IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

GERHARD STAIGER Appellant, vs. STATE OF TEXAS, Appellee.	§ § § § § § § § §	**No. 02-MCA-2801**

OPINION

Appellant appeals his conviction in Municipal Court after his conviction 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 this Appellant is the husband of Eleanor 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.

They were neighbors with 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 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 them 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 statute were filed against the Staigers.

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.

However, a strained and liberal review of the entire record considered in the light most favorable to the verdict under a legal sufficiency point of error leads this court to believe that there was more than a mere scintilla of evidence to support the court's decision, and therefore there was legally sufficient evidence to sustain the conviction as to this Appellant, Gerhard Staiger.

Nonetheless, under a factual evidence review which this court has been called upon to make as a result of Appellant's attack on the conviction, this court must review all of the evidence submitted, and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. The record before this court is clearly deficient to meet the allegations of the complaint. There is no direct evidence that Appellant engaged in any wrongful conduct. Other than hiring a landscaping company which actually performed the work, a review of the evidence reflects significant ambiguity as whether any of the testimony could be construed as Appellant being responsible for placing any of these plants on the Brittons' property as opposed to the removal of these plants on his property which he had a legal right to do because of their encroachment thereon. It has been strongly argued by Appellant both in his Brief and at Oral Argument, that he clearly had a right to remove the bushes from

his property, and by placing the plants on the Brittons property, the landscaping company was doing no more than returning the plants to their rightful owner.

In connection with this particular point of error, the City contends that Appellant's admission that he hired a professional landscaper was sufficient evidence to establish that Appellant himself had engaged in the wrongful conduct. Even the statement cited by the City in it's Brief which it relies upon to show the culpability of Appellant, that he had hired a professional landscape person and that that person assisted him in the removal of the plants does not prove that Appellant himself did anything that met the allegations of the complaint. In fact, the question as to the removal of the plants does not address the questions as to whether the plants were thrown, dumped, or deposited on this property as alleged in the complaint. The State's evidence focused on removal of the plants which is not unlawful.

Therefore, because this court believes the evidence to be factually insufficient to support the conviction, it is hereby reversed and remanded to the Trial Court.

SIGNED this 12 day of March, 2003.

JUDGE

JUDGMENT

This case came on to be heard on the Transcript of the Record of the Court below, the same being considered, it is ORDERED, ADJUDGED and DECREED by the Court that the case be reversed and remanded to the Trial Court for re-trial.

SIGNED this 12 day of March, 2003.

JUDGE