

DENYING APPLICANT'S INVOCATION OF THE SPOUSAL COMMUNICATION PRIVILEGE (Tex. R. Evid. 504) AND PERMITTING APPLICANT'S EX-WIFE TO REPEAT APPLICANT'S REBUKE OF HER DURING THE COURSE OF THEIR MARRIAGE, VIA HIS USE OF DEROGATORY NAMES AND TERMS FOR HER. U.S. CONST. AMEND. IV, V, XIV.

CLAIM FOR RELIEF NUMBER THIRTY-THREE

THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR IN DENYING APPLICANT'S INVOCATION OF THE SPOUSAL COMMUNICATION PRIVILEGE (Tex. R. Evid. 504) AND PERMITTING APPLICANT'S EX-WIFE TO REPEAT APPLICANT'S PRIVILEGED STATEMENTS REGARDING HIS THOUGHTS AND FEELINGS TOWARD THE COMPLAINANT. U.S. CONST. AMEND. IV, V, XIV.

CLAIM FOR RELIEF NUMBER THIRTY-FOUR

THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR IN DENYING APPLICANT'S INVOCATION OF THE SPOUSAL COMMUNICATION PRIVILEGE (Tex. R. Evid. 504) AND PERMITTING APPLICANT'S EX-WIFE TO REPEAT APPLICANT'S PRIVILEGED STATEMENTS REGARDING HIS WHEREABOUTS AND ACTIVITIES ON THE NIGHT OF COMPLAINANT'S DEATH. U.S. CONST. AMEND. IV, V, XIV.

Applicant filed a pretrial motion/notice entitled "Defendant's Notice of Intention to Invoke Confidential Communication Privilege Between Husband and Wife Pursuant to Texas Rule of Evidence 504(a). (CR2, 246-251). A hearing of this motion/notice was conducted out of the presence of the jury on Dec. 4, 2003. (RR.24, 62).

Applicant testified, solely for the purposes of this hearing, that he had married Shanna Stryjek on December 4, 1987. Their marriage culminated in divorce proceedings on September 1, 1995. Applicant informed the court that he wished to invoke the marital communication privilege under Texas Rule of Evidence 504(a) as to any confidential communications between himself and his wife, Shanna Stryjek, during the course of the marriage. (RR.24, 60). Following the hearing on this matter, the trial court denied the request. (RR.24, 61).

As noted, Shanna Stryjek, Applicant's ex-wife, testified in this case at the request of the State. Over Applicant's repeated objections, she asserted that in the course of their marriage, Applicant had attempted unsuccessfully to engage in anal intercourse with her on two separate occasions, (RR. 24, 69) When Applicant became frustrated and angry at her refusals, Applicant called her "a bitch, a slut, a whore," and "cunt." (RR 24, 70-71).

Additionally, over Applicant's continued objections asserting the marital communication privilege, Stryjek testified and repeated that Applicant had shared his feelings and impressions of the complainant with her in private, during the course of their

marriage, and had described the complainant as a snotty "bitch" who thought that she was better than everybody else. Additionally, Applicant had asserted that he hated the complainant. (RR 24, 73-74).

Similarly, Stryjek informed the jury that Applicant stated privately to her that while he had told the police that he had been home with his mother throughout the night of complainant's death, he had actually been out with a friend, George and had returned to his parents' home between 1:00 a.m. and 2:00 a.m. (RR 24, 75-77).

It is undisputed that both Applicant and Stryjek were husband and wife between December 4, 1987 and September 1, 1995. It is also undisputed that each statement ascribed to Applicant was made solely to Stryjek in private, that each was intended as a private oral communication and was not overheard by any third parties.

In its closing argument to the jury at the end of the first phase of trial, the State stressed and reminded the jury of Applicant's statements to Stryjek and emphasized their evidentiary importance in finding Applicant guilty of capital murder. (RR 24, 21-26). The jury found Applicant guilty of capital murder, as charged in the indictment. (CR1. 167; 191-192; RR 25, 89).

The trial court abused its discretion and committed constitutional error in failing to recognize and accept Applicant's right to invoke and assert the oral marital communication privilege, as opposed to the spousal testimonial privilege, to preclude Stryjek from repeating Applicant's private oral communications to her during the course of their marriage.

The trial court abused its discretion and violated Applicant's constitutional rights to due process to invoke the marital communication privilege as set forth in Tex. R. Evid. 504(a). Applicant complains of constitutional error subject to harmless error review. As this Court cannot say that the repetition of Applicant's privileged communications to his wife during the course of their marriage did not contribute to the jury's decision to find Applicant guilty, in light of the factual insufficiency of the evidence in this case, see previous issues raised herein, this Court must reverse Applicant's judgment of conviction as the error cannot be characterized as harmless beyond a reasonable doubt. TEX. R. APP. P. ANN. 44.2(a) (Vernon Pamph. 2000); **Chapman v. California**, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The United States Supreme Court in **Griswold v. Connecticut**, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) recognized a constitutional right of privacy surrounding the marriage relationship. **Griswold**, 381 U.S. at 486. As stated:

"Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association which promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

The marital communication privilege is constitutionally protected. The essence of the justification for the marital communication privilege is that in the absence of the privilege, spouses would be less likely to confide in one another and, therefore, weaken the strength

and significance of the institution of marriage. See **Trammel v. United States**, 445 U.S. 40, 44, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980).

In the instant case, as noted, it is undisputed that Appellant and Stryjek were husband and wife between December 4, 1987 and September 1, 1995. It is also undisputed that the statements ascribed to Applicant were made solely to Stryjek, his wife, in private during the course of their marriage, and were not overheard or repeated to any other persons. Similarly, it is also undisputed that these communications were intended to remain confidential.

Applicant, outside the presence of the jury, invoked the marital communication privilege under Texas Rule of Evidence 504(a) as to any confidential communications between himself and his wife, made during the course of the marriage relationship. (RR 24, 61). Following the hearing on this matter, the trial court denied the request. (RR, 24, 61). Applicant has properly preserved these matters for appeal.

The United States Supreme Court in **Wolfe v. United States**, 291 U.S. 7, 13; 54 S.Ct. 279, 280; 78 L.Ed. 617 (1934) opined that marital confidences are considered "so essential to the preservation of the marital relationship as to outweigh the disadvantages to the administration of justice which the privilege entails." **Id.** See also **Blau v. United States**, 340 U.S. 332, 71 S.Ct. 301, 95 L.Ed. 306 (1951). Marital communications are presumed to be confidential unless the presumption is overcome by proof that it was not intended to be private. **Pereira v. United States**, 347 U.S. 1, 6; 74 S.Ct. 358, 361; 98 L.Ed. 435 (1954).

It is undisputed that during their marriage, each statement ascribed to Applicant

was made solely to Stryjek, in private, and was not intended to be overheard by any third parties. As noted, none of the exceptions to the matrimonial communication privilege apply in this case, nor did the State claim that any exceptions applied. Based upon the holdings of the courts above, the trial court abused its discretion and violated Applicant's constitutional rights to due process as well as Applicant's statutory rights under Tex. R. Evid. 504(a), in failing to recognize and accept Applicant's right to invoke and assert the marital communication privilege to preclude Stryjek from repeating his private oral communications to her during the course of their marriage, including: a) Applicant's calling Stryjek "a bitch, a slut, a whore," and "cunt;" b) Applicant's expressed feelings of disdain towards the complainant, specifically his description of her as a snotty "bitch" who thought that she was better than everybody else; and c) Applicant's statement regarding his whereabouts and activities on the night of complainant's death.

The trial court abused its discretion and violated Applicant's constitutional rights to due process by permitting Stryjek to repeat, over Applicant's repeated and timely objections, Applicant's confidential marital communications. As noted, the State repeated and reminded the jury of Applicant's confidential statements to Stryjek and emphasized their evidentiary importance in finding Applicant guilty of capital murder. (RR 25, 21-26; 77). The State stressed the importance of Stryjek's testimony in the following closing argument:

"... But he was gong to have sex with her, every way he wanted. And he did. And he stabbed her at least 16 [sic] times. Because this was a sadistic sex rage, is what it was. That bitch. That snotty bitch. Remember that? Snotty bitch wasn't going to turn me down. ..."