THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0030

State of New Hampshire

v.

Kevin Drown

Appeal Pursuant to Rule 7 from Judgment
of the Grafton County Superior Court

BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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Issue preserved by Drown's objection, T* 249–51, the State's argument, T 250–51, and the court's ruling, T 252. To the extent the issue is not preserved, it is raised as plain error.

2. Whether the court erred by permitting the prosecutor to require Drown to express an opinion about the complainant's credibility.

Issue raised as plain error.

3. Whether the court erred by permitting the prosecutor to argue that Drown's opinions about the complainant's credibility were inculpatory and contradicted his attorney's arguments.

Issue preserved by Drown's objection, T 244, the State's argument, T 244–45, and the court's ruling, T 245–46. To the extent the issue is not preserved, it is raised as plain error.

* Citations to the record are as follows:
"A" refers to the appendix to this brief;
"S" refers to the transcript of the sentencing hearing on December 15, 2016;
"T" refers to the transcript of trial on October 25–26, 2016.

STATEMENT OF THE CASE

In February 2016, the State obtained from a Grafton County grand jury three indictments alleging that Kevin Drown committed aggravated felonious sexual assault ("AFSA") and one indictment alleging that he committed felonious sexual assault ("FSA"). A1–A4. The indictments alleged offenses between August 1, 1988, and August 1, 1990, and pertained to the same complainant, who was six to eight years old during that time frame. A1–A4.

At the conclusion of a two-day trial in October 2016, the jury found Drown guilty of all four indictments. A1–A4; T 262–64. On December 15, 2016, the court (Bornstein, J.) sentenced Drown on each of the AFSA convictions to seven and a half to fifteen years, stand committed, and on the FSA conviction to three and a half to seven years, suspended for ten years. A23–A30; S 14–15, 19–22. All of the sentences were consecutive. A23–A30; S 14, 20–22.

STATEMENT OF THE FACTS

Kevin Drown was born and raised in Webster and has lived in various towns in central New Hampshire. T 165–66; A5–A6. In about 1987, Drown, his wife and their four young children moved into an apartment in Bristol. T 38–39, 71, 157–58, 160, 166–67, 172–73; A6–A7, A9–A13, A17–18. Drown worked full-time days for a condominium in Lincoln, part-time nights for a cleaning company, and, occasionally, a third job cleaning for a real estate company. T 167–68, 183; A11. His wife stayed home and cared for their children. T 74, 168; A11.

In about 1988 or 1989, another family, which also included several children, moved into the apartment upstairs from the Drown family. T 33–37, 71–72, 87–88, 160–61, 168–69, A12, A18. The two families were friends with each other and the other family's children often spent time in the Drowns' apartment. T 38–39, 43, 87, 158–59, 169, 175; A12–A13, A19. The complainant, one of the other family's daughters, was seven years old at the time. T 34, 158, 169; A12. The two families only lived in the same building for a short period of time. See T 42 (complainant's family "moved to a different apartment soon after" moving in); 173 (Drown's family moved out in the spring of 1989). Drown did not see the complainant again. T 63–64, 179; A12, A21.

Trial took place in October 2016, twenty-seven years after the families lived in the same building. T 1–267. By then, Drown was the father of seven and a grandfather of thirteen or fourteen. A7–A8. The complainant was

thirty-four years old, had been married for fourteen years, and was the mother of three. T 34, 64, 93.

The complainant testified that, while her family lived at the Bristol apartment, Drown sexually assaulted her on several occasions. T 56–61. She testified that, on three occasions, Drown brought her into a spare bedroom in his apartment, had her disrobe, and had her watch him masturbate. T 47–48, 50–54, 75. She testified that she then told her mother, but that her mother, who passed away in 2014 and whom she and her sister described as an abusive alcoholic, told her not to tell anyone. T 42–43, 54, 69, 90–91.

The complainant testified that on the next occasion, Drown had her disrobe and move her hands up and down on his penis. T 56–57. She testified that on the following occasion, Drown had her disrobe and perform fellatio. T 57. She testified that on the final two occasions, Drown had her disrobe and lay down and that he inserted the handle of a hairbrush into her vagina. T 58–60. On each occasion, the complainant testified, Drown told her not to tell anyone. T 51, 68.

The complainant and her sister testified that, when the complainant was a teenager, she alleged to her sister that Drown sexually assaulted her. T 63, 88. The complainant and her husband testified that, a couple of months into their relationship, she alleged to him that Drown sexually assaulted her. T 63–64, 93–94. In the fall of 2014, a detective with the Merrimack County Sheriff's Office called the complainant and asked her if Drown had sexually

assaulted her. T 22–23, 27, 29, 64–65. The complainant said that he had. T 29, 66–67.

The police conducted two recorded interviews with Drown. T 31, 123, 130; 140–41; A5–A22. Both in his interviews and at trial, Drown said that he did not assault the complainant. T 170, 183–84; A14, A17, A19–A21. He said that he did not recall even being alone with the complainant. A13–14, A17, A20. He said that he did not know why the complainant accused him of assaulting her. T 187; A14, A17–21.

SUMMARY OF THE ARGUMENT

A prosecutor may not ask the jury to base its verdict on facts not in evidence or argue that a sexual assault complainant is credible merely because she testified. Here, the prosecutor told the jury, without evidence, that it was "really, really hard" and "embarrassing" for the complainant to testify, that she knew it would be difficult, and that she did not want to testify. The prosecutor argued that, merely because the complainant testified, she was credible. This improper argument was deliberate, the court did not strike the argument or give a cautionary instruction, and the argument was prejudicial.

A prosecutor may not require a defendant to express an opinion about the credibility of a prosecution witness. Here, the court plainly erred by permitting the prosecutor to ask Drown repeatedly whether he believed the complainant was "lying" or "mistaken." The error was prejudicial because this case turned entirely on the credibility of the complainant and Drown. In light of this Court's repeated and forceful admonitions against such questions, the error seriously affects the fairness, integrity and public reputation of judicial proceedings.

Because a defendant's opinion about the credibility of a prosecution witness is irrelevant, a prosecutor may not argue that it constitutes evidence of guilt. Here, the court erred by overruling Drown's objection to the prosecutor's argument that he was guilty because he expressed inconsistent opinions about the complainant's credibility and because his opinion contradicted his attorney's argument.

I. THE COURT ERRED BY PERMITTING THE PROSECUTOR TO ARGUE THAT IT WAS DIFFICULT AND EMBARRASSING FOR THE COMPLAINANT TO TESTIFY, AND THAT SHE WAS CREDIBLE SIMPLY BECAUSE SHE TESTIFIED.

Drown's lawyer argued in closing that the charged acts did not occur. T 210–11. She focused on the absence of injury or physical evidence, the fact that no one noticed anything unusual at the time, Drown's busy work schedule, the complainant's inability to testify to certain circumstances related to her allegations, and the fact that circumstances about which she did testify — that the bedroom had a tin ceiling and no windows — was not supported by the police investigation. T 211–16. The complainant, she argued, "made it up"; "the whole thing is a lie." T 215. She argued that the complainant may have had "a need for attention," "something to gain by playing the role of a victim," or "some sort of grudge against [Drown]." T 218. She noted that "[p]eople lie for all kinds of reasons" and that "[t]hey don't always reveal the reasons behind the lies." T 218. "[E]ven though you may not know why [the complainant] is being untruthful," she argued, there were several reasons "to be highly skeptical of her account." T 219. Later, she noted that, while "[i]t's very easy to make a complaint against someone," "[i]t's much harder to prove a negative; that something didn't happen." T 227. She noted that Drown consistently denied the allegations, which is "[a]ll a man falsely accused of a crime like this . . . can do." T 227.

The prosecutor, in her closing argument, asserted that:

> [the complainant] didn't want to come into this courtroom and tell strangers about a handle of a hairbrush been shoved up her vagina. She hadn't even

> told her husband that fact, but when Deputy Fiske called her two years ago, she took her time to think about whether she wanted to go through with this process and she did. She broke her silence by coming in here yesterday and telling you what happened to her; what the Defendant did to her.

T 230–31. Later she argued:

> [W]hat [Drown's attorney is] saying is . . . that [the complainant] likes the attention of being a victim. Do you think [the complainant] had fun yesterday[?] Do you think this process has been fun for her? Do you think she likes the attention and if she did, why'd she have to take that time to think about whether or not she wanted to go through with this process, or do you think she knew it was going to be really, really, hard to come and tell 14 strangers about what that man did to her?

T 238–39. Later still, she argued:

> [the complainant's] gone through two years of waiting for this trial to come about. Her family's been dragged into it. Her husband; her sister. They didn't even know about these assaults. She told you, she never planned on doing this. She never planned on telling the police about this.

T 242. Later, she asked, "Why would [the complainant] tell anyone at that point; to drag herself back through this process?" T 248. She added:

> And if [fabricating the allegations] was her plan, why? So she could come here and cry on the stand in front of 14 strangers; so her husband and her sister could find out what happened to her when she was seven; so they could hear embarrassing things like the Defendant put a handle of a hairbrush in my vagina? And I know you guys don't want to hear that again; nobody wants to hear that. [The complainant] didn't want to say it.
>
> Why? Why would she come here and tell you that if it wasn't true?

T 248–49.

At that point, Drown's attorney objected. T 249. Citing a case from Massachusetts[1], she argued that it is impermissible for a prosecutor to argue that a complainant is credible simply because she chose to testify. T 249. She noted that the prosecutor had made the argument repeatedly. T 251.

The prosecutor argued that she was merely posing a question; she "[hadn't] said [that] because [the complainant's] doing this, she is telling the truth." T 250–51. She argued that because Drown's attorney had argued in closing that the complainant was not credible, sustaining the objection would leave her "hamstrung." T 251.

The court overruled the objection, finding that the prosecutor's argument was "posed [in] the form of a rhetorical question for the jury to draw their own inferences" and was not an expression of personal opinion. T 252. The court added that the prosecutor could address the defense's argument that the complainant was not credible "and ask the jury to . . . make rational inferences about whether [the complainant's] testimony is truthful based on the evidence presented and the circumstances presented overall." T 252.

In light of the court's ruling, Drown's attorney did not ask the court to strike the prosecutor's comments or issue a curative instruction. T 252–53. Near the conclusion of her closing, the prosecutor reiterated the argument:

> I'm sure you could see yesterday it was really hard for [the complainant] to come in here and tell you about

[1] The transcript indicates a reference to "Commonwealth versus Jergo (phonetic)." T 249. The context establishes that Drown's attorney was referring to Commonwealth v. Dirgo, 52 N.E.3d 160 (Mass. 2016), discussed infra.

> what happened to her. She did it and now she's counting on all of you to have the courage to complete the final step of this process, which now rests in your hands.

T 258. By overruling Drown's objection to the prosecutor's argument, the court erred.

A prosecutor's duty is to seek justice, not merely to convict. State v. Leveille, 160 N.H. 630, 634 (2010). Thus, there are limits on a prosecutor's latitude to zealously argue the State's case. State v. Addison, 165 N.H. 381, 548 (2013). "While a prosecutor may strike hard blows, [s]he is not at liberty to strike foul ones." Id. (quotation omitted). A trial court's ruling on the propriety of closing argument is reviewed for an unsustainable exercise of discretion. Id. at 549 (2013). If such a ruling is clearly untenable or unreasonable to the prejudice of the appellant's case, it will be reversed. Id.

The prosecutor's argument was improper for two reasons. First, she made assertions that were not supported by the evidence. Second, she asked the jury to find the complainant credible simply because she chose to testify. This brief will address each of these points below.

A. The prosecutor's assertions were not supported by the evidence.

It is improper for a prosecutor to ask the jury to base its verdict on facts not in evidence. State v. Cooper, 168 N.H. 161, 168 (2015). In State v. Mussey, 153 N.H. 272 (2006), for instance, the prosecutor argued that the testimony of law enforcement officers is credible because, if they are found to have lied, "their careers will be over." Id. 276. This Court found the argument improper

in part because "[t]here was no testimony regarding the likelihood of such consequences." Id. at 278.

Here, similarly, the prosecutor made several references to facts not in evidence. There was no evidence, for instance, that "[the complainant] didn't want to come into this courtroom and tell strangers about" the allegations. T 230–31. There was no evidence that "it was . . . really, really, hard to come and tell 14 strangers about" the allegations or, assuming that it was, that the complainant, prior to trial, "knew it was going to be really, really, hard." T 239, T 258. There was no evidence that the complainant was "embarrass[ed]" about her allegations or that she "didn't want to say it." T 249. There was no evidence that, as a result of trial, the complainant's "husband and her sister . . . f[ou]nd out" the details of her allegations. T 248–49. These assertions may have been based on the prosecutor's personal observations, but they were not based on any evidence presented to the jury.

To the extent that this argument is not preserved, it is raised as plain error. This Court may reverse for plain and prejudicial errors that seriously affect the fairness, integrity or public reputation of judicial proceedings. Sup. Ct. R. 16-A; State v. Morrill, ___ N.H. ___ (March 10, 2017). The error was plain because the rule prohibiting reference to facts outside the evidence is "well settled." Cooper, 168 N.H. at 168. The assertions here plainly violated it. Drown will address the third and fourth prongs of the plain error analysis in subsection C below.

B. It was improper for the prosecutor to argue that the complainant was credible merely because she testified.

Even if the prosecutor's assertions had been supported by the record, the argument would still have been improper. In Mussey, this court held that the prosecutor's argument that law enforcement officers are credible because, if they lie, "their careers will be over" was improper for several reasons beyond the fact that it was unsupported by the evidence. Mussey, 153 N.H. at 277–78. Among other things, such arguments, "vouch for the credibility of witnesses," "encourage the jury to act based on considerations other than the particularized facts of the case," "impermissibly elevate the credibility of police officers over the credibility of other witnesses, including the defendant," and "distract[the jury] from its primary responsibility of weighing the evidence before it." Id.

The prosecutor's argument here was impermissible for exactly the same reasons. The prosecutor argued that the complainant in a sexual assault case was credible because she chose to testify despite the difficulty and embarrassment of doing so. Like the argument in Mussey, this argument vouches for the credibility of witnesses and distracts the jury from its primary responsibility of weighing the evidence before it.

Put simply, the prosecutor's argument proves too much. If the record here is sufficient to infer that the complaint found it difficult or embarrassing to testify, then the record in any sexual assault case would be sufficient to draw such an inference. If the complainant here was credible merely because she chose to give such testimony, then every sexual assault complainant would

be credible for the exactly the same reason. Thus, the State's argument encouraged the jury to act based on considerations other than the particularized facts of the case and elevated the credibility of sexual assault complainants, as a group, over the credibility of other witnesses, including defendants.

This Court has not yet addressed whether it is improper for a prosecutor to argue that a sexual assault complainant is credible simply because the complainant chose to testify. Massachusetts appellate courts, however, have held that such arguments are improper. "A prosecutor may not . . . suggest to the jury that a victim's testimony is entitled to greater credibility merely by virtue of her willingness to come into court to testify." Commonwealth v. Ramos, 902 N.E.2d 948, 950 (Mass. App. Ct. 2009).

In Commonwealth v. Beaudry, 839 N.E.2d 298, 306 (Mass. 2005), the court held that it was improper for the prosecutor to argue that a complainant of child sexual assault "was credible simply because she testified at trial." Id. "[T]he problem in Beaudry was the prosecutor's attempt to emphasize the victim's willingness to come into court and undergo the rigors of trial." Commonwealth v. Helberg, 896 N.E.2d 651, 655 n.7 (Mass. App. Ct. 2008).

In Ramos, the prosecutor asked the jury why the complaint of a sexual assault, allegedly committed when she was fifteen years old, "would come in almost four years later and say to a group of complete strangers, 'I was sexually assaulted. I had my period. I was wearing a pad.'" Ramos, 902 N.E.2d at 950. The appellate court held that, "[b]y alluding to conjectured

embarrassment experienced by a young woman in coming before a group of strangers to describe a sexual assault . . . the prosecutor sought to bolster the credibility of the complainant by virtue of her willingness, despite such a burden, to come into court and testify." Id. Ruling that the argument "committed precisely the error against which the court cautioned in Beaudry," the court reversed the defendant's conviction. Id. at 950–51.

In Commonwealth v. Dirgo, 52 N.E.3d 160 (Mass. 2016), the prosecutor, referring to the complainant of a child sexual assault, asked the jury, "[W]hen she sat on the witness stand yesterday and today and was . . . relaying [the allegations], do you think that was easy for her to do that?" Id. at 163. The prosecutor continued, "She subjected herself to your scrutiny. . . Did she seem embarrassed at times? Maybe a little uncomfortable . . . [?]. Think about that." Id. at 164. The prosecutor concluded by asking, "Why would she subject herself?" Id. at 164. On appeal, the Commonwealth conceded that the argument was improper and the Supreme Judicial Court of Massachusetts agreed, finding no "evidentiary support" for "the argument that the complainant was credible because of her willingness to testify." Id. at 163–64. Although the defendant did not object at trial, the court found that this argument, in combination with other improper arguments, created "a substantial risk of a miscarriage of justice" and reversed the defendant's convictions. Id. at 167.

The prosecutor's argument here is indistinguishable from the arguments held improper in Beaudry, Ramos and Dirgo. Like the prosecutors in all three

of those cases, the prosecutor here asked the jury why the complainant would come to court and testify to her allegations if they weren't true. T 249. Like the prosecutors in Ramos and Dirgo, the prosecutor argued that the complainant was credible merely because she gave testimony that was embarrassing and uncomfortable.

C. The error requires reversal.

In determining whether a prosecutor's improper closing argument requires reversal of the conviction, this Court considers three factors. Mussey, 153 N.H. at 280. The first factor is whether the prosecutor's argument was deliberate. Id. The second factor is "whether the trial court gave a strong and explicit cautionary instruction." Id. The third factor is "whether any prejudice surviving the court's instruction likely could have affected the outcome of the case." Id.

In determining whether the prosecutor's argument was deliberate, this court considers whether it was "a conscious decision, as opposed to a mere slip of the tongue." Id.; State v. Ellsworth, 151 N.H. 152, 157 (2004). Here, as in Ellsworth, "the prosecutor did not admit to making a mistake or express any regret" after making the improper arguments. Ellsworth, 151 N.H. at 157. Instead, she "tried to justify h[er] actions." Id. This Court also considers whether, at the time of trial, New Hampshire law clearly prohibited the argument. Mussey, 153 N.H. at 280. At the time of trial, New Hampshire law clearly prohibited arguing facts not in evidence. Cooper, 168 N.H. at 168.

Because the court overruled Drown's objection to the State's argument, it did not give a strong and explicit cautionary instruction. Thus, it failed to "signal[] to the jury that the court disapproved of the prosecutor's statement." Mussey, 153 N.H. at 281; see also Beaudry, 839 N.E.2d at 306–07 (improper argument cured by court's instruction that "the fact that a complaining witness has come into court and testified before you does not entitle that witness to any greater credibility").

The prosecutor's improper argument likely could have affected the outcome of the case, for two reasons. First, it "was not a single, offhanded remark." Dirgo, 52 N.E.3d at 163. As in Dirgo, "the prosecutor established throughout the argument an overarching theme that the complainant was credible because of her willingness to testify." Id. Second, this case boiled down to a credibility contest between the complainant and Drown. Drown consistently denied any inappropriate contact with the complainant, and, as in Ellsworth, the complainant's "testimony was not corroborated." Ellsworth, 151 N.H. at 158. Although it met the bare minimum threshold for legal sufficiency, the evidence of Drown's guilt "was by no means overwhelming." Id. Drown's defense focused on challenging the complainant's credibility. The State's improper argument, intended to bolster the complainant's credibility, "struck at the heart of the defense." Id. There was an "increased . . . likelihood of prejudice because the improper remarks were among the last words spoken to the jury by the trial attorneys." United States v. Ayala-Garcia, 574 F.3d 5, 20 (1st Cir. 2009). Thus, "[i]t would be virtually impossible to determine the

degree to which the jury may have been influenced by the prosecutor's comment." State v. Lake, 125 N.H. 820, 824 (1984).

To the extent this issue is analyzed under the plain error standard, it satisfies the third and fourth prongs. For the reasons stated above, the prosecutor's improper argument was prejudicial. Allowing the conviction to stand would seriously affect the fairness, integrity or public reputation of judicial proceedings. See Dirgo, 52 N.E.3d at 166–67. "[I]mproper argument, while objectionable in any case, is especially troublesome when made by a prosecutor, as the prosecutor is likely to be seen by the jury as an authority figure whose opinion carries considerable weight." Ellsworth, 151 N.H. at 154.

II. THE COURT ERRED BY PERMITTING THE PROSECUTOR TO REQUIRE DROWN TO COMMENT ON THE COMPLAINANT'S CREDIBILITY.

In the recorded interviews of Drown, the police repeatedly asked him whether he knew of any reason the complainant would fabricate sexual assault allegations against him. A14, A17–19. Drown repeatedly told the police that he did not know why the complainant was making the allegations. A14, A17–21. At one point, he responded, "[E]ither she is transferring it from somebody else or I, I don't, I have no answers. . . I don't know how to defend myself." A14. Later, he said, "I'm not denying . . . [t]hat she's making it up. I'm just saying it wasn't me, I didn't, never, I mean never, ah, never." A20.

At trial, while cross-examining Drown, the prosecutor asked "[i]n your interview with the police, they asked you several times why [the complainant] would make this up 25 years after it happened[?]" T 185. Drown's attorney objected, arguing that the prosecutor was "shifting the burden." T 185. She noted, "It's not on Mr. Drown to prove that he didn't do this. It's for the State to prove that he did." T 185. The prosecutor responded, "That may be the case if he didn't take the stand. He's on the stand now. He's obligated to answer questions, especially about something he already talked to the police about." T 185–86. The court overruled the objection, finding that "the question posed has not resulted in any burden shifting." T 186. The court added that the prosecutor "can ask [Drown] about what he said to the police, which the jury heard evidence of." T 186. The prosecutor then elicited Drown's acknowledgment that the police repeatedly asked him "why [the complainant]

would make this up," and that he repeatedly told them that he "[had] no idea why." T 186–87.

The prosecutor then asked Drown to confirm that the police asked him "whether . . . [he] thought [the complainant] was lying." T 187. The prosecutor appears to have been mistaken. Although the police asked Drown on several occasions if he knew of any reason why the complainant would accuse him of sexual assault, they did not ask Drown whether he thought the complainant was "lying." See State v. Willis, 165 N.H. 206, 220 (2013) (distinguishing between "reason to lie" questions and "was the witness lying" questions). In any event, Drown, who appears not to have had a transcript of the interview at hand, responded, "Yes." T 187. The transcript then reflects the following:

> Prosecutor: And what did you say?
>
> Drown: I said I have no way of knowing if she's lying or not about that having been done to her. I can only attest that I did not do anything to her.
>
> Prosecutor: So your testimony here today is that you said to Lieutenant Mitchell, I have no way of telling if she's lying or not?
>
> Drown: Correct.
>
> Prosecutor: Your Honor, may I approach the witness?
>
> Court: You may.
>
> Defense Counsel: And where are you at?
>
> Prosecutor: I'm at page five of the second interview [A20], line 147. Mr. Drown, please read line 147 and 148.
>
> Drown: "I'm not – I'm not denying that with [the complainant] at all that she's making it up. I'm just

> saying it wasn't me. I didn't never – I mean never, ah, never."
>
> Prosecutor: So in that interview you said I'm not denying that with [the complainant] at all, I'm not saying she made it up, right?
>
> Drown: Correct.

T 187–88.

The prosecutor then turned away from Drown's statements during the interview and to his present beliefs about the complainant's credibility:

> Prosecutor: Okay. Do you think [the complainant's] lying now?
>
> Drown: If she's saying that I did something, she's absolutely wrong, yes.
>
> Prosecutor: Well, you saw her testimony. That's what she said. Is she lying?
>
> Drown: She is lying.
>
> Prosecutor: So that passage you just read for us, an interview, you said you're not denying that [the complainant's] telling the truth. You said you didn't think she was lying and now you're saying –
>
> Drown: As far as being molested, I have no idea if she was molested or not, but I did not do anything to her.
>
> Prosecutor: So you think that maybe [the complainant's] mistaken about the person who did these things to her?
>
> Drown: I have no idea, but that's always a possibility. I don't know.
>
> Prosecutor: Do you think [the complainant's] mistaken about the person who made her stand unclothed and watched them masturbate?
>
> Drown: If she's saying it's me, she is mistaken, yes.

> Prosecutor: Do you think she's mistaken about the person who made her touch his penis when she was seven?
>
> Drown: Yes.
>
> Prosecutor: Do you think she's mistaken about the man who put his penis in her mouth when she was seven?
>
> Drown: Yes.
>
> Prosecutor: And do you think she's mistaken about who shoved the handle of the hairbrush up her vagina when she was seven?
>
> Drown: Yes.
>
> Prosecutor: No further questions, Your Honor.

T 188–89 (emphasis added). By permitting the State to repeatedly ask Drown whether the complainant was either "lying" or "mistaken," the court erred.

Drown concedes that it was permissible for the prosecutor to ask him about his statements during the interrogation. "[A] recorded interview does not implicate the same concerns that underlie [this Court's] prohibition against witness testimony at trial that opines upon the credibility of other witnesses." Willis, 165 N.H. at 218–19. Additionally, the police only asked Drown why the complainant would accuse him of assaulting her; they did not ask him whether he believed that the complainant was lying. Unlike a defendant's opinion about whether a complaint is lying, a defendant's statement about whether he is aware of any motive for the complainant to lie is relevant and carries minimal risk of undue prejudice. Id. at 220.

The prosecutor crossed the line, however, when she asked Drown, "Do you think [the complainant's] lying now," "Is she lying," and "Do you think [the

complainant's] mistaken." T 188–89. Because Drown did not object to these questions, this Court will review the issue for plain error.

Permitting the prosecutor to ask the questions was error. This Court has adopted "a broad prohibition on questions requiring a witness to comment upon the credibility of other witnesses." State v. Lopez, 156 N.H. 416, 424 (2007).

The error was also plain. Since Lopez, this Court has repeatedly held that questions such as those posed here are improper. State v. Guay, 164 N.H. 696, 704 (2013); State v. Souksamrane, 164 N.H. 425, 428 (2012); State v. Parker, 160 N.H. 203, 213 (2010). As this Court has noted, "it is inconceivable that any prosecutor would be unaware of the impropriety of such conduct." Souksamrane, 164 N.H. at 428.

The error was prejudicial. As noted above, this case involved a credibility contest between the complainant and Drown about what did or did not occur decades ago. The evidence of guilt cannot fairly be characterized as overwhelming. This fact alone distinguishes this case from Guay, Souksamrane and Lopez. See Guay, 164 N.H. at 705 ("the evidence of the defendant's guilt in this case was overwhelming"); Souksamrane, 164 N.H. at 429 ("the evidence of the defendant's guilt was overwhelming"); Lopez, 156 N.H. at 425 ("overwhelming evidence of premeditation"). The prosecutor's improper questions both bolstered the complainant's credibility and undermined Drown's. Further, as explained in Drown's third argument,

presented below, the prosecutor exploited her improper questions for maximum prejudicial effect during her closing argument.

Finally, the error seriously affects the fairness, integrity and public reputation of judicial proceedings. "[A]sking the defendant whether another witness is lying . . . is incompatible with the duties of a prosecutor." Souksamrane, 164 N.H. at 428. "[S]uch questions distort the government's burden of proof, create a 'no win' situation for the witness, and are argumentative." Id. (quotation omitted). They "interfere[] with the jury's obligation to determine the credibility of witnesses, and are not probative in that [they] require[] a witness to testify to things outside of her or his knowledge." Lopez, 156 N.H. at 423. "Unfairly questioning the defendant simply to make the defendant look bad in front of the jury regardless of the answer given is not consistent with the prosecutor's primary obligation to seek justice, not simply a conviction." Souksamrane, 164 N.H. at 428.

This Court has "condemn[ed], as forcefully as possible, prosecutorial cross-examination that compels a defendant to state that the police or other witnesses lied in their testimony." Id. And yet, prosecutors continue to disregard this Court's admonition. It is one thing to affirm in those cases in which the evidence of guilt is overwhelming. But to affirm in a case such as this — a "he said, she said" dispute about allegations that did or did not occur decades ago — would undermine the credibility of this Court's pronouncements, both generally and with regard to this issue specifically. For these reasons, this Court should find plain error.

III. THE COURT ERRED BY PERMITTING THE PROSECUTOR TO ARGUE THAT DROWN'S OPINIONS ABOUT THE COMPLAINANT'S CREDIBILITY WERE INCULPATORY AND CONTRADICTED HIS ATTORNEY'S ARGUMENTS.

After the court overruled her objection to the prosecutor's question during Drown's cross-examination, Drown's attorney expressed concern that the prosecutor would use the answer to present an improper closing argument. She stated, "I want to be clear that . . . the State isn't going to . . . say that it must have happened because [Drown] can't explain why [the complainant would fabricate the allegation]. That's improper." T 186. The prosecutor responded, "I think I can argue that in my closing." T 186. The court deferred ruling on the issue. T 186.

After the defense rested, the court invited Drown's attorney to elaborate on her objection to the State's intended closing argument. T 190. She explained that "it's not [Drown's] job to tell the Court what [the complainant's] motivation is for lying." T 191. The prosecutor responded, "That may be the case if [Drown] had not made any comment about what [the complainant's] motive might be in this case. He was asked several times in the interviews that were admitted as evidence what her motives might be and he said he didn't know." T 191. She argued that the defense's objection was "simply ludicrous" and that sustaining it "would have grand implication for cases following this one." T 191–92.

The court ruled that the State's intended closing argument would not be "impermissible . . . per se," but invited the defense to renew the objection

during the prosecutor's closing argument, adding that, with respect to whether the argument is improper, "I'll know it when I see it." T 193–94.

In her closing argument, the prosecutor told the jury:

> Now the defense attorney and her client, the Defendant, seem to disagree about what actually happened here. The defense attorney told you [the complainant's] a liar. Everything she told you yesterday was a lie, but Kevin Drown didn't say that. Even this morning when I asked him, well, is she a liar now, Kevin? You heard her testimony yesterday. He said, well, she's lying about me doing it to her, but he never said it didn't happen. And the defense attorney said to you, well, that's because maybe he feels some sympathy for [the complainant] and he doesn't want to call her an outright liar. Maybe that's the case or maybe he knows what happened and maybe he knows it's not a lie.

T 231.

Later, the prosecutor said,

> [W]hen the Defendant is asked about her motive to lie during the interview, he's asked almost a dozen times. They ask him over and over again. He says, I don't know, every single time; just like he did today. He didn't say to you, well, I think it's because she needs the attention. He didn't say to you, I think it's because she has something to gain from playing the role of victim. And he didn't say, well, I think she's holding a grudge against me. In fact when they asked him that question, he said, nope. No grudges. Everyone in that family seems to like me just fine.
>
> Again, the Defendant seems to be unclear here. Either [the complainant's] a liar and this didn't happen or maybe she's got the wrong person. He told you this morning, actually, I think it's this. She has the wrong person. His defense attorney just told you, nope. Never happened. [the complainant's] a liar.
>
> So, he -- his testimony to you this morning is that he thinks [the complainant's] mistaken about who did

> these things to her. Maybe [the complainant's] mistaken about who put the handle of the hairbrush in her vagina. Maybe [the complainant's] mistaken about who put his penis in her mouth when she was seven. . . [T]hat's what the Defendant wants you to believe. This is all just a big mistake.
>
> And the reason he told you that is because he has no reason to provide about why she would make this up.

T 242–44.

At that point, Drown's attorney objected, arguing that the prosecutor was improperly shifting the burden. T 244. The prosecutor argued that she was merely rebutting the defense lawyer's closing argument. T 244–45. The court overruled the objection. T 245–46. The prosecutor then continued:

> As I was saying, the Defendant answered the question about whether or not there was a motive in this case, several times during his interview and today on the stand and I'm going to play a clip of that interview although it's not the only time that he answers the question.

T 246. The prosecutor then played a portion of the interview and asked, "Is there a grudge there? Where's the grudge the defense attorney pointed to?" T 247.

Near the conclusion of her closing, the prosecutor stated, "The Defendant isn't sure which theory to go with. He's not sure if he should say [the complainant's] just an outright liar or if he should say that it was somebody else that did it. You guys have to decide who's telling the truth here." T 257. By permitting the prosecutor to argue that Drown's statements about the complainant's credibility contradicted his attorney's arguments and were

inculpatory, the court erred. To the extent this issue is not preserved, it constitutes plain error.

As noted above, this Court has repeatedly held that a defendant's opinion about whether a prosecution witness is lying is irrelevant, and that it is improper for a prosecutor to attempt to elicit it. It is equally improper for a prosecutor to refer to such matters in closing argument. D. Norwood, Prosecutorial Misconduct in Closing Argument §14.7, at 481 (2014) ("It is improper for a prosecutor to ask a defendant if other witnesses are lying or then to make reference to that answer in closing"); United States v. Schmitz, 634 F.3d 1247, 1270 (11th Cir. 2011) ("The problem with the prosecutor's comments in this case is that they were a clear continuation of the improper questions posed previously during [the defendant's] cross-examination"). Thus, it was improper for the prosecutor to argue that Drown was not credible because he expressed inconsistent opinions about whether the complainant was lying or mistaken. It was also improper for the prosecutor to argue that Drown was not credible because his opinions about whether the complainant was lying or mistaken differed from the theory of case presented by his attorney in opening statement and closing argument.

The court's error in permitting these arguments was plain because this Court has repeatedly made clear that the line of reasoning employed here is fallacious and improper. It was prejudicial because this line of reasoning constituted a major theme of the prosecutor's closing argument in a close case. Finally, it seriously affects the fairness, integrity and public reputation of

judicial proceedings because the jury likely placed significant weight on the prosecutor's improper argument.

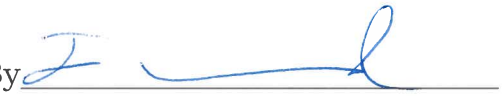
CONCLUSION

WHEREFORE, Kevin Drown respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

The appealed decisions were not in writing and therefore are not appended to the brief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to:

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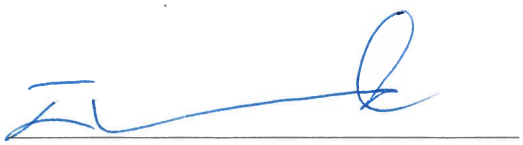

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Thomas Barnard

DATED: July 5, 2017