THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0265

State of New Hampshire

v.

Benjamin M. MacKenzie

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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QUESTION PRESENTED

1. Whether the court erred by admitting text messages exchanged between the 3908 phone and drug-purchasers other than B.F.

Issue preserved by State's motion, defense objection, the hearing on the matter, and the court's ruling. AD 62; T2 255-57, 260-61, 302; A7-A29.*

* Citations to the record are as follows:
"DB" refers to MacKenzie's opening brief;
"SB" refers to the State's brief;
"AD" refers to the addendum to MacKenzie's opening brief containing the appealed decisions;
"A" refers to the appendix to MacKenzie's opening brief containing relevant pleadings;
"H" refers to the transcript of the hearing held on January 18, 2019;
"T1" through "T4" refer to the designated volume of the consecutively-paginated transcript of the four-day trial, held in January 2019.

STATEMENT OF THE CASE AND FACTS

In his opening brief, MacKenzie advanced two broad claims. First, he contended that the court erred in allowing the State to introduce testimony that B.F. habitually bought drugs from MacKenzie. DB 17-33. Second, he argued that the court erred by admitting text messages exchanged between the 3908 phone and drug-purchasers other than B.F. DB 34-54.

In its brief, among other arguments, the State responded to MacKenzie's text-message argument by asserting for the first time that the defense opened the door to the evidence. SB 31-32. This reply brief responds to that new argument.

I. THE COURT ERRED IN ADMITTING TEXT MESSAGES SHOWING DRUG SALES TO OTHER CUSTOMERS.

For at least three reasons, this Court must reject the State's opening-the-door argument. First, the State failed to preserve that argument in the trial court. Second, the trial court did not rely on an opening-the-door rationale. Third, the defense did not open the door to the text-message evidence. This brief develops each point in turn below.

A. The State's argument is not preserved.

At no point in the trial court did the State argue that MacKenzie opened the door to the evidence. In its brief on appeal, the State made no claim to the contrary. SB 31. The preservation obligation applies to the State as appellee. See, e.g., State v. West, 167 N.H. 465, 468 (2015) (refusing to consider unpreserved State argument); State v. Bailey, 166 N.H. 537, 541 (2014) (same); State v. Cheney, 165 N.H. 677, 679 (2013) (same). Accordingly, because the State did not preserve the argument in the trial court, this Court must reject it.

B. The trial court did not rely on an opening-the-door rationale.

As described in MacKenzie's opening brief, the State presented, and the court relied on, two evidence rules during the pre-trial and mid-trial litigation about the admissibility of

the text messages. See DB 34-35 (noting reliance on view that the messages were "intrinsic" to the charged crime of selling to B.F., and on Rule 404(b)). At no point during the discussions of the text-message issue did the parties or the court cite the opening-the-door doctrine or any caselaw pertinent to it.

In this case, the State prevailed before trial on its request to introduce the text-message evidence. The basic premise of the opening-the-door doctrine – that as a response to the creation of a misleading impression a party may introduce previously suppressed or otherwise inadmissible evidence – thus did not apply here. By the time of opening statements, the text-message evidence was not previously suppressed or inadmissible. On the contrary, the State had already won the right to introduce it. When, mid-trial, the defense renewed its objection to the evidence, the State did not assert an opening-the-door rationale. T2 255-57, 260-61, 302. Unsurprisingly, therefore, the trial court did not rely on any such rationale.

Indeed, because the State had won the right, before trial, to introduce the evidence, the defense was entitled to introduce responsive evidence. This Court has described as a "pitfall" to be avoided the idea that a party's response to a pre-trial ruling can be held, retrospectively, to justify that pre-trial ruling. State v. Bassett, 139 N.H. 493, 497 (1995). The State's opening-the-door argument steps into that pitfall.

C. MacKenzie did not open the door to the text-message evidence.

Only in narrow circumstances will this Court affirm a ruling on a ground not relied on by the trial court. An appellate court can affirm on such an alternative ground only in the rare case in which, as a matter of law, the trial court would have had to rely on the alternative ground, had it been argued. State v. Hayward, 166 N.H. 575, 583-84 (2014). For the reasons stated below, the trial court would not have been compelled, on this record, to conclude that MacKenzie opened the door to the text-message evidence.

"'Opening the door' is . . . applied to situations in which one party has created a misleading advantage, and the opponent is then permitted to use previously suppressed or otherwise inadmissible evidence to directly counter the misleading advantage." State v. Morrill, 154 N.H. 547, 549-50 (2006). The Morrill Court distinguished between two varieties of "opening the door:" "curative admissibility," allowing admission of otherwise inadmissible evidence to rebut erroneously admitted evidence, and "specific contradiction," "when one party introduces evidence that provides a justification beyond mere relevance for an opponent's introduction of evidence that may not otherwise be admissible." Id. The State, on appeal, relies on the specific contradiction doctrine. SB 31.

The State's brief focuses on the fact that the defense, at trial, contended that B.F. might have received the fatal dose from somebody other than MacKenzie. SB 31-32. The State contends that the text-message exchange with Meagher supports the proposition that people "addicted to opiates do not typically stockpile drugs, but consume what they have before contacting a dealer to obtain more drugs." SB 32. Several flaws undermine that argument.

First, nothing about the defense was misleading. The fact that the State disagrees on the merits with a defense theory does not make it misleading. "The mere existence of contrary evidence does not … mean that the defendant's initial theory and supporting evidence were misleading." State v. Morrill, 154 N.H. 547, 551 (2006). Stated as a general proposition, it is not misleading to suggest that B.F. might have obtained the fatal dose from another person.

Second, the "fact that the door has been opened does not, by itself, permit all evidence to pass through. The doctrine is to *prevent* prejudice and is not to be subverted into a rule for *injection* of prejudice." State v. Trempe, 140 N.H. 95, 99 (1995) (citation omitted) (emphasis in original). Even if the defense created a misimpression, the court should not have admitted the proffered text-message evidence, because it carried a risk of unfair prejudice out of proportion to any probative value.

In Trempe, this Court reversed a conviction where the trial court improperly applied the opening-the-door doctrine. It noted that evidence "about a confessed simple assault with incestuous overtones was highly prejudicial. Admission of this evidence risked a conviction based on a perceived disposition to commit such crimes." Id. The same logic applies here. To hold that the defense opened the door to evidence of MacKenzie's sales of drugs to several other people would expand the doctrine far beyond its proper boundaries.

For all these reasons, this Court must reject the State's opening-the-door argument.

CONCLUSION

WHEREFORE, for the reasons stated above as well as those given in his opening brief and those to be offered at oral argument, Mr. MacKenzie requests that this Court reverse his conviction.

This brief complies with the applicable word limitation and contains approximately 1194 words.

Respectfully submitted,

/s/ Christopher M. Johnson

By_____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to Assistant Attorney General Zachary Higham, Esq., of the Criminal Bureau of the New Hampshire Attorney General's office, through the electronic filing system's electronic service.

/s/ Christopher M. Johnson

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Christopher M. Johnson

DATED: August 31, 2021