State of New Hampshire
Supreme Court

NO. 2022-0067

2022 TERM

DECEMBER SESSION

State of New Hampshire

v.

Odessa Lemieux

RULE 7 APPEAL OF FINAL DECISION OF THE
MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT/APPELLANT, ODESSA LEMIEUX

December 14, 2022

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STATEMENT OF FACTS

I. Mother Busy With Four Children at Home

Odessa Lemieux, who was 29 at the time of events here, grew up and went to high school in Louisiana. Odessa has twin daughters, L and R,[1] whose father left when they were infants. She also has two additional children a few years younger, D and M (the youngest) whose father Odessa divorced and is not present. Working in a nightclub in 2015, Odessa met Tailor, who hailed from New Hampshire, but was stationed at a military base in Louisiana. INTERVIEW at 2, 9, 10-12, 17.[2]

In 2016, temporarily entrusting the children to her mother, Odessa and Tailor traveled north, made residential arrangements, and then relocated with the children to New Hampshire. INTERVIEW at 9-11; *Day-1* at 59-60.[3] The family initially lived in Deerfield with Tailor's parents, for a time in a small place in Pittsfield, and then in a larger seasonal rental house in Newbury. Odessa and Tailor got married in 2017. INTERVIEW at 3, 12-15; *Day-1* at 62; *Arraignment Hrg*. (June 15, 2018) at 2-3.

Tailor was a tow-truck driver who worked long hours out of the house, leaving in the early afternoon and coming home after midnight "basically every day." INTERVIEW at 21; *Day-1* at 74. Odessa stayed at home with the four

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[1]Out of respect for the privacy of minors, and because this brief is a public document, the names of children are abbreviated herein. References to them are to the initial of their first names: "L," "R," "D," and "M." Their full names are readily discernible from the record. M was the only one to testify.

[2]The citation to "Interview" refers to an interview Odessa Lemieux gave to the State's Investigator, which took place at the Newbury Police station on June 14, 2018, shortly after her arrest. An audio recording of the interview was played to the jury during trial. *Day-2* at 147. A transcript of the interview is contained in the appendix beginning at page 4. Citations to the transcript are to the page number of the transcript itself.

[3]The trial transcript is cited to its day and page. The first day, November 3, 2021, is cited herein as *Day-1*; the second day, November 4, 2021, is cited as *Day-2*.

children, and began home-schooling them, She normally served the children breakfast and dinner, but often skipped lunch when it was not practical. She also tried starting a business, which was not successful. Her typical day was full. *Day-1* at 63-64, 68, 71, 74-75; *Day-2* at 146, 156; INTERVIEW at 16, 18-22.

The twin girls, L and R, being 13, caused daily frustration for Odessa. D and M were also difficult; one night they stole cash from their parents' wallets and escaped through a window, ending up in the custody of the police. Odessa regarded the children as poorly-behaved at home. INTERVIEW at 39-41.

II. Children Developed Urination Problems Which Mother Tried to Alleviate

Due to the long move away from Odessa's family, medical or genetic causes, or nobody-knows-why, several of the children developed urinary issues. *Day-2* at 146, 156-59; INTERVIEW at 33, 45. D sometimes urinated in his bed, even before they relocated to New Hampshire. He appeared to grow out of it, but started again after the move. He told his parents it was because he was not able to hold it, or because he wanted to. *Day-2* at 156-57; INTERVIEW at 33-34. Then R began similar behavior. She would get up from bed to go to the bathroom, but then just urinate on the floor because, she said, she could not hold it. INTERVIEW at 28-29. Her twin L would refrain from urinating, which Odessa believed was an excuse to avoid doing her schoolwork. INTERVIEW at 32.

Odessa employed many stratagems to address these behaviors. On advice of a doctor, she gave the children cranberry juice and tried medication. *Day-2* at 157. Because the doctor suggested that some children do not fully release their bladder, Odessa scheduled regular breaks, making sure they went to the bathroom every two to three hours. *Day-1* at 40; *Day-2* at 157-58; INTERVIEW at 31. Odessa also instituted a permission-to-use-the-bathroom rule, in an attempt to mimic school routines. *Day-2* at 146; INTERVIEW at 30.

Odessa found "Pullups" at Walmart; she regularly put them on D, and once on R. INTERVIEW at 32-33.

When the children urinated inappropriately, Odessa punished them. She would issue a reprimand, require the child help clean up, INTERVIEW at 33-35, spank them, have them sit on their knees for 15 minutes as her mother once did to her, INTERVIEW at 38; *Day-1* at 107, and occasionally withhold a meal. *Day-1* at 66-67, 75.

III. Mother Took Children to the Doctor Looking for Solutions

On May 30, 2018, finding these techniques ineffective, Odessa appeared at a scheduled a doctor's appointment, and she and all four children met with a pediatric nurse practitioner. *Day-1* at 18-20, 22, 34, 43-44, 67, 76-77; *Day-2* at 157; INTERVIEW at 24, 29, 42.

The nurse noted the children were in a low weight percentile and that they complained of constipation, *Day-1* at 22-30, so conducted examinations but found the children negative for gastrointestinal symptoms, diabetes, or thyroid problems. *Day-1* at 22-23, 27, 40-41. Odessa explained that food was plentiful and that she had tried fiber cereal to reduce constipation. *Day-1* at 27, 35.

The nurse persisted, and asked the children about their emotional health. *Day-1* at 20, 34, 45. She learned from all four that Tailor may have been conducting himself inappropriately with the children, *Day-1* at 28-29, 45, 68-69, 77; INTERVIEW at 42, and as her legal duty required, she reported the situation to DCYF. *Day-1* at 29-30.

When Odessa and the children arrived home, the Newbury police and a DCYF social worker were already there. *Day-1* at 99-103, 112-15. Noting the

children's leanness and some bruising, they were concerned about abuse.[4] The DCYF worker and the police questioned the children, and then placed them that day with Tailor's parents. *Day-1* at 71, 88-89, 104 106-108, 110, 115; *Day-2* at 142-43, 151-53, 158.

The police arrested Odessa, acquired a search warrant, and they and the social worker entered and searched the house. *Day-1* at 120. Downstairs there was one bedroom with an attached bathroom, which was shared by L and R. There were three bedrooms upstairs: one shared by the parents, a second was D's, and the third M's. *Day-1* at 63, 121, 124.

[4]There is no allegation that Odessa abused the children. Tailor has been charged with 25 counts and his trial is pending. *See State v. Tailor Lemieux*, Merr.Cnty.Super.Ct. Nos. 217-2018-CR-511 and 217-2018-CR-771.

STATEMENT OF THE CASE

I. Allegations and Trial

In June 2018, two weeks after the doctor's appointment, Odessa was interviewed by a State investigator. The next day Odessa was charged with two crimes. The first, witness tampering, concerned her communications with the children on the ride home from the doctor's appointment. A jury acquitted her.

In the same proceeding, she was also charged with child endangerment, RSA 639:3, I,[5] the topic of this appeal. The misdemeanor complaint alleged that "[b]etween November 1, 2017 [and] May 30, 2018," Odessa Lemieux:

> knowingly endanger[ed] the welfare of four children … by restraining the children in their bedrooms for multiple hours at night by using a tether implement around the door knob and wrapped around nails so that they were restrained in their rooms with no means of a safe escape.

COMPLAINT (June 18, 2018), *Addendum* at 27.

Trial by jury occurred over three days in November 2021. Testifying were the nurse practitioner, the DCYF social worker, the State's investigator, two Newbury police officers, and M – who was 10 at the time of trial in 2021, and related her experiences in 2018 when she was "like six or seven." *Day-1* at 65. The State entered several photo exhibits, and the audio of the State's interview of Odessa, which was played to the jury. *Day-2* at 147.

[5]RSA 639:3, I provides: "A person is guilty of endangering the welfare of a child … if he knowingly endangers the welfare of a child under 18 years of age … by purposely violating a duty of care, protection or support he owes to such child …, or by inducing such child … to engage in conduct that endangers his health or safety."

II. Testimony of Nurse, Social Worker, Officer, and Investigator

Pediatric Nurse Practitioner Danielle Lambert testified that Odessa and the four children visited her office in May 2018 for concerns about R's and D's recurring urination difficulties. *Day-1* at 18-19, 22. She described her observations and the tests she performed. *Day-1* at 22-30, 35, 40. Lambert recounted her questions about the children's emotional health, their responses regarding Tailor's disciplinary methods, her resulting concerns, and her report to DCYF. *Day-1* at 20, 28-29, 34, 45.

DCYF Child Protection Officer Sherri Williams testified that she received a call from the nurse practitioner, called the police for assistance, and went to the Lemieux's home. *Day-1* at 100-03. When Odessa and the children arrived a few minutes later, she spoke to them, and then entered the house with the police. *Day-1* at 102-04. Williams found adequate food in the kitchen cupboards, refrigerator, and freezer. *Day-1* at 105-06, 110. She also noticed a smell of urine in the children's rooms. *Day-1* at 106. Williams saw that the closets in the children's room were locked and blocked by furniture, though Odessa explained that was because the house was a seasonal rental and the owners' belongings were stored out of the children's reach. *Day-1* at 106, 111, 126; INTERVIEW at 36.

Newbury Patrol Officer Thomas Harriman testified he received a call from DCYF, went to the Lemieux's house, waited for them to arrive, and later accompanied the children to the police station. *Day-1* at 112-15.

County Attorney Investigator Jennifer Adams testified that she conducted Odessa to the police station, helped interview the children as part of DCYF's investigation, and later interrogated Odessa as part of the criminal investigation. *Day-2* at 140-44. An audio recording of that interview was played in full to the jury at the end of trial, *Day-2* at 145-46, 147, 150-51, and Adams repeated some of its contents. *Day-2* at 146-59. Adams suggested that Tailor

may have been controlling or abusing both Odessa and the children, and that she did not believe Odessa's denial of those suspicions. *Day-2* at 158-59.

III. Police Testified About Holes and Fabric

Newbury Police Chief Bradley Wheeler testified that he prepared and executed a search warrant of the Lemieux's home on June 14, 2018. He described the locations of bedrooms and bathrooms in the house, noted that the closets were locked and there was an odor of urine in the children's rooms. *Day-1* at 118-26.

Wheeler noticed, and offered photographs of, nail-size holes in the doorframes of the children's rooms, *Day-1* at 121-22, 124 (downstairs); *Day-1* at 125-26 (upstairs); PHOTOS, *exhibits* 1A-D, *Appx*. at 55-58. He repeatedly speculated the holes had once contained a "screw or nail," but offered no evidence of screws or nails. *Day-1* at 121, 124, 125, 126. The holes had been repaired, and he saw putty and related tools in the living room, *Day-1* at 120-28; PHOTOS, *exhibits* 1A, 1B, 1D, *Appx*. at 55-57, although Odessa explained Tailor had been fixing up the house because it was only a seasonal rental and the lease was ending soon. INTERVIEW at 37.

Wheeler observed a pole mechanism outside of the upstairs bathroom door, which he speculated would have been able, once engaged, to lock the bathroom door. *Day-1* at 121-123; PHOTOS, *exhibits* 1E, 1F, *Appx*. at 58. He also found "two pieces of black fabric" in the parents' bedroom. *Day-1* at 126; PHOTO, *exhibit* 1C, *Addendum* at 28.

IV. M's Bedroom Door was Locked "Sometimes"

M testified that about three years before trial, when she was "six or seven," *Day-1* at 65, there were times when her parents locked her bedroom door. *Day-1* at 64-65, 74.

M could not see the lock, knew nothing about how her door was locked, and recalled no holes or anything strange about the door frames. *Day-1* at 65. Rather, she said "the doors were tied," *Day-1* at 64, but that she never actually saw how they were fastened shut. *Day-1* at 65. While M was asked about her "typical" day, *Day-1* at 64, she did not testify about how often her door was locked. At most she said she "sometimes" tried to open it. *Day-1* at 72.

M said that if she had to use the bathroom when the doors were locked, she would have to wait until morning. *Day-1* at 66-67, 82-83. She corroborated that she and the other children had urination incidents, which might result in parental discipline. *Day-1* at 66-67.

V. Conviction and Sentence

At the close of the State's case, Odessa moved to dismiss, which was denied. The jury acquitted Odessa of witness tampering, but found her guilty of misdemeanor child endangerment. *Day-2* at 195-96; ORDER FOLLOWING VERDICT (Nov. 4, 2021), *Appx*. at 3. In January 2022, the court sentenced Odessa to six months in jail. MITTIMUS (Jan. 6, 2022), *Addendum* at 23. She is currently on bail pending appeal.

SUMMARY OF ARGUMENT

Odessa Lemieux was alleged to have endangered her children by tying their bedroom doors shut. The child witness did not aver, however, that her door was locked on any regular basis, or for any purpose other than occasional parental discipline. In addition, the State alleged that the child's door was kept shut with a tie, but adduced no proof of tying. The evidence was therefore insufficient to meet the offense, and this court should reverse.

ARGUMENT

I. Evidence Was Insufficient to Show that Odessa Did Anything Beyond Appropriate Parenting and Discipline

The New Hampshire child endangerment statute provides:

> A person is guilty of endangering the welfare of a child … if he knowingly endangers the welfare of a child under 18 years of age … by purposely violating a duty of care, protection or support he owes to such child.

RSA 639:3, I. A duty of care is owed by parents to their children. *State v. Yates*, 152 N.H. 245 (2005).

Child endangerment does not require proof of "risk of death or serious injury." To convict, the State must show the defendant's behavior "created an actual and significant risk of injury" to the child. *In re N.K.*, 169 N.H. 546, 553 (2016). Endangerment is a factual determination in "the totality of the circumstances." *Id* at 552.

> [A]mong the factors to be considered are: (1) the gravity and character of the risk; (2) the degree of accessibility of the offender; (3) the length of time that the child was exposed to the risk; (4) the child's age and maturity; and (5) the protective measures taken by the offender, if any.

Id. (quotations and citations omitted).

Applying these factors to Odessa's case, it is apparent the State did not offer sufficient evidence, and this court should reverse.

First, the risk was not particularly grave. At most, the harm was that the children would urinate in their beds. While that may be unsanitary if left unaddressed, Odessa noted her constant cleaning and that she required the children help clean up when they urinated inappropriately. This indicates that while there was an odor of urine in the bedrooms, hygiene was being addressed.

Second, as to the character of the risk, "'endanger' means more than a

threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment." *Interest of J.W.*, 645 S.W.3d 726, 748 (Tex. 2022) (termination of parental rights) (quotations and citations omitted). This court has specified that under the statute, endangerment "means to bring into danger or peril of probable harm or loss: imperil or threaten danger to." *In re N.K.,* 169 N.H. at 551. In Odessa's case, the State offered no evidence, or even a suggestion, that the children faced any probable harm or loss as a result of being kept in their rooms at night. There was nothing like the violent abuse as in *State v. Bortner*, 150 N.H. 504 (2004) and *State v. Portigue*, 125 N.H. 352 (1984), nor the injury obviously risked by driving drunk with a child in the car, *State v. Wall*, 154 N.H. 237 (2006), nor something like firing a high-powered rifle in the direction of an occupied building. *Hale v. State*, 654 So. 2d 83, 84 (Ala. Crim. App. 1994).

Third, there was no proof that M was subject to being locked in her room for significant lengths of time. It was at most overnight. Moreover, in her testimony, M did not distinguish between a single incident, a series of occasional incidents, or a permanent status. She did not say the doors were locked every night, that it was a regular occurrence, or even that it was frequent. At most she said she "sometimes" tried to open the door.

Fourth, the children easily circumvented the supposedly endangering condition – they urinated in bed. That differs from a four-year-old child who, effectively abandoned by his drunk babysitter, was incapable of self-care and at risk of exposure to dangerous substances. *In re N.K.*, 169 at 546.

Fifth, locking the children's doors was itself the "protective measure" taken by the defendant. Securing the doors was intended to address what Odessa perceived as misbehavior.

Sixth, while it does not take much to imagine the harm a four-year-old might encounter unattended by a drunk babysitter, *In re N.K.*, 169 at 553 (child

"could easily have been harmed by either ingesting the alcohol readily within reach, or slipping on the floor slick with beer and littered with ashes and beer cans"), any harm to M and the other children is "speculative and hypothetical." *Id.*

In Odessa's case, the children developed urination problems, at times wilfully refusing to relieve themselves, at others purposely relieving themselves on the floor. Odessa tried many remedies, including diet, medication, scheduled bathroom breaks, and Pullups. Odessa's consultation with a doctor was a further attempt to correct the predicament.

After other methods failed, Odessa regarded the children's urination problems as a behavioral issue. She then disciplined them accordingly – by reprimands, making them clean up, requiring time-outs on their knees, and withholding a meal. Locking the children's bedroom doors from time-to-time was a reasonable way for Odessa to hopefully enforce scheduled urination, punish misbehavior, and prevent escape, which had occurred at least once. There has been no allegation that these chastisements harmed the children in any way.[6] A locked door alone, without any other evidence indicating maltreatment, is not sufficient evidence of endangerment. *See, e.g., State v. Crowdell*, 487 N.W.2d 273 (Neb. 1992) (endangering conviction upheld where child locked in dark, drafty, freezing, unheated workshop, unnourished, every night for two to five years).

Accordingly, the State did not show that Odessa "created an actual and significant risk of injury" to the child, *In re N.K.*, 169 N.H. at 553, and this court should reverse.

In addition, parents have authority to discipline their children, provided

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[6]Because the jury acquitted Odessa on the witness tampering charge, any statements she may have made to the doctor or children regarding Tailor's conduct is not relevant to this appeal.

it is without malice and is reasonable under the circumstances in method, proportion, and duration. RSA 627:6 ("A parent, guardian or other person responsible for the general care and welfare of a minor is justified in using force against such minor when and to the extent that he reasonably believes it necessary to prevent or punish such minor's misconduct."); *Lovan v. Dep't of Children & Families,* 860 A.2d 1283, 1289 (Conn.App. 2004) (permissible corporal punishment of child); *see generally* 59 AM. JUR. 2d *Parent and Child* § 25 (discipline). Parental authority over children's discipline is constitutionally based. U.S. CONST., amds. 8 & 14; N.H. CONST., pt. 1, arts. 2 & 15; *Meyer v. Nebraska*, 262 U.S. 390 (1923) (parents have "fundamental" right to control child's upbringing); *Ingraham v. Wright*, 430 U.S. 651 (1977) (public school as *parens patriae* may use corporal punishment); *Troxel v. Granville*, 530 U.S. 57 (2000) (state cannot enforce grandparent visitation over objection of parent); *In re Kurowski*, 161 N.H. 578, 589 (2011) (constitutional "presumption that fit parents act in the best interests of their children"); *Guardianship of Raven G.*, 165 N.H. 70 (2013) (person seeking guardianship of child over parent's objection must overcome constitutional presumption); *see generally,* Cynthia Godsoe, *Redefining Parental Rights: The Case of Corporal Punishment*, 32 CONST. COMMENT. 281 (2017); Deana A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 AM. U. L. REV. 447 (2002).

Because the State's evidence was insufficient to prove beyond a reasonable doubt that M or the other children were regularly or routinely restrained with a purpose to violate Odessa's parental duty of care, this court should reverse.

II. Evidence Was Insufficient to Show that the Doors Were Tied Shut to Purposely Endanger the Children

The State's complaint alleged that Odessa "restrain[ed] the children in their bedrooms … by using a tether implement around the door knob and wrapped around nails." COMPLAINT, *Addendum* at 27.

The only testimonial evidence that the children's doors were locked by tying was from M. She testified that "the doors were tied." She admitted, however, that she did not ever see any ties, did not see how the doors were locked, and did not know by what mechanism her door would not open.

Separately, the State offered a picture depicting a black splotch on a shelf next to what appear to be bottles of cosmetics and a blue box. PHOTO, *exhibit* 1C, *Addendum* at 28. In his testimony, Chief Wheeler called the splotch "black fabric." The photo – which was never authenticated pursuant to the rules of evidence – has a hand-written inscription in the margin: "Black ties - parents bedroom closet."[7]

The fabric itself was not an exhibit, and no witness described it. The fabric could have been the flimsiest of silk or the sturdiest of canvas. It may have been tiny pieces or great swaths, either of which would be unsuited for tethering a door. Perhaps it was a woman's dress, a man's cravat, or – as it was found in a bedroom – bed linens.

Further, there was no testimony to connect the black fabric to fastening of doors. The only potential correlation was the word "ties" in the inscription on the margin of the photograph. That apparently was written either by the prosecutor in an unethical effort to mislead the jury, or surmised by the police

[7]Chief Wheeler testified he "recognized" the photo. But he was not asked who took the picture, when it was taken, whether it accurately depicted what it purported to show, or who wrote the inscription. *See* N.H.R.EVID. 901. The photo was published to the jury nonetheless. *Day-1* at 126.

who failed to make any actual connection in testimony. Although the photo was published to the jury, the inscription must be discounted as unreliable. *See Northern New England Telephone Operations, LLC v. Town of Acworth*, 173 N.H. 660, 676 (2020) (exhibit without background testimony reliable only because opponent stipulated to admissibility). How M was educated that her door was shut with ties is unanswered in the record.

There is also no evidence to support the State's surmise that the doors were locked by use of "screw or nail" in the filled holes in the doorframes. The State did not produce any actual screw or nail, nor a photograph of one. There was no evidence that the holes in the doorframes ever contained a screw or nail, rather than, for example, a thumbtack.

Beyond a mention in its opening statement to the jury, the State offered nothing to show that doors were fastened using alleged tethers, screws, or nails. *Day-1* at 10; *State v. Martin*, 138 N.H. 508, 516 (1994) ("opening statement is not evidence").

Where the State has alleged a means-and-manner of committing an offense, it must prove the means-and-manner alleged. *State v. Grice*, 515 N.W.2d 20, 22-23 (Iowa 1994)("If the State specifies one way of committing a crime … the offense must be proved to have been committed in the way charged."). Even if some variance between the means-and-manner alleged and the evidence actually adduced is permissible, *Mitchem v. State*, 685 N.E.2d 671, 677 (Ind. 1997) (allegation that crime was committed with a handgun but evidence showed defendant used a rifle); *State v. Scarberry*, 418 S.E.2d 361 (W. Va. 1992); (stolen property belonged to someone different than alleged), here the State did not prove any *other* manner by which Odessa may have endangered the children.

There are numerous innocent explanations for small filled holes in doorframes, and for black fabric in Odessa's bedroom. Doors can be secured

without ties or tethers, and there is no apparent connection between the holes and the fabric, beyond conjecture by Chief Wheeler. The jury must infer innocence when circumstantial evidence can be innocently explained, *State v. Lorton*, 149 N.H. 732, 733 (2003) ("When the evidence presented is circumstantial, it must exclude all rational conclusions except guilt in order to be sufficient to convict."). Accordingly, the evidence was insufficient to prove beyond a reasonable doubt that M or the other children were endangered by being restrained in the only manner alleged, and therefore this court should reverse.

CONCLUSION

Because there was no evidence that the children were restrained on a regular basis, by unreasonable means, for reasons that were not a valid exercise of a mother's duties, or in the manner alleged, this court should reverse.

Respectfully submitted,

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Dated: December 14, 2022

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CERTIFICATIONS & REQUEST FOR ORAL ARGUMENT

A full oral argument is requested.

I hereby certify that the decision being appealed is addended to this brief. I further certify that this brief contains no more than 9,500 words, exclusive of those portions which are exempted.

I further certify that on December 14, 2022, copies of the foregoing will be forwarded to the Office of the Attorney General, via this court's e-filing system.

Dated: December 14, 2022

Joshua L. Gordon, Esq.

ADDENDUM