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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-230

APRIL TERM, 2018

State of Vermont v. Dennis Dundas*	}	APPEALED FROM:
	}	
	}	Superior Court, Windsor Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 481-4-15 Wrcr
		Trial Judge: Theresa S. DiMauro

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

Defendant Dennis Dundas appeals his conviction of aggravated assault following a jury trial. We affirm.

On April 26, 2015, defendant called 911 and informed the dispatcher that he had shot his neighbor, Donald Giovanella, three times. He claimed that he had acted in self-defense. Defendant was charged with aggravated assault with a weapon in violation of 13 V.S.A. § 1024(a)(2). A three-day jury trial was held in January 2017, resulting in a conviction.

Giovanella testified at trial that he and defendant had been friends for several years. On the evening of the shooting, the two of them were drinking at the bar in defendant's residence. They were discussing World War II and the Vietnam War, and Giovanella made a tactless comment about prisoners of war. Defendant, a Vietnam veteran, became "explosive." He pulled out a gun, pointed it at Giovanella, and ordered him to get out. As Giovanella was attempting to leave, defendant shot him, hitting him in his arm and rib cage. Giovanella, in disbelief, said, "You shot me." Defendant responded, "[Y]eah, now I'm going to shoot you again," then shot Giovanella in his arm. Giovanella fell to the floor. Defendant then shot him once more in the stomach. After initially refusing Giovanella's pleas to call 911, defendant did so. Defendant then dragged Giovanella outside, where he was found by first responders.

On appeal, defendant argues that the trial court committed reversible error by not permitting him to present evidence of his character for peacefulness. Vermont Rule of Evidence 404(a)(1) permits an accused to present evidence of a pertinent trait of the accused's character "for the purpose of proving action in conformity therewith on a particular occasion." Rule 405 limits such evidence to testimony as to reputation, although inquiry into specific instances of conduct is allowable on cross-examination. Unlike the federal courts, Vermont holds "to the rule that only community reputation may be admitted and that the personal knowledge and belief of a witness as to the defendant's relevant character traits is rigorously excluded." State v. Sturgeon, 140 Vt. 240, 245 (1981).

The record does not support defendant's claim that the trial court refused to permit him to present evidence of his reputation of peacefulness. Defendant first raised the issue at the beginning

of the second day of trial, when his counsel informed the court that the defense intended to call a witness who would testify regarding "Giovanella's prior assaultive behavior towards her as well as [defendant's] reputation and her experience with him as peacefulness." The State objected that it had not been provided notice of the proffered testimony about a prior assault, and no one had brought up defendant's reputation for peacefulness. The trial court ruled that the evidence of the prior assault was inadmissible due to lack of notice and because it was extrinsic evidence.

The trial court then considered the proposed reputation evidence, stating that it needed to double-check whether the defense could initially raise the issue of character. The court stated, "Okay so that can be evidence of indurative [sic] character offered by accused. So I'm thinking that it can be opinion or reputation in that specific instance[]. When you look at 404(a)(1)."[1] Defense counsel apparently believed that the court had decided to exclude the evidence, because he began to bring up a different topic. The court corrected him, stating:

The court:	[T]he other [issue] is the ability [of] this witness to, what? Testify to her own personal opinion as to his character for peacefulness?
[Defense counsel]:	Yes, Judge.
The court:	But not community reputation?
[Defense counsel]:	I can't say that she knows—
The court:	Yeah, okay.
[Defense counsel]:	—about the reputation in the community.
The court:	All right. So that testimony is going to be pretty truncated, it seems.
[Defense counsel]:	Well—
The court:	Well, while we're thinking about that, what's the other issue?

The parties then began to discuss another topic and never returned to the issue of reputation evidence. The defense did not call any witnesses to testify other than defendant.

The above record shows that the trial court never issued a definitive ruling on the admissibility of the reputation evidence. The court opined that the proposed character witness's testimony would likely be "truncated" because she would not be able to testify about defendant's reputation in the community, as required by Vermont case law. See V.R.E. 405; Sturgeon, 140 Vt. at 245. But then it stated, "Well, while we're thinking about that, what's the other issue?" This latter statement indicated that the question of admissibility was still open. When a trial court reserves its ruling on the admissibility of evidence, the party seeking to admit the evidence must raise the issue again to preserve a claim of error for appeal. See V.R.E. 103(a) (providing that offer of proof and "definitive ruling" is required to preserve claim of error). Defendant never

[1] We agree with the State that "indurative" appears to be a transcription error. The court referred to Rule 404(a), which states that the accused can offer evidence of a "pertinent" character trait.

raised the issue again, nor did he call the witness and attempt to present the character evidence. Accordingly, defendant failed to properly preserve this question for review. See State v. Hooper, 151 Vt. 42, 46 (1988) (where trial court expressed doubt in preliminary hearing about admissibility of hair sample evidence at sexual assault trial but never ruled that it was inadmissible, and defendant never raised issue at trial, defendant failed to preserve issue for appellate review); see also State v. Goodnow, 162 Vt. 527, 531 (1994) (holding that issue of whether trial court should have admitted opinion testimony of witness was not preserved where defendant never called witness to testify).

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice