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TIBA TEXAS INDEPENDENT BAR ASSOCIATION

Post Office Box 783
Austin, Texas 78767
Tel. 512-354-7823
Fax: 512-532-6282

Web Site: www.texindbar.org



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Case Name: *John Chambers v. The State of Texas*

- **OFFENSE:** Falsifying a Governmental Record
 - **COUNTY:** Cameron
 - **COURT OF APPEALS:** Corpus Christi
 - **C/A CITATION:** 523 S.W.3d 681
 - **C/A RESULT:** Conviction Affirmed
 - **CCA. CASE No.** PD-0771-17
 - **DISPOSITION:** Court of Appeals Reversed
 - **OPINION:** [Judge Newell](#) **VOTE:** 6-3
 - **TRIAL COURT:** 103rd D/C; Hon. Janet Leal
 - **LAWYERS:** [Chad Van Brunt](#) & [David Botsford](#) (Defense); [Sam Katz](#) (State)
- DATE OF OPINION:** June 26, 2019

(Background Facts): Appellant served as the chief of police for the small community of Indian Lake in Cameron County. He was the sole paid employee of Indian Lake's police department for most of the year, though during the winter months the department would sometimes employ one other full-time officer. The department also included some twenty to thirty reserve officers appointed by Appellant who were not paid by the department but rather worked other full-time jobs mostly outside of law enforcement. In January 2015, the Texas Commission on Law Enforcement (TCOLE) conducted an audit of Indian Lake's police department. Derry Minor, a TCOLE field agent, administered the audit by examining the department's paperwork regarding, among other things, criminal background checks, firearms qualifications, and medical and psychological testing of the officers. Minor reviewed records for fifteen of the reserve officers and he determined that firearms qualifications records for eight of the reserve officers were missing. Believing that the department was required by law to keep such records, Minor notified Appellant of the deficiency via a preliminary audit report dated January 13, 2015. Appellant signed the report, which stated that he had until January 23, 2015, to correct the deficiency. Appellant then instructed Alfredo Avalos, the only other full-time officer with the department at the time, to fill out firearms qualifications forms for fourteen different Indian Lake reserve

police officers. The forms indicated that each reserve officer had passed a “firearms qualification practical pistol course” on September 20, 2014, using a .40-caliber Smith & Wesson pistol with a serial number registered as belonging to Appellant. Each of the fourteen named reserve officers testified at trial that they did not, in fact, pass a firearms course on September 20, 2014, using a .40-caliber Smith & Wesson pistol. Appellant was charged by indictment with fourteen counts of knowingly making false entries in governmental records with the intent to defraud or harm the State of Texas.

Ed Note: (Procedural History) The State charged Appellant with 14 counts of tampering with a governmental record with intent to defraud or harm. Each count corresponded to a firearms-proficiency form for a reserve officer. The intent-to-defraud-or-harm element elevated the offenses from Class A misdemeanors to state jail felonies. Multiple reserve officers testified to various discrepancies within the firearms-proficiency forms. Appellant argued at trial that the false records were not governmental records because the reserve officers were not employees who were required to undergo a firearms-proficiency qualification. Defense counsel questioned Derry Minor, TCOLE’s field agent about this subject, but Minor would not agree with counsel’s interpretation of the law. Minor did acknowledge that volunteer reserve officers were unpaid and were “appointed” rather than “employed.” Based on this testimony, Appellant sought a jury instruction on § 341.012 of the Local Government Code advising the jury that the municipality governs the standards and qualifications of reserves, not TCOLE. The trial court refused the request, and the jury found Appellant guilty of 14 counts of tampering with a governmental record with the intent to defraud or harm.

§ 324 Court's Charge / Instructions & Definitions / Defensive Charges : Appellant argued to the court of appeals that the records were not governmental records because they were not required by law to be kept or, at the very least, were not actually kept for a government purpose. In Appellant’s reply brief, he clarified that argument, asserting that the State was also required to disprove his statutory defense. That defense states: “It is a defense to prosecution under Subsection (a)(1), (a)(2), or (a)(5) that the false entry or false information could have no effect on the government’s purpose for requiring the governmental record.” Appellant raised another sufficiency challenge, arguing that the evidence was insufficient to support the elevating element of intent to defraud or harm. He also challenged the trial court’s denial of his requested jury instruction. The Court of Appeals rejected all of Appellant’s claims and affirmed the trial court’s judgment (see [§](#), [Vol. 25, No. 17](#); 05/08/2017). On discretionary review, Appellant argues that the trial court erred by rejecting his requested jury instruction on the law regarding reserve officers (specifically, the instruction on Texas Local Government Code § 341.012).

Holding: Here, assuming without deciding that Appellant properly preserved his claim and that the trial court erred in denying Appellant’s requested instruction, we conclude that any error was harmless because Appellant did not even suffer “some harm.” *** A general rule of statutory interpretation is that the expression of one thing implies the exclusion of other, unexpressed things. The tampering statute provides six ways to commit the offense. In the statutory defense, however, the Legislature expressly mentioned only three of the six, specifically, Subsections (a)(1), (a)(2), and (a)(5). The express statement of those three subsections implies that the statutory

defense does not apply to Subsections (a)(3), (a)(4), and (a)(6). In other words, Subsections (a)(3), (a)(4), and (a)(6) are implicitly excluded. Accepting Appellant's interpretation would inappropriately extend the statutory defense to those excluded subsections despite the Legislature's express limitation. We reject Appellant's argument that a document must, at the very least, be kept for a government purpose to constitute a governmental record. Under the plain text of the statute, the purpose is relevant to the defense to prosecution, not an element of the offense. *** In sum, Appellant's interpretation of the definition of "governmental record" conflicts with the statute's plain language. The firearms proficiency records for the reserve officers were governmental records even without a showing that the Department was "required by law" to keep them. Consequently, the absence of an instruction on the issue of whether the Department was required by law to keep the records did not harm Appellant because it would have had no effect on the jury's determination that the firearms-proficiency records were governmental records.

§ 541.02 Sufficiency of the Evidence / Tampering with Government Records: Appellant also argues that the evidence is insufficient to establish that he acted with an "intent to defraud or harm." Tampering with a governmental record is a state jail felony if "the actor's intent [was] to defraud or harm another." Without that intent, the offense is a Class A misdemeanor.

Holding: Appellant's sufficiency challenge requires us to determine the meaning of the phrase "intent to defraud" as it is used within the applicable statute. *** Appellant asserts that, even if the records at issue are governmental records, it was legally impossible for him to defraud or harm TCOLE because TCOLE had no authority to require the keeping of the records in the first place. Therefore, Appellant argues, the evidence is insufficient to show an intent to defraud or harm TCOLE. We agree. *** These (omitted) definitions line up with the common general meaning of "defraud." So, in the context of this statute: To be defrauded, the government must have a right or duty to act (or refrain from acting) on the matter intended to be affected by the deceit. *** Holding otherwise would create, as Appellant argues, a legal impossibility. A legal impossibility exists where the defendant intends to do something that would not constitute a crime (or at least the crime charged). In other words, the defendant may intend to commit a crime, not because he intends to do something the criminal law prohibits, but because he is ignorant of the law. *** We conclude that intent to defraud a government entity requires not only an intent to cause the entity to rely upon a false representation to act (or refrain from acting) on a certain matter, but also that the government has the right or duty to act on that matter. The question then becomes whether TCOLE had the right or duty to require the firearm-proficiency records for the licensed reserve officers. It did not. *** According to its plain language, [Occupations Code § 1701.355] applies only to "peace officers" who are "employed." *** The question then becomes whether the reserve officers here were "employed." They were not. *** With regard to Appellant's claim that there was insufficient evidence to establish an intent to defraud or harm, we hold that the State must prove that the government has the legal authority to require the keeping of records in order to show that it is legally possible to defraud the government by filing a false record. *** In this case, it was legally impossible for TCOLE to be defrauded by Appellant's deceit and for Appellant to intend to defraud TCOLE through his deceit. There is also no evidence to show intent to defraud by causing pecuniary or property loss or some other cognizable loss or to show intent

to harm by causing a loss, disadvantage, or injury to another. Consequently, the evidence is insufficient to support the intent-to-defraud-or-harm element.

§ 511.06 Appellate Procedure / Policies & Presumptions / Disposition of Cases: Appellant argued to the Court of Appeals that the records were not governmental records because they were not required by law to be kept or, at the very least, were not actually kept for a government purpose. In Appellant's reply brief, he clarified that argument, asserting that the State was also required to disprove his statutory defense. The court of appeals stated in a footnote that Appellant did not raise a sufficiency claim regarding the rejection of the statutory defense. Rather than address Appellant's complaint as part of his initial sufficiency challenge, the Court of Appeals discussed the existence of the statutory defense to undercut Appellant's argument that a broad interpretation of "governmental record" would lead to an absurd result. In effect, as part of its interpretation of the statute, the court of appeals acknowledged that the governmental purpose of the records is treated as a defensive issue, but then it did not address Appellant's argument that the State's evidence was insufficient to overcome that defensive issue. On discretionary review, Appellant again combines the issue of the statutory defense with his argument regarding the governmental-record definition. He specifically complains that, even if the Court holds that this is an issue about a statutory defense rather than the governmental-record definition, the evidence is still legally insufficient. Further, Appellant argues that the Court of Appeals' opinion did not comply with Rule 47.1 of the Texas Rules of Appellate Procedure, which requires the Court of Appeals to address every issue raised and necessary to a final disposition on appeal.

Holding: Though we have never specifically addressed when courts of appeals should address arguments raised by an appellant in a reply brief, several courts of appeals have. Generally, an appellant may not raise a new issue in a reply brief because Rule 38.3 allows Courts of Appeals to decide the matter prior to receiving the reply brief. But courts of appeals can consider arguments and authorities in a reply brief that are related to the arguments in the original brief. We agree with the courts of appeals that new issues raised in a reply brief should not be considered. However, Appellant's argument in his reply brief was not a new issue; it was related to the arguments in his original brief. *** Having determined that the governmental purpose of the record can be a requirement when considered as part of a statutory defense rather than as an element of the offense, the Court of Appeals should have considered Appellant's responsive argument in his pre-submission reply brief that the evidence is legally insufficient to overcome his statutory defense. *** Thus, we remand the case for the Court of Appeals to evaluate the meaning of "government's purpose for requiring the governmental record" in § 37.10(f) and, based on its determined meaning, consider whether the evidence was sufficient to overcome the statutory defense.

Concurring / Dissenting Opinions: [Judge Slaughter](#) filed a dissenting opinion and was joined by **Judge Yeary**. She agreed that the evidence is insufficient to support the intent-to-defraud-or-harm element, and that the Court of Appeals failed to address the issue raised on appeal of whether the evidence was sufficient to overcome the statutory defense, but would not remand the case. Rather, she would "instead render a judgment of acquittal for Appellant because I find that the evidence is insufficient on the element of 'governmental record.'"