

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0163

State of New Hampshire

v.

Teresa Mercon

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
CARROLL COUNTY SUPERIOR COURT

REPLY BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

THE OFFICE OF THE ATTORNEY
GENERAL

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ISSUES PRESENTED

I. Whether the question of jury instructions is properly before this Court and whether the issue has been resolved in the State's favor.

II. Whether the trial court erred as a matter of law that proof that the prior conviction had occurred was an element of the offense.

III. Whether the trial court exceeded its discretion in denying a motion to continue because a witness is not available, combined with its ruling on admissibility of the case summary, and considering its comments about the State's decision to seek a stay.

STATEMENT OF THE CASE AND FACTS

The State relies on its brief for the procedural history and factual background.

SUMMARY OF THE ARGUMENT

The State offers three points in response to the defendant's brief.

First, the defendant argues that the certified copy of the case summary is not dispositive evidence. She also contends that State might ask the court for a jury instruction that directed the jury that it must find that the State had proven that element of the offense. The State has not asked the trial court to instruct the jury in this manner. This issue is not properly before this Court.

Second, the defendant contends that proof of the prior conviction is an element of the offense. The State disagrees, but if it is an element, it makes the trial court's delays in ruling on the State's motions all the more significant.

Third, although granting or denying a continuance is generally discretionary with the trial court, the denial of the continuance in this case is significant for two reasons: (1) if the defendant is correct and proof of the conviction is an element of the offense, the State could not proceed without a ruling on its motion to reconsider; and (2) in the February pretrial conference, the trial court seemed to criticize and to discourage the State from challenging its evidentiary ruling on appeal.

ARGUMENT

I. THE JURY INSTRUCTION WAS NOT RAISED WITH THE TRIAL COURT AND IS NOT PROPERLY BEFORE THIS COURT.

The defendant contends that the State’s “quarrel with the evidentiary ruling suggests that it hopes to have the jury instructed that, on the basis of the sheet,” the jury must find that the defendant had a prior conviction. DB 18.¹ Jury instructions were never discussed in this case and that suggestion by the defendant is without support on the record.

It may very well be that, if the case goes to trial and the case summary is admitted, the defendant will not contest the prior conviction. Indeed, according to the State’s pleading, contesting the conviction was not her trial strategy in the district division of the circuit court. SA 51 (“Transcripts from the District Court trial show that the Defendant’s strategy was to fully admit the offense and request the Court’s leniency.”). The issue presented here is not what (if any) jury instruction should be given to the jury. It is whether the case summary, certified by the court of conviction as accurate, is admissible to prove that the defendant was convicted. It is, in part, the vagueness of the trial court’s ruling that has prompted the State’s appeal. *See* T 25 (The trial court ruled that the case summary is “some evidence of that DWI conviction and revocation on the basis of that DWI conviction.”). The issue of jury instructions, however, is not presented here.

¹Citations to the record are as follows:

“DB _” refers to the defendant’s brief and page number.

“SA _” refers to the State’s appendix to its brief and page number.

“T_” refers to the February 26, 2020 hearing transcript and page number.

II. IF THE PRIOR CONVICTION IS AN ELEMENT OF THE OFFENSE, THE TRIAL COURT'S RULING IS EVEN MORE SIGNIFICANT.

Second, the defendant contends that proof of the prior conviction is an element of the offense. DB 21. If it is an element, it makes the trial court's delays and lack of clarity in ruling on the State's motions all the more significant.

At the outset, the delay in ruling on the motion to reconsider left the State without recourse. If proof of the conviction is required, and the documents that would prove the conviction, with the exception of the case summary, have been destroyed, then the case cannot be prosecuted. The court's initial ruling, requiring proof that the guilty plea was knowing, voluntary, and intelligent, if applied to other cases would undercut the State's ability to prove offenses that require proof of conviction. *See, e.g.*, RSA 159:3, 159:3-a, 159:7. If a conviction occurred outside the State of New Hampshire, and the court persisted in its later ruling that the certified copy of the conviction was only "some evidence" of the conviction, the State might find it impossible to prove more serious offenses. It is clear that certified copies of court documents are routinely admitted in cases of far greater gravity than this case. *Cf. State v. Addison*, 165 N.H. 381, 533 (2013) (noting that the defendant argued that the State should be limited to presenting certified copies of convictions during the guilt phase of the trial); *State v. Scognamiglio*, 150 N.H. 534, 539 (2004) (certified copy of conviction sufficient proof of prior conviction in sentencing for second-degree assault); *State v. Buckwold*, 122 N.H. 111, 112 (1982) (certified abstracts sufficient to prove convictions).

The trial court's February 2020 ruling that the case summary was "some evidence" of the prior conviction fell short of acknowledging that it was actual proof. The State did not, as the defendant suggests, "ultimately prevail[]," DB 18, on the issue because it is not clear what "some proof" actually means. The court did not state, for example, that the case summary was admissible, but subject to challenge by the defense. *Cf. Buckwold*, 122 N.H. at 112 ("Once the State produced the certified abstracts of the defendant's prior convictions, the defendant had the burden of proving that he was not duly convicted of the prior offenses."). Because the court had concluded that prove of the conviction was an element of the offense, the court's ambiguous ruling did not result in the State "ultimately prevail[ing]."

III. THE TRIAL COURT'S DECISION TO DENY THE MOTION TO CONTINUE EXCEEDED ITS DISCRETION.

Finally, although granting or denying a continuance is generally discretionary with the trial court, the denial of the continuance in this case is significant for two reasons: (1) if the defendant is correct and proof of the conviction is an element of the offense, the State could not proceed without a ruling on its motion to reconsider, a ruling that the trial court declined to give before the January jury selection; and (2) in the February pretrial conference, the trial court seemed to criticize and to discourage the State from challenging its evidentiary ruling on appeal.

The defendant asserts, without support, that the State's "request for a continuance centered more on Trooper Muto's unavailability than on [its] desire to appeal the court's pre-trial rulings." DB 35. In arguing this, the defendant avoids the issue that is central to this appeal: if the State must prove the prior conviction as an element of the offense, and if the certified copy of the case summary is only "some" evidence of the prior conviction, the State cannot be confident that its case would survive a motion to dismiss.

The trooper's unavailability certainly compounded the State's problems, but that alone would not have prompted an interlocutory appeal. The trial court did not apply the speedy trial analysis adopted by this Court, *see State v. Allen*, 150 N.H. 290, 292 (2003), and, therefore, the State's argument on that issue was not addressed. When the court denied the second motion to continue after criticizing the State for seeking a stay and exploring its rights on appeal, it exceeded its discretion.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court reverse the judgment below.

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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January 20, 2021

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CERTIFICATE OF COMPLIANCE

I, Elizabeth C. Woodcock, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this reply brief contains approximately 1,325 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

January 20, 2021

/s/Elizabeth C. Woodcock
Elizabeth C. Woodcock

CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, hereby certify that a copy of the State's reply brief shall be served on Chief Appellate Defender Christopher Johnson, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

January 20, 2021

/s/Elizabeth C. Woodcock
Elizabeth C. Woodcock