

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0045

State of New Hampshire

v.

Russell Schofield

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
NASHUA DISTRICT COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(5 Minutes 3JX Panel Oral Argument)

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ISSUE PRESENTED

Whether there was sufficient evidence presented that the defendant's touching of H.R.'s breast took the victim by surprise, such that a rational trier of fact could have found guilt beyond a reasonable doubt, where H.R. testified that she had no idea why the defendant unexpectedly removed her bra, and then quickly covered herself with her arms once the defendant touched her breast.

STATEMENT OF THE CASE

The defendant, Russell Schofield, was charged by complaint with one count of sexual assault and one count of simple assault. See RSA 632-A:4 (2007); RSA 631:2-a (2007). Following a two day bench trial in the Nashua District Court (Leary, J.), the defendant was found not guilty of simple assault, and guilty of sexual assault. T-II 247.¹

After the verdict was announced, the defendant moved to dismiss the sexual assault charge for failing to allege all elements of the offense because the complaint lacked the words “through concealment or surprise.” T-II 277. The court ordered the parties to file memorandums of law on the issue. DB A-2. The court then allowed the State to amend the body of the complaint to include the phrase “through the element of surprise.” DB A-27. The court denied the defendant’s motion to reconsider and maintained its guilty finding on the sexual assault charge. DB A-43. The defendant was sentenced to a \$1200 fine, which was suspended on the condition that he receive a psychosexual examination. S 7. This appeal followed.

¹ Citations to the record are as follows:
“T-I” and “T-II” refer to the first and second volumes of the trial transcript;
“DB” refers to the defendant’s appellate brief;
“S” refers to the sentencing transcript.

STATEMENT OF FACTS

During February of 2008, the defendant was dating Lauren.² T-I 7, 10; T-II 206. Lauren had a fifteen-year-old sister, H.R. T-I 6. On numerous occasions the defendant was invited to Lauren and H.R.'s house in Nashua, where H.R. lived with her parents and younger sister. T-I 5; T-II 207.

The defendant was invited over to the residence on one occasion during H.R.'s February school vacation. T-I 10, 81. After eating dinner with the family, the defendant and Lauren went into the living room to lie down on a blown up air mattress. T-I 11-12; T-II 208. At some point after Lauren and the defendant were on the air mattress, Lauren's mother, Maria, asked H.R. to go into the living room and chaperon Lauren and the defendant. T-I 54, 101. H.R. then joined Lauren and the defendant on the air mattress, with the defendant in between the two girls. T-I 54, T-II 214-15.

The defendant then began giving a back rub to Lauren, at which point H.R. asked if the defendant would give her a back rub as well, something that the defendant had done in the past. T-I 14, 25; T-II 217. H.R. felt that the defendant was like a brother to her. T-I 9. During the back rub, the defendant put his hand down the back of H.R.'s pants and underneath her underwear. T-I 24. H.R. pretended to be asleep during the incident because she was afraid that if the

² Last names will be omitted where it is necessary to protect the identity of the victim, who was a minor.

defendant knew she was awake he might do something else. T-I 24-25. This was the first time that the defendant had made H.R. feel uncomfortable. T-I 25. After the backrub, the defendant asked H.R. if she wanted him to carry her up to her room, which she allowed him to do. T-I 22, 57.

A few days following this first incident, the defendant took H.R. to see a movie at Chunky's. T-I 28. After moving her chair to be closer to the screen, the defendant moved his chair to be closer to H.R. and then asked her to put her head on his lap, at which time the defendant began brushing H.R.'s hair. T-I 30-32.

Following the movie, the defendant and H.R. picked Lauren up and the three went back to the defendant's apartment in Nashua. T-I 34. Once at the apartment, the defendant, Lauren, and H.R. lay down on the air mattress to watch a movie. T-I 36-37. While lying on the mattress, the defendant was positioned between Lauren and H.R. T-I 37. H.R. was under the impression that the defendant would be sleeping on a beanbag while Lauren and H.R. would be sleeping on the air mattress. T-I 38. During the movie, Lauren fell asleep, and H.R. faced away from the defendant because she was afraid he would touch her again. T-I 39. H.R. admitted feeling conflicted because she was hoping that the defendant had not intended to touch her during the incident at her house and that maybe things would go back to normal. T-I 40.

After the first movie ended, H.R. asked if the defendant would put on another movie because she did not want to be alone with him in the dark. T-I 41-

42. During the second movie, the defendant began giving back rubs to Lauren and H.R., alternating between the two until it became apparent that Lauren was asleep, at which point the defendant focused his back rubs entirely on H.R. T-I 43. H.R. pretended to be asleep during the back rub because she was afraid of the defendant. In the course of the back rub, the defendant undid the clasp and removed H.R.'s bra. T-I 45. H.R. had no idea why the defendant was removing her bra and felt really uncomfortable. T-I 47. After removing H.R.'s bra, the defendant continued to rub H.R. and at some point touched her breast. T-I 45. When H.R. realized that the defendant was touching her breast she quickly moved to cover herself with her arms. T-I 46. The defendant stopped touching H.R. and moved to the beanbag to sleep for the night. T-I 48.

After the incident, H.R.'s personality began to change. H.R. "went from a child who sings everyday and talks constantly, to a child who didn't speak at all and hid out in her room." T-I 81. After being confronted by her mother, H.R. eventually disclosed the two incidents involving the defendant. T-I 82-83.

H.R.'s mother did not immediately report the incidents to the police because she felt that if the defendant was out of their lives, the family could just cut ties with him. T-I 104. When Lauren began dating the defendant again, it became clear to H.R.'s mother that the defendant would not be out of their lives, and she eventually went to the police to report the incidents. T-I 105.

Detective Jonathan Lehto interviewed the defendant at the Nashua Police Department. T-I 111. During the interview, regarding the first incident at Lauren and H.R.'s house, the defendant admitted to rubbing H.R. to her pant line and touching her buttocks as well as rubbing H.R.'s stomach up to her bra line. T-I 156-57. As to the second incident at the defendant's apartment, the defendant admitted to removing H.R.'s bra and then touching her breast. T-I 164-65.

At trial, the defendant testified that he did not remember touching H.R.'s buttocks during the first incident. T-II 220. The defendant also testified that during the second incident, he removed H.R.'s bra. T-II 240. When asked if he touched H.R.'s breast, the defendant responded, "Not that I know of," and conceded that he may have touched the side of H.R.'s breast. T-II 239. Upon further questioning by his counsel, the defendant then completely denied ever touching H.R.'s breast and accused Detective Lehto of coercing statements from him during the interview. T-II 241. The defendant also testified that he did not give H.R. a back rub for his own sexual gratification. T-II 242.

SUMMARY OF THE ARGUMENT

The State presented sufficient evidence that the defendant's touching of H.R.'s breast took the victim by surprise, such that a rational trier of fact could have found guilt beyond a reasonable doubt. The evidence demonstrated that the victim was a fifteen-year-old high school sophomore, who viewed the defendant, her sister's boyfriend, as an older brother. The victim did not understand why the defendant unexpectedly took off her bra and touched her breast. She felt very uncomfortable when he did so, and she quickly covered herself with her arms. The defendant's conduct is precisely the type of conduct prohibited by RSA 632-A:2, (I)(i) (2007), which is incorporated in RSA 632-A:4 (2007). Therefore, the evidence was sufficient to prove beyond a reasonable doubt that the defendant, through the element of surprise, was able to engage in sexual contact with the victim's breast.

ARGUMENT

THERE WAS SUFFICIENT EVIDENCE PRESENTED THAT THE DEFENDANT'S TOUCHING OF H.R.'S BREAST TOOK THE VICTIM BY SURPRISE, SUCH THAT A RATIONAL TRIER OF FACT COULD HAVE FOUND GUILT BEYOND A REASONABLE DOUBT, WHERE H.R. TESTIFIED THAT SHE HAD NO IDEA WHY THE DEFENDANT HAD REMOVED HER BRA, AND THEN QUICKLY COVERED HERSELF WITH HER ARMS ONCE THE DEFENDANT TOUCHED HER BREAST.

On appeal, the defendant asks this Court to find that the State did not present evidence sufficient to support the "surprise" and "adequate chance to resist" elements of RSA 632-A:2, I(i), which are incorporated into RSA 632-A:4. DB 8.

"To prevail on 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. Littlefield, 152 N.H. 331, 350 (2005) (quoting State v. Evans, 150 N.H. 416, 424 (2003)).

After a two-day bench trial and after the court had entered a finding of guilty on the sexual assault charge, the defendant moved to dismiss the charge, arguing both that the complaint was defective for not including the words "through the element of surprise," and that the State had not presented sufficient evidence to support guilt beyond a reasonable doubt. T-II 276-79. The Court asked the defendant and the State to prepare memorandums on the issue and eventually

denied the defendant's motion to dismiss while granting the State's motion to amend the complaint. DB A2, A25.

RSA 632-A:4, I(a) (2007) provides that a person is guilty of a class A misdemeanor "when the actor subjects another person who is 13 years of age or older to sexual contact under any of the circumstances named in RSA 632-A:2." The charged circumstance listed in RSA 632-A:2, I(i) (2007) applies "when the actor through concealment or by the element of surprise is able to cause [sexual contact] with the victim before the victim had an adequate chance to flee or resist." The defendant argues that there was insufficient evidence presented to prove guilt beyond a reasonable doubt with regard to the element requiring that the contact occur through concealment or the element of surprise before the victim had an adequate chance to flee or resist. DB 10.

This Court has addressed the "through concealment or by element of surprise" variant of RSA 632-A:2 once previously in State v. Kepple, 155 N.H. 267 (2007). The Court in Kepple had to decide whether RSA 632-A:2, I(i) applied to the factually unique situation where the defendant causes sexual penetration of another to whom he has provided alcohol. Id. at 272.

In Kepple, the defendant provided the victim with a bottle of vodka and encouraged her to drink from it. Id. at 271. After the victim had consumed between a third and a half of the bottle, the defendant performed oral sex on her. Id. The victim testified that while the defendant was undressing her and

performing oral sex, she “just checked out of [her] body,” and that once she realized what was happening she gathered her clothes, got dressed and ran out of the house. Id.

In beginning its analysis, this Court recognized that New Hampshire had “established no jurisprudence on concealment or surprise, only a trio of cases in which the defendants chose not to appeal the applicability of the statute to the acts they were accused of committing.” Id. This Court then acknowledged that the RSA 632-A:2, I(i) analysis “focus[es] on the actions of the defendant,” but that it had to determine whether the acts of the defendant—providing alcohol to another and subsequently causing sexual penetration during her inebriation—fell outside the scope of the statute. Id.

In seeking guidance on this issue, the Kepple Court looked to a Rhode Island Supreme Court case as well as a trio of unreported cases from the Michigan Court of Appeals. In the Rhode Island Supreme Court case, In re Paul M., 626 A.2d 694 (R.I. 1993), the trial judge “concluded that the evidence indicated that the victim was in an impaired and at times, an unconscious condition and that, as a result, the definition of ‘surprise’ was broad enough to include the actions of [the] defendant.” Id. at 695. The Kepple Court noted that unlike the situation in Kepple, where the victim’s impairment was the result of the defendant’s actions, the victim’s impairment in In re Paul M. was not caused by the actions of the

defendant, and yet still fit within the statutory definition of concealment or surprise. Kepple, 155 N.H. at 272-73.

This Court then cited three unreported cases from the Michigan Court of Appeals in support of the State's position: People v. Ferguson, No. 263275, 2006 WL 3298902, at *2 (Mich. Ct. App. Nov. 14, 2006), which relied on the dictionary definition of "surprise" as "to strike with a sudden feeling of wonder or astonishment esp. by being unexpected"; People v. Shingledecker, No. 259140, 2006 WL 1084348, at *3 (Mich. Ct. App. Apr. 25, 2006), which held that the statutory requirement of "surprise" was met by evidence of the victim's response to the defendant's actions; and People v. Tran, No. 236621, 2003 WL 213662988, at *3 (Mich. Ct. App. June 12, 2003), which defined "sexual contact by the element of surprise" as occurring when a person "engag[es] in sexual contact with a victim in circumstances in which it would be unexpected."

This Court concluded that because of the victim's impaired condition, which was caused by the defendant, the victim did not realize what the defendant was doing to her, and that once the victim did realize what was happening to her, she gathered her clothes, got dressed, and ran out of the house. Kepple, 155 N.H. at 274. This evidence, the Court concluded, supported the State's claim that the victim's impairment allowed her to be surprised by the defendant's actions and thus any motion to seek dismissal, a directed verdict, or a JNOV would not have been properly granted. Id.

While Kepple does provide some insight into analyzing whether a particular set of circumstances meets the statutory element of concealment or surprise, the facts of the case were particularly unique. The defendant reads too much into the Court's conclusions in Kepple. The defendant notes that impairment on the part of the victim is a common feature in Kepple and the out-of-state cases that the court relied upon. DB 14. The State disputes that there is a common feature in throughout these cases. In People v. Shingledecker, although the victim was sleeping when the defendant entered her room, she was awake and fully conscious during the pre-assault back rub and during the sexual assault itself. Shingledecker, 2006 WL 1084348, at *1. In People v. Tran, the court did not provide the facts of the case beyond the fact that the victim told a friend that the defendant had touched her breast. Tran, 2003 WL 213662988.

Putting this aside, what the Kepple Court had to decide was whether this unique situation fit within the statutory framework of RSA 632-A:2, I(i) or whether it was outside the scope of the statute. In finding that the set of facts in Kepple met the statutory element of concealment or surprise, the Court was certainly not holding that the set of circumstances in Kepple would become the rule, but rather that it fell within the rule.

This Court must look at the set of facts in this case and decide whether they fall within the scope of RSA 632-A:2, I(i). In following the framework that this Court used in Kepple in analyzing those unique facts, this Court should hold that

the facts in this case are exactly the kind that RSA 632-A:2, I(i) was meant to address. While the holding in Kepple is limited to the situation in which the defendant causes sexual penetration of another to whom he has provided alcohol, the analysis of “concealment or surprise” and the examination of foreign authorities proves helpful in the current case.

The Rhode Island Supreme Court case relied upon in Kepple, In Re Paul M., only provides a short discussion of the surprise element in connection with an intoxicated victim and is thus inapposite to this case. The three unreported cases from the Michigan Court of Appeals, on the other hand, prove helpful in examining the concealment or surprise element in light of the facts in this case.

The Kepple Court cited People v. Ferguson as support because that court relied upon the dictionary definition of “surprise” as “to strike with a sudden feeling of wonder or astonishment, esp. by being unexpected.” Kepple 155 N.H. at 273. This definition is particularly helpful in the current case. H.R. testified that she had no idea why the defendant had removed her bra and that she felt really uncomfortable as a result of his actions. T-I 47. H.R. also testified that when the defendant touched her breast, she quickly moved to cover herself up with her arms. T-I 46. These are certainly the actions of someone who has been struck with a sudden feeling of wonder, especially by being unexpected. H.R. had no idea why the defendant was removing her bra and when he unexpectedly touched her breast,

she quickly moved to stop him and cover herself up. These facts fall into the dictionary definition of “surprise” cited by this Court in Kepple.

In Kepple, this Court also cited People v. Shingledecker for support because that court held that the statutory requirement of “surprise” was met by evidence of the victim’s response to the defendant’s actions. Kepple, 155 N.H. at 273. In Shingledecker, the defendant entered the victim’s bedroom between 4:00 and 4:30 a.m. and began rubbing the victim’s back. Shingledecker, 2006 WL 1084348, at *1. The defendant then rubbed the side of the victim’s breast and licked her neck, at which point the victim said “Yuck” and noted she felt uncomfortable. Id. The defendant then put his hand inside the victim’s boxer shorts and put his fingers into her vagina. Id. The victim questioned the defendant, but he persisted and made references to intercourse. Id. The victim told the defendant to stop between two and five times, but the defendant continued penetrating the victim after she asked him to stop. Id. The victim did not scream or put up a fight because “she had never been in that predicament before and [she] didn’t know what to do.” Id.

In holding that sufficient evidence had been presented to support the inference that the defendant overcame the victim by surprise, the court relied on the fact that the victim had noted that the defendant was like a father or older-brother figure and she had not been uncomfortable when he began rubbing her back. Id. at *3. When the defendant began to touch her sexually, the victim asked

him what he was doing and asked him to stop. Id. The court noted that “[t]his is not the reaction of someone who expects a certain course of action. Thus, a reasonable jury could infer from these circumstances that defendant initially overcame the victim through surprise.” Id.

The present case has many parallels to the Shingledecker case. In both cases, the assault began with a back rub from an older-brother figure and eventually progressed into something that made the victim feel uncomfortable. In both cases, once the sexual assault began, the victim reacted like someone who did not expect a certain course of action. In this case H.R., quickly covered herself up as soon as the defendant touched her breast. As in the Shingledecker case, the current facts show someone who clearly was not expecting a certain course of action, and thus fit within the scope of a “surprise” under RSA 632-A:2, I(i).

The third in the trio of cases that the Kepple Court cited for support was People v. Tran, which defined “sexual contact by the element of surprise” as occurring when a person “engages in sexual contact with a victim in circumstances in which it would be unexpected.” Kepple, 155 N.H. at 273. Tran was dealing with this surprise element in the context of a challenge to the statute as unconstitutionally vague. The definition provided for sexual contact by the element of surprise was, according to the court, “the commonly accepted meanings of the words.” Tran, 2003 WL 21362988, at *3.

Using this commonly accepted definition of “surprise,” it is clear that the defendant’s actions fall within the scope of the statute. In this case, the defendant was like a brother to the victim. T-I 9. He had given her back rubs in the past, and while the previous back rub had made her uncomfortable, the victim testified that she was hoping that she had misunderstood the situation and that everything would “go back to normal.” T-I 40. She admitted that she did not understand why the defendant had taken her bra off and became very uncomfortable. T-I 47. Finally, when the defendant touched her breast, the victim quickly moved to cover herself up with her arms. T-I 46. These facts prove that the defendant engaged in sexual contact with the victim in circumstances in which it would be unexpected. Indeed, it was unexpected for the victim as she quickly covered herself up. All of the foreign authority cited by the Kepple Court support the conclusion that the defendant’s actions were exactly the type of actions meant to be addressed by the concealment or surprise variation of RSA 632-A:2, which is incorporated in RSA 632-A:4.

The defendant makes much of the fact that the defendant touched the victim’s breast before he removed her bra, which, according to the defendant, negates any surprise that she could have had at the subsequent touching of the breast. DB 15. The defendant’s characterization of this fact, however, is the result of a mistaken reading of the transcript. The pertinent part of the victim’s direct examination reads as follows:

Q. And how did this—did this back rub progress to something else?

A. Yeah.

Q. Can you describe for the Court exactly what happened and just take it slow and—

A. Just like last time he, you know, put his hand down my pants and stuff. Except this time he actually went to touch my breast.

Q. Okay. Now, so he's rubbing – at some point he's rubbing the front of you again?

A. Yes.

Q. And can you describe exactly – did you have a bra on?

A. I did but he took it off again.

Q. And how did he take your bra off?

A. He just undid the clasp and took my arms out of the sleeves And—

Q. All right. So after your bra is off, does he continue to rub you?

A. Yeah.

Q. And can you describe for the Court exactly – did he touch your breasts at some point?

A. Yeah.

T-I 45.

While the defendant reads the transcript as the victim testifying that the defendant touched her breast once before he removed her bra and once again after the bra was removed, the more likely reading of the testimony is that the victim rushed to tell the whole incident in as few words as possible with the prosecutor

asking follow up questions to get more detail. The prosecutor asked the victim to describe how the back rub progressed into something else and the victim testified that it was just like the back rub before, where he put his hand down her pants, but that this time he actually touched her breast. The prosecutor then backed up and had the victim talk about when the defendant was rubbing her front. He asked her about the bra, and eventually got back to the defendant touching her breast. On cross-examination, defense counsel walked the victim through the same set of events, but with no mention of multiple touching of the breast. T-I 64-66. The most likely interpretation of the trial testimony is that a fifteen-year-old sexual assault victim was trying to rush through her explanation of the traumatic events that took place at the defendant's home. Looking at the transcript of both the direct examination and the cross-examination of the victim it becomes clear that the breast touching that the victim was referring to was a single incident that occurred after the defendant removed the victim's bra.

The defendant also seems to imply that the fact that the defendant unclasped the victim's bra and then removed it means that the victim could not have been surprised by the breast touching. DB 15. This is without merit. The victim was a fifteen-year-old high school sophomore who testified that she "was really wondering why he would be [removing her bra]." T-I 47. While she did feel very uncomfortable, the facts support the conclusion that the victim was not expecting the defendant to touch her breast. The victim quickly covered herself

with her arms, which supports the inference that she was surprised by the defendant's actions.

Given all the evidence and all reasonable inferences from it, considered in the light most favorable to the State, the defendant has failed to meet his burden to prove that no rational finder of fact could have found him guilty beyond a reasonable doubt.

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 before a 3JX Panel.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

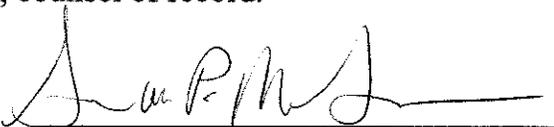
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I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to David M. Rothstein, counsel of record.


for Stephen D. Fuller

