Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-237

JULY TERM, 2018

State of Vermont v. Joseph R. Casey*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 2910-8-16 Cncr
		Trial Judge: Dennis R. Pearson

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

Defendant appeals his conviction of unlawful mischief and the resulting sentence. On appeal, he argues that: (1) the court committed plain error by not excluding some of the complainant's trial testimony about defendant's past behavior; (2) the court improperly based defendant's sentence on complainant's sentencing testimony; and (3) two probation conditions fail to provide adequate notice and are invalid. We affirm.

Following an altercation with his girlfriend, defendant was charged with reckless endangerment, domestic assault, and unlawful mischief. The information alleged that defendant had committed unlawful mischief when he intentionally kicked or stomped on complainant's vehicle, causing a dent. At the beginning of trial, the State indicated that it did not intend to present evidence of prior bad acts. Complainant testified as follows to her version of the events giving rise to the charges. She stated that she and defendant have two young children and on the day of the incident all four were in the car while she was driving defendant to a relative's house. Defendant was in a bad mood, swore at her, and threated to punch her in the face. He then grabbed the wheel of the car and pulled on it. She pulled the car over. They struggled for complainant's cell phone. Defendant got out and she opened the trunk. Defendant removed his belongings and, as complainant drove away, defendant threw a cup, hitting the trunk. After ten minutes, complainant went back to defendant to allow the children to say goodbye to him. She spoke to defendant, but he was angry, threatened to kill her, and lunged at her. Defendant kicked the hood of the car causing a dent. She backed up and defendant jumped on the hood of the car. She slammed on the brakes and defendant fell off. She drove away and stopped at a stranger's home to call the police. The State also presented testimony from both the woman whose home complainant went to and the responding officer.

Defendant testified, and his version of events differed from complainant's. He denied grabbing the wheel and veering the car into oncoming traffic; he claimed that while complainant was driving she swerved into the other lane and defendant grabbed the wheel to bring the vehicle back into the correct lane. He also asserted that after complainant pulled over, she yelled at him to leave the vehicle and struck him with debris as she sped off. After complainant came back, defendant testified that she attempted to hit him with the vehicle and he kicked the front of the car

with his foot. He alleges he jumped on the hood of the car to avoid being struck by the car. He admitted that he punched the hood of the car, stating that he slammed it "pretty hard." He claimed that he did not physically threaten her.

The jury acquitted defendant of domestic assault and reckless endangerment, but convicted him of unlawful mischief. The court sentenced defendant to three-to-six months, all suspended but fifteen days, and two years of probation. The court imposed several probation conditions, including two that are challenged in this appeal. The first states: "Violent or threatening behavior is not allowed when in the presence of [the complainant] and his own 2 children." The second requires defendant to engage in "anger management counseling as approved by his [probation officer] and to the satisfaction of the treatment provider."

Defendant first argues that the court committed plain error in allowing the complainant to make certain statements about defendant at trial. During her testimony, complainant stated that she did not remember why defendant was not driving. She said "I know he wasn't comfortable driving. I can't remember if [defendant] didn't have a license at the time, or he didn't have insurance. There was some reason why he wasn't comfortable driving his vehicle." In addition, she noted that defendant could not get a reference for renting an apartment and "had really bad credit." She also made statements about his prior behavior towards her including that defendant had tried to take her telephone away from her in the past when she tried to call for help, that when he is angry he gets scary, and that she had many incidents with him involving violence.

Defendant contends that these statements were not admissible as either prior bad acts or as character evidence. Under Vermont Rule of Evidence 404, evidence of a person's character is not admissible "for the purpose of proving action in conformity therewith," and evidence 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." V.R.E. (a), (b). Of the challenged statements, defendant objected at trial only to complainant's testimony that she had experienced many incidents with defendant involving violence. Defendant did not, however, cite Rule 404(b) as basis for excluding the testimony or ask the court to engage in a balancing under Vermont Rule of Evidence 403. The court overruled the objection. We conclude that, even assuming the objection was properly preserved for our review, the court acted within its discretion in admitting the complainant's statement that she had many incidents with defendant involving violence. See State v. Russell, 2011 VT 36, ¶ 6, 189 Vt. 632 (mem.) ("We apply a deferential standard of review to the trial court's evidentiary rulings and will reverse its decision only when there has been an abuse of discretion that resulted in prejudice." (quotation omitted)). This brief statement did not refer to any specific violent act defendant performed and was made in response to a question about how the complainant felt when defendant lunged at her. It was within the court's discretion to admit the statement to provide context and explain complainant's actions during the incident. See State v. Sanders, 168 Vt. 60, 62 (1998) (explaining that in that case evidence of past incidents admissible in domestic violence cases to provide context for behavior).

Because defendant did not object at trial to the remaining statements, we review admission of the statements for plain error. V.R.Cr.P. 52(b). Plain error exists "in exceptional circumstances where a failure to recognize error would result in a miscarriage of justice, or where there is glaring error so grave and serious that it strikes at the very heart of the defendant's constitutional rights." In re Carter, 2004 VT 21, ¶ 21, 176 Vt. 322 (quotation omitted). Plain error is an error affecting substantial rights that has "an unfair prejudicial impact on the jury's deliberations." Id. When a defendant asserts that plain error resulted from admission of prejudicial evidence, the defendant "must demonstrate that the judgment was substantially affected by admission of the testimony"

and there is no plain error if the jury had other evidence from which it could find guilt. State v. Leroux, 2008 VT 104, ¶ 14, 184 Vt. 396 (quotation omitted).

