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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-420

JULY TERM, 2006

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
Michael Deloreto	}	
	}	DOCKET NO. 5519-10-04 CnCr

Trial Judge: Michael S. Kupersmith

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

Defendant appeals from a conviction, based upon a jury verdict, of aggravated assault. He contends the court erroneously admitted evidence of prior bad acts under V.R.E. 404(b).[1] We affirm.

Defendant=s conviction arose from an incident that occurred in October 2004. Defendant and another man, John Desjarlais, were drinking in the apartment of a mutual friend, Anne Marie Hanifin. Desjarlais testified that Hanifin went into the bedroom to lie down; that he heard her fall out of bed and went in to help her back into bed; that he then lay down in the bed next to her, and that defendant, seeing this, attacked him with a

knife, cutting his face. When Desjarlais attempted the call the police, defendant grabbed the phone and threw it to the floor. Desjarlais managed eventually to call the police. When they arrived, they observed that Desjarlais had a laceration near his eye, and Hanifin was extremely intoxicated and upset. Desjarlais described the attack to the officers, and indicated that defendant had threatened Ato call his friends@ if Desjarlais called the police. Hanifin recalled that she had asked defendant to leave before retiring to the bedroom, and that he resisted and pushed her head against the bedroom door. She heard the men scuffle but did not see the fight or the knife.

Defendant, who had left the apartment before the police arrived, was stopped on the street by the police, arrested, and transported to the station. The arresting officer observed blood on defendant=s hands, which defendant attempted to rub off. The officer recalled that, while being processed, defendant made a number of veiled threats against the officer, Desjarlais, and Hanifin. Defendant testified at trial that he was the victim and that when he entered the bedroom, Desjarlais jumped out of bed with a knife and attacked him.

Defendant=s sole claim on appeal concerns Hanifin=s testimony that defendant physically abused her on several occasions prior to the incident. The issue arose as follows. Defendant had filed a motion in limine prior to trial to preclude the introduction of any evidence concerning prior incidents of his violence or abuse on the ground that the State had filed no notice of its intent to introduce prior bad acts. The court granted the motion Aunless the defendant opens the door.@ On direct examination by the State, Hanifin was asked about an encounter she had with defendant after the incident, at which point defense counsel objected that the State was attempting to introduce prior bad act evidence Awithout giving me notice.@ The court overruled the objection, and Hanifin testified that defendant saw her on the street and told her Athat he knew people@ and that he could kill Desjarlais if he wanted to. Hanifin acknowledged that she had not informed the police about the threat, but indicated that she had told Desjarlais.

The defense later called Hanifin as a witness and questioned her about the encounter with defendant. Defense counsel recalled that, during an earlier deposition, Hanifin had said Acertain unflattering things about [defendant]@ but had Anever said anything about any threat.@ He asked whether this was because she was

now Afabricating@ the threat, which Hanifin denied. On cross-examination by the State, the prosecutor asked about the Aunflattering@ things that Hanifin had reported and why she had failed to report the threat to the police. Defendant objected, and the State argued that defendant had opened the door to testimony that Hanifin was afraid to report the threat to the police because defendant had threatened and physically abused her in the past. Defense counsel denied that he had opened the door, but advanced no other objection or argument against the testimony other than to note that Hanifin had invited defendant to her apartment at least once since the incident. The court overruled the objection, but offered to give a limiting instruction, which defense counsel accepted. The court then informed the jury that Hanifin=s testimony about defendant=s past conduct was offered only to show why she was afraid, and was not to be used as evidence that defendant acted in conformity with the past acts in connection with the charged offense. Hanifin then recalled her earlier deposition testimony recounting several incidents in which defendant had kicked and punched her.

On appeal, defendant contends the court erred in failing to weigh the probative value of the evidence of defendant=s prior violence against its prejudicial effect, under V.R.E. 403. Defendant acknowledges that he did not expressly object to the evidence on this ground, but argues that such an objection was apparent from the Acontext,@ citing State v. Shippee, 2003 VT 106, & 12, (mem.). In Shippee, the court had ruled prior to trial that certain bad-act evidence was inadmissible because its unfair prejudicial effect was not outweighed by its probative value. Id. & 4. During the trial, however, the State again moved to admit the evidence, and the courtCover an objection that it was inadmissible Apropensity@ evidenceCallowed its admission. Id. & 9. On appeal, we ruled that Athe necessary interaction between 404(b) and 403 in determining the admissibility of prior bad acts evidence, the context in which the objection was made, and the court=s pretrial 404(b) ruling on Rule 403 grounds@ were sufficient to alert the trial court to defendant=s prejudice claim and to preserve the issue for appeal. Id. & 12.

The facts here are quite different. Defendant=s pretrial motion was based solely on lack of notice, the initial objection at trial was on the same ground and later on the ground that defendant had not opened the door to the evidence, and defendant never made any argument, expressly or by implication, that the evidence was unfairly prejudicial. Accordingly, we are not persuaded that the issue was preserved for review on appeal. See

id. & 10 (to preserve issue for review on appeal, timely objection is required to allow trial court to rule on issue Aintelligently and quickly@). The question, therefore, is whether the admission of the testimony was plain error, which requires the demonstration of Aerror so grave that it strikes at the very heart of defendant=s constitutional rights or it affects the fair administration of justice.@ State v. Franklin, 2005 VT 90, & 6 (mem.). Although the jury here was required to choose between two quite different versions of what had occurred, the victim=s account that defendant was the aggressor was strongly bolstered by Hanifin=s testimony that defendant had assaulted her just prior to the knife attack, by the wounds to the victim, by defendant=s efforts to conceal blood on his hands, by the police observations that Hanifin and the victim both appeared to be quite shaken, and by the police testimony that defendant had threatened both Hanifin and the victim during his booking. The court also was careful to instruct the jury both prior to the testimony in question and at the conclusion of the trial on the permissible use of the prior incidents. Accordingly, we cannot conclude that the prejudicial effect of the evidence was such that its admission was plain error.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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[1] This Rule provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.