Affirmed and Opinion filed April 5, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00732-CR

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DAVID LEE HENDERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 96CR1294

O P I N I O N

Appellant was convicted by a jury of indecency with a child. He elected the court to determine punishment, which it assessed at eighteen years' confinement. On this appeal, we determine whether the court erred in (1) excluding evidence of the complainant's emotional state, and (2) instructing a deadlocked jury to "try to reach a verdict." We affirm.

Background

The complainant is the stepdaughter of appellant. She accused appellant of sexually molesting her from approximately 1992 to 1996, beginning when she was twelve years old.

Appellant denied the charges and attempted to contradict her testimony. During cross-examination of the complainant's mother, appellant asked: "You never bothered to get her to some kind of a psychiatrist or psychologist to determine how happy she was even at this time, two months from the last allegation [of indecency], you were still concerned as you are – ." The state then objected, "Victim impact evidence is not admissible in the guilt/innocence stage." The court sustained the objection and appellant responded, "Your honor, I was just asking as to what she [complainant's mother] had done." The court reiterated its ruling. Appellant then asked the witness, "Despite this one video [of complainant taken by Children's Protective Services] being done on July 30th, you had not brought the child to any kind of doctor?" The witness answered, "I had." Appellant continued to elicit testimony regarding complainant's attending counseling sessions.

Thereafter, during deliberations in the guilt/innocence phase, after several hours had passed, the jury sent the court a note stating, "We are presently deadlocked 11 guilty 1 not guilty. The 'not guilty' juror is not sure of [complainant's] proof. What are our options. [sic]" The court replied, "Continue deliberations and try to reach a verdict." It did not instruct the jury on any options it may have had. Appellant had objected to this instruction, requesting the court either instruct the jury, "Please continue your deliberations," without instructing it to try to reach a verdict, or submit a full *Allen* charge. The court overruled the objection. The jury continued to deliberate for about an hour before it found appellant guilty.

Excluded Evidence

We review a trial court's decision to exclude evidence under an abuse of discretion standard. *Green v. State*, 934 S.W.2d 92, 101-02 (Tex. Crim. App. 1996). An abuse of discretion occurs when the trial court acts without reference to any guiding rules or principles. *See Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1991) (op. on reh'g). The rules of evidence are guiding rules and principles.

Appellant argues that he tried to elicit evidence from the mother of complainant with

respect to her child's behavior. He points out that just because evidence (such as a child's mental state) is victim impact evidence, does not make it a "victim impact statement" and there is no reason to treat it differently than other relevant evidence. We do not disagree with this general proposition. Appellant's issue nonetheless fails for at least two reasons.[1]

First, in defending its proffer of the question, appellant merely made the statement, "Your honor, I was just asking as to what she had done." This vague and general comment provides little of substance for the court to rule upon, thus appellant waived his issue by failing to sufficiently apprize the trial court what specific evidence he wished to introduce. TEX. R. EVID. 103(a)(2); *Warner v. State*, 969 S.W.2d 1, 2 (Tex. Crim. App. 1998) (in the absence of such information, any claim of error is not preserved for appellate review). Appellant agrees the "expected testimony" was not preserved for review, however, he contends it was clear from the context that the testimony was "of a nature indicating that the child did not need counseling, that the child's behavior was normal, not anything to worry about." We agree. TEX. R. EVID. 103(a)(2); TEX. R. APP. P. 33.1(a)(1)(A). Assuming, *arguendo*, the trial court should have noted the fact the government's objection was spurious, and the defense offer was contextually patent, appellant's argument still fails because no substantial right of appellant was affected, as we note below.

Second, after the state's objection was sustained, appellant went on to ask the witness what appears to have been essentially the same question about whether the mother took the complainant for counseling. This time, the state did not object, the witness answered appellant's questions, and appellant eventually went on to another line of questioning. Also, prior to the state's objection to the previous question, appellant had elicited other testimony from the same witness about complainant's normal behavior and lack of emotional distress.

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[1] We note that, in his brief, appellant failed to even cite where in the record the court's error might have occurred. Thus, the issue would have been waived for that reason. TEX. R. APP. P. 33.1. The state, however, provides record cites which appear to correspond to appellant's general arguments, thus we address those references as they apply to appellant's issues.

For these reasons, we fail to see how a substantial right of appellant would have been harmed by any error by sustaining the state's objection to that particular question. TEX. R. EVID. 103(a) (error may not be predicated upon a ruling that excludes evidence unless a substantial right is affected).[2] We therefore hold that although the trial court abused its discretion in excluding appellant's proffered evidence, the error is harmless because it did not affect a substantial right.

Jury Instruction

Next, appellant argues the court erred in responding to the jury's note that it was deadlocked to "continue deliberations and try to reach a verdict."[3] The primary inquiry to determine the propriety of an *Allen* or "dynamite" charge of this nature is its coercive effect on juror deliberation, "in its context and under all circumstances." *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988).

Appellant cites *Griffith v. State*, 686 S.W.2d 331 (Tex. App.—Houston [1st Dist.] 1985, no pet.) as analogous to this case. There, in response to a deadlocked jury, the trial court stated, among other things, "follow the oath that you took." *Id.* at 331-32. The appellate court held that such an admonishment implied that the failure to reach a unanimous verdict either results from or constitutes a violation of the juror's oath. *Id*. at 333. Further, the court observed that instructing a deadlocked jury to follow its oath creates a significant risk that jurors will interpret the comment as criticism of the position taken by the minority. *Id.*

We disagree with appellant that *Griffith* is on point with this case. A trial court's instruction to a jury to continue deliberating will not be construed as coercive unless it

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[2] Appellant waived any right to confrontation argument he may have had by failing to raise that specific ground in the trial court. TEX. R. APP. P. 33.1(a).

[3] Since appellant requested as one option to simply tell the jury to continue deliberations, we infer the only objectionable portion of the instruction is "try to reach a verdict."

pressures the jurors into reaching a verdict. *Montoya v. State*, 810 S.W.2d 160, 166-67 (Tex. Crim. App. 1989); *Ford v. State*, 14 S.W.3d 382, 395 (Tex. App.—Houston [14th Dist.] 2000, no pet.). We fail to see how the precatory statement that the jury "try to reach a verdict" applies coercive pressure as in "follow the oath you took."

Rather, the language in our case is similar to that which has been held proper in other cases. *See, e.g., Montoya*, 810 S.W.2d at 166-67 ("Would you please deliberate for another 30 minutes to see if you are able to reach an answer to the special issues in accordance with the Court's instructions and please report to me after that."); *Arrevalo v. State*, 489 S.W.2d 569, 571-72 (Tex. Crim. App. 1973) (charge stated, in part, "you are instructed to continue deliberations in an effort to arrive at a verdict which is acceptable to all members of the jury"); *Garza v. State*, 974 S.W.2d 251, 256 (Tex. App.—San Antonio 1998, pet. ref'd) (charge stated, in part, "deliberate with a view of reaching an agreement"); *Love v. State*, 627 S.W.2d 457, 459 (Tex. App.—Houston [1st Dist.] 1981, no pet.) (charge stated, in part, "You are instructed that this case has been ably tried by experienced lawyers, and in the interest of justice, if you could end this litigation by your verdict, you should do so").

Unlike *Griffith*, in each of the proximally cited cases, and the case *sub judice*, the trial court issued instructions that merely requested the jurors to continue to attempt to come to an agreement. There is nothing in the court's statement implying that its request that the jury *try* to reach a verdict (1) criticizes or otherwise addresses the lone juror, that it would (2) coerce a juror to vote against his or her prior convictions, or that the failure to reach a verdict would somehow (3) constitute a violation of any juror's oath. We also note the jury requested complainant's testimony after the court issued the instruction. Thus it is apparent that the jury continued to deliberate, undermining any contention that the dissenting juror was coerced. We find the jury instruction in this case was not improper. We therefore overrule this issue.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed April 5, 2001.

Panel consists of Justices Edelman, Wittig, and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).