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. 2018-039

MARCH TERM, 2019

State of Vermont v. Shawn Adam Collette*	}	APPEALED FROM:
	}	
	}	Superior Court, Addison Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 508-11-15 Ancr
		Trial Judge: Samuel Hoar, Jr.

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

Defendant appeals from jury convictions on charges of obstruction of justice, disorderly conduct, simple assault, and simple assault by menace. He argues that the trial court erred by denying his motion for judgment of acquittal on the obstruction-of-justice charge. He also argues that the court committed plain error by denying his motion for severance of his and his co-defendant's cases for trial. We affirm.

When this Court reviews the "denial of a V.R.Cr.P. 29 motion for judgment of acquittal, we view the evidence presented by the State in the light most favorable to the prosecution, excluding any modifying evidence, and determine whether the State's evidence sufficiently and fairly supports a finding of guilt beyond a reasonable doubt." State v. Squiers, 2006 VT 26, ¶ 2, 179 Vt. 388. With this standard of review in mind, we examine the State's evidence.

The charges stemmed from an incident that occurred on November 4, 2015. The obstruction-of-justice charge, in particular, also concerned an incident that occurred the previous day. On November 3, 2015, the Bristol Police Department responded to an altercation between I.S., his girlfriend A.B., and two sisters, Tove and Tara Tower—defendant's wife and sister-in-law, respectively. The Tower sisters had arranged to meet with I.S., who was selling a stereo-radio that they believed had been stolen from their camp two weeks earlier. During the November 3 confrontation, the Tower sisters physically assaulted I.S., resulting in injuries that were treated at a hospital. The participants in the confrontation each gave statements to police. That evening, after the police consulted with the state's attorney, it was determined that criminal charges would be brought against the Tower sisters and that I.S. and A.B. would be witnesses. The next day, November 4, the sisters were cited by the police for assault based on what had occurred during the November 3 incident. That same day, the sisters and defendant were arrested as a result of the incident described below.

On November 4, 2015, Z.R., whom the Tower sisters apparently believed was involved in the break-in at their camp, his girlfriend K.B., I.S., and A.B. were parked in a car in the driveway of I.S.'s grandparents. The Tower sisters and defendant drove up in a pickup truck and partially blocked the car. Defendant and the Tower sisters then exited the truck and assaulted the occupants

of the car. During the altercation, defendant attempted to hit Z.R. and pull him out of the car, while the Towers sisters jumped on the car and smashed its windows with a baseball bat. At one point, defendant went back to the truck and returned with a plastic gun that had been painted and modified to look real. Defendant stuck the gun in Z.R.'s face and threatened to kill him and the other occupants of the vehicle.

Based on this incident, defendant and the Tower sisters were charged with various crimes. The State indicated that it intended to prosecute the three defendants together. The trial court denied defendant's pretrial motion for severance of the defendants with respect to the charges stemming from the November 4 incident. Tove Tower eventually pled guilty to all charges stemming from both incidents. At trial, the State presented the testimony of two police officers who responded to the November 3 and November 4 incidents, respectively, and the four persons in the complainants' car during the November 4 incident. Following the trial, the jury convicted defendant and Tara Tower of all charges.

We first consider defendant's challenge to the trial court's denial of his motion for severance of the defendants for trial. Because defendant's pretrial motion for severance was not renewed before or after the close of evidence, defendant can prevail only by showing plain error. See V.R.Cr.P. 14(b)(4)(C) (defendant must renew pretrial motion for severance before or after close of evidence, or severance is waived); see also State v. Freeman, 2017 VT 95, ¶ 12 n.3 (noting that this Court reviewed unpreserved severance argument under plain error standard in State v. Willis, 2006 VT 128, ¶ 25, 181 Vt. 170, and that therefore "defendant would have to show that the joinder errors he alleges meet the plain error standard to prevail"). To demonstrate plain error, defendant must show that there was an obvious and prejudicial error affecting his substantial rights and that this Court must correct the error to protect the fairness, integrity, or public reputation of the judicial proceedings. State v. Herrick, 2011 VT 94, ¶ 18, 190 Vt. 292.

Vermont Rule of Criminal Procedure 13(a) "gives the [trial] court broad discretion to order joint trials where cases could be joined for pleading under" Vermont Rule of Criminal Procedure 8. State v. Casey, 2013 VT 22, ¶ 5, 193 Vt. 429. "Rule 8 authorizes the joinder of defendants when 'it is alleged that the several offenses charged (A) were part of a common scheme or plan; or (B) were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one charge from proof of others.' " Id. (quoting V.R.Cr.P. 8(b)(3)(A)-(B)). "Rule 14 provides that 'the court shall grant severance of the moving defendant unless the court finds that there is no reasonable likelihood that that defendant would be prejudiced by a joint trial.' " Id. ¶ 10 (quoting V.R.Cr.P. 14(b)(2)(D)). "The onus is on defendant to specify to the court the reasons he opposes joinder and to show why there is a reasonable likelihood that he would be prejudiced by a joint trial." Id.

Here, the charged offenses appeared to concern a common scheme and, in any event, were closely connected in time and place. Defendant's pretrial motion for severance asserted, without further explanation, that there was sufficient variation regarding defendants' specific acts to allow for separation of the charges and that separation of defendants would not pose a substantial difficulty in the proof of individual conduct. In denying the motion, the trial court ruled that defendants were clearly joinable under Rule 8 and that defendant had failed to show any reasonable likelihood of prejudice warranting severance. On appeal, defendant argues that denial of his motion for severance was plain error because the prosecution expressly asked the jury to infer he knew of the November 3 altercation solely on the basis of his relationship with his co-defendant and his wife. This argument, raised for the first time on appeal, fails to take into account that the State could have asked the jury to make the same inference even if the defendants had been tried separately. Cf. State v. Beshaw, 136 Vt. 311, 313 (1978) (finding no prejudice resulting from

joinder where it was "quite apparent that, with or without severance, identical evidence of the course of events in connection with all of the charges would be appropriately before the jury with respect to the trial of any of the charges that were submitted in fact to the jury in the case"). As the trial court indicated, defendant has failed to demonstrate any likelihood of prejudice warranting severance. In short, defendant has not demonstrated error, let alone plain error, with respect to the trial court's denial of his motion for severance.

Defendant also argues that the trial court erred in denying his motion for judgment of acquittal with respect to the obstruction-of-justice charge. At the close of evidence, Tara Tower's attorney moved for judgment of acquittal on that charge, arguing that there was no evidence she was aware that I.S. was in the car or of the connection between Z.R. and I.S. until some point during the November 4 incident when she realized that I.S. was a passenger in the car. Defendant joined the motion on the same grounds. The prosecutor responded that the evidence, taken in a light most favorable to the State, indicated, with respect to defendant, that he knew I.S. was in the car and acted in a manner to intimidate him—including attempting to pick a fight with him—while reasonably being aware, from the previous day's incident and the relationships of the parties, that I.S. was going to be involved in an upcoming judicial proceeding. The court denied the motion, stating that there was sufficient circumstantial evidence for the jury to reasonably infer, without speculating, that: (1) defendant was aware, or became aware during the November 4 incident, that I.S. was in the car; and (2) defendant intended to intimidate I.S., knowing that I.S. had been involved in the November 3 incident with the Tower sisters and that he was likely to be involved in a criminal proceeding as the result of that incident.

Defendant argues that the trial court erred by denying his motion for judgment of acquittal based on an improper inference that he must have known of the November 3 incident solely because he was married to Tove Tower. Defendant contends that his motive for the November 4 attack was his belief that Z.R. had stolen items from his camp. According to defendant, his conviction for obstruction of justice rested upon nothing more than guilt by association. We disagree.

Defendant was charged under the so-called omnibus clause of 13 V.S.A. § 3015, which, in relevant part, criminalizes the use of threats or force for the purpose of obstructing or impeding "the due administration of justice" regarding matters "already heard, presently being heard or to be heard before any court or agency." See State v. O'Neill, 165 Vt. 270, 276 (1996) (concluding that Vermont statute is broader than federal statute in that it reaches conduct that obstructs administration of justice with respect to matters to be heard). As noted above, "[t]he standard for sufficiency of the evidence is that, taken in the light most favorable to the State and excluding modifying evidence, there must be sufficient evidence to fairly and reasonably support a finding of guilt beyond a reasonable doubt." State v. Robar, 157 Vt. 387, 391 (1991) (quotation and alterations omitted). While evidence that gives rise to mere speculation or conjecture is insufficient to support a guilty verdict, id., the jury can "employ rational inferences to bridge factual gaps left by circumstantial evidence." State v. Durenleau, 163 Vt. 8, 14 (1994).

The "evidence of intent under the obstruction of justice statute is nearly always circumstantial." State v. Fucci, 2015 VT 39, ¶ 12, 198 Vt. 482; see United States v. Neal, 951 F.2d 630, 634 (5th Cir. 1992) (finding sufficient evidence of defendant's knowledge of judicial proceedings to support jury's guilty verdict despite no direct evidence as to defendant's knowledge). Further, "[i]t is elementary that a defendant's intent may be inferred from the nature of his acts." Fucci, 2015 VT 39, ¶ 13. Although conspiracy "cannot be proven solely by familial relationships," other facts in combination with a familial relationship may be sufficient to prove obstruction of justice. United States v. Brodie, 403 F.3d 123, 151 (3d Cir. 2005) (stating that

conspiracy was proven not merely by "bare fact of kinship" but also by fact that brothers were co-owners of entities involved, were active participants in company affairs, and appeared to communicate with one another on business affairs); see also Black River Assocs. v. Koehler, 126 Vt. 394, 399 (1967) (stating that husband's visit to attorney one day after wife was advised to see attorney "permits the inference that [wife] reported to her husband the substance of the conversation"); United States v. Aquino-Garcia, 162 Fed. App'x 5, 7 (1st Cir. 2006) (per curiam) (stating that "the jury was entitled to infer that [defendant] had knowledge that his spouse's check was worthless" with regard to joint home purchase); United States v. Warshawsky, 20 F.3d 204, 209 n.2 (6th Cir. 1994) ("In assessing [brothers'] knowledge that parts were stolen, the jury could properly consider the fact that the defendants were both brothers and business partners, which raises a permissible inference that they might share information concerning their business activities.").

Here, beyond the fact the Tove and Tara Towers were his wife and sister-in-law, respectively, A.B. testified that during the November 4 incident, although defendant seemed to direct his wrath initially at Z.R., he eventually turned his attention to I.S., who was attempting to walk away from the scene to his grandparents' house. A.B. testified that she had to walk between I.S. and defendant, who was walking alongside I.S. screaming and spitting, saying that they were going to pay and that it was not over. Further, the same day of the incident, as revealed by a recording played to the jury, defendant told police that I.S. said to him that he wanted "nothing to do with you guys, I got some of that last night." By making this comment, defendant appeared to acknowledge that he understood I.S.'s reference to the November 3 incident. Given defendant's close familial relationship with the Tower sisters, his conduct toward I.S. during the November 4 incident, and his statement to police about what I.S. said concerning the November 3 incident, the jury could have reasonably concluded that defendant was aware of the November 3 incident at the time he and the Tower sisters confronted the four complainants, including I.S., on November 4. Defendant asserts that, in denying his motion for judgment of acquittal, the trial court relied solely on his familial relationship with the Tower sisters. That is not accurate, but, in any event, the question on review from a denial of a motion for judgment of acquittal is whether the record supports the jury's verdict. In this case, it does with respect to defendant's challenge to the element of intent.

Affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice