

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-257

SEPTEMBER TERM, 2006

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin Circuit
Anthony Phillips	}	
	}	DOCKET NO. 309-3-05 FrCr

Trial Judge: Mark J. Keller

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

Defendant Anthony Phillips appeals from his conviction, after a jury trial, of simple assault on a police officer. He argues that: (1) the prosecutor made statements at trial that constituted plain error; and (2) there was insufficient evidence to support his conviction. We affirm.

Defendant was charged with simple assault on a police officer in March 2005 after a scuffle at his mother=s home. The following evidence was presented at trial. On the day in question, police responded to a 911 call from defendant=s mother, who indicated that defendant was taking an overdose of medication. When police arrived at the home, Officer Jamie Salter found defendant and his mother in a small bathroom standing over the sink. Defendant=s mother stated that defendant had taken half of the bottle of medication. Defendant started yelling, and the officer told him to calm down. Defendant began swinging with his fists and he struck the officer in the head. Defendant kept swinging, and the officer tried to grab defendant=s arm, and in the process, hit defendant in the face. Defendant then charged the officer, pushed him over a table in the hallway, and struck him twice more in the head. The officer retreated and called for assistance. The officer returned with backup and found defendant=s mother attempting to restrain defendant. Defendant spat a mouthful of blood at the officer, kicked him in the shin, and gouged the side of the officer=s face with his fingernails. Police eventually subdued defendant and defendant was taken to the hospital. Defendant argued at trial that the officer struck him first, hitting him in the mouth. Defendant claimed to have blacked out as soon as he was struck and stated that he could not recall anything that happened until he was later subdued by police. A jury found defendant guilty, and this appeal followed.

Defendant first argues that he was deprived of a fair trial because the prosecutor stated his personal beliefs about the evidence and the credibility of witnesses during his cross-examination of defendant and during his closing argument. He also asserts that the prosecutor improperly questioned him about his mental health history.

Defendant failed to object to any of these statements at trial, and thus our review is for plain error only. See State v. Pelican, 160 Vt. 536, 538-39 (1993) (A plain 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@) (internal quotations and citation omitted). We find no plain error here.

We begin with the prosecutor=s statements during trial. As defendant notes, the prosecutor stated during

his cross-examination of defendant, A[w]hy don=t you tell the truth?@ During the same exchange, counsel suggested that defendant=s testimony about blacking out was Abaloney.@ While these comments were inappropriate, defendant fails to demonstrate that two isolated statements during a day-long trial rose to the level of plain error. We reach a similar conclusion with respect to the prosecutor=s closing argument. Again, we agree that the prosecutor acted inappropriately. He improperly expressed his personal opinions about the credibility of several witnesses, suggesting that defendant=s mother had not testified truthfully and indicating that defendant=s story about blacking out was Abaloney.@ AWe have long condemned prosecutors= statements conveying their beliefs or opinions about a case.@ State v. Rehkop, 2006 VT 72, & 34, __ Vt. __.

Defendant bears a heavy burden, however, in establishing that these statements warrant reversal of his conviction. As we have explained, in challenges made to statements during closing arguments, Awe have found reversible error absent an objection only if the argument is manifestly and egregiously improper.@ State v. Ayers, 148 Vt. 421, 426 (1987) (internal quotations omitted). In other words, defendant must show not only that the prosecutor=s argument was improper but that it impaired defendant=s right to a fair trial. Rehkop, 2006 VT 72, & 37. Defendant fails to make such a showing here; indeed, he provided no specific argument as to how these errors affected his trial. While we recently found plain error where a prosecutor=s statements went Abeyond a general attack on the veracity, consistency, or bias of the defense witnesses,@ Rehkop, 2006 VT 72, & 38, defendant fails to meet that high standard here. See Ayers, 148 Vt. at 426 (recognizing that plain error is rarely found in prosecutor=s arguments to the jury even where the Court condemns the argument). We reject defendant=s assertion that the cumulative effect of the prosecutor=s statements constitutes plain error.

There is similarly no support for defendant=s assertion that reversible error occurred when the prosecutor asked defendant about his mental health history. Contrary to defendant=s assertion, the court did not prohibit the State from asking any questions about defendant=s mental health history. Instead, the record shows that the court denied the State=s specific request to present evidence that defendant had a history of exaggerating and fabricating his mental health symptoms. Indeed, defendant testified without objection to his mental health history at trial, as did his mother. His mother indicated that defendant was Aantisocial,@ and that he never went outside. She testified that he had attempted suicide seven previous times. Defendant similarly testified

that this was not his first suicide attempt. The inquiry to which defense counsel objected whether defendant had met with mental health professionals on the day after the incident was not pursued by the State after an objection was raised by defendant. When defendant later asserted that he blacked out because he suffered from post-traumatic stress disorder, the State sought to pursue its earlier inquiry into defendant's past history. The trial court denied its request, but noted that defendant had volunteered the information about PTSD. The court then ordered the jury to disregard defendant's explanation for the blackout. The State later asked defendant about his behavior in connection with previous suicide attempts, and defendant objected. The court stated that it did not want to get into the specifics of anything other than what had occurred on the evening in question, and the inquiry was not pursued further. The record simply does not support a claim of plain error, if any error at all.

Finally, defendant asserts that there was insufficient evidence to support his conviction. More specifically, he maintains that the State failed to prove that the officer's actions were authorized by law, necessary, and justified. Defendant suggests, without support, that to meet its burden on this element, the State was required to produce evidence beyond the officer's testimony. Somewhat confusingly, defendant argues that because the court failed to instruct the jury that defendant had the right to defend himself against an excessive use of force, this shows that *even under a reduced burden of proof,* the State failed to prove that the officer's use of force was necessary.

These arguments are without merit. In considering a claim that the evidence was insufficient, we view the evidence in the light most favorable to the State and exclude modifying evidence, and ask if the State has produced evidence fairly and reasonably tending to show the defendant is guilty beyond a reasonable doubt. *State v. Carrasquillo*, 173 Vt. 557, 559 (2002) (mem.) (internal quotations omitted). The evidence amply supported the jury's verdict here.

To establish defendant's guilt, the State needed to prove, among other elements, that the assault occurred while the officer was performing a lawful duty. See 13 V.S.A. ' 1028; *State v. Elkins*, 155 Vt. 9, 13 (1990). As to the contested element, the State presented evidence that police were summoned to defendant's

mother=s home because defendant was trying to kill himself. They arrived to find defendant and his mother in a small bathroom with defendant attempting to swallow more pills. In a confined space, defendant lashed out and struck the officer. The officer attempted to control the situation and in the process struck defendant in the mouth. Defendant continued to struggle, and the officer was forced to retreat. When the officer returned, defendant physically attacked the officer again. The evidence, if believed by the jury, was plainly sufficient for the jury to conclude that the assault occurred while the officer was performing a lawful duty, and that the officer=s use of force against defendant was lawful and necessary.

It is difficult to discern the exact nature of defendant=s argument concerning the jury instructions. Defendant agreed to the instructions that the court provided to the jury. The issue of an instruction on self-defense was discussed on the morning of trial. The court reasoned that if the officer=s punch was lawful, then defendant did not have a right to self-defense; if the punch was not lawful, the jury would be instructed that defendant was not guilty. Defendant agreed to this instruction, and he did not preserve any claim of error. The court thus instructed the jury that even if the State proved that the officer was performing a lawful duty, it must also prove beyond a reasonable doubt that the punching of defendant was authorized by law and necessary and justified under the circumstances. The instruction recognized that the police were statutorily authorized to preserve the peace and suppress unlawful disorder by the use of force if the use of force was reasonably necessary under the circumstances. It provided, however, that if the State failed to prove that the officer=s punching of defendant was lawful and necessary, then it must find defendant not guilty. Defendant fails to show that this instruction was erroneous, or that the court committed plain error by failing to include an instruction about his right to defend himself against the use of Aexcessive force.@

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice