

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2007-002

MAY TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
	}	
James Burke	}	DOCKET NO. 6303/4-11-03 CnCr

Trial Judge: Michael S. Kupersmith

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

Defendant appeals his jury convictions of contributing to the delinquency of a minor and furnishing alcohol to a minor, in violation of 13 V.S.A. § 1301 and 7 V.S.A. § 658. He contends that the trial court's erroneous admission of evidence of other alleged misconduct and the court's improper remarks to the jury rendered his trial fundamentally unfair. We affirm.

In November 2003, the State charged defendant on counts of contributing to the delinquency of a minor, furnishing alcohol to a minor, and disseminating indecent materials to a minor. The charges were based on a sixteen-year-old girl's allegations that defendant, who was a boarder in her mother's home, invited her into his room, gave her an alcoholic drink, smoked marijuana with her, and then showed her computer images of older men having sex with teenaged girls. In April 2006, the State dismissed the charge of disseminating indecent materials, apparently because it was unable to locate the hard drive on defendant's computer.

Approximately one week before the May 2006 jury trial, the State filed a motion in limine requesting, among other things, that the complainant be allowed to testify about everything that occurred in defendant's room on the day in question. Defendant, who had sought and received permission to represent himself, filed a brief response objecting to the State's attempt to prejudice him and confuse the jury with evidence concerning a dismissed charge. At a motion hearing held a few days before the trial, the State argued that it should be allowed "to tell the jury the whole picture of what happened." Defendant responded that the State was attempting to set up a mistrial by introducing irrelevant evidence. The court deferred ruling on the motion until the morning of the first day of trial. At that time, before the jury was brought in, defendant raised what he claimed was a Brady violation, but again stated that the State was attempting to prejudice him and confuse the jury with evidence of a dismissed charge. The State

reiterated that the complainant's testimony describing the entire episode between her and defendant was necessary to present the jury with a complete picture of what occurred. The court agreed, stating that it made sense to allow the complainant to testify as to what occurred in defendant's room.

Later, during the trial, the complainant testified on direct examination that on the day in question: (1) defendant asked her to come into his room so that he could show her something; (2) when she asked for something to drink, he gave her a bottle of orange juice with vodka in it; (3) he offered and she agreed to smoke marijuana with him; (4) at one point, he turned on the computer, revealing images of older men having sex with teenage girls; (5) defendant began rubbing his private area and making noises; (6) when he touched her leg, she asked him to drive her home, which he did; and (7) on the way home, he told her that he dated teenaged girls because they generally do not have any money and he can treat them. During this direct examination, defendant objected on three or four occasions, arguing that the testimony was hearsay and irrelevant. The court overruled the objection each time. Following the trial, the jury convicted defendant on both counts.

On appeal, defendant first argues that the court made prejudicial remarks to the jury, thereby denying him a fair trial. He raises this argument for the first time on appeal, not having objected at trial to any of the allegedly prejudicial remarks. Defendant complains about the trial court's repeated interruptions during his cross-examination of witnesses and about statements that the court made while apologizing to the jury for the repeated interruptions resulting from the court's efforts to limit defendant's cross-examination to relevant issues. We find no reversible error, if any error at all. The court's interruptions were necessary to prevent defendant from cross-examining witnesses on subjects that the court had already ruled were off limits.\* Moreover, for the most part, the court's statements to the jury were intended merely to explain and apologize for the repeated interruptions. Defendant fails to show how these interruptions caused him any prejudice. There may have been one or two phrases—such as “he doesn't seem to want to follow my instructions”—that would have been better left unsaid, but they were minimal and understandable in light of defendant's repeated and blatant disregard for the court's specific rulings regarding the limits of his cross-examination.

Defendant also argues on appeal that the trial court committed reversible error by allowing the State to present the complainant's testimony regarding defendant's alleged sexual advances toward the complainant. To the extent that defendant relies upon V.R.E. 404(b), we decline to consider this argument because he did not object at trial based on that rule and does not claim plain error on appeal. See *State v. Lee*, 2005 VT 99, ¶ 14, 178 Vt. 420 (stating that defendant's Rule 404(b) argument was not asserted before the trial court and thus not preserved for appellate review). Defendant did contend, however, on the morning the trial began, that the State was presenting evidence of his sexual advances to prejudice and confuse the jury, and he did object, at the time the testimony was presented, on grounds of relevancy. While we acknowledge that testimony concerning defendant's sexual advances toward the complainant was potentially prejudicial, we conclude that the evidence was relevant, and that the probative value of the evidence was not substantially outweighed by its potential prejudice. V.R.E. 403

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\* Defendant does not challenge on appeal the trial court's rulings prohibiting him from raising certain subjects during cross-examination.

(“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.”).

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” V.R.E. 401. The instant case was essentially a swearing contest between the complainant and defendant. Defendant’s sexual advances via the displaying of pornographic images and other acts were part of a single, continuous episode of conduct alleged by the complainant. All of defendant’s actions during this discrete period of time provided the jury with a complete picture of what allegedly occurred and a thus a context for the charged offenses. See State v. Longley, 2007 Vt. 101, ¶ 19, 939 A.2d 1028 (noting that we have allowed admission of evidence, notwithstanding its prejudicial impact, when it established a situational context for otherwise isolated and seemingly incongruous conduct); cf State v. Forbes, 161 Vt. 327, 331 (1993) (“The history of defendant’s incestuous relationship with his daughter was particularly relevant because it supplied the context within which the charged incidents of sexual contact occurred). Defendant’s overall conduct suggested a motive and a plan that involved the charged offenses. While motive and plan are not elements of the crime to be proved, they are relevant. See V.R.E. 404(b). Absent the entire picture of what occurred, defendant’s actions concerning the charged offenses made less sense. The jury was entitled to hear the complainant’s allegations as to what occurred during the single, continuous episode that formed the basis for the charged offenses.

Because defendant claimed only lack of relevance and hearsay at the time the testimony was admitted, the trial court did not explicitly balance the potential prejudice against the probative value of the evidence. Implicitly, however, the court ruled that the evidence was not unduly prejudicial when it agreed with the State that the jury was entitled to a complete picture of the complainant’s allegations. We conclude that the trial court did not abuse its discretion in allowing the challenged testimony. See Lee, 2005 VT 99, ¶¶ 11-12 (noting that defendant must overcome a very deferential standard of review in arguing that evidence should have been excluded on the basis that its potential prejudice substantially outweighed its probative value).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Brian L. Burgess, Associate Justice