



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS,	§	08-18-00092-CR
Appellant,	§	Appeal from the
v.	§	346th District Court
MICHAEL ANTHONY TORRES,	§	of El Paso County, Texas
Appellee.		(TC# 20170D03112)

OPINION

The State of Texas appeals from the trial court's order granting appellee Michael Anthony Torres' motion to quash an indictment alleging that he committed a violation of section 1956.040 of the Texas Occupations Code ("Section 1956.040"). We reverse and remand.

I. BACKGROUND

The indictment at issue alleges:

[O]n or about the 30th day of April, 2015, and anterior to the presentment of this indictment, in the County of El Paso and State of Texas, MICHAEL ANTHONY TORRES, hereinafter referred to as Defendant, did then and there knowingly sell stolen regulated material to wit: copper cable to Lopez Scrap Metal[.]

Torres filed a motion to quash the indictment, asserting that it was deficient because it did not comply with various articles of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. arts. 21.02 (requisites of an indictment), 21.03 (indictment should state everything

necessary to be proved), 21.04 (certainty required), 21.08 (allegation of ownership). Torres' argument at the hearing on his motion to quash revealed that the basis of each of his assertions of defect was the failure of the indictment to identify the owner of the allegedly stolen property. The trial court granted Torres' motion to quash and dismissed the indictment. The State then perfected this appeal.

II. DISCUSSION

The State asserts, in one issue, that the trial court erred by granting Torres' motion to quash because the indictment against him is legally sufficient.

A. Standard of Review

The sufficiency of an indictment presents a question of law, which is reviewed *de novo*. *State v. Drummond*, 501 S.W.3d 78, 81 (Tex. Crim. App. 2016); *Smith v. State*, 297 S.W.3d 260, 267 (Tex. Crim. App. 2009).

B. Principles governing the sufficiency of an indictment

Under Texas law, “the indictment must allege on its face the facts necessary to show that the offense was committed, to bar a subsequent prosecution for the same offense, and to give the defendant notice of precisely what he is charged with.” *Bynum v. State*, 767 S.W.2d 769, 778–79 (Tex. Crim. App. 1989); *see* TEX. CODE CRIM. PROC. ANN. arts. 21.03, 21.04.

An indictment shall be deemed sufficient which charges the commission of the offense in ordinary and concise language 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, and enable the court, on conviction, to pronounce the proper judgment[.]

TEX. CODE CRIM. PROC. ANN. art. 21.11.

As a general rule, an indictment that tracks the language of the applicable statute satisfies constitutional and statutory requirements. *Hughitt v. State*, 583 S.W.3d 623, 626 (Tex. Crim. App. 2019); *Curry v. State*, 30 S.W.3d 394, 398 (Tex. Crim. App. 2000). But a motion to quash may be

granted if a defendant claims that the indictment gives him inadequate notice to present a defense and the facts he seeks are essential to give notice. *Bynum*, 767 S.W.2d at 779. The State is not, however, required to plead evidentiary matters. *Curry*, 30 S.W.3d at 398; *see Bynum*, 767 S.W.2d at 779 (State not required to plead non-essential facts). The starting point of our analysis, then, is to identify the elements of the offense with which Torres was charged. *See Hughitt*, 583 S.W.3d at 626.

C. Elements of the offense of selling stolen regulated material

Section 1956.040 states that “[a] person commits an offense if the person knowingly sells stolen regulated material.” TEX. OCC. CODE ANN. § 1956.040(c). The elements of the offense are, therefore, (1) a person (2) knowingly (3) sells (4) stolen (5) regulated material. *See id.* The indictment here at issue alleges that “[1] MICHAEL ANTHONY TORRES [a person] . . . [2] did then and there knowingly [3] sell [4] stolen [5] regulated material to wit: copper cable[.]” The State argues that the indictment tracks the language of the applicable statute, alleges every essential element of the offense, and, therefore, is legally sufficient. *See Hughitt*, 583 S.W.3d at 626; *Curry*, 30 S.W.3d at 398.

Torres, on the other hand, argues that Section 1956.040 alleges a form of theft and, as a result, incorporates the essential elements of the offense of theft as defined in the Texas Penal Code. *See TEX. PENAL CODE ANN. § 31.03.* He notes that “the gravamen of theft is two-pronged—taking certain specified property away from its rightful owner or depriving that owner of its use or enjoyment. Ownership and appropriation of property are both important.” *Byrd v. State*, 336 S.W.3d 242, 250–51 (Tex. Crim. App. 2011). Because “[e]verything should be stated in an indictment which is necessary to be proved[.]” an indictment for theft must allege both of these prongs. TEX. CODE CRIM. PROC. ANN. art. 21.03. Further, while only the existence of a specific owner is an element of theft, Texas law requires that the State allege the name of the property

owner in its charging instrument. *Byrd*, 336 S.W.3d at 251.

Torres asserts in his brief on appeal that “[t]he Indictment did not meet the requirements of § 31.02¹ and § 31.03² of the Texas Penal Code and therefore did not meet the requirements [of] Article[] 21.03³ of the Texas Code of Criminal Procedure.” The essence of Torres’ argument is that (1) Section 1956.040 concerns “stolen” property, (2) “stolen” implicates “theft,” (3) ownership and appropriation are elements of “theft,” so (4) ownership and appropriation are elements of an offense under Section 1956.040. But this argument is foreclosed by the reasoning of the Court of Criminal Appeals in *Ex parte Williams*, 622 S.W.2d 876 (Tex. Crim. App. 1981) (en banc).

The defendant in *Williams* was indicted for the offense of credit card abuse, the elements of which are “(1) a person (2) steals a credit card or, (3) knowing it has been stolen (4) receives the card with the intent to (5) use it, sell it, (6) transfer it to a person other than the issuer or cardholder.” *Id.* at 877 (citing TEX. PENAL CODE ANN. § 32.31(b)(4)). The Court of Criminal Appeals held that an indictment for that offense is sufficient if it alleges “(1) a person (2) knowing a credit card to have been stolen (3) receives it with intent to use it.” *Id.* The court expressly rejected the contention that it was necessary “to allege the ‘cardholder’ or ‘owner’ or to allege that the receipt of the credit card with intent to use ‘was without the effective consent of the cardholder or issuer.’” *Id.*

The defendant in *Williams* argued that the Court of Criminal Appeals had previously held an indictment to be “fatally defective because it failed to allege that the credit card was used without the effective consent of the cardholder.” *Id.* (citing *Jones v. State*, 611 S.W.2d 87 (Tex.

¹ Section 31.02 consolidates previously distinct theft offenses into one offense. TEX. PENAL CODE ANN. § 31.02.

² Section 31.03 defines the offense of theft. TEX. PENAL CODE ANN. § 31.03.

³ Article 21.03 provides that “[e]verything should be stated in an indictment which is necessary to be proved.” TEX. CODE CRIM. PROC. ANN. art. 21.03.

Crim. App. 1981)). But the *Williams* court correctly noted that *Jones* involved a different offense and “[t]he element that the card was used without the effective consent of the cardholder is part of the offense [charged in *Jones*], but is not an element of the offense with which petitioner was charged[.]” *Id.*

The Court of Criminal Appeals later reiterated its *Williams* holding and applied the same reasoning in an analogous context. *See Odom v. State*, 628 S.W.2d 804 (Tex. Crim. App. 1982) (en banc) (on rehearing). The issue in *Odom* was whether an indictment for gambling promotion was required to include the names of the persons patronizing the gambling place. *Id.* at 805. The court first noted its holding in *Williams* that it was “not necessary for the indictment to allege the cardholder or owner because neither of those persons was part of the elements of credit card abuse” as defined by the relevant statute. *Id.* at 806. It then similarly held that, because “the persons patronizing a gambling place are not part of the elements of gambling promotion[.]” it was not necessary to name such persons in the indictment. *Id.*

This Court has also addressed, and rejected, an argument attempting to incorporate the ownership element of a theft offense into a separately-defined offense. *See State v. Rivera*, 42 S.W.3d 323 (Tex. App.—El Paso 2001, pet. ref’d). The defendant in *Rivera* was charged with two counts of engaging in organized criminal activity for the commission of bribery and aggregated theft. *Id.* at 325. He argued that the indictment was deficient because it failed to state the identity of the owner of the property that was allegedly stolen. *Id.* at 330. This Court held that that information was incidental to the crime alleged and therefore, was not required to be included in the indictment. *Id.*

With this guidance in mind, we return now to the elements of the offense of selling stolen regulated materials. Again, those elements are that (1) a person (2) knowingly (3) sells (4) stolen

(5) regulated material. TEX. OCC. CODE ANN. § 1956.040(c). Neither ownership of the regulated material nor that the regulated material was sold without the owner’s effective consent are included as elements. And, as in *Williams*, the mere fact that the statute makes reference to “stolen” material does not mean that it incorporates into itself the elements of a separate theft offense. *See Williams*, 622 S.W.2d at 877 (rejecting argument based on separate offense that expressly included lack of effective consent as an element); *see also Rivera*, 42 S.W.3d at 330 (recognizing offense of engaging in organized criminal activity for the commission of aggregated theft does not incorporate theft element of ownership).

We conclude that neither ownership of the subject regulated material nor appropriation without the owner’s effective consent are elements of the offense of selling stolen regulated material under Section 1956.040. Because they are not elements of the offense, the State was not required to allege them in the indictment and the trial court erred by granting Torres’ motion to quash.

The State’s sole issue is sustained.

III. CONCLUSION

The trial court’s order granting Torres’ motion to quash the indictment is reversed and the cause is remanded to the trial court for further proceedings.

GINA M. PALAFOX, Justice

June 15, 2020

Before Alley, C.J., Rodriguez, and Palafox, JJ.

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