IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

ELEANOR STAIGER	§	
	§	
Appellant,	§	
	§	
vs.	§	**No. 02-MCA-2800**
	§	
STATE OF TEXAS,	§	
	§	
Appellee.	§	

OPINION

Appellant appeals her conviction in Municipal Court after having been convicted of violating Section 9.04.34(a) of the Code of The City of El Paso by having unlawfully thrown, dumped, or deposited garbage, rubbish, ashes, or other waste matter on property located at 5122 Thorton. That section identifies the offense as "Littering and Dumping".

After a trial before the Court, Appellant was found guilty and was fined $50.00, and this appeal ensued.

This case arises out of an unfortunate dispute between neighbors over their property boundaries. The record reflects that Appellant is the wife of Gerhard Staiger, who was also charged with this same offense, and whose case is likewise disposed by a companion opinion of this court issued this same date.

The Staigers are neighbors of the Brittons, who had evidently planted some Oleander bushes which encroached on Appellant's property. After a number of surveys, some of which were disputed, evidently it was determined, at least in the minds of the Staigers, that they had finally received a survey that determined accurately the boundary between their properties, and the Oleanders which the Brittons had planted were encroaching on their property. They then hired a landscaper to remove the Oleanders so they could build a fence. The landscaper was digging up the Oleanders and depositing them on the Brittons' property, and a city police officer was invited to observe the entire removal procedure. He was there supposedly to keep the peace between the quarreling neighbors, but did not suggest to anyone nor

did he testify that anything being done was illegal. The Brittons refused to take any action to save the plants, even though they had been instructed how they might replant them and save them, but allowed them to die. Ultimately, it appears that the Staigers reported the Brittons to the City for allowing these plants to remain on their property. Needless to say, that triggered a retaliatory response, and charges under the above cited littering ordinance were filed against the Staigers.

Appellants attack their convictions on a number of fronts. They first assert that the complaint is fatally defective for failing to allege a culpable mental state, which renders it invalid statutorily and also defective under the Texas Constitution. Secondly, that the evidence is both factually and legally insufficient to sustain the conviction, and lastly that Chapter 9.04 of the City Code of El Paso Texas is preempted by a state statute addressing similar offenses and contained in Chapter 365.012 et. Seq. Texas Health and Safety Code.

This court has concluded that the issue relating to the defective complaint and the preemption matter need not be addressed by this court because of it's disposition in regard to Appellant's point of error raising the insufficiency of the evidence to support the conviction while recognizing that Appellant may well have waived any complaints concerning the defects in the complaint or the issue of preemption by not raising those matters before the Trial Court in a timely matter.

Particularly, in regard to alleging that the complaint is defective for failing to allege a culpable mental state, Appellant relies strongly on **Huynh v. Texas, 901 S.W. 2d. 480 (Tex. Crim. App. 1995)**. The Huynh decision held that Art. 1.14, Tex. Code Crim. Pro. providing that defects in an information or an indictment are waived unless raised before trial was inapplicable to complaints, and, thus allowed a defect in a complaint to be raised for the first time on appeal. The rationale of that case has been superseded by the subsequent amendment to Article 45.019, Tex. Code Crim. Pro. which requires that any defect in the complaint must be raised by a pre-trial motion or it is waived, and cannot be raised for the first time on appeal. Therefore, Huynh is not controlling.

As to Appellant's attack on the compliant for failing to allege a culpable mental state under the Constitution, it may well be that such error was also waived by failing to make any timely or specific

assertion of that right before the Trial Court. Constitutional errors may be waived by failure to make such a timely assertion of the right, and cannot be raised on direct appeal unless they were so timely presented to the Trial Court. See **Cain v. State, 947 S.W. 2d, 262 (Tex. Crim. App. 1997)** and **Boulware v. State 542 S. W. 2d, 677 (Tex. Crim. App. 1976)**.

