Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-009

SEPTEMBER TERM, 2018

State of Vermont v. John Washek*	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 1021-8-16 Frcr
		Trial Judge: A. Gregory Rainville (motion to suppress); Martin A. Maley (final judgment)

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

Defendant appeals from his conviction, by jury, of driving under the influence (DUI). He argues that the court erred in denying his pretrial motion to suppress and dismiss and in denying his request to introduce a portion of his conversation with the public defender that was inadvertently recorded. Defendant also asserts that the prosecutor engaged in misconduct during her closing argument. We affirm.

Defendant was charged with DUI following an August 2016 traffic stop. He filed a motion to suppress and dismiss, arguing that the arresting officer lacked reasonable grounds to stop him. Following a hearing on February 21, 2017, the court denied the motion. It made the following findings. In the early morning hours of August 18, 2016, a police officer observed defendant turn his car around in a hospital parking lot. Defendant was driving a convertible with out-of-state plates. After turning around, defendant proceeded back the way he had just come. The officer followed the car and observed defendant weave in his lane with the tires touching or crossing the solid yellow center line. Defendant was traveling 15 to 20 miles under the 40 miles per hour speed limit. He weaved to the white fog line and then back. As he approached an intersection, defendant slowed his vehicle nearly to a stop in his travel lane despite having the right of way and being followed by two cars. The officer observed defendant's tires again cross the center line. He then stopped defendant's vehicle. Although defendant denied consuming alcohol, the officer detected a faint odor of intoxicants emanating from defendant. He also observed that defendant's eyes were watery and bloodshot. Additionally, defendant's speech was somewhat slurred and he appeared confused about how to get to his destination. Defendant had been driving in the opposite direction of his stated destination.

The officer had defendant exit his vehicle and perform roadside sobriety exercises. He concluded that defendant did not satisfactorily complete these exercises. He placed defendant under arrest and processed him for DUI at the police station. The officer put defendant in contact with an attorney. Defendant started immediately conversing with the attorney after the officer handed him the phone, and it took a few seconds for the officer to gather his papers and leave the

room. Because of this, sixty seconds of defendant's conversation with the attorney was inadvertently recorded. There was no evidence that any of the recorded call contained information material to defendant's defense. Defendant refused to provide an evidentiary breath test after speaking with an attorney.

Based on these findings, the court concluded that the officer had reason to believe that defendant committed a motor vehicle violation and thus, he was justified in stopping his vehicle. It explained that crossing the center line of the road alone justified the stop. The officer, based on his training and experience, also had a reasonable suspicion that defendant was driving while impaired based on the totality of the circumstances. See State v. Pratt, 2007 VT 68, ¶¶ 5-6, 182 Vt. 165 (explaining that stop is justified when officer has reasonable suspicion of impaired driving, and "[r]easonable suspicion is assessed by examining the totality of the circumstances," including officer's expertise "in recognizing signs of impaired operation"). In this case, the officer observed defendant traveling well under the speed limit, weaving within his lane, crossing the centerline, and stopping in the traveled portion of the road for no apparent reason. The officer testified that, based on his experience, defendant's driving was consistent with impaired operation.

The court also determined that because the officer had reasonable grounds to suspect that defendant was driving under the influence, he was justified in ordering defendant to exit his vehicle to conduct a further investigation. The court rejected defendant's assertion that the exit order was based solely on the officer smelling a faint odor of intoxicants. It explained that the officer observed numerous indicia of impairment prior to requesting defendant to exit, including a faint odor of intoxicants in the face of a denial of having consumed any alcohol, defendant's bloodshot and watery eyes, and his slurred and confused speech. As recounted above, the officer had also observed operation that indicated impairment. Finally, the court rejected defendant's assertion that the inadvertent recording of a brief portion of his consultation with an attorney inhibited his ability to have a meaningful legal consultation. The court thus denied defendant's motion to suppress and dismiss.

A jury trial was held in December 2017 and the jury found defendant guilty of DUI. This appeal followed.

On appeal defendant argues that the officer lacked reasonable grounds to stop him and to order him to exit his vehicle. He suggests that the stop was based on intra-lane weaving alone and that the exit order was based solely on the officer smelling a faint odor of intoxicants. Defendant cites to testimony from the jury trial, which post-dates the trial court's ruling on his motion to suppress.

Defendant did not order a transcript of the suppression hearing. He therefore waived his right to challenge the court's findings. See V.R.A.P. 10(b)(1) ("By failing to order a transcript, the appellant waives the right to raise any issue for which a transcript is necessary for informed appellate review."); Evans v. Cote, 2014 VT 104, ¶ 7, 197 Vt. 523 ("Without the transcript, this Court assumes that the trial court's findings are supported by the evidence."). The court's findings support its conclusions here. See State v. Lawrence, 2003 VT 68, ¶ 9, 175 Vt. 600 (mem.) (explaining that on review of denial of motion to suppress, Supreme Court defers to trial court's factual findings, but reviews do novo ultimate legal conclusion drawn from those facts).

A stop is justified if a police officer has "a reasonable and articulable suspicion that the driver is engaged in criminal activity or has committed a traffic violation." State v. Howard, 2016 VT 49, ¶ 5, 202 Vt. 51. In this case, as reflected above, the court did not rely solely on intra-lane

weaving to uphold the stop. In addition to the intra-lane weaving, the court cited defendant's act of crossing the centerline of the road, driving significantly under the speed limit, and stopping in the middle of the road. See id. ¶ 7 (explaining that "[c]rossing the center line of the road" is traffic violation that justifies stop); see also Pratt, 2007 VT 68, ¶ 5 (recognizing that Court has "upheld investigatory stops for suspicions of DUI based on erratic driving," including intra-lane weaving). The officer testified that, based on his experience, defendant's driving was consistent with impaired operation. The court did not err in concluding that the stop was justified.

The court's conclusion as to the exit order is also supported by its findings. "[W]hen an officer can point to specific, articulable facts that a suspect is driving under the influence, he may order the suspect to exit his vehicle for the purpose of conducting further investigation." State v. McGuigan, 2008 VT 111, ¶ 13, 184 Vt. 441. The exit order was not based solely on the faint odor of intoxicants, as defendant asserts. Instead, it was based on the totality of the circumstances recounted above. We find no error.

Defendant next argues that the court should have allowed the jury to hear an inadvertently recorded sixty-second portion of his conversation with his attorney.[*] He argues, for the first time on appeal, that its admission was required under "the rule of completeness." See State v. Hemond, 2005 VT 12, ¶ 8, 178 Vt. 470 (mem.) (discussing "rule of completeness" codified in V.R.E. 106). Rule 106 provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Defendant also asserts that this recording was important to show the jury his demeanor, articulation, and comprehension of events.

We find no error. The record shows that the parties stipulated to the admission of the processing video before trial. Both parties recognized that a small portion of defendant's conversation with his attorney had been inadvertently captured on the processing video. Defendant's attorney stated that "that part can be fast forwarded" and the State agreed that it "would just jump over that part, of course." The processing video was later played for the jury. The State indicated the point at which the video should be stopped to prevent showing the attorney-client discussion. The State argued that it would be inappropriate to play the snippet of the conversation unless the whole conversation was admitted. Defendant argued that the snippet should be admitted to show his demeanor. The State responded that such evidence would be cumulative as defendant's demeanor was evident throughout the processing video as well as in a roadside video that had been admitted. The State, not defendant, argued that the snippet should not be admitted under the rule of completeness. The trial court concluded that the snippet was cumulative. It also found that playing a snippet of the interview—and not the entire interview—would be unfair to the State.

The court reasonably excluded this evidence as cumulative and incomplete. See State v. Russell, 2011 VT 36, ¶ 6, 189 Vt. 632 (mem.) (explaining that this Court applies "a deferential

[*] We note that defendant does not provide any citation to the record for where this issue was discussed, nor does he provide record citations for his allegations, discussed below, that the prosecutor engaged in misconduct by labeling his driving "scary" and describing his behavior as "threatening." Our rules require defendant to provide citations to the "parts of the record on which [he] relies," V.R.A.P. 28(a)(4)(A), and as a general rule, the Court will not "search the record for error" on defendant's behalf. Livingston v. Town of Hartford, 2009 VT 54, ¶ 10, 186 Vt. 547 (mem.).

standard of review to the trial court's evidentiary rulings and will reverse its decision only when there has been an abuse of discretion that resulted in prejudice" (quotation omitted)). Defendant did not argue below that the rule of completeness required admission of this snippet, and he fails to show plain error. See State v. Longley, 2007 VT 101, ¶ 24, 182 Vt. 452 (explaining that "[p]lain error lies only in the rare and extraordinary cases where a glaring error occurred during trial that was so grave and serious that it strikes at the very heart of defendant's constitutional rights" (quotation omitted)).

Finally, defendant asserts that the prosecutor engaged in misconduct during her closing argument by referring to his driving as "scary" and stating that defendant "threatened" the officer. He argues that her comment about his driving went directly to the theory of the defense that he was lost and trying to find his way to his hotel. Defendant also asserts that the prosecutor's statement about his threatening behavior was unsupported by the record and that it constituted a personal and prejudicial attack on his character. Defendant maintains that the comments rise to the level of plain error.

The record shows the following. In her closing argument, the prosecutor described the totality of the evidence that the officer had relied upon in deciding to stop defendant. She stated that "it wasn't one thing" that led the officer to make the stop, but rather, many things that began to add up. She stated that in the officer's conversation with defendant immediately after the stop, defendant agreed that he had been weaving and doing "kind of scary driving." She explained that during processing, defendant became "slightly argumentative" with the officer, stating that he was "going to call the police chief, because he thinks [the officer's] done some unlawful procedures." She contrasted this with the officer's respectful and courteous behavior. She referred the jury to the video that they had seen. In his closing argument, defense counsel acknowledged that defendant was "drifting" and "hugging . . . one side of the road," but asserted that this was not "scary driving." He maintained that it was evidence that defendant was lost and trying to figure out where he was going. In her rebuttal closing argument, the prosecutor rebutted defendant's characterization of his driving. She stated that the driving was "scary" because defendant was "doing several things and it's adding up," noting there could be grave consequences to other motorists if defendant was in fact driving while impaired. After discussing the evidence, the prosecutor stated that in its totality, "everything from the driving, from the interaction of the officer at roadside, from the field sobriety, during processing when he continues to ask questions, when he's threatening of the officer, these are all things that demonstrate that he is under the influence."

We find no plain error. It is well-established that "prosecutors are entitled to a good deal of latitude in their closing arguments," but they must also "keep within the limits of fair and temperate discussion circumscribed by the evidence in the case." State v. Rehkop, 2006 VT 72, ¶ 35, 180 Vt. 228 (quotation and alteration omitted). "Because we afford prosecutors a great deal of latitude when making their closing arguments, we have found plain error only if the argument is manifestly and egregiously improper." Id. ¶ 37 (quotation omitted). In other words, a defendant must show "that the prosecutor's closing argument was not only improper, but also that it impaired the defendant's right to a fair trial." Id. (quotation omitted).

In this case, it was fair for the prosecutor to use the word "scary" to describe what it argued was erratic driving. This description is grounded in the evidence presented at trial, including the officer's testimony that he observed defendant crossing the centerline, weaving, and coming to a stop at an intersection where there was no stop sign. The prosecutor's statement that defendant threatened the officer is also grounded in the evidence. The officer testified that during processing, defendant threatened to report him to the police chief for allegedly conducting illegal procedures.

None of the isolated comments identified by defendant were "manifestly and egregiously improper," and they did not impair defendant's right to a fair trial.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice