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

REPLY BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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

Chasrick Heredia was convicted of, among other things, witness tampering and solicitation to falsify physical evidence. A* 17–18. In his opening brief, Heredia conceded that the evidence was sufficient to prove that he committed solicitation to falsify physical evidence but argued that the evidence was insufficient to prove that he committed witness tampering. DB 19–25. He also argued, in the alternative, that if the evidence was sufficient to prove that he committed witness tampering, the court erred by imposing convictions and sentences for both crimes because they were same offense under the double-jeopardy clauses of State and Federal Constitutions. DB 26–35.

A premise of these arguments was that both charges were based on the same conduct: Heredia sending a coded letter to Matthew Hugle instructing Hugle find and delete a video. DB 20, 29–30. This premise was based on the indictments. The witness-tampering indictment alleged that Heredia committed that crime "when he wrote Hugle a letter

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* Citations to the record are as follows:
"A" refers to the appendix to Heredia's opening brief;
"DB" refers to Heredia's opening brief;
"SB" refers to the State's brief;
"SE25 1," SE25 2," etc., refer, by call number, to the recorded telephones calls contained on State's Exhibit 25, to be transferred directly to this Court; and
"T1," T2," etc., refer, by volume number, to the transcript of trial on June 2–14, 2021.

and requested that Hugle delete information from an[] electronic device or . . . communication service." A 17. The solicitation-to-falsify-physical-evidence indictment alleged that Heredia committed that crime when he "solicited Hugle to delete information relevant to pending criminal prosecution." A 18.

This premise was reinforced by the trial transcript. The State, at trial, never suggested that the witness-tampering and solicitation-to-falsify charges were based on different acts. In its objection to Heredia's motion to dismiss, for instance, the State referred to the charges as "the two falsifying charges." T5 1029.

On appeal, the State does not argue that the evidence was sufficient to prove that Heredia committed witness tampering by sending Hugle the letter requesting that he find and delete the video. Rather, it argues, for the first time, that Heredia committed witness tampering later, during multiple phone calls with Hugle. SB 32–33.

The State also argues, for the first time, that the crimes involved different conduct. While the solicitation-to-falsify charge was based on Heredia's request that Hugle delete "the video," SB 28, the witness-tampering charge, according to the State, was based on Heredia's "attempt[] to induce or cause Hugle to withhold information regarding the video, including the letter, the coded message in the letter, the location of the

video, and the video's destruction." SB 33. The State does not, however, cite any particular call or statement constituting such an attempt. Rather, it argues that, in a much more general sense, Heredia committed witness tampering because "[t]hese calls served as a reminder to Hugle that he and [Heredia] were longtime friends, that [Heredia] was incarcerated, and that [Heredia] was facing an imminent criminal proceeding." SB 32.

Based on its new argument that the crimes were committed at different times and involved different conduct, the State faults Heredia for not moving to transfer the recordings of the phone calls prior to filing his opening brief. SB 32. Because the calls were not transferred, it asserts, "this Court must assume that the jury could have concluded from these calls" that Heredia, at some unspecified point and in some unspecified manner, committed witness tampering. SB 32–33. The State notes that its appellate counsel listened to the calls and asserts — again without identifying any particular call or statement — that "[t]he calls support [its] argument that the jury could have inferred from all the evidence admitted at trial that [Heredia] attempted to induce or cause Hugle to withhold any information about the letter or the video, including [Heredia's] instructions to Hugle contained in the letter regarding the video's destruction." SB 33 n.2.

This Court could reject the State's new argument for two reasons. First, the State charged Heredia with witness tampering for sending the coded letter to Hugle, not for anything he said during subsequent phone calls. Second, even if the witness-tampering charge was based on subsequent phone calls, nothing Heredia said in those calls constituted witness tampering. To enable this Court to address the latter argument, Heredia is filing, concurrently with this reply brief, an assented-to motion to transfer the recordings of the calls directly to this Court.

A. The witness-tampering charge was based on the letter, not the subsequent phone calls.

Part I, Article 15 of the New Hampshire Constitution provides, "No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him." RSA 601:1 provides, "No person shall be tried for any offense, the punishment of which may be death or imprisonment for more than one year, unless upon an indictment found against such person by the grand jury of the county or judicial district thereof in which the offense is committed or is triable." Witness tampering carries a potential punishment of more than one year. RSA 641:5 (defining witness tampering as "a class B felony"); RSA 651:2 (authorizing imprisonment for up to seven years for a class B felony). "A defendant has a right to rely upon the information

contained in an indictment in preparing his defense, and a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." State v. Oakes, 161 N.H. 270, 278 (2010) (quotation marks omitted).

The indictment here alleged that Heredia committed witness tampering "when he wrote Hugle a letter." A 17. It did not allege that Heredia committed witness tampering during subsequent phone calls. A 17. The indictment alleged that Heredia committed witness tampering by "request[ing] that Hugle delete information from any electronic device or . . . communication service." A 17. It did not allege that Heredia committed witness tampering by "attempt[ing] to induce or cause Hugle to withhold information regarding the video, including the letter, the coded message in the letter, the location of the video, and the video's destruction." SB 33.

State v. Kelly, 160 N.H. 190 (2010), is analogous. There, the complaint alleged that the defendant violated a protective order by driving within 100 yards of his ex-girlfriend's house. Id. at 193. The protective order prohibited the defendant from going within 100 yards of his ex-girlfriend, or entering her house or its curtilage, except with a police escort to retrieve specified items from the house. Id. at 196. The evidence showed that the defendant drove to his ex-girlfriend's house with a police escort and parked on the road while the officer approached the house and spoke to his ex-girlfriend. Id.

at 193. The defendant's ex-girlfriend claimed that she twice saw him drive past her house earlier that day, without a police escort, although he disputed that claim. Id. When the officer returned and told the defendant that he could not retrieve his belongings that day, the defendant turned around in his ex-girlfriend's driveway and drove away. Id.

The jury asked whether the defendant was charged with driving by his ex-girlfriend's house prior to the police escort or turning around in her driveway during the police escort. Id. at 195. The court responded, without objection, "You may consider all of the evidence that was admitted at trial in deciding whether the State has proven the elements of the crime beyond a reasonable doubt." Id. (brackets omitted). The jury then found the defendant guilty. Id. at 194.

On appeal, this Court held that the complaint referred only to the allegation that the defendant drove past his ex-girlfriend's house prior to the police escort. Id. at 196. The court's answer to the question, this Court held, "effectively expanded the scope of the charge to include the police escort and the defendant's turning around in the driveway." Id. Because "the defendant relied upon the complaint and protective order to not include the act of driving by [his ex-girlfriend's] house with a police escort," this Court held, the court's answer "impermissibly amended the complaint." Id. at 198. This Court reversed the conviction, finding plain

error, because "allow[ing] the defendant's conviction to stand would seriously affect the fairness and integrity of judicial proceedings." Id.

Just as the charge in Kelly referred only to driving by the house without a police escort, and not turning around in the driveway during the escort, the indictment here referred only to the letter, and not to the subsequent phone calls.

B. Nothing Heredia said in the phone calls constituted witness tampering.

As charged here, the witness-tampering indictment required the State to prove that Heredia, "attempt[ed] to induce or otherwise cause" Hugle to "[w]ithhold . . . information," while "[b]elieving that an official proceeding . . . or investigation is pending or about to be instituted." A 17. State's Exhibit 25 contains ten recorded telephone calls between Heredia and Hugle. SE25. In these calls, Hugle did most of the talking, repeatedly expressing optimism regarding the pending sexual assault charges, particularly because G.W., A.R. and S.W. were so sexually aggressive. See, e.g., SE25 4 ("If anything, we got raped."). In the earlier calls, Heredia told Hugle that he sent him a letter and repeatedly asked him if he received the letter. See SE25 2–6. In the later calls, when Hugle told Heredia that he still had not received the letter, Heredia expressed concern that the police had

intercepted the letter and would find the video. See SE25 7, 8.

At no point in these phone calls did Heredia attempt to induce or otherwise cause Hugle to withhold any information. Thus, the calls do not "support the State's argument that the jury could have inferred from all the evidence admitted at trial that [Heredia] attempted to induce or cause Hugle to withhold any information about the letter or the video, including [Heredia' instructions to Hugle contained in the letter regarding the video's destruction." SB 33 n.2.

Even if Heredia had, during the earlier phone calls, attempted to induce Hugle to withhold information about the letter, that would not have supported a conviction for witness tampering. Witness tampering requires that the defendant "[b]eliev[e] that an official proceeding . . . or investigation is pending or about to be instituted." RSA 641:5, I. During the earlier phone calls, Heredia did not believe that any investigation into his letter was pending or about to be instituted. As time passed and Hugle still had not received the letter, Heredia came to suspect that the police had intercepted it. But there is no evidence that, after that point, he attempted to induce Hugle to withhold any information about it.

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

Heredia was also convicted of three counts of contributing to the delinquency of a minor "by provid[ing] alcohol to" G.W., A.R., and S.W. A 5–7. 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, 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.

In his opening brief, Heredia argued that the evidence was insufficient to prove that he contributed to G.W., A.R., or S.W.'s delinquencies because the possession and consumption of alcohol did not render G.W., A.R., or S.W. delinquent. DB 36–40. He noted that the State chose not to charge him with violating RSA 179:5, which prohibits any person from providing alcohol to another person under the age of 21. DB 36.

On appeal, the State argues that the evidence was sufficient to prove that Heredia contributed to G.W., A.R., and S.W.'s delinquencies because it proved that G.W., A.R. and S.W. "violated RSA 179:5 in soliciting, aiding, or agreeing to

attempting to aid in purchasing alcohol to provide to individuals under twenty-one years of age," namely, themselves. SB 34–35. In short, the State argues that Heredia "produce[d], promote[d] or contribute[d]" to G.W., A.R., and S.W.'s delinquencies because G.W., A.R. and S.W. solicited, conspired with, or aided Heredia in providing alcohol to themselves.

This Court should reject the State's convoluted theory of criminal liability, for two reasons. First, a person cannot be guilty of a crime under an accomplice, solicitation, or conspiracy theory of liability if "[t]he offense is so defined that his conduct is inevitably incident to its commission." RSA 626:8, VI(b) (accomplice liability); accord Model Penal Code & Commentaries §2.06(6)(b), at 296 (1985) (accomplice liability); id. §5.04(2), at 476 (extending principle to solicitation and conspiracy liability). Just as a typical drug buyer cannot be guilty of accomplice to, solicitation of, or conspiracy in the sale of a controlled drug to himself, G.W., A.R., and S.W. could not be guilty of accomplice to, solicitation of, or conspiracy in the provision of alcohol to themselves, in violation of RSA 179:5.

Second, even if G.W., A.R., and S.W. could be guilty of accomplice to, solicitation of, or conspiracy in the provision of alcohol to themselves, in violation of RSA 179:5, the evidence would still be insufficient to prove their delinquencies.

RSA 169-B:2, IV defines "delinquent" as a minor who has committed an offense "which would be a felony or misdemeanor under the criminal code of this state if committed by an adult, or which is a violation of RSA 318-B:2-c, II or III." RSA 179:5 is not part of the "Criminal Code," which is set forth in Title 52 of the Revised Statutes Annotated. Rather, it is part of Title 13, governing "Alcoholic Beverages."

CONCLUSION

WHEREFORE, Chasrick Heredia respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

This brief complies with the applicable word limitation and contains 2,317 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, Assistant Attorney General, through the electronic filing system's electronic service.

/s/ Thomas Barnard
Thomas Barnard

DATED: August 21, 2023