THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2008-0840

State of New Hampshire

v.

Deborah Gelsi

Appeal Pursuant to Rule 7 from Judgment
of the Grafton County Superior Court

DEFENDANT'S REPLY BRIEF

Stephanie Hausman
Assistant Appellate Defender
Appellate Defender Program
2 White Street
Concord, NH 03301
NH Bar #15337
(603) 228-9218

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QUESTION PRESENTED

Whether the trial court erred in allowing the prosecutor to repeatedly argue that the evidence against Gelsi was "uncontroverted."

Issue raised as plain error pursuant to Supreme Court Rule 16-A.*

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*Citations to the record are as follows:
"DB" refers to Gelsi's opening brief;
"SB" refers to the State's brief.

STATEMENT OF THE CASE AND OF THE FACTS

On July 16, 2009, Ms. Gelsi filed her brief arguing that the prosecutor's closing argument violated her rights to remain silent, to a fair trial, and to due process. DB 10. On September 29, 2009, the State filed its brief. SB 34. The State argued that the references to "uncontroverted" evidence were not references to Gelsi's failure to testify but "to the fact that the evidence was uncontradicted." SB 20. Gelsi files this response to address that argument.

I. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO REPEATEDLY ARGUE THAT THE EVIDENCE AGAINST GELSI WAS "UNCONTROVERTED."

Gelsi argued in her opening brief that the prosecutor's repeated references to the "uncontroverted" evidence against her violated her rights to remain silent, to a fair trial, and to due process. DB 10. Gelsi argued that these references highlighted her failure to testify or call any witnesses. DB 13. The State responded, arguing that the references to "uncontroverted" evidence did not refer to Gelsi's failure to testify but rather properly referred to her failure to offer evidence to controvert the State's case. SB 20, 24, 28. The State enumerated the witnesses that Gelsi could have called that may have contradicted the testimony of the State's witnesses. SB 26 (arguing that Gelsi's daughter, Gelsi or Arthur's family court lawyers or court personnel, real estate agent, troopers, or landlord-tenant lawyers or court personnel could have been called to dispute testimony of State's witnesses).

The State's argument fails to recognize that comment on the defendant's failure to put on evidence is a violation of her right to due process. As this Court has previously held, "[a] defendant's decision not to testify or present evidence in [her] own defense can provide no basis for an adverse comment by the prosecutor." State v. Hearns, 151 N.H. 226, 233 (2004) (quoting State v. Fowler, 132 N.H. 540, 545 (1989)). See also, State v.

Lovely, 124 N.H. 690, 696-97 (1984). Explicit argument regarding lines of inquiry not presented by the defense is improper. Hearns, 151 N.H. at 233 ("prosecutor's statement concerning the defendant's failure to cross-examine [the victim] regarding aspects of her testimony constituted improper comment."). Even implicit argument about evidence not presented by the defense is improper. In Lovely, the prosecutor argued:

> Now, the defendant's case revolved around certain people who did not know Mr. Lovely and who came in here and only knew [the victim]. I think it is interesting and very revealing as to who they called as versus who they did not call. Where were all the witnesses to come in here and say what a great guy Mr. Lovely is? Where were all of Mr. Lovely's neighbors? Where were all of Mr. Lovely's co-workers?

124 N.H. at 696. Even though "the prosecutor did not directly comment" on the defendant's choice, this Court found "no difficulty in concluding that the remarks in question were improper." Id. at 697.

Here, the prosecutor's repeated characterization of the State's evidence as "uncontroverted" is precisely the type of argument this Court has found improper. The only logical interpretation of the State's argument was that the evidence was not controverted *by Gelsi*, either by her own testimony or by calling other witnesses. Either inference is an impermissible violation of Gelsi's right to due process and this Court must reverse.

CONCLUSION

WHEREFORE, Ms. Gelsi respectfully requests that this Court vacate her conviction.

Respectfully submitted,

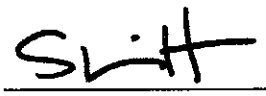
By

Stephanie Hausman
NH Bar No. 15337
Assistant Appellate Defender
Appellate Defender Program
2 White Street
Concord, NH 03301

CERTIFICATE OF SERVICE

I, Stephanie Hausman, hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, this 19th day of October, 2009 to:

Susan McGinnis
Senior Assistant Attorney General
Office of the Attorney General
33 Capitol Street
Concord, New Hampshire 03301



Stephanie Hausman. 15337

DATED: October 19, 2009