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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-440

JUNE TERM, 2003

State of Vermont v. Gerald Baker, Jr.	}	APPEALED FROM: District Court of Vermont, Unit No. 2, Chittenden Circuit DOCKET NO. 6485-10-00 Cncr Trial Judge: Michael S. Kupersmith

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

Defendant appeals his conviction for sexual assault after a trial by jury. He contends that the prosecutor went beyond permissible advocacy in her closing argument to the jury. Defendant also claims that the trial court erred by denying his motions for a new trial and judgment of acquittal based on insufficiency of the evidence. We affirm.

We begin with the trial court' s denial of defendant' s motions for judgment of acquittal and for a new trial. We review these claims under similar standards. In reviewing a district court' s denial of a motion for judgment of acquittal, the Court examines the evidence in the light most favorable to the State, and excludes any modifying evidence. State v. Couture, 169 Vt. 222, 226 (1999). If the evidence, when viewed in this manner, " fairly and reasonably tends to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt," the lower court' s decision must stand. Id. (quoting State v. Delisle, 162 Vt. 293, 307 (1994)). Similarly, when ruling on a motion for new trial, the district court must weigh the evidence and determine whether it preponderates heavily against the jury' s verdict, and sustaining the conviction would result in a serious miscarriage of justice. Id. at 227. We review the court' s decision under the abuse-of-discretion standard because ruling on a motion for new trial is a discretionary decision for the trial court in the first instance. State v. Elkins, 155 Vt. 9, 18 (1990).

Defendant admitted that he engaged in sexual intercourse with the victim, and thus the central disputed issue at trial was whether the victim consented to the act. Defendant and the victim were strangers, and both were at a bar in Burlington on the night of the assault. At about 2:00 a.m., the victim asked the bartender, whom she knew, to call her a cab because she was too intoxicated to drive. Earlier that evening, defendant had seen the visibly intoxicated victim arguing with another bar patron.

The cab arrived at approximately 2:15 a.m. and was driven by David Ritchie. Defendant and Ritchie knew each other because they both worked for the cab company. The victim left the bar after the bartender informed her that the cab had arrived. Once outside, the victim got into a car which she believed at the time was the cab the bartender had summoned. Instead, it was defendant' s vehicle. Ritchie saw defendant open his car door for the victim and watched her get in. Afterwards, defendant walked over to Ritchie, told him that the victim did not need a ride home, gave him three dollars for his trouble, and thanked him. Ritchie left.

When defendant and the victim arrived at her residence, defendant opened her door because the victim could not insert her key into the door lock. She shut the door behind her and went upstairs to the bathroom. When she emerged from the bathroom with her pants unfastened, she saw defendant standing in her bedroom. She asked who he was, and why he was there, and told him to leave. Defendant grabbed her shirt, seized her arm and twisted it behind her back. The victim then fell to the bedroom floor and passed out.

Sometime later, the victim awoke to find her pants unzipped and pulled down to her thighs and her shirt disheveled. She did not recall exactly what happened after she passed out, but was experiencing significant pain in her legs and right shoulder. She crawled to her telephone, called emergency services, and said that she had been raped. She identified her assailant as the cab driver who picked her up at the bar and said that he had attacked her in her house, but that he was no longer there. The dispatcher sent a Burlington police officer to investigate the victim' s allegations.

The officer found the victim still on the telephone with the police when he arrived. The victim became hysterical and repeatedly said she did not want him or anyone else to touch her. The officer took the victim to the hospital, where she broke down again when recounting what she thought had happened " that the cab driver who took her home had raped her. The attending nurse saw bruises on the victim' s back, arms, buttocks, and the inner sides of her legs. The victim' s shoulder was swollen and bruised. Defendant twisted her arm so forcefully that she required physical therapy for her right shoulder, which still had not fully healed by the time of trial.

When first confronted with the victim' s allegations, defendant denied knowing her or having intercourse with her, and he claimed that he did not give her or anyone else a ride home on the evening in question. Later, he admitted he had sex with her, and told the police that she was " pretty lit" and was stumbling and staggering that night. He claimed that the victim went home with him willingly, and that she crawled onto his lap in the car and began kissing and rubbing him. He alleged that he went to the bathroom at the victim' s home, and that when he came out, she put her arms around him. Presenting the victim as the aggressor, defendant said they went to the bedroom where they had consensual sex. Defendant said that he left her home approximately fifteen minutes after they arrived.

At trial, defendant' s chief defense came in the form of expert psychiatric testimony on the effects alcohol has on memory. Defendant attempted to prove that the victim " blacked out," meaning that alcohol left her without a memory of what happened, but that she was conscious and showing few signs of intoxication so he could not tell that she was unable to consent. Defendant' s theory was supported by his expert, who explained that it was possible for a person to show no signs of intoxication even though she " blacked out." On cross examination the psychiatrist admitted, however, that a person experiencing a black out from alcohol could in fact show very serious signs of intoxication, and that memory loss could result from a blow to the head or psychological trauma.

Given the evidence recounted above, the court did not abuse its discretion by denying defendant' s motions for acquittal or a new trial. The evidence was sufficient for the jury to infer that defendant knew the victim was intoxicated and that she was unable to give her consent to engage in sex either because she was too drunk or because she was unconscious. Cf. State v. Cate, 165 Vt. 404, 413 (1996) (" Whether the jury found that complainant was unable to consent because she had passed out or blacked out was not significant, so long as the evidence did not preponderate heavily against the jury verdict."). The victim' s injuries following the assault corroborate her account. Moreover, as the trial court noted, defendant' s version of the events was implausible. He asked the jury to believe that the victim showed no signs of intoxication even though she could not drive home and could not open her front door without his help. According to defendant' s fanciful theory, the victim got into a car with a man she did not know, sat on his lap and began kissing and fondling him. He wanted the jury to also believe that he was being helpful by offering to drive the victim home even though the taxi she called was ready to take her there. In sum, the record contains ample evidence to sustain the jury' s verdict beyond a reasonable doubt. The court did not err by so concluding and denying defendant' s motions.

Defendant next contends that error appears in the prosecutor' s closing argument because the prosecutor allegedly analogized defendant' s assault on the intoxicated victim to a predatory animal stalking weak prey and inserted her personal beliefs about the case into the argument. Defendant concedes that we must review his claim under the plain error standard because he did not object to the closing argument at trial. See V.R.Cr.P. 52(b) (plain errors may be noticed even though error was not brought to trial court' s attention below). Only in the extraordinary and rare case will plain error be found. State v. Ross, 152 Vt. 462, 468 (1989). The error must be obvious and must affect the defendant' s substantial rights. Id. The Court will reverse only where failure to recognize the error will result in a miscarriage of justice or where the error is so grave that it strikes at the heart of defendant' s constitutional rights. State v. Davignon, 152 Vt. 209, 222 (1989). When the plain error claim is grounded on the State' s closing argument, we will not reverse unless the comments at issue " are so manifestly and egregiously improper that there is no room to doubt the prejudicial effect." State v. Martel, 164 Vt. 501, 506 (1995). A number of factors may determine whether an improper closing argument was prejudicial: the argument' s frequency; whether the remark " was inflammatory and attacked defendant' s

character" ; and whether a curative instruction was given. Id.

The transcript of the closing arguments in this case leaves doubt as to whether the prosecutor' s comments prejudiced defendant. While we find that the comments at issue exceed the bounds of permissible advocacy, we cannot say that they rose to the level of plain error. The improper comments defendant cites were isolated and infrequent. The references to a predatory animal hunting vulnerable prey were few, and at least one reference was made to rebut defendant' s argument that he had not schemed to get the victim into his car so that he could assault her. In fact, defense counsel' s closing argument referred more frequently to the predatory animal theory than did the prosecutor' s closing argument. Defendant has failed to establish that the improper comments so prejudiced his case that reversal is required.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned