

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2009-482

OCTOBER TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Washington Circuit
	}	
Michael H. Rollins	}	DOCKET NO. 535-5-09 Wncr

Trial Judge: Brian J. Grearson

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

Defendant appeals from his conviction of domestic assault following a jury trial. We affirm.

Defendant was charged with domestic assault based on an allegation that he recklessly caused bodily injury to his then-girlfriend by hitting her in the mouth. Defendant admitted in a videotaped police interview that he hit his girlfriend with the back of his hand. Defendant later moved to prohibit the State from playing this videotape at trial. He argued that it would be prejudicial because during the interview the police officer alluded to defendant's other bad acts. Both parties agreed that no prior bad acts would be admitted, and the State indicated that it could skip certain parts of the video. The court allowed the tape to be played to the jury, with the exception of defendant's statement that he had never hit any women previously.

The victim testified to the following events at trial. In early September 2008, she made plans to go out with her girlfriends and arranged to have defendant pick her up at a certain bar at 1:00 a.m. When defendant arrived, the victim realized that she had lost her car keys. After searching for them without success, she left with defendant. Defendant was upset with the victim for losing her keys, smoking cigarettes, and drinking too much. He was yelling at her, and at one point, he pulled over and tried to push her out of the car. The victim resisted and started laughing. Defendant then hit the victim in the lip with the back of his hand. The victim testified that it hurt and she started to cry. The parties drove home, and not long thereafter, defendant left the residence. The victim called her friend, told her that defendant had hit her and that she was scared, and asked the friend to pick her up. The victim went outside to meet her friend but saw defendant first. She rode with defendant to a schoolyard where the parties continued to argue. Eventually, defendant pushed the victim out of the parked car, and she ran away and sought help at a neighboring residence.

The victim's friend also testified about the evening's events, as did the investigating officer. The videotaped interview with defendant was then played for the jury. In the interview, defendant admitted hitting the victim, but stated that she had been screaming in his ear and that it

was just a “reaction,” and that he immediately apologized. The detective asked defendant if he had hit the victim to “shut her up,” to which defendant responded, “I guess.” The jury did not hear defendant’s next statement, which apparently was “I’ve never hit any females in my life, so I don’t know.” Defendant raised no objection to the playing of the videotape, and his attorney cross-examined the police detective. Defendant then testified on his own behalf. He again admitted hitting the victim, and stated that it had been an impulsive act. Without objection, defendant testified on cross-examination that he had answered affirmatively when the police detective asked if he had hit the victim to “shut her up.” Following defendant’s testimony, both sides rested, and the court indicated that the evidence was closed.

After a lunch break, defense counsel indicated that he wanted to object to a question asked to defendant about his videotaped interview. Specifically, counsel objected to the State’s question on cross-examination as to whether defendant told the officer he hit the victim to “shut her up.” Counsel argued that the question was unfair because the jury was not allowed to hear defendant’s complete answer, including his statement that he had never hit any women in the past. Counsel asked the court to strike this portion of the testimony and to prohibit the State from referring to it during its closing argument. The court found defendant’s objection untimely, explaining that, had the objection been made at the appropriate time, the court could have addressed it, but it was now too late as the evidence was closed. Following a discussion of the jury instructions, including defendant’s objections thereto, the jury returned a guilty verdict. This appeal followed.

We begin with defendant’s challenge to the State’s closing argument. According to defendant, he was denied a fair trial when the State referred to his testimony about hitting the victim to “shut her up.” Defendant maintains that the State violated a pretrial stipulation by referring to this evidence, and the court should have granted his request to prohibit the State from citing this evidence in its closing argument.

As the trial court stated on the record, and reiterated in its order denying defendant’s motion for a new trial, defendant did not raise a timely objection to this testimony. Thus, the trial court was not in a position to decide if the State’s question had violated the pretrial stipulation or whether a motion to strike would be appropriate. Defendant waived any claim of error on appeal by failing to raise a timely objection below. State v. Brink, 2008 VT 33, ¶ 6, 183 Vt. 603 (mem.) (explaining that “[t]o properly preserve an issue for appeal a party must present the issue with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it,” and Supreme Court “will not decide issues that have not been properly preserved for appeal” (quotation omitted)). Because the testimony in question was part of the properly-admitted evidence at trial, the State could refer to it in its closing argument. See State v. Lapham, 135 Vt. 393, 406 (1977) (“The longstanding rule in Vermont is that counsel should confine argument to the evidence of the case and inferences properly drawn from it . . .”). Defendant fails to show the prosecutor acted improperly by referring to this testimony, or that he was denied a fair trial. See State v. Hemond, 2005 VT 12, ¶ 11, 178 Vt. 470 (mem.) (“A defendant seeking reversal of a conviction based on an allegedly improper closing argument must show not only that the prosecutor’s argument was improper, but also that it impaired the defendant’s right to a fair trial.” (quotation omitted)).

We turn next to defendant's challenge to the jury instructions. Defendant argues that the court erred by not adopting his proposed definition of the term "recklessly." According to defendant, Vermont law requires the trial court to charge the jury on a defendant's defense theory when that theory is supported by the evidence. He maintains that the court reversibly erred by not adopting his instruction, which provided that: "[i]t is the defense's theory that [defendant] did not act consciously when his hand struck [the victim], that he did not think about or consider his actions, and an instinctual reaction is not reckless conduct." Defendant relies primarily on State v. Drown, 148 Vt. 311, 313 (1987) (per curiam), and State v. Brisson, 119 Vt. 48, 52-54 (1955), as support.

