

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-456

JULY TERM, 2006

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
Rod Ilges	}	
	}	DOCKET NO. 1324-3-05 Cncr

Trial Judge: Michael S. Kupersmith

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

Defendant Rod Ilges appeals from his conviction of domestic assault after a jury trial. He argues that he is entitled to a new trial because he was erroneously charged with, although not convicted of, aggravated domestic assault. We affirm.

Defendant was charged with first degree aggravated domestic assault in April 2004. The State alleged that defendant recklessly caused serious bodily injury to his wife, Shannon Ilges, by choking her, in violation of 13 V.S.A. ' 1043(a)(1). Defendant moved to dismiss the charge under V.R.Cr.P. 12(d), alleging that the State could not prove that he recklessly caused Aserious bodily injury@ to the victim within the meaning of 13 V.S.A. ' 1021(2). Specifically, he argued that choking someone for five seconds, as alleged by the victim in her

affidavit, was not life-threatening as a matter of law. The trial court, Judge Cashman presiding, granted defendant's motion to dismiss, concluding that a momentary head lock did not constitute aggravated assault. The charge was amended to misdemeanor domestic assault, although the court noted that the State could reinstate the felony charge if it obtained better evidence.

At a hearing before Judge Kupersmith on an unrelated motion, Judge Kupersmith questioned whether the amended information alleged a felony or misdemeanor offense. In response to a request for clarification of the charge, Judge Cashman issued a written decision, reiterating his decision to dismiss the felony aggravated assault charge and reduce the charge to misdemeanor domestic assault. A jury trial was held before Judge Kupersmith on the misdemeanor domestic assault charge. During the charge conference, the State moved to amend the charge to aggravated domestic assault. Judge Kupersmith indicated that, after hearing the evidence, he believed that the charge could be aggravated assault, but he declined to amend the charge back to a felony. The court noted that if there was a hung jury, as far as he was concerned, the charge could be refiled as an aggravated domestic assault. The jury could not reach a verdict on the domestic assault charge, and a mistrial was declared. Judge Kupersmith stated to the parties,

If the State wants to retry this, the State should file an amended information setting forth the information (sic). As you see fit, based on our discussion today, I expect it will be a modification and as I said earlier, I think the evidence supports an aggravated assault charge. I will make a note for the file that if a 12(d) motion is filed, it should be set in front of me since I've heard most of the evidence. . . . [B]ut we're not going to do anything unless we get a . . . motion to amend the information and if we don't get that in 30 days, we'll simply dismiss the case.

The State later filed an amended information, charging defendant with one count of first degree aggravated domestic assault. Defendant moved to dismiss the charge, asserting that because the original charge against him had been reduced to a misdemeanor, the trial court could not reverse that decision and it should not have invited the State to refile the charge as a felony. After a hearing, the court denied the motion to

dismiss. A trial was held, and the jury found defendant guilty of domestic assault, a lesser-included offense of aggravated domestic assault.

Defendant moved for a new trial, asserting that Judge Kupersmith was not authorized to overrule Judge Cashman's decision reducing the original charge from aggravated domestic assault to simple domestic assault. He argued that, although he was not convicted of aggravated domestic assault, he suffered prejudice because his conviction may have been the result of a compromise verdict. According to defendant, if the jury had been asked to consider only a simple domestic assault charge, it may have reached a different verdict. The court denied the motion, finding that defendant failed to cite a single authority in support of his position and it did not need to entertain assertions in a memorandum that were unaccompanied by facts, law, or reasoning. This appeal followed.

On appeal, defendant argues that the court erred in allowing the jury to consider an improper aggravated assault charge. He maintains that he was entitled to a new trial because his domestic assault conviction suggests that the jury was prejudiced by the improper charge and their verdict was a compromise verdict.

This argument is wholly without merit. Even assuming that the court erred in allowing the State to amend the information, defendant fails to demonstrate that he suffered any prejudice as a result. Defendant was not convicted of aggravated domestic assault. His conviction for domestic assault is amply supported by the evidence at trial. See State v. Wigg, 2005 VT 91, ¶¶ 25-26 (error is harmless if it is clear beyond a reasonable doubt that a jury would have returned a guilty verdict regardless of the error, and harmless error analysis generally focuses on evidence of guilt in the record). To establish defendant's guilt of domestic assault, the State needed to prove beyond a reasonable doubt that he recklessly caused bodily injury to the victim. See 13 V.S.A. § 1042. Bodily injury was defined by the court at trial as physical pain, illness, or any impairment of physical condition. The victim testified at trial that defendant forcibly grabbed her and put his arm around her throat for at least five seconds and as a result she was unable to breathe. She testified that she felt pain. The victim's testimony was corroborated by testimony of her son, in addition to the testimony of other witnesses. Photographs of the victim's injuries were also admitted at trial. We note that defendant does

not argue that the evidence is insufficient to establish his guilt. He offers no support whatsoever for his speculative contention that but for the jury=s consideration of the aggravated assault charge, he would not have been convicted of domestic assault. The trial court did not abuse its discretion in denying his request for a new trial. See State v. Eaton, 134 Vt. 205, 206 (1976) (Supreme Court reviews trial court=s decision on motion for new trial for abuse of discretion).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice