

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2020-0053

The State of New Hampshire

v.

Matthew Gedney

SUPPLEMENTAL MEMORANDA

On April 15, 2021, this Court ordered the parties to “file supplemental memoranda, . . . addressing any out of state cases or other authorities relevant to the question of whether the defendant in this case, who was convicted of conspiracy to commit armed robbery, but not convicted of armed robbery because the jury was unable to reach a verdict on that charge, can be ordered to pay the restitution ordered by the trial court.”

The defendant argued in his appellate brief that restitution was not appropriate because “the State presented no evidence that Gedney’s acts caused the victims’ need for counseling.” DB 17. In response, the State drew this Court’s attention to the trial court’s finding at sentencing that trial testimony established by at least a preponderance of the evidence that the defendant caused the victims’ need for counseling because the “evidence at trial from Ms. Evans was that [the defendant was] the one with the gun and . . . the one that pointed the gun at Mr. Rhude, at his head.” ST 24; SB 18. At oral argument, the questioning focused not on whether there was sufficient evidence in the record to support the trial court’s finding, but

instead on whether the trial court erred in making factual findings at sentencing that were not readily apparent from the jury's verdict. Considerable case law establishes that the trial court can make factual findings at the lower preponderance of the evidence standard, and order restitution based on those findings, even though the jury was unable to reach a verdict on the armed robbery charge.

In 1987, this Court recognized that “[i]t is of course well settled in most jurisdictions that a trial court may consider evidence of pending charges, as well as charges that have fallen short of conviction, in determining sentencing.” *State v. Cote*, 129 N.H. 358, 374 (1987). Based on this “well settled” principle of law, the trial court did not exceed its discretion when it considered trial testimony which established that the defendant entered the victims’ home and threatened them—evidence relevant to at least two of the overt acts alleged in the conspiracy indictment—even though the armed robbery charge that also relied on that evidence did not result in a conviction.

In *United States v. Watts*, the Supreme Court held that even “an acquittal in a criminal case does not preclude the [g]overnment from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.” 519 U.S. 148, 156, (1997) (*per curiam*) (quoting *Dowling v. United States*, 493 U.S. 342, 349 (1990)). Although *Watts* involves an acquittal, as opposed to a hung jury, and does not involve restitution, the reasoning is highly relevant to this Court’s questions regarding a court’s ability to make factual findings at sentencing that are not readily apparent from the jury’s verdict.

In *Watts*, the police discovered drugs and two guns in the defendant's home. *Id.* at 149. A jury convicted the defendant of possession with intent to distribute but acquitted on the charge of using a firearm in relation to a drug offense. *Id.* at 149-50. At sentencing, the district court found by a preponderance of the evidence that the defendant had used the guns in connection with the drug offense and was subject to a higher sentence. *Id.* at 150.

The Ninth Circuit vacated *Watts*' sentence and remanded for resentencing. *United States v. Watts*, 67 F.3d 790, 796-98 (9th Cir. 1995). The Circuit Court reasoned that, although a District Court can consider conduct "other than that of which a defendant was convicted" in calculating a sentence, it could not "reconsider facts that the jury necessarily rejected by its acquittal of the defendant on another count." *Id.* at 796.

The Supreme Court reversed, reasoning that the Ninth Circuit "failed to appreciate the significance of the different standards of proof that govern at trial and sentencing," and "misunderstood the preclusive effect of an acquittal" when it held that the government was barred from relitigating the acquitted gun charge at sentencing. *Watts*, 519 U.S. at 155. The Court explained that "it is impossible to know exactly why a jury found a defendant not guilty on a certain charge" in the absence of specific factual findings. *Id.* An acquittal, the Court reasoned, "is not a finding of any fact" and does not establish that the jury rejected any facts or concluded that the defendant was innocent of the charged conduct; it establishes only that the government failed to prove an essential element of the offense beyond a reasonable doubt. *Id.* Hence, the Court concluded, the jury's acquittal on the gun charge did not "preclude a finding by a preponderance of the

evidence,” at sentencing, “that the defendant did, in fact, use or carry ... a weapon ... in connection with a drug offense.” *Id.* at 157. In other words, the acquittal did not prevent the district court from finding, under a lower standard of proof, that the conduct that supported the acquitted charge occurred.

In February 2021, the United States Court of Appeals for the First Circuit relied on *Watts* in *United States v. Frederickson*, 988 F.3d 76, 85 (1st Cir. 2021). In *Frederickson*, a defendant on supervised release was indicted on a count of assaulting a federal employee after he punched his probation officer in the face during a scheduled urine test. *Id.* at 81. The probation office also sought revocation of his supervised release on the basis that he violated the conditions of his release by committing another crime. *Id.* At the assault trial, the defendant testified that he punched the probation officer in self-defense after the probation officer touched his genitals. *Id.* at 81-82. The jury returned a not guilty verdict. *Id.* at 82. At the subsequent revocation hearing, the same judge who presided at the jury trial revoked the defendant’s supervised release on the basis of the same conduct. *Id.* at 80. On appeal, the defendant argued that the court improperly used acquitted conduct to revoke his supervised release. *Id.* at 84.

The First Circuit affirmed the revocation of defendant’s supervised release, finding, based on the “straightforward logic of *Watts*,” that an acquittal during a criminal case does not prevent the government from relying on the same acquitted conduct during a revocation hearing because the revocation hearing is “similarly governed by a lower standard of proof.” *Id.* at 85-86.

Turning from federal to New Hampshire decisional law, pursuant to a 1987 New Hampshire case that predates *Watts*, a trial court may not consider evidence of charges of which the defendant has been acquitted to punish the defendant. *Cote*, 129 N.H. at 374-76. Nevertheless, in 2008, in *State v. Gibbs*, this Court concluded that a trial court did not violate a defendant's due process rights when it considered the conduct at issue in the acquitted charge when deciding whether to impose a suspended sentence. 157 N.H. 538, 542 (2008). This Court reasoned that "the trial court's determination did not imply the jury's verdict was inaccurate" because "the motion to impose is a separate proceeding, with a different, lesser, burden of proof." *Id.* Therefore, when "the trial court independently evaluated the evidence before it to determine whether the State proved, by a preponderance of the evidence, that a violation of the suspension conditions had occurred," it was "in no way reflect[ing] upon the jury's separate task of determining whether, beyond a reasonable doubt, the defendant committed the alleged crimes." *Id.*

The issue presented by this appeal is whether the State has met its burden to prove by a preponderance of the evidence that the victims' economic loss "is causally connected to the offense and bears a significant relationship to the offense." *State v. Folley*, 172 N.H. 760, 771 (2020). This restitution determination, like the revocation proceeding in *Gibbs*, similarly presents: 1) a question that is independent from the jury's verdict; 2) is governed by a lower standard of proof; and 3) in no way reflects upon the jury's "separate task of determining whether, beyond a reasonable doubt," the defendant committed an additional crime of armed robbery. *Gibbs*, 157 N.H. at 542.

Restitution cases from this Court and other states confirm that the trial court did not err when it ordered restitution after crediting trial evidence that established by at least a preponderance of the evidence that Gedney's own act—holding a gun and pointing in at Mr. Rhude's head—caused the Rhudes' need for counseling and warranted a restitution order in this case. ST 24, 26. The trial court's factual findings are supported by the record and are not clearly erroneous. *See State v. Schwartz*, 160 N.H. 68, 71 (2010).

For example, in *Schwartz*, this Court affirmed a \$36,389 restitution order in a case in which a jury convicted the defendant of simple assault for causing unprivileged physical conduct to a victim but acquitted of a more severe second degree assault charge. *Id.* On appeal, the defendant argued that a trial court erred in sentencing him to pay restitution for breaking the victim's jaw because the simple assault charge did not allege that he caused injury; therefore, "the State failed to prove the requisite causal connection between the simple assault of which he was convicted and the damages for which it sought restitution." *Id.* at 71. This Court rejected the defendant's arguments, reasoning that the defendant had misconstrued the statutory requirements for awarding restitution because restitution "is not an element of the offense." *Id.* at 72. Rather, a defendant "may be held liable for economic losses directly resulting from factual allegations that support the conduct covered by the conviction." *Id.* (citing *State v. Armstrong*, 151 N.H. 686, 687 (2005)). Therefore, this Court concluded that the trial court did not err in ordering restitution because the defendant was convicted of unprivileged physical contact by hitting and the record supported a finding by a preponderance of the evidence that the victim's physical injuries were

causally connected to the fact that defendant hit him, even though the jury had acquitted the defendant on the second degree assault charge. *Id.*

Similarly, in *State v. Lewis*, 222 Ariz. 321, 326 (Ariz. Ct. App. 2009), a trial court ordered the defendant to pay restitution for the medical expenses of a victim who had been shot in the shoulder after a jury convicted the defendant of drive-by shooting, acquitted him of aggravated assault resulting in serious physical injury, and failed to reach a verdict on a charge of aggravated assault with a deadly weapon. *Id.* at 323. On appeal, the defendant asked the court to vacate the restitution order, arguing that he was acquitted of the aggravated assault charge and nothing in the jury's verdict suggested that they believed that he fired at a person as opposed to a building. *Id.* The court disagreed and affirmed the restitution order, reasoning that "the facts underlying the conviction determine whether there are victims of a specific crime." *Id.* at 325. The court concluded that even though the defendant was acquitted of the aggravated assault charge, he could still be liable for restitution "so long as his criminal conduct—the drive-by shooting—directly caused [the victim's] injuries." *Id.* at 325.

The court then reviewed the evidence from trial and held the trial court could have reasonably found that the defendant's criminal conduct directly caused the victim's economic loss. *Id.* at 326. The court observed that because a trial court's restitution order is based on its "independent evaluation of the evidence adduced at trial" and is governed by a lower preponderance of the evidence standard; "the trial court was not constrained by [the defendant's] acquittal on the aggravated assault charge, on which the state had the burden of proving his guilt beyond a reasonable doubt." *Id.*

at 326.¹ In sum, even though the defendant could have still been found guilty of drive-by without committing the act that caused the victim's economic loss, the appellate court confirmed the restitution order because the evidence in the record established at the lower preponderance standard that the defendant's specific acts taken as part of the crime of conviction directly caused the victim's economic loss.

Here, the exact conduct that caused the victims' need for counseling is included in the list of overt acts in the conspiracy indictment. T 13. Because restitution is not an element of the offense, the jury did not need to find that the defendant engaged in the exact act that caused the victims' economic loss in order for a judge to order restitution. And although, as was the case in *Lewis*, the defendant could be guilty of the crime of conviction—conspiracy in this case and drive-by shooting in *Lewis*—without committing the act that directly caused the victim's economic loss; specific trial testimony established by at least a preponderance of the evidence that the defendant indeed entered the victims' home and threatened them—the specific act that caused the need for counseling. Therefore here, as in *Lewis*, restitution is appropriate.

Finally, the fact that this case involves a conspiracy conviction as opposed to the drive-by shooting conviction in *Lewis* or the simple assault conviction in *Schwartz* is of no moment. The defendant was convicted of conspiracy to rob the victims. And ample trial evidence supports the trial

¹ The court also noted that even if another individual participated in the crime, that fact "would not alter our conclusion," because in Arizona—as in New Hampshire—a defendant may be held responsible for all of the damage or loss caused to a victim even when criminal conduct is undertaken in concert with others. *Lewis*, 222 Ariz. at 326-27 (quoting *State v. Eno*, 143 N.H. 465, 471 (1999)).

court's conclusion that, as part of his own actions in furtherance of the conspiracy, the defendant took the charged, overt act of entering the victims' home and threatening them. This act directly caused economic loss and restitution is appropriate. The fact that the same activity on the part of the defendant might have also resulted in a conviction on a second or more serious charge, but did not in this case, does not mean that the trial court is somehow prevented from ordering restitution; a defendant "may be held liable for economic losses directly resulting from factual allegations that support the conduct covered by the conviction." *Armstrong*, 151 N.H. at 687.

Furthermore, the defendant's activity which caused the victims' economic loss—threatening the victims—preceded the victims' economic loss. And the action was criminal because it was taken in furtherance of the conspiracy for which the defendant was convicted. Accordingly, this Court should affirm because here, unlike in *Pinault*, the defendant's own criminal actions both preceded and caused the victims' economic loss. *Cf. State v. Pinault*, 168 N.H. 28, 33 (2015) (concluding trial court erred in ordering restitution for economic loss that preceded the crime of conviction because the economic loss could not logically be the result of the subsequent criminal act).

Finally, New Hampshire Courts have not had previous occasion to consider whether a person convicted of conspiracy can be ordered to pay restitution for all losses attributable to coconspirators. It need not reach that question in this case; it can affirm on the basis that ample evidence supports the trial court's: 1) permissible evaluation of the trial evidence at sentencing; and, 2) conclusion that, by at least a preponderance of the

evidence, the defendant's own actions in furtherance of the conspiracy directly caused the victims' economic loss. However, should this Court reject the trial court's factual finding, and proceed to the statutory interpretation question about the interplay of the "any offender" language in the restitution statute, RSA 651:63, and the penalty portion of the conspiracy statute, RSA 629:3, IV (stating that "[t]he penalty for conspiracy is the same as that authorized for the crime that was the object of the conspiracy") the State directs this Court to the multitude of cases which hold that a convicted conspirator is liable in restitution for all losses that proximately result from the conspiracy itself, including losses attributable to coconspirators. *See, e.g., United States v. Newell*, 658 F.3d 1, 32 (1st Cir. 2011) ("[I]t is well established that defendants can be required to pay restitution for the reasonably foreseeable offenses of their co-conspirators."); *United States v. Newsome*, 322 F.3d 328, 337-38 (4th Cir. 2003) (ordering restitution for entire amount of loss caused by conspiracy, even though amount far exceeded the loss personally attributable to defendant); *United States v. Ismoila*, 100 F.3d 380, 398-99 (5th Cir. 1996) (a participant in a conspiracy is legally liable for all the actions of his co-conspirators, and the district court was "well within its discretion to order restitution for the losses resulting from the entire fraudulent scheme and not merely the losses directly attributable to [the defendant's] actions"); *United States v. Grovo*, 826 F.3d 1207, 1220 (9th Cir. 2016) (restitution provision at 18 U.S.C. § 2259 requires a causal connection between the offense and the victim's harm, but "a defendant convicted of conspiracy is liable for restitution for not only those harms resulting from the defendant's individual actions, but also others caused by the conspiracy itself"); *People*

v. Grant, 455 Mich. 221, 236 (1997) (a convicted conspirator can be ordered to pay restitution for all economic loss from conspiracy because “in the eyes of the law, the acts of one or more are the acts of all the conspirators”); *Moore v. State*, 673 A.2d 171, 172 (Del. 1996) (“A defendant may be ordered to make restitution on the basis of acts of a co-conspirator, just as a defendant may be given any other appropriate punishment based on the acts of a co-conspirator.”); *State v. Hoseman*, 799 N.W.2d 479, 486 (Wis. 2011) (affirming restitution to cover economic loss to direct victims of the conspiracy and there was a direct causal connection between defendant’s actions and economic loss).

The State respectfully asks this Court to affirm the restitution order.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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April 27, 2021

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CERTIFICATE OF COMPLIANCE

I, Elizabeth Velez, hereby certify that pursuant to this Court's April 15, 2021 order, this supplemental memoranda contains approximately 2,991 words, which is fewer than the words permitted by this Court's order. Counsel relied upon the word count of the computer program used to prepare this brief.

April 27, 2021

/s/Elizabeth Velez
Elizabeth Velez

CERTIFICATE OF SERVICE

I, Elizabeth Velez, hereby certify that a copy of the State's supplemental memoranda shall be served on Stephanie Hausman, Deputy Chief Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

April 27, 2021

/s/Elizabeth Velez
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