State v. Michael Abel

2019 | Cited 0 times | Supreme Court of Vermont | March 29, 2019

2019 VT 22

No. 2017-362

State of Vermont Supreme Court

On Appeal from v. Superior Court, Orleans Unit, Criminal Division

Michael Abel September Term, 2018

Howard E. Van Benthuysen, J.

-Appellee.

Matthew Valerio, Defender General, and Dawn Matthews, Appellate Defender, Montpelier, for Defendant-Appellant.

PRESENT: Reiber, C.J., Skoglund, Robinson, Eaton and Carroll, JJ.

¶ 1. CARROLL, J. Defendant appeals from his conviction of two counts of domestic assault following a jury trial. He argues that both convictions arise from the same assaultive incident in violation of the Double Jeopardy Clause of the U.S. Constitution. Defendant also asserts that the court committed plain error in its jury instructions. We affirm.

¶ 2. Defendant was charged with numerous crimes in October 2015 based on allegations

that he harmed and threatened to harm the complainant his cohabitating partner

three children, then ages one, three, and five. 1

The charges at issue allege separately that defendant

struck the complainant in the ribs and hit her in the arm. Two charges were dismissed at arraignment for lack of probable cause. The jury acquitted defendant of other charges and we do not recount the testimony related to these charges.

¶ 3. The complainant testified to the following at trial. She met defendant online when

she was thirteen and defendant was eighteen. She later moved to Vermont to live with defendant.

Defendant began physically abusing her in 2012 a He

continued to physically and verbally abuse her thereafter. In April 2015, defendant held the

complainant down on the floor and repeatedly punched her in the head, resulting in a concussion

and bruised ribs. Defendant also threatened life in front of the children.

¶ 4. On the day in question, the complainant was preparing the children for school. One

child made a loud noise. Defendant became upset; he picked the child up and slammed her down.

Defendant then instructing the

complainant not to tell him what to do in front of the children. He shoved the complainant while

she was standing in the kitchen holding the youngest child, causing the complainant and

the child to fall. Defendant told the older children to go to their rooms, which they did. The

complainant then moved a highchair from the kitchen into a bedroom and put the youngest child

in it. After this, defendant hit the complainant and put his hands around her neck. Defendant then

called the school and informed them that the children would be absent.

¶ 5. Upon further questioning by the State, the complainant clarified that after defendant

shoved her to the ground, he called the school. When asked where on her body defendant hit her, five times in the arm or the side or on her body. While striking her, defendant yelled that she was The complainant stated that it hurt when defendant hit her. When the State asked the complainant if defendant hit her in the ribs before or after the children went to their rooms, She testified that defendant put his hands around her neck after she put the children in their rooms.

¶ 6. Defendant did not present any evidence. He moved for a judgment of acquittal under Vermont Rule of Criminal Procedure 29 at the close of the evidence, asserting in relevant part that the two us, that there should be only one charge. Defendant maintained that there was no evidence to show any break in time between the charged acts of striking the complainant in the ribs and arm. The State responded that this argument could be addressed after the case went to the jury.

¶ 7. The court denied motion as to the counts at issue here, although it reduced the aggravated domestic assault charge for allegedly striking the complainant in the ribs to a misdemeanor charge of domestic assault. 2 The court also proposed a special verdict sheet to avoid confusion. The special verdict sheet asked the jury to determine if it found defendant guilty of both domestic assault charges if there was Neither party objected to this instruction. The jury found defendant guilty of both domestic assault charges and it found that two separate assaults occurred. Defendant renewed his Rule 29 motion, which the court denied. This appeal followed.

¶ 8. On appeal, defendant reiterates his argument that the domestic assault charges were

part of a single, continuous assault and that his two convictions therefore violate the Double

Jeopardy Clause. He asserts that there was no sufficient to allow him to form

a new intent to assault the complainant. In support of this argument, defendant points to the

ent, in its discussion with the trial court,

that the counts might be the same. Defendant asserts that to allow both counts to go to the jury.

¶ 9. We review the trial a motion for a judgment of acquittal to

determine if 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 State v. Delisle, 162 Vt. 293, 307, 648 A.2d 632,

641 (1994) (quotation and alterations omitted). We review legal questions de novo. State v.

Neisner, 2010 VT 112, ¶ 11, 189 Vt. 160, 16 A.3d 597. As set forth below, we conclude that there

was no Double Jeopardy violation here. A reasonable jury could find, based on the evidence, that

defendant committed two separate acts of domestic assault.

¶ 10. As we have explained, [t]he Double Jeopardy Clause safeguards a criminal

defendant from facing multiple Id.; see also U.S. Const.

. Among other things, the Double Jeopardy Clause prohibits the State

from Spencer v. State,

868 A.2d 821, 822 (Del. 2005). This is Id.

at 823.

¶ 11. There is no bright- for determining multiplicity-doctrine violations. Id.

- if defendants actions are

sufficiently separate in time and location to constitute distinct acts Id. In conducting this

analysis, we have looked to:

geographic location; whether an intervening event occurred between

successive pa sufficient time for reflection between assaultive acts for the

defendant to again commit himself.

State v. Fuller, 168 Vt. 396, 400, 721 A.2d 475, 479 (1998). he critical inquiry is whether the

temporal and spatial separation between the acts supports a factual finding that the defendant

formed a separate intent to commit each criminal act. Spencer, 868 A.2d at 823; see also Fuller,

168 Vt. at 400, 721 A.2d at 479 (considering, as most importan sufficient time between the commission of the two acts to reflect upon what he was doing and to

.

¶ 12. In Fuller, we considered continuous sexual assault rather than two separate sexual acts. The defendant there forced his

stepson to drink alcohol, followed the child into a bedroom, and began masturbating in front of

him. The child tried to escape but the defendant grabbed him eventually escaped and

ran into the living room. The defendant followed him, threw the child onto a couch, and again

placed his mouth on the child

¶ 13. Applying the factors cited above, we concluded that two sexual assaults occurred.

Fuller, 168 Vt. at 400, 721 A.2d at 480. We reasoned that while the defenda bedroom and the living room was close in time, there was an intervening event between the two

acts escape from [the] defendant and his flight from the bedroom into the

Id. at 400, 721 A.2d at 479. As noted above, we found it most significant that the

defendant had sufficient time between the commission of the two acts to reflect upon what he

was doing and to recommit himself to sexually assaulting the child [who] had escaped. Id.

¶ 14. In reaching our conclusion, we distinguished State v. Perrillo, 162 Vt. 566, 649

A.2d 1031 (1994). In Perrillo, the defendant carried his victim to a couch where, over the course

of several minutes, he touched her chest and genitals. Id. at 567, 649 A.2d at 1032. The defendant

was charged with two counts of lewd or lascivious conduct with a child

genitals and the second for rubbing her chest. We reversed and remanded for a new trial,

concluding that the evidence supported only one charge. We reasoned that because episode of sexual misconduct ordinarily involves the wrongdoer touching the victim more than

exponentially depending on the number of touches involved in a single episode of sexu Id. at 567-68, 649 A.2d at 1032. We observed that the charge at issue Id. at 568, 649 A.2d at 1032.

¶ 15. The Fuller Court distinguished Perrillo because the in that case

and there was no evidence suggesting any time between touches for [the defendant] to reflect on

his conduct and recommit himself to abusing the victim, thereby making it more likely that his

Fuller, 168 Vt. at 401, 721 A.2d at 480.

¶ 16. Considering the evidence in the instant case in the light most favorable to the State,

we conclude that the alleged acts could be charged as separate and distinct offenses. While the

alleged acts happened close in time and in the same geographic location, they were interrupted.

The complainant left the kitchen, took a highchair to a bedroom, and then placed a child in the

highchair. During this time, defendant called the school. This interval provided defendant

Id.; see

also State v. Garnett, 298 S.W.3d 919, 923 (Mo. Ct. App. 2009) (recognizing that

cases, separate offenses can arise from a single set of facts each time the defendant forms an intent

separated by time con . The complainant did not

kitchen

State v. Carrolton, 2011 VT 131, ¶ 13, 191 Vt. 68, 39 A.3d 705

(quotation omitted); see also Missouri v. Burns, 478 S.W.3d 520 (Mo. Ct. App. 2015) (concluding

time to reconsi . The State did not concede, as defendant suggests, that there was only one assault at issue here.

¶ 17. It is elemental that

simply because there is only State v. Kleckner,

867 N.W.2d 273, 281 (Neb. 2015), overruled on other grounds by State v. Thalken, 911 N.W.2d

562 (Neb. 2018). As set forth above, t ction

long enough to infer that the defendant stopped, reconsidered his or her actions, and then launched

Id. Based on the evidence presented in this case, the court could properly send

both counts to the jury, and the jury could reasonably find, as it did, that there were two separate

¶ 18. Finally, defendant argues that the court committed plain error in instructing the jury

on the domestic-assault counts. According to defendant, there was no evidentiary support for two

misdemeanor convictions and the court misstated the law by failing to set forth the law of Fuller

in its special jury verdict form. We have We

similarly reject his plain-error argument as to the special verdict form.

¶ 19. As we have explained,

Four factors guide our plain error analysis: (1) there must be an error; (2) the error must be obvious; (3) the error must affect substantial rights and result in prejudice to the defendant; and (4) we must correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. When reviewing possible error in a jury instruction, we examine the instructions in light of the record evidence as a whole and determine if any error would result in a miscarriage of justice. Moreover, we review the instructions in their entirety. If the charge as a whole is not misleading, there is no plain error. This is a very high bar we find plain error only in rare and extraordinary cases.

State v. Herrick, 2011 VT 94, ¶ 18, 190 Vt. 292, 30 A.3d 1285 (citations omitted). This is not one

where plain error exists. Id.

¶ 20. The instructions, viewed in their entirety, were not misleading. The court properly

instructed the jury as to the elements of each domestic-assault count. To convict defendant on the

first count, the jury was required to find that defendant intentionally caused the complainant bodily

injury by repeatedly striking her in the ribs. To convict on the second count, the jury had to find

that defendant intentionally caused the complainant bodily injury by striking her arm. The jury

found, as a matter of fact, that defendant possessed the requisite criminal intent as to each charge

and that he committed the acts in question.

¶ 21. The special verdict form was drafted to respond to the concern that defendant

expressed at trial. Defendant argued that there was one continuous assault because the evidence

the charged acts. He asserted that he could strike the

complainant in the arm and rib at the same time and he maintained that this is what the evidence

showed. The State took the position that this issue could be decided after the case went to the jury

a e court asked if the parties wanted a special

interrogatory to ask the jury parties could

. Defendant stated that he did not

want such an instruction. Ultimately, and without objection, the jury was asked to decide if it

found defendant guilty of the two domestic-assault charges

¶ 22. Defendant of Fuller the court should have asked the jury to make findings as to

the factors discussed above. Citing State v. Rounds, 2011 VT 39, ¶ 32, 2189 Vt. 447, 2 A.3d 477,

d and it therefore follows that he was

harmed. This is not the standard set forth in Rounds. See id the jury instruction misstated the law and in so doing permitted the jury to infer an element of the crime based on a lower standard than the statute demands Beyond a

generalized assertion, defendant does not explain how the failure to include all of the Fuller factors

in the special jury verdict form affected his substantial rights and resulted in prejudice to him.

¶ 23. In any event, the special verdict form, while not setting forth all of the Fuller factors,

encompassed a key component of several different factors, namely whether time elapsed between

and implicitly, given the testimony in this case, whether

. As noted

above, the complainant testified that she left the kitchen at one point and she stated that some of

the hitting occurr The jury rejected the notion

or sequence. Continuous, Merriam-Webster Online Dictionary, Merriam-Webster.com

[https://perma.cc/BHY5-UD9L]. Instead, it found a separation of time between the charged acts.

In light of the instructions as a whole, and given that the jury explicitly considered the temporal

question, we find no plain error.

Affirmed.

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FOR THE COURT:

Associate Justice