

**COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS
TEXARKANA**

COURT OF APPEALS CASE NO. _____

COURT OF CRIMINAL APPEALS CASE NO. _____

Defendant-Petitioner

v.

**STATE OF TEXAS
Plaintiff-Respondent.**

**PETITION FOR DISCRETIONARY REVIEW FROM THE
JUDGMENT OF THE TEXAS SIXTH COURT OF APPEALS**

PETITION OF DEFENDANT-PETITIONER

ADRIENNE A DUNN

Attorney for Defendant-Petitioner

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested.

STATEMENT OF THE CASE

It is well settled in Texas law that when the state admits evidence of extraneous acts, the defendant is entitled to a charge instructing the jury that they are to consider the extraneous acts only if proven beyond a reasonable doubt and only for the limited purpose for which the evidence was admitted.

Here, the trial court caused egregious harm to Appellant when it failed to give the above mentioned instructions. In addition, Appellant was denied effective assistance of counsel when his trial attorney failed to request such an instruction.

STATEMENT OF PROCEDURAL HISTORY

Appellant was indicted for felony criminal mischief. (CR 6)¹ He pled not guilty and proceeded to jury trial on April 6 and 7, 2005. (CR 4 & 5) Appellant was convicted of criminal mischief with the loss amount of \$1500 to \$20,000 and was sentenced to two years in the state jail probated for five years. (CR 48) In addition, Appellant was ordered to pay restitution in the amount of \$5300. (CR 48) Appellant timely filed his notice of appeal. (CR 58)

In his direct appeal to the Court of Appeals for the Sixth District, Appellant complained (1) that the trial court caused egregious harm when it failed to properly instruct the jury that they are not to consider extraneous acts unless proven beyond a reasonable doubt and when they consider those acts, it is for a limited purpose; and (2) that Appellant's trial attorney was ineffective for failing to request these limiting instructions.

In its opinion, the court of appeals held that (1) Appellant did not suffer egregious harm as a result of the omission of the limiting instructions; and (2) a direct appeal is an inadequate vehicle for challenging the constitutional effectiveness of Appellant's attorney. On March 30, 2006, Appellant moved for rehearing which was denied on April 11, 2006.

¹ "CR" refers to Clerks Record followed by the page number.

GROUNDS FOR REVIEW

- I. Did the court of appeals error when it held the trial court did not cause egregious harm by failing to properly instruct the jury that they are not to consider extraneous acts unless they believe beyond a reasonable doubt that Appellant committed the acts and of the limited purpose of those acts? (*See*, CR 41 Court's Charge to the Jury)

- II. Did the court of appeals error when it held Appellant was not denied effective assistance of counsel when his trial attorney failed to request the proper instruction that the jury is not to consider extraneous acts unless they believe beyond a reasonable doubt that Appellant committed the acts and of the limited purpose of those acts? (*See*, CR 41 Court's Charge to the Jury)

STATEMENT OF THE FACTS

Appellant was charged with intentionally damaging Complainant's motorcycle in violation of TEX. PENAL CODE §28.03. (CR I:6) Specifically, the state alleged Appellant intentionally ran over Complainant's motorcycle with his truck causing \$5300 in damage.

The state labeled Appellant a bully. To that effect, it produced two witnesses who described his past behavior during its case-in-chief.

The complainant in the charged offense and the neighbor of Appellant's daughter, described in detail each time he believed Appellant damaged his property. First, Complainant stated he knew Appellant ran over his mailbox prior to the charged offense because he saw tire marks leading up to Appellant' truck. (RR 3:8)² Next, Complainant told the jury that on November 20, 2003, Appellant knocked down his fence and left a note telling Complainant he could not put a fence there. (*Id.*) Finally, Complainant told the jury that the summer before the charged offense, Appellant ran over his mailbox. (*Id.*) Complainant said he knew it was Appellant who had done this because Complainant found the mailbox somewhat underneath Appellant' truck. (*Id.*)

The state also called Ronnie Foust, the investigating officer for the November 20, 2003 damage to Complainant's fence. (RR 2:92) Foust testified that on Complainant's damaged fence was a note written and signed by Appellant in which he admitted to damaging the fence and threatening future property damage. (RR 2:93) Foust stated that in addition to the note, Appellant had repeated essentially the same story to him. (RR 2:93) On cross-examination, Foust admitted that he had no knowledge of the facts to which Appellant was charged. (RR 2:94)

² "RR" refers to the Reporter's record followed by the volume and page number.

To counter this evidence, Appellant testified that he accidentally backed over Complainant's mailbox. (RR 3:83) Appellant further testified that he did not knock down Complainant's fence but simply loosened the wires and let it fall to the ground. (RR 3:85) He also denied leaving a note on the fence. (*Id.*)

In summations, the state argued that the evidence established Appellant as a bully. (RR 3:137) "He kept running over [Complainant's] property and he got away with it for a long time. But that stops today...You can't keep bullying your neighbors because you don't like what they're doing with their property." (RR 3:140) The state went on to argue that based on Appellant's prior bad acts, it was obvious he intended to damage Complainant's motorcycle. "...I know there's enough evidence to show that he acted intentionally....But the past history, he's terrorized his neighbor before, running over his stuff....Go back to the jury room and tell him he can't do that anymore." (RR 3:141)

Appellant's trial attorney did not object to the admission of the extraneous acts or to the state's arguments. More importantly, the trial attorney did not request the limiting instructions regarding extraneous acts.

ARGUMENT

- I. The court of appeals erred when it held the trial court did not cause egregious harm by failing to properly instruct the jury that they are not to consider extraneous acts unless proven beyond a reasonable doubt and when they consider those acts, it is for a limited purpose.**

A. The Standard of Review

The applicable standard of review is egregious error. If no objection was made to the charge at trial, a reversal is required “if the error is so egregious and created such harm that [the defendant] ‘has not had a fair and impartial trial’ -- in short ‘egregious harm.’” *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).

Almanza articulated four factors courts may consider when conducting a harm analysis: “1) the charge itself; 2) the state of the evidence including contested issues and the weight of the probative evidence; 3) arguments of counsel; and, 4) any other relevant information revealed by the record of the trial as a whole.” *Bailey v. State*, 867 S.W.2d 42, 43 (Tex. Crim. App. 1993) *citing Almanza*.

B. Application

As detailed above, the state introduced evidence of Appellant’s prior alleged acts of property destruction. The jury was not instructed that (1) this evidence is only to be considered if it was proven beyond a reasonable doubt

and (2) the evidence was admitted only for a limited purpose. (*See*, CR 41 Court's Charge to the Jury)

Because Appellant's valuable right to be judged solely on the evidence specific to the charged offense and not on the evidence of his character generally was violated, Appellant request this Court to grant his petition for discretionary review.

In its opinion, the court of appeals applied the factors outlined in *Almanza* to determine that Appellant's harm from the omission of the limiting instructions concerning extraneous acts did not rise to the level of egregious. The court of appeals noted that the jury charge "adequately informed the jury of the applicable law, defined the charged offense, and comported with the indictment." Regarding the state of the evidence, the court of appeals held that the jury did its job in judging the credibility and weight of the testimony of the witnesses. Lastly, the court of appeals noted that the state referenced the extraneous acts in its closing.

"The purpose of the jury charge is to inform the jury of the applicable law and guide them in its application to the case." *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). If the jury charge fails to contain an accurate description of the law, "the integrity of the verdict is called into doubt." *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994).

Furthermore, appellate courts must consider the “presumption that the jury is presumed to have understood and followed the court’s charge absent evidence to the contrary.” *Hutch*, 922 S.W.2d at 172.

“Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” TEX. R. EVID. 404(b). The United States Supreme Court warned:

The state may not show defendant’s prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

Mickelson v. United States, 335 U.S. 469, 476 (1948).

In keeping with the limited purpose for which the evidence is admitted, trial courts are required to instruct the jury that (1) they are not to consider the evidence unless it was proven beyond a reasonable doubt and (2) they are only to consider the evidence for the limited purpose for which it was admitted. *George v. State*, 890 S.W.2d 73 (Tex. Crim. App. 1994). Defendants have been entitled to these instructions since the early part of the last century.

It is well settled law in this state that when evidence of collateral crimes is introduced for one of the various purposes for which such evidence becomes admissible, the jury should be instructed that they cannot consider against the defendant such collateral crimes, unless it has been shown to their satisfaction that the accused is guilty thereof.

Lankford v. State, 248 S.W. 389 (1923).

In applying the *Almanza* standard, this Court held a charge that instructed the jury opposite as to the actual state of the law resulted in egregious harm to the defendant. *Hutch*, 922 S.W.2d 166. *Hutch* first analyzed that the charge contained error. In fact, the jury was instructed opposite of what it should have been instructed. *Id.* at 172. Also, this Court noted that the error occurred in the application paragraph, which is the portion of the charge authorizing the jury to act. *Id.* Next, this Court noted the error related to a contested issue going to the crux of the defendant's case. *Id.* at 173. Third, the *Hutch* Court examined the summations. It held, even though both attorneys correctly argued the law, the erroneous charge had not been cured. *Id.* at 174. Finding egregious harm, this Court reversed and remanded the case to the trial court. *Id.*

Applying the *Almanza* factors to the case at bar, it is clear Appellant suffered egregious harm. First, the jury charge was clearly wrong. *See, George and Lankford, supra.* It is well established that the jury must be

instructed to consider extraneous acts only if proven beyond a reasonable doubt and to consider the evidence for the limited purpose for which it was admitted. The charge in the instant case is silent to this issue, thereby invoking the type of prejudicial consideration Rule 404(b) is aimed at preventing. As cautioned in *Mickelson*, the jury will, unless instructed otherwise, rely too heavily on the evidence of extraneous acts when deciding the guilt of Appellant as to the charged conduct.

Second, the error in the charge relates to an issue of contention. As in *Hutch*, the crux of Appellant's defense was that he accidentally damaged Hargrove's motorcycle. The state, on the other hand, admitted the evidence of the prior alleged acts of property destruction as proof of Appellant's intent to run over Complainant's motorcycle. Without the limiting instruction, the jury was left with the misimpression that this evidence was to be considered as direct evidence of Appellant's guilt; that is, that he acted in conformity with his character.

Last, the summation by the state reiterated the error and the harm caused by the omission in the charge. Unlike *Hutch*, where the attorneys argued the law correctly, here, the state's attorney argued just as the Supreme Court in *Mickelson* and the Texas Rules of Evidence warned against – that Appellant acted in conformity with his bad character. The

state urged the jury to convict Appellant because he was a bad person generally and not solely based on the evidence tending to establish the charged offense, thus denying defendant a “fair opportunity to defend against [the] particular charge.” Without an instruction telling the jury that it is only to consider the evidence of extraneous acts if proven beyond a reasonable doubt and that consideration is for a limited purpose only, the jury was misled and confused as to the state of the law. *See, Ruiz v. State*, 753 S.W.2d 681, 684 (Tex. Crim. App. 1988) (holding the defendant suffered egregious harm when the “possibility existed that the jury was confused and misled into ending their deliberations under the incorrect instruction of the law”).

Here, Appellant was undeniably entitled to have the jury instructed that they are not to consider the evidence of his alleged prior bad acts unless proven beyond a reasonable doubt that Appellant committed those acts and to consider the evidence for the limited purpose for which it was admitted. The trial court’s failure to instruct the jury regarding whether and how it could consider the prior acts vitally affected a valuable right of Appellant. As expressed in *George and Lankford*, the only measure against the jury not convicting Appellant based on his bad behavior in general is the limiting instructions. Absent that measure, it must be presumed the jury followed the

charge as written. Thus, it must be presumed that the jury did not limit their consideration of the extraneous acts to merely rebutting the defendant's theory of accident (which would have been difficult to do since the state introduced this evidence in its case-in-chief). Instead, it must be presumed that the jury considered the evidence of extraneous acts without it first being proven beyond all reasonable doubt and as direct evidence of Appellant's guilt; thus convicting Appellant, in part, for being a bad person generally. Appellant's valuable right to be judged and convicted solely based on the evidence specific to the charged offense was compromised.

II. The court of appeals erred when it held Appellant was not denied effective assistance of counsel when his trial attorney failed to request the proper instruction that the jury is not to consider extraneous acts unless they believe beyond a reasonable doubt that Appellant committed the acts and of the limited purpose of those acts.

A. The Standard of Review

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court outlined the test courts are to apply when considering an ineffective assistance of counsel claim. The appellant must establish (1) "that counsel's representation fell below an objective standard of reasonableness" and (2) "any deficiencies in counsel's performance must be prejudicial" to the defendant. *Id.* at 688 and 692.

In determining whether an attorney's conduct fell below an objective standard of reasonableness, courts do not judge counsel's trial decisions in hindsight. *See Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992). Instead, courts presume counsel's competence. Nevertheless, showing through a preponderance of the evidence the trial attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound trial strategy can rebut this presumption. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994); *Miniel*, 831 S.W.2d at 323.

In assessing harm (the second prong), the defendant must establish a "reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* 466 U.S. at 694. The *Strickland* court defines this in the negative. The "defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Id.* at 693. *Strickland* goes on to explain, "the result of the proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at

694. “[T]he ultimate focus of the inquiry must be on the fundamental fairness of the proceeding...” *Id.* at 696.

B. Application

The state introduced evidence of Appellant’s extraneous acts; namely, evidence of Appellant’s prior alleged property destruction. Despite this, Appellant’s trial attorney failed to request that the jury be instructed (1) that they are not to consider the evidence unless it was proven beyond a reasonable doubt and (2) that they are only to consider the evidence for the limited purpose for which it was admitted. The trial attorney’s conduct fell below the objective standard of reasonableness and harmed Appellant.

In its opinion, the court of appeals ruled that “There is simply nothing in the record before us from which we can properly question the strategy of Giddens’ trial counsel.” However, there is no strategic decision for not requesting the limiting instructions to which Appellant was entitled.

This Court recently held a trial lawyer was ineffective for failing to request the two instructions related to uncharged conduct. *Ex Parte Varelas*, 45 S.W.3d 627 (Tex. Crim. App. 2001). Varelas was convicted of the capital murder of his two-year old step-daughter and sentenced to death. *Id.* at 629. The state admitted evidence of past physical abuse committed by Varelas on the victim. *Id.* at 630. Varelas’ trial attorney did not request that

the jury be instructed that it may only consider this extraneous evidence if proven beyond a reasonable doubt and that it may consider the evidence only for the limited purpose for which it was admitted. *Id.*

This Court held the trial attorney's failure to request the entitled instructions was deficient conduct. "[I]f the applicant's counsel had requested the jury to be instructed that they could not consider the extraneous act evidence unless they believed beyond a reasonable doubt that applicant committed those acts, the requested charge should have been given." *Id.* at 631. The same ruling applied to the second instruction: "[I]f applicant's counsel had requested that they jury be instructed that they could consider the extraneous act evidence only for the limited purposes for which it was offered, the trial court would have been required to the requested instruction." *Id.*

In determining that the trial attorney's deficient conduct prejudiced the defendant, *Varelas* stated:

Because this charge did not contain the appropriate burden of proof for the extraneous act evidence, it is reasonable to presume that the jury did not necessarily find beyond a reasonable doubt that the extraneous acts were committed by applicant before using this evidence against him....Similarly, the charge did not contain a limiting instruction telling the jury to consider the extraneous acts only for the purposes for which they were admitted...Without such an instruction, the jury was likely to consider the extraneous acts as direct evidence of

applicant's guilt; that is, that he acted in conformity with his character.

Id. at 633-634. *Varelas* also noted that the extraneous acts evidence was introduced during the state's case-in-chief, and that it was similar in nature to the charged offense. *Id.* at 634 and 636. Additionally, the lack of proper instruction reduced the possibility that the jury would find the defendant guilty of a lesser-included offense. *Id.* at 635.

Varelas is on all fours with the instant case. Appellant's trial attorney failed to request that the jury is only to consider the extraneous acts if proven beyond a reasonable doubt and for the limited purpose for which it was admitted. As in *Varelas*, Appellant's trial attorney's deficient conduct fell below the objective standard of reasonableness.

Further, the same harm articulated in *Varelas* occurred here. In the absence of an instruction explaining the appropriate burden of proof, it is reasonable to presume that the jury considered the evidence of the prior property destruction without believing beyond a reasonable doubt that Appellant committed those acts. Similarly, without a limiting instruction, it is reasonable to presume the jury considered the extraneous acts as substantive evidence invoking the type of prejudicial consideration Rule 404(b) aimed to avoid. As in *Varelas*, the extraneous acts evidence was

introduced during the state's case-in-chief and was substantially similar in nature to the charged offense. Lastly, the evidence was reiterated during the state's closing argument, making it ever more unlikely that the jury did not consider the evidence for the limited purpose for which it was admitted but instead as evidence that Appellant acted in conformity with this character trait.

Therefore, because of Appellant's trial attorney's unprofessional error, confidence in the outcome of the proceeding has been undermined and fairness in the trial has been compromised. Thus, Appellant was denied effective representation when his trial attorney failed to request the proper jury instructions.

PRAYER

Because of the foregoing reasons, Appellant requests this Court to review the court of appeals' opinion.

Respectfully submitted,