

STATE OF MAINE

v.

ABERNATHY B. MILLER

Submitted on Briefs December 12, 2008

Decided March 12, 2009

Panel: SAUFLEY, C.J., and CLIFFORD, ALEXANDER, LEVY, and GORMAN, JJ.

MEMORANDUM OF DECISION

Abernathy B. Miller appeals from a judgment of conviction for aggravated assault (Class B), 17-A M.R.S. § 208(1)(B) (2008), entered in the Superior Court (Penobscot County, *Humphrey, C.J.*) following a jury verdict finding him guilty. We are unpersuaded by Miller's contention that the judgment should be vacated because the court improperly precluded him from testifying about his knowledge of the victim's recent incarceration for a crime related to a domestic assault. The testimony was cumulative to other evidence of Miller's knowledge of the victim's dangerous propensities, and any error in the court's exclusion of that testimony was harmless. *State v. Stanley*, 2000 ME 22, ¶ 12, 745 A.2d 981, 985; *State v. Dutremble*, 392 A.2d 42, 47 (Me. 1979). Contrary to Miller's additional contention, there was no violation of his Fifth Amendment right against self-incrimination when, during cross-examination, the State impeached him on his failure to tell the police shortly after the assault about facts on which he relied at trial to justify his assaultive conduct. *See* M.R. Evid. 611(b); *State v. Kane*, 432 A.2d 442, 444 (Me. 1981). Although Miller spoke to the police at the time, he made no motion to suppress any statements, and he "cannot [] explain[] away" his "failure to speak in exculpation" by claiming that he was invoking his right to remain silent. *See Kane*, 432 A.2d at 444.

Furthermore, contrary to what Miller argues, the court's instruction on self-induced intoxication was correct as a matter of law, and the court therefore did not abuse its discretion by declining to give the instruction that Miller requested. *See State v. Smith*, 472 A.2d 948, 951 (Me. 1984); *State v. Rancourt*, 435 A.2d 1095, 1104 & n.7 (Me. 1981); *see also State v. Michaud*, 513 A.2d 842, 853 (Me. 1986); Alexander, *Maine Jury Instruction Manual* § 6-49 at 1-6 (4th ed. 2004). Additionally, contrary to Miller's contention, the court did not abuse its discretion by denying his request to caution the jury about placing undue reliance on the contents of a videotape of the assault and the events surrounding the assault. The court instructed the jury at the start of the trial not to "form any opinions in this case until you have heard all of the evidence," and we review jury instructions in their entirety. *See State v. Dumond*, 2000 ME 95, ¶ 11, 751 A.2d 1014, 1017; *State v. Atkinson*, 458 A.2d 1200, 1203-04 (Me. 1983); *see also State v. Bennett*, 658 A.2d 1058, 1063 (Me. 1995).

Finally, Miller's contention that, without testimony from an expert or from the victim, there is no evidence in the record to support a finding that the flashlight used by Miller in the assault was capable of producing serious bodily injury, is without merit. *See State v. Woo*, 2007 ME 151, ¶ 5, 938 A.2d 13, 14; *State v. Drewry*, 2008 ME 76, ¶ 32, 946 A.2d 981, 991; *see also State v. Carmichael*, 405 A.2d 732, 735 (Me. 1979).

The entry is:

Judgment affirmed.

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