

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2003-0453, State of New Hampshire v. Denis A. Kennedy, the court on June 1, 2005, issued the following order:

The defendant, Denis A. Kennedy, appeals his convictions for aggravated felonious sexual assault and felonious sexual assault. We affirm.

The defendant first argues that the trial court erred in denying his motions for a mistrial. To justify a mistrial, the conduct must be more than merely inadmissible; it must constitute an irreparable injustice that cannot be cured by jury instructions. State v. Kerwin, 144 N.H. 357, 358-59 (1999). We will not overturn the trial court's denial of a mistrial absent an unsustainable exercise of discretion. State v. Scognamiglio, 150 N.H. 534, 537 (2004).

During the prosecutor's opening statement, the defendant objected on the ground that the prosecutor was vouching for the credibility of the victim. The trial court instructed the jury to disregard the prosecutor's personal opinion. The prosecutor then explained to the jury that he had intended to state that the allegations in the indictments should be proven beyond a reasonable doubt by the witnesses. No further objection was made to the prosecutor's opening statement. After balancing the relevant factors, see State v. Hearns, 151 N.H. 226, 233 (2004), we cannot conclude that the trial court engaged in an unsustainable exercise of discretion.

The defendant objected to testimony from two witnesses that he argues communicated to the jury that he had, on past occasions, committed crimes. In both cases, the trial court instructed the jury to disregard the testimony. We agree with the State that neither comment unambiguously conveyed criminal conduct by the defendant, see State v. Ellison, 135 N.H. 1, 6 (1991), and that the court's curative instructions were sufficient to cure any taint, see State v. Pandolfi, 145 N.H. 508, 513 (2000). We are not persuaded that the trial court's curative instructions were rendered ineffective by the number of times such instructions were given in this case.

The defendant objects to the admission of a photograph of the victim taken when she was eleven and one-half years old. In this case, the photograph had some probative value by corroborating the victim's testimony. While we agree with the defendant that the probative value was limited, we conclude that it was greater than the probative value of the photographs admitted in State v. Cook, 148 N.H. 735 (2002). Furthermore, we agree with the State that the danger of unfair

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prejudice resulting from the admission of this single photograph was less than the danger created by the admission of the four photographs admitted in Cook. See Cook, 148 N.H. at 737-38 (trial court admitted photographs of victim as she appeared in each year the conduct was alleged to have occurred, *i.e.*, between summer of 1990 and fall of 1993). Accordingly, because we cannot say that the danger of unfair prejudice resulting from the admission of the photograph substantially outweighed its probative value, we find no unsustainable exercise of discretion. See N.H. R. Ev. 403.

Nor did the trial court err by excluding evidence that the victim was employed as an exotic dancer several years after the sexual assaults. The victim testified that at the time of trial, she was a college student. The defendant argues that the State thereby opened the door to evidence of her earlier employment. We see no misleading advantage for the State that was created by the victim's testimony. See State v. Crosman, 125 N.H. 527, 531 (1984). Nor do we see any relevance, with respect to the victim's credibility or otherwise, of evidence concerning her employment as an exotic dancer. See N.H. R. Ev. 401. Therefore, its exclusion was a sustainable exercise of the trial court's discretion.

Finally, the defendant challenges the trial court's refusal to ask prospective jurors during voir dire the following question: "Do you believe that a child making an allegation of sexual assault is probably telling the truth?" The trial court has broad discretion to determine the choice of questions used in voir dire. See State v. Bone, 131 N.H. 408, 410 (1989). Here, the trial court asked several questions specific to sexual assault. We decline to second-guess the trial court in its choice of questions, as we find no unsustainable exercise of its discretion. Cf. id. at 411.

Affirmed.

NADEAU, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**

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