THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0030

The State of New Hampshire

v.

Kevin Drown

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE GRAFTON COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 minutes)

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1. Whether the prosecutor properly responded to the defendant's closing argument that ascribed several secret motivations for the victim to fabricate her allegations against the defendant by asking the jury to consider her emotional response to testifying and what motivations she may have to lie or what she may gain from lying.

2. Whether the trial court plainly erred in a manner that prejudiced the defendant's case by permitting the prosecutor to ask the defendant whether the victim had lied or whether she was mistaken when she identified him as her assailant.

3. Whether the prosecutor properly responded to the defendant's closing argument that ascribed several secret motivations for the victim to fabricate her allegations against the defendant by emphasizing that the defendant had told investigators that he did not believe the victim had any motivation to make up these allegations and held no bias toward him.

STATEMENT OF THE CASE

A Grafton County grand jury indicted the defendant, Kevin Drown, on three counts of aggravated felonious sexual assault (AFSA) and one count of felonious sexual assault (FSA). DA 1-4;[1] RSA 632-A:2 (Supp. 1988); RSA 632-A:3 (1986). Each of the AFSA indictments alleged that between August 1, 1988 and August 1, 1990, the defendant knowingly sexually assaulted the victim, T.C., who was under thirteen years of age at the time. DA 1-4. The first AFSA charge alleged that the defendant "engaged in sexual penetration" by inserting his penis into the victim's mouth. DA 1. The second and third AFSA charges alleged that the defendant "engaged in sexual penetration" by "insert[ing] a hair brush into a genital opening of [the victim's] body, her vagina" on two different occasions. DA 2-3. The FSA indictment alleged that during the same time period, the defendant purposely "engaged in sexual contact" with the victim by causing her to touch his penis "for the purpose of sexual arousal or gratification." DA 4.

After a two-day trial in October 2016, a jury found the defendant guilty on all four charges. T 262-65. The trial court (*Bornstein*, J.) sentenced the defendant to three consecutive seven-and-a-half to fifteen-year terms in prison for the three AFSA convictions and one three-and-a-half to seven-year term in prison, which was fully suspended for ten years upon the defendant's release from prison, for the FSA conviction. ST 14, 19-22.

This appeal followed.

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[1] DA refers to the appendix at the end of the defendant's brief.
DB refers to the defendant's brief.
T refers to the trial transcript.
ST refers to the sentencing hearing transcript.

STATEMENT OF FACTS

The victim grew up in Bristol. T 36. When she was in the second grade, in 1988-89, she lived in an apartment at 66 School Street. T 36, 111, 166, 168. She lived on the second floor with her mom, stepdad, and five siblings. T 36-37, 168. Her mother was physically and psychologically abusive and did little to supervise her children. T 43, 90-91. The victim attended the elementary school across the street, and her teacher was C.H. T 36, 47-48, 111-12.

The victim's family was close with the defendant's family, who lived downstairs. T 38-39, 158, 174. Her mother's best friend was the defendant's wife. T 39, 158. The victim was good friends with S.D., who was the defendant's daughter and about the same age as the victim. T 38-3, 159-60. The victim would visit the defendant's apartment often. T 43, 175. Both families were Jehovah's Witnesses. T 40, 44, 159. The victim went to church two to three times per week and was taught to "obey all adults with no exceptions." T 41. Those teachings caused her to believe that she had to do whatever adults told her to do. T 41.

During the 1988-89 school year, when the victim was seven years old, she often visited the defendant's family. T 43, 47-48. Over the course of seven different visits, the defendant brought her into one of the bedrooms. T 47. Each time, the defendant pulled or pushed her into the room. T 47. Each time, she and the defendant were the only ones in the room, everybody else was in the apartment or outside. T 48. During each assault, the defendant increased the intensity of the sexual abuse. T 50-61.

During the first assault, the defendant sat on the bed and the victim stood in front of him. T 50. The defendant told her to take off her shirt, which she did. T 50. Then, the defendant pulled his penis out through his zipper and masturbated in front of her. T 50, 58. He told her to watch him. T 51. After a time, he stopped and told her to get dressed. T 51. He also told her not to tell anybody about what happened. T 51. During the second assault, the defendant ordered the victim to take off her shirt and pants. T 52. Then, he pulled out his penis and masturbated in front of the victim. T 53. He made her watch. T 53. When he finished, he told her to dress and leave. T 53. During the third assault, the defendant told the victim to remove all of her clothes. T 53. The victim did not want to take off her underwear, but the defendant "forced them down." T 53. The defendant sat on the bed, pulled his penis out through his zipper, and masturbated. T 54. When he was finished he told her to get dressed and leave. T 54.

After the third assault, the defendant began ordering the victim to touch him or he would touch her. T 56-60. During the fourth assault, the defendant told the victim that he "wanted [her] to touch his penis." T 56. He made her get naked and showed her how to masturbate him. T 56-57. He then made the victim touch his penis and masturbate it. T 57. "After a little while he just told [her] to put [her] clothes on, like before." T 57. During the fifth assault, the defendant made the victim undress and then put his penis into her mouth. T 57. During the sixth and seventh assaults, the defendant made the victim undress. T 58, 60. He ordered he to lay on the floor, near the bed. T 59-60. He then took a dark hair brush and shoved the handle inside her vagina. T 59-60. The victim felt pain and just look up at what she described as the "tin like" ceiling. T 60. After the

defendant finished his assault, the victim got dressed and left. T 60. A few months after the seventh assault, the victim's family moved away. T 61.

After the third assault, the victim reported what the defendant was doing to her mother. T 54. Her mother told her not to tell anybody what was happening. T 54. Additionally, her mother, to the victim's knowledge, did not take any steps to protect the victim from the defendant or to keep him away from the victim. T 54. The victim never disclosed the assaults to anyone else while she was a child. T 61. Years later, as a teenager, the victim disclosed to one of her sisters that the defendant had sexually assaulted her, but she did not provide any details. T 63, 88. At that time, neither made any reports to the police. T 63, 88. Several years after that, the victim disclosed to her then-boyfriend, now-husband, a few months into their relationship that she had been sexually assaulted by a neighbor as a child. T 64, 93-94. She explained to him how it had affected her life, but neither reported it to the police. T 64, 94-95.

In 2014, over twenty-five years after the assaults began, Detective Stacie Fiske from the Merrimack County Sheriff's Office contacted the victim. T 23. Detective Fiske initiated this contact because she had learned that the defendant may have assaulted the victim. T 24, 64-65. The victim confirmed Detective Fiske's suspicions and disclosed that the defendant had assaulted her multiple times as a child. T 29, 66-67. The victim agreed to a forensic interview with the Child Advocacy Center, which occurred on November 19, 2014. T 31, 67. During the investigation of the assaults, Lieutenant Phil Mitchell of the Webster Police Department went to 66 School Street to document the

home. T 116. He did not discover a tin ceiling, but instead a more recently constructed suspended ceiling. T 149-50; DA 10.

The defendant eventually learned of the victim's allegations and agreed to two interviews with police. T 31-32, 123, 130. In the first interview, on January 16, 2015, the defendant admitted that he lived in Bristol on School Street and knew the victim's family, who lived upstairs. DA 8, 12. He admitted that he may have been alone with the victim, but denied the allegations. DA 13-14. He also stated three times that he had no idea why the victim would make the allegations and that she had no bias against him. DA 14. In the second interview, on February 14, 2015, the defendant again admitted that the victim had nothing to gain by making these allegations and he had no idea why she would make them. DA 18-19. He also did not deny that the victim had been assaulted, but instead, claimed that he was not the one who assaulted her. DA 20.

At trial, the defendant argued that the victim's allegations "only came about recently, not back in 1988 when [she said] these terrible things occurred." T 16. The defendant denied the allegations and stated that he had heard about them from one of his sons. T 170, 183-84. The State asked whether the defendant believed the victim was lying now and he said that she was. T 187. The defendant also acknowledged that he had no explanation for why the victim would invent these allegations. T 187-88. During his closing argument, the defendant referred to the victim as a liar and presented numerous motivations for her to come forward with her allegations. T 218-19, 223-24. The State, in its closing, however, highlighted the defendant's statements and testimony that he had no explanation for why the victim would make up these allegations. T 244.

SUMMARY OF THE ARGUMENT

1. The prosecutor's statements during closing argument about the victim's motivation to lie and the difficulty she faced in testifying, to the extent that the defendant preserved his challenges, were proper subjects for closing argument. The prosecutor based the argument on evidence from the records that the victim had never intended to come forward and had not disclosed the details of the assaults to family members. Additionally, her demeanor on the witness stand allowed the prosecutor to infer that testifying was an emotional ordeal. Moreover, because the defendant ascribed several motivations to the victim to explain why she would make these allegations, it was a fair response for the prosecutor to invite the jury to question what the victim had to gain by coming forward and why she would do so. Accordingly, this Court must affirm.

2. The prosecutor's questions to the defendant asking if the victim had lied or was mistaken about him being the assailant were not plain error. Although a prosecutor may not ask any witness to comment on the credibility of another witness, in this case, the defendant cannot show that the error was prejudicial because the jury heard the defendant repeatedly deny assaulting the victim and heard the defendant argue that these allegations were recent fabrications. Therefore, the defendant's answer to the prosecutor's questions would not come as a surprise to the jury. Moreover, asking the defendant if the victim was mistaken about him being her assailant was not error because it did not force the defendant to choose between conceding the point or branding another witness as a liar, which was the problem with asking the defendant whether the victim

was lying. Accordingly, the defendant has failed to meet his burden, and this Court must affirm.

3. The prosecutor's argument about the defendant's inconsistent statements was proper because it was a fair response to the defendant's closing argument. The defendant's theory of defense was that the victim lied about the assaults and lied on the stand. The prosecutor's closing argument relied upon the evidence introduced during trial to question the defendant's conviction that the victim was lying to the jury and that he believed she had motive to lie about the assaults. Accordingly, it was a fair response to the defendant's argument, and this Court must affirm his convictions.

ARGUMENT

I. THE PROSECUTOR'S STATEMENTS DURING CLOSING ARGUMENT ABOUT SUCH THINGS AS THE VICTIM'S DEMEANOR AND THE FACT THAT HER FAMILY WOULD LEARN THE DETAILS OF THE DEFENDANT'S ASSAULTS WERE PROPER BECAUSE THEY WERE SUPPORTED BY EVIDENCE IN THE RECORD AND DID NOT CONSTITUTE VOUCHING.

The prosecutor's closing argument drew reasonable inferences from the facts presented and from the victim's demeanor, which were made to address the defendant's arguments that she had made up the allegations and had secret motivations for doing so. Moreover, the prosecutor appropriately asked the jury to consider what motivation the victim had for making these allegations. The prosecutor's closing argument relied upon the evidence or reasonable inferences drawn therefrom and did not include her opinion on the victim's credibility. Accordingly, this Court must affirm.

A. The prosecutor's assertions during closing argument were supported by the evidence or constituted reasonable inferences that she could draw from the evidence.

As a threshold matter, the defendant did not preserve this argument because he did not raise the argument he now pursues on appeal before the trial court. "As the appealing party, the defendant has the burden of providing this court with a record sufficient to demonstrate that he raised all of his appeal issues before the trial court." *State v. Whittaker*, 158 N.H. 762, 767 (2009). This Court has held that if the defendant attempts to raise alternative arguments or expand an argument for the first time on appeal, then that argument has not been preserved and this Court will not address it. *See, e.g.*, *id.* ("The record provided on appeal fails to demonstrate that the defendant ever raised the same arguments that he raises here. [This Court], therefore, decline[s] to

address them."); *State v. Mouser*, 168 N.H. 19, 27-28 (2015) (holding that an appealing party cannot rely on a new theory that was not presented to or addressed by the trial court, unless such theory is raised in a motion for reconsideration); *State v. Young*, 144 N.H. 477, 484 (1999) (concluding that a defendant cannot change arguments on appeal from those argued at trial); *State v. Croft*, 142 N.H. 76, 80 (1997) (refusing to permit the defendant to expand the scope of his 404(b) objection to include more than just relevance on appeal).

Here, the prosecutor had just stated, "Why? Why would [the victim] come here and tell you that if it wasn't true?" when the defendant objected. T 249. The basis for the objection was that the rhetorical question constituted "an inappropriate argument to make." T 249. The defendant cited *Commonwealth v. Dirgo*, 52 N.E.3d 160 (Mass. 2016),[2] in support of his objection, which he stated addressed a situation where "the prosecutor repeatedly argued that the alleged victim must be telling the truth because she would not have otherwise chosen to prosecute, testify, and be cross-examined." T 249. T 249. The defendant never argued, as he does now on appeal, that "the prosecutor's assertions were not supported by the evidence." DB 10; T 249-51. Accordingly, the defendant has failed to preserve his challenges to these statements.

Should this Court conclude that the defendant did preserve this argument, it still must affirm because the prosecutor based her statements on evidence in the record or reasonable inferences drawn from the evidence in the record. "In examining claims of prosecutorial misconduct during closing argument, [this Court] face[s] the delicate task of

[2] The record indicates a reference to "*Commonwealth versus Jergo* (phonetic)." T 249. The context establishes that the defendant was referring to *Dirgo*.

balancing a prosecutor's broad license to fashion argument with the need to ensure that a defendant's rights are not compromised in the process." *State v. Cable*, 168 N.H. 673, 688 (2016) (quotation omitted). "A prosecutor may draw reasonable inferences from the facts proven and has great latitude in closing argument to both summarize and discuss the evidence presented to the jury and to urge them to draw inferences of guilt from the evidence." *Id.* (quotation omitted). The prosecutor may discuss evidence related to any motive, plan, or scheme. *Cf. State v. Sands*, 123 N.H. 570, 598 (1983) ("The prosecution may elaborate on evidence relating to any motive, plan, or scheme which would explain the defendant's alleged conduct."). A prosecutor "may not, however, discuss or state as facts matters which are not in evidence." *Id.*

Here, evidence in the record supported each of the challenged statements.[3] DB 7-9 (complained-of statements). Generally, the defendant complains of statements that the victim did not want to come testify or share what had been done to her and that she had not shared this with her family. The victim testified that although she had told her sister and husband that she had been assaulted, she did not provide them with details, which they confirmed. T 63-64, 88, 93-94. She testified that she had never told anybody what had happened until Detective Fiske called her. T 66-67. She repeatedly testified that she

[3] Many of the challenged statements are rhetorical questions that ask the jury to consider why the victim would put herself through the difficulty of trial. It is unclear how such questions constitute comments on evidence and accordingly, the State will not address them in detail. Nevertheless, the record reflects that the victim did become emotional during her testimony and had difficulty discussing the assaults, *see, e.g.*, T 48 (prosecutor offers victim tissues and asks if she needs a break), 66 (victim explaining that she became physically sick when speaking with Detective Fiske about the assaults), 226 (defense counsel comments on the victim's demeanor and how emotional she became while testifying). Therefore, it would be reasonable to infer that testifying about these things in front of a jury and her family was a difficult experience for the victim and consequently, to ask the jury to consider that difficulty in evaluating her credibility.

was not planning on reporting because she was just "liv[ing] her life" or "had a life" and "was trying to be happy," so she "just put [the assaults] away." T 63-64, 67. Additionally, she stated that she felt physically sick when Detective Fiske asked about the defendant and became upset at points during her testimony. T 48, 66, 226. Given that each of these challenged statements has a source in the evidence presented to the jury, the prosecutor's derived her argument from facts proven or reasonable inferences drawn therefrom. Accordingly, the defendant's argument is without merit and this Court must affirm.

B. The prosecutor did not vouch for or comment on the victim's credibility, but instead asked the jury to consider what motivation she had to lie or what she had to gain from lying.

As a threshold matter, the defendant did not preserve this argument because he did not raise the argument he now pursues on appeal before the trial court. "As the appealing party, the defendant has the burden of providing this court with a record sufficient to demonstrate that he raised all of his appeal issues before the trial court." *Whittaker*, 158 N.H. at 767. This Court has held that if the defendant attempts to raise alternative arguments or expand an argument for the first time on appeal, then that argument has not been preserved and this Court will not address it. *See, e.g., id.*; *Mouser*, 168 N.H. at 27-28; *Young*, 144 N.H. at 484; *Croft*, 142 N.H. at 80.

As detailed above, the prosecutor had just stated, "Why? Why would [the victim] come here and tell you that if it wasn't true?" when the defendant objected. T 249. The basis for the objection was that the rhetorical question constituted "an inappropriate argument to make." T 249. He then went on to make arguments addressed at the

rhetorical question, with a vague reference that "it's not just this instance. This is repeatedly." T 250-51. The defendant does not cite any other specific instances aside from the rhetorical question. This vague reference was insufficient to allow the trial court to consider and rule on whether the comments the defendant cites on appeal were objectionable. *See Laramie v. Stone*, 160 N.H. 419, 435 (2010) ("Without each remark having been identified specifically, the trial court was unable to consider and rule upon the defendants' objections. Accordingly, [this Court] find[s] that this issue was not preserved for [its] review."). Accordingly, the defendant has failed to preserve his challenges to these new statements.

Should this Court conclude that the defendant has preserved his arguments, it still must affirm his convictions because the challenged statements did not constituted vouching or an unfair comment on the victim's credibility. "In order for the court to find prosecutorial overreaching, the government must have, through gross negligence or intentional misconduct, caused aggravated circumstances to develop which seriously prejudiced a defendant, causing the defendant reasonably to conclude that continuation of the tainted proceeding would result in his conviction." *State v. Bureau*, 134 N.H. 220, 223 (1991) (quotation and brackets omitted). "However, an improper comment made by the prosecutor does not, in every case, constitute prosecutorial overreaching requiring a new trial." *Id.* "The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecution." *Hearns v. Warden, N.H. State Prison*, No. 05-cv-413-JL, 2008 U.S. Dist. LEXIS 77396, at *9 (D.N.H. Sept. 30, 2008). If, and only if, the challenged statements were improper does

the Court then consider: "(1) the severity of the misconduct; (2) the context in which it occurred; (3) whether the judge gave any curative instructions and the likely effect of such instructions; and (4) the strength of the evidence against the defendant." *United States v. Manning*, 23 F.3d 570, 574 (1st Cir. 1994); *see also Hearns*, 2008 U.S. Dist. LEXIS 77396, at *9-10.

"A prosecutor improperly vouches for a witness when she places the prestige of her office behind the government's case by, say, imparting *her personal belief* in a witness's veracity or implying that the jury should credit the prosecution's evidence simply because the government can be trusted." *United States v. Vazquez-Rivera*, 407 F.3d 476, 483 (1st Cir. 2005) (emphasis added); *see also State v. Bujnowski*, 130 N.H. 1, 4 (1987) ("It is well settled that it is improper for prosecutors to profess to the jury their personal opinions as to the credibility of a witness or the guilt of the accused."). "Improper vouching does not occur, however, when the prosecutor asks the jury to make certain inferences from the evidence or argues that a witness has reasons to testify truthfully without resort to the prestige of the office." *Hearns*, 2008 U.S. Dist. LEXIS 77396, at *16 (citations omitted). For example, the prosecutor may not insert her personal opinion about the credibility of a witness by using such language as "I think," "I believe," or "I know" because those phrases suggest to the jury that this is the prosecutor's personal opinion and put the prestige of the prosecutor's office behind the witness's testimony. *See Bujnowski*, 130 N.H. at 5 (concluding that statements such as "I think [the defendant is] guilty" constituted improper vouching). The prosecutor may, however, argue based upon the evidence in the record that "the fair inference from the

facts presented is that a witness has no reason to lie," *Bureau*, 134 N.H. at 224, and the prosecutor may "assert reasons why a witness ought to be accepted as truthful" and "ask[] the members of the jury to use their common sense in evaluating the witnesses' testimony," *United States v. Perez-Ruiz*, 353 F.3d 1, 10 (1st Cir. 2003).

Moreover, a prosecutor may rely on rhetorical questions to respond to the defendant's arguments. *See, e.g., Murphy v. Commonwealth*, 509 S.W.3d 34, 51 (Ky. 2017)) ("[T]here is nothing intrinsically wrong with the Commonwealth's use of rhetorical questions in closing argument."); *Commonwealth v. Gautreau*, No. 15-P-137, 2017 Mass. App. Unpub. LEXIS 86, at *4 (Mass. App. Ct. Jan 25, 2017)) ("Rhetorical questions in closing argument which do no shift the burden of proof to the defendant are permissible."). "[R]hetorical questions have long been a persuasive tool in American jurisprudence." *Murphy*, 509 S.W.3d at 51.

Here, none of the challenged statements injected the argument with the prosecutor's personal opinion. Instead, the comments asked the jury to consider why the victim would lie about the assaults, as the defendant claimed she was, or why she would make up the assaults for attention, as the defendant had just argued she had done. *State v. Answorth*, 151 N.H. 691, 698 (2005) (examining the prosecutor's comments in the context of responding to the defendant's closing argument). Nowhere in these statements did the prosecutor insert herself or her opinions into the mix for the jury to consider. Nowhere in these statements did the prosecutor do anything beyond highlight the evidence presented to the jury, including the victim's demeanor while testifying, and ask them to consider why she would lie about such things or why twenty-five years after the

assaults she would make such allegations to get attention. These statements were neither vouching nor an improper comment on the victim's credibility. Accordingly, this Court must affirm.

