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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-041

JANUARY TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin Circuit
James Hutchins	}	DOCKET NO. 1643-12-07 FrCr
		Trial Judge: Michael S. Kupersmith

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

Defendant appeals his conviction of sexual assault of a minor while "serv[ing] in a parental role." 13 V.S.A. § 3252(e). Defendant argues that the trial court committed plain error in its instructions on what it means to serve in a parental role and on the meaning of beyond a reasonable doubt. We affirm.

In December 2007, defendant was charged with three counts relating to alleged sexual acts with K.L., a child under sixteen. Defendant was charged with engaging in a sexual act with a minor between June 1, 2006 and April 30, 2007 while serving in a parental role. Defendant was also charged with two counts of lewd and lascivious conduct with K.L. for placing K.L.'s hand on his penis and for touching K.L.'s breasts. Defendant pled not guilty to all three counts.

Testimony at trial revealed the following. Defendant is not K.L.'s father, but he lived in her household at various times from 1999 until March 2007. Although defendant and K.L.'s mother were never married, they had a relationship and two children together who also lived in the household. Defendant moved out of the household in 2005, and returned the following year. He permanently left in March 2007.

K.L. testified that after defendant's return in 2006, he started coming into her bedroom in the evenings in his underwear. At first, defendant watched her get dressed, then he began laying on top of her, on one occasion he touched her breast and on another occasion grabbed her hand and made her touch his penis. She also alleged that he put his finger in her vagina. K.L. disclosed her allegations in September 2007. K.L.'s brother testified that he saw defendant in his underwear pass through his room into K.L.'s room in the evening a number of times. Defendant testified and denied the allegations. The court instructed the jury, and there were no objections following the instructions. The jury found defendant guilty on all three counts. Defendant appeals.

On appeal, defendant first alleges that the trial court erred in instructing the jury on the meaning of "serv[ing] in a parental role," and that there was no evidence that defendant was

serving in a parental role in this case. Because defendant did not object to the jury instructions following the charge, defendant did not preserve the objection for our review. V.R.Cr.P. 30; State v. Martin, 2007 VT 96, ¶ 42, 182 Vt. 377. Therefore, reversal is appropriate only if the court committed plain error. State v. Forant, 168 Vt. 217, 219 (1998); see V.R.Cr.P. 52(b). "Plain error will be found only in rare and extraordinary cases where the error is obvious and strikes at the heart of defendant's constitutional rights or results in a miscarriage of justice." State v. Hendricks, 173 Vt. 132, 137 (2001) (quotation omitted).

The court instructed the jury to consider the following factors to determine if defendant was serving in a parental role:

> One. Whether the defendant lived in the minor's household when the act took place.
> Two. The frequency of the contacts between the defendant and the minor.
> Three. The nature and extent of control exercised by the defendant over the minor.
> Four. The duration of the defendant's contact with the minor.
> And five. The defendant's relationship to the minor's parent or parents.

According to defendant, the above instruction was inaccurate and misleading.

Defendant's first objection relates to factor one—whether defendant lived in the same household as the minor. The statute that defendant was charged under states: "No person shall engage in a sexual act with a child under the age of 16 if . . . the actor is at least 18 years of age, resides in the victim's household, and serves in a parental role with respect to the victim." 13 V.S.A. § 3252(e). According to defendant, because living in the same household is already included in the statute, this cannot also be indicative of serving a parental role. Assuming that it was error to include this as a factor, we conclude that it did not result in plain error, as this factor was presented as one of five factors for the jury to consider and not the sole basis for finding that defendant acted in a parental role. See State v. Johnson, 158 Vt. 508, 514 (1992) (holding no plain error where an erroneous factor was not presented as the sole means for the jury to convict).

Defendant also asserts that the court's instruction failed to give the jury accurate guidance about what "serv[ing] in a parental role" entails. Defendant contends, based on definitions in the child protection statutes, 33 V.S.A. § 4912, that the definition should have required the jury to find that he fulfilled the functions of a parent such as educating the child and caring for the general welfare of the child. We review jury instructions in their entirety and will reverse for plain error only when the instruction as a whole is misleading. Forant, 168 Vt. at 220. Here, when taken as a whole, the instructions gave the jury sufficient guidance. The instructions directed the jury to consider what role defendant played in the victim's life, including the "nature and extent of control" defendant had. While the instructions could have been more explicit, defendant did not request different language, and the court was not required sua sponte to elaborate on its instruction. We also note that the applicable criminal statute does not include a definition of "serv[ing] in a parental role" and there are no prior decisions from this Court interpreting the term. Even if it was error not to incorporate the definition from the child protection statutes as defendant now suggests, we disagree that failing to apply a definition from

another title can be termed an "obvious" error. See State v. Yoh, 2006 VT 49A, ¶ 39, 180 Vt. 317 (defining plain errors as obvious). Therefore we conclude that the instruction in this case did not result in plain error.

We further reject defendant's argument that the trial court erred in denying defendant's motion for acquittal because there was no evidence that defendant served in a parental role. Relying on decisions from other states, defendant asserts that a parental role includes "evidence of emotional trust, disciplinary authority, and supervisory responsibility," State v. Bailey, 592 S.E.2d 738, 744 (N.C. Ct. App. 2004), and that such evidence was absent in this case. We conclude that Bailey is not applicable to this case. In Bailey, the appeals court concluded that the evidence was insufficient to demonstrate that the defendant assumed a position of a parent in the household because (1) the defendant was not romantically involved with the victim's mother, (2) there was no evidence that the defendant was authorized to make disciplinary decisions, or assist with homework, and (3) there was no evidence of a relationship based on trust. Id. at 745.

In contrast, here, when viewing the evidence in the light most favorable to the State, we conclude that there was sufficient evidence for the jury to determine that defendant served in a parental role to the victim. See State v. Grega, 168 Vt. 363, 380 (1998) (outlining that on appeal from denial of motion for acquittal, appellate court views evidence in light most favorable to prosecution). Defendant was in a long-term relationship with K.L.'s mother, had resided in K.L.'s house for many years, was left alone to care for K.L. and her siblings, was responsible for household chores related to K.L. and her siblings, and had authority to discipline K.L. and her siblings.

Defendant next challenges the court's instruction on reasonable doubt. Again, we review for plain error because defendant did not object to the court's instruction. The trial court instructed the jury that the State was required to prove each essential element beyond a reasonable doubt, and explained this in the following manner:

> Few things in life are absolutely certain. To say that you believe something beyond a reasonable doubt is to say that you are convinced of it with great certainty. But proof beyond a reasonable doubt does not require you to be absolutely or 100 percent certain. A reasonable doubt may arise from the evidence or from the lack of evidence.

Defendant contends that the court's statement that the jury must be "convinced of [defendant's guilt] with great certainty" was erroneous because it applied a clear-and-convincing evidence standard rather than a beyond-a-reasonable-doubt standard. We conclude that, when taken as a whole, the instructions were not plain error, if error at all. The court instructed the jury several times that the jury must find each element beyond a reasonable doubt. After the portion of the instruction cited by defendant, the court further explained:

> You must find the defendant not guilty when you have a reasonable doubt even if you believe that he is probably guilty. You may find him guilty only if you have no reasonable doubt. You need not be able to articulate or to voice an explanation for your doubt and that doubt which you have as an individual need not be the same doubt held by your fellow jurors.

The trial court's statement that jurors must be convinced "with great certainty" did not undermine the rest of the court's instruction, which properly directed the jury to apply a reasonable doubt standard.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice