Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NOS. 2019-062 & 2019-140

MARCH TERM, 2020

State of Vermont v. Jennifer L. Jarvis*	}	APPEALED FROM:
	}	
	}	Superior Court, Grand Isle and
	}	Franklin Units,
	}	Criminal Division
	}	
	}	DOCKET NOS. 15-2-13 Gicr, 609-5-17 Frcr & 1153-8-18 Frcr
		Trial Judge: A. Gregory Rainville

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

Defendant appeals her convictions of reckless endangerment and simple assault, arguing that the court's instruction on prior-act evidence was plain error and that the court erred in sustaining objections during her closing argument. Defendant also appeals probation violations that were based on the convictions of these crimes. We affirm.

The following facts were introduced at trial. The complainant lives with her husband and three sons in a house that shares a long driveway with her neighbor. On prior occasions, the complainant observed defendant coming and going from her neighbor's house many times a day at a high rate of speed. Previously, the complainant asked her neighbor to speak with defendant about this, but the behavior continued.

In July 2018, the complainant was in her yard when she saw defendant come up the driveway and stop at the top of the drive. The complainant had already been up and down the driveway several times that day at a rapid rate of speed and the complainant was concerned. The neighbor was in the passenger seat and got out to check the mailbox. The complainant decided to speak to her neighbor, so she started to walk down the driveway to reach her neighbor on the passenger side of vehicle. As she was walking, the complainant called to her neighbor that she needed to speak to him. The neighbor looked down and acknowledged the complainant. Defendant then noticed the complainant and started screaming, waving her arms, and swearing at the neighbor to get in the car. The neighbor returned to the car and before he could even close the door, defendant had gunned the gas and was heading down the grass towards the complainant. The complainant was afraid and thought that defendant was going to run her over. The complainant started to run backwards and got behind a post and stone wall. Defendant did not slow down and swerved back onto the main driveway at a high rate of speed. The complainant went back to her house and called the police. The complainant testified that her neighbor came over a few days later and apologized for defendant's behavior.

The complainant explained that the reason she did not attempt to speak directly with defendant about her driving that day was because of an interaction with defendant six to eight weeks previously. On that day, defendant had made several trips in and out of the driveway at high rates of speed and the complainant decided to speak to her directly. Defendant was coming up the driveway so the complainant walked over and defendant pulled up and started screaming at the complainant, stating she would go as fast as she wanted, swearing, and telling the complainant to call the cops if she wanted. Defendant gunned the car and swerved into the complainant so that she had to push herself off the car to avoid getting her feet run over. Defendant screamed at the complainant for touching her car and waved her arms wildly.

Deputy Albarelli responded to the scene in July 2018. He spoke to the complainant and then went over to the neighbor's house. Defendant was there and Deputy Albarelli spoke with her. She denied driving quickly or veering towards the complainant. She became agitated, called the complainant names, used foul language, and made several threats against the complainant, including that she would burn the complainant's house down, would beat the complainant, and that the next time she would run the complainant over.

Defendant did not testify. Neighbor testified on her behalf. He stated that he did not see defendant drive on the grass or drive erratically. He testified that he did not hear any yelling from his neighbor or defendant. He also stated that defendant was driving five to ten miles per hour. He testified that he did not remember apologizing to the complainant after the July 2018 incident.

The jury convicted defendant of both counts. Defendant subsequently admitted to several probation violations for violating a condition requiring her not to be convicted of a crime. Defendant appeals the convictions for reckless endangerment and simple assault as well as the probation violations.

Defendant's first argument concerns the court's instruction on prior acts. During the charge conference, the court discussed the instruction related to defendant's prior bad acts. The parties had agreed to some changes to the instruction, including retitling the section "other act evidence." The State then requested to "eliminate the last sentence" of the instruction, but the record does not reveal the content of that language. The State argued that the sentence implied that the jury could not consider the prior-act evidence as proof of the alleged offense in any manner and that this was incorrect because it could be used to establish some elements of the offense, particularly intent. Defendant argued that the language should be fleshed out to explain that the prior incident could not be "the sole piece of evidence" to prove the offense. The State suggested some language and with minor suggestions from defendant, both sides agreed[1] to the following language: "Evidence of other acts cannot by themselves sufficiently prove that [the defendant] committed the alleged acts for which she is on trial." The court provided this instruction in its charge without objection.

On appeal, defendant contends that this instruction was in error. Because defendant did not object, we review the argument for plain error. See V.R.Cr.P. 52(b) (providing that plain errors are those "affecting substantial rights"). Plain error "exists only in exceptional circumstances where a failure to recognize error would result in a miscarriage of justice, or where there is glaring

[1] We do not reach the question of whether defendant waived her right to challenge this instruction under the invited-error doctrine. See State v. Morse, 2019 VT 58, ¶ 9 ("Defendant may not inject error into the proceedings by advocating for one type of jury instruction and then attempt to profit from the legal consequences of the error by challenging the same instruction on appeal." (quotation omitted)).

error so grave and serious that it strikes at the very heart of the defendant's constitutional rights." In re Carter, 2004 VT 21, ¶ 21, 176 Vt. 322 (quotation omitted). We view jury instructions "in their entirety" and will assign error "only when the entire charge undermines our confidence in the verdict, and only in extraordinary cases will we find plain error." State v. Brooks, 163 Vt. 245, 250 (1995).

Here, we conclude that the instructions, when viewed in their entirety, even if error, did not amount to plain error.[2] As to the prior-act evidence, the court instructed the jury as follows:

> During the trial, you may have heard that [defendant] may have committed other acts outside of the charged offense at some time other than at the time of the alleged offense. The law is strict about how you may use such evidence. You may consider it as relevant to the issue of intent or motive. However, you may not consider this evidence as tending to prove that [defendant] was acting in the same way or doing the same thing that she did previously. . . . In other words, evidence of other acts cannot by themselves sufficiently prove that she committed the alleged acts for which she is on trial.

Defendant asserts that this instruction was inadequate because it allowed the jury to use the prior-act evidence to conclude that defendant committed the charged offense.

This instruction did not amount to an error so grave that it undermines our confidence in the verdict. The instruction did not, as defendant asserts, allow the jury to base its conviction on the prior-act evidence. The court instructed the jury that the prior-act evidence was relevant for the limited purpose of proving intent or motive, that it could not be used to conclude that defendant had a propensity to commit a crime or similar kind of crime, and that the prior act could not alone prove the charged offense. The instruction, when viewed in its entirety, accurately reflected the law and did not amount to plain error. See State v. Hendricks, 173 Vt. 132, 140-41 (2001) (concluding there was no plain error in instructing jury "where the court admitted prior bad acts evidence to show context, and issued limiting instructions requiring jurors to consider it for that purpose alone").

Defendant's next argument concerns objections the State made during defendant's closing argument. During closing argument, defense counsel emphasized the State's burden to prove the charge beyond a reasonable doubt, and the following exchange occurred:

> [Defense counsel]: Just even one doubt in your mind and it's reasonable, you must acquit.
>
> [State's attorney]: That's not correct. Your Honor, objection.
>
> THE COURT: So I'll read you folks what the burden of proof is and what your job is. So just depend upon what I give you for the instructions, all right?
>
> [Defense counsel]: So each and every one of you has this immense amount of power to say no. You have a duty and a responsibility. My question to you is, are you brave enough to tell the State—

[2] We do not imply that the instruction was error; we need not and do not reach this question.

[State's attorney]: Objection, Your Honor. Not appropriate.

A bench conference followed in which the State objected that defendant was impermissibly seeking to appeal to the jury's sympathy. The court sustained the objection, explaining that defendant could "argue about reasonable doubt being adequate to say no," but should not "appeal to [the jury's] sense of courage to say no."

Defendant argues that the court improperly impaired defense counsel from telling jurors that they had the power to say no and encouraging them to be brave enough to tell the State it had not met its burden.

"Control of closing arguments is committed to the trial court's discretion and is reviewed only for abuse of that discretion." State v. Karov, 170 Vt. 650, 653 (2000) (mem.). We conclude that the court did not abuse its discretion in this case because the court did not improperly limit defendant from commenting on the State's burden of proof or impair defendant from making appropriate arguments. In response to the State's objection regarding defense counsel's explanation of the burden of proof, the court indicated that it would provide the jury with an explanation of the law and explained to counsel at the bench conference that defense counsel could argue about whether reasonable doubt was adequate. Moreover, the court provided a detailed instruction on the State's burden of proving the charges beyond a reasonable doubt.

As to defendant's request that the jury be "brave," the court acted within its discretion in directing counsel not to appeal to the jury's "sense of courage to say no." In prior cases, this Court has explained that in closing argument, counsel should focus on the evidence and the inferences that can be drawn from the evidence, but should "avoid appealing to the prejudice of the jury, and should not play on the jury's sympathy or seek to inflame their passions." State v. Reynolds, 2014 VT 16, ¶ 30, 196 Vt. 113 (quotation omitted). The court did not abuse its discretion in construing defense counsel's exhortation to be brave as an impermissible attempt to appeal to the jurors' emotions instead of the evidence.

Defendant's final argument is that if this Court reverses her convictions for reckless endangerment and simple assault, it should also reverse her probation violations, which were based on being convicted of those crimes. We need not reach this argument because we are affirming her convictions.

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Harold E. Eaton, Jr., Associate Justice

_____
William D. Cohen, Associate Justice