Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-238

JULY TERM, 2019

State of Vermont v. Tara L. Tower*	}	APPEALED FROM:
	}	
	}	Superior Court, Addison Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 510/513-11-15 Ancr
		Trial Judge: Helen M. Toor

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

Defendant appeals her convictions, following two separate jury trials, of obstruction of justice, disorderly conduct, assault and robbery, and unlawful mischief. We affirm.

The charges stemmed from separate incidents that occurred on November 3 and 4 of 2015. On November 3, the Bristol Police Department responded to an altercation in which defendant and her sister, Tove, assaulted an individual named Ivan. The sisters had arranged to meet with Ivan, who was selling a car stereo that they believed had been stolen from their camp two weeks earlier. Defendant approached Ivan, who was in a vehicle with his girlfriend, Ashley, at the arranged meeting place. During the altercation, both sisters physically assaulted him, resulting in injuries that were treated at a local hospital. During the assault, defendant swung the radio at Ivan and smashed it on the ground. The participants in the confrontation each gave statements to police. That evening, after the police consulted with the State's attorney, it was determined that criminal charges would be brought against the sisters and that Ivan and Ashley would be witnesses. The next day, November 4, the sisters were cited by police for assault based on what had occurred the day before.

Also on November 4, the sisters and Tove's husband, Shawn, confronted Ivan and Ashley, along with two other individuals, Zach and Kayla. The four individuals were in a car parked near Ivan's grandparents' home. The sisters believed that Zach had been involved in the break-in at their camp two weeks earlier. The sisters and Shawn, who were in a pickup truck, drove up to and partially blocked the car in which the four individuals were seated. Shawn attempted to pull Zach out of the car through a car's window, while Tara stood in front of the car and Tove went to the back of the car with a baseball bat. Tove began smashing out the windows of the car while Shawn verbally threatened its occupants and threatened Zach with a toy gun that had been painted and modified to look real. At some point, Ivan and Ashley got out of the car and headed to Ivan's grandparents' home, with Shawn threatening Ivan along the way. Zach and Kayla managed to drive the car away from the scene.

The sisters and Shawn were charged with various crimes based on these two incidents. Tove eventually pled guilty to all charges stemming from both incidents. Based on the November

3 incident, defendant was charged with assault and robbery, larceny from a person (which the State eventually dismissed), and unlawful mischief. Based on the November 4 incident, defendant was charged with obstruction of justice and disorderly conduct. The charges for the November 3 and November 4 incidents were tried separately, but the trial court denied a co-defendant's pretrial motion for severance of the defendants with respect to the charges stemming from the November 4 incident. Following separate jury trials, defendant was convicted of the obstruction-of-justice and disorderly-conduct charges on August 31, 2017 and the assault-and robbery and unlawful-mischief charges on February 14, 2018. Shawn was convicted along with defendant on the charges stemming from the November 4 incident, and this Court affirmed his convictions. See State v. Collette, No. 2018-039, 2019 WL 1110108 (Vt. March 8, 2019) (unpub. mem.), https://www.vermontjudiciary.org/sites/default/files/documents/eo16-243.pdf.

On appeal, defendant first argues that the trial court committed plain error by not severing her and Shawn's trials. Two or more defendants may be joined for trial when the State alleges that several charged offenses "were part of a common scheme or plan . . . or . . . were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one charge from proof of others." V.R.Cr.P. 8(b)(3)(A)-(B). "On motion of a defendant," however, "the court shall grant severance of the moving defendant unless the court finds that there is no reasonable likelihood that that defendant would be prejudiced by a joint trial." V.R.Cr.P. 14(b)(2)(D). In determining the likelihood of prejudice, the court must consider "whether, in view of the number of offenses and defendants charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense and as to each defendant." V.R.Cr.P. 14(b)(2)(E).

"In order to adequately move for severance, defendant must file a motion before trial, and if overruled, defendant must renew the motion on the same grounds, before or after the close of all evidence." State v. Casey, 2013 VT 22, ¶ 10, 193 Vt. 429; see V.R.Cr.P. 14(b)(4)(A), (C). "The onus is on defendant to specify to the court the reasons he [or she] opposes joinder and to show why there is a reasonable likelihood that he would be prejudiced by a joint trial." Casey, 2013 VT 22, ¶ 10. "Severance is waived if the motion is not made at the appropriate time" or if the motion is not renewed. V.R.Cr.P. 14(b)(4)(A), (C).

In situations when the defendant has failed to renew a pretrial severance motion, this Court has applied a plain-error analysis to a claim that the trial court erred by not granting the motion. See State v. Freeman, 2017 VT 95, ¶ 12 n.3, 206 Vt. 37; State v. Willis, 2006 VT 128, ¶ 25, 181 Vt. 170. On the other hand, when the defendant never raised a severance motion at trial, this Court has declined to consider the merits of a first-time claim that the defendants were improperly joined. Casey, 2013 VT 22, ¶¶ 11-12.

In this case, defendant never filed a severance motion. During a July 2016 status conference, defendant's attorney indicated that he would probably be filing a motion to sever. **7-** By the time of the next status conference in August 2016, Shawn's attorney had already filed a motion to sever. The trial court indicated that it wanted to see motions to sever from all three defendants before deciding the issue. Defendant's attorney agreed with this procedure. At a November 2016 status conference, defendant's attorney told the trial court that he had not yet filed a motion to sever because he was still working on depositions. At one point, defendant's attorney stated that he did not expect to file anything different from what had already been filed and that he could simply join Shawn's motion to sever. The trial court responded that if he and Tove's attorney were willing to do that, then the court could decide the motions that week, but it wanted to provide the sisters an opportunity to file their own separate motions. A discussion then ensued about how the motions to sever from each of the defendants might differ under the circumstances. In the end,

defendant's attorney agreed to a November 30, 2016 deadline to file a separate motion to sever, but he never did so. At a February 2017 status conference, the trial court noted that neither defendant's nor Tove's attorney had filed the expected separate motions to sever, and Tove's attorney explained that "the way that we are planning to approach it is if we come up with any additional information regarding the prejudice that [the court] discussed in the entry order [denying Shawn's motion to sever], that we would potentially renew at that time if . . . we felt that it was appropriate." No subsequent motion to sever was filed.

In short, the record demonstrates that defendant never filed a separate motion to sever or joined Shawn's motion; thus, she has waived any argument on appeal that the trial court erred by not severing her and Shawn's trials. Cf. Casey, 2013 VT 22, ¶¶ 8, 11-12 (declining to address merits of whether trial court improperly joined cases because defense counsel's "cryptic and scant" remark—"The same here, Judge, on that issue"—in response to request by co-defendant's counsel for separate trials failed to preserve issue for review). In any event, defendant cannot meet the rigorous plain-error standard, which requires her to demonstrate either that not reversing her conviction would "result in a miscarriage of justice" or that the claimed error is "so grave and serious that it strikes at the very heart of the defendant's constitutional rights." Freeman, 2017 VT 95, ¶ 12 n.3 (quotations omitted). The charged offenses in this case allegedly concern a common scheme and were closely connected in time and place. Defendant argues that she was prejudiced by the introduction at trial of statements Shawn made to Ivan during the November 4 incident and to police following that incident—statements indicating that Shawn was aware of the altercation the previous day and that he had threatened Ivan—and she contends that those statements would not have been admissible had she and Shawn been given separate trials. For the most part, the statements defendant objects to were elicited to demonstrate that Shawn was aware of the altercation the day before, on November 3. That is, the statements were not admitted to prove the truth of the matter asserted in the statements but, rather, were admitted to show Shawn's knowledge and state of mind. See V.R.E. 801(c). For that reason, they would have been admissible in defendant's trial even if the charges had been severed. Defendant has failed to demonstrate a miscarriage of justice or a grave error striking at the heart of her constitutional rights.

Defendant also argues that the evidence at trial was insufficient to support her obstruction-of-justice, assault-and-robbery, and unlawful-mischief convictions. The inquiry "on review of a V.R.Cr.P. 29 motion [for judgment of acquittal] is whether the evidence, when viewed in the light most favorable to the State and excluding any modifying evidence, fairly and reasonably tends to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt." State v. Prior, 174 Vt. 49, 53 (2002) (quotation omitted). In making this inquiry, "[w]e assess the strength and quality of the evidence; evidence that gives rise to mere suspicion of guilt or leaves guilt uncertain or dependent upon conjecture is insufficient." State v. McAllister, 2008 VT 3, ¶ 13, 183 Vt. 126 (quotation omitted).

Regarding the obstruction-of-justice conviction, defendant contends that the evidence was insufficient to show that she or Shawn intended to intimidate Ivan as opposed to Zach, the person the sisters suspected of breaking into their camp. She points to testimony that the November 4 confrontation occurred only after someone from the truck shouted out about seeing Zach and that Shawn initially sought to find out which occupant in the car was Zach. According to defendant, the entire encounter was aimed at confronting Zach, not Ivan.

We find these arguments unavailing. As the trial court stated in denying defendant's motion for judgment of acquittal, there was evidence from which the jury could conclude that at some point during the November 4 altercation both defendant and Shawn were aware that Ivan was in the car, that Shawn threatened Ivan in addition to Zach, and that defendant and her sister

were acting in concert with Shawn. This evidence could have convinced a reasonable jury to infer, without resorting to speculation or conjecture, that defendant, in concert with her sister and brother-in-law, intended to obstruct justice by intimidating Ivan, whom defendant and her sister had assaulted the day before, as a result of which defendant and her sister faced potential prosecution.

Regarding her challenge to the assault-and-robbery and unlawful-mischief convictions, defendant did not move for judgment of acquittal under Vermont Rule of Criminal Procedure 29. When no such motion is made, "a court should move for acquittal only when the record reveals that the evidence is so tenuous that a conviction would be unconscionable." State v. Erwin, 2011 VT 41, ¶ 17, 189 Vt. 502 (quotation omitted). Defendant cannot make such a showing here. Defendant contends that she took the radio from Ivan believing that it belonged to her family and that therefore she had a right to damage it. Ivan testified, however, that the radio belonged to him and he denied stealing it. There was no testimony that either sister told Ivan the radio belonged to them. The jury was entitled to assess the credibility of the witnesses and determine that defendant took and destroyed property that did not belong to her. See State v. Hinchliffe, 2009 VT 111, ¶ 22, 196 Vt. 487 (stating that credibility of witnesses and weight of evidence are matters entirely within province of jury and are distinct from claims of sufficiency of evidence).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice