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COURT OF CRIMINAL APPEALS
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COURT OF APPEALS CAUSE NO. 03-15-00332-CR

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COURT OF CRIMINAL APPEALS
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TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

TERRI REGINA LANG — Appellant

v.

STATE OF TEXAS — Appellee

Appeal from Burnet County

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

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INDEX OF AUTHORITIES

U.S. Supreme Court:

Texas Court of Criminal Appeals:

Texas Courts of Appeals:

Statutes/Rule:

Legislative History:

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APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant respectfully urges this Court to grant Appellant's Petition for Discretionary Review for the reasons given below.

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument, but will present oral argument if the Court grants it.

STATEMENT OF THE CASE

Appellant was charged with and convicted of organized retail theft.[1] She contended on appeal that the evidence was legally insufficient to support her conviction because the statute cannot be violated by a person who acts alone, as Appellant did, nor can the statute be violated by the very act of shoplifting, which is all that Appellant did. The Court of Appeals disagreed, declining to consider the legislative history showing that the statute was intended to target professional theft rings, and instead holding that "that the statutory language permits only one reasonable understanding concerning whether the statute requires proof that the defendant acted with others in committing this offense—it does not—and whether the offense criminalizes the underlying act of theft—it does." *Lang v. State*, 03-15-00332-CR, 2017 WL 1833477 at *7 (Tex. App.—Austin May 5, 2017) (mem. op., not designated for publication). Appellant's petition challenges these two holdings and asks this Court to revise its rule on when legislative history may be considered.

STATEMENT OF PROCEDURAL HISTORY

The Third Court of Appeals affirmed Appellant's conviction in an unpublished opinion delivered May 5, 2017. *Lang v. State*, 03-15-00332-CR, 2017 WL 1833477 (Tex. App.—Austin May 5, 2017) (mem. op., not designated for

[1] Tex. Penal Code § 31.16(b)(1), (c)(3).

publication). Neither party filed a motion for rehearing. Appellant received an extension of time to file her petition for discretionary review, making it due on or before July 5, 2017.

GROUNDS FOR REVIEW

1. May this Court adhere to a rule that refuses to allow the consideration of legislative history to interpret a statute unless the statute is ambiguous, when the Legislature states that legislative history may be considered whether or not a statute is ambiguous?

    a. Must *Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991) and its progeny be overruled to the extent they conflict with Texas Government Code Section 311.023, which Texas Penal Code Section 1.05(b) makes applicable to the Penal Code?

    (IV R.R. at 38-48).

2. Does the organized retail theft statute admit of more than one reasonable interpretation with respect to whether the statute may be violated by a solitary actor committing ordinary shoplifting, and does consulting the plain language alone lead to absurd results that the legislature could not possibly have intended?

    (III 9-17; 29; 32) (IV R.R. at 10; 17-18; 38-48).

3. May a shoplifter violate the organized retail theft statute by committing ordinary shoplifting while acting alone?

    (III 9-17; 29; 32) (IV R.R. at 10; 17-18; 38-48; 51-52; 56-58) (State's Ex. 1, 3 and 4).

ARGUMENT FOR GROUND ONE

A. Texas Government Code Section 311.023 and *Boykin*

The will of the legislature, as expressed in the plain language of Section

311.023, is as follows: "[i]n construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:…(3) legislative history". Tex. Gov't Code § 311.023(3). In *Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991), this Court announced instead that "[i]f the plain language of a statute would lead to absurd results, or if the language is not plain but rather ambiguous, then *and only then*, out of absolute necessity is it constitutionally permissible for a court to consider, in arriving at a sensible interpretation, such *extra*textual factors as executive or administrative interpretations of the statute or legislative history." *Id*. at 785-786 (emphasis in original).

So, there is a conflict. *Boykin* has been followed consistently without attempting to resolve this conflict. *See, e.g.*, *Ex parte Spann*, 132 S.W.3d 390, 393 (Tex. Crim. App. 2004) ("In addition, a court may consider 'legislative history' and the 'object sought to be attained' even when an ambiguity does not exist…However, despite the broad latitude afforded by the legislature, this Court considers 'extra-textual factors' such as legislative history only when the plain language of the statute is 'ambiguous' or when a literal interpretation would lead to 'absurd results.'") (citing *Boykin*); *Cary v. State*, 507 S.W.3d 750, 756 (Tex. Crim. App. 2016); *Yazdchi v. State*, 428 S.W.3d 831, 838 (Tex. Crim. App. 2014). Or has it?

The First Court of Appeals claims *Boykin* has been "eviscerated" by *Lanford v. State*, 847 S.W.2d 581, 587 (Tex. Crim. App. 1993): "As in *Warner*, we again easily avoid a conflict [between Section 311.023 and *Boykin*] by resorting to *Lanford v. Fourteenth Court of Appeals*, in which the court of criminal appeals eviscerated its *Boykin* rule by finding ambiguity when the parties took polar opposite interpretations of the text…Because the parties take polar opposite positions here, we are free to apply the Code Construction Act in resolving the issue." *Allen v. State*, 11 S.W.3d 474, 476 (Tex. App.—Houston [1st Dist.] 2000), *aff'd*, 48 S.W.3d 775 (Tex. Crim. App. 2001). But this does not resolve the conflict; it only deepens it. For it acknowledges[2] that an ambiguity must be found before the will of the Legislature—that legislative history be available for consideration in all cases—may be followed.

And yet the *Boykin* rule persists. But should it?

B. Reasons to Depart from, or Modify, *Boykin*

1. *Boykin* is self-contradictory

Boykin purported to adopt a rule that "demonstrates respect for [the legislative] branch" by offering "the only method that does not unnecessarily invade the lawmaking province of the Legislature." *Boykin*, 818 S.W.2d at 785-786. The "Legislature", said *Boykin*, "is *constitutionally entitled* to expect that the

[2] Of course, as an intermediate appellate court, the First Court could not do any more.

Judiciary will faithfully follow the specific text that was adopted." *Id*. at 785 (emphasis in original). Thus, *Boykin* counseled adherence to the "literal text of the statute" and "the plain language" of the statute. *Id*.

How, then, can it ignore the plain language of Section 311.023? What could be plainer than "*whether or not a statute is considered ambiguous on its face*", extra-textual sources may be considered? Tex. Gov't Code § 311.023(3) (emphasis added). How does it demonstrate respect for the Legislature to ignore what the Legislature has said? Why can the Legislature not write statutes and then give guidance as to how they should be interpreted? Why is the legislature not "constitutionally entitled" to expect that the Judiciary will faithfully follow the text of Section 311.023 that was adopted? *See Boykin*, 818 S.W.2d at 785. *Boykin* suggested that resorting to extra-textual sources is unwise—but the Legislature is free to enact unwise laws. *Salinas v. State*, --S.W.3d--, PD-0170-16, 2017 WL 915525, at *13 (Tex. Crim. App. Mar. 8, 2017) (published) (Newell, J., dissenting) ("The late Supreme Court Justice Antonin Scalia famously quipped that 'a lot of stuff that's stupid is not unconstitutional.'").

2. The Legislature has twice told courts to consider legislative history in construing the Penal Code

Texas Penal Code Section 1.05, entitled "Construction of Code" states in subsection (b) that "Unless a different construction is required by the context, Sections…311.021 through 311.032 of Chapter 311, Government Code (Code

Construction Act), apply to the construction of this code." Tex. Pen. Code § 1.05(b). So, once in the Penal Code, and once through the Government Code, the will of the Legislature—wise or unwise—is plain that legislative history may be considered no matter what. This Court is not free to contravene that will absent a finding that Section 311.023 is unconstitutional in some respect, and *Boykin* did not hold Section 311.023 to be unconstitutional. Indeed, this Court has elsewhere considered legislative history and justified doing so with reference to Section 311.023 and respect for the will of the legislature: "Clearly both the House and Senate believed that all defects in a charging instrument were waived if not raised by a defendant before trial. Clearly the perceived evil they were correcting was the raising of indictment defects for the first time after a trial and conviction and the subsequent reversal of that conviction because of that defect. To say that an indictment that does not contain an element of an offense is not an 'indictment for purposes of SB 169, would be to completely ignore the entirety of Govt. Code Sec. 311.023, as well as to thwart the intent and the will of the legislature and, presumably, the people who passed Art. V, § 12." *Studer v. State*, 799 S.W.2d 263, 270–71 (Tex. Crim. App. 1990).

3. *Boykin* as applied here violates other canons of construction

It is well-settled that "[n]either the trial court nor this court has the power to

legislate and read into a statute something which the legislature has omitted therefrom." *Barkley v. State*, 152 Tex. Crim. 376, 384, 214 S.W.2d 287, 291–92 (1948). Section 1.05 states: "Unless a different construction is required by the context", Section 311.023 applies to the construction of the Penal Code. Yet, *Boykin* makes 1.05 read, "Unless a different construction is required by the context or the statute is unambiguous and would not lead to absurd results…." *Boykin* thus results in words being added to the statute, at least by implication. Yet even *Boykin* recognized that "[w]here the statute is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute." *Boykin*, 818 S.W.2d at 785 (quotation omitted). Since 1.05 is "clear and unambiguous", why does *Boykin* add words that are not there? And, because 1.05 contains but one exception ("Unless a different construction is required by the context") to the application of 311.023 to the Penal Code, no other exception may be implied or grafted on, *State v. Daugherty*, 931 S.W.2d 268, 270 (Tex. Crim. App. 1996)—so why does *Boykin* do so?

4. *Boykin* disregarded 311.023 in *dicta*

In setting up its rule, *Boykin* could not avoid Section 311.023. But when it addressed the statute explicitly, it did so in a footnote—and footnotes are not binding authority. *Gonzales v. State*, 435 S.W.3d 801, 813 (Tex. Crim. App. 2014)

("Finally, it is not clear how much precedential value a pronouncement delivered by this Court in a footnote should carry, considering that we have stated that footnotes 'should receive minimal precedential value.'); *Young v. State*, 826 S.W.2d 141, 145 (Tex. Crim. App. 1991) ("As is generally true with footnotes, we regard this footnote as dictum even though we are not in complete disagreement with some of its observations."). If Section 311.023 is reconcilable with *Boykin*, or if it is unconstitutional for some reason, then this Court should declare as much in an opinion, not a footnote.

5. *Boykin* contravenes rather than effects the will of the Legislature

To some extent this point has already been stated, but here the focus is on the legislative history for the organized retail theft statute. No one who considers that history can come away with any other conclusion than that the legislature enacted the organized retail theft statute to target professional theft rings. As the House Committee Report Bill Analysis from 2007 describes it, "[o]rganized retail crime is distinct from petty shoplifting in that it involves professional theft rings that move quickly from community to community and across county lines to steal large amounts of merchandise." *See* House Committee Report Bill Analysis for H.B. 3584, 80th Leg., R.S. The analysis continues: "[t]his criminal activity requires many thieves (boosters) organized by a central figure (fence) that pays the boosters pennies on the dollar, then repackages and resells the merchandise

through alternate distribution channels to the general public." *Id*. Likewise, the House Research Organization's Bill Analysis summarizes the supporters of the bill as noting that the bill "would combat the growth of organized retail theft, in which groups of shoplifters and fences form multi-state crime rings that cost retailers millions of dollars a year in stolen goods. *The bill would weaken these organized rings by targeting the fences who hold the syndicates together.* If the public could effectively prosecute and incarcerate *these key players*, then shoplifters would have difficulty selling stolen merchandise and would be discouraged from shoplifting in the future." *See* House Research Organization Bill Analysis for H.B. 3584, 80th Leg., R.S. (emphasis added).

Likewise, the 2011 legislative history: the Senate Research Center's Bill Analysis for H.B. 2482 describes "[o]rganized retail crime (ORC) [as] the orchestrated scheme to convert stolen goods to cash. It can generally be described as professional burglars, boosters, cons, thieves, fences and resellers conspiring to steal and sell retail merchandise obtained from retail establishments by theft or deception." *See* Senate Research Center Bill Analysis for H.B. 2482, 82nd Leg., R.S. Continuing, the bill analysis describes the scheme of organized criminal activity: a booster is the "front line thief who steals with the intention of reselling the stolen goods"; such boosters not uncommonly work in a "booster group" moving from "city to city or across state lines [and taking] several thousand dollars

of goods a day"; these boosters "coordinate with 'fences,' the first buyers of the stolen goods, who typically purchase the items for pennies on the dollar"; these fences then "sell the items outright at flea markets, convenience stores, or online"; and sometimes these fences "repackage [the stolen goods] for sale to higher level fences." *Id*. Thus, "H.B. 2482 targets the patterns of these crimes committed by corrupt *enterprises* by allowing the *major players and ring leaders* to be held accountable." *Id*. (emphasis added). Likewise, the House Committee Report's Bill Analysis comments that "[i]nterested parties contend that organized criminal enterprises, including gangs and foreign nationals, are often behind organized retail theft crimes and that these crimes have been linked to the funding of domestic and international terrorism, drugs, guns, prostitution, and human smuggling." *See* House Committee Report Bill Analysis for H.B. 2482, 82nd Leg., R.S.

By excluding such evidence from review of the statute, *Boykin* can lead to the absurd result that the will of the legislature is not given effect. *See Studer*, 799 S.W.2d at 270–71 (Tex. Crim. App. 1990).

6. Legislative History is not so widely shunned

Boykin based itself in part on its method as being "long recognized and accepted…as constitutionally and logically compelled." *Boykin*, 818 S.W.2d at 786. But is that really true? *County of Washington v. Gunther*, 452 U.S. 161, 182, 101 S.Ct. 2242, 2254, 68 L.Ed.2d 751 (1981) (Rehnquist, J., dissenting) ("[I]t [is]

well settled that the legislative history of a statute is a useful guide to the intent of Congress"); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 572, 125 S. Ct. 2611, 2628, 162 L. Ed. 2d 502 (2005) (Stevens, J., dissenting) ("Because ambiguity is apparently in the eye of the beholder, I remain convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted. Indeed, I believe that we as judges are more, rather than less, constrained when we make ourselves accountable to *all* reliable evidence of legislative intent."); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 611, n. 4, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) ("[C]ommon sense suggests that inquiry benefits from reviewing additional information rather than from ignoring it"); *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543–544, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'" (footnote omitted)); *United States v. Fisher*, 2 Cranch 358, 386, 2 L.Ed. 304 (1805) (Marshall, C.J.) ("Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived"). At the very least the wisdom of ignoring clear evidence of legislative intent is up for debate. After all, does it make any sense to read a book while ignoring the author's express guidance for how to interpret that book?

7. A Solution?

Precedent is hard to dislodge: *stare decisis* and all that. So why not distinguish *Boykin* by holding that its prohibition against considering legislative history does not apply to the Penal Code, because the Code makes 311.023 expressly applicable to the whole Code? This would leave all statutes before the 60th legislative session still generally subject to *Boykin*, since the Code Construction Act applies only to, among other things, statutes enacted by the 60th or later legislative session. *See* Tex. Gov't Code § 311.002. Hence, *Boykin* survives where it can, and the legislature's will is obeyed as it should.

Still, the real solution is to follow the will of legislature and apply the Code Construction Act as written, which means *Boykin* and its progeny must go. We apply the rest of the Code Construction Act without qualm, so why not this part?

ARGUMENT FOR GROUND TWO

But suppose we are stuck with *Boykin*, and cannot, notwithstanding 311.023, look to legislative history unless 31.16 is ambiguous or the plain language leads to an absurd result that the legislature could not have possibly intended. "A statute is ambiguous when it may be understood by reasonably well-informed persons in two or more different senses…On the other hand, a statute is unambiguous when it reasonably permits no more than one understanding." *State v. Schunior*, 506 S.W.3d 29, 34–35 (Tex. Crim. App. 2016) (citation and quotations omitted).

In relevant part, the organized retail theft statute reads: "A person commits an offense if the person intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, or disposes of: (1) stolen retail merchandise". Tex. Pen. Code § 31.16(b)(1). Additionally, a person's punishment may be increased: "(d) An offense described for purposes of punishment by Subsections (c)(1)-(6) is increased to the next higher category of offense if it is shown on the trial of the offense that:

(1) the person organized, supervised, financed, or managed one or more other persons engaged in an activity described by Subsection (b); or

(2) during the commission of the offense, a person engaged in an activity described by Subsection (b) intentionally, knowingly, or recklessly:

(A) caused a fire exit alarm to sound or otherwise become activated;

(B) deactivated or otherwise prevented a fire exit alarm or retail theft detector from sounding; or

(C) used a shielding or deactivation instrument to prevent or attempt to prevent detection of the offense by a retail theft detector." Tex. Pen. Code § 31.16(d).

Appellant can show an ambiguity in this text, resulting in the need to consult legislative history, either under *Boykin* or *Lanford*, as understood by *Allen*.

A. Ambiguity under *Lanford*

Lanford stated: "Indeed, we conclude that subsection (d) is classically ambiguous, as the polar interpretations of the court of appeals and the parties, set out previously, would suggest." *Lanford*, 847 S.W.2d at 587. The First Court of Appeals comments that, with this language, this Court "eviscerated its *Boykin* rule by finding ambiguity when the parties took polar opposite interpretations of the text." *Allen*, 11 S.W.3d at 476. The parties plainly took polar opposite positions here: Appellant claims the organized retail theft statute cannot be violated by an ordinary shoplifter acting alone, nor can it be violated merely by committing shoplifting; the State says group activity is not required, and the underlying theft can support a conviction. So, if *Allen* correctly interprets *Lanford*, then we have a classic ambiguity in Section 31.16, and extra-textual sources, including legislative history, should be consulted to resolve it.

B. Ambiguity under *Boykin*

But if something more than diametrically-opposed disagreement is required, then all Appellant needs to show is that Section 31.16 may be reasonably understood in more than one sense by well-informed persons. This is done easily enough: a person commits an offense under Section 31.16 if, and only if, the retail merchandise is already stolen. Tex. Pen. Code § 31.16(b)(1) ("A person commits an offense if the person intentionally conducts, promotes, or facilitates an activity

in which the person receives, possesses, conceals, stores, barters, sells, or disposes of: (1) stolen retail merchandise".). Thus, all of the prohibited conduct identified in the statute is directed at doing something after the theft has already occurred. But the Court of Appeals disagreed, saying that a "person who unlawfully appropriates retail merchandise also 'possesses' stolen retail merchandise." *Lang*, 2017 WL 1833477 at *7. Now, Appellant thinks that interpretation is untenable: it means that a person commits organized retail theft by the act of stealing, but the statute requires the property to already have been stolen by the time the person conducted, promoted, or facilitated the activity in which he received, possessed, concealed, stored, bartered, sold, or disposed of the retail merchandise. Tex. Pen. Code § 31.16(b)(1). Even the trial judge thought so: "it seems…that this [organized retail theft] technically involves stolen property as opposed to theft of property theoretically". (IV R.R. at 56). The statute does not say a person commits an offense if he does something (conducts, promotes, facilitates) with respect to an activity in which he *steals* retail merchandise, but rather, with respect to *stolen*—already stolen—retail merchandise. Surely Appellant's interpretation is not one that no reasonable person could hold, and let us assume for the sake of argument that the Court of Appeals' interpretation is also reasonable. That is an ambiguity under *Boykin*.

Or, let us take subsection (d)(1). The Court of Appeals thought this section showed that "a single person can engage in the prohibited behavior defined in the statute" because the subsection refers to "*one* or more other persons *engaged in an activity described by Subsection (b)*." *Lang*, 2017 WL 1833477 at *6 (emphasis in original). Now, no one argues that one person alone can be prosecuted and convicted of organized retail theft. The question is whether "an activity described by Subsection (b)" is one that can be committed by a single person, acting alone, to commit ordinary shoplifting. The Court of Appeals' interpretation seems to be that because one person can be prosecuted alone, that means that one person can violate the statute by acting alone. But that does not follow: all it shows is that a person may be prosecuted alone, but we still do not know whether he may prosecuted for *acting* alone. And especially not whether he can be prosecuted for acting alone by committing ordinary shoplifting.

Then, subsection (d) plainly targets those "higher ups" in the criminal organization, which, reviewing the legislative history cited above, shows was part of the Legislature's concern.

C. Absurd Result

There is at least one absurd result that flows from construing the statute to find that a person can violate it by acting alone to commit ordinary shoplifting. This can be seen in the following hypothetical.

A person walks past the point-of-sale with merchandise while harboring the requisite intent. He has thus violated the "simple" theft statute. Having done so, he possesses stolen retail merchandise. Now, at this point he cannot have violated the organized retail theft statute because he has not done any "activity" with respect to the stolen retail merchandise: even if he, at the moment of stealing, possesses stolen merchandise he has not yet conducted an activity in which he possesses it—when he conducted the activity the merchandise was not yet stolen. Now, he saunters out to his vehicle (conducts an activity)[3] while carrying (possessing) the (now stolen) retail merchandise. Thus, merely by continuing to walk out of the store, he has committed organized retail theft. But every shoplifter will do this, and thus every shoplifter commits both theft and organized retail theft. Moreover, the shoplifter who takes the stolen merchandise home, sits on his couch, and gazes at the fruits of his theft—by the very act of sitting and staring at the pilfered goods—commits organized retail theft: he conducts an activity (sits on the couch and looks at the stolen merchandise) in which he possesses stolen merchandise (he is holding it after all). The basic point is that, under the reasoning of the Court of Appeals, these scenarios are not only possible but inevitable—and they are untenable.

[3] Actually, Appellant does not think that "activity" simply means "doing something" or "an act", *see* Appellant's Brief, Pages 39-42 and *Lang*, 2017 WL 1833477 at *6, nor that "conducts" in the context of the statute means simply "to do", *see* Appellant's Brief, Page 43-44 and *Lang*, 2017 WL 1833477 at *4, but let us assume they do for the sake of argument.

Now, the Court of Appeals did not think this absurd because the legislature is free to, and has, criminalized the same conduct under different statutes. *See Lang*, 2017 WL 1833477 at *6. But, the problem with the analysis of the Court of Appeals is that the above-described actions are not the same conduct, that is, the same act, but neither are they separate and distinct acts have nothing to do with each other—they are at best separate parts of a continuum of different yet related actions, but by criminalizing each stage of the trip from the register to the car to the couch, we seem to be straying into the realm of stop-action prosecution. *Patterson v. State*, 152 S.W.3d 88, 92 (Tex. Crim. App. 2004). And, while the legislature can criminalize separate acts within the same course of conduct (for example, touching a child's anus and breast during the same sequence of molestation), it does so when there is clear statutory authority for doing so based on the gravamen of the offense, and the offenses are not otherwise subsumed under *Patterson*.

D. Conclusion

These are but some of the problems that could be shown, but the above is enough to show that the Court of Appeals erred. And, provided that *Boykin* will not be modified or jettisoned, and provided that the Court will not find that the statute unambiguously does not allow a solitary actor to be convicted for committing ordinary shoplifting, there is enough to show that legislative history should contribute to the proper construction of the statute.

ARGUMENT FOR GROUND THREE

Among the reasons that could be proffered for why 31.16 cannot be violated by a person acting alone to commit ordinary theft is one suggested by the Court of Appeals itself. The Court concluded that a person could violate the statute by the act of stealing because once a person steals something he *ipso facto* possesses stolen property. *Lang*, 2017 WL 183347 at *7. The consequence of this construction, however, is that "simple" theft is a lesser-included offense of organized retail theft.

However, as Appellant showed in her brief, Appellant's Brief at Pages 55-60, and as the trial judge correctly found, (IV R.R. at 51-52; 56-57), simple theft is not a lesser-included offense of organized retail theft.[4] But if a person violates the organized retail theft statute by ordinary shoplifting while acting alone, then simple theft must be a lesser-included offense of organized retail theft—otherwise how could you violate the latter by committing the former?

Indeed, the relevant venue statute (like the related, nearly identical cargo theft statute,[5] briefed but ignored by the Court of Appeals) confirms that the underlying theft is not the same as the offense of organized retail theft: "(b) An offense under Section 31.16 or 31.18, Penal Code, may be prosecuted in any

[4] The fact that Appellant offered a reasonable interpretation of the statute showing that the underlying theft, at least not when committed by a person acting alone, is not criminalized by 31.16 is another reason to conclude that the statute is ambiguous.

[5] Tex. Pen. Code § 31.18.

county in which *an underlying theft* could have been prosecuted as a separate offense." Tex. Code Crim. Proc. art. 13.08(b) (emphasis added). Plainly the underlying theft is different from the offense of organized retail theft, otherwise the venue statute would say that the offense could be prosecuted in any part of any county in which the *offense* was committed (which would be unnecessary to state, of course). And, why would the venue statute refer to *an* underlying theft, as opposed to "the underlying theft constituting the offense"? Because the criminal activity covered by organized retail theft is that described by the legislative history quoted above: mobile, professional, theft rings—not petty shoplifters acting alone. Indeed, this venue language would be unnecessary if 31.16 covered simple theft because the venue for that offense is already covered by Article 13.08(a): "[w]here property is stolen in one county and removed to another county, the offender may be prosecuted either in the county in which the property was stolen or in any other county through or into which the property was removed." Tex. Code Crim. Proc. 13.08(a). "An underlying theft", then, as if it say: "an underlying theft of the several underlying thefts constituting the organized activity regarding stolen retail merchandise."

There are other reasons to conclude that the organized retail theft statute does not permit conviction of a solitary actor committing ordinary shoplifting, but

the above is enough to show that the Court of Appeals erred, and this Court should intervene.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant asks this Court to GRANT her Petition for Discretionary Review, and REVERSE and REMAND the case to the Third Court of Appeals for reconsideration of Appellant's legal sufficiency issue using the legislative history and any other extra-textual sources, or to perform the legal sufficiency analysis itself, after proper construction of the organized retail theft statute, and REVERSE and RENDER a judgment of acquittal.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify that according to Microsoft Word's word count tool, the relevant portions of this document (excluding those portions covered by Texas Rule of Appellate Procedure 9.4(i)(1) as well as the Grounds for Review) contain 4,471words.

/s/ Justin Bradford Smith
Justin Bradford Smith

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2017, a true and correct copy of Appellant's Petition for Discretionary Review was forwarded to the counsel below by email and/or eservice:

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APPENDIX

No. PD-0563-17
COURT OF APPEALS CAUSE NO. 03-15-00332-CR

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

TERRI REGINA LANG — Appellant

v.

STATE OF TEXAS — Appellee

Appeal from Burnet County

APPENDIX

Tab	Documents
1	*Lang v. State*: Memorandum Opinion

TAB 1

Lang v. State
Memorandum Opinion

2017 WL 1833477
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Do Not Publish
Court of Appeals of Texas,
Austin.

Terri Regina LANG, Appellant
v.
The STATE of Texas, Appellee

NO. 03–15–00332–CR
|
Filed: May 5, 2017

FROM THE DISTRICT COURT OF BURNET COUNTY, 424TH JUDICIAL DISTRICT, NO. 42185, THE HONORABLE EVAN C. STUBBS, JUDGE PRESIDING

Attorneys and Law Firms

Justin Smith, for Terri Regina Lang.

Stacey M. Soule, for the State of Texas

Before Justices Puryear, Goodwin, and Field

MEMORANDUM OPINION

Melissa Goodwin, Justice

***1** A jury convicted appellant Terri Regina Lang of the offense of organized retail theft involving merchandise valued at $500 or more but less than $1,500, *see* Tex. Penal Code § 31.16(b)(1), (c)(3), and the trial court assessed her punishment at confinement for 20 months in a state jail facility, *see id.* §§ 31.16(c)(3), 12.35. [1] On appeal, appellant challenges the sufficiency of the evidence and complains about the imposition of court-appointed attorney's fees. We find no reversible error. However, through our own review of the record, we have found non-reversible clerical error in the written judgment of conviction. Sustaining appellant's complaint about attorney's fees, we will modify the judgment to correct the errors and, as modified, affirm the trial court's judgment of conviction.

1 Effective September 1, 2015, subsection (c) of the organized retail theft statute was amended to change the value ladder and offense classification scheme for the offense. *See* Act of May 25, 2007, 80th Leg., R.S., ch. 1274, § 1, sec. 31.16, 2007 Tex. Gen. Laws 4258, *amended by* Act of May 31, 2015, 84th Leg., R.S., ch. 1251, § 13, sec. 31.16, 2015 Tex. Gen. Laws 4209, 4215 (current version at Tex. Penal Code § 31.16). However, because the value and classification changes in the statute are not implicated by the issues in this appeal, we cite to the version of the statute in effect at the time of the offense in this opinion.

BACKGROUND [2]

2 Because the parties are familiar with the facts of the case, its procedural history, and the evidence adduced at trial, we provide only a general overview of the facts of the case here. We provide additional facts in the opinion as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4. The facts recited are taken from the testimony and other evidence presented at trial.

As appellant was shopping at HEB, an employee observed her putting the groceries and merchandise items inside reusable bags in her cart instead of directly in the cart. The employee thought this unusual and continued to observe appellant as she shopped for about one hour before she approached the checkout. In addition to several reusable bags inside of the cart, appellant had one bag tied to the right-hand side of the cart away from the register. The employee saw appellant remove all the bags inside the cart and place them on the conveyor belt for the cashier to scan. She did not do so with the bag tied to the side of the cart. The employee alerted her manager about the possibility of someone leaving the store with merchandise not paid for.

After appellant paid for the items scanned by the cashier, she headed toward the main doors to exit the store, opening a beverage that she removed from the bag tied to the side of the cart on the way. The employee and her manager stopped appellant before she left the store, returned her inside, and called the police. The value of the items in the bag tied to the cart, which appellant had not paid for, was $582.10. The cost of the purchased items was $262.17.

DISCUSSION

***2** In her first two points of error, appellant challenges the sufficiency of the evidence supporting her conviction for organized retail theft.

Sufficiency of the Evidence

Due process requires that the State prove, beyond a reasonable doubt, every element of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); *Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014). When reviewing the sufficiency of the evidence to support a conviction, we consider all the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). We assume that the trier of fact resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict. *Jackson*, 443 U.S. at 318; *see Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009).

Because factfinders are permitted to make reasonable inferences, "[i]t is not necessary that the evidence directly proves the defendant's guilt; circumstantial evidence is as probative as direct evidence in establishing the guilt of the actor, and circumstantial evidence alone can be sufficient to establish guilt." *Carrizales v. State*, 414 S.W.3d 737, 742 (Tex. Crim. App. 2013) (citing *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)); *see Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016); *Nowlin v. State*, 473 S.W.3d 312, 317 (Tex. Crim. App. 2015). The standard of review is the same for direct and circumstantial evidence cases. *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016); *Nowlin*, 473 S.W.3d at 317; *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014).

Appellant was charged by indictment with the offense of organized retail theft under Penal Code section 31.16. The indictment alleged, in relevant part, that appellant

> did then and there intentionally conduct and promote and facilitate an activity in which [appellant] received and possessed and concealed and stored stolen retail merchandise, to wit: groceries, herbal supplements, energy drinks and animal treats, and the total value of the merchandise involved in the activity was greater than $500 but less than $1500[.]

See Tex. Penal Code § 31.16(b)(1). In challenging the sufficiency of the evidence, appellant maintains that the evidence is insufficient to support her conviction because "organized retail theft is not an activity that can be committed alone through ordinary shoplifting." She makes two arguments regarding sufficiency of the evidence. First, appellant argues that the evidence was insufficient because organized retail theft cannot be committed alone and there was no evidence that appellant acted with others. Second, appellant asserts that the evidence was insufficient because the offense cannot be committed by "merely shoplifting." Appellant presents her sufficiency argument by raising two "conundrums": "[C]an an ordinary shoplifter commit *organized* retail theft when acting alone, and relatedly, can such a shoplifter commit organized retail theft *by the very act* of shoplifting, that is, does the statute criminalize the underlying theft?" (emphases in brief).

***3** To resolve these questions, and appellant's sufficiency challenges, we must construe the organized retail theft statute. *See Boston v. State*, 410 S.W.3d 321, 325 (Tex. Crim. App. 2013) (construing robbery statute to resolve appellant's claim that evidence was insufficient). In analyzing a statute, we "seek to effectuate the 'collective' intent or purpose of the legislators who enacted the legislation." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991); *see Cary v. State*, 507 S.W.3d 750, 756 (Tex. Crim. App. 2016); *Johnson v. State*, 423 S.W.3d 385, 394 (Tex. Crim. App. 2014). To do so, we first look to the literal text of the statute because "the text of the statute *is the law* in the sense that it is the only thing actually adopted by the legislators, probably through compromise, and submitted to the Governor." *Whitfield v. State*, 430 S.W.3d 405, 408 (Tex. Crim. App. 2014) (quoting *Boykin*, 818 S.W.2d at 785). To determine the plain meaning of the statutory language, we consult dictionary definitions, apply the normal rules of grammar and common usage, and consider words and phrases in context. *Cary*, 507 S.W.3d at 756; *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex.

Crim. App. 2016); *Yazdchi v. State*, 428 S.W.3d 831, 837 (Tex. Crim. App. 2014); *see* Tex. Gov't Code § 311.011(a). We presume that every word in a statute has been used for a purpose and that each word, clause, and sentence should be given effect if reasonably possible. *Cary*, 507 S.W.3d at 756; *Perry*, 483 S.W.3d at 902–03; *Yazdchi*, 428 S.W.3d at 837.

We give effect to the plain meaning of the statute's language unless the language is ambiguous or the plain meaning leads to absurd results that the Legislature could not have possibly intended. *Cary*, 507 S.W.3d at 756; *Chase v. State*, 448 S.W.3d 6, 11 (Tex. Crim. App. 2014); *Boykin*, 818 S.W.2d at 785. Only if the text of a statute is ambiguous, or the plain meaning leads to such absurd results, should we review extra-textual resources to discern the collective intent of the legislators that voted to pass the bill. *Cary*, 507 S.W.3d at 756; *Boykin*, 818 S.W.2d at 785. Ambiguity exists when the statutory language may be understood by reasonably well-informed persons in two or more different senses; conversely, a statute is unambiguous when it permits only one reasonable understanding. *State v. Schunior*, 506 S.W.3d 29, 34–35 (Tex. Crim. App. 2016); *Phillips v. State*, 463 S.W.3d 59, 65 (Tex. Crim. App. 2015); *Yazdchi*, 428 S.W.3d at 838; *see Chase*, 448 S.W.3d at 11 (statute is ambiguous when it is "reasonably susceptible to more than one understanding").

Appellant relies on section 311.023 of the Government Code, which articulates relevant factors that courts may consider when construing a statute "whether or not the statute is considered ambiguous on its face," *see* Tex. Gov't Code § 311.023, to engage in a review of the legislative history of the statute to support his claim that "an absurdity results." [3] However, the Court of Criminal Appeals has determined that despite the broad latitude afforded by the Legislature in the Code Construction Act, only if the statutory language is ambiguous, or leads to absurd results that the Legislature could not have possibly intended, may courts consult extra-textual sources. *See Gipson v. State*, 428 S.W.3d 107, 112 (Tex. Crim. App. 2014); *Johnson*, 423 S.W.3d at 394; *see also Whitfield*, 430 S.W.3d at 408 ("If the plain language of a statute would lead to absurd results, or if the language is not plain but rather ambiguous, then *and only then*, out of absolute necessity, is it constitutionally permissible for a court to consider ... such *extra* textual factors as executive or administrative interpretations of the statute or legislative history.") (quoting *Boykin*, 818 S.W.2d at 785–86); *Ex parte Spann*, 132 S.W.3d 390, 393 (Tex. Crim. App. 2004) ("[D]espite the broad latitude afforded by the legislature [in Government Code section 311.023], this Court considers 'extra-textual factors' such as legislative history only when the plain language of the statute is 'ambiguous' or when a literal interpretation would lead to 'absurd results.' ") (citing *Boykin*, 818 S.W.2d at 785). As an intermediate appellate court, we are bound by the decisions of the Texas Court of Criminal Appeals in criminal cases and have no authority to disregard or overrule them. *See Ex parte Quyen Trung Ly*, 409 S.W.3d 843, 844 (Tex. App.–Beaumont 2013, no pet.); *Lockard v. State*, 364 S.W.3d 920, 924–25 (Tex. App.–Amarillo 2012, no pet.); *State v. DeLay*, 208 S.W.3d 603, 607 (Tex. App.–Austin 2006), *aff'd sub nom. State v. Colyandro*, 233 S.W.3d 870 (Tex. Crim. App. 2007); *see also* Tex. Const. art. V, § 5 (a) (providing that Texas Court of Criminal Appeals is final authority for interpreting criminal law in Texas). Accordingly, we must first analyze the organized retail theft statute to determine if the statute is ambiguous or its plain meaning leads to absurd results that the Legislature could not have possibly intended before we may resort to extra-textual sources, such as the legislative history of the statute.

3 The State does not address the issue of whether the organized retail theft statute is ambiguous or whether the plain meaning of the statutory language would lead to an absurd result, but also references legislative intent in its argument.

***4** Penal Code section 31.16, the organized retail theft statute, provides,

> A person commits an offense if the person intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, or disposes of:
>
> (1) stolen retail merchandise; or
>
> (2 merchandise explicitly represented to the person as being stolen retail merchandise.

Tex. Penal Code § 31.16(b). "Retail merchandise" is defined as "one or more items of tangible personal property displayed, held, stored, or offered for sale in a retail establishment." *Id.* § 31.01(11). The range of punishment for the offense is dictated by "the total value of the merchandise involved in the activity."

See id. § 36.16(c). The statute also provides for increased punishment when the person engages in certain aggravating conduct when committing the offense. *See id.* § 36.16(d).

In analyzing whether the statute can be violated by an "ordinary shoplifter" acting alone, we first observe that the statute has no explicit language regarding acting with others as compared to other provisions within the Penal Code expressly referring to the conduct of others. *See, e.g.*, Tex. Penal Code §§ 71.02 (a) (providing that person who commits offense of engaging in organized criminal activity must act with intent to act with others (in a "combination") to commit one or more of certain enumerated offenses), 71.01(a) (defining "combination"). [4]

4 Specifically, section 71.02 provides

> A person commits an offense if, *with the intent to establish, maintain, or participate in a combination* or in the profits of a combination or as a member of a criminal street gang, the person commits or conspires to commit one or more of [certain enumerated offenses].)

Tex. Penal Code § 71.02 (a) (emphasis added). Under section 71.01,

> "Combination" means three or more persons who collaborate in carrying on criminal activities, although:
> (1) participants may not know each other's identity;
> (2) membership in the combination may change from time to time; and
> (3) participants may stand in a wholesaler-retailer or other arm's-length relationship in illicit distribution operations.

Id. § 71.01(a); *see also id.* § 71.01(d) (defining "criminal street gang").

In her analysis, while acknowledging that the term "conduct" is "sometimes used generally to mean 'do,' " appellant focuses on alternative definitions to aver that "in its precise meanings [conduct] generally requires leading directing, guiding, and so forth." In addition, appellant cites to dictionary definitions defining "promote" as to "help (something) to grow or develop" and defining "facilitate" as to "make [something] easier [or] help bring [it] about." Based on these definitions, appellant argues that each of these terms "requires or implies the involvement of someone else" or "[implies] group activity to a common purpose." We disagree that collective or group action is required by the statute.

After conducting our review of dictionary definitions of these terms, *see Lopez v. State*, 253 S.W.3d 680, 685 (Tex. Crim. App. 2008) ("We initially consult dictionary definitions for the plain meaning of a word[.]"); *Olivas v. State*, 203 S.W.3d 341, 345–46 (Tex. Crim. App. 2006) (looking to common dictionary definitions for guidance in determining plain meaning of undefined words in Penal Code), we conclude that the definitions of these terms do not require (and are not limited to) collective behavior or group involvement. For example, the most common dictionary definitions for "conduct" include:

***5** · to organize and carry out; behave in a specified way; *see* https://en.oxforddictionaries.com/definition/conduct;

· to direct or take part in the operation or management of; *see* https://www.merriam-webster.com/dictionary/conduct;

· to behave or manage (oneself); to direct in action or course; manage; carry on; *see* http://www.dictionary.com/browse/conduct; and

· to do or carry out; to behave or manage (oneself); *see* https://www.collinsdictionary.com/dictionary/english/conduct.

See also https://www.merriam-webster.com/thesaurus/conduct ("to manage the actions of (oneself) in a particular way."). The most common dictionary definitions for "promote" include:

· to support or actively encourage (a cause, venture, etc.); further the progress of; *see* https://en.oxforddictionaries.com/definition/promote;

· to contribute to the growth or prosperity of; further; *see* https://www.merriam-webster.com/dictionary/promote;

· to help or encourage to exist or flourish; further; *see* http://www.dictionary.com/browse/promote; and

· to further or encourage the progress or existence of; *see* https://www.collinsdictionary.com/dictionary/english/promote.

The most common definitions of "facilitate" include:

- to make (an action or process) easy or easier; *see* https://en.oxforddictionaries.com/definition/facilitate;

- to make easier; help bring about; *see* https://www.merriam-webster.com/dictionary/facilitate;

- to make easier or less difficult; help forward (an action, a process, etc.); and *see* http://www.dictionary.com/browse/facilitate;

- to make easier; assist the progress of; *see* https://www.collinsdictionary.com/dictionary/english/facilitate.

In looking at the definitions of these terms, although an individual's behavior *may* contribute toward a greater collective effort or a broader group objective, the requirement of collective action or group behavior is not inherent in the definitions.

Moreover, appellant's interpretation defines these terms out of context. *See* Tex. Gov't Code § 311.011(a) (mandating that statutory words are to be "read in context"); *see also Nguyen v. State*, 1 S.W.3d 694, 696 (Tex. Crim. App. 1999) ("[W]e endeavor to give effect to the whole statute, which includes each word and phrase, if possible. ... [W]e cannot interpret a phrase [or word] within a statute in isolation[.]"); *Thomas v. State*, 919 S.W.2d 427, 430 (Tex. Crim. App. 1996) ("We always strive to give words and phrases meaning within the context of the larger provision."). The statute refers to the actor committing the offense (the defendant) in the singular: "*a* person commits an offense" with no mention of other actors. The prohibited behavior is defined by the terms "conducts, promotes, or facilitates," which are transitive verbs that are part of a phrase that includes a direct object: "an activity." "Activity" is defined as:

- a specific deed, action, function, or sphere of action; *see* http://www.dictionary.com/browse/activity;

- any specific deed, action, pursuit; *see* https://www.collinsdictionary.com/dictionary/english/activity;

- a specified pursuit in which a person partakes; and *see* http://www.thefreedictionary.com/activity;

***6** - a pursuit in which a person is active; *see* https://www.merriam-webster.com/dictionary/activity.

This indicates that what the defendant "conducts, promotes, or facilitates" is a thing, not a person. This interpretation is reinforced by subsection (d)(1) of the statute, which increases the punishment for the offense to the next higher category "if it is shown on the trial of the offense that ... the person organized, supervised, financed, or managed one or more other persons engaged in an activity described by Subsection (b)." Tex. Penal Code § 31.16(d)(1). When the statute envisions the defendant acting in concert with others, it directly states that relationship. The direct object of the transitive verbs used in this subsection is "one or more persons." Thus, in contrast to the direct object following the transitive verbs used in defining the prohibited behavior, in subsection (d) what the defendant "organize[s], supervise[s], finance[s], or manage[s]" is a person (or persons), not a thing. Further, the aggravating factor under subsection (d)(1) is the organization, supervision, financing, or management of "*one* or more other persons *engaged in an activity described by Subsection (b)*." *Id.* (emphases added). Thus, subsection (d)(1) makes clear that a single person can engage in the prohibited behavior defined in the statute, i.e., "an activity described by Subsection (b)."

Appellant asserts that "by using the word 'activity[,'] the legislature cannot simply have meant 'doing' or 'action'—the law always proscribes conduct—but rather something more. That 'something more' must be something done with someone else." However, the statutory language does not support appellant's construction of the "something more" associated with "activity." The term "activity" is modified by the dependent clause "in which the person receives, possesses, conceals, stores, barters, sells, or disposes of" stolen retail merchandise. This clause uses a definite article to refer to the actor, "*the* person," which refers back to the single actor who "conducts, promotes, or facilitates" the activity. From a plain reading of the statute, the "something more" is that the "activity" be one that causes the actor to "receive, possess, etc." stolen retail merchandise, not that it be done with others.

Reading all words and phrases in context, the statute is violated when a person "organizes, carries out, takes part in, does" (per the definition of conducts), "furthers, helps" (per the definition of promotes), "makes easier, or helps bring about" (per the definition of facilitates) a "specified action or pursuit" (per the definition of activity) where that person "receives, possesses, conceals, stores, barters, sells, or disposes of" stolen retail merchandise.

Nothing in the statutory language requires that the person committing the offense work with others when engaging in the prohibited behavior.

Appellant claims that "an absurdity results" because "every shoplifter, acting alone, necessarily violates both the 'simple' theft statute and the organized retail theft statute by the very same course of conduct." She cites no authority to support her contention that the mere fact that a statute governs conduct prohibited by another Penal Code provision renders the statute "absurd." The Legislature can enact different statutes that apply to the same conduct with one focusing on a particular aspect of the conduct. For example, a person who inflicts serious bodily injury to a child, elderly individual, or disabled individual engages in conduct that violates Penal Code section 22.04, the statute prohibiting injury to a child, elderly individual, or disabled individual. *See* Tex. Penal Code § 22.04(a)(1). However, such conduct also violates Penal Code section 22.02, the aggravated assault statute. *See id.* § 22.02(a)(1). The Legislature enacted a separate statute to address the protection of these specific types of vulnerable individuals. We are not persuaded that the mere fact that the organized retail theft statute applies to the conduct of "mere shoplifters" who can be prosecuted under the general theft statute renders the plain meaning of the statute absurd. It may very well be that the Legislature enacted this statute to address the theft of a particular type of property, retail merchandise, believing that the theft of this type of property warranted special attention.

***7** Appellant also suggests that the statute results in an absurdity if it can be violated by the act of "ordinary shoplifting." She maintains that by using the phrase "stolen retail merchandise," the statute "envisions a person whose criminal activity begins after the thief has done his work." She maintains that the statute addresses "post-theft activity, not a theft itself." We must again disagree. "Stolen" is the past participle of "steal." The Penal Code defines "steal" as "to acquire property or service by theft." *Id.* § 31.01(7). A person commits theft if she "unlawfully appropriates property with intent to deprive the owner of property." *Id.* § 31.03(a). Thus, the person who unlawfully appropriates retail merchandise also "possesses" stolen retail merchandise. *See id.* § 1.07(39) (" 'Possession' means actual care, custody, control, or management."). Appellant's commission of theft is covered by the statute.[5] That the statute also addresses others who may come into contact with the stolen retail merchandise after the theft (those who receive, possess, conceal, store, barter, sell, or dispose of it) does not inevitably mean that the person who committed the act of theft that rendered the merchandise "stolen" is excluded. Given the Legislature's heightened concern over the theft of retail merchandise—as evidenced by the enactment of a statute solely addressing stolen retail merchandise—it could very well be that the Legislature intended to address every phase concerning the theft of such merchandise, including the moment it becomes stolen, and to punish all those associated with the property, including the one who caused it to be "stolen." We cannot conclude that the application of the statute to the "ordinary shoplifter" causes absurd results that the Legislature could not possibly have intended.

5 Appellant does not assert that the evidence is insufficient to show that appellant committed theft with her shoplifting conduct.

Applying the principles of statutory construction to section 31.16(b), we conclude that the statutory language permits only one reasonable understanding concerning whether the statute requires proof that the defendant acted with others in committing this offense—it does not—and whether the offense criminalizes the underlying act of theft—it does. Thus, the statute is unambiguous. *See Schunior*, 506 S.W.3d at 35 (statute is unambiguous when it reasonably permits no more than one understanding); *Phillips*, 463 S.W.3d at 65 (same). Further, we cannot conclude that a plain reading of the statute's text leads to absurd results that the Legislature could not have possibly intended. Accordingly, because we conclude that the statute is unambiguous and does not lead to absurd results, we need not, indeed may not, resort to extra-textual sources. *See Bays v. State*, 396 S.W.3d 580, 584–85 (Tex. Crim. App. 2013) ("If the language is unambiguous, our analysis ends because the Legislature must be understood to mean what it has expressed, and it is not for the courts to add to or subtract from such a statute."). Consequently, we give effect to the plain meaning of the statute, which does not require proof that appellant committed this offense working with others and applies to the underlying theft appellant committed. *See State v. Vasilas*, 187 S.W.3d 486, 489 (Tex. Crim. App. 2006) ("The seminal rule of statutory construction is to presume that the legislature meant what it said."); *Seals v. State*, 187 S.W.3d 417, 421 (Tex. Crim. App. 2005) ("But these are not the words that the legislature *actually*

used.... The only interpretation that is permitted under the seminal rule of statutory construction: We presume that the legislature meant what it said.").

The evidence in this case demonstrated that appellant unlawfully appropriated retail merchandise from HEB when she concealed various items in the reusable shopping bag tied to her shopping cart and attempted to leave the store without paying for the items. After committing the theft, she possessed stolen retail merchandise as she tried to leave the store with the unlawfully appropriated items. This evidence was sufficient to support the jury's verdict convicting appellant of organized retail theft. We overrule appellant's first two points of error.

Imposition of Attorney's Fees

In her third point of error, appellant contests the trial court's order for the repayment of court-appointed attorney's fees in the judgment of conviction. When the trial judge sentenced appellant in open court, he ordered her to pay "$1,060 fine, plus court cost[s], plus reimbursement to the county of court-appointed attorney fees." The written judgment of conviction reflects the imposition of $1,500.00 attorney fees with the following statement: "THE DEFENDANT ACKNOWLEDGED HIS/HER ABILITY TO PAY COURT APPOINTED ATTORNEY FEES IN PERIODIC PAYMENTS UPON RELEASE FROM INCARCERATION, AND IS HEREBY ORDERED TO PAY COURT APPOINTED ATTORNEY FEES IN THE AMOUNT OF $1,500.00."

***8** A trial court's authority to order a defendant to repay the cost of court-appointed legal counsel is expressly conditioned on the court determining that the defendant has the financial resources and ability to pay. Tex. Code Crim. Proc. art. 26.05(g). The defendant's financial resources and ability to pay are explicit critical elements under article 26.05(g) that must be supported by the record evidence. *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010). The record reflects that the trial court found appellant to be indigent prior to trial and appointed a public defender to represent her. Once an accused is found to be indigent, she is presumed to remain so through the proceedings absent proof of a material change in her circumstances. Tex. Code Crim. Proc. art. 26.04(p); *Mayer*, 309 S.W.3d at 557. Nothing in the record indicates a change in appellant's financial circumstances or demonstrates that appellant has the ability to pay court-appointed attorney's fees. In fact, the record reflects that after trial appellant completed another form reflecting her inability to afford counsel (that reflected no change in appellant's status as a recipient of public assistance), and the trial court appointed counsel to represent her on appeal. Thus, as the State concedes, the trial court erred in ordering the payment of attorney's fees in its oral pronouncement of sentence and in its written judgment of conviction. We sustain appellant's third point of error.

When the evidence does not support the order to pay attorney's fees, the proper remedy is to delete the order. *Mayer*, 309 S.W.3d at 557. Accordingly, we modify the judgment of conviction to delete the order for repayment of $1,500.00 attorney's fees.

Clerical Error in Written Judgment

In addition, on review of the record, we observe that the written judgment of conviction in this case contains non-reversible clerical error. The judgment of conviction states that the "Statute for Offense" is "31.16(1) Penal Code." This is a typographical error; there is no section 31.16(1). The applicable statutory provision for the offense as alleged in the indictment is section 31.16**(b)**(1) of the Penal Code, the statutory provision that defines the offense of organized retail theft as indicted in this case. In addition, the applicable statutory provisions include section 31.16(c)(3), the subsection that, at the time of the offense, established the level of the offense as a state jail felony because the total value of the merchandise involved in the activity was $500 or more but less than $1,500.[6] This Court has authority to modify incorrect judgments when the necessary information is available to do so. *See* Tex. R. App. P. 46.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993). Accordingly, for the sake of clarity and accuracy, we modify the judgment to reflect that the "Statute for Offense" is "31.16(b)(1), (c)(3) Penal Code."

6 As noted previously, the value ladder and offense classification scheme for the offense were amended in 2015. *See* Act of May 31, 2015, 84th Leg., R.S., ch. 1251, § 13, sec. 31.16, 2015 Tex. Gen. Laws 4209, 4215. Subsection (c)(3) now establishes the level of the offense as Class A misdemeanor if the total value

of the merchandise involved in the activity is $750 or more but less than $2,500. *See* Tex. Penal Code § 31.16(c)(3).

CONCLUSION

***9** Having concluded that the evidence is sufficient to support appellant's conviction for organized retail theft but that the written judgment of conviction contains non-reversible error, we modify the trial court's judgment to reflect that the "Statute for Offense" is "31.16(b)(1), (c)(3) Penal Code" and to delete the order for repayment of $1,500.00 attorney's fees, and affirm the judgment of conviction as modified.

All Citations

Not Reported in S.W.3d, 2017 WL 1833477