THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0460

State of New Hampshire

v.

Chasrick Heredia

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

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BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to prove that Heredia committed the crime of witness tampering.

Issue raised as plain error.

2. Alternatively, whether the court erred by imposing two convictions and separate, consecutive sentences for solicitation to falsify physical evidence and witness tampering.

Issue preserved by Heredia's objection to separate or consecutive sentences, A* 20; S 43, and the court's sentences, A 35, 38. To the extent the issue is not preserved, it is raised as plain error.

3. Whether the evidence was sufficient to prove that Heredia committed the crime of contributing to the delinquency of a minor.

Issue raised as plain error.

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* Citations to the record are as follows:
"A" refers to the appendix to this brief;
"T1," T2," etc., refer, by volume number, to the transcript of trial on June 2–14, 2021; and
"S" refers to the transcript of sentencing on September 9, 2021.

STATEMENT OF THE CASE

In July 2019, the State filed three complaints in the Hillsborough County Superior Court – Northern District – alleging that Chasrick Heredia intentionally contributed to the delinquency of a minor. A 5–7. In September 2019, January 2020, and September 2020, the State obtained indictments from Hillsborough County grand juries charging Heredia with aggravated felonious sexual assault, five counts of felonious sexual assault, witness tampering, and solicitation to falsify physical evidence. A 9–10, 13–18.

During a seven-day jury trial from June 2 to 14, 2021, the court (Messer, J.) dismissed one count of felonious sexual assault. T5 1031; A 14. At the conclusion of trial, the jury found Heredia not guilty of aggravated felonious sexual assault, not guilty of the four remaining counts of felonious sexual assault, and guilty of three counts of contribution to delinquency, witness tampering, and solicitation to falsify physical evidence. T7 1287–91; A 5–7, 13, 15–18.

On September 8, 2021, the court sentenced Heredia on the witness-tampering conviction to three to six years, to serve, on the solicitation-to-falsify-physical-evidence conviction to three-and-a-half to seven years, suspended, and on the three contribution-to-delinquency convictions to twelve months, two of which were to serve and one of which was

suspended. S 59–64; A 25–40. All the sentences were consecutive. S 59–64; A 25–40.

STATEMENT OF THE FACTS

In the Summer of 2019, Chasrick Heredia was twenty-five years old and living in an apartment complex in Manchester. T3 513, T5 1042, 1064, T6 1158. On the evening of July 23, 2019, Heredia's friend, Matthew Hugle, called Heredia, told him that a local restaurant was selling half a pound of chicken tenders for two dollars, and invited him to go. T1 82, T2 459, T5 1056–57. Heredia agreed. T5 1057, 1066.

When Hugle arrived at Heredia's apartment, there were three young women in his car, G.W., A.R., and S.W., smoking cigarettes, and they exchanged introductions. T1 94–95, 163–64, 217–19, T2 408–10, 413, T4 807, T5 1057–58, T6 1138–39. G.W., A.R., and S.W. told Heredia that they had run away from a drug-treatment facility and that they were addicted to heroin, fentanyl, and methamphetamine. T1 218–19, T2 296–97, 410, T4 844–45, T5 1058–60. They also told Heredia that they were between eighteen and twenty years old. T5 1058, 1061, T6 1135, 1139; but see T1 98 (G.W. testified that she told Heredia that she was sixteen and that A.R. and S.W. were fifteen), T1 219, T2 295–96 (A.R. testified that she told Heredia that she was seventeen or eighteen and that G.W. and S.W. were sixteen), T2 410 (S.W. testified that she didn't recall if she told Heredia how old they were).

G.W., A.R., and S.W. told Heredia that they were planning to steal beer from a grocery store, so Heredia offered to purchase beer for them. T1 162–63, T2 397–98, 406–07, 410, T5 1060–61. They drove to a convenience store, where G.W., A.R., and S.W. gave Heredia money and asked him to purchase tall cans of beer. T1 98, 219–21, T2 411, T4 807, T5 1061–62. Heredia purchased six cans of beer and gave them to G.W., A.R., and S.W. T1 98–99, 219, 221–22, T2 313–14, 411–12, T4 807, T5 1061–62.

G.W., A.R., and S.W. were in search of a place to "hang out," so Hugle drove them back to Heredia's apartment complex, which was on the same road as their drug-treatment facility, and within walking distance of it. T1 101, 222–23, T2 413, 456, 468, T3 513, 546, 561–62, T4 715, 732, 807–08, T5 1063–64, T6 1158–59. Hugle and Heredia left G.W., A.R., and S.W. by a bench outside. T1 101, T2 246, 414–15, T4 808, T5 1065. When S.W. asked Hugle whether he and Heredia would return, Hugle responded that he didn't know. T5 1065. Heredia did not expect to see G.W., A.R., and S.W. again. T6 1158–59.

Hugle first drove Heredia to a friend's house, where Heredia had a few shots of tequila, and then to the restaurant, where Heredia had a couple beers. T2 497, T4 808, 819, T5 1066–68. They spent about an hour and a

half at the restaurant and left around 10:00 or 10:30 p.m. T4 808, T5 1066–69.

When Hugle drove Heredia back to Heredia's apartment complex, G.W., A.R., and S.W. were still there. T1 105, T2 255, 418–19, T5 1070. S.W. told Heredia that, while he and Hugle were gone, she performed oral sex on G.W. T5 1071. G.W., A.R., S.W., Hugle, and Heredia then went to the clubhouse of Heredia's apartment complex. T1 105, T2 256–57, 419–20, T4 809, T5 1073–74. The clubhouse was officially closed at that time, but, due to a defective lock on the front door, they were able to enter anyway. T3 542, T5 1073–74.

In the clubhouse, A.R. had sex with Hugle on a pool table upstairs. T2 258, T4 810–11, T5 1076, T6 1176. S.W. witnessed this and, after telling A.R., "Get it girl," she asked G.W. to lie down on a couch, also upstairs. T5 1076–78. S.W. then performed oral sex on G.W., "right in front of [Heredia]." T5 1078. G.W. then reached her hand into Heredia's pants. T5 1080. G.W. then had sex with Heredia on the couch, first in missionary position, then with G.W. on top of Heredia. T1 107–08, T2 276, 330, 379, T5 1078–81.

After A.R. had sex with Hugle, S.W. had sex with him, which resulted in an argument between A.R. and S.W. T2 422, T4 813, 825, T5 1079–80. A.R. then had sex with Hugle a second time, downstairs in a shower. T2 425,

T5 1082–83, 1101, T6 1143–44, 1181, 1183. Meanwhile, G.W. engaged in additional sexual activity with Heredia upstairs on the couch, which Heredia recorded on his phone. T2 278–80, 331–32, T4 814, 845, T5 1044–45, 1084. G.W. told Heredia, "You better not show anybody that." T5 1045.

Shortly after midnight, Heredia thought he heard someone entering the clubhouse. T2 459, T4 690, T5 1087. Heredia was on probation, which included a curfew and an alcohol prohibition. T5 1087. Fearful that it was the police, Heredia opened the door to a fire escape, which set off a loud alarm. T1 109, T2 280–81, T5 1087–88. G.W., A.R., S.W., Hugle, and Heredia all ran to Hugle's car and drove away. T1 111, T2 282–84, 427–28, T5 1089–90.

G.W., A.R., and S.W. asked Hugle to drop them off a few blocks away from their drug-treatment facility. T1 111, T2 285, T5 1090–91. On the way, G.W. took Heredia's phone and added herself to his snapchat account. T1 111, 159, 164–65, T2 286, 297, T5 1094. When they arrived, G.W. told Heredia, "You better give me a kiss" and kissed him before leaving. T1 112, 156–58, T5 1095. At trial, G.W. explained that kissing Heredia goodbye "felt like the right thing to do in that moment." T1 112.

A.R. secretly planned with Hugle to stay in the car when G.W. and S.W. left and to spend the night at his home. T2 285, 287, 315–17, T5 1099. After G.W. and S.W. got out of

the car, S.W. realized that A.R. was not coming and tried unsuccessfully to pull her out of the car. T1 161, T2 287–88, 429–30, T5 1099. Hugle drove away and dropped Heredia off at his apartment before bringing A.R. to his home. T1 112, 161–62, T2 288, 291, 429–30, T5 1099–1101.

The following day, the police arrested Heredia. T2 496, T3 511, T5 1045, T6 1139. At that point, he learned that G.W., A.R., and S.W. had lied about their ages. T5 1045–46, T6 1139. G.W. was sixteen, while A.R. and S.W. were fifteen. T1 71, 75, 186, 198, T2 390, 470. All three had applied makeup to make themselves appear older than they were. T1 77, 204–05, T2 242, 370–71, 400. They also exaggerated the extent of their drug addictions, again to make themselves appear older than they were. T2 296–97, T4 844–45.

Heredia also learned that G.W., A.R. and S.W. made various allegations against him and Hugle, whom they described to police as "two black males."[1] T2 403, 436, 464, 467, T4 697, 703, 715, 840. Upon returning to the drug treatment facility, S.W. claimed that Hugle and Heredia "gang raped" G.W. and "kidnapped" A.R. T1 113–15, T2 461–62, T3 561, T4 714.

Although G.W. was sixteen years old and thus legally capable of consenting to sex, see RSA 632-A:3, II, RSA 632-A:4, I(c), she claimed that she was exceptionally

[1] Hugle is African-American. T4 704. Heredia is Latino.

drunk when she had sex with Heredia, so much so that she was "physically helpless to resist." RSA 632-A:2, I(b); T1 102 ("I . . . urinated [on] myself," "I blacked out"), 103 ("[S.W.] said [,'F]ind somebody and call 9-1-1, I think [G.W.] is dying,'" "I remember wondering if my limbs were still attached to my body"), 104 ("I had thrown up," "I was really confused"), 105 (testifying that Hugle and Heredia had to carry her to the clubhouse), 105–09 (testifying that she repeatedly lost consciousness), 107 (testifying that she woke up to Heredia having sex with her), 108 ("I couldn't keep my eyes open. . . I couldn't really move anything but my head."). At 3:40 a.m., however, her blood-alcohol concentration was just 0.047 percent. T5 899. At trial, G.W. admitted that she had falsely accused her own father of sexual assault. T1 131–38, 176–77. She also testified that she and her family were planning to sue the drug-treatment center, alleging that it should have done more to prevent her from running away. T1 166–67.

A.R. claimed that, although she had sex with Hugle upstairs on the pool table, it was Heredia, not Hugle, with whom she had sex downstairs in the shower. T2 261–71, 320, 379. At the hospital the following day, however, she refused to submit to a sexual assault examination kit, which may have resulted in DNA evidence proving or disproving that

allegation. T5 1102–03. Like G.W., A.R. and her family also planned to sue the drug-treatment center. T2 351.

For almost two years, Heredia was incarcerated at the Valley Street Jail on these false allegations. T5 1045, T6 1145. He told his lawyer that he wanted to give prosecutors the video he took of his sexual activity with G.W., which he thought was backed up to a Google account belonging to his mother's friend, Max. T5 1007, T6 1193–95. By showing that G.W. was "awake" and "engaging in the sexual activities," Heredia believed that the video would exonerate him from the allegation that she was "physically helpless to resist." T5 1084, T6 1192–93. His lawyer, however, advised against it, explaining that, because G.W. was sixteen when the video was made, it constituted child pornography. T5 1046, T6 1192–93; see also RSA 649-A:3, 3-b (prohibiting the manufacture and possession of "any visual representation of a child engaging in sexually explicit conduct"); RSA 649-A:2, I (defining "child" as "any person under the age of 18 years").

Fearful that, if the police found the video, he would be charged with manufacturing child pornography, Heredia sent a coded letter to Hugle from the jail. T5 982–84, 1046–48, T6 1171, 1189; A 11. The letter was unremarkable on its face, but Heredia deliberately misspelled words so that, when combined with three underlined words, they read, "Max, get

the password to his Gmail, MaximBoneo@gmail.com, google photos, delete videos." A 12; T5 982–84, 1000–01, 1048, T6 1189–90. Heredia then called Hugle and instructed him, upon receipt of the letter, to underline all the misspelled words. T5 999–1000, 1048.

The police intercepted the letter, listened to the phone call, and discovered the coded message. T5 982, 999–1000, 1048–49. They obtained and served on Google a subpoena for material associated with the email address, but no photographs or videos were found. T5 1011–12. At trial, Heredia testified that he didn't know why the police didn't find the video. T6 1194–95.

SUMMARY OF THE ARGUMENT

1. A person commits witness tampering, under RSA 641:5, I(b), only if he attempts to cause another person to "withhold" something. To "withhold" something, one must possess it. Here, Heredia's request that Hugle delete a video was not a request that he "withhold" it, because Heredia did not believe that Hugle possessed it. And separate from his request that Hugle delete the video, Heredia did not request that Hugle "withhold" it.

2. Alternatively, if this Court holds that a request to destroy something implies a request to "withhold" it, then solicitation to falsify physical evidence was the same offense as witness tampering, and the separate convictions and sentences for those offenses violated Heredia's rights to be free from double jeopardy. The offenses were the same under the State Constitution because the facts charged in either indictment, if true, would have sustained the other. And they were the same under the Federal Constitution because witness tampering did not require proof of any element that solicitation to falsify physical evidence did not also require.

3. A "delinquent" is a minor who commits a crime or possesses marijuana. Heredia did not contribute to G.W., A.R., or S.W.'s delinquencies by giving them beer because possession and consumption of alcohol is not a crime or marijuana-related offense.

I. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT HEREDIA COMMITTED THE CRIME OF WITNESS TAMPERING.

Evidence is legally insufficient unless a reasonable factfinder, viewing all the evidence in the light most favorable to the State, could find each element proven beyond a reasonable doubt. State v. Cullen, ___ N.H. ___ (Mar. 3, 2023). Sufficiency of the evidence is reviewed de novo. Id. Heredia's sufficiency challenge to the witness-tampering conviction primarily raises a question of statutory construction. Like sufficiency challenges generally, issues of statutory construction are reviewed de novo. In re J.P.S., ___ N.H. ___ (Feb. 28, 2023).

RSA Chapter 641, entitled "Falsification in Official Matters," prohibits various acts intended to impair the truth-finding function of courts and other government agencies. It defines crimes such as perjury, false reports to law enforcement, witness tampering, falsifying physical evidence, and tampering with public records. RSA 641:1–7.

RSA 641:6 is entitled "Falsifying Physical Evidence." As relevant here, the statute provides that "[a] person commits a class B felony if, believing that an official proceeding . . . or investigation is pending or about to instituted, he . . . destroys, conceals or removes any thing with a purpose to impair its verity or availability in such proceeding or investigation." RSA 641:6, I.

RSA 641:5, the preceding statute, is entitled "Tampering with Witnesses and Informants." As relevant here, the statute provides that "[a] person is guilty of a class B felony if . . . [,b]elieving that an official proceeding . . . or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to . . . [w]ithhold any testimony, information, document or thing." RSA 641:5, I(b).

The State charged Heredia under both provisions. A 17–18. Each indictment was based on the same conduct — instructing Hugle to delete the video. A 17–18. One indictment charged Heredia with solicitation to falsify physical evidence. A 18. It alleged that Heredia, "with the purpose that . . . Hugle [commit] the crime of Falsifying Physical Evidence . . ., solicited Hugle to delete information relevant to a pending criminal prosecution." A 18. Another indictment charged Heredia with witness tampering. A 17. It alleged that Heredia, "believing that an official investigation . . . was pending, knowingly attempted to induce or otherwise cause . . . Hugle . . . to withhold . . . information when he . . . requested that Hugle delete information . . . related to the official investigation." A 17.

The evidence related to these charges was not disputed. It showed that Heredia instructed Hugle to obtain the password to a Google account belonging to Heredia's mother's

friend and to delete the video of G.W engaging in sexual activity with Heredia.

Heredia concedes that, by writing and sending this letter, he committed the crime of solicitation to falsify physical evidence. The evidence, however, was insufficient to prove that he committed the crime of witness tampering.

The witness tampering indictment required the State to prove that Heredia asked Hugle to "withhold" the video. A 17; RSA 641:5, I(b). For two reasons, Heredia did not ask Hugle to "withhold" the video.

First, "withholding" requires possession. By definition, one cannot "withhold" something that one does not possess.

In questions of statutory interpretation, this Court "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." J.P.S., ___ N.H. at ___; see also RSA 21:2 (In general, "[w]ords and phrases shall be construed according to the common and approved usage of the language."). "Absent an ambiguity, [it] need not look beyond the language of the statute to discern legislative intent." J.P.S., ___ N.H. at ___.

RSA 641:5 does not define "withhold." When a statute does not define the meaning of a word, this Court looks to the dictionary for guidance. Natal v. GMPM Co., 175 N.H. 74, 78 (2022). When RSA 641:5 was enacted in 1971, Webster's Third New International Dictionary defined "withhold" as "to

hold back," "to desist or refrain from granting, giving, or allowing," or to "keep in one's possession or control." Webster's Third New International Dictionary 2627 (unabridged ed. 1968). Black's Law Dictionary defined it as "[t]o retain in one's possession that which belongs to or is claimed or sought by another." Black's Law Dictionary 1777 (rev. 4th ed. 1968). As these definitions demonstrate, possession is an indispensable component of the definition of "withhold."

When construing the word "withhold" in a statute, courts are in accord with this common understanding. In Kissinger v. Reps. Comm. for Freedom of the Press, 445 U.S. 136 (1980), a group of journalists, academics, and others filed requests under the Freedom of Information Act (FOIA) for summaries and transcripts of telephone conversations involving Henry Kissinger, an official in the Nixon and Ford administrations. Id. at 139–43. They filed their requests with the State Department, but by that time Kissinger had removed the records from the State Department, which was an agency under the FOIA, and transferred them, with strict confidentiality terms, to the Library of Congress, which was not. Id. at 141–43, 145.

The State Department denied the FOIA requests, in part because it no longer possessed the records, and the requesters brought suit under the FOIA. Id. at 143–45. The

district court held that Kissinger "wrongfully removed" the records from the State Department and ordered the Library of Congress to return them to the State Department, which would then review them and respond to the FOIA requests. Id. at 145. The Circuit Court affirmed. Id. at 146.

The Supreme Court reversed. Id. at 158. The FOIA, it noted, only permitted judicial intervention if an agency improperly "withheld" agency records. Id. at 150. The Court examined "the usual meaning of the word." Id. at 151. "The act described by this word," it found, "presupposes the actor's possession or control of the item withheld." Id. "The requesters," it observed, "would have us read the 'hold' out of 'withhold.'" Id. Even if the records were "wrongfully removed," it held, the State Department had not "withheld" them, because it did not possess them when the FOIA requests were filed. Id. at 148, 150. An agency cannot "withhold[] a document which has been removed from the possession of the agency prior to the filing of the FOIA request," because "the agency has neither the custody or control necessary to enable it to withhold." Id. at 150–51.

The Supreme Court is not alone. For decades and throughout the country, courts have held that withholding requires possession. See, e.g., Upham v. Forster, 504 P.3d 654, 661 (Or. App. Ct. 2021) (under the "ordinary meaning" of the word, "a party can 'withhold' only that which it possesses

or controls"); Kuehnapfel v. Chintall, 2014 WL 3407229, at *6 (N.J. Super. Ct. App. Div. July 15, 2014) ("Stated simply, one cannot withhold from disclosure that which one does not possess"); Beck v. Allen, 58 Miss. 143, 162 (1880) ("A man cannot properly be said to withhold that which he does not possess").

Here, at the time that Heredia sent his request, Hugle did not possess the video. More to the point, Heredia did not believe that Hugle possessed the video. Thus, as a matter of law, Heredia's request could not constitute a request that Hugle "withhold" the video.

Second, regardless of whether withholding requires possession, Heredia did not request that Hugle withhold the video. Heredia's requested that Hugle "get the password to [Max's] Gmail," go to the "google photos" application, and "delete [the] videos." Heredia did not instruct Hugle, for instance, "Whatever you do, don't give the video to the police." Because Heredia simply instructed Hugle to delete the video, not to refrain from giving it to the police, as a matter of law, his request did not constitute a request that Hugle "withhold" the video.

Heredia concedes that his sufficiency challenge is not preserved. This Court, however, may reverse for plain and prejudicial errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings. O'Malley-Joyce

v. Travelers Home & Marine Ins. Co., 175 N.H. 245, 251 (2022); Sup. Ct. R. 16-A. Although plain error "should be used sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result," O'Malley-Joyce, 175 N.H. at 251, this Court has consistently found that convictions based on legally insufficient evidence constitute plain error. State v. Racette, 175 N.H. 132, 139–41 (2022); State v. Houghton, 168 N.H. 269, 273–74 (2015); State v. Guay, 162 N.H. 375, 380–84 (2011).

For the reasons stated above, the evidence was plainly insufficient to prove that Heredia requested that Hugle "withhold" the video. The error was prejudicial because it resulted in Heredia's convictions, based on the same conduct, for both solicitation to falsify physical evidence and witness tampering, even though he was guilty of only the former. See Racette, 175 N.H. at 141; Houghton, 168 N.H. at 274; Guay, 162 N.H. at 384. The error seriously affects the fairness, integrity, or public reputation of judicial proceedings because it resulted in Heredia's conviction for a crime of which he was innocent. See Racette, 175 N.H. at 141; Houghton, 168 N.H. at 274; Guay, 162 N.H. at 384.

II. ALTERNATIVELY, THE COURT ERRED BY IMPOSING TWO CONVICTIONS AND SEPARATE, CONSECUTIVE SENTENCES FOR SOLICIATION TO FALSIFY PHYSICAL EVIDENCE AND WITNESS TAMPERING.

Heredia argues above that the evidence was insufficient to prove that he committed witness tampering because he did not request that Hugle "withhold" the video. The State may argue that whenever one person requests that another person destroy something, with a purpose to impair its verity or availability in a pending proceeding or investigation, that request impliedly includes a request to withhold that thing from the authorities.

For the reasons stated above, this Court should reject that statutory interpretation and hold that the evidence of witness tampering was legally insufficient. If, however, this Court adopts the State's proposed statutory interpretation, it must then consider another issue: whether, under that interpretation, the solicitation-to-falsify and witness-tampering charges here constituted the same offense for double-jeopardy purposes, thus precluding the entry of multiple convictions and sentences.

In his sentencing memorandum, Heredia objected to separate sentences on the solicitation-to-falsify and witness-tampering charges. A 20. He noted that the convictions "relate to the same conduct and the same purpose and the same witness being tampered with." A 20. "Since the two

charges bear from the same conduct and purpose," he argued, "separate sentences for more than one of those charges is not appropriate." A 20.

At sentencing, Heredia reiterated his objection to separate or consecutive sentences on the solicitation-to-falsify and witness-tampering charges. S 43. Although he conceded that the charges "ha[d] slightly different elements," he noted that they were based on "the same conduct." S 43. If the court imposed consecutive sentences, he argued, it would be "punishing [him] twice for in essence what amount[s] to the same crime." S 43. Heredia asked the court to refrain from imposing a sentence on the witness-tampering charge, but rather "indicate that that sentence was handled on the solicitation [to] falsify charge." S 43. The court rejected Heredia's arguments and imposed convictions for each charge, along with consecutive sentences. S 60, 63–64; A 35, 38.

Part I, Article 16 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution protect against double jeopardy. These provisions prohibit multiple convictions and sentences for the same offense. State v. Woodbury, 172 N.H. 358, 368 (2019) (double jeopardy prohibits "multiple punishments for the same offense"); State v. Wilson, 169 N.H. 755, 775 (2017) ("the defendant's four separate convictions, and the sentences

therefor, constitute multiple punishments for the same offense"); Rutledge v. United States, 517 U.S. 292, 301–03 (1996) (prohibition on multiple punishments includes multiple convictions); Ball v. United States, 470 U.S. 856, 865 (1985) ("the second conviction, even if it results in no greater sentence, is an impermissible punishment"). Here, under a request-to-destroy-implies-a-request-to-withhold statutory interpretation, solicitation to falsify physical evidence constituted the same offense as witness tampering. Thus, separate convictions and sentences for those offenses violated the double-jeopardy clauses of the state and federal constitutions.

Heredia's double-jeopardy challenge is preserved. "The purpose of th[e] preservation rule is to afford the trial court an opportunity to correct any error it may have made." State v. Woodburn, ___ N.H. ___ (Mar. 23, 2023) (quotation marks omitted). This Court will find an argument preserved "if the trial court had the opportunity to consider that legal issue or the development of facts that might or might not have supported the specific argument raised on appeal." Id.

While Heredia did not utter the magic words, "double jeopardy," he did argue that, if the court imposed consecutive sentences, it would be "punishing [him] twice for in essence what amount[s] to the same crime." S 43. Punishing a

defendant twice for the same crime is precisely what the double-jeopardy provisions prohibit.

Additionally, there is no way the trial court could have understood Heredia's argument other than as a double-jeopardy challenge. While some states place limits on a court's ability to impose consecutive sentences, New Hampshire, like most states, "entrust[s] to judges' unfettered discretion the decision whether sentences for discrete offenses shall be served consecutively or concurrently." Oregon v. Ice, 555 U.S. 160, 163–64 (2009); accord Duquette v. Warden, 154 N.H. 737, 744 (2007). In New Hampshire, if two offenses are not the "same offense" for double-jeopardy purposes, then the sentencing court has virtually unlimited discretion to impose consecutive sentences, no matter how closely related they are. Duquette, 154 N.H. at 740–47 (rejecting various statutory and constitutional challenges to courts' discretion to impose consecutive sentences). Given this broad discretion to impose consecutive sentences, Heredia's objection to separate and consecutive sentences could only have been understood as a double-jeopardy challenge.

Heredia's double-jeopardy challenge raises a "double-description" issue. See State v. Ramsey, 166 N.H. 45, 51 (2014) (explaining the deference between "double-description" issues and "unit-of-prosecution" issues). "[T]he issue is

whether two statutes describe two separate offenses or are merely different descriptions of the same offense." Id. This Court reviews questions of constitutional law de novo. State v. Rivera, 175 N.H. 210, 215 (2022).

To resolve double-description issues under the State Constitution, courts ask "whether proof of the elements of the crimes as charged will require a difference in evidence." Id. If "the facts charged in [one] indictment would, if true, have sustained [another indictment]," then the indictments charge the same offense. State v. McGurk, 157 N.H. 765, 773 (2008). Here, under a request-to-destroy-implies-a-request-to-withhold interpretation of the witness tampering statute, the facts charged in either the solicitation-to-falsify indictment or the witness-tampering indictment would have sustained the other.

The solicitation-to-falsify indictment alleged that Heredia, "with the purpose that . . . Hugle [commit] the crime of Falsifying Physical Evidence . . ., solicited Hugle to delete information relevant to a pending criminal prosecution." A 18. As charged, the indictment required the State to prove: (a) that Heredia "believ[ed] that an official proceeding or investigation [wa]s pending or about to be instituted," RSA 641:6; A 18 ("a pending criminal prosecution"); see also RSA 629:2, I (solicitation requires "a purpose that another engage in conduct constituting a crime"); (b) that Heredia

"solicited Hugle to delete information," A 18; RSA 641:6, I ("destroy"[2]); (c) that the information was "relevant to a pending criminal prosecution," A 18; and (d) that Heredia acted "purpose[ly]," A 18; RSA 629:2 (solicitation requires that the defendant act "with a purpose that another engage in conduct constituting a crime"); RSA 641:6 (falsifying physical evidence requires that the defendant act "with a purpose to impair [the thing's] verity or availability in such proceeding or investigation").

The witness-tampering indictment alleged that Heredia, "believing that an official investigation . . . was pending, knowingly attempted to induce or otherwise cause . . . Hugle . . . to withhold any information [by] writ[ing] a letter . . . request[ing] that Hugle delete information . . . that constituted evidence related to the official investigation." A 17. As charged, the indictment required the State to prove: (a) that Heredia "[b]eliev[ed] that an official proceeding . . . or investigation [wa]s pending or about to be instituted," RSA 641:5, I, A 17 ("an official investigation"); (b) that Heredia "attempted to induce or otherwise cause . . . Hugle . . . to withhold any information" by "request[ing] that Hugle delete information," A 17; and (c) that Heredia acted purposely, RSA 641:5, I ("attempts"); RSA 629:1, I (defining "attempt" as a

[2] RSA 641:6, I, also prohibits "conceal[ing] or remov[ing] any thing." To the extent that this Court holds that a request to "conceal" or "remove" implies a request to "withhold," the double-jeopardy analysis is the same.

"purpose[ful]" act); State v. Kilgus, 125 N.H. 739, 743 (1984) (witness tampering requires proof that the defendant acted purposely).

If a request to destroy something implies a request to withhold it, then, as charged, proof that Heredia committed either solicitation to falsify physical evidence or witness tampering would, without more, constitute proof that he committed the other offense. Both indictments required the State to prove that Heredia believed that an official proceeding or investigation was pending or about to be instituted. Both indictments required the State to prove that Heredia asked Hugle to delete the same information. And both indictments required the State to prove that Heredia acted purposely. Thus, "proof of the elements of the crimes as charged" did not "require a difference in evidence," Ramsey, 166 N.H. at 51, and the offenses were the same under the State Constitution.

Under the Fifth and Fourteenth Amendments to the United States Constitution, two offenses are the same unless each requires proof of an element that the other does not. Blockburger v. United States, 284 U.S. 299, 304 (1932); State v. Hutchinson, 156 N.H. 790, 791 (2008).

Solicitation to falsify physical evidence requires proof, in relevant part, that: (a) the defendant "believe[ed] that an official proceeding . . . or investigation was pending or about to be instituted"; (b) the defendant "command[ed], solicit[ed]

or request[ed] that . . . [an]other person" "destroy[], conceal[] or remove[] any thing"; and (c) the defendant acted with "a purpose to impair its verity or availability in such proceeding or investigation." RSA 629:2, I; 641:6, I.

Witness tampering requires proof, in relevant part, that: (a) the defendant "believe[ed] that an official proceeding . . . or investigation was pending or about to be instituted"; and (b) the defendant "attempt[ed] to induce or otherwise cause a person to . . . [w]ithhold . . . any testimony, information, document or thing." RSA 641:5. Despite the title of the crime, the statute does not require that the other person actually be a "witness." Kilgus, 125 N.H. at 742–43.

Heredia concedes that solicitation to falsify physical evidence requires proof of some elements that are not required by witness tampering. Solicitation to falsify physical evidence requires that the defendant "command[], solicit[], or request[]" that the other person engage in conduct, while witness tampering merely requires that the defendant "attempt to induce or otherwise cause a person to do so." Solicitation to falsify physical evidence requires a request to "destroy[], conceal[] or remove[]," while witness tampering merely requires an inducement to "withhold." Solicitation to falsify physical evidence requires that the object of the request be a "thing," while witness tampering merely requires that it be "any testimony, information, document or thing."

Finally, solicitation to falsify physical evidence requires that the defendant act "with a purpose to impair [the thing's] verity or availability in such proceeding or investigation," while witness tampering does not. See id. at 743 (under witness-tampering statute, "no proof of a connection between the matter under investigation and the information to be falsified is required").

The problem, however, is that under a request-to-destroy-implies-a-request-to-withhold interpretation of the witness tampering statute, witness tampering does not require proof of any element that solicitation to falsify physical evidence does not also require. Witness tampering requires proof that the defendant believed that an official proceeding or investigation was pending or about to be instituted, but so does solicitation to falsify physical evidence. Witness tampering requires proof that the defendant attempted to cause a person to "withhold" something, but, under the assumed statutory construction, so does solicitation to falsify physical evidence. Thus, the offenses were the same under the Federal Constitution.

To the extent that this issue is not preserved, it constitutes plain error. As noted above, this Court may reverse for plain and prejudicial errors that seriously affect the fairness, integrity or public reputation of judicial proceedings, Racette, 175 N.H. at 141; Sup. Ct. R. 16-A. The

"[i]mposition of an illegal sentence is a serious error routinely corrected on plain error review." State v. Sideris, 157 N.H. 258, 264 (2008).

Here, the error was plain because, under both the State and Federal Constitutions, the charges for solicitation to falsify physical evidence and witness tampering constituted the same offense. The error was prejudicial because the court entered two convictions for a single crime.

Finally, the error seriously affects the fairness, integrity, and public reputation of judicial proceedings. While incarcerated on false sexual-assault accusations, Heredia sent a single letter, containing a single request to delete a video. For that, Heredia was guilty of a single crime under RSA Chapter 641. But following Heredia's acquittal of the sexual assault charges, the court instead entered two felony convictions and imposed separate, consecutive sentences. This result seriously affects the fairness, integrity, and public reputation of judicial proceedings. See State v. DePaula, 170 N.H. 139, 155 (2017) (pursuant to State's concession, separate conspiracy convictions and sentences for "a single overall plan" violated double jeopardy and constituted plain error).

III. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT HEREDIA COMMITTED THE CRIME OF CONTRIBUTING TO THE DELINQUENCY OF A MINOR.

RSA 179:5, I, prohibits "any . . . person" from providing alcohol to another person who is "under the age of 21." See also State v. Small, 99 N.H. 349, 351 (1955) (confirming that the prohibition applies to "any . . . person," not just licensees and sales agents). For reasons not apparent from the record, the State did not charge Heredia with violating this statute. Rather, it charged him with three counts of accomplice[3] to the violation of RSA 169-B:41, entitled "Intentional Contribution to Delinquency." A 5–7. The complaints alleged that Heredia or Hugle "produce[d], promote[d], or contribute[d]" to the delinquencies of G.W., A.R., and S.W. by "provid[ing] alcohol to [them]." A 5–7.

In relevant part, RSA 169-B:41, I, prohibits any person from "knowingly or willfully . . . produc[ing], promot[ing], or contribut[ing] to the delinquency of [a] minor." RSA 169-B:2, IV defines "delinquent" as:

> a person who has committed an offense before reaching the age of 18 years which would be a felony or misdemeanor under the criminal code of this state if committed by an adult,

[3] Although the complaints alleged that Heredia aided Hugle in providing alcohol to G.W., A.R., and S.W., the evidence proved that it was Heredia who gave them the beer. The fact that the indictments charged Heredia as an accomplice does not affect the sufficiency-of-the-evidence analysis. See State v. Sinbandith, 143 N.H. 579, 584 (1999) (an indictment alleging accomplice liability sufficiently notifies the defendant that he is also being charged as a principal).

> or which is a violation of RSA 318-B:2-c, II or III, and is expressly found to be in need of counseling, supervision, treatment, or rehabilitation as a consequence thereof.

RSA 179:10, I, prohibits "any person under the age of 21 years" from "possess[ing] any liquor or alcoholic beverage," or from being "intoxicated by consumption of an alcoholic beverage." The offense is "a violation," punishable by a minimum fine of $300 for a first offense, $600 for a second offense, and in either case a maximum fine of $1000. Id.; RSA 651:2, IV(a).

While the possession of alcohol by a minor constitutes a violation under RSA 179:10, it is not "a felony or misdemeanor under the criminal code of this state," nor is it "a violation of RSA 318-B:2-c, II or III." RSA 169-B:2, IV; see also RSA 318-B:2-c, II, III (prohibiting the possession of small amounts of marijuana and hashish). Thus, the possession or consumption of alcohol does not render a minor a "delinquent." Even though the evidence proved that Heredia provided beer to G.W., A.R., and S.W., as a matter of law, it did not amount to proof that he or Hugle "produce[d], promote[d], or contribute[d]" to their delinquencies.

State v. Davies, 121 N.H. 366 (1981) is analogous. In Davies, a fourteen-year-old boy's mother prohibited the boy from seeing the defendant, a family friend, believing the

defendant to be a negative influence. Id. at 367. One night, the boy ran away from home and the defendant allowed the boy to spend the night at his apartment. Id. The State charged the defendant with contributing to the boy's delinquency by "allowing [him] stay at this apartment overnight with knowledge that the boy was missing from home." Id. Following convictions in the district court and, after trial de novo, in the superior court, the defendant appealed. Id. at 366–67.

At the time of the alleged offense, "delinquent" was defined as:

> a child who has committed an offense before reaching the age of eighteen which would be a felony or misdemeanor . . . if committed by an adult or who is a child who has violated the terms of probation and is expressly found to be in need of counseling, supervision, treatment, or rehabilitation as a consequence thereof.

Id. at 367–68. In light of this definition, "a person may be convicted of contributing to the delinquency of a minor," this Court held, "only if his conduct contributes to the minor's commission of an act which would be a misdemeanor or a felony if committed by an adult or if the minor has been found to be in need of the services described." Id. at 368. Because there was no evidence "that the minor had

committed a delinquent act or that he had been found to be in need of services," this Court found the evidence insufficient to prove that the defendant contributed to the minor's delinquency. Id. To hold otherwise, this Court noted, would "do violence to the express statutory definition [of delinquency]." Id.

G.W., A.R., and S.W.'s possession and consumption of alcohol did not render them delinquent. Thus, by giving them beer, Heredia and Hugle did not contribute to their delinquency. As a matter of law, the evidence was insufficient to support Heredia's convictions for contributing to the delinquency of a minor.

As with his challenge to the witness-tampering conviction, Heredia concedes that his sufficiency challenge to the contribution-to-delinquency convictions is not preserved. As noted above, however, this Court may reverse for plain and prejudicial errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings, Racette, 175 N.H. at 141; Sup. Ct. R. 16-A, and it has consistently found that convictions based on legally insufficient evidence constitute plain error. Racette, 175 N.H. at 139–41; Houghton, 168 N.H. at 273–74; Guay, 162 N.H. at 380–84.

For the reasons stated above, the evidence was plainly insufficient to prove that Heredia contributed to G.W., A.R., or S.W.'s delinquencies. The error was prejudicial because it

resulted in Heredia's convictions. See Racette, 175 N.H. at 141; Houghton, 168 N.H. at 274; Guay, 162 N.H. at 384. The error seriously affects the fairness, integrity, or public reputation of judicial proceedings because it resulted in Heredia's conviction for a crime of which he was innocent. See Racette, 175 N.H. at 141; Houghton, 168 N.H. at 274; Guay, 162 N.H. at 384.

CONCLUSION

WHEREFORE, Chasrick Heredia respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

The appealed decisions were not in writing and therefore are not appended to the brief.

This brief complies with the applicable word limitation and contains 6,964 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to Audriana Mekula-Hanson, counsel for the State, through the electronic filing system's electronic service.

/s/ Thomas Barnard
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