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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-393

OCTOBER TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
	}	
Gary W. Vincent	}	DOCKET NO. 3019-7-06 CnCr
		Trial Judge: Michael S. Kupersmith

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

Defendant appeals from a judgment of conviction, based on a jury verdict, of lewd and lascivious conduct with a child. He contends that the trial court committed plain error by allowing the investigating officer to testify as to the credibility of defendant and failing to give a limiting instruction on the use of other bad acts evidence. We affirm.

The facts may be summarized as follows. The complainant, who was fourteen years old at the time of the offense, testified that, in early July 2006, she was vacationing with her family at a campground in Swanton, Vermont when defendant, who lived nearby, offered her a job helping to clean his house. She recalled that, on the fourth day of the job, defendant offered to pay her for sex, then offered to show her a nude photograph on his cell phone, and thereafter entered the bathroom that she was cleaning, grabbed her waist with both hands, and pressed his penis between her buttocks. Some time later, defendant sat down opposite the complainant in the living room and exposed himself to her. While driving her home that day, defendant expressed a desire to have oral sex with complainant and another girl.

The complainant's cousin testified that complainant was upset and nervous when she returned that day. The cousin told complainant that she needed to talk to her parents and discontinue working for defendant. After speaking with complainant, her parents reported the incident to the police, who met with complainant that night.

The investigating officer from the Chittenden Unit for Special Investigations who spoke with complainant, and later interviewed defendant, also testified. In describing his background and training, the officer was asked whether there were any "general principles" that he followed in interviewing a suspect. The officer responded as follows:

> Yeah, generally, you know, when you interview you kind of use your own style and you take little pieces from training that you've learned and implement them. The training teaches you how to detect deception, as well as truthfulness, the different verbal and nonverbal cues, you know, that you can pick up on when someone is being deceptive or being untruthful.

The officer did not reveal what the complainant reported to him that night. In recounting his interview with defendant, the officer testified that defendant denied having offered money to the complainant for sex, denied having offered to show the complainant any nude photos, said that complainant had generally raised the subject of sex, and acknowledged being in the bathroom with the complainant but explained that he was there only to paint the ceiling and might have inadvertently rubbed against her while she was bent over.

Defendant did not testify or call any witnesses. The jury returned a verdict of guilty. The court found that defendant had been convicted of a prior offense of lewd and lascivious conduct, and defendant was subsequently sentenced to five years to life. This appeal followed.

Defendant first contends that the officer's testimony quoted above was an impermissible comment on defendant's lack of credibility. As there was no objection raised, we review solely for plain error, which requires a showing of such "exceptional circumstances [that] a failure to recognize error would result in miscarriage of justice, or . . . error so grave and serious that it strikes at the very heart of the defendant's constitutional rights." State v. Yoh, 2006 VT 49A, ¶ 39, 180 Vt. 317, 342. (internal quotations omitted). Judging the credibility of witnesses is the sole province of the jury, and we have therefore repeatedly stated that an expert may not "infringe[] on the jury's core function by telling it what or who should be believed." State v. Weeks, 160 Vt. 393, 402 (1993); accord State v. Wetherbee, 156 Vt. 425, 430 (1991) (reaffirming the principle that an expert may not "go so far as to conclude that the witness is a victim of sexual abuse" (quoting State v. Gokey, 154 Vt. 129, 134 (1990))).

Although defendant here claims that the officer's testimony that he was trained to detect deception and truthfulness ran afoul of this principle, the statements in question were not remotely similar to those that have been held to be error. See Weeks, 160 Vt. at 401 (noting that when the expert "was finished testifying, no one could reasonably doubt that he had given his unqualified endorsement of the child's believability"); Wetherbee, 156 Vt. at 432 (expert's overall testimony left the "distinct impression that he believed" the child victim). The officer here was not offered or qualified as an expert witness, and he made virtually no statement attesting directly or indirectly to his views on whether defendant was telling the truth. See State v. Danforth, 2008 VT 69, ¶ 24 (distinguishing Weeks and holding that officer's testimony concerning his methods "to help ensure the credibility of witness statements" presented "no opinions, either personal or professional, as to whether the witness statement were, in fact, credible"). Defendant's argument rests solely on the claim that the officer impliedly disbelieved defendant because "the prosecution went forward as a result of the investigation." The asserted implication is far too tenuous to support a claim of error, however, much less plain error that strikes at the very heart of defendant's constitutional rights. Accordingly, we find no basis to disturb the judgment on this ground.

Defendant also contends the trial court erred in failing to give a limiting instruction to the jury on the use of evidence of other bad acts. As defendant acknowledges, he failed to request such an instruction and therefore must satisfy the plain-error standard. Danforth, 2008 VT 69, ¶ 11. Defendant refers to several acts of defendant alleged by the complainant to have occurred just before and after the charged offense that occurred in the bathroom, including a solicitation of sexual acts, sexually inappropriate conversation, exposure of his penis, and reference to an allegedly nude photograph on his cell phone. All of the conduct in question was closely linked in time and circumstances to the charged offense, forming an almost uninterrupted effort by defendant to induce the complainant to discuss and eventually engage in sex. As such it was part of the res gestae surrounding the crime and therefore, as explained in State v. Maduro, 174 Vt. 302, 306 (2002), did "not require a limiting instruction that would otherwise accompany evidence of uncharged bad acts." See also State v. Norton, 147 Vt. 223, 235 (1986) (acts "which form a body of evidence relating to the events surrounding the crime of which defendant is charged are part of the res gestae, and do not require a cautionary instruction"). Accordingly, we find no error.

Affirmed.

BY THE COURT

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Paul L. Reiber, Chief Justice

_____
Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice