THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0425

The State of New Hampshire

v.

Reilly O. Leith

**STATE'S MEMORANDUM OF LAW IN LIEU OF BRIEF UNDER SUPREME COURT RULE 16(4)(b)**

## STATEMENT OF THE CASE

The defendant, Reilly O. Leith, was charged by indictment with one count of theft by unauthorized taking. Tr. 9.[1] *See* RSA 637:3, I (2016). The indictment charged the defendant specifically with knowingly "exercis[ing] unauthorized control over various items including clothing and accessories[,] … the property of Kohl's[,] … said merchandise being valued in excess of $1,000[,] … with a purpose to deprive the owner thereof …." Tr. 9. After a one-day trial in the Rockingham County Superior Court (Wageling, J.), the jury found the defendant guilty as charged. Verdict Tr. 3. On June 20, 2017, the court gave the defendant a sentence of twelve months, all deferred, with probation for two years, and restitution of $188. This appeal followed.

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[1] References to the transcript of the trial will be made as "Tr. __."
The transcript of the verdict, announced on May 4, 2017, will be made as "Verdict Tr. __."
References to the defendant's brief will be made as "Def. Br. __."

## STATEMENT OF FACTS

### 1. The Crime

On September 21, 2013, Stephanie Boucher, a loss prevention officer at Kohl's in Newington, was monitoring the security cameras. Tr. 31. She saw that the defendant had entered the store with a large red bag that was apparently empty. Tr. 32. She selected a carriage, walked to the juniors section of the store, and "started selecting merchandise at a rapid pace." Tr. 32. Boucher saw that she was selecting merchandising without checking the prices. Tr. 32. The defendant then added some beauty products to her cart, again without looking for the prices. Tr. 33. She then did the same thing in the accessories and intimates department. Tr. 34.

As the defendant headed to the misses department, Boucher had her associate, Jessica Desjardins, make sure the fitting rooms were empty of clothing. Tr. 34–35. That way, if the defendant used a fitting room, they could later identify anything that would be missing. Tr. 35. The defendant entered a fitting room in the misses department with her carriage full of merchandise, and stayed there for about forty minutes. Tr. 35, 36. When she finally emerged, the carriage was left behind. Tr. 36.

The defendant then walked directly to the front of the store, past all the registers, and out of the building. Tr. 37. Boucher left her office, followed the defendant out of the store, and then she and Desjardins stopped the defendant on the sidewalk. Tr. 37, 115. After Boucher identified herself, the defendant went back into the store, and accompanied Boucher to her office. Tr. 37. Boucher asked her to give the merchandise back, and the defendant complied. Tr. 38. The defendant also apologized for taking it. Tr. 38. There were holes in some of the clothing, showing where hard tags had been forcible removed. Tr. 65. Because the defendant was wearing some of the merchandise, Boucher had to take her back to a fitting room so she could remove it. Tr. 38. After Boucher gathered all the merchandise, she called the police. Tr. 82.

As part of her duties as a loss prevention officer, Boucher filled out an inventory form listing the items that the defendant had stolen, along with their retail prices taken from their price tags. Tr. 42; *see also* Tr. 62–64, 106. The total of the prices of all the merchandise was $1,174. Tr. 108.

**2. The Inventory Form**

When the State asked to admit the inventory form in evidence, the defendant objected. Tr. 43. Defense counsel argued first that there was no foundation for admission of the prices because Boucher knew nothing about the value of the merchandise, and had merely copied the prices off the price tags. Tr. 43. He argued that the prices listed on the form were therefore hearsay.

Tr. 43–44.

He also argued that admission of the form violated the best evidence rule, and that there was "no testimony that the retail price accurately reflects the sales price or the fair market value of the items …." Tr. 44. Finally, he argued that admission violated the defendant's right to confrontation under the Sixth Amendment to the United States Constitution and part 1, article 15 of the New Hampshire Constitution. Tr. 44.

The State argued that the document, with the numbers from the price tags, was admissible as a document kept in the normal course of business. Tr. 47. *See N.H. R. Ev.* 803(6) (2016) (amended 2017). Defense counsel alerted the court to a split in out-of-state case law regarding whether price tags were admissible, but argued that testimony about the price tags, without the price tags themselves, was still inadmissible. Tr. 49. The State also argued that the information was admissible under the residual hearsay exception. Tr. 49. *See N.H. R. Ev.* 803(24) (repealed and replaced, 2017) (*see N.H. R. Ev.* 807 for current version).

Defense counsel then argued that the State had not presented a sufficient foundation for admission under Rule 803(6), and that it could not because Boucher did not have personal knowledge concerning the prices. Tr. 51. He also argued that the document was prepared specifically for litigation, and not in the ordinary course of business. Tr. 51. The court agreed that the State had not presented a sufficient foundation under Rule 803(6), nor sufficient guarantees of trustworthiness under Rule 803(24). Tr. 53–55.

In response, the State made an offer of proof:

> Ms. Boucher is going to testify that the store receives the items that are—when they receive them the price tags are already affixed by corporate. That the price tags are then put on the shelves. She'll testify that the store itself cannot change the price tags and do not change the price tags.
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> ....
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> That it is—whatever items are found to be stolen then this document is created, the document has Kohl's at the top. The loss prevention office creates this document regardless of whether there's going to be prosecution and this is filed with corporate and also given to the police if needed. That they read the price tags which are affixed on the items to get and ascertain the value and write the value down.

Tr. 56.

Defense counsel objected both on the grounds that Boucher's knowledge was insufficient and on the grounds that because of that, the defendant could not adequately cross-examine her regarding the prices. Tr. 56, 57. The court, however, ruled that the defendant had an adequate opportunity to cross-examine Boucher, and that, if the foundation set out in the proffer is presented, the document would be admissible under Rule 803(6). Tr. 57.

When the prosecutor resumed his direct examination, Boucher testified:

(1) that the loss prevention officers fill out an inventory form every time they "apprehend a shoplifter regardless of prosecution";

(2) that she had filled out hundreds of such forms;

(3) that she used the same retail value every time she fills out a form;

(4) that she was trained to fill out the form as part of her training as a loss prevention officer at Kohl's;

(5) that when merchandise arrived at Kohl's to be sold, the price tags have already been attached by the vendors;

(6) that the store personnel cannot change the price tags;

(7) that the retail price on the price tag is used "for every single matter"; and

(8) that when she fills out the form, in "[e]very single case," she puts the quantity, a description, and the price of the item shown on the price tag.

Tr. 58–63.

Boucher testified that "[e]very aspect is the retail price whether it be a product that's damaged, whether it be a product that someone stole, whether it be—our inventory shortage number is based off of the retail value as well," and that a form is created "even if someone is not apprehended …." Tr. 63. Thus, a form is filled out regardless of whether anyone is ever prosecuted. Tr. 83.

She further testified that after the form is filled out, it is entered into their "loss prevention management system where [they] store [their] non-recovered merchandise information if [they] know products have been stolen, to track it." Tr. 63. A form would not be generated, however, if the merchandise is stolen along with the attached tags, and the thief is not apprehended. Tr. 82. In that case, Kohl's will lose the item at its full retail price. Tr. 82.

The State again moved to admit the form in evidence after its redirect examination of Boucher. Tr. 98. Defense counsel renewed his objections on several grounds: relevance (based on an allegation of lack of a foundation showing that the prices reflected fair market value), hearsay (along with a claim that the exception for business records didn't apply because Boucher

did not have personal knowledge of the prices), the best-evidence rule, the federal and state constitutional right to confrontation, and burden shifting. *See* Tr. 98–105.

The trial court rejected all these arguments. It ruled that the information was relevant and that the jury could give it whatever weight it deserved. Tr. 100. The court also ruled that the State had sustained its burden to demonstrate the form's admissibility under Rule of Evidence 803(6) and the best-evidence rule, reasoning that "the accuracy and authenticity and use of numbers aren't substantially in doubt and that the best evidence rule wouldn't apply to something that's been compiled …." Tr. 104; *see also* Tr. 102–03. Finally, the court ruled that there had been no burden shifting, and that defense counsel was able to effectively cross-examine Boucher. Tr. 105.

## ARGUMENT

### 1. The trial court did not unsustainably exercise its discretion in admitting the retail prices of the merchandise, set out on the inventory form prepared by the loss prevention officer.

The defendant claims that the retail prices listed on the inventory form that Boucher filled out were inadmissible on several grounds, including hearsay, the best-evidence rule, and the defendant's right to confrontation under both the United States and New Hampshire constitutions. "The admissibility of evidence is generally within the trial court's sound discretion." *State v. Lavoie*, 152 N.H. 542, 546 (2005); *accord State v. Gamester*, 149 N.H. 475, 478 (2003). Therefore, this Court "will not reverse the trial court's admission of evidence absent an unsustainable exercise of discretion." *Lavoie*, 152 N.H. at 546; *accord Gamester*, 149 N.H. at 478. "To show that the trial court's exercise of discretion is unsustainable, the defendant must show that the decision was clearly unreasonable to the prejudice of his case." *State v. Roldan*, 151 N.H. 283, 287 (2004). The defendant cannot meet that burden here.

#### 1.1. Hearsay

The defendant argues that the prices constituted hearsay, and that they did not fall into the exception set out in Rule of Evidence 803(6). Specifically, the defendant argues that Boucher, a loss prevention officer, did not have personal knowledge of the prices, and therefore could not testify to them. Rather she was simply copying onto the form what she had read on the price tags. Def. Br. 8.

Further, the defendant argues that there should not be an exception for prices read from price tags in this case because the theft was from Kohl's, which, she argues, is well known for charging less than the printed retail price. Def. Br. 9. Further, she argues that the hearsay exception in Rule 803(6) should not apply because Boucher was not writing the prices down

based on her personal knowledge. Def. Br. 10. And finally, she argues that because an inventory form is generated when a theft has been committed, it is more akin to a police report—which is not admissible under Rule 803(6)—than to a business record. Def. Br. 10–11. As demonstrated below, there was no unsustainable exercise of discretion is admitting the form under Rule 803(6).

The version of Rule 803(6) in effect at the defendant's trial provided that "[a] memorandum, report, record, or data compilation, in any form" is admissible despite being hearsay, so long as it was

> made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness … unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness.

*N.H. R. Ev.* 803(6) (2016) (amended 2017).

Boucher testified that the inventory forms were filled out in order to keep a record of the theft for Kohl's corporate office, and that they were filled out regardless of whether there was ever going to be a prosecution. Tr. 63, 83. Further, it was part of her job and training to fill out an inventory form whenever there was a theft or damage to merchandise. Tr. 63. Thus, Boucher—a "qualified witness"—established that the inventory form was "kept in the course of a regularly conducted business activity," and that "it was the regular practice of that business activity to make the … report …." Thus, the form met the criteria for admission under Rule 803(6).

The defendant also argues, however, that the prices that Boucher wrote on the form were themselves inadmissible hearsay. Def. Br. 8. For this proposition, he relies on *Stephans v. State*, 262 P.3d 727 (Nev. 2011), in which the Supreme Court of Nevada held that the testimony of a loss prevention officer concerning prices that he had read off of price tags should not have been admitted to establish the prices of the merchandise. *Id.* at 714. It held so on the grounds both that

the testimony was hearsay (with no offered exception) and that it violated the best-evidence rule. *See id.* at 718–20.

However, the *Stephans* court also described a split of authority regarding the admission of price tags themselves under an exception to the hearsay rule. Specifically, the court noted:

> The courts that characterize price tag evidence in a shoplifting case as hearsay do not require much to overcome the hearsay bar. Thus, price tag evidence has been admitted to prove value under the business records exception to the hearsay rule, on the theory that courts can properly take judicial notice of the fact that price tags on retail clothing generally reflect the market value of the clothing ….

*Id.* at 732 (citations, quotation marks, and ellipsis omitted) (citing cases from Connecticut, Maryland, North Carolina, Virginia, and Washington).

Admission of price tags as business records is well-established in several jurisdictions. *See, e.g., State v. McPhie*, 662 P.2d 233, 236 (Idaho 1983) ("Even accepting the hearsay character of the price tag admitted in evidence, we hold nevertheless that the price tag falls within the business records exception to the hearsay rule …."); *Alexander v. State*, 694 S.W.2d 611, 613 (Tex. App. 1985) ("This rule—that hearsay evidence is admissible to show value—is so well-established that the court in *Holmes v. State* … said that: 'Where value is an issue, hearsay is primary and indeed the best evidence, and in proving value it is always admissible to resort to hearsay.'" (Quoting *Holmes v. State*, 72 S.W.2d 1092, 1093 (Tex. Crim. App. 1934).)).

Here, Boucher established that the prices were established at the corporate office, that the price tags were already attached when the merchandise arrived, that the individual Kohl's store had no control over the prices, and that the price tag reflected the retail price of each item. *See* Tr. 59–62. It cannot be doubted, therefore, that the price tags were "kept in the course of a regularly conducted business activity, … as shown by the testimony of the custodian *or other qualified witness* …." *N.H. R. Ev.* 803(6) (emphasis added). Thus, the price tags themselves

would have been admissible under Rule 803(6). Therefore, the prices on the report were admissible because both levels of hearsay were overcome through Rule 803(6).

This case is similar to *Pace v. State*, 375 S.W.3d 751 (Ark. Ct. App. 2010), in which the Arkansas Court of Appeals found no error in the admission of a store manager's testimony and a register receipt where the manager had taken the items that the defendant had stolen and used a cash register to generate a receipt for the total price of the items. *Id.* at 755–57. The court rejected the defendant's argument that the manager did not have personal knowledge of the prices, and had simply just read them off the receipt. *See id.* at 755. The court noted that the witness knew the prices by following the store's usual practice by ringing up the items on a register. *Id.* at 756. That testimony, along with other testimony establishing that the items were stolen, was sufficient to lay the foundation necessary to admit the receipt under the business-record exception to the hearsay rule. *Id.* at 756–57.

The court here committed no unsustainable exercise of discretion in admitting the inventory form with the prices on it.

**1.2. The Best-Evidence Rule**

The defendant also argues that in order for the prices to be admissible, the original price tags had to be produced at trial under the best-evidence rule. Def. Br. 11–13. This rule states: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." *N.H. R. Ev.* 1002 (2016) (amended 2017). The rule does not bar admission in this case.

First, price tags are not the sort of documents to which the best-evidence rule generally applies in New Hampshire.

> [I]t is generally recognized that the best evidence rule only applies to transactions such as wills, contracts, and deeds which as a matter of substantive law are

> required to take the form of a writing. Thus, any attempt to prove the transaction inevitably involves the content of the writing and the best evidence rule. On the other hand, if the event does not take the form of a writing and is only incidentally put in writing, the Rule does not apply.

*N.H. R. Ev.* 1002, Reporter's Notes (LexisNexis 2017). Although a price tag is evidence of the retail value of an item, it is not the content of the price tag that is the legally operative fact, unlike a contract or a will. The value of the merchandise—the element that must be proven—is not established *by* the price tag; the price tag is simply a written record of the price. (Indeed, the price on the price tag was most likely generated from another writing established at the corporate office.)

Second, the Rules of Evidence also provide that "[t]he original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if … [n]o original can be obtained by any available judicial process or procedure …." *N.H. R. Ev.* 1004(2) (2016) (amended 2017). Thus, the original writings are not required if they cannot be obtained. *See, e.g.*, *Watkins v. Commonwealth*, 2014 Va. App. LEXIS 264, *11–12 (because the witness "was testifying as to the content of the price tags, the best evidence rule required the Commonwealth either to produce those price tags *or to provide an explanation as to why the price tags were unavailable*" (emphasis added)).

As the prosecutor argued at trial, the theft occurred over 3½ years before the trial, and in the meantime, the merchandise was sold off by Kohl's in the normal course of business. Tr. 45. If the merchandise, including the original price tags, had been kept, Kohl's would have lost the ability to sell the items, and would have been forced to take a loss. Tr. 45. Instead, Boucher copied the prices down as part of the inventory form immediately after the theft. There was no violation of the best-evidence rule.

### 1.3. Confrontation

The defendant also argues that the form was created only because a crime was committed, and therefore it was "testimonial" for purposes of his constitutional right to confrontation. Def. Br. 14. Under the Sixth Amendment,[2] testimonial out-of-court statements by an absent witness are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Bullcoming v. New Mexico*, 564 U.S. 647, 658 (2011) (quoting *Crawford v. Washington*, 541 U.S. 36, 59 (2004)). But the rule applies only to *testimonial* statements, and neither the price tags nor the report is testimonial.

"Most of the hearsay exceptions cover[] statements that by their nature [are] not testimonial—for example, business records or statements in furtherance of a conspiracy." *Crawford v. Washington*, 541 U.S. 36, 56 (2004). "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). As demonstrated above, the form and prices at issue here were admissible as business records under Rule 803(6). As such, they are not testimonial, and their admission does not implicate the Confrontation Clause.

### 1.4. Burden Shifting

The defendant claims that the admission of the retail prices somehow shifted the burden to her to prove the "actual value" of the merchandise. Def. Br. 10. To support this argument, the defendant relies on the dissent in *Robinson v. Commonwealth*, 516 S.E.2d 475 (Va. 1999), to

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[2] The defendant makes no separate argument under the New Hampshire Constitution, and therefore any separate state claim has been waived. *See State v. Faragi*, 127 N.H. 1, 8 (1985).

suggest that the defendant should not have to rebut evidence that is "unreliable" and "inherently untrustworthy." Def. Br. 9 (quoting *Robinson*, 516 S.E.2d at 479 (Keenan, J., dissenting). The argument thus rests on a false premise.

The disagreement between the majority and the dissent in *Robinson* concerned whether Virginia should carve out a new "price tag" exception in shoplifting cases. The dissent's position was that the new exception rested on "a rationale … without substance" and that "[t]he business records exception to the hearsay rule is alive and well in Virginia." *Robinson*, 516 S.E.2d at 479 (Keenan, J., dissenting). "By proper use of that exception, the Commonwealth can present evidence of value in grand larceny shoplifting cases." *Id.*

Here, as explained above, the evidence was properly admitted under Rule 803(6), as the State argued below. Thus, there was no shift of the State's burden to prove value under RSA 637:11.

**2. The inventory form was sufficient to prove that the value of the stolen items exceeded $1,000.**

A theft is a class B felony if the value of the stolen items "is more than $1,000 but not more than $1,500 …." RSA 637:11, II(a) (2016). If the value is less than $1,000, the theft is a misdemeanor. RSA 637:11, III. On appeal, as at trial, the defendant does not contest the evidence that she committed a theft by unauthorized taking. Rather, the defendant argues only that the evidence was insufficient to prove that the stolen merchandise had a total value of at least $1,000. Def. Br. 15; *see* Tr. 131.

"A challenge to the sufficiency of the evidence raises a claim of legal error; therefore, [this Court's] standard of review is *de novo*." *State v. Morrill*, 169 N.H. 709, 718 (2017) (quoting *State v. Collyns*, 166 N.H. 514, 517 (2014)). "To prevail upon her challenge to the sufficiency of the evidence, the defendant must prove that no rational trier of fact, viewing all of the evidence

and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt." *Id.* (quoting *Collyns*, 166 N.H. at 517). "[I]n determining whether the evidence was sufficient, [this Court will] consider all the evidence—including evidence that was erroneously admitted." *Id.*; *accord State v. Gordon*, 161 N.H. 410, 418 (2011). Thus, regardless of the defendant's challenge to the admissibility of the inventory form showing the retail prices, that evidence must be considered in the light most favorable to the State. The inventory form that Boucher created was sufficient to prove that the value of the stolen property exceeded $1,000.

For purposes of determining the grade of the crime of theft, the "value" of the stolen merchandise is defined as "the *highest amount* determined by any reasonable standard of property or services." RSA 637:2, V (2016) (emphasis added). Taken in the light most favorable to the State, the inventory form proved that the aggregate retail value exceeded $1,000. It is this full amount, and not any supposed, discounted sale price, that represented the "the highest amount determined by any reasonable standard of property or services." RSA 637:2, V.

Regardless, if this Court finds that the evidence was insufficient to prove that the value of the merchandise exceeded $1,000, then the crime is a misdemeanor, and the proper remedy is to remand the case to the trial court for a resentencing hearing. *See Tr.* 141–42 (trial court instructed the jury on the lesser included offense of theft by unauthorized taking); RSA 637:11, III.

## CONCLUSION

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

The State waives oral argument. *See Sup. Ct. R.* 16(4)(b).

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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## CERTIFICATE OF SERVICE

I hereby certify that I have sent two copies of the State's brief to counsel for the defendant, Albert Hansen, by first-class mail postage prepaid, at the following address:

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April 9, 2018

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