VERMONT SUPREME COURT
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Case No. 23-AP-273

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

JUNE TERM, 2024

State of Vermont v. Brian Cox* } APPEALED FROM:
} Superior Court, Franklin Unit,
} Criminal Division
} CASE NO. 22-CR-02637
Trial Judge: Martin A. Maley

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

Defendant appeals his conviction of lewd and lascivious conduct, arguing that the trial court improperly excluded evidence of his good character. We affirm.

In March 2022, defendant was charged with one count of lewd and lascivious conduct and one count of prohibited conduct based on allegations that he placed his hands under his employee's shirt and touched her breast and asked her to sit on his lap.

A one-day jury trial took place in February 2023. The complainant, who was twenty-two years old, testified that in March 2022 she was an assistant manager at a Family Dollar store, where she had worked for almost two years. On the afternoon of the incident, she, defendant, and another employee were at the store. She was discarding expired and damaged products when defendant came up to her and told her that his hands were cold. He put his hands under her shirt and put his right hand over her bra and his left hand on her upper waist. She felt like he was not going to let go and was scared to move. She told him that there was a heater in the office. He said, "You're right, there is," and opened the door to the office and ushered her inside. He sat down in the office chair and asked if she wanted to sit on his lap, patting his right leg. She said no. At that point, a delivery truck arrived, and she was able to leave the office.

The complainant testified that the incident occurred while she and defendant were alone in an employee-only area of the store, where there were no security cameras. The complainant told the other employee at the store what had happened. She texted another assistant manager, Chris Harris, that something had happened and she wanted to speak with him. She also told her father, who encouraged her to contact the police. She described the incident to police and to Harris the following day.

Harris testified that the complainant told him that defendant had touched her inappropriately. On cross-examination, defense counsel asked Harris if he had ever seen defendant make any advances toward the complainant. Harris replied that he had not. The State

objected that evidence of prior good conduct was inadmissible to prove that defendant acted in conformity therewith. The court sustained the objection. Defense counsel tried three more times to elicit similar testimony from Harris, and the State's objection to each question was sustained by the court.

After the State rested, defense counsel indicated that he wanted to call David Hanson, a human-resources manager for Family Dollar "for the entire east coast." The State objected that Hanson was not present, and it did not consent to Hanson appearing remotely. Defense counsel proffered that Hanson would testify that he interviewed defendant, the complainant, and other store employees, and reviewed video footage, and could not conclude whether defendant in fact touched the complainant. He further proffered that Hanson would testify that he reviewed company personnel files looking for previous complaints and would testify that defendant's reputation was that he "had not engaged in any sexual behavior." The court stated that the proffered testimony was not admissible for the purpose that defense counsel was offering it. It denied defendant's request to have Hanson appear remotely. Defense counsel stated that he would try to have Hanson appear in person. The court indicated that if Hanson appeared, defendant could attempt to admit the testimony, but its ruling was unlikely to change. Defense counsel did not call Hanson.

Defendant then testified. He stated that he had worked for Family Dollar for twenty-five years. In March 2022, he was the manager of the St. Albans store. He testified that the complainant was a good employee and that he had not had any problems with her. He denied that he put his hands under the complainant's shirt or asked her to sit on his lap.

The jury found defendant guilty of lewd and lascivious conduct. Defendant moved for a new trial, arguing that the court erred in excluding the testimony from Harris and Hanson because he had a right to present evidence of his good character under Vermont Rule of Evidence 404(a)(1). In April 2023, the court issued a written decision denying the motion. It reasoned that the proffered evidence was not pertinent to the crime charged, as required to be admissible under Rule 404(a)(1), and did not qualify as reputation evidence admissible under Vermont Rule of Evidence Rule 405(a). It subsequently imposed a sentence of eighteen months to five years, split to serve thirty days. This appeal followed.

Defendant argues that the court committed reversible error by excluding the testimony from Harris and Hanson. "We apply a deferential standard of review to the trial court's evidentiary rulings and will reverse its decision only when there has been an abuse of discretion that resulted in prejudice." State v. Russell, 2011 VT 36, ¶ 6, 189 Vt. 632 (mem.) (quotation omitted).

As a threshold matter, the State argues that defendant failed to preserve his challenge to the exclusion of Hanson's testimony because he did not call Hanson to the stand. Defendant argues that the court issued a definitive ruling that Hanson's testimony was inadmissible, so he was not required to renew his challenge. Alternatively, he argues that the exclusion of Hanson's testimony was plain error. See State v. Discola, 2018 VT 7, ¶ 36, 207 Vt. 216 ("Plain error occurs in the extraordinary case where a glaring error occurred during the trial and was so grave and serious that it strikes at the very heart of the defendant's constitutional rights." (quotation omitted)). We need not resolve these arguments because we conclude that there was no error, let alone plain error, in the court's ruling.

Vermont Rule of Evidence 404(a) provides that character evidence "is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: . . . [i]n a

criminal case, evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution[] to rebut the same." Where, as here, character is not an essential element of the charge or defense, "[a] defendant wishing to offer such evidence may do so only through testimony as to reputation, and not through personal opinion or evidence of specific past incidents." State v. Fellows, 2013 VT 45, ¶ 11, 194 Vt. 77 (quotation omitted); see V.R.E. 405(a) ("In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation.").

Assuming without deciding that Hanson's proffered testimony related to defendant's reputation for a pertinent character trait, the trial court properly determined that it would not be admissible because defendant failed to demonstrate that Hanson knew anything about defendant's reputation in the workplace prior to conducting his investigation. "A person's general reputation is made up of what his neighbors and acquaintances think of him, basing their opinion on what they have observed and heard regarding his conduct in the past." In re Monaghan, 126 Vt. 53, 62 (1966). Here, defendant proffered that Hanson lived in Connecticut and was the human-resources manager for all Family Dollar stores on the east coast, and that he had interviewed defendant and his coworkers and reviewed company personnel files after the incident. There is no indication that Hanson personally knew defendant or his coworkers or had heard anything about defendant's workplace reputation prior to March 2022.[1] "One does not qualify as a character witness to the reputation of another by information he or she has gained in the course of a short-time investigation conducted after the occasion calling for such an inquiry." 29 Am. Jur. 2d Evidence § 369; see Commonwealth v. Baxter, 166 N.E. 742, 743 (Mass. 1929) ("A stranger sent by a party to the neighborhood of the complainant to investigate her character is not permitted to testify as to the result of his inquiries."). Such testimony would cross the line from reputation evidence, which is admissible under our rules, to hearsay, which generally is not. See United States v. Perry, 643 F.2d 38, 52 (2d Cir. 1981) (holding that trial court properly excluded as hearsay testimony of private investigator hired by defendant's wife regarding his good reputation in community, because investigator was not personally familiar with defendant's reputation). The court therefore acted within its discretion in excluding the testimony under Rules 404 and 405.

The trial court also did not abuse its discretion in excluding Harris's testimony about defendant's prior behavior toward the complainant. While defendant on appeal argues that he was merely seeking to admit evidence of his professionalism and reputation for appropriate behavior in the workplace, this differs from his proffer below. The trial transcript shows that defendant repeatedly tried to ask Harris if he had ever seen defendant make advances toward the complainant.[2] Even if such evidence was pertinent to the act charged, defendant was not

[1] Defendant argues that defense counsel proffered that Hanson had supervised him for five years. This is an overly expansive interpretation of what defense counsel actually said, which was that "having worked as personnel manager over branch [sic] for five years, and having access to Family Dollar records, [Hanson] reviewed the character of the accused looking for a following of—or not hundred percent following Family Dollar rules about appropriate interpersonal behavior towards customers and coworkers." Counsel did not state that Hanson supervised the St. Albans branch, or defendant himself, for five years, or that Hanson knew defendant prior to this incident. Further, defendant testified that at the time of the March 2022 incident, he had been managing the St. Albans branch for about a month.

[2] Defendant argues that he also tried to ask Harris about his reputation, stating, "So [defendant]'s reputation at—in the community of Family Dollar was that he didn't make inappropriate—." Though he framed it as a question about reputation, defendant was still clearly

permitted to prove character through specific instances of conduct. V.R.E. 405(a); State v. McCarthy, 156 Vt. 148, 153 (1991) (stating that under V.R.E. 405(a), "defendant is not authorized to use such evidence at all"); see also Michelson v. United States, 335 U.S. 469, 477 (1948) (explaining that character witness "may not testify about defendant's specific acts or courses of conduct," but is "allowed to summarize what he has heard in the community"). "Testimony as to an absence of prior arrests or other testimony as to the lack of prior bad acts is in essence testimony as to multiple instances of good conduct and is not admissible under [Rule 405(a)]." 29 Am. Jur. 2d Evidence § 374; see Gov't of Virgin Islands v. Grant, 775 F.2d 508, 512 (3d Cir. 1985) (holding same and additionally noting that such testimony is "especially weak character evidence" because "a clever criminal, after all, may never be caught"). The court therefore acted within its discretion in determining that Harris's testimony that defendant had not previously made advances toward the complainant was inadmissible under Rule 405(a).

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

Nancy J. Waples, Associate Justice

attempting to elicit testimony that Harris had not observed any prior incidents between defendant and the complainant.