

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2006-259

JUNE TERM, 2006

|                  |   |                             |
|------------------|---|-----------------------------|
| State of Vermont | } | APPEALED FROM:              |
|                  | } |                             |
|                  | } |                             |
| v.               | } | District Court of Vermont,  |
|                  | } | Unit No. 1, Windsor Circuit |
| Leroy Goodwin    | } |                             |
|                  | } | DOCKET NO. 608-5-06 Wrcr    |

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

Defendant Leroy Goodwin appeals the district court=s order holding him without bail. Defendant was arraigned on two felony counts of Aggravated Domestic Assault for two separate allegations that defendant manually choked his wife. Persons charged with felony acts of violence against others may be held without bail:

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.

13 V.S.A. ' 7553a. Defendant asserts the trial court erred because the evidence does not support the findings required by the statute. Upon review, this Court affirms on Count II.

The appeal was set for a new evidentiary hearing before a single justice of this Court as provided by 13 V.S.A. ' 7556(d) and V.R.A.P. 9(b), but the parties agreed to rely on the record of the district court proceedings below. See 13 V.S.A. ' 7556(d) (ASuch hearing de novo shall be an entirely new evidentiary hearing without regard to the record compiled before the trial court; except, the parties may stipulate to admission of portions of the trial court record.@). Defendant further stipulated that the factual allegations by complainant were as described in her affidavit, without the need for her actual testimony. Defendant reserved his right to contest the facts, the weight and credibility of complainant=s allegations, and the district court=s conclusions. The only new evidence offered at the second hearing was brief testimony from the defendant stating that he understands his marriage is over and that he has no intention of contacting complainant.

Based on complainant=s affidavit, the State presents substantial and admissible evidence of the following. Defendant and complainant have been married since December of 1998. On May 2, 2006, complainant sought police protection due to her husband=s violent actions. That morning, the couple argued, during which defendant took food from complainant and threw it across the room, threw and broke the leg off a table, spit in her face, and picked her up and bit her on the nose. The couple=s nineteen month old child was present during these events. One day earlier, during an argument about a missing document, defendant kicked and broke a wastebasket, a fragment of which hit complainant=s elbow, causing bleeding and swelling. Three or four days earlier, defendant choked complainant to near unconsciousness, and then proceeded to destroy some of defendant=s property, including a porcelain doll that had been a gift from complainant=s mother. Defendant lit the doll on fire, completely burning it, then threw it on the floor and urinated on it, asking Awhat are you going to do now?@

Complainant's affidavit further recites that she was the subject of ongoing hitting, pushing and choking by defendant, as well as mocking and bullying verbal abuse. Complainant explained that she did not previously report the abuse because of defendant's threats against her if she said anything. According to complainant, defendant said she would be tied to a pail of cement and dropped in the river, or be confined to a wheelchair due to him breaking her spine, and that if she were gone, no one would miss her. She states that she was afraid for her life.

An officer who took complainant's statements corroborated the presence of red marks on complainant's nose, and located evidence in the couple's home of the broken table leg, what appeared to the officer to be a punch@ holes in the walls, the remnants of the destroyed doll, burn marks on the furniture and a stain on the bedroom rug consistent with complainant's report of defendant urinating on her doll.

Defendant submits that surrounding circumstances tarnish complainant's credibility or detract from the weight of her allegations. Despite frequent opportunities to leave when defendant traveled to New York for employment, complainant chose to stay. Complainant's brother, defendant's brother-in-law, appeared as a witness for defendant at the district court hearing to testify that defendant stayed at the brother's New York City apartment some forty times in the past year, and would be welcome to stay again. Defendant argues that the State presented no evidence of bruising. Defendant offers that a New Jersey charge of domestic violence against defendant in 2001 may have been initiated by complainant, thus putting into question her claim of not reporting any of the many incidents to the police@ because of defendant's threats. Defendant posits that if complainant's allegations are true, her credibility must be strained by likely vindictiveness.

Defendant failed to impeach complainant's version of events. It may seem counterintuitive, but it is not uncommon, for persons to stay with abusive partners. No evidence was presented to show that the brother-in-law was particularly familiar with the domestic relations between complainant and defendant. Even if complainant's brother sided with defendant, which does not appear from his limited testimony, the brother-in-law's partisanship, without an expressed opinion, has no bearing on complainant's credibility. Absent medical testimony, it is not evident that bruising must necessarily appear three days after being choked. Assuming, for argument, that complainant reported abuse to New Jersey police five years ago, her instant representation of no reports to police could easily mean no reports to police in Vermont, or that, given the significant passage of time, she made no reports to police in the last five years. Vindictiveness based on a history of abuse is no less a motive for telling the truth.

Having little or no reason to doubt the veracity of complainant's statement, portions of which were corroborated by police investigation, her statement is found by this Court to be clear and convincing evidence of the facts alleged.

Under 13 V.S.A. ' 7553a, evidence of guilt is A great@ when the State presents prima facie evidence sufficient to prevail against a motion to dismiss under V.R.Cr.P. 12(d). See State v. Madison, 163 Vt. 390, 393 (1995) (Morse, J.) (citing State v. Blackmer, 160 Vt. 451, 454 (1993)). The applicable standard for Rule 12(d) is whether the State has substantial admissible evidence, taken in the light most favorable to the State and excluding any modifying evidence, fairly and reasonably tending to show the defendant's guilt beyond a reasonable doubt. State v. Burnham, 145 Vt. 161, 165 (1985).

Defendant first argues, and this Court agrees, that the State fails to make a prima facie case on the elements of A serious bodily injury@ required for the first count of Aggravated Domestic Assault under 13 V.S.A. ' 1043(a)(1). In reference to Count I, complainant's affidavit says in pertinent part that defendant A put his hands around me as I gasped for forgiveness. I was picked up until we were face to face . . . .@ Although the investigating officer's affidavit relates that complainant's taped verbal statement describes loss of consciousness due to being choked by defendant, that statement is not in evidence and the officer's recitation is inadmissible hearsay. No prima facie case supports Count I. The evidence of guilt for that charge is not great.

The sufficiency of the evidence for Count II of Aggravated Domestic Assault was not challenged and the State does present a prima facie case. Complainant's affidavit states that defendant choked her to the point of unconsciousness. Unconsciousness, even temporary, appears to be A substantial loss or impairment of the function of [a] bodily . . . organ,@ such as the lungs, trachea and brain, required for A serious bodily injury@ as defined by statute.

13 V.S.A. ' 1021(2). The State=s evidence in support of this charge is great.

Additionally, this Court concludes that there is clear and convincing evidence of a substantial risk to complainant=s physical safety if defendant is released. Defendant engaged in three assaultive incidents against complainant within a one week period. Coincidentally, or previously, defendant threatened future violence against his wife if she reported any incidents of violence. Defendant points out that the threats described could have been made at any time, and might have been remote. Immediate or remote, defendant threatened dire consequences if his wife complained. The condition precedent is now satisfied. This is not the first incident of threatening conduct by defendant, who has two prior convictions for misdemeanor Amenacing-2nd:weapon@ in 1994 and 1996.

Based on the instant finding of assaultive conduct, defendant is demonstrably capable of following through on his threats, at least to the extent of serious battery. The Ahands on@ nature of the strangulation, and the threats of serious injury and worse, reflect significant personal animus. This animosity, and defendant=s contempt for complainant, is further confirmed by his very personalized and dramatic destruction of her doll. Defendant=s violence against his wife has been escalating. No reason suggests that release of defendant would lessen his resentment of complainant or cool his passion against her.

Finally, this Court finds clear and convincing evidence that no condition or combination of conditions will reasonably prevent the violence. Any conditions would be entirely dependent upon voluntary compliance by defendant. Defendant argues, and this Court does find, that he has no record of violations of conditions of release, probation or parole. Defendant does, however, have an ongoing history of noncompliance with relatively mild court requirements to appear, as demonstrated by eleven bench warrants (not counting those noted as Avacated@) issued against him between 1983 and 2001, as well as a conviction for bail jumping in 1996. Defendant testified that he has no interest in his wife and would abide by no-contact conditions to stay away from her and his children while this case is pending, but defendant is not a reliable respondent to court process. Any breach of reporting conditions, in state or out of state, means only that defendant would have a head start on the authorities to reach complainant. Balanced against the substantial risk posed to complainant by his release, there is no monitoring or practically enforceable assurance to reasonably guarantee voluntary compliance by defendant.

Affirmed.

FOR THE COURT:

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Brian L. Burgess, Associate Justice