THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0318

The State of New Hampshire

v.

Mohammad Salimullah

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
HILLSBOROUGH COUNTY SUPERIOR COURT
FOR THE SOUTHERN JUDICIAL DISTRICT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ISSUES PRESENTED

1. Whether the trial court properly held that a new indictment was required to restore its jurisdiction after it had dismissed the indictment a year earlier upon finding the defendant incompetent and not restored.

2. Whether the trial court properly denied defense counsel's post-trial request for an evaluation of the defendant's competency on the basis that the history of the case, the record, and its own observations demonstrated there was no legitimate doubt about his competency.

3. Whether the trial court erred when it added a no-contact provision to the defendant's stand-committed sentence of 30 years to life on his attempted murder conviction.

STATEMENT OF THE CASE

In October 2013, the defendant, Mohammad Salimullah, was indicted on one count of attempted murder, one count of first-degree assault with a deadly weapon, and an alternative count of reckless conduct with a deadly weapon. DB 53–55.[1] *See* RSA 629:1 (2016); RSA 630:1-a (2016) (amended 2017); RSA 630:1-b (2016); RSA 631:1, I (b) (Supp. 2018); RSA 631:2, I(b) (Supp. 2018); RSA 631:3, I–III (Supp. 2018).

In 2014, defense counsel raised concerns about the defendant's competency. Doctors Dennis Becotte and Albert Drukteinis evaluated the defendant and "concluded that [he] was not competent," but potentially restorable. The superior court (*McGuire*, J.) then reached the same conclusion. DB 46, 58. In October 2014, the probate division of the circuit court committed the defendant to the Secure Psychiatric Unit at the New Hampshire State Prison (SPU) for three years. DB 46 n.1, 57–58.

In August 2015, Dr. Becotte re-evaluated the defendant and concluded that he "ha[d] not been restored to competence." DB 58. In September, the court (*Colburn*, J.) reached the same conclusion and dismissed the indictments without prejudice. DB 59 (citing RSA 135:17-a, IV (2015)). In November, SPU transferred the defendant to New Hampshire Hospital (NHH). DB 41, 46.

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[1] "DB" refers to the defendant's brief and the attached appendix.
"HA-I" refers to the transcript of the hearing on arraignment on February 18, 2016.
"HA-II" refers to the transcript of the hearing on arraignment on March 1, 2016.
"HS" refers to the sequentially paginated transcripts of the hearing on suppression on December 6-7, 2017, January 3, 2018, and January 5, 2018.
"JS" refers to the transcript of the jury selection and motion hearing on March 5, 2018.
"JT" refers to the sequentially paginated transcripts of the trial on March 12-15, 2018.
"SH" refers to the transcript of the sentencing hearing on May 4, 2018.

In January 2016, the defendant was indicted on one count of attempted murder, an alternative count of first-degree assault with a deadly weapon, one count of second-degree assault with a deadly weapon, and an alternative count of reckless conduct with a deadly weapon. DB 60–63. At the defendant's arraignment on February 18, he moved to dismiss the indictments without prejudice for a violation of RSA 135:17-a, VI. DB 42. The court (*Ignatius*, J.) held that given this Court's opinion in *State v. Demesmin*, 159 N.H. 595 (2010), the State had properly re-indicted the defendant, so he would be arraigned. DB 41–44.

At the arraignment on March 1, 2016, defense counsel said that he was going to file a motion for a competency evaluation. HA-II 3. The court suggested that it could just order one and defense counsel agreed, so it did. HA-II 16, 17; DB 64–67. Dr. Drukteinis re-evaluated the defendant and concluded that he was malingering and competent. DB 46. The defendant's expert, Dr. Fabian Saleh, interviewed him and "concluded that [he] remained incompetent …." DB 46–47. Both doctors testified on January 5, 2017, and the court (*Colburn*, J.) agreed with Dr. Drukteinis's conclusions and found the defendant competent. DB 68–78.

In November 2017, the defendant was indicted on one count of attempted murder, one count of first-degree assault with a deadly weapon, and an alternative count of second-degree assault with a deadly weapon. DB 79–81. The State later entered *nolle prosequis* on the 2016 indictments for attempted murder and second-degree assault. DB 60, 62. The defendant then stood trial on March 12–15, 2018, and the jury found him guilty, as charged, on the remaining counts. DB 61, 63, 79, 81; JT 634–46.

On April 30, 2018, defense counsel filed a motion for a competency determination. DB 45, 82–96. The State objected. DB 45, 87–94. On May 4, the court (*Smukler*, J.) heard arguments and denied the motion. DB 45; SH 14–16. It then sentenced the defendant on the attempted murder conviction to a stand-committed term of 30 years to life with 1,453 days of pretrial confinement credit. DB 95–96. On the first-degree assault conviction that was not an alternative count, the court sentenced the defendant to a consecutive term of 7½–15 years, suspended until 20 years after his release, and restitution of $4,798.67. DB 97–98. On each sentence, the court added a no-contact condition. DB 96–98. The defendant objected to the addition of the condition to the sentence for attempted murder. SH 54–55.

On May 29, 2018, the trial court issued a written order denying the motion for a competency determination. DB 45–52. This appeal followed.

STATEMENT OF FACTS

S.S. and her older sister A.S. were born and raised in Malaysia. JT 41, 45. In 2005, their parents arranged a marriage between A.S. and M.A., and in 2007, their parents arranged a marriage between S.S., who was only seventeen years old, and the defendant, who was forty years old. JT 41–45, 365–66, 368. S.S. did not know or want to marry the defendant, but her religion prohibited her from saying no, so she married him. JT 46.

S.S. tried to make the defendant happy, but he got angry when she spoke to anyone, and he did not allow her to have friends, go anywhere alone, or talk on the telephone when he was gone. JT 48–49, JT 116–17. Then, in 2011, the defendant sustained serious injuries in a motorcycle accident, so S.S. had to get a job and take care of him. JT 117.

In September 2012, the defendant and S.S. immigrated to the United States as legal refugees, and Lutheran Services helped them get an apartment, schooling, and temporary financial support. JT 41–42, 50–51, 260. In January 2013, A.S., M.A., and their son also immigrated to the United States as legal refugees, and Lutheran Services helped them get an apartment in Nashua. JT 51–52, 249, 257, 368.

By April 2013, S.S., A.S., and M.A. all had full-time jobs. JT 52–53, 260. S.S. and A.S. worked from 9:00 a.m. to 5:00 p.m., and M.A. worked from 5:00 p.m. to 1:00 a.m. JT 53, 260. Around June 2013, S.S. and the defendant moved in with A.S. and her family because the financial support had ended and S.S. did not make enough to the pay the rent. JT 373–74. A.S., M.A., and their seven-year-old son had a bedroom off the living room, and the defendant and S.S. had a bedroom upstairs. JT 54, 56, 263.

The defendant did not work, but he controlled the money S.S. made; he constantly complained about the way she cleaned and the food she made, and got angry when his dinner was late, so she was very unhappy. JT 57–59, 118. In August 2013, S.S. asked the defendant for a divorce, but he said no. JT 59, 265. S.S. said, "[L]eave me and go," and the defendant said, "I'll give you a divorce, I'll go forever." JT 121; *see also* JT 59. S.S. said, "[O]kay, give me the divorce." JT 59.

The next morning, M.A. tried to talk S.S. out of a divorce, and then he had three male elders from their Rohingya community come over. JT 60–61, 122–23, 264–66. The elders told S.S. that getting a divorce was hard, so she had to stay and think about it for a month, and she said no. JT 61, 265. The elders said that it was the final week of Ramadan, the biggest festival in their religion, and that they would not make a decision during it, so the defendant and S.S. had to spend the rest of the week thinking and talking about their marriage. JT 61–62, 264–67, 377–78. S.S. eventually agreed to do as they asked because it was the "law of the community." JT 125–26.

Over the next few days, the defendant and S.S. took turns sleeping in the bed and he always left before she got home from work and returned after she went to sleep. JT 62–63. Then, when S.S. got home from work on August 12, 2013, the defendant was sitting on the bedroom floor packing clothes in a suitcase. JT 64–65. The defendant said that he had to leave and give her a divorce at the end of the week, so he was getting ready. JT 65. S.S. said that they could still talk after that, and the defendant responded that he had to go far away because he would miss her too much if he

stayed. JT 65–66. The defendant was never sad, but he was very sad that night. JT 66.

Around 10:00 p.m., S.S. fell asleep. JT 66–68. Then, around 3:00 a.m., the defendant held a large kitchen knife in one hand, covered S.S.'s mouth with his other hand, and then started cutting her throat from one side to the other. JT 68–69, 73, 132–35, 139, 192. SS. woke up, grabbed the knife blade with her left hand, and tried to push it away. JT 69–70, 136–37, 239. The defendant pulled the blade out of her hand, pushed it against her throat, and said, "If I divorce you, we will die together," so she grabbed it again and tried to push it away. JT 394; *see also* JT 69–71, 138, 191. The defendant pushed the blade even harder against her throat, so she grabbed the hand he had around the knife handle with her other hand, pushed him away, and then jumped up and turned the lights on. JT 70–72, 90–93, 238.

S.S. asked the defendant why he was trying to kill her, but he did not respond. JT 72–73. Instead, he started stabbing himself in the stomach. JT 90, 92–93, 142. S.S. ran downstairs, woke A.S. and M.A., and told them everything. JT 73–76, 90, 199, 238–39, 271–76, 382–83, 394, 415–18. A.S. put towels on S.S.'s neck and hand, woke her son, and they then waited in the living room while M.A. went upstairs. JT 76–78, 151, 270, 274.

M.A. asked the defendant why he tried to kill S.S., and the defendant simply raised his hand. JT 419. M.A. was afraid he would attack them with the knife, so he took it downstairs and put it in the kitchen sink. JT 192, 387, 395, 423–24, 427, 435. They were all afraid of the police in Malaysia, so M.A. repeatedly called the Rohingya elders, but the only one who answered would not come to the apartment, so M.A. called 911. JT 80, 280, 309–11, 352–54, 372–73, 389–90, 401.

S.S. had a ten-centimeter-long laceration that went from one side of her neck to the other, and if the knife had gone any deeper, she would have died. JT 82–83, 458–69, 472. S.S. also had a superficial laceration right below the deep laceration. JT 82–83, 459–60, 467–68. In addition, she had deep lacerations on four fingers on her left hand, and after two surgeries and physical therapy, she still had pain in her hand, could not completely straighten it, and had no feeling in her pinky finger. JT 82–85, 459, 468–70.

SUMMARY OF THE ARGUMENT

1. This Court should not consider the defendant's arguments that the trial court erred in relying on the opinion in *Demesmin* and in finding RSA 135:17-a, VI ambiguous because he either did not preserve them or waived them, and he has not invoked the plain-error rule. He also cannot meet that strict standard because the trial court properly found that *Demesmin* stands for the propositions that a trial court no longer has jurisdiction to order a re-assessment of competency after it dismisses charges, so the State is required to re-indict before it moves the court to do so. Even if the trial court did err, the error was not plain.

2. This Court will not consider most of the defendant's arguments concerning the denial of his post-trial motion for an assessment of competency because he either did not preserve them or waived them, and he has not invoked the plain error rule. He also cannot meet that strict standard because the trial court properly found that the concerns about his competency were similar to those raised before another judge had held he was competent and malingering in February 2017, and that the subsequent history of the case, its own observations of the defendant, and the record of the prior proceedings and the sentencing hearing all demonstrated that there were no legitimate concerns about his competency.

3. The State does not dispute that the trial court erred in adding a no-contact provision to the defendant's attempted murder sentence after it imposed a stand-committed term of 30 years to life.

ARGUMENT

1. The defendant did not preserve his arguments that the trial court erred in relying on *State v. Demesmin* and in finding RSA 135:17-a ambiguous; he has not invoked the plain error rule; and he cannot meet that strict standard because the trial court did not err, and even if it did, the error was not plain.

On appeal, the defendant argues that by re-indicting him, the State circumvented the requirements for a re-evaluation set out in RSA 135:17-a, VI. DB 22–23, 26. He concludes that therefore, the court erred by denying his motion to dismiss.[2]

On February 18, 2016, the trial court (*Ignatius*, J.) started to arraign the defendant on the 2016 indictment, and his counsel then orally moved to dismiss them. HA-I 2. The State argued that the defendant "need[ed] to be arraigned" and the motion "should be filed in writing," and the court agreed. HA-I 2. Defense counsel then argued that it was inappropriate to arraign the defendant because he had been found not competent and civilly committed, RSA 135:17-a, VI (2015) set out a procedure for obtaining a re-evaluation of competency under those circumstances, and the State had not followed it or met its requirements. HA-I 3.

The court said that it did not understand why the statutory provisions made it inappropriate to arraign first "and then initiate whatever need[ed] to be done regarding [a] competency evaluation." HA-I 4. Defense counsel responded that: (1) it had been only a few months since Judge Colburn

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[2] The defendant argues that the trial court (*Colburn*, J.) denied his motion to dismiss in January 2017. DB 19–20 (citing DB 72–78). However, it did not deny his oral motion to dismiss for a violation of RSA 135:17-a in that order. Instead, it denied his subsequent "motion to be declared incompetent to stand trial and dismiss pending charges." DB 68.

found the defendant "not competent, not restorable" and Dr. Becotte opined "it was not likely [he] was going to be restored," (2) RSA 135:17-a, VI did "not call for the reinitiation of an indictment," and (3) the State had not followed the process in it, so the court had to dismiss the charges without prejudice to allow the State to do so. HA-I 4, 6.

The court asked where paragraph VI said it did not "allow for reinitiation of charges." HA-I 6. Defense counsel responded that it did not, but it did "specifically allow for a re-initiation of proceedings" under certain conditions. HA-I 7–8. He argued that the Criminal Code envisioned "an adversarial proceeding" before "the indictment process," and that allowing the State to "jump forward with [it]" would render RSA 135:17-a, VI "meaningless." HA-I 8. The State argued that the statute did not prevent re-indictment or authorize a court to "reinstate indictments," and that other statutes required the court to arraign the defendant and set bail. HA-I 9. It further argued that a dismissal "without prejudice" meant the State could re-indict, and that the court should not consider the motion until it was filed in writing and the State was given an opportunity to respond. HA-I 9.

The court said that it saw "something regarding changes the State identified as a basis for bringing the charges," and the State said it was the motion for a capias. HA-I 10. The State argued that the change in circumstances was the defendant's being stepped down to New Hampshire Hospital (NHH) and its belief that he would soon be released. HA-I 10, 12. NHH was "not a secure facility, so … [he could] walk away" and the State could lose track of him if the court did not set bail. HA-I 10. The State noted that Dr. Becotte had said that "the State [could] consider bringing up the charges and having him reevaluated" if he went to NHH. HA-I 10–11.

Defense counsel argued that the State had not shown "a reasonable basis to believe that [the defendant's] condition ha[d] changed such that he [was] competent to stand trial" because it had not presented evidence of why he was stepped down or it believed he was going to be released. HA-I 13. The court asked if there were "records of what the thinking was in the transfer," and the State responded that it did not have access to records and NHH's counsel had said they could not provide any information, so the State could meet its burden only if the court ordered SPU and NHH to release records. HA-I 14. Defense counsel said that they did not object to the court doing so, it had authority to do so, and the State had a right to the records because it needed them to meet its burden. HA-I 14–15. The court said that "in an abundance of caution," it was not going to arraign the defendant, but it was going to order him to sign releases and waive time-based defenses. HA-I 18–19.

The defendant's psychiatric social worker, Connie Easterling, then said that it was not unusual for patients to just leave NHH, and the defendant could have done so before the State re-indicted him. HA-I 24, 27. Easterling also said that they were working on a plan to increase his privileges gradually, set up services and housing for him in Nashua, and then discharge him in a few months, and that it was possible he could be discharged without a plan or services. SH-I 25–27. The State then again argued that the court had to arraign the defendant and set bail. HA-I 28. Defense counsel responded that nothing "prevent[ed] the Court from continuing an arraignment" and then considering whether the indictments should be dismissed before they went any further. HA-I 28–29. The court

said that it would stick to its prior plan, but it would order SPU and NHH to provide the records to counsel. HA-I 30–31.

After the hearing, the court reviewed the relevant case law and statutes and held that "*Demesmin* [stood] for the proposition that a trial court [lost] jurisdiction once the charges have been dismissed" under RSA 135:17-a, so the State was "required to re-indict in order to reassess the defendant's competency," and that interpreting the statute to mean that "once the charges [were] dismissed, the State [lost] its ability to petition for re-evaluation under RSA 135:17-a, VI" put it "in harmony with *Demesmin*." DB 43. The court then noted that the statute did not make clear whether the State had to move for re-evaluation in the criminal court or the probate court, but interpreting it "as requiring a re-indictment … avoid[ed] this issue." DB 43–44. The court then said that the defendant would "be arraigned," and that his counsel were free to "file a written motion to dismiss for consideration after the arraignment and after the State ha[d] an opportunity to respond in writing" and "raise his competency …." DB 44.

On March 1, 2016, defense counsel asked the court (*Ignatius*, J.) to enter not-guilty pleas, and said he would file a motion for a new competency evaluation. HA-II 2–3, 13–14. The court arraigned the defendant and set bail. HA-II 14–18. It then said that they knew "the issue of competency [was] central," and there was no doubt defense counsel's motion would "be granted, … so rather than put [them] through filing it, [they could] go straight to that being done on the [c]ourt's order." HA-II 18. Defense counsel responded, "I'm happy with that." HA-II 19. The court then ordered the evaluation. DB 64–67.

A. This Court will not address the substance of two of the defendant's arguments because he did not preserve them in the trial court and has not invoked the plain-error rule on appeal.

As an initial matter, in his argument on appeal, the defendant contends that the trial court improperly interpreted, and relied on, *State v. Demesmin*, DB 23–24, and that it erred in finding that "it is unclear in which court the State would move for re-evaluation," DB 25 (quoting DB 43–44). Because these arguments were not raised below, this Court should not consider them.

"The defendant, as the appealing party, has the burden to provide this [C]ourt with a sufficient record to decide his issues on appeal and demonstrate that he raised [them] before the trial court." *State v. Brooks*, 162 N.H. 570, 583 (2011). "The trial court must have had the opportunity to consider any issues asserted by the defendant on appeal; thus, to satisfy this preservation requirement, any issues that could not have been presented to the trial before its decision must be presented to it [by him] in a motion for reconsideration." *State v. Mouser*, 168 N.H. 19, 27 (2015); *see also N.H. R. Crim. P.* 43(a).

"To the extent that the defendant believed that the trial court improperly relied upon [*Demesmin* and found the statute ambiguous in its order], it was incumbent upon [him] to move for reconsideration." *Mouser*, 168 N.H. at 27. "The record on appeal, however, does not demonstrate that the defendant filed such a motion." *Id.* He also has not invoked this Court's plain-error rule on appeal. Therefore, it will decline to address the substance of the foregoing arguments. *See State v. Brum,* 155 N.H. 408,

417 (2007) (declining to consider Brum's argument because he did not preserve it in the trial court or invoke the plain-error rule on appeal).

Furthermore, the trial court said that "based on *Demesmin*, [it was] find[ing] that the State ha[d] properly re-indicted the defendant." DB 44. Therefore, if this Court declines to consider the substance of the defendant's arguments concerning *Demesmin*, it must also affirm the trial court's holding that the State had properly re-indicted him.

The defendant argues that "the State did not claim that there was 'a reasonable basis to believe that [his] condition had changed such that competency to stand trial may have been affected,'" and that "the court made no such finding prior to ordering a new competency evaluation." DB 23 (quoting RSA 135:17-a, VI). However, as demonstrated above, the State did argue, and provide evidence of, a change in the defendant's circumstances that could have reflected a change in competency, and defense counsel then conceded that it could not meet its burden without treatment records. Then, at the defendant's arraignment, defense counsel moved for a new competency evaluation and then agreed the court could just order one, so the trial court did. Therefore, because "the court ruled consistently with defense counsel's representations [and requests] at the hearing[s], the defendant cannot now complain of error." *State v. Gay*, 169 N.H. 232, 248 (2016).

B. Even if this Court addresses the defendant's arguments under the plain error rule, there was no error, and even if there was, it was not plain.

> [This Court will] apply the [plain error] 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) [it] must be plain; (3) [it] must affect substantial rights; and (4) [it] must seriously affect the fairness, integrity or public reputation of judicial proceedings.

State v. Pennock, 168 N.H. 294, 310 (2015) (quotations omitted). "[T]he defendant bears the burden under the plain error test." *State v. Cooper*, 168 N.H. 161, 168 (2015). Here, the defendant cannot meet that strict standard because there was no error and even if there was, it was not plain.

i. *State v. Demesmin* does not bar the State from re-indicting a defendant before requesting a re-evaluation

In *Demesmin*, the trial court found Demesmin incompetent, ordered an evaluation for dangerousness under RSA 135:17-a, V (2015), granted the State's motion for a re-assessment of competency after he was found ineligible for civil commitment, and then found him competent. *Demesmin*, 159 N.H. at 596–97. On appeal, Demesmin argued "that the trial court lacked jurisdiction to order the re-assessment of his competency under the original indictment, because by ordering an evaluation of [his] dangerousness under RSA 135:17-a, V, [it had] impliedly dismissed without prejudice the original indictment by operation of law." *Id.* at 597.

This Court interpreted RSA 135:17-a and held that "RSA 135:17-a, I, specifically requires the trial court to find by 'clear and convincing

evidence that the defendant cannot be restored to competency' in order for the case against [him] to be dismissed without prejudice." *Id.* at 598. This Court then held that because "the trial court made no such finding," it "never dismissed the original indictment against [Demesmin], and the State was not required to re-indict him to continue prosecuting him." *Id.* Thus, this Court's holding in *Demesmin* constitutes a recognition that there is no bar to re-indictment when the State has reason to move for the re-evaluation of a defendant who had previously been found to be incompetent.

Here, in 2015, the trial court first held "that the defendant ha[d] not been restored to competence," and then said, "Accordingly, the case again [him] shall be dismissed without prejudice. *See* RSA 135:17-a, IV." DB 59. That being the case, the trial court properly found that the State was then "required to re-indict him to continue prosecuting him." *Demesmin*, 159 N.H. at 598.

The defendant argues that the following passage from *Demesmin* requires a contrary finding:

> There is a presumption against divesting a court of its jurisdiction once it has properly attached, and any doubt is resolved in favor of retaining jurisdiction. Further, it is common practice that once a court has acquired jurisdiction, no subsequent error or irregularity will remove that jurisdiction, so that the court may not lose jurisdiction because it makes a mistake in determining either the facts, the law, or both.

Id. at 598–99. However, the defendant has not explained why he believes that is so. DB 24–25. Instead, he "made only a 'passing reference' to [the argument] in [his] brief," so this Court will "consider it waived." *State v. Hermsdorf*, 135 N.H. 360, 365 (1992) ("because the defendants made only

a 'passing reference' to [their admissibility of the evidence claim] in their brief, we consider it waived").

The defendant has fully briefed his argument that RSA 135:17-a "envisions that the court's jurisdiction will continue even after the case is dismissed," DB 21 (citing RSA 135:17-a, I, V), and "expressly envisions that, even after [it] is ..., the court may, under certain circumstances, reevaluate the defendant's competency," DB 22 (citing RSA 135:17-a, VI). However, the trial court's holding was that the statute "can be interpreted in harmony with *Demesmin*" only if it means that "once the charges have been dismissed, the State loses its ability to petition for re-evaluation under RSA 135:17-a, VI," DB 43, and the defendant never moved it to reconsider that holding.

In any event, resolution of these issues requires statutory interpretation. "The interpretation of a statute is a question of law, which [this Court] will review *de novo*." *State v. Lantagne*, 165 N.H. 774, 777 (2013).

> When examining the language of the statute, [this Court will] construe [it] according to its plain and ordinary meaning. [This Court will] interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that [it] did not see fit to include.

Id. (citations omitted). "Unless [this Court] find[s] that the statutory language is ambiguous, [it] need not look to legislative intent." *Bond v. Martineau*, 164 N.H. 210, 213 (2012). "Furthermore, [this Court will] interpret statutes in the context of the overall statutory scheme and not in isolation." *Id.* Here, the plain language of the sections of the statute the defendant cites belie his arguments about them.

RSA 135:17-a, I, provides:

> If, after hearing, the district court or superior court determines that the defendant is not competent to stand trial, the court shall order treatment for the restoration of competency unless it determines, by clear and convincing evidence, that there is no reasonable likelihood that the defendant can be restored to competency through appropriate treatment within 12 months. If the court finds, by clear and convincing evidence, that the defendant cannot be restored to competency within 12 months, the case against the defendant shall be dismissed without prejudice and the court shall proceed as provided in paragraph V.

Paragraph V provides:

> If the court has determined that the defendant has not regained competency, and the court determines that he or she is dangerous to himself or herself or others, the court shall order the person to remain in custody for a reasonable period of time, *not to exceed 90 days, to be evaluated for the appropriateness of involuntary treatment pursuant to RSA 135-C:34 or RSA 171-B:2*. The court may order the person to submit to examinations by a physician, psychiatrist, or psychologist designated by the state *for the purpose of evaluating appropriateness and completing the certificate for involuntary admission* into the state mental health services system, the state developmental services delivery system, or the secure psychiatric unit, as the case may be. If a defendant who was charged with a sexually violent offense, as defined in RSA 135-E:2, XI, has not regained competency, the court shall proceed pursuant to RSA 135-E.

RSA 135:17-a, V (emphasis added). The plain language of those paragraphs makes it clear that once the trial court dismisses the defendant's charges, it may still act to hold the defendant for 90 days and order an evaluation for commitment under RSA 135-C:34 or RSA 171-B:2.

RSA 135:17-a, VI then provides:

> If the person is ordered to be involuntarily committed following proceedings pursuant to RSA 135-C or RSA 171-B, the court may, upon motion of the attorney general or county attorney at any time during the period of the involuntary commitment and before expiration of the limitations period applicable to the underlying criminal offense, order a further competency evaluation, to be conducted as prescribed in paragraph III. Such further competency evaluations may be ordered if the court finds that there is a reasonable basis to believe that the person's condition has changed such that competency to stand trial may have been affected. During proceedings authorized by this paragraph, the person is entitled to the assistance of counsel, including appointed counsel under RSA 135-C:22.

Nothing in the plain language of that paragraph prohibits the State from re-indicting before it requests a further evaluation, or treats a trial court's jurisdiction to order one after it has dismissed the charges. It merely sets out the procedure for requesting a re-evaluation when "there is a reasonable basis to believe that the person's condition has changed such that competency to stand trial may have been affected." RSA 135:17-a, VI.

Demesmin was issued in January 2010, and the legislature has not seen fit to amend paragraph VI since that time, but it did add RSA 135:17-a, VII (2015), which address only competency reports. *See* Laws 2010, 46:1 (eff. May 18, 2010). Therefore, this Court will "presume that the legislature was aware of [the] prior decision[in *Demesmin*] ..., and has adopted [its] construction of the [statute] by amending other sections of [it] while failing to amend" RSA 135:17-a, VI to prohibit the State from re-indicting before it requests the re-evaluation of a defendant. *Averill v. Cox*, 145 N.H. 328, 335 (2000).

It must also be noted that there is no statute that gives a trial court authority to order NHH, SPU, or any other treatment provider to release a defendant's records after the probate court has civilly committed him, and the defendant conceded at the hearing that the State cannot meet its burden under RSA 135:17-a, VI without them. That being the case, the State would necessarily have to re-indict a defendant before it could obtain his treatment records, file a petition for re-evaluation, meet its burden under RSA 135:17-a, VI, or have a trial court consider that request. Thus, re-indictment must be allowed to avoid putting the State in an impossible position under RSA 135:17-a, VI.

ii. The trial court did not err in finding that the plain language of RSA 135:17-a, VI does not make clear whether the State must move for re-evaluation in that court or the probate court.

The defendant argues that the trial court erred in finding that it was "unclear in which court the State would move for re-evaluation." DB 25 (quoting DB 43). He argues that RSA 135:17-a, I, "sets forth the procedure to be followed if 'the district court or superior court determines that the defendant is not competent,'" and "every subsequent reference to 'the court' in RSA 135:17-a is to the circuit or superior court in which the criminal trial would take place." DB 25–26. However, RSA 135:17-a, II (2015) provides, in relevant part:

> If the defendant is to undergo treatment to restore competency, he or she may be treated in the state mental health system or at the secure psychiatric unit only under an order for involuntary admission or involuntary emergency admission ordered *by the district court or probate court*

> *having jurisdiction pursuant to RSA 135-C.* In all other cases, the accused shall, if otherwise qualified, be admitted to bail ....

The plain language of that section makes it clear that a defendant may be civilly committed at the time the court orders him "to undergo treatment to restore competency," he must be civilly committed if treatment is to occur at NHH or SPU, and only the district court or probate court has jurisdiction to civilly commit him.

Thus, when RSA 135:17-a, VI is viewed in the context of the entire statutory scheme and this Court's opinion in *Demesmin*, the only reasonable interpretation of it is that a trial court has jurisdiction to order the release of a defendant's records and a re-evaluation of his competency before it dismisses the charges, but once the charges have been dismissed, the only way for the State to obtain the records necessary to meet its burden under RSA 135:17-a, VI, is to re-indict the defendant to continue the prosecution.

iii. Even if the trial court erred, the error could not have been plain because if *Demesmin* did not decide the issues, they are of first impression and turn upon interpretations of the statute that this Court has never adopted.

"When the law is not clear at the time of trial and remains unsettled at the time of appeal, a decision by the trial court cannot be plain error. 'Plain' as used in the plain error rule is synonymous with clear or, equivalently, obvious." *Pennock*, 168 N.H. at 310 (quotations, citations, and parentheticals omitted). An error is "neither clear nor unequivocally obvious" if "the case is one of first impression," *id.*, or the defendant's argument "turns upon an interpretation of [a statute] that [this Court] has never adopted," *Depanphilis v. Maravelias*, No. 2017-0139, order at 3 (N.H. July 28, 2017) (non-precedential order).

As demonstrated above, *Demesmin* either resolved the issues the defendant raised and supported the trial court's findings or it did not resolve the issues at all, in which case, they were of first impression and turned upon interpretations of the statutes that this Court has never adopted. Therefore, even if the trial court erred in finding that the State properly re-indicted the defendant, the error could not have been plain.

2. The defendant did not preserve or has waived the majority of his arguments about the trial court's denial of his post-trial request for a re-evaluation of competency, he has not invoked the plain-error rule, and he cannot meet that strict standard because the trial court did not err in finding that there were no legitimate concerns about his competency to be sentenced.

During the June 2016 competency evaluation, Dr. Drukteinis "conducted several tests … designed to identify malingering/exaggeration." DB 73. The defendant's score on one "was so low" it "suggest[ed] severe dementia," his score on another "approached chance" and "represent[ed] a deliberate attempt to appear impaired with regard to memory function," and his score on another was double the score that "suggest[ed] malingering." DB 74 (quotations and brackets omitted). Dr. Drukteinis then concluded that the defendant was competent, "was malingering (faking or exaggerating) symptoms and was, in fact capable of learning about the trial process and assisting his attorney." DB 73.

The defendant's expert, Dr. Fabian Saleh, interviewed him in person and on the phone and concluded that he had "some rational and factual understanding of the proceedings," but he "lack[ed] sufficient … ability to consult with and assist his lawyer … with a reasonable degree of rational understanding," DB 71 (quotation omitted). Dr. Drukteinis then re-evaluated the defendant and again conducted tests for malingering, and the results "paint[ed] a picture of a man with severe dementia, an inability to count dots, and a drawing ability on par with that of a small child," which was inconsistent with his "ability to successfully run a restaurant in Malaysia, and instead strongly suggest[ed] that [he was] either refusing to put any effort into the tests, or [was] outright faking his symptoms." DB 74.

Dr. Saleh reviewed Dr. Drukteinis's report and maintained his prior opinion that the defendant was not competent. DB 71 (quotations and brackets omitted). Dr. Saleh then said "that the defendant lack[ed] the motivation and the desire to have a favorable outcome" because his "depression render[ed him] incapable of wanting to engage." DB 73. However, Dr. Saleh never administered any tests. DB 75.

Judge Jacalyn Colburn heard testimony from both doctors. DB 68, 72, 78. After doing so, she "credit[ed] Dr. Dukteinis'[s] conclusions—that the [defendant's test] results … show[ed] either a lack of effort by [him] or an outright attempt to feign impairment," DB 75; he was not having hallucinations or suffering from any psychosis, DB 76; and his depression was "subject-dependent," "situational," and "not significant enough to prevent him from working productively with his attorney," DB 77. She then found the defendant competent. DB 78.

In September 2017, Judge David Garfunkel held a full-day settlement conference, and the defendant entered a guilty plea. The defendant then withdrew it on October 18, 2018, so Judge Colburn "conducted a colloquy with [him] to ensure that [doing so] was his choice and that he understood the potential consequences of going to trial." DB 88. In December 2017, Judge Tina Nadeau ordered the production of the defendant's treatment records. HS 7–8. On December 6, the State gave the records to her and said that they showed the defendant had "stopped taking some of his … depression medication," his counsel were "not seeking to raise the competency issue," and the State questioned whether she felt it was "necessary to have a colloquy with [him]" before they held the scheduled suppression hearing. HS 8. Defense counsel said that he had met

with the defendant, was not raising the issue, and did not "think that the Court need[ed] to do a colloquy." HS 8–9. Judge Nadeau said that in light of the competency order, her own discussions with counsel "about the Defendant's depression, and the decision of [his] counsel," she did not think a colloquy was necessary. SH 9. The suppression hearing then started that day and continued on December 7, 2017, January 3, 2018, and January 5, 2018.

On March 5, 2018, Judge Larry Smukler held jury selection. On March 12–15, 2018, he presided over the defendant's jury trial, and before the closing arguments, he conducted a colloquy with him and determined that he understood, and agreed with, his counsel's decision to argue he had committed only reckless conduct or second degree assault. JS 556, 559–60.

After the guilty verdicts, defense counsel said they were not requesting a PSI because of the "number of evaluations and such that ha[d] been part of this case." JT 636. The court scheduled sentencing for May 4, 2018, and on April 27, defense counsel filed a motion for a competency determination. DB 83–80. Counsel first said his concerns were that the defendant's "mental state [was] affecting his ability to rationally work with [him] on the question of sentence and on the development of additional potential mitigation," and that he was "suffering from significant depression and, as a result, ha[d] reached a troubling level of resignation with respect to the sentencing itself." DB 83–84. Counsel then argued that: (1) the defendant had a state and federal constitutional right not to be sentenced if he was legally incompetent, DB 84; (2) "the Court should conduct an evidentiary hearing" if there was "a bona fide or legitimate

doubt" that he was, DB 85 (quotation omitted); and (3) counsel "believe[d] that there [was]," DB 85.

The State objected, arguing that: (1) Judge Colburn had considered similar concerns about the defendant's behavior, DB 90–91, and found he "was malingering," and "was competent," DB 89; (2) he had appeared before four judges since September 2017 and neither they nor his counsel had "express[ed any] concerns with [his] competency," DB 88–89; *see also* DB 90; (3) his counsel had filed "a sentencing memo and several objections to the State's sentencing arguments/materials," DB 91; and (4) the court should question the defendant and his counsel and consider all the competency materials in the 2013 and 2016 files, the 3JX opinion in *State v. Wheat*, No. 2016-0765 (N.H. Nov. 21, 2014), and the settlement conference record, DB 92–93.

At a hearing, defense counsel reiterated the concerns in his motion, and added that he was also concerned because the only sentence the defendant had "authorized [him] to ask for was life," which was more "than … the State [was] asking for." SH 3. Counsel then said that he "could certainly offer an argument … with respect to mitigating factors," SH 4, but he "felt that [he] had a bona fide doubt" about the defendant's competency, SH 5. The court said that it had reviewed the current pleadings and those "that underlay the previous competency adjudication[s]," SH 5–6, and was not sure it saw "any difference between what [counsel] raised," so it wanted to know whether there was "a material difference" and what it was, SH 6.

Counsel responded that (1) the "material difference" was the "level of overall resignation," SH 8; (2) "depression and competency [went] together … when … someone ha[d] resigned themselves to the process," "it

[was] not clear that they [were] making choices that [were] logical or rational," and they had "more or less given up," SH 8; (3) he did not "know if [he was] exactly there," but he thought he was "closer to that scenario," SH 8; and (4) competency for "[s]entencing present[ed] a different set of questions" than "competency [for] trial," SH 9. The State argued that there was no material difference in the concerns because the defendant's level of resignation was the same as it was in October 2017 when he withdrew his plea and Judge Colburn had the colloquy with him, and it believed that he was again malingering and choosing not to participate or assist his counsel. SH 10, 11, 13.

Based on its review of the record and its own observations, the court did not "think the threshold ha[d] been crossed." SH 14. Further, "based on the history of this case and everything [it had] read," including the relevant case law, the court did not believe it had "hear[d] enough to depart from the previous adjudications with respect to the choices that [the defendant was] making." SH 15.

The court later issued a written order denying the motion. DB 45–52. It held that the raised "competency issue" was "almost identical to [that] raised and adjudicated" in February 2017. DB 49. It found that "the defendant ha[d] the … ability to consult with and assist his attorneys, but ha[d] made the conscious and intentional decision not to do so." DB 50. It found that the defendant's "petulant behavior [was] consistent with Dr. Drukteinis's opinion that he [was] malingering, and that his depression [was] situational and opportunistic," and that his "feelings of depression and resignation on the eve of sentencing for a crime as serious as attempted murder [were] abundantly rational under the circumstances." DB 50.

Further, the defendant's "behavior at sentencing—including, his volitional decision to rip up the sentence review form in open court—as well as his sentence request ... clearly indicate[d] that he understood the nature of the proceeding," and his counsel's presentation of "extensive mitigating evidence ..., [m]uch of [which] was highly personal and specific to [his] life ... suggest[ed] that it [had been] provided ... by [him]." DB 50.

On appeal, the defendant argues that the trial court erred in finding that there was no legitimate doubt about his competency to be sentenced because: (1) "the prior competency evaluations raised legitimate doubts about [his] competency," DB 31; (2) his "request [for] the maximum possible sentence" also did so, DB 32; (3) "there was nothing speculative about the possibility that ... the trial and guilty verdicts [had] rendered him temporarily incompetent," DB 33; and (4) the "previous ruling that the State could obtain a new competency evaluation merely by reindictment ... creat[ed] a double-standard," DB 33.

A. This Court will not address the substance of most of the defendant's arguments because he either did not preserve or waived them, and he has not invoked the plain error rule.

In the trial court, defense counsel argued that sentencing presented "a different scenario," "a different situation," and "a different set of questions" compared to competency for trial. SH 9. By doing so, he waived the defendant's new appellate argument that the same standards applied.

In his brief, the defendant does not challenge the trial court's findings "that he was competent to stand trial," DB 20, n.1, and that he was malingering, DB 27–33. Thus, he has waived any challenge to those

findings. *See State v. Ayer*, 150 N.H. 14, 34 (2003); *State v. Blackmer*, 149 N.H. 47, 49 (2003). Those findings were necessarily a finding that there were no "legitimate doubts" about the defendant's competency at that time. Therefore, the defendant has also waived his argument that "the prior competency evaluations raised legitimate doubts about [his] competency," and that "[t]his history was inconsistent with the court's [post-trial] finding that 'no bona fide doubt existed as to [his] competency ....'" DB 31.

Furthermore, at the hearing on the post-trial motion, defense counsel said that he was not sure the defendant's level of depression had reached the point where he was no longer competent, but he thought they were getting close to that scenario. SH 8. In other words, he waived the defendant's argument that "there was nothing speculative about the possibility that ... the trial and guilty verdicts [had] rendered him temporarily incompetent to be sentenced." DB 32–33.

In addition, in the trial court, the defendant never argued that "the court's denial of [his] request for a new competency evaluation was particularly unsustainable given its previous ruling that the State could obtain a new competency evaluation merely by re-indictment," or that "[t]his combination of rulings create[d] a double standard ...." DB 33. In fact, he never moved the trial court to reconsider the post-trial decision, and the trial court had never made any such pre-trial ruling. Instead, it had held that "once the charges have been dismissed, the State loses its ability to petition for re-evaluation under RSA 135:17-a, VI," so it "would be required to re-indict in order to reassess [his] competency." DB 43. The court then said that defense counsel were free to raise "competency," but it never said that they had to do so or held that the State did not. DB 44.

Defense counsel then waived any argument that the State had to do so when he first said they were going to move for a new evaluation and then agreed that the court could just order one. Therefore, this Court should not address the substance of the foregoing arguments because the defendant waived them, and he has not invoked the plain-error rule.

B. Even if this Court considers all the defendant's arguments, other than those that are factually inaccurate, the trial court did not err in denying his motion.

> Due process guarantees under both the Federal and State Constitutions protect defendants from standing trial if they are legally incompetent. The test for competency, as formulated by the United States Supreme Court in *Dusky v. United States,* 362 U.S. 402, 402 (1960), and adopted by this court, is two-pronged. First, the defendant must have a sufficient present ability to consult with and assist his lawyer with a reasonable degree of rational understanding. Second, the defendant must have a factual as well as rational understanding of the proceedings against him. [This Court] has held that a trial court, in order to comply with due process, *must* order an evidentiary hearing on the issue of competency whenever a bona fide or legitimate doubt arises whether a criminal defendant is competent to stand trial.

State v. Kincaid, 158 N.H. 90, 93 (2008) (quotations and citations omitted).

> [T]he trial court should consider evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competency. Where a trial court has before it only a tentative speculation that the defendant is incompetent, it need not order an evidentiary hearing .... In addition, a trial record void of any indication that the defendant could not assist in his defense, or rationally comprehend the nature of the proceedings, provides substantial evidence of [his] competence.

Id. (quotation and citation omitted).

Neither this Court nor the United States Supreme Court has held that due process requires that a defendant be competent for sentencing or that the *Dusky* standard applies. Assuming that both propositions are true, this Court will "defer to the trial court's determination of competence unless [it] conclude[s] that no reasonable fact finder could have found as the trial court did." *State v. Decato*, 165 N.H. 294, 296 (2013). That is not the case here because the record supports all the trial court's findings.

As demonstrated above, Judge Colburn had considered similar concerns about the defendant's behavior, and had found that he was competent, was malingering, and was choosing not to participate or assist his counsel, *i.e.*, that there was no legitimate doubt about his competency, but he had tried to create some. Numerous judges had then observed the defendant at pretrial hearings, Judge Colburn had conducted a colloquy with him about withdrawing his plea, and Judge Smukler had observed him at jury selection, a pretrial hearing, and at trial, and had conducted a colloquy with him about his counsel's decision to argue he had committed only the lesser offenses. However, none of those judges or defense counsel had raised any concerns about competency. In fact, defense counsel had told Judge Nadeau she did not need to conduct a colloquy with the defendant about his competency, and had told the trial court he understood, and agreed with, their decision to argue for convictions on lesser offenses.

Then, as demonstrated above, defense counsel raised only tentative speculation that the defendant was so depressed he was unable to make rational decisions or assist him. The trial court did not think those concerns were sufficient to depart from the prior decisions concerning the defendant's competence, depression, malingering, and choices. SH 16–18.

Defense counsel then presented substantial mitigating evidence, most of which could only have been provided to him by the defendant. SH 33–44.

In addition, after the trial court sentenced the defendant to 30 years to life, which was less than he had authorized his counsel to request, and imposed the no-contact condition, the defendant assured the court that he understood the sentence, and then ripped up his sentence review form, SH 50, 53. Therefore, given the entire history of the defendant's behavior and the proceedings, it cannot be said that no rational trier of fact could have found that there were no "legitimate concerns" about his competency.

3. The State does not dispute that the trial court erred when it added a no-contact provision to the defendant's stand-committed sentence on his attempted murder conviction.

After the trial court sentenced the defendant to a stand-committed term of 30 years to life on his attempted murder conviction, SH 48, and then added a no-contact provision, SH 52, he argued that under *State v. Towle*, 167 N.H. 315 (2015), a court cannot add a no-contact order to a stand-committed prison sentence. SH 54. The court asked about the fact that the defendant would be on parole, and defense counsel said that his understanding was that the court still could not add the condition. SH 54.

In *Towle*, the defendant received a stand-committed sentence of 57 to 114 years, but none of the sentence was suspended or deferred. *Towle*, 167 N.H. at 327. This Court therefore concluded that "the no-contact order [was] an independent term that require[d] statutory authority for its imposition." *Id.* This Court then held that nothing in RSA 651:2 (2016) gave "trial courts the authority to impose no-contact orders as part of a sentence," and that therefore, by imposing that condition, "the trial court exceeded its statutory authority." *Id.* at 328.

In light of this Court's decision in *Towle*, and the fact that the legislature has not seen fit to amend the sentencing statutes to provide for such a condition since *Towle*, the State does not dispute that the trial court erred in adding the no-contact provision.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court vacate the no-contact order on the defendant's sentence for attempted murder and otherwise affirm the judgment below.

The State requests a fifteen-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
Gordon J. MacDonald
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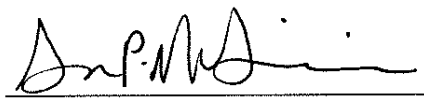

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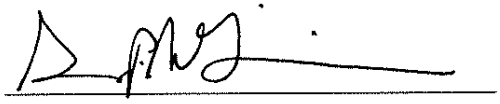
July 19, 2019

CERTIFICATE OF COMPLIANCE

I, Susan P. McGinnis, hereby certify that pursuant to New Hampshire Supreme Court Rule 16(11), this brief contains approximately 9,198 words, which is less than the total permitted by the rule. Counsel has relied on the word count of the computer program used to prepare this brief.

July 19, 2019



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CERTIFICATE OF SERVICE

I, Susan P. McGinnis, hereby certify that two copies of this brief were mailed this day, postage prepaid, to Thomas Barnard, Senior Assistant Appellate Defender, counsel of record for the defendant, at the following address:

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