2024 VT 54

No. 23-AP-284

State of Vermont — Supreme Court

v. — On Appeal from Superior Court, Windsor Unit, Criminal Division

Larry L. Labrecque — June Term, 2024

John R. Treadwell, J.

Travis W. Weaver, Deputy State's Attorney, White River Junction, for Plaintiff-Appellee.

Allison N. Fulcher of Martin, Delaney & Ricci Law Group, Barre, for Defendant-Appellant.

PRESENT: Reiber, C.J., Eaton, Carroll and Waples, JJ., and Dooley, J. (Ret.), Specially Assigned

¶ 1. **CARROLL, J.** Defendant Larry Labrecque appeals a jury verdict finding him guilty of one count of sexual assault. We affirm.

¶ 2. The State presented the following evidence at trial. In May 2018, complainant, complainant's mother, complainant's younger brother, defendant, and defendant's son from a prior relationship all lived in a small apartment in Hartford Village. Complainant was seventeen years old and a junior in high school at the time. On the morning of May 14, 2018, complainant was unclothed in the bathroom, getting ready to take a shower. She thought everyone was asleep. Defendant then entered the bathroom, bent complainant over the sink, and penetrated her vagina with his penis. Defendant ejaculated into the toilet or into a tissue that he flushed down the toilet. Complainant did not want to have sex with defendant but did not protest because, after years of

similar conduct, she had "just given up." She showered, put on clean clothes, including new underwear, and went to school.

¶ 3. Following a conversation about the incident with her boyfriend, complainant reported it to her high-school guidance counselor. A police officer transported complainant to the hospital for an examination designed to provide sexual-assault victims with appropriate medical care and to collect evidence. Hospital staff collected samples of complainant's clothing and vaginal swabs for DNA analysis. An initial test of complainant's underwear revealed a positive result for the presence of acid phosphatase and prostate specific antigens. This finding was consistent with the probable presence of seminal fluid. Further testing of the underwear showed that defendant's DNA was a match to the prostate specific antigens found on complainant's underwear.[1] Defendant's DNA was not found in the vaginal swabs.

¶ 4. As amended, the State charged defendant with two counts of aggravated sexual assault and one count of sexual assault, no consent. The case was tried to a jury in May 2022. The jury acquitted defendant of the two aggravated-sexual-assault charges but returned a guilty verdict on the charge of sexual assault, no consent.

¶ 5. Defendant moved for a new trial. The trial court denied the motion and sentenced defendant to a minimum of ten years with a maximum term of life to serve, all suspended except four years. This appeal followed.

¶ 6. Defendant argues that the court committed plain error on several evidentiary matters involving the State chemist, and a former Hartford Town Police Department detective who

[1] The State chemist testified that the process used to determine the presence of DNA from sperm cells or seminal fluid as opposed to DNA from epithelial cells—such as skin—is called a "differential-extraction" test. In a differential-extraction test, the tester can separate epithelial cells from sperm cells because sperm cells have thick protein coats that do not break down as easily as epithelial cells. A buffer is added to a sample—here, a piece of complainant's underwear—that breaks down the epithelial cells, making DNA extraction from epithelial cells possible. This is called the "epithelial fraction," and may include skin and other tissues. The remainder of the sample is called the "sperm fraction." A different buffer is added to that solution permitting DNA extraction if any is present. DNA can be extracted from both fractions.

was the lead investigating officer. While defendant objected below to the rulings he challenges on appeal, he contends, for the first time on appeal, that the alleged errors deprived him of due process and confrontation rights. Because defendant did not raise these constitutional claims below, we review for plain error. See State v. Bubar, 146 Vt. 398, 400, 505 A.2d 1197, 1199 (1985) ("An objection on one ground does not preserve an appeal on other grounds.").

¶ 7. Our review for plain error focuses on whether there was obvious error that affected the defendant's substantial rights and resulted in prejudice to the defendant. State v. Ray, 2019 VT 51, ¶ 6, 210 Vt. 496, 216 A.3d 1274. To this end, we will reverse a conviction where there was obvious error that compromised the fairness, integrity, or public reputation of judicial proceedings. Id. "This is a very high bar—we find plain error only in rare and extraordinary circumstances." Id. (quotation omitted). We conclude that the court committed no error, and therefore no plain error.

¶ 8. Defendant first asserts that the court erred when it refused to permit him to impeach the State chemist about an alleged prior inconsistent statement. Defendant's theory at trial was that his DNA could have been transferred to complainant's underwear via "indirect transfer," for example, in the laundry. Defense counsel had the following exchange with the State chemist during a pretrial deposition:

> DEFENSE COUNSEL: Given the state of things, wouldn't it be more likely that um, the, [defendant's] DNA . . . got [onto complainant's underwear] from the laundry?
>
> THE STATE CHEMIST: Like I said that's an explanation but it doesn't necessarily mean that's what happened.
>
> DEFENSE COUNSEL: Um, the same could be said for it coming there through a sexual act too, it's an explanation but it doesn't mean that's what happened.
>
> THE STATE CHEMIST: Correct.

On direct examination at trial, the State chemist testified that it was his opinion that the transfer of defendant's DNA to complainant's underwear was more likely the result of "a more direct contact" than an indirect transfer from the laundry.

¶ 9. On cross-examination, defense counsel asked the State chemist this question: "Did you ever give testimony in your depositions about . . . [t]he likelihood of how the manner of transfer of DNA on to the fabrics you tested?" The State chemist stated that he did not think he had been asked that question before trial. The State chemist continued: "I believe the question to me was whether it was possible it was transferred [through the laundry]. Yeah, it's possible." Defense counsel then asked: "So this is the first time in this case, after two depositions, that you're talking about probability[?]"

¶ 10. The court stopped the cross-examination and ultimately refused to allow defense counsel to pursue a line of questioning meant to impeach the State chemist for being untruthful about his deposition testimony. The court concluded that the State chemist had been asked a different question during the deposition and had been truthful during his trial testimony when he stated that he had never been asked about whether direct transfer was the more likely explanation.

¶ 11. We conclude that the questions posed during the deposition and at trial were each intended to elicit testimony about the likelihood of one method of DNA transfer over the other. We are unpersuaded by the State's argument that the questions were not the same for purposes of impeachment because the question at trial was the "inverse" of the one asked during the deposition. We nevertheless affirm because the record supports the court's determination that the State chemist's deposition testimony was not inconsistent with his trial testimony, which is the critical inquiry. See State v. VanBuren, 2018 VT 95, ¶ 70, 210 Vt. 293, 214 A.3d 791 (explaining that "[t]his Court may affirm the trial court's judgment on any basis").

¶ 12. "Vermont Rule of Evidence 613(b) governs the admission of out-of-court statements used to impeach a witness." State v. Kelley, 2016 VT 58, ¶ 36, 202 Vt. 174, 148 A.3d 191. Rule 613(b) includes "strict limits against the admission of the statement itself." Id.

(quotation omitted). While prior inconsistent statements can be used to impeach the credibility of a witness, "the court must be persuaded that the statements are indeed inconsistent." United States v. Hale, 422 U.S. 171, 176 (1975).

¶ 13. During the deposition, the State chemist made the following statement in response to a question about whether it was more likely that the DNA transferred in the laundry: "Like I said that's an explanation, but it doesn't necessarily mean that's what happened." The State chemist's statement, which was effectively unresponsive to the question asked, addressed the possibility of the indirect-transfer theory. His trial statement, on the other hand, was an opinion that the direct-transfer method was the more likely explanation as between the two theories. These two statements are not inconsistent because they address different concepts—whether the occurrence of an event was possible versus whether the occurrence of an event was probable. Had defense counsel asked follow-up questions during the deposition to pin down the State chemist's position on the probability or likelihood of indirect transfer, we would be able to evaluate whether the chemist gave an inconsistent opinion on that topic at trial. On this record, we cannot. It was not error to refuse defense counsel's request to impeach the State chemist pursuant to Rule 613(b).

¶ 14. Defendant also contends that he was prejudiced by the State's failure to disclose that the State chemist would testify about the probability of the method of transfer of the DNA at trial. This argument is unavailing.

¶ 15. "Vermont Rule of Criminal Procedure 16(a)(2)(C) requires the State to disclose the reports of experts, 'including results of physical or mental examinations and of scientific tests, experiments, or comparison.' " State v. Provost, 2005 VT 134, ¶ 11, 179 Vt. 337, 896 A.2d 55 (quoting Vermont Rule of Criminal Procedure 16(a)(2)(C)). Defendant bears the burden of showing a rule violation and that the violation prejudiced his defense "in some meaningful manner." Id. (quotation omitted).

¶ 16. The State chemist testified during the pretrial depositions that he did not find defendant's DNA in the epithelial screen using the differential-extraction test. He did find

defendant's DNA in the sperm screen. Thus, according to him, the more likely explanation was transfer by direct contact between defendant's ejaculate and complainant's underwear. This was an obvious inference, which the State raised in its motion papers. We are therefore not persuaded that defendant lacked sufficient notice of the substance of the State chemist's testimony.

¶ 17. We encountered a similar situation in Provost, 2005 VT 134, ¶ 13. In Provost, a medical examiner's testimony about the effects of a victim's fatal gunshot wound tended to undermine the defendant's version of events. The medical examiner did not include the opinion he expressed at trial about the effects of the wound in his reports detailing the autopsy of the victim. We held that "[w]hile [the] defendant may have been prejudiced by [the medical examiner's] testimony, which was at least somewhat inconsistent with defendant's version of events, he was not prejudiced by the lack of notice of this testimony." Id. ¶ 13. We explained that the defendant had waived his right to depose the medical examiner, gave no basis for undermining the medical examiner's testimony, and did not offer a strategy to limit the effect of the testimony. Id. ¶¶ 12-13.

¶ 18. As in Provost, even assuming defendant received insufficient notice of the State chemist's testimony, he has failed to demonstrate prejudice. Defense counsel availed himself of the opportunity—twice—to depose the State chemist. It should have come as no surprise that the State chemist discounted the laundry theory in comparison to the direct contact theory at trial, because he did throughout the litigation, including during the depositions. Defense counsel had ample opportunity before trial to ask the State chemist precisely what his opinion was concerning how defendant's DNA was transferred to complainant's underwear. Moreover, defendant called his own expert to testify about the DNA transfer, who stated that he could not reach an opinion on how defendant's DNA was found on complainant's underwear. The jury was free to credit the competing expert testimonies accordingly. See State v. Scott, 2013 VT 103, ¶ 17, 195 Vt. 330, 88 A.3d 1173 (affirming decision to permit State's expert witness to testify as to defendant's speed in fatal car accident where defendant's challenges went to expert's credibility rather than

testimony's admissibility and where defendant cross-examined State's expert and offered testimony of his own expert). Defendant does not explain how he would have acted differently if he had notice of the testimony. Based on the foregoing, we conclude that defendant has failed to demonstrate prejudice resulting from the allegedly insufficient notice.

¶ 19. Defendant next challenges two of the court's evidentiary rulings regarding the lead investigator, a former Hartford Town Police Department detective. Defendant contends that it was plain error to exclude testimony from other police officers about the detective's termination from employment under Vermont Rule of Evidence 405(b) and testimony from the process server that the detective refused service of process under Vermont Rule of Evidence 403.

¶ 20. In July 2020, the State's attorney issued a Brady letter to the defense bar stating that the detective had been terminated for being untruthful about her actual location during an emergency call and misrepresenting that she was sick when she was actually at Logan airport preparing to travel. The detective was terminated after she conducted the investigation in this case.

¶ 21. Defendant sought to undermine the State's case by calling the detective to testify and posing questions to her about how she conducted her portions of the investigation. Defendant also wanted to connect the detective's termination and the circumstances surrounding it to how the entire investigation was conducted. Defendant attempted to serve a subpoena on the detective two days before trial. Service was unsuccessful. Defendant made no further attempt to serve the detective, and she did not attend trial. Instead, defendant sought to question other testifying police officers about why she was terminated.[2]

¶ 22. Defendant's justification for relying on the Brady letter at trial was that it went "to the professionalism, the credibility of all the police witnesses and their work as a department." He argued that evidence of the detective's termination went "to show whether or not the police force

[2] Defendant also sought to offer deposition testimony given by the detective under Vermont Rule of Evidence 804. The court denied the motion. Defendant does not appeal that decision.

as a whole did a professional investigation where they knew of the maleficence of one officer—or the lead detective." The court asked whether the allegations in the Brady letter were related to or contemporaneous with the investigation into complainant's allegations. Defense counsel represented that they were not related or contemporaneous. The court then asked defense counsel whether he would be able to offer specific instances of conduct under Rule 405(b). Defense counsel responded, "under 405, no."

¶ 23. The court excluded the evidence as irrelevant and acted within its discretion in so doing. It concluded that "any testimony regarding an attempt to serve a witness on a single day" was not "probative of any issues that the jury must decide in this case."

¶ 24. Defendant contends on appeal that the evidence was admissible under Rule 405(b). Rule 405(b) provides that, "in cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct." However, defendant waived this argument by conceding to the trial court that specific instances of the detective's character were not admissible under Rule 405 given the purposes for which he sought to introduce them. See State v. Griswold, 172 Vt. 443, 446-47, 782 A.2d 1144, 1147 (2001) (holding that in case where defendant was convicted of aggravated sexual assault, specific instances of victim's history as victim of domestic violence committed by third party were not admissible under Rule 405(b) because defendant's asserted defenses were consent and mistaken identity); see also State v. Morse, 2019 VT 58, ¶ 7, 211 Vt. 130, 219 A.3d 1309 (holding that defendant waived challenge to conviction by agreeing to proposed jury instruction that defendant later sought to appeal as erroneous). Because the circumstances surrounding the detective's termination were neither related to or contemporaneous with the investigation in this case, and because defense counsel conceded that he could not introduce the evidence under Rule 405(b), the court did not err in excluding it.

¶ 25. Defendant's last contention is that the court erred when it did not permit him to call the process server to testify that the detective had refused service. He asserts that this error

deprived him of an opportunity to present a complete defense because he had a right to show the jury why the lead investigator was not at trial. The court concluded that testimony about a single attempt to serve the detective two days before trial was not probative of any issue in the case and was therefore substantially outweighed by its prejudicial effect. See V.R.E. 403 ("Although relevant, evidence may be excluded 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.").

¶ 26. "Rule 403 rulings are highly discretionary." State v. Lee, 2005 VT 99, ¶ 11, 178 Vt. 420, 886 A.2d 378 (quotation omitted). "Absent an abuse of discretion, in which the court either totally withholds or exercises its discretion on clearly untenable or unreasonable grounds, the trial court's evidentiary ruling stands on appeal." State v. Ogden, 161 Vt. 336, 341, 640 A.2d 6, 10 (1993). Setting aside the question of whether a single attempt to serve the detective with a subpoena two days prior to trial would merit the process server's testimony in this case, we conclude that the trial court properly excluded the testimony under Rule 403. Defense counsel represented that the process server was prepared to testify as to the contents of an email he sent to defense counsel, which recounted the details of the service attempt on the detective. The email stated that he attempted service at the detective's apartment, left a business card at the apartment, and that a person who the process server took to be the detective later called him and said, "I can't help you," and hung up. The process server also texted photos of the subpoena to the detective's number but received no response.

¶ 27. To the extent the foregoing was probative of a fact in issue—which is doubtful—the trial court acted within its discretion in determining that the putative testimony was substantially outweighed by its prejudicial effect. For example, it is not clear that the person who called the process server was, in fact, the detective; nor is it clear that she could have physically participated as a witness in the trial. Moreover, even if the detective did call the process server and could have attended trial, the court permitted defendant to cross-examine other police officers

about the conduct of the investigation. The court also ruled that defendant could not introduce evidence of the circumstances surrounding the detective's termination. Accordingly, the detective's purported refusal to be served—even if true—was not in issue. See State v. Webster, 165 Vt. 54, 57-58, 675 A.2d 1330, 1333 (1996) (affirming exclusion of testimonial evidence under Rule 403 that victim of domestic abuse was having affair with lead investigator because lead investigator did not testify and therefore his bias was not in issue, and his actions and motives had no bearing on victim's credibility, which defendant sought to undermine). We also observe that defense counsel did not move for a continuance to have the detective appear at a later date. Cf. State v. Heffernan, 2017 VT 113, ¶ 22-23, 206 Vt. 261, 180 A.3d 579 (holding that defendant was prejudiced by court's denial of his motion to continue trial where defendant's key witness was hospitalized and unable to attend trial). Under these circumstances, the trial court did not err in denying defendant's request to have the process server testify.

¶ 28. Finally, to the extent that defendant is arguing his conviction should be reversed because of the cumulative effect of the trial court's evidentiary rulings, we disagree. Defendant was not prejudiced by any issue he raises on appeal, and therefore there is no cumulative prejudicial effect. See State v. Noyes, 2021 VT 50, ¶ 46, 215 Vt. 182, 260 A.3d 1132 ("[B]ecause we have determined no prejudice resulted from any of the circumstances identified by [the] defendant, there can be no resulting cumulative prejudicial effect.").

Affirmed.

FOR THE COURT:

_____

Associate Justice