



# TIBA TEXAS INDEPENDENT BAR ASSOCIATION

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## TIBA's Case of the Week

Case Name: [Kevin Lavelle Kent v. The State of Texas](#)

- OFFENSE: Theft
- COUNTY: Harris
- C/A CASE No. 14-13-00375-CR
- DATE OF OPINION: August 28, 2014
- DISPOSITION: Conviction Reversed      OPINION: [McCally, J.](#)
- TRIAL COURT: 174th D/C
- LAWYERS: [James Pons](#) (Defense); [Eric Kugler](#) (State)

(Background Facts) Appellant was charged by complaint with theft of money in the aggregate of over \$200,000 from Barbara Allen, Tamara Allen, Larry Aniol, and Joann Aniol during a period of five years. The State presented evidence that the Aniels, husband and wife, wished to sell their commercial property, River Gardens, to Barbara Allen for \$19.5 million. Tamara Allen was Barbara's daughter and business partner. An intermediary put the Aniels and Barbara in touch with Appellant, who did business as "Orlando Mortgage Company," so Appellant could serve as a mortgage broker for Barbara and secure financing for the transaction. The State also presented evidence that Appellant convinced the Aniels and Barbara to transfer money to him by his use of various deceptions, including lies about his ability to secure financing, the involvement of his father, statements on his website about his past deals, and a purported \$50 million line of credit issued to Orlando Mortgage. Ultimately, the State adduced evidence that the Aniels and Barbara transferred over \$1.4 million to Appellant. The Aniels and Barbara believed their money was being held in escrow, but when the sale never closed, Appellant did not return the money to them.

⚖ **321.04 Court's Charge / Application Paragraph (Unanimity on Victim Identity):** The trial court's charge to the jury on guilt/innocence contained the following language in the application paragraph: "if you find . . . the defendant . . . did then and there unlawfully . . . appropriate . . . money, owned by Barbara Allen or Tamara Allen or Larry Aniol or Joann Aniol . . . and the total value of the property appropriated was over two hundred thousand dollars, then you will find the defendant guilty of theft of property of the total value of over two hundred thousand dollars . . ." Appellant objected to the jury charge because it did not require the jury to agree unanimously that the State proved beyond a reasonable doubt each element of the offense, arguing that the Court of Criminal Appeals "considers each theft an element of the offense in an aggregated case."

Appellant asked that each underlying theft be listed by date, amount of money, and the owners. The trial court overruled Appellant's objection. On appeal, Appellant contends the trial court submitted an erroneous jury charge with a disjunctive application paragraph that allowed for a non-unanimous verdict.

**Holding:** In an issue of first impression, we must decide whether statutory violations aggregated for purposes of Section 31.09 of the Penal Code, the aggregate theft statute, are elements that the jury must unanimously agree upon, or whether the violations are mere manner and means for which no unanimity is required. \*\*\* In light of the plain text of the statute and the purpose for which it was enacted, and consistent with the Court of Criminal Appeals' treatment of each of the underlying thefts as an "element" of aggregate theft, we conclude that the Legislature intended for jurors to unanimously agree beyond a reasonable doubt that a defendant committed the underlying statutory violations comprising a Section 31.09 offense. Accordingly, when an aggregate theft offense is predicated on Section 31.03, the jury must unanimously agree about what property was unlawfully appropriated and who owned it. \*\*\* After reviewing the entire record, including the jury charge, the contested issues and evidence, and the arguments of counsel, we "cannot determine that the jury was, in fact, unanimous in finding" the elements of aggravated theft. \*\*\* The evidence was contested, the State told the jury that unanimity was not required, the State urged for a conviction based on evidence of different underlying thefts (i.e., different elements of aggregate theft), and the jury charge's boilerplate language compounded the harm. \*\*\* The jury might well have reached a non-unanimous verdict concerning the gravamina of the underlying thefts -- in particular, from whom Appellant stole over \$200,000. Appellant suffered some actual, rather than theoretical, harm.