We conclude that even assuming there was any error in admitting the statements, defendant has failed to demonstrate any resulting prejudice to him.[1] The jury acquitted defendant on all charges except the unlawful mischief count. The unlawful mischief count was based on the allegation that defendant had intentionally damaged complainant's vehicle by kicking or stomping on it. Given that there was substantial evidence to support this charge—including defendant's own admissions at trial—defendant has failed to demonstrate that any of the challenged statements contributed to the verdict.

Next, defendant claims that his sentence was in error because he alleges it was based on the complainant's sentencing testimony, which defendant characterizes as unreliable and contested.[2] The court has "broad discretion in imposing sentence" and "[a]bsent exceptional circumstances, we will defer to the court's judgment so long as the sentence is within the statutory limits and was not based on improper or inaccurate information." State v. Daley, 2006 VT 5, ¶ 6, 179 Vt. 589 (mem.). The complainant testified about her interactions with defendant, including his past charges for domestic assault. Defendant was afforded an opportunity to cross examine, but the court indicated there was no need to particularly cross examine about each prior offense because the court would rely on defendant's criminal history record and not the victim's account of the facts underlying those convictions. Defendant asserts that complainant's testimony contained hearsay statements and the court did not make sufficient findings as to the reliability of those statements. V.R.Cr.P. 32(c)(4)(A) ("When a defendant objects to factual information submitted to the court or otherwise taken into account by the court in connection with sentencing, the court shall not consider such information unless, after hearing, the court makes a specific finding as to each fact objected to that the fact has been shown to be reliable by a preponderance of the evidence, including reliable hearsay."). Even assuming that the court failed to make a reliability determination regarding the complainant's statements, there is no indication that the court's decision was based on any of the challenged statements. In explaining its sentencing decision, the court took into account the intentional nature of defendant's conduct and defendant's prior criminal history; the court did not mention any of the challenged assertions in complainant's testimony. The court acted well within its discretion in sentencing defendant. The court relied on proper considerations, including his prior convictions, the need for treatment, and the risk he posed to others. See State v. Webster, 2017 VT 98, ¶ 45.

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[1] We do not reach the question of whether complainant's statements were admissible under Vermont Rule of Evidence 404(a), or (b).

[2] There is no merit to defendant's argument that he was provided insufficient notice in advance of sentencing. At the first sentencing hearing, defendant noted that the State had not provided advance notice of any evidence that it intended to offer. The State initially indicated that it did not intend to present any testimony and the complainant would simply provide a victim impact statement. When the court indicated that it would require the complainant to be under oath before making statements about conduct beyond what was discussed at trial, defendant moved for a continuance to allow time to prepare to rebut any allegations. The court granted the request and continued the hearing. Therefore, defendant was on notice that the complainant would make statements about prior incidents between her and defendant. To the extent defendant now claims that this notice was insufficient, the argument is not preserved for appeal because at the continued hearing, defendant did not object that he had insufficient notice of the testimony offered.

Defendant also claims that it was error for the court to refuse to order a presentence investigation report (PSI). Under Vermont Rule of Criminal Procedure 32(c)(1)(A), the court had discretion to dispense with a PSI because the charged offense is a misdemeanor. The court properly exercised that discretion in this case.

Finally, defendant challenges two probation conditions imposed by the court. The trial court has discretion to impose probation conditions and the conditions will be upheld if "there is a reasonable basis for the court's action." State v. Putnam, 2015 VT 113, ¶ 44, 200 Vt. 257 (quotation omitted). Defendant has the burden of demonstrating that the court failed to exercise its discretion. Id.

Defendant argues that the probation conditions requiring defendant not to engage in "violent or threatening behavior" in front of his children and to attend anger management counseling to the satisfaction of his treatment provider are too vague to provide notice of what behavior is prohibited. Because defendant did not object to these conditions in the trial court, they are subject to plain-error review. See State v. Lumumba, 2018 VT 40, ¶ 9 (requiring defendant preserve objection to probation condition in trial court). On appeal, defendant does not argue that imposition of the conditions amounted to plain error. See State v. Davis, 2018 VT 33, ¶ 20 (declining to reach plain error argument where not briefed on appeal).

Even if we were to consider defendant's argument, we would conclude that there was no plain error in this case. The context of defendant's challenge to the conditions is important. Notice is typically an issue in probation-violation cases because to be charged with violating a condition "a defendant must have notice before the initiation of a probation revocation proceeding of what circumstances will constitute a violation of probation." State v. Sanville, 2011 VT 34, ¶ 8, 189 Vt. 626 (mem.) (quotation omitted). Defendant's argument fails to provide a basis to invalidate the conditions on their face. As to the condition prohibiting violent and threatening behavior in front of his children, although the scope of similar conditions have been debated in probation-violation cases, we have "never specifically deemed a condition prohibiting violent and threatening behavior to be, in and of itself, unlawful." State v. Cornell, 2016 VT 47, ¶ 20, 202 Vt. 19. As to the condition requiring defendant to attend anger management counseling to the satisfaction of his treatment provider, defendant again fails to demonstrate how any lack of clarity in the meaning of the condition would invalidate the condition on its face.

Affirmed.

BY THE COURT:

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice