THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0147

State of New Hampshire

v.

Robert Leroux

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
6TH CIRCUIT COURT – DISTRICT DIVISION – FRANKLIN

BRIEF FOR THE APPELLEE THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(*Oral argument waived*)

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ISSUES PRESENTED

I. Whether the standard of review for the defendant's challenge to the sufficiency of the driving after suspension complaint is plain error because the defendant failed to raise this claim in a timely fashion at the trial court.

II. Whether the trial court erred by finding the driving after suspension complaint sufficient when the complaint accurately recited the law and adequately apprised the defendant of the alleged crime.

III. Whether the defendant's hearsay challenge to the certified DMV records is preserved when the defendant did not raise this claim until a week after trial concluded.

IV. Whether certified DMV records contained inadmissible hearsay within hearsay because they referenced the defendant's prior DWI convictions.

STATEMENT OF THE CASE AND FACTS

I. THE DEFENDANT'S TWO VIOLATIONS OF RSA 263:64 FOR DRIVING AFTER SUSPENSION

a. The July 14, 2018 incident

On July 14, 2018, Sergeant Bryan Kydd-Keeler of the Tilton Police Department was on a patrol in Tilton, New Hampshire. TT(874)[1]3-5; DA3. At around 6:10 PM, Sergeant Kydd-Keeler observed a silver Isuzu Trooper SUV make a left-hand turn without using the directional signal. TT(874)5-6, 8.

Sergeant Kydd-Keeler pulled the vehicle over. TT(874)6. He got out of his cruiser and walked over to the vehicle. *See* TT(874)5-6. Sergeant Kydd-Keeler saw that the defendant was the driver. *See* TT(874)5-6.

Sergeant Kydd-Keeler asked the defendant for his license and registration. TT(874)7. The defendant said he did not have his driver's license with him. TT(874)7. The defendant also was unable to provide a vehicle registration. TT(874)7.

Sergeant Kydd-Keeler returned to his cruiser and contacted police dispatch about the defendant's license status. TT(874)9. Police dispatch

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[1] Citations to the record are as follows:
"DB__" refers to the defendant's brief and page number.
"DD__" refers to the defendant's addendum and page number.
"DA__" refers to the defendant's appendix and page number.
"TT(1213)__" refers to the trial transcript from November 23, 2020 in Case No. 437-2018-CR-01213 and page number.
"TT(874)__" refers to the trial transcript from November 23, 2020 in Case No. 437-2018-CR-00874 and page number.
"ST__" refers to the sentencing hearing transcript from February 19, 2021 and page number.
"SD__" refers to the State's addendum and page number.

told Sergeant Kydd-Keeler that the defendant "not only did not have a driver's license, he only had an identification card, but also that his operating privileges were suspended[2] for . . . a DWI [driving while intoxicated], second offense, stemming back from 2010." TT(874)9. Sergeant Kydd-Keeler then placed the defendant under arrest for driving after suspension. TT(874)12.

Shortly thereafter, Sergeant Kydd-Keeler completed a complaint charging the defendant with a class A misdemeanor for "driving after revocation or suspension" contrary to RSA 263:64.[3] DA3. The complaint alleged that the defendant did:

> Knowingly drive a certain motor vehicle, to wit, a silver 2002 Isuzu Trooper . . . upon a certain way . . . after his operator's privilege had been suspended by the director of motor vehicles[4] for DWI-second offense, on 05/17/2010 . . . .

DA3; *see also* RSA 265-A:2, I; RSA 265-A:18, IV.

b. The October 5, 2018 incident

On October 5, 2018, Officer Richard Ort of the Tilton Police Department was on patrol in Tilton, New Hampshire. TT(1213)5-6. At

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[2] Throughout the trial court proceedings and on appeal, the terms revocation and suspension have been used interchangeably. *See* DA; DD; DB. The distinction between revocation and suspension is not relevant to this appeal. *See* RSA 263:64, IV-V (referring to "suspension or revocation"); RSA 259:90; RSA 259:107. In this brief, the State refers to the defendant's license as suspended.

[3] Sergeant Kydd-Keeler also completed another complaint that is not at issue in this appeal. *See* DA4; DB6; DD35.

[4] Throughout the proceedings, the parties referred to New Hampshire Department of Safety, Division of Motor Vehicles as "the director of motor vehicles," the "DMV," the "Department of Motor Vehicles," and the "Division of Motor Vehicles." *See generally* DD; DA; TT(874); TT(1213). For clarity and consistency, the State refers to the New Hampshire Department of Safety, Division of Motor Vehicles in this brief as the "DMV."

about 4:03 AM, Officer Ort saw a 2002 silver Isuzu Trooper SUV drive through a stop sign without stopping. TT(1213)6, 19-20. Officer Ort pulled over the vehicle. TT(1213)6-7.

Officer Ort ran the vehicle's temporary license plate through his mobile data terminal. *See* TT(1213)7. Officer Ort discovered that the plate had expired "in the last year or two." TT(1213)7. Officer Ort contacted police dispatch, which confirmed that the vehicle's plate had expired. *See* TT(1213)8.

Officer Ort walked over to the vehicle. TT(1213)8. Officer Ort identified the driver as the defendant. TT(1213)8.

Officer Ort told the defendant that he stopped him because of an expired temporary license plate. TT(1213)9. Officer Ort asked the defendant for his license and registration. TT(1213)9. The defendant told Officer Ort "that he didn't have [his license] because it been suspended for DWI." TT(1213)9. Officer Ort again contacted police dispatch, which told Officer Ort that the defendant's license had been suspended since May 17, 2010. TT(1231)9-11.

Shortly thereafter, Officer Ort completed a complaint charging the defendant with a class A misdemeanor for "driving after revocation or suspension" contrary to RSA 263:64. SD42. The complaint alleged that the defendant did:

> Knowingly drive a certain motor vehicle, to wit, a silver 2002 Isuzu Trooper . . . upon a certain way . . . after his operator's privilege had been suspended by the director of motor vehicles for driving while intoxicated (second offense) on 05/17/2010 . . . .

SD42; *see also* RSA 265-A:2, I; RSA 265-A:18, IV.

II. THE TRIALS

a. Case 1213

On November 23, 2020, the 6th Circuit Court – District Division – Franklin (*Luneau*, J.) (the "trial court") held a combined suppression hearing and bench trial for Case No. 437-2018-CR-01213 ("Case 1213").[5] TT(1213)1. The proceeding began at 10:37 AM. TT(1213)1.

The prosecution called Officer Ort to testify about the defendant driving after suspension on October 5, 2018. TT(1213)2-38; *supra* section I.b.[6] During Officer Ort's testimony, the prosecution admitted, without objection, two certified DMV records as exhibits: (1) the defendant's notice of license suspension, and (2) the defendant's motor vehicle history. TT(1213)11-13. The prosecution also admitted, without objection, court records regarding the defendant's DWI convictions. TT(1213)37-38.

Following witness testimony, the defense moved to dismiss the complaint for driving after suspension. TT(1213)52-53, 56-57. Defense counsel argued, for the first time, that the complaint was defective because it alleged that the "director of motor vehicles," rather than a court, suspended the defendant's license. *See* TT(1213)52-53, 56-57; SD42; RSA 263:64, V (stating that the phrase "period of suspension or revocation" in RSA 263:64, IV means "only suspension or revocation imposed by a court of competent jurisdiction"). The prosecution objected, arguing that, although a court "is the one who imposes, in the initial instance, that period

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[5] This matter corresponds with New Hampshire Supreme Court Case No. 2021-0148. TT(1213)1. On September 8, 2021, this Court ruled that the transcripts from Case No. 2021-0148 could be considered in this appeal. *See* Order (Sept. 8, 2021).

[6] The defendant also testified. TT(1213)40-44.

of revocation or suspension," it is "the Department of Motor Vehicles who is sending out that notice to say you are hereby suspended for this period of time" and "gets to ultimately suspend [a] license." TT(1213)53-56. The trial court took the matter under advisement. *See* TT(1213)57-58; DA13; DD32.

b. Case 874

Also on November 23, 2020, the trial court held a bench trial for Case No. 437-2018-CR-00874 ("Case 874").[7] TT(874)1. The proceeding started at 12:08 PM—immediately after the combined suppression hearing and bench trial for Case 1213. TT(1213)58; TT(874)1.

The prosecution called Sergeant Kydd-Keeler to testify about defendant driving after suspension on July 14, 2018. TT(874)3-18; supra section I.a. During Sergeant Kydd-Keeler's testimony, the prosecution admitted, without objection, two certified DMV records as exhibits: (1) the defendant's notice of license suspension, and (2) the defendant's motor vehicle history. TT(874)10-12; DA5-12. The prosecution, however, did not introduce court records regarding the defendant's DWI convictions as it had in Case 1213. *See* TT(874)23; DA15.

After the prosecution rested, the defense moved to dismiss the complaint for driving after suspension. TT(874)19-20. As in Case 1213, the defense alleged that the complaint was deficient because it stated that the New Hampshire "director of motor vehicles," rather than a New Hampshire court, suspended the defendant's license. TT(874)19-20, 23; RSA 263:64,

[7] This matter corresponds with this appeal—*i.e.*, New Hampshire Supreme Court Case No. 2021-0147. *See* TT(874)1.

V. The defense further contended that the prosecution failed to meet its burden because it did not introduce court records regarding the defendant's DWI convictions. *See* TT(874)19-20, 23. The prosecution objected. *See* TT(874)20-23. The trial court took the matters under advisement. *See* TT(874)24; DA13; DD32.

III. POST-TRIAL PROCEDURAL HISTORY

Pursuant to the trial court's request, on November 24, 2020, the prosecution filed a memorandum of law opposing the defense's motions to dismiss in Case 1213 and Case 874. DA13-18.

In response to the defense's argument that the complaints for driving after suspension were defective, the prosecution argued that, based on New Hampshire law and the evidence introduced at trial, the complaints were not deficient and that "judicial and administrative revocations may run concurrently, as well as consecutively." *See* DA15. The prosecution further argued it was "not a dispositive error" that it did not introduce court records regarding the defendant's DWI convictions in Case 874. DA15. The prosecution wrote that, based on the evidence presented in Case 1213 and Case 874, the trial court could draw the "reasonable inference" that "the same DWI-second offense conviction and revocation [was] at issue in both docket numbers." DA15-16. The prosecution further argued that the certified DMV records introduced in Case 874, standing alone, established that a court convicted the defendant of DWI – second offense. DA16-17.

On November 30, 2020, the defense filed a response. DA19-24. In addition to reiterating the arguments it presented at trial, *see* DA19-24, the defense argued for the first time that, in Case 874, the DMV records

contained inadmissible hearsay insofar as they referenced the defendant's DWI convictions in Laconia District Court, *see* DA22.

On January 22, 2021, the trial court issued an order on the defendant's motions for both Case 1213 and Case 874. DD32-35. The trial court rejected the defendant's motions and held, in relevant part:

> Based on the weight of credible evidence and the standards in the statutes and case, law, the Court finds that the Misdemeanor A complaints [for driving after suspension] in both cases are sufficient for convictions of Misdemeanor A RSA 263:64[,] IV.
>
> Although the two Misdemeanor A complaints do not include the exact wording in the statute that that the Defendant's license suspension was as a result of "a conviction by a court of competent jurisdiction" or list the court in which the convictions took place, the complaints did allege the suspension was as a result of "DWI second offense" and listed a specific date.
>
> A "second offense" is defined by Black's Law Dictionary as "an offense committed after conviction of a first offense." An "offense" is defined by Black's Law Dictionary as "a violation of the law; a crime, often a minor one."
>
> To give the last sentence in these two Misdemeanor A complaints logical meaning, a reading of the term "offense" in the body of these complaints is to define an offense as a conviction. Only a Court, not the DMV, can convict a person of a crime.
>
> This reading of an "offense" meaning a conviction is also consistent with the wording of the statute in section IV, and VII . . . which refers to the fines for the violation level for a "first offense" and "second or subsequent offense."
>
> Thus, the term "DWI second offense" as used in these complaints is interchangeable with "DWI second conviction", and is enough to put the Defendant (and the reader) on notice that the Defendant had two prior convictions for DWI, the

> second one in 2010, when he was arrested. At trial, based on credible evidence, the detail about the second DWI conviction from the Laconia District Court, which is a court of competent jurisdiction, was put into evidence.

DD34-35 (citations omitted). After denying the defense's motions to dismiss, the trial court found the defendant guilty of class A misdemeanor driving after suspension in both Case 1213 and Case 874. DD35; RSA 263:64.

On February 1, 2021, the defense filed a motion for reconsideration. DA25-26. The defense contended that the trial court neglected to address its argument that, in Case 874, the prosecution failed to introduce sufficient evidence "to support a finding beyond a reasonable doubt that [the defendant]'s license was suspended by a court for DWI." DA25-26.

In a March 19, 2021 order, the trial court denied the defense's motion for reconsideration:

> There was sufficient evidence [in Case 874] for the Court to find that the state met its burden beyond a reasonable doubt that the Defendant's license was suspended from a DWI second offense conviction out of the Laconia District Court. The Court considered the testimony of the witnesses and the exhibits, including Exhibit 2, the Defendant's certified DMV record, which includes a listing of the 2010 conviction, with details, and is a certified public record.

DD36. Further, pursuant to this order, the trial court sentenced the defendant[8] to serve "30 days in [the house of corrections], all suspended but 7 24 hour periods, for one year good behavior, one year license loss, and 12 months of interlock after license is restored." DD36. The trial court stayed

[8] A month prior, on February 19, 2021, the trial court held a sentencing hearing. ST1-12. The trial court took the parties' sentencing recommendations under advisement. ST11.

the imposition of the defendant's sentence for the duration of the appeal period. DD36.

This appeal followed.

SUMMARY OF THE ARGUMENT

I.

On appeal, the defendant first claims that the driving after suspension complaint in Case 874 was defective because it alleged that the "director of motor vehicles," rather than a court, suspended the defendant's driver's license. *See* DB9-22; RSA 263:64, IV-V. The defendant's argument is misplaced.

First, the defendant failed to challenge the sufficiency of the complaint before trial as required by this Court's decisional law. As such, the standard of review for this claim is plain error.

Second, the defendant has failed to demonstrate that the trial court committed plain error when it held that the driving after suspension complaint was sufficient. Rather, the trial court did not err because: (1) the complaint correctly recited the law that the DMV, rather than a court, is responsible for suspending an individual's driver's license in this context; (2) implicit in the wording of the complaint is that a court first imposed the defendant's license suspension; and (3) even if, for the sake of argument, the driving after suspension complaint misstated the law, it was still sufficient when viewed in its entirety. Further, even if the trial court erred, its error was not plain because the trial court's decision was reasonable and well-supported by the applicable statutes, the language of the complaint, and this Court's decisional law. Finally, even if the trial court committed plain error, the defendant has made no showing, or even argued, that the complaint limited his ability to prepare for trial or otherwise prejudiced him.

Third, even if the standard of review is not plain error, this Court should uphold the trial court's decision because (1) the trial court did not err, and (2) even if it did err, any such error did not prejudice the defendant.

II.

The defendant further claims that the certified DMV records admitted at trial for Case 874 contained inadmissible hearsay statements that the Laconia District Court convicted the defendant of DWI. *See* DB23-28. This argument fails for several reasons.

The defendant's hearsay argument is not preserved because the defense did not make a contemporaneous and specific hearsay objection at trial. Rather, the defense presented its hearsay objection for the first time in a memorandum of law filed a week after the conclusion of trial. This was too late to preserve this claim for appellate review.

Even if the defendant's hearsay claim is preserved, it is without merit. First, the defendant's conviction history contained in the certified DMV records was admissible under the public records exception to the rule against hearsay because the DMV regularly records this information. *See N.H. R. Evid.* 803(8). Second, pursuant to this Court's longstanding decisional law, the defendant's conviction history contained in the certified DMV records was admissible even though this information did not originate within the DMV. Third, even if this Court determines that the defendant's prior DWI convictions in the certified DMV records constitute hearsay within hearsay, the alleged second level of hearsay—*i.e.*, the Laconia District Court's statement to the DMV about the defendant's DWI

convictions—was itself admissible as a public record by operation of statute. *See* RSA 263:60.

ARGUMENT

I. THE DRIVING AFTER SUSPENSION COMPLAINT WAS SUFFICIENT.

a. The standard of review for this claim is plain error because the defense failed to challenge the sufficiency of the complaint before trial.

On appeal, the defendant contends that he adequately preserved his challenge to the sufficiency of the driving after suspension complaint. *See* DB5. The defendant, however, failed to present this issue to the trial court in a timely manner. Consequently, the standard of review for this claim is plain error. *See Sup. Ct. R.* 16-A.

A defendant "must bring challenges to the sufficiency of the charging document before trial." *State v. Pinault*, 168 N.H. 28, 33 (2015); *see also State v. Ortiz*, 162 N.H. 585, 590 (2011) ("The defendant's motion, brought in the middle of trial, after the State rested its case, was untimely . . . ."); *United States v. Ramirez*, 324 F.3d 1225, 1227-28 (11th Cir. 2003) (per curiam) (holding that the defendants waived their ability to challenge the sufficiency of an indictment because they did not raise their challenge in a pretrial motion); *Commonwealth v. Lamont L.*, 438 Mass. 842, 784 N.E.2d 1119, 1122 (2003) (finding that failing to object to defect in indictment before trial ordinarily waives any argument pertaining to the alleged defect); *Dist. Div. R.* 1.8(E); *Fed. R. Crim. P.* 12(b)(3)(B). Failure to raise this claim in a timely fashion, however, does not preclude all appellate review; it instead confines this Court's review to plain error. *Pinault*, 168 N.H. at 33; *Ortiz*, 162 N.H. at 590.

The defense did not challenge the sufficiency of the driving after suspension complaint until after the prosecution rested. *See* TT(874)19-20; DB13. This is untimely—a defendant must challenge the sufficiency of a charging document before trial. *See, e.g.*, *Pinault*, 168 N.H. at 33. Because the defense failed to do so, the standard of review for this claim is plain error. *See id.*

b. The trial court did not commit plain error when it determined that the complaint was sufficient.

For this Court to find plain error: "(1) there must be error; (2) the error must be plain; and (3) the error must affect substantial rights." *State v. Mueller*, 166 N.H. 65, 68 (2014) (quotation omitted); *Sup. Ct. R.* 16-A. If all three of these conditions are met, this Court "may then exercise [its] discretion to correct a forfeited error only if the error meets a fourth criterion: the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." *Mueller*, 166 N.H. at 68 (quotation omitted). The plain error rule "is used sparingly, however, and is limited to those circumstances in which a miscarriage of justice would otherwise result." *Id.* (quotation omitted).

i. The trial court did not err when it rejected the defendant's challenge to the sufficiency of the complaint.

The defendant claims that the driving after suspension complaint in Case 874 was defective because it alleged that the "director of motor vehicles," rather than a court, suspended the defendant's driver's license. *See* DB9-22; RSA 263:64, IV-V. The defendant's argument is misplaced.

Part I, Article 15 of the New Hampshire Constitution requires that a charging document describe the offense with sufficient specificity to ensure that the defendant can prepare for trial and avoid double jeopardy. *State v. Ericson*, 159 N.H. 379, 384 (2009). "The question is not whether the [complaint] could have been more certain and comprehensive, but whether it contains the elements of the offense and enough facts to warn a defendant of the specific charges against him." *State v. Cheney*, 165 N.H. 677, 679 (2013). "[A]n element need not be stated in precise statutory language, if the [complaint] as a whole may fairly be understood to charge it." *Id.* (quoting *State v. French*, 146 N.H. 97, 103 (2001)); *State v. Shute*, 122 N.H. 498, 504 (1982).

RSA 263:64 ("Driving After Revocation or Suspension") states, in relevant part:

> I. No person shall drive a motor vehicle in this state while the person's driver's license or privilege to drive is suspended or revoked by action of the director or the justice of any court in this state, or competent authority in the out-of-state jurisdiction where the license was issued.
>
> . . . .
>
> IV. . . . . Any person who violates this section by driving or attempting to drive a motor vehicle . . . in this state during the period of suspension or revocation of his or her license or driving privilege for a violation of RSA 265-A:2, I . . . shall be guilty of a misdemeanor and shall be sentenced to imprisonment for a period not less than 7 consecutive 24-hour periods to be served within 6 months of the conviction, shall be fined not more than $1,000, and shall have his or her license or privilege revoked for an additional year. . . .
>
> V. Notwithstanding the definition of "revocation" in RSA 259:90 and the definition of "suspension" in RSA 259:107,

> the phrase "period of suspension or revocation" as used in paragraph IV and for purposes of paragraph IV only shall mean only suspension or revocation imposed by a court of competent jurisdiction. "Period of suspension or revocation" shall include the period specifically designated and until the restoration of the person's driver's license or privilege to drive.

RSA 263:64, I, IV-V; *see also State v. Mercon*, 174 N.H. 261, 261 A.3d 958, 961 (2021) (holding that "for a defendant to be convicted of misdemeanor driving after suspension or revocation, the State must prove: (1) that the defendant's license to drive had been suspended or revoked; (2) that the defendant drove a motor vehicle after such suspension; and (3) that the defendant did so with knowledge of the revocation or suspension of his license to drive" (quotation omitted)).

After the July 14, 2018 incident, Sergeant Kydd-Keeler completed a complaint charging the defendant with a class A misdemeanor for "driving after revocation or suspension" contrary to RSA 263:64. DA3; *see also* RSA 625:9, IV(a) (defining a class A misdemeanor). The complaint alleged that the defendant did:

> Knowingly drive a certain motor vehicle, to wit, a silver 2002 Isuzu Trooper . . . upon a certain way . . . after his operator's privilege had been suspended by the director of motor vehicles for DWI-second offense, on 05/17/2010 . . . .

DA3; *see also* RSA 265-A:2, I; RSA 265-A:18, IV. As the trial court acknowledged, Sergeant Kydd-Keeler's complaint did not "include the exact wording in the statute" that the defendant's license suspension was a result of a conviction "by a court of competent jurisdiction." DD34; RSA 263:64, IV-V. Nonetheless, the complaint was sufficient.

First, the complaint correctly recited the applicable law. Pursuant to RSA 263:56 ("Authority to Suspend or Revoke License"), the DMV is authorized to suspend a person's driver's license when he or she "[h]as committed an offense for which mandatory revocation of license is required upon conviction." *See* RSA 263:56, I(a). Under RSA 265-A:18 ("Penalties for Intoxication or Under Influence of Drugs Offenses"), an individual's second DWI offense requires a mandatory suspension of license:

> IV. Upon conviction of any offense under RSA 265-A:2, I . . . , based on a complaint which alleged that the person has had one or more prior convictions under RSA 265-A:2, I . . . the person shall be subject to the following penalties in addition to those provided in paragraph I:
>
> (a) For a second offense:
>
> . . . .
>
> (4) The person's driver's license or privilege to drive shall be revoked for not less than 3 years. The person's driver's license or privilege to drive shall not be restored by the department until the person shall have completed the service plan . . . and paid all relevant fees.

RSA 265-A:18, IV. When these statutes are construed in harmony, a court first "impose[s]" a license suspension for a DWI – second offense, *see* RSA 263:64, V; RSA 265-A:18, IV(a), and the DMV then "suspend[s]" the person's license, *see* RSA 263:56, I; *see also* RSA 263:56-b, II ("The director shall, when ordered by the court, revoke the driver's license or privilege to drive . . . ."); DA5 (the "Notice of Suspension/Revocation Action" sent to the defendant, which states: "As a result of your conviction in the Laconia District Court on 05/17/2010 for[] driving while intoxicated second offense[,] all license/operating privileges are

suspended/revoked . . . ."). As such, the driving after suspension complaint correctly recited the applicable law.

Further, implicit in the wording of the complaint is that a court first "imposed" the defendant's license suspension. *See* RSA 263:64, V; *State v. Bird*, 161 N.H. 31, 37-38 (2010) (finding an indictment sufficient when an element of the crime was "[i]mplicit" in the indictment's allegations); *Cheney*, 165 N.H. at 679 ("[A]n element need not be stated in precise statutory language, if the [complaint] as a whole may fairly be understood to charge it."). Although the DMV may suspend a person's license without a court conviction in limited circumstances, *see, e.g.*, RSA 265-A:30, only a court may convict an individual of a DWI offense, *see, e.g.*, RSA 265-A:18, IV (explaining the penalties for a "second offense," which follows a "conviction of any offense under RSA 265-A:2, I"); RSA 502-A:11 ("Each district court . . . shall have original jurisdiction, subject to appeal, of all crimes and offenses committed within the confines of the district in which such court is located which are punishable by a fine not exceeding $2,000 or imprisonment not exceeding one year . . . ."); DD34 (the trial court noting: "Only a Court, not the DMV, can convict a person of a crime."). Because the complaint alleged that the defendant's license was suspended for "DWI-second offense," it implicitly stated that a court convicted the defendant of this crime and that the defendant's license suspension was a result of this conviction. *See* RSA 263:64; *Bird*, 161 N.H. at 37-38; *Pinault*, 168 N.H. at 34; RSA 265-A:18, IV (describing penalties for a "second offense" of driving while intoxicated). The complaint, accordingly, was sufficient. *See Bird*, 161 N.H. at 37-38; *Pinault*, 168 N.H. at 34; *Cheney*, 165 N.H. at 679.

Finally, even if, for the sake of argument, the driving after suspension complaint misstated the law, it was still sufficient when viewed in its entirety. *See Cheney*, 165 N.H. at 679. As the trial court aptly held, the complaint, even if technically inaccurate, contained "enough to put the [d]efendant . . . on notice that the [d]efendant had two prior convictions for DWI . . . when he was arrested"—particularly because the complaint correctly stated the date on which the Laconia District Court convicted the defendant of DWI – second offense. *See* DD34-35; DA3, 5, 8; RSA 263:64; *see also Mercon*, 261 A.3d at 961 (describing elements of misdemeanor driving after suspension). Because the complaint adequately apprised the defendant of the alleged crime, it was not deficient. *See Cheney*, 165 N.H. at 679.

For these reasons, the trial court did not err when it denied the defendant's challenge to the sufficiency of the driving after suspension complaint. This Court, therefore, should affirm.

ii. The trial court did not commit plain error.

"For the purposes of the plain error rule, an error is plain if it was or should have been obvious in the sense that the governing law was clearly settled to the contrary." *State v. Panarello*, 157 N.H. 204, 209 (2008) (quotation omitted). "When the law is not clear at the time of trial and remains unsettled at the time of appeal, a decision by the trial court cannot be plain error." *Id.* "Plain" as used in the plain error rule "is synonymous with clear or, equivalently, obvious." *Id.* (quotation omitted).

Even if the trial court erred, the error was not plain. *See id.* Unlike instances where the charging document is defective because it omits an element of the crime, the driving after suspension complaint at issue in this

appeal alleged all elements of the crime—just not with the exact language contained in RSA 263:64. *Compare In re Alex C.*, 158 N.H. 525, 528 (2009) (finding a charging document deficient that omitted the applicable *mens rea* because "a charging document failing to allege all the elements of an offense cannot provide sufficient notice"), *with Cheney*, 165 N.H. at 679-81 (finding a charging document sufficient even though it did not exactly conform with the statutory language of the crime because "[a]n element need not be stated in precise statutory language"). Even if this Court determines that the trial court's ruling was ultimately incorrect, it was not plainly or obviously wrong in light of the applicable statutes, the language of the complaint, and this Court's decisional law. *See supra* section I.b.i; *Panarello*, 157 N.H. at 209; DD32-35; *see also Mercon*, 261 A.3d at 961 (describing elements of misdemeanor driving after suspension).

The trial court did not commit plain error. This Court, therefore, should affirm.

iii. The trial court's alleged error did not affect the defendant's substantial rights or seriously affect the fairness, integrity, or public reputation of judicial proceedings.

For a defendant to prevail under the plain error standard, "the defendant must demonstrate that the error was prejudicial, *i.e.*, that it affected the outcome of the proceeding." *Mueller*, 166 N.H. at 70 (quotation omitted). The third prong of the plain error test "is similar to the harmless error analysis [this Court] use[s] to evaluate preserved claims of error, with one important distinction: whereas the State bears the burden under harmless error analysis, the defendant bears the burden under the plain error test." *Id.* This Court "will find prejudice under the third prong

when [it] cannot confidently state that the [factfinder] would have returned the same verdict in the absence of the error." *Id.*; *McIntire v. Woodall*, 140 N.H. 228, 230 (1995); *In re Sawyer*, 161 N.H. 11, 17 (2010). Additionally, even if the error prejudiced the defendant, the error must also "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Mueller*, 166 N.H. at 68 (quotation omitted).

The defendant contends that the alleged insufficiency of the complaint violated his due process rights. *See* DB16. The defendant, however, has made no showing, or even argued, that the complaint limited his ability to prepare for trial or otherwise prejudiced him because it read "the director of motor vehicles" instead of "a court of competent jurisdiction." *See* DB10-22; *In re Sawyer*, 161 N.H. at 17 (affirming issuance of temporary protective order because the defendant failed to establish that the charging document's insufficiency "caused him actual prejudice"); *Pinault*, 168 N.H. at 34-35 (similar). Further, as described above, *see supra section* I.b.i, the complaint "taken as a whole, [could] be fairly read to imply" that the defendant was accused of driving after suspension—*i.e.*, the complaint "provided the defendant with the ability to understand the charge against [him] and to adequately prepare for trial," *see Pinault*, 168 N.H. at 34-35; *Cheney*, 165 N.H. at 679; *Bird*, 161 N.H. at 37-38 (finding an indictment adequate when one of the elements of the offense was implicitly stated).

Moreover, the wording of the complaint did not prejudice the defendant when the trial court determined his guilt. *See Pinault*, 168 N.H. at 35. Instead of relying solely on the text of the complaint, the trial court considered the language of RSA 263:64 and the evidence presented at

trial—including the defendant's certified DMV records that recited the defendant's DWI convictions at the Laconia District Court—in finding the defendant guilty of driving after suspension. *See* DA5, 8; DD32-36; *Pinault*, 168 N.H. at 35. Therefore, "the alleged deficiency in the complaint did not affect the outcome of the case." *See Pinault*, 168 N.H. at 35; *see also, e.g.*, *Ericson*, 159 N.H. at 384-85; *State v. Carr*, 167 N.H. 264, 270 (2015).

The trial court did not commit plain error. Accordingly, this Court should uphold the defendant's conviction.

c. Even if the standard of review is not plain error, this Court should affirm.

Even if this Court determines that plain error is not the proper standard of review for the defendant's challenge to the sufficiency of the complaint, this Court should still affirm. *See Cheney*, 165 N.H. at 679 (stating that this Court reviews questions of constitutional law *de novo*). For the reasons stated above, the trial court did not err by denying the defendant's motion to dismiss because: (1) the complaint was not deficient, *see id.*; *supra* section I.b.i; and (2) even if the complaint was deficient, the deficiency did not prejudice the defendant, *see McIntire*, 140 N.H. at 230; *In re Sawyer*, 161 N.H. at 17; *supra* section I.b.iii.

II. THE CERTIFIED DMV RECORDS DID NOT CONTAIN INADMISSIBLE HEARSAY.

The defendant claims that the certified DMV records admitted at trial contained inadmissible hearsay statements that the Laconia District Court convicted the defendant of DWI. *See* DB23-28. This argument fails for several reasons.

a. The defendant's hearsay claim is not preserved.

"The general rule in this jurisdiction is that a contemporaneous and specific objection is required to preserve an issue for appellate review." *Ericson*, 159 N.H. at 386. The objection must also "state explicitly the specific ground of objection." *Id.*

The defendant's hearsay argument is not preserved because the defense did not make a contemporaneous and specific hearsay objection to the certified DMV records at trial. When the prosecution sought to introduce the two certified DMV record exhibits, the defense twice did not object to their admission. *See* TT(874)10-12; DA5-12. In fact, the defense never raised any hearsay objection at trial. *See generally* TT(874). Rather, the defense introduced its hearsay objection for the first time in a memorandum of law filed on November 30, 2020—a week after the conclusion of trial. *See* DA22, 24. This was too late to preserve this argument for appellate review. *See Ericson*, 159 N.H. at 386. Accordingly, this Court should not consider this claim. *See id.*; *Halifax-Am. Energy Co. v. Provider Power, LLC*, 170 N.H. 569, 574 (2018) (stating that, "although the plain error rule allows [this Court] to consider errors not brought to the

attention of the trial court," it may "exercise [its] discretion to consider plain error only when the defendants specifically argue under that rule").

b. Even if the defendant's hearsay claim is preserved, it is without merit.

On appeal, the defendant contends that the defendant's DWI court convictions contained in the defendant's certified DMV records constituted inadmissible hearsay within hearsay. *See* DB25-28; *N.H. R. Evid.* 805. Specifically, the defendant claims:

> The entry in the DMV record . . . reflects the occurrence of some prior communication between the Laconia District Court and the DMV, in which the court notified the DMV of [the defendant]'s conviction and sentence. No exception to the hearsay rule applies to make admissible that communication.

DB27. The defendant's argument is unavailing.

This Court reviews "a trial court's ruling on the admissibility of evidence under an unsustainable exercise of discretion standard, and reverse only if the rulings are clearly untenable or unreasonable to the prejudice of a party's case." *Carignan v. Wheeler*, 153 N.H. 465, 467 (2006). "Hearsay" means "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." *N.H. R. Evid.* 801(c); *State v. Hammell*, 155 N.H. 47, 48 (2007). Pursuant to New Hampshire Rule of Evidence 803(8), official records are admissible as an exception to the rule against hearsay:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

> . . . .
>
> (8) Public Records. A record or statement of a public office if:
>
> > (A) it sets out:
> >
> > > (i) the office's activities;
> > >
> > > (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
> > >
> > > (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
> >
> > (B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

N.H. R. Evid. 803; *see also United States v. Brockwell*, 14 C.M.R. 653, 657 (A.F.B.R. 1954) ("[O]fficial records made by public officers in the course of their public duties are admissible, and such records are prima facie evidence of all facts required to be reported." (citing *Abbott v. Prudential Insurance Co.*, 195 A. 413 (N.H. 1937)); *cf. Simpson v. Calivas*, 139 N.H. 1, 9-11 (1994). "The basis of the official record exception is that when it is the duty of a public officer to make a statement as to a fact coming within his [or her] official cognizance, the great probability is that he [or she] does his [or her] duty and makes a correct statement." *State v. Marcotte*, 124 N.H. 61, 64 (1983). Likewise, in the context of "public records prepared for purposes independent of specific litigation," this Court permits the admission of "documents recording routine, objective observations, made as part of the everyday function of the preparing official or agency." *Hammell*, 155 N.H. at 49-50 (quotation omitted).

First, the defendant's conviction history contained in the certified DMV records was admissible under New Hampshire Rule of Evidence 803(8) because the DMV regularly records this information. *N.H. R. Evid.* 803(8); *Hammell*, 155 N.H. at 49-50; *Brockwell*, 14 C.M.R. at 657. By statute, the DMV must keep "[p]roper motor vehicle records"—*i.e.*, "all applications, reports required by law, registrations, histories, certificates, and licenses issued or revoked by the department relative to motor vehicles and the information, including personal information, contained in them." RSA 260:14, I(a), II. The DMV must also retain abstracts of people's court convictions. *See* RSA 263:60. Because the DMV routinely records individuals' driving histories and court convictions in the course of its public duties, DMV records are admissible for establishing an individual's prior driving convictions. *See N.H. R. Evid.* 803(8); *see also, e.g.*, *Brockwell*, 14 C.M.R. at 657.

Contrary to the defendant's allegations, the defendant's conviction history contained in the certified DMV records was admissible even though this information did not originate within the DMV. This Court has repeatedly held that information contained in public records is admissible even if that information originally came from an external source. For example, in *State v. Blais*, 104 N.H. 214 (1962), this Court wrote:

> If the question of proving the former conviction [for violating a motor vehicle law] is raised on the appeal, this can be done by several methods, none of which is particularly burdensome. The original court record or a certified copy of it prepared by the clerk or the judge of the . . . court would, of course, be sufficient. Another means of proving the prior conviction would be to call the clerk of that court . . . . *Still*

> *another method of proving the former conviction would be the record certified by the Commissioner of Motor Vehicles . . . .*

Blais, 104 N.H. at 215 (emphasis added) (citations omitted).

In *Abbott v. Prudential Insurance Co.*, 195 A. 413 (N.H. 1937), this Court also rejected a challenge to the information contained in public records that originated from an external source. In that case, an insurer issued a policy that would pay out if the insured had "sustained bodily injury, solely through external violent and accidental means." *Id.* at 414. The insured was severely injured in an automobile accident and perished shortly thereafter. *Id.*

At trial, the plaintiff attempted to introduce an authenticated death certificate from the bureau of vital statistics to show the insured's cause of death. *See id.* at 413. The death certificate stated, in relevant part: "Cause of Death; Cerebral Hemmorrage [sic]; Duration, 2 days; Contributing cause, Injury; Duration, 11 days ago." *Id.* at 414. The trial court, however, denied the plaintiff's request. *See id.* at 413.

On appeal, this Court observed that the hearsay rules at common law allowed a party to admit "official records made by public officers in the course of their public duties as prima facie evidence of all facts required by law to be reported." *Id.* at 415; *see also N.H. R. Evid.* 803(8). The defendant argued, however, that a statute governing death certificates limited the death certificate's admissibility to prove only that the insured perished. *See id.* at 415.

This Court reasoned that the "decisive question" was whether the death certificate could serve as "prima facie evidence of the fact of death alone, or whether those records are also prima facie evidence of other facts

contained therein"—*i.e.*, the facts regarding the insured's cause of death. *See id.* at 415. This Court determined that the death certificate could serve as prima facie evidence for the insured's cause of death—including those facts initially determined by the attending physician—because, if this were not so, death certificates (and, by extension, other public records, *see Simpson*, 139 N.H. at 9-11) "would be of no practical value in the great majority of litigated cases," *see id.* at 414-15; *see also Bickford v. Metro. Life Ins. Co.*, 114 N.H. 237, 240 (1974); *State v. D'Alo*, 649 A.2d 498, 499 (R.I. 1994).

In this appeal, it is of no consequence that the Laconia District Court originally recorded the defendant's DWI convictions. Pursuant to *Blais* and *Abbot*, information in public records that originates from an external source is admissible where, as here, the recording of such information is mandated by statute and falls within the regular course of the public office's activities. *See N.H. R. Evid.* 803(8); *Blais*, 104 N.H. at 215; *Abbott*, 89 N.H. 149. If this Court were to adopt the defendant's argument, each piece of information in a public record that did not originate within that public office would constitute potentially inadmissible hearsay within hearsay. This Court should reject "so stringent a limitation" because it would render public records "of no practical value in the great majority of litigated cases." *See Abbott*, 89 N.H. 149; *Simpson*, 139 N.H. at 9-11; *see also Marcotte*, 124 N.H. at 64 (stating that the "basis of the official record exception is that when it is the duty of a public officer to make a statement as to a fact coming within his [or her] official cognizance, the great probability is that he [or she] does his [or her] duty and makes a correct statement").

Moreover, even if this Court determines that the defendant's conviction history contained in the certified DMV records constituted hearsay within hearsay, *see N.H. R. Evid.* 805; DB26-28, the alleged second level of hearsay—*i.e.*, the Laconia District Court's statement to the DMV about the defendant's DWI convictions—was itself admissible as a public record by operation of statute. *See N.H. R. Evid.* 803(8). Pursuant to RSA 263:60:

> A full record shall be kept by every court or justice in this state of every case in which a person is charged with a violation of any of the provisions of any law relative to motor vehicles, and an abstract of the record in cases of conviction shall be sent within 7 days by the court or justice to the department. Said abstracts shall be made upon forms prepared under authority of the director and shall include all necessary information as to the parties to the case, the nature and date of the offense, the date of the hearing, the plea and the judgment, and shall be certified by the clerk of the court or by the justice. The department shall keep such records in its office, and they shall be open to the inspection of any person.

RSA 263:60. Under this statute, communications between the court and the DMV regarding a person's convictions are certified public records and, accordingly, fall under the public records exception to the hearsay rule. *See id.*; *N.H. R. Evid.* 803(8); 2 *McCormick on Evid.* § 324.1 (8th ed.) ("If both the primary and the included statements are by persons acting in the routine of the business, then both are admitted under the regularly kept records exception, and no further exception need be invoked."); *Abbott*, 195 A. at 413-15 (stating that parties may admit "official records made by public officers in the course of their public duties as prima facie evidence of all facts required by law to be reported"); *cf. Marcotte*, 124 N.H. at 64-65

("Under the habitual offender statute, the clerk of court was required to file with the Division of Motor Vehicles a copy of the court order revoking the habitual offender's license. The Director of the Division of Motor Vehicles was required by statute to keep a record of all license revocations. Accordingly, the Division of Motor Vehicles record of a license revocation after an individual's adjudication as an habitual offender would fall within the hearsay exception for official records.").

In sum, the certified DMV records did not contain inadmissible hearsay.[9] This Court, accordingly, should affirm.

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[9] Alternatively, even if this Court determines that the certified DMV records contained inadmissible hearsay, this Court should still affirm because the trial court could take judicial notice the defendant's prior DWI convictions established in Case 1213. *See* DD35-36. The trial court was permitted to take judicial notice of Case 1213 because: (1) the trial court heard Case 1213 immediately before Case 874, and (2) Case 1213 was a closely related proceeding with the same parties. *See* TT(1213); TT(874); *N.H. R. Ev.* 201; *Fed. R. Evid.* 201; *see also, e.g.*, *Nnaka v. Fed. Republic of Nigeria*, 238 F. Supp. 3d 17, 26 (D.D.C. 2017) ("[A] court may generally take judicial notice of court records in related proceedings."), *aff'd*, 756 F. App'x 16 (D.C. Cir. 2019); *Envtl. Utils., LLC. v. PSC of Mo.*, 219 S.W.3d 256, 265 (Mo. Ct. App. 2007) ("Courts may take judicial notice of other proceedings when the cases are interwoven or interdependent."); 29 Am. Jur. 2d *Evidence* § 148 (2021) ("A court may take judicial notice of closely related proceedings, particularly where the same parties are involved and the allegations from those proceedings have been proved, or where the cases are essentially the same." (footnotes omitted)).

CONCLUSION

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

The State waives oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

and

ANTHONY J. GALDIERI
SOLICITOR GENERAL

December 16, 2021

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CERTIFICATE OF COMPLIANCE

I, Weston R. Sager, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 7,707 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.

December 16, 2021 *<u>/s/ Weston R. Sager</u>*
Weston R. Sager

CERTIFICATE OF SERVICE

I, Weston R. Sager, hereby certify that a copy of the State's brief shall be served on, Christopher M. Johnson, Chief Appellate Defender and counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

December 16, 2021 */s/ Weston R. Sager*
Weston R. Sager

ADDENDUM TABLE OF CONTENTS

The State of New Hampshi
COMPLAINT

Case Number: _____ **Charge ID:** _____

☐ VIOLATION	MISDEMEANOR ☒ CLASS A ☐ CLASS B ☐ UNCLASSIFIED (non-person)
	FELONY ☐ CLASS A ☐ CLASS B ☐ SPECIAL ☐ UNCLASSIFIED (non-person)

You are to appear at the: **6TH Circuit - District Division - Franklin** Court,
Address: **7 HANCOCK TER , Franklin, NH** County: **MERRIMACK**
Time: **8:00 AM** Date: **11/16/2018**

Under penalty of law to answer to a complaint charging you with the following offense:

THE UNDERSIGNED COMPLAINS THAT : PLEASE PRINT

LEROUX			ROBERT			E
Last Name			First Name			Middle
9 SARGENT ST			GILFORD		NH	03249
Address			City		State	Zip
M	W	5 1 1	1 6 5	BLUE		BROWN
Sex	Race	Height	Weight	Eye Color		Hair Color
12/17/72		[redacted]		NH		
DOB		License #:		OP License State		

☐ COMM. VEH. ☐ COMM. DR. LIC. ☐ HAZ. MAT. ☐ 16+PASSENGER

AT: TILTON SHOP EXPRESS: 622 LACONIA RD, TILTON NH
On 10/05/2018 at 4:03 AM in BELKNAP County NH, did commit the offense of:
RSA Name: DRIVING AFTER REVOCATION OR SUSPENSION
Contrary to RSA: 263:64
Inchoate:
(Sentence Enhancer):

And the laws of New Hampshire for which the defendant should be held to answer, in that the defendant did:

KNOWINGLY DRIVE A CERTAIN MOTOR VEHICLE, TO WIT, A 2002 SILVER ISUZU TROOPER, BEARING NEW HAMPSHIRE TEMPORARY REGISTRATION 290650, UPON A CERTAIN WAY, TO WIT, LACONIA ROAD IN TILTON, NEW HAMPSHIRE, AFTER HIS OPERATOR'S PRIVILEGE HAD BEEN SUSPENDED BY THE DIRECTOR OF MOTOR VEHICLES FOR DRIVING WHILE INTOXICATED (SECOND OFFENSE) ON 05/17/2010,

against the peace and dignity of the State.

☐ SERVED IN HAND

Complainant Signature	Patrolman RICHARD J ORT	Tilton PD
	Complainant Printed Name	Complainant Dept.

Making a false statement on this complaint may result in criminal prosecution.

Oath below not required for police officers unless complaint charges class A misdemeanor or felony (RSA 592-A:7.I).
Personally appeared the above named complainant and made oath that the above complaint by him/her subscribed is, in his/her belief, true.

Date _____ Justice of the Peace _____

NHJB-2962-D (6/27/2016)

Case Number: _____ Charge ID: _____