THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Nos. 2017-0336, 2019-0071

The State of New Hampshire

v.

Daniel Turcotte

9/3/19 5:15pm

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE HILLSBOROUGH 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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ISSUES PRESENTED

1. Did the trial court sustainably exercise its discretion when it denied the defendant's motion for a mistrial based on Detective Parker's testimony, "It was discussed and I believe I am not supposed to mention other locations? So I don't know," finding that any resultant prejudice could be cured with an instruction to the jury?

2. Did the trial court sustainably exercise its discretion when it denied the defendant's motion for a mistrial based on the prosecutor's inadvertent statement implying that the defendant carried a burden at trial, and his isolated statement that he thought the victim was credible, finding that any resultant prejudice could be cured with an instruction to the jury?

3. Does New Hampshire recognize the triviality doctrine with regard to the right to a public trial secured by the Sixth Amendment and Part I, Article 15 of the New Hampshire Constitution, and did the trial court sustainably exercise its discretion when it found that the court's decision to lock the courtroom door during closing argument amounted to a trivial closure, and therefore, it did not violate the Sixth Amendment?

4. Should this Court overrule precedent and establish that it now reviews motions for a new trial pursuant to RSA 526:1 and the courtroom closures *de novo*, rather than for an unsustainable exercise of discretion?

STATEMENT OF THE CASE

The defendant was charged with four counts of aggravated felonious sexual assault and five counts of felonious sexual assault. T1 177–81[1]; *see* RSA 632-A:2, I(*l*) (2007) (aggravated felonious sexual assault); RSA 632-A:3, II, III (2007 & Supp. 2012) (felonious sexual assault). Following a three-day trial, the jury convicted the defendant on all counts. T3 641–44. On the aggravated-felonious-sexual-assault charges, the court (*Kissinger*, J.) sentenced the defendant to terms of 10–20 years, 20–40 years, and 20–40 years, all stand committed and all to be served consecutively. S 43–44. The court also sentenced the defendant to a 20–40-year term, which was suspended conditioned upon good behavior and compliance with the terms of the stand-committed sentences. S 45.

On the felonious-sexual-assault charges, the court sentenced the defendant to five 3½-to-7-year terms to be served concurrently, but consecutive to the last stand-committed 20–40-year sentence. S 46.

After sentencing, the defendant moved for a new trial pursuant to RSA 526:1 (2007), arguing that the court's decision to lock the courtroom door during closing arguments violated his Sixth Amendment rights. A51–A81. The court denied the defendant's motion. A44–A50.

The defendant appealed the merits of his conviction, as well as the denial of this motion for a new trial, both of which are at issue here.

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[1] "T1" refers to transcript of trial that occurred on May 8, 2018.
"T2" refers to transcript of trial that occurred on May 9, 2018.
"T3" refers to transcript of trial that occurred on May 10, 2018.
"S" refers to the sentencing hearing that occurred on May 18, 2018.
"DB" refers to the appellant's brief.
"A" refers to the defendant's addendum.

STATEMENT OF FACTS

A. The Defendant's Sexual Assaults against M.H.

The defendant first sexually assaulted M.H. when she was about six or seven years old. T2 387, 390. The defendant reached up M.H.'s shirt and grabbed her breasts. T2 387, 390. He also reached down her pants and touched her vagina. T2 387, 390. These assaults would not be isolated incidents. Instead, the defendant continued to sexually assault M.H. until she was about twelve or thirteen years old. T2 407-08. By then, the defendant was engaging in fellatio, cunnilingus, and intercourse with M.H., sometimes while M.H.'s parents slept nearby. T2 396. The years of assaults only stopped once M.H.'s parents found sexually explicit text messages from the defendant on their daughter's phone. T1 237; T2 408.

M.H. was born in 1999; the defendant is over sixty years old. T2 373. The defendant originally worked with and befriended M.H.'s father. T1 225. At the time, M.H. was just a year or two old. *See id.* M.H.'s father and the defendant "h[u]ng out" frequently—as frequently as every weekend—drinking beer and spending time with other friends. *Id.*

M.H. and her family moved quite a bit, and as a result, over time saw the defendant less frequently. T1 226–27; T2 373–75. Still, the defendant remained a fixture and friend in the family's lives, visiting up to twice a month and often spending the night. T1 227, 233. The defendant and the family went to Canobie Lake Park, and on hot days, swimming. T1 227. Sometimes, the defendant and M.H. would play dolls. *Id.* The defendant babysat M.H. while her parents ran errands. T1 228.

M.H. also considered the defendant a friend. T2 385. They talked, played games together, and watched T.V. T2 386. But when M.H. was about 6 or 7, the defendant started to abuse the closeness afforded to him by his friendship with her parents. T2 389–90. One morning, while the defendant babysat M.H. in the family's Manchester apartment, he sat down next to her on the couch while she watched TV. T2 387, 390. The defendant first touched M.H.'s breasts and vagina over her clothes. *Id.* He then reached under her clothes, and touched her breasts and vagina again, putting his finger inside her. T2 391, 394. M.H. ended the interaction by removing the defendant's hand from her body and retreating to her bedroom. T2 392.

On another occasion when M.H. was 6 or 7 years old, the defendant spent the night in the family's Manchester apartment. T2 392. The defendant called M.H. to the living room as she walked toward the kitchen to get a glass of water. *Id.* He removed M.H. clothes and "put his mouth right on [her] vagina and licked it." *Id.*

When M.H. was about nine or ten years old, the family moved to Hillsborough, where the assaults continued. T2 393, 395–96. On one occasion, again while her parents slept nearby, the defendant ordered M.H. onto the couch. T2 396. When M.H. complied, the defendant removed her pants and underwear, and again "put his mouth on [her] vagina and licked." T2 393.

M.H. also visited the defendant at his apartment in Manchester. T2 399. He assaulted her there, too. T2 400. On night, while M.H. played on the computer, the defendant grabbed M.H.'s arm and told her "to kneel on the floor." T2 401 He then pulled off his pants and put his penis in

M.H.'s mouth. *Id.* M.H. testified that she "felt like [she] was going to gag." *Id.*

M.H.'s mother subsequently moved to Manchester, in the same building in which the defendant previously lived. T2 402. The defendant visited and spent the night when M.H. was there. T2 403. On night, M.H. was sleeping in the unoccupied third floor of her mother's building. T2 405. The defendant roused her from sleep. *Id.* He removed M.H.'s clothes, put his penis in her mouth, and his finger in her vagina. T2 406. The defendant then put his penis in M.H.'s vagina. T2 406.

On another occasion in the same apartment, the defendant ordered M.H. to undress and sit on top of his naked body. T2 407. She complied and the defendant again placed his penis inside her vagina. *Id.*

B. Relevant Portions of the Trial

1. Pretrial interviews and trial testimony

The police interviewed the defendant twice before arresting and charging him with nine counts of sexual assault against M.H. T2 327, 335. Detective Geha, Detective McGillicuddy, and Detective Parker conducted the interviews. T2 314, 327-28. The defendant admitted that he engaged in criminal, sexual conduct with M.H. During the first interview, the defendant professed that he loved M.H. and that they were like "boyfriend and girlfriend." T2 328, 329; T3 529. The defendant also admitted that he touched M.H.'s breasts and vagina, and she touched his penis. T2 330, T3 525, 527–28. The defendant recounted another instance during which M.H. put her vagina on his mouth. T2 331, 332. According to the defendant,

M.H. "tasted really good so [he put his mouth on her vagina] on more than one occasion." T2 332; T3 529. The defendant recalled other instances during which M.H. "suck[ed] his penis." T2 332; T3 529. The fellatio also occurred on more than one occasion. *Id.* What's more, the defendant claimed that M.H. was desperate to have intercourse with him, so he admitted that he "gave into her" and had intercourse "just to kind of keep her quiet." T2 332–33.

During the second interview, the defendant made more location-specific admissions. He admitted to engaging in oral sex with M.H. when her family lived in Hillsborough. T2 336. According to the defendant, M.H. "climbed under his covers and gave him … a blow job." T2 336; T3 531. The defendant also admitted that he had intercourse with M.H. on the third floor of her mother's apartment building in Manchester. T2 337. The defendant referenced another incident in Salem, during which M.H. put her vagina on his mouth, but that he refused because she tasted bad. T2 280. The defendant reiterated that he and M.H., then about 13 years old, were in love and that M.H. was "more advanced than girls that he had dated." *Id.*; T3 530.

Before trial, the parties addressed the admissibility of the defendant's admissions, which the court (*Abramson*, J.) ruled were admissible. *Id.* At trial, the defendant moved to exclude the defendant's discussion of the incidents that happened in Salem. The court (*Kissinger*, J.) granted the motion as to the Salem incident because it constituted "prior bad acts conduct." T2 284.

The State subsequently called Detective Parker to recount her interview of the defendant. T2 313. Detective Parker testified that the

defendant admitted to her that he and M.H. were like "boyfriend and girlfriend." T2 329. She also testified that the defendant admitted that he touched M.H.'s breasts and vagina, and licked her vagina more than once; that M.H. performed fellatio upon him more than once, and that he engaged in intercourse with M.H. T2 330–35. The defendant did not object to the admission of this testimony, nor does he contend on appeal that such admission was erroneous. *See id.*

Detective Parker then testified that the defendant specifically admitted that he engaged in fellatio with M.H. when her family lived in Hillsborough. T2 336; T3 531. He also admitted that he had intercourse with M.H. on the third floor of her mother's apartment building in Manchester. T2 337. Again, the defendant did not object to the admission of this testimony, nor does he contend on appeal that such admission was erroneous.

On cross-examination, defense counsel attempted to impeach Detective Parker by omission—highlighting that she did not write in her report that the defendant admitted to performing oral sex on M.H. in Hillsborough. T2 340. Defense counsel asked, "You don't report that [the defendant] said he had performed, himself, cunnilingus on [M.H.] in Hillsborough?" *Id.* Detective Parker replied, "It was discussed and I believe I am not supposed to mention other locations? So I don't know—" *Id.* Defense counsel asked to approach, and before counsel did, Detective Parker added, "It's kind of hard to address that without saying that." *Id.*

Defense counsel moved for a mistrial. *Id.* The court *sua sponte* instructed the jury as follows:

> Members of the jury, I'm going to—the last statement by the detective – you're to disregard that last statement. It's to form no part of your deliberations in the case whatsoever. I'm striking it in its entirety; that last statement by the detective and we will take our morning break now; probably about a 10 or 15-minute break then we'll resume with testimony.

T2 340–41. Defense counsel did not object to this instruction or request any particular language.

Defense counsel subsequently renewed his motion for a mistrial, arguing that the jury now "kn[e]w that this officer's not allowed to talk about other places, that there were other places, and for some reason she's not allowed to talk about it. There's no way you can unring that bell with a curative instruction." T2 342, 348. The court acknowledged that Detective Parker's statement was "improper," *id.*, but denied the defense's motion, T2 343.

The defense next moved to strike Detective Parker's testimony that the defendant "said that he engaged in cunnilingus in Hillsborough." T 346. The court granted the defendant's motion and agreed to "strike the testimony about—that he admitted to oral sex in Hillsborough; that he admitted to cunnilingus in Hillsborough." T2 347. When the jury returned to the courtroom, defense counsel prompted the court to instruct the jury, though again did not request that the court give a particular instruction. T2 351. The court gave the following instruction:

> Members of the jury, there was some testimony from the detective about—she specifically testified that the Defendant made an admission regarding the act of cunnilingus taking place in Hillsborough. I am striking that testimony. It's to form no part of your deliberations in this case whatsoever. So just that portion of her testimony.

T2 351–52. Defense counsel thanked the court and did not object to the given instruction. *Id.*

2. The closing arguments

The court locked the courtroom to additional members of the public just prior to closing argument. A44. The court did not, however, remove those spectators who were already present in the courtroom. A44, A48.

The defendant had at least two friends present throughout the trial, John Leppala[2] and Christos Karadonis. A52, A69, A72, A80. Leppala was present in the courtroom through every aspect of trial, including closing arguments. A69. Karadonis was also present, but was temporarily locked out after he left the courtroom to use the bathroom just before closing arguments. A69, A72. While locked out, however, Karadonis was able to contemporaneously perceive the closing arguments—he could view the courtroom through a window, A69, *see* A72 (Karadonis stated he could see the judge while locked out), and "could hear everything when he was standing outside" the courtroom. A73. Karadonis was able to return to the courtroom midway through closing arguments. A69, A73.

During the State's closing argument, the prosecutor stated: "So let's talk a little about the Defendant. Obviously, Attorney Naro *has no choice* but to say, you know, if you believe the detectives—" T3 614 (emphasis added). Defense counsel objected and requested that the Court contemporaneously instruct the jury that the defendant carries no burden of

[2] The record also refers to another person, "Ted." A73. It is plausible that Ted refers to Leppala, but that fact is not precisely clear from the record.

proof. *Id.* He did not, however, ask the court to use specific language in its instruction, assert that the conduct amounted to prosecutorial misconduct, or move for a mistrial. *See id.*

> The court sustained the objection and instructed the jury as follows:
>
> Members of the jury, I'm going to instruct you to disregard the Statement from the State regarding the Defense having no choice. As I talked the principles and I'm going to refer to them again in my instructions, in criminal cases, the Defendant is under no obligation whatsoever, the State has the burden of proof, the charge is beyond a reasonable doubt, the Defendant is under no obligation whatsoever.

T3 615–16. Defense counsel did not object to this instruction. *See id.* The prosecutor immediately reiterated this instruction, stating:

> And, ladies and gentlemen, I don't want in any way to suggest that the Defense has a burden. The evidence has been presented and the Defense has chosen to ask you to address it, right? He is asking you to take a specific interpretation of that evidence *and he has to*, right?

T3 616 (emphasis added). Despite this, the defendant objected to the phrase "and he has to." *Id.* The court repeated its instruction: "Again, the Defense is under no obligation. I'm going to strike that last comment by the State. It's to form no part of your deliberations." *Id.* Again, defense counsel did not object to the instruction.

The prosecutor stated later during his closing argument: "*I think* [M.H.]'s testimony, while difficult to follow and difficult for her to provide is reliable ...." T3 619 (emphasis added). Defense counsel objected and the court sustained the objection. *Id.* Defense counsel next argued that the prosecutor's statement was the "second objection that would amount to

prosecutorial misconduct," though defense counsel had not previously made such an assertion nor did he identify the prior referenced comment. T3 620. He then moved for a mistrial. *Id.*

The court disagreed that the prosecutor's comment amounted to misconduct and could not be cured by an instruction. *Id.* The court called the statement "flip" and "unintentional." *Id.* The court then instructed the jury as follows:

> Members of the jury, I'm going to strike the last comment by the State regarding what the State—what an individual prosecutor thinks or believes. That's really not relevant, that's not part of any of your consideration in the case and it was improper for the Prosecutor to say that. Please continue.

T3 621. The prosecutor then repeated:

> As I told you early on in the opening, you decide the credibility of the witnesses. My misspeaking, obviously, does not change that burden and that obligation that you have, that's your job to be the judges of the facts and that's what the Court will talk about in instructions, that you are the judges of the facts and that, of course, includes witness credibility.

T3 621–22.

Moments later, the court reinforced its curative instructions immediately following closing arguments during its charge to the jury. Relevant to the issues raised on appeal, the court expressly instructed the jury: "The burden is on the State to prove the Defendant's guilt beyond a reasonable doubt. The Defendant has no obligation to present any evidence or to prove that he is innocent." T3 624. "In deciding whether the State has proven a charge against the Defendant beyond a reasonable doubt you must

decide the credibility of witnesses, that is, it is up to you to decide who to believe." T3 628–29. The court also instructed the jury:

> You have heard the lawyers discuss the facts and the law and their arguments to you. These arguments are not evidence, their purpose is to help you understand the evidence and the law. If the lawyers state the law differently from the law as I explain it to you then you will follow my instructions and ignore the Statements of the lawyers. If the lawyers state the evidence differently from how you recall it, then you should follow your own memory of what the evidence was . . . ,

T3 625, and:

> If I sustained an objection or excluded any evidence you must not guess as to what the answer or evidence would have been. If I ordered that a question and answer be stricken from the record, you must not consider either the question or the answer as evidence . . . ,

T3 626.

SUMMARY OF THE ARGUMENT

1. The trial court sustainably exercised its discretion when it denied the defendant's motion for a mistrial based on Detective Parker's testimony, "It was discussed and I believe I am not supposed to mention other locations? So I don't know." The testimony at issue referred to the fact that the defendant admitted to law enforcement that he engaged in oral sex with M.H. in Salem—an admission that the court deemed inadmissible at trial. Although the defendant argues the inadvertent admission of this fact improperly injected the defendant's prior criminal conduct into the trial for the first time and mandated a mistrial, the cumulative facts of this case do not require such a result.

The jury properly heard extensive and admissible testimony from Detective Parker that the defendant admitted to engaging in prior sexual, criminal conduct with M.H.—including fellatio, cunnilingus, and intercourse—before the now-challenged portion of Detective Parker's testimony. Against that backdrop, Detective Parker's subsequent testimony implying that the defendant may have also admitted more specifically to performing cunnilingus on M.H. in some unnamed town did not inject into the trial for the first time the notion that the defendant had engaged in prior similar, criminal conduct. The jury had already heard significant, admissible testimony on this point. Thus, the court sustainably exercised its discretion and found that a curative instruction would mitigate any prejudice to the defendant.

2. The trial court sustainably exercised its discretion when it denied the defendant's motion for a mistrial based on the prosecutor's statement that implied that the defendant carried a burden at trial, and subsequent statement that he thought the victim was credible. The trial court properly found that these statements were unintentional, provided immediate and explicit curative instructions following each challenged statement, thus bearing the "weight of judicial disapproval," and reinforced these instructions during the charge to the jury, which was delivered shortly after the statements at issue. Thus, the court sustainably exercised its discretion and found that a curative instruction would mitigate any prejudice to the defendant.

The defendant's secondary argument, that the given instructions were insufficient to remedy any resultant prejudice, is not preserved for appeal. At trial, the defendant neither requested that the court give specific instructions nor objected to those given. He may not do for the first time on appeal. Regardless, the instructions were proper.

3. The Sixth Amendment right to a public trial provides to the defendant the following guarantees: (1) to ensure a fair trial, (2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) to encourage witnesses to come forward, and (4) to discourage perjury. Many state and federal courts have embraced the triviality doctrine, which provides that temporary courtroom closures can be too trivial to trigger Sixth Amendment concerns. A closure is trivial when it does not impinge upon the guarantees of the Sixth Amendment. This court should similarly recognize this doctrine, which strikes the proper

balance between protecting the criminal defendant's Sixth Amendment rights and the court's ability to manage its courtroom.

The court's decision to lock the courtroom during closing argument amounted to a trivial closure that did not violate the defendant's Sixth Amendment rights. The defendant had two friends present throughout the trial. While one friend was temporarily locked out during a portion of closing arguments, he admitted that he could contemporaneously see and "hear everything" while he was outside the courtroom. Thus, the defendant's friends were able to view his entire trial and safeguard the guarantees of the Sixth Amendment.

4. This Court will overturn precedent only after considering: (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Here, while asking the Court to overturn its prior decisions that this Court reviews motions for new trials, and questions of whether a closure occurred and violated the Sixth Amendment, for an unsustainable exercise of discretion, and instead apply a *de novo* standard, the defendant failed to conduct the necessary analysis. When faced with a similar failure in *Ford v. New Hampshire Department of Transportation*, 163 N.H. 284, 290 (2012), this Court stated, "Having failed to brief any of the four stare decisis

factors, the plaintiff has not persuaded us that our decision .... must be overruled." The same is true here and the Court should therefore decline the defendant's request.

Regardless of the standard applied, however, the trial court's denial of the defendant's motion for a new trial was proper. While the trial judge did lock the courtroom door just prior to closing arguments, that act did not deny the defendant his Sixth Amendment rights. As stated above, the defendant had two friends present throughout the trial. While one friend was temporarily locked out during a portion of the closing arguments, he admitted that he could contemporaneously see and "hear everything" while he was outside the courtroom. A73. Thus, the defendant's friends were able to view his entire trial and safeguard his rights under the Sixth Amendment. Under either standard of review, the court's denial of the defendant's motion for a new trial was proper.

ARGUMENT

I. The trial court properly denied the defendant's motion for a mistrial because Detective Parker's statement did not constitute an irreparable injustice given that the jury had already heard extensive, admissible testimony that the defendant admitted to engaging in sexual conduct with M.H.

At trial, Detective Parker testified extensively about the defendant's admissions—the defendant admitted that he and M.H. were like "boyfriend and girlfriend," T2 329, that he touched M.H.'s breasts and vagina, that he licked M.H.'s vagina more than once, that M.H. performed fellatio upon him more than once, and that he engaged in intercourse with M.H. T2 330–35. Detective Parker then testified that the defendant specifically admitted that he engaged in fellatio with M.H. when her family lived in Hillsborough, T2 336; T3 531, and that he admitted that he had intercourse with M.H. on the third floor of her mother's apartment building in Manchester, T2 337. The defendant did not object to the admission of this testimony, nor does he contend on appeal that such admission was erroneous.

On cross-examination, defense counsel tried to impeach Detective Parker by highlighting that she did not write in her report that the defendant admitted to performing oral sex on M.H. in Hillsborough. T2 340. Defense counsel asked, "You don't report that [the defendant] said he had performed, himself, cunnilingus on [M.H.] in Hillsborough?" *Id.* Detective Parker replied, "It was discussed and I believe I am not supposed to mention other locations? So I don't know—" *Id.* Defense counsel asked to

approach, and before counsel did, Detective Parker added, "It's kind of hard to address that without saying that." *Id.*

Defense counsel moved for a mistrial. *Id.* The court immediately instructed the jury to disregard the statement and struck it from the record. T2 340–41. Defense counsel did not object to this instruction or request any particular language. *See id.*

The defendant now contends on appeal that the court erred in denying his motion for a mistrial, arguing that the admission of the challenged testimony constituted an "irreparable injustice" that could not be cured by a jury instruction. DB 22. He also argues that even if an instruction could have neutralized the prejudice of the statement, the given instruction was insufficient to do so, thus necessitating a mistrial. Each of these arguments fails.

A mistrial is appropriate only when the circumstances indicate that justice may not be done if the trial continues to a verdict. *State v. Wells*, 166 N.H. 76, 77 (2014). The decision to grant a motion for mistrial is within the discretion of the trial court and this Court will only reverse the decision of a trial court where it engaged in an unsustainable exercise of discretion. *State v. Gaudet*, 166 N.H. 390, 397 (2014).

First, this case is unlike those cited by the defendant—that is, cases in which the State introduced unambiguous evidence of the defendant's prior, unrelated criminal conduct that otherwise would not have become known to the jury. In the cases that the defendant cites—*Ayotte*, *Kerwin*, *Woodbury*, and *LaBranche*—the challenged testimony improperly injected the defendant's prior criminal conduct into the trial for the first time, thus prejudicing him. *See State v. Ayotte*, 146 N.H. 544, 548 (2001) (State

offered improper evidence throughout an arson trial of a similar arson incident involving the defendant); *State v. Kerwin*, 144 N.H. 357, 360 (1999) (victim testified that another girl told her that the defendant "raped some girl"); *State v. Woodbury*, 124 N.H. 218, 220 (1983) (detective improperly testified that the defendant claimed he had previously been charged with arson); *State v. LaBranche*, 118 N.H. 176, 179 (1978) (State's witnesses improperly testified about untried indictments of attempted sexual assault).

In contrast, this jury properly heard extensive and admissible testimony from Detective Parker that the defendant admitted to engaging in prior sexual, criminal conduct with M.H.—including fellatio, cunnilingus, and intercourse—before the now-challenged portion of Detective Parker's testimony. Against that backdrop, Detective Parker's subsequent testimony implying that the defendant may have also admitted more specifically to performing cunnilingus on M.H. in some unnamed town did not inject into the trial for the first time the notion that the defendant had engaged in prior similar and criminal conduct. The jury had already heard significant, admissible testimony on this point. Thus, the erroneous testimony did not prejudice the defendant as was the case in *Ayotte*, *Kerwin*, *Woodbury*, and *LaBranche*, and did not constitute an "irreparable injustice." Based on this, the court's denial of the defendant's motion was not an unsustainable exercise of discretion.

Second, the defendant did not preserve his challenge to the sufficiency of the court's instructions striking Detective Parker's statement, "It was discussed and I believe I am not supposed to mention other locations? So I don't know—" T2 340. At no time then or subsequently did

the defendant object to the given instruction or request that a specific instruction be given. Instead, defense counsel thanked the court. The defendant may not challenge the sufficiency of the instructions for the first time on appeal. *State v. Devaney*, 139 N.H. 473, 474 (2002).

Moreover, the given instructions were sufficient. Following the defendant's first motion for a mistrial, the court immediately delivered the now-challenged instruction striking the offending testimony:

> Members of the jury, I'm going to—the last statement by the detective—you're to disregard that last statement. It's to form no part of your deliberations in the case whatsoever. I'm striking it in its entirety; that last statement by the detective and we will take our morning break now; probably about a 10 or 15-minute break then we'll resume with testimony.

T2 340–41. The defendant now argues that a subsequent instruction, striking additional testimony "may have misled the jury into thinking that the court's prior instruction … was no longer in effect." DB 24. However, the subsequent instruction:

> Members of the jury, there was some testimony from the detective about—she specifically testified that the Defendant made an admission regarding the act of cunnilingus taking place in Hillsborough. I am striking that testimony. It's to form no part of your deliberations in this case whatsoever. So just that portion of her testimony,

T2 351–52, does not reference any prior instruction or purport to supplant any previously given instruction. Thus, any argument to the contrary is rooted in the hypothetical, rather than the record, and should therefore be summarily rejected.

II. The trial court properly denied the defendant's motion for a mistrial because the prosecutor's statements during closing argument, even if improper, were unintentional, isolated, and able to be cured by an instruction to the jury.

The defendant also appeals the court's denial of his motion for a mistrial based on the prosecutor's closing argument. The defendant argues that the prosecutor engaged in deliberate and repeated misconduct when he stated: "So let's talk a little about the Defendant. Obviously, Attorney Naro *has no choice* but to say, you know, if you believe the detectives—" T3 614 (emphasis added) (the "first statement");

> And, ladies and gentlemen, I don't want in any way to suggest that the Defense has a burden. The evidence has been presented and the Defense has chosen to ask you to address it, right? He is asking you to take a specific interpretation of that evidence *and he has to*, right?

T3 616 (emphasis added) (the "second statement"); "*I think* [M.H.]'s testimony, while difficult to follow and difficult for her to provide is reliable." T3 619 (emphasis added) (the "third statement").

While the defendant now argues that these statements in the aggregate constitute prosecutorial misconduct, he did not make this argument at trial. Instead, he argued that the first and third statements constituted prosecutorial misconduct. T3 620 ("The cumulative effect of those *two comments* ....") (emphasis added). Thus, this Court should not consider the prosecutor's second statement as part of the misconduct issue raised on appeal since it was not part of the argument presented and preserved before the trial court.

At trial, the court found that the prosecutor's first and third challenged statements were improper; it never addressed the second. T2 615, 621. The State does not challenge that finding on appeal. Still, the court nonetheless found that even taken together, the statements were not so prejudicial as to require a mistrial. Rather, it correctly found that curative instructions could sufficiently remedy any resulting prejudice. This Court should affirm that finding.

"Mistrial is the proper remedy only if the evidence or comment complained of was not merely improper, but also so prejudicial that it constitutes an irreparable injustice that cannot be cured by jury instructions." *State v. Boetti,* 142 N.H. 255, 261 (1997) (quotation omitted). The trial court is in the best position to determine what remedy will adequately correct the prejudice created by a prosecutor's remarks, and absent an unsustainable exercise of discretion, This Court will not overturn its decision. *Id.*; *cf. State v. Lambert,* 147 N.H. 295, 296 (2001) (explaining the unsustainable-exercise-of-discretion standard).

As a threshold matter, this Court must determine whether the prosecutor's remarks amounted to impermissible comments. *State v. Ellsworth,* 151 N.H. 152, 155 (2004). If they were, this Court must then determine whether the error requires reversal of the verdict. *Id.* at 155; *see Boetti,* 142 N.H. at 261, 699 A.2d 585. In making that determination, this Court balances the following factors: "(1) whether the prosecutor's misconduct was isolated and/or deliberate; (2) whether the trial court gave a strong and explicit cautionary instruction; and (3) whether any prejudice surviving the court's instruction likely could have affected the outcome of the case." *Ellsworth,* 151 N.H. at 155 (quotation omitted). This Court also

considers the trial court's later charge to the jury when addressing this inquiry. *Id.* at 157.

Here, the facts support the conclusion that the trial court sustainably exercised its discretion when weighing the relevant factors to determine that the curative instructions were appropriate in this case. First, the trial court properly found that the prosecutor's statements were not deliberate. This inquiry rests heavily on the prosecutor's demeanor, which the trial court was best situated to assess. *See, e.g., State v. Towle*, 167 N.H. 315, 320 (2015) ("We have recognized that a trial court is in the best position to consider the demeanor of a witness.").

After drawing an objection to his first challenged statement, the prosecutor immediately offered to withdraw it, implying his knowledge of the error. T3 614. Moreover, after the prosecutor explained his intention to the court, the judge—who was able to consider the attributes such as the prosecutor's demeanor and the context of the statement—confirmed, "I don't disagree with your intent," but explained that the inadvertent effect of the prosecutor's statement—that is, to imply the defendant carried a burden.

The defendant now claims that the prosecutor made a second improper statement implying the defendant's burden, though as stated above, he made no such argument at trial. Even so, while the defendant subsequently made a statement that may have carried a similar implication of a burden on the defendant, he couched the statement with explicit language reiterating that the defendant did not carry a burden—"I don't want in any way to suggest that the Defense has a burden"—thus indicating his lack of intention to suggest the contrary. T3 616.

The court similarly found that the prosecutor's third challenged statement was "flip" and "not intentional." T3 620. The fact that it was isolated underscores this finding. This case is unlike *State v. Bujnowski*, 130 N.H. 1 (1987), which the defendant cites in his brief, where the prosecutor injected his personal opinion into his closing argument at least five times—including going so far as to state that he thought a witness was lying and the defendant was guilty. *Id.* at 3. Noting, "[n]ormally, curative instructions can negate misconduct," this Court also noted that the repetitive, intentional, and egregious nature of the prosecutor's conduct mandated a mistrial. *Id.* at 5–6. But this case is not like *Bujnowski*. The prosecutor did not cast witnesses as liars, share his personal belief about that witness's motivation for lying, or profess his personal belief that the defendant was guilty. Instead, the prosecutor erroneously injected his opinion only once, thus supporting the court's conclusion that it was not intentional.

Second, the court provided immediate and explicit curative instructions following each challenged statement, thus bearing the "weight of judicial disapproval." T3 615, 616, 621; *see Ellsworth*, 151 N.H. at 157 ("[A]n immediate curative instruction can adequately remedy improper prosecutorial misconduct."); *Bujnowski*, 130 N.H. at 6 ("Normally, curative instructions can negate misconduct.").

After the prosecutor made the first statement, the court immediately instructed the jury:

> Members of the jury, I'm going to instruct you to disregard the Statement from the State regarding the Defense having no choice. As I talked the principles and I'm going to refer to them again in my instructions, in criminal cases, the

> Defendant is under no obligation whatsoever, the State has the burden of proof, the charge is beyond a reasonable doubt, the Defendant is under no obligation whatsoever.

T3 614. The court reiterated this instruction after the second statement, stating, "Again, the Defense is under no obligation. I'm going to strike that last comment by the State. It's to form no part of your deliberations." *Id.*

After the third statement, the court instructed:

> Members of the jury, I'm going to strike the last comment by the State regarding what the State—what an individual prosecutor thinks or believes. That's really not relevant, that's not part of any of your consideration in the case and it was improper for the Prosecutor to say that.

T3 621.

Moreover, the prosecutor immediately and explicitly reiterated the court's instruction when he next spoke to the jury. Following the first statement, the prosecutor repeated, "[l]adies and gentlemen, I don't want in any way to suggest that the Defense has a burden." T3 616. Similarly, after the instruction following the third statement, the prosecutor stated,

> As I told you early on in the opening, you decide the credibility of the witnesses. My misspeaking, obviously, does not change that burden and that obligation that you have, that's your job to be the judges of the facts and that's what the Court will talk about in instructions, that you are the judges of the facts and that, of course, includes witness credibility

T3 621–22.Third, the court reinforced its curative instructions immediately following closing argument during its charge to the jury. Relevant to the issues raised on appeal, the court expressly instructed the jury: "The burden is on the State to prove the Defendant's guilt beyond a

reasonable doubt. The Defendant has no obligation to present any evidence or to prove that he is innocent," T3 624, and: "In deciding whether the State has proven a charge against the Defendant beyond a reasonable doubt you must decide the credibility of witnesses, that is, it is up to you to decide who to believe," T3 628–29. The court also instructed the jury:

> You have heard the lawyers discuss the facts and the law and their arguments to you. These arguments are not evidence, their purpose is to help you understand the evidence and the law. If the lawyers state the law differently from the law as I explain it to you then you will follow my instructions and ignore the Statements of the lawyers. If the lawyers state the evidence differently from how you recall it, then you should follow your own memory of what the evidence was,

T3 625, and:

> If I sustained an objection or excluded any evidence you must not guess as to what the answer or evidence would have been. If I ordered that a question and answer be stricken from the record, you must not consider either the question or the answer as evidence,

T3 626. This Court "presume[s] that jurors follow jury instructions," *State v. Boggs*, 171 N.H. 115, 124 (2018), and should do so here.

Now, on appeal, the defendant argues for the first time that the given instructions were insufficient. But again, that argument is not preserved because the defendant did not make this argument at trial. *Devaney*, 139 N.H. at 474. Not only did the defendant fail to contemporaneously challenge the sufficiency of any instruction at trial, he also did not offer or request a particular instruction in place of those he now challenges. He

cannot remain passive or indifferent to the instructions given at trial and then challenge them as insufficient on appeal. *Id.*

Regardless, the given instructions were proper in light of the challenged statements. The first instruction identified the precise statement challenged by the defendant—the use of the phrase "has no choice" to imply that the defendant carried a burden at trial. T3 615. The court then not only reiterated the contrary—that the defendant bore no burden at trial—but also reinforced that the State bore the burden and stated what that the burden was. T3 616. The court concluded by stating again that the defendant had no burden. *Id.* The court also reminded the jury that it would revisit these principles in the court's instructions at the conclusion of the trial, which it did. *Id.*

After the second statement, the court struck the statement at issue—that the defendant "ha[d] to" advocate for a certain interpretation of the fact—and reiterated for the third time within just a few moments that the defendant bore no burden at trial. *Id.*

The court expressly called the prosecutor's third statement "improper," and made it clear to the jury that what the prosecutor believed was irrelevant to their function. Just moments later during its charge to the jury, the court was clear: "In deciding whether the State has proven a charge against the Defendant beyond a reasonable doubt you must decide the credibility of witnesses, that is, it is up to you to decide who to believe." The court then gave an extensive and explicit instruction explaining how to undertake this function. T3 628-30.

Fourth, the strength of the evidence against the defendant supports the court's exercise of discretion. *Ellsworth*, 151 N.H. at 157–58. The

defendant seemingly does not argue to the contrary. *See* DB 25–29. Here, the victim provided detailed testimony about the assaults. And what's more, the defendant corroborated that testimony.

The defendant did not deny that he engaged in sexual contact with M.H. Instead, Detective Parker testified that the defendant admitted that he and M.H. engaged in the precise sexual conduct charged—touching M.H.'s breasts and vagina, fellatio, cunnilingus, and intercourse. The defendant also told Detective Parker that he loved M.H., and that they were like boyfriend and girlfriend. T2 329. The jury also heard testimony that defendant specifically admitted that he engaged in fellatio with M.H. when her family lived in Hillsborough. T2 336; T3 531. He also admitted that he had intercourse with M.H. on the third floor of her mother's apartment building in Manchester. T2 337. Each specific admission corroborated a charged assault.

The decision to grant a motion for mistrial is within the discretion of the trial court and this Court will only reverse a trial court decision if it was clearly untenable or unreasonable to the prejudice of the defendant's case. *Gaudet*, 166 N.H. at 397 (2014); *State v. Beltran*, 153 N.H. 643, 647 (2006). On this record, the court sustainably exercised its discretion and determined that any prejudice created by the prosecutor's statements was cured by its instructions, the prosecutor's reiteration of those instructions, and its charge to the jury. In sum, all four factors in this case weigh in favor of the court's denial of the defendant's motion for a mistrial. The prosecutor's statements were isolated and unintentional, and the trial court gave strong curative instructions and a strong charge to the jury. Last, the strength of the evidence against the defendant was sufficient to outweigh

any resulting prejudice. Accordingly, the court's denial of the defendant's motion for a mistrial was a sustainable exercise of discretion.

III. The trial court properly denied the defendant's motion for a new trial because the defendant was not denied the guarantees of the Sixth Amendment.

The defendant's courtroom-closure issue raises two questions on appeal. First, a question of first impression, whether this Court recognizes a triviality doctrine with regard to the right to a public trial secured by the Sixth Amendment and Part I, Article 15 of the New Hampshire Constitution. Second, if so, whether the trial court properly found that the temporary closure in this case was trivial, and therefore, did not violate the Sixth Amendment. Here, the trial court properly determined that the closure is this case was too trivial to violate the Sixth Amendment. This Court should affirm that finding.

The State agrees that this Court reviews the first question *de novo*. However, this Court reviews motions for new trials, and questions of whether a closure occurred and violated the Sixth Amendment for an unsustainable exercise of discretion. *State v. Woodbury*, No. 2018-0118, slip op. at 10 (N.H. July 11, 2019); *State v. Cote*, 143 N.H. 368, 379 (1999); *State v. Guajardo*, 135 N.H. 401, 404 (1992). The defendant's third issue related to courtroom closure asserts the contrary, that such questions should be reviewed *de novo*.

A. New Hampshire should recognize the triviality doctrine, that is, that a closure is trivial when it does not deny the defendant the guarantees of the Sixth Amendment.

Part I, Article 15 of the state constitution encompasses the federal Sixth Amendment right of the defendant to a public trial in all criminal

prosecutions. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions ...." *Waller v. Georgia*, 467 U.S. 39, 46 (1984). "But this public-trial right is not absolute and must be balanced against other important considerations in the administration of justice." *United States v. Acosta-Colon*, 741 F.3d 179, 187 (1st Cir. 2013) (citing *Waller*, 467 U.S. at 45).

Thus, to justify excluding the public from a criminal proceeding, four criteria must be met: (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) the trial court must make findings adequate to support the closure. *Waller*, 467 U.S. at 48. Deprivations of a defendant's right to a public trial are considered "structural errors," which are not subject to harmless-error review. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907–08 (2017).

However, "[t]he *Waller* test applies ... only if closing the courtroom implicates the defendant's Sixth Amendment right." *United States v. Perry*, 479 F.3d 885, 889–90 (D.C. Cir. 2007) ("Before applying the *Waller* test to determine whether the district court violated [the defendant's] Sixth Amendment right to a public trial, we must first determine whether the right attaches ...."). Not all courtroom restrictions do so—some are too trivial to implicate the guarantees of the Sixth Amendment. *Peterson v. Williamson*, 85 F.3d 39, 42–43 (2d Cir. 1996) (no Sixth Amendment

violation where spectators, rather than members of the petitioner's family, were removed from the courtroom, the unauthorized closure lasted fifteen to twenty minutes, and the courtroom was immediately reopened when the prior failure to do so was discovered); *see Carson v. Fischer*, 421 F.3d 83, 92 (2d Cir. 2005) ("Even an unjustified closure may, in some circumstances, be so trivial as not to implicate the right to a public trial); *Snyder v. Coiner*, 365 F. Supp. 321, 324 (N.D. W. Va. 1973) (finding no Sixth Amendment violation where a deputy sheriff closed the courtroom doors during summations because he had misunderstood a state trial judge's order to keep the courtroom quiet, finding the closure was only for a "relatively small portion of the trial" and "[n]either the judge nor the parties were aware of any exclusion of the public taking place"), *aff'd*, 510 F.2d 224 (4th Cir. 1975).

The Second Circuit applied the triviality doctrine in *Peterson*. In that case, the judge cleared and closed the courtroom during a particular witness's testimony and inadvertently left it closed for 15 to 20 minutes after that witness had finished testifying, while the defendant testified. *Peterson*, 85 F.3d at 41–42. When the judge realized the extended closure, she reopened the courtroom, members of the public reentered, and defense counsel repeated all of the defendant's relevant testimony in summation. *Id.* The Second Circuit ultimately found that this partial closure was trivial, and therefore, did not violate the Sixth Amendment. *Id.* at 44.

The court explained:

> A triviality standard, properly understood, does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer "prejudice" or "specific injury." It is, in other words, very different from a

> harmless error inquiry. It looks, rather, to whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment.

Id. at 42. These protections include guarantees: (1) to ensure a fair trial, (2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) to encourage witnesses to come forward, and (4) to discourage perjury. *Id.*; *Waller,* 467 U.S. at 46–47. Because none of these values were compromised during the closure at issue in *Peterson*, the court found that the defendant's Sixth Amendment rights had not been infringed and he was not entitled to a new trial. *Peterson*, 85 F.3d at 44.

State and federal courts, including the trial court in this case, have recognized and applied the *Peterson* framework to determine whether a closure is trivial and therefore does not violate the Sixth Amendment. For example, in *State v. Brown*, 815 N.W.2d 609, 617 (Minn. 2012), the Minnesota Supreme Court held that locking the door during jury instructions did not violate the defendant's Sixth Amendment rights where the trial court did not clear the courtroom of all spectators. Noting, "[n]ot all courtroom restrictions implicate a defendant's right to a public trial," *id.*, the court found that the closure was too trivial to violate the Sixth Amendment. The court highlighted that the "courtroom was never cleared of spectators," the trial remained open to the public, and there was no period during which the courtroom was empty of the defendant's friends and family. *Id.*; *see also, e.g., Braun v. Powell,* 227 F.3d 908, 919 (7th Cir. 2000) (applying *Peterson* to hold that the exclusion of a single excused

juror from the trial did not implicate the right to a public trial); *United States v. Al-Smadi,* 15 F.3d 153, 154–55 (10th Cir. 1994) (applying *Peterson* to hold that the brief and inadvertent closure of the courtroom did not implicate the Sixth Amendment); *Commonwealth v. Cohen*, 921 N.E.2d 906, 919–20 (Mass. 2010) ("We agree with the principles discussed in [*Peterson*, *Al-Smadi*, and *Braun*] but those principles do not govern here."); *State v. Torres*, 844 A.2d 155, 162 (R.I. 2004) (specific and prolonged removal of defendant's sisters from courtroom during *voir dire* and jury selection was not trivial, and therefore, violated the Sixth Amendment); *State v. Decker*, 907 N.W.2d 378, 384-85 (S.D. 2018) (applying *Peterson* and holding that the presence or absence of a singular member of the public is too trivial to impede the guarantees of advancing fairness of the trial, reminding the judge and prosecutor of their responsibility to the accused and importance of their functions, encouraging witnesses to come forward, and discouraging perjury).

The Court should similarly recognize this doctrine, which is accepted among state and federal courts, and strikes an appropriate balance between a trial judge's discretion to manage their courtroom and docket, *see In the Matter of Conner & Conner,* 156 N.H. 250, 252 (2007) ("The trial court has broad discretion in managing the proceedings before it."), and a criminal defendant's constitutional rights.

B. The trial court sustainably exercised its discretion when it denied the defendant's motion for a new trial.

Save for 15–20 minutes, the defendant's trial was completely open. The one exception—the court locked the courtroom to additional members

of the public just prior to closing arguments. A44. Notably, however, the court did not remove any spectators who were already present in the courtroom, so spectators were present at all times during the trial. A44, A48.

The defendant's two friends, Leppala and Karadonis, were present throughout the trial. A52, A69, A72, A80. Leppala was present in the courtroom through every aspect of the trial, including closing arguments. A69. Karadonis was present for every aspect of trial, except that he was temporarily locked out after he left the courtroom to use the bathroom just before closing arguments. A69, A72. However, even while locked out, Karadonis was able to contemporaneously perceive the closing arguments because he could view the courtroom through a window, A69, *see* A72 (Karadonis indicating he could see the judge while locked out), and "could hear everything when he was standing outside" the courtroom. A73. Karadonis was able to return to the courtroom midway through closing arguments. A69, A73.

Given these facts, the trial court properly determined that the temporary, partial closure at issue did not infringe the guarantees of the Sixth Amendment. At all times, the defendant had interested spectators, including his friends, present to ensure that he was "fairly dealt with and not unjustly condemned" and to discourage perjury. *Waller*, 467 U.S. at 47–48; *see United States v. Scott*, 564 F.3d. 34, 38 (1st Cir. 2009) (even if a hypothetical member of the public was denied access, there was no Sixth Amendment violation when other members of the public were present). Both friends contemporaneously witnessed opening statements, all the evidence come in during trial, and closing arguments; thus, each had the

opportunity to come forward with additional, relevant information, as necessary. *Id.* Thus, regardless of the standard of review, this Court should affirm the trial court's denial of the defendant's motion for a new trial.

C. This Court need not reach the issue of the proper standard of review because the defendant has not properly presented it on appeal and it does not affect the outcome of this case.

The defendant argues that this Court should overrule its precedent and establish now that it reviews motions for a new trial pursuant to RSA 526:1 (2007) and the courtroom closures *de novo*, rather than for an unsustainable exercise of discretion. In the first instance, this Court should not reach this issue as the defendant has not properly presented it on appeal. Moreover, the Court need not reach the issue because the trial court's determination was proper under either standard.

The defendant seeks a new trial pursuant to RSA 526:1. A51. "The grant of a new trial is within the discretion of the trial court, and [this Court] will not overturn the court's determination absent an unsustainable exercise of discretion." *Woodbury*, No. 2018-0118, slip op. at 10. Similarly, this Court reviews a trial court's decision to close the courtroom for an unsustainable exercise of discretion. *Cote*, 143 N.H. at 379; *Guajardo*, 135 N.H. at 404. Here, the defendant argues that the Court should overturn this precedent and review such decisions *de novo*.

"The doctrine of stare decisis demands respect in a society governed by the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results." *Ford v. N.H. Dept. of Transp.*, 163

N.H. 284, 290 (2012) (citing *Jacobs v. Director, N.H. Div. of Motor Vehicles*, 149 N.H. 502, 504 (2003)). "[W]hen asked to reconsider a holding, the question is not whether [this Court] would decide the issue differently *de novo*, but whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed." *State v. Quintero*, 162 N.H. 526, 539 (2011) (quotation omitted). Thus, the Court will overturn a decision only after considering: (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. *Ford*, 163 N.H. at 290.

Here, while asking the Court to overturn precedent, the defendant failed to conduct the necessary analysis. DB 33 n.2. When faced with a similar failure in *Ford*, this Court stated, "Having failed to brief any of the four stare decisis factors, the plaintiff has not persuaded us that our decision .... must be overruled." *Ford*, 163 N.H. at 290. The same is true here and the Court should therefore decline the defendant's request.

Regardless of the standard applied, however, the trial court's denial of the defendant's motion for a new trial was proper. While the trial judge did lock the courtroom door just prior to closing arguments, that act did not deny the defendant his Sixth Amendment rights. As stated above, the defendant had two friends present throughout the trial. While one friend was temporary locked out during a portion of the closing arguments, he

admitted that he could contemporaneously see and "hear everything" while he was outside of the courtroom. A73. Thus, the defendant's friends were able to view his entire trial and safeguard his rights under the Sixth Amendment. Under either standard of review, the court's denial of the defendant's motion for a new trial was proper.

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 COMPLIANCE

I, Elizabeth A. Lahey, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,834 words, which is more than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

Stephanie Hausman, Deputy Chief Appellate Defender, counsel for the defendant, assents to a motion to exceed word count, which is being filed with this brief.

September 3, 2019

Elizabeth A. Lahey

CERTIFICATE OF SERVICE

I, Elizabeth A. Lahey, hereby certify that I have sent copies of this brief to Stephanie Hausman, Deputy Chief Appellate Defender, counsel for the defendant, by first-class mail postage prepaid, at the following address:

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