


One Fabulous Skyline

# TIBA TEXAS INDEPENDENT BAR ASSOCIATION

1801 East 51st Street, Suite 365-474  
Austin, Texas 78723  
Tel. 512-850-6544

Web Site: [www.texindbar.org](http://www.texindbar.org)




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Case Name: [Maria Del Carmen Hernandez v. The State of Texas](#)

- OFFENSE: Capital Murder - Life Sentence
- COUNTY: Bexar
- C/A CASE No. 04-05-0634-CR
- DATE OF OPINION: November 1, 2006
- DISPOSITION: Conviction Affirmed
- OPINION: Simmons, J.
- TRIAL COURT: 227th D/C; Hon. Philip Kazen
- LAWYERS: Lori Rodriguez (Defense); Daniel Thornberry (State)

**Ed Note:** (Background Facts) Appellant met Leffew and Rodriguez at the Bexar County Battered Women's Shelter and the three became friends. After leaving the shelter, Leffew invited Appellant and her children to move into her home. Robert Fernandez had an "on again off again" relationship with Appellant and moved in as well. Leffew accused Fernandez of abusing her daughter. In an attempt to get him to confess, Leffew crushed numerous prescription drugs into an alcoholic drink and gave it to Fernandez. Fernandez continued to maintain his innocence then passed out. Fernandez's hands and feet were tied and he was placed in the trunk of Leffew's car. The three women left and drove around for a while, then Leffew suffered a panic attack. EMS came and treated Leffew, but she refused transportation and Appellant and Rodriguez took her home. At Rodriguez's home, Rodriguez instructed Appellant to place trash bags over Fernandez's head and smother him. When Fernandez fought back, Rodriguez used panty hose to secure the bag. Rodriguez then left with Fernandez in the trunk, leaving Appellant at her house. Fernandez's body was discovered in a ditch in rural Bexar County two days later.

 **311.03 Cross-Examination & Impeachment /Prior Statements:** During its case-in-chief, the defense called two inmates to testify regarding statements made by Leffew, both of which tended to implicate Leffew and exonerate Appellant to some degree. The State argued that the defense was "opening the door" to Leffew's written statement to police, but no hearsay objection was made by the State. When the State asked a detective to read portions of Leffew's statement, the defense argued that the statement could not be a prior inconsistent statement because Leffew did not testify at trial about her statements to the inmates. The trial court gave the jury both oral and written limiting instructions and allowed the portions of the statement to be read aloud in court.

**Holding:** Prior to any controverted testimony, the trial court instructed the jury that they were to consider Leffew's written statement for impeachment purposes only and not as substantive evidence of Appellant's guilt. A similar instruction was included in the jury charge. Despite her allegations, the record does not support Appellant's position that the statement was necessarily understood by the jury as substantive evidence. Because the evidence was properly admitted under Rule 806, and we presume the jury follows the instructions given to them by the trial court, we are unable to conclude that the statement was utilized for any purpose other than as impeachment evidence.

**Ed Note:** The Court also held that Appellant's Sixth Amendment right of confrontation was not transgressed by reading Leffew's prior statement.

**¶ 334 Prosecutorial Misconduct / Improper Argument:** During cross-examination, the State questioned Appellant regarding a popular country song about the demise of an abusive spouse entitled "Goodbye Earl," recorded by the Dixie Chicks. Appellant alleges the prosecutor's questions were suggestive of Appellant's intent and plan, specifically "[t]hey decided Robert had to die, just like Earl." Although defense counsel did lodge an objection at the beginning of the State's cross-examination based on relevance, the State argues that the defense failed to properly object with regard to prosecutorial misconduct and thereby failed to preserve error.

**Holding:** Although defense counsel did make a timely objection, there was no request for an instruction, nor did he move for a mistrial. Thus, in accordance with Rule 33.1, T.R.A.P., Appellant failed to preserve error. Assuming, arguendo, defense counsel properly preserved error, a prosecutor is traditionally given great leeway in proposing questions and making reasonable deductions from the evidence. Having reviewed the record, we do not believe the testimony was so inflammatory or of such a character that, had Appellant requested an instruction to disregard, the instruction would not have cured any prejudicial effect. Because Appellant failed to preserve error, or alternatively, the prosecutor's statements were not so egregious that they could not have been cured by an instruction by the trial court, we overrule Appellant's second point of error.

**Sidebars:** ([David A. Schulman](#)) While I love those Dixie Chicks, I know this woman would have been in even more trouble if the lyrics had been from Sawyer Brown's "Betty's Bein' Bad" ("Betty cleaned house for the very last time").