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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2000-577
NOVEMBER TERM, 2001

State of Vermont	}	APPEALED FROM:
v.	}	District Court of Vermont,
Harold P. Haner Sr.	}	Unit No. 2, Bennington Circuit
	}	DOCKET NO. 1483-10-99 Bncr
	}	Trial Judge: Nancy Corsones

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

Defendant appeals his conviction after jury trial for aggravated sexual assault on his minor daughter, A.H. He claims error in the court's denial of his motion for judgment of acquittal and his request to introduce evidence of other alleged sexual abuse of the victim. Defendant also alleges the court erroneously prohibited him from cross examining A.H. on specific instances of sexual conduct to show alternate sources of trauma to her vagina. Finding no error, we affirm.

In March 1999, eleven-year-old A.H. was living with defendant, his wife and four young siblings in the Alta Gardens Trailer Park in Pownal. One night she was awakened by a sharp pain in her vagina. She did not open her eyes because she was afraid the person in her room might hurt her. She opened her eyes when she heard the person leave. A minute or two later, after opening her eyes, she saw defendant walking towards her. He knelt down by her bed and began watching her. A.H. asked defendant what he was doing, and he told her that he was checking on her because she had been talking in her sleep. A.H. did not report the incident to anyone right away.

Some days later, A.H. disclosed the assault to a family friend. The friend called a family physician who later notified authorities about the incident. A.H. was eventually examined by Dr. Nancy Scattergood. Dr. Scattergood found evidence of trauma to A.H.'s vagina consistent with vaginal penetration, although she could not determine what caused the trauma or when it occurred. The State subsequently charged defendant with sexual assault on a minor pursuant to 13 V.S.A. 3252(b)(1).

Prior to trial, defendant filed a motion for permission to introduce evidence of A.H.'s alleged prior false allegations of sexual abuse under 13 V.S.A. 3255(a)(3)(C). The allegations concerned incidents with A.H.'s uncle and a family friend, but did not involve any allegation of penetration of A.H.'s vagina. The court denied the motion because defendant could not prove that the allegations were in fact false as required by 3255(a)(3)(C). See State v. Ross, 152 Vt. 462, 471 (1989) (3255(a)(3)(C) requires specific evidence of past false allegations before evidence of victim's past sexual conduct may be admitted). The court's order denying defendant's motion also scheduled a hearing to inquire whether the prior sexual assaults were relevant to explain A.H.'s vaginal injury apparent from the medical evidence. At that hearing, which occurred the morning of the first day of trial, A.H. testified about the other incidents. Her testimony confirmed that the alleged perpetrators of the past incidents did not put anything inside A.H.'s vagina. Notably, defendant did not ask the court for an order allowing him to offer evidence of the past assaults to prove an alternate source of vaginal injury under 3255(a)(3)(B) after A.H. had completed her testimony and the court ended the hearing. After the jury's guilty verdict and the court's denial of defendant's motion for judgment of acquittal under V.R.Cr.P. 29, defendant appealed.

Defendant first claims that the court should have granted his motion for judgment of acquittal. Our review of a denial of a motion under V.R.Cr.P. 29 entails determining whether the State's evidence, taken in the light most favorable to the State and disregarding any modifying evidence, "sufficiently and fairly supports a finding of guilt beyond a reasonable doubt." State v. Durenleau, 163 Vt. 8, 10 (1994). We must look at the quality and strength of the evidence, ensuring that the conviction rests on evidence that does more than give rise to suspicion of guilt only. Id.

We believe the evidence before the jury was sufficient to support its determination that defendant was guilty of the assault on A.H. Although the victim did not open her eyes to see the person who was assaulting her, defendant was in her room a minute or two after the assault. The only other people in the home at the time of the assault were A.H.'s younger siblings, the oldest of which was ten, defendant and his wife. Defendant's wife denied ever touching A.H. There was evidence that defendant had previously wrestled with A.H. by getting on top of her and moving his "bottom half up and down." A.H. also testified to another incident while she was living with defendant when only she, her brother and defendant were present in the home. On that occasion, she woke up when someone opened her legs and she felt something wet rubbing against her vagina. Finally, the medical evidence that A.H. had been vaginally penetrated corroborated her account of an assault. The evidence, while circumstantial, was enough to sustain defendant's conviction.

Defendant next complains that the court should have excluded expert testimony from a psychologist who had treated A.H. concerning her experience with delayed reporting of sexual assaults by juvenile victims. He argues that such evidence is permissible to help the jury understand a victim's bizarre behavior, but that A.H.'s behavior was never raised by the evidence. The transcript reveals otherwise, however; on cross examination defendant elicited from A.H. that she did not report defendant's assault immediately.. The State contends that it offered the expert testimony to inform the jury that juvenile victims of sexual abuse may tend to delay reporting the incidents to authorities. We find no error in the admission of this testimony because defendant did not object to it at trial and no plain error is apparent from the record. State v. Bubar, 146 Vt. 398, 400 (1985). The testimony was permissible to rehabilitate A.H.'s testimony about her delayed report. See State v. Gokey, 154 Vt. 129, 133-37 (1990) (expert testimony on behavior of juvenile victims of sexual abuse permissible to assist jury in understanding child's delayed report of abuse).

Defendant nevertheless argues that the court should have allowed him to rebut the expert testimony on delayed reporting by introducing evidence of an alternative source of injury to A.H.'s vagina. We fail to see how evidence on alternative sources of trauma is relevant to rebut expert testimony on delayed reporting by juvenile victims of sexual assault. Defendant's argument assumes that the expert testimony was relevant only to prove that defendant assaulted A.H. As we just explained, the testimony was offered to explain why victims of sexual abuse often delay their reports of the abuse to others.

In any event, the evidence defendant cites as relevant to other sources of injury to A.H.'s vagina was properly excluded. The pre-trial hearing, at which A.H. testified about her prior victimization, revealed that the evidence could not reasonably be interpreted to show that someone other than defendant could have caused her vaginal injury. The prior alleged abuse consisted of breast fondling by another juvenile and undressing in front of a male relative. Therefore there was no error excluding evidence of these other alleged incidents.

Defendant also claims error because he was not permitted to cross examine A.H. on her ambiguous answer to the State's question, "[B]efore the time in your dad's trailer that night, had anyone or anything been placed inside your vagina before?" A.H. answered, "[n]ot in Alta Gardens." Defendant argues that it was error for the court to deny him the opportunity to cross examine A.H. on that answer. The transcript shows, however, that defendant's attorney agreed to limit his follow up to A.H.'s answer by asking her whether she recalled the State's question and her answer to it. By reaching an agreeable resolution to the issue, defendant has waived any claim on appeal that the court erred by limiting his cross examination of A.H. on this point. State v. Poutre, 154 Vt. 531, 535 (1990) (by withdrawing objection and agreeing to amended information defendant waived appellate review of claim related to information).

Finally, defendant seeks reversal due to statements the prosecutor made during closing argument. Defendant did not raise this claim before the trial court so we review for plain error only. State v. Hughes, 158 Vt. 398, 401 (1992). Before we will consider closing arguments under the plain error standard, we must find the argument to be egregiously and manifestly improper. Id. In closing arguments, counsel is permitted to "point out what the evidence shows and the

inferences that can be made from the evidence." State v. Riva, 145 Vt. 15, 20 (1984). The prosecutor's closing argument about which defendant complains simply pointed out what the evidence showed and what inferences the jury might draw from it. There was nothing egregious or manifestly improper about the argument and reversal is unwarranted.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice