

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-466

APRIL TERM, 2004

	} APPEALED FROM:
	}
State of Vermont	} District Court of Vermont, Unit No. 3, Essex Circuit
	}
v.	}
	} DOCKET NO. 38-4-02 ExCr
Deborah J. Beaton	} Trial Judge: M. Kathleen Manley
	}
	}

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

Defendant appeals from her conviction of attempted unlawful trespass, arguing that the district court erred by denying her motion for a new trial. We affirm.

Following her conviction, defendant filed a motion for a new trial, in which she argued that (1) the trial court usurped the jury's function by repeatedly stating in the jury instructions that a certain bank was in possession of the property upon which defendant was alleged to have trespassed, thereby determining as a matter of law one of the elements of the charge; (2) in its comments following sentencing, the trial court recognized that someone other than defendant was responsible for her conduct that led to the conviction; and (3) the trial court improperly replaced one juror with another for no apparent reason, using an unacceptable lottery system. In denying defendant's motion, the trial court addressed each of these arguments. Regarding the first argument, the court stated that its instructions set forth the elements of the charge and left it for the jury to determine if the evidence presented by the State satisfied each of those elements. Regarding the second argument, the court stated that its comments at sentencing were not meant to suggest that defendant was not responsible for her own actions, but rather that the circumstances surrounding the offense called for leniency in sentencing. Regarding the third argument, the court acknowledged that during the charge to the jury it mistakenly picked by lot a juror to be designated as the alternate, forgetting that three weeks earlier during the jury draw the thirteenth juror had been designated as the alternate. When the sheriff's department was unable to locate the juror who had been dismissed, the court decided that the thirteenth juror would remain on the panel as the twelfth juror. The court concluded that the interests of justice did not warrant granting a new trial, considering that each party had had an opportunity to question all thirteen of the jurors at the voir dire, and that each of the jurors had been sworn in at the beginning of the trial and had heard the parties' evidence and arguments and the court's instructions.

On appeal, defendant raises no specific claims of error, but rather asks this Court to review her motion for a new trial. We conclude that the trial court's reasons for rejecting each of the arguments contained in defendant's motion for a new trial are sound. First, the court's instructions plainly did not decide any of the elements of the charged offense; rather, they listed the elements of the offense and left it for the jury to decide whether the State had proved each element. In her motion for an enlargement of time to file her reply brief, defendant responds that she presented evidence at trial to show that the bank was not in lawful possession of the property. This contention misses the point. The point is that the jury was allowed to weigh the evidence and determine if each element of the charged offense was supported by the evidence. Second, the court's comments following sentencing did not somehow absolve defendant of responsibility for her conduct that led to the charges against her. As the court stated, it was merely considering all of the facts and

circumstances before determining the appropriate sentence. Third, defendant has failed to show how she was prejudiced by having one juror rather than another become the alternate juror. See State v. Turner, 2003 VT 73, & 11, 830 A.2d 122 (mem.) (A The grant of a new trial is a remedy used sparingly and only in exceptional circumstances.@). Nor did she object at the time to the court= s method for determining the alternate juror. Finally, defendant attaches to her brief statements by persons claiming that one of the State= s witnesses was seen milling in and out of the courtroom before being called as a witness. To the extent that this is intended as an argument on appeal, it is inadequately presented.

Affirmed.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Paul L. Reiber, Associate Justice