THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0345

State of New Hampshire

v.

Brittany Boggs

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

REPLY BRIEF FOR THE DEFENDANT

Christopher M. Johnson
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(15 minutes oral argument)

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TABLE OF AUTHORITIES

QUESTIONS PRESENTED

1. Whether the State presented sufficient evidence to convict Boggs on the two charges of issuing a bad check.

Issue preserved by defense motion to dismiss, the hearing on the motion, and the court's ruling. T 73-77.*

2. Whether the court erred by overruling Boggs's objection to a jury instruction that shifted the burden of proof.

Issue preserved by defense objection to the jury instruction, the hearing on the objection, and the trial court's ruling. T 89-98, 110.

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* Citations to the record are as follows:
"A" refers to the Appendix to Boggs's opening brief;
"DB" refers to the designated page of Boggs's opening brief;
"SB" refers to the designated page of the State's brief;
"S" refers to the transcript of the sentencing hearing on May 17, 2017;
"T" refers to the transcript of the trial held on February 28, 2017.

STATEMENT OF THE CASE AND OF THE FACTS

In her opening brief, Boggs raised a claim of error challenging the sufficiency of the evidence offered to convict her at trial. DB 8-20. In addition, Boggs contended that the trial court erred in giving a jury instruction that shifted the burden of proof away from the State on an element by establishing an unconstitutional mandatory presumption as to that element. DB 21-28. This reply brief addresses certain arguments made by the State with respect to the jury instruction issue.

The State nowhere defends the jury instruction given as constitutional, and the fact that a statute might authorize it cannot rescue an instruction that violates the United States or New Hampshire Constitution. The State comes closest to defending the instruction's constitutionality in a section arguing that this Court should not find the giving of the instruction to constitute plain error. SB 16-20. However, this Court need not consider that argument, because trial counsel objected to the instruction, thereby preserving the issue without need for plain error review. Otherwise, the State advances a mélange of waiver and preservation arguments, none of which has merit. This reply brief addresses those arguments.

I. THE COURT ERRED IN OVERRULING BOGGS'S OBJECTION TO A BURDEN-SHIFTING JURY INSTRUCTION.

First, this Court must reject the State's argument that trial counsel did not preserve the claim. SB 12. In part, the State's argument seems premised on the view that a burden-shifting objection and a mandatory-presumption objection raise two claims so distinct and unrelated that neither objection preserves the other claim. This is incorrect. In Francis v. Franklin, 471 U.S. 307, 314 (1985), the Supreme Court made clear that mandatory-presumption instructions violate the Due Process Clause because they relieve the State of its burden of proof on the presumed element. In Francis, the Court stated:

> The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. This bedrock, axiomatic and elementary constitutional principle prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.

Francis, 471 U.S. at 313 (citations, brackets, and quotation marks omitted). Thus, to describe an instruction as creating a mandatory presumption on an element is simply another way to say that the instruction shifts the burden of proof as to that element away from the prosecution.

Here, preservation is established by the fact that, when the prosecutor proposed the instruction during the trial, defense counsel objected to it, noting that the proposed instruction shifted the burden of proof to the defense. T 89-98. At the end of the discussion about the objection, counsel addressed the

court as follows: "Note my objection to the jury instruction for the record. My – first my objection is that that section of the statute, it [sic] applied to this in the jury instruction, it shifts the burden of proof and that's contrary to Part I, Article 15 in the New Hampshire Constitution and (indiscernible) in the United States Constitution." T 97. That statement of objection prompted the court to read the terms of the statute into the record. T 97-98. Counsel responded, "I understand there's a ruling on it, I just maintain my objection." T 98.

That discussion, in its entirety, unequivocally establishes preservation. This Court has explained that the "purpose underlying our preservation rule is to afford the trial court an opportunity to correct any error it may have made before those issues are presented for appellate review." State v. Town, 163 N.H. 790, 792 (2012). Here, trial counsel "did enough to alert the court to his concerns . . . ." Id. at 793.

The State argues, nevertheless, that defense counsel had some obligation to suggest language that might alter the State's proposed instruction so as to make it constitutionally acceptable. SB 13-16. The State cites no authority for that proposition, and this Court has never held that the defense has a duty to help the prosecution reframe its unconstitutional proposed instructions in an unobjectionable way. As this Court said in the face of another State non-preservation argument, "'[t]o adopt the State's strict construction of our preservation rule would run contrary to our preservation jurisprudence." State v. Ayer, 150 N.H. 14, 21 (2003).

Contrary to the State's arguments, RSA 626:7 does not rescue the unconstitutional jury instruction. SB 14-16. First, as noted above, an unconstitutional jury instruction does not lose its impermissible character simply because a statute suggests or requires that it be given. Moreover, RSA 626:7, II(b) mandates that any presumption instructions be given in a permissive rather than mandatory form. Here, in phrasing the instruction in mandatory terms, the court did not follow that statutory command. Finally, if this Court were inclined to adopt the State's strict construction of preservation requirements, it would have to reject the State's RSA 626:7 argument because the prosecutor below never cited that statute. See, e.g., State v. Willis, 165 N.H. 206, 223 (2013) (applying preservation obligation to State, with respect to arguments it makes on appeal); State v. Boyle, 148 N.H. 306, 309 (2002) (same).

Equally unavailing is the State's waiver argument. SB 16. At one point during the discussion about the instruction, defense counsel proposed a re-wording that would minimize the unfair damage the instruction would do to the defense. Specifically, counsel suggested that before the jury could act on the presumption stated in the State's proposed instruction, it would first have to find that Boggs knew the account was closed. T 93. See also T 94 (court summarizing: "so you would say it has to be that she – it's presumed that she would know it would not be paid if she knew that the account had been closed?"). The State objected to that reformulation, however, T 95, and the court ultimately did not use it in instructing the jury. If the trial court had

given the instruction proposed by defense counsel, Boggs would indeed be hard pressed to allege error on appeal in the giving of an instruction counsel requested. However, that did not happen.

On appeal, the State argues that the defense somehow waived his objection to the instruction given, by suggesting the alternative to which the State objected, and which the court ultimately did not employ. SB 16. Nothing supports the State's novel waiver theory. Berliner v. Clukay, 150 N.H. 80 (2003), cited by the State, SB 16, certainly does not do so. In Berliner, this Court observed that a "chambers discussion directed at persuading the court to craft or utilize a proposed instruction, without more, or to adopt a specific view of the applicable law does not constitute a specific, contemporaneous objection." Berliner, 150 N.H. at 84. The Court continued: "[e]xchange of views on the law, however cogent or well-intentioned, cannot substitute for a formal objection, unless an objection is plainly expressed." Id.

Here, as noted above, defense counsel plainly expressed a formal objection to the instruction the trial court gave. On appeal, Boggs does not argue that the trial court erred in failing to give the modified instruction defense counsel at one point suggested. The two potential instructional issues are not interdependent, in the sense that the trial court did not confront a stark choice of either giving the defense instruction or giving the State's instruction. Rather, the court could have decided to deny both parties' requests. On appeal, Boggs challenges only the court's decision to overrule her

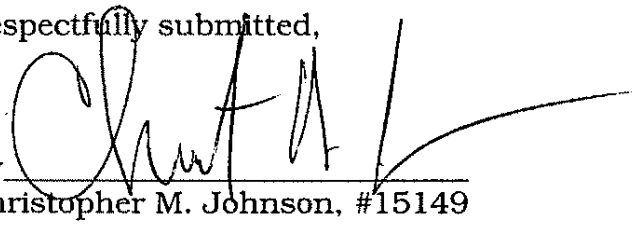
objection to the State's proposed instruction. Nothing else counsel said constitutes a waiver of that objection.

Finally, this Court must reject the State's assertion that the claim of error has been insufficiently briefed on appeal. SB 11-12. The State's position seems premised on the notion that a burden-shifting objection and a mandatory-presumption objection raise two entirely unrelated claims. As described above, that notion is incorrect. The defense brief develops the claim in eight pages, citing the appropriate constitutional doctrines and caselaw that support Boggs's position. DB 21-28. Fundamentally, as argued in Boggs's opening brief, the instruction shifted the burden of proof by relieving the State of its obligation to prove a necessary element of the offense: knowledge that the check would not be paid. In the place of that element, the State could, under the instruction, prove its case even if Boggs did not know the check would not be paid, so long as the TD Bank account was in fact closed at the time she issued the check. There is nothing insufficiently developed about that claim in Boggs's opening brief.

CONCLUSION

WHEREFORE, for the reasons stated above as well as those given in Ms. Boggs's opening brief and those to be offered at oral argument, Ms. Boggs respectfully requests that this Court reverse her convictions.

Respectfully submitted,



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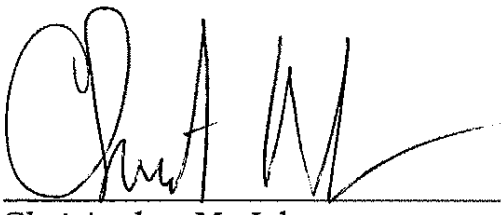
CERTIFICATE OF SERVICE

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

Criminal Bureau
New Hampshire Attorney General's Office
33 Capitol Street
Concord, NH 03301



Christopher M. Johnson

DATED: March 26, 2018