

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2018-0708

State of New Hampshire

State of New Hampshire

v.

and

v.

James Folley

Karen Folley

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
HILLSBOROUGH COUNTY SUPERIOR COURT
NORTHERN DISTRICT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

Gordon J. MacDonald
Attorney General

Bryan J. Townsend, II
N.H. Bar ID No. 19842
Assistant Attorney General
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301
(603) 271-7094

(The State Waives Oral Argument)

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
ISSUES PRESENTED	5
STATEMENT OF THE CASE	6
STATEMENT OF FACTS.....	7
SUMMARY OF THE ARGUMENT.....	13
ARGUMENT	15
1. THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANTS OF THEIR CRIMES	15
A. The defendants’ arguments fail because they do not apply this court’s sufficiency standard correctly.	15
B. The State submitted direct evidence to prove that the defendants lacked authorization to use Barbara’s money and that Barbara’s money was property of another.	16
C. The State’s evidence excluded all reasonable conclusions except for the defendants’ guilt.....	18
2. SUMMERHILL IS ENTITLED TO RESTITUTION BECAUSE IT SUFFERED ECONOMIC LOSS AS A DIRECT RESULT OF THE DEFENDANTS’ CRIMES.....	23
CONCLUSION	26
CERTIFICATE OF COMPLIANCE	27
CERTIFICATE OF SERVICE.....	28

TABLE OF AUTHORITIES

Cases

<i>In re Search Warrant for 1832 Candia Road, Manchester</i> , 171 N.H. 53 (2018).....	24
<i>State v. Cable</i> , 168 N.H. 673 (2016)	17
<i>State v. Evans</i> , 150 N.H. 416 (2003)	22
<i>State v. Fogg</i> , 170 N.H. 234 (2017)	24
<i>State v. Gagne</i> , 165 N.H. 363 (2013)	16, 17, 20
<i>State v. Hanes</i> , 171 N.H. 173 (2018).....	18, 24
<i>State v. Karasi</i> , 170 N.H. 543 (2018).....	19
<i>State v. Kelley</i> , 159 N.H. 449 (2009).....	17
<i>State v. Labrie</i> , 171 N.H. 475 (2018)	7, 15, 16
<i>State v. Newcomb</i> , 140 N.H. 72 (1995)	19, 20
<i>State v. Woodbury</i> , ___ N.H. ___ (decided July 11, 2019) (slip op.) ...	16, 20

Statutes

RSA 626:8, II(c) (2016)	6
RSA 631:9 (2016).....	6, 16
RSA 631:10 (2016).....	6
RSA 637:2, IV	16
RSA 637:3 (2016).....	6, 16
RSA 651:61-a, I (2016)	23
RSA 651:62	24
RSA 651:62, V (2016).....	23

RSA 651:62, VI.....	24
RSA 651:63	13
RSA 651:63, I (2016)	23

Other Authorities

<i>Webster's Third New International Dictionary</i> (unabridged ed. 2002)	20
---	----

ISSUES PRESENTED

1. Whether the State presented sufficient evidence to prove the defendants took the “property of another.”

2. Whether the State presented sufficient evidence to prove the defendants took the victim’s property without authorization.

3. Whether the long-term care facility in which the victim lived was entitled to restitution where it suffered economic loss as a direct result of the defendants’ crimes.

STATEMENT OF THE CASE

Following a joint jury trial in the Hillsborough County Superior Court (Northern District), James Folley (“James”) and his wife, Karen Folley (“Karen”), were each convicted of two class A felony counts of theft by unauthorized taking, as principal/accomplice. Tr. 707-08.¹ *See* RSA 626:8, II(c) (2016), RSA 637:3 (2016). James was convicted of one additional class A felony count of theft by unauthorized taking and one class B felony count of financial exploitation of an elderly adult, *see* RSA 631:9, :10 (2016). Tr. 707-08.

James was sentenced to serve one to four years in the New Hampshire State Prison for Men, stand committed. S. Tr. 46. He received additional State Prison sentences that were conditionally suspended. S. Tr. 46-50. Karen was sentenced to serve one to two years in the New Hampshire State Prison for Women, stand committed, with one additional sentence that was conditionally suspended. *Id.* The trial court (*Abramson, J.*) also ordered both defendants to pay restitution. *Id.*

The defendants filed separate notices of appeal. On February 13, 2019, this Court consolidated the matters. Because the matters are consolidated, and the issues raised and arguments made by each defendant are virtually identical, the State submits a single brief responsive to both defendants.

¹ “Tr.” refers to the trial transcript.
“S. Tr.” refers to the sentencing transcript.
“JB” refers to James Folley’s brief.
“KB” refers to Karen Folley’s brief.

STATEMENT OF FACTS

The facts herein are set forth in the light most favorable to the State, as required in appeals concerning sufficiency of the evidence. *See State v. Labrie*, 171 N.H. 475, 482 (2018). There is a stark contrast, however, between the “facts” set forth in the defendants’ briefs and those to follow. The reason for the contrast is simple: no fair-minded person could describe the defendants’ versions of “the facts” as cast in the light most favorable to the State. The defendants omit facts supportive to the State and ask the court to credit their own trial testimony, much of which was contradicted by the State’s evidence. Given the defendants’ decisions not to follow the legal standard applicable to this case, the State requests that this Court consider the defendants’ sufficiency challenges according to the following factual recitation:

In October 2011, James’s sister, Barbara McEneaney (“Barbara”), applied for admission to Summerhill Assisted Living (“Summerhill”). Tr. 59-61. Barbara, then 77 years old, had Parkinson’s disease, which limited her mobility. Tr. 66-68. She required the use of a walker and needed complete assistance managing many daily activities, such as cooking, cleaning, and taking medication. Tr. 68.

Summerhill is a private-pay facility and does not accept State assistance, such as Medicaid. Tr. 64. Staff informs prospective residents that their assets and income are reserved for payment to Summerhill. *Id.* Barbara disclosed the entirety of her assets, roughly \$170,000, and monthly income of \$1,900, on her application. Tr. 69-70. Her resources would have allowed her to live at Summerhill for several years. Tr. 69-71.

Barbara moved into one of Summerhill's smallest units, which lacked special amenities like a kitchenette. Tr. 71-72. The choice reflected Barbara's frugality; she spent deliberately and cautiously. In the 19 months before moving to Summerhill, Barbara spent less than \$600 on non-essential, retail spending. Tr. 245. More than 98% of her spending was for housing and medical care. Tr. 248. Barbara rarely donated to charity and, then, only in small amounts. *Id.* She paid bills by check and did not have a debit card. Tr. 236.

Barbara added James to her bank accounts as a co-owner when she moved to Summerhill. Tr. 237. James also obtained a debit card linked to Barbara's primary checking and savings accounts. *Id.* Both James and Karen ran errands for Barbara at times, and Barbara gave James access to her accounts to assist her in purchasing necessities. Tr. 75, 344-46. The defendants understood the money in Barbara's accounts belonged to Barbara alone. Tr. 169, 171. James also served as Barbara's attorney-in-fact under a durable power of attorney, which imposed a fiduciary obligation on him to act in her best interests. Tr. 321-22.

Barbara enjoyed Summerhill and participated in many activities. She often played bingo—for 10 cents per game. Tr. 69, 110. She attended knitting groups and played bridge. Tr. 69-70, 73, 109-10. Barbara also enjoyed reading, and staff drove her to a local bookstore to buy used books; each time she exchanged a book in order to receive a discount. Tr. 109-10. She accompanied fellow residents and staff to retail stores, but rarely bought anything. Tr. 111-12. Barbara continued to manage her own finances for a time after moving to Summerhill, spending money on necessities only, like her rent and medical expenses. Tr. 250.

In April 2012, James changed the address associated with Barbara's primary accounts so that the bank no longer sent account statements to Barbara at Summerhill, but to the defendants' home instead. Tr. 255-56. On August 7, 2012, Barbara told her primary care doctor that she was experiencing memory loss, which caregivers and family members also observed. Tr. 129, 132.

Within days of Barbara's appointment, there was an "explosion in spending" by the defendants from Barbara's accounts through cash withdrawals and purchases on the debit card. Tr. 237-39, 342. Over the next year, the defendants spent approximately \$20,000 at retail and online stores for themselves, purchasing items such as car parts, building supplies, and cookware. Tr. 237-39, 282-83, 289-90, 348. Together they withdrew an additional nearly \$20,000 in cash from Barbara's account at ATMs, at times depositing the funds into their personal bank account. Tr. 250-52, 343. In March 2013, James withdrew another \$50,000 from the account, which he used to construct an auto garage where he built hot rod cars. Tr. 291-92, 326-27.

By September 2013, less than two years after moving to Summerhill, Barbara had only \$1,342.68 left in total assets. Tr. 258. Due to her physical and cognitive decline, Barbara was living in Summerhill's memory care unit. Tr. 76-77. Due to her dementia, her doctor had activated her health care power of attorney, and she was no longer writing or signing her own checks. Tr. 134-37, 260. James had taken over signing checks from Barbara's account to pay Barbara's bills as her attorney-in-fact. Tr. 260.

The defendants depleted Barbara's accounts, leaving her insufficient funds to afford her rent at Summerhill. Tr. 78. In February 2014, at James's

request, Summerhill reduced Barbara's rent. Tr. 78-79. Summerhill accommodated Barbara's financial reality, but James consistently failed to pay the reduced rent amount, even though the defendants continued spending Barbara's money on themselves. Tr. 80, 284. When asked by Summerhill's executive director why the defendants were unable to satisfy Barbara's rent obligations, Karen admitted that the defendants had "not been careful" with Barbara's money. Tr. 80-81.

In April 2015, James tried to move Barbara to a new facility and applied for Medicaid on her behalf. Tr. 161. Medicaid is a needs-based program, and applicants must provide five years' worth of financial records to confirm eligibility. Tr. 160-61. An applicant can be penalized or deemed ineligible for unnecessary spending found during this "look-back" period. *Id.* Shortly before applying and during the subsequent review, James withdrew more than \$1,000 in cash from Barbara's accounts, depositing some of the funds into his personal account. Tr. 295-97.

As part of the Medicaid review, the defendants were asked to explain many questionable transactions, including nearly all of their retail spending and cash withdrawals, as well as James's \$50,000 lump sum withdrawal. Tr. 166-68. Both defendants lied consistently to Medicaid staff—as well as to a Bureau of Elderly and Adult Services ("BEAS") Investigator assigned to investigate financial exploitation. Their lies include, but are not limited to, the following:

- They claimed several debits at Bed, Bath, and Beyond were purchases of bedding, waterproof mattress covers, and curtains for Barbara. However, receipts showed that the defendants actually purchased cookware and kitchen

appliances, including a KitchenAid Mixer that was shipped in the name of “Karen Folley” to the defendants’ home. Tr. 281-83.

- They claimed thousands of dollars in purchases they made were authorized by Barbara to “help out” the defendants. They assured Medicaid staff that they “paid her back.” However, at no point did the defendants deposit any of their own funds into Barbara’s accounts. The only money deposited by either defendant into Barbara’s account was a return of \$5,500 that was traced directly back to the \$50,000 James took from Barbara. Tr. 171, 331, 529-30.
- They claimed grocery store purchases were “fruits and candy” for gift baskets that Karen made up for Summerhill staff. Summerhill, however, prohibits gifts to staff, and receipts showed the purchases consisted mostly of cigarettes and typical grocery items, such as deli meats and soda. Tr. 278-79, 289-90.
- They claimed Amazon purchases, including an Amazon membership account payment, were for Barbara. Yet, the Amazon membership account was registered to “Karen Folley.” Additionally, 90 of the 93 items purchased were shipped to the defendants’ home, and such items—including kids’ toys, tools, and pet supplies—Barbara could not use, and, therefore, were not for Barbara. Tr. 283-87.
- They claimed a \$1,000 payment to a secured credit card company was to “pay off” Barbara’s credit card debt. In fact, James used the \$1,000 to open his own credit card account that he utilized to purchase tools and other personal items. He later closed the account, and when the company returned the \$1,000 in secured funds to him, he deposited the money into his own account. Tr. 272-78.
- They claimed several ATM withdrawals, totaling approximately \$10,000, were allegedly requested by Barbara

so that she could send the cash to her step-children out-of-state. Barbara, however, had not spoken to her step-children in many years, had not sent them cash in the past, and, at trial, they each denied receiving money from her during this time. Tr. 188, 384, 390, 397, 402, 409.

- They claimed Barbara asked James to take her to the bank and she withdrew \$50,000 to give to him. However, bank records showed that James's name alone appeared on the withdrawal slips. Tr. 325-26.

Ultimately, Barbara was denied Medicaid and lived at Summerhill until her death in November 2017. Tr. 61-62, 172.

The State indicted the defendants, as principal/accomplice, on two counts of theft based upon their debit purchases and ATM withdrawals. Tr. 8-11. The State indicted James on one additional count of theft for the \$50,000 taking and one count of financial exploitation of an elderly adult for taking more than \$1,000 while acting as attorney-in-fact. Tr. 11-13.

At trial, the defendants testified contrary to what they told Medicaid staff and the BEAS Investigator. They, for the first time, stated that they sat down with Barbara on a monthly basis and obtained permission to spend her money on themselves. Tr. 559. After Barbara's step-children testified that they received no cash from Barbara, James effectively admitted that he had made up those prior explanations. Tr. 481-82, 498-99. Finally, James testified that an imposter made at least one of two 2015 withdrawals, totaling more than \$1,000, despite records showing the teller confirmed his identity prior to withdrawal. Tr. 514-16.

SUMMARY OF THE ARGUMENT

1. The State submitted sufficient evidence to convict the defendants of theft by unauthorized taking and James of financial exploitation of an elderly adult. As an initial matter, the Court should reject the defendants' claims because they failed to cast the facts in the light most favorable to the State, as required by this Court's legal standard. Further, contrary to the defendants' assertions, the State submitted direct evidence to prove the challenged elements: (1) property of another, and (2) lack of authorization. The State submitted direct evidence that Karen had no legal interest in Barbara's money. The State also submitted direct evidence in the form of the defendants' own statements that they had limited authority to handle Barbara's money. Additional evidence showed the defendants exceeded this limited authority. Finally, assuming the State submitted only circumstantial evidence, it excluded all reasonable conclusions other than guilt. Contrary to defendants' arguments, Barbara was not required to testify for the State to prove its case, nor was the jury required to credit the defendants' testimony. Here, the State presented sufficient circumstantial evidence to prove lack of authorization, including that Barbara needed the money for housing, that she was frugal, and that the defendants consistently lied about their spending.

2. Summerhill is a "victim" entitled to restitution. Restitution is "money provided by the offender to compensate a victim for economic loss." RSA 651:63. The statute defines "victim" as a person who suffers economic loss as a direct result of an offender's criminal conduct. In

February 2014, James asked Summerhill to reduce the amount it was charging Barbara for rent because she was “out of money.” Summerhill agreed. The sole reason Barbara was out of money at that time was because the defendants stole from her. If not for the defendants’ thefts, James would not have requested reduced rent, and Summerhill would have received additional funds. Summerhill did not forfeit its status as a “victim” by agreeing to the reduction. Construing the statute as the defendants suggest would not promote justice. Summerhill acted humanely to protect Barbara, and such action should be encouraged. Summerhill did not know about the defendants’ theft and acted in Barbara’s best interest, suffering direct financial harm as a result.

