

Affirmed and Memorandum Opinion filed August 31, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00376-CR

KEITH C. SCHUPP, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the County Criminal Court at Law No. 13
Harris County, Texas
Trial Court Cause No. 1553141**

M E M O R A N D U M O P I N I O N

Appellant, Keith C. Schupp, was convicted by a jury of misdemeanor assault and sentenced to six months in jail. On appeal, appellant contends that the trial court erred by excluding evidence regarding the complaining witness's credibility and bias. We affirm.

I. BACKGROUND

Appellant was tried for misdemeanor assault of Jessica Reh, a person with whom appellant had a dating relationship in September 2008. The complainant testified that on the night of the assault, appellant became angry after having discovered cigarettes in her bedroom drawer. With a closed fist, appellant struck the complainant's eye. Appellant

left the scene, and the complainant called 911. Two investigating officers testified that they took the complainant's statement regarding the assault and observed that she had a swollen and bruised left eye. Two of the complainant's neighbors also testified that the complainant told them about the assault minutes after it had occurred. Appellant also testified, denying the assault. A jury ultimately found appellant guilty, and punishment was assessed at six months in county jail and a \$2,000 fine.

Appellant now appeals his assault conviction, contending that the trial court erred by excluding three exhibits, exhibits 3, 4, and 8. In his first issue, appellant contends that exhibits 3 and 4 are pictures of the complainant holding alcoholic beverages. Appellant contends that exhibits 3 and 4 were relevant regarding her credibility. In appellant's second issue, he argues that exhibit 8, a message on the complainant's My Space page, was relevant regarding the complainant's motive for testifying against him at trial.

II. STANDARD OF REVIEW

We review a trial court's decision to exclude evidence for abuse of discretion. *Sauceda v. State*, 129 S.W.3d 116, 120 (Tex. Crim. App. 2004). A trial court does not abuse its discretion if its evidentiary ruling was within the "zone of reasonable disagreement" and correct under any legal theory applicable to the case. *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007); *Woods v. State*, 301 S.W.3d 327, 332 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Because the trial court is usually in the best position to decide whether evidence should be admitted or excluded, we must uphold its ruling unless its determination was so clearly wrong as to lie outside the zone within which reasonable persons might disagree. *See Winegarner*, 235 S.W.3d at 790 (quoting *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)); *see also Hartis v. State*, 183 S.W.3d 793, 801–02 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

III. EVIDENTIARY EXCLUSIONS

In two issues, appellant contends that exhibits 3, 4, and 8, which according to appellant were relevant regarding the complainant's credibility, motive, and bias, were erroneously excluded by the trial court.

A. *Exhibits 3 and 4: Pictures of the Complainant's Holding Alcoholic Beverages*

At trial, the complainant testified on cross examination that she did not heavily consume alcohol because she was regularly taking prescribed medication for a medical condition. Appellant then offered exhibits 3 and 4 to impeach the complainant's testimony. Appellant argued before the trial court that the photographs, in which the complainant is holding beverages, showed that, despite her denial, she heavily consumed alcohol while taking her medication. The trial court disagreed and excluded the photographs. On appeal, appellant similarly contends that exhibits 3 and 4 were relevant regarding the complainant's credibility.

Generally, only relevant evidence is admissible. *Woods*, 301 S.W.3d at 335. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tex. R. Evid. 401; *see also Fox v. State*, 283 S.W.3d 85, 91 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). Although generally relevant evidence is admissible, relevant evidence is properly excluded under rule 403 when its probative value is substantially outweighed by the danger of unfair prejudice. Tex. R. Evid. 403.

Here, exhibit 3 depicts the complainant's holding a beverage with her hands in the air and her tongue stuck out of her mouth. But the photograph does not establish that the beverage in the complainant's hand is in fact an alcoholic beverage. Exhibit 4 depicts the complainant holding a beer. There is nothing in either photograph reflecting that the complainant had in fact consumed either of the beverages she was holding. Most importantly, there is nothing in the photograph or in the record reflecting when exhibits 3

and 4 were taken. Thus, it is unclear whether the photographs were taken at the time the complainant was taking medication. Appellant simply has failed to show, through exhibits 3 and 4, that the complainant heavily consumed alcohol while taking her medication.

Moreover, appellant has failed to show how the complainant's action in holding beverages, one obviously an alcoholic beverage, is connected to the charged offense. The photographs do not make the complainant's version of the September 2008 assault more or less probable. *See* Tex. R. Evid. 401; *see also Woods*, 301 S.W.3d at 335. Because the challenged evidence lacked probative value in the case, the trial court did not abuse its discretion by excluding the photographs. Accordingly, we overrule appellant's first issue.

B. Exhibit 8: My Space Message

In appellant's second issue, he argues that exhibit 8, a message on the complainant's My Space page, was relevant to her motive for testifying against him at trial. The message was discovered from an Internet Google search for "Keith Schupp" and "Houston." The message read, "Keith schupp is gonna pay 4 hurtn me.legally of course." Appellant contends that because the message reflects the complainant's revenge-inspired motive for testifying against him, the trial court erred by excluding it from trial. Appellant's complaint regarding the exclusion of exhibit 8 suffers from the same defect as his complaint regarding the exclusion of exhibits 3 and 4: nothing in the record reflects when the message was posted. The only date reflected on the message is the last login date; there is nothing showing when the actual message was posted. Furthermore, it is unclear from the face of the exhibit who posted the message—the complainant or a "My Space friend." Without a time frame regarding when the message was posted and without evidence of the posting's author, appellant has failed to adequately connect the My Space message to the September 2008 assault, especially in light of the complainant's testimony that appellant had assaulted her on a number of prior

occasions. Accordingly, the trial court did not abuse its discretion by excluding exhibit 8. We overrule appellant's second issue.

Having overruled all of appellant's issues, we affirm the trial court's judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Yates and Boyce.

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