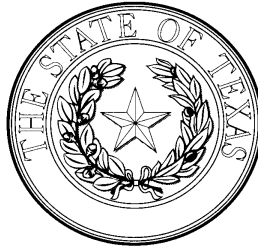


Opinion issued March 31, 2016



In The
Court of Appeals
For The
First District of Texas

NO. 01-12-00896-CR

CRAIG LYNN BEAL, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 8
Harris County, Texas
Trial Court Case No. 1793757

MEMORANDUM OPINION

Appellant, Craig Lynn Beal, was convicted of the misdemeanor offense of cruelty to non-livestock animals and was sentenced to one year in the Harris County Jail. Appellant argues we should reverse and remand his conviction for a new trial

based on a reporter's record that was lost but is now incomplete and inaccurate. We reverse.

Procedural Background

The appellate record was originally due on November 12, 2012. On December 5, 2012, we notified the court reporter, Sondra Humphrey, that the reporter's record was late. No response was received. On February 22, 2013, Humphrey filed an excerpt of trial testimony with the caption that the record was volume one of a one-volume record. The clerk's office of this Court accepted this as the reporter's record and set a deadline for the filing of appellant's brief in March 2013. After receiving no response to our notices that appellant's brief was late, we issued an order in October 2013, remanding to the trial court to determine why no brief had been filed. While waiting for the trial court to file its hearing record, we determined that the reporter's record was incomplete and issued an abatement order, remanding the case to the trial court for a hearing to determine why Humphrey had not filed the reporter's record, to set a date for the filing of the reporter's record, and to make findings whether Humphrey should be held in contempt. We also noted that Humphrey had failed to file reporter's records in several other cases.

In the summer of 2014, we granted Humphrey's request for an extension of time to file the reporter's record. No reporter's record was filed. On June 23, 2015, we issued another abatement order, again directing the trial court to hold a hearing

to determine why the reporter's record had not been filed and to make findings and conclusions regarding whether the reporter's record was lost or destroyed. The Honorable Sherman A. Ross, former Presiding Judge of the Harris County Criminal Courts at Law, was assigned to hear the proceedings regarding past due reporter's records in this case and in a number of other cases.¹ On July 22, 2015, a supplemental clerk's record was filed containing the trial court's findings of fact and conclusions of law.

The trial court found that, despite numerous hearings and orders, Humphrey failed to appear and refused to turn over her notes and audio recordings. The trial court then ordered Humphrey to turn over all her notes and audio recordings. Given her refusal to cooperate and comply with his orders, the trial court found her in contempt and sentenced her to 30 days in jail and a \$500 fine. The trial court found that a complete record would not be filed in this case and concluded that Humphrey "violated her oath to keep a correct, impartial record" and that appellant was entitled to a new trial.

¹ See *Bryant v. State*, 464 S.W.3d 99 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Castillo v. State*, No. 01–13–00632–CR, 2015 WL 1778776 (Tex. App.—Houston [1st Dist.] April 16, 2015, no pet.); *Matamoros v. State*, No. 01–13–00633–CR, 2015 WL 4043067 (Tex. App.—Houston [1st Dist.] July 2, 2015, no pet.); *Markle v. State*, No. 14–13–00961–CR, 2015 WL 1622175 (Tex. App.—Houston [14th Dist.] April 7, 2015, no pet.); *Acosta v. State*, No. 01–13–01048–CR, 2015 WL 3608906 (Tex. App.—Houston [1st Dist.] June 9, 2015, no pet.); *Bankett v. State*, No. 01–13–00896–CR, 2015 WL 3637957 (Tex. App.—Houston [1st Dist.] June 11, 2015, no pet.).

In September 2015, Beal asked that we follow the trial court's findings and conclusions and reverse and remand for a new trial. The next day, Humphrey tendered a reporter's record that the clerk's office refused for failure to include the listed exhibits. On September 14, 2015, almost three years after it was originally due, Humphrey filed a reporter's record with the exhibits.

On September 11, 2015, the State asked this Court to order the trial court to withdraw its previous findings and conclusions and to file new ones based on the recently-filed reporter's record that "appears to be both complete and accurate." We asked the parties to review the reporter's record and file any complaints concerning its completeness or accuracy within 10 days. The State did not file a response, but appellant filed an objection, stating that the reporter's record was "per se unreliable due to the irregularity of the proceedings and untrustworthiness of the reporter," that given the extreme delay, it was no longer possible to ensure the accuracy and completeness of the record, and set out a number of errors identified from a "cursory examination." We then ordered Humphrey to make corrections to the reporter's record, specifying the errors appellant had asserted. A corrected reporter's record was not filed.

On December 8, 2015, we directed the trial court to hold a hearing and to determine whether the defects in the record could be corrected, and whether the corrections were necessary to the resolution of the appeal. TEX. R. APP. P.

34.6(e)(2). A week later, Humphrey filed a corrected reporter's record; however, it still contained a number of the errors noted in our December 8 order.

On February 4, 2015, we received a supplemental clerk's record containing the trial court's supplemental findings of fact and conclusions of law. We also received a hearing record. The trial court noted that Humphrey failed to appear at the first hearing scheduled on December 14, 2015. The matter was reset to January 4, 2016. During that hearing, Humphrey appeared and attempted to explain the problems with the record. Counsel for the State advised the trial judge that she did not believe any errors were essential to the appeal, but added:

I still am not confident that I'm completely aware of everything that is wrong with this record at this point. I think that there's more to be unearthed and everything has to be gone through page by page. We were attempting to do that; and Ms. Woods [appellant's counsel] and I have already noticed some errors, some differences, some changes that are problematic.

The trial court found that the reporter's record was necessary to the resolution of the appeal and that the reporter's record could not be replaced by agreement of the parties. The trial court further found that Humphrey either did not have a complete stenographic record or audio recording of the proceedings "or she willfully refused and continues to refuse to obey the orders of the Court and either file the record or turn over her materials." The trial court noted that both sides agreed that the record contained numerous errors in both the transcript of testimony and in the

exhibits. The trial court further found that both the September and December reporter's record were "so blatantly and pervasively defective as to undermine their overall integrity" and that they "should not be considered an official or complete record of the proceedings." Based on his findings, the trial court concluded that appellant was entitled to a new trial. The State has not challenged the trial court's fact findings or conclusions of law.

Issue Presented

Appellant claims he is entitled to a new trial because he has been denied due process, and the integrity of the appeal was "shattered due to the extreme delay" and the "bad faith by an officer of the court [Humphrey]." Although the State objected to appellant's first motion in September 2015, asserting that the reporter's record appeared to be complete and accurate, the State has not objected to a new trial after the trial court's January 2016 hearing. Indeed, the State agreed with the trial court's findings that the record contained numerous defects, that the latest record contained newly-created defects, and that additional problems would be discovered if the parties had more time to analyze the record.

Standard of Review

An appellant is entitled to a new trial if, through no fault of the appellant, a reporter's record is lost or destroyed, and the portion lost or destroyed is necessary

to the resolution of the appeal and cannot be replaced by agreement of the parties. TEX. R. APP. P. 34.6(f); *Mendoza v. State*, 439 S.W.3d 564, 566 (Tex. App.—Amarillo 2014, no pet.); *Castillo v. State*, No. 01–13–00632–CR, 2015 WL 1778776, at *2 (Tex. App.—Houston [1st Dist.] April 16, 2015, no pet.). If the missing portion of the reporter’s record is not necessary to the resolution of the appeal, the appellant is not entitled to a new trial. See TEX. R. APP. P. 34.6(f); *Nava v. State*, 415 S.W.3d 289, 306 (Tex. Crim. App. 2013); *Routier v. State*, 112 S.W.3d 554, 571–72 (Tex. Crim. App. 2003).

Few cases addressing lost or destroyed records set out the standard for reviewing the trial court’s findings of fact and conclusions of law. In *Lucas v. State*, No. 05–01–00078–CR, 2003 WL 21771333, at *4 (Tex. App.—Dallas Aug. 1, 2003, pet. ref’d), the Dallas court noted this lack of authority and determined it should apply the standard set out in *Guzman v. State*, 955 S.W.2d 85 (Tex. 1997) when reviewing a trial court’s findings and conclusions about a lost or destroyed record. Under *Guzman*, the proper standard for reviewing trial court findings of fact is an abuse of discretion standard, giving “almost total deference to a trial court’s determination of the historical facts that the record supports.” *Guzman*, 955 S.W.2d at 89. We review conclusions applying the law to those facts *de novo*. *Id.* We will apply the *Guzman* standards here.

Analysis

Appellant is not at fault for the missing record

We turn first to the trial court's finding that appellant was not at fault for the lost or destroyed reporter's record. The trial court found:

5. On September 13, 2012, trial counsel withdrew, and the appellant filed notice of appeal asserting his indigence and requesting the reporter's record. [The trial judge] denied this request.

10. On November 11, 2013, Ms. Humphrey testified that she had spoken with the appellant and was aware that he had requested the record.

11. Despite the fact that she knew appellant had requested the record, she testified she had "not yet" made an estimate of the cost for the record. She then testified a "ballpark" would be \$200–300. However, an undated attachment later set the price at \$1,160.

14. The appellant bears no fault for Ms. Humphrey's failure to complete and file the reporter's record.

Rule 34.6 requires that the loss of the reporter's record have occurred without any fault on the part of the appellant. TEX. R. APP. P. 34.6(f)(1)-(2); *see Hawkins v. State*, No. 12–08–00357–CR, 2010 WL 546701, at *2 (Tex. App.—Tyler Feb. 17, 2010, pet. ref'd). Typically, this "fault" is invoked when an appellant either does not request or pay for the record. *See, e.g., Cheek v. State*, 65 S.W.3d 728, 730 (Tex. App.—Waco 2001, no pet.). The trial court did not abuse its discretion in finding no fault by appellant because he timely filed his notice of appeal, sought a finding

of indigence at the time he filed his notice of appeal so that he could obtain a reporter's record, and timely requested the record.

The record is lost or destroyed

The trial court made the following findings to which he states the parties agree:

- a. Numerous defects still exist in the record filed in December.
- b. Ms. Humphrey failed to correct many of the specific defects ordered by the Court of Appeals.
- c. The December record contains newly-created, additional defects and deficiencies (i.e., exhibit pages filed in the September version were missing and strangely altered in the December version).
- d. Additional problems would likely continue to be discovered if the parties had more time to analyze the records.

In addition to defects in the reporter's record, the "lost" notes prevent any verification of the accuracy of what is included. The trial court found:

25. The Court finds that Ms. Humphrey failed to file the record because she had neither a complete stenographic record, nor a complete audio recording of the proceedings in the trial court, or she willfully refused and continues to refuse to obey the orders of the Court and either file the record or turn over her materials.

26. This Court does not believe that a complete record will ever be filed by Ms. Humphrey, nor will she ever submit her notes of recordings in this case.

A court reporter's failure to file the record, by itself, may not be a sufficient basis for concluding that the reporter's notes and records are "lost or destroyed." *Johnson v. State*, 151 S.W.3d 193, 196 (Tex. Crim. App. 2004) (citing to *Payne v. State*, 802 S.W.2d 686 (Tex. Crim. App. 1990) and *Routier v. State*, 112 S.W.3d 554 (Tex. Crim. App. 2003)). This is because courts have the power to appoint substitute court reporters to prepare and file the record from the original court reporter's notes, and thus, a reporter's notes and records can be considered "lost" only if missing portions are irretrievable. *Johnson*, 151 S.W.3d at 196.

The trial court implicitly found the notes and tapes were irretrievably lost. Despite being found in contempt and sentenced to 30 days in jail, Humphrey failed to turn over her notes or recordings. This supports the trial court's finding that the notes and tapes would never be provided—implicitly finding that Humphrey's notes or tapes are irretrievably lost. *See Markle v. State*, No. 14-13-00961-CR, 2015 WL 1622175, at *3 (Tex. App.—Houston [14th Dist.] Apr. 7, 2015, no pet.) (court reporter's refusal to turn over audio tapes supports implied finding that reporter's record is irretrievably lost).²

² Even if she had turned over her notes and tapes, the record still may have been considered lost. In other cases, Humphrey did turn over her notes and audio tapes, but the substitute court reporter was unable to reconstruct the reporter's record based on those tapes and notes. *See Castillo*, 2015 WL 1778776, at *1-2; *Matamoros*, 2015 WL 4043067, at *3; *Bankett*, 2015 WL 3637957 at *1-2. The tapes also would not cure problems with the exhibits. The trial court in one of these other cases found a possible reason for the poor notes and tapes—Humphrey was experiencing a

Our review of the record reveals that it contains illegible words, sentences that are nonsensical, presumably because portions are missing, errors in the index of exhibits, a missing exhibit that is listed in the index, and an exhibit that not only now contains official signatures that were missing from that exhibit in the September volume, but also has large portions of each page missing or not copied. At least one witness is not identified by his full name. Based on our review of the record, we find no abuse of discretion by the trial court in his findings about the defective state of the reporter's record and that a complete record will never be filed.

