

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

ENTRY ORDER

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

SUPREME COURT DOCKET NO. 2009-234

MAY 21 2010

MAY TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Bennington Circuit
	}	
Lenny N. Gauthier	}	DOCKET NO. 14-1-08 Bncr
	}	
		Trial Judge: John P. Wesley

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

Defendant appeals from a judgment of conviction, based on a jury verdict, of grand larceny and burglary. He contends the court erred in (1) denying a motion to suppress evidence seized during a warrantless search and (2) admitting a post-arrest recorded conversation between defendant and a State's witness. We affirm.

The essential facts may be briefly summarized; additional material facts will be set forth in the discussion that follows. A law enforcement officer with the Bennington Police Department had information that a burglary suspect was living at defendant's residence. On November 27, 2007, the officer went to the residence and spoke with defendant, who acknowledged that the suspect had lived there and left some electronic equipment, including an HTS-100 receiver which defendant showed the officer. The officer informed defendant that the receiver might be stolen, and defendant responded that the officer could therefore take it. According to defendant, he told the officer that "if it's stolen, I don't want it here." The officer recalled telling defendant that he would confirm the receiver's status and call or return later, and that defendant said the officer "could come back and take it, he didn't want any stolen property in his house."

Defendant was arrested later that day for a furlough violation and jailed at the Marble Valley Correctional Facility. The officer in the meantime learned that the receiver was indeed stolen and that someone had subsequently broken into defendant's residence. The officer testified that he telephoned defendant at the correctional facility, informed him about the break-in and the receiver's status, asked for consent to enter the residence to retrieve the receiver, and obtained consent from defendant. He then went to the residence where he could not relocate the receiver but did observe numerous other items that were on a list of stolen property from a recent burglary at a residence on Walloomsac Road in Bennington. Defendant acknowledged that he received a telephone call from an officer while at the correctional facility, but denied that he gave him permission to enter his residence.

Based on the foregoing, the trial court denied a motion to suppress the stolen items seized from defendant's residence, concluding that the search was consensual. The court found the

officer's testimony that defendant had consented to be credible, noting that the finding was also consistent with defendant's earlier statement that he did not want to retain any stolen property.

Defendant, his roommate, and his former girlfriend were later arrested for the theft and burglary on Walloomsac Road. A two-day trial was held in February 2009. The evidence included the testimony of a painting contractor that defendant had worked for him for a day or two at the residence where the break-in occurred. Defendant's former girlfriend, who was tried in juvenile court and sent to diversion, testified that she was present on the afternoon of November 18, 2007 when defendant and his roommate discussed robbing a house. Defendant pressured her to go with them, and all three then drove to a house that defendant said he knew of on Walloomsac Road. Defendant told her that he used to work for the owners and knew the location of a key, which he retrieved and used to enter the house. Defendant and his roommate then went upstairs and removed a number of pieces of electronic equipment to their van, including a television that was later found in the house of defendant's girlfriend. Defendant's roommate also testified, corroborating the events as recounted by defendant's girlfriend. Defendant testified in his own behalf, denying any involvement in the burglary and claiming that he had purchased a television and speakers from his roommate unaware that they were stolen.

The jury returned guilty verdicts on the charges of grand larceny and burglary, and also found defendant to be an habitual offender. The court denied a motion for new trial, and defendant was later sentenced to an aggregate term of seven to fifteen years. This appeal followed.

Defendant first contends the trial court erred in denying his motion to suppress. On appeal of a motion to suppress, we accept the trial court's underlying findings unless shown to be clearly erroneous, and review its conclusions of law de novo. State v. Pontbriand, 2005 VT 20, ¶ 12, 178 Vt. 120. The trial court is in the best position to determine issues of credibility, State v. Merchant, 173 Vt. 249, 257 (2001), and we will generally not disturb its discretionary decision to credit the testimony of one witness over that of another. State v. Dixon, 2008 VT 112, ¶ 39, 185 Vt. 92. The officer here testified unequivocally that defendant consented to the search of his residence to retrieve the stolen receiver, and the trial court was well within its discretion in concluding that the officer's testimony was credible and consistent with defendant's earlier statement to the officer that he did not want to retain any stolen property. Although defendant claims that any consent was necessarily involuntary because he was incarcerated at the time he spoke with the officer, there was no evidence or claim of any coercion, and "[c]ustody alone has never been enough in itself to demonstrate a coerced confession or consent to search." State v. Sole, 2009 VT 24, ¶ 24, 185 Vt. 504 (quotation omitted). Accordingly, we find no basis to disturb the court's ruling.

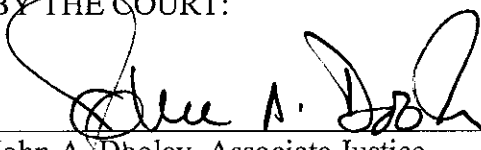
Defendant further contends the court erred in admitting a telephone conversation with his girlfriend recorded while defendant was incarcerated. The issue arose as follows. On cross-examination of defendant, the State asked whether he had told his girlfriend that he would "help [her] pay for a real lawyer." Defendant denied making such a statement. The State then moved to introduce the recorded conversation to impeach defendant. Defendant objected that the recording was unduly prejudicial because it would reveal his incarceration. After listening to the recording, defense counsel acknowledged that it contained a prior inconsistent statement, but renewed the claim of undue prejudice, adding that the conversation contained an unfair "inference that [defendant] is trying to manipulate" his girlfriend. The court observed that nothing in the recording alluded to defendant's incarceration, and concluded that the recording was admissible to impeach defendant, whose credibility was at issue. The court also ruled that

the recording was relevant to the question of witness manipulation, a subject which defense counsel had “opened up” earlier while cross-examining defendant’s girlfriend.

“The trial court has broad discretion under V.R.E. 403 in determining whether the probative value of testimony outweighs its prejudicial effect, and the burden on defendant to show abuse of that discretion is a heavy one.” *State v. Turner*, 2003 VT 73, ¶ 13, 175 Vt. 595 (mem.). Defendant contends the court erred in finding that defense counsel himself had opened the door to the issue of witness manipulation while cross-examining defendant’s girlfriend. The court was correct. The record shows that defense counsel asked the girlfriend whether she had told defendant that she was drunk when she gave a statement to the police implicating defendant in the burglary. She acknowledged that she had. Defense counsel then returned to the subject on re-cross, asking whether defendant had tried to convince her that her statement was “incredible,” and she responded that defendant “wanted me to tell them that I was drunk when I gave my statement so it would be called or counted on as an incredible statement, which means my statement didn’t matter.” The court was thus correct in finding that defendant himself had broached the subject of witness manipulation, and in further concluding that such evidence is independently admissible as showing a “consciousness of his guilt.” *State v. Desautels*, 2006 VT 84, ¶ 22, 180 Vt. 189. Defendant has not shown, therefore, that the recording was irrelevant or unfairly prejudicial, or that its admission was an abuse of discretion. Accordingly, we find no basis to disturb the judgment.

Affirmed.

BY THE COURT:



John A. Dooley, Associate Justice



Denise R. Johnson, Associate Justice



Marilyn S. Skoglund, Associate Justice