Vermont Department of State's Attorneys

Vermont Criminal Law Month

March - April 2019

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

COURT REVIEWS FINDINGS REQUIRED IN SETTING BAIL

In re Rougeau, 2019 VT 18. BAIL: EXERCISE OF DISCRETION IN SETTING BAIL; EXPLICIT FINDING RE BAIL AMOUNT BEING LOWEST AMOUNT NECESSARY TO MITIGATE RISK OF FLIGHT; CONNECTION BETWEEN REASONABLE BASIS FOR BAIL AND ULTIMATE CONCLUSION; CONSIDERATION OF PUBLIC DEFENDER APPLICATION IN ASSESSING DEFENDANT'S FINANCIAL SITUATION. BAIL EXCEEDING MAXIMUM FINE THAT COULD BE IMPOSED.

Full court published opinion. Imposition of bail, and amount of bail ($100,000) affirmed. The defendant was charged with aggravated assault on a law enforcement officer by threatening with a deadly weapon; reckless endangerment; and interference with access to emergency services. 1) The trial court did not abuse its discretion in determining that the pretrial release of the defendant without the imposition of bail would not reasonably mitigate the risk that he might flee from prosecution. The court reasonably relied upon the seriousness of the offenses charged and the nature and circumstances giving rise to the charges and found that these override the other factors that would militate towards a lesser amount of bail or no bail. The court also found that the defendant's mental condition was unstable and that he was unreliable at the time of the incident, and had prior convictions for noncompliance with court orders, and a conviction for failure to appear, although it was fifteen years old. 2) The trial court is not required to make an explicit finding that the amount of bail imposed is the lowest amount necessary to reasonably mitigate the risk that the defendant might flee from prosecution, where the defendant has only argued that he poses no risk of flight, and he has not also argued that a lesser amount of bail would reasonably mitigate his risk of flight. 3) The trial court was not required to explicitly connect the factors that it has relied upon with its ultimate conclusion; rather, the court simply must set forth a "reasonable basis" for continuing the challenged condition of release. If the factors relied upon are a "reasonable basis" for continuing the condition imposed, then the court has done all that it must. 4) The court erred when it refused to consider the defendant's public-defender application

when requested to do so by the defendant, when assessing the defendant's financial resources and his ability to post bail. However, this error was harmless because the trial court accepted as true defense counsel's representation that the defendant was "not a person of means." Public defender applications must be taken into account when one party requests that the court do so, the opposing party does not object, and the court does not offer any reason for failing to do so. This simply means that the court must consider the information in the application when requested to do so and when there is no objection by the opposing party. The information in the application, as well as all the other information before the court, still must be analyzed to determine whether it is reliable and sufficient to prove what it is offered to show. A court considering a public-defender application will determine what weight to give it. It is appropriate for the court to take measures to verify the information where it is challenged. 5) The Court declines to rule that the maximum amount of bail imposed for a felony cannot exceed the maximum fine that could be imposed. If the Legislature had intended to change the law in this way, it would have done so explicitly, just as it has for misdemeanor charges. Skoglund, dissenting: interprets the new statutory language "flight from prosecution" to require judges to identify specific behaviors that demonstrate attempts to hide out, flee the jurisdiction, escape from custody, or some action that is specifically designed to avoid prosecution. (The majority opinion disagrees on this point, stating that the statute requires the court to foresee if such actions will occur, not look into the past to see if they have occurred). Also disagrees that the record supports the amount of bail imposed, given the defendant's family ties, employment, health issues, and his waiver of extradition to Vermont from New York, where he was being treated for his injuries. Robinson, dissenting: The amendment to the bail statute no longer requires the trial court to attempt to "ensure" the defendant's future appearance, merely to "mitigate the risk of flight." The court here recited the proper standard, and relied most heavily on two considerations specifically identified by the Legislature – the nature and circumstances of the offense charged and the accused's mental condition at the time of the alleged offenses. Although it is a close case, it is not possible to conclude that as a matter of law on this record the trial court exceeded its discretion in concluding that the defendant posed some risk of flight. Does not agree that the trial court's refusal to consider the defendant's public defender application was harmless error, because the court's conclusion on the basis of defense counsel's representation that the defendant was "not a person of means" did not satisfy the requirement that the court consider the defendant's finances and ability to post bail based on available information, in the face of an order for $100,000 bail. The court also erred in considering the fact that the defendant's mother owned a home, since there was no information about the value of the home, his mother's equity in it, or her willingness to encumber the home to post bail for the defendant. Finally, the court never indicated that the bail it set was the least restrictive condition that would reasonably mitigate the risk of flight, as the statute requires it to be. Doc. 2019-037, March 22, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op19-037.pdf

VRE 807 FOUND UNCONSTITUTIONAL – TRAUMA FROM TESTIMONY MUST BE FOUND TO A PREPONDERANCE OF THE EVIDENCE

State v. Bergquist, 2019 VT 17. Full court published opinion. CHILD HEARSAY STATEMENTS; SIGNIFICANT INDICIA OF RELIABILITY. EXCLUSION OF CUMULATIVE, IRRELEVANT, OR

COLLATERAL EVIDENCE. VRE 807 TESTIMONY: UNCONSTITUTIONAL STANDARD FOR WITNESS TRAUMA; HARMLESSNESS; RELIANCE ON CHILD'S THERAPIST; OPPORTUNITY TO CONSULT WITH COUNSEL DURING 807 TESTIMONY; ACCESS TO CHILD'S COUNSELING RECORDS. VOUCHING FOR CHILD: REFERENCE TO STUDIES OF ATTEMPTS TO COERCE ACCOUNTS OF SEXUAL ASSAULT; DESCRIPTION OF CHILD'S DEMEANOR DURING REPORT OF ASSAULTS.

Sexual assault of a minor affirmed. 1) The trial court did not err in finding that the victim's statements to a detective bore sufficient indicia of reliability to be admitted pursuant to 804a. This is despite the fact that the trial court had excluded the child's statement to her mother the night before as not bearing sufficient indicia of reliability. The trial court's finding implicitly rejected any claim that the statement to the detective had been irretrievably contaminated by the mother's questioning of the child the night before. 2) The trial court's rulings excluding testimony that the mother had admitted to various people having herself sexually abused the child in the past, and her subsequent inconsistent statements on this topic, were not prejudicial, to the extent that the objections were preserved at all, because the mother herself testified to these events or because testimony about her inconsistencies around the reporting of the event were collateral. 3) The court did not err in excluding a DCF evaluation of the family from five years earlier that concluded that the defendant was a stable and supportive factor in the family, as only remotely relevant if relevant at all. 4) The court did not err in limiting the defense access to a psychosexual evaluation of the mother that was done in connection with sexual assault charges against her. Relevant portions were disclosed; the remaining portions were not relevant to this case. 5) VRE 807 violates the U.S. Constitution's Confrontation Clause in that it permits a child to testify remotely, and out of sight of the defendant, upon a mere finding of a "substantial risk" of trauma affecting the child's ability to testify, when the constitutional standard is to a preponderance of the evidence. However, that does not require reversal in this case because the trial court's findings – that it was "highly likely" that the child would be unable to testify – did meet the constitutional standard. 6) The court did not err in relying upon testimony from the child's therapist in making a finding that in-court testimony would result in trauma to the child. 7) The defendant failed to show any plain error or prejudice from a claimed inability to consult with his attorney during the course of the recording of the child's 807 testimony. 8) The defendant failed to preserve his claim that the child's counseling records should have been disclosed to him in connection with the Rule 807 hearing, where he did not make any request for those records after the trial court made a preliminary ruling that they would proceed with a waiver of confidentiality limited to the subject of the hearing, and see what transpired after that. 9) There was no plain error where the State's expert testified concerning a study in which 91% of children resisted coercive questioning, although it was a close case. The expert explained that this was not a global statistic, but arose from a particular study, and was a logical response to the testimony of the defendant's expert who described research suggesting that children can be coerced to make false allegations. 10) There was also no error in the testimony of the examining physician that the child's disclosures were significant, clear and graphic, as this was not vouching for her credibility, but merely an explanation of why he refrained from questioning her about her history. Doc. 2017-282, March 22, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op17-281.pdf

DEFENDANT'S STATEMENTS WHILE IN CUSTODY WERE NOT THE PRODUCT OF INTERROGATION

State v. O'Neill, 2019 VT 19. MURDER: SUFFICIENCY OF THE EVIDENCE. CUSTODIAL INTERROGATION: NECESSITY OF INTERROGATION; INVOLUNTARINESS: ABSENCE OF STATE ACTION.

Aggravated murder affirmed. 1) The evidence was sufficient to support the jury's verdict where the defendant telephoned both a friend and her sister, and told them that she had shot the two victims; she admitted having killed them both while she was in police custody; there was no evidence that anyone else was in the house at the time; the defendant's DNA was found on the gun that killed the victims; the guns in the home, including the murder weapon, were stored on the upper floor where the defendant, who was upstairs that evening, would have had easy access to them; and the defendant was angry with one of the victims because he had broken off their engagement and was inflamed by his relationship with a neighbor, and was upset that he had beaten her. The nature of the wounds to that victim suggested that she had acted out of frustration with their failed romantic and sexual relationship and rage at his perceived infidelity. 2) The defendant's statements while in police custody were properly admitted because the police did not interrogate her. Her statements were all volunteered, often when she was alone in the police cruiser or at the police barracks. The occasional casual conversation with officers did not constitute interrogation. The court did not reach the issue whether holding someone in custody without questioning them for an extended period of time may under some circumstances be tantamount to custodial interrogation. This is not such a case. The elapsed time between the defendant's initial arrest and the formal questioning was around two and a half hours. 3) The totality of the circumstances – her high level of intoxication; the trauma of events; the absence of Miranda warnings; and her detention incommunicado despite requests for counsel, did not combine to render her statements involuntary under the Due Process Clause of the 14th Amendment of the US Constitution. The police did nothing to coerce her statements. Custody alone is not enough to demonstrate a coerced confession. A defendant does not have an immediate right to counsel upon arrest, and failure by police to immediately furnish counsel is not necessarily coercive, even where the suspect is mentally unstable. Finally, while prolonged incommunicado detention could in certain circumstances overbear a suspect's will, two and a half hours of detention during which officers gave the defendant water and tissues and allowed her to use the restroom, were not coercive. Given that this was a double-homicide case, in which the officers needed time to familiarize themselves with the facts before questioning the defendant, the delay here was not so excessive as to render the defendant's statements involuntary. Doc. 2017-307, March 29, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op17-307.pdf

INTERRUPTION IN ASSAULT JUSTIFIED TWO SEPARATE COUNTS

State v. Abel, 2019 VT 22. DOUBLE JEOPARDY: SEPARATE ACTS OF ASSAULT.

Full court opinion. Two counts of domestic assault affirmed. A reasonable jury could find, based on the evidence, that the defendant committed two separate acts of domestic assault, and therefore that two convictions were not barred by the Double Jeopardy Clause. The 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. While here 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, the defendant called the school. The interval provided the defendant sufficient time to reflect on his conduct and recommit himself to abusing the victim. The complainant testified, not that the hitting happened throughout, but that some was before the children were sent to their rooms and the complainant left the kitchen, and some was after. This break provided the defendant time to pause, reflect, and form a new criminal intent between the occurrences. 2) The failure to include all of the pertinent factors in making this determination in the special verdict form was not plain error. Given that the jury explicitly considered the temporal question, there was no plain error. Doc. 2017-362, March 29, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op17-362.pdf

INSUFFICIENT EVIDENCE OF PREJUDICE JUSTIFIED SUMMARY JUDGMENT FOR STATE IN PCR

In re James Burke, 2019 VT 28. POST-CONVICTION RELIEF: SUMMARY JUDGMENT; STANDARD FOR CLAIMS OF ATTORNEY CONFLICT OF INTEREST; SUFFICIENCY OF EVIDENCE OF ATTORNEY ERROR OR PREJUDICE; ATTORNEY-DEFENDANT ANIMOSITY; AMENDMENT OF PETITION.

Full court published opinion. Grant of summary judgment to the State in post-conviction relief matter affirmed. 1) The Court applied the Strickland standard to the claim of ineffective assistance of counsel, rather than the standard proposed by the petitioner to be applied where there is a claim of a conflict of interest, which does not require prejudice where there is a showing of an actual conflict of interest. The latter standard was not argued or presented before the PCR court, and in any event, the same conclusion is reached applying either standard. 2) Summary judgment was appropriate as to the claim that the petitioner's attorney failed to select a fair jury, where the petitioner failed to provide any legal argument against the PCR court's analysis or decision, and where his own expert did not identify the handling of the jury draw as falling below the professional standard or prejudicing the petitioner. 3) The petitioner claimed that his attorney was ineffective for failing to argue for an instruction on voluntary intoxication or diminished capacity and failing to employ forensic-toxicology experts. There was no evidence that these alleged failures prejudiced the petitioner, and the results of any opinion or report were, as the PCR court found, highly speculative at best. The petitioner's trial attorney testified that there was no indication that the petitioner was intoxicated to the point that he didn't know what was going on. 4) The petitioner argued that the personal conflict and animosity which resulted in an overall lack of communication between him and his attorney constituted ineffective assistance of counsel. The trial record shows that the petitioner's attorney provided an adequate defense. Nor was there a showing that a breakdown in communication prejudiced the petitioner. The Court adopts a four-prong test in determining whether a complete breakdown in communication resulted in ineffective assistance of counsel: a) whether the petitioner made a timely motion requesting new counsel or leave to proceed pro se; b) whether the trial court adequately inquired into the matter; c) whether the conflict was so great that it resulted in a

total lack of communication preventing an adequate defense; and d) whether the petitioner substantially and unjustifiably contributed to the breakdown in communication. All of these prongs favor affirming the PCR court's decision, most critically, the fact that the petitioner's own behavior was the primary cause of the breakdown in communications. 4) Trial counsel's failure to introduce certain evidence at trial was not ineffective assistance where the petitioner's expert concluded that it was not; or where it involved evidence that had been ruled inadmissible by the trial court. 5) The PCR court denied the petitioner's motion to amend his petition. V.R.Cr.P. 15, concerning amendments of pleading, applies here. It provides that where a pleading is one, such as a PCR, to which no responsive pleading is permitted, the pleading may be amended after 21 days after service only by leave of the court, which shall be freely given when justice so requires. At the time of the proposed amendment, after three years of litigation surrounding the PCR, nearly one hundred motions in the PCR litigation itself, hours of depositions, and hours more spent interpreting and responding to the petitioner's extensive motion practice, permitting amendment and thereby requiring the State to determine the exact nature of the proposed changes and then respond to those changes would impose an undue burden on the State and result in further delay in this already extended litigation. Nor can it be said that the proposed amendment was not obviously frivolous nor made as a dilatory maneuver in bad faith. The motion did not indicate any reason why justice required the amendment at this late stage in litigation. Doc. 2017-261, April 19, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op17-261.pdf

Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

The precedential value of decisions of three-justice panels of the Vermont Supreme Court is governed by V.R.A.P. 33.1(c), which states that such decisions "may be cited as persuasive authority but shall not be considered as controlling precedent." Such decisions are controlling "with respect to issues of claim preclusion, issue preclusion, law of the case, and similar issues involving the parties or facts of the case in which the decision was issued."

SEVERANCE OF TWO DEFENDANTS FOR TRIAL PROPERLY DENIED

State v. Collette, three-justice entry order. SEVERANCE: PREJUDICE FROM JOINDER OF CO-DEFENDANTS. OBSTRUCTION OF JUSTICE: SUFFICIENCY OF THE EVIDENCE – FAMILIAL RELATIONSHIP AS EVIDENCE OF KNOWLEDGE.

Obstruction of justice, disorderly conduct, simple assault, and simple assault by menace, affirmed. 1) The trial court did not commit plain error when it denied the defendant's motion to sever his trial from that of his co-defendant. The charged offenses appeared to concern a common scheme and were closely connected in time and place. The defendant's specific claim of prejudice is made for the first time on appeal, and in any event the inference the State asked the jury to make (the claim of prejudice) could have been made whether the co-defendants had been joined for trial or not. 2) Nor did the trial court err in denying the defendant's motion for

judgment of acquittal, made on the grounds of insufficient evidence that the defendant was aware of the judicial proceeding which he was accused of obstructing. The trial court properly took account of the defendant's familial relationship with a person involved in that proceeding, along with other evidence, in determining that there was sufficient circumstantial evidence that he was aware of it. Doc. 2018-039, March 8, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-039_0.pdf

LOST EVIDENCE DIDN'T JUSTIFY REVERSAL

State v. Senese, three-justice entry order. STIPULATION TO JUDGMENT IN CIVIL SUSPENSION PROCEEDING: WAIVER OF CHALLENGE TO PRETRIAL RULINGS. LOST EVIDENCE: NO BAD FAITH AND LIMITED PREJUDICE.

Civil suspension affirmed. 1) When the defendant stipulated to final judgment in the suspension proceeding, she waived her right to challenge a pretrial ruling. There is no provision for entry of a conditional plea in a civil suspension matter, and even if the criminal rule applied, the defendant did not obtain approval of the court and consent of the State, as required by V.R.Cr.P. 11(a)(2). 2) In any event, the trial court did not abuse its discretion in refusing to suppress evidence concerning the defendant's DUI processing after the State lost the videotape of that proceeding, where there was no bad faith on the part of the State, and the videotape would have been of limited importance in the case. Doc. 2018-188, March 8, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-188.pdf

FINDING THAT ABSENCES WERE UNJUSTIFIED IN TRUANCY CASE AFFIRMED DESPITE PARENT'S CLAIM OF MEDICAL NECESSITY

In re S.D., three-justice entry order. OBJECTION TO FOUNDATION FOR BUSINESS RECORDS: WAIVER. ERRONEOUS ADMISSION OF EVIDENCE: OTHER EVIDENCE ON SAME POINT. JUDICIAL QUESTIONING OF WITNESS. UNJUSTIFIED ABSENCES: SUFFICIENCY OF THE EVIDENCE.

CHINS finding based on habitual truancy affirmed. 1) The juvenile waived her objection to the admission of school attendance records as lacking foundation where after the objection the court asked several additional foundational questions, then asked if there were any further objections, and no further objection was made. 2) In any event, there was no plain error in the admission of the records where other evidence, the mother's testimony, established the absences as well. 3) The trial court's asking of several foundational questions concerning the school records was not an abuse of discretion and did not amount to advocacy. 4) The evidence supported the trial court's finding that the absences were unjustified, where it determined that the explanations provided by the mother and the juvenile were not weighty enough on their own, without medical testimony, to find that the absences were for justifiable medical reasons. Doc. 2018-373, March 8, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-373.pdf

CHALLENGE TO UNDERLYING CONDITIONS IN VIOLATION OF CONDITIONS CASE WAS UNTIMELY

State v. Baird, three-justice entry order. CHALLENGE TO CONDITIONS OF RELEASE: TIMELINESS. SENTENCING: TRIAL COURT'S DISCRETION.

DUI injury resulting, and violation of conditions of release, affirmed. 1) The defendant's challenge to his VCR convictions for possessing alcohol, on the grounds that he is an alcoholic and therefore incapable of controlling his use of alcohol, would not be considered where he failed to challenge the condition when it was imposed. 2) The court did not abuse its discretion in imposing the sentence that it did. The defendant argued that the sentence was inappropriate because the VCR convictions were invalid, but since those convictions were valid, there was no abuse of discretion in the imposition of sentence. Doc. 2018-017, March 8, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-017.pdf

COURT ERRED IN APPLYING POST-BRIDGER LAW IN RULE 11 CHALLENGE

In re Perkins, three-justice entry order. RULE 11 PRE-BRIDGER: STIPULATION TO FACTUAL BASIS.

Grant of summary judgment to petitioner in post-conviction relief proceeding reversed and remanded for entry of summary judgment for the State. The trial court erred in applying post-Bridger law in evaluating the change of plea proceeding here. The trial court recited the specific alleged facts underlying each of the charges and confirmed that the petitioner understood what the State was alleging. After the petitioner indicated that he was pleading guilty to each of the charges, he agreed that the affidavit accompanying the charges set forth facts establishing each element of each charge and that he was pleading guilty to each of the charges because he was "in fact, guilty of them." This was sufficient to satisfy the factual-basis requirement in Rule 11(f), certainly with respect to pre-Bridger law. The fact that the petitioner's acknowledgement of his having committed the acts as set forth in the affidavit came a few minutes after the court recited the alleged facts to him is of no consequence insofar as his acknowledgement was essentially a stipulation to a factual basis to the charges. Doc. 2018-325, March 8, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-325_0.pdf

CONDITIONS OF RELEASE INSUFFICIENTLY ONEROUS TO JUSTIFY CREDIT FOR TIME SERVED

In re Nelson, three-justice entry order. PRE-TRIAL RELEASE ON CURFEW: CREDIT FOR TIME SERVED.

Denial of motion to correct sentence affirmed. The defendant was not entitled to credit for time spent pretrial on a twenty-four hour curfew under pre-Byam law, pursuant to State v. Kenvin. The defendant here could, at his own discretion, leave the house for court and attorney appointments, medical appointments, medical emergencies, and counseling. Although he was released to a responsible adult, the responsible adult was not required to monitor the defendant during times that he

left the house for excepted activities. Therefore, the defendant was not under conditions akin to incarceration and was not entitled to credit for time served. Doc. 2018-119, March 8, 2019.

https://www.vermontjudiciary.org/sites/default/files/documents/eo18-119.pdf

COURT PROPERLY CONSIDERED DEATH RESULTING FROM SIMPLE NEGLIGENT OPERATION WHEN SENTENCING DEFENDANT

State v. Goodrich, three-justice entry order. NEGLIGENT OPERATION: ELEMENTS; SENTENCING FACTORS.

