

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-013

NOVEMBER TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
	}	
Michael S. Baer	}	DOCKET NO. 3402-8-06 Cncr

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 second degree unlawful restraint. He contends the trial court erred by: (1) declaring a mistrial before the jury had been sworn; and (2) failing to instruct on a statutory defense. We affirm.

Defendant was charged with two counts of aggravated domestic assault and one count of first degree unlawful restraint, all stemming from an altercation with the victim, his former domestic partner, in August 2006. On the evening in question, the victim returned home to find defendant there, who had been drinking. She testified that defendant told her not to leave, blocked her from doing so, and struck her on the cheek, resulting in a black eye. The victim told defendant that she wanted to return to her current boyfriend's home but defendant continued to prevent her from leaving, pushed her down, and grabbed her throat. She and defendant both eventually fell asleep.

The police were notified and an officer interviewed the victim the next day. The officer testified that the victim appeared to be upset and had a black eye. He recalled that the victim reported that defendant had punched and strangled her and refused to let her leave the apartment. Also testifying was the victim's upstairs neighbor, who stated that she heard yelling from the apartment below and specifically heard the victim asking defendant to let her out. When she saw defendant the following day, he blamed the victim's current boyfriend for her black eye. Defendant called one witness, a female friend, who also testified that defendant had later accused the victim's boyfriend of hitting her and causing the black eye.

At the charge conference the trial court ruled that, in addition to the charged offenses, it would instruct on the lesser included offense of second degree unlawful restraint.¹ The jury returned a verdict of not guilty on the charge of aggravated domestic assault and first degree unlawful restraint, and guilty on the charge of second degree unlawful restraint.² Following the denial of several post-judgment motions, defendant appealed.

Defendant's first claim concerns a mistrial declared by the court on its own motion a few weeks before the trial that led to defendant's conviction. A jury had been selected but not yet sworn. On the morning of trial, the prosecutor informed the court that the victim, although subpoenaed, had not appeared and could not be located. Defendant, in response, moved to dismiss or for a directed verdict. The court denied the motion and indicated that it would consider, instead, declaring a mistrial. At the State's request, however, the court held a hearing on the admissibility of the victim's statements to the investigating officer. At the conclusion of the hearing, the court ruled that, although a few of the initial statements were admissible as excited utterances, most were inadmissible hearsay. Thereafter, the court declared a mistrial, issued a warrant for the victim's arrest, and set the matter for the next jury draw. Shortly thereafter, defendant filed a consolidated motion to dismiss, for directed verdict, and for reconsideration of the mistrial ruling, asserting that the court lacked the authority to grant a mistrial before the jury was sworn. The court denied the motion, explaining that it had inherent authority to declare a mistrial. The case proceeded to trial, where defendant was convicted of the lesser included offense of second degree unlawful restraint.

On appeal, defendant renews his claim that the court lacked the authority to declare a mistrial before the jury was sworn and jeopardy attached. As noted, however, defendant did not make this specific argument on the morning of trial. The record shows that defense counsel merely stated: "I would ask that the Court rather than declaring a mistrial in essence direct a verdict." It is axiomatic that issues or objections not raised in the trial court in the first instance will not be considered on appeal. State v. Stevens, 2003 VT 15, ¶ 10, 175 Vt. 503. Although defendant belatedly raised the issue of the trial court's authority after the court declared a mistrial, such post-judgment motions are generally not sufficient to avoid a waiver. See State v. Saunders, 168 Vt. 60, 63 (1998) (burden is on defendant to bring alleged error to the attention of the trial court without delay, and claims raised for the first time in motion for new trial are not preserved for appellate review).

Even had the argument been preserved, however, defendant cites no authority to support the claim.³ Indeed, although it is well settled that jeopardy attaches when the jury is sworn, State v. Corey, 151 Vt. 325, 330 (1989), there is also authority for the proposition that trial commences with the jury selection process, and that the court may properly declare a mistrial, in the interests of justice, before jury selection has been completed or the jury sworn. See, People v. Albarez, 618 N.Y.S.2d 528, 528 (App. Div. 1994) (holding that trial court had authority to declare mistrial before the jury panel was fully selected and sworn based upon the People's

¹ Although defendant initially acquiesced in the decision to charge on the lesser-included offense, he subsequently opposed the instruction. On appeal, however, defendant concedes that the instruction was proper.

² The court had earlier dismissed the other charge of aggravated domestic assault.

³ Defendant concedes that, since the jury was not sworn, no jeopardy attached.

representation that material witnesses could not be found despite diligent search); Blackley v. Donnelly, 385 N.Y.S.2d 587, 588 (App. Div. 1976) (holding that trial commenced with jury selection process and that trial court could properly declare mistrial after six of twelve jurors selected when prosecutor discovered that crucial evidence was missing). Therefore, we find no error.

Defendant further contends the court erred in failing to instruct on the defense to second-degree unlawful restraint set forth in 13 V.S.A. §2406(b), which provides: “It is a defense to a prosecution under this section that the defendant acted reasonably and in good faith to protect the person from imminent physical or emotional danger.” It is undisputed that defendant failed to request such an instruction either before or after the court charged the jury. Accordingly, we review solely for plain error, 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. Tahair, 172 Vt. 101, 110 (2001) (quotation and citation omitted); see State v. Lambert, 2003 VT 28, ¶¶ 12-13, 175 Vt. 275 (failure to request instruction or object to its omission before jury retires to deliberate results in review solely for plain error). Although two witnesses testified that, after the incident, defendant blamed the victim’s black eye on her then current boyfriend, there is no evidence to suggest that defendant restrained the victim out of a concern that she might be assaulted by the boyfriend if she returned to his home. Accordingly, we find no error in the court’s failure to instruct on the statutory defense, much less plain error that “strikes at the very heart of defendant’s constitutional rights.” Tahair, 172 Vt. at 110. See State v. Cantrell, 151 Vt. 131, 135 (1989) (court is not required to instruct on defense theory “not covered by the evidence”) (quotation and citation omitted); State v. Knapp, 147 Vt. 56, 59 (1986) (to be entitled to instruction, defendant must establish elements of the defense to be asserted). Accordingly, we find no basis to disturb the judgment.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice