

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-064

NOVEMBER TERM, 2018

State of Vermont v. Kandeh Kebbie*	}	APPEALED FROM:
	}	
	}	Superior Court, Rutland Unit,
	}	Criminal Division
	}	
	}	DOCKET NOS. 976-8-16 Rdcr & 1022-9-16 Rdcr

Trial Judge: Thomas A. Zonay

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

Defendant appeals his convictions for domestic assault, aggravated domestic assault, and unlawful restraint following a jury trial. On appeal, defendant argues that the trial court committed plain error in instructing the jury and in not declaring a mistrial after dismissing a juror, the court erred in admitting a photograph of a gun and several hearsay statements as excited utterances, and the State made prejudicial statements during closing argument. We affirm.

Defendant was charged with ten different counts, including several charges of domestic assault, all stemming from his alleged behavior towards complainant, his girlfriend at the time. One charge alleged that defendant used complainant's vehicle without her consent. The other charges were based on assaultive conduct from eight different days between October 2015 and August 2016 in which defendant allegedly punched, strangled, or restrained complainant. During some of the time period complainant and defendant lived with complainant's mother; during other periods they had their own apartment where complainant's daughter also lived. At trial, complainant testified as to all the incidents, and described defendant's actions in detail. The State presented testimony from coworkers, family members, and friends of complainant that testified to seeing bruises on complainant or observing some of defendant's behavior. The jury found defendant not guilty of three counts and guilty of unlawful restraint, two counts of aggravated domestic assault, and four counts of domestic assault. Defendant filed this appeal.

On appeal, defendant first argues that the court erred in instructing the jury on its role in the trial. The background facts are as follows. At the beginning of the second day of trial, the court informed the parties that Juror L. told the clerk that another juror had stated that the judge was not stating the law correctly. The court questioned Juror L. about what had happened and Juror L. reported that Juror C. had been soliciting other jurors' views on jury nullification and expressing an opinion that it was a constitutional right. The court recalled a conversation during orientation in which the court had informed Juror C. that jury nullification is not the law in Vermont. Juror L. stated that while the entire jury was present Juror C. stated that the court's statement at the orientation was incorrect. The State and defendant agreed that if Juror C. made those statements, he should be removed from the jury.

The court then summoned Juror C. and questioned him. Juror C. stated that he had explained jury nullification to other jurors and gave a description of his understanding of the concept to the court. Juror C. did not agree with the trial court's statement that jury nullification was not the law in Vermont. The court provided both the State and defendant an opportunity to question Juror C.

The court then discussed the situation with the parties. The State expressed that Juror C. should be removed because he had not obeyed the court's instruction not to independently research the law. The court dismissed Juror C., explaining that although Juror C. may have a different view of the law, the court had instructed jurors not to research the law and that the jurors were bound to follow the instructions of the court.

The court recalled the remaining jurors and asked if they had heard discussions about whether the jury was required to follow the law as given by the judge. Two jurors reported hearing Juror C. saying that the jury was not required to follow the law. These jurors responded that they dismissed the statements and that they were able to follow the law. When questioned, all jurors affirmed that they were able to follow the law that the court provided. The court provided the following instructions to the jury:

[Y]ou must follow the law we'll give you and its instructions. You must find the facts from the evidence in the case and you must apply the law that the Court gives you. Juries do not have the power to decide questions of law and are not permitted to override the law laid down by the Court and to declare the law for themselves. You should not concern yourself with the wisdom of any rule of law or any opinion you might have about what the law should be. You must decide the facts based on the evidence that has been presented and you must apply the law that the Court gives you in its instructions. You may not base any verdict on bias, prejudice, or sympathy.

Neither party objected to the court's instruction.

On appeal, defendant argues that the court erred in instructing the jury that it did "not have the power to decide questions of law." This Court has recognized that although jurors need not account for their verdict, it is also not "their legal province to override the law laid down by the court, and to declare it for themselves." State v. Burpee, 65 Vt. 1, 16 (1892). Based on this premise that juries do not have the power to decide questions of law in Vermont, in State v. Findlay, this Court rejected the defendant's argument that the trial court should have provided a jury instruction on the jury's "inherent right to acquit or nullify," known as jury nullification. 171 Vt. 594, 598 (2000) (mem.) This Court explained that it was the general view that courts do not provide instructions on the jury's right to acquit against the weight of the evidence. Id.

Defendant recognizes that he is not entitled to an instruction on jury nullification—that is, that the jury has an inherent right to acquit—but contends that the court affirmatively instructed against jury nullification and that was in error. Because defendant did not preserve his objection to the instruction, we review for plain error. "When reviewing for plain error, we look at the instructions in light of the record evidence as a whole." State v. Lambert, 2003 VT 28, ¶ 14, 175 Vt. 275. Plain error exists when there is there is a "miscarriage of justice." Id.

We conclude that there was no error in the instruction, let alone plain error. The court in this case did not tell the jury that it was beyond its power to acquit against the evidence; rather, the court instructed the jury that it must follow the law as given by the court and to decide the case based on the evidence provided. This is an entirely accurate statement of the law. In describing the jury's role in a criminal case, Justice Harlan stated as follows:

We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions.

Sparf v. United States, 156 U.S. 51, 102-03 (1895). Our prior law states that the court, not the jury, decides the law. See Findlay, 171 Vt. at 598 (recognizing that juries do not decide questions of law in Vermont). Under similar circumstances, the Hawaii Court of Appeals concluded that the defendant "had no substantial right to an instruction informing the jury of jury nullification or to the deletion of an instruction informing the jurors that they were to follow the law as given them by the court." State v. Hatori, 990 P.2d 115, 122 (Haw. Ct. App. 1999). We agree and reject defendant's argument.

Related to the same incident, defendant contends that instead of simply removing Juror C., the court should have declared a mistrial. Defendant contends that Juror C.'s comments infected the entire jury and resulted in a tainted proceeding. The trial court has discretion to grant a mistrial and "a claim of error can be supported only where the trial court's discretion was either totally withheld, or exercised on clearly untenable or unreasonable grounds." State v. Messier, 2005 VT 98, ¶ 15, 178 Vt. 412. Because defendant did not move for a mistrial, he contends the failure to grant one was plain error.

We conclude that there was no error. "To prevail on a claim of extraneous influence, defendant must demonstrate (1) that the irregularity occurred; and (2) that the irregularity had the capacity to affect the jury's verdict." State v. Johnson, 2013 VT 116, ¶ 15, 195 Vt. 498. Where a curative instruction is given, "this Court will presume that the jury has heeded the instruction and disregarded the improper remark." Messier, 2005 VT 98, ¶ 15. Here, the court provided a curative instruction, and when questioned, all remaining jurors stated that they could follow the law and disregard Juror C.'s comments. See State v. Grega, 168 Vt. 363, 370-71 (1998) (concluding that court did not abuse discretion in denying mistrial where court instructed jury that single juror's comment was inappropriate, and each juror indicated ability to ignore comment in making decision). Moreover, defendant has not demonstrated that Juror C.'s comments affected the jury's ability to make a fair and impartial decision insofar as the jury demonstrated its ability to judge the case on the facts by acquitting on some counts.

Defendant next argues that several evidentiary rulings were erroneous and there were improper statements made during closing argument and this accumulation of errors warrants reversal. Defendant asserts that the court erred in admitting statements made by complainant's daughter as excited utterances. Count 5 alleged that on March 16, 2016, defendant had committed domestic assault by punching complainant in the jaw. At trial, complainant testified as follows concerning the incident. She was home with her daughter and defendant, who was in the kitchen and became angry with complainant. Complainant walked from the kitchen through her daughter's bedroom and into the bathroom. Defendant entered the bathroom, yelled at her, and punched her in the face. He grabbed her by her neck and dragged her from sitting on the toilet to the living room. He punched her with both fists and kicked her. Complainant screamed, and defendant stopped. Defendant left the room, and complainant heard her daughter moving around in the bedroom. Complainant testified that her daughter was scared and crying. The court overruled defendant's objection on hearsay grounds to complainant's testimony about what her daughter said. The court concluded that the statements were admissible as excited utterances because the evidence indicated the child's statements were made while the child was experiencing distress from the assault. Complainant testified that her daughter asked why defendant had hit complainant, stated that she heard defendant drag complainant out of the bathroom and heard complainant ask defendant to stop hitting her, and told complainant to look at her face. Complainant testified that she went into the bathroom and her face was red and puffy. It remained swollen and complainant had trouble opening her mouth and talking. It took a month to heal. Complainant went to the hospital, and the record of her visit was introduced. Coworkers and friends testified that complainant had a bruised and injured face. The State admitted some photographs of bruises.

Under Vermont Rule of Evidence 803(2), hearsay is not excluded if it is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." "Our review of trial court evidentiary rulings is deferential, and we reverse only when there is an abuse of discretion resulting in prejudice." State v. Jackson, 2008 VT 71, ¶ 9, 184 Vt. 173. Defendant argues that the State failed to show that complainant's daughter was scared and crying because she witnessed the assault. The court did not abuse its discretion in admitting the statements in this case. Complainant's testimony demonstrates that the child was in close proximity to the assault, that during the assault complainant was screaming, and that just after the assault, the child was scared and crying. This evidence supports the court's conclusion that complainant's daughter was experiencing the stress caused by the startling event—here, the assault—and that her stress was caused by that event. Therefore, the court acted within its discretion in admitting the statements. Moreover, given the other evidence of the assault, the hearsay statements were cumulative.

Defendant next contends that the court erred in admitting a photograph of a gun. This objection relates to complainant's testimony regarding an incident on August 30, 2016. Complainant described how defendant attacked her when she arrived home and dragged her through the house. He hit complainant and yelled at her in five different attacks. After the third attack, he went into a closet by the bathroom, where a week and a half before complainant had seen a gun. Complainant testified that she heard defendant go into the closet and that she heard a gun cock. She did not see defendant holding a gun. At trial, the court admitted a photograph of a gun that complainant testified she took and was the gun she found in the closet across from the bathroom. The court admitted the photograph over defendant's objection on relevance grounds.

On appeal, defendant argues that the photograph was not admissible because it was not relevant and did not comply with the best-evidence rule. The court did not abuse its discretion in denying defendant's relevance objection; complainant testified that the gun was present in the

home, and she heard it cock during the assault. As to the best-evidence argument, Vermont Rule of Evidence 1002 states that “[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.” Defendant asserts that in lieu of the photograph, the State was required to produce the actual gun. Because defendant did not object on those grounds at trial, we review for plain error and conclude there was no error here. Defendant does not argue that the photograph was inadmissible because it was not the original photograph, but that the rule requires admission of the actual item. This goes beyond the requirements of the rule. The best-evidence rule allows admission of photographs by its plain terms, and the photograph in this case was properly authenticated by complainant, who testified that she took the photograph and that it depicted the gun she found in the closet.

Defendant’s final argument is that the prosecutor made comments during closing arguments that improperly vouched for the credibility of complainant. During closing argument and in rebuttal, the prosecutor stated several times that complainant was telling the truth. For example, the prosecutor recounted complainant’s testimony about the assault on August 30, 2016, and stated:

She told you on August 30th, 2016, she ran out of the house because she thought she heard a gun cock back. She didn’t tell you she saw a gun. She didn’t tell you he waved a gun at her or pointed a gun at her. She could’ve, but she didn’t. She came in and told you the truth. She thought she heard a gun. She had that cut on her knee. She told you she cut herself because she was taking something out of the oven. She burned herself. The oven door fell down and it hit her knee and she cut herself. She could’ve run to [a friend’s] house and said look what he did to my knee. She didn’t. She went over there and explained I cut myself on the oven. The State submits she’s telling you those things because that’s part of the story. That’s the truth. She’s not overselling anything. She’s just telling you what happened. When she tells you his hands were on her neck and he was squeezing and she couldn’t breathe, that’s the truth.

To obtain reversal of a conviction based on improper closing argument, a defendant “must show not only that the prosecutor’s argument was improper, but also that it impaired the defendant’s right to a fair trial.” State v. Hemond, 2005 VT 12, ¶ 11, 178 Vt. 470 (mem.) (quotation omitted). Because defendant did not object to the statements at trial, we review for plain error and will not reverse “unless [the comments] are so manifestly and egregiously improper that there is no room to doubt the prejudicial effect.” State v. Martel, 164 Vt. 501, 506 (1995).

“[T]his Court has condemned statements by the prosecutor that indicate a personal belief that the defendant is guilty.” State v. Ayers, 148 Vt. 421, 425 (1987). In Ayers, the prosecutor expressed a personal belief that the victim was telling the truth and told the jury that the prosecutor believed the victim. This Court concluded the statements improperly expressed a personal belief and this was harmful due to the “great risk that the jury will give special weight to [the personal opinion of the prosecutor] because of the prestige of the prosecutor and the fact-finding facilities available to the office.” 148 Vt. at 425-26. These statements differed from those in Ayers. Here, there was no such egregious error insofar as the prosecutor explained how the evidence showed complainant’s truthfulness, but the prosecutor did not express a personal belief or opinion about complainant’s credibility or defendant’s guilt.

Moreover, defendant has not demonstrated the prejudice necessary for plain error. In Ayers, this Court concluded that the improper statements amounted to plain error based on the facts that the case turned on the credibility of the witnesses, the prosecutor's statements were repeated, and the defendant was without counsel. Id. Here, the case was not merely a credibility contest between complainant and defendant. Several witnesses corroborated parts of complainant's account, and there was medical and photographic evidence of complainant's injuries. Furthermore, the jury acquitted defendant on some counts, indicating that the jury evaluated the facts related to each charge and was not improperly influenced by the prosecutor to believe complainant's testimony over other evidence.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Jr., Associate Justice