THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0345

The State of New Hampshire

v.

Brittany Boggs

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE CARROLL 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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ISSUES PRESENTED

I. Whether the trial court erred in overruling the defendant's objection to the State's requested instruction on the presumption in RSA 638:4, II (2016) where it quoted the statute, RSA 626:7, II(a) (2016) entitled the State to it, the defendant's proposed alternative instruction also said "is presumed," neither instruction suggested that the presumption was rebuttable, and the defendant never requested that the trial court add the clarifying language in RSA 626:7, II(b).

II. Whether the evidence was sufficient to prove that the defendant knew or believed the checks she issued to Hobbs Tavern would not be paid where it showed that she issued the $8,517.27 check on the LLC account 58 days after it last had any money in it and 22 days after the bank closed it, that she issued the $1,315.73 check on her personal account when the balance in it was only $551.04, that she falsely told an officer she had taken care of the checks, and that she never did so.

STATEMENT OF THE CASE

In 2015, the defendant, Brittany Boggs, was indicted on one class A felony count of issuing bad checks, *see* RSA 638:4, I, IV(a)(1)(A) (2016), and one class B felony count of issuing bad checks, *see* RSA 638:4, I, IV(a)(2)(A). DB A1-A2.[1] Following a one-day jury trial in the Carroll County Superior Court (*Ignatius*, J.) on February 28, 2017, she was convicted as charged. DB A1-A2; JT 117.

On May 17, 2017, the trial court sentenced the defendant on the class A felony conviction to a term of 4 to 8 years and sentenced her on the class B felony conviction to a concurrent term of 1½ to 3 years. SH 29-30; DB A3, A5. Both terms commenced upon the defendant's completion of her sentence for violating her parole on her 2007 convictions. SH 29-30; DB A3, A5. This appeal followed.

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[1] "ASB" refers to the appendix attached to the State's brief.
"DB" refers to the defendant's brief and the attached appendix.
"JT" refers to the transcript of the jury trial on February 28, 2017.
"MH" refers to the transcript of the motion hearing on March 28, 2017.
"SH" refers to the transcript of the sentencing hearing on May 17, 2017.

STATEMENT OF FACTS

On April 19, 2014, the defendant, who was the manager of Wolfeborough Diner LLC, and Jeffrey Boggs, who was a managing member of the LLC, went to TD Bank and opened a deposit account for the LLC. JT 36; ASB 1. In doing so, they certified that a meeting of the LLC had been held that day, and that a quorum had voted to give them sole signature authority on the account. JT 36-37; ASB 1.

Between October 14 and November 19, 2014, the LLC account was continuously overdrawn. DB A12. During that time, 45 checks totaling $49,380.73 were presented to TD Bank for payment and then returned to the payees due to insufficient funds. DB A9-A11, A15-A17. By November 19, the account balance had been negative for 58 days, so TD Bank closed the account. JT 37, 40; DB A17.

The next day, the defendant went to Citizens Bank and opened a personal checking account and a personal savings account. JT 44-45; ASB 2. In doing so, she connected the two accounts and set up the savings account as an overdraft account for the checking account. DB A19, A24.

On December 10, the balance in the defendant's savings account was $29.19 and the balance in her checking account was -$845.77. DB A19, A24. The same day, the defendant entered into a contract with Hobbs Tavern and Brewing Company in West Ossipee to host her "pretty extravagant wedding" on December 13. JT 62; ASB 3-9. In doing so, she accepted Hobbs Tavern's proposal and agreed to pay it $8,517.27 for providing everything she had requested, including, among other things, four decorated Christmas trees, three servers, a bartender, 64 dozen appetizers, 64 salads, 68 dinners,

105 specialty deserts, a children's gingerbread station, a cocoa bar, a children's dairy bar, and 64 signature cocktails. JT 65; ASB 8-9.

On December 11, the defendant issued a check for $8,517.27 from the closed TD Bank LLC account to Hobbs Tavern and then gave it to the tavern's event coordinator. JT 41, 60, 62, 67; DB A12, A17; ASB 10. At that point, the LLC account had been overdrawn for at least 58 days and closed for 22 days. DB A12, A17. On December 12, Charles Fischbein, an owner of Hobbs Tavern, deposited the check in the tavern's account at Northway Bank. JT 60, 67; ASB 10. Northway bank then presented it to TD Bank and on December 16, TD Bank returned it because the account was closed. DB A15; ASB 11. The same day, Northway Bank notified Hobbs Tavern that the check had been returned, and that it had debited $8,517.27 plus a $20 fee from the tavern's account. ASB 11.

In the meantime, the defendant had also been writing bad checks on her Citizens Bank account. DB A18-A19. On December 11, the balance in her checking account was -$170 and the balance in her savings account was $29.19. DB A19, A25. On December 12, she transferred $29 from her savings account to her checking account and deposited a check for $4,200 into her checking account, which brought her balance up to $4,059. DB A19. However, the same day, she withdrew $981 and used her debit card to make an $18.28 purchase. DB A18-A19. In addition, the bank deducted a $35 fee for a prior check it had returned for insufficient funds and the amounts of three other checks it was presented with for payment that day, the total of which was $2,473.68. DB A18-A19. After it did so, the balance left in the account was only $551.04. DB A18-A19.

The following day, December 13, Hobbs Tavern hosted the defendant's wedding and in doing so provided everything she had requested and agreed to pay for. JT 64-65. Afterwards, the defendant issued a check for $1,315.73 from her Citizens Bank account to Hobbs Tavern for her bar tab. JT 47, 64, 58; ASB 12.

On December 15, Citizens Bank returned the three checks it had processed on December 12 for insufficient funds and then added the amounts of the checks, which totaled $2,473.68, back into the checking account, which brought the balance back up to $3,024.72. DB A18-A19. On December 17, a total of $600.91 was deposited into the defendant's account, but the $4,200 check that had been deposited into the account on December 12 was returned to Citizens Bank for insufficient funds, so it deducted the $4,200 from the account, which brought the balance down to -$574.37. JT 48, 50; DB A21. The same day, Fischbein deposited the defendant's $1,315.74 check in the tavern's account. JT 17.

The following day, November 18, Northway Bank presented the check to Citizens Bank for payment, so Citizens Bank deducted the $1,315.74 from the defendant's account. JT 47; DB A22. Citizens Bank was also presented with two other checks the defendant had issued, so it deducted the amounts of those checks, which totaled $1,957.91, leaving a balance of -$4,141.11. DB A21. Citizens Bank then returned all three checks for insufficient funds. JT 47; DB A22; ASB 12. On December 22, Northway Bank notified Hobbs Tavern that the defendant's second check had been returned for insufficient funds, and that it had debited the $1,315,73 and another $20 fee from the tavern's account. ASB 12.

After Fischbein learned that each check had been returned, he contacted the defendant several times, but she never made any payments. JT 69. Finally, on December 31, he contacted the Carroll County Sheriff's Department. JT 20-21. He then gave the returned checks to Detective Brian King. JT 20-21. Det. King contacted the defendant and asked her about the checks and she lied and said "that she had taken care of it already." JT 21. Det. King told her that she had not done so, and that she needed to come to the station to pick up some letters. JT 21.

On January 5, 2015, the defendant went to the station and Det. King gave her two 14-day notice and demand letters. JT 21-23, 26-27; ASB 13-14. One letter notified her that the TD Bank check had been returned because the account was closed and had insufficient funds, and the other letter notified her that the Citizens Bank check had been returned because the account had insufficient funds. JT 21-22; ASB 13-14. Each letter also notified her that purposely issuing a check from an account that has insufficient funds or has been closed was a crime, that she had 14 days to pay the amount of the check at issue plus a $25 service fee to the Sheriff's Office by certified funds, and that failing to do so would result in further action, including criminal prosecution. JT 21-22; ASB 13-14.

After that, Det. King contacted the defendant several times and she "made several promises to pay." JT 26; *see also* JT 24. However, when she had still had not made any payments by January 29, Det. King obtained a warrant for her arrest. JT 26. At some point, he also obtained her TD Bank and Citizens Bank records pursuant to a search warrant. JT 21, 34-35; ASB 1-2; DB A18-A25.

The defendant never paid Hobbs Tavern any money. JT 26, 69. However, Hobbs Tavern still had to pay all the vendors it had contracted with for her wedding. JT 71.

SUMMARY OF THE ARGUMENT

I. The defendant's argument that the trial court erred in denying her objection to the State's requested instruction on the presumption in RSA 638:4, II because it shifted the burden of proof is insufficiently briefed and fatally flawed and her argument that it erred in doing so because the instruction created a mandatory presumption is not preserved. Furthermore, the trial court properly denied her request to omit the instruction because RSA 626:7, II(a) (2016) entitled the State to it. In addition, she never requested that the trial court add the clarifying language in RSA 626:7, II(b). Moreover, she has not invoked this Court's plain error rule. Even if she had, any error could not be plain because both issues are of first impression. It also could not have affected the verdict because the other instructions made it clear the burden remained on the State and it had to prove the *mens rea* element beyond a reasonable doubt, and because the evidence was more than sufficient to prove that the defendant knew the checks would not be paid.

II. The evidence was sufficient to prove that the defendant knew the checks would not be paid because it showed that she issued the check from the LLC's account 58 days after it had any money in it and 22 days after the bank closed it. It also showed that she issued the check from her personal account when it had insufficient funds to cover the other checks she had already issued. In addition, it showed that she lied about having taken care of the debts, and that she never paid them.

ARGUMENT

I. The trial court properly overruled the defendant's objection to the State's requested instruction on the presumption in RSA 638:4, II because it quoted the statute, it did not shift the burden of proof, the State was entitled to it, the defendant's proposed instruction also created a mandatory presumption, and she never requested that the trial court add the clarifying language in RSA 626:7, II(b).

After closing arguments, the State requested that the trial court add the language in RSA 638:4, II (2016) to its instruction on the TD Bank charge. JT 90-92. That section provides:

> For the purposes of this section, as well as any prosecution for theft committed by means of a bad check, a person who issues a check for which payment is refused by the drawee is presumed to know that such check would not be paid if he had no account with the drawee at the time of issue.

RSA 638:4, II. Defense counsel argued that "those words just as written ... shift[ed] the burden to the Defense." JT 93 (quotation omitted). He next said, "How is the jury going to understand what a presumption is? They can't presume that [the defendant is] guilty, they have to presume innocence." JT 93. He then argued that "knowingly applie[d] to every element," so if the trial court gave an instruction on the presumption at all, the instruction had "to say a person has no account and is aware and knows she does not have an account." JT 93. He then said, "It shifts the burden and it conflicts with this." JT 93.

The trial court asked, "[I]s it not what the statute says, that it is presumed, so it becomes a rebuttable presumption at that point?" JT 93. Defense counsel responded that the statute did "say that, but ... [it was] basically telling the jury the burden[was] on the Defense." JT 93-94. He then asked how it could be "presume[d] that [the defendant

was] guilty ... without any requirement that [the State] ... prove that she knew there was no account?" JT 94. The trial court asked whether it was the defendant's position that the instruction had to say "it[was] presumed that she would know it would not be paid if she knew that the account had been closed?" JT 94. Defense counsel answered, "Right." JT 94.

The State argued that it was not shifting any burden to the defense, and that the defendant was asking the trial court to add language that was not in the statute, but the State was asking it "to include exactly the statutory language." JT 95. The State then said that if defense counsel had "different wording ... from a legitimate source, [it was] open to hearing that," but it was entitled to the instruction. JT 95. Defense counsel then reiterated his argument that the defendant "should at least have to know there[was] no account." JT 96. The trial court responded,

> I don't agree with you on that. ... [T]he statutory language is what it is and the jury will make sense of it as they see fit, and they might find your arguments about ... no evidence introduced of the account being closed ... persuasive to them in creating reasonable doubt, but I'm not going to add ... and knew that the account had been closed.

JT 96. Defense counsel then said that his objection to the instruction was that it "shift[ed] the burden of proof and that[was] contrary to Part I, Article [15] in the New Hampshire Constitution and [the 14th Amendment] in the United States Constitution." JT 97.

During the trial court's final instructions, it read the TD Bank indictment and then instructed the jurors the State had to prove: (1) that "the Defendant issued a check for the payment of money," (2) that "payment was refused by the bank on which the check was

drawn," (3) that "the Defendant knew or believed that the check would not be paid by the bank," and (4) that she "acted knowingly." JT 110. It then said, "For the purposes of this charge, a person who issues a check for which payment is refused by the drawee is presumed to know that such check would not be paid if the person had no account with the drawee at the time of issue." JT 110. Defense counsel did not renew his objection after the trial court did so or after it completed its final instructions.

On appeal, the defendant first argues that the trial court erred in overruling her objection because the instruction

> shifted the burden of proof in violation of [her] due process rights under the United States and New Hampshire Constitutions by telling the jury that the law presumes that the culpable mental state element is proven merely upon evidence establishing that the TD Bank account no longer existed at the time she issued the checks.

DB 23-24. That argument is insufficiently briefed and fatally flawed.

This Court has held that "neither passing reference to constitutional claims nor off-hand invocations of constitutional rights without support by legal argument or authority warrants extended consideration." *State v. Durgin*, 165 N.H. 725, 731 (2013). Thus, this Court will "confine its review to only those issues that the defendant has fully briefed." *State v. Blackmer*, 149 N.H. 47, 49 (2003).

Here, the defendant makes the foregoing assertion in her brief. DB 23-24. However, she never explains how "telling the jury that the law presumed that the culpable mental state element is proven merely upon evidence establishing that the TD Bank account no longer existed at the time she issued the checks" shifted the burden of proof. DB 23-24. In fact, elsewhere in her brief she argues that the instruction

"contained no suggestion that the presumption ... could be rebutted." DB 27. In other words, she argues that the instruction stated an "[a]n *irrebuttable* presumption," which "does not shift any burden to the defendant ...." *Francis v. Franklin*, 471 U.S. 307, 317 n.5 (1985). Therefore, her burden shifting argument is not only insufficiently briefed, it is waived, and even if it is not, it is fatally flawed. *See Blackmer*, 149 N.H. at 49 (a passing reference to a constitutional claim renders an argument waived).

On appeal, the defendant also argues that the instruction "created [an unconstitutional] mandatory presumption" because it "told the jury that a person who issues a check when the person does not have an account 'is presumed to know that such check would not be paid,'" and because the jury was never "told anything that might suggest that it could fail to find the mental state element despite finding the basic fact that the TD Bank account no longer existed at the time [she] issued the check." DB 25 (quoting JT 25). That issue is not preserved.

"The defendant, as the appealing party, has the burden to provide this [C]ourt with a sufficient record to decide h[er] issues on appeal and demonstrate that [s]he raised the issues before the trial court. Preservation of an issue for appeal requires a contemporaneous and specific objection." *State v. Brooks*, 162 N.H. 570, 583 (2011) (quotations and citations omitted). "The trial court must have had the opportunity to consider any issues asserted by the defendant on appeal ...." *State v. Mouser*, 168 N.H. 19, 27 (2015); *see also N.H. R. Crim. P.* 43(a). "Providing the trial court with the opportunity to correct error is particularly appropriate where an alleged error involves a jury instruction." *Berliner v. Clukay*, 150 N.H. 80, 83 (2003) (quotation omitted).

Therefore, a jury instruction issue is preserved for appeal only if the appealing party gave the trial court an opportunity to correct the alleged error. *Id.* The defendant did not do so.

In the trial court, the defendant never argued that the language in RSA 638:4, II created a mandatory presumption or that doing so was unconstitutional. In fact, she never used the word "mandatory." She also never suggested any alternative language that would have made it clear that the presumption was permissive or that the burden remained on the State, even after the State invited her to do so. JT 95. Instead, when the trial court asked defense counsel if it was the defendant's position that the jury had to be instructed that "it[was] presumed that [the defendant] would know [the check] would not be paid if she knew that the account had been closed," he answered, "Right." JT 94. Therefore, because the language suggested by defense counsel would have left "is presumed" in the instruction, it is clear that the defendant's unconstitutional mandatory presumption arguments concerning that language are not preserved because she never gave the trial court an opportunity to consider them. *Cf. State v. Horne*, 136 N.H. 348, 349 (1992) ("the remedies of dismissal and suppression are so distinct in this case, requesting one below does not preserve the other"). That being the case, this Court will not review them. *See N.H. Dep't of Corrections v. Butland*, 147 N.H. 676, 679 (2002) (this Court "will not review constitutional issues on appeal that were not presented below").

It is also worth noting that the defendant does not argue that the trial court erred in failing to modify the statutory language in the manner she suggested or in any other

manner. Therefore, the State assumes that her argument on appeal is that the trial court erred in failing to grant her request that it omit the presumption instruction entirely. However, it did not do so because the State was entitled to have the jury instructed on the statutory presumption.

RSA 626:7, II (2016) provides, in relevant part:

> II. When this code establishes a presumption with respect to any fact which is an element of an offense, it has the following consequences:
>
> (a) When there is evidence of the facts which give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the court is satisfied that the evidence as a whole clearly negatives the presumed fact ....

Here, RSA 638:4, II provides that "a person who issues a check for which payment is refused by the drawee is presumed to know that such check would not be paid if he had no account with the drawee at the time of issue." RSA 638:4, IV(b) then provides that the State "shall prove that the person issued or passed the check knowing or believing that [it] would not be paid by the drawee." Thus, RSA 638:4, II "establishes a presumption with respect to [a] fact which is an element of the offense ...." RSA 626:7, II(a). That being the case, the State was entitled to the instruction so long as it had presented any evidence of the facts giving rise to the presumption. It had.

The evidence at trial proved that the defendant was the manager of the Wolfeborough Diner LLC, and that she was one of only two people with signature authority on the LLC's bank account. ASB 1. It also proved that the account had been overdrawn since at least October 14, DB A12, so the bank had closed it on November 19, DB A17, and that the defendant had then issued the $8,517.27 check on December 11,

which was 22 days after the account was closed, JT 41. Before the trial court discussed the instructions with the jury, it had already held that that evidence had been sufficient to prove that the account was closed, and that the defendant knew or believed the check would not be paid. JT 77. Therefore, the trial court was correct to give the presumption instruction because the State was entitled to have the jury instructed on it.

Furthermore, if the defendant was concerned that the language in RSA 638:4, II created a mandatory presumption or shifted the burden of proof, she should have requested that the trial court add the statutory presumption explanation set forth in RSA 626:7, II(b). That section, which was taken directly from, and is identical to, Model Penal Code §1.12(5), provides:

> When the issue of the existence of the presumed fact is submitted to the jury, the court shall charge that while the presumed fact *must*, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury *may* regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.

RSA 626:7, II(b) (emphasis added). *See Report of Commission to Recommend Codification of Criminal Laws* § 571:7, cmt. at 16 (1969); *Model Penal Code and Commentaries* § 1.12(5) at 186 (Official Draft and Revised Comments 1985). That "formulation, requiring the court to charge the jury that it 'may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact,' but not mandating that it do so, does not invade the province of the court or jury, as the Supreme Court has held." *Id.* at 205 (citing *Turner v. United States*, 396 U.S. 398 (1970); *United States v. Gainey*, 380 U.S. 63, 68-69 (1965)). In other words, that instruction would have made it clear to the jury "that it could fail to find the mental state element despite finding the

basic fact that the TD Bank account no longer existed at the time [she] issued the check." DB 25.

That instruction also would have made it clear "that the presumed fact must, on all the evidence, be proved beyond a reasonable doubt," *Model Penal Code and Commentaries* § 1.12(5) cmt. at 187, which "satisfies due process requirements," *id.* at 206. In other words, that instruction would have corrected both of the alleged errors. However, the defendant never requested that the trial court give that instruction. In fact, she never mentioned RSA 626:7, II(b). She also has not done so on appeal. Therefore, because she requested an instruction that also said "is presumed" and never requested that the jury be "told anything that might suggest that it could fail to find the mental state element despite finding the basic fact that the TD Bank account no longer existed at the time [she] issued the check," DB 25, she has waived any claim that trial court erred in failing to use the words "may be presumed" instead of "is presumed" or in failing to give any such clarifying instructions. *See Berliner,* 150 N.H. at 83 (a jury instruction issue is preserved only if the appealing party gave the court an opportunity to correct the alleged error). That being the case, this Court should not consider the defendant's mandatory presumption claim. *See Blackmer*, 149 N.H. at 49 (this Court generally does not review unpreserved or insufficiently briefed claims); *Butland*, 147 N.H. at 679 (this Court "will not review constitutional issues on appeal that were not presented below").

Furthermore, the defendant has not invoked this Court's plain error rule. Even if she had done so, she cannot meet that strict standard of review.

> The plain error rule allows [this Court] to consider errors that were not raised in the trial court. [It will] apply the rule sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result. To reverse a trial court decision under the plain error rule: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

State v. Pennock, 168 N.H. 294, 310 (2015) (quotations omitted). However, "the plain error rule is not met when the case presents a question of first impression." *Aranosian Oil Co. v. State*, 168 N.H. 322, 331-32 (2015) (citing *State v. Ortiz*, 162 N.H. 585, 591 (2011)).

This Court has never addressed whether RSA 638:4, II violates due process by creating a mandatory presumption or by shifting the burden of proof. It also has never addressed whether the legislature intended for the statutory presumption to modify the statute's *mens rea*. Therefore, 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).

In addition, although this Court did hold in *State v. Hall*, 148 N.H. 394 (2002), that "the charge read as a whole did not explain or cure th[e] deficiency" caused by an instruction that could have been "interpreted ... to mean that it was 'the law of th[e] case' that the defendant was aware of the results of his actions," *Id.* at 400, it has never held that other instructions cannot explain or cure that type of deficiency. In addition, in that case, "the court informed the jury that the presumption was rebuttable," but then "informed the jury that the defendant could not rebut the presumption ...." *Id.* at 399.

Likewise, although it is true that in *Franklin* and in *Sandstrom v. Montana*, 442 U.S. 510 (1979), the Court rejected the government's arguments that the trial court's general instructions on the presumption of innocence and the burden of proof cured or mitigated the harm caused by the presumption instructions given in those cases, DB 26, it has never held that other instruction cannot do so. In fact, in *Franklin*, it said that "[o]ther instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption." *Franklin*, 471 U.S. at 315.

In addition, in that case, the trial court had informed the jury "that the presumptions 'may be rebutted,'" which the Supreme Court held "could have indicated to a reasonable juror that the defendant bore an affirmative burden of persuasion once the State proved the underlying act giving rise to the presumption." *Id.* at 318. However, it then said, "The jury charge taken as a whole might have explained the proper allocation of burdens with sufficient clarity that any ambiguity in the particular language challenged could not have been understood by a reasonable juror as shifting the burden of persuasion." *Id.* at 318-19. Therefore, it is neither clear nor unequivocally obvious that "[t]he presence of an unconstitutional mandatory presumption instruction requires reversal of a conviction, even though a jury is otherwise also told that the defendant is presumed innocent and that the burden of proof remains always on the prosecution." DB 26. Instead, it is clear that other instructions may cure the harm caused by an instruction that creates a mandatory presumption.

In any event, even if the errors were plain, this Court "will find prejudice under the third prong [only] when [it] cannot confidently state that the jury would have returned the same verdict in the absence of the error." *State v. Thomas*, 168 N.H. 589, 606 (2016) (quotation omitted). That is not the case here.

At the beginning of the trial, the trial court instructed the jurors that "the State ha[d] the burden of ... proving each element of the charges beyond a reasonable doubt." JT 9. It also instructed them that "the Defendant m[ight] put on evidence," but she was "not required to [do so] because ... the burden of proof [was] always on the State." JT 10. In addition, it instructed them that "[t]he Defendant d[id] not have to prove she [was] innocent," that "the State ha[d] to prove she [was] guilty ... beyond a reasonable doubt," JT 10, and that "[t]he Defendant [did not] have to present any evidence if she [did not] want to," JT 11.

Then, during the trial court's final instructions, it instructed the jurors that "all Defendants in criminal cases [were] presumed to be innocent until proven guilty [beyond] a reasonable doubt," that "[t]he burden of proving guilt [was] entirely on the State," and that "[t]he Defendant [did not] have to prove her innocence." JT 103. It also instructed the jurors that "[t]he Defendant enter[ed the] courtroom as an innocent person, and [that the jurors] must consider her to be an innocent person until the State convince[d them] beyond a reasonable doubt that she [was] guilty of every element of the alleged offense." JT 103-04.

In addition, the trial court instructed the jurors that "[i]f they ha[d] a reasonable doubt as to whether the State ha[d] proved any one of more of the elements of the crime

charged, [they] must find the Defendant not guilty," and that the defendant was "not required to [take the witness stand]." JT 104. It also instructed them again that "the burden of proof [was] on the State," and that "[t]he Defendant [was] under no obligation to prove anything in this matter." JT 105. Then, right before it instructed the jurors on the presumption, it instructed them that the State had to prove that "the Defendant knew or believed that the check would not be paid by the bank." JT 110.

Furthermore, here, unlike in *Franklin* and *Hall,* the presumption instruction "contained no suggestion that the presumption ... could be rebutted." DB 27. Instead, it simply said that "a person who issues a check for which payment is refused by the drawee is presumed to know that such check would not be paid if the person had no account with the drawee at the time of issue." JT 110. Therefore, the jurors had no reason to conclude that the presumption shifted any burden at all to the defendant. Instead, they had every reason to conclude that she had no burden at all, and that the burden remained on the State to prove all the elements of the offense, including the *mens rea* element.

Moreover, as will be demonstrated in § II of this brief, the evidence at trial was more than sufficient for a rational finder of fact to conclude beyond a reasonable doubt that the defendant knew the check she issued on the LLC's account would not be paid by the bank. Therefore, even if there was error and the error was plain, reversal is not required because it can "confidently [be] state[d] that the jury would have returned the same verdict in the absence of the error." *Thomas,* 168 N.H. at 606.

II. The evidence was sufficient to prove beyond a reasonable doubt that the defendant knew or believed both checks would not be paid because it showed that she issued the first check 58 days after the account for the LLC she managed had any money in it and 22 days after the bank closed it, that she issued the second check on her personal account the day after she made a deposit that was insufficient to cover her other outstanding checks, that she falsely told an officer she had taken care of the debts, and that she never did.

After the State rested its case at trial, the defendant moved to dismiss both charges. JT 73-74. She argued that the evidence had been insufficient to prove that she knew or believed the check she issued on the TD Bank account would be refused because it did not prove that she knew TD Bank had closed the account when she issued the check. JT 73-74, 76. She also argued that the evidence had been insufficient to prove that she knew or believed the check she issued on the Citizens Bank account would be refused because it proved that $4,200 was deposited into her account on December 12, that she wrote the check on December 13, and that the balance in the account on December 15 was $3,024. JT 74. The State objected. JT 75-76. The trial court then held that a reasonable jury could find beyond a reasonable doubt that the defendant knew or had reason to believe that both checks would not be paid by the banks they were issued on. JT 77.

After trial, defense counsel filed a motion to set aside the verdicts in which he reiterated the sufficiency of the evidence arguments made at trial and added an argument that the verdict on the Citizens Bank charge was against the weight of the evidence. DB A26-A30. The State objected. DB A31-A35. The defendant then "filed a separate motion to set aside the verdict, alleging both the issues that [her counsel] had raised, and also a claim of ineffective assistance of counsel during the trial itself." MH 2-5, 22.

At a hearing on March 28, 2017, the defendant told the trial court that she did not want her trial counsel to represent her on the motion or anything else. MH 10, 37. Defense counsel also told the trial court that he could not ethically do so. MH 10, 23, 48. Because they had done so, the trial court never addressed the merits of counsel's motion. MH 48. Instead, it issued a margin order on the motion that said. "Motion Denied. See record transcript of 3/28/2017." DB A26. It then granted the defendant's motion for substitute counsel, but it never addressed the merits of her motion to set aside the verdict. ASB 20-24.

On appeal, the defendant "challenges the sufficiency of the evidence to prove that she knew or believed that the banks would not pay the checks." DB 10. "Because a challenge to the sufficiency of the evidence raises a claim of legal error, [this Court's] standard of review is *de novo*." *State v. Collyns*, 166 N.H. 514, 517 (2014). This Court will "objectively review the record to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State." *State v. Francis*, 167 N.H. 598, 604 (2015).

> When the evidence is solely circumstantial, it must exclude all reasonable conclusions except guilt. However, ... [this Court] does *not* determine whether another *possible* hypothesis has been suggested by the defendant which *could* explain the events in an exculpatory fashion. Rather, [it] evaluates the evidence in the light most favorable to the State and determines whether the alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt.

State v. Zubhuza, 166 N.H. 125, 130 (2014) (quotations, citations, and brackets omitted).

> Further, the trier may draw reasonable inferences from facts proved and also inferences from facts found as a result of other inferences, provided they can be reasonably drawn therefrom. In reviewing the evidence, [this Court will] examine each evidentiary item in the context of all the evidence, not in isolation.

Francis, 167 N.H. at 604 (quotations, citations, and parentheticals omitted). It will also "assume all credibility resolutions in favor of the State ...." *State v. Saunders*, 164 N.H. 342, 351 (2012). "It is the defendant who bears the burden of demonstrating that the evidence was insufficient to prove guilt." *Id.* (quotation and brackets omitted). Here, the defendant has not met that burden.

On appeal, the defendant argues that "[i]n order to prove the [*mens rea*] element under the circumstances charged here, the State had to prove that, at the time [she] issued each check, she knew or believed that the bank would not pay when Hobbs Tavern presented the check for payment." DB 11-12. That argument is not preserved because the defendant never gave the trial court an opportunity to consider it. Instead, she repeatedly argued to the jury and to the trial court that the State had to prove she knew the checks were not going to be paid when she issued them, *see* JT 74, 84, or when she passed them, JT 18; DB A27. That being the case, this Court should not consider that argument. *See Berliner*, 150 N.H. at 84 ("because the defendant never preserved a statutory multiplier objection, he cannot now pursue a claim that the evidence was insufficient to support the jury's selection of an 8.5 statutory multiplier").

In any event, the State does not dispute the defendant's claim because in *State v. Stewart*, 155 N.H. 212 (2012), this Court held that "it is the defendant's knowledge or

belief as to whether the check will clear at the time it is presented to the bank by the payee that constitutes the mental state of the crime." *Id.* However, it also said:

> We note that knowledge of insufficient funds is evidence of knowledge or a belief that a check will be dishonored, and as checks are often issued, delivered and negotiated in a short period of time, such knowledge will often be compelling evidence of the criminal *mens rea*. Thus, in many cases, a jury may find that the *mens rea* element is satisfied solely by the State's evidence of insufficient funds at the time the check was issued.

Id. at 217 (citing RSA 638:4, IV(a)). Likewise, knowledge of a closed account is evidence of knowledge that a check will be dishonored. RSA 638:4, II.

Here, the checks were not postdated and there was no evidence of any agreement by Hobbs Tavern not to deposit them immediately. Therefore, so long as the evidence was sufficient for a rational juror to conclude that the defendant knew or believed that the checks would not be honored when she issued them to Hobbs Tavern, it was also sufficient for a rational juror to conclude that she knew or believed they would not be honored when presented for payment. It was.

A. The only reasonable conclusion the jury could have reached was that the defendant knew the TD Bank check would not be honored when it was presented for payment.

The defendant argues that the circumstantial evidence was insufficient to "exclude rational inferences consistent with [her] innocence" because "[i]n the absence of any evidence proving that [she] received notice of the closure of the TD Bank account, it [was] rational to infer that she did not receive notice." DB 13. However, viewing all the evidence and all inferences therefrom in the light most favorable to the State, the only

rational conclusion a juror could have reached was that she knew the TD Bank account was closed when she issued the check.

The evidence showed that the defendant was the "manager" of Wolfeborough Diner LLC, and that she and Jeffrey Boggs, who was a "managing member" of the LLC, were the only people with signature authority on the account. ASB 1. It also showed that the account was continuously overdrawn between October 14 and November 19, 2014, DB A12, A17, that 45 checks totaling $49,380.73 were presented for payment and then returned for insufficient funds between those dates, DB A9-A11, A15-A17, and that the bank then closed the account on November 19, DB A17. It further showed that each time the bank returned a check, it credited the account with the amount of the check and debited the account for a returned check fee. DB A9-A12, A15-A17. It also showed that the LLC's bank statements had the LLC's address on them, DB A7, A13, that the October statement showed the account had been continuously overdrawn and 19 checks had been returned between October 14 and 31, DB A12, and that the November statement showed it had been continuously overdrawn since November 1, that another 26 checks had been returned between November 1 and 18, and that the account had been closed on November 19, DB A16-A17.

Although there was no evidence that the bank had sent any returned check notices or bank statements to the LLC, it is common knowledge that banks do so. In addition, the evidence showed that Northway Bank had sent Hobbs Tavern notices that the defendant's checks had been returned, and that the account had been debited for the amount of each check plus a returned check fee. ASB 11-12. Therefore, viewing the

evidence and the inferences to be drawn therefrom in the light most favorable to the State, it cannot be said that no rational juror could have concluded that the bank had sent the statements and returned check notices to the LLC, and that the defendant, as the manager of the LLC, had either gotten them or had been made aware of them.

Furthermore, the evidence showed that two sets of checks were presented to the bank for payment between October 14 and November 19, 2014, DB A10-A11, A16, that the first set had numbers between 1083 and 1149, that the second set had numbers between 1424 and 1468, DB A10-A11, A16, and that 27 of the checks in the first set had been returned for insufficient funds, DB A10, A16. It also showed that the check at issue here was number 1141, that the defendant had issued it at least 58 days after the account had last had any money in it and 22 days after it had been closed by the bank, DB A12, A17; ASB 11, and that Fischbein had notified her when it was returned to him, JT 69.

The evidence further showed that not all the checks with numbers between 1083 and 1149 had been presented to the bank before it closed the account. DB A9-A10, A15-A16. Therefore, it also cannot be said that no rational juror could have concluded that the defendant had also written the other checks in the first set, and that even if the bank had not notified her they had been returned and the account had been closed, at least one of the payees of those other checks had to have done so at some point before she issued the check to Hobbs Tavern.

Moreover, the evidence showed that the defendant lied to the police about having taken care of the check. JT 21. *See State v. Etienne*, 163 N.H. 57, 85 (2011) (falsehoods are evidence of guilt). It also showed that Fischbein told the defendant that the check had

been returned, JT 69, that Det. King told her the check had been returned, JT 21, and that he gave her a 14-day notice and demand letter that also notified her it had been returned, JT 21-22; ASB 14, but she never made any payments to Hobbs Tavern or the Sheriff's Department, JT 24, 26, 69, 71. *See* RSA 638:4, III ("The actor's failure to make ... payment within 14 days after receiving notice that payment was refused shall be prima facie evidence of a violation of paragraph I of this section."). Considering all that evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the State, it cannot be said that no rational trier of fact could have found that the only reasonable conclusion was that the defendant knew the check would not be paid by the bank.

In fact, a rational trier of fact could have found that the only reasonable conclusion was that she never had any intention of paying Hobbs Tavern anything for providing everything she had requested for her wedding. *See State v. Kuder*, 640 N.E.2d 587, 590 (Ohio Ct. App. 1994) (holding that "[t]he fact that Kuder made no attempt to make [the] check good after finding out that it had bounced [was] material to the issue of whether he knew that it would be dishonored when he issued it" because "[t]he state could well argue that his failure [to do so] support[ed] an inference that he knew from the start that it would be dishonored").

B. The only reasonable conclusion the jury could have reached was that the defendant knew the Citizens Bank check would not be honored when it was presented for payment.

On appeal, the defendant argues that the evidence was insufficient to prove that she knew or believed that the check she issued to Hobbs Tavern from her Citizens Bank account would fail to clear because "[f]or all the record reflects, ... the failure of th[e] $4,200 check could have come as a surprise to [her]." DB 18. She also argues that the evidence was insufficient to do so because "[o]ne might reasonably attribute to people in general a lower level of financial literacy, leading to a higher rate of incompetence in the management of their finances," and if one does, "one could rationally infer that [she] was not aware, at the time she issued the check, that her bank would not pay it when the Tavern presented it." DB 19. However, in the trial court, she never made the second argument, so that argument is not preserved and should not be considered by this Court.

Furthermore, even if the failure of the $4,200 check could have come as a surprise to her, the bank records themselves demonstrated that the bank's refusal to honor the check she had issued to Hobbs Tavern could not have done so. Those records showed that on December 11, the balance in the defendant's checking account was -$170, DB A19, A25, and that on December 12, she transferred $29 from her savings account to her checking account and a check for $4,200 was also deposited in her account, which brought her balance up to $4,059, DB A19. However, they also showed that the same day, the defendant withdrew $981 from the account and used her debit card to make an $18.28 purchase, that the bank deducted a $35 fee for a check it had previously returned for insufficient funds, and that it was presented with and deducted the amounts of three

other checks she had issued, the total of which was $2,473.68, which left a balance of only $551.04. DB A18-A19. Therefore, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the State, it cannot be said that no rational trier of fact could have found that when she issued the $1,315.73 check to Hobbs Tavern on December 13, she knew it would not be paid.

In addition, the evidence demonstrated that the only reason the balance in her checking account went back up to $3,024.72 on December 15 was that Citizens Bank returned the three checks it had processed on December 12 for insufficient funds and credited her account with the amounts of the checks, which totaled $2,473.68. DB A18-A19. Therefore, it also cannot be said that no rational trier of fact could have found that the defendant foresaw on December 13 when she issued the check that it would fail to clear when it was presented to the bank.

Moreover, the evidence demonstrated that the defendant lied to the police about having taken care of the check, JT 21, which was evidence of consciousness of guilt, *see Etienne*, 163 N.H. at 85. It also demonstrated that she was notified three times that the check had been returned, JT 21-22, 69; ASB 13, but she never paid the amount due, JT 24, 26, 69, 71, which was prima facie evidence that she violated the statute, *see* RSA 638:4, III. Therefore, viewing all the evidence and the inferences to be drawn therefrom in the light most favorable to the State, as this Court must, it cannot be said that no rational trier of fact could have found that at the time the defendant issued both checks, she knew or believed that they would not clear when they were presented to the banks for payment. Accordingly, this Court must affirm her convictions.

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

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CERTIFICATE OF SERVICE

I, Susan P. McGinnis, 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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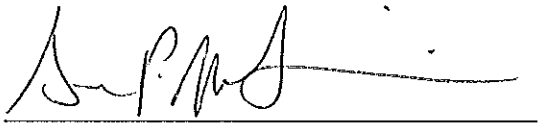
March 6, 2018



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