

VERMONT SUPREME COURT
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Case No. 21-AP-218

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

MAY TERM, 2022

State of Vermont v. Richard A. Morrell*	}	APPEALED FROM:
	}	Superior Court, Chittenden Unit,
	}	Criminal Division
	}	CASE NO. 1298-5-20 Cncr
		Trial Judge: Martin A. Maley

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

Defendant appeals from his conviction of domestic assault following a jury trial. He argues that the court committed reversible error in admitting a video recording of the alleged incident. We affirm.

The record indicates the following. On a May 2020 evening, defendant called police to report that his wife was driving while intoxicated with the parties' children in the car. Shortly thereafter, wife called police to report that defendant assaulted her. An officer located wife and spoke to her. She did not appear intoxicated; she was very upset and emotional and said she was assaulted. Wife stated that there was a video recording system in the parties' home. Police spoke to defendant at the parties' home. He blamed wife for swatting him. Defendant asked the officers to retrieve and review a video of the incident captured by a camera system in the home, which they did.

Defendant was charged with domestic assault for attempting to cause or willfully or recklessly causing bodily injury to wife by striking her. Defendant moved to dismiss the charge. He argued that the State could not establish the necessary elements of the crime because wife did not provide a sworn statement at the time of the incident and she had since recanted her allegations. The State opposed the motion, arguing that the video of the incident provided independent evidence of guilt that corroborated wife's initial statements to police.

At a hearing on the motion, defendant moved to exclude the videotape, stating that he no longer consented to its use. Defendant offered no support for his request and the court rejected it. The court explained that "[a] revocation of consent does not operate retroactively to render

unreasonable that search conducted prior to the time of revocation.” 4 W. LaFave, Search & Seizure § 8.1(c) (6th ed.). The court reviewed the video and made findings of fact as to what it depicted. At the hearing, wife denied that defendant hit or choked her.

The court concluded that the State had sufficient evidence to support the elements of the charge. It considered the firsthand observations in the police officer’s affidavit and deemed wife’s statements to police admissible as excited utterances. It also considered the video footage, which it found showed defendant pushing wife onto her back on the kitchen table while he held her down by her throat, after which she kicked him away. The court found that this evidence corroborated wife’s excited utterances. Wife also told police that her jaw was sore and that she suffered pain from the incident, which constituted bodily injury under the statute. For these and other reasons, the court denied defendant’s motion to dismiss.

At another pretrial motion hearing, defendant’s attorney noted that defendant had provided the video to police, believing it would exonerate him, and counsel did not think that stipulating to the video’s authenticity and admissibility would be a problem. Defendant referenced the video in his opening argument at trial. He did not object to its admission at trial. The responding officer testified that both wife and defendant stated that there was a recording system in the home. After defendant was transported to the police station, he demanded that police retrieve the camera system so that he could show police the video, indicating that he wanted them to “have a copy of it.” Later that night, the officer reviewed a portion of the video with defendant. The officer testified that he had been inside the parties’ residence and that the video fairly and accurately depicted the parties’ residence. He could easily identify defendant in the video and the woman in the video had the same appearance as wife. The State then offered the video into evidence and, when asked, defendant’s counsel stated that he had no objection to its admission. The court admitted the evidence and played the seven-and-a-half-minute long video for the jury. The video was created by an officer recording the video provided by defendant. There is no audio.

Another police officer also testified. Her body camera recorded the conversation during which wife reported that defendant had choked her that evening. The officer described wife as visibly upset and shaken and stated that wife appeared to have experienced a traumatic event. Wife also testified. She said that she was the aggressor, and that defendant did nothing wrong. She said she had been drinking that evening and had lied to police. Defendant did not present any evidence. He moved for a judgment of acquittal, which was denied.

As the State prepared to give its closing argument, defendant attempted to raise a pro se objection to the State’s use of the video in its closing. Defendant’s counsel explained that defendant was unhappy that counsel had conceded to the video’s admission and that defendant had obtained an enhanced copy of the original video that he wanted counsel to submit but counsel had identified various hurdles to doing so pretrial. The court explained that the State clearly had the right to refer in closing to evidence that had already been admitted and that it was too late to be raising objections to the admission of such evidence or seeking to present new evidence. The jury found defendant guilty. Defendant filed a motion to set aside the verdict, which was denied. This appeal followed.

Defendant argues on appeal that the court erred in admitting the video. He maintains that the police exceeded the scope of his consent by making a copy of the video; the State failed to present the best evidence or properly authenticate the video; and the error was not harmless. With respect to authentication, defendant argues that the officer could not identify wife in the video, there were no timestamps on the video, and there was no evidence regarding the reliability of the reproduction process. He cites State v. Hiltl, 2021 VT 60, in support of this argument. Defendant acknowledges that he failed to object to the admission of the video at trial but notes that he objected at the pretrial hearing on his motion to dismiss and at another pretrial motion hearing and that defendant raised a pro se objection following the close of evidence. Assuming that he failed to preserve this claim, defendant asserts that the court's admission of the video was plain error.

At the outset, we conclude that defendant failed to properly preserve his arguments for appeal. “[T]o preserve a claim of error in the introduction of evidence, the party opposing introduction must make a timely objection,” meaning “that [t]he objection must have been made at the time the evidence was offered or the question was asked.” State v. Kinney, 171 Vt. 239, 253-54 (2000) (quotations omitted). Defendant's pretrial objections did not suffice, nor did his pro se objection after the close of evidence when it was too late to raise such objections. Defendant was obligated to object to the admission of the video at trial when the evidence was offered, and he failed to do so. We thus review only for plain error.

“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 error so grave and serious that it strikes at the very heart of the defendant's constitutional rights. The error must not only affect substantial rights, but also have an unfair prejudicial impact on the jury's deliberations. State v. Carpenter, 170 Vt. 371, 375 (2000) (citation omitted).

Defendant fails to show that any violation of the best-evidence rule is plain error. A surveillance video is admissible under Vermont Rule of Evidence 901(a) if there is “evidence sufficient to support a finding that the matter in question is what its proponent claims.” “This is merely a preliminary determination, and as such, the test for authenticating evidence is not a demanding one.” Hiltl, 2021 VT 60, ¶ 28 (quotation omitted). “[T]he trial court acts as a gatekeeper” and need only “conclude that there is evidence upon which a reasonable jury” could find “that the evidence is what it purports to be.” Id. (quotations omitted). We distinguish this case from Hiltl because, unlike that case, our review here is only for plain error. In Hiltl, moreover, we considered the admissibility of a surveillance video generated by a business, which police obtained from the business. In this case, defendant controlled the video recording, which captured images from his own home. He provided the camera system to police and there was no opportunity for police to modify it before viewing it. Defendant demanded that police review the video that he provided, and defendant and police watched the video together.

We find no miscarriage of justice or glaring error that “strikes at the very heart of defendant's constitutional rights” in the court's admission of the surveillance video here. Carpenter, 170 Vt. at 375 (citation omitted). As indicated above, the video was from a system set up in the parties' home; defendant provided the camera system to police and demanded that they review it. Police reviewed the video with defendant and made a copy of it. The question of consent was resolved before trial. Defendant's attorney indicated at a pretrial hearing that he

was unlikely to challenge the video's authenticity, and he did not object to its admission at trial. The responding officer testified at trial that the video fairly and accurately depicted the inside of the parties' residence; he recognized defendant and a woman who had the same appearance as wife. Defendant himself wanted to present the video to the jury in an enhanced version. There was evidence here from which the jury could reasonably conclude that the video was what it purported to be, and the court did not commit plain error in admitting it.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice