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IN THE COURT OF APPEALS  
FOR THE STATE OF GEORGIA

ROBERT THOMPSON, : APPEAL NO. A93A2140  
: :  
Appellant : :  
: :  
v. : :  
: :  
THE STATE : :  
: :  
Appellee :

BRIEF OF APPELLANT

PART I.

STATEMENT OF THE CASE

In September or October of 1988, appellant was approached by two (2) men, Mr. James Rodriguez and Mr. Ron Sable, with whom appellant had worked briefly in the past, approached appellant with an offer of employment. (T-1359) Sable and Rodriguez described the automobile assumption business, with which appellant was somewhat familiar, and explained that they were interested in expanding their business from Houston, Texas to Macon. (T-1360). Appellant had several contacts in the automobile financing industry, and thus Sable offered appellant employment in the new business in the position of securing financing for potential automobile purchasers.

The proposed business sounded like a good deal to appellant. He had been in the automobile sales business for many years, and was very interested in working in the finance end of automobile sales. The automobile assumption business sounded like a type of business which was designed to help

people who were either in financial distress and needed to get rid of car payments or people with such poor credit history that they would not be able to purchase an automobile through any other channel. Before accepting an offer of employment, appellant took it upon himself to investigate further the nature and legitimacy of the automobile assumption business. He placed telephone calls to the Attorney General's Office in Atlanta, the Secretary of State's Office, the Bureau of Consumer Affairs, and a personal attorney. (T-1362-1363). After said conversations, appellant was of the opinion that the business in which he was about to be employed was a valid and legitimate one, and the contracts which they were to use in selling, consigning, or putting out for assumption vehicles presented no legal problems.

Appellant went to work for Southern Financial Services on November 1, 1988, when Southern Financial Services opened its doors for business in Macon, Georgia. Appellant soon came to find himself alone in the office, except for the company's secretary, with Mr. Sable often times absent from the business. Appellant handled many telephone calls, assisted the company by responding to questions as to how the business operated, helped put vehicles out for assignment by transferring numbers from consignment agreements to assumption agreements, assisted customers in selecting vehicles, and signed as a witness documents entered into between customers of the company and the company.

Before long, appellant also began handling a number of customer complaints. (T-200-205). Appellant was never responsible for sending customers finance payments along to the lien holder. However, customers were calling and complaining that their payments had not been sent to their respective lien holders, and that these lien holders in turn were calling the consignees, who were still legally responsible for making car payments, and demanding payment of same. The evidence presented in the testimony given by appellant and State's chief witness as to matters pertaining to in-office affairs, Pam Odom, establishes clearly that appellant's main duty was to submit applicants for financing once a satisfactory payment record had been compiled by automobile assumers.

In fact, testimony shows that Ms. Odom considered among her chief responsibilities, that of depositing checks and sending payments. (T-97). Ironically, Ms. Odom initially opened the company bank account, and for some period of time was the only person whose name appeared on the signature card for said account. (T102). Furthermore, State's witness Odom testified that she was responsible for keeping the books on each vehicle that came in and went out of the office, and, with the exception of two (2) or three (3) times, was the only employee who compiled any information with regards to payment and receipt schedules. (T-100).

Appellant contended throughout trial, and contends now, that he and the other employees of Southern Financial Services did everything they could to try and solve their

customers problems when it became apparent that the owner of the business was not operating the type of business that he had described. Once Mr. Sable left town, apparently for good, appellant actually remained in the office, and, with the help of Ms. Odom, tried to extricate the company from its problems with various customers. (T-202-205). Once an investigation had begun, appellant shows that he did everything in his understanding and ability to cooperate. He made contact with the District Attorney's Office and expressed his concerns that the business was not operating as it should. (T-204). He made himself available to investigators from the District Attorney's Office, and produced all those documents which he believed were being asked of him. (T-1373).

On February 8, 1990, an indictment issued from the Grand Jury, in the State of Georgia, County of Bibb, against appellant Thompson, appellant Wilbur Gil Chancellor, James Rodriguez, and Ron Sable (although the indictment names Mr. Sable under three of his known assumed names, to wit: Thomas Rich a/k/a Thomas Sable a/k/a Ron Rich). The indictment accused appellant of violating Georgia's RICO Act, O.C.G.A. §16-14-4, supported by allegations of fifty-seven (57) predicate acts, and various of fifty-four (54) other substantive Counts which mirrored the allegations enumerated in the predicate acts.

On June 4, 1990, the jury returned verdicts as to appellant Thompson on the RICO Count, without specifying which predicate acts appellant was guilty of in order to

return such a verdict, and thirty-eight (38) of forty-seven (47) substantive Counts of Theft by Deception, Theft by Conversion, and Theft by Taking, of which he was charged. On June 19, 1990, appellant was sentenced to twenty (20) years, serve ten (10) on the racketeering Count, and ten (10) years (one hundred years probation) on the theft Counts, consecutive to the racketeering Count. Subsequently, the Court granted a Motion in Arrest of Judgment as to all Counts, except as to Count I, the RICO Count, leaving intact the sentence on said Count I. Appellant filed his Amended Motion for New Trial on December 26, 1991, and denial of said Motion was Ordered on May 26, 1993, from which this appellant appeals.

#### PRESERVATION OF ERRORS

The errors enumerated in this appeal were preserved at trial according to the Rules of Civil Procedure. Evidence of compliance with the rules relating to the preservation of errors is to be found in the following pages of the transcript at trial: (1) Insufficient Evidence, T-1092 and 1110; (2) Tainted Evidence, T-1123, 1694, 1132, 1123, 1703; (3) The Court committed reversible error by denying appellant's Motion for a Directed Verdict at the conclusion of the State's case; (4) The Court committed reversible error by denying appellant's renewal of the Motion for Directed Verdict at the conclusion of the trial proceedings; (5) The Court committed reversible error by denying

appellant's Motion for New Trial; (6) The Court committed reversible error by depriving appellant to his right of due process as guaranteed by the Fourteenth Amendment.

PART II.

ENUMERATION-OF-ERRORS

I. The Trial Court committed harmful and reversible error in denying appellant's Motion for New Trial, in that the evidence produced at trial was insufficient to enable a rational trier of fact to find appellant guilty.

A. The jury did not find appellant guilty of any predicate acts, nor did they indicate at least two (2) predicate acts on which they based their guilty verdict in the RICO Count.

B. The evidence presented to the jury was insufficient to sustain a verdict on any predicate acts of Theft by Taking.

C. The evidence presented to the jury was insufficient to sustain a verdict on any predicate acts of Theft by Conversion.

D. The evidence presented to the jury was insufficient to sustain a verdict on any predicate acts of Theft by Deception.

E. Appellant did not have the requisite knowledge of the criminal element of enterprise sufficient to sustain conviction.

II. The Trial Court committed harmful and reversible error in denying appellant's Motion for New Trial, in that the jury was subjected to tainted and decidedly false testimony and documentary evidence, and thus violated the appellant's Fourteenth Amendment right to due process and the due process rights secured by the Georgia Constitution.

III. The Trial Court committed harmful and reversible error in its jury charge on the RICO Count, in that the jury charge improperly led the jury to believe that if one defendant were found guilty, then the other must, as a matter of law, also be found guilty.

PART III.

ARGUMENT AND CITATION OF AUTHORITIES

- I. THE TRIAL COURT COMMITTED HARMFUL AND REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION FOR NEW TRIAL, IN THAT THE EVIDENCE PRODUCED AT TRIAL WAS INSUFFICIENT TO ENABLE A RATIONAL TRIER OF FACT TO FIND APPELLANT GUILTY.

The Georgia RICO Act is contained in O.C.G.A. §16-14-1 through O.C.G.A. §16-14-15. Racketeering is defined in O.C.G.A. §16-14-4, which states in pertinent part as follows:

"a. It is unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom to acquire, or maintain, directly or indirectly, any interest or control of any enterprise, real property, or personal property of any nature, including money.

b. It is unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly, or indirectly, such enterprise through a pattern of racketeering activity."

O.C.G.A. §16-14-3(8) further states that a "...pattern of racketeering activity means engaging in at least two (2) incidents of racketeering activity that have the same or similar intents, results, accomplices, victims, or methods of commission...."

O.C.G.A. §16-14-9(A) states that "Racketeering activity means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit any

crime which is chargeable by indictment under the following laws of this State: (ix) Article 1 of Chapter 8 of this title, relating to theft."

When on appeal, and after viewing the evidence in the light most favorable to the prosecution, a criminal conviction cannot stand if the evidence is insufficient to enable any rational trier of fact to find the defendant guilty. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979).

A. THE JURY DID NOT FIND APPELLANT GUILTY OF ANY PREDICATE ACTS, NOR DID THEY INDICATE AT LEAST TWO (2) PREDICATE ACTS ON WHICH THEY BASED THEIR GUILTY VERDICT IN THE RICO COUNT.

