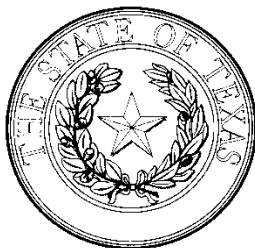


Opinion issued January 13, 2011



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-09-00936-CR

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**DANIEL TORRES, Appellant**  
V.  
**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 232nd District Court  
Harris County, Texas  
Trial Court Case No. 1140167**

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**MEMORANDUM OPINION**

Daniel Torres appeals the trial court's adjudication of his guilt for burglary of a habitation. *See* TEX. PENAL CODE ANN. § 20.02(c)(2) (Vernon 2003). After the trial court deferred adjudication of Torres's guilt, the State filed a motion to

adjudicate, which the trial court granted, assessing his punishment at five years' confinement. On appeal, Torres contends this Court should reform the judgment in this case to reflect his plea of not true to the allegations in the State's motion to adjudicate his guilt and to reflect the correct offense for which he was convicted. We agree the judgment should be reformed to accurately show Torres's plea, but affirm the portion of the judgment that reflects the offense for which he was convicted. We modify the trial court's judgment and affirm as modified.

### **Background**

Torres pleaded guilty to committing the offense of burglary of a habitation, and the trial court deferred adjudication of his guilt and placed him on community supervision for three years. During his community supervision, Torres walked into a clothing store in the Greenspoint Mall while carrying a bag from Foot Action, a nearby store. A few minutes later, two managers from Foot Action came into the store and accused Torres of stealing a shirt. The clothing store manager approached Torres and found within the Foot Action bag a pair of jeans from the clothing store that still had price tags and theft detection sensors attached.

The State moved to adjudicate Torres's guilt based on the theft of the jeans and the failure to meet other conditions of his community supervision. Torres pleaded "not true" to the allegations in the motion to adjudicate guilt. At the

hearing, he testified that an employee of the clothing store had given him the jeans and he did not know they were stolen.

The trial court granted the State's motion, found Torres guilty of "burglary of a habitation with the intent to commit theft," and sentenced Torres to five years' confinement. In its judgment, the trial court stated that it had found Torres guilty of burglary of a habitation, but erroneously stated that he had pleaded "true" to the allegations in the State's motion to adjudicate.

### **Reformation of Judgment**

Torres contends that the judgment should be reformed because it inaccurately states that he pleaded true to the allegations in the State's motion to adjudicate. And he was convicted of "burglary of a habitation with intent to commit theft" when the Texas Penal Code contains no section entitled "Burglary of a Habitation."

"[A]n appellate court has authority to reform a judgment to include an affirmative finding to make the record speak the truth when the matter has been called to its attention by any source." *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992); *accord Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *see also* TEX. R. APP. P. 43.2(b) (appellate court may modify trial court's judgment and affirm as modified). The State concedes that Torres pleaded not true to the motion to adjudicate and the judgment should be

so reformed. We, therefore, sustain this portion of Torres’s issue and reform the judgment to reflect Torres’s plea of not true to the allegations in the State’s motion.

However, the judgment does not incorrectly reflect the crime for which Torres was convicted. Torres contends that the judgment in a criminal case “shall reflect . . . [t]he offense or offenses for which the defendant was convicted.” TEX. CODE CRIM. PROC. ANN. art. 42.01, § 1(13) (Vernon Supp. 2010). Specifically, Torres asserts that the judgment should reflect the offense identified in the title of the relevant section of the Penal Code. Torres observes that section 30.02 of the Texas Penal Code is entitled “Burglary,” not “Burglary of a Habitation,” and that the Penal Code does not contain a separate section entitled “Burglary of a Habitation.” Torres concludes that the titles in the Penal Code require that his judgment of conviction must be reformed to state “Burglary” rather than “Burglary of a Habitation with Intent to Commit Theft.”

The Texas Penal Code defines the following three ways in which the offense of burglary may be committed:

- (a) A person commits an offense if, without the effective consent of the owner, the person:
  - (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
  - (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or

- (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

TEX. PENAL CODE ANN. § 30.02(a) (Vernon 2003). The Penal Code further provides the classification of the different types of burglary, stating,

- (c) Except as provided in Subsection (d), an offense under this section is a:
  - (1) state jail felony if committed in a building other than a habitation; or
  - (2) felony of the second degree if committed in a habitation.
- (d) An offense under this section is a felony of the first degree if:
  - (1) the premises are a habitation; and
  - (2) any party to the offense entered the habitation with intent to commit a felony other than felony theft or committed or attempted to commit a felony other than felony theft.

*Id.* § 30.02(c), (d). Torres was charged with a second degree felony. Under subsections (c) and (d), the only second degree felony offense of burglary is burglary of a habitation with an intent to commit theft. Thus, the judgment accurately reflects the offense charged.

Torres does not cite any case interpreting the Penal Code or the Code of Criminal Procedure to require the judgment to use the titles used in the Penal Code. Trial courts are to ensure that judgments and sentences include “an accurate description of the offense.” *Davis v. State*, 501 S.W.2d 629, 633 (Tex. Crim. App.

1973). The example given by the Court of Criminal Appeals was “burglary with intent to commit theft” or “burglary with intent to commit rape” instead of the more general phrase “burglary.” *Id.* The Court of Criminal Appeals has reformed judgments to reflect the precise type of burglary at issue in a case. *See Harris v. State*, 630 S.W.2d 774, 776 (Tex. Crim. App. 1982) (“burglary of a habitation” instead of “burglary of a building”); *Jones v. State*, 532 S.W.2d 596, 601 (Tex. Crim. App. 1976) (“burglary of a building” instead of “burglary of a habitation”), *overruled on other grounds by Moss v. State*, 574 S.W.2d 542 (Tex. Crim. App. 1978); *Castaneda v. State*, 491 S.W.2d 885, 887 (Tex. Crim. App. 1973) (“burglary of a private residence at nighttime with intent to commit theft” instead of “burglary with intent to commit theft”).

We overrule this portion of Torres’s sole issue.

### **Conclusion**

We modify the trial court’s judgment to reform the judgment to reflect Torres’s plea of not true. As modified, we affirm.

Harvey Brown  
Justice

Panel consists of Justices Jennings, Higley, and Brown.

Do not publish. TEX. R. APP. P. 47.2(b).