

Trahan had not been subpoenaed, he was not required to put on a defense. The defendant did not take the witness stand, nor did he provide any more information. The court then adjudicated the defendant an habitual offender. On appeal, the defendant contends, *inter alia*, that there was no independent identification process proving that he was Kevin Trahan.

We will not decide the issue of the sufficiency of the evidence, but, rather, pursuant to our superintending powers under RSA 490:4, will consider the identification procedure utilized by the trial court. The defendant appeared in court pursuant to the service upon him of an habitual offender petition. He argued at trial that, since he had not been subpoenaed, he did not have to testify. The service upon him, however, of the habitual offender petition required his presence in court. Service of a subpoena requiring the defendant's presence would have been nothing more than superfluous. The only issue at trial was whether the defendant was the same individual whose record of conviction was before the court. The court should have allowed the State to call the defendant to the witness stand and question him on the issue of identification. In effect, the court had the power to compel the defendant to testify, barring the assertion of any relevant privileges, and should have done so.

The defendant's argument that the civil standard of proof employed in habitual offender petitions offends the due process clause of the fifth amendment was not raised below, and we decline to address that issue. *See Daboul v. Town of Hampton*, 124 N.H. 307, 309, 471 A.2d 1148, 1149 (1983).

*Reversed and remanded.*

Hillsborough  
No. 86-335

THE STATE OF NEW HAMPSHIRE

v.

HARRY DAY

June 3, 1987



secutive terms of 7 1/2 to 15 years on one count and 7 to 15 years on the other; the second sentence was suspended.

Part I, article 15 of the State Constitution provides in relevant part that “[n]o subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him. . . .” More specifically, this means that

“an indictment must contain sufficient information to advise a defendant of the offense with which he is charged. . . . It must state the elements of the offense with enough specificity to permit the defendant to prepare for trial and to protect him, whether acquitted or convicted, from later being placed in jeopardy for the same offense.”

*State v. Sands*, 123 N.H. 570, 588, 467 A.2d 202, 213 (1983) (citations omitted). However, we have noted many times that “[t]he test is not whether the information could be more comprehensive and certain, but only whether the indictment meets the basic requirements of specificity and fair notice. *State v. Manchester News Co.*, 118 N.H. 255, 257, 387 A.2d 324, 327, *appeal dismissed*, 439 U.S. 949 (1978).” *Sands*, *supra* at 589, 467 A.2d at 213. Thus, to be sufficient, an indictment must state the elements of the offense; the statement thereof must be specific enough to allow adequate trial preparation; and the defendant must be protected from later being placed in jeopardy again for the same offense.

The first question in this instance is whether the name of the under-thirteen victim of an aggravated felonious sexual assault is an element of the offense which must be specified in an indictment, the absence of which will render the indictment constitutionally insufficient. RSA 632-A:2, XI provides that “[a] person is guilty of a class A felony if he engages in sexual penetration with another person . . . [w]hen the victim is less than 13 years of age.” (Emphasis added.)

RSA 625:11, III defines “[e]lement of an offense” as

“such conduct, or such attendant circumstances, or such a result of conduct as:

- (a) Is included in the definition of the offense; or
- (b) Establishes the required kind of culpability; or
- (c) Negatives an excuse or justification for such conduct;  
or
- (d) Negatives a defense under the statute of limitations;  
or
- (e) Establishes jurisdiction or venue.”

■■ Thus, as more narrowly stated, the issue to be decided is whether the name of the victim is an "attendant circumstance[ ] . . . as . . . [i]s included in the definition of the offense." We hold that it is not. The essential elements of the offense here are that the defendant must have sexually penetrated a person who was under the age of thirteen at the time of the offense. RSA 632-A:2, XI; see also New Hampshire Bar Association, *New Hampshire Criminal Jury Instructions*, Instruction 2.08 (1985). The indictments at issue specified exactly that. The protection of the victim from unnecessary disclosure of her identity, particularly in view of her age, is an appropriate policy concern of the State, and omission of her name from the indictment was one, though perhaps not the best, way to so protect her. See *United States v. Agone*, 302 F. Supp. 1258, 1261-62 (S.D.N.Y. 1969) (under certain circumstances not present in cited case, name of victim may properly be omitted from indictment). On the facts of this case, in which the omission of the name of the victim did not hobble the defendant's preparation of his defense, the omission does not, *per se*, render the indictment constitutionally insufficient.

■ It is clear that the defendant knew from his earliest contacts with the police who the alleged victim was, and was therefore not prejudiced in his ability to prepare to meet the charges against him at trial. See *State v. Lakin*, 128 N.H. 639, 640, 517 A.2d 846, 847 (1986). This is thus not a case where the defendant could have been confused as to the identity of the victim described in the indictments. Nor could he be put again in jeopardy for the same offenses, as he would be entitled to rely on the trial record as well as on the indictments in any subsequent attempt to prosecute him. *State v. Fennelly*, 123 N.H. 378, 388-89, 461 A.2d 1090, 1095-96 (1983). The motion to quash was therefore properly denied.

*Affirmed.*

All concurred.