

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 NO. 2020-073

JANUARY TERM, 2021

State of Vermont v. Christopher Ferraro*	}	APPEALED FROM:
	}	
	}	Superior Court, Rutland Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 646-6-18 Rdcr
		Trial Judge: Thomas A. Zonay

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

Defendant appeals jury convictions on several charges stemming from his alleged assault of his girlfriend and a neighbor, arguing that the trial court committed reversible error by denying his motion for a mistrial after the State inadvertently played a brief portion of a recorded conversation between an investigating officer and defendant’s girlfriend that the court had ruled inadmissible. We affirm.

Based on an incident that occurred in June 2018, the State filed an amended information charging defendant with multiple counts of aggravated domestic assault, multiple counts of violating conditions of release, unlawful restraint, violating an abuse-prevention order, interference with access to emergency services, aggravated assault, and simple assault. At the time, there were pending charges against defendant based on a February 2018 incident involving defendant and his girlfriend at the same location. The State sought to join the two cases, or in the alternative allow “evidence of the February 2018 incident as well as other evidence of the Defendant’s violent and threatening relationship towards [his girlfriend].” The trial court denied the motion to join the cases, citing conflict-of-interest and scheduling concerns, but did not rule at that time on the State’s request to allow evidence of prior bad acts under Vermont Rule of Evidence 404(b).

By the time the case went to the jury, ten of the charges from the June 2018 incident remained. Following a two-day jury trial, the jury convicted defendant of seven of those charges: two counts of aggravated domestic assault, four counts of violating conditions of release, and a charge of violating an abuse-prevention order.

Defendant’s challenge on appeal focuses on evidence inadvertently presented to the jury in contravention of the parties’ stipulation. The specific background is as follows. At the start of the first day of trial, the court considered the State’s request to admit evidence of prior bad acts relating to the February 2018 incident. Reviewing the State’s offer of proof concerning the incident, the court concluded that it was probative because it related to a pattern of abuse and control involving the same victim, relatively close in time. Concluding that the evidence gave the jury context concerning the parties’ relationship, and that the probative value was not outweighed

by the danger of unfair prejudice, the court ruled that the State could offer the evidence. See State v. Brandt, 2012 VT 73, ¶ 16, 192 Vt. 277 (stating that in domestic-assault cases “we have generally allowed evidence of other noncharged acts of domestic violence to be admitted to explain the circumstances of the relationship between the parties”); see also State v. Williams, 2010 VT 77, ¶ 16, 188 Vt. 405 (explaining that such evidence is probative “to explain the dynamic of the parties’ relationship and complainant’s conduct both before and after the assault”).

Later that day, the State sought to play for the jury a nine-minute portion of a video recording from a police cruiser that captured a conversation between one of the investigating officers and defendant’s girlfriend immediately following the incident. Defendant objected generally, and also specifically objected on the basis that the recording included a reference to a prior uncharged act of choking that was not included in the restraining order associated with the February 2018 incident that had been admitted into evidence. Defendant contended that the State had not given him notice, pursuant to Vermont Rule of Criminal Procedure 26(c), of its intention to offer evidence of this alleged act of choking. After a short break so counsel could review the video together, the State informed the court that the parties had reached an agreement to replay the recording with the fifteen-second portion relating to that allegation muted.

The court admitted the evidence pursuant to the excited-utterance exception to the hearsay rule and implicitly accepted the parties’ stipulation to mute the portion of the video in which defendant’s girlfriend referenced a prior instance of choking. Upon replaying the recording following the jury’s return, the prosecutor approached the bench and asked if the first word following the fifteen-second muted portion—“choked”—could be heard. Defense counsel replied in the affirmative and asked for a mistrial. The trial court denied the motion, ruling that at most the isolated word was heard without any context. The court noted that it understood the word only because it knew what the word was from its prior discussion with the attorneys. Defense counsel disagreed with the court’s assessment, stating that he heard the word clearly and that the jurors were near the speakers. Defense counsel declined the trial court’s offer of a curative instruction, stating that he did not want to draw further attention to the word. The court then told the jurors that it was striking everything they had just heard in the recording, which would be replayed again. The recording was then replayed without the offending word, with an additional ten seconds muted.

Defendant’s sole argument on appeal is that the trial court committed reversible error by not granting him a mistrial after the State inadvertently played a brief portion of the video recording that should have been excluded. We conclude that the trial court did not abuse its discretion in denying defendant’s motion for a mistrial. See State v. Messier, 2005 VT 98, ¶ 15, 178 Vt. 412 (“The disposition of a motion for mistrial is discretionary, and, as such, a claim of error can be supported only where the trial court’s discretion was either totally withheld, or exercised on clearly untenable or unreasonable grounds.”). For this Court to overturn a denial of a motion for a mistrial, “it must appear affirmatively that a denial of the motion has resulted in prejudice to the moving party, with the burden of proof being on the movant.” State v. Voorheis, 2004 VT 10, ¶ 20, 176 Vt. 265 (quotation omitted).

Reviewing “the denial of the motion within the context of the entire proceedings,” *id.*, we conclude that the trial court acted within its discretion in determining that it was highly unlikely that defendant suffered any prejudicial impact as a result of the jurors possibly hearing the isolated words “choked me” without surrounding context. The record supports the trial court’s conclusion that the errantly played words followed a period of approximately fifteen seconds during which defendant’s girlfriend’s statements were muted, such that the specific context of the words was unclear. Moreover, the jury knew through the admission of an exhibit and presentation of

testimony that defendant had been served with a one-year order of protection in March 2018 forbidding him from contacting his girlfriend or committing further acts of abuse against her. Further, defendant's girlfriend, who was a recanting hostile witness for the State, acknowledged that there had been an incident between her and defendant in February 2018 and that around that time she obtained a relief-from-abuse order against him. Therefore, any suggestion that defendant had previously threatened or injured his girlfriend did not add significantly to the evidence. And the court's curative instruction did not mention the challenged language, but rather merely told the jury to disregard the recording in its entirety and listen to it played again.

Finally, we reject as highly speculative defendant's suggestion that the jury's mixed verdict supports an inference that the mistakenly broadcast words prejudiced defendant. In making this argument, defendant points to the fact that the jury convicted him only of the offenses to which he conceded guilt (violating conditions of release and an abuse-prevention order) and those involving threatening behavior toward his girlfriend that put her in fear of imminent serious bodily injury. The evidence concerning the respective contested charges varied, and there is nothing particular about the mention of an earlier incident of choking in defendant's girlfriend's recorded statement that would lead the jury to convict defendant of two counts of domestic assault for threatening his girlfriend with a flare gun and causing her to be in fear of imminent serious bodily injury but acquit him of unlawfully restraining her or assaulting the neighbor.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice