IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0159-20

THE STATE OF TEXAS

v.

DANA LEE INGRAM, Appellee

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE TWELFTH COURT OF APPEALS SMITH COUNTY

YEARY, J., filed a dissenting opinion.

DISSENTING OPINION

Indicted for burglary of a building, TEX. PENAL Code § 30.02(a)(1), Appellee filed a motion to quash the indictment for lack of specificity. He argued that, because the indictment did not allege how much of his body entered the premises he burgled, he could not tell from the pleading whether he would be able to pursue a jury charge authorizing conviction for the lesser-included offense of trespass. TEX. PENAL CODE § 30.05(a). As support for this proposition, he cited this Court's opinion in *State v. Meru*, 414 S.W.3d 159 (Tex. Crim. App. 2013), and particularly footnote three of that opinion. The trial court

agreed and granted his motion to quash. When the State appealed from that ruling, the court of appeals affirmed. *State v. Ingram*, No. 12-18-00329-CR, 2020 WL 90915 (Tex. App.—Tyler del. Jan. 8, 2020) (mem. op., not designated for publication). Now the State seeks discretionary review of the court of appeals' decision, arguing that it erred to rely on *Meru*'s footnote three. Because the Court today refuses the State's petition, I respectfully dissent.

The issue in *Meru* was whether the defendant in that case was entitled to a lesser-included-offense jury instruction for criminal trespass at the conclusion of the guilt phase of his trial for burglary. 414 S.W.3d at 161–62. The indictment had alleged that the defendant "entered" a habitation. For purposes of a burglary prosecution, "'enter' means to intrude . . . any part of the body[.]" TEX. PENAL CODE § 30.02(b)(1). For purposes of criminal trespass, however, "'[e]ntry' means the intrusion of the entire body." TEX. PENAL CODE § 30.05(b)(1). The indictment in *Meru* failed to specify whether the defendant had intruded his entire body, or just a part of it, into the invaded premises. 414 S.W.3d at 164. This Court decided that, if—in committing the *actus reus* of burglary—the defendant invaded the premises with only a part of his body, he would not be able to obtain a lesser-included offense instruction for criminal trespass because the first prong of the *Hall* cognate-pleadings analysis would prohibit it. *See id*. (applying the first prong of the analysis set out in *Hall v. State*, 225 S.W.3d 524, 535–36 (Tex. Crim. App. 2007), to conclude that, because burglary's "entry" does not require all of the defendant's body to enter, and criminal trespass's "entry" does require a complete entry, criminal trespass would not ordinarily be a lesser-included offense of burglary).

Along the way, the Court in *Meru* dropped a footnote in which it suggested that an accused in Meru's position might still be able to preserve the right to seek a lesser-included offense instruction—by filing a motion to quash the indictment. *Id.* at 164 n.3. The Court posited that, in such a motion to quash, the accused could seek specificity in the indictment with respect to whether the State intended to prove intrusion of only a part of the body, or instead of the whole body, in establishing the greater offense of burglary. *Id*. If the indictment was then revised to reflect intrusion of the whole body, the Court suggested, the defendant should be able to get a jury instruction for that lesser-included offense. *Id*.

Specifically, footnote three in *Meru* said:

> In a burglary indictment in which the State does not allege whether the defendant's entry was full or partial, an instruction on criminal trespass as a lesser-included offense would be prohibited. However, a defendant who committed a full-body entry and wants the opportunity for an instruction on criminal trespass can file a motion to quash the indictment for lack of particularity. This would force the State to re-file the indictment, specifying the type of entry it alleges the defendant committed and allow either party to later request an instruction on criminal trespass.

Id. The footnote cited no authority for this proposition, however, and three judges on the Court disputed it. *Id*. at 168 (Alcala, J., concurring). In her concurring opinion, joined by Judges Womack and Cochran, Judge Alcala expressed grave doubt about the proposition that an accused could force the State to specify its theory of entry in a burglary indictment, since the State could not be compelled to plead such evidentiary matters. *Id*. Professors Dix and Schmolesky have since been critical of *Meru*'s footnote three as well:

> As Judge Alcala observed, Texas law contains no basis for the *Meru*'s majority opinion's footnote stating unqualifiedly that Texas law enables a defendant to force the State—if it plans to prove burglary by entry of the entire body—to specify the details of the entry to be proved. The fact that a

> majority of the judges could join that statement of the law suggests a sorry state of Texas charging instrument law.

George E. Dix & John M. Schmolesky, 42 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 25:112, at 14 (3d ed. Supp. 2019).

I heartily agree with Judge Alcala and the former judges who joined her concurring opinion in *Meru*. Our law does not require the State to specify in a burglary indictment whether it intends to prove an entry of the whole body into the burgled premises. Compelling such an evidentiary pleading would also engender trial-level anomalies that I doubt the Court fully considered when it crafted footnote three in *Meru*.

Suppose a prosecutor was required to specify, in response to a motion to quash such as the one in this case, whether the State intended to prove entry of the whole body in an indictment charging burglary. Suppose that prosecutor honestly indicated, by re-filing or amending his indictment, that he did in fact believe his evidence would prove as much at trial. Suppose then that, at trial, the evidence showed that the accused had intruded *most* of his body into the premises, but that one foot never actually crossed the threshold. Under this scenario, the State's evidence would still have established the commission of a burglary, since burglary entails an intrusion of *any* part of the body. But if the jury had been instructed, in accordance with the honestly revised indictment, that it must be able to find that the accused intruded his *entire* body onto the premises in order to convict, it would be obliged by the jury charge to acquit the accused of *both* burglary *and* trespass. And this is true even though the evidence was legally sufficient—given a hypothetically correct jury charge, which would authorize conviction for burglary given an intrusion of *any* part of the

body—to convict him of the greater offense of burglary! This is precisely the reason the State should not be compelled to allege its evidence.

The court of appeals in this case felt that it had to follow the dictates of the flawed footnote in *Meru.* It also identified other courts of appeals' decisions that have been likewise constrained. *State v. Ingram*, 2020 WL 90915, at *3, *6. Given the lack of both authority and reason to back it up, the footnote in *Meru* cries out for our reconsideration. Because the Court declines this perfect opportunity to do so, I respectfully dissent.

FILED: June 17, 2020
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