IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

TIMOTHEO SARABIA

Appellant

vs.

No. 89-MCA-2018

STATE OF TEXAS,

Appellee

OPINION

Appellant appeals his conviction in Municipal Court for violation of a zoning ordinance.

The City alleged that the Appellant violated the zoning laws of the City of El Paso by using the premises located at 2027 Magoffin in the city for a use not permitted in a C-4 Commerical District, to-wit: the open storage of portable toilets. Appellant admits in the evidence and in his brief before this court that the portable toilets are, in fact, on these premises, but initially alleges that the trial court erred in admitting evidence of an extraneous offense which had a prejudicial impact on the jury's findings, and constituted reversible error. In that regard, appellant contends that one of the city's witnesses was allowed to testify that obnoxious odors were affecting the area where she worked and the neighborhood in general, even though she could not directly identify the source of the odors or attribute them

directly to the appellant. There was other evidence in the record which directly attributed the source of these odors to the presence of the toilets on the premises. In any event, appellant contends that the introduction of that evidence established the existence of a nuisance on the premises which is a separate offense under the City Code of El Paso. See Section 9.16.010, El Paso Municipal Code.

Appellant correctly contends that an accused can only be convicted by evidence showing that he is guilty of the offense as charged, and that evidence that he committed other crimes is generally inadmissible. Kemp vs. State, 464 SW2d 141, (Tex. Cr. App. - 1970). However, several exceptions to the general rule exist, and evidence of an extraneous offense which are res gestae, show motive or intent, identity, plan or scheme, or rebut some defense raised by the defendant are admissible if they are relevant to a material issue, and its relevancy outweighs its inflammatory or prejudicial potential. Boutwell vs. State, 719 SW2d 164 (Tex. Cr. App. - 1985). Kemp vs. State, supra, Porter vs. State, 623 SW2d 374 (Tex. Cr. App. - 1981).

Appellant timely objected to the introduction of such evidence and the objection was overruled.

The City's position is that the evidence was material and relevant, and only incidentally shows the commission of some other offense, and therefore, was admissible. Gonzalez vs. State, 688 SW2d 185 (Tex. App. - Corpus Christi 1985).

Admissibility of extraneous offenses requires the prosecution to show that the evidence is relevant to a material issue and that the relevancy value of the evidence outweighs its inflammatory or prejudicial potential. Williams vs. State, 662 SW2d 344, (Tex. Cr. App. - 1983).

Proof of the circumstances surrounding the commission of an offense which form a part of the occurrence are admissible. Ross vs. State, 334 SW2d 174 (Tex. Cr. App. - 1960).

An extraneous offense may also be admissible when it is part of the res gestae of the offense on trial. Grayson vs. State, 481 SW2d 859 (Tex. Cr. App. - 1972). Therefore, a witness testifying as to the events surrounding the commission of an offense, can relate all the acts, statements, appearances, and other circumstances even if an extraneous offense is included among them. Texas Criminal Practice Guide, TEAGUE, Section 73.05(8)(b).

Evidence of what occurs immediately prior and subsequent to the commission of an offense is always admissible under the reasoning that events do not occur in a vacuum and that the factfinder has a right to have the offense placed in its proper context so that all evidence may be realistically evaluated. Although the term "res gestae" has been criticized as causing additional confusion, it does seem appropriate in this case since the evidence was used to describe the impact of the offense on the area, and to assist the jury in their comprehension of the situation, and

the need for zoning regulations in this particular area. Mattox vs. State, 682 SW2d 563 (Tex. Cr. App. - 1985).

Further, whether or not the introduction of this evidence was prejudicial also needs to be addressed. This court cannot assume that the jury related this evidence to the existence of an extraneous offense because it certainly is not the classical case involving extraneous offenses. This court believes that it is unlikely that the jury attached any particular significance to the introduction of the testimony, let alone that the state was attempting to show that appellant was involved in criminal conduct generally. Lastly, the court further diminished the impact of this particular evidence by orally instructing the jury that they could only consider such testimony in respect to possible punishment that they might assess if they found the appellant guilty but not otherwise.

This court considers any evidence introduced by the city in respect to this particular charge to be part of the res gestae of the offense, not prejudicial, and therefore, admissible.

Secondly, Appellant contends that the evidence is insufficient to establish that his use of the premises is in violation of the zoning laws. It appears from the review of the Statement of Facts, that the City Inspectors and Zoning Officials involved in this particular matter are of the opinion that activities being conducted on these premises

would be legal in an M-1 zone, but not in a C-4 zone. This Court is unable to clearly deliniate their reasons for these differences. In fact, the record supports Appellant's contention that he is operating a business which sells and leases portable toilets, and points to at least five (5) separate permitted uses under which his business arguably would fall under Section 20.42.020 of the Municipal Code of the City of El Paso, which include material sales for construction activities, shops for the conduct of a retail business, the sale and storage of contractor's equipment, operating of a wholesale establishment, and a general contractor's yard. Further, the permitted accessory uses allowed under Section 20.42.030 of the code provide for the storage of supplies, merchandise, equipment or goods normally carried in stock and used in connection with the permitted uses listed above.

The City's primary witness concluded, without support, that the use to which Appellant was making of his property was not within C-4 zoning based on his interpretation of the code. Even reviewing the evidence in the light most favorable to the verdict, it is difficult for this Court to conclude that the operation of this business is not authorized in a C-4 commercial zone.

The zoning scheme used by the City of El Paso is to attempt to identify the permitted uses as opposed to identifying the prohibited uses, and if not expressly authorized

then they are prohibited. Section 20.08.050, El Paso Municipal Code. Applying that zoning scheme, Appellant's business operation would be illegal no matter where located. Nonetheless, the broad language used to describe the permitted uses is inclusive of Appellant's business operations as contained in the record before this Court. Nowhere, in any of the numerous types of zoning regulations provided is the sale, leasing, or storage of portable toilets specifically addressed. Since many of the terms applicable to this particular case are undefined under the ordinances, they are to be interpreted in the context of their common and ordinarily understood meaning, and the operation of Appellant's business falls within the ambit of those terms and the permitted uses provided by ordinance.

The use that Appellant is making of his property is not an expressly permitted use under either C-4 or M-1, but in the interpretation of the witness, his use would be permissible in an M-1 zone. At best, that is contradictory, and at worst, it is uncertain to the point of being unenforceable.

Just because the zoning inspector says it is illegal, does not necessarily make it so. Laws must provide explicit standards for those who apply them to avoid arbitrary and discriminatory enforcement. It is not sufficient to leave enforcement to the sound discretion of the enforcing officer, trusting him to invoke the law only in appropriate

cases. Therefore, a criminal statute must itself be precisely drawn so that it eliminates the risk of capricious application rather than fostering it. The language used in this particular zoning matter fails to provide any objective criteria by which a person's conduct can be measured, and encourages purely subjective judgments within the discretion of the zoning official, leaving the risk of capricious application to be borne by the alleged offender, and therefore, encourages arbitrary and erradict enforcement of those particular laws. Cotton vs. State, 686 SW2d 140 (Tex. Cr. App. - 1985). O'Brien vs. State, 83 MCA 1697 (Mun. Ct. App. - 1986). Holmes vs. State, 89 MCA 2028 (Mun. Ct. App. - 1990).

As long as Appellant is operating a business which is involved with the sale and lease of these toilets, he can, incident to that business, store the units on his premises, and nothing in the record before this Court or in the zoning laws of the City of El Paso indicate otherwise.

Having found the evidence insufficient to support the verdict, the judgment of the Trial Court is reversed and rendered in Appellant's favor.

SIGNED this 15 of February, 1990.

JUDGE

J U D G M E N T

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 his behalf.

SIGNED this 15 day of Feb., 1990.

JUDGE