ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-316

DECEMBER TERM, 2020

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	Superior Court, Chittenden Unit,
	}	Criminal Division
	}	
Nicolelus Sanborn	}	DOCKET NO. 20-CR-02990
	}	
	}	Trial Judge: Kirstin K. Schoonover

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

Defendant Nicolelus Sanborn appeals from a superior court order holding him without bail pursuant to 13 V.S.A. § 7553a pending trial on a first-degree aggravated domestic assault charge. He contends that the court erred by considering the sworn, recorded statement of the alleged victim in determining that the evidence of his guilt was great, and therefore he cannot be held without bail. In the alternative, he requests that the Court exercise its discretion to nonetheless grant his release on conditions prior to trial. I affirm.

Under Chapter 2, § 40(2) of the Vermont Constitution and § 7553a of Title 13, a person charged with a felony offense involving an act of violence against another may be held without bail if the evidence of guilt is great and a court finds that release would pose a substantial threat of physical violence to another which cannot be reasonably prevented by setting conditions. Where a court so finds, the defendant is entitled to review of the merits of that decision by a single Justice of the Supreme Court. Vt. Const. ch. 2, § 40; 13 V.S.A. § 7556(d). This review is de novo, with no deference afforded to the criminal division's rulings as to matters of fact or law. 13 V.S.A. § 7556(d).

The procedural history of this case is as follows. On November 18, 2020, defendant was charged with one count of first-degree aggravated domestic assault against alleged victim L.N., in contravention of 13 V.S.A. § 1043(a)(1), and two counts of violating conditions of release, in violation of 13 V.S.A. § 7559(e). All three offenses are alleged to have taken place on November 17, 2020, in Burlington. The State contends that, on that date, defendant was subject to conditions of release in a separate case which included the requirement that he observe a twenty-four-hour curfew at a residence in Essex and that he not contact L.N. The State moved to hold defendant without bail under § 7553a; the court did so, pending a bail hearing scheduled for December 2, 2020.

The State and defendant appeared at that evidentiary hearing by video due to COVID-19 safety measures. The State's evidence consisted of the affidavit of Officer Randall Webster of the Burlington Police Department—excluding any hearsay statements contained therein—and L.N.'s sworn statement made shortly after the alleged assault, which was captured on an officer's body-worn camera. The parties have stipulated to the admission of the record of the hearing, including the admitted exhibits.[1] Neither party offered additional evidence on appeal.

I. Record Evidence

Officer Webster's affidavit reflects that, on November 17, 2020, he and another officer responded to a Burlington residence regarding a reported assault. At that time, defendant was subject to conditions of release in a separate case which included a twenty-four-hour curfew at a residence in Essex unless accompanied by a responsible adult designated by the court, and an order that he not have contact with L.N.

The body-camera video shows an officer entering a residence, where a woman—who identified herself as L.N.—was in the process of cleaning up items scattered on the floor. Her voice was low and rasping, and what appeared to be blood ran from her forehead down her face. The officer asked L.N. whether everything she was about to tell him was true, under the pains and penalties of perjury, and she agreed.

L.N. went on to make the following statement regarding the alleged encounter, recorded on the officer's body camera. She had answered her door, and "it was Nick." He immediately began to "attack" her, grasping her by the throat and throwing her to the ground. There, the two "tussled," causing the disarray visible in the apartment. Defendant continued to hold L.N. by her throat, even as she told him she could not breathe. Her breathing was constricted to the point that her legs began shaking, she spit up blood, and she believed that she was going to die. Defendant stated that he was going to kill her.

Afterward, L.N. got up and went into the kitchen. Defendant followed, picked up a plate, and "smashed" it over L.N.'s head, causing the injury her forehead. As a result of the blow, she fell to the floor, unconscious.

As she made the statement, L.N. indicated she continued to have a pain in her chest and difficulty breathing and speaking. Officer Webster observed a small cut on L.N.'s throat, bruises on her forearm and knee, and what appeared to be small puncture wounds on her stomach. She was transported to the hospital for a medical assessment.

Officer Webster subsequently located defendant in a back room in the basement of L.N.'s residence, with the lights off. Defendant provided Officer Webster with a false name and indicated that he was not in possession of identification. However, another officer immediately recognized him based on prior law-enforcement contact, and defendant's identity was later confirmed with reference to his Vermont driver's license. At the scene, dispatch confirmed that defendant had an

[1] At a hearing before the undersigned, the parties stipulated that the portion of the video which was admitted into evidence is located between time stamps 0:45 and 4:24. Accordingly, the record on appeal includes only that segment of the video exhibit.

outstanding arrest warrant for violation of conditions of release. An inquiry into his criminal history also reflected a prior failure to appear.

Following the State's evidence, defendant called two witnesses, each of whom appeared by telephone.

The first was L.N. She testified that she and defendant have two children together, and acknowledged that, on November 17, 2020, she made a statement to the police regarding events which had taken place in her home. When asked whether it was accurate to state that she did not tell police the truth about what happened that day, L.N. replied that at the time, she was under the influence of drugs, "so it's a big possibility." She agreed that in the days leading up to November 17, she had some contact with the defendant, and testified that on that day, she became upset with him and "started a fight" after he indicated he would not see her any longer.

When defense counsel asked L.N. whether it was accurate to say that defendant "never put his hands around [her] throat . . . that day," L.N. first responded "I don't know how to answer that," but, when queried again, agreed. She also agreed that defendant did not hit her in the head with a plate.

On cross-examination, L.N. agreed that on November 17, she sustained injuries during an altercation with defendant, and that she went to the hospital, but testified that "part of me being under the influence of drugs and me not wanting him to leave and everything caused those injuries." She stated, "I don't think they just physically came from [defendant]. Like, I think that some were caused by me and how I acted."

L.N. also testified that she believed defendant was capable of staying away from her and their children if he was ordered by the court, because their November 17 encounter was "the final breaking point." She indicated that she thought his ability to follow conditions had changed since last May, because, after being incarcerated, he had "detoxed" and was prescribed medication for a mental health condition. When asked whether she was concerned about her own safety if defendant did not receive necessary treatment, she indicated she was, but went on to say, "not that I'm afraid of [defendant], it's afraid that—I'm worried that I'm going to bury [him] by the time [he] turns thirty."

Defendant then called his mother, Christine Donald, who testified that she arrived at L.N.'s home on November 17 after defendant called her and asked her to pick him up. Ms. Donald indicated that upon her arrival, she did not observe any injury to L.N.'s forehead; defendant put his bag into his mother's car, but then she lost sight of him. Thereafter, Ms. Donald testified, she saw L.N. hit herself in the face with a plate; L.N. appeared to her to be "high." Ms. Donald later learned that officers had located her son in the basement of L.N.'s residence.

Ms. Donald also testified that defendant was seeking admission to Valley Vista, a drug-treatment program, and that she was available to drive defendant to and from the program. She indicated that she was not proposing defendant stay in her home, but was "aware of some potential" that defendant could live with her mother—his grandmother—if he successfully completed the program. Defendant's grandmother did not testify.

II. Analysis

To hold a defendant without bail prior to trial under 13 V.S.A. § 7553a, a court must find that (1) defendant is charged with a felony; (2) an element of that felony involves an act of violence against another; (3) the evidence of defendant's guilt is great; and—by a standard of clear and convincing evidence—that (4) defendant's release would pose a substantial threat of physical violence to any person; and (5) no condition or combination of conditions of release will reasonably prevent such violence. 13 V.S.A. § 7553a; see also State v. Lohr, 2020 VT 41, ¶ 14, __ Vt. __.

Defendant does not dispute that first-degree aggravated domestic assault is a felony, an element of which involves an act of violence against another. 13 V.S.A. § 1043(a)(1). However, he argues that the criminal division erred in concluding that the evidence of his guilt is great as to that charge because it should not have considered L.N.'s video-recorded statement. And he contends that, even if the evidence of his guilt is great, the Court should exercise its discretion to release him on the condition that he attend residential drug treatment and thereafter reside with his grandmother, who would supervise him as a responsible adult.

A. Weight of the Evidence

To determine whether the evidence of defendant's guilt is great under § 7553a, courts apply the standard applicable to a motion to dismiss for lack of a prima facie case under Vermont Rule of Criminal Procedure 12(d). State v. Duff, 151 Vt. 433, 439 (1989); see also State v. Downing, 2020 VT 97, ¶ 6, __ Vt. __ (mem.). Thereunder, the prosecution must "establish by affidavits, depositions, sworn oral testimony, or other admissible evidence that it has substantial, admissible evidence as to the elements of the offense." V.R.Cr.P. 12(d). The evidence of guilt is great if, taking the evidence in the light most favorable to the State and eschewing any modifying evidence, the court concludes that the State "can fairly and reasonably show defendant guilty beyond a reasonable doubt." Duff, 151 Vt. at 439.

For purposes of this inquiry, a recording of a sworn, oral statement—like the one from L.N. furnished by the State here—is "the functional equivalent" of an affidavit. State v. Bray, 2015 VT 25, *2, 196 Vt. 620, (2009) (unpub. mem.). However, defendant argues that the criminal division erred in considering L.N.'s recorded statement, positing that where a witness provides live testimony at a weight-of-the-evidence hearing in contravention to a prior sworn statement, "the live testimony controls and establishes what the State may be able to prove at trial," whereas the sworn statement becomes "modifying" evidence which must be excluded from consideration. Specifically, he argues that absent the recorded statement, the State cannot establish one of the essential elements of first-degree aggravated domestic assault under § 1043(a)(1): that defendant attempted to cause, or willfully or recklessly caused, serious bodily injury.

Defendant supports his argument with citations to two decades-old superior court opinions, see State v. Pecor, 41-1-03 Ancr (2003); State v. Forrester, 174-2-99 Bncr (1999), noting that there appear to be no Supreme Court rulings on the issue presented. In those two cases, trial courts reasoned that where a witness under oath repudiates an earlier sworn statement, the earlier statement is no longer appropriately considered as part of the State's prima facie case as it is presumably inconsistent with the testimony the witness would provide at trial and therefore

inadmissible as direct evidence. See V.R.Cr.P. 12(d) (requiring State to demonstrate it has "substantial, admissible evidence as to the elements of the offense" (emphasis added)).

Defendant also points to the Reporter's Notes to Rule 12, which explain that on a motion to dismiss for lack of a prima facie case, although "the prosecution may establish its case by affidavits of witnesses as to their potential testimony," "either party may call witnesses and offer real evidence, and the defendant may force the state to a greater degree of proof by cross-examining the state's witnesses or calling them as hostile witnesses." Reporter's Notes, V.R.Cr.P. 12; see also V.R.Cr.P. 12(d)(2). He argues that, under these circumstances, L.N.'s testimony at the hearing is the "real evidence," while her sworn statement is modifying evidence not appropriately considered in connection with this inquiry.

Defendant's argument elides this Court's more recent decisions on the topic of modifying evidence. In State v. Stolte, the Court explained that modifying evidence includes "testimonial evidence introduced by the defense in contravention to the State's evidence, the credibility or weight of which is ultimately for the factfinder's determination." 2012 VT 12, ¶ 11, 191 Vt. 600 (mem.) (citing State v. Gibney, 2003 VT 26, ¶ 14, 175 Vt. 180 ("By modifying evidence, we mean exculpatory evidence introduced by defendant, such as countervailing testimony.")). Here, defendant asks the Court to disregard the State's evidence—L.N.'s recorded statement—in favor of contravening testimonial evidence offered by the defense. This interpretation wars with both the language of Stolte and the very purpose of excluding modifying evidence under these circumstances, which is "to avoid judicial decisions on credibility at bail hearings." State v. Breer, 2016 VT 120, ¶ 11, 203 Vt. 649.

The fact that L.N. is the source of both statements at issue does not change the analysis. Defendant argues that, in light of L.N.'s testimony at the bail hearing, the State cannot show her recorded statement would be admissible at trial as direct evidence. He contends that the Court must assume that L.N.'s testimony at trial would be consistent with her testimony at the bail hearing, rather than the sworn statement made immediately following the event. The State's burden at this juncture, however, is "to demonstrate that it has evidence that will be admissible at trial, not to have it lawfully admitted at the hearing as if it were a trial." State v. Bullock, 2017 VT 7, ¶ 8, 204 Vt. 623 (mem.). Speculation at this point as to whether L.N.'s testimony at trial is likely to be consistent with her recorded statement rather than her statement at the bail hearing is precisely the type of pretrial credibility determination that the exclusion of modifying evidence is intended to prevent. As explained in State v. Turnbaugh,

> it is not the role of the court in a bail review hearing to judge the State's case. In a bail hearing, guilt or innocence of the accused is not the issue, and there should be no evaluation of the evidence with that result in mind. Direct conflicts between inculpatory or exculpatory facts cannot be resolved at this stage. Such matters must await jury determination at trial. Rather, the court need only determine if the State's evidence is sufficient to sustain a verdict of guilty, not whether the jury will indeed be persuaded to render same.

174 Vt. 532, 534 (2002) (mem.). Because the Court, in assessing the weight of the evidence, must take that evidence in the light most favorable to the State, disregarding modifying evidence in order to avoid pretrial determinations of credibility, I must assume at this point that L.N.'s sworn recorded statement, and not her testimony at the bail hearing, represents the evidence the State could produce at trial.[2] To conclude otherwise would amount to a pretrial determination that L.N.'s testimony adduced at the bail hearing was more credible than her sworn statement following the alleged assault.

Moreover, contrary to defendant's assertion, the Supreme Court has had occasion to consider a very similar set of facts. In State v. Baker, a defendant appealed from a decision holding him without bail under 13 V.S.A. § 7553. The Court observed that while defendant's wife "testified in prior sworn statements that defendant threatened to smash her in the face with [a] board . . . she receded from that statement in her testimony at the weight-of-the-evidence hearing and avoided giving a straight answer about whether he in fact threatened to strike her." Baker, 2015 VT 62, ¶ 4 n.2, 199 Vt. 639. However, it concluded that because the Rule 12(d) standard "requires the court to view the evidence in a light most favorable to the State and exclude modifying evidence," the court "could properly rely on the wife's sworn statement in determining whether the State made out a prima facie case." Id. Just so here. Although L.N. receded from her prior sworn statements at the weight-of-the-evidence hearing, the relevant standard requires the court to consider the evidence in the light most favorable to the State, excluding modifying evidence. L.N.'s contravening hearing testimony—and not the sworn statement offered by the State—is modifying evidence not appropriately considered in assessing the weight of the evidence. After Stolte, Gibney, and Baker, the prior trial court cases reaching the contrary conclusion are without persuasive value. See Baker, 2015 VT 62, ¶ 4 n.2; Stolte, 2012 VT 12, ¶ 11; Gibney, 2003 VT 26, ¶ 14.

Finally, defendant's reliance on the reference to "real evidence" in the Reporter's Notes to Rule 12 is misplaced. As the Court explained in Turnbaugh, the fact that Rule 12(d)(2) allows a defendant to introduce affidavits or further evidence on his behalf does not mean that, in assessing whether the evidence of guilt is great for purposes of bail, the trial court should "utilize the modifying evidence to make a determination between whose version of the events was the more believable." 174 Vt. at 534 (explaining application of 12(d)(2) in context of motion to dismiss for State's failure to make out prima facie case is distinguishable from "bail review assessing whether evidence of guilt is great"); see also, e.g., Reporter's Notes—2008 Amendment, V.R.Cr.P. 12 (explaining that the "language of the rule requires the court to observe the formality of defendant's cross-examination of witnesses, even though the court cannot properly consider such 'modifying' evidence in deciding the motion" (emphasis added)).

I conclude that the State has established that it has substantial, admissible evidence as to the challenged element of the offense: that defendant attempted to cause, or willfully or recklessly caused, serious bodily injury. Taken in the light most favorable to the State, and excluding modifying evidence, the record shows that, on November 17, 2020, defendant grasped L.N. by her

[2] For this reason, the Court need not reach the State's argument that L.N.'s recorded statement would be admissible at trial because it satisfies the criteria of an "excited utterance" hearsay exception under Vermont Rule of Evidence 803(2).

neck, obstructing her breathing, and hit her in the head with a plate, rendering her unconscious. The definition of "serious bodily injury" includes "strangulation by intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck," as well as any bodily injury creating "a substantial loss or impairment of the function of any bodily member or organ." 13 V.S.A. § 1021(2)(A)(ii), (B). Defendant's argument that the State did not meet its burden as to this element of the charge fails. The trial court properly concluded that the evidence of defendant's guilt on the charge of first-degree aggravated domestic assault is great. The resolution of credibility issues awaits trial.

B. Conditions of Release

Defendant argues that, even if the Court concludes that the evidence of his guilt is great, it should nonetheless exercise its discretion to release him on conditions, including that he attend residential drug treatment at Valley Vista. He proffers that at a hearing in connection with his contemplated completion of the program, he would propose to reside with his grandmother, who would serve as his responsible adult. In support of his request, defendant cites L.N.'s testimony at the hearing that when defendant receives proper medication and treatment, she does not fear for her safety. The State responds that, due to defendant's alleged failure to comply with prior strict, specific conditions of release intended to protect L.N. from the risk of violence, it is without confidence that any condition or combination of conditions can assure L.N.'s safety.

Where the evidence of guilt is great, a defendant may be held without bail if the court finds, by a standard of clear and convincing evidence, that the defendant "poses a substantial threat of physical violence to any person" and that "no condition or combination of conditions of release will reasonably prevent" such violence. 13 V.S.A. § 7553a.

Based on the record before me, I find by a standard of clear and convincing evidence that defendant poses a substantial threat of physical violence to L.N. Although her testimony at the bail hearing is appropriately considered in connection with this inquiry, her statement that she did not fear defendant was more equivocal that defendant acknowledges—she initially agreed that she was concerned for her safety if defendant did not obtain treatment, but then stated that she was concerned for defendant's safety if he did not obtain treatment. Even if taken at face value, her testimony does not lessen the threat of violence in the eyes of the Court, given that it relies on the predicate assumption that defendant will be successful in treatment.

I further find that no condition or combination of conditions of release could reasonably ameliorate the risk of harm presented to L.N. by defendant's release on conditions. The record reflects that, at the time of the alleged offense, defendant was subject to conditions of release prohibiting him to have contact with L.N. and restricting him to a twenty-four-hour curfew in Essex, where he was supervised by responsible adults. The witnesses called by defendant himself agreed that on November 17, he was at L.N.'s home, in violation of both conditions. In addition, at the time of the offense, defendant had an outstanding arrest warrant on a charge of violating conditions of release. Defendant addresses none of these concerns.

Because I conclude that each element of § 7553a is satisfied, a "manifest need for incarceration" arises. State v. Lohr, 2020 VT 41, ¶ 14, __ Vt. __. "Given the findings of risk of

harm required under § 7553a, a court's discretion to nonetheless release a defendant on bail or conditions" is "narrow," but "not nonexistent." State v. White, 2020 VT 62, ¶ 10, __ Vt. __. As in Lohr, I find that there is "no safe basis" on which to exercise this narrow discretion in order to release defendant on conditions. 2020 VT 41, ¶ 14; see also White, 2020 VT 62, ¶ 10.

The order holding defendant without bail under 13 V.S.A. § 7553a is affirmed.

FOR THE COURT:

Harold E. Eaton, Associate Justice