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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-070

NOVEMBER TERM, 2006

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
Jeremy Seerveld	}	
	}	DOCKET NO. 4581-9-05 CnCr

Trial Judge: Michael S. Kupersmith

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

Defendant appeals his conviction for domestic assault. We affirm.

The State charged defendant with domestic assault under 13 V.S.A. ' 1042, alleging that he struck his fiancée during an argument on September 5, 2005. Defendant represented himself at the trial, which was before a jury. Both defendant and the victim testified that, while defendant did strike victim on the date in question, it was an accident that occurred during Ahorseplay.@ The State countered with testimony from

witnesses who spoke with the victim shortly after the incident. These witnesses testified that the victim was visibly upset following the incident and reported that defendant had hit her intentionally during an argument about whether she was cheating on him. The State also presented evidence that the victim had previously admitted to a police officer (who was a co-worker of the victim) that defendant was physically abusing her. The police officer further testified that the victim had given him photographs of her injuries from the prior abuse, and these photographs were admitted into evidence.

On appeal, defendant challenges the district court=s decision to admit evidence that defendant had previously abused the victim and hearsay evidence of the victim=s conversations with other individuals following the September 5, 2005, incident. We review all of defendant=s claims for plain error only, as he did not raise these issues at trial. State v. Eddy, 2006 VT 7, & 8.

Evidence of a defendant=s prior bad acts offered to show that defendant had a propensity for such conduct is generally inadmissible under V.R.E. 404(b). See State v. Yoh, 2006 VT 49, & 16 (Rule 404(b) Aprohibits use of prior bad acts to prove that a defendant acted consistently with a propensity for the type of behavior at issue@). There are, however, certain exceptions to this rule. For example, evidence of prior bad acts is allowed to show Amotive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.@ V.R.E. 404(b). In State v. Sanders, 168 Vt. 60 (1998), we set forth a specific exception to the bar against prior bad act evidence in domestic violence cases. There we held that, in cases of domestic violence, evidence that the defendant had previously abused the same victim could be admitted to (1) demonstrate the context of the relationship between the defendant and the victim, (2) show that the violence was not an accident, or (3) explain why a victim, fearful of her abuser, might recant a prior accusation of violence. Id. at 62-63.

If the State intends to use prior bad act evidence under one of the exceptions to Rule 404(b), it must provide the defense with fair notice of that fact so that it may move to exclude the evidence. See V.R.Cr.P. 26(c) (requiring written notice to defense seven days prior to trial).

Here, the State maintained that the evidence that defendant had previously abused the victimCin the form of testimony from the police officer and the photographs the victim allegedly gave the police officerCwas admissible under the Sanders exception. The State sent notice of its intention to use this evidence to defendant=s attorney prior to the trial, but the attorney had since withdrawn. Nonetheless, the State also announced its intent to use the prior bad act evidence at the beginning of the trial, and showed the photographsCsome of which defendant had taken himselfC to defendant before the trial began. When asked whether he objected to the State=s use of the evidence, defendant stated that he did not. Rather, defendant sought to establish through argument and testimony elicited from the victim that she had not, in fact, previously complained of abuse and that the photographs were taken to document injuries the victim had sustained while at work.

Though he did not object to the evidence at trial, on appeal defendant claims admission of this evidence was error for three reasons. First, defendant argues that the evidence did not fall within the parameters of the Sanders exception because the evidence was not material and there was other evidence directed at the same issues (those issues being defendant=s jealousy and the victim=s fear of reporting his abuse). As stated above, we review this argument for plain error only. The logic of Sanders is most clearly applicable in cases where a defendant claims that his actions were an accident or where a victim recants an earlier admission that she suffered abuse at the hands of the defendant. See State v. Hendricks, 173 Vt. 132, 146-47 (2001) (Skoglund, J., concurring) (recognizing relevance of prior bad act evidence to disprove defense of accident and explain victim=s retraction of statement). Both circumstances are present in this case.

The evidence that defendant had previously abused the victim (which defendant countered with testimony from the victim, leaving it to the jury to determine credibility) was useful for establishing that his abuse of the victim in this instance was not an accidentCa claim that defendant put in issue by raising it as a defense. Further, the evidence that defendant had previously abused the victim and that she was reluctant to report the abuse out of fear of retaliation could have assisted the jury in understanding why the victim would recant her prior statement that defendant had hit her intentionally. These purposes fall squarely within the exception established by Sanders. Further, even if we agreed with defendant that other evidence touched on these

issues, this would not make the prior bad act evidence either unnecessary or inadmissible.

Defendant also maintains that the evidence did not meet the second prong of admissibility because its prejudicial impact outweighed its probative value. See V.R.E. 403 (relevant evidence may be excluded if probative value is Asubstantially outweighed by the danger of unfair prejudice@). As explained above, the probative value of the evidence was high, and because the alleged prior conduct involved the same victim, the risk of unfair prejudice was not great. See State v. Anderson, 2005 VT 17, & 11, 178 Vt. 467 (concluding that any prejudice was not unfair where prior bad acts were directed at the same victim as charged conduct). The district court did not err in admitting the evidence.

Second, defendant argues that, even if the prior bad act evidence was properly admitted, he did not receive timely notice of the State=s intent to use the evidence as required by V.R.Cr.P. 26(c). AThe purpose of V.R.Cr.P. 26(c) is to inform the defendant of crimes the State intends to introduce and to allow the defendant time to respond by a motion in limine.@ Sanders, 168 Vt. at 61 (quotations omitted). While the State only provided notice to defendant on the first day of trial, there is no suggestion that defendant would have been inclined to seek to exclude the evidence had he received notice earlier. Rather, he stated he did not object to its admission, and instead chose to counter the evidence with the victim=s testimony denying that she had appealed to the police officer or had given him the photographs. The victim further testified that the photographs documented workplace injuries. There is no indication that defendant lacked the opportunity to formulate his argument against the evidence, or that the lack of earlier notice prejudiced his defense. Accordingly, this argument presents no basis for reversal. See Eddy, 2006 VT 7, & 8 (to reverse for plain error, Court must conclude that error seriously affected defendant=s substantial rights).

Third, defendant argues that the district court was obligated to instruct the jury regarding the limited purpose of the prior bad act evidence, despite the fact that defendant did not request any such instruction. Defendant cites Hendricks, 173 Vt. at 140-41, for the proposition that failure to give any limiting instruction under these circumstances is plain error. Neither Hendricks nor State v. Holcomb, 156 Vt. 251 (1991), the case cited in Hendricks, stand for the proposition that failure to give a limiting instruction for prior bad acts evidence is plain

error per se, and we are not inclined to create such a category. See State v. Pelican, 160 Vt. 536, 546 (1993) (recognizing strong presumption against determining that a type of error is in the category of per se plain error). Rather, in this case, the district court=s instruction to the jury that the allegation against defendant was based on the September 5, 2005, incident eliminated any risk that the jury might be confused as to the conduct that formed the basis for the charge. Cf. Holcomb, 156 Vt. at 256 (holding that failure to give unrequested limiting instruction was not reversible error where court gave general instruction that defendant was not on trial for any act not alleged in the indictment). This Court will find plain error based on jury instructions Aonly when the entire charge undermines our confidence in the verdict, and only in extraordinary cases.@ State v. Brooks, 163 Vt. 245, 250 (1995). Defendant has not demonstrated that the jury instructions on the whole could have or actually did confuse the jury. There is no plain error.

In addition to the prior bad act evidence, defendant asserts that the district court erred in admitting hearsay testimony from a number of individuals with whom the victim spoke shortly following the incident. The district court admitted the hearsay testimony under the Aexcited utterance@ exception to the hearsay rule. See V.R.E. 803(2).

Defendant first argues it was error for the court to admit the testimony without making a finding that the declarant (the victim in this case) was unavailable and that the testimony was reliable. The Aexcited utterance@ exception, however, is one of the exceptions to the hearsay rule where the availability of the declarant to testify at trial is immaterial. See V.R.E. 803 (listing exclusions that apply Aeven though the declarant is available as a witness@). Rather, A[t]he underlying rationale for the [excited utterance] exception lies in the assumption that a person=s powers of reflection and fabrication will be suspended when she is subject to the excitement of a startling event, and any utterances she makes will be spontaneous and trustworthy.@ State v. Lemay, 2006 VT 76, & 9 (quotations omitted). Thus, hearsay testimony that is admitted under the excited utterance testimony is not deemed admissible because it is the Anext best thing@ in the absence of the declarant=s trial testimony, but because of the special indicia of reliability that are associated with such statements.

Thus, there is no requirement that the declarant be unavailable within the Rule of Evidence themselves, nor does such a requirement arise from the constitutional right to confrontation, as defendant argues. A criminal defendant=s right to be confronted by witnesses against him is secured by Chapter I, Article 10 of the Vermont Constitution and the Sixth Amendment of the Federal Constitution. Noting that United States Supreme Court has rejected the same argument based on the Sixth Amendment, defendant nonetheless cites cases from other jurisdictions where Aexcited utterance@ hearsay, admitted without a finding that the declarant was unavailable, was found to violate the defendant=s right to confrontation. See State v. Lee, 925 P.2d 1091 (Haw. 1996); State v. Storch, 612 N.E.2d 305 (Ohio 1993); State v. Martinez, 653 P.2d 879 (N.M. Ct. App. 1982).

The reasoning explored in this line of cases is inapplicable to the facts before us. In each case, the declarant whose statements were being admitted through hearsay was not present to testify andCmore importantlyCbe cross-examined at trial. It was this fact rather than admission of the excited utterance hearsay per se that raised concerns about the defendant=s right to confront the witnesses against him. The proposed solution to these concerns in each case was either to require the prosecution to show that the witness was truly unavailable or to have the witness testify at trial. See, e.g., Martinez, 653 P.2d at 882-83 (absent an opportunity for cross-examination of a witness on the part of defendant, the state must demonstrate due diligence in attempting to secure witness= presence at trial before it may obtain admission of excited utterance hearsay). Here, the victim did testify at trial and defendant had ample opportunity to cross-examine her. There was no violation of defendant=s right to confrontation. See State v. Cameron, 168 Vt. 421, 426 (1998) (noting that confrontation clause protects two interests: criminal defendant=s right to face those who testify against him and right to conduct cross-examination.).

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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Brian L. Burgess, Associate Justice