EVIDENCE/TRIAL/JURY

MIRANDA/CONFESSION

State v. Mumley, 2009 VT 48.

Reversal of Judge Kupersmith's denial of a motion to suppress statements. The officer had the defendant in custody for an alleged attempted kidnapping. He read the Miranda rights to defendant, who answered yes to the questions "do you understand?" But the cop failed to read the sentence, "I understand that I am waiving my right to be represented by an attorney…." And the defendant never signed the form. He made some incriminating statements. Judge Kupersmith denied the challenge to the admission of the statements, finding a valid implicit waiver, "assuming that the court finds" the defendant had the requisite experience, etc. to understand the nature of the rights and the consequences of waiving them. He also found that the videotaping of the interrogation constituted a record for purposes of 13 VSA 5237- requiring a waiver of counsel to be in writing or other record. VSC ruled that Kupersmith failed to consider the factors required by State v. Malinowski,148 Vt. 517, 518-20 and by 13 VSA 5237 such as defendant's age, experience, education, background, intelligence, capacity to understand the warnings and the consequences of a waiver, familiarity with the English language and the complexity of the crime involved. The error was not harmless as the state used the statements against him to discredit his defense. The Court did not address the issue of whether the videotape could constitute a record for waiver of counsel under sec. 5237. Reversed.

VIOLATIONS OF CONDITIONS OF RELEASE

In re Miller, 2007-254, 2009 VT 36. April 3, 2009.

Interpreting 13 V.S.A. § 7559(d), relating to failures to appear "in connection with a prosecution," the Court held that the subsection is meant to punish only "failures to appear in court—or at other proceedings that directly advance a pending prosecution." The Court made clear that § 7559(d) does not punish mere failures to report to a police station for an alcohol test or other violations of conditions of release. These later types of violations are subject, instead, to 13 V.S.A. § 7559(e), which punishes conduct less severely. This decision effectively halts prosecutorial overcharging of violations of conditions of release not related to court appearances.

SEARCH & SEIZURE/TRIAL/RECORD RECONSTRUCTION/JURY INSTRUCTIONS

State v. Bain, 2009 VT 34.

Appeal of suppression motion where court could not transcribe suppression hearing record for appeal due to mislaid CDs. Defendant claims that record was inadequate as reconstructed and lacked details advantageous to defendant's claim on appeal of denial of suppression motion. Court holds that V.R.A.P. 10 governs recreation of the record and requires, despite permissive language, that defendant prepare a statement of the evidence. Here defendant was ordered by the trial court to prepare such a statement but did not, and a defendant who does not seek preparation of a substitute statement of trial proceedings forfeits any claim that he or she is prejudiced by the absence of a transcript. Any testimony missing from the record was deemed a result of defendant's lack of participation in the reconstruction process. Affirmed.

SPEEDY TRIAL/SUFFICIENCY OF THE EVIDENCE

State v. Vargas, 2009 VT 31 (mem.).

The only really important part of this decision is found in the first footnote where the Court points out that it was reversed in Vermont v. Brillon by the Supreme Court of the Untied States on the ground that the Court improperly counted delay attributable to the defendant's public defenders against the State for purposes of evaluating the defendant's speedy trial claim **but in "all other respects, State v. Brillon remains good law"!** Affirmed.

DISORDERLY CONDUCT/FIRST AMENDMENT

State v. Colby, 2009 VT 28.

Court unanimously dismissed charges of disorderly conduct under 13 VSA § 1026(4) (w/o lawful authority disturbs any lawful assembly or meeting of persons). At a commencement ceremony at St. Johnsbury Academy, where U.S. Director of Intelligence John Negroponte delivered a speech, Appellant yelled out "[Negroponte] had blood on his hands" and invited the audience to walk out. The speech continued on. The Court held that the statute must be read narrowly to avoid First Amendment violations. The state must prove that Defendant's conduct "substantially impair[ed] the effective conduct of a meeting." Substantial impairment is assessed using an objective standard as to "the actual impact of that misconduct on the course of the meeting," reviewing "timing, duration or intensity." Because appellants' actions constituted de minimis disturbances it "cannot serve as the basis for criminal liability without running afoul of the First Amendment." Dismissed.

EVIDENCE

State v. Tester, 2009 VT 3

On appeal, the defendant challenged the admission of certain DNA evidence in a prosecution of sexual assault, on several grounds. While the Supreme Court finds error in admission of some of the DNA evidence, it finds that error harmless.

Defendant was charged with sexual assault following an evening at a campground where the 33 year old defendant befriended two fourteen year old girls. The three sat around the campsite drinking and talking. At some point they all end up in defendant's tent. While there were inconsistencies in the girl's stories as to what actually happened, both girls ultimately claimed that defendant had sexual intercourse with one of the girls. (The "other" girl admitted that she thought they were having sex but couldn't actually see them having sex because it was dark, and the complainant said that while she could not recall feeling the defendant's penis inside of her, she did experience pain when he removed it from her.) After the girls left the tent, they encountered another woman camping at the campgrounds, who claimed the shaken, crying and intoxicated girls told her that the defendant had had sex with the complainant.

Complainant goes to hospital and has sexual assault examination. DNA testing done on swab taken from inside her vagina, showed a mixture of male and female DNA. The sample could only generate a partial profile and was "consistent with that of the defendant's." While the defendant could not be excluded, because of the partial profile, the chemist did not determine a statistical significance of the match. The swab of her "external genital area" contained male DNA. From the DNA profile generated from the external swab, the chemist testified that he could perform a full statistical analysis and that the probability of a randomly selected unrelated individual having the same DNA profile as the one generated was one generated was one in twenty-two quadrillion. With the test results, the lab did not disclose any error rates.

First point of significance…Relying heavily on two reports generated by the National Research Council (NRC) published in the 90's, the Supreme Court "adopts the recommendation of the NRC and hold(s) that the laboratory error rate, to the extent it can be known, goes to the weight of the statistical match evidence and not to its admissibility."

Second point…Pursuant to VRE 702, the Court holds that it was error to admit the DNA evidence concerning the internal vaginal swab because the chemist could not give a statistical match probability for the sample. (The Court specifically endorses the holdings of People v. Coy, 620 N.W.2d 888 (Mich. Ct. App. 2000) and Peters v. State, 18 P.3d 1224 (Alaska Ct. App. 2001).)

Third point…While the Court holds that probability statistics are required under VRE 702 for DNA evidence to be admissible, the Court also recognizes that there may be some situations, as

other courts have held, where lack of probability statistics may not bar admission of DNA evidence: 1) where there is testimony of a match and its qualitative significance; 2) where the probability of the identification of a different person is so statistically remote; and 3) where DNA evidence is being used to exclude an identification.

Fourth point…While the court concludes that "in the circumstances of this case, the admission of DNA match evidence, without additional evidence of the frequency with which such matches might occur by chance, is error", the error is harmless. While the Court found that it is a close call, it found that the remaining evidence was strong, the strength of the erroneously admitted evidence was limited, and the defendant vigorously attacked the DNA evidence through expert testimony (way to go Trudy Miller) sending the message to the jury that it should cautiously rely on the DNA evidence, if at all.

EVIDENCE

State v. Johnson, 2008 VT 135

Vermont Supreme Court to reverse a conviction for domestic assault! In a case where the defendant did not testify, and therefore did not place his credibility in issue, the state may not introduce the defendant's exculpatory statements for the sole purpose of impeaching them. Judge Joseph had permitted the state to introduce statements that the defendant made denying that he had kicked his wife, and then impeach the statements with the defendant's subsequent 911 call and statements to the police.

COMPETENCY/EVIDENCE/LESSER INCLUDED OFFENSES

State v. Beaudoin, 2008 VT 133.

Over the dissents of Justices Johnson and Skoglund, Court upholds trial court's findings regarding competency of mentally retarded man. State's expert found defendant competent to stand trial. Defendant's expert found him incompetent. Trial court credited State's expert's findings. Initial competency determination was upheld as supported by findings that were not clearly erroneous.

Although the trial court's competency ruling noted that defendant had impaired cognitive functioning and memory, and that State's own expert recognized a "need for accommodation" at trial, Court holds that accommodations were not mandatory but advisory. In any event, trial court's regularly halting proceedings during trial and pre-trial proceedings to summarize in plain language for the defendant the testimony of witnesses, together with corresponding opportunities for defendant to consult at length with counsel did in fact constitute accommodation.

Court further holds that defense attorney's regularly objecting to the competency determination during pre-trial motion hearings and at trial did not constitute a request for a new competency hearing and finding based on changed circumstances, and so the question of defendant's competency was reviewed for plain error. To preserve the issue on appeal, a request for a new competency hearing should be made during pre-trial or trial proceedings based on an assertion of changed circumstances, which would undermine the initial finding.

The offense of prohibited act of engaging in lewdness is not a lesser included of the charged offense of felony lewd and lascivious conduct with a child. Affirmed.

EVIDENCE/TRIAL/JURY DRAW/RIGHT TO TESTIFY

State v. Lee, 2008 VT 128.

Court holds that videotape of defendant in holding cell at time of DUI arrest played to jury for purpose of showing his state of intoxication was not admitted in error as infringing on defendant's right to remain silent because the tape was admitted only for the purpose of showing intoxication and it was not clear that jury would have viewed defendant's conduct in refusing to

respond to police statements on the tape as an invocation of the right to remain silent, as opposed to merely "a pause in his belligerent obscenities." The prosecutor did not comment on defendant's silence on the tape in closing, a fact the Court found significant, given the purpose of the evidence at issue.

Court further holds that any possibility that there was an improper influence on the jury verdict due to the exposure of one juror to an image of defendant in shackles was cured by court's dismissal of that juror and canvassing of remaining jurors to assure no improper influence due to the image.

Defendant lastly argued that he did not waive his right to testify on his own behalf and such a finding cannot be supported from a record silent on the issue and without a waiver accomplished through colloquy with the court. Court reaffirms that defendant has a right to testify but must assert that right and cannot now claim that his right to testify was in any way burdened by the trial court, which the Court holds does not have a duty to conduct a colloquy on defendant's choice not to testify, as this decision is best made tactically by defendant with the advice of counsel. Affirmed.

PLEAS/TRIAL/EVIDENCE/IMPEACHMENT

State v. Amidon, 2008 VT 122.

Under V.R.Cr.P. 11(e)(5)(C) and V.R.E. 410, where statements made in the course of plea proceedings are not admissible in another criminal or civil proceeding, the Court held that a defendant's statements made during a PSI after a change of plea but before it was accepted by the trial court are not admissible for purposes of impeachment. During his PSI, Amidon admitted to committing sexual assault. Upon reviewing the PSI, the trial court rejected the proposed deal and defendant withdrew his plea. At the subsequent trial, the court ruled that the state could use incriminating PSI statements against defendant for impeachment purposes should he testify. Amidon, who did not testify, was convicted by a jury. The Supreme Court reversed the conviction, holding that the plain language and drafters' intent of the rules did not include an impeachment exception to the general inadmissibility rule governing statements made in the course of plea proceedings. To hold otherwise would "have a chilling effect on plea negotiations." Reversed.

MIRANDA

State v. Fleurie, 2008 VT 118.

Robbery suspect interrogated at his home and later at police station. He was read his Miranda rights once brought to police station, but not before. Before trial, he moved to suppress all statements made at his home and those made later at police station. He was found to be "In custody" at his home and because law enforcement did not provide Miranda warning, any statements he made there were suppressed. Trial court did not suppress statements made at police station. (He did not actually confess to robbery until at the police station.)

The Vermont Supreme Court considers in detail the United Supreme Court decisions in Oregon v. Elstad, 470 U.S. 298 (1985) (unwarned admission suppressed but admissibility of subsequent statement turns on whether they were knowingly and voluntarily made) and Missouri v. Seibert, 542 U.S. 600 (2004), (where question-first strategy undermines Miranda) two cases where defendants received Miranda warnings only after police had already begun questioning. The Court notes that since there was no majority opinion in Seibert, it must first decide which opinion is controlling and since Justice Kennedy's concurrence is "narrower than the plurality" it wins. Under Justice Kennedy's test, the threshold inquiry is whether the police intentionally withheld Miranda warnings to circumvent protections. "If warnings were not intentionally withheld, both Kennedy and the Seibert plurality would apply the Elstad framework." The Court then finds that the interrogation in this case, while a two-step interrogation, was materially different than those in either Elstad and Seibert. (Not as brief and innocuous as Elstad and not as deliberate and intense as

Seibert.) So the Court looks to both cases and finds there is substantial overlap and concludes that the warned confession in this case was admissible under Elstad and Seibert because the Miranda warnings defendant received functioned effectively, and the defendant's waiver of those rights was voluntary. Affirmed.

TRIAL/CONFRONTATION CLAUSE

State v. Shea, 2008 VT 114.

In response to an alleged domestic assault, police arrive at a private residence minutes after the asserted incident and after defendant had reportedly fled the scene. The Court upheld findings that the complainant's statements were nontestimonial and; therefore, not subject to the confrontation clause as they were given in an emergency situation and the primary purpose of the cop's questions was to resolve the emergency.

When determining whether an out-of-court statement is testimonial two elements should be considered: (1) whether the emergency involved is ongoing; and (2) what is the police officer's purpose in prompting the hearsay statement. For the first element, the Court considered whether defendant was at large and may return and whether the victim or the officer is in danger due to a medical emergency or because the defendant poses a threat. In considering the second element, the Court determined whether the questions helped to resolve an emergency or served to acquire evidence for a later prosecution. The level of formality of the interrogation and the spontaneity of the declarant's statement also provides evidence of the purpose behind the officer's questioning.

The Court has shifted confrontation clause analysis to rest entirely on the perspective of the cop/questioner. This is in direct conflict with Davis, which held "it is in the final analysis the declarant's statements, not the interrogator's questions that the Confrontation Clause requires us to evaluate." The decision also misplaces focus on public safety (i.e. whether an emergency is ongoing is now from the standpoint of the level of injury to a crime victim or officer) treating confrontation clause analysis as some form of balancing of procedural rights of defendants against the protection of the public when Crawford does away with this type of balancing of interests analysis. Affirmed.

JUVENILE TRANSFER

State v. Jonas Dixon, 2008 VT 112.

Justice Reiber, writing for an unanimous Court, reversed and remanded on interlocutory appeal the district court's order denying Jonas Dixon's transfer request to juvenile court in a case involving 2d degree murder. This is the first case where the Supremes have found the trial court to have abused its discretion in refusing to transfer a criminal case to juvenile court. The Court found error in the lower court's failure to give any weight to the "factual backdrop to defendant's actions," which included his inability to control any of the escalating events at home or the fact that there was a DCF "system breakdown" against the defendant. The Court held that failure to consider these factors goes against the special status accorded juvenile cases by the Legislature under 33 V.S.A. 5501.

The Court also rejected concerns that transfer would hamper the ability of the public to follow the case through the judicial system. "This was not a proper consideration and was not entitled to independent weight as a matter of law. The Legislature has determined that a primary purpose of the juvenile court system is to project juveniles from the 'taint of criminality' that inevitably results from the publicity and permanence of convictions in the district court." The Court, rejecting the district court's consideration of all non-Kent factors, also rejected the court's analysis of some of the Kent factors, including whether there was prospective merit to the complaint. Dismissing this factor has not having much, if any, dispositive weight, the Court found this issue to have already been decided by the district court's finding of probable cause for the charge. Additionally, "requiring an evaluation of defenses at such an early state of prosecution, seems to us

rather unwieldy; it would seem to require a mini-trial at a stage of the proceedings when the defense might be well-served not to reveal its hand."

EVIDENCE/V.R.Cr.P. 404(b) CONTEXT EVIDENCE/HEARSAY
State v. Leroux, 2008 VT 104.

Court upheld admissibility of 404 (b) context evidence of defendant's other acts committed during the act charged, along with evidence that defendant had previously kicked complainant, put dog collar on her neck, locked her out of house, mockingly referred to her as a virgin and kept her social security check for his own use.

Although the acts encompassed a range of behavior beyond sexual assault, they showed a pattern of abuse and oppression probative to explain the context of the relationship, helped the jury understand the circumstances surrounding the sexual assault and were relevant to prove an "act of criminal domination." Affirmed.

PUBLIC RECORDS/MEDIA ACCESS TAPES OF SUPPRESSION HEARING/MOOT
State v. Rooney, 2008 VT 102.

The media appealed the trial court decisions denying the media access to audio and video exhibits admitted in Rooney's suppression hearing, which was not closed to the public. After Rooney's conviction, the trial court vacated its prior decision denying the media access to the exhibits. The Supreme Court determined that the media's appeal for access to the exhibits was moot and would not be reviewed on the merits as it did not fall within exception to the mootness doctrine. The Court determined that the trial court's order sealing the record provided sufficient time for expedited review on appeal, but the media delayed actions in requesting such review. Additionally, the case was highly fact specific unlikely to be duplicated in the future and any analysis would not affect future media-access controversies as the facts would presumably be substantially different there. Appeal dismissed.

EVIDENCE/SUFFICIENCY/HEARSAY/V.R.E. 403/JURY INQUIRIES/JURY INSTRUCTIONS
State v. Brunelle, 2008 VT 87.

Defendant charged with aiding and abetting retail theft for working in concert with his girlfriend and a store cashier to take items without paying.

Anonymous calls tipping off the store to the thefts were admitted over hearsay objection. Court holds the statements are not hearsay because offered to show the subsequent conduct of the person who heard them. Here, they were offered to show why the store was monitoring the cashier. The statement that defendant would avoid being caught on video did not fit this exception, but Court holds that it was brought out by defendant on cross-examination and thus defendant cannot now object. The probative value outweighed any prejudicial effect, a finding the Court would not disturb because the evidence was of limited value in proving guilt and was cumulative to other evidence directly implicating defendant.

Defendant argued that trial court committed plain error in summarizing for the jury certain portions of the cashier's testimony rather than reading from the transcript. Court holds that, while it does not condone speculation by the court as to the contents of testimony, it was not objected to and did not rise to the level of plain error because, although inaccurate, the court's summary was partially accurate and not glaring error. Affirmed.

PRIOR BAD ACTS
State v. Laprade, 2008 VT 83.

This is an appeal from a conviction of first-degree aggravated domestic assault. Court revisits Sander and Hendricks and finds the prior bad acts evidence admitted in this case were relevant to show context under the facts of the case. While the complaining witness did not directly recant her testimony about the charged conduct, "the jury might well have found [her] behavior – particularly her decision not to call the police herself when she repeatedly saw defendant near her apartment after the charged incident – incongruous or difficult to reconcile with her claim that defendant had recently broken into her apartment and strangled her. This is just the sort of incongruity that "context" evidence is meant to remedy in domestic-violence cases. The jury would have been unable to make an adequate determination of [her] credibility without hearing further testimony about the nature of her relationship with defendant." The court also found no error in admitting expert testimony on Battered Woman's Syndrome because the testimony was probative to explain the anomalies in the complaining witnesses' testimony at trial. Affirmed.

RIGHT TO COUNSEL: DNA DATA BANK

State v. Ritter, 2008 VT 72 (mem).

Similar to NTOs, a criminal defendant has no right to counsel, pursuant to the Vermont Public Defender Act, at a hearing held to contest the mandatory taking of a DNA sample. Affirmed.

ID/HEARSAY/CONFRONTATION CLAUSE/PROSECUTOR STATEMENTS

State v. Jackson, 2008 VT 71

Court finds no error in an in-court ID of defendant by a witness who had been unable to ID him before. Defendant waived a claim that a Wade hearing was required.

It was error to admit a statement as an excited utterance which was made after the event and showed reflective thought, but the error was harmless and not a Confrontation Clause violation. Defendant's argument that any restraint in the kidnapping charge was incidental to simple assault or extortion is rejected. The prosecutor's statements in opening weren't an expression of personal opinion and the statements in closing weren't error under State v. Lapham, 135 Vt. 393 (1977) as going beyond the evidence or proper inferences.

PRIOR INCONSISTENT STATEMENTS/V.R.E. 613/WITNESSES/CREDIBILITY COMMENTS

State v. Danforth, 2008 VT 69

Court rejects a claim that the Court should not have admitted a statement as evidence instead of just impeachment as not plain error. Defense counsel failed to lay a proper foundation for the admission of testimony about an inconsistent statement of a witness under V.R.E. 613 and the subsequent exclusion of the defense witness was not an abuse of discretion. Trooper did not vouch for credibility of witnesses where he described his methods of ensuring the accuracy of witness statements and that he had no reason to believe the statements were inaccurate because he was not testifying as an expert or giving his opinion that the witnesses were credible.

PRIOR BAD ACTS/JURY INSTRUCTIONS/JURY VERDICT QUESTIONS

State v. Jones, 2008 VT 67

Affirming conviction for second degree murder and domestic assault, the Court upheld the admission of prior bad acts evidence through testimony of five witnesses to show pattern and nature of abusive relationship with the decedent and to rebut anticipated defense theory of accidental death. Even though the defense did not present such a theory at trial, the Court held prior abuse was relevant to other issues. The Court held that when prior bad acts involve the same victim, the evidence serves the same purpose as an admission of intent to harm that particular victim rather than establishing propensity for violence. Having five witnesses testify at trial was not unduly prejudicial

given the lack of direct evidence in the case. The Supremes also held that the trial court's jury instruction on the decedent's vulnerability, that "[a]ny evidence that [she] may have been more susceptible to death or serious bodily injury due to the ingestion of alcohol or drugs is of no legal…significance on the element of causation," did not constitute a directed verdict as the jury was otherwise correctly instructed on the law of causation. Denial of defendant's request for special jury verdict questions was also upheld because there were already addressed by the proposed jury instructions.

TRESPASS/PRIVILEGED ENTRY/CUSTOM

State v. Cram, 2008 VT 55

Court reviewed whether evidence was sufficient to establish that defendant had knowledge that she was not licensed or privileged to enter a dwelling house, an element of trespass, where her car overheated in a rural area when she had her young daughter with her and she entered a residence to use a phone to obtain assistance. Court held that licensed entry requires consent while privileged entry is without consent. The knowledge requirement is subjective, which may be proven by the defendant's acts and other circumstantial evidence. Affirming the conviction below, the Court determined defendant's acts of driving her car to the garage, which was hidden from the road, entering without permission, walking past at least one phone before encountering the male adult homeowner, "beating feet" for the door and making no effort to use the phone when she encountered the homeowner, and possessing an old cracked ID card that looked like it may have been used to pry open a door, was sufficient circumstantial evidence that defendant knew she did not have privilege to enter the home. The Court dismissed defendant's argument that in Vermont there exists a custom of allowing stranded motorists in rural areas to enter homes to use telephones.

SPEEDY TRIAL

State v. Brillon, 2008 VT 50

The Court vacated defendant's convictions and dismissed his charges because of: a three-year delay in getting to trial; a significant part of the delay was attributable to the state (including the Defender General and the court); the defendant consistently demanded a trial and the defendant was prejudiced by the delay.

HEARSAY/CONFRONTATION/SUFFICIENCY

State v. Brink, 2008 VT 33 (mem.)

Defendant convicted of sexually assaulting his stepdaughter and enabling her consumption of alcohol. Defendant raised three issues on appeal: court erred in permitting the state to introduce complainant's statements to her boyfriend as prior consistent statements, court violated his confrontation rights by permitting complainant to provide a written accusation rather than oral testimony, and court erred in denying his motion for judgment of acquittal. Supreme Court declined to reach first issue where defendant failed to raise a timely objection as required by V.R.E. 103. While defendant objected to the prior statements admissions prior to trial, the court made only a preliminary ruling on defendant's motion to exclude the testimony, and defendant did not reassert the objection at trial. Court also found that allowing the complainant to write down what body part of the defendant touched what body part of the complainant instead of orally testifying to it, and then allowing the state to read what she wrote, did not violate the defendant's confrontation rights, likening the matter to Maryland v. Craig, where the Maryland Supreme Court upheld the statute that permitted testimony by alleged child abuse victims by one-way, closed circuit television. The court reasoned that the court required the complainant "to provide her testimony, including her written accusation, in full view and awareness of the defendant." Finally, Court found that court did not err

in denying his motion for judgment of acquittal because while the state's evidence was fraught with inconsistencies, was sufficient on the elements of the crimes.

JURY SELECTION/FIXED AND IMPLIED BIAS

State v. Sharrow, 2008 VT 24

Court affirmed decision to not strike a prospective juror for cause, where juror was a police officer for 25 years, had taught at the police academy for 13 years, was presently employed by the Colchester Police Department, and who knew several of the Burlington police officer witnesses to be called by the state. Where the officer-juror "unequivocally and confidently reaffirmed his intention and ability" to maintain impartiality, even though he admitted it would be "tough," there was no demonstrated fixed bias. No implied bias was found either as there is no "per se inability to impartially judge the testimony of the officer-witnesses," based on a juror's status as a "former teacher, an acquaintance, or member of the same profession as a witness."

HAIR ANALYSIS/HEARSAY/SUFFICIENCY OF THE EVIDENCE/CROSS-EXAMINATION

State v. Brochu, 2008 VT 21

Affirmance of an aggravated murder case where the defendant had a strong alibi. The Court rejects a claim that there was no proof of sexual assault basically saying the jury could have concluded that the sex was not consensual because there was evidence of her mutilation, although there was no proof of when the sex occurred. The Court allows restriction on defense cross-examination of a possible suspect and his weak alibi witness and the exclusion of the best alibi witness' opinion that Al Brochu could not have left his place of work for 24 minutes. Admission of the hair analysis was okay because it was accompanied by mtDNA analysis which is more reliable, but the Court ducks the question of whether the admission of any hair analysis was misleading where other possible donors were not tested. The defense was properly precluded from cross-examining on the victim's sex list of her many sexual partners as possible donors of hairs left at the scene. The defense was properly precluded from asking an officer what one of the victim's lovers had said about having oral sex with her, even though the lover had testified that if that was what the police had recorded, that was what he said.

SUFFICIENCY OF THE EVIDENCE/BURDEN-SHIFTING/DRUGS/ CHAIN OF CUSTODY

State v. McAllister, 2008 VT 3

A bad Skoglund opinion. J. Skoglund affirms a motion to suppress and a JOA motion. Defendant was strip-searched as she was coming into corrections, and they found pills in her vagina. She said they were her meds. She was charged with transportation of a regulated drug into a place of detention, and possession of a narcotic drug without a valid prescription.

1) The gap in the chain of custody of the drugs (which took a circuitous route to the crime lab and ended up in bag without her name on it) did not require exclusion of the drugs, as the chain was sufficiently reliable and established.

2) The evidence was sufficient to permit the jury to infer beyond a reasonable doubt that the defendant did not have a prescription for the drugs, where she transported them into the correctional center in her vagina, and resisted handing them over once they were discovered, and appeared to grind them in her hand. She never asserted that she had a prescription. Defense argued that it was the state's burden to prove she didn't have a valid prescription- and the court was shifting the burden unconstitutionally to the defense. J. Dooley and Johnson dissent- arguing that this is clear burden shifting. No one ever asked her if she had a valid prescription. The only way the Court can affirm is to shift the burden of proof to the defendant.

CONFRONTATION/JUROR TAINT/ID

State v. Mayo, 2008 VT 2

Defendant was convicted of aggravated assault and being a habitual offender. On appeal, defendant challenged these convictions on three grounds, claiming that the trial court erred by: (1) quashing his subpoena for recordings of telephone calls made by one of the State's witnesses from jail; (2) admitting what he describes as an unnecessarily suggestive photographic lineup, and allowing the victim to identify him in court; and (3) refusing to properly investigate allegations that the jury was tainted.

Supreme Court holds that quashing the subpoena for the recordings did not violate defendant's confrontation rights because the confrontation clause affords no protection to defendant in the context of a pretrial motion for discovery. Sixth Amendment confrontation right is a trial right. Defendant also argued that the quashing of the subpoena violated his due process rights. Reviewing the claim for plain error, the court found no such error. Court also found that the pretrial identification (the lineup) was not suggestive and there was no error in admitting the victim's in court identification. Finally, while the Court found that the court did not abuse its discretion in deciding not to hold an evidentiary hearing on the issue of juror taint, ultimately the Court found that the defendant waived this argument for failing to raise this claim before empanelment of the jury, raising it for the first time in his motion for new trial.

NEWLY DISCOVERED EVIDENCE & JURY INSTUCTIONS ON LESSER INCLUDED OFFENSE OF MANSLAUGHTER

State v. Schreiner, 2007 VT 138

Defendant was convicted of second degree murder following a jury trial. In the final days of the trial counsel received an unsolicited letter from an inmate in the state prison in Berlin, NH suggesting that his cousin may have been involved in the murder. The defendant moved for a continuance, to further investigate this allegation, but the motion was denied by the court. On appeal defendant argued the trial court erred in: (1) denying her motion for a continuance; (2) denying her an evidentiary hearing on her motion for a new trial; (3) denying her motion for a new trial; and (4) not including a manslaughter charge in the instructions given to the jury. The Supreme Court found no abuse of discretion in denying the motion for a continuance where the evidence presented to the court about the other possible perpetrator lacked the requisite showing of opportunity and some evidence connecting him to the charged crime as well as the concerns about prejudice to the deliberative function of the jury. Concerning the motion for new trial and the denial of defendant's request for an evidentiary hearing, the Supreme Court did find error in the trial court's finding that the motion was totally lacking in merit where the court relied on an unsworn report produced by an investigator from the Windham County State's Attorney's Office. However, the Court found that the motion should have been denied for other reasons, and therefore found no error in the denial of the motion.

On the issue of the lesser include offense, while defense counsel mentioned a voluntary manslaughter instruction during the jury charge, counsel failed to object on the record following the reading of the instructions to the jury without any voluntary manslaughter instruction. Reviewing the claim therefore for plain error, the Court found none where defendant could not establish that there was evidence to support the four elements of manslaughter; adequate provocation, inadequate time to cool off, actual provocation and actual failure to cool off.

JURY INSTRUCTIONS/UNANIMITY/DOUBLE JEOPARDY

State v. Prior, 2007 VT 1

Felony violation of relief from abuse order, attempted felony violation of relief from abuse order, and two violations of conditions of release. There was no plain error in the trial court's failure to instruct the jury that they must be unanimous as to whether the defendant had followed the victim, stalked the victim, or both. Where evidence relating to alternative theories under which a jury could convict is intertwined throughout the trial and defendant's defense did not distinguish between the theories, no plain error will be found.

The defendant's convictions for violating the abuse prevention order by following or stalking the victim, and for contempt for violating his condition of release by coming within 100 feet of the victim or her vehicle, did not violate Double Jeopardy. The elements of the two offenses are different: one required that the defendant have been subject to an abuse prevention order that prohibited following or stalking, and that he knew of that specific order, and that he engaged in conduct that rose to the level of following or stalking. The other required that the defendant have knowingly come within 100 feet of the victim's vehicle in violation of conditions of release known to him. In any event, the legislature clearly authorized multiple punishments in the VAPO statute.

RECKLESS ENDANGERMENT/AGGRAVATED DOM.VIO./OPERABILITY OF FIREARM

State v. Longley, 2007 VT 101

Reversing a reckless endangerment conviction, the Court held that the offense requires proof of operability of a firearm because an essential element requires the person be placed in *actual* danger. In contrast, aggravated domestic assault does not require imminent threat; therefore, a deadly weapon does not have to be loaded and operable. Prior abusive behavior of wife goes to context and is for admissible prior bad acts evidence of domestic violence.

L&L/SUBPOENA/COMPULSORY PROCESS/JURY INSTRUCTIONS/ HABITUAL/MINORS

State v. Rideout, 2007 VT 59A

CJ Reiber opinion. When Rideout was 16 he was convicted of four felonies: 2 B & Es, receiving stolen property & armed robbery. He was then convicted of three more felonies, one of which was a federal offense. He was then charged with 2 L&Ls on his daughter. He was charged under the habitual statute 13 VSA § 11 and convicted. He was sentenced to 20-50.

The Court holds that felonies in adult court committed by a minor are properly used for habitual enhancement and the sentence did not constitute cruel and unusual punishment. The Court notes that the defendant at 16 did not move for transfer to juvenile court.

Defense failed to show that a subpoena to his federal probation officer was material to the defense, so it was no violation of the Compulsory Process Clause.

The jury asked a question after 6 hours of deliberation. The question was could the jury have information as to whether the daughter's in court testimony was consistent with the statements made to CUSI. The court eventually gave them an instruction which said that they couldn't have any new evidence, but the statements of the witnesses were given to the defense who has a right to cross-examine the witnesses but is not required to do so and might not for practical reasons. The challenge to this instruction to the jury was sufficiently preserved but the Court finds no error.