

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0692, State of New Hampshire v. Donald Spinner, the court on January 31, 2008, issued the following order:

The defendant, Donald Spinner, appeals his conviction on six counts of aggravated felonious sexual assault and one count of felony indecent exposure and lewdness. See RSA 632-A:2, I(1), III (2007); RSA 645:1, II(a) (2007). He argues that the trial court erred in: (1) admitting evidence of uncharged conduct; (2) admitting the victim's out-of-court statement; (3) overruling his objection to a statement made by the prosecutor during closing argument; (4) precluding him from introducing information provided to the victim's physician for purposes of medical diagnosis; (5) granting the State's pre-trial motion to exclude his statements to the police; (6) denying his motion to dismiss the indictments for insufficiency of the evidence; (7) denying his motion to set aside the verdict based upon the State's failure to disclose evidence prior to trial; and (8) denying his motion to merge the indictments for sentencing. We affirm.

A trial court has broad discretion to determine the admissibility of evidence. We review its decision to admit evidence under our unsustainable exercise of discretion standard. State v. Miller, 155 N.H. 246, 249 (2007).

The defendant first argues that the trial court erred in allowing the victim to testify that on two occasions the defendant placed chocolate candies in his pants, removed them, and made the victim eat the candies. New Hampshire Rule of Evidence 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." However, such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." N.H. R. Ev. 404(b). We have established a three-part test for the admissibility of evidence under Rule 404(b): the evidence must be relevant for a purpose other than showing the defendant's character or disposition, there must be clear proof that the defendant committed the act, and the prejudice to the defendant must not substantially outweigh the probative value of the evidence. State v. Beltran, 153 N.H. 643, 647 (2006). We accord the trial court considerable deference in determining whether the probative value is substantially outweighed by the danger of unfair prejudice. State v. Miller, 155 N.H. at 252.

The defendant does not dispute the "clear proof" prong of the test. Instead, he contends that the evidence is not relevant for a non-propensity

purpose because it does not constitute a grooming technique. He also argues that the evidence was highly prejudicial. The trial court found that the evidence was relevant to show preparation; specifically, that a progression was shown from eating the candies that had been in his pants to forcing the victim to perform fellatio.

The defendant argues there is not a sufficient temporal nexus between the prior acts and the charged acts to constitute preparation and that the victim's testimony failed to demonstrate that the chocolate incidents were contemporaneous to the sexual assaults. Based upon the State's offer of proof, the trial court found that the acts were concurrent with the victim's allegations of abuse. See *State v. Haley*, 141 N.H. 541, 543 (1997) ("grooming" through a series of acts when the victim was "younger" was considered concurrent); see *State v. Castine*, 141 N.H. 300, 305 (1996) (preparation through escalating uncharged acts "perpetrated against the victim over several months" prior to the assaults was considered concurrent). This finding is supported by the record. The victim testified that the chocolate incidents occurred when she was about eight years old and that the sexual assaults occurred between the ages of eight and fourteen. Any argument concerning a lack of temporal nexus went to the weight of the evidence and not to its admissibility. Because the victim's testimony regarding the prior acts was brief and limited, the prejudicial effect was not substantially outweighed by the probative value. Based upon the record before us, we find no error in this ruling.

The defendant next argues that the trial court erred in admitting the victim's out-of-court statement to a friend that "if I sorted out problems that I had, that someone would be in jail for a very long, long time." The State elicited this testimony to rebut the assertion of recent fabrication made during the defendant's opening argument and throughout his case. The statement was properly admitted under New Hampshire Rule of Evidence 801(d)(1)(B) as a prior consistent statement because "it predate[d] the motive to fabricate that it [was] purported to rebut." *State v. Young*, 144 N.H. 477, 482 (1999). Additionally, the trial court issued a limiting instruction to the jury that the testimony should only be considered in evaluating whether the statement was actually made, not to show the truth of the matter asserted. We find no error in the trial court's decision to admit this evidence.

The defendant next contends that the trial court erred when it overruled his objection to the prosecutor calling him an "unstable person" in closing argument. The trial court found that the prosecutor's remarks were a fair and reasonable inference based upon the victim's testimony that she had seen the defendant using a knife on himself and threatening to hurt himself after he sexually assaulted her. Because the prosecutor "may draw reasonable inferences from the facts proven and has great latitude in closing argument," the

trial court did not commit an unsustainable exercise of discretion by allowing the prosecutor to make the statement. State v. Glodgett, 148 N.H. 577, 582 (2002).

The defendant next argues that the trial court erred when it precluded him from introducing a statement made by the victim's mother to the victim's physician for the purposes of medical diagnosis. The victim's mother had informed the physician that the victim had had blood in her diaper when she was an infant. At trial, the physician testified that her examination of the victim after the assaults resulted in a normal finding. The defendant sought to introduce the statement during cross-examination, arguing that the physician used the victim's medical history as part of her evaluation. The trial court found the evidence irrelevant because the information provided by the mother had no impact upon the physician's ultimate finding. Because there was no link between the proposed testimony and an alternate explanation for the sexual assaults, we find no error in the trial court's decision.

The defendant next contends that the trial court erred when it precluded him from introducing his statements to the police in which he denied committing the offenses. The trial court ruled that the statements constituted inadmissible hearsay and if the defendant did not testify, the statements had the potential to mislead the jury. See N.H. R. Ev. 801(c); see State v. Bennett, 144 N.H. 13, 15 (1999). On appeal, the defendant claims that "his denials and the police's indifference and reaction to them were crucial to his attack on the quality of the police investigation." The defendant fails to explain how the denials and the police reaction to them impacted the police investigation, and thus to admit his statements would assert them for the truth of the matter. Given the record before us, we conclude there was no error.

The defendant next argues that the trial court erred when it denied his motion to dismiss the indictments based upon insufficiency of the evidence. To succeed on a sufficiency of the evidence claim, "the defendant must prove that no rational trier of fact, viewing all the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt." State v. Evans, 150 N.H. 416, 424 (2003). The defendant was charged with six aggravated felonious sexual assaults. The victim testified that the defendant sexually assaulted her repeatedly over a five-year period. While the defendant argues that the victim only testified for thirty minutes and there was a lack of corroborating evidence, those issues were for the jury to resolve. State v. Giles, 140 N.H. 714, 716 (1996). There is no requirement that a victim's testimony be corroborated. See RSA 632-A:6, I (2007). Accordingly, we find no error.

The defendant contends that the trial court erred when it denied his motion to set aside the verdicts based upon the State's failure to disclose evidence prior to trial. Specifically, the defendant argues that the State failed to

disclose that the victim would testify that the defendant used a green sex toy on himself and was intoxicated during some of the sexual assaults. To secure a new trial based upon the prosecution's failure to disclose evidence, "a defendant must prove that the prosecution withheld evidence that is favorable and material." State v. Dewitt, 143 N.H. 24, 33 (1998). The trial court found that the State had not withheld this evidence because these statements by the victim were mentioned in discovery and made available to the defendant. The record supports this conclusion.

In his final claim of error, the defendant argues that the trial court erred when it denied his motion to merge the indictments for sentencing. Specifically, he contends that double jeopardy prohibited the court from sentencing him on multiple pattern aggravated felonious sexual assault convictions occurring within an overlapping time period. The trial court found that each pattern indictment relied upon acts not charged in another pattern indictment and, therefore, the same pattern was never charged twice. State v. Richard, 147 N.H. 340, 343 (2001). We agree. Because each indictment involved different acts of sexual assault, sentencing the defendant on each charge did not violate his right to be free from double jeopardy.

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**