



# TIBA TEXAS INDEPENDENT BAR ASSOCIATION

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⚖ Vol. 19, No. 13, April 4, 2011

## TIBA's Case of the Week

Case Name: [Lavonne Byrd v. The State of Texas](#)

- OFFENSE: Theft
- COUNTY: Bexar
- COURT OF APPEALS: San Antonio 2009
- C/A CITATION: 319 S.W.3d 102
- C/A RESULT: Conviction Affirmed
- CCA. CASE No. PD-0738-10      DATE OF OPINION: March 30, 2011
- DISPOSITION: Court of Appeals Reversed
- OPINION: Cochran, J.      VOTE: 8-0
- TRIAL COURT: CCL 4; Hon. Sarah Garrahan
- LAWYERS: [Michael Robbins](#) (Defense); [Kevin Yeary](#) (State)

**Ed Note:** (Background Facts) At trial, the State called a loss prevention officer for Wal-Mart, where the theft had occurred. The officer watched Appellant as her two female cohorts scooped up items from different departments in the store. They then passed those items to Appellant to hide underneath a blanket covering a baby's car seat propped up in a shopping cart. Two Wal-Mart employees attempted to stop all three women after they left the store without paying for the items. When Appellant was stopped outside the store, she said "Here, you can have your stuff back," and she emptied out all of the merchandise that had been hidden in the car seat. The two other women fled. The total value of the forty-three items that were hidden underneath the blanket was \$306.61.

⚖ 541 **Sufficiency of the Evidence (Identification of the "Owner"):** Appellant was charged with misdemeanor theft for shoplifting. The information alleged that Appellant stole three pairs of pants and a DVD from "the owner, Mike Morales." Neither of the two employees involved were named "Mike Morales." The jury charge tracked the information, including the allegation that the owner of the property was "Mike Morales." The jury found Appellant guilty of theft, and the trial judge sentenced her one year probation. At no time during the trial did anyone ever refer to a "Mike Morales." And no witness ever made any connection between a "Mike Morales" and Wal-Mart or any of the property that Appellant shoplifted. A sharply divided en banc Court of Appeals held that the discrepancy between the alleged owner and the proof at trial was an immaterial variance and affirmed the conviction (see ⚖, [Vol. 17, No. 3](#); 01/26/2009).

**Holding:** Federal due process requires that the State prove, beyond a reasonable doubt, every element of the crime charged. A "variance" occurs whenever there is a discrepancy between the allegations in the indictment and the proof offered at trial. A conviction that contains a material variance that fails to give the defendant sufficient notice or would not bar a second prosecution for the same murder requires reversal, even when the

evidence is otherwise legally sufficient to support the conviction. Immaterial variances are to be disregarded in reviewing the sufficiency of the evidence. The gravamen of theft is in depriving the true owner of the use, benefit, enjoyment or value of his property, without his consent. Ownership and appropriation of property are both important. But the name of the owner is not a substantive element of the offense of theft. The existence of the specific owner is an element, but not his name. However, Article 21.08 of the Code of Criminal Procedure requires the State to allege the name of the owner of property in its charging instrument. Consequently, although the name of the owner is not a substantive element of theft, the State is required to prove, beyond a reasonable doubt, that the person (or entity) alleged in the indictment as the owner is the same person (or entity)-regardless of the name-as shown by the evidence. \* \* \* We need not address the issue of whether the State may re-prosecute under a different charging instrument.

**Sidebars:** ([David A. Schulman](#)) Without trying to claim that I'm psychic or know so much about this Court, I will say that I saw this coming. I was suspect of the Court of Appeals' opinion, which held more or less that the exact owner's name wasn't important. Given the "literally thousands of cases involving the sufficiency of evidence and 'special' owners, like Mike Morales in this case" and the holding in this case, it is clear that the owner's name is still important.