ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-078

MARCH TERM, 2020

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	Superior Court, Windham Unit
	}	Criminal Division
James C. Lohr	}	
	}	DOCKET NO. 129-2-20 Wmcr
	}	
		Trial Judge: John R. Treadwell

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

Defendant James Lohr has filed an interlocutory appeal from the decision of the Windham Superior Court, Criminal Division, holding him without bail pursuant to 13 V.S.A. § 7553a on a felony charge of aggravated assault in violation of 13 V.S.A. § 1024(a)(1) and a misdemeanor charge of simple assault. The decision is affirmed.

I. Procedural Background

The instant charges arose from an incident on or about February 10, 2020, at the home of Mary Nicholson, during which the defendant allegedly strangled Ms. Nicholson. After being held on bail overnight, the defendant was arraigned on February 11, 2020, and released on conditions that, among other things, he not contact, harass, or come within 300 feet of Ms. Nicholson. Less than two hours after those conditions of release were established, the defendant was arrested for violating them after he showed up at Ms. Nicholson's home. On February 25, 2020, the Windham Superior Court, Criminal Division, issued a decision and order regarding the State of Vermont's motion to hold the defendant without bail pursuant to 13 V.S.A. § 7553a, and declined to release the defendant pursuant to 13 V.S.A. § 7554.

The defendant appealed to this Court, and a de novo hearing was held on March 10, 2020, before Superior Court Judge Elizabeth D. Mann, sitting by special designation over the single-justice-review proceeding as provided by 13 V.S.A. § 7556(d) and Vermont Rule of Appellate Procedure 9(b)(1). The State was represented by Deputy State's Attorney Dana J. Nevins. Defendant was present and represented by attorney Daniel S. Stevens.

At the de novo hearing, the State presented two additional exhibits and defendant presented two additional video clips from body-worn cameras of law enforcement. The parties stipulated to the admission of the trial-court record and exhibits admitted below, and the facts as found by the trial court are not in dispute. The defendant acknowledged at the de novo hearing that the only issue is whether the audio statement of the complaining witness is appropriately characterized as

an affidavit. If that statement is an affidavit, the defendant concedes that the evidence of guilt is great.

II. Standard of Review

On this de novo review, the Court affords no deference to the lower court's conclusions of law. State v. Madison, 163 Vt. 390, 393 (1995) (mem.). While the lower court's findings of fact are subject to the same standard of review, "nothing prevents a reviewing court from adopting unchallenged findings . . . of the trial court." Id.

A person may be held without bail under 13 V.S.A. § 7553a if charged with a felony, an element of which involves an act of violence against another person, "when the evidence of guilt is great and the court finds, based upon clear and convincing evidence, that the person's release poses a substantial threat of physical violence to any person and that no condition or combination of conditions of release will reasonably prevent the physical violence."

In making a decision under § 7553a regarding whether the evidence of guilt is great, the trial court applies the standard applicable under Vermont Rule of Criminal Procedure 12(d) for a motion to dismiss for lack of prima facie case. Madison, 163 Vt. at 394 (1995); see also State v. Duff, 151 Vt. 433, 439 (1989). This requires that the prosecution establish " 'by affidavits, depositions, sworn oral testimony, or other admissible evidence that it has substantial, admissible evidence as to the elements of the offense . . . sufficient to prevent the grant of a motion for judgment of acquittal at the trial." State v. Blackmer, 160 Vt. 451, 454 (1993) (quoting Duff, 151 Vt. at 439). The court must evaluate the evidence, taking it "in the light most favorable to the State and excluding modifying evidence," and determine whether the State "can fairly and reasonably show defendant guilty beyond a reasonable doubt." Duff, 151 Vt. at 439 (quotation omitted); see also State v. Turnbaugh, 174 Vt. 532, 532 (2002) (mem.); Madison, 163 Vt. at 394. Importantly,

> it is not the role of the court in a bail review hearing to judge the State's case. In a bail hearing, guilt or innocence of the accused is not the issue, and there should be no evaluation of the evidence with that result in mind. Direct conflicts between inculpatory or exculpatory facts cannot be resolved at this stage. Such matters must await jury determination at trial. Rather, the court need only determine if the State's evidence is sufficient to sustain a verdict of guilty, not whether the jury will indeed be persuaded to render same.

Turnbaugh, 174 Vt. at 534; see also State v. Breer, 2014 VT 132, ¶ 8, 98 Vt. 629.

III. Findings and Conclusions of Law

The Court has applied the clear-and-convincing evidence standard of proof in making its factual findings. State v. Lontine, 2016 VT 26, ¶ 46, 201 Vt. 637 (mem.) ("The evidentiary standard to be applied to the analysis of facts found under § 7553a is the clear-and-convincing evidence standard.").

A. Admissibility of the Complaining Witness's Statement

The defendant has challenged the admissibility of a video of the complaining witness being interviewed by two police officers, on the grounds that the complainant's statement is not sufficient to be considered an affidavit and because the complainant was intoxicated at the time she gave her statement. During the hearing, defense counsel raised a separate argument regarding the affidavit: he contended that the statement was unsworn because the officer to whom the complaining witness made the statement regarding strangulation had left the room at the time the other officer had defendant swear to it. Based on the exhibits and video clips admitted at hearing, as well as the applicable case law, the court concludes that the audio statement of the complainant is a sworn statement such that the evidence of guilt is great.

The use of an oral sworn statement as an affidavit for purposes of evaluating evidence under § 7553a has been considered by the Court in similar situations. In State v. Bushey, the Court affirmed the trial judge's finding that the evidence of the defendant's guilt was great in a case involving multiple sexual-assault charges punishable by life imprisonment. 2009 VT 12, ¶ 1, 185 Vt. 597 (mem.) (citing 13 V.S.A. § 7553). The trial court had based its decision in part on an audio recording of the police interview with the complaining witness, which included her swearing to the truth of her statement at the end of the interview. Id. ¶ 3. The Court "likened such a sworn oral statement to 'a written affidavit attested to at the bottom of the statement.' " State v. Hugerth, 2018 VT 89, ¶ 8, 208 Vt. 657 (mem.) (quoting Bushey, 2009 VT 12, ¶ 5). Notably, the Court reached the same conclusion in Hugerth. In holding that the child witness's sworn interview "was the functional equivalent of an affidavit," the Court emphasized the fact that the child witness swore to the truth of his statement at the end of the interview "[did] not negate its admissibility." Id. In a similar vein, in State v. Whittemore, a case in which the defendant was charged with first-degree aggravated sexual assault on a minor, the trial court accepted as evidence of guilt a transcript of a police interview with the victim. 2015 VT 16, ¶ 5, 196 Vt. 608 (mem.). The interview contained the following exchange between the detective and victim:

> Q: . . . And has everything that you've told me been the truth and nothing but the truth as best as you can remember?
> A: Yes.
> Q: So help you God?
> A: Yes.

Id. Rejecting the defendant's argument that the exchange was deficient because it came at the end of the interview, the trial court found the interview to be a sworn statement of the victim. Id. The Vermont Supreme Court affirmed the decision of the trial court finding that evidence of guilt was great, agreeing with the court's observation that "any deficiencies [were] of form and not substance," and that "the interview transcript was competent evidence in the context of a bail review hearing under § 7553." Id.

Based on review of the video of Ms. Nicholson's interview, the court finds that the sworn statement in the instant case parallels those statements in Whittemore, Bushey, and Hugerth found to be admissible. The transcript in this case reflects the following exchange occurred between Officer Busch and the complaining witness:

> Officer Busch: . . . And just to verify. Do you swear that everything you've told me today is the truth.
> Nicholson: Yes sir.
> Officer Busch: Under the pains and penalties of perjury.
> Nicholson: Yes sir.
> Officer Busch: Do you understand that lying to a police officer is a crime?
> Nicholson: Yes I do.
> Officer Busch: Okay. Thank you. Have a good rest of your night.

Ms. Nicholson's interview bears the same qualities as an affidavit or sworn statement. Ms. Nicholson made the statements on personal knowledge, she affirmed that all of her statements were true,[1] there is no question as to her competence to testify, and, as in Whittemore, Bushey, and Hugerth, she attested to her statement at the end of the interview. See V.R.Cr.P. 12(d)(3). And, given that such evidence has been found to be properly submitted at a weight-of-the-evidence hearing in the context of cases punishable by life imprisonment, the Court deems the evidence to be similarly appropriate in the context of a charged felony involving an act of violence against another person under 13 V.S.A. § 7553a.

Further, the Court does not find that Ms. Nicholson's intoxication during the police interview renders her sworn statement inadmissible. By the Court's observations, the video does not present a woman who is unable to provide a coherent statement of the events that transpired. Indeed, she states quite clearly that the defendant "beat," "slammed," and "chok[ed]" her. Although Ms. Nicholson's presentation indicates that she may be intoxicated, it is unclear from the video to what extent her demeanor and manner of speech is related to alcohol consumption, as opposed to personal attributes. Nor does it appear that Ms. Nicholson is incapable of understanding her duty to tell the truth. As such, to the extent the defendant contends that Ms. Nicholson should be disqualified as a witness, we find no basis for such disqualification.[2] See V.R.E. 601 (requiring for disqualification that the proposed witness be incapable of expressing himself about matter so as to be understood by factfinder either directly or through interpretation, or be incapable of understanding witness's duty to tell the truth).

In any event, the Court also finds Ms. Nicholson's statements during the police interview to be admissible under the excited-utterance exception to the hearsay rule. An excited utterance is a statement " 'relating to a startling event or condition made while the declarant was under the

---

[1] The interview of Ms. Nicholson was conducted by both Officer Busch and Officer Penniman. All of Ms. Nicholson's factual statements were made to both officers. The oath given to Officer Busch therefore applied to all statements of Ms. Nicholson.

[2] Where a witness has consumed alcohol or drugs "heavily at the time of critical events, and testifies to an ebbing or fading memory concerning those events, the question is properly treated by the court as one of credibility and not competency, and the question is best left to the jury." State v. Cate, 165 Vt. 404, 411 (1996). In this case, there has been no evidence that Ms. Nicholson engaged in "heavy" alcohol use or that she had any difficulty in recalling the events in question.

stress of excitement caused by the event or condition.' " State v. Ives, 162 Vt. 131, 142 (1994) (quoting V.R.E. 803(2)). "The statement need not be contemporaneous with the exciting event; 'the key consideration is the condition of the declarant.' " Id. (quoting State v. Shaw, 149 Vt. 275, 281 (1987)) (emphasis added).

Here, we observe the following portion of Ms. Nicholson's interview with Officer Busch and Officer Penniman:

Nicholson:	I went into bring him something. He was laying in the bedroom…..He took me and he slammed me and he just wouldn't let go of me (at 10:59 of Busch video Ms. Nicholson becomes detectably upset) I tried to get him off. I come from a lot of abuse.
Busch:	What did he slam you on to?
Nicholson:	The floor.
Busch:	The floor?
Nicholson:	And the bedframe and whatever Hey! (at 11:26, Ms. Nicholson stomps foot, voice becomes much louder) when I'm getting beaten, I'm not looking …
Penniman:	Yeah, I hear ya. I hear ya.
Nicholson:	It happens that fast. It takes you guys five minutes to get here. You know how long five minutes is when you're getting beat?
Penniman:	It seems like a lot more than five minutes when its happening.
Nicholson:	It's terrifying. And I'm like Oh shit, oh damn, you're going to die. You need to put me on death row. Look!
Penniman:	How did he do that to your hand? Did he step on it? or
Nicholson:	I don't know. I think I must—he was grabbing me. I was trying to get him off me or something.
Penniman:	Was he choking you, strangling you?
Nicholson:	All of it.
Penniman:	All of it? Like with two hands around your neck?
Nicholson:	Oh yes. He was choking me. He was going to kill me.

The video reflects that Ms. Nicholson was clearly under the stress of the assault when she spoke with Officers Busch and Penniman. When describing the beating, she became visibly upset, her voice was raised, and her movements depicted a person in distress, as though reacting to the assault itself. While it is unclear when the actual incident occurred, Ms. Nicholson stated that it was "[n]ot 24 hours ago." Under these circumstances, we find these statements admissible under V.R.E. 803(2).

B. Evidence of Guilt is Great

Under 13 V.S.A. § 1024(a), "[a] person is guilty of aggravated assault if the person . . . attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life." "Serious bodily injury," includes bodily injury that creates a substantial risk of death, a substantial loss or impairment of the function of any bodily member or organ, and strangulation by impeding normal breathing. Id. § 1021(a)(2). "Extreme indifference," in turn, "may be characterized as knowing of the likelihood that the act might naturally cause death or great bodily harm, but engaging in the action nonetheless[.]" State v. Blish, 172 Vt. 265, 272 (2001) (citing State v. Shabazz, 169 Vt. 448, 455 (1999)).

Here, the admissible evidence, taken in the light most favorable to the State and excluding modifying evidence, could fairly and reasonably show, beyond a reasonable doubt, that the defendant caused or attempted to cause serious bodily injury to Ms. Nicholson, purposely, knowingly, or recklessly. At the least, Ms. Nicholson's statement that the defendant "slammed" her to the floor and the bed frame, and "beat" her until she thought, "[y]ou're going to die[,]" in addition to choking her, constitutes evidence of an attempt to cause serious bodily injury under circumstances manifesting extreme indifference to the value of human life.

In addition, the extremely violent nature of Mr. Lohr's unprovoked acts against Ms. Nicholson, his re-arrest after he went to Ms. Nicholson's home upon his release—against the condition that he not come within 300 feet of her and her home—as well as his criminal history, including violations of an abuse prevention order and prior conditions of release, establish by clear and convincing evidence that the defendant's release would pose a substantial threat of physical violence to the complainant, and that no condition or combination of conditions of release would reasonably prevent the physical violence. Cf. State v. Steuerwald, 2012 VT 98, 193 Vt. 663 (clear and convincing evidence held to support the denial of bail to defendant who had been charged with aggravated domestic assault, and violating conditions of release, and furnishing alcohol to a minor, given, in part, defendant's threat of physical violence and act of strangling girlfriend). Accordingly, we affirm the trial court's finding that the State has met its burdens under § 7553a.

C. Release Pursuant to 13 V.S.A. § 7554 Not Warranted

We must now consider the factors set forth under 13 V.S.A. § 7554. See State v. Collins, 2017 VT 85, ¶ 15, 205 Vt. 632 (mem.) (requiring consideration of the factors listed under § 7554 before holding a defendant without bail). These factors include whether the defendant presents a risk of flight from prosecution, "the weight of the evidence against the accused, the seriousness of the charge, the defendant's family ties, his record of convictions," his "recent history of violent threats," the defendant's financial resources, his mental condition, and his record of appearances at court proceedings. Id. ¶ 17 (quotation omitted); see also 13 V.S.A. § 7554(b).

It is unclear how long defendant has been in Vermont but there is no evidence that defendant has any significant ties to the community. Prior to his arrest he was reportedly living in a tent and in need of medical care.

Defendant has a history of criminal convictions including offenses of credit card fraud, simple assault, threatening to commit a crime, criminal harassment, violating an abuse-prevention order, violations of conditions of release, and a violation of probation from both Massachusetts and Vermont spanning a ten-year stretch from 2005 to 2015. There is an outstanding Massachusetts warrant for the arrest of Mr. Lohr.

The weight of the evidence against defendant is great as discussed above. The charges here are unquestionably serious. Significantly, the violent assault charged here appears to have been completely unprovoked and, immediately after his release, defendant violated the conditions designed to prevent him from engaging in similar unprovoked violent behavior. These events demonstrate that defendant is unwilling or unable to control his behaviors even when faced with a pending serious felony charge and subject to court-ordered conditions of release.

The Court has carefully considered each of the relevant factors, as well as potential conditions of release, including bail, and cannot find that conditions of release can adequately assure public safety or defendant's appearance for future court proceedings. The seriousness of the offense, as well as the factors relating to the nature and circumstances of the offense, the weight of the evidence, defendant's prior criminal history, and his character and mental condition raise substantial concerns regarding public safety as well as defendant's return to court. Critically, there is no evidence to support the viability here of oft-used conditions of release designed to protect the public like release to a responsible adult and a 24/7 curfew.

The Court concludes there is clear and convincing evidence that there is no condition or combination of conditions which can be imposed here to reasonably protect the public. Thus, for the reasons stated herein, the Windham criminal division's decision to hold defendant without bail pursuant to 13 V.S.A. § 7553a is affirmed.

Affirmed.

FOR THE COURT:

_____

Elizabeth D. Mann, Superior Judge,
Specially Assigned