

Court of Criminal Appeals
January 13, 2016

Fernandez v. State

PD-0123-15

Case Summary written by Jack Fulgham, Staff Member.

PRESIDING JUDGE KELLER delivered the opinion of the court.
JUDGE JOHNSON filed a concurring opinion.

Issue: “Whether a public servant commits theft by deception when he purchases an airline ticket for county-approved travel with a county credit card but later uses the voucher resulting from the cancellation of the ticket for personal travel, without correcting the impression that the ticket would be used for county-approved business.”

On February 6, 2012, Justice of the Peace James Fernandez directed his chief deputy clerk, Veronica Mojica, to book a flight to Orlando so that he could attend a work related conference that June. Using the county-owned credit card, Mojica booked a non-refundable flight for Fernandez. The county had a policy of booking non-refundable flights because they are typically cheaper. The price of the ticket was \$381.60. On June 11, 2012, nine days before the scheduled flight, Fernandez fell ill and instructed Mojica to cancel the flight. Because the ticket was non-refundable, when Mojica canceled the flight, the purchase price was not refunded and instead converted into a Southwest travel voucher for the purchase price of the ticket.

In August 2012, Fernandez asked Mojica for the voucher reservation number from the canceled flight. Fernandez then directed Mojica to give the number to his son. A few weeks later, County Auditor Frank Lowe noticed the county was nearing its travel budget limit for 2012. In response, he contacted Southwest Airlines to inquire about the funds from the cancelled ticket. Southwest informed Lowe that a voucher had been issued and later used for a flight to Phoenix on August 8, 2012. Lowe had received no documentation for the Phoenix flight, which was customary for all county-related air travel. The County has a policy that prohibits using county property or funds for personal travel.

Thinking the voucher had been used for personal travel, Lowe contacted the Val Verde County Attorney to conduct an investigation.

In response, the Attorney General initiated an investigation into the matter. Shortly after, Fernandez attempted to pay back the county for using the voucher, but his payment was refused. Fernandez's son, James Fernandez Jr., testified that he was the one who suggested that he use the voucher, and that they had every intent of paying the county back. Fernandez was convicted of theft by a public servant by way of deception. The Fourth Court of Appeals affirmed the conviction.

The appellant, Fernandez, appealed his conviction on the grounds that the State failed to prove that he induced consent to use the voucher by deception. The Court of Criminal Appeals reviewed the complaint under the legal-sufficiency standard set forth in *Jackson v. Virginia*. The court examined "the evidence in the light most favorable to the verdict and ask whether any rational fact-finder could have found the elements of the charged offense beyond a reasonable doubt.

The real issue on appeal was whether or not Fernandez had received the county's apparent consent to use the voucher by means of deception. The Texas Penal Code defines consent as "assent in fact, whether express or apparent", and deception as "failing to correct a false impression of law or fact that is likely to affect the judgment of another in the transaction, that the actor previously created or confirmed by words or conduct, and that the actor does not now believe to be true." To meet its burden for theft by deception, the State must show that the owner of the stolen property (the County) consented to transfer the property because of a deceptive act of the accused. Therefore, the deception must precede the consent.

The appellant argued that consent only occurred when the County approved his purchase of the original plane ticket. The court disagreed, finding that "consent" can occur more than once, and the consent pertinent to the case actually occurred when appellant directed Mojica to give the voucher number to his son. The court found that the conveyance of the voucher to appellant's son was enough to constitute apparent consent.

Next, the court had to decide whether the apparent consent was obtained by deception. The court found that deception did take place before the county consented to giving the voucher number to the appellant's son. By remaining silent about what the voucher was being used for, appellant failed to correct the impression that the funds were for county-approved travel. The court held that the appellant's silence

constituted deception, and affirmed the lower court's holding that Fernandez committed theft by deception against Val Verde County.

In his concurrence, Judge Johnson agreed with the conclusion of the majority, but did not agree that Mojica or Fernandez had the capacity to consent on behalf of the county.

Marshall v. State

Nos. PD-0509-14 & PD-0510-14

Case Summary written by Kayla Hackerott, Staff Member.

JUDGE KEASLER delivered the opinion of the court, joined by JUDGES JOHNSON, HERVEY, ALCALA, RICHARDSON, and NEWELL. JUDGE YEARY filed a concurring and dissenting opinion, jointed by JUDGE MEYERS, and jointed as to Part I only by PRESIDING JUDGE KELLER. PRESIDING JUDGE KELLER dissented.

The facts were not in dispute in this case. On September 5, 2005, Marshall and his wife, Shawne, began physically fighting. Marshall pushed Shawnee onto the bed where "he straddled her and put a pillow over her face, holding down each side of the pillow." Shawne testified that while she remained conscious and "never lost the complete ability to breath," she could not take deep breaths due to the pillow. The jury charge informed the jury that Marshall was guilty if they found:

That the defendant, Patrick James Marshall. . . did then and there intentionally, knowingly, or recklessly impede the normal breathing or circulation of the blood of Shawne Marshall by blocking the nose or mouth of Shawne Marshall with a pillow, and the said Shawne Marshall was then and there a member of the defendant's family or household.

Despite the omission of "bodily injury" from the jury charge, Marshall's counsel did not object. Marshall was convicted under Penal Code § 22.01, felony assault against a family member.

On appeal, Marshall argued that the state was relieved from their burden of proving every essential element by omitting "bodily injury" from the charge, thus allowing the jury to find Marshall guilty without finding he caused bodily injury. He further argued that the evidence was insufficient to support the jury's verdict. The court of appeals rejected the insufficient evidence claim, yet they "agreed that the jury

charge was erroneous, found the error resulted in egregious harm, vacated the conviction, and remanded for a new trial.”

Issues: Whether the jury’s verdict was sufficiently supported by the evidence, and “whether omitting bodily injury from the jury charge’s application portion caused egregious harm”?

Egregious Harm. If an error in the jury charge is found, there are different standards of review depending on if the defendant timely objected to the instructions. When the defendant fails to timely object, reversal occurs if the error caused egregious harm, resulting in an unfair and biased trial. Several factors are used to determine whether the error is egregious: (1) the entirety of the jury charge itself, (2) the state of the evidence, (3) counsel’s arguments, and (4) any other relevant information revealed by the entire record. Courts must examine “the relevant portions of the entire record to determine whether appellant suffered actual harm.”

According to §22.01:

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person’s spouse

...

(b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:

...

(2) a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code. If:

...

(B) the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person’s throat or neck or by blocking the person’s nose or mouth

Bodily injury is defined as any physical pain, illness or impairment of physical condition, which includes hindering a person’s ability to breath. According to Black’s Law Dictionary, impairment is defined as a damaged, weakened, or diminished condition.

The court found that while the charge omitted “bodily injury,” the jury had to find Marshall impeded the breathing of Shawne, which constituted an actual bodily injury, bodily injury per se. The jury in this case found that Marshall impeded Shawne’s breathing by holding the pillow over her face. Thus, the court overruled the court of appeals’ holding that Marshall suffered egregious harm.

Legal Sufficiency. The evidence must be viewed in the light most favorable to the jury verdict. Based on the evidence, the court had to determine “whether a rational jury could find all the requisite elements beyond a reasonable doubt.” During trial, Shawnee testified that she was unable to take deep breaths due to the pillow over her head, and while she never lost consciousness, her breathing was hindered. The court held the evidence was sufficient for a reasonable jury to find that Marshall impeded Shawne’s normal breathing.

JUDGE YEARY filed a concurring and dissenting opinion.

Judge Yeary dissented because he believed the jury charge error, which he found using a different method, caused Marshall egregious harm. Judge Yeary concurred that the evidence was legally sufficient, however, he reached the conclusion using a different rationale.

Jury Charge Error. Judge Yeary rejected the court’s finding that impeding Shawne’s breathing constituted bodily injury per se. According to Judge Yeary, impeding the normal breathing of an individual is a description of the type of conduct, or method, used to reach the result of causing a bodily injury. Thus, while a jury could find a defendant impeded a person’s breathing, it still must find that that method actually caused bodily injury, by finding that the method used caused “physical pain, illness, or any impairment of physical condition.” According to Judge Yeary, “an impediment [such as to a person’s breathing] does not necessarily amount to an impairment.” Judge Yeary explained that while a person’s breathing can be impeded, if the hindrance is removed, the person’s “trachea and lungs will ordinarily resume their normal functions immediately, ‘unimpaired.’”

Egregious Harm. According to Judge Yeary, to determine egregious harm, the court must determine “whether it is likely that the jury could have convicted [Marshall] simply for impeding Shawne’s normal breathing momentarily, without ever going on to ask itself whether that impediment was sufficiently protracted, or occurred with

sufficient force, as to cause ‘bodily injury,’” defined as physical pain or an impairment of physical condition. The court of appeals found on multiple occasions the prosecutor informed the jury that all the State had to prove for a guilty verdict was that Marshall impeded Shawne’s breathing by blocking her nose and mouth with the pillow. Judge Yeary explained that the evidence did not demonstrate that Marshall caused Shawne any pain, or any impairment of physical condition by impeding her breathing. Thus, according to Judge Yeary, because the jury most likely convicted Marshall based on the evidence that he impeded Shawne’s breathing, without finding it caused pain or impairment, the jury charge caused Marshall egregious harm.

Legal Sufficiency. The evidence pointed out that before Marshall impeded Shawne’s breathing with a pillow, he briefly strangled her. Judge Yeary determined that “under the indictment and jury charge in this case, . . . strangulation would have been an available alternative theory by which a rational jury could have convicted [Marshall] under a hypothetical jury charge.” The indictment alleged that Marshall “impeded the normal breathing *or circulation of the blood* of Shawnee Marshall by blocking the nose or mouth of Shawne Marshall with a pillow.” The application paragraph of the jury charge also included the theory of strangulation. According to Judge Yeary, a rational jury could infer that strangulation, no matter how brief, could cause physical pain.