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. 2017-373

AUGUST TERM, 2018

State of Vermont v. Jacob Banis*	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 1501-11-14 Wmcr
		Trial Judge: Michael R. Kainen

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

Defendant appeals his conviction by a jury for domestic assault. He argues that the trial court improperly prevented him from thoroughly cross-examining the complainant regarding her motivation to fabricate her accusations against him. We affirm.

At trial, the complainant testified that she and defendant began an intimate relationship in February 2014. Defendant's girlfriend, whom he had met online, moved to Vermont to live with him around the same time. According to the complainant, she had a sexual relationship with both defendant and his girlfriend. The complainant stayed at defendant's home in Putney several nights a week and slept in the bed with defendant and his girlfriend when she stayed over. In October 2014, defendant and his girlfriend moved to Brattleboro. The complainant loaned defendant $1400 to help with the move. She had a key to the new apartment and kept some possessions there.

On November 12, 2014, the complainant and defendant had a disagreement at a bar about her plan to take him to New York City, a trip for which she had already paid. The complainant became annoyed and tipped defendant's beer over onto the bar counter. Defendant got up and left. The complainant later went to defendant's apartment and attempted to sleep in the bedroom as usual, but defendant told her to sleep on the couch. The following morning, she and defendant continued their argument. Defendant threw her clothes down the stairs into the garage and told her to leave. He threatened to throw her down the stairs as well and grabbed her by the shoulders and propelled her to the top of the stairs. She was able to brace herself in the doorway, and he stopped pushing her after she agreed to leave. Defendant's girlfriend, who was present during the incident, denied that defendant assaulted the complainant and testified that it was the complainant who attacked defendant.

On the evening of November 15, 2014, after having a few beers at a bar, the complainant returned to defendant's apartment to speak with him about the future of their relationship. Defendant became violent and attempted to throw her down the stairs, then put his hands around her neck and strangled her, saying, "no wonder you've experienced this before." He slammed her head against the baseboard, the washer and dryer, and the refrigerator. She pleaded with him to let her go, and he eventually released her. As the complainant left the premises, she drove her car

through defendant's garage door, causing extensive damage. She then went to the Brattleboro police department to report the assaults.

Defendant was charged with one count of aggravated domestic assault based on the alleged strangulation and two counts of domestic assault. The jury acquitted defendant of the November 13, 2014 domestic assault, was unable to reach a verdict on the aggravated domestic assault, and convicted defendant of the November 15, 2014 domestic assault. The State dismissed the aggravated domestic assault charge with prejudice after relying upon the underlying facts at sentencing. Defendant was sentenced to serve nine to eighteen months. This appeal followed.

On appeal, defendant claims that the court violated his constitutional right of confrontation by denying him the opportunity to thoroughly cross-examine the complainant on her fear of prosecution for the damage she caused to his garage door. Specifically, he claims that he should have been allowed to elicit testimony that the victim's advocate told the complainant that she could "plead the Fifth," as this information was relevant to his theory that she fabricated her story to escape potential criminal charges. We review the challenged evidentiary ruling for abuse of discretion and will not disturb the court's decision unless such discretion was "withheld or exercised on clearly unreasonable grounds." State v. Cartee, 161 Vt. 73, 76 (1993).

During defense counsel's cross-examination of the complainant, she admitted that she had intentionally driven through defendant's garage door. The defense asked if the State had filed charges against her, and she replied, "Not to my knowledge." The State objected that whether it had charged her was irrelevant, though it conceded that the defense could validly inquire whether she was worried about being charged at the time she made the report. The defense argued that the complainant testified at her deposition that the victim's advocate "advised her to take the Fifth," showing that the State was holding potential criminal charges over her head. The court apparently disagreed with the latter conclusion, and defense counsel replied, "Well, I'm not going to try to say they were holding it over her head, other than to tell you that I think—that's my belief." He asked if he could elicit testimony that the complainant was told by the victim's advocate that she had criminal exposure. The court responded, "No. You can ask whether she believed she had criminal exposure. Where she derived that belief from, I don't see as being necessary. It's a disputed point." The State said that the complainant misspoke at the deposition because she was actually advised about her Fifth Amendment right by a private attorney and argued that defendant's proposed line of questioning would take them "far afield" because the State would have to call additional witnesses to rebut the incorrect statement. The court ultimately ruled that the defense could ask the complainant if she had reported the assaults "to curry favor with the State Attorney's Office, in hopes that they wouldn't prosecute you for damaging the garage." The defense then proceeded to examine the complainant as follows:

> Q. [D]id you have concerns about being criminally charged?
>
> A. No.
>
> Q. Did you think, when you came to each of the two depositions that we conducted, in May of 2015 and June of 2015, that there was a prospect that you could have criminal charges based on your driving incident involving the garage?
>
> A. I had—at that point, there was some awareness that that was a possibility.
>
> Q. And what was that awareness based on?

[State's Attorney]: Objection. Calls for hearsay.

The Court: You are leading the witness.

Q. Well, did somebody tell you something, without tell[ing] me what they said, did somebody speak to you and create that concern for you?

The Court: I'll allow that.

A. I was reminded of my ability to plead the Fifth to keep from self-incriminating.

. . . .

Q. Was your concern about the possibility of criminal charges—did that influence your reportage with regards to this event that you claim to have had with [defendant]?

A. At the time that I went to the police, that was not in my mind at all.

Q. Is it something that you carried in your mind after you had gone to the police?

A. No.

Q. It's not a concern that you have as you sit here today?

A. Only because you're talking about it.

Defendant argues that by preventing him from eliciting the source of the complainant's awareness that she could be subject to criminal charges, the court violated his right of cross-examination under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution. We disagree. " 'Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " State v. Larose, 150 Vt. 363, 369 (1988) (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985)) (emphasis in original). "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986); see also V.R.E. 403.

Unlike the cases relied upon by defendant, the court in this case did not prohibit all questioning into the complainant's possible motive to fabricate her story. Cf. State v. Findlay, 171 Vt. 594, 596 (2000) (mem.); Cartee, 161 Vt. at 77. To the contrary, defendant had a sufficient opportunity "to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." Davis v. Alaska, 415 U.S. 308, 318 (1974). The defense elicited testimony that the complainant had purposely driven through the garage door and that she had been drinking alcohol earlier that evening; that she was aware that she could have criminal charges brought against her, though none had been filed; and that her awareness of potential criminal liability resulted from being reminded

that she could exercise her right under the Fifth Amendment to avoid self-incrimination. Thus, "the defense was able to leave a clear impression of both the extent of the witness's involvement in criminal activity and [her] lenient treatment by the State." State v. Carter, 156 Vt. 437, 445 (1991). The trial court did not abuse its discretion by excluding the source of the complainant's understanding that she had criminal exposure, as this information was disputed, only marginally relevant to the case against defendant, and may have been confusing to the jury. Van Arsdall, 475 U.S. at 679; see also State v. Raymond, 148 Vt. 617, 621 (1987) (holding that trial court did not violate Confrontation Clause by prohibiting defendant charged with sexual assault against minor son from examining son or son's mother about details of prostitution and theft investigations pending against mother, because defendant was permitted to ask questions as to existence of police investigations and fears about prosecution or loss of custody).

Defendant also claims that the trial court erred in excluding testimony about the complainant's prior experience as a crime victim. He argues that this evidence could show that the complainant had experience with the system that led her to believe that she might avoid charges by accusing defendant. However, defendant never made such a proffer to the trial court. An offer of proof must be made before error can be based on a ruling excluding evidence. V.R.E. 103(a)(2). The offer of proof " 'must be specific and concrete, showing what evidence will be introduced, the particular circumstances or conditions covered and the purpose of the offer.' " State v. Ringler, 153 Vt. 375, 378 (1989) (quoting Reporter's Notes, V.R.E. 103). During cross-examination, the defense asked the complainant about her testimony that defendant told her during the assault, "no wonder you've experienced this before." The State objected to the line of questioning going any further, as it believed the defense was going to ask the complainant about prior assaults she had experienced in previous relationships, which it argued were irrelevant. The court stated, "Okay. We're not going to go into any prior assault that she experienced, are we?" Defense counsel responded, "I don't have to." The court then stated that questions about whether the complainant was assaulted in the past were irrelevant. At no point did defense counsel indicate that he was trying to elicit evidence of prior assaults suffered by the complainant or argue that such evidence was admissible for the reasons he now claims on appeal. Accordingly, he failed to preserve this issue for our review. Id.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Karen R. Carroll, Associate Justice