

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2009-0503

State of New Hampshire

v.

Kristen Stevens

**Appeal Pursuant to Rule 7 from Judgment
of the Rockingham County Superior Court**

BRIEF FOR THE DEFENDANT

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(15 Minutes Oral Argument)**

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QUESTION PRESENTED

Whether the trial court erred in excluding evidence that was relevant to rebut the State's contention that the defendant fabricated her competing harms defense?

Issue preserved by proffer of evidence, T* 128-29, 169-71, 172-74; State's objection, T 129, 174-75; and court's ruling on objection, T 129-30, 171-72 174.

*Citations to the record are as follows:
"T" refers to Trial Transcript; and,
"A" refers to the Appellate Appendix.

STATEMENT OF THE CASE

Kristen Stevens was charged with one count of driving while intoxicated, second offense pursuant to RSA 265-A:2. T 5-6, A1. Prior to trial, Stevens filed a Notice of Competing Harms Defense contending that she believed that her conduct "was necessary to avoid harm to herself, to wit physical and/or sexual assault by two males . . ." A2-A3. At trial, she also argued that her erratic driving and poor performance on the field sobriety tests were the result of her emotional state following the assault rather than intoxication. T 12-14, 148-49.

A jury found Stevens guilty following a one-day trial. T 184. The trial court (McHugh, J.) sentenced her to six months at the Rockingham County House of Correction, of which all but thirty-seven days are suspended. T 185-88; A4, A8. Thirty days of the stand committed portion of the sentence is to be served at the House of Corrections followed by seven days to be served at the Multiple Offender Intervention Detention Center. T 185-88, A4-A5, A8. Her sentence also includes a three-year loss of license, a fine, and a requirement that she install an interlock device on any vehicle she operates. T 185-88, A4-A8. Imposition of the jail sentence is stayed pending appeal. T 185-88, A9-A12.

STATEMENT OF FACTS

At about 11:30 p.m. on August 9, 2008, Paul Mitchell was traveling home from Maine, when he noticed a car driving erratically on Route 101 in Exeter, New Hampshire. T 15-16. Mitchell called the police and reported what he saw. T 15-16. Mitchell continued to follow the car until a police officer caught up to him. T 18. Mitchell testified that, while he followed the car, he noticed it swerving, accelerating and decelerating and, at one point, ran a red light. T 17-18.

Officer Joseph Byron responded to the call. T 27-28. When he located the car, he saw it drifting "from the solid, double yellow line to almost driving off the paved portion of the roadway." T 28. Byron signaled for the driver to pull over, which she did without incident. T 28-30, 74-75.

The driver identified herself as Kristen Stevens, and produced her license and registration for Byron without incident. T 30-31, 75-75. Byron testified that Stevens's eyes were "red, glassy and bloodshot," and her speech slurred. T 31. In response to his questions, Stevens told him where she had been and what she had to drink. T 31-32.

Byron asked Stevens to get out of the car. T 32. As she did, Byron noticed that she leaned on the door for balance. T 32. When he told her to walk to the area behind her car, Byron said she had difficulty walking. T 33. According to Byron, when

she got to the rear of the car, Stevens fell against the trunk.
T 33.

At the rear of the car, Byron administered the following field sobriety tests: horizontal gaze nystagmus, walk and turn, and one legged stand. T 33, 40, 43. According to Byron, Stevens failed all three tests. T 39, 43, 45.

Byron testified that he asked Stevens again how much she had had to drink and she told him that she had had three drinks. T 45. Byron said that when he asked her whether on a scale of one to ten with one being sober, how intoxicated she was she stated five. T 45-46. At trial, Stevens acknowledged that she "could have been" impaired by alcohol when Byron stopped her. T 123-24.

Byron arrested Stevens and took her to the police station. At the police station, Byron read Stevens the Administrative License Suspension form and asked her to take the breath test. T 46-50. Stevens refused to take the test. T 50.

Stevens's defense was based on what had occurred that evening before Byron pulled her over. After working her regular shift at Honeydew Donuts, Stevens drove to Hampton Beach to visit some friends who were having a beach party. T 97-98. She planned to go to a bar called La Bec's later that evening to listen to her favorite band. T 99-100.

When she got to Hampton Beach, Stevens parked her car behind a bar called Wally's and walked to the beach party. T 99. She

had a hot dog or hamburger and drank an alcoholic drink called "sex on the beach." T 98, 116-17. After a few hours, Stevens walked back to Wally's. T 99, 117. There, she played pool and had another "sex on the beach." T 117.

Stevens then walked from Wally's to La Bec's. T 100, 101-03, 117. When she got to La Bec's, Stevens talked with the band members and then went to the bar for a glass of water. T 103-04. While at the bar, two men whom Stevens did not know started making derogatory and offensive comments to her. T 104-05, 118-20. Stevens described the comments as sexual and racial in nature, but the trial court would not permit her to repeat the comments. T 105-08. Although Stevens tried to get away from them, the men kept walking by her and repeating the comments, which caused her to become increasingly more uncomfortable. T 105, 108.

Stevens began to think that she may have provoked the attention by her attire. T 109. Despite the ninety degree weather, she decided to go back to her car for a sweatshirt to put on over her shirt. T 109-10, 120-21. She intended to walk back to La Bec's after she got the sweatshirt. T 110.

As she neared her car, however, Stevens realized that she was being followed. T 110-11, 121. By that time, it was dark and the lot where her car was parked was not lighted. T 110-11. When she reached into her purse for her keys, the two men from

the bar pushed her up against her car. T 111, 121-22. The men started touching Stevens, trying to kiss her, putting their hands up her shirt and on her buttocks. T 111-12. She thought she was going to be raped. T 112-13. The assault ended when Stevens heard some other voices and the men ran off. T 112-13.

Stevens was upset, ashamed, and "felt like dying." T 113. Rather than go back to the bar, she just wanted to get out of there, and go to where she would be safe. T 113. She picked up her purse and keys, which had fallen on the ground, got in her car to drive home. T 113, 122. Throughout her drive and the subsequent motor vehicle stop, Stevens testified that she was scared, wanted to get home to be safe, and did whatever she had to do to get home "the quickest." T 113-15.

Stevens acknowledged that she did not call the police or go to the Hampton police station after assault. T 122-23. She also did not tell Byron about the assault after he pulled her over. T 51, 124-25. The court prevented Stevens from fully explaining why she did not report the assault to Byron, which related to an assault she experienced as a teenager. T 129-30. Stevens explained that she refused to take the breath test because she "didn't want to put [her] mouth on anything else that [she] didn't know," referring to the assault. T 115-16.

SUMMARY OF THE ARGUMENT

The State challenged the credibility of Stevens's allegation that she had been assaulted based on her failure to report the assault to Byron. This challenge rendered Stevens's explanation for why she did not report the assault "highly relevant" and, thus, admissible. She was under no obligation to disclose this explanation in her notice of defense. The trial court's ruling that this evidence was inadmissible was in error. The conviction should be reversed.

I. STEVENS'S EXPLANATION FOR NOT REPORTING THE ASSAULT WAS RELEVANT TO REBUT THE CONTENTION THAT SHE FABRICATED THE DEFENSE.

Stevens filed a notice of competing harms defense contending that she believed that driving "was necessary to avoid harm to herself, to wit physical and/or sexual assault by two males . . ." A2-A3. At trial, she also argued that her erratic driving and performance on the field sobriety tests were the result of her emotional state following the assault rather than intoxication. T 146-49.

The State questioned the credibility of Stevens's claim that she had been assaulted noting that she did not report the assault to Byron or any other law enforcement agency. The State began its attack by eliciting testimony from Byron that Stevens did not tell him that she had been assaulted. T 51. The attack continued during the State's cross-examination of Stevens:

Q. And [Byron] stops you. He comes up to your window. Do you tell him what just happened to you?

A. No, I don't.

Q. And he asks you to step out of the car to do some tests?

A. Yes.

Q. Do you tell him what's going on at that point?

A. No.

Q. Now you're scared, correct?

A. Yes, I am.

Q. You're terrified?

A. Yes.

Q. You're having difficulty with these tests because of that?

A. Yes.

Q. So you say something to the officer, right?

A. I actually did. I told him when he was - when we did the - this nine-step one, I told him when he was looking at me, and I told him that "I can't do this now."

Q. And you said, "I can't do this now." Is that all you said? Did you tell him why you couldn't do it?

A. No, I couldn't.

Q. So you didn't tell him what happened to you?

A. No.

Q. Okay. Now, you had said on direct examination when your attorney was asking you questions that you just wanted to get home because you wanted to be safe.

A. Yes.

Q. So there you are on the side of the road with a police officer.

A. Yes.

Q. And you don't say anything?

A. No. I don't say anything. I'm -

- Q. Okay. And at that point, you go through the tests, and at some point, Officer Byron tells you that you're under arrest for driving while intoxicated, correct?
- A. Yes.
- Q. And he puts handcuffs on you?
- A. Yes.
- Q. Do you tell him what happened to you then?
- A. No. I was afraid to say anything.
- . . .
- Q. All right. So, during that five minute drive to the Exeter police Department, you don't tell him that you were attacked?
- A. No.
- Q. Okay. Now, you get in to the police department and he starts reading you this form. And at that point, do you tell him that you were attacked?
- A. No.
- . . .
- Q. Okay. And how about the next day when you woke up, did you call the Hampton Police Department to report what happened?
- A. No.
- Q. Okay. And did you call the Exeter Police Department to tell them what was going on?
- A. No.

Q. No. And how about the week later, did you call the Hampton Police Department then?

A. No.

Q. Have you ever reported this assault to the Hampton Police Department?

A. No, I haven't.

Q. Have you reported it to any police agency in the State of New Hampshire?

A. No, I haven't.

T 124-28.

During his re-direct examination of Stevens, defense counsel asked her to explain why she did not tell Byron about the assault when he stopped her. T 128. Stevens explained that she felt ashamed and that it was "partially [her] fault." T 128. When she started to say, "because of what happened when I was a teenager," the State objected and argued anything that Stevens had to say about when she was a teenager was irrelevant. T 129. The court interrupted defense counsel's attempts to respond to this argument and the following exchange occurred between the court and defense counsel:

Court: Why the fairy tale today?

Mr. Naro: Judge excuse me. Judge, excuse me.

Court: No, no. I'm not - you can't ask that question, okay? Thanks a lot.

Mr. Naro: Judge, that's a violation of her rights.

Court: Really?

Mr. Naro: Yes.

Court: Well, then take it up on appeal.
Next question.

T 129-30. Defense counsel thereafter concluded Stevens's re-direct examination and asked the court to excuse the jury so he could make a proffer about the excluded testimony. T 130-31. The court indicated that it would allow the defense to make the record later in the trial. T 131.

After the case was submitted to the jury, the court addressed the excluded testimony. The court noted that its comment about a "fairy tale" was imprudent and should not have been made. T 159-60. Nonetheless, the court explained that it believed that, if the defense intended to rely on Stevens's teenage experience as part of the competing harms defense, it should have referenced the event in the notice of defense. T 160. Because it was not included in the notice, the court ruled it inadmissible. T 160-61.¹

The court then permitted defense counsel to make a proffer of the excluded testimony and present further argument on its admissibility. The defense explained that Stevens would have

¹ At this point in the discussion, the court and counsel addressed the implications of the court's "fairy tale" comment, whether the jury may have heard the comment, and whether a mistrial was appropriate. T 160-66. The court then reconvened the jury to ask whether any jurors had heard any comments that were made at the bench. T 166-68. Satisfied that they had not, the court returned the jury to their deliberations. T 168-69.

testified that when she was a teenager she had been sexually assaulted and left on the side of a road. T 169. Although there were two witnesses to the incident and Stevens reported it to the police, the police never pursued her assailant. T 169-70. Stevens believed this was because the police or the witnesses were protecting her assailant. T 170. Stevens also felt that her parents blamed her for the incident. T 170. Stevens did not want to "go through all this pain with the police" if nothing would happen as a result. T 170.

The defense argued that this information was relevant and admissible to rebut the State's challenge to Stevens's credibility. It was not part of the competing harms defense nor did it become relevant until the State mounted its attack, and so the evidence did not have to be disclosed in the Notice. T 172-73, 175-76. The State countered that it never put Stevens's credibility in issue so the evidence was not relevant, and reiterated the court's comment that the information was not included in the notice of defense. T 174-75.

For two reasons, the trial court erred in not allowing Stevens to explain why she did not report the assault to Byron. First, the evidence was relevant to rebut the inference that Stevens must have fabricated the assault because she never reported it. Second, Stevens was not required by court rule or statute to include this evidence in her notice of defense.

This Court reviews a trial court's evidentiary rulings pursuant to the unsustainable exercise of discretion standard. State v. Connor, 156 N.H. 544, 546 (2007); State v. Yates, 152 N.H. 245, 249 (2005). "To demonstrate that the trial court exercised unsustainable discretion, the defendant must show that the ruling was clearly untenable or unreasonable to the prejudice of his case." Yates, 152 N.H. at 249. See also Connor, 156 N.H. at 546; State v. McGlew, 139 N.H. 505, 507 (1995).

"All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute or by these rules or by other rules prescribed by the New Hampshire Supreme Court." N.H. R. Evid. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.H. R. Evid. 401.

Contrary to the State's argument below, it did dispute the credibility of Stevens's claim that she had just been assaulted. It did so by suggesting that her allegation was not true because she did not report it to Byron when he pulled her over. The State emphasized this attack on the credibility of Stevens's assault allegation in its closing argument:

But now let's talk about this justification, that she had no choice, she had to do this because otherwise, she was going to be raped.

That was her story. She sat up there, she told you that story.

. . .

And now, you have an officer who stops you by the side of the road, a police officer, and you don't say anything to him. Not one word. Because you're too embarrassed, you're too ashamed to tell this one police officer what you're now sitting here telling all of us in the courtroom today.

It's just not reasonable, ladies and gentlemen.

. . .

It's just not reasonable, ladies and gentlemen. It's not reasonable for someone, regardless of how scared they are, to not say one word to anyone. She even told you up here she didn't tell a friend. She didn't tell anyone because she was too embarrassed and ashamed. Yet, here we are, a whole courtroom full of people. And now it's, "I had no choice, I had to do this."

T 152-54. Indeed, in the absence of the excluded testimony, Stevens's failure to report the assault to Byron would not seem "reasonable."

Stevens's explanation for why she did not report the assault thus was relevant to rebut the inference that she fabricated the sexual assault allegation. Stevens's explanation tended to disprove the suggestion that the assault did not happen because she did not report it to Byron or anyone else after she was stopped. In this respect, the evidence helped to explain the precise question that the State wanted to raise in the jury's minds - why didn't she report the assault? By challenging

Stevens's credibility based on her failure to report the assault, the State made Stevens' explanation for her failure to report "highly relevant" and, thus, admissible. State v. Kulas, 145 N.H. 246, 248 (2000) (sexual assault victim's conversation with her lawyer about reporting the incident to police was "highly relevant to explain why the victim did not report the alleged rape" earlier). See also, State v. Cook, 158 N.H. 708, 713-14 (2009) ("The State may introduce evidence to explain a sexual assault victim's behavior. [Citations omitted.] 'We have recognized in recent years that victims of sexual assaults may not immediately disclose them.'" (quoting State v. Woodard, 146 N.H. 221, 226 (2001))); State v. Legere, 157 N.H. 746, 760 (2008) (the evidence provided the necessary context for the defendant's alleged conduct and "helped to explain an otherwise inexplicable act, i.e., the murder of a man for wearing a particular shirt"); State v. Beltran, 153 N.H. 643, 714 (2006) ("the detailed evidence of the defendant's abuse of Siegel was admissible to explain her submission to the defendant's demands surrounding the murders and her delay in reporting," and relevant to her general credibility as a prosecution witness which was vigorously challenged at trial); State v. Berry, 148 N.H. 88, 92 (2002) (prior assault evidence "explained why Holly became resigned to her fate as a victim of repeated sexual assault. It also

explained her belief that reporting the abuse would be futile, thereby giving context to her delay in reporting the assaults").

Contrary to the trial court's assertion, Stevens had no obligation to provide her explanation for not reporting the assault in her notice of competing harms defense or otherwise give any advance notice that she had been assaulted as a teenager. Superior Court Rule 98 B(1) sets forth a defendant's pretrial disclosure obligations. Regarding defenses, the rule requires that a defendant file a notice with the court and the prosecution of any defense within thirty days after her entry of a not-guilty plea. N.H. Super. Ct. R. 98 B(1). Rule 101, which governs competing harms defenses, requires that the notice set forth the grounds for the defense. N.H. Super. Ct. R. 101. RSA 627:3 defines the scope of a "Competing Harms" defense as "[c]onduct which the actor believes to be necessary to avoid harm to himself or another . . ." where such conduct is "urgently necessary" and there are "no lawful alternatives." RSA 627:3, I; State v. O'Brien, 132 N.H. 587, 589-90 (1989).

Stevens's Notice of Competing Harms complied with her disclosure obligations under the court rules and the statute. The notice properly identified the harm that she contended necessitated her driving, that is, that she drove to avoid a "physical and/or sexual assault by two males." A2-A3. Stevens's explanation for why she did not report the assault to Byron or

any other law enforcement agency after Byron stopped her was not, as the court reasoned, "part and parcel" of the harm she was seeking to avoid by driving. On the contrary, the explanation only became relevant when the State chose to attack the defense by suggesting it was not credible because Stevens failed to report it. Neither the court rules nor the competing harms statute required that Stevens anticipate how the State intended to attack her defense and disclose the evidence she would offer in response to such an attack. Cf. State v. Fichera, 153 N.H. 588 (2006) (finding sufficient a notice of insanity defense stating defendant's "intention to assert the defense of insanity" pursuant to the insanity statute). Indeed, although Rule 98 requires a defendant to disclose pretrial statements of witnesses a defendant anticipates calling at trial, the rule exempts from this disclosure requirement any statements of the defendant. N.H. Super. Ct. R. 98 C(2) ("Notwithstanding the preceding sentence, this rule does not require the defendant to provide the state with copies of or access to statements of the defendant.")

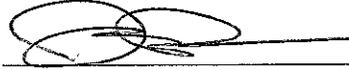
Stevens's explanation for not reporting the sexual assault to Byron or any other law enforcement agency was "highly relevant" and admissible. The trial court's ruling excluding it from evidence was clearly untenable and unreasonable and prejudiced Stevens's defense. Her conviction should be reversed.

CONCLUSION

WHEREFORE, Kristen Stevens respectfully requests that this Court vacate her conviction.

Undersigned counsel requests 15 minutes of oral argument.

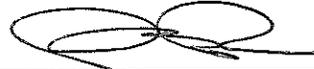
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the following brief were sent by first-class mail to the N.H. Attorney General's Office, 33 Capitol Street, Concord, NH 03301.



Pamela E. Phelan

DATED: December 22, 2009