

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0851, State of New Hampshire v. Joseph San Giovanni, the court on August 21, 2007, issued the following order:

The defendant, Joseph San Giovanni, appeals his conviction by a jury for theft by deception. See RSA 637:4 (2007). We affirm.

The defendant first argues that the trial court erred in denying his motion to dismiss based upon a lack of sufficient evidence. In an appeal challenging the sufficiency of the evidence, the defendant carries the burden of proving that no rational trier of fact, viewing the evidence in the light most favorable to the State, could have found guilt beyond a reasonable doubt. State v. Schonarth, 152 N.H. 560, 563 (2005). In reviewing the sufficiency of the evidence, we examine each evidentiary item in the context of all the evidence, not in isolation. *Id.*

To convict the defendant, the State had to prove, beyond a reasonable doubt, that he “obtain[ed] or exercise[d] control over the property of another by deception and with a purpose to deprive him thereof.” RSA 637:4, I. More specifically, pursuant to the indictment, the State had to prove that the defendant obtained \$13,000 from the victims by deceiving them and with a purpose to deprive them of this money by creating or reinforcing “the impression, which was false and which he did not believe to be true, that St. Jude’s Residence . . . was a drug and alcohol treatment facility that would provide such treatment to [their] son.” See RSA 637:4, II(a).

Viewing the evidence and all reasonable inferences therefrom in the light most favorable to the State, we conclude that it was sufficient for a rational trier of fact to have found, beyond a reasonable doubt, that the defendant engaged in theft by deception as alleged in the indictment. The defendant did not dispute that he obtained \$13,000 from the victims. Moreover, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the State, we believe that a rational trier of fact could have found, beyond a reasonable doubt, that the defendant obtained this money by creating or reinforcing the false impression that St. Jude’s Residence would provide certain kinds of treatment to the victims’ son. Such treatment included “[m]otivational [i]nterviewing,” “[d]irectional therapy,” and one-on-one counseling provided by licensed, trained counselors, who supervised the residents twenty-four hours a day. A rational trier of fact could have found, however, that: none of the peer

counselors employed by St. Jude's Residence were either licensed or trained to provide the promised counseling and therapy; such counseling and therapy were not, in fact, provided as part of the treatment for which the victims paid; and the residents were not supervised twenty-four hours a day. A rational trier of fact could also have found that the defendant obtained the victims' money by creating or reinforcing the impression that St. Jude's Residence was a licensed facility, when, in fact, it was not.

Further, a rational trier of fact could also have found the defendant created or reinforced these false impressions knowing that they were false and for the purpose of depriving the victims of their money. While the evidence of the defendant's state of mind was solely circumstantial, we conclude that, when viewed in the light most favorable to the State, it was sufficient to exclude all rational conclusions except that the defendant had the requisite mens rea. See State v. LaCasse, 153 N.H. 670, 672 (2006); see also State v. DiNapoli, 149 N.H. 514, 516-17 (2003).

The defendant next asserts that the trial court erred when it denied his request to strike all of the victims' testimony. We examine the trial court's decision to strike only portions of the victims' testimony under our unsustainable exercise of discretion standard. See State v. VanDerHeyden, 136 N.H. 277, 285 (1992); cf. State v. Lambert, 147 N.H. 295, 296 (2001) (explaining unsustainable exercise of discretion standard). "The trial court is in the best position to gauge the prejudicial impact of particular testimony, and what steps, if any, are necessary to remedy that prejudice." VanDerHeyden, 136 N.H. at 285 (quotation and brackets omitted). Under this standard, the defendant must demonstrate that the trial court's ruling clearly was unreasonable and untenable to the prejudice of his case. See Lambert, 147 N.H. at 296. Based upon our review of the record, we conclude that the trial court sustainably exercised its discretion.

The defendant next contends that the trial court erred by failing, *sua sponte*, to declare a mistrial. As the State aptly notes: "The trial court cannot be faulted for failing to provide a remedy that the defendant never sought." We further agree with the State that this case is distinguishable from State v. Ayer, 150 N.H. 14 (2003). While the error in Ayer was a structural error, which tainted the entire trial process, the alleged error here was, at most, a trial error. See Ayer, 150 N.H. at 24-25. Thus, the defendant's reliance upon Ayer is misplaced.

Finally, the defendant contends that the trial court erred when it overruled his objection to certain statements made by the prosecutor in his closing argument. He contends that the prosecutor's improper comments entitle him to a new trial. Because the trial court is in the best position to gauge any prejudicial effect that the prosecutor's closing remarks had on the jury, we review its decision for an unsustainable exercise of discretion. State v.

Mussey, 153 N.H. 272, 277 (2006). Based upon our review of the record submitted on appeal, we conclude that the trial court did not unsustainably exercise its discretion.

Affirmed.

DALIANIS, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**