

NO. 000000

STATE OF TEXAS) IN THE COUNTY COURT
VS.) AT LAW NUMBER 13
JO SMITH) BEXAR COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INFORMATION

TO THE HONORABLE JUDGE OF SAID COURT:

Jo Smith moves that the information filed in this case be set aside for the reasons set forth below:

I.

The information alleges, in pertinent part, that Ms. Smith did “intentionally, knowingly, and recklessly cause bodily injury to [the complainant] by scratching the complainant with the hand of Defendant and grabbing the complainant with the hand of the complainant.” ” **[I don’t have the information. Does it say “hand of the complainant,” or “hand of the Defendant”]** This information is defective because it fails to allege recklessness with the “reasonable certainty,” as expressly mandated by article 21.15 of the Texas Code of Criminal Procedure.

Two cases from the Texas Court of Criminal Appeals are key. The information in *Smith v. State*, alleged that defendant had committed indecent exposure and was reckless about whether another was present, to wit: “the defendant exposed his penis and masturbated.” The Court of Criminal Appeals held that the information should have been quashed under article 21.15 “because there is nothing *inherently reckless* about either

exposing oneself or masturbating.” 309 S.W.3d 10, 12 (Tex. Crim. App. 2010)(emphasis supplied); *see also Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988).

Similarly, an information alleging the reckless discharge of a firearm within a city, “by pulling the trigger on a firearm which contained ammunition and was operable” was properly quashed under article 21.15 because “the State must allege something about the setting or circumstances of discharging a firearm within city limits that demonstrates disregard of a known and unjustifiable risk.” *State v. Rodriguez*, 339 S.W.3d 680, 681 (Tex. Crim. App. 2011). The Court elaborated on this requirement:

For example, the State might allege “by shooting into the ground in a crowd of people,” or “by shooting a gun in the air in a residential district,” or “by shooting at beer bottles in his backyard in a residential district,” or “by shooting a gun on the grounds of an elementary school,” or “by shooting at a stop sign in a business district,” or “by shooting into the bushes at a city park. *These are the sorts of actions that might entail a known and unjustifiable risk of harm or injury to others, risks that the ordinary person in the defendant's shoes probably would not take.*”

Id. at 683-84(emphasis supplied).

And so it is with the information in our case. There is nothing “inherently reckless” about “scratching” or “grabbing” another. Nor are either of these acts “the sorts of actions that might entail a known and unjustifiable risk of harm or injury to others, risks that the ordinary person in the defendant’s shoes probably would not take.” This information must be set aside because it fails to comply with article 21.15 of the Texas Code of Criminal Procedure.

II.

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 information 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 information must be set aside because it violates article 21.15.

III.

Alternatively, even if this Court chooses not to set aside the entire information, it “should

grant lesser relief, such as striking or nullifying the allegation of recklessness.” *See* George Dix and John Schmolesky, 42 Tex. Prac., Criminal Practice And Procedure § 25:99 (3d ed. Thomson).

IV.

The allegation is internally inconsistent. Specifically, the information alleges, on the one hand, that Ms. Smith acted "intentionally and knowingly," and on the other, that she 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 information 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 information 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 information would not bar a future prosecution for the same alleged conduct.

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

/s/ Mark Stevens

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Attorney for the Defendant

CERTIFICATE OF SERVICE

I certify that a copy of defendant's Motion To Set Aside The Information has been delivered to the Bexar County District Attorney's Office, 101 W. Nueva St., San Antonio, Texas, on October , 2022.

/s/ Mark Stevens

MARK STEVENS

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ORDER

On this the _____ day of _____, 2019, came on to be considered
Defendant's Motion to Set Aside the Information, and said Motion is hereby

(GRANTED) (DENIED).

JUDGE PRESIDING