

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0087

STATE OF NEW HAMPSHIRE V. KEVIN BUTLER

*Mandatory appeal pursuant to Rule 7 from decisions of the
Seventh Circuit Court – District Division – Rochester*

Appellant's Brief

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(5 minutes 3JX requested)

TABLE OF CONTENTS

Table of Authorities..... ii

Question Presented 1

Statement of the Case and Facts2

Argument.....8

Conclusion.....11

Request for Argument 12

Rule 16(3)(i) Statement 12

Rule 16(11) Statement.....12

Addendum 13

TABLE OF AUTHORITIES

Cases

<i>State v. Ebinger</i> , 135 N.H. 264 (1992).....	9
<i>State v. Krovvidi</i> , 274 Kan. 1059 (2002).....	9–10
<i>State v. Littlefield</i> , 152 N.H. 331 (2005).....	8, 9
<i>State v. Pittera</i> , 139 N.H. 257 (1994).....	9
<i>State v. Shepard</i> , 158 N.H. 743 (2009).....	8–10

Statutes

NH RSA 626:2, II(d).....	8
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A person acts negligently with respect to a material element of an offense when he fails to become aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that his failure to become aware of it constitutes a gross deviation from the conduct that a reasonable person would observe in the situation.

QUESTION PRESENTED

1. Did the trial court err in denying the defendant's motions to dismiss based on sufficiency of the evidence?¹

Preserved by oral motion and argument. (T 78–82)

¹ The Defendant's Notice of Appeal lists two questions; one for each conviction. Because each question and analysis is the same for each conviction, they have been consolidated in this brief.

STATEMENT OF THE CASE AND FACTS

Kevin Butler stood trial on two complaints alleging mistreatment of a dog. The operative statutes, RSA 644:8, III and 644:8-aa are entitled “cruelty to animals” and “animals in motor vehicles,” respectively. The complaint invoking RSA 644:8 (1764805C) alleges, in pertinent part, that Butler “negligently deprived any animal ... necessary care, sustenance or shelter.” The other complaint (1764803C) alleges that Butler “confine[d] a dog in a motor vehicle, in which the temperature was so high as to cause serious harm to the animal.”

State’s Case

To support its case, the State offered the testimony of four witnesses: Jessica Bougie, Officer Sue Paradis, Dr. Jane Allard, and Officer Jonathan Labosier.

Jessica Bougie is Butler’s neighbor. T 8.² She was the first to notice that a dog had been left in a car July 20, 2020. T 8. She noticed the dog as she was leaving her apartment and did not think much of it. T 9. When she returned after a one-hour trip, she noticed the dog was still in the car, scratching at the window. T 9–10. It was hot that day, the car was off, and the windows were up, so she called the police. T 10–11, 13.

Sue Paradis is the animal control officer for the City of Rochester. T 15. On July 20, 2020, she received a call asking her to respond to the parking lot of Butler’s apartment complex. T 16. There, she saw a dog in a car up against the driver’s side

² “T” is used as shorthand for the transcript of the February 12, 2021 trial.

window. T 17. The door was unlocked, so she entered the car. T 17. When she opened the door, she could feel the heat hit her face, as it was over 90 degrees that day. T 17. The dog was panting and “heavily unaware” while leashed inside the car. T 17. She took the dog to her air-conditioned car. T 18. Her observations of the dog were consistent with overheating, so she took him to the nearest veterinary clinic. T 24. There, clinicians (including witness Dr. Allard) gave the dog oxygen and cold packs to cool him down. T 25, 28. Using a thermometer, the clinicians confirmed that the temperature started going down and reached a normal temperature after about 30 minutes. T 27–28. Without consulting the dog’s owners, T 34, Officer Paradis then took the dog to a clinic in Portsmouth for further observations. T 29. Before the ride, the dog appeared to have seizures. T 29. During the ride, the dog lied against the passenger door, which Paradis thought to be abnormal for a young husky. T 30. The next day, she retrieved the dog and left it with the Rochester Veterinary Clinic for holding, where he stayed until at least the day of trial. T 31. On cross-examination, Officer Paradis admitted that she was aware of cases in which dogs have overheated but no charges were filed. T 34. She also admitted that, although the dog was in distress, she took the time to talk to Bougie and photograph Butler’s car before taking him to the veterinarian’s office. T 38.

Dr. Jan Allard is an associate veterinarian at the Animal Health Center in Rochester, NH. T 54. On July 20, 2020, she received a dog from Officer Sue Paradis. T 55. At that time, the dog had to be carried into the building. T 55. He was not aware of his surroundings and was panting excessively. T 55. She took this as signs of shock and

distress. T 55. She first took the dog's temperature and it surpassed the thermometer's limit of 105 °F. T 55. She cooled the dog with cold wash cloths and wraps and hydrated the dog with an intravenous catheter. T 55–56. Concerned about possible seizure activity, she administered valium. T 56. The treatment brought the dog back to normal temperature in around 30 to 35 minutes. T 56. At that point, she deemed him safe to be transported to a hospital where he could be monitored all night. T 56–57.

Officer Jonathan Labosier is a police officer working with the Rochester Police Department. T 62. On July 20, 2020, he was dispatched to Butler's apartment complex around 4:00 PM. T 62–63. He found the car that the dog had been in and noticed a leash and dog hair on the seats and several bite and claw marks on the passenger door. T 63. He noted that the car was in the direct sunlight and his watch said it was 92 °F that day. T 66. He made contact with the registered owner of the car, who he identified as the Defendant. T 67. He asked where his dog was and Butler said "oh ----" with an expletive and call to his son to ask where the dog was. T 67, 71. Labosier heard a response from a little voice saying he didn't know. T 67. Butler then said that the dog might still be in the car. T 67. Labosier noted that Butler seemed disappointed. T 72. Labosier then revealed to Butler that the dog had already been seized. T 68 The two went down to the car, where Labosier pointed out the scratches. T 68. Butler said that he was less concerned about damage and more concerned about the health of the dog and asked where the dog was. T 72. Labosier asked Butler what happened. T 69. Butler explained that he was running some errands and had his hands full when he got home. T 69. He said he asked his eight-year-old son to

let the dog in. T 69. He then guessed that the dog was left in the car for about an hour. T 69. Later, Labosier asked about the dog's medical history and confirmed that he had not suffered any seizures that Butler was aware of.

After Labosier's testimony, the State rested.

Motion to Dismiss

After the State's case, the defense moved to dismiss both charges. T 78. It argued that the State had not proven that the Defendant had acted "negligently" as it is defined in the criminal code, merely proving negligence as it applies in civil cases. T 78. It pointed to evidence that he was shocked and concerned when he realized the dog might have been left in the car and that he had believed his son had brought the dog inside the house as demonstrating that he did not act in a manner that grossly deviated from that of a reasonable person.

The State countered that Butler "knew he brought the dog with him," that he "knew the dog was in the car," and that he had failed to care for the dog once he was made aware that he was left in the car. T 81–82. It posited "what other deviation would be other than gross to leave an animal locked in [a car]?" T 82. The trial court denied the motion T 82.

Defense Case

The Defense called one witness: Kevin Butler. He testified that the dog belongs to his wife, who bought him as a puppy. T 93. Butler and his son, who Butler trained to take

care of the dog. T 93. It was the son's responsibility to take out the dog, feed him, make sure he had water, and get him in and out of the car. T 93. His son is very responsible for his age and this was Butler's way of "increas[ing]" his son's responsibility. T 94.

On the day in question, Butler had gone shopping with his children and the dog and returned with enough groceries to fill both his hands. T 92. He told his son to "bring [the dog] out, as [his son] always does." T 92. It was part of their routine for his son to bring the dog to go to the bathroom before coming back in. T 92. His other child was being hyper that day, though, and Butler stopped to have a conversation with him. T 95–96. After that he put away the groceries and received an important phone call. T 96. After about 25 minutes, he heard his son come back in the house. T 96. He had assumed the dog was with him. T 96. However, he never saw the dog come out. T 105.

After the phone call, the police knocked on the door. T 97. They asked him where the dog was and he asked his son, who said he didn't know. T 97. Butler cursed and said that he might still be in the car. T 97.

He also testified that he had a number of interactions with Bougie, but never had problems with her. T 87. He did not believe she had any reason to be afraid of him, either. T 91.

On cross examination, he acknowledged that the dog had been in the hot car for about a half-hour. He acknowledged that he made a mistake not checking to see whether his son had taken the dog out of the car, as his is responsible for both his child and the dog. T 105–06.

The defense then rested. T 107.

Closing Argument and Conviction

In closing, the defense argued that the State had not proven the “gross deviation” required to sustain a finding of criminal negligence. T 107. He argued that the evidence showed that he merely believed the child had the dog and brought the dog back into the house after taking him out, as was their usual “course of conduct.” T 107. Finally, the Defense argued that the criminal negligence mental state applied on both charges. T 108.

The State argued that the charged entitled “Animals in Motor Vehicles” under RSA 644:8-aa (1764803C) did not require any mental state, as a strict liability crime, but the Court ruled that it would apply the “negligently” mental state because it was charged as a misdemeanor. T 108–09. Nonetheless, the State argued that it had proven the elements—particularly criminal negligence—because everyone agreed the dog was in a hot car between a half-hour and an hour. T 109. It argued that “[n]o reasonable person would think that it was okay not to make sure that dog came out of that vehicle on that day.” T 109.

The trial court (Pendleton, J.) found Butler guilty on both counts. This appeal follows.

ARGUMENT

The issue in this case is a simple one: whether the State provided sufficient evidence to prove criminal negligence. All other elements are uncontested. In such a case, “the defendant must prove that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt.” *State v. Shepard*, 158 N.H. 743, 746 (2009). The analysis is informed by a wealth of this Court’s cases that help us understand when the State has met its burden of proving this particular mental state.

Criminal negligence is defined in RSA 626:2, II(d). It reads:

A person acts negligently with respect to a material element of an offense when he fails to become aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that his failure to become aware of it constitutes a gross deviation from the conduct that a reasonable person would observe in the situation.

Not every act of carelessness that results in a death or serious bodily injury entails criminal negligence, however, and a person charged with criminal negligence may not be convicted on evidence that establishes only ordinary negligence. *Shepard*, 158 N.H. at 756. “[T]he carelessness required for criminal negligence is appreciably more serious than that for ordinary civil negligence, and ... its seriousness [must] be apparent to anyone who shares the community's general sense of right and wrong.” *State v. Littlefield*, 152 N.H. 331, 351 (2005). (quotation and ellipsis omitted). Criminal negligence requires not only the failure to perceive a more than ordinary risk, “but also some serious blameworthiness in the conduct that caused it.” *Id.* (quotation omitted).

Accordingly, “unless a defendant has engaged in some blameworthy conduct creating or contributing to a substantial and unjustifiable risk of death [or serious bodily injury],” he has not engaged in criminally negligent conduct. *Id.* (quotation omitted).

This Court discussed this concept at length in *State v. Shepard*, 158 N.H. at 746–50, a case involved a charge of negligent homicide and vehicular assault stemming from a motor vehicle collision caused when the defendant’s car crossed nearly halfway into an opposing lane of traffic collided with a motorcycle. The *Shepard* Court looked to three prior cases to divine the line between civil and criminal negligence: *Littlefield, supra*; *State v. Ebinger*, 135 N.H. 264 (1992); and *State v. Pittera*, 139 N.H. 257 (1994). In each of these cases, the Court observed, “criminal negligence [did] not depend upon the consequences of the defendant’s act, no matter how tragic. Rather it is the circumstances of the defendant’s conduct that control the outcome.” *Shepard*, 158 N.H. at 749. The Court pointed to the defendant’s “risk-creating” conduct in each case as justifications for sustaining convictions. In contrast, it noted, other cases showed that a failure to perceive a risk explained by mere “inattention” is not sufficient for criminal negligence. *See Shepard*, 158 N.H. at 749 (citing *State v. Krovvidi*, 274 Kan. 1059 (2002) for the proposition that “mere violation of a traffic ordinance, through inattention, without more, was insufficient to constitute the degree of negligence required.”). Ultimately it held that criminal negligence is not established where the circumstances creating the risk are unknown, or not culpable. *Id.*

The defense does not contest that risk in this case is “more than ordinary”—the only issue is whether the record contains anything indicating the requisite “serious

blameworthiness” in causing the failure to perceive the risk. On this point, the State’s evidence and summation missed the mark. The State never alleged any “culpable conduct” that caused the failure to become aware of the dog’s location at all. Rather, it proceeded as though the act of leaving the dog in the car was *per se* criminal negligence. It was certainly correct for the State to say that “[n]o reasonable person would think that it was okay not to make sure that dog came out of that vehicle on that day”—but the analysis does not end there. That merely identifies that Butler failed to become aware of a substantial and unjustifiable risk—in this case, that risk is that the dog will overheat in the hot car. Civil negligence requires only that a plaintiff prove that Butler failed to become aware of that risk. But *criminal* negligence requires us to ask *why* he failed to become aware. The State did not offer any evidence or argument on that other than the Defendant’s statement to Labosier, which revealed nothing more than pure absent-mindedness. This was corroborated with more detail through the Defendant’s testimony. He merely thought that the dog had been brought out of the car by his son. At worst, he failed to become aware of the risk because he became distracted by his other child and a phone call. This is exactly the kind of momentary inattention that was not sufficient in *Krovvidi*, which, as the *Shepard* Court explained in approving its reasoning, involved a lower negligence standard than New Hampshire requires. *Shepard*, 158 N.H. at 749.

At most, the defendant was careless. New Hampshire law is settled that carelessness does not, by itself, rise to the level of criminal negligence.

CONCLUSION

Because evidence of mere absent-mindedness cannot satisfy the element of criminal negligence, this Court must REVERSE the trial court's denial of the defendant's motion to dismiss and VACATE his convictions.

REQUEST FOR ARGUMENT

Mr. Butler respectfully requests 5-minute argument in front of a 3JX panel, for which the undersigned will appear.

RULE 16(3)(I) STATEMENT

The lower court's denial of the Mr. Butler's oral motion to dismiss was not in writing, so is not included with this brief. T 82. The Court's finding of guilt was pronounced orally, T 109, and memorialized in the attached sentencing order.

RULE 16(11) STATEMENT

This brief contains 3040 words, within the 9,500 word limit.

Respectfully Submitted,

Kevin Butler

By his attorney:

Date: November 8, 2021

/s/ Jared Bedrick, Esq. #20438
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Certificate of Service

I hereby certify that this Brief been forwarded this day to the New Hampshire Department of Justice, who is a registered e-filer, through the NH Electronic Filing Service.

/s/ Jared Bedrick

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: 7th Circuit - District Division - Rochester

Case Name: State v. Kevin Bottler

Case Number: 471- 2020-CR-1363 Charge ID Number: 1764803c
(if known) 1764805C

DISPOSITION AND SENTENCING FORM

PLEA: Guilty Not Guilty No Contest No Plea
 Change Plea To: No Contest Guilty

FINDING: Guilty Not Guilty Dismissed

Complaint placed on file With finding Without finding

and not to be brought forward after _____ on the below conditions of this order.

PROBABLE CAUSE: Found Not Found Hearing Waived _____ (date)

Bail \$ _____ Committed See attached bail order

SENTENCE:

FINE

The defendant is fined \$ 1200, plus statutory penalty assessment of \$ 280
\$ 600 of the fine is: suspended deferred for 2 months years
\$ 144 of the statutory penalty assessment is:
 suspended deferred for 2 months years

The defendant shall perform _____ hours of community service to satisfy the fine.

This is a domestic violence conviction under RSA 631:3 reckless conduct, or RSA 633:3-a interference with freedom – stalking, requiring the mandatory imposition of a \$50.00 fine which may not be reduced, suspended or discharged by imprisonment.

COMMITMENT

The defendant is sentenced to the House of Corrections for a period of _____ days months

Pretrial confinement credit: _____ days.

This sentence is to be served as follows:

Stand committed Commencing _____

_____ days months of the sentence are suspended deferred to _____ (date) on the below conditions.

The commitment is consecutive to _____

RESTITUTION

The defendant is ordered to make restitution to City of Rochester
in the amount of \$ 4,437.00

Payable through the Department of Corrections as directed by the probation/parole officer plus the statutory administrative fee.

Other: _____

Case Name: State v. MIRIAM L CHASE-BURROWS

Case Number: 471-2020-CR-00611

Charge ID Number: 1734497C

DISPOSITION AND SENTENCING FORM

PROBATION

The defendant is placed on probation for a period of ___ months ___ year(s), upon the usual terms of probation and any special terms of probation determined by the probation/parole officer.

Effective: ___ Immediately ___ Upon Release

The defendant is ordered to report immediately/upon release to the Probation/Parole Office.

OTHER CONDITIONS OF SUSPENDED OR DEFERRED SENTENCE

The defendant is ordered to be of good behavior and comply with all the terms of this sentence for a period of 2 ___ days ___ months [X] years. Good behavior is defined as not committing any act(s) that would constitute a felony, misdemeanor or major motor vehicle violation as defined in RSA 259:39 (I).

The defendant's ___ license ___ privilege to operate in New Hampshire is ___ Suspended ___ Revoked for a period of ___ days ___ months ___ years effective ___

The loss of license is consecutive to ___

The defendant shall meaningfully participate in LADC/mental health/___ evaluation and follow all recommendations including, but not limited to, counseling, treatment and education programs. Written proof of the evaluation shall be provided to the prosecutor and the court by ___ (date) and written proof of compliance with the recommendations shall be provided by ___ (date).

The defendant shall perform ___ hours of community service and provide proof to the State by ___ (date).

The defendant is ordered to have no contact with ___ either directly or indirectly, or through third parties, including but not limited to contact in-person, by mail, phone, e-mail, text message, social networking sites and/or electronic communications for a period of ___ days ___ months ___ years

The defendant is not allowed to enter ___ (location) for a period of ___ years.

[X] Other:

The suspended sentence and right to care for the animal or any pet is conditioned upon the defendant completing the Pet Ownership Course through the SPCA or similar agency within 60 Days, with proof to state.

APPEAL ___ (date) Bail \$ ___ Committed ___ See attached bail order

Date 2/16/2021

Signature of Judge JOHN T. PENDLETON Printed Name of Judge