

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-289

DECEMBER TERM, 2010

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| State of Vermont | } | APPEALED FROM: |
| | } | |
| | } | |
| v. | } | District Court of Vermont, |
| | } | Unit No. 2, Chittenden Circuit |
| | } | |
| Gary R. O'Brien | } | DOCKET NO. 10-1-08 Cncr |

Trial Judge: Geoffrey W. Crawford, M.
Patricia Zimmerman

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. He contends the trial court erred in admitting: (1) evidence of defendant's prior bad acts; and (2) testimony vouching for the credibility of the complainant. We affirm.

This case arose out of an incident that occurred on New Year's day in 2008, at the home which defendant shared with complainant, his domestic partner of many years. Complainant testified that she returned home with several metal shelves, brought them inside, and was in the process of cleaning them when defendant appeared and shouted at her that he did not want them in the house. Defendant told her that he was going to throw the shelves outside onto the deck. Complainant begged him not to because the deck was covered in snow. Defendant threw one shelf outside and picked up a second to do the same. Complainant, in response, stood in the doorway and again begged him not to throw it outside. Defendant swore and screamed profanities, picked her up, and threw her outside onto the deck. Complainant landed on her back, causing pain and bruises.

Complainant also testified to several prior incidents of domestic assault. One occurred on Thanksgiving day in 2004. Complainant testified that she accidentally knocked over a shelf in the kitchen, and that defendant—in response—became angry, swore and screamed at her, and pushed her against a wall. Complainant also testified to an incident in August 1994, when defendant became engaged in an argument over a cassette tape with the parties' daughter. When complainant picked up a telephone to call the police, defendant grabbed the phone, hit her on the head with it, and pushed her against a wall. Complainant also described an argument over a car in 1998, when defendant grabbed a purse off of her shoulder, and an incident in January 2008, when complainant returned home to find that defendant had used a mop to beat her dogs. When complainant stated that she planned to call the police, defendant threatened to shoot her.

The prior incidents were the subject of a pretrial motion and hearing in which the State asserted that the incidents were relevant to show context, arguing essentially that they helped to explain defendant's seeming overreaction to a relatively minor argument over shelves. The State

also asserted that the incidents were relevant to rebut defendant's anticipated defense that the complainant's fall was the result of an accident. Defendant argued that the incidents were relevant only to show propensity, and that several were too far removed in time to be probative. The court issued a written ruling, concluding that the incidents were admissible to establish context, "to show that a tiny domestic disagreement such as the dispute in this case which concerned a set of shelves has its place in a history of domestic abuse," as well as to show that the assault was intentional and not the result of an accidental shove, as defendant claimed.

Defendant claims on appeal that the prior incidents were inadmissible and irrelevant to the issue of intent because defendant was merely charged with acting "recklessly." However, the record does not show, nor does defendant assert, that this argument was raised before the trial court. Accordingly, it was not preserved for review on appeal. See State v. Hinchliffe, 2009 VT 111, ¶ 32, 186 Vt. 487 (stating that to properly preserve issue for review on appeal a party must present the issue "with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it" (quotation omitted)). Nor does defendant assert plain error. See id. ¶ 34 (noting that Court will not address plain error where it is not raised). Defendant does not otherwise challenge the court's finding that the prior incidents were relevant to establish context, and does not claim that they were so remote in time that any probative value was substantially outweighed by undue prejudice. See State v. Grega, 170 Vt. 573, 575 (1999) (mem.) (recognizing that issues not raised on appeal are waived). Accordingly, we discern no basis to disturb the court's ruling.

Defendant also asserts that a witness improperly vouched for complainant's credibility. The witness was a state trooper who responded to the domestic-assault report. The trooper testified that he spoke with another officer at the scene, who told him that he "had observed some injuries to [complainant], and based on her story he believed that [defendant] had committed the domestic assault." Although defendant did not object to the testimony, he claims that the issue was properly preserved by the court's pretrial ruling granting defendant's motion in limine to exclude any "vouching for the credibility of the victim or anyone else." Defendant asserts that this was a "definitive" ruling and did not require renewal at the time of trial. See State v. Brink, 2008 VT 33, ¶ 7, 183 Vt. 603 (mem.) (noting that a "definitive" ruling on admissibility may obviate need for renewed objection at trial). A broad pretrial ruling excluding "vouching" is not sufficient, however, to preserve an objection to specific testimony adduced at trial where—as here—the testimony was not clearly offered to vouch for complainant and a specific objection was necessary to alert the trial court that defendant believed that the testimony fell within the court's pretrial ruling. Accordingly, we conclude the issue was not properly preserved for review on appeal. See Hinchliffe, 2009 VT 111, ¶ 32.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice