State of New Hampshire
Supreme Court

NO. 2022-0067

2023 TERM

MARCH SESSION

State of New Hampshire

v.

Odessa Lemieux

RULE 7 APPEAL OF FINAL DECISION OF THE
MERRIMACK COUNTY SUPERIOR COURT

REPLY BRIEF

March 14, 2023

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2A Richard B. McNamara, *New Hampshire Practice: Criminal Practice and Procedure* § 43.47 at 57 (6th ed. 2017). 4

ARGUMENT

I. Defendant's Sufficiency Argument Was Preserved

The State contends that Ms. Lemieux, through her attorney, Theodore Barnes, did not preserve her sufficiency-of-the-evidence argument. *State's Brf*. at 18-20, 28-29. As the State noted, upon the prosecutor resting the State's case, the court called the parties' lawyers to the bench for a sidebar. A colloquy followed:

> THE COURT: So do you have a motion?
>
> MR. BARNES: Your Honor, I suppose I should.
>
> THE COURT: Are you moving to dismiss the charges?
>
> MR. BARNES: I am.
>
> THE COURT: I'm going to deny the motion. I find that given the evidence and the weight most favorable to the State, the State has met its burden throughout each of the elements and (indiscernible) the State is proceeding and given the standard that applies. The motion is denied.

Trn. at 161-62.

A motion to dismiss at the end of the State's case to preserve sufficiency for appeal has been a mandatory part of New Hampshire criminal practice for decades, *see State v. Stearns*, 130 N.H. 475, 490-91 (1988), and courts thus anticipate lawyers making the routine motion. 2A Richard B. McNamara, *New Hampshire Practice: Criminal Practice and Procedure* § 43.47 at 57 (6th ed. 2017) ("It is virtually the universal practice of defense counsel to move for a directed verdict at the close of the State's case.").

In Ms. Lemieux's case, that is what happened. The court called the parties to the bench and solicited the expected motion, which the defense attorney breviloquently articulated. The court clearly understood the attorney's statement, "I am," as a motion to dismiss for insufficiency; the court responded that the State "has met its burden throughout each of the elements." *Trn.* at 161.

A motion for directed verdict based on insufficiency of the evidence need not list each element that the State failed to meet. In *State v. Gordon*, 161 N.H. 410 (2011), the defendant's appeal attacked sufficiency of the evidence – whether he took a substantial step toward breaking and entering, and whether he had sufficient intent to commit a crime therein. *Gordon* 161 N.H. at 418. "At trial, the defendant moved to dismiss the charge against him 'based on sufficiency of the evidence.'" *Id.* at 417. This court held that because "the defendant specifically moved to dismiss the State's case on the ground that the evidence to convict him was insufficient, … [n]othing more was required to preserve his sufficiency of the evidence argument for our review." *Id.; see also State v. Tayag*, 159 N.H. 21, 24 (2009) ("We conclude that because the defendant's argument concerns the sufficiency of evidence, the issue was preserved by his motion to dismiss at the close of the State's case.").

Accordingly, the defendant's motion to dismiss preserved all sufficiency-of-the-evidence issues. And even if Ms. Lemieux's motion were overly terse, any error was plain as a matter of law. *State v. Guay*, 162 N.H. 375, 381 (2011).

The State relies on *State v. Dodds*, 159 N.H. 239, 243 (2009), to claim lack of preservation. But *Dodds* does not apply because it was not a sufficiency appeal. In *Dodds,* while the defendant's motion to dismiss "asserted only that the evidence was insufficient to support a conviction," the issue he pressed on appeal was interpretation of two statutes – a legal issue clearly not within the defendant's sufficiency-based dismissal motion.

Requiring extreme specificity in a motion to dismiss based on sufficiency would force the defendant to carry some of the burden of proof, which the State properly bears. *State v. Prescott*, 7 N.H. 287 (1834); *In re Winship*, 397 U.S. 358 (1970). It would also violate defendants' due process rights by requiring defendants to list the elements and articulate the State's

deficiencies without benefit of a transcript nor an opportunity to review it. *Bundy v. Wilson*, 815 F.2d 125 (1st Cir. 1987); *State v. Cigic*, 138 N.H. 313 (1994).

Here, because the defendant moved to dismiss at the close of the State's evidence based on insufficiency of the evidence, and insufficiency is also the issue on appeal, Ms. Lemieux's arguments were preserved, and this court should reach the merits.

II. Children Did Not Lose Weight

In its brief, the State repeatedly claims the children lost weight between doctors' visits. *State's Brf.* at 7 ("children had lost substantial amounts of weight"), 8 ("weight loss might have been caused by distress"), 30 ("children had lost weight").

There was no evidence of weight loss. Rather, some of the children had gone down in their weight percentiles. That is not the same as losing weight. During testimony of the nurse who examined the children and reported to DCYF, the defendant objected to the State's conflation of the two concepts. *Trn*. at 23-25. That resulted in the court, in a sidebar, admonishing the parties to be clear about the difference. *Trn.* at 24 ("I think she's probably explaining the percentiles and what that means."). Immediately following the sidebar, the State's attorney reminded the witness and the jury: "So I just want to be clear about when we're talking about the percentiles." *Trn*. at 25. The State's attorney then asked the nurse to explain what weight percentiles mean, which she did. *Trn.* at 26.

Although the State's Summary of Argument is accurate on the matter, *State's Brf.* at 16, the remainder of the State's commentary on weight is incorrect. Given that the issue was differentiated at trial, such misinformation should not be repeated on appeal.

III. "Food Deprivation" is Not An Issue

The State gives considerable attention in its brief to alleged "withholding food" and "food deprivation." *State's Brf.* at 22, 27-28. Any discussion of the matter is verboten for several reasons.

First, the State did not charge Ms. Lemieux for child endangerment based on unavailability of food. The complaint alleged endangering welfare based only on restraint. COMPLAINT (June 18, 2018), *Addendum to Defendant's Opening Brief* at 27.

Second, at trial, the State attempted to bring in evidence of inadequate food, prompting the defendant to object. *Trn*. at 104. After a sidebar, the court instructed the jury,

> Members of the jury, I'm going to strike the testimony regarding looking for adequate food. And that's to form no part of your deliberations in the case.

Trn. at 105.

Given the defendant's objection and trial court's admonition, it is disingenuous for the State to attempt to resurrect the issue for appeal. Accordingly, those portions of the State's brief mentioning the issue should be stricken.

IV. Restraint Was Not Intended to Cause Harm

The State cites several cases from other jurisdictions in an apparent effort to undermine Ms. Lemieux's argument that she did not knowingly endanger the children by purposely violating her duty of care. *State's Brf.* at 22-23.

Beyond several unpublished lower court decisions, which are not canvassed here, the reported cases cited by the State do not support its contention. *In re Dorothy V.*, 774 A.2d 1118 (Me. 2001), was a child protection case where the child was living in truly abominable conditions; the restraint was minimal, or even trivial, in that context. *Custody of Minor*, 389 N.E.2d 68 (Mass. 1979), was also a child protection case, where, like *Dorothy V.*, the child's living conditions were terrible; the duration of restraint was unspecified, but it was clearly much longer than overnight. *Commonwealth v. O'Conner*, 372 S.W.3d 855 (Ky. 2012), was a criminal child abuse case, where the child's living conditions were similarly revolting; like *Custody of Minor,* the duration of restraint was unspecified, but clearly much longer than overnight.

V. Photograph Evidence Does Not Prove Restraint

In her brief, Ms. Lemieux argues that the photograph of alleged "ties" does not aid in the State's proof of restraint because the photo is not self-revelatory – it is not obvious what the black blobs are – and there was no testimony explaining it. *Defendant's Brf.* at 19.

Admissibility of the photo is not an issue in this appeal. Contrary to the State's assertion, *State's Brf.* at 28, however, because sufficiency-of-the-evidence was preserved generally, the deficiency of the photograph as evidence of restraint was preserved as well.

In her brief, Ms. Lemieux discusses the words written in the margin of the photo and how they got there. *Defendant's Brf.* at 19. The purpose was to highlight that, aside from unethical motives, how the words appeared there was not supported by any testimony, and that therefore any conclusions the jury or this court may have drawn from the inscription must be discounted.

VI. Urinary Issues Were Not Due to Restraint

In its brief, the State suggests that the children's urinary accidents all occurred because they were restrained in their rooms. *State's Brf.* at 22, 24, 26. The facts do not support the allegation.

The State's investigator testified that D had previous urination issues, had resolved them, but then regressed when the family moved to Newport. *Trn*. at 156-57. R would start on her way to the bathroom, but then sit down and urinate on the floor. INTERVIEW at 29. L would hold her urine to avoid going to school. *Id.* at 32.

Even if the upstairs bathroom door could have been blocked, the police confirmed that there were two bathrooms in the house, *Trn.* at 121-22, and Ms. Lemieux brought the children to the doctor in an effort to address their urinary issues.

In any event, urination was a problem that was not exclusive to the context of nighttime bedroom restrictions.

VII. Jury Found Ms. Lemieux Not Guilty of Witness Tampering

In its brief, the State suggests this court should draw conclusions based on its claim that Ms. Lemieux told the children "not to talk to the police." *State's Brf.* at 26. Based on such allegations, the State charged Ms. Lemieux for witness tampering. However, the jury found her not guilty of that charge, and this court should accordingly ignore the matter.

CONCLUSION

Because the evidence was insufficient to support Ms. Lemieux's conviction, this court should reverse.

Respectfully submitted,

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Dated: March 14, 2023

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CERTIFICATIONS

I hereby certify that this brief contains less than 3,000 words, exclusive of those portions which are exempted.

I further certify that on March 14, 2023, copies of the foregoing will be forwarded to the Office of the Attorney General, via this court's e-filing system.

Dated: March 14, 2023

Joshua L. Gordon, Esq.