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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-034

NOVEMBER TERM, 2005

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin Circuit
Jason A. Ames	}	
	}	DOCKET NO. 1538-12-03 FrCr
		Trial Judge: Mark J. Keller

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

Defendant appeals from his conviction of assault and robbery in violation of 13 V.S.A. ' 608(b) following a jury trial. He argues that his conviction should be reversed because: (1) the evidence presented at trial was insufficient to prove that he used a weapon or stole money from the victim; (2) he was denied a fair trial through testimony offered on rebuttal; and (3) he was not convicted by a unanimous verdict of twelve jurors. We affirm.

Defendant was charged with assault and robbery with a dangerous weapon in December 2003. The information alleged that defendant, armed with a gun, had assaulted Diane Longway and stolen money from her. The victim testified at trial to the following facts. On the day of the incident, defendant and one of his friends had called Longway=s husband and asked for help starting their car. Her husband went to help and later returned with defendant and others to the Longway home. The group, most of whom the victim knew, stayed at the house for approximately an hour. During this time, Longway took some money out of her purse and began to count it. Defendant and several others walked through the room while she was doing so. Longway=s husband and the men then left. Shortly thereafter, defendant returned, and Longway allowed him to come inside. Defendant held a gun to her head and demanded her money. Longway described the gun as black and silver, and stated that it resembled a nine millimeter. According to Longway, defendant told her that if she did not give him the money, he would use the gun. Longway retrieved the money, approximately $2500 in insurance proceeds, and gave it to defendant. Longway testified that defendant took the money, left her home, and ran up the street. She stated that she had seen someone who resembled one of defendant=s friends standing outside during the robbery, and she observed defendant get into a car and drive off.

At the close of the State=s evidence, defendant moved to dismiss for lack of a prima facie case. He asserted that the State had not met its burden of proving that the money existed or that he had used a gun. The court denied the motion. Defendant renewed his motion the following day just before the defense rested, and the court denied it on the same basis. Defendant did not move for a judgment of acquittal at the close of all of the evidence. The jury found defendant guilty. Defendant filed a post-judgment motion for a new trial and a motion for judgment of acquittal, both of which were denied. This appeal followed.

Defendant first argues that the court erred in denying his motion for judgment of acquittal because the evidence was insufficient to show that he was guilty beyond a reasonable doubt. He asserts that the victim=s testimony alone was insufficient to show that he threatened her with a gun and stole her money. According to defendant, the State was also obligated to introduce the gun or the stolen money, or provide testimony that the gun or money were discovered at his house.

When reviewing the trial court=s denial of a motion for judgment of acquittal under Rule 29 of the Vermont Rules of Criminal Procedure, we must determine Awhether, taking the evidence in the light most favorable to the state and excluding modifying evidence, the state has produced evidence fairly and reasonably tending to show the defendant guilty beyond a reasonable doubt.@ State v. Carrasquillo, 173 Vt. 557, 559 (2002) (mem.) (brackets and quotations omitted). The evidence was sufficient here.

In this case, the State needed to prove that defendant, armed with a dangerous weapon, assaulted Longway and stole money from her. 13 V.S.A. ' 608(b). As detailed above, the victim testified that defendant held a gun to her head and robbed her of $2500 in cash. This testimony was sufficient to establish the elements of the crime. See State v. Prior, 174 Vt. 49, 53 (2002) (holding that victim=s testimony regarding assault was sufficient to establish elements of crime, and rejecting argument that knife was not in evidence and State relied entirely on victim=s testimony). We reject defendant=s assertion that the victim=s failure to describe the gun in detail rendered her testimony insufficient. This argument does not address the sufficiency of the evidence but rather goes to the credibility of the witness and the weight of the evidence, matters which are

entirely within the province of the jury. State v. Norton, 134 Vt. 100, 103 (1976). We note that other witnesses corroborated aspects of the victim=s testimony. The victim=s husband testified, for example, that he had cashed a large insurance check in December. He stated that when he returned home that evening, Longway was Avery upset@ and crying and she told him that they had been robbed and the money was gone. Several others also testified that the victim stated that she had been robbed at gunpoint and she was upset and scared that evening. There was also testimony that defendant was aware of the insurance money and had engaged in quiet conversation with one of his friends when the subject arose. The evidence presented at trial was sufficient for a reasonable jury to conclude that defendant violated 13 V.S.A. ' 608(b).

Defendant next argues that he was denied a fair trial when one of the State=s witnesses, Corporal Couture, testified on rebuttal and answered two questions posed by the jury. The record shows that the jury asked Corporal Couture why the police had not searched defendant=s home for the gun or the money. The witness responded that, in these types of incidents, it was unlikely that the items would be found at the criminal=s home. He added that, in this case, defendant had left the scene in another person=s car, and police were therefore unable to determine where these items could be located. Defendant argues that this testimony undermined his case because the witness essentially told the jury that the police were not required to conduct a search for the gun or the money. According to defendant, this undercut his position that the State needed to introduce the gun and the money to sustain its burden of proof.

Defendant did not object to this testimony at the time it was offered, and we find no plain error. APlain error exists only in exceptional circumstances where a failure to recognize error would result in a miscarriage of justice, or where there is glaring error so grave and serious that it strikes at the very heart of the defendant=s constitutional rights.@ State v. Pelican, 160 Vt. 536, 538 (1993) (quotations omitted). As discussed above, the State did not need to introduce the gun and the money to satisfy its burden of proof. Moreover, as the State points out, defendant elicited similar testimony during its examination of this witness. In any event, defendant was free to make an argument to the jury as to how it should construe Corporal Couture=s testimony. We find no error.

Finally, defendant argues that his conviction must be reversed because it is not apparent from the record that he was convicted by twelve jurors. The record reveals that there was some confusion as to which jurors had been selected as alternates and which had been excused. On the first day of trial, the court named juror Brenda Goodhue as the only alternate and, the same time, it excused Mr. Daniels for health reasons at his request. For reasons that are not clear, Mr. Daniels apparently remained throughout the trial. On the second day of trial, one of the jurors, Hilary Boudreau, was questioned about her familiarity with one of the witnesses; she indicated she knew him from high school but that she could remain impartial. She was not excused from the panel. After the jury was charged but before they began deliberations, confusion arose as to which juror was the alternate. The court informed Ms. Goodhue that she was the alternate and excused her. Mr. Daniels was present, and the court excused him again. The jury then deliberated and informed the court that it had reached a unanimous guilty verdict. The record indicates that the jury was polled but reflects only eleven responses, all indicating guilt. Ms. Boudreau was not polled and gave no response. No objection was raised.

On appeal, defendant suggests that it is possible that, due to the confusion as to who was an alternate, the jurors, including Ms. Boudreau, could have thought that she was an alternate and therefore did not need to participate in deliberations and render a verdict. We find no error. The record indicates that the jury informed the court that it had reached a unanimous verdict. While it is unclear from the record why only eleven jurors were polled, there is no evidence to suggest that only eleven jurors participated in deliberations. Defendant=s claim of error is purely speculative. Moreover, defendant did not object at trial, which would have allowed the trial court to address the presumed polling oversight. See People v. Lessard, 375 P.2d 46, 48 (Cal. 1962) (en banc) (AWhere a jury is incompletely polled and no request is made for correcting the error, such further polling may be deemed waived by defendant, who cannot sit idly by and then claim error on appeal when the inadvertence could have readily been corrected upon his merely directing the attention of the court thereto.@); People v. Phillips, 91 P.3d 476, 480 (Colo. Ct. App. 2004) (finding no plain error in court=s failure to poll twelfth juror where jurors had orally informed court that their verdict was unanimous, the record did not show a lack of unanimity in the verdict, and the unexplained failure to poll one of the jurors did not undermine the fundamental fairness of the trial). We find no error.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice