

Opinion issued October 27, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-01086-CR

THAN VAN NGUYEN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Case No. 10CR1899

MEMORANDUM OPINION

After a bench trial on two counts of robbery, the trial court convicted Than Van Nguyen on one count of robbery and sentenced him to two years'

imprisonment.¹ Nguyen appeals on the ground that the trial court erred in admitting evidence of five of his prior convictions for impeachment purposes because the prejudicial effect of the convictions outweighed their probative value. We conclude that the trial court did not abuse its discretion in admitting the prior convictions. We therefore affirm the trial court's judgment.

Background

D. Cumpian is a loss-prevention detective for CVS Pharmacy. She testified that, in June 2010, she witnessed Nguyen enter a CVS store, place several items in the pockets of his shorts, and exit the store without paying for them. Cumpian notified the store manager that she would be making an apprehension and followed Nguyen outside of the store. Once outside the store, Cumpian identified herself and reached out toward Nguyen. A struggle ensued between them, during which Nguyen struck Cumpian with his hands and feet. E. Patina, a CVS supervisor, heard the commotion and went outside to assist Cumpian. He pulled Nguyen away from Cumpian. Nguyen bit Patina, but Patina continued to restrain Nguyen until the police arrived.

The State indicted Nguyen for robbery on allegation that, "while in the course of committing theft of property with intent to obtain or maintain control of said property, [he] intentionally, knowingly or recklessly caused bodily injury to

¹ See TEX. PENAL CODE ANN. § 29.02 (West 2011).

[Cumpian] by striking [her] with his hand and kicking her with his foot.” The State also charged him with robbery on the basis of the bodily injury to Patina.

Nguyen waived his right to a jury trial and elected to have his case heard by the trial court. At trial, the court admitted a video that showed Nguyen entering and exiting CVS, as well as the struggle that ensued outside of the store. Through a translator, Nguyen admitted to stealing the items from CVS, stating that he was hungry and had no money with which to buy food. He testified that Cumpian and Patina attacked him and that he fought back because Patina restrained him in a way that hindered his breathing. He testified that he did not want to hurt anyone but that he wanted to run away because he did not want to go to jail. He denied striking Cumpian.

During Nguyen’s cross-examination, the State introduced five of Nguyen’s prior convictions for impeachment purposes: a conviction for theft in 2007, a conviction for felony criminal mischief in April 2005, and three felony convictions for unauthorized use of a motor vehicle in April 2005, September 2006, and January 2010. Nguyen’s attorney objected to the admission of the prior convictions: “Your Honor, I would object to use of these five judgments to impeach [Nguyen]. Since his testimony and [Cumpian’s] testimony are both critical, that weighs in the favor of excluding such evidence, and we’d ask that he

be able to testify free from that impeachment.” The trial court overruled Nguyen’s objection.

The trial court found Nguyen guilty of robbery on the charge relating to Cumpian but not guilty on the charge relating to Patina, finding reasonable doubt as to whether the injuries Nguyen caused to Patina occurred in the course of committing the theft or whether Nguyen believed he was acting in self-defense because his breathing was impaired. The court sentenced Nguyen to two years’ confinement for the robbery conviction. This appeal followed.

Standard of Review

We review a trial court’s decision to admit or exclude evidence—including its determination as to whether the probative value of evidence was substantially outweighed by its prejudicial effect—under an abuse of discretion standard. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010), *cert. denied*, 180 L. Ed. 2d 253 (U.S. June 6, 2011); *Green v. State*, 934 S.W.2d 92, 104 (Tex. Crim. App. 1996). A trial court abuses its discretion in this regard if its determination “lies outside the zone of reasonable disagreement.” *Martinez*, 327 S.W.3d at 736; *see Green*, 934 S.W.2d at 104 (using similar language to describe standard).

Impeachment with Prior Convictions

Rule 609 of the Texas Rules of Evidence authorizes the admission of evidence that a witness has been convicted of a crime for the purposes of impeaching the witness's credibility if:

- (1) the crime was a felony or a crime of moral turpitude,
- (2) the trial court determines that the probative value of admitting the evidence outweighs its prejudicial effect, and
- (3) no more than ten years has elapsed since the date of the conviction or the witness's release from confinement imposed for the conviction, whichever is later, unless the court makes certain specific findings regarding the probative value of the conviction.

TEX. R. EVID. 609(a), (b). It is undisputed that the prior convictions admitted by the trial court during the guilt-innocence phase of the trial were felonies or crimes of moral turpitude for which Nguyen was convicted within the last ten years. Nguyen's challenge on appeal relates to the second requirement: whether the prejudicial effect of the convictions outweighed their probative value.

Nguyen does not identify what the prejudicial effect of his prior convictions is or how it outweighs their probative value. Instead, his only complaint is that the trial court did not make any statements on the record regarding this balancing test. On this basis, Nguyen asserts that the trial court erred by failing to analyze whether the probative value of the convictions outweighed their prejudicial effect. Nguyen recognizes that the case law establishes that a trial court need not conduct the

balancing test on the record. *See Bryant v. State*, 997 S.W.2d 673, 676 (Tex. App.—Texarkana 1999, no pet.) (“A record of [the Rule 609 balancing] test is not necessary. When considering the probative effect of evidence versus its possible prejudicial effect, the appellate court may presume that the trial judge conducted the balancing test, which need not be shown in the record.”); *see also Berry v. State*, 179 S.W.3d 175, 180 (Tex. App.—Texarkana 2005, no pet.); *Nolen v. State*, 872 S.W.2d 807, 812 (Tex. App.—Fort Worth 1994, pet. ref’d); *Walker v. State*, No. 09-09-00338-CR, 2010 WL 2533774, at *3 (Tex. App.—Beaumont June 23, 2010, pet. ref’d) (mem. op., not designated for publication); *Luna v. State*, No. 05-08-01647-CR, 2010 WL 1782237, at *6 (Tex. App.—Dallas May 5, 2010, pet. ref’d) (mem. op., not designated for publication). But Nguyen contends that this case is distinguishable from the cases applying that rule because the record establishes that the trial judge did not perform such a balancing analysis.

We disagree that the record establishes that the trial court did not consider the probative value of Nguyen’s prior convictions and the prejudicial effect of admitting such convictions. Nguyen’s counsel objected to the admission of the prior convictions on that basis and nothing in the record establishes that the trial court did not consider that objection when he overruled it. *See Rojas v. State*, 986 S.W.2d 241, 250 (Tex. Crim. App. 1998) (“[W]here nothing in the record shows the trial judge did not perform the balancing test, we have found no error when the

judge simply listened to the defendant's objections, then overruled them."'). We presume that the trial court did balance the prejudicial effect of Nguyen's prior convictions against their probative value, and the record does not contradict that presumption. *See Bryant*, 997 S.W.2d at 676; *Berry*, 179 S.W.3d at 180; *Nolen*, 872 S.W.2d at 812; *Walker*, 2010 WL 2533774, at *3; *Luna*, 2010 WL 1782237, at *6. We therefore reject Nguyen's contention that the trial court failed to conduct the balancing test required by Rule 609.

Moreover, even if the trial court had failed to perform the balancing test, Nguyen could prevail on appeal only upon a showing that (1) if the trial court had applied the balancing test, it would have resulted in the exclusion of the prior convictions and (2) the improper admission of the prior convictions impaired Nguyen's substantial rights. *See Craig v. State*, No. 14-00-01282-CR, 2003 WL 21467209, at *2-3 (Tex. App.—Houston [14th Dist.] June 26, 2003, no pet.) (mem. op., designated for publication) (holding, when record established that trial court failed to perform balancing test, there was no reversible error because evidence was admissible under test); *see also* TEX. R. APP. P. 44.2(b) (requiring showing of harm for reversal of criminal conviction on basis of non-constitutional error).² Although Nguyen contends that the impeachment of his credibility was

² Nguyen admits that the error he asserts here is non-constitutional error. *See, e.g., Geuder v. State*, 142 S.W.3d 372, 376 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (holding that trial court's error in admitting prior convictions under

harmful to his case, he does not analyze whether the convictions' probative value was outweighed by their purported prejudicial effect. Additionally, the harm Nguyen asserts is founded on the prior convictions' impeachment of Nguyen's credibility—the very purpose for which such evidence may be admitted—rather than any undue prejudice that the convictions purportedly engendered. *See* TEX. R. EVID. 609(a) (authorizing admission of prior convictions to impeach credibility of witness absent unfair prejudice that outweighs probative value of convictions).

Finally, we note that this was a bench trial. When a case is tried to a trial judge rather than a jury, the danger that the trial judge will consider the extraneous offense evidence for anything other than the limited purpose for which it was admitted—here, impeachment—is reduced, as is the danger that the evidence will unfairly prejudice the defendant. *Corley v. State*, 987 S.W.2d 615, 621 (Tex. App.—Austin 1999, no pet.); *see Ex parte Twine*, 111 S.W.3d 664, 668 (Tex. App.—Fort Worth 2003, pet. ref'd) (same principle applied in context of Rule 403 balancing test); *Thomas v. State*, No. 05-03-01445-CR, 2004 WL 1615836, at *3 (Tex. App.—Dallas July 20, 2004, no pet.) (mem. op., not designated for publication) (same).

Rule 609 is non-constitutional error); *Lopez v. State*, 990 S.W.2d 770, 777 (Tex. App.—Austin 1999, no pet.) (same).

Conclusion

We conclude the trial court did not abuse its discretion in admitting five of Nguyen's prior convictions for impeachment purposes. We therefore affirm.

Harvey Brown
Justice

Panel consists of Justices Jennings, Sharp, and Brown.

Do not publish. TEX. R. APP. P. 47.2(b).