THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0284, State of New Hampshire v. Daniel Knox, the court on March 23, 2005, issued the following order:

Following a jury trial, the defendant was convicted on two counts of felonious sexual assault. On appeal, he contends that the trial court erred in denying his request on one of the indictments for a jury instruction on simple assault as a lesser-included offense of felonious sexual assault. We affirm.

A defendant is entitled to have a jury consider a lesser-included offense if, upon review of the statutory elements of each, the lesser offense is embraced within the legal definition of the greater offense and the evidence adduced at trial provides a rational basis for a finding of guilt on the lesser offense rather than the greater offense. State v. Watkins, 148 N.H. 760, 765 (2002).

The elements of the variant of simple assault for which the defendant requested jury instructions were that he: (1) acted purposely; (2) caused physical contact to another; and (3) that the contact was unprivileged. See RSA 631:2-a (1996); In re Nathan L., 146 N.H. 614, 620 (2001). The elements of the felonious sexual assault offense with which the defendant was charged in the indictment were that he: (1) purposely; (2) engaged in sexual contact; (3) with a person not his spouse and under the age of thirteen; (4) for the purpose of sexual gratification. Sexual contact requires intentional touching for the purpose of sexual arousal or gratification. See RSA 632-A:1, IV (Supp. 2004).

The defendant argues that because the victim was too young to give consent, the contact was necessarily unprivileged. Although we have previously recognized that a sexual assault victim's age may render his or her consent irrelevant, we are aware of no case, nor does the defendant cite one, in which we have held that the language of the statute establishes that a seven-year-old victim is per se incapable of giving consent. See, e.g., State v. Besk, 138 N.H. 412, 414 (1994).

The felonious sexual assault offense with which the defendant was charged did not require that the contact be unprivileged. The offense of simple assault, which includes the element of unprivileged contact, cannot therefore be said to be embraced within the legal definition of felonious sexual assault. Accordingly, we find no error in the trial court's ruling.

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

Eileen Fox,
Clerk

In Case No. 2004-0284, State of New Hampshire v. Daniel Knox, the court on March 23, 2005, issued the following order:

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