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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-447

AUGUST TERM, 2005

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windham Circuit
Nancy McKenzie	}	
	}	DOCKET NO. 1347-10-03 WmCr

Trial Judge: John P. Wesley

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

Defendant appeals her conviction of simple assault, arguing that (1) the evidence was insufficient to support the conviction; (2) the district court erred in permitting the State to amend its information on the day of trial; and (3) the court erred by ruling that if she testified, the State could cross-examine her concerning an alleged prior bad act. We affirm.

The State initially charged defendant with domestic assault, alleging that she attempted to cause bodily injury to a household member, in violation of 13 V.S.A. ' 1042. On the morning of trial, but before the jury drawing took place, the court granted, over defense counsel=s objection, the State=s motion to amend the charge to one of simple assault, alleging that defendant recklessly caused bodily injury to another in violation of 13 V.S.A. ' 1023(a)(1). At trial, neither the complainant nor defendant testified. The State produced photographs of an injury to complainant=s nose, as well as the testimony of two police officers who had investigated the disturbance that led to the charge against defendant. The officers both testified that defendant, when asked about the injury to the complainant=s nose, told them that she had gone after his face. Based on this evidence, the jury convicted defendant of the charged offense.

On appeal, defendant first argues that the State=s evidence was insufficient to support the conviction. According to defendant, because the only evidence that the injury to the complainant resulted from a criminal act was her own admissions introduced through the testimony of the officers, the court erred by admitting that testimony. Putting aside whether defendant=s legal analysis is correct, it contains a faulty factual premiseCthat her admissions were the only evidence of an injury caused by a criminal act. Apart from defendant=s admissions, the police officers testified that (1) responding to a dispatch, they arrived at an apartment that evidently had been the scene of a disturbance, with items tossed around and a door partially smashed; (2) defendant and the complainant, who had locked himself in a bedroom, were the only persons in the apartment; and (3) the complainant=s shirt was ripped into tatters and he had an injury to his nose. The injury to the complainant=s nose was pictured in photographs taken by the officers. Thus, there was other evidence, beyond defendant=s admissions, of an injury caused by a criminal act. See State v. Fitzgerald, 165 Vt. 343, 350, 683 A.2d 10, 16 (1996) (noting that even slight corroboration of confession may be sufficient to support conviction).

Defendant argues, however, that even if her admissions may be considered, the evidence was still insufficient to support the conviction. In defendant=s view, the jury would have had to resort to impermissible conjecture to conclude, based on the photographs of the complainant=s injury and defendant=s admission that she went after his face, that

defendant caused the injury to the complainant=s face. We conclude that the evidence, taken in a light most favorable to the State and excluding any modifying evidence, was sufficient to fairly support the jury=s finding of guilt beyond a reasonable doubt. V.R.Cr.P. 29; State v. Durenleau, 163 Vt. 8, 10, 652 A.2d 981, 982 (1994).

Next, defendant argues that, by allowing the State to amend the complaint to allege that she recklessly caused the complainant=s injury rather than attempted to cause the injury, the trial court deprived her of the opportunity to negate the specific intent element by way of a Apotential@ claim of diminished capacity. See V.R.Cr.P. 7(d) (if no additional or different offense is charged and substantial rights of defendant are not prejudiced, court may permit information to be amended at any time after trial commenced and before verdict); State v. Beattie, 157 Vt. 162, 170, 596 A.2d 919, 924 (1991) (holding right to amend information before trial remains subject to constitutional requirement that defendant receive fair notice of charged offense). We need not address whether defendant=s legal analysis is sound because we conclude that defendant has failed to demonstrate prejudice. There is no indication that defendant intended to claim diminished capacity at trial. In fact, defendant failed to file a notice of such pursuant to V.R.Cr.P. 12.1. Indeed, in objecting to the State=s requested amendment, defense counsel neither complained of the State=s reduced burden of proof nor mentioned defendant=s intention to claim diminished capacity. Rather, defense counsel stated only that defendant was prepared to show that the complainant himself caused the injury to his nose, and that defendant was merely acting in self-defense. In her motion for judgment of acquittal following the jury verdict, defendant argued for the first time that the amendment had eased the State=s burden of proof, but she still did not indicate that she had wanted to claim diminished capacity. Now, for the first time on appeal, she argues that allowing the State to amend its information Awas obviously prejudicial@ because of the loss of her Apotential@ diminished capacity defense, which would have been supported by the officers= testimony that she was intoxicated at the time the underlying incident occurred. Under these circumstances, we find neither preservation nor prejudice.

Finally, defendant argues that the trial court erred by ruling that if she took the stand, the State could cross-examine her about a prior incident in which she allegedly assaulted the complainant. According to defendant, the court should not have ruled that it would allow the State to cross-examine her concerning the incident if she testified because if she had testified and the State had asked about the prior incident, she would have denied that the incident occurred, and the State would not have had any other admissible evidence demonstrating that the incident occurred. The problem with this argument is that defendant never took the stand, and thus the prior incident was never introduced at trial. As in State v. Koveos, 169 Vt. 62, 70-71, 732 A.2d 722, 728 (1999), defendant is asking this Court to relieve her of the results of her tactical decision (in this case, her decision not to testify) based on the court=s advisory ruling of what it would allow the State to do if she did testify. Because defendant decided not to testify, and the alleged prior incident was never introduced, we cannot review defendant=s hypothetical claim of error.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice