State of New Hampshire
Supreme Court

NO. 2019-0099

2019 TERM

NOVEMBER SESSION

State of New Hampshire

v.

Kyle Perkins

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

REPLY BRIEF

November 4, 2019

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ARGUMENT

I. Law Cited Regarding Value in Perkins's Opening Brief is Current and Controlling

In its brief, the State says that Perkins's recitation of the law regarding "value" is outdated because Perkins relies on *State v. Belanger*, 114 N.H. 616 (1974), and *State v. Moody*, 113 N.H. 191 (1973), which reflect common law pre-criminal code statutes. *State's Brf.* at 25-26. The contention is inapposite for several reasons.

First, the propositions for which Perkins cited *Belanger* and *Moody* are not affected by New Hampshire's codification of the criminal code in 1973. Those propositions are that value must reflect fair market value, value is measured at the time of the offense, value is not affected by subjective or emotional significance, and there is a difference between valuing items that tend to appreciate and those that tend to depreciate. *Defendant's Brf*. at 17-18, 24-25.

New Hampshire's adoption of the criminal code in 1973 did not abandon the common law in this area; it codified it. The 1973 codification provided that, "'Value' means the highest amount determined by any reasonable standard of property." RSA 637:2, V. To the extent *Belanger* and *Moody* are common law cases, they help define what is a "reasonable standard of property," making both cases relevant and controlling.

Second, even if citation to *Belanger* and *Moody* is anachronistic, the two post-codification cases also cited by Perkins largely track *Belanger* and *Moody*. In *State v. Hammell*, 128 N.H. 787 (1986), the defendant was convicted of receiving stolen property, and argued that due to an erroneous valuation, his felony indictment should have been Class-B rather than Class-A. This court held:

> It is clear that the value of the [stolen property] *at the time of the offense* is determinative of the degree of the offense of which the defendant can be convicted.

Hammell, 128 N.H. at 789 (emphasis added). In *State v. Leith*, 172 N.H. 1 (2019), this court ratified the trial court's instruction, which was:

> Value means the market value or the price which the property will bring in a fair market *at the time of the alleged theft*, after reasonable efforts have been made to find the purchaser who will give the highest price for it. Value means the highest amount determined by any reasonable standard of property.

Leith, 172 N.H. at 4 (emphasis added).

II. Replacement Value is Not a Reasonable Standard of Property

The State says that the verdict was justified because the jury could establish value based on the cost of replacement. It also claims that the State's witnesses provided evidence of replacement value. Both contentions are wrong.

First, New Hampshire's statute provides that "'[v]alue' means the highest amount determined by any *reasonable* standard of property." RSA 637:2, V (emphasis added). While historical and future values may be relevant in determining value at the time of the offense, *Hammell*, 128 N.H. at 789 (jury could consider appraisal of car reflecting post-theft repairs), replacement value is different than value at the time of the offense, especially for items (as noted in Perkins's opening brief) that rapidly change in value. Therefore replacement value is not a "reasonable standard of property."

Second, the State's legal claim rests on the laws of other jurisdictions, which do not support the claim. The State cites an Iowa statute, *State's Brf.* at 26, which specifically provides that value may be replacement value. Iowa Code § 714.3 ("Reasonable standard includes but is not limited to market value within the community, actual value, *or replacement value*.") (emphasis added). It also cites a North Dakota case, which in turn cites an Ohio case, which is based on an Ohio statute, which (like Iowa) specifically provides that value may be "the cost of replacing the property with new property of like kind and quality." *State v. Ebach*, 589 N.W.2d 566, 572 (N.D. 1999), citing *State v. Ensz*, 503 N.W.2d 236, 239 (N.D. 1993), in turn citing Ohio Rev. Code § 2913.61.

Third, even if replacement cost were a viable basis on which to value received stolen property, the State did not offer evidence of replacement cost. In its brief, the State claims that Concord detective Brian Womersley "testified that he had researched the value of the stolen iPads in 2015, and that new ones like them cost $429 apiece." *State's Brf.* at 27.

But Womersley was talking about purchase price, not replacement value.

He testified that the "approximate value [he] was told that they were worth was $429," *Day 1* at 112, and that he got that number from the school district. *Day 1* at 128. He said he "looked up" the value and "[t]hey were new for that." *Day 1* at 128. He testified that the basis of the school district's knowledge of the value was that "[t]hey're the owners of the property and it's whatever cost was to their School Board to purchase these items, however they purchased them." *Day 1* at 133.

III. Defense Counsel Knew Perkins Would Testify That the Items Had Value

The State claims that Perkins's lawyer was not ineffective because Perkins testified differently than what his lawyer expected him to say. The State maintains that before trial, the lawyer "had gone over" Perkins's anticipated testimony, and that the lawyer understood Perkins would "testify that [the iPads] were valueless at the outset." *State's Brf.* at 30.

However, the lawyer's own words belie that claim. In his opening statement, the defense attorney told the jury it would hear directly from Perkins, and promised Perkins was "going to testify that the value of those iPads is around 55, $60 each." *Day 1* at 15. Defense counsel's opening statement makes clear that he did not anticipate Perkins would say the items were valueless.

The State's contention appears to be an after-the-fact justification rather than an accurate rendition of trial-time strategic thinking. The disparity also casts doubt on the defense lawyer's other recollections.

IV. All Appellate Issues Have Been Preserved

In its brief, the State claims Perkins did not adequately preserve the issues pressed here. *State's Brf*. at 32-33. To allege lack of preservation, the State breaks down the defendant's argument into its smallest and narrowest elemental parts, and then alleges he did not previously enunciate each elemental part.

The State's position is overly narrow.

> 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. Perhaps more importantly, however, we have always found that when a trial court holds a separate hearing on a single issue, a defendant need neither object nor except to adverse dispositive rulings on that legal issue.

State v. Ayer, 150 N.H. 14, 21 (2003) (citations omitted).

The State's position also conflates argument before appellate and trial courts.

> [A]ppellate practice entails rigorous original work in its own right. The appellate practitioner who takes trial level points and authorities and, without reconsideration or additional research, merely shovels them in to an appellate brief, is producing a substandard product. Rather than being a rehash of trial level points and authorities, the appellate brief offers counsel probably their best opportunity to craft work of original, professional, and, on occasion, literary value.

In re Marriage of Shaban, 105 Cal. Rptr. 2d 863 (Cal.Ct.App. 2001).

Perkins preserved all his appellate arguments, and the State's position should be rejected.

V. Inaccurate Statement Regarding Sentencing

In what appears to be an effort to prejudice the court, in its brief the State says that before this trial, Perkins had "a prior felony conviction for the same thing." *State's Brf*. at 15. While Perkins may have believed this, *Day 2* at 184, that was a misunderstanding. It was that same misunderstanding which led to Perkins being re-sentenced before the commencement of this ineffective assistance claim. *See* MOTION FOR RESENTENCING ON GROUNDS THAT COURT BASED SENTENCING ON INCORRECT UNDERSTANDING OF DEFENDANT'S PRIOR CRIMINAL HISTORY (Nov. 21, 2017), *Addm. to Reply Brf*. at 13; STATE'S OBJECTION TO DEFENDANT'S MOTION FOR RESENTENCING (Dec. 4, 2017), *Addm. to Reply Brf*. at 18; ORDER (granting motion for resentencing) (Jan. 23, 2018), *Addm. to Reply Brf*. at 20; *see also Defendant's Brf.* at 14.

As detailed in the cited pleadings, the misunderstanding was based on the State's own misleading statements to the sentencing court, and should not have been repeated here.

CONCLUSION

A motion for directed verdict, questions posed to a defendant-witness, and a motion for accurate jury instructions are all "critical stage[s] of … trial," *Garza v. Idaho*, __ U.S. __, 139 S. Ct. 738, 744, 203 L. Ed. 2d 77 (2019). Had Perkins's attorney not been ineffective in these matters, it would have resulted in a verdict of not guilty, and this court should therefore dismiss the indictment.

Respectfully submitted,

Kyle Perkins
By his Attorney,
Law Office of Joshua L. Gordon

/s/ Joshua L. Gordon

Dated: November 4, 2019

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CERTIFICATIONS

I hereby certify that this brief contains no more than 3,000 words, exclusive of those portions which are exempted.

I further certify that on November 4, 2019, copies of the foregoing will be forwarded to the Office of the Attorney General through the court's e-filing system.

/s/ Joshua L. Gordon

Dated: November 4, 2019

Joshua L. Gordon, Esq.