

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2018-0441

The State of New Hampshire

v.

James Castine

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**APPEAL PURSUANT TO RULE 7 JUDGMENT OF THE  
ROCKINGHAM COUNTY SUPERIOR COURT**

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**BRIEF FOR THE STATE OF NEW HAMPSHIRE**

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THE STATE OF NEW HAMPSHIRE

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Pursuant to *Sup. Ct. R. 36*

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(Oral Argument Waived)

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### **ISSUES PRESENTED**

1. Whether the trial court sustainably exercised its discretion when it considered evidence presented by the State from pending charges that the defendant led a drug enterprise, including evidence that the defendant had a network of people who transported and sold drugs for him, as part of the defendant's sentencing hearing in this case.

2. Whether the State presented sufficient evidence for a rational jury to conclude beyond a reasonable doubt that the defendant had sold fentanyl to a cooperating individual working with the Rockingham County Sheriff's Office.

## STATEMENT OF THE CASE

A Rockingham County grand jury indicted the defendant, James Castine, on three charges of sale of a controlled drug. Tr.:<sup>1</sup> 15-17; RSA 318-B:2 (2016). The charges alleged that on February 21, February 23, and March 3, 2017, the defendant had knowingly sold fentanyl to an individual cooperating with the Rockingham County Sheriff's Office. *Id.* at 15-17.

The defendant's trial took place on January 16, 2018. *Id.* at 1. Over the course of the day, the jury heard testimony and evidence related to the charges. *Id.* at 15-192. The next day, the jury found the defendant guilty on all three charges. *Id.* at 194-97.

The trial court (*Delker, J.*) sentenced the defendant on July 2, 2018. Sen.: 1. On the same day, the trial court held a dispositional conference on the defendant's pending drug enterprise charge in a separate case. *Id.* at 3; RSA 318-B:2, XII. During the sentencing hearing, the court considered evidence regarding the drug enterprise charge from an offer of proof by the State, describing the results of police searches of the defendant's Facebook account. *Id.* at 6-16. The court ultimately sentenced the defendant to 22 1/2 to 45 years in the New Hampshire State Prison, with the conditional opportunity to have some of that time suspended. *Id.* at 28-32. The trial court stated that it had considered evidence of the defendant's conduct in this case, his prior convictions, and the State's proffer regarding the pending drug enterprise case. *Id.* at 28.

This appeal followed.

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<sup>1</sup>"Tr." refers to the transcript of day one of the defendant's trial;  
"Sen." refers to the transcript of the defendant's sentencing hearing;  
"App." refers to the defendant's brief.

## STATEMENT OF FACTS

### **A. Drug Sales**

The Rockingham County Sheriff's Office began investigating the defendant after learning about him from a cooperating individual, Joshua Lamb. Tr.: 40-41. The Epping Police Department had arrested Lamb on February 20, 2017, and charged him with possession of heroin. *Id.* at 39. Lamb told the officers that he had information about drug sales that he was willing to divulge. *Id.* at 103. Specifically, Lamb said that he could arrange to buy heroin from the defendant. *Id.* at 41. Lamb knew the defendant and had been friends with him for years. *Id.* at 42. Lamb said he could visit the defendant's home and purchase up to a gram of heroin from him without arousing suspicion. *Id.* at 41-43. Detective Stephen Soares met with Lamb, and Lamb agreed to work with the detective. *Id.* at 96-107.

Lamb arranged three separate purchases of heroin from the defendant. *Id.* at 107, 117, 124. The sales occurred on February 21, February 23, and March 3, 2017. *Id.* Detective Soares searched Lamb and Lamb's car before and after each sale. *Id.* at 109, 118, 125. Detective Soares also provided pre-recorded money to Lamb for each purchase. *Id.* at 112, 119, 126. In each instance, Detective Soares and several other officers followed Lamb to the defendant's home and waited nearby. *Id.* at 113-14. Lamb entered and gave the defendant the pre-recorded money. *Id.* at 48. Lamb watched the defendant bring out a bag of drugs, measure a small amount, weigh it, and package it. *Id.* at 48-49. The defendant gave the drugs to Lamb, and Lamb left. *Id.* at 49. Lamb then delivered the drugs to Detective Soares. *Id.* at 50.

Each package that the defendant gave to Lamb contained a brown powder mixture of fentanyl and cocaine. *Id.* at 165-66. Lamb testified that he had arranged to purchase heroin, and that he knew that fentanyl was stronger and more potent than heroin, but that he could not visually tell the difference between the two. *Id.* at 41-45. The package from February 21 contained .196 grams of the mixture. *Id.* at 165. The package from February 23 contained .565 grams. *Id.* The package from March 3 contained .439 grams. *Id.* The defendant sold Lamb about 1.2 grams of fentanyl and cocaine over two weeks. *Id.*

#### **B. Sentencing Hearing**

At the defendant's sentencing hearing, the trial court noted that the defendant had a pending drug enterprise charge. Sen.: 3. The State outlined the evidence against the defendant in that case. *Id.* at 6-16. The State argued (1) that the defendant controlled an "extensive network" of people who transported and sold drugs for him; (2) that he had traded drugs for firearms and for sex on different occasions; (3) that he sold to people he knew had overdosed days earlier; and (4) that he controlled the people who worked for him by taking advantage of their addiction and cutting them off of his supply of drugs if they refused to comply with his orders. *Id.* at 3-10. The State said that the Rockingham County Drug Task Force had collected evidence to support the drug enterprise charges in the form of Facebook messages between the defendant, his workers, and his customers. *Id.* at 11-12. The State concluded that the defendant was not a "typical drug dealer," but that he ran an "immense enterprise," that he "manipulate[d]" and

“violently harm[ed]” others, “exploit[ed] other people for his own profit,” and had “no remorse.” *Id.* at 6-15.

Ultimately, the trial court sentenced the defendant to 7 1/2 to 15 years on each charge of sale of a controlled drug. *Id.* at 29-32. The trial court explained its formulation by saying that it had considered the defendant’s conduct in this case, his previous convictions, and the evidence that the State had gathered in his pending case. *Id.* at 29. The trial court concluded that the defendant’s conduct made him an “exhibit A contributor” to the drug problem in Rockingham County. *Id.*



### **SUMMARY OF THE ARGUMENT**

1. The trial court sustainably exercised its discretion when it considered evidence of the defendant's pending drug enterprise charges in determining his sentence. Sentencing courts have wide discretion to consider a broad range of factors and evidence. The trial court properly considered evidence carrying "suspicion to the point of probability" from the defendant's conduct, the indictments, and the State's evidence from the pending drug enterprise case, including records preserved from the defendant's Facebook account.

2. The State presented sufficient evidence at trial for a rational jury to find the defendant guilty beyond a reasonable doubt. The State presented direct and circumstantial evidence of the defendant's guilt, including eyewitness testimony and physical evidence. That evidence, when viewed in the light most favorable to the State, was sufficient to find the defendant guilty on all charges.

## ARGUMENT

**1. THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT CONSIDERED EVIDENCE OF THE DEFENDANT'S PENDING DRUG ENTERPRISE CHARGES TO FORMULATE HIS SENTENCE.**

The trial court had the authority to consider the defendant's pending drug enterprise charge at his sentencing hearing because the State presented sufficient evidence to believe that the defendant probably committed the crime charged in that case. This Court reviews sentencing decisions on an "unsustainable exercise of discretion standard." *State v. Lambert*, 147 N.H. 295, 296 (2001). "To show that the trial court's decision [was] not sustainable, the defendant must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of this case." *Id.* (quotations omitted).

The sentencing court has "broad discretion to choose the sources and types of evidence upon which to rely in imposing a sentence," although the discretion is "not unlimited." *State v. Burgess*, 156 N.H. 746, 751 (2008) (quoting *State v. Lambert*, 147 N.H. 295, 295-96 (2001)). A sentencing court must "consider all the relevant factors necessary to the exercise of its discretion," including "whether the sentence imposed will meet the traditional goals of sentencing—punishment, deterrence and rehabilitation." *Duquette v. Warden, New Hampshire State Prison*, 154 N.H. 737, 746 (2007). Sentencing courts "are not constricted by the rules of evidence." *State v. Nutter*, 135 N.H. 162, 166 (1991).

When a sentencing court considers conduct outside of the defendant's indictment, as the court did here, the only restriction is that the

court should not consider “allegations” that are “unsubstantiated, resolved by acquittals, or the product of speculation.” *State v. Tufts*, 136 N.H. 517, 519 (1992) (quotations omitted). The types of evidence available to the sentencing court are still “broader than those at trial.” *Nutter*, 135 N.H. at 166. The main concern is avoiding evidence of criminal conduct without a “factual basis.” *Tufts*, 136 N.H. at 519 (quoting *State v. Coppola*, 130 N.H. 148, 156 (1987)). Sentencing courts may consider evidence that carries “suspicion to the point of probability.” *State v. Cobb*, 143 N.H. 638, 661 (1999). Additionally, the rules of evidence do not apply at sentencing hearings, the sentencing court may consider evidence that it may normally exclude during trial, such as evidence of “extrinsic bad acts.” *Nutter*, 135 N.H. at 166.

The trial court could consider the defendant’s drug enterprise charge because the State presented sufficient evidence to support the trial court’s reliance on that charge. A grand jury indicted the defendant on the drug enterprise charge prior to his sentencing hearing in this case. Sen., 3-5. A grand jury’s decision to indict the defendant “conclusively determines the existence of probable cause for the purpose of holding the accused to answer.” *Ojo v. Lorenzo*, 164 N.H. 717, 723 (2013).

A finding of probable cause goes beyond speculation or unsubstantiated allegations. Probable cause means that there is “sufficient, trustworthy information to warrant a reasonable person to believe that the [defendant] has committed a crime.” *State v. Lantagne*, 165 N.H. 774, 777 (2013). The defendant’s indictment on the drug enterprise charge represents a determination by the grand jury that there was sufficient and reliable information that the defendant committed that crime.

Furthermore, the defendant acknowledges that the State submitted evidence to the Court to support its offer of proof regarding the evidence in the drug enterprise charges. Sen.: 21. The State presented evidence in the form of a chart, Facebook communications, and an audio recording of a phone call made by the defendant while in jail that supported its position. Therefore, because the trial court relied on evidence carrying suspicion to the point of probability, it sustainably exercised its discretion in relying on the drug enterprise charge. App.: 14. This Court must affirm the trial court's decision.

To the extent that this Court considers this issue under its plain error rule, the trial court did not commit plain error. In order for this Court to find plain error, "(1) there must be error; (2) the error must be plain; and (3) the error must affect substantial rights." *State v. Panarello*, 157 N.H. 204, 207 (2008) (quotations omitted). If this Court finds all of these conditions, it must analyze a fourth criterion: "the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.* (quotations omitted).

The trial court did not err because, as discussed above, the trial court properly considered the evidence before it. But even if the court did err, the error was not plain. "For the purposes of the plain error rule, an error is plain if it was or should have been obvious in the sense that the governing law was clearly settled to the contrary." *Panarello*, 157 N.H. at 209. Governing law in this case states that the rules of evidence do not constrain a sentencing court. *Nutter*, 135 N.H. at 166. In terms of sentencing, evidence must carry "suspicion to the point of probability." *Cobb*, 143 N.H. at 661. This Court has never ruled that a sentencing court may not rely on a

defendant's grand jury indictment in a pending case or the State's evidence supporting that indictment, when it sentences a defendant. No law or precedent exists that plainly demonstrates that the trial court erred. Therefore, even if the trial court did err, the error was not plain.

Even if there was error, and even if that error was plain, it did not affect the defendant's substantial rights. "Generally, to satisfy the burden of demonstrating that an error affected substantial rights, the defendant must show that the error was prejudicial, i.e., that it affected the outcome of the proceeding." *State v. Guay*, 164 N.H. 696, 704 (2013). The trial court made clear that it considered more factors than just the State's proffer. In fact, the court was more concerned with the defendant's "conduct in this case," and his "prior cases." Sen.: 28. The court said that "given the history" and given that this was "not our first interaction," referring to the court and the defendant, that it formulated this sentence to allow the defendant, "after . . . a significant period of incarceration" to "get [his] life on track and lead a productive life after prison." *Id.* at 28-29. The court observed that it had "tried very hard to work with" the defendant in his "last convictions," and the fact that he continues to sell drugs "disappoints the court tremendously" and "undercuts the whole purpose of what the last sentence's rehabilitation was." *Id.* at 29.

The trial court clearly developed this sentence with more mind towards the fact that the defendant had been in this court before on similar charges. The court had tried to rehabilitate the defendant before, and saw the defendant as a continuing "contributor" to Rockingham County's drug problem. *Id.* at 28. The court considered these factors and decided to impose a harsher sentence. If the court erred in considering the State's

evidence from the pending charges, that consideration did not affect the defendant's substantial rights. The court would have given the defendant a similar sentence regardless of whether or not it considered evidence that he ran a drug enterprise.

If the trial court did plainly err in a way that affected the defendant's substantial rights, this Court should still uphold the trial court's sentence. If this Court finds such an error here, it has "the *discretion* to remedy the error – discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Russell*, 159 N.H. 475, 491 (2009) (citations omitted). This analysis is "meant to be applied on a case-specific and fact-intensive basis." *Id.* Meeting this standard "is difficult, as it should be." *Id.*

In *Russell*, this Court declined to exercise its discretion under the fourth prong of the plain error rule to reverse a conviction and a sentence. *Id.* The trial court in that case sentenced the defendant to an extended prison term without giving the proper jury instructions during the trial. *Id.* at 489. The instructions said that the jury must unanimously conclude that the defendant used a firearm during the armed robbery for which he was on trial. *Id.* On review, this Court declined to exercise its discretion and disturb the sentence because "the real threat ... to the fairness, integrity, and public reputation of judicial proceedings would be if the defendant, despite the overwhelming and uncontroverted evidence that he used a firearm, were not to receive the enhanced sentence. *Id.* at 492 (quotations omitted).

This case is similar to *Russell*. Here, the defendant is a repeat offender, and the trial court recognized him from the similar convictions for which he had appeared before the trial court in the past. Sen.: 28-29. The

court emphasized that it had tried to work with the defendant before and rehabilitate him so that he could live a “productive life after prison.” *Id.* The defendant continued his criminal conduct and “undercut[] the whole purpose” of rehabilitation. *Id.* at 29. If the trial court did consider the State’s proffered evidence of the defendant’s drug enterprise when formulating his sentence in such a way that it affected his substantial rights, then this Court should not disturb that sentence. The “real threat” to the “fairness, integrity, and public reputation of judicial proceedings” would be if the trial court gave the defendant a lesser sentence despite his continued criminal activities that undercut rehabilitation and are detrimental to the community at large. *Russell*, 159 N.H. at 492. Therefore, this Court must affirm.

**2. THE STATE PRESENTED SUFFICIENT EVIDENCE AT TRIAL FOR A RATIONAL JURY TO FIND THE DEFENDANT GUILTY.**

At trial, the State presented sufficient direct and circumstantial testimony and evidence that a rational trier of fact could find the defendant guilty beyond a reasonable doubt. This Court reviews challenges to the sufficiency of the evidence *de novo*, and it “objectively review[s] the record to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Boggs*, 171 N.H. 115, 125 (2018). “[T]he defendant ‘bears the burden of demonstrating that the evidence was insufficient to prove guilt.’” *Id.* (quoting *State v. Sanborn*, 168 N.H. 400, 412 (2015)). This Court will “consider the evidence in the light most favorable to the [S]tate and examine each evidentiary item in context, not in isolation.” *State v. Shepard*, 158 N.H. 743, 746 (2009).

A sufficiency of the evidence analysis involving witness credibility “need not exclude all rational conclusions other than guilt in a case that does not rely solely on circumstantial evidence . . . because of the jury’s role in making credibility determinations.” *State v. Saunders*, 164 N.H. 342, 352 (2012).

That is, where the proof involves both direct and circumstantial evidence, a sufficiency challenge must fail if the evidence, including the jury’s credibility determinations, is such that a rational trier of fact could find guilt beyond a reasonable doubt, even if the evidence would support a rational conclusion other than guilt if the jury had resolved credibility issues differently.

*Id.*



At trial, the State presented both direct and circumstantial evidence of the defendant's guilt. Joshua Lamb described in detail how the defendant possessed and sold drugs. Tr.: 47-50. Lamb described watching the defendant taking his money, pulling out a large package of drugs from his pants, measuring out a small quantity of powder from the larger package, weighing the smaller quantity, packaging the smaller quantity, and giving that package to him. *Id.* Detective Soares described how he followed Lamb to each buy and received a package of drugs from Lamb after each buy. *Id.* at 113, 131. Detective Soares also described searching Lamb before and after each buy to ensure that the drugs could only have come from the defendant. *Id.* at 109, 118, 125. The State depicted, through testimony and physical evidence, how the defendant had sold drugs to Lamb three separate times. Lamb's testimony constituted direct evidence of the defendant's guilt.

To the extent that the defendant contends that no reasonable jury could have found him guilty because no reasonable jury could have found Lamb credible, that contention lacks merit. The jury has broad leeway to make credibility determinations, and this Court must assume that the jury, in convicting the defendant, resolved all credibility determinations in the State's favor. *See, e.g., State v. McDonald*, 163 N.H. 115, 121 (2011) (“[I]t is the province and obligation of the jury to determine the credibility of witnesses.”); *State v. Thomas*, 154 N.H. 189, 193 (2006) (“It is the jury which observes the witnesses, judges their credibility and hears their testimony, accepting or rejecting it in whole or in part.”); *State v. Jordan*, 148 N.H. 115, 120 (2002) (“It is well settled that the jury has substantial latitude in determining the credibility of witnesses.”). Lamb provided direct

testimony that he witnessed the defendant commit the crimes. The jury believed Lamb and accordingly, convicted the defendant. Thus, the defendant's sufficiency challenge fails. Accordingly, this Court must affirm.

**CONCLUSION**

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

The State waives oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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April 17, 2019

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Pursuant to *Sup. Ct. R. 36*

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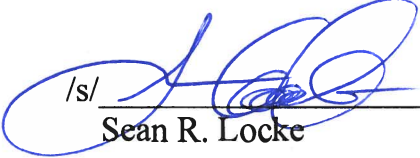
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**CERTIFICATE OF COMPLIANCE**

I, Sean R. Locke, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 3,353 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

April 17, 2019

/s/   
Sean R. Locke

**CERTIFICATE OF SERVICE**

I, Sean R. Locke, hereby certify that a copy of the State's brief shall be served on counsel for the defendant, David Rothstein, by first-class mail postage prepaid, at the following address:

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