the Jasuta / Schulman report

Volume 32, Number 18 ~ Monday, May 13th, 2024 (Report No. 1,513)

TIBA's Case of the Week

Court of Criminal Appeals

Case Name: ***Larry Jean Hart v. The State of Texas***

- **OFFENSE**: Capital Murder
- **COUNTY**: Dallas
- **COURT OF APPEALS**: Dallas
- **C/A CITATION**: Unpublished
- **C/A RESULT**: Conviction Affirmed
- **CCA. CASE No**. PD-0677-22 **DATE OF OPINION**: May 8, 2024
- **DISPOSITION**: Conviction Reversed
- **OPINION**: Judge Jesse McClure **VOTE**: 3-2-4
- **TRIAL COURT**: 363rd D/C
- **LAWYERS**: Ron Goranson (Defense); Grace Shin (State)

(**Background Facts**): On June 21, 2017, Appellant drove an acquaintance, who he claimed only knew by the nickname "Mondo," and three other individuals unknown to him to an apartment complex in Dallas where the complainant, Michael Gardner, lived. As of the day of trial, the identity of the other passengers in Appellant's vehicle were unknown. Appellant testified that he remained in the car with his four-way flashers on while the passengers robbed the complainant and shot him to death. However, surveillance video from a parking lot behind complainant's apartment shows four people entering the complainant's apartment. Further, a 9-1-1 caller said four people were running from the apartment. The State charged Appellant with capital murder while committing or attempting to commit the felony offense of burglary.

Ed Note (**Testimony Regarding Appellant's Competency**): According to Appellant's statements to police and at trial, when Appellant was at an apartment complex visiting his godbrother, Mondo asked Appellant for the ride and told Appellant that they were going to "break in" to Mondo's uncle's house. Although Appellant was unable to explain another reason for the trip, he denied believing Mondo that the four were going to "break in" to the apartment. Appellant's theory at trial largely comported with his initial statements to law enforcement: he gave a ride to some individuals as a favor but had no idea the group planned to commit a robbery or murder.

Appellant testified at trial to this effect. When Appellant's counsel began to ask whether the fact he called one of other passengers "little partner" meant he had a close relationship with him, Appellant answered: "*No Sir, I just -- I just use certain words like -- I just have certain meanings for a lot of words. I mean, I don't have -- I guess the right comprehension skills to just -- you know, referring to somebody as the right thing because I was always around just how I say words or just the people I'm around or just -- it just -- it rolls out of me, yes, sir.*" The prosecutor then asked whether Appellant understood what it looked like that "*some people did that you gave them a ride to*?" When Appellant asked the prosecutor to repeat that, the trial court excused the jury to conduct a competency evaluation. Dr. Lisa Clayton, who evaluated Appellant, found that Appellant was competent, but had a low IQ. Defense counsel requested to call Dr. Clayton as a witness before the jury, but the trial court denied the request. As a proffer of proof, however, Dr. Clayton was allowed to testify before the court as to the following: ❶ Appellant has a below-average IQ in the range of 70–80; ❷ An IQ of 55 to 65 is considered intellectual disability; ❸ Due to Appellant's IQ and history, he would be more likely to seek approval from others; ❹ Appellant's IQ makes him naïve and unable to think abstractly about motives or consequences; and ❺ When Appellant is under stress he might freeze or be unable to remember things. The jury never heard Dr. Clayton's conclusions regarding Appellant's diminished IQ and Appellant continued his testimony."

[311.07 **Cross-Examination & Impeachment / Impeachment of Defendant**]: Appellant told the jury that he only knew Mondo by his nickname, he didn't see him very often, he couldn't remember what he was thinking about giving him a ride, but he was unaware he was giving Mondo a ride to commit a crime. He testified that he learned a burglary and murder happened about twenty-four hours later and "It made [him] feel like real dumb. It made [him] feel . . . it wasn't right." When Appellant's testimony on direct examination concluded, the State moved to introduce "character evidence," or evidence of his "level of sophistication" through YouTube rap videos "relat[ing] to his ability to understand what people are communicating to him and form his own opinions about things. The first video does not depict Appellant but is a picture of three cartoon cough syrup bottles affixed with cartoon faces of the three wise monkeys. The photo also depicts the name of the song "I.W.T." (I Won't Tell) and Appellant's rap name, "Block Da Foo Foo." The second rap video the State sought to introduce depicts Appellant amongst a crowd inside a house. The crowd is dancing and singing, and Appellant appears to be rapping the lyrics which make references to weapons, cough syrup, and being a "trap king." Appellant objected on grounds of relevance, that the State never proved Appellant wrote the lyrics, how long it took him to come up with the lyrics, or if the voice is Appellant's since Appellant appears to be lip-syncing in the video. He also objected that "*this song is a glorification of criminal activity, including guns and drugs and violence. And in a case like this, its prejudicial effect would be quite significant . . . its prejudicial effect significantly outweighs [its] probative value*." In response, the court noted that Appellant "certainly" brought his character into question based on his testimony." The trial court overruled all of Appellant's objections "because the Defendant testified as to him being friendly, [which] opened the door to the character witness evidence . . . in addition to the rest of his

testimony." Appellant's denial of owning any guns led the State to introduce additional rap lyrics and photos, this time posted on Facebook, referencing guns. The trial court again overruled relevancy and prejudice objections from Appellant. Still on cross-examination, Appellant explained that the posts were either lyrics written by other people or slang that he didn't intend to imply possessing weapons. The defense closed its case by calling Appellant's mother to testify that Appellant spent a significant amount of time in remedial courses, that he was bullied as a child, that he doesn't often understand others' intentions, and that he is eager to please people. The jury returned a guilty verdict and sentenced Appellant to life without parole. On direct appeal, Appellant argued the trial court erred when it introduced the rap videos, Facebook posts, his oral statement to law enforcement, and a witness's credibility opinion.

Ed Note (**Direct Appeal**): The Court of Appeals disagreed and affirmed Appellant's conviction in an unpublished 2022 opinion. As to the rap videos specifically, the majority held that the rap videos were relevant to guilt or innocence in that they were a "small nudge toward proving a fact of consequence -- specifically, Appellant's ability to comprehend, and to form intent regarding [Mondo]'s plan to break into Gardner's home," quoting ***Stewart v. State***, 129 S.W.3d 93 (Tex.Cr.App. 2004)(see ☙, Vol. 12, No. 7; 02/23/2004; and Vol. 12, No. 9; 03/08/2004). The Court of Appeals also undertook a balancing test under Rule 403. The Court first noted that the evidence held considerable relevance as it rebutted Appellant's "limited communication and comprehension skills." The Court of Appeals noted Appellant's argument that introduction of the videos encouraged the jury to "vilify Appellant's character for cultural reasons," but held the trial court could have concluded the State's need for the evidence outweighed such considerations. As to the potential for misleading the jury, the Court of Appeals agreed: "the evidence did have potential to impress the jury in some irrational but nevertheless indelible way" (quoting ***Montgomery v. State***, 810 S.W.2d 372 (Tex.Cr.App. 1990). Nevertheless, it did not find the trial court's ruling constituted a clear abuse of discretion. *** The dissent agreed that the evidence was admissible under Rule 404(a)(2)(A) as character evidence but should ultimately have been excluded under Rule 403. Justice Reichek explained: "Gangsta rap like that at issue in this case is characterized by 'lyric formulas,' a key one of which involved fictionalized bragging about the performer's 'badness' vis-à-vis criminal behavior . . . The genre often emphasizes violence in inner cities albeit not necessarily in an accurate manner." Justice Reichek also noted persistent bias about rap and rap artists meant that introduction of the evidence would have an enormous prejudicial effect and, because the State never proved Appellant authored the lyrics to anything introduced, the rap "shed no light on Appellant's ability to communicate with words, because these weren't his words at all." Even assuming Appellant wrote the lyrics to "'I Won't Tell,' there was no evidence of the ease with which he wrote these lyrics, how long it took him to write them, or whether anyone assisted him." Of the lyrics introduced, this song was the least sophisticated and did not establish a connection with any fact of consequence is the case. As a result, Justice Reichek wrote, "any perceived probative value was vastly outweighed by the prejudicial effect."

Holding: To determine whether evidence is admissible under Rule 403, Texas Appellate courts will use the ***Montgomery*** factors: (1) the strength of the evidence's probative value, (2) the

potential for the evidence to "impress the jury in some irrational but nevertheless indelible way," (3) The amount of time required at trial to develop the evidence, and (4) the proponent's need for the evidence.

Holding [**Probative Value**]: The court below concluded that "evidence of Appellant's ability to rap, lip sync, or post lyrics about crime is a 'small nudge' toward proving a 'fact of consequence' -- specifically, Appellant's ability to comprehend, and to form intent regarding, little partner's plan to break into Gardner's home." *** Assuming this is correct, we must consider whether the value of this probative evidence is outweighed by its potential for unfair prejudice. For this, we continue to the second ***Montgomery*** factor.

Holding [**Time Needed to Develop the Evidence**]: As a secondary inquiry, we ask how much trial time was dedicated to the development of the evidence such that its introduction caused undue delay. *** This factor focuses on the time needed "to develop the evidence, during which the jury [is] distracted from consideration of the indicted offense." ***State v. Mechler***, 153 S.W.3d 435 (Tex.Cr.App. 2005)(see ☙, Vol. 13, No. 2; 01/17/2005). *** The time needed to develop the rap lyric video evidence amounted to about six pages out of the fifteen pages of the record of Appellant's cross-examination of by the State. During the cross-examination, the State played the videos. The time of each video was 4 minutes and 13 seconds and 3 minutes and 17 seconds; however, the State would periodically pause the video to discuss certain video images or specific lyrics. The entire re-direct examination was devoted to the rap video evidence. Appellant's testimony consisted of 45 pages of the record. Eight (8) pages of the record were exclusively focused on the rap videos. Five (5) were exclusively focused on Appellant's photos and rap lyrics from his Facebook postings. Therefore, approximately twenty-eight percent of Appellant's testimony was spent on the extraneous evidence. Evidence that consumes such an inordinate amount of time has the potential to confuse or distract the jury from the main issues. *** Therefore, this factor weighs in favor of exclusion.

Holding [**Prejudicial Dangers**]: While Texas has not yet addressed this issue, courts in other jurisdictions have recognized that the admission of rap music or rap videos is highly prejudicial due to the nature of the lyrics that distract from the charged offense [citations omitted]. *** But by no means is rap the exclusive genre for glorification of criminal activity. Most song lyrics are often fictitious or exaggerations of real events. Other than Taylor Swift who is known to write songs based on her personal experiences, it is not reasonable to assume that all lyrics are autobiographical as to past or future conduct, unless there is direct evidence to suggest otherwise. Holding song lyrics to their literal meaning would lead to the following conclusions: Freddie Mercury "killed a man," Bob Marley "shot the sheriff," Macy Gray "committed murder and . . . got away," the band formerly known as The Dixie Chicks killed Earl, and classically, Johnny Cash "shot a man just to watch him die." These are conclusions we cannot accept outside of some other evidence demonstrating the lyrics are something more than fiction. *** The videos introduced by the State were a glorification of criminal activity. The lyrics and videos included references to illicit drugs, criminal activity in general ("dirty money"), snitching, owning weapons, degrading women, and, classically, being a "trap king." As discussed above, other courts have recognized that the

content of these songs and videos can unduly prejudice the jury because music can impact a jury in an emotional way. As in many of those cases, there is no question here that the introduction of Appellant's rap videos encouraged the jury to convict him on the improper basis that he is a criminal generally or associates with criminals generally. This is because any song that glorifies criminality, regardless of genre, is inherently prejudicial. The danger associated with playing these videos to the jury is that the jury might regard creative expression as proof that Appellant engaged in criminal behavior based upon his rap videos instead of regarding them as nothing more than creative expression. This is problematic in Appellant's case for two reasons. First, Appellant lacked the inherent familiarity of a popular artist that provides the ability to disassociate the artist with the individual. Unlike an easily recognizable pop star, the listener cannot disassociate "Block Da Foo Foo" from the message. Second, the subject matter in the expression is itself inflammatory. Regardless of the genre, inflammatory lyrics create the potential that the jury could ascribe character assessments to the defendant based on the content of the music he listened to or lyrics he wrote. Said plainly, music lyrics do not prove anything about the character of the person who listens to the music or lip syncs to it on video. "[W]e don't convict people for murder simply because they have written lyrics about murder." ***United States v. Stuckey***, 253 F. App'x 468 (6th Cir. 2007). To the Sixth Circuit's point, we certainly wouldn't convict a person of murder for rapping about drinking, drugs, and guns. Here, the State did not offer anything demonstrating that the lyrics and video were somehow representative of Appellant's character in that they applied outside of the artistic rendering, nor did they demonstrate that, even if they had some real-world application, it was relevant to the charged offense. This factor therefore weighs heavily in favor of exclusion.

Holding [**State's Need**]: The State's need for this evidence was weak. As discussed above, the State had several other available options to address Appellant's mental state when he drove the individuals to the complainant's apartment. These methods included Appellant's statement that Mondo told him they were going to "break in" to his uncle's house, inconsistencies or "evasiveness" in the same statement, surveillance footage of Appellant pulling the car around the parking lot prior to letting the other individuals out of the car, Appellant's internet-search activity in the days following the murder, and the fact Appellant subsequently visited the apartments again despite being purportedly "scared to death" at the time of the shooting. This evidence tended to show Appellant was aware of the circumstances surrounding the trip to the complainant's apartment. As a result, we find this factor weighs in favor of exclusion.

Holding [**Weighing the Factors**]: Considering the extreme danger of prejudice resulting from introduction of Appellant's rap videos, admission of the videos was error under Rule 403. The videos' probative value was incredibly weak, especially where the State introduced no evidence that Appellant authored the lyrics, or merely memorized them. Was he actually singing or was he lip syncing? Did he have any assistance in becoming proficient enough to perform, and how long did it take for him to be able to "successfully" pull off the performance? Without answers to these questions, using the video introduced in this trial was unfairly prejudicial, and proved very little about his intellectual capabilities. The videos did not reflect any significant amount of credulity

or articulacy, and were not relevant to Appellant's character, since there was no evidence outside of the lyrics themselves corroborating that Appellant was a violent or unfriendly person.

Holding [**Harm**]: Following the State's case, Appellant's case primarily consisted of his own testimony. He testified that he had a hard time remembering, he is a friendly person and believed he was just giving a ride, he doesn't think critically about the words he uses, he has a hard time understanding things, and when he discovered what happened, he felt dumb. *** In providing additional context for Appellant's concededly "dumb" actions, Appellant sought to introduce testimony from his competency hearing that revealed he has a low IQ and potentially could not understand the underlying motives of the individuals in his car on June 21. The trial court did not permit this evidence, however. Had Dr. Clayton been allowed to testify, she would have told the jury that individuals with diminished IQ trust others easily, are more naïve, don't think abstractly about the motives of others, are more forgetful when under stress, and are generally more susceptible to manipulation by others. The jury, in this sense, was not allowed to hear Appellant's side of the story despite it having heard the State's full story assisted by officers' credibility determinations. *** Then came the rap videos. After having heard the State cast Appellant as a liar, as testified to by law enforcement, and being deprived of potentially helpful testimony from Dr. Clayton, the State introduced both rap videos to demonstrate Appellant was literate and articulate. As discussed above in the context of Rule 403, these rap videos did very little to prove that fact and instead cast Appellant and his fellow performers as criminals in general, untethered to the particular facts of the charged offense. Moreover, while introducing the videos, the State went as far as injecting its own interpretations of slang words into Appellant's testimony. *** Lastly, the jury was not given a limiting instruction to restrict their use of the rap videos to their stated purpose. "[W]here no limiting instruction is given . . . we must conclude that any prejudice resulting from introduction of the extraneous offense is unabated." ***Abdnor v. State***, 871 S.W.2d 726, 738 (Tex.Cr.App. 1994). Viewed in light of the record as a whole, we find introduction of extraneous rap videos had more than a slight effect on the jury's verdict and therefore affected Appellant's substantial rights.

> **Concurring / Dissenting Opinions**: Judge Bert Richardson concurred. He was joined by **Judge Barbara Hervey** and Judge David Newell, and argued that there "is no confidence that the jury came to a decision of guilty free from the emotional effects of the rap videos." Presiding Judge Sharon Keller dissented. She was joined by **Judge Kevin Yeary**, **Judge Mary Lou Keel**, and **Judge Michelle Slaughter**, and noted that, in its Rule 403 analysis, "the Court counts in Appellant's favor the absence of a limiting instruction. But Appellant did not request a limiting instruction." She argued that, under Rule 105, Tex.R.Evid., the defendant's "failure to request a limiting instruction forfeited his claim regarding the admission of the rap videos." Judge Kevin Yeary filed a separate dissenting opinion in which he was joined by **Presiding Judge Sharon Keller** and **Judge Mary Lou Keel**. He argued that the Court's opinion "abandons our usual posture of deference to a trial court's broad discretion in admitting or excluding evidence." He argued that the Court's opinion fails to

demonstrate that the trial court's decision was outside "the zone of reasonable disagreement." He would affirm the Court of Appeals. Judge Mary Lou Keel also dissented. She was joined by **Presiding Judge Sharon Keller** and **Judge Kevin Yeary**, indicated that she agreed with their opinions, and raised "additional objections to the majority opinion for its distortions of unfair prejudice and probative value and its garbled harm analysis." She argued that the opinion of the Court "abandons our usual approaches to prejudicial effect," that is "prejudicial effect" analysis was incomplete and wrong.

Sidebars

(**John G. Jasuta**) A lucid and appropriate opinion. I might add that I used to sing along with "I Shot the Sheriff," "Folsom Prison Blues," and even (gasp) "Thunder Road."

(**Troy McKinney**) It is about time that the CCA called BS to associating song lyrics to a Defendant who had not written or recorded them or for whom there was no direct evidence of adoption of the content and meaning of the lyrics. Despite the wide and broad deference given to a trial court's discretion on admissibility and 403 issues, such discretion is not unlimited, though it often seems like it is in most appellate court decisions. In this case, the State massively overstepped and the trial court let it happen. Exclusion of the defense evidence concerning Defendants low intellectual and processing level just added insult to injury. Heads the State wins, tails Defendant loses. Bottom line: these factors rendered this trial fundamentally unfair, even without mentioning or directly considering the racial undertones.

(**Greg Sherwood**) If you had told me the facts of this case, and asked me to predict the result, I would have guessed that the conviction would be affirmed, either because there was no error in admitting the rap video evidence, or because any error was harmless. Yet, this 5-4 decision by the Court of Criminal Appeals, which reviewed a 2-1 decision from the Dallas Court of Appeals, found harmful error in the trial court's abuse of discretion in admitting this evidence. I'm not sure what surprises me more -- that the CCA reversed this conviction finding an abuse of discretion that was harmful error, which is an extremely difficult Appellate burden to meet, or that the Court decided to publish this opinion, instead of making it non-precedential by not publishing it. Reversals of convictions for an abuse of discretion in erroneously admitting evidence under the ***Montgomery*** test are rare, and attorneys should read this opinion to provide a road map on how to meet each ***Montgomery*** factor in order to exclude evidence in the trial court, or to provide enough of a record to have a fighting chance of obtaining a reversal on appeal.

(**Ross Craft**) In my view, "limiting instructions" are as useless as "instructions to disregard." Things like this cannot be unseen or unheard. Highly inflammatory evidence not directly related or connected to the charged offense, should have been viewed out of the presence of the jury, then excluded! I additionally feel defense should have made more and stronger

objections. I have practiced before both Judge Keel and Judge McClure and consider them fine jurists. I usually agree with Judge Keel, but in this case I feel Judge McClure is spot on.

(**Ken Florence**) - This case is not a panacea. On the specific facts, the Court arguably got this one right. However, more broadly, this case presents a warning to defense counsel that you must have a good reason to put the defendant on the stand, anticipate the State's impeachment evidence on cross-examination, and beware, beware, beware opening the door. If the limiting instruction were given, the result most probably would have been different. The Court's conclusory statement that the evidence in question was not character evidence seems legalistic and divorced from reality ("Said plainly, music lyrics do not prove anything about the character of the person who...lip syncs to it on video" and, thus, the videos "were not relevant to character"). If the Pope, Dali Lama, Trump or Biden had a rap video akin to the ones at issue in this case, the public would surely have made character conclusions, and rightly so. Although we don't allow unfairly prejudicial 'propensity' evidence, the rap(s) are circumstantial evidence of state of mind to defendant being 'friendly' and of limited mind and words such that he could not form the requisite intent. One thing we know, it will be interesting to watch if this case is hereafter limited or broadened with the upcoming changes to one-third of the judges on the CCA.

(**Rob Daniel**) The holding is simple: don't use song lyrics as a weapon. Some prosecutors, those who enjoy sailing close to the wind or do not realize they are doing so, will argue there should be exceptions to the rule. There shouldn't be.

(**David A. Schulman**) As early as the mid-1990s, the idea that introduction of lyrics from a defendant's favorite musical selections was acceptable was so ingrained in the criminal law practice that, in the case of ***Ronald Ray Howard*** (see GBS, Vol. 4, No. 23; 06/19/1996; and Vol. 4, No. 49; 12/23/1996), a notorious case involving rap lyrics that admittedly affect the defendant (see, e.g., "The Moment Tupac Became America's Most Dangerous Rapper"), the issue never even made it to discussion on appeal. In the case of ***Jesse Chaddick***, which involved a member of the Confederate Hammerheads (CH), a racist "skinhead" gang, and introduction of interview of another gang member on "Panzerfaust Internet Radio 88," and the admission into evidence of lyrics from two songs by the "Bully Boys," a "white power" musical group (see GBS, Vol. 14, No. 43; 11/06/2006), the Dallas Court of Appeals found no problems. Also, in the case of ***Maria Del Carmen Hernandez***, a murder case in which three women, one of whom had accused the deceased of abusing her daughter, killed the fellow then disposed of his body, and, during cross examination, the prosecutor questioned the defendant regarding a popular country song about the demise of an abusive spouse entitled "***Goodbye Earl***," recorded by the Dixie Chicks. The San Antonio Court of Appeals found that the defense objection to the line of questioning wasn't enough to preserve the error (see GBS, Vol. 14, No. 44; 11/13/2006). So, nearly 30-years on from Ronald Howard's case, things may have begun to change. What happens from here is very much up to the defense

bar. Better research and more distinct and forceful objections, like happened here, are required.

(**Chris Morgan**) I have no problems with the merits. I am troubled by the "music you listen to" cases David references. Is there any credible research showing that people, even more likely than not, chose their playlist based on lyrics, rather than everything but? What little research I know of on this suggests it is often because of the tune generally, "hooks" in it inserted for this purpose, cultural events or many other things. In many cases, what we like is not even a conscious decision. Shall we throw bones to determine which it was for a particular song the DA thinks the jury won't like? And, I guess given one of the dissents, the trial tip from it would be: defense should always request a limiting instruction every time the court admits evidence over our objection. Given that this argument in many recent evidence cases recently, some judges clearly want to make failure to do so a trap-door to deep six all complaints about admitting evidence. Sure, limiting instructions originally were not for preservation but as part of harm analysis, are of speculative, if any, actually effect on the jury, and such objections will either be meaningless as the trial court routinely denies them or significantly slow the trial, or both, but what the hey, another technicality to rule against defendants! And, as an extra bonus, if you "preserve" this way, you've reduced chances the error will be judged harmful, based solely on speculation concerning the efficacy of this skunk cure.