IN THE SUPREME COURT
OF THE STATE OF VERMONT
DOCKET NO. 2020-079

STATE OF VERMONT, APPELLEE

V.

DEVAN CALABRESE, APPELLANT

APPEAL FROM THE
SUPERIOR COURT OF VERMONT, CRIMINAL DIVISION
WINDHAM COUNTY
DOCKET NO. 1068-9-19 WmCr

Appellee State of Vermont's Brief

STATE OF VERMONT

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ISSUES PRESENTED

Whether the motion to suppress was correctly denied because the defendant lacked standing to claim a violation under the Fourth Amendment or Article 11 and because the cartridge seized by the officer was in plain view from a legal vantage point.

Whether the defendant's use of a racial epithet in describing the encounter was relevant to the victims' credibility and was not unduly prejudicial.

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STATEMENT OF THE CASE

The defendant was convicted of aggravated assault with a deadly weapon, unlawful possession of a firearm, and violation of a condition of release, and acquitted of reckless endangerment, following a jury trial in Windham Superior Court, Criminal Division, on November 18 and 20, 2019. He now appeals from that conviction.

STATEMENT OF THE FACTS

Evidence at Trial

The charges in this case arose out of a dispute over the sale of a 2009 Honda Civic. In August, 2019, Teyanna Mack-Coughlin agreed to buy the car from Katelyn Short, a long-time family friend, for $2600 down and $100 a month until either the full amount of $6000 was paid, or until Teyanna paid off the balance. Teyanna took possession of the car and made payments until December, when she missed a payment. She made some subsequent payments and missed others. Teyanna explained that she stopped paying because Katelyn hadn't given her the title to the car and she couldn't register it, whereas Katelyn testified that Teyanna had lost the title, and that Katelyn was in the process of obtaining a copy for her from the Department of Motor Vehicles. Whatever the reason, the transaction resulted in bad feelings all around. Teyanna's boyfriend Trevis Brown testified that Katelyn had accosted him about the payments. On cross-examination, in an attempt to impeach Trevis, the defense played recordings of messages that Trevis had left for Katelyn through Facebook, in which Trevis used offensive and racially-charged language. 11/18/19, pp. 36 – 42, 78 – 82. As discussed below, the defense highlighted this

language, to the extent of beginning its closing argument by quoting the language at length.

Teyanna and Katelyn eventually were able to agree that Teyanna would make the back payments due and pay off the balance, and Katelyn would give her the title to the car. Teyanna testified that Katelyn insisted that this transaction take place at her house, whereas Katelyn testified that she had tried to arrange another time and place without success. On the day in question Trevis drove the Civic to Katelyn's house. With him in the car were Teyanna and a friend of Trevis, Jamel Brown, who had happened to be around when they set off. 11/18/19, pp. 42 – 45; 11/20/19, pp. 19 – 20.

Katelyn asked her boyfriend, the defendant, to be present because of the earlier unpleasantness, and the defendant called his friend Mark Zostant to drive over because the defendant wasn't sure he could make it in time. When Teyanna and her friends showed up, both Mark and the defendant were present. 11/20/19, pp. 22 – 23.

Trevis got out of the Civic by himself and approached Katelyn to conclude the transaction. Mark and the defendant were standing nearby. The transaction was successfully completed but at that point Teyanna had gotten out of the car, and she and Katelyn began bickering. Teyanna wanted to know why Katelyn had been acting the way she had concerning the whole affair. As Teyanna approached Katelyn the defendant stepped in front of Teyanna. Reacting to that, Trevis stepped in front of the defendant. The defendant then pulled out a gun, cocked it, and

pointed it at Trevis. Trevis heard a bullet drop. The defendant said, "You better step back, boy and keep a-moving…. Yeah, make the right choice, boy, leave. Yeah, boy, leave. I only pull it out when I'm going to use it, boy." Trevis backed up with his hands up. When he and Teyanna got back onto the road where the Civic was parked the defendant put the gun away. Teyanna and Trevis got into the car and immediately drove to the Brattleboro Police Station where they reported what had happened. 11/18/19, pp. 86 – 91.

John Waitekus, a Vermont State Police trooper, responded to their report because the event had occurred in Dummerston. After speaking with the three of them, Waitekus went to Katelyn's house to speak with the defendant, but they could not find him there. Katelyn told them where the defendant lived, and they looked for the defendant there, but also without success. 11/18/19, pp. 118 – 121.

Two days later Waitekus was asked to conduct a welfare check at Katelyn's house because her neighbor hadn't seen her in 72 hours. Waitekus happened to know Katelyn's father so he called him to see if Katelyn was with her father. She was not, and her father agreed to meet him at the house. They knocked on the door with no response, then entered as the door was unlocked. Waitekus checked the house but didn't find anyone present. 11/18/19, p. 124.

As the two of them left they walked down the driveway of the house where the earlier events had occurred. Waitekus had spoken to one of the participants since he had been there two nights earlier and had a better idea of exactly where the confrontation had occurred. When he got to that point on the driveway he looked

down to see if he could spot the cartridge, and he did see one exactly where it should have been given what he had learned about the location of the confrontation. He took the cartridge into evidence. 11/18/19, pp. 124 – 126.

A laboratory examination did not detect any fingerprints on the cartridge, which was not unexpected given that it had been left outside overnight. 11/18/19, pp. 178 – 179.

Beth McClean, an employee of the State of Vermont Agency of Human Services, spoke with the defendant the day after the occurrence about the matter. He told her that he had to protect Kate from three black people. She later overheard him say the same thing, except that he used the n-word instead of "black people.", and Beth told him not to use that language. 11/18/19, p. 182.

Both Katelyn and Mark Zostant testified that they had never seen the defendant pull out a gun. 11/20/19, pp. 30, 69. The parties stipulated that it would be unlawful and in violation of a condition of release for the defendant to possess a firearm. 11/18/19, p. 6.

The jury found the defendant guilty of aggravated assault with a deadly weapon, unlawful possession of a firearm, and violation of a condition of release, and not guilty of reckless endangerment. 11/20/19, p. 163.

The Motion in Limine

The trial court's September 23, 2019, scheduling order required all motions in limine to be filed by November 6, 2019. No motion was filed by that date.

At the close of the suppression hearing on November 12, 2019, the day before the jury draw, the State noted that the defense had not filed a motion in limine within the court's deadline with respect to the defendant's racial-animus related language both to Trevis directly and within the hearing of his parole officer, and that "the time for in limine motions has passed." The defense indicated it had no objection to the defendant's use of the word "boy" when speaking to Trevis, but did object to his use of the n-word in the probation office, arguing that it was extremely prejudicial. The State replied that this motion "was filed late." The court indicated that it would rule the following day before the jury draw. 11/12/19, pp. 79 – 81.

The next morning the court ruled that the evidence was not unduly prejudicial and that it would be admitted. 11/13/19, p. 4. During the State's jury voir dire, the prosecutor raised the issue, telling the prospective jurors that, "You also may hear some testimony about racial bias and about how that may have played a role in this case, things that were said that indicate racial bias." Seven jurors specifically questioned said that that evidence would not interfere with their ability to hear the case fairly and impartially and no one else responded to a general inquiry concerning the same point. 11/13/19, pp. 36 – 37.

During the defense voir dire, the defense asked, "if there were testimony that my client used the N word, would that affect how you view this case?" He specifically inquired of three prospective jurors, who all indicated it would not affect their ability to be fair. 11/13/19, pp. 40 – 41. Another prospective juror said that she felt a little conflicted because "-- 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… . A threat or use of hate language, that's violence." A second prospective juror agreed: "that's not an appropriate thing to call anybody." A third prospective juror said that "it disturbs me to hear that kind of language used. I don't think that it would make me unable to disregard it, basically, since it isn't part of the charge, since we're not dealing with a hate speech case or harassment." A fourth prospective juror said that her reaction to hearing that the word was used would affect her ability to be fair. No one else responded to a repeated general inquiry on the point. 11/13/19, pp. 44 – 46.

During the second round of voir dire, two jurors indicated that they could not be fair and impartial, and eight indicated that they could be (one of them, after an explanation by the prosecutor that the evidence was not offered to show that someone was a bad person, but because "it may show their motivation at a specific time. It may show their intent at a specific time. It may explain why they did what they did and how they did it."). 11/13/19, pp. 63 – 66. None of the jurors who expressed concerns about the use of the word sat on the jury.

The Motion to Suppress.

On October 3, 2019, the defense filed a motion to suppress the cartridge found by Trooper Waitekus, arguing that the defendant had a privacy expectation at Ms. Short's residence and that the trooper's search in the curtilage violated that expectation. A hearing was held on the motion on November 12, 2019.

Waitekus testified concerning his initial response to the incident on August 29, 2019. He and two other troopers were present at the house for about fifteen minutes, and with Katelyn's permission they looked inside the house for the defendant but did not find him. With respect to the location of the incident, at that time he knew only that it took place on the driveway, without further detail. On August 31, 2019, he received a call to conduct a welfare check on Katelyn as her neighbor hadn't seen her in a few days and was concerned about her. Waitekus happened to know Katelyn's father, Terry Short, so he called Terry to see if Katelyn was with him. She was not, and Terry offered to meet him at Katelyn's house. They met at the driveway to the house, and knocked on the front door and announced themselves. No one answered. Waitekus found the door was unlocked and opened it and called out. No one answered and he walked through the house looking at places where a person would fit. No one was inside. He and Terry left the house and proceeded down the driveway. 11/12/19, pp. 15 – 20.

By that time Waitekus had received more specific information concerning where on the driveway the confrontation had occurred, and it occurred to him that the cartridge might be there. He looked down where it should have been according to the witness accounts and saw a cartridge. He was standing on the edge of the driveway about halfway between the house and the road and the cartridge was in plain view from where he was standing in the driveway. He didn't have to move any grass in order to see it. He did nothing in the nature of a search other than to look down. He did not, for example, get on his hands and knees and rummage through

the grass. He said, "oh my god Terry, don't move," and went to get his camera. He took a photograph of the cartridge, then placed the cartridge in an evidence bag. He didn't recall if he was using a flashlight when he located the cartridge, but it was highly possible. 11/12/19, pp. 20 – 27, 41 – 42.

Waitekus testified that there is nothing at the property indicating that there is a restriction on access to the driveway: no trespassing signs, gate, or any sort of enclosure. 11/12/19, p. 27. The photographs admitted at the hearing show that the driveway is the only way to access a short pathway from the top of the driveway to the front door of the house. State's 1 – 5 (suppression hearing). One photograph shows the cartridge, a blue cylinder clearly visible lying among the green grass leaves. State's 8 (suppression hearing), attached to this brief.

Terry Short testified that Waitekus did not actively go into the the grass searching for something before he said, "wait, don't move." The trooper did have a flashlight with him. 11/12/19, pp. 51, 53.

Phil Damone, supervisor at the Probation and Parole office in Brattleboro, testified that at the time of these events the defendant was on parole status, as a part of which he needed to provide address information to the Department of Corrections. He provided the address of 66 Highlawn Road, Apartment 101, in Brattleboro, and did not provide Katelyn's address of 83 East-West Road in Dummerston. In addition, the defendant had a curfew which required him to be in his residence on Highlawn Road from 9 p.m. until 6 a.m. He had no exception to the curfew for him to stay at 83 East-West Road in Dummerston. Katelyn had inquired

several times about having a relationship with him and was told that the defendant could not be in a relationship with her because it would create some jeopardy for her and her daughter, given his status as having a sexual assault conviction and a domestic violence conviction. 11/12/19, pp. 55 – 61.

The State also offered into evidence the defendant's sex offender registry showing the Brattleboro address. State's 9 (suppression hearing).

Katelyn testified that she was in a relationship with the defendant and during that relationship he would sometimes stay at her house. He had some belongings there, some clothes and probably bathroom stuff and hat and belt and random other items around the house. He did not live there and she told the officers that he did not live there. He had his own apartment. She was not aware of the defendant's curfew. The defendant's overnights at her house were probably not every week, and she was probably more at his home. 11/12/19, pp. 63 – 68.

The trial court made its ruling on the record at the conclusion of the hearing:

> 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.

11/12/19, p. 75 - 78

ARGUMENT

I.

THE MOTION TO SUPPRESS WAS CORRECTLY DENIED BECAUSE THE DEFENDANT LACKED STANDING TO CLAIM A VIOLATION UNDER THE FOURTH AMENDMENT OR ARTICLE 11 AND BECAUSE THE CARTRIDGE WAS IN PLAIN VIEW FROM A LEGAL VANTAGE POINT.

The defendant first argues that the trial court erred when it denied his motion to suppress the cartridge found next to Katelyn's driveway. The trial court's ruling should be affirmed both because the cartridge was in plain view from a place the officer had a legitimate right to be and because the defendant lacks standing to assert this alleged violation of the Fourth Amendment and Article 11.

A. Standing.

"[A] defendant need only assert a possessory, proprietary or participatory interest in the item seized or the area searched to establish standing to assert an Article Eleven challenge." State v. Wood, 148 Vt. 479, 489 (1987). Few cases since Wood have discussed the nature of this requirement.

In State v. Morris, 165 Vt. 111, 121 (1996), this Court held that a defendant had not abandoned his possessory interest in a garbage bag left on the street for collection because he had not abandoned the reasonable expectation of privacy he had in the property. The Court concluded that he had not, because he had merely "exposed to public view only the exterior of opaque trash bags, and in doing so, he sought to dispose of his personal possessions in the accepted manner that normally would result in commingling them inextricably with the trash of others." 165 Vt. at 126. In State v. Welch, 160 Vt. 70, 78 (1992), the Court relied upon the fact that patients "share with their pharmacists an expectation that information obtained in an inspection of their prescriptions will not be disclosed except in certain limited ways," in finding that the defendant had standing to challenge a search of her pharmaceutical records. In State v. Wright, 157 Vt. 653, 654 (1991) the Court cited Wood in granting automatic standing where the defendant "is charged with an offense in which possession of the seized evidence at the time of the contested search is an essential element of the crime," an issue which is not present here. And in State v. Pitts, 2009 VT 51, ¶ 23 the Court found it unnecessary to reach the question whether the defendant had standing to contest the illegal detention of her brother, which occurred outside of her apartment and outside of her presence. The dissent in that case argued that the defendant did have standing because of her alleged "involvement in the underlying criminal conduct that generated the evidence." Id. at ¶ 34.

Only two of these cases, Morris and Wood itself, bear even the slightest resemblance to this case. Morris involved something left by the defendant in a publicly accessible area. Wood found that the defendant had standing to challenge a search of a trailer and its curtilage because the caretaker of the property where the trailer was located, "gave express permission to [the defendant's] wife to use the trailer, and at least tacit approval to the defendant," and where "the defendant and his family resided in the trailer for two weeks before his arrest." State v. Wood, 148 Vt. at 490–91 (1987).

The defendant here was not residing at the house. He spent the night there occasionally, "probably wasn't every week." 11/12/19, p. 68. Furthermore, when he did stay there, he was in violation of his conditions of parole, which required him to observe a curfew in his apartment in Brattleboro from 9 p.m. to 6 a.m. Thus, to the extent that he was an overnight guest, he was there illegally, and his status was akin to that of a trespasser. See, United States v. Battle, 637 F.3d 44, 49 (1st Cir. 2011) ("A defendant lacks a legitimate expectation of privacy in a place, however, when he does not have permission to be present."). This distinguishes this case from Wood, where the defendant was actually and legally living in the trailer, and had been there for two weeks before his arrest.

Overnight guests have standing to challenge searches under the federal test. Minnesota v. Carter, 525 U.S. 83, 90 (1998) ("an overnight guest in a home may claim the protection of the Fourth Amendment"). But that status must exist at the time of the search. See, United States v. Grandberry, 730 F.3d 968 (9th Cir.

2013); United States v. Reyes-Bosque, 596 F.3d 1017 (9th Cir.2010); State v. Cortis, 237 Neb. 97, 465 N.W.2d 132 (1991); White v. State, 263 Ga. 94, 428 S.E.2d 789 (1993). The Vermont standing test is broader than the federal test, and the defendant would likely have standing to contest a search of the personal possessions which he was said to have left at Katelyn's house, under the possessory wing of Vermont's standing test. But this would not apply to the house or its grounds in general, as they were not in his possession at the time of the search. Since he was not the owner of the property, he had no proprietary interest in the house or its grounds, and since he wasn't present at the time of the search, he had no participatory interest.

The defendant also asserts that he had a possessory interest in the cartridge because it was said to have been ejected from the gun which he brandished. If the defendant retained a possessory interest in the cartridge, then someone who enters a stranger's house and shoots the homeowner to death retains a possessory interest in the shells ejected by his firearm. This is obviously an incorrect conclusion. The defendant did not retain a possessory interest in the cartridge because he left it lying on the ground. He abandoned it.

In State v. Kerr, 143 Vt. 597, 609 (1983), this Court found that the defendant had abandoned a bag and its contents when he dropped it as a Border Patrol agent's vehicle approached him and, after speaking briefly with the agent, walked away without retrieving the bag. Assuming that the defendant had a possessory interest of some kind at the time he was first discovered by the agent, he abandoned the

property when he dropped it and walked away. Similarly, here, as in Kerr, the defendant dropped the cartridge and walked away. He abandoned the cartridge and therefore had no standing to contest its later seizure.

State v. Morris, 165 Vt. 111 (1996), applying this state's standing test to garbage left for pick-up, does not change the result. Morris held that garbage left for pick-up had not been abandoned because, although the garbage had been left at the curb, the defendant had not "abandoned the reasonable expectation of privacy he had in the property." 165 Vt. at 121. The defendant had "exposed to public view only the exterior of opaque trash bags," and "he sought to dispose of his personal possessions in the accepted manner that normally would result in commingling them inextricably with the trash of others." 165 Vt. at 126. The defendant here had no expectation that the cartridge that he left on the lawn would be collected and commingled inextricably with other cartridges. By leaving the cartridge on the lawn, and for several days, he abandoned any reasonable expectation of privacy he had in the property. See, State v. Shaw, 2014 WL 30918, at *10–11 (N.J. Super. Ct. App. Div. Jan. 3, 2014) (under "possessory, proprietary, or participatory" interest analysis, "property is abandoned if: (1) a person has either actual or constructive control or dominion over property; (2) he knowingly and voluntarily relinquishes any possessory or ownership interest in the property; and (3) there are no other apparent or known owners of the property.")

B. Plain View.

The defendant argues that Trooper Waitekus violated the Fourth Amendment and Article 11 when he walked down Katelyn's driveway and shined a flashlight into the grass next to the driveway. Even assuming the defendant somehow has standing to assert Katelyn's privacy rights, the trooper was in a place that he had a right to be, and the cartridge was in plain view from that place.

The trial court relied upon this Court's ruling in State v. Bovat, 2020 WL 6121478 (U.S.), in denying the motion to suppress. On appeal the defendant argues that Bovat incorrectly stated the law, citing to the statement of Justice Gorsuch which accompanied the United States Supreme Court's denial of the petition for a writ of certiorari in that case. This statement has no precedential value. It was signed by three of eight justices, and thus does not constitute a binding statement of the law. All that can be said of the view of the United States Supreme Court towards the Bovat decision is that the Court denied the petition for a writ of certiorari. We know what three justices think about the Bovat decision, but not what the remaining five (now six) think about the decision.

Furthermore, Justice Gorsuch's statement was based upon a misunderstanding of the factual situation in Bovat. Justice Gorsuch's statement is predicated on the assumption that "the wardens lingered on the property for perhaps fifteen minutes and never even made it to the front door…. [T]he wardens exceeded the scope of their implied license to approach the front door by heading to

the garage and spending so much time peering through its window… [T]he Fourth Amendment hardly tolerates the sort of meandering search that took place here." Bovat v. Vermont, 2020 WL 6121478 at *2. But none of these facts have ever been found to exist by any court, and they were disputed by the State.

Mr. Bovat's wife did testify that fifteen minutes passed before the officers made contact with her, but one of the game wardens testified that the time between arriving and going to the front door "would have been very quick," as it is routine for game wardens and law enforcement officers, upon arriving at a residence, to "notify the homeowner what's going on and also to see what other people are there for officer safety reasons. So it happens relatively quick." The trial court's findings of fact did not resolve this inconsistency, stating merely that "at one point" the wardens looked through the window of the garage.[1] Furthermore, it is not clear that the wardens "head[ed] to the garage and spen[t] so much time peering through its window." The testimony is equally consistent with the wardens heading to the front door past the garage, and there is no evidence at all about how long the wardens spent peering through the window.

In other words, the evidence was not conclusive one way or the other how long the wardens were on the driveway, where they went while on the driveway, and whether they ever "meandered." Since in a motion to suppress the defendant bears the burden of proving a Fourth Amendment violation, and since Mr. Bovat

[1] Mrs. Bovat testified that she was concerned that the wardens were there to tell her that something had happened to her husband, making it unlikely that she would wait fifteen minutes before going to meet them. And she did not describe what the wardens could have been doing for fifteen minutes on a bare concrete slab.

failed to do so, the decision of this Court was correct – the motion to suppress was correctly denied. See, United States v. Bissonette, No. 5:14-CR-50055-JLV, 2016 WL 11407825, at *8 (D.S.D. May 2, 2016), report and recommendation adopted, No. CR. 14-50055-JLV, 2016 WL 4617072 (D.S.D. Sept. 6, 2016), quoting United States v. Long, 30 F.Supp. 835, 849 (D.S.D. 2014), quoting, in turn, United States v. Esquivel-Rios, 725 F.3d 1231, 1239 (10th Cir. 2013)):

> [T]he record contains scant evidence regarding the location of the pickup truck on the driveway, the paths taken by law enforcement, and whether the officers failed to restrict their movements to those areas made accessible to visitors. 'Because the defendant "bears the burden of proving a Fourth Amendment violation," it is he "who shoulders the consequences of an insufficiently developed record.'"

In any event, even if Justice Gorsuch's recitation of the facts were correct, they bear no resemblance to the facts here, and therefor this Court need not rely upon the Bovat decision to affirm the denial of the motion to suppress in this case. Even Justice Gorsuch agrees that,

> [A] doorbell or 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." … [L]aw enforcement agents, like everyone else, may take up this "implied license" to approach.

Bovat v. Vermont, 2020 WL 6121478, at *1.

And "when officers walk up to the front door of a house, they are permitted to see, hear, and smell whatever can be detected from a lawful vantage point." Florida

v. Jardines, 569 U.S. 1, 21 (2013) (dissenting opinion, citing California v. Ciraolo, 476 U.S. 207, 213 (1986)).

The defendant here does not dispute that Trooper Waitekus could constitutionally approach Katelyn's home via the driveway, conduct his welfare check, and then leave. Defendant's brief at p. 18. What he takes issue with is the fact that Trooper Waitekus "search[ed] the lawn with a flashlight." But Tooper Waitekus did not "search the lawn." He looked down at the ground while he was walking down the driveway and saw the cartridge on the edge of the driveway. He did not get on his hands and knees and rummage through the grass. He did not actively go into the grass searching for something before he said to Mr. Short, "wait, don't move." As the attached photograph, Exhibit 8, shows, the blue cartridge is easily discernible among the green grass leaves.

The defendant argues that the lawn, unlike the driveway, is not used for normal ingress and egress to the house, and notes the presence of a sitting area on the lawn used by the homeowner to extend the activity of her homelife. The State does not disagree with this analysis, but that does not immunize the lawn from observations of items in plain view from the driveway. For example, if a handgun were visible from the driveway, lying on the table in the sitting area, it would not be immune from seizure. Similarly, the cartridge, lying in the grass right next to the driveway, and in plain view of anyone walking up or down this normal means of ingress or egress, and located without any "snooping around" as in Jardines, could be lawfully seized. Waitekus did not, as the defendant claims, "search[] the

overgrown lawn." As he was walking down the driveway it occurred to him that he was where the confrontation allegedly took place and he looked down and saw the cartridge.

United States v. Beierle, 2013 WL 12210170, at *2 (D. Wyo.), aff'd, 810 F.3d 1193 (10th Cir. 2016), presents a factual situation nearly identical to that here. In response to a report of a suspect shooting a rifle, the police went to the suspect's home and knocked on the door. Not receiving an answer, they proceeded to the adjacent shop, using the normal route of access which would be used by the public in general in visiting the shop. "From their vantage point on the driveway in front of the shop, the deputies, with the use of flashlights, saw the casings in the snow." The defendant argued that the casings were not in plain view because they were obscured by snow, just as the defendant here argues that the cartridge was obscured by grass. But photographs of the casings in Bierle showed that the casings were in plain view, either on top of compacted snow or on a portion of the driveway that was clear of snow, just as here the photograph shows that the cartridge was not obscured by grass. The court concluded that the seizure of the casings was not a fruit of an illegal search and the motion to suppress was denied. See also, State v. Cobb, 115 Ariz. 484, 489 (1977) (stolen brooch seen by officer leaving defendant's front porch was properly seized: "He had the right to be in the position to view the brooch, and the fact that he aided his view with a flashlight is inconsequential.").

The trooper did have a flashlight with him and may have used it to locate the cartridge. This did not mean that the cartridge was not in plain view. State v.

Bauder, 2007 VT 16, ¶ 30 (2007), cites Texas v. Brown, 460 U.S. 730, 739 (1983) for the proposition that the use of a flashlight to enhance visibility did not invalidate the seizure of drugs observed by officers. State v. Trudeau, 165 Vt. 355, 358 (1996), also cited Brown for the proposition that it is "'beyond dispute that [the officer's] action in shining his flashlight to illuminate the interior of [defendant's] car trenched upon no right secured to the [defendant] by the Fourth Amendment.'" See also, State v. Murray, 134 Vt. 115, 118–19 (1976):

> The use of the flashlight is routine police procedure, and its use does not alter the case from one where the observation was made by daylight.
>
> > (T)he fact that the officer used a flashlight to pierce the nighttime darkness does not transform his observation into a search. . . . The plain view rule does not go into hibernation at sunset.
>
> Marshall v. United States, 422 F.2d 185, 189 (5th Cir. 1970).

For these reasons, the denial of the motion to suppress should be affirmed.

II.

THE DEFENDANT'S USE OF A RACIAL EPITHET IN DESCRIBING THE ENCOUNTER WAS RELEVANT TO THE VICTIMS' CREDIBILITY AND WAS NOT UNDULY PREJUDICIAL.

The defendant next argues that the trial court erred in failing to exclude, pursuant to V.R.E. 403, evidence of the defendant's use of a racial slur.

The motion was untimely, and therefore the issue should not be reached on appeal. The trial court's September 23, 2019, scheduling order states that motions in limine must be filed by November 6, 2019. 9/23/19 Order, p. 9. The motion in

limine was made on November 12, 2019. See, State v. Vuley, 2013 VT 9, ¶ 6 (motion to sever not considered where filed after deadline where "defendant gave no reason for why the motions could not have been filed earlier, and we can see no reason in the record").

If the Court should reach this issue, the denial of the motion was not an abuse of discretion. Under Rule 403, the trial court has "substantial discretion" in determining admissibility, and its judgement will not be overruled unless the defendant demonstrates that the court's discretion was either "totally withheld or exercised on grounds clearly untenable or unreasonable." State v. McElreavy, 157 Vt. 18, 23 (1991). It is not enough that "a different judge or, for that matter, this Court might have reached a different result, and, indeed, be able to rationalize that conclusion as logically as any other." State v. Parker, 149 Vt. 393, 401 (1988). "This burden is a heavy one and often difficult to satisfy; nevertheless, it has always been the standard." State v. Dorn, 145 Vt. 606, 616 (1985). Cases in which the trial court's discretion has been upheld include State v. Cardinal, 155 Vt. 411, 414 (1990) (longstanding pattern of sexual abuse of daughter, accompanied by death threats towards her); State v. Bruyette, 158 Vt. 21, 31 (1992) (aberrant sexual activity with girlfriend, including master/slave role-playing, bondage, and illegal drug use); and State v. Parker, 149 Vt. at 403 (sexual assaults of another child in defendant's household during prior year). The trial court's ruling here was not an abuse of discretion.

The probative value of the evidence is obvious. The State's witnesses and the defendant's witnesses described two very different encounters. The State's witnesses described a hostile and aggressive defendant who repeatedly used racially inflammatory language in confronting Travis: "You better step back, boy and keep a-moving…. Yeah, make the right choice, boy, leave. Yeah, boy, leave. I only pull it out when I'm going to use it, boy." 11/18/19, P. 89.

The defense witnesses described an encounter in which Teyanna "rushed up," tried to "get in my face," was doing a "threatening little behavior," at which point the defendant "just kind of tried to step in front so that she wouldn't do anything to me." Trevis put his hand on the defendant's chest "to try to back him down from preventing Teyanna to getting" to Katelyn. At that point Mark and Katelyn calmly told them they needed to leave, it was time to get off her property. "They kept running their mouths for a minute or two and we just were very adamant that they needed to leave now, or we would call the cops or something." The defendant did not use bad language. He had his arm up and just kept pointing at the road, "like, to leave." 11/20/19, pp. 28 – 30.

The defendant's use of a racial slur corroborates the account given by the State's witnesses. The State's witnesses described someone who used racially inflammatory language during the encounter,[2] and the defense witnesses described someone who did not. The very next day the defendant used another racially inflammatory term in describing that very encounter. This fact supports the State's

[2] The defendant argues on appeal that "boy" can be used "quite benignly." It doesn't appear that the defendant is arguing that his use of the term "boy" was on this occasion benign.

case that it was the person described by its witnesses, and not the person described by the defense witnesses, who was in action that day. See, People v. Middagh, 2010 WL 1697557, at *4 (Cal. Ct. App. Apr. 28, 2010) ("the evidence of prior aggression and racial slurs against African–Americans was used to corroborate witness accounts that defendant was the aggressor in the shooting of two Latinos").[3] In short, the hostility evinced by the defendant in using this term demonstrates his hostility towards the victims, no matter whether actually racially motivated or not, and thus corroborates their account of his hostility towards them during the events in question. See, Parnell v. Commonwealth, 15 Va. App. 342, 348 (1992) (defendant's statement two days after charged incident had the tendency to prove his animosity towards victim, where during the charged incident defendant had called victim vile names and was extremely angry with him); Desper v. Commonwealth, 1996 WL 742014, at *2 (Va.) (defendant's keying of victim's car relevant to demonstrate defendant's hostility towards victim, "where the alleged crime clearly demonstrated a similar hostility.").[4]

The defense argument that this language was not relevant to credibility rings hollow in light of its heavy reliance upon racially inflammatory language used by Trevis to attack his credibility. In fact, the defense started its closing argument by

[3] Middagh involved a self-defense claim, but the same reasoning holds – the use of the racial slurs on one occasion corroborated the witnesses' account on another occasion, during which racial slurs were also used.

[4] The defense notes that the trial court declined to find probable cause that Trevis' race motivated the defendant's conduct. The State never argued that it did, and the relevance of the defendant's language the next day does not depend upon any assumption that he was so motivated. The language bears on the credibility of the trial witnesses because it corroborates his actions, not because it demonstrates racial bias on his part.

reading the transcript of Trevis' recording messages, previously played for the jury by the defense:

> "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."
>
> I want you to think about those words. And the State is correct, we are not raising the self-defense claim. But I want you to think, who talks like that? Who talks like that to a pregnant woman? Who makes those threats? Is this someone who is credible? Is this the type of person you're going to find trustworthy beyond a reasonable doubt?

11/20/19, p. 113.

The defense argued that Trevis's use of racially inflammatory language makes him, per se, less credible. The State did not make such an argument. The relevance of the defendant's use of the language was to show that the defendant's behavior and language the next day was more consistent with the State's witnesses' account than with the defense witnesses' account, and therefore the State's witnesses' account was more credible.

The defendant's prejudice claims are also without merit. The cases he cites on this point involve cases in which the racial slur was found not to be probative. But

where, as here, the slur does have probative value, prejudice does not automatically follow:

> Although it is true that the word "nigger" is often used in a highly offensive and inflammatory manner—as it was in this case—that its use was offensive and inflammatory does not mean that evidence of its use must be unfairly prejudicial. To be sure, there may be circumstances, as the trial court recognized in its ruling, in which the danger of unfair prejudice outweighs the probative value derived from evidence of the use of a slur, but those circumstances are not presented in this case. In addition, racial slurs, like sexist and homophobic slurs, are not uncommon. … If jurors can bear witness to bloody photographs and graphic testimony and still properly reach a decision on the merits, then surely they can hear defendant's unsavory racial slur, place it in context with the other evidence, and deliberate on all of the evidence to reach a verdict. That a juror may have to work hard to check her or his own assumptions and prejudices at the courthouse door in order to render a fair and impartial verdict does not require the exclusion of racially charged words from being entered into evidence, where, as here, the trial court determines that the evidence has probative value that is not substantially outweighed by the risk of unfair prejudice.

State v. Lipka, 289 Or. App. 829, 834, 413 P.3d 993, 996, review denied, 362 Or. 860, 418 P.3d 763 (2018). See also, People v. Quartermain, 16 Cal. 4th 600, 628, 941 P.2d 788, 805 (1997), as modified (Sept. 17, 1997):

> The unfortunate reality is that odious, racist language continues to be used by some persons at all levels of our society. While offensive, the use of such language by a defendant is regrettably not so unusual as to inevitably bias the jury against the defendant.

Several factors present in this case underscore that the use of the word was not unduly prejudicial. First, the jury heard one of the victims in the case use far

more offensive and racially charged language, and which was addressed directly to at another person in a confrontational manner, unlike the defendant's words. The jury didn't just hear a witness repeat the language, they heard an actual recording of the victim making the statements. The defense underscored the effect of the language by beginning its closing argument by quoting the language at length. Compared to this language, the single word used in passing by the defendant was mild. Any unfairly prejudicial effect would have been effectively diluted by the victim's language, which was heavily emphasized by the defense.

Second, the defendant did not use the language in a confrontational manner with the victims, but in a conversation the next day out of their earshot. This fact would address the concerns of even the potential jurors who were excused, since they appeared to be under the mistaken impression that the word had been used in a confrontational manner. See, 11/13/19, p. 44: "-- I think that using that, that is a form of violence."

Third, the jury acquitted the defendant of one of the charges, thus establishing that they had not been so prejudiced against him that they were incapable of weighing the evidence on each charge, and declining to return a verdict of guilt where the evidence, in their view, did not justify it. See, State v. Emerson, 2019 WL 1504279, at *2 (Vt.) (three-justice entry order), citing State v. Freeman, 2017 VT 95, ¶ 19 for the proposition that the jury's acquittal on one charge showed that it "did not act based on prejudice." See also, People v. Middagh, 2010 WL

1697557, at *5 (Cal. Ct. App.) (defendant's racial slurs did not create substantial danger of undue prejudice, where jury acquitted defendant of some charges).

Finally, the jury was specifically questioned about the term, and no prospective member who expressed any concern sat on the jury. See, State v. Taylor, 2019 WL 6523012, at *1–2 (Vt.) (three-justice entry order) (where a number of potential jurors indicated they could not be fair in animal cruelty case, including one who noted the defendant was "not malnourished," and therefore could "feed their damned dog when it's dying;" and another who the defense claimed was in tears, jury panel was not tainted).

CONCLUSION

For these reasons the defendant's conviction should be affirmed.

Dated: November 30, 2020

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CERTIFICATE OF COMPLIANCE

David Tartter, Deputy State's Attorney and Counsel of Record for the Appellee, State of Vermont, certifies that this brief complies with the word count limit in V.R.A.P. 32(a)(7)(A). According to the word count of the Microsoft Word processing software used to prepare this brief, the text of this brief contains 8301 words.

by: 

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