No. ________

In The
Supreme Court of the United States

DEBORAH BOWEN,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Texas, Eastland

PETITION FOR WRIT OF CERTIORARI

STAN BROWN*
P.O. Box 3122
Abilene, Texas 79604
325-677-1851
Fax 325-677-3107
State Bar No. 03145000
Email: mstrb@aol.com

ANGELA MOORE
310 S. St. Mary's, Ste. 1830
San Antonio, Texas 78205
210-364-0013
Fax 210-855-1040
State Bar No. 14320110
Email: amoorelaw2014@gmail.com

Attorneys for Petitioner

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether the right to a jury trial mandated by U.S. Const. Sixth and Fourteenth Amendments, and U.S. Const. art. III §2, and the concepts set out by this Court in *Apprendi*[1] and *Blakely*,[2] is violated by the procedure we challenge, that is, a judicial finding of an element not alleged in the indictment or submitted to the jury, which is an unacceptable departure from the jury tradition, an indispensable part of our criminal justice system, by making appellate courts fact finders as to an element not considered by the jury.

2. Whether the right to a jury trial and Due Process required by the Fifth, Sixth, and Fourteenth Amendments, and *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), was violated when the Texas Court of Criminal Appeals reformed the Petitioner's acquittal in the intermediate appellate court to the conviction of a lesser offense, when such lesser offense was neither charged in the indictment nor submitted to the jury, as the amount of pecuniary loss in this statute is not merely an aggravating factor, but rather an element of the offense, resulting in a reformed verdict which could not have been rendered by the jury or the trial court.

---

[1] *Apprendi v. New Jersey*, 530 U.S. 466, 483-84, 120 S.Ct. 2348, 2359, 147 L.Ed.2d 435 (2000).

[2] *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

QUESTIONS PRESENTED – Continued

3. Pursuant to the Double Jeopardy Clauses of the Fifth and Fourteenth Amendments, as well as *Martinez v. Illinois*, ___ U.S. ___, 134 S.Ct. 2070, 188 L.Ed.2d 1112 (2014), if an intermediate appellate court reverses a conviction and enters a judgment of acquittal, is the judgment the "functional equivalent of an acquittal," which bars further review of the case by another court?

PARTIES TO THE PROCEEDING

Deborah Bowen, Petitioner.

State of Texas, Respondent.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
RELEVANT CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	3
Introduction	3
Background Facts	4
STANDARD OF REVIEW	10
REASONS FOR GRANTING THE WRIT	11
CONCLUSION AND PRAYER	29

APPENDIX

Court of Appeals, Eastland, Opinion filed April 30, 2015	App. 1
Court of Criminal Appeals, Opinion filed June 20, 2012	App. 10
Court of Appeals, Eastland, Opinion filed September 2, 2010	App. 26
Court of Criminal Appeals, Denial of Review filed November 4, 2015	App. 43
Court of Criminal Appeals, Denial of Rehearing filed December 16, 2015	App. 44

TABLE OF AUTHORITIES

Page

CASES

Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) 11, 12

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) 3, 11, 12, 16

Arnold v. State, 867 S.W.2d 378 (Tex. Crim. App. 1993) 26

Bailey v. State, 44 S.W.3d 690 (Tex. App. – Houston [14th Dist.] 2001, aff'd, 87 S.W.3d 122 (Tex. Crim. App. 2002) 17

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) 3, 11, 15, 16, 17

Boston v. Lecraw, 58 U.S. 426 (1855) 28, 29

Bowen v. State, 322 S.W.3d 435 (Tex. App. – Eastland 2010, pet. granted) 1, 4, 5, 8, 25

Bowen v. State, 374 S.W.3d 427 (Tex. Crim. App. 2012) .... *passim*

Bowen v. State, ___ S.W.3d ___, 2015 WL 1956866 (Tex. App. – Eastland, April 30, 2015, pet. ref'd) 1, 5, 7, 25

Brooks v. State, 323 S.W.3d 893 (Tex. Crim. App. 2010) 19

Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) 20, 26, 27

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 21, 23

TABLE OF AUTHORITIES – Continued

Page

Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948) 14, 15

Collier v. State, 999 S.W.2d 779 (Tex. Crim. App. 1999) 5

Commonwealth v. Webster, 59 Mass. 295 (1950) 23

Dunn v. United States, 442 U.S. 100, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) 13, 14

Evans v. State, 202 S.W.3d 158 (Tex. Crim. App. 2006) 26

Evans v. Michigan, ___ U.S. ___, 133 S.Ct. 1069, 185 L.Ed.2d 124 (2013) 26, 27

Geesa v. State, 820 S.W.2d 154 (Tex. Crim. App. 1991) 22, 23

Gonzalez v. State, 8 S.W.3d 640 (Tex. Crim. App. 2000) 25

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 18, 19, 20, 21, 23

King v. Burwell, ___ U.S. ___, 135 S.Ct. 2480, 192 L.Ed.2d 483 (2015) (Scalia, J., dissenting) 18

Martinez v. Illinois, ___ U.S. ___, 134 S.Ct. 2070, 188 L.Ed.2d 1112 (2014) 4, 24, 27

McCarty v. State, 820 S.W.2d 795 (Tex. Crim. App. 1991) 26

McCormick v. United States, 500 U.S. 257, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991) 14

Morgan v. Devine, 637 U.S. 632, 35 S.Ct. 712, 59 L.Ed. 1153 (1915) 17

TABLE OF AUTHORITIES – Continued

Page

Olivas v. State, 203 S.W.3d 341 (Tex. Crim. App. 2006) 26

Paulson v. State, 28 S.W.3d 570 (Tex. Crim. App. 2000) 22

Rodriguez v. State, 819 S.W.2d 871 (Tex. Crim. App. 1991) 26

Salve Regina College v. Russell, 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) 10

Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) 21, 22

Texas v. Cobb, 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001) 17

United States v. Ball, 163 U.S. 662 (1896) 27

United States v. O'Brien, 560 U.S. 218, 130 S.Ct. 2169, 176 L.Ed.2d 979 (2010) 11

Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) 21, 23

Wooley v. State, 273 S.W.3d 260 (Tex. Crim. App. 2008) 18

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III §2 11

U.S. Const. Amend. V ....*passim*

U.S. Const. Amend. VI ....*passim*

U.S. Const. Amend. XIV ....*passim*

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Tex. Penal Code §32.45(b) (Vernon's, 2015) 19

Tex. Penal Code §32.45(c)(6) (Vernon's, 2015) 6

OTHER AUTHORITIES

Federal Jury Practice and Instructions §12.10 at 363 (West 1992) 22

https://en.wikipedia.org/wiki/Smells_Like_Teen_Spirit, last accessed February 21, 2016 24

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Deborah Bowen respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals is published at *Bowen v. State*, 374 S.W.3d 427 (Tex. Crim. App. 2012) (*Bowen II*) and appears at App. 10. The opinion of the Eastland Court of Appeals in Texas, reversing the verdict of the trial court and entering a judgment of acquittal, is published, *Bowen v. State*, 322 S.W.3d 435, 442 (Tex. App. – Eastland 2010, pet. granted) (*Bowen I*) and appears at App. 26. The opinion of the Eastland Court of Appeals, following the resentencing for the lesser offense as ordered by the Court of Criminal Appeals, which affirmed the resentencing of Petitioner is as yet unpublished and is cited at App. 1 as *Bowen v. State*, ___ S.W.3d ___, 2015 WL 1956866 (Tex. App. – Eastland, April 30, 2015, pet. ref'd) (*Bowen III*).

STATEMENT OF JURISDICTION

On June 20, 2012, the Texas Court of Criminal Appeals reversed the opinion and judgment of the Texas Eleventh Court of Appeals. *Bowen v. State*, 374

S.W.3d 427 (Tex. Crim. App. 2012). Under 28 U.S.C. §1257(a), this Court has jurisdiction.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without Due Process of law. . . .

U.S. Const. Amend. V.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without Due Process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

Introduction

This case presents three issues pertaining to the Sixth Amendment right to a trial by a jury, Due Process Clauses of the Fifth and Fourteenth Amendments, and the Fifth Amendment protection against Double Jeopardy.

First, an appellate court finding sufficient evidence to support an element of a different offense that was neither presented to the jury in the indictment nor the jury charge, is a violation of the right to a trial by jury, invoking the protections of the Sixth Amendment and the concepts set out in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Second, an appellate court sitting as fact finder cannot issue a verdict the jury or the trial court could not have rendered. Under those same constitutional provisions as well as *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the trier of fact resolves conflicts in the testimony, weighs the

evidence, and draws reasonable inferences from basic facts to ultimate facts, not a reviewing court. An appellate court sitting as fact finder cannot issue a verdict the jury or the trial court could not have rendered.

Lastly, under the Double Jeopardy Clauses of the Fifth and Fourteenth Amendments, and *Martinez v. Illinois*, ___ U.S. ___, 134 S.Ct. 2070, 188 L.Ed.2d 1112 (2014), this Court should uphold the concept that if an intermediate appellate court reverses a conviction and enters a judgment of acquittal, such a judgment is the "functional equivalent of an acquittal," and should bar further review of the case by any other court.

Background Facts

Petitioner Bowen stands convicted of an offense for which she was not indicted by the Grand Jury, or submitted to the trial jury, and of which she was acquitted on direct appeal. The Court of Criminal Appeals "reformed" the judgment, to convict her of an offense on which the jury did not and could not enter a verdict.

Petitioner was indicted by a Fisher County, Texas, Grand Jury of first degree Misapplication of Fiduciary Property; trust assets, owned by Dana White. C.R. 2.[3] On August 26, 2008, she entered a

[3] Citations to the previous record in 11-08-00262-CR (*Bowen v. State*, 322 S.W.3d 435 (Tex. App. – Eastland 2010, pet. granted) will be designated (C.R. at ___) and (R.R. at ___), while (Continued on following page)

plea of not guilty before a jury. C.R. 60-62. The jury found Petitioner guilty as charged in the indictment on September 2, 2008. C.R. 57-58, 60-62; R.R. 5:63-65. No lesser-included offense instructions were included in the trial court's charge to the jury. The trial court ordered a pre-sentence investigation report and on October 8, 2008, sentenced Petitioner to serve eight years in the Texas Department of Criminal Justice, Institutional Division, to pay a $10,000.00 fine, and to pay $350,000.00 in restitution. C.R. 60-62; R.R. 6:71-74.

Petitioner appealed her conviction to the Eastland Court of Appeals, an intermediate appellate court. That court found there was insufficient evidence to support the jury's conclusion Petitioner engaged in the misapplication of trust assets owned by Dana White in the amount of $200,000.00 or more. The Court, following *Collier v. State*, 999 S.W.2d 779 (Tex. Crim. App. 1999), reversed Petitioner's conviction and rendered an acquittal. *Bowen v. State*, 322 S.W.3d 435, 442-43 (Tex. App. – Eastland 2010, pet. granted).

The State filed a petition for discretionary review, which was granted. The Texas Court of Criminal Appeals held although the State did not prove all the essential elements of the offense of misapplication

---

citations to the record following the remand by the Court of Criminal Appeals (*Bowen v. State*, ___ S.W.3d ___, 2015 WL 1956866 (Tex. App. – Eastland, April 30, 2015, pet. ref'd)) will be designated (Suppl. C.R. at ___) and (Suppl. R.R. at ___).

of fiduciary property of over $200,000 beyond a reasonable doubt, as alleged, by the State's failure to prove an "aggravating element" of the offense; that is, the requisite value of the property misapplied. The Court of Criminal Appeals further found the amount of pecuniary loss could be reformed, based on its own interpretation of the evidence, although not ruled on by the jury, which that court held supported a conviction for a second-degree felony pursuant to Section 32.45(c)(6) of the Texas Penal Code. The judgment of the Eastland Court of Appeals was reversed and reformed to reflect a conviction of second-degree felony misapplication of fiduciary property, and the case was remanded to the trial court for a new punishment hearing. *Bowen v. State*, 374 S.W.3d 427, 432 (Tex. Crim. App. 2012).

On remand, the trial court conducted a second punishment hearing after overruling Petitioner's Plea in Bar, which raised double jeopardy. The trial court sentenced Petitioner to seven years in the Texas Department of Criminal Justice, a fine of $7,500.00, and $103,344.00 restitution to Dana White. Petitioner filed a Motion for New Trial on the day of sentencing, which the trial court denied. Petitioner timely filed her Notice of Appeal and the trial court properly certified Petitioner's right of appeal. (V Suppl. R.R. at 145) (Suppl. C.R. at 84, 89). The intermediate appellate court sustained petitioner's conviction of second-degree misapplication by a fiduciary, and petition for discretionary review to the Court of Criminal Appeals was refused, and a rehearing on that petition was

denied December 16, 2015. *Bowen v. State*, ___ S.W.3d ___, 2015 WL 1956866 (Tex. App. – Eastland, April 30, 2015, pet. ref'd).

The indictment only alleged Dana White as "the owner of said property, and the person for whose benefit the property was held" by Petitioner as a fiduciary. The court of appeals found the record was legally insufficient to support the verdict that Petitioner misapplied over $200,000 of trust assets owned by Dana White or that were held for the benefit of Dana White. The court noted in dicta: "It appears that at most only slightly over $100,000 of trust assets were owned by Dana White or held for her benefit." And, the jury charge did not include a lesser-included offense. The State argued at trial the sole complainant listed in the indictment, Dana White, had a power of attorney from both of her brothers, Cody Douglass and Michael Douglass (Parnice's grandchildren from Petitioner's deceased brother); therefore, Dana White had a greater right of possession to one-half of the trust than Petitioner did. Analyzing "ownership" in terms of right of possession did not help the State.[4] The powers of attorney executed by the complainant's two brothers only authorized

[4] Indeed, the record below will demonstrate that the two brothers were convicted criminals with violent histories and the State chose strategically not to list them in the indictment as a matter of trial strategy, so as not to put the men on the stand. The State tried to use the power of attorney from the two brothers to circumvent this problem.

Dana White to act as their agent in pursuing their claims involving their father's estate against Petitioner. The terms of the trust determined who the owners were or for whose benefit the trust assets were held, not the powers of attorney. Under the terms of the trust, none of the three siblings (Petitioner's deceased brother's children) had any right of possession to the trust assets until the trust terminated by its terms on the death of Parnice Douglass, their grandmother and Petitioner's mother. The jury's verdict necessarily included a finding on the amounts of loss attributed to the two brothers of the indicted complainant, Dana White. *See Bowen v. State*, 322 S.W.3d 435, 442 (Tex. App. – Eastland 2010, pet. granted), rev'd, 374 S.W.3d 427 (Tex. Crim. App. 2012).

When Parnice Douglass, Petitioner's mother, died, the Trust contained $376,584.11. Half of that, $188,292.05 should have gone to Petitioner, and as Petitioner's brother Jackie Douglass had already died; leaving three children: Dana White, Cody Douglass, and Michael Douglass; the other half should have been split evenly among those three, making it approximately $62,764.02 each. *See* generally, II R.R. at 44-45, 68-69. The second time around, following the resentencing of Petitioner for second degree felony misapplication of fiduciary property, the trial court ordered restitution in the amount of $103,344.00; "with giving credit for any monies that you paid toward restitution." V Suppl. R.R. at 145, Suppl. C.R. at 84. (It is unclear from the record what

that statement meant or what amounts were credited.) Dana White agreed that as a result of a settlement hearing of October 11, 2011 (Suppl. C.R. at 16), some six months prior to the affidavits of non-prosecution, the Jackie Douglass heirs were deeded 1,026 acres by Appellant, conservatively valued at more than one million dollars.[5] (V Suppl. R.R. at 29-31). Longtime area real estate and estate planning attorney, Mark Hargrove, testified the land sold by Dana White, 216.03 acres, sold for $297,041.25, and that "[my] calculation of that would reflect $1,375 per acre." (V Suppl. R.R. at 51-53). Thus, the jury had to combine the amounts of pecuniary loss attributed to the two brothers (complainant's brothers), Petitioner's nephews, in order to find a pecuniary loss of over $200,000. However, due to the detailed difficulty of the myriad of facts in this case, the legal issues surrounding vesting of the trust,[6] the value of land and machinery and what monies had already been paid by Petitioner, it is impossible for an appellate court to determine an amount of actual loss the jury should have determined, when such issue was not submitted to the jury, and a general verdict was

---

[5] Petitioner gave the land to the Jackie Douglass heirs in an effort to resolve the family's dispute and the land transfer was not the result of any court order or judgment. Petitioner also relinquished 50% of her 100% of the oil and mineral rights on all land transferred to the heirs. (V Suppl. R.R. at 88-92).

[6] This case is also an example of a civil matter wrongfully pursued in the criminal justice system, when it should have remained in probate court.

returned. Even if the court were to rely only on the monetary amounts left in the trust, which was all the trust contained, the amount owed by the Petitioner would only be $67,402, much less than the figure found by the appellate court.

The determination of the amount of loss attributed to Petitioner's actions was not a "mistake" on the part of the State, as characterized by the Court of Criminal Appeals in *Bowen II* at 432. It was a fatal error in pleading and proof; and a failure of the State's analysis of the law and the facts applicable to this case. The State sets its own burden by the indictment, and here the State set a burden it did not meet. Additionally, if the State is sloppy in its investigation, research, or analysis of the applicable law, that is held against the State, not the accused. Simply put, the indictment created by the Prosecution charged Petitioner with a first-degree felony and it was not by the State.

STANDARD OF REVIEW

Because this petition involves the interpretation of federal constitutional law and prior holdings of this Court, the standard of review is *de novo*. *See Salve Regina College v. Russell*, 499 U.S. 225, 231-32, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991).

REASONS FOR GRANTING THE WRIT

ISSUE ONE: Whether the right to a jury trial mandated by the Sixth and Fourteenth Amendments, and art. III §2 of the United States Constitution, and the concepts set out by this Court in *Apprendi*[7] and *Blakely*,[8] is violated by the procedure we challenge, that is, a judicial finding of an element not alleged in the indictment or submitted to the jury, which is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system, by making appellate courts fact finders as to an element not considered by the jury.

"The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether that fact constitutes an 'element' or 'ingredient' of the charged offense." *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151, 2158, 186 L.Ed.2d 314 (2013) (*citing United States v. O'Brien*, 560 U.S. 218, 130 S.Ct. 2169, 176 L.Ed.2d 979 (2010); *Apprendi*, *supra*, at 483, n. 10, 120 S.Ct. 2348). And in accordance with those decisions and many others, *Alleyn*e specifically held: "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted." *Id.* 133 S.Ct. at 2155.

---

[7] *Apprendi v. New Jersey*, 530 U.S. 466, 483-84, 120 S.Ct. 2348, 2359, 147 L.Ed.2d 435 (2000).

[8] *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Apprendi's definition of "elements" necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. *Alleyne*, *id.* at 2158 (*citing Apprendi*, 530 U.S., at 483, n. 10, 120 S.Ct. 2348). Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt. *Id.* When an accused has been acquitted of the indicted offense, the punishment range is zero. Put another way, when an accused is punished for an offense not charged in the indictment or submitted to the jury, the judicially found element exposes the accused to a higher minimum sentence. The judicially found element here, a pecuniary loss in the amount of less than $200,000, which was neither submitted to nor found by the jury, is a fictional connection between what was actually proved and determined by the fact finder and the holding of the Texas Court of Criminal Appeals.

The Court of Criminal Appeals issued a bold sweeping holding that the amount of pecuniary loss is merely an aggravating factor. *Bowen II* at 427, 432. The court reasoned the reformation of the verdict in Petitioner's case, was much like a felony driving while intoxicated (which requires the proof of the indicted offense plus two prior convictions for the same offense) and the offense of assault causing serious bodily injury, if the aggravating feature, bodily injury

or the prior convictions, are not proved beyond a reasonable doubt. In those limited examples, the accused would still be guilty of the lower offense. This comparative analysis is incorrect. If serious bodily injury is not proved beyond a reasonable doubt, an assault is still an assault. If a second or third driving while intoxicated is not proved beyond a reasonable doubt, then the charged driving while intoxicated is still an offense. If, however, pecuniary loss over $200,000 is not proved in this case, there is no offense committed.

Due Process prevents an appellate court from affirming a conviction based upon legal and factual grounds that were not submitted to the jury. *See Dunn v. United States*, 442 U.S. 100, 105-07, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) ("To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of Due Process."). In *Dunn*, the court of appeals affirmed the defendant's convictions for making false declarations under the theory that he lied under oath during an October 1976 proceeding that was neither alleged in the indictment nor presented to the jury (the indictment alleged that, and the jury was instructed to convict if, the defendant lied under oath during a September 1976 proceeding). *See Dunn*, 442 U.S. at 102-07, 99 S.Ct. 2190. This Court decided that violated "basic notions of Due Process" which establish a defendant's right "to be heard on the specific charges of which he is accused." *See id.* And this Court concluded the defendant's "conviction cannot

stand" unless his conviction could be upheld based on the September, 1976 proceeding. *See id.*

In *McCormick v. United States*, the court of appeals interpreted the criminal statute at issue contrary to the jury instructions and then affirmed the defendant's conviction based on that statutory interpretation. 500 U.S. 257, 268-70, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991). This Court decided that resulted in the defendant's conviction being affirmed on "legal and factual grounds that were never submitted to the jury." *See id.* ("Thus even assuming the court of appeals was correct on the law, the conviction should not have been affirmed on that basis but should have been set aside and a new trial ordered."). In *McCormick*, this Court further determined a conviction should not be affirmed "on legal and factual grounds that were never submitted to the jury. . . . It goes without saying that matters of intent are for the jury to consider." *McCormick v. United States*, 500 U.S. 257, 269-70, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991).

Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948) further illustrates our understanding of the federal Due Process principle. There the defendants were charged with and convicted of violating Section 2 of an Arkansas statute, but the Arkansas Supreme Court affirmed their convictions on the basis that the defendants "committed the separate, distinct, and substantially different offense defined" in Section 1 of the Arkansas statute. *See Cole*, 333 U.S. at 198-202, 68 S.Ct. 514. This Court reversed the

convictions and remanded the case to the Arkansas Supreme Court "to have the validity of [the defendants'] convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court" (i.e., whether the defendants' convictions could be affirmed based on Section 2 of the Arkansas statute). "No principle of procedural Due Process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *See id.*

Therefore, if the element of the amount of pecuniary loss alleged in the indictment was not proved, or proved to be zero (which is an acquittal), or since the facts given to the jury are so convoluted and are actually mixed questions of law and fact as in this case, then an element of that offense is not proved beyond a reasonable doubt. An appellate court's speculation on what the jury could have found, cannot serve as a constitutionally compatible substitute for the jury's clear verdict on all the elements.

In *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), a fairly recent case concerning the Sixth Amendment, this Court addressed the rules for deciding which facts must be decided by a jury in a criminal case and which are mere "sentencing facts" that may be found by a judge. *Id*. 542 U.S. at 303-04. To summarize, that case involved a challenge to the State of Washington's

sentencing guidelines. Under those guidelines, a judge can adjust the range within the statutory minimum and maximum upon a post-conviction judicial finding of additional facts. *Id*. at 302-04.

The Court then opined: "Our precedents make clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id*. at 303. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. *Id*. at 303. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority. *Id*. at 304.

This Court held a judge must return a sentence that is in accordance with the jury verdict and not based on any additional facts presented to or known by the judge outside of trial. In Petitioner's case, those facts unknown to the trial court are what acts and resulting loss the jury attributed to the named complainant, not unnamed third parties. To base a verdict on such facts is contrary to the Sixth Amendment. As discussed above, in *Blakely*, the Court found that even a sentence below the statutory minimum can violate the Sixth Amendment. Justice Scalia, in his majority opinion, wrote "[now] the 'statutory maximum' for *Apprendi* purposes is the maximum

sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, *supra*, 542 U.S. at 303. (Emphasis in original).

Additionally, taking property from more than one owner during the same criminal transaction can certainly and constitutionally constitute distinct offenses. *See Morgan v. Devine*, 637 U.S. 632, 639-40, 35 S.Ct. 712, 59 L.Ed. 1153 (1915).[9] *See also*, *Texas v. Cobb*, 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001); *Bailey v. State*, 44 S.W.3d 690, 694 (Tex. App. – Houston [14th Dist.] 2001, aff'd, 87 S.W.3d 122 (Tex. Crim. App. 2002). As seen, each owner should be alleged separately in the indictment, or in separate indictments, in order to prosecute Petitioner regarding those other than Dana White. In Petitioner's indictment, however, the State utterly failed to

[9] "If in the night a man breaks and enters a dwelling house to steal therein, and steals, he may be punished for the two offenses or one, at the election of the prosecuting power. An allegation simply of breaking, entering, and stealing states the burglary in a form which makes it single, and a conviction therefor will bar an indictment for the larceny or the burglary alone. But equally well a first count may set out a breaking and entering with intent to steal, and a second may allege the larceny as a separate thing, and thereon the defendant may be convicted and sentenced for both." Vol. 1, §1062, p. 638. "The test is whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be." Section 1052, p. 630. (Quoting from Bishop, Criminal Law, 8th Ed.) (Footnote omitted).

identify any owner other than Dana White. (C.R. p. 2). The jury charge tracked the indictment. (C.R. pp. 53-55). Therefore a verdict based on anything other than pecuniary loss attributed to Dana White, is unconstitutional. The Texas Court of Criminal Appeals' substitution of its own fact finding regarding an element not alleged in the indictment or submitted to the jury, is just a "next bit of interpretive jiggery-pokery." *King v. Burwell*, ___ U.S. ___, 135 S.Ct. 2480, 2500, 192 L.Ed.2d 483 (2015) (Scalia, J., dissenting).[10] Petitioner's right to a jury determination of whether she committed any act other than misapplication of fiduciary property of the value of $200,000.00, or more, from anyone other than Dana White was definitely violated.

ISSUE TWO: Whether the right to a jury trial and Due Process required by the Fifth, Sixth, and Fourteenth Amendments, and *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), was violated when the Texas Court of Criminal Appeals reformed the Petitioner's acquittal in the intermediate appellate court to the conviction of a lesser offense, when such lesser offense was neither charged in the indictment nor submitted to the jury, as the amount of pecuniary loss in this statute is not

---

[10] In fact, in *Bowen II*, the Texas Court of Criminal Appeals ignored its own precedent that held: "To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of Due Process." *Wooley v. State*, 273 S.W.3d 260, 268 (Tex. Crim. App. 2008).

merely an aggravating factor, but rather an element of the offense, resulting in a reformed verdict which could not have been rendered by the jury or the trial court.

As the amount of pecuniary loss in the statute in question, Misapplication of Fiduciary Property or Property of Financial Institution,[11] is not an aggravating factor, but rather an element of the offense, the reformed verdict is not a verdict that could be rendered by the jury. A conviction is legally sufficient if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. at 316-19; *see also*, *Brooks v. State*, 323 S.W.3d 893, 902-03, 912 (Tex. Crim. App. 2010) (affirming the only sufficiency review in Texas is based on the *Jackson* legal sufficiency review). The Due Process Clauses of the Fifth and Fourteenth Amendments require that a criminal conviction be supported not only by proof beyond a reasonable doubt regarding every essential element of a crime, and such a determination must be made by a rational trier of fact. U.S. Const. Amend. V; U.S.

---

[11] The statute, in pertinent part, states: "A person commits an offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held." Following that, the statute assigns different degrees of punishment ranges, depending on the monetary amount involved. Tex. Penal Code §32.45(b) (Vernon's, 2015).

Const. Amend. XIV; *Jackson*, *supra*, 443 U.S. at 316-19.

In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination a defendant has been convicted through a judicial process that is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When that occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt, free from error, just as society maintains a valid concern for insuring that the guilty are punished. *Burks v. United States*, 437 U.S. 1, 15, 98 S.Ct. 2141, 2149, 57 L.Ed.2d 1 (1978).

It is not enough the Court of Criminal Appeals believed based on the evidence Petitioner "did *something*"; the evidence must prove beyond a reasonable doubt Petitioner committed the indicted offense. As discussed above in Issue 1, the amount of pecuniary loss in the instant offense was an element of the offense. The Court of Criminal Appeals cannot constitutionally judicially find a missing element of an offense that was not even charged in the indictment and presented to the jury in the charge. The *Jackson v. Virginia* standard which implements the right to a jury trial and Due Process, and mandates the jury must find all the elements of the charged offense in the indictment beyond a reasonable doubt, does not

allow judges to find guilt of a different offense based on the courts' interpretation of evidence submitted to the jury.

It is no doubt true every attorney in the United States is at least familiar with the concept of "proof beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 22-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). But what reasonable doubt *means* across the nation remains unsettled; by virtue of federalism it will likely remain so. *Victor v. Nebraska*, 511 U.S. 1, 16-17, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) ("[The Court] has no supervisory power over the state courts, and in the context of [the trial court's] instructions as a whole we cannot say that the use of the phrase [in defining reasonable doubt] rendered the instruction given . . . unconstitutional."). Evidence is legally sufficient only if the state has affirmatively proved each of the essential elements of the offense. *Jackson*, *supra*, 443 U.S. at 319. When conducting a legal sufficiency review, a reviewing court considers all evidence in the record of the trial, whether admissible or inadmissible. *Id.* at 324. The reviewing court presumes the trier of fact resolved conflicting inferences in favor of the verdict and defers to that resolution. *Id.* at 326.

Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) further confirms Petitioner's position. "It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not

satisfy the Sixth Amendment to have a jury determine . . . that the defendant is *probably* guilty, and then leave it up to the judge to determine whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Id*. 508 U.S. at 278. All agree "probably guilty" falls short of proof beyond a reasonable doubt.

In Texas, it is possible for appellate judges to vary greatly in their subjective conception of the term. A judge with practical experience in the Fifth Circuit might well contemplate that jurisdiction's definition.[12] Similarly, a judge who commenced his practice in the 1990's might reminisce about Texas' own short-lived effort at defining the phrase. *Cf. Geesa v. State*, 820 S.W.2d 154, 162 (Tex. Crim. App. 1991) (adopting a definition almost identical to that relied upon by the Fifth Circuit today). Also, a judge whose tenure on the bench precedes *Geesa*, or avoided that era entirely, may construe reasonable doubt as an indefinable concept, personal to each individual juror who takes the oath. *See Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000) ("It is ill-advised for us to require trial courts to provide the

[12] A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. 1 Federal Jury Practice and Instructions §12.10 at 363 (West 1992).

jury with a redundant, confusing, and logically-flawed definition when the Constitution does not require it, no Texas statute mandates it, and over a hundred years of pre-*Geesa* Texas precedent discourages it."). In turn, each of these approaches to the problem of defining reasonable doubt, differs greatly from the *Webster* instruction so long considered the benchmark definition of the term. *Victor v. Nebraska*, *supra*, 511 U.S. at 8 (quoting *Commonwealth v. Webster*, 59 Mass. 295, 320 (1950) (Shaw, C.J.)).

Prior to *Chapman*, such differences of personal opinion between appellate judges were wholly irrelevant. No appellate judge from Austin to parts-unknown was ever required to apply the beyond a reasonable doubt standard unless personally called to serve on a petit jury. Even when conducting a legal sufficiency review, appellate courts are not called upon to determine whether the evidence was sufficient beyond a reasonable doubt. Instead, they need only determine whether *any* rational trier of fact could have so found. *Jackson v. Virginia*, *supra*, 443 U.S. at 317. The subjective nature of the beyond a reasonable doubt standard renders it wholly unsuited for the purposes of fact finding during an appellate review. A reviewing court is confined to the four corners of a cold record. It cannot assess critical questions such as demeanor and credibility – often going to great length not to invade the "province of the jury." These realities exist to give the appellate system uniformity. But asking courts to apply beyond a reasonable doubt in the context of sufficiency of the evidence of a missing

element of an indicted offense is akin to the task of crafting a uniform, objective treatise on exactly what "smells like teen spirit" means as sung by Nirvana.[13]

Nevertheless, the clear directive from this Court requires the jury as fact finder to determine the existence of proof of each element beyond a reasonable doubt. While courts may disagree on the exact amount of evidence necessary to support proof beyond a reasonable doubt, courts do not disagree that a missing element of an offense does not rise to proof beyond a reasonable doubt. All courts except the Texas Court of Criminal Appeals, that is.

ISSUE THREE: Pursuant to the Double Jeopardy Clauses of the Fifth and Fourteenth Amendments, as well as *Martinez v. Illinois*, ___ U.S. ___, 134 S.Ct. 2070, 188 L.Ed.2d 1112 (2014), if an intermediate appellate court reverses a conviction and enters a judgment of acquittal, is the judgment the "functional equivalent of an acquittal," which bars further review of the case by another court?

This issue is preserved for appellate review. Although this issue was not identified as a question before the Court of Criminal Appeals, due to the "fundamental nature of double jeopardy protections,"

[13] "Smells Like Teen Spirit" is a song by the American rock band Nirvana. It is the opening track and lead single from the band's second album, *Nevermind* (1991), released on DGC Records. https://en.wikipedia.org/wiki/Smells_Like_Teen_Spirit, last accessed February 21, 2016.

a Petitioner may raise a claim of double jeopardy for the first time on appeal provided that: (1) the undisputed facts show the double jeopardy violation is clearly apparent on the face of the record; and (2) enforcement of the usual rules of procedural default would serve no legitimate state interests. *See Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2000). As the arguments below will show, jeopardy attached when the Court of Appeals reversed the judgment of conviction and sentence imposed on Petitioner and rendered a judgment of acquittal in *Bowen I*. Moreover, Petitioner could not have raised this issue in the initial appeal to the intermediate Court of Appeals since it is the opinion and judgment of the Court of Appeals that acquitted her. And, the State filed for discretionary review, not Petitioner. Petitioner raised this issue before the trial court after the case was remanded back to that court for resentencing by filing her Plea in Bar, which was considered and denied by the trial court. (Suppl. C.R. at 78) (IV Suppl. R.R. at 19). Following the resentencing, Petitioner then appealed a second time to the Court of Appeals. *Bowen III*. Petitioner has preserved this issue for review, and procedural default does not apply.

Petitioner is not aware of a case in which this Court differentiates between acquittals that occur at the trial court or the appellate court level. In other words, regardless of when a court makes a “ruling” that the state’s proof was insufficient to establish a

defendant's liability and thus acquits a defendant, "an acquittal is an acquittal."[14] As a result, Petitioner asks that this Court hold an acquittal entered by an intermediate appellate court is the functional equivalent of an acquittal, which under the Double Jeopardy Clause bars further review of the case by any court. In fact, *Burks v. United States*, 437 U.S. 1, 15, 98 S.Ct. 2141, 2149, 57 L.Ed.2d 1 (1978) held the Sixth Circuit Court of Appeals, an intermediate appellate court, erred when it found the evidence insufficient and reversed and remanded to the trial court for a new trial. When the evidence is found insufficient on appeal, the appellate court must reverse and reform to show a judgment of acquittal. "[W]e are squarely presented with the question of whether a defendant may be tried a second time when a reviewing court has determined that in a prior trial the evidence was insufficient to sustain the verdict of the jury." *Id*. 437 U.S. at 5.

Relying heavily on *Burks*,[15] *Evans v. Michigan*, ___ U.S. ___, 133 S.Ct. 1069, 185 L.Ed.2d 124 (2013)

[14] It is interesting to note this case, which overruled years of state precedent that mirrored federal law, was based on the State's petition for discretionary review. *This is a recurring pattern in Texas*. *See for example*, *Rodriguez v. State*, 819 S.W.2d 871 (Tex. Crim. App. 1991); *Arnold v. State*, 867 S.W.2d 378 (Tex. Crim. App. 1993); *Evans v. State*, 202 S.W.3d 158 (Tex. Crim. App. 2006); and *Olivas v. State*, 203 S.W.3d 341 (Tex. Crim. App. 2006). *But see McCarty v. State*, 820 S.W.2d 795 (Tex. Crim. App. 1991).

[15] "Perhaps most inconsistent with the State's and United States' argument is *Burks*. There we held that when a defendant

(Continued on following page)

reversed the Michigan Supreme Court: "In the end, this case follows those that have come before it. The trial court's judgment of acquittal resolved the question of Evans' guilt or innocence as a matter of the sufficiency of the evidence, not on unrelated procedural grounds. That judgment, 'however erroneous' it was, *precludes re-prosecution on this charge*, *and so should have barred the State's appeal as well*." *Id*. at 133 S.Ct. 1078. (Emphasis supplied). And *Martinez v. Illinois*, ___ U.S. ___, 134 S.Ct. 2070, 188 L.Ed.2d 1112 (2014), relying on *Evans*, reinforces our position an acquittal is an acquittal.[16]

The concept that "an acquittal is an acquittal" is nearly 120 years old, as in *United States v. Ball*, 163 U.S. 662, 671 (1896), this Court held: "As to the

---

raises insanity as a defense, and a court decides the 'Government ha[s] failed to come forward with sufficient proof of [the defendant's] capacity to be responsible for criminal acts,' the defendant has been acquitted because the court decided that 'criminal culpability ha[s] not been established.' 437 U.S., at 10, 98 S.Ct. 2141. Lack of insanity was not an 'element' of Burks' offense, bank robbery by use of a dangerous weapon. . . . Rather, insanity was an affirmative defense to criminal liability. Our conclusion thus depended upon equating a judicial acquittal with an order finding insufficient evidence of culpability, not insufficient evidence of any particular element of the offense." *Evans*, 133 S.Ct. at 1078. (Footnote and citation omitted).

[16] "[W]e have emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action"; it turns on "whether the ruling of the judge, whatever its label, actually represents a resolution . . . of some or all of the factual elements of the offense charged." 134 S.Ct. at 2076. (Citations omitted).

defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence." (Internal citations omitted). For more than 160 years, this Court has held the Constitution does not permit the trier of fact to presume that persons are engaged in criminal activity. In *Boston v. Lecraw*, 58 U.S. 426 (1855), Justice Grier wrote:

> That the law will not presume any man's acts to be illegal, and will therefore attribute to long continued use and enjoyment, by the public, of a right of way or other privilege in or over that lands of another, to a legal rather than an illegal origin; and will ascribe long possession which cannot otherwise be accounted for, to a legal title: upon a reasonable principle and very forcible presumption, that the acquiescence in such enjoyment, for a long period, by those whose interest it was to interrupt it, arose from the knowledge and consciousness on their part that the enjoyment was rightful, and could not be disturbed; and also on consideration of the hardship which would accrue to parties, if after long possession, and when time had robbed them of the means of proof, their

> titles were to be subjected to a rigorous examination.

Id. at 435.

Although Justice Grier's opinion in *Boston v. Lecraw* dealt with a property issue, the holding applies to all cases, and absent evidence a person is engaged in illegal activity as charged in the indictment, the law does not presume the person's acts are illegal. Absent proof beyond a reasonable doubt, as found by the jury of the exact amount of pecuniary loss as alleged, results in Petitioner not having engaged in illegal conduct at all. Accordingly, under this Court's precedents, the fact the prosecution did not prove the pecuniary amount of loss of $200,000.00 or more to Dana White attributable to Petitioner, must result in an acquittal due to insufficiency of the evidence. An unproved element of an offense is not a trial error; it is an acquittal.

CONCLUSION AND PRAYER

For the reasons stated in this petition, the Texas Court of Criminal Appeals decided important federal constitutional questions: (1) that have not been, but should be, settled by this Court, and (2) in ways that conflict with relevant decisions of this Court. Therefore, Petitioner respectfully asks this Court to issue a

writ of certiorari to the Texas Court of Criminal Appeals on the issues presented in this petition.

Respectfully submitted,

Stan Brown*
P.O. Box 3122
Abilene, Texas 79604
325-677-1851
Fax 325-677-3107
State Bar No. 03145000
Email: mstrb@aol.com

Angela Moore
310 S. St. Mary's, Ste. 1830
San Antonio, Texas 78205
210-364-0013
Fax 210-855-1040
State Bar No. 14320110
Email: amoorelaw2014@gmail.com

Attorneys for Petitioner

Counsel of Record

2015 WL 1956866
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Texas,
Eastland.

Deborah Bowen, Appellant
v.
The State of Texas, Appellee

No. 11-13-00114-CR
|
Opinion filed April 30, 2015
|
Discretionary Review Refused November 4, 2015
|
Rehearing Denied December 16, 2015

On Appeal from the 32nd District Court, Fisher County, Texas, Trial Court Cause No. 3313

Attorneys and Law Firms

Stan Brown, for Deborah Bowen.

Ann Reed, District Attorney, for State of Texas.

Panel consists of: Wright, C.J., Bailey, J., and McCall.[1]

OPINION

JIM R. WRIGHT, CHIEF JUSTICE

Deborah Bowen was initially convicted of the first-degree felony offense of misapplication of fiduciary property owned by, or held for the benefit of, Dana White and valued at $200,000 or more. *See* TEX. PENAL CODE ANN. § 32.45(b), (c)(7) (West Supp.2014). In Appellant's first appeal to this court, we held that, although the evidence was sufficient to show that Appellant misapplied more than $200,000 of the family trust, the evidence was insufficient to show that $200,000 of those misapplied assets were owned by White, one of four beneficiaries under the trust. *See Bowen v. State*, 322 S.W.3d 435, 437 (Tex.App.-Eastland 2010), *rev'd*, 374 S.W.3d 427 (Tex.Crim. App.2012) (*Bowen I*). Based on our holding that the evidence was insufficient to support the conviction and based on the fact that the jury charge did not contain a lesser included offense, we reversed and entered a judgment of acquittal. *Id.* The Court of Criminal Appeals reversed the judgment of this court, held that the evidence supported a conviction for the second-degree felony offense of misapplication of fiduciary property, and remanded the case to the trial court to reform the conviction to a second-degree

---

[1] Terry McCall, Retired Justice, Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.

felony and to conduct a new punishment hearing on the reformed conviction. *Bowen v. State*, 374 S.W.3d 427, 432 (Tex.Crim.App.2012) (*Bowen II*). In authorizing a reformation of the conviction, the Court of Criminal Appeals overruled *Collier v. State*, 999 S.W.2d 779 (Tex.Crim.App.1999), and *Haynes v. State*, 273 S.W.3d 183 (Tex.Crim.App.2008), in which it had previously held that the court of appeals could not reform a conviction of a greater offense to a lesser included offense unless the lesser included offense was submitted to the jury. *Id.* On remand, the trial court convicted Appellant of the second-degree offense as instructed by the Court of Criminal Appeals; held a hearing on punishment; and assessed Appellant's punishment at confinement for a term of seven years, a fine in the amount of $7,500, and restitution in the amount of $103,344. Appellant presents four issues for our review. We affirm.

In her first issue, Appellant asserts that the trial court abused its discretion when it denied her plea in bar. Specifically, Appellant argues that our acquittal should stand and she should not have been subject to further prosecution by the Court of Criminal Appeals and subsequently by the trial court. The Double Jeopardy Clause provides in part that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause protects criminal defendants from three harms: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple

punishments for the same offense. *Ex parte Milner*, 394 S.W.3d 502, 506 (Tex.Crim.App.2013) (citing *Brown v. Ohio*, 432 U.S. 161, 164-65, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977)).

Appellant directs us to the following quote from *Stephens v. State*, 806 S.W.2d 812, 819 (Tex.Crim. App.1990), in support of her argument: "Therefore, we hold that when a defendant has obtained a reversal of a conviction for a greater offense solely on the ground that there was insufficient evidence to prove the aggravating element of that offense, the Double Jeopardy Clause bars a subsequent prosecution for a lesser included offense." However, in *Stephens*, the State sought a new indictment and conviction for the offense of rape after the Court of Criminal Appeals affirmed the judgment of acquittal of the Dallas Court of Appeals in which the Dallas court held that the evidence was insufficient to support a conviction for aggravated rape. 806 S.W.2d at 813-14. The court explained that the Double Jeopardy Clause precluded the State from retrying the defendant and that the State was not entitled to a separate opportunity to present evidence that it failed to present during the first trial. *Id.* at 816-17. Here, Appellant was not subject to a second trial on the lesser included second-degree felony offense of misapplication of fiduciary property. The Court of Criminal Appeals used the evidence presented at Appellant's first trial to determine that the evidence supported a conviction for a second-degree felony even though it did not support a

conviction for a first-degree felony. *Bowen II*, 374 S.W.3d at 432.

Appellant also cites to several other cases to support her argument that "[a]n acquittal is an acquittal" and that she should not have been subject to any further prosecution, including further review of her case by the Court of Criminal Appeals. *See, e.g.*, *Evans v. Michigan*, ___ U.S. ___, 133 S.Ct. 1069, 1073, 185 L.Ed.2d 124 (2013) (Double Jeopardy Clause bars retrial following a court-decreed acquittal even where acquittal is based upon erroneous conclusion of law); *Burks v. United States*, 437 U.S. 1, 18, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) (accused cannot be subjected to a second trial when an appellate court reverses the conviction for lack of legally sufficient evidence); *State v. Blackshere*, 344 S.W.3d 400, 406 (Tex.Crim. App.2011) (State not authorized to appeal acquittal; "any further prosecution, including an appeal by the prosecution that would lead to a second trial, is prohibited") (relying in part on *State v. Moreno*, 294 S.W.3d 594, 598, 602 (Tex.Crim.App.2009) (holding same)). However, what is banned in each of the cases upon which Appellant relies is a second trial on guilt/innocence, not a second trial on punishment. Appellant has not been subjected to a "second trial" to determine her guilt or innocence; she has been subjected only to a second punishment hearing. *See Monge v. California*, 524 U.S. 721, 724, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998) (holding that the Double Jeopardy Clause is not applicable to noncapital sentencing proceedings). Therefore, Appellant has not

been "tried again," nor has she received multiple punishments for the same offense.

Furthermore, a post-verdict judgment, such as a trial court's grant of a motion for new trial on sufficiency grounds, is reviewable on appeal and does not violate double jeopardy. *State v. Savage*, 933 S.W.2d 497, 500 (Tex.Crim.App.1996) (citing *United States v. Wilson*, 420 U.S. 332, 336, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975)). Our holding that the evidence was insufficient to support Appellant's conviction in *Bowen I* is analogous to a post-verdict judgment of acquittal and, thus, was reviewable by the Court of Criminal Appeals. In addition, our judgment of acquittal was never final and was rendered a nullity when it was vacated by the Court of Criminal Appeals. *See Gaddy v. State*, 433 S.W.3d 128, 131 n. 2 (Tex.App.-Fort Worth 2014, pet. ref'd) (op. on remand) (Court of Criminal Appeals vacated prior judgment, which refutes defendant's double-jeopardy argument). Therefore, Appellant's claim that the Court of Criminal Appeals and the trial court violated the Double Jeopardy Clause is misplaced. Moreover, as an intermediate appellate court, we decline to hold that the Court of Criminal Appeals violated the Double Jeopardy Clause when it considered the State's petition for discretionary review, reversed our judgment, and remanded the cause to the trial court for a new punishment hearing. We overrule Appellant's first issue.

Appellant argues in her second issue that the trial court abused its discretion when it denied her

motion for new trial on the ground that her right to due process had been violated. Appellant asserts that due process of law and TEX.R.APP. P. 43.2(c) demand that the decision by the Court of Criminal Appeals to allow an appellate court to reform a judgment to reflect a conviction on a lesser included offense, even when the jury is not instructed on the lesser included offense, should have applied prospectively, not retroactively. Appellant argues that she was entitled to rely on the doctrine that, when the prosecution failed to prove what was alleged in the indictment and charged to the jury, an appellate court could not reform the judgment to show a conviction of a lesser included offense. Prior to the decision of the Court of Criminal Appeals in *Bowen II*, a defendant could forego requesting a lesser included instruction when the defendant thought that there was insufficient evidence to support the charged offense in hopes that the defendant would be acquitted by the jury or on appeal. Although *Bowen II* might have changed the defensive strategy for requesting jury instructions on lesser included offenses, it did not violate due process.

In *Janecka v. State*, the court explained that, although the "retroactive application of an unforeseeable judicial construction of a statute, or a sudden, unanticipated change in a court-made rule, may violate due process," "the gravamen of this due process guarantee is 'fair warning' to the defendant that his conduct was criminal at the time he engaged in it." 937 S.W.2d 456, 461 (Tex.Crim.App.1996). Here, the indictment charged Appellant with "intentionally,

knowingly, or recklessly misapply[ing] property, . . . of the value of $200,000 or more, that [Appellant] held as a fiduciary . . . in a manner that involved substantial risk of loss of the property to Dana White . . . by appropriating the said property for her own benefit." The allegations in the indictment gave Appellant sufficient notice of the crime with which she was being charged. Although the indictment did not allege in the alternative that Appellant misapplied lesser amounts of fiduciary property, Appellant's misapplication of property in a lesser amount would not have made her conduct a different crime but, instead, would have changed the degree of the offense and the punishment applicable to her criminal conduct. The criminal conduct alleged in the indictment against Appellant and set out in Section 32.45 of the Penal Code has not changed. Therefore, Appellant cannot claim that she was denied due process; Appellant had fair warning under Section 32.45 that her conduct was criminal. Furthermore, the Court of Criminal Appeals clearly intended for its decision to apply to Appellant when it applied its holding to Appellant's case and remanded the cause to the trial court to reform the judgment to reflect a conviction for the lesser included offense. *Bowen II*, 374 S.W.3d at 431-32. We overrule Appellant's second issue.

In her third issue, Appellant contends that the evidence was insufficient to support a first-degree felony conviction. This issue is moot. We held in *Bowen I* that the evidence was insufficient to support a conviction for a first-degree felony. 322 S.W.3d at

437. The Court of Criminal Appeals agreed that the evidence was insufficient to support a first-degree felony but reversed our judgment of acquittal because the evidence supported a lesser included offense. *Bowen II*, 374 S.W.3d at 432. Therefore, we overrule Appellant's third issue.

Appellant asserts in her fourth issue that the evidence is also insufficient to support a second-degree felony offense of misapplication of fiduciary property. We are not at liberty to again review the evidence at this juncture. This appeal comes to us after a new sentencing hearing, not following a new trial on the merits. Furthermore, the Court of Criminal Appeals expressly concluded that "[t]he value of the property misapplied was approximately $103,344, which supports a felony conviction in the second degree. Accordingly, the judgment must be reformed to reflect a second-degree felony conviction." *Id.* (footnote omitted). The trial court reformed the judgment as instructed by the Court of Criminal Appeals. We will not disturb that judgment. Appellant's fourth issue is overruled.

We affirm the judgment of the trial court.

Willson, J., not participating.

---

374 S.W.3d 427
Court of Criminal Appeals of Texas.

Deborah BOWEN, Appellant,
v.
The STATE of Texas.

No. PD-1607-10.
|
June 20, 2012.
|
Rehearing Denied Aug. 22, 2012.

Attorneys and Law Firms

John R. Saringer, Abilene, for Appellant.

Lisa C. McMinn, State Prosecuting Atty., Austin, for State.

OPINION

MEYERS, J., delivered the opinion of the Court, in which KELLER, P.J., and WOMACK, JOHNSON, COCHRAN and ALCALA, JJ., joined.

In *Collier v. State*, 999 S.W.2d 779 (Tex.Crim. App.1999), we held that the court of appeals cannot reform a conviction of a greater offense to a lesser-included offense unless the lesser-included offense was requested by the parties or included in the jury charge. Since the case was decided, we have had to revisit the law regarding lesser-included instructions in many cases, such as those pertaining to the

reformation of convictions,[1] which party can request the instructions,[2] and the implications of a trial court's refusal to submit requested instructions.[3] The purpose of *Collier*, which was to prevent the State from overreaching and having an unfair advantage over the defendant, has been lost through our subsequent decisions. This Court has forced itself to work around the holding, and the decision has proved to be unworkable in practice and inapplicable in many instances. We now overrule *Collier*, reverse the judgment of the Eastland Court of Appeals, and remand to the trial court for further proceedings consistent with this opinion.

I. BACKGROUND

Appellant's father died in 2001. Her father's will established a family trust, and Appellant's mother was named as the primary beneficiary. The trust was to terminate at her mother's death, and the trust assets were to be distributed equally, per stirpes, to Appellant and her brother, Jackie. Jackie predeceased his mother, leaving three children. Appellant was appointed co-trustee in 2004. The balance of the

[1] *See, e.g.*, *Miles v. State*, 357 S.W.3d 629 (Tex.Crim.App. 2011); *Haynes v. State*, 273 S.W.3d 183 (Tex.Crim.App.2008); *Smith v. State*, 158 S.W.3d 463 (Tex.Crim.App.2005); *Bryant v. State*, 187 S.W.3d 397 (Tex.Crim.App.2005).

[2] *See, e.g.*, *Grey v. State*, 298 S.W.3d 644 (Tex.Crim.App.2009).

[3] *See, e.g.*, *Tolbert v. State*, 306 S.W.3d 776 (Tex.Crim.App. 2010); *Delgado v. State*, 235 S.W.3d 244 (Tex.Crim.App.2007).

trust at the time of appointment was $620,065. Appellant distributed the entire balance of the trust to herself when her mother died, rather than distribute one-half of the assets to Jackie's children, as required by the trust provisions. Jackie's daughter, Dana White, had power of attorney to act on behalf of her two brothers. Appellant was charged with misapplication of fiduciary property owned by or held for the benefit of White for the value of $200,000 or more. TEX. PENAL CODE § 32.45(b) & (c)(7). She was convicted by a jury, sentenced to eight years in prison, and ordered to pay a fine and restitution to White and her brothers. No lesser-included offense instructions were submitted to the jury.

The Eastland Court of Appeals concluded that the evidence was legally insufficient to prove that the misapplied assets owned by or held for Dana White's benefit equaled $200,000 or more. *Bowen v. State*, 322 S.W.3d 435, 442-43 (Tex.App.-Eastland 2010, pet. granted). The court held that the terms of the trust, not the powers of attorney, controlled who owned, or for whose benefit, the trust assets were held. *Id.* at 442. Thus, White was a beneficiary of only one-sixth of the trust amount, totaling approximately $103,344. *Id.* The court of appeals, bound by *Collier*, did not reform the judgment to reflect a conviction for a lesser-included offense because a lesser charge was not submitted to the jury. *Id.* at 442-43. Instead, the court ordered an acquittal. *Id.*

The State filed a petition for discretionary review, asking us to overrule *Collier*, reverse the judgment of the Eastland Court of Appeals, and remand the case to reflect a conviction for the appropriate lesser-included offense.

II. ANALYSIS

A. *Caselaw*

In *Collier*, a plurality of this Court held that an appellate court does not have the authority to reform a judgment to reflect a conviction of a lesser-included offense if it was neither requested nor submitted in the jury charge. *Collier*, 999 S.W.2d at 785. Judge Mansfield's lead opinion, joined by three judges, was based on the rationale that allowing the reformation of judgments would encourage the State to use a "go for broke" trial strategy of not requesting a lesser-included offense instruction in order to make it more likely to obtain a conviction for the charged offense. *Haynes*, 273 S.W.3d at 185 (citing *Collier*, 999 S.W.2d at 781-82). The four-judge plurality decided that:

> A court of appeals may reform a judgment of conviction to reflect conviction of a lesser included offense only if (1) the court finds that the evidence is insufficient to support conviction of the charged offense but sufficient to support conviction of the lesser included offense and (2) either the jury was instructed on the lesser included offense (at the request of a party or by the trial court *sua sponte*) or

> one of the parties asked for but was denied such an instruction.

Collier, 999 S.W.2d at 782.

Judge Keasler's concurring opinion focused on the power of an appellate court to modify a trial court's judgment under Rules of Appellate Procedure 43.2(b) and (c).[4] The opinion notes that "the 'judgment that the trial court should have rendered' can only be a judgment that the trial court was capable of rendering. . . ." *Collier*, 999 S.W.2d at 784 (Keasler, J., concurring). Judge Keasler concluded that an appellate court cannot reform a judgment to reflect a conviction for a lesser-included offense unless the lesser-included offense was submitted to the jury. *Id.*

Nearly a decade later in *Haynes*, we determined that Judge Keasler's concurring opinion in *Collier* set out the majority holding because his opinion contained the narrowest ground upon which five judges agreed. 273 S.W.3d at 187. The narrowest ground was that "an appellate court may reform a judgment to reflect a conviction for the lesser-included offense

---

[4] The court of appeals may:

> . . .
>
> (b) modify the trial court's judgment and affirm it as modified;
>
> (c) reverse the trial court's judgment in whole or in part and render the judgment that the trial court should have rendered. . . .

TEX.R.APP. P. 43.2.

when that lesser-included offense was submitted in the jury charge." *Id.*

B. "Overreaching" Strategy

The rationale behind the plurality opinion in *Collier* was that, in some cases, the State "overreaches" or "goes for broke" by not requesting an instruction on a lesser-included offense in order to make it more likely to obtain a conviction for the greater offense, even if the evidence only weakly supports the more severe conviction. *Haynes*, 273 S.W.3d at 185. The holding does not consider that the defense may also have a strategic reason to not request a lesser-included offense instruction – the defense may hope for outright acquittal, rather than diminished culpability. DIX & SCHMOLESKY, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 43:47 (3d ed.2011).

On several occasions since *Collier* was decided, this Court has considered the implication of the State's or the defendant's strategic decision to not request a jury instruction on a lesser-included offense. The prosecution and the defense may both request the submission of a lesser-included offense instruction. The trial court may submit the instruction, but is not required to do so unless the defendant requests the instruction and sets out specific evidence that supports the lesser offense and negates the greater offense. *Flores v. State*, 245 S.W.3d 432, 439 (Tex.Crim.App.2008).

In holding that the trial court was not required to *sua sponte* provide a lesser-included instruction, we noted that regardless of which side goes for broke, the trial court need not rescue the party from its strategic choice. *Tolbert v. State*, 306 S.W.3d at 782 (quoting *Haynes v. State*, 273 S.W.3d at 191 (Johnson, J., concurring)). Tolbert was charged with capital murder (murder during the course of a robbery) and chose not to request an instruction on the lesser-included charge of murder, despite evidence that she did not decide to rob the victim until after she murdered him, which negated the capital murder charge. *Id.* at 777.

When she appealed her capital murder conviction, Tolbert argued that, because the State unsuccessfully requested the lesser-included offense instruction, the murder instruction was "applicable to the case," and therefore the trial judge was required to submit the charge. *See id.* at 781-82. This Court compared lesser-included instructions to defensive issues, which frequently depend on trial strategy. *Id.* at 780-81.[5] A defensive issue must be preserved on the record in order to be applicable to the case. *See id.* at 780 (quoting *Posey v. State*, 966 S.W.2d 57, 62 (Tex. Crim.App.1998)). Because she did not object to the trial court's denial of the State's request, we determined that she had waived her right to complain on

---

[5] The trial court is not required to *sua sponte* instruct the jury on potential lesser-included offenses, defensive issues or evidentiary issues because these "frequently depend upon trial strategy and tactics." *Delgado*, 235 S.W.3d at 249.

appeal. *Id.* at 781 n. 10 (quoting *Grey v. State*, 298 S.W.3d at 654-55 (Cochran, J., concurring)).

Although the sufficiency of the capital murder conviction was not at issue, we pointed out that our holding in *Haynes* left open the question of whether an appellate court could reform a judgment if a lesser-included offense was requested by either party, but denied by the trial court. *Id.* at 782 n. 12. This alludes to one of the impracticalities of the overreaching rationale in *Collier* – the State is not "going for broke" if it requests a lesser-included offense, but the trial court does not submit the instruction.

To contrast, in *Grey v. State*, 298 S.W.3d at 646, we examined the applicability of the *Royster-Rousseau* test[6] to jury instructions that were prepared by the State and objected to by the defendant. In *Arevalo v. State*, we held that the second prong of the *Royster-Rousseau* test applies equally to requests by the State and the defendant. *Id.* at 645. The consequences of

[6] The *Royster-Rousseau* test is used to determine if a trial judge should submit to the jury a lesser-included offense to the jury. *See Arevalo v. State*, 943 S.W.2d 887, 889 (Tex.Crim.App. 1997). The test is two-pronged:

> 1) The lesser-included offense must be included within the proof necessary to establish the offense charged.
>
> 2) There must me some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense.

Id.

the rule in *Arevalo* were examined, particularly in light of our holding in *Collier*.

We noted the high risk of error that is present for prosecutors under *Arevalo* and *Collier*. *Id.* at 650. In some cases, the prosecutor has to weigh the benefits of requesting a lesser-included offense instruction and risk reversal under *Arevalo* if the submission of the instruction was given in error. *Id.* Or, the State may face reversal under *Collier* if it does not request a lesser-included offense instruction and the evidence is legally insufficient to support the greater conviction. *Id.* Because of the illogical result of this combination, we overruled *Arevalo* and determined that the State is not bound by the second prong of the *Royster-Rousseau* test. *Id.* at 645. The case demonstrates yet another instance in which this Court forced itself to work around the *Collier* holding.

Subsequent decisions by this Court and lower appellate courts have followed *Collier* and ordered acquittals in a number of cases in which there was neither a request for a jury instruction on a lesser-included offense, nor was one given by the trial court, but the evidence was legally insufficient to support a conviction of the more serious offense. In many of these cases, there was no indication that either the State or the defendant exercised gamesmanship by not requesting a lesser-included offense instruction. Thus, it is questionable if the rationale behind *Collier* applies in practice.

For example, in *Lawrence v. State*, 106 S.W.3d 141 (Tex.App.-Amarillo 2003, no pet.), the State failed to prove that the victim was at least sixty-five years of age when the defendant was convicted of causing bodily injury to a person sixty-five years of age or older. The elements of the offense include: "(a) Intentionally, knowingly, recklessly, or with criminal negligence, (b) Caused, by action or failure to act, . . . bodily injury, (c) *To . . . person 65 years of age or older.*" TEX. PENAL CODE § 22.04 (emphasis added). The State failed to prove each element of the offense and did not request that a lesser-included offense, such as assault, in [sic] contained in the jury charge. *See* TEX. PENAL CODE § 22.01. Thus, the Amarillo Court of Appeals acquitted the appellant.

Similarly, in *Haynes*, the appellant was convicted of family-violence assault, a felony. 273 S.W.3d at 184. The State failed to prove as an element of the offense that the appellant and the victim were living together in the same dwelling at the time the crime was committed. Neither the State nor the appellant requested an instruction on assault, a lesser-included offense. *See id.* at 186 n. 4. In holding that *Collier* has precedential value, we rejected the State's contention that the First Court of Appeals should have reformed the trial court's judgment and entered a conviction for the misdemeanor offense of assault. *Id.* at 185-87.

III APPLICATION

In this case, the defendant was charged with misapplication of fiduciary property. The State must prove beyond a reasonable doubt that the defendant intentionally, knowingly, or recklessly misapplied property that she held as fiduciary in a manner that involved a substantial risk of loss to the owner of the property or to the person for whose benefit the property was held. TEX. PENAL CODE § 32.45. The State met its burden of proof and presented sufficient evidence to support a conviction for misapplication of fiduciary property. However, the indictment listed only Dana White as the owner of the trust property, rather than White and her brothers. Although White had power of attorney on behalf of her brothers, she was not the owner of their share of the trust assets. At most, she was entitled to $103,344. Accordingly, the court of appeals held that the record was legally insufficient to support a conviction of misapplication of $200,000 or more in trust assets owned by White or held for her benefit. *Bowen*, 322 S.W.3d at 442-43.

The court of appeals, following *Collier*, reversed the trial court's judgment and acquitted Appellant. While compatible with our mandate in *Collier*, this result is unjust. Acquittal is improper because, although the State failed to prove the value of the property misapplied, which is an aggravating element of the offense, the State proved the essential elements of the offense of misapplication of fiduciary property beyond a reasonable doubt. The fact finder's determination of guilt should not be usurped in the

punishment phase if the evidence is legally sufficient to support a conviction. There is no indication that either party "overreached" here. The failure to request the second-degree felony was not a result of gamesmanship by the State or Appellant, but rather a mistake as to the applicable law.[7]

The rationale of *Collier* is unworkable here, as it has been in many other instances since the decision came down. Because of the impracticalities created by the case, we now overrule *Collier.*

Here, the State has met its burden by proving the essential elements of the offense of misapplication of fiduciary property beyond a reasonable doubt, but the amount of property shown to have been misapplied, an aggravating element of the offense, was legally insufficient to support a first-degree felony conviction. The value of the property misapplied was approximately $103,344, which supports a felony conviction in the second degree.[8] Accordingly, the judgment must be reformed to reflect a second-degree felony conviction.

---

[7] *See Grey*, 298 S.W.3d at 650-51 (discussing the implications of *Arevalo*'s application in cases in which there is a legitimate dispute about the meaning of the language of the aggravating element that distinguishes the greater and lesser offenses).

[8] TEX. PENAL CODE § 32.45(c)(6):

> "An offense under this section is a felony in the second degree if the value of the property misapplied is $100,000 or more but less than $200,000."

IV. CONCLUSION

We overrule *Collier* and its progeny. The "over-reaching" rationale behind the plurality in *Collier* does not take into account the trial strategy of both parties, it is unworkable in practice, and the decision applies only to jury trials, making it difficult to apply fairly across all cases.[9] Because *Haynes*, holding that *Collier* is binding precedent, was based in part on the same "overreaching" rationale, it is also overruled.

The conviction stands, and we reverse the judgment of the Eastland Court of Appeals. We remand to the trial court to reform the conviction to reflect the felony of misapplication of fiduciary property in the second degree and to conduct a new punishment hearing.

PRICE, J., filed a dissenting opinion, in which KEASLER and HERVEY, JJ., joined.

PRICE, J., filed a dissenting opinion in which KEASLER and HERVEY, JJ., joined.

In *Haynes v. State*,[1] a solid majority of the Court recognized Judge Keasler's concurring opinion in *Collier v. State* as the governing *ratio decidendi.*[2]

---

[9] *See* DIX & SCHMOLESKY, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 56:214 ("Where trial was to the court without a jury, there are apparently no similar qualifications on the courts of appeals power to reform.").

[1] 273 S.W.3d 183 (Tex.Crim.App.2008).

[2] *Id.* at 187 (citing *Collier v. State*, 999 S.W.2d 779 (Tex. Crim.App.1999)).

Judge Keasler's position in *Collier* was contingent, in turn, upon the language of Rule 43.2(c) of the Texas Rules of Appellate Procedure.[3] His argument was that a court of appeals's authority to "render" judgment on appeal is limited to what it concludes "the trial court should have rendered."[4] In a jury trial, unless the jury is authorized to convict a defendant of a lesser-included offense as well as the greater-inclusive offense, it cannot be said that, when the evidence proves insufficient to establish the greater offense but sufficient to establish the lesser, the trial court "should have rendered" a conviction for the lesser-included offense – because the jury could not have done so.[5] And when it is not the case that the "trial court should have rendered" a judgment of conviction for the lesser-included offense, an appellate court is not authorized under Rule 43.2(c) to do so.[6] This logic led Judge Keasler to conclude that an appellate court cannot reform a trial court's judgment to reflect conviction of a lesser-included offense in a jury trial unless the jury was expressly authorized by the jury charge to convict the defendant for that

---

[3] *Id.* at 186 n. 4. *See* TEX.R.APP. P. 43.2(c) ("**Types of Judgment** The court of appeals may . . . reverse the trial court's judgment in whole or in part and render the judgment that the trial court should have rendered.").

[4] *Collier*, *supra*, at 784 (Keasler, J., concurring).

[5] *Id.*

[6] *Id.*

lesser-included offense.[7] In *Haynes*, we embraced this rationale as controlling law.[8]

Twice in its opinion in this cause, the court of appeals took pains to point out that the jury charge contained no lesser-included-offense instruction authorizing the jury to convict the appellant for misapplication of fiduciary property as a second-degree felony.[9] That being the case, it cannot be said, consistent with the logic and holding of *Haynes*, that the "trial court should have rendered" a judgment of conviction for the offense of misapplication of fiduciary property as a second-degree felony. Therefore, the court of appeals correctly perceived that it lacked the authority to render that judgment itself under Rule 43.2(c).

At least four times in recent memory, the State has urged us to overrule *Collier*.[10] What the State ought really to be advocating, if anything, is for this Court's Rules Committee to undertake a re-examination

---

[7] *Id.* at 785.

[8] *Haynes*, *supra*, at 187.

[9] *Bowen v. State*, 322 S.W.3d 435, 437 & 442 (Tex.App.-Eastland 2010).

[10] Besides this case and *Haynes*, the State has also urged us to overrule *Collier* in *Shipp v. State*, 331 S.W.3d 433, 434 n. 5 (Tex.Crim.App.2011), and in *Tucker v. State*, 274 S.W.3d 688, 691 n. 13 (Tex.Crim.App.2008), but we disposed of each of those cases in such a way that we ultimately did not have to reach the question.

of Rule 43.2(c), with a view to amending it.[11] In *Haynes*, we have already firmly resolved the issue of the authoritativeness of our construction of the present incarnation of Rule 43.2(c), identifying Judge Keasler's reasoned position as controlling and *stare decisis*. The only thing that has changed since that time is "the composition of this Court, which is not a valid reason for ignoring *stare decisis* principles."[12]

I would honor *stare decisis* and affirm the judgment of the court of appeals. Because the Court does not, I respectfully dissent.

---

[11] *See Haynes*, *supra*, at 189 n. 14 (pointing out that "the rule applied in this case should be changed through the legislative or rule-making process rather than through judicial activism").

[12] *Id.* at 187.

322 S.W.3d 435
Court of Appeals of Texas,
Eastland.

Deborah BOWEN, Appellant,
v.
STATE of Texas, Appellee.

No. 11-08-00262-CR.
|
Sept. 2, 2010.
|
Discretionary Review Granted March 2, 2011.

Attorneys and Law Firms

John Saringer, Abilene Office, Wagstaff, Alvis, Stubbeman Seamster & Longacre, Abilene, for appellant.

Ann Reed, District Attorney, Sweetwater, Patricia Dyer, Assistant Crim. Dist. Atty., Abilene, Jeffrey L. Van Horn, State Prosecuting Atty., Austin, for appellee.

Panel consists of: WRIGHT, C.J., McCALL, J., and STRANGE, J.

OPINION

TERRY McCALL, Justice.

This case involves a family trust established by the will of Alfred P. Douglass. The initial primary beneficiary was his wife. Upon her death, the trust was to terminate, and its assets distributed equally to their children: appellant Deborah Bowen and her

brother or their descendants per stirpes. A jury convicted appellant of misapplication of fiduciary property owned by Dana White (or held for her benefit) of the value of $200,000 or more. *See* TEX. PENAL CODE ANN. § 32.45 (Vernon Supp. 2009). Appellant was sentenced to eight years in the Texas Department of Criminal Justice – Institutional Division, assessed a $10,000 fine, and ordered to pay restitution in the amount of $350,000 to Dana White and her brothers, Cody Douglass and Michael Douglass, who were the children of appellant's deceased brother.

In her first two issues, appellant contends that the evidence was legally and factually insufficient to prove each element required for a finding of misapplication of fiduciary property. In her third and fourth issues, appellant contends that the evidence was legally and factually insufficient to prove appellant committed a first degree felony because the evidence did not show that over $200,000 of trust assets were owned by Dana White or held for her benefit. Although there is substantial evidence that appellant as trustee misapplied more than $200,000 of the family trust corpus in question, the evidence is legally insufficient to show that $200,000 of trust assets that were misapplied were owned by Dana White or held for her benefit. At most, slightly over $100,000 of trust assets were owned by Dana White or held for her benefit. The jury charge did not include a lesser offense. We reverse and enter a judgment of acquittal.

Standard of Review

In order to determine if the evidence is legally sufficient, the appellate court reviews all of the evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Laster v. State*, 275 S.W.3d 512, 517-18 (Tex.Crim. App.2009); *Jackson v. State*, 17 S.W.3d 664, 667 (Tex.Crim.App.2000). To determine if the evidence is factually sufficient, the appellate court reviews all of the evidence in a neutral light. *Laster*, 275 S.W.3d at 519; *Watson v. State*, 204 S.W.3d 404, 414 (Tex.Crim. App.2006); *Johnson v. State*, 23 S.W.3d 1, 10-11 (Tex.Crim.App.2000); *Cain v. State*, 958 S.W.2d 404, 407-08 (Tex.Crim.App.1997); *Clewis v. State*, 922 S.W.2d 126, 129 (Tex.Crim.App.1996). Then, the reviewing court determines whether the evidence supporting the verdict is so weak that the verdict is clearly wrong and manifestly unjust or whether the verdict is against the great weight and preponderance of the conflicting evidence. *Watson*, 204 S.W.3d at 414-15; *Johnson*, 23 S.W.3d at 10-11.

The appellate court reviews the factfinder's weighing of the evidence and cannot substitute its judgment for that of the factfinder. *Cain*, 958 S.W.2d at 407; *Clewis*, 922 S.W.2d at 133. Due deference must be given to the factfinder's determination, particularly concerning the weight and credibility of the evidence. *Johnson*, 23 S.W.3d at 9; *Jones v. State*,

944 S.W.2d 642 (Tex.Crim.App.1996). The jury, as the finder of fact, is the sole judge of the weight and credibility of the witnesses' testimony. TEX.CODE CRIM. PROC. ANN. art. 36.13 (Vernon 2007), art. 38.04 (Vernon 1979). This court has the authority to disagree with the factfinder's determination "only when the record clearly indicates such a step is necessary to arrest the occurrence of a manifest injustice." *Johnson*, 23 S.W.3d at 9.

Background Facts

Alfred P. Douglass died in March 2001, leaving a substantial estate. The community estate was valued at $1,723,991.63; Alfred's one-half was valued at $861,995.82. He was survived by his wife, Parnice W. Douglass, and his two children, Jackie Douglass and appellant. Alfred's will established the Alfred P. Douglass Trust, which utilized the Federal Unified Gift and Estate Tax Credit to exclude the amount placed in the marital trust from estate taxes. Parnice was the primary beneficiary; and, upon her death, the trust assets were to be distributed to Alfred's living descendants per stirpes. The trust account was funded with $673,219 in an account at Edward D. Jones & Co. (Edward Jones) in Sweetwater. The initial co-trustees were Parnice and Jon Bergstrom of Edward Jones. The trust produced an income of approximately $33,000 in 2002.

Jon Bergstrom of Edward Jones, Alfred's financial adviser for eighteen years, testified that the

purpose of the trust was to take advantage of the unified tax credit under the inheritance tax exemption.[1] Bergstrom invested the trust assets in tax-free municipal bonds because Alfred did not want the trust to invest in risky assets or to pay taxes on its income. According to Bergstrom, Alfred wanted the trust assets to remain invested and increase until both he and his wife had died.

After Alfred's death, Jackie Douglass became the primary caretaker of Parnice. He lived in the same town as Parnice and farmed his own land and land owned by Parnice. Jackie died unexpectedly in October 2002. He was survived by his three children: Dana White, Cody Douglass, and Michael Douglass. Appellant and Parnice served as administrators of Jackie's estate.

Appellant became the caretaker of Parnice after Jackie's death. In October 2002, the month that Jackie died, Parnice executed a statutory durable power of attorney naming appellant as her attorney-in-fact. The power of attorney gave appellant the power to handle all of Parnice's financial affairs. In the summer of 2004, appellant and her husband moved into Parnice's home and became her full-time

---

[1] Although Bergstrom referred to it as the inheritance tax exemption, he was referring to the federal estate tax exemptions and credits that are part of the Unified Gift and Estate Tax system. *See* 26 U.S.C. §§ 2001(a), 2010 (unified credit against estate tax), and 2056 (marital exemption). The credit at that time was $675,000.

caretakers. Jon Bergstrom was asked to resign as co-trustee of the trust, and Parnice appointed appellant as the successor co-trustee. At the time appellant was appointed co-trustee in May 2004, the balance in the trust account was $620,065. Within three years, appellant had reduced the trust account to $12,000.

It had taken Alfred and Parnice a lifetime to build an estate of $1,723,991. At the time of Alfred's death, Parnice had inherited $188,776 (Alfred's one-half minus the $673,219 placed in the trust) from Alfred and her one-half of the community estate was valued at $861,995. Thus, in addition to being the primary beneficiary of the trust, Parnice had assets of $1,050,772 when Alfred died in March 2001. When Parnice died in March 2006, five years after Alfred died, appellant had reduced Parnice's assets from $1,050,772 to an estate of $603,879.87. All of Parnice's investments in bonds and cash had disappeared; the land owned by Parnice at her death amounted to $592,000 of the $603,879 according to Parnice's probate inventory filed by appellant. At the time of Parnice's death, the trust had assets of approximately $376,584, but appellant as trustee did not distribute one-half of the assets to Jackie's children as required by the trust provisions. Appellant ultimately distributed all of the remaining trust assets to herself. By December 2006, the trust only had a balance of $124,435.61. The Edward Jones statement for January 1-26, 2007, reflects a trust balance of zero. Jason Blake of Edward Jones testified that there was only $12,000 in the trust account

when Edward Jones received a *lis pendens* freezing the account.

The trust provided that the co-trustees could distribute income and principal from the trust to Parnice:

> [A]s are necessary, when added to the funds reasonably available to her from all other sources known to [the] Trustee to provide for her health, support, maintenance and education, taking into consideration her age, education and station in life.

The co-trustees, in their discretion, could also make distributions from the trust to any of Alfred Douglass's descendants:

> [A]s are necessary, when added to the funds reasonably available to [them] from all other sources known to [the] Trustee, to provide for their health, support, maintenance and education, taking into consideration their age, education and station in life.

Parnice had significant funds reasonably available to her from sources other than the trust. At about the same time the trust was set up, Parnice also had a separate account with Edward Jones in the amount of $293,336. Parnice owned approximately 1,100 acres, and she was earning income from a lease of the land to Terry Lee Coker. Parnice also had income from Social Security, income from her IRA account, and a separate banking account at Hamlin National Bank that had an average balance of between $75,000 to

$200,000 during Alfred's lifetime. At the time of her death in March 2006, Parnice had a balance of $217,000 in that account, although we note that appellant did not list that amount in the probate inventory she filed on behalf of Parnice's estate.

Shortly after Jackie's death, appellant and Parnice opened a joint checking account numbered 791-07863 with right of survivorship at Edward Jones. The joint checking account was initially funded with money from another account owned by Parnice; subsequently, $5,000 was withdrawn from the trust and put in the joint account. Bergstrom had concerns because the joint tenancy account could be used to avoid the equal division provisions (one-half to Jackie and his descendants and one-half to appellant and her descendants) of the trust.

Bergstrom's concerns were justified. In August 2003, $60,000 was withdrawn from the trust account (apparently by Parnice as co-trustee) and put into the joint account. Appellant testified that the $60,000 was to help appellant and her husband and that the earlier $5,000 was a loan to Jackie. Bergstrom resigned as co-trustee in May 2004, and Parnice appointed appellant as co-trustee. On numerous occasions, appellant then transferred money from the trust to her own account, her joint account with Parnice, or to Parnice's account. And appellant had a power of attorney from Parnice that allowed her to withdraw funds from Parnice's separate accounts. Beginning with the first $5,000 withdrawal from the trust on December 18, 2002, a total amount of

$329,140.20 was withdrawn from the trust and placed in the joint account by April 2006.

Expenditures utilizing trust funds included a 1998 GMC Yukon SUV titled in appellant's name, many pieces of farm equipment, several farm tractors, several trailers, trucks, jeeps, an old Cadillac, a sand buggy, a Caterpillar bulldozer, a trailer to carry the bulldozer, an asphalt spreader, a Case backhoe, and many other items. None of the items were ever titled in the name of the trust.

Appellant acknowledged that the trust was funded with $673,219 when Alfred died and that, by May 2002, the trust account had increased to $687,000. She also acknowledged that the titles to the farm equipment, tractors, trailers, trucks, jeeps, bulldozer, backhoe, and other items were usually put in her name. On February 17, 2006, a month before Parnice died, trust funds were used to purchase a $25,000 motor home from Fun Time RV. Appellant said that she sold the motor home after Parnice's death and kept the money. Two days before Parnice died, appellant used trust funds to purchase a classic Thunderbird for $25,000. Appellant sold it after Parnice's death, realizing a $9,000 profit. Appellant kept the proceeds.

There were a number of checks, funded from trust funds, in the amount of $3,000 payable to the Office of the Standing Trust in connection with appellant's bankruptcy restitution payments. Appellant explained that, at the time of Parnice's death in

March 2006, appellant was still paying $3,000 a month to her creditors in bankruptcy.

Appellant testified that the construction business she owned with her husband had filed for bankruptcy in 2002. Although appellant testified that all of the trucks, jeeps, trailers, a dozer, and a backhoe were purchased for the farm, a more reasonable inference is that appellant purchased them with trust funds for her construction business or for the benefit of her and her husband, not for the benefit of Parnice. Appellant testified that Parnice wanted to get back into farming after Alfred died in 2001. Both Alfred and Parnice were eighty-one years of age in 2001. They had quit farming years before. Terry Lee Coker, who lives in Roby near Sylvester, testified that Alfred had turned over the farming to him. Coker worked the land on a crop-sharing basis, paying Alfred and Parnice 25% of the crop proceeds. If Coker did not make a crop, he would pay them 25% of the crop insurance. He paid Parnice's estate 25% of the crop insurance that he collected in the year that Parnice died. There is no evidence that appellant or her husband knew anything about farming. Farming, a risky enterprise, was something that appellant and her husband wanted to try. It was not for the benefit of Parnice or "to provide for her health, support, maintenance and education, taking into consideration her age, education and station in life."

The jury returned a unanimous verdict that, as a fiduciary, appellant had intentionally, knowingly, or

recklessly misapplied property of more than $200,000 owned by Dana White or held for her benefit.

Analysis

Section 32.45 of the Texas Penal Code defines the offense of misapplication of fiduciary property, providing in pertinent part:

> A person commits an offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.

Section 32.45(b).

When a valid trust is created, the beneficiaries become the owners of the equitable or beneficial title to the trust property and are considered the real owners. *Faulkner v. Bost*, 137 S.W.3d 254, 258 (Tex.App.-Tyler 2004, no pet.); *City of Mesquite v. Malouf*, 553 S.W.2d 639, 644 (Tex.Civ.App.-Texarkana 1977, writ ref'd n.r.e.). Pursuant to the Texas Trust Code, one of the methods a trust may be created is by "a property owner's testamentary transfer to another person as trustee for a third person." TEX. PROP. CODE ANN. § 112.001(3) (Vernon 2007). The trustee is merely the depository of the bare legal title. *Faulkner*, 137 S.W.3d at 258-59. The trustee is vested with legal title and right of possession of the trust property but holds it for the benefit of the beneficiaries, who are

vested with equitable title to the trust property. *Id.* at 259; *Jameson v. Bain*, 693 S.W.2d 676, 680 (Tex.App.-San Antonio 1985, no writ). As a beneficiary, Dana White was one of the real owners of the trust assets.

As trustee of the trust, appellant owed a fiduciary duty to the trust and its beneficiaries. Appellant also served as a fiduciary to Parnice in handling all of Parnice's financial affairs under the power of attorney executed by Parnice. The record amply supports the jury's conclusion that appellant engaged in the misapplication of the trust assets and used them for appellant's own benefit. *See Tyler v. State*, 137 S.W.3d 261 (Tex.App.-Houston [1st Dist.] 2004, no pet.). Although the question was not before the jury, there is also sufficient evidence in the record for the jury to have concluded that appellant also engaged in the misapplication of Parnice's assets. At the time of Parnice's death in March 2006, the trust still had assets of $376,584. Appellant distributed all of those assets to herself instead of distributing one-half to Jackie's children immediately after Parnice's death when the trust terminated. After Alfred died in March 2001, Parnice had assets of $1,050,772. When Parnice died five years later, appellant had reduced Parnice's assets to $603,879.87 according to the estate inventory filed by appellant.

Shortly before Parnice died, appellant contacted an attorney, David DeFoore, to prepare a new will for Parnice that would leave all of Parnice's estate to appellant. DeFoore testified that he prepared the will at appellant's request but that he never spoke with

Parnice. Tom Reese Jr. testified that he had prepared similar wills for Alfred and Parnice; Parnice's earlier will split her estate between Jackie and appellant (or their respective descendants if one should die before Parnice). By having Parnice execute a new will in Parnice's final days, appellant made certain that Jackie's children would not participate in any of the assets that Alfred and Parnice had accumulated.

Alfred and Parnice had executed their wills at the same time in February 2000. Bergstrom of Edward Jones testified that he had been involved in discussions with Alfred and Parnice that led them to consider a trust in their wills. Their goal was to take advantage of the unified estate tax credit to pass property free of estate taxes to their descendants. They also wanted the trust to be set up to avoid income taxes. Bergstrom said that Alfred had his Edward Jones account invested only in tax exempt municipal bonds and that he wanted Bergstrom to invest the trust assets the same way. According to Bergstrom, Alfred wanted the trust to reinvest all income and then be terminated at the death of himself and Parnice.

Appellant argues that the State did not prove that she intentionally, knowingly, or recklessly misapplied the property because she did not know the terms of the trust. Yet she also argues that she did not violate the terms of the trust. Appellant, as a trustee, had a duty to administer the trust in good faith according to its terms. *See* TEX. PROP.CODE ANN. § 13.051 (Vernon 2007). Before expenditures

from the trust were to be made for Parnice's benefit, the trustees were to take into consideration her other sources of income and her age and station in life. Parnice had ample sources of income that should have been considered, and she had always lived modestly. The record reflects that appellant spent a lot of the money from the trust and from Parnice's accounts to directly benefit herself and her husband. There is sufficient evidence in the record for the jury's finding that appellant intentionally, knowingly, and recklessly misapplied property of the trust that she held as fiduciary in a manner that involved substantial risk of loss to the owner of the property and to beneficiaries of the trust.

Appellant had Parnice execute a new will during Parnice's final days; obviously, appellant knew the terms of Parnice's earlier will. Both wills contained the same trust provisions according to the attorney, Reese, who prepared the wills. The jury placed little or no credibility on appellant's testimony that she did not know the provisions of the trust. Appellant's first and second issues are overruled.

Appellant's third issue contends that the State's evidence was legally insufficient to prove appellant committed a first degree felony because there is insufficient proof that over $200,000 in trust assets were owned by Dana White or held for her benefit. Had the indictment listed Parnice, Dana White, Cody Douglass, and Michael Douglass as owners of the equitable or beneficial title to the trust property and as persons "for whose benefit the property was held,"

this would be an easy case. However, the indictment only listed Dana White as "the owner of said property, and the person for whose benefit the property was held" by appellant as a fiduciary. We find that the record is legally insufficient to support the verdict that appellant misapplied over $200,000 of trust assets owned by Dana White or that were held for the benefit of Dana White. It appears that at most only slightly over $100,000 of trust assets were owned by Dana White or held for her benefit. And the jury charge did not include a lesser included offense.

The State argues that Dana White had a power of attorney from both of her brothers, Cody Douglass and Michael Douglass; therefore, Dana White had a greater right of possession to one-half of the trust than appellant did. Analyzing "ownership" in terms of right of possession does not help the State. Cody Douglass executed his durable power of attorney on June 23, 2006, and Michael Douglass executed his durable power of attorney on April 5, 2006. The powers of attorney authorized Dana White to act as their agent in pursuing their claims involving their father's estate against appellant. The terms of the trust determined who the owners were or for whose benefit the trust assets were held, not the powers of attorney. Under the terms of the trust, none of Jackie's children had any right of possession to the trust assets until the trust terminated by its terms on the death of Parnice in March 2006. At that time, the trust had assets of $376,584, one-half of which would be $188,292. Appellant clearly misapplied the $188,292

by distributing that amount to herself, but the indictment accused her of misapplying over $200,000, and Dana White was entitled to only a third of the $188,292 at the date of termination.

The State contends that the jury was entitled to look at appellant's actions from the time she became a co-trustee. We agree, but we still face the problem of whether $200,000 in trust assets were owned by Dana White or held for her benefit. Section 32.45 of the Texas Penal Code provides that the victim of a fiduciary's misapplication of property may be either "the owner of the property" or "a person for whose benefit the property is held." Under *Faulkner*, 137 S.W.3d at 258, all of the beneficiaries of the trust were the real owners and persons for whose benefit the trust property was held. When appellant became a trustee in May 2004, the trust asset balance was $620,065. Even ignoring Parnice as an owner and primary beneficiary of the trust, one-half of $620,065 is $310,032. And only one-third of that amount – $103,344 – could reasonably be said to be owned by, or held for the benefit of, Dana White; the other two-thirds would have been for the benefit of her brothers.

The indictment charged appellant with a first degree felony under Section 32.45. The State's evidence was legally insufficient to show that misapplied trust assets owned by Dana White or held for her benefit amounted to $200,000 or more. Appellant's third issue is sustained. We need not reach appellant's fourth issue.

This Court's Ruling

The judgment of the trial court is reversed, and a judgment of acquittal is rendered.

FILE COPY

OFFICIAL NOTICE FROM COURT
OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

11/4/2015 **COA No. 11-13-00114-CR**
BOWEN, DEBORAH Tr. Ct. No. 3313 PD-0798-15

On this day, the Appellant's petition for discretionary review has been refused.

Abel Acosta, Clerk

STAN BROWN
ATTORNEY AT LAW
P. O. BOX 3122
ABILENE, TX 79604
* DELIVERED VIA E-MAIL *

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

12/16/2015
BOWEN, DEBORAH Tr. Ct. No. 3313 PD-0798-15

On this day, the Appellant's motion for rehearing has been denied.

Abel Acosta, Clerk

ANGELA MOORE
310 S. ST. MARY'S STREET
SUITE 1830
SAN ANTONIO, TX 78205
* DELIVERED VIA E-MAIL *