To the extent that the defendant relies upon a series of cases from Massachusetts, *Commonwealth v. Beaudry*, 839 N.E.2d 298 (Mass. 2005), *Commonwealth v. Ramos*, 902 N.E.2d 948 (Mass. App. Ct. 2009), and *Commonwealth v. Dirgo*, 52 N.E.3d 160 (Mass. 2016), to support his argument, that reliance is misplaced. Those cases did not address situations where the prosecutor had responded to arguments calling into question the victim's motivation for lying. In each of the three cases, the respective courts found that it was not proper for a prosecutor to claim that the victim was credible simply because she testified, even in the face of attacks on the victim's credibility, because such claims do not have a basis in the evidence. *See Dirgo*, 52 N.E.2d at 164 (agreeing that the claims that the victim was credible because she testified were improper because such claims lacked evidentiary support); *Ramos*, 902 N.E.2d at 826 (concluding that seeking "to bolster the credibility of the complainant by virtue of her willingness, despite such a burden, to come into court and testify" was improper); *Beaudry*, 839 N.E.2d at 587 (holding that it is improper for a prosecutor to argue that a witness was credible simply because the witness testified).

Where the defendant has accused the victim of having a motive to lie, however, the Supreme Judicial Court has held that prosecutors may ask the jury to consider what motives the victim may have to lie and to subject herself to the rigors of trial. *See Commonwealth v. Polk*, 965 N.E.2d 815, 828-29 (Mass. 2012) ("Where . . . defense

counsel in his closing argument challenged the credibility of the alleged victim, a prosecutor acts properly in inviting the jury to consider whether the victim has a motive to lie."); *Commonwealth v. Shanley*, 919 N.E.2d 1254, 1272-74 (Mass. 2010) (affirming convictions and distinguishing *Beaudry* where the defendant not only attacked the victim's credibility but ascribed to her motivations to lie about the assaults and the prosecutor used rhetorical questions to prompt the jury to question these motives). *Dirgo* recognizes this distinction as well. *See Dirgo*, 52 N.E.2d at 164 ("Where . . . defense counsel in closing argument challenges the credibility of the complainant, it is proper for the prosecutor to invite the jury to consider whether the complainant had a motive to lie."). Here, because the defendant ascribed multiple motivations for the victim to lie, such as seeking attention, T 218-19, 223-24, the reasoning behind *Dirgo*, *Ramos*, and *Beaudry*, are inapplicable. Accordingly, this Court must affirm.

II. ASKING THE DEFENDANT IF THE VICTIM WAS MISTAKEN IN IDENTIFYING HIM AS HER ASSAILANT WAS NEITHER PLAIN ERROR NOR DID IT PREJUDICE HIM AND ALTHOUGH THE PROSECUTOR ERRED IN ASKING THE DEFENDANT IF THE VICTIM WAS LYING, THAT ERROR DID NOT PREJUDICE HIM.

During her cross-examination of the defendant, the prosecutor asked the defendant a series of questions that called upon the defendant to state that the victim was mistaken when she identified him as the person who sexually assaulted her. The prosecutor also asked a series of questions that called upon the defendant to state that the victim was lying. The defendant never objected to these questions, and the trial court was never able to rule on the questions. Although it was plain error for the prosecutor to ask if the defendant thought the victim was lying, it was not error to ask if she was mistaken. Additionally, neither set of questions prejudiced the defendant because his answers challenged the State's theory and comported with what any reasonable person would expect the defendant to believe. Accordingly, this Court must affirm.

Because the defendant did not object to these questions at trial, he raises them as plain error. *Sup. Ct. R.* 16-A. "Under the plain error rule, [this Court] may consider errors not raised before the trial court." *State v. Russell*, 159 N.H. 475, 489 (2009). "A plain error that affects substantial rights may be considered even though it was not brought to the attention of the trial court or the supreme court." *Id.* (quoting *Sup. Ct. R.* 16-A). "However, the rule should be used sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result." *Id.* (quotation omitted). "To find plain error: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness,

integrity or public reputation of judicial proceedings." *Id.* (quotation omitted). This Court has "looked to federal plain error analysis for guidance" when conducting its own plain error analysis. *Id.* Although the defendant blurs the lines between those questions where the prosecutor asked the defendant if the victim was mistaken and those questions where the prosecutor asked the defendant if the victim was lying, the law treats each category of question differently. Accordingly, each category of question will be addressed in turn.

A. Although the trial court erred when it permitted the prosecutor to ask the defendant if he believed the victim was lying, and that error was plain, the error did not prejudice the defendant.

The defendant contends that the trial court plainly erred when it permitted the prosecutor to ask the defendant whether the victim was lying. DB 20-22. Although the prosecutor erred by asking this question, the defendant cannot meet his burden to prove that the question prejudiced his case and affected the outcome. The defendant's theme throughout trial was that the victim had fabricated the assaults and the allegations against him. He made this point during his opening argument, he testified to this, and he made similar statements to investigators. Thus, his answer to the prosecutor's question was expected and obvious and did not afford the prosecutor any sort of prejudicial advantage. Accordingly, this Court must affirm.

"The trial court has broad discretion to determine the admissibility of evidence, and [this Court] will not upset its ruling absent an unsustainable exercise of discretion." *State v. Edic*, 169 N.H. 580, 584 (2017). "To prevail under this standard, the defendant must demonstrate that the trial court's decision was clearly untenable or unreasonable to

the prejudice of his case." *Id.* The State acknowledges that this Court has previously held that it is plain error for a prosecutor to ask a witness to opine on the credibility of another witness. *See State v. Lopez*, 156 N.H. 423-24 (2007) ("[This Court] agree[s] that requiring a witness to opine upon the credibility of other witnesses is error because such questioning interferes with the jury's obligation to determine the credibility of witnesses, and is not probative in that it requires a witness to testify to things outside of her or his knowledge."). Accordingly, the State will address the third and fourth prongs of the plain error analysis.

This Court has affirmed convictions in cases where the prosecutor has asked one witness to comment upon the credibility of another because the errors were harmless beyond a reasonable doubt due to the overwhelming evidence presented against the defendant. *See, e.g., State v. Souksamrane*, 164 N.H. 425, 429 (2012) (affirming after concluding that "the evidence of the defendant's guilt was overwhelming"); *State v. Brooks*, 164 N.H. 272, 283-84 (2012) (concluding that "the State has established beyond a reasonable doubt that the verdict was not affected by the admission of [the witness's] opinion"); *State v. Parker*, 160 N.H. 203, 214 (2010) (declining to consider a harmless error argument because the Court reversed on other grounds); *Lopez*, 156 N.H. at 425 (concluding that "the prosecutor's questions, while improper, were not prejudicial in light of the overwhelming evidence of premeditation presented at trial"). This is true even when the defendant raised the issue as plain error because the defendant must "satisfy the burden of demonstrating that an error affected substantial rights." *See Lopez*, 156 N.H. at 425; *see also Souksamrane*, 164 N.H. at 430 (addressing unobjected to questions under

plain error). Because the evidence against the defendant was overwhelming in these cases, this Court has never addressed, particularly under a plain error analysis, the defendant's burden to show how the complained-of questions prejudiced his case. *See Lopez*, 156 N.H. at 425 (explaining that a defendant must show the an error was prejudicial to show that it "affected substantial rights").

Although this Court has not addressed the defendant's burden, the United States Court of Appeals for the First Circuit has. *See Russell*, 159 N.H. at 489-90 (looking to federal courts for guidance on conducting plain error analysis). The First Circuit has recognized that "[w]hen the defendant has made a timely objection to an error . . . a court of appeals normally engages in a specific analysis of the district court record -- a so-called 'harmless error' inquiry -- to determine whether the error was prejudicial." *United States v. Olano*, 507 U.S. 725, 734 (1st Cir. 1993). When the defendant raises the issue as plain error, however, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* "This burden shifting is dictated by a subtle but important difference in [the appellate analysis]: While [review of objected-to evidence] precludes error correction only if the error 'does *not* affect substantial rights[,'] [plain error] authorizes no remedy unless the error *does* 'affect substantial rights.'" *Id.* at 734-35.

In the context of asking the defendant to comment on the credibility of other witnesses, the First Circuit has affirmed convictions under a plain error analysis because the defendant's answers were obvious and did little to advance the government's case or because the government raised the issue briefly in a manner that would not affect the

outcome. *See, e.g.*, *United States v. Robinson*, 473 F.3d 387, 396 (1st Cir. 2007) (concluding, under plain error, that asking the defendant whether an investigating officer had lied was not prejudicial because "this question merely drew the jury's attention to the discrepancy between [the defendant's] and [the investigator's] testimony"); *United States v. Fernandez*, 145 F.3d 59, 64 (1st Cir. 1998) (emphasizing that asking the defendant whether an investigating officer had lied constituted nothing more than a "few miscast questions" when the court concluded that the error was not prejudicial).

In *United States v. Sullivan*, 85 F.3d 743 (1st Cir. 1996), the court concluded that asking the defendant whether some cooperating witnesses had lied was not plain error because the error was not prejudicial. *Id.* at 750. The court explained, "That there was a contradiction between [the cooperating witnesses'] testimony and [the defendant's] was obvious. Pointing out the obvious most likely scored the government, at most, rhetorical points." *Id.* Therefore, the court "[could not] say that these few largely rhetorical questions from the prosecutor affected at all the outcome of the trial." *Id.*

> Here, the following exchange occurred:
>
> Prosecutor: Okay. Do you think [the victim's] lying now?
>
> Defendant: If she's saying that I did something, *she's absolutely wrong*, yes.
>
> Prosecutor: Well, you saw her testimony. That's what she said. Is she lying?
>
> Defendant: She is lying.

T 188 (emphasis added). At trial, the defendant's rendition of events differed starkly from the victim's. In his opening statement, he argued that these allegations were recent

fabrications that the victim had made up. T 16. Moreover, he repeatedly had told investigators that he did not doubt that the victim had been sexually assaulted but she was wrong when she identified him as her assailant because he did not assault her. The jury would have expected these answers because of the statements he had made and the arguments he had made in his opening statement. Thus, his testimony that she was "absolutely wrong" or lying was obvious and not prejudicial in light of these statements to police, arguments to the jury, and testimony at trial.

Additionally, the prosecutor allowed the defendant to revise his answer afterward when she asked the defendant a series of questions about whether the victim was mistaken in identifying him as her assailant. T 188-89. These questions were proper areas of inquiry, as discussed in section II.B below, and allowed the defendant an opportunity to explain his answers in a manner consistent with *Lopez* and its progeny. Accordingly, the questions did not prejudice the defendant, and this Court must affirm.

B. The trial court did not err when it permitted the prosecutor to ask the defendant if he believed the victim was mistaken about who had sexually assaulted her because it does not raise the same concerns as asking a one witness to comment on whether another was lying.

The defendant contends that the trial court plainly erred when it permitted the prosecutor to ask the defendant a series of questions where he had to answer whether the victim was mistaken or not about the assaults. DB 20-22. The trial court did not err when it allowed the prosecutor to ask these questions because asking a defendant whether a witness was mistaken does not place the defendant in the same position as asking if another witness was lying. Accordingly, this Court must affirm.

"The trial court has broad discretion to determine the admissibility of evidence, and [this Court] will not upset its ruling absent an unsustainable exercise of discretion." *Edic*, 169 N.H. at 584. "To prevail under this standard, the defendant must demonstrate that the trial court's decision was clearly untenable or unreasonable to the prejudice of his case." *Id.*

The State is not aware of any case in this jurisdiction that addressed the issue of asking one witness to speak about whether another witness's testimony contained mistakes. The First Circuit, however, has addressed this issue and concluded that such questions are not improper. *See United States v. Desimone*, 699 F.3d 113, 127-28 (1st Cir. 2012); *United States v. Thiongo*, 344 F.3d 55, 61 (1st Cir. 2003) ("[T]his Court . . . has clarified that asking whether a witness was 'wrong' or 'mistaken' is proper because the witness is not required to choose between conceding the point or branding another witness as a liar." (Quotation omitted.)). In *Desimone*, the court found that although "[i]t is improper for an attorney to ask a witness whether another witness lied on the stand[, t]his rule is not read broadly." *Id.* at 127 (quotation and citation omitted). "It is not improper to ask one witness whether another was 'wrong' or 'mistaken,' since such questions do not force a witness to choose between conceding the point or branding another witness as a liar." *Id.* (quotation omitted). "There is no error in simply asking a witness if he agreed with or disputed another witness's testimony." *Id.* Accordingly, the prosecutor did not err when asking similar questions and this Court must affirm.

Should this Court conclude that the trial court did err and that its error was plain, then the State relies upon its analysis of plain error factors three and four detailed in section II.A above.

III. THE PROSECUTOR'S STATEMENTS ABOUT THE DEFENDANT'S INCONSISTENT STATEMENTS DURING HER CLOSING ARGUMENT WERE PROPER BECAUSE THEY WERE A FAIR RESPONSE TO THE DEFENDANT'S CLOSING ARGUMENT.

To the extent that the defendant preserved the new claim he raised on appeal the prosecutor's statements during closing argument were not objectionable and do not, on appeal, create reversible error because they were not improper. The defendant's theory of defense was that the victim lied about the assaults and lied on the stand. This theory was apparent from the defendant's opening statement, which comprised two and a half pages of transcript, when he stated that the "[a]llegations . . . only came about recently, not back in 1988 when [the victim] sa[id] these terrible things occurred." T 16. This theory persisted through the entire trial and in the defendant's closing argument when he repeatedly stated that the victim had lied and attributed to her several potential motivations for lying. T 218-19, 223-24. The prosecutor's closing argument relied upon the evidence introduced during trial to question the defendant's conviction that the victim was lying to the jury and that he believed she had motive to lie about the assaults. Accordingly, it was a fair response to the defendant's argument, and this Court must affirm his convictions.

As a threshold matter, the defendant did not preserve this argument because he did not raise the argument he now pursues on appeal before the trial court. "As the appealing party, the defendant has the burden of providing this court with a record sufficient to demonstrate that he raised all of his appeal issues before the trial court." *Whittaker*, 158 N.H. at 767. This Court has held that if the defendant attempts to raise alternative arguments or expand an argument for the first time on appeal, then that

argument has not been preserved and this Court will not address it. *See, e.g., id.*; *Mouser*, 168 N.H. at 27-28; *Young*, 144 N.H. at 484; *Croft*, 142 N.H. at 80.

Here, the defendant objected and stated "I just object on the same grounds as I stated before, burden shifting." T 244. The defendant developed his burden shifting argument and acknowledged that the prosecutor could "talk about what he had said" in his interviews and at trial. T 244-45. The prosecutor responded and argued that "[d]uring the [d]efendant's closing argument [defense counsel] said that motives for the victim to make this up included wanting attention; liking to play the role of victim . . . and hold any grudge against the [d]efendant. I certainly am entitled to rebut [] those assertions . . . and I'm doing that by saying the defendant did not present any evidence of that during his testimony [] today or during his interviews with the police." T 244-45. The trial court held that discussion and argument based upon the defendant's statements did not constitute burden shifting and overruled the objection. T 245-46. Nowhere did the defendant contend that the prosecutor's argument impermissibly suggested that the defendant's statements were inculpatory. Accordingly, this argument is unpreserved.

To the extent that the defendant raises the issue as plain error, this Court should decline to address that argument as the defendant has failed to adequately develop his arguments. "To find plain error: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." *Russell*, 159 N.H. at 489. As the appealing party, the defendant has the burden of demonstrating reversible error. *Gallo v. Traina*, 166 N.H. 737, 740 (2014). With respect to the third and fourth prongs of

the plain error analysis, the defendant offers nothing more than single sentence conclusory statements that include no citations to any case law, court rules, or statutes. DB 27-28. Without more, this argument is undeveloped and does not warrant further consideration. *See State v. Korean Methodist Church of New Hampshire*, 157 N.H. 254, 258 (2008) (concluding that an argument was undeveloped and did not warrant consideration where the party does not address the relevant test or point to any controlling precedent that supported its argument).

To the extent that this Court concludes that the defendant's argument was preserved or that it warrants review under the plain error analysis, this Court must still affirm because the prosecutor's closing argument constituted a fair response to the defendant's arguments throughout trial. "To assess whether the State advanced an improper argument, we consider the challenged remarks *in the context of the case*." *State v. Addison*, 165 N.H. 381, 548 (2013) (emphasis added); *accord State v. Bisbee*, 165 N.H. 61, 68 (2013). This determination "involves balancing a prosecutor's broad license to fashion argument with the need to ensure that a defendant's rights are not compromised in the process." *Addison*, 165 N.H. at 548 (quotation omitted). However, "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning." *Id.* (quotation omitted). Accordingly, this Court must examine the complained-of statements in the context of not only the prosecutor's entire closing argument but also in the context of arguments made by the defense and the facts of the trial as a whole. *See, e.g.*, *id.* at 551-52 (examining alleged general deterrence argument in the context of the prosecutor's entire argument); *Answorth*, 151 N.H. at 698.

This Court has held that, in the context of a case, a prosecutor may properly make arguments that respond to those made by the defense. *See Answorth*, 151 N.H. at 698; *accord State v. Demond-Surace*, 162 N.H. 17, 24 (2011) (stating the general rule that the prosecutor can respond to arguments made by the defense in its case unless prohibited from doing so by the trial court). Additionally, this Court has held that if defendant has not objected to evidence and the jury sees or hears that evidence, then the State may rely upon that evidence in closing argument. *See State v. Merritt*, 143 N.H. 714, 721 (1999) (concluding that prosecutorial misconduct did not occur when the prosecutor referenced evidence that had been admitted without objection).

Here, the defendant opened his case with the claim that the "allegations . . . only came about recently, not back in 1988 when [the victim] sa[id] these terrible things occurred." T 16. During closing argument, the defendant contended that "[the victim] didn't provide her sister or husband with any details [about the assaults] because she knew it wasn't true." T 217. The defendant then went on to contend that the victim only went forward with the prosecution, when contacted unexpectedly by Detective Fiske, because

> She's in a bind at that point. If she says no, how does that look to her sister and her husband? She can't tell her sister or her husband that she doesn't want to go forward because it was all a lie from the start. She's stuck. She has to come up with details. She does and look at how those details she gave turned out. No tin ceiling and a window where she says there was none.

T 218. The defendant returns to this a few sentences later and argues

> Why is [the victim] not telling you the truth? Because of a need for attention? Because she has something to gain by playing the role of a victim. Because she has been holding some sort of grudge against [the

> defendant]. Some people have a grudge and they reveal it. They talk about it. Others don't reveal it. The just act on it when the opportunity presents itself.
>
> People lie for all kinds of reasons. They don't always reveal the reasons behind the lies. I don't know why [the victim] is being untruthful. I don't have any special insight into the inner workings of her mind.

T 218-19. The defendant then returned to discussion of his burden and the evidence. T 219. He discussed how he spoke with police when he did not have to. T 222-23. Then he returned to this theme of lying about sexual assault and argues

> Sexual assault of a young child is a horrible crime. No one in this room would disagree with that, but what's worse than the sexual assault of a child is lying about it because lying about it undermines the credibility of the true victims and also of course, because it is devastating to the accused.

T 223-24. He returned to it again when discussing the victim's demeanor while testifying by claiming, "If you're telling the truth, it doesn't really matter who is asking the questions." T 226.

A core tenant of the defendant's closing argument was to ascribe motivations to the victim that support his claim that she lied about the sexual assaults. This opened the door for the prosecutor to fairly respond by highlighting the dissonance between the defendant's arguments and the evidence presented at trial. The prosecutor highlighted that the defendant's arguments stood in contrast to the statements that he provided to police, which were admitted as evidence, and his testimony at trial. In the interviews he repeatedly stated that he had no idea why the victim would make these allegations and that she had no bias against him of which he was aware. DA 14, DA 18-19. At trial he acknowledged that he believed the victim was assaulted and again expressed his

uncertainty regarding why the victim would accuse him of sexual assault. T 185-88. Thus, the prosecutor's arguments were proper.

Moreover, to the extent that the defendant's argument on appeal is simply another way to describe burden shifting, it too must fail because the prosecutor was allowed to present competing inferences that could be drawn from the evidence. "Where the defendant has presented a defense . . . the government is permitted to discuss competing inferences from the evidence on the record." *United States v. Glover*, 558 F.3d 71, 77 (1st Cir. 2009). "When commenting on the plausibility of a defense theory, the government's focus must be on the evidence itself and what the evidence shows or does not show, rather than on the defendant and what he or she has shown or failed to show." *Id.* Here, the theory of defense was that the victim was lying and had hidden motivations to accuse the defendant. In response, the prosecutor was able to point out that the defendant's own words and testimony were not consistent with that theory because it constituted competing inferences that could be drawn from the evidence, such as that the victim had not motivation to lie about the defendant and that she did not bear any grudge against him. Accordingly, the argument was proper, not prejudicial, and this Court must affirm.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a fifteen-minute oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sean R. Locke, hereby certify that I have sent two copies of the State's brief to counsel for the defendant, Thomas Barnard, by first-class mail postage prepaid, at the following address:

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