

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-483

SEPTEMBER TERM, 2004

	}	APPEALED FROM:
	}	
State of Vermont	}	District Court of Vermont, Unit No. 1,
	}	Windsor Circuit
v.	}	
	}	
Godfrey Ojearontor	}	DOCKET NO. 1808-12-02 WrCr
	}	
	}	Trial Judge: Theresa S. DiMauro
	}	

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

A jury convicted defendant of domestic assault for hitting his girlfriend's then ten-year old daughter in the face. He appeals the conviction on three grounds: (1) the court erroneously denied his motion for mistrial after the State elicited inadmissible evidence from the victim's mother; (2) defendant was denied his right to confrontation when the court excluded evidence of the mother's prior statements during a relief-from-abuse hearing; and (3) the State unduly prejudiced defendant when it allowed a victim's advocate to escort the child victim to the witness stand while she held a teddy bear. We affirm.

The record reveals the following facts. Defendant and his girlfriend, Tahira Jackson, lived together with Jackson's daughter Jalessah and her son Kasim. Defendant has a son from a previous relationship, but he lives out of state with his mother. On December 28, 2002, the date of the assault on Jalessah, defendant was upset about not seeing his son. Jackson testified that, while blaming her for his failure to see the child, defendant's conduct escalated to the point that he dragged her by the collar into a bedroom where Kasim and Jalessah were watching television. Seeing her mother upset, Jalessah began to cry. Defendant told her to A shut up@ and then hit her. The blow caused Jalessah's lip to split and bleed. That incident gave rise to the charges for which defendant was convicted on August 14, 2003. This appeal followed defendant's conviction.

defendant's first argument relates to the trial court's pre-trial ruling excluding evidence of a relief-from-abuse order Jackson had obtained previously against defendant in the family court. Evidence of the order came in through the State's direct examination of Jackson. The State asked, A From C from that point in 2000, when did Mr. Ojearontor, if he did, when did he stop living with you?@ Jackson responded, A It was last year when C I got a restraining order against him last year.@ After defense counsel objected and moved for a mistrial, the prosecutor explained that he had not advised Jackson about the court's pre-trial ruling, but that he did not intend to elicit the inadmissible answer. He also explained that the question's purpose was to obtain testimony relevant to a key element of the offense charged, namely that defendant and Jackson were household members on the date of the assault. See 13 V.S.A. § 1042 (criminalizing actions that wilfully or recklessly cause bodily injury to a A family or household member@). After some discussion at the bench, the court gave a curative instruction to the jury, striking the answer and telling the jurors that prior orders have no relevance to the case.

Defendant claims the court should have declared a mistrial because the prosecutor's question was calculated to elicit the inadmissible response. Whether granting a mistrial is necessary is a discretionary question for the trial court's determination. State v. Voorheis, 2004 VT 10, & 20, 844 A.2d 794. To reverse on this claim, defendant must show that the court's ruling was based on untenable grounds and caused him prejudice in light of the entire record. Id. Defendant has not met his burden here. The court gave a limiting instruction to the jury to disregard Jackson's inadmissible

testimony. Defendant does not explain how that instruction failed to cure the prejudice flowing from Jackson's statement. Moreover, defendant not only agreed to the curative instruction that the court gave, but it was his counsel who suggested the language that the court ultimately used. Finally, the court disagreed, as do we, that the prosecutor's question was improper. Nothing on the face of the question itself can be construed to seek information about the relief-from-abuse order that the court excluded through its pre-trial ruling.

Defendant argues that additional inadmissible testimony elicited from Jackson also prejudiced him, requiring reversal and a new trial. He claims that Jackson testified about prior bad acts defendant committed C hitting and spitting at her in November 2002, and hitting her on the same night that he assaulted Jalessah. Defendant claims that the testimony was inadmissible under Rule 404(b) as uncharged prior bad act evidence. V.R.E. 404(b). As to defendant's hitting and spitting in November 2002, we find no error because the evidence was elicited by defense counsel during his cross examination of Jackson. No motion to strike or other objection was raised at the time the testimony was given. Therefore, we find no error in the admission of evidence about the November 2002 events. V.R.E. 103(a)(1).

Further, we find no abuse of discretion in the trial court's decision to admit the information about defendant's conduct towards Jackson on the night he assaulted Jalessah. See State v. Kelley, 163 Vt. 325, 328-29 (1995) (trial court has discretion to admit and exclude evidence and will not be overturned unless that discretion is abused). Defendant argues that he was not charged for his conduct towards Jackson, so evidence about that conduct was inadmissible as bad act evidence under Rule 404(b). The court disagreed, concluding that the evidence was res gestae of his assault on Jackson's daughter. Defendant contests the trial court's ruling that hitting Jackson was part of the res gestae for the crime against Jalessah.

The res gestae doctrine allows testimony about other crimes if they form a body of evidence relating to the events surrounding the crime of which defendant is charged. @ State v. Maduro, 174 Vt. 302, 306 (2002). A Res gestae evidence > is generally linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime,' and > is not subject to the general rule that excludes evidence of prior criminality.' @ Id. The evidence defendant contests here falls squarely within that doctrine. The incident between Jackson and defendant occurred on the same evening and not long before defendant hit Jalessah. The evidence tended to show that defendant's conduct on the evening in question escalated over time and culminated in hitting Jalessah in the face hard enough to split her lip. Although the evidence that defendant hit Jackson did not concern his actions towards Jalessah, the event was linked in time and circumstances to his assault on Jalessah and was, therefore, properly admitted.

Defendant next argues that he was denied his right to confront Jackson because the trial court prohibited him from inquiring about prior statements she made during the relief-from-abuse hearing in family court. We note that at trial and in the parties' briefs on appeal the dispute over the permissibility of defendant's intended inquiry centered on whether defendant needed an official transcript of the hearing as a prerequisite to impeaching Jackson through her prior statements. The parties and the court discussed at some length whether Rule 613 or Rule 801 of the Vermont Rules of Evidence, or both, controlled the issue. We do not reach that question because we find a more fundamental problem with defendant's contention. Nowhere in the record can we find an offer of proof about what defendant intended to elicit from Jackson about her prior testimony at the relief-from-abuse hearing. It is elementary that an offer of proof is required to preserve an appellate claim that evidence was improperly excluded at trial. V.R.E. 103(a)(2). Moreover, defendant must show that the ruling prejudiced him. V.R.E. 103(a). Without knowing what he intended to ask or elicit, we cannot assess the prejudicial effect of the court's ruling. It is possible that the evidence was inadmissible as irrelevant even if defendant had possessed an official copy of the transcript. Defendant has not demonstrated any substantial right that was affected by the court's decision.

defendant's last claim is also unavailing. He challenges as unduly prejudicial the fact that the child victim was escorted to the witness stand by the State's victim advocate while the child held a teddy bear. According to the parties, when it came time for Jalessah to testify, she was crying and refused to enter the courtroom. A short recess was taken, and when the court resumed, the State called the child to the stand. Jalessah entered the courtroom holding the victim advocate by the hand. The advocate returned to her place in the gallery after Jalessah was seated at the witness stand. Neither the court nor defendant knew in advance that the advocate would so assist the child. At no time before the verdict did defendant inform the court that he believed the jury was prejudiced against him because of the manner in which Jalessah entered the courtroom or took the stand. Defendant raised the issue for the first time in a post-conviction motion for a

new trial, which the court denied due to the lack of an objection or demonstrable prejudice. Defendant waived this claim by not raising it before the case was submitted to the jury so the court could cure any prejudice that might have resulted by giving an appropriate instruction to the jury. Cf. State v. Lumbra, 122 Vt. 467, 469 (1962) (explaining that failure to object to error before jury rendered its verdict when there was opportunity to do so is unfair to the State).

Affirmed.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Frederic W. Allen, Chief Justice (Ret.),

Specially Assigned