PD-0771-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 8/23/2017 9:24 PM
Accepted 8/25/2017 5:17 PM
DEANA WILLIAMSON
CLERK

NO. PD-0771-17

FILED
COURT OF CRIMINAL APPEALS
8/25/2017
DEANA WILLIAMSON, CLERK

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

JOHN CHAMBERS, Petitioner

VS.

THE STATE OF TEXAS, Respondent

On appeal from Cause No. 2015-DCR-268-D from the 103rd Judicial District Court of Cameron County, Texas

Seeking review of the Thirteenth Court of Appeals' Judgment in Cause No. 13-16-00079-CR

PETITIONER'S PETITION FOR DISCRETIONARY REVIEW

LAW OFFICE OF CHAD VAN BRUNT
Chad P. Van Brunt
State Bar No. 24070784
310 S. St. Mary's St., Ste. 1840
San Antonio, Texas 78205
VanBruntLaw@gmail.com
Telephone: 210-399-8669
Facsimile: 210-568-4927

PERKES LAW FIRM, PC
Gregory T. Perkes
State Bar No. 15782550
P.O. Box 1663
Corpus Christi, Texas 78403
GPerkes@PerkesLaw.com
Telephone: 361-813-8003
Facsimile: 361-904-0256

BOTSFORD & ROARK
David L. Botsford
State Bar No. 02687950
1307 West Avenue
Austin, Texas 78701
DBotsford@aol.com
Telephone: 512-479-8030
Facsimile: 512-479-8030

ATTORNEYS FOR PETITIONER

ORAL ARGUMENT REQUESTED

IDENTITY OF JUDGE, PARTIES AND COUNSEL

Trial Judge:

Hon. Janet Lee Leal
103th Judicial District Court
Cameron County Courthouse
974 East Harrison Street
Brownsville, TX 78520

Petitioner, John Chambers

Petitioner's Counsel:

Gregory T. Perkes
THE PERKES LAW FIRM, P.C.
Courthouse Square
P.O. Box 1663
Corpus Christi, TX 78403

David L. Botsford
BOTSFORD & ROARK
State Bar No. 02687950
Botsford & Roark
1307 West Avenue
Austin, Texas 78701

Chad P. Van Brunt
THE LAW OFFICE OF CHAD VAN BRUNT
Tower Life Building
310 St. Mary' Street, Suite 1840
San Antonio, Texas 78205

Respondent, The State of Texas

State's Counsel:

Luis. V. Saenz, District Attorney
Jennifer Avendano, Asst. Dist. Atty.
Cameron County District Attorney
64 East Harrison Street, 4th Floor
Brownsville, Texas 78520

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT REGARDING ORAL ARGUMENT

John Chambers sets forth a series of arguments that, if Petition for Discretionary for Review is granted, will require intensive statutory interpretation, as well as questions of first impression regarding the application of the tampering with a governmental record statute to cases involving the regulatory authority of the Texas Commission on Law Enforcement. In light of the complexity of these arguments, Chambers submits that oral argument would greatly assist this Court in its deliberations.

NO. PD-0771-17

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

Austin, Texas

JOHN CHAMBERS,
Petitioner

VS.

THE STATE OF TEXAS,
Respondent

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW John Chambers, Petitioner, and pursuant to Rule 68 of the Texas Rules of Appellate Procedure, moves this Court to grant discretionary review, and in support thereof respectfully shows this Honorable Court as follows:

STATEMENT OF THE CASE

John Chambers was charged with fourteen counts of tampering with governmental records with intent to defraud or harm, each a state jail felony. [CR at 5]. TEX. PENAL CODE ANN. §37.10(c)(1) (West, Westlaw through 2015 R.S.). Specifically, he was accused of submitting fourteen firearm qualifications forms indicating that each "reserve" police officer passed a firearms qualification practical pistol course on September 20, 2014, with a firearm registered to Chambers. Id. Although the evidence showed that each reserve police officer had, in fact, passed the firearms qualification practical pistol course that calendar year, the calendar date and weapon serial number were not properly identified. [RR Vol 11 at 98, 105, 114, 126, 134, 137, 144, 148, 154, 161, 164, 173, 182]. After a jury found Chambers guilty of all fourteen counts, the trial court sentenced him to two years confinement in state jail, probated for five years, and a $200 fine for each count. [CR at 226] The sentences are to run concurrently. *Id.*[1]

[1] One of the officers listed in the charge, Jose Luis Hernandez Jr. did not testify. Thus, the State did not provide any testimony from him as to the accuracy of the entries. Notwithstanding, Chambers was still found guilty of that count. [RR Vol 13 at 54].

STATEMENT OF PROCEDURAL HISTORY

After the trial court certified Chambers right to appeal [CR at 219], Chambers timely filed a notice of appeal in the Thirteenth Court of Appeals. [CR at 217]. In a published opinion, the court of appeals affirmed the trial court's judgment. [Appendix]. A motion for rehearing en banc was subsequently denied.

Chambers brings this petition discretionary review to challenge the court of appeals' conclusions and holdings. A motion to extend the time for filing a petition for discretionary review was filed on July 21, 2017, and granted by this court. This petition for discretionary review is timely if filed by August 23, 2017.

GROUNDS FOR REVIEW

I. The Appellate Court Improperly Reviewed the Legal Sufficiency of the Evidence Against Chambers pursuant to § 37.10 of the Texas Penal Code when it Refused to Acknowledge that the Texas Commission on Law Enforcement was Acting in Contravention of its Legal Authority.

II. This Court Should Summarily Grant this Petition for Discretionary Review and Remand the Case to The Court of Appeals Because of That Court's Failure to Comply with Texas Rule of Appellate Procedure 47.1.

III. The Trial Court Abused its Discretion by Failing to Submit an Instruction to the Jury on the Applicable Law Regarding the Distinction Between an Employee and a Volunteer Reservist.

IV. The Difference Between the Class A Misdemeanor and the Felony Enhancement Pursuant to § 37.10 of the Texas Penal Code is a Distinction Without a Difference. In Addition, the Appellate Court's Reliance Upon an Improper Application of Law is Legally Insufficient to Uphold a Finding of an "Intent to Defraud."

STATEMENT OF FACTS

John Chambers was the chief of police for the Indian Lakes Police Department in Cameron County, Texas. [RR Vol 12 at 7]. He served as a licensed peace officer from 1994 until the time of his conviction [RR Vol 12 at 8]. Indian Lakes is a small town, with a population ranging between 600 to 800 residents, depending upon the time of year. [RR Vol 12 at 8-9]. The Indian Lakes PD consists of only one or sometimes two full-time employees (including the chief of police), with the bulk of the manpower coming from volunteer "reserve" police officers appointed by the chief. [RR Vol 12 at 9 – 10]. At that time, the only two individuals employed and working for the Indian Lakes PD was Chambers and Fred Avalos. [RR Vol 12 at 10].

In early 2015, the Texas Commission on Law Enforcement ("TCOLE") appeared and conducted an audit of the Indian Lakes PD to determine if the department's record keeping obligations were in order. [RR Vol 10 at 61]. The audit was conducted by TCOLE field agent Derry Minor, who is tasked with the duty of auditing law enforcement agencies for their hiring records and to assist department administrators in the process of hiring employees. [RR Vol 10 at 44]. After the audit, Agent Minor prepared a preliminary report indicating that eight reservist police officers did not have up-to-date firearms qualification records on file at the

Indian Lakes PD. [RR Vol 10 at 66]. Agent Minor gave Chambers seven business days to correct the deficiency. [RR Vol 10 at 68].

Agent Minor attested to his belief that the law requires a police department to acquire and maintain firearms qualification records for every officer *appointed* to that department. [RR Vol 10 at 85-86]. Without this qualification at the time of appointment, Minor contended, even an otherwise licensed peace officer would have no authority to carry a weapon. [RR Vol 10 at 85-86].

All of Agent Minor's testimony, however, presupposes that only licensed peace officers regulated by TCOLE can serve as a "reserve" police officer. When confronted with the statutory text of the Texas Local Government Code, which allows for a police chief to appoint a volunteer **irrespective** of his licensure and subject only to the regulations promulgated by the police department, Agent Minor could only state that this statute was in direct conflict with TCOLE policy. [RR Vol 10 at 93].

The evidence indisputably shows that Chambers, as the police chief, delegated the responsibility of correcting the firearms qualification deficiencies to his second-in-command, Fred Avalos. [RR Vol 11 at 32].[2] Avalos was

[2] Chambers was running in a heated election for Sheriff of Cameron County. [RR Vol. 12 at 7]. Avalos stood to benefit from Chambers' ousting as Police Chief because, as the only other peace officer in the Indian Lakes PD, he would become the Police Chief by default. He actually did become the interim Police Chief for a short time. [RR Vol. 11 at 73].

uncomfortable with Chamber's instructions because of his mistaken belief that the "firearms qualifications forms" that the Indian Lakes PD used were somehow promulgated by TCOLE, or that the forms were the only permissible method of keeping the information sought by TCOLE, and that he would somehow be violating the law if he modified them.[3] [RR Vol 11 at 72-3]. In reality, there is no statutorily prescribed manner for keeping firearms qualification information. [RR Vol 12 at 92]. Chambers would have been perfectly within his right to call each officer with missing information, write that information down on a legal pad, and fax it to TCOLE. *Id.*

Avalos then disregarded Chambers' instructions to find the qualifications records and prepare forms with the proper information. [RR Vol 11 at 63]. Instead, he went to TCOLE, where he demanded and obtained a verbal promise of criminal immunity. *Id*. He subsequently personally created each one of the documents at issue in this case, placing the identical incorrect information into each one, namely the incorrect date and weapon serial number. [RR Vol 11 at 32-33].

The evidence, however, showed that each and every one of the "reserve" police officers were, in fact, plainly qualified to use the type of weapon disclosed in the firearms qualification documents submitted to TCOLE, and that the other

[3] Since Avalos did not have a "blank form" to use, he used Chambers' form as a template for each of the reserve officers.

language was mere surplusage even according to the requirements of the Texas Administrative Code. [RR Vol 11 at 98, 105, 114, 126, 134, 137, 144, 148, 154, 161, 164, 173, 182].

The defense moved for directed verdict of acquittal at the close of the State's case-in-chief and at the close of evidence. Both motions were denied. [CR at 227]. The defense also sought the inclusion of language in the jury charge instructing the jury on the Texas Local Government Code, which by its plain *terms and meaning* obviates the need for firearms qualification record keeping for ***all volunteer reserve officers*** at a department like Indian Lakes PD. The trial court denied the instruction. [RR Vol 12 at 123].

ARGUMENT - REASONS FOR REVIEW

PRELIMINARY STATEMENT.

The Court of Criminal Appeals should grant Chamber's Petition for Discretionary Review to give guidance to certain municipal police departments whose power with respect to "reserve" police officers are seemingly being usurped by the Texas Commission on Law Enforcement in violation of existing law. The matters at issue herein would not exist had TCOLE not barged into a small municipal police department, scared its employees, and unlawfully sought to impose its will. In short, TCOLE has taken a position that every municipal police department must comply with its rules and regulations. However, that is not the law. Although the Texas Occupations Code generally lays out the scope of TCOLE's authority to regulate, it does not trump the Texas Local Government Code § 341.012 that gives all municipalities the ***sole*** power to regulate their volunteer "reserve" police officers. The Court of Appeals published opinion on this issue exacerbates the problem. As explained below, Chamber's Petition for Discretionary Review should be granted under Texas Rule of Appellate Procedure 66.3(b, c, d and f).

I. The Appellate Court's Legal Sufficiency Analysis Was in Error

In reviewing the legal sufficiency claim, a court should review the evidence in a light most favorable to the verdict and determine if any rational trier of fact could find the essential elements of the offense beyond a reasonable doubt. *Hacker*

v. State, 389 S.W.3d 860, 865 (Tex. Crim. App. 2013). The problem in this case has less to do with the factual determination of the evidence but more to do with the court's interpretation of the definition of a "government record" pursuant to § 37.01 of the Texas Penal Code. Such an interpretation is overly broad and ignores the impact of the statutory defense. Agreement as to facts does not necessarily support a conviction, the facts must be taken in their totality according to the law of the case. *DeLay v. State*, 443 S.W.3d 909, 912 (Tex. Crim. App. 2014) (requiring proper construction of penal provision charged).

a. <u>Background</u>

The infirmities of the lower court's opinion come from the same problem that spawned the criminal case against Chambers in the first place. It is a refusal to acknowledge that the Texas Commission on Law Enforcement was acting in contravention of its delegated authority and applicable laws. TCOLE wrongfully required Chambers to maintain firearms qualifications records for his reserve police force. At trial, this fact was not in dispute. An exchange between trial counsel and one of the agents for TCOLE, Derry Minor sums up the problem succinctly:

> Q: Are you aware of the provisions in [the Local Government Code] which state that a chief of police can appoint a person who is not a licensed peace officer to serve at his direction?
>
> A: And it directly conflicts with our Administrative Code.
>
> Q: I understand. So if you're looking at something that is statutorily set forth in the Local Government Code . . . in your mind, working for

> [TCOLE], the Administrative Code controls how do you advise the chief what you want the chief to do, et cetera?
>
> A: Yeah, we're set by the legislature that we enforce the Occupations Code, 1701 of the Occupations Code, which then refers back to the Administrative Code. It does not mention the Local Government Code.
>
> Q: Now, Mr. Minor, does not the Occupations Code also list within it the provisions of Sec. 341 of the Texas Local Government Code?
>
> A: Yes it does.
>
> Q: And that is the provision for a reserve police force?
>
> A: Yes.
>
> Q: So the legislature explicitly tells us to go look at that part of the law that allows for non-licensed peace officers, doesn't it?
>
> A: Our Commission and our director has ruled to us, that's what they directed me . . . that they cannot appoint an unlicensed peace officer.

[RR Vol 10 at 93-94]. TCOLE does not recognize a police chief's authority to create a reserve police force that is not regulated by their agency. This is in direct contravention of the limits set out by the legislature in the creation of TCOLE. TEX. OCC. CODE § 1701.003(a)(1) (cannot limit municipality's power).

A brief overview of the relevant regulations is vital to an understanding of this case. Section 1701 of the Texas Occupations Code lays out the scope of TCOLE's authority to regulate. Within that code is reference to a police chief's power to create and regulate his own reserve police force pursuant to section 341.012 of the Texas

Local Government Code. TEX. OCC. CODE § 1701.001(6). That section allows reserves to carry a weapon in the line of duty after appointment by the chief, subject to the regulations of the municipality, irrespective of whether or not that officer holds a peace officer's license (or meets any of the requirements to possess one) from TCOLE. Moreover, the Texas Occupations Code recognizes the distinction and dictates that TCOLE oversee the continuing weapons proficiency of only peace officers[4] that are **employed** by a law enforcement agency. TEX. OCC. CODE § 1701.355. The language is mirrored within TCOLE's own regulations promulgated via the Texas Administrative Code. 37 TEX. ADMIN CODE § 218.9. That code is likewise silent as to reservists in its regulations concerning the "hiring" of officers by a department which also contains firearms qualification record keeping requirements. 37 TEX. ADMIN. CODE § 217.7.

b. The Analysis of "Government Record"

The appellate court seems to find that because Chambers and Fred Avalos were police officers at the time Avalos created the documents in question, the inquiry ends. The documents are government records. Opinion at 6-7. The problem is that the court took no time to address the meaning of "for information of government" as used in § 37.01. It shirked the responsibility not to lead to absurd results in a plain

[4] Provision does not include reserve law enforcement officers. TEX. OCC. CODE § 1701.001 (defining "peace officer" separately from "reserve law enforcement officer").

meaning analysis. *Faulk v. State*, 608 S.W.2d 625, 630 (Tex.Crim.App. 1980). The statute must refer to records that have a legal reason or at the very least serve some purpose toward the duties of the government. *Id.*; TEX. PENAL CODE § 37.01; TEX. PENAL CODE § 37.10(f). Without this understanding, an individual could be charged under this statute for making false entries in matters as trivial as a holiday gift exchange list.

The case cited by the appellate court for the proposition that there is no need for a record to be required by law to be kept is distinguishable. Opinion at 6 (citing *Magee v. State*, No. 01-02-00578-CR, 2003 WL 22862644, at *2 (Tex. App.—Houston [1st Dist.] Dec. 4, 2003, no pet.) (mem. op., not designated for publication). *Magee*, dealt with false entries in a police report which, although not specifically required by law, are part and parcel to the functioning of a police department—the duty to investigate crimes. *Id*. In this case, the situation is very different. The documents in question were required by TCOLE, not the City of Indian Lakes; this requirement was in direct conflict with existing law. *Cf*. TEX. OCC. CODE § 1701.003(a)(1); LOC. GOV'T CODE § 341.012(g); [RR. Vol. 12 at 97-98].

All powers of the government to act are ultimately granted by the people through their representatives in the form of law. TEX. CONST. Art. I § 2. Requiring the State to prove where the need to keep the information came from is both legally required and logical. It was not superfluous to the charged conduct. In fact, the State

attempted to prove the source of the requirement and utterly failed. The provisions from which TCOLE derived its firearm qualifications requirements did not apply to volunteer reserve officers.[5] The record is undisputed. None of the individuals whose records were alleged to have false entries were **employed** by the city of Indian Lakes Police Department. They were members of the reserve police force. Even more unsettling is that the evidence showed that the need for the records by TCOLE was in direct and knowing opposition to the laws of this state [RR Vol. 12 at 97-8].

c. Legal Analysis of the Defense Contained in Texas Penal Code § 37.10(f).

Admittedly, the court of appeals did attempt to find a way to read § 37.10 in a manner that would not lead to altogether absurd results. It relied on the statutory defense provided in § 37.10(f) of the Texas Penal Code. The court reasoned that this "safety valve" would sufficiently narrow the broad definition of government record in § 37.01. Opinion at 8. The problem, however, is that the statutory defense refers only to the entries or falsified information and not the definition of a government record in itself.

Nonetheless, this interpretation still favors a finding of legal insufficiency and hardly undercuts Chambers' arguments at trial and on appeal. [CR at 176]; App. Reply Br. at 4-6. It logically follows that a record which has no governmental

[5] *See* 37 TEX. ADMIN CODE § 218.9 and 37 TEX. ADMIN. CODE § 217.7.

purpose for its existence could have no entries or information that served a government purpose within it.

At trial, it was necessary for the state to disprove the statutory defense that "the false entry or false information could have no effect on the government's purpose for having the governmental record." TEX. PENAL CODE § 37.10(f). If there is a reasonable doubt with respect to this defense, the accused must be acquitted under TEX. PENAL CODE § 2.03(d). *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex.Crim.App. 2003). The defense was stated in the jury charge [CR at 176]. The State could show utterly no meaningful reason that Chambers was required to keep the information. Without a legal reason to maintain the information, why would an any entry matter? No rational trier of fact could have found Chambers guilty. *Jackson v. Virginia*, 443 U.S. 307 (1979).

d. <u>Legal Impossibility</u>

The facts of this case present a legal impossibility. A legal impossibility exists where what the actor intends to do would not constitute a crime. *Lawhorn v. State*, 898 S.W.2d 886, 891 (Tex.Crim.App. 1995). This is a defense to prosecution that is still recognized by this Court. *Chen v. State*, 42 S.W.3d 926, 929 (Tex.Crim.App. 2001). In this case, it was impossible for Chambers to violate the law whether he completed the act or not. Even if he intended to make false entries in the firearms qualifications with the intent defraud TCOLE into believing the information

contained in the documents was correct, it was impossible for the actions to constitute a crime. As discussed above, the documents were completely meaningless and required by TCOLE in contravention of their statutorily authorized authority.

The lower court improperly reviewed Chambers' legal sufficiency challenge to his convictions. The broad-brush strokes with which the court sweeps this case under the rug creates a myriad of ambiguities in the application of § 37.10 of the Texas Penal Code and the authority of TCOLE. It further ignores the legal impossibility of Chambers' actions. *Id.* Clarification is desperately needed by this Court to ensure fair application of the law in this case and in future cases. Tex.R.App.P. 66.3(b), (d).

II. Failure To Comply With Texas Rule of Appellate Procedure 47.1

The court of appeals failed to fully consider and address Chambers' arguments regarding the defense embodied within Section 37.10(f).

Chambers argued in his opening brief that "[b]ecause these records were not required by law to be kept, **nor were they kept for government purposes**, they are not governmental records. *Cf. Pokadnik v. State*, 876 S.W. 2d 525, 527 (Tex. App.– Dallas 1994, no pet.) (holding that because the record in question was not kept by government for informational purposes, the record was not a governmental record)." App.Br. at 15 (emphasis added).

In its brief, the State responded that it was unnecessary to prove that the

government record had any purpose in the law. St.Br. at 8.

Chambers replied to the State's argument, pointing out that it ignored the statutory defense embodied within Section 37.10(f) to the effect that "the false entry or false information could have no effect on the government's purpose for having the government record." App.Reply Br. at 4-6.

In its opinion, the court of appeals noted that "[t]he jury charge contained an instruction as to the section 37.10(f) defense," and concluded that it did not have to fully address Chambers' arguments because he "does not argue on appeal that the evidence was insufficient to support the jury's implicit rejection of that defense." Opinion at 8, n. 4. But in an apparent contradiction, the court further observed that the section 37.10(f) defense "serves as a safety valve that would generally prevent conviction in cases where the record at issue, though `kept' by a government entity `for information,' is insignificant or otherwise unrelated to the entity's government function." Opinion at 8.

Chambers' argument regarding the impact of the section 37.10(f) defense was an integral component of his first issue on appeal: that the evidence was legally insufficient, in part, because the documentation reflecting the firearms qualifications of the fourteen reserve officers were not "government records" for purposes of the tampering statute.

By failing to directly address Chambers' argument, the court of appeals failed

to comply with Texas Rule Appellate Procedure 47.1, which provides, in relevant part, that the "Court of Appeals must hand down a written opinion ... *that addresses every issue raised and necessary to final disposition of the appeal* ...." (Emphasis added). Indeed, in *Light v. State*, 15 S.W.3d 104, 105 (Tex.Crim.App. 2000), this Court stated:

> The courts of appeals are required to review every argument raised by a party that is necessary to the disposition of that appeal. *See Tex.R.App.Proc. 47.1(a)*; *Davis v. State*, 817 S.W.2d 345, 346 (Tex. Cr. App. 1991) (holding that the courts of appeals should not dismiss a point of error when it is properly briefed by a party). Failure by a court of appeals to address a point of error properly raised by a party requires remand for consideration of that point of error. *See Davis*, 817 S.W.2d at 346 (remanding a neglected point of error to the court of appeals for consideration); cf. *Weatherford v. State*, 828 S.W.2d 12, 13 (Tex. Cr. App. 1992) (*holding that the remedy for a failure to address a reply to point of error on appeal is to vacate and remand the case to the court of appeals to consider the neglected argument*) (emphasis added).

See also State v. Cortez, 501 S.W.3d 606 (Tex.Crim.App. 2016)(granting State's petition for discretionary review and remanding because the court of appeals failed to address every issue necessary to the disposition of the case); *Carsner v. State*, 444 S.W.3d 1 (Tex.Crim.App. 2014) (same). Accordingly, discretionary review should be granted under Texas Rule of Appellate Procedure 66.3(f).

III. The Court of Appeals Erred by Upholding the Trial Court's Denial of Chambers' Requested Jury Instruction.

The court of appeals improperly upheld the trial court's denial of Chambers' requested jury instruction. Opinion 8-11. Chambers' requested instruction 6 would

have informed the jury that under TEX. LOCAL GOV'T CODE § 341.012, the volunteer reserve officers named in each count of the indictment were not subject to TCOLE regulation and therefore, the firearm qualification documents submitted to TCOLE as to each of them failed to fall within the definition of "government record" [as defined by TEX. PENAL CODE § 37.01(2)(A & B)("anything belonging to, received by, or kept by the government for information" or "anything required by law to be kept by others for information of government," as submitted to the jury as submitted to the jury 7)]. [CR 172, 175]. By failing to instruct the jury on TEX. LOCAL GOV'T CODE § 341.012, the jury was deprived of the law that would have allowed it to properly determine that Chambers did not violate the tampering statute (i.e., TEX. PENAL CODE §37.10(a)(1) &(c)(1), as alleged in each count of the indictment).

The court of appeals concluded that the trial court did not err by denying Chambers' requested instruction embodying language from § 341.012 "because, to the extent he asserted a defensive theory relating to that statute, it consisted only of negating this element of the State's case," citing *Walters v. State*, 247 S.W.3d 204 at 209 (Tex.Crim.App. 2007). Opinion at 11.

The court of appeals' opinion is simply wrong. While a *non-statutory* defensive instruction that goes no further than to negate an element of the offense, such as alibi, is not required under *Walters*, Chambers' requested instruction was *statutorily based* and went further than negating an element of the offense. Indeed,

it was integral to the jury's ability to determine whether the documents satisfied the definition of "governmental record." This necessarily follows because it would have informed the jury of the law by which it properly should have determined whether the documents were or were not "kept by government for information" or "required by law to be kept" (under both prongs of the definition of "government record" submitted to the jury and embodied in § 37.01(2)(A and B, respectively). By so doing, the court of appeals has issued a published opinion inconsistent with *Walters*, justifying discretionary review under Texas Rule of Appellate Procedure 66.3(b).

Additionally, the court of appeals opinion also conflicts with this Court's opinion in *Celis v. State*, 416 S.W.3d 419, 432-34 (Tex.Crim.App. 2013). In *Celis*, this Court approved the submission of instruction on a statutorily defined term - "foreign legal consultant" - contained in State Bar Rules in order to assist the jury in ascertaining whether Celis satisfied the defensive issue of whether he was "in good standing with the State Bar" (element under TEX. PENAL CODE § 38.122). This conflict also justifies discretionary review under Texas Rule of Appellate Procedure 66.3(c), separate and apart from the realization that the court of appeals' published opinion has decided an important issue of state law that this Court has not previously addressed. *See* Tex.R.App.P. 66.3(b).

Furthermore, the court of appeals' opinion ignores the long-standing mandate that "[i]t is not the function of a jury charge merely to avoid misleading or confusing

the jury: it is the function of the charge to lead and to prevent confusion." *Williams v. State*, 547 S.W.2d 18, 20 (Tex.Crim.App. 1977); *Gordon v. State*, 633 S.W.2d 872, 877 (Tex.Crim.App. 1982); *Hutch v. State*, 922 S.W.2d 166, 170 (Tex.Crim.App. 1990); *Vasquez v. State*, 389 S.W.3d 361, 367 n.11 (Tex.Crim.App. 2012). A full explanation of the law contained within § 341.012 was necessary so that the jury could ascertain whether the firearm qualification documents submitted to TCOLE as to each of the fourteen counts fell within the definition of "government record." Only by being instructed on the law embodied within § 341.012 of the Local Government Code could the jury fully, fairly and faithfully discharge its duties. As such, the court's failure to reverse the trial court's denial of the requested instruction also justifies discretionary review under Texas Rule of Appellate Procedure 66.3(c).

IV. The Court of Appeals Erred in its Analysis of the Intent to Defraud Enhancement

The difference between the class a misdemeanor and the felony enhancement is a distinction without a difference. *See* Tex. Penal Code § 37.10(c)(1). In addition, the appellate court's analysis of the "intent to defraud" enhancement contained in Texas Penal Code § 37.10(c)(1) depended upon the ability of TCOLE to enforce a violation of its auditing procedures. *See* Opinion at 12-13. The problem once again flows back to the appellate court's refusal to analyze whether TCOLE was, as a matter of law, able to regulate reserve officers in the first place. If TCOLE was

regulating what it could not according to the law, then how could it take action against Chambers or his department? Thus, the problems urged by Chambers on appeal remain.

There was nothing in the trial that could support a finding that Chambers made the false entries with the intent to defraud the State of Texas as charged. Due to the legal impossibility of enforcement as a matter of law, the totality of the evidence is legally insufficient to support a conviction. *Lawhorn*, 898 S.W.2d at 891. This is so even if the evidence showed Chambers mistakenly believed he could be reprimanded by TCOLE. *DeLay*, 443 S.W.3d at 912 (Tex. Crim. App. 2014) (citing *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007) (facts establish what State alleges but still does not constitute a crime). The analysis was in error and this Court should exercise its discretion under Texas Rule of Appellate of Procedure 66.3(d).

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, John Chambers, Petitioner, respectfully prays that this Court grant discretionary review and order full briefing on the merits.

Respectfully submitted,

LAW OFFICE OF CHAD VAN BRUNT

/s/ Chad P. Van Brunt

Chad P. Van Brunt
State Bar No. 24070784
310 S. St. Mary's St., Ste. 1840
San Antonio, Texas 78205
VanBruntLaw@gmail.com
Telephone: 210-399-8669
Facsimile: 210-568-4927

PERKES LAW FIRM, PC

/s/ Gregory T. Perkes

Gregory T. Perkes
State Bar No. 15782550
P.O. Box 1663
Corpus Christi, Texas 78403
GPerkes@PerkesLaw.com
Telephone: 361-813-8003
Facsimile: 361-904-0256

BOTSFORD & ROARK

/s/ David L. Botsford

David L. Botsford
State Bar No. 02687950
1307 West Avenue
Austin, Texas 78701
DBotsford@aol.com
Telephone: 512-479-8030
Facsimile: 512-479-8030

ATTORNEYS FOR PETITIONER

CERTIFICATE OF COMPLIANCE

I hereby certify that this document contains 4,408 words in the portions of the document that are subject to the word limits of Rule 9.4(i) of the Texas Rules of Appellate Procedure, as measured by counsel's word-processing software.

/s/ Chad P. Van Brunt
Chad P. Van Brunt

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Discretionary Review was emailed to Luis V. Saenz at luisv.saenz@yahoo.com and to Jennifer Avendano at jennifer.avendano@co.cameron.tx.us on this the 23rd day of August, 2017.

/s/ Chad P. Van Brunt
Chad P. Van Brunt

APPENDIX

Court of Appeals Opinion

NUMBER 13-16-00079-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

JOHN CHAMBERS, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 103rd District Court of Cameron County, Texas.

O P I N I O N

Before Justices Rodriguez, Contreras, and Longoria
Opinion by Justice Contreras

Appellant John Chambers was convicted on fourteen counts of tampering with governmental records with intent to defraud or harm, each a state jail felony. *See* TEX. PENAL CODE ANN. § 37.10(c)(1) (West, Westlaw through 2015 R.S.). He was sentenced to two years in state jail and a $2,800 fine, with the jail sentence suspended and community supervision imposed for five years. On appeal, Chambers argues that the

evidence was insufficient to support the conviction, that the trial court lacked jurisdiction, and that the trial court erred in denying a requested jury instruction. We affirm.

I. BACKGROUND

Chambers served as the chief of police for the small community of Indian Lake in Cameron County.[1] 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 Chambers who were not paid by the department but rather worked other full-time jobs mostly outside of law enforcement. *See* TEX. LOC. GOV'T CODE ANN. § 341.012 (West, Westlaw through 2015 R.S.) (authorizing the establishment of a police reserve force by the governing body of a municipality).

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 Chambers of the deficiency via a preliminary audit report dated January 13, 2015. Chambers signed the report, which stated that he had until January 23, 2015 to correct the deficiency.[2]

[1] As of the 2010 Census, Indian Lake had a population of 640. U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml (last visited May 1, 2017).

[2] The report stated: "If an agency fails to correct the deficiencies by the compliance date, TCOLE may take disciplinary action on the license of the chief administrator and/or assess an administrative penalty

According to trial testimony, Chambers 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 Chambers.[3] 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.

Chambers 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. *See* TEX. PENAL CODE ANN. § 37.10(c)(1). The jury, having been instructed on the law of parties, *see id*. § 7.02 (West, Westlaw through 2015 R.S.), found Chambers guilty on all fourteen counts. This appeal followed.

II. DISCUSSION

A. Governmental Record

By his first issue, Chambers argues that the evidence was insufficient to support the jury's verdicts because the falsified documents in this case were not "governmental records." *See id.* § 37.10(a)(1).

In reviewing sufficiency of the evidence, we consider the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found

under Texas Occupations Code 1701.507 of up to one thousand dollars ($1000) per day, per violation."

[3] Avalos contacted a TCOLE investigator prior to filling out the forms. The investigator directed Avalos to follow Chambers' instructions and, according to Avalos, the investigator told him that he would be "given immunity" for doing so.

the essential elements of the crime beyond a reasonable doubt. *Hacker v. State*, 389 S.W.3d 860, 865 (Tex. Crim. App. 2013); *see Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A sufficiency review sometimes "involves simply construing the reach of the applicable penal provision in order to decide whether the evidence, even when viewed in the light most favorable to conviction, actually establishes a violation of the law." *DeLay v. State*, 443 S.W.3d 909, 912 (Tex. Crim. App. 2014). "If the evidence establishes precisely what the State has alleged, but the acts that the State has alleged do not constitute a criminal offense under the totality of the circumstances, then that evidence, as a matter of law, cannot support a conviction." *Id*. (citing *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007)).

We measure sufficiency by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Such a charge would instruct the jury in this case that Chambers is guilty of tampering with governmental records as alleged in the indictment if, as a principal or as a party, he "knowingly ma[de] a false entry in . . . a governmental record." TEX. PENAL CODE ANN. § 37.10(a)(1); *see id*. § 7.02. In accordance with the definition provided in the penal code, the jury was instructed that "governmental record" means "anything belonging to, received by, or kept by government for information" or "anything required by law to be kept by others for information of government." *See id*. § 37.01(2)(A), (B) (West, Westlaw through 2015 R.S.).

Chambers contends specifically that the firearms qualifications forms at issue here are not "governmental records" because they are not legally required to be kept. He notes

that, according to regulations promulgated by TCOLE, a police agency is required to keep firearms qualifications records only for each "peace officer" that it "employs," and he argues that this excludes reserve officers. *See* 37 TEX. ADMIN. CODE § 218.9(a) (West, Westlaw through 42 Tex. Reg. No. 1288) ("Each agency or entity that employs at least one peace officer shall: (1) require each peace officer that it employs to successfully complete the current firearms proficiency requirements at least once each calendar year for each type of firearm carried . . . [and] (3) keep on file and in a format readily accessible to the commission a copy of all records of this proficiency."); *see also* TEX. OCC. CODE ANN. § 1701.001(3), (4), (6) (West, Westlaw through 2015 R.S.) (defining "officer" as "a peace officer or reserve law enforcement officer" and defining the two types of officers differently). Chambers further argues that, under the Texas Local Government Code, the appointment and qualifications of reserve municipal police officers are not governed by TCOLE but instead are under the sole purview of the municipality's police chief. *See* TEX. LOC. GOV'T CODE ANN. § 341.012(g) (stating that a reserve municipal police officer who is not a "peace officer" as defined in code of criminal procedure article 2.12 may carry a weapon "only when authorized to do so by the chief of police and only when discharging official duties as a peace officer"); *see also* TEX. CODE CRIM. PROC. ANN. art. 2.12(3) (West, Westlaw through 2015 R.S.) (defining "peace officer" in part as "those reserve municipal police officers who hold a permanent peace officer license issued under Chapter 1701, Occupations Code").

We need not determine whether the documents at issue here were in fact required to be kept by law because that is not an essential element of the offense. As noted, a "governmental record" may be "anything belonging to, received by, or kept by government

for information." TEX. PENAL CODE ANN. § 37.01(2)(A). "Government" includes the police department of Indian Lake. *See id.* § 1.07(24) (West, Westlaw through 2015 R.S.) ("'Government' means: (A) the state; (B) a county, municipality, or political subdivision of the state; or (C) any branch or agency of the state, a county, municipality, or political subdivision."). Accordingly, the State did not need to prove that the firearms qualifications records were "required by law to be kept"; instead, it needed only to prove that the records "belong[ed] to, [were] received by, or [were] kept" by the police department of Indian Lake "for information." *See id*. § 37.01(2)(A). It is undisputed that Chambers directed the creation of the records in his capacity as chief of police of Indian Lake. Although Chambers argues that the records were not legally required to be kept, he does not dispute that the records, in fact, "belong[ed] to" and were "kept by" the department "for information." Therefore, the records are "governmental records." *See id.*; *see also Magee v. State*, No. 01-02-00578-CR, 2003 WL 22862644, at *2 (Tex. App.—Houston [1st Dist.] Dec. 4, 2003, no pet.) (mem. op., not designated for publication) (rejecting appellant's argument that police offense report was not a "governmental record" because "the State did not prove it was required by law to be kept").

Chambers cites three cases where courts have found that a record was not a "governmental record" in the context of a tampering case under penal code section 37.10(a)(1), but we find that those cases are distinguishable. In *Pokladnik v. State*, the appellant, a private citizen, made false entries in affidavits based on a form promulgated by the State Department of Highways and Public Transportation (SDHPT). 876 S.W.2d 525, 527 (Tex. App.—Dallas 1994, no pet.). The Dallas Court of Appeals held that the affidavits were not "governmental records" because they were never submitted to any

governmental entity, including SDHPT. *Id*. at 527 (rejecting the argument that the affidavits "belonged" to SDHPT because the form upon which they were based was prescribed by statute). In *Constructors Unlimited, Inc. v. State*, the First District Court of Appeals held that "Contractor's Estimate" forms were not "governmental records" because they did not belong to the government, had not been received by the government, and were not kept by the government for information at the time they were executed. 717 S.W.2d 169, 172 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd). The Beaumont Court of Appeals reached a similar conclusion in *Siegel v. State*, No. 09-13-00536-CR, 2015 WL 3897860, at *3 (Tex. App.—Beaumont June 24, 2015, pet. ref'd) (mem. op., not designated for publication) (finding, where appellant made a false entry regarding her length of residency in an application for a ballot place, that the application was not a governmental record at the time it was made). Here, the records at issue were governmental records at the time they were made because the police department of Indian Lake is part of the government for purposes of the statute, and Chambers directed the falsification of the records in his capacity as police chief. *See* TEX. PENAL CODE ANN. § 1.07(24)(C).

Chambers contends that this broad interpretation of the definition of "governmental record" would lead to an absurd result because "[i]t would include virtually any piece of paper with information kept at a police department." *See Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016) ("In construing a statute, we give effect to the plain meaning of its language unless the language is ambiguous or the plain meaning leads to absurd results that the legislature could not have possibly intended."). We do not find this result to be absurd or contrary to legislative intent. The Legislature could have added a

requirement to the definition of "governmental record" in penal code section 37.01(2)(A)—similar to the one actually contained in section 37.01(2)(B)—that the record at issue be required to be kept by law. *See* TEX. PENAL CODE ANN. § 37.01(2)(A), (B). It is also noteworthy that section 37.10 provides for a defense to tampering with governmental record in cases where "the false entry or false information could have no effect on the government's purpose for requiring the governmental record." *Id.* § 37.10(f). Though this provision appears to presume that the government has some "purpose for requiring" the record that was falsified, there is no language anywhere in the statute explicitly stating that a record must be "required" by a government entity in order for the record to qualify as a "governmental record." In any event, the defense set forth in section 37.10(f) serves as a safety valve that would generally prevent conviction in cases where the record at issue, though "kept" by a government entity "for information," is insignificant or otherwise unrelated to the entity's governmental function.[4] The existence of the section 37.10(f) defense therefore undercuts Chambers' argument that a broad interpretation of "governmental records" would lead to an absurd result.

For the reasons set forth above, we conclude that the firearms qualifications records at issue in this case were "governmental records" for purposes of the tampering statute. Chambers' first issue is overruled.

B. Jury Charge Error

By his second issue, Chambers contends that the trial court erred in denying his request for a jury charge instruction regarding the "distinction between an employee and

[4] The jury charge contained an instruction as to the section 37.10(f) defense. Chambers does not argue on appeal that the evidence was insufficient to support the jury's implicit rejection of that defense.

a volunteer reservist" under section 341.012 of the local government code. He argues that this statute "establishes that the qualifications for reserve officers are set by the municipality and the chief, not TCOLE," and that "no rational trier of fact could have found [him] guilty beyond a reasonable doubt had they been instructed" on this statute.

The trial court is required to give the jury a written charge "distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury." TEX. CODE CRIM. PROC. ANN. art. 36.14 (West, Westlaw through 2015 R.S.). An accused generally has the right to an instruction on any defensive issue raised by the evidence, whether that evidence is weak or strong, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility of the evidence. *Sanchez v. State*, 400 S.W.3d 595, 598 (Tex. Crim. App. 2013) (noting that "[t]his rule is designed to ensure that the jury, not the judge, decides the credibility of the evidence"). But if the defensive theory is not explicitly listed in the penal code and merely negates an element of the State's case, rather than independently justifying or excusing the conduct, the trial judge should not instruct the jury on it. *Walters v. State*, 247 S.W.3d 204, 209 (Tex. Crim. App. 2007); *see Alonzo v. State*, 353 S.W.3d 778, 784 (Tex. Crim. App. 2011); *see also Giesberg v. State*, 984 S.W.2d 245, 246 (Tex. Crim. App. 1998) (noting that the defendant does not have the burden to prove "[a] defensive issue which goes no further than to merely negate an element of the offense," such as alibi, and concluding that a special instruction on alibi would constitute an unwarranted comment on the weight of the evidence).

Section 341.012 of the local government code provides, in its entirety, as follows:

> (a) The governing body of a municipality may provide for the establishment of a police reserve force.
>
> (b) The governing body shall establish qualifications and standards of training for members of the reserve force.
>
> (c) The governing body may limit the size of the reserve force.
>
> (d) The chief of police shall appoint the members of the reserve force. Members serve at the chief's discretion.
>
> (e) The chief of police may call the reserve force into service at any time the chief considers it necessary to have additional officers to preserve the peace and enforce the law.
>
> (f) A member of a reserve force who is not a peace officer as described by Article 2.12, Code of Criminal Procedure, may act as a peace officer only during the actual discharge of official duties.
>
> (g) An appointment to the reserve force must be approved by the governing body before the person appointed may carry a weapon or otherwise act as a peace officer. On approval of the appointment of a member who is not a peace officer as described by Article 2.12, Code of Criminal Procedure, the person appointed may carry a weapon only when authorized to do so by the chief of police and only when discharging official duties as a peace officer.

TEX. LOC. GOV'T CODE ANN. § 341.012. Chambers notes that the State had the burden to prove that the records at issue were "governmental records," and he argues that "[t]he jury was unable to rationally decide this question because it was denied an instruction on the law applicable to whether this firearms qualification data was required by law to be kept."

The trial court did not err in declining to instruct the jury on this statute. The State had the burden to establish all elements of the offense, including that the falsified documents at issue fell within the penal code's broad definition of "governmental records." *See* TEX. PENAL CODE ANN. §§ 37.01(2), 37.10(a)(1). Chambers was not entitled to a jury

charge instruction on local government code section 341.012 because, to the extent he asserted a defensive theory relating to that statute, it consisted only of negating this element of the State's case. *See Walters*, 247 S.W.3d at 209. Moreover, we have already concluded that the State met its burden to establish this element, notwithstanding section 341.012. Chambers' second issue is overruled.

C. Intent to Harm or Defraud

Tampering with governmental records is a state-jail felony if "the actor's intent is to defraud or harm another." TEX. PENAL CODE ANN. § 37.10(c)(1). Here, the indictment alleged that Chambers acted with the intent to defraud or harm the State. Chambers argues by two issues that "to defraud or harm the State" means "to deprive the State of a pecuniary or property interest." He contends by his third issue that there was insufficient evidence to support a finding that he intended to deprive the State of a pecuniary or property interest, and he contends by his fourth issue that the district court lacked jurisdiction because no such interest was alleged in the indictment. *See* TEX. CODE CRIM. PROC. ANN. art. 4.05 (West, Westlaw through 2015 R.S.) (setting forth criminal jurisdiction of district courts).

The jury charge in this case, consistent with the penal code, defined "harm" as "anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested." *See* TEX. PENAL CODE ANN. § 1.07(25). "Defraud" is not defined in the penal code.[5] An undefined statutory term is "to be understood as ordinary usage allows, and jurors may thus freely read statutory language to have any meaning which is acceptable in common parlance." *Clinton v.*

[5] The jury was instructed that "defraud" "should be given the plain meaning it bears in ordinary use."

State, 354 S.W.3d 795, 800 (Tex. Crim. App. 2011) (citing *Vernon v. State*, 841 S.W.2d 407, 409 (Tex. Crim. App. 1992)).

Chambers argues that the word "defraud" "inherently refers to wrongful acts bent upon the immoral or unlawful acquisition of property." *See* MERRIAM-WEBSTER'S ONLINE DICTIONARY, at http://www.merriam-webster.com/dictionary/defraud (last visited May 1, 2017) (defining "defraud" as "to deprive of something by deception or fraud"); *see also McNally v. United States*, 483 U.S. 350, 351 (1987) ("The words 'to defraud' commonly refer to wronging one in his property rights by dishonest methods . . . ."). He contends that the State's interest in the firearms qualifications records at issue "is neither proprietary nor pecuniary, and the State cannot be defrauded solely of its regulatory power." *See Cleveland v. United States*, 531 U.S. 12, 20 (2000) (holding that, for purposes of the federal mail fraud statute, a state or municipal license "is not 'property' in the government regulator's hands" and therefore the government does not "part[] with 'property'" when it issues a license).

But in the context of the tampering with governmental records statute, courts have construed "intent to defraud" as the intent "to cause another to rely upon the falsity of a representation, such that the other person is induced to act or is induced to refrain from acting." *See Wingo v. State*, 143 S.W.3d 178, 187 (Tex. App.—San Antonio 2004), *aff'd*, 189 S.W.3d 270 (Tex. Crim. App. 2006) (citing 41 TEX. JUR. 3d *Fraud and Deceit* § 9 (1998)); *Martinez v. State*, 6 S.W.3d 674, 678 (Tex. App.—Corpus Christi 1999, no pet.) (finding sufficient evidence to support conviction for tampering with governmental records); *see also State v. Gollihar*, No. 04-07-00623-CR, 2008 WL 2602095, at *2 (Tex. App.—San Antonio July 2, 2008) (mem. op., not designated for publication), *aff'd on other*

grounds, No. PD-1086-08, 2010 WL 3700790 (Tex. Crim. App. Sept. 22, 2010); *Christmann v. State*, No. 08-04-00103-CR, 2005 WL 3214832, at *5 (Tex. App.—El Paso 2005, no pet.) (not designated for publication).[6] Under this definition, which is "acceptable in common parlance," *see Clinton*, 354 S.W.3d at 800, the State does not need to allege or prove that Chambers deprived the State of a proprietary or pecuniary interest in order to sustain a felony tampering charge. And the evidence supported a finding that Chambers directed the falsification of the records in order to cause TCOLE to refrain from taking action against him and his department. *See Wingo*, 143 S.W.3d at 187; *Martinez*, 6 S.W.3d at 678.

Chambers notes that "[t]he act of intentionally making a false entry in a governmental record is inherently deceptive" and he argues that, under this interpretation of "intent to defraud," "it is difficult to conceive of any prosecution" under the tampering statute that would not rise to the level of a state jail felony. He contends that construing "intent to defraud" in this fashion, though consistent with the statute's plain language, would lead to an absurd result that the Legislature "could not possibly have intended when it created a base level offense and a separate enhancement for fraud or harm." *See Ex parte Perry*, 483 S.W.3d at 902; *Whitelaw v. State*, 29 S.W.3d 129, 131 (Tex. Crim. App. 2000) (noting that, in conducting an inquiry into a statute's plain meaning, "we generally presume that every word in a statute has been used for a purpose" and "each word,

[6] As the State notes, conspiracy to defraud has also been interpreted under federal law to include deception unrelated to pecuniary or property loss. *See Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) ("To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated . . . ."); *United States v. Goldberg*, 105 F.3d 770, 773 (1st Cir. 1997) ("[C]onspiracies to defraud are not limited to those aiming to deprive the government of money or property, but include conspiracy to interfere with government functions.").

phrase, clause, and sentence should be given effect if reasonably possible") We acknowledge that the interpretation of "intent to defraud" to include deception unrelated to pecuniary or property loss is broad; however, we do not agree that the Legislature could not have intended this result. It is possible for a person to commit tampering with governmental records without triggering the "intent to harm or defraud" enhancement; for example, as Chambers concedes, the offense would be a misdemeanor if the governmental record at issue "is never intended to be seen by another person." In any event, Chambers has not provided us with a reason to deviate from the established precedent, in the tampering with governmental records context, construing intent to defraud as intent "to cause another to rely upon the falsity of a representation, such that the other person is induced to act or is induced to refrain from acting." *See Wingo*, 143 S.W.3d at 187; *Martinez*, 6 S.W.3d at 678.

For the foregoing reasons, we conclude that a felony tampering charge does not require pleading or proof of a pecuniary or property loss by the government. Accordingly, the evidence was sufficient to support the intent finding and the district court properly exercised jurisdiction.[7] We overrule Chambers' third and fourth issues.[8]

[7] We note that, even if the indictment alleged facts only amounting to a misdemeanor, the district court would still have jurisdiction because the alleged offense involved official misconduct. *See* TEX. CODE CRIM. PROC. ANN. art. 4.05 (West, Westlaw through 2015 R.S.) (providing that district courts "shall have original jurisdiction in criminal cases of the grade of felony" and "of all misdemeanors involving official misconduct"); *see also id.* art. 3.04(1) (West, Westlaw through 2015 R.S.) (defining "official misconduct" as "an offense that is an intentional or knowing violation of a law committed by a public servant while acting in an official capacity as a public servant"); TEX. PENAL CODE ANN. § 1.07(41)(A) (West, Westlaw through 2015 R.S.) (defining "public servant" as, among other things, "an officer, employee, or agent of government").

[8] In his brief, Chambers lists a fifth appellate issue challenging the exclusion of certain evidence at trial. However, the issue is not supported by any argument. Accordingly, it is waived. *See* TEX. R. APP. P. 38.1(i).

III. CONCLUSION

The trial court's judgment is affirmed.

DORI CONTRERAS
Justice

Publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
4th day of May, 2017.

THE THIRTEENTH COURT OF APPEALS

13-16-00079-CR

John Chambers
v.
The State of Texas

On appeal from the
103rd District Court of Cameron County, Texas
Trial Cause No. 2015-DCR-268-D

JUDGMENT

THE THIRTEENTH COURT OF APPEALS, having considered this cause on appeal, concludes that the judgment of the trial court should be AFFIRMED. The Court orders the judgment of the trial court AFFIRMED.

We further order this decision certified below for observance.

May 4, 2017