

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-250

JULY TERM, 2006

State of Vermont

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APPEALED FROM:

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v.

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District Court of Vermont,

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Unit No. 2, Addison Circuit

Sean P. Tremblay

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DOCKET NO. 825-11-02 AnCr

Trial Judge: Helen M. Toor

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

Defendant appeals from a judgment of conviction, based upon a jury verdict, of unlawful trespass, reckless endangerment, and two counts of simple assault. He contends the court erroneously admitted: (1) evidence of statements made by the victims to their neighbor as prior consistent statements; and (2) bad act evidence irrelevant to the crimes charged. We affirm.

Defendant=s conviction was the result of events that occurred in the early morning hours of November 19, 2002. Elizabeth Corey, then 16 years old, and her sister Amanda, then 14 years old, lived in a mobile home

park in Middlebury with their mother Christine. Christine had left the girls to spend the night with a friend. Elizabeth recalled that, at about 1:00 a.m, defendantCa neighbor and friend of the familyCknocked on the mobile home door and window. Elizabeth let him in and observed that he was carrying a can of beer and a rifle. Defendant said that he needed a place to stay, and Elizabeth told him that it was not a good idea to stay at the mobile home because her mother was not present. Defendant persisted, and Elizabeth eventually told him that he could sleep on the couch. Amanda remained in her room.

A short time later, defendant entered Elizabeth=s room, talked with her for about 25 minutes, then left to enter Amanda=s room. Elizabeth heard Amanda ask defendant to leave. She then entered Amanda=s room to observe defendant lying on the bed with Amanda. Elizabeth told defendant it was time to leave. Defendant, in response, picked up a handgun that was lying on the floor next to the bed, grabbed Elizabeth around the neck, pushed her against the wall, and pointed the gun at her head. Defendant told her, AYou can both die. . . . You both could lay here on the floor bleeding to death and no one would care.@ Amanda tried to push defendant away from her sister, and defendant, in response, put the handgun to Amanda=s head. The trio then moved to the living room, where the girls discussed trying to contact their neighbor, Kevin Taylor. Defendant, in response, picked up the rifle that he had left on the kitchen counter, pointed it at Elizabeth, and said that he was leaving and that he would shoot them if they went outside. Defendant then left the mobile home and paced outside for about five minutes before departing.

The two girls went to sleep together in Amanda=s room until about 6:30 a.m. Elizabeth then looked outside to make sure that defendant was gone, and the two girls then went to the mobile home of their neighbor, Kevin Taylor, to report what had happened. Taylor had Elizabeth call her mother to report the incident. Her mother then called the police, and Elizabeth gave a statement about the events of that morning. In addition to Elizabeth=s testimony, the State elicited testimony from Amanda which confirmedCwith some relatively minor variations in her observations and the sequence of eventsCthat defendant had entered the trailer with a rifle, entered her room, and lay down on her bed. Amanda testified over objection that defendant started rubbing her thigh and she asked him to leave. She confirmed Elizabeth=s recounting of the events that followed: that defendant grabbed Elizabeth around the neck and put a gun to her head; that Amanda tried to

intervene, and defendant then pointed the gun at her; and that defendant later pointed the rifle at Elizabeth before leaving. Like her sister, Amanda gave a statement to the police later that morning recounting the events of the morning.

In addition to the two girls, the State called Kevin Taylor to testify. Taylor recounted that, at about 6:30 a.m. of the morning in question, the two girls came to his house and were crying, very shaken, and very upset. When asked about what the girls told him, defendant objected on hearsay grounds. The State argued that the testimony was admissible under the excited utterance exception to the hearsay rule, V.R.E. 803(2), or as prior consistent statements, under V.R.E. 801(d)(1)(B) (a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination and the statement is consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive). The court questioned whether, notwithstanding the girls' agitated state, the excited utterance exception applied in light of the several hours that the girls had slept before their conversation with Taylor. The prosecutor then noted that defense counsel had questioned Amanda as to whether she had consulted with Elizabeth about certain details of the incident, and argued that the statements to Taylor were admissible as prior consistent statements to rebut the implication that they had conspired to tailor their story. The court admitted the testimony on that basis. Taylor then testified that the girls told him defendant had entered their trailer, that there was some grabbing and pulling around and at some point in time they were very animate (sic) about the gun to the head thing. And that stuck in my head very well. He recalled that they described the guns as a pistol and rifle, and that defendant had threatened to shoot them if they went to their neighbors.

The girls' mother also testified for the State, recalling that she received a telephone call from Elizabeth that morning and that Elizabeth was very upset, crying, and scared. After Elizabeth recounted what had occurred, the mother called the police, returned to the mobile home, and spoke with Taylor. Defendant did not testify. He called several witnesses to testify that they had never known him to possess a handgun, and argued in closing that the girls had lied about the incident, implying that their motive was to avoid getting in trouble for letting defendant into the mobile home contrary to their mother's instructions.

As noted, the jury returned a verdict of guilty on both counts of simple assault, unlawful trespass, and reckless endangerment. Defendant was sentenced to a term of eighteen months to seven years. This appeal followed.

Defendant contends the court erred in admitting the girls' statements to Taylor as prior consistent statements. He notes that we have held the rule has three requirements: (1) the prior consistent statement corroborates the witness's in-court statements; (2) the party offering the statement establishes that it is being offered to rebut an express or implied charge against the witness of recent fabrication; and (3) the statement is shown to have been made prior to the time that the supposed motive to falsify arose. State v. Carter, 164 Vt. 545, 549 (1996). Defendant argues that the third requirement was not satisfied here because the alleged motive to falsify to avoid getting in trouble with their mother was present from the moment of the incident, and the statements to Taylor were made some hours later. See id. at 551 (holding that sexual assault victim's prior consistent statement to her sister came after any claimed recent fabrication, and therefore was inadmissible under Rule 801(d)(1)(B)).

While not conceding error, the State does not assert that the girls' statements were properly admitted as prior consistent statements. The State argues instead that they were admissible as excited utterances, noting that we have never held that the statement must be contemporaneous with the startling event, and citing to a number of out-of-state cases admitting such statements even after some period of sleep. The court did not address this issue, however, and we decline to do so here. We hold, rather, that even if the court erred in admitting the testimony in question under the prior-consistent statement rule, any error was harmless beyond a reasonable doubt.

We may affirm a defendant's conviction, despite the court's error in admitting hearsay evidence, if we find that the error was harmless beyond a reasonable doubt. State v. Oscarson, 2004 VT 4, & 29. In calculating harm, we consider a number of factors, including most importantly the overall strength of the State's case without the offending evidence, and the strength of the offending evidence. Id. & 32. Here, we may confidently conclude that the jury would have returned the same verdict regardless of the presumed error. The

evidence of both complaining witnesses was detailed, graphic, and on the whole consistent. Defendant did not testify or offer any defense other than to call several friends who stated that they had not known him to have a handgun, and to question the complainants' motive. The alleged motive to fabricate, however, was weak. Although defendant suggested that the girls had violated their mother's rule by allowing defendant to enter the mobile home, their mother testified that her rule was not to let anyone in whom they did not know or trust, and both she and Elizabeth testified that defendant was a good friend of the mother and the family. Furthermore, apart from Taylor's testimony about the girls' statements, which was not particularly extensive or detailed, he offered forceful testimony about their agitated demeanor and state of mind, which he described as Avery upset, a seriously shaken, and evidencing a serious problem. The girls' mother corroborated their highly emotional condition on the morning after the incident. Considering all of the evidence, therefore, we conclude that any error in the admission of the girls' statements to Taylor was harmless beyond a reasonable doubt.

Defendant further contends that the court erred in admitting, over objection, Amanda's testimony that she asked defendant to leave when he started rubbing her thigh. Defendant asserts that the testimony was inadmissible as prior bad act evidence under V.R.E. 404(b). Defendant did not clearly raise this specific objection below, however, and therefore waived the argument on appeal. State v. Kinney, 171 Vt. 239, 253 (2000) (to preserve issue for review, defendant must make timely objection). Furthermore, the incident was plainly part of the events surrounding the offense, or *Ares gestae*, and therefore was not subject to the general rule excluding evidence of prior bad acts. State v. Maduro, 174 Vt. 302, 306 (2002). Defendant also claims that the testimony was irrelevant and that any probative value was substantially outweighed by its unfair prejudicial impact. The court overruled the objection based on the State's argument that the testimony was relevant to explain the girls' concern and interest in asking defendant to leave, and further found that the brief testimony was not unduly prejudicial. Defendant offers no factual or legal basis to conclude that the court's conclusions in this regard were clearly erroneous or an abuse of its broad discretion. See State v. Turner, 2003 VT 73, ¶13 (affirming trial court's broad discretion under V.R.E. 403 to determine whether the probative value of testimony outweighs its prejudicial effect, and indicating burden on defendant to show abuse of that discretion is a heavy one). Defendant further claims the court erred in

failing to give a limiting instruction on the use of the testimony. Although the court noted that defense counsel could later, if desired, discuss whether you want some kind of [limiting] instruction, counsel did not request such an instruction or raise an objection to its absence after the court's instructions to the jury. Accordingly, any claim in this regard was waived. See State v. Dunbar, 172 Vt. 557, 536 (2001) (mem.) (requiring timely objection after charge to challenge jury instructions on appeal). We thus discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice