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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-371

SEPTEMBER TERM, 2006

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin Circuit
Paul Corey	}	
	}	DOCKET NO. 1355-10-01 FrCr

Trial Judge: Michael S. Kupersmith

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

Defendant appeals his conviction and sentencing on a charge of attempted sexual assault of a minor, his niece. We affirm.

Defendant was arrested on October 11, 2001 after his niece reported to a school counselor, and later police, that her uncle had sexually assaulted her on several occasions between the spring of 2000 and the spring of 2001 when she was fourteen years old. The information charged that between May 1, 2000 and May

31, 2001, defendant engaged Ain a sexual act@Cpenis-to-vagina contactCwith his minor niece, in violation of 13 V.S.A. ' 3252(a)(3). Following months of pre-trial discovery and unfruitful plea negotiations, a jury draw was held on August 24, 2004 and a trial date was set for the following week. On August 26, the State filed a motion to amend the information to allege penis-to-vulva contact rather than penis-to-vagina contact. The court granted the motion before the trial commenced on September 1. At the conclusion of the direct examination of the complaining witness on the first day of trial, the court granted the State=s motion to amend the information a second time to allege attempted sexual assault rather than sexual assault. Following the two-day trial, the jury found defendant guilty of attempted sexual assault. The district court later imposed a sentence of four-to-sixteen years to serve.

Defendant appeals, arguing that the district court erred (1) by allowing the State to repeatedly amend the information before and during trial; (2) by refusing to allow him to obtain a handwriting sample of a prosecution witness during cross-examination of the witness; (3) by refusing to grant a new trial after it was discovered that the same witness gave perjured testimony during the trial; (4) by not granting a mistrial after another prosecution witness gave a prejudicial nonresponsive answer to a question during direct examination; (5) by allowing another prosecution witness to testify to a statement defendant made that could be characterized as an admission only through an attenuated inference; and (6) by increasing his sentence based on other unproven allegations of unlawful sexual conduct. We address each of these claims in the order presented.

Defendant first contends that the trial court erred by allowing the State to amend its information immediately before and during his trial. On the morning of the trial, before the jury was sworn, the court granted the prosecutor=s motion to conform the information to the language of 13 V.S.A. ' 3252(a)(3) by substituting the word Avulva@ for the word Avagina.@ Defendant objected, stating that the amendment was aimed at focusing the charge on one incident not involving intercourse, thereby changing the whole theory of the defense. After noting that the amendment would not add a new element to the charged offense, the court offered to cancel the trial and allow defendant to engage in further preparation if he felt the amendment affected his substantial rights. Defense counsel responded that Awe=re prepared to go forward.@ The second request for an amendment to the charge occurred following direct examination of the complainant. Apparently, the prosecutor was surprised by the complainant=s testimony regarding the principal incident upon which the charge

was basedCthe so-called Lake Carmi incident. The complainant testified that defendant tried to have sex with her but could only get his penis between her upper thighs.

Following the complainant=s testimony, defendant argued that there was no evidence of actual sexual contact to support the charge. The prosecutor then indicated that she was contemplating asking the court to amend the charge to attempted sexual assault. The court opined that an amendment was not necessary because an attempt is a lesser-included offense. Nevertheless, after further discussion, the prosecutor moved to amend the information. The court asked defendant if he wanted to be heard regarding the request for the amendment, and then asked the prosecutor to confirm that the charge against defendant was based on the Lake Carmi incident. The prosecutor confirmed that she was relying on that incident, and defense counsel stated that as long as the jury was informed of the amendment, he had no objection. The court then addressed the jurors, informing them that the attorneys and the court agreed that no evidence of a consummated sexual act as defined in the statute had been presented with respect to the Lake Carmi incident, but that the court had allowed the prosecutor to amend its information to allege attempted sexual assault.

We require that an information A >be a plain, concise, and definite written statement of the essential facts constituting the offense charged.= @ In re Carter, 2004 VT 21, & 13, 176 Vt. 322 (quoting V.R.Cr.P. 7(b)). This Aensures that a criminal defendant is provided with sufficient notice to enable the preparation of an effective defense.@ Id. (citing State v. Brown, 153 Vt. 263, 272 (1989)). In determining whether an information sufficiently provides notice, the information must be read in conjunction with the accompanying affidavit. Id. Between the start of a trial and the pronouncement of a verdict, the trial court may permit an amendment to an information A[i]f no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.@ V.R.Cr.P. 7(d).

Here, neither amendment charged an additional or different offense. See State v. Young, 139 Vt. 535, 542 (1981) (A[A] jury may return a verdict of guilty of attempt of the felony when the defendant is charged with the commission of that felony. An attempt is a lesser included offense.@). Further, defendant has failed to demonstrate that either amendment prejudiced his substantial rights. The record unequivocally reveals

defendant=s understanding that the prosecution was relying on the Lake Carmi incident to support its sexual assault charge. The record also reveals that defense counsel indicated that defendant was prepared to go forward with the trial, even though the court offered to continue the trial if defendant believed that the first amendment changing the word Avagina@ to Avulva@ prejudiced his substantial rights. Further, assuming that the second amendment changing the charge to attempted sexual assault was necessary, but see 13 V.S.A. ' 10 (when information charges commission of felony, Athe jury may return a verdict that the respondent is not guilty of the principal offense, but is guilty of an attempt to commit the same@), defendant expressly indicated that he had no objection to the amendment as long as the jury was informed of the change. Under these circumstances, there was no substantial prejudice to defendant.

Defendant next argues that the trial court=s refusal to require a prosecution witness to submit a handwriting sample during cross-examination violated his constitutional right to confront witnesses against him. During the trial, a prosecution witness who was a friend of the complainant testified regarding when complainant first told her of the alleged assault. On cross-examination, defense counsel showed the witness a handwritten note, signed in her name, (1) denying that a certain assault by defendant against the complainantCnot the Lake Cormi incident upon which the charge was basedCcould have occurred, (2) registering her disbelief that anything improper had taken place, and (3) describing a pattern of lies in the complainant=s past communications. The witness denied having written or signed the note. When defense counsel asked the witness to sign her name for him, the prosecution objected. At a bench conference, defense counsel stated that he was sure the witness had signed the document, but he was Awilling to walk away from it.@ The court stated that defense counsel=s demand that the witness sign the document immediately was, in effect, Aasking the jury to try to figure out whether she signed that document by comparing the signatures.@ Defense counsel stated that he was not seeking to obtain evidence for cross-examination, and then started to mention the possible need for an expert. The prosecutor suggested that the witness sign her name outside the presence of the jury during a break in the proceedings, and the court agreed. Defense counsel appeared to acquiesce to this arrangement. The court had the witness remain outside of the courtroom after she finished her testimony. A few minutes later when the hearing recessed for the day, the court asked defense counsel if he wanted the witness to sign her name. He responded that he was Anot going to do that@ because A[t]hat=s over and

done with.@

On appeal, defendant claims that the court impermissibly abridged his right to confront witnesses by not requiring the witness to sign her name during cross-examination. According to defendant, requiring her to sign her name on the witness stand would probably have demonstrated to the jury that her denials of authorship were false. We find no merit to this argument. Defendant had a full opportunity to cross-examine the witness. Requiring the witness to sign her name while she was on the witness stand would have done nothing toward proving that she lied about not having written or signed the note. The trial court did not abuse its discretion in refusing to put the jury in the position of comparing signatures during the cross-examination of a witness, and there was nothing to be gained by having the witness sign her name at that time. If defense counsel had wanted to follow-up on his efforts to show that the witness was lying, he could have accepted the court=s offer to have the witness sign her name during a trial break, after which he could have obtained an expert to testify as to whether she was the person who had written or signed the note. There was no violation of defendant=s constitutional right to confront the witnesses against him.

In a related argument, defendant next contends that the trial court erred by denying his motion for a new trial, which was based on the same witness=s post-trial admission that she had perjured herself when she denied having written and signed the note. Defendant=s motion asserted that he was entitled to a new trial because the witness had lied when she denied writing the note. The trial court gave defendant the opportunity to depose the witness and assigned counsel for the witness. After consulting with counsel, the witness admitted that she lied when she testified that she had not written the note. At a follow-up evidentiary hearing, the witness testified that she had been pressured by defendant=s eventual wife, his step-daughter, and a friend of his step-daughter to write the note, and that they told her what to write. Defendant=s wife testified that they told the witness to write only what she felt like writing. Following the hearing, the trial court issued a written decision denying defendant=s motion for a new trial. In its decision, after addressing each of the statements in the note, the court found the witness=s account of what happened more credible than the one offered by defendant=s wife. The court concluded that the note had essentially been dictated to the witness when she was thirteen years old, and that the witness simply did not know whether the various assertions that the complainant

had made were true. After considering the criteria for determining whether a new trial is warranted based on newly discovered evidence, the court denied defendant=s motion, concluding that none of the criteria had been met in this instance.

On appeal, defendant argues that each of the criteria for granting a new trial based on newly discovered evidence was satisfied here. We disagree. Generally, for the trial court to grant a new trial based on newly discovered evidence,

> the evidence must (1) be material; (2) have been discovered subsequent to trial; (3) be such that the result on retrial would probably change; (4) be truly new, and not merely undiscovered through lack of due diligence; and (5) not be merely cumulative or impeaching.

State v. Briggs, 152 Vt. 531, 541 (1989). Given the circumstances surrounding the writing of the note revealed at the post-trial hearing, and considering that the witness did not have any direct knowledge of the Lake Carmi incident upon which the charge against defendant was based, there is strong support for the trial court=s conclusion that the proffered evidence was not material and merely impeaching in nature. In any event, as the trial court found, defendant=s wife gave the note to defense counsel after witnessing the complainant=s friend write it, and thus defense counsel knew that the complainant=s friend had written the note. Further, defense counsel had the opportunity at trial to obtain a signature of the complainant=s friend and to call defendant=s wife as a witness to show that complainant=s friend had written the note. Yet, defense counsel declined the court=s offer to obtain the signature during a break in the trial and did not ask to present defendant=s wife as a witness, even though she was available during the trial. Thus, evidence indicating that the complainant=s friend wrote the note was not newly discovered after trial, and the trial court did not abuse its discretion in denying defendant=s motion for a new trial. See In re Hamlin, 155 Vt. 98, 100 (1990) (denial of motion for new trial is reviewed on abuse-of-discretion standard).

Next, defendant argues that the trial court erred by not granting his motion for a mistrial after a

prosecution witness gave a nonresponsive prejudicial answer on direct examination. During direct examination, a state trooper testifying for the prosecution was asked if defendant had corroborated any of the information provided by the complainant. The trooper responded that defendant Atold me that he had given alcohol and marijuana to [his niece].@ Defense counsel objected and asked for a mistrial, asserting that the statement was not corroborating anything the complainant had said and was highly prejudicial to defendant. The court sustained the objection and struck the trooper=s answer. The prosecutor then rephrased the question to ask the trooper if there had been alcohol at Lake Carmi.

On appeal, defendant reiterates that the alleged statement he made to the trooper did not corroborate the victim=s testimony that defendant=s friends had given her beer at Lake Carmi and that she had not smoked any marijuana. Defendant contends that a mistrial was the appropriate remedy because the trooper=s statement portrayed him as a purveyor of drugs to minors, and the court did not even instruct the jury to disregard the statement. We find no abuse of discretion. See State v. White, 150 Vt. 255, 257 (1988) (trial court=s decision on motion for mistrial will not be reversed on appeal unless moving party shows that court=s discretion was either totally withheld or exercised on clearly untenable or unreasonable grounds). Given the undisputed evidence that the victim had been allowed to consume alcohol during the Lake Carmi incident, the trooper=s statement was not highly prejudicial. As for the court=s failure to provide a curative instruction, defendant did not ask for one.

Defendant also argues that the trial court erred by allowing his half-brother to testify that defendant Atold me I did not force her to do anything.@ The trial court indicated that the statement could be construed as an admission, and that it was up to the jury to determine what, if anything, could be inferred from the statement. On appeal, defendant argues that the testimony should not have been admitted because the statement was irrelevant, was taken out of context, and required the jury to make an impermissibly attenuated inference. We find no reversible error, if any error at all. Even though the complainant had testified that the Lake Carmi incident did not involve penetration, and the prosecution had amended its information to charge attempted sexual assault, defendant=s alleged statement was still relevant as to whether unlawful sexual contact occurred, and, as the trial court stated, the jury ultimately would determine what, if anything, to infer from the statement.

Moreover, the relevance or materiality of the statement was not affected by the fact that the contents of the newspaper defendant allegedly pointed at while making the statement were not explored during examination of the witness.

Finally, defendant argues that the trial court erred by enhancing his sentence based on the complainant=s unproven allegations of other sexual acts between her and defendant. According to defendant, the trial court resurrected these charges even though they had been dropped by the prosecutor based on the court=s own warning that the State would have to focus at trial upon specific instances of alleged misconduct. We find no error. Contrary to defendant=s argument, the State did not drop charges of multiple instances of sexual assault upon which jeopardy had already attached. Although the accompanying affidavit noted multiple instances of unlawful sexual contact, the State=s information alleged that defendant had engaged in Aa sexual act@ with the victim, and the parties acknowledged before trial that the prosecution was focusing on the Lake Carmi incident.

As defendant concedes, although a sentencing court may not rely on Amere assertions of criminal activities,@ State v. Williams, 137 Vt. 360, 364 (1979), it may rely on facts not proven at trial. AA defendant has a constitutional right that he not be sentenced on the basis of materially untrue information.@ State v. Ramsey, 146 Vt. 70, 78 (1985). Nevertheless, a sentencing A >court may consider unsworn information from a variety of sources,= @ as long as the information is reliable and the defendant has had an adequate opportunity to rebut it. Id. at 79, 81-82 (quoting V.R.Cr.P. 32, Reporter=s Notes, 1980 Amendment); see Williams v. New York, 337 U.S. 241, 247 (1949) (sentencing judge must have Athe fullest information possible concerning the defendant=s life and characteristics@). If a defendant objects to factual information presented at sentencing, the court may not consider the information Aunless, after hearing, the court makes a specific finding as to each fact objected to that the fact has been shown to be reliable by a preponderance of the evidence.@ V.R.Cr.P. 32(c)(4).

Here, at sentencing, the court expressly found by a preponderance of the evidence that defendant had engaged in other sexual acts with the victim during the course of a year. Evidence concerning those facts was presented before the sentencing court at trial and subjected to the rules of evidence. Defendant had a full

opportunity to cross-examine the complainant regarding her testimony as to the alleged sexual acts. Thus, the court did not err in considering that testimony for purposes of imposing a sentence on defendant.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice