

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-009

JANUARY TERM, 2007

State of Vermont

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APPEALED FROM:

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v.

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Addison District Court

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Robert H. Meacham

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DOCKET NO. 358-7-05 AnCr

Trial Judge: Matthew I. Katz

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

Defendant appeals from his conviction of second-degree aggravated domestic assault, arguing that the evidence was insufficient to support the conviction, and that the trial court committed reversible error by allowing the admission of prior-bad-act evidence. We affirm.

Defendant was initially charged with first-degree aggravated domestic assault based on an incident in which he allegedly struck his girlfriend while the two were sitting in an automobile parked outside the victim=s

workplace. The charge was amended at trial to second-degree aggravated domestic assault. Following the trial, during which defense counsel objected to the admission of testimony concerning statements defendant allegedly made following his arrest, the jury convicted defendant of the charged crime.

On appeal, defendant first argues that the evidence presented at trial was insufficient to support his conviction. In reviewing a denial of a motion for acquittal, we look at the evidence presented by the State, viewing it in the light most favorable to the prosecution and excluding any modifying evidence, and determine whether that evidence sufficiently and fairly supports a finding of guilt beyond a reasonable doubt. @ State v. Grega, 168 Vt. 363, 380 (1998). We examine the evidence for its quality and strength; evidence that merely gives rise to a suspicion of guilt or that leaves guilt dependent on conjecture is insufficient. Id. In this case, several witnesses testified as to what occurred during the incident that led to defendant's arrest and conviction for domestic assault. Two of the witnesses were the victim's coworkers who began watching defendant and the victim in their car outside the workplace after another coworker reported that the couple was arguing. One of the coworkers testified that she observed defendant's arm tense up and move in a quick motion toward the victim, while simultaneously the victim's upper torso moved and her head struck the driver's side window of the car. A second eyewitness testified as to seeing defendant and the victim arguing, and then turning away for a second when she heard the first eyewitness say that defendant was hitting the victim. According to her testimony, she turned around in time to see the victim's head bounce off the driver's side window. Both witnesses also testified that the victim was upset and had a red mark on the right side of her face when she came into work shortly thereafter. Another witness was the manager of the workplace who confronted defendant after hearing that defendant was hitting the victim. He testified that he observed defendant angrily gesturing to the victim, and that he escorted the victim into the workplace. He also testified that the victim was upset and had a red mark on the side of her face. Two other witnesses, including a police officer who arrived at the scene shortly after the incident, testified that the victim was upset and had a red mark on the side of her face that was consistent with being struck in the face. Notwithstanding defendant's argument that no one testified to actually seeing defendant's hand make contact with the victim's face, the evidence amply supports a finding of guilt beyond a reasonable doubt.

Defendant also argues that the trial court committed reversible error when it denied defendant's motion to exclude evidence of prior bad acts. In making this claim of error, defendant refers to the admission of testimony concerning statements that defendant allegedly made shortly after he was arrested. On the morning of the trial, before the submission of evidence, defense counsel informed the trial court that she had not received notice that the State would be introducing evidence of prior bad acts. Upon inquiry from the court, the prosecutor indicated that it would not be introducing any such evidence. Later, during his opening statement, the prosecutor told the jury that the arresting officer would testify that defendant made incriminating statements at the police station following his arrest. According to the prosecutor, among other things, the officer would testify that defendant asked why he did this, and further stated that he was in classes for this. Defense counsel objected, arguing that the State was introducing evidence of prior bad acts, and that defendant could not confront these statements without explaining that he was taking anger management classes because of a prior domestic assault conviction. The court overruled the objection, concluding that the prosecutor's comments did not constitute evidence of a prior domestic assault.

At trial, the prosecutor called a police officer to testify about his observations of the victim and the admissions defendant made while in custody. Defense counsel objected when the officer began discussing the spontaneous incriminatory statements defendant had made at the police station following his arrest. The State argued that the testimony demonstrated an admission and thus was relevant to counter defendant's claim that he did not strike the victim. The court again overruled the objection, stating that although the subject of the testimony was on the edge of prior-bad-act evidence, it was particularly probative as to defendant's state of mind. Although the officer testified to some of defendant's statements, he never testified to the statement about defendant's classes. During his closing argument, the prosecutor reminded the jury of the unsolicited incriminating statements that defendant had made at the police station following his arrest, including the statement that he was taking classes for this. Defendant again objected, arguing that the State was introducing prior bad acts, and that there was no testimony indicating that defendant had made the latter statement. The court agreed that the State had not presented any evidence that defendant had made such a statement, and thus the prosecutor withdrew that portion of the argument. At the request of defense counsel, the court told the jury to ignore any statement about defendant taking classes.

On appeal, defendant argues that the trial court's admission of his statement that he was taking classes for this is reversible error because the statement concerned prior bad acts and was admitted solely for the purpose of demonstrating that defendant acted in conformity therewith. Irrespective of the court's ruling, there was no actual testimony that defendant made such a statement, and the trial court instructed the jury to ignore the prosecutor's reference to the alleged statement because there was no testimony supporting it. Defendant neither objected to this curative instruction nor sought a mistrial. In the absence of the allegedly offensive evidence, the court's ruling is harmless.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice