

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

**No. 2009-0220**

**State of New Hampshire**

**v.**

**Albert W. Demello, Jr.**

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**Appeal Pursuant to Rule 7 from Judgment  
of the Hillsborough County Superior Court / South**

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**BRIEF FOR THE DEFENDANT**

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**David M. Rothstein  
Deputy Chief Appellate Defender  
Appellate Defender Program  
2 White Street  
Concord, NH 03301  
NH Bar No. 5991  
(603) 228-9218**

**(5 Minutes 3JX Panel Oral Argument)**

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii
Question Presented.....	1
Statement of the Case.....	2
Statement of Facts.....	3
Summary of Argument .....	6
Argument	
I.    THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY THAT K.D.'S TESTIMONY DID NOT HAVE TO BE CORROBORATED.....	8
Conclusion.....	17

TABLE OF AUTHORITIES

	<u>Page</u>
<b><u>CASES:</u></b>	
<u>Brown v. State</u> , 11 So.3d 428 (Fla. 2009).....	11
<u>Burke v. State</u> , 624 P.2d 1240 (Alaska 1980).....	14
<u>Gaxiola v. State</u> , 121 Nev. 638, 119 P.3d 1225 (2005).....	12
<u>Ludy v. State</u> , 784 N.E.2d 459 (Ind. 2003).....	11
<u>State v. Dukette</u> , 122 N.H. 336, 444 A.2d 547 (1982).....	10
<u>State v. Erickson</u> , 403 N.W.2d 281 (Minn. App. 1987).....	11
<u>State v. Janda</u> , 397 N.W.2d 59 (N.D., 1986).....	14
<u>State v. Johnson</u> , 679 N.W.2d 378 (Minn.App. 2004).....	11
<u>State v. King</u> , 136 N.H. 674, 621 A.2d 921 (1993).....	9
<u>State v. Lemire</u> , 115 N.H. 526, 345 A.2d 906 (1975).....	9
<u>State v. McMillan</u> , 158 N.H. 753, 973 A.2d 287 (2009).....	8
<u>State v. Moses</u> , 143 N.H. 461, 726 A.2d 250 (1999).....	10
<u>State v. Rayfield</u> , 369 S.C. 106, 631 S.E.2d 244 (2006)....	13
<u>State v. Saluter</u> , 715 A.2d 1250 (R.I. 1998).....	12
<u>State v. Zimmerman</u> , 130 Wash.App. 170, 121 P.3d 1216 (2005).....	13, 14
<u>Veteto v. State</u> , 8 S.W.3d 805 (Tex. Ct. App. 2000).....	11
<b><u>STATUTES:</u></b>	
RSA 632-A:6, I.....	7, 8, 9
RSA 632-A:6, III.....	9

QUESTION PRESENTED

Whether the trial court erred when it instructed the jury that K.D.'s testimony did not have to be corroborated.

Issue preserved by objection to instruction. T-I\* 143.

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\*Citations to the record are as follows:  
'NOA" designates the notice of appeal;  
"T-I" and "T-II" designate the two volumes of trial transcript.

STATEMENT OF THE CASE

A Hillsborough County (South) grand jury indicted Albert Demello with four counts of felonious and one count of aggravated felonious sexual assault. T-I 3-6. In each instance the alleged victim was K.D., his granddaughter. T-I 38. At the close of the State's case, the court (Groff, J.) dismissed one of the felonious sexual assault charges. T-I 122. The jury convicted Demello of the rest of the charges. T-II 177-78. The court imposed a sentence of 7½ - 15 years in prison. NOA 11.

STATEMENT OF FACTS

At the time of trial, K.D. was 21 years old. T-I 35. She had two brothers and a sister: Steven, who was 19 at the time of trial; Elizabeth, who was 16; and Jimmy, who was 13. T-I 36. As a child, K.D. lived with her siblings; her mother, Melody Demello; and her adoptive father, James Demello. T-I 37-38. James's parents are Albert and Alberta Demello. T-I 39, 95.

K.D. lived primarily in Milford. T-I 38. The Demellos lived in Brookline and K.D. lived with them for six months while she was in third grade, and a shorter period of time while she was in sixth grade. T-I 38. In addition, K.D. often visited her grandparents in Brookline and they visited the Milford home. T-I 39. During the Brookline visits, K.D. enjoyed playing with friends, watching television, and eating candy, which, according to K.D., her grandparents hid all over the house. T-I 40-41.

K.D. claimed that Albert used to "touch [her] all the time in a sexual way." T-I 41. The first time was at her house in Milford. She was eight years old, and she and Albert were babysitting her brother, Jimmy, who was an infant. T-I 41-42. According to K.D., when she was on the couch watching television, Albert put her hand on his penis for a couple of minutes. T-I 43. Neither of them said anything during the incident. T-I 44. K.D. did not tell anyone about it. T-I 44.

Another time in Milford, after the family moved to a different house, K.D. claimed she once again found herself alone with Albert when Elizabeth and Alberta went shopping. T-I 44-45. K.D. testified that she and Albert were watching television in his bedroom when he asked her to kiss his penis. T-I 45. K.D. claimed she did it as fast as she could, and that Albert was angry because it was too fast. T-I 45. After this, K.D. heard her grandmother's car pull into the driveway. T-I 46. K.D. did not tell anyone what happened. T-I 46.

K.D. testified that many molestation incidents occurred at her grandparents' Brookline home. T-I 47. She testified that between 1995 and 1999, when she was between the ages of eight and twelve, Albert often touched her genital area beneath her clothes as she slept on the sleep sofa. T-I 47, 62-64. K.D. claimed that Albert would crouch down, reach under the blankets and the long shirt she wore to bed, and put his finger into her vagina. T-I 65. She would close her eyes and not say anything. T-I 66. Occasionally, she fell asleep while this was occurring. T-I 75. Elizabeth, who was often sleeping on the sofa next to K.D., did not see or hear anything unusual. T-I 62-64. K.D. did not tell anyone what happened at any point during this four-year time frame. T-I 72-73, 75.

The last incident occurred in Brookline when K.D. was 12. T-I 67. She had been outside playing and announced to the

others, including her sister and brothers, that she was going into the house to get candy. T-I 68, 77-78. K.D. claimed that Albert followed her down to the basement, grabbed her vaginal area over her pants, and would not let her go. T-I 68, 78. After this incident, K.D. sat on the ottoman in the living room and Albert stood in front of her. T-I 69. K.D. started to cry and went into the bathroom. T-I 69. She claimed that through the closed door, Albert said, "I'm sorry. I didn't know you felt that way." T-I 69-70. K.D. did not tell anyone what had occurred.

K.D. reported the alleged molestation to the Milford Police in October of 2006. T-I 28-29, 71. Albert voluntarily spoke to the police about K.D.'s allegations and denied any misconduct. T-I 111. At trial, Albert clarified that he did not keep candy in the basement, but admitted there was candy in other areas of the house. T-I 134.

K.D. never told any teacher, guidance counselor, or DARE police officer about what Albert was doing to her, even though the school curriculum included education about "good touch/bad touch" and encouraged students to report such conduct. T-I 72-73. When she was in the eighth grade, K.D. told her friend Sarah that Albert had touched her. T-I 70. Sarah's mother told Melody. T-I 83. When Melody asked K.D. about the allegation, however, K.D. said, "I lied to Sarah so that Sarah would feel bad

for me." T-I 84. After she denied that Albert had molested her, K.D. continued to go to her grandparents' home, spend time there, and swim in their pool. T-I 79.

## SUMMARY OF THE ARGUMENT

The trial court erred when it instructed the jury that K.D.'s testimony need not be corroborated in order for it to convict.

This Court has indicated in the past that such an instruction is not erroneous per se, and Demello espouses no such rule here. Instead, Demello directs the Court to the underlying purpose of the statute from which the instruction derives, RSA 632-A:6, I, which is to ensure that judges do not dismiss cases sheerly due to a lack of corroboration, and does not compel a jury instruction on the issue. He also directs the Court's attention to out-of-state cases in which courts question the need for a lack of corroboration instruction, as well as discuss the potential prejudice inherent in such instructions. As courts have stated, the prejudice is at its highest, and the instruction is least favored, where, as here, the jury must weigh the uncorroborated testimony of the alleged victim and the defendant.

Based on the law and the unique circumstances of this case, the trial court abused its discretion by telling the jury that K.D.'s testimony need not be corroborated. Demello is entitled to a new trial.

I. THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY THAT K.D.'S TESTIMONY DID NOT HAVE TO BE CORROBORATED.

Demello objected to the trial court's instruction that K.D.'s testimony need not be corroborated in order for the jury to convict. T-I 143. Counsel argued that the corroboration statute, RSA 632-A:6, I, governed only whether the trial court should grant a motion to dismiss due to lack of corroboration, and that a jury instruction would be inappropriate "because it heightens the importance of that particular witness's testimony. . . ." T-I 143. Accordingly, counsel argued that to the extent such an instruction was appropriate on an ad hoc basis, it would constitute an abuse of discretion to give it in Demello's case, where the alleged victim testified the assaults occurred, and the defendant testified they did not. The trial court erred when it overruled counsel's objection and gave the corroboration instruction. Demello is entitled to a new trial.

The trial court has discretion to decide whether to give certain jury instructions. State v. McMillan, 158 N.H. 753, 756 (2009). The court exercises its discretion with reference to the applicable law as well as the circumstances of the case. Based on statutory and constitutional law, the court must always give an instruction on, for example, the elements of an offense, a sufficiently supported defense, or reasonable doubt. However, other instructions may be improper, or inadvisable, depending on the circumstances of the case. In addition, while a jury

instruction on how to evaluate a witness's credibility is customary, see N.H. Pattern Jury Instr. 1.12 (1983), an instruction that in its effect bolsters the credibility of a witness is improper. See, e.g., State v. King, 136 N.H. 674, 677-78 (1993) (court's instruction had impermissible effect of bolstering victim's credibility).

RSA 632-A:6, I states that "[t]he testimony of the victim shall not be required to be corroborated in prosecutions under this chapter." This statute, adopted in 1975 from a Michigan law, was part of an initiative to change then-existing attitudes about sexual assault and removed perceived barriers to prosecution of these case. Analysis accompanying H.B. 793 (eff. August 6, 1975); Testimony of Jean Wallin in support of H.B. 793, April 22, 1975. It codifies the common law principle that the testimony of a sexual assault victim need not be corroborated. State v. Lemire, 115 N.H. 526, 533 (1975). Thus, the statute ensures complainants can prosecute sexual assault cases without corroborating evidence, and prevents judges from dismissing cases solely because there is no corroboration. It does not, however, state an element of a sexual assault offense, define a statutory term, or relate to a defense. Cf. RSA 632-A:6, III (narrowing the circumstances under which jury may find consent defense). Accordingly, while RSA 632-A:6, I is a guidepost for judges and an aid for sexual assault complainants, the statute does not

clearly compel a jury instruction that the alleged victim's testimony need not be corroborated.

This Court has not held that such an instruction should or must be given in every sexual assault case. In State v. Dukette, 122 N.H. 336, 338 (1982), defense counsel elicited during the victim's cross-examination that there were no eyewitnesses to the assault and there had been no emission. The trial court instructed the jury that neither witness corroboration nor emission were required to obtain a sexual assault conviction. Id. This Court, while not approving of the practice of giving such an instruction during trial testimony, upheld it due to the nature of the cross-examination. Id.

In State v. Moses, 143 N.H. 461, 462 (1999), the Court upheld a corroboration instruction against a claim that it "impermissibly allowed the jury to convict the defendant if they found the victim's testimony credible, but not necessarily believable beyond a reasonable doubt." The Moses Court upheld the instruction because it was carefully linked to instructions on credibility and reasonable doubt. Id. However, the Court cautioned that "[w]hen viewed in isolation, the instruction . . . would seem to permit conviction merely if the jurors believed the victim was a credible witness." Id. at 463. In neither of these cases was the Court specifically asked to determine the validity of the instruction where, as here, the trial's outcome hinged

uniquely on the jury's balancing of the complainant's uncorroborated testimony that the assaults occurred against the defendant's uncorroborated denial of the assaults.

There is a split of authority with regard to whether it is error for the trial court to instruct the jury that the complainant's testimony need not be corroborated. Some courts have held that the instruction is erroneous because it constitutes an improper comment on the evidence. Brown v. State, 11 So.3d 428, 439-40 (Fla. 2009); Ludy v. State, 784 N.E.2d 459, 461-62 (Ind. 2003); Veteto v. State, 8 S.W.3d 805, 816 (Tex. Ct. App. 2000); State v. Erickson, 403 N.W.2d 281, 286 (Minn. App. 1987); but see State v. Johnson, 679 N.W. 2d 378, 388 (Minn. App. 2004) (holding instruction improper, but no prejudicial error where directly connected with reasonable doubt instruction).

For example, in Brown, the defendant objected that the corroboration statute "goes more to [a] motion for judgment of acquittal" than a jury instruction, and that instructing the jury that there need not be corroboration "is pretty much deciding the verdict." 11 So.3d at 431. The Brown Court reviewed the case law precluding judicial commentary on the evidence. Id. at 433-34. It then reviewed the history behind the corroboration statute, which, like New Hampshire's, was passed in the mid-70's as part of an initiative to reform sexual assault laws. Id. at 434 ("The purpose of the [statute]

was to eliminate a judicially created corroboration requirement for a rape or sexual battery conviction. . . .").

The court discussed Florida cases, which disapproved of the instruction as an impermissible comment on the weight of the evidence and credibility. Id. at 435-36. After discussing cases from other jurisdictions that had similarly disapproved of the instruction, the court concluded that a special corroboration instruction "constitutes an improper comment on the evidence," and "is likely to confuse and mislead the jury." Id. at 436-39. The court held that while the instruction was a correct statement of the law, "reading the statute to the jury is unwarranted and unnecessary." Id. at 439.

Other courts, citing the legal principle on which the instruction is based, i.e., that the complainant's testimony need not be corroborated to sustain a conviction, uphold the instruction without particular reservation. Gaxiola v. State, 119 P.3d 1225, 1232-33 (Nev. 2005) (plain error review); State v. Saluter, 715 A.2d 1250, 1257-58 (R.I. 1998) ("[W]e discern no error in the trial justice's instructions that accurately advised the jurors on the applicable law on corroboration.").

The majority of courts confronting the issue, however, either uphold the instruction with some reservation or uphold it only under some circumstances. A Michigan court deemed the instruction appropriate, but in so doing seized on the fact

that the defense had specifically attacked the lack of corroboration in its closing. People v. Smith, 385 N.W.2d 654, 657 (Mich. App. 1986). In State v. Rayfield, a majority of the South Carolina Supreme Court reversed the appellate court's finding that the corroboration instruction was improper. 631 S.E.2d 244, 249-50 (S.C. 2006). However, the Rayfield Court noted that the instruction is not required, and is only proper where "this single instruction is not unduly emphasized and the charge as a whole comports with the law." Id. at 250. Two justices dissented from this holding. Id. at 251-52 ("By specifically charging that the alleged victim's testimony need not be corroborated, the trial court singles out the alleged victim and appears to express an opinion on her credibility.") (Pleicones and Bartlett, JJ., dissenting) (quotation omitted).

Similarly, in State v. Zimmerman, 121 P.3d 1216, 1222-23 (Wash. App. 2005), the Washington Court of Appeals upheld a corroboration instruction but made clear that the Washington Supreme Court Committee on Jury Instructions recommended against giving the instruction. "Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel." Id. (quoting comment to jury instruction). Though affirming the lower court's decision, the

Zimmerman court noted it "share[s] the [Jury Instruction Committee's] misgivings [about the instruction]. . . ." Id. at 1223.

Two courts expressed concern about the corroboration instruction where, as here, the defendant testified at trial that he did not commit the charged offenses. In State v. Janda, 397 N.W.2d 59, 69-70 (N.D. 1986), the court agreed that an instruction similar to the one given in this case is a correct statement of the law but did not hold that the instruction "should be given in every criminal case in which no corroborating evidence is required." (Quotation omitted). Instead, the court held that when the trial judge instructs the jury that the complainant's testimony need not be corroborated, it should give a corresponding instruction relative to the defendant's testimony that is effective to "guard against the possibility that the jurors might infer that the complainant's testimony need not be corroborated, but a defendant's must be corroborated." Id. at 70.

In Burke v. State, 624 P.2d 1240, 1257 (Alaska 1980), the defendant objected to a standard corroboration instruction. The court, though not finding plain error, held the instruction inappropriate for reasons similar to those set forth in Janda.

In our view, to instruct that a victim's testimony need not be corroborated by other evidence emphasizes the lack of a need for corroboration without similarly indicating

that other witnesses' testimony need not be corroborated. Particularly where the defendant has given a statement or taken the stand, it would be prejudicial to indicate that the victim's testimony not be corroborated without similarly indicating that the defendant's testimony not be corroborated. Thus, we conclude that the instruction should not have been given.

Id.

Thus, a review of the cases reveals that while the corroboration instruction is an accurate statement of the law, it may mislead the jury or constitute an improper comment on the evidence. The risk associated with the instruction, in the view of some courts, is diminished if the instruction is linked with other instructions, such as reasonable doubt. On the other hand, the risks are exacerbated where the defendant testified at trial and the court did not instruct the jury that no witness's testimony need be corroborated.

In this case, the risks associated with the corroboration instruction were heightened. The case hinged upon the jury's determination of the credibility of two testifying witnesses: K.D. and Demello. By telling the jury that it could convict absent corroboration of K.D.'s testimony, the court created the risk that the jury may have believed that Demello's testimony, in order to be credited, had to be corroborated. If so, this unfairly tipped the credibility balancing exercise in the State's favor. Moreover, the State stressed the corroboration

instruction in its closing argument. T-I 158 ("The State doesn't need to put in front of you anything more than the testimony of . . . [K.D.]. . . . [F]or thousands of years people have been convicted without fingerprints and without DNA evidence because you just have to decide."). Because the trial court, under the circumstances of this case, erred in instructing the jury that K.D.'s testimony need not be corroborated, Demello is entitled to a new trial.

CONCLUSION

WHEREFORE, Mr. Demello respectfully requests that this Honorable Court reverse his convictions and remand for a new trial.

Undersigned counsel requests five minutes of oral argument before a 3JX Panel of this Court.

Respectfully submitted,

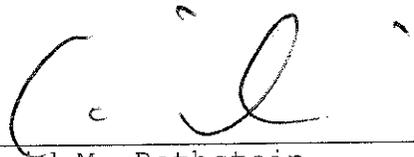
By

  
David M. Rothstein, NH Bar #5991  
Deputy Chief Appellate Defender  
NH Appellate Defender Program  
2 White Street  
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, this 22<sup>nd</sup> day of February, 2010, to:

Criminal Bureau  
Attorney General's Office  
33 Capitol Street  
Concord, NH 03301

  
David M. Rothstein

DATED: February 22, 2010