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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-438

JULY TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Grand Isle Circuit
James F. Creller	}	DOCKET NO. 45-6-07 Gicr
		Trial Judge: Ben W. Joseph

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

Defendant appeals from a judgment of conviction, based on a jury verdict, of simple assault and obstruction of justice. He contends: (1) the prosecutor committed prejudicial error during closing argument by characterizing the offense as a domestic assault; and (2) the court erred in denying a motion for mistrial based upon the erroneous admission of a DUI arrest. We affirm.

The facts may be briefly summarized. Additional material facts will be set forth in the discussion which follows. In May 2006, to celebrate her birthday, the victim went camping with defendant, whom she had known her whole life, and another friend. Although the victim stated that she and defendant had never dated or lived together, she acknowledged that they were "more than just friends." On the way to the campsite, they stopped at a pub, met another man, and invited him to join them. The victim and the man later left the campsite to retrieve a radio from the man's home. When the victim later returned, she found the campsite had been abandoned and the fire put out. The victim accordingly went back to the man's house, where she spent the night. While there, she received a telephone call from defendant, who was angry and upset. She stated that he blamed her for a DUI arrest that night.

The next day, the victim hosted a birthday party at her rented camp in Alburg. Defendant appeared at the party to retrieve a grill and, according to the victim, threatened to kill her. He then left, but later called to apologize and asked to return with a gift. He came back with an Indian statue but, upon seeing the man with whom the victim had the spent the night became angry again and threatened to smash the victim's face with the statue if she did not ask the man to leave. After defendant made several additional threats, the victim threw the statue out the window. Defendant, in response, punched the victim. The victim fought back, but was knocked down several times. Defendant eventually went outside, picked up a lawn chair, smashed the windshield of the victim's car, and left. The victim testified that he took several of her possessions with him. Defendant later returned to apologize but, when the victim would not let him in, he threatened to kick in the door and kill her. Defendant called the victim several times thereafter, threatening to kill her and call her probation officer if she brought charges. The victim acknowledged that she had subsequently seen defendant, that he has "a nice side [and] . . . can be a very loving person," and that there was a "cycle" to their relationship.

Defendant was charged with assault, unlawful mischief, petit larceny, and obstruction of justice. The unlawful mischief and larceny charges were dismissed. The jury returned a verdict of guilty on the assault and obstruction-of-justice charges. A subsequent motion for judgment as a matter of law or new trial was denied. This appeal followed.

Defendant first contends the prosecutor committed prejudicial error during closing argument when, over objection, he stated that the victim and defendant had "a complex relationship," that it was "a domestic relationship, even though both of them would like to deny that." The prosecutor went on to talk briefly about domestic violence and observed that, "[w]hen you look at the dynamics of this relationship, you see a perfect cycle of domestic violence, where there's an incident of violence, there's threats, there's remorse, an apology, a period of reconciliation."

The longstanding rule in Vermont is that counsel must confine their argument to the record evidence and inferences properly drawn therefrom. State v. Rehkop, 2006 VT 72, ¶35, 180 Vt. 228. "[P]rosecutors are entitled to a good deal of latitude in their closing arguments" so long as they keep with the limits of "fair and temperate discussion . . . circumscribed by the evidence in the case. Id. (internal quotation omitted). A defendant seeking reversal based upon prosecutorial argument must show not only that the argument was improper but also that it impaired the defendant's right to a fair trial. State v.Hemond, 2005 VT 12, ¶ 11, (mem.). In assessing prejudice, we look to a number of factors, including "the blatancy of the challenged statement," the impact on the theory of the defense, the persistence and frequency of the statement, the opportunity for the court to minimize potential prejudice, the relevance of the statement, the overall strength of the state's case, the apparent motivation for making the remarks, and "whether the statement was inflammatory and attacked defendant's character." Id. ¶ 12.

Assessed in light of these standards, we find no reversible error. Although defendant was not charged with domestic assault, there was some evidence of a romantic relationship between the victim and defendant; the events in question revealed a pattern of violence and forgiveness between the victim and defendant that was comparable in some ways to behavior typical of domestic violence; and the victim herself acknowledged the "cyclic" nature of their relationship. See State v. Hendricks, 173 Vt. 132, 144 (2001) (Dooley, J., concurring) (discussing the particular "dynamic" of domestic violence). Accordingly, we are not persuaded that, in arguing that circumstances here were similar to a domestic-violence situation, the prosecutor exceeded the record evidence or the latitude accorded in closing argument. Even if the comparison were unsupported, however, we would not find that it required reversal; the statements in question were relatively brief and were not particularly inflammatory, there was no evidence of improper motive, and—contrary to defendant's claim—there was no suggestion that the prosecutor inserted his personal opinion that this was a domestic assault. Accordingly, we find no prejudice warranting reversal.

Defendant further contends that the court erred in denying a motion for mistrial. The court had ruled inadmissible defendant's arrest for DUI on the evening before the assault. When asked whether defendant had threatened her, however, the victim testified that defendant blamed her because "he had just got a DWI." **Tr. 5/28/087 at 49** Defendant objected, which the court overruled, and defendant subsequently moved for a mistrial. The court denied the motion, ruling that the remark was not so prejudicial as to warrant a mistrial. The court observed, in this regard, that there had already been a great deal of testimony that the parties had been consuming alcohol, so that the remark was not especially noteworthy. The court further declined to give a

curative instruction, explaining that such an instruction often "cures the record, but compounds the error."

Defendant claims the court erred. The court's ruling on a motion for mistrial is discretionary and will not be disturbed absent a showing that the court's discretion was withheld or exercised on clearly unreasonable grounds, and that the error was prejudicial. State v. Messier, 2005 VT 98, ¶ 15, 178 Vt. 412. As the trial court her noted, there was substantial evidence that all of the parties had been drinking on the evening before the assault. Indeed, defendant—testifying on his own behalf—acknowledged that they had had drinks with dinner, had then stopped at a pub on the way to the campsite, and at one point the victim had taken the wheel from him because she "didn't like the way I was driving." Moreover, apart from the victim's spontaneous, brief reference to the DUI, no further mention was made of the incident. Accordingly, we find no basis to disturb the court's finding that the testimony was not prejudicial, and did not require a curative instruction or a mistrial.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Brian L. Burgess, Associate Justice