IN THE SUPREME COURT OF THE STATE OF VERMONT

STATE OF VERMONT, APPELLEE

V.

DEVAN CALABRESE, APPELLANT

SUPREME COURT DOCKET NO. 2020-079

APPEAL FROM THE

SUPERIOR COURT OF VERMONT – CRIMINAL DIVISION
WINDHAM COUNTY
DOCKET No. 1068-9-19 WMCR

BRIEF OF THE APPELLANT

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STATEMENT OF THE ISSUES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

PRELIMINARY STATEMENT

On appeal, Devan Calabrese challenges his convictions of aggravated assault with deadly weapon, unlawful possession of a firearm, and violation of conditions of release following a jury trial held in the Windham Superior Court, Criminal Division. Mr. Calabrese asserts that the court committed reversible error when it denied his motion to suppress and permitted the State to introduce racial statements allegedly made by him that were highly prejudicial and had no probative value.

STATEMENT OF THE FACTS AND CASE

I. The State's narrative:

Katelyn Short, Devan Calabrese's girlfriend, sold a 2009 Honda Civic to a family friend, Teyanna Mack-Coughlin, in August of 2018 for $6000. Teyanna made a down payment of $2600.00 and agreed to pay a minimum of $100.00 a month, until the car was paid off. Teyanna made her payment each month until she missed the December payment. Then in May, she decided to withhold payments because she claimed that Katelyn never gave her the title to the vehicle, and she could not register or inspect the vehicle. Things became very tense, and colorful words, phone calls and texts were exchanged between them and between Trevis Brown, Teyanna's boyfriend, and Katleyn[1]. Then in June, Teyanna paid $400.00 to cover the December payment

[1] In Facebook voice messages to Katelyn, Trevis said, ""Dirty ass, stinking bitch, who the fuck you think you are talking to? You're going to get yourself fucked up. Real talk. Do you know these punk ass broke niggers you are fucking with? I'll really do this, bitch. My name wins out, you fucking dirty donkey. Tell whoever you want. Have any nigger do anything, I don't give a fuck. We can do this Muhammad Ali way or Clint Eastwood way. Bitch, I got (indiscernible), what up, ho. I'll really do this shit, bitch. Come holler at me. Have the same man with you when I see you walking down the street, you little crack head ho. I have my bitch or whoever beat the fuck out of you. Slap you baldheaded, bitch. Go back to the (indiscernible) you fucking donkey." TT1 at 92-105, TT2 at 113.

she missed and the payments for the months of May through July. Katelyn gave her the title. Trial Transcript 11/18/19 (hereinafter TT1) at 35-42, Trial Transcript 11/20/19 (hereinafter TT2) at 12.

In August, 2019, Teyanna decided that she wanted to pay off the car in full. After several attempts to meet, they finally agreed to meet at Katelyn's house on August 29, 2019. That evening, Teyanna brought with her Trevis and his friend, Jamel Thompson. Also present with Katelyn, was Mr. Calabrese and his friend, Mark Zostant. After parking, Teyanna and Trevis got out of the vehicle and Trevis brought the final paper work up to Katelyn for her to sign. After she signed it, Trevis gave her Teyanna's check for $2300.00. During this transaction Teyanna and Katelyn exchanged some words and Teyanna moved towards Katelyn as did Mr. Calbrese and Mark. Mr. Calabrese stepped in front of Teyanna and then Trevis stepped in between them. That is when Teyanna claims she heard a gun cock and saw Mr. Calabrese pointing a gun at Trevis saying, "I only pull it out if I'm going to use it, boy." According to Trevis, he heard Mr. Calabrese cock the gun twice, hearing a bullet eject to the ground. Teyanna and Trevis backed away, as Mr. Calabrese continued to call Trevis boy, telling him to make the right choice and leave. Once back at the car, Teyanna, Trevis and Jamel drove to the police station and made out a report to Trooper John Waitekus. TT1 at 43-58, 87-91.

Two days later, on August 31, 2019, Trooper Waitekus responded to call to do a welfare check at Katelyn's home because the neighbor had not seen her for two days, and her dog was barking non-stop. Before Trooper Waitekus went, he called

Katelyn's father, Terry Short, who he knew because Terry was his electrician, to see if Terry knew Katelyn's whereabouts. Terry did not, but he agreed to meet Trooper Waitekus a Katelyn's house. They searched her home, she was not there, and they found nothing of concern. As they were leaving the house, they walked down the driveway and Trooper Waitekus looked with his flashlight over on the grass where he believed the claimed ejected bullet would be. He saw it, got his camera to take pictures and then collected the bullet. PC at 17, TT1 at124-127.

II. Evidence from the defense:

Both Katelyn and Mark testified. Neither saw a weapon or anyone threaten anyone with a weapon during the exchange on April 29, 2019. Mr. Calabrese only stepped in front of Katelyn and put a hand up to Trevis' chest. TT2 at 30-31, 65, 69.

III. The case:

On September 3, 2019, the State charged Devan Calabrese with aggravated assault with a deadly weapon, reckless endangerment, unlawful possession of a firearm and violation of conditions of release. Printed Case (hereinafter PC) at 6-10.

Prior to trial, Mr. Calabrese moved to suppress the recovery of the 9mm bullet from Katelyn Short's yard following Trooper Waitekus' warrantless and unconstitutional search of the curtilage of her property, pursuant to Article 11 of the Vermont Constitution. PC at 11-15.

A hearing on the motion was held November 12, 2019. Trooper Waitekus testified that when he was dispatched to do a welfare check on Katelyn Short, since he knew her father, he called Terry Short to see if he was possibly having dinner with

his daughter. He never inquired if she might be at work or attempt to get a telephone number to call her. Terry said that he had not seen her but, he would be happy to meet Trooper Waitekus at her house. Upon arrival, at around 8:22 in the evening, they knocked on the door, but there was no answer. The door was unlocked, so they walked in and looked around. They then left the house. Motion Hearing 11/12/19 (hereinafter MH) at 16-19, 29, 37.

When they left the house, they walked out the door into the garage and then out to the driveway from the garage. (See photo, State's Exhibit 4). About half way down[2] the driveway, his "brain told [him] that specifically, this other incident took place at a specific location in the driveway and as I walked down the driveway, I looked down where it should have been and observed something. …one bullet." MH at 20-21. While he claimed it was in plain view, he also said it was "highly possible" he was using a flashlight when looking for the bullet. MH at 22, 27, 39, 41-43. (See also his trial testimony where he "suspects [he] had [his] flashlight on." TT1 at 154.) Terry confirmed Trooper Waitekus was in fact using a flashlight, and that the grass was long and unkept. MH at 53-54. Trooper Waitekus said he did not attempt to get a search warrant because, "I do not believe I would have needed a search warrant to go look for this bullet, even if I went there specifically for that purpose." MH at 44. And while he did not testify as such during the motion hearing, he admitted at trial that he purposefully communicated again with the witnesses on August 30th to gain additional information about where the incident occurred on the driveway because "it

[2] Trooper Waitekus testified that the driveway was about 30' long. Halfway down the driveway would then be about 15' from the house. MH at 47.

would be real nice to look for that bullet." TT1 at 123. Then on August 31st, when he and Terry were leaving the house and walking down the driveway, he said in his head, "this is a fantastic opportunity to look down and see if I can spot that round, that bullet, or cartridge. And I saw a bullet exactly where I was hoping to find one." TT1 at 124-125.

Following argument at the motion hearing, and relying on this Court's decision in State v. Bovat, 2019 VT 81, *cert. denied* Bovat v. Vermont, 2020 WL 612478, 592 U.S. ____ (2020)(mem.), which had just issued the week prior, the court announced that it found Bovat "squarely on point with this matter." MH at 75-76. The court concluded:

> As the Court noted in Bovat, portions of the curtilage like driveways or walkways, which are normal access routes for anyone visiting the premises are considered semi-private places. When State officials restrict their movements to semi-private areas to conduct an investigation, observations made from such vantage points are not covered by the Fourth Amendment. The Court adopted that language and does not appear to have distinguished Article 11 jurisprudence on that particular point.
>
> Tpr. Waitekus' comment that he was entitled to, effectively, even if he had been -- gone to the residence to look for the cartridge, he would have been entitled to walk up the driveway and look where he looked without a warrant, I think is a correct statement. The law, however, here the trooper was lawfully present in the driveway itself having a conversation with Mr. Short when he observed the cartridge in question. There had been no steps taken by Ms. Short or anyone else to indicate that strangers were not welcome and that an expectation of privacy -- was an expectation of privacy associated with the side of the driveway there.
>
> Under the circumstances, the Court does not find that Mr. Calabrese's constitutional rights were impaired in any way

> by the action of Tpr. Waitekus in recovering the bullet cartridge in this matter and the motion to suppress is denied.

MH at 77-78.

At the conclusion of the hearing on the motion to suppress, the State announced that it intended on introducing "racial-animus related language" communicated by Mr. Calabrese both during the alleged incident and to his parole officer thereafter. The State asserted:

> I want to make sure that there's no issue about that, because I do have an amendment where I can add the hate-based enhancement. But I don't have to. And it wouldn't change the penalty in the case, but we certainly can proceed that way if there's any question about its relevance in admissibility. And I want to make sure that we're doing that before, rather than after I raise it with the jury.

MH at 79. Mr. Calabrese did not object to admitting his alleged use of the word "boy", but did object to introducing his alleged use of the "n-word" when speaking to his parole officer as it was not relevant and extremely prejudicial. MH at 80-82. The court said that it would take it up again before the jury draw so the State filed its notice of amendment. PC at 23.

The following day, before the parties drew the jury, the court announced that "applying the 403 standard, it is not unduly prejudicial, and the Court will allow that statement to be admitted at trial, over a 403 objection." Jury Draw 11/13/19 (hereinafter JD) at 4. With that ruling, the State said it no longer would seek to amend the information. The court responded, "Well, the Court didn't find probable cause. The Court didn't find that the making of the statement alone showed that the defendant's conduct was subject to motivated by the alleged victim's race. So it doesn't

matter whether it's filed or not at this point." JD at 4.

While picking the jury the State voir dired the potential jurors on "racist comments and motivations". Not a single juror responded. JD at 37. However, during Mr. Calabrese's voir dire, while no juror initially seemed to have an issue with the use of the "N word", a juror on her own initiative later in the questioning volunteered:

> Going back to the racial slur, I'm -- I'm a little conflicted because I -- I think that using that, that is a form of violence, as well. I know that the defendant isn't charged with that, but it's hard for me to separate that from -- you know, if there was violence involved, to me that is one form of violence.

JD at 44. The following ensued:

> MR. FOX: Thank you for speaking up. I know it's hard to be the first one to raise these concerns, but we do definitely need to hear them. So from what I take it you're saying, that you believe that language is, in itself, a form of violence and that is something that, obviously, very much upsets you to hear?
>
> PROSPECTIVE JUROR WALLAS: Yeah, I just think that, you know, with apparently talking about a case with possible violence, threats, and all of that is violence. A threat or use of hate language, that's violence.
>
> MR. FOX: And do you think the use of that language predisposes you to believe that the other elements of this crime that is charged happened?
>
> PROSPECTIVE JUROR WALLAS: Not necessarily. I would depend on the evidence, but you know, I couldn't totally separate if the person is using hate -- kind of hate speech that, you know -- I mean, if the evidence is clear that they're -- they're, you know, his own words, it's still a form of violence that it's not being charged with, so I think if the evidence is clear, I could be clear about that. I just wanted to express that because I think it was --… I just felt conflicted about not saying anything.

JD at 44-45. Three more jurors then came forward saying that they had a problem with hearing the use of the N word. JD at 45-47. After these jurors and other jurors were removed, the same concerns came up in the second round of questioning with at least two more jurors. JD at 63-66, 68-69.

At trial, during the State's case-in-chief, the State asked Mr. Calabrese's parole officer:

> Q. And I want to draw your attention, please, to August 30th of 2019. Did there come a time on that date, I think it was a Friday, that you had an opportunity to talk with defendant about the case that's now in front of the Court that the jury is hearing?
>
> A. Yes.
>
> Q. Did defendant say anything to you on that date about his conduct with respect to the incident that brings us before the Court?
>
> A. Yes.
>
> Q. What did he say to you?
>
> A. He said that he had to protect Kate.
>
> Q. And did he say any more?
>
> A. Initially he said that he had to protect them from three black people. Later, he was in the office adjacent to mine with -- and the door was open; I could hear him. And he said that he had to protect Kate from three niggers, and I told him not to use that language.

TT1 at 181-182.

Also during trial, pursuant to the parties stipulation, the jury was instructed:

> So members of the jury, with respect to Count III of the information, it is charged that the defendant unlawfully possessed a firearm. The parties here have stipulated and agreed that it would be unlawful for the defendant to

> possess a firearm.
>
> And then, with respect to Count IV, it is alleged that there was a court order that the defendant shall not engage in criminal behavior. And the parties have again stipulated and agreed that on August 29th, 2019, the defendant was subject to a court order that he shall not engage in criminal behavior.

TT1 at 187.

At the close of the State's case and then at the close of all the evidence, Mr. Calabrese moved for judgment of acquittal on all counts. The motions were denied. TT2 at 5-7, 101-102.

During jury deliberations, the jury requested to re-hear the testimony of Mr. Calabrese's parole officer. TT2 at 150-156. The jury returned with a verdict of not guilty on the reckless endangerment count, and guilty on the remaining three counts. TT2 at 162-163.

At the sentencing hearing held on February 25, 2020, the court sentenced Mr. Calabrese to three concurrent to serve sentences for an aggregate sentence of two to five years. Sentencing Hearing at 31, PC at 24-25.

This appeal followed. PC at 26.

STANDARD OF REVIEW

This Court's review of a denial of a motion to suppress is a two-step analysis. The Court will defer to the trial court's factual findings and will affirm them unless clearly erroneous. As to the legal questions, the review is "plenary and nondeferential." State v. Hieu Tran, 2012 VT 104, ¶10, citing State v. Lawrence, 2003 VT 68, ¶8 and quoting State v. Sole, 2009 VT 24, ¶17, State v. Pontbriand, 2005 VT

20, ¶12.

Evidentiary rulings are reviewed for an abuse of discretion. State v. Corliss, 168 Vt. 333, 337 (1998).

ARGUMENT

I. The court erred in denying Devan Calabrese's motion to suppress the 9mm bullet seized during an unconstitutional search.

The alleged incident occurred on August 29, 2019. On August 30, 2019, Trooper Waitekus gathered more information in an effort to learn where exactly the ejected bullet might be found. The next day he violated Chapter 1, Article 11 of the Vermont Constitution[3], when he searched for and seized that bullet because he abused the limited scope of his license by specifically looking around the lawn on his way back from conducting the welfare check.

In denying certiorari in Bovat, Justice Gorsuch, in which Justices Sotomayor and Kagan joined issued an opinion stating that this Court's decision in Bovat did not square with Florida v. Jardines, 569 U.S. 1 (2013), "and that case's teachings almost certainly required a different result." Bovat, 2020 WL 612478 at *2, 592 U.S. at ____ (2020). Explaining Jardines, the Court stated:

> After surveying the Fourth Amendment's original meaning and history, Jardines acknowledged that a doorbell or

[3] State v. Hall, 168 Vt. 327, 329 (1998) (The Vermont Constitution offers greater protections than does the Fourth Amendment.) Accordingly, if conduct would violate the Fourth Amendment, that same conduct would be violative of the Vermont Constitution. Furthermore, "A central precept to Article 11 is the requirement that law enforcement receive a warrant before entering private property; warrantless searches are presumptively unreasonable. Id.; see also State v. Medina, 2014 VT 69, ¶ 13, 197 Vt. 63, 102 A.3d 661 ("Warrantless searches are ... per se unreasonable."); State v. Morris, 165 Vt. 111, 115, 680 A.2d 90, 93 (1996) ("The first and foremost line of protection is the warrant requirement."). And while some warrantless searches are permissible, any exception to the warrant requirement "must be jealously and carefully drawn." State v. Savva, 159 Vt. 75, 85, 616 A.2d 774, 779 (1991) (quotation omitted)." State v. Dupuis, 2018 VT 86, ¶7.

> knocker on the front door often signals a homeowner's consent allowing visitors to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." Id., at 8, 133 S.Ct. 1409. The Court recognized, too, that law enforcement agents, like everyone else, may take up this "implied license" to approach. But, the Court stressed, officers may not abuse the limited scope of this license by snooping around the premises on their way to the front door. Whether done by a private person or a law enforcement agent, that kind of conduct is an unlawful trespass—and, when conducted by the government, it amounts to an unreasonable search in violation of the Fourth Amendment. On this much, the Court unanimously agreed.

Bovat, 2020 WL 612478 at *1, 592 U.S. at ____ (2020.)

In Jardines, police took a drug-sniffing dog to Jardines' front porch, where the dog gave a positive alert for narcotics. Based on the alert, the officers obtained a warrant for a search, which revealed marijuana plants; Jardines was charged with trafficking in cannabis. The Jardines Court upheld the lower court's decisions suppressing the evidence which found that the officers had engaged in a Fourth Amendment search unsupported by probable cause, before obtaining the warrant.

The Court explained in Jardines that the reasonable expectation of privacy test is not the only definition of a Fourth Amendment search, as was found in United States v. Jones, 565 U.S. 400 (2012), which revived the "common-law trespassory test".

> When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." United States v. Jones, 565 U.S. ——, ——, n. 3, 132 S.Ct. 945, 950–951, n. 3, 181 L.Ed.2d 911 (2012).

Jardines, at 599 U.S. at 5. The Jardines Court found that the officers were gathering information in and area belonging to Jardines and in the curtilage of his house, which enjoys the protection as part of the home itself, and they gathered that information by physically entering the area to engage in conduct not explicitly or implicitly permitted by the homeowner. Id., at 5-6.

When Trooper Waitekus shined his flashlight on the lawn from the driveway, he was gathering information from and in an area belonging to the homeowner and in the curtilage of her house. The area was within 15 feet of the house. While the driveway is used for normal ingress and egress to the house, the lawn next to it is not, and in fact contains a little sitting area, with a bench for the homeowner to extend the activity of her homelife. In fact, the trial court did not dispute that the area in question in this case was part of the curtilage. Rather, the court relying on this Court's holding in Bovat, found that "portions of the curtilage like driveways or walkways, which are normal access routes for anyone visiting the premises are considered semi-private places. When State officials restrict their movements to semi-private areas to conduct an investigation, observations made from such vantage points are not covered by the Fourth Amendment. The Court adopted that language and does not appear to have distinguished Article 11 jurisprudence on that particular point."

This is however, an incorrect statement of the law. As Justice Gorsuch stressed that "[u]nder Jardines, there exist no 'semiprivate areas' within the curtilage where governmental agents may roam from edge to edge." Bovat. at 2020 WL 612478 at *3,

592 U.S. at ____ (2020).

Trooper Waitekus, without a warrant and while on this constitutionally protected area, could approach Katelyn's home via the driveway, conduct his welfare check, and then leave. Jardines, at 8. ("…[A] police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.' Kentucky v. King, 563 U.S. ——, ——, 131 S.Ct. 1849, 1862, 179 L.Ed.2d 865 (2011).") Katelyn had not given him leave or anyone else to search her lawn. Just as introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence violates the Constitution, so does searching the front lawn with a flashlight with the full intent of looking for the bullet. Being called to Katelyn's house to do a welfare check, did not call him there to do a search. Jardines, at 9. "The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose." Id.

Furthermore, he did not see the bullet in plain view as he left the home. While standing in the driveway, longer than needed to accomplish his purpose of conducting the welfare check, he told himself that he should look for the bullet. So, with flashlight in hand, he searched the overgrown lawn. His "behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do." Id. at 10. Trooper Waitekus conducted a warrantless and unconstitutional search and seizure.

And not disputed by anyone below, Mr. Calabrese has standing to challenge the lawfulness of the search and seizure of the bullet under the Vermont Constitution.

> To establish standing for the assertion of an Article 11 violation committed against another person, "a defendant need only assert a possessory, proprietary or participatory interest in the item seized or the area searched." State v. Wood, 148 Vt. 479, 489, 536 A.2d 902, 908 (1987). This is a broader standard than the "expectation of privacy" test employed by the federal courts under the Fourth Amendment. As we explained in State v. Welch, 160 Vt. 70, 77, 624 A.2d 1105, 1109 (1992), "we look at the objective relationship of the person to the place searched or items seized, as opposed to a subjective evaluation of the legitimacy of the person's expectation of privacy."

State v. Pitts, 2009 VT 51, ¶33. Mr. Calabrese has both participatory as well as possessory interest in the item seized because the allegations were that he pulled the gun that ejected the bullet that is the subject of the charges.

For all the forgoing reasons, it was error for the court to deny Mr. Calabrese's motion to suppress the recovery of the 9mm bullet from Katelyn's property, because Trooper Waitekus conducted an unconstitutional search in violation of the Vermont Constitution.

II. The error in denying the motion to suppress was not harmless.

> "For the error to be harmless, the reviewing court must find beyond a reasonable doubt that the jury would have returned a guilty verdict regardless of the error." State v. Oscarson, 2004 VT 4, 30, 176 Vt. 176, 845 A.2d 337. When conducting a harmless-error analysis to determine whether the jury would have convicted without the offending evidence, we consider the extent to which the offending evidence was inculpatory, whether it was cumulative or duplicative of other evidence, and how prominent it was at trial. See State v. Keith, 160 Vt. 257, 265–66, 628 A.2d 1247, 1252–53 (1993) (considering whether erroneously admitted evidence was inculpatory or exculpatory), overruled on other grounds by State v. Brillon, 2008 VT 35, 42, 183 Vt. 475, 955 A.2d 1108;1 State v. Lynds, 158 Vt. 37, 42, 605 A.2d 501, 503 (1991) (considering prominence of erroneously admitted evidence

> at trial and presence or absence of corroborating and contradictory evidence). Analyzing these factors helps us understand how heavily the jury was likely to have relied on the evidence.

State v. Mumley, 2009 VT 48, ¶20. Teyanna and Trevis both testified that they heard a gun cocked and saw Mr. Calabrese point a gun at Trevis. Trevis heard a bullet eject and hit the ground. Katelyn and Mark testified that they never saw a gun or anyone threatened with a gun. This was a classic swearing contest; a case dependent completely upon the credibility of the complaining witnesses. Quoting the Court in State v. Hazelton, 2006 VT 121, ¶20, "With credibility being the key ingredient in this swearing contest between complainant and defendant, and absent any [other] independently corroborating evidence of the [alleged conduct], we cannot avoid a conclusion that it was reasonably possible, as intended, that the erroneously admitted [evidence] influenced the jury's decision to believe [Teyanna and Trevis]."

The bullet was the key piece of evidence because it provided corroboration, the only corroboration, for Teyanna and Trevis' story that Mr. Calabrese pulled a gun on Trevis. It cannot be found beyond a reasonable doubt that the jury would have returned a guilty verdict absent that evidence. The error in not suppressing the recovery of the bullet was not harmless, and Mr. Calabrese's convictions must be reversed.

III. The court committed reversible error in admitting highly prejudicial, non-probative evidence, over Devan Calabrese's objection.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." V.R.E. 401, State v.

LeClair, 175 Vt. 52, 58 (2003).

> A question of relevance always raises two subquestions: (1) Is the evidence probative of the proposition for which it is offered? (2) Is the proposition for which the evidence is offered one provable in the case? The first of these questions is sometimes confusingly labeled "relevancy" or "logical relevancy." The second question is commonly called "materiality." See McCormick, Evidence § 185 (2d ed. 1972).

Reporter's Notes, V.R.E. 401. "The test of relevancy is thus not whether the evidence makes the proposition for which it is offered more probable than competing propositions, but rather whether the evidence has any tendency to establish (or refute) the proposition." Reporter's Notes, V.R.E. 401. Furthermore, even if relevant, evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues. V.R.E. 403.

In State v. Bevins, 140 Vt. 415, 419 (1981) the Court explained:

> Relevant evidence is evidence with some probative value. It is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. Even though relevant, evidence is still not admissible if its probative value is outweighed by such considerations as "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403; State v. Gardner, 139 Vt. 456, 459, 433 A.2d 249, 251 (1981); Quazzo v. Quazzo, 136 Vt. 107, 110, 386 A.2d 638, 640 (1978).

As the Reporter's Notes explain, the words of Federal Rule 401 were adopted by the Vermont Supreme Court in V.R.E. 401. Rptrs. Notes, V.R.E. 401, see also State v. Bushey, 147 Vt. 140 (1986).

> Under Rule 403, the court must first find that the evidence has probative value that makes it relevant. [State v. Parker, 149 Vt. 393,]398; see V.R.E. 401 (evidence is relevant if it makes a fact of consequence more or less probable); V.R.E. 402 (relevant evidence admissible unless otherwise excluded by constitution, statute or rule)….
>
> The next step of the Rule 403 analysis requires consideration of whether the introduction of the evidence was so unfairly prejudicial as to outweigh its probative value; if so, the court in its discretion may exclude the evidence. Parker, 149 Vt. at 400.

(ciatations omitted) State v. Ogden, 161 Vt. 336 (1993), See also State v. Gilman, 158 Vt. 210 (1992), State v. Bruyette 158 Vt. 21 (1992). State v. Shippee, supra, 2003 VT 106, ¶14, State v. Myers, 2011 VT 43, ¶13.

In Myers, the defendant, charged with numerous crimes, sought to exclude evidence of events that occurred in a bar prior to his arrival at the complaining witness' house. Specifically, he sought to exclude testimony that he had been in a local bar where he got into an argument with another patron in which they discussed the defendant's white supremacist beliefs, and he called the other patron a "spic".

> Defendant argued that evidence of the event would be prejudicial because of its racist content and had no probative value because it was irrelevant to the charges. The prosecution opposed the motion arguing that the evidence would show defendant's consumption of alcohol a short time before the incident, discussion of his racists beliefs, and an angry argument between defendant and the patron. In denying the motion, the trial court ruled that evidence from the bar was relevant as "highly probative" on the issues of defendant's motivation and intent in committing the later crimes. On this point the court held "any racist statements defendant made tend to cast light on his motive to be violent with [the complaining witness], whom—according to the State's version of the facts—defendant knew has a daughter whose godfather is black." The court agreed that the evidence would be somewhat

> prejudicial, but it judged the events at the bar to be sufficiently relevant and probative because they were part of the res gestae of the charged crimes, meaning they "form[ed] a body of evidence relating to the events surrounding the crime of which a defendant is charged." State v. Maduro, 174 Vt. 302, 306, 816 A.2d 432, 435 (2002) (quotation omitted).

Myers, at ¶6.

During the trial, the issue of defendant's beliefs came up several times in addition to the bar incident. Id. at ¶8. This Court, agreeing with the defendant that the evidence could prove prejudicial, ruled that the denial of his motion to exclude the evidence was not error and resulted in only one minor addition to other evidence that illustrated his racial beliefs. The Court did not address the question of relevance because it was not raised by the defendant on appeal[4]. As to the question of whether the evidence should have been excluded pursuant to V.R.E. 403, the Court found it to be a "close question." Id., ¶14. Nonetheless, this Court agreed with the trial court finding that: "While evidence of defendant's use of a racial epithet may have troubled the jury, that was not its primary purpose. The evidence of defendant's presence at the bar focused on his high level of intoxication and his aggressive interaction with another patron."

It appears from the record, although not clearly argued, that the State's assertion as to relevancy of the statement "he said that he had to protect Kate from three niggers", was that it somehow showed racial motivation for committing the

[4] The trial found the visit to the bar relevant "relying on the fact that defendant acted aggressively toward the patron, the incident was close in time to the charged crimes, and the evidence showed that defendant was under the influence of alcohol at the time of the charged crimes, one of which was DUI." Id. at ¶14.

alleged offense of pointing a gun at Trevis. However, when the State sought to amend the charge, the court did not find probable cause to permit the amendment because the "[f]acts as alleged in affidavit do not support a finding that victim's race motivated defendant's conduct." PC at 23. The court was right. While Mr. Calabrese's use of the word "boy" and certainly "nigger" paint Mr. Calabrese as a racist, there is nothing in the record to support that his alleged conduct of pulling and pointing a gun at Trevis was motivated because Trevis was black. It had no relevance to the charges because it did not make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence[5]. And while his use of the term "boy" might have been relevant because it was the term he used during the alleged incident, and "boy" can connote prejudicial beliefs, it does not in all circumstances and can be used quite benignly. "Nigger", on the other hand, is never benign, and always highly offensive and prejudicial. Courts in other jurisdictions agree and usually find the term so offensive that it is rarely harmless error to admit it, when it has no relevance.

> The racial epithet that defendant used is highly offensive and inflammatory. See [State v.] Lipka, 289 Or. App. [829] at 834, 413 P.3d 993 [2018]; see also Swinton v. Potomac Corp., 270 F.3d 794, 817 (9th Cir. 2001) ("'["Nigger" is] perhaps the most offensive and inflammatory racial slur in English * * *.'" (quoting Merriam-Webster's Collegiate Dictionary 784 (10th ed. 1993))). The introduction of such evidence, in a case where it lacks any probative value, presents the risk that the jury would be tempted to deliver a verdict on the improper ground that defendant is a racist who deserves punishment.

[5] The trial court never addressed the issue of relevancy. JD at 4.

State v. Roberts, 418 P.3d 41, 50 (Or.App. 2018). See also Eiler v. State, 492 A.2d 1320, 1327 (Md. App. 1985) (Voir dire on issue of race is one factor to consider in determining harmless error, but under a totality of the circumstances, where the evidence was prejudicial and irrelevant, the error in admitting it was not harmless.); Bray v. American Property Management Corp., 988 P.2d 933, 938 (Or. App.1999); Guerrero v. State, 125 So.3d 811, 815 (Fla. 4th DCA 2013) ("Ordinarily, racial slurs and ethnic epithets are so prejudicial as to render them inadmissible, unless the probative value outweighs any prejudice that may result from having the jury hear them." MCI Exp., Inc. v. Ford Motor Co., 832 So.2d 795, 800 (Fla. 3d DCA 2002)); Tate v. State, 784 So.2d 208, 215 (Miss. 2001) (Finding probative value of racial slurs made by defendant was clearly substantially outweighed by the danger of unfair prejudice.)

There was no probative value in admitting the testimony of Mr. Calabrese's parole officer that "he said that he had to protect Kate from three niggers". Her relevant testimony was that he had to protect Kate, and that "he had to protect them from three black people." The prejudicial effect of admitting the highly offensive word "nigger" was substantial. Not only have numerous Courts around the Country so found, just looking at what happened during jury draw in this case highlights how offensive and prejudicial the use of that word is to many jurors, who are often hesitant to come forward with their inherent feelings. Furthermore, this is not a single word that escaped the jury as they specifically asked to re-hear the parole officer's very short testimony. And as found by the Roberts Court, supra, "The introduction of such

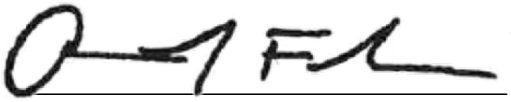
evidence, in a case where it lacks any probative value, presents the risk that the jury would be tempted to deliver a verdict on the improper ground that defendant is a racist who deserves punishment."

The only purpose served by admitting the use of the word "nigger" was to inflame the jury, and the error in admitting the evidence, with credibility being the key ingredient in this swearing contest between the complainant and defendant, is not harmless. Mr. Calabrese's convictions must be reversed.

CONCLUSION

For the reasons stated above, the Appellant Devan Calabrese requests that this Court reverse his convictions.

Dated at Montpelier in the County of Washington and State of Vermont this 23rd day of October, 2020.

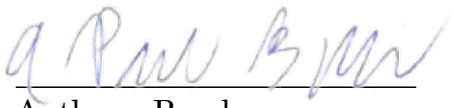


Allison N. Fulcher

CERTIFICATE OF COMPLIANCE

I certify that the above brief submitted under Rule 32(a)(7)(B) was typed using Microsoft Word for Office 365 and the word count is 6,349.

Dated at Montpelier, Vermont this 23rd day of October, 2020.



Anthony Bambara

cc: David Tartter, Esq.