IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0061-16

KELVIN LYNN O'BRIEN, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIRST COURT OF APPEALS HARRIS COUNTY

YEARY, J., filed a dissenting opinion.

DISSENTING OPINION

I join Judge Walker's dissenting opinion. For the reasons he expresses, I believe the Court is mistaken to conclude that the predicate offenses that go to establishing guilt for the offense of engaging in organized criminal activity constitute mere manner and means of committing the offense, such that the jury need not agree on which offense (or offenses) the defendant committed. I write further only to add a few brief observations of my own.

First, I am concerned about the double jeopardy implications of the Court's holding today. We have recognized on many occasions "that double-jeopardy and jury-unanimity

issues constitute closely intertwined strands of our jurisprudence," *Gonzales v. State*, 304 S.W.3d 838, 848 & n.37 (Tex. Crim. App. 2010) (citations and internal quotation marks omitted), and the way we resolve one issue typically dictates how we will resolve the other. Consistent with the Court's holding today with respect to the jury-unanimity issue, I would expect it to resolve the double-jeopardy issue, when the time comes, in the following way: Once a defendant has been convicted or acquitted of the offense of organized criminal activity, he may never again be prosecuted for that offense based on any subsequently committed predicate offense as a member of the *same* combination he was convicted or acquitted of promoting in the first prosecution. In other words, for each combination, the State may pursue only one engaging-in-organized-criminal-activity prosecution, regardless of the number of additional predicate offenses the defendant may have committed (or may yet commit) with the requisite intent to establish, maintain, etc., that combination. I have my doubts that the Legislature contemplated such a limitation.

Second, I respectfully disagree with the Court's assertion that "the question of whether jury unanimity is required . . . in cases where the State alleges two predicate offenses of different degree" is not one that is presented in this case, such that resolving it "would be advisory." Majority Opinion at 37 n.89. Section 71.02 of the Penal Code plainly provides that the offense "is one category higher than the most serious" predicate offense committed. TEX. PENAL CODE § 71.02(b). I do not see how we can, with any consistency, declare that

predicate offenses are mere manner and means when choosing among them does not determine the grade of offense, *but that they are elemental when it does*. It seems to me that they are either elemental or they are not—period. I see no basis in the language of the statute to draw a distinction. Moreover, I do not see how we can declare that they are anything *but* elemental when—at least sometimes—they determine the level of the offense. *See Calton v. State*, 176 S.W.3d 231, 234 (Tex. Crim. App. 2005) (a statute that indicates that an offense "is a felony of the third degree if" certain facts are proven has plainly identified those facts as "elements"). And if the predicate offenses *are* elemental, then jury unanimity is required. *See Jourdan v. State*, 428 S.W.3d 86, 94 (Tex. Crim. App. 2014) ("Under state law, the jury must be unanimous in finding every constituent element of the charged offense in all criminal cases.") (citing *Pizzo v. State*, 235 S.W.3d 711, 714 (Tex. Crim. App. 2007)).

With these supplemental remarks, I join Judge Walker's dissent.

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