

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0322

State of New Hampshire

v.

Justin Gunnip

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

BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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QUESTION PRESENTED

Whether the court correctly interpreted RSA 641:6, Falsifying Physical Evidence, in ruling that Mr. Gunnip had not altered, destroyed, or removed “any thing” when he held paper in front of a video camera.

Issue preserved by Gunnip’s motion to dismiss, Gunnip’s memorandum of law, the court’s mid-trial ruling, Gunnip’s motion to set aside verdict, the court’s order, and the court’s order on the State’s motion to reconsider. T1* 114-19; SA 50-53; T2 3-5; SA 37-42, 59-65, 73.

* Citations to the record are as follows:

“SA” refers to the Addendum to the State’s brief;

“SB” refers to the State’s brief;

“T1” and “T2” refer to the transcripts of the two-day trial, held on February 10 and 11, 2020; it is followed by the page number as indicated on the PDF of the document.

STATEMENT OF THE CASE AND THE FACTS

Justin Gunnip was charged with conspiracy to commit assault by prisoner and falsifying physical evidence. T1 6-7. The jury convicted him of assault by prisoner, T2 59, and that conviction is not the subject of this appeal.

As to the falsifying physical evidence charge, the State alleged that Gunnip committed Falsifying Physical Evidence by “hold[ing] up a certain newspaper such that a camera’s view at the Sullivan County House of Corrections was obstructed preventing it from capturing a certain incident that occurred there so that it’s recording would not be available” for a future investigation or proceeding.¹ SB 31.

The evidence showed that, on August 17, 2019, Gunnip was a prisoner at the Sullivan County House of Corrections. T1 43. Gunnip knew that activities within the jail were video recorded. T1 38. The video recorded by the cameras was stored in a server room to which the inmates did not have access. T1 43-48.

Gunnip argued in a midtrial motion to dismiss, to the jury, and in a post-trial motion to set aside the verdict that he

¹ The State asserts in its brief that the evidence showed Gunnip holding a newspaper in front of a camera. SB 10. However, the State’s cites to the transcript do not establish this evidence and the State has not moved to transfer the exhibits that purportedly show this event. “It is the burden of the appealing party . . . to provide this [C]ourt with a record sufficient to decide [its] issues on appeal.” Bean v. Red Oak Property Management, Inc., 151 N.H. 248, 250 (2004). As the court’s order seems to assume this fact, SA 61-64, and as Gunnip acknowledged it, SA 38, the defense will treat it as a proven fact.

had not altered, destroyed, or removed “any thing,” because the physical evidence, the video, was unaltered and available to the prosecution for use at trial. T1 22-24, 114-17; T2 3-4, 6-7; SA 50-53, 37-42. However, the trial court denied his midtrial motion to dismiss and the jury convicted Gunnip of this offense. T2 4-5, 59-60.

After trial and upon reconsideration of the issue, the court granted Gunnip’s motion to set aside the verdict on the falsifying physical evidence charge. SA 61-65. It denied the State’s motion to reconsider. SA 73.

SUMMARY OF THE ARGUMENT

The plain language of the falsifying physical evidence statute makes clear that the defendant must act upon some object already in existence in order to be guilty of the crime. The legislature knows how to criminalize acts affecting the creation of evidence and potential future events. It did not criminalize any act affecting the creation of potential physical evidence in paragraph I of the falsifying physical evidence statute. Moreover, the title of the statute and the context of the statutory scheme make clear that Gunnip's act of holding a paper in front of a surveillance camera was not intended to be criminalized by this statute.

- I. THE COURT CORRECTLY INTERPRETED RSA 641:6, FALSIFYING PHYSICAL EVIDENCE, IN RULING THAT GUNNIP HAD NOT ALTERED, DESTROYED, OR REMOVED “ANY THING” WHEN HE HELD PAPER IN FRONT OF A VIDEO CAMERA.

Gunnip was charged with falsifying physical evidence by an indictment alleging that he purposely, believing that an official proceeding or investigation was pending or about to be instituted, altered, destroyed, or removed any thing with a purpose to impair its verity or availability in such proceeding or investigation by holding up a newspaper “such that a camera’s view at the Sullivan County House of Corrections was obstructed preventing it from capturing a certain incident that occurred there so that its recording would not be available in such proceeding or investigation.” SA 31.

RSA 641:6, Falsifying Physical Evidence, states:

A person commits a class B felony if, believing that an official proceeding, as defined in RSA 641:1, II, or investigation is pending or about to be instituted, he:

- I. Alters, destroys, conceals or removes any thing with a purpose to impair its verity or availability in such proceeding or investigation; or
- II. Makes, presents or uses any thing which he knows to be false with a purpose to deceive a public servant who is or may be

engaged in such proceeding or investigation.

A challenge to the sufficiency of the evidence raises a claim of legal error that this Court reviews de novo. State v. Luikart, ___ N.H. ___ (decided May 4, 2021) (slip op. at 3). When reviewing a sufficiency challenge, the Court reviews the entire record “to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, considering all the evidence and all reasonable inferences drawn therefrom in the light most favorable to the State.” State v. Cavanaugh, 174 N.H. 1, 2 (2020). “The defendant has the burden of demonstrating that the evidence was insufficient to prove guilt.” Id. The conviction of a defendant on the basis of legally insufficient evidence violates the Due Process Clause of the Fourteenth Amendment. Jackson v. Virginia, 443 U.S. 307, 317-18 (1979).

Determining whether obstructing the view of a camera constitutes falsifying physical evidence requires this Court to engage in statutory interpretation. Statutory interpretation presents a question of law which this Court reviews de novo. In re J.S., ___ N.H. ___ (decided July 30, 2021) (slip op. at 4). The Court first looks “to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning.” Id. The Court interprets

“legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.” Id.

The Court construes “all parts of a statute together to effectuate its overall purpose and to avoid an absurd or unjust result.” Id. The Court interprets “statutes in the context of the overall statutory scheme and not in isolation.” Id. The Court’s “goal is to apply statutes in light of the legislature’s intent in enacting them and in light of the policy sought to be advanced by the entire statutory scheme.” Id. “Absent an ambiguity,” the Court “need not look beyond the language of the statute to discern legislative intent.” Id.

RSA 641:6, I, criminalizes doing one of four acts (altering, destroying, concealing, or removing) to “any thing” with the purpose to destroy the thing’s “verity or availability” to a proceeding or investigation that the defendant believes is pending or about to be instituted. Altering, destroying, concealing, or removing is the actus reus of the offense. In re Juvenile 2003-187, 151 N.H. 14, 15-16 (2004).

The legislature did not define “any thing.” The State urges an expansive reading of the phrase to include a potential thing, such as a particular view that may be captured by video footage. SB 15-22 (State phrases the “thing” at issue in this case as the camera’s “intended view”). The plain language of the statute belies this interpretation.

The verbs used to define the actus reus of the offense make plain that the legislature intended “any thing” to mean any physical thing in existence at the time of the defendant’s actions. One cannot alter a thing that does not yet exist. See Webster’s Third New International Dictionary 63 (unabridged ed. 2002) (defining “alter” as “to cause to become different in some particular characteristic...without changing into something else”). Similarly, one cannot destroy, conceal, or remove a thing that does not then exist. In contrast, the legislature contemplated the creation of a physical thing in Paragraph II of the statute when it criminalized *making* any thing which the defendant knows to be false with a purpose to deceive.

The plain language of the statute also makes clear that the legislature did not intend for “any thing” to encompass *potential* physical evidence. When the legislature intends to speak about possibilities, it knows how to do so. In this very statute, the legislature articulated an official proceeding or investigation that a defendant believed was “about to be instituted.” RSA 641:6. If the legislature intended to criminalize an act that influenced the creation of potential evidence it could have done so.

For example, the legislature could have drafted a statute that criminalized “any act that is intended to detrimentally affect any potential evidence in a pending or anticipated

investigation or official proceeding.” However, this Court will not redraft statutory language. In re J.S., (slip op. at 4). “[R]ewriting statutes is a task reserved for the legislature.” State v. Dor, 165 N.H. 198, 204 (2013).

To adopt the State’s interpretation would require adding a word that the legislature did not see fit to include. The State interprets this paragraph of the falsifying physical evidence statute as applying to *potential* evidence, evidence that is not yet in existence. This Court will not adopt an interpretation that adds words to a statute. In re J.S., (slip op. at 4).

As the trial court found, the evidence here – the video recording – was not altered, destroyed, or removed. SA 62, 64. Nor was its verity or availability impaired in anyway. It recorded what was in front of the camera. What a video might record will vary any time there is movement in front of the camera, as any object moving through the space will necessarily obscure what is located behind it. For example, while the seat of a bench may be visible when no person appears in front of the camera, what the recording ultimately captures will be different if a person sits on the bench. At most, Gunnip’s actions altered what *may* have been captured by the video. The falsifying physical evidence statute does not criminalize an act that affects the potential creation of evidence.

The legislature’s intent is also apparent from the title of the statute: Falsifying Physical Evidence. That title speaks of physical evidence, something that exists in the world and upon which the defendant acts. “While the title of a statute is not conclusive of its interpretation, it provides significant indication of the legislature’s intent in enacting the statute.” Garand v. Town of Exeter, 159 N.H. 136, 142 (2009) (quotation omitted).

That interpretation is supported by the rest of the chapter in which RSA 641:6 is located. RSA 641 addresses “falsification in official matters.” While many of its provisions address false statements, several other statutes address falsity in physical objects. For example, RSA 641:3, I(b)(4) criminalizes submitting or inviting reliance on “any sample, specimen, map, boundary mark, or other object which he or she knows to be false.” Similarly, RSA 641:7 makes it a crime to make a “false entry in or false alteration of any thing belonging to, received, or kept by the government,” presenting or using “any thing knowing it to be false,” or unlawfully destroying, concealing, removing, or otherwise impairing “the verity or availability of any such thing.” As in the falsifying physical evidence statute, the actus reus of these provisions can only be performed on an actual item of physical evidence. When this chapter criminalizes actions taken to affect the

creation of *potential* physical evidence, it makes that intention clear.

The trial court's interpretation is in accord with every published case this Court has issued related to paragraph I of the falsifying physical evidence ("FPE") statute for which the basis for charging FPE is apparent from the Court's opinion. See State v. Woodbury, 172 N.H. 358, 361-63 (2019) (defendant charged with FPE for cleaning up blood after an inmate assault); State v. Page, 173 N.H. 46, 48-49 (2019) (defendant charged with FPE for apparently deleting photos from his phone); In re E.G., 171 N.H. 223, 227 (2018) (defendant charged with FPE for moving a bag of marijuana); State v. Edic, 169 N.H. 580, 582 (2017) (defendant charged with FPE for destroying, concealing, and/or removing blood evidence and cleaning materials after a prison assault), see also State v. Milton, 169 N.H. 431 (2016) (co-defendant also charged with FPE); State v. Decato, 165 N.H. 294, 295 (2013) (defendant charged with FPE for apparently taking bed linens from scene of rape); State v. Dodds, 159 N.H. 239, 243-45 (2009) (defendant charged with FPE for injuring his feet); State v. Daoud, 158 N.H. 334, 335 (2009) (defendant charged with FPE for removing key from car he was driving and concealing it in his shoe); State v. McGurk, 157 N.H. 765, 768 (2008) (defendant charged with FPE for eating a bag of marijuana); In re Juvenile 2003-187, 151 N.H. 14, 14-15

(2004) (juvenile charged with FPE for dropping a pack of cigarettes with marijuana in officer's presence); State v. Laudarowicz, 142 N.H. 1, 3-6 (1997) (defendant charged with attempted FPE for trying to light a car on fire to destroy fingerprint evidence), see also State v. Duguay, 142 N.H. 221 (1997) (co-defendant also charged with attempted FPE); State v. Beland, 138 N.H. 735, 736 (1994) (defendant charged with conspiracy to commit FPE for removing video poker machines from his business just prior to execution of search warrant); State v. St. Laurent, 122 N.H. 540, 540 (1982) (defendant charged with FPE for hiding forty-foot flatbed trailer sought by police).

In no case considered by this Court has the defendant been charged with affecting *potential* physical evidence. Rather, the defendants have all been charged with acting upon a thing already in existence at the time of his actions. For all of these reasons, the Court should conclude that the falsifying physical evidence statute requires that the defendant act upon a thing in existence at the time of his or her actions.

The State argues that its interpretation of the falsifying physical evidence statute better effectuates the legislature's intent to capture "a broad range of actions intended to impair the availability of evidence and obstruct the administration of justice." SB 22. While defining the phrase "any thing" to

encompass potential items of physical evidence may arguably advance the goal of the falsifying physical evidence statute, “it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.” Dor, 165 N.H. at 206. (quotation omitted, emphasis in Dor).

In the only case either side has been able to find that addresses this issue, State v. Callahan, 2003 WL 1960267 (Tenn. Crim. App. 2003), overruled on other grounds by State v. Smith, 436 S.W.3d 751 (Tenn. 2014), the court reached the same conclusion. In Callahan, the defendant was charged with tampering with or fabricating evidence under Tenn. Code Ann. § 39-16-503 (1997), which criminalizes making, presenting, or using “any record, document or thing with knowledge of its falsity and with intent to affect the course or outcome of the investigation or official proceeding.” Id. at *2 and *4. The State alleged that she put something over a surveillance camera at her place of business, took money from the register, and reported a robbery to the police. Id. at *1-*2. The court found that the videotape was never altered and, as such, “the statute does not reach the defendant’s actions in obstructing the view of the security camera.” Id. at *4. The court likened the defendant’s actions to a bank robber wearing a mask to conceal his identity. Id.

A bank robber wearing a mask whose face is not captured on surveillance video, or a burglar wearing gloves to prevent fingerprints being left at the scene, or an assailant who chooses to commit the offense only once the victim has left a room covered by surveillance video, act only with the intent to prevent the creation of evidence. Because they do not act to alter, conceal, remove, or destroy physical evidence already in existence, their acts do not fall within the ambit of the falsifying physical evidence statute. To interpret the falsifying physical evidence statute differently would invite prosecutors to charge that offense nearly every time a substantive crime is committed, as criminals frequently take steps to prevent leaving evidence.

So too here, Gunnip did not alter, remove, or destroy physical evidence already in existence. The evidence was insufficient that he committed the crime of falsifying physical evidence. This Court must reverse.

CONCLUSION

WHEREFORE, Justin Gunnip respectfully requests that this Court affirm.

Undersigned counsel requests fifteen minutes of oral argument before a full panel of this Court.

This brief complies with the applicable word limitation and contains under 3100 words.

Respectfully submitted,

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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: August 20, 2021