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ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-110

FEBRUARY TERM, 2005

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin Circuit
Eric P. Cyr	}	
	}	DOCKET NO. 721-5-02 FrCr
		Trial Judge: Michael S. Kupersmith

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

Defendant appeals from a judgment of conviction, based on a jury verdict, of unlawful trespass, in violation of 13 V.S.A. § 3705(d). He contends the court erroneously: (1) admitted prior bad act evidence; (2) admitted irrelevant evidence regarding the actions of another; and (3) failed to weigh the probative value of the challenged evidence against its prejudicial effect. We affirm.

The facts may be summarized as follows. On the evening of May 9, 2002, Donald Chapple observed a vehicle parked in the driveway of the Bessette residence in the Town of Sheldon. Chapple's sister and brother-in-law, Remi Bourdeau, live next door to the Bessettes. The Bessette driveway is about fifty yards long, and the car was parked close to the end, next to the Bessette house. Chapple observed several individuals exit the car. One of the individuals, later identified as Jason Cyr, defendant's brother, ran across the street and pulled on the front door of another house, owned by Laura Colwell. Chapple observed a second individual, later identified as defendant, cross the Bessette yard and enter the Bourdeau's garage. Through the front window, Chapple then observed defendant inside the living room of the house, walking back and forth. Chapple estimated that defendant remained in the house for two to five minutes.

Chapple was aware that his sister and brother-in-law were not home, and confronted defendant as he left the residence. Defendant told Chapple that his car had run out of gas, and that he was seeking assistance. Chapple attempted to detain defendant, but defendant entered his car and drove away. Shortly thereafter, Chapple spotted the car in the parking lot of a store located nearby, and called the police. When they arrived, defendant repeated his claim that he had run out of gas and was looking for assistance. The state trooper at the scene testified that he asked defendant to start the car, and that it started right away and idled for several minutes.

Defendant was charged with unlawful trespass. Prior to trial, defendant filed a motion in limine, seeking to exclude evidence of an incident that had occurred about a week before the events in question, when a state trooper found defendant's car parked on Route 7 in Swanton. Defendant's sister, who was inside the car, informed the officer that the car had run out of gas, and that her brothers had gone to her uncle's to get gas. The State argued that the prior incident was admissible as a prior bad act to prove a common scheme, implying that the gas story was merely a cover to commit burglary. The trial court ruled that the prior incident was admissible on this basis. Defendant also moved to exclude evidence that defendant's brother had yanked on the door of the Colwell house across the street, arguing that it had no probative value. The court ruled that the evidence was relevant and admissible.

At trial, however, the State did not elicit any evidence concerning the prior incident during its case-in-chief.

Instead, defense counsel called defendant's sister, and elicited the story from her. Defendant's brother also testified for the defense, stating that the car frequently ran out of gas, and confirming the incident of the prior week. Along the same lines, defendant's father testified that the car's gas gauge was broken, and that the car would frequently stall when low on gas, but would then build up pressure and start again for a short time. Defendant testified in his own behalf, confirming his sister's and brother's testimony that the car had run out of gas before, including the incident in Swanton, when he claimed to have walked with his brother to his uncle's house for gas. Concerning the incident at the Boudreau residence, defendant asserted that he entered the garage looking for some help, knocked on the door to the residence inside the garage, thought that he heard someone, and entered the house for just a brief time before he realized that no one was home.

The jury returned a verdict of guilty on the charge of unlawful trespass. The court denied defendant's motion for new trial. This appeal followed.

Defendant contends the court erred in admitting the earlier incident as a prior bad act, under V.R.E. 404(b), and in failing to weigh its probative value against its prejudicial effect. The record plainly discloses, however, that notwithstanding the court's pretrial ruling denying defendant's motion to exclude the evidence as a prior bad act, the State did not elicit the evidence for this or any other purpose. It was the defense, rather, that elicited the evidence, in an effort to lend credibility to defendant's explanation for the incident that had led to the criminal charge, by showing that the car had a malfunction that had resulted in similar prior incidents. As we have noted, the "denial of a motion in limine seeking to exclude evidence is normally a preliminary ruling that 'does not . . . mean that the evidence is admissible." State v. Koveos, 169 Vt. 62, 69 (1999) (quoting State v. Dubois, 150 Vt. 600, 602 (1988) (emphasis and omission in original)). Evidence may be relevant and admissible for more than one purpose. Here, defendant plainly chose to elicit the prior incident to support the defense theory, and thus waived any objection to its admissibility on other grounds. This was not a case, as in State v. Keiser, 174 Vt. 87, 98-99 (2002), where we held that defendant had not waived his objection to the admissibility of prior convictions by electing to bring them in himself rather than wait for the State to elicit them. The record shows that defendant made the strategic choice to offer the prior incident for his own purposes. Accordingly, any objection was waived.

Defendant also asserts that the court erred in denying the motion to exclude evidence that his brother crossed the street and pulled on a neighbor's door. Although the State did elicit this evidence through Chapple's testimony, the record shows that both defendant and his brother testified to almost the same effect, his brother explaining that he had pulled on the screen door to knock on the inside door. The evidence supported defendant's explanation that their purpose in stopping in the residential area was to find someone who could help them. Accordingly, even if the court failed, as defendant contends, to adequately explain its ruling or weigh the probative value and prejudicial effect, any error was harmless. State v. Lipka, 174 Vt. 377, 384 (2002).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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

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