THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2007-0590, State of New Hampshire v. Anthony Damelio, the court on January 23, 2009, issued the following order:

The defendant, Anthony Damelio, appeals his conviction for dispensing a controlled drug with death resulting. He argues that the trial court erred in: (1) imposing a sentence greater than the maximum established for the offense alleged in the indictment; (2) admitting hearsay testimony; and (3) denying his motion to dismiss based upon insufficient evidence. We affirm.

The defendant first contends that the trial court erred in imposing a sentence greater than the maximum sentence authorized for the offense alleged in the indictment. He asks that we consider this error under our plain error rule. See Sup. Ct. R. 16-A; State v. Sideris, 157 N.H. 258, 264 (2008) (for court to find plain error: (1) there must be error; (2) error must be plain; (3) error must affect substantial rights; and (4) error must seriously affect the fairness, integrity or public reputation of judicial proceedings).

The defendant argues that the indictment failed to include all of the elements that constituted the charged offense. In his brief, he concedes, however, that the State could argue that the omitted language that he construes as elements of the offense actually serves to define the requisite elements that were included in the indictment. The parties cite no case in which we have addressed this issue as it relates to this statute. Accordingly, any alleged error cannot be said to be plain. See State v. Lopez, 156 N.H. 416, 424 (2007) (error is plain if it was or should have been obvious in sense that the governing law was clearly settled to the contrary). We therefore decline the defendant's request to vacate his sentence and remand for resentencing.

The defendant next argues that the trial court erred in admitting hearsay testimony. Specifically, he argues that the trial court erred in admitting testimony that the victim said he was worried because he had swallowed "a baggie with a twisty." At oral argument, the defendant conceded that evidence that the victim was worried was admissible. After oral argument, we requested supplemental memoranda from the parties addressing whether the specific issue raised on appeal had been preserved. Having reviewed the record and the memoranda, we conclude that it has not.

During direct examination of the victim's mother, the State asked her: "[W]hat did he say in terms of whether he intended to [throw up]?" Defense

counsel objected; the objection was overruled. Questioning continued; after questions addressing the victim's intent, the State asked: "Did he express his state of mind and the concerns that he was having?" Defense counsel did not object to this question. Contrary to the defendant's contention, his earlier objection was not sufficient to put the trial court on notice; the scope of the examination extended beyond the objection originally raised.

Finally, the defendant argues that the trial court erred in denying his motion to dismiss based upon insufficient evidence. Specifically, he argues that because evidence was presented of the victim's polysubstance abuse, the State failed to prove that the defendant provided the specific oxycodone that caused the victim's death. He concedes that the State presented sufficient evidence to establish that he provided oxycodone to the victim and that an overdose of oxycodone caused the victim's death. He argues, however, that no direct evidence established that the oxycodone that caused the victim's death was supplied by the defendant.

To prevail in his challenge to the sufficiency of the evidence, the defendant must prove that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt. State v. MacDonald, 156 N.H. 803, 804 (2008). When the evidence is solely circumstantial, it must exclude all rational conclusions except guilt. Id. Under this standard, we consider the evidence in the light most favorable to the State and examine each evidentiary item in context, not in isolation. Id.

The evidence presented included that the victim and his sister went to the defendant's home to obtain drugs, specifically oxycodone. The victim had money; his sister testified that she believed he gave the money to the defendant. She also testified that the victim obtained two or three oxycodone pills while at the defendant's house and that he left the defendant's house with the pills in a baggie. After they left the defendant's home, the victim, his sister and a friend were stopped by the police as the victim drove them to his home. The arresting officer patted the victim down but did not report finding any drugs. The victim was released to the custody of his mother; not long after they returned home, he came downstairs and reported that he was worried because he had swallowed "a baggie with a twisty." The chief medical examiner who performed the autopsy on the victim testified that: (1) the victim died from acute intoxication of the combined effects of oxycodone and diazepam; (2) if the victim had ingested the drugs prior to falling asleep, his demeanor would have noticeably changed; and (3) the examiner found a plastic bag with a twist tie in the victim's stomach.

The evidence presented in this case, viewed in the light most favorable to the State, excludes all rational conclusions other than that the oxycodone that caused the victim's death was supplied by the defendant. See State v. Lacasse, 153 N.H. 670, 672 (2006) (correct analysis is not whether every possible

conclusion had been excluded but rather whether other rational conclusions based upon the evidence had been excluded).

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk