

*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. 2019-138

JANUARY TERM, 2020

State of Vermont v. James R. Wheelock*	}	APPEALED FROM:
	}	
	}	Superior Court, Lamoille Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 134-4-18 Lecr
	}	
	}	Trial Judge: Megan J. Shafritz

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

Defendant appeals his convictions for perjury, subornation of perjury, and obstruction of justice. On appeal, defendant argues that the court erred in permitting the State to introduce other bad-act evidence. We affirm.

The following evidence was submitted at trial. In September 2016, defendant was living in the home of his uncle, Michael, along with his uncle’s wife, Rebecca, and her son, Jacob.<sup>1</sup> September 3, 2016, when Rebecca was away, defendant drove himself, Michael, and another uncle of defendant’s, Mark, to a party. They returned to Michael’s house after the party. Jacob was at the house with his girlfriend. Early in the morning on September 4, 2016, Jacob and his girlfriend were awoken to loud music and the sound of banging. Jacob found defendant and Mark playing music and beating a dresser. They appeared to be intoxicated. Jacob turned off the power to the house to stop the music. Defendant became angry and yelled. He threatened to cut off the head of the person who had turned off the lights. Jacob felt threatened. Jacob tried to get help from Michael, but he had passed out on his bed. When Jacob could not reach his mother, he called 911. While Jacob was talking to the 911 operator, he watched defendant and Mark get into defendant’s vehicle and back out of the driveway. He observed the vehicle’s lights turn off and then watched the vehicle drive up the driveway. Jacob then heard a lot of banging in an area outside that he could not see and where his car was parked.

Later, outside, Jacob and his girlfriend discovered damage to their vehicles. Jacob’s vehicle had a large rock thrown through the windshield, the hood was dented, and two tires were slashed. Jacob’s girlfriend’s car had the tires slashed.

Several state troopers responded to the 911 call and located defendant’s vehicle down the road at the house where Mark lived. The troopers observed that the vehicle’s engine was still warm, and the tire tracks were visible in the dew. The troopers spoke to defendant and explained that there was a complaint about his behavior at Michael’s house, including an allegation that they

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<sup>1</sup> We refer to the witnesses in this case by first name for clarity and do not intend any lack of respect.

had been smashing things outside. When asked, defendant stated that he lived at Michael's residence but denied that he had been there that night. The troopers located a machete in defendant's vehicle.

On September 4, 2016, Michael ordered defendant to move out of the house and defendant moved in with Mark.

Jacob filed a request for a relief-from-abuse order (RFA) against defendant. A hearing was held on October 4, 2016. At the hearing, defendant testified that he was at a party on the night of September 3 with Michael and Mark but did not see Michael after the party or go back to Michael's house. Mark testified at the RFA hearing that he left the party on September 3, 2016, with defendant, and did not go back to Michael's house.

Defendant was charged with two counts of perjury, one count of subornation of perjury, and one count of obstruction of justice. The perjury charges alleged that defendant lied at the RFA hearing when he falsely testified that he did not see Michael after the party and that he and Mark did not return to Michael's house. The subornation charge alleged that defendant procured Mark to commit perjury at the RFA hearing on his behalf. The obstruction-of-justice charge alleged that defendant asked Mark to attend the RFA hearing and to lie for defendant.

Prior to trial, the State filed motions in limine regarding certain evidence it sought to introduce at trial regarding defendant's prior conduct, including that he damaged vehicles on the night of the incident. Following a hearing, the court concluded that the State could offer this evidence. The court explained that evidence of damage to the vehicles and defendant's statements to police on that night were admissible as prior bad acts because they were not admitted to show propensity to commit a crime but to demonstrate defendant's motive for lying. The court also found that evidence demonstrating that defendant damaged the vehicles was relevant to show that defendant had been at Michael's residence that night. The court found that the probative value of the evidence was not outweighed by undue prejudice.

At trial, the State introduced evidence from multiple witnesses regarding the events from September 3-4, including the damage to the vehicles. Jacob's girlfriend testified about being woken up early on September 4 to obnoxious noises. She stated that after defendant and Mark left the house, she and Jacob heard crashing noises and when they went outside, they saw damage to their vehicles. She identified photographs of the damaged vehicles. Michael testified that he left the party with defendant and Mark and they all went back to his house after the party. He identified damage he observed to the vehicles. Jacob testified about what happened that evening, including the damage to his vehicle. Mark testified that defendant asked him to lie at the RFA hearing and that he lied because he felt intimidated by defendant, who was then living in the same house as he was. Mark testified that when he and defendant were leaving Michael's house, defendant first backed out of the driveway, and then drove back into the driveway, went around to the back of the house, grabbed a rock, and threw it through defendant's windshield.

In its instructions, the court advised the jury that evidence of damage to the vehicles was relevant only to the question of defendant's motive and as context and could not be used as propensity evidence. The jury found defendant guilty on all four counts. Defendant appeals.

On appeal, defendant argues that the court erred in admitting other bad-act evidence. Vermont Rule of Evidence 404(b) provides that "[e]vidence 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." This evidence may, however, be admitted for other purposes, such as to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

accident.” V.R.E. 404(b). Even if introduced for a proper purpose, bad-act evidence may nonetheless be excluded under Vermont Rule of Evidence 403 “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” “As with other evidentiary rulings, we give deference to the trial court’s decision to admit bad-act evidence pursuant to Rule 404(b), and review its decision only for abuse of discretion.” *State v. Jones*, 2008 VT 67, ¶ 14, 184 Vt. 150. In a prosecution for perjury, evidence demonstrating a motive to lie may be admitted as prior bad-act evidence. *State v. Wheel*, 155 Vt. 587, 602 (1990).

Here, the State offered multiple reasons for defendant to lie at the RFA hearing about his presence at Michael’s home on September 3-4. At the hearing on the motion in limine, the State argued that defendant made false statements at the RFA hearing because he did not want to be subject to an RFA order and did not want to be criminally or civilly liable for the damage to the vehicles. The court agreed and concluded that the State could offer evidence about the damage to the vehicles to demonstrate defendant’s motive for perjuring himself at the RFA hearing and to provide context for defendant’s false testimony.<sup>2</sup>

We conclude that the court did not abuse its discretion in admitting evidence about the damaged vehicles as relevant to defendant’s motive to lie. It was reasonable to infer from the evidence that defendant made false statements at the RFA hearing regarding his presence at the house on that evening to avoid liability for the damage to the vehicles. When first approached by police on September 4 about the events at Michael’s house, including the damage to the vehicles, defendant claimed that he had not been at the house that evening. This false statement was made before the RFA complaint was filed. We reject defendant’s assertion that his testimony at the RFA hearing denying his presence at Michael’s house would not have impacted his liability for the vehicle damage. By testifying that he was not present at the house, defendant avoided responsibility for both the behavior that formed the basis for the RFA complaint and the vehicle damage. If defendant had admitted at the RFA hearing that he had been present that night, this would have created an inconsistency with his statements to police and would have created suspicion that he was also involved in damaging the vehicles. Therefore, defendant had a motive to lie about his presence to avoid implicating himself in causing damage to the vehicles.

Defendant further argues that the court abused its discretion in balancing the probative value of the evidence against its prejudicial effect. Relevant evidence may be excluded only if it is unfairly prejudicial, that is “when its primary purpose is to appeal to a jury’s sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case.” *State v. Amidon*, 2018 VT 99, ¶ 21, \_\_ Vt. \_\_ (quotation omitted). Here, the trial court explained that the evidence of the vehicle damage was probative of defendant’s motive to lie. The

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<sup>2</sup> The court also concluded that the vehicle damage was relevant to demonstrating that defendant was present at Michael’s home. Defendant argues that the evidence had minimal value in proving that he was present because there was ample other evidence to establish his presence. He asserts that the evidence should have been excluded under Rule 403 because this limited probative value was outweighed by its prejudicial effect. We need not reach the question of whether the evidence should have been excluded under Rule 403 if the sole purpose was to demonstrate defendant’s presence because we conclude that the evidence was also relevant to demonstrating defendant’s motive to lie.

court further found that this probative value was not outweighed by unfair prejudice because the property damage was dissimilar to the charges against defendant and was not highly inflammatory.

We conclude that the court acted within its discretion in determining that the evidence was relevant to show motive and this probative value was not outweighed by undue prejudice. See Wheel, 155 Vt. at 604 (explaining that “court has broad discretion in weighing the competing considerations and reaching an evidentiary ruling based on that weighing process”). Moreover, any prejudicial effect was minimized by the court’s limiting instruction on how the evidence could be used. See Amidon, 2018 VT 99, ¶ 23 (explaining that jury is presumed to follow court’s limiting instruction).

Affirmed.

BY THE COURT:

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Beth Robinson, Associate Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice