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

REPLY BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS.

The indictments in this case alleged that Bell committed theft by deception by "creat[ing] or reinforce[ing] the false impression that he was repairing [each customer's] vehicle, which was false and which Brim Bell did not believe to be true." A* 3–8. In his opening brief, Bell argued that the evidence was insufficient to prove "that Bell was not repairing [his customer's] vehicles when he requested money from them." DB 20.

The State, in its brief, does not argue that the evidence proved that Bell was not repairing his customers' vehicles when he requested money from them. Indeed, it argues that it is "immaterial" whether Bell was working on each person's vehicle when he requested money from them. SB 33. It argues instead that the evidence proved that Bell committed theft by deception by:

> (1) not telling [his customers] that their money was being spent at casinos and other non-restoration costs, (2) not correcting their mistaken impression that their money was being used for

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* Citations to the record are as follows:
"AD" refers to the addendum to Bell's opening brief;
"A" refers to the appendix to Bell's opening brief;
"RBA" refers to the appendix to this reply brief;
"SB" refers to the State's brief; and
"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.

> vehicle restoration, and, (3) for at least some of his clients, sending them pictures of other vehicles to give the misleading impression that he was making more progress on their vehicles than he was.

SB 32–33.

The State is required to provide a defendant with notice of the charges prior to trial, not two years after trial. See N.H. Const., Part I, Art. 15 ("No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him"); U.S. Const., 14th Amend. ("[No] State [shall] deprive any person of life, liberty, or property, without due process of law."). Here, the State obtained indictments alleging that Bell committed theft by deception by "creat[ing] or reinforce[ing] the false impression that he was repairing [each customer's] vehicle." A 3–8. The indictments did not allege that Bell committed theft by deception by "not telling [his customers] that their money was being spent at casinos and other non-restoration costs," "not correcting their mistaken impression that their money was being used for vehicle restoration," or "giv[ing] the misleading impression that he was making more progress on their vehicles than he was." SB 32–33.

The indictments were read to the jury at the commencement of trial. T 7–10. At no point during trial did the State move to amend the indictments to include any

alleged deception other than that set forth in the original indictments. At the conclusion of trial, the court instructed the jury that Bell was accused of theft by deception by "creat[ing] or reinforce[ing] the false impression that he was repairing [each customer's] vehicle." T 822. It later instructed the jury that the fourth element of the offense was "deception," that "[t]o prove deception, the State must prove that [Bell] purposely created or reinforced an impression which was false and which [he] believed to be false," and that "[i]n this case the State alleges that [Bell] created or reinforced the false impression that he was repairing the alleged victims' vehicles." T 825. At the conclusion of the instruction, the court asked the parties, "[I]s there anything from counsel regarding the instructions?" T 830. The State responded, "No, Your Honor."[1] T 831.

For these reasons, the record clearly establishes that (a) the indictments charged Bell with committing theft by deception by falsely telling each customer that he was repairing their vehicle, (b) the court repeatedly instructed the jury that Bell was charged with committing theft by deception

[1] If the State had moved to amend the factual allegations in the indictments, either actually or constructively through jury instructions, then the issue for the trial court would have been whether the proposed amendment prejudiced Bell. See, e.g., State v. Kelly, 160 N.H. 190, 195 (2010) (court's answer to jury question constructively amended the complaint to the defendant's prejudice). Because the court here did not amend the indictments, either actually or constructively, Bell had no reason to articulate the prejudice any such proposed amendment would have caused, and this issue is not present in this appeal.

by falsely telling each customer that he was repairing their vehicle, and (c) the State failed to seek an amendment to the indictments or to object to the jury instructions. In light of these facts, the State is mistaken when it claims, in its brief, that it was "immaterial" whether Bell was, in fact, "working on each person's vehicle when he requested money from them." SB 33. Far from being "immaterial," the truth or falsity of that fact was the lynchpin upon which this case turned. See State v. Paglierani, 139 N.H. 37, 38 (1994) (where party did not object to jury instructions, those instructions control in determining sufficiency of the evidence). What is "immaterial" are the new alleged deceptions that the State sets forth for the first time on appeal.

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

On January 30, 2018, the State moved to join, for a single trial, six pairs of indictments charging Bell with theft by deception and theft by unauthorized taking, each pair naming a different alleged victim: J.T., A.M., J.M., C.T., K.K., and E.P. A 17–23. On February 9, 2018, Bell objected. A 24–25. On April 25, 2018, the court granted the motion over Bell's objection, a ruling that Bell challenges on appeal. AD 46.

While that motion was pending, the State, on March 15, 2018, obtained a seventh pair of indictments naming J.O. as a victim. A 7. On August 28, 2018, it filed a second motion to join. A 27. It noted that, at the time it filed its first motion to join, the new indictments had not been returned. A 28. It argued that the new indictments "allege the same scheme, plan and/or course of conduct as alleged in all of the other docket numbers previously joined." A 29.

The State's second motion to join contained inconsistent references to the precise relief it requested. On the one hand, the State requested that the court "additionally join" the new pair of indictments for the already-scheduled trial on the six previously-joined pairs of indictments. A 30. On the other hand, in its prayer for relief, it asked the court to "[j]oin all of the above referenced cases for trial," A 30, an identical

request to that made — and granted — in its first motion to join, A 22.

The State asserted in its motion that Bell's lawyer "assents to the relief requested," without further specification. A 30. The court granted the motion. A 27. The State later nol prossed one of the new indictments, and the jury found Bell not guilty of the other new indictment. A 7.

The State now argues that, by assenting to the State's second motion to join, Bell waived his prior objection to joining the six initial pairs of indictments. SB 36–40. The State speculates that, because Bell was represented by different lawyers when he responded to the two motions to join, his assent to the second motion reflected "changes in . . . [Bell's] litigation strategy." SB 38–40.

After the State filed its brief, this Court remanded this case to the Superior Court to "make written factual findings and clarify the scope of [Bell's attorney's] assent to the second motion to join." RBA 3–4. The Superior Court, in turn, issued an order finding that, in response to the State's second motion to join, Bell's attorney "explained to the court that, in light of the court's order [on the first motion to join], litigating the consolidation of the seventh docket was futile." RBA 5–6. "He explained that while he objected to consolidation and did not believe it to be appropriate, he understood that the court would rule consistent with [its order on the first motion to

join]." RBA 6. "Thus, while he did not advance an extended argument on the issue, he did object and clearly did not intend to waive the issue of the propriety of consolidation." RBA 6.

The court's order establishes that Bell did not waive his objection to joining the six initial pairs of indictments. Additionally, when a party assents to a motion, that assent signifies the party's assent to the relief requested in the motion, not, as the State claims, SB 40, its agreement with each and every "premise" articulated in the motion. See Archdiocese of San Salvador v. FM Int'l, LLC, 2006 WL 2583262, at *1, n.2 (D.N.H. Sept. 7, 2006) (rejecting party's argument that assent to a motion to amend complaint constituted waiver of argument that an allegation in the amendment should be stricken). Finally, even if the State's second motion to join were construed as a request to join, for the second time, the six pairs of indictments that had already been joined, it would have been futile for Bell to object to that request. See State v. Brown, 138 N.H. 649, 652 (1994) (preservation does not require a futile objection).

The court granted the State's motion to join the six initial pairs of indictments based on its finding that the charges were "part of a common scheme or plan" under New Hampshire Rule of Criminal Procedure 20(a)(1)(B). AD 47. The court did not find that the charges were "logically and

factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct" under Rule 20(a)(1)(C). AD 47.

The State, in its brief, argues that the joinder was appropriate primarily because the charges were logically and factually connected. SB 42–45. It structures its entire argument around the five factors articulated in State v. Brown, 159 N.H. 544 (2009), which are used to determine whether charges are "logically and factually connected," not whether they are part of a common scheme or plan. SB 44–45; id. at 551–52.

In a footnote, the State acknowledges that "this Court has traditionally applied these factors in the context of determining whether cases are 'logically and factually connected,'" but claims that the trial court here "considered these factors in concluding that the defendant engaged in a 'common scheme or plan.'" SB 44, n.17. The State is mistaken; the trial court neither cited Brown nor articulated any of its five factors.

In another footnote, the State acknowledges that the trial court did not find that the charges were logically and factually connected, and thus, that this argument constitutes an alternative ground for affirmance. SB 42, n.16. It cites State v. Berry, 148 N.H. 88 (2002) for the proposition that

this Court can affirm a trial court's ruling on an alternative ground. SB 42, n.16.

The State overlooks more recent case law establishing the standard of review that this Court applies when considering whether to affirm on an alternative ground, that, if addressed by the trial court, would have involved a discretionary ruling. In that circumstance, this Court "may sustain the trial court's ruling on a[n alternative] ground . . . only if there is only one way the trial court could have ruled as a matter of law." State v. Cavanaugh, 174 N.H. 1 (2020).

Here, had the trial court addressed whether the charges were "logically and factually connected in a manner that d[id] not solely demonstrate that [Bell] ha[d] a propensity to engage in criminal conduct," that ruling would have been discretionary. State v. Girard, 173 N.H. 619, 623 (2020). The State does not argue that the trial court would have been compelled, as a matter of law, to find that the charges were logically and factually connected in a non-propensity manner. Nor can any such argument be supported on this record.

The first Brown factor, "the temporal and spatial relationship among the underlying charged acts" does not strongly support either result. While the charged acts all took place between 2010 and 2016, that was an extremely broad time frame. While their cars were all moved to New

Hampshire, the alleged victims resided across the eastern United States.

The second Brown factor, "the commonality of the victim(s) and/or participant(s) for the charged offenses," strongly supports severance. Each of the six charges alleged a different victim, and Bell was alleged to have stolen distinct funds from each.

Bell concedes that the third and fourth Brown factors, "the similarity in the defendant's mode of operation" and "the duplication of law regarding the crimes charged," supported joinder.

The fifth Brown factor, "the duplication of witnesses, testimony and other evidence related to the offenses," moderately supports severance. While some background witnesses, such as Lund, may have testified in relation to multiple indictments, the primary evidence in support of each indictment was the testimony of the alleged victim. As noted above, each indictment alleged a different victim.

On balance, the Brown factors, taken as a whole, neither strongly support joinder nor strongly support severance. This is exactly the type of case in which there is no one right answer. Rather, the determination of whether the charges are sufficiently logically and factually connected to support joinder rests squarely within the trial court's discretion. Because the trial court would not have been

compelled, as a matter of law, to join the charges as "logically and factually connected," this Court should reject the State's invitation to affirm on this alternative ground.

In his opening brief, Bell argued extensively that the court erred in finding that the charges "constitute[d] parts of a common scheme or plan." DB 33–38. He noted that this Court has held that, to constitute parts of a common scheme or plan, the charged acts must be "mutually dependent." DB 34. The State, he argued, failed to demonstrate this required "mutual dependency." DB 38.

The State, in its brief, offers no argument that the court correctly found that that the charges were parts of a common scheme or plan.[2] It fails even to mention the requirement of mutual dependency.

For these reasons, the court erred by joining the charges.

[2] The State asserts that Bell "erroneously relies upon this Court's case law interpreting the more stringent joinder standard in existence prior to January 1, 2008." SB 45. On that date, this Court adopted Superior Court Rule 97-A, which added to the definition of "related" offenses those that "are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct." The rule did not purport to modify the existing categories of related offenses, namely, those "alleged to have occurred during a single criminal episode," and those that "[c]onstitute parts of a common scheme or plan." See generally, Brown, 159 N.H. at 550–51.

CONCLUSION

WHEREFORE, Brim Bell respectfully requests that this Court reverse.

Undersigned counsel requests fifteen minutes oral argument.

This brief complies with the applicable word limitation and contains 2,505 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Thomas Barnard
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DATED: December 23, 2021