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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-237

MARCH TERM, 2003

State of Vermont v. Mark Rich	}	APPEALED FROM: District Court of Vermont, Unit No. 2, Chittenden Circuit DOCKET NO. 5070-9-99 Cncr Trial Judge: Helen M. Toor

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

Defendant appeals his sexual assault conviction following a jury trial, arguing that the trial court erred by permitting the State to use hearsay testimony to bolster the complaining witness' s credibility, and that the evidence was insufficient as a matter of law to support the conviction. We affirm.

The State presented five witnesses at the one-day jury trial: two of the complainant' s friends, the investigating officer, the complainant, and the nurse who examined the complainant on the night of the alleged assault. One of the complainant' s friends testified, among other things, that she had learned of the assault from the complainant when she called her the next morning. The complainant testified that defendant had lured her out of a bar on the pretext that her sister was waiting for her, but then dragged her into some shrubs and sexually assaulted her. After the State rested, defendant took the stand and denied assaulting the complainant or having sexual intercourse with her. At the conclusion of the testimony, the jury was read a stipulation stating that defendant' s semen was not found at the crime scene, and that DNA testing conducted as part of the sexual assault examination revealed semen attributable only to the complainant' s boyfriend. The jury found defendant guilty of the alleged offense, and he received a sentence of fifteen to twenty years.

Defendant first argues that the trial court erred when it permitted the State to use hearsay evidence to bolster the complainant' s credibility. During the State' s direct examination of one of the complainant' s friends, the witness testified that she first found out about the alleged assault the next morning when she called the complainant, who informed her that defendant had sexually assaulted her the night before. Defense counsel objected to this response on hearsay grounds. The prosecutor indicated that she was not going any further with that line of questioning, and the trial court stated " All right." Apparently, the court said something else, but it is marked " inaudible" on the transcript. According to defendant, by permitting the above testimony to go to the jury, the trial court allowed the State to bolster the complainant' s credibility with inadmissible and prejudicial evidence.

This argument is unavailing. First, the record does not demonstrate that the trial court admitted the challenged statement. The court' s complete response to defendant' s objection was not transcribed. For all we know, the court may have stricken the witness' s statement. It is defendant' s obligation to produce an adequate record for appellate review, and his failure to do so through V.R.A.P. 10(c) or by other means will preclude review by this Court. See State v. Gadreault, 171 Vt. 534, 538 (2000) (mem.).

Second, even assuming that the trial court admitted the challenged statement, the error was harmless. Notwithstanding that complainant' s friend testified before complainant, the fact remains that the brief challenged statement was insignificant and cumulative, given (1) the other friend' s testimony, admitted under the excited utterance exception, that

shortly after the alleged assault complainant came running down the street crying and claiming that defendant has just raped her; (2) the investigating officer' s testimony, also admitted under the excited utterance exception, that complainant told him shortly after the alleged assault that defendant had raped her; and (3) complainant' s lengthy testimony on both direct and cross-examination concerning the details of the assault. Cf. State v. Fisher, 167 Vt. 36, 41-42 (1997) (amount and consistency of testimony by social services worker, investigating police officer, victims' mother, and victims themselves demonstrated that psychologist' s hearsay statement concerning alleged lewd and lascivious conduct was harmless); State v. Derouchie, 153 Vt. 29, 33 (1989) (doctor' s hearsay statement in sexual assault case was harmless, given that testimony was very limited and cumulative, and that complainant was available for cross-examination); State v. Gallagher, 150 Vt. 341, 349 (1988) (same). Considering all of the testimony in this case, it is clear beyond a reasonable doubt, that without the single challenged statement, the jury still would have returned a guilty verdict.

We also reject defendant' s argument that the evidence does not support the conviction. Because defendant failed to move for judgment of acquittal at the conclusion of the case or within ten days of the verdict, see State v. Brooks, 163 Vt. 245, 254 (1995), the issue is whether " the evidence is so tenuous that a conviction would be unconscionable." State v. Norton, 139 Vt. 532, 534 (1981). Defendant cannot come close to meeting this standard. Indeed, he cannot satisfy the standard for overturning a trial court' s denial of a motion for judgment of acquittal " " whether the evidence, taken in a light most favorable to the State and excluding modifying evidence, is sufficient to fairly and reasonably support a finding of guilt beyond a reasonable doubt." Brooks, 163 Vt. at 254-55. No evidence corroborating the complainant' s testimony was required for the conviction, see 13 V.S.A. § 3255, but in this case there was testimony by at least three other witnesses supporting the jury' s verdict. Cf. State v. Cate, 165 Vt. 404, 408-09 (1996) (evidence was sufficient to support jury' s sexual assault conviction in light of complainant' s testimony and testimony of two other witnesses describing complainant' s state of mind shortly after assault). The absence of inculpatory DNA evidence did not preclude the jury from convicting defendant in this case, given the complainant' s testimony that she did not know if defendant had ejaculated during the assault. Cf. People v. Simmons, 485 N.E.2d 1135, 1142 (Ill. App. Ct. 1985) (given complainant' s testimony that her attacker did not ejaculate, there was sufficient evidence of rape despite existence of semen stains not belonging to defendant); People v. Counts, 632 N.Y.S.2d 4, 5 (App. Div. 1995) (given complainant' s testimony that she did not know if her attacker had ejaculated, there was sufficient evidence of rape despite existence of semen stains not belonging to defendant).

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Denise R. Johnson, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned