THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0204

State of New Hampshire

v.

Roger Roy

Appeal Pursuant to Rule 7 from Judgment of the
Hillsborough County Superior Court – Northern District

REPLY BRIEF FOR THE DEFENDANT

Thomas Barnard
Senior Assistant Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301
NH Bar #16414
603-224-1236
(15 minutes oral argument)

TABLE OF CONTENTS

Page

Table of Authorities 3

Argument

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR FELONY DOMESTIC VIOLENCE. 4

C. Even if estoppel does not apply, RSA 631:2-b, I(e) and II do not define, as a felony, conduct that does not constitute criminal threatening with a deadly weapon under RSA 631:4, II(a)(2). 4

Conclusion 8

TABLE OF AUTHORITIES

Page

Cases

In re R.H.,
___ N.H. ___ (July 2, 2021)....................6

State v. Locke,
166 N.H. 344 (2014)....................5

Constitutional Provisions

New Hampshire Constitution, Part I, Article 16....................5

United States Constitution, Fifth Amendment....................5

Statutes

RSA 631:2-b....................4, 5

RSA 631:4....................4, 5

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR FELONY DOMESTIC VIOLENCE.

C. Even if estoppel does not apply, RSA 631:2-b, I(e) and II do not define, as a felony, conduct that does not constitute criminal threatening with a deadly weapon under RSA 631:4, II(a)(2).

In his opening brief, Roy notes that the felony of criminal threatening with a deadly weapon, as defined by RSA 631:4, II(a)(2), requires that the victim perceive the weapon. DB* 23–24. He argues that the felony of domestic violence, as defined by RSA 631:2-b, I(e) and II, also requires that the victim perceive the weapon. DB 32–38.

The State does not dispute that the felony of criminal threatening with a deadly weapon, as defined by RSA 631:4, II(a)(2), requires that the victim perceive the weapon. It argues, however, that the felony of domestic violence, as defined by RSA 631:2-b, I(e) and II, does not require that the victim perceive the weapon. SB 28–31.

The State overlooks a significant implication of its proposed statutory interpretation. If the State is correct, then a defendant can be convicted and sentenced for both felony

---

* Citations to the record are as follows:
"A" refers to the separately-filed appendix to Roy's opening brief, containing documents other than the appealed decision;
"DB refers to the Roy's opening brief;
"SB" refers to the State's brief.

criminal threatening and felony domestic violence based on a single threat.

Part I, Article 16 of the New Hampshire Constitution and the Fifth Amendment to the United States Constitution prohibit multiple convictions and punishments for the same offense. To determine whether two offenses constitute the same offense, courts ask whether "each requires proof of an element that the other does not." State v. Locke, 166 N.H. 344, 351 (2014). If so, then they are not the same offense, for double jeopardy purposes, and a defendant can be convicted and sentenced for both offenses, even if they are based on the same act. Id.

Felony domestic violence, under RSA 631:2-b, I(e) and II, clearly requires proof of an element that felony criminal threatening, under RSA 631:4, II(a)(2), does not, namely, that the offense be committed "against a family or household member or intimate partner." RSA 631:2-b, I. Under Roy's proposed statutory interpretation, these provisions would still constitute the same offense, for double jeopardy purposes, because felony criminal threatening would not require proof of any element that felony domestic violence does not.

Under the State's proposed statutory interpretation, however, felony criminal threatening would require proof of an element that that felony domestic violence does not, namely, that the victim perceive the weapon. Thus, under the

State's interpretation, each provision would require proof of an element the other does not, so a defendant could be convicted and sentenced for both felonies for a single threat.

Permitting a defendant to be convicted and sentenced for two felonies based on a single threat is absurd and unjust. But see In re R.H., ___ N.H. ___ (July 2, 2021) ("We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result."). A woman who, on a single occasion, points a kitchen knife at her boyfriend while threatening to "cut" him, for instance, could be given two consecutive seven-year sentences, one for "criminal threatening" and another for "domestic violence."

The legislative history confirms that the legislature did not intend this result. At the House Committee Hearing, Representative Mark Warner cited the existing criminal-threatening statute and asked the sponsor of the domestic-violence bill, Donna Soucy, "Is it your understanding or intention that prosecutors could charge the perpetrator, the bad actor, with both crimes . . . essentially the same crime, but under different statutes?" Hearing on SB 318-FN Before the House Criminal Justice and Public Safety Comm. 12:00 (Apr. 15, 2014) ("House Comm. Hearing")[1]; A 231. Soucy

[1] The audio recording of the House Committee Hearing is available at http://www.gencourt.state.nh.us/houseaudio/2014/standing_committees/Criminal%20Justice/SB0318_04152014.asx. A link to the recording is available at http://gencourt.state.nh.us/bill_Status/BillStatus_Media.aspx?lsr=2811&sy=2014&sortoption=billnumber&txtsessionyear=2014&txtbillnumber=sb318.

responded, "[T]he intent [is] that, based on a single act, a single crime would be charged. . . It is not the intent to charge additional crimes, it is the intent to better characterize the crime that is charged." House Comm. Hearing 12:40; A 231. A few minutes later, Deputy Attorney General Ann Rice assured the committee, "If it's for the same act, a person could only be convicted and sentenced on one." House Comm. Hearing 16:00; A 231.

For these reasons, the State's proposed statutory interpretation would lead to an absurd and unjust result that is inconsistent with legislative intent. In addition to the points raised in Roy's opening brief, this further suggests that the State's proposed statutory interpretation is incorrect, and should be rejected.

CONCLUSION

WHEREFORE, Roger Roy respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

This brief complies with the applicable word limitation and contains 788 words.

Respectfully submitted,

By /s/ Thomas Barnard
Thomas Barnard, #16414
Senior Assistant Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that a copy of this reply brief is being timely provided to Elizabeth Valez of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ Thomas Barnard
Thomas Barnard

DATED: July 16, 2021