THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0407

State of New Hampshire

v.

Melanie Parry

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

Danielle H. Sakowski
N.H. Bar No. 265360
Senior Assistant Attorney General
Criminal Justice Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3671

(10 minutes, 3JX)

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ISSUES PRESENTED

I. Whether the trial court properly denied the defendant's request for a jury instruction specifically addressing the voluntariness requirement of possession.

II. Whether the trial court properly overruled the defendant's objection to the prosecutor's closing argument in which she stated that voluntariness is not an element of possession of a controlled drug and also properly denied the defendant's renewed request for a specific instruction on voluntariness.

STATEMENT OF THE CASE

In April of 2016, a Grafton County Grand Jury returned one indictment charging the defendant, Melanie Parry, with one count of possession of a controlled drug (crack cocaine). DA 29[1]; *See* RSA 318-B:2. The trial court (*Bornstein*, J.) denied the defendant's request that the jury be instructed on the text of RSA 626:1, requiring a voluntary act. T 45. The trial court also denied the defendant's request for a curative instruction after the prosecutor stated in closing argument that voluntariness is not an element of the crime of possession of a controlled drug. T 180.

The jury returned a conviction against the defendant for possession of a controlled drug. T 195. On possession of a controlled drug, the trial court sentenced the defendant to a twelve-month House of Correction sentence, deferred for one year, with three years of probation. DA 30-31.

This appeal followed

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[1] Citations to the record are as follows:
"DB ___" refers to the Defendant's brief and page number.
"DA___" refers to the appendix to the Defendant's brief and page number.
"T ___" refers to the transcript of trial held on March 19-20, 2019, and page number.

STATEMENT OF FACTS

On August 18, 2015, Jeremy Perkins, a senior officer with the Lebanon Police Department, followed a vehicle heading southbound on I-89. T 17-18, 20. Officer Perkins' cruiser was equipped with a cruiser camera. T 18. As Officer Perkins followed the vehicle, he noted some lane-control issues, specifically that the vehicle swerved in and out of its lane from the shoulder to the opposite lane and then back into its own lane. T 20. Officer Perkins followed the vehicle for approximately three and a half miles before signaling for the vehicle to stop. T 20-21. The vehicle complied with Officer Perkins' signal to stop and pulled over. T 21.

Officer Perkins approached the vehicle on the driver's side. T 22. The officer identified the driver as Michael LaFountain and the passenger as the defendant. T 21-22. While speaking with the driver and the passenger, Officer Perkins detected the odor of burnt marijuana. T 22-23. He also noted that the driver was extremely nervous, specifically that he was sweating profusely on what was a relatively cool night and his hands were trembling. T 22, 25. Officer Perkins also noted track marks on the defendant's arms, indicating intravenous drug use. T 22, 24.

Officer Perkins told the driver and the defendant that he smelled marijuana and asked them about it. T 26. After asking the question, Officer Perkins noted that the defendant immediately grabbed her purse, "almost like hugging it in fear." *Id*. The purse had initially been next to the defendant and she moved it and held it in her arms around her upper body following Officer Perkins' question regarding the odor of burnt marijuana.

T 26-27. After some further conversation, the driver gave Officer Perkins consent to search the vehicle. T 27.

Corporal Harwood arrived on scene as backup and Officer Perkins began his search of the vehicle on the passenger's side of the car. T 29-31. Officer Perkins asked the defendant to step out of the car and she complied. T 31. The defendant exited the car while still grasping her purse and Officer Perkins asked her if he could look inside the purse. *Id*. Officer Perkins testified that he believed there was likely contraband in the purse based on the way the defendant grasped it following his question about drugs. T 32. The defendant agreed to show Officer Perkins the contents of her purse. *Id*. The defendant proceeded to open the purse while also reaching in it. *Id*. Officer Perkins was struggling with the available lighting and the way the defendant was handling the purse and proceeded to ask her if she was going to let him look in the purse or not. T 32-33. The defendant told Officer Perkins she was concerned about him dumping the contents of her purse out. T 50. Officer Perkins then took the purse to the back of the vehicle and proceeded to take the items out one by one while the defendant watched. T 33-34. Officer Perkins located a substance he believed to be crack cocaine, a crack pipe, heroin paraphernalia, a substance he believed to be heroin, and a marijuana pipe in the defendant's purse. T 34, 50.

The defendant admitted that she was a heroin addict and that the substance that appeared to be heroin belonged to her. T 52. The defendant did not admit that the substance that appeared to be crack cocaine belonged to her. T 62. The substance that appeared to be heroin ultimately did not document the presence of a controlled drug after testing at the state lab. T 101.

At trial, the defendant, through counsel, argued that the erratic operation Officer Perkins observed could have been the driver reaching over to put crack cocaine in the defendant's purse after seeing the police cruiser behind him and therefore, according to her argument, the defendant's possession of the crack cocaine was not voluntary. T 165-68.

SUMMARY OF THE ARGUMENT

I. The trial court properly denied the defendant's request for a specific instruction on voluntariness using the language of RSA 626:1, II, as the voluntariness requirement is sufficiently incorporated in the standard jury instruction for possession of a controlled drug.

II. The trial court properly overruled the defendant's objection to the prosecutor's statement in closing argument and also properly denied the defendant's renewed request for a specific jury instruction on RSA 626:1, II, as the prosecutor's statement was not improper, the defendant was permitted to address the voluntariness issue in her closing argument, and the standard jury instruction for possession of a controlled drug sufficiently addressed the voluntariness requirement of a criminal act.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S REQUEST FOR A SPECIFIC JURY INSTRUCTION ON VOLUNTARINESS AS THE STANDARD JURY INSTRUCTION SUFFICIENTLY ADDRESSED THE REQUIREMENT OF CUSTODY AND CONTROL.

The trial court properly denied the defendant's request for a specific jury instruction on voluntariness. Specifically, the defendant requested that the trial court instruct the jury on the statutory language of RSA 626:1, II which states in part, "Possession is a voluntary act if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession." *See also* T 143. The trial court (*Bornstein*, J.) denied the request, stating that the standard instruction on possession of a controlled drug adequately addressed the voluntariness issues and that "if the jury [finds] the four elements of the alleged offense as instructed, or as set forth in the instructions, the jury will, under RSA 626:1, II, necessarily have found that the – such possession was a voluntary act." T 145.

"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*, 171 N.H. 115, 122 (2018) (citations omitted). "A trial judge's primary duty in charging the jury is to clarify the issues of the case, and to assist the jury in understanding the questions to be resolved." *State v. Bird*, 122 N.H. 10, 15 (1982). "As long as the trial court adequately instructs the jury on the applicable law, the court is under no obligation to include the specific language requested by a party." *State v. Burrell*, 135

N.H. 715, 717 (1992). "[This Court] reviews the trial court's decisions on these matters for an unsustainable exercise of discretion. *State v. King*, 168 N.H. 340, 344 (2015). "In determining whether a ruling is a proper exercise of judicial discretion, [this Court] considers whether the record establishes an objective basis sufficient to sustain the discretionary decision made." *Id*. "When reviewing jury instructions, [this Court] evaluate[s] allegations of error by interpreting the disputed instructions in their entirety as a reasonable juror would have understood them, and in light of all the evidence in the case." *Id*. "[This Court] determine[s] whether the jury instructions adequately and accurately explain[ed] each element of the offense and reverse only if the instructions did not fairly cover the issues of law in the case." *Id*. Additionally, "the defendant bears the burden of demonstrating that the trial court's ruling was clearly untenable or unreasonable to the prejudice of her case." *Id*.

Here, the trial court appropriately instructed the jury on the requirements of a criminal act, the elements of the crime of possession of a controlled drug, and the State's burden of proof, and thus "adequately and accurately explain[ed] each element of the offense." *Id*. As a result, the trial court was under no obligation to, and did not err in refusing to give the defendant's requested instruction detailing the language of RSA 626:1, II. As stated by the trial court, the instruction on the elements of the crime of possession of a controlled drug, specifically the element requiring the defendant to have custody and control of the controlled drug, adequately addressed the voluntariness requirement of RSA 626:1. *See* T 145.

In denying the defendant's request for a specific instruction outlining the language of RSA 626:1, the trial court pointed to the established

elements of possession of a controlled drug, specifically the element requiring a defendant to exercise custody and control over the controlled drug, as well as a prior ruling of this Court holding that, "the precise time of the defendant's knowledge of the possession of the controlled drug is not a necessary element of the offense of possession of a controlled drug substance." *Id*. The elements the State must prove beyond a reasonable doubt for a conviction on possession of a controlled drug have long been established. Specifically, "the State must prove that the defendant knew of the substance's presence in his vicinity, knew of its nature as a drug, and had custody of it, exercising dominion and control." *State v. Cartier*, 133 N.H. 217, 220 (1990). *See also State v. Francis*, 167 N.H. 598, 604 (2015) ("To prove possession of a controlled drug, the State must show beyond a reasonable doubt that the defendant: (1) had knowledge of the nature of the drug; (2) had knowledge of its presence in his vicinity; and (3) had custody of the drug and exercised dominion and control over it."). The State must also prove that the defendant acted knowingly. *See State v. Nickerson*, 114 N.H. 47, 51 (1974).

The trial court also relied on *State v. Donovan*, 128 N.H. 702 (1986), while not citing it explicitly. In *Donovan*, this Court upheld the trial court's jury instruction that directed the jurors that they only needed to find that the defendant knowingly possessed the controlled substance "when the defendant came into possession of it or at anytime thereafter." *Id*. at 707. In reaching that conclusion, this Court discussed the voluntary possession requirement of RSA 626:1, II and found that the "precise time of defendant's knowledge of possession of the controlled drug is not a necessary element of the offense." *Id*. Effectively, voluntariness can be a

fluid concept, where something, in this case possession, may begin as involuntary and segue into voluntary and vice versa. As applied to this case, assuming for the sake of argument that the driver placed the crack cocaine into the defendant's purse when he noticed the police officer, the defendant could have had the opportunity to transition from involuntary possession to voluntary possession based on, in this case, the length of time the defendant had before the officer initiated the traffic stop. *See* T 166. There was no evidence introduced at trial that the driver made furtive or reaching movements, consistent with planting the crack cocaine in the defendant's purse, once the car stopped for the police. *Id*.

As the trial court noted, "if the jury beyond a reasonable doubt [finds] the four elements of the alleged offense as instructed, or as set forth in the instructions, the jury will, under RSA 626:1, II, necessarily have found that the – such possession was a voluntary act", essentially, that the standard jury instruction for possession of a controlled drug adequately addressed the voluntariness issue raised by the defendant. T 145. The judge ultimately instructed the jury on the four elements (including the requisite mental state) of possession of a controlled drug, including the following as to custody and control and the mental state of knowingly:

> In deciding whether the defendant has custody and control over the drug, you should consider where the drug was found, the defendant's control over the place where the drug was found, and any other evidence presented. If you decide that the evidence only proves that the defendant was present where the drug was found, then the State has not proven custody and control. If you decide that the evidence only shows that the defendant knew where the drug was but exercised no control over the drug, then the State has not proven custody and control…

> Part of the definition of the crime of possession of a controlled drug is that the defendant acted knowingly when she is aware of the nature of her conduct or the circumstances under which she acted. The State does not have to prove that the defendant specifically desired or intended a particular result. What the State must prove is that the defendant was aware of the nature of her conduct or the circumstance under which she engaged in the conduct.

T 153-54.

The trial court's instructions adequately addressed the issue of voluntariness through the standard language. That the word "voluntariness" or the concept that a person who does not have adequate time to terminate their possession of an item is not explicitly stated does not mean that the concept is not made clear by these instructions. *See* RSA 626:1, II. Notably, the custody and control portion of the trial court's instruction included language stating, "In deciding whether the defendant has custody and control over the drug, you should consider where the drug was found, the defendant's control over the place where the drug was found, *and any other evidence presented*." T 153 (emphasis added). The defendant argued in closing that the lane issues and the defendant's silence as to the crack cocaine while taking ownership of the heroin-like substance meant that the driver had placed the crack cocaine in the defendant's purse and therefore she had not and could not have knowingly possessed it. T 166. The defendant also argued in closing that the driver placed the crack cocaine in the defendant's purse as the police approached the car, though there was no evidence, besides the defendant's silence, to plausibly support that scenario. *Id*.

Contrary to the defendant's assertion, the trial court's refusal to give a specific instruction using the language of RSA 626:1, II does not raise a question as to the State's burden of proof or an interpretation of a statute, and therefore *de novo* review is not the appropriate standard. *See* DB 15-16. At no time did the trial court assert that the State was not required to prove that the defendant's possession was voluntary, nor did it assert that the defendant's possession did not have to be voluntary. Rather, the trial court found that the existing instruction for possession of a controlled drug sufficiently addressed the issue of voluntariness, while leaving the issue open for the defendant to argue in her closing argument to the jury, which she did. To confine the focus to whether the word voluntary was used by the trial court in its instructions is misplaced and ignores the fact that that concept of voluntariness was communicated by the standard instruction and that the defendant was permitted to highlight the statute (RSA 626:1, II) and her version of how the evidence failed to prove her voluntary and knowing possession of the crack cocaine. *See* T 165-67. Ultimately, while this Court has established that "criminal liability is based on conduct that includes a voluntary act…", there is no requirement that a jury be specifically instructed on RSA 626:1 where the standard jury instruction for the criminal offense alleged sufficiently covers the concept articulated within, as it did in this case. *State v. Starr*, 170 N.H. 106, 108 (2017).

The trial court did not err by refusing to give a specific instruction using the language of RSA 626:1 as the concept and requirement of voluntariness, as explained in RSA 626:1 are sufficiently covered by the standard jury instruction for possession of a controlled drug. The defendant was permitted to argue in closing that she had not voluntarily possessed the

drug, as evidenced by the driver's erratic operation that could have been explained by the driver placing the crack cocaine in the defendant's purse and the defendant's admission of ownership as to the heroin-like substance but not the crack cocaine. The jury, alternatively, chose a theory of the case consistent with guilt after finding that the State had met its burden. The defendant has failed to cite authority that supports her claim that the trial court erred and has failed to meet her burden in "demonstrating that the trial court's ruling was clearly untenable or unreasonable to the prejudice of her case." *King*, 168 N.H. at 344.

II. THE TRIAL COURT DID NOT ERR IN ITS RULINGS FOLLOWING THE PROSECUTOR'S STATEMENT IN CLOSING ARGUMENT

The trial court did not err in denying the defendant's objection to the prosecutor's statement, nor did it err in refusing to give a specific instruction using the language of RSA 626:1 in response to the prosecutor's statement in closing argument that voluntariness is not an element of possession of a controlled drug. *See* T 176. In the State's closing argument, the prosecutor stated, "It's what you do with it once you know about it. But also remember the elements of this case. Voluntary is not an element. It is custody and control." *Id*.

In assessing whether the trial court erred, this Court has held that "the trial court is in the best position to determine what remedy will adequately correct the prejudice created by a prosecutor's remarks, and absent an unsustainable exercise of discretion, [this Court] will not overturn its decision." *State v. Collins*, 168 N.H. 1, 5 (2015). "To show that the trial court's decision is not sustainable, the defendant must demonstrate that it was clearly untenable or unreasonable to the prejudice of [her] case." *Id*. The defendant incorrectly, and citing no authority, states that *de novo* review is the appropriate standard, contrary to this Court's holding in *Collins*. *Id*.

To resolve the issue of whether the prosecutor's statement "was clearly untenable or unreasonable to the prejudice of [her] case" this Court must first determine whether the State's closing argument was improper. *Id*. In order to do so, it will

> consider the challenged remarks in the context of the case. For instance, viewed in context, challenged remarks may constitute a fair response to a position advanced by defense counsel. Although prosecutors may present their case zealously, this latitude has limits: While a prosecutor may strike hard blows, he is not at liberty to strike foul ones. This maxim is particularly relevant to closing arguments, for such arguments come at an especially delicate point in the trial process and represent the parties' last, best chance to marshal the evidence and persuade the jurors of its import. At the same time, a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations. Ultimately, determining the propriety of a prosecutor's comments involves balancing a prosecutor's broad license to fashion argument with the need to ensure that a defendant's rights are not compromised in the process.

State v. Addison, 165 N.H. 381, 548 (2013) (quotations, citations, brackets, and parenthetical phrases omitted).

The prosecutor's statement was not improper under the standard set forth in *Addison*. Contrary to the defendant's assertion both at the bench conference and on appeal, the prosecutor did not argue that the State did not have to prove a voluntary act, rather that voluntariness, was not, in and of itself, a distinct element of possession of a controlled drug. *See* DB 23; T 176, 179. As a threshold matter, the prosecutor's statement was, in a literal sense, correct. The trial court instructed the jury:

> The definition of the crime of possession of a controlled drug has four parts or elements. The State must prove each element beyond a reasonable doubt. Thus, the State must prove that, first, the defendant had the drug under her custody and control, and, second, the defendant knew that the drug was in her vicinity and, third, the defendant knew that the drug found was

> a controlled drug, that is crack cocaine, and, fourth, the drug found was in fact crack cocaine.

T 163. While the concept of voluntariness is subsumed within the elements of possession of a controlled drug, the word itself does not appear, and thus the prosecutor did not misstate the law in stating that voluntariness by itself is not an element of possession of a controlled drug, as voluntariness is a concept incorporated into the established elements of possession of a controlled drug.

The defendant has failed to show "that the trial court's overruling of the defendant's objection and its refusal to give a curative instruction during closing argument prejudiced the defendant's case." *Collins*, 168 N.H. at 6. The defendant was permitted to explore and argue the issue of voluntariness in her closing argument, specifically arguing:

> He [Officer Perkins] sees no signs of impairment whatsoever. So why is Michael swerving all over the road. That was never explained. And that is circumstantial evidence. You just heard an instruction on circumstantial evidence that it's consistent with Michael [LaFountain] seeing a police officer following him from Main Street onto the highway, following him for a few miles, and reaching over to hide something in [the defendant]'s purse, reaching over to hide his crack cocaine and not hers. Possession has to be knowing and voluntary. That's what we talked about at jury selection. We talk about if somebody put something in my bag or your purse and you don't know it's there, you don't consent to them putting it there. If you don't know it's there, that's not knowing possession. And we talked about what happens if someone stuff something into your bag or your purse right as a police officer is walking up … There's an instruction, though, about custody and control. Think about this. Do you really have control of something is [sic] somebody's pressing it into your

> bag or your purse without your consent just as a police officer walks up? Is that meaningful control over something?

T 165-66.

At worst, the prosecutor's statement can be read as an inartful attempt at addressing the defendant's statement that, "possession has to be knowing and voluntary", as voluntariness, again, is not a stand-alone element, but rather a concept incorporated within other elements of the crime. T 166. Furthermore, the judge instructed the jurors that, "if the lawyers state the law differently from the law as I explain it to you, then you must follow my instructions and ignore the statements of the lawyers." T 155. *See also State v. Woodbury*, 172 N.H. 358, 369 (2019) ("We presume the jury followed the court's instructions.). To the extent the jurors' understanding of the judge's instructions, which were legally correct, conflicted with how the prosecutor addressed the concept of voluntariness, the jury is presumed to have followed the trial court's instruction that its instruction on the law trumped how the prosecutor described it.

Ultimately, the prosecutor's statement sought to direct the juror's attention back to the custody and control element of possessing a controlled drug, of which voluntariness is part and parcel of. The defendant relied on limited conjectural evidence to try to convince the jury that she had not voluntarily possessed the crack cocaine, namely the driver's short duration lane issues and the fact that the defendant claimed ownership of the heroin-like substance but not the crack cocaine. Conversely, jurors were also able to consider, and presumably did, the fact that the police officer followed the vehicle for several miles before signaling for it to pull over (thus, giving the

defendant time to rid herself of the crack cocaine if the defendant's postured scenario was correct), the lack of testimony as to any observation by the officer of reaching or furtive movements by the driver as the officer approached the vehicle, the defendant's reaction towards her purse when the officer asked about the burnt marijuana odor, the defendant's initial dishonesty with the officer, and the defendant's behavior when the officer first attempted to search her purse.

The defendant has failed "to show that the trial court's decision [was] not sustainable" and has not "demonstrate[d] that [the trial court's ruling] was clearly untenable or unreasonable to the prejudice of [her] case." *Collins*, 168 N.H. at 5. Indeed, any error in failing to sustain the objection, or give the specific instruction on RSA 626:1, II was harmless. "An error may be harmless beyond a reasonable doubt if the [State demonstrates that the] alternative evidence of a defendant's guilt is of an overwhelming nature, quantity or weight and if the … evidence [at issue] is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt." *State v. Gordon*, 161 N.H. 410, 416-17 (2011) (quotations and citations omitted). As described above, the defendant's theory relied on a highly conjectural analysis of the evidence when compared to the strength of the State's case.

Here, the trial court exercised proper discretion in overruling the defendant's objection and in declining to give the jury a specific instruction on RSA 626:1, II, as the prosecutor's statement was not improper and the trial court had sufficiently and properly instructed the jury on the applicable law. As a result, the defendant's case was not prejudiced.

CONCLUSION

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

The State requests a 3JX oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

May 28, 2020

/s/Danielle H. Sakowski
Danielle H. Sakowski
N.H. Bar No. 265360
Senior Assistant Attorney General
Criminal Justice Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3671
Danielle.Sakowski@doj.nh.gov

CERTIFICATE OF COMPLIANCE

I, Danielle H. Sakowski, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 4,430 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.

May 28, 2020 *<u>/s/Danielle H. Sakowski</u>*
Danielle H. Sakowski

CERTIFICATE OF SERVICE

I, Danielle H. Sakowski, hereby certify that a copy of the State's brief shall be served on Christopher M. Johnson, Chief Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

May 28, 2020 *<u>/s/Danielle H. Sakowski</u>*
Danielle H. Sakowski