

VERMONT SUPREME COURT
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Case No. 25-AP-402

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

OCTOBER TERM, 2026

State of Vermont v. Richard Welch, Jr.*	}	APPEALED FROM:
	}	Superior Court, Rutland Unit,
	}	Criminal Division
	}	CASE NO. 22-CR-09149
		Trial Judge: Cortland Corsones

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

Defendant appeals from his jury conviction of aggravated sexual assault, arguing that the criminal division erred in admitting certain exhibits and by declining to give a limiting instruction on consciousness of guilt. We affirm.

I. Background

In October 2022, the State charged defendant with aggravated sexual assault on a victim under the age of thirteen in violation of 13 V.S.A. § 3253(a)(8).^{*} The supporting affidavit alleged the following. In August 2022, police learned that defendant's twelve-year-old stepdaughter, M.B., was pregnant. Shortly thereafter, M.B. gave birth to a daughter, H.B. After testing DNA from M.B., H.B., M.B.'s father, and defendant, the Vermont Forensic Laboratory (VFL) reported genetic results reflecting an extremely high likelihood that defendant was the biological father of H.B.

Prior to defendant's jury trial in October 2024, defendant filed two motions in limine. The first sought to exclude evidence regarding certain DNA samples. Defendant argued that the State had tested multiple samples from some of these individuals, resulting in very similar reports, and contended that the probative value of both samples was substantially outweighed by

^{*} The State later filed an amended information with an additional charge of aggravated sexual assault of a child, but it dismissed this count prior to trial.

considerations of undue delay, waste of time, or needless presentation of cumulative evidence. He requested that the court limit the State to presenting one set of DNA samples and the accompanying chain-of-custody evidence and report. The State opposed the motion, arguing, among other things, that all of the proffered DNA evidence was admissible for the purpose of demonstrating that law enforcement conducted a complete and thorough investigation; the numerous witnesses were necessary because there was no stipulation as to the chains of custody regarding the DNA samples; and the State intended to rely on the DNA analyses to prove an essential element of the crime—that a sexual act occurred. The court issued an order indicating that the motion was denied at the time for the reasons asserted by the State.

Defendant's second motion in limine sought to exclude recordings of phone calls between defendant and M.B.'s mother in October 2022, after defendant's arrest. The court took this issue up on the first day of trial. The State argued that it sought to admit only limited portions of the recorded calls as evidence of defendant's intent, mindset, and consciousness of guilt, and argued that the offered recordings all pertained directly to the case. The court denied defendant's motion, explaining that the evidence went to defendant's intent—a "critical issue" in the case and one that, as our case law acknowledges, is rarely proven through direct evidence. It explained that the recordings also provided evidence of the context and nature of defendant's relationship with M.B. in his own words, was not unfairly prejudicial, and that the weight to be given to it was ultimately a question for the jury.

At trial, the State called seven law-enforcement officers, three VFL employees, M.B.'s aunt, and M.B.'s mother. The evidence presented through these witnesses and by stipulation included the following.

M.B. was born in March 2010. She is the eldest of three siblings. M.B.'s mother and father divorced in 2017. Mother subsequently began a relationship with defendant; the two later married and, at the time of the trial, were divorced.

Mother moved in with defendant in 2017, when M.B. was seven years old. Mother initially had custody of M.B. and her siblings on alternating weeks. In December 2017, M.B. told her father that defendant touched her "girl parts" beneath her undergarments. In March 2018, M.B. told her father that defendant sexually assaulted her and her siblings in various ways. She made a similar report to investigators. M.B. later admitted to her aunt that she had lied about these allegations.

Beginning in 2021, the children lived with mother and defendant full-time, visiting their father on alternating weekends. Mother worked at a nursing home as a licensed nurse's aid. She typically worked overnight shifts and, while at work, left the children in defendant's care. Mother described M.B. and defendant as having a "[f]riendly," relationship, "[l]ike father-daughter."

Mother testified that M.B. sometimes sleepwalked. Mother never saw M.B. sleepwalk past the living room or enter the room mother shared with defendant while she was sleepwalking. M.B. was always clothed while sleepwalking. When mother redirected M.B., M.B. did not appear to be awake; mother knew that M.B. was sleepwalking because she grumbled and made no sense.

Mother also testified that defendant slept in the nude, that as far as she knew he slept through the night, and that she never observed defendant sleepwalking or doing anything strange while sleeping. Occasionally, defendant would have sex with mother while seeming to be awake and doing everything normally but, the next morning, would tell mother that he did not remember this. Because defendant told mother he did not remember, she thought he had been asleep during these instances.

At least twice while mother was working, defendant texted mother and told her that M.B. had sleepwalked, entered mother and defendant's room, and gotten into their bed.

In November or December of 2021, when M.B. was eleven, mother took her to the doctor for a checkup. At the time, mother told the doctor of her concern that M.B., who had begun menstruating, had missed a period. The doctor did not do anything in response, and no test was conducted.

In the months that followed, through early 2022 into the spring of 2022, mother observed that M.B. had gained some weight. Defendant noticed and told mother that M.B. needed to exercise more. Mother did not have continued concerns about M.B.'s missed periods or that she was pregnant.

In August 2022, M.B.'s father called the police, indicated that he had received a message suggesting that M.B. was pregnant, and requested an investigation. An officer went to the home, where he met with defendant, mother, and M.B. The officer observed that M.B. appeared to be pregnant and was wearing what looked like a compression belt. The State admitted footage from the officer's body-worn camera depicting this interaction. The officer described defendant's demeanor as "eerily calm" in light of the circumstances.

Mother subsequently took M.B. to the hospital, where it was confirmed that she was in the final trimester of a pregnancy. M.B. gave birth to H.B. at the end of August 2022. At the hospital, a detective collected DNA samples from M.B. and H.B. Law-enforcement officers also collected DNA samples from two men: M.B.'s father and defendant. Defendant told the detective who collected his sample in September 2022 that M.B. would sometimes sleepwalk into his bed at night when her mother was not home. Additional samples were collected from M.B. and H.B. in November 2022.

Law-enforcement officers testified to the process by which the DNA samples were collected, sealed with tamper-proof tape, secured, and then submitted to the VFL for testing and described the process for documenting the chain of custody. The VFL employees testified to the process by which they received this evidence and secured it prior to and during testing and likewise described their process for documenting the chain of custody.

The DNA analyst who tested the samples testified that it was seventy-two trillion times more likely that defendant was the father of H.B. than an untested, unrelated, random man in the population.

After defendant was arrested in October 2022, mother continued to have contact with him and they remained in a relationship. They spoke by phone during this time. Recordings of calls between defendant and M.B.'s mother during October 2022 were played for the jury.

During these calls, defendant made statements to mother including, “Just tell everybody there, only thing they have is DNA. They have nobody complaining.” He told her, “As long as you message you-know-who, be like, ‘stay strong.’ They got nothing.” M.B.’s mother testified that she understood “you-know-who” to be a reference to M.B. Defendant asked whether M.B. had to testify and repeatedly asked mother to “keep [M.B.] happy.” He told mother, “My lawyer says I won’t be able to go back there because that’s the place it happened. Fifty-something days ago—no wait, nine months and fifty-something days ago.” Mother testified that she took this to mean “[t]hat she was pregnant, and he did it.” Defendant also stated, “I didn’t do anything. If anything happened, it was in my sleep. If [M.B.] sticks to the same [expletive] program, we’re good.”

Defendant further asked mother if H.B. looked like him and said that he was writing her a book. He referred to the “initials of three names,” “A.W., H.—it’s going to W. And then M.B.” M.B.’s mother understood the second initials as a reference to H.B., and that the reference to “W” was for “Welch,” defendant’s last name.

Regarding M.B., defendant said that he did not want her to “hang around” with a particular person, noting that “[s]he’s got a baby to worry about.” He said that he did not want M.B. “out playing with boys instead of [H.B.]” so that there would not be “another” H.B. He also stated, “[b]etter keep the boys out of her pants. I’ll kick their asses.” Defendant told mother that he tried not to think of M.B., but thought of her all day, and expressed that if he had his phone he would fall asleep messaging M.B. He asked if M.B. still loved him and asked mother to send M.B. his love if she had a chance.

After the State rested, defendant moved for a judgment of acquittal. The court denied the motion.

On the final day of trial, defendant called a counselor at M.B.’s school, who testified that she spoke with M.B. regarding a rumor at the school that M.B. was pregnant, but did not make a report to the Department for Children and Families because she was not aware that M.B. was actually pregnant. Defendant also called his mother, who testified that she never saw defendant interacting inappropriately with M.B. and described a family history of sleep disturbances, sleepwalking, and sleep apnea. She further testified that defendant was a truthful person, and that she would not lie for him.

Defendant took the stand and testified to the following. With both M.B.’s mother and a former partner, he would sometimes learn that he had had sex the night before, but would not recall doing so. At the end of 2021, multiple health issues, as well as stress from M.B.’s false accusations, were negatively impacting his sleep. He was later diagnosed with sleep apnea, and believed that he was suffering from the condition at the time M.B. became pregnant.

Between September and December 2021, defendant woke up in the morning to find M.B. in his bed two or three times a month. On these occasions, he would get up, get dressed—because he routinely slept in the nude—and tell M.B. that she could not be there. Defendant did not recall ever having intercourse with M.B. Defendant submitted to the DNA test because he wanted to prove that he had not done anything wrong. He was not expecting the results of the test to show that he was H.B.’s biological father. He continued to believe that this was not true.

Defendant also answered questions about the statements he made to H.B.'s mother in the recorded calls, testifying to the following. He also asked about M.B.'s siblings during the calls. When he said he loved M.B., he meant that he loved her as a daughter; he spoke about how she was spending her time not because he was possessive of her, but because he was looking out for her. He wanted M.B.'s mother to keep M.B. happy so she would not start lying or become suicidal and because he believed her mental state would impact H.B.'s. He was concerned about M.B. lying because of her prior false allegations. When he said that M.B. had "better" still love him "or I'll have to beat her with my flip-flop," he "should have said feather instead of flip-flop." When he referred to H.B. having his last name, he was suggesting that he could adopt H.B. to help M.B. out. He said that he was going to have a sleep study done because that would mean "no charges" only because this is what his psychiatrist told him.

Finally, defendant called an expert witness, an academic physician with a board certification in sleep medicine. He testified to the following. Parasomnia is a type of sleep disorder involving inappropriate and unwanted experiences or behaviors associated with sleep. "Sexsomnia" is a recognized type of parasomnia that involves sexualized behavior, including sexual intercourse, arising from sleep. It is a "rare and uncommon condition." Sleep deprivation, including sleep deprivation resulting from obstructive sleep apnea, might increase the likelihood of experiencing sexsomnia. Many medical conditions have a genetic predisposition, so the presence of other individuals in a family who have a vulnerability to sleepwalking "adds to the weight of consideration." Sexual intercourse usually occurs during episodes of sexsomnia only when another individual is in close proximity, such as in the bed. During these episodes, the behavior of the individual with sexsomnia is typically different in character to their behavior when awake, and they do not recall the incident.

When asked whether, based on the material he reviewed in this case, the expert had an opinion about whether "sexsomnia could be a plausible explanation," he replied, "I think it's a consideration." He did not examine defendant or diagnose him.

As discussed below, defendant requested that the jury receive a limiting instruction on consciousness of guilt given the admission of the phone-call recordings. The court declined to do so. After deliberation, the jury returned a verdict of guilty. Defendant then moved for a judgment of acquittal and new trial. The court denied the motion. This appeal followed.

II. Analysis

A. Evidentiary Rulings

We first address defendant's challenges to evidentiary rulings made at trial. Our standard of review is deferential. State v. Bergquist, 2019 VT 17, ¶ 22, 210 Vt. 102 (recognizing that we apply deferential standard of review to trial court's evidentiary rulings). We will reverse only where the defendant shows that the court's discretion "was either totally withheld, or exercised on grounds clearly untenable or unreasonable" and this abuse of discretion resulted in prejudice. State v. Lyddy, 2025 VT 1, ¶ 13, 220 Vt. 510 (quotation omitted); see V.R.Cr.P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

1. Lab-Submission Forms and Chain-of-Custody Documents

The trial court admitted two police department lab-submission forms and two of the VFL's chain-of-custody reports over defendant's hearsay objections at trial. These exhibits documented the movement and storage of some of the DNA evidence from the time of collection by law enforcement through its submission to the VFL and ultimate testing. The court ruled that they were admissible under Vermont Rule of Evidence 803(8), which creates a hearsay exception for, as relevant here, "records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities." V.R.E. 803(8)(A). Rule 803(8)(B) itemizes four exceptions: (i) "investigative reports by police and other law enforcement personnel"; (ii) "investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party"; (iii) "factual findings offered by the government in criminal cases"; and (iv) "any matter as to which the sources of information or other circumstances indicate lack of trustworthiness." The court reiterated these conclusions in its ruling on defendant's motion for judgment of acquittal and a new trial.

Defendant argues that the admission of these documents was error because each exhibit included statements of fact and were offered to show that the DNA evidence, at the time it was tested by the VFL, was undamaged or unaltered. He asserts that the error was not harmless because, in the absence of these documents, the State would not have been able to introduce the DNA evidence. In support of this contention, he points to the testimony of an evidence technician and a DNA analyst at the VFL, arguing that without these exhibits, they would not have been able to testify that they received the samples in the same condition they were in when packaged upon collection. We do not reach the question of whether the submission forms and chain-of-custody documents were properly admitted under Evidence Rule 803(8) because we conclude that, assuming for the sake of argument that this was error, the error was harmless beyond a reasonable doubt. See State v. Groce, 2014 VT 122, ¶ 18, 198 Vt. 74 ("Because defendant contemporaneously objected to the trial court's admission of the evidence, we will review for harmless error.").

Where an error involves the admission of evidence, we apply the harmless-error standard "by imagining a trial in which the evidence is not admitted." State v. Tester, 2009 VT 3, ¶ 45, 185 Vt. 241. "In assessing harm, we use four factors: the importance of the evidence in the prosecution's case, the cumulativeness of the evidence, the extent of cross-examination, and the overall strength of the prosecution's case." Id.

"The State generally can meet its burden with respect to the chain of custody by demonstrating that 'a sample is sealed and labeled upon collection and received by the technician performing the test in that condition.'" Id. ¶ 22 (quoting Dep't of Soc. Welfare v. Miller, 157 Vt. 92, 96 (1991)). This Court has never required that the State admit written documentation of the chain of custody in order to make this demonstration. Id. ¶ 23 ("We have never held that law-enforcement officers must provide written documentation to ensure an adequate chain of custody, and we see no reason to do so now."). Indeed, we have held that the State need not "perfectly establish[]" the chain of custody. State v. Stevens, 137 Vt. 473, 477 (1979) (concluding that despite "gap" in recital of chain of custody, "the court correctly admitted the test results" because reasonable assurance of identity of sample was established). Rather, the

State must show circumstances establishing only “reasonable assurance of the identity of the sample tested.” State v. McAllister, 2008 VT 3, ¶ 10, 183 Vt. 126 (quotation omitted).

The record reflects that this standard was amply satisfied here without the four exhibits in question. The State presented testimony from five police officers and three VFL employees regarding the steps taken to ensure the integrity of the DNA samples after they were collected and submitted for testing. Defendant does not contest this; rather, the crux of his prejudice argument appears to be that the VFL evidence technician and DNA analyst referenced the challenged exhibits in order to testify that the DNA samples were sealed and labeled upon collection and received by them in the same condition. The problem with this argument is that these and other documents could be used to refresh each witness’s memory without being introduced into evidence. See State v. Lander, 155 Vt. 645, 645 (1990) (mem.) (explaining that prior written statement may be used to refresh witness’s recollection and, “[i]f the attempted refreshment is successful, the witness may proceed to testify from present memory,” and recognizing that only if “the witness’s recollection remains exhausted, the prior written statement could be admitted only under an exception to the hearsay rule”); V.R.E. 612. Because the State independently established that the DNA evidence was “sealed and labeled upon collection and received by the technician performing the test in that condition,” Tester, 2009 VT 3, ¶ 22 (quotation omitted), any error in admitting the lab-submission reports and chain-of-custody documents pursuant to Evidence Rule 803(8) was harmless beyond a reasonable doubt.

2. Allele Tables

Defendant also argues that the criminal division erred in admitting, over his hearsay objection, two allele tables prepared by the DNA analyst. He contends that the tables were improperly admitted under Rule 803(8) because they contained factual findings regarding the genetic match between defendant and H.B. and constituted investigative reports prepared by the government and offered by it in a case in which it is a party.

This argument fails because defendant has not shown that the allele tables contained hearsay in the first instance. They were admitted through the DNA analyst, who was qualified as an expert witness in the subject of DNA profiling. He testified that, according to accepted standards, he examined twenty-two loci from each DNA sample and used them to create DNA profiles for each subject. He then compared H.B.’s profile with defendant’s across each locus to determine whether defendant could have contributed each of the alleles in question. He described allele tables as a “simple way” for analysts to compare DNA profiles as part of this process, and he also testified that he conducted the DNA analyses for each sample and input the results into the allele tables.

At trial, defendant objected to the admission of the allele tables, arguing that they did not fall within an exception to Rule 803(8). In response, the State contended only that these were tables the expert witness had produced while running his DNA analysis, and that he input the data therein. The court overruled the objection based on the witness’s testimony that he input the data and created the tables in accordance with accepted standards.

On this record, it is not clear that the criminal division in fact admitted the allele tables under Rule 803(8). In any event, this argument fails because defendant has not shown that the

tables constituted hearsay such that they could be admitted only pursuant to a hearsay objection. The DNA analyst conducted the underlying DNA tests and created the tables by inputting his own data, and he testified as to the underlying processes and his resulting opinion. See V.R.E. 703 (“The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.”). Compare State v. Walker, 212 A.3d 1244, 1255 (Conn. 2019) (holding that witness’s testimony about DNA profiles she generated “was not hearsay because she conducted these analyses herself”), with Commonwealth v. McCowen, 939 N.E.2d 735, 756 (Mass. 2010) (concluding that portions of allele chart created by witness that were derived from testing conducted by another analyst were hearsay “because these were factual findings made by a nontestifying witness for the purpose of investigating the murder” (emphasis added)). Therefore, defendant has not identified any abuse of discretion in the trial court’s admission of the allele tables. Lyddy, 2025 VT 1, ¶ 13.

B. Jury Instructions

Finally, we consider defendant’s argument that—having admitted the recorded phone calls with H.B.’s mother—the court erred in declining to issue his requested jury instruction on consciousness of guilt.

During the charge conference, defendant requested that the court instruct the jury that evidence of consciousness of guilt “has relatively little weight,” and that defendant could not be found guilty based solely on consciousness of guilt. In support of this request, he pointed to this Court’s decision in State v. Scales, 2017 VT 6, 204 Vt. 137, arguing that it stood for the proposition that it was error not to give a limiting instruction where there was evidence of consciousness of guilt. The State opposed the request, arguing that Scales was distinguishable and that the recorded phone calls in this case showed defendant talking about M.B., the allegations, and “keeping their story straight.” The court declined to issue the requested instruction, concluding that the holding in Scales and the cases cited therein was specific to evidence of flight and that it was up to the jury to weigh the recordings and the attorneys to address that evidence in their closing arguments. In response to defense counsel’s question, the court indicated that he was not prohibited from arguing that consciousness of guilt was not sufficient evidence—and defense counsel indeed made this argument during his closing. The court reiterated its conclusions in denying defendant’s motion for judgment of acquittal and a new trial.

Where, as here, a challenge to the jury instructions is raised below, “we assess whether, viewing the instructions in their entirety, they provided sufficient guidance to the jury without introducing prejudice into their deliberations.” State v. Kolibas, 2012 VT 37, ¶ 11, 191 Vt. 474 (quotation omitted). “The instructions must accurately state the law on every theory fairly put forward by the evidence,” however, “[w]ithin the parameters of the law, the trial court may exercise its discretion in the wording of the jury charge.” State v. Snow, 2013 VT 19, ¶ 8, 193 Vt. 390 (quotations omitted). “We will assign error only where the instructions undermine our confidence in the verdict.” State v. Shabazz, 169 Vt. 448, 450 (1999).

Defendant has not demonstrated that the criminal division abused its discretion in declining to give the requested consciousness-of-guilt instruction. As the trial court recognized,

the statements defendant made during the recorded phone calls were very different to the category of evidence at issue in Scales. In that case, we acknowledged this Court’s long recognition “that so-called consciousness-of-guilt evidence has little probative value, even when the prosecutor can show that it is relevant to a legitimate issue other than propensity to commit the crime charged.” Scales, 2017 VT 6, ¶ 7 (quotations and citation omitted). We also explained, however, that we had “most often” addressed the topic “when evidence of flight is offered as consciousness of guilt.” Id. ¶ 8 (citing State v. Perrillo, 162 Vt. 566, 570 (1994)). In those cases, “[t]he probative value of evidence of flight as circumstantial evidence of guilt depends upon the confidence placed on four inferential steps”: (1) from the defendant’s behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; (4) and then from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. Perrillo, 162 Vt. at 570. “The use of evidence of flight has been criticized on the grounds that the second and fourth inferences are not supported by common experience,” and, on those grounds, we have found “ ‘evidence of flight or related conduct only marginally probative as to the ultimate issue of guilt or innocence.’ ” Scales, 2017 VT 6, ¶ 9 (quoting Perrillo, 162 Vt. at 570).

In Scales, we concluded that the criminal division erred in admitting evidence that the defendant provided a police officer with an alternate name when the officer arrived at a residence where defendant was believed to be living in order to serve an arrest warrant. Id. ¶ 15. We explained that giving the police an alternate name was “highly ambiguous conduct” that did not demonstrate that he was attempting to elude law enforcement—particularly because there were other reasons to explain why the defendant used this name, including that he apparently used it “consistently.” Id. ¶¶ 11-12. Thus, the first two inferential steps could not be made. Id. We further noted that the third inference was not supported because there was “scant evidence” to show that the defendant was aware that the warrant, which was served in Pennsylvania, was connected to charges filed in Vermont for a crime allegedly committed seven years earlier. Id. ¶ 13. Finally, we held that there was “no connection” between the defendant’s identification of himself by an alternate name and “any disputed elements in the case.” Id. ¶ 14. And, as relevant here, we concluded that under these circumstances the court’s refusal to issue a consciousness-of-guilt instruction compounded the prejudice to the defendant. Id. ¶ 19.

The circumstances here are very different. As defendant acknowledges, the evidence at issue went directly to the question of his intent, which was disputed. See id. ¶ 14 (explaining that because consciousness-of-guilt evidence did not relate to disputed elements in case, “it was highly prejudicial”); see also State v. Theriault, 2014 VT 119, ¶ 7, 198 Vt. 625 (mem.) (recognizing that “[i]ntent is rarely proved by direct evidence; it must be inferred from a person’s acts and proved by circumstantial evidence” (quotation omitted)). Defendant made the statements at issue shortly after his arrest and while being detained on the charge of aggravated sexual assault, and no great inferential leap was required for the jury to conclude that the statements pertained directly to his prosecution for the same. See Scales, 2017 VT 6, ¶ 13 (observing that “where there is a substantial time lag between the time of the crime charged and the proffered evidence,” a court admitting evidence of flight “must be certain there is evidence that a defendant knows he is being sought for the specific crime charged and not some other crime or event” (quotation omitted)). For all of these reasons, the phone-call evidence did not require the type of inferential leaps that warrant a limiting instruction regarding consciousness of

guilt. As a result, the court's decision not to issue the instruction here does not undermine our confidence in the verdict. See Shabazz, 169 Vt. at 450. We therefore see no error.

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

Nancy J. Waples, Associate Justice

Christina E. Nolan, Associate Justice