

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

VERMONT SUPREME COURT  
FILED IN CLERK'S OFFICE

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2008-033

JAN 14 2009

JANUARY TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
	}	
Jeffrey T. Smith	}	DOCKET NO. 1542-4-06 CnCr

Trial Judge: Michael S. Kupersmith

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

Defendant appeals his sentence of 30 years to life following a contested sentencing hearing in the district court. He contends the court abused its discretion in allowing the State to introduce evidence at the hearing that had not been previously disclosed to the defense. We affirm.

Defendant pled guilty to aggravated sexual assault pursuant to a plea agreement which provided that charges of attempted murder and kidnapping would be dismissed, that the State would argue for a sentence of no more than 30 years to life, and that defendant would be free to argue for less. At the plea hearing, defendant admitted that he engaged in anal sex with the victim without her consent and while choking her with his arm to the extent that it impeded her breathing. The court accepted the plea and ordered a presentence investigation report (PSI), which was completed in October 2007 and sent to the parties. The PSI included an interview with defendant's former wife (who was not the victim of the charged offenses) in which she stated that defendant had been "verbally and physically abusive" to her during their relationship, recounting one incident in which he struck her and caused her head to bounce off a door jam.

The State called four witnesses at the sentencing hearing: defendant's former wife, the victim, an emergency room physician, and a neighbor who had called the police to report the assault. Defendant's claim relates solely to an incident recounted by his former wife in which she testified that, on one occasion in 1994, defendant chased her down a hallway and choked her. The state's attorney inquired about the incident in some detail before shifting his questions to the witness's concerns about her daughter's safety. At that point, defense counsel interposed an objection, asserting that "[t]he scope of the testimony is well beyond anything that was discussed

in the PSI.” The court overruled the objection, and the witness later testified without objection to a second incident in 1996 in which defendant had slammed her head against a door and to a number of instances in which she had sexual intercourse with defendant when she did not want to. At the conclusion of defense counsel’s cross-examination, counsel indicated that he continued to “object to statements that were made [by the witness] beyond what was recounted in the prior statement to which we did not object.”

The prosecutor referred to the former wife’s testimony during closing argument, citing the choking incident as evidence that defendant had a history of violence and was a risk to re-offend. In imposing sentence the court referred to the testimony of defendant’s former wife as proof that defendant “was involved in abuse of women prior to this incident” but characterized the charged offense as “the single most vicious crime” short of homicide that it had seen. The court explained that it was imposing sentence based on that offense alone, which it referred to as a “defining event” that required a lengthy sentence to protect the public “even had there been no other offenses or abuses committed by” defendant.

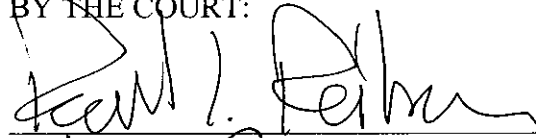
On appeal, defendant contends that the court violated his statutory and constitutional rights by allowing the testimony concerning the prior choking incident without prior notice to defendant. Defendant relies on V.R.Cr.P. 32(c)(3), which provides that “[a]ny other information submitted to the court for consideration at sentencing shall be disclosed sufficiently prior to the imposition of sentence as to afford reasonable opportunity for the parties to decide what information, if any, the parties intend to controvert by the production of evidence.” See also State v. Ramsay, 146 Vt. 70, 78 (1985) (recognizing that defendant has a constitutional right not to be sentenced on the basis of materially untrue information and that factual reliability “is sought through a process of disclosure and opportunity to rebut”).

Defendant’s claim fails on several grounds. First, the record does not disclose a timely and specific objection to the challenged testimony. The witness testified about the choking incident over the course of several pages of transcript before defendant raised an objection, and even then the subject of the objection was unclear. See State v. Decoteau, 2007 VT 94, ¶10 (party opposing the introduction of evidence “must object at the time the evidence is offered to preserve this issue for appeal”). Even assuming a timely objection, however, defendant was fully informed in advance through the PSI of his former wife’s claim that he had physically abused her during their marriage, and had adequate opportunity to discover and rebut the details of her allegations by way of deposition or a continuance, which were not sought here. See State v. Pellerin, 164 Vt. 376, 382 (1995) (noting that defendant was aware his past offenses would be raised at sentencing and had adequate opportunity to controvert evidence through cross-examination or request for continuance). Finally, and most tellingly, the court stated plainly that the sentence was based on the vicious nature of the offense and the need to protect the public and would have been imposed “even had there been no other offenses or abuses committed by” defendant. Accordingly, any conceivable error in the admission of the evidence was harmless. See State v. Kimmick, 2007 VT 45, ¶ 8 (finding no prejudicial error where “the district court did

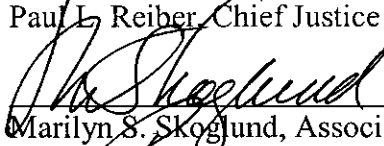
not relate its conclusions regarding the sentence to the [challenged] statements”). Accordingly, we find no basis to disturb the sentence.

Affirmed.

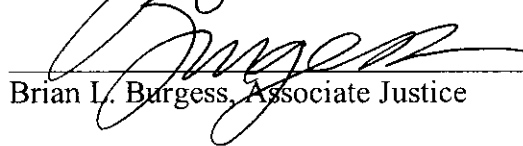
BY THE COURT:



Paul L. Reiber, Chief Justice



Marilyn S. Skoglund, Associate Justice



Brian L. Burgess, Associate Justice