

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-528

NOVEMBER TERM, 2003

	}	APPEALED FROM:
	}	
State of Vermont	}	District Court of Vermont, Unit No. 2,
	}	Chittenden Circuit
v.	}	
	}	DOCKET NO. 3331-5-00 CnCr
Frederick Reed	}	
	}	Trial Judge: Ben W. Joseph
	}	
	}	

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

Defendant was convicted of aggravated assault and sentenced to a term of four to fifteen years. He appeals his conviction, claiming that the court erroneously admitted hearsay testimony and thereby violated his constitutional right of confrontation. We affirm.

In May 2000, defendant was homeless and living in a tent behind the McNeil Generating Plant in Burlington. The victim, Thomas Berard, and Timothy Goodell also lived there. The three men were drinking beer and other alcoholic beverages on May 25, 2000 when defendant kicked the victim out of the chair he was sitting in and began punching and choking him as he lay on the ground. Eventually, Goodell pulled defendant off the victim, who ran away to call the police.

Defendant was charged with aggravated assault in violation of 13 V.S.A. §1024(a)(1). At trial, the investigating officer, the victim, Goodell, and defendant testified. During redirect examination of the investigating officer, the prosecutor asked him to read a portion of his report reflecting the officer's account of what the victim told him on the evening of the assault. The State also offered the report into evidence. In response to the prosecution's offer, defense counsel stated, " Only if Mr. Berard will rise for cross-examination." The court allowed the testimony and exhibit, stating, " I think I'm going to permit Mr. Simpson to do redirect as to what he was told, and if there needs to be special instructions later on, they'll be given." Defense counsel thanked the court, and never asked for a limiting instruction, or otherwise objected to the evidence on hearsay grounds. When the victim and Goodell testified, they recounted the events consistently with officer's report and his testimony. The jury returned a guilty verdict, and defendant now appeals.

On appeal, defendant argues that the court violated his constitutional right to confront the witnesses against him by admitting the officer's testimony and his report. The State claims that defendant failed to preserve the issue for appeal, and therefore we must review his claim under the plain error standard. We agree. Counsel must timely object to the admission of evidence to preserve an appellate claim that the admission amounted to reversible error. V.R.E. 103(a)(1). Moreover, objections must be specific; thus, we review only those objections raised in and ruled on by the trial court. See State v. Ramsay, 146 Vt. 70, 75 (1985) (an objection properly preserved on one ground does not preserve an appellate claim on different grounds). Defense counsel's qualified objection " that evidence should be excluded unless the victim was available for cross examination " was insufficient to preserve the constitutional claim he presses here. We therefore review defendant's argument for plain error only. Id.; see also V.R.Cr.P. 52(b) (" Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

It is only the extraordinary and rare case in which we will find plain error. State v. Ross, 152 Vt. 462, 468 (1989). The

error must be obvious and it must affect the defendant's substantial rights. *Id.* We will reverse a conviction if failure to recognize the error will result in a miscarriage of justice or where the error is so serious that it strikes the heart of defendant's constitutional rights. State v. Davignon, 152 Vt. 209, 222 (1989). Defendant's burden to demonstrate plain error is extremely high. State v. Lipka, 817 A.2d 27, 37 (2002). Here, defendant has not met that burden. Defense counsel objected to the admission of the evidence only if the victim was not going to testify. The victim did testify and defense counsel cross examined him. Moreover, the contested evidence was cumulative because the victim and Goodell testified consistent with it. On this record, we cannot say that defendant's conviction was a miscarriage of justice.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Denise R. Johnson, Associate Justice

Paul L. Reiber, Associate Justice