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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-373

AUGUST TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Rutland Circuit
	}	
Webb MacJarrett	}	DOCKET NO. 663-5-08 Rdcr
		Trial Judge: Thomas A. Zonay

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

Defendant appeals from a judgment of conviction, based on a jury verdict, of sexual assault on a child under the age of sixteen. Defendant contends: (1) the evidence was insufficient to support the verdict; and (2) the court erred in forcing defendant to be sworn in while testifying at his sentencing hearing. We affirm.

On the evening of November 11, 2007, the complainant, then fourteen years old, was visiting the home of a friend in Rutland. Complainant had changed into sweatpants and spent part of the evening watching a video with her friend and defendant—her friend's uncle—who also apparently lived in the home. Complainant testified that, shortly after her friend left to play a video game, defendant asked to massage her back, removed her bra, rubbed her breasts and stomach, and then placed his fingers inside her vagina. Complainant told defendant that it hurt, and he stopped.

Complainant left to go to bed, and told her friend in the morning about the incident. She also reported it to her grandmother when she returned home, who informed her parents. The police were called, and they took a statement and transported her to the hospital for an examination. The medical examination revealed no overt signs of assault. Defendant was charged with sexual assault on a child under sixteen. Following a two day trial in May 2009, the jury returned a verdict of guilty. He was sentenced in September 2009 to a term of seven to twenty years. This appeal followed.

Defendant first contends the evidence was insufficient to sustain a conviction, and that the trial court erred in denying his motions for judgment of acquittal. As we recently observed, "[d]efendant faces a heavy burden in arguing on appeal that we should overturn the jury's unanimous verdict." State v. Godfrey, 2010 VT 29, ¶ 13. In reviewing the court's ruling, "we look at the evidence presented by the State, viewing it the light most favorable to the prosecution and excluding any modifying evidence, and determine whether that evidence sufficiently and fairly supports a finding of guilt beyond a reasonable doubt." State v. Grega, 168 Vt. 363, 380

(1998). The record evidence here established that defendant and the fourteen year old complainant were together after complainant's friend left, and complainant testified that defendant then removed her bra, massaged her breasts, and ultimately put his finger inside her vagina. Additional witnesses established that complainant reported the assault shortly after it occurred. The evidence, if believed, was thus sufficient to prove beyond a reasonable doubt that defendant committed sexual assault as charged.

In asserting otherwise, defendant relies principally on complainant's earlier deposition testimony in which she denied that defendant had inserted his finger into her vagina. The record shows, however, that complainant explained the discrepancy, stating that she thought the deposition question was whether defendant went "up" with his fingers, and she confirmed at trial that defendant did, in fact, "touch the inside" of her vagina with his hand. We afford substantial deference to the fact finder in weighing the credibility of witnesses, State v. Wiley, 2007 VT 13, ¶ 16, and thus cannot conclude—in light of the testimony—that the evidence was legally insufficient to support a finding of guilt beyond a reasonable doubt.

Defendant also contends the court erred at sentencing when it ordered him to be placed under oath and then asked defendant whether he had committed the offense. The record shows that the prosecutor argued for a straight sentence of ten to twenty years, observing that defendant steadfastly denied responsibility for the offense, took advantage of a position of trust in committing the crime against a vulnerable victim, had an extensive criminal record and, according to the PSI, was not agreeable to treatment and presented a high risk to re-offend. Defense counsel, in response, argued for a sentence of one to three years, and defendant then addressed the court.

Defendant explained that, contrary to certain statements in the PSI, he was agreeable to sex-offender treatment but still maintained his innocence. The court informed defendant that any incriminating statements he made at sentencing could not be used against him in a subsequent retrial or perjury prosecution, and then asked defendant whether had committed the crime and accepted responsibility for it. Defendant responded that he was "accepting responsibility for it . . . because I am willing to do the programming." The court pressed defendant for clarification, explaining that "willing to do programming and accepting responsibility . . . are two different things." Defendant then admitted that he had committed the offense, but acknowledged under further questioning that the admission was solely to obtain a reduced sentence.

The trial court, apparently frustrated, then directed defendant to be sworn in and again asked defendant whether had committed the offense and accepted responsibility for his actions. Defendant reasserted his innocence and again explained that his earlier admission was solely to be eligible for programming and to avoid a longer sentence. After a short recess, the court sentenced defendant to a term of seven to twenty years, citing the circumstances of the offense in which he victimized a young vulnerable girl, his lengthy criminal record, and his failure to accept responsibility or express remorse for the offense.

Defendant asserts that the trial court erred in requiring him to testify under oath but fails to identify how he was—or might be—tangibly prejudiced as a result. Defendant said nothing under oath that he had not earlier stated in allocution. Moreover, we have adopted an "exclusionary rule for statements made by sex offenders, convicted after trial, during their

sentencing." State v. Loveland, 165 Vt. 418, 427 (1996) (citing State v. Cate, 165 Vt 404, 417-418 (1996)). Such statements "will not be admissible against him or her at any subsequent criminal proceeding," id., and this "exclusionary rule" plainly applies whether or not the statements are made under oath. Defendant posits that the court's action could still put him in jeopardy of a perjury charge, in violation of his right against self-incrimination. Defendant's constitutional rights, however, can be vindicated as necessary in any such subsequent proceeding and need not detain us here. Accordingly, regardless of the propriety of the court's decision to place defendant under oath, we discern no prejudice to defendant from the ruling, and hence no basis to disturb the judgment. See V.R.Cr.P. 52(a) ("any error, defect, variance, or irregularity which does not affect substantial rights shall be disregarded").

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice