

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-332

APRIL TERM, 2003

State of Vermont

v.

Edwin Rodriguez

}	APPEALED FROM:
}	
}	District Court of Vermont, Unit No. 2,
}	Bennington Circuit
}	
}	DOCKET NO. 2-1-01 Bncr
}	
}	Trial Judge: David A. Howard
}	

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

Defendant Edwin Rodriguez appeals his conviction of burglary, simple assault, and aggravated assault. He argues that: (1) insufficient evidence supports his aggravated assault and burglary convictions; (2) the court erred in giving the jury an instruction on flight; and (3) the court erred in allowing the victim's wife to testify that she believed that defendant had previously assaulted another woman. We affirm.

Defendant was charged with burglary, two counts of aggravated assault, and simple assault after a December 24, 2000 fracas. The following evidence was presented at trial. On December 24, 2000, Melissa Benson invited her estranged husband John Benson to her apartment to spend time with their two young children. John arrived very intoxicated and argued with Nicky Bessette, a neighbor who was in the apartment. After John called her a "stupid bitch," Nicky left the apartment and returned with defendant, her boyfriend. Defendant confronted John, and the two quarreled. At Melissa's urging, defendant and Nicky left the apartment. They quickly returned, and defendant and John squabbled through the closed front door of the apartment. Melissa testified that defendant threatened to break down the door. Defendant then entered the apartment brandishing a club, and a fight between John and defendant ensued. Melissa did not see defendant strike John with the club but assumed that he had based on John's injuries. Two police officers testified that John's eye injury was more consistent with being hit by a club than by a fist. Melissa observed defendant choking John with the club and, when she tried to intervene, defendant struck her in the face. Nicky's father arrived and broke up the fight, and Nicky and defendant departed.

When the police arrived, Melissa and John refused to give written statements about the incident. Melissa later executed a statement denying that defendant had assaulted her or had broken into her apartment. At her deposition, Melissa claimed that she did not know what had taken place that evening. At trial, Melissa testified that she had lied in her pretrial statements because she had been threatened by Nicky and was afraid of defendant. Over defendant's objection, Melissa testified that one reason she feared defendant was her belief that he had previously assaulted another woman.

Officer Weiland Ross testified that police did not locate defendant until six days after the incident. Defendant acknowledged that he had left the area after the incident even though he knew that the police were looking for him. When police finally located defendant at Nicky's house, defendant refused to surrender until officers were able to "talk him out of the house" twenty minutes later. Over defendant's objection, the court later instructed the jury that if they found that the evidence established that defendant had fled, they could consider it in reaching their verdict. Defendant

twice moved for a judgment of acquittal, arguing that there was insufficient evidence to support the charges against him. The court denied his motions. Defendant was subsequently convicted of burglary, aggravated assault, and simple assault. This appeal followed.

Defendant first argues that his aggravated assault conviction, which stemmed from clubbing John, is not supported by sufficient evidence. Defendant asserts that the evidence presented to support this charge was based on " assumption and conjecture." A person is guilty of aggravated assault if he " attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon." 13 V.S.A. § 1024(a)(2). On review, we ask whether the evidence presented, " when viewed in the light most favorable to the State and excluding any modifying evidence, fairly and reasonably tends to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt." State v. Delisle, 162 Vt. 293, 307 (1994) (citation and internal quotation marks omitted). In this case, the State presented evidence that defendant entered Melissa' s apartment carrying a club. Melissa did not see defendant strike John with the club because she was tending to her two young children, but she surmised that it had caused John' s facial injuries. She observed defendant choke John with the club. Two police officers testified that John' s eye injury was consistent with the use of a club, rather than a fist. This evidence, while circumstantial, is sufficient to convince a reasonable trier of fact that defendant was guilty of aggravated assault beyond a reasonable doubt. See State v. Colby, 140 Vt. 638, 642 (1982) (guilt may be proved by circumstantial evidence alone, if evidence is otherwise proper).

Defendant next contends that his burglary conviction is not supported by sufficient evidence because the evidence does not show that he knowingly entered the apartment without license or privilege to do so. See 13 V.S.A. § 1201(a). We disagree. The State presented evidence that defendant returned to Melissa' s apartment after being asked to leave. After arguing with John through the closed front door of the apartment, defendant threatened to break the door down. He then entered the apartment. This evidence, viewed in the light most favorable to the State, is sufficient to convince a reasonable trier of fact that defendant entered the apartment without license or privilege to do so and is therefore guilty of burglary beyond a reasonable doubt. See Delisle, 162 Vt. at 307.

Defendant next argues that the court erred in giving the jury an instruction on flight. He maintains that there was no evidence that he fled the scene, and therefore the court' s instruction constitutes reversible error. We disagree. The State presented evidence that police did not locate defendant until six days after the incident. Defendant acknowledged that he left the area after the incident even though he knew the police were looking for him. Defendant initially refused to surrender to police and had to be " talked out" of Nicky' s home. The court instructed the jury that they could decide whether this evidence indicated flight and, if so, whether defendant' s flight was precipitated by reasons other than guilt. The court made clear that evidence of flight alone would be insufficient to prove guilt beyond a reasonable doubt. We find no error in this instruction. See State v. Unwin, 139 Vt. 186, 193-94 (1980), cert. denied, 450 U.S. 1033 (1981) (no error in court' s carefully limited flight instruction); State v. Giroux, 151 Vt. 361, 366 (1989) (same).

Finally, defendant argues that the court erred in allowing Melissa to testify that she feared defendant because he had allegedly assaulted another woman. Defendant argues that this statement should have been excluded because its prejudicial effect outweighs its probative value. The trial court has substantial discretion in making a determination under V.R.E. 403, and its decision will not be overturned absent an abuse of discretion. State v. McElreavy, 157 Vt. 18, 23 (1991). To support a claim of abuse of discretion, defendant must show that the court' s discretion was totally withheld or exercised on clearly untenable or unreasonable grounds. Id. We find no abuse of discretion here.

In this case, defendant filed a motion in limine to prevent the State from introducing evidence about Nicky' s threat to Melissa, defendant' s gang activity and drug dealing, and his alleged assault on the " mother of his child." The State sought to show that Melissa lied in her pretrial statements because she was afraid of defendant. Defendant argued that this information should be excluded because it was irrelevant and unduly prejudicial. After weighing the evidence under Rule 403, the court concluded that defendant' s alleged drug dealing and gang involvement should be excluded as unduly prejudicial. The court allowed testimony about the threat, explaining that it was a " straightforward example" of why a witness might say they gave inconsistent statements. As to defendant' s alleged prior assault on the " mother of his child," the court ruled that Melissa could testify that she heard that defendant had assaulted a woman and that this caused her concern and fear. However, to avoid undue prejudice, the court prohibited Melissa from discussing whether this assault occurred on the mother of his child. The court sought to further minimize any prejudicial effect by giving a cautionary instruction to the jury immediately following Melissa' s testimony. Under these circumstances, we find no

abuse of discretion in the court' s decision to admit this testimony.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Ernest W. Gibson III, Associate Justice (Ret.)

Specially Assigned