

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-231

APRIL TERM, 2003

	}	APPEALED FROM:
	}	
State of Vermont	}	District Court of Vermont, Unit No. 2,
	}	Bennington Circuit
v.	}	
	}	
Brian S. Nolan	}	DOCKET No. 171-2-01 Bncr
	}	
	}	Trial Judge: David A. Howard
	}	

In the above-entitled cause, the Clerk will enter:

Defendant appeals his convictions on two counts of lewd and lascivious conduct, arguing for the first time on appeal that he was denied a fair trial when the prosecutor improperly vouched for the credibility of a state witness who was recalled to change his earlier perjured testimony. We affirm.

Defendant was given a ride by several young women after he ran out of gas. Eventually, he wound up at the women's apartment, where he became belligerent and engaged in an altercation. Two brothers who lived downstairs helped the women throw defendant out of the apartment. Defendant called police and reported that he had been assaulted. After police spoke to the various witnesses, they charged defendant with multiple counts of lewd and lascivious conduct for grabbing and groping three of the women.

At trial, one of the downstairs neighbors denied that his brother had been involved in the altercation with defendant. Based on the testimony of other witnesses, the State suspected that the neighbor had lied about his brother not being involved in the fracas. The neighbor was recalled, without objection, and allowed to amend his earlier testimony concerning his brother's actions. The neighbor first acknowledged that he had had a conversation with the prosecutor about the laws of perjury, and that he had spoken to his attorney, who advised him to amend his testimony. When asked why he had lied, the neighbor responded that he had wanted to protect his brother. The prosecutor reminded the neighbor that he had been given immunity with respect to any assault charge, and that he had nothing to lose by telling the truth. During cross-examination, defense counsel asked defendant if he understood what was important to the prosecutor, and the neighbor responded that the prosecutor wanted to win the case. On redirect, the prosecutor emphasized to the neighbor that he did not care whether he won the case, but simply wanted the neighbor to tell the truth. Following the neighbor's amended testimony, the State rested, and defendant filed a motion to dismiss, arguing that the State had relied on confused and perjured testimony. The district court denied the motion, and later denied defendant's motion for judgment of acquittal following the close of evidence, ruling that the conviction did not rest upon the knowing presentation of perjured testimony, and that the neighbor's initial perjured testimony involved only the collateral assault. Defendant was eventually convicted on two counts of lewd and lascivious conduct.

On appeal, defendant argues for the first time that he was denied a fair trial when the prosecutor personally vouched for the neighbor's testimony by threatening, in front of the jury, to bring criminal charges against him if he did not tell the truth. We find no plain error, if any error at all. See State v. Kinney, 171 Vt. 239, 253 (2000) (" Plain error exists only in exceptional circumstances where the failure to recognize it would result in a miscarriage of justice or where the error is so grave and serious that it strikes at the heart of defendant's constitutional rights."). The prosecutor was compelled to

recall the neighbor to correct the suspected perjured testimony. See State v. Ladabouche, 146 Vt. 279, 281 (1985) (" A conviction obtained through the use of false evidence, known to be such by the State, and either solicited by the State or allowed to go uncorrected, violates the Fourteenth Amendment of the United States Constitution."). Although the jury learned that the neighbor and the prosecutor had had a conversation about the laws of perjury, the prosecutor did not directly threaten defendant in front of the jury with perjury charges. Rather, the prosecutor merely encouraged defendant to come clean and tell the truth without fear of prosecution. The prosecutor' s repeated emphasis on the neighbor telling the truth came only after defense counsel elicited a response in which the neighbor expressed his belief that the prosecutor' s principal interest was winning the case. Defendant has failed to cite any case law on point suggesting that the colloquy between the prosecutor and the recalled witness was improper or required reversal of the conviction.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Ernest W. Gibson III, Associate Justice (Ret.)

Specially Assigned