VERMONT SUPREME COURT
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Case No. 23-AP-113

ENTRY ORDER

APRIL TERM, 2023

State of Vermont** v. Michael Louise* } APPEALED FROM:
} Superior Court, Rutland Unit,
} Criminal Division
} CASE NO. 22-CR-09413
Trial Judge: Cortland T. Corsones

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

Defendant Michael Louise appeals from the superior court's imposition of cash bail or surety in the amount of $200,000. The State cross-appeals the superior court's refusal to hold defendant without bail pursuant to 13 V.S.A. § 7553 pending trial. For the following reasons, we affirm the order of the superior court.

Defendant was arrested on October 13, 2022, in Liverpool, New York after a Vermont court issued a warrant for his arrest on two counts of second-degree murder in connection with the unsolved 1989 deaths of George and Catherine Peacock, defendant's in-laws. The Peacocks were found stabbed to death in their Danby, Vermont home in September 1989. Investigators found a significant amount of blood in the residence, including a bloody footprint, and medical examiners determined that the characteristics of the stabbing would likely have resulted in a lot of blood being transferred to the assailant. In conducting the investigation, police interviewed both defendant's niece Patricia Gannon, and wife, Penny Louise.

Ms. Louise's statement revealed that defendant had left her two notes shortly after the Peacocks were killed, which the police interpreted as suicide notes. In the notes, defendant professes his love to his wife and asserts his innocence in the murder of her parents. He explains that he was driving toward their residence in Vermont that day to pick up some boards but became tired and returned to his home in New York. Defendant expressed that he is fearful of being blamed for the murders, does not know what to do, and "threw one gun into the river."

Defendant's own 1989 statement to police describes his travel on the day of the homicides. He recounted how he had remembered leaving some particle boards at the Peacocks' home in Danby some years earlier, which he thought could be useful, and began driving his Chevrolet Celebrity in that direction around 9:30 a.m. Defendant then described arriving at a rest stop in Saratoga, New York around 2:00 p.m., where he decided he was too tired to continue driving and instead began driving back toward his home, where he arrived between 5:30 and 6:00 p.m. Police determined that, had defendant continued toward the Peacocks' residence, he would have arrived at approximately the time the killings took place. When asked by police

about the work boots he was wearing that day, he said he discarded them because they hurt his feet. Defendant also recounted telling police in an earlier statement, when questioned whether he could have blacked out and killed the Peacocks, "yes, I've thought of that," before reiterating that he did not travel to Vermont on the day of the killings.

Police also interviewed defendant's niece, Patricia Gannon, who detailed a conversation she had with defendant in which he described driving toward Vermont and "blacking out" after crossing the border. This directly contradicted defendant's previous statement to police, and, in light of this contradiction and defendant's conduct, police began to consider defendant a suspect in the killings. Ms. Louise provided written consent for police to search the couple's Chevrolet Celebrity, where they recovered a floor mat containing a drop of blood.

In 2020, the Vermont State Police (VSP) decided to reopen the investigation based on advancements in the science of DNA testing since their last attempt to identify the blood sample in 2004. VSP had the floor mat transferred from the long-term evidence storage cage to an evidence locker within the Vermont Forensics Laboratory but was notified by a forensic chemist that the blood stain had already been cut from the floor mat during previous testing. A pouch with a similar description and markings to the floor mat containing the cut blood sample was retrieved from the DNA-extract freezer and tested, revealing the blood to be a match for that of George Peacock. Defendant was arrested in New York and arraigned in Vermont after waiving extradition. The State sought to hold defendant without bail and a weight-of-the-evidence hearing was held over two days in February of 2023.

At the hearing, the State sought to satisfy its burden of showing that the evidence of guilt was great pursuant to 13 V.S.A. § 7553 by submitting the results of the DNA test along with affidavits purporting to establish the chain of custody of the blood sample. However, the trial court found that the State provided no testimony or affidavit from the New York trooper who collected the floor mat and that the forensic laboratory records only indicated "[e]vidence collected from suspect vehicle by New York Trooper Charles Stepneski in N. Syracuse, N.Y."[*]

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[*] The State contends that the excluded hearsay statement was made by Det. Truex and read:

> Through investigation we have identified that Michael Louise is the person who killed George and Catherine Peacock. I know that the killer was Michael Louise due to George Peacock's DNA being found in a blood spot found on Michael Louise's driver side car floor mat of his 1986 Chevrolet Celebrity bearing NY Registration IRE885.

The trial court makes no reference to this statement in its order. It referred only to the statement contained within the forensic records suggesting that the evidence was collected by New York Trooper Stepneski. Det. Truex's statement appears to be based on the forensic record and not on "personal knowledge or admissible evidence," and a cursory review of the record does not so acquaint Det. Truex with the requisite information to provide competent testimony regarding the chain of custody. See Levy v. Town of St. Albans Zoning Bd. of Adjustment, 152 Vt. 139, 145 (1989). Det. Truex's statement was therefore inadmissible for similar reasons as the forensic-records statement.

The State attempted to rely on these records to establish the chain of custody for the blood sample under the business-records exception. V.R.E. 803(6). The trial court rejected this argument, finding that the statements contained in the forensic laboratory records were testimonial in nature, and thus must be excluded from consideration. With the exclusion of the State's only direct evidence tying the blood sample to defendant's vehicle, the trial court went on to find that the remaining circumstantial evidence was insufficient to hold defendant without bail under 13 V.S.A. § 7553.

The court then went on to consider conditions of release pursuant to the statutory factors laid out in 13 V.S.A. § 7554. It found defendant posed a risk of flight given the seriousness and number of offenses, as well as defendant's lack of ties to the area. The court therefore imposed cash bail or surety in the amount of $200,000 to ensure defendant's appearance.

On appeal, defendant challenges the trial court's imposition of $200,000 in cash bail or surety, arguing that the court did not properly consider the § 7554 factors, and that even if it did, it did not consider the least restrictive means of ensuring defendant's appearance. The State cross-appeals the trial court's refusal to hold defendant without bail, arguing that the court improperly considered the weight of the evidence below by excluding the blood sample and business records from its consideration. For the following reasons, we affirm the decision of the trial court.

Pursuant to 13 V.S.A. § 7553, a person charged with an offense punishable by life imprisonment is not entitled to bail as a matter of right where the evidence of guilt is great. State v. Welch, 2022 VT 65, ¶ 8. Nevertheless, a trial court retains discretion to impose conditions of release on defendant, including bail. Id. A charge of second-degree murder carries a maximum penalty of life imprisonment. 13 V.S.A. § 2303(a)(2). The evidence of guilt is great when "substantial, admissible evidence, taken in the light most favorable to the State and excluding modifying evidence, can fairly and reasonably show defendant guilty beyond a reasonable doubt." State v. Kirkland, 2022 VT 38, ¶ 10. "The State may meet its burden with affidavits, depositions, sworn oral testimony, or other admissible evidence." Id.; see State v. Duff, 151 Vt. 433, 439-40 (1989) (adopting standard in Vermont Rule of Criminal Procedure 12(d) to weigh evidence of guilt under § 7553). Testimonial evidence introduced by defendant in contravention of the State's evidence and other types of evidence implicating factual disputes constitute modifying evidence and is excluded from consideration under 13 V.S.A. § 7553. Kirkland, 2022 VT 38, ¶ 10. In assessing whether the evidence of defendant's guilt is great, we independently apply the Rule 12(d) standard. Id.

When a court finds the evidence of guilt is not great pursuant to 13 V.S.A. § 7553, then the court must analyze the factors set out in § 7554 to determine which conditions of release, including bail, might be appropriate. These factors include: the nature and circumstances of the offense charged; the weight of the evidence against the accused; the accused's employment and financial resources; the accused's character and mental condition; the accused's length of residence in the community; and the accused's record of appearance at court proceedings. 13 V.S.A. § 7554(b)(1). In consideration of the above factors, the court is required to craft the least restrictive set of conditions that will reasonably mitigate the risk of flight of the defendant. Id. We review the trial court's bail decision for an abuse of discretion and must affirm an order imposing bail if supported by the proceedings below. State v. Rougeau, 2019 VT 18, ¶ 14, 209 Vt. 535.

We first consider whether the trial court erred by refusing to hold defendant without bail because the weight of the evidence of guilt was not great. The State contends that it demonstrated sufficient evidence to hold defendant without bail, that the trial court erred in excluding that evidence from consideration, that the records supporting the chain of custody are admissible, and even if not, that any evidentiary gaps in the chain of custody are for the factfinder's consideration, not the court's. The State argues that it is entitled to establish elements of the offense by "affidavits, depositions, sworn oral testimony, or other admissible evidence." This, however, does not rescue the excluded statement contained within the business records from the realm of hearsay. See V.R.E. 805 ("Hearsay within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.").

Hearsay is defined as a statement, "other than one made by declarant while testifying at trial or hearing, ordered in evidence to prove the truth of the matter asserted." V.R.E. 801(c); see also State v. Babson, 2006 VT 96, ¶ 9, 180 Vt. 602 ("Hearsay is an out-of-court statement offered to prove the truth of the matter asserted."). Here, the statement in the forensic laboratory records that the "[e]vidence [was] collected from suspect vehicle by New York Trooper Charles Stepneski in N. Syracuse, N.Y." necessarily falls within that definition because: (1) it was made outside of the court; and (2) it is offered to prove the very assertion it makes, that the floor mat was collected by Trooper Stepneski. Therefore, unless this statement falls into one of the hearsay exceptions outlined in Vermont Rules of Evidence 803 or 804, it would not be admissible evidence. See V.R.E. 802 ("Hearsay is not admissible except as provided by these rules."). The only potentially applicable exception is the business-records exception, Rule 803(6), but even then, only if the statement is not "testimonial," and therefore does not violate defendant's confrontation rights under the U.S. Supreme Court's decision in Crawford v. Washington. 541 U.S. 36, 51-52 (2004) ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protections to the vagaries of the rules of evidence, much less to the amorphous notions of 'reliability.' ").

In Crawford, the U.S. Supreme Court held that testimonial evidence admitted pursuant to the exception for business records violates the Sixth Amendment's confrontation right unless the witness is unavailable, or the holder of the right had a prior opportunity to cross examine the declarant. Id. at 68. The U.S. Supreme Court has not weighed in on the exact contours of a testimonial statement. However, federal appellate courts have attempted to divine the meaning. These courts have largely held that testimonial statements in business records are those not prepared for managing an entity's day-to-day business affairs, but instead have the primary purpose of proving some fact relevant to later criminal prosecution. See, e.g., United States v. Cameron, 699 F.3d 621, 640 (1st Cir. 2012) ("To rank as testimonial, a statement must have a primary purpose of establishing or proving past events potentially relevant to later criminal prosecution." (quotation omitted)); United States v. Feliz, 467 F.3d 227, 234 (2d Cir. 2006) (noting "business records cannot be made in anticipation of litigation or include observations made by law enforcement personnel").

Here, the trial court correctly applied Crawford in determining whether the hearsay statement within the records the State sought to admit was testimonial. It found that the primary purpose of the out-of-court statement was for use in a potential criminal prosecution of defendant and that both the New York State Police and their forensics labs were "in the business" of criminal prosecution. The State asserts that the factfinder is entitled to determine the proper weight to give this evidence in light of the chain-of-custody issues, but this is incorrect, as

described in Crawford, because the defendant would not have any opportunity to cross examine the trooper who collected the evidence, depriving the jury of the full breadth of information required to make that judgment. 541 U.S. at 62 ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.").

Next, the State argues that it was improper for the trial court to exclude evidence based on the chain of custody at such an early stage of the prosecution. The State argues that at this stage, the State's burden is to prove it will have admissible evidence for trial, not evidence which may be lawfully admitted at the weight-of-the-evidence hearing. While the State is correct that evidentiary rulings at a § 7553 hearing will not form the law of the case on future admissibility issues, it does not mean that the trial court may consider evidence without regard to its admissibility at trial. In considering whether the evidence of guilt is great, courts must evaluate "substantial, admissible evidence, taken in the light most favorable to the State and excluding modifying evidence, can fairly and reasonably show defendant guilty beyond a reasonable doubt." Kirkland, 2022 VT 38, ¶ 10 (emphasis added). Thus, in considering the weight of the evidence, the trial court must necessarily consider what evidence bolstering the State's prima facie case will likely be admissible at trial. Here, both the record and case law support the trial court's exclusion of the challenged hearsay statement from its consideration as inadmissible evidence and we will not reverse this determination. Of course, the State may attempt to proffer the evidence at trial if it lays a proper foundation. See State v. Spaulding, 2014 VT 91, ¶ 18, 197 Vt. 378 (evaluating foundational requirements for admission of evidence pursuant to a hearsay exception). There, the court could fully consider these evidentiary issues, as opposed to this summary proceeding, where the court is merely attempting to determine which evidence presented by the State would be admissible.

Next, we turn to the defendant's contention that the trial court abused its discretion in setting cash bail or surety in the amount of $200,000. Defendant first argues that the trial court allocated improper weight to the seriousness of the charged offense while disregarding other factors more favorable to him in determining his risk of flight. But defendant misunderstands the requirements of 13 V.S.A. § 7554(a)(1), which states that "[i]n determining whether the defendant presents a risk of flight from prosecution, the judicial officer shall consider, in addition to any other factors, the seriousness of the offense charged and the number of offenses with which the person is charged." Thus, the threshold inquiry of whether a defendant is a flight risk is primarily based on these two factors. State v. Hart, No. 2019-027, 2019 WL 409635, at *2 (Vt. Jan. 24, 2019) (unpub. mem.) [https://perma.cc/8XWA-PA3L]. From that threshold inquiry, courts must then assess the factors listed in § 7554(b)(1) in determining which conditions of release to impose to reasonably mitigate the risk of flight. Id. Here, the trial court properly weighed the seriousness and number of offenses charged, as required by § 7554(a)(1), in finding that defendant poses a risk of flight. Further, the trial court weighed "other factors" such as the defendant's prior court appearances and ties to Vermont. See 13 V.S.A. § 7554(a)(1). These findings are amply supported by the record, and as such, we will not disturb them.

Defendant next argues that the trial court abused its discretion because its order lacks findings regarding the amount of bail, how it would ensure defendant's appearance, or if it was the least restrictive means. He argues the trial court accorded undue weight to some factors while disregarding others. However, "[t]his Court's role is not to reweigh the evidence on appeal," State v. Calabrese, 2023 VT 19, ¶ 17, and trial court decisions regarding conditions of release "shall be affirmed if supported by the proceedings below." 13 V.S.A. § 7556(b). Here,

the trial court did properly consider the statutory factors, and in its sound discretion determined that the seriousness of the offenses coupled with defendant's complete lack of ties to Vermont warranted the imposition of bail, even in light of factors more favorable to defendant. The trial court also considered defendant's financial resources in imposing bail, taking note of the equity in his residence and potential retirement savings. No more is required. See State v. Pratt, 2017 VT 9, ¶ 16, 204 Vt. 282 ("[N]othing in the statute suggests that financial resources was intended to be the controlling factor rather than one of several.").

Additionally, the trial court did make findings concerning the least restrictive conditions that would ensure defendant's appearance, noting "[f]or the same reasons stated above, the court concludes that no conditions of release, or combination thereof, less restrictive than the posting of a significant surety bond or cash will reasonably mitigate the risk of flight from prosecution." Thus, in consideration of the statutory factors, the trial court properly exercised its discretion in imposing bail as a condition of defendant's release. State v. Henault, 2017 VT 19, ¶ 7, 204 Vt. 628 (noting that the § 7554 "analysis is within the trial court's broad discretion"). Finally, the trial court need not provide a mathematical computation of its bail determination. Here, the trial court recognized that the bail ordered was "very significant" but necessary to "reasonably prevent flight to avoid prosecution," illustrating the consideration that went into the amount and type of bail based on the statutory factors. This decision is amply supported by the record below and we decline to disturb it. Vt. Nat. Bank v. Clark, 156 Vt. 143, 145 (1991) ("Abuse of discretion requires a showing that the trial court has withheld its discretion entirely or that it was exercised for clearly untenable reasons or to a clearly untenable extent."). For these reasons, we affirm the decision of the trial court declining to hold defendant without bail, and instead imposing $200,000 in cash bail or surety.

Affirmed.

FOR THE COURT:

Nancy J. Waples, Associate Justice