

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2001-039

DECEMBER TERM, 2001

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	
Nelson A. Barney, Jr	}	Unit No. 2, Bennington Circuit
	}	
	}	DOCKET NO. 566-4-00 Bncr
	}	
	}	Trial Judge: Nancy Corsones
	}	

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

Defendant appeals his jury conviction of aggravated domestic assault, arguing that the combination of discovery violations, improper prosecutorial remarks, and erroneous evidentiary rulings deprived him of a fair trial. We affirm.

Defendant was charged with three counts of aggravated domestic assault based on three separate incidents allegedly occurring on March 25, April 2, and April 5, 2000. Each of the alleged incidents took place in defendant's home, where he lived with his girlfriend, Shannon, his then nine-year-old daughter, Crystal, Shannon's then nine-year-old daughter, Kaylee, and other siblings. The first charge was based on Crystal's report to a school nurse that on March 25 defendant had grabbed her by the throat and banged her into a couch. That charge was dismissed after Crystal testified at the hearing on defendant's motion to dismiss that her father had merely held her under the arm pits and sat her down. The second charge was based on Kaylee's report to a school nurse that on April 2 defendant had grabbed her by the neck and thrown her onto a couch. That count survived defendant's motion to dismiss, but was dismissed by the State at trial after Kaylee testified that defendant had merely grabbed her by the arm and led her over to a couch. The third charge was based upon Shannon's report that on April 5 defendant had, among other things, grabbed her by the neck and thrown her onto the floor. Apparently, Shannon backed away from this version of what took place until the day before trial, at which point she decided that she would testify fully against defendant. Following a jury trial, defendant was convicted of aggravated domestic assault because of his prior 1997 conviction for assaulting Shannon. He was sentenced to a six-to-ten-year prison term.

On appeal, defendant contends that a combination of erroneous court rulings and improper prosecutorial tactics deprived him of a fair trial. His specific claims of error are that (1) the prosecutor and the trial court improperly discussed defendant's custody status in front of the jury pool during voir dire; (2) the court abused its discretion by allowing the State to use the evidence presented on the charge concerning Kaylee as prior-bad-act evidence in support of its charge concerning Shannon; (3) the trial court erred in ruling that the State did not violate the notice requirements of V.R.Cr.P. 26(c); and (4) the trial court erroneously relied upon State v. Sanders, 168 Vt. 60 (1998) in admitting evidence of an alleged December 1999 assault by defendant on Crystal.

Before considering defendant's general argument that he was deprived of a fair trial, we first examine each of his four specific claims of error. We find unavailing defendant's claim that the jury pool was tainted by an improper exchange between the trial judge and the prosecutor. The allegedly improper exchange took place during voir dire, when the trial judge responded to the prosecutor's queries by confirming that defendant was in jail on \$25,000 bail. The transcript of the voir dire proceeding indicates, however, that the exchange took place at the bench; thus, it presumably was not overheard by the prospective jurors. See Reynolds v. City of Little Rock, 893 F.2d 1004, 1007 (8th Cir. 1990) (court on

review assumes that comments made during bench conference were out of hearing of jury). If defendant has evidence outside the trial court record that the exchange was overheard by jurors, the proper avenue for such a claim is a post-conviction-relief proceeding, where the facts can be examined more fully. See State v. Durling, 140 Vt. 491, 497 (1981) (post-conviction-relief proceeding permits review based on developed record and full evaluation of all relevant issues, rather than on inadequate inferences of trial transcript).

Next, defendant argues that the trial court abused its discretion by allowing evidence of his assault against Kaylee to be admitted as prior-bad-act evidence in support of the charge concerning Shannon. According to defendant, admission of this evidence was highly prejudicial to him because it allowed the jury to infer that he had a propensity to commit the act that formed the basis of the remaining charge against him. We find no abuse of discretion and, in any case, no prejudice. After resting its case-in-chief, the State dismissed the charge against Kaylee, presumably because she testified that defendant had merely held her under the arms and led her to the couch, and that she did not remember making an inconsistent statement earlier to the school nurse. Following the State's dismissal of its charge against Kaylee, the attorneys debated as to whether the jury should be allowed to consider evidence of the alleged assault on Kaylee to support the remaining charge concerning Shannon. The court eventually instructed the jurors that if they found by a preponderance of the evidence that defendant had in fact committed other bad acts reported by witnesses, those acts could not be considered as evidence that defendant committed the remaining charged offense, but could be considered to put into context Shannon's prior recantations, the testimony of Crystal and Kaylee, and the alleged assault against Shannon.

We conclude that the trial court acted within its discretion in treating Kaylee's testimony as admissible evidence in support of the charge concerning Shannon, given that the testimony had the potential to demonstrate that Kaylee had "sanitized" her version of what occurred on April 5 either because she was afraid of defendant or wanted to protect him.

Next, defendant argues that the trial court erred by ruling that the State did not violate the notice requirements of V.R.Cr.P. 26(c). Rule 26(c) requires the State to provide the defendant in a criminal action with a written statement at least seven days before trial setting forth evidence of other crimes that it intends to offer under V.R.E. 404(b) or V.R.E. 609, "except that the court may allow the notice to be given at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case." Here, four days before trial, the prosecutor faxed defense counsel materials concerning prior-bad-act evidence that the State intended to use. On the morning of the first day of trial, but before the trial began, defense counsel complained that the notice was late and incomplete. The attorneys then debated whether there had been a discovery violation and whether evidence of defendant's prior assaults on Crystal and Shannon should be admitted. Following the discussion, the trial court ruled that there was no notice violation because (1) evidence of a December 1999 assault on Crystal and a March 2000 assault on Shannon was newly discovered and could not have been obtained earlier through due diligence; and (2) defendant was on notice with respect to a 1997 assault on Shannon because that assault was the predicate conviction and thus an element of the charged offense - aggravated domestic assault. Before the trial commenced, the court also ruled, after hearing argument from both sides, that the three prior assaults noted above were admissible under State v. Sanders, 168 Vt. 60 (1998) to provide context for the relationship among defendant and the victims, particularly given Shannon's history of recantations.

Defendant briefly argues that he was prejudiced by the State's late notice, but fails to address, let alone challenge, the trial court's reasoning for its ruling concerning Rule 26(c). Consequently, defendant has waived any claim that the court's ruling was erroneous. See State v. Fuller, 168 Vt. 396, 409 (1998) (assertions unaccompanied by facts, law, or reasoning will not be considered); State v. Taylor, 145 Vt. 437, 439 (1985) (appellant has burden to make proper presentation of claims of error on appeal, and this Court will not construct an appellate case for either party). Moreover, defendant cannot claim prejudice from any notice violation, given that the trial court ruled on the admissibility of the prior bad acts before trial and after hearing argument from both sides, and that defendant did not seek a continuance of the trial based on any lack of notice. See Sanders, 168 Vt. at 61 (because purpose of Rule 26(c) is to inform defendant of crimes State intends to introduce and to allow defendant time to respond, if defendant actually brings motion in limine to exclude prior-bad-act evidence, he cannot claim insufficient notice); State v. Kelley, 163 Vt. 325, 329-30 (1995) (trial court's erroneous ruling under Rule 26(c) was harmless because before trial court considered and ruled on defendant's motion in limine to exclude evidence, and thus purpose of Rule 26(c) was fulfilled).

Finally, defendant argues that the trial court construed Sanders too broadly by admitting evidence of his alleged December 1999 assault on Crystal. Defendant points out that the charge concerning Crystal, which was based on a separate incident, had already been dismissed. He contends that, because Crystal was not the victim with respect to the remaining charged offense, introducing evidence of his alleged assault on her could not be used to show context concerning the relationship between him and the alleged victim, Shannon. We conclude that the trial court did not abuse its discretion in admitting evidence of defendant's alleged December 1999 assault on Crystal. The State argued, and the court instructed, that the evidence was admissible to place Crystal's testimony concerning the alleged assault on Shannon in context. Like Kaylee, Crystal was an eyewitness to the April 5 incident that led to the charge concerning Shannon. Crystal's trial testimony was directly contrary to that of Shannon, however, in that it depicted Shannon, and not her father, as the instigator and aggressor. To properly evaluate this testimony, the jury was entitled to hear evidence on the nature of the relationship between Crystal and her father. As we stated in Sanders:

Previous incidents of domestic abuse are also relevant to put the victim's recantation of prior statements into context for the jury. Victims of domestic abuse are likely to change their stories out of fear of retribution, or even misguided affection. This prior history of abuse gives the jury an understanding of why the victim is less than candid in her testimony and allows them to decide more accurately which of the victim's statements more reliably reflect reality.

168 Vt. at 63 (internal citations omitted).

That same reasoning is applicable to eye witnesses to an assault who themselves have been victims of the defendant's abuse. Allowing the jurors to hear Crystal's version of the April 5 incident without permitting them to evaluate her testimony in light of her relationship with defendant would have left them with an incomplete picture of the dynamics of the relationships among the persons involved in the incident. See State v. Torres, 556 P.2d 1159, 1162 (Ariz. Ct. App. 1976) (evidence that defendant had choked and thrown jar at witness was admissible to explain why witness would fear defendant and therefore lie to corroborate defendant's version of what occurred); Mitchell v. State, 427 S.E.2d 814, 815-16 (Ga. Ct. App. 1993) (prosecution could use defendant's prior bad acts to show that his alibi witness may have been testifying out of fear of him because of prior beatings); cf. State v. Crannell, 170 Vt. 387, 406-07 (2000) (trial court may admit prior-bad-act evidence to rehabilitate State's witness).

Having rejected each of defendant's individual claims of error, we also reject his principal argument that he was deprived of a fair trial because of the combination of those claimed errors.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice