

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0053

State of New Hampshire

v.

Matthew Gedney

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

BRIEF FOR THE DEFENDANT

Stephanie Hausman
Deputy Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301
NH Bar # 15337
603-224-1236
shausman@nhpd.org
(10 minutes 3JX)

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	3
Question Presented	4
Statement of the Case	5
Statement of the Facts.....	6
Summary of the Argument	11
Argument	
I. THE COURT ERRED BY ORDERING RESTITUTION WHEN THE STATE FAILED TO PROVE THAT GEDNEY’S ACTS AS A CONSPIRATOR DIRECTLY CAUSED THE VICTIMS TO SEEK COUNSELING.....	12
Conclusion.....	19
Addendum	Add. 22

TABLE OF AUTHORITIES

Page

Cases

State v. Charest,
164 N.H. 252 (2012) 13

State v. Dilboy,
160 N.H. 135 (2010) 14

State v. Fedor,
168 N.H. 346 (2018) 13

State v. Folley,
172 N.H. 760 (2020) 16

State v. Moore,
___ N.H. ___ (decided June 10, 2020) 15

State v. Papillon,
___ N.H. ___ (decided February 13, 2020) 13

State v. Pinault,
168 N.H. 28 (2015) 16

Statutes

RSA 629:3, IV 14

RSA 651:62 15, 16

RSA 651:63, I 15

QUESTION PRESENTED

Whether the court erred by ordering restitution when the State failed to prove that Gedney's acts as a conspirator directly caused the victims to seek counseling.

Issue preserved by Gedney's objection to restitution as part of the sentence and the court's ruling. SH* 12-13, 19-20, 25-27; Add. 22-24.

* Citations to the record are as follows:

"Add." refers to the Addendum attached to this Brief;

"SH" refers to the sentencing hearing, held on January 6, 2020;

"T1 - T2" refers to the transcripts of the two-day trial held on September 26 - 27, 2019; this citation is followed by the page number as given in the PDF of the transcript.

STATEMENT OF THE CASE

Matthew Gedney was charged with armed robbery and conspiracy to commit armed robbery in the Grafton County Superior Court. T1 13-15. After a jury trial in September 2019, Gedney was found guilty of conspiracy. T2 107-08. The jury hung on the armed robbery count. T2 106. The court (MacLeod, J.) sentenced Gedney to serve six and a half to fifteen years in prison. SH 26-29. One year of the minimum may be suspended upon successful completion of treatment. Id. Other conditions of the sentence include restitution for counseling costs and other provisions. Id.

STATEMENT OF THE FACTS

At a little after 6:00 a.m. on April 4, 2019, two masked individuals entered Randolph and Christine Rhude's home on Lynn Avenue in Alexandria. T1 26-28, 52-54. They first encountered Randolph in the living room. T1 53-54. They told him to open his safe and then followed him into the bedroom, where Christine was resting. T1 27-28, 54-55. One of the masked intruders was male and held what appeared to be a black and silver handgun. T1 28, 31, 54, 57. The other intruder was female and held a baseball bat. T1 28, 55.

The man followed Randolph to a safe in the master bathroom. T1 29, 55. He told Randolph to open the safe or he would "blow [their] fucking heads off." T1 28. He told Randolph not to "try anything funny." T1 55. Randolph had recently injured his right arm and he struggled to get the combination to the safe entered with his left hand. T1 29, 53, 55. The woman stood over Christine, who sat on the bed, within view of the safe. T1 30, 55-56. Christine begged for their lives and covered her face with a pillow. T1 30.

When the safe was opened, the man asked the woman to toss him a bag. T1 31, 56. She tossed a knapsack, which the man began filling with items from the safe, including boxes full of cash and Christine's purse. T1 30-31, 36-37, 56-57. As they left, the woman took a pack of cigarettes from the bureau, telling Christine the cigarettes would kill her. T1

50. Christine later noticed some rings were also missing from her bureau. Id.

When the intruders left, Christine and Randolph watched them walk down the driveway and called 911. T1 31-32, 57-58. They reported that around \$140,000 in cash had been stolen. T1 59-60. They described the male robber as being around five foot, seven inches, approximately Randolph's height. T1 44-45, 61, 107.

At about 6:13 a.m., Mark Bedard and Andrea Bujeaud, also residents of Lynn Avenue, woke to a loud bang. T1 63-64, 66-67. They looked outside and saw a blue Lexus that had gotten stuck up a snowbank. T1 68, 71. Bedard saw two people run from the car. T1 64, 67. Bujeaud went out to investigate and saw one-hundred-dollar bills blowing around outside the car. T1 68-69.

Police arrived at the scene of the crash. T1 86. Trooper Anthony Cattabriga's canine led officers to an abandoned barn. T1 122, 127. Police called to any occupants in the barn to come out, but no one did. T1 130. Cattabriga's dog went into the barn and found a suspect, Jessica Evans. T1 131. The dog bit her and she came out of the barn. T1 132. Evans later said that her boyfriend, Gedney, was still in the barn. T1 94, 158.

Police then entered the barn and found fresh blood droplets in a small room in the barn. T1 140-41. Also in the

room, they found a jacket, a neck warmer, an open backpack overflowing with cash, an open fanny pack also stuffed with cash, and loose bills, some of which appeared to have been loosely buried. T1 138-41, 154-56. Cattabriga believed there was more blood in the room than would have come just from Evans's injury. T1 147.

Police continued to search the barn and discovered a person up in the rafters. T1 144. That person, later identified as Gedney, eventually came down and was arrested. T1 145-46. He also had an injury consistent with a dog bite on his arm. T1 147.

Evans and Gedney were placed in adjacent cells at the Plymouth Police Department. T1 164-65. Police overheard Evans tell Gedney that she had told the police that "KK and Smitty" were with them, to which Gedney replied, "KK and who?" T1 168. Gedney asked "did they drive?" Id. Evans later said "make it Travis, not Kit Kat." Id. Gedney said "don't say I was with you, you don't remember." Id.

Police searched the Lexus and found a black and silver BB gun near the driver's seat and a baseball bat in the front passenger area. T1 89, 96-100. They found hats, masks, gloves, cards with Christine's name on them, a bill of sale for the car with Gedney's name as the buyer, and additional currency. T1 96-100. All the money was brought to

Northway Bank in Plymouth and counted; it totaled \$171,873.25. T1 158-61.

Local residents Charles Kuizinas and Alison Joyce saw the blue Lexus in the area two days before the robbery. T1 75-77, 80-82, 109. At the time, it was occupied by two men. T1 80, 109-10.

Police interviewed Evans on the day of her arrest. T1 110. Although she promised to be honest, she told the police she was not involved in the robbery. T1 111.

At trial, Evans testified that she participated in the robbery with Gedney. T2 11-18. She said that, at the time of the robbery, she had been living with and very close to Tracey Rhude, Randolph's former sister-in-law. T2 7, 35-37. Tracey told her about the money at Randolph and Christine's house. T2 8-9. Evans claimed that she had not participated in conversations between Tracey and Gedney during which Tracey provided more information. T2 9.

Evans said that Gedney was supposed to do the robbery with someone named Ben, that Ben had gone up with them before the robbery happened, but that they could not reach Ben on the morning of the robbery. T2 9-11, 55-56. Because they could not reach Ben, Gedney expected Evans to take his place. T2 11.

Although Evans testified that she drove to the Rhudes' house, she said that Gedney drove from the house and that

he was driving so fast, he lost control and crashed the car.
T2 11-12, 18-19. She testified that she brought the backpack
into the barn. T2 193. Evans tried to call someone to pick
them up. T2 19, 22. She testified that Gedney was with her
in the small room in the barn when the dog bit her and that
he had pried the dog off of her. T2 26-27.

SUMMARY OF THE ARGUMENT

Gedney was found guilty of conspiracy to commit robbery, but the jury was unable to reach a verdict on the allegation that Gedney was one of the armed robbers. A conviction for conspiracy means only that the jury found that Gedney reached an agreement with the purpose that the crime be committed and that at least one overt act was committed. The jury's inability to reach a verdict on the armed robbery signifies that the State failed to prove that Gedney's acts caused the victims' need for counseling. As Christine stated at sentencing, that need was, rather, caused by the acts of those who interacted with the Rhudes while actually committing the robbery. The State did not sustain its burden to prove that Gedney's acts directly caused the victims' need for counseling.

I. THE COURT ERRED BY ORDERING RESTITUTION WHEN THE STATE FAILED TO PROVE THAT GEDNEY'S ACTS AS A CONSPIRATOR DIRECTLY CAUSED THE VICTIMS TO SEEK COUNSELING.

Gedney was initially charged with two counts: armed robbery and conspiracy to commit armed robbery. T1 13-15. The armed robbery indictment alleged that Gedney, "in the course of committing a theft, . . . purposely put [Randolph] in immediate fear of physical force by displaying what reasonably appeared to [Randolph] to be a deadly weapon, a handgun, and demanding cash, and then left the Rhude residence in Alexandria, New Hampshire with a quantity of US currency in cash in excess of 100,000 dollars." T1 13-14.

The conspiracy count alleged that Gedney had a purpose that a crime defined by statute be committed, that he agreed with one or more persons to commit or cause a commission of such crime, and that an overt act was committed by one of the conspirators in furtherance of the conspiracy. T1 14. The overt acts alleged were:

- Gedney and Evans drove to 337 Lynn Avenue in Alexandria, New Hampshire;
- Gedney and Evans covered their faces with masks;
- Gedney had a handgun and Evans had a baseball bat when they entered the Rhude residence;

-Gedney and Evans forced Randolph to open a safe and took over \$100,000 in U.S. currency, cash, that belonged to Randolph;

-Gedney and/or Evans put the cash in a backpack and then left the Rhude residence.

T1 14-15. The jury was instructed that they need only find that one identified overt act was committed. T2 76-77. It was instructed that the State need not prove that Gedney “personally committed or knew of the overt act.” T2 77. Conspiracy “is an inchoate crime that does not require the commission of the substantive offense that is the object of the conspiracy.” State v. Papillon, ___ N.H. ___ (slip op. at 14) (decided February 13, 2020) (quotation omitted).

Gedney admitted in his argument to the jury that he accompanied Evans and Ben to Alexandria, but he argued that he did not conspire with them to commit a robbery. T2 79-89. The jury convicted Gedney of conspiracy but did not convict him of the substantive offense of armed robbery. T2 106-08. The conspiracy count was resolved with a general verdict, T2 107-08; the State did not request a special verdict that would identify the basis of the jury’s decision. See, e.g., State v. Fedor, 168 N.H. 346, 349 (2018) (special verdict form used to identify of which variant of charged offense defendant found guilty); State v. Charest, 164 N.H. 252, 254-55 (2012) (special verdict form used to clarify jury finding on relevant

sentencing provisions); State v. Dilboy, 160 N.H. 135, 154-63 (2010) (upholding use of special findings to clarify which factual allegations jury found in support of an element of the offense).

At sentencing, the State requested restitution up to \$10,000 to reimburse the Rhudes for the cost of counseling. SH 3. The State specified that Christine was “in counseling as a result of what happened to them on the 4th of April the past year.” SH 19. Gedney argued that there was an insufficient nexus between Gedney’s conspiracy conviction and the Rhudes’ need for counseling, in that Gedney’s actions, as a mere conspirator, did not cause the need for counseling. SH 12-13, 20.

The court rejected Gedney’s argument. SH 25-26. While acknowledging that the jury’s verdict did not reveal the overt act or acts on which the conviction was based, the court found that the impact on Christine of the crime was “evident.” Id. The court also relied on the conspiracy sentencing provision authorizing the same sentence for conspiracy as for the underlying offense. SH 26; see RSA 629:3, IV. Finally, the court found that restitution would serve both a rehabilitative and a punishment function. SH 26. The sentence included a provision that Gedney pay up to \$10,000 in restitution for counseling. SH 27. In so ruling, the court erred.

RSA 651:63, I, provides, in pertinent part, that “[a]ny offender may be sentenced to make restitution in an amount determined by the court.” “Restitution” is defined, in pertinent part, as “money or service provided by the offender to compensate a victim for economic loss.” RSA 651:62, V. “[E]conomic loss” means “out-of-pocket losses or other expenses incurred as a direct result of a criminal offense.” RSA 651:62, III.

“Determining the appropriate restitution *amount* is within the discretion of the trial court.” State v. Moore, ___ N.H. ___ (slip op. at 3) (decided June 10, 2020) (emphasis added). “If the factual basis for restitution is disputed, however, the State must prove by a preponderance of the evidence that the victim’s loss or damage is causally connected to the offense and bears a significant relationship to the offense.” Id. The court reviews the trial court’s factual findings with deference; it reviews the court’s legal conclusions de novo. Id.

“Restitution is meant to compensate a victim for ‘losses’ directly arising from a crime.” Id. at 4. “For an expense to be compensable as restitution, the State must prove that the expense represents ‘loss or damage’ to the victim that was caused by the defendant.” Id.

When this Court has considered whether a loss is a “direct result” of a defendant’s criminal conduct, the Court

has carefully delineated that concept. The Court has found that the restitution statute “clearly and unambiguously requires a causal connection between the criminal act and the economic loss or damage.” State v. Folley, 172 N.H. 760, 772 (2020) (quotation omitted). The Court has defined “direct” as meaning “proceeding from one point to another in time or space without deviation or interruption” or “stemming immediately from a source.” Id. (quotations omitted). Thus, the Court has not found loss to be a direct result of a crime when the loss was to potential income to an assisted living facility when the defendants stole the resident’s assets. Id. at 772-73. The Court found that damage to a mailbox was not a direct result of the crime of conduct after an accident of which the defendant had been convicted. State v. Pinault, 168 N.H. 28, 31-33 (2015).

Gedney does not dispute that counseling for a victim of a home invasion and theft may properly be reimbursed through an order of restitution upon conviction for any crime that caused the need for counseling. See, e.g., RSA 651:62, III(a) (covering “mental health services for the victim”). Instead, he disputes that the crime of which he was convicted, conspiracy, directly caused the victims’ need for counseling.

The jury may have convicted Gedney based on finding both that he agreed with others to commit the crime of

robbery and that an overt act – he and Evans traveling to Alexandria – occurred. The jury’s verdict, under that circumstance, would not reflect a finding that an armed robbery occurred or that Gedney participated in it. Rather, the jury’s split verdict indicates it was not unanimously convinced that Gedney participated in an armed robbery.

While the court could find by a preponderance from the trial evidence that a robbery occurred, the State presented no evidence that Gedney’s acts caused the victims’ need for counseling. Rather, the victims’ need for counseling grew out of the actions of the people who committed the armed robbery. Christine expressed the belief at the sentencing hearing that Gedney entered their home, stole their money, and threatened them. SH 5-6. She attributed her need for counseling to the fear caused by experiencing the robbery. SH 7-8.

Given the jury’s finding that Gedney conspired to commit the robbery, but its inability to find that Gedney participated in the robbery, the State had to prove that the Rhudes’ need for counseling was caused by *Gedney’s* actions, not the robbers’ actions. This task was nearly impossible, because the State did not ask for a special verdict form or special findings to indicate which overt act or acts the jury found beyond a reasonable doubt. Given that Gedney conceded that he had gone to Alexandria with Evans, the first

alleged overt act is the only act about which there can be any certainty.

Christine did not attribute her need for counseling to the knowledge that Gedney and others reached an agreement to rob them. Nor did she attribute her need for counseling to the fact that Gedney and Evans drove to Alexandria. Instead, she attributed her need for counseling to the understandable feelings of violation and fear occasioned by being robbed in their home. Restitution for her counseling is an appropriate sentencing provision for anyone found guilty of robbing her. Restitution is not, however, an appropriate element of Gedney's sentence, as the State failed to show that the victims' need for counseling was a direct or immediate result of Gedney's actions. This Court must reverse.

CONCLUSION

WHEREFORE, Matthew Gedney respectfully requests that this Court reverse the order for restitution and remand.

Undersigned counsel requests ten minutes of oral argument before a 3JX panel of this Court.

The appealed decision is in writing and is appended to the brief.

This brief complies with the applicable word limitation and contains under 3200 words.

Respectfully submitted,

By /s/ Stephanie Hausman
Stephanie Hausman, 15337
Deputy Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

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/ Stephanie Hausman
Stephanie Hausman

DATED: September 17, 2020

A D D E N D U M

ADDENDUM – TABLE OF CONTENTS

	<u>Page</u>
Mittimus	Add. 22

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

http://www.courts.state.nh.us

Court Name: Crafton Superior
 Case Name: State v. Matthew Gedney
 Case Number: 215-2019-CR-153 Charge ID Number: 1608822C
(if known)

STATE PRISON SENTENCE

Plea/Verdict: <u>Guilty</u>	Clerk: <u>Carlson</u>
Crime: <u>Conspiracy to Commit Robbery</u>	Date of Crime: <u>4/4/19</u>
Monitor:	Judge: <u>MacLeod, J.</u>

A finding of GUILTY/TRUE is entered.

- The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b or of an offense recorded as Domestic Violence. See attached Domestic Violence Sentencing Addendum.
- 1. The defendant is sentenced to the New Hampshire State Prison for not more than 15 nor less than ~~6.5 years~~ There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.
- 2. This sentence is to be served as follows: Stand committed Commencing 1/6/20
- 3. _____ of the minimum sentence and _____ of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends ___ years from today or release on _____ (Charge ID Number)
- 4. _____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.
- 5. See Addendum to State Prison Sentence Sexual Offender Assessment and Treatment.
- 6. The sentence is consecutive to _____ (Charge ID Number(s))
 concurrent with _____ (Charge ID Number(s))
- 7. Pretrial confinement credit: 277 days.
- 8. The Court recommends to the Department of Corrections:
 - Screen and/or assess for drug and alcohol treatment needs.
 - Sentence to be served at House of Corrections
 - _____

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

Case Name: State v Matthew Gedney
Case Number: 215-2019-CR-153

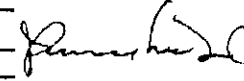
STATE PRISON SENTENCE

PROBATION

- 9. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.
Effective: Forthwith Upon Release _____
 The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.
- 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.
- 11. Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.

OTHER CONDITIONS

- 12. Other conditions of this sentence are:
 - A. The defendant is fined \$ _____ plus statutory penalty assessment of \$ _____
 The fine, penalty assessment and any fees shall be paid: Now By _____ OR
 Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed for the collection of fines and fees, other than supervision fees.
 \$ _____ of the fine and \$ _____ of the penalty assessment is suspended for ____ year(s).
A \$25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.
 - B. The defendant is ordered to make restitution of \$ 10,000 maximum.
 - Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
 - At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
 - Restitution is not ordered because: _____
 - C. The defendant is to participate meaningfully in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
 - D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.
 - E. Under the direction of the Probation/Parole Officer, the defendant shall tour the
 New Hampshire State Prison House of Corrections
 - F. The defendant shall perform _____ hours of community service and provide proof to
 the State or probation within _____ days/within _____ months of today's date.
 - G. The defendant is ordered to have no contact with _____
either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.
 - Law enforcement agencies may destroy the evidence return evidence to its rightful owner.
 - I. The defendant and the State have waived sentence review in writing or on the record.
 - J. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
 - K. Other: See addendum **Additionally, the defendant shall undergo a psychological evaluation for co-occurring disorders and comply fully with all treatment recommendations with proof to the State.**

Date January 6, 2020 Presiding Justice  Honorable Lawrence A. MacLeod

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: Grafton County Superior Court
Case Name: State v. Matthew Gedney
Case Number: 215-2019-CR-0153 Charge ID Number: 1608822C
(if known)

ADDENDUM TO STATE PRISON SENTENCE
SUBSTANCE USE ASSESSMENT AND TREATMENT

The Court recommends the defendant receive an assessment for substance use treatment at the State Prison to determine whether, and to what extent, treatment is appropriate.

If the assessment recommends completion of substance use treatment at the New Hampshire State Prison, then the defendant shall successfully complete the program(s) prior to suspension of his/her sentence. Upon successful completion of the treatment at the New Hampshire State Prison one yr of the minimum and none of the maximum sentence shall be suspended subject to the other conditions of this sentence.

If the assessment recommends a form of treatment outside the prison, then 0 of the minimum and 0 of the maximum shall be suspended upon acceptance into the recommended treatment. In addition to other conditions of this sentence, successful completion of treatment shall be a specific condition of the suspended sentence.


If the assessment establishes that no treatment is needed, 0 of the minimum and 0 of the maximum shall be suspended subject to any other conditions imposed by this Court.

Any suspended portion of the sentence may be imposed after a hearing at the request of the State brought at any time beginning today and up to 10 yrs after the date the sentence was suspended.

This Addendum to State Prison Sentence is attached to, and made a part of, the State Prison Sentence imposed on the defendant this date by the Court.

January 6, 2020

Date



Presiding Justice Honorable Lawrence A. MacLeod