

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-381

SEPTEMBER TERM, 2006

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|---------------------|---|-----------------------------|
| State of Vermont | } | APPEALED FROM: |
| | } | |
| v. | } | District Court of Vermont, |
| | } | Unit No. 1, Windham Circuit |
| Jeffrey Scott Bacon | } | |
| | } | DOCKET NO. 893-7-03 WmCr |

Trial Judge: John P. Wesley

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

Defendant appeals from his conviction of one count of second degree aggravated domestic assault for recklessly causing bodily injury to his stepmother, Patricia Bacon, and one count of misdemeanor domestic assault for wilfully causing his girlfriend Kolleen Dodge to fear imminent serious bodily injury. He asserts that the trial court erred in making several evidentiary rulings. We affirm.

In July 2003, as the result of a violent incident at his father and stepmother=s home, defendant was charged with first degree aggravated domestic assault, second degree aggravated domestic assault,

misdemeanor domestic assault, carrying a weapon while committing a felony, and reckless endangerment. According to the police affidavit, defendant's girlfriend called 911 to report that defendant had a gun, he had beaten up his father, and she and defendant's stepmother were hiding from defendant in the basement. When police arrived at the scene, they encountered defendant's father and stepmother, who were distraught and had obvious signs of bleeding from the head and face. Defendant's girlfriend was apparently still hiding in the basement but darted to safety when police arrived. Police found defendant hiding in a tree. He attempted to evade police but was taken into custody. After a jury trial, defendant was convicted of one count of second degree aggravated domestic assault and one count of misdemeanor domestic assault for the attacks on his stepmother and girlfriend. Defendant filed a motion for judgment of acquittal or for a new trial, which the court denied. This appeal followed.

Defendant first argues that the trial court erred by excluding evidence that his father and stepmother had abused him in the past. He asserts that he raised a valid self-defense claim, and he therefore should have been allowed to explore the alleged victims' character for violence. According to defendant, his personal knowledge of the victims' alleged violent character was highly relevant and it affected how he reasonably perceived the circumstances on the evening in question. In a somewhat similar vein, defendant argues that, because this was a domestic abuse case, the evidence should have been admitted to provide context for the evening's events.

We review the trial court's evidentiary rulings for abuse of discretion. State v. White, 172 Vt. 493, 500 (2001) (citation omitted). Defendant bears the burden of showing that the court withheld its discretion or exercised its discretion upon grounds clearly untenable or unreasonable. Id. (citation omitted). We will not interfere with discretionary rulings of the trial court that have a reasonable basis, even if another court might have reached a different conclusion, nor will we interfere with the judgment of the trial court simply because a different court might have reached a different conclusion. Id. (citation omitted).

The record shows that defendant sought to introduce evidence of a 1986 assault for which his father was convicted, as well as earlier uncharged acts of child abuse against him by his father and stepmother, which

allegedly occurred while defendant was in elementary school. The court found the proffered evidence inadmissible under V.R.E. 404(a)(2) as character evidence because such evidence was limited by V.R.E. 405 to reputation rather than specific acts. State v. Roy, 151 Vt. 17, 31 (1989). The court also rejected defendant's assertion that the evidence was admissible under V.R.E. 404(b) to prove knowledge of the victims' capacity for violence and to provide context for his claim of self-defense. The court noted that these arguments would have had more force had the prior events not been so remote from the circumstances that gave rise to the charges at issue. It explained that defendant was now thirty-four years old, and to the extent that it might be claimed that the family traumas from the past had any probative effect, this effect was plainly outweighed by the prejudicial impact under V.R.E. 403.

The court did not abuse its discretion in reaching its conclusion. As the court explained, the alleged incidents occurred in the distant past and their relevance to the events at issue was marginal at best. There had been no other claim of violence involving defendant's father and stepmother after 1986, and in fact, defendant had recently been on good terms with both individuals. As the trial court noted, the evidence at trial suggested that, rather than stemming from past family disputes, the evening's events were best understood in the context of a night of heavy drinking combined with an unplanned revelation that defendant was going to have a child with a former girlfriend. The trial court reasonably concluded that exploring past incidents of alleged abuse would have substantially lengthened the trial and introduced confusing claims and explanations as to largely collateral matters, while yielding little of substantive relevance. We find no error. See State v. Ovitt, 2005 VT 74, & 11, 178 Vt. 605 (mem.) (finding no abuse of discretion in exclusion of evidence of prior bad acts under V.R.E. 403 where proffered testimony concerned incident that occurred seven to nine years earlier, and substantial interval between prior act and current case made evidence less probative and created potential to confuse the jury).

Defendant next argues that the court erred by refusing to allow him to cross-examine his father and stepmother about the illegal nature of a sawed-off shotgun, which defendant found at their home and used on the evening in question. He argues that this evidence was relevant to the victims' credibility and to establish that they had a motive to lie about the evening's events.

The trial court excluded this line of inquiry under V.R.E. 403, and it did not abuse its discretion in doing so. As the court explained, the question of whether the shotgun was illegal under federal law for being sawed-off, and the question of whether the Bacons were aware of it, was entirely collateral to any issue of material fact. The only purpose in exploring this line of questioning was to tarnish the witnesses, not to legitimately test their credibility. We agree that the proposed inquiry was tangential at best, and it carried with it an unreasonable risk of prejudice. The court plainly acted within its discretion in excluding this evidence.

Finally, defendant argues that the court erred in admitting a tape-recording of the victim's 911 call because the tape was prejudicial, cumulative, and it included statements that did not fall within any exceptions to the hearsay rule. Defendant concedes that some of the victim's initial statements may have been admissible as excited utterances under V.R.E. 803(2), but he maintains that much of the call transpired when his girlfriend was in the basement where she was not recording her present sense impression of events or reacting to a startling event or condition. Defendant does not identify any particular statements that he believes should have been excluded.

This argument is without merit. The victim's statements on the 911 tape recording were plainly relevant and admissible, and the court acted within its discretion in admitting them. Pursuant to V.R.E. 803(1), an exception to hearsay rule exists for statements describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. Similarly, under V.R.E. 803(2), a hearsay exception exists for statements relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. In this case, defendant's girlfriend and stepmother were hiding from defendant in the basement when his girlfriend made the 911 call. Defendant's girlfriend expressed fear that defendant was going to shoot her, and at several points, she was too afraid to speak and communicated with the operator by tapping into the telephone receiver. She was eventually able to dart to safety when police arrived on the scene. The statements recorded during the 911 call were plainly made during an ongoing attack, and they were admissible. See State v. Muscari, 174 Vt. 101, 109 (2002) (finding 911 statements made under similar circumstances admissible). The trial court rejected defendant's assertion

that the tape was needlessly cumulative, and defendant offers no compelling basis for disturbing this discretionary decision. Defendant did not argue below that this evidence should be excluded as unduly prejudicial under V.R.E. 403, and he therefore waived this argument. See V.R.E. 103(a)(1); State v. Fisher, 167 Vt. 36, 43 (1997).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice