THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0047

State of New Hampshire

v.

Brim Bell

Appeal Pursuant to Rule 7 from Judgment
of the Strafford County Superior Court

BRIEF FOR THE DEFENDANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the convictions.

Issue preserved by Bell's motion to dismiss, T4 654-56*, the State's objection, T4 656-58, and the court's ruling, T4 659-60.

2. Whether the court erred granting the State's motion for joinder.

Issue preserved by the State's motion for joinder, A17-23, Bell's objection, A24-26, and the court's order, AD 43-46.

* Citations to the record are as follows:
"AD" refers to the addendum to this brief;
"A" refers to the appendix to this brief;
"T1-6" refers to the transcripts of trial on September 26, 2018 through October 4, 2018. T will identify the volume number, to be followed by the non-Adobe page number.

STATEMENT OF THE CASE

The State obtained six indictments from a Strafford County grand jury charging Brim Bell with theft by deception. A3-8. At the conclusion of a six-day trial from September 26 to October 4, 2018, the jury acquitted Bell of two counts and found him guilty of the remaining four. T6 845-847; A3-8. On January 2, 2019, the court (Howard, J.) sentenced Bell on all counts to five to ten years at the State Prison. A9-16. In one sentence, the court suspended six months of the minimum for ten years. A9-10. The remaining three sentences were concurrent with each other but consecutive to the first, and all suspended for ten years. A11-16.

STATEMENT OF THE FACTS

Brim Bell was born in 1970. T4 662. As a child, he was always fascinated with cars and dreamed of working on cars as an adult. T4 663. When Bell was sixteen years old, he received his first Volkswagen, restored it, and drove it for over ten years. T4 663.

Bell's first "official job" started in 1992 at a BMW dealership in New Jersey, where he did collision-repair work. T4 663. On the side, Bell and his coworkers restored classic cars. T4 663-64. In 1995, Bell moved to New Hampshire, where he continued to work in auto-body shops. T4 664-65.

In 1996, Bell established his own shop in Brentwood, "Brim's Restoration." T4 665. In 1998, he moved his shop to Somersworth and specialized in Volkswagen restoration. T4 665-66. For a brief period, starting in about 2001, Bell owned a second shop in Barrington, which specialized in British and American sports cars. T4 666-67.

In 2002, Bell began renting warehouse space in Strafford from James Lund. T3 482-83, 485, 496-97, 501; T4 697. Bell initially rented one bay of a five-bay building. T3 484-85, 497. As Bell's business expanded and other bays became available, Bell rented those as well. T3 485; T4 668. By 2008, Bell was renting the entire three-story warehouse, at a cost of $4000 to $5000 per month. T3 485-86, 496, 501-

02; T4 696-97. Lund and Bell eventually became friends. T3 498-99; T4 697.

The warehouse needed several hundred thousand dollars in renovations. T4 667. Bell and Lund split the cost. Id. Bell used his entire life savings, about $100,000 in parts, labor and materials. Id.

In 2005, Bell met a woman named Rebecca at a car show. T4 681. Bell and Rebecca bought a house together and Rebecca became his business partner as well, contributing capital and assuming a significant role in the business. T4 682.

Bell owned a total three shops: in Somersworth, Strafford and a Volkswagen service shop in Connecticut. T4 668-69. Prior to 2010, business was "at an all-time high" and it ran "like a well-oiled machine." T4 684. Bell agreed that "a lot of that was because of Rebecca's help." T4 684-85. The overhead grew from about $2000 a month to about $10,000 a month. T4 671-72. Bell had up to four employees at his Somersworth shop, but considered himself an artist and preferred to work alone. T4 668-71. At his Strafford shop, Bell worked by himself on higher-end Volkswagen restorations. T4 668-69.

High-end Volkswagen restoration is a long-term project. T4 673. The average time for a complete restoration is five to ten years. Id. The entire car must be disassembled, and each

part cleaned or replaced. T4 674-75. Only then can the restorer accurately assess the costs of restoration. Id. The body needs grinding, welding, sanding, and painting. T4 674-76. Parts for old Volkswagens are not readily available. T4 679. Bell did not like to purchase parts online without personally inspecting them first, so he travelled throughout New England in search of parts. T4 669. Most of his dealers were in Connecticut. T4 729. Reassembly occurs only when most of the parts have been acquired. T4 677-78. Labor constitutes seventy-five to eighty percent of the total cost of restoration. T5 768.

Bell's clients considered him "one of the best." T3 503. The cars that he restored won numerous awards. T4 679-80. One client said that even "the people in Germany couldn't hold a candle to [him]." T3 503-04. Among his clients, Bell boasted a 95 percent satisfaction rate. T5 744.

Over the course of three months in late 2009 to early 2010, Bell's relationship with Rebecca deteriorated and ultimately ended. T4 682. Bell became deeply depressed and turned to drinking. T4 683. Although Bell was previously "very enthusiastic about" his work, his "motivation level dropped to an all-time low." T3 504; T4 683. As a result, Bell's business suffered; his clients "started getting upset that [he] was taking too long." T4 683. Bell described 2010 as "probably [the] worst year of [his] life." T4 682-83.

2011 was not much better. In April of that year, Bell fell from a 20-foot ladder. T3 430-31, 464-65, 513; T4 684, 689-90. He was airlifted to the hospital and did not regain consciousness for days. T4 684. The fall shattered two vertebrae in his neck, ruptured his spleen, fractured three different bones in his right arm, and caused a severe concussion. T4 685. Bell spent a month in the hospital and underwent surgeries on his neck and arm. T4 686-87. Doctors recommended that Bell refrain from strenuous activity or heavy lifting for at least a year. T4 687. Bell contracted out work and hired extra employees. T4 688. His overhead and debt increased. T4 689. He became more depressed and started drinking more. Id.

Bell fell behind on rent payments to Lund. T3 487, 508, 510-11. He sometimes borrowed money from Lund to finish a project. T3 512. On several occasions, Lund threatened to evict Bell. T3 488-89, 509-10; T4 699. Because Bell's clients started posting negative reviews on social media, his "business was going down the tubes." T4 699-700. Bell attempted to obtain a business loan, but they "laughed [him] right out of the bank." T4 691.

Bell was aware of the option of filing for bankruptcy but rejected it. T5 759-60. He considered bankruptcy "a dishonest, weasel[-]ly way to basically get out of your obligations to your clients." T5 760.

In late 2011, Bell read a magazine article about the founder of Federal Express. T4 691. The article detailed how the founder was down to his last dollar and about to go out of business, but by gambling in Las Vegas, he saved his business, which is "now one of the largest shipping companies in the world." Id. Desperate to save his business, Bell started gambling at casinos in Connecticut. T4 691; T5 691, 754, 756, 760. Initially, Bell's plan to was "to go [to the casinos] once or twice, . . . hit the [$]200,000 [he] was looking for[,] . . . and be done with it." T5 754.

Bell was successful in his first year of gambling. T4 692-93. He reduced his debt "way down to almost nothing." T4 693-94. Bell continued to work on cars, to buy parts, and to pay rent, wages, and other bills for his remaining two auto shops. T4 696. Because he was spending so much time at Foxwoods and Mohegan Sun, he "used th[ose] casinos as a bank." T4 695-96.

In his second year of gambling, Bell's "luck ran out" and he about broke even. T4 694. He "definitely lost a lot" in his third year. Id. By the time Bell "gave up on [gambling]" in 2014, he was at least $100,000 in debt, mostly to Lund. T4 694-98, 700.

From 2014 to 2016, Bell's debt to Lund "was stressing [Bell] out" and making him "less productive." T4 700. Lund asked Bell for money almost daily. T4 700-01. Bell explained

to most of his clients that he was having financial difficulty and even asked some of them for loans. T4 701; T5 760. Bell testified that "it was hard to work under extreme financial pressure." T4 700. Nevertheless, Bell's goal was to save his business and complete the restoration jobs he started. T3 516, 524-25; T4 698-99.

By early fall of 2016, Bell owed Lund between $150,000 and $180,000. T3 489; T4 701-02. Feeling like he "had to do something," Bell left New Hampshire "to round up enough money to save the business" and "complete all [his] client[s'] cars." T3 517, 522; T4 701; T5 745, 749. Bell planned to raise about $100,000 through personal loans and odd jobs. T5 748-49. Bell maintained contact with Lund after he left. T3 522; T4 702-03.

Shortly after Bell left New Hampshire, Lund contacted Randy Young, a friend of Lund's and an officer with the Strafford Police Department, who began an investigation. T3 518-19. Lund told Bell to call Young. T3 519; T4 703. In January 2017, Bell called Young. T4 704.

Young told Bell that there was already an indictment against him and that, if he returned at that time, Young would arrest him and bail would be set at $350,000 cash. T4 705; T5 747. Young also told Bell that he was facing "a lot of prison time," and Bell had heard that Young told Lund and Bell's clients that he was facing twenty to twenty-five years in

prison. Id. However, Young told Bell that there was "a solution": if Bell came up with $200,000, "the situation would be resolved." T4 705. Based on that conversation, Bell decided not to return to New Hampshire until he had raised the $200,000. T4 705; T5 746-47.

Bell returned to New Hampshire at the end of 2017. T4 706. By that time, individuals claiming to be Bell's clients had contacted Lund, who let them into the warehouse to retrieve what they claimed were the parts to their cars. T2 368; T3 493-94, 523-24. Lund testified that he did not purposely allow anyone to take parts that were not theirs, but he admitted that he did not know the individuals who contacted him and took the parts. T3 494. By the time this process was completed, the parts were completely disorganized and many parts, and even whole cars, were missing. T1 102-03, 177; T2 201, 269, 288, 366; T3 404, 456; T4 708-09, 717-19.

A.M.

In 2010, A.M., who lived in Boston, purchased a 1974 Volkswagen Super Beetle. T1 41-43. A.M. wanted to have the car completely restored, and, after finding Bell's business on the internet, contacted Bell in 2011. T1 44, 104-05. In November 2011, Bell took the car to his shop in New Hampshire. T1 46-47, 106.

Prior to February 2012, A.M. paid Bell $11,500. T1 120-21; A32. Bell provided a total estimate of $28,940, including $20,000 for labor and $8,940 for parts. T1 49-50. The estimate stated, "When job is completed some other cost[s] may be added if need be." Id. It envisioned that A.M. would "pay as we go." Id. A.M. and Bell verbally agreed that she would pay Bell $2000 per month. T1 52, 112.

The original estimate did not include a completion date. A32. A.M. testified that Bell initially told her the car would be done by March 2014 but kept pushing that date back. T1 101, 118. In late 2014, A.M. told Bell to "just scrap the car" and stopped communicating with him. T1 101, 114.

J.M.

In 1977, J.M. bought a 1957 Volkswagen Beetle. T1 125, 132-33; T2 187. In the summer of 2012, J.M., then living in Maryland, found Bell on the internet and contacted him about restoring the car. T1 138; T2 187-88. The car had no engine or windshield and the transmission was bad. T2 189. J.M. wanted the car restored to its original condition, but with a more powerful engine. T2 194, 196-97. J.M. shipped the car to Bell's shop in Somersworth. T1 139; T2 189.

In 2016, Bell started asking for more money and loans. T1 147, 175; T2 196-97. J.M. and Bell had "[l]ong, drawn-out

. . . conversations" in which Bell explained "his financial dilemma," and emphasized that "he was trying to save his business." T2 198. Bell told J.M. that "[h]is car w[ould] disappear" if he did not get a loan. T2 207.

In late 2016, another of Bell's clients, J.T., told J.M. that "Bell had, basically, gone off the map." T2 199. In October 2016, Bell's phone number was no longer working and J.M.'s texts to Bell were returned as undeliverable. T2 200. J.M. had no further communication with Bell. T1 174; T2 200-01.

J.T.

In 2006, J.T. bought a 1977 Volkswagen convertible Super Beetle. T3 421. Someone recommended that J.T. "hot rod" the car and J.T. had read about Bell in "Hot VWs," a magazine, and found Bell's website online. T3 426, 457-58. In the fall of 2010, J.T., then living in Tennessee, contacted Bell and, in January 2011, J.T. shipped the car to Bell in New Hampshire. T3 421, 427, 458-59.

J.T. wanted Bell to replace the motor, perform body work, and install a new interior and a new top. T3 427. J.T. understood that the project would require that Bell completely disassemble the car. T3 460-61, 469-70. They initially discussed a budget of $25,000 to $30,000 and a time frame of eight to twelve months. T3 427-28; 451, 464. J.T.

paid Bell $10,000 initially, and another $10,000 a couple weeks later. T3 428, 431-33, A44.

Bell sometimes asked J.T. for more money for parts and labor. T3 429-30, 460. Bell asked J.T. to send the money through Moneygram or Western Union. T3 430. J.T. sent money directly to business, such as BugCity.com, which Bell said was for parts. T3 436, 438-45, 462. On one occasion, J.T. sent money to J.K., another client, which Bell also said was for parts. T2 325; T3 439-40. J.K. testified that he passed the money on to Bell, who said that he needed J.K.'s assistance because his license had expired. T2 325-26. J.K. claimed that he never sold Bell any parts. Id.

On another occasion, J.T. received money from J.K., which at Bell's request he then passed on to someone else. T3 450-51; A34. From January 2011 to August 2016, J.T. paid a total of $55,055 to Bell or people Bell designated. T3 455; A44. J.T.'s relationship with Bell ended in 2016, after which he was unable to reach Bell. T3 452.

J.K.

In 2014, J.K. was a retired deputy sheriff living in Raynham, Massachusetts. T2 293-94. J.K. wanted to buy a Volkswagen and called Bell to see if he had any for sale. T2 294. Bell did not, but J.K. later found a 1957 Volkswagen

"ragtop" Beetle on Craigslist.com and Bell accompanied J.K. to inspect the car before he bought it. T2 294-97, 348-49.

J.K. did not like the car's pink color and a shelf in his garage fell on the car, causing damage, so he decided to restore it. T2 301. J.K. wanted new fenders, semaphores (a type of turn signal involving moving parts), and body work. T2 330-31. He had started refurbishing cars in the past but had never finished. T2 338. J.K. wanted someone to take the car and "basically give [him] back a show car." T2 330.

One restoration shop backed out on J.K., so he turned to Bell as "a last resort." T2 340. In November 2015, J.K. shipped the car to Bell's Somersworth shop. T2 302, 347-48.

From November 2015 to May 2016, J.K. sent Bell a total of $11,520.59 in eleven payments. T2 307-18; A37. All of these payments were made through Moneygram from a Walmart store in Raynham, Massachusetts. A38-43.

SUMMARY OF THE ARGUMENT

1. Bell's convictions must be reversed because the State failed to prove beyond a reasonable doubt that Bell created or reinforced the false impression that he was repairing the alleged victims' vehicles when he obtained money from them. To the contrary, the evidence did not establish that Bell was not working on each person's vehicle.

2. The court erred by granting the State's motion for joinder. Each indictment alleged a discrete offense against an individual alleged victim, and the success of no offense hinged on the success of others. The court erroneously found that the charges were "part of a common scheme." The charges should have remained severed as unrelated.

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS.

After the State rested, Bell moved to dismiss the charges. T4 654. Bell argued that there was insufficient evidence that he acted with a purpose to deprive the alleged victims of their money. T4 654-55. He argued that the evidence showed that he "inten[ded] to continue [his] business and to continue doing the excellent work that he had been doing." T4 655. Bell also argued that the casino transactions were insufficient evidence of deception. T4 655-656.

The court denied Bell's motion, finding "substantial evidence that Mr. Bell used deception . . . either through lying about the purpose of the money or by reinforcing a false impression that that money was being used to renovate the cars." T4 659. The court further found that "[t]he intent to deprive element [wa]s clearly met by the transactions at the casinos." T4 660. In so ruling, the court erred.

When reviewing claims of insufficiency, this Court "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, considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State." State v. Saintil-Brown, 172 N.H. 110, 117 (2019). "Because a

challenge to the sufficiency of the evidence raises a claim of legal error, [the Court's] standard of review is de novo." Id.

Here, the State alleged in each indictment that Bell deceived the alleged victims by "creat[ing] or reinforce[ing] the false impression that he was repairing [the alleged victims'] vehicle[s], which was false and which Brim Bell did not believe to be true." A3-8; see also T5 822-823, 825-826 (jury instructions). The evidence, however, did not establish beyond a reasonable doubt that Bell was not repairing their vehicles when he requested money from them. To the contrary, the evidence established that Bell, though moving at a snail's pace, was working on each person's vehicle when he requested money from them.

While Bell did not complete the restoration of their vehicles, the jury was currently instructed that this fact, on its own, was insufficient to establish an intent to deceive. T5 826. The commentary to the Model Penal Code, which this Court "may look to when interpreting analogous New Hampshire statutes," State v. Gua, 166 N.H. 514, 519 (2014), further explains the purpose behind the court's instruction to the jury. The commentary explains that the effect of the language used in RSA 637:4, II(a) is to shield businesspeople from being subjected to criminal liability for breaches of contract, a common occurrence in business. Model Penal Code, §223.3 cmt. 3, at 189-190. "Among business[people],

especially in certain trades, there will be a general understanding that words of promise mean only that the promisor will perform or submit to civil remedies." Id. Thus, "[i]t is only where the actor did not believe what he purposely caused his victim to believe, and where this can be proved beyond a reasonable doubt, that the actor can be convicted of theft." Id.

Recognizing judicial reluctance to impose criminal liability for breaches of contract by business owners, such as Bell, the prosecutor did not draft indictments that alleged that Bell falsely promised to perform any act in the future, Rather, the indictments alleged that Bell falsely claimed "that he was repairing [the alleged victims'] vehicle[s]." A3-8. Having chosen to limit the indictments in this way, the State had the burden of proving that Bell had not done anything to "repair" the cars when he represented that he had. The evidence did not support such a finding. Thus, while Bell may be civilly liable for breach of contract, the evidence failed to prove that he committed a criminal act, as alleged in the indictments, and this Court must reverse.[1]

[1] To the extent that the trial court relied on a finding that the evidence supported a finding, beyond a reasonable doubt, that the money was not used for parts, but rather to gamble, the State's indictments did not contain any such allegation.

A. The evidence was insufficient to support a conviction in 219-2017-CR-606 (A.M.)

Bell provided A.M. with an invoice, which included an estimate of what the restoration of her vehicle would cost. T1 49-50, 107-108. The invoice did not set forth a deadline for the completion of work. T1 108, A32.

Bell took A.M.'s vehicle to his shop in New Hampshire in November 2011. T1 46-47, 106. A.M. visited the shop in February 2012 to check on the work he had performed thus far. T1 109-110, 112. A.M. saw that Bell had worked on her car, disassembling it down to the shell. T1 110. A.M. also saw that Bell had multiple other restoration projects in progress at his shop. T1 111.

A.M.'s February 2012 visit to Bell's shop was the only time she went to New Hampshire to check on her vehicle. T1 112-113. She could not say whether Bell continued to work on her vehicle thereafter, and if so, to what degree. Id.

At one point, Bell told A.M. that her vehicle's restoration would be completed by March 2014. T1 101, 108. However, Bell did not complete the work by March and told A.M. that he needed additional time, and that the work would be done in May. T1 101. Bell subsequently delayed the estimated completion date to July and then the fall of 2014. Id. While she understood that delays for restoration projects were normal, T1 119, A.M. decided to end her relationship with

Bell in 2014, before he completed the work. T1 113-114. A.M. ended the relationship because Bell, in her mind, was being inappropriate by asking her for more money and his tone was growing more desperate with each request. T1 101-102, 113-114.

In total, A.M. paid Bell $81,900, which was $52,960 beyond the original estimate. T1 121; A32.[2] However, A.M. admitted to making multiple changes to the original restoration project, including installation of a new engine, seats, and a custom interior, that increased in the cost of the project. T 121-123; see also 717-718 (Bell describing additional modifications requested by A.M.).

When she ended her relationship with Bell, A.M. did not request that the vehicle be returned, but instead told him that he could "scrap" the vehicle. T1 114. Thus, A.M. had no knowledge about the degree of work performed by Bell on her vehicle at the time she ended her relationship with Bell and gave him her vehicle. A.M. did not call the police until Lund suggested she do so, three years later. T1115. There was no evidence that A.M. asked Bell for a refund or sought civil remedies.

[2] A.M. testified that she paid $56,000 more than she expected to pay, T1 121. However, when comparing what she paid to the original estimate, A32, the difference is $52,960. For the purposes of this brief, it is a distinction without a difference.

Contrary to the court's findings, the evidence was insufficient to sustain a finding that Bell deceived A.M. by creating a false impression that he was working on her vehicle when Bell requested and received money from A.M. This Court must reverse.

B. The evidence was insufficient to support a conviction for 219-2017-CR-614 (J.M.)

Bell gave J.M an invoice outlining an agreed-upon price for restoring his vehicle. T1 145; T2 189.[3] The agreed upon price changed twice, once at Bell's request due to the amount of rust found in the vehicle, and once to upgrade the engine at J.M.'s request. T1 147; T2 196-197.

J.M. never visited Bell's shop to view the progress of the restoration project. T1 196, 201. Bell sent him pictures, but J.M. suspected that it was not his vehicle. T1 142-143; T2 207, 212. Notwithstanding this suspicion, however, J.M. did not testify that he took any steps to confirm or deny that the photos depicted his vehicle. The evidence also reflected that he continued his business relationship with Bell and did not demand a return of his money or vehicle.

J.M. paid Bell the agreed upon fee of approximately $19,000, but also made an additional $5,100 in payments. T 197; A33. J.M. testified that he viewed the additional funds as

[3] J.M. testified that he lost the original written estimate. T2 190.

loans to help support Bell's business so he could finish J.M.'s project. T1 174; T2 197-199, 207-208.

At the time of trial, J.M. did not know the whereabouts of his vehicle. T1 177. Acknowledging that restoration projects take time, J.M. testified that he expected the completion of the restoration of his vehicle before six years had passed. T2 189-190, 203. J.M. could not say how much work had been done on his vehicle and what stage in the restoration process it was when he paid Bell the agreed upon price of $19,000. T2 201. The last payment towards the $19,000 was in early February 2015. A33.

While J.M. might have been motivated to loan Bell money after February 2015, to help keep Bell's business afloat and with the hope that his car would be restored, the loans were not directly tied to any agreement to work on J.M.'s vehicle. Bell was not charged with theft of the loan funds. Thus, even assuming Bell was not working on J.M.'s vehicle after February 2015, any transactions after that date are not relevant for the Court's sufficiency analysis.

The evidence was insufficient to sustain a finding that Bell deceived J.M. by creating a false impression that he was working on his vehicle when Bell requested and received money from J.M. for the restoration of J.M.'s vehicle. This Court must reverse.

C. The evidence was insufficient to support a conviction for Charge ID 219-2017-CR-604 (J.T.)

In January 2011, J.T. shipped his car to Bell's shop in New Hampshire. T3 427. J.T. and Bell discussed a budget in the range of $25,000 to $30,000 for the restoration of J.T.'s vehicle. Id. Within the first two weeks of Bell having J.T.'s vehicle, J.T. paid $20,000. T3 428, 431-33; A44. Bell requested additional funds for parts, which J.T. paid to Bell. T3 429-430. Bell originally estimated that the project would be completed in eight to twelve months, leaving J.T. with the expectation that he would have his vehicle back in early 2012. T3 451, 464.

J.T. never visited Bell's shop to view the progress of his vehicle's restoration. T3 429, 466. Early in the project, Bell sent J.T. some pictures of his vehicle to show his progress. T3 429, 430, 459. Outside of those photos, J.T. testified that he "could never get updates" from Bell. T3 430. J.T. testified that he gave Bell "the benefit of the doubt" after learning from the news that Bell had been involved in a serious accident. T3 431, 459, 464-465.

In 2016, after his relationship with Bell ended due to a lack of communication from Bell, J.T. received a photo of his vehicle from one of Bell's customers. T3 453, 470. J.T. saw that his vehicle was stripped to its shell. T3 452-452. J.T. testified that the condition of the vehicle was consistent with

a vehicle being restored, albeit not one in the final stages of restoration. T3 453, 460-461, 469. J.T. acknowledged that Bell painted his vehicle "atomic orange," as agreed upon. T3 455, 465, 470. J.T. also testified that it was possible Bell, in addition to the other work, installed fenders on the vehicle. T3 470.

It was J.T.'s understanding that, the person at Bell's shop who was assisting him was unable to determine which vehicle parts in the shop belonged to his vehicle. T3 455-456. J.T. could not say whether the parts Bell requested money for were in the shop. T3 455, 467, 472, 473. Due to the distance, J.T. elected to not travel to Bell's shop and personally inspect his vehicle and locate the parts. T3 454. Thus, the evidence was insufficient to sustain a finding that Bell deceived J.T. by creating a false impression that he was working on his vehicle when Bell requested and received money from J.T. This Court must reverse.

D. The evidence was insufficient to support a conviction for 219-2017-CR-617 (J.K.)

Bell estimated that restoring J.K.'s vehicle would cost approximately $9,000. T2 302-304, 342, 344; A35. As expected by J.K., there were overages, however, J.K. felt that Bell was harassing him for money constantly, including asking for loans. T2 305-306, 307, 336-337, 345, 349, 356,

358-359. J.K. did loan Bell money, putting Bell in debt to him. T2 326, 349, 356.

J.K. was aware that restoring a vehicle was expensive and took a lot of time. T2 228, 347, 361. Bell, who received J.K.'s vehicle in 2015, estimated that the work would take about a year to complete. T2 347.

J.K would request photographs of his car from Bell, so that he could see what progress was being made. T2 319. Bell did not respond to these requests. Id. On the one occasion Bell sent J.K. a photograph, J.K. did not believe the vehicle was his. T2 320-321, 323, 327, 347, 357; A36. When he confronted Bell however, Bell contended that it was J.K.'s vehicle, T2 321, and J.K. told Bell "I'm fucking with you." A36; see also, T6 840-844 (court instructed jury that it could consider J.K.'s response).

Sometime after being sent this photo, J.K. went to Bell's shop to see the progress made on his vehicle. T2 361-362, 364-365, 372. The vehicle had been stripped down to its shell, had not been sandblasted and primed, as was depicted in the photo, and it appeared that Bell had only rubbed paint thinner and paint stripping on the vehicle. T2 332. J.K. acknowledged that the vehicle, in the condition he found it, was prepared to be sandblasted. T2 372. J.K. also testified that it also appeared that Bell had cut off the rear apron and removed the oil pan. T2 332. He believed that removing the

rear apron and oil pan should have taken no more than forty-five minutes. Id.

The vehicle was missing important parts, such as the engine. T2 333-334. Bell told J.K. that the engine was in Maine at his engine builder's home but refused to provide the address or drive with J.K. to Maine to retrieve it. T2 335. At that point, J.K. informed Bell that he had thirty-days to get some work done on the vehicle. T2 334.

In June 2016, JK received a call from Young informing him that his vehicle was at Bell's shop in Strafford and that Bell was gone. T2 361-363. J.K. went to Bell's shop to retrieve his vehicle. He saw that only a little work had been done to the rear heater channel since his last visit to the shop. T2 334.

While J.K. was not happy with the pace of Bell's progress on the vehicle, the evidence established that work was being done when Bell solicited and received money from J.K. Further, while J.K. might have been motivated to loan Bell money at times to ensure that the business would remain open and his vehicle could be restored, the loans were not directly tied to Bell's business, let alone any agreement to work on J.K.'s vehicle. T2 350-358, 361. Thus, any loans

made to Bell are not relevant to this Court's analysis of whether there was sufficient evidence to convict.[4]

The evidence was insufficient to sustain a finding that Bell deceived J.K. by creating a false impression that he was working on his vehicle when Bell requested and received money from J.K. This Court must reverse.

E. If this Court finds that Bell did not preserve the issues raised in each indictment, it should find plain error.

To the extent that this Court finds Bell did not preserve for appeal the issues raised in subsections A through D, this issue for appeal, it should find plain error. The Court may reverse for plain and prejudicial errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings. State v. Hanes, 171 N.H. 173, 182 (2018); Sup. Ct. R. 16-A. To find plain error: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings. Id.

Although plain error is "used sparingly … and is limited to those circumstances in which a miscarriage of justice would otherwise result," Hanes, 171 N.H. at 182,

[4] J.K. made $9050 in payments to Bell between November 17, 2015 and February 27, 2016. A37. He made an additional $2470.49 in loans between April 26, 2016 and May 3, 2016. Id.

this Court has found that convictions based on insufficient evidence constitute plain error. State v. Houghton, 168 N.H. 269, 273-74 (2015); State v. Guay, 162 N.H. 375, 380-84 (2011); see also State v. Bergeron, No. 2016-0088 at *5 (N.H. June 30, 2017) (non-precedential order).

For the reasons stated above, the trial court erred by denying Bell's motions to dismiss and entering a conviction for each of the four indictments. Moreover, the error was plain. The error was prejudicial because it resulted in Bell's conviction. Guay, 162 N.H. at 384. The error seriously affects the fairness, integrity, or public reputation of judicial proceedings because Bell stands convicted of a felony for which there was not sufficient evidence and has been ordered to serve five to ten years in prison for the offenses. Id.

Because there was insufficient evidence to sustain a conviction, the Court should reverse.

II. THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION FOR JOINDER.

Bell faced six theft by deception indictments involving six alleged victims. A3-8. The charges were alleged to have taken place during various periods, which sometimes overlapped. Id. The alleged victims did not know each other, nor did their agreements with Bell to restore their vehicles have any connection.[5]

On January 30, 2018, the State requested that the indictments be joined for trial. A17-23.[6] It argued that the indictments were part of a common scheme or plan. A19-22. The State argued, in the alternative, that the allegations were logically and factually connected in a manner that did not demonstrate Bell's propensity to engage in criminal conduct. Id.[7]

Bell objected, arguing that joinder was improper because the indictments were not part of a common scheme or plan. A24-25. The court, ruling on the pleadings, found,

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[5] On one occasion, Bell did have J.T. send money to J.K., who then forwarded the money along to Bell. T 325, 439-40. On another occasion, Bell had H.K. send J.T. money, who then forwarded the funds to someone else. T 450-51.

[6] The State's motion only covered 219-2017-CR-604; 606; 614; 615; 617; 949. In August 2018, the State sought to join 219-2018-CR-189 to the six dockets that were joined over Bell's objection in April 2018. A27-31. Bell did not object to the State's motion to join 219-2018-CR-189, and any objection would have been futile given the court's prior ruling with respect to the remaining dockets. Bell was acquitted in 219-2018-CR-189. A7.

[7] The court did not rely on this alternative ground in its order. As such, Bell does not address this ground in his brief.

> the charges are so clearly a part of a common scheme or plan as to defy further explanation. Over a relatively brief period of time, the defendant engaged in the same conduct with each victim; employed the same deceptive tactics to convince victims to part with additional money; and not only did none of the promised work, but also in fact stripped the cars and sold the parts.

AD 46. In so ruling, the court erred.

Under Criminal Procedure Rule 20(a)(2), charges shall be joined for trial, upon request of a party, if they are "related" unless "joinder is not in the best interests of justice." N.H. R. Crim. P. 20(a)(2). Offenses are "related" within the meaning of Rule 20 if they are "alleged to have occurred during a single criminal episode," "[c]onstitute parts of a common scheme or plan," or "are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct." N.H. R. Crim. P. 20(a)(1)(A-C).

On appeal, this Court will "uphold the trial court's ruling unless the decision constitutes an unsustainable exercise of discretion." State v. Brown, 159 N.H. 544, 550 (2009). "To show the trial court's decision was unsustainable, the defendant must demonstrate that the ruling was clearly

untenable or unreasonable to the prejudice of the defendant's case." Id. (brackets and quotations omitted).

This Court has adopted the definition of "common plan" as set forth in New Hampshire Rule of Evidence 404(b), for the purposes of Rule 20(a)(1)(B). Petition of the State (State v. San Giovanni), 154 N.H. 671, 675 (2007); State v. McIntyre, 151 N.H. 465, 466-67 (2004).

> The distinguishing characteristic of a common plan under Rule 404(b) is the existence of a true plan in the defendant's mind which includes the charged crimes as stages in the plan's execution. That a sequence of acts resembles a design when examined in retrospect is not enough; the prior conduct must be intertwined with what follows, such that the charged acts are mutually dependent.

State v. McIntyre, 151 N.H. at 467. In other words, this Court looks to whether the offenses were mutually dependent.

This Court's holding in San Giovanni is instructive. There, the defendant faced fifteen indictments for theft which were identical but for the names of the victims and the amount of money stolen. Id. at 673. The defendant was accused of creating or reinforcing the false impression, which he did not believe to be true, that a treatment facility he owned was a drug and alcohol treatment facility and would provide treatment to the victims or the beneficiaries of the

victims who were paying for their treatment at the facility. Id. The acts, which were alleged to have taken place at different times, all took place during a sixteen-month period. Id. The State appealed the trial court's denial of its motion to join the matters. Id. at 672.

This Court, affirming the trial court, observed that the indictments concerned "discrete offenses committed against multiple victims." State v. San Giovanni, 154 N.H. at 676. The Court also observed that the State "failed to present any facts to support its claims that the defendants could not have committed the later thefts without the money from the earlier thefts." Id. The Court acknowledged that the trial court "could reasonably have found that the actions described by the State-without more-at most established a pattern or systemic course of conduct, which is not enough to prove the existence of a common plan." Id. at 766.

Here, the trial court essentially tracked the State's unsuccessful argument in San Giovanni, finding a common scheme purely due to the temporal proximity of the offenses, the number of victims, and the modus operandi. As this Court clearly held in San Giovanni, the appearance of a design does not equate to a "common scheme or plan" under Rule 20(a)(1)(B). This Court's line of cases involving a single victim further illustrate the point.

For example, in State v. Schonarth, 152 N.H. 560, 561 (2005), the defendant targeted a single victim and defrauded them "through increasingly grandiose schemes connected to the defendant's alleged desire to repay his debt to the victim." Id. at 562. The Court reflected that "the defendant's actions demonstrated a prior design that included the charged acts as part of its consummation." Id.

In a similar vein, this Court sustained the trial court's joinder order in State v. Breed, 159 N.H. 61, 63 (2009), finding that the defendant, a medical examiner, "strove to develop an exclusive relationship with the operators of [the victim, a crematory] to increase the number of examination fees he could collect." Id. at 70. The Court further explained, "the more fraudulent transactions [the defendant] participated in, the more reliant [the victim crematory] became on his services . . .." Id. at 70. Thus, each fraudulent transaction was designed to further the defendant's relationship with the victim making "the charges mutually dependent." Id. at 70.

Here, Bell's alleged schemes to deceive A.M., J.M., J.T., or J.K., were not tied to each other. The State failed to prove that Bell's success in deceiving one alleged victim was fundamental to his success in deceiving subsequent victims. The State's allegations, though similar in kind, only

demonstrated that Bell took advantage of opportunities as they arose.

The State alleged that Bell, on at least one occasion, requested that J.K. receive a wire transfer from J.T., and then wire the funds to Bell, while telling J.T. to wire the money to J.K. because he was purchasing parts from J.K. A20. This allegation, momentarily connected these two alleged victims, but did not make Bell's alleged efforts to obtain money from J.T. through deception dependent upon the success of his efforts to do the same to J.K. Any assertion that it did would be supported only be speculation and not evidence proffered by the State in its motion. Further, in its order, the trial court made no reference to this fleeting interaction between J.K. and J.T. AD 44-46.

The State also alleged that Bell told J.M. to send money to J.T. on two occasions, indicating that J.T. was a "friend." A20. The State, however, failed to proffer any evidence that these two transactions created a dependency between the alleged thefts against each person. Instead, it erroneously abandoned this Court's definition of "common scheme or plan" and argued that the trial court should find a "common scheme or plan," essentially relying on the res gestae doctrine discussed by this Court in State v. Wells, 166 N.H. 73, 77-79 (2014). A20 While one factor to consider under the res gestae doctrine is whether there was a causal connection with the

charged crime, it is not a necessary factor. Instead, the res gestae connection could be temporal or spatial to the charged crime, and thus not requiring the necessary dependency required by this Court for joinder under Rule 20(a)(1)(B). Id. (observing temporal connection of uncharged assault and how evidence of the uncharged act "provided the jury with a full account of a single event, and enabled the jury to realistically evaluate [the victim's] testimony."); see also State v. McIntyre, 151 N.H. at 467.

The reasoning behind the court's finding that the charges were part of a common plan or scheme was akin to a matching game. The charges all occurred within a six-year time frame, with some periods overlapping, the same tactics were used, and the result was the same in each case. What the trial court's order lacked, and what the State failed to proffer evidence in support of, was a finding of a mutual dependency between the charges. Thus, the court erred in finding that the charges were part of a "common scheme or plan."

The court's error prejudiced Bell. Aside from the identities of the alleged victims, the indictments were virtually identical. This Court has long recognized the risk that jurors will draw an improper propensity inference from evidence that a defendant has committed similar other crimes. See, e.g., State v. Watkins, 148 N.H. 760, 768 (2002) (unsustainable

exercise of discretion to admit evidence of prior habitual offender conviction during trial for the same); State v. Ayotte, 146 N.H. 544, 548 (2001) (evidence of an earlier fire reported by defendant during arson trial); State v. Bassett, 139 N.H. 493, 502 (1995) ("Because of the similarity of the conviction for assault and the charged crimes, the jury may have been persuaded to find the defendant guilty . . ."); State v. LaBranche, 118 N.H. 176, 178-179 (1978) (reference to untried indictment required a mistrial because the jury could have found that defendant was "culpable for other instances of criminal conduct closely related to the charge before it."). For these reasons, the court unsustainably exercised its discretion to the prejudice of Bell's case, and this Court must reverse.

CONCLUSION

WHEREFORE, Brim Bell respectfully requests that this Court reverse.

Undersigned counsel requests fifteen minutes of oral argument.

The appealed decision regarding Bell's motion to dismiss was not in writing and therefore is not appended to the brief. The appealed decision regarding the court's order to join the indictments for trial is in writing and is appended to the brief.

This brief complies with the applicable word limitation and contains approximately 7476 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief has been timely provided to the Criminal Bureau of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ *Anthony J. Naro*
Anthony J. Naro, #18409

DATED: August 5, 2020

A D D E N D U M

ADDENDUM – TABLE OF CONTENTS

Page

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NOTICE OF DECISION

File Copy

Case Name: **State v. Brim Bell**
Case Number: **219-2017-CR-00604, 219-2017-CR-00606, 219-2017-CR-00614, 219-2017-CR-00615, 219-2017-CR-00617 & 219-2017-CR-00949**

Enclosed please find a copy of the court's order of April 25, 2018 relative to:

Order On State's Motion For Joinder; Order made (Howard, J.)

April 25, 2018

Kimberly T. Myers
Clerk of Court

(472)

C: Chelsea Elizabeth Lane, ESQ; Kristen Guilmette, ESQ; Strafford Cty Community Corrections Prg

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

State of New Hampshire

v.

Brim Bell

Docket Nos.: 219-2017-CR-604; 606; 614; 615; 617; and 949

ORDER ON STATE'S MOTION FOR JOINDER

The defendant Brim Bell ostensibly operated an antique automobile restoration business in Somersworth, and later Strafford, New Hampshire, known as "Brim Bell's VW Restoration." He claimed to specialize in the restoration of vintage Volkswagen cars. According to the indictments in the six (6) dockets, between 2011 and 2017, Bell obtained unauthorized control over vintage Volkswagens belonging to six different individuals with the intent to deprive the owners of the vehicles, and also deceived the owners into making additional payments toward the restoration of the vehicles when Bell knew he was not doing the restorations. The State requests that the six cases be tried together. (219-2017-CR-604, Court Index #20). The defense objects. (219-2017-CR-604, Court Index #21). For the reasons that follow, the State's motion is GRANTED.

FACTS

In addition to the foregoing facts, the State asserts that the evidence will demonstrate at trial that between 2011 and 2017, the named victims in the indictments contacted Bell for the purpose of having their vintage Volkswagen vehicles professional restored. Each victim delivered their vehicle to Bell, along with a check, and signed a contract for a quoted price. Bell held the vehicles in some cases for several years. He periodically sent pictures of the vehicles

to the victims to demonstrate his progress. The pictures were fakes. He requested additional money from the victims on multiple occasions in order allegedly to complete the restorations. As time wore on, the defendant stopped asking for additional funds to complete the restorations, but instead pleaded with the customers to send him more money simply to keep his shop open. Wanting their cars restored, the victims sent more money to Bell.

Bell lost the business and possession of the vehicles to the property owner, one Lund. Lund contacted the vehicle owners, all of whom came to the property to retrieve their vehicle. Upon arrival, they discovered that not only had Bell not performed restoration work on the cars, in many instances he had stripped the cars and sold the parts.

ANALYSIS

New Hampshire has adopted the approach to joinder of offenses suggested by the ABA Standards for Criminal Justice. See State v. Ramos, 149 N.H. 118, 128 (2003). This approach, based largely on a determination of whether charged offenses are "related" or "unrelated," is embodied in the superior court rules. *See* Super. Ct. Crim. Pro. 20. Rule 20(a) states, in pertinent part:

> (2) Joinder of Related Offenses for Trial. If a defendant is charged with two or more related offenses, either party may move for joinder of such charges. The trial judge shall join the charges for trial unless the trial judge determines that joinder is not in the best interests of justice.

Rule 20(a)(2). Offenses are related if they: (1) "[a]re alleged to have occurred during a single criminal episode"; (2) "[c]onstitute parts of a common scheme or plan"; or (3) "[a]re alleged to have occurred during separate criminal episodes, but nonetheless, are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct." Rule 20(a)(1); see also State v. Brown, 159 N.H. 544, 551 (2009).

In this case, the charges are so clearly part of a common scheme or plan as to defy further explanation. Over a relatively brief period of time, the defendant engaged in the same conduct with each victim; employed the same deceptive tactics to convince victims to part with additional money; and not only did none of the promised work, but also in fact stripped the cars and sold the parts.

Accordingly, the above referenced dockets are consolidated for trial. Trial is currently scheduled to begin with jury selection on **May 15, 2018**. The final pretrial is scheduled for **May 2, 2018**.

So Ordered.

Date: April 25, 2018

Mark E. Howard
Presiding Justice