because the existence of an owner

is a statutory element of theft, but the identity of the owner is not, theft is a lesser-included offense of ORT in this case, and Appellant's conviction meets the *Thornton* reformation standards. We reverse the judgment of the court of appeals, modify the judgment to reflect a conviction for theft, and remand the case to the trial court for a new sentencing hearing.

I. Background

A. *The Underlying Conviction, Trial, and Appeal*

We laid out the factual details of Appellant's underlying ORT conviction in our prior opinion. *See Lang v. State*, 561 S.W.3d 174, 176–77 (Tex. Crim. App. 2018) (*Lang I*).[1] To summarize, Appellant shoplifted $565.59 worth of items from HEB. She was charged with ORT under the 2011 version of Texas Penal Code § 31.16(b)(1), (c)(3).[2] The indictment alleged that Appellant conducted, promoted, or facilitated an activity in which she received, possessed, concealed, or stored stolen retail merchandise valued at $500 or more but less than $1,500, and it described the stolen property. The indictment did not allege the owner of the stolen property, although at trial the State showed that HEB was the owner of the stolen merchandise. Appellant was convicted, and the court of appeals affirmed her conviction.

B. *Lang I*

We granted Appellant's petition for discretionary review which challenged, among other

[1]The facts are also discussed at *supra* Part II.E.2.

[2]At the time of Appellant's offense ORT was a state jail felony if the value of the stolen merchandise was $500 or more but less than $1,500. Act of May 19, 2011, 82d Leg., R.S., ch. 323, § 3, 2011 Tex. Gen. Laws 941, 942 (current version at TEX. PENAL CODE Ann. § 31.16). Under the current statute, ORT of merchandise valued at $100 or more but less than $750 is a Class B misdemeanor. TEX. PENAL CODE Ann. § 31.16(c)(2). For ORT to be considered a state jail felony under the current statute, the value of the stolen merchandise must be $2,500 or more but less than $30,000. *Id.* § 31.16(c)(4). The conduct prohibited by § 31.16 remains the same as it was in 2011, and citations will be to the current provision.

things, the appellate court's conclusion that the ORT statute permits a conviction for "committing ordinary shoplifting while acting alone[.]" *Lang I*, 561 S.W.3d at 178 n.3. Ultimately, we held that ORT "requires proof of . . . some activity distinct from the mere activity inherent in the ordinary shoplifting of retail items by a single actor." *Id.* at 183. In other words, ORT "requires proof of some activity that is distinct from the act of theft itself." *Id.* at 179. Because the State failed to show that Appellant did anything more than shoplift, we held that the evidence was insufficient to support Appellant's conviction, and we remanded the case to the appellate court to determine if the conviction should be reformed to a lesser-included offense. *Id.* at 183–184.

C. *Lang II*

On remand, the court of appeals considered whether Appellant's conviction could be reformed to either attempted ORT or theft. *Lang v. State*, 586 S.W.3d 125, 130 (Tex. App.—Austin 2019) (*Lang II*). First, considering reformation to attempted ORT, the appellate court noted that attempt requires "'specific intent to commit an offense,'" along with an act that is "'more than mere preparation that tends but fails to effect the commission of the offense intended.'" *Id*. (quoting TEX. PENAL CODE Ann. § 15.01(a)). The court found the record contained "no evidence" that Appellant's "actions tended but failed to effect the commission of any activity 'distinct from the mere activity inherent in the ordinary shoplifting of retail items by a single actor.'" *Id*. at 131 (quoting *Lang I*, 561 S.W.3d at 183). The State and Appellant "agree[d], though for different reasons, that reformation of the judgment of conviction in this case to the lesser-included offense of attempted organized retail theft is not appropriate." *Id.* Thus, the court of appeals concluded that the ORT conviction could not be reformed to an attempted ORT conviction. *Id.*[3]

[3]We agree with the court of appeals's analysis regarding reformation to attempted organized retail theft and

The court of appeals then considered whether reformation to theft was appropriate. *Id*. Appellant conceded that the evidence produced at trial "is sufficient to show that she committed the offense of theft of property." *Id*.; *see also* TEX. PENAL CODE Ann. § 31.03 (theft statute). However, Appellant argued—and the court of appeals agreed—that theft is "not a lesser-included offense of the charged organized retail theft[,]" making reformation to theft impossible. *Lang II*, 586 S.W.3d at 136. To reach this conclusion, the court of appeals relied on our opinion in *Byrd v. State*[4] and found that "the identity of the property owner" is a "theft element missing from the indictment for organized retail theft[.]" *Id.* at 134. The appellate court stated:

> [W]hile it is true that the offense of organized retail theft involves stolen retail merchandise, the general status of the property as stolen retail merchandise does not designate or specify the particular retail establishment from which the merchandise came. The identity of the particular retail establishment from which the merchandise came—that is, the owner of the stolen retail merchandise—is not a required element of the offense of organized retail theft. It matters not which retail establishment the merchandise came from (HEB, Target, Walmart, etc.); the State must only prove that the property at issue is stolen retail merchandise. While the State *could* prove the identity of the particular retail establishment from which the merchandise was stolen in order to show that the retail merchandise at issue is stolen . . . the State is not required to do so.

Id. at 135 (emphasis in original). Since the court of appeals found that the identity of the property owner was not reflected in Appellant's indictment, the court concluded that theft could not be a lesser-included offense of ORT as charged, and reformation was deemed unavailable. *Id.* at 135–36. The court of appeals rendered a judgment of acquittal. *Id.* at 136.

D. Ground for Review

We granted the State's petition for discretionary review to determine whether the appellate

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will not provide further commentary on this point.

[4]336 S.W.3d 242 (Tex. Crim. App. 2011).

court was correct in holding that Appellant's ORT conviction cannot be reformed to theft.[5] A conviction may only be reformed to lesser-included offenses of the crime the appellant was convicted of. Accordingly, we must determine whether theft is a lesser-included offense of ORT in this case and whether reformation is available. We will reverse and hold that theft is a lesser-included offense of ORT in this case and Appellant's conviction can be reformed.

II. Discussion

A. Thornton *Reformation*

Under *Thornton v. State*, after a court of appeals has determined that evidence is insufficient to support a conviction, the court may reform the judgment to reflect a conviction for a lesser-included offense. 425 S.W.3d 289, 299–300 (Tex. Crim. App. 2014). This is known as reformation. The purpose of reformation is "to avoid the 'unjust' result of an outright acquittal[.]" *Id.* at 300. The use of reformation is limited to convicting for lesser-included offenses—not different offenses altogether. *Id.* at 298–99 ("[C]ourts of appeals should limit the use of judgment reformation to those circumstances when what is sought is a conviction for a lesser offense whose commission can be established from facts that the jury actually found."); *Walker v. State*, 594 S.W.3d 330, 340 (Tex. Crim. App. 2020) ("[R]eformation is proper when the 'lesser included' offense is authorized by the indictment[.]"). This limitation helps prevent the court from wholly usurping the prosecution's charging power. *See Neal v. State*, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004) ("[P]rosecutors have broad discretion in deciding which cases to prosecute[,] . . . 'what charge to file generally rests entirely within his or her discretion.'") (quoting *State v. Malone Serv.*

[5]The State, operating on the belief that theft is a lesser-included offense of ORT, stated its ground for review as: "Is reformation unauthorized unless the State pled all the elements and statutorily required notice allegations of the lesser-included offense?"

Co., 829 S.W.2d 763, 769 (Tex. 1992)).

After finding the evidence insufficient to support an appellant's conviction and determining that the offense the conviction is potentially being reformed to is a lesser-included of the charged offense, reformation to the lesser-included offense is required[6] if the reviewing court can answer yes to two questions:

> 1) in the course of convicting the appellant of the greater offense, must the jury have necessarily found every element necessary to convict the appellant for the lesser-included offense; and 2) conducting an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction for that offense?

Thornton, 425 S.W.3d at 300; *see also Walker*, 594 S.W.3d at 338. "If the answer to either of these questions is no, the [reviewing court] is not authorized to reform the judgment" and should acquit. *Thornton*, 425 S.W.3d at 300.

These *Thornton* questions help prevent "arbitrary deprivation of liberty based upon charges never filed while also ensuring that the State carries its burden to prove each element of the charged offense beyond a reasonable doubt." *Walker*, 594 S.W.3d at 338. Moreover, the standards serve to "give effect" to the verdict "by tying reformation to what the jury necessarily found when it reached that verdict." *Id.*

In summary, when reformation is permissible, it proceeds as follows:

> (1) The reviewing court finds the evidence insufficient to support the appellant's conviction.
> (2) The reviewing court determines that there is a lesser-included offense of the greater offense the defendant was convicted of.

[6]While there is an exception to the reformation requirement, this exception is not invoked here. *See Rodriguez v. State*, 454 S.W.3d 503, 510 (Tex. Crim. App. 2015) (op. on reh'g) (finding that "mandatory reformation" does not "extend to circumstances where there are multiple lesser-included offenses that meet the criteria for reformation, or where we have no way to determine which degree of the lesser-included offense the jury found the appellant guilty of[.]").

(3) The reviewing court determines that the trial court, in convicting the appellant of the greater offense, necessarily found every element required to convict the appellant of the lesser-included offense.
(4) The reviewing court conducts a sufficiency analysis as though the appellant was convicted of the lesser-included offense at trial and finds the evidence sufficient to support the hypothetical conviction.
(5) The reviewing court must reform the appellant's conviction to reflect a judgment of conviction for the lesser-included offense.[7]

B. *Lesser-Included Offenses*

In *Lang I*, we held that the evidence was insufficient to uphold Appellant's ORT conviction. 561 S.W.3d at 184. The next step in our reformation process requires us to determine whether theft is a lesser-included offense of ORT. *See Thornton*, 425 S.W.3d at 298–99. Under Texas Code of Criminal Procedure article 37.09(1), "[a]n offense is a lesser included offense if . . . it is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]" Rephrased, a lesser-included offense exists if proof of the alleged offense would also prove the supposed lesser-included offense. TEX. CODE CRIM. PROC. Ann. art. 37.09(1). Whether a lesser-included offense exists is "a question of law, and it does not depend on the evidence . . . produced at trial." *Safian v. State*, 543 S.W.3d 216, 220 (Tex. Crim. App. 2018); *Rice v. State*, 333 S.W.3d 140, 144 (Tex. Crim. App. 2011).

To determine whether a lesser-included offense exists under article 37.09(1), the Court uses the cognate-pleadings approach. *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007); *Ex parte Watson*, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009) (op. on reh'g) ("[I]n *Hall* we adopted the cognate pleadings approach exclusively and expressly rejected all other approaches to lesser-included offense determinations[.]"). Under the cognate-

[7]*See Thornton*, 425 S.W.3d at 299–300.

pleadings approach, the reviewing court compares the elements of the greater, charged offense as stated in the indictment to the statutory elements of the purported lesser-included offense. *E.g.*, *Fraser v. State*, 583 S.W.3d 564, 568 (Tex. Crim. App. 2019); *Safian*, 543 S.W.3d at 220; *Ex parte Castillo*, 469 S.W.3d 165, 169 (Tex. Crim. App. 2015); *Watson*, 306 S.W.3d at 273; *Hall*, 225 S.W.3d at 525, 535–36. An offense is a lesser-included offense of another "if the indictment for the greater-inclusive offense either: 1) alleges all of the elements of the lesser-included offense, or 2) alleges elements plus facts (including descriptive averments . . .) from which all of the elements of the lesser-included offense may be deduced." *Watson*, 306 S.W.3d at 273.

"[T]he elements of the lesser-included offense do not have to be pleaded in the indictment if they can be deduced from facts alleged in the indictment." *State v. Meru*, 414 S.W.3d 159, 162 (Tex. Crim. App. 2013); *see also Watson*, 306 S.W.3d at 273. When applying the cognate-pleadings approach, reviewing courts may employ the functional-equivalence concept. *Meru*, 414 S.W.3d at 162. "When utilizing functional equivalence, the court examines the elements of the lesser offense and decides whether they are 'functionally the same or less than those required to prove the charged offense.'" *Id.* (quoting *McKithan v. State*, 324 S.W.3d 582, 588 (Tex. Crim. App. 2010)); *Rice*, 333 S.W.3d at 144–45.

C. Arguments of the Parties

The primary difference in the parties' positions in this case is how they would apply the cognate-pleadings approach in a reformation case. The State argues that, regardless of this case's ultimate issue of whether ORT can be reformed to theft, the cognate-pleadings

approach requires us to examine only the statutory elements of theft—the elements laid out in Penal Code § 31.03(a)—and compare those elements to Appellant's indictment alleging ORT. The State argues that the appellate court misinterpreted *Byrd v. State*[8] by finding that the identity of the owner of stolen property is an element of theft.

Appellant argues that the cognate-pleadings approach in this reformation case requires us to examine the "essential" elements of theft— the essential elements meaning those that would be required in a hypothetically correct jury charge—and compare those elements to the indictment. Appellant posits that because the name of the owner of stolen property is an essential element of theft that would have to be proven by the State to sustain a conviction in a case where theft is charged, and because the name of the owner of stolen property is not something that had to be proven under Appellant's indictment for ORT, theft is not a lesser-included offense of ORT.

D. Theft Can Be a Lesser-Included Offense of ORT

1. Appellant's Construction of the Cognate-Pleadings Approach is Incorrect

At the outset, we note that Appellant's argument ignores a good deal of our cognate-pleadings caselaw. In *Hall*, this Court's flagship case on applying article 37.09, we explicitly determined that we would use the cognate-pleadings approach to analyze whether an offense is a lesser-included offense of another. *Hall*, 225 S.W.3d at 535; *see also Watson*, 306 S.W.3d at 273. The very first paragraph of our *Hall* opinion states that we determine "whether the allegation of a greater offense includes a lesser offense" by "comparing the elements of the greater offense, as the State pled it in the indictment, with

[8]336 S.W.3d 242.

the elements in the statute that define[] the lesser offense." 225 S.W.3d at 525 (emphasis added). We have reaffirmed this principle numerous times. *E.g.*, *Fraser*, 583 S.W.3d at 568 ("The cognate-pleadings test allows a court to look to non-statutory elements only for the charged offense; lesser offenses are examined only for their statutory elements."); *Castillo*, 469 S.W.3d at 169 ("[T]he cognate-pleading approach adopted in *Hall v. State* . . . requires us to compare the elements of the greater offense as pled to the statutory elements of the potential lesser-included offense in the abstract."); *Safian*, 543 S.W.3d at 220 (quoting *Castillo*); *Ex parte Benson*, 459 S.W.3d 67, 72 (Tex. Crim. App. 2015) ("[T]he cognate-pleadings approach . . . entails comparing the elements of the greater offense as pleaded to the statutory elements of the lesser offense."); *Watson*, 306 S.W.3d at 273 ("Both statutory elements and any descriptive averments alleged in the indictment for the greater-inclusive offense should be compared to the statutory elements of the lesser offense."); *Cavazos v. State*, 382 S.W.3d 377, 383 (Tex. Crim. App. 2012) (citing *Watson*).

Thus, Appellant's argument that in conducting the cognate-pleadings analysis we should examine the essential elements of theft, as opposed to the statutory elements of theft, is unavailing. The cognate-pleadings analysis does not change because we are attempting to determine whether reformation is permissible. As explained above, the threshold question in a reformation analysis is whether the offense the conviction is potentially being reformed to is a lesser-included offense. *Thornton*, 425 S.W.3d at 298–99; *Walker*, 594 S.W.3d at 340. We apply the cognate-pleadings approach to determine whether a lesser-included offense exists. *Hall*, 225 S.W.3d at 535. We see no need or grounds to depart from this standard merely because we are dealing with a reformation

issue as opposed to an issue of double jeopardy or jury instructions. *Cf. Castillo*, 469 S.W.3d at 168–69 (employing the cognate-pleadings approach in context of double-jeopardy claim); *Safian*, 543 S.W.3d at 217, 219–20 (employing the cognate-pleadings approach to determine whether Safian was entitled to a jury instruction). The question we must answer is whether ORT, as pled in the indictment, alleges elements plus facts from which the statutory elements of theft can be deduced. *See Watson*, 306 S.W.3d at 273.

2. Unlawful Appropriation and Intent to Deprive

Appellant's indictment alleged that she did

> intentionally conduct and promote and facilitate an activity in which the defendant received and possessed and concealed and stored stolen retail merchandise, to wit: groceries, herbal supplements, energy drinks and animal treats, and the total value of the merchandise involved in the activity was greater than $500 but less than $1500.

This indictment tracks the language of the ORT statute. *See* TEX. PENAL CODE Ann. § 31.16(b)(1).

The statutory elements of theft are (1) a person; (2) with the intent to deprive the owner of property; (3) unlawfully appropriates that property. TEX. PENAL CODE Ann. § 31.03(a). Appropriate means "to bring about a transfer or purported transfer of title to or other nonpossessory interest in property, whether to the actor or another; or . . . to acquire or otherwise exercise control over property other than real property." TEX. PENAL CODE Ann. § 31.01(4); *see also McClain v. State*, 687 S.W.2d 350, 353 n.7 (Tex. Crim. App. 1985) (noting appropriating property means exercising control over the property in question). Appropriation is unlawful if "it is without the owner's effective consent;" "the property is stolen and the actor appropriates the property knowing it was stolen by another; or" the property is in the "custody of any law enforcement agency" and "was explicitly

represented by any law enforcement agent to the actor as being stolen and the actor appropriates the property believing it was stolen by another." TEX. PENAL CODE Ann. § 31.03(b). An owner is one who "has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor[.]" *Id.* § 1.07(a)(35)(A); *see also Morgan v. State*, 501 S.W.3d 84, 91 (Tex. Crim. App. 2016).

In comparing theft's statutory elements to the elements of ORT as pled, we agree with the appellate court that the theft elements of unlawful appropriation and intent to deprive the owner of property are not explicitly included in Appellant's indictment. *See Lang II*, 586 S.W.3d at 132. We also agree that both elements can be deduced from Appellant's ORT indictment. *See id.* at 132–34.

First, we have noted that appropriating property knowing the property was stolen by another as laid out in Penal Code § 31.03(b)(2) is a subset of § 31.03(b)(1). *McClain*, 687 S.W.2d at 354 ("[K]nowing the property possessed 'was stolen by another' is merely a subset of knowing the possession is 'without the owner's consent.'"); *see also Chavez v. State*, 843 S.W.2d 586, 588 (Tex. Crim. App. 1992) (quoting, and affirming, same passage from *McClain*). Thus, unlawful appropriation can be summarized as exercising control over the property of another without the consent of the owner. *See* TEX. PENAL CODE Ann. §§ 31.01(4), 31.03(b)(1),(2).[9]

Here, the ORT indictment required the State to prove that Appellant intentionally conducted, promoted, or facilitated an activity in which she received, possessed, concealed or stored stolen retail merchandise. As the court of appeals correctly noted, "[w]hen the

[9]As § 31.03(b)(3) is not relevant to this case, we do not address it.

State is required to prove that a person receives, possesses, conceals, or stores stolen retail merchandise, the State must necessarily prove that the person 'exercised control' over stolen property." *Lang II*, 586 S.W.3d at 133. Further, because the State was required to prove that the merchandise Appellant handled was "stolen retail merchandise," and stolen retail merchandise means retail merchandise acquired by theft, the State was required to prove that the appropriation was unlawful—without the consent of the owner. *See* TEX. PENAL CODE Ann. §§ 31.01(7),[10] 31.03(a)–(b). Thus, we agree with the court of appeals that the act "of conducting, promoting, or facilitating an activity in which [Appellant] received, possessed, concealed, or stored stolen retail merchandise is the functional equivalent of the theft element of unlawful appropriation of property—both exercising control over stolen property as well as exercising control over property without the owner's effective consent." *Lang II*, 586 S.W.3d at 133.

Second, Appellant's ORT indictment did not specifically require the State to prove that Appellant acted with intent to deprive the owner of his or her property. However, the cognate-pleadings approach is flexible, and Appellant's indictment did require that she intentionally conducted, promoted, or facilitated an activity in which she received, possessed, concealed, or stored stolen retail merchandise. *See Meru*, 414 S.W.3d at 162 (noting it is enough if "the elements of the lesser offense" are functionally the same or less than the elements necessary to prove the alleged offense). "A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." TEX. PENAL

[10]Texas Penal Code § 31.01(7) states that "'[s]teal' means to acquire property or service by theft."

CODE Ann. § 6.03(a). We agree with the court of appeals that "[c]ommon sense dictates that any [intentional] activity involving stolen property—other than returning it to its owner—necessarily involves an intent to deprive the owner of that property." *Lang II*, 586 S.W.3d at 134. Because the State was required, based on the ORT indictment, to prove that Appellant received, possessed, concealed, or stored stolen property (and receiving, possessing, concealing, or storing stolen property does not involve returning the property to its rightful owner), the theft element requiring Appellant to intend to deprive the owner of property can be deduced from the ORT indictment.

3. The Court of Appeals Misinterpreted *Byrd*

We diverge from the court of appeals however in their conclusion that theft required an element that cannot be deduced from the ORT indictment. Relying on our opinion in *Byrd*, the court of appeals found that the identity, or existence, of the property owner is a "theft element missing from the indictment for organized retail theft . . . ." *Id.*

In *Byrd*, the defendant was convicted of theft after the State alleged she stole property from Mike Morales; however, at trial, the State failed to ever mention Mike Morales. *Byrd*, 336 S.W.3d at 244. Instead, the State proved that Byrd stole the property from Wal-Mart. *Id.* We granted review to determine whether the evidence was sufficient to uphold Byrd's theft conviction. *Id*. In ascertaining whether the State's proving Wal-Mart owned the property instead of Mike Morales was a material variance rendering the evidence insufficient, we examined the essential elements of theft and found that the existence, or identity, of the specific owner of the stolen property is an element of theft, but the owner's name is not. *Id*. at 250–52, 258. We noted, however, that the Code of

Criminal Procedure "requires the State to allege the name of the owner of property in its charging instrument." *Id*. at 251–52 & n.48 (discussing TEX. CODE CRIM. PROC. Ann. arts. 21.08, 21.09). As a result, we found that "a theft indictment or information must both name the owner and describe the property as both elements constitute the gravamen of the offense." *Id*. at 252 n.48. And the State must prove "that the person (or entity) alleged in the indictment as the owner is the same person (or entity) . . . as shown by the evidence." *Id*. at 252. Accordingly, despite the State's proving that Wal-Mart owned the stolen property at trial, we found the evidence insufficient to support Byrd's conviction because "the State failed to prove that 'Mike Morales' had any ownership interest in the property that [Byrd] stole[.]" *Id.* at 258.[11]

We disagree with the court of appeals in finding that *Byrd* held the specific identity of the owner of stolen property is a statutory element of theft. The ultimate issue in *Byrd* was whether the evidence was sufficient to support Byrd's conviction. *Id.* at 244, 246. The elements at issue in a sufficiency analysis are the essential elements of an offense—not the statutory elements. *Zuniga v. State*, 551 S.W.3d 729, 732 (Tex. Crim. App. 2018) ("When addressing a challenge to the sufficiency of the evidence, we consider whether, after viewing all of the evidence in the light most favorable to the verdict, any rational trier of

[11]In fact, our review of the record indicated that

> [a]t no time during the trial did anyone ever refer to a "Mike Morales." And no witness ever made any connection between a "Mike Morales" and Wal–Mart or any of the property that appellant shoplifted. No one—not the prosecutor, the defense counsel, the trial judge, or even the jury—seemed to notice this astonishing discrepancy between the allegation of "Mike Morales" as the owner of the property in both the information and the jury charge and the absence of any mention of him or his possible connection to the property at trial.