The court declined to use defendant's proposed language, finding that its own instructions, as a whole, provided the jury with the law that was applicable to the case. The court instructed the jury that it could find that defendant acted recklessly:

if he acted without regard to the possible consequences of his actions. In other words, [defendant] recklessly caused bodily injury if he consciously ignored a known, substantial and unjustifiable risk that his conduct would cause that result. His disregard of the risk, when considered in light of the nature and purpose of his conduct, and the circumstances known to him, must have been a gross deviation from how a law-abiding person would have acted in the same situation. The mental state with which a person does an act may be shown by the way in which he or she expresses it to others, or by his or her conduct. In determining [defendant's] mental state, you should consider all of the surrounding facts and circumstances established by the evidence.

The court explained that the parties were free to argue to the jury how the law should apply to the particular facts of this case. Defendant renewed his objection after the charge was given to the jury.

Where a party raises a timely objection to an allegedly deficient jury instruction, "we assess whether, viewing the instructions in their entirety, they provided sufficient guidance to the jury without introducing prejudice into their deliberations." State v. Viens, 2009 VT 64, ¶ 10, 186 Vt. 138 (quotation omitted). "The instructions need not be perfect;" but "they must reflect the true spirit of the law, such that the jury has not been misled." Id. (quotation omitted). We will not reverse "unless the court's instructions, viewed in this light, undermine confidence in the jury's verdict." Id. (quotation omitted).

The court did not err in refusing to charge in accordance with defendant's request here. The court's instruction fully and fairly apprised the jury of the elements of the crime, including the mens rea necessary to support a conviction for domestic assault. See, e.g., State v. Brooks, 163 Vt. 245, 251 (1995) (explaining that a "person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct" (quotation omitted)). While defendant argues that his theory of the case was not before the jury, the record shows otherwise.

We addressed a similar argument in State v. Davis, 157 Vt. 506, 511 (1991). In Davis, the defendant was charged with attempted first-degree murder, and he argued at trial that he did not possess a specific intent to kill because he thought his gun was unloaded. He proposed a jury instruction to this effect, providing that “you must find the defendant not guilty if you have any reasonable basis to believe that the defendant was not aware, at the time of the alleged offense, that there was a bullet in the gun.” Id. at 510. The trial court refused to charge the jury in accordance with the defendant’s request, and we upheld its decision on appeal. We explained that the “instructions given fully and fairly apprised the jury” of the necessary elements of the crime, including the specific intent to kill, and that the jury “could not have concluded that defendant had this intention without confronting defendant’s argument that he thought the gun was unloaded.” Id. at 510-11.

We reach a similar conclusion here. Defendant argued at trial that he acted without thinking, and the court’s instruction on the mental element of the crime plainly allowed the jury to consider whether this was true. As in Davis, the jury was squarely confronted with defendant’s theory of the case, and it necessarily had to reject this theory in order to find him guilty. We find the cases on which defendant relies inapposite. See, e.g., Drown, 148 Vt. at 313 (reversing where “[f]ailure to make any reference to the defense raised by the evidence may well have closed that course to the exploration of the jury,” and “could have had the effect of denying the jury’s consideration of the sole issue upon which the respondent relied for freedom from criminal liability” (quotation omitted)); Brisson, 119 Vt. at 53 (in drunk driving case, defendant was entitled to an instruction that his poor coordination was due to a medical condition rather than excessive consumption of alcohol; and explaining that ascertainment of the ultimate truth or falsity of defendant’s argument was jury’s principal mission, and trial court had duty to “present this issue to the jury squarely, that they might confront it, consider it, and resolve its truth or falsity by their verdict”). Obviously, a trial court is not required “to use the precise terms” that defendant proffered— “[t]he court may select its own language for instructions.” State v. Morse, 127 Vt. 137, 141 (1968). The court’s instruction here was “full, fair, and correct,” State v. Ciocca, 125 Vt. 64, 74 (1965), and we find no error.

Finally, defendant argues that the court abused its discretion by including a requirement that he complete the “Alternatives Program.” Defendant asserts that the court failed to make findings as to why this condition was necessary.

This claim of error is without merit. The trial court has discretion to impose those conditions of probation that it “deems reasonably necessary to ensure that the offender will lead a law-abiding life or to assist [him] to do so.” 28 V.S.A. § 252(a). This includes conditions that are “reasonably related to his or her rehabilitation.” Id. § 252(b)(18). At the sentencing hearing, the State argued that defendant’s placement in the Alternatives program would address a rehabilitative aspect of this case; defendant argued the program was unnecessary. The trial court agreed with the State. It found that this case involved more than just a “momentary back of the hand,” as defendant argued. Instead, the court looked to all of the events on the evening in question, including the fact that the victim had to run and hide from defendant at one point. The court found the conditions it imposed necessary to help defendant understand his behavior, and to ensure that he did not engage in similar behavior again. The court acted well within its discretion in concluding that defendant should participate in the Alternatives program. State v. Moses, 159 Vt. 294, 297 (1992) (trial court has discretion in determining appropriate conditions

of probation, and Supreme Court will not find error unless court’s discretion “has been exercised to a clearly unreasonable extent”).

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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Brian L. Burgess, Associate Justice