THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0118

State of New Hampshire

v.

Jonathan Woodbury

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

BRIEF FOR THE DEFENDANT

Stephanie Hausman
Deputy Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301
NH Bar # [Bar ID #]
603-224-1236
(15 minutes oral argument requested)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Constitutional Provisions

Rules

QUESTIONS PRESENTED

1. Whether the court plainly erred in finding sufficient evidence of falsifying physical evidence.

Issue raised as plain error pursuant to Supreme Court Rule 16-A.

2. Whether the trial court erred in not instructing that, to convict of falsifying physical evidence, the jury must find that the defendant believed that an official investigation was pending or about to be instituted.

Issue preserved by Woodbury's request and the trial court's ruling. T3* 269-73, 289-90.

3. Whether the court plainly erred in imposing consecutive sentences for two assault-by-prisoner convictions when the charges were not differentiated in any way.

Issue raised as plain error pursuant to Supreme Court Rule 16-A.

4. Whether the court erred in ruling that the evidence did not support an instruction on the lesser offense of mutual consent.

Issue preserved by Woodbury's motion and the court's order. A-A.

* Citations to the record are as follows:
"A" refers to the appendix to this brief;
"Ex. 6" refers to the State's exhibit 6, a video of the incident, transferred to this Court;
"S" refers to the sentencing hearing, held on February 2, 2018;
"T1 – T3" refer to the transcripts of the three-day trial held November 20 to 22, 2017.

STATEMENT OF THE CASE

Jonathan Woodbury was charged in the Coos County Superior Court with three counts of assault by prisoner and one count of falsifying physical evidence. A15-A18. As to the assault charges, he raised the defense of use of force in defense of a third person. T3 286-89.

The jury acquitted Woodbury on one count of assault by prisoner and convicted him of the remaining three charges. T3 320-25. The court (Bornstein, J.) sentenced him to serve concurrent sentences of two and a half to five years in prison on the falsifying and one assault charge. S 15-17. These sentences run consecutively to a sentence Woodbury was already serving. Id. On the final assault charge, Woodbury was sentenced to three and a half to seven years in prison, all suspended for ten years. S 17.

STATEMENT OF THE FACTS

On December 8, 2016, Jonathan Woodbury, Terrance Hartley, and M.M. were inmates at the Northern New Hampshire Correctional Facility in Berlin, housed on Bravo Block. T1 16, 19, 126-27; T2 179-80, 199. Hartley and M.M. were cellmates in cell five. T1 126-27; T2 180, 199. They had a fight in their cell that resulted in M.M.'s nose and two ribs being broken. T1 127-29, 133-35. M.M. left the cell, bleeding profusely, and closed the door behind him, locking Hartley inside the cell. T1 40-41, 66-67, 109, 130, 133-34; T2 192, 202-03. Once M.M. left the cell, the encounter was captured by prison surveillance cameras, of which the inmates were aware. Exh. 6; T1 79-80; T2 195, 213.

M.M. then turned and spit through the window in the door in Hartley's face. T1 67, 80-81, 115, 131, 147; T2 192-93, 202-05. Woodbury was standing nearby and, in order to stop M.M. from continuing to spit on Hartley, Woodbury struck M.M. in the head. T1 67, 90, 104, 111-12, 131; T2 193, 195-96, 204-06, 260. M.M. turned to Woodbury and they began fighting, with both men throwing punches. T1 91 (men "squared up" and took "aggressive positions as though they're going to fight," M.M. connected "at least once")), 112 (men "squared up"), 131 (M.M. testified that he "tried to fight [Woodbury] and [Woodbury] ran off at one point. I did have engaged fighting with him."), 132 (M.M. testified that he and Woodbury "exchange[d] blows"); T2 207 (Woodbury's testimony that M.M. "turned around . . . and swung at [him]," they "got into a fight," and M.M. swung a second time); Ex. 6. Woodbury described

the incident as ending quickly. T2 207. Both men later plead guilty to disciplinary infractions arising out of this incident. T1 92; T2 237-39.

M.M. went to the bathroom to clean himself. T1 68, 83. No one prevented M.M. from going into the bathroom, followed him into the bathroom, or assaulted him there, despite the absence of cameras in the bathroom. T1 83, 154-55; T2 207, 213-14. Woodbury and another inmate got a mop and bucket and began cleaning blood off the floor and tables in the common area. T1 67-68; T2 212, 240. M.M. came out of the bathroom and pushed the button on the call box, summoning correctional officers to his aid. T1 68-69, 83-84, 120, 134-35; T2 240.

SUMMARY OF THE ARGUMENT

1. The court plainly erred in finding sufficient evidence of falsifying physical evidence. Here, the State's witnesses explained why an inmate would clean blood in the common areas for reasons unconnected to any purpose to impair a pending investigation. Moreover, the witnesses also indicated that many assaults in the prison are never investigated, a fact casting doubt on whether Woodbury believed that an investigation was about to be instituted. Because the evidence was insufficient to support the conviction, the court plainly erred in failing to dismiss the falsifying physical evidence indictment.

2. The court erred in failing to instruct the jury fully on the element regarding the impending investigation. Falsifying physical evidence applies only to official investigations, as made plain by the context of the statute and its chapter. Failure to instruct on an element is structural error requiring reversal.

3. The court plainly erred in imposing consecutive sentences for two charges alleging the same act on the same day. Because this error implicates Woodbury's constitutional rights to be free from double jeopardy and to clarity in his charging documents, and because the error resulted in an illegal sentence, this Court should reverse.

4. The court erred in finding no evidence to support a mutual combat instruction. Both participants described the incident as a mutual fight and this characterization was supported by the State's witnesses and the video of the encounter.

I. THE COURT PLAINLY ERRED IN FINDING SUFFICIENT EVIDENCE OF FALSIFYING PHYSICAL EVIDENCE.

At the close of the State's case, Woodbury moved to dismiss the falsifying charge, arguing that the blood he cleaned up was not significant evidence in the investigation. T2 161-67. Woodbury does not press that claim on appeal. Rather, Woodbury argues that the trial court plainly erred in finding sufficient evidence that he had a purpose to impair the verity or availability of the blood in an investigation he believed was pending or about to be instituted. He raises this claim as plain error. Supr. Ct. R. 16-A.

In order to prove falsifying physical evidence, the State must prove that, "believing that an official proceeding . . . or investigation is pending or about to be instituted, [the defendant] [a]lters, destroys, conceals or removes any thing with a purpose to impair its verity or availability in such proceeding or investigation." RSA 641:6, I. The State alleged that Woodbury:

> did commit the crime of Falsifying Physical Evidence, in that he, believing that an investigation of the crime of Assault by Prisoner was about to be instituted at the New Hampshire Department of Corrections Northern Correctional Facility, . . . purposely destroyed or removed blood splatters left by Inmate [M.M.] by mopping the splatters off the floor and/or table area with a purpose to impair their availability in the investigation.

A15.

Evidence is legally insufficient to establish an element of the offense if "no rational trier of fact, evaluating all of the evidence and reasonable inferences therefrom in the light most favorable to the State, would conclude beyond a reasonable doubt that [the defendant] had committed the charged

crime." State v. Hanes, ___ N.H. ___ (slip op. at 3) (decided July 18, 2018). "When the evidence is solely circumstantial, it must exclude all reasonable conclusions except guilt." Id. at 3-4. The Court will "examine each evidentiary item in context, not in isolation." Id. at 4. The conviction of a defendant on the basis of legally insufficient evidence violates the Due Process Clause of the Fourteenth Amendment. Jackson v. Virginia, 443 U.S. 307, 317-318 (1979).

The State's institutional witnesses all testified that they treat an inmate's blood as a potential biological hazard and take appropriate cautionary steps to avoid anyone coming into contact with it. T1 26-27, 44, 77-79, 115. There was also testimony that many assaults in prison do not get reported to staff, sometimes because assaulted inmates choose not to report it. T1 47, 106-07; T2 225. Finally, there was testimony that inmates clean their own living spaces. T1 115-17.

Investigator Timothy Coulombe testified that it is not uncommon for inmates to clean up blood after an assault because they want to prevent an investigation from being undertaken. T1 90; see also T1 16-17, 92-93 (staff investigating a potential crime lock inmates in their cells). The State's evidence conflicted as to whether inmates would clean up blood without staff direction. T1 71-74, 89, 115-18. However, no evidence was presented that inmates are forbidden from cleaning blood. See, e.g., T2 212-13. In addition, testimony established that blood is harder to clean once it dries. T1 90.

In this case, the evidence showed that M.M. did not immediately alert authorities of the assault. T1 134-35. Woodbury and another inmate began

cleaning the blood before M.M. called for assistance. T1 68-69, 83-84; T2 240; Ex. 6. There was no evidence that Woodbury or the other inmate who cleaned up M.M.'s blood in the common area tried to hide that they had done so. See, e.g., T1 124; T2 213. Woodbury testified that he cleaned up M.M.'s blood because "that's our home. We live there on the unit. We basically, clean up after ourselves. We're grown men. You know, I took it upon myself to clean the blood. . . . I mean, we eat at those tables." T2 212.

"The plain error rule allows [the Court] to exercise [its] discretion to correct errors not raised before the trial court." Hanes, (slip op. at 8). In order to find plain error, "(1) there must be error; (2) the error must be plain; and (3) the error must affect substantial rights." Id. (quotation omitted). If these three conditions are met, the Court may then exercise its discretion "to correct a forfeited error only if the error meets a fourth criterion: the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." Id. (quotation omitted).

It was plain error to find sufficient evidence of the required mental state. There was no direct evidence that Woodbury believed that an investigation was about to be instituted and that he cleaned the blood with the purpose to impair its availability for such investigation. Rather, the direct evidence established that Woodbury had no reason to believe that an investigation was about to be instituted and that he cleaned the blood in order to keep his living space clean and free from potential biohazards. Circumstantial evidence from the State's institutional witnesses supported Woodbury's testimony that not every prison

assault is investigated, that inmates clean their living spaces, and that blood is seen by those in the prison system as being a potential health problem.

Moreover, no evidence supported the State's theory that Woodbury had a purpose to impair a potential investigation. Rather, the evidence established that inmates know that the common area is video surveilled by prison staff and that Woodbury and the other inmate took no steps to hide the fact that they cleaned up blood there. In addition, no effort was undertaken to clean up blood in those areas of the prison that are not video surveilled; *i.e.*, Hartley's and M.M.'s cell and the bathroom. No rational trier of fact could have found that the evidence excluded the conclusion, consistent with innocence, that Woodbury did not have an investigation-impairing purpose in cleaning the blood from the common area. There was plainly insufficient evidence of the required mental state.

This error affected substantial rights. Generally, to show that an error affected substantial rights, "the defendant must demonstrate that the error was prejudicial, *i.e.*, that it affected the outcome of the proceeding." State v. Thomas, 168 N.H. 589, 606 (2016). Whenever this Court has found insufficient evidence of an element, it has found the third plain error prong met. State v. Houghton, 168 N.H. 269, 274 (2015); State v. Guay, 162 N.H. 375, 380-84 (2011).

Finally, Woodbury's claim also satisfies the fourth plain error prong. "Because the defendant was convicted based upon insufficient evidence of guilt, to allow the defendant's conviction to stand would seriously affect the

fairness and integrity of judicial proceedings." Houghton, 168 N.H. at 274 (brackets and quotation omitted). This Court must vacate the conviction.

II. THE COURT ERRED IN DENYING WOODBURY'S REQUEST FOR AN INSTRUCTION THAT THE STATE MUST PROVE THAT THE DEFENDANT BELIEVED THAT AN OFFICIAL INVESTIGATION WAS PENDING OR ABOUT TO BE INSTITUTED.

RSA 641:6 states:

> A person commits a class B felony if, believing that an official proceeding, as defined in RSA 641:1, II, or an investigation is pending or about to be instituted, he:
>
> I. Alters, destroys, conceals or removes any thing with a purpose to impair its verity or availability in such proceeding or investigation; or
>
> II. Makes, presents or uses any thing which he knows to be false with a purpose to deceive a public servant who is or may be engaged in such proceeding or investigation.

RSA 641:1, II defines "official proceeding" as "any proceeding before a legislative, judicial, administrative or other governmental body or official authorized by law to take evidence under oath or affirmation including a notary or other person taking evidence in connection with any such proceeding."

Before jury instructions were given, the following discussion took place:

> DEFENSE COUNSEL: The second thing, it's kind of a fairly obvious thing, but I think it's important. The model instructions and the Court instructions define an official proceeding, but they don't define an official investigation. And I would ask that there be a definition of the official investigation . . . provided.
>
> TRIAL COURT: Well, official proceeding is a statutorily defined term.
>
> DEFENSE COUNSEL: I understand
>
> TRIAL COURT: Investigation, it's just an investigation, not official investigation under the statute. And an investigation –
>
> DEFENSE COUNSEL: Correct.

TRIAL COURT: -- I've never defined it in falsifying physical evidence cases because it's a word that is defined by its plain, ordinary meaning.

DEFENSE COUNSEL: Well, I guess the concern would be, I mean, as a parent, if there's spilled milk on the table, I'm conducting an investigation to see who spilled the milk, but I don't think that if someone altered the milk spilled that it would be a Class B felony. I think it needs to be an investigation by a law enforcement agency or something. There has to be more to it than just an investigation.

If, you know, somebody is investigating who turned out the lights or who broke a window and it's not a police agency, it's a neighbor, I mean, the word investigation is too broad. I think it does need to be tied – the fact is the statute does require an official proceeding for there to be falsifying physical evidence, and they define that by statute. But they don't define an investigation, and I do think that it needs to be an official investigation. . . .

And I'll be candid, when I started to look at this last night, I – it occurred to me that that's something that I should raise with the Court. And the fact that they don't define what an investigation is in the statute or in the model instructions, I think is a gap that we should address.

TRIAL COURT: [State], anything you want to say about that issue?

PROSECUTOR: Just that I agree with the Court that an investigation is an investigation. I think the jury understands the plain meaning of what an investigation is. They heard from law enforcement. They heard what was done.

TRIAL COURT: Okay. . . . I mean with respect to the request that the term investigation be defined, again, the statute explicitly, you know, is worded in the alternative. That either if an official proceeding, as defined by statute, 641:1(II), or investigation is pending, or is about to be instituted, and again, the

> definition of official proceeding appears at 641:1(II) under the perjury statute.
>
> And again, the falsifying physical evidence statute incorporates by definition that – by reference that definition of official proceeding. But again, the Defendant in this case is charged with falsifying physical evidence believing that an investigation is pending or about to be instituted, or in this case. And the – in my view, the term investigation doesn't require further definition [or] explanation. . . .
>
> It's a word that is, like many words in many of the elements of an offense, or in many of the criminal statutes, has its plain and ordinary meaning.

T3 269-73. As a result of this ruling, the jury was instructed, as to the first element of the crime, only that they must find "the Defendant believed that an investigation was pending or about to be instituted regarding the crime of assaults by prisoners." T3 289. In so ruling, the court erred.

"The necessity and the particular scope and wording of a jury instruction generally fall within the sound discretion of the trial court." State v. Boggs, ___ N.H. ___ (slip op. at 6) (decided July 6, 2018). "However, when a particular jury instruction raises a question of law relating to the State's burden of proof, [the Court will] review such matters de novo." Id.; see also State v. Kousounadis, 159 N.H. 413, 422-29 (2009) (characterizing issue of missing instruction that further defines element as being constitutional error because "akin to the direction of a verdict" on that element).

Also, when a jury instruction issue raises a question as to the interpretation of a statute, this Court will review such questions de novo. State v. Etienne, 163 N.H. 57, 70 (2011). This Court is the "final arbiter[] of the

legislature's intent as expressed in the words of the statute considered as a whole." Kousounadis, 159 N.H. at 423 (quotation omitted). The Court construes "provisions of the Criminal Code according to the fair import of their terms and to promote justice." Id. The Court "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." Id. The Court "interpret[s] a statute in the context of the overall statutory scheme and not in isolation." Id.

This case is similar to Kousounadis. In that case, the defendant was charged with felony criminal threatening for firing a shotgun in the vicinity of another person. Id. at 422. The defendant requested that the jury be instructed on the full definition of "deadly weapon," *i.e.*, "any firearm, knife or other substance or thing which, in the manner it is used, intended to be used, or threatened to be used, is known to be capable of producing death or serious bodily injury." Id. at 422-23 (quotations omitted). The trial court denied the request and instructed the jury on that element thusly: "that the defendant [placed the victim in fear of imminent bodily injury] through conduct that is by removing a deadly weapon, a shotgun, from his car and firing it in the vicinity of [the victim]." Id. at 422.

This Court looked at whether the qualifying phrase, "which, in the manner it is used, intended to be used, or threatened to be used, is known to be capable of producing death or serious bodily injury," modified "firearm" and decided it was reasonable to interpret the statute either way. Id. at 423-24 (quotations omitted). The Court then looked at the "manner in which the term

'deadly weapon' is functionally used throughout the Criminal Code," but found no clarifying answer there. Id. at 424. The Court finally found guidance in the legislative history and concluded that the qualifying phrase was intended to modify the noun "firearm." Id. at 424-25.

Once the Court interpreted the statute, it became clear that the State bore the burden of proving, beyond a reasonable doubt, that the shotgun fit the definition of a "deadly weapon." Id. at 425. Because the instructions had not included the modifying phrase, "the instructions relieved the jury from its obligation of determining whether the shotgun in this case constituted a deadly weapon" and "removed from the jury's consideration an element of the felony charge." Id. at 426.

The Court finally concluded that the constitutional error of not instructing the jury on the definition of "deadly weapon" was structural error requiring reversal. Id. at 427-29. The Court concluded that, under the State Constitution, the "failure to instruct the jury on one element of a crime is . . . indistinguishable from a directed verdict, and deprives a defendant of his right to a jury trial." Id. at 429.

Here, the Court's first task is to interpret the falsifying physical evidence statute to determine whether the modifier "official" qualifies both "proceeding" and "investigation." The first element of RSA 641:6 is that the defendant believes "that an official proceeding, as defined in RSA 641:1, II, or investigation is pending or about to be instituted." The phrase "official proceeding" is then statutorily defined, but the statute and chapter give no

definition for "investigation" or "official investigation." It is unclear whether the phrase, "as defined in RSA 641:1, II," is intended to signify that the qualifier "official" modifies only "proceeding."

Because "official proceeding" is statutorily defined, but "investigation" or "official investigation" is not, the legislature would be hard pressed to find phrasing that would clarify this question. For example, if the legislature meant for "official" to also modify "investigation," but still wanted to refer to the statutory definition of "official proceeding," changing the order of the nouns would not clarify the question unless the legislature awkwardly repeated the word "official" ("believing that an official investigation or official proceeding, as defined…"). Whereas if the legislature intended to include *any* investigation within the ambit of the statute, it could remove any ambiguity by changing the order of the subjects ("believing that an investigation or official proceeding, as defined…"). The composition of the falsifying statute is open to two reasonable interpretations: that the legislature intended the adjective "official" to modify only the noun that immediately follows it, "proceeding," and that it intended the adjective to modify both nouns that follow, "proceeding" and "investigation."

The context of the falsifying statute makes plain that the legislature intended "official" to modify both nouns, including "investigation." RSA 641:6 makes it a felony to interfere with evidence that may be used in certain proceedings or investigations. The type of proceeding is sharply circumscribed by definition. RSA 641:1, II. However, according to their plain meanings, "investigation" has a much more broad connotation than "proceeding." For

example, an employer, school, homeowner, or parent may undertake an "investigation," which would never result in any kind of "proceeding."

The context of the statute indicates that the legislature intended the two nouns to have a similar scope. For example, the rest of the statute treats the two objects, "proceeding" and "investigation," as two objects of like kind ("such proceeding or investigation"). Paragraph II of the statute makes it a crime to "[m]ake[], present[] or use[] any thing which he knows to be false with a purpose to deceive *a public servant who is or may be engaged in such proceeding or investigation*." This phrasing indicates an intent to limit investigations to those undertaken by "public servant[s]:" *i.e.*, official investigations.

Moreover, RSA 641:6 is found in a chapter, entitled "Falsification in Official Matters," which includes other crimes, such as perjury, false report to law enforcement, and witness tampering. The context of the statute and its chapter makes plain that the legislature intended the qualifier "official" to modify "investigation" as well as "proceeding." The court erred in failing to instruct the jury on this aspect of the element.

Because this error resulted in the jury not being instructed on the full definition of a statutory element, the error requires reversal regardless of the evidence at trial. This Court must reverse and remand for a new trial.

III. THE COURT PLAINLY ERRED IN IMPOSING CONSECUTIVE SENTENCES FOR TWO ASSAULT CONVICTIONS WHEN THE CHARGES WERE NOT DIFFERENTIATED IN ANY WAY.

The State brought three assault by prisoner charges, alleged to have been committed on December 8, 2016. A16-A18. Each read as follows:

> Jonathan Woodbury . . . did commit the crime of Assaults by Prisoners: Simple Assault, in that he, while being held in official custody at the New Hampshire Department of Corrections Northern Correctional Facility, knowingly caused unprivileged physical contact to Inmate [M.M.], in that Inmate Woodbury struck Inmate [M.M.] with his fist, an act constituting Simple Assault under RSA 631:2-a(I)(a).

Id.

In instructing the jury on the assault charges, the trial court did not differentiate the charges in any way. T3 285-89. As to the relation of the charges to each other, the court gave this general instruction:

> each of the charges against this Defendant constitutes a separate offense. You must consider each charge separately and determine whether the State has proven the Defendant's guilt beyond a reasonable doubt. The fact that you may find the Defendant guilty or not guilty on any one of the charges, should not influence your verdict with respect to the other charges.

T3 283. The court also instructed that the verdict must be unanimous. T3 315.

The jury acquitted Woodbury on one assault charge, the one with the lowest charge ID number, and convicted him of the remaining two. T3 320-25. The parties and the court treated these verdicts as representing the jury's conclusion that Woodbury was acting in defense of a third person for the first

punch but that the second and third punches were not so justified. Ex. 6 (showing sequence of contact); S 5, 14; A7-A8, A11, A13. At sentencing, the court gave Woodbury consecutive sentences on the two assault charges. S 14-17. In giving consecutive sentences under these circumstances, the court plainly erred.

"The plain error rule allows [the Court] to exercise [its] discretion to correct errors not raised before the trial court." State v. Hanes, ___ N.H. ___ (slip op. at 8) (decided July 18, 2018). In order to find plain error, "(1) there must be error; (2) the error must be plain; and (3) the error must affect substantial rights." Id. (quotation omitted). If these three conditions are met, the Court may then exercise its discretion "to correct a forfeited error only if the error meets a fourth criterion: the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." Id. (quotation omitted).

Part I, Article 16 of the New Hampshire Constitution and the Fifth Amendment to the United States "protect[] against multiple punishments for the same offense." State v. Martinko, ___ N.H. ___ (slip op. at 3) (decided August 17, 2018). In Martinko, the defendant moved to withdraw his pleas to three pattern aggravated felonious sexual assault charges, each alleging the same variant of sexual assault but each occurring in a separately-identified time period. Id. at 1-3. The Court reviewed its caselaw, which has allowed multiple pattern convictions when the charges are distinguishable. Id. at 4-5 (examining State v. Richard, 147 N.H. 340 (2001) and State v. Jennings, 155 N.H. 768 (2007)). The Court noted that the:

> defendant was charged with committing acts that occurred within discrete periods of time that did not overlap. To obtain conviction, the State was required to prove that two or more acts occurred within each of the charged discrete periods. Given the difference in the evidence required to obtain a conviction and the purpose of the statute, we hold that the State was permitted to seek separate convictions on the charged informations, without violating the defendant's protection against double jeopardy.

Id. at 5.

Part I, Article 15 of the New Hampshire Constitution provides, "No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him." This provision "requires that an indictment describe the offense with sufficient specificity to ensure that the defendant can prepare for trial and avoid double jeopardy." State v. Kuchman, 168 N.H. 779, 784 (2016) (quotation omitted).

This situation also implicates the constitutional guarantee of jury unanimity as to the charges. State v. Greene, 137 N.H. 126, 128 (1993). Without differentiating three, separate charged acts, the jurors may only have agreed that two acts occurred but not have agreed upon which acts were proven and/or were not justified by Woodbury's defense.

Here, the indictments were exactly the same. They did not differentiate three separate acts in any way. Without anything to differentiate them, or an instruction that the jury must find distinct acts, there was nothing preventing the jury from reaching two guilty verdicts on the same act. Multiple sentences here were improper because the charges were "entirely identical in fact as well as in law." State v. Allison, 126 N.H. 111, 114 (1985). Given these indictments

and circumstances, it was plain error to give Woodbury consecutive sentences on two identical charges.

This issue implicates Woodbury's constitutional rights to be free from double jeopardy, to clarity in his charging documents, and to juror unanimity as to the acts charged. It resulted in illegal sentences, the type of error this Court has consistently found to meet the third and fourth prongs of the plain error rule. See, e.g., State v. Towle, 167 N.H. 315, 326-28 (2015); State v. Charest, 164 N.H. 252, 254-57 (2012); State v. Sideris, 157 N.H. 258, 264-65 (2008); State v. Hancock, 156 N.H. 301, 302-05 (2007); State v. Henderson, 154 N.H. 95, 96-99 (2006); State v. Matey, 153 N.H. 263, 265-66 (2006); State v. Edson, 153 N.H. 45, 48-50 (2005); State v. Taylor, 152 N.H. 719, 720-21 (2005). For these reasons, the Court should reverse and remand for the trial court to vacate one of the sentences for assault by prisoner.

IV. THE COURT ERRED IN FINDING THAT NO FIGHT-BY-MUTUAL-CONSENT INSTRUCTION SHOULD HAVE BEEN GIVEN.

At trial, the defense argued that Woodbury acted in defense of a third person related to all three of the assault by prisoner charges. T3 286-89, 293-99, 302-04, 307-08. The defense argued that when M.M. spit on Hartley, Woodbury was justified in punching M.M. to prevent further spitting. T3 293-99, 302-04, 307-08. The defense did not consider a distinct defense for the second and third chronological punch. A7-A11.

However, the evidence supported a finding of a fight entered into by mutual consent. M.M. testified on direct, "I tried to fight [Woodbury] and he ran off at one point. I did have engaged fighting with him." T1 131. He also admitted "exchang[ing] blows" with Woodbury. T1 132. Woodbury echoed this account in his testimony: "[after the first punch,] I believe he turned around . . . and swung at me. . . . [Then] I swung back[, and] we got into a fight." T2 207.

The State's institutional witnesses confirmed that characterization of the contact between Woodbury and M.M. after the first punch, in describing the actions depicted on the video. For example, Coulombe testified that M.M. turned on Woodbury, they "square[d] up," and they both took "aggressive positions as though they're going to fight." T1 91. He also testified that M.M. threw punches at Woodbury and connected at least once. Id. Lieutenant Shannon Berwick testified that M.M. and Woodbury "squared up." T1 112.

After the verdicts, the defense moved to set aside the verdict and for a new trial. A7-A11. Trial counsel argued both that the judge erred in not giving

a mutual-consent instruction and that he had been ineffective for failing to request such an instruction. Id. The trial court held that Woodbury failed on both claims because the evidence did not support a mutual consent instruction. A1-A6. In so ruling, the court erred.

RSA 642:9 indicates that a simple assault committed by a prisoner is a class B felony "unless committed in a fight entered into by mutual consent, in which case it is a misdemeanor." See also State v. Matton, 165 N.H. 35, 37 (2013) (referring to this defense as "mutual combat").

"A defendant is entitled to a jury instruction on his theory of defense if there is some evidence in the record that would support a rational finding in favor of the defense." State v. Mayo, 167 N.H. 443, 454 (2015); Matton, 165 N.H. at 38. "'Some evidence' means more than a minutia or scintilla of evidence." Matton, 165 N.H. at 38. "To be more than a scintilla, evidence cannot be vague, conjectural, or the mere suspicion about the existence of a fact, but must be of such quality as to induce conviction." State v. Carr, 167 N.H. 264, 271 (2015) (quotation omitted).

This Court reviews the trial court's decision not to give an instruction on a defense for an unsustainable exercise of discretion. Id. at 270. Woodbury must show "that the court's ruling was clearly untenable of unreasonable to the prejudice of [his] case." Id.

Here, there was far more than a scintilla of evidence to support a mutual combat instruction. Both participants in the encounter described it as a mutual fight. M.M. testified that he was willing to keep fighting but that

Woodbury "ran off." Moreover, the State's institutional witnesses described the men as "squaring up" and exchanging blows. These descriptions are consistent with the video which captures some, but not all, of the encounter. Ex. 6.

The court erred in finding no evidence to support a mutual combat instruction. This prejudiced Woodbury's case. Woodbury's counsel relied on defense of a third person to defend against all three assault charges. However, the jury reasonably found that that defense applied only to the first punch. This left Woodbury without any defense on the remaining two charges. However, some evidence, both from the defense and from numerous State witnesses, including the alleged victim, supported a mutual combat instruction. Had the jury been able to consider this defense, it may have convicted Woodbury of only misdemeanor level offenses, for which he would necessarily receive sentences less than those he did receive. This Court must reverse.

Woodbury raised this issue in two ways: failure of the court to *sua sponte* give the instruction and ineffective assistance of counsel for counsel's failure to request such an instruction. The trial court dispatched with both arguments with its ruling on the merits. This Court must reverse that ruling and remand for consideration of whether, under either or both arguments, Woodbury is entitled to a new trial. Woodbury also asks that, on remand, he be appointed counsel other than his trial counsel, to fully argue the ineffective assistance of counsel question.

CONCLUSION

WHEREFORE, Jonathan Woodbury respectfully requests that this Court:

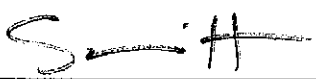
regarding the falsifying physical evidence conviction – either vacate the conviction (if he prevails on Issue I) or remand for a new trial (if he prevails on Issue II); and

regarding the assault by prisoner convictions – remand to vacate one of the assault sentences (if he prevails on Issue III) and/or remand for consideration of the effect of a lack of mutual combat instruction (if he prevails on Issue IV).

Undersigned counsel requests fifteen minutes of oral argument before a full panel of this Court.

The appealed decision in Issue 4 is in writing and is appended to the brief. There are no written orders concerning the other issues.

Respectfully submitted,

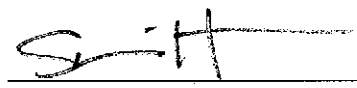
By 

Stephanie Hausman, 15337
Deputy Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

CERTIFICATE OF SERVICE

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

Criminal Bureau
New Hampshire Attorney General's Office
33 Capitol Street
Concord, NH 03301



Stephanie Hausman

DATED: September 20, 2018

A P P E N D I X

APPENDIX – TABLE OF CONTENTS

THE STATE OF NEW HAMPSHIRE

COÖS, SS. **SUPERIOR COURT**

No. 214-2017-CR-83

State of New Hampshire

v.

Jonathan L. Woodbury

ORDER ON DEFENDANT'S MOTION TO SET ASIDE VERDICT AND FOR NEW TRIAL AND APPOINT NEW COUNSEL FOR DEFENDANT

On September 22, 2017, a jury found the defendant, Jonathan L. Woodbury, guilty of one count of falsifying physical evidence, see RSA 641:6, I, and two counts of assaults by prisoners, see RSA 642:9, I, and found him not guilty of a third count of assaults by prisoners. The defendant now moves the Court to grant him a new trial because his trial counsel "failed to request a jury instruction involving a fight entered by mutual consent" with respect to the assaults by prisoner charges and because the Court did not provide such a "mutual consent instruction to the jury on its own." (Def.'s Mot. ¶¶ 5–9.) He argues that these "failures" entitle him to a new trial pursuant to RSA 526:1. The defendant further contends that his trial counsel's failure "to seek or even argue mutual consent on the second and third punches" constituted ineffective assistance of counsel entitling him to a new trial. (Id. ¶¶ 16, 17.)

The State contends that "the facts presented at trial, and the manner in which the evidence was introduced at trial, did not make the decision to refrain from requesting such an instruction [on mutual combat], or the failure to request such an instruction, a fatal error that rendered defense counsel's representation constitutionally deficient and prejudicial to the outcome of the case." (State's Obj. ¶ 3.) Specifically, the State argues (1) that the

CLERK'S NOTICE DATED 2/26/18
CC: McCormick
Hayden | Vux

"evidence and facts presented at trial" demonstrate that the defendant's "assaults committed against Mr. Moriarty were in no way the product of a fight entered into by mutual consent" but, rather, that the defendant struck Mr. Moriarty "in the face/head in a stealthy manner as Mr. Moriarty [was] facing Mr. Hartley's cell;" (2) that Moriarty then "turn[ed] around to defend himself from the attack and is struck two more times;" (3) that before the defendant assaulted him, Moriarty had "already suffered serious injuries at the hands or feet of Hartley;" and (4) that "[b]eing struck with an unexpected punch in prison, and then taking protective measures, while suffering additional blows does not amount to an explicit or implicit agreement to enter a fight." (Id. ¶¶ 5, 6.) The State, therefore, maintains that the defendant's trial counsel did not provide ineffective assistance of counsel by not requesting "an instruction that was supported at best by a scintilla of evidence" and that, likewise, "the Court did not commit an error that amounts to an unsustainable exercise of discretion when it elected to refrain from issuing, *sua sponte*, a mutual consent instruction." (Id. ¶ 7.)

The significance of the mutual combat instruction relates to the classification of the three RSA 642:9 offenses with which the defendant was charged. RSA 642:9, I provides that "[a]ny person held in official custody who commits an assault under RSA 631 is guilty of an offense under this section." These three indictments allege in relevant part that the defendant "knowingly caused unprivileged physical contact to Inmate Matthew Moriarty" by striking "Inmate Moriarty with his fist, an act constituting Simple Assault under RSA 631:2-a(I)(a) on three separate and distinct occasions. RSA 642:9, IV provides that such an "offense is a class B felony. . . if the offense committed is simple assault as defined under

RSA 631:2-a unless committed in a fight entered into by mutual consent, in which case it is a misdemeanor." Such "mutual consent requires that both parties agree to participate in the fight, either expressly or by implication." State v. Place, 152 N.H. 225, 227 (2005).

The defendant contends that he is entitled to a new trial under RSA 526:1, which provides that "[a] new trial may be granted in any case when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable." (Def.'s Mot. ¶¶ 11–14.) Whether to grant a motion for a new trial under the statute is within the sound discretion of the trial court. Hodgdon v. Beatrice D. Weeks Mem'l Hosp., 128 N.H. 366, 368 (1986). The "questions involved in an application for a new trial are questions of fact entirely within the jurisdiction of the superior court." Wright v. Clark Equip. Co., 125 N.H. 299, 303 (1984) (quotations omitted).

The defendant also maintains that he was denied effective assistance of counsel at trial. "Part I, Article 15 of the State Constitution and the Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant reasonably competent assistance of counsel." State v. Brown, 160 N.H. 408, 412 (2010) (quotation omitted); Strickland v. Washington, 466 U.S. 668, 686 (1984). "[T]he standard for determining whether a defendant has received ineffective assistance of counsel is the same under both the State and Federal Constitutions." State v. Kepple, 155 N.H. 267, 269 (2007). The Court, therefore, conducts its analysis under the State Constitution, referring to federal cases for guidance only. "To successfully assert a claim for ineffective assistance of counsel, a defendant must first show that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case." Id. at 269–70. "A failure to establish either prong

requires a finding that counsel's performance was not constitutionally defective." Brown, 160 N.H. at 412.

Under the first prong of the test, the defendant is required to show "that counsel made such egregious errors that he or she failed to function as the counsel that the State Constitution guarantees." State v. Dewitt, 143 N.H. 24, 29 (1998) (brackets and quotation omitted). "[T]he defendant 'must show that counsel's representation fell below an objective standard of reasonableness.'" State v. Whittaker, 158 N.H. 762, 768 (2009) (quoting Strickland, 466 U.S. at 688). "[B]road discretion is permitted trial counsel in determining trial strategy, and the defendant must overcome the presumption that counsel's trial strategy was reasonably adopted." State v. Flynn, 151 N.H. 378, 389 (2004). "Criminal defendants are entitled to reasonably competent assistance of counsel, but not perfection in trial tactics, or success." Id.

Under the second prong of the test, "a defendant must demonstrate that there is a reasonable probability that the result of the proceeding would have been different had competent legal representation been provided." Kepple, 155 N.H. at 270; see also Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case. The prejudice analysis considers the totality of the evidence presented at trial." Kepple, 155 N.H. at 270 (citation omitted).

Although the defendant frames his argument as twofold, his RSA 526:1 claim and his ineffective assistance of counsel claim are essentially two sides of the same coin. Their common factual predicate is that the jury was not instructed on the subject of mutual combat.

"The defendant was entitled to the requested mutual combat jury instruction only if

there was some evidence to support a rational finding in favor of that defense." State v. Matton, 165 N.H. 35, 38 (2013). "'Some evidence' means more than a minutia or scintilla of evidence." Id. "To be more than a scintilla, evidence cannot be vague, conjectural, or the mere suspicion about the existence of a fact, but must be of such quality as to induce conviction." State v. Carr, 167 N.H. 264, 271 (2015) (quotations omitted). "Where there is simply no evidentiary basis to support the theory of the requested jury instruction, the party is not entitled to such an instruction, and the trial court may properly deny the party's request." Id. (quotation omitted). The issues that the defendant's motion presents are whether trial counsel's failure to request a mutual combat jury instruction constituted ineffective assistance of counsel and whether said conduct or the fact that the court did not, *sua sponte*, give such an instruction entitles the defendant to a new trial under RSA 526:1.

The parties presented evidence to the jury over the course of two days. The State's evidence included the testimony of the victim, Matthew Moriarty, and of three New Hampshire State Prison employees, a video depicting the charged conduct and the events leading up to and immediately following it (State's Ex. 6), and various photographs. (State's Exs. 1–5.) The defendant testified in his own defense and also presented the testimony of Terrance Hartley, an inmate who was the "other person" whom the defendant claimed to be defending under RSA 627:4, II, when he struck Moriarty. The defendant also introduced eight photographs of the cell block occupied by Hartley (Def.'s Ex. A) and two other exhibits. (Def.'s Exs. B & C.)

Having carefully considered all the evidence presented at trial, the Court finds that

the defendant has "failed to show some evidence of an agreement to fight." Place, 152 N.H. at 228. On the contrary, the evidence established that the defendant approached the victim from behind and, without warning, struck the victim with his fist three times. There is simply no evidentiary basis to support the defendant's theory that both parties agreed to participate in the fight, either expressly or by implication. Consequently, even if trial counsel had requested a mutual combat jury instruction, the Court would have denied that request. As such, the defendant's trial counsel's failure to request such an instruction was not constitutionally deficient representation and did not actually prejudice the outcome of the defendant's case. The Court concludes that the defendant's ineffective assistance of counsel claim is without merit.

The defendant's RSA 526:1 claim is likewise unavailing for the same reasons. There was no evidence to support a mutual combat jury instruction presented in this case. Consequently, the fact that the jury was not instructed on that subject does not constitute "accident, mistake or misfortune" within the meaning of the statute and did not work any injustice on the defendant. The defendant is not entitled to a new trial under RSA 526:1.

For the foregoing reasons, the Court rules that the defendant is not entitled to a new trial under RSA 526:1 and that he has not shown that he was deprived of his constitutional right to effective assistance of counsel. Accordingly, the defendant's motion to set aside verdict and for new trial and appoint new counsel is DENIED.

So Ordered.

Dated: 2/23/18

Peter H. Bornstein
Presiding Justice

Law Office of Leonard D. Harden
104 Main Street, Suite #3
Lancaster, NH 03584
(603) 788-2080

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

COOS, SS **FEBRUARY TERM, 2018**

STATE OF NEW HAMPSHIRE

v.

Jonathan L. Woodbury

214-2017-CR-83

DEFENDANT'S MOTION TO SET ASIDE VERDICT AND FOR NEW TRIAL AND APPOINT NEW COUNSEL FOR DEFENDANT

The defendant, Jonathan Woodbury, by and through his attorney, Leonard D. Harden respectfully moves this Court to set aside the verdict and for a new trial and to appoint new counsel for the defendant, stating the following:

1. The defendant was indicted on June 16, 2017 on 3 counts of assault by prisoner, simple assault and 2 counts of falsifying physical evidence all class B felonies.

2. The state dropped one of the falsifying physical evidence charges prior to trial.

3. The defendant went to trial on November 20, 2017 on the 3 assaults by prisoner and 1 count of falsifying physical evidence.

4. He was acquitted on one assault by prisoner (defense of another raised and argued) and found guilty of the other two assaults by prisoner (mutual consent not raised or argued).

5. Undersigned counsel, failed to request a jury instruction involving a fight entered by mutual consent.

6. Undersigned counsel was focused so intently on the defense of another that he lost sight of the need for a mutual consent jury instruction. Undersigned committed a mistake by omission.

Law Office of Leonard D. Harden
104 Main Street, Suite #3
Lancaster, NH 03584
(603) 788-2080

7. The Court failed to provide a jury instruction involving a fight entered by mutual consent.

8. The failure to instruct the jury that if they found the second and third punches were as a result of a fight entered by mutual consent means that undersigned provided ineffective assistance of counsel.

9. The Court also committed error in not providing the mutual consent instruction to the jury on its own.

10. A sentencing was held on February 2, 2018 on the two assaults by a prisoner and falsifying physical evidence.

LEGAL ARGUMENT

I. THIS COURT SHOULD GRANT A NEW TRIAL UNDER RSA 526:1

11. Motions for new trial are controlled by RSA 526:1 which provides that: "A new trial may be granted in any case when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable." *See State v. Monroe*, 146 N.H. 15, 16 (2001); *State v. Jaroma*, 139 N.H. 611, 613 (1995). The bottom line question must always be the statutory one—i.e., whether through accident, mistake or misfortune justice has not been done.

12. In this case undersigned counsel was myopic in his defense and through his oversight failed to request a mutual consent instruction. Additionally, undersigned counsel did not argue that the jury had the option of acquitting on the assault on prisoner if it found a violation level offense of a fight entered by consent.

13. Upon information and belief there was no doubt that Mr. Woodbury and Mr. Moriarty in fact entered into a fight by mutual consent after the first punch was thrown.

14. A new trial is warranted regardless of whether trial counsel provided effective assistance because the court also failed to properly instruct the jury about the law of mutual consent.

12. For all of the foregoing reasons, this court should grant a new trial under RSA 526:1 as a mistake that has resulted in injustice has been committed through no fault of the defendant.

II. THIS COURT SHOULD GRANT A NEW TRIAL BECAUSE TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL

13. Ineffective Assistance In General: Part 1, Article 15 of the New Hampshire Constitution and the Sixth Amendment to the United States Constitution "entitle[] criminal defendants to reasonably competent assistance of counsel." *State v. Henderson*, 141 N.H. 615, 618 (1997). *See also, State v. Flynn*, 151 N.H. 378, 389 (2004); *State v. Roy*, 148 N.H. 662, 664 (2002); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). To successfully assert a claim for ineffective assistance of counsel, a defendant must show that:

a. Counsel's representation was constitutionally deficient; and

b. Counsel's deficient performance actually prejudiced the outcome of the case. *Flynn*, 151 N.H. at 389; Roy, 148 N.H. at 664; *State v. Seymour*, 140 N.H. 736, 748 (1996); *Strickland*, at 694.

