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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-090

NOVEMBER TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin Circuit
	}	
Elliott Turcotte	}	DOCKET NO. 809-8-06 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 prohibited lewd acts, in violation of 13 V.S.A. § 2632(a)(8). Defendant contends that the evidence was so tenuous that the court erred in failing to enter a judgment of acquittal on its own motion. We affirm.

The material facts may be summarized as follows. K.R., who was fourteen years old at the time, testified that on July 25, 2007, defendant—who lived across the street—asked her if she wanted to go for a ride on his four-wheeler. She got on the back, and defendant drove them down to a nearby river. K.R. testified that, while there, defendant pulled down her shirt and bra and attempted to touch her breast. She told him to stop and asked him three or four times to drive her home, which he finally did. She was upset when she returned and told her friend O.T. what had happened. K.R. further testified that the next day, July 26, 2007, she and O.T. were hanging out at the river when defendant drove up in his truck and stopped to talk them. K.R. testified that defendant asked the girls if they could steal prescription drugs from their parents' houses, and then asked O.T. to show him her breasts. The girls became extremely uncomfortable and left. O.T., who was fifteen years old at the time, testified about the events of that day as well, recalling that defendant asked them to steal painkillers from their parents' houses and then asked to see their breasts. O.T. informed K.R.'s mother about the incidents, who reported the matter to the police. K.R. also testified that, some months later when she was shopping in St. Albans, she observed defendant drive by and stare at her several times.

Defendant was subsequently charged with one count of attempted lewd and lascivious conduct stemming from his attempt to touch K.R.'s breast, one count of prohibited acts in connection with his request to see the girls' breasts, and one count of obstruction of justice resulting from the staring incident. At the close of the State's case, defendant moved for judgment of acquittal on the lewd-and-lascivious and obstruction charges, but not on the prohibited-acts charge. The court denied the motion. Thereafter, following deliberations, the jury returned verdicts of guilty on the prohibited-acts charge and not guilty on the obstruction charge, and a hung verdict on the lewd-and-lascivious charge. This appeal followed.

Defendant contends that the court erred in failing, on its own motion, to enter a judgment of acquittal on the prohibited-acts charge pursuant to Vermont Rule of Criminal Procedure 29(a). Defendant acknowledges that the standard in these circumstances is high, requiring a judgment of acquittal "only when the record reveals that the evidence is so tenuous that a conviction would be unconscionable," State v. Penn, 2003 VT 110, ¶ 8, 176 Vt. 565 (mem.) (quotation omitted), and that this Court reviews such claims solely for plain error amounting to a "miscarriage of justice." Id. ¶ 7 (quotation omitted). Defendant's argument is predicated on certain inconsistencies in the victims' testimony as follows: K.R. testified that defendant asked her friend O.T. to show her breasts, but had earlier told the police that defendant's request was directed to both girls; O.T. testified that defendant asked both girls to expose their breasts but stated in an earlier deposition that he had asked only K.R. Defendant also notes that O.T. made a number of allegations of other sexual advances by defendant at her deposition which she had not mentioned in her earlier reports to the police. Defendant argues that these inconsistencies, together with the not-guilty and hung-jury verdicts on the other counts, make it likely that the jury reached a compromise verdict on the prohibited-acts charge based not on the evidence but "on a general feeling that defendant must have been guilty of some wrongdoing." State v. Crepeault, 167 Vt. 209, 213 (1997).

The argument is unpersuasive. In Crepeault, this Court reversed a jury verdict of guilt on an aggravated sexual assault charge as inconsistent with the jury's acquittal on three other charges, and as a likely compromise verdict, because the assault charge lacked a factual basis separate from the other charges. Id. at 214. Here, although one of the victims was the same, the counts were based on entirely separate and independent facts and the jury was free to evaluate the evidence separately and draw different conclusions as to the weight of the evidence and the witness' credibility. See State v. Wigg, 2005 VT 91, ¶ 37, 179 Vt. 85 (rejecting claim that jury's guilt verdict on lewd-and-lascivious charge was inconsistent with its acquittal on sexual assault charge or represented compromise verdict because the charges were based on separate factual allegations and "[e]ven though both findings were based primarily on the jury's evaluation of one witness' credibility . . . the jury was free to believe her in part and disbelieve her in part"); State v. Carpenter, 155 Vt. 59, 64 (1990) (finding no inconsistency in jury's conviction of aggravated assault and acquittal of sexual assault where the offenses involved separate elements). Contrary to defendant's claim, moreover, the inconsistencies in the victims' testimony—as to whether defendant's request was directed at one or both girls—were not so significant as to render the verdict "unconscionable." Accordingly, we find no basis to disturb the judgment.

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice