

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00779-CR

Robert Lee Green, Jr., Appellant

v.

The State of Texas, Appellee

**FROM THE DISTRICT COURT OF BELL COUNTY, 27TH JUDICIAL DISTRICT
NO. 73949, HONORABLE JOHN GAUNTT, JUDGE PRESIDING**

MEMORANDUM OPINION

A jury found appellant Robert Lee Green, Jr., guilty of aggravated kidnapping, and the trial court sentenced him to 30 years' imprisonment. *See* Tex. Penal Code § 20.04. In a single appellate issue, Green contends that the trial court abused its discretion in admitting extraneous-offense evidence. We will affirm the judgment of conviction.

DISCUSSION

Before trial, Green filed a motion in limine requesting that the trial court instruct the State not to refer to any extraneous offenses or alleged misconduct without first holding a hearing outside the jury's presence. The trial court granted the motion. At trial, the State informed the court that it would call a witness who would testify about an assault that Green allegedly committed against the victim several hours before kidnapping her. Green's attorney stated, "Your Honor, the

position of the Defense would be that the prejudicial effect of this would outweigh the probative value of what they're trying to get into it.”

The trial court then held a hearing outside the presence of the jury. At the hearing, the State called several witnesses who testified about the alleged earlier assault. The victim did not testify at the hearing. At the conclusion of the hearing, Green’s attorney made the following statement:

Your Honor, for purposes of the record I will—the Defense is going to object that the prejudicial effect substantially outweighs the value of allowing this in. It is five hours beforehand, Judge. I realize it’s assaultive and it is tied in to the alleged offense he is alleged to have committed, but we would object.

The trial court concluded, “I find that is a part of the same scheme or transaction and continuing course of conduct. I will allow the testimony.” Later, the victim and other witnesses testified in front of the jury concerning the alleged earlier assault, and Green did not object.

On appeal, Green argues that evidence of the alleged earlier assault did not constitute same-transaction contextual evidence, was not admissible under Texas Rule of Evidence 404(b), and was impermissible character evidence that introduced the supposition that Green later acted in conformity with his bad character when he allegedly kidnapped the victim. *See* Tex. R. Evid. 404(b)(1) (“Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”). The State responds that Green failed to preserve his issue on appeal because his objection at trial—that the prejudicial effect of the evidence substantially outweighed its probative value, *see id.* R. 403—does not comport with his appellate issue—that the evidence constituted impermissible character evidence. The State further argues that Green waived any objection he may

have had to the evidence because he failed to object when the State introduced substantially the same information through the victim's testimony. In addition, the State argues that the trial court did not abuse its discretion in admitting evidence of the alleged earlier assault because the earlier assault was part of the same criminal transaction and evidence of the assault was necessary for the jury to understand the entire context of the kidnapping. Finally, the State argues that any error the trial court may have made in admitting the evidence was harmless because "[t]he evidence of [Green's] guilt of the charged offense was virtually uncontested and so overwhelming that the [earlier] part of the offense could hardly have had a substantial effect upon his rights."

We agree with the State that Green has failed to preserve the complaint he makes on appeal. At the hearing outside the jury's presence, Green's attorney objected that "the prejudicial effect of this would outweigh the probative value of what they're trying to get into it" and "the prejudicial effect substantially outweighs the value of allowing this in." These objections did not "state[] the grounds for the ruling that [Green] sought from the trial court with sufficient specificity to make the trial court aware" of the complaints Green raises on appeal. *See* Tex. R. App. P. 33.1(a)(1)(A); *Yazdchi v. State*, 428 S.W.3d 831, 844 (Tex. Crim. App. 2014) ("For a party to preserve a complaint for appellate review . . . the point of error on appeal must comport with the objection made at trial."); *Karr v. State*, No. 03-16-00246-CR, 2017 WL 1549018, at *3 (Tex. App.—Austin Apr. 25, 2017, no pet. h.) (mem. op., not designated for publication) (holding relevance objection did not preserve Rule 403 complaint); *Phifer v. State*, No. 05-14-01411-CR, 2016 WL 772737, at *4 (Tex. App.—Dallas Feb. 29, 2016, no pet.) (mem. op., not designated for publication) (collecting cases in which objection did not preserve complaint); *Benitez v. State*, No. 01-10-00684-CR, 2011 WL 6306643, at *5 (Tex. App.—Houston [1st Dist.] Dec. 15, 2011,

no pet.) (mem. op., not designated for publication) (“Although Benitez objected that the testimony was too prejudicial, he failed to make an objection under Rule 404(b) and, therefore, waived these arguments.”); *Lopez v. State*, 200 S.W.3d 246, 251 (Tex. App.—Houston [14th Dist.] 2006, pet. ref’d) (“A rule 403 objection is not implicitly contained in relevancy or 404(b) objections; rather, a specific rule 403 objection must be raised to preserve error.”).

Moreover, even if Green had preserved his Rule 404(b) complaint, and even assuming without deciding that the trial court should have excluded evidence of the alleged earlier assault, we conclude that any error the trial court may have committed in admitting the evidence is harmless and not reversible. Although evidence of the earlier assault may have assisted the jury in understanding the kidnapping that allegedly occurred several hours later, the State presented ample additional evidence of the kidnapping and its surrounding circumstances. Compared to the evidence of the repeated beatings and death threats that allegedly accompanied the kidnapping, we cannot conclude that the evidence of the initial assault “had a substantial and injurious effect or influence in determining the jury’s verdict.” See *Schmutz v. State*, 440 S.W.3d 29, 39 (Tex. Crim. App. 2014); see also Tex. R. App. P. 44.2(b) (“Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”); *Cantos v. State*, No. 03-14-00585-CR, 2016 WL 691012, at *2 (Tex. App.—Austin Feb. 19, 2016, no pet.) (mem. op., not designated for publication) (“Where the error did not influence the jury or had but a slight effect, substantial rights are not affected.”) (internal quotation marks omitted).

Because we conclude that Green did not preserve his complaint and that any error the trial court may have committed in admitting evidence of the alleged earlier assault was harmless, we overrule Green’s sole appellate issue.

CONCLUSION

We affirm the trial court's judgment of conviction.

Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed

Filed: July 6, 2017

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