

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

ENTRY ORDER

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

SUPREME COURT DOCKET NO. 2008-158

FEB 4 2009

FEBRUARY TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Bennington Circuit
	}	
William E. Burdick	}	DOCKET NO. 607-5-07 Bncr

Trial Judge: Katherine A. Hayes

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

Defendant appeals from his conviction of domestic assault following a jury trial. He argues that the court erred in admitting evidence of his prior bad acts. We affirm.

Defendant was charged with domestic assault in May 2007 based on an allegation that he willfully caused his wife to fear imminent serious bodily injury in violation of 13 V.S.A. § 1042. In June 2007, the State filed notice that it sought to introduce evidence of defendant's prior bad acts under Vermont Rule of Evidence 404(b). The State indicated that this evidence was intended to show the absence of mistake or accident (intent), as well as the history of violence perpetrated on the victim by defendant throughout their twenty-four-year relationship. The noticed bad acts included the following: punching the victim in the face several times causing black eyes; repeatedly accusing the victim of infidelity; threatening to take the victim's children away from her; throwing a toilet tank top at the victim and injuring her wrist; choking the victim; holding a loaded rifle to the victim's head and stating that he was going to kill her several times; threatening the victim's life with a gun on three or four other occasions; and hitting the victim with a cane. The State also indicated that the victim had obtained restraining orders against defendant on several occasions but she had later dropped them out of fear and intimidation by defendant and his relatives. Defendant did not file a written response to this motion.

At the jury draw several months later, the State sought to question the jurors regarding their feelings about individuals who remain in abusive relationships. Defendant objected. The State indicated that it would not be going into any specifics about defendant's prior bad acts, but rather, it sought to inquire generally about the issue. The court noted that it would have a hearing on the question of the relevance and admissibility of the noticed bad acts at a later date, and it allowed the State to ask general questions about abusive relationships during voir dire.

At trial, the victim testified that on the evening in question, defendant followed her as she drove to the mall with her daughter. Defendant shook his finger at her in anger and shouted at

her. Defendant then drove away. When the victim returned to the parties' trailer around midnight, defendant had locked the doors and placed all of the victim's clothing in garbage bags. Defendant told the victim that her clothes were "trampy," and the two began arguing. At one point, defendant forcefully punched the wall just above the victim's head, which scared her. He also threatened to shoot and kill her. The victim indicated that she was afraid that defendant would carry out his threat because he had put guns to her head before. At that point, defendant objected, arguing that the reference to the prior bad acts was more prejudicial than probative. The State responded that the evidence provided context and demonstrated that the victim had not misinterpreted defendant's actions. As the State explained, the jury would not understand why the victim was fearful unless it knew that defendant had threatened her in the past and actually held a loaded gun to her head several times during the course of their relationship. The court reasoned that this type of evidence was admissible to demonstrate the context in which the charged events occurred and the nature of the parties' relationship. It explained that defendant would be entitled to an instruction informing the jury of the purpose of such evidence, to which defense counsel responded, "Okay. That's what I would be asking for, then, is the . . . instruction." The court then instructed the jury about the proper use of context evidence.

Following this instruction, the victim testified that there were five guns in the trailer, some of which were loaded. She stated that defendant had threatened her with a gun three or four times during the course of their marriage, telling her that he was going to shoot her. When the victim recounted that defendant had once attempted to actually shoot her, defense counsel renewed her earlier objection. The court then reminded the jury that the evidence was for context purposes only and not to show what happened on the occasion charged against defendant. The victim testified that she was afraid when defendant punched the wall just above her head because he had hit her before. Defendant objected, and the court again repeated its caution to the jury that this was context evidence to explain the victim's reactions. The parties then approached the bench and defendant made a standing objection to the use of the prior bad acts. The victim then stated that she was afraid because defendant had punched her in the face several times, resulting in black eyes, and that he had once hit her with a cane which required her to get stitches. When the State asked the victim if she had ever needed to go to the hospital, defense counsel again objected claiming the question was overbroad, irrelevant and she reiterated her standing objection to the introduction of defendant's prior bad acts. The court overruled the objection. The victim repeated that she had to get stitches, and she also recounted an incident where defendant threw a toilet tank top at her, spraining her wrist.

The victim then continued her testimony about the charged crime. She stated that following the evening's events (described above), she woke up early to get ready for work. She and defendant continued to argue. Defendant followed her out to her car and started kicking her headlights. He was screaming and yelling and very angry. He pulled open one of the car's doors. Defendant then picked up a log and aimed it at her windshield. The victim then drove away. As she did so, defendant threw a log at the back of her car. Later that day, the victim's daughter came to the victim's workplace and informed the victim that defendant was on his way there to harm and embarrass the victim. The victim was scared, and she went to the police station with a friend from work. This friend also testified to the day's events.

Defendant took the position at trial that the victim was not put in imminent fear of serious bodily injury as required by 13 V.S.A. § 1042 because there was no evidence that he was holding

a gun at the time of the threat to shoot the victim. The parties' daughter also testified on defendant's behalf. She stated that defendant had not been yelling at the victim on the way to the mall. She also testified that defendant was clumsy, as support for the defense's theory that defendant had fallen, rather than punched the wall above the victim's head. In its instructions to the jury, the court repeated its caution about the proper use of the evidence of defendant's prior bad acts. The jury found defendant guilty, and this appeal followed.

On appeal, defendant challenges the court's admission of his prior bad acts. He maintains that certain bad acts—the 1989 threat to shoot the victim and spraining the victim's wrist in 1992—were too stale to be admissible, had low probative value, and failed to provide any context for the current state of the parties' relationship. Defendant also challenges the court's admission of several other bad acts, namely, the victim's statement that defendant threatened to shoot her three or four times during their marriage and her statement that defendant had hit her and given her black eyes several times in the past. Defendant maintains that these statements were too vague to allow the jury to assess the current context of the parties' relationship, and they thus had limited probative value. He also argues that the victim's testimony was insufficient to establish by a preponderance of the evidence that the uncharged misconduct occurred. Finally, with respect to all of the bad acts, defendant argues that the court failed to weigh the probative value of the evidence against its prejudicial effect.

We apply a deferential standard of review to the trial court's evidentiary rulings, and we will reverse the trial court's decision “only when there has been an abuse of discretion that resulted in prejudice.” State v. Desautels, 2006 VT 84 ¶ 12, 180 Vt. 189. While evidence of a defendant's prior bad acts is not admissible “to prove the character of a person in order to show that he acted in conformity therewith,” V.R.E. 404(b), such evidence is admissible for other purposes, including to provide needed context for the behavior at issue in domestic abuse cases and to portray the history surrounding abusive relationships, see State v. Sanders, 168 Vt. 60, 62 (1998). As we have explained, “[t]he purpose of establishing defendant's history of abusing the victim is not to show his general character for such abuse, but to provide the jury with an understanding of defendant's actions on the date in question.” Sanders, 168 Vt. at 62. If the jury is unaware of the “history of the relationship between the defendant and the victim, jurors may not believe the victim was actually abused, since domestic violence is ‘learned, . . . controlling behavior aimed at gaining another's compliance’ through multiple incidents.” Id. (citation omitted). “[W]e have also noted that the need to provide context in domestic abuse cases is especially relevant when the pattern of abuse involves the same victim.” State v. Longley, 2007 VT 101, ¶ 17, 182 Vt. 482. Nevertheless, evidence admissible under Rule 404(b) remains subject to V.R.E. 403, see State v. Winter, 162 Vt. 388, 399 (1994), and the trial court has discretion to exclude the evidence if “its probative value is substantially outweighed by the danger of unfair prejudice,” V.R.E. 403; State v. Derouchie, 153 Vt. 29, 34 (1989).

We begin with defendant's contention that two incidents testified to by the victim—the 1989 threat to shoot the victim and spraining the victim's wrist in 1992—were too temporally remote to be admissible under Rule 404(b). Assuming this claim of error was preserved, which it does not appear to be, we find defendant's argument without merit. Contrary to defendant's assertion, we have not imposed a temporal requirement on prior bad acts introduced to provide context in domestic assault cases. The case cited by defendant as support for this proposition involved bad acts evidence used to prove a scheme or plan, which is not at issue here. See State

v. Catsam, 148 Vt. 366, 382 (1987) (indicating that proximity in time is one of two crucial considerations in deciding whether to admit prior bad acts evidence to establish a plan or scheme); State v. Winter, 162 Vt. 388, 396 (1994) (“Catsam clearly holds that temporal proximity is a prerequisite to admission in plan or scheme cases.”). Defendant also cites State v. Ovitt, 2005 VT 74, 178 Vt. 605, as support for his assertion that this evidence should have been excluded. In that case, a defendant convicted of second-degree murder claimed error in the trial court’s exclusion of evidence of an alleged bad act by the victim, which he argued was relevant to his claim of self-defense. We concluded that the trial court acted within its discretion in excluding the evidence, noting that because the incident at issue had occurred seven to nine years earlier, it was of limited probative value to defendant’s self-defense claim, and it had the potential to confuse the jury. Id. ¶ 11. Our ruling in Ovitt does not establish that all incidents remote in time must necessarily be excluded, and it does not persuade us that the trial court here was obligated to exclude the two incidents cited above. We are similarly unpersuaded by the out-of-state cases cited by defendant, none of which involve domestic abuse. The parties here were married for approximately twenty-five years and these prior bad acts shed light on the “history of the relationship between the defendant and the victim.” Sanders, 168 Vt. at 62. The acts were relevant and admissible as context evidence under Rule 404(b).

We next address defendant’s assertion that the victim’s statements about the remaining two incidents—that defendant threatened to shoot her three or four times during their marriage and that defendant had hit her and given her black eyes several times in the past—were too vague to be admissible. With respect to the latter testimony, defendant did not raise this specific claim of error below. Although counsel objected, she did not identify any grounds for her objection, and this claim of error is therefore waived. See State v. Valley, 153 Vt. 380, 397 (1989) (“Where an objection is absent, untimely, or nonspecific, the error, if any, is waived.”). While counsel had at that point raised a “standing objection” to admission of any additional prior bad acts, we presume from the initial concerns expressed by counsel that this objection was on Rule 403 grounds. As we have often repeated, “[a]n objection on one ground does not preserve an appeal on other grounds.” State v. Bubar, 146 Vt. 398, 400 (1985). In any event, as discussed below, we reject the claim that this testimony was too vague to be admissible.

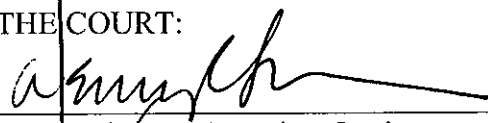
With respect to the testimony about defendant putting guns to the victim’s head in the past, the record shows that defense counsel complained at trial that the State failed to provide any proof that any such incident had actually occurred. A discussion about the admissibility of this evidence ensued. The court indicated that the evidence was admissible to show context and that it would instruct the jury about the limited purpose of such evidence. Defense counsel agreed to this approach. Assuming that defendant preserved his claim, we find no error. The victim was competent to testify to these incidents, and the credibility of her testimony was for the jury to assess. Moreover, we recognized in State v. Wheel, 155 Vt. 587, 603 (1990) that evidence of prior bad acts may be admitted for the purposes stated in Rule 404(b) without a preliminary finding by the trial court that the act actually occurred. Similarly, the United States Supreme Court has stated that evidence of prior bad acts, if offered for a proper purpose, “is subject only to general strictures limiting admissibility such as Rules 402 and 403.” Huddleston v. United States, 485 U.S. 681, 688 (1988). The evidence was relevant under Rule 402, and as discussed below, the trial court evaluated the evidence under Rule 403 and concluded that it should be admitted. We also note that the victim testified several times, without objection, that

defendant threatened her with a gun three or four times during the course of their marriage. We find defendant's second claim of error without merit.

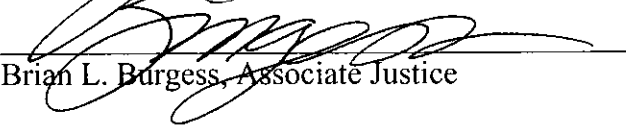
Finally, we reject defendant's claim that the trial court failed to evaluate the evidence under Rule 403. The record shows that defendant argued to the court that the probative value of his prior bad acts was outweighed by their prejudicial effect. The State took the opposite position. It acknowledged that the evidence was somewhat prejudicial, but it maintained that this was true of all evidence presented against a defendant. In this case, the State argued, the evidence was highly probative and it went to the heart of the State's case—it served to provide a context for the acts at issue and to show defendant's intent, as well as to show that the victim had not misinterpreted defendant's actions. Because defendant was not actually holding a gun when he threatened to shoot and kill the victim, the State asserted that the jury would not understand why the victim was fearful absent evidence of his prior bad acts. The court agreed with the State. It found that the evidence was admissible to show context, and to address any undue prejudice, the court repeatedly instructed the jury about the proper use of this evidence. In reaching its conclusion that this evidence should be admitted, the court did "not need to articulate the precise weights assigned to the probative value or prejudicial effect of evidence, or specify why one outweighs the other." Ovitt, 2005 VT 74, ¶ 9. As in Longley, 2007 VT 101, ¶ 19, it is evident from the parties' arguments, the court's statements, and the court's repeated cautionary instructions to the jury, that it considered the probative and prejudicial effect of this evidence under Rule 403. While defendant urges us to find certain testimony of limited probative value, we will not reweigh the evidence on appeal nor interfere with the trial court's exercise of its broad discretion. We find no error.

Affirmed.

BY THE COURT:


Denise R. Johnson, Associate Justice


Marilyn S. Skoglund, Associate Justice


Brian L. Burgess, Associate Justice