

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2005-248

JUNE TERM, 2006

State of Vermont

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APPEALED FROM:

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v.

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District Court of Vermont,

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Unit No. 2, Chittenden Circuit

Frank Highley

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DOCKET NO. 2831-5-01 Cncr

Trial Judge: Michael S. Kupersmith

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

Defendant appeals from a judgment of conviction, based on a jury verdict, of second-degree aggravated domestic assault. Defendant contends the court erroneously: (1) refused to permit the complainant=s credibility to be impeached through the use of a prior felony conviction; and (2) admitted the hearsay testimony of the complainant=s child. We affirm.

Defendant=s conviction arose from an incident which occurred on the morning of May 18, 2001.

According to the complainant's report and testimony, defendant—the father of her child—came to her house seeking drugs. The complainant refused, and the parties began to argue. Defendant became angry, dragged the complainant to her room while their three-year old son followed, pushed and slapped her, and ripped the phone from the wall. Defendant also contacted the police about the incident, claiming that the complainant had attacked him. The complainant and the investigating officer were the only witnesses at trial. The jury returned a verdict of guilty. Defendant stipulated to a prior conviction of domestic assault, and he was sentenced to a term of two to five years. This appeal followed.

Defendant first contends the court erred in excluding evidence of the complainant's prior convictions for retail theft. The issue arose prior to trial, when the State moved to exclude evidence of pending charges against the complainant for providing false information to a police officer in connection with a separate incident, as well as evidence of complainant's prior convictions for retail theft. The court addressed the motion immediately prior to the start of the one-day trial. The court ruled that the complainant could be questioned about the charge of providing false information, and she later testified on direct examination that she had lied to the police about the location of her current boyfriend. As to the prior retail-theft convictions, defense counsel argued that they A[i]nvolved untruthfulness or falsification@ under V.R.E.609(a)(1), and therefore were admissible to impeach the complainant's credibility. The trial court disagreed, observing that the Reporter's Notes to the rule state that theft offenses are excluded from the category of offenses involving untruthfulness or falsification.

On appeal, defendant does not challenge this ruling, but asserts rather that the court erred by failing to admit the convictions under V.R.E. 609(a)(2), which provides an alternative basis for admission if the prior offense was a Afelony conviction under the law of Vermont or was punishable by death or imprisonment in excess of one year under the law of another jurisdiction, and the court determines that the probative value of this evidence substantially outweighs its prejudicial effect.@ It is axiomatic, however, that a defendant must specifically raise an issue with the trial court in order to preserve it for review on appeal. State v. Shippee, 2003 VT 106, &10. As we explained in Shippee, one of the principal purposes of the rule requiring specific objections or arguments Ais to sufficiently alert the trial court to the theory behind the objection so that the

judge can rule intelligently and quickly.@ Id. The record here discloses that defendant did not raise or argue V.R.E.609(a)(2) as a basis for admission. Accordingly, the claim was waived for purposes of review on appeal.

In the absence of a claim below, we may review the court=s ruling solely for plain error, which occurs Awhen there is glaring error so grave that it strikes at the very heart of defendant=s constitutional rights or it affects the fair administration of justice.@ State v. Franklin, 2005 VT 90, & 6. Despite the court=s exclusion of the prior convictions, the record discloses that the complainant readily acknowledged on cross-examination that she had been addicted to drugs and had shoplifted to support her habit, and had also lied to the police to protect her boyfriend. Thus, defendant was able to impeach defendant=s credibility to almost the same effect as he would have with the admission of the theft convictions. We therefore discern no basis to conclude that defendant=s rights to a fair trial or effective defense were fundamentally impaired by the court=s ruling.

Next defendant contends the court erred by overruling an objection to the investigating officer=s testimony concerning a statement by the complainant=s child. The officer testified that, when she arrived on the scene, she found the complainant upset and crying. The complainant=s three year old son was in the living room and appeared to be Avery excited.@ The officer recalled that the child pointed to a telephone that had been ripped from the wall and said that Adaddy [had] ripped it.@ When asked, Adid [the child] say anything about what had happened?@ the officer responded that the child said defendant had Apulled her down@ and Ahit mommy.@ Defense counsel thereupon objected, explaining A[t]hat=s not what [the child] said according to [the officer=s] report.@ Subsequent comments by defense counsel are reported in the transcript as Ainaudible.@ The court responded that counsel was Aa little slow on the objection@ and the matter should have been raised earlier. Counsel then indicated that he was aware there were certain statements in the officer=s report that Awould come in@ but that A[t]his would not come in.@ Further comments by the court and counsel are reported in the transcript as Ainaudible.@ Ultimately, the court overruled the objection.

On appeal, defendant claims the court committed prejudicial error by admitting the child=s hearsay testimony. As the quoted portions of the record reveal, however, there is no indication that defendant raised a

hearsay objection; he merely objected that the specific statement of defendant Ahit mommy was not in the officer's report. As noted earlier, a specific objection is required to preserve an issue for review on appeal. Shippee, 2003 VT 106, & 10. Furthermore, while portions of the record are reported as inaudible, and might have contained a hearsay objection, it is defendant's responsibility to provide an adequate record for review through V.R.A.P. 10(c) or otherwise. State v. Synnott, 2005 VT 19, & 25. Accordingly, the claim was not preserved for review on appeal. Nor does the court's ruling present grounds for a finding of plain error. Even if hearsay, the officer's testimony that the child appeared to be very excited provides a basis for admission of the testimony under the excited utterance exception to the hearsay rule. V.R.E. 803(2). Furthermore, the officer testified without objection that the child told her defendant had dragged her [the complainant] down. Thus, the child's additional testimony that defendant Ahit complainant added little to the overall record. Accordingly, we find no basis to conclude that the court's ruling was so prejudicial as to impair defendant's fundamental constitutional rights.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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**Brian L. Burgess, Associate Justice**