THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2013-0248

State of New Hampshire

v.

Therese Goddu

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

BRIEF FOR THE DEFENDANT

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(15 Minutes Oral Argument)

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QUESTION PRESENTED

Whether the trial court erred in failing to instruct the jury that an "attempt to drive" under RSA 265-A:2 requires a purposeful mens rea.

Issue preserved by defense motion, A 7-10, argument, T 7-12, court's ruling, T 12, question from jury, A 11; T 281, proposed answer from the defense, T 281, and the trial court's response. A 12; T 282.*

* Citations to the record are as follows:
"A" refers to the Appendix to this brief;
"T" refers to the consecutively-paginated transcript of the jury trial held on November 14 and 15, 2012.

STATEMENT OF THE CASE

Therese Goddu was charged with one count of driving under the influence as a subsequent offense. A 1-2; T 21. The body of the complaint alleged that Goddu "attempt[ed] to drive a vehicle." Id. She stood trial on November 14 and 15, 2012. T 1, 106. The jury found Goddu guilty. T 282-284.

The trial court (Kissinger, J.) sentenced Goddu to 180 days in the house of corrections, 160 days of which was suspended for a period of three years. A 5. Further, the Court imposed a $750.00 fine, suspended Goddu's privilege to drive in New Hampshire for three years, and ordered her to complete the Impaired Driver Care Management Program (IDCMP). A 4-5. The Court also ordered Goddu to perform twenty-five hours of community service. A 6.

STATEMENT OF FACTS

A. Testimony at trial.

On July 14, 2011, the Wal-Mart store in Hinsdale closed due to a power outage. T 30, 69, 85. Wal-Mart's policy during power outages is that customers are not permitted in the store. T 31, 70-71, 87. In furtherance of this policy, employees were stationed at the entrance to the parking lot and at the store entrances in order to turn customers away. T 32, 71, 87.

At 11:20 a.m., store manager Gayle Ann Brodean saw a female customer, who was later identified as Therese Goddu, inside the store. T 35, 44-45. Brodean observed Goddu walk toward the restrooms, "kind of swaying from side to side." T 35-36. As Goddu was about to enter the men's restroom, Brodean approached her and told her that the store was closed. T 36. Goddu asked if she could use the restroom, and Brodean agreed. Id. Goddu's speech was fine, although Brodean thought that there was "some confusion." T 37. Brodean guided Goddu into the women's restroom with a flashlight because the stalls were "completely dark." T 36-37.

Brodean thought that Goddu was taking a "considerable length of time," so she asked Goddu if she was okay, to which Goddu replied, "yes." T 38. Brodean exited the restroom to give Goddu privacy. Id. Melissa Buccieri, the asset protection manager, and Anne Lang Boucher, a supervisor, joined Brodean outside the women's restroom. T 65, 73, 84, 90. The three checked on Goddu, and found her on the floor in the restroom stall. T 38, 73-74, 91. Boucher testified that Goddu's pants and underwear were around her ankles.

T 91. They asked Goddu if she needed help, and Goddu replied that she did not. T 39, 74, 91.

They left the restroom and Brodean spoke with an assistant manager. T 39. Brodean returned to the restroom and informed Goddu that she needed to leave the store or they would call 9-1-1. Id. After a short time, Goddu exited the restroom and walked out of the store with an "irregular gait." T 40-41, 75-76, 93, 95. They were concerned about Goddu, so they followed her to the parking lot. T 41, 77-78, 96-97. Buccieri called the Hinsdale Police Department and asked them to send an officer to Wal-Mart to investigate. T 42, 77-78.

Goddu walked to a car and unlocked the driver's side door. T 43, 56-57. She got into the driver's seat, and laid down across the front passenger seat. T 42-43, 57-58, 97. Goddu was alone in the car. T 42, 97. She did not start the car, open the windows, or turn on the lights. T 58, 81, 101-102.

Brodean, Buccieri, and Boucher watched the motionless car for ten to fifteen minutes until the police arrived. T 44, 80-81, 98; see also T 208-209 (dispatch log indicated sixteen minutes elapsed between initial call and police arrival); but see T 109, 122 (Hinsdale Police Chief Todd Faulkner's recollection that it took "five minutes, maybe a little longer" to respond). Brodean was five to six feet away from the driver's door window, and observed Goddu "just lying there." T 44. Brodean did not see Goddu with keys. Id.

Faulkner arrived and approached the car. T 127. He testified that he saw Goddu in the driver's seat "kind of leaned over toward the center console

looking at a set of keys very closely. . . ." T 128-129. Faulkner described Goddu as leaning over more than forty-five degrees. T 129-130, 226. When Faulkner knocked on the window, Goddu turned, looked at him, and opened the door. T 131. Faulkner observed that Goddu's face was "flushed red" and that her eyes were "glassy and bloodshot." T 131-132. Faulkner smelled "a sweet aroma of what [he] believed . . . to be of an alcoholic beverage. . . ." T 132.

Although Faulkner described Goddu's speech as "slurred," she was cooperative with him. T 133. While Faulkner spoke to Goddu, she drank a small bottle of orange juice and some Diet Coke. T 146, 195. Faulkner asked Goddu about her medical history, and she informed him that she was a diabetic. T 145-146, 194. Faulkner requested an ambulance, which arrived ten to fifteen minutes later. T 146. After the EMTs arrived and spoke with Goddu, she got out of the car. T 151. She walked to the ambulance and got inside the back with the EMTs. T 153. She remained inside the ambulance for about fifteen minutes. T 154.

After Goddu stepped out of the ambulance, Faulkner spoke with the EMTs, who then drove away. T 155. Faulkner requested that Goddu submit to field sobriety testing, and Goddu agreed. T 156. According to Faulkner, Goddu failed all three tests. T 172, 176, 184, 188, 227. Faulkner then arrested Goddu, and read her an Administrative License Suspension form. T 189. Goddu refused to submit to a breath test. T 191-192.

Faulkner testified that he never witnessed any erratic operation; indeed, he never observed the car in motion at all. T 230. The car was not running, nor were Goddu's hands on the steering wheel. T 132, 227. Moreover, Faulker testified that there was no key in the ignition. Id.

B. Requested jury instruction.

Goddu filed a pretrial motion requesting that the Court provide the following instruction to the jury:

Attempt

> The defendant has been charged with an attempt to commit the crime of driving while intoxicated. To prove that the defendant attempted to commit the crime of driving while intoxicated, the state must prove beyond a reasonable doubt that the defendant intended to drive a vehicle while she was intoxicated. That is, the state must prove that the defendant acted with a purpose that the crime of driving while intoxicated be committed, and that the defendant took a substantial step toward the commission of the act of driving a vehicle, while the defendant was intoxicated.

A 7; T 7-8. The State objected. T 9-12. After hearing argument, the Court refused to provide the requested instruction, concluding that "there is no mental state component for this offense. It's a strict liability offense." T 12.

At the close of the case, Goddu renewed her request for an instruction that included a mental state component, T 237, and the Court again denied such an instruction. T 240. Nevertheless, during the State's closing, the State argued

> [defense counsel] says it's not enough. When is it enough? Should the police have shown up, let her start the car? Should they have let her drive away?

> Should they have let her idle there for a while, just so we have enough to convict her? The chief did exactly what he should have – he saw a danger, he made sure it wasn't medical, and he stopped someone from driving a vehicle. All the evidence indicates that was Ms. Goddu's intent when she got into that car, to go step by step.

T 266 (emphasis added). Defense counsel objected, pointing out that the State was now arguing the law contrary to the Court's earlier ruling. Id. The State responded that

> The word intent does not trigger the law, Your Honor. It can be used in a non-law sense, as it's going to be here, because there's going to be no intent instruction. But my argument is clearly, step by step, goal to goal. The next goal is to drive the car. My intent to use that phrase is certainly not misleading.

Id. The trial court found the argument proper, and overruled the objection. T 267.

The trial court instructed the jury that "to prove that the Defendant attempted to drive while intoxicated the State must prove beyond a reasonable doubt that the defendant took a substantial step toward the commission of the crime of driving while intoxicated." T 277. During deliberation, the jury posed the following question to the trial court: "Is there a legal distinction between the words intent and attempt?" T 281; A 11. Defense counsel proposed the following answer: "Attempt means to form a conscious intent to perform an act, taking a substantial step toward the act with the intent and purpose to commit the act." T 281. Further, intent is "forming the conscious object or purpose to perform an act." Id.

The trial court refused to provide the answer proposed by defense counsel, instead answering the jury's question with the following language:

> The State is required to prove each of the elements of the crime charged beyond a reasonable doubt. To prove the element that the Defendant attempted to drive a vehicle, the State must prove beyond a reasonable doubt the Defendant took a substantial step toward the commission of the crime of driving while intoxicated.

A 12. Twenty minutes after providing this answer, the jury returned a guilty verdict. T 282-283; A 3.

SUMMARY OF THE ARGUMENT

As used in RSA 265-A:2, the phrase "attempt to drive" must be defined so as to require a purposeful *mens rea*. This conclusion finds uniform support from a broad spectrum of sources, including decisions of this Court. Moreover, a purposeful *mens rea* does not undermine the purpose of the DWI statute. Rather, it serves to separate criminality from otherwise innocuous behavior, ensuring that the conduct sought to be punished is truly culpable. Here, the trial court determined that the jury could find that Goddu "attempted to drive" without any consideration as to what her intentions were. As this ruling was erroneous, this Court must reverse.

I. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT AN "ATTEMPT TO DRIVE" UNDER RSA 265-A:2 REQUIRES A PURPOSEFUL MENS REA.

RSA 265-A:2 states, in relevant part, that "[n]o person shall drive or attempt to drive a vehicle upon any way . . . [w]hile such person is under the influence of intoxicating liquor or any controlled drug or any combination of intoxicating liquor and controlled drugs. . . ." RSA 265-A:2, I(a) (2011) (emphasis added).[1] RSA 265-A:2 does not define the word "attempt," nor is it defined in RSA Chapter 259 (entitled "Words and Phrases Defined"). Nevertheless, the phrase "attempt to drive" necessarily includes a purposeful *mens rea*. In other words, a conviction under this variant of RSA 265-A:2 requires the jury to find, among other things, that a defendant formed the conscious object to drive a vehicle. See RSA 626:2, II(a) (definition of "purposely"). As the trial court failed to properly instruct the jury as to the correct meaning of "attempt to drive," this Court must reverse.

"The purpose of the trial court's charge is to state and explain to the jury, in clear and intelligible language, the rules of law applicable to the case." State

[1] RSA 265-A:2 has been revised and recodified numerous times through the years. Two such revisions to the language, "No person shall drive or attempt to drive a vehicle upon any way" deserve mention. First, after this Court's decision in State v. O'Malley, 120 N.H. 507 (1980), the legislature recodified the motor vehicle statutes, replacing "operate" with "drive." State v. Willard, 139 N.H. 568, 570 (1995) (citing Laws 1981, 146:1) (discussing RSA 265:82, the predecessor statute to RSA 265-A:2). Second, the language "or attempt to operate" was added in 1931:

> Amend section 15 of chapter 102 of the Public Laws by inserting after the word "operate" in the first line of said section the following words, viz: or attempt to operate, so that said section as amended shall read as follows: 15. Intoxication. Any person who shall operate, or attempt to operate, a motor vehicle upon any way while under the influence. . . ."

PL 66:1 (1931). Undersigned counsel's research did not disclose any legislative history relative to the 1931 amendment.

v. Etienne, 163 N.H. 57, 70 (2011) (citation omitted). "When reviewing jury instructions, [this Court] evaluate[s] allegations of error by interpreting the disputed instructions in their entirety, as a reasonable juror would have understood them, and in light of all the evidence in the case." Id. This Court's duty is to "determine whether the jury instructions adequately and accurately explain each element of the offense," and it will reverse "only if the instructions did not fairly cover the issues of law in the case." Id. "Whether a particular jury instruction is necessary, and the scope and wording of jury instructions, are within the sound discretion of the trial court. . . ." Id. This Court reviews such decisions for an unsustainable exercise of discretion. Id. To show that the trial court's decision is not sustainable, a defendant must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of his case." State v. Lambert, 147 N.H. 295, 296 (2001) (citation and quotation omitted). However, the interpretation of a statute involves a question of law, which this Court reviews *de novo.* State v. Gardner, 162 N.H. 652, 652-653 (2011).

In matters of statutory interpretation, this Court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. Etienne, 163 N.H. at 71. "[This Court] interpret[s] legislative intent from the statute as written and [it] will not consider what the legislature might have said or add language that the legislature did not see fit to include." State v. Hayden, 158 N.H. 597, 599 (2009) (citation omitted). While this Court interprets a statute in the context of the overall statutory scheme, it will not

consider legislative history to construe a statute that is clear on its face. Id.; State v. Formella, 158 N.H. 114, 116 (2008) ("Absent an ambiguity we will not look beyond the language of the statute to discern legislative intent.") (citation omitted). RSA 265-A:2 is not ambiguous.

When a word or phrase is not explicitly defined in the statute in which it appears, this Court has often turned to one of five familiar resources: (1) other statutes, see State v. Kelley, 153 N.H. 481, 483-484 (2006) (though not defined in the Criminal Code, derivations of the word "detention" appear elsewhere in the statutes); (2) the Model Penal Code, see State v. Donohue, 150 N.H. 180, 183 (2003) (Court looks to the Model Penal Code for guidance when interpreting analogous New Hampshire provisions); (3) the common law, see Appeal of Geekie, 157 N.H. 195, 203 (2008) ("Generally, courts interpret words and phrases that are defined in the common law according to their common-law meanings, unless defined by the statute in which they appear.") (citation and emphasis omitted); (4) a legal dictionary, see In Re Estate of Wilber, ___ N.H. ___, (decided August 21, 2013) (slip op. at *7) (Black's Law Dictionary definition of the word "claim"); and (5) an English language dictionary, see State v. Mercier, ___ N.H. ___, (decided May 14, 2013) (slip op. at **5) (Webster's Third New International Dictionary definition of the word "equipped"). Goddu's interpretation of the word "attempt," as that term is used in RSA 265-A:2, finds support in all five sources.

The criminal code defines the crime of attempt as follows:

> A person is guilty of an attempt to commit a crime if, with a purpose that a crime be committed, he does or

> omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step toward the commission of the crime.

RSA 629:1, I; see also T 281. New Hampshire's attempt statute, in turn, reflects the influence of the Model Penal Code. Model Penal Code § 5.01, at 300 n.7 (1985). The drafters of the Model Penal Code recognized that the crime of attempt invariably includes a *mens rea* component. Id. at 293 (Attempt "always presuppose[s] a purpose to commit another crime. . . .").

Moreover, the Model Penal Code's inclusion of a *mens rea* component reflects the definition of attempt that existed at common law. Under the common law, attempt included "a specific intent to commit the unlawful act." Braxton v. United States, 500 U.S. 344, 351 fn. 1 (1991) (citations omitted); see also United States v. Resendiz-Ponce, 549 U.S. 102, 106 (2007) ("At common law, the attempt to commit a crime was itself a crime if the perpetrator not only intended to commit the completed offense, but also performed some open deed tending to the execution of his intent.") (citation and quotations omitted). "At common law, a person commits an attempt when, with intent to commit a particular crime, he performs an act which tends toward but falls short of the consummation of such crime." 4 Charles E. Torcia, Wharton's Criminal Law § 741, at 565 (14th ed. 1981).

This Court has stated that "[i]n enacting legislation, the legislature is presumed to be aware of the common law: [this Court] will not construe a statute as abrogating the common law unless the statute clearly expresses such an intention." State v. Hermsdorf, 135 N.H. 360, 363 (1992) (citations

and quotations omitted); see also Etienne, 163 N.H. at 74 ("We have often stated that we will not interpret a statute to abrogate the common law unless the statute clearly expresses that intent.") (citation omitted). This deference to an established common law meaning was echoed in Morissette v. United States, 342 U.S. 246 (1952):

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Id. at 263.

Still other sources provide definitions of the word "attempt." Black's Law Dictionary explains that

> [i]n statutes and in cases other than criminal prosecutions an "attempt" ordinarily means an intent combined with an act falling short of the thing intended. It may be described as an endeavor to do an act, carried beyond mere preparation, but short of execution.

Black's Law Dictionary 127 (6th ed. 1990). As used in the realm of criminal law, an attempt is

> [a]n intent to commit a crime coupled with an act taken toward committing the offense. An effort or endeavor to accomplish a crime, amounting to more than mere preparation or planning for it, which, if not

> prevented, would have resulted in the full consummation of the act attempted, but which, in fact, does not bring to pass the party's ultimate design. The requisite elements of "attempt" to commit a crime are: (1) an intent to commit it, (2) an overt act toward its commission, (3) failure of consummation, and (4) the apparent possibility of commission. . . .

Id.

Although the word "attempt" is a legal term of art with a substantial common law pedigree, its conventional usage likewise presupposes a mental state. The word "attempt" is defined in a variety of ways, although one is most relevant here. "Attempt" means

> to make an effort to do, accomplish, solve, or effect - <~ to swim> <~ a problem> - often used in venturous or experimental situations sometimes with implications of failure <I doubted at first whether I should ~ the creation of a being like myself – Mary W. Shelley>.

Webster's Third New International Dictionary 140 (unabridged ed. 2002). One cannot attempt an act without first intending to take such action. Put a different way, an action cannot be deemed an attempt unless there was an intended result.

Contrary to defense counsel's urging, the trial court did not inform the jury that an "attempt to drive" required that Goddu form "the conscious object or purpose to perform an act." T 281-282; A 12. This reading of RSA 265-A:2 arguably advances the purpose of the statute - preventing the operation of cars by persons under the influence of intoxicating liquor - to a greater extent than Goddu's interpretation. "But, as the Supreme Court has aptly observed, 'it frustrates rather than effectuates legislative intent simplistically to assume

that whatever furthers the statute's primary objective must be the law.'" State v. Dor, ___ N.H. ___, (decided August 7, 2013) (slip op. at *16) (citing Rodriguez v. United States, 480 U.S. 522, 525 (1987) (per curiam); see Brown v. Secretary of Health & Human Services, 46 F.3d 102, 108 (1st Cir. 1995)) (emphasis in original).

In State v. MacNamara, 345 A.2d 509 (Me. 1975), the court examined Maine's then-existing DWI statute, which provided, in pertinent part, that "[w]hoever shall operate or attempt to operate a motor vehicle within this State while under the influence of intoxicating liquor or drugs. . . ." Id. at 511 (citing 29 M.R.S.A. § 1312(10)). The court construed the language of the statute as "defining two distinct motor vehicle violations, namely, (1) an attempt to operate a motor vehicle, and (2) the operation of a motor vehicle in violation of the statute." Id. at 512 (citation omitted). The court explained how an allegation of attempted operation required proof of criminal intent:

> The proscribed act of operating a motor vehicle while thus impaired, per se, constitutes a violation of the statute. The offense is *malum prohibitum* and intent is not an element of the offense. However, such is not the case when dealing with a charge of attempting to operate a motor vehicle while impaired by alcohol or drugs. In the words of Mr. Justice Fellows (later Chief Justice):
>
> > Where an attempt to operate is charged, there must be an intent to commit the offense of operating. Unless the acts done were done with the intent to operate the motor vehicle while under the influence of liquor, no offense is committed. . . .
>
> Thus it is clear that the State, in charging an attempt to violate Section 1312(10), must prove an intent to

> operate, an element not essential to prove an operation in violation of the section.

Id. at 511-512 (citations and quotations omitted) (emphasis in original).

In United States v. Gracidas-Ulibarry, 231 F.3d 1188 (9th Cir. 2000) (en banc), the Ninth Circuit Court of Appeals was confronted with an analogous statute, 8 U.S.C. § 1326, which provides that "a previously deported alien who 'enters, attempts to enter, or is at any time found in' the United States without the express consent of the Attorney General is subject to a fine and imprisonment for up to two years." Id. at 1190 (citation omitted).[2] The court had previously held that entry under 8 U.S.C. § 1326 "required only a showing of general intent because it was a *malum prohibitum* regulatory offense and the statute did not otherwise specify an intent requirement for that crime." Id. (citing Pena-Cabanillas v. United States, 394 F.2d 785 (9th Cir. 1968)). However, the Gracidas-Ulibarry court recognized that

> the statutory language for the crime of attempted illegal reentry differs from the language used for an accomplished illegal reentry, because "attempt" is a term that at common law requires proof that the defendant had the specific intent to commit the

[2] 8 U.S.C. § 1326 provides, in relevant part, that

(a) [A]ny alien who—

> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless
>
> > (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or
> >
> > (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this or any prior Act, shall be fined under title 18, United States Code, or imprisoned not more than 2 years or both.

> underlying crime and took some overt act that was a substantial step toward committing that crime. Because we must assume Congress intended to incorporate the well-established common law meaning of "attempt" into § 1326 absent a contrary statutory command, we conclude the crime of attempted illegal reentry into the United States includes the common law element of specific intent.

Id. (citation omitted); see also United States v. De Leon, 270 F.3d 90, 92 (1st Cir. 2001).

Of course, in State v. Goding, 126 N.H. 50 (1985), this Court held that "the State need not allege and prove a culpable mental state in order to convict a defendant of a misdemeanor DWI offense." Id. at 53. However, the Goding Court's determination that DWI is a strict liability offense was premised on actual driving, not an attempt to drive. Id. at 51 ("The conduct prohibited by this statute, as well as those upon which the defendants' prior DWI misdeameanor offenses were based, is driving a vehicle on a public way while under the influence of alcohol and/or drugs.") (emphasis added). Goding is thus in accord with the Ninth Circuit's holding in Pena-Cabanillas, and with other cases that hold that that DWI is a strict liability offense where actual driving is concerned. See, e.g., State v. West, 416 A.2d 5 (Me. 1980).

Here, however, the State alleged that Goddu attempted to drive a vehicle. In such situations where a completed prohibited act is absent, an uncertainty arises as to the intention of the actor. "The reason for requiring specific intent for attempt crimes is to resolve the uncertainty whether the defendant's purpose was indeed to engage in criminal, rather than innocent, conduct." Gracidas-Ulibarry, 231 F.3d at 1193 (citation omitted). "This uncertainty is not

present when the defendant has completed the underlying crime, because the completed act is itself culpable conduct." Id. "When the defendant's conduct does not constitute a completed criminal act, however, a heightened intent requirement is necessary to ensure that the conduct is truly culpable." Id. (citation omitted); see also United States v. Bailey, 444 U.S. 394, 405 (1980) (regarding attempt offenses, "a heightened mental state separates criminality itself from otherwise innocuous behavior") (citation omitted).

Consideration of the underlying purpose of the DWI statutes does not compel a different result. This Court has stated "that the purpose of the DWI statutes is to prevent the operation of cars by persons under the influence of intoxicating liquor." Petition of Mooney, 160 N.H. 607, 612 (2010) (citation omitted). "The declared policy of the legislature is that intoxicated drivers are a severe threat to the health and safety of the citizens of New Hampshire and visitors from out-of-state who use our highways." Id. (citation and quotations omitted).

If reasonable articulable suspicion exists that a person is attempting to drive a vehicle while he is impaired, a police officer may undertake an investigatory stop. See State v. Dalton, ___ N.H. ___, (decided August 21, 2013) (slip op. at *4) ("In order for a police officer to undertake an investigatory stop, the officer must have a reasonable suspicion — based on specific, articulable facts taken together with rational inferences from those facts — that the particular person stopped has been, is, or is about to be, engaged in criminal activity.") (citation and brackets omitted). If an officer develops probable cause

that the person is attempting to drive a vehicle while he is impaired, the officer may then place the person under arrest. See State v. Martin, 116 N.H. 47, 49 (1976). Alternatively, even in those cases where probable cause is lacking, the police may take an intoxicated person into protective custody. See RSA 172-B:3.

Thus, the ability of the police to prevent the operation of cars by persons under the influence of intoxicating liquor is enhanced by allowing them to intervene in cases where driving has yet to occur. Inclusion of a *mens rea* component to the phrase "attempt to drive" in RSA 265-A:2 does nothing to thwart the purpose of the statute, nor does it compromise public safety. Rather, it ensures that innocent behavior will not be punished. See Bailey, 444 U.S. at 405; Gracidas-Ulibarry, 231 F.3d at 1193.

This Court has previously touched on this issue. In Martin, a vehicle was found on the side of Route 93 with its engine running. Martin, 116 N.H. at 48. The defendant was the sole occupant of the vehicle, and was asleep in the driver's seat. Id. After awakening the defendant and determining that he was impaired, a police officer arrested him for attempted driving under the influence. Id. A breathalyzer test at the police station yielded a result of 0.12. Id. The defendant moved to suppress evidence of the breathalyzer test on the grounds that the officer lacked probable cause to arrest him, and the trial court denied the motion. Id. at 47-48.

While the facts were "sufficient to warrant a finding that the defendant had operated the vehicle to the extent necessary to reach the point where he

was found," that issue was not presented on appeal. Id. at 49. This Court explained that

> the only issue to be determined [ ] is whether the agreed facts could be found to have furnished the arresting officer with probable cause to believe that a misdemeanor was committed in his presence [ ], namely, that the defendant was then engaged in an attempt to operate a motor vehicle while under the influence of intoxicating liquor. We are of the opinion that the district court properly so found. . . . The circumstances under which the defendant was found furnished probable cause to believe that he was then and there engaged in an attempt to operate the vehicle which, although temporarily suspended, would probably be resumed, quite likely at a time when his impaired judgment might satisfy him that his competence to operate had been restored.

Id. (citations and quotations omitted). This Court went on to explain its reasoning:

> The defendant was engaged in conduct constituting a substantial step toward the commission of a continuing crime, which findably had already been committed, and findably was to be resumed. His intent to continue to operate was inferable from the circumstantial evidence. Nothing in the surrounding circumstances furnished evidence of a complete withdrawal of his criminal purpose. Rather they suggested the probability of resumption of that purpose.

Id. (citations and quotations omitted) (emphasis added). In other words, this Court recognized that an attempted DWI charge necessarily includes a purposeful *mens rea* component.

In State v. Polk, 155 N.H. 585 (2007), the defendant was charged with aggravated DWI based upon a complaint that alleged that he "did drive a motor

vehicle on Elm St. a public way, while under the influence of an intoxicating liquor and did attempt to elude pursuit by a law enforcement officer by increasing speed." Id. at 586. The defendant requested "that the jury be instructed that the State was required to prove that he acted purposely in attempting to elude pursuit by a law enforcement officer." Id. After the court denied the request and gave a jury instruction which contained no scienter element on the aggravated DWI charge, the jury found the defendant guilty. Id. On appeal, the defendant argued that a complaint alleging a violation of RSA 265:82-a (I) (c)[3] must contain "an appropriate scienter requirement with respect to the material element of attempting to elude pursuit by a law enforcement officer by increasing speed." Id. (emphasis omitted).

This Court acknowledged that RSA 626:2, I, requires a culpable mental state with respect to material elements of a crime. Id. at 588. However, it determined that while the State must prove that the defendant "[a]ttempt[ed] to elude pursuit by a law enforcement officer," this was not a material element of the crime of aggravated DWI requiring a culpable mental state. Id. (citation omitted). This Court explained that:

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[3] Former RSA 265:82-a provided, in pertinent part:

A person shall be guilty of a violation of this section if the person drives or attempts to drive a vehicle upon any way:

> I. While under the influence of intoxicating liquor or any controlled drug or any combination of intoxicating liquor and controlled drug and, at the time alleged:
>
> . . .
>
> (c) Attempts to elude pursuit by a law enforcement officer by increasing speed, extinguishing headlamps while still in motion, or abandoning a vehicle while being pursued . . . .

See Polk, 155 N.H. at 587.

> the underlying offense for DWI and aggravated DWI is the same: driving while under the influence of intoxicating liquor, a controlled drug, or any combination of these. Aggravated DWI merely adds aggravating factors which elevate the strict liability crime of DWI to a misdemeanor for purposes of enhancing the penalty. Proof of the prohibited act, *i.e.*, attempting to elude pursuit by a law enforcement officer, is necessary only for that purpose; it is not an additional material element that requires proof of a culpable mental state.

Id. (citations omitted). Here, by contrast, an "attempt to drive" is a material element of the offense. See RSA 625:11, IV.[4]

This Court echoed its decision in Goding and determined that aggravated DWI is a strict liability offense. However, as in Goding, Polk involved an allegation of driving, not an attempt to drive. Compare Martin, 116 N.H. 49 (discussing defendant's criminal purpose and intent to operate).

Moreover, in Polk, this Court stated that imposing a culpable mental state requirement may, in many cases, defeat the purpose of the statute. Id. at 589. The Court concluded that this is because

> to prove the core offense of DWI, the State would have to prove that the defendant was impaired by alcohol. That proof would simultaneously provide the defendant a basis to claim that his level of intoxication prevented him from acting purposely with respect to the aggravating factor of eluding the police. See RSA 626:4 (1996) (evidence of intoxication may be taken into consideration in determining whether an element of the crime has been proven beyond a reasonable doubt).

[4] "'Material element of an offense' means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unrelated to (1) the harm sought to be prevented by the definition of the offense, or (2) any justification or excuse for the prescribed conduct." RSA 625:11, IV.

Id. However, inclusion of a *mens rea* component in attempted driving cases does not interfere with the ability of police officers to investigate, arrest, or charge an individual suspected of attempting to drive a vehicle in an impaired state. Nor does it impair the ability of police officers to take an intoxicated person into protective custody.

Concededly, a defendant might claim at a future trial that his intoxication impacts an element of the offense, a claim that, if made, "may be taken into consideration" by the factfinder. However, the mere existence of this possibility does not "defeat the purpose of the statute." The language "attempt to drive" in RSA 265-A:2 is, by its own terms, circumscribed. It requires a purpose to drive, not a purpose to drive while intoxicated. Thus, RSA 626:4 could not be invoked to undermine the element of impairment. Further, Polk involved an aggravating factor relevant to the level of offense and to the potential sentence. Thus, the Polk Court did not consider the overarching concern that is present here - that when a defendant's conduct does not constitute a completed criminal act, "a heightened intent requirement is necessary to ensure that the conduct is truly culpable." Gracidas-Ulibarry, 231 F.3d at 1193 (citation omitted).

This Court also discussed the use of the word "attempt" in State v. Moscone, 161 N.H. 355 (2011). In Moscone, the defendant was charged under RSA 649-B:4, I(a) for "knowingly utiliz[ing] a computer on-line Internet service . . . to attempt to seduce, solicit, lure or entice persons . . . whom [the defendant] believed to be under the age of 16, to engage in sexual penetration." Id. at 358

(quotations omitted). He argued on appeal that RSA 629:1, the attempt statute, applied and thus the trial court was required to give an attempt jury instruction that included the mental state of "purposely." Id. This Court stated that "use of the word 'attempt,' in a criminal statute, does not automatically mandate [application of] RSA 629:1, I." Id. at 359.

This Court looked to RSA 626:2, which provides, in relevant part, that "[w]hen the law defining an offense prescribes the kind of culpability that is sufficient for its commission, without distinguishing among the material elements thereof, such culpability shall apply to all the material elements, unless a contrary purpose plainly appears." Id. (citing RSA 626:2, I). While this Court did not explicitly define the word "attempt," it held that the legislature intended for the mental state of "knowingly" to apply to all material elements of RSA 649-B:4, I(a) "because the word attempt is not a 'contrary purpose plainly appear[ing]' in the statute. Id. at 361 (citing RSA 626:2, I).

However, RSA 626:2, I is inapplicable here because RSA 265-A:2, "the law defining the offense," does not explicitly prescribe any degree of culpability. Moreover, as the issue in Moscone turned on the applicability of RSA 629:1, the Court had no occasion to consider other sources that provide a nearly uniform definition for the word "attempt." Here, the trial court determined that the jury could find that Goddu "attempted to drive" without any consideration as to what her intentions were. As this ruling was erroneous, this Court must reverse.

CONCLUSION

WHEREFORE, Therese Goddu respectfully request that this Court reverse and remand for a new trial.

Undersigned counsel requests 15 minutes of oral argument.

The appealed decision is, in part, in writing and the written portions are therefore appended to the brief.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to:

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_____
James B. Reis

DATED: October 15, 2013

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