

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2008-0925

The State Of New Hampshire

v.

Gerard Beloin

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APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE  
HILLSBOROUGH COUNTY SUPERIOR COURT –  
NORTHERN JUDICIAL DISTRICT

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BRIEF FOR THE STATE OF NEW HAMPSHIRE

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THE STATE OF NEW HAMPSHIRE

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(5 minutes)

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**ISSUES PRESENTED**

I. Whether the trial court properly refused to instruct the jury by discussing the term “reasonable expectation of privacy,” where that term does not appear in either the charging statute, RSA 570-A:2 (Supp. 2004) (amended 2006, 2008), or the definitional statute, RSA 570-A:1 (2001).

II. Whether the trial court properly refused to instruct the jury regarding RSA 644:9 (Supp. 2004) (amended 2005, 2008), where that statute by its terms creates an exception only for violations of RSA 644:9, and not for violations of RSA 570-A:2.

**STATEMENT OF THE CASE**

In 2005, a Hillsborough County grand jury indicted the defendant, Gerard Beloin, on one count of prohibited interception of an oral communication. T 25-26.<sup>1</sup> See RSA 570-A:2 (Supp. 2004) (amended 2006, 2008). The defendant was tried by a jury in the same court on November 13, 2008, and was convicted. T 126-27. The court sentenced him to a term of thirty days in the House of Corrections, with all but three days suspended on good behavior, and gave him three days of pretrial confinement credit; he was also placed on probation for one year. T 129. This appeal followed.

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<sup>1</sup> References to the record are as follows: “NOA” is the notice of appeal; “DB” is the defendant’s brief; “T” is the transcript of the trial on November 13, 2008.

**STATEMENT OF FACTS**

**A. Testimony At Trial**

The defendant was self-employed as a designer and builder of roofing systems. T 86. His business occupied space in a building on Factory Street in Goffstown; the building was managed by John Janigan. T 32. On December 13, 2004, the two men met on the street outside this building. T 32-33. The defendant was wearing a tape recorder around his waist; Janigan noticed it and asked for a brief demonstration. T 33. After the demonstration was over and Janigan said he did not think he was interested in buying a recorder like that, the defendant started recording their conversation without Janigan's knowledge. T 33-35, 90-91. They discussed Janigan's fears that the defendant's public criticisms of and accusations against certain people (what Janigan called "spreading rumors," T 37-38), might lead those people to retaliate by illegal means. DB Appendix C. The defendant took the view that Janigan was conveying a death threat from Goffstown officials and others. T 87, 89, 90; DB Appendix D. Much of the recording was played in court. T 35-86.

**B. Other Events At Trial**

The defendant appeared *pro se*, and said in his opening statement: “I did record Mr. Janigan without his knowledge, without his consent, without his approval.” T 28. He repeatedly attempted to argue that he had a right to record the conversation because, as he alleged, he had reason to believe that a crime was being committed. T 29, 105. He later requested the court to instruct the jury on the provisions of RSA 644:9, IV (Supp. 2004) (redesignated as RSA 644:9, V in 2005); the court refused, and ruled that RSA 644:9 was inapplicable. T 75. He also asked that the jury be instructed on the term, “reasonable expectation of privacy.” T 97. The court only agreed that the jury could hear the definition of “oral communication” in RSA 570-A:1 (2001). T 98-99.

## SUMMARY OF THE ARGUMENT

I. Because the New Hampshire Constitution and RSA chapter 570-A have been held to create privacy rights greater than those protected by the Federal Constitution, the definition of “oral communication” in RSA 570-A:1, II (2001) does not incorporate the “reasonable expectation of privacy” analysis used by federal courts under the Fourth Amendment. In any case, even Fourth Amendment cases, as well as cases construing language similar to that in RSA 570-A:1, II, have recognized that “oral communications” include conversations held on a public street. The trial court instructed the jury on the law correctly, and was not obliged to discuss the term “reasonable expectation of privacy.”

II. By its express terms, RSA 644:9, IV (Supp. 2004) (redesignated RSA 644:9, V in 2005) was only intended to immunize police officers and private investigators from prosecution under RSA 644:9, not from prosecution under RSA 570-A:2. The latter statute would become meaningless if the defendant’s construction were accepted. The trial court therefore correctly refused to instruct the jury regarding RSA 644:9. For similar reasons, the definition of “oral communication” must be held to include statements made in furtherance of a crime.

**ARGUMENT**

The defendant's brief lists several issues that have not been developed by argument. DB 1-2, paragraphs 1, 4, and 5. "[I]n the realm of appellate review, a mere laundry list of complaints regarding adverse rulings by the trial court, without developed legal argument, is insufficient to warrant judicial review. Thus, [this Court will] confine [its] review to only those issues that the defendant has fully briefed." *State v. Blackmer*, 149 N.H. 47, 49 (2003) (citation and quotation omitted). These issues have accordingly been waived.

In addition, paragraph 4 on page 1 of the brief raises issues (arguing that the indictment alleged insufficient facts to establish the existence of an oral communication, and that the defendant performed acts similar to those in this case, but was not prosecuted therefor) that were never brought to the attention of the trial court, and therefore have not been preserved for appeal. *State v. McMillan*, 158 N.H. 753, 755 (2009).

Similarly, the defendant appears to argue on pages 12-13 of his brief that the evidence was insufficient to prove the existence of an oral communication. Any such argument must be raised at trial through a motion to dismiss at the end of the State's evidence or at the end of trial, and may not be raised for the first time on appeal. *State v. Hammond*, 144 N.H. 401, 407 (1999). Because no such motion was made, this issue has also been waived. Any claim of plain error must

fail because, as argued below, the jury could reasonably have found all the elements of an oral communication.

**I. THE TRIAL COURT'S JURY INSTRUCTIONS CORRECTLY STATED THE LAW REGARDING THE CRIME OF INTERCEPTING ORAL COMMUNICATIONS.**

The defendant argues that the trial court erred in refusing to instruct the jury on the term “reasonable expectation of privacy,” and argues that the definition of “oral communication” in RSA 570-A:1, II does not include conversations on a public street. DB 9-13. This argument is without merit.

The purpose of the trial court's charge is to state and explain to the jury, in clear and intelligible language, the rules of law applicable to the case. When reviewing jury instructions, [this Court will] evaluate allegations of error by interpreting the disputed instructions in their entirety, as a reasonable juror would have understood them, and in light of all the evidence in the case. [This Court will] determine whether the jury instructions adequately and accurately explain each element of the offense and reverse only if the instructions did not fairly cover the issues of law in the case. Whether or not a particular jury instruction is necessary, and the scope and wording of the instruction, is within the sound discretion of the trial court, and [this Court will] review the trial court's decisions on these matters for an unsustainable exercise of discretion.

*State v. McMillan*, 158 N.H. 753, 756 (2009) (citations and quotation omitted).

“To show that the trial court's decision is not sustainable, the defendant must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of his case.” *State v. Lambert*, 147 N.H. 295, 296 (2001) (quotation omitted). The defendant here cannot meet this test.

The defendant was charged with intercepting an oral communication, defined by statute as “any oral communication uttered by a person exhibiting an

expectation that such communication is not subject to interception under circumstances justifying such expectation.” RSA 570-A:1, II (2001). The defendant was permitted to read this definition to the jury in his closing argument, T 98-99, 104, after which the court instructed the jury that the State had to prove “that the defendant intercepted an oral communication of John Janigan without his consent,” T 118.

This Court has never been called on to construe RSA 570-A:1, II. The defendant argues that the definition was intended to be consistent with the term “reasonable expectation of privacy,” as construed in cases discussing the Fourth Amendment to the Federal Constitution. DB 9. *See, e.g., Kee v. City of Rowlett, Tex.*, 247 F.3d 206, 211 n.8 (5th Cir. 2001) (construing similar federal wiretap statute).

This argument must fail in the first place because this Court has held that New Hampshire citizens enjoy a greater expectation of privacy under the State Constitution than that protected by the Fourth Amendment, *State v. Goss*, 150 N.H. 46, 48-50 (2003), and RSA chapter 570-A has been held to provide still greater privacy rights, *State v. Ayres*, 118 N.H. 90, 91 (1978) (“RSA ch. 570-A ... protects the individual’s right to privacy to a greater degree than the United States Constitution or the federal statute”) (applying earlier version of statute). In the second place, the defendant has made no showing that the instructions given by the trial court were an inadequate statement of the applicable law.

The defendant appears to argue that Janigan could have no reasonable expectation that his words would not be intercepted either because he was on a public street or because he was allegedly transmitting by proxy a criminal threat. DB 10-12. The defendant never expressly requested the trial court to instruct the jury to this effect, *see* T 97-99, but made a similar argument to the jury himself, T 104. Neither argument is valid.

Even in the context of the Fourth Amendment, the Supreme Court of the United States has held that “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected.” *Katz v. United States*, 389 U.S. 347, 351 (1967) (citation omitted) (emphasis added). At least one state court applying *Katz* has refused to adopt a rule that “conversations occurring in public areas can *never* be made with an expectation of privacy. Common experience teaches that the opposite may often be true.” *Brandin v. State*, 669 So. 2d 280, 281 (Fla. Dist. Ct. App. 1996).

The Supreme Court of Oregon has construed a statute similar to RSA 570-A:1, II to include a conversation on a public street. In *State v. Fleetwood*, 16 P.3d 503 (Or. 2000), a police informant wearing a body wire intercepted, and the police recorded, conversations between the defendant and others; the wire had not been authorized by a court. *Id.* at 506. One of these conversations took place on a

public street, between a female juvenile standing on the street and the defendant, who was a passenger in the informant's car; the juvenile sold marijuana to the defendant. *Id.* Although Oregon law immunized the police from criminal liability for such an intercept, *id.*, the court held that the evidence derived from the intercept was not admissible in the defendant's drug trial because it was an unlawful intercept of an oral communication, defined as "any oral communication ... uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." *Id.* at 508 n.6, 511 (quoting Or. Rev. Stat. § 133.721(7) (2000) (amended 2001)).

The conversation in *Fleetwood* took place on a public street in the presence of a third person—the informant. Here, it is undisputed that the defendant and Janigan were alone on the street at all times during the conversation. That fact alone is sufficient to create an inference that Janigan expected the conversation to go unrecorded, and that the expectation was reasonable. *Cf. Bowyer v. Hi-Lad, Inc.*, 609 S.E.2d 895, 907 (W. Va. 2004) (holding that "[m]ost employees, even those working in 'public' spaces, have a reasonable expectation that their oral communications with other employees or with customers are not going to be recorded by hidden microphones").

Cases cited by the defendant in support of his argument are easily distinguishable. *State v. Johnston*, 150 N.H. 448 (2004), addressed whether police

were trespassing when they entered the defendant's driveway, *id.* at 451-52; it had nothing to do with any expectation of privacy in conversation.

The defendant appears to argue, DB 11, that the intercept in *State v. Smart*, 136 N.H. 639 (1993), was legal in part because it occurred on a public street. This is without merit for at least two reasons. First, nothing in the *Smart* decision suggests that any of the intercepts in that case occurred on a public street. *See id.* at 645-46, 661-66. Second, there is no doubt that Smart's statements were "oral communications" within the meaning of the statute; their interception was legal only because it was formally authorized by an assistant attorney general under the provisions of RSA 570-A:2, II(d). *Id.* at 661. The same is true of the intercepts in *State v. Kilgus*, 128 N.H. 577, 588 (1986) (construing an earlier version of RSA 570-A:2, II(d)) (cited at DB 11).

Here, no such authorization existed. Janigan testified that, after the defendant demonstrated how the recorder worked, he was unaware that the rest of the conversation was being recorded. T 33-35. This testimony was not "rebutted," as the defendant claims. DB 13. The defendant admitted on cross-examination that he never told Janigan he was being recorded, T 90-91, and said in his opening statement that he "did record Mr. Janigan without his knowledge, without his consent, without his approval," T 28.

The defendant may be arguing that the trial court should have instructed the jury that Janigan could not have a reasonable expectation that the conversation

would not be recorded, as a matter of law. He never requested such an instruction expressly, and thus the issue is not preserved for appeal. *State v. Guay*, 130 N.H. 413, 418-19 (1988). Failure to give such an instruction could not be plain error, *see N.H. Sup. Ct. R. 16-A*, because (as argued above) the jury could reasonably have found that Janigan exhibited an expectation that the conversation would not be intercepted, and could also have found that expectation to be reasonable. There was therefore no unsustainable exercise of discretion.

The following section will address the defendant's claim that the interception was lawful because the conversation was evidence of a crime.

**II. THE TRIAL COURT CORRECTLY RULED THAT RSA 644:9 HAD NO APPLICATION TO THIS CASE.**

The defendant argues that the trial court erred when it refused to instruct the jury on the provisions of RSA 644:9, IV (Supp. 2004) (redesignated as RSA 644:9, V in 2005). DB 14-15. He claimed throughout the trial that this “Violation of Privacy” statute authorized him to record any conversation if he had “articulable suspicion that a crime was being committed....” T 29, 105. This argument is without merit.

This Court will “review questions of statutory interpretation *de novo*. This court is the final arbiter of the meaning of a statute, as expressed in the words of the statute itself. [This Court will] interpret statutes not in isolation, but in the context of the overall statutory scheme.” *State v. Watkins*, 148 N.H. 760, 762 (2002) (citation and quotation omitted). Because the events at issue occurred in December 2004, any application of RSA 644:9 must be based on the statute as it existed then, before its amendment in 2005 (effective January 1, 2006). *See State v. Sampson*, 120 N.H. 251, 253-55 (1980) (amendments to criminal statutes are generally prospective in effect). At that time, RSA 644:9 read in full as follows:

I. A person is guilty of a class A misdemeanor if such person unlawfully and without the consent of the persons entitled to privacy therein, installs or uses:

(a) Any device for the purpose of observing, photographing, recording, amplifying, broadcasting, or in any way transmitting images or sounds of the private body parts of a person including the genitalia, buttocks, or female breasts, or a person’s body underneath that person’s clothing; or

(b) In any private place, any device for the purpose of observing, photographing, recording, amplifying or broadcasting, or in any way transmitting images or sounds in such place; or

(c) Outside a private place, any device for the purpose of hearing, recording, amplifying, broadcasting, or in any way transmitting images or sounds originating in such place which would not ordinarily be audible or comprehensible outside such place.

II. As used in this section, "private place" means a place where one may reasonably expect to be safe from surveillance including public restrooms, locker rooms, or any place where a person's private body parts including genitalia, buttocks, or female breasts may be exposed.

III. A person is guilty of a class A misdemeanor if that person knowingly disseminates or causes the dissemination of any photograph or video recording of himself or herself engaging in sexual activity with another person without the express consent of the other person or persons who appear in the photograph or videotape. In this paragraph, "disseminate" and "sexual activity" shall have the same meaning as in RSA 649-A:2.

IV. Paragraphs I and II shall not be construed to impair or limit any otherwise lawful activities of law enforcement personnel, nor are paragraphs I and II intended to limit employees of governmental agencies or other entities, public or private, who, in the course and scope of their employment and supported by articulable suspicion, attempt to capture any type of visual image, sound recording, or other physical impression of a person during an investigation, surveillance, or monitoring of conduct to obtain evidence of suspected illegal activity, the suspected violation of any administrative rule or regulation, a suspected fraudulent insurance claim, or any other suspected fraudulent conduct or activity involving a violation of law, or pattern of business practices adversely affecting the public health or safety.

RSA 644:9 (Supp. 2004).

The plain language of the statute says that, under certain circumstances, paragraph IV provides immunity only from prosecution for *violation of privacy* under paragraphs I and II; it does not provide immunity from prosecution under

any other statute such as RSA 570-A:2. If this were not the case, the requirements imposed by RSA 570-A:2, II(d) on officers seeking to intercept oral communications while investigating crime—that they obtain the consent of one party to the communication, get approval from an authorized member of the Attorney General’s office, and ensure that the crime being investigated is one of those specified in the statute—would be meaningless. “It is elementary that the legislature should not be presumed to do an idle and meaningless act, nor one which would lead to an absurd result.” *Kalloch v. Board of Trustees*, 116 N.H. 443, 445 (1976) (citation omitted).

For the same reason, neither RSA 644:9 nor RSA 570-A:1 can be read to mean that “one engaged in criminal conduct has no justifiable expectation of privacy.” DB 14. The provisions of RSA 570-A:2, II(d) discussed above would also be meaningless if statements constituting evidence of crime were exempted from the definition of “oral communication.”

The case of *Jatar v. Lamaletto*, 758 So. 2d 1167 (Fla. Dist. Ct. App. 2000) (cited at DB 14), is inapposite because the court was construing Florida law, not the broader array of privacy rights adopted by this Court under the New Hampshire Constitution and RSA chapter 570-A. Moreover, in *Jatar* the statements in question had resulted in a conviction for extortion, *id.* at 1168, and the court concluded that “[s]ociety is not prepared to recognize as reasonable an expectation of privacy in such activity,” *id.* at 1169. Here, Janigan testified on

cross-examination that his statements were merely intended to suggest that the defendant might suffer retaliation if he continued to spread rumors about others. T 37-38. The statements themselves, excerpts of which are quoted in Appendices A, C, E, and F of the defendant's brief, are far too ambiguous (especially when presented out of context, as here) to be deemed extortionate as a matter of law.

As it is, even officers investigating illegal activity (i.e., doing what the defendant claims he was doing in this case) may be, and have been, prosecuted for violating RSA 570-A:2, *see State v. Sheedy*, 125 N.H. 108, 110 (1984) ("the State is prosecuting at least two police officers for violating RSA 570-A:2, I"); and evidence collected under those circumstances has been excluded from trial pursuant to RSA 570-A:6 (2001), *see Ayres*, 118 N.H. at 91-93 (applying earlier version of statute). It is accordingly clear that RSA 644:9 can have no effect on any prosecution under RSA 570-A:2, and that "oral communications" include statements made in furtherance of a crime.

If this were not enough, it should also be clear that the language of RSA 644:9, IV (Supp. 2004) can have no application to the kind of activity this defendant was engaged in. He was not an "employee[] of [an] entit[y], public or private, [acting] in the course and scope of [his] employment...." *Id.* The defendant was a self-employed roofer, not a police officer or private investigator, as the trial court reminded him. T 75. It follows that RSA 644:9, IV (Supp. 2004)

could never be applied to him. Accordingly, there was no error in the trial court's refusal to instruct the jury on that statute.

Finally, the case of *Beaber v. Beaber*, 322 N.E.2d 910 (Ohio Ct. Com. Pl. 1974) (cited at DB 15) does not stand for the proposition that the defendant's recordings were "legal." DB 15. That case merely recognized an "interspousal exception" to the Ohio wiretap law that would permit admission of illegally recorded conversations in a civil divorce case. *Beaber*, 322 N.E.2d at 914-15. Two years after *Beaber*, the United States Court of Appeals for the Sixth Circuit held that no such exception would be applied in criminal prosecutions under the federal wiretap act: "[T]he plain language of the section and the Act's legislative history compels interpretation of the statute to include interspousal wiretaps." *United States v. Jones*, 542 F.2d 661, 673 (6th Cir. 1976). The plain language of RSA 570-A:2 requires a similar result for intercepts like this one.

**CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 5-minute oral argument.

Respectfully submitted,

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December 14, 2009

I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Gerard Beloin, pro se.



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