

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2006-520

NOVEMBER TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Washington Circuit
	}	
Raymond Normandy	}	DOCKET NO. 169-2-06 Wncr

Trial Judge: Walter M. Morris

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

Defendant appeals his conviction of two counts of first-degree domestic assault and one count of obstruction of justice, and his resulting sentence. On appeal, defendant argues that the court (1) violated his right to confrontation by limiting cross-examination of the complaining witness regarding recent charges against her, and (2) erred in denying defendant's motion for a mistrial because of improper witness statements. We affirm.

In February 2006, defendant was living with complainant, his then-girlfriend, in an apartment rented by defendant's friend. According to complainant, on February 12, defendant returned to the apartment drunk, and the two began to fight. Defendant grabbed her by the throat, pushed her to the floor and choked her. When the friend said she would call the police, defendant threatened to kill complainant. Defendant assaulted complainant again, this time slamming her head into a mirror. Defendant then left the apartment for a short time. Complainant knew that defendant was on furlough status and warned him not to return or she would call the Department of Corrections Field Supervision Unit (FSU). When defendant returned and refused to leave, the friend called FSU and two officers arrived. They took defendant away. The officers questioned the women, and examined complainant. The State charged defendant with two counts of domestic assault and with obstruction of justice.

At trial, complainant testified for the State, as did the FSU officers. The friend had moved out of state and did not testify. The jury convicted defendant of all three counts, and defendant appealed.

First, defendant claims that the court violated his right to confront adverse witnesses when the court limited cross examination of the complaining witness regarding any recent or

pending charges against her. We conclude that the court's rulings did not violate defendant's right to confrontation.

The right to confront adverse witnesses includes the right to conduct effective cross-examination. Davis v. Alaska, 415 U.S. 308, 315 (1974). One method of discrediting a witness on cross-exam is to reveal any motivation for potential bias, including revealing facts showing that a witness has received favorable treatment from the State in exchange for testimony. Id. at 316, 319-20. In this case, defendant contends that he had a good faith basis for believing that complainant had recently been issued a criminal citation and the State had decided not to bring a formal charge. Defendant argues that the court prevented him from questioning complainant about her citation and the favorable outcome. Although we agree with defendant that information about whether a witness is receiving favorable treatment in exchange for testimony is admissible to demonstrate bias, we disagree that in this case defendant was precluded from eliciting this type of testimony.

During cross-examination, defendant questioned whether complainant had any current criminal charges pending and the witness answered negatively. Defense counsel then asked if she had recently had charges pending against her and the witness answered, "No, I did not." The State objected, and the court held a brief conversation at the bench. Defense counsel submitted that the information was relevant as to whether complainant had a bias or motivation to lie. The court sustained the objection. Defendant then questioned the witness as to whether her current boyfriend had any charges pending against him. The State objected that the information was not relevant and defendant again proffered that it would demonstrate complainant's bias. The court ruled that defendant could question the witness about any expectations she had for receiving favorable treatment, but could not question her about her boyfriend's particular charges. Defendant did not pursue the line of questioning any farther. Later in the day, defendant renewed his objection. The State explained that it did not object to defendant questioning the witness as to whether she had any motive to lie, explaining "the question could have been asked, and may still be asked, why are you here today, has anybody promised you anything?" The court ruled that defendant could question complainant as to whether she "anticipated favor by reason of cooperation with the State," but could not ask about specifics of any charges pending against her boyfriend. Defendant then did in fact question complainant and she testified that she had not discussed her boyfriend's charges with the prosecutor prior to testifying. On redirect examination, complainant testified that she was not being promised any favorable treatment in exchange for her testimony.

The court did not impermissibly limit defendant's cross-examination of complainant. This case is similar to State v. Carter, where we concluded that the court did not violate defendant's confrontation right because defendant had an opportunity to cross examine the witness about pending charges. 156 Vt. 437, 446-47 (1991). As in Carter, defendant had an opportunity to question the complainant about her credibility and to explore his theory that she had a motivation to lie. Defendant's failure to elicit the response he desired does not equate to a denial of confrontation. See Carter, 156 Vt. at 445-6 (explaining that witness' reluctance or inability to answer questions about the disposition of past criminal charges did not prevent defendant from bringing the witness' possible bias to the jury's attention). We find no violation of defendant's right to confront adverse witnesses.

Second, defendant argues that the court erred in denying his motion for a mistrial. “The disposition of a motion for mistrial is discretionary, and, as such, a claim of error can be supported only where the trial court’s discretion was either totally withheld or exercised on clearly untenable or unreasonable grounds.” State v. Messier, 2005 VT 98, ¶ 15, 178 Vt. 412. We will reverse only where the moving party demonstrates prejudice, as evidenced by the entire proceeding. Id.

Prior to trial, defendant moved to exclude certain testimony. Defendant sought to prevent witnesses from referring to his prior misconduct and convictions, as well as his status as a furloughed prisoner. The State stipulated that it would not solicit any information regarding defendant’s prior convictions or bad acts. The court ruled that FSU officers could testify about their professional duties generally, but could not reference defendant’s arrest or compelled removal. The court also ruled that the FSU officers could not recount complainant’s statements about her version of the events, but could relate any statements about her then-existing mental or physical condition.

Defendant argues that the State violated the in limine ruling in two ways. During complainant’s testimony she stated that defendant had showed signs of being violent in the past and had sold heroin. Defendant did not object following these statements. On cross-exam of complainant, the following exchange took place,

Q: You had no idea this was going to trial?

A: No, I did not.

Q: Did you assume your word would be enough to have him punished?

A: No. I assumed because of his past record that that would be enough to keep him in jail, along with what he did to me.

Defendant did not object at the time, but moved for a mistrial at the end of complainant’s testimony, arguing that she had referred to defendant past record in violation of the in limine ruling. The court denied defendant’s request, concluding that the reference to defendant’s past record was ambiguous and could have been construed as merely a reference to this particular incident and not any prior conviction. The court offered to provide a curative instruction if defendant requested or suggested one. Defendant did not request that the court include any such instruction.

Defendant also contends that the FSU officers violated the in limine ruling during their testimony by relating hearsay statements that the complainant made to them following the alleged abuse. In particular, one FSU officer testified that “[complainant] had said she had been choked and had injuries.” Defendant did not object. Defendant argues that these statements impermissibly bolstered complainant’s testimony, which prejudiced him because the case depended on her credibility.

As an initial matter, we emphasize that defendant did not contemporaneously object to admission of the statements at issue. Without a contemporaneous objection, the trial court did not have an opportunity to give the jury a curative instruction. See Messier, 2005 VT 98, ¶ 20 (explaining that a prompt curative instruction alleviated prejudice). When defendant objected at

the close of the evidence, the court offered to provide such an instruction, but defendant did not request one.

Furthermore, defendant has not shown that the above-cited statements prejudiced the entire proceeding. Messier, 2005 VT 98, ¶ 15. As noted, the references to defendant's past record were brief and ambiguous. Similarly, the FSU officers' statements about complainant's version of the alleged attack were brief and not the focus of their testimony. Therefore, in the context of the entire proceeding, we conclude that defendant was not impermissibly prejudiced and the court was within its discretion to deny defendant's motion for a mistrial. See State v. Desautels, 2006 VT 84, ¶ 11, 180 Vt. 189 (affirming trial court's denial of a new trial because harmful remark not prejudicial where it was not the focus of the testimony).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice