

Opinion issued July 14, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00432-CR

RODRIGO BENITEZ, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Case No. 1228908

MEMORANDUM OPINION

Rodrigo Benitez appeals the denial of a motion to quash the State's indictment. Benitez pleaded guilty to the state jail felony charge of burglary with intent to commit theft. TEX. PENAL CODE ANN. § 30.02(a)(1), (c)(1) (West 2011). Following the denial of his motion, the trial court assessed his punishment at nine months' confinement in the Harris County Jail. On appeal, Benitez contends that

the trial court violated his due process rights under the Fourteenth Amendment of the United States Constitution and under Article I, § 10 of the Texas Constitution and violated articles 21.03 and 21.11 of the Texas Code of Criminal Procedure because the indictment failed to specify a culpable mental state related to his entry into the building that the State alleged he burglarized. We conclude that the trial court properly denied the motion to quash. We therefore affirm.

Background

Benitez walked into the Next Level Hair Salon on a Monday between the hours of eight a.m. and five p.m. The salon displayed a banner reading “Open” and “Walk-ins Welcome,” but it was routinely closed on Sundays and Mondays, including at the time Benitez entered it. In the indictment, the State alleged that “on or about August 17, 2009, Benitez did then and there unlawfully, with intent to commit theft, enter a building not then open to the public” Benitez moved to quash the indictment, arguing that it fails to allege that he intentionally or knowingly entered a building not open to the public; it instead merely alleged that he intended to commit theft. The trial court denied the motion.

Discussion

Benitez contends that the State was required to plead a culpable mental state that he knew that the building was “not then open to the public,” and intentionally entered it anyway; thus, he argues, the indictment is defective and violated his

rights under the United States and Texas Constitutions and articles 21.03 and 21.11 of the Texas Code of Criminal Procedure. *See* U.S. CONST. amend. VI; TEX. CONST. art I, § 10.

Standard of Review

We review de novo a trial court’s ruling on a motion to quash. *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004). Both the Texas and United States Constitutions require that “the charging instrument . . . be specific enough to inform the accused of the nature of the accusation against him so that he may prepare a defense.” *Id.* The Texas Code of Criminal Procedure also requires that the instrument charge the offense “in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged” TEX. CODE CRIM. PROC. ANN. art. 21.11 (West 2009); *State v. Shuck*, 222 S.W.3d 113, 114 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (discussing article 21.11).

Analysis

The Texas Court of Criminal Appeals, however, has “repeatedly held that where the gravamen of an offense is an act coupled with a specific intent, pleading the requisite specific intent is sufficient to allege a culpable mental state.” *Ex parte Prophet*, 601 S.W.2d 372, 374 (Tex. Crim. App. 1980). In particular, in burglary

with intent to commit theft cases, the State need only allege the specific intent to commit theft because burglary is an entry with the specific intent to commit theft. *See Teniente v. State*, 533 S.W.2d 805, 806 (Tex. Crim. App. 1976); *see also Ex parte Prophet*, 601 S.W.2d at 374. A burglary indictment that alleges that entry into a building “with intent to commit theft” thus is sufficient, even though the indictment does not allege intentional or knowing unlawful entry into the building. *DeVaughn v. State*, 749 S.W.2d 62, 64 n.3 (Tex. Crim. App. 1988). The specific mental state of “intent to commit theft” subsumes the general mental state relating to the unlawful entry into the building. *Id.*

Benitez relies on *Salazar v. State* to analogize criminal trespass with burglary to assert that a notice requirement in the criminal trespass statute implies that a second culpable mental state is required to be pleaded in an indictment for burglary. 284 S.W.3d 874, 880 (Tex. Crim. App. 2009); *see Bader v. State*, 15 S.W.3d 599, 606 (Tex. App.—Austin 2000, pet. ref’d) (“The elements of criminal trespass are that: (1) a person, (2) without effective consent, (3) enters or remains on the property or in a building of another, (4) knowingly, intentionally, or recklessly, (5) when he had notice that entry was forbidden or received notice to depart and failed to do so.”); TEX. PENAL CODE ANN. § 30.05(a) (West 2011).

Salazar is distinguishable. There, the court addressed notice as an element of criminal trespass. *Salazar*, 284 S.W.3d at 878. The court held that a habitation

inherently provides notice that entry is forbidden, so criminal trespass can be included as a lesser included offense of burglary of a habitation without express language in the indictment regarding notice. *Id.* The court did not, however, reject the principle, set forth in its earlier precedent, that the allegation of an “intent to commit theft” sufficiently notifies a defendant charged with burglary that the State must prove an unlawful intentional or knowing entry into the building. *See id.* at 878–79.

The indictment alleges that Benitez “did then and there unlawfully, with intent to commit theft, enter a building not then open to the public . . . without the effective consent of the [c]omplainant, namely, without any consent of any kind.” Pleading an “intent to commit theft”—the only mental state that must be alleged—provides adequate notice in the charging instrument. *See DeVaughn*, 749 S.W.2d at 64 n.3; *Ex parte Prophet*, 601 S.W.2d at 374; *Teniente*, 533 S.W.2d at 806; *see also McIntosh v. State*, 297 S.W.3d 536, 543 (Tex. App.—Houston [1st Dist.] 2009, pet. ref’d); *Martinez v. State*, 269 S.W.3d 777, 781–82 (Tex. App.—Austin 2008, no pet.). Accordingly, we hold that the indictment here, alleging the specific mental state of “intent to commit theft,” includes the general mental state relating to unlawful entry into a building not then open to the public to commit a theft, and is not defective for the purpose of notifying the defendant of the charge against him.

Conclusion

We hold that the indictment effectively alleged the offense of burglary, and thus the trial court did not err in refusing to quash the indictment. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Justices Keyes, Higley, and Bland.

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