Id. at 245.

fact could have found the essential elements of the crime beyond a reasonable doubt."). The essential elements of the crime "are defined by the hypothetically correct jury charge." *Alfaro-Jimenez v. State*, 577 S.W.3d 240, 244 (Tex. Crim. App. 2019); *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The "hypothetically correct jury charge accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Alfaro-Jimenez*, 577 S.W.3d at 244. The law authorized by the indictment "includes the statutory elements of the offense and those elements as modified by the indictment." *Zuniga*, 551 S.W.3d at 733.

Accordingly, the essential elements of the hypothetically correct jury charge include more than the mere statutory elements. *See id.* Because the *Byrd* opinion analyzed the sufficiency of Byrd's theft conviction, rather than the statutory elements of theft as a whole, *Byrd* does not stand for the notion that the specific identity of the owner of the stolen property is a statutory element of theft. *See Byrd*, 336 S.W.3d at 258 (finding that the "evidence is insufficient" to uphold Byrd's conviction under *Malik*, 953 S.W.2d 234, *Gollihar v. State*, 46 S.W.3d 243 (Tex. Crim. App. 2001), and *Fuller v. State*, 73 S.W.3d 250 (Tex. Crim. App. 2002)—three cases analyzing sufficiency of the evidence). Rather, *Byrd* may be understood to mean that the specific identity of the owner of the stolen property, where known, may be an essential element of theft—and the incorrect name or lack of an allegation demonstrating the identity of the stolen property's owner may give

rise to a "failure of proof" at trial. *See id.*[12] In short, because *Byrd* examined the essential elements of theft, those included in a hypothetically correct jury charge, and not only the statutory elements of theft—as laid out in Penal Code 31.03(a)—*Byrd* is not relevant to our lesser-included offense analysis in this case.

4. The State Must Prove an Owner Existed—Not the Identity of the Owner

Returning to the statutory elements of theft, Penal Code § 31.03(a) states that "[a] person commits [theft] if he unlawfully appropriates property with intent to deprive the owner of property." Based on the plain language of the theft statute, an owner of the allegedly stolen property is a statutory element of theft because the State cannot show unlawful appropriation—or theft at all—without showing the existence of an owner. *See* TEX. PENAL CODE Ann. § 31.03. The State cannot show that a defendant intended to deprive an owner of his or her property if it cannot show that the property had an owner. *See id.* § 31.03(a). Nor can the State show unlawful appropriation if it does not prove the property owner exists; there is no way to show that the owner did not consent or that the defendant received property knowing it was stolen if there is no owner to withhold consent or steal property from. *See id.* § 31.03(a)–(b). If the State cannot show that an owner of the allegedly stolen property existed, it cannot prove that the defendant was a thief. Our theft statute does not make it a crime to exercise control over one's own property, or property that no one else has claimed. *See id.* Therefore, the property's owner must exist for theft to

[12]It is true that *Byrd* noted that theft jury charges must incorporate the "statutorily required descriptions of both ownership and property." *Id.* at 257. However, the opinion cites Texas Code of Criminal Procedure articles 21.08 and 21.09 for this proposition; both of which deal with pleading requirements in theft cases—not the statutory elements of theft as laid out in Penal Code § 31.03(a). *Id.* at 257 n.90; *see also* TEX. CODE CRIM. PROC. Ann. arts. 21.08, 21.09.

occur under the plain language of Penal Code § 31.03.

However, the specific identity of the stolen property's owner is not a statutory theft element; rather, it is a pleadings issue. *See* TEX. PENAL CODE Ann. § 31.03; TEX. CODE CRIM. PROC. Ann. arts. 21.08, 21.09 (requiring name of stolen property's owner to be pled where known); *Garza v. State*, 344 S.W.3d 409, 412 (Tex. Crim. App. 2011) ("[N]owhere in the Penal Code is the name of the owner made a substantive element of theft[;]" however, "the Code of Criminal Procedure, as a matter of state law, requires the state to allege the name of the owner of the property in its charging instrument."); *Freeman v. State*, 707 S.W.2d 597, 602–03 (Tex. Crim. App. 1986) (noting that Texas Code of Criminal Procedure article 21.08 requires the "name of the title owner of the property or the lawful possessor of the property from whom it was unlawfully taken [to] be alleged in the charging instrument[,]" but "Art. 21.08 . . . is a rule of pleading . . . and is not a part of the definition of the offense of theft."). Under our principles of statutory construction, we give effect to a statute's plain meaning. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). It is not this Court's place to create additional requirements in a statute that are not already apparent from the statute's plain text. *See id.* Nowhere in our theft statute did the Legislature include a requirement that the State prove the identity of the specific owner of the stolen property. TEX. PENAL CODE Ann. § 31.03.

Indeed, the Legislature allowed for a theft conviction even if the defendant appropriated property merely knowing it was stolen by another. *Id.* § 31.03(a), (b)(2) (allowing for unlawful appropriation if "property is stolen and the actor appropriates the property knowing it was stolen by another"); *see also Renfroe v. State*, 157 S.W.2d 365,

366 (Tex. Crim. App. 1941) ("That a prosecution will lie for the theft of property from an unknown owner is well established[.]"). This explicitly allows the State to obtain a theft conviction even if it cannot prove who the original owner of the property was, so long as it can prove that the property has been stolen. TEX. PENAL CODE Ann § 31.03(a), (b)(2).

Because the theft statute's plain language allows for theft convictions where the specific identity of the owner of the stolen property is unknown, and the prohibited conduct outlined in the theft statute does not require the State to prove the specific identity of the stolen property's owner, we hold that the identity of the stolen property's owner is not a statutory element of theft. But the existence of an owner of the stolen property is a statutory element because there must be an owner of the property at issue for theft to occur. *See id.* § 31.03.[13]

Because the existence of an owner of the stolen property is a statutory element of theft, we must determine whether this element can be deduced from Appellant's ORT indictment. We find that it can be. An owner is one who has title or possession of property, or one who has a greater right to possession of property than the actor. TEX. PENAL CODE Ann. § 1.07(a)(35)(A). Appellant's indictment alleged that she conducted, promoted, or facilitated an activity in which she received, possessed, concealed, or stored stolen retail merchandise.

Retail merchandise is defined as "one or more items of tangible personal property

[13]To the extent that *Byrd* used "identity" and "existence" synonymously, we acknowledge that this was incorrect. *See Byrd*, 336 S.W.3d 252–53. The identity of a specific owner is not the same as an owner's existence. While the identity of the specific owner of stolen property is important in a sufficiency analysis, sufficiency analyses consider essential elements—not statutory elements. *See id.* at 250 (discussing the "essential elements of the offense of theft").

displayed, held, stored, or offered for sale in a retail establishment." *Id.* § 31.01(11). This definition of retail merchandise suggests ownership. If the retail establishment is displaying, storing, or offering the merchandise for sale in its place of business, the retail establishment has a greater right to possession of the property than the defendant. *See id.* §§ 1.07(a)(35)(A), 31.01(11). Further, as the word retail modifies merchandise, "retail merchandise" implies that there is an owner of the merchandise, or property, and that owner is a retail establishment. The owner does not have to be specific; it is enough that it is an entity with more right to possession of the property than Appellant. *See id*. § 1.07(a)(35)(A).[14]

The State would be unable to prove ORT as alleged without proving that the stolen property came from a retail establishment. Since the property, or merchandise, must be stolen from the retail establishment, the retail establishment is the owner of the property—one with more right to possession of the property than Appellant. *Id.*; *Morgan*, 501 S.W.3d at 87. Thus, because the ORT indictment requires the State to prove that the stolen merchandise is stolen retail merchandise, the State would have to prove the existence of the stolen property's owner as required for a theft conviction. Accordingly, as all the elements of theft can be deduced from Appellant's ORT indictment, we find that theft is a lesser-included offense of ORT in this case. *See Watson*, 306 S.W.3d at 273.

[14]It could be argued that ORT's requirement that the retail merchandise be "stolen" implies that all the elements of theft, including the existence of an owner, are automatically incorporated in a properly worded ORT indictment because stolen is defined as having been acquired by theft. *See* TEX. PENAL CODE Ann. § 31.01(7) ("'Steal' means to acquire property or service by theft."). This would imply that theft is always a lesser-included offense of ORT. However, we decline to make this broad of a ruling and will address only whether theft is a lesser-included offense of ORT based on the indictment at issue.

E. Appellant's Conviction Must Be Reformed

The next steps in our reformation process require us to answer the two *Thornton* questions. *Thornton*, 425 S.W.3d at 300. First, we must determine whether the jury necessarily found every element required to convict Appellant of theft in convicting her of ORT. *See id.*; *Walker*, 594 S.W.3d at 338. If we find they did, we must then determine whether the evidence produced at trial is sufficient to support a theft conviction. *Thornton*, 425 S.W.3d at 300; *Walker*, 594 S.W.3d at 338. If we determine that the evidence produced at trial is sufficient to support a theft conviction, we must reform the judgment. *See Thornton*, 425 S.W.3d at 300.

1. The Jury Found Every Element Necessary to Convict Appellant of Theft

In determining whether the jury—by convicting Appellant of ORT—found every element necessary to convict Appellant of theft, we must examine what her conviction for ORT entailed. *See id*. In convicting Appellant of ORT, the jury found that Appellant intentionally conducted, promoted, or facilitated an activity in which she received, possessed, concealed, or stored stolen retail merchandise. *Lang I*, 561 S.W.3d at 177; *see also* TEX. PENAL CODE Ann. § 31.16(b).[15] This Court reversed, finding that ORT "requires

[15]The jury instructions track the language of the ORT statute. Specifically, the application paragraph reads:

> You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—
>
> 1. the defendant, in Burnet County, Texas, on or about the 2nd day of October, 2013, did then and there intentionally conduct or promote or facilitate an activity
> 2. in which the defendant received or possessed or concealed or stored stolen retail merchandise
> 3. the stolen retail merchandise being groceries, herbal supplements, energy drinks, and animal treats
> 4. the total value of the merchandise involved in the activity was $500.00 or more but less than $1,500.00.

proof of conducting, promoting, or facilitating some activity distinct from the mere activity inherent in the ordinary shoplifting of retail items by a single actor." *Id.* at 183. We found the evidence insufficient to establish that Appellant "intentionally conducted, promoted, or facilitated an activity in which she received, possessed, concealed, stored, bartered, sold, or disposed of stolen retail merchandise." *Id.*

The parties did not dispute that "the evidence, viewed in the light most favorable to the prosecution, shows that appellant stole items from HEB by placing them in her reusable shopping bag, fail[ed] to pay for those items in the checkout line, and then attempt[ed] to leave the store while still possessing the items." *Id.* at 179. We accordingly described Appellant's conduct as "stealing items from HEB and then attempting to leave the store with those items[.]" *Id.* at 183. Therefore, we found that Appellant's ORT conviction failed because the evidence could not support a finding of the first element of ORT—intentionally conducting, promoting, or facilitating an activity "undertaken with respect to stolen retail merchandise that goes beyond . . . ordinary shoplifting." *Id*. The jury found the other elements of ORT—namely that Appellant received, possessed, concealed, or stored stolen retail merchandise when she stole items from HEB and attempted to leave the store. *Id*.

