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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-198

MAY TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Addison Circuit
	}	
Matthew J. Verno	}	DOCKET NO. 413-7-07 AnCr
		Trial Judge: Helen M. Toor

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

Defendant appeals from a jury conviction of four counts of sexual assault, one count of attempted sexual assault and one count of lewd and lascivious conduct. Defendant argues that the court committed plain error in admitting a prior consistent statement of the complaining witness, and in allowing the prosecution to make an improper comment during closing arguments. We affirm.

On July 16, 2007, the complaining witness contacted the Middlebury Police and reported that defendant had attempted to sexually assault her the previous night. An officer met with complainant and she reported that defendant had been pressuring her to have sex with him on a weekly basis and had sexually assaulted her on at least three separate occasions since March 2007. The complainant provided a sworn written statement in which she described how defendant had sexually assaulted her multiple times, including four to six occasions when he penetrated her. The State also obtained a sworn statement from complainant's friend who stated that he witnessed defendant attempt to sexually assault complainant at complainant's home on July 15, 2007.

The State initially charged defendant with one count of sexual assault and one count of lewd and lascivious conduct. Following defendant's motion to specify the dates in the information, the State filed an amended information charging defendant with four counts of sexual assault, one count of attempted sexual assault and one count of lewd and lascivious conduct and indicating more specific dates for each charge.

Trial was held in January 2008. At trial, complainant testified that she met defendant in November 2004 and was friends with him, but they had never had a consensual sexual relationship. She explained that defendant had propositioned her several times prior to March 2007, but she had refused him. She testified that on four occasions between March 2007 and June 2007 defendant entered her home and had sexual contact with her without her consent. She

described the events of July 15, 2007 when defendant attempted to have sex with her and grabbed her in front of her friend.

During cross examination, defense counsel questioned complainant regarding how many times she told police defendant tried to have sexual contact with her. She testified that defendant penetrated her four to six times. Defense counsel then had complainant read portions of her deposition testimony and police affidavits regarding her statements to them in an attempt to highlight inconsistencies in complainant's story, including that one police affidavit reported that she stated defendant penetrated her three times. Counsel also sought to point out inconsistencies in the number of times complainant said defendant attempted to sexually assault her between her deposition testimony and the reports of her statements in the police affidavits. On redirect, the prosecution moved to admit complainant's sworn statement as a prior consistent statement that defendant had penetrated her four to six times. In response to the court's inquiry as to whether there was an objection, defense counsel stated, "That's fine, Judge. No objection." The court thus admitted the entire statement.

In addition to complainant's testimony, the State also presented the testimony of other witnesses. Complainant's friend corroborated complainant's testimony that on the evening of July 15, 2007 defendant came to complainant's house and entered the bathroom while complainant was showering. After they came out of the bathroom, the friend testified that he witnessed defendant touching and groping complainant while complainant asked him to stop and pushed him away. In addition, complainant's neighbor testified that in April 2007 complainant told the neighbor that defendant had raped her. The neighbor also stated that in July 2007, complainant was very upset and told her that defendant tried to have sex with her, but only groped her. The neighbor explained that she encouraged complainant to contact police, which complainant did. Defendant did not testify.

At the close of the evidence, both sides made closing arguments. Defense counsel stated that complainant was "an emotionally unstable woman."* In rebuttal, the prosecutor stated:

> There's an old axiom in defense lore. When the facts are on your side, hammer the facts with the jury. When the law is on your side, hammer the law. When neither, hammer the witnesses. [Defense counsel] in his closing argument did a very—pretty good hatchet job of [complainant], but nothing he says about her excuses what his client did to [complainant]. He might not ever invite her over to tea, but she never deserved what happened to her.

Defendant did not object to this statement. The court then charged the jury. The court instructed the jury that "The lawyers may argue about what the evidence shows, but what they say is not evidence. The evidence is the testimony you have heard and the exhibits that were admitted." After the charge, defendant objected to the prosecutor's use of the words "hatchet job." The

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* In addition, in his opening statement, defense counsel had begun by saying, "The complaining witness in this case, the victim, is a pill-popping, drug peddler who was having an affair with [defendant]."

court questioned, "Are you asking me to do anything about it? Other than give him a dirty look or something?" Defense counsel replied, "No, Your Honor, no specific [sic], just I think it's objectionable. Obviously, we want this case to go to the jury. I don't think, you know, certainly the whole thing of saying something twice just reemphasizes . . . . I would just note for the record we object to it, Judge." The jury found defendant guilty on all counts.

Defendant filed a post-trial motion for judgment of acquittal or for a new trial. Defendant argued that the evidence was insufficient to sustain the verdict. Defendant also moved for a new trial based on the erroneous admission of the complainant's prior consistent statement and what defendant described as "The Prosecutor's closing remarks regarding the defenses' [sic] tactics." The court denied the motions. The court held that the evidence was legally sufficient to support the charge. As to the prior statement, the court held that defendant had waived any objection having failed to object to its admission at trial. Finally, the court did not address defendant's argument regarding the prosecutor's statement, concluding that it was inadequately briefed.

On appeal, defendant claims that it was plain error to admit the complainant's prior consistent statement and to allow the prosecutor to comment about the defense's tactics during closing arguments.

We first address defendant's argument regarding the admission of complainant's sworn statement. Defendant did not object to the admission of this statement, therefore we review for plain error only. V.R.Cr.P. 52(b). "Plain error exists only in exceptional circumstances where a failure to recognize error would result in a miscarriage of justice, or where there is glaring error so grave and serious that it strikes at the very heart of the defendant's constitutional rights." State v. Babson, 2006 VT 96, ¶ 8, 180 Vt. 602 (mem.) (quotation omitted). Thus, such error will result in reversal only when "the error seriously affected defendant's substantial rights and had an unfair prejudicial impact on the jury's deliberations." Id. (quotation omitted). Further, where a defendant claims it was plain error to admit certain evidence, he "must demonstrate that the judgment was substantially affected by admission of the testimony." State v. Bubar, 146 Vt. 398, 401 (1985).

The State alleges that admitting the complainant's sworn statement was not error because the statement was admissible as a prior consistent statement under Vermont Rule of Evidence 801(d)(1)(B). See State v. Carter, 164 Vt. 545, 549 (1996) (explaining that Rule 801(d)(1)(B) requires that the prior consistent statement (1) corroborates the witness's in-court testimony, (2) is offered to rebut a charge of recent fabrication, and (3) was made prior to the time of the motive to fabricate). Alternatively, the State contends that the statement was admissible to rehabilitate the witness. See State v. Hazelton, 2006 VT 121, ¶ 13, 181 Vt. 118 (explaining that prior statement may be admissible to rehabilitate a witness but it "must have some 'rebutting force' other than that the witness merely said something earlier that was the same as that part of her trial testimony that was not impeached"). Defendant argues that this statement was hearsay and not admissible under Rule 801(d)(1)(B) because the statement was not made prior to the time a motive to fabricate arose. Defendant also contends that the entire statement was not properly introduced to rehabilitate the witness because there was an inconsistency alleged only as to one part of complainant's story.

We do not reach the question of whether the entire statement was properly admitted under Rule 801(d)(1)(B) or as a statement to rehabilitate the witness because we conclude that even if admitting the statement was error, the admission did not amount to plain error. Defendant has not demonstrated that the jury was substantially affected by admission of the sworn statement. Despite defendant's argument otherwise, this was not a situation where the State's case rested solely on complainant's testimony and the allegedly improper statement bolstered the victim's version of events. Cf. Hazelton, 2006 VT 121, ¶ 20 (holding that the erroneous admission of the victim's prior statements through third parties' testimony was not harmless because it bolstered the victim's credibility). The State's case did not rest solely on complainant's testimony. Complainant's friend also testified that he witnessed defendant's attempts to sexually assault complainant on July 15, 2007. In addition, complainant's neighbor testified that complainant had told her defendant had raped her and attempted to sexually assault her. Moreover, the prior statement was introduced during complainant's own testimony and did not introduce any new allegations; rather it was cumulative of her testimony regarding defendant's conduct, and defendant had ample opportunity to cross examine complainant concerning her statements. See State v. Burgess, 2007 VT 18, ¶ 11, 181 Vt. 336 (concluding that admission of victim's prior statement was not plain error where the statement was cumulative of victim's own testimony and victim was subject to cross examination); Babson, 2006 VT 96, ¶¶ 10-11 (holding that admission of witness's prior statement was not plain error given the State's independent evidence of the defendant's guilt and the availability for cross-examination of the witness). Under these circumstances, we cannot conclude that the verdict was substantially affected by admission of the testimony.

Next, defendant argues that the prosecutor's statement during his closing argument that defense counsel did a "hatchet job" of complainant is grounds for a new trial. Defendant did not timely object to the statement, therefore, we again review for plain error. "Comments made during a closing argument will not amount to plain error unless they are so manifestly and egregiously improper that there is no room to doubt the prejudicial effect." State v. Martel, 164 Vt. 501, 506 (1995). We conclude that the prosecutor's one-time reference to defense counsel's questioning as a "hatchet job" did not rise to this level.

To assess whether a prosecutor's statement was improper and "impaired the defendant's right to a fair trial," we consider several nonexclusive factors:

> the blatancy of the challenged statement, the impact on the theory of the defense, the persistence and frequency of the statement, the opportunity for the court to minimize potential prejudice, the strength of the evidence supporting the relevance of the statement, the overall strength of the State's case, the apparent motivation for making the remarks, and whether the statement was inflammatory and attacked defendant's character.

State v. Hemond, 2005 VT 12, ¶¶ 11, 12, 178 Vt. 470 (mem.) (quotation and citations omitted). In this case, the allegedly improper statement was not blatant or persistent, was made only once, and was not an inflammatory remark on defendant's character. Furthermore, although the court indicated that it was willing to provide a curative instruction, defendant specifically stated that he

did not want one. Given the other evidence against defendant and the very limited and isolated nature of the prosecutor's statement, we conclude that the statement was not so "manifestly and egregiously improper" as to prejudice the jury. Thus, the statement does not warrant a new trial.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice