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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-237

APRIL TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin Circuit
John A. Connelly	}	
	}	DOCKET NO. 1256-11-05 FrCr
		Trial Judge: Mark J. Keller

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

Defendant John A. Connelly appeals from his conviction, after a jury trial, of unlawful mischief. He argues that he was denied his right to confront witnesses and present a defense. We affirm.

Defendant was charged with unlawful mischief and simple assault in November 2005 after he allegedly smashed several car windows with a hammer and one of the passengers was injured by flying glass. The following evidence was then presented at trial. In July 2005, defendant's wife, Erin Connelly, was celebrating her twenty-first birthday with Tanya Lampman and Ricky Benjamin. At approximately 3:30 a.m., defendant called Mrs. Connelly and told her that it was late and she needed to come home. Ms. Lampman testified that when the group arrived at the Connelly home, defendant "came flying out of nowhere with a hammer" and smashed two side windows and the front window of her car. Ms. Lampman let Mrs. Connelly out and drove away. Mr. Benjamin similarly testified that defendant emerged from the porch of his house with a hammer and smashed the car windows. Ms. Lampman and Mr. Benjamin called the police from a pay phone near by. An investigating officer took their statements, and then went to defendant's house. The officer observed a substantial amount of broken glass in defendant's driveway and on the roadway adjacent to defendant's house. The officer attempted to talk to defendant, but defendant did not answer the door. When the officer returned to defendant's house later that day, the broken glass was gone.

The record indicates that before trial, defendant's attorney indicated that he would like to ask Mr. Benjamin about the fact that he was arrested on the day before the alleged incident. Counsel suggested that perhaps this arrest put Mr. Benjamin in a "really foul mood," which prompted him to get into a fight with Ms. Lampman, and break the car windows. Counsel admitted that this was speculation and he did not have anyone who could offer any testimony to this effect. The trial court explained that defendant could certainly try to blame someone else for the crime, and he could ask Mr. Benjamin and Ms. Lampman if they had gotten into a fight. The court failed to see the relevance of Mr. Benjamin's arrest, however, and indicated that it would be inappropriate for defendant to mention it just for the sake of saying that Mr. Benjamin was arrested. The court explained that if

defendant could come up with a connection, it might allow the inquiry depending on the evidence presented at trial, but it would not allow the jury to look down on the witness merely because he was arrested.

At trial, defense counsel asked Mr. Benjamin about his activities on the day before the window-smashing incident. Mr. Benjamin testified that he had been at a friend's house. A bench conference ensued and the court told defense counsel that his questions were inappropriate as the State had not opened the door to such testimony. The court noted that it was possible that Mr. Benjamin had indeed gone to a friend's house after getting out of jail, but in any event, Mr. Benjamin's activities on the day before the incident were immaterial. Counsel stated that he wanted to "place [his] comments on the record as to [his] ability to question the veracity of his statements." This apparently referred to counsel's desire to prove that Mr. Benjamin was lying about what he did on the day before the incident.

Defendant denied breaking the car windows. He testified that, on the morning in question, he awoke to the sound of his wife pounding on the door and a car horn honking. According to defendant, he went outside where he was confronted by Mr. Benjamin. A fight ensued and defendant stated that he choked Mr. Benjamin almost to the point of unconsciousness. Mr. Benjamin then got into the car and left. Defendant denied touching Ms. Lampman's car or owning a hammer, and he stated that he never saw any broken glass in the driveway. Mrs. Connelly testified that she did not witness any windows being broken, nor did she ever see any broken glass in the driveway. She also stated that she did not believe they had a hammer in the house. The jury found defendant guilty of unlawful mischief and it acquitted him of the simple assault charge. This appeal followed.

Defendant argues that he was denied his right to confront witnesses and present a defense. Citing V.R.E. 608(b), he argues that the should have been allowed to ask Mr. Benjamin about the fact that he was arrested on the day before the window-smashing incident. He argues that the fact that Mr. Benjamin refused to give his real name to the arresting officer was probative of Mr. Benjamin's character for untruthfulness. Defendant maintains that his trial presented a credibility contest, and his ability to attack Mr. Benjamin's reliability and character were crucial to his defense.

Defendant waived this argument by failing to raise it below. The record indicates that before trial, defense counsel sought to use the evidence of Mr. Benjamin's arrest to show that Mr. Benjamin could have been in a foul mood, which led him to break Ms. Lampman's car windows. Even defense counsel admitted this was pure speculation. While defense counsel stated that Mr. Benjamin "refused to give his name to the correctional facility" and was held as a John Doe, he did not argue that this made evidence of the arrest admissible under V.R.E. 608(b). This argument was similarly not raised at trial. This Court has consistently held that to preserve an issue for appeal, a party must "present the issue with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it." In re White, 172 Vt. 335, 343 (2001) (internal quotation marks and citation omitted). Because defendant did not argue at trial that this evidence was admissible under V.R.E. 608(b), he waived this claim of error.

Nor was there plain error that would warrant reversal. See State v. Pelican, 160 Vt. 536, 538-39 (1993) ("Plain error exists only in exceptional circumstances where a failure to recognize error

would result in a miscarriage of justice, or where there is glaring error so grave and serious that it strikes at the very heart of the defendant's constitutional rights.") (citation omitted). "A defendant's right to confrontation is not absolute, and is limited by the requirements that evidence must be relevant, V.R.E. 402, and more probative than prejudicial, V.R.E. 403." State v. Muscari, 174 Vt. 101, 117 (2002). The trial court has discretion in resolving evidentiary issues, and it "may impose reasonable limits on the scope of a defendant's cross-examination" based on concerns that the interrogation is prejudicial or only marginally relevant. Id. In this case, the trial court found the evidence of Mr. Benjamin's arrest irrelevant and unduly prejudicial, and it did not err in reaching this conclusion. Its decision did not deny defendant his ability to confront the witnesses against him, nor did it hamper defendant's ability to prepare a defense. See id. (if evidence is not relevant or is unduly prejudicial, it is inadmissible and the Confrontation Clause may not be invoked to change that result).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice