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THE SUPREME COURT OF NEW HAMPSHIRE

Grafton
Case No. 2024-0625
Citation: State v. Brousseau, 2026 N.H. 10

THE STATE OF NEW HAMPSHIRE

v.

MATTHEW BROUSSEAU

Argued: February 12, 2026
Opinion Issued: March 13, 2026

John M. Formella, attorney general, and Anthony J. Galdieri, solicitor general (Audriana Mekula, assistant attorney general, on the brief and orally), for the State.

Pamela E. Phelan, senior assistant appellate defender, of Concord, on the brief and orally, for the defendant.

DONOVAN, J.

[¶1] Following a jury trial in Superior Court (MacLeod, J.), the defendant, Matthew Brousseau, was convicted on six counts of pattern aggravated felonious sexual assault (AFSA), see RSA 632-A:2, III (2016); one count of

felonious sexual assault (FSA), see RSA 632-A:3, III (Supp. 2024); and five counts of criminal threatening, see RSA 631:4, I (2016). The defendant appeals his convictions, arguing that: (1) the Superior Court (Bornstein, J.) erred by allowing the complainant to testify outside of his presence at trial in violation of his right to confrontation under the New Hampshire Constitution; (2) the evidence was insufficient to support his convictions on three of the pattern AFSA charges; and (3) the trial court “may have erred when it failed to disclose more of the records” that it reviewed in camera. We reverse the defendant’s conviction on the pattern AFSA charge alleging sexual intercourse, and reverse and remand as to his remaining convictions.

I. Background

[¶2] The jury could have found the following facts. When the complainant was between the ages of four and ten years old, she visited the defendant on every other weekend and on certain holidays. During the visits, the defendant and the complainant slept in the same bed and showered together. The defendant began engaging in numerous acts of sexual assault and threatened to kill the complainant and her family if she spoke to anyone about his conduct. The complainant eventually told her mother about the defendant’s conduct, and the complainant’s mother contacted the New Hampshire Division for Children, Youth and Families.

[¶3] The defendant was ultimately indicted on eight counts of pattern AFSA, three counts of AFSA, one count of FSA, and five counts of criminal threatening based upon conduct occurring between November 2015 and February 2022. Prior to trial, the defendant filed motions seeking in camera review of records pertaining to the complainant, which the trial court granted in part and denied in part. The State moved to allow the complainant to testify at trial by way of “remote live video-feed,” asserting that “the trauma inflicted on [the complainant] by the defendant’s presence would very likely render her ‘unavailable,’ . . . to testify in the courtroom.” Following a hearing, the trial court granted the State’s motion.

[¶4] At trial, the complainant testified by way of a two-way video feed. After the State rested, the parties agreed to dismiss two of the pattern AFSA charges and two of the single instance AFSA charges. The State entered a nolle prosequi on the third single instance AFSA charge. The jury subsequently convicted the defendant on the remaining charges, and this appeal followed.

II. Analysis

A. Confrontation Clause

[¶5] We first consider the defendant’s argument that allowing the complainant to testify outside of his presence violated his right to confrontation

under the State Constitution. The New Hampshire Constitution provides that an individual accused of a crime “shall have a right . . . to meet the witnesses against him face to face.” N.H. CONST. pt. I, art. 15. We have characterized the right to confrontation as “one of the basic safeguards of liberty.” State v. Cook, 135 N.H. 655, 661 (1992). “The constitutional right to confront adverse witnesses is fundamental and of such importance that the State’s interest in protecting a certain class of witnesses must fall before the right of the accused to seek out the truth in the process of defending himself.” State v. Warren, 177 N.H. 196, 203 (2025), 2025 N.H. 5, ¶20; see State v. Howard, 121 N.H. 53, 58 (1981). “Although the right is not absolute, we have recognized few exceptions.” Warren, 177 N.H. at 203, 2025 N.H. 5, ¶20.

[¶6] In State v. Warren, the State moved to allow the alleged victim to testify by a one-way video feed “to prevent her from having to see” the defendant, her mother. Id. at 199, 2025 N.H. 5, ¶7. The trial court granted the State’s motion, applying the analysis set forth in Maryland v. Craig, 497 U.S. 836 (1990). Id. at 200, 2025 N.H. 5, ¶8. We reversed, holding that Part I, Article 15 of the New Hampshire Constitution “clearly and unambiguously requires a face-to-face confrontation between the accused and the witness.” Id. at 204, 2025 N.H. 5, ¶21. “[U]nder the literal meaning of the words, Part I, Article 15 mandates that an individual accused of a crime has the right to be in the presence of and face the witnesses testifying at trial.” Id. at 202, 2025 N.H. 5, ¶14. Accordingly, we concluded that “where the witness testified from a location outside the presence of the defendant and could not see the defendant while she was testifying, there was no face-to-face meeting, thereby violating the plain meaning of Part I, Article 15.” Id. at 204, 2025 N.H. 5, ¶22. We clarified that the right to direct confrontation is not “merely a preference” and explained that this court will treat the test set forth in Craig as limited to challenges brought solely under the Sixth Amendment to the United States Constitution. Id. at 204, 2025 N.H. 5, ¶21 (quotation omitted); see Craig, 497 U.S. at 849.

[¶7] Warren controls the outcome of this case. Here, prior to trial, the State filed a motion requesting that the complainant be allowed to testify “by remote live video-feed” because the trauma of being in the defendant’s presence would likely render the complainant unavailable to testify. In support of its motion, the State attached a letter from the complainant’s therapist explaining that “[h]aving to testify to [the alleged] events in front of [the defendant] as well as public figures . . . would most likely impact [the complainant’s] ability to verbalize the events as well as recall them in a way that is needed for testimony.”

[¶8] The trial court’s decision granting the State’s motion, which preceded our decision in Warren, applied the analysis set forth in Craig. See Craig, 497 U.S. at 846-47, 849-50. The trial court found that the State had a legitimate interest in protecting the complainant from trauma, and that being

in the defendant's presence would impair or preclude the complainant's ability to testify. The trial court found that "having [the complainant] sit in front of a laptop will provide the jurors, the Defendant, the Court, and everyone in the courtroom with the ability to observe her demeanor, her manner of speech and so forth." Further, it noted that "it's important that [the complainant's] face and facial expressions and manner of expression be visible and clearly visible in the video," but that "if she doesn't want to look at the Defendant, I'm sure there's ways she can accomplish that."

[¶9] Consistent with Warren, we conclude that allowing the complainant to testify remotely from another room in the courthouse by way of a two-way video feed violated the defendant's confrontation right under the State Constitution. The complainant's testimony deprived the defendant of his "right to be in the presence of and face the witnesses testifying at trial." Warren, 177 N.H. at 202, 2025 N.H. 5, ¶14. We agree with the defendant that "it is the physical presence of a witness, a defendant, and a jury that is a mainstay of the right to confrontation." See Com. v. Bergstrom, 524 N.E.2d 366, 371 (Mass. 1988) ("To interpret the words of this mandate as requiring only that the defendant be able to see and hear the witness renders superfluous the words 'to meet' and 'face to face.'" (construing a nearly identical provision of the Massachusetts constitution)).

[¶10] We are not persuaded by the State's argument on appeal that, because the complainant and the defendant could see each other during the complainant's testimony, and the complainant "testified directly into the camera, meaning that she could make direct eye contact with the camera, and therefore with the defendant," the complainant "provided face-to-face testimony in the defendant's presence." The complainant testified outside the defendant's presence, and there was no face-to-face meeting regardless of whether the complainant and the defendant saw each other by video. See Warren, 177 N.H. at 204, 2025 N.H. 5, ¶22. Accordingly, we reverse the defendant's convictions and remand for further proceedings.

B. Sufficiency of the Evidence

[¶11] We next consider the defendant's argument that there was insufficient evidence to support his convictions on three of the pattern AFSA charges. We address this argument because, if the evidence was insufficient to support the convictions, the Double Jeopardy Clauses of both the New Hampshire and United States Constitutions would preclude a new trial on those charges. State v. Horak, 159 N.H. 576, 582 (2010). Because the defendant failed to preserve his sufficiency challenge, we conduct a plain error analysis of his arguments on appeal. See State v. Houghton, 168 N.H. 269, 273 (2015). To find plain error: (1) there must be an error; (2) the error must be plain; and (3) the error must affect substantial rights. State v. Pinault, 168 N.H. 28, 33 (2015). "If all three of these conditions are met, we may then

exercise our discretion to correct a forfeited error only if the error meets a fourth criterion: the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 33-34.

[¶12] With respect to the first prong of plain error review — whether there was error — we review the evidence to determine whether it was sufficient to prove the essential elements of the charges beyond a reasonable doubt. *See State v. Racette*, 175 N.H. 132, 140 (2022). A challenge to the sufficiency of the evidence presents a question of law; therefore, our standard of review is *de novo*. *Id.* To prevail upon a challenge to the sufficiency of the evidence, the defendant must demonstrate that no rational trier of fact, viewing all of the evidence and all reasonable inferences drawn therefrom in the light most favorable to the State, could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

[¶13] RSA 632-A:2, III provides: “A person is guilty of [AFSA] when such person engages in a pattern of sexual assault against another person, not the actor’s legal spouse, who is less than 16 years of age.” “Pattern of sexual assault” means “committing more than one act under RSA 632-A:2 or RSA 632-A:3, or both, upon the same victim over a period of 2 months or more and within a period of 5 years.” RSA 632-A:1, I-c (2016).

[¶14] The defendant first argues that there was insufficient evidence to support his conviction on the two indictments alleging pattern offenses in which he “purposely engag[ed] in sexual contact with [the complainant] . . . in that [the defendant] grabbed [the complainant’s] buttocks directly, through clothing, or otherwise, on more than one occasion” between November 2015 and November 2019, and between November 2019 and February 2022. The defendant asserts that the State’s evidence “establishe[d] only that the alleged sexual act occurred more than once,” but that “the evidence is ambiguous about whether those acts occurred at least two months apart.”

[¶15] We conclude that the evidence was sufficient to sustain the defendant’s convictions on the two charges alleging that the defendant engaged in a pattern of grabbing the complainant’s buttocks. At trial, the complainant testified that she visited the defendant every other weekend when she was between the ages of four and ten. The complainant testified that when she was “younger, closer to the age of 4,” the defendant began touching her buttocks while she was in bed and “sometimes in the shower.” She stated that the defendant touched her buttocks while she was in bed more than once when she was between the ages of four and seven and more than once when she was between the ages of eight and ten. She also testified that the defendant regularly touched her buttocks when she was in the shower until she was ten years old. The complainant explained that, when she visited the defendant, she “ha[d] to take a shower at least one of those days . . . but preferably both days.” In light of the complainant’s testimony, as well as testimony that the

complainant visited the defendant “every other weekend . . . as well as a week in the summertime,” the jury could have rationally concluded that the defendant touched the complainant’s buttocks more than once “over a period of 2 months or more and within a period of 5 years” from 2015 to 2019, as well as over a separate period from 2019 to 2022. RSA 632-A:1, I-c.

[¶16] The defendant also argues that there was insufficient evidence to support his conviction on the charge alleging that he engaged in a pattern offense in which he “knowingly engaged in sexual penetration, to wit: sexual intercourse with [the complainant] . . . on more than one occasion” between November 2019 and February 2022. The defendant maintains that the complainant’s testimony was insufficient to establish when the acts of penetration occurred “or when they occurred in relation to each other.” We agree.

[¶17] The complainant testified that the defendant engaged in sexual intercourse with her while they were on the defendant’s bed. She stated that she had “pain in [her] vagina only a couple times,” and that, although she could not recall what happened, “it was when [she] was older . . . probably nine.” The complainant testified that, although she did not know how many times the defendant engaged in sexual penetration, she recalled that “it was at least two times.” We conclude that this testimony was insufficient to support the defendant’s conviction for engaging in sexual intercourse with the complainant “over a period of 2 months or more.” RSA 632-A:1, I-c. The complainant’s testimony did not establish when the two acts occurred in relation to one another.

[¶18] The State contends that the jury could have inferred that these acts occurred for a period of two or more months and within a period of five years “based on the other evidence establishing how often the defendant sexually assaulted [the complainant] in other ways from when she was four to ten,” together with the complainant’s young age and her stated difficulty recalling traumatic events. We are not persuaded. Nothing in the complainant’s testimony established that the instances of sexual intercourse occurred with the same frequency as the other types of conduct with which the defendant was charged. *See Racette*, 175 N.H. at 140-41 (concluding evidence supporting conviction on pattern AFSA charge was insufficient because, among other reasons, complainant’s testimony did not establish that “the instances of attempted sexual intercourse occurred with the same frequency as the instances of touching the intimate parts of her body”). Viewing the evidence in the light most favorable to the State, we conclude that no rational juror could have found beyond a reasonable doubt, based upon the complainant’s testimony alone and without making assumptions of facts not in evidence, that the defendant engaged in sexual intercourse with the complainant more than once “over a period of 2 months or more.” RSA 632-A:1, I-c.

[¶19] We next address whether the error was plain. See Racette, 175 N.H. at 141. An error is plain when it is clear or obvious. Id. We conclude that the error was plain because there was no evidence to establish that the alleged sexual intercourse occurred more than once “over a period of 2 months or more,” an essential element of the crime. See id.; RSA 632-A:1, I-c; see also RSA 632-A:2, III. Further, we conclude that the error affected the defendant’s substantial rights because the trial court’s failure to dismiss the indictment resulted in the defendant’s conviction. See State v. Guay, 162 N.H. 375, 384 (2015). Finally, because the jury convicted the defendant based upon insufficient evidence of guilt, allowing the defendant’s conviction to stand would seriously affect the fairness and integrity of judicial proceedings. See id. Accordingly, the trial court committed plain error, and we reverse the defendant’s conviction on the pattern of sexual intercourse charge.

C. In Camera Review

[¶20] Finally, the defendant contends that the trial court may have erroneously failed to disclose some of the records that it reviewed in camera. Prior to trial, the defendant filed motions seeking production of the complainant’s counseling and mental health records for in camera review by the trial court. The trial court granted the motions in part and, following its review, disclosed certain records to the parties. The defendant requests that, even if the trial court applied the correct legal standard, we review the records to determine whether the trial court erroneously failed to disclose any additional records to the parties.

[¶21] We review a trial court’s ruling on the management of discovery to determine whether its decision is sustainable. State v. Girard, 173 N.H. 619, 627 (2020). When a defendant argues on appeal that a trial court’s ruling regarding the disclosure of privileged records is unsustainable, we must review the same records and determine whether the ruling was clearly unreasonable or untenable to the prejudice of his case. Warren, 177 N.H. at 210, 2025 N.H. 5, ¶46.

[¶22] We recently clarified that, to obtain disclosure of records held by private organizations that are privileged under RSA 329-B:26 and RSA 330-A:32, a defendant must establish an essential need for the records sought. State v. Zarella, 177 N.H. 328, 341 (2025), 2025 N.H. 20, ¶36. Given that our decision in Zarella was not issued until after the trial court’s orders in this case, the trial court did not have the benefit of that opinion. Consistent with Girard, the trial court determined whether “material and relevant evidence is in fact contained in the records.” Girard, 173 N.H. at 628 (quotation omitted); see also N.H. R. Ev. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”).

[¶23] The defendant contends that Zarella is inapplicable and that there may be undisclosed records that are “material and relevant” to his defense. Girard, 173 N.H. at 628. We conclude, based upon our review, that the trial court did not unsustainably exercise its discretion with respect to the majority of the records, with the exception of certain specific records, which we will identify to the trial court in a separate order under seal. See Warren, 177 N.H. at 210, 2025 N.H. 5, ¶46; Girard, 173 N.H. at 628. We therefore vacate the trial court’s order dated June 3, 2024 and remand for the trial court to: (1) determine whether Zarella applies to the records identified; and, if so, (2) provide the complainant with notice and an opportunity to be heard. See Zarella, 177 N.H. at 342, 2025 N.H. 20, ¶37. We express no opinion as to whether any of these records are admissible or may be used for cross-examination. The parties will receive copies of our order without the records attached.

Reversed and remanded.

MACDONALD, C.J., and COUNTWAY and GOULD, JJ., concurred.