

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

State of New Hampshire

v.

C. J.

01-S-726 et. al.

ORDER

Defendant is charged with one count of second degree assault with a deadly weapon contrary to RSA 631:2(b) and four counts of reckless conduct with a deadly weapon contrary to RSA 631:3, II. Defendant moves to dismiss each of these charges for failing to allege criminal acts under New Hampshire's Criminal Code. Alternatively, defendant argues that the statutes under which he is charged are unconstitutionally vague. The State objects. After hearing and after significant consideration of the parties' arguments with the applicable law, defendant's Motion to Dismiss is DENIED.

I. Background

All five of defendant's charges arise from an unprotected sexual relationship with E.C., the alleged victim, while he was positively infected with the Human Immunodeficiency Virus (HIV). Specifically, the combined charges state that defendant knew of his HIV infection and failed to tell E.C. of that infection during the period they engaged in unprotected sexual intercourse. Upon termination of their relationship, and while E.C. was pregnant, defendant told her of his HIV status. This conduct allegedly caused E.C. to suffer severe

psychological injuries, as well as the ongoing threat of permanent bodily injury through contracting HIV or its variants, "which are the causative agents of acquired immune deficiency syndrome (AIDS), AIDS related conditions (ARC), and other clinical manifestations." RSA 141-F:2, V.

On these facts, the State charged defendant with second degree assault for recklessly causing serious psychological injuries to E.C., by engaging in unprotected sexual relations with her, during her pregnancy while he was infected with HIV, and later informing her that he was infected and had exposed her and the fetus to the virus.

See RSA 631:2 (b). The State also charged defendant with four counts of reckless conduct for four other occasions that he engaged in uninformed, unprotected sexual intercourse with E.C. while his seminal fluid was infected with the HIV virus, which the State asserts is a deadly weapon, thereby placing E.C. in danger of serious bodily injury through contracting the HIV virus and its resultant terminal medical conditions. See RSA 631:3, II.

According to defendant's motion, the New Hampshire Criminal Code does not criminalize his conduct. However, his conduct is subject to the civil penalties laid out in RSA 141-C and RSA 141-F et. seq. Defendant posits that more than thirty states have criminalized such conduct, in addition to providing civil remedies for victims. Therefore, defendant says that had our legislature intended to criminalize acts that may cause the transmission of HIV, it would have enacted a statute to do so. Defendant alternatively argues that

if the indictments charge criminal conduct under their respective statutes, then the statutes and their corresponding definition of "deadly weapon" contained in RSA 625:11, V, are unconstitutionally vague. Defendant contends that RSA 625:11, V does not sufficiently notify him that his genitalia and seminal fluid are "deadly weapons" under our criminal code because they are incapable of causing "serious bodily injury."

## II. Standard of Review

To succeed on his motion to dismiss, defendant must show that under any fair reading of his indictments, drawing all reasonable inferences in the State's favor, there are insufficient factual allegations to constitute a defined crime under our criminal code. See e.g., State v. Vaillancourt, 122 N.H. 1153 (1982); State v. Shannon, 125 N.H. 653 (1984). As always, it is axiomatic that an indictment must allege a criminal act to survive dismissal. Vaillancourt, 122 N.H. 1153. Defendant additionally bears a heavy burden in proving that these criminal statutes are unconstitutionally vague, because criminal statutes always possess a strong presumption of constitutionality. In re Justin D., 144 N.H. 450, 454 (1999). If any person of ordinary intelligence can fairly tell what conduct is prohibited by the statute at issue then it satisfies constitutional standards. Id. at 453-54. The Court addresses each of defendant's arguments in turn.

## III. Sufficiency of Indictments

According to defendant, his indictments fail to allege criminal conduct because New Hampshire has not yet joined the majority of states which criminalize the knowing transmission of HIV to an uninformed party. Defendant's theory, while novel, is incorrect. The existence, or not, of a specific statute criminalizing the transmission of HIV does not grant or deprive the Court of jurisdiction over facts which constitute criminal conduct under our criminal code. See Lamar v. United States, 240 U.S. 60 (1916); see also United States v. Cotton, No.01-687 (U.S. Supreme Court) (decided May 20, 2002) (Slip. Op. at 3). Thus, if after any fair reading of defendant's indictments, the Court finds they plead sufficient facts to constitute a criminal offense, defendant's Motion to Dismiss must be denied.

To be constitutionally sufficient to proceed to trial, an indictment must merely inform a defendant of the crime charged with enough specificity so that he can adequately prepare for trial and he is protected from being placed again in jeopardy for the same offense. See State v. Pelky, 131 N.H. 715, 718 (1989); State v. Inselberg, 114 N.H. 824, 827 (1974). To do so, the indictment must allege all of the elements of a criminal offense with enough facts to advise defendant of the specific charge against him. See Pelky, 131 N.H. at 719.

RSA 631:2(b), under which the State charged defendant with second degree assault, provides that "[a] person is guilty of a class B felony if he . . . [r]ecklessly causes bodily injury to another by

means of a deadly weapon . . . ." Thus, the material elements of this offense for which offense-specific facts must be alleged in defendant's indictment are (1) a reckless mental state, (2) causing bodily injury, and (3) by using a deadly weapon.

For an indictment to allege a reckless mental state, it must clearly inform a defendant that he is charged with "being aware of and consciously disregarding a risk that his conduct would cause serious bodily injury," and that the risk was of such a degree that its disregard constituted conduct that is a "gross deviation" from that of a normal law-abiding person in the same circumstances. Pelky, 131 N.H. at 719; RSA 626:2, II(c). A fair reading of this indictment clearly demonstrates reckless conduct. From the facts alleged, a reasonable jury could find that someone aware of his positive HIV status and its medical consequences who engages in unprotected sex with someone without informing her of his HIV status, and later only informs her of that status and her exposure to the virus while she was pregnant, is acting in "gross-deviation" from how a law-abiding citizen in the same circumstances would act. However, each of these facts must be proven at trial and found by the jury.

A fair reading of this indictment also states a risk of serious bodily injury. "Serious bodily injury" is defined as "any harm to the body which causes severe, permanent or protracted loss of or impairment to the health or of the function of the body." RSA 625:11, VI. The Supreme Court has explained that this definition includes serious psychological injury, because that is a severe

impairment to a person's "health," which requires having both a sound mind and body. State v. Goodwin, 118 N.H. 862, 868-69 (1978). However, again, whether a psychological injury exists, as well as the precise extent of that injury also are factual determinations for the jury. See id.

Finally, a "Deadly weapon" means any ". . . substance or thing which, in the manner it is used, intended to be used, or threatened to be used, is known to be capable of producing serious bodily injury." RSA 625:11, V. Here, a fair reading of the indictment would allow a reasonable juror to find that a person infected with HIV who engages in unprotected sex is using his sexual organs as a dangerous weapon. A reasonable juror may find that HIV is commonly transmitted through unprotected sex, and that HIV constitutes a serious bodily injury because it is a serious impairment to one's health that often results in death.

Accordingly, the Court finds that a fair reading of the facts alleged in the second degree assault indictment denotes all of the material elements constituting the criminal act charged. The same is true for the four Reckless Conduct indictments.

RSA 631:3 states that:

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.

II. Reckless conduct is a class B felony if the person uses a deadly weapon as defined in RSA 625:11, V.

Therefore, again the material elements for this offense which must be alleged in the indictment are (1) a reckless mental state, (2) conduct placing another person in danger of serious bodily injury, and (3) use of a deadly weapon.

In the present case, the indictments plead facts (1) that defendant through engaging in unprotected sex, while infected with HIV and without informing his partner, acted recklessly; (2) that such conduct placed E.C. in danger of contracting HIV, which is a permanent bodily injury, through unprotected exposure to the virus; and (3) that seminal fluid infected with HIV can transmit the disease and cause permanent injury or death, thereby constituting a deadly weapon.

Again, a fair reading of these facts shows all of the material elements constituting the criminal offense charged. Therefore, the indictments must be submitted to the jury for their factual determination of the crimes charged.

#### IV. Statutory Vagueness

According to defendant's final argument, under the Court's findings above, both RSA 631:2 and RSA 631:3 are unconstitutionally vague because the statutory variants under which he is charged do not notify criminal defendants that their sexual organs or seminal fluids could constitute "deadly weapons" under our criminal code. Specifically, defendant says that sexual organs and seminal fluid are not "deadly weapons" because they intrinsically are incapable of causing serious bodily injury. See RSA 625:11, V. Defendant, in what

is more of an inartful constitutional overbreadth argument, posits that if such body parts and fluids are found to be deadly weapons under 625:11, V, then arguably any bodily fluid or body part could constitute a deadly weapon and significant everyday conduct could be criminalized under these statutes.

In deciding whether a statute is unconstitutionally vague, the Court looks to "whether men of common intelligence must guess at its meaning and differ as to its application." State v. Beckert, 144 N.H. 315, 319 (1999) (quotation omitted). Under our criminal code, a "deadly weapon" is defined as "any firearm, knife, or other substance or thing which, in the manner it is used, intended to be used, or threatened to be used, is known to be capable of producing death or serious bodily injury." RSA 625:11, V. The critical phrase in this statute, eliminating any vagueness challenge to the "deadly weapon" definition, is "the manner [in which an object] is used, intended to be used, or threatened to be used[.]" This is because, as defendant correctly asserts, many innocuous everyday objects can become deadly weapons when put to assaultive uses.

It is only the specific manner of an object's use which makes them "capable of producing death or serious bodily injury." See, e.g., State v. Piper, 117 N.H. 64 (1977) (belt buckle becomes dangerous weapon when blade is attached and it is swung at someone); State v. Kiluk, 120 N.H. 1 (1980) (dinner fork becomes a deadly weapon when it is used to stab someone in the eye); In re Justin D., 144 N.H. 450 (1999) (multiple rolls of reinforced coins become



dangerous weapons when swung at someone's head); see also United States v. Sturgis, 48 F.3d 784, 788 (4th Cir.), cert denied, 116 S.Ct. 107 (1995) (listing cases where belts, shoes, metal chairs, staplers, telephone receivers and cords, beer bottles, teeth, fists, and feet have been found to be deadly weapons depending upon the manner in which they were used to cause death or injury); Najera v. State, 955 S.W.2d 698, 701 (TX App. 1997) (finding that penis and seminal fluid of a person infected with HIV can be dangerous weapons); State v. Hutchinson, 734 N.E.2d 454, 458 (OH App. 1999) (finding that person who commits rape while infected with HIV is guilty of attempted murder). This is precisely why the issue is factual in nature and must be determined by a jury.

Furthermore, our Supreme Court already has sufficiently clarified our "deadly weapon" statute so that no person of common intelligence could ever reasonably differ as to its meaning. See State v. Hatt, 144 N.H. 246, 247 (1999). Specifically, when addressing an argument framed in an identical manner to defendant's here, the Court found that a reasonable person would be on notice that an unloaded firearm was a "deadly weapon" under RSA 625:11, V. Id. In so doing, the Court explained that "the legislature clearly intended to limit the definition to those instruments which are objectively understood to be capable of causing death or serious bodily injury in the manner in which they are used, intended to be used, or threatened to be used." Id. at 248. The Court specifically noted that "the legislature did not require the state to prove that a

particular weapon is actually capable of causing death or serious bodily injury, and [declined to] add that requirement." Id. (emphasis in original).

Thus, in this case, if seminal fluid and sexual organs infected with HIV can objectively be understood to be capable of causing death or serious bodily injury in the manner they are used, then the statute satisfies our constitutional notice requirement and it is not unconstitutionally vague. Id.; see also Beckert, 144 N.H. at 319 (finding that the phrase "dangerous weapon" is not unconstitutionally vague); In re Justin D., 144 N.H. at 454 (finding same when applying term to reinforced coin rolls).

Here, the general public, the media, our legislature, state courts, and federal courts all objectively understand that HIV is a communicable disease that results in fatal illnesses such as AIDS and is transmittable through unprotected sexual contact. See e.g., RSA 141-F (enacted because the legislature found HIV to be a public threat to health, safety and welfare); 22 U.S.C.A. 6801 et. seq. (same); Bragdon v. Abbot, 524 U.S. 624 (1998) (finding HIV infection to be a permanent disability from the moment of its inception); United States v. Sturgis, 48 F.3d at 788 (finding that HIV infection causes AIDS, and whether it could be transmitted by a body part or bite is a factual issue for the jury); Najera v. State, 955 S.W.2d at 701 (finding that HIV is a fatal disease transmittable by sexual intercourse); State v. Hutchinson, 734 N.E.2d at 458 (finding same).

Thus, it follows that the sexual organs and bodily fluids exchanged

during unprotected sexual contact can objectively cause serious bodily injury and potentially death.

In society today, it would be disingenuous for any person, at any level of intelligence, to argue they do not know that HIV causes death and permanent infection, or to argue that they do not know how the disease is transmitted and prevented. Accordingly, the Court rules that sexual organs and seminal fluids are objectively capable of causing serious bodily injury and death in the manner they were used in this case. Specifically, when they are infected with HIV and used in unprotected sexual contact, thereby exposing a victim to the potentially fatal virus. Therefore, defendant was sufficiently notified by our "deadly weapon" definition that "the manner of" his conduct, and not his disease, could be found to be criminal under RSA 631:2 and RSA 631:3. However, again such a finding is a factual determination for the jury at trial.

Accordingly, the Court rules that under a fair reading of defendant's indictments they factually allege the charges asserted and, under a fair reading of the statutes charged, the phrase "deadly weapon" is not unconstitutionally vague. Therefore, a jury must decide if defendant actually engaged in the charges presented under the statutes and defendant's Motion to Dismiss is DENIED.

So ORDERED.

May 23, 2002

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DATE

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PATRICIA C. COFFEY

Presiding Justice