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One Fabulous Skyline

GIS Vol. 18, No. 12 - April 1, 2010

Case Name: **Mary S. Roberts v. The State of Texas**

- OFFENSE: Theft
- COUNTY: Bexar
- C/A CASE No. 04-09-0017-CR
- DATE OF OPINION: March 17, 2010
- DISPOSITION: Conviction Affirmed OPINION: [Marion, J.](#)
- TRIAL COURT: 226th D/C; Hon. Sid Harle
- LAWYERS: [Leslie Soliz](#) (Defense); [Enrico Valdez](#) (State)

Ed Note: (Background Facts - greatly abbreviated, please see opinion for detailed facts of this sordid tale of theft and extortion by members, unfortunately, of our profession): Appellant found e-mails indicating that her husband, Ted Roberts, was having an affair. After she later discovered Ted perusing an adult website, Appellant created her own profile on two adult websites indicating she was a professional woman, without enough sex in her life, was discreet, and enjoyed great sex. Appellant then met and had sexual relationships with four men, who are the complainants in this case. Ted found e-mails from Appellant to the complainants. Ted was an attorney and he drafted petitions under Rule 202, Tex.R.Civ.Pro., to take the depositions of each of the four men in anticipation of a lawsuit. Appellant, also an attorney, assisted Ted in drafting and typing the petitions. Appellant told each of the men that Ted had seen the e-mails between them and set up at least one of the meetings each complainant had with Ted. Ted presented the complainants with the petitions and negotiated "settlements" amounting to a total of \$115,000. Appellant was convicted on all four counts of theft. This opinion says that Ted was acquitted in an earlier, separate trial on three of the counts; however, Ted's appellate opinion states the jury convicted him of three counts. **Roberts v. State**, 278 S.W.3d 778 (Tex.App. - San Antonio 2008)(see **GIS, Vol. 16, No. 41**; 10/20/08).

GIS 541 Sufficiency of the Evidence / Theft-Fraud (Causation): Appellant asserts that the State failed to satisfy "but-for" causation as required by Penal Code § 6.04(a), which is satisfied either when the defendant's conduct is sufficient to have caused the harm regardless of a concurrent cause or when the defendant's conduct together with another cause is sufficient to have caused the harm. Appellant argues that her acts of typing revisions, delivering documents to one of the complainants, arranging a meeting with one of the men and signing some of the settlement documents are not sufficient to satisfy the "but-for" clause.

Holding: Appellant's argument is without merit because the State could establish Appellant's guilt as a party under Section 7.02, and Section 6.04(a) has nothing to do with a defendant's responsibility for the actions of another under Section 7.02.

G&S 541 Sufficiency of the Evidence / Theft-Fraud (Intent): Appellant asserts the evidence is legally insufficient to prove she acted with intent to promote or assist in the theft or of that she solicited, encouraged, directed, aided, or attempted to aid Ted to commit theft. Appellant points to testimony from her friends, neighbors, and acquaintances that she was a truthful and law-abiding person, and the testimony of one of the complainants that he did not believe Appellant intended to steal, the testimony of another of the State's witnesses that Appellant and her husband were not on the same page, and her own testimony that she would not do anything illegal.

Holding: Appellant's argument ignores the standard of review for legal sufficiency, which requires us to "review the evidence in the light most favorable to the jury's verdict and to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." The jury is the exclusive judge of the witnesses' credibility and the weight to give their testimony. The undisputed evidence is legally sufficient.

Sidebars: ([Gail Kikawa McConnell](#)) This holding requires an appellant to use the proper standard and pleadings—I like it! But as this is a criminal case and the pleadings are to be liberally construed, should the Court of Appeals address the obvious factual sufficiency argument?

G&S 541 Sufficiency of the Evidence / Theft-Fraud (Deception & Coercion): Appellant asserts that because she had no duty to disclose to each of the complainants that she had engaged in sexual relations with others and that Ted had drafted and presented Rule 202 Petitions to others, she did not engage in any deception. Appellant argues that the Penal Code definition of deception creates only a duty to disclose a lien, security interest, claim, or impediment when selling or otherwise transferring or encumbering property.

Holding: The definition contained in Penal Code § 31.01 plainly defines "deception." And by that definition, the State is not required to establish that the defendant had a duty to disclose. Appellant plainly created or confirmed by words or conduct a false impression, or failed to correct a false impression that was likely to affect the judgment of the complainants, who were each told they were to make payments to make Appellant's husband "whole."

G&S 530.06 Sufficiency of the Evidence / Affirmative Defense (Mistake of Law): Appellant asserts that her conviction should be reversed because she did not believe her conduct to be illegal. The trial court charged the jury with Appellant's affirmative defense of mistake of law in that Appellant should be acquitted if Appellant "reasonably believed the conduct charged did not constitute a crime and that [appellant] acted in reasonable reliance upon: a written interpretation of the law contained in an opinion of a court of record."

Holding: Appellant testified she was familiar with Rule 202 and believed the petitions were legitimate and had an expert testify to the same. However, the jury was free to believe that the use of the petitions amounted to a "shake down" for "hush money" and to reject Appellant's argument.

G&S 324 Court's Charge / Defensive Instructions: Appellant asserts the trial court erred in denying her requested instruction about the potential causes of action that may be filed in Texas, "It is the law in Texas that a spouse may, in some circumstances involving adultery, bring a cause of action for intentional infliction of emotional distress against the offending spouse and against a third party based on interference with the marriage relationship." Appellant argues that without this instruction, the jury was left with the impression that Ted had no reasonable basis to believe the Rule 202 petitions had any benefit other than to "shake down" the complainants.

Holding: The State did not dispute that Rule 202 petitions are legitimate pleadings to pursue legitimate claims. The trial court included Appellant's affirmative defense, which included that Appellant could have "acted in reasonable reliance upon: a written interpretation of the law contained in an opinion of a court record." This instruction enabled Appellant to argue that the petitions were used to "bring a cause of action on interference with the marriage relationship"—

an argument that Appellant did not make. Because the trial court's instructions adequately protected Appellant's rights, the trial court did not err in refusing this instruction.

¶ 60 Challenges to Prosecution / Constitutional Challenges: Appellant asserts the theft statute is unconstitutional as to her because Ted's legal secretary engaged in the same conduct and was not indicted.

Holding: "Arguing that another individual also could have been charged with the same offense does not establish how the statute is unconstitutional as to Appellant's conduct." We conclude that Appellant fails to show how the statute is unconstitutional as to her.

Ed Note: The Court of Appeals also found that acquittal of a principal does not prohibit conviction of an accomplice; that the jury instructions on the counts for which Ted were acquitted were properly presented to the jury, and that the statutory definitions for deception and the law of parties were properly given; that the indictment tracked the statute and was specific enough to enable Appellant to investigate and establish a defense. The court also followed its holding in Ted's case, *supra*, in finding that the theft statute is neither unconstitutionally vague or over broad on its face. Also, note that Appellant apparently was never licensed in Texas or at least does not appear on the Texas Bar website.