**Reversed and Remanded and Opinion filed August 16, 2001.**

**In The**

# Fourteenth Court of Appeals

---

**NO. 14-99-00377-CR**

---

**SHANNON EUGENE MOSES, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

---

**On Appeal from the 230th District Court**
**Harris County, Texas**
**Trial Court Cause No. 785,631**

---

## O P I N I O N

This case involves an alleged bribery of a peace officer by a wrecker driver. A jury found appellant guilty of bribery, and the trial court assessed his punishment at five years' imprisonment, probated for five years, and a payment of an $800.00 fine. Appellant brings three points of error to this court, contending that the trial court abused its discretion by (1) admitting extraneous offense evidence; (2) denying appellant's motion for mistrial after the jury indicated it was deadlocked; and (3) denying appellant's motion for new trial based on newly discovered evidence not available to appellant before trial. Our resolution of this case is controlled by appellant's first issue, so we will only address it. Because we

find that the extraneous offense evidence admitted at trial was not relevant apart from its propensity to show character conformity, we reverse the judgment of the trial court and remand this cause of action for further proceedings in accordance with this opinion.

## FACTUAL BACKGROUND

According to testimony in the record, in Harris County, when a vehicle needs to be towed, the officer on the scene is to ask the driver of the vehicle whether there is a wrecker service he or she would prefer. If one is selected by the driver, then a call is placed for that service. If no wrecker service is selected, then a general "wrecker needed" call is sent over the police radio, which is monitored by wrecker drivers. The first wrecker on the scene gets the business. However, if more than one wrecker arrives at the same time, the wrecker who will tow the car is chosen by lot.

Appellant is a wrecker driver. James Blackledge, a deputy constable with the Harris County Precinct Four Constable's office, testified that on May 12, 1998, while on patrol, he met with appellant. Blackledge testified that during this meeting, appellant offered to buy Blackledge a cellular telephone, and pay the monthly service charge for the use of the phone, if Blackledge would agree to call appellant first before placing a general call over his police radio for wrecker service. Blackledge declined to enter this agreement. Later, Blackledge reported this conversation to a supervisor, who directed him to tape record any further conversations he may have with appellant. One such conversation was recorded on May 27, 1998, when appellant alluded that he and his wife, former constable's deputy Dawn Moses, were angry at Deputy Bobby Norris, whose son drove a tow truck and may have gotten preferential treatment from his father. Appellant asked if a formal complaint had been filed on that matter.

At trial, appellant denied ever offering Blackledge the use of a cellular telephone. He testified that they had discussed cellular telephones, possibly on May 12th, and that, after Blackledge said he could not obtain a cellular phone because of credit problems, he had offered to put Blackledge in touch with a friend of his who managed a cellular phone

business. On cross-examination, appellant testified that Blackledge had lied about him. On re-direct examination, appellant said that he assumed he became a target for retaliation because he and his wife "got some deputies in trouble."

In the State's rebuttal case, Blackledge and Deputy Constable Steve Spoon each testified that, on two prior occasions, appellant explained to each of them that he was having financial trouble, and offered to kick-back part of his towing fee if the officers would specifically request his towing service. The conversation with Spoon took place in early March, while the conversation with Blackledge allegedly took place in early April. Spoon and Blackledge both testified that they declined these offers. Blackledge explained that while one of these offers occurred in early April of 1998, he did not inform his supervisor until late April, when he noticed appellant tailing him as he made traffic stops. Blackledge became concerned about the appearance of favoritism, and orally reported the incident to his supervisor. Blackledge said that due to scheduling problems he did not file a written statement about this first offense right away. Instead, when the alleged conversation about cellular phones occurred on May 12th, Blackledge executed a written statement about both the cellular phone offer and the incident in April.

On May 27th, appellant's wife complained to one of her husband's superiors that she wanted to file a formal complaint against the constable's deputies for exercising preferential treatment for a particular wrecker driver.

Formal charges were not filed against appellant in this case until June 9th.

The trial court instructed the jury that it could consider the alleged prior bribery attempts only for the purpose of rebutting the appellant's defensive theory that he was the victim of retaliation by the constable's deputies, and could only consider it if the jury believed beyond a reasonable doubt that appellant committed those offenses.

## DISCUSSION AND HOLDINGS

## I. Extraneous Offense Evidence

In his first point of error, appellant contends that the trial court abused its discretion during the prosecution's rebuttal case in admitting extraneous offense evidence. At trial appellant objected that such evidence was irrelevant, but if relevant, the evidence was more prejudicial than probative. The State responded that the evidence was offered to rebut appellant's defensive theory of retaliation.

The guilt of the accused may not be proved by evidence of an extraneous offense. *Morrow v. State*, 735 S.W.2d 907, 909 (Tex. App.—Houston [14th Dist.] 1987, no pet.). The reason for this is clear – a defendant is only on trial for the offense charged, not for his propensity to commit crimes, as that is not material to whether he is guilty of the charged offense. *Id*. Thus, although relevant, "evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." TEX. R. EVID. 404(b).

However, extraneous offenses may be admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id*.; *Montgomery v. State*, 810 S.W.2d 372, 387-88 (Tex. Crim. App. 1991) (op. on reh'g). The proponent of the extraneous offense evidence may also persuade the court that the evidence is relevant upon a logical inference not anticipated by the rulemakers. *Montgomery*, 810 S.W.2d at 387-88 (Tex. Crim. App. 1990). The Texas Court of Criminal Appeals has held that extraneous offense evidence is admissible to rebut defensive theories raised by the State's witnesses during cross-examination, *Ransom v. State*, 920 S.W.2d 288, 301 (Tex. Crim. App. 1994), or raised by the defendant's testimony in his case-in-chief. *Rubio v. State*, 607 S.W.2d 498, 500-01. However, merely introducing evidence for a purpose other than character conformity, or any of the other enumerated purposes in rule 404(b), does not, by itself, make that evidence admissible. *Rankin v. State*, 974 S.W.2d 707, 709 (Tex. Crim. App .1996). The extraneous offense must also be relevant to a "fact of consequence" in the case, *Id*.; *Owens v. State*, 827 S.W.2d 911, 914

(Tex. Crim. App. 1992), and it must be relevant beyond its tendency to prove the character of a person in order to prove conformity therewith. *Montgomery*, 810 S.W.2d at 387.

The true test of admissibility for extraneous offense evidence lies with (1) the relevancy of the evidence to a material issue other than character conformity, and (2) whether the probative value of the evidence is outweighed by its inflammatory or prejudicial nature. *Morrow*, 735 S.W.2d at 909.

Here, appellant testified that he never offered Blackledge a cellular phone in exchange for priority treatment by the constables' deputies. In support of this contention, appellant testified, and implied in his cross-examination of State's witnesses, that the bribery charge was brought as retaliation for reports that his wife had made concerning bribes made by other wrecker services to constable's deputies. In support of the retaliation theory, he particularly relied on the fact that no charges were immediately filed after the alleged conversation about cellular phones, and that he was charged with the bribery offense only after his wife made her complaints public on May 27, 1998.

The State claims that the extraneous offenses (1) showed that appellant was systematically attempting to influence the exercise of official discretion of deputy constables in the area, (2) explained that appellant was motivated by financial trouble to make these deals, and (3) explained the delay in filing of charges which the appellant characterized as proof of retaliatory motivation. At oral argument, the State claimed that this evidence was admissible under the "doctrine of chances" to show that it was unlikely that the subsequent allegation occurred as a result of retaliation.

A trial court's determination that an extraneous offense has relevance to an issue other than the defendant's character will be reviewed only for an abuse of discretion, and will not be disturbed on appeal so long as it was within the "zone of reasonable disagreement." *Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997). However, if extraneous offense evidence is not relevant, apart from supporting an inference of character conformity, it is absolutely inadmissible under Rule 404(b).

*Montgomery*, 810 S.W.2d at 387.

The State's first contention – that the extraneous offense showed appellant was systematically attempting to influence the exercise of official discretion – smacks of character conformity. Appellant was charged with one bribery offense, not a bribery scheme. The State's first contention, then, is tantamount to arguing that because appellant allegedly attempted to bribe officers once or twice before, he attempted to bribe Blackledge in the offense charged. We reject that this contention shows that the extraneous offense evidence is relevant apart from supporting an inference of character conformity.

By its second contention, the State claims that the extraneous offense was admissible to show that appellant was motivated by financial trouble to systematically influence the exercise of official discretion in Harris County. During cross-examination, appellant testified that he was not worried about making money, and that he made a good living. He went on to say that he thought some wrecker drivers received preferential treatment, and that would interfere with his ability to make money. Both Blackledge and Spoon testified that the reason appellant gave to support his bribe attempt was that he had experienced financial trouble since his wife stopped working. Because appellant denied making the offer and somewhat denied having monetary problems, we believe the issue of motive to be relevant. However, only the information leading up to the extraneous offense, that is, only the alleged statement that appellant was having financial trouble, supports the State's contention that appellant was motivated by his financial troubles to make the bribe. That information could have been admitted without including the extraneous offense evidence. The probative value of including superfluous information about an extraneous offense to show a financial motivation is clearly outweighed by its prejudicial effect. TEX. R. EVID. 403. Therefore, we reject this contention as well.

In its third contention, the State claims the extraneous offense evidence explained the delay in filing charges against appellant from when the conversation about cellular

phones occurred until after appellant's wife made public her criticism of the constable's deputies. This argument is specious. The allegation that appellant attempted to bribe Blackledge and Spoon before the conversation about cellular phones took place in no way explains the delay in filing charges. The conversation about cellular phones allegedly occurred on May 12th, the two prior bribes occurred before May 12th, and formal charges were not filed until after appellant's wife made her complaint's public on May 27th. Appellant argued that the fact that no charges were filed until after his wife made public complaints showed that this charge was a retaliatory fabrication. This argument is simply not rebutted by the fact that appellant made bribery attempts on two prior occasions.

Finally, we decline to apply the "doctrine of chances" to this case. The State argues that the "doctrine of chances" makes this extraneous offense evidence relevant beyond its tendency to prove character conformity. Our research of this doctrine reveals that it is logically only applicable where intent to do a bad act is at issue. *Plante v. Texas*, 692 S.W.2d 487, 491-92 & n.7 (Tex. Crim. App. 1985); *see Goldstein v. State*, 803 S.W.2d 777 (Tex. App.—Dallas 1991, pet. ref'd) (intent at issue); *Wiggins v. State*, 778 S.W.2d 877 (Tex. App.—Dallas 1989, pet. ref'd) (defendant claimed innocent intent); *Scott v. State*, 720 S.W.2d 264 (Tex. App.—Austin 1986, no pet.). The State does not contend that appellant's intent to bribe Blackledge was put in issue, nor does it contend that the doctrine of chances supports an inference of appellant's intent. Rather, the State focused its argument on the "doctrine of chances" to argue that because appellant allegedly bribed officers before, he bribed officers in this case. We recognize the general applicability of the "doctrine of chances." We recognize that it could have applicability if, for instance, appellant testified that he did offer Blackledge a cell phone, but only as a friendly gesture. Then the doctrine of chances would indicate that appellant had a bad intent in making the offer. That sort of testimony is not present in this case. Appellant did testify to talking to Blackledge about cellular phones. However, we find that type of conversation too far removed from an actual offer of a cellular phone in exchange for preferential treatment to admit the extraneous offense evidence under a "doctrine of chances" theory. Thus, the

"doctrine of chances" does not make the extraneous offense evidence relevant beyond its obvious implication of character conformity.

Having rejected all of the State's contentions for admissibility, we are left with the conclusion that the evidence of prior bribe attempts is not relevant apart from showing character conformity. Thus, it is absolutely inadmissible in this case. *Montgomery*, 810 S.W.2d at 387. For this reason, we find that the trial court abused its discretion in admitting this extraneous offense evidence. We grant appellant's first point of error, reverse the judgment of the trial court, and remand this cause of action to the trial court for further proceedings in accordance with this opinion.

/s/ Norman R. Lee
Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Yates, Wittig, and Lee.[1]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice Norman R. Lee sitting by assignment.