

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2007-0281, State of New Hampshire v. Frederick W. Davis, the court on November 20, 2008, issued the following order:

Having considered the briefs and record on appeal, we conclude that oral argument is unnecessary for the disposition of this appeal. See Sup. Ct. R. 18(1). We affirm.

The defendant, Frederick Davis, appeals his convictions for pattern aggravated felonious sexual assault and for indecent exposure and lewdness. He argues that the trial court erred by failing: (1) to dismiss the pattern sexual assault charges for insufficient evidence; and (2) to instruct the jury on an element of the indecent exposure and lewdness charge.

The defendant concedes that he did not raise these issues in the trial court, and, thus, they are not preserved for our review. See State v. Blackmer, 149 N.H. 47, 48 (2003). He asks, however, that we consider them under our plain error rule. See Sup. Ct. R. 16-A.

Since adoption of the plain error rule, we have emphasized that it should be used sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result. State v. Hancock, 156 N.H. 301, 302 (2007). To find error under this rule: (1) there must be error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings. *Id.*

The defendant first argues that because the State failed to present sufficient evidence to establish that the assaults took place over a period of two months or more, see RSA 632-A:1, I-c (2007) (pattern of sexual assault requires that assaults take place on same victim for a period of two months or more), the trial court erred in failing to dismiss the pattern assault charges *sua sponte*.

In a challenge to the sufficiency of the evidence, the defendant must prove that no rational trier of fact, viewing the evidence in the light most favorable to the State, could have found guilt beyond a reasonable doubt. State v. Pepin, 156 N.H. 269, 280 (2007). On appeal, we examine each evidentiary item in the context of all of the evidence, not in isolation. *Id.*

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In support of his challenge to the sufficiency of the evidence, the defendant cites alleged inconsistencies in the victim's testimony concerning his age at the time of the assaults. During direct examination, the victim testified that he thought he was eleven years old when he first went to the defendant's house and was assaulted. On cross-examination, he testified that he first went to the defendant's house a "week or a few weeks" after a Fourth of July party, where he met the defendant for the first time. The victim also testified that he had reported that he was ten years old when he first spoke with the police and that he was not "good with ages and stuff." The defendant testified that he met the victim in 2003 at a picnic.

The defendant contends that given the victim's age and August birthday and his testimony that he first went to the defendant's house a week or a few weeks after a Fourth of July party, the party must have been in 2004. Therefore, the defendant argues, because the victim did not testify as to how long after he turned twelve the sexual contact continued, the evidence establishes only that it occurred sometime between mid-July and August 18 of 2004.

The evidence, however, is not so limited. In addition to the victim's testimony that the assaults occurred when he was eleven and twelve, the victim's mother testified that the victim saw the defendant when the victim was between the ages of ten and fourteen. Other testimony established that the victim visited the defendant before the victim's parents separated in 2003, and after the victim's mother remarried in 2005.

Examining each evidentiary item, not in isolation, but in the context of all of the evidence, and viewing it in the light most favorable to the State, a rational jury could have found that the sexual contact occurred from the time the victim was ten and continued after he became twelve. Accordingly, we find no error in the trial court's failure to dismiss the pattern felonious sexual assault charges for insufficient evidence. *See id.*

The defendant also argues that the trial court committed plain error by failing to define "sexual contact" when it instructed the jury on the charge of indecent exposure. *See* RSA 645:1 (2007). RSA 645:1 does not define "sexual contact." The defendant contends that the definition of sexual contact contained in RSA 632-A:1, IV, applies to the charged offense in this case. As the State notes, we have never held that the definitions contained in RSA 632-

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A:1 (2007) are applicable to offenses found outside RSA chapter 632-A – indeed, the language preceding the definitions states: “In this chapter:”. RSA 632-A:1. Thus, even if we assume that the defendant’s argument may have merit, the law on this issue was not clear at the time of trial and remains unsettled at this time. Accordingly, any error made by the trial court in instructing the jury could not have been clear or unequivocally obvious. See State v. Panarello, 157 N.H. 204, 209-10 (2008). The defendant has therefore failed to demonstrate that the second requirement for application of the plain error rule has been met. See *id.*

Affirmed.

Broderick, C.J., and Dalianis, Duggan, Galway and Hicks, JJ., concurred.

**Eileen Fox,
Clerk**

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