ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-195

FEBRUARY TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont, Unit No. 3, Franklin Circuit
	}	
Alphonso Williams	}	DOCKET NO. 112-1-08 FrCr
		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 sexual assault, domestic assault, unlawful restraint, and operating a motor vehicle without the owner's consent. Defendant contends the trial court erred in failing to order a new trial after the State referred to the fact that defendant was in custody. We affirm.

This appeal arose out of an incident that occurred on January 19, 2008. The victim testified that she and defendant had been in a relationship "off and on for about a year" when defendant arrived at her apartment in St. Albans on the date in question and asked if he could stay there until he could get a ride to Burlington. She agreed that he could stay overnight on the couch. As she was doing the dishes later that day, defendant approached her from behind, grabbed hold of her, and dragged her to the bedroom. Once there, he held her on the ground and sexually assaulted her. Afterwards, defendant blocked the bedroom door and refused to let her leave until she "calm[ed] down." Defendant eventually left the bedroom, but stayed in the apartment and pushed the victim back inside the bedroom when she tried to leave. Defendant finally departed, and the victim was able to call the police to report the assault and the fact that her car was missing. The victim also told a friend about the assault, who recalled that the victim was "very distressed" and "in a shock state." The friend later received a telephone call from defendant, who said that he was looking for the victim "and that he wished he could take it all back."

A police officer came to the victim's apartment and observed that she was upset and visibly shaking; she was wrapped in a blanket and distraught. The victim received a number of telephone calls while the officer was present, including one from defendant which the officer listened in on. According to the officer, defendant offered to return the victim's car if she had not called the police. Defendant became increasingly irate during the call, and eventually the victim hung up.

The victim testified that she received a telephone call from the police later that day informing her that "they had [defendant] in custody" and had located her car. Shortly thereafter, however, she received another call from the police informing her that defendant had "escaped from custody" and warning her not to retrieve the car. Eventually two officers returned to her

apartment to assure her that they had found defendant. An officer subsequently testified that the "person we had in custody," identified as defendant, had escaped, but was later found and returned to the station.

Toward the end of the victim's direct testimony, the prosecutor asked, "Since you learned that the defendant was back in custody, have you had any further contact with him at all?" The witness indicated that she had not. After several additional questions, defense counsel indicated that she had an objection and asked to approach. During the ensuing bench conference, counsel moved for a mistrial, arguing that the prosecutor's question implied that defendant was "in custody now and has been ever since." The court disagreed, finding that "in the context it was asked it was since he was arrested by the police," and the court thus denied the motion.

The defense called three witnesses, two friends who testified to seeing the victim become angry and yell at defendant, and the victim's former supervisor at work, who testified that the victim had been terminated for giving false information about several absences. As noted, the jury returned verdicts of guilty on the charges stemming from the sexual assault, but acquitted on several additional charges of domestic assault against the victim from other occasions. This appeal followed.

Defendant contends that the trial court erroneously denied his motion for mistrial, asserting that the prosecutor's question referring to his being "in custody" removed the presumption of innocence to which defendant was entitled. See, e.g, State v. Harrison, 37 P.3d 1, 3 (Idaho Ct. App. 2001) ("Many jurisdictions have . . . held that informing the jury that a defendant is in jail is improper because it may raise an inference of guilt."). The trial court enjoys broad discretion in ruling on a mistrial motion, and we will not disturb its ruling "unless the court's discretion was either totally withheld or exercised on grounds clearly untenable or unreasonable." State v. Mears, 170 Vt. 336, 345 (2000) (quotation omitted). "The trial court is in the best position to assess whether any comment, in the context of the trial before it, is prejudicial enough to warrant a new trial." State v. Desautels, 2006 VT 84, ¶ 11, 180 Vt. 189. Like the trial court, "we examine the totality of the circumstances, considering the testimony within the context of the entire proceedings," in deciding whether a defendant has been unduly prejudiced. Mears, 170 Vt. at 345.

Assessed in light of these standards, the testimony at issue here was plainly harmless. The victim had previously testified without objection that the police had called her on the evening in question to tell her that defendant was in custody, and subsequently warned her to stay in her house because defendant had escaped from custody. They later called again to tell her that defendant had been found. Thus, the record supports the trial court's conclusion that the prosecutor's question—understood in context—was simply whether the complainant had any further contact with defendant since he was re-arrested that evening.

Even if understood differently, however, we discern no possibility of undue prejudice. First, the question and answer were brief and fleeting, and neither party revisited the issue. See Desautels, 2006 VT 84, ¶ 11 (police officer's testimony that she arrested defendant at the office of his parole officer did not warrant a mistrial where it was "insignificant in the context of the evidence" and was not repeated). Moreover, the jury here was already aware that defendant had been taken into custody, and the jury would not have been surprised or unduly influenced by the prosecutor's question. See Harrison, 37 P.3d at 4 (holding that prosecutor's references to defendant's custodial status were not prejudicial where they "occurred fleetingly" and where "the jury was otherwise informed through testimony that [defendant] had been arrested" and "had been taken into custody"); State v. Childs, 499 A.2d 1041, 1048 (N.J. Super. Ct. App. Div. 1985)

(finding "no real chance of prejudice" from the prosecutor's comment that defendant was "in custody" where "[t]he reference to custody was fleeting and inadvertent" and where it "cannot have surprised the jury to hear about [defendant's] being in custody because they knew she had been stopped . . . , taken to the police station and searched"). Finally, we note that the jury here actually acquitted defendant of several additional domestic assault charges stemming from earlier incidents involving the same victim, thus tending to dispel any concern that the remark may have improperly prejudiced the jury against defendant or destroyed the presumption of innocence. See Harrison, 1 P.3d at 4 (observing that the jury's acquittal of the defendant on two of the charges "tends to dispel any concern that the verdict may be been based on prejudice or a perception that [defendant] was predisposed to crime"). Accordingly, we find no basis to disturb the judgment.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice