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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-034

NOVEMBER TERM, 2017

State of Vermont	}	APPEALED FROM:
	}	
	}	Superior Court, Orange Unit,
v.	}	Criminal Division
	}	
	}	
Dylan Lawrence	}	DOCKET NO. 564-12-15 Oecr
		Trial Judge: Timothy B. Tomasi

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

Defendant Dylan Lawrence appeals his conviction by a jury for felony unlawful mischief. We affirm.

The following facts were presented at trial. On September 5, 2015, a high school student drove to Chelsea, Vermont to attend a friend's soccer game. She parked her parents' car, a white 2000 Subaru Outback, at the Chelsea recreation field. She left the car parked there overnight and went to spend the night with her friend. When she returned to retrieve the car the following morning, she found the windows had been smashed, a rearview mirror broken, and the tires slashed. She called the police. Her parents' insurance company later declared the car a total loss and sent them a check for $3,062.85.

The sheriff's deputy who responded to the call found no evidence at the scene of who caused the damage. After issuing a press release asking for information, he identified two persons of interest: Colby Johnson and defendant. On September 18, 2015, he saw Mr. Johnson at the Tunbridge fair and asked him about the incident. Mr. Johnson told the deputy that he wanted to come clean, and he said that he and defendant had caused the damage to the car. The deputy was unable to contact defendant until November 15, 2015, when he located defendant at his home in Chelsea. He asked if defendant knew why he was there, and defendant asked if it was about the vandalized car at the recreation field. The deputy said that it was, and defendant denied having anything to do with it. The deputy charged defendant with one count of felony unlawful mischief.

Colby Johnson testified that he lived in Tunbridge and became friends with defendant at high school, from which he had graduated in June 2015. On September 5, 2015, a Saturday, he drove to Chelsea and met defendant at the village store. That evening, they drove to the store in Chelsea, passing the recreation field on the way. They noticed the Subaru parked in the field and joked about smashing it up. Neither of them knew who owned the car. They drove around a bit, discussed smashing the car, and formed a plan. Defendant already had a baseball bat in his car, so they went to Mr. Johnson's mother's house to obtain another. They drove back and smashed up the car. When Mr. Johnson was approached by the sheriff's deputy at the fair, he decided it would

be better to come clean. He subsequently resolved his case through the court diversion program by paying an insurance deductible and writing a letter of apology.

On cross-examination, defense counsel asked Mr. Johnson about a statement he had written for the sheriff's deputy on September 18, 2015. In the statement, Mr. Johnson swore under penalty of perjury:

> That I was unwilling [sic] witnessed a car get smashed up by [defendant], he popped the tires, smashed the windows while I stood and watched. I did not want to take part but he coerced me into it. I feel terrible but I didn't want to sell him out. It occurred in early evening with his bat he brought from home.

After having Mr. Johnson identify and authenticate the statement, defense counsel moved to admit it into evidence. The prosecutor objected on hearsay grounds. Defense counsel responded, "I would assert that its admission is demonstrative of Mr. Johnson's motive, not necessarily offered for the truth of the matter asserted in the statement." The court noted that "at the moment there's nothing inconsistent in the statement" and explained to defense counsel that she had to ask Mr. Johnson direct questions about the topic at issue, in order to demonstrate that the contents of the written statement were inconsistent and then move it into evidence. Defense counsel replied, "All right."

Mr. Johnson went on to testify that he was not an unwilling participant in the vandalism: "[I]s that what is in my statement? Then I wouldn't say unwilling. I was saying I was a participant in the manner of—I guess by unwilling, I mean unwilling in the way of probably shouldn't have done it, but I still participated, and that's really all that matters." He did not recall telling the police officer that he stood by and watched. He said that he told the sheriff's deputy the same story he told the jury. When defense counsel asked him if he told the police he had been coerced because he was nervous, he replied, "Yes. I think that was something I—I didn't mean to say. . . . Because I was not coerced. It was under my own will." Defense counsel did not renew her attempt to admit the written statement into evidence.

Defendant then testified on his own behalf. He testified that on the date in question, he picked up Mr. Johnson and they went to his house and played videogames and watched television. He said that he then dropped off Mr. Johnson at his car and was home by 9:30 p.m. He helped his mother unload wood and didn't leave the house again until the next morning.

The jury found defendant guilty. He received a suspended sentence of one to three months with twelve months of probation, and defendant now appeals his conviction.

On appeal, defendant argues that the court improperly excluded Colby Johnson's written statement because it was not hearsay. Defendant maintains that he offered the statement not for its truth but to show that Mr. Johnson lied to implicate him in the crime. He argues that the alleged error was not harmless because the State's case depended on the jury's believing Mr. Johnson's version of events, and the statement would have undermined Mr. Johnson's credibility. We review the trial court's decision to admit or exclude evidence for abuse of discretion. State v. Kelley, 2016 VT 58, ¶ 19, 202 Vt. 174.

Defendant is correct that an out-of-court statement by a witness that is not offered for its truth is not hearsay. See V.R.E. 801(c) (defining hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted"). "Prior inconsistent statements made in any form may be used for impeachment without a hearsay problem, because they are not offered for

their truth but simply to show the fact of self-contradiction, which is relevant to credibility." Reporter's Notes, V.R.E. 801; see Kelley, 2016 VT 58, ¶ 35 ("The theory behind admitting such statements for impeachment purposes is that a witness's vacillation between two positions is relevant to the witness's credibility, regardless of the information in the inconsistent out-of-court statement.").

However, the admissibility of such statements is subject to the limitation set forth in Vermont Rule of Evidence 613(b), which provides that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same." V.R.E. 613(b); see also State v. Young, 139 Vt. 535, 538 (1981) (explaining that "inconsistent statements sought to be used for impeachment must first be brought to the attention of the witness and an opportunity provided for explanation or denial.").[*] This rule is applicable even if the prior inconsistent statement is offered solely for impeachment purposes. See Reporter's Notes, V.R.E. 801 ("Regardless of whether the statement is used as substantive evidence or for impeachment, its admission is subject to the requirement of Rule 613(b) that the witness have an opportunity to explain.").

The court invoked this rule here, explaining that before the written statement could be admitted, defendant had to lay the proper foundation by asking Mr. Johnson a question about a topic and then about any specific inconsistent assertions contained within the written statement. The trial court acted within its discretion in declining to admit the statement without this foundation evidence. Young, 139 Vt. at 538-39 (affirming trial court's exclusion of prior inconsistent statements of complainant, which defendant sought to admit for impeachment purposes, where defense counsel had not previously asked complainant about specific inconsistent statements or given her an opportunity to explain them); see also State v. Danforth, 2008 VT 69, ¶ 19, 184 Vt. 122 (affirming trial court's refusal to admit extrinsic evidence of prior inconsistent statement by witness where defense counsel did not lay proper foundation when witness testified). As noted above, defendant did go on to ask Mr. Johnson about specific assertions contained in his written statement. However, defendant never renewed his request to admit the statement. We therefore see no error.

Defendant further argues that during closing argument, the prosecutor embellished the evidence, shifted the burden of proof, and vouched for his witness. Because defendant did not object to the prosecutor's statements or request a curative instruction, we review for plain error. See State v. Rehkop, 2006 VT 72, ¶¶ 36-37, 180 Vt. 228. "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).

In summarizing the evidence, the prosecutor described Mr. Johnson and defendant as two "bored" teenagers who "felt invincible" and "felt like they wouldn't be caught," and suggested that the young men pressured each other into vandalizing the car. The testimony at trial supported the inferences drawn by the prosecutor. Mr. Johnson testified that there wasn't much to do in Chelsea. He said that the idea to vandalize the car began as a joke, but that they continued to talk about it as they drove around town and eventually formed a plan that they both carried out. He said that this was something he would never do by himself, and the involvement of a willing peer made it possible. The prosecutor could rationally infer from the behavior of defendant and Mr. Johnson, as testified to by Mr. Johnson, that they did not think they would get caught. "It is the

[*] Young was decided before Vermont adopted its Rules of Evidence. However, Rule 613 merely codified then-existing law, so our analysis is unchanged. See Reporter's Notes, V.R.E. 613 ("Rule 613(b) states the former Vermont rule" (citing Young)).

general rule that counsel may recount and comment on evidence properly admitted at trial, that he may draw legitimate inferences from the record, and that he may reflect unfavorably on the defendant so long as the remarks are based on properly admitted evidence." State v. Blakeney, 137 Vt. 495, 504 (1979), abrogated on other grounds by State v. Trombley, 174 Vt. 459 (2002) (mem.), as recognized in State v. Reynolds, 2014 VT 16, 196 Vt. 113. The prosecutor's comments fell within the bounds of this rule, and they did not amount to vouching for the credibility of the State's witness.

Defendant also claims that the prosecutor improperly suggested during closing argument that defendant had conceded most of the elements of the crime. The prosecutor argued that most of the elements of the case were "undisputed" and that "[e]veryone agree[d]" that the white Subaru was intentionally vandalized without permission; that the damage totaled $3,062.85; that Colby Johnson was at the scene; and that defendant had been with Mr. Johnson that night. The prosecutor argued that "the only question" was whether defendant participated in vandalizing the car. Again, these statements do not rise to the level of plain error. The State presented evidence sufficient to satisfy each element of the charge. This evidence was unrebutted, with the exception of whether defendant participated in the crime. Defendant stipulated to the fact of the vandalism and the amount of damage to the car. He admitted that he was with Mr. Johnson that night. Mr. Johnson testified that he and defendant intentionally smashed the car and that they did not have permission to do so. During her closing argument, defense counsel agreed that the car had been vandalized and that whoever did the damage acted without permission. We therefore find no error in the prosecutor's description of the evidence. Even if the prosecutor's statements could be construed as improperly suggesting to the jury that defendant had to disprove one or more elements of the crime, any harm was cured by the court's subsequent instruction that the State had to prove each element of the crime beyond a reasonable doubt.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Karen R. Carroll, Associate Justice