

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 290TH JUDICIAL DISTRICT
JOE SMITH) BEXAR COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves that the indictment filed in this case be set aside by virtue of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I §§ 10 and 19 of the Texas Constitution, and Articles 1.05, 21.01, 21.02, 21.03, 21.04, and 21.11 of the Texas Code of Criminal Procedure for the following reasons:

I.

Count I, Paragraph A of the indictment is defective because:

1. it alleges that the complainant was a “disabled individual,” even though it does not explain which of the various statutory definitions of that phrase provided by § 22.04(c)(3) of the Texas Penal Code that the state intends to rely on. “[I]t is clear that even though an act or omission by a defendant is statutorily defined, if that definition provides for more than one manner or means to commit that act or omission, then upon timely request, the state must allege the particular manner or means it seeks to establish.” *Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1981); *see also Geter v. State*, 779 S.W.2d 403, 406 (Tex. Crim. App. 1989);
2. it impermissibly “bootstraps” the second degree felony offense of sexual assault to the first degree offense of aggravated sexual assault by apparently twice using the same feature – the complainant’s “mental disease or defect;”
3. it does not allege the manner and means whereby defendant caused the complainant’s sexual organ to contact or be penetrated by the sexual organ of the defendant. *Cf. Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*,

689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979)(indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal);

4. it alleges more than one offense – namely, that the defendant caused the female sexual organ of the complainant “to contact *or* be penetrated by the sexual organ of the defendant” – in a single paragraph of the indictment, in violation of article 21.24 of the Texas Code of Criminal Procedure. In addition to violating article 21.24, the manner in which the state has pleaded these offenses will certainly make it difficult, if not impossible, to instruct the jury in such a way as to insure that its verdicts are unanimous, as required by Article V, § 13 of the Texas Constitution and article 36.29(a) of the Texas Code of Criminal Procedure;
5. it alleges more than one offense – namely, that the complainant was “incapable either of appraising the nature of the act *or* resisting it” – in a single paragraph of the indictment, in violation of article 21.24 of the Texas Code of Criminal Procedure;

II.

Count I, Paragraph B of the indictment is defective because:

1. it alleges that the complainant was a “disabled individual,” even though it does not explain which of the various statutory definitions of that phrase provided by § 22.04(c)(3) of the Texas Penal Code that the state intends to rely on. “[I]t is clear that even though an act or omission by a defendant is statutorily defined, if that definition provides for more than one manner or means to commit that act or omission, then upon timely request, the state must allege the particular manner or means it seeks to establish.” *Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1981); *see also Geter v. State*, 779 S.W.2d 403, 406 (Tex. Crim. App. 1989);
2. it does not allege the manner and means whereby defendant caused the complainant’s sexual organ to contact or be penetrated by the sexual organ of the defendant. *Cf. Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege

manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979)(indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal);

3. it alleges more than one offense – namely, that the defendant caused the female sexual organ of the complainant “to contact *or* be penetrated by the sexual organ of the defendant” – in a single paragraph of the indictment, in violation of article 21.24 of the Texas Code of Criminal Procedure. In addition to violating article 21.24, the manner in which the state has pleaded these offenses will certainly make it difficult, if not impossible, to instruct the jury in such a way as to insure that its verdicts are unanimous, as required by Article V, § 13 of the Texas Constitution and article 36.29(a) of the Texas Code of Criminal Procedure;

III.

Count II, Paragraph A of the indictment is defective because:

1. it alleges that the complainant was a “disabled individual,” even though it does not explain which of the various statutory definitions of that phrase provided by § 22.04(c)(3) of the Texas Penal Code that the state intends to rely on. “[I]t is clear that even though an act or omission by a defendant is statutorily defined, if that definition provides for more than one manner or means to commit that act or omission, then upon timely request, the state must allege the particular manner or means it seeks to establish.” *Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1981); *see also Geter v. State*, 779 S.W.2d 403, 406 (Tex. Crim. App. 1989);
2. it impermissibly “bootstraps” the second degree felony offense of sexual assault to the first degree offense of aggravated sexual assault by apparently twice using the same feature – the complainant’s “mental disease or defect;”
3. it does not allege the manner and means whereby defendant caused the complainant’s sexual organ to contact or be penetrated by the sexual organ of the defendant. *Cf. Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W.

2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979)(indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal);

4. it alleges more than one offense – namely, that the defendant caused the female sexual organ of the complainant “to contact *or* be penetrated by the sexual organ of the defendant” – in a single paragraph of the indictment, in violation of article 21.24 of the Texas Code of Criminal Procedure. In addition to violating article 21.24, the manner in which the state has pleaded these offenses will certainly make it difficult, if not impossible, to instruct the jury in such a way as to insure that its verdicts are unanimous, as required by Article V, § 13 of the Texas Constitution and article 36.29(a) of the Texas Code of Criminal Procedure;
5. it alleges more than one offense – namely, that the complainant was “incapable either of appraising the nature of the act *or* resisting it” – in a single paragraph of the indictment, in violation of article 21.24 of the Texas Code of Criminal Procedure;

IV.

Count II, Paragraph B of the indictment is defective because:

1. it alleges that the complainant was a “disabled individual,” even though it does not explain which of the various statutory definitions of that phrase provided by § 22.04(c)(3) of the Texas Penal Code that the state intends to rely on. “[I]t is clear that even though an act or omission by a defendant is statutorily defined, if that definition provides for more than one manner or means to commit that act or omission, then upon timely request, the state must allege the particular manner or means it seeks to establish.” *Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1981); *see also Geter v. State*, 779 S.W.2d 403, 406 (Tex. Crim. App. 1989);
2. it does not allege the manner and means whereby defendant caused the complainant’s sexual organ to contact or be penetrated by the sexual organ of the defendant. *Cf. Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W.

2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979)(indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal);

3. it alleges more than one offense – namely, that the defendant caused the female sexual organ of the complainant “to contact *or* be penetrated by the sexual organ of the defendant” – in a single paragraph of the indictment, in violation of article 21.24 of the Texas Code of Criminal Procedure. In addition to violating article 21.24, the manner in which the state has pleaded these offenses will certainly make it difficult, if not impossible, to instruct the jury in such a way as to insure that its verdicts are unanimous, as required by Article V, § 13 of the Texas Constitution and article 36.29(a) of the Texas Code of Criminal Procedure;

V.

Because of these defects:

1. The indictment does not accuse defendant of an "act or omission which, by law, is declared to be an offense", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.01.
2. The offense is not "set forth in plain and intelligible words", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.02(7).
3. The indictment does not state "[e]verything . . . which is necessary to be proved", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.03.
4. The indictment does not possess "[t]he certainty . . . such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense," in violation of TEX. CODE CRIM. PROC. ANN. art. 21.04 and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I §§ 10 and 19 of the Texas Constitution.
5. The indictment does not "charge[] the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant and with what degree of certainty that will give the defendant notice of the particular offense with

which he is charged, and enable the court, on conviction, to pronounce the proper judgment . . ." in violation of TEX. CODE CRIM. PROC. ANN. art. 21.11 and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, §§ 10 and 19 of the Texas Constitution.

WHEREFORE, premises considered, the defendant prays that the Court set aside the indictment in the above-numbered and entitled cause.

Respectfully submitted:

MARK STEVENS
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Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of defendant's Motion To Set Aside The Indictment has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 21st day of February, 2018.

MARK STEVENS

ORDER

On this the _____ day of _____, 2018, came on to be considered Defendant's Motion to Set Aside the Indictment, and said Motion is hereby

(GRANTED) (DENIED)

JUDGE PRESIDING