

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2018-0608

State of New Hampshire

v.

Stephen Girard

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

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BRIEF FOR THE DEFENDANT

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(10 minute, 3JX argument)

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I. THE COURT ERRED BY DENYING GIRARD'S MOTION TO SEVER.

Girard files this reply to address two topics: (a) a factual assertion made by the State; and (b) the State's citation of case law.

Of the six indictments at issue in this case, two alleged that, between January 1, 2016, and September 11, 2016, Girard committed indecent exposure — one for purposely masturbating in S.Ne.'s presence and another for sending S.Ne. a picture of his penis. DB\* A5, DB A6. The State asserts, "On September 22, 2016, Lieutenant [Kennedy] Richard interviewed [Girard], who confessed to both counts of indecent exposure." SB 8. In support of this assertion, the State cites page 28 of the trial transcript. SB 8.

There was no evidence that Girard confessed to the allegation that he committed indecent exposure by purposely masturbating in S.Ne.'s presence. Nothing on page 28 of the trial transcript suggests that Girard confessed to indecent exposure. The following exchange occurs at page 30–31 of the transcript:

[Lt. Richard]: I asked him about another allegation that was made,

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\* Citations to the record are as follows:

"DB A" refers to the appendix to the defendant's opening brief containing documents other than the appealed decisions;

"SB" refers to the State's brief.

"T" refers to the transcript of the bench trial on June 13, 2018.

reference to him and masturbating himself in front of [S.Ne.].

[Prosecutor]: How did he respond to that?

[Lt. Richard]: He denied that; said he never did masturbate himself in front of her purposely, but he admitted to the fact that she walked in on him once to masturbating while he was watching porn, and she immediately left, and it was just an unfortunate incident. But he never did it purposely.

. . .

He . . . admitted he did have a Hentai animated video on his — watching on while [S.Ne.] was in the room, but denied masturbating himself in front of her.

. . .

[Prosecutor]: [W]hen you confronted him with . . . text messages, how did he respond?

[Lt. Richard]: He still denied ever[] masturbating himself purposely, and only admitted to watching the porn while she was in the room but not revealing himself or masturbating himself at any time.

T 30–31.

Turning to case law, under State v. Brown, 159 N.H. 544 (2009), the first factor in determining whether charges are “logically and factually connected,” justifying joinder, is

“the temporal and spatial relationship among the underlying charged acts.” Id. at 551–52. The State asserts:

This Court has routinely held that conduct occurring over multiple years can retain a sufficient temporal connection to support joining the offenses into a single trial. See State v. Allen, 128 N.H. 390, 397 (1986) (finding sufficient temporal connection between two acts occurring three-and-a-half years apart); see State v. Dukette, 145 N.H. 226, 230–231 (2000) (discussing sufficient logical connection and temporal relevancy between acts committed one and two years prior to the charged offense); see also State v. Magoon, No. 2018-0280, 2019 WL 2184829, at \*4 (N.H. May 21, 2019) (unpublished) (holding joinder sustainable where charges span four years, five of six charges occurred over two years and offenses occurred at the same location and a similar time of day).

SB 16.

Allen and Dukette involved the application of New Hampshire Rules of Evidence 403 and 404(b) to evidence of uncharged misconduct. Allen, 128 N.H. at 397–98; Dukette, 145 N.H. at 229–32. Neither Allen nor Dukette involved an issue of joinder.

CONCLUSION

WHEREFORE, Stephen Girard respectfully requests that this Court reverse.

Undersigned counsel requests a 10 minute, 3JX oral argument.

This brief complies with the applicable word limitation and contains 583 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ Thomas Barnard  
Thomas Barnard

DATED: August 5, 2019