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2024 VT 67

No. 23-AP-160

State of Vermont

Supreme Court

v.

On Appeal from
Superior Court, Bennington Unit,
Criminal Division

Joshua McMahan

September Term, 2024

Kerry Ann McDonald-Cady, J.

Jared C. Bianchi, Bennington County Deputy State's Attorney, Bennington, for
Plaintiff-Appellee.

Matthew Valerio, Defender General, and A. Alexander Donn, Appellate Defender, Montpelier,
for Defendant-Appellant.

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

¶ 1. **WAPLES, J.** Defendant appeals from his conviction for attempted second-degree murder. He argues that the trial court erred in denying his motion for judgment of acquittal, admitting certain testimony at trial, excluding an argument from defendant's closing presentation to the jury, and imposing the sentence. We affirm.

¶ 2. This case arises out of a violent incident that occurred in April 2022 at the Bennington County Coalition for the Homeless. The incident was videorecorded by multiple cameras. The State presented the following evidence at trial.

¶ 3. Defendant arrived at the building on a motorcycle. He parked, removed his gloves, took out a knife, then ran after the victim into the building by entering the back door and running

up the stairs. At the entryway to the kitchen, defendant stood behind the victim and held a knife in his hand against the victim's throat. Defendant fell into the kitchen on top of the victim and dropped the knife. While the two were on the floor, defendant again grabbed the knife. In the struggle, defendant pulled his arm against the victim's throat. The two men grappled on the floor, with defendant on top of the victim. Defendant had the knife in his left hand and hit the victim in the head multiple times with his left hand while holding the knife. When a woman entered the room to stop the assault, defendant grabbed a frying pan that was in use on the stove and dumped its contents onto the victim. The woman testified about the incident at trial. Defendant then quickly left the kitchen, got on his motorcycle, and drove away. The whole incident, from defendant's arrival at the building to his hasty departure, was approximately forty-five seconds long.

¶ 4. The victim did not testify at trial. Responding officers testified that the victim had a small scratch or cut on his face and a "little burn" on his arm but was not hospitalized and did not seek any medical treatment. Another witness who saw the end of the altercation testified that the victim was "up walking around, holding his phone, [and] smoking a cigarette" after the attack.

¶ 5. Defendant was tried on two charges: attempted second-degree murder and aggravated assault with a deadly weapon. The jury found him guilty on both counts. Due to double-jeopardy concerns, the State dismissed the aggravated-assault conviction before sentencing. Defendant filed two post-trial motions: a motion for a new trial and a motion for judgment of acquittal. His motion for a new trial argued, in relevant part, that the court abused its discretion by preventing defense counsel from arguing during closing arguments that the victim did not think the matter was "important" because the victim did not testify at trial. Defendant's motion for judgment of acquittal argued that the State failed to put forth any evidence of defendant's intent to kill the victim. The court denied both motions.

¶ 6. Defendant now appeals, arguing that the trial court erred in: (1) denying his motion for judgment of acquittal; (2) allowing a police officer to testify that the victim had Parkinson’s disease; (3) preventing defense counsel from arguing in closing that the victim did not testify because the case was not important to him; and (4) relying on information not in the record at sentencing. We consider each argument in turn.

I. Judgment of Acquittal

¶ 7. We review the denial of a motion for judgment of acquittal de novo, using the same standard as the trial court. State v. Wisowaty, 2015 VT 97, ¶ 13, 200 Vt. 24, 128 A.3d 876. In doing so, we determine “whether the evidence, when viewed in the light most favorable to the State and excluding any modifying evidence, fairly and reasonably tends to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt.” State v. Perez, 2006 VT 53, ¶ 19, 180 Vt. 388, 912 A.2d 944 (quotation omitted).

¶ 8. “A judgment of acquittal is proper only if the prosecution has failed to put forth any evidence to substantiate a jury verdict.” State v. Russell, 2011 VT 36, ¶ 11, 189 Vt. 632, 22 A.3d 455 (mem.). We examine the strength and quality of the evidence, but we “are not triers of fact, and we will not substitute our judgment for that of the jury.” State v. Hale, 2021 VT 18, ¶ 8, 214 Vt. 296, 256 A.3d 595 (quotation omitted). Though the evidence may be amenable to multiple interpretations, not all of which point towards guilt, “it is not our role to second-guess the interpretations of the jury.” State v. Robitille, 2019 VT 36, ¶ 34, 210 Vt. 202, 213 A.3d 437.

¶ 9. Defendant argues* that attempted second-degree murder “requires the State to prove that the accused had a specific intent to kill.” See Roberts, 2024 VT 32, ¶ 42 (citing Haskins,

* The State conceded that an essential element of its case against defendant was proving that defendant had intent to kill. This Court has not determined whether the charge of attempted second-degree murder requires intent to kill, as opposed to intent to do serious bodily injury or to manifest extreme indifference to human life. State v. Book, 2021 VT 31, ¶ 15, 214 Vt. 644, 253 A.3d 893 (mem.) (declining to decide the issue); State v. Roberts, 2024 VT 32, ¶ 42, ___ Vt. ___, ___ A.3d __ (explaining that “attempted murder,” not “attempted second-degree murder” requires proof of intent to kill); State v. Haskins, 2016 VT 79, ¶ 37, 202 Vt. 461, 150 A.3d 202 (affirming

2016 VT 79, ¶ 37). Specific intent to kill requires that “defendant subjectively intended” to kill the victim. State v. Cahill, 2013 VT 69, ¶ 10, 194 Vt. 335, 80 A.3d 52. “Intent is rarely proved by direct evidence; it must be inferred from a person’s acts and proved by circumstantial evidence.” State v. Cole, 150 Vt. 453, 456, 554 A.2d 253, 255 (1988). Juries may draw reasonable inferences from circumstantial evidence but may not “bridge evidentiary gaps with speculation.” State v. Jones, 2019 VT 3, ¶ 13, 209 Vt. 370, 206 A.3d 153 (quotation omitted).

¶ 10. Defendant argued at the close of the State’s case and again in a post-trial motion that he was entitled to a judgment of acquittal because the State failed to offer evidence sufficient to prove, beyond a reasonable doubt, that he intended to kill the victim. Defendant reiterates the same argument on appeal. He contends that the State put forth no evidence showing a connection between defendant and the victim, no evidence of a possible motive, no evidence of serious injuries to the victim, and no evidence of defendant saying anything during the attack. He contends that the State’s entire case rested on what can be inferred from fourteen seconds of surveillance footage, and thus that the State did not prove beyond a reasonable doubt that defendant intended to kill the victim.

¶ 11. Defendant asks us to disregard the statement of the woman who witnessed the attack and rely solely on the video evidence. He asserts that the witness’s acknowledgement that “whatever the video shows is what happened” means her testimony “adds nothing” to the evidence of defendant’s intent to kill. We decline his invitation to disregard her testimony. We consider the evidence in the light most favorable to the State and emphasize that it is the “exclusive province of the jury” to “decide who to believe.” State v. Tenney, 143 Vt. 213, 216, 464 A.2d 747, 748 (1983).

jury instruction in attempted second-degree murder case that required specific intent to kill but citing State v. Blish, 172 Vt. 265, 272, 776 A.2d 380, 386 (2001), which clarified intent requirements for conviction of second-degree murder, not for attempted second-degree murder). However, we need not resolve this question here because the record contains sufficient evidence for a reasonable jury to find that defendant intended to kill the victim.

¶ 12. Accordingly, we consider whether the witness testimony and video footage can “substantiate [the] jury verdict.” Russell, 2011 VT 36, ¶ 11; see also In re M.K., 2015 VT 8, ¶ 15, n.*, 198 Vt. 233, 114 A.3d 107 (explaining that we may review video footage as part of trial court record without making independent findings based on our review of footage).

¶ 13. We conclude that the evidence viewed in the light most favorable to the State supports the jury’s finding, beyond a reasonable doubt, that defendant intended to kill the victim. The video footage shows defendant holding the knife to the victim’s throat. Defendant hit the victim in the head repeatedly while holding a knife in his hand. A witness to the attack testified that defendant was “trying to slit [the victim’s] throat” and that defendant was “aggressively punching” the victim. The witness explained that she pushed defendant “as hard as [she] could to get him off” the victim and that it took “a few pushes.” This circumstantial evidence is sufficient to support the inference that defendant attacked the victim with intent to kill him.

¶ 14. Defendant points to out-of-state cases where courts have reversed convictions for insufficient evidence of intent to kill. The court in People v. Reynolds, for example, concluded there was insufficient evidence of intent to kill where defendant hit victim in the face “multiple times with the blunt end of a box cutter” while threatening to kill her. 2021 IL App (1st) 181227, ¶ 36, 184 N.E.3d 344. Though that court purported to apply a similar deferential standard of review, that court was also bound by other cases from Illinois that had reversed jury findings of intent to kill as a matter of law. See, e.g., People v. Thomas, 262 N.E.2d 495, 501-02 (Ill. App. Ct. 1970) (concluding there was insufficient evidence of intent to kill where defendant entered victim’s apartment, attacked her, repeatedly threatened to kill her, sexually assaulted her, stole money, and fled because “the opportunity for murder was such that there was insufficient proof that defendant intended or attempted to commit that crime”); People v. Jones, 541 N.E.2d 132, 143 (Ill. App. Ct. 1989) (concluding there was insufficient evidence of intent to kill victim where three defendants broke into apartment, beat and sexually assaulted victim’s family, and threatened to

kill them, because defendants “did not use the knife” in attack against victim and only used gun to beat him); People v. Garrett, 576 N.E.2d 331, 336 (Ill. App. Ct. 1991) (concluding there was insufficient evidence of intent to kill where defendant held knife to victim’s throat and beat him because defendant did not use weapon against victim and because victim was treated for injuries on outpatient basis only).

¶ 15. We have no such history of displacing a jury’s factual findings. We recognize that the jury, as the factfinder, “has the sole determination concerning the weight of the evidence, the credibility of the witnesses and the persuasive effect of the testimony.” State v. Parker, 139 Vt. 179, 182, 423 A.2d 851, 852 (1980). In past cases, we have upheld findings of intent to kill based on circumstantial evidence. See, e.g., State v. Johnson, 2013 VT 116, ¶¶ 29-30, 195 Vt. 498, 90 A.3d 874 (holding that defendant’s act of stabbing victim in throat and saying he would be back “to finish the job” provided evidence for jury to infer intent to kill for purposes of attempted aggravated-murder charge); Book, 2021 VT 31, ¶ 16 (affirming denial of bail on charge of attempted second-degree murder because defendant’s act of driving bus towards officer after making threats provided sufficient evidence for jury to infer intent to kill).

¶ 16. Taken as a whole and viewed in the light most favorable to the State, the evidence put forth by the State to show defendant’s intent to kill—the witness statement and video footage—could fairly convince a jury “that the defendant is guilty beyond a reasonable doubt.” Perez, 2006 VT 53, ¶ 19 (quotation omitted).

II. Admission of Testimony

¶ 17. Defendant next contends that the trial court committed reversible error by admitting purportedly prejudicial testimony from a responding police officer. In response to a question about whether the officer obtained a statement from the victim, the officer testified that the victim “told me he has Parkinson’s . . . so I wrote the statement for him.” At trial, defendant objected to this testimony on hearsay grounds. The court overruled the objection because the statement was not

offered to prove that the victim had Parkinson's. On appeal, defendant now argues that the officer's testimony about the victim having Parkinson's disease was unduly prejudicial and that the trial court erred by not conducting a balancing test under Vermont Rule of Evidence 403 before admitting the testimony.

¶ 18. Defendant did not object on this ground below. Vermont Rule of Evidence 103(a)(1) provides that a ruling that admits evidence is not error unless "a substantial right of the party is affected, and . . . a timely objection . . . appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." Rule 103 precludes a party who raised a specific objection on the wrong grounds at trial from "raising a specific objection on other, tenable grounds on appeal." State v. Bissonette, 145 Vt. 381, 392, 488 A.2d 1231, 1237 (1985) (citing 1 Weinstein's Evidence ¶ 103[02], at 103-22 to 103-23 (1982)). We thus conclude that defendant waived this claim of error.

¶ 19. This case is not like State v. Shippee, cited by defendant. 2003 VT 106, ¶ 9, 176 Vt. 542, 839 A.2d 566 (mem.). In Shippee, the defendant raised a Rule 404(b) objection at trial, objecting to the admission of evidence of the defendant's prior conduct. On appeal, the defendant raised a Rule 403 objection for the first time. We determined that we could review the Rule 403 objection on appeal because of the "necessary interaction" between Rules 403 and 404(b). Id. ¶ 12. "Rules 403 and 404(b) go hand in glove because 404(b) describes a particular form of evidence that might create the unfair prejudice anticipated under Rule 403." Id. ¶ 11 (quotations and alteration omitted). The relationship between Rules 404(b) and 403 made the defendant's Rule 404(b) objection "sufficiently specific to alert the trial court to [the] defendant's theory behind the objection and preserve the [Rule 403] objection for our review." Id. ¶ 12. Here, by contrast, defendant's objection on hearsay grounds at trial fails to preserve his Rule 403 objection for appeal.

¶ 20. Even without preserving his objection, defendant urges us to apply a plain-error analysis and reverse for a new trial. To find plain error, we must find three things: first, “there must be an error; second, the error must be obvious; and third, it must affect substantial rights and result in prejudice to the defendant.” State v. Grace, 2016 VT 113, ¶ 16, 204 Vt. 68, 165 A.3d 122 (quotation omitted). Plain error exists “only in extraordinary situations where the error is obvious and strikes at the heart of defendant’s constitutional rights or results in a miscarriage of justice.” State v. Lucas, 2015 VT 92, ¶ 9, 200 Vt. 239, 129 A.3d 646 (quotation and alteration omitted).

¶ 21. This is not an “extraordinary situation.” Id. Though defendant asserts on appeal that the officer’s comment could have made the victim “appear vulnerable to the jurors and inspired them to seek justice on his behalf,” defendant’s counsel conceded the victim’s relative vulnerability at trial. During closing, defense counsel argued to the jury that “it did not look to me like [the victim] had the strength to fight [defendant] off.” Counsel’s argument made the same assertion that defendant now claims was prejudicial. Admission of the officer’s testimony about the victim’s own report regarding his health did not prejudice the defendant and so was not plain error.

III. Defendant’s Closing Argument

¶ 22. Defendant contends that the trial court committed reversible error by precluding defense counsel from arguing that the victim would have testified at trial if it were “important” to him. Defendant now asserts this this argument was “a way of implying that the complainant was not seriously injured and, therefore, that the assailant had not intended to kill him” and was central to the defense’s argument to the jury. He argues that the court’s decision precluding him from making that argument violated his right to counsel under the U.S. and Vermont Constitutions.

¶ 23. Though a defendant’s constitutional right to counsel includes the right to have counsel “make a closing summary of the evidence,” our constitutional system recognizes that the presiding judge must have “great latitude” in “limiting the scope of closing summations.” Herring

v. New York, 422 U.S. 853, 860, 862 (1975). Our longstanding rule is that “counsel should confine argument to the evidence of the case and inferences properly drawn” from the record. State v. Hemingway, 148 Vt. 90, 91, 528 A.2d 746, 747 (1987). “Control of closing arguments is committed to the trial court’s discretion and is reviewed only for abuse of that discretion.” State v. Karov, 170 Vt. 650, 653, 756 A.2d 1236, 1239 (2000) (mem.). A defendant may “properly point out the absence of more persuasive types of evidence and argue that the State has not proved its case beyond a reasonable doubt.” State v. Davis, 165 Vt. 240, 252, 683 A.2d 1, 8 (1996). But a defendant may neither argue that “the absent evidence would have been exculpatory” if it had been presented, nor encourage the jury to “speculate about the State’s motive for not pursuing or presenting such evidence.” Id.

¶ 24. Defendant overstates what the court forbade during the closing arguments of his trial. In his closing argument, counsel for defendant made the following arguments referencing the victim’s absence without objection from either the State or the court.

We don’t have [the victim]. Very important witness. We don’t have him to come in and say what, if anything, was said. That would be very important, wouldn’t it? From the time that the motorcycle reaches the parking lot to the time [defendant] leaves, was anything said to him? Well, we know he’s not here because, obviously, it’s not important to him to be here.

....

. . . There are a lot of other alternative reasons why this event occurred aside from an intent to kill. And you could probably count them all on your hands and toes and everything else and how many there are. Was it to scare him? Was it to intimidate him? Was it even to rough him up a bit for whatever reason? And again, we don’t know any of that because the important witness is not here.

....

If you look at the video after this attack, [the victim] gets up, kind of brushes himself off, still has a cell phone in one hand, a cigarette in another hand. Is that physical pain? If [the victim] came in here and said, man, that hurt. I got this red scar, that may satisfy the case, right? If he comes in and said, oh, this thing on my head, that really hurt, that impairs me, that might satisfy, but we have none of it. No

testimony regarding pain, illness, or impairment of physical condition. It's required. [The victim] isn't here to talk to about it.

....

What we don't know because of his absence is what was said, how the redness on the hand and how the scratch occurred . . . And what was the nature of the injuries? [The victim] could fill in a lot of gaps on that one. If any of those things happened. And the pain, why didn't he seek medical attention? Those are all important in analyzing this case.

Defendant called the jury's attention to the victim's absence from his trial. He argued that the missing testimony did not allow the State to meet its burden to prove the case beyond a reasonable doubt. See Davis, 165 Vt. at 252, 383 A.2d at 8 (allowing defendant to point to absence of evidence to show that State had not met its burden).

¶ 25. However, counsel for defendant drew objections from the State and corrective instructions from the court for attempting to make the following argument: "What caused this entire incident to occur? If [the victim] thought it was important to show up for his own case, he'd tell you." The court ordered the jury to "disregard that statement" because it was speculative as to why any witness was or was not present. Despite that instruction, counsel for defendant again argued: "Look, the bottom line is, this is a very, very serious case. And maybe [the victim] doesn't think it's important." Again, the court ordered counsel not to reference "what [the victim] thinks or not" because "it's speculative" and "not proper here for closing argument." The court then ordered the jury to disregard counsel's argument. After a discussion at the bench between the court and counsel for the parties, the court then instructed the jury:

You cannot consider why [the victim] is not here. It is completely speculative of why he may be here or not here. It is completely inappropriate for you to determine that as part of the evidence here at your deliberations. I'm instructing you that you cannot consider it as part of your deliberations whether or not and why [the victim] is here or not here. Again, it is not evidence, it is totally speculative, and you cannot consider it as part of your deliberations.

¶ 26. This instruction to the jury is the opposite of a so-called “missing witness instruction.” Historically, we approved of the court offering an instruction allowing the jury to “draw an inference against a party who fails to call a witness whose testimony would apparently be useful to that party.” State v. Tahair, 172 Vt. 101, 105, 772 A.2d 1079, 1082 (2001) (quotation omitted). In Tahair, we announced a new rule: the “missing witness instruction should no longer be given in criminal cases.” Id. at 109, 772 A.2d at 1086. However, we left open the question of whether “counsel—as opposed to the court—may comment upon an opposing party’s failure to call a witness.” Id. at 110, 772 A.2d at 1086. We need not decide the issue we left open in Tahair, as such commentary would only be appropriate where the party that fails to produce a witness has it “peculiarly within [its] power” to produce the witness. Id. at 105, 772 A.2d at 1082 (citing Graves v. United States, 150 U.S. 118, 121 (1893)). Here, there was no evidence offered to show that the victim was “peculiarly” within the State’s control, as would be necessary for defendant to raise the “missing witness” argument.

¶ 27. Defendant’s constitutional right to present a closing argument that summarizes the evidence and “inferences properly drawn” from the record was not infringed because there was no evidence in the record as to why the victim was absent. See Hemingway, 148 Vt. at 91, 528 A.2d at 747. The trial court did not abuse its discretion in declining to allow defendant to encourage the jury to speculate about why the State did not call the victim to testify. See Davis, 165 Vt. at 252, 683 A.2d at 8.

IV. Sentencing

¶ 28. Finally, defendant claims the court abused its discretion by imposing a sentence of twenty years to life based on information that was not contained in the record. He asserts that the court erred in noting that the incident was “particularly egregious” because it occurred in a homeless shelter designed to “create a safe place for vulnerable members of the community.” He

further asserts that the court incorrectly stated that there was no evidence of the age of defendant's children in the record.

¶ 29. “The trial court has broad discretion in fashioning a sentence.” State v. Webster, 2017 VT 98, ¶ 45, 206 Vt. 178, 179 A.3d 149 (quotation omitted). A sentencing court is not confined only to the facts and circumstances of a case in fashioning an appropriate sentence; it may consider other factors. Id. ¶ 45 (referencing 13 V.S.A. § 7030(a)). We will affirm a sentence “if it falls within the statutory limits,” is not based upon “improper or inaccurate information,” and is not the result of “personal bias or animus against the defendant.” State v. Sullivan, 2018 VT 112, ¶ 9, 208 Vt. 540, 200 A.3d 670 (quotations omitted).

¶ 30. We generally review sentencing decisions for an abuse of discretion. State v. Lumumba, 2014 VT 85, ¶ 22, 197 Vt. 315, 104 A.3d 627. However, where the defendant “fails to object to his . . . sentence at the time of sentencing,” we will vacate the sentence only upon a finding of plain error. State v. Ray, 2019 VT 51, ¶ 6, 210 Vt. 496, 216 A.3d 1274. As we discussed above, supra, ¶ 19, a finding of plain error requires that we find that there is an error, that it is obvious, and that it affects “substantial rights and result[s] in prejudice to the defendant.” Grace, 2016 VT 113, ¶ 16 (quotation omitted). Plain error exists in “exceptional circumstances where a failure to recognize error would result in a miscarriage of justice.” State v. Koons, 2011 VT 22, ¶ 11, 189 Vt. 285, 20 A.3d 662.

¶ 31. The trial court imposed the statutory minimum sentence after consideration of the appropriate sentencing factors. Even assuming the court erred in noting that the incident was “particularly egregious” because it took place in a homeless shelter and erred by not recognizing that the age of defendant's children was established, there is no miscarriage of justice. The jury found defendant guilty of the charge of attempted second-degree murder. The Legislature has determined that an attempted murder shall be punished as the murder would be punished. 13 V.S.A. § 9(a). “The punishment for murder in the second degree shall be imprisonment for: (A) a

minimum term of not less than 20 years and a maximum term of life; or (B) life without the possibility of parole.” 13 V.S.A. § 2303(a)(2).

¶ 32. In effect, defendant asks us to conclude that the court abused its discretion by sentencing defendant to the statutory minimum sentence. As the court noted at sentencing, “the mandatory minimum limits the trial judge’s discretion in imposing a minimum sentence less than the mandatory minimum.” Sullivan, 2018 VT 112, ¶ 12. The court determined that it could not impose a sentence of less than twenty years, though it had discretion to impose a probationary or split sentence. The court declined at sentencing to do so because of defendant’s criminal history, the seriousness of this offense, and defendant’s “major disciplinary infractions” while incarcerated.

¶ 33. The court’s commentary on the purpose of the homeless shelter did not motivate the sentencing. Instead, the court determined that the jury’s finding that defendant had intent to kill, the facts of the assault, and defendant’s probationary status at the time made his sentence appropriate. The court expressed particular concern about the fact that defendant was on furlough supervision at the time of the offense and that being on furlough did not deter his behavior. These were appropriate factors for the court to consider in fashioning the sentence. Webster, 2017 VT 98, ¶¶ 45-46.

¶ 34. Courts have broad discretion in sentencing defendants, and we will vacate those sentences for plain error only in exceptional circumstances. Ray, 2019 VT 51, ¶ 16. Such exceptional circumstances are not present here.

Affirmed.

FOR THE COURT:

Associate Justice