THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2007-0912, State of New Hampshire v. Brianne Sexton, the court on June 11, 2009, issued the following order:

The defendant appeals her conviction for perjury. She argues that the trial court erred in denying her request for a competing harms instruction, and committed plain error by: (1) issuing a limiting instruction regarding her testimony; and (2) allowing the State to argue in closing that there was no evidence other than one conviction that she was abused. We affirm.

We turn first to the defendant's argument that the trial court erred in denying her request for a competing harms instruction. The defendant first requested a competing harms instruction after the close of evidence. See Super Ct. R. 101, 98 (notice that defendant intends to assert defense set forth in Criminal Code must generally be filed with court and prosecution within thirty days of plea of not guilty). Citing the prejudice caused to the State if the instruction were to be given, the trial court denied the request. We review the trial court's decision for an unsustainable exercise of discretion. See State v. Lavoie, 152 N.H. 542, 546 (2005). As the trial court aptly noted, had the State known that the defendant intended to request a competing harms instruction, it could have called other witnesses to rebut the defendant's testimony that she perjured herself to avoid further abuse. Accordingly, we find no error in the trial court's ruling.

The defendant also argues that the trial court committed plain error in issuing a limiting instruction regarding her testimony. When the court advised that it would give a limiting instruction that the jury could consider the defendant's testimony to the extent that it was relevant to establish her state of mind, defense counsel stated, "We have no problem." The State argues that because the defendant affirmatively assented to this ruling, she waived any claim of error; accordingly, plain error review does not apply. See United States v. Washington, 434 F.3d 7, 11 (1st Cir. 2006). Given the explicit concurrence by defense counsel, we conclude that the defendant waived this claim of error and we decline to consider this issue under our plain error rule. See United States v. Olano, 507 U.S. 725, 733 (1993) (distinguishing between waiver and forfeiture in plain error analysis under Federal Rules of Criminal Procedure: "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'").

The defendant also argues that the trial court committed plain error in allowing the State to argue in closing that there was no evidence other than one

conviction that she had been abused. We note that after closing argument, the trial court instructed the jury that "if anything either lawyer said to you [in opening statements or closing arguments] is contrary to your recollection of the facts, you will take your recollection of the facts from the evidence as you heard it."

The defendant argues that she was prejudiced by the State's remarks because the State did not introduce overwhelming evidence of guilt. The record reflects that during her trial on the perjury charge, she admitted that she had testified in a previous proceeding that she was pregnant when she knew that she was not.

Even if we accept the defendant's argument that the State's closing argument was inaccurate, she argues only that the inaccuracy was relevant to her fear of further abuse, an issue not relevant given the exclusion of her competing harms defense. To the extent that she argues that the State was required to prove that she knew her false statement was material, she cites no case in which we have so held. Accordingly, we find no plain error. See State v. Lopez, 156 N.H. 416, 424 (2007) (at minimum, court of appeals cannot correct error unless error is clear under current law); Olano, 507 U.S. at 734.

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk