

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2007-131

FEBRUARY TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Orleans Circuit
	}	
John Corsano	}	DOCKET NO. 152-3-06 OsCr

Trial Judge: Edward J. Cashman

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

Defendant appeals a jury conviction of sexual assault, arguing that the trial court erred by allowing testimony that he had spent time on probation and in jail. We affirm.

The twenty-one-year-old defendant was charged with sexual assault based on his alleged nonconsensual digital penetration of the sixteen-year-old complainant’s vagina while defendant and the complainant were alone in a movie theater. Defendant filed a pretrial motion in limine, asking the trial court to exclude evidence of his probation status at the time of the alleged offense. The court considered the motion before the jury trial began. The prosecutor argued that the complainant’s knowledge of defendant’s past criminal record was part of the reason she did not do more to resist the assault in the movie theater. Defense counsel responded that the complainant had stated that she was fearful of defendant that night, not because he was on probation—which she had known for months—but rather because he had been smoking marijuana and was not acting like himself. After concluding that evidence of defendant’s probation status would not be admissible unless the complainant correlated her alleged fear of defendant with his known criminal history, the court gave the prosecutor an opportunity to confer with complainant to determine whether her trial testimony would establish such a correlation. The prosecutor then conferred with the complainant and confirmed that she would testify that she was fearful of defendant and had in mind defendant’s criminal past at the time he assaulted her. The court ruled that if she were to so testify, the probative value of such testimony on the issue of consent outweighed any potential prejudice to defendant.

At trial, the complainant testified that she went to see a movie with defendant and another couple, and that the four of them were the only people in the theater. Although she voluntarily kissed defendant, she resisted his attempts to put his hands down her pants. Defendant became “very aggravated,” and stated, [t]his is fucked up.” At some point during the movie, when the

other couple was outside the theater smoking cigarettes, defendant unbuttoned the complainant's pants and digitally penetrated her vagina. The complainant testified that she "didn't dare [] do anything," because defendant was high on marijuana and not acting like himself. She stated that, because of what she knew of him, she was afraid that he might hit her. She also stated her awareness that defendant "had a past" and, at the prosecutor's prompting, confirmed that he had told her that he was on probation. She further indicated she was aware that defendant had been in jail. Defendant did not object to any of these questions or answers.

Following the jury verdict, defendant filed a motion for a new trial, arguing that the trial court's ruling allowed the complainant to testify about her knowledge of defendant's criminal past only to explain her reaction to his sexual advances when, in fact, her testimony had not actually linked her fear of him with her knowledge of his criminal past. The prosecutor responded that the complainant had in fact testified that one of the influencing factors that caused her to fear defendant and affected her reaction to his advances was his criminal past. When the prosecutor argued that defendant had waived any objection to her testimony by not challenging it at trial, defendant responded that any objection would have been pointless, because of the trial court's denial of his motion in limine. The court denied the motion for a new trial, stating that the complainant was entitled to explain why she was afraid of defendant and did not do more to resist his advances, particularly given that the predominant issue at trial was whether she had consented to his advances. On appeal, defendant argues that his conviction must be reversed because (1) the complainant's testimony concerning his criminal past had no probative value and was highly prejudicial; and (2) the prosecution failed to elicit testimony from the complainant establishing a nexus between her fear and his criminal past—a correlation that the trial court had required in its ruling conditionally granting his motion in limine.

Defendant first argues that the trial court erred by allowing the complainant to testify about her knowledge of defendant's criminal past without requiring the prosecution to establish that: (1) defendant's past crimes involved the complainant; (2) were violent in nature; or (3) were similar to the present charge. According to defendant, permitting trial courts to admit any and all evidence of a defendant's past criminal conduct, irrespective of these factors, would create a de facto special sexual-assault exception to Rule 404(b)'s exclusion of evidence of prior bad acts to show a general propensity to commit the charged offense. See State v. Winter, 162 Vt. 388, 392 (1994) (declining to allow such a special exception for sexual assault cases).

We disagree. Evidence of a prior crime or wrong is not admissible to show that a defendant acted in conformity with prior bad conduct, but such evidence may be admitted if it is relevant to some other legitimate issue in the case. V.R.E. 404(b). Although evidence of a prior criminal offense unrelated to the charged offense is generally inadmissible, such evidence may be admissible when the consent of an alleged sexual-assault victim is at issue. State v. Shattuck, 141 Vt. 523, 531 (1982) ("The victim's belief that the defendant had been in jail was probative on the consent issue, as it provided important evidence on the victim's fear of the defendant and her reactions under the circumstances."). As we stated in Shattuck, "each case must turn on its own facts" with respect to whether the evidence was probative of the victim's state of mind and reaction to the alleged offense. Id. at 532.

Here, the trial court determined that, if the complainant testified that she feared defendant because of his criminal background, that testimony's probative value would outweigh its

potential prejudicial impact, given defendant's claim that the complainant consented to his conduct. In challenging this ruling, defendant emphasizes that the complainant did not know of which crimes he had been convicted and went out with him even though she knew of his criminal past. According to defendant, these facts suggest that his criminal background did not make her afraid of him.

The trial court enjoys wide discretion in balancing the probative value of evidence against its potential prejudicial impact. See State v. Derouchie, 153 Vt. 29, 34 (1989) ("The balancing of the evidence's probative value against its prejudicial effect is left to the trial court's discretion."). Upon review of the record, we conclude that the trial court did not err as a matter of law in determining that, given defendant's claim that the complainant consented to his sexual advances, the probative value of the complainant's proffered testimony outweighed its potential prejudice.

Defendant also argues that, even if the trial court did not abuse its discretion by concluding that the probative value of evidence concerning his criminal background outweighed its potential prejudicial impact, the court conditioned its ruling on the prosecution establishing a nexus between his criminal background and the complainant's alleged fear of him, which, in turn, the prosecution failed to do. We need not resolve the debatable question of whether the prosecution in fact linked the complainant's alleged fear of defendant with his criminal background, because we conclude that defendant waived this objection by failing to raise it during complainant's trial testimony. In denying defendant's motion in limine before the commencement of the trial, the trial court ruled that evidence of defendant's criminal background was admissible as long as the prosecution established a connection between the complainant's awareness of that background and her alleged fear of him. While examining the complainant at trial, the prosecution attempted to establish this link, sometimes asking leading questions in an effort to do so. Defendant never objected during this discourse either to the prosecution's questions or the complainant's answers. Nor did defendant move to strike any part of the discourse based on an argument that the prosecution had failed to establish the required nexus.

Under these circumstances, notwithstanding his later motion for a new trial, defendant waived his argument on appeal that the complainant's testimony did not establish the nexus required by the trial court's conditional ruling on his motion in limine. See State v. Fisher, 167 Vt. 36, 43 (1997) (holding that a defendant cannot claim any error in the admission of evidence at trial unless he objected to the evidence or filed a motion to strike at the time the evidence was offered). Even though the same judge had denied defendant's motion in limine shortly before the trial began, the conditional nature of the judge's ruling required a timely objection by defendant at the time the challenged testimony was offered. Cf. State v. Jewell, 150 Vt. 281, 283 (1988) (stating that objection at trial would not have been useless despite the pretrial denial of defendant's motion to exclude, because a different judge presided over the trial, and pretrial rulings are tentative and subject to revision).

Finally, defendant briefly argues that he was further prejudiced by testimony concerning his criminal past when the prosecutor referred to the complainant's knowledge of his past during closing argument and when a prosecution witness mentioned during direct examination that he had cited defendant for the instant offense at a correctional facility. We need not address this

argument because defendant did not object to either reference to his criminal history, and he does not argue plain error on appeal.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice