

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 187th 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 for the reasons set forth below:

I.

Count I of the indictment alleges, in pertinent part, that Mr. Smith did “recklessly cause bodily injury to Mary Jones, a member of the defendant’s Family and Household, by striking Mary Jones’s head against a garage door track. . . .” This count, however, does not allege with reasonable certainty the act or acts relied upon by the state to show that Mr. Smith acted recklessly. There is nothing “inherently reckless” about striking another’s head against a garage door track, so the trier of fact cannot infer recklessness from the acts alleged in the indictment. *Smith v. State*, 309 S.W.3d 10, 16 (Tex. Crim. App. 2010); *Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988); see TEX. CODE CRIM. PROC. ANN. art. 21.15.

II.

Count I of the indictment goes on to allege that Mr. Smith did “intentionally,

knowingly or recklessly cause bodily injury to Susan Johnson . . . by striking Susan Johnson with the hand of the defendant. . . .” The indictment, however, does not allege with reasonable certainty the act or acts relied upon by the state to show that Mr. Smith acted recklessly. There is nothing “inherently reckless” about striking another with one’s hand, so the trier of fact cannot infer recklessness from the acts alleged in the indictment. *Smith v. State*, 309 S.W.3d 10, 16 (Tex. Crim. App. 2010); *Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988); see TEX. CODE CRIM. PROC. ANN. art. 21.15.

Counsel acknowledges the existence of contrary authority. *E.g.*, *State v. Castorena*, 486 S.W.3d 630, 635 (Tex. App.–San Antonio 2016, no pet.) (“we hold that because the State, in addition to alleging Castorena acted recklessly, alleged Castorena acted intentionally or knowingly, it was not required under Article 21.15 to allege the act or acts relied upon to constitute recklessness”). We respectfully disagree with this holding, for two reasons. First, *Castorena* relies on *Crawford v. State*, 646 S.W.2d 936 (Tex.Crim.App.1983). But as the court conceded, “*Crawford* did not reference Article 21.15”. *State v. Castorena*, 486 S.W. 3d at 635. Second, even assuming *Crawford* is persuasive authority, it, and cases like *Castorena* which rely upon it, were incorrectly decided. Article 21.15 is plain on its face: “*Whenever* recklessness or criminal negligence enters into or is a part or element of any offense, or it is charged that the accused acted recklessly or with criminal negligence in the commission of an offense, the complaint, information, or indictment in order to be sufficient in any such case must allege, with

reasonable certainty, the act or acts relied upon to constitute recklessness” The exception that cases like *Castorena* attempt to carve out is irreconcilable with the statute’s undeniably plain language. The *Castorena* exception cannot be permitted to eviscerate the Legislature’s mandate – unambiguously set out in article 21.15 – that “*whenever*” the state alleges recklessness, its charging instrument must set out the underlying acts “with reasonable certainty,” and this is true regardless of whether other culpable mental states are also alleged. This indictment must be set aside because it violates article 21.15.

III.

Alternatively, even if this Court chooses not to set aside the entire indictment, it “should grant lesser relief, such as striking or nullifying the allegation of recklessness.” regarding complainant Johnson. *See* George Dix and John Schmolesky, 42 Tex. Prac., Criminal Practice And Procedure § 25:99 (3d ed. Thomson).

IV.

The allegation in Count I concerning complainant Johnson is internally inconsistent. Specifically, this Count alleges, on the one hand, that Mr. Smith acted "intentionally and knowingly," and on the other, that he acted "recklessly." It is impossible for defendant to have done this same act intentionally, knowingly *and* recklessly. If defendant acted recklessly, then he did not do so intentionally or knowingly, and vice versa. The indictment therefore contains matter that is a legal

defense to the prosecution, and should be set aside pursuant to article 27.08(3) of the Texas Code of Criminal Procedure. As written, the indictment is so inconsistent, vague, uncertain, and broad, that it fails to give a person of ordinary intelligence fair notice of what he must defend against. Furthermore, judgment on this indictment would not bar a future prosecution for the same alleged conduct.

V.

TEX. PENAL CODE ANN. §25.11(b) purports to authorize a conviction for continuous violence against the family without requiring the jury “to agree unanimously on the specific conduct in which the defendant engaged that constituted an offense under Section 22.01(a)(1) against the person or persons described by Subsection (a) or the exact date when that conduct occurred.” A jury instruction to this effect would authorize Mr. Smith’s conviction on less than a unanimous verdict, and would violate the Sixth and Fourteenth Amendments to the United States Constitution, article 36.29(a) of the Texas Code of Criminal Procedure, and Article V, § 13 of the Texas Constitution.

VI.

Count I alleges that Mary Jones is a member of Mr. Smith’s family **and** household. and Counts I and II allege that Ms. Johnson is a member of his family, household, **or** a person with whom Mr. Smith has or has had a dating relationship. Each of these terms is defined differently in §§ 71.0021(b), 71.003, and 71.005 of the Texas Family Code. If the State believes that all of the characterizations apply to each complainant, it should

have to prove them as alleged. If it is uncertain which (if any) characterizations apply, it should allege them separately, in separate paragraphs, as provided by article 21.24(b) of the Texas Code of Criminal Procedure. Otherwise there will be no way to ensure the unanimous verdict to which Mr. Smith is entitled to under the Sixth and Fourteenth Amendments to the United States Constitution, article 36.29(a) of the Texas Code of Criminal Procedure, and Article V, § 13 of the Texas Constitution.

VII.

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:

/s/ 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 Bexar County District Attorney's Office, 101 W. Nueva St., San Antonio, Texas, on May 12, 2020.

/s/ Mark Stevens
MARK STEVENS

2020-CR-0000

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ORDER

On this the _____ day of _____, 2020, came on to be considered Defendant's Motion to Set Aside the Indictment, and said Motion is hereby (GRANTED) (DENIED).

JUDGE PRESIDING