We must now determine whether the jury's finding that Appellant received, possessed, concealed, or stored stolen retail merchandise necessarily encompasses the

---

> You must all agree on 1, 2, 3, and 4 listed above.
>
> If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3 and 4 listed above, you must find the defendant "not guilty."
>
> If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant "guilty."

elements of theft. *See Thornton*, 425 S.W.3d at 300; *Walker*, 594 S.W.3d. at 338. As discussed, for a defendant to be convicted of theft, the State must show that the defendant unlawfully appropriated property with intent to deprive the owner of that property. TEX. PENAL CODE Ann. § 31.03(a). Subsection (b) of Penal Code § 31.03 describes different means of unlawful appropriation—it does not create more than one type of theft offense. *See Chavez*, 843 S.W.2d at 588 (noting that the 1985 Penal Code revision consolidated theft offenses into one statute, and there is no longer any "erstwhile distinction between theft and receiving stolen property" as "they now appear as subdivisions of the same general theft law"). The manner of unlawful appropriation "is not an essential element of theft under current law." *Id.*; *see also Ex parte Porter*, 827 S.W.2d 324, 327 (Tex. Crim. App. 1992) (op. on reh'g) ("The only elements of theft are those set forth in . . . Penal Code, section 31.03(a). The definitional provisions set forth in . . . Penal Code, section 31.03(b) are merely evidentiary matters[.]"). Accordingly, so long as the jury in convicting Appellant of ORT necessarily found that Appellant unlawfully appropriated property using one of the three methods described in § 31.03(b), the unlawful appropriation element will be met.[16]

Since the jury found that Appellant received, possessed, concealed, or stored stolen retail merchandise by shoplifting items from HEB, the jury necessarily found that

[16]As a reminder, Penal Code § 31.03(b) states:

> (b) Appropriation of property is unlawful if:
>
> > (1) it is without the owner's effective consent;
> >
> > (2) the property is stolen and the actor appropriates the property knowing it was stolen by another; or
> >
> > (3) property in the custody of any law enforcement agency was explicitly represented by any law enforcement agent to the actor as being stolen and the actor appropriates the property believing it was stolen by another.

Appellant exercised control over—appropriated—items that did not belong to her. *See* TEX. PENAL CODE Ann. §§ 31.01(4), 31.03(a). Because the jury found the items to be "stolen"—taken from HEB—the jury necessarily found that Appellant took the items without the property owner's consent, meaning the appropriation was unlawful. *See id.* § 31.03(b)(1).

Further, in finding that Appellant received, possessed, concealed or stored the stolen merchandise, the jury necessarily found that Appellant acted with the intent to deprive the stolen property's owner of the property. As stated above, we agree with the appellate court that "[c]ommon sense dictates that any [intentional] activity involving stolen property—other than returning it to its owner—necessarily involves an intent to deprive the owner of that property." *Lang II*, 586 S.W.3d at 134. As the jury found that Appellant received, possessed, concealed, or stored the stolen merchandise, the jury did not find that Appellant was attempting to return the property to its owner. Thus, in convicting Appellant of ORT, the jury "necessarily found every element necessary to convict" Appellant of theft. *See Thornton*, 425 S.W.3d at 300.[17]

[17]The dissent argues that "[w]hile Section 31.16 certainly requires a jury to find that the retail merchandise involved was 'stolen,' it does not on its face necessarily require proof that it was the accused who appropriated it unlawfully in the first place." Dissenting op., at 9. We disagree. Theft requires that an individual unlawfully exercise control over another's property without the consent of the owner. TEX. PENAL CODE Ann. §§ 31.01(4), 31.03(a). Since the jury found that Appellant intentionally conducted, promoted, or facilitated an activity that involved receiving, possessing, concealing, or storing stolen retail merchandise, the jury necessarily found that Appellant exercised control over property. By finding the merchandise to be stolen, the jury necessarily found that the property belonged to another who did not grant consent (both in the statutory sense of the word stolen and the common sense of the word). *See id.* § 31.01(7); *Stolen*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/stolen (last visited July 22, 2022) (defining stolen as "past participle of steal"); *Steal*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/steal (last visited July 22, 2022) (defining steal as "to take the property of another wrongfully and especially as a habitual or regular practice" and "to take or appropriate without right or leave and with intent to keep or make use of wrongfully"). Further, by the jury's finding that Appellant intentionally conducted this activity, the jury found that Appellant knew the merchandise was stolen. *See* TEX. PENAL CODE Ann. § 6.03(a). Accordingly, the jury necessarily found that Appellant committed theft.

2. The Evidence Produced at Trial Is Sufficient to Support a Theft Conviction

Under *Thornton*, the next question we must ask is whether the evidence produced at Appellant's trial is sufficient to support a conviction for theft. *See id.*; *Walker*, 594 S.W.3d at 338. "The relevant question 'is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Thornton*, 425 S.W.3d at 303 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original). As discussed, the essential elements of a crime "are defined by the hypothetically correct jury charge" which "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense" the defendant is being accused of. *Alfaro-Jimenez*, 577 S.W.3d at 244. The essential elements of theft include the statutory elements as laid out in § 31.03(a) "as modified by the charging instrument." *See id.*

Byrd held that the identity of the property owner is an essential element of theft. 336 S.W.3d at 257 ("[S]ufficiency of the evidence is assessed under the hypothetically correct jury charge—a jury charge that incorporates the name of the owner and a description of the property in a theft prosecution."). We still agree with this holding. Under Texas Code of Criminal Procedure articles 21.08 and 21.09, a theft charging instrument must include the name of the owner of stolen property if known. Accordingly, the charging instrument in a theft case would include the identity of the owner of stolen property; it is a necessarily pled allegation and would be included in a hypothetically correct jury charge. *See Gollihar*, 46 S.W.3d at 253 (noting "hypothetically correct charge[s] may disregard

certain *unnecessarily* pled indictment allegations on sufficiency review") (emphasis added); TEX. CODE CRIM. PROC. Ann. arts. 21.08, 21.09.

Similarly, because the value of the stolen property and the description of the stolen property must be included in a theft charging instrument, they are essential elements of theft. We have held that proper theft indictments allege the value of the stolen property and a description of the property. *Ex parte Sewell*, 606 S.W.2d 924, 924 (Tex. Crim. App. 1980). The value (or range of value) of the stolen property must be pled, and proven, to establish jurisdiction and the proper punishment grade for the theft offense. TEX. PENAL CODE Ann. § 31.03(e); *McKnight v. State*, 387 S.W.2d 662, 663 (Tex. Crim. App. 1965) ("It is essential in all cases of theft . . . to allege the value of the property so that the indictment may show upon its face that the court has jurisdiction of the offense."); *see also Sanders v. State*, 664 S.W.2d 705, 709 (Tex. Crim. App. 1984) (op. on reh'g) (noting "the value of the property stolen is an essential element of [theft] when it is made the basis of punishment"); *Christiansen v. State*, 575 S.W.2d 42, 44 (Tex. Crim. App. [Panel Op.] 1979) (noting proof of the stolen property's value is a "critical element[] in the offense of theft.").

Likewise, under Code of Criminal Procedure article 21.09, titled "Description of Property," a theft indictment must identify the stolen property by "name, kind, number, and ownership" where known. If these specific characteristics are unknown, the indictment must state that fact and provide a "general classification, describing and identifying the property as near as may be[.]" TEX. CODE CRIM. PROC. Ann. art. 21.09. As both the value and description of the stolen property are necessarily included in theft charging

instruments, they are essential elements of theft.

Accordingly, based on the statutory elements of theft and the elements that would be in included in a theft charging instrument, the hypothetically correct jury charge in this case would allege that Appellant unlawfully appropriated[18] groceries, herbal supplements, energy drinks, and animal treats—valuing greater than $500 but less than $1,500—with the intent to deprive the owner, HEB, of said property. Viewing the evidence in the light most favorable to the State, we must determine whether any rational trier of fact could have found Appellant guilty on this charge beyond a reasonable doubt. *See Thornton*, 425 S.W.3d at 303; *Zuniga*, 551 S.W.3d at 732. We find that the evidence is sufficient.

In *Lang I*, we described Appellant's conduct as follows:

> In October 2013, appellant was shopping at HEB when an employee observed her placing unpaid-for merchandise into reusable shopping bags in her cart. Appellant also placed items inside a reusable shopping bag that was tied to the right-hand side of her cart. Thinking this behavior unusual, the employee began observing appellant as she shopped for around one hour. Appellant eventually finished shopping and headed towards the checkout. As appellant went through the checkout, the employee observed appellant place the reusable bags from inside her cart on the conveyor belt so that the items inside could be scanned by the cashier. However, appellant did not do so with the bag that was tied to the side of her cart. After appellant paid for the items that had been inside her cart, she loaded the items back into the cart and headed towards the store's exit. Once appellant had exited the main doors, the employee and her manager stopped appellant and questioned her about the bag tied to the side of her cart, which was full of unpaid-for items. The store employees called the police, who arrived and eventually arrested appellant. Upon tallying up the value of the items found in appellant's possession, store employees determined that the value of the unpaid-for merchandise totaled $565.59 before tax, whereas the paid-for merchandise totaled $262.17.

561 S.W.3d at 176–77. Based on this evidence, a rational trier of fact could have found

[18]The manner of unlawful appropriation as set forth in § 31.03(b) is not an essential element of theft and thus is not considered in the hypothetically correct jury charge. *See Chavez*, 843 S.W.2d at 588. However, if the State chooses to plead the manner of unlawful appropriation, it is required to prove it. *See id.*

that: Appellant exercised control over the grocery store items as described in the hypothetically correct jury charge; the grocery store items were valued at over $500 and less than $1,500; Appellant, by leaving the store with the items and not paying for them, intended to deprive HEB of the items without HEB's consent; and HEB owned the property. Thus, the evidence is sufficient to uphold a theft conviction. *See* TEX. PENAL CODE Ann. § 31.03.

III. Conclusion

We have determined that the evidence is insufficient to support Appellant's ORT conviction, theft is a lesser-included offense of ORT in this case, the jury necessarily found every element necessary for a theft conviction in convicting Appellant of ORT, and the evidence is sufficient to support a conviction for theft. Therefore, we must reform Appellant's ORT conviction to a reflect a theft conviction. *See Thornton*, 425 S.W.3d at 300; *Walker*, 594 S.W.3d at 338.

The purpose of reformation is to avoid an unjust result and prevent an appellant from enjoying a windfall. *Thornton*, 425 S.W.3d at 298, 300. Here, "[A]ppellant has conceded that the evidence is sufficient to show that she committed conduct that would amount to theft." *Lang I*, 561 S.W.3d at 184. Reformation in this case prevents an unjust result and reflects a conviction for the illegal conduct Appellant committed. However, we continue to caution that reformation is a narrow remedy; it should only be used "when what is sought is a conviction for a lesser offense whose commission can be established from facts that the jury actually found." *Thornton*, 425 S.W.3d at 298–99.

Because Appellant committed theft, and theft is a lesser-included offense of ORT

in this case, this is one instance where reformation is appropriate. Accordingly, we reverse the judgment of the court of appeals, modify the judgment to reflect a conviction for theft, and remand the case to the trial court for a new sentencing hearing.

Delivered: August 24, 2022
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