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THE SUPREME COURT OF NEW HAMPSHIRE

Strafford
Case Nos. 2023-0690
2024-0183
Citation: State v. Levier, 2026 N.H. 7

THE STATE OF NEW HAMPSHIRE

v.

DONALD LEVIER, JR.

Argued: October 9, 2025
Opinion Issued: February 13, 2026

John M. Formella, attorney general, and Anthony J. Galdieri, solicitor general (Sam M. Gonyea, assistant attorney general, on the brief and orally), for the State.

Christopher M. Johnson, chief appellate defender, of Concord, on the brief and orally, for the respondent.

COUNTWAY, J.

[¶1] The respondent, Donald Levier, Jr., appeals orders issued by the Superior Court (Will, J.) related to two civil commitment hearings pursuant to RSA 135-E:5, II (2021). The trial court found that the respondent, who has

been deemed incompetent to stand criminal trial, committed two charged acts of attempted aggravated felonious sexual assault (AFSA) involving two different victims, and that his incompetence did not substantially interfere with his ability to assist in his defense at the civil commitment hearings. The respondent challenges the trial court's ruling that the State did not bear the burden of proving that his incompetence did not affect the outcome of the hearings. We affirm in part, vacate in part, and remand.

[¶2] The following facts are supported by the record or otherwise undisputed. The respondent was charged in two separate dockets with two attempted AFSAs and was later declared incompetent to stand trial. The State then dismissed the criminal charges and filed two petitions — one for each attempted AFSA — for the respondent's civil commitment as a sexually violent predator under RSA chapter 135-E (2021 & Supp. 2025). Pursuant to RSA 135-E:5, II, the trial court scheduled two evidentiary hearings (the 2023 Hearing and the 2024 Hearing, respectively) to consider whether the State's evidence proved beyond a reasonable doubt that the respondent committed the charged acts.

[¶3] Prior to the 2023 Hearing, the trial court requested briefing on how it should determine, as required by the statute, “the extent to which the [respondent's] incompetence affected the outcome of the hearing.” After briefing from the parties, the trial court ruled that the statute does not impose a burden of proof on either party with respect to the effect of the respondent's incompetence at the evidentiary hearings. Instead, the trial court concluded that it need only consider this factor as part of its determination of whether the State met its ultimate burden to prove beyond a reasonable doubt that the respondent committed the charged acts.

[¶4] After the 2023 Hearing, the trial court found beyond a reasonable doubt that the respondent committed the charged acts underlying the first attempted AFSA, and also found that his incompetence did not substantially interfere with his ability to assist his counsel. The respondent appealed.

[¶5] After the 2024 Hearing, the trial court found beyond a reasonable doubt that the respondent committed the charged acts underlying the second attempted AFSA, and also found that his incompetence once again did not substantially interfere with his ability to assist his counsel. The trial court further found that, even if the respondent's incompetence substantially interfered with his ability to assist his counsel at the 2024 Hearing, the State's evidence was strong enough to “foreclose[] the [respondent's] incompetence from having had a substantial impact” on that hearing. See RSA 135-E:5, II. The respondent also appealed that ruling.

[¶6] In both appeals, the respondent argues that the trial court erred in concluding that the State did not bear the burden of proof under RSA 135-E:5,

II with respect to the effect of his incompetence at the evidentiary hearings. The State counters that the statute does not impose this burden on either party, and even if it did, the burden should be borne by the respondent.

[¶7] As a threshold argument, the State also contends that whether RSA 135-E:5, II imposes a burden of proof with respect to the effect of the respondent's incompetence is "an academic question with no practical implications" in this case. It asserts that the issue is hypothetical with respect to the 2023 Hearing because the trial court found that the evidence "demonstrated that the [respondent's] incompetence did not affect the outcome of the hearing" and "[p]lacing the burden with the State would not have changed that evidence." We disagree.

[¶8] Placing the burden of proof on the State as to the effect of the respondent's incompetence could have changed the evidence submitted at the 2023 Hearing and, ultimately, the trial court's ruling. A burden of proof places upon one party the obligation to prove a disputed assertion or charge, see Roberts v. Town of Windham, 165 N.H. 186, 190 (2013), and thereby determines which party is responsible for presenting evidence and persuading the factfinder of the truth of its claim, see, e.g., Black's Law Dictionary 243 (12th ed. 2024) (defining burden of proof in part as "a proposition regarding which of two contending litigants loses when there is no evidence on a question"). A party's burden of proof includes both the burden of production and burden of persuasion. See id.

[¶9] At the 2023 Hearing, the respondent — not the State — presented evidence of the effect of the respondent's incompetence at the hearing. Had the trial court put the burden of proof on the State, the respondent would have had no obligation or incentive to offer such evidence, and we cannot speculate as to what evidence the State would have offered to meet its burden under those circumstances. Accordingly, contrary to the State's assertion, placing the burden of proof on the State could have altered the evidence the parties submitted and ultimately the trial court's ruling. Moreover, even if the same evidence was submitted, placing the burden of proof on the State could have changed how the trial court assessed the evidence. See Appeal of Jackson, 142 N.H. 204, 207 (1997) ("We cannot speculate whether the board would have reached the same decision had it . . . properly allocated the burden of proof."). We therefore disagree that whether one party bears the burden of proof regarding the impact of the respondent's incompetence is a hypothetical matter as to the 2023 Hearing.

[¶10] Specific to the 2024 Hearing, the State also argues that the placement of the burden of proof is immaterial because the trial court made an additional finding in that case that satisfied the statute — that, even assuming that the respondent's incompetence substantially interfered with his ability to assist counsel, the strength of the State's case foreclosed the respondent's

limitations from substantially impacting the proceedings. Although we do not agree with the State that the placement of the burden of proof was immaterial, we nevertheless affirm the outcome of the 2024 Hearing as explained below in [¶28] and [¶29].

[¶11] Having determined that the allocation of the burden of proof to the State could have changed the outcome of the 2023 Hearing, we now turn to whether the statute assigns the burden of proof to either party. Resolving the issue of which party, if any, bears the burden of proof with respect to the effect of a person's incompetence at a RSA 135-E:5, II hearing requires that we interpret that statute. The interpretation of a statute presents a question of law, which we review *de novo*. *State v. Parr*, 175 N.H. 52, 55 (2022). We first look to the language of the statute itself, and, if possible, construe the language according to its plain and ordinary meaning. *Doe v. N.H. Attorney Gen. (Activity Logs)*, 176 N.H. 806, 813 (2024), 2024 N.H. 50, ¶15. We interpret the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. *Id.* We construe all parts of a statute together to effectuate its overall purpose and to avoid an absurd or unjust result. *Id.*

[¶12] RSA chapter 135-E sets forth the procedure for the civil commitment of sexually violent predators. See RSA ch. 135-E; RSA 135-E:1 (2021); *State v. DeCato*, 156 N.H. 570, 571-72 (2007) (explaining purpose of RSA chapter 135-E). RSA 135-E:5, II, at issue here, governs the first step in the process when the State petitions to civilly commit an individual who was charged with a sexually violent offense and then deemed incompetent to stand trial. The statute provides in relevant part that the trial court

shall first hear evidence and determine whether the person did commit the act or acts charged. The hearing on this issue shall comply with all the procedures specified in this section. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged beyond a reasonable doubt. In determining whether the state has met its burden, the court shall consider the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including the person's ability to assist his or her counsel by recounting the facts, identifying witnesses, testifying in his or her own defense, or providing other relevant information or assistance to counsel or the court. If the person's incompetence substantially interferes with the person's ability to assist his or her counsel, the court shall not find the person committed the act or acts charged unless the court can conclude beyond a reasonable doubt that the acts occurred, and that the strength of the state's case, including physical evidence, eyewitness testimony, and corroborating evidence, is such that the

person's limitations could not have had a substantial impact on the proceedings. If, after the conclusion of the hearing, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, the court shall enter a final order, appealable to the supreme court on that issue.

RSA 135-E:5, II (emphases added).

[¶13] We agree with the respondent that the State bears the burden of proof as to the effect of a person's incompetence at the RSA 135-E:5, II hearing. The statute first provides that "the court shall make specific findings on whether the person did commit the act or acts charged beyond a reasonable doubt." *Id.* The next sentence begins with the language: "In determining whether the state has met its burden" *Id.* (emphasis added). We construe these sentences together and in the context of the entire statute as establishing that the State bears the ultimate burden of proving beyond a reasonable doubt that the person committed the charged acts. The State concedes that it bears this ultimate burden. We thus read the remainder of the statutory language with this ultimate burden in mind. *See, e.g., Doe (Activity Logs)*, 176 N.H. at 813, 2024 N.H. 50, ¶15 (stating that we will construe all parts of statute together to effectuate its overall purpose and will not consider words and phrases in isolation, but rather within context of statute as a whole).

[¶14] After establishing the State's ultimate burden of proof, the statute provides that, "[i]n determining whether the state has met its burden, the court shall consider the extent to which the person's incompetence or developmental disability affected the outcome of the hearing." RSA 135-E:5, II (emphases added). Viewed in isolation, this sentence could be read to instruct the trial court to merely consider as a factor in its decision the impact of the person's incompetence on the proceedings. Reading the language in the context of the entire provision, however, we construe it and the language that follows it as requiring that, in order for the State to satisfy its ultimate burden of proof, it also bears the burden of demonstrating that the person's incompetence did not substantially impact the outcome of the hearing.

[¶15] The statute sets forth two ways in which the State can meet that burden. First, it can show that the person's incompetence did not substantially interfere with the person's ability to assist counsel. *See id.* The statute provides: "If the person's incompetence substantially interferes with the person's ability to assist his or her counsel, the court shall not find the person committed the act or acts charged" *Id.* Cognizant of the State's ultimate burden, we construe this language to mean that, if the trial court finds that the State failed to prove that the person's incompetence did not substantially interfere with his or her ability to assist counsel, the trial court shall not find that the State has met its burden of proving beyond a reasonable doubt that the person committed the charged acts. Articulated from the State's

perspective, the statute requires that, in order to satisfy its ultimate burden of proof, the State must prove that the person's incompetence did not substantially interfere with the person's ability to assist counsel at the hearing.

[¶16] In the alternative, the statute allows the State to instead demonstrate that its case is so strong that the person's limitations could not have had a substantial impact on the proceedings. It provides that "the court shall not find the person committed" the charged acts — in other words, the State cannot satisfy its ultimate burden of proof — if the person's incompetence substantially interfered with his or her ability to assist counsel "unless the court can conclude beyond a reasonable doubt that the acts occurred, and that the strength of the state's case . . . is such that the person's limitations could not have had a substantial impact on the proceedings." Id. (emphasis added).

[¶17] Both of the above findings relate to the "extent" of the impact the person's limitations had upon "the outcome of the hearing," id., and we therefore construe them as alternative means of proving that the limitations did not substantially impact the outcome. Construing the statute as a whole, we conclude that proof that the person's incompetence did not substantially impact the outcome of the proceedings is elemental to the State's ability to demonstrate that the person committed the charged acts. Cf. RSA 625:11, III(c) (2016) (defining element of offense as "conduct, or such attendant circumstances, or such a result of conduct as . . . [n]egatives an excuse or justification for such conduct"); State v. Qualters, 121 N.H. 484, 486-87 (1981) (holding that non-applicability of statutory exemptions to otherwise criminal conduct constituted elements of offense and that State bore burden of proving, beyond reasonable doubt, that exemptions did not apply). Because the lack of a substantial impact on the proceedings due to the person's incompetence is elemental to the State's case, the State must bear the burden of its proof. Cf. Ulster County Court v. Allen, 442 U.S. 140, 156-57 (1979) (distinguishing elemental facts, which must be proved by State beyond a reasonable doubt in a criminal case, from basic or evidentiary facts, which need not necessarily be proved); Stock v. Byers, 120 N.H. 844, 848 (1980) (stating that "[a]n essential element of the plaintiff's cause of action" in civil case was missing and thus the trial court erred by not directing a verdict for the defendant).

[¶18] We are not persuaded by the State's arguments to the contrary. First, the State argues that we should not analogize an RSA 135-E:5, II hearing to the criminal process in considering whether the statute imposes a burden of proof. But our interpretation is based on the statute's plain text, not on equating civil commitment proceedings for incompetent persons with criminal prosecutions. See RSA 135-E:5, II; see also State v. Ploof, 162 N.H. 609, 620, 622 (2011); State v. Dirole, No. 2022-0588 (non-precedential order at 3-4, 6), 2024 WL 3374647 (N.H. July 11, 2024).

[¶19] Alternatively, the State suggests that, even if the statute imposes a burden to prove the effect of the respondent's incompetence on one party, that burden should rest with the respondent. According to the State, unless the respondent testifies, "only the [respondent] and his counsel would have direct, personal knowledge" of the extent to which his limitations affected his ability to assist counsel in his defense. It further contends that placing this burden on the State would potentially require calling the respondent's attorney as an essential witness, thereby implicating privilege issues.

[¶20] We are not persuaded that the legislature intended to impose this burden on the respondent. Nothing in the statute's plain text suggests this proposition. See RSA 135-E:5, II. This argument also fails to consider that the State bears the burden of proving a criminal defendant's competency to stand trial, see State v. Moncada, 161 N.H. 791, 795 (2011), which similarly requires the State to discover and prove facts that are more easily accessible to defense counsel. Moreover, as the State acknowledged at oral argument, there are no barriers to the State obtaining an expert evaluation addressing the factors enumerated in RSA 135-E:5, II, such as the respondent's "ability to assist his or her counsel by recounting the facts, identifying witnesses, testifying in his or her own defense, or providing other relevant information or assistance to counsel or the court." RSA 135-E:5, II. Lastly, even if there are practical challenges to proving that the respondent's incompetence did not substantially interfere with the ability to assist counsel, our construction of the statute provides another avenue for the State to meet its burden of proving that the person's limitations did not substantially impact the hearing — by showing "that the strength of the state's case . . . is such that the person's limitations could not have had a substantial impact on the proceedings." Id.

[¶21] Having concluded that RSA 135-E:5, II imposes a burden of proof on the State with respect to the effect on the hearing of the respondent's incompetence, we now consider the applicable standard of proof. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Ploof, 162 N.H. at 623 (quoting Addington v. Texas, 441 U.S. 418, 423 (1979)).

[¶22] RSA 135-E:5, II is a civil statute. In a civil action, the standard of proof by which the plaintiff must generally prove its case is by a preponderance of the evidence. See Dunlop v. Daigle, 122 N.H. 295, 298 (1982). The language of RSA 135-E:5, II, however, sets forth a higher standard of proof in some respects. It requires that the State must meet its ultimate burden by proving beyond a reasonable doubt that the respondent committed the charged acts. See RSA 135-E:5, II. As explained above, an element of the State's case is proof that the person's limitations did not substantially interfere with the outcome of the proceedings, which the State can prove in one of two ways: (1)

by showing that the person’s incompetence did not substantially interfere with the person’s ability to assist counsel; or (2) by showing that its case is so strong “that the person’s limitations could not have had a substantial impact on the proceedings.” Id.

[¶23] As to the first method of proving this element, RSA 135-E:5, II requires that the trial court make a factual finding as to whether the person’s incompetence substantially interfered with the person’s ability to assist counsel. See id. The statute is silent as to the standard of proof applicable to this finding. See id. When a statute is silent with respect to the applicable standard of proof, factual findings in a civil proceeding need only be proven by a preponderance of the evidence. In the Matter of Sutton & Sutton, 176 N.H. 709, 712-13 (2024); 2024 N.H. 39, ¶8. Accordingly, we conclude that the preponderance of the evidence standard applies to this finding. See id.; Dunlop, 122 N.H. at 298.

[¶24] As to the second method of proving this element, the statute requires that the State show “beyond a reasonable doubt that the acts occurred, and that the strength of the state’s case . . . is such that the person’s limitations could not have had a substantial impact on the proceedings.” RSA 135-E:5, II (emphases added). We construe this passage to mean that the State bears the burden of proving beyond a reasonable doubt that the strength of its case “is such that the person’s limitations could not have had a substantial impact on the proceedings.” Id.

[¶25] Thus, we hold that in order for the State to meet its ultimate burden under RSA 135-E:5, II of proving that the person committed the charged acts, the State must: (1) prove beyond a reasonable doubt that the charged acts occurred; and either (2) prove by a preponderance of the evidence that the person’s incompetence did not substantially interfere with his or her ability to assist counsel at the hearing; or (3) prove beyond a reasonable doubt that the evidence that the charged acts occurred is so strong “that the person’s limitations could not have had a substantial impact on the proceedings.” Id.

[¶26] With this statutory framework in mind, we now consider whether the trial court committed reversible error with respect to the 2023 and 2024 Hearings. The interpretation of a trial court order presents a question of law for us to decide. State v. Hinkley, 174 N.H. 414, 421 (2021). As the appealing party, the respondent bears the burden of demonstrating reversible error. See In the Matter of Nadeau & Nadeau, 177 N.H. 126, 136 (2024); 2024 N.H. 68, ¶27. “Within the context of a non-criminal appeal, this generally requires the appealing party to demonstrate how the alleged error affected the outcome of the case, regardless of whether the error is grounded upon a constitutional or statutory right.” Id. at 136-37; 2024 N.H. 68, ¶27 (quotation omitted).

[¶27] We conclude that the respondent has demonstrated reversible error with respect to the 2023 Hearing. As noted above, the respondent — not the State — introduced evidence concerning the effect of the respondent’s incompetence at the 2023 Hearing. Had the trial court placed the burden of proof on the State consistent with our construction of RSA 135-E:5, II, the respondent may not have offered such evidence. We cannot speculate about what evidence the State would have introduced or whether the trial court would have reached the same decision in the absence of the respondent’s evidence and the burden of proof. Because the respondent was prejudiced by the trial court’s failure to properly allocate the burden of proof with respect to the effect of the respondent’s incompetence, we must vacate the order resulting from the 2023 Hearing and remand for further proceedings consistent with this opinion.

[¶28] On the other hand, we conclude that the respondent has not demonstrated reversible error with respect to the 2024 Hearing. There, in the trial court’s alternative analysis, it assumed that the respondent’s limitations substantially interfered with his ability to assist counsel. It then found that the strength of the State’s case was such that the respondent’s incompetence could not have had a substantial impact on the proceedings.

[¶29] Notwithstanding the trial court’s erroneous pre-hearing ruling that neither party bore a burden of proof with respect to the impact of the respondent’s incompetence, its alternative analysis was consistent with our interpretation of the statute in that the trial court placed the burden on the State to prove beyond a reasonable doubt that its case was so strong that the respondent’s incompetence could not have had a substantial impact on the outcome of the hearing. The trial court recounted the State’s “strong” evidence — including DNA evidence that “alone establishe[d] beyond a reasonable doubt” that the respondent was present at the scene of the assault — before finding that the State had proved beyond a reasonable doubt that the respondent committed the charged acts. The trial court then “easily” concluded that the strength of the State’s case foreclosed the respondent’s incompetence from having had a substantial impact on the proceedings. Based on our reading of the trial court’s order, we conclude that the trial court found that the State proved beyond a reasonable doubt that the strength of its case was “such that the person’s limitations could not have had a substantial impact on the proceedings.” RSA 135-E:5, II. This determination was consistent with the second method by which the State can prove that the person’s limitations did not substantially interfere with the outcome of the proceedings as outlined in this opinion. Because the respondent has not demonstrated reversible error, we affirm the trial court’s order following the 2024 Hearing. See Matter of Nadeau, 177 N.H. at 136-37; 2024 N.H. 68, ¶27.

[¶30] If the legislature disagrees with our interpretation of RSA 135-E:5, II, it is free to amend the statute as it sees fit within constitutional bounds.

Attorney General v. Hood, 177 N.H. 176, 188 (2025); 2025 N.H. 3, ¶31. Any issues the respondent raised in his notices of appeal but did not brief are deemed waived. See State v. Blackmer, 149 N.H. 47, 49 (2003).

Affirmed in part; vacated in part;
and remanded.

MACDONALD, C.J., and DONOVAN and GOULD, JJ., concurred.