

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
)	
v.)	DEF. I.D.: 0809014939
)	
ST. JULIAN SELBY,)	
)	
Defendant.)	

Date Submitted: August 14, 2009
Date Decided: December 22, 2009

MEMORANDUM OPINION

*Upon Consideration of Defendant's
Motion for Judgment of Acquittal.*
GRANTED in Part and DENIED in Part.

Richard Hubbard, Esquire, Deputy Attorney General. Attorney for the State of Delaware.

Gene W. Morton, Esquire. Attorney for the defendant.

SLIGHTS, J.

I.

On August 6, 2009, a jury convicted St. Julian Selby of two counts of Theft and two counts of Home Improvement Fraud, and found him not guilty of one count of Theft and one count of Home Improvement Fraud. On August 14, 2009, Mr. Selby filed a Motion for Judgment of Acquittal¹ under Rule 29(c) of the Superior Court Criminal Rules in which he sets forth three grounds for acquittal. First, he asserts that the Court lacked jurisdiction to adjudicate Counts V and VI, Theft and Home Improvement Fraud as to Mr. and Mrs. Parikh, because the alleged criminal acts occurred in Pennsylvania, not Delaware.² Second, he asserts that the State did not meet its *prima facie* burden of proving intent with regard to each of the four counts of the indictment on which he was convicted.³ Third, and finally, he asserts that the State did not meet its burden of proving the value of the victims' loss with respect to Counts V and VI.⁴ Not surprisingly, the State disputes Mr. Selby's jurisdictional

¹ After the verdict in this case, the Court sent a letter to the parties reminding them of their right to submit a Motion for Judgment of Acquittal or, in the alternative, a Motion for New Trial. *See* D.I. 32. Mr. Selby, through counsel, chose to file only a Motion for Judgment of Acquittal.

² Def.'s Mot. ¶¶ 6-15 (D.I. 33). Prior to trial, Mr. Selby filed a Motion to Dismiss asserting, among other things, the same jurisdictional grounds asserted here. The Court denied that motion prior to the assignment of this case for trial. *See* Aug. 4, 2009 Trial Tr. 11:10:16. At the close of the State's case, Mr. Selby renewed his Motion to Dismiss on jurisdictional grounds as a Motion for Judgment of Acquittal. The Court reserved decision on the Motion for Judgment of Acquittal and allowed the case to be submitted to the jury. *See* Aug. 5, 2009 Trial Tr. 124:20-23. The Court will address that motion now.

³ *Id.* at ¶¶ 16-24.

⁴ *Id.* at ¶¶ 25-28.

challenge and contends that it met its burden of proving all elements for each of the indicted charges.⁵

For the reasons that follow, the Court finds that it lacked jurisdiction to adjudicate Counts V and VI and, therefore, the motion for judgment of acquittal as to those counts must be **GRANTED**. Having dismissed Counts V and VI on jurisdictional grounds, the Court need not address whether the State presented sufficient evidence to convict Mr. Selby of these charges. The Court further finds that the State did meet its burden with respect to intent as to Counts I and II. Accordingly, Mr. Selby's Motion for Judgment of Acquittal as to Counts I and II must be **DENIED**.

II.

Mr. Selby contracted to complete home improvements for three sets of clients: Darren Clark and Thomas Keiper (Counts I and II), Desmond and Dolores Bascombe (Counts III and IV), and Bhavnish and Alpa Parikh (Counts V and VI). The State alleged that Mr. Selby never intended to perform the work as promised to the homeowners. The two projects that are the subject of this motion will be discussed in more detail below.⁶

⁵ See generally State's Opp. to Def.'s Mot. (D.I. 39).

⁶ Mr. Selby was found not guilty of the two counts on the indictment relating to the Bascombe project. Therefore, the Court need not address the facts as they relate to that project.

A. The Clark/Keiper Project

The Clark/Keiper project involved the installation of a pool and surrounding decking, the installation of a back deck, and related landscaping.⁷ The installation of the pool required, in addition to the pool itself, an engineering report, permits from the town of Townsend, a retaining wall, a fence, and electrical and gas lines.⁸ The contract provided that Mr. Selby would also install a patio around the pool and a deck off the back of the house, with a pad for a hot tub.⁹ Mr. Selby was supposed to install the wiring and breaker for the hot tub as well as a privacy panel.¹⁰ Finally, the project involved a walkway around the side of the house, a new driveway, and the installation of six columns on the front and side of the house.¹¹ The contract stated that the project would be completed by September 14, 2006, and included a “time is of the essence” clause.¹²

Mr. Clark testified that Mr. Selby told him that he was an authorized dealer for Florida North, the pool company that Mr. Clark selected for the project.¹³ When the job failed to progress adequately, Mr. Clark attempted to confirm this. He testified

⁷ Aug. 4, 2009 Trial Tr. 42:3-9.

⁸ *Id.* at 50:6-17; 56:7-9; 57:5-12.

⁹ *Id.* at 51:6-7.

¹⁰ *Id.* at 48:1-6.

¹¹ *Id.* at 50:19-51:4.

¹² *Id.* at 53:9-13.

¹³ *Id.* at 42:19-20; 48:16-18.

that he called the pool company and was told that Mr. Selby was in no way affiliated with the company, as a dealer or otherwise.¹⁴ In addition, the jury was told that Mr. Selby admitted to Mr. Prettyman, an investigator with the Department of Justice Consumer Protection Unit, that he had never installed a pool before, contrary to the representations Mr. Selby made to Mr. Clark.¹⁵ The jury also heard testimony that, contrary to his representations to the homeowners, Mr. Selby never supplied the town with the engineering reports required to apply for a permit to install the pool.¹⁶

Mr. Clark also testified that Mr. Selby told him that a \$20,000 deposit would have to be paid to the pool company in order “to get that pool down here.”¹⁷ In mid-September, however, Mr. Clark contacted the pool company and was told that Mr. Selby had not sent a deposit for the pool, despite the initial \$40,000 Mr. Clark gave Mr. Selby when he first signed a contract.¹⁸ At that time, Mr. Selby represented to Mr. Clark that \$20,000 of the initial payment was for the “pool deposit.”¹⁹ Mr. Clark further testified that when confronted with this information, Mr. Selby told him the pool had not been ordered yet, but he had the \$20,000 deposit in an escrow account

¹⁴ *Id.* at 123:11-14.

¹⁵ Aug. 5, 2009 Trial Tr. 19:6-7.

¹⁶ *Id.* at 26:22-27:20.

¹⁷ Aug. 4, 2009 Trial Tr. 49:16-17.

¹⁸ *Id.* at 123:3-5.

¹⁹ *Id.* at 49:21-23.

waiting for the preliminary work to be completed before he could order the pool.²⁰ Mr. Clark made repeated requests to see documentation that the money was, in fact, in an escrow account. Mr. Selby never produced the documentation, however, and never returned the initial \$20,000 deposit.²¹

The State presented testimony that Mr. Selby filed an insurance claim for damage to decking he had installed. Mr. Clark testified that he received a letter from Mr. Selby's insurance company stating that a claim had been submitted in Mr. Clark's name.²² This came as a shock to Mr. Clark as he had not authorized any claim to be submitted on his behalf.²³ Mr. Clark further testified that he told Mr. Selby he would not participate in the claim because Mr. Selby was falsely representing to the insurance company that the decking was damaged when one of Mr. Selby's workers accidentally dragged a tool across the deck.²⁴ According to Mr. Clark, the damage occurred as a result of faulty installation.²⁵

Mr. Clark also testified that when he asked Mr. Selby at the end of August why the pool had not arrived, Mr. Selby told him he was still waiting for the site

²⁰ *Id.* at 84:12-19.

²¹ *Id.* at 84:17-23.

²² Aug. 5, 2009 Trial Tr. 75:6-13.

²³ *Id.* at 75:6-12.

²⁴ *Id.* at 76:10-19.

²⁵ *Id.*

engineering report.²⁶ When Mr. Clark went directly to the engineer responsible for preparing the report, however, he was told that the report was never prepared because Mr. Selby's check to pay for the report had bounced.²⁷

Mr. Clark testified that his last contact with Mr. Selby was in mid-November. At that time, Mr. Selby came to the house and told Mr. Clark that he had underbid the job and that if Mr. Clark wanted the work to be completed, he would have to pay an additional \$30,000.²⁸ Mr. Clark refused to pay Mr. Selby any additional money and that was the last time he saw Mr. Selby.²⁹ Thereafter, repeated attempts to contact Mr. Selby went unanswered.³⁰

B. The Parikh Project

Mr. and Mrs. Parikh were interested in renovating the basement of their Pennsylvania home to include a play area, bar, and home theater room. Mrs. Parikh first saw Mr. Selby's business advertisement in Newark, Delaware. She then called Mr. Selby and reached him at the Delaware phone number posted on his sign.³¹ Prior to signing any contract, Mr. Selby drove the Parikhs around Middletown, Delaware

²⁶ *Id.* at 82:13-17.

²⁷ *Id.* at 82:19-22.

²⁸ *Id.* at 87:17-23; 88:1-16.

²⁹ *Id.* at 91:1-4.

³⁰ *Id.* at 92:5-11.

³¹ Aug. 5, 2009 Trial Tr. Excerpt 34:13-35:3.

to see examples of his work.³² Thereafter, during the negotiation of the contract, Mr. Selby and the Parikhs exchanged a number of phone calls and e-mails between the Parikhs' Pennsylvania home and Mr. Selby's Delaware office.³³ Mr. Parikh also met with either Mr. Selby or one of his employees to select carpet at a store in New Castle or Wilmington, Delaware.³⁴ Thereafter, Mr. Selby sent the Parikhs a fax from a hardware store in Delaware. The fax contained information about the design of the bar that was to be installed in the Parikh's basement.³⁵ The Parikhs made payments to Mr. Selby that were deposited into Mr. Selby's Delaware bank account.³⁶

The State alleged that Mr. Selby began work on the Parikh's basement but did not finish it. He also allegedly misapplied funds and demonstrated poor workmanship.

III.

A. Standard of Review

On a Motion for Judgment of Acquittal, the Court's function is to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty of the charged offenses beyond a reasonable

³² *Id.* at 35:9-13.

³³ *Id.* at 10:16-11:12.

³⁴ *Id.* at 20:2-4.

³⁵ *Id.* at 30:15-19.

³⁶ *See* D.I. 39, at Ex. B (a copy of a check and deposit slip showing that Mr. Selby deposited a \$28,000 check from the Parikhs at the Governor's Square branch of Commerce Bank in Bear, DE).

doubt.³⁷ Superior Court Criminal Rule 29(b) allows the Court to defer its ruling on a timely filed Motion for Judgment of Acquittal until after the jury has returned its verdict. The jury having returned guilty verdicts on Counts I, II, V and VI, Mr. Selby's motion, properly presented at trial, is now ripe for decision.

B. Jurisdiction - The Parikh Project

Mr. Selby's jurisdictional argument pertains to Counts V and VI of the indictment. He alleges that the Court lacks jurisdiction to adjudicate these two counts because any criminal conduct alleged therein occurred in Pennsylvania, not Delaware.³⁸ The State bears the burden of establishing jurisdiction beyond a reasonable doubt.³⁹

The jurisdiction of the Delaware courts is codified at 11 Del. C. §§ 204 and 2736.⁴⁰ These jurisdictional statutes are to be construed broadly.⁴¹ The extent of the Court's criminal jurisdiction is rarely litigated. Consequently, there is little guidance

³⁷ Del. Super. Ct. R. 29(a); *Seward v. State*, 723 A.2d 365, 369 (Del. 1999).

³⁸ D.I. 33 at ¶ 3.

³⁹ *James v. State*, 377 A.2d 15 (Del. 1977) (“[I]t is elemental and fundamental that the State must prove as part of the prosecution that the conduct constituting the crime occurred in Delaware.”).

⁴⁰ 11 Del. C. § 204 (providing, in pertinent part, that “a person may be convicted under the law of this State of an offense committed by the person's own conduct or by the conduct of another for which the person is legally accountable if . . . [e]ither the conduct or the result which is an element of the offense occurs within Delaware”); 11 Del. C. § 2736 (“If any criminal offense is begun in this State and completed elsewhere, it shall be deemed to have been committed in this State, and may be dealt with, inquired of, tried, determined and punished in this State in the same manner as if it had been actually and wholly committed in this State.”).

⁴¹ See *Bright v. State*, 490 A.2d 564, 567 (Del. 1985) (noting support for the broad construction of Delaware's jurisdictional statutes in the commentary to 11 Del. C. § 204).

in the case law regarding the proper application of our criminal jurisdiction statutes. As best as the Court (and the parties) can discern, there are only two significant cases that have any resemblance to this case – *Bright v. State*⁴² and *Sheeran v. State*.⁴³ They will be addressed *seriatim*.

In *Bright*, the defendant robbed a store clerk, abducted her at gunpoint, and raped her multiple times.⁴⁴ The robbery and abduction took place in Delaware. The rapes occurred in both Delaware and Maryland.⁴⁵ The Court noted that “our courts have jurisdiction when part of the criminal conduct transpired in Delaware.”⁴⁶ Applying this general principal to the facts before it, the Court determined that 11 *Del. C.* §§ 204 and 2736 “provide jurisdiction in Delaware whenever conduct which is part of a multi-element crime is committed in Delaware, or when a criminal offense begins in Delaware even though it is completed in another state.”⁴⁷ The Court found that the victim’s “lack of consent was clear from the outset of her abduction in Delaware.”⁴⁸ Therefore, an element of the crime of rape – the coercion probative of lack of consent – was conclusively found to have occurred in Delaware (even for the

⁴² *Id.*

⁴³ 526 A.2d 886 (Del. 1987).

⁴⁴ *Bright*, 490 A.2d at 565.

⁴⁵ *Id.*

⁴⁶ *Id.* at 568.

⁴⁷ *Id.* at 567.

⁴⁸ *Id.*

sexual assaults that occurred in Maryland) and, accordingly, jurisdiction in Delaware was appropriate.⁴⁹

In *Sheeran*, the defendant was convicted of criminal solicitation.⁵⁰ The case involved multiple contacts between the defendant and his accomplice, some of which took place in Delaware, and some of which took place in Pennsylvania and Maryland.⁵¹ The Court noted that “the fact that a criminal solicitation can be accomplished with one contact does not preclude *several contacts*.”⁵² The Court further noted that “a single solicitation may continue over a period of time and involve several contacts.”⁵³ Therefore, the fact that one contact that constituted solicitation under Delaware law occurred in Delaware was sufficient to establish criminal liability in Delaware for the entire solicitation.⁵⁴

Mr. Selby argues that the State must present evidence of conduct in Delaware that satisfies an element or part of an element of the charged offense in order to trigger this Court’s criminal jurisdiction.⁵⁵ According to Mr. Selby, the State failed to present evidence of any criminal conduct that occurred in Delaware with respect

⁴⁹ *Id.*

⁵⁰ *Sheeran*, 526 A.2d at 887.

⁵¹ *Id.* at 888.

⁵² *Id.* at 892-93.

⁵³ *Id.* (citing *Frye v. State*, 489 A.2d 71, 74 (Md. 1985)).

⁵⁴ *Id.*

⁵⁵ Def.’s Resp. 1 (D.I. 40).

to the Parikh project. For its part, the State contends that the evidence revealed “numerous contacts with Delaware involved in the transaction with the Parikhs sufficient to meet the principles contained in sections 204 and 2736.”⁵⁶ As stated, the burden is on the State to prove territorial jurisdiction as an implicit element of each criminal offense charged.⁵⁷

Unfortunately, neither *Bright* nor *Sheeran* offer the Court much guidance with respect to the case *sub judice*. While it is clear that the criminal jurisdiction of Delaware courts is broad, the Court must draw a line somewhere. That being said, the decision in this case is strictly limited to the facts currently before the Court. There is no evidence that Mr. Selby ever received a check from the Parikhs while he was in Delaware.⁵⁸ Further, the Court notes that the State, in its response to Mr. Selby’s Motion for Judgment of Acquittal, failed to direct the Court to any authority (from Delaware or elsewhere) in support of its assertion that criminal jurisdiction can be established by merely depositing a check, received outside of Delaware, into a

⁵⁶ D.I. 39 at 3.

⁵⁷ *Sheeran*, 526 A.2d at 890.

⁵⁸ To the contrary, the only evidence on this point – Mr. Selby’s testimony – appears to suggest that all payments were received at the Pennsylvania job site. *See, e.g.*, Aug. 6, 2009 Trial Tr. 11:1-11 (noting several occasions on which Mr. Selby “did not pick up a check” for parts of the Parikh project).

bank account maintained within Delaware.⁵⁹ Moreover, the State did not identify any specific statement by or conduct of Mr. Selby, in Delaware, that constituted probative evidence of any element of the charged criminal offenses. That Mr. Selby drove the Parikhs around to some of his Delaware job sites,⁶⁰ and occasionally communicated with them about the job from Delaware,⁶¹ is simply not evidence probative of any element of home improvement fraud or theft.

The Court has examined Mr. Selby's contact with the State of Delaware in the course of his business relationship with the Parikhs and holds that the contact was insufficient to support territorial jurisdiction with respect to Counts V or VI. Therefore, Mr. Selby's motion to dismiss these counts, renewed in his Motion for Judgment of Acquittal, must be **GRANTED**.

⁵⁹ The Court notes its dissatisfaction with the parties' failure to cite to sufficient supporting authority in their submissions in support of and in opposition to Defendant's Motion for Judgment of Acquittal. *See Gonzalez v. Caraballo*, 2008 WL 4902686, at *3 (Del. Super. Nov. 12, 2008) ("Courts throughout the country hold that they are not obligated to do counsel's work for him or her. The Court is not asking counsel to routinely submit arguments worthy of publication in a law review; indeed, in some instances (such as a party's failure to provide discovery) it is often unnecessary to cite any authorities. Nonetheless, in all but the simplest motions, counsel is required to develop a reasoned argument supported by pertinent authorities. Counsels' performance in this matter fell well short of that standard.") (internal citations omitted).

⁶⁰ If Mr. Selby had taken the Parikhs to see work that was not actually performed by him, or had made fraudulent misrepresentations regarding any aspect of that work, then the State might be heard to argue that this Delaware contact is probative of the jurisdictional analysis. No such evidence was presented, however.

⁶¹ The State made no effort at trial or in its response to this motion to identify specifically any one of these discussions with Mr. Selby while he was in Delaware that was probative of any element of the charged offenses.

B. Intent - The Clark/Keiper Project

The Court next turns to Mr. Selby's argument that the State failed to prove intent with respect to any of the indicted charges. As the Court already has held that it lacked jurisdiction to adjudicate Counts V and VI, the Court need only address intent with respect to Counts I and II. As stated, these Counts relate to the project Mr. Selby performed for Darren Clark and Thomas Keiper.

As with all elements, the State was obligated to prove criminal intent beyond a reasonable doubt.⁶² Therefore, the Court's task on this motion is to determine whether, viewing all evidence in the light most favorable to the State, a reasonable trier of fact could have determined that Mr. Selby acted with the requisite intent to commit home improvement fraud or felony theft.⁶³

The intent required for theft and home improvement fraud is the same.⁶⁴ That intent is codified at 11 *Del. C.* § 841. Section 841(a) provides, in pertinent part, that “[a] person is guilty of theft when the person takes, exercises control over or obtains

⁶² *Seward*, 723 A.2d at 369.

⁶³ *Id.*

⁶⁴ See 11 *Del. C.* § 841 (“A person commits theft when, with the intent prescribed in § 841 of this title . . .”); 11 *Del. C.* § 916 (“A person is guilty of home improvement fraud who enters, or offers to enter, into a home improvement contract as the provider of home improvements to another person, and who with the intent specified in § 841 of this title . . .”).

property of another person intending to deprive that person of it or appropriate it.”⁶⁵ In response to Mr. Selby’s application during trial, the State confirmed that its *prima facie* burden of proving intent with respect to home improvement fraud must be reconciled with 11 *Del. C.* § 844,⁶⁶ which states that “[t]he accused’s intention or belief that a promise would not be performed may not be established by or inferred from the fact alone that the promise was not performed.”⁶⁷ The crux of Mr. Selby’s argument is that the State failed to meet its burden of proving intent because the only evidence of intent was Mr. Selby’s failure to complete the work he contracted to perform.⁶⁸

After viewing the evidence in the light most favorable to the State, the Court finds that a reasonable trier of fact could have found that the State met its burden of proof with respect to intent. In addition to the abundant evidence regarding Mr. Selby’s failure to perform the home improvements in accordance with the contract, the jury also heard evidence of Mr. Selby’s misrepresentations (e.g. regarding his status as an authorized pool dealer and his experience as a pool installer as well as his having obtained necessary permits), and his misappropriation of funds (e.g. the “pool

⁶⁵ 11 *Del. C.* § 841. See *Zugehoer v. State*, 980 A.2d 1007, 1012 (Del. 2009) (holding that Section 841(a) sets forth the appropriate standard for determining intent to commit home improvement fraud).

⁶⁶ See D.I. 39 at 4 (the State accepting the premise that 11 *Del. C.* § 844 is applicable in this case).

⁶⁷ 11 *Del. C.* § 844.

⁶⁸ D.I. 33 at ¶ 19.

deposit,” the payment for site engineering services and his refusal to return money paid for work not performed). In the aggregate, viewing this evidence in a light most favorable to the State, the Court is satisfied that a reasonable fact finder could determine that the State met its burden to prove intent under Section 841(a), even in light of the burden the State willingly accepted under Section 844. Therefore, Mr Selby’s Motion for Judgment of Acquittal with respect to Counts I and II is **DENIED**.

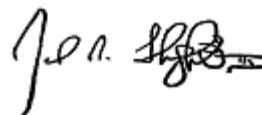
C. Valuation

Mr. Selby’s last argument is that the State failed to prove the value of the work he performed on the Parikh project, and what it cost to complete that project after he left the job. As the Court already has found that the State did not meet its burden of proving that the Court had jurisdiction to adjudicate the charges related to the Parikh project, the Court need not address this argument.

III.

Based on the foregoing, the defendant’s Motion for Judgment of Acquittal is hereby **GRANTED in part and DENIED in part**.

IT IS SO ORDERED.



Joseph R. Slights, III

JRS, III/sb
Original to Prothonotary