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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-435

JUNE TERM, 2004

State of Vermont v. Chad Gibney	}	APPEALED FROM: District Court of Vermont, Unit No. 3, Franklin Circuit DOCKET No. 276-3-03 FrCr Trial Judge: Hon. Michael S. Kupersmith

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

Defendant appeals his jury conviction on two counts of domestic assault, in violation of 13 V.S.A. ' 1042. We affirm.

On March 30, 2003, defendant and his wife got into an altercation, apparently when the wife confronted defendant about a telephone call she had received that day from a woman claiming to be having an affair with defendant. At some point, the wife= s teen-aged son became involved and called police, who later arrived at the scene. Defendant was eventually charged with two counts of domestic assault for causing bodily injury to his wife and his wife= s son. Following a trial, the jury convicted him on both counts, and he was given a nine-to-twelve-month suspended sentence. On appeal, defendant argues that the admission of certain evidence was reversible error.

Defendant first argues that the admission of his wife= s testimony concerning a telephone call in which the wife was told that her husband was having an affair requires reversal because his confrontation rights were violated and the evidence was inadmissible as prior bad acts. At trial, on direct examination, defendant= s wife began to testify about the call, when defense counsel objected. The State= s proffer was that the evidence was necessary to give the jury an understanding of how and why the altercation between defendant and his wife transpired. Defense counsel objected that the testimony would be pure hearsay, but the court stated that it was not being offered for the truth of the matter asserted, and offered to instruct the jury as such. Defense counsel accepted the court= s offer to give the jury a limiting instruction. The court then informed the jury that the testimony regarding the telephone call was not being offered for the truth of the information given during the telephone call, but rather merely to explain the altercation that later took place between defendant and his wife. Following this limiting instruction, the court allowed the wife to testify that a female had called her the day of the fight, indicating that she had known her husband for a long time and had been having an affair with him.

Because the only objection at trial was that the testimony was hearsay, we review under a plain error standard defendant= s arguments on appeal B that the evidence was inadmissible as prior bad acts and that its admission violated his constitutional right to confront witnesses. See State v. Bubar, 146 Vt. 398, 400 (1985) (objection on one ground does not preserve appeal on another ground). We conclude that there was no plain error, if any error at all. See State v. Turner, 2003 VT 73, & 15, 830 A.2d 122 (even in cases involving evidence of prior bad acts, defendant= s burden of demonstrating plain error is extremely high, and thus plain error will be found very rarely; reversal of criminal conviction is warranted based on plain error only in extraordinary cases where error so affects substantial rights of defendant that fair trial cannot be presumed). Here, defendant was charged with domestic assault, not adultery, which is not a crime. Although we recognize that the testimony had the potential to be prejudicial to defendant, he exaggerates

the risk of a connection that the jury might have made between adultery and domestic assault. Indeed, the testimony had the potential to cut in defendant= s favor, given his claim of self-defense. If the jurors believed that defendant= s wife had just been told that defendant was having an affair, they might have been more likely to believe his claim that she was the aggressor in the altercation. In short, to the extent that this issue even concerns prior bad acts or defendant= s confrontation rights, there was no plain error in admitting the testimony about the call with the limiting instruction.

Defendant also argues that admission of the part of the 911 call when his wife was talking to her mother was plain error. Defendant= s wife testified that defendant had come back into the house several times after her son called 911, and at one point hurled his wedding ring at her, just missing her head. In contrast, defendant testified that his wife used an expletive in demanding the ring from him, and that he gently tossed it to her. The prosecutor noted that the 911 operator had connected the call between defendant= s wife and her mother, and thus the call had been recorded. Without objection from defense counsel, the prosecutor played a part of that call to impeach husband= s testimony concerning the wedding ring. Among other things, the jury heard defendant= s wife say to her mother that defendant had got physically violent with her, that he had hurt her son, and that he had A just barely pegged his ring at me.@ Defendant argues that, if anything, only the last line was needed to impeach him. We disagree. The only way to verify defendant= s testimony that his wife had demanded the ring from him was to listen to more of the tape. We recognize that whether defendant hurled the ring at his wife or merely tossed it to her after she rudely demanded it is relatively insignificant in and of itself. But defendant himself acknowledges that this case was essentially a credibility contest between two people telling very different stories. Thus, it was important for the State to show that defendant was not telling the truth B even about relatively insignificant events occurring during the altercation. There is no plain error here, if any error at all.

Next, defendant argues that the first few minutes of the 911 call and a state trooper= s hearsay testimony were improperly admitted as excited utterances. Before the trial began, defense counsel objected that admission of the 911 call would be prejudicial and inflammatory because defendant= s wife was hysterical during the call. When the court asked defense counsel if he was contesting that the wife= s statements during the first few minutes of the tape were excited utterances, he replied that the wife certainly was hysterical. Defense counsel asserted, however, that there was nothing on the tape that defendant= s wife could not testify to directly at trial. Nevertheless, defense counsel had no response when the court pointed out that excited utterances are admissible as an exception to the hearsay rule under V.R.E. 803(2) even if the declarant is available. Hence, the court admitted the first few minutes of the tape under the excited utterance exception. On appeal, defendant argues for the first time that this Court should construe the Vermont Constitution to disallow admission of hearsay evidence under the excited utterance exception in cases where the declarant is available to testify. Defendant claims that this argument was preserved, but it was not, and thus we review it under a plain-error standard. Although defense counsel noted that defendant= s wife could testify directly as to what was on the tape, and thus that playing the prejudicial tape was not necessary, he did not argue, based on the Vermont Constitution or any other law, that the excited utterance exception to the hearsay rule should never be allowed when the declarant is available. Indeed, defense counsel did not respond when the court pointed out that excited utterances are admissible under Rule 803(2) even when the declarant is available. Thus, the trial court had no chance to consider this argument.

The State presented part of the 911 tape to counter defendant= s argument that his wife was the aggressor and that he acted in self defense. The response of the 911 operator indicates that defendant= s wife was very upset when she called, and that her comments were likely not the result of reflection. Without determining whether we would join those states that have refused to allow excited utterances as exceptions to the hearsay rule when the declarant is available to testify, we conclude that in this case there was no plain error justifying reversal of the criminal conviction. Rule 803(2) allows excited utterances as an exception to the hearsay rule even if the declarant is available. See State v. Muscari, 174 Vt. 101, 109 (2002) (no error in admitting 911 call under V.R.E. 803(2)). There is a reasonable basis for that rule, and until the issue is properly preserved and thoroughly reviewed, we find no basis for finding plain error.

Finally, defendant argues that it was plain error to admit a state trooper= s hearsay statements indicating what defendant= s wife and her son told him when he arrived at the residence in response to the 911 call. According to defendant, because the statements to the trooper were made approximately fifty minutes after the altercation ended, the testimony lacked the foundation necessary to be admitted under the excited utterance exception to the hearsay rule. Because there was no objection to the state trooper= s testimony, it is unclear from the record what the bases would have been for admitting or refusing to admit the testimony. The trooper testified that defendant= s wife was very upset

but not frantic when he spoke to her. Regardless of whether this testimony satisfied the foundational requirements of the excited utterance exception, we conclude that, given the weight of the other evidence against defendant, any error in admission of the testimony was not so prejudicial as to undermine confidence in the outcome of the trial. See State v. Johnson, 158 Vt. 508, 513-14 (1992) (stating plain error standard).

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Paul L. Reiber, Associate Justice