The record cannot be replaced by agreement

The trial court further found that the reporter's record could not be replaced by agreement of the parties. The trial occurred in September 2012. Appellant contends, and the State has not disputed, that over this lengthy period waiting for Humphrey to file the record, counsels' memories have faded and it would be impossible to correct all the defects in the reporter's record of this jury trial. We conclude the trial court did not abuse its discretion in finding that the parties are unable to replace the missing or inaccurate portions of the reporter's record by agreement.

“medical condition, [and] personal, and professional problems during the [time she reported the cases].” *Castillo*, 2015 WL 1778776, at *2; *see also Matamoros*, 2015 WL 4043067, at *2; *Bankett*, 2015 WL 3637957 at *1.

The missing record is necessary to resolve the appeal

Finally, the trial court found that the reporter's record was necessary to the resolution of the appeal. An appellant bears the burden of establishing that missing portions of the record are required for resolving the appeal. *See Doubrava v. State*, 28 S.W.3d 148, 151 (Tex. App.—Eastland 2000, pet. ref'd) (citing *Issac v. State*, 989 S.W.2d 754, 757 (Tex. Crim. App. 1999)). An incomplete and defective reporter's record hampers an appellant's ability to present meaningful issues on appeal. *See Bryant v. State*, 464 S.W.3d 99, 103 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (reversing and remanding case with record taken by Humphrey); *Hawkins*, 2010 WL 546701, at *4 (reversing and remanding for new trial because lost portions of reporter's record were not mere formality or summary proceeding and lost portion of reporter's record was necessary to resolution of appeal).

In most cases, either a discrete portion or the entire record is missing and the finding of harm depends on whether the particular lost portion of the record is harmful to the appellant's case on appeal. *See Routier*, 112 S.W.3d at 571–72 (missing 54 pages not shown to be harmful to appellant); *Pierre v. State*, 2 S.W.3d 439, 444 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (missing reporter's record of voir dire, opinion statements and closing arguments during guilt-innocence phase, and entire punishment phase held harmful to appellant). In this case, there is not a discrete missing portion. Instead, the defects are scattered throughout the

record. The defects throughout the reporter's record led the parties to agree there were numerous defects throughout the record and that more could likely be discovered in the future. This also supports the trial court's finding that the blatant and pervasive defects undermine the overall integrity of the record.

Based on this record, we conclude that the trial court did not abuse its discretion in finding harm to appellant. *See Issac v. State*, 989 S.W.2d at 757 (“[T]he lack of a record may in some cases deprive an appellate court of the ability to determine whether the absent portions [of the reporter's record] are necessary to the appeal's resolution” and thus, a determination of harm is required for reversal); *see also Villagomez Invs., L.L.C. v. Magee*, 294 S.W.3d 687, 690 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (record must include all evidence admitted at trial for criminal appellant to raise sufficiency argument); *Bryant*, 464 S.W.3d at 103 (ability to present meaningful issues in appeal of jury trial is severely limited absent a reporter's record); *Castillo v. State*, No. 01–13–00632–CR, 2015 WL 1778776, at *3 (Tex. App.—Houston [1st Dist.] April 16, 2015, no pet.) (“it would strain credulity” to conclude that a lost reporter's record was unnecessary to resolution of appeal).

Appellant is entitled to a new trial

Lastly, we review *de novo* the trial court's conclusion of law that appellant is entitled to a new trial. Rule 34.6(f) provides that an appellant is entitled to a new

trial when the facts show that: (1) he timely requested the reporter's record, (2) a significant exhibit or a significant portion of the reporter's notes or recording has been lost or destroyed through no fault by appellant, and (3) the reporter's record cannot be replaced by agreement of the parties. TEX. R. APP. P. 34.6(f). The record shows Beal timely requested the record, a significant portion of the record is lost through no fault on Beal's part, and the record cannot be replaced by agreement of the parties. The record also supports the trial court's finding that the missing portions are necessary to the appeal. Accordingly, we conclude that the trial court did not err in concluding that, based on Rule 34.6, appellant is entitled to a new trial.

Conclusion

We reverse the trial court's judgment, and remand the cause for a new trial. *See* TEX. R. APP. P. 34.6(f), 43.2(d). Any pending motions are dismissed as moot.

Harvey Brown
Justice

Panel consists of Justices Bland, Brown, and Lloyd.

Do not publish. TEX. R. APP. P. 47.2(b).