

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2017-0385, State of New Hampshire v. David Martinko, the court on September 14, 2018, issued the following order:

Supreme Court Rule 22(2) provides that a party filing a motion for rehearing or reconsideration shall state with particularity the points of law or fact that he claims the court has overlooked or misapprehended.

We have reviewed the claims made in the defendant's motion for rehearing and conclude that no points of law or fact were overlooked or misapprehended in our decision. Accordingly, upon reconsideration, we affirm the August 17, 2018 opinion and deny the relief requested in the motion.

Relief requested in motion for reconsideration denied.

Lynn, C.J., and Hicks, Bassett, and Hantz Marconi, JJ., concurred.

**Eileen Fox,
Clerk**

Distribution:

Clerk, Strafford County Superior Court, 219-2013-CR-00521

Honorable Steven M. Houran

Honorable Peter H. Fauver

Joshua L. Gordon, Esquire

Elizabeth A. Lahey, Esquire

Allison R. Cook, Supreme Court

File

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THE SUPREME COURT OF NEW HAMPSHIRE

Strafford
No. 2017-0385

THE STATE OF NEW HAMPSHIRE

v.

DAVID MARTINKO

Argued: April 17, 2018
Opinion Issued: August 17, 2018

Gordon J. MacDonald, attorney general (Elizabeth A. Lahey, assistant attorney general, on the brief and orally), for the State.

Law Office of Joshua L. Gordon, of Concord (Joshua L. Gordon on the brief and orally), for the defendant.

LYNN, C.J. The defendant, David Martinko, appeals an order of the Superior Court (Houran, J.) denying his motion to vacate guilty pleas that he entered in 2014 to three felony informations. The informations charged him with aggravated felonious sexual assault under the pattern sexual assault statute. See RSA 632-A:2, III (2016). He argues that: (1) the informations violated his state and federal constitutional protections against double jeopardy; and (2) his trial counsel provided ineffective assistance because he did not advise the defendant of these violations. We affirm.

Appendix D

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was wrong and that his plea was either involuntary or unknowing for the reason he specifically claims. Id.

The Double Jeopardy Clauses of the State and Federal Constitutions each provide three protections: (1) protection against subsequent prosecution for the same offense after acquittal; (2) protection against subsequent prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Wilson, 169 N.H. 755, 772 (2017). The defendant argues that the three informations violated his protection against multiple punishments.

In support of his argument, he observes that the informations “are precisely successive”; that is, the second information charged assaults beginning on the next day after the period charged in the first information ended, and the third information charged assaults beginning on the next day after the end of the period charged in the second information. He contends that because there is no evidence in the record “that three distinct patterns began and ended on those dates,” “the periods are arbitrary, and therefore the Informations are multiplicitous, in violation of federal and state constitutional bars against double jeopardy.” Accordingly, he argues, we should reverse two of his convictions and remand this case for resentencing on the third information.

Whether charging documents violate double jeopardy protections found in the State and Federal Constitutions presents a question of constitutional law, which we review de novo. See id. Challenges to multiple convictions based on multiplicity can be divided into two categories. State v. Lynch, 169 N.H. 689, 706 (2017). In “double-description” cases, the question is whether two statutes describe separate offenses or are simply different descriptions of the same offense. Id. In “unit of prosecution” cases, the question is whether a defendant’s course of conduct constitutes more than one violation of a single statutory provision. Id. The parties agree that the issue in this case requires us to determine the applicable unit of prosecution.

When a defendant argues that his rights have been violated under both the State and Federal Constitutions, we consider the arguments first under our State Constitution and rely upon federal law only to aid our analysis. State v. Mitchell, 166 N.H. 288, 296 (2014). To determine whether charged offenses violate the double jeopardy protections of our State Constitution in unit of prosecution cases, we examine whether proof of the elements of the crimes as charged will require a difference in evidence: State v. Ramsey, 166 N.H. 45, 51 (2014). Although we have consistently articulated this test, we have not consistently applied it and have previously invited parties “to suggest a formulation of the double jeopardy test to be applied under our State Constitution.” State v. Locke, 166 N.H. 344, 353 (2014). Neither party has accepted our invitation in this case.

not subject the defendant to multiple punishments for the same offense and did not violate the federal protection against double jeopardy. State v. Jennings, 155 N.H. 768, 778 (2007). However, Jennings did not establish that each of these factors was required when the State sought to indict a defendant for multiple pattern offenses that had been committed during a common five-year period.

Indeed, in Jennings, we rejected the defendant's argument that the pattern sexual assault statute is intended to define as a single pattern all sexual assaults of the same variant committed against a single victim that occur within the same five-year period, observing that the "statute on its face contains no such limit." Id. at 777. We observed that the purpose of the pattern statute is to address the concern that young victims, who have been subjected to numerous, repeated incidents of sexual assault over a period of time by the same assailant may be unable to identify discrete acts. Id. To construe the statute to define all assaults of the same variant committed against the same victim within a five-year period as a single pattern would undermine its very purpose. Id. at 778. "The more plausible reading of the statute allows the State to charge more than one pattern of a given sexual assault variant within a five-year time frame, each as an individual unit of prosecution, when the evidence of discrete patterns so warrants." Id. Because the challenged indictments in Jennings charged three discrete patterns of sexual assault and the "prosecution at trial would have to prove that the acts occurred within each of the alleged, discrete periods of time," we concluded that the defendant was not subjected to multiple punishments for the same offense. Id.

The defendant contends that because his "conduct was one continuous pattern spanning three years," the State could not charge him with three different one-year pattern offenses. Rather, he argues, the State must plead "actual distinct patterns" found in the evidence. Absent legislative direction, we decline to impose this requirement. The defendant was charged with committing acts that occurred within discrete periods of time that did not overlap. To obtain conviction, the State was required to prove that two or more acts occurred within each of the charged discrete periods. Given the difference in the evidence required to obtain a conviction and the purpose of the statute, we hold that the State was permitted to seek separate convictions on the charged informations, without violating the defendant's protection against double jeopardy.

We reach the same conclusion when we review the defendant's claim under the Federal Constitution. As noted above, the defendant cites State v. Richard and State v. Jennings to support his double jeopardy challenge. The defendants in those cases relied exclusively on the Federal Constitution to argue that their convictions violated double jeopardy. To determine whether a defendant is subject to multiple punishments for the same offense, in violation

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