In order for a criminal defendant to be convicted under Georgia's RICO Act, the State first must prove the commission of two (2) or more offenses as prescribed by O.C.G.A. §16-14-3(8), then must prove that those predicate acts resulted from the participation in an enterprise engaging in a pattern of racketeering activity, as prescribed in O.C.G.A. §16-14-3(6) and O.C.G.A. §16-14-3(9)(a). Martin v. State, 189 Ga. App. 483, 495, 376 S.E. 2d 888 (1988).

When returning its verdict, the jury neither mentioned nor indicated in any way that its verdict of guilty in the RICO Count (Count I) was based on a finding of guilt in any predicate act as set forth in the indictment. (T-1716). Instead, the jury found appellant guilty on the Count I RICO violation, and returned verdicts of guilty on numerous substantive Counts of Theft by Taking, Theft by Deception, and Theft by Conversion.

"When the same conduct of an accused may establish the commission of more than one crime...he may not be convicted of more than one crime if: (1) one crime is included in the other...." O.C.G.A. §16-1-7(a). "A crime is included in another when it is established by proof of the same." Martin v. State, 189 Ga. App. 483, 495, 376 S.E. 2d 888 (1988). When one crime is included in another, that is a bar to conviction and punishment for the lesser included crime. Williams v. State, 156 Ga. App. 481, 482, 274 S.E. 2d 826 (1980).

Appellant cited this argument to the Trial Court in his Motion in Arrest of Judgment. The Court agreed with appellant's argument, and accordingly amended the jury's verdict to show a verdict of guilty in only Count I, the RICO violation. The State had used up all the evidence that the appellant committed one crime in establishing the other, which meant that, if at all, the former crime must be included in the latter as a matter of law under O.C.G.A. §16-1-6(1). Haynes v. State, 249 Ga. 119, 120, 288 S.E. 2d 185 (1982).

Appellant finds neither Federal nor Georgia case law which states that a Court is entitled to infer guilt of a defendant in the commission of predicate acts as named in the RICO Count from a finding of guilt of lesser included (and heretofore mentioned impermissible) substantive acts. Throughout the entire trial, the jury was apprised of the

enumeration of both predicate and substantive Counts upon examination of witnesses. Furthermore, the Trial Court charged the jury specifically that in order for the jury to convict appellant on the RICO Count, they must find appellant guilty of having committed at least two (2) of the predicate offenses. (T-1674-1676). The jury deliberated and returned verdicts. The jury's failure to enumerate the predicate acts upon which it based appellant's guilt in the RICO Count was not merely harmless error. Appellant submits that the verdict as returned cannot stand as a matter of law.

B. THE EVIDENCE PRESENTED TO THE JURY WAS INSUFFICIENT TO SUSTAIN A VERDICT ON ANY PREDICATE ACTS OF THEFT BY TAKING.

Although appellant contends, as set out above, that the jury's verdict in the RICO Count was improperly based upon evidence presented to prove the substantive Counts which subsequently were vacated when the Trial Court granted appellant's Motion in Arrest of Judgment, appellant will address the sufficiency of the evidence as if the jury had found him guilty of any predicate act.

"A person commits the offense of Theft by Taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated." O.C.G.A. §16-8-2. The term "deprive" is defined as, "without justification: (A) to withhold property of another

permanently or temporarily; or (B) to dispose of the property so as to make it unlikely that the owner will recover it." O.C.G.A. §16-8-1. [Emphasis added]. Intention is a material element of the crime of Theft by Taking. Scott v. State, 46 Ga. App. 213, 167 S.E. 210 (1932).

All of the predicate acts in which the State alleges Theft by Taking, allege in the indictment either the taking of vehicles or the taking of monies designated as down payments, and thereafter knowingly and unlawfully appropriating said property to their own use with the intention of depriving victims of said property. The record shows, in numerous places, on both cross examination and direct examination, that all parties recognized monies paid in the form of down payment were to be used for anything but paying off the car. Appellant submits that on several occasions, he received down payment checks from customers, deposited them into the company bank account and was authorized to withdraw money in order to receive payment as commissioned. The State put on evidence that appellant was involved in some forty-seven (47) separate transactions. Appellant testified at trial that he was not responsible for receiving and opening mail, keeping records on customer accounts, or sending checks as an agent for the company to make payment on said vehicles. The State simply cannot point to any evidence in the trial transcript which supports its contention that appellant was ever in possession of an individual's car or down payment money "without

justification." Because all monies received by appellant were those in payment of commissions, there is simply no evidence to support the contention that the vehicles which he received or sold (or participated in the reception or selling of said vehicles) were not being received or disposed of properly.

While the State conclusively showed, and appellant never denied, that appellant participated in the completion of transactions, the State failed to prove the requisite element of intent to deprive someone of property. Appellant asserts that he did intend to receive down payments, and he did intend to put vehicles voluntarily released to the company on assignment into the hands of others. These actions being wholly justified, appellant's conviction on any of the Counts of Theft by Taking cannot be found to be supported by sufficient evidence.

C. THE EVIDENCE PRESENTED TO THE JURY WAS INSUFFICIENT TO SUSTAIN A VERDICT ON ANY PREDICATE ACTS OF THEFT BY CONVERSION.

"(a) A person commits the offense of Theft by Conversion when, having lawfully obtained funds or other property of another including, but not limited to, leased or rented personal property, under an agreement or other known legal obligation to make a specified application of such funds or a specified disposition of such property, he knowingly converts the funds or property to his own use in violation of the agreement or legal obligation...."

O.C.G.A. §16-8-4. The gravamen of a Theft by Conversion prosecution is the terms of the agreement between the two (2) parties. When the State proves that one (1) person has knowingly converted money to his own use in violation of the agreement after having received the money from another under the agreement to make a specified application of the money, the person can be found by a jury to be guilty of Theft by Conversion. Baker v. State, 131 Ga. App. 48, 49, 205 S.E. 79 (1974). As in the above argument, the element of intent is dispositive in justifying a conviction. In the case of conversion, fraudulent intent characterizes Theft by Conversion. Baker v. State, 143 Ga. App. 302, 303, 238 S.E. 2d 241 (1977).

All of the predicate acts of Theft by Conversion cited in the indictment allege that vehicles were sold by appellant and the proceeds of such sales were not applied to the outstanding debt of the owner from whom the vehicle was assigned. A finding of guilt on any of these predicate acts simply does not comport with the evidence adduced at trial.

The State introduced as evidence at trial every consignment agreement executed between Southern Financial Services and the owners of the vehicles in question. [As there are numerous exhibits, appellant points the Court to volumes nine (9) and ten (10) of the trial transcript which contain exhibits]. Each consignment agreement contains a section titled "amount to be financed or assumed." Under this section of the contract, the set amount has been derived

by multiplying the actual payment amounts as owed to respective lien holders, multiplied by the number of payments remaining, as indicated by each consignee's note payments booklet. Nothing in the consignment agreement prevents appellant nor the company for whom he worked from receiving an additional commission not included in the contract amount to be financed.

Appellant points the Court to the consignment agreement appearing in the transcript at 1728, and the month to month assumption agreement contained in the record at 1734. Appellant submits that these two (2) agreements are representative of the evidence presented at trial by the State. State's Exhibit 2A, at T-1728, the consignment agreement contemplates forty-four (44) payments at Three Hundred Twelve Dollars and Ninety-Seven Cents (\$312.97) each, totalling Thirteen Thousand Seven Hundred Ninety Dollars and Sixty-Eight Cents (\$13,790.68) to be financed or assumed. State's Exhibit 2E, at T-1734, similarly shows the consigned vehicle in the aforementioned exhibit to be put out for assumption at forty-four (44) payments at Three Hundred Twelve Dollars and Ninety-Seven Cents (\$312.97) each, totalling Thirteen Thousand Seven Hundred Ninety Dollars and Sixty-Eight Cents (\$13,790.68). The figures on these two (2) agreements match identically. The month to month assumption agreement does, however, list a down payment of One Thousand and Five Hundred Dollars (\$1,500.00) due and payable. The down payment does not alter the total number of

payments and the amount per payment due in any way. This evidence clearly shows that no portion of the down payment was intended to be part of the amount assumed, as contemplated in the consignment agreement. Appellant submits, and the evidence shows, that every party to the agreement was possessed of average business intelligence to the extent that no one expected appellant nor his company to provide a service for free.

Appellant contends, as he did at trial, that his responsibility ended upon the completion of the contractual portion of these agreements. Appellant is unaware of any business or industry in which the salesperson is responsible for the application of proceeds received after such sale has been closed. If salesmen were responsible in such a manner, appellant contends that the Trial Courts would be filled with prosecutions on RICO Counts, and that this Court would be flooded with appeals such as this.

The evidence adduced on this particular Count is representative of the evidence produced in the other substantive Counts/predicate acts. Appellant submits that the evidence adduced is insufficient upon which to base a conviction for Theft by Conversion. Certainly in this one (1) particular example, the evidence clearly does not support a guilty verdict. The outcome of the trial more than suggests that the jury merely rubber-stamped each conviction on the substantive Counts, and while they did not pass judgment on the predicate acts necessary to sustain a

conviction on the RICO Count, had they done so, the verdicts simply could not stand for insufficiency.

D. THE EVIDENCE PRESENTED TO THE JURY WAS INSUFFICIENT TO SUSTAIN A VERDICT ON ANY PREDICATE ACTS OF THEFT BY DECEPTION.

Statutory provision on Theft by Deception states in pertinent part as follows:

"(a) A person commits the offense of Theft by Deception when he obtains property by any deceitful means or artful practice with the intention of depriving the owner of the property.

(b) A person deceives if he intentionally:

(1) creates or confirms another's impression of an existing fact or past event which is false and which the accused knows or believes to be false;...(4) sells or otherwise transfers or encumbers property intentionally failing to disclose a substantial and valid known lien, adverse claim, or other legal impediment to the enjoyment of the property, whether such impediment is or is not a matter of official record...."  
O.C.G.A. §16-8-3.

A survey of the relevant law of Theft by Deception reveals that the elements of the crime as set forth in the present Code and the case law which interprets them generally follow the standards set out in the 1933 Code, Sections 26-3918, 26-7408, 26-7409, and 26-7410, relating to cheating and swindling by false representations. Elements of the former crime are still integral to proving elements of the present crime of Theft by Deception. Among the elements necessary for the State to prove in order to make out a case against a criminal defendant, the State must show proof that some sort of representation by any deceitful means or artful practice, which is knowingly and designedly false was made with the

intent to deceive and defraud. Diamond v. State, 52 Ga. App. 184, 182 S.E. 813 (1935) (decided under former Code 1933, §26-3918, §26-7408, §26-7409, and §26-7410).

Absolutely no evidence was produced at trial, and the State can show none, which even suggests that appellant failed to disclose a legal impediment to the delivery of an automobile purchaser of the title of said automobile. The record is replete with examples of State's witnesses admitting that they had full knowledge that they were assuming the payments of others, such assumption payments going toward the ultimate purchase of the vehicle. Appellant contends here, and asserted at trial, that he was under no responsibility other than to disclose the valid and proper liens on the vehicles to the assuming purchasers.

The State has continually maintained that appellant's failure to receive express consent from the existing lien holder constitutes a crime. Yet, the State has never referred to, presented evidence of, or cited, any section of the Georgia Code describing said practice as illegal. In fact, every bank officer which was called as a witness by the State testified either on direct examination, cross examination, or both, that any responsibility to notify the bank of a transfer rested with the person responsible for making the note payments as named on the bank note. (T-661-671, T-682-690, T-743-755, and T-810-835). Furthermore, appellant contends that every party to the contract knew exactly what he or she was getting. Those wishing to assume

a vehicle knew that all normal channels of obtaining a vehicle would be closed to them. The evidence is not only insufficient, but it is completely lacking as to any deceitful means used to separate the alleged victims from their money. For this reason, appellant shows this Court that the evidence presented at trial was insufficient at trial upon which to base a guilty verdict.

E. APPELLANT DID NOT HAVE THE REQUISITE KNOWLEDGE OF THE CRIMINAL ELEMENT OF ENTERPRISE SUFFICIENT TO SUSTAIN CONVICTION.

In order to convict a criminal defendant under Georgia's RICO Act, the State must first prove that two (2) or more statutorily defined offenses were committed, and then must prove that those offenses were committed as part of an enterprise engaged in a pattern of racketeering activity. Martin v. State, 189 Ga. App. 483, 495, 376 S.E. 2d 888 (1988). In order to be considered part of an enterprise at law, an individual, "...by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes." United States v. Elliott, 571 F. 2d 880, 903 (5th Cir. 1978). Furthermore, "...mere association with nefarious characters is not a ground to convict." United States v. Bright, 630 F. 2d 804, 822 (5th Cir. 1980).

The State alleged, put on evidence, and tried to prove, that appellant was a ground-floor conspirator. However, the totality of the evidence presented at trial is overwhelmingly contradictory. According to the evidence, the absolute worst that can be said is that appellant unwittingly participated in an undercapitalized automobile business. Anytime that he was sent to the bank to deposit money or cash a check for the company, he did so justifiably in that he was withdrawing what he believed, what the secretary believed, what the customers believed, and what the other employees believed was his rightfully earned commission. However, no evidence was presented which even suggested that appellant wittingly participated in any such misapplication or misappropriation of funds, and certainly did not do so in any conspiratorial manner.

Appellant submits that even though the RICO Act is written broadly enough to ensnare enterprise participants at all levels, the Act is not meant to convict honest and unwitting salesmen for the financial schemes perpetrated by higher-ups which sour the fruits of the salesman's labor. For the foregoing reasons, appellant submits that his conviction under Georgia's RICO Act cannot stand, as he is not a statutory participant of the enterprise, inasmuch as he had absolutely no knowledge of the criminal element and intent of his employers.

II. THE TRIAL COURT COMMITTED HARMFUL AND REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION FOR NEW TRIAL, IN THAT THE JURY WAS SUBJECTED TO TAINTED AND DECIDEDLY FALSE TESTIMONY AND DOCUMENTARY EVIDENCE.

The jury was subjected to highly prejudicial and unduly damaging false testimony over the objection and Motion of appellant's counsel, and was permitted to deliberate on said testimony before the Trial Court properly removed said testimony and corresponding exhibits from their presence. The Georgia Courts have held that knowing use of perjured testimony by the District Attorney is a violation of the appellant's Fifth and Fourteenth Amendment rights to due process of law. Kitchens v. State, 160 Ga. App. 492, 287 S.E. 2d 316 (1981). The Courts have tended to focus on the State's "knowing use of perjured testimony," and where there has been knowing use of perjured testimony by the State, a new trial must be granted. Arnold v. State, 163 Ga. App. 10 (1982).

In Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173 (1959), the defendant was tried for the murder of a policeman. At trial the principal State's witness, then serving a 199 year sentence for the same murder, in response to a question by the District Attorney, testified that he had received no promise of consideration in return for his testimony. In fact, the State's attorney had promised the defendant consideration, but did nothing to correct the witness' false testimony. The defendant appealed on the basis that he had been denied due process of law in violation

of the Fourteenth Amendment of the United States Constitution. The Supreme Court reversed, holding that "...the false testimony used by the State in securing the conviction may have had an effect on the outcome of the trial."

In Napue, supra at 1177, the Court stated, "[t]he principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence and it is upon such subtle factors...that a defendant's life or liberty may depend."

"It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the District Attorney has the responsibility and duty to correct what he knows to be false and illicit the truth. That the District Attorney's silence or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair." Napue, 79 S. Ct. at 1177, citing People v. Savvides, 1 N.Y. 2d 554, 136 N.E. 2d 853, 854-855.

After the testimony of Lance Russett and the introduction into State's evidence Exhibit 70, appellant approached the District Attorney with a correct copy of the assumption contract. The copy the District Attorney received, from the appellant was a copy of the faxed contract to Ford Motor Credit Company. "The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment." Giles v. State of Maryland, 87 S. Ct. 793, 809 (1967). With the District Attorney purposely concealing from the jury the correct version of the assumption contract the State did not uphold its obligation to seek the truth. The appellant was unable to receive a fair trial, as the State did not introduce the new evidence that would have refuted State's Exhibit 70. This resulted in a violation of the appellant's right to a fair trial, guaranteed by the Due Process Clause of the Fourteenth Amendment. "...suppression of evidence which, although not in bad faith, constituted a denial of due process." Napue, supra at 794. "A conviction must fall under the Fourteenth Amendment when the prosecution 'although not soliciting false evidence, allows it to go uncorrected when it appears,' even though the testimony may be relevant only to the credibility of a witness." Napue, supra at 797.

When the State received from the appellant a faxed copy of the original assumption contract, they had a duty to offer it into evidence. Failure to do so will compel the Court to overturn the conviction under the Fourteenth Amendment. In the case at bar, the State failed to introduce the unaltered faxed contract into evidence. Introduction of this unaltered contract would have destroyed the credibility of Lance Russett, a State's witness. The State has a duty to bring before the Court any evidence it has in its possession that may be relevant to the credibility of a witness. See Giles, supra. When the State fails to perform this duty, any conviction from the trial proceedings must be overturned.

At this point, with the altered version of the assumption contract, the recently discovered unaltered version of the assumption contract, and the testimony of appellant and co-appellant that State's Exhibit 70 had been altered (T-1270-1273, T-1472-1473) in the State's possession before resting its argument, the State had an affirmative duty to correct that testimony which it had evidence of which was perjured and the nonfeasance of the State amounted to knowing use of perjured testimony in order to obtain a conviction of the appellant. Appellant submits that this knowing use of perjured testimony by the State is grounds for a new trial. Kitchens-v.-The-State, 160 Ga. App. 492 (1), 287 S.E. 2d 316; Arnold-v.-The-State, 163 Ga. App. 10, 11 (1982). Further proof that the Court recognized a duty to

remove tainted evidence from the evidence entered into the record appears in the transcript at 1641, lines 1-24. In particular, the Court recognized the prejudicial nature of improper evidence that is allowed to go to the jury. (T-1641, 20-24).

Appellant shows that counsel brought this matter to the attention of the Court and made Motion for Mistrial on said evidence. However, the testimony and State's Exhibits 70 and 71 were not removed from the consideration of the jury until after they had begun their deliberations. In response to counsel's request to remove the testimony and the evidence from the jury's consideration, the trial Judge stated as follows:

"I didn't believe him when he testified and I'm not going to let the jury keep considering that evidence because I certainly don't believe him now. I think that purgery has been committed in this Court." (T-1706) [Emphasis added].

The Trial Court then did call the jury in and instruct them not to consider said testimony and removed the exhibits from their presence.

The Motion for Mistrial should have been granted, even though State's Exhibit 70 and 71 were withdrawn. The jury was already exposed to said Exhibits 70 and 71, and this exposure most certainly would have a lasting negative effect in the jury's determination of the appellant's guilt or innocence.

Further evidence of error committed by the Court is a recognition that there may be a need to retry this case, but that the Court was reluctant to declare a mistrial. This is reflected by the Court's statements:

"THE COURT: I'm not about to declare a mistrial, you can bet your last dollar on that.

MR. RALEY: Yes, sir, but I --

THE COURT: I may try this case again, but I'm not going to do it because I said it's going to be retried." (T-1704, 6-11).

When viewed in conjunction with the other arguments presented in this Brief, it is clear that the Judge's instruction commanding the jury to disregard Mr. Russett's testimony and the evidence supporting it, simply was not curative. Mr. Russett's testimony was the only testimony presented by the State which tended to show conclusively that appellant took large sums of money from the alleged victims, falsified documents, and generally did not live up to this appellant's end of the bargain. Hearing this false testimony and furthermore, deliberating on it in the jury room, no doubt can be seen as having influenced the outcome of this case. The results suggest rather strongly that the jury imputed guilt to the appellant based on what they saw as an obvious act of deception and criminality, which it rightfully would have been, had it been the truth. Inasmuch as the appellant was convicted on every Count charged, including charges for which absolutely no proof was presented,

appellant submits that the only conclusion to be drawn is that the jury's deliberations were tainted by this false testimony.

"The responsibility of a public prosecutor differs from that of a usual advocate; his duty is to seek justice, not merely to convict." Georgia State Bar Rules E.C. 7-13. The appellant submits that the State had a duty to seek the truth. Obviously the State did not do this in regard to Lance Russett's testimony. The State did not question Mr. Russett regarding the two (2) very different assumption contracts, both of which were in the possession of the District Attorney, when they recalled Mr. Russett to the stand a second time. (T-616).

Appellant submits that Mr. Russett's false and perjured testimony tainted the entire trial in that State's Exhibit 70 and 71 were allowed to go out with the jury and were considered by the jury, along with Mr. Russett's testimony. The subsequent removal of Exhibit 70 and 71, and Lance Russett's testimony from the jury by Order of the Judge was not sufficient to repair the damage done, nor did it excuse the State from its failure to perform its obligation to introduce the new evidence. Lance Russett's perjured testimony was irreparably harmful to the appellant. It was obvious from this point on, that the defense could offer nothing to overcome it. The jurors, exposed to the perjured testimony, false receipt, and altered assumption contract

were not given the opportunity to observe the disparity in the two (2) different contracts. The District Attorneys, in failing to perform their obligation to disclose, as required by law, violated the appellant's Fifth and Fourteenth Amendment rights to due process, and hence the appellant could not receive a fair trial. "...the prosecution's constitutional duty to disclose extends to all evidence admissible and useful to the defense." Giles v. State, at 797. The prosecution's failure to do so caused irreparable harm to the appellant and his constitutional right to a fair trial was violated.

III. THE TRIAL COURT COMMITTED HARMFUL AND REVERSIBLE ERROR IN ITS JURY CHARGE ON THE RICO COUNT, IN THAT THE JURY CHARGE IMPROPERLY LED THE JURY TO BELIEVE THAT IF ONE DEFENDANT WERE FOUND GUILTY, THEN THE OTHER MUST AS A MATTER OF LAW, ALSO BE FOUND GUILTY.

"The charge of the Court must always be considered as a whole in determining whether a particular portion thereof amounts to harmful or reversible error." Ideal Pool Corporation v. Champion, 157 Ga. App. 380, 384, 277 S.E. 2d 753 (1981) [citing Scoggins v. Hughes, 112 Ga. App. 777, 779 (1965)]. "And where, the charge as a whole substantially presents issues in such a way as is not likely to confuse the jury even though a portion of the charge may not be as clear and precise as could be desired, an Appellate Court will not reverse a verdict authorized by the evidence." Ideal Pool Corporation v. Champion, Id. at 384 [citing Johnston v. Woody, 148 Ga. App. 152, 155 (1978)].

The jury charge on page 1681 of the Trial Court's transcript constitutes harmful and reversible error, inasmuch as the language of the instruction as a whole was confusing to the jury. The Court stated beginning on line six (6) of said charge as follows:

"What I'm saying is the finding on any particular Count, and I'm talking about now, two through fifty-five, you are not bound to return the same verdict against both defendants. What your verdict is, in otherwords, as to each defendant as to any particular Count depends on your view of the evidence as it applied to that defendant and to that particular Count.

The exception is this and that is to Count I because in order, as I have told you, to find a defendant guilty as to Count I, you must find that that defendant engaged in, aided and abetted, did a predicate act beyond a reasonable doubt, at least two predicate acts. So that is the only limitation."

The jury charge in the above mentioned paragraph is confusing to the jury as a whole due to the unclear and confusing language used by the Trial Court. The jury could easily have been led to incorrectly believe that to find one (1) defendant guilty under Count I would mandate them to also find the other defendant guilty. This understanding occurs when the Judge instructs the jury on Counts II through LV, by stating that the same verdict does not have to be returned for each defendant. This is clear, but in the second paragraph, the Court states that, "The exception to what I just stated is Count I." A jury could reasonably, but incorrectly, conclude that an exception to not having to

return the same verdict as to both defendants, is having to return the same verdict as to both defendants in regard to Count I. And inasmuch as this is not the law, the imprecise language used by the Trial Court does constitute a harmful and reversible error. The jury charge as a whole does substantially present issues in a manner which confuses the jury for which a new trial should be granted.

#### CONCLUSION

The appellant herein and the appellant in the companion case both show this Court that their convictions under Georgia's RICO Act cannot stand. The jury failed to designate in their return of verdict, any predicate offenses of which they found appellants guilty and upon which they could base a conviction of the RICO violation, as prescribed by the Act itself.

Beyond this, the appellants both argue that even if their convictions were based upon violations of the substantive Counts, which is not possible because of the Trial Court's arrest of judgment, or were based upon findings of guilt as to the predicate Counts, which even though unnamed in the verdict were presumed to have been imputed from findings of guilt in the substantive acts, the convictions cannot stand, inasmuch as they were based upon insufficient evidence. The State failed to prove that either appellant was guilty of Theft by Taking, Theft by Conversion,

or Theft by Deception. Contrary to all the evidence, the jury returned guilty verdicts on most substantive Counts for which appellants were charged. This in itself is highly suspicious, in that the evidence shows that both appellants were even found guilty on substantive Counts/predicate offenses for which either no evidence was presented at trial, or for which only limited evidence was presented that under no circumstances a rational trier of fact could have found a criminal defendant guilty of the crime as charged.

In light of this, it seems clear that the jury was entirely unsure of its role and function. The erroneous guilty verdicts in the substantive Counts as mentioned above, leads one to the only possible conclusion that, based upon the juror's impression of the appellants, in no small way affected by the false testimony of Mr. Russett, they deemed the appellants guilty of a RICO Act violation and its attendant conspiracy, then as a matter of course, rubber-stamped appellants as guilty to each of the substantive Counts/predicate offenses.

The overwhelming evidence points out that appellants were merely used car salesmen. They were used by their employer; they were used throughout the investigative process; they were used by the District Attorney's Office, inasmuch as known false testimony was not redacted by the prosecution upon first notice; and they were used by a jury which was not properly instructed as to its duties, but

which itself was used in order to make martyrs out of ostensibly the only two (2) men associated with the business who were not involved in a scheme to defraud credit poor and credit hungry victims.

For the foregoing reasons, appellant urges this Court to review the evidence and agree that, as a matter of law, a conviction under Georgia's RICO Act cannot stand.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

GEORGIA, BIBB COUNTY.

This is to certify that I have deposited a true and correct copy of the within and foregoing, BRIEF OF APPELLANT, upon opposing counsel by placing same in the United States mail with adequate postage affixed thereto to insure delivery, addressed as follows:

Mr. Willis Sparks and  
Mrs. Kim Shumate  
District Attorney's Office  
Macon Judicial Circuit  
Grand Building  
Macon, Georgia 31201

This 3<sup>rd</sup> day of Aug., 1993.

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