Sentence of seven months to one year for negligent operation affirmed. 1) The sentencing court did not err in taking into account the fact that a death resulted from the defendant's negligent operation, even though it is not an element of the offense. 2) The court erred in stating that the jury determined that it was the defendant's negligence in crossing the center line that caused the accident, since the jury did not explicitly make such a finding, but it is fair to conclude that the jury found the decedent not at fault. Because the court's statement is grounded in the evidence, its error in attributing this finding to the jury is harmless. Moreover, any negligence on the decedent's part would be irrelevant in this context as It would not absolve or mitigate the defendant's negligence. 3) The court did not err in considering the defendant's lengthy criminal history. 4) The court did not err in observing that, by virtue of his criminal history, the defendant had already been provided with all the sentencing, all the rehabilitation, and all the counseling options available. This statement was immaterial since both parties agreed that rehabilitation was not at issue, regardless of whether the State provided the full sentencing details of the defendant's twenty-one criminal convictions. 5) The trial court was making a statement of fact, and not an error, when it observed that it had no information concerning the prior criminal history of the other defendants whose sentences for negligent operation the defense presented as comparable cases, and therefore found those sentences unpersuasive. Doc. 2018-267, April 5, 2019.
https://www.vermontjudiciary.org/sites/default/files/documents/eo18-267.pdf

APPEAL OF RESTITUTION ORDER WAS UNTIMELY

State v. Ritchie, three-justice entry order. RESTITUTION ORDER: TIMELINESS OF APPEAL.

Appeal from restitution order held untimely and dismissed. The defendant argued that the meaning of "all cases" in the restitution provision of the plea agreement referred only to the charges to which he pleaded; the State argued that it applied to all of the matters in the charging documents. Although it does not appear that the order is ambiguous, the question is not reached because the appeal was untimely filed. The order was entered on February 26, 2018, and the notice of appeal was filed on May 11, 2018, well beyond the thirty-day time limit. Although the order was not mailed until March 22, and the defendant did not accept service of it until April 12, these facts alone do not automatically extend or reopen the appeal period, and no motion to reopen the appeal period was filed. Doc. 2018-166, April 5, 2019.
https://www.vermontjudiciary.org/sites/default/files/documents/eo18-166.pdf

PRIOR BAD ACTS PROPERLY ADMITTED IN DOMESTIC ASSAULT CASE TO SHOW CONTEXT OF RELATIONSHIP

State v. Emerson, three-justice entry order. PRIOR BAD ACTS: TO SHOW CONTEXT IN DOMESTIC ASSAULT AND EXPLAIN COMPLAINANT'S ACTIONS. 2) IMPROPER ARGUMENT: FAILURE TO PRESERVE.

Aggravated domestic assault and interference with access to emergency services affirmed. 1) Prior bad act evidence was properly admitted to explain the complainant's behavior in staying in the house after the assault, and failing to immediately report it, and to provide context for the defendant's controlling and abusive behavior leading up to the incident. Otherwise, the jury would have been left with a single act of domestic violence, which could otherwise seem inexplicable. And the evidence demonstrated that the complainant did not immediately call police or leave the house after the assault, but waited until her daughter came to pick her up from the house before reporting the crime because she was fearful that the defendant would try to stop her. 2) The claim that the prosecutor improperly emphasized the prior bad acts in closing argument and urged the jury to make an inference concerning the defendant's character was not preserved for appeal, and the defendant did not make a plain error argument on appeal. Therefore it would not be reached. Doc. 2018-185, April 5, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-185.pdf

VICTIM SWATTING DEFENDANT'S FINGERS FROM FACE DIDN'T ENTITLE DEFENDANT TO SELF-DEFENSE INSTRUCTION

State v. McCullough, three-justice entry order. DOMESTIC ASSAULT: SUFFICIENCY OF EVIDENCE OF BODILY INJURY. SELF-DEFENSE: ENTITLEMENT TO INSTRUCTION.

Domestic assault affirmed. 1) The evidence was sufficient to establish bodily injury where the complainant told the 911 operator that she was "not really" hurt, but that the defendant bent his fingers back; she acknowledged that her finger was "injured," and she testified that her fingers hurt slightly. 2) The defendant was not entitled to a self-defense instruction based upon the complainant's statement that she made initial physical contact by swatting the defendant's finger from her face. This did not establish that the defendant had a reasonable belief that he faced imminent bodily harm from the complainant's action.Doc. 2018-196, April 5, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-196.pdf