ARGUMENT

1. **THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANTS OF THEIR CRIMES**

A. **The defendants' arguments fail because they do not apply this court's sufficiency standard correctly.**

The defendants seek to overturn their convictions claiming the evidence of their guilt was insufficient. JB 12, 17; KB 12, 17. As mentioned above, the Court assesses a sufficiency claim by viewing “the evidence presented at trial, and all reasonable inferences drawn therefrom, in the light most favorable to the State, and uphold[s] the jury’s verdict unless no rational trier of fact could have found guilt beyond a reasonable doubt.” *Labrie*, 171 N.H. at 482. The Court examines each evidentiary item in the context of all the evidence, not in isolation. *Id.* The defendants “bear[] the burden of demonstrating that the evidence was insufficient to prove guilt.” *Id.*

The initial shortcoming of the defendants’ arguments is their failure to follow the standard of review. They would have this Court view the facts in the light *least* favorable to the State. When a “fact” rests on James or Karen’s testimony, they would have the Court assume its credibility—a presumption the jury was free to, and apparently did reject. They dismiss false statements about their spending as mere forgetfulness, rather than an effort to mislead. JB 14; KB 13. They contend that Barbara withdrew \$50,000 to give James as an “inheritance,” despite clear evidence that James alone signed the withdrawal slip. JB 7; KB 7. The jury evaluated the evidence and made crucial witness credibility determinations; not only does

their verdict deserve the measure of deference the standard of review affords, but also this Court's decisional law compels that deference. *See Labrie*, 171 N.H. at 482. When viewed under the proper standard, the evidence overwhelmingly supports the verdicts.

B. The State submitted direct evidence to prove that the defendants lacked authorization to use Barbara's money and that Barbara's money was property of another.

To convict the defendants of theft by unauthorized taking, the State had to prove, among other things, that: (1) they took property of another, and (2) the taking was unauthorized. *See* RSA 637:3; *see also State v. Gagne*, 165 N.H. 363, 368 (2013). "Property of another" includes "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. To convict James of financial exploitation, the State similarly had to prove that he was not authorized to use Barbara's funds. *See* RSA 631:9. The defendants argue the State's evidence was insufficient to prove the elements of lack of authorization and property of another. JB 12, 17; KB 12, 17.

The defendants argue the State submitted no direct evidence to prove the contested elements. JB 13, 19; KB 12, 18. They are incorrect. The Court employs a different test depending on whether the State's evidence was solely circumstantial or included direct evidence. *See State v. Woodbury*, ___ N.H. ___ (decided July 11, 2019) (slip op. at 3). "Direct evidence is evidence which, if accepted as true, directly proves the fact for which it is offered, without the need for the factfinder to draw inferences." *State v.*

Kelley, 159 N.H. 449, 451 (2009). If the State submits direct evidence, “the defendant’s challenge must fail, so long as the evidence is such that a rational trier could find guilt beyond a reasonable doubt.” *State v. Cable*, 168 N.H. 673, 678 (2016).

As an initial matter, the Court need not separately analyze sufficiency with respect to the element of property of another. Karen has no reasonable basis to argue that the State failed to prove that she took property of another. She relies exclusively on *State v. Gagne* to support her argument. KB 17-18. In *Gagne*, this Court held that “property of another” includes a joint bank account if the arrangement between the *account holders* does not provide one *owner* with a privilege to take funds from the account in the manner he withdrew them. *Gagne*, 165 N.H. at 371. Karen’s reliance on *Gagne* is a red herring and entirely misplaced because the State’s direct evidence conclusively showed that she had no legal interest in Barbara’s accounts; she was not a joint account holder. Tr. 236, 253. Thus, with regard to Karen, the only question is whether the State’s evidence was sufficient to prove that she lacked authorization to use Barbara’s money.

Further, while James had a legal interest in Barbara’s accounts as a co-owner, evidence sufficient to prove that he lacked authorization is equally sufficient to prove that he took property of another under *Gagne*. The arrangement between James and Barbara did not allow for unfettered use of her funds, Tr. 169, 171, and James admits it was Barbara’s money. JB 13 (“There is no dispute that it was Barbara’s money in the . . . account to be used as she determined.”). James argues that the funds were not “property of another” because Barbara orally authorized the spending. *Id.*

Whether the funds taken by James were “property of another,” therefore, rests on whether Barbara authorized the spending.

The State introduced direct evidence to prove the defendants lacked authorization to use Barbara’s funds in the manner they did. The State introduced the defendants’ pre-trial statements that the funds in the account were Barbara’s alone. Tr. 169, 171. The defendants claimed much of their spending out of the account they “paid back,” and that many of the purchases were for Barbara. *Id.* James stated that Barbara authorized the \$50,000 withdrawal by withdrawing it herself. Tr. 325-26. These pre-trial statements are direct evidence that the defendants had *limited* authority to use Barbara’s funds. The State subsequently showed at trial, through receipts and account statements, the defendants did not act according to this limited authority in that: they failed to pay Barbara back, Tr. 171, 331, 529-30; purchased most of the items for themselves, Tr. 281-87; and Barbara did not sign the withdrawal slip, Tr. 325-26. From this direct evidence, a rational trier of fact could find guilt beyond a reasonable doubt.

C. The State’s evidence excluded all reasonable conclusions except for the defendants’ guilt.

Even assuming the State submitted solely circumstantial evidence to prove that defendants lacked authorization to use Barbara’s money, the State’s circumstantial evidence was sufficient for the jury to find guilt. When the evidence to prove an element is solely circumstantial, “it must exclude all reasonable conclusions except guilt.” *State v. Hanes*, 171 N.H. 173, 177 (2018). “The proper analysis is not whether every possible

conclusion consistent with innocence has been excluded, but, rather, whether all reasonable conclusions based upon the evidence have been excluded.” *State v. Karasi*, 170 N.H. 543, 545 (2018). The Court must determine “whether an alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt.” *Id.* at 546.

The defendants contend that because Barbara did not testify and contradict the defendants’ trial testimony, the State *could not* prove that they lacked authorization to spend her money. JB 14, 19; KB 13, 19. They argue that without Barbara’s testimony, there is a “*possibility* that the State’s theory is incorrect.” JB 14; KB 13 (emphasis added).

The question here, however, is not whether there is a “possibility” of innocence, but rather, whether all “reasonable” conclusions consistent with innocence have been excluded. *See Karasi*, 170 N.H. at 545-46. Further, the State was not required to present Barbara’s testimony. The logical end of this refrain is that the State could never meet its burden of proof in a case in which the victim could not testify. This would effectively preclude the State from bringing an entire swath of cases against individuals who commit crimes against victims who are unable to testify through a lack of competence or death.

In fact, the State is not required to present any direct evidence to prove its case. The State may prove an element through circumstantial evidence. *State v. Newcomb*, 140 N.H. 72, 80 (1995). There is “no

distinction between direct evidence of a fact and evidence of circumstances from which the existence of a fact may be inferred.” *Id.*²

Moreover, requiring the State to rebut a defendant’s testimony with direct evidence would eliminate the jury’s essential function to determine witness credibility. *See Woodbury*, (slip op. at 4). Here, the jury clearly found the defendants not credible, otherwise the outcome would have been different. The defendants effectively argue the jury was obligated to credit their testimony. However, in a sufficiency review, the Court resolves credibility issues in the State’s favor. *Id.*

The defendants are left to argue that a juror could reasonably conclude Barbara allowed them to take more than \$90,000 of her money because: they were family, they took her to medical appointments and ran errands, and Barbara made James a co-owner on her accounts with “rights of survivorship.” JB 15, 20-21; KB 14-15, 20-21. They contend that for this reason, Barbara wanted them, and no others, to inherit her money, and she authorized that “inheritance” early. *Id.* This conclusion is unreasonable based on the evidence.

Adding James as a co-owner with “rights of survivorship” was not evidence Barbara wanted the defendants to spend unlimited sums of her money, nor does it indicate she wanted to give James an early inheritance. “Survivorship,” by definition, requires the death of another. *See Webster’s Third New International Dictionary*, 2303 (unabridged ed. 2002). Thus, by making James a co-owner on her account, Barbara expressed a desire, at

² Nor does *Gagne* support their argument. While the victim in *Gagne* testified the co-owner was not authorized to use the money as she did, the Court did not hold that the State was *required* to present such evidence. *See Gagne*, 165 N.H. at 370-73.

most, to allow any funds left after her death to be given to James. Further, the evidence conclusively showed that Barbara added James as a co-owner for the particular purpose of purchasing necessities. Tr. 344-46.

The defendants' proposed hypothesis is also unreasonable because authorizing the defendants to drain Barbara's accounts could have left her homeless. Summerhill was a private-pay facility that did not accept Medicaid. Tr. 64. There was no guarantee Summerhill would continue to allow Barbara to remain when her funds ran out. At admission, Barbara expressed an intention that all of her then existing assets and income would be used to pay Summerhill. Tr. 69-70. She also enjoyed the facility, and participated in several activities. Tr. 60, 110. To conclude that Barbara would jeopardize her own living arrangements, which she enjoyed, so that the defendants could waste her money on items like hot rods, pet supplies, and cookware, is not a reasonable conclusion consistent with innocence.

The defendants' inference becomes all the more unreasonable given Barbara's frugality. Before the defendant became a co-owner, Barbara spent cautiously, paying the vast majority of her money toward necessities, such as housing and medical expenses. Tr. 245, 248. She received discounts on used books and rarely purchased items at retail stores. Tr. 111-12. Her frugal pattern continued while writing checks at Summerhill. Tr. 250. While the defendants used the debit card to spend Barbara's money, Barbara did not hold the debit card and continued to write checks for necessities only. *Id.*

The defendants also waited to begin their theft until after they changed the address on the account and Barbara declined cognitively. Their "explosion" in the spending of Barbara's funds almost perfectly coincided

with the appointment in which she acknowledged memory problems to her doctor. Tr. 129, 132, 237-39, 342. If Barbara had authorized the defendants to drain her assets, there would have been some indication *prior* to these events.

Most damaging to the defendant's *post hoc* rationalization are the defendants' constant lies. If Barbara authorized all of the transactions, as they claim, they would not have lied about their purchases, such as claims they purchased bedding and curtains for Barbara, when they actually purchased appliances for themselves. Tr. 281-83. Their lies not only constitute independent evidence that they lacked authorization, but also that they were conscious of their own guilt. *See State v. Evans*, 150 N.H. 416, 420 (2003) ("Evidence that a defendant intentionally made an exculpatory statement that is later discovered to be false may constitute circumstantial evidence of consciousness of guilt.").

Based on the foregoing, the defendants have failed to meet their burden to establish that the State submitted insufficient evidence to convict them of their crimes.

2. SUMMERHILL IS ENTITLED TO RESTITUTION BECAUSE IT SUFFERED ECONOMIC LOSS AS A DIRECT RESULT OF THE DEFENDANTS' CRIMES.

The defendants challenge the portions of the Court's sentencing orders requiring them to pay restitution to Summerhill. The trial court may sentence "any offender to make restitution." RSA 651:63, I (2016). Restitution is "money provided by the offender to compensate a victim for economic loss." RSA 651:62, V (2016). Restitution not only reimburses victims for their economic loss, but also serves to rehabilitate offenders. RSA 651:61-a, I (2016). There is a presumption that, when present, the court will order a defendant to pay restitution. *Id.*

The Court sentenced James to pay \$91,267.27 in restitution. S. Tr. 45-49. The Court sentenced Karen to pay \$44,293.27. *Id.* It ordered James to pay the first \$81,890.83 of his total restitution amount and Karen to pay all of her restitution amount to Summerhill. *Id.* The amount ordered to be paid to Summerhill reflected the additional amount Summerhill would have received had Summerhill not reduced Barbara's rent at James's request. S. Tr. 47.

The cost for Barbara's room in the memory care unit was \$3,500 per month. Tr. 78. In February 2014, James informed Summerhill's executive director that Barbara was "out of money." *Id.* The *only* reason Barbara landed in those desperate financial straits at that time is because the defendants had, by then, stolen the bulk of her assets. Tr. 258. James asked Summerhill to accept Barbara's monthly income in payment of her rent, although that was approximately \$1,600 less than she had been paying. Tr. 79. While thinking it odd that Barbara was out of money so quickly,

Summerhill agreed. *Id.* There is no evidence that Summerhill had access to Barbara's financial records in order to determine where the money had gone.

"The interpretation of a statute is a question of law," which the court reviews *de novo*. *State v. Hanes*, 171 N.H. 173, 178 (2018). This Court is the final arbiter of the legislature's intent "as expressed in the words of the statute considered as a whole." *Id.* "The Court construes the "language according to its plain and ordinary meaning." *Id.* "All parts of a statute are construed "together to effectuate its overall purpose and avoid an absurd or unjust result." *State v. Fogg*, 170 N.H. 234, 236 (2017). The criminal code is construed to "promote justice." *Hanes*, 171 N.H. at 178.

The defendants argue Summerhill is not a "victim" entitled to restitution. JB 23; KB 22. RSA 651:62 defines "victim" as "any person or claimant who suffers economic loss as a result of an offender's criminal conduct." "Economic loss" is defined as "out-of-pocket losses or other expenses incurred as a direct result of a criminal offense." *Id.* RSA 651:62, VI, lists examples of economic loss, including "reasonable charges incurred for products, services, and accommodations." The list, however, is not exhaustive. *See In re Search Warrant for 1832 Candia Road, Manchester*, 171 N.H. 53, 59 (2018) ("[U]se of the words 'including' means that the list is *not* exhaustive.").

By the statute's plain language, Summerhill is a victim because it suffered economic loss and incurred expenses as a direct result of the defendants' crimes. Summerhill reduced Barbara's rent based on James's representation that she was "out of money," a condition of the defendants'

making. Had the defendants not stolen Barbara's money, she would have had the means to pay an additional \$81,890.83 to Summerhill.

The defendants contend that Summerhill forfeited its victim status by agreeing to James's request to accept partial rent payments. JB 23-24; KB 22-23. This argument lacks merit. James's request omitted the cause of Barbara's inability to pay. Summerhill granted the request based on a deception. The defendants' thievery left Barbara destitute. She had not been approved for, nor would she ever be approved for Medicaid assistance. Tr. 172. As a direct consequence of the defendants' crimes, Summerhill was left with two options: accept partial payment of its normal monthly charge, or kick Barbara to the curb. It elected the humane option and suffered economic loss as a direct result. It strains credulity for the defendants to suggest that the scenario presented was simply a bargained for negotiation. JB 24; KB 23.

The defendants' proposed interpretation would not promote justice. The onus should not be placed on a victim to know when he or she is being swindled or when a thief is attempting to conceal his crimes. The statute should be interpreted to compensate victims, especially those such as Summerhill, that placed its resident's needs first. Summerhill had no access to Barbara's "financial information," and could not undertake an "investigation" as defendants allege. JB 24; KB 23. Summerhill, like Barbara, trusted that James would and did discharge his fiduciary duty to his sister. Barbara would not have been penalized for trusting the defendants, had she lived; neither should Summerhill.

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

By its attorneys,

Gordon J. MacDonald
Attorney General

August 30, 2019

/s/Bryan J. Townsend, II
Bryan J. Townsend, II
N.H. Bar ID No. 19842
Assistant Attorney General
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-7094
Bryan.Townsend@doj.nh.gov

CERTIFICATE OF COMPLIANCE

I, Bryan J. Townsend, II, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 5, 207 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.

August 30, 2019

/s/Bryan J. Townsend, II
Bryan J. Townsend, II

CERTIFICATE OF SERVICE

I, Bryan J. Townsend, II, hereby certify that a copy of the State's brief shall be served on Michael J. Zaino, counsel for Karen Folley, and Justin C. Shepherd, counsel for James Folley, through the New Hampshire Supreme Court's electronic filing system.

August 30, 2019

/s/Bryan J. Townsend, II
Bryan J. Townsend, II