Further, although this court need not address the validity of Section 1.08.080 of El Paso's Municipal Code which globally dispenses with the requirement of a culpable mental state for any Municipal Court violation, Section 6.02 (b) of the Texas Penal Code, provides that the definition of an offense can dispense with a culpable mental state if it is so plainly stated. Whether the City's attempt to globally inoculate all of their violations from the requirement of a culpable mental state will have to be decided at another time.

Turning attention to Appellant's points of error raising the legal insufficiency of evidence, this Court employs the standard set forth in **Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)** as adopted by the State of Texas in **Clewis v. State, 922 S. W. 2d. 126 (Tex. Crim. App. 1996)**. In reviewing a legal insufficiency challenge, those cases require this court to view the relevant evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Whereas, a factual insufficiency of evidence review dictates that the evidence be viewed in a neutral light, favoring neither party. Evidence can be factually insufficient in one of two ways: (1) the evidence is so weak as to be clearly wrong or manifestly unjust, or (2) the finding of a vital fact is so contrary to the great weight and preponderance of the evidence as to be clearly wrong. **Clewis, Supra. Johnson v. State, 23 S.W. 3rd, 1 (Tex. Crim. App. 2000)** and **Zulini v. State, (citation unavailable decided February 5, 2003)**. The reviewing court must ask whether "a neutral review of all the evidence... demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the fact finder's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. **Johnson v. State, 23 S.W. 3rd. 1 (Tex. Crim. App. 2000)**. The court reviews the evidence weighed by the fact finder that tends to prove the existence of the elemental fact in dispute and

compares it with the evidence that tends to disprove that fact. **Johnson, supra. Jones v. State, 934 S.W. 2d. 642 (Tex. Crim. App. 1996).** In conducting it's factual sufficiency review, an Appellate court reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination. **Clewis, supra. Johnson, supra.**

If the court determines that a legal insufficiency evidence point of error is sustained, the court must reverse and render the decision and order an acquittal of the defendant. On the other hand, if a factual insufficiency point of error is sustained, the case is reversed and remanded for re-trial.

First, considering Appellant's issue relating to the legal sufficiency of the evidence, it should be noted, in a case of heightened emotion and complex factual disputes, and a Statement of Facts that is thirty-five (35) pages long, the entire prosecution's direct evidence only covered approximately two (2) pages, or a total of thirty (30) lines.

The overwhelming inference from the evidence introduced at this trial suggests that Appellant's landscaping company did this removal work rather than appellants, and this court does not believe that Appellants are legally responsible for the actions of their independent contractor or the inaction of their neighbors in not taking the appropriate action to preserve the plants, but rather allowing them to wither and die on their property.

When the only witness called by the State on direct examination was asked if she saw Mrs. Staiger doing anything, her reply was "No, I did not". There is no other reference to Mrs. Staiger except for the fact that all parties involved seemed to continue to use pluralistic pronouns, which supposedly included her, in reference to the activities of the persons involved. However, when her husband was asked on cross examination, who he included in the use of "we" during his testimony, he said he was referring to himself and the landscaping company and not Mrs. Staiger.

In view of the direct evidence, from the City's own witness, that Mrs. Staiger was not observed engaging in any illegal activity, the evidence is clearly legally insufficient to sustain her conviction. In fact, the record reflects that even her attorney seemed to be unaware that any charges had been filed against her.

Therefore, this court having found that the evidence is legally insufficient to sustain the conviction against Appellant, Mrs. Eleanor Staiger, her conviction is hereby reversed and rendered in her favor.

SIGNED this 12 day of March, 2003.

JUDGE

JUDGMENT

This case came on to be heard, the same being considered, because it is the opinion of this Court that there was error in the Judgment, it is ORDERED, ADJUDGED and DECREED by the Court that the Judgment be in all things reversed and rendered in Appellant's favor, and judgment of acquittal be entered in her behalf.

SIGNED this 12 day of March, 2003.

JUDGE