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IN THE COURT OF APPEALS  
FOR THE FIFTH JUDICIAL DISTRICT  
DALLAS, TEXAS

**RECEIVED IN**  
COURT OF APPEALS, 5th DIST.

AUG 30 2011

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05-11-00450-CR

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**MICHAEL TOWERY ROBERTS**  
Appellant

v.

**THE STATE OF TEXAS**  
Appellee

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**On Appeal from the 422nd Judicial District Court  
of Kaufman County, Texas**

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**APPELLANT'S BRIEF**

**Taryn Davis**  
State Bar No. 00792449  
109 N. Jackson  
Kaufman, Texas 75142  
Telephone (972) 962-0653  
Fax (972) 962-0656

**ATTORNEY FOR APPELLANT**

## IDENTITY OF PARTIES

Appellant: Michael Towery Roberts

Trial Judge: B. Michael Chitty  
422<sup>nd</sup> Judicial District Judge  
Kaufman County Courthouse  
Kaufman, Texas 75142

Appellant's Counsel: Taryn Davis  
SBN: 00792449  
109 N. Jackson  
Kaufman, Texas 75142

Trial Counsel: Dennis Jones  
SBN 1086980  
201 W. Mulberry  
Kaufman, Texas 75142

State's Attorney: Michelle Sutton  
SBN: 24027900  
Assistant Criminal District Attorney

Mark Hasse  
SBN: 09202000  
Assistant Criminal District Attorney

Kaufman County Courthouse  
Kaufman, Texas 75142

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## **THE HONORABLE JUSTICES OF THE COURT OF APPEALS:**

Comes now Appellant and submits this brief pursuant to the Texas Rules of Appellate Procedure specifying error of which Appellant complains on appeal.

### **PRELIMINARY STATEMENT**

Appellant, Michael Towery Roberts, was charged by indictment with Failure to Register as a Sex Offender, third degree felony. On March 21, 2011, a jury was selected, empanelled, and Appellant pled not guilty (R. V3P84). Appellant was convicted of failing to register. On April 6, 2011, punishment was assessed by the judge, at two (2) years confinement in the Texas Department of Criminal Justice – Institutional Division. Appellant gave timely written notice of appeal.

### **POINTS OF ERROR**

**POINT OF ERROR Number 1** - Whether the evidence is sufficient to prove beyond a reasonable doubt that Mr. Roberts failed to register as alleged in the indictment.

**POINT OF ERROR Number 2** - Whether the trial court erred in holding the evidence to be sufficient when an element of the offense charged was not proved.

**POINT OF ERROR Number 3** – Whether the trial court failed to properly instruct the jury on sex offender, registration as it applied to Mr. Roberts.

### **STATEMENT OF FACTS**

Preliminarily Counsel for Appellant moved for a continuance based on his inability to receive subpoenaed phone records, which ultimately received and not used (R. V3 P25). The Court denied (R. V3 P26). Appellant was admonished and elected the judge the access punishment in the event of a conviction (R. V3 P26).

Testimony began with the State calling Sergeant Susan Monroe, certified peace officer with the Kaufman County Sheriff's Department and resident fingerprint expert (R V3 P88). She made a comparison of Appellant's prints, State's Exhibit No. 1, which was a fingerprint card that was generated at the jail from Mr. Roberts (R. V3 P93). The prints were taken by Deputy Dickens and observed by Sgt. Monroe (R. V3 P93). Appellant was identified (R. V3 P94). State's Exhibit No. 2, Judgment from Kaufman County Cause No. 18654 containing Appellant's fingerprint, which was confirmed by the witness' comparison of the two exhibits (R. V3 P95). State's Exhibit No. 2 is then admitted, without objection (R. V3 P96).

On cross, trial counsel emphasizes that State's Exhibit No. 2 is not actually a conviction (R. V3 P98).

The State next called Sergeant Joseph Cagle. He testified that he is an investigator and certified peace officer with Kaufman County Sheriff's Office and that his current duties include sex offender registration (R. V3 P100). He identified Appellant as one of the 151 registered sex offenders that he works with (R. V3 P101). He identified State's Exhibit No. 2 as a document that would trigger sex offender registration (R. V3 P103). He explained how the Kaufman County sex offender registration works. He testified that Appellant's address was 1606 Warrington Way in Forney, within Kaufman County and that that address was covered by his registration authority (R. V3 P108). He testified that Appellant was personally interviewed and provided with the required notices under Chapter 62 of the Code of Criminal Procedure (R. V3 P108). He testified that he was alerted Appellant was not residing at his specified location due to Sgt. Cagle's May 3, 2010, letter to Appellant being returned to sender May 28, 2010 (R. V3 P111-112). Thereafter, Sgt. Cagle did a compliance check at Appellant's residence (R. V3

P112). The only time Sgt. Cagle knew Appellant had been in Alabama was when he was arrested there (R. V3 P122).

On cross, Sgt. Cagle testified that Appellant missed his annual verification appointment on September 7, 2010 (R. V3 P126). And, his last verification was made on September 16, 2009 (R. V3 P126). Sgt. Cagle testified that Appellant's record's indicated that he continuously registered from 1997 to 2009 (R. V3 P128). Trial counsel questioned Sgt. Cagle about his compliance letter and his two physical compliance check, which is the alleged offense date in the indictment versus his failure to comply with the annual registration date of September. Sgt. Cagle went on to say that the house was listed for sale that that he contacted Coldwell Banker on September 13, 2010, and was informed by Aden Flores that Appellant was the owner and had the residence currently listed for sale (R. V3 P133). Sgt Cagle testified that on May 28, 2010, he wrote a report noting that he went to Roberts' residence for a compliance check and observed the house was listed for sale, the yard was un-kept, and there was a numeric key lock on the front door. The residence appeared vacant and he took photographs evidencing that fact. He found a letter sent by the post office in Roberts' mailbox informing the owner that the residence was notated as a vacant residence. He testified that on May 28, 2010, he tried to contact Appellant's wife, Rhonda Stephens and had left a voice message with no return call (R. V3 P135).

Sgt. Cagle was questioned about his possession of any follow-up papers where a case was dismissed or discharged from probation; and he responded that he had a polygraph (R. V3 P144). Trial counsel approached; and the jury was excused to take up a matter outside their presence (R. V3 P144). Trial counsel objected to Sgt. Cagle's response as being nonresponsive, and that he mentioned the word "polygraph". The results being not allowed and thereby there being no way

to clear up (R. V3 P145). The Court sustained the objection (R. V3 P145). Trial counsel moved for a mistrial, which the Court denied (R. V3 P145).

Then trial counsel, still outside the presence of the jury asks that he be allowed to go into the results of the polygraph with the jury and withdraws his nonresponsive objection (R. V3 P149). The Judge would not allow the defense to go into the polygraph results (R. V3 P149).

As a result of the Court's rulings, he reasserted the nonresponsive objection and requested an instruction for the jury to disregard (R. V3 P150). The Court instructed the jury to disregard the comment and not to give it any consideration for any purpose and noted for the record that the jury is all nodding in agreement (R. V3 P151).

On redirect, State's Exhibit 21, September 16, 2009, CR39 form, is admitted without objection (R. V3 P160). State's Exhibit 23, notification of registrant's duty to register, is admitted, without objection (R. V 3 P161). State's Exhibit 22, a letter signed acknowledging that the sex offender has received a copy of the CCP, is admitted, without objection (R. V3 P163). State's Exhibit 24, another form given to sex offender to be signed, is admitted, without objection (R. V3 P164).

On recross, Sgt. Cagle testified that the warrant was put out for Appellant's arrest on September 14, 2010 (R. V3 P166).

The State called Sergeant Phillip Stewart, certified peace officer with Kaufman County Sheriff's Office assigned to criminal investigations (R. V3 P167). Sgt. Stewart testified that he made visits to 1606 Warrington Way, Forney, Texas with Sgt. Cagle. He identified State's Exhibits 3,4,5,6,7,8, and 9; photographs of that location taken on May 28, 2010 (R. V3 P169). Sgt. Stewart testified that the house appeared vacant although it also appeared that there were some renovations going on inside the residence (R. V3 P172). State's Exhibits 3-9 were

admitted, without objection (R. V3 P169). Sgt. Stewart identified State Exhibits 10 through 15, pictures taken of the residence on August 30, 2010. They were admitted, without objection (R. V3 P173).

On cross, Sgt Stewart testified that he did not check the mailbox, did not knock on the door or windows, and did not check with any neighbors (R. V3 P176). And, upon further inspection of the exhibits, Sgt. Stewart agreed that the grass appeared to have been cut or did not grow between the taking of the pictures (R. V3 P178).

The State called Brandi Fernandez, Kaufman County Assistant Criminal District Attorney. The jury was excused on the request of the State to take up matters outside their presence. State's Exhibit 16, transcript of testimony from a bond hearing, is offered; and without objection is admitted for record purposes only (R. V3 P183). The Court granted the State's Motion in Limine as to an Order discharging Appellant from probation (R. V3 P185).

Brandi Fernandez testified that she was present during a hearing held on November 23, 2010, involving Mr. Roberts. She went on to identify Appellant (R. V3 P186). She identified State's Exhibit 2, a community supervision judgment placing the defendant on community supervision out of the 86<sup>th</sup> Judicial District Court for the offense of indecency with a child. Ms. Fernandez is asked to explain the effect of the document; and over a "editorializing" and a relevance objection she is allowed to explain the judgment (R. V3 P188). Trial counsel objects to Ms. Fernandez summarization of what the law is as it relates to Chapter 62 of the Code of Criminal Procedure and further asserts that the law comes from the Court. The Judge excuses the jury to clarify the objection (R. V3 P190). The Judge instructs the witness to just read the law if she is going to testify about it (R. V3 P191).

Trial counsel believes the State has opened the door to allowing him to introduce Defendant's Exhibit 1, the Order discharging Mr. Roberts from community supervision (R. V3 P191). Trial counsel argues that under two theories, one being a mistake of fact and secondly, mitigation he should be allowed to introduce this exhibit (R. V3 P194). The Judge overruled the State's objection (R. V3 P196). On cross examination, Defense Exhibit No. 1, Order discharging Mr. Roberts from community supervision is offered, and without objection here is admitted (R. V3 P205).

Ms. Fernandez went on to testify that Mr. Roberts had a reportable adjudication that required sex offender registration for life because it was an indecency by contact (R. V3 P197). Ms. Fernandez referred to State's Exhibit No. 16, and testified about her eliciting testimony from Mr. Roberts during a writ hearing. She testified that when Mr. Roberts was question about where he resided prior to his arrest and he replied, Mobile, Alabama for 28 days (R. V3 P199). And, when asked where he lived prior to that, Mr. Roberts responded that he lived in Pascalooga, Mississippi (R. V3 P200). According to her, he further testified during this writ hearing that the last time he lived in Kaufman County was June or July of 2010 (R. V3 P200). Additionally, Mr. Roberts testified during that hearing that he had been in Arkansas, Tennessee, California, Mississippi, and Alabama since being in Texas (R. V3 P203).

The State rests (R. V3 P206).

The defense is reurging its Motion for Continuance due to their inability receiving subpoenaed phone records (R. V3 P208). The court recessed the case until the following morning. Appellant is put back on the record with regards to him testifying and again he indicated it was his desire to testify (R. V3 P210). The Court further admonished Mr. Roberts

(R. V3 P212). Appellant elected to testify and seemingly waived his privilege against self-incrimination freely, voluntarily and knowingly (R. V3 P213).

On March 22, 2011, the defense began by moving for an instructed verdict of not guilty based on the indictment alleging that Mr. Roberts had a “reportable conviction.” (R. V4 P5). The evidence was such that Mr. Roberts received a deferred adjudication, which was in essence not a conviction. Trial counsel argued the State alleged the wrong wording and that they are “stuck” with proving a reportable conviction, which they did not. They proved a reportable adjudication (R. V4 P5). There is a variance between the proof and the indictment. The Court denied the Motion asserting the indictment puts the defendant on notice of what he’s charged with (R. V4 P7).

Trial counsel’s second Motion for Instructed Verdict had to do with the evidence showing Mr. Robert’s failed to notify Kaufman County of his move versus actually proving that he failed to register in another jurisdiction (R. V4 P8). The actual evidence was that he failed to notify Kaufman County of a change of address again not that he failed to register. The Court denied the Motion (R. V4 P12).

The defense began with no opening and called Lacy Smith, Kaufman County Adult Probation Officer. She identified State’s Exhibit No. 2, a letter written by her. It was offered and admitted without objection (R. V4 P15). Defense Exhibit No. 2, this letter merely confirms Order discharging Mr. Roberts from community supervision and acknowledges that he was not convicted of the charge and was addressed to Transportation Securities Administration.

Trial Counsel recalled Sergeant Joseph Cagle (R. V4 P21). Sgt. Cagle testified that Mr. Roberts was due to verify on September 16, 2010, and had a 30 day window before or after that date to schedule this appointment (R. V4 P23). Sgt. Cagle identified Defense (“State’s”) Exhibit

No. 3, the Probable cause affidavit for the warrant for Mr. Roberts' arrest. Defendant's Exhibit No. 3 is offered; and without objection, admitted (R. V4 P27).

Appellant took the stand. He testified his birthday is September 7 (R. V4 P29). Mr. Roberts testified that he was a truck driver who was not in Kaufman County very often and that he believed Kaufman County was aware of his situation. When he went into Alabama DMV to renew his commercial driver's license during the time of his birthday, he was attempting to establish his residence there and then would have needed to notify Kaufman County Sheriff's Department of the change (R. V4 P40). The Court sustained the State's leading objection (R. V4 P41). Mr. Roberts testified that he was instructed by Mobile Metro Police that he had to first establish of residence then register (R. V4 P43). Mr. Roberts testified that he was further instructed to get his license first and then come back to register (R. V4 P43). Mr. Roberts was not able to get his license renewed until his \$740 log-book ticket was paid in Maine, which took until September 17, 2010 (R. V4 P44). Mr. Roberts testified that his long-time girlfriend and he had broke-up in August 2009, and that when she left she took most of the furnishings (R. V4 P48). Mr. Roberts testified that Sgt. Cagle was mistaken about any belongings being in the house because the only view he had into his home was from the front window where he took pictures (R. V4 P50). He testified he had a bed in his bedroom and clothes there. Mr. Roberts testified the house in Forney was his residence until he got an apartment, was attempting to renew his driver's license in Alabama and register there as instructed (R. V4 P51). The Defense rests (R. V4 P64).

Trial counsel had objected to the charge (R. V4 P66). He asserted that the indictment charges Appellant with failing to register. The Charge is allowing for a conviction by failing to notify the proper authority of the change of address. The objection was overruled (R. V4 P68).

Trial counsel moved again for instructed verdict being that there was no evidence that Mr. Roberts failed to register because the State had not proved he had actually changed his address for the purpose of triggering the duty to register at anytime other than his annual verification (R. V4 P69). The Court overruled the objection (R. V4 P69).

The Jury is brought in and the Charge is read. After deliberations, the jury found Mr. Roberts guilty.

The jury is excused. Court is reconvened the following day for testimony from Sergeant Susan Monroe for a prove-up on more prints from two judgments out of California. On March 23, 2011, the punishment phase of the trial began with Sgt. Monroe.

Sgt. Monroe testified that State's Exhibit No. 20 was a document that she examined for the purpose of doing a fingerprint comparison (R. V5 P4). This document is offered; and without objection, admitted (R. V5 P6). State's Exhibit No. 18 was another document that she examined. State's Exhibit No. 18 is offered; and without objection, admitted (R. V5 P10).

The case is recessed until April 6, 2011, for the completion of the PSI. During the punishment phase the Court takes judicial notice of both the original and supplemental pre-sentence investigation report (R. V6 P5).

Mr. Roberts testified that he had been registering since 1997 (R. V6 P8). Trial counsel requested State's Exhibit No. 20, judgment with someone else's name on it, but linked to Mr. Roberts, which he attempted to explain the error to dispel any belief that Mr. Roberts was purposely using an alias, be admitted for all purposes at this time (R. V6 P10). Defense Exhibit No. 4, a copy of State's 20, was offered; and without objection, admitted. Mr. Roberts is requesting probation from the Court. Both sides closed (R. V6 P31). The Court accessed

punishment at two years in the Texas Department of Criminal Justice – Institutional Division (R. V6 P37).

**POINT OF ERROR Number 1** - Whether the evidence is sufficient to prove beyond a reasonable doubt that Mr. Roberts failed to register as alleged in the indictment.

### **SUMMARY OF ARGUMENT**

The indictment charged the defendant with failure to register. The State failed to prove beyond a reasonable doubt that Mr. Roberts had established residence anywhere other than Kaufman County. The State failed to prove that Mr. Roberts' address of 1606 Warrington Way, Forney, Texas was even located within rural Kaufman County. His annual registration was not due at the time alleged in the indictment (May 28, 2010). And, if there was no move, then Mr. Roberts was registered and in good standing with Kaufman County.

### **ARGUMENT**

Mr. Robert's indictment in said cause fails to state an offense to which Appellant can be held criminal responsible. The trial counsel specifically argued this point in support of his Motion for Instructed Verdict (R. V4 P8). An appellate court reviews a challenge to the denial of a motion for instructed verdict as a challenge to the sufficiency of evidence. Williams v. State, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996).

Under the proper sufficiency standard of review, an appellate court considers all the evidence in the light most favorable to the verdict to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); Brooks v. State, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). Appellate courts are required to determine whether any rational juror could have found the essential elements of the

offense beyond a reasonable doubt. See Jackson, 443 U.S. at 319; Brooks, 323 S.W.3d at 902 n. 19. An appellate court is required to defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given to their testimony. See Jackson, 443 U.S. at 319, 326; Brooks, 323 S.W.3d at 899. All evidence, whether properly or improperly admitted, will be considered when reviewing the sufficiency of the evidence. See McDaniel v. Brown, 130 S. Ct. 665, 672 (2010); Lockhart v. Nelson, 488 U.S. 33, 41-42(1988); Jackson, 443 U.S. at 319.

A person is subject to the sex-offender registration program if he has a reportable conviction or adjudication. For purposes of CCP ch. 62, a "reportable conviction or adjudication means of conviction or an adjudication, including a deferred adjudication. Depending on the offense, there are two types of registration: a duty to register for life or a duty to register for ten years after disposition or discharge. See CCP arts. 62.001(5), 62.101. Then, an adult who has a lifetime registration for CCP art. 62.101(a) offense and who fails to verify registration once each year as required by CCP art. 62.058. Failure to register as such shall be punished as a third degree felony. Code of Crim. Proc. Ann. art. 62.102(b)(2). The indictment is specifically titled and charged Mr. Roberts with an offense for failing to register for "life/annually" alleged to have been committed on or about May 28, 2010, and mistakenly cites Texas Penal Code sec. 62.1 versus same article number under Texas Code of Criminal Procedure (Clerk's R. P7).

The testimony is uncontroverted that Mr. Roberts' annual reporting was due in September 2010. Mr. Roberts testified his birthday is September 7 (R. V4 P29). On cross, Sgt. Cagle testified that Appellant missed his set annual verification appointment on September 7, 2010 (R. V3 P126). Sgt. Cagle testified that he obtained a warrant for Appellant on September 14, 2010 (R. V3 P166). Appellant's last verification was made on September 16, 2009 (R. V3

P126). Sgt. Cagle testified that Appellant's records indicated that he had continuously registered from 1997 to 2009 (R. V3 P128). Sgt. Cagle also testified that annual registration is required 30 plus or minus days of Mr. Roberts' September 7 birthday (R. V3 P130). Code Crim. Proc. Ann. art. 62.058(a). Thus, the evidence was insufficient to prove Appellant failed to register annually.

Appellant further asserts the State has failed to properly charge Appellant. The indictment alleges . . . :

“while being a person required to register with the local law enforcement authority in the county where the defendant resided or intended to reside for more than seven days, to-wit: Kaufman County, because of a reportable conviction for Indecency with a Child, intentionally or knowingly fail to register with the local law enforcement authority in said county,” (Clerk's R. P7) . . . .

Sgt. Cagle even testified that sex offenders are obligated to report seven day before or after, just within seven days of the move. He testified, “Okay, here's the deal, they've got to notify me seven days, within seven days of their move. If they're going to move next week, they can contact me and say hey, we're moving next week. That's plenty of time. But if they move that next week, they have seven days to notify the next jurisdiction, you see.” (R. V3 P119). The evidence is insufficient as to Appellant intentionally or knowingly violating the law when State's own witness is incorrectly testifying and relaying to the jury the law as he believed it applied to Appellant.

The State put on testimony from Sgt. Cagle who testified that he was alerted Appellant was not residing at his specified location due to Sgt. Cagle's May 3, 2010, letter to Appellant being returned to sender May 28, 2010 (R. V3 P111-112). Thereafter, Sgt. Cagle did a compliance check at Appellant's residence (R. V3 P112). Sgt. Cagle testified that 1606 Warrington Way in Forney is an address that's within Kaufman County (R. V3 P108). The

State's evidence is insufficient here because the State failed to prove-up that if Appellant failed to register, registration was even required in Kaufman County and not within the City of Forney.

Evidence was held to be insufficient where the State's evidence failed to prove that one's residence was located in rural area of a County and not within the municipality. Simpkins v. State, 300 S.W.3d 860 (Tex. App.--Texarkana 2009).

The Statute is such that any intended change of address must be reported seven days prior to the change. Code Crim. Proc. Ann. art. 62.055(a). The Statute is such that if the person moves to another state that has a registration requirement for sex offenders, the person shall, not later than the 10<sup>th</sup> day after the date on which the person arrives in the other state, register . . . . Code Crim. Proc. Ann. art. 62.055(c). The Statute is such that if a person intended to regularly visit other locations for more than 48 consecutive hours on 3 or more occasions during a month other registration guidelines are triggered. Code Crim. Proc. Ann. art. 62.059. Although, Sgt Cagle again testified incorrectly. He testified the window is 72 hours at another location for more than 3 times per month requires a report. (R. V3 P120). Nevertheless, the State did not charge Mr. Roberts with that violation.

The trial court erred when it failed to grant Appellant's Motion for Instructed Verdict (R. V4 P4, 69). The evidence at best showed Mr. Robert's failed to notify Kaufman County of his intended move seven days prior to an intended move versus actually proving that he failed to register because it is undisputed he was registered in Kaufman County, Texas.

If there was a move, as the evidence may suggest to Alabama, then registration would have been required there. However, residency never was established, nor proved to be, anywhere else that would have allowed Mr. Roberts to basically, un-register in Kaufman County.

Mr. Roberts testified that Sgt. Cagle was mistaken about any belongings being in the house because the only view he had into his home on the two trips he made there, was from the front window where he took pictures (R. V4 P50). He testified he had a bed in his bedroom and clothes there. Mr. Roberts testified the house in Forney was his residence (R. V4 P51). The State failed to prove Mr. Roberts had established residence anywhere other than Kaufman County. Sgt. Cagle testified that the house at 1606 Warrington Way in Forney, Texas was listed for sale that that he contacted Coldwell Banker on September 13, 2010, and was informed by Aden Flores that Appellant was the owner and had the residence currently listed for sale (R. V3 P133).

The State's never proved Mr. Roberts intentionally or knowingly failed to register anywhere because he was in fact registered in Kaufman County. A reasonable fact-finder would necessarily entertain reasonable doubt about Mr. Robert's guilt as charged; due process requires a reversal and order of judgment of acquittal. Swearingen v. State, 101 S.W.3d 89, 95 (Tex. Crim. App. 2003)

**POINT OF ERROR Number 2** - Whether the trial court erred in holding the evidence to be sufficient when an element of the offense charged was not proved.

### **SUMMARY OF ARGUMENT**

The indictment alleged that Mr. Roberts had a "reportable conviction." The indictment says nothing about the alternative mechanism for triggering sex offender registration, which was having a "reportable adjudication." Mr. Roberts was placed on deferred probation, not convicted, for indecency with a child. That is a fatal variance, which requires reversal and an acquittal.

## ARGUMENT

Should the Court believe that the State actually correctly charged Mr. Roberts with failing to register; then, Appellant refers you to the indictment, which alleges that Mr. Roberts had a “reportable conviction” (Clerk’s Record P7). The evidence of the deferred community supervision definitely does not support a “reportable conviction” element (State’s Exhibit No. 2 and Defendant’s Exhibit No. 1). Again, the trial court erred when overruled Appellant’s Motion for Instructed Verdict (R. V4 P4, 69). Counsel specifically argued the variance (R. V4 P5).

A fatal variance existed as to an aggravated assault offense where the indictment charged that a defendant “did then and there unlawfully, while a *public servant* . . . intentionally and knowingly threaten J.B. Easthagen.” However, the evidence did not show the defendant was a public servant. The evidence was such that Easthagen was the public servant. Because of this fatal variance between indictment and the proof, reversal for acquittal was required. Roy v. State, 76 SW3d 87 (Tex. App—Houston [14<sup>th</sup> Dist.] 2002).

Additionally, a trial court erred in holding the evidence sufficient to sustain a conviction when there was a material and fatal variance between the instrument set out in the indictment by its tenor and the instrument offered in evidence to support such description. This referenced case had to do with a check appearing in the indictment bearing a 2-19-74 date and a bank transit number appearing as 88-135; and when the check was introduced into evidence it bore the date 2-19-74 and bank transit number was 88-1135, the Criminal Court of Appeals held that was a variance fatal to conviction. Armstrong v. State, 573 S.W.2d 813 (Tex. Crim. App. 1978).

In our case, the State alleged a “reportable conviction” and they proved a “reportable adjudication.” The evidence is insufficient to sustain the conviction.

**POINT OF ERROR Number 3** – Whether the trial court failed to properly instruct the jury on sex offender registration as it applied to Mr. Roberts.

### **SUMMARY OF ARGUMENT**

The State was allowed to include language associated with a failure to register violation when a person fails to report an intended move, which absolutely has nothing to do with Mr. Roberts' alleged violation. It would appear they were trying to include additional violations of the Statute that might apply to Appellant, and give some credence to their application paragraph, while confusing the already confusing issues.

### **ARGUMENT**

Article 36.19 of the Texas Code of Criminal Procedure establishes the standard for reversal on appeal when the requirements of Article 36.14, which relates to the charge of the court, have been disregarded: “the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of the defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial.” Tex. Code Crim. Proc. Ann. art 36.19.

Under Almanza, jury charge error requires reversal of the judgment when the defendant has properly objected to the charge and the appellate court finds “some harm” to his rights. Almanza v State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). Trial counsel objected to the charge and argued that the indictment charges Appellant for specifically “failing to register;” and that the Charge is allowing for a conviction by “failing to notify the proper authority of the change of address.” (R. V4 P66). The objection was overruled (R. V4 P68) (Clerk’s R. P118).

The change of address, in midstream so to speak, and failure to annually register are

controlled by two different Code of Criminal Procedure Articles. Tex. Code Crim. Proc. arts. 62.055, 62.058 (respectively).

After a review of the indictment, the trial court's jury charge on the law; and then, the application paragraph, harm is shown.

The indictment alleged . . . :

“while being a person required to register with the local law enforcement authority in the county where the defendant resided or intended to reside for more than seven days, to-wit: Kaufman County, because of a reportable conviction for Indecency with a Child, intentionally or knowingly fail to register with the local law enforcement authority in said county,” (Clerk's R. P7) . . . .

The Charge mixed CCP Arts. 62.051(a) and 62.055(a) thereby giving irrelevant instructions that pertained to a person failing to notify law enforcement of an intended change of address, which Mr. Roberts was surprisingly not accused of.

The application paragraph tracks the indictment (Clerk's R. P120). The indictment by itself is confusing enough with the title referring to one violation and the body referring to Appellant's failure to basically un-register. The harm is evident with the conviction.

The State alleged it would prove a *reportable conviction*, but did not. The State alleged a failure to register in *Kaufman County*, although Mr. Roberts was registered in Kaufman County. The State seemingly may have proved Mr. Roberts failed to notify Kaufman County of an intended change of address seven days before any potential change (and was allowed to have this law in the charge). However, it is what is accused in the indictment that must be proved.

The insertion of the following paragraph in the Court's Charge:

“If a person required to register under this chapter intends to change address, regardless of whether the person intends to move to another state, the person shall, not later than the seventh day before the intended change, report in person to the local law enforcement

authority designated as the person's primary registration authority by the department . . .  
." (Clerk's R. P118),

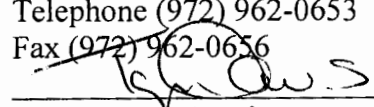
makes a case for conviction clearly and significantly more persuasive. Taylor v. State, 332 S.W.3d 483, 490 (Tex. Crim. App. 2011). Appellant was harmed by the insertion of law that did not apply to Mr. Roberts as he was indicted when the jury returned its verdict of guilty. Trial counsel properly made the objection to the jury charge. The inclusion of the law as it related to individuals who failed to notify law enforcement of any intended change in address seven days prior to the change was irrelevant to the accusations made in Mr. Roberts' indictment. And, with that charge being improperly included, reversal is required with "some harm" being shown. Tex. Code Crim. Proc. art. 36.19.

#### PRAYER OF RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant prays this reviewing court reverse the trial court's judgment and enter a judgment of acquittal.

Respectfully submitted,

Law Office of Taryn Davis, PLLC  
109 N. Jackson  
Kaufman, Texas 75142  
Telephone (972) 962-0653  
Fax (972) 962-0656

  
BY: Taryn Davis  
State Bar No. 00792449  
ATTORNEY FOR APPELLANT

#### CERTIFICATE OF SERVICE

I, hereby, certify that a true and correct copy of Appellant's brief was hand-delivered to the Kaufman County Criminal District Attorney, Kaufman County Courthouse, Kaufman, Texas 75142, on this 30th day of August, 2011.

  
Taryn Davis