THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0265

State of New Hampshire

v.

Owen Labrie

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

REPLY BRIEF FOR THE DEFENDANT

Christopher M. Johnson
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(15 minutes oral argument)

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QUESTION PRESENTED

Whether trial counsel rendered ineffective assistance with respect to the felony computer services prohibited charge.

Issue preserved by motion for a new trial, the State's response, Labrie's supplement to the motion, the hearing on the motion, the parties' post-hearing memoranda, and the court's order. A1-A124; H 1-538; Supp. 1-24.*

* Citations to the record are as follows:
"DB" refers to Labrie's opening brief;
"SB" refers to the State's brief;
"A" refers to the Appendix filed under separate cover at the time of the filing of Labrie's opening brief;
"Supp." refers to the documentary supplement filed with Labrie's opening brief;
"T" refers to the transcript of the eight-day trial held in August 2015;
"S" refers to the transcript of the sentencing hearing held on October 29, 2015;
"H" refers to the transcript of the three-day post-conviction evidentiary hearing, held in February 2017.

STATEMENT OF THE CASE AND OF THE FACTS

In his opening brief, Labrie argues that trial counsel rendered ineffective assistance in defending against the computer services charge. The brief advances two claims: first, that counsel rendered ineffective assistance in failing adequately to present a defense to the mental state element, DB 21-29; and second, that counsel rendered ineffective assistance in failing to present an *actus reus* defense focused on the nature of the SPS intranet computer network, DB 29-39.

In its responsive brief, the State argues, with respect to both claims, that counsel's performance was not deficient, and that any deficiency did not prejudice Labrie. This reply brief addresses arguments made by the State with respect to the mental state claim, focusing specifically on the deficient performance prong. SB 20-27.

I. TRIAL COUNSEL RENDERED DEFICIENT PERFORMANCE IN FAILING TO PRESENT A MENTAL-STATE DEFENSE TO THE CHARGE.

The argument that trial counsel rendered deficient performance in failing to present a defense to the crime's mental-state element rests on three fundamental points. First, the raw material for a defense existed in Labrie's testimony and other evidence tending to show that, at the time he sent messages to F.P., Labrie did not intend to engage in sexual penetration with her. Second, counsel failed in opening statement, closing argument, or otherwise, to marshal that evidence by communicating to the jury its legal significance with respect to the computer services charge. Third, counsel had no strategic reason to fail to communicate the defense to the jury. The failure arose out of counsel's misunderstanding of the relevant law.

On the first point, the State concurs with Labrie. In its brief, the State acknowledges that counsel "adduced evidence which, if accepted by the jury, would have supported acquittal by undermining the State's circumstantial evidence of the defendant's intent." SB 24. Thus, this is not a case in which counsel had no viable defense to present.

The fact that the record contained evidence from which counsel could construct a defense does not redeem counsel's performance. The jury's job is to decide whether to believe evidence supporting a defense. It is not the jury's job to seek out some theory of defense that the evidence supports. A lawyer who fails to marshal available evidence into a clear defense theory demands too much of the jury, and thereby performs deficiently.

As to the second point, the State suggests that counsel did marshal that evidence in support of a defense to the computer felony charge. SB 23. This Court must reject that contention. Not once during trial did counsel even mention to the jury either the computer felony charge or Labrie's defense to it. H 508. At the times cited in the State's brief, counsel contested the penetration element associated with other charges, T 52-54, 1066-68, but the absence of penetration does not constitute a defense to the computer use felony. See DB 24-25 (making this point). As the State also notes, SB 23, counsel argued for Labrie's credibility, but a credibility argument not linked to the crucial contested element on the computer felony charge does nothing to alert the jury to Labrie's defense to that charge.

Finally, this Court must also reject the State's response to the third point and its suggestion that a reasonable strategy supported counsel's failure to communicate the defense to the jury. The State cites a case in which counsel's closing argument called to the jury's attention some features of the defense while neglecting others. SB 22 (citing Yarborough v. Gentry, 540 U.S. 1 (2003)). Claims of ineffective assistance tend to fail in such cases, because lawyers can make various strategic decisions about which points to emphasize to the jury, as "judicious selection of arguments for summation is a core exercise of defense counsel's discretion." Yarborough, 540 U.S. at 8. In the closing argument in Yarborough, for example, counsel made "several key points." Yarborough, 540 U.S. at 6. Such cases do not support the State's position here,

though, because Labrie's counsel never mentioned the computer use charge or any defense to it.

Undoubtedly, in certain cases counsel can make a reasonable strategic decision to ignore a charged offense. If counsel has no viable defense to present, little can be gained by calling attention to the charge. Or if, as the State observes, SB 24, some "danger also existed in focusing too heavily on the computer use charge," counsel might reasonably decide to ignore the charge.

Those circumstances and considerations, however, do not describe the present case. As noted above and as conceded by the State, the trial record contained ample evidence from which a mental-state defense to the charge could be constructed. Nor did counsel here claim that they faced the predicament of having no defense. On the contrary, they acknowledged at the post-conviction hearing that Labrie had a viable mental-state defense to the computer-use charge. H 328-29, 365-66, 468-69.

Equally unavailing is the State's assertion of a "danger" inherent in "focusing too heavily on the computer use charge because it could risk an admission that the defendant did intend to have sexual intercourse with the victim." SB 24. The State cites nothing in support of that contention because counsel never claimed to perceive any such "danger." Nor could such a "danger" account for counsel's failure in closing argument to communicate the defense to the jury, for by then Labrie had testified and had not admitted to having any such intention at the time the messages were sent.

As the Supreme Court has held, courts should "not indulge [a] *post hoc* rationalization for counsel's decisionmaking that contradicts the available evidence of counsel's actions." Harrington v. Richter, 562 U.S. 86, 109 (2011) (citing Wiggins v. Smith, 539 U.S. 510, 526-27 (2003)). Counsel's performance must be measured by the actual strategy they articulated, not by some alternative hypothetical strategy they were not pursuing. See Thomas v. Varner, 428 F.3d 491, 500 n.7 (3rd Cir. 2005) ("We believe that an inquiry into whether counsel actually had some strategy is permissible. . . . Otherwise, incompetency of defense counsel could be rewarded by ingenuity on the part of a State's attorney in supplying hypothetical strategies to explain defense counsel's uninformed prejudicial oversights"); Hernandez v. Chappell, 878 F.3d 843, 850 (9th Cir. 2017) ("Where counsel has provided the reason for his conduct, and we have no reason to doubt the validity of that explanation, the relevant inquiry is whether the stated reason was objectively unreasonable"); Pinholster v. Ayers, 590 F.3d 651, 673 (9th Cir. 2009) ("To give the attorneys the benefit of the doubt is one thing, but to fabricate an excuse that the attorneys themselves could not conjure up is another").

In some cases, such as in Bell v. Cone, 535 U.S. 685 (2002), counsel can make a reasonable strategic decision to forego closing argument. See SB 22 (citing Bell for proposition that "it might sometimes make sense to forego [closing argument] altogether"). That case, however, affords no support to the State's position here. In Bell, state law structured closing argument in a capital penalty phase by granting the State both the first, and if defense counsel

argues, the last, opportunity to address the jury. Bell, 535 U.S. at 701. In Bell, after a "junior prosecutor delivered a very matter-of-fact closing that did not dwell on any of the brutal aspects of the crime," defense counsel could have given a closing that would presumably just reprise his penalty phase opening statement, but at the cost of entitling "the lead prosecutor, who all agreed was very persuasive, the chance to depict his client as a heartless killer just before the jury began deliberations." Id. at 701-02. Alternatively, by waiving closing argument, the defense lawyer could block that prosecutor from making any final closing. Id. at 702. Either option could constitute a reasonable strategic choice, and for that reason the Supreme Court rejected the defendant's claim of ineffective assistance. Id. In Labrie's case, by contrast, nothing was gained by entirely ignoring the computer felony charge.

On the contrary, counsel ignored the computer felony charge because they believed that no conviction on that charge would be legally proper if the defense prevailed on the other charges. As explained in Labrie's opening brief, DB 24-26, counsel misunderstood the law in that respect. A decision based on a misunderstanding of the law is not sustainable as the expression of a reasonable strategy.

The State cites authority for the proposition that the analysis takes into account the extent of trial counsel's experience. SB 21. In one of the cases the State cites, the court explained that

> We accept that even the very best lawyer could have a bad day. No one's conduct is above the reasonableness inquiry. Just as we know that an inexperienced lawyer can be competent, so we recognize that an experienced

> lawyer may, on occasion, act incompetently. Our point is a small one: Experience is due some respect.

Chandler v. United States, 218 F.3d 1305, 1316 n.18 (11th Cir. 2000) (*en banc*). This Court has in the past found experienced counsel to have performed deficiently. See, e.g., State v. Whittaker, 158 N.H. 762, 772 (2009) (finding ineffective assistance rendered by counsel who was a "seasoned criminal trial attorney" and had practiced for "approximately thirty years"). Here, counsel entirely ignored the computer use felony and failed to communicate an available and viable defense to it, based on a misunderstanding of law. This Court must conclude that that constitutes deficient performance.

CONCLUSION

WHEREFORE, for the reasons stated above as well as those given in Mr. Labrie's opening brief and those to be offered at oral argument, Mr. Labrie respectfully requests that this Court reverse his computer use felony conviction.

Respectfully submitted,

By_____

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CERTIFICATE OF SERVICE

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

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_____

Christopher M. Johnson

DATED: November 8, 2018