ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-268

JULY TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin Circuit
	}	
Daniel Peters	}	DOCKET NO. 539-5-08 Frcr

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

Defendant appeals the district court's decision to deny him bail pursuant to 13 V.S.A. § 7553a. Defendant was charged with first degree aggravated domestic assault, domestic assault, and four counts of violation of an abuse prevention order against his girlfriend. Defendant was held without bail after a hearing on May 28, 2008. This bail decision was reviewed and reaffirmed by the trial court on June 2, 2008, and defendant appealed this decision on July 7, 2008. This Court held a de novo bail hearing on July 17, 2008, and affirms the trial court's decision to deny defendant bail pending trial.

Section 7553a states that

> A person charged with . . . a felony, an element of which involves an act of violence against another person, may be held without bail when the evidence of guilt is great and the court finds, based on clear and convincing evidence, that the person's release poses a substantial threat of physical violence to any person and that no . . . conditions of release will reasonably prevent the physical violence.

Defendant was charged with first degree aggravated domestic assault, a felony, in violation of 13 V.S.A. § 1043(a). "Conduct constituting the offensive of first degree aggravated domestic assault . . . shall be considered a violent act for the purpose of determining bail." Id. § 1043(c).

Taking the evidence in the light most favorable to the state, see State v. Dixon, 169 Vt. 15, 17 (1999) (to determine whether the prosecution has proved a prima facie case, the court must consider the evidence "in the light most favorable to the State and excluding modifying evidence."), the hearing testimony makes out the following history. Defendant lived with the complainant, his girlfriend, at her home in Richford before these charged incidents occurred. The immediate troubles began the evening of May 11, when defendant and complainant argued during dinner. Defendant was drunk. Upon returning home in Richford, the argument escalated

and they went into the bathroom where defendant slapped complainant across the face. Not a hard slap, it nevertheless stung a little, according to complainant.[1] Because she was scared and did not want the fight to worsen, complainant began praying the rosary aloud. Defendant told the victim to stop. When she did not, he lifted her up, sat her down on the toilet seat, and left the room.

As complainant continued to pray, with her eyes closed, defendant reentered the room and placed a shotgun barrel against complainant's throat, under her chin, telling her that if she did not shut up he would kill her.[2] The shotgun was one of four guns complainant kept in the house. The shotgun was stored under her bed in case of intruders, while the other weapons were kept in her older daughter's closet.[3] Complainant heard defendant open and close the shotgun's loading breach before he placed it against her throat. Complainant continued to pray, and defendant again said he would kill her. Defendant then left the room and brought their three-year-old daughter into the bathroom, telling her to observe how stupid her mother looked. At that point, complainant stopped praying and reassured her daughter that everything was okay.

The next incident occurred on the morning of May 22, when defendant and complainant again argued at home. When complainant tried to walk away, defendant pushed her down on the couch and slapped her face, harder than he had on May 11. Defendant was sober. When the complainant tried to get off the couch he pushed her down, effectively restraining her on the couch for approximately an hour. Defendant made a number of threats and complainant was frightened. Later that day, complainant asked defendant to move out of the house.

Defendant at first agreed, but the next day, on May 23, refused to move out and insisted that he and complainant would resolve their conflict. After an argument, defendant, complainant and their daughter drove into town. Complainant left defendant at a friend's house and drove off to apply for an emergency relief-from-abuse order. An emergency order was issued and served on defendant that night. It ordered him to cease all contact with complainant and to vacate her home. Out of fear that defendant would return to the house, complainant spent the next two nights at her sister's house.

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[1] While we do not take it into account as modifying evidence for purposes of a prima facie case, it is relevant, as to whether there is clear and convincing evidence of an ongoing threat of violence, to note that complainant testified at the first bail hearing that this slap was slight and "really didn't hurt." Nevertheless, complainant's latest testimony that the slap stung a little bit was more credible as entirely consistent with the described fact of being slapped, even slightly, by an angered defendant appearing to the court to be over twice her size.

[2] We also find credible complainant's testimony that she could identify the gun barrel by its contact against her throat following what she recognized as the sound of its loading breach being open and shut.

[3] Defense counsel elicited testimony from complainant's other daughter that all of the guns had been stored in her closet, and that defendant never entered her room to retrieve the shotgun on the night of May 11. This testimony does not, however, foreclose complainant's description of the shotgun being then kept under her bed.

Returning to her house on the morning of May 25 to get ready for church, complainant found defendant was inside. Complainant told him he was not supposed to be there. Defendant explained that he came in through an unlocked window. Complainant repeatedly told him to leave, and eventually drove him downtown on her way to church. After the service, defendant was waiting at her car, wanting to talk and to apologize. After retrieving some things for defendant from the house at his request, complainant left and spent the night in Plattsburgh with her daughter out of fear that defendant would again return to her house.

On May 26, at Plattsburg, complainant received a phone call from her home phone. It was defendant. Complainant told him she did not want to talk and did not want to see him when she returned home. When she returned home, however, defendant was still in the house and wanted to talk. Complainant agreed to speak with him, provided that her fifteen-year-old daughter stayed nearby holding the phone, ready to call 911. Defendant began arguing, insisting that he be allowed to spend the night. Complainant forcefully told defendant to get out. When defendant got angry, complainant told her daughter to call the police. Defendant calmed down and complainant drove him to town.

Defendant called complainant first thing the next morning, May 27, and continued to call her—for a total of five times—throughout the day, reporting on his progress in seeking substance abuse and mental health treatment. Complainant declined his request to talk further. Regardless, he came to her house that afternoon. When complainant told him she wanted him to leave, he walked in the door anyway, advised that he had disconnected the house phone line and that they were going to talk. Afraid, but realizing defendant was not going to leave, complainant allowed him to talk and tried not to antagonize him. Defendant threatened to take their daughter, and threatened that if complainant was "ever with anyone else, ever," he would kill them both. Complainant left to drop off some sports equipment for her older daughter at school and, after consulting with school staff about her situation, called police to report defendant's behavior.

Defendant was arrested and arraigned on May 28 for aggravated domestic assault with a deadly weapon, along with five counts of Violating an Abuse Prevention Order (VAPO) for violating the no-contact, vacate-the-house, and no-threats conditions of the emergency relief-from-abuse order. The emergency order was extended once, with a final relief-from-abuse order issued on June 9th and served on defendant. This order was later modified to allow defendant to contact the parties' three-year old daughter, but all of the orders prohibited defendant from contacting complainant.

While incarcerated, defendant sent several letters to his daughter at complainant's address. The three-year-old could not read, and in these letters were messages clearly intended for complainant. In one letter, defendant wrote that

> I am not ever giving up on you or your mother . . . tell her I am very sorry for every thing I love her and I am not going to give up on her I want your mom to be happy but be happy with me and you not any one else . . . I will not let any but me make her happy . . . I will not give up I will get her back I will promise she will NOT

> EVER be happy unless she is with us . . . this time you will be happy with me I will make sure of it.

In a second letter, defendant professed his love and stated, essentially, that he would revert to his former outlaw ways and rely on his own brand of self-help if complainant did not return to him, warning: "If I can't get you back, I will not do my time and not get help . . . I must have you. Don't forget, I know every Coke dealer and every drug dealer." Defendant also indicated that he knew something about a local woman who, according to community lore, vanished after being involved with a local drug dealer suspected in her disappearance: "And this is something you don't know—I know shit about [this woman]. I don't want to go this route." What defendant knew is ambiguous, but whether his letter is interpreted as suggesting that he was involved in the disappearance or, as posited by counsel, that he could turn informant to get out of jail so as not to be kept away, this was a thinly veiled threat to complainant. Both letters reflect defendant's ongoing obsession with complainant and his determination to be with her, regardless of her consent or court orders prohibiting contact.

The State establishes a prima facie case that it has substantial and admissible evidence by which to prove the elements of first degree aggravated domestic assault, with and by threat of using a deadly weapon, beyond a reasonable doubt. 13 V.S.A. § 1043(a). Accordingly, defendant is found charged with a felony crime of violence, for which "the evidence of guilt is great." 13 V.S.A. § 7553a; see also State v. Madison, 163 Vt. 390, 393-94 (1995) (explaining that the "evidence of guilt is great" standard is met when the prosecution has established a prima facie case). It is also noted that that the state makes out a prima facie case for all of the VAPO counts, save one alleging a threat. [4]

From the foregoing this Court also finds by clear and convincing evidence that defendant's release presents "a substantial threat of physical violence to" complainant as contemplated by 13 V.S.A. § 7553a. Complainant's credible testimony is, and the court so finds, that defendant is bent on dominating her, slaps her and went so far as to place a shotgun to her throat and threaten to kill her. Complainant's credible testimony is, and the court so finds, that defendant is jealous of her, is obsessively possessive and dominant, and cannot take "no" for an answer. Defendant cannot stay away from her, and threatens to injure her while demonstrating his capability to hurt her in fact. Alcohol may aggravate defendant's behavior, but defendant is threatening, dominating and physically abusive when sober as well.

Conditions of release cannot reasonably prevent the demonstrable risk of violence. Complainant's credible testimony is, and the court so finds, that defendant does not comply with court orders. Even after arrest and arraignment on the instant charges, defendant evidently could not refrain from contact with, and threatening, complainant. Complainant credibly testified, and the court so finds, that while on furlough conditions of release from prison in her home and company, defendant violated those conditions. Moreover, defendant's record reflects some half-

[4] At the bail appeal, the State failed to establish a prima facie case on count four, specifically charging a threat by defendant on May 25, 2008 in violation of the emergency order. Although complainant testified that defendant threatened her numerous times, and described a particular threat on May 27, she could not describe any threat by defendant on May 25 as charged.

dozen violations of probation, confirming, independently of complainant's credibility, that he cannot be relied upon to abide by court-imposed conditions of release.

Defendant proposes that he be released to the custody of his twenty-one year old daughter and be ordered confined to her home until placed, by prearrangement, at the Brattleboro Retreat's residential program for substance abuse and mental health treatment. This proposal assumes that defendant's violence towards the complainant is the product of alcohol abuse, but alcohol alone does not account for his violent behavior and threatening another with a firearm. Nor is there evidence that defendant's dangerous aggression is the product of mental illness or that, even if so, such danger would be curtailed by treatment. The proposal further assumes that defendant would elect to stay at this unsecured facility, rather than attack complainant. Defendant points out that the Retreat is three hours away from complainant's home, and that complainant could be notified immediately by the authorities in the event defendant chose to leave.

Defendant's proposal affords complainant little more than a three-hour head start, and does not reasonably prevent the substantial risk of physical violence posed by his release. Moreover, the evidence is clear and convincing that no conditions or combination of conditions of release could reasonably ensure complainant's safety. Defendant refuses to relinquish complainant and is prepared to have her even at the cost of his liberty, as demonstrated by his repeated violations of the restraining order after being arrested and jailed for the same offense. Defendant's declared intention to harm complainant is confirmed by his actual injuries to her and his threat against her with a deadly weapon in hand. Because court orders are meaningless to defendant, this court is persuaded that nothing short of his detention can reasonably protect complainant.

Defendant shall be held without bail pending trial.

FOR THE COURT:

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Brian L. Burgess, Associate Justice