TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00268-CR

Brandon DeLeon, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF HAYS COUNTY, 274TH JUDICIAL DISTRICT
NO. CR-16-0016, HONORABLE JACK H. ROBISON, JUDGE PRESIDING

O P I N I O N[1]

This appeal from a conviction for theft of a firearm, *see* Tex. Penal Code § 31.03(a), (e)(4)(C), requires us to determine whether theft of a firearm was a lesser-included offense of burglary of a habitation as alleged in the indictment. Because we conclude that it was not a lesser-included offense, we will reverse the trial court's judgment of conviction and render a judgment of acquittal.

BACKGROUND

The indictment against Brandon DeLeon for burglary of a habitation alleged the following:

[1] Notice of appeal for this case was originally filed in this Court in December 2016, at which time the case was transferred to the El Paso Court of Appeals in compliance with a docket-equalization order issued by the Texas Supreme Court. On April 12, 2018, the Texas Supreme Court ordered that certain cases be transferred back to this Court from the El Paso Court, and we consider this appeal pursuant to that order. *See* Misc. Docket No. 18-9054 (Tex. Apr. 12, 2018) (per curiam).

> On or about the 8th day of August, 2015, in Hays County, Texas, the Defendant, Brandon Deleon, did then and there, with intent to commit theft or with intent to attempt to commit theft, or commit theft, intentionally or knowingly enter a habitation, without the effective consent of [the victim], the owner thereof . . . .

Near the conclusion of the jury trial, the State requested the inclusion of an instruction allowing the jury to find DeLeon guilty of the alleged lesser-included offense of theft of a firearm. The trial court included the instruction over DeLeon's objection. The jury found DeLeon not guilty of burglary of a habitation but guilty of theft of a firearm. The trial court sentenced DeLeon to two years in state jail, suspended his sentence, and placed him on community supervision for four years. This appeal followed.

DISCUSSION

In his sole appellate issue, DeLeon contends that the trial court reversibly erred in charging the jury that it could find him guilty of the lesser-included offense of theft of a firearm.

We review alleged jury-charge error in two steps: first, we determine whether error exists; if so, we then evaluate whether sufficient harm resulted from the error to require reversal. *See Arteaga v. State*, 521 S.W.3d 329, 333 (Tex. Crim. App. 2017); *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g)); *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005); *see also Sweed v. State*, 351 S.W.3d 63, 69 (Tex. Crim. App. 2011) (holding that the trial court erred in not giving a jury instruction on a lesser-included offense and remanding for the court of appeals to perform a harm analysis under *Almanza*); *Saunders v. State*, 840 S.W.2d 390, 392 (Tex. Crim. App. 1992) (per

curiam) (same). Here, DeLeon objected to the jury instruction on theft of a firearm, so "any error that is not harmless will constitute reversible error." *See Price*, 457 S.W.3d at 440.

We begin, then, by considering whether the trial court erred in submitting an instruction to the jury on theft of a firearm. When deciding whether a lesser-included-offense instruction should have been given, "[t]he first step is to determine whether the requested instruction pertains to an offense that is a lesser-included offense of the charged offense, which is a matter of law." *Bullock v. State*, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016); *see Rice v. State*, 333 S.W.3d 140, 144 (Tex. Crim. App. 2011); *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007); *Waldron v. State*, No. 03-17-00065-CR, 2018 WL 700047, at *11 (Tex. App.—Austin Feb. 1, 2018, pet. ref'd) (mem. op., not designated for publication). As relevant here, "[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." Tex. Code Crim. Proc. art. 37.09(a)(1). In analyzing whether an offense is a lesser-included offense, reviewing courts "do not consider what the evidence at trial may show but only what the State is required to prove to establish the charged offense." *Cannon v. State*, 401 S.W.3d 907, 910 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). Reviewing courts then "compare these elements to those of the potential lesser-included offense . . . and decide whether the elements of the lesser offense are functionally the same or less than those required to prove the charged offense." *Id.*; *see also* Tex. Code Crim. Proc. art. 37.09 (defining lesser-included offenses). "An offense is a lesser-included offense of another offense . . . 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, such as non-statutory manner and means, that are alleged for purposes of providing notice) from which all

of the elements of the lesser-included offense may be deduced." *Ex parte Watson*, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009) (op. on reh'g) (per curiam). If the offense listed in the requested instruction is a lesser-included offense of the offense that the defendant was charged with, the reviewing court must then determine "whether there is some evidence adduced at trial to support such an instruction." *Hall*, 225 S.W.3d at 535; *see Bullock*, 509 S.W.3d at 925; *Waldron*, 2018 WL 700047, at *12.

We must therefore first "compar[e] the elements of the offense as alleged in the indictment with the elements of the requested lesser offense." *State v. Meru*, 414 S.W.3d 159, 162 (Tex. Crim. App. 2013). The elements of burglary of a habitation, as alleged in the indictment, are:

> (1) DeLeon;
> (2) intentionally or knowingly entered a habitation;
> (3) without the effective consent of the owner;
> (4) "with intent to commit theft or with intent to attempt to commit theft, or commit theft."[2]

See Tex. Penal Code § 30.02(a)(1). The statutory elements of theft of a firearm are:

> (1) A person;
> (2) unlawfully appropriates property;
> (3) with intent to deprive the owner of property; and
> (4) the property stolen is a firearm.

See id. § 31.03(a), (e)(4)(C).

The fact that the stolen property was a firearm is an element of this theft because it makes the offense a state-jail felony and thus determines the maximum possible punishment. *See*

[2] This quotation is from the indictment. Although the indictment's grammar is opaque, we will assume, without deciding, that it alleges a completed theft in the alternative.

id. § 31.03(e)(4)(C); *see also Ring v. Arizona*, 536 U.S. 584, 602 (2002) ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."). Indeed, because the value or nature of the stolen property always determines the punishment range of a theft offense, *see* Tex. Penal Code § 31.03(e), the value or nature of the stolen property is always an essential element of the offense, as are other circumstances surrounding the theft that affect the offense level. *See Price*, 457 S.W.3d at 442 ("Consider, for example, the allegation of two prior convictions for driving while intoxicated as a required element in the offense of felony driving while intoxicated, or the allegation of the value of stolen property above a misdemeanor amount as a required element of felony theft. Both are required elements . . . ."); *Sowders v. State*, 693 S.W.2d 448, 450 (Tex. Crim. App. 1985) ("The State must prove at trial that the amount of money stolen satisfies the jurisdictional requirement of the State's pleading."); *Sanders v. State*, 664 S.W.2d 705, 709 (Tex. Crim. App. 1982) (op. on reh'g) ("Thus, under our decisions interpreting [Texas Penal Code section 31.03], the value of the property stolen is an essential element of the offense when it is made the basis of punishment and theft from the person is an essential element of the offense when it is made the basis of punishment. Put another way, the 'offense' of theft as defined by statute will always include one of the provisions of [the predecessor to Texas Penal Code section 31.03(e)]."); *Ramirez v. State*, 422 S.W.3d 898, 901 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) ("Under Texas law, the value of the property taken is an essential element of the offense."); *see also Gant v. State*, 606 S.W.2d 867, 871 (Tex. Crim. App. [Panel Op.] 1980) ("Thus, we agree with appellant, that . . . the prior theft offenses, as jurisdictional elements of the offense alleged, must be included in the body of the main charge before the jury is authorized to make a general finding of guilt, and

we so hold."); *Diamond v. State*, 530 S.W.2d 586, 587 (Tex. Crim. App. 1975) ("The addition of the prior theft convictions in the instant case created a new offense of the grade of felony."); *Hairston v. State*, No. 03-17-00140-CR, 2017 WL 3378895, at *1 (Tex. App.—Austin Aug. 4, 2017, no pet.) (mem. op., not designated for publication) ("'It has been uniformly held that prior theft convictions alleged to elevate a misdemeanor theft to a felony-level offense are jurisdictional elements of a new, felony offense, rather than simply punishment enhancements.'") (quoting *State v. Reyes*, 310 S.W.3d 59, 61 (Tex. App.—El Paso 2010, pet. ref'd)); *Moore v. State*, 916 S.W.2d 537, 539 (Tex. App.—Dallas 1995, no pet.) ("Elevating a misdemeanor theft to a felony theft by use of previous theft convictions does not enhance punishment, but creates a new offense and vests the district court with jurisdiction. Previous theft convictions that elevate misdemeanors to felonies are jurisdictional elements of the offense alleged.") (citation omitted); *Carter v. State*, 804 S.W.2d 326, 327 (Tex. App.—Waco 1991, no pet.) ("Because the prior theft offenses are elements of the offense, that portion of the indictment alleging them should be read to the jury at the beginning of the guilt-innocence phase of the trial, evidence of them should be permitted during that phase, and the guilt-innocence charge must require the jury to find the prior theft offenses before returning a general guilty verdict of third-degree felony theft.").

Because the value or nature of the stolen property is an essential element of the offense of theft, an indictment that does not allege the value or nature of the stolen property is substantively defective as to a charge of theft, even if the indictment is not defective as to a greater offense, such as burglary. *See Ex parte Sewell*, 606 S.W.2d 924 (Tex. Crim. App. 1980) ("The petitioner alleges that . . . he was convicted for the offense of theft on an indictment which did not

charge the offense of theft. A copy of that indictment in this record properly alleges as the primary offense the offense of burglary; the allegations are insufficient to allege the offense of theft because they do not describe nor allege the value of the stolen property."); *Peoples v. State*, 566 S.W.2d 640, 641 (Tex. Crim. App. [Panel Op.] 1978) ("In Cause # F-76-4084-P, the theft conviction, the appellant contends that the original indictment is fundamentally defective because it does not allege any value of the stolen property. Such a contention was sustained as fundamental error in *Standley v. State*, 517 S.W.2d 538 (Tex. Cr. App. 1975) . . . . Accordingly, the order revoking probation in Cause # F-76-4084-P and the original judgment are reversed and the indictment is ordered dismissed.").

For example, in *Davila v. State*, the Texas Court of Criminal Appeals held that an indictment was sufficient to charge burglary but also concluded that the indictment was defective as to a charge of theft:

> The indictment in the case at bar alleged that the appellant "did then and there commit theft," and immediately thereafter it attempted to allege the elements of theft. This attempt to allege theft failed to allege that the appellant acted "with intent to deprive the owner of property." The omitted element is an allegation of the culpable mental state required. Since everything necessary to be proven should be stated in an indictment, the attempt to allege theft is fatally defective. Therefore, the question is whether the allegation "did then and there commit theft" is sufficient to allege burglary under V.T.C.A. Penal Code, Sec. 30.02(a)(3), without alleging all of the elements of theft. We hold that it is sufficient.

Davila v. State, 547 S.W.2d 606, 608 (Tex. Crim. App. 1977) (citations omitted).

Texas courts have also specifically held that theft is not a lesser-included offense of burglary when the indictment does not allege all the elements of theft, including a description of the

stolen property.[3] In *Dixon v. State*, the defendant was indicted for, and convicted of, burglary of a habitation. *See* 43 S.W.3d 548, 550 (Tex. App.—Texarkana 2001, no pet.). On appeal, Dixon contended that the trial court erred in denying his request that the court instruct the jury on the lesser-included offense of possession of stolen property. *Id.* at 550–51. Our sister court held that the trial court properly refused the requested instruction because the indictment did not describe the stolen property:

> [I]n *Ex parte Sewell*, 606 S.W.2d 924, 924 (Tex. Crim. App. 1980), the Texas Court of Criminal Appeals held that theft is not a lesser included offense of burglary of a habitation when actual theft is not charged. The court held that theft is not charged when the indictment does not describe the property or allege its value. An indictment for theft that does not adequately describe the property or adequately allege its value would be defective and susceptible to a motion to quash.
>
> In the present case, the indictment does not describe the property allegedly stolen or the value of that property. Consequently, Dixon was not entitled to a lesser included offense instruction.

Id. at 551 (citations omitted); *see Middleton v. State*, 187 S.W.3d 134, 140 (Tex. App.—Texarkana 2006, no pet.) ("The indictment does not allege actual theft, describe the property stolen, or

---

[3] As one court has put it, "We acknowledge that the law regarding theft as a lesser included offense of burglary is somewhat unclear." *Bugge v. State*, No. 14-02-01064-CR, 2003 WL 21782635, at *4 n.3 (Tex. App.—Houston [14th Dist.] July 31, 2003, no pet.) (mem. op., not designated for publication). We believe this confusion arises largely from the fact that it is impossible to state categorically whether theft is or is not a lesser-included offense of burglary. Instead, whether theft is a lesser-included offense of burglary turns on the indictment and facts of a particular case. If the indictment alleges all the elements of theft or facts from which all the elements of theft can be deduced, then the trial court may grant an instruction on the lesser-included offense of theft if there is some evidence adduced at trial to support such an instruction. But if the indictment merely alleges that the defendant committed or intended to commit theft, then not all the elements of theft can be deduced from the indictment, and the trial court may not give an instruction on theft.

allege the value of that property. Therefore, Middleton was not entitled to a lesser-included offense instruction for theft or theft by possession of stolen property."); *see also Meshell v. Dretke*, No. 3:03-CV-086-D, 2004 WL 1926321, at *8 (N.D. Tex. Aug. 26, 2004) ("Theft by possession of stolen property is not a lesser included offense of burglary of a habitation when, as here, the indictment does not describe the property or allege its value.") (citing *Dixon*, 43 S.W.3d at 551).

Similarly, in *Steward v. State*, the defendant was indicted for burglary of a habitation "with the intent to commit theft and committed theft." 830 S.W.2d 771, 772 (Tex. App.—Houston [14th Dist.] 1992, no pet.). The jury acquitted the defendant of burglary but found her guilty of the offense of misdemeanor theft. *Id.* On appeal, the defendant contended "that the charge on the offense of misdemeanor theft was improper in this case because theft was not a lesser included offense of burglary of a habitation as alleged in count one of the indictment." *Id.* at 773. Our sister court agreed with the defendant and explained, "Where the indictment does not describe the property or allege its value, the offense of theft is not charged . . . . Consequently, the inclusion of an improper lesser included offense is fundamental error." *Id.* at 774; *see Alvarez v. State*, No. 14-04-00866-CR, 2006 WL 220997, at *3 (Tex. App.—Houston [14th Dist.] Jan. 31, 2006, pet. ref'd) (mem. op., not designated for publication) ("Where theft is not properly charged (i.e., description of value or property value) in a burglary indictment, it is not a lesser-included offense thereof.").[4]

---

[4] Consider also *Pettus v. State*, No. B14-92-00254-CR, 1993 WL 153411, at *3 (Tex. App.—Houston [14th Dist.] May 13, 1993, pet. ref'd) (not designated for publication), where the court stated:

> The offense of burglary is complete if entry was made with the intent to commit theft. This would logically preclude the necessity of including a charge of theft either in the indictment or the instructions to the jury. This is especially so since it has long been

Likewise, in *Dean v. State*, the Fourteenth Court of Appeals held that the defendant was not entitled to an instruction on the lesser-included offense of theft by receiving when the indictment did not describe the stolen property:

> Appellant mistakenly assumes that theft by receiving is a lesser included offense of burglary. This is not the case unless actual theft has been charged. Here, theft has not been charged because the indictment does not describe the stolen property or allege its value. Since only burglary has been charged and since theft by receiving is not a lesser included offense of burglary, the first prong of the *Rousseau* test[5] is not satisfied, and the trial court properly refused to include an instruction on that offense in its charge.

Dean v. State, 938 S.W.2d 764, 770 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (citations omitted); *see Morris v. State*, No. 08-01-00349-CR, 2003 WL 195009, at *4 (Tex. App.—El Paso Jan. 30, 2003, no pet.) (not designated for publication) ("Since burglary is complete upon entry with requisite intent, and receipt of stolen property is a downstream offense that has nothing to do with the entry, it is not a lesser-included offense. That theft by receiving is not a lesser-included offense of burglary is well established.").[6]

> established that theft is not a lesser included offense of burglary . . . . Therefore, as "theft by receiving" is merely a type of theft, the trial court did not err in refusing to submit an instruction on that offense.

[5] *See Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993).

[6] These holdings are consistent with the demands of due process. *See Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007) (noting that there can be "due-process concerns" when "the face of the charging instrument [does] not have to contain the elements of the lesser-included offenses"); *Beasley v. State*, 426 S.W.3d 140, 149 (Tex. App.—Houston [1st Dist.] 2012, no pet.) ("Allowing a jury to find the defendant guilty of an unindicted offense that was not a lesser-included offense of the charged offense runs afoul of due process requirements."). If a defendant is indicted for burglary of a habitation and the indictment merely alleges that the defendant intentionally entered a habitation without the effective consent of the owner and committed theft, the indictment fails

Holding that theft was not a lesser-included offense of burglary in this case is consistent with the decision of the Texas Court of Criminal Appeals in *State v. Meru*. In *Meru*, the court concluded that criminal trespass was not a lesser-included offense of burglary of a habitation as it was alleged in the indictment. *See* 414 S.W.3d at 164. As the court explained, whether criminal trespass is a lesser-included offense of burglary turns on the indictment's specific allegations:

> The definition of "entry" in Section 30.05(b) [the criminal trespass statute] makes the showing of only a partial entry by the defendant insufficient for a conviction of criminal trespass. This same partial entry, however, is all that is needed to support a burglary conviction. In other words, a burglary can be complete upon only a partial intrusion onto the property, whereas the lesser offense would require a greater intrusion. One can imagine a variety of circumstances, including the one in this case, where a defendant who partially encroaches on property could be convicted of burglary but not of criminal trespass because his "entire body" did not enter onto the property. Because criminal trespass requires proof of greater intrusion than burglary, the divergent definitions of "entry" will generally prohibit criminal trespass from being a lesser-included offense of burglary.
>
> It would be possible, however, for the elements of criminal trespass to be deduced from the facts alleged in an indictment for burglary of a habitation, as expressly discussed in *Watson*. Under the cognate-pleadings approach, criminal trespass would qualify as a lesser-included offense if the indictment alleges facts that include the full-body entry into the habitation by the defendant. This is consistent with our prior analyses of lesser-included offenses . . . . Therefore, had Appellee's indictment in this case alleged that he entered by intruding his entire body into the habitation, criminal trespass could have been a lesser-included offense since such a descriptive averment is identical to the entry element of criminal trespass.

Id. at 163–64.

---

to provide notice to the defendant concerning the nature of the allegedly stolen property or the facts that the State would have to prove to obtain a conviction for theft. Moreover, the burglary indictment fails to provide notice to the defendant of the offense level and punishment range that could be associated with a conviction for the theft, and the theft statute provides a wide variety of offense levels ranging from Class C misdemeanor to first-degree felony. *Compare* Tex. Penal Code § 31.03(e)(1) with § 31.03(e)(7).

Similarly, if DeLeon's burglary indictment had included the essential elements of theft of a firearm—by alleging, for example, that after entering the habitation DeLeon unlawfully appropriated a firearm with the intent to deprive the owner of the firearm—then theft of a firearm would have been a lesser-included offense of burglary as alleged in the indictment. Here, however, one cannot deduce every element of theft of a firearm from DeLeon's burglary indictment.

In light of this case law, we conclude that the indictment against DeLeon failed to allege an essential element of theft of a firearm—namely, that the stolen property was a firearm—and that, therefore, the elements of theft of a firearm cannot all be deduced from the indictment.[7] Therefore, we hold that theft of a firearm was not a lesser-included offense of burglary of a habitation as alleged in the indictment against DeLeon and that the trial court erred in overruling DeLeon's objection and submitting a question on theft of a firearm to the jury. *See* Tex. Code Crim. Proc. art. 37.09(a)(1); *Ex parte Watson*, 306 S.W.3d at 273.

The State argues that, even if the indictment did not allege all the elements of theft, DeLeon has waived his complaint because he did not move to quash the indictment. The State relies on *Mohammed v. State*. *See* No. 05-98-00945-CR, 2001 WL 710436 (Tex. App.—Dallas June 26, 2001, no pet.) (not designated for publication). Our sister court explained the facts in *Mohammed* as follows:

---

[7] Because we conclude that theft of a firearm does not satisfy the first prong in our lesser-included-offense analysis—namely, whether every element of theft was included in the indictment or could be deduced from facts alleged in the indictment—we need not consider the second prong by examining the evidence presented at trial. *See State v. Meru*, 414 S.W.3d 159, 164 (Tex. Crim. App. 2013).

> A grand jury indicted appellant for burglary of a building. The indictment alleged, in part, that he entered a building without the effective consent of the owner and committed theft. Although the indictment alleged appellant committed theft, it did not contain allegations of the description or value of any stolen property, nor did it contain allegations that appellant had previously been convicted for two other theft offenses. Before trial, the State filed a motion to "reduce" the offense from burglary of a building to a state jail felony level theft. Without a plea bargain, appellant entered a guilty plea to and was convicted of a state jail felony theft, which, in this instance, was theft of property valued less than $1,500, with two previous convictions for any grade of theft.

Id. at *1. On appeal, the defendant contended that his conviction was void, arguing, "in essence, that the trial court was without jurisdiction to convict him of state jail felony theft because theft is not a lesser included offense of burglary of a building where the burglary indictment fails to allege a specific theft offense." *Id.*

The court of appeals focused its analysis on "whether the trial court had jurisdiction to convict appellant of theft when the indictment failed to allege a specific theft offense." *Id.* The court explained that the indictment was "wanting":

> On its face, the indictment in appellant's case was wanting in two ways. First, it failed to detail the underlying theft element of the burglary offense. Second, it failed to allege any specific type of theft offense because it merely charged "theft" without setting out the particulars of the offense. Notably, in this regard, it did not allege the value of the stolen property was $1,500 or less, nor did it allege that appellant had been twice previously convicted for any grade of theft offense. These allegations would have characterized a state jail felony level theft.

Id. at *2. The court further noted, "The court of criminal appeals and one of the Houston courts of appeals have held that the failure to describe or allege the value of the stolen property in a burglary indictment precludes the trial court from convicting the defendant of the underlying theft as a lesser

included offense." *Id.* Nevertheless, the court held that the indictment was sufficient to confer jurisdiction on the trial court despite its defects:

> Here, the indictment clearly identified the penal statute for burglary of a building . . . by alleging that appellant entered a building without the effective consent of the owner and committed "theft." But the indictment did not describe any particular type of theft; it did not reveal whether the underlying theft was of property or something else. As such, the indictment was arguably incomplete. The indictment's incompleteness, however, was not fatal to the trial court's exercise of jurisdiction.

Id. at *3 (citation and footnote omitted). The court further explained,

> [B]y alleging "theft" in the burglary indictment, the State in essence alleged every variety of section 31.03 theft, including state jail felony theft. The "theft" alleged was a lesser included offense of the burglary because it was a completed theft. Because appellant did not object to the burglary indictment before trial, as required by article 1.14(b),[8] he waived any substantive defect in the indictment. Under *Studer* [*v. State*, 799 S.W.2d 263 (Tex. Crim. App. 1990)] and its progeny, the trial court had jurisdiction to convict appellant of burglary of a building or of the included offense of state jail felony theft.

Id. The court affirmed the judgment of conviction. *Id.*

Assuming, without deciding, that *Mohammed* was correctly decided, we nevertheless conclude that it is distinguishable from the case before us. First, *Mohammed* was decided before the Texas Court of Criminal Appeals firmly adopted the "cognate-pleadings" approach to analyzing lesser-included offenses. *See Hall*, 225 S.W.3d at 535 ("We now hold that the pleadings approach

---

[8] *See* Tex. Code Crim. Proc. art. 1.14(b) (" If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding.").

is the sole test for determining in the first step whether a party may be entitled to a lesser-included-offense instruction."). Second, and more importantly, *Mohammed* addressed whether a defective indictment conferred jurisdiction on a trial court. The case before us, by contrast, addresses jury-charge error. In the case before us, the question is not whether the burglary indictment conferred jurisdiction, but whether the trial court erred in submitting an instruction on theft of a firearm over DeLeon's objection. We are not applying the *Studer* line of cases—we are applying *Almanza* and *Hall*.

The Texas Court of Criminal Appeals clarified this distinction between jurisdiction and jury-charge error in *Trejo v. State*, 280 S.W.3d 258 (Tex. Crim. App. 2009). In *Trejo*,

> The indictment of the appellant alleged the offense of aggravated sexual assault. The court's charge authorized the jury to convict for that offense or for any of three lesser offenses: sexual assault, aggravated assault, or assault. The appellant did not object to the submission of the lesser offenses. The jury found the appellant guilty of the lesser offense of aggravated assault.

Id. at 259. "On appeal, the appellant said that, because aggravated assault was not a lesser-included offense of the aggravated sexual assault that was alleged, the trial court did not have jurisdiction to convict him of that lesser offense." *Id.* The court of criminal appeals explained that the trial court had jurisdiction because the indictment accused the defendant of a felony and therefore invoked the trial court's subject-matter jurisdiction over felony offenses. *See id.* at 260–61. The court recognized that this jurisdictional inquiry was distinct from the question of whether the trial court erred in submitting an instruction on the lesser offense of aggravated assault to the jury. *See id.* at 261. As the court put it, "Although the trial court may have erred in its charge to the jury, it had jurisdiction to commit the error." *Id.* The court of criminal appeals remanded the case to the

court of appeals to determine whether the defendant suffered egregious harm from the jury-charge error. *Id.* On remand, the court of appeals explained, "On discretionary review, the Court of Criminal Appeals determined that the trial court's error was charge error that did not deprive the trial court of jurisdiction." *Trejo v. State*, 313 S.W.3d 870, 871 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Our sister court then concluded that the defendant "was egregiously harmed by the trial court's submission of a charge authorizing the jury to convict appellant for an unindicted offense" and reversed the judgment of conviction. *See id.* at 874.

Similarly, in the case before us, the issue of the trial court's jurisdiction, which the *Mohammed* opinion addressed, is distinct from the question of charge error. We conclude that, even assuming that it has jurisdiction to do so, the trial court erred in submitting an instruction on theft of a firearm to the jury.[9]

Having determined that the trial court erred in submitting the instruction on theft of a firearm to the jury, we must now consider whether this error was harmless. *See Price*, 457 S.W.3d

---

[9] Moreover, if the State were correct that DeLeon waived his ability to question the trial court's instruction on a lesser offense by not moving to quash the indictment, two untenable consequences would follow. First, criminal defendants would be required to examine their indictment, try to predict whether the State would later ask for a lesser-included-offense instruction midway through trial, and, upon concluding that the State would do so, move to quash what might be a perfectly sound indictment for the greater offense. We are not aware of any controlling precedent that places such a burden on defendants. Second, such a holding would vitiate the current paradigm for analyzing whether an instruction on a lesser-included offense is appropriate. Instead of analyzing the issue as one of jury-charge error under *Almanza* and its progeny and comparing the elements of the charged offense to those of the proposed lesser-included offense under the cognate-pleadings approach of *Hall*, every case would treat the defendant's issue as a complaint against the indictment that may be waived under article 1.14(b). In the absence of authority to that effect from a higher court, we will not apply our sister court's jurisdictional analysis in *Mohammed* to the jury-charge error in the case before us.

at 440 ("If error exists, we then analyze the harm resulting from the error. If the error was preserved by objection, any error that is not harmless will constitute reversible error."). As one of our sister courts has explained,

> [T]he harm flowing from the charge was obvious. The jury acquitted appellant of the charged offense and convicted him of an offense with which the jury should not have been charged because that offense was not a lesser-included offense. Accordingly, we hold that appellant suffered egregious harm from the trial court's error in submitting the lesser-included-offense charge.

Farrakhan v. State, 263 S.W.3d 124, 145 (Tex. App.—Houston [1st Dist.] 2006), *aff'd*, 247 S.W.3d 720 (Tex. Crim. App. 2008); *see State v. Ramos*, 479 S.W.3d 500, 510 (Tex. App.—El Paso 2015, no pet.) ("Because Appellant's due process rights were violated under the circumstances, and because nothing in the charge can mitigate this harm, reversal is proper."). We agree that we cannot consider the trial court's error harmless when DeLeon was acquitted of the charged offense and found guilty only of the lesser offense. Moreover, the State has conceded in its appellate brief that, "where a lesser included offense is submitted when it is not warranted and the appellant is convicted of that lesser included offense . . . the Appellant suffers egregious harm" and that "the only issue the Court need consider is whether Theft of a Firearm is a proper lesser included offense of Burglary of a Habitation as charged in the indictment." Therefore, we hold that DeLeon was harmed by the trial court's erroneous instruction on theft of a firearm.

We have concluded that the trial court erred in submitting an instruction on theft of a firearm to the jury and that DeLeon suffered harm as a result. Accordingly, we sustain DeLeon's

sole appellate issue.[10] Because DeLeon was convicted only of theft of a firearm, which the trial court should not have submitted to the jury, we must render a judgment of acquittal. *See Vanwinkle v. State*, No. 04-14-00762-CR, 2015 WL 8983014, at *1 (Tex. App.—San Antonio Dec. 16, 2015, no pet.) (mem. op., not designated for publication); *Trejo*, 313 S.W.3d at 874; *Joyce v. State*, No. 07-07-0188-CR, 2008 WL 2967105, at *4 (Tex. App.—Amarillo Aug. 4, 2008, no pet.) (mem. op., not designated for publication); *Douglas v. State*, 915 S.W.2d 166, 169 (Tex. App.—Corpus Christi 1996, no pet.).

CONCLUSION

We reverse the trial court's judgment of conviction and render a judgment of acquittal.

_____

Scott K. Field, Justice

Before Chief Justice Rose, Justices Goodwin and Field

Reversed and Rendered

Filed: December 28, 2018

Publish

[10] Importantly, we do not hold today that theft may *never* be a lesser-included offense of burglary, only that it is not a lesser-included offense in this case because the burglary indictment did not include all the elements of theft or facts from which all those elements could be deduced. *See supra*, n.3.