THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0170

The State of New Hampshire

v.

Michael Hanes

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 Minutes)

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I. Whether RSA 640:3, I(a) (2016) requires proof that the threat was of imminent harm, was unconditional, and was made with the purpose to terrorize where its plain language explicitly states that a person is guilty if he "[t]hreatens any harm to a public servant . . . with the purpose of influencing his action," and whether the evidence was sufficient to prove that the defendant made a true threat, not protected by the First Amendment or part I, article 22.

II. Whether the trial court plainly erred in failing to *sua sponte* strike Officer Foster's testimony expressing his lay opinion regarding the threatening nature of the message, the immediacy of the threat, and the purpose behind it.

STATEMENT OF THE CASE

The defendant, Michael Hanes, was indicted on one class B felony count of improper influence. DB A1.[1] *See* RSA 640:3, I(a) (2016). Following a one-day jury trial in the Merrimack County Superior Court (*McNamara*, J.), he was convicted as charged. DB A1; JT 90.

On March 1, 2017, the trial court sentenced the defendant to a term of twelve months in the Merrimack County House of Corrections, but then suspended all but seven days of that term for one year. DB A3. The trial court also ordered the defendant to have "no contact with the employees of the Town of Pembroke." DB A4. This appeal followed.

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[1] "ASB" refers to the appendix attached to this brief.
"DB" refers to the defendant's brief and the appendix attached to it.
"EXH 1" refers to the CD of the voicemail, which has been transferred to this Court.
"JT" refers to the transcript of the jury trial on December 7, 2016.

STATEMENT OF FACTS

The defendant lived in Pembroke, "in the old area of town" on an "extremely narrow" street. JT 20. Paved public sidewalks with no curbs ran along both sides of the street and the opposite sides of those sidewalks directly abutted or were within a foot of the front steps of many of the older homes on the street, including the defendant's residence. JT 20-21; ASB 1.

The employees at the Pembroke Department of Public Works (DPW) maintained and plowed the roads, highways, and sidewalks according to several policies and procedures set by the Board of Selectmen, including a Snow Removal Policy Plan. JT 22-24, 27-28. Around October of each year, the Board reviewed the Plan and determined the order in which the DPW employees would plow the roads and sidewalks. JT 24-29.

The Town Administrator, David Jodoin, enacted the Board's policies and procedures, including the Plan, and he and the department heads then implemented them. JT 12-12, 24-25. Jodoin also handled discipline and other personnel matters, supervised the department heads, gave them advice on how to implement the policies and procedures, made sure that they and other town employees knew and followed them, and followed up on citizen complaints, the majority of which came directly to him and were followed up on only by him. JT 11-12, 24-31.

There were "over 80 miles of road" to plow and only eight plow truck drivers, including the DPW director. JT 21, 23. Jodoin had "to continually remind them to stick to the plan" because when they received complaints, they tended to go back and

forth dealing with them and then forget where they had been before they got them. JT 29.

When DPW employees plowed snow off of the defendant's street, it often went up onto the sidewalks. JT 20, 22, 32-34, 41. On those occasions, he could not go out his front door and walk down the sidewalk to his car until they cleared the sidewalk. JT 20, 22, 32-34. During the winter of 2014-2015, there was a "tremendous amount of snow." JT 20. Around February 2015, the defendant called Jodoin and complained "about the snow removal again, and [the fact] that he had been plowed in ...." JT 20. Jodoin explained that they had "a snow policy that[was] adopted by the Town Board of Selectmen, and that [they] would go out and take care of it and clean it up once [they] could, but they were behind on the snow removal and ... had other issues that [they] had to deal with ...." JT 20. The defendant did not "threaten anyone during that conversation." JT 20.

However, on February 16, 2016, at 9:17 a.m., he again called Jodoin to complain, but Jodoin did not answer, so he left the following voicemail:

> Dave Jodoin this is Mike Haynes, ... I called you last year because we were having a problem with the city plowing the snow right up onto my sidewalk. Well today, and this isn't a whole lot of snow that we're getting, but they, the little bit of snow, it's accumulated in front of my house over the winter, they pushed all of that and the snow from today, last night up onto my damn sidewalk. I got two feet of snow in my fucking front yard! I want Jimmy fired! I want to see somebody fired down there! I want you to fucking fire some goddamn plow drivers! You come and look in front of my goddamn house! I am fucking just mad as hell! I want a plow driver fired for this and I want Jimmy's fucking head on a goddamn stick! I'm gonna start shooting these bastards if they keep this up! I will kill every fucking plow driver in

> this mother fucking goddamn city if they do this one more fucking time! Thank you!

DB A2; EXH 1. He "started out pretty calm [and] reasonable, [but] then … went from … zero to 60 … in … three seconds" and "was loud, yelling, screaming, threatening, want[ing] somebody fired, and then the threats came." JT 14.

After Jodoin listened to the message, he called the police chief because threatening people was always "a police issue" and he was concerned about the safety of town employees. JT 15. He also called the DPW, told the director's secretary what was going on, and advised her to contact the police if any DPW employees had any contact with the defendant. JT 15.

The police chief went to Jodoin's office, made a recording of the message, and then took it to the police station and played it for Officer Michael Foster and another officer. JT 44-45, 48. Due to "the nature of the threat and the immediacy of it," they went to the defendant's house. JT 45. Officer Foster "asked him what was going on with the plow truck drivers" and the defendant said "that he had been upset about them plowing snow, and that he had left a pretty nasty voicemail for the Town Administrator." JT 46. He also said "a few times that he thought it was a mistake." JT 47. The officers then arrested him at 11:45 a.m. JT 47.

SUMMARY OF THE ARGUMENT

I. RSA 640:3, I(a) (2016) does not require proof that the threat at issue was of imminent harm, unconditional, or made with the purpose to terrorize. Instead, it requires proof only that the defendant "[t]hreaten[ed] any harm to a public servant … with the purpose of influencing his action …." The defendant does not argue that the evidence was insufficient to prove that he said he would shoot and kill the plow truck drivers, and that he did so for the purpose of influencing their actions. Furthermore, although the State also had to prove that his words were a "true threat," it did not have to prove that he meant to convey a serious expression of his intent to commit an unlawful act of violence against the plow truck drivers in order to do so. Even if it did, the evidence, when viewed in the light most favorable to the State, was sufficient to do so.

II. The trial court did not err in failing to *sua sponte* strike Officer Foster's testimony expressing his lay opinion regarding the nature of the threat, the immediacy of it, and the purpose behind it because it had a tendency to prove those material and disputed facts and was not unfairly prejudicial. Furthermore, any error could not have been plain because this Court has never addressed whether this type of lay opinion testimony is admissible. Moreover, any error could not have affected the verdict or the integrity or public reputation of the trial because the jury heard the message, the State did not have to prove the threat was imminent, and the defendant never asked the trial court to instruct the jury it did.

ARGUMENT

I. RSA 640:3, I(a) (2016) does not require proof that the threat was of imminent harm, that it was unconditional, or that it was made with the purpose to terrorize, and the evidence was sufficient to prove that the defendant made a true threat to harm public servants, and that he did so for the purpose of influencing their actions.

The defendant was charged with violating RSA 640:3, I(a) (2016). DB A1. It provides, in relevant part: "A person is guilty of a class B felony if he … [t]hreatens any harm to a public servant … with the purpose of influencing his action, decision, opinion, recommendation,… or other exercise of discretion …." RSA 640:3, I(a). RSA 640:3, II (2016) then provides, in relevant part:

> "Harm" means any disadvantage or injury, to person or property or pecuniary interest, including disadvantage or injury to any other person or entity in whose welfare the public servant … is interested, provided that harm shall not be construed to include the exercise of any conduct protected under the First Amendment to the United States Constitution or any provision of the federal or state constitutions.

The indictment against the defendant alleged that:

> [he,] with a purpose to influence a public servant's action, decision, opinion, recommendation or other exercise of discretion[,] did threaten any harm to a public servant, employees of the Pembroke Public Works Department, by calling the Pembroke Town Administrator leaving a message that he was going to shoot the Public Works Department's snow removal employees if they plowed snow on the sidewalk in front of his home ….

The defendant never challenged the sufficiency of the indictment or filed any proposed jury instructions. *See* ASB 2-4; JT 43, 53-54. However, after the State rested at trial, he argued that his words were "not a threat as defined under the Criminal Threatening Statute" because "[a] threat of a crime is immediate, and it [is]

to a person, and the intent is to terrorize[,] alarm[,] or frighten a person." JT 55. He then argued that "the intended immediacy and … response for a threat of harm could not [have] occur[red]" because his words "were to a voicemail" and the threat "was conditional, it was futuristic." JT 55. The trial court responded that RSA 640:3, I(a) is "different" from criminal threatening or common-law assault because the statute provides "that a person can threaten any harm with the purpose of influence in his action." JT 55.

The defendant next argued that in *Virginia v. Black*, 538 U.S. 343 (2003), the Supreme Court discussed "true threats" and in doing so said, "A speaker directs a threat to a person, with the intent to place them in fear of bodily injury." JT (quotation omitted). He then argued that a threat left on voicemail cannot be a "true threat" because there is "no immediacy" or "threat to a person," JT 56, and that therefore, his "complaint" was "protected by the First Amendment," JT 57. He then again argued that neither "a conditional threat" nor "a threat given to an inanimate object" can violate RSA 640:3. JT 58. The trial court responded that "a person is guilty of criminal threatening is not [in] the statute," and that "the with the purpose of influencing the action" part of it "builds in a conditional element," which makes it different from criminal threatening or common-law assault. JT 59.

The State argued that the statute was "specifically designed to cover conditional situations." JT 60. It then began addressing the sufficiency of the evidence, but the trial court interrupted and said that the defendant was not arguing about the evidence, and that he was instead arguing that a conditional threat cannot

violate the statute. JT 61. The defendant then said, "And that the threat [was] protected under the First Amendment." JT 61.

The trial court took a recess. JT 61. When it returned, it noted that the statute at issue in *Black* made burning a cross "with the intent of intimidating any person" a crime, and that the Supreme Court found a problem with the part that said, "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." JT 62 (quotation omitted). It then held that "by the terms of [RSA 640:3], the threat is conditional," JT 63, that the "true threat" argument failed "in the context of this case," JT 64, and that RSA 640:3 "focused on the Defendant's intent, rather than [on the] harm caused …." JT 65.

The trial court later instructed the jury that the State had to "prove that: 1) [t]he Defendant made a threat of harm to another person; …2) [t]he other person was a public servant; and 3) the threat of harm was intended to influence the recipient's action, decision, opinion, recommendation, or other exercise of discretion." JT 86. It also defined the words "public servant," "harm," and "purposely." JT 86-87. At the end of the instructions, the trial court asked counsel if they had "any issues with the instructions," and defense counsel answered, "No, Your Honor." JT 88.

On appeal, the defendant does not argue that the trial court erred in instructing the jury. He also does not argue that evidence was insufficient to prove that he said he was going to harm a public servant, and that he did so for "the purpose of influencing his action, decision, opinion, recommendation … or other exercise of discretion." RSA 640:3, I(a). Instead, he argues that the dictionary definitions of

"threatens" and "threat" and this Court's definitions of "the elements of criminal threatening," DB 9, demonstrate that RSA 640:3, I(a) also requires proof of "a purpose to instill fear of imminent injury" and "a purpose to cause 'extreme fear,'" and that the evidence was insufficient to prove those additional elements, DB 10 (quoting *State v. Fuller*, 147 N.H. 210, 213 (2001)). He also argues that the Supreme Court has held that the 'true threat' category of unprotected speech "'encompasses those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,'" and that the evidence was insufficient to prove that he did. DB 12 (brackets omitted) (quoting *Black*, 538 U.S. at 359).

This Court cannot interpret the statute as the defendant suggests because doing so would violate its well-established rules of statutory construction.

> The interpretation of a statute is a question of law, which [this Court] will review *de novo*. In matters of statutory interpretation, [it is] the final arbiter[] of the intent of the legislature as expressed in the words of the statute considered as a whole. When examining the language of the statute, [this Court will] construe [it] according to its plain and ordinary meaning. [This Court will] interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. [It will also] construe the Criminal Code "according to the fair import of [its] terms and to promote justice." RSA 625:3 [(2016)].

State v. Lantagne, 165 N.H. 774, 777 (2013) (citations omitted). This Court

> must keep in mind the intent of the legislation, which is determined by examining the construction of the statute as a whole, and not simply by examining isolated words and phrases found therein. [It also] must construe th[e] statutory provision in a manner that is consistent with the spirit and objectives of the legislation as a whole.

JTR Colebrook, Inc. v. Town of Colebrook, 149 N.H. 767, 770-71 (2003) (internal quotations and citations omitted). Here, the plain language and legislative history of the statute demonstrate that it was not intended to, and does not, require proof of a purpose to instill fear of imminent injury or a purpose to terrorize, and that construing it as doing so is inconsistent with the spirit and objectives of the legislation as a whole.

"The plain meaning of 'threaten' is 'to utter threats against: promise punishment, reprisal, or other distress … to promise as a threat: hold out by way of menace or warning … to give signs of the approach of (something evil or unpleasant): indicate as impending.'" *Lantagne*, 165 N.H. at 777-78 (quoting *Webster's Third New International Dictionary* 2382 (unabridged ed. 2002)). The defendant argues that "[t]he dictionary further defines 'impending' as something 'that is about to occur: imminent.'" DB 9 (quoting *Webster's Third New International Dictionary* 1132). He then argues that the definitions "incorporate[] the idea of imminence," DB 9, and that "[e]vidence of a threat to injure a person on some indefinite future occasion, and then only after the occurrence of a pre-condition, does not prove imminence," DB 10. In other words, he interprets the statute as encompassing only a threat of harm made in the victim's presence while the victim is engaging in or about to engage in the conduct the threat is intended to influence, *i.e.*, unconditional threats of imminent harm. The plain language and legislative history of the statute make it clear that the legislature did not intend to limit the reach of the statute in that manner.

RSA 640:3, I(a) explicitly provides that a person is guilty of the offense if he "[t]hreatens any harm to a public servant ... *with the purpose of influencing [his] action, decision, opinion, recommendation, nomination, vote or other exercise of discretion* ...." (Emphasis added.) Common sense dictates that a person cannot influence conduct that has already occurred, and that a threat of imminent harm cannot influence future conduct. Instead, only a threat to harm the person in the future, and then only if the person fails to engage in the desired conduct, can do so. Thus, the plain language of the statute makes it clear that it encompasses threats to harm a public servant in any manner in the future, and then only if the public servant fails to engage in the desired conduct. In other words, it encompasses conditional threats of future harm. Therefore, this Court will not construe the term "threatens" as requiring proof of a purpose to instill fear of imminent harm because doing so is contrary to the plain language, spirit, and objectives of the legislation. *Cf. Lantagne*, 165 N.H. at 778 (holding that because "each of the remaining terms in [the statute] ... involve[d] conduct with immediate consequences to other persons present," "[i]n context," the phrase "threatening behavior in a public place" had to be construed "to encompass conduct posing a threat of imminent harm to other persons present").

Furthermore, in drafting the statute, the Commission to Recommend Codification of Criminal Laws explicitly stated that it "is designed to preserve the integrity of the governmental process," and that "[p]aragraph I protects persons with key roles in this process from *intimidation* aimed at influencing their decisions." ASB 8-9 (emphasis added). The dictionary defines "intimidate," in relevant part, as

"to compel to action or inaction (as by threats)," and then notes that a man was "charged with *intimidating* public officials to get the government to buy guns he was selling ...." *Webster's Third New International Dictionary* 1184. It also defines "influence," in relevant part, as "corrupt interference with or manipulation of authority for personal gain ...." *Id.* at 1160. Thus, the Commission's statements about the intent of the statute, which was then enacted by the legislature with only one slight technical change, *see* Laws 1971, 518:1 at 670 (enacting RSA 640:3), clearly demonstrate that, contrary to the defendant's claim, it was intended to encompass "a threat to injure a person on some indefinite future occasion, and then only after the occurrence of a pre-condition ...." DB 10.

The later legislative history of the statute also does so. In 2006, the legislature amended the definition of "harm." *See* Laws 2006, 43:1. Before it did so, then-Merrimack County Attorney Daniel St. Hilaire, explained that a judge had found the phrase "any harm" unconstitutionally overbroad, and that the amendment would remedy the problem. ASB 17. He also explained that amending the phrase "any harm" to "any unlawful harm" would also do so, but he did not want to use the term "unlawful" because saying, "'If you don't vote a certain way, I won't give you a bank loan' or "'I won't let your son or daughter into my college' ... is a harm," even though it is "not necessarily unlawful." ASB 17. He then explained that the statute does not require proof that the victim "actually fe[lt] threatened" or "harmed." ASB 19. Thus, his statements about the amendment, which the legislature adopted, *see* Laws 2006, 43:1, also clearly demonstrate that the legislature intended for the conduct

prohibited by the statute to encompass "a threat to injure a person on some indefinite future occasion, and then only after the occurrence of a pre-condition ...." DB 10. Therefore, this Court cannot interpret the statute as encompassing only a threat made with "a purpose to instill fear of imminent injury" and "a purpose to terrorize," DB 10, because doing so is not "consistent with the spirit and objectives of the legislation as a whole," *JTR Colebrook, Inc.*, 149 N.H. at 770-71.

It is also worth noting that other courts have held that "[t]he ordinary meaning of 'threaten' clearly includes ... future threats," and that "when one threatens to do something, he or she is ... communicat[ing] *an intent to injure* a person or property sometime in the future, immediate or remote." *State v. Edwards*, 924 P.2d 397, 400 (Wash. Ct. App. 1996), *rev. denied*, 936 P.2d 416 (Wash. 1997); *see also, e.g., Ex Parte Perry*, 483 S.W.3d 884, 905 (Tex. Crim. App. 2016) (the term "threat" can be defined "broadly as "a declaration of an intention or determination to inflict punishment, injury, etc., in retaliation for, or conditionally upon, some action or course" (quotations and brackets omitted)); *Keyes v. Commonwealth*, 572 S.E.2d 512, 516 (Va. Ct. App. 2002) (a "threat is an avowed present determination or intent to injure presently or in the future" (quotation omitted)). In doing so, one court said:

> To threaten is "to project to another person potential or even imminent harm." "To threaten is to try to influence by creating an expectation of punishment to be carried out against anyone who disobeys or otherwise behaves objectionably." As opposed to menacing an individual, which primarily seeks to cause alarm, the primary purpose of threatening someone is to influence that individual's behavior.

Schmitz v. U.S. Steel Corp., 831 N.W.2d 656, 667 (Minn. Ct. App. 2013) (internal citations and ellipsis omitted) (quoting Bryan A. Garner, *Garner's Dictionary of Legal Usage* 893 (3d ed. 2011)). Therefore, the defendant's interpretation is also inconsistent with the ordinary meaning of the term "threatens" in a legal context.

The defendant also argues that the "sense of 'threat' as incorporating the idea of imminence finds further support in [this Court's] decisions defining the elements of criminal threatening under RSA 631:4 [(2016)]," DB 9-10, that it has held that RSA 631:4, I(a), requires proof of a purpose to place the victim in fear of *imminent* bodily injury," DB 10 (citing *State v. McCabe*, 145 N.H. 686, 692 (2001), and that "a purpose to terrorize" means "a purpose to cause 'extreme fear,'" DB 10 (quoting *Fuller*, 147 N.H. at 213). His reliance on the criminal threatening statute and the decisions defining the terms in it is misplaced.

RSA 631:4, I, provides that a person is guilty of the offense when:

> (a) By physical conduct, the person purposely places or attempts to place another in fear of imminent bodily injury or physical contact; or
>
> (b) The person places any object or graffiti on the property of another with a purpose to coerce or terrorize any person; or
>
> (c) The person threatens to commit any crime against the property of another with a purpose to coerce or terrorize any person; or
>
> (d) The person threatens to commit any crime against the person of another with a purpose to terrorize any person; or
>
> (e) The person threatens to commit any crime of violence, or threatens the delivery or use of a biological or chemical substance, with a purpose to cause evacuation of a building, place of assembly, facility of public transportation or otherwise to cause serious public inconvenience, or in reckless disregard of causing such fear, terror or inconvenience; or

> (f) The person delivers, threatens to deliver, or causes the delivery of any substance the actor knows could be perceived as a biological or chemical substance, to another person with the purpose of causing fear or terror, or in reckless disregard of causing such fear or terror.

Thus, it is clear that the statute requires proof of a purpose to instill fear of imminent injury only where "physical conduct" is at issue, that it does not always require proof of "a purpose to terrorize," and that when the legislature intends for a particular provision of it to require proof of a particular purpose, it says so explicitly. That being the case, the plain language of the criminal threatening statute belies, rather than supports, the defendant's claims.

Furthermore, after this Court defined "a purpose to terrorize" as "a purpose to cause 'extreme fear,'" DB 10 (quoting *Fuller*, 147 N.H. at 213), many legislators found that "rather extreme definition ... too narrow," so they "propose[d] a more reasonable definition." *N.H.S. Jour.* 705 (2003). The legislature then enacted RSA 631:4, III(b), which provides: "As used in this section, 'terrorize' means to cause alarm, fright, or dread; the state of mind induced by the apprehension of hurt from some hostile or threatening event or manifestation." *See* Laws 2003, 69:1. Therefore, the defendant's reliance on this Court's definition of that term is also misplaced because it is clear that the legislature did not intend for the phrase "a purpose to terrorize" to mean "a purpose to cause extreme fear."

In any event, had the legislature intended for RSA 640:3, I(a) to require proof "of a purpose to place the victim in fear of *imminent* bodily injury" and "a purpose to terrorize," it could have done so explicitly as it did in RSA 631:4, which was enacted

at the same time. *See* Laws 1971, 518:1 at 656 (enacting RSA 631:4); *id.* at 670 (enacting RSA 640:3). However, it did not do so. Therefore, this Court will "not add a requirement that the legislature did not see fit to include in the statute's text." *Appeal of Town of Seabrook*, 163 N.H. 635, 653 (2012); *see also JTR Colebrook, Inc.*, 149 N.H. at 771-72 (noting that had the legislature "intended to permit municipalities to enact stricter … standards" in the statute, "it could have explicitly done" so as it had "[i]n other statutory schemes").

Furthermore, this Court has "noted that imminent danger is relative, and not absolute, and is measured more by the nature of the consequences than by the lapse of time." *In re D.R.*, No. 2015-0574, order at 2 (N.H. Mar. 18, 2016) (quotation omitted) (non-precedential unpublished order). Here, as demonstrated above, the plain language of the statute requires proof that the defendant intended for his threat of harm to cause a public servant to act or fail to act in the future, and the nature of the consequences is future harm to the public servant or another person. Therefore, "imminent danger" in this context could not mean danger that is imminent at the time the threat is made. Instead, it could only mean danger that is imminent after the public servant acts or fails to act.

Moreover, the defendant's reliance on the Supreme Court's opinions in *Black* and *Watts v. United States*, 394 U.S. 705 (1969), in support of his claim that the evidence was insufficient to prove that his words constituted a "true threat" is misplaced. DB 11-12. The defendant notes that in *Black*, the Supreme Court "held that the 'true threat' category 'encompass[es] those statements where the speaker

means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." DB 12 (quoting *Black*, 538 U.S. at 359-60). He then argues that "the State failed to prove that [he] meant to communicate a *serious expression* of such intent." DB 12. In other words, he reads *Black* as having imposed a subjective-intent requirement. However, one of the Supreme Court justices has since held that it did not do so, as have the justices of most of the United States courts of appeals.

In *Elonis v. United States*, 135 S. Ct. 2001 (2015), the Supreme Court interpreted a federal statute that made "it a crime to transmit in interstate commerce 'any communication containing any threat ... to injure the person of another,'" *Elonis*, 135 S. Ct. at 2004, but did "not indicate whether the defendant [had to] intend that his communication contain a threat," *id.* at 2008. It held that although "negligence [was] not sufficient," there was "no dispute that the mental state requirement . . . [was] satisfied if the defendant transmit[ted] a communication for the purpose of issuing a threat, or with knowledge that [it would] be viewed as [one]." *Id.* at 2012. It then declined to consider "any First Amendment issues" or to determine whether "recklessness" would suffice. *Id.*

Justice Thomas issued a dissenting opinion. In that opinion, he addressed the First Amendment issue and in doing so said:

> Elonis also insists that our precedents require a mental state of intent when it comes to threat prosecutions under [the statute], primarily relying on *Watts* ... and *Black* .... Neither of those decisions, however, addresses whether the First Amendment requires a particular mental state for threat prosecutions.

> As Elonis admits, *Watts* expressly declined to address the mental state required under the First Amendment for a "true threat." True, the Court ... noted "grave doubts" about [the Court's prior] construction of "willfully" in the presidential threats statute. But "grave doubts" do not make a holding, and that stray statement in *Watts* is entitled to no precedential force. If anything, *Watts* continued the long tradition of focusing on objective criteria in evaluating the mental requirement.
>
> The Court's fractured opinion in *Black* likewise says little about whether an intent-to-threaten requirement is constitutionally mandated here. *Black* concerned a Virginia cross-burning law that expressly required an intent to intimidate a person or group of persons, and the Court thus had no occasion to decide whether such an element was necessary in threat provisions silent on the matter. Moreover, the focus of the *Black* decision was on the statutory presumption that any cross burning was prima facie evidence of intent to intimidate. A majority of the Court concluded that [it] failed to distinguish unprotected threats from protected speech because it might allow convictions based solely on the fact of cross burning itself, including cross burnings in a play or at a political rally. The objective standard for threats [in the statute here] helps to avoid this problem by forcing jurors to examine the circumstances in which a statement is made.

Elonis, 135 S. Ct. at 2026-27 (quotations, citations, parentheticals, and brackets omitted). Therefore, it is clear that Justice Thomas concluded that *Black* did not impose a subjective-intent requirement, and that an objective-intent requirement is all that is necessary to distinguish between protected and unprotected speech.

Most of the United States courts of appeals, including the United States Court of Appeals for the First Circuit, "have [also] declined to read *Black* as imposing a subjective-intent requirement." *United States v. Heineman*, 767 F.3d 970, 979 (10th Cir. 2014) (citing, *e.g.*, *United State v. Clemens*, 738 F.3d 1, 9-12 (1st Cir. 2013); *United States v. Martinez*, 736 F.3d 981, 986-88 (11th Cir. 2013); *United States v. Nicklas*, 713 F.3d 435, 438-40 (8th Cir. 2013); *United States v. Jeffries*, 692 F.3d 473,

477-81 (6th Cir. 2012), *cert. denied*, 134 S. Ct. 59 (2013); *United States v. White*, 670 F.3d 498, 506-12 (4th Cir. 2012)); *see also United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009). *But see Heineman*, 767 F.3d at 978 (interpreting "*Black* as establishing that a defendant can be constitutionally convicted of making a true threat only if [he] *intended* the recipient of the threat to feel threatened"); *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005) (similar). Instead, those courts have held that "[a] person 'may be convicted for making a [true] threat if 'he should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it was made.'" *United States v. Stefanik*, 674 F.3d 71, 75 (1st Cir. 2012).

It is also worth noting that, on remand, the *Elonis* trial court held that the Government had to satisfy "both a subjective and objective component." *United States v. Elonis*, 841 F.3d 589, 596 (3d Cir. 2016), *cert. denied*, 2017 U.S. LEXIS 4876 (Oct. 2, 2017). However, it also held "that to satisfy the subjective component ..., the Government must demonstrate beyond a reasonable doubt that the defendant transmitted a communication for the purpose of issuing a threat *or with knowledge that the communication would be viewed as a threat*." *Id.* (emphasis added). It then held that to satisfy the objective component, the Government must "prove beyond a reasonable doubt that the defendant transmitted a communication that a reasonable person would view as a threat," and that it "distinguishes true threats from hyperbole, satire, or humor" because "[i]t requires the jury to consider the context and circumstances in which a communication was made to determine whether *a*

reasonable person would consider the communication to be a serious expression of an intent to inflict bodily injury on an individual." *Id.* at 596-97 (emphasis added).

Here, the defendant does not argue that the evidence was insufficient to prove that "he should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it was made,'" *Stefanik*, 674 F.3d at 75, that he knew it "would be viewed as a threat," or "that a reasonable person would view [it] as a threat," *Elonis*, 841 F.3d 596-97. Therefore, even if this Court holds that the State must satisfy a subjective component and an objective component, the defendant has failed to meet his "burden of proving that no rational trier of fact, viewing the evidence in the light most favorable to the State, could have found guilt beyond a reasonable doubt." *State v. Crie*, 154 N.H. 403, 406 (2007).

Moreover, even if the State did have to prove that the defendant meant "to communicate a serious expression of an intent to commit an act of unlawful violence," the opinion in *Watts v. United States*, 394 U.S. 705 (1969), belies, rather than supports, his claim that the State presented insufficient evidence to so. DB 12. Watts was attending "a public rally on the Washington Monument Grounds" and when the crowd broke "into small discussion groups," he joined one that was "scheduled to discuss police brutality." *Watts*, 394 U.S. at 706. During the discussion, a "member of the group suggested that the young people present should get more education before expressing their views." *Id.* Watts then said:

> They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me

> carry a rifle the first man I want to get in my sights is L. B. J. They are not going to make me kill my black brothers.

Id. After he did so, he and the crowd laughed. *Id.* at 707. He was then convicted of "knowingly and willfully threatening the President." *Id.* at 706.

The Supreme Court reversed the conviction and in doing so said:

> [T]he statute initially requires the Government to prove a true "threat." We do not believe that the kind of political hyperbole indulged in by [Watts] fits within that statutory term. For we must interpret the language Congress chose against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The language of the political arena, like the language used in labor disputes, is often vituperative, abusive, and inexact. We agree with [Watts] that his only offense here was a kind of very crude offensive method of stating a political opposition to the President. Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.

Id. at 708 (quotations and citations omitted).

The defendant argues that his "words similarly constitute hyperbole" because "[h]is expression of a desire to have 'Jimmy's head on a stick' cannot reasonably be taken literally," and "[i]ts presence ... casts a shadow of hyperbole over his immediately following words about shooting Pembroke's plow drivers." DB 12. However, the circumstances are completely different from those in *Watts.*

Here, the defendant was not attending a political rally or engaging in political speech, his threat was not conditioned on a hypothetical future event that was unlikely to occur, and neither he nor the people who heard his words laughed. Instead, he was making a complaint about the plow drivers pushing snow up onto the sidewalk in

front of his house, which had happened before and was likely to happen again in the near future because it was February, it was snowing, the street was very narrow, and the sidewalks directly abutted it. EXH 1; ASB 1. In doing so, he started out calm and reasonable, but then became more and more angry. He said that he wanted the drivers and Jimmy fired and "Jimmy's fucking head on a goddamn stick," and then said, "I'm gonna start shooting these bastard if they keep this up! I will kill every fucking plow driver in this mother fucking goddarm city if they do this one more fucking time!" EXH 1. By that point, he was screaming, furious, and sounded completely out of control. EXH 1.

When Jodoin heard the message, he considered it a threat and was concerned about the safety of the plow drivers, so he called the police and then called the DPW, told the director's secretary about the threat, and advised her to call the police if the defendant had any contact with the DPW employees. JT 15. When the police officers heard the message, they also considered it a threat and were concerned about Jodoin and the plow truck drivers, so they immediately went to the defendant's house. JT 45-47. Therefore, here, unlike in *Watts*, "[t]aken in context, and regarding the expressly [un]conditional nature of the statement and the reaction of the listeners," *Watts*, 394 U.S. at 708, it cannot be said that no rational trier of fact, viewing the evidence in the light most favorable to the State, could have interpreted the defendant's statements as a "true threat."

II. The trial court did not plainly err in failing to *sua sponte* strike Officer Foster's testimony expressing his lay opinions regarding the threatening nature of the message, the immediacy of the threat, and the purpose behind it because his opinions were relevant to material and disputed factual issues, rationally based upon his perceptions and the surrounding circumstances, and not unfairly prejudicial.

During Officer Foster's direct, the prosecutor asked him, "After you listened to the voicemail, what did you do then?" JT 45. Officer Foster answered:

> Well, the voicemail was somewhat threatening towards the Town Administrator and the plow truck operators for the town, and based off what was said in it, we believe that it constituted basically an obstacle or a threat that was designed to prevent the plow truck drivers from completing their duties, and based off the nature of the threat and the immediacy of it, we went to [the defendant's] residence on Front Street.

JT 45-46. The defendant did not object to that testimony.

On appeal, the defendant invokes Supreme Court Rule 16-A, the plain error rule, DB 14, which "allows [this Court] to consider errors that were not raised in the trial court," *State v. Pennock*, 168 N.H. 294, 310 (2015). However, it will "apply the rule sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result." *Id.* "For [this Court] to find error under the rule: (1) there must be an error; (2) [it] must be plain; (3) [it] must affect substantial rights; and (4) [it] must seriously affect the fairness, integrity or public reputation of judicial proceedings." *State v. Lopez*, 156 N.H. 416, 423 (2007). "[T]he defendant bears the burden under the plain error test." *State v. Cooper*, 168 N.H. 161, 168 (2015). He has not that heavy burden here.

The defendant argues that the trial court erred in failing to *sua sponte* strike the foregoing testimony because Officer "Foster's opinion about [the] message had no

tendency to prove any material or disputed fact," DB 12 (citing *N.H. R. Ev.* 401), and was "unfairly prejudicial" in that it "proved his guilt of the charged crime," DB 12 (citing *N.H. R. Ev.* 403). However, he has completely failed to develop those arguments. Therefore, they are insufficiently briefed to warrant this Court's consideration. *See State v. Durgin*, 165 N.H. 725, 731 (2013) ("judicial review is not warranted for complaints regarding adverse rulings without developed legal argument"). That being the case, this Court should not consider them. *State v. Blackmer*, 149 N.H. 47, 49 (2003) (this Court will generally not address insufficiently briefed issues).

In any event, the record belies the defendant's claim that Officer Foster's opinion "had no tendency to prove any material or disputed fact." DB 12. After the State rested its case at trial, the defendant argued that "[a] threat of a crime is immediate ... and the intent is to terrorize[,] alarm[,] or frighten a person," and that "the intended immediacy and the intended response … could not occur" because his words "were to a voicemail." JT 55. He also argued that his words could not be a "true threat" because "there[was] no immediacy … and ... no threat to a person." JT 56. Then, during his closing argument, the defendant argued that the evidence demonstrated that his "purpose was "not to threaten," JT 67, or "to influence a Town Administrator or the Public Works," JT 72.[2] Therefore, it is clear that the issues of whether his words were a threat, whether there was immediacy to the threat, and

[2] It is also worth noting that in his brief, the defendant has again challenged the sufficiency of the evidence of the "immediacy" of the threat and his "intent" in making it. DB 9-12.

whether his "intent" in making the threat was to influence the plow driver's actions were all material and disputed.

Furthermore, case law makes it clear that those issues were all questions of fact. *See Pub. Serv. Co. v. Seabrook*, 133 N.H. 365, 371 (1990) (the issue of intent is a question of fact); *see also United States v. Walker*, 665 F.3d 212, 226 (1st Cir. 2011) (the question of whether statements "can fairly be construed as a threat .... is one of fact"); *Fuller v. Myers*, 123 F. App'x 365, 368 (10th Cir. 2005) ("the district court may resolve the factual issue of imminent danger"); *Tryon v. North Branford*, 755 A.2d 317, 322 (Conn. App. Ct. 2000) ("the question of imminent harm is a factual one"); *Wingrave v. Hebert*, 964 So. 2d 385, 392 (La. Ct. App. 2007) ("[w]hether any reasonable person would consider the statements threatening is ... a factual determination"). Therefore, the question is whether Officer Foster's opinion "had any tendency to make [those] fact[s] more or less probable than [they] would be without the evidence." *N.H. R. Ev.* 401. It did.

"Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990); *see also United States v. Stefanik*, 674 F.3d 71, 75 (1st Cir. 2012) (in determining "whether a reasonable person would understand the statement to be threatening," "the fact-finder may consider other evidence, including the effect of the statement on the recipient" (quotation omitted)); *cf. State v. Fuller*, 147 N.H. 210, 215 (2001) ("the victim's reaction to the threat may be ... relevant to ... intent"). Here, Officer Foster listened

to the message. Therefore, his opinion about the nature, immediacy, and purpose of it, *i.e.*, his reaction to it, was relevant because it had a tendency to make the material and disputed facts more probable than they would be without it.

The defendant also argues that the "testimony was unfairly prejudicial … because it … proved his guilt of the charged crime," and "[t]his Court has long recognized the inadmissibility of a witness's testimony that the witness believes the defendant to be guilty," DB 13 (citing *N.H. R. Ev.* 403; *State v. Wargo*, 83 N.H. 532 (1929)). He also claims that this Court has "held inadmissible analogous testimony that does nothing more than convey, directly or indirectly, a witness's opinion about the defendant's guilt." DB 13 (citing *State v. McDonald*, 163 N.H. 115, 121 (2011); *State v. Huard*, 138 N.H. 256, 259 (1994); *State v. Reynolds*, 136 N.H. 325, 327-29 (1992); *State v. Ober*, 126 N.H. 471, 472 (1985)).

However, "[a]n opinion is not objectionable just because it embraces an ultimate issue," *N.H. R. Ev.* 704, and "[r]elevant evidence is not unfairly prejudicial if it merely causes detriment to a defendant because it tends to prove his guilt," *State v. Stott*, 149 N.H. 170, 172 (2003). Instead, "[t]he prejudice required to prove reversible error is an undue tendency to induce a decision against the defendant on some improper basis …." *Id.* Therefore, the question is whether the trial court erred in failing to *sua sponte* find that the testimony had a tendency to induce a decision against the defendant on some improper basis. It did not.

This Court has never addressed whether the type of lay opinion testimony at issue here is admissible under Rule of Evidence 701. However, it has held that the

"opinion of [a] police officer as to the intoxication of the defendant, and its basis ... are competent evidence even though they bear on a main issue, that is, whether the defendant was driving under the influence ...." *State v. Arsenault*, 115 N.H. 109, 112 (1975). When a defendant is charged with driving while impaired and the only issue at trial is whether he was in fact impaired, an officer's testimony that, in his opinion, the defendant was impaired indirectly conveys his opinion about the defendant's guilt.

In addition, when a defendant testifies at the trial that he was not impaired, an officer's testimony conveying his opinion that the defendant was impaired also indirectly conveys his opinion that the defendant is not credible. However, the State could not find a case in which this Court has held that opinion testimony on impairment was inadmissible because it did so. Therefore, it is clear that relevant opinion testimony is not unfairly prejudicial simply because it indirectly conveys the officer's opinion of the defendant's guilt or the defendant's credibility.

Furthermore, contrary to the defendant's claim, the testimony at issue here is not analogous to that in the cases he cites. In *Wargo*, the officer testified,

> I said, Wargo, you don't deserve any help from me, or from nobody. ... You don't have to tell me you are guilty of this, because there is more ways than one of a man's showing guilt. You can't beat your conscience. You can say No to this for a hundred years, but I see by your attitude that you are guilty, and I ... have no sympathy for you. I have been twenty-two years in this game. .... [F]or me to help you or show you any sympathy would put me on the same level with yourself; and I am above that.

Wargo, 83 N.H. at 534 (quotations omitted). This Court held that the testimony was not relevant, and that "[t]he tendency of [it] to prejudice the jury in giving them the

opinion ... that [Wargo] was guilty [was] not doubtful." *Id.* Here, on the other hand, Officer Foster's testimony was relevant and it did not express an opinion about the defendant's guilt. Therefore, here, unlike in *Wargo*, the tendency of the evidence to prejudice the jury is highly doubtful.

In *McDonald*, the trooper testified that McDonald's "emotion ... seemed very feigned," and that his body language and "emotions were overly dramatic" and "very over exaggerated." *McDonald*, 163 N.H. at 120. This Court held that his "testimony was tantamount to a comment on [McDonald's] credibility" because he "effectively testified that, in his opinion, [McDonald's] demeanor demonstrated that he was not being truthful." *Id.* at 122-23. Here, on the other hand, Officer Foster did not directly or indirectly express an opinion about the credibility of the defendant or his demeanor. Therefore, his testimony is different from that at issue in *McDonald*.

In *Huard*, the prosecutor asked its expert, who had interviewed the victim and the defendants, "Based on your experience and your education in the past on such matters, do you have an opinion as to whether or not [the victim's] story is consistent with that of a child of like years, nine years old, [who had been] sexually abused?" *Huard*, 138 N.H. at 258. The expert answered, "His story is consistent in that what [he] described to me ... is impossible for a nine year old to know about unless they had experienced it. And my opinion is, that [he] experienced exactly what he told me." *Id.* This Court held that the trial court erred in admitting the testimony because the witness's "opinion of [the victim's] credibility was inadmissible as either an expert or a lay opinion." *Id.* at 259.

This Court then held that the error was not harmless because "guilt or innocence ... depended on the [victim's] credibility," "[h]e was a reluctant witness," details of his story were "contradicted by his prior versions ... and by the testimony of other witnesses," including the defendants, *id.* at 259, and the witness's opinion "suggested that he believed [the victim] and disbelieved the defendants," *id.* at 260. Here, on the other hand, Officer Foster's lay opinion was based on his perception of the message and his knowledge of the surrounding circumstances, it did not suggest that he believed or disbelieved anyone, and the verdict did not depend on the credibility of the defendant or his threat. Therefore, not only is the opinion at issue here different from the inadmissible, unfairly prejudicial expert opinion at issue in *Huard*, the circumstances at issue here are different from those at issue in *Huard.*

In *Reynolds*, the trooper was asked "whether he had any reason to disbelieve what [the victim] told him regarding the allegations of fellatio" and "[o]ver the defendant's objection ... was permitted to answer: 'No. I had no grounds to disbelieve anything she told me.'" *Reynolds*, 136 N.H. at 326-27. He was also allowed to testify over the defendant's objection that he did not find the discrepancies in her stories "surprising." *Id.* at 327. In addition, he testified that he had investigated other sexual assault cases. *Id.* This Court held that the second part of the trooper's testimony also constituted a comment on credibility because he "in essence told the jury that [the] discrepancies should not diminish the victim's credibility." *Id.* at 328. It then held that the error was not harmless because "the case was ultimately and essentially a credibility contest between the victim and the defendant" and "the

victim's credibility had been attacked ... with some success ...." *Id.* at 329. Here, on the other hand, Officer Foster's lay opinion was based on his perception of the message and his knowledge of the surrounding circumstances, it did not suggest that he believed or disbelieved anyone, and the verdict did not depend on the credibility of the defendant or his threat. Therefore, not only is the opinion at issue here different from the inadmissible, unfairly prejudicial opinion at issue in *Reynolds*, the circumstances at issue here are different from those at issue in *Reynolds*.

In *Ober*, "the prosecutor asked a police officer whether [he] had requested the victim to take a polygraph test," the defendant asked for a mistrial, and the trial court gave a curative instruction instead. *Ober*, 126 N.H. at 471. This Court noted that its rule "that the results of polygraph tests are not admissible as evidence of guilt or innocence .... is based upon the unreliability of [them], as well as the danger that a jury will rely upon them to establish the truth or falsity of a witness's statements." *Id.* at 471-72. It also noted that "if the jury speculates from the question that the victim was not asked to take a polygraph test, the victim's credibility will be enhanced." *Id.* at 472. Here, on the other hand, the testimony at issue had nothing to do with a polygraph test or with credibility. Therefore, it is different from the inadmissible, unfairly prejudicial evidence issue in *Ober*. That being the case, all of the foregoing authorities belie, rather than support, the defendant's claims "that the admission of the testimony was error," and "that that error was plain." DB 15.

Furthermore, because this Court has never addressed whether Rule 701 permits the admission of this type of lay opinion testimony and it is more analogous

to an opinion on "impairment" than it is to an opinion on "guilt" or "credibility," any error "could not have been 'clear' or 'unequivocally obvious, [*i.e.* plain,] because this case presents an issue of first impression." *State v. Moussa*, 164 N.H. 108, 122 (2012). It also could not have been plain because other courts have held that "the ability to perceive whether a statement is threatening is an innate process of everyday reasoning, and thus well within the scope of lay opinion testimony." *United States v. Denton*, 146 Fed. Appx. 888, 890 (9th Cir. 2005). Therefore, even if there was an error, this Court "cannot correct" it because it was not "clear under current law." *State v. Noucas*, 165 N.H. 146, 161 (2013).

In any event, this Court has never "reversed a conviction on plain error review of the admission of the evidence ...." DB 15. Instead, it has "acknowledged that 'conceivably, a trial court would have such an obligation when there could be no dispute that certain testimony impaired the defendant's substantial rights and adversely affected the fairness, integrity, or public reputation of judicial proceedings.'" DB 15 (ellipsis omitted) (quoting *State v. Rawnsley*, 167 N.H. 8, 12 (2014)). Those circumstances do not exist here.

Officer Foster's testimony about the "immediacy" of the threat could not have affected the verdict because, as demonstrated in § I of this brief, the State did not have to prove that the threatened harm was imminent, and even if it did, the defendant neither requested, nor did the trial court give, the jury an instruction that required it to make any such findings. His testimony that the message was threatening, and that the defendant's purpose was to influence the plow driver's actions, also could not have

done so because the State played it for the jury and in it, the defendant said it was snowing, and that he was going to kill the plow truck drivers if they again plowed snow onto his sidewalk. JT 14; EXH 1.

In addition, Jodoin testified that the message was "threatening," and that he had "concerns about [the town] employees' safety," so he called the police and then called the DPW, told the secretary what was going on, and advised her to call the police if any DPW employees had contact with the defendant. JT 15. The State also admitted a photograph of the defendant's house, which showed that there were no curbs between the street and the sidewalks, and that there was no place else for the plow drivers to push the snow. ASB 1. Therefore, the evidence that the defendant threatened to harm the plow truck drivers, and that he did so for the purpose of influencing their actions was overwhelming. That being the case, it is not beyond dispute that the testimony "impaired the defendant's substantial rights and adversely affected the fairness, integrity, or public reputation of [the trial] ...." *Rawnsley*, 167 N.H. at 12. Accordingly, for the reasons stated in this brief, this Court must affirm the defendant's conviction.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 15-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,
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November 9, 2017

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Christopher M. Johnson, Chief Appellate Defender, counsel of record, at the following address:

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Susan P. McGinnis

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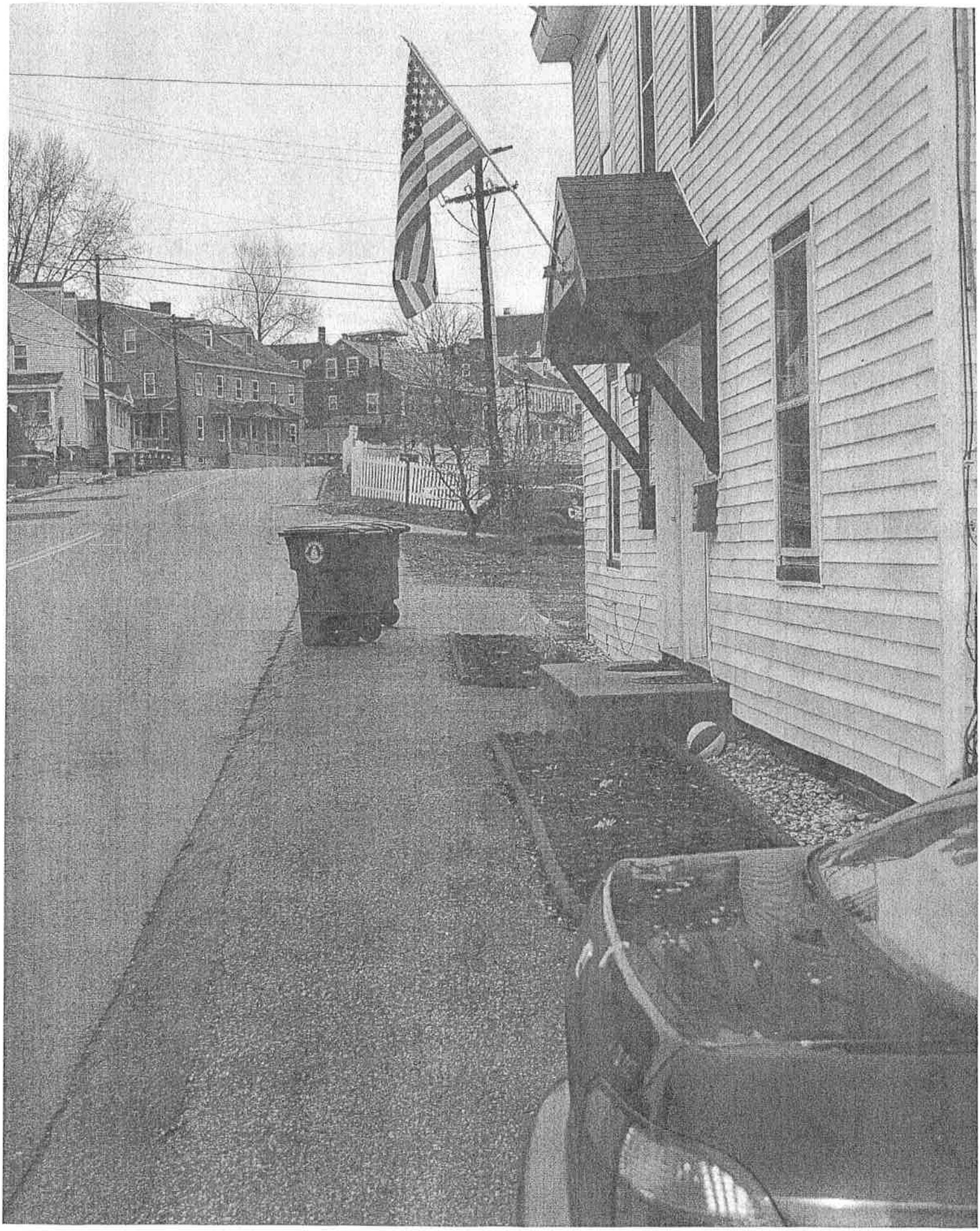

MERRIMACK SUPERIOR COURT

CASE SUMMARY

CASE NO. 217-2016-CR-00449

State v. Michael Hanes

§ Location: **Merrimack Superior Court**
§ Judicial Officer: **McNamara, Richard B**
§ Filed on: **05/20/2016**
§

CASE INFORMATION

Offense	Statute	Deg	Date	Case Type:	**Criminal**
Jurisdiction: **Pembroke**					
1. Improper Influence	640:3	FELB	02/16/2016	Case Status:	**03/27/2017 Appealed to Supreme Court**
ChargeID: 1228991C ACN: 007025J161228991001					
Arrest:					

PARTY INFORMATION

		Attorneys
Defendant	**Hanes, Michael** [redacted] *White Male Height 5' 9" Weight 200* *DOB: [redacted] Age: 55*	**Davis, Robin A., ESQ** *Retained* 603-224-1236(W)
Prosecutor	**Merrimack County Attorney** *Four Court Street* *Concord, NH 03301*	**Waldron, George B., ESQ** *Retained* 603-228-0529(W)

DATE	EVENTS & ORDERS OF THE COURT	INDEX
05/20/2016	Indictment *Charges: 1*	*Index #1*
06/09/2016	Appearance Filed by: Attorney Davis, Robin A., ESQ	*Index #2*
06/10/2016	Ntc of Eligibility and Appt of Counsel *Charges: 1*	*Index #3*
06/15/2016	**Arraignment**	
06/15/2016	Entry of Not Guilty Plea and Waiver of Arraignment Filed by: Attorney Waldron, George B., ESQ; Attorney Davis, Robin A., ESQ; Defendant Hanes, Michael *with Bail Order* *Charges: 1*	*Index #4*
06/16/2016	Approved (Judicial Officer: Nicolosi, Diane M)	
06/15/2016	Personal Recognizance Bond Filed by: Defendant Hanes, Michael	*Index #5*
06/15/2016	**Plea** (Judicial Officer: Nicolosi, Diane M) 1. Improper Influence Not Guilty	
08/12/2016	**Dispositional Conference** *Hearing Held*	
08/12/2016	Dispositional Conference Order (Judicial Officer: McNamara, Richard B) *FPT: 11/17/16; JS: 12/5/16; TRJ: Weeks of 12/5/16 and 12/12/16*	*Index #6*

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12/05/2016	**Jury Selection** (Judicial Officer: Nicolosi, Diane M) *Jury Empanelled*	
12/05/2016	Witness List Filed by: Attorney Waldron, George B., ESQ *State's Witness List*	*Index #8*
12/07/2016	**Jury Trial** *Day 1 of 1* *Jury Trial Held*	
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12/07/2016	**Disposition** (Judicial Officer: McNamara, Richard B) 1. Improper Influence Jury Verdict of Guilty	
01/10/2017	Assented to Motion to Continue Filed by: Attorney Davis, Robin A., ESQ	*Index #10*
01/10/2017	Granted (Judicial Officer: McNamara, Richard B)	
01/12/2017	*CANCELED* **Sentencing**	
03/01/2017	**Sentencing** *Hearing Held*	
03/01/2017	**Sentence** (Judicial Officer: McNamara, Richard B) 1. Improper Influence House of Correction - All or Portion Suspended Condition - Adult: 1. 13 Good Behavior, 03/01/2017, Active 03/01/2017 2. 14 Other Condition (See Judge's Order), Defendant shall have no unofficial contact with the employees of the Town of Pembroke. The Defendant shall self surrender on March 8, 2017 at 9 AM., 03/01/2017, Active 03/01/2017 Confinement Effective Date: 03/01/2017 Agency: Merrimack County Jail Maximum Term: 12 Months Mandatory Minimum Not Applicable Comment: All but 7 days suspended for 1 year from today's date.	
03/01/2017	Sentence Sheet (Judicial Officer: McNamara, Richard B) *Charges: 1*	*Index #11*
03/01/2017	Mittimus *Charges: 1*	*Index #12*
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09/05/2017	Supreme Court Order *transmit exhibit #1, (delivered 9/11/17)*	*Index #20*

TARGET DATE	TIME STANDARDS

RSA 640:3, I (a) Improper influence [threats]

The defendant is charged with the crime of improper influence. The definition of this crime has three parts or elements, each of which the State must prove beyond a reasonable doubt. Thus the State must prove that:

1.The defendant made a threat of harm to another person; and

2. The other person was a [public servant] [party official] [voter]; and

3. The threat of harm was intended to influence the recipient's action, decision, opinion, nomination, vote, recommendation or other exercise of discretion in his capacity as a [public servant] [party official] [voter].

This is the definition of the crime of improper influence. Certain words in the definition need to be further explained.

A "public servant" means any officer or employee of the state or any political subdivision of the state, including judges, legislators, consultants, jurors and persons otherwise performing a governmental function. A person is considered a public servant upon his election, appointment or other designation as such, although he may not yet officially occupy that position.

A "party official" means any person who holds any post in a political party whether by election, appointment or otherwise.

"Harm" means any disadvantage or injury, pecuniary or otherwise, including disadvantage or injury to any other person or entity in whose welfare the [public servant] [party official] [voter] is interested.

"Purposely" means [see definition of purposely.]

MENTAL STATES - PURPOSELY

Part of the definition of the crime of _____ is that the defendant acted purposely. A person acts purposely when his/her conscious object is to [cause a certain result][engage in certain conduct]. The State must prove that the defendant had the conscious object to [cause this result][engage in this conduct]. The key words here are "conscious object". To have a "conscious object" means to have a specific intent. It means that the defendant desired to [cause a certain result][engage in certain conduct]. It is not enough for the state to prove that the defendant knew or was aware of what he/she was doing. Nor is it enough for the state to prove that the defendant created a risk of injury or harm. To prove that the defendant acted purposely requires more that than. It requires proof that the defendant specifically intended or desired to [bring about a particular result][do a particular act].[1]

[1] The court and counsel should determine for the crime at issue which elements the mental state applies to, that is, which elements are material elements, as opposed to merely elements. *See* R.S.A. 625:11, IV. Unless a contrary intent plainly appears in the statute defining the crime at issue, the required mental state applies to all material elements. *See* R.S.A. 626:1, I

REPORT

of

Commission to Recommend Codification of Criminal Laws

Established under Chapter 451 Laws of 1967

Richard H. Keefe — Clifford J. Ross
Frank R. Kenison, Chairman

FOLLOWS EQUITY THE LAW
PUBLISHING CORPORATION
ORFORD, NEW HAMPSHIRE

and traditional sphere of politics. Protecting the integrity of political and governmental functions, therefore, requires that bribery of political party officials be prohibited. Further expansion occurs by virtue of the definition of "public servant" in paragraph II. Consultants whose reports and decisions are often of vital significance in determining government policy are listed among those whose discretion may not be bribed. Since many consultants serve without compensation, there is no requirement that they be on a compensated basis. The prohibition of this section takes place as soon as the public servant is elected or appointed and does not await his official occupancy of the office, since it is obvious that bribery at that point can be just as pernicious as any which occurs later.

The exception at the end of paragraph II is important. It is designed to make clear that there is no misconduct involved when a public official promises to improve economic conditions through the exercise of his discretion, in return for which he solicits the electoral support of his constituents. He may not, however, accept pecuniary benefits from a particular segment of the economy, a trade association, for example, in return for his support of its economic progress. Campaign contributions that are intended to secure election to office and are not tied to a specific exercise of discretion are not prohibited by this section. The inclusion of candidates for electoral office puts incumbents and their challengers on a par in terms of what they may solicit or accept in return for a particular exercise of discretion when they achieve office.

In view of the many difficulties of enforcing bribery laws, paragraph I–b requires that reports be made of bribery attempts.

585: 2 **Improper Influence.**

I. A person is guilty of a class B felony if he

(a) threatens any harm to a public servant, party official or voter with the purpose of influencing his action, decision, opinion, recommendation, nomination, vote or other exercise of discretion; or

(b) privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, argument or other communication with the purpose of influencing that discretion on the basis of considerations other than those authorized by law; or

(c) being a public servant or party official, fails to report to a law enforcement officer conduct designed to influence him in violation of paragraphs I(a) or I(b) of this section.

II. "Harm" means any disadvantage or injury, pecuniary or otherwise, including disadvantage or injury to any other person or entity in whose welfare the public servant, party official, or voter is interested.

Comments

This section is a modified version of the Model Penal Code, § 240.2. Like the bribery law, it is designed to preserve the

integrity of the governmental process. Paragraph I protects persons with key roles in this process from intimidation aimed at influencing their decisions. The prohibition in paragraph II is limited to judicial and administrative proceedings because legislative and executive officers are traditionally subject to such a variety of special pleas for the exercise of their discretion that there are no prevailing norms, short of penalties for threat or outright bribery, that prohibit communications to them for favor. In the absence of a widely held view that there is something wrong about appealing to legislative and executive personnel, the law ought not to create the condemnation on its own. But in judicial and administrative proceedings, the situation is quite different. The forms of communication and their substance are much more formally structured. Canon 17 of the Canons of Judicial Ethics of the American Bar Association expresses a related principle:

> A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.

Administrative proceedings that are based on a court model undoubtedly have similar ethical obligations. This section does not go so far as to enact these ethics into penal law, however. It is a combination of the substance of the communication and the privacy of its transmission that gives rise to the penalty. *Ex parte* appeals to a judicial officer that one of the litigants is a meritorious relative of counsel is the practice this section operates against. See, also, RSA 495: 1, 2.

585: 3 **Compensation for Past Action.** A person is guilty of a misdemeanor if

I. being a public servant, he solicits, accepts or agrees to accept any pecuniary benefit in return for having given a decision, opinion, recommendation, nomination, vote, otherwise exercised his discretion, or for having violated his duty; or

II. he promises, offers or gives any pecuniary benefit, acceptance of which would be a violation of paragraph I.

Comments

This section is based on the Model Penal Code, § 240.3. It fills a gap in the law dealing with official integrity which is occasioned by giving or receiving what, in essence, is a bribe *after* the official action has taken place. The rationale for reaching unofficial compensation under these circumstances is described by the Model Penal Code comments:

> Soliciting or accepting pay for past official favor should be discouraged because it undermines the integrity of administration. Compensation for past action implies a promise of similar compensation for future favor. Apart from this implied bribery for the future, when some "clients" of a

Comments

This is a modified version of Model Penal Code, § 211.1(2) and defines an offense which falls short of homicide only insofar as the victim, by some good fortune, does not die as a result of the attack made on him. The serious bodily injury required in paragraph I is defined in section 570:11(VI).

Although RSA 585:22, which this section replaces, contains no substantive definition, the proposed aggravated assault includes the serious type of injury to which 585:22 relates. As is true concerning simple assault, attempts are included here because they are usually considered a species of assault. See State v. White, 105 NH 159 (1963). Any injury purposely or recklessly caused by a deadly weapon is also included. Paragraph III also requires only bodily injury of any degree and the justification for permitting slight harm to be the basis for a felony conviction is that the defendant's conduct was of the most threatening sort and it is largely by chance that a murder was not committed.

576:3 **Reckless Conduct.** A person is guilty of a misdemeanor if he recklessly engages in conduct which places or may place another in danger of serious bodily injury.

Comments

This section is derived from Model Penal Code, § 211.2. It has no counterpart in common law or in the New Hampshire statutes. But in dealing with conduct that endangers but does not harm others, it fills an undesirable gap in the law. If actual harm occurs, then a criminal assault will have taken place. Since, when a person acts recklessly, he disregards a risk he knows of and acts with an indifference to the injury he may cause to others, he is just as culpable when the risk does not eventuate in the injury as when it does. Without a statute of this sort, however, a person whose behavior menaces in this way could be prosecuted only if the harm actually occurs.

The scope of this new offense is limited in two ways, however, in view of the fact that conditions of modern urban living require that to some extent we leave others to their own resources to avoid the harm our conduct threatens. Driving an automobile during a rush hour is an example of this endangering conduct. One of the limits is that the actor be reckless and know of the undue risk he is creating. The second is that *serious* bodily injury be at stake, not merely any harm.

The Model Penal Code creates a presumption of recklessness whenever a firearm is pointed at another. This has not been included on the grounds that almost any time a firearm is held in the presence of others a pointing could occur entirely inadvertently.

576:4 **Criminal Threatening.** A person is guilty of a misdemeanor when,

I. By physical conduct, he purposely places or attempts to place another in fear of imminent bodily injury or physical contact; or

II. He threatens to commit any crime against the person of another with a purpose to terrorize any person; or

III. He threatens to commit any crime of violence with a purpose to cause evacuation of a building, place of assembly, facility of public transportation or otherwise to cause serious public inconvenience, or in reckless disregard of causing such fear, terror or inconvenience.

Comments

Paragraph I of this section describes the fear-producing type of conduct which would be considered an assault at common law. It is included here because it is more closely related to the other forms of criminal threatening than it is to an assault in that all of the conduct in this section is characterized by an absence of intent to cause any immediate actual harm.

The remainder of the section is based on Model Penal Code, § 211.3. There is no similar offense in present New Hampshire law. The purpose of these provisions is to prevent grave fears for personal safety. This not only safeguards an important psychological interest but also serves to forestall breaches of the peace that might ensue as a reaction to the fear produced by the threats. Paragraph III deals with conduct that is likely to result in large scale panic and the problems of personal injury that are likely to arise when crowds of people are under the influence of fear of an impending catastrophe.

576:5 Operating Boats Under Influence of Liquor or Drugs.

I. A person is guilty of a misdemeanor if he operates a boat while under the influence of intoxicating liquor or a narcotic or habit-producing drug.

II. The meaning of "boat" as used in this section includes any craft that can be propelled on the water by motor, sail, paddle, oar, or any other manual or mechanical means.

III. Any person convicted of a violation of

(a) this section; or

(b) sections 576:1, 576:2, 576:3 or 575:2 wherein the offense was committed by means of his operation of a boat,

shall not operate a boat on the waters of this state for a period of one year from the date of his conviction, whether or not such conviction is appealed. Any person operating a boat during such a period is guilty of a misdemeanor.

Comments

RSA 570:28 (1967 supp.) presently defines this offense but includes more than is restated in this section. It includes recklessly endangering others, a problem dealt with generally in section 576:3. Homicide occurring from the reckless operation of a boat, also part of the present statute, is not

New Hampshire General Court - Bill Status System

Docket of SB256

Docket Abbreviations

Bill Title: relative to the definition of "harm" for purposes of the crime of improper influence.

Official Docket of **SB256:**

Date	Body	Description
1/4/2006	S	Introduced and Referred to Judiciary; **SJ 1**, Pg.6
1/4/2006	S	Hearing; January 31, 2006, Room 103, State House, 1:30 p.m.; **SC1**
2/8/2006	S	Committee Report; Ought to Pass [02/16/06]; **SC6**
2/16/2006	S	Ought to Pass, MA, VV; OT3rdg; **SJ 5**, Pg.101
2/16/2006	S	Passed by Third Reading Resolution; **SJ 5**, Pg.107
2/22/2006	H	Introduced and ref Criminal Justice and Public Safety **HJ20**, pg 1257
3/9/2006	H	Public Hearing March 23 10:30 RM 204/LOB
3/23/2006	H	Subcommittee Work Session March 28 9:00 RM204/LOB
3/31/2006	H	Comm Rprt: OTP April 5 (vote 13-0; CC)
4/5/2006	H	Passed, MA, VV **HJ 31**, pg 1756
4/13/2006	S	Enrolled; **SJ 11**, Pg.383
4/13/2006	H	Enrolled; **HJ 33**, Pg.1814
4/19/2006	S	Signed by the Governor on 04/18/06; Eff.date 01/01/07; Chapter 0043

NH House	NH Senate

SB 256 – AS INTRODUCED

06-2649
08/09

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Six

AN ACT relative to the definition of "harm" for purposes of the crime of improper influence.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Improper Influence; Harm. Amend RSA 640:3, II to read as follows:

II. "Harm" means any disadvantage or injury, ***to person or property or*** pecuniary [~~or otherwise~~] ***interest***, including disadvantage or injury to any other person or entity in whose welfare the public servant, party official, or voter is interested***, provided that harm shall not be construed to include the exercise of any conduct protected under the First Amendment to the United States Constitution or any provision of the federal or state constitutions.***

2 Effective Date. This act shall take effect January 1, 2007.

Judiciary Committee Gail

Hearing Report

TO: Members of the Senate

FROM: Susan Duncan, *Senior Legislative Aide*

RE: Hearing report on SB 256 – *AN ACT relative to the definition of "harm" for purposes of the crime of improper influence*

HEARING DATE: January 31, 2006

MEMBERS OF THE COMMITTEE PRESENT: Senators Foster, Clegg Roberge, Letourneau and Gottesman

MEMBERS OF THE COMMITTEE ABSENT: Senator Odell

Sponsor(s): Senators Johnson and Flanders

What the bill does: This bill clarifies the definition of "harm" for purposes of the crime of improper influence.

Who supports the bill: Senator Johnson
Senator Flanders
Attorney Daniel St. Hilaire
Merrimack County Attorney

Who opposes the bill: No one appeared in opposition

Summary of testimony received:

- This legislation was filed by Senator Johnson at the request of Attorney St. Hilaire.
- Attorney St. Hilaire testified that the bill is a housekeeping matter and seeks to provide clarification to RSA 640:3, the improper influence statute.
- He explained the background of a situation where a citizen threatened the Attorney General and the case was dismissed by the Judge.
- The way "harm" is written in the statute, it is incredibly broad. This provides a wording to rectify the problem when someone threatens a public official.

- Senator Foster asked if Attorney St. Hilaire was aware of SB 379 which appears to be dealing with the same subject. Attorney St. Hilaire was not aware of it.
- The Committee members discussed whether the subject matter in SB 379 and SB 256 are the same. Attorney St. Hilaire was provided with a copy of the proposed amendment to SB 379.
- Attorney St. Hilaire said that an official could be threatened with, for example, not giving someone a bank loan unless they did something. This does no physical harm, but is a threat.
- In discussing the impetus for filing this legislation, Attorney St. Hilaire explained that the case in question was State v. Joe Haas. He said that the current language has been ruled unconstitutional. SB 256 would narrow the definition.

Funding: Not applicable

Future Action: The Committee took the bill under advisement.

sfd
[file: SB 256 report]
Date: February 3, 2006

RJB

Date: January 31, 2006
Time:
Room: State House Room 103

The Senate Committee on Judiciary held a hearing on the following:

SB 256 relative to the definition of "harm" for purposes of the crime of improper influence.

Members of Committee present: Senator Foster
Senator Clegg
Senator Letourneau
Senator Roberge
Senator Gottesman

The Chair, Senator Joseph A. Foster, opened the hearing on SB 256 and invited Susan Duncan, on behalf of prime sponsor, Senator Johnson, to introduce the legislation.

Susan Duncan: Thank you. For the record, I'm Susan Duncan here at the request of Senator Carl Johnson, who apologizes, but he is chairing the committee of which he is chair obviously. He put this bill in at the request of County Attorney Dan St. Hilaire and just wanted me to introduce him and let him explain the bill. Again, he does apologize that he is unable to be present. Thank you.

Senator Robert J. Letourneau, D. 19: Good job, as always.

Senator Joseph A. Foster, D. 13: Call County Attorney St. Hilaire.

Dan St. Hilaire, Merrimack County Attorney: Good afternoon. May I pass out a copy of the statute that we are referring to?

Please see New Hampshire RSA 640:3 Improper Influence, attached hereto and referred to as Attachment #1.

HB3

Good afternoon. I asked Senator Johnson to sponsor what I call a housekeeping measure to change the definition of harm under RSA 640:3, which is the improper influence statute. The reason for my request was, occasionally a public official will receive some sort of harm or threat directed at them, mainly to try to get them to do something or get them not to do something.

My particular instance was against the Attorney General Kelly Ayotte where somebody threatened her child. When we charged the person under the statute for improper influence, the case was dismissed because the judge found that the statute was unconstitutional. The reason for that finding was that this statute says that it is against the law for anybody to threaten any harm, which you will see under paragraph II(a). Now, any harm can encompass almost anything, the court concluded, which could be a letter writing campaign, for instance. If Senator So and So doesn't vote my particular way, I am going to institute a letter writing campaign or I am going to go to his constituents and complain and thwart his re-election campaign. All kinds of things like that. That could constitute harm in the broadest sense. However, those actions of writing letters and working on campaigns, those are protected under the Constitution First Amendment. You have a right to free speech; you have a right to do those things.

Now, obviously, you don't have the right to threaten the life of somebody's child, but because the statute says that any harm threatened is illegal, that statute could infringe on somebody's constitutional rights and therefore cannot be applied to even defendants who I consider would be guilty. But, it could not be applied to anybody.

So, I'm requesting that the definition of harm be amended in Roman II. That is self-explanatory, but the provision would really exclude any conduct protected under the First Amendment of the United States Constitution or any right granted to any citizen in the state of New Hampshire by any federal or state constitutions. Now, hopefully, that will rectify the problem.

Other states have defined improper influence by saying anybody who threatens any unlawful harm and that would be the alternative way to remedy this statute. But, I would rather not say any unlawful harm because somebody could threaten a Senator. For instance, they could ay, "If you don't vote a certain way, I won't give you a bank loan" or "I won't let your son or daughter into my college". That is a harm. It is not necessarily unlawful not to allow your son or daughter into college. So, I would prefer to amend the definition of harm the way it is now and see where that takes us if the Legislature decides this is the way to go and we have another charge to file.

Senator Joseph A. Foster, D. 13: Thank you for your testimony. Are you aware that there is SB 379 that I believe Justice Galway and a group put together to address this issue that is working its way before this committee? I think there is an amendment that Assistant Attorney General Rice is working on as well.

Attorney St. Hilaire: I'm not aware of that, but I did run this by Assistant Attorney General Rice and Attorney General Kelly Ayotte. She didn't say, "By the way, Dan, we're already addressing this".

Senator Joseph A. Foster, D. 13: She may not know. I think it addresses the same issues and I want to make sure that we do it once, but do it right. So, what I might suggest is you check with her. I know she is working with Judge Galway and I believe the differences between this, and I could be wrong, but I would love to hear back from you if you don't think this is covering a different subject matter. I think it lists the public servants who are covered.

Attorney St. Hilaire: I know that they did ask for advice and that they had a judicial panel after some judges got shot out of state, look at the whole security issue and how we charge people. We gave them our opinion as to what they should do for their rules.

Senator Joseph A. Foster, D. 13: I think all of us agree that this is an issue and I think the others agree, but I may be wrong.

Attorney St. Hilaire: Can I get the number of that bill?

Senator Joseph A. Foster, D. 13: Senate Bill 379. Any other questions? Senator Clegg?

Senator Robert E. Clegg, Jr., D. 14: I'm just going to reiterate what Senator Foster just said. The problem, and I'm not sure it is a problem, but provided that the harm shall not be construed to include exercise of any conduct protected under the First Amendment of federal or state Constitution. I think when we talked with Justice Galway, he basically talked about the harassment of a phone call. I guess you have the right to call someone, especially an elected official, and there is nothing anywhere that says I can't call him every five minutes to give him my opinion. But, in some cases, we found that to be a problem.

But, I think the bill that we talked about also goes a little further with harm and talks about the feeling of being threatened, which would be somebody following you at a mall which, the way you define harm, would be okay

because he has a right to be in the mall or sitting out in front of your house eating his lunch every day and staring at your house. There is nothing that bars you. In fact, the Constitution gives you the freedom to go anywhere you want.

Attorney St. Hilaire: Correct. But, the difference is, and that may be the distinction if I look up this Senate bill, because that is under the criminal harassment statute. If you feel threatened or harmed, that would be a violation of the statute.

This statute doesn't require that you actually feel threatened. If somebody says, "If you don't vote my way, I'm not going to give you a bank loan", you might not feel harmed or threatened by that, but it is still somebody trying to influence you and change your vote. It is under a different statute than the harassment statute, which has just been struck down.

Senator Robert E. Clegg, Jr., D. 14: I'm saying they have combined the two. You are using the definition of harm from this statute to say that, and we will use it in the case of the justices, that if you start following a justice or a justice's wife all day long or husband, we have a female justice. Not that I think anybody would want to follow Griff. I guess I have a problem with the way this is written, but I fully understand that we can't violate somebody's rights. Somebody has got to get together.

Senator Joseph A. Foster, D. 13: So, perhaps if you could just check in with her and if you think you are addressing different subject matter, if you could just let us know.

Attorney St. Hilaire: Thank you.

Senator Joseph A. Foster, D. 13: Thank you.

Senator David M. Gottesman, D. 12: Why do we want to pen it up to further interpretation as to what might be violated? Why aren't we letting a judge just determine that based on existing law?

Attorney St. Hilaire: Well, because the way it is defined now, the judges and courts have determined the statute to be unconstitutional. If we say any harm, you can define harm as almost anything, including as I mentioned earlier, a letter writing campaign complaining to the Governor or whatever. That could be construed as harm because it affects your campaign or your livelihood if that is what your livelihood is. So, we need to define harm more stringently, if you will. We can't broaden it; we have to narrow it.

RJB

Senator David M. Gottesman, D. 12: I think the way the other one is coming down is any threat of harm would be a Class B felony; any actual rendering of harm would be a Class A felony. I think they defined it in that fashion. I know we have this other one kicking around and we're all trying to get to the same place. But, in my mind, this may have unintended consequences if you do it this way.

Senator Joseph A. Foster, D. 13: We will work on that. Any other questions?

Senator Robert E. Clegg, Jr., D. 14: Can you give us the court case you are referencing?

Attorney St. Hilaire: Yes. It would be State v. Joe Haas and I will get a copy of it for you. There are a few others as well.

Senator Joseph A. Foster, D. 13: The amendment I think does also deal with the First Amendment. It is expressly carved out. The final details seem to be ambiguous. Any questions? Senator Letourneau?

Senator Robert J. Letourneau, D. 19: Do you have any actual examples of something that may have occurred here?

Attorney St. Hilaire: A court case?

Senator Robert J. Letourneau, D. 19: Sure.

Attorney St. Hilaire: State v. Joe Haas which was the impetus for this. Last year when Joe wrote a letter to Kelly Ayotte saying, "If you continue to prosecute my friend, Gus Bretton, death be to your first born child". Now, he included, she had just delivered a baby, and he included announcements cut off from the newspaper. Many of us are familiar with Joe Haas so we may not be able to testify that our lives felt threatened because we have dealt with him a few times.

However, receiving these threatening letters is something that is improper as well. So, the most appropriate statute for the charge was the improper influence. In that case, it was thrown out because the harm is defined so broadly. As I said, in most states, this similar statute, they say threatening any unlawful harm to a public servant. Our statute says threaten any harm to a public servant. I'm reading this very quickly and I will have to research this.

But, the other bill, 379, represents a cause of bodily injury to or commits any crime against a sitting member. Again, if you're going to be threatened by your mortgage holder if you don't drop a charge against my son to the Attorney General, then I am going to foreclose your mortgage, or I won't give you a mortgage, or I won't let your daughter get into my daycare. I'm not sure that this statute would cover that. No physical injury is being threatened under this particular statute.

Senator Joseph A. Foster, D. 13: The amendment is fairly different. Please take a look at that. We probably won't act on that until next week.

Senator Robert J. Letourneau, D. 19: Thank you.

Senator Joseph A. Foster, D. 13: Thank you very much for your testimony and seeing nobody else here to speak on the bill, I will close the hearing.

Hearing closed at 2:45 p.m.

Respectfully submitted,

L. Gail Brown
Senior Senate Secretary
2/28/06

1 Attachment