THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0680

State of New Hampshire

v.

Seth Hinkley

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE COOS COUNTY SUPERIOR COURT

REPLY BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

OFFICE OF THE NEW HAMPSHIRE ATTORNEY GENERAL

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(15-minute oral argument)

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ISSUES PRESENTED

I. Whether in its brief, the State relied on the wrong statements.

II. Whether the State's argument regarding immunity for an element of an offense is "not entirely clear" and whether the reply brief clarifies the argument.

III. Whether, in its brief, the State misidentified the point at which the defendant confessed to sexually assaulting the victim.

STATEMENT OF CASE AND FACTS

The State relies on its brief for the procedural history and factual background.

SUMMARY OF THE ARGUMENT

The State did not rely on the wrong statements. The trial court tried to take the statements by the officer out of context and the State's brief disagreed with the trial court's approach and conclusion with respect to the officer's statements.

If the State's argument regarding immunity for an element of an offense is "not entirely clear," this reply brief has tried to clarify the argument. First, the State disagrees that the officer promised immunity. Second, and of equal importance, the State disagrees that assuring a suspect that an act, which is also an element of an offense, is legal is also a promise of immunity for the criminal offense.

In its brief, the State did not misidentify the point at which the defendant confessed to sexually assaulting the victim. Up until the time that the officer asked why the victim would lie, the defendant had denied that he forced her to submit to sexual intercourse and had only agreed that at some points she had said that she did not want to have sexual relations and that they had engaged in them anyway.

ARGUMENT

I. THE STATE IDENTIFIED THE CORRECT STATEMENTS.

The defendant states that the State is relying on the wrong statements by the officer in challenging the trial court's ruling. DB[1] 18. There were three statements: (1) "[Y]ou're not in trouble if you had sex with [F.T.]." (2) "She's over the age of 16. That's the age of consent." and (3) "[Y]ou're not gonna be in trouble from me if you told me that you had sex with her." SA 96. He contends that the trial court relied on the officer's assurances that the defendant would not be "in trouble" with the officer if he admitted that he had engaged in sexual relations with the victim. DB 18; *see also* SA 71-72 (trial court's order). The trial court did find that the comments that the defendant would not be "in trouble" induced the defendant to admit that he had sexual relations. SA 71-72.

But the statements, which all occurred in the same discussion, should not be taken separately because they were all directed to the defendant's misunderstanding about the age of consent. The two "in trouble" statements, therefore, were related to the assurance that the officer was not investigating the defendant for statutory rape. The State challenges trial court's order that the officer "went far beyond" the assurance that sex with a 16-year-old was not a prosecutable offense tried to separate the statement of law from the accompanying sentences. *See* SB 23 (arguing that

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[1] Citations to the record are as follows:
"SB__" refers to the State's brief and page number.
"SA_" refers to the appendix to the State's brief and page number.
"DB_" refers to the defendant's brief and page number.
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the “in trouble” statements should be considered in their context). All three of the statements were interrelated and should have been treated as such by the trial court.

II. THE STATE OFFERS CLARIFICATION OF ITS ARGUMENT REGARDING IMMUNITY.

The defendant states that he finds the State's argument "not entirely clear." DB 21. The State apologizes, but in its view, the lack of clarity stems from the trial court's ruling that the statements that the defendant would not be "in trouble" (1) promised the defendant immunity and did so (2) for *an element* of the offense. SA 72. In its brief, the State argues that the officer did not promise immunity and will not repeat that argument here. SB 22.

The statement that immunity cannot be granted for an element without granting immunity for the entire offense, DB 21 (citing SB 26), does not conflict with the State's statement that "a promise of immunity for a legal act is illusory." DB 21 (citing SB 27). The trial court's order did not conclude that the defendant was granted immunity for forcible rape, which he was not; it concluded that the defendant was granted immunity for a lawful act, which happened to be an element of the offense. The fact that a lawful act is an element of a crime does not make the act by itself unlawful and, therefore, capable of being immunized.

The trial court attempted to narrow the scope of the immunity promised and then extend the immunity to cover the entire offense. The trial court erred when it treated the officer's assurance that *consensual* sex with a person 16 years old or older was not unlawful as tantamount to granting immunity for an entirely different scenario, one that involved a crime.

This is in stark contrast to the hypotheticals suggested by the defendant. DB 22-23. It is particularly true in the hypothetical in which the

defendant suggests that the State's argument would make it permissible for officers to tell a middle-aged man that he "wouldn't be in any trouble" if he admitted that he had sexual relations with a 13-year-old, because he was not also admitting that he was more than five years older than the child. SB 23. In other words, according to the defendant, the suspect has not admitted to the full offense.

The State's argument is exactly the opposite. Sexual relation between a middle aged man and a child of 13 is unlawful and the suspect's failure to admit that, as a man in his 40s, he is more than five years older than his victim is simply not analogous. A promise that there would be "no trouble" to admitting to this conduct is both (1) wrong as a matter of law and (2) a promise of immunity. If, on the other hand, the middle aged man was charged with having forcibly raped a contemporary, assuring him that consensual sex is not illegal does not constitute immunity for the crime. Under the trial court's ruling, a person who admits to consensual sex after being told that consensual sex is not illegal, is immune from prosecution for forcible rape simply because sexual intercourse is an element of forcible rape.

The State reiterates its argument: immunity cannot be promised for anything except a crime and an element of the crime, which is otherwise lawful, is not the crime itself.

III. THE DEFENDANT CONFESSED AFTER BEING ASKED WHY THE VICTIM WOULD LIE.

The defendant also argues that the State misstated the record when it stated that the defendant confessed after he was asked why the victim would lie and he responded that she would not lie. DB 27; *see also* SA 102. While it is true that the defendant admitted that he had sexual relations with the victim after she had told him that she "really [didn't] want to do this," SA 102-03, he did not admit at that point that she had "physically resisted sexual activity." DB 28. And his admission was hardly unequivocal. He said that they had sexual intercourse after she told him that she "really [didn't] want to do this" "every once in a while." SA 102.

At that point, the defendant admitted that she had been physical with him. But the admission regarding her physical resistance involved the times when they were "out in the open" and "with someone." SA 103-04. The defendant described the victim as the aggressor, stating: "[S]he always has this thing where she wants to go and like show off to her friends" and say that she was "the male-type person" and that she was "the person in charge." SA 103-04. According to the defendant's statement, the victim would hit him on those occasions. SA 104. He did not admit that he hit her in order to make her submit to sexual relations.

Thereafter, the officer began to tell the defendant what the victim had said. SA 104. The defendant's responses ("Um-hum") were acknowledgments that he understood that she had said those things, not that he had forced the victim to have non-consensual sex. SA 104-05. In fact, during the pages cited by the defendant's brief, the defendant denied that he had forced the victim to have sex. *See* SA 104 (Q: "[W]ere there occasions,

though, that she – beyond saying no that she was trying to push you off of her/" A: "No."); (Q: "[The victim says that] [s]he was trying to push you off." A: "That never happened.").

In contrast, at other times in the interview, the defendant seems to be agreeing that he understood the question, but not admitting to the conduct. *See* SA 107 (Q: "Okay. Um – so I think there were occasions when [the victim] was having sex with you and she didn't want to have sex with you. And she was trying to tell you beyond just telling you no." A: "Um-hum."). This answer was not an admission that the defendant agreed that he had assaulted the victim; rather, it appears to be a statement that he understood that the officer thought that the scenario just described had taken place. The officer apparently did not understand the response as anything more than that because the officer then asked why the victim would lie. SA 107. If the defendant had just admitted that the accusations were true, the officer would not have raised the question of a motive for the victim to make false accusations.

CONCLUSION

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

The State requests a 15-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

OFFICE OF THE NEW HAMPSHIRE ATTORNEY GENERAL

January 25, 2021

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CERTIFICATE OF COMPLIANCE

I, Elizabeth C. Woodcock, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this reply brief contains approximately 1,639 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.

January 25, 2021 *<u>/s/Elizabeth C. Woodcock</u>*
Elizabeth C. Woodcock

CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, hereby certify that a copy of the State's reply brief shall be served on Senior Assistant Appellate Defender Thomas Barnard, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

January 25, 2021 *<u>/s/Elizabeth C. Woodcock</u>*
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