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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-528

NOVEMBER TERM, 2004

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
Jeffrey Castonguay	}	
	}	DOCKET NO. 3243-5-02 Cncr
		Trial Judge: Ben W. Joseph

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

Defendant Jeffrey Castonguay appeals from his conviction of second degree aggravated domestic assault following a jury trial. He argues that his conviction should be reversed because: (1) the trial court erroneously admitted testimony about a "standard threat" that he had made to the victim; and (2) the prosecutor made improper statements during her closing argument. We affirm.

Defendant was charged with one count of second degree aggravated domestic assault after allegedly striking his girlfriend Jacinda Davis. The following evidence was presented at trial. In May 2002, Burlington Police Officer Bonnie Beck was dispatched to meet with Ms. Davis, who had allegedly been assaulted. When the officer arrived, Ms. Davis was crying and shaking, and she appeared scared. Ms. Davis stated that defendant had hit her legs, and the officer observed that Ms. Davis's knees were red, and there was a bruise on her thigh. Ms. Davis informed the officer that she had been talking on the telephone to Megan Emerson when defendant told her to hang up the phone. When she failed to comply, defendant moved toward her, growled, and said he was going to "smash" her. Defendant then punched Ms. Davis's legs when she tried to push him away. Ms. Davis provided police with a sworn statement to this effect. The officer testified that Ms. Davis did not appear to be intoxicated or on heroin at the time of the interview.

Ms. Emerson testified that she had been on the telephone with Ms. Davis, and Ms. Davis was crying and screaming. Ms. Emerson heard defendant say that he wanted to hit Ms. Davis. Defendant then made a growling noise, and Ms. Emerson heard a noise that sounded like defendant had hit or kicked Ms. Davis. Ms. Davis told Ms. Emerson that defendant had hit her and she was going to the police; she asked Ms. Emerson for help. The phone line was then disconnected. Ms. Emerson gave a sworn, written statement as to what she had heard, which was admitted into evidence.

The officer testified that she met with defendant on the evening of the alleged assault. Defendant admitted arguing with Ms. Davis and speaking to Ms. Emerson on the telephone. He denied hitting Ms. Davis. Defendant stated that Ms. Davis was angry, and that she had attacked him because he had threatened to leave her. At defendant's direction, the officer observed a scratch on defendant's face, and redness in his right eye.

At trial, Ms. Davis testified as a defense witness. She stated that she had lied to the police, and lied during a previous court proceeding when she said that defendant had hit her. Ms. Davis testified that she had lied because she believed that defendant was going to leave her, and she was upset. She stated that she had been under the influence of heroin that evening, and she had kicked and hit defendant as he tried to take the telephone from her. Ms. Davis testified that, after running from the residence, she hit herself, causing the redness to her legs.

On cross-examination, the prosecutor asked Ms. Davis if she recalled making a prior statement regarding a "standard threat" that defendant had used on her when he wanted her to do something. Defendant objected on relevancy grounds, stating that "a standard threat as opposed to something that was made on this particular day is not relevant to the situation." The court stated that it had "read the Affidavit" and understood "the history of this." After clarifying that the prosecutor was asking Ms. Davis about a statement contained in the police officer's report, the court overruled defendant's objection. The prosecutor then asked Ms. Davis if she had previously testified at defendant's bail hearing that defendant had told her that if he went to jail, he would sodomize her. Ms. Davis acknowledged that she had made such a statement. The prosecutor then asked Ms. Davis if she recalled making a similar statement a few weeks prior to trial. Ms. Davis stated that "it's not true as to how I said it. It was – he – he used to say it to me like in a joke, I don't know, I don't know, he used to say that if I cheated on him that he would rape the guy up the ass and then, but - and then that's where I got it from." Ms. Davis stated that she did not remember telling the prosecutor that defendant had threatened to sodomize her if he went to jail. She then stated that defendant had not made this statement in a threatening way, but "we were just talking one day and that's what was said and that's where I - it just stuck in my head and that's where I got it." The prosecutor again asked Ms. Davis if she remembered telling her that defendant had threatened to sodomize her in the past, and Ms. Davis replied, "No, but obviously I did."

The jury found defendant guilty of second degree aggravated domestic assault, and this appeal followed.

Defendant first argues that the trial court committed reversible error by admitting testimony regarding a "standard threat" that he had used against Ms. Davis. Defendant asserts that there was no permissible evidentiary basis for overruling his objection, and the court failed to balance the prejudicial impact of this testimony against its probative value. According to defendant, this balancing was particularly important because the testimony concerned defendant's uncharged prior wrongful conduct that was only tenuously connected to the charged crime. Defendant maintains that reversal is required because the testimony on this issue was extensive, and "strongly determinative" of his guilt. Defendant also asserts that the court improperly commented on this evidence by

referring to the police officer's affidavit of probable cause, which gave the testimony undue prominence.

We find these arguments without merit. A defendant cannot claim error in the admission of evidence unless he has made a timely and specific objection during trial. V.R.E. 103(a)(1); State v. Fisher, 167 Vt. 36, 43 (1997). "The objection must have been made at the time the evidence was offered or the question was asked, and objection on one ground does not preserve the issue for appeal on other grounds." Fisher, 167 Vt. at 43 (internal citations omitted). In this case, defendant objected to the admission of this testimony on relevancy grounds; he did not argue that its prejudicial effect outweighed its probative value. He did not object to the court's comments. Therefore, our review is for plain error only. "[W]e will find plain error to warrant reversal of a criminal conviction, absent preservation, only in rare and extraordinary cases where the error so affects the substantial rights of the defendant that we cannot find the overall trial to be fair." State v. Turner, 2003 VT 73, ¶ 15, 175 Vt. 595 (mem.) (internal quotation marks and citation omitted). Defendant has not demonstrated the existence of plain error here.

It appears from the record that Ms. Davis did not directly respond to the prosecutor's question regarding defendant's "standard threat" as discussed in the police affidavit. Instead, Ms. Davis acknowledged, without objection, her previous in-court testimony that defendant had threatened to sodomize her if he went to jail. She testified that this statement had been misinterpreted, however, and that defendant's "threat" stemmed from a joke that defendant would rape any man that Ms. Davis slept with. The court did not err in allowing this testimony. In overruling defendant's earlier relevancy objection, the trial court stated that it had "read the Affidavit." The court did not refer to the substance of the police officer's affidavit, and there is no support for defendant's assertion that, through the court's comment, the jury would have been led to believe that the alleged threat actually occurred. We find no plain error.

Defendant next argues that he was denied a fair trial due to the prosecutor's statements during closing. Specifically, defendant challenges the prosecutor's assertion that, by changing her testimony at trial, Ms. Davis sought "to get [defendant] out of trouble . . . in order to protect him." Defendant maintains that this was inappropriate because the only evidence in the record on that point was Ms. Davis's statement that she had not come to court to help defendant. Defendant also takes issue with the prosecutor's statement that "this was an abusive relationship. You know from Ms. Davis, she's sort of admitted [defendant's] threats to sodomize her." Defendant maintains that the record did not contain any evidence of an overall abusive relationship, and Ms. Davis had consistently denied and rebutted the State's assertion regarding a "standard threat" of sodomy. Finally, defendant challenges the prosecutor's statement that "if somebody's willing . . . to control somebody's behavior by threatening to sodomize them, wouldn't they be capable of saying you need to get off the phone, I want you off the phone and when they don't get off the phone they hit them?" Defendant asserts that this statement raised an unsupported and highly prejudicial inference, and it exceeded the bounds of the evidence.

We find these arguments without merit. As defendant acknowledges, he did not object to these statements below, and thus, our review is for plain error only. "Comments made during a

closing argument will not amount to plain error unless they are so manifestly and egregiously improper that there is no room to doubt the prejudicial effect." State v. Martel, 164 Vt. 501, 506 (1995). Defendant fails to establish the existence of plain error here. Most of the comments highlighted by defendant are supported by evidence presented at trial. See State v. Billado, 141 Vt. 175, 181-82 (1982) ("It is the general rule that counsel may recount and comment on evidence properly admitted at trial, that he may draw legitimate inferences from the record, and that he may reflect unfavorably on the defendant so long as the remarks are based on properly admitted evidence.") (internal quotation marks and citation omitted).

The State presented evidence that Ms. Davis's trial testimony was inconsistent with her prior statements that defendant had punched her, and he had threatened to sodomize her if he went to jail. Ms. Davis acknowledged her inconsistent statements, and testified that she was now telling the truth in an effort to better herself. Ms. Davis stated that she still cared about defendant, and that she had visited him in jail. She testified that she had spoken to defendant, and that he had her fill out an affidavit saying that her prior statements had been untrue. Ms. Davis testified that, "in her heart," she considered defendant to be the father of her child. Thus, although Ms. Davis denied changing her story to protect defendant, the prosecutor could legitimately infer from the evidence that Ms. Davis changed her testimony to protect defendant, or to facilitate a resumption of their relationship. The prosecutor could also legitimately infer that defendant's threat to sodomize Ms. Davis, or her paramours, is indicative of an "abusive" relationship. Even assuming that the prosecutor's statements were improper, however, they do not rise to the level of plain error. We therefore find defendant's second claim of error without merit.

Affirmed.

BY THE COURT:

_____
John A. Dooley, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

_____
Frederic W. Allen, Chief Justice (Ret.),
Specially Assigned