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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-369

MAY TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
	}	
Timothy J. Casey	}	DOCKET NO. 1348-4-08 Cncr
		Trial Judge: Christina C. Reiss

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

Defendant appeals from a judgment of conviction, based on a jury verdict, of disturbing the peace by use of a telephone, in violation of 13 V.S.A. § 1027(a)(ii). Defendant contends that the court erred in admitting evidence of a prior conviction, and that the error was prejudicial. We agree, and therefore reverse.

The record evidence may be summarized as follows. Defendant's food stamp benefits were scheduled to expire on February 15, 2008, the result—in defendant's view—of a record-keeping error by the Department of Prevention, Assistance, Transition and Health Access (PATH), the agency responsible for administering the food stamp program. Defendant testified at trial that he had repeatedly attempted to correct the error earlier in the year without success. He testified that, beginning around 9:00 a.m. on February 15, 2008, he made a series of telephone calls in an effort to forestall the cancellation of benefits, beginning with the PATH office in Burlington. Unable to reach his caseworker or a supervisor, defendant testified that he then called the Governor's hotline to obtain the number for the PATH office in Waterbury, that he then called the Waterbury office, and that someone there promised to contact the Burlington office and have a caseworker contact him. When no one called, defendant made several more telephone calls to Waterbury and the Governor's office, before again trying the PATH office in Burlington, his tenth call of the day.

The individual who answered the telephone at the Burlington office in the early afternoon of the 15th was a temporary worker who had been with the office for about six months. She testified that defendant initially asked to speak with a specific supervisor; that she informed defendant the supervisor was not in the office; and that defendant informed her that he had called earlier and had left messages and was running out of food. She recalled that defendant sounded angry and frustrated and loud, although he was not yelling. After five to ten minutes, according to the worker, defendant said, "What do I have to do, come down there and hold a gun to your head to get the paperwork done?" She thought at first that defendant was joking and told him, "[y]ou don't want to do that, you'll get in trouble," but he responded, "I don't care about disorderly conduct, I'm coming down in twenty minutes, I'm getting dressed, I'll cause some raucous [sic]." At that point, the worker became frightened and gave the telephone to a colleague. It was this call that resulted in the charge of disturbing the peace.

Defendant testified on his own behalf at trial, acknowledging that he placed the telephone call in question but denying that he had ever alluded to a gun or that it was his intent to threaten or intimidate anyone. According to defendant, he merely told the worker that he would come to the office with a police officer if the situation was not resolved, and he acknowledged that he swore at the end of the call. The only other witness at trial was the investigating officer, who testified that the worker seemed upset and fearful when interviewed later that day, and that defendant, when contacted, was agitated and angry because of the paperwork mix-up but denied having threatened anyone with a gun.

During the State's cross-examination of defendant, the state's attorney asked defendant whether he had been previously convicted, in November 2002, of a charge of disorderly conduct by telephone. The question was the culmination of an earlier pre-trial motion by the State to admit the conviction to demonstrate intent or lack of mistake. The motion was supported by the information from the earlier case, the affidavit of probable cause, and the docket sheet. Defendant filed a responsive motion to exclude the prior, arguing that its only purpose was to demonstrate propensity to commit the crime charged and that its prejudicial effect would substantially outweigh any probative value.

The trial court heard argument on the motions before the start of trial. The court then ruled that the while the prior conviction was probative on the issue of defendant's intent and was not unduly prejudicial, it would not be admitted during the State's case-in-chief but would be admitted if defendant placed his intent at issue by denying that he made the call with the intent to intimidate. The court later clarified that it would admit the conviction but not the affidavit of probable cause because defendant had pled no contest and had not necessarily admitted all of the facts alleged in the affidavit.

As noted, defendant was asked about the prior on cross-examination and admitted the offense. The court thereupon gave a limiting instruction to the jury, explaining that evidence of the prior conviction was relevant to the issue of defendant's intent at the time he placed the call, but could not be considered as evidence that he committed the offense. The court repeated the limiting instruction in its subsequent charge to the jury. The jury returned a guilty verdict, and defendant received a one-to-three-month sentence, all suspended except for twenty days of work crew. This appeal followed.

Under V.R.E. 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith," but may be introduced if relevant to some other issue in the case, such as "motive, opportunity, [or] intent." While it is necessary for the State to demonstrate that the element for which the evidence is admitted is genuinely at issue, that is not sufficient for its admission. As we have explained, "[t]he state has the burden to show precisely how the proffered evidence is relevant to the theory advanced, how the issue to which it is addressed is related to the disputed elements in the case, and how the probative value of the evidence is not substantially outweighed by its prejudicial effect." State v. Lipka, 174 Vt. 377, 391 (2002) (quotation omitted); see also United States v. Garcia, 291 F.3d 127, 137 (2d Cir. 2002) (holding that while the government must show that evidence of a prior bad act is admitted for a proper purpose relative to an issue in dispute, the court's "inquiry does not end there . . . because the government still must establish the relevance of the evidence to the issue in dispute").

The State here all but concedes that the court erred in admitting the prior conviction, acknowledging that the prosecutor "neglected to identify any specific circumstances connecting the prior conviction and the February 15 telephone call, or otherwise explain why the prior conviction made it more probable than not that [defendant] on the charged occasion acted with the requisite intent." Indeed, apart from finding that the issue of intent was in dispute, the trial court made no findings as to how the facts and circumstances surrounding the six-year old prior

conviction were sufficiently similar to the charged offense to show that it was likely that defendant acted with the requisite intent in this case. The State acknowledges in this regard that there was no such evidence in the record, conceding that "the evidence produced at trial does not appear to reveal a similarity or connection between the prior conviction and the charged act that makes the prior conviction probative of [defendant's] intent on February 15." And the State goes on to concede: "Given the lack of any evidence about the circumstances of the prior telephone call, there was no apparent similarity or connection between the prior conviction and the call the complainant [here]. There is nothing in the trial record to explain how the prior conviction had any logical tendency to prove that [defendant] intended to intimidate when he made the call."*

Thus, rather than argue that the prior conviction was properly admitted, the State here maintains that its admission was harmless. As we have explained, for an error to be harmless, "the reviewing court must find beyond a reasonable doubt that the jury would have returned a guilty verdict regardless of the error." State v. Oscarson, 2004 VT 4, ¶ 30. When the error involves improper admission of evidence, the error cannot be harmless if there is a "reasonable possibility that the evidence complained of might have contributed to the conviction." Id. (internal quotations omitted). We have recognized, as well, that evidence of prior similar wrongs creates a particular risk of prejudice. Lipka, 174 Vt. at 377.

Assessed in light of these standards, we are unable to conclude with confidence that admission of the prior conviction was harmless beyond a reasonable doubt. The case resolved essentially to a credibility contest between the complainant and defendant (the only other witness, the investigating officer, merely confirmed that the complainant was upset and that defendant steadfastly denied threatening or intimidating anyone). Even if believed, moreover, the complainant's testimony—that after five or ten minutes of speaking loudly and angrily defendant threatened to bring a gun to the office and otherwise make a "raucous"—did not conclusively establish that the call was made with the intent to intimidate or threaten, as the law requires. See State v. Wilcox, 160 Vt. 271, 275 (1993) (intent to threaten or intimidate under § 1027(a) "is measured at the time the telephone call is made"). In these circumstances, we cannot conclude that evidence of a prior conviction on the identical offense exerted no influence on the verdict. Accordingly, the judgment must be reversed.

Reversed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice

* The State notes that the trial court also arguably erred in finding that intent was genuinely in dispute, since defendant denied that he made any statement about bringing a gun, but we need not decide this issue.