Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-288

APRIL TERM, 2004

State of Vermont	APPEALED FROM:
	District Court of Vermont, Unit No. 2, Chittenden Circuitt
v.	DOCKET NO. 3505-6-02 Cncr
David Lawrence	Trial Judge: Ben W. Joseph

In the above-entitled cause, the Clerk will enter:

Defendant David Lawrence appeals from his conviction of aggravated domestic assault following a jury trial. He argues that the court erred by allowing the State to cross-examine him concerning his two prior misdemeanor convictions. We affirm.

Defendant was charged with one count of first degree aggravated domestic assault under 13 V.S.A. ' 1043(a)(2) for allegedly threatening his girlfriend Celia Pratt with a machete. The following evidence was presented at trial. Police officers responded to a report of domestic disturbance at defendant= s home. While they were attempting to secure a shed where the incident had allegedly occurred, Ms. Pratt= s son stated that defendant had threatened him and his mother with a knife. Ms. Pratt= s son provided the officers with a sworn written statement as to what had occurred, and this statement was admitted into evidence. Ms. Pratt= s daughter testified that she awoke to hear her mother yelling A [Defendant] pulled a knife on me. Her written sworn statement to this effect was also entered into evidence. The officers also spoke with Ms. Pratt, who responded affirmatively when asked if defendant had threatened her with a knife after an argument. When the officers asked Ms. Pratt why she ran out of the shed, she told them that she thought defendant was going to kill her. At trial, Ms. Pratt denied that she had argued with defendant, that he had threatened her with a knife, or that she had told anyone that defendant had threatened her with a knife.

The officers spoke to another individual, Mr. Bushey, who was present during the incident. Mr. Bushey had called police, and he provided the officers with a sworn, written statement about the evening= s events. In his statement, which was admitted into evidence, Mr. Bushey indicated that he had observed defendant arguing with Ms. Pratt, and he had seen defendant wield a machete, slam the blade into the counter, and threaten to kill Ms. Pratt. Mr. Bushey testified at trial that he could not recall whether defendant threatened Ms. Pratt with a knife.

The officers also interviewed defendant, who appeared intoxicated. Defendant informed them that he had argued with Ms. Pratt but had not threatened her or anyone else with a weapon. Defendant admitted to owning a machete, which he showed to the officers. The officers observed grooved marks on a counter top in the shed that were consistent with a bladed object hitting the surface. Defendant stated that he had been making stew and using the machete to cut up the ingredients.

At trial, defendant testified that on the evening in question, he had had an argument with Mr. Bushey, and that while cleaning his machete, he hit the counter top with it, and told Mr. Bushey to leave. He denied threatening to kill Ms. Pratt, or threatening her with the machete. Defendant maintained that Ms. Pratt suffered from anxiety and depression, and that he was paid to be the caretaker of both Ms. Pratt and her elderly mother, in part because Ms. Pratt could not be

left alone. Before cross-examining defendant, the State argued that defendant had opened the door to admission of his previous assault convictions by implying that he was A a gentle caretaker.@ Defense counsel= s response was inaudible. The court allowed the testimony, and on cross-examination, defendant admitted that approximately two weeks prior to the charged offense, he pled no contest to simple assault for striking a neighbor with a stick. He also admitted that in 1994, he had been convicted of simple assault on a police officer. Defense counsel did not object during this testimony, nor did he later request a limiting instruction from the court. Defendant was found guilty of the charged offense, and this appeal followed.

On appeal, defendant argues that the trial court committed reversible error by allowing the State to cross-examine him about his two prior misdemeanor convictions. Relying on V.R.E. 609, defendant asserts that the evidence should have been excluded because his convictions were for misdemeanors, not felonies, and they did not involve untruthfulness or falsification. Defendant also contends the admission of this evidence was erroneous because the State failed to provide him with notice under V.R.Cr.P. 26(c) that it intended to impeach him with these convictions, the court did not instruct the jury on the limited purpose of the evidence, and the court failed to conduct the requisite balancing test. Defendant contends that plain error resulted from the admission of this evidence because he was the only witness for the defense and his prior convictions were for acts similar to the charge pending against him.

Because defense counsel= s response to the proposed introduction of this evidence was not transcribed, we review defendant= s claim of error assuming that he raised a proper objection. As discussed below, we conclude that any error that occurred in the admission of this evidence was harmless beyond a reasonable doubt. See V.R.Cr.P. 52(a); State v. Oscarson, 2004 VT 4, & 29, 15 Vt. L. Wk. 3, 4.

First, we note that contrary to defendant= s assertion, his prior convictions were not introduced pursuant to V.R.E. 609, but instead pursuant to V.R.E. 404(a) to rebut his testimony that he was A a gentle caretaker@ of Ms. Pratt and her elderly mother. Under these circumstances, the State was not required to provide defendant with notice that it intended to introduce evidence of his prior offenses. See V.R.C.P. 26(c) (A No notice is required for evidence of offenses used in rebuttal.@). Moreover, because defendant did not request a limiting instruction below, nor did he object to the absence of a limiting instruction, he waived his right to raise this issue on appeal. See Turner, 2003 VT 73, & 14 (A When defense counsel fails to request a limiting instruction or fails to object to the absence of a limiting instruction, a defendant= s right to raise this issue on appeal is waived.@).

Even assuming that the admission of this testimony was error, we are persuaded that the evidence supports a conclusion beyond a reasonable doubt that the jury would have convicted defendant even without his testimony as to his prior convictions. See id. at & 16; see also Oscarson, 2004 VT at & 29 to assess harmlessness, Court considers the likelihood of the conviction in the absence of the offending testimony). As discussed above, the State presented evidence from numerous witnesses, one of whom was present during the actual assault, that defendant had threatened Ms. Pratt with a machete. At the time of the incident, Ms. Pratt acknowledged to police that defendant had threatened her, and that she feared for her life. Ms. Pratt= s son and daughter stated that Ms. Pratt told them that she had been threatened by defendant. The officers observed physical evidence that was consistent with the statements of these witnesses. Defendant= s position, in contrast, was inconsistent. On the evening in question, he told the officers that he had been using a machete to make stew. He denied threatening Ms. Pratt or anyone else. At trial, he testified that he had gotten into an argument with Mr. Bushey, and while cleaning his machete, he hit the countertop with it, and told Mr. Bushey to leave. In light of the evidence presented at trial, we conclude that the admission of defendant= s prior convictions was harmless beyond a reasonable doubt.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Paul L. Reiber, Associate Justice