

his name from the sex offender registry. The Department denied his request in a short letter. Mr. Lane subsequently filed the present petition for review of governmental action pursuant to Rule 75. Cf. *Fraser v. Sleeper*, 2007 VT 78, 182 Vt. 206.

The parties have filed cross-motions for summary judgment. Taking as true the uncontroverted assertions of material fact set forth in the parties' respective motions, V.R.C.P. 56(c)(2), the undisputed facts for purposes of summary judgment are as follows:

Mr. Lane was convicted in New Hampshire in 1998 for the offense of indecent exposure, R.S.A. § 645:1. The elements of the offense are that “[a] person is guilty of a misdemeanor if such person fornicates, exposes his or her genitals, or performs any other act of gross lewdness under circumstances which he or she should know will likely cause affront or alarm.” Mr. Lane was charged and convicted under the portion of the statute prohibiting a person from exposing his genitals under circumstances which he should have known were likely to cause affront or alarm.³

To decide whether an out-of-state offense requires registration as a sex offender in Vermont, the analysis under 13 V.S.A. § 5401(10)(C) is whether the elements of the out-of-state offense “would constitute a crime under subdivision (10)(A) or (B) of this section if committed in this state.” Here, the question is whether the essential elements of lewd and lascivious conduct, 13 V.S.A. § 2601, would be met by proof that a person exposed his genitals under circumstances which he should have known were likely to cause affront or alarm.

The essential elements of lewd and lascivious conduct are met when a person (1) intentionally engages in behavior that is both (2) open and gross and (3) lewd and lascivious. 13 V.S.A. § 2601; *State v. Penn*, 2003 VT 110, ¶ 12, 176 Vt. 565 (mem). The element of “open and gross” conduct requires proof that the act was undisguised and observed by at least one witness. *State v. Benoit*, 158 Vt. 359, 361 (1992). The element of lewdness and lasciviousness requires proof that the behavior was “sexual in nature, lustful, or indecent, that which offends the common social sense of the community, as well as its sense of decency and morality.” *Penn*, 2003 VT 110, ¶ 12. Although the definition of lewd and lascivious behavior is generally not susceptible to precise explanation, all of the reported cases suggest that there must be a sexual component to the crime. See *State v. Purvis*, 146 Vt. 441, 443 (1985) (suggesting that a defendant would not be convicted for lewd and lascivious conduct for “mere nudity”).

The New Hampshire offense of indecent exposure contains elements of openness and grossness, but not any element of lewdness or lasciviousness. Its elements are that the defendant must have exposed his genitals under circumstances likely to cause “affront or alarm.” R.S.A. § 645:1. In New Hampshire case law construing the elements, the only

³ Mr. Lane asserted in his statement of undisputed material facts that he was neither charged with nor convicted for fornication or committing any other act of gross lewdness. He also attached photocopies of his complaint and arrest warrant, which show that he was charged with exposing his genitals under circumstances likely to cause affront or alarm. The court takes this assertion to be true because the Department has not disputed it in opposition to Mr. Lane's cross-motion for summary judgment. V.R.C.P. 56(c)(2).

reported cases explain that the statute derives from common law, that the offense requires only a “general intent to expose himself, and not an intent to expose himself to any particular individual or in any particular way,” *State v. Bergren*, 677 A.2d 145, 146–47 (N.H. 1996) (citation omitted), that the defendant must actually expose his genitals, *State v. Devaney*, 657 A.2d 832, 833–34 (N.H. 1995), and that the exposure must “offend against order and decency.” See *State v. Lizotte*, 148 A.2d 91, 92 (N.H. 1959) (distinguishing earlier statute prohibiting indecent exposure from statute prohibiting lascivious behavior); see also *State v. Burgess*, 89 A. 452 (N.H. 1914) (explaining that earlier statute prohibiting indecent exposure applied to “bathing in public, and not to lascivious conduct”). The court has not located any New Hampshire cases requiring that indecent exposure be lewd or lascivious in nature.

A person may expose his or her genitals in public in any number of ways that would cause affront or alarm, but not also be lewd. For example, a person might urinate in public, stroll naked down the sidewalk, or sunbathe nude on the town green. As other courts have noted, the common-law offense of indecent exposure “can be committed by an exhibitionist” and includes “an innumerable variety of offenses, ranging from reprehensible to the arguably innocuous, or from moral depravity to momentary poor judgment.” See *Duran v. State*, 948 A.2d 139, 151 (Md. Ct. Spec. App. 1998) (concluding that a Maryland conviction for indecent exposure does not require a person to register as a sex offender in Maryland) (internal quotations omitted). In short, the elements of common-law indecent exposure can be met through a wide variety of behavior, but conviction for indecent exposure does not necessarily require “sexual contact, a sexual act, sexual arousal, gratification, or any other element normally associated with a sexual offense.” *Duran*, 948 A.2d at 151.

For these reasons, the court concludes that a person who exposes his genitals under circumstances likely to cause affront or alarm would not necessarily commit the offense of lewd and lascivious conduct if the act was committed in Vermont. The court therefore holds that a New Hampshire conviction for indecent exposure, R.S.A. § 645:1, does not require a person to register as a “sex offender” in Vermont within the meaning of 13 V.S.A. § 5401(10)(C).

The court expresses no opinion as to whether Mr. Lane’s name must be removed from the sex offender registry.

ORDER

(1) Defendant’s Motion for Summary Judgment (MPR #1), filed March 4, 2009, is *denied*.

(2) Petitioner’s Motion for Summary Judgment (MPR #2), filed March 10, 2009, is *granted*.

(3) Petitioner is entitled to a declaration that his New Hampshire conviction for indecent exposure is not, under 13 V.S.A. § 5401(10)(C), a sex crime the elements of which would constitute a crime under subdivision (10)(A) or (B) of § 5401 if committed in Vermont.

Dated at Chelsea, Vermont this 22nd day of July, 2009.

Hon. Mary Miles Teachout
Superior Court Judge