**ENTRY ORDER**



SUPREME COURT DOCKET NO. 2009-043

NOVEMBER TERM, 2009

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| State of Vermont | } | APPEALED FROM: |
| | } | |
| v. | } | District Court of Vermont, |
| | } | Unit No. 2, Chittenden Circuit |
| Thomas D. Lafayette | } | Ddocket no. 1815-5-08 Cncr |
| | | Trial Judge: Geoffrey W. Crawford |

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

Defendant Thomas D. Lafayette appeals from a judgment of conviction of burglary. He contends the court erred in: (1) denying a motion for judgment of acquittal based on a lack of evidence that defendant knew he was not licensed or privileged to enter the building; and (2) denying a motion for mistrial based on the prosecutor's allegedly misleading statements concerning the elements of burglary. We affirm.

The record evidence may be summarized as follows. Defendant's mother was the upstairs tenant in a two-unit apartment building in Winooski. Her lease did not entitle her to use a two-car garage located to the rear of the building, and she had never owned a vehicle during her tenancy. The neighbor who lived next door to the apartment building shared a driveway leading to the garage, where she stored a snowblower with the apartment owner's permission.

On the morning of March 13, 2008, the neighbor observed two men, one of whom she recognized as defendant, loading her snowblower into a van parked in front of the garage. The neighbor confronted defendant and told him to put the snowblower back. Defendant responded that the landlord had given him permission to borrow it and that there was a misunderstanding. Defendant returned the snowblower and left the scene.

Defendant's mother testified that she had stored items in the garage and had given defendant permission to do so as well. The landlord acknowledged that he had acquiesced when the mother's former boyfriend had kept a car in the garage for several years. The landlord testified, however, that that he had never given defendant permission to enter the garage, store items there, or use the snowblower. He also testified that, several years earlier, he had called the police to have defendant removed from the garage, where he had spent several nights without permission.

Defendant moved for judgment of acquittal at the close of the State's case, asserting that there was insufficient evidence to prove that he knew that he was not licensed or privileged to enter the garage. See 13 V.S.A. § 1201(a) ("A person is guilty of burglary if he enters any building or structure knowing that he is not licensed or privileged to do so, with the intent to commit a felony, petit larceny, simple assault or unlawful mischief."). The court denied the

motion, as well as subsequent motions for acquittal at the close of the evidence and following the jury's guilty verdict. This appeal followed.

On review of a motion for acquittal we must determine "whether the evidence, when viewed in the light most favorable to the State and excluding any modifying evidence, fairly and reasonably tends to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt." State v. Couture, 169 Vt. 222, 226 (1999) (quotations omitted). Defendant maintains that the State failed to prove that he knew he was not licensed or privileged to enter the garage, and defendant asserts that the uncontradicted evidence supports an inference precisely to the contrary—namely, that defendant reasonably believed he had permission to enter the garage. Defendant cites mother's testimony that her boyfriend had stored his car in the garage for years, that she had permission from the landlord to store items there, and that she had told defendant he could store items there as well. Defendant argues that, inasmuch as there was no countervailing State's evidence, the court erred when, in denying the motion for acquittal after the verdict, it excluded the modifying evidence of mother's testimony.

Defendant overlooks the garage owner's express testimony. When asked directly by the prosecutor whether he had "ever give[n] Mr. Lafayette, ever, any permission to go into your garage or live there," the landlord responded, "No." The landlord further denied that defendant's mother had asked for permission to store items there, or that—apart from the boyfriend's vehicle years earlier—he had ever granted such permission. This testimony—which the jury was free to credit over that of defendant's mother, whose impartiality was clearly at issue—together with the circumstances of defendant's abrupt departure from the scene when confronted by the neighbor, was more than sufficient to support a jury's finding beyond a reasonable doubt that defendant knew he was not privileged or licensed to enter the premises.

Defendant further maintains that, in denying the motion for judgment of acquittal, the trial court erred in declining to consider the testimony of defendant's mother. Defendant asserts that his mother's testimony was unimpeached and uncontradicted. As discussed above, however, the State adduced ample evidence that defendant was not licensed or privileged to enter the garage, in direct opposition to the mother's testimony. In light of this substantial countervailing evidence, the trial court properly declined to consider the mother's testimony in denying defendant's motion for judgment of acquittal. See id. (in ruling on a motion for judgment of acquittal, the trial court must view the evidence in the light most favorable to the State and exclude any modifying evidence); State v. Gibney, 2003 VT 26, ¶¶ 14-17, 175 Vt. 180 (testimony of alibi witness and eyewitness offered by defendant represented modifying evidence that was properly excluded by the court in determining whether the evidence as a whole supported a verdict of guilty beyond a reasonable doubt). Accordingly, we find no basis to disturb the trial court's ruling.

Defendant also claims that the court erred in failing to issue a curative instruction or to grant a mistrial in response to the prosecutor's repeated misstatements of the law during closing argument. Defendant objected at the beginning of the State's closing argument, asserting that the prosecutor had improperly argued that the evidence showed no permission to enter the garage for the purpose of taking the snowblower. Defendant objected that the statutory element involved permission solely to enter, not permission for a specific purpose. The court responded that defense counsel could make the point during her closing argument and that the court would instruct the jury on the correct elements of the offense. Defense counsel renewed the objection at the end of the State's closing argument, asserting that the prosecutor had repeated the same error several times, which constituted reversible error. The court again indicated that it would clarify the law in its instructions. Defense counsel thereupon emphasized in her closing

argument that the purpose of any permission to enter the garage was irrelevant, and the court subsequently instructed specifically in response to defendant's earlier objection that "[i]t is permission to enter the structure that is at issue, not permission to take the snowblower or do some other act. To be privileged means that a person has a legal right to enter."

Despite the court's specific and accurate instruction on the law, defendant maintains that the prosecutor's repeated mischaracterizations required a mistrial. The claim is unpersuasive for several reasons. First, defendant asserts that the State misstated the law on seven separate occasions, but defendant acknowledges raising only one initial objection, which was insufficient to preserve the subsequent claims of error. See State v. Curtis, 145 Vt. 552, 552-53 (1985) (objections made at the bench after the State's closing argument were not sufficiently timely to preserve alleged error for review). Accordingly, we review the bulk of the alleged misstatements solely for plain error, id., which "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," State v. Pelican, 160 Vt. 536, 538 (1993) (quotation omitted). Second, the prosecutor ended his argument by accurately stating that the evidence must show that "defendant entered the garage, knowing he was not licensed or privileged or had permission to do so, with the intent to steal [the] snowblower." And finally, we perceive no basis to conclude that the court's clear and accurate instruction failed to clarify for the jury the precise nature of the elements of the offense. See State v. Messier, 2005 VT 98, ¶ 15, 178 Vt. 412 (when reviewing the sufficiency of a curative instruction, we presume the jury heeded the instruction and disregarded any improper remarks). Therefore, we perceive no glaring error or manifest denial of defendant's rights warranting reversal of the judgment.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice