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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-049

MARCH TERM, 2002

State of Vermont	}	APPEALED FROM:
v.	}	District Court of Vermont,
Ronnie R. Rushford	}	Unit No. 2, Chittenden Circuit
	}	DOCKET NOS. 639/6370-11-99 Cncr
	}	Trial Judge: Brian Burgess

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

Defendant appeals from a judgment of conviction, based on a jury verdict, of two counts of sexual assault, in violation of 13 V.S.A. 3252(a)(1). Defendant contends the court erred in: (1) failing to enter a judgment of acquittal on its own motion based on insufficient evidence to support the charge of nonconsensual intercourse; and (2) denying a motion for new trial based on allegations that two jurors were asleep during deliberations. We affirm.

Viewed in the light most favorable to the judgment, see State v. Grega, 168 Vt. 363, 380 (1998), the facts may be summarized as follows. Defendant was employed as a temporary correctional officer at the Chittenden Regional Correctional Facility. M.Y. and S.B. were inmates at the facility. On the evening of October 31, 1999, the two women were socializing in M.Y.'s unlocked cell when defendant entered the cell. Defendant was the only officer assigned to that unit during the shift ending at 11:30 p.m. When S.B. asked defendant if he was going to report them for smoking cigarettes, defendant grabbed the chests of both women. Shortly thereafter, defendant told M.Y. to clean an adjacent locked unit. M.Y. objected that it was too late to be cleaning, but defendant insisted. Feeling uncomfortable, M.Y. asked S.B. for help. The women entered the unit, which locked behind them.

Once in the unit, defendant pulled M.Y. into one of the cells. M.Y. called for S.B. When the latter arrived, she saw that defendant was holding M.Y. by the hair, and that M.Y. was crying and looked scared. Defendant then grabbed S.B. by the hair, and she saw that defendant's pants were unzipped and his penis was out. M.Y. told defendant that she did not want to do this, and tried to leave. He pulled her back, and forced both women to perform oral sex. Both women testified that they told defendant "no." S.B. heard defendant tell M.Y. to take her pants down. He then had intercourse with M.Y. while she cried and held onto S.B.'s arm. M.Y. was six months pregnant at the time. Defendant then forced S.B. again to have oral sex, and ejaculated onto her face and hair. When he was finished, defendant told the women that nobody would believe them if they reported the incident.

Defendant initially denied any sexual contact, but later claimed that it was consensual. Defendant was charged with three counts of sexual assault, consisting of nonconsensual oral sex with S.B. and M.Y., and nonconsensual intercourse with M.Y. The jury returned verdicts of guilty on the charge of nonconsensual oral sex with S.B., and forced intercourse with M.Y. The jury deadlocked on the charge of nonconsensual oral sex with M.Y., and a mistrial was declared on that count. Defendant subsequently moved for a new trial, claiming that he was denied a fair trial and due process when, during the read-back of certain testimony, two jurors were allegedly asleep. Following a hearing, the court denied the

motion, ruling that the evidence did not support the claim. This appeal followed.

Defendant first contends the evidence was insufficient to support the verdict on the charge of nonconsensual intercourse with M.Y. Because defendant did not move for acquittal on the basis of insufficient evidence at trial or in a post-judgment motion, we review the claim solely for plain error. See State v. Crannell, 170 Vt. 387, 407-408 (2000). We have held that the trial court may order entry of judgment on its own motion only when the evidence is so tenuous that a conviction would be unconscionable. See State v. Koveos, 169 Vt. 62, 66-67 (1999) ("plain error exists only in extraordinary circumstances where it is obvious and strikes at the heart of defendant's constitutional rights or results in miscarriage of justice").

In support of his plain error claim, defendant cites several inconsistencies in the testimony of the two victims. He notes, for example, that M.Y. testified that defendant had initially entered her cell when she asked him to light her cigarette, while S.B. testified that defendant entered the cell to offer them cigarettes. Our review of the testimony in its entirety reveals that the accounts of the two women concerning the events surrounding the assault were largely consistent, with only a few, relatively minor discrepancies of this type. We are not persuaded that these discrepancies fundamentally undermined the credibility of the victims' testimony or the reliability of the verdict. Defendant also cites the jury's inability to reach a consensus on the charge of nonconsensual oral sex with M.Y., claiming that it could not logically convict of nonconsensual intercourse if it could not agree on the other charge. The record evidence, however, fully supported the conviction of nonconsensual sexual intercourse; M.Y.'s testimony demonstrated that she clearly manifested her lack of consent and fear during the incident, and her account was supported by the testimony of S.B. The jury's inability to reach a verdict on the one count does not undermine its conclusion on the other. See State v. Carpenter, 155 Vt. 59, 64 (1990) ("logical consistency between verdicts is not a requirement of law, and allowing a verdict to stand that is inconsistent with the jury's determination on another count does not violate due process principles").

Defendant also contends the court erred in denying a motion for new trial. The motion alleged that a television reporter covering the trial had reported that several jurors were apparently asleep during the read-back of certain testimony. At the hearing on the motion, defendant's father testified that two male jurors appeared to be sleeping during the read-back; he stated that one juror had his head tilted back and his eyes closed for about fifteen minutes, and the other had his head down with his eyes closed for about the same time period. The court officer in charge of the jury during the trial also testified. She stated that she had observed the jury during the entire trial, and had not observed any of them to be asleep at any time. The court, which presided over defendant's trial, found that although one juror appeared to have his eyes shut during the read-back, the court was not persuaded that the juror was asleep rather than listening with his eyes closed; nothing else suggested that the juror was asleep, and all of the jurors rose and left the courtroom together when the read-back was finished.

We have held that a defendant challenging the integrity of the jury has to show only the existence of circumstances capable of prejudicing the deliberative function of the jury; the defendant need not prove that they actually influenced the result. See State v. Ovitt, 126 Vt. 320, 324-25 (1967). Although defendant claims that the potential impact of two jurors asleep during the read-back was sufficient under this standard to order a new trial, he overlooks the court's finding that the evidence failed to establish that any juror was asleep. Defendant has not challenged this finding, which supported the conclusion that there was nothing amiss in the jury's deliberative process. In arguing for a new trial, defendant also cites some apparent juror confusion when they initially reported their verdict. The State asserts that this argument was not raised below, and therefore - absent a showing of plain error - it was not preserved for review on appeal. See State v. Fitzgerald, 165 Vt. 343, 349 (1996). Even assuming, however, that the issue was preserved, we have reviewed that portion of the transcript in which the jury announced the verdict, and note that any initial confusion over the verdict as to each count was immediately clarified and resolved by the court. We find no basis for the claim that juror confusion provided a ground for a new trial.

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