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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2007-034

DECEMBER TERM, 2007

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| State of Vermont | } | APPEALED FROM: |
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| v. | } | District Court of Vermont |
| | } | Unit No. 3, Orleans Circuit |
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| Carey Eastman | } | DOCKET NO. 130-3-06 OsCr |
| | | Trial Judge: Edward J. Cashman |

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

Defendant appeals a jury conviction for lewd and lascivious conduct. On appeal, defendant claims that the trial court committed plain error when it (1) seated three jurors who conceded they could not be impartial; (2) allowed the prosecutor to call defendant a "sexual predator" during his opening statement; and (3) allowed a police officer to testify as an expert and comment on the credibility of the complaining witness. We affirm.

Defendant was charged with lewd and lascivious conduct following an incident at an indoor recreation facility. At trial, the complainant testified that, while in the locker room, defendant exposed himself to complainant and masturbated, and touched complainant's penis. Complainant went to the front desk and told the receptionist working there what had happened. At the time, complainant was sixteen. The receptionist and two police officers also testified for the State. Defendant testified on his own behalf and explained that the encounter was consensual. The jury rendered a verdict of guilty and defendant appealed.

Defendant did not object to any of the matters now raised on appeal. Therefore, we review defendant's claims for plain error. Under this standard, we will reverse only if the error is so grave that it strikes at the heart of defendant's constitutional rights. State v. Pelican, 160 Vt. 536, 538 (1993).

First, defendant asserts that the trial court committed plain error when it seated three jurors who expressed some doubt about their ability to be impartial. "The defendant has a constitutional right to a trial by an impartial jury." State v. Holden, 136 Vt. 158, 161 (1978) (citing U.S. Const. amends. VI, XIV; Vt. Const. ch. I, art. 10). Thus, a juror is properly removed for cause if she demonstrates "a fixed opinion, bias or prejudice." Id. "Once a fixed bias has been demonstrated, disqualification is required as a matter of law, but whether the juror

entertains an opinion that is truly a fixed bias is a question for the sound discretion of the trial judge who has observed the demeanor of the juror on voir dire." State v. Percy, 156 Vt. 468, 478 (1990). Defendant contends that the jurors expressed doubts about their ability to judge the case impartially and that the court should have dismissed them for cause. The record reveals that although the three jurors expressed some doubts, all three agreed that they could judge the case impartially.* See id. at 480-81 (explaining that even where a juror expressed doubt, the trial court's reliance on a subsequent statement of impartiality was not error). Although we have explained that a juror's expression of impartiality is not dispositive, we defer to the trial judge's determination in the absence of other evidence of bias. Id. at 479. Given that defendant's attorney was apparently satisfied by the jurors' responses at the time, and did not seek to dismiss the jurors for cause or otherwise, there is nothing in the record that suggests the trial court abused its discretion in failing to sua sponte excuse the three jurors.

Second, defendant contends that it was plain error for the prosecutor to refer to defendant as a "sexual predator." In his opening statement, the prosecutor remarked that the complainant did not expect that "when [he] went to [the recreation facility] that day to work out, he would become the target for a sexual predator." Defendant argues that the prosecutor's characterization of him as a sexual predator implied that defendant had a prior record. We disagree; the statement was easily understood merely as a reference to the acts alleged against defendant in this case. The prosecutor did not reference any prior convictions or attempt to demonstrate that defendant had a propensity to commit this type of crime. Cf. State v. Moran, 141 Vt. 10, 19-20 (1982) (concluding that prosecutor's use of prior convictions in closing argument was plain error because it was used to suggest that the defendant had a propensity to commit crime). Even assuming the statement improperly portrayed defendant as a prior offender, given the quality of the complainant's testimony, we conclude that this one-time reference did not prejudice the proceedings and was not a miscarriage of justice. See State v. Babson, 2006 VT 96, ¶¶ 13-15 (concluding there was no plain error when prosecutor repeated inadmissible hearsay during closing given the strength of the State's case).

Third, defendant argues that the court impermissibly allowed the investigating officer to testify as an expert and to comment on the complainant's credibility. During his testimony, one of the officers at the scene described his interview of the complainant. In response to a question about the complainant's demeanor during his interview, the officer answered that complainant was "scared, in shock. He was very pale, nervous, almost crying." The prosecutor questioned why it was important to denote an interviewee's demeanor and the officer answered: "You can determine truthfulness, truthfulness of people, their emotional state as a result of incidents, stuff like that." On appeal, defendant contends that the officer's answer was expert testimony that impermissibly commented on the truthfulness of complainant. See State v. Weeks, 160 Vt. 393, 400 (1993) (finding plain error where expert extensively testified about the victim's credibility and "explicitly vouch[ed] for the victim's story"). Experts in child sexual abuse cases are "not

* Defendant challenges the impartiality of three specific jurors, referred to herein as jurors one, two and three. Although juror one expressed doubt about her ability to be objective, she also testified on at least four occasions that she was a fair person and would be impartial. Juror two acknowledged that he had been at the recreation center the day of the incident, but testified that he could be impartial and had not drawn any conclusions about what happened that day. Juror three also stated that she would be fair.

permitted to comment directly on their personal perceptions or beliefs regarding the credibility of the child victim." State v. Leggett, 164 Vt. 599, 599 (1995) (mem.). The jury's role is to determine a witness's credibility and it is error for an expert to comment directly on whether a complainant is telling the truth. Id.

We conclude that there was no such error in this case. The officer described generally why it is important to a law enforcement officer investigating an alleged crime to observe a person's demeanor during an interview; the officer did not testify that the complainant was truthful or that he believed the complainant. See Leggett, 164 Vt. at 600 (concluding there was no error where the expert testified generally about why children who are sexually abused by family members are more likely to delay reporting, but did not comment on the victim's veracity). We conclude there was no plain error as the reference was short, general and did not impermissibly lend credibility to the complainant's story.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice