Affirmed and Opinion filed June 21, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00926-CR

EDWARD KINCADE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 8
Harris County, Texas
Trial Court Cause No. 999,000

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

A jury convicted appellant, Edward Eugene Kincade, of the offense of harassment and sentenced him to 180 days confinement, probated for two years, and a $1,000 fine. In his only issue, appellant complains that the trial court erred by not engaging in the required balancing test once appellant raised a Rule 403 objection to testimony regarding previous assaults by appellant on complainant. We affirm.

Background

Appellant was charged with harassment of complainant, his wife. At trial, complainant and a co-worker, Laurie Brock, testified that appellant called complainant numerous times at her workplace because complainant had dropped a pot that chipped the kitchen floor. Complainant and Brock testified that, in retaliation for the damage to the floor, appellant repeatedly threatened complainant with physical violence when she returned home.

After complainant testified that the calls had frightened her, the State appropriately approached the bench and requested to ask complainant whether appellant had "gotten physical" with complainant on prior occasions to show "admissible fear in relation to the phone calls." Appellant objected that the evidence was "inflammatory." The court excused the jury and conducted a hearing. Complainant then testified, among other things, that appellant had been physically violent with her on at least ten occasions before the alleged offense, had threatened to kill her, and had "inflicted" a few things upon his father. The court stated: "I think that the state of mind would be relevant. I'm not sure of the testimony about abuse of his father would be relevant. The threats that he made to her would be relevant to her state of mind, I'm going to allow it." The jury was then returned and complainant was permitted to testify of the past incidences of violence against complainant but not his father.

Balancing Test

In his only issue, appellant complains that the trial court erred because it did not engage in the required balancing test once appellant raised his Rule 403 objection. Once a proper Rule 403 objection is raised, the court must determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, among other factors. TEX. R. EVID. 403.

Appellant argues that the court's statements concerning relevance "strongly suggests" the court did not engage in the balancing test. We disagree. First, as appellant candidly points out, a trial court is not required to affirmatively state on the record either

that it has conducted a balancing test or its reasons for the ruling. *Caballero v. State*, 919 S.W.2d 919, 922 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). Though appellant surmises that the record "strongly suggests" the trial court acted outside of the rules, we cannot assume from the court's statements on relevance that it failed to engage in a balancing test.[1] We note that the court immediately removed the jury in response to appellant's "inflammatory" objection. This is appropriate trial court action to afford a correct forum to hear the objection. Obviously the court openly considered the first prong of the balancing test, the probative value. The court properly sustained in part the "inflammatory" objection by excluding the alleged violence to appellant's father. It is problematic for appellant to argue the trial court did not properly consider the very objection made and sustained in appellant's behalf. Thus, we conclude, the trial court properly heard, considered, and ruled on appellant's objection. TEX. R. EVID 403. Accordingly, we overrule appellant's issue. The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed June 21, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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

[1] If appellant did not believe the court had engaged in a balancing test, he was required to have called it to the court's attention at the time and made a sufficient record from which we could properly review the issue. TEX. R. APP. P. 33.1(a).