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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-157

JANUARY TERM, 2003

State of Vermont v. Patrick J. Lanteigne, Jr.	}	APPEALED FROM: District Court of Vermont, Unit No. 2, Bennington Circuit DOCKET NO. 1209-9-00 Bncr Trial Judge: David A. Howard

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

Defendant appeals from a judgment of conviction, based on a jury verdict, of burglary, aggravated assault, and unlawful mischief. He contends that: (1) the court erred by instructing the jury that voluntary abandonment of the aggravated assault after commission of the overt act necessary to constitute an attempt did not prevent a finding of guilt; (2) the evidence was insufficient to establish an attempt to commit serious bodily injury; and (3) the court erroneously admitted testimony of the victim' s advocate to impeach the victim' s testimony. We affirm.

The record evidence may be summarized as follows. Late in the afternoon of September 9, 2000, defendant " angered that his former girlfriend might be dating the victim " broke into the victim' s house and assaulted him. He struck the victim on the side of the face, backed him against a wall, choked him, and pounded his head against the wall. He was yelling and screaming at the victim to stay away from his girlfriend, and threatening to kill him if he did not. The victim did not resist, and defendant suddenly let go of him and ran out the door. The day before the incident, defendant had confronted the victim at his place of work and chased him around the building.

The jury returned a verdict of guilty on charges of burglary, aggravated assault, and unlawful mischief. This appeal followed.

Defendant first contends that the court erred in instructing the jury, over objection, as follows:

> For action to constitute an attempt, there must be a physical act attempting to cause serious injury; it must go beyond mere preparation and planning. If you find such a physical act occurred beyond preparation and planning, then voluntarily stopping by the Defendant after that point does not prevent a finding of guilt.

Defendant argues that the court erred by instructing that " voluntarily stopping" after the physical act beyond preparation and planning " does not prevent a finding of guilt." He asserts that the instruction improperly removed a valid defense of abandonment from the consideration of the jury, and erroneously directed the jury to ignore evidence that he lacked the requisite intent to injure the victim.

A person is guilty of an attempt to commit an offense by doing " an act toward the commission thereof," 13 V.S.A. § 9(a), which we have held " consists not only of an intent to commit a particular crime, but . . . some overt act designed to carry out such intent." State v. Hudon, 103 Vt. 17, 20 (1930); see also State v. Boutin, 133 Vt. 531, 533 (1975) (criminal attempt must advance conduct of actor beyond sphere of mere intent so as to amount to " commencement of the consummation"). It is well settled, however, that once the defendant has committed the requisite overt act, the offense is complete, and abandonment of the enterprise does not negate guilt. See, e.g., Wiley v. State, 207 A.2d 478, 480 (Md. 1965) (" a voluntary abandonment of an attempt which has proceeded beyond mere preparation into an overt act or acts in furtherance of the commission of the attempt does not expiate the guilt of, or forbid punishment for, the crime already committed"); State v. Miller, 477 S.E.2d 915, 922 (N.C. 1996) (" once a defendant engages in an overt act, the offense is complete, and it is too late for the defendant to change his mind"); State v. Stewart, 420 N.W.2d 44, 50 (Wis. 1988) (voluntary abandonment of robbery attempt after sufficient acts had been committed to constitute attempt did not excuse defendant from liability). Accordingly, the court here correctly instructed that defendant' s voluntarily stopping after completion of the acts necessary to constitute an attempt did not prevent a finding of guilt. See Wiley, 207 A.2d at 480-81 (upholding court' s instruction that defendant' s abandonment of attempt after completion of overt acts sufficient to constitute attempt was not valid defense).

Defendant next asserts that the evidence was insufficient to support a finding that he had attempted to cause serious bodily injury. For purposes of establishing aggravated assault, the statute provides that serious bodily injury " means bodily injury which creates a substantial risk of death or which causes substantial loss or impairment of the function of any bodily member or organ or substantial impairment of health, or substantial disfigurement." 13 V.S.A. § 1021(2). The victim here testified that, after kicking in the door, defendant hit him several times on the side of the face, choked him, and bounced his head against the wall a couple of times, while yelling and screaming that he was going to kill him if he didn' t stay away from defendant' s girlfriend. Defendant also forced his fingers into the victim' s mouth while threatening to rip his face off. The victim testified that the day before the assault, defendant had chased him around the building at his place of work and had threatened to kill him.

Although the victim here escaped with only cuts and bruises on his face, the evidence showing the violent and brutal nature of the assault was more than sufficient to establish an attempt to cause serious bodily injury. See State v. Sorrell, 152 Vt. 543, 547 (1989) (evidence that defendant hit, slapped, and choked girlfriend was sufficient to establish aggravated assault). Viewed in the light most favorable to the judgment, the record evidence amply supported the verdict. See State v. West, 164 Vt. 192, 193 (1995) (to determine sufficiency of evidence, we must view evidence in light most favorable to verdict, excluding modifying evidence).

Finally, defendant contends that the court erred in permitting the victim' s advocate to testify that the victim had told her before trial that he was concerned defendant, or others, would " attempt to come after him" for his testimony. Defendant further contends that the prosecutor erred in referring to the victim advocate' s testimony during closing argument. The issue arose after the victim had testified in response to questioning by the state' s attorney that he was no longer afraid of defendant. The State then offered the victim advocate' s testimony to impeach the victim' s testimony. Defendant objected on the ground that the testimony was irrelevant and was more prejudicial than probative. The court overruled the objection.

Defendant argues on appeal that the evidence and argument concerning the victim' s fears were inadmissible absent independent evidence that defendant had made, or caused to be made, threats against the victim concerning his testimony. This argument was not the basis of defendant' s objection below, and therefore is not cognizable on appeal. State v. Lettieri, 149 Vt. 340, 343-44 (1988). Furthermore, apart from a bare assertion that the evidence was highly prejudicial, defendant has not demonstrated how or why the victim advocate' s testimony was irrelevant, or was more prejudicial than probative. As to the prosecutor' s remarks, we note that no objection was made during closing argument, and therefore the issue was not preserved for review. State v. Koch, 171 Vt. 515, 517 (2000) (mem.) (since defendant failed to object to prosecutor' s closing argument, issue of improper argument not preserved for appeal). Nor has defendant claimed that the remarks constituted plain error, resulting in a miscarriage of justice. State v. Bubar, 146 Vt. 398, 403 (1986) (since defendant failed to object to prosecutor' s closing argument nor asked for curative instruction, he must demonstrate plain error to prevail). Accordingly, we discern no basis to disturb the judgment.

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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Marilyn S. Skoglund, Associate Justice