THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0118

The State of New Hampshire

v.

Jonathan Woodbury

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

ISSUES PRESENTED

1. Whether the State presented sufficient evidence to support a falsifying physical evidence conviction where the jury heard detailed evidence from both the State's witnesses and the defendant regarding the defendant's intent.

2. Whether the trial court correctly instructed the jury when it relied upon the plain meaning of the word "investigation" as it is used in RSA 641:6 (2016).

3. Whether the trial court correctly declined to intervene *sua sponte* to correct unobjected-to indictments that each alleged a single punch as the basis for a charge of assault by a prisoner.

4. Whether the trial court sustainably exercised its discretion when it denied the defendant's post-conviction motion for a new trial that alleged error because, among other things, the trial court did not *sua sponte* give a mutual combat instruction.

STATEMENT OF THE CASE

A Coos County Grand Jury indicted the defendant, Jonathan Woodbury, on three charges of assault by prisoners: simple assault and one charge of falsifying physical evidence. DApp.:[1] A15-A18; RSA 631:2-a (2016); RSA 641:6 (2016); RSA 642:9 (2016). The three assault charges alleged that the defendant engaged in unprivileged contact with the victim, M.M., by contacting him with his fist while the defendant was in custody at the Northern Correctional Facility. DApp.: A16-A18. The falsifying physical evidence charge alleged that the defendant purposely destroyed or removed blood splatters that the victim had left on the floor by mopping the splatters off of the floor to prevent the splatters from being available to the investigation. DApp.: A15.

After a three-day trial in November 2017, the jury convicted the defendant on the falsifying physical evidence charge and two of the assault charges. Tr.: 320-22. The trial court (*Bornstein*, J.) sentenced the defendant to two and a half to five years, stand committed, and three and a half to seven years, all suspended for a period of ten years. SHTr.: 14-17.

Soon after sentencing, the defendant filed a motion for a new trial in which he argued that the trial court erred when it failed to *sua sponte* give a mutual combat instruction and that his trial counsel—the same attorney who filed the motion—provided ineffective assistance of counsel. DApp.:

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[1] DApp. refers to the appendix at the end of the defendant's brief.
DBr. refers to the defendant's brief.
Tr. refers to the trial transcript.
SHTr. refers to the sentencing hearing transcript.
VRec. refers to the surveillance video that has been transferred to this Court.

A7-A11. The State objected. DApp.: A12-A14. On February 26, 2018, the trial court denied the defendant's motion without a hearing. DApp.: A1-A6.

This appeal followed.

STATEMENT OF FACTS

A. The Assault

On December 8, 2018, Terrence Hartley, an inmate at the Northern Correctional Facility in Berlin, brutally assaulted the victim who was also his cellmate. Tr.: 19, 55, 57, 61, 65-66, 104, 126-30, 180, 199-201;VRec. The assault began after Hartley had accused the victim of having stolen from him. Tr.: 127-28, 138. Hartley knocked the victim to the ground and kicked him several times in the face and chest. Tr.: 128, 132. The assault caused the victim to bleed, disrupted his memory, and caused internal injuries to the victim's lungs. Tr.: 130-31, 134.

During the assault, the defendant, who had known Hartley for years, skulked about outside the victim's cell along with two other inmates. VRec.; Tr.: 62, 65-66, 205. At one point, the defendant took a towel from the floor outside the cell and used it to cover the window of the victim's cell. Tr.: 62; VRec. Approximately eleven minutes into the assault, Hartley exited the cell and spoke with the defendant and the other two inmates. Tr.: 65; VRec. Hartley then reentered the cell and continued his assault. Tr.: 65-66; VRec. While Hartley continued his assault, one of the inmates retrieved the mop and bucket from its storage closet. VRec. Another inmate blocked the door to the victim's cell to prevent it from opening. Tr.: 66; VRec. After approximately nineteen minutes total, Hartley shoved the victim from his cell into the common area. Tr.: 66; VRec.

When the victim regained his composure, he turned toward the cell door and spat at Hartley through the window. Tr.: 67, 131, 193, 204; VRec. In response, the defendant approached the victim from behind and punched

him in the back of the head. Tr.: 67, 131, 201, 239; VRec. The victim staggered several feet away from the cell door and turned to face the defendant. Tr.: 112; VRec. The defendant quickly closed the gap between them and struck the victim at least two more times. VRec.; Tr.: 132. The victim tried to defend himself by striking back at the defendant. Tr.:132, 207; VRec.

After the defendant assaulted the victim, the victim proceeded to the bathroom to clean himself up and the defendant went to get the mop and bucket. Tr.: 67-68, 134, 212; VRec. With the mop and bucket the defendant began to clean the victim's blood from the floor of the cell block. Tr.: 67-68, 212; VRec. Unable to breathe, the victim left the bathroom and pushed the call box, which summoned corrections officers to the scene. Tr.: 69, 134. When the corrections officers responded, they found the victim with his face "covered in blood." Tr. 19.

B. Prison Policies

During trial, the State presented evidence from several staff members at the Northern Correctional Facility regarding the prison's policies and practices with respect to clearing blood from the cell blocks. Tr.: 17, 71-74, 92-94, 116-24. All testified that discovery of blood in a cell block or an injured inmate would be cause to launch an investigation. Tr.: 17, 71-74, 92-94, 123-24. During the investigation, they would lockdown the block, which would limit the inmates' abilities to move freely and exercise any privileges that they may have. Tr.: 17, 71-74, 92-94, 123-24. Accordingly, inmates will often clean blood to avoid detection and a lockdown. Tr.: 90, 92-93.

Lieutenant Shannon Berwick further explained that cleaning of cell block units was the responsibility of the "unit service teams." Tr.: 116. The prison trained these teams on how to clean the blocks and safely handle biohazardous material. Tr.: 116-23. The prison provided special gear to the team members to protect them from biohazard contamination. Tr.: 123-24. Lt. Berwick further explained that individual inmates cannot clean biohazardous material without authorization. Thus, finding an inmate who was cleaning or has cleaned biohazardous material without authorization would raise corrections officers' suspicions. Tr.: 117-18.

C. The Defendant's Case

After the State rested, the defendant and Hartley testified in the defendant's behalf. Tr.: 179-255. During his testimony, the defendant explained that fights and altercations happen frequently. Tr.: 200. He acknowledged that he was aware of the fight between Hartley and the victim, but denied seeing them fighting. Tr.: 201, 224-25. He testified that he saw the victim spit at Hartley and "reacted" to prevent more spitting. Tr.: 205. He admitted that he punched the victim in the head and struck him at least one other time. Tr.: 206-07, 226, 239. He claimed that the victim swung at him after the first punch. Tr.: 207.

The defendant further testified that, after the fight, he decided to clean up because he wanted a clean living space. Tr.: 212. He denied being aware of any policy that would prohibit him from cleaning up blood on the cell block floor. Tr.: 212. He was aware, however, that surveillance cameras monitored the common areas of the cell block. Tr.: 213, 226-27 (discussing cameras).

SUMMARY OF THE ARGUMENT

1. The State presented sufficient evidence to support a conviction of falsifying physical evidence. At trial, the jury had the benefit of both direct and circumstantial evidence. The jury saw video surveillance of the defendant's suspicious behavior. Moreover, the jury was able to evaluate the defendant's credibility and found his denials not credible. Accordingly, the evidence presented allowed a rational jury to conclude beyond a reasonable doubt that the defendant falsified physical evidence when he cleaned up the victim's blood.

2. The trial court properly instructed the jury when it declined to explain that the investigation discussed in RSA 641:6 had to be an "official investigation." In the context of this case, any investigation would have satisfied the "official" requirement the defendant wishes to impose upon the statute because corrections officials would have conducted the investigation. Moreover, unlike an "official proceeding," the investigation element of the falsifying physical evidence statute relies upon the plain and ordinary meaning of "investigation." That plain and ordinary meaning—particularly in light of the evidence in this case—necessarily includes official elements in its definition. Accordingly, the extra word in the jury instruction was unnecessary, and the trial court sustainably exercised its discretion by refusing to give it.

3. The trial court neither erred nor plainly erred when it refused to dismiss the charges or limit sentencing of the defendant to a single assault by prisoner charge. Each of the indictments announced with sufficient specificity the charges that the defendant would face and to the

extent the defendant needed further clarity, his remedy was to request a bill of particulars. The trial court also gave the standard unanimity instruction to the jury, which is sufficient unless the defendant requests and is entitled to a more specific unanimity discussion in the jury instructions. The defendant bears the burden to request more specific instructions, and his failure to raise the issue waived any claim related to the unanimity of the verdicts. Moreover, the arguments by the parties during trial clearly established two categories of assaults that mirrored how the jury convicted and acquitted the defendant.

4. The trial court sustainably exercised its discretion when it denied the defendant's motion for a new trial because the trial court did not *sua sponte* provide a mutual combat instruction. The evidence at trial failed to show that the victim explicitly or implicitly agreed to fight the defendant, a necessary element for a mutual combat instruction. All the evidence showed was that a severely beaten man tried to defend himself from a second assault in a short period of time, which does not support an instruction on mutual combat. Moreover, to the extent that the defendant claims he received ineffective assistance of counsel, that claim also lacks merit because, in the context of this case, the defendant received objectively reasonable assistance of counsel with respect to the question of mutual combat. Accordingly, this Court must affirm.

ARGUMENT

I. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR FALSIFYING PHYSICAL EVIDENCE.

Based upon the evidence presented during trial, a rational jury could conclude beyond a reasonable doubt that the defendant cleaned up the victim's blood to make sure it would not be available to investigators. The State presented evidence regarding the prison's policies on cleaning cell blocks and what would prompt investigations into inmate conduct. The video recording showed that the defendant, along with other inmates, consulted with Hartley and had the mop and bucket ready for when the victim left his cell. The defendant testified and provided the jury with both direct evidence and an opportunity to evaluate his credibility. Taken together, and viewed in the light most favorable to the State, the evidence was sufficient to support the defendant's conviction for falsifying physical evidence. Accordingly, this Court must affirm.

"To prevail in a challenge to the sufficiency of the evidence, the defendant bears the burden of proving that no rational trier of fact, viewing the evidence in the light most favorable to the State, could have found guilt beyond a reasonable doubt." *State v. Kelley*, 159 N.H. 449, 454-55 (2009). "In reviewing the evidence, [this Court] examines each evidentiary item in the context of all the evidence, not in isolation." *Id.* at 455. The trier of fact may draw reasonable inferences from facts proved and also inferences from facts found as a result of other inferences, provided they can be reasonably drawn therefrom." *Id.* This Court must, however, resolve credibility determinations or conflicting evidence in the State's favor. *See*

State v. Zurita, 133 N.H. 719, 725 (1990) (explaining that viewing the evidence in the light most favorable to the State means "resolving issues of credibility in the State's favor"). This Court's review is *de novo*.[2] *State v. Collyns*, 166 N.H. 514, 517 (2014).

A. The traditional standard of review for sufficiency claims applies because the jury had both direct and circumstantial evidence to consider when it determined the defendant's intent.

Contrary to the defendant's assertion, the evidence presented regarding the defendant's intent comprised a mix of circumstantial and direct evidence, and therefore, the standard of review for circumstantial evidence does not apply. DBr.: 7; *see State v. Cable*, 168 N.H. 673, 678 (2016) ("Although the defendant refers to the standard we apply when evidence to prove an element is solely circumstantial that standard does not apply here because the evidence of causation was both direct and circumstantial." (Citation omitted.)). The defendant correctly asserts that the State's evidence was predominantly circumstantial. After the State rested, however, the defendant chose to testify, to submit to cross examination, and to explain why he chose to clean the blood from the cell block floor. *See State v. Hill*, 163 N.H. 394, 395-96 (2012) (explaining that in a sufficiency challenge, if "the defendant . . . offers evidence, [this Court] review[s] the entire trial record because, even though the defendant is not required to present a case, if he chooses to do so, he takes the chance

[2] Although the defendant raises this claim under the plain-error standard, DBr.: 1, generally, a successful sufficiency challenge satisfies the four-part plain error test. *See, e.g.*, *State v. Houghton*, 168 N.H. 269, 274 (2015) (addressing the remaining parts of the plain-error analysis in summary fashion after concluding that the evidence was not sufficient to support certain convictions). Accordingly, the State will limit its analysis to the question of whether the evidence was, in fact, sufficient.

that evidence presented in his case may assist in proving the State's case." (Quotation omitted.)). The defendant, by testifying, provided direct evidence of his intent. As a result, the jury considered both direct and circumstantial evidence when it reached its verdict. As the evidence comprised a mixture of direct and circumstantial, the evidence need not exclude all rational conclusions other than guilt. *See State v. Saunders*, 164 N.H. 342, 351-52 (2012) (explaining the distinction between a purely circumstantial case and a case where the evidence was a mixture of direct and circumstantial).

B. Sufficient evidence existed to support a conviction for falsifying physical evidence.

To prove that the defendant falsified physical evidence, the State needed to show that he "believ[ed] that an official proceeding . . . or investigation [wa]s pending or about to be instituted" and that he, in this case, "alter[ed], destroy[ed], conceal[ed] or remove[d] any thing with a purpose to impair its verity or availability in such proceeding or investigation." RSA 641:6 (2016).

The evidence clearly supports the jury's conclusion that the defendant cleaned up the victim's blood in order to hinder, or even prevent, an investigation into the assault. The State presented evidence that the discovery of a fight or blood in the cell block would prompt an official investigation into the cause. Tr.: 17, 71-74, 92-94, 123-24. It presented evidence that the blood would be material that the corrections officers would gather to aid in their investigation. Tr.: 73, 100. It presented evidence that inmates often cleaned material like blood to avoid detection, lockdown, and punishment. Tr.: 90, 92-94. It presented evidence that only

certain inmates were responsible for cleaning the cell blocks. Tr.: 116-18. For his part, the defendant admitted that he cleaned up the blood and was aware of the consequences that would follow if corrections officers discovered the fight. Tr.: 200, 212.

The video recording provided further evidence confirming the defendant's plan to conceal the assault. The video showed that an inmate brought the mop and bucket out moments after Hartley consulted with the defendant and others in the middle of his assault. VRec. The video also showed that same inmate assisted in keeping the victim sealed in his cell with Hartley. VRec. It then showed the defendant retrieving the mop and cleaning the floors and table where the victim had spilled blood. VRec. The only rational explanation for this behavior was that Hartley had warned the defendant and others to anticipate cleaning up after the assault and that they prepared to do so. Based upon the evidence presented, including the defendant's testimony and the video recording, a rational jury could conclude beyond a reasonable doubt that the defendant cleaned up the victim's blood to prevent it from being available to investigators and to prevent an investigation into the assault. Accordingly, this Court must affirm.

II. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY BECAUSE WHERE THE STATUTE RELIES UPON THE PLAIN AND ORDINARY MEANING OF THE TERMS, A SPECIALIZED JURY INSTRUCTION IS UNNECESSARY.

The trial court correctly instructed the jury when it informed them that they must find that "the [d]efendant believed that an investigation was pending or about to be instituted regarding the crime of assaults by prisoners." Tr.: 289. The term "investigation" is not a term of art and instead, the legislature relied upon the plain and ordinary meaning of that term when it drafted the statute. Where a statutory term relies upon the plain and ordinary meaning, no specialized jury instruction is necessary. Nor does the term require any further explanation for the jury to understand the State's burden of proof. Accordingly, the trial court properly denied the defendant's motion, and this Court must affirm.

A. This Court reviews trial court decisions regarding jury instructions for an unsustainable exercise of discretion and the defendant must show how failure to give the requested instruction prejudiced him.

"The purpose of the trial court's charge is to state and explain to the jury, in clear and intelligible language, the rules of law applicable to the case." *State v. Kousounadis*, 159 N.H. 413, 422 (2009) (quotation omitted). "When reviewing jury instructions, [this Court] evaluate[s] allegations of error by interpreting the disputed instructions in their entirety, as a reasonable juror would have understood them, and in light of all the evidence in the case." *Id.* (quotation omitted). This Court "determine[s] whether the jury instructions adequately and accurately explain each element of the offense and reverse[s] only if the instructions did not fairly cover the issues of law in the case." *Id.* (quotation omitted). "Whether or

not a particular jury instruction is necessary, and the scope and wording of the instruction, is within the sound discretion of the trial court, and [this Court] review[s] the trial court's decisions on these matters for an unsustainable exercise of discretion." *Id.* at 422-23 (quotation omitted).

Where the challenge relates to the interpretation of a statute, however, this Court will first "address the parties' dispute regarding the statutory meaning . . . and then turn to consider whether the instructions fairly covered the issues of law in the case." *Id.* at 423. "The interpretation of a statute is a question of law, which [this Court] review[s] *de novo*." *Id.* "In matters of statutory interpretation, [this Court is] the final arbiter[] of the legislature's intent as expressed in the words of the statute considered as a whole." *Id.* (quotation omitted). This Court "construes provisions of the Criminal Code according to the fair import of their terms and to promote justice." *Id.* This Court looks "first to the language of the statute itself, and, if possible, construe[s] the language according to its plain and ordinary meaning." *Id.* "Further, [this Court] interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language it did not see fit to include." *Id.* If this Court concludes that the plain and ordinary meaning of the terms of a statute is the correct interpretation, as opposed to terms of art or other specially defined terms, a trial court need not provide specialized instructions to explain that plain and ordinary meaning to the jury. *See State v. Labrie*, No. 2015-0687, slip op. at 6 n.2 (N.H. Nov. 6, 2018) ("[B]ecause we have adopted the plain and ordinary meaning of these words, there was no requirement for a jury instruction by the trial court."). Moreover, the defendant still must show

how the erroneous instruction, if one was given, caused him prejudice in light of all the evidence in the case. *See Kousounadis*, 159 N.H. at 422.

B. The plain meaning of the term "investigation" envisions official action and, in the context of this case, any investigation undertaken by corrections officers would be an "official investigation."

RSA 641:6 applies where a defendant "believe[s] that an official proceeding, as defined in RSA 641:1, II, or investigation is pending or about to be instituted." As the plain language makes clear, the phrase "official proceeding" has its own unique definition provided for in a separate statute. RSA 641:6. The term "investigation," however, does not refer to a unique definition. RSA 641:6.

Webster's Third New International Dictionary defines investigation to mean "1: the action or process of investigating : detailed examination . . . 2: a searching inquiry . . . : an official probe." *Webster's Third New International Dictionary* 1189 (unabridged ed. 2002). Furthermore, to investigate means "to observe or study closely : inquire into systematically : . . . to subject to an official probe . . . : to make a systematic examination : . . . to conduct an official inquiry." *Id.* at 1189; *see also Black's Law Dictionary* 830 (7th ed. 1999) ("1. To inquire into (a matter) systematically; to make (a suspect) the subject of a criminal inquiry . . . 2. To make an official inquiry.").

In the context of this case, however, this Court need not entertain the defendant's arguments regarding whether an investigation must be "official." With the dictionary definitions in mind and in light of the evidence presented during the trial, it is apparent that the plain meaning of "investigation" presumes that any investigation would be "systematic" or

"official." In this case, no question exists that an investigation into the actual or suspected assault of a prisoner by corrections officials would comprise an "official investigation" because corrections officials, who were State agents, would undertake the investigation and as a result of the investigation, the prisoners involved faced disciplinary and even criminal consequences. Thus, the distinction the defendant attempts to create between an "investigation" and an "official investigation" is immaterial and the trial court sustainably exercised its discretion when it declined to give the requested instruction.

Moreover, neither "investigation" nor "official investigation" require a more detailed explanation than their plain and ordinary meanings. Unlike "official proceeding," RSA 641:6 does not point to a specialized definition for the term "investigation." It simply invites jurors to apply the plain and ordinary meaning, which based upon the definitions above, makes sense in the context of what the statute prohibits. No further explanation was necessary to help the jury understand what conduct RSA 641:6 prohibits. Accordingly, the trial court correctly interpreted the statute and sustainably exercised its discretion when it denied the defendant's request.

To the extent that the defendant relies upon *Kousounadis*, that reliance is misplaced. *Kousounadis* presented this Court with the construction of the statutory 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 of serious bodily injury" and whether that phrase modified the term "firearm" in addition to other terms in the statute. *Kousounadis*, 159 N.H. at 424. Each of the two plausible interpretations would have

required dramatically different instructions for the jury to properly evaluate the charge. *Id.* at 425-26.

By contrast, the distinction between "official investigation" and "investigation" in the context of RSA 641:6 and the evidence presented in this case is non-existent. Absent a specialized definition provided for in another statute, the jury must use its common sense and apply the plain and ordinary meaning of the terms. As discussed above, in the context of this case, any investigation would have had an official element that would have been readily apparent to the jury. Thus, using the term "official investigation" provides no different guidance to the jury than using the term "investigation." An instruction that invites the jury to use their common sense and apply the plain and ordinary meaning of the terms does not require additional explanation. *See Labrie*, slip op. at 6 n.2. Moreover, where, in the context of this case, the evidence is clear that the investigation would comprise an official inquiry, the defendant cannot show how the trial court's ruling prejudiced him. Accordingly, this Court must affirm.

III. THE TRIAL COURT DID NOT PLAINLY ERR WHEN IT SENTENCED THE DEFENDANT ON THE TWO ASSAULT CONVICTIONS BECAUSE THE JURY HAD SUFFICIENT INFORMATION TO DISTINGUISH THE OFFENSES AND THE DEFENDANT HAD REASONS TO DECLINE SUCH MEASURES AS A DETAILED UNANIMITY INSTRUCTION.

The trial court did not plainly err when it sentenced the defendant on the two assault convictions because the issues the defendant has raised for the first time on appeal are not of the nature that would require *sua sponte* intervention by the trial court. The facts presented sufficient basis for the defendant to be aware of the facts underlying each of the assaults and the jury had sufficient information to distinguish the assaults into two distinct categories, the initial punch—for which the defendant was acquitted—and the two follow-up punches—for which the defendant was convicted. Moreover, the defendant may have had rational strategic reasons for declining to seek a more detailed unanimity instruction. Accordingly, this Court must affirm.

"The plain error rule allows [this Court] to exercise [its] discretion to correct errors not raised before the trial court." *State v. Drown*, 170 N.H. 788, 792 (2018). "The rule, however, should be sued sparingly, its use limited to those circumstances, in which a miscarriage of justice would otherwise result." *Id.* "For [this Court] to find plain error: (1) there must be error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.*

This Court has repeatedly emphasized that plain error arises where the error is so egregious that the trial court must intervene *sua sponte* to

correct that error, something this Court discourages trial courts from doing except in the most extraordinary of circumstances. *See, e.g.*, *Labrie*, slip op. at 13 (explaining that the trial court was not obligated to intervene to correct a misstatement by a prosecutor during closing argument); *Drown*, 170 N.H. at 799 (explaining that plain error requires trial court action and that it often cannot occur in the absence of an objection by defense counsel); *State v. Noucas*, 165 N.H. 146, 161 (2013) ("[This Court] ha[s] never held that a trial court must *sua sponte* strike or issue a curative instruction with respect to witness testimony. Indeed, . . . [this Court] ha[s] suggested that courts should refrain from taking such action."); *State v. King*, 146 N.H. 717, 722 (2001) (holding it was error for the trial court to *sua sponte* assert the privilege against self-incrimination on a witness's behalf).

A. A Double Jeopardy issue does not arise because the Assault by Prisoner indictments each alleged an offense, the evidence available to the defendant supported three charges, and the trial court was not obligated to *sua sponte* order the State to produce a bill of particulars.

Regarding the defendant's Double Jeopardy and specificity challenges, the defendant fails to assert how the trial court erred by allowing the indictments to proceed to trial. Part I, Article 15 of the New Hampshire Constitution "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. Davis*, 149 N.H. 698, 704 (2003) (quotation omitted). "To this end, the indictment must contain the elements of the offense and enough facts to notify the defendant of the specific charges." *Id.* (quotation omitted); *see also State v. Bisbee*, 165 N.H. 61, 66

(2013) (rejecting the argument that the State must present indictments that "assure jury unanimity"). "An indictment is generally sufficient if it recites the language of the relevant statute; it need not specify the means by which the crime was accomplished or any other facts that are not essential elements of the crime." *Davis*, 149 N.H. at 704.

RSA 642:9, "Assaults by Prisoners," makes it a class B felony for "any person held in official custody" to commit simple assault. RSA 631:2-a, I (2016) provides that a person has committed simple assault "if he . . . purposely or knowingly causes . . . unprivileged physical contact to another." Each of the indictments alleged that the defendant, who was "held in official custody at the New Hampshire Department of Corrections Norther Correctional Facility, knowingly caused unprivileged physical contact" to the victim by "str[iking the victim] with his fist." DApp.: A16-A18. Ultimately, each indictment was sufficiently specific to support a charge of assault by a prisoner. *See Davis*, 149 N.H. at 705 (concluding that multiple felon-in-possession indictments were sufficiently specific even if they did not identify the specific weapons that supported each charge).

To the extent that the defendant wanted greater detail, he could have sought a bill of particulars, but it was his obligation to make such a request. *See id.* Moreover, the parties make it clear in their arguments that each charge related to a single punch that the defendant threw at the victim. *See, e.g.*, Tr.: 12 ("My client . . . ma[de] connection three times. So that's why there are three charges."). The trial court had no obligation to *sua sponte* intervene and dismiss any of the charges or convictions or order production of a bill of particulars because each charge was sufficiently specific. Accordingly, this Court must affirm.

B. The defendant carried the burden to request a more detailed unanimity instruction from the trial court and his failure to do so waived any challenge he could raise for the first time on appeal.

Regarding the defendant's unanimity challenge and claim that the trial court plainly erred by sentencing him twice for the same offense in violation of Part I, Article 16, the defendant has the burden to request a more detailed unanimity instruction and has failed to show that the trial court had an obligation to intervene *sua sponte* and provide further instruction on unanimity to the jury. Since *State v. Greene*, 137 N.H. 126 (1993), this Court has held that "a general instruction to the jury on the requirement of a unanimous verdict is sufficient." *Greene*, 137 N.H. at 130; *see also State v. Sinbandith*, 143 N.H. 579, 582 (1999) ("The right to jury unanimity as to each element of a criminal offense may ordinarily be satisfied through a general unanimity instruction."). This Court has placed the burden to request more specific unanimity instructions upon the defendant and held that failure to do so waives his right to jury unanimity. *See Sinbandith*, 143 N.H. at 582 ("When a defendant's affirmative challenge is necessary to apprise a court that a constitutionally protected interest is at stake, it is reasonable to construe a defendant's silence as a waiver of the challenge."). In *Sinbandith*, this Court explicitly held that the defendant has a duty to alert the trial court to its potential error with regard to his right to a unanimous verdict. *Id.* at 582.

The trial court provided the general unanimity instruction and further instructed the jury that it must consider each offense separately. Tr.: 283, 315. Having given the general unanimity instruction, the trial court had no obligation to intervene *sua sponte* and provide greater or additional

instruction on jury unanimity absent a specific request from the defendant. *See Sinbandith*, 143 N.H. at 582. To the extent that the trial court could have erred, given the conflicting guidance from *Sinbandith*, any error would not be plain. Thus, the defendant has failed to satisfy the requirements of the plain error analysis, and this Court must affirm.

Moreover, this Court has recognized that the arguments of the parties can provide the necessary information to resolve unanimity questions, *see, e.g.*, *State v. Smith*, 144 N.H. 1, 8 (1999) (finding that the prosecutor's arguments defined the offense for the jury and that the evidence supported that definition). The parties' arguments, particularly the State's, clearly divided the three assaults into two categories: (1) the initial punch after the victim spit at Hartley and (2) the two subsequent punches after the victim staggered away.

The defendant, in both opening and closing statements, argued that he threw the initial punch to defend Hartley from the victim's spit. *See, e.g.*, Tr.: 12, 295, 297. The defendant acknowledged that the nature of the fight changed at that point but still tried to bootstrap that initial intervention to the subsequent punches after the victim staggered away. *See, e.g.*, Tr.: 12 (explaining that the victim's spitting stopped after the first punch but claiming that the victim "squared up" to fight the defendant), 295, 297.

The State, in both opening and closing statements, drew a distinction between the first punch and the two subsequent punches. *See, e.g.*, Tr.: 7, 310. The State contended that first punch occurred after the victim spat at Hartley, but after that punch, the victim staggered away from the cell door, eliminating any need to defend Hartley. Tr.: 7, 310. Yet, the defendant

closed the gap and continued to assault the victim, punching him two more times. Tr.: 7, 310.

These arguments led the jury to acquit on one charge and convict on the remaining two, which mirrored how the parties presented the assaults. Given this dynamic that the parties set up through their arguments, the parties and the trial court all concluded that the acquittal stemmed from the first punch that the jury found was thrown in defense of another. SHTr.: 14. Because the parties' arguments resolved any questions regarding the punch for which the jury acquitted the defendant, the result did not prejudice the defendant, and this Court must affirm.

IV. THE DEFENDANT WAS NOT ENTITLED TO A MUTUAL COMBAT INSTRUCTION BECAUSE HE WAIVED THE DEFENSE AND FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUPPORT AN INSTRUCTION.[3]

The defendant waived his right to request a mutual combat instruction because he failed to request such an instruction from the trial court. Even if the trial court had to intervene *sua sponte* and provide instructions on unraised defenses, the defendant failed to provide sufficient evidence to support a mutual combat instruction for the jury to consider. Further, to the extent that the defendant alleges that trial counsel provided ineffective assistance, trial counsel had no obligation to make meritless requests or present potentially inconsistent defenses. Accordingly, this Court must affirm.

A. The trial court sustainably exercised its discretion when it denied the defendant's motion because it had no obligation to *sua sponte* instruct on an unraised defense.

RSA 526:1 (2007) 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." "The grant of a motion for a new trial is within the discretion of the trial court, and [this Court] will not overturn the [trial] court's determination absent an [unsustainable]

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[3] Although the defendant should have raised this collateral attack on his convictions in a notice of discretionary appeal, *see Sup. Ct. R.* 3 (defining "mandatory appeal" to exclude "an appeal from a final decision on the merits issued in a post-conviction review proceeding (including . . . motions for new trial)"); *Sup. Ct. R.* 7(1)(B) (explaining this Court's ability to decline any discretionary appeals), because the parties addressed the issues raised in the collateral attack and received a decision before the deadline to file the instant appeal expired, the case does not present a problem akin to that presented in *State v. Thompson*, 161 N.H. 507 (2011). Thus, the State will address the underlying merits of the defendant's collateral attack.

exercise of discretion." *Hodgdon v. Beatrice D. Weeks Memorial Hosp.*, 128 N.H. 366, 368 (1986).

As a threshold matter, a defendant's failure to request a mutual combat instruction, or an instruction on any possible defense, waives his ability to return to the trial court and claim it erred by not acting *sua sponte* to instruct the jury on an unannounced defense. Although this Court has not had opportunity to address such a claim, the United States Court of Appeals for the First Circuit has consistently concluded that a trial court has no obligation to provide an unrequested instruction on an unannounced defense. *See, e.g., United States v. George*, 448 F.3d 96, 100 (1st Cir. 2006) (holding that a defendant is not entitled to an instruction relating to a defense that he did not assert and that a trial court has not plainly erred by not acting *sua sponte* to give such an instruction); *see also United States v. Lewis*, 987 F.2d 1349, 1354 (8th Cir. 1993) (concluding that defendants must make the tactical decision regarding whether to assert a particular defense and failure to do so in a timely manner waives that defense); *cf. Sinbandith*, 143 N.H. at 582 (concluding that a defendant can silently waive his constitutional right to unanimity by failing to request more detailed jury instruction). Should this Court conclude otherwise, it would be putting the trial court in the awkward position of having to second guess defense counsel's strategies, something it has generally discouraged trial courts from doing. *See, e.g., Noucas*, 165 N.H. at 161; *King*, 146 N.H. at 722. Accordingly, the defendant cannot prevail in his claim that the trial court erred in failing to *sua sponte* instruct the jury on mutual combat when he never requested such an instruction.

B. The defendant failed to present evidence that supported giving a "mutual combat" instruction.

Even if the defendant had requested a mutual combat instruction or the trial court had an obligation to *sua sponte* instruct on unraised defenses, the trial court correctly concluded that one was not warranted in this case. "The trial court may give an instruction on a defendant's theory of the case whenever it is necessary to assist the jury in resolving the legal issues in a case and reaching a verdict." *State v. Ramos*, 149 N.H. 272, 274 (2003). "Whether an instruction is necessary in a particular case, however, is an issue reserved to the trial court's sound discretion." *Id.* "The trial court must grant a defendant's request for a jury instruction on a specific defense if there is some evidence to support a rational finding in favor of that defense." *State v. Small*, 150 N.H. 457, 461 (2004). "On appeal, [this Court] review[s] the trial court's jury charge in its entirety to determine if it fairly covers the issues and law in a case." *Ramos*, 149 N.H. at 274. This Court "will only reverse a jury verdict for a trial court's failure to charge a particular instruction if that failure was an unsustainable exercise of discretion." *Id.* Thus, in the context of a motion for a new trial, this Court's review must be doubly deferential to the trial court's ruling.

This Court has interpreted mutual combat to mean "consensual activity" or, in other words, "an activity in which both parties agree to participate." *State v. Place*, 152 N.H. 225, 227 (2005). Such an agreement can be made both expressly and implicitly. *Id.*

The evidence in this case does not support a finding that the victim consented or agreed to combat with the defendant either expressly or implicitly. Just before the defendant first assaulted the victim, Hartley had

spent the prior fifteen to twenty minutes beating the victim, causing injury to his face, chest, and puncturing one of his lungs, and had shoved the victim from his cell into the common area. The victim, unaware of the defendant's presence behind him, spit at Hartley. The defendant emerged from the victim's blind spot and punched him in the head. The victim staggered away and turned to defend himself, at which point the defendant closed the gap between them and continued to punch the victim while the victim tried feebly to defend himself. At no point did any individual present evidence that the victim expressly agreed to fight the defendant. Nor does the evidence support a finding of an implicit agreement. All the evidence shows that a battered man attempted to defend himself from a second attack in less than twenty minutes. Thus, a mutual combat instruction was never warranted and the trial court sustainably exercised its discretion when it denied the defendant's motion for a new trial. Accordingly, this Court must affirm.

C. The defendant received objectively reasonable assistance of counsel because counsel had no obligation to raise meritless claims or present inconsistent defenses.

To the extent that the defendant claims that he was entitled to a new trial due to ineffective assistance of counsel, those claims are without merit for two reasons: (1) trial counsel has no obligation to raise meritless issues and (2) it was a reasonable strategic choice to not present competing defenses.[4]

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[4] Trial counsel, who represented the defendant at trial, raised the allegations that he provided ineffective assistance of counsel to the trial court. In *State v. Veale*, 154 N.H. 730 (2007), this Court recognized that trial counsel, or members of trial counsel's firm, may not represent a defendant in a post-conviction proceeding in which claims of

Regarding the first issue, objectively reasonable performance does not compel defense counsel to file meritless motions or make futile objections. *See, e.g.*, *United States v. Rushin*, 642 F.3d 1299, 1311 (10th Cir. 2011) ("If the motion underlying the ineffective-assistance claim . . . would have been meritless, then counsel's performance cannot be said to be deficient."). As discussed in section IV.B. above, the defendant's claim that he was entitled to a mutual combat instruction is meritless. Accordingly, trial counsel did not provide ineffective assistance in failing to request such an instruction.

Regarding the second issue, defense counsel's decision not to request a mutual combat instruction was objectively reasonable because such an instruction would have been inconsistent with the defense of another theory articulated at trial. During trial, the defendant argued that all three assaults were the product of his efforts to protect Hartley from the victim. To have argued this and then alternatively argued that even if the jury concluded the second and third punches were not in defense of

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ineffective assistance of counsel arise because doing so creates a conflict of interest. *Veale*, 154 N.H. at 734; *see also Shelton v. United States*, 323 A.2d 717, 718 (D.C. 1974) ("[W]here an attorney has represented a convicted defendant at trial and, as the defendant's attorney on appeal, concludes in good faith that a legitimate issue exists as to the constitutional adequacy of his representation of the defendant at trial, it is the duty of the attorney to move to withdraw as counsel on appeal."); *Etienne v. State*, 716 N.E.2d 457, 463 (Ind. 1999) ("Arguing one's own ineffectiveness is not permissible under the Rules of Professional Conduct."). As these decisions explain, even if an actual conflict does not arise, the potential for a conflict is sufficient to disqualify both trial counsel and trial counsel's entire firm. *Veale*, 154 N.H. at 734. Moreover, in many instances, evaluation of an ineffective assistance claim would require testimony from trial counsel, which would violate Rule of Professional Conduct 3.7. The State concurs with the appellate defender, that if this Court desires further review of the defendant's ineffective assistance of counsel claims, the trial court, on remand, must consider whether to appoint new counsel or have the defendant proceed self-represented.

another, the jury should consider them mutual combat, would have undermined his primary defense and risked confusing the jury. Accordingly, it was not objectively unreasonable to forgo the mutual combat defense, and this Court must affirm.

CONCLUSION

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

The State requests a ten-minute oral argument before a 3JX panel.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
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December 19, 2018

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CERTIFICATE OF COMPLIANCE

I, Sean R. Locke, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 7,378 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

December 19, 2018

/s/ Sean R. Locke

CERTIFICATE OF SERVICE

I, Sean R. Locke, hereby certify that a copy of the State's brief shall be served on counsel for the defendant, Stephanie Hausman, by first-class mail postage prepaid, at the following address:

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December 19, 2018

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