14. Counsel's representation will be deemed constitutionally deficient if it "fell below an objective standard of reasonableness." *Smiley v. Maloney*, 422 F.3d 17, 20 (1st Cir. 2005). In making this determination, the court must recognize that "broad discretion is permitted trial counsel in determining trial strategy," and, therefore, the court must start with a presumption that counsel's trial strategy was reasonably adopted. *Flynn*, 151 N.H. at 389. *See also State v. Fennell*, 133 N.H. 402, 409-10 (1990). However, the term "strategy" implies a conscious

Law Office of Leonard D. Harden
104 Main Street, Suite #3
Lancaster, NH 03584
(603) 788-2080

choice among known alternatives. No presumption is warranted when counsel acts out of ignorance rather than deliberation. Further, the presumption of reasonableness is not irrebuttable—no deference is due to an incompetent or unreasonable strategy. *See e.g., Bullock v. Carver*, 297 F.3d. 1036, 1047-1048 (10th Cir. 2002) ("[T]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable."); *Tejeda v. Dubois*,142 F.3d 18 (1st Cir. 1998) (holding that counsel's inflammatory trial tactics were objectively unreasonable); *United States v. Span*, 75 F.3d 1383, 1389 (9th Cir. 1996) ("The label of 'trial strategy' does not automatically immunize an attorney's performance from sixth amendment challenges.").

15. A defendant is prejudiced by constitutionally deficient representation if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, at 694. In this context, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Smiley*, at 20, *citing Strickland*, at 694. *See also Argencourt v. United States*, 78 F.3d 14, 16 (1st Cir. 1996). Thus, a defendant need not prove that he would have been acquitted; he need only demonstrate that counsel's deficient performance undermines confidence in the verdict. *Strickland*, at 694. *See also Ouber v. Guarino*, 293 F.3d 19, 25 (1st Cir. 2002) (defendant must show that "his attorney's parlous conduct may have altered the outcome of the case."); *Matthews v. Rakiey*, 54 F.3d 908, 916 fn.2 (1st Cir. 1995).

16. Undersigned counsel in this case for no good reason and certainly no strategic reason failed to seek or even argue mutual consent on the second and third punches. Undersigned committed a mistake in not seeking the mutual consent instruction.

17. Undersigned counsel believes that if the mutual consent instruction and appropriate argument on the issue was presented that outcome would have been altered.

Law Office of Leonard D. Harden
104 Main Street, Suite #3
Lancaster, NH 03584
(603) 788-2080

18. New Hampshire trial courts have long been afforded great discretion in determining whether a verdict should be set aside and a new trial granted. Staet v. Hascall, 6 NH 352 (1833); State v. Kelly, 120 NH 904 (1980); State v. Jaroma, 139 NH 611 (1995).

19. Opposing counsel, John McCormick was contact and assents/ objects/ takes no position was unavailable to take a position on the relief sought.

WHEREFORE, defendant Jonathan Woodbury requests the following relief:

A. Appoint new counsel for Jonathan Woodbury to properly assert the ineffective assistance of counsel claim;

B. Set aside the verdict and order a new trial; and

C. Such further relief as the Court deems just and proper.

Respectfully Submitted,
Leonard D. Harden

Leonard D. Harden
NH Bar #10239

Law Office of Leonard D. Harden
104 Main Street, Suite #3
Lancaster, NH 03584
(603) 788-2080

CERTIFICATE OF SERVICE

I, Leonard D. Harden, hereby certify that I have served a copy of this motion on this __ day of February 8, 2018 to opposing counsel John McCormick, Esquire.

Leonard D. Harden

STATE OF NEW HAMPSHIRE

Coos, SS.

Superior Court

State of New Hampshire

v.

Jonathan L. Woodbury, #58466

Superior Court Case: 214-2017-CR-83

Charge ID: 1379228C, 1379230C, 1379231C, 1379232C, 1379229C

STATE'S OBJECTION TO MOTION TO SET ASIDE VERDICT AND FOR NEW TRIAL AND APPOINT NEW COUNSEL FOR DEFENDANT

NOW COMES the State of New Hampshire, by and through the Office of the Coos County Attorney, John G. McCormick, Coos County Attorney and states as follows:

1. Defendant filed a Motion to Set Aside Verdict and For New Trial and Appoint New Counsel for Defendant with the Court on February 8, 2018, citing RSA 526:1, and citing to State v. Monroe, 146 N.H. 15, 16, (2001) for the proposition that a new trial *may* be granted in any case when through accident, mistake or misfortune justice has not been done.

2. Specifically, defense counsel asserts that his failure to request a mutual consent instruction, and the Court's failure to properly instruct the jury, *sua sponte*, about the law of mutual consent, resulted in defendant's conviction on two counts of assault by prisoner and as such produced an unjust result. Defense counsel characterizes his decision to refrain from requesting a mutual consent instruction as a fatal one that resulted in the injustice of convictions for two class B felony assault by prisoner charges and amounted to ineffective assistance of counsel. State v. Henderson, 141 N.H. 615, 618 (1997); State v. Flynn, 151 N.H. 378, 389 (2004); State v. Roy, 148 N.H. 662, 664 (2002); Strickland v. Washington, 466 U.S. 668 (1984).

3. The State objects, as the facts presented at trial, and the manner in which the evidence was introduced at trial, did not make the decision to refrain from requesting such an instruction, or the failure to request such an instruction, a fatal error that rendered defense counsel's representation constitutionally deficient and prejudicial to the outcome of the case. Id.

4. The decisions made during trial are based on the facts as they are presented and, likewise, questions involved in the application for a new trial are questions of

fact within the jurisdiction of the superior court. Wright v. Clark Equip. Co., 125 N.H. 299 (1984).

5. The evidence and facts presented at trial support the position that Mr. Woodbury's assaults committed against Mr. Moriarty were in no way the product of a fight entered into by mutual consent. The videotape evidence shows defendant strike Mr. Moriarty in the face/head in a stealthy manner as Mr. Moriarty is facing Mr. Hartley's cell, looking in toward the interior of that cell, and apparently hollering at Hartley. Moriarty at this point is a bloody mess. Moriarty is struck by defendant and turns around to defend himself from the attack and is struck two more times. Although defendant's defense of others defense prevailed with regard to the first punch, as it is reasonable to conclude in view of the admissible evidence that defendant was coming to Hartley's aid, defendant's insertion into the Moriarty/Hartley matter can in no way be characterized as a fight entered into by mutual consent, but rather could be reasonably viewed as an overzealous defense, as the jury reasonably concluded that one punch was okay but two more amounted against an already injured individual amounted to instances of assault.

6. The only reasonable interpretation of the video is that Moriarty, already injured by Hartley, is attacked by defendant and attempts unsuccessfully to defend himself. Such an attack by defendant and response by Moriarty in no way fits the definition of a fight entered into by mutual consent. ""...mutual consent requires that both parties agree to participate in the fight, either expressly or by implication." State v. Place, 152 N.H. 225 (2005). In this case, the setting for those crimes was prison at a time when Moriarty has already suffered serious injuries at the hands or feet of Hartley. As defendant noted during his sentencing hearing, this context is very different from free society. Being struck with an unexpected punch in prison, and then taking protective measures, while suffering additional blows does not amount to an explicit or implicit agreement to enter a fight.

7. Accordingly, defense counsel did not commit a constitutional deficiency and perform so poorly as to actually prejudice the outcome of the case where he simply, for whatever reason, did not ask for an instruction that was supported at best by a scintilla of evidence. State v. Matton, 165 N.H. 35, 38, citing State v. Soto, 162 N.H. 708, 713 (2011). Likewise, although within its discretion to do so, the Court did not commit an error that amounts to an unsustainable exercise of discretion when it elected to refrain from issuing, *sua sponte*, a mutual consent instruction. Id.

8. Additionally, there has been no actual prejudice to defendant. Defendant was sentenced by the Court to the same stand committed sentence under the falsifying physical evidence conviction, also a class B felony, as he was for the assault by prisoner charge, to be served concurrently with one of the assault by prisoner charges and consecutively to the prison sentence that he is currently serving. See sentencing orders of the Coös Superior Court; See also, State v. Matton, 165 N.H. 35 (2013).

WHEREFORE, the State requests that this Honorable Court:

A. DENY the Defendant's Motion without a hearing; or
B. HOLD a hearing on the matter; or
C. Grant any other relief deemed proper and just.

Respectfully Submitted,
STATE OF NEW HAMPSHIRE

February 21, 2018

John G. McCormick
Coos County Attorney
NH Bar # 16183
Office of the Coos County Attorney
55 School Street, Suite 141
Lancaster, NH 03584

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has this day been forwarded to Leonard D. Harden, 104 Main Street Suite #3, Lancaster, NH 03584, counsel for the defendant.

Respectfully Submitted,
STATE OF NEW HAMPSHIRE

February 21, 2018

John G. McCormick
Coos County Attorney

Count 2
RSA 641:6,I
Offense: Falsifying Physical Evidence
CLASS B Felony
Information Use Only

Superior Court Case: 214- 2017-CR-83
Charge ID: 13792290

THE STATE OF NEW HAMPSHIRE

COÖS, SS.

At the Superior Court held at Lancaster within and for the County of Coos, upon the 16th day of June, in the year Two Thousand Seventeen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon their oath, present that:

JONATHAN L. WOODBURY, #58466

DOB: 12/30/1982

of or formerly of Nothern NH Correctional Facility, 138 East Milan Road, Berlin, NH 03570, on or about the 8th day of December 2016, at Berlin, in the County of Coös, aforesaid

did commit the crime of **Falsifying Physical Evidence,** in that he, believing that an investigation of the crime of Assault by Prisoner was about to be instituted at the New Hampshire Department of Corrections Northern Correctional Facility, he purposely destroyed or removed blood splatters left by Inmate Matthew Moriarty's (DOB: 1/31/1983) by mopping the splatters off the floor and/or table area with a purpose to impair their availability in the investigation,

contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.
Dated at Lancaster June 16, 2017

Foreperson

Assistant Coos County Attorney
JDM

Arraignment _____
Waiver Date _____
Formal Date _____
Plea of Not Guilty _____
Clerk _____

Change(s) of Plea _____
Date(s) _____
Judge _____
Reporter _____
Clerk _____

2017 JUN 16 P 12:34
COOS SUPERIOR COURT

(2)

Count3
RSA 642:9,I
Offense: Assaults by Prisoners
CLASS B Felony
Information Use Only

Superior Court Case: 214- 2017-CR-83
Charge ID: 13792300

THE STATE OF NEW HAMPSHIRE

COÖS, SS.

At the Superior Court held at Lancaster within and for the County of Coos, upon the 16th day of June, in the year Two Thousand Seventeen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon their oath, present that:

JONATHAN L. WOODBURY, #58466

DOB: 12/30/1982

of or formerly of Nothern NH Correctional Facility, 138 East Milan Road, Berlin, NH 03570, on or about the 8th day of December 2016, at Berlin, in the County of Coös, aforesaid

did commit the crime of **Assaults by Prisoners: Simple Assault,** in that he, while being held in official custody at the New Hampshire Department of Corrections Northern Correctional Facility, knowingly caused unprivileged physical contact to Inmate Matthew Moriarty (DOB: 1/31/1983), in that Inmate Woodbury struck Inmate Moriarty with his fist, an act constituting Simple Assault under RSA 631:2-a(I)(a),

contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.
Dated at Lancaster June 16, 2017

Foreperson

Assistant Coos County Attorney
JDM

Arraignment _____
Waiver Date _____
Formal Date _____
Plea of Not Guilty _____
Clerk _____

Change(s) of Plea _____
Date(s) _____
Judge _____
Reporter _____
Clerk _____

2017 JUN 16 P 12:34
COOS SUPERIOR COURT

(3)

Count 4
RSA 642:9,I
Offense: Assaults by Prisoners
CLASS B Felony
Information Use Only

Superior Court Case: 214- 2017-CR-83
Charge ID:
1379231C

THE STATE OF NEW HAMPSHIRE

COOS, SS.

At the Superior Court held at Lancaster within and for the County of Coos, upon the 16th day of June, in the year Two Thousand Seventeen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon their oath, present that:

JONATHAN L. WOODBURY, #58466

DOB: 12/30/1982

of or formerly of Nothern NH Correctional Facility, 138 East Milan Road, Berlin, NH 03570, on or about the 8th day of December 2016, at Berlin, in the County of Coös, aforesaid

did commit the crime of **Assaults by Prisoners: Simple Assault,** in that he, while being held in official custody at the New Hampshire Department of Corrections Northern Correctional Facility, knowingly caused unprivileged physical contact to Inmate Matthew Moriarty (DOB: 1/31/1983), in that Inmate Woodbury struck Inmate Moriarty with his fist, an act constituting Simple Assault under RSA 631:2-a(I)(a),

contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.
Dated at Lancaster June 16, 2017

Foreperson

Assistant Coos County Attorney
JDM

Arraignment _____
Waiver Date _____
Formal Date _____
Plea of Not Guilty _____
Clerk _____

Change(s) of Plea _____
Date(s) _____
Judge _____
Reporter _____
Clerk _____

2017 JUN 16 P 12:34
COOS SUPERIOR COURT

(4)

Count 5
RSA 642:9,I
Offense: Assaults by Prisoners
CLASS B Felony
Information Use Only

Superior Court Case: 214- 2017 - CR-83
Charge ID: 1379232a

THE STATE OF NEW HAMPSHIRE

COÖS, SS.

At the Superior Court held at Lancaster within and for the County of Coos, upon the 16th day of June, in the year Two Thousand Seventeen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon their oath, present that:

JONATHAN L. WOODBURY, #58466

DOB: 12/30/1982

of or formerly of Nothern NH Correctional Facility, 138 East Milan Road, Berlin, NH 03570, on or about the 8th day of December 2016, at Berlin, in the County of Coös, aforesaid

did commit the crime of **Assaults by Prisoners: Simple Assault,** in that he, while being held in official custody at the New Hampshire Department of Corrections Northern Correctional Facility, knowingly caused unprivileged physical contact to Inmate Matthew Moriarty (DOB: 1/31/1983), in that Inmate Woodbury struck Inmate Moriarty with his fist, an act constituting Simple Assault under RSA 631:2-a(I)(a),

contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.
Dated at Lancaster June 16, 2017

Foreperson

Assistant Coos County Attorney
JDM

Arraignment _____
Waiver Date _____
Formal Date _____
Plea of Not Guilty _____
Clerk _____

Change(s) of Plea _____
Date(s) _____
Judge _____
Reporter _____
Clerk _____

COOS SUPERIOR COURT
2017 JUN 16 P 12:34

(5)