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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-004

DECEMBER TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Rutland Circuit
	}	
Michael J. Myers	}	DOCKET NO. 360-3-09 Rdcr
		Trial Judge: Thomas A. Zonay

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

Defendant appeals his conviction and sentence for possessing heroin. We affirm.

Defendant was an inmate when he was charged with possession of heroin. Following trial, the jury found him guilty of the charge, and the trial court denied his motion for acquittal and sentenced him to a term of six-to-twelve months consecutive to his previously imposed sentence. On appeal, defendant argues that the evidence was insufficient to support the conviction and that the trial court impermissibly enhanced his sentence based on his decision to testify at trial.

"We will affirm a trial court's denial of a motion for acquittal where, viewing the evidence in the light most favorable to the State, there is sufficient evidence to convince a reasonable trier of fact that all the elements of the crime have been proven beyond a reasonable doubt." State v. Coburn, 2006 VT 31, ¶ 14, 179 Vt. 448. "The law does not require the State to establish guilt by direct evidence alone." State v. McAllister, 2008 VT 3, ¶ 17, 183 Vt. 126. Nor does the law distinguish between the weight to be given evidence based on whether it is direct or circumstantial in nature; there is no greater degree of certainty required of circumstantial evidence than direct evidence. Id. Accordingly, "the guilt of a defendant in a criminal case may be proved by circumstantial evidence alone, if that evidence is proper and sufficient in itself." State v. Kerr, 143 Vt. 597, 603 (1983). "In assessing circumstantial evidence, the fact-finder may draw rational inferences to determine whether disputed ultimate facts occurred." State v. Durenleau, 163 Vt. 8, 12 (1994). Any evidentiary gaps, however, must be filled with more than speculation, and all of the evidence, in sum, must produce more than a suspicion of guilt. State v. Baird, 2006 VT 86, ¶ 13, 180 Vt. 243.

The State has plainly satisfied its burden in this case. The evidence at trial revealed that a correctional officer noticed defendant clenching both fists while standing for a pat-down search. When the officer asked defendant to open his hands, defendant placed his hands in his pocket and then pulled them out, revealing empty hands. The officer then asked defendant to turn his pockets inside out. Defendant refused, however, and walked briskly away out the door and down a hallway. The officer pursued him, losing sight of him for a few seconds. Another officer, who was dispensing medication in the hallway, observed defendant throw an oblong object into an

open mop closet. The second officer told the first officer to search the mop closet. The search revealed two "slugs"—the term used for small packages of contraband wrapped in plastic or tape. The slugs, each of which contained four smaller wrapped pieces of paper holding a powered substance—were taken to the forensic lab, where four were tested and found to contain heroin. Given this evidence, the jury could have rationally inferred that the slugs found in the closet were deposited there by defendant.

Defendant argues that the evidence was insufficient to support the conviction because the correctional officer observed defendant throw one object, yet two objects were found, and because only four of the eight packages were analyzed (and thus shown to contain heroin). We find this argument unavailing. Defendant could have easily thrown both slugs at the same time without the officer noticing that it was actually two rather than one object that had been thrown. Indeed, the objects were very similar and were found close to each other in the closet. The jury did not have to bridge much of an evidentiary gap to come to the rational conclusion that defendant threw the slugs into the closet.

Next, defendant argues that the sentencing court violated his constitutional right to testify by basing its sentencing decision, in part, on defendant's decision to testify. At sentencing, defendant told the court that he fought the charge "because I felt that . . . it couldn't be proved and I wasn't guilty. It was never proven that I was guilty of possessing it." In explaining its sentence, the court noted, among other things, that defendant had not accepted responsibility for the crime. The court stated: "If you hadn't testified at trial and the jury hadn't rejected that, then the Court wouldn't be looking at someone who is—has essentially committed, according to the jury, a false statement to the jury." The court stated that "there's a significant difference between putting the State to its burden of proof and testifying under oath at trial to a manner that is rejected by the jury." The court then stated as follows:

> And the Court had an opportunity to observe the testimony, to hear all the evidence. And I know that you say that the evidence was not such that you agree with the State, that you agree with the jury. But the Court does not—cannot say—it does not say that it's a case where the Court doesn't see where the jury had sufficient substantial physical evidence to find you guilty of the offense.
>
> If the Court didn't think the case had been proven and that the jury did not have the ability to return the verdict, the Court had an opportunity to address that. And the Court did address the law, and the Court does not believe it's appropriate to look at the jury's verdict as anything other than a full and complete analysis of the case, a following of the instructions, and a conviction of the charged offense.

In defendant's view, the trial court's comments violated the principle in United States v. Dunnigan, 507 U.S. 87, 96-97 (1993) that a trial court may not enhance a defendant's sentence based on the defendant having committed perjury at trial unless the court makes findings to support all elements of a perjury violation.

We find no constitutional violation. In Dunnigan, the Supreme Court cited its own precedents in reiterating that "a defendant's right to testify does not include a right to commit perjury." 507 U.S. at 96. The defendant in Dunnigan argued that the trial court violated his constitutional right to testify by enhancing his sentence for having committed perjury based on a

sentencing guideline that called for enhancement if the defendant willfully impeded the administration of justice during the criminal prosecution. Concerned that the guideline could be interpreted as requiring an automatic sentence enhancement every time a defendant testified and was found guilty—even though there would be many instances where false testimony was the result of confusion, mistake, or faulty memory—the Court held that "if an accused challenges a sentence increase based on perjured testimony, the trial court must make findings to support all the elements of a perjury violation in the specific case." Id. at 96-97 (emphasis added). Here, notwithstanding the sentencing court's statements that it was considering whether defendant's false testimony should enhance his sentence, neither defendant nor his attorney objected so as to trigger the Supreme Court's requirement that the sentencing court make explicit findings that the false testimony satisfied the elements of perjury. See id. at 98 ("When contested, the elements of perjury must be found by the district court with the specificity we have stated, so that the enhancement is far from automatic." (emphasis added)); see also id. at 95 (stating that "if a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish" a willful intent to obstruct justice under the statutory guideline and the "perjury definition we have set out" (emphasis added)).

Nor do we find an abuse of discretion. This Court has noted that " 'defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing.' " State v. Noyes, 157 Vt. 114, 119 (1991) (quoting United States v. Grayson, 438 U.S. 41, 50 (1978)). To the extent that defendant's sentence was enhanced because of his false testimony, the enhancement was based on the court's discretion rather than a statutory guideline. Moreover, the comments quoted above reveal that the court believed that the jury had made a rational decision based on the evidence and that defendant had offered false testimony. Plainly, defendant's testimony that he did not throw the heroin "slugs" into the closet was not a result of confusion, mistake, or faulty memory; rather, defendant was directly disputing the testimony of the State's eye witnesses. The court acted within its discretion in considering defendant's false testimony when determining the appropriate sentence. See id. at 94, 97 (noting that "commission of perjury is of obvious relevance . . . because it reflects on a defendant's criminal history, on her willingness to accept the commands of the law and the authority of the court, and on her character in general," and further noting that "[i]t is rational for a sentencing authority to conclude that a defendant who commits a crime and then perjures herself in an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process").

Affirmed.

BY THE COURT:

_____

Paul L. Reiber, Chief Justice

_____

John A. Dooley, Associate Justice

_____

Denise R. Johnson, Associate Justice