

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-213

MARCH TERM, 2003

	}	APPEALED FROM:
	}	
State of Vermont	}	Dist. Ct., Unit II, Chittenden Cir.
	}	
v.	}	DOCKET No. 5164-9-01 CnCr
	}	
Francis Joseph	}	Trial Judge: Dean Pineles
	}	
	}	

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

Defendant Francis Joseph appeals his conviction of second degree aggravated domestic assault and his sentencing as an habitual offender under 13 V.S.A. § 11. On appeal, he argues that the trial court erred by (1) allowing the State to introduce irrelevant and prejudicial evidence that a rifle was found in his home; (2) allowing the State to present irrelevant profile evidence; and (3) failing to instruct the jury that the State needed to prove beyond a reasonable doubt that he had four prior convictions to enhance his conviction under the habitual offender statute. We affirm.

Defendant was convicted of second degree aggravated domestic assault after a jury trial. The State's evidence showed that on January 27, 2001, police responded to a complaint of an "in progress" domestic assault at defendant's home. Officer Peter Chapman arrived to find defendant's wife, Mrs. Joseph, with a bloody towel covering two lacerations on her leg. Mrs. Joseph was very upset and told the officer that defendant had broken a lamp and cut her with one of the pieces. She stated that defendant had fled the residence on foot. The officer asked Mrs. Joseph for a piece of defendant's clothing to assist in canine tracking. Mrs. Joseph showed the officer defendant's coat, and when the officer reached to pick it up, he found a rifle wrapped inside. Mrs. Joseph was surprised to see the rifle.

At trial, Mrs. Joseph testified that she did not remember talking to the officers when they came to her home. She stated that on the evening in question, she had gotten into an argument with her husband and had cut him on the chest. She testified that she then cut her own leg because she was angry and upset. She stated that she had never done anything like that before or since and that her actions were apparently caused by "some kind of nervous breakdown." Mrs. Joseph stated that she had seen a psychiatrist to help her figure out why she would do such a thing. She testified that she initially told police that defendant had assaulted her because she worried that she would go to prison and would be unable to take care of her son.

In light of Mrs. Joseph's recantation, the State presented expert testimony regarding victims of domestic violence and behavioral patterns of those who "self-mutilate." The State explained that it was offering expert testimony regarding self-mutilators because defendant had implied that there was a psychological reason that Mrs. Joseph had cut herself. The expert testified, without objection, that people cut themselves for various reasons, including trauma or victimization. She stated that it was uncommon for such behavior to occur in the midst of a fight, and, further, that those who engage in such behavior typically do so more than once. The expert also testified that it is common for domestic violence victims to recant abuse claims.

The admissibility of evidence concerning the discovery of the rifle became an issue before and during trial. The State

maintained that Mrs. Joseph's reaction to the rifle's discovery supported its theory that she had recanted her testimony because she feared retribution from defendant. Defendant orally objected in limine to the introduction of the gun, arguing that its ownership had not been established. The court replied that the gun had been found wrapped in defendant's coat, which seemed to obviate any ownership questions. The court indicated its inclination to admit the rifle evidence, but stated that it would withhold its decision until trial. When the subject came up at trial, the State asked whether defense counsel wanted to raise any issues regarding admissibility. Defense counsel stated, "I think I did, Your Honor. I mean, I would object to it, but I think the Court noted that it was wrapped in his jacket and that makes it admissible and we'll just have to let it play." The officer then testified without objection about the discovery of the rifle and Mrs. Joseph's reaction to it. The State moved to admit a photograph of the rifle wrapped in defendant's coat. The court asked for defendant's position on the admissibility of the photograph and defense counsel replied, "No, Your Honor, we've already, we've already noted our objection." After the court admitted the photograph, defense counsel stated "Your Honor, for the record, the objection is based on relevancy."

The jury found defendant guilty of the domestic assault charge. The State then presented a certified copy of defendant's prior conviction of domestic assault, and the jury found defendant guilty of second degree domestic assault. Finally, the State presented certified copies of court records showing defendant's four prior felony convictions. The court instructed the jury that "the burden of proof now is for the State to prove" defendant's prior felony convictions. Defendant stipulated to the admission of the certified court documents and presented no contradictory evidence. The jury found defendant guilty of having four previous felony convictions, and he was subsequently sentenced as a habitual offender. This appeal followed.

Defendant first argues that the trial court abused its discretion in allowing the State to present evidence that a rifle was found at the scene. According to defendant, the presence of the rifle had no bearing on any issue raised at trial, and its introduction was more prejudicial than probative. The State asserts our review should be for plain error rather than for abuse of discretion because defendant failed to raise the issue at trial. We agree. A defendant cannot claim error in the admission of evidence unless he has made a timely objection during trial. V.R.E.103(a)(1); see State v. Fisher, 167 Vt. 36, 43 (1997). The objection must have been made at the time the evidence was offered or the question was asked, and objection on one ground does not preserve the issue for appeal on other grounds. Fisher, 167 Vt. at 43.

In this case, defense counsel failed to raise a specific objection to admission of testimony involving the discovery of the rifle. Before trial, defendant challenged the introduction of the rifle based on ownership. At trial, prior to the officer's testimony, defense counsel stated to the court, "I mean, I would object to it, but I think the Court noted that it was wrapped in his jacket and that makes it admissible and we'll just have to let it play." He did not raise any objections during the officer's testimony. He did not raise any objections to Mrs. Joseph's testimony regarding discovery of the rifle. He objected after the fact to the admission of a photograph of the rifle. At no time did he assert that the evidence should be excluded because it was prejudicial. Rather, he objected based on relevancy after the photograph had been admitted into evidence. Under these circumstances, defendant failed to offer timely, specific objections to the rifle evidence on the grounds he now raises; accordingly, he has waived his right to appellate review of this issue on an abuse-of-discretion standard. The trial court's admission of the rifle evidence does not rise to the level of plain error. See State v. Mears, 170 Vt. 336, 341 (2000) (plain error exists only in exceptional circumstances where failure to recognize it would result in a miscarriage of justice or where there is glaring error so grave and serious that it strikes at very heart of defendant's constitutional rights).

Defendant next argues that the trial court erred in allowing the State to present expert testimony regarding behavioral patterns of those who engage in self-mutilation. According to defendant, the expert's testimony constituted "irrelevant profile evidence" that did not tend to prove or disprove that defendant committed the charged act. Defendant argues that because no one ever claimed Mrs. Joseph was a self-mutilator, this condition was not at issue. Again, because defendant failed raise this objection at trial, we review for plain error.

Defendant maintains that admission of the expert testimony was plain error because, other than Mrs. Joseph's testimony, the State's case was based on hearsay, and the evidence was not overwhelming. Defendant argues that the jury's guilty verdict necessarily depended on whether it believed Mrs. Joseph's testimony that she cut defendant and then cut herself. Defendant argues that, under these circumstances, the prejudicial nature of the expert's testimony is clear, and it cannot be said beyond a reasonable doubt that the jury would have convicted even in the absence of error.

We disagree. At trial, defendant suggested that Mrs. Joseph stabbed herself as a result of a mental breakdown. Mrs. Joseph testified that she had sought psychiatric help to determine why she acted the way she did. The expert testified about common behavioral characteristics of people who cut themselves for psychological reasons. She made it clear that she had never interviewed Mrs. Joseph, and she did not testify that Mrs. Joseph was lying about stabbing herself in the leg. See, e.g., Fisher, 167 Vt. at 44 (no plain error where testimony did not rise to level of vouching for minor abuse victim's credibility); State v. Kinney, 171 Vt. 239, 251 (2000) (upholding admissibility of expert testimony on rape trauma syndrome and concluding there was little risk expert would be seen as a "truth detector"). The court's allowance of brief expert testimony regarding the characteristics of those who engage in self-mutilating behavior does not rise to the level of plain error, if any error at all. See Mears, 170 Vt. at 341.

Finally, defendant argues that the trial court erred by failing to instruct the jury that the State had to prove beyond a reasonable doubt that he had four prior convictions to enhance his sentence under the habitual offender statute. According to defendant, under Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), when a jury is asked to determine whether a defendant will be subject to an enhanced sentence as a habitual offender, the State must prove the elements of the charge beyond a reasonable doubt. Because defendant did not object to the court's instructions prior to the jury's deliberations, however, we review for plain error. See State v. Tahair, 172 Vt. 101, 104-05 (2001). When determining whether plain error exists in the content of jury instructions, we review instructions in their entirety. State v. Forant, 168 Vt. 217, 220 (1998). The alleged error must not only affect substantial rights, but it must also have had an unfair prejudicial impact on the jury's deliberations. Tahair, 172 Vt. at 110.

First, we note that defendant misreads Apprendi, which provides that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490 (emphasis added); accord State v. Stevens, 14 Vt. L.W. 71, 72 (2003) (mem.) ("Apprendi explicitly allows the fact of a prior conviction to be used for sentence enhancement without it being found by the jury"). Thus, to the extent Apprendi applies, the fact of a prior conviction does not have to be proved beyond a reasonable doubt. Even if we assume for purposes of defendant's claim of error that the State was required to prove each of defendant's prior convictions beyond a reasonable doubt to satisfy the habitual offender statute, defendant has not demonstrated that the court's failure to reiterate the reasonable doubt standard rises to the level of plain error. In this case, the State offered certified copies of court records as proof that defendant had been convicted of four prior felonies. Defendant offered no objection to the court records and presented no contradictory evidence. The court instructed the jury that "A the burden of proof is upon the State to prove these further convictions listed in the document and you will take the evidence with you into the jury room and you can give it such weight as you think it's entitled to receive." Although the court did not state the reasonable doubt standard prior to the jury's consideration of defendant's status as a habitual offender, the jury had been repeatedly instructed in earlier charges that the State bore the burden of proving each element of the charged offenses beyond a reasonable doubt. Under these circumstances, we fail to see how the court's instructions had an unfair prejudicial impact on the jury's deliberations or how they violated defendant's constitutional rights. We therefore find no plain error.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Denise R. Johnson, Associate Justice

Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned