

# The State of New Hampshire

## SUPREME COURT

Case No. 2018-0710

2019 TERM

STATE OF NEW HAMPSHIRE

V.

KAREN FOLLEY

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RULE 7 APPEAL OF JURY VERDICT FROM THE  
HILLSBOROUGH COUNTY SUPERIOR COURT – NORTHERN  
DISTRICT

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### **BRIEF OF THE DEFENDANT KAREN FOLLEY**

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## **QUESTIONS PRESENTED**

1. Whether or not the evidence was sufficient for the jury to have found beyond a reasonable doubt whether the defendant's use of the money was unauthorized?
  
2. Whether or not the evidence was sufficient for the jury to have found beyond a reasonable doubt whether the money used was the property of another?
  
3. Whether or not the court erred when it found Summer Hill was a victim under RSA 651:62 VI and ordered the defendant to pay restitution to Summer Hill?

## **STATEMENT OF THE FACTS AND STATEMENT OF THE CASE**

This appeal follows a jury trial in the Hillsborough County Superior Court – Northern District. Following trial, the defendant, Karen Folley was found guilty of two charges of Theft by Unauthorized Taking.

Karen Folley is the wife of James Folley. TR441. James Folley was the brother of Barbara McEneaney, the alleged victim in this matter. TR 442. In 2006, Barbara went to live with James and his wife, Karen in their home in Bennington, NH. TR 444. At the time, Barbara's husband was moved to a nursing home and Barbara could not live on her own. TR 545. None of Barbara's five stepchildren were willing to take care of Barbara. TR 545 – 550. James agreed to take care of Barbara and she moved in with James and Karen for approximately six to nine months. Id.

While Barbara was living there, they lived as a family. Id. Karen developed a relationship with Barbara like a sister. Id. James and Karen would take Barbara to visit her husband, they would take her out shopping, out for meals, and to all her medical appointments. Id. James, Karen, and Barbara grew closer developing a strong relationship. Id. On May 11, 2006, Barbara named James as a Power of Attorney for finances and for healthcare. State's Exhibit 4.

In late 2006, Barbara moved to Scott Farrar, an assisted living facility in Peterborough, NH. TR 553. James and Karen continued to take her to all of her appointments and maintained their close relationship by taking her out for day trips and shopping, as they did when they lived together. TR 552 – 553. In 2008, James had health issues and was forced to take several weeks off work. TR 449 – 450. This created a financial

hardship for James and Karen. TR 450. James was ultimately forced to retire as a result in 2011. TR 447, 553. In 2008, Karen was also forced to retire from work due to a physical disability. TR 553. These events were unforeseen and caused significant financial hardship for James and Karen. As a result, James talked to Barbara about his situation. TR 464 – 465. During this conversation, Barbara agreed to help James financially based on his situation. *Id.* James's described his use of Barbara's money as family helping family based on his conversation with Barbara. TR 490.

On June 19, 2010, Barbara opened a joint checking account and named James Folley as attorney in fact on that account. TR 299 – 300. Then on September 28, 2011, Barbara changed James' designation to a joint owner with right of survivorship. TR 300 – 301. A debit card was attached to the account on October 24, 2011. TR 250. Barbara remained at Scott Farrar until she moved to Summer Hill in October 2011. TR 61. After Barbara moved to Summer Hill, Karen and James assisted Barbara with her finances, but Barbara was involved in the review of her statements and the drafting of checks. TR 468 – 469, 482, 559 – 560.

On March 13, 2013, Barbara and James went to the bank at Barbara's request and Barbara withdrew \$50,000 to give to James as an inheritance. TR 472 – 475. The purpose was to help James complete building his dream garage to build hotrod cars. *Id.* Barbara maintained an active role in her finances until August of 2013, when Dr. Shippee activated the durable power of attorney for healthcare. TR 135 – 136. At that point, James and Karen took over the handling of Barbara's finances. They continued to review the statements monthly. *Id.*

Around this point in time, Barbara was moved to the Memory Care Unit at Summer Hill, a locked facility and her ability to come and go was significantly limited. TR. 76 – 77. The cost of Barbara’s care was significantly higher in the Memory Care Unit due to the increased care needed. TR 77. James was able to negotiate a lower rate with Summer Hill for Barbara’s monthly expenses. TR 77 – 78; 475 - 476. This was necessary because Barbara was running out of money. Id. Summer Hill knew how much money Barbara had when she entered the facility and how much she was earning each month when they agreed to the lower monthly rate. TR 69 – 71.

In April of 2015, James filed for Medicaid on behalf of Barbara because she was out of money and could no longer afford Summer Hill. TR 161. An investigation was started by the long-term care office, as is custom for individuals requesting assistance and needing placement in a nursing home. TR 159 – 161. The investigation looks back 5 years. Id. James and Karen cooperated with the investigation, attempting to explain where the money went. TR 569 – 574. When they provided answers, James and Karen did not have bank records in front of them, they merely reviewed excel spreadsheets produced by the Medicaid investigators. Id. The Folley’s wrote answers on the sheets and sent them back. Id.

In January and February of 2016, investigator Shawn Driskell went to the Folley’s home and interviewed them about their application. TR 573 – 577. Again, the Folley’s cooperated fully with Investigator Driskell attempting to explain what happened to the money. Id. During this interview, the Folley’s made clear that all their spending was either pre-authorized by Barbara or paid back. TR 369 – 371. Both James and Karen



reiterated this during their testimony. TR 562 – 564; 581 - 582. As well, having the records provided in discovery enabled the Folley's to look at the actual spending and point out situations where their notes were incorrect. TR 587 – 594.

Following the State's case-in-chief, the Court denied defendant's motion to dismiss finding that it was up to the jury to determine the nature of the arrangement between the Folley's and Barbara. TR 429. Following the State's case, both James and Karen Folley testified explaining the actual nature of the agreement between them. At the conclusion of the case, the jury returned verdicts of guilty on all charges. Following the verdicts, the defense moved to vacate the convictions arguing insufficient evidence as to authorization and property of another. The motion was denied.

At the sentencing hearing, the Court ordered restitution to Summer Hill over the defendant's objection. SENT 22 – 23, 45. The Court ordered Karen to pay \$44,293.27 joint and several to Summer Hill along with James Folley, who was ordered to pay \$90,030.27. SENT 46.

## **SUMMARY OF ARGUMENT**

In this case, there was insufficient evidence presented to prove beyond a reasonable doubt that Karen Folley's use of a check and/or debit card linked to a (Sovereign) Santander bank checking account and money market account belonging to Barbara McEneaney and James Folley was unauthorized and/or the property of another. In order to establish that the use was unauthorized and/or the property of another, it is the defendant's position that the State relied exclusively on circumstantial evidence, as Barbara McEneaney, the alleged victim, did not testify at trial. Therefore, there was no evidence of whether the arrangement provided one owner of the account a privilege to take funds from the account under the circumstances in which that owner withdrew them.

When the State relies solely on circumstantial evidence to prove an element, it must exclude all reasonable conclusions except guilt. In this case, the Folley's testified at trial and explained the arrangement between James Folley, Karen Folley, and Barbara McEneaney. As they told investigator Driskell, their use of the funds was not only known, but also authorized by Barbara McEneaney. The Folley's had taken care of Barbara McEneaney at her time of need, as family does. Barbara's stepchildren could not be bothered to help. The Folley's developed a bond and as they helped Barbara in her time of need, Barbara helped them in theirs. This constitutes direct evidence establishing the privilege established by the arrangement. This evidence also supports a reasonable conclusion consistent with innocence. Therefore, the State cannot exclude the reasonable conclusion that Barbara McEneaney authorized the defendant's use of the funds from their joint account.

Assuming the Court finds there was sufficient evidence to prove that Karen's use of the funds was unauthorized or the property of another, the defendant argues that Summer Hill was not a victim and therefore not entitled to restitution. Any loss suffered by Summer Hill was the result of a contractual agreement between them and James Folley for a reduced rate for Barbara McEneaney to stay there. Summer Hill was aware of how much money Barbara had when she entered the facility and they knew how much they had charged her to stay there. As a result, they should have known that the money was gone too early. Nevertheless, they still agreed to accept a lower monthly rate. As such, they are not a victim because they did not suffer an economic loss as a result of the offender's conduct. Their loss was the result of their own choice to continue doing business with Barbara McEneaney at a reduced rate.

## ARGUMENT

### **I. THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT WHETHER THE DEFENDANT’S USE OF THE MONEY WAS UNAUTHORIZED**

The defendant, Karen Folley was charged with two counts of Theft by Unauthorized Taking. The two indictments alleged different amounts of theft based on how the money was taken, to wit ATM transactions and retail transactions. The relevant parts of the indictments are identical and allege that

pursuant to one scheme or course of conduct, Karen Folley, acting in concert with and aided by James Folley in the commission of the crime of theft by unauthorized taking, obtained or exercised unauthorized control over the property of another, Barbara McEneaney, with a purpose to deprive her thereof, the aggregate value of which exceeded \$1,500. Karen Folley acted with a purpose of promoting or facilitating the theft of the property.

RSA 637:3 makes it unlawful for a person to “obtain or exercise unauthorized control over the property of another with a purpose to deprive him thereof.” Thus, the State must prove beyond a reasonable doubt that the defendant (1) obtained or exercised unauthorized control over; (2) the property of another; (3) with a purpose to deprive the other of the property. *State v. Gagne*, 165 N.H. 363, 368 (2013).

The defendant maintains that the State introduced no direct evidence regarding whether the use of the funds was authorized or not. Since Ms. McEneaney did not testify at trial the State was unable to prove whether the

defendant's use of the funds from a joint account in the name of Barbara and James was authorized. The defendants told investigators that the money was Barbara's and that she was in control of her money, this does not demonstrate or prove whether she authorized the defendant to use the money or not. In the absence of testimony by Ms. McEneaney detailing which transactions were authorized and which were not, the State could not meet its burden of proof that the use was not authorized, especially since James was a co-owner with right of survivorship on the account. The Folley's maintained prior to and during trial that their use of the funds was not only known by Ms. McEneaney, but also authorized by her. They detailed at trial how they would review transactions and purchases with Ms. McEneaney either prior to or after their occurrence. Based on the testimony and evidence presented at trial, Ms. McEneaney was involved with her banking records and authorized the use of the money by the Folley's.

Part of the State's evidence attempting to prove lack of authorization were the Folley's written notes on lookback logs that were submitted to Medicaid. Even though these notes were written without the benefit of receipts or bank records, they still do not prove that the use of the money was unauthorized. The Folley's found errors in their notes when they were subsequently provided with the actual records to support them and they noted those in trial. Incorrect statements made years later describing what was purchased does not indicate whether the purchase was authorized.

The problem with not having the alleged victim testify about authorization is it leaves open the possibility that the State's theory is incorrect and the defendant's use of the money was, in fact, authorized.

Thus, in the absence of direct testimony from one owner of a joint account that the use of the money was unauthorized (or beyond the scope of the agreement), the State cannot meet its burden of proof as a matter of law that the use by another owner was unauthorized and the matter should have been dismissed.

In the absence of evidence that directly proves the fact for which it is offered, without the need for the factfinder to draw any inferences, the State must rely on circumstantial evidence. Here, that is all that was presented on the issue of authorization. Thus, the State asked the jury to infer that the use was unauthorized.

The defendant is challenging the sufficiency of the circumstantial evidence as to the element of authorization. This requires the burden to shift to the defendant to establish that the evidence does not exclude all reasonable conclusions except guilt. *State v. Germain*, 165 N.H. 350, 361 (2013). According to *Germain*, the reviewing court must evaluate the evidence in the light most favorable to the prosecution and determine whether the alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. *Id.* at 361 – 362.

Here, an alternative reasonable conclusion consistent with innocence exists. The defendants told investigators and the jury that their use of the funds was authorized by the alleged victim. The defendants took the alleged victim into their home and cared for her when no one else in her family would. She was left alone and abandoned by her husband's family. James and Karen Folley willingly agreed to take her in, even when they were, at the time, caring for James' mother as well. James and Karen not

only took her in, but they also dedicated their time to caring for her, spending time with her, doing activities with her, and taking her to appointments. James and Karen even took Ms. McEneaney multiple times to visit her husband while he was in a nursing home before he died. Even after Ms. McEneaney moved into assisted living facilities, James and Karen continued to visit, spend time, and enjoy things together with Ms. McEneaney. James was her brother. He was the only family she had that actually cared about her, that actually spent time with her, and that visited her regularly. The Folley's made clear that their actions were based on the premise that family takes care of family. This was the explanation provided for why Ms. McEneaney would authorize their use of the money when it was needed. Ms. McEneaney was willing to help the Folley's in their time of need, as they were willing to help Barbara in hers.

This conclusion is made more reasonable because Ms. McEneaney added James to her account, not just as power of attorney, but as co-owner with rights of survivorship. This took place after James asked Barbara for help and after Barbara agreed to help. This demonstrates she wanted James to have her money and not her stepchildren that abandoned her. Ms. McEneaney was living in an assisted living environment. Her money was either going to go to pay the facility or was going to go to James. It is reasonable to find that she preferred to help her brother James and Karen rather than Summer Hill.

Therefore, in the absence of direct evidence on the issue of authorization, there remains a conclusion consistent with innocence that the use was authorized. As a result, no rational juror could find beyond a reasonable doubt that the State proved the circumstances presented were

consistent with guilt and inconsistent with any reasonable hypothesis of innocence.



## **II. THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT’S USE OF THE MONEY WAS PROPERTY OF ANOTHER**

The defendant, Karen Folley was charged with two counts of Theft by Unauthorized Taking. The two indictments alleged different amounts of theft based on how the money was taken, to wit ATM transactions and retail transaction. The relevant parts of the indictments are identical and allege that

pursuant to one scheme or course of conduct, Karen Folley, acting in concert with and aided by James Folley in the commission of the crime of theft by unauthorized taking, obtained or exercised unauthorized control over the property of another, Barbara McEaney, with a purpose to deprive her thereof, the aggregate value of which exceeded \$1,500. Karen Folley acted with a purpose of promoting or facilitating the theft of the property.

RSA 637:3 makes it unlawful for a person to “obtain or exercise unauthorized control over the property of another with a purpose to deprive him thereof.” Thus, the State must prove beyond a reasonable doubt that the defendant (1) obtained or exercised unauthorized control over; (2) the property of another; (3) with a purpose to deprive the other of the property. *State v. Gagne*, 165 N.H. 363, 368 (2013).

The legislature defined “property of another” as “property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property.” RSA 637:2, IV. This Court has held that “property of another” includes a joint bank account. *Gagne*, 165 N.H. at

370. Citing to the commentary of the Model Penal Code, the Court went on to explain

The formality of the arrangement between the thief and the owner is immaterial. Instead, what is important is that the thief sets out to appropriate a property interest beyond any privilege established by the arrangement. Thus to determine whether a person was privileged to appropriate funds in a joint account, and, hence, whether the funds were the property of another, we look to the privilege established by the arrangement. With respect to a joint account, if the arrangement does not provide one owner of the account with a privilege to take funds from the account in the circumstances under which that owner withdrew them, that owner may be convicted of stealing.

*Id.* at 372 (citations and quotations omitted).

In *Gagne*, the defendant argued that she did not need the victim's permission to withdraw funds and the Court found that does not mean the defendant was privileged to appropriate the victim's interest in those funds.

*Id.* The Court then went on to rely on the victim's testimony that the purpose of the joint account was to allow the defendant to better assist her with big bills and that she never authorized the defendant to make withdrawals from the joint account for her own needs. *Id.* Relying on the direct evidence of the victim's testimony, the Court found such evidence sufficient to establish that the funds in the joint bank account were the "property of another."

In this case the State introduced no direct evidence regarding

whether money spent was, in fact, the “property of another.” Unlike *Gagne*, the victim did not testify to the nature of the arrangement between herself and James Folley. The victim did not testify that she did not give James Folley permission to withdraw funds and use for his own purposes.

In the absence of such testimony, the State could not and did not meet its burden that the funds were “property of another” beyond a reasonable doubt. As a matter of law, in the absence of testimony from another party to a joint bank account establishing the nature of the agreement the State cannot meet its burden regarding whether the funds in said account are the property of another when used by the other owner.

The victim did not testify to the nature of the arrangement. The defendant’s told investigators that Barbara was in control of her money and that they helped her. This does not prove the nature of the agreement, as it remains reasonable that Barbara would allow the defendants to use her money. There is no evidence in the record that proves Barbara did not allow the Folley’s to use the money. If Barbara allowed James and Karen to use her money, it is not property of another. The defendants told investigators and testified that Ms. McEneaney was aware of and authorized their use of funds in the joint account. This direct testimony clearly demonstrates the nature of the agreement between Ms. McEneaney and the Folley’s. This evidence is the only evidence that was offered regarding the nature of the agreement.

To meet its burden of proof on this element, the State attempts to rely solely on circumstantial evidence to infer the nature of the agreement between Ms. McEneaney and James and Karen Folley. The defendant challenges the sufficiency of the circumstantial evidence as to the element

of property of another. This requires the burden to shift to the defendant to establish that the evidence does not exclude all reasonable conclusions except guilt. *Germain*, 165 at 361.

Here, as in the case of authorization, an alternative reasonable conclusion consistent with innocence exists. The defendants told investigators and the jury that their use of the funds was authorized by the alleged victim. The defendants took the alleged victim into their home and cared for her when no one else in her family would. She was left alone and abandoned by her family. James and Karen Folley agreed to take her in, even when they were, at the time, caring for James' mother as well. James and Karen not only took her in, but they also dedicated their time to caring for her. Spending time with her, and taking her to appointments. James and Karen even took Ms. McEneaney multiple times to visit her husband while he was in a nursing home before he died. Even after Ms. McEneaney moved into assisted living facilities, James and Karen continued to visit, spend time, and enjoy things together with Ms. McEneaney. James was her brother. He was the only family she had that actually cared about her, that actually spent time with her, and that visited her regularly. Karen even testified that they became like sisters during this time. The Folley's made clear that their actions were based on the premise that family takes care of family. This was the explanation provided for why Ms. McEneaney would authorize their use of the money in their time of need. Ms. McEneaney was willing to help the Folley's in their time of need, as they were willing to help her in hers.

This conclusion is made more reasonable because Ms. McEneaney added James to her account, not just as power of attorney, but as co-owner

with rights of survivorship. This demonstrates she wanted James to have her money and not her stepchildren that abandoned her. Ms. McEneaney was living in an assisted living environment. Her money was either going to go to pay the facility or was going to go to James. It is reasonable to find that she preferred to help James and Karen rather than Summer Hill.

Therefore, in the absence of testimony by one owner on the issue of whether the money used by the other owner in a joint account constitutes “property of another,” there remains a conclusion consistent with innocence that the use was within the nature of the agreement. If the use was within the nature of the agreement, then as a matter of law, it cannot be “property of another.” As a result, no rational juror could find beyond a reasonable doubt that the State proved the circumstances presented were consistent with guilt and inconsistent with any reasonable hypothesis of innocence.

### **III. THE COURT ERRED WHEN IT FOUND SUMMER HILL WAS A VICTIM UNDER RSA 651:62 VI AND ORDERED THE DEFENDANT TO PAY RESTITUTION TO SUMMER HILL.**

Following guilty verdicts on all counts, the court imposed sentence. In addition to other terms, the Court ordered Karen Folley to pay restitution in the amount of \$44,293.27 to Summer Hill over the defendant's objection, joint and several with James Folley. The defendant argues that Summer Hill was not a victim and should not gain the benefit of restitution.

RSA 651:62 defines "restitution" as "money or service provided by the offender to compensate a victim for economic loss, or to compensate any collateral source subrogated to the rights of the victim, which indemnifies a victim for economic loss under this subdivision." RSA 651:62, V. According to this definition, restitution can only be paid to a "victim" or a collateral source subrogated to the rights of the victim.

RSA 651:62 defines "victim" as "a person or claimant who suffers economic loss as a result of an offender's criminal conduct or the good faith effort of any person attempting to prevent or preventing the criminal conduct." RSA 651:62, VI.

The defendant argues that Summer Hill does not meet the definition of "victim" in this matter. Summer Hill was provided with Ms. McEneaney's financial information when she applied to Summer Hill. They were made aware of her monthly income at the time in addition to the amount of money she had in savings.

At the time James Folley advised Summer Hill that Ms. McEneaney's money was gone, Summer Hill was in a position to know whether that was consistent with the amount they charged, and the amount

Ms. McEneaney had when she entered. Summer Hill chose not to investigate or wonder about where the money had gone. Instead, they made a choice to simply negotiate a new monthly amount with James Folley. As such, they did not suffer economic loss as a result of James and Karen Folley's criminal conduct. Rather, Summer Hill suffered economic loss as a result of their voluntary choice to accept a lower monthly rate. They entered into this bargained for agreement with full knowledge of Ms. McEneaney's financial status. They had access to her financial information. They could have requested an explanation for why the need existed for a lower rate. They chose not to ask. They engaged in a good faith negotiation with James Folley and they did so voluntarily. Summer Hill was not forced to engage in the negotiations. Summer Hill was not forced to accept the lower rate. As a result, they did not suffer a loss as result of the offender's conduct. Rather, they suffered an economic loss as a result of their voluntary choice to accept less money each month to allow Ms. McEneaney to remain in their facility. This was a voluntary choice.

As such, the defendant argues that Summer Hill is not a "victim" and should not be entitled to restitution. The money that was spent belongs to James Folley upon the death of Ms. McEneaney. This was her wish, as evidenced by her granting James survivorship rights on the joint bank account. As such, the restitution order should be vacated.

## CONCLUSION

In this case, there was insufficient evidence to prove beyond a reasonable doubt that the use of the money in a joint account was either unauthorized or the property of another. The State relied solely on circumstantial evidence to prove both elements. As such, they must prove beyond a reasonable doubt that the evidence excludes all reasonable conclusions except guilt. In the absence of testimony from one owner of the account claiming the others use was beyond the scope of their agreement, they cannot meet their burden of proof.

Further, the trial court erred when it ruled that Summer Hill was a victim under RSA 651:62 and ordered restitution to be paid to them.

Given the facts and argument as stated above the defendant's conviction should be vacated.



## WAIVER OF ORAL ARGUMENT

I, Michael J. Zaino, Counsel for Karen Folley, hereby waives oral argument.

## CERTIFICATIONS

I, Michael J. Zaino, hereby certify that on July 1, 2019, copies of the foregoing was forwarded to the NH Attorney General's Office, as counsel for the State, and to Attorney Justin Shepherd, as counsel for the co-defendant, James Folley, by electronic service.

I, Michael J. Zaino, hereby certify that the appealed decision is in writing and is appended to this brief.

Respectfully submitted,  
**Karen Folley**

By her Attorney,

Dated: July 1, 2019

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