

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0147

State of New Hampshire

v.

Robert Leroux

Appeal Pursuant to Rule 7 from Judgment
of the Sixth Circuit Court – District Division – Franklin

REPLY BRIEF FOR THE DEFENDANT

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QUESTIONS PRESENTED

1. Whether the court erred by denying the defense motion to dismiss the complaint.

Issue preserved by the request to dismiss the complaint, the hearings on the matter, the parties' memoranda of law, the defense motion to reconsider, and the court's orders. AD 32-36; A13-A26; H 52-57; T 19-23; S 2-12.*

2. Whether the court erred by admitting hearsay statements in the DMV records to prove the truth of the matters asserted.

Issue preserved by defense objection, the hearings on the matter, the parties' memoranda of law, the defense motion to reconsider, and the trial court's orders. AD 32-36; A13-A26; T 21-23; S 2-12.

* Citations to the record are as follows:

"DB" refers to the designated page of Leroux's opening brief;

"SB" refers to the designated page of the State's brief;

"AD" refers to the supplement attached to Leroux's opening brief, containing the orders from which Leroux appeals;

"A" refers to the separate appendix to Leroux's opening brief;

"H" refers to the transcript of the proceedings held in the morning of November 23, 2020, when the same judge convened the bench trial on Leroux's other charges;

"T" refers to the transcript of the bench trial held on the afternoon of November 23, 2020;

"S" refers to the transcript of the sentencing hearing held on February 19, 2021.

STATEMENT OF THE CASE AND FACTS

In his opening brief, Leroux advanced two claims. First, he contended that the court erred in denying the defense motion to dismiss the misdemeanor complaint. DB 10-22. Second, he argued that the court erred in admitting, for the truth of the matter asserted, notations in DMV records as offered to prove a conviction adjudicated in Laconia District Court. DB 23-28.

In its brief, among other arguments, the State responded to the charging-document claim by challenging the timeliness of the defense request. SB 20-21. On the hearsay claim, the State first asserted that the defense waived the claim by the timing of the objection. SB 30-31. It next contended that the public-records exception covers the DMV record's notation. SB 31-37. This reply brief responds to those arguments.

I. THE COURT ERRED IN FAILING TO DISMISS THE MISDEMEANOR COMPLAINT AGAINST LEROUX.

For at least two reasons, this Court must reject the State's untimeliness argument. First, the State did not raise the argument in the trial court. At trial, the State could have, but did not, object on grounds of untimeliness. Instead, it chose to defend the adequacy of the complaint on the merits. Accordingly, the trial court did not rely on any consideration relating to timeliness, in denying the defense motion. The State has an obligation to preserve, in the trial court, arguments that it subsequently advances on appeal. See, e.g., State v. West, 167 N.H. 465, 468 (2015) (refusing to consider unpreserved State argument); State v. Bailey, 166 N.H. 537, 541 (2014) (same); State v. Cheney, 165 N.H. 677, 679 (2013) (same).

Two points add weight to Leroux's contention that the State waived its untimeliness argument. First, because the State didn't raise the concern in the trial court, the defense had no opportunity to put on the record all the reasons that a timeliness objection should be rejected. Second, because the trial court didn't rely on any untimeliness consideration, the State on appeal is asking this Court to affirm on an alternative ground. This Court "may sustain the trial court's ruling on a[n alternative] ground ... only if there is only one way the trial court could have ruled as a matter of law." State v. Cavanaugh, 174 N.H. 1, 259 A.3d 805, 815 (2020). A ruling

relying on untimeliness, however, would have been discretionary. Thus, this Court cannot affirm on that ground.

Second, on the merits, good reason existed here to allow the defense to raise the motion during trial. Because the charging document took the form of a complaint rather than an indictment, the State had the power to amend it. The State did not do so. See DB 16 (discussing amendment option). The fact that the charging document may be amended even as to its elemental allegations distinguishes this case from State v. Ortiz, 162 N.H. 585 (2011), on which the State relies. SB 20.

State v. Pinault, 168 N.H. 28 (2015), on which the State also relies, does not defeat Leroux's claim. In that case, the charging document omitted an allegation without which Pinault's conduct broke no law. The charging document alleged that Pinault operated a car and knew or should have known that "an accident occurred" when she left the scene of the accident. Id. at 33-34. Because the charging document didn't allege that Pinault was involved in the accident, the allegations in the complaint were consistent with her passively witnessing, and then departing from, an event in which she played no active role. No law obliges mere witnesses to the accidents of others to stay on the scene.

Here, by contrast, the complaint alleged a violation-level offense against Leroux. See DB 16 n.3 (making that point). The complaint therefore was not defective; it did charge that Leroux broke the law. At most, it was defective only in the

legally irrelevant, subjective sense that it failed to charge the misdemeanor the prosecutor wanted to charge. Thus, the defect noted by the defense implicated questions of offense-classification and sentencing. Having thus suffered no injury merely by being brought to trial, Leroux could properly raise the question when counsel did.

II. THE COURT ERRED IN ADMITTING, FOR ITS TRUTH, EVIDENCE CONTAINED IN A DMV RECORD ABOUT COURT PROCEEDINGS.

In responding to Leroux’s hearsay claim, the State first asserted a claim of non-preservation, based on the timing of the defense objection. SB 30-31. This Court must reject that argument. First, the State did not assert, in the trial court, an objection based on untimeliness, and the court did not rely on any such concern. For the reasons stated above and incorporated herein by reference, the State therefore waived any timeliness objection, and this Court cannot rely on untimeliness to affirm on alternative grounds.

Moreover, this Court should reject the State’s characterization of the defense objection as having been made “a week after the conclusion of the trial.” SB 30. The defense advanced the hearsay argument in a memorandum filed on November 30, 2020. The court did not return a verdict in the case until January 22, 2021. In the context of a bench trial, presided over by a judge capable of disregarding evidence or considering it only for a limited purpose, an objection made weeks before the verdict is made during the trial.

On the merits of the hearsay claim, the State argues that Evidence Rule 803(8), the public records hearsay exception, covers a DMV-record notation of a conviction entered in the Laconia District Court. In support, the State proposes that the hearsay exception covers not only DMV

record notations of the acts of DMV officials, but also notations of the acts of other entities – here the Laconia District Court – when the entity has a duty to report the act to the DMV.

This Court must first reject the argument because it was not made by the State below, and thus was not relied upon by the trial court. See supra (noting obligation of State to preserve in the trial court the arguments on which it relies on appeal).

Moreover, this Court should reject the State’s interpretation of the rule. As relevant in this criminal case, Rule 803(8) defines as falling within the scope of the exception a public office’s record if it sets out “the office’s activities” or “a matter observed while under a legal duty to report but not including, in a criminal case, a matter observed by law-enforcement personnel.” N.H. R. Evid. 803(8)(A)(i) and (ii). A judgment of conviction entered in Laconia District Court is not “the office’s activity” when the office in question is the DMV. Moreover, the entry of a conviction in a court is not a “matter observed” by a DMV official.

Finally, the DMV does not have a legal duty to report criminal convictions. Courts have a legal duty to report DWI convictions to the DMV, under RSA 263:60. The same statute obliges the DMV to “keep such records in its office.” But RSA 263:60 does not create a duty on the part of the DMV

separately to create records of DWI convictions. Rule 803(8) thus does not cover a DMV record notation of the entry of a criminal conviction.

In its brief, the State cites some cases as supporting the assertion that Rule 803(8) covers the record notation here. For the following reasons, this Court must reject that contention.

First, several of the cases were decided before 1985, when New Hampshire adopted the Rules of Evidence. See Preamble, N.H. R. Evid. (noting that rules were first adopted by the New Hampshire Supreme Court in January 1985, effective July 1, 1985). Before 1985, New Hampshire courts applied common law rules of evidence. See, e.g., State v. Marcotte, 124 N.H. 61, 64 (1983) (applying common law doctrine to public-record hearsay question). As stated in Marcotte, the common law rule “provide[d] for the admissibility of an official record made by a public officer in the course of his public duties in order to prove any fact required to be reported.” Id. at 64. The Court explained the basis of the common law exception as follows: “when it is the duty of a public officer to make a statement as to a fact coming within his official cognizance, the great probability is that he does his duty and makes a correct statement.” Id.

In certain respects, that common law rule was broader than the current rule. For example, Rule 803(8) covers statements of “the office’s activities.” That formulation

excludes the activities of other offices. The common law rule, by contrast, was not defined in terms of the office that created the document. Rather, it covered statements made in the course of an officer's duties, as to matters coming within "his official cognizance."

In addition, Rule 803(8) implies that the requisite duty to report falls on the official creating the record in question. The common law rule formulated the obligation in the passive voice, speaking of "any fact required to be reported." That formulation at the least implies that the legal duty to report could fall on some person other than the person creating the record in question.

Finally, in some of the old cases on which the State relies, it mattered to the admissibility analysis that the legislature had enacted a statute making the record in question *prima facie* evidence of the facts recorded in it. For example, Bickford v. Metropolitan Life Ins. Co., 114 N.H. 237 (1974), involved the admissibility, to prove a decedent's cause of death, of a death certificate filed with a town clerk. In affirming the certificate's admissibility for that purpose, this Court cited a statute making a town clerk's record of birth, marriage or death *prima facie* evidence in any judicial proceeding. Id. at 240 (citing former RSA 126:18). When the legislature has passed a statute that gives the status of *prima facie* evidence to a certain kind of record when offered to prove a certain kind of fact, it necessarily follows that the

legislature would intend that record to be admissible to prove that fact.

The State cites no statute, though, that gives the status of *prima facie* evidence to DMV records when offered to prove court convictions. Indeed, when the court records themselves exist, there is no need to rely on DMV records for that purpose. Accordingly, the State's interpretation, which without adequate reason makes DMV records the equal of court records to prove a court event, must be rejected.

Near the end of its brief, the State argued that, even if the DMV record's notation of the conviction constitutes hearsay, a separate application of Rule 803(8) would cover the Laconia District Court's communication to the DMV of information about Leroux's conviction. SB 36-37. This Court must also reject that argument. The problem is that, at Leroux's trial, the State did not introduce the communication made by the Laconia District Court to the DMV. Rather, the State introduced only the DMV's summary of information about the conviction. A5-A12. None of the records introduced at trial bear a certificate signed by an officer of the Laconia District Court. Thus, the State relied on an assertion by the DMV about information known first-hand only to the Laconia District Court.

CONCLUSION

WHEREFORE, for the reasons stated above as well as those given in his opening brief and those to be offered at oral argument, Mr. Leroux requests that this Court reverse his conviction.

This brief complies with the applicable word limitation and contains fewer than 2200 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to Assistant Attorney General Weston Sager, Esq., through the electronic filing system's electronic service.

/s/ Christopher M. Johnson

Christopher M. Johnson

DATED: January 5, 2022