THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
SOUTHERN DISTRICT

NOS. 10-S-745-760

STATE OF NEW HAMPSHIRE

V.

PETER PRITCHARD

ORDER ON MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A BILL OF PARTICULARS

LYNN, C.J.

The defendant, Peter Pritchard, is charged with one count of attempted felonious sexual assault, three counts of felonious sexual assault (FSA), one count of aggravated felonious sexual assault (AFSA), ten counts of sexual assault, and one count of attempted sexual assault. The alleged victim of these crimes is Angela H.[1] Presently before the court is the defendant's motion to dismiss indictments 746-748, informations 750-754, and informations 756-760, or, in the alternative, for a bill of particulars with respect to each of these charges. The court held a hearing on the defendant's motion on September 8, 2010. The court concludes that the motion must be denied.

I.

Indictments 746-748 each charge the defendant with one count of felonious sexual assault. All of these indictments allege that, on or between December 1, 2005 and July 19, 2006, the defendant digitally penetrated Angela H.'s genital opening. The

[1] The defendant also is charged with ten counts of various types of sexual assaults against the alleged victim Jessica G. See Docket Nos. 09-S-228-232, 10-S-761-765. Pursuant to the court's order of July 18, 2010, all of the charges involving both Jessica G. and Angela H. have been consolidated for trial.

indictments are distinguishable from each other only by language incorporated into the ones pertaining to subsequent instances of the same alleged act which indicate the sequence of that act within the series charged in these indictments. Thus, indictment 747 alleges that the conduct it describes occurred “on a second occasion,” and indictment 748 alleges that the conduct occurred “on a third occasion.”

Informations 750-754 are drafted in the same fashion. Each information charges the defendant with one count of sexual assault. All the informations allege that, on or between January 1, 2006 and July 19, 2006, the defendant touched Angela H.’s genitalia over her clothing in a manner which could reasonably be construed as being for the purpose of sexual arousal or gratification. Again, the informations pertaining to subsequent instances of the same alleged conduct contain language identifying the sequence of the act in the series. For example, information 750 alleges “this [conduct] being a fifth occasion,” information 751 alleges “this being a fourth occasion,” and so forth.

Informations 756-760 each allege that, on or between December 1, 2005 and July 19, 2006, the defendant touched Angela H.’s genitalia over her clothing when Angela indicated physically or verbally that she did not freely consent to this conduct. Information 760, which pertains to the first act in this series, contains no additional language, whereas information 759 alleges “this [conduct] being a second occasion,” information 758 alleges “this being a third occasion,” etc.

The defendant moves to dismiss indictments 746-748, informations 750-754, and informations 756-760, or, in the alternative, for a bill of particulars as to these indictments and informations. The defendant alleges that the indictments and

informations violate the Sixth and Fourteenth Amendments of the United States Constitution and Part 1, Article 15 of the New Hampshire Constitution, because they are insufficient to provide him with adequate notice of the charges against him. The defendant asserts that the charging documents are indistinguishable from one another because they are differentiated only by the reference to the sequential number of the occasion of the conduct to which each pertains. The defendant argues that he is "prejudiced in his ability to prepare a defense as to each [charge], including the possibility of raising an alibi defense as to any one of [them], and his ability to guard against double jeopardy." Def.'s Mot. Dismiss at ¶ 13. In the alternative, the defendant argues that he is at least entitled to a bill of particulars, setting forth all temporal details, including specific dates on which the sexual assaults were alleged to have taken place.

The State objects, arguing in response that each indictment contains all required elements and is sufficiently specific for the defendant to prepare a defense.

II.

In its analysis, the court looks to the New Hampshire Constitution first, relying on federal law only for guidance. See State v. Pseudae, 154 N.H. 196, 199 (2006) (citing State v. Ball, 124 N.H. 226, 231-33 (1983)). Part I, Article 15 provides that "[n]o subject shall be held to answer for a crime, or offense, until the same is fully and plainly, substantially and formally, described to him." N.H. CONST. pt. I, art. 15. A bill of particulars can provide protection for this constitutional right. See State v. Dupont, 149 N.H. 70, 76 (2002). However, "[a] bill of particulars is, in this State, a tool for clarifying an inadequate indictment or complaint, rather than a general discovery device." State v. Chick, 141 N.H. 503, 506 (1996) (emphasis added). Here, if the indictments and

informations at issue were in fact inadequate, they would have to be dismissed because the State represented at oral argument that Angela H. is unable to provide any additional specific facts to differentiate between the similar sexual acts specified in the charging documents other than to say each type of act occurred on multiple occasions. Thus, the State has no ability to provide the type of details the defendant seeks through the mechanism of a bill of particulars. As demonstrated below, however, the State's inability to provide particulars is not fatal because the indictments and informations are sufficient as they stand.

To satisfy the requirements of Part I, Article 15, a charging document such as an indictment, information or complaint must inform the defendant of the offense with which he is charged with sufficient specificity so that he knows what he must be prepared to meet at trial and so that he is protected from being put in jeopardy on a subsequent occasion for the same offense. See State v. Carroll, 120 N.H. 458, 460 (1980). However, as the court explained in State v. Sideris, 157 N.H. 258 (2008):

> While the State is required to plead all the elements of an alleged crime in [the charging document], it is not obligated to plead facts beyond those necessary to identify the specific offense charged. . . . [A charging document] need only ensure that a defendant can prepare for trial and avoid being subjected to double jeopardy. . . . Once these goals are accomplished, there is no further and independent requirement to identify the acts by which a defendant may have committed the offense, or to limit proof of guilt to acts specifically pleaded.

Id. at 261-62.

In support of his argument that the indictments and informations charging multiple counts of the same conduct are insufficient, defendant relies primarily on State

v. Mayo, Docket Nos. 00-S-151-154 (Belknap Cty.Super.Ct.), Order of Aug. 18, 2000 (McHugh, J.). As is the situation here, in Mayo, the court was faced with five indictments which alleged the exact same sexual conduct and which were distinguished from each other only by language indicating the sequential numbering of the act to which each indictment pertained. While the court recognized that none of the indictments was duplicitous, as had been the case in State v. Patch, 135 N.H. 127 (1991), because each one charged only a single offense, the court nonetheless held that the rationale of Patch mandated that to be constitutionally sufficient the indictments had to contain more distinguishing information than simply the number of the occasion within the sequence each was intended to cover. The court reasoned that, by charging in this fashion, the State "has made the number of each offense a necessary element. In other words, in order for a jury to find the defendant guilty of indictment #151 they (sic) would first have to find the defendant guilty of indictment #150." Mayo, Order at 6. The court expressed concern that presenting the five indictments charging the same exact conduct to the jury would, in effect, ask the jury to simply "'pick a number' without being able to adequately differentiate the various alleged incidents." Id. at 7. Noting that the State based its decision to bring five indictments on a single statement of the victim that she had had sexual intercourse with the defendant "like 3, 4, 5, 6, I'd say 7 times," and that this statement "smacks of nothing more than sheer speculation on her part," the court also found as a matter of law that "the State would be unable to prove beyond a reasonable doubt that the defendant sexually assaulted the victim a definitive number of times." Id.

This court disagrees with Mayo's analysis. First, insofar as the court purported to make a determination of the sufficiency of the State's evidence to establish guilt beyond a reasonable doubt in the context of ruling on a pretrial motion to dismiss, such a ruling seems clearly erroneous. There is no such thing as a motion for summary judgment in criminal cases. See, e.g., United States v. Pope, 613 F.3d 1255, 1259 (10th Cir. 2010); United States v. Young, 694 F.Supp. 25, 28 & n.4 (D.Me. 2010); United States v. Solomanyan, 452 F.Supp.2d 334, 348 n.3 (S.D.N.Y. 2006); State v. Taylor, 810 A.2d 964, 980-81 (Md. 2002); State v. Palmer, 2010 WL 2171662, *3-4 (Ohio App.). See generally Costello v. United States, 350 U.S. 359, 363 (1956) ("An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face is enough to call for trial of the charge on the merits."). Therefore, determining the legal sufficiency of the evidence to meet the State's burden of proof is a matter that cannot be determined prior to the close of the State's case at trial.

Second and more fundamentally, the court sees no constitutional infirmities in indictments or informations which are differentiated from one another only by the specification of the sequence in which each alleged act occurred. Charging in this fashion does not undermine the essential functions that an indictment or information is designed to serve. Even though Angela H. may not be able to provide specific details to differentiate between one act of sexual assault and a similar act of the same kind, the very fact that she can testify that such acts were committed by the defendant two, three, four times, etc., would, if believed by the jury, be sufficient to establish two, three, four, etc., separate offenses. See People v. Jones, 792 P.2d 643, 654 (Cal. 1990)

("[A]lthough the jury may not be able to readily distinguish between the various acts, it is certainly capable of unanimously agreeing that they took place in the number and manner described." Court held that generic testimony of multiple acts of sexual abuse is sufficient to sustain multiple convictions provided the evidence contains specifics as to three matters: (1) the type of act committed; (2) the number of acts committed; and (3) the general time period.); State v. Hayes, 914 P.2d 788, 796-97 (Wash. App. 1996) (adopting Jones analysis). And while it may be true, as Justice McHugh observed, that in order to convict the defendant of the second incident of a particular type of sexual act, the jury would necessarily have to find that a first incident of that act had occurred, the court fails to see how the jury's implicit need to make such a finding prejudices the defendant's rights. Because the finding that the act in question was the second act of the type of assault alleged would be necessary to differentiate it from the indictment charging the first act of that type (or the third act), the jury would of course be required to unanimously find this fact beyond a reasonable doubt. But, again, Angela H.'s testimony that such acts happened on two or more occasions within the general time period alleged would be sufficient to meet the State's burden.

The manner of charging employed here also protects the defendant against the risk of being placed in double jeopardy. For example, if the defendant were found guilty of committing, say, the first and second incidents of a particular type of sex act but not of committing the third, fourth and fifth such acts, this would preclude the State from later alleging that additional instances beyond the two for which the defendant had been convicted occurred during the same time frame alleged in the charging documents because the jury's verdict would amount to a determination that only two incidents

occurred during that period. Cf. State v. Dixon, 144 N.H. 273, 278-79 (1999). By the same token, if the defendant is convicted of, say, all three counts of felonious sexual assault charged in indictments 746-748, in order for the State to later charge the defendant with an additional act of the same kind of assault during the same time frame, the State would have to prove beyond a reasonable doubt that the act in question constituted a fourth act occurring during that period; and if the State were able to meet that burden, then the defendant, by definition, would not have been prosecuted for any of the same offenses of which he was previously convicted.

Further, where time is not an element of the charged crime, "[a] defendant generally has no basis for complaining that the indictment fails to allege a precise date, absent a showing that the inexactness raises a possibility of prejudice specific to him." State v. Lakin, 128 N.H. 639, 640 (1986). The defendant has failed to make this showing. The court finds that each charging document sufficiently sets forth the elements of the crime charged and provides enough specific information to allow the defendant to distinguish each alleged crime and prepare for trial. While the defendant argues that knowing more detail will aid in preparing for trial and may provide him with an alibi defense, these arguments are vague. Where the defendant has not articulated any basis for an alibi defense, the State is not required to provide details other than the elements of the charged crimes, even when they may be helpful to the defendant. See Dupont, 149 N.H. at 77. The State has represented that the alleged victim cannot give any additional information and "[the State] should not be required to arbitrarily select exact dates in order to furnish the defendant with an alibi defense." Dixon, 144 N.H. at 276. The court notes that the defendant has been provided with extensive discovery

relating to the nature of the charged offenses. "The sufficiency of an indictment is determined not by inquiring whether the indictment could be more certain and comprehensive, but by determining whether it contains the elements of the offense and enough facts to warn the accused of the specific charges against him." State v. Pelky, 131 N.H. 715, 719 (1989) (quotation and citation omitted).

The defendant argues that, "Without an allegation of a particular date, there is a high likelihood that the jury's verdicts may not be unanimous as to each separate offense." Def.'s Mot. at ¶ 19. The court finds that there is not any substantial danger that the jury's verdicts may not be unanimous as to each separate offense. Although many of the alleged acts are similar in nature, the indictments clearly set forth separate sequential occasions when they occurred. Each act is charged separately, thereby protecting against potential jury confusion. Further, any danger of possible lack of juror unanimity may be cured by a jury instruction which makes it clear that for each count the jurors must unanimously agree that the same specific act has been proved beyond a reasonable doubt.

III.

For the reasons stated above, the defendant's Motion to Dismiss or, in the Alternative, for a Bill of Particulars is denied in all respects.

So ordered.

September 28, 2010

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ROBERT J. LYNN
Chief Justice