THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2009-0045, State of New Hampshire v. Russell Schofield, the court on March 30, 2010, issued the following order:

The defendant, Russell Schofield, appeals his conviction for sexual assault. See RSA 632-A:4, I (a) (2007); RSA 632-A:2, I (i) (2007). He contests the sufficiency of the evidence. We reverse.

To prevail in his challenge to the sufficiency of the evidence, the defendant must prove that no rational trier of fact, viewing all of 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. Ericson, 159 N.H. 379, 385 (2009).

In this case, to obtain a conviction, the State was required to prove that the defendant: (1) subjected the victim to sexual contact; and (2) "through concealment or by the element of surprise" was able to cause such contact with the victim before the victim had "an adequate chance to flee or resist." RSA 632-A:2, I (i). The defendant does not challenge the evidence establishing the sexual contact element of the offense, but argues that there was insufficient evidence of the victim's "surprise" or "lack of adequate chance to resist."

To review the sufficiency of the evidence, we must first interpret the term "surprise." "Surprise" is defined as "the action of assailing unexpectedly or attacking without warning: the sudden attacking and capture of something . . . (2): the action of coming upon unexpectedly or taking unawares – used esp. in the phrase take by surprise." Webster's Third New International Dictionary 2301 (unabridged ed. 2002).

In this case, the victim testified about a previous incident of sexual contact by the defendant that took place a few days before the incident giving rise to this appeal. She testified that the first incident took place at the victim's home while she lay on an air mattress with the defendant and her sister, who was the defendant's girlfriend, and the defendant gave both the victim and her sister a back rub. The second incident took place at the defendant's apartment while the victim, the defendant and the victim's sister again lay on an air mattress, watching movies. In her testimony the victim explained that, on the night of the second incident, while she lay on the air mattress, she "tried to face away from" the defendant because she thought he might touch her "[b]ecause he had before and I thought he might do it again." She also testified

that she asked for a back rub. She further testified that, at some point during the back rub, the defendant unclasped her bra and then went through an extended process to remove it.

The victim was able to recall the second incident with significant detail and the defendant does not deny that there was sexual contact. The progression of events described by the victim, however, does not support a finding that there was a sudden attack or that she was taken by surprise. Because we conclude that no rational trier of fact, viewing all of the evidence in the light most favorable to the State, could have found guilt beyond a reasonable doubt on the specific offense with which the defendant was charged, we reverse.

Reversed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk