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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-285

MARCH TERM, 2002

State of Vermont	}	APPEALED FROM:
v.	}	District Court of Vermont,
James Edward Pixley	}	Unit No. 3, Washington Circuit
	}	DOCKET NO. 1575-11-00 Wncr
	}	Trial Judge: M. Patricia Zimmerman

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

Defendant appeals from a jury conviction of second degree aggravated domestic assault. We affirm.

Defendant first argues that the trial court committed reversible error by allowing the investigating state trooper to testify as to what the complainant told her and by admitting the written statement that the complainant made at the time she reported the assault. We find no merit to this argument.

In his opening statement, defense counsel suggested to the jurors that the complainant reported the assault out of spite after defendant informed her that he wanted to break off their relationship. Defense counsel told the jurors that the complainant had been inconsistent in reporting what day the assault allegedly occurred and why she had delayed in reporting it. Defense counsel also pointed out that the complainant had later written defendant a letter apologizing for reporting the abuse.

During direct examination, the prosecutor did not ask either defendant's probation officer, to whom the complainant first reported the abuse, or the investigating state trooper to relate what the complainant told them. Nevertheless, on cross-examination, defense counsel questioned both of those witnesses on what the complainant told them. In response to defense counsel's questions, the trooper testified that the complainant told her that she had been assaulted on Saturday, October 7, 2000 (as opposed to Sunday, October 8, 2000), and that she had not reported the incident earlier because she and defendant had stopped fighting and got high on drugs. Defense counsel later recalled the trooper to the stand and questioned her further on what the complainant told her. During closing argument, defense counsel again referred to the complainant's statements to police in arguing that the complainant had been inconsistent about both the date the assault occurred and her reason for failing to report the assault right away.

After the trooper had already been examined and cross-examined, the prosecutor questioned the complainant on what she told the trooper. The complainant briefly testified that she told the trooper that she and defendant had been arguing and got out of control, and that there was nothing she needed to tell the trooper about her striking defendant. The court then admitted the complainant's one-page written statement that she gave at the time she reported the abuse. In it, the complainant indicated that she and defendant had argued and got high, and that he smashed her windshield and later held her down and punched her.

Defendant argues that this case is controlled by State v. LaRose, 137 Vt. 531, 532 (1979), in which we reversed a sexual

assault conviction because the trial court allowed the investigating state trooper to testify at length as to what the complainant told him. We disagree. Here, it was defense counsel, not the prosecutor, who elicited testimony from defendant's probation officer and the state trooper as to what the complainant told them. Further, it was the complainant, not the trooper, who made the statements that defendant is challenging. Given that defendant first elicited testimony from the officers concerning complainant's statements to them to bolster his claim that the complainant fabricated the abuse out of spite and later acknowledged that fact, the court did not abuse its discretion in admitting the complainant's written statement and brief testimony as to what she told investigators. See State v. Church, 167 Vt. 604, 605-06 (1998) (allowing prior consistent statement to rehabilitate complainant after defendant elicited testimony that complainant had recanted sexual abuse claim); State v. Payne, 944 F.2d 1458, 1471 (9th Cir. 1991) (allowing consistent statements drawn from same investigative reports from which defendant drew impeaching inconsistent statements); United States v. Tarantino, 846 F.2d 1384, 1411 (D.C. Cir. 1988) (refusing to allow opposing party to pick and choose among prior statements to create appearance of conflict and then object when appearance is rebutted by means of fuller version of same prior statements).

Defendant acknowledges that hearsay statements may be admitted to rehabilitate witnesses, but notes that the prosecutor in this case never offered the challenged testimony and written statement to rehabilitate the complainant. That may be so, but neither did defendant request a limiting instruction. In any event, even assuming error, admitting the complainant's cumulative statements was plainly harmless under the circumstances of this case. Cf. State v. Derouchie, 153 Vt. 29, 32-33 (1989) (finding admission of cumulative hearsay statement to be harmless, and distinguishing LaRose, which found prejudice due to State's extensive reliance upon hearsay testimony of state trooper who testified first at trial and at great length); State v. Gallagher, 150 Vt. 341, 349 (1988) (finding admission of hearsay testimony to be harmless, given that testimony was cumulative and complainant was available for cross-examination). The challenged statements added little, if anything, to what the jurors had already heard on several occasions.

Next, defendant argues that he was denied a fair trial because the trial court admitted a plethora of allegations about other misconduct beyond what was necessary to make the jury aware of the context of the assault. He contends that the trial court abused its discretion by allowing the complainant to testify as to remote incidents of abuse that were distinct from the events leading up to the assault for which defendant was being charged. There were two prior incidents of abuse in particular about which the complainant testified, one occurring in May 1999, and the other in August 2000, approximately two months before the October 2000 assault upon which the instant charge arose.

Defendant seems to criticize State v. Sanders, 168 Vt. 60, 62-63 (1998) without challenging our holding in that case that evidence of prior bad acts may be admissible in domestic assault cases to provide a context for abusive behavior and to put a complainant's recantation into the proper perspective. In a recent case, State v. Hendricks, 12 Vt. L.W. 337, 338-39 (2001), we reaffirmed the context rationale for allowing domestic assault victims to testify as to prior assaults by the alleged abuser. Such testimony is particularly probative and therefore admissible under a context rationale in cases such as the instant one, where the complainant delayed in reporting the abuse and then later acted in a manner that could be interpreted as disavowing it. See id. at 341 (J. Dooley, concurring) ("the lack of context is a particular problem in the all-too-frequent situation where [the complainant] recants her claim that [the accused] battered her in the instance before the court"); Sanders, 168 Vt. at 63 (victims of domestic abuse are likely to change their stories out of misguided affection or fear of retribution; evidence of prior history of abuse allows jury to decide more accurately which of victim's statements more accurately reflect reality).

Here, in defense of the charges against him, defendant asked the jury to consider the complainant's delayed reporting and the letter she later wrote asking defendant for his forgiveness. Thus, the complainant's testimony concerning prior bad acts was relevant and probative to give the jury an understanding of her actions. These are precisely the considerations that the trial court weighed before allowing the prosecutor to elicit testimony as to some bad acts, but not others. Upon review of the record, we find no abuse of discretion. See Hendricks, 12 Vt. L.W. at 338 (trial court's decision to admit evidence under Rules 404(b) and 403 will be reversed only if court withheld or abused its discretion and substantial right of defendant was affected by alleged error).

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice