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

YEARY, J., filed a dissenting opinion.

This case is before the Court again, this time on the State's petition for discretionary review. When the case was before us previously, the Court held that the offense of organized retail theft

"requires 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." *Lang v. State*, 561 S.W.3d 174, 183 (Tex. Crim. App. 2018) (construing TEX. PENAL CODE § 31.16(b)). I dissented; I would have held that the plain language of the organized retail theft statute could embrace the conduct of a single unaffiliated shoplifter—so long as, once she had exercised control over the retail merchandise while still in the store, she then exited the store and thereby "conducted . . . an activity in which [she] . . . possessed [already] stolen retail merchandise." *Id.* at 191 (Yeary, J., dissenting) (citing TEX. PENAL CODE § 31.16(b)(1)). The Court remanded the case to the court of appeals for a determination of whether the trial court's judgment may be reformed to reflect conviction for a lesser-included offense under the standard we announced in *Thornton*. *Id.* at 184 (citing *Thornton v. State*, 425 S.W.3d 289, 299–300 (Tex. Crim. App. 2014)). The court of appeals held that it may not, and it rendered a judgment of acquittal in the case. *Lang v. State*, 586 S.W.3d 125, 136 (Tex. App.—Austin 2019).

Today the Court reverses that holding. I cannot join the Court's opinion, for two reasons. First, the Court lets stand its earlier opinion in *Byrd v. State*, 336 S.W.3d 242, 251–52 (Tex. Crim. App. 2011)—the very case the court of appeals relied upon in its holding below. Even so, the Court nevertheless reverses the court of appeals' judgment, declaring that theft is a lesser-included offense of organized retail theft notwithstanding *Byrd*. It is not altogether clear to me how the Court has reasoned its way to that result. When the time comes, I would simply

overrule *Byrd* rather than attempt to distinguish it as the majority seems to do.

Having said that, I ultimately dissent to the Court's disposition of the case for a different reason—one that would make ruling on the continued viability of *Byrd* unnecessary. Even though the court of appeals erred, in my view, to rely on *Byrd*, I would nonetheless uphold its judgment of acquittal for a reason having nothing to do with whether theft is conceptually a lesser-included offense of organized retail theft. Even assuming that theft *is* a lesser-included offense, as the Court holds today (*Byrd* notwithstanding), the jury's verdict in this case did not necessarily embrace every constituent element of the lesser theft offense. That being so, the court of appeals was not authorized under *Thornton* to reform the trial court's judgment to reflect a conviction for the lesser offense. It is because the Court today holds otherwise that I must ultimately, respectfully, dissent.

I. *BYRD* MISLED THE COURT OF APPEALS

In *Thornton*, this Court held as a preliminary matter that "courts of appeals should limit the use of judgment reformation to those circumstances when what is sought is a conviction for a lesser included offense." *Thornton*, 425 S.W.3d at 298-99. As a result, in its opinion on remand, the court of appeals proceeded to analyze whether, in the abstract, theft constitutes a lesser-included offense of organized retail theft. *Lang,* 586 S.W.3d at 131–36. And, in deciding whether theft is a lesser-included offense, the court of appeals invoked the *Hall* "cognate-pleadings approach," along with its ancillary "functional equivalence test." *Id*. at 131–32 (citing *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim.

App. 2007) and *Safian v. State*, 543 S.W.3d 216, 220 (Tex. Crim. App. 2018), respectively).

Whether an offense is a lesser-included offense of another, the Court has said, "is a question of law." *Hall* at 535. It is accomplished "by comparing the *elements* of the offense *as they are alleged in the indictment or information* with the *elements* of the potential lesser-included offense." *Hall* at 535–36 (emphasis added). The Court explained in *Castillo* that it will "compare the *elements* of the greater offense *as pled* to the *statutory elements* of the potential lesser-included offense in the abstract." *See Ex parte Castillo*, 469 S.W.3d 165, 169 (Tex. Crim. App. 2015) (*citing Hall*, 225 S.W.3d at 531, 535) (emphasis added). In *Meru*, the Court also explained that the 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). And in *Safian*, the Court said that "[w]hen there are allegations in the indictment that are not identical to the elements of the lesser offense, a court should apply the functional-equivalence test to determine whether elements of the lesser offense are functionally the same or less than those required to prove the charged offense." *Safian*, 543 S.W.3d at 220.

The court of appeals concluded that organized retail theft contains at least the "functional equivalent" of *most* of the actual elements of theft. Specifically, it found that organized retail theft contains elements amounting to: (1) exercising control over property without the owner's effective consent, (2) with the intent to deprive the owner of the property. *Lang*, 586 S.W.3d at 132–34. The only "element"

the court of appeals found to be missing, even under the more forgiving "functional equivalent" test, was "the identity of the owner." *Id*. at 134.

Of course, the theft statute requires proof that the property alleged to have been stolen had *an owner*, but it says nothing about "the identity of the owner" as an elemental fact.[1] Nevertheless, relying upon this Court's opinion in *Byrd*, the court of appeals concluded that theft is not a lesser-included offense of organized retail theft because, unlike the latter offense, theft requires proof of the identity of the owner of the stolen property. *Lang*, 586 S.W.3d at 134–35. Having concluded that theft is therefore not a lesser-included offense of organized retail theft, the court of appeals concluded that it lacked authority to reform the judgment to reflect conviction for that offense, and so it rendered a judgment of outright acquittal instead. *Id*. at 136.

As I see it, all of this simply underscores the real problems surrounding this Court's holding in *Byrd*, upon which the court of appeals based its conclusion (understandably, since the lower court is not at liberty to ignore this Court's opinions). Keep in mind that, in that very opinion (*Byrd*), this Court said that Byrd was "not correct" to argue "that the *name* of the owner is a substantive element of the offense of theft." *Byrd*, 336 S.W.3d at 251 (emphasis added). The Court also observed that "[n]owhere in the penal code is the *name* of the owner made a substantive element of theft." *Id*. (emphasis added). Still, the Court concluded that it is "the *identity* of the person, not his formal

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[1] Our theft statute provides that "[a] person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property." TEX. PENAL CODE § 31.03(a). Appropriation is unlawful when "it is without the owner's effective consent[.]" TEX. PENAL CODE § 31.03(a)(1).

name, that controls and guides the sufficiency of the evidence review." *Id.* at 253. And then the Court decided that, because the State "failed to prove that 'Mike Morales' had any ownership interest in the property," the evidence was legally insufficient. *Id.* at 258. The Court first established a nearly impossible distinction between the concepts of name and identity, and then it failed even to follow its own distinction when, in the end, it held the State to the burden of proving a name: "Mike Morales." *Id.*

But all that our theft statute actually requires to be proved is that some owner existed who did not give effective consent. TEX. PENAL CODE § 31.03(b)(1) (appropriation is unlawful if "it is without the owner's effective consent"). Only the *existence* of an owner is elemental. And that can be proven circumstantially without also proving either the owner's name or identity, as can that person's lack of effective consent. Neither the name of the owner, nor his identity, is elemental.[2] So, it seems to me

[2] "'Steal' means to acquire property . . . by theft." TEX. PENAL CODE § 31.01(7). Theft can be committed (1) by stealing property directly, (2) by receiving property knowing it was stolen by another, or (3) by receiving it from law enforcement who represents that it was stolen, and the actor believes it was stolen by another. When theft is committed by stealing property directly, our statute requires no more than proof that the property was owned by someone and that it was unlawfully appropriated by the defendant with the intent to deprive the owner of property. When theft is committed by receiving stolen property, our theft statute does not demand proof of the name or identity of either the person from whom the items were taken or the person who originally stole them. *Compare* TEX. PENAL CODE § 31.03(b)(1) (providing that appropriation is unlawful if "it is without the owner's effective consent") *with* § 31.03(b)(2) (providing that appropriating is unlawful if "the property is stolen and the actor appropriates the property knowing it was stolen by another"). In the case of receiving stolen property from law enforcement, of course, it must be proved that the property was in the custody of law enforcement. TEX. PENAL CODE § 31.03(b)(3) (providing that appropriation is unlawful if "property in the

that the court of appeals was led astray by this Court's erroneous decision in *Byrd* when it considered "the identity of the owner" to be an *element* of theft in its lesser-included offense analysis.

This Court concluded in *Byrd* that "the State is required to prove, beyond a reasonable doubt, that the person (or entity) alleged in the indictment as the owner is the same person (or entity) regardless of the name as shown by the evidence." *Byrd*, 336 S.W.3d at 252. Because the evidence in *Byrd* was insufficient to demonstrate a name reflecting the identity of the owner that was pled in the charging instrument, which name was—by the Court's own admission—not even an element of the offense of theft, the Court ordered an acquittal. *Id*. at 258. But the only statute that the Court cited to support its conclusion that the State was required to *prove* the identity of the owner was the provision in the Code of Criminal Procedure that requires the State to *allege* "ownership" of property in its charging instrument, "if known." *See id.* at 251–52 n.48 (referring to TEX. CODE CRIM. PROC. arts. 21.08, 21.09). The Court in *Byrd* failed to perceive the very real difference between a fact that must be *alleged* to give notice to an accused, and a fact that must be *proved* so as to sustain a judgment of conviction under our law.

Notice of what the State intends to prove and sufficiency of the evidence may be related, but they are not the same.[3] It is evident to me

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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"). Under none of these theories of theft does the statute require proof of either the name *or the identity* of the property's owner.

[3] An error relating merely to the sufficiency of the notice that was given in a charging instrument should not result in an acquittal. *See Malik v. State*,

that this Court's opinion in *Byrd* has misled the court of appeals, causing it to conclude that a fact required to be pled in a charging instrument merely to give the defendant notice so that he can prepare his defense is, in fact, an element of the offense. But it is not an element. When the appropriate time comes, we should say so.

II. *THORNTON*'S FIRST PRONG REQUIRES ACQUITTAL

Byrd notwithstanding, the Court today errs to reverse the judgment of the court of appeals—for a reason having nothing to do with whether theft is conceptually a lesser-included offense of organized retail theft under the *Hall*/*Safian* cognate-pleading/functional-equivalent standard. Even assuming that theft is a conceptual lesser-included offense under that standard, reformation of the judgment to reflect conviction for that lesser-included offense in this case is untenable under *Thornton*'s test for determining when a jury's verdict for the greater offense will support conviction for the lesser.

Under *Thornton*, when an appellate court concludes that the evidence is legally insufficient to support conviction for a greater-inclusive offense, it may reform the judgment to reflect a conviction for a lesser-included offense so long as two circumstances exist. 425 S.W.3d at 300. First, the appellate court must be able to conclude that, in convicting the appellant of the greater offense, the jury *necessarily* found every required element of the lesser-included offense. *Id*. Second, the

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953 S.W.2d 234, 240 (Tex. Crim. App. 1997) ("[A] judgment of acquittal should be reserved for those instances in which there is an actual failure in the State's proof of the crime.") (internal quotation marks omitted); *and see Jackson v. Virginia*, 443 U.S. 307, 324 n.16 (1979) (explaining that the *Jackson* standard for review of sufficiency of the evidence "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law").

appellate court must be able to conclude that the evidence, though legally insufficient to establish the greater offense, was legally sufficient to support every element of the lesser-included offense. *Id*. While the parties agree that the evidence was sufficient to support a conviction for theft in this case, thus satisfying the second *Thornton* prong, in my view, the first prong is definitely not satisfied.

The reason is simple. A defendant can be convicted of organized retail theft in the absence of a jury finding that she herself actually committed a simple theft under Sections 31.03(a) and 31.03(b) of the Texas Penal Code. TEX. PENAL CODE §§ 31.03(a), 31.03(b). While 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. TEX. PENAL CODE § 31.16(b). It only requires proof that, once the property has been "stolen" (by whomever—the statute is indifferent as to who commits the initial theft), the accused have "intentionally conduct[ed], promote[d], or facilitate[d] an activity in which [she] receive[d], possess[ed], conceal[ed], store[d], barter[ed], s[old], or dispose[d] of" it. *Id*. The jury charge in this case tracked the statute in this respect. It therefore did not require the jury to find, in convicting Appellant of organized retail theft, that she was the one who perpetrated the original theft that rendered the retail merchandise "stolen"—and so it could not have "necessarily" done so, in satisfaction of *Thornton*'s first prong.

But could the jury have found that Appellant "received" the stolen retail merchandise; and if so, might that necessarily have constituted a

finding of fact that would support a conviction for theft under the theory of unlawful appropriation embraced by Section 31.03(b)(2)? *See* TEX. PENAL CODE § 31.03(b)(2) ("Appropriation of property is unlawful if . . . the property is stolen and the actor appropriates the property knowing it was stolen by another[.]"). That provision makes it an offense to appropriate already-stolen property with knowledge that it is stolen. As I see it, there are two problems with this theory.

First, the jury did not necessarily make a finding with respect to *receipt* of stolen property. Given that the jury returned a general guilty verdict for organized retail theft, we cannot say for certain that it found that Appellant *received* the stolen retail merchandise at all; much more likely, it would have found that she simply "possessed" it upon leaving the store, having found a completed theft when it was unlawfully appropriated inside the store. *See Lang*, 561 S.W.3d at 191 (Yeary, J., dissenting) (citing *Ford v. State*, 537 S.W.3d 19, 24 (Tex. Crim. App. 2017); *Hill v. State*, 633 S.W.2d 520, 521 (Tex. Crim. App. 1981)); *Barnes v. State*, 824 S.W.2d 560, 562 (Tex. Crim. App. 1990) (holding that a theft offense "is committed upon the initial coalescence of the alleged elements") (overruled on other grounds in *Proctor v. State*, 967 S.W.2d 840, 842 (Tex. Crim. App. 1998)). Thus, we cannot conclude that *the jury necessarily* made *a finding* with respect to *receipt* of the stolen property, so as to satisfy *Thornton*'s first prong.

Second, and in any event, Section 31.03(b)(2) requires proof that the accused received the stolen property with knowledge that it was stolen "by another." Even if we could conclude that the jury in this case necessarily found that Appellant "received" stolen retail merchandise,

in satisfaction of *Thornton*'s first prong, such a finding would never survive *Thornton*'s second prong—that the evidence must be legally sufficient to establish the lesser-included offense. There was no evidence in this case to support a finding of fact that Appellant "received" the stolen property "from another," much less that she knew she did. And while this may only serve to demonstrate that the facts show, without contradiction, that it was Appellant who originally appropriated the property unlawfully, the fact remains that the jury was not required to make *a fact finding* with respect to *that* theory of how the retail merchandise came to be "stolen."

Even if the jury necessarily found that *somebody* had unlawfully appropriated the retail merchandise before Appellant came to "receive" or possess" it outside the store, it was not required to make—and did not specifically make—a finding with respect to whether it was *Appellant* who committed the initial appropriation. And in the absence of such an actual finding on the jury's part, it cannot be said that the interest *Thornton* sought to protect—that appellate courts should not usurp the fact-finding function of juries—has been vindicated. *See Thornton*, 425 S.W.3d at 299 (requiring appellate courts to determine what the "jury actually found[,]" and observing that "[t]o do otherwise would be to usurp the jury's institutional function in the criminal justice system—to determine the facts").

For this reason, if no other, I would ultimately affirm the court of appeals' judgment. Because the Court does not, I respectfully dissent.

FILED: August 24, 2022
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