THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-093

State of New Hampshire

v.

Timothy Verrill

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

REPLY BRIEF FOR THE DEFENDANT

David M. Rothstein
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(Fifteen Minute Oral Argument)

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QUESTION PRESENTED

1. Whether the court erred when it found that the State acted with mere culpable negligence, and that the State did not goad the defense into requesting a mistrial.*

* Citations to the record are as follows:
"SB" refers to the State's Brief;
"DB" refers to the Defendant's Brief;
"App." refers to the Appendix to the Defendant's Brief;
"H2" refers to the transcript of the hearing on the second motion to dismiss.

STATEMENT OF THE CASE AND FACTS

Verrill relies on the Statements of the Case and Facts in his opening brief.

I. THE COURT ERRED WHEN IT FOUND THAT THE STATE ACTED WITH MERE CULPABLE NEGLIGENCE, AND THAT THE STATE DID NOT GOAD THE DEFENSE INTO REQUESTING A MISTRIAL.

The State argues that it did not goad the defense into moving for a mistrial. SB 21-33. It also argues that the trial court's finding on culpability, which establishes the baseline for determining sanctions if retrial is not jeopardy-barred, was not clearly erroneous. SB 35, 39. Verrill files this reply brief to address a preservation issue and clarify the standard of review.

A. Preservation Issue.

With respect to the goading issue, the State argues the defense's claim that intent may encompass "reckless disregard" of the risk that its actions would provoke a mistrial, or "awareness plus conscious disregard" of that risk, DB 29-30, is not preserved. SB 21-22. The issue is preserved.

An issue is preserved for appellate review where the trial court "had the opportunity to consider that legal issue or the development of facts that might or might not have supported that argument." State v. Brum, 157 N.H. 408, 417 (2007). The goading argument centers on representations made during a phone call on October 31; the call was part of a broader discussion about a course of conduct surrounding the status and management of discovery. Verrill argued that

MCU and prosecution were culpable, that their level of culpability was greater than "gross negligence," and that a level of culpability equal to recklessness or conscious disregard was sufficient to afford him the relief he sought. App. 89 (State engaged in "pattern of deliberate disregard" which provoked him into moving for a mistrial); App. 89-90 (citing the pattern and the failure to disclose significant drug investigation material); App. 90-91 (noting that it is against the backdrop of prior discovery issues that the events of October 31 must be viewed); App. 98 ("willful misconduct" includes pattern of recklessness or reckless disregard of defendant's rights); H2 364 (arguing recklessness of October 25 representation that all discovery had been turned over); H2 364 (noting cases equate reckless disregard and intent); App. 356 (arguing, with respect to goading issue, "If this is not intentional conduct, calculated to force the defense's hand with respect to a mistrial, it is reckless, or it is grossly negligent, especially given the prosecution's knowledge of the ineptitude of its investigators with respect to discovery matters.").

The intent issue addressed in Verrill's brief is preserved. Even if it is not, based on the events outlined in the brief and developed below, Verrill maintains that the State intended to

goad the defense into moving for a mistrial.[1]

B. Standard of Review: Mixed Question.

The State argues that the Court should affirm because the lower court's findings are not "clearly erroneous." SB 20-21; see, e.g., United States v. Cartagena-Carrasquillo, 70 F.3d 706, 714 (1st Cir. 1995) (citing standard of review). While that statement is not inaccurate, the inquiry is a mixed question of fact and law rather than wholly deferential.

A finding of fact is clearly erroneous "where it is against the clear weight of the evidence or when upon review of the evidence, the appellate court 'is left with the definite and firm conviction that a mistake has been committed."' Johnson v. United States, 600 F.2d 1218, 1222 (6th Cir. 1979) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1958)). This Court views the inquiry into a trial court's factual findings as "a mixed question of fact and law. . . . [The] inquiry is to determine whether the evidence presented to the trial court reasonably supports the court's findings, and then whether the court's decision is consonant with applicable law." Appeal of Farmington School District, 168 N.H. 726, 730 (2016) (quotation omitted).

[1] Apart from culpability as it relates to goading, if the Court determines that a retrial is not jeopardy-barred, it must still consider whether the lower court erred in not finding any culpability on the part of the prosecutors. Any culpability determination is relevant on the issue of sanctions.

Verrill argues that the lower court erred in finding that Strong was merely culpably negligent. He further argues that the court erred in assigning no culpability to the MCU. Finally, he argues that the court erred in finding that the Attorney General's Office, which oversees the MCU, bore no culpability for the failures that occurred, or for its representations with respect to the status of discovery.

CONCLUSION

WHEREFORE, Timothy Verrill requests that this Court reverse the trial court's rulings and bar the trial of his case; or in the alternative, rule that the trial court erred in finding mere culpable negligence on the part of a single investigator, and remand for the imposition of sanctions.

Undersigned counsel requests fifteen minutes of oral argument.

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

This brief complies with the applicable word limitation and contains under 1200 words.

Respectfully submitted,

By /s/ David M. Rothstein
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to Peter R. Hinckley, Esq. and the State of New Hampshire through the electronic filing system's electronic service.

/s/ *David M. Rothstein*
David M. Rothstein

DATED: March 17, 2022