

*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. 2018-185

APRIL TERM, 2019

State of Vermont v. Dennis Wright Emerson*	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 186-2-16 Wmcr
		Trial Judge: Michael R. Kainen

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

Defendant appeals his convictions for aggravated domestic assault and interference with access to emergency services following a jury trial. On appeal, defendant argues that the trial court erred in admitting evidence of prior bad acts. We affirm.

Following a reported incident of domestic violence, defendant was charged with first-degree aggravated domestic assault for attempting to cause serious bodily injury by placing a vacuum cord around the complainant's neck, first-degree aggravated domestic assault for placing the complainant in fear of imminent serious bodily injury by wrapping a vacuum cord around the complainant's neck, and interference with access to emergency services for taking the telephone from the complainant when she was attempting to call police. The State provided notice pursuant to Vermont Rule of Criminal Procedure 26(c) of its intent to introduce evidence of defendant's prior bad acts. The State proffered that the evidence of prior acts was relevant for several reasons, including to show the context for the parties' relationship and the alleged acts of violence. The request included a general description of the relationship from 2009 onward, specific instances of assaultive behavior, and defendant's three suicide attempts. Prior to trial, the court considered the admissibility of the alleged acts. Defendant argued that the prejudice of admitting the acts outweighed any benefit. The court concluded that some of the State's proffered evidence was more probative than prejudicial and was relevant to explaining the complainant's behavior following the assault and the context of the parties' relationship. The court excluded several instances proffered by the State, including those involving firearms and any reference to defendant's mental-health status.

At trial, the complainant testified as follows. In February 2016, at the time of the relevant conduct, defendant and the complainant were in a relationship. Defendant was at the complainant's house and was drinking alcohol. The complainant was upstairs and when she went downstairs, he was passed out on the couch. She began to cook dinner, and defendant abruptly woke up and began to vacuum. The complainant asked defendant what he was doing, and defendant began to vacuum her leg. The vacuum hurt the complainant, so she unplugged it. Suddenly, defendant took the cord, placed it around the complainant's neck, and threatened to kill

her. Defendant's facial expression made the complainant fearful. Defendant tightened the cord and then loosened it. The complainant reached for a telephone, and defendant yelled that the complainant had promised not to call the police again and wrestled the telephone from her hand. The complainant was scared and thought defendant was going to kill her. She tried to remain calm and went upstairs. She telephoned her daughter, who came and picked her up and brought her to the police station.

The complainant also testified about her relationship with defendant leading up to that day. She explained that in 2010 she began seeing defendant. He would visit her for the weekend, and they would drink heavily. In 2012, they both went through outpatient alcohol rehabilitation and moved in together. Defendant, however, began drinking again. The complainant recounted one incident in which they got in an argument while out for dinner and the complainant drove home, leaving defendant to walk. When defendant got home, he slapped the complainant across the face and pulled a scarf that was wrapped around her neck. The complainant struggled with defendant to get to the telephone and was able to call 911. The police came and the complainant subsequently obtained a restraining order. Complainant explained that after that, in 2013, she moved and obtained her own housing, but defendant would continue to see her. Her relationship with defendant between 2014 and 2016 was not good. Defendant would visit on the weekend and drink constantly. She felt like a prisoner in her home because defendant would listen to her conversations on the telephone and did not want her to leave the house without him. In September 2015, on the complainant's birthday, the complainant asked defendant to leave because when she returned home around 3 p.m. defendant was already drunk. The complainant then locked the door and jammed it shut with a chair after he left. Later that evening, when the complainant was home with her daughter, defendant returned and broke down the door to enter the complainant's home. The complainant did not call the police. In November 2015, the complainant had told defendant that she did not love him, did not want to marry him, and did not want to be with him. The complainant was in her bedroom when she heard the dog whimpering in her daughter's bedroom. When she opened the door, she heard defendant fall to the floor and saw he had something wrapped around his neck and attached to the door. Defendant told her he wanted to kill himself. A couple of months later, the complainant accidentally hurt herself and defendant initially refused to take her to the emergency room. He told her that he was afraid that police would think that he had injured her because the night before police had found him intoxicated in a cemetery .

The complainant's daughter also testified. She described that her mother and defendant fought frequently. She recounted the events of the complainant's birthday and remembered being home with her mother when she heard defendant trying to enter. She went downstairs to find that defendant had broken down the door. She then asked defendant to leave and repaired the door. She also described the events leading to these charges in February 2016. She stated that she received a telephone call from her mother, who told her that she could not go to the police station because she was scared defendant would not let her. She picked up her mother and brought her directly to the police station.

Defendant testified. He described the incident after going out for dinner and admitted to slapping the complainant but denied grabbing her scarf. He also recounted the event in February 2016, explaining that when the complainant unplugged the vacuum, he balled up the cord and tossed it at her. He denied threatening the complainant. He stated that he looped the cord and put it over complainant's shoulders but did not tighten it.

In its instructions, the court advised the jury that it could consider the evidence of defendant's prior assault of the complainant and conflicts in the relationship "to understand the nature of the parties' relationship but not to conclude that [defendant] is a bad person or is more likely to have committed the charged offense."

The jury acquitted defendant of first-degree aggravated domestic assault for attempting to cause bodily injury and found him guilty of the other two charges. Defendant appeals.

On appeal, defendant argues that the trial court erred in admitting the prior-bad-act evidence. Pursuant to Vermont Rule of Evidence 404(b), evidence of other crimes or acts may not be admitted to prove a defendant's propensity to commit a crime, but it can be used "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The evidence may be excluded if its probative value is substantially outweighed by other factors, including unfair prejudice, under the test in Vermont Rule of Evidence 403. The trial court has broad discretion in making its evidentiary rulings, and these rulings are "not subject to revision unless it clearly and affirmatively appears that the trial court withheld or abused its discretion." State v. Catsam, 148 Vt. 366, 383 (1987).

Here, the trial court admitted the evidence to explain the complainant's behavior after the assault in staying in the home and failing to immediately report the alleged assault and to provide context for defendant's alleged controlling and abusive behavior leading up to the incident. In domestic-assault cases, evidence of a defendant's prior acts of violence against the same victim can be admitted "to portray the history surrounding the abusive relationship, providing the needed context for the behavior in issue." State v. Sanders, 168 Vt. 60, 62 (1998). "The purpose of establishing [the] defendant's history of abusing the victim is not to show his general character for such abuse, but to provide the jury with an understanding of [the] defendant's actions on the date in question." Id.

Defendant asserts that the evidence in this case served no purpose other than to establish that defendant had the propensity to commit the charged crimes. Defendant contends that the evidence was not required to show why the complainant delayed reporting because the evidence showed that the complainant did not delay.

The court considered the probative value of the evidence and balanced that against unfair prejudice. The court acted within its discretion in balancing these interests and in concluding that some incidents were admissible while others were overly prejudicial. The court considered that without the context of the prior incidents and the evidence about the relationship in general the jury would be left with a single act of domestic violence, which could otherwise seem inexplicable. See id. ("Allegations of a single act of domestic violence, taken out of its situational context, are likely to seem incongruous and incredible to a jury." (quotation omitted)). Further, the court admitted it to explain the complainant's actions following the assault. Although defendant asserts that there was no delay in reporting to explain, the complainant's behavior after the assault may not appear credible without the context of the parties' relationship. The evidence demonstrated that the complainant did not immediately call police or leave the house after the assault but waited until her daughter came to pick her up from the house before reporting the crime because she was fearful that defendant would try to stop her. As to prejudice, the court acted within its discretion in reaching the balance that it did. Contrary to defendant's assertion, the jury's acquittal on one charge does not indicate that the jury was prejudiced by the introduction of the prior acts. If anything, it shows that the jury was able to assess the evidence relative to each charge.

See State v. Freeman, 2017 VT 95, ¶ 19 (explaining that fact that jury acquitted on one charge showed that jury was able to differentiate between different counts and did not act based on prejudice). Furthermore, the jury acquitted defendant of attempting to cause serious bodily injury in favor of convicting him of placing the complainant in fear of imminent serious bodily injury, which is a reasonable interpretation of the evidence presented.

In a related argument, defendant generally contends that the prosecutor impermissibly emphasized the prior-act evidence in closing argument and urged the jurors to make an inference that defendant's prior bad acts made him more likely to have committed the domestic assault. We do not reach this argument. Defendant did not object at any point during the State's closing argument and has not made any plain-error argument on appeal. See State v. Lampman, 2011 VT 50, ¶ 33, 190 Vt. 512 (mem.) (declining to address unpreserved argument where defendant did not argue plain error on appeal).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice