

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-078

APRIL TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
Paul West	}	
	}	DOCKET NO. 2820-5-05 Cncr
		Trial Judge: Michael S. Kupersmith

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

Defendant Paul West appeals from his conviction, after a jury trial, of second degree aggravated domestic assault. He argues that: (1) the court's wrongful admission of the victim's taped statement to police was not harmless error; (2) the court committed reversible error in refusing to allow him to impeach the victim with a prior forgery conviction; (3) the victim's mother should not have been allowed to testify to his prior bad acts; and (4) the cumulative and combined effect of the errors denied him his right to a fair trial. We affirm.

In May 2005, defendant was charged with first degree aggravated domestic assault, first degree unlawful restraint, and violation of conditions of release, in connection with an alleged attack on his girlfriend. Before trial, the State amended the information to include a charge of aggravated second degree domestic assault based on an allegation that defendant recklessly caused bodily injury to girlfriend and that his conduct violated an order of protection.

Girlfriend provided a sworn, tape-recorded oral statement to police shortly after the incident in which she described the alleged assault as follows. Girlfriend had been out with her sister, defendant, and a friend. On the car ride home, defendant started calling her names and pulling her hair. He smacked her repeatedly and punched her head. She took a beer bottle and smashed it over his head. She and defendant exited the car and he kept shoving her down. The car drove away. Defendant then laid her on the ground and kept hitting her and pulling her hair, "rag-dolling" her around, and slapping her. She pretended to stop breathing, hoping that he would leave her alone. Defendant threatened to kill her. He then urinated all over her, including in her mouth, and bit her face. Girlfriend described other violent acts as well. She stated that she was extremely dirty from the assault, and missing her shoes, and she tried to flag down a passing car. Ultimately, she was picked up by a cab driver who took her to a friend's house. The court ruled before trial that the taped statement was not admissible as an excited utterance under V.R.E. 803(2) but it could be admitted as a prior inconsistent statement if girlfriend testified at trial that she fabricated the charge against defendant.

At trial, girlfriend denied that defendant assaulted her. She testified that on the evening in question, she was out drinking with defendant, her sister, and a male friend. On the way home from a bar, girlfriend was “freaking out” because defendant cheated on her. She stated that she hit defendant over the head with a beer bottle. She asked the driver to pull over so she could use the bathroom and both she and defendant exited the car. They were still arguing. She acknowledged telling police that defendant grabbed her by the hair and slapped her but she denied that it actually occurred. The parties’ friend drove away, and girlfriend stated that she began hitting defendant all over his body, kicking him in the genitals, hitting him in the face and head, and ripping off his shirt. According to girlfriend, defendant did not do anything other than ask her to stop hitting him. Girlfriend told defendant that she was going to do whatever she could to get him in trouble. She eventually flagged down a taxi and told the taxi driver that she had just gotten in a fight with her boyfriend and needed a ride home.

Girlfriend testified that she went to her friend’s house and told the friend that she was going to lie about what had happened. According to girlfriend, the friend agreed to help her and called police. When the police arrived, girlfriend told them that defendant assaulted her, bit her face, urinated in her mouth, strangled her, and tried to kill her. She could not remember if she also told police that she played dead. She stated that she was intoxicated when she made her statement to police and that she lied to get defendant in trouble. According to girlfriend, her injuries, including the bite mark, were inflicted during a fight with one of defendant’s other girlfriends the day before the alleged assault. She testified that her clothes were dirty and covered in urine due to her own actions. She testified that she loved defendant, he was a good father to their child, and she wanted to be in a relationship with him.

Girlfriend’s sister testified that she was in the car with girlfriend, defendant, and a male friend. Defendant and girlfriend were fighting in the back seat and the sister heard defendant slap her. The sister turned around and asked what happened, and girlfriend said that defendant just slapped her, to which defendant responded, “You’re fucking right, I did, you fucking pig.” Girlfriend then started crying. The sister went home shortly thereafter because she was afraid that the police would be called and at the time she was on furlough release from prison and did not want to get into trouble. She testified that she had not seen any marks or injuries on girlfriend prior to the car ride. The sister also stated that girlfriend later told her to lie at her deposition and say that girlfriend got into a fight with a girl and that she had the bite mark on her face earlier that evening.

The taxi driver also testified at trial. He stated that he picked up girlfriend around 4:00 a.m. after she flagged him down. She was very upset and crying. Her clothes were dirty, as if she had been rolling around on the ground, and she had a bite mark and scratches on her face. She told him that her boyfriend had taken her into the woods, beaten her up, and left her there. She stated that he bit her and that she was afraid to call the police because defendant threatened to kill her family. The taxi driver drove girlfriend to her friend’s house.

The friend testified that girlfriend arrived at her house at approximately 5:30 a.m., crying hysterically. Girlfriend was in a “pretty rough condition,” drenched in mud, feces, urine, water, and beer, and she had numerous marks and injuries, including bruising on her arms and legs, skinned

knees, a laceration above one eye, and a bite mark on her face. Girlfriend said that defendant tried to kill her and she described how defendant urinated on her, dragged her through dog poop, punched her, and slammed her head into the ground. Girlfriend also said that defendant held her over a bridge and she had to beg for her life, that she had to pretend she was dead to get him to leave, but he returned and dragged her back down, put her head back in the mud, and then walked away. The friend called police. The friend also testified that several weeks after the incident, girlfriend told her she was going to lie to get defendant out of trouble and she asked the friend to lie as well.

Detective Burke testified that when he arrived at the friend's home, girlfriend was upset, crying, and avoiding eye contact. He observed and photographed girlfriend's injuries, including a bite mark on her face, an abrasion on her hip, and bruises on her neck, which appeared to be consistent with the choking that she reported. Girlfriend told him that during the assault, defendant pulled her around by the hair, threw her to the ground in a wooded area, and urinated on her. She complained that her scalp hurt from having her hair pulled. In addition to photographing her injuries, Detective Burke also collected and photographed the clothing girlfriend had been wearing.

When Detective Burke indicated that he had a taped copy of girlfriend's sworn statement, a bench conference ensued. Defendant objected to the admission of the tape, arguing that the State called girlfriend for the sole purpose of admitting the taped statement, knowing what her trial testimony would be. The court rejected defendant's argument that the State was prohibited from calling girlfriend and concluded that the State could introduce her prior inconsistent statement. Shortly thereafter, the State moved to introduce the audio recording, and defendant indicated that he had no objections other than the ones already stated. The audio recording was then played into the record. A transcript of the interview was also admitted, but only as a guide to the audio recording.

Girlfriend's mother then testified to a prior bad act by defendant, which occurred approximately two months before the charged offenses. She explained that on the evening in question, girlfriend and girlfriend's children, one of whom is defendant's child, were at her house. Defendant arrived and got into a fight with girlfriend's brother. He stayed around the mother's locked house all night, banging on the widows, and threatening to burn down her house with the parties' child inside. Another witness present testified to this incident as well, stating that defendant had threatened to burn down the house. She testified that she also observed defendant slap girlfriend in the face while girlfriend was holding her baby, and that the following morning, defendant grabbed girlfriend's breast and slapped her face.

Defendant did not testify, but he presented a witness who stated that she observed the fight between girlfriend and another woman and she saw the woman bite girlfriend. The witness also stated that girlfriend had a reputation as a liar, and that girlfriend told her that she was going to make up a story to get defendant in trouble. The witness indicated that both the sister and the mother did not have good reputations for truthfulness either. Girlfriend also testified as a rebuttal witness for defendant.

The jury acquitted defendant of the unlawful restraint charge but found him guilty of a lesser included offense of domestic assault on the first count, second-degree aggravated domestic assault, and violation of conditions of release. Defendant moved for a new trial, arguing that the court

should have prevented girlfriend from testifying for the State and it should not have admitted her taped hearsay statement. He argued that the probative value of the taped statement was substantially outweighed by its prejudicial effect because girlfriend recanted this statement shortly after making it. The court denied defendant's request. As to defendant's claim that the court erred by admitting the tape-recorded statement, the court explained that it had issued a pretrial order allowing admission of the tape as a prior inconsistent statement should the victim deny that the assault occurred at trial. It found that defendant now asserted, without citing any legal authority, that the order was erroneous. Because his assertion was not accompanied by any facts, law or reasoning, the court declined to consider it. On its own motion, the court dismissed the domestic assault and VCR convictions on double jeopardy grounds.

After sentence was imposed, defendant filed a notice of appeal. While the appeal was pending, he filed a second motion to vacate his conviction and a motion for new trial. He argued that he had previously moved to exclude the taped hearsay statement and it should not have been admitted as substantive evidence. In an August 2006 decision, the court denied the motion. It explained that the statement was admissible for impeachment purposes, but it agreed, as did the State, that girlfriend's taped statement should not have been admitted as substantive evidence. The court noted that, although defendant initially requested a limiting instruction, he acquiesced to its exclusion and did not object to its absence from the closing instructions. The court also noted that defendant failed to renew his objection to the admissibility of the tape at trial.

Nonetheless, given that the statement was not admissible as substantive evidence, the court evaluated whether the error entitled defendant to a new trial. It concluded beyond a reasonable doubt that defendant would have been convicted absent this evidence. As the court explained, girlfriend testified at trial to what she had alleged in her statement to police, including that defendant assaulted her, bit her, urinated in her mouth, and tried to kill her. Thus, the jury had already heard the substance of what girlfriend had told police prior to the playing of the tape at trial. The court found a plethora of other evidence to support the conviction as well, including the testimony of the victim's sister, the taxi driver, and Ms. Pratt. From this, the court concluded that the improper admission of the videotaped statement constituted harmless error. This appeal followed.

Defendant first argues that the trial court wrongly concluded that the admission of the tape was harmless error. As an initial matter, he argues that he was not required to renew his objection to the admission of this evidence at trial given the court's definitive pretrial ruling. More importantly, he asserts that without the victim's taped hearsay statement, there was insufficient evidence to support his conviction.

We find these arguments without merit. First, the court's statement about defendant's failure to renew his objection at trial does not appear to have influenced its analysis in any respect. As to defendant's second concern, it is clear that the testimony of the sister and taxi cab driver, that defendant admitted slapping girlfriend and, according to girlfriend's excited utterance, defendant physically abused her, was sufficient prima facie evidence to support the State's complaint.

Even assuming that defendant did not need to renew his objection to the admissibility of this evidence at trial because the court made a definitive pretrial ruling, see V.R.E. 103(a)(2), we find

no basis to disturb the court's conclusion that the admission of the taped statement was harmless error. As the trial court recognized, an error in the admission of evidence is harmless only if, "absent the alleged error, it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict regardless of the error." State v. Catsam, 148 Vt. 366, 371 (1987) (quotations omitted); see V.R.Cr.P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). The relevant factors in this analysis are: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of the cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." State v. Oscarson, 2004 VT 4, ¶ 32, 176 Vt. 176 (quotations omitted).

To establish defendant's guilt of second degree aggravated domestic assault, the State needed to prove in relevant part that he recklessly caused bodily injury to girlfriend. See 13 V.S.A. §§ 1042, 1044(a)(1); see also id. § 1021(1) (" 'Bodily injury' means physical pain, illness or any impairment of physical condition"). While the tape did recite in detail girlfriend's allegations that she recanted on the stand, the State did not need to prove these details beyond a reasonable doubt to establish defendant's guilt. In light of the other evidence presented at trial, we agree with the trial court that the admission of the taped statement was harmless error. The record shows that girlfriend described substantive portions of her taped statement in her testimony at trial and was subject to cross-examination about her prior statement. She acknowledged that she told police that defendant assaulted her, bit her face, urinated in her mouth, strangled her, and tried to kill her. Detective Burke also testified that girlfriend made such statements. He testified without objection that girlfriend told him that during the assault, defendant pulled her around by the hair, threw her to the ground in a wooded area, and urinated on her. The friend also described many of the same alleged acts related to her by girlfriend shortly after the assault. With respect to many of the alleged acts of violence perpetuated by defendant, the tape itself was merely cumulative evidence. Girlfriend's initial account of the assault was also corroborated by numerous witnesses, including the testimony of Detective Burke, the friend, and the taxi cab driver. Detective Burke also observed girlfriend's injuries, and several other witnesses testified to girlfriend's condition both before and shortly after the assault, which was consistent with the descriptions of being attacked, bitten on the face, and urinated upon that girlfriend initially provided and were admissible. Girlfriend's sister also testified that she heard the sound of a slap from the back seat, and defendant admitted that he had just slapped girlfriend. Based on this and other evidence in the record, we conclude that the admission of the tape was harmless error.

Defendant next argues that the trial court reversibly erred by preventing him from impeaching girlfriend with a prior forgery conviction. He maintains that this case presented a credibility contest and he should have been allowed to fully explore girlfriend's credibility.

The record shows that the trial court excluded this evidence after finding that its probative value did not exceed its prejudicial effect. It did not abuse its discretion in reaching this conclusion. See State v. Ogden, 161 Vt. 336, 341 (1993) ("Absent an abuse of discretion, in which the court either totally withholds or exercises its discretion on clearly untenable or unreasonable grounds, the trial court's evidentiary ruling stands on appeal."). The court found that girlfriend was already

“impeachable three or four different ways,” and that it was not going to “heap additional impeachment techniques upon her.” The record amply supports this decision. Girlfriend’s credibility was impeached by numerous witnesses and other evidence at trial. Girlfriend herself admitted that she lied on numerous occasions, including in her statement to police. The court did not abuse its discretion in excluding evidence of girlfriend’s prior forgery conviction.

Defendant next asserts that the court committed reversible error by allowing girlfriend’s mother to testify to a prior bad act that did not involve girlfriend. He maintains that because the incident did not involve girlfriend, it did not fall within the scope of “context” evidence admissible in domestic assault cases, and it was not admissible under any of the other grounds set forth in V.R.E. 404(b). According to defendant, the mother’s testimony was simply propensity evidence. He also asserts that, although the court evaluated this evidence under V.R.E. 403 in its pretrial ruling, it erred by failing to conduct a balancing test again at trial. He argues that the evidence had a high risk of being unfairly prejudicial, and it had little or no probative value, particularly when another witness testified to defendant’s assault on girlfriend the following day.

We find no error. The record indicates that the court made a definitive ruling before trial about the admissibility of defendant’s prior bad acts. As the court explained in its written decision, girlfriend was found by police shortly after the incident distraught, sobbing, and apparently beaten. At that time, she identified defendant as her assailant but she recanted her story sometime thereafter. The court concluded that, given these circumstances, evidence of defendant’s prior conduct was admissible under Rule 404(b) not only to show context but also to show the absence of mistake and the motivation for girlfriend’s recantation. The court explicitly engaged in the balancing test set forth in Rule 403, and concluded that the probative value of the evidence outweighed its prejudicial effect. The court found the probative value of the prior bad act evidence was high because it helped to establish the context of the offense and it provided reasons why girlfriend recanted her accusations. On the other hand, the danger of unfair prejudice was low. In view of the circumstances wherein girlfriend recanted an accusation in the face of a severe assault, it was not unfairly prejudicial to advise the jury about possible reasons for the change in her story. The court therefore denied defendant’s motion to exclude.

The record shows that just prior to the mother’s testimony at trial, defendant questioned “what she would be able to add” because her deposition testimony indicated that she did not actually witness defendant assaulting girlfriend and she thus lacked personal knowledge. The State responded that the mother’s testimony related to the bad acts evidence that the court had previously ruled upon. No formal objection was raised, and the parties both moved on to other matters.

The court did not commit reversible error in allowing the mother to testify. See State v. Sanders, 168 Vt. 60, 62 (1998) (“In reviewing the trial court’s admission of evidence under V.R.E. 404(b), we must decide whether the evidence was both relevant and material to the subject cause of action, and if so, whether the trial court abused its discretion in deciding that the introduction of such evidence was more probative than prejudicial under V.R.E. 403.” (citation omitted)). As reflected above, the mother testified that girlfriend was in the house while defendant was banging on the locked doors and windows all night, threatening to burn down the house with the parties’ child inside. Given that girlfriend was in the house during this time, defendant’s actions “involved” her,

and the testimony offered by the mother was relevant as context evidence to help explain to the jury why girlfriend might recant. See *id.* at 62-63 (explaining that previous incidents of domestic abuse are relevant to put the victim’s recantation of prior statements into context for the jury, and noting that victims of domestic abuse “are likely to change their stories out of fear of retribution, or even out of misguided affection”). Because the trial court had already conducted a balancing test under Rule 403, and because at trial, defendant raised only the issue of the mother’s lack of personal knowledge, the court did not err by failing to conduct another balancing test at trial. Cf. *State v. Shippee*, 2003 VT 106, ¶¶ 10-12, 176 Vt. 542 (mem.) (concluding that trial court should have engaged in explicit balancing test before admitting prior bad act evidence at trial where it had denied the State’s initial proffer on Rule 403 grounds, and where defendant raised a “propensity” objection at trial when the State again moved to admit this evidence). Even if the court did err in allowing this testimony, it was harmless. The mother’s testimony was cumulative to the testimony offered by the other witness present at the house that night, and defendant fails to show that the admission of the mother’s testimony warrants reversal of his conviction.

Finally, we reject defendant’s assertion that he was denied a fair trial due to the cumulative and combined effect of errors at trial. Defendant waived this argument by failing to raise it below, and even if it had been preserved, we would find it without merit in light of our conclusions above.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice