THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0460

State of New Hampshire

v.

Chasrick Heredia

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
HILLSBOROUGH COUNTY SUPERIOR COURT
NORTHERN DISTRICT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(Fifteen-minute oral argument requested)

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ISSUES PRESENTED

I. Whether there was sufficient evidence to prove the witness tampering and contributing to the delinquency of a minor charges.

II. Whether the trial court erred by imposing two separate sentences on the solicitation to falsify physical evidence and witness tampering convictions.

STATEMENT OF THE CASE

The Hillsborough County grand jury indicted the defendant with one aggravated felonious sexual assault (AFSA) against G.W. contrary to RSA 632-A:2, I(b), five felonious sexual assaults (FSA) against A.R. contrary to RSA 632-A:3, II, one class B felony witness tampering contrary to RSA 641:5, I, one class B felony solicitation to falsify physical evidence contrary to RSA 641:6, I, and three class A misdemeanor contributing to the delinquency of three minors, G.W., A.R., and S.W., contrary to RSA 169-B:41, I. T[1] 4-9; DA 13-18. The AFSA, FSAs, and the contributing to the delinquency of a minor charges arose from the defendant's conduct on July 23, 2019. *Id*. The remaining charges arose from the defendant's conduct on October 24, 2019. DA 17-18.

Following a six-day trial in June 2021, the jury convicted the defendant of witness tampering, falsifying physical evidence, and the contributing to the delinquency of a minor charges. T 1289-91. The defendant was found not guilty of the AFSA and the FSAs. 1287-89.

On September 8, 2021, the defendant was sentenced to three years to six years stand committed on the witness tampering charge and to two twelve-month stand committed sentences on two contributing to the delinquency of a minor convictions, all of which were consecutive. DA 25-30, 35-37. The defendant was also sentenced to twelve months on the

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[1] Citations to the record are as follows:
"DA_" refers to the defendant's brief appendix and page number;
"DB_" refers to the defendant's brief and page number;
"ST_" refers to the sentencing transcript and page number;
"T_" refers to the trial transcript and page number.

remaining contributing to the delinquency of a minor charge and to three-and-one-half years to seven years on the falsifying physical evidence charge, both of which were all suspended for ten years upon release, to run consecutively to each other and the stand committed sentences if ever imposed. DA 31-34, 38-40. This appeal followed.

STATEMENT OF FACTS

A. The State's Case at Trial.

1. G.W.'s, S.W.'s, and A.R.'s Testimony.

In July 2019, 16-year-old G.W. was living at Granite Pathways in Manchester, New Hampshire. T 72-75. Granite Pathways is a 30-day to 90-day residential substance abuse treatment center for children aged fourteen to eighteen. *Id*. While G.W.'s parents were litigating their divorce, the family court ordered G.W. to attend Granite Pathways because she was not going to school, was smoking marijuana, and "drinking a lot." T 73-74. While there, G.W. befriended fifteen-year-olds A.R. and S.W. T 74-75.

A.R.'s parents sent her to Granite Pathways at the end of June or the beginning of July 2019 because she was suspended from high school at the end of her freshman year for being "high" on marijuana during school. T 194-95. S.W.'s adoptive parents sent her to Granite Pathways because she was struggling with substance abuse. T 390-91. On July 23, 2019, S.W. had been at Granite Pathways for four days. T 392.

On July 23, 2019, G.W., A.R., and S.W. decided to "run away from [the] treatment center because [they] wanted cigarettes, and [their] plan was to return that evening." T 76. It was S.W.'s idea to run away because she wanted to use marijuana, alcohol, and cigarettes. T 396. That night, around 8:30 p.m., during the program's "nightly walk," the girls ran away from campus in search of a gas station and someone willing to purchase them cigarettes. T 76, 82. S.W. brought with her twenty dollars that she had from prior to her admittance to Granite Pathways. T 213. The girls also "layered [their] clothes," so that if staff reported them missing and provided a

description of their clothing to police, they could remove their first layer of clothes so as not to be recognized. T 77. They also wore makeup in the hopes that they would look seventeen. T 204. The girls said that children ran away from Granite Pathways "all the time." T 77, 201.

After the girls had run far enough down the street so that they could not see the campus anymore, they stopped running, removed their first layer of clothing, and hid them in some bushes. T 82, 211. Then, the three continued running until they saw a 7-Eleven sign. T 83. When they arrived at 7-Eleven, the girls asked people inside and outside the store to purchase cigarettes for them to no avail. T 83, 211. The three noticed a man, later identified as Matthew Hugle, getting into his car across the street at Cumberland Farms. *Id*. They crossed the street and A.R. and S.W. approached Hugle while G.W. stayed further back. *Id*.

A.R. asked Hugle if he would purchase them cigarettes. T 212. She also told him that they were seventeen. T 213. Hugle told them his name was "Matt" and agreed to purchase the cigarettes. T 213-14. Hugle purchased the girls one pack of cigarettes and matches at Cumberland Farms. T 84, 214, 806. Once outside the store, he handed the girls the cigarettes. T 84. He asked the girls where they were from, and they told him that they had run away from "rehab." T 85. He asked them if they wanted a ride back to the facility and the girls told him they did not want to return and wanted to get high or drunk instead. T 215. The girls got into Hugle's car and he began driving as the girls smoked the cigarettes. T 217, 408.

During the drive, G.W. told Hugle that she was sixteen and A.R. and S.W. were fifteen. T 93. Hugle "drove around for a little bit" while he was

texting. T 94. He asked the girls where they wanted to go, and they said Market Basket so they could steal alcohol. T 85, 94. In response, Hugle said he had to pick up his friend prior to going to Market Basket. T 94. Hugle then drove to an apartment complex and his friend, later identified as the defendant, entered the front passenger seat. *Id*. He introduced himself to the girls as "Chas" according to G.W. and S.W. and "Rick," according to A.R. T 95, 217, 413.

The girls told the defendant that they had "run away from rehab" and told him that the rehabilitation facility was at the youth detention center, or YDC. *Id*. The defendant told them that he had been to YDC and that he was currently on probation. T 95-96, 410. The five continued talking and G.W. told the defendant that she was sixteen and A.R. and S.W. were fifteen. T 98.

When they arrived at a "corner store," the defendant asked the girls what they wanted to drink. T 220. S.W. told him to buy them something with a high alcohol concentration. *Id*. He asked them if they could "handle" that and they said "of course." *Id*. S.W. gave the defendant the remaining cash she had from Hugle's cigarette purchase, and the defendant entered the store and bought the girls beer. T 98-99. A.R. said that the defendant purchased six tall beer cans. T 221, 411. When the defendant handed the girls the beer, he told them "get drunk. It's your last night out." T 99.

The girls drank their beer in the car while Hugle drove them to an apartment complex. T 101. G.W. almost finished drinking a can in the car. *Id*. She later told a SANE nurse that she had "a couple beers." T 638. A.R. drank a full can in the car and part of a second can. T 223. S.W. drank part of a can in the car as well. T 412. When G.W. exited the car, she felt "a

little drunk" and stumbled as she walked. T 101. A.R. said she felt "tipsy" but not drunk and that Hugle said she was slurring her words. T 223, 225. The men brought the girls upstairs to the apartment's "clubhouse," and then left the girls there to go eat dinner. T 244-45. After the men left, the girls walked outside, sat on a bench, and continued drinking while they waited for the men to return. T 245-46.

While the men were gone, G.W. felt "pretty foggy." T 102. She remembered laughing with S.W. and kissing her outside on the bench. *Id*. She also urinated herself and did not realize it was happening until she felt her pants become wet. *Id*. She also remembered trying to stand up to walk around and then she remembered "black[ing] out." *Id*. A.R. felt drunk and "disconnected" outside on the bench. T 246. S.W. felt dizzy and her vision was blurry while outside on the bench. T 415. She also said that her coordination was "off" and that it was hard to walk. T 415-16. She also remembered that the girls had drunk four cans of beer while they were outside. T 415. While outside, G.W. and S.W. began throwing up. T 248-49.

When Hugle and the defendant returned to the apartment complex, one of them said about the girls, "they're drunk." T 105. The men helped G.W. and S.W. walk to the clubhouse while A.R. walked with them on her own. T 256-57, 419. Once in the clubhouse, S.W. had a "sexual encounter" with Hugle downstairs. T 422. A.R. also "had a sexual encounter with [] Hugle" on the pool table inside the clubhouse. T 258. At some point after that, A.R. went to the bathroom. T 260. While in the bathroom, the defendant entered. T 262. A.R. described having multiple sexual encounters

with the defendant in this bathroom, including vaginal and oral sex. T 262-69.

When the defendant was done, he and A.R. walked back to the clubhouse and once inside, A.R. saw Hugle having sex with G.W. while G.W. was on the couch. T 273. S.W. was asleep on the floor underneath the coffee table. T 274. A.R. also remembered the defendant having sex with G.W. on the couch. T 277.

A.R. also saw that the defendant was holding a phone and remembered that he pointed the phone at her and Hugle and then pointed it at G.W. while he was having sex with her. T 278-79. A.R. walked over to the defendant and saw that his phone had a small, blue square in the corner, meaning that it was video recording. T 279. Then, A.R. remembered going to the pool table with Hugle for another "sexual encounter." T 280.

G.W. remembered that she kept passing out and waking up on a couch in the clubhouse. T 105-06. G.W. remembered at one point waking up on the couch while S.W. was also lying on the couch next to her with her head "slumped to one side and her eyes [] closed." *Id*. G.W. saw Hugle on top of S.W. having sex with her. *Id*.

G.W. passed out again and when she woke up, her pants were off and she "felt a lot of weight on [her]." T 107. She also felt a man's facial hair scratching her neck behind her ear and felt "his penis [] in [her] vagina." *Id*. She assumed it was the defendant because of the facial hair and because the man on top of her felt heavy and muscular and Hugle was skinny and clean shaven. T 107-08. G.W. could not move while this was happening and said to the defendant, "give me a break." T 108-09.

S.W. did not remember much about the evening of July 23, 2019, but did remember that she had a "sexual encounter" with Hugle and remembered that at one point, the defendant asked her to "eat out" G.W., which she declined. T 422, 426.

At some point, the girls heard an alarm in the clubhouse that caused the defendant to jump off of G.W. and run away. T 109. G.W. remembered that after the defendant ran away, she was alone on the couch and S.W. was on the floor. G.W. and S.W. then decided to return to Granite Pathways. T 110. The girls made their way to Hugle's car. T 111.

A.R. also heard an alarm going off while she was on the pool table with Hugle. T 280. When the alarm went off, Hugle told her they had to go. *Id*. She could not find all of her clothes, so she put Hugle's sweatshirt on over her red tank top and underwear. *Id.* A.R. next remembered walking down the fire exit stairs to go outside. T 283. She also remembered all five of them being in Hugle's car driving back to Granite Pathways. T 283-86.

Hugle stopped the car on the street in front of Granite Pathways to drop the girls off there. T 286. G.W. and S.W. exited the car, but A.R. remained inside and the two men drove away with A.R. T 112. G.W. and S.W. walked to Granite Pathways and when they arrived, a nurse on shift called 911. T 115. EMTs and police responded, and an ambulance transported G.W. to Elliot Hospital. *Id*.

A.R. remained in the car because she was not ready to return to treatment. T 287. Hugle drove the defendant home and took A.R. back to his apartment. T 288-91. A.R. spent the night there and had another sexual encounter with Hugle. *Id*. The next morning, A.R. put on Hugle's sweatshirt and nothing else and walked outside. *Id*. Soon after, a police

officer approached her and asked if she was A.R. T 293. When she said that she was, the officer had her sit in his cruiser until an ambulance responded and brought A.R. to the hospital. T 293-94.

2. The Police Investigation.

At 1:04 a.m. on July 24, 2019, Manchester Police Sergeant Khavari responded to Granite Pathways for a report that two of the three reported runaway girls had returned and alleged that they had been sexually assaulted. T 456, 458. When she arrived, she learned that G.W. and S.W. were transported to Elliot Hospital. T 460-61. The sergeant drove there to speak with the girls. *Id*.

When the sergeant arrived at the hospital, she spoke to G.W., whom she felt was still intoxicated based on G.W.'s sluggish and slurred speech and an odor of an alcoholic beverage. T 463. G.W. told the sergeant that a Black man in a 7-Eleven parking lot across from a Cumberland Farms offered to purchase the girls cigarettes. T 464. G.W. told the sergeant that she was in a field that night and entered an apartment, but did not know the location of the field or the apartment and could only describe one of the men as being a Black man. T 467. Based on this information, the sergeant directed the other responding officers to begin their investigation at the 7-Eleven and Cumberland Farms on Webster Street. T 468-69.

At approximately 8:55 a.m., Manchester Police Detective Georgoulis responded to Elliot Hospital to try to conduct minimal facts interviews with G.W. and S.W. T 473. While there, Jill, a Granite Pathways staff member who was with G.W., told him that G.W. told Jill that a suspect would be on G.W.'s Snapchat. T 476. Jill accessed G.W.'s

Snapchat and saw a username of Showtiime009 and a name underneath that of "Chas Heredia with several A's at the end." T 476-77. Jill googled "Chas Heredia" and found a news article that included a picture of the defendant. T 477. Jill showed that picture to G.W., who identified the defendant in the picture as one of the men involved in her sexual assault. *Id*.

While speaking with G.W., A.R. arrived at the hospital. T 478. Based on a minimal facts interview with A.R. and her description of the clubhouse, police determined that the clubhouse was at Colonial Village Apartments on River Road. T 479-80. Police also learned that the defendant lived at Colonial Village. T 512-13.

On July 24, 2019, police searched the clubhouse and the grass at Colonial Village. T 560, 562-63. In the clubhouse, they photographed a 25-ounce "Natty Daddy" can and a pair of socks in a trash can. T 583. They also photographed a white stain on the pool table cover. T 583. They were also told that the "fire escape door" in the clubhouse was open at 8:15 a.m. when the property manager arrived for work. T 542. In the women's bathroom, police photographed a white stain on the edge of the seat in the shower stall. T 578-79. Police also learned from the cleaning crew that they had cleaned "two half-dollar size[d] circles of . . . women's discharge [] on the toilet seat in the first stall." T 580. Police also learned that none of the surveillance cameras they saw inside the buildings were working. T 544.

In the grass outside of Colonial Village, they found "multiple" 25-ounce "Natty Daddy" cans and a "whole bunch" of vomit. T 545. In the parking lot leading to the clubhouse, police observed two "Natty Daddy" cans and a cigarette butt. T 572. Near a side door of the clubhouse, police photographed an empty cigarette pack. T 571. Detective Fleming collected

seven 25-ounce "Natty Daddy" beer cans and said they were all empty when he collected them. T 666, 670. After G.W.'s CAC interview, police located, photographed, and collected the clothes she and S.W. hid in the bushes. T 733-35.

Detective Georgoulis recounted his interview with Hugle at trial. Hugle admitted to the detective that he bought the girls a pack of cigarettes and at the same time bought himself a cigarillo and a "Natty Daddy" beer. T 803. Hugle said that the girls asked him for a ride, which he agreed to provide, and that they all told him they were either eighteen or twenty years old. T 803-04. Despite what Hugle claimed the girls told him about their ages, he told the detective that they looked "mad young," which the detective said meant that the girls looked "very young." T 810. Hugle said he picked up the defendant and the five of them stopped at a convenience store where the defendant purchased six "tall Natty Daddy beer cans and provided that to the three girls." T 807. Then, Hugle dropped the girls and the beer off at Colonial Village and he and the defendant went to dinner at Central Ale House in Manchester. T 808.

When the two returned approximately 90 minutes later, they found G.W. and S.W. passed out in the grass and learned that they both had vomited and that G.W. had urinated herself. *Id*. Hugle said he and the defendant "laughed about that." T 809. Hugle also told the detective that the girls seemed very intoxicated when they returned and that G.W. was "the most intoxicated." T 816.

Hugle admitted that he had sexual intercourse with A.R. on the pool table in the clubhouse. T 810-11. At that time, he said that he saw the defendant on the couch with G.W. T 811. Hugle told the detective that

while the defendant was on the couch with G.W., G.W. was "nodding off," and appeared to be unconscious at times. T 813. Hugle also told the detective that there appeared to be a light on the defendant's phone that to Hugle indicated that a video was recording while the defendant was on the couch with G.W. T 814. Hugle also admitted to having sexual intercourse with S.W. and G.W. *Id*. He said that he ejaculated twice on A.R.'s "pubic bone region" and once on S.W.'s "pubic bone region." T 815.

Colleen Scarneo, an expert in forensic toxicology, explained that a 25-ounce "Natty Daddy" beer is eight percent alcohol by volume and is "equivalent to 3.3 standard size beers." T 900. Scarneo analyzed G.W.'s hospital blood sample that was drawn at 3:40 a.m. on July 24, 2019 and determined that at 11:30 p.m. on July 23, G.W.'s blood alcohol concentration (BAC) would have been 0.109 "with a range of 0.086 to 0.133." T 899, 901. Based on the police reports and interviews, Scarneo determined that at 11:30 p.m., G.W. was in the clubhouse. T 904.

Scarneo explained that someone with a BAC up to 0.10 would likely feel "euphoric," disinhibited, tired, lethargic, relaxed, or drowsy. T 896. Above 0.10, someone may lose coordination and the ability to effectively process information. *Id*. One may have slurred speech, appear drowsy, or be less likely to pick up on social or visual cues. *Id*. At high BACs, she explained that the body begins to eliminate the alcohol, meaning a person may vomit or urinate more frequently. T 897. Given her calculations, Scarneo said that it "seemed consistent" to her that G.W. was vomiting and urinating on herself on July 23, given her estimated BAC. T 906. Scarneo concluded that "an inexperienced drinker with a [BAC] of 0.109 [could] be rendered physically helpless to resist." T 908.

Manchester Police Detective Valenti testified at trial. He became the lead investigator in this case in May 2020. T 981. That month, he learned of both a letter confiscated from Valley Street Jail, where the defendant was being held, and the defendant's jail calls to Hugle. T 982, 984. The letter was sent from the defendant to Hugle's address on October 24, 2019. T 984; DA 11. Detective Valenti referred to Hugle as the defendant's "co-defendant" during his testimony. T 984-85, 993, 1005, 1007-08. Portions of the defendant's jail calls were played for the jury and admitted as a full exhibit. T 985-1004. When the calls were admitted, the trial court informed the jury that the exhibit would be available to the jury to listen to during their deliberations. T 1003-04. The trial court also instructed the jury that:

> Deciding what's on the calls, the words that are said, that is for you to decide. Okay? That is for the jury to determine. So if this witness indicates that he heard something on the call that led him to do or not do something, you may take it into consideration as to what he believed that led him to do something. But ultimately, the words on the call are for you to decide. Okay? So I want to be clear about that, and I'm going to say it again. The words on the calls will be for you to determine. This witness is permitted to identify certain words or statements that he thought were on the call that led him to do a particular action. But ultimately, it is for you to decide what the words on the call are.

T 1004.

Detective Valenti recounted some of the content of the jail calls in his testimony. He testified that, in an October 23, 2019 jail call between the defendant and Hugle, the defendant said that he and Hugle were facing an "unbeatable charge" and asked Hugle if he lived at 56 Ledgewood Drive. T 994.

Detective Valenti said that, in an October 25, 2019 jail call between the defendant and Hugle, the defendant told Hugle twice that he was sending Hugle a letter in which Hugle should underline the misspelled words. T 999-1000. At the end of this call, the defendant said that he would call Hugle later that afternoon or the next day and that the defendant "believe[d] what need[ed] to be done [would] be done by then." T 1000. Based on this call, the detective underlined all the misspelled words and decoded a message that said "Max, get the password to his gmail, maximbonio@gmail.com, google photos, delete videos." T 1000-01. This decoded message was directed to Hugle.

In an October 26, 2019 jail call between the defendant and Hugle, Detective Valenti said that the defendant asked Hugle if he received his letter and confirmed Hugle's address and zip code. T 1001. In an October 28, 2019 jail call, the detective said that the defendant told Hugle that one of the girls saw a flash. T 1005-06.

In an October 29, 2019 jail call, the detective testified that the defendant:

> noted that the letter was skittles and that he felt it was going to somehow get him in trouble. He again mentioned the flash, and later on noted that something had been backed up in referencing his cell phone.

T 1007. The defendant later explained that "skittles" was "a code between [him] and a few of [his friends]" that they used "when [they] were younger when . . . [they] thought there was something alarming going on" and that it meant "to be alarmed" or to "be on the lookout." T 1047-48. Detective Valenti took the defendant's references to a flash in the jail call to refer to a

light on a cell phone that is on when a video is recording. T 1010. Detective Valenti also said that the defendant seemed "nervous" in the jail calls when discussing the video as it could result in another charge against him. T 1009-10.

After reviewing the jail calls, Detective Valenti executed two separate search warrants for the email in the letter, but the warrants did not yield anything relative to the email. T 1011-12. He explained that this may have occurred because he executed the warrants six months after the calls occurred, or because the email address was misspelled. T 1012.

B. The Defendant's Motion to Dismiss.

After the State rested, the defendant moved to dismiss all of the charges. T 1024. Pertinent to this appeal, the defendant argued that the contributing to the delinquency of a minor charges should be dismissed because there was insufficient evidence that Hugle and the defendant made a purposeful plan to purchase beer for the girls, arguing instead that the defendant only purchased the beer because the girls asked him to do so. T 1026-27. The defendant argued that there was insufficient evidence to support the witness tampering charge because there was no proof that the defendant knew that an official investigation into manufacturing of child sexual abuse images was pending. T 1027. The defendant did not make a specific argument regarding the falsifying physical evidence charge.

The State argued that there was "ample evidence" that the girls were under twenty-one when the defendant provided them with alcohol and that the defendant and Hugle discussed who would purchase the girls beer prior to the defendant entering the convenience store. T 1029. The State also

argued that it was "abundantly clear" from the defendant's jail calls that he was "concerned about an active and ongoing investigation in this case" and was concerned that a video from July 23, 2019 would "corroborate the current charges" and become the basis for additional charges. *Id*.

The trial court denied the defendant's motion to dismiss the contributing to the delinquency of a minor charges and the witness tampering and falsifying physical evidence charges. T 1031.

C. The Defendant's Case at Trial.

The defendant admitted that he recorded himself digitally penetrating G.W. and while he was recording, A.R. was naked in the background of the video. T 1044. He said he was "worried" about this recording because at the time he made it, he did not know that the girls were minors. *Id*. He explained that would have been a "big problem" because making the video that he made with children could lead to a charge with a maximum sentence of fifteen to thirty years. T 1046.

He also admitted that, because of that "big problem," he wrote a letter, DA 12, to Hugle so that Hugle would delete the video. T 1047. The defendant said he had known Hugle for twelve years. *Id*. The two met in high school, had been steady friends since that time, and would hang out all of the time. *Id*. He claimed that it did not go "as planned" because Hugle was confused by the letter, or he did not seem to receive the letter. T 1048-49.

The defendant also testified that before Hugle picked him up on July 23, he did not know that Hugle had three girls in the car. T 1058. When Hugle arrived, the defendant explained that he entered the car and spoke

with the girls. *Id*. He said that G.W. and S.W. said they were eighteen and that A.R. said she was nineteen or twenty. *Id*. He also said that they told him they were from Granite Pathways, which the defendant thought was a rehabilitation facility for adults. T 1059. He admitted that he purchased beer for the girls with their money. T 1060. He said he purchased the "Natty Daddys" because the girls asked for the "tall cans." T 1061. He said that he bought six of them because "most people only just want one, so [he] thought two [] would be a better number." T 1062.

The defendant said that it was Hugle's idea to bring the girls to the Colonial Village clubhouse. T 1064. He said that when they arrived, he and Hugle dropped the girls off outside by a bench and left for dinner. T 1065-66. The defendant said he had "a few shots" of Patron with friends before going to the Central Ale House. T 1067. Then at Central Ale House, the defendant had a couple beers and some chicken tenders. T 1068.

After dinner, Hugle and the defendant returned to where they had left the girls. T 1070. When they arrived, G.W. and S.W. were alert and sitting on the bench. The defendant claimed that they were "a little drunk" because they were more flirtatious and talkative than when they first met. T 1071. He also said that G.W. told him that she threw up, but that she felt better. T 1072.

The defendant said that Hugle and A.R. entered the clubhouse before he, G.W. and S.W. did. T 1073. When the defendant, G.W., and S.W. entered the clubhouse, the defendant saw Hugle having sex with A.R. on the pool table. T 1076. Then the defendant said that S.W. told G.W. to get on the couch and then S.W. performed cunnilingus on G.W. T 1078. The defendant said he "joined in" and kissed G.W. and grabbed her breasts. T

1079. Then, Hugle motioned for S.W. to go with him downstairs and the defendant had vaginal intercourse with G.W. T 1079-80. He stopped when Hugle, A.R., and S.W. returned to the room. T 1082. Then, he digitally penetrated G.W. and recorded it on his cell phone. T 1084. The defendant said that G.W. was "fine" during this time, that her eyes were open, and that she was moaning. T 1084.

The defendant said that at some point, he heard an alarm, and he ran from the clubhouse through the fire escape. T 1087. He said he ran because he was on probation and had already violated probation by missing his curfew and by drinking alcohol. T 1086-87. He said that Hugle ran out with him, and the girls followed them a few minutes later. T 1090. Then, Hugle drove them to Granite Pathways and dropped them off on the street. T 1091. After the girls exited the car, A.R. jumped back in the car and Hugle drove away. T 1099. Then, Hugle brought the defendant home. T 1100.

The defendant denied having any sexual encounters with A.R. and S.W. on July 23, 2019. T 1101-04.

D. The Defendant's Sentencing.

On September 3, 2021, the defendant filed a sentencing memorandum. DA 19-24. Relevant to this appeal, in this memorandum, the defendant argued that the witness tampering and the falsifying physical evidence charges "relate[d] to the same conduct and the same purpose and the same witness being tampered with," and as such, the defendant could not receive sentences on each charge. DA 20.

A sentencing hearing was held on September 8, 2021. During the hearing, the defendant argued that the trial court could not sentence the

defendant on both the witness tampering and falsifying physical evidence charges because the two charges were "in essence" relative to the same criminal behavior. ST 43.

The State did not respond to this argument at the hearing. The trial court sentenced the defendant on both charges without addressing the defendant's argument that the defendant could not be sentenced on both convictions. T 60-61, 64.

SUMMARY OF THE ARGUMENT

The State presented sufficient evidence to support the witness tampering conviction. The defendant knew that an investigation into the video he admitted to making was pending or about to be instituted. He was nervous about it because the video would constitute child sexual abuse material, a charge he recognized as very serious. The defendant therefore attempted to induce or otherwise cause Hugle, a longtime personal friend who was facing criminal charges similar to the defendant, to withhold information related to the video by sending him a coded letter that the defendant referred to as "skittles" or "alarming" and that requested Hugle delete the video. The defendant's jail calls with Hugle about the letter, the video, and the two of them facing an "unbeatable charge" reinforce this conclusion. Accordingly, sufficient evidence existed in the record to support the witness tampering charge.

The State also presented sufficient evidence to support the contributing to a delinquency of a minor charges. The defendant, Hugle, and the girls conspired to procure alcohol for the girls in violation of RSA 179:5, a misdemeanor offense. The defendant, Hugle, and the girls decided to purchase alcohol instead of stealing it from Market Basket. Hugle drove to the place of purchase and S.W. gave money to the defendant for the express purpose of procuring alcohol for the girls. The defendant purchased the alcohol for the girls and gave it to them. And the girls distributed the alcohol among themselves. If any one of the girls were adults in that situation, they could have been charged criminally with violating RSA 179:5, either directly, as co-conspirators, or solicitors. The defendant's acts

therefore promoted, produced, or contributed to the delinquency of each of the minors, and sufficient evidence existed to sustain those charges.

Notably, on appeal, the defendant advances different sufficiency of the evidence arguments than he did at trial. At trial, the defendant moved to dismiss the witness tampering charge because there was no proof that the defendant knew an official investigation into the manufacture of child sexual abuse images was pending. The defendant also moved to dismiss the delinquency of a minor charges because the State had not proven that Hugle and the defendant made a purposeful plan to purchase beer for the girls. The trial court rejected these arguments.

Now, however, the defendant argues that the evidence was insufficient to show that Hugle withheld the video with respect to the witness tampering charge, and that the evidence was insufficient to show that the defendant contributed to the girls performing a delinquent act within the meaning of RSA 169-B:41, I. These arguments were not preserved because they were never presented to the trial court. This Court should, therefore, decline to consider them.

If this Court considers these arguments, it must do so under the plain error rule because the trial court never had an opportunity to address these new arguments. The defendant's insufficiency arguments fail under the plain error rule because they do not establish that the trial court committed error or that any error committed was plain.

For an error to be plain in the insufficiency of the evidence context, the insufficiency must be "so obvious and fundamental that the trial court erred in submitting the case to the jury." *State v. Parker*, 392 P.3d 398, 403 (Utah 2017) (internal quotations omitted); *see State v. Houghton*, 168 N.H.

269, 274 (2015) (concluding certain pornographic images on their own were insufficient to allow a jury to conclude beyond a reasonable doubt that the individuals depicted were under the age of eighteen); *State v. Guay*, 162 N.H. 375, 384 (2011) (concluding that evidence of touching the vagina was plainly insufficient to establish sexual penetration under RSA 632-A:2).

In this case, the insufficiency is not so obvious and fundamental as to be plain. Significant evidence supports the witness tampering and contributing to the delinquency of a minor charges and, if any insufficiency exists, the error is, at best, one of degree and does not fall within the category of errors that are so obvious as to meet the plain error standard.

Finally, the defendant argues that the trial court violated his double jeopardy rights when it sentenced him to consecutive sentences on the witness tampering and solicitation to falsify physical evidence convictions. These crimes, as the State charged them, constituted different offenses because each indictment required proof of a fact not necessary to prove the other. The witness tampering indictment required the State to prove that the defendant attempted to induce or cause Hugle to withhold any information when he wrote Hugle the coded letter and requested Hugle delete information from any electronic storage device or any electronic communication service. Thus, the jury could have concluded that the defendant was attempting to induce Hugle to withhold information about the video, including information about the letter, what the letter meant, and where the video might be. The solicitation to falsify physical evidence indictment required the State to prove that the defendant solicited Hugle to actually alter, destroy, conceal, or remove the video. The defendant testified that the letter was intended to solicit Hugle to delete the video, and

detectives did not locate the video where the defendant said it was prior to trial. The elements of these two offenses are different, and the record supports a finding of guilty on each that is distinct from the other.

Accordingly, this Court should affirm the defendant's convictions and sentences below.

ARGUMENT

I. SUFFICIENT EVIDENCE EXISTED TO CONVICT THE DEFENDANT OF WITNESS TAMPERING AND CONTRIBUTION TO THE DELINQUINCY OF MINORS.

A. Standard of Review.

"A challenge to the sufficiency of the evidence raises a question of law, which [this Court] review[s] *de novo*." *State v. Siebel*, 174 N.H. 440, 445 (2021). "When considering a challenge to the sufficiency of the evidence, '[this Court] objectively review[s] the record to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt … considering all the evidence and all reasonable inferences therefrom in the light most favorable to the state.'" *State v. Sanders*, 164 N.H. 342, 351 (2012) (quoting *State v. Spinale*, 156 N.H. 456, 464 (2007)). Because the defendant chose to present a case, this Court reviews the entire trial record to determine the sufficiency of the evidence. *State v. Saintil-Brown*, 172 N.H. 110, 117 (2019). "The defendant bears the burden of proving that the evidence was insufficient to prove the guilt." *Id*.

"With respect to sufficiency of the evidence, sufficiency is a term of art meaning the legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *Spinale*, 156 N.H. at 463 (quotations and citation omitted). "Determining whether evidence is sufficient requires both quantitative and qualitative analysis; 'quantitatively,' evidence may fail only if it is absent, that is, only where there is none at all, while 'qualitatively,' it fails when it cannot be said

reasonably that the intended inference may logically be drawn therefrom." *Id*. (quotations and citation omitted).

B. There Was Sufficient Evidence to Convict The Defendant of Witness Tampering.

The State charged the defendant with witness tampering for attempting to induce or cause Hugle to "withhold any information when he wrote Hugle a letter and requested that Hugle delete information from any electronic device or any electronic communication service, that constituted evidence related to the official investigation." DA 17. Witness tampering is a crime "based on the attempt to induce false testimony and, therefore, the statute focuses on the defendant's intent, rather than the actions of the person tampered with, or the outcome of the pending investigation." *State v. Kilgus*, 125 N.H. 739, 742 (1984).

At trial, the State introduced the letter that the defendant wrote to Hugle, DA 12, and played jail calls for the jury in which the defendant discussed this letter with Hugle. T 984-1011. The detective who reviewed the jail calls also submitted two search warrants to Google regarding the email address and both times received "completely empty" files back. T 1011-12.

Additionally, the defendant testified that he and Hugle had been friends for twelve years, met when they were in high school, and regularly hung out "all the time." T 1047. The defendant agreed that he placed the phone calls that the State played for the jury, he admitted to recording himself digitally penetrating G.W., and he admitted to sending Hugle a

coded letter with a message telling Hugle to log into an email and delete videos. T 1042-49.

The defendant also admitted that he wanted Hugle to delete the video because he did not want police to locate it and charge him with manufacturing child sexual abuse images. T 1045-47. He explained that his prior attorney told him that the video would be evidence that he manufactured child sexual abuse images, which has a maximum sentence of fifteen years to thirty years stand committed. T 1046. The defendant also referred to the letter in jail calls as "skittles," which the detective took to mean that the letter would "somehow get him in trouble" and the defendant explained was a phrase he and his friends used when they were younger when they "thought there was something alarming going on." T 1007, 1048.

Given this evidence, a rational juror could conclude that the defendant attempted to induce or otherwise cause Hugle, his longtime friend and co-defendant, to withhold information regarding the video. The jury heard testimony about the letter, its coded message, the existence of the video itself, and information regarding the video's location and destruction. The jury heard some of the jail calls that the defendant placed to Hugle surrounding the day that he wrote and mailed the letter. These calls served as a reminder to Hugle that he and the defendant were longtime friends, that the defendant was incarcerated, and that the defendant was facing an imminent criminal proceeding.

The trial court also instructed the jury that it was its duty to determine what was said on the jails calls and their significance. T 1000-04. Because the jail calls were not provided to this Court on appeal, this Court

must assume that the jury could have concluded from these calls, coupled with the other evidence admitted at trial, that the defendant attempted 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[2]. *See Bean v. Red Oak Prop. Mgmt.*, 151 N.H. 248, 250 (2004) (holding that this Court "must assume that the evidence [on the jail calls] was sufficient to support the result reached by the trial court.").

C. There Was Sufficient Evidence to Convict the Defendant of The Contributing to The Delinquency of a Minor Charges.

The State charged the defendant with three counts of accomplice to contributing to the delinquency of a minor for aiding, agreeing, or attempting to aid Hugle in planning or committing the offense by "knowingly provid[ing] alcohol to [G.W., S.W., and A.R.], [] minor[s], to produce, promote, or contribute to" their delinquency. DA 5-8.

This Court has held in *State v. Cross* that a minor does not need to be "found a delinquent in court proceedings under chapter 169" to convict a defendant of contributing to the delinquency of a minor. 111 N.H. 22, 24 (1971). As such, the State only needed to prove in this case that the defendant engaged in either the promotion, production, or contribution to the girls' delinquency. RSA 169-B:41, I.

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[2] Undersigned counsel listened to these jail calls. The calls support the State's argument that the jury could have inferred from all the evidence admitted at trial that the defendant attempted to induce or cause Hugle to withhold any information about the letter or the video, including the defendant's instructions to Hugle contained in the letter regarding the video's destruction.

Determining the meaning of promote, produce, and contribute to in RSA 169-B:41, I, requires this Court to engage in statutory interpretation. *State v. Moore*, 173 N.H. 386, 390 (2020). This Court interprets these terms based on their plain and ordinary meaning and "[t]he legislature is not presumed to waste words or enact redundant provisions, and whenever possible, every word of a statute should be given effect." *Id*. "Promote" means "to bring or help to bring into being." Webster's Third New International Dictionary 1815 (unabridged ed. 2002). "Produce" means "to cause to have existence or to happen." *Id*. at 1810. "Contribute" means to "lend assistance or aid to a common purpose." *Id*. at 496.

Here, the State presented sufficient evidence that the defendant violated RSA 169-B:41, I, as alleged in the complaints. There was ample evidence from the girls, Hugle, the defendant, and the police investigation that together, the defendant and the girls 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. RSA 626:8, III(a); RSA 179:5, I; RSA 179:58, I. The girls were seeking alcohol and they solicited Hugle and the defendant to get it for them. Hugle agreed to drive them to the point of purchase. T 220. The defendant agreed to purchase the alcohol for the girls. *Id*. S.W. provided the defendant the money to buy the alcohol. T 98-99, 213. The defendant purchased the alcohol and gave it to the girls. T 99, 221, 411. The girls then distributed the alcohol among themselves and shared it. Specifically, while in the car, the girls passed around two cans of beer amongst themselves, aiding the defendant in violating RSA 179:5 by passing the beers around and violating RSA 179:5 themselves by "giv[ing] away" beer to each other. RSA 179:5, I; T 222, 412.

If any one of the girls had been an adult, she could have been charged criminally: (1) as a co-conspirator or accomplice to the defendant's violation of RSA 179:5 under RSA 629:3 or RSA 626:8; (2) for criminal solicitation under RSA 629:2, I to violate RSA 179:5; and (3) with one or more misdemeanor offenses under RSA179:5 itself. As such, a rational juror could conclude that the defendant was guilty of contributing to the delinquency of the three minors.

II. THE DEFENDANT'S INSUFFICIENY ARGUMENTS ARE NOT PRESERVED AND, IF THE TRIAL COURT ERRED, ANY ERROR IS NOT PLAIN.

A. Standard of Review

This Court does "not consider issues raised on appeal that were not presented to the trial court." *State v. Batista-Silva*, 171 N.H. 818, 822 (2019). This requirement "reflects the general policy that trial forums should have the opportunity to rule on issues and to correct errors before they are presented to the appellate court." *Id*. "The defendant, as the appealing party, bears the burden of demonstrating that he specifically raised the arguments articulated in his appellate brief before the trial court." *Id*. "[A]n issue is preserved when the trial court understood and therefore addressed the substance of" the issue. *State v. Perez*, 173 N.H. 251, 258 (2020).

Here, the defendant's insufficient evidence arguments are not adequately preserved because they were not raised with the trial court in his motion to dismiss. At trial, the defendant argued only that there was insufficient evidence to support the witness tampering charge because there

was no proof that the defendant knew that an official investigation into manufacturing of child sexual abuse images was pending. T 1027. He argued only that there was insufficient evidence to prove the contributing to the delinquency of a minor charges because the State had not proven that Hugle and the defendant made a purposeful plan to purchase beer for the girls. T 1026-27.

He presses different sufficiency of the evidence arguments on appeal. Specifically, with respect to witness tampering, he asserts there was insufficient evidence to prove that Hugle possessed the video to then withhold it. DB 18. With respect to the contributing to the delinquency of a minor charge, he asserts there was insufficient evidence to prove that the defendant's actions contributed to the girls' commission of a delinquent act. *Id*. Because the defendant did not raise these arguments before the trial court, the trial court did not address them. These arguments are therefore not preserved.

Accordingly, this Court should review the defendant's insufficiency arguments under the plain error rule. "The plain error rule allows [this Court] to exercise [its] discretion to correct errors not raised before the trial court." *Batista-Silva*, 171 N.H. at 824. "The rule is used sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result." *Id*. To find plain error: "(1) there must be error; (2) the error must be plain; and (3) the error must affect substantial rights. 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." *Id*. "Plain is synonymous with clear or,

equivalently, obvious." *Guay*, 162 N.H. at 384. It is the defendant's burden to demonstrate plain error. *Id*.

B. The Defendant Cannot Establish Plain Error Regarding The Witness Tampering Conviction.

First, if the trial court erred in not dismissing the witness tampering charge, this error was not plain because it was not clear or obvious that the defendant was charged with witness tampering regarding Hugle's withholding of only the video, as the defendant argues. DB 24. The indictment required, and the trial court instructed, T 1271, that to establish the witness tampering charge, the State had to prove that the defendant attempted to induce or cause Hugle to withhold any *information* regarding the video. DA 17.

The letter, the jail calls, the police testimony about them, and the defendant's testimony all support the conclusion that the defendant attempted to induce or cause Hugle to withhold such information. Moreover, each jail call that the State admitted was a reminder of the defendant's friendship with Hugle and a reminder that the defendant was incarcerated. The calls also reminded Hugle that the defendant was engaged in a proceeding that could result in continued incarceration.

Additionally, there is no evidence that, after October 2019, Hugle reported to police any information regarding the video, including its attempted or actual destruction, or any information about the defendant's October letter and jail calls. As a result, on this record, the trial court cannot have committed plain error because the evidence, taken in the light most favorable to the State, would not have alerted the trial court to the alleged

weaknesses that the defendant now raises. As such, if an error occurred at all, the error was, at best, a slight degree of error; it was not an error that was so obvious or fundamental that no judge should have allowed the matter to reach the jury. *Parker*, 392 P.3d at 403.

C. The Defendant Cannot Establish Plain Error Regarding The Contribution to The Delinquency of a Minor Charges.

Similarly, if the trial court committed any error with respect to the delinquency charges, the error was not plain. It is not so clear or obvious from the record that the State failed to prove that the defendant and the girls procured or gave away alcohol to minors in violation of RSA 179:5, thereby contributing to the girls' delinquency in violation of RSA 169-B:41, I. Indeed, there was ample evidence at trial from the State's witnesses and the defendant himself that the girls assisted him in purchasing alcohol and that they shared the alcohol amongst themselves after the defendant purchased it for them. As such, if any error occurred, the error was, at best, one of slight evidentiary degree; it was not an error that was so obvious or fundamental that the trial court should have dismissed the charges during trial. *Parker*, 392 P.3d at 403.

Accordingly, sufficient evidence existed for a rational jury to convict the defendant of both the witness tampering and the contributing to the delinquency of a minor charges. The trial court committed no error in allowing these charges to go to the jury and, even if it did, any error in its decision to do so was not plain. The defendant's convictions should be affirmed.

III. THE TRIAL COURT DID NOT ERR IN SENTENCING THE DEFENDANT ON THE WITNESS TAMPERING AND THE FALSIFYING PHYSICAL EVIDENCE CONVICTIONS.

The defendant argues that the trial court violated his right to freedom from double jeopardy when it sentenced him to separate sentences for the witness tampering and falsifying physical evidence convictions. The trial court did not err in doing so because these two charges, as alleged by the State, are separate and distinct offenses.

"The Double Jeopardy provisions of the State and Federal Constitutions provide protection against: (1) subsequent prosecution for the same offense after acquittal; (2) subsequent prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *State v. Woodbury*, 172 N.H. 358, 368 (2019). To determine whether the defendant has received multiple punishments for the same offense, this Court "examine[s] whether proof of the elements of the crimes as charged will require a difference in evidence." *Id*. The Court "address[es] the defendant's double jeopardy claim under the State Constitution and rel[ies] upon federal law only to aid [its] analysis." *State v. Glenn*, 167 N.H. 171, 178 (2014). This Court reviews "questions of constitutional law *de novo*." *State v. Leavitt*, 165 N.H. 32, 33 (2013).

The State charged the defendant with witness tampering contrary to RSA 641:5, I, alleging that the defendant, "believing that an official investigation as defined in RSA 641:1, II, was pending, knowingly attempted to induce or otherwise cause a person, specifically Matthew Hugle, to withhold any information when he wrote Hugle a letter and requested that Hugle delete information from any electronic device or any

electronic communication service that constituted evidence related to the official investigation." DA 17.

The State also charged the defendant with solicitation to commit falsifying physical evidence, contrary to RSA 629:2 and 641:6, alleging that the defendant "with the purpose that another, specifically Matthew Hugle, engage in conduct constituting the crime of falsifying physical evidence as defined in RSA 641:6, so solicited Hugle to delete information relevant to a pending criminal prosecution." DA 18. As defined by RSA 641:6, and as the trial court instructed the jury, "a person commits the crime of falsifying physical evidence if believing that an official proceeding or investigation is pending or about to be instituted, he alters, destroys, conceals, or removes anything with the purpose to impair its verity or availability in such proceeding or investigation." T 1272.

"As charged, each indictment required the State to prove a fact not necessary to the other." *State v. Ramsey*, 166 N.H. 45, 51 (2014). The witness tampering charge required the State to prove that the defendant attempted to induce or cause Hugle to withhold information from an official proceeding regarding his October 2019 letter and his plot to have Hugle log in to an email account and delete a video or any other information relative to the video, email address, electronic device storing the video, or electronic communication service. Conversely, the falsifying physical evidence charge required proof that the defendant solicited Hugle to actually alter, destroy, conceal, or remove information relevant to the investigation, which in this case was a video. In other words, the witness tampering charge required the State to prove that the defendant induced or caused Hugle not to report to anyone any action he took following his

receipt of the defendant's letter and jail calls relative to the letter. The falsifying physical evidence charge required the State to prove that the defendant solicited Hugle to destroy, alter, conceal, or remove the video.

Thus, because the evidence required to prove each indictment beyond a reasonable doubt was different, even if based on the same criminal conduct, the two convictions did not result in punishment for the same offense. Accordingly, this Court should affirm the defendant's sentences on both convictions.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the defendant's convictions and sentence below.

The State requests a 15-minute oral argument delivered by Audriana Mekula, Esq.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

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August 2, 2023

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CERTIFICATE OF COMPLIANCE

I, Audriana Mekula, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,435 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.

August 2, 2023 *<u>/s/ Audriana Mekula</u>*
Audriana Mekula

CERTIFICATE OF SERVICE

I, Audriana Mekula, hereby certify that a copy of the State's brief shall be served on Deputy Chief Appellate Defender Thomas Barnard, Esq., counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

August 2, 2023 */s/ Audriana Mekula*
Audriana Mekula