



**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-08-00198-CR

THE STATE OF TEXAS, Appellant

V.

JAMES LEROY CLAYTON, Appellee

On Appeal from the County Court at Law
Cass County, Texas
Trial Court No. CCLM080081

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Justice Carter

MEMORANDUM OPINION

_____James Leroy Clayton was charged with failing to provide necessary food, water, care, and/or shelter to a bay mare horse.¹ During a "hotly contested" trial, the State's witness injected extraneous offense evidence in violation of the trial court's motion in limine. Based on the prejudicial nature of the statement, which implied that Clayton's failure to properly care for a different horse led to its death, the trial court granted a post-verdict motion for new trial. The State appealed the trial court's ruling on the sole question of whether the grant of a new trial constituted error. We find this case illustrates a proper exercise of judicial discretion by a trial court and affirm the judgment.

I. Factual and Procedural Background

Edward Homer, Jr., Clayton's neighbor, was driving past Clayton's property and noticed "two of the horses was [sic] down." According to Homer, there was no food or water on the property, "the horses were thin," and "you could see the ribs on all of them." Homer called Deputy George Bates, who went to the property and saw a mare lying on the ground, struggling to rise. Bates also noticed that there was no water on the property and that some of the horses appeared thin. He called Investigator John Garrett, who drove to the property only to discover that the mare had died. Garrett also claimed there was no food or water within view, and decided to feed the other twelve horses on the property.

¹TEX. PENAL CODE ANN. § 42.09(2) (Vernon Supp. 2008) (cruelty to livestock animals) (class A misdemeanor).

Veterinarian Mike Dodd was contacted to conduct an autopsy on the dead mare. It revealed that the mare had no fat or muscle, prominent hip bones, and was infested with live parasites. Dodd concluded the mare was "severely emaciated" and "likely died from malnutrition and a heavy parasite load." Clayton was arrested after the autopsy was released and was charged with cruelty to animals.

Prior to trial, Clayton filed a motion for discovery requesting the State to provide him with notice of any evidence of other crimes, wrongs, or acts pursuant to Rule 404(b) of the Texas Rules of Evidence. A motion in limine excluding all extraneous crimes or conduct of which Clayton did not receive prior notice was granted. During a discourse held in the trial court's chambers, Clayton expressed concerns that the State's witnesses might speak of extraneous offenses in violation of the motion in limine. At that time, the State was instructed to admonish its witnesses in order to prevent them from discussing any extraneous offenses without the matter being first brought to the trial court's attention.

During cross-examination of the State's witness, Garrett, the following discussion ensued regarding other horses on the property:

Q. [By Clayton's counsel] What was the condition of those horses?

A. [By Garrett] Most of them were in poor condition. There might have been one or two horses that were not in as bad condition as the other, but for the most part it was pretty poor.

....

Q. [By Clayton's counsel] And you determined that it was not necessary to seize the rest of these horses?

A. [By Garrett] There was a filly there that was in pretty bad shape and I probably should have seized her. And that's my mistake, I didn't, because I think she later died.

Clayton's counsel promptly objected to the question and argued at the bench that Garrett had volunteered information going to "the very matter that [he] was speaking to the Court about, about other animals dying." While Clayton's counsel alleged this was a violation of the motion in limine, the State argued Clayton had opened the door to the statement. Although the trial court dismissed the State's argument in ruling that Garrett's answer was nonresponsive, the court determined the matter could be cured by instruction. Specifically, the trial court stated, "The only statement made by the witness was that a horse died. He didn't expound on what the causation was . . . so I'm going to give an instruction to the jury to disregard that last statement of the witness." Clayton's motion for mistrial was denied, and a "hotly contested" trial continued.

Through the State's witnesses, Clayton established there was some grass and water on the property. State's witness Alton McWaters, who sold the mare to Clayton, described the eighteen-year-old mare as lame from an injury to her left front ankle. He stated she limped badly, could not get around, and had to be specially fed. McWaters said the mare was underweight due to her age and also because she was a thoroughbred racehorse. Dodd noted there was grass in the mare's stomach and fecal matter was present, indicating the mare had eaten. He admitted there could have been other causes for the mare's death.

Clayton also introduced witness Michael Jordan, who took care of Clayton's horses. Jordan described the property as a twenty- to thirty-acre piece of land with two water ponds and a well shed containing grain. It was Jordan's duty to feed the horses every day. Because the grass on the property was poor, Jordan kept three rolls of hay at the back of the property for the animals to feed on in addition to the grain. The testimony was significant since Garrett testified he knew there were storage buildings on the property but did not investigate to see if they contained grain, and did not walk the property to identify natural water sources.

Like State's witness McWaters, Jordan described the mare as old and poor. He testified she had an injury to her front leg and ankle and had a rear leg that was "messed up" when she was being unloaded from a trailer. Because the mare was the descendant of Native Dancer, an award-winning racehorse that placed in the Kentucky Derby, Clayton wanted the mare to produce a colt, implying that Clayton had a motive to keep the mare in good condition. Jordan fed her separately and testified she was able to eat. The mare was wormed twice, once when purchased and again a week or two prior to her death. Clayton had been in the hospital the two days prior to the mare's death. Noting that the mare was having problems in the days leading up to her death, Clayton and Jordan had decided to "put her down" if she did not get better. According to Jordan, the mare had died before they called the veterinarian.

At the conclusion of the evidence, the jury found Clayton guilty, and the court sentenced him to pay a \$2,000.00 fine, costs, and one year's incarceration, consisting of ninety days' actual

confinement in the Cass County jail, followed by nine months' electronic monitoring in the alternative incarceration program.

Clayton timely filed a motion for new trial claiming that Garrett's statement was a violation of the motion in limine and constituted material error which could not be cured by instruction. At the hearing, Clayton argued that the statement was made more egregious by the fact that it was not true. The court stated it "came very close to granting a . . . mistrial" because "[t]here was no question in [its] mind even at the time that the statement was made . . . [it was] in violation of the motion in limine and that it was non-responsive to the question." The trial court found the statement by Garrett that another animal died was an extraneous offense that went "to the very heart of the case," which was "whether or not the bay mare horse in question died as a result of lack of care or died from natural causes." The trial court decided it was "certainly . . . highly, highly prejudicial for a fact finder or a jury to hear that another horse in the same location, in the same place, in a short period of time thereafter, died while under the care of the defendant," and granted the motion for new trial.

The State now appeals the order granting a new trial and argues: 1) Garrett's statement was not extraneous offense evidence; 2) the State had no duty to provide Clayton with notice of its intent to use extraneous offense evidence; and 3) the instruction given to the jury cured any error. *See* TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(3) (Vernon Supp. 2008).

II. Standard of Review

"For more than one hundred and twenty years, our trial judges have had the discretion to grant new trials in the interest of justice," and that decision is reviewed only for an abuse of discretion. *State v. Herndon*, 215 S.W.3d 901, 906 (Tex. Crim. App. 2007). In order to overturn the order granting a new trial, we must decide that the trial court acted without reference to guiding rules or principles or was outside the zone of reasonable disagreement. *Id.* at 907; *Edwards v. State*, 37 S.W.3d 511, 515 (Tex. App.—Texarkana 2001, pet. ref'd). In deciding this issue, we will not substitute our judgment for that of the trial court, but will only determine if the decision was arbitrary or unreasonable. *State v. Kelley*, 20 S.W.3d 147, 150 (Tex. App.—Texarkana 2000, no pet.). The ruling of the trial court is presumed correct, and the burden in this case rests on the State to prove otherwise. *Id.* at 150–51.

Having heard the evidence and being present to observe the dynamics of the trial, the trial court is in a much better position than an appellate court to evaluate the impact on a jury when inadmissible evidence is injected into the record. The State would have us review the case as if the trial court had exercised its discretion by denying the new trial and only instructing the jury to disregard the testimony. When a trial court denies the motion for mistrial or new trial, for the appellate court to reverse, it essentially must conclude the error was established as a matter of law. In that event, merely instructing the jury to disregard the evidence is insufficient to cure the error and would be outside the scope of the discretion allowed. This type of review requires the appellate

court to balance the magnitude of the probable effect of the evidence on the jury against the probable efficacy of an instruction to disregard. *See Hardin v. State*, 20 S.W.3d 84, 93 (Tex. App.—Texarkana 2000, pet. ref'd). By contrast, here, the trial court exercised its discretion to grant the motion for new trial. In that instance, reversible error need not be established as a matter of law. *Herndon*, 215 S.W.3d at 907. When the trial court grants a motion for new trial, the Texas Court of Criminal Appeals has held that there is generally no abuse of discretion if: (1) the defendant articulated a valid legal claim in the motion for new trial, (2) evidence in the trial record substantiated the legal claim, (3) and there is a showing the defendant's rights were prejudiced under the standards articulated in Rule 44.2 of the Texas Rules of Appellate Procedure. *Id.* at 909; *see* TEX. R. APP. P. 44.2. We will review the record concerning these matters.

A. Valid Legal Claim

As a preliminary matter, we analyze the State's first argument that Garrett's statement, "[t]here was a filly . . . in pretty bad shape . . . [that] later died," did not constitute extraneous offense evidence. During the guilt/innocence phase, Rule 404(a) of the Texas Rules of Evidence prohibits the use of character evidence "on the ground that it is generally 'laden with the dangerous baggage of prejudice, distraction, time consumption and surprise.'" *Sims v. State*, No. PD-1575-07, 2008 Tex. Crim. App. LEXIS 820, at *5 (Tex. Crim. App. July 2, 2008); *see* TEX. R. EVID. 404(a). Character evidence such as extraneous offense evidence "tends to confuse the issues," "weigh[s] too much with

the jury and . . . overpersuade[s] them as to prejudge one with a bad general record and deny him a fair opportunity to defend a particular charge." *Id.*

An extraneous offense is defined as any "act of misconduct that . . . is *not shown in the charging papers.*" *Coffel v. State*, 242 S.W.3d 907, 909 (Tex. App.—Texarkana 2007, no pet.) (citing *Rankin v. State*, 953 S.W.2d 740, 741 (Tex. Crim. App. 1996)). The statement must have reflected a crime or bad act to which Clayton was connected. *See Moreno v. State*, 858 S.W.2d 453, 463 (Tex. Crim. App. 1993). This trial was to determine if Clayton failed unreasonably to provide food, water, or care for a livestock animal in his custody. The defense was that this horse had access to food and water and was old, sick, and likely died of disease, age, or other causes unrelated to Clayton's lack of provision of food and water.

Evidence was presented that several other horses were observed on this same property subject to the care of Clayton. The fact that one of these other horses died because it was in "pretty bad shape" and "should have been seized" clearly implies that Clayton neglected to provide for other horses, making the argument that the horse in question died from a cause, other than starvation, much less persuasive. The statement implied that Clayton committed a violation of the law leading to the death of another horse, for which he was not charged. We agree with the trial court's assessment that the statement constituted extraneous offense evidence.

The State next argues that, since Clayton never obtained a ruling on his motion for discovery asking the State to disclose its intent to use extraneous offense evidence, the State had no duty to do

so. We need not address the State's position because, as remains uncontested, the duty was imposed by the trial court's granting of the motion in limine and admonishment to the State to warn its witnesses not to discuss any extraneous offense evidence without prior ruling from the court.

By arguing that Garrett's insertion of an extraneous offense denied Clayton the constitutionally protected right of a criminal defendant to a fair and impartial trial, as is required in order to obtain due process, Clayton articulated a valid claim in his motion for new trial.

B. Evidence in the Record Substantiated the Claim

The record has previously been cited showing that, during the trial, one of the State's witnesses, by a nonresponsive answer on cross-examination, stated that another horse on the property owned or leased by Clayton also was in "bad shape" and died. Clayton's attorney promptly objected and the trial court attempted to rectify the harm by instructing the jury to disregard the testimony. At that time, the trial court denied a motion for mistrial, but later granted a motion for new trial. The trial court stated that it had granted a motion in limine to prevent this type testimony from being presented without giving the court an opportunity to specifically rule on the evidence. The record reveals that Clayton's claim is substantiated by evidence in the trial court record.

C. Harm or Prejudice

As required by Rule 44.2(b) of the Texas Rules of Appellate Procedure, we are to determine if Garrett's statement affected Clayton's substantial rights. A substantial right is not affected and the error is harmless if, after reviewing the entire record, we determine that the error did not influence,

or had only a slight influence, on the trial outcome. *Montez v. State*, 975 S.W.2d 370, 373 (Tex. App.—Dallas 1998, no pet.). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

This was accomplished in response to the State's contention that the trial court's instruction to the jury to disregard the extraneous evidence was sufficient to cure any error, thus removing the need for new trial. The particular instruction given was as follows:

[T]here may be times when I would instruct you to disregard certain evidence. We have now come to a situation like that. In response to the last question of defense counsel, Mr. Shelton, the officer testified that there was a, the death of another horse on the premises. I am hereby instructing you to disregard that statement regarding the death of any other horse in connection with this case. You are not to consider that statement as evidence in this case. You further are not to consider that statement for any purposes whatsoever in arriving at your verdict in this case.

Extraneous offenses "can be rendered harmless by an instruction to disregard by the trial judge, unless it appears the evidence was so clearly calculated to inflame the minds of the jury or is of such damning character as to suggest it would be impossible to remove the harmful impression from the jury's mind." *Kemp v. State*, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992); *see Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). In a majority of cases, the evidence complained of has little relevance to any material issue in the case, such that a prompt instruction to disregard will ordinarily cure any prejudicial effect. *State v. Boyd*, 202 S.W.3d 393, 402 (Tex. App.—Dallas 2006, pet. ref'd). However, an instruction to disregard will not cure the error of improperly inserted

evidence of an extraneous offense when that evidence establishes exactly what the State is trying to prove. *Id.* at 402–03 (citing *Music v. State*, 135 Tex. Crim. 522, 528, 121 S.W.2d 606, 609–10 (1938)).

At the hearing on the motion for new trial, the court stated:

I did try to cure the error by instructing the jury to disregard, but I have to conclude that this type of evidence was highly material to the jury. And since they were confronted with the issue of whether or not to convict based upon whether the defendant had failed to provide care or whether or not . . . the horse had simply died from old age or some other unrelated cause. A second dead horse was extremely vital and material evidence to show that the defendant had knowledge that horses were dying out there and that he should have been taking steps to care for them. . . . So it's not the kind of evidence that I think that I, that's curable by instruction.

In other words, the trial court found that Garrett's statement went "to the very heart of the case," hindered Clayton's constitutional right to a fair trial, and contributed to his conviction. As the trial court noted, Clayton was harmed because he was essentially put in a position to defend the allegation that another horse died while in his care. Since Clayton was not provided notice of the extraneous offense, he would not have been able to "investigate, prepare, or defend" the issue. This is exactly the type of situation Rule 404(b) of the Texas Rules of Evidence was adopted to prevent.

The record shows that the trial court reviewed the trial record prior to ruling on the motion for new trial. After duly considering the issue, the trial court clearly enunciated a proper ground for the granting of the new trial, stating: "A second dead horse was extremely vital and material evidence to show that the defendant had knowledge that horses were dying out there and that he should have been taking steps to care for them"

"[T]he trial court was in the best position to assess the effect of its instruction to the jury. As a result, it was not outside the zone of reasonable disagreement for the trial court to conclude the instruction to disregard," did not cure the error caused by the introduction of the extraneous offense. *Boyd*, 202 S.W.3d at 403–04.

Since Clayton successfully met the *Herndon* requirements while the State failed to meet its burden to prove error, we cannot say that the trial court abused its discretion in granting the new trial. 215 S.W.3d 901.

III. Conclusion

We affirm the decision of the trial court in granting the new trial.

Jack Carter
Justice

Date Submitted: February 10, 2009
Date Decided: February 11, 2009

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