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

REPLY BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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STATEMENT OF THE FACTS

The State asserts that the complainant described a "tin like" ceiling in the bedroom in which she claimed to have been sexually assaulted. SB 4* (citing T 60 ("Q: And do you know what kind of material [the ceiling] was? A: Just like a tin like.")). Later in her testimony, the complainant clarified that the ceiling was, in fact, tin. T 75–76 ("Q: [You testified today] that it was tin? A: Uh-huh."). She further testified that it was painted white and had a "swirling pattern." T 75–76.

The State asserts that when a police officer went to the apartment in 2014, "[h]e did not discover a tin ceiling, but instead a more recently constructed suspended ceiling." SB 5–6. The officer did not stop there, however. T 149. In two bedrooms, he used his baton to move a suspended ceiling tile. T 149–50. Above the suspended ceiling, he did not find the swirling tin ceiling the complainant described, but an older "plaster or sheetrock type ceiling." T 149.

* Citations to the record are as follows:
"SB" refers to the State's brief;
"T" refers to the transcript of trial on October 25–26, 2016.

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.

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

The State argues that this case is unlike Commonwealth v. Beaudry, 839 N.E.2d 298, 306 (Mass. 2005), Commonwealth v. Ramos, 902 N.E.2d 948, 950 (Mass. App. Ct. 2009), and Commonwealth v. Dirgo, 52 N.E.3d 160 (Mass. 2016), but similar to Commonwealth v. Polk, 965 N.E.2d 815 (Mass. 2012) and Commonwealth v. Shanley, 919 N.E.2d 1254 (Mass 2010). SB 16–17. According to the State, the distinction between Beaudry, Ramos and Dirgo, on the one hand, and Polk and Shanley, on the other, is that in the former, the defendant did not accuse the complainant of having a motive to lie, while in the latter, the defendant did. SB 16. If the defendant accuses the complainant of having a motive to lie, the State argues, then the "prosecutor[] may ask the jury to consider what motives the victim may have . . . to subject herself to the rigors of trial." SB 16.

The cases do not support the State's distinction. In Beaudry, the complainant "had a variety of motives for fabrication," including moving back in with her mother in Florida. Beaudry, 839 N.E.2d at 300–01, 305. In Dirgo, "the defendant's theory [was] that the complainant was lying to divert her mother's attention from her cigarette and marijuana use." Dirgo, 52 N.E.3d at 164. In each, the court held that it was improper for the prosecutor to argue that the complainant was credible merely because she chose to testify, even

though the defendant accused the complainant of having a specific motive to lie. Dirgo, 52 N.E.3d at 163–64; Beaudry, 839 N.E.2d at 306.

In Polk, the prosecutor merely asked, "What motive does [the complainant] have to lie?" Polk, 965 N.E.2d at 828. The prosecutor made no reference to the rigors of trial. Id. The court recognized that "a prosecutor may not argue that a victim is credible simply because she appeared to testify in court." Id. at 829. Because the prosecutor made no such argument, the court found no impropriety. Id. Thus, Polk does not support the State's proposition that it is sometimes appropriate for a prosecutor to emphasize the rigors of trial.

Shanley was a church sex abuse case; the defendant was a Catholic priest. Shanley, 919 N.E.2d at 1257. At trial, the defense accused the complainant of having specific motives to lie, including monetary benefit from a civil suit against the Archdiocese of Boston. Id. at 1261. The court, over the defendant's objection, allowed the prosecutor to rebut this accusation by introducing evidence that, by trial, the civil suit had already settled and that the complainant "appeared 'voluntarily' and not by subpoena or as a result of a contractual agreement related to the settlement of the civil suit." Id. at 1272. On appeal, the court held that, in light of the defense's argument that the settlement in the civil suit provided a motive for the complainant to lie at the criminal trial, it was proper for the prosecutor to introduce evidence that the civil suit did not require the complainant to testify at the criminal trial. Id. at 1274.

Several features distinguish this case from Shanley. First, in Shanley, the defense accused the complainant of having a specific motive to lie, money. Here, by contrast, although Drown's lawyer offered the jury three possible motives the complainant might have to lie, she ultimately told the jury, "I don't know why [the complainant] is being untruthful. I don't have any special insight into the inner workings of her mind. . ." T 218.

Second, in Shanley, the prosecutor's argument directly rebutted the motive to lie put forth by the defense. The fact that the civil settlement did not require the complainant to testify in the criminal case completely negated the notion that the civil suit motivated the complainant's trial testimony. Here, by contrast, the prosecutor's argument did not directly rebut the three possible motives raised by the defense. If the complainant had a need for attention, something to gain by playing the role of a victim, or a grudge against Drown, she might still choose to testify to her allegations, notwithstanding the rigors of trial.

Third, although the prosecutor in Shanley made a brief and isolated reference in closing to the complainant sustaining "long, painful questioning," she mainly emphasized the fact that the settlement did not require that the complainant testify in the criminal case. Id. at 1273–74. Here, by contrast, the prosecutor throughout her closing argument repeatedly emphasized the purported difficulty the complainant experienced testifying in court.

Fourth, the defense in Shanley did not specifically object to the prosecutor's reference to "long, painful questioning," and neither the trial court

nor the appellate court specifically addressed its propriety. Id. at 1274. Here, by contrast, Drown specifically objected "to the argument that [the complainant] must be telling the truth otherwise why would she have made the decision to testify and prosecute this case." T 249. He specifically argued that it is improper for a prosecutor to "argue[] that the alleged victim must be telling the truth because she would not have otherwise chosen to prosecute, testify and be cross-examined." T 249.

The State asserts that "a prosecutor may rely on rhetorical questions to respond to the defendant's argument." SB 15. To the extent the State argues that a rhetorical question, by its very nature, cannot be improper or prejudicial, any such argument should be rejected. "Why didn't the defendant testify?", "If the investigation didn't establish that the defendant was guilty, why did the police arrest him?" and "What message would an acquittal send to sexual assault victims?" are all clearly improper and prejudicial, even though they are phrased in the form of a question. See also United States v. Gracia, 522 F.3d 597, 601 (5th Cir. 2008) ("it [is] improper for a prosecutor to ask a jury the rhetorical question whether federal agents would risk their careers to commit perjury").

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

The State concedes that it was improper for the prosecutor to ask Drown whether the complainant was "lying." SB 19. However, it cites two federal cases for the proposition that, unlike asking a defendant whether another witness is "lying," it is not improper for a prosecutor to ask a defendant whether another witness is "mistaken." SB 24. It further argues that, in any event, asking Drown whether the complainant was "mistaken" was not prejudicial. SB 25.

This Court has not limited the applicable prohibition to questions about whether another witness is "lying." Rather, it has "adopted a broad prohibition against questions requiring a witness to comment on the credibility of other witnesses." State v. Souksamrane, 164 N.H. 425, 427–28 (2012); accord State v. Lopez, 156 N.H. 416, 424 (2007). Although "[a] few" courts draw a distinction between asking a defendant if another witness is "lying" and asking a defendant if another witness is "mistaken" or "wrong," Liggett v. People, 135 P.3d 725, 730 (Colo. 2006); accord State v. Singh, 793 A.2d 226, 236 (Conn. 2002), more courts reject the distinction and hold that both questions are improper. Liggett, 135 P.3d at 729–35 (cited with approval in Souksamrane, 164 N.H. at 428, and Lopez, 156 N.H. at 424); Singh, 793 A.2d at 239 n.16; Ordway v. Commonwealth, 391 S.W.3d 762, 788–89 (Ky. 2013); State v. Flanagan, 801 P.2d 675, 679 (N.M. Ct. App. 1990) (holding affirmed in State v. Duran, 140 P.3d 515, 522–23 (N.M. 2006)); Jensen v. State, 116 P.3d 1088, 1097 (Wyo. 2005).

The State's proposed distinction between asking, "Is the witness lying?" and, "Is the witness mistaken?" is unsound. If a witness gives false testimony, the witness is either lying or mistaken. The only difference is that a lying witness knows that the testimony is false, while a mistaken witness honestly believes the false testimony. Thus, asking a defendant whether another witness is mistaken is no different, in substance, from asking a defendant whether another witness is lying. Both questions compel the defendant to speculate as to whether the other witness honestly believes the testimony. See State v. Lopez, 156 N.H. 416, 423 (2007) ("requiring a witness to opine upon the credibility of other witnesses is error because . . . it requires a witness to testify to things outside of her or his knowledge").

As the prosecutor's questions here demonstrate, "[a]sking a defendant if a witness for the state is 'mistaken' too easily lends itself to abuse." Flanagan, 801 P.2d at 679. The prosecutor asked Drown, "Do you think [the complainant's] mistaken about the person who [assaulted her]?" T 188–89. The prosecutor asked this question four times in a row, inserting different graphic details of the complainant's allegations in each question. T 188–89.

Prior to the prosecutor asking Drown whether the complainant was "mistaken," T 188–89, Drown had steadfastly denied assaulting the complainant. T 170, 183–84, 188. He had refused to speculate about whether someone else assaulted her. T 188 ("I have no idea if she was molested or not, but I did not do anything to her").

By asking Drown whether the complainant was "mistaken about the person who" assaulted her, the prosecutor put Drown in "a 'no win' situation." Souksamrane, 164 N.H. at 428 (quoting Liggett, 135 P.3d at 729). A "no" answer would create the misimpression that he was admitting that the complainant was assaulted and that he was the perpetrator. But a "yes" answer would also create the misimpression that he believed that the complainant was assaulted, she just misidentified the perpetrator.

Faced with this dilemma, Drown answered, "Yes." T 188–89. Thus, the prosecutor succeeded in creating the misimpression that Drown believed that the complainant was, in fact, assaulted. The State's appellate brief confirms that the prosecutor succeeded in creating this misimpression. In it, the State asserts, "At trial [Drown] acknowledged that he believed the victim was assaulted. . ." SB 30 (citing T 185–88). Because the prosecutor's questioning mislead the State's appellate counsel, it is likely that it mislead the jury as well.

The misimpression was prejudicial for two reasons. First, the jury likely wondered why Drown would believe that the complainant was assaulted if he did not assault her. Without a satisfactory answer to that question, the jury likely viewed the apparent concession as incriminatory and convicted Drown on that basis.

Second, the misimpression substantially lessened the State's burden of proof. The State had the burden of proving, beyond a reasonable doubt, that both (a) the complainant was assaulted and (b) Drown was the perpetrator. But because the State created the misimpression that Drown conceded that the

complainant was assaulted, the jury likely concluded that that element was proven merely by virtue of Drown's apparent concession. Once the jury concluded that the complainant was assaulted and that the only question was whether Drown was the perpetrator, it was much more likely to find Drown guilty. See id. at 427 ("requiring a witness to comment on the credibility of other witnesses . . . 'distort[s] the government's burden of proof. . .'" (quoting Liggett, 135 P.3d at 729)).

For these reasons, repeatedly asking Drown whether he "[thought the complainant was] mistaken about the person who [assaulted her]" was demonstrably prejudicial. By engaging in this questioning, the prosecutor lessened the State's burden of proof. As a result, the misconduct seriously affected the fairness, integrity and public reputation of the proceedings. See State v. Mueller, 166 N.H. 65, 70 (2014) (finding plain error where the court's erroneous jury instructions "lessened the State's burden of proof" and "there [wa]s the very real prospect that the jury would have returned different verdicts had it been properly instructed").

In a case involving serious allegations such as this, the jury's verdict should depend on the evidence, not on the prosecutor's willingness to "[u]nfairly question[] the defendant simply to make the defendant look bad in front of the jury regardless of the answer given." Souksamrane, 164 N.H. at 428. This Court should reverse.

CONCLUSION

WHEREFORE, Kevin Drown respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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DATED: October 31, 2017