THE SUPREME COURT OF NEW HAMPSHIRE

Strafford
Case No. 2024-0321
Citation: State v. Price, 2026 N.H. 3

THE STATE OF NEW HAMPSHIRE

v.

GABRIEL PRICE

Argued: November 12, 2025
Opinion Issued: January 30, 2026

John M. Formella, attorney general, and Anthony J. Galdieri, solicitor general (Elizabeth C. Woodcock, senior assistant attorney general, on the brief and orally), for the State.

Christopher M. Johnson, chief appellate defender, of Concord, on the brief and orally, for the defendant.

MACDONALD, C.J.

[¶1] The defendant, Gabriel Price, appeals his convictions following a jury trial in Superior Court (Edwards, J.) for reckless conduct, second degree assault, and simple assault. See RSA 631:3 (Supp. 2024); RSA 631:2 (Supp. 2024); RSA 631:2-a (2016). The defendant argues that: (1) there was insufficient evidence to prove that he acted recklessly by leaving his child unsupervised in his car in the presence of his gun; (2) the trial court erred in

its jury instructions on self-defense, thereby requiring reversal of the second degree assault conviction; and (3) the trial court erred in refusing to give a unanimity instruction on the simple assault charge. We reverse the defendant's conviction for reckless conduct, and reverse and remand his convictions for second degree assault and simple assault.

I. Background

[¶2] The jury could have found the following facts. On February 8, 2022, the defendant picked up his ten-year-old child from school and was driving home. The defendant and the victim were merging into the same lane, and their vehicles collided. The defendant and the victim pulled over.

[¶3] The defendant approached the victim's vehicle and smashed the driver-side window with a baton. The defendant then hit the victim with the baton multiple times. After the victim got out of the vehicle, he fell to the ground where the defendant beat and kicked him.

[¶4] Other motorists observed the incident and called 911, and the defendant left before the police arrived. The defendant exited the highway and called 911. The police arrested the defendant and, during the arrest, he told the trooper that there was a child and a gun in the vehicle. The State subsequently charged the defendant and, following a jury trial, he was convicted for reckless conduct, second degree assault, two simple assaults, and criminal mischief. This appeal followed.

II. Analysis

[¶5] On appeal, the defendant challenges three of his convictions: (1) reckless conduct for placing his child in danger of serious bodily injury by leaving him unsupervised in a car containing an unsecured, loaded firearm when the defendant left the vehicle to confront the victim after the accident; (2) second degree assault for recklessly causing injury to the victim by striking him with a deadly weapon (a baton); and (3) simple assault for unprivileged physical contact by kicking the victim. The defendant argues that the State introduced insufficient evidence to convict him of reckless conduct and that the trial court erred by restricting direct examination of his ten-year-old child. He also argues that the trial court erred in its jury instruction on self-defense, and by declining to give a specific unanimity instruction on the simple assault charge. We address these arguments in turn.

A. Reckless Conduct

[¶6] The defendant argues that the evidence was insufficient to prove that he acted with criminal recklessness in leaving his child alone in his vehicle with a gun. The defendant raises the issue as plain error, "[b]ecause the claim

was not raised in the trial court." See Sup. Ct. R. 16-A. Our review of the record, however, establishes that the issue was sufficiently raised to preserve appellate review. At the close of the State's case, defense counsel moved to dismiss the reckless conduct charge for insufficient evidence. Moreover, following trial the defendant moved for judgment notwithstanding the verdict on the reckless conduct charge, arguing that the evidence was insufficient to prove that "leaving a child alone in a vehicle with a weapon that is incapable of being fired at the time is a 'gross deviation' from the conduct of a law-abiding citizen." Accordingly, the purpose of our preservation requirement was met. See State v. Ploof, 165 N.H. 113, 118 (2013) (explaining that the purpose of our preservation rule is to afford the trial court an opportunity to correct any error it may have made before those issues are presented for appellate review).

[¶7] A challenge to the sufficiency of the evidence raises a claim of legal error, which we review de novo. State v. Reed, 177 N.H. __, __ (2025), 2025 N.H. 34, ¶16. When considering a challenge to the sufficiency of the evidence, we objectively review the record to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State. Id. The trier of fact may draw reasonable inferences from facts proven as well as from facts found as a result of other inferences, provided they can be reasonably drawn therefrom. State v. Pierce, 176 N.H. 487, 492 (2024), 2024 N.H. 12, ¶18.

[¶8] Pursuant to RSA 631:3, I, "[a] person is guilty of reckless conduct if he recklessly engages in conduct which places or may place another in danger of serious bodily injury." A defendant is criminally reckless if he was aware of a substantial, unjustifiable risk of serious bodily injury resulting from his conduct, consciously disregarded the risk, and had knowledge of circumstances that made disregarding the risk a "gross deviation" from law-abiding conduct. State v. Belleville, 166 N.H. 58, 62 (2014). Assessment of criminal recklessness involves comparing the defendant's conduct with that of a law-abiding person. Id. The fact-finder should measure the "substantiality" and "unjustifiability" of the risk by asking whether its disregard, given the actor's perceptions, involved a gross deviation from the standard of conduct that a law-abiding person in the actor's situation would observe. Id.

[¶9] The defendant's child testified that he was sitting in the back seat of the vehicle behind the driver's seat. He stated that the length of the altercation between his father and the victim was "maybe . . . 10 minutes." A state trooper testified that he "looked through the interior of the defendant's vehicle" and that the gun holster was "clipped to . . . a pocket" in the front of the driver's seat between the defendant's legs. The trooper testified that there was a magazine in the gun but there was no round chambered in the gun and that "[y]ou have to actually pull back the slide and let it go for a round to be ready to be fired."

[¶10] This evidence established that: there was no round in the chamber of the gun and a further step was required to be taken to prepare the gun to be fired; the gun was holstered in the front of the driver's seat facing away from the child seated in the back seat; and the child was alone in the vehicle for approximately ten minutes during the defendant's altercation with the victim. Considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State, we conclude that, on this record, no rational trier of fact could have found beyond a reasonable doubt that the defendant was aware of a substantial risk that his child would suffer serious bodily injury or that leaving his child alone in the vehicle with the gun was a "gross deviation from the conduct of a law-abiding citizen." Belleville, 166 N.H. at 62; cf. State v. Mentus, 162 N.H. 792, 797-98 (2011) (observing that it was a reckless act for the defendant to handle a gun in a vehicle when he did not determine whether there was a round in the chamber, or check to see if the safety was on, and pointed the gun at the back of the seat in which the victim was sitting). Furthermore, there was no evidence upon which a rational trier of fact could have found beyond a reasonable doubt that the defendant, at the time he exited his vehicle to approach the victim, consciously disregarded any risk posed by the presence of the firearm.

[¶11] Accordingly, we reverse the defendant's conviction for reckless conduct for insufficient evidence. In light of this conclusion, we need not address the defendant's argument that it was error to restrict direct examination of his child about the child's awareness of gun safety. See Pierce, 176 N.H. at 492, 2024 N.H. 12, ¶18 (explaining that a determination that the evidence was legally insufficient to convict the defendant precludes a second trial on that charge).

B. Self-Defense Instruction

[¶12] The defendant next argues that the trial court erred in its instructions to the jury on self-defense. The State asserts that the defendant failed to preserve this issue for appellate review. As a general rule, a contemporaneous objection to a jury instruction is necessary to preserve the issue for appellate review. State v. Nightingale, 160 N.H. 569, 577 (2010). Here, after reading the instructions to the jury, and before sending the jury to deliberate, the trial court held a sidebar at which defense counsel objected to the instruction at issue. That specific objection was sufficient to preserve the issue for appellate review. See id.

[¶13] Whether a particular jury instruction is necessary, and the scope and wording of jury instructions, are within the sound discretion of the trial court. State v. Washburn, 170 N.H. 688, 697 (2018). We review the trial court's decisions on these matters for an unsustainable exercise of discretion. Id. To show that the trial court's decision is not sustainable, the defendant

must demonstrate that the court's ruling was untenable or unreasonable to the prejudice of his case. Id.

[¶14] Regarding self-defense, the trial court instructed the jury that:

> The law of self-defense or defense of another distinguishes between the use of deadly force and non-deadly force. The term "deadly force" means any assault or confinement which the actor commits with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily injury. **Purposely striking with a baton . . . capable of causing serious bodily injury or death in the direction of another person constitutes deadly force.** If you find that the defendant struck [the victim] with a baton . . . in response to a threat which would be considered by a reasonable person as a threat to inflict serious bodily injury or death and the defendant's intent in striking with the baton . . . was to warn away [the victim], then defendant has not committed a criminal act and you must find him not guilty.

(Bolding and underlining added.) Defense counsel objected to the inclusion of the bolded language, arguing that it was legally incorrect. The trial court offered to remove the bolded sentence, but only if the underlined sentence was also removed. Defense counsel objected to the court's proposal, given that the underlined sentence was not erroneous. Faced with the option offered by the trial court, defense counsel agreed to the instructions.

[¶15] We agree with the defendant that the bolded instruction erroneously "communicated that the act of striking with a baton constituted deadly force as a matter of law," thereby taking from the jury "the duty of deciding whether [the defendant's] use of the baton constituted deadly force." (Italics omitted.) The trial court's instruction prior to the bolded language correctly instructed the jury that "'deadly force'" means "any assault or confinement which the actor commits with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily injury." See RSA 627:9, II (2016). The bolded instruction that followed, however, treated "[p]urposely striking with a baton . . . capable of causing serious bodily injury or death" as satisfying the mens rea element in RSA 627:9, II, i.e., that the defendant act with the purpose of causing, or commit an assault which he knows to create a substantial risk of causing, death or serious bodily injury. See id. A finding that the defendant purposely struck the victim with a baton that is capable of causing serious bodily injury or death does not resolve whether the defendant had the purpose of causing death or serious bodily injury or had knowledge that his act would create a substantial risk of causing death or serious bodily injury. Thus, in essence the bolded instruction

resolved the mens rea element of deadly force against the defendant. See State v. Williams, 133 N.H. 631, 634 (1990) (explaining that where an error is akin to the direction of a verdict for the prosecution on an element of the offense charged, it is a constitutional error requiring reversal). We agree with the defendant that "the jury could not both follow its instructions and find that [his] act of striking [the victim] with the [baton] amounted only to non-deadly force."

[¶16] We are not persuaded that the defendant invited this error through his acquiescence to the instruction at trial. Given that the defendant was entitled to the underlined instruction, the trial court's refusal to strike the bolded erroneous instruction unless the defendant agreed to removing the non-erroneous underlined instruction was untenable or unreasonable to the prejudice of his case. See Washburn, 170 N.H. at 697. Accordingly, we conclude that the trial court's ruling was an unsustainable exercise of discretion. Therefore, we reverse the defendant's conviction for second degree assault and remand.

C. Specific Unanimity Instruction

[¶17] Finally, the defendant argues that the trial court erred in refusing to give a specific unanimity instruction for the simple assault charge alleging kicking. Citing State v. Greene, 137 N.H. 126 (1993), the defendant asserts that the jury instructions "failed adequately to communicate" that the jury "had to agree unanimously on a particular kick."

[¶18] "A person is guilty of simple assault if he . . . [p]urposely or knowingly causes bodily injury or unprivileged physical contact to another." RSA 631:2-a, I(a). The charge here alleges that the defendant "knowingly cause[d] unprivileged physical contact to [the victim] by kicking him." The jury was instructed that the State had to prove beyond a reasonable doubt that the defendant acted "knowingly" in that he was "aware of the nature of his conduct or the circumstances under which he acted" and that he "had unprivileged physical contact" by kicking the victim, meaning "any physical contact through the use of physical force, which is not justified by law or consent."

[¶19] The New Hampshire Criminal Code requires jury unanimity with respect to the presence of the elements of offenses in criminal cases as charged. See RSA 625:10 (2016) ("No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt."); Greene, 137 N.H. at 128. "Unanimity is guaranteed as a matter of constitutional law, as we have held that the legislature may not provide for juries of a less number than twelve, nor to provide that a number of the petit jury, less than the whole number, can render a verdict." Greene, 137 N.H. at 128 (quotation omitted).

[¶20] Here, jury unanimity is required with respect to the element of unprivileged physical contact. Evidence at trial included that the defendant kicked the victim: in the legs; "maybe four or five times"; in the torso at least three times; "[a] few to the torso and then one to the head"; in the thighs and "knee area"; "a good 8 to 10" times; around the abdomen; and about the "general body," including some "on the legs, and some in the midsection." Given this evidence, the defendant was entitled to a unanimity instruction on which contact supported a finding of guilt. See State v. Doucette, 146 N.H. 583, 593 (2001) (explaining that because any one of the contacts alleged in Greene could have provided the basis for finding the element of unprivileged physical contact, and because "the defendant in Greene could potentially have been convicted of three separate assaults," the jury had to be unanimous as to which unprivileged physical contact occurred); cf. State v. Sanborn, 168 N.H. 400, 421 (2015) (declining to resolve whether Greene "can be squared with our later unanimity cases" but noting that Greene's reasoning is limited to the unprivileged physical contact variant of simple assault). Under these circumstances, the trial court erred by declining to instruct the jury that unanimity was required on which kick constituted unprivileged contact. Accordingly, we reverse the defendant's conviction for simple assault based on kicking and remand.

[¶21] We have considered the parties' remaining arguments and have concluded that they do not require further discussion. See Vogel v. Vogel, 137 N.H. 321, 322 (1993); Sup. Ct. R. 25(8). In sum, we reverse the defendant's reckless conduct conviction for insufficient evidence, reverse and remand his second degree assault conviction based on an erroneous self-defense jury instruction, and reverse and remand the simple assault conviction based on the trial court's failure to give a specific unanimity instruction.

Reversed and remanded.

DONOVAN, COUNTWAY, and GOULD, JJ., concurred.