State of New Hampshire
Supreme Court

NO. 2011-0859

2013 TERM

FEBRUARY SESSION

State of New Hampshire
v.
Priscilla Protasowicki

RULE 7 APPEAL OF FINAL DECISION OF
CONWAY DISTRICT COURT

REPLY BRIEF

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I. All Issues Adequately Preserved

The State alleges Ms. Protasowicki did not preserve several matters, which are, however preserved.

A. Use of Reasonable Physical Force

The State suggests that Ms. Protasowicki neglected to preserve her authority, as an innkeeper, to use reasonable physical force. STATE'S BRF. at 12.

In her Motion to Dismiss, Ms. Protasowicki notified the State and the court that she intended to assert the innkeeper ejection defense, and cited RSA 353:3-c where the defense is codified. MOTION TO DISMISS AND/OR MOVE TO MISTRIAL ¶3J (May 12, 2011), *Appx.* at 29 (typed copy). The motion moreover set forth the text of the ejection defense statute, with some words highlighted, including "may remove" in the statute's subsection I, and "may immediately remove" in subsection II. The motion referred to the statute as "[t]he ejection of guests with refusal to leave upon request," *id*., and requested the case be dismissed based on it.

The statute is entitled ""Ejection of Guests." Although it contains some conditions, its unmistakable import is to give innkeepers authority to physically remove guests. By invoking the statute and indicating her intent to defend based on it, combined with the allegation that she physically assaulted a hotel guest, it is untenable to suggest the nature of her defense was a mystery.

B. Implications of Innkeeper Eviction Defense

The State does not dispute Ms. Protasowicki notified it and the court of her intent to present the innkeeper eviction defense, as it was done (twice) in writing well before trial in language making clear she claimed an absolute defense that should result in dismissal. MOTION TO DISMISS AND/OR MOVE TO MISTRIAL (May 12, 2011), *Appx.* at 28 & 29-30 (handwritten and typed copy).

The State suggests however, that Ms. Protasowicki did not adequately raise in the trial court the distinctions between a pure defense, an affirmative defense, and a statutory defense, and the various burdens and standards that distinguish them. STATE'S BRF. at 12.

There are several problems with this suggestion.

First, preservation requires that a defendant timely raise an issue; not that the defendant list all the legal implications of the issue raised. That is, preservation does not give the State an opportunity to stand mulely by waiting for the defendant to instruct what to do with the information. *State v. Ayer*, 150 N.H. 14, 20-21 (2003) (defendant adequately preserved issue of unfair trial even though requested erroneous remedy: "The State contends that, because the defendant refused to consent to a mistrial without prejudice as alternative relief below, he is barred from now requesting that relief on appeal. The State urges us, therefore, to find that this issue is not preserved for our review because the defendant did not ask for a new trial as relief from the constitutional error at trial.... To adopt the State's strict construction of our preservation rule would run contrary to our preservation jurisprudence. In the past, we have found that when an issue is directly raised by the trial court and subsequently addressed by both parties and the court, it is adequately preserved for appellate review.").

Second, the district court rules require that "[a]ffirmative defenses must be raised by written notice at least five days in advance of trial." DIST.CT.R. 2.8B. The rule requires only bare notice, and no more. It does not even require – as the superior court rules do – that the defendant specify grounds for the defense. *Compare* SUPER.CT.R. 101 (requiring notice that "defendant intends to claim [the] defense," and "setting forth the grounds therefor"). Certainly the rule does not require a list of legal implications of the defense, or who has the burden of proof.

Third, it is not credible to suggest that notice must be given regarding burdens of proof in criminal cases. *In re Winship*, 397 U.S. 358 (1970); RSA 626:7, I ("When evidence is admitted on a matter declared by this code to be: (a) A defense, the state must disprove such defense beyond a reasonable doubt; or (b) An affirmative defense, the defendant has the burden of establishing such defense by a preponderance of the evidence."). Upon receiving its notice that Ms. Protasowicki intended to invoke the innkeeper-eviction defense, if the State was then unsure about its burdens, it was *State's* job to either reach its own legal conclusions or request a ruling on the matter.

C. Whether the Stewarts Registered

The State suggests Ms. Protasowicki neglected to preserve the fact that the Stewarts registered as guests. STATE'S BRF. at 12. Presumably the import of this is that if they did not register, they were not guests, and thus the innkeeper's authority to eject them would not apply.

First, whether or not they were officially registered as guests is not material. As noted in Ms. Protasowicki's opening brief, the common law of innkeepers' authority – including the authority to "require him to depart, and expel him" – runs to everyone present in the hotel, not just registered guests. *Markham v. Brown*, 8 N.H. 523, 531 (1837).

Second, it *is* preserved. In her motion to dismiss Ms. Protasowicki noted "Mrs. Stewart signed a registration card." MOTION TO DISMISS AND/OR MOVE TO MISTRIAL ¶3D.

Third, to the extent it is relevant, it is not a matter of preservation, but rather an element the State would have had to disprove beyond a reasonable doubt.

D. Registration Card is Part of the Record

The State suggests that the registration card the Stewarts signed is not in the record. STATE'S BRF. at 12.

The signed card was attached to Ms. Protasowicki's Motion to Dismiss, and was incorporated by reference in the motion. MOTION TO DISMISS AND/OR MOVE TO MISTRIAL ¶3D. While not formally entered as an exhibit, reference was made to it, and at trial the Stewarts testified they signed it and understood the rules printed on it. *Trn*. at 24.

II. Regardless of Who has Burden, Innkeeper-Eviction Defense was Proved

Unaddressed and unresolved in the lower court is the issue of who has the burden of proof regarding the innkeeper-eviction defense.

> A pure defense is a denial of an element of the offense, while an affirmative defense is a defense overriding the element. The former must be negated by the State by proof beyond a reasonable doubt and must be submitted to the jury for determination. The latter need not be negated by the State. The burden of proof to establish an affirmative defense is on the defendant, who must carry this burden on a balance of the probabilities.

State v. Soucy, 139 N.H. 349, 352-53 (1995) (citations omitted).[1]

In her opening brief Ms. Protasowicki noted that New Hampshire has made statutory defenses pure defenses which must be negated by the State, RSA 627, argued that the innkeeper-eviction defense is such a statutory pure defense, and also argued that the State did not negate the defense beyond a reasonable doubt. In its brief the State claims the defense is merely affirmative, which Ms. Protasowicki failed, "because no evidence of her defense was elicited at trial." STATE'S BRF. at 23.

There are only two types of criminal defenses in New Hampshire – pure and affirmative. *State v. Etienne*, 163 N.H. 57, 81 (2011); *Soucy*, 139 N.H. at 349.

Justification defenses are pure defenses which the state must disprove beyond a reasonable doubt. RSA 627:1 ("Conduct which is justifiable under this chapter constitutes a defense to any offense.") All the pure defenses in RSA 627 are based on "justification" and all contain the word. RSA 627:2 (public duty defenses); RSA 627:3 (competing harms); RSA 627:4 (physical force in defense of person); RSA 627:5 (physical force in law enforcement); RSA 627:6 (physical force by persons with special responsibilities); RSA 627:7 (use of force in defense of premises); RSA 627:8

[1]The State makes what appears to be a claim that because the motion was heard after the evidence rather than before or during it, the standard of proof might shift. STATE'S BRF. at 22. The timing of a ruling, however, does not affect substantive rights. *Walker v. Walker*, 63 N.H. 321, 328 (1885) (*Doe*, J.) ("The judgment, and any necessary process for carrying it into effect, being directed to the ends of justice, cannot be obstructed by imaginary barriers of form.").

(use of force in defense of property); RSA 627:8-a (use of force by merchants).

Affirmative defenses require the defendant prove the elements of the defense by a preponderance of the evidence. RSA 626:7, I(b). They include entrapment, duress, and voluntary renunciation in the crime of attempt. RSA 626:5; *State v. Daoud*, 141 N.H. 142 (1996); *State v. Jernigan*, 133 N.H. 396 (1990).

Although the innkeeper-eviction defense is not listed in the *criminal* code, it is undeniably a statute. And it is based on justification. *Markham v. Brown*, 8 N.H. 523, 531 (1837). As pointed out in Ms. Protasowicki's opening brief, it is akin to the other codified defenses because it involves public duty, defense of others, defense of property, and persons with special responsibilities. For these reasons it should be considered a pure rather than affirmative defense.

Even if it is an affirmative defense, however, Ms. Protasowicki proved its elements by a preponderance of the evidence. Ms. Protasowicki showed that the Stewarts:

- were guests in that they had registered for lodging;
- were in the hotel lobby which is part of the residential property and part of the "establishment" from which they were sought to be removed;
- had made a reservation, resulting in the hotel holding a room for them;
- were unwilling to pay in that they demanded refund of their deposit, even though the service for which the deposit was paid – holding the room open for them against other paying guests – had already been rendered;
- created risk of affecting the quiet enjoyment of others, in that they acted threatening and unreasonable in the lobby of the hotel;
- violated a hotel rule regarding refunds in that they insisted on a refund;
- received notice that the innkeeper desired they leave;
- were asked to leave for a valid reason;
- were victims of no more force than reasonably necessary to remove them.

Accordingly, Ms. Protasowicki proved the elements of the defense, and should have been acquitted.

III. "Rental Unit" and "Residential Property" Means More than Merely Private Quarters

A. Definition of "Rental Unit" as "Residential Property" Applies to all Subsections of Innkeeper Eviction Statute

The State analysis of the innkeeper eviction statute, RSA 353:3-c, is that subsection I applies to "rental unit" while subsection II does not, and that this binary is what distinguishes the differing provisions. STATE'S BRF. at 21-22 ("The phrase [rental unit] does not appear in the second paragraph.").

While such an easy difference would be convenient, that is not what the statute says. Both subsections apply in a "rental unit."

Subsection I begins: "All hotel keepers … may remove … any guest remaining in a rental unit." Subsection I ends: "[T]he term 'rental unit' shall include residential property rented for one month or less."

Subsection II begins: "All hotel keepers and persons keeping … any rental unit may immediately remove … any guest who [engages in certain conduct]." Subsection II-a provides, identically with subsection I, that "[T]he term 'rental unit' shall include residential property rented for one month or less."

Because New Hampshire's statutory codification regards the entirety of the innkeeper-eviction statutes as a "section," both identical definitions apply to all the subsections of RSA 353:3-c. Moreover, identical terms appearing in a statute are to be construed identically, unless there is good reason to construe them differently. *Ocasio v. Fed. Exp. Corp.*, 162 N.H. 436, 451 (2011); *Appeal of Int'l Bhd. of Police Officers*, 148 N.H. 194, 195 (2002); *Dupont v. Chagnon*, 119 N.H. 792, 794 (1979); *Appalachian Mountain Club v. Meredith*, 103 N.H. 5, 16 (1960).

"Rental unit" is twice defined as "residential property," and there is no reason to think it means something different in subsection II.

Accordingly, because "residential property" means the entire hotel, the State's attempt at distinguishing the two subsections based on application of the definition must fail.

B. "Residential Property" Means the Entire Property Rented

The State suggests that the term "rental unit" means nothing more than one's private bedroom suite. It claims that the only reason the legislature defined the term – equating "rental unit" with "residential property" rented for less than a month – is to distinguish innkeepers from landlords. STATE'S BRF. at 15-18. While that is undoubtably one of its effects, the definition sweeps more broadly, for the reasons noted in Ms. Protasowicki's opening brief and amply emphasized by the *amicus curiae*.

The State does not offer any rebuttal of the problem identified by the *amicus* – that if the statute were construed so narrowly, innkeepers would be precluded from protecting property and guests whenever a qualifying customer emerged from private quarters. The State likewise does not offer a cogent construction of "residential property."

Other courts, however, have consistently given these terms constructions far broader than merely "an individual guest room." STATE'S BRF. at 15. *Karrell v. United States*, 181 F.2d 981 (9th Cir. 1950) (for veterans benefits purposes, "residential property" includes land to be purchased for construction of dwelling); *Boswell v. Howell*, 275 So. 2d 658 (Ala. 1973) (for taxation purposes entire single-family dwelling held "residential property"); *Marzullo v. Molineaux*, 651 A.2d 808 (D.C. 1994) (for purposes of contractor licensing, entirety of vacant three-story rowhouse in substantial disrepair held "residential property"); *Evangelical Lutheran Good Samaritan Soc'y v. Bd. of Review of Montgomery County*, 688 N.W.2d 482 (Iowa App. 2004) (skilled-nursing facility held "residential property" because used primarily for human habitation); *Alpha One Properties, Inc. v. State Tax Comm'n of Missouri*, 887 S.W.2d 390 (Mo. 1994) (for taxation purposes, entirety of apartment complex considered "residential property"); *Smith v. Young*, 692 A.2d 76 (N.J. Super. App. Div. 1997) (for premises liability purposes, entire duplex residence considered "residential property"); *Borges v. Hamed*, 589 A.2d 199 (N.J. Super. 1990) aff'd, 589 A.2d 169 (N.J. App. Div. 1991) (for premises liability purposes, entirety of three family house in residential zone held "residential

property" not "commercial property"); *State ex rel. Howell v. Meador*, 154 S.E. 876 (W.Va. 1930) (for zoning purposes "residential property" includes "church or church building" as distinguished from commercial or industrial uses). No known case has held the phrase "residential property" to be so limited as "an individual guest room" as the State urges.

Even the naked term "rental unit" has not been so narrowly construed as the State urges. *See Blacknall v. Dist. of Columbia Rental Hous. Comm'n*, 544 A.2d 710 (D.C. 1988) (for rent-control purposes "rental unit" held to be entire apartment suite); *Rent Control Bd. of Cambridge v. Cambridge Tower Corp*., 477 N.E.2d 1011, 1014 (Mass. 1985) (for condominium-conversion purposes, "rental unit" held to mean entire living suite).

Regardless of the distinctions between subsections I and II of the innkeeper eviction statute, as Ms. Protasowicki argued in her opening brief, she is relieved of criminal liability under both. Bolstering that argument, it should be noted that subsection II applies when a guest "[v]iolates any local or state law." Once an owner makes clear that someone is not welcome, they become a trespasser, and remaining there puts them in violation of New Hampshire's trespass statute. RSA 635:2. Accordingly, once Ms. Protasowicki and her father made clear the Stewarts were no longer welcome, they became trespassers, thus allowing Ms. Protasowicki to physically eject them.

IV. Hotel Lobby is Part of Hotel "Establishment"

Regardless of the definitions of "rental unit" and "residential property," the language of the statute makes clear that removal applies to the entire "establishment."

The statute provides that "[a]ll hotel keepers … may remove or cause to be removed *from such establishment* any guest" who violates its conditions. RSA 353:3-c, I (emphasis added). The statute does not limit removal from the guest's private quarters, but from the entire "establishment." The State's effort to limit the places in the hotel to which the statute applies is thus undermined by the language of the statute itself.

V. Intervening Invitation

The State suggests that after Ms. Protasowicki issued her verbal warning that the Stewarts should leave, it was ineffective because either the Stewarts were already leaving, STATE'S BRF. at 11-12, or that her father issued an intervening invitation that Ms. Protasowicki should offer them their cash back. STATE'S BRF. at 24-25. The facts, however, support neither of these contentions.

First, although Jean Stewart was already outside, Christopher had not left. Given that he was the one involved in the ruckus, Ms. Protasowicki was obligated to see him out.

Second, although Ms. Protasowicki's father intervened, his testimony was clear that he asked Mr. Stewart to leave *after* his intervention failed to calm the confrontation. *Trn*. at 36.

VI. Refund

In its brief the State draws attention to the statutory requirement that "upon … eviction, the guest shall be refunded the unused portion of [the] rental." STATE'S BRF. at 25. Although only a portion of the transaction is in the record, it is believed the Stewarts were fully refunded. In any event, if a refund is an element of the defense, the State made no effort to prove it was not made.

More important, whether or not there was a refund is not relevant to the issues here – that the innkeeper-eviction statute is a defense to assault and applies to Ms. Protasowicki's case. The State cannot seriously argue that to effectuate an eviction, the innkeeper is required to immediately toss cash out the door.

CONCLUSION

Because the innkeeper-ejection defense authorizes the reasonable use of force, Ms. Protasowicki cannot be guilty of assault for minor physical contact while removing a guest. Accordingly, this Court must set aside her conviction.

Respectfully submitted,

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Dated: February 25, 2013

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CERTIFICATION

I hereby certify that on February 25, 2013, copies of the foregoing will be forwarded to the Office of the Attorney General.

Dated: February 25, 2013

Joshua L. Gordon, Esq.