In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00523-CR

PATRICK WILLIAM SAPP, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 5
Montgomery County, Texas
Trial Cause No. 09-252303

MEMORANDUM OPINION

A jury convicted appellant Patrick William Sapp of harassment, and the trial court assessed punishment at one hundred eighty days of confinement in the Montgomery County Jail and a $1000 fine. *See* Tex. Penal Code Ann. § 42.07(a)(2) (West 2011). The trial court suspended imposition of sentence and placed Sapp on community supervision for sixteen months. Sapp then filed this appeal, in which he contends in a single issue that the trial court erred by admitting evidence of Sapp's prior bad acts. We affirm the trial court's judgment.

Deputy Brian Lennon of the Montgomery County Sheriff's Office testified that he was dispatched to a residence, and upon his arrival, he spoke with the complainant, K.S.M. According to Deputy Lennon, K.S.M. was upset, and she informed Deputy Lennon that she had received a telephone call from Sapp, who was her estranged husband, during which Sapp threatened to burn the house down, burn her car, and kill her father. Deputy Lennon explained that he obtained K.S.M.'s phone records and forwarded them to the District Attorney's office.

Prior to K.S.M.'s testimony, the court heard argument on the admissibility of Sapp's bad acts. The State argued that evidence of Sapp's bad acts would be relevant to prove the victim's mindset and the fact that the victim "was placed in a manner of reasonable alarm" and "took it seriously." Sapp's counsel argued that the acts were not admissible "because none of them are recent in time or of the same nature [as] what Mr. Sapp is accused of here today[,]" and that the State's written notice of its intent to use the acts was overly vague. In addition, Sapp's counsel argued that the prejudicial effect of the offense substantially outweighed its probative value. The court ruled that the evidence was relevant to prove various statutory elements of the offense, including intent to harass, annoy, alarm, abuse, torment, or embarrass, as well as whether the alleged conduct "would be reasonably likely to alarm" and whether it was reasonable for the victim to believe Sapp would carry out his threats. *See* Tex. Penal Code Ann. §

42.07(a)(2). The trial court permitted Sapp's counsel to have a running objection to such testimony.

K.S.M. testified that Sapp is her former husband. K.S.M. testified that Sapp was verbally, physically, and emotionally abusive during their marriage, "[u]sually just when he drank." According to K.S.M., when Sapp was drinking, he consumed anywhere from twelve to eighteen beers per day. K.S.M. explained that when Sapp drank, he got "[o]ut of control" and "would yell and scream, break windows, break down doors, throw things, damaged anything he could put his hands on." K.S.M. testified that Sapp was "like a monster" when he drank, and that he was verbally abusive and tried to intimidate her.

K.S.M. related that on one occasion after she and Sapp had attended a sporting event, they went to the retail store where they both worked, and Sapp became angry with her, and he threw the store's computers through the glass at the front of the store. K.S.M. testified that on another occasion, Sapp became angry when he was drinking "nonstop for three days" during a camping trip. Sapp squirted lighter fluid onto a campfire, and as a result, the fire spread to a nearby tree.

According to K.S.M., the worst incident of physical abuse during the marriage occurred when Sapp picked her up and threw her onto cement, and she suffered two dislocated discs and was bedridden for about eight weeks. K.S.M. testified that when Sapp became angry after he had been drinking, he kicked down doors in their home.

K.S.M. also explained that on one occasion when Sapp was drinking, Sapp waved a gun in front of K.S.M. while their son was in the room.

K.S.M. testified that when Sapp was moving out of their home, he called K.S.M. and asked if he could retrieve some of his belongings. K.S.M. consented, but informed Sapp that she wanted a constable to be present because she "could tell on the phone that [Sapp] had been drinking." K.S.M. explained that Sapp became "very angry" and began making threats. According to K.S.M., Sapp "said that he was going to burn my house down – or our house – and my car down. He said that he was going to run his car into the house, and he also said he was going to kill my father."

K.S.M. explained that she "was scared to death[,]" and she called her parents to warn them, as well as to obtain help with gathering her children's belongings and leaving the house. K.S.M. and her children went to her parents' home, and after K.S.M.'s mother contacted the authorities, K.S.M. informed the authorities of the threats. K.S.M. testified that she believed Sapp was threatening her when Sapp made the statements, and she was alarmed and afraid. During cross-examination of K.S.M., Sapp's counsel asked K.S.M., "You were so scared, in fact, that you never called the police?" and K.S.M. answered, "No."

We review a trial court's ruling concerning the admissibility of evidence under an abuse of discretion standard. *Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001). Accordingly, we must uphold a trial court's admissibility decision when it is

within the zone of reasonable disagreement. *Id.*; *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g). Rule 404(b) of the Texas Rules of Evidence provides as follows:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

Tex. R. Evid. 404(b).

The mere fact that the evidence is introduced for a purpose other than character conformity does not make the evidence admissible. *Webb v. State*, 36 S.W.3d 164, 180 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (en banc). Evidence is relevant if it tends to make the existence of any fact of consequence more probable or less probable than it would be without the evidence. Tex. R. Evid. 401. The proferred evidence must also be relevant to a fact of consequence in the case. *Powell*, 63 S.W.3d at 438; *Webb*, 36 S.W.3d at 180 (citing *Rankin v.* State, 974 S.W.2d 707, 709 (Tex. Crim. App. 1996); *see also* Tex. R. Evid. 404(b). The proponent of the evidence may persuade the trial court that the other crime, wrong, or act has relevance apart from character conformity; that it tends to establish some elemental fact; that it tends to establish some evidentiary fact; or that it rebuts a defensive theory. *Montgomery*, 810 S.W.2d at 387.

Section 42.07(a)(2) of the Texas Penal Code provides that a person commits the offense of harassment if, by telephone, with the intent to harass, annoy, alarm, abuse,

torment, or embarrass the person, he threatens to inflict bodily injury on the person or to commit a felony against the person or a member of the person's household, or against the person's property, in a manner reasonably likely to alarm the person. Tex. Penal Code Ann. § 42.07(a)(2). The State was required to prove that Sapp intended to harass, annoy, alarm, abuse, torment, or embarrass K.S.M., and that Sapp's threats were reasonably likely to alarm her. *See id*. The evidence concerning Sapp's prior bad acts toward K.S.M. were relevant to show both Sapp's intent, and the reasonable likelihood that K.S.M. was alarmed by Sapp's threats. *See id*.; Tex. R. Evid. 401, 404(b); *Powell*, 63 S.W.3d at 438; *Webb*, 36 S.W.3d at 180. In addition, during both his cross-examination of K.S.M. and his closing argument, Sapp's counsel offered the defensive theory that K.S.M. was not alarmed by the telephone call from Sapp because she did not call the authorities. Accordingly, the proferred evidence was also relevant to rebut the defense's theory that because K.S.M. did not contact the authorities, she was not alarmed. *See Montgomery*, 810 S.W.2d at 387-88.

As part of his statement of his issue, Sapp asserts that the admission of the evidence of his prior bad acts was also "more prejudicial than probative." Once a trial court determines that extraneous offense evidence is admissible under Rule 404(b), the trial court must, upon proper objection by the opponent of the evidence, weigh the probative value of the evidence against its potential for unfair prejudice. *Montgomery*, 810 S.W.2d at 389; Tex. R. Evid. 403. Rule 403 favors admissibility of relevant

evidence, and the presumption is that relevant evidence will be more probative than prejudicial. *Montgomery*, 810 S.W.2d at 389. A Rule 403 analysis requires the court to balance the following factors:

> (1) the inherent probative force of the proferred item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted.

Gigliobianco v. State, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006).

We believe the trial court properly and adequately weighed the probative value of the evidence against its potentially prejudicial effect. The evidence was not needlessly cumulative and the danger of undue prejudice to the defendant was not so great that the trial court's decision to allow it should be disturbed.

For these reasons, we overrule Sapp's issue and affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on June 9, 2011
Opinion Delivered July 13, 2011
Do Not Publish
Before McKeithen, C.J., Kreger and Horton, JJ.