THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0215, State of New Hampshire v. Rocky Van Curen, the court on March 10, 2009, issued the following order:

The defendant, Rocky Van Curen, appeals his conviction in superior court on thirteen charges of aggravated felonious sexual assault, see RSA 632-A:2 (Supp. 2008), arguing that: (1) his trial counsel's failure to interpose numerous evidentiary objections, to move to strike improperly admitted evidence, and to request limiting instructions, constituted ineffective assistance of counsel; and (2) the imposition of consecutive sentences violated his state and federal constitutional rights to due process, his state constitutional right to proportionality in sentencing, and the separation of powers doctrine under the State Constitution. We affirm.

The defendant raises both questions on appeal pursuant to the "plain error" rule. See Sup. Ct. R. 16-A. To find plain error: "(1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." State v. Lopez, 156 N.H. 416, 423 (2007). The plain error rule is "used sparingly, and [is] limited to those circumstances in which a miscarriage of justice would otherwise result." Id.

We will not consider the defendant's ineffective assistance of counsel claims on direct appeal. As we have previously stated, a claim of ineffective assistance of counsel is "a method of collateral review, and will not prematurely be merged with a defendant's claims on direct appeal." State v. Veale, 154 N.H. 730, 736 (2007). In this case, the defendant has already brought his ineffective assistance of counsel claims in a collateral proceeding. The trial court rejected those claims, and we declined the defendant's appeal from that ruling. See State v. Rocky Van Curen, docket no. 2008-0395 (N.H. July 11, 2008). We see no reason to depart from our practice of reviewing ineffective assistance of counsel claims through collateral proceedings rather than on direct appeal.

Although we do not consider claims of ineffective assistance of counsel on direct appeal, we have discretion to review the record for "plain error." See Sup. Ct. R. 16-A. We have reviewed the record relative to the trial court's actions as they relate to the underlying conduct alleged by the defendant as the basis for his ineffective assistance claims. With respect to the defendant's contention that his wife was erroneously permitted to testify in violation of the marital privilege, N.H. R. Ev. 504, we agree with the State that any error could

not have been "plain" in light of RSA 632-A:5 (2007), which provides in part that "[l]aws attaching a privilege against the disclosure of communications between husband and wife are inapplicable to proceedings under this chapter." See State v. Emery, 152 N.H. 783, 787 (2005).

As for the alleged improper impeachment of the defendant's wife, we again agree with the State that in light of the witness's flat denial that her mother had said anything other than that the victim "thinks she's going to be the mother of [the witness's] children," impeachment with the witness's prior inconsistent statements was not plain error, if error at all. Furthermore, given the other evidence that was introduced demonstrating that the victim disclosed the sexual assaults in 1992 and the limiting instruction given to the jury restricting the use of prior inconsistent statements, we do not find that any error in admitting this evidence seriously affected the fairness, integrity or public reputation of judicial proceedings.

Similarly, even assuming that the admission of an e-mail authored by the defendant's wife's brother was error, the e-mail was consistent with the defendant's theory of defense and cumulative of other evidence. In reviewing for plain error in the unobjected-to admission of evidence, we keep in mind that any error must have been obvious to the trial judge – was the error so plain that the trial judge should have acted sua sponte to take corrective action? See United States v. Williams, 527 F.3d 1235, 1247 (11th Cir. 2008) (for admission of evidence to constitute plain error, evidence must have been so obviously inadmissible and prejudicial that, despite defense counsel's failure to object, trial court, sua sponte, should have excluded it). Where the evidence in question was consistent with the defendant's theory of defense, we are less inclined to conclude that the trial judge should have sua sponte excluded it. Cf. United States v. Smith, 459 F.3d 1276, 1302 (11th Cir. 2006) (Tjoflat, J., specially concurring) (noting that if appellate court were to review claims of evidentiary error under plain error doctrine without factoring in strategic reasons not to object, court would thereby be providing defense counsel with a strategic reason not to object), cert. denied, 549 U.S. 1137 (2007); Burton v. State, 180 P.3d 964, 968-69 (Alaska App. 2008) (because defense counsel's decisions on whether to object to evidence may rest on considerations of strategy and trial tactics, trial judge may not know that counsel acted incompetently in allowing admission of evidence; question on plain error review is whether, based upon what trial judge knew, trial judge's failure to recognize the problem and take corrective action sua sponte was unreasonable or incompetent). Here, we do not find that any error in admitting this evidence was "plain." Furthermore, we conclude that any such error did not seriously affect the fairness, integrity or public reputation of judicial proceedings.

Finally, we conclude that the trial court did not engage in plain error by sentencing the defendant to consecutive prison terms. As the State points out in its brief, we specifically rejected the defendant's arguments regarding his

consecutive sentences in Duquette v. Warden, New Hampshire State Prison, 154 N.H. 737 (2007), a case we decided after the defendant filed his brief in this appeal. Accordingly, there was no error in imposing consecutive sentences upon the defendant.

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk

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