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

SUPREME COURT DOCKET NO. 2017-275

JUNE TERM, 2018

State of Vermont v. Andrew J. Benson*	}	APPEALED FROM:
	}	
	}	Superior Court, Grand Isle Unit,
	}	Criminal Division
	}	
	}	DOCKET NOS. 34-4-16 Gicr, 44-6-16 Gicr, 61-8-16 Gicr
		Trial Judge: Michael J. Harris

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

Defendant appeals his conviction by a jury of two counts of domestic assault and six violations of conditions of release. The charges were based on three incidents involving the same complainant that took place in the spring and summer of 2016. Defendant claims that he was entitled to separate trials and that the court erred in denying his motion to sever the charges. We affirm.

The complainant testified at trial that she had lived with defendant in his home in Alburgh for three years. On April 9, 2016, the complainant called 911 and reported to police that defendant had beaten her. She said that defendant became angry after she asked him if he had seen her cell phone. He came up behind the chair where she was sitting, took her by the throat, lifted her out of the chair, slapped his hand over her mouth, and whispered, "I could break your neck and leave you in the woods and nobody would care." He also pulled her hair, causing her pain. Defendant was charged with one count of domestic assault. He was released on conditions, including the condition that he not have contact with the complainant or abuse or harass her.

Despite the conditions of release, defendant and the complainant continued to live together. On May 17, 2016, they had another altercation. The complainant could not recall how it began, but she ended up on the floor with defendant on top of her trying to gouge out her eye and slapping her in the face. The complainant managed to get out of the house. She called 911 but hung up. Defendant then called the police and told them that the complainant had showed up at his house and tried to assault him. He told them that he wanted them to remove her, that he did not want to talk to officers, and that he had left the house and was walking to New York. The police officer who responded to the call observed red marks on the complainant's neck and that her left eyelid was swollen shut. As a result of this incident, defendant was charged with domestic assault and two violations of conditions of release. In addition to the prior conditions that he not contact, abuse, or harass the complainant, the court imposed additional conditions, including that he not buy, have, or drink any alcoholic beverages.

The third incident took place on August 6, 2016. The complainant and defendant were at the house with a couple defendant had invited over. Defendant and the couple were making crystal meth. Defendant was drinking and shooting up meth and Suboxone. Defendant and the couple decided to go for a walk. The complainant went to sleep. She woke up at 2:30 in the morning with defendant punching her in the face, screaming that she was a whore and that he knew she was "f-ing somebody." He grabbed her by the shirt and flung her. He then went to the gunrack, pulled a .410 shotgun off the rack, and pointed it at her. She testified that he ejected a shell from the gun and said, "It was that easy." She attempted to run away, and he kicked her in the back, cracking three of her ribs, and put her in a headlock. She bit him, and he let her go. She then called 911.

When police responded to the house, they could not find defendant or the complainant. Defendant later called one of the responding officers and stated that he had hidden in a cornfield because he was afraid of getting arrested. He said that his conditions of release prohibited him from being with the complainant. Immediately after that call, the complainant reported to police that defendant was trying to break into the apartment by removing an air conditioner from the window. Police found defendant walking down the street in Alburgh and took him into custody. He admitted he had been drinking and had a beer in his backpack. The complainant went to the emergency room three days later, where she was found to have facial contusions, an eye injury consistent with having been punched, and a painful area on her chest. Defendant was charged with one count of aggravated domestic assault, one count of domestic assault, one count of criminal threatening, and six counts of violating conditions of release.

In October 2016, defendant moved to sever the three cases for trial. The State opposed the motion to sever and filed its own motion for joinder. In December 2016, the trial court granted the motion for joinder and denied defendant's motion to sever.

Following a two-day trial in April 2017, the jury found defendant guilty of two counts of domestic assault for the events in April and May 2016, and six counts of violating conditions of release. It acquitted him of the charges of aggravated domestic assault, the August 2016 domestic assault, criminal threatening, and two counts of violating conditions of release. Defendant received a sentence of zero to eight months, suspended with probation, for the violations of conditions of release. The court imposed concurrent sentences of eight months to one year for the domestic assault convictions. Defendant appealed.

At issue on appeal is whether the trial court erred by denying defendant's motion to sever. Vermont Rule of Criminal Procedure 13 allows multiple offenses to be tried together if the offenses could have been joined together in a single information under Rule 8, subject to the defendant's right to a severance under Rule 14. V.R.Cr.P. 13(a). Rule 8 permits joinder of two or more offenses in one information if they "are of the same or similar character," or "are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." V.R.Cr.P. 8(a). Under Rule 14, the defendant has an absolute right to severance "[w]henever two or more offenses have been joined for trial solely on the ground that they are of the same or similar character." V.R.Cr.P. 14(b)(1)(A). Whether the charges against defendant were properly joined for trial is a question of law that we review de novo. State v. Brandt, 2012 VT 73, ¶ 9, 192 Vt. 277.

Defendant claims that he was entitled to have each case tried separately because his offenses were joined together solely on the ground that they were of the same or similar character. The trial court disagreed, finding that the charges were part of a single scheme or plan. We conclude that the trial court reached the right result but for the wrong reason, and therefore we

affirm. See Gilwee v. Town of Barre, 138 Vt. 109, 111 (1980) (explaining that this Court will affirm lower court decision if record reveals "any legal ground for justifying the result").

Offenses that are joined solely because they are of the same or similar character are "normally unrelated crimes that involve different times, separate locations, and distinct sets of witnesses and victims." State v. Johnson, 158 Vt. 344, 350 (1992) (quotation omitted). "Of course, in a given situation offenses may be of the same or similar character, and, at the same time, constitute a series of connected acts or parts of a single scheme." Id. at 351. That is the situation in this case. Defendant's offenses involved repeated acts of physical violence against the same victim in the same location and occurred within a four-month period. Several of the May and August 2016 charges were for violations of conditions of release that had been imposed after the first incident. The offenses therefore qualify as a "series of acts connected together," in addition to being similar in character, and were properly joined for trial. See Brandt, 2012 VT 73, ¶¶ 12-14 (rejecting argument that Rule 8(a)(2) permits joinder only where one offense is committed to aid in accomplishing another, and holding that two domestic assaults against same victim in same location in close time frame were series of acts connected together); State v. Jatta, No. 59099-5-I, 2008 WL 555948, at *3 (Wash. Ct. App. Mar. 3, 2008) (per curiam) (unpub. mem.) (cited with approval in Brandt, 2012 VT 73, ¶ 14) (holding domestic assaults against same victim committed three months apart were "sufficiently connected" to be joined for trial).

Given the seemingly spontaneous nature of the assaults and the lack of any evidence or argument by the State that defendant was attempting to further some objective by committing them, we agree with defendant that it was inappropriate in this case for the court to categorize the offenses as part of a single scheme or plan.[*] Cf. Johnson, 158 Vt. at 350-51 (holding defendant not entitled to severance of seven counts of lewd and lascivious conduct with a child, because offenses were part of single scheme or plan by defendant to take advantage of position as camp counselor to sexually exploit young, male, mentally handicapped campers during two-week camp session); State v. Freeman, 2017 VT 95, ¶¶ 12 n.2, 16, 178 A.3d 326 (holding defendant not entitled to severance of sexual assault charges involving four different victims where evidence showed that offenses were part of defendant's single scheme or plan of exchanging marijuana for sex with young girls). However, as described above, the offenses were plainly connected to each other in the sense that they involved escalating physical violence against the same victim in the same location and occurred within a relatively close time frame. For this reason, we affirm the trial court's conclusion that defendant was not entitled to an automatic severance under Rule 14(b)(1)(A).

Defendant also argues that the court should have exercised its discretion to grant a severance under Rule 14(b)(1)(B), which permits the court to sever offenses for trial if "necessary to achieve a fair determination of the defendant's guilt or innocence of each offense." Whether to grant a severance under Rule 14(b)(1)(B) is a decision "committed to the sound discretion of the trial court." State v. LaBounty, 168 Vt. 129, 134 (1998). Here, the court declined to grant a discretionary severance because it found that defendant had not demonstrated that he would be substantially prejudiced or that the jury would be unable to distinguish one charge from another and apply the law intelligently. It also found that evidence of the charged offenses would likely be admissible in each trial if the offenses were tried separately.

[*] By reaching this conclusion, we do not mean to imply that multiple domestic violence charges could never be joined as part of a single scheme or plan. We merely hold that the evidence did not support such a determination in this case.

We see no reason to disturb the trial court's ruling. Contrary to defendant's argument, the court was correct in stating that prior acts of domestic abuse are usually admissible in domestic assault cases under Vermont Rule of Evidence 404(b). See Brandt, 2012 VT 73, ¶ 16 (explaining that in domestic violence cases, "we have generally allowed evidence of other noncharged acts of domestic violence to be admitted to explain the circumstances of the relationship between the parties"). The purpose of admitting evidence that a defendant has assaulted a victim on prior occasions "is not to show his general character for such abuse, but to provide the jury with an understanding of defendant's actions on the date in question." State v. Sanders, 168 Vt. 60, 62 (1998). Such evidence is often necessary because "[a]llegations of a single act of domestic violence, taken out of its situational context, are likely to seem 'incongruous and incredible' to a jury." Id. If defendant's offenses had been tried separately, evidence of the other assaults would likely have been admissible in each trial. The joinder of the offenses therefore did not prejudice defendant by putting evidence before the jury that would otherwise have been absent. See Brandt, 2012 VT 73, ¶ 16. The trial court accordingly acted within its discretion in denying defendant's motion to sever under Rule 14(b)(1)(B).

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Harold E. Eaton, Jr., Associate Justice

_____
Karen R. Carroll, Associate Justice