**Affirmed and Opinion filed September 6, 2001.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-00-01034-CR**

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**SAMUEL RICHARD MARES, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the County Criminal Court at Law No. 14**
**Harris County, Texas**
**Trial Court Cause No. 0993530**

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## O P I N I O N

Appellant, Samuel Richard Mares, was convicted of driving while intoxicated and sentenced by the trial court to 90 days' confinement in the custody of the Sheriff of Harris County. Appellant appeals his conviction and briefs this court on two points of error. Based on the reasoning set out below, we affirm the judgment of the trial court.

## FACTUAL BACKGROUND

While riding a motorcycle on Interstate 59, the Southwest Freeway, appellant was pulled over by two Houston police officers (Officers O.R. Warren and Randall M. Pocevic).

The officers observed appellant driving at least 90 miles per hour and swerving in and out of lanes. The officers claim they had to exceed 100 miles per hour in order to catch up with him in approximately four blocks. When the officers turned on their siren and lights and motioned appellant over, he complied. The officers allege that appellant was barely able to hold himself up, and needed help getting off the motorcycle. The stop occurred on the shoulder of I-59, a location the officers felt was too dangerous to administer any field sobriety tests. The officers testified that, from the look of his bloodshot eyes, his clothing, slurred speech, and the strong smell of alcohol, they presumed he was intoxicated. Thus, the officers handcuffed appellant and placed him in the patrol car. At that time, Chadwick Collins, a friend of appellant, passed by and was given custody of the motorcycle with appellant's consent.

Once appellant arrived at the police station, he alleges that there was some doubt as to whether charges should have been filed. With permission, appellant called a friend of his, a Sergeant in the Houston Police Department. The Sergeant then spoke to Officer Kenneth P. Smallwood, who had custody of appellant at the station, and asked that charges not be filed. According to appellant, Officer Smallwood refused the sergeant's request and insisted that charges be filed.

## PROCEDURAL HISTORY

Prior to trial, the trial court granted appellant's motion in limine. This motion provided that "the opposing party be directed to approach the trial court before offering certain types of evidence, asking certain questions, or otherwise going into particular areas before the jury," such as appellant's previous convictions.

## DISCUSSION AND HOLDINGS

### I. Motion For Mistrial

In his first point of error, appellant contends that the trial court erred in failing to grant a mistrial after the State's witness allegedly injected testimony of an extraneous offense which could not be cured by an instruction to disregard. Appellant claims that the

State violated the Motion in Limine when the State asked Houston Police Officer O.R. Warren if he was familiar with an exhibit, which was a photograph of appellant from 1997. The photograph was never admitted as an exhibit, but in appellant's brief, he identifies the photo as referring to a previous arrest in 1997, on a charge for which the appellant had been acquitted. Appellant argues that although the photograph was never admitted, the reference to it was strong enough to suggest appellant's extraneous offense to the jury, and thus any reference to it was not cured by the court's subsequent instruction to disregard. As we explain below, we disagree with this contention.

**A. Standard of Review**

We review the denial of a motion for mistrial under an abuse of discretion standard. *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). Generally, a trial court does not abuse its discretion unless its decision fell outside the zone of reasonable disagreement. *Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997). Under this standard of review, we view the evidence in the light most favorable to the trial court's ruling, giving the trial court almost total deference on its findings of historical fact that find support in the record. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). If the resolution of the factual issues does not involve an evaluation of credibility or demeanor, we employ a de novo review of the trial court's determination of the law, as well as its application of the law to the facts. *Id*. at 89.

Typically, any harm caused from an improper question and answer is cured by an instruction to disregard. *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). In contrast, a mistrial is required only when the improper evidence is "clearly calculated to inflame the minds of the jury and is of such a character as to suggest the impossibility of withdrawing the impression produced on the minds of the jury." *Hinojosa v. State*, 4 S.W.3d 240, 253 (Tex. Crim. App. 1999). Additionally, the jury is presumed to follow the trial court's instruction to disregard improperly admitted evidence. *Id*.

**B. Motion in Limine and Instruction to Disregard**

Motions in limine prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury. *Sims v. State*, 816 S.W.2d 502, 504 (Tex. App.—Houston [1st Dist.] 1991, pet. denied). The purpose of a motion in limine is to prevent the opposing party from presenting prejudicial evidence to the jury without first asking the court's permission. *Id*.

The remedy for a violation of a motion in limine rests with the trial court. *Banks v. State*, 955 S.W.2d 116, 119 (Tex. App.—Fort Worth 1997, no pet.). The court can, among other things, grant a mistrial, instruct the jury to disregard, or hold the offending party in contempt. *Id*. Generally, testimony referring to an extraneous offense allegedly committed by the defendant can be rendered harmless by the trial court's instruction to disregard. *Bell v. State*, 768 S.W.2d 790, 797 (Tex. App.—Houston [14th Dist.] 1989, pet ref'd.). Because the law prefers that a trial continue, a mistrial should be granted only when an objectionable event is so emotionally inflammatory that curative instructions are not likely "to prevent the jury from being unfairly prejudiced against the defendant." *Janney v. State*, 938 S.W.2d 770, 772-73 (Tex. App.—Houston [14th Dist.] 1997, no writ). Having set out the pertinent law, we turn to the allegedly objectionable exchange.

The following exchange occurred at trial:

> **Ms. Taylor:** I'm gonna [sic] show you what has been premarked as State's Exhibit 1 (Indicating). Now, without telling me what it is, are you familiar with what is depicted in State's Exhibit Number 1?
>
> **Witness:** Yes, I am.
>
> **Ms. Taylor:** And does it fairly and accurately depict what it purports to be, on that date?
>
> **Witness:** Yeah. This picture is from 1997.
>
> **Ms. Taylor:** Okay.
>
> **Mr. Moore:** What was that, Officer?
>
> **Witness:** That picture –
>
> **The Court:** Ah, ah, ah, ah, ah! No.

Appellant argues that the State's witness injected testimony of an extraneous offense which had a prejudicial effect on the jury and resulted in his conviction. We disagree. We find that no extraneous offense evidence was injected. The jury never saw the exhibit, nor did they even know the contents of the exhibit. By the witness's testimony, at most the jurors were informed only that the exhibit was a picture from 1997. There was no indication that it was a picture of appellant, much less one relating to appellant's previous conviction.

The trial court chose to resolve this issue by instructing the jury to disregard the last question and answer by the prosecutor and the witness. The instruction cures this type of error, assuming that the error was not "clearly calculated to inflame the minds of the jury and is of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jury." *Richards v. State*, 912 S.W.2d 374, 378 (Tex. App.—Houston [14th Dist.] 1995, pet ref'd). Here, we do not find that the cryptic testimony about a picture - not even presented to the jury - could have been clearly calculated to inflame the minds of the jury. Nor was the admitted testimony of such character as to suggest that it could not have been corrected with a curative instruction. We find the trial court's instruction to disregard cured the prejudicial effect of the testimony, if any. Appellant's first point of error is overruled.

**2. Exclusion of Evidence**

We turn now to evidence appellant claims was wrongfully excluded. Appellant contends that only Officer Smallwood insisted on bringing charges against him in this case; the other officers were not interested in bringing charges. Consequently, appellant wanted to discredit Officer Smallwood's testimony. To do this, appellant attempted, during trial, to elicit information from Officer Smallwood about a pending perjury investigation against the officer. Apparently, appellant hoped that Officer Smallwood would invoke his Fifth Amendment right against self-incrimination in front of the jury. On the State's objection, this testimony was excluded. In his second point of error, appellant claims that

the trial court erred and abused its discretion in excluding appellant's evidence concerning Officer Smallwood. For the reasons set forth below, we disagree.

In general, "evidence of a person's character or character trait is not admissible for the purpose of proving action in conformity therewith on a particular occasion." TEX. R. EVID. 404(a). "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." *Id.* at 404(b). With regard to a witness's credibility, "specific instances of conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence." *Id*. at 608(b).

On cross-examination, appellant attempted to impeach Officer Smallwood's credibility by introducing evidence of his pending perjury investigation. According to the Rules of Evidence, Officer Smallwood's credibility cannot be judged on the basis of the incident that led to his perjury investigation. *See id*. At the time of his testimony in this case, Officer Smallwood had not been convicted of any crime. He was merely under investigation. As a result, the perjury investigation, and the events giving rise to it, cannot be used to affect his credibility as a witness in this case. *See Murphy v. State*, 587 S.W.2d 718, 722 (Tex. Crim. App. 1979).

Nevertheless, appellant attempts to support his argument by citing cases where witnesses testified who had personal bias against the defendant. *See Castro v. State*, 562 S.W.2d 252 (Tex. Crim. App. 1978); *Blair v. State*, 511 S.W.2d 277 (Tex. Crim. App. 1974); *Evans v. State*, 519 S.W.2d 868 (Tex. Crim. App. 1975). These cases are not on point. The difference is nexus. The fact that a witness has been arrested or is under indictment is not normally admissible for the purpose of impeaching the witness to show bias or ill motive; however, if the witness's arrest or indictment "arises out of the same transaction for which the defendant is on trial, it may be admissible as such for impeachment of the witness." *Smith v. State*, 516 S.W.2d 415, 420 (Tex. Crim. App. 1974).

Therefore, the credibility of a witness may be attacked, but first a direct connection between the witness's testimony and the cause of the bias or motive must be made. *Willingham v. State*, 897 S.W.2d 351, 358 (Tex. Crim. App. 1995). Appellant never made this connection, and apparently cannot. "An issue regarding the general credibility of a witness in a criminal trial is not a material issue in the sense that it will justify the admission of inherently prejudicial evidence of details of an extraneous offense committed by the witness." *Bell*, 768 S.W.2d at 801. Thus, even if appellant could show a nexus between the two events, he would still need to prove the relevancy of the extraneous offense, other than its propensity to show the character of the witness. *Hernandez v. State*, 914 S.W.2d 226, 232 (Tex. App.—Waco 1996, no pet.). He would also need to show that the probative value of the evidence would "not be substantially outweighed by the danger of unfair prejudice." *Id*. Appellant did not prove any of these factors and, within the trial court's discretion, the court ruled that the matter relating to the perjury investigation was not relevant to the current issue, and if relevant was prejudicial and would confuse the issues. We find that, by excluding the evidence, the trial court did not abuse its discretion. Appellant's second point of error is overruled.

Having overruled both of appellant's points of error, we affirm the judgment of the trial court.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed September 6, 2001.

Panel consists of Justices Yates, Fowler, and Sears[1].

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

[1] Senior Justice Ross A. Sears sitting by assignment.