

Prior to trial, defendant moved to exclude, among other things, evidence of his 2004 convictions of negligent operation and violation of conditions of release and his 2006 convictions of reckless endangerment, grossly negligent operation, and attempting to elude a law-enforcement officer. He argued that this evidence was inadmissible under Vermont Rule of Evidence 609 because the offenses did not involve untruthfulness or falsification, their probative value was outweighed by the danger of unfair prejudice, and more than fifteen years had elapsed since the convictions. The trial court granted the motion to exclude the 2004 violation of conditions of release, but denied defendant's motion to exclude the other convictions, concluding that their admission would not be unduly prejudicial.

At trial, during direct examination of defendant, plaintiff's counsel indicated that he intended to question defendant about the 2004 and 2006 convictions, "[t]he ones the court ruled could be used." The court disagreed with plaintiff's characterization of its ruling, stating that it had not affirmatively ruled that the convictions were admissible, only that it was denying defendant's pretrial motion to exclude them. It questioned how the convictions were relevant and for what purpose plaintiff offered them. Plaintiff's counsel stated that he was offering them to prove a "pattern of behavior and intent to prove punitive damages here." Defense counsel argued that the convictions were more than fifteen years old, were inadmissible prior bad acts, and the danger of prejudice outweighed their probative value.² The court concluded that "given their age, given that there is a significant possibility of potential for a jury to misunderstand their use here," the probative value of the convictions in relation to the punitive-damages claim was outweighed by the danger of prejudice. The court therefore prohibited plaintiff's counsel from asking defendant about the convictions.

Under Vermont Rule of Evidence 404(b), evidence of prior crimes "is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Plaintiff argues that the court's ruling was error because in Carpentier v. Tuthill, we held that evidence of a defendant's prior convictions was admissible to show the degree of reprehensibility of the defendant's conduct for purposes of proving punitive damages in a trial on that issue. 2013 VT 91, ¶ 17. Because the convictions were not being offered to prove propensity, we rejected the defendant's claim that they were inadmissible under Rule 404(b). Id.; see also Sweet, 173 Vt. at 440 (holding prior-bad-act evidence admissible to prove punitive damages).

The fact that such evidence is admissible under Rule 404(b) is not the end of the inquiry, however, because "evidence that fits within the exception of this rule must also pass the balancing test of Rule 403." Reporter's Notes, V.R.E. 404. "That balancing is highly discretionary," State v. Winter, 162 Vt. 388, 399 (1994), and the court need not "specify the precise weight it accords each factor in the balancing test," State v. Shippee, 2003 VT 106, ¶ 14, 176 Vt. 542 (mem.). The court here determined that the age of the convictions, coupled with their potential for misleading the jury, meant that their probative value was outweighed by their prejudicial effect. The court reasonably exercised its discretion in weighing the factors and

² Under Rule 609, a prior conviction that does not involve untruthfulness or falsification is admissible to attack the credibility of a witness if it was a felony conviction, occurred within the past fifteen years, and the court determines that its probative value outweighs its prejudicial effect. Although defendant sought to exclude the evidence under Rule 609, that rule did not bar admissibility where, as here, the convictions were being offered for a different purpose than impeachment. See Carpentier v. Tuthill, 2013 VT 91, ¶ 16, 195 Vt. 52 (holding Rule 609 did not bar admission of convictions that were more than fifteen years old because they were offered to prove reprehensibility element of punitive-damages claim, not to impeach witness).

concluding that the evidence was inadmissible. Cf. State v. Patten, 2018 VT 98, ¶ 14, 208 Vt. 312 (affirming decision to admit evidence that defendant was sex offender where record showed court conducted Rule 403 analysis). Although the court indicated otherwise in its pretrial decision, “the trial court may reserve the right to reconsider its decisions on motions in limine during trial in light of the evidence adduced and defenses presented.” State v. McAllister, 2018 VT 129, ¶ 21, 209 Vt. 60. We therefore decline to disturb the court’s ruling.

Plaintiff next challenges the court’s punitive-damages instruction to the jury. Plaintiff argues that the court’s instruction that plaintiff had to prove that defendant “was actually aware of the substantial certainty of death or great bodily harm and ignored that” to receive punitive damages was an incorrect statement of plaintiff’s burden under the law.

To preserve a challenge to a jury instruction, a party must raise the specific objection to the trial court at the charge conference or before the case is submitted to the jury. Hartnett v. Union Mut. Fire Ins. Co., 153 Vt. 152, 160 (1989); V.R.C.P. 51 (“No party may assign as error the giving or the failure to give an instruction unless that party objects thereto either at a charge conference or before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.”). Plaintiff does not indicate how she preserved this argument for appeal, but the transcript of the charge conference indicates that plaintiff objected to the court’s instruction regarding punitive damages. “The propriety of a jury instruction depends upon whether the charge, as a whole and not piecemeal, captures the true spirit and doctrine of the law.” Jordan v. Nissan N. Am., Inc., 2004 VT 27, ¶ 6, 176 Vt. 465 (quotation omitted). The trial court instructed that, to receive punitive damages, plaintiff had to prove defendant “was actually aware of the substantial certainty of death or great bodily harm and ignored that.” Plaintiff claims this was an incorrect statement of plaintiff’s burden under the law because it suggested a specific intent that is not required. In Fly Fish Vermont, Inc. v. Chapin Hill Estates., Inc., 2010 VT 33, ¶ 25, 187 Vt. 541, this Court held that, to award punitive damages for reckless or wanton misconduct, the plaintiff must prove “that the defendant acted, or failed to act, in conscious and deliberate disregard of a known, substantial and intolerable risk of harm to the plaintiff, with the knowledge that the acts or omissions were substantially certain to result in the threatened harm.” The court’s instruction here reflects the proper legal standard for awarding punitive damages, which requires “conscious disregard of a known and sufficiently serious risk of harm,” equivalent to malice. Id. ¶ 24. Because the court’s instruction captured the spirit and doctrine of the law, there is no basis for reversal.

Because we conclude that plaintiff has not demonstrated reversible error, we do not reach defendant’s argument that, if the verdict is reversed, we should order the trial court to instruct the jury that there was no claim for the death of plaintiff’s significant other.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Nancy J. Waples, Associate Justice