THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0204

State of New Hampshire

v.

Roger Roy

Appeal Pursuant to Rule 7 from Judgment of the Hillsborough County Superior Court – Northern District

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BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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TEXT OF RELEVANT STATUTES

631:4 Criminal Threatening

I. A person is guilty of criminal threatening when:

. . .

(d) The person threatens to commit any crime against the person of another with a purpose to terrorize any person

. . .

II. (a) Criminal threatening is a class B felony if the person:

. . .

(2) Uses a deadly weapon as defined in RSA 625:11, V in the violation of the provision[] of subparagraph . . . I(d).

(b) All other criminal threatening is a misdemeanor.

. . .

631:2-b Domestic Violence

I. A person is guilty of domestic violence if the person commits any of the following against a family or household member or intimate partner:

. . .

(e) Threatens to use a deadly weapon against another person for the purpose to terrorize that person;

. . .

II. Domestic violence is a class A misdemeanor unless the person uses or threatens to use a deadly weapon as defined in RSA 625:11, V, in the commission of an offense, in which case it is a class B felony.

. . .

625:11 General Definitions

V. "Deadly weapon" means 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.

QUESTIONS PRESENTED

1. Whether the court erred by finding the evidence sufficient to support a conviction for felony domestic violence.

Issue preserved by Roy's motion to dismiss, T[*] 608–16, the State's objection, T3 612–16, the court's denial of that motion, T3 634–35, Roy's motion for judgment notwithstanding the verdict, A 422, the State's objection, A 426, and the court's denial of that motion, AD 4.

2. Whether the court erred by precluding Roy from questioning A.R. about sexual text messages.

Issue preserved by the State's motion to exclude, A 345, the parties' arguments, T1 6–26, T2 248–57, and the court's order, AD 3; T2 265–68.

[*] Citations to the record are as follows:
"A" refers to the separately-filed appendix containing documents other than the appealed decision;
"AD" refers to the separately-filed appendix containing the appealed decisions;
"T1," "T2," etc., refer, by volume number, to the transcripts of trial on February 5-10, 2020.

STATEMENT OF THE CASE

In July 2019, the State filed four complaints in the Hillsborough County Superior Court, Northern District, alleging that Roger Roy committed domestic-violence ("DV") simple assault. A 340–43. In September 2019, the State obtained two indictments charging Roy with aggravated felonious sexual assault ("AFSA"), one indictment charging robbery, one indictment charging second-degree assault, and one indictment charging DV criminal threatening with a deadly weapon. A 335–39. During a four-day jury trial on February 5–10, 2020, the court (Nicolosi, J.) dismissed one of the AFSA indictments. T3 605. At the conclusion of trial, the jury found Roy not guilty of the remaining AFSA, robbery, and second-degree assault, and guilty of DV criminal threatening with a deadly weapon and the four counts of DV simple assault. T4 729–33; A 418. On March 12, 2020, the court sentenced Roy on the DV-criminal-threatening-with-a-deadly-weapon conviction to three to seven years at the State Prison, to serve, on two of the DV-simple-assault convictions to twelve months, to serve, concurrent, and on the remaining two DV-simple-assault convictions to twelve months, suspended for 8 years. A 430–40.

STATEMENT OF THE FACTS

At the end of 2018 or beginning of 2019, A.R. entered what became an on-and-off-again romantic relationship with Roger Roy. T1 173–74, 194, T2 457. As of July 2019, the relationship had been off for a couple months. T1 174, 194, T2 292.

A.R. lived in a three-bedroom apartment in Manchester with her best friend, Tiffany Albert, and Albert's two children. T1 102–04, 106, 116–17, 143–48, 171–72, T2 278, 441–42. A.R. had her own bedroom. T1 104, 117, 172, 178.

On Sunday, July 14, 2019, A.R. picked up Roy and his friend at a gas station and brought them back to her apartment, where all three drank alcohol. T1 149–50, 155, 175–77, 187, T2 287, 296, 303–04, 322–23. Later that night, A.R. and Roy dropped Roy's friend off at his home and returned together to A.R.'s apartment. T1 179. Roy spent the night, during which A.R. and Roy had consensual sex. T1 179, 194, T2 305–06, 427–28, 475–76.

Roy stayed at A.R.'s apartment for the next two days. T1 129, 149, 170, 193, 200, T2 458, 474. During that time, A.R. and Roy left the apartment multiple times, including trips to A.R's methadone clinic and to fast food restaurants. T1 150–52, 154, 183, 212–14, T2 340–41. Albert accompanied them on one of these outings. T1 152.

Roy stayed at the apartment until Tuesday, July 16. T1 129, 149, 170, 193, 200, T2 458, 474. After Roy left, A.R. alleged to Albert that Roy stole her personal belongings and tried to kill her. T1 126–29, 141, 201.

A.R. drove to her bank. T1 217. At trial, she testified that she was afraid that Roy would use her debit cards to drain her bank accounts. T1 202. She then drove to the police station. T1 217–18. The police called an ambulance, which brought her to the hospital. T1 66–69, 123–24, 219–21, T2 287, 439.

A.R. had bruises, a hoarse voice, and a broken finger nail. T1 68, 78, 82, 86, 89–91, 216–17, 230–32, T2 439. She told the police that Roy physically and sexually assaulted her, but refused a genital examination. T1 77, 84–85, 226–27. She also claimed that Roy threatened her with a gun. T1 85; but see T3 691 (court instructed jury that witnesses' pretrial statements could not be considered for their truth).

Police arrested Roy that evening. T2 447, T3 537–44. He was cooperative and had no weapons on him. T3 543–44. He had three of A.R.'s bank cards, her food-stamp card, and her cell phone. T2 449, 460–61, 475. He told the police that A.R. gave him her food-stamp card, but did not know why he had the other items. T2 460–61.

At trial, A.R. testified that, on Monday, July 15, she answered a phone call from a friend, which angered Roy.

T1 180–83. She testified that from then into the next day, Roy committed various crimes against her.

The most serious of A.R.'s allegations resulted in acquittals. A.R. alleged that Roy forced her to have sex with him, but the jury acquitted Roy of aggravated felonious sexual assault. T1 195–98, T4 730. A.R. alleged that Roy stole her personal property, but the jury acquitted Roy of robbery. T1 191–92, 200–08, 215, T2 413, T4 730–31. A.R. alleged that Roy twice strangled her until she lost consciousness, but the jury acquitted Roy of second-degree assault. T1 184–86, 188, 193, 197–98, 216, T2 411–12, T4 731–32.

A.R. also alleged that Roy committed uncharged crimes. She alleged that Roy confined her in her bedroom, and that he threatened to kill Albert and her children. T1 188–93, T2 353, 356.

Some of A.R.'s allegations resulted in misdemeanor guilty findings. She testified that Roy punched her, slapped her, pulled her hair and spit on her, and the jury found Roy guilty of four counts of misdemeanor domestic violence based on that testimony. T1 183–85, 187–88, 193, 199, T4 732–33.

Only one of A.R.'s allegations resulted in a felony guilty finding. A.R. alleged that Roy told her that he would kill her if she tried to leave the room or screamed. T1 198, T2 356. She also alleged that Roy "used to always carry a gun on him" and "kept acting like he had one," explaining that Roy "was

grabbing his, like, waistband like every time, like, I tried to like get up or something. He's like — was grabbing right here like as if something was there." T1 199. A.R. also testified that Roy, at some point, said that he had gun, but she admitted that she didn't see one. T1 199. Based on this testimony, the jury found Roy guilty of a felony domestic violence indictment that alleged that Roy "threatened to use a deadly weapon against A.R. . . . when he brandished a firearm . . . and stated words to the effect of 'shut up or I'll kill you.'" A 339; T4 730.

A.R.'s testimony aligned, in some respects, with Albert's. A.R. testified that on Tuesday, her mother came to the apartment to retrieve a food-stamp card. T1 189–90. She testified that Roy held his hand over her mouth and told her not to open her bedroom door. T1 189. She testified that she opened the door quickly, tossed the card out and closed the door without speaking to her mother. T1 189–90, 192. Albert testified that A.R. spoke to her mother through the bedroom door, but would not open it. T1 132–34, 137. A.R.'s mother did not respond to police requests to speak with her and did not testify at trial. T3 577–78.

A.R. testified that, after her mother's visit, Roy slammed her on the ground and she said, "[N]o, babe, stop." T1 188. A couple minutes later, she testified, Albert knocked on her door, but Roy threatened to kill her if she opened it, so she

just stayed quiet. T1 188. Albert testified that she heard someone say, "[B]abe, no," and a "boom" or "bang." T1 138, 163. She testified that she knocked on the door and asked, "[A]re you guys fucking around in there?", but did not receive a response. T1 138. Believing that A.R. and Roy were either having sex or wrestling, Albert testified that she decided to "mind [her] business" and return to her room. T1 138–39, 166–67.

In other respects, A.R.'s testimony diverged from Albert's. A.R. for instance, testified that on Tuesday morning, she, Roy, Albert and Albert's children all went to Dunkin Donuts together. T1 212–15. Albert, however, testified that they did not go anywhere on Tuesday morning; to the contrary, Albert spent that morning trying to get A.R. to come out of her room. T1 157–59.

Roy told the police that he did not physically or sexually assault A.R. and denied preventing A.R. from seeing her mother. T2 457–59, 474–80. He said that, when he left the apartment on Tuesday morning, A.R. was fine. T2 458–59, 474, 479–80. He added that Albert and A.R.'s mother did not like him. T2 479.

Roy's counsel impeached A.R. on a number of points. A.R. admitted that she had been convicted of robbery, a class A felony. T2 373–74. She admitted that, at the time of the events at issue here, she described herself on Facebook as

"Taken, I love you Brandon Limbardo," T2 402–03, although she maintained that "[t]aken" meant she was taken by someone else, and that she had never met Limbardo, who was then a prison inmate, in person. T2 403, 432–33. A detective assigned to conduct a follow-up interview with A.R. testified that she failed to appear for three appointments for the interview. T3 546–57. Roy's counsel pointed out numerous omissions in A.R.'s statements to police. T3 518–32, 575–76.

A.R. testified that, as of July 2019, her relationship with Roy "had broken off" and she had not been in contact with him for two months. T1 174–75. Roy initiated contact, she claimed, by calling her and telling her that he "wanted to apologize for the breakup." T1 175, T2 298–99. She testified that she was apprehensive about meeting Roy, but that Roy was insistent. T2 299–300. In response, Roy's counsel questioned A.R. about, and introduced, a series of text messages, dated July 13 to July 14, in which A.R. sent Roy a sexually explicit photograph and video, referred to Roy as "Babe," told Roy, "I love u," and repeatedly expressed an eagerness to spend time with him. T2 308–34; A 373.

A.R. claimed that the text messages were from July 2018, not July 2019, T2 309–12, 318–21, 327, 329, 333–34, although she had earlier testified that her relationship with Roy did not start until the end of 2018 or beginning of 2019, T1 174. She claimed that it was merely coincidental that A.R.

agreed in the text messages to pick Roy up on July 14 at the same gas station from which she picked him up on July 14, 2019, adding, "[W]e always meet there." T2 330. A.R. also claimed that some text messages were missing from the exhibit and that others were "fabricated." T2 313–14.

SUMMARY OF THE ARGUMENT

1. Evidence is insufficient if, viewed in the light most favorable to the State, no reasonable juror could find that it proves each element of the offense. The evidence here was insufficient to prove that Roy used a deadly weapon, as required to sustain a conviction for felony criminal threatening, because A.R. did not perceive any such weapon. The Executive Branch should be estopped from arguing that Roy's conduct nevertheless constitutes felony domestic violence, because it repeatedly told the legislature that the bill enacting the domestic-violence statute would not create any new crime or increase the penalty for any existing crime. Even if estoppel does not apply, the statute is ambiguous and the other legislative history is entirely consistent with the Executive Branch's statements to the legislature. Even if felony domestic violence is broader than felony criminal threatening, the evidence here was still insufficient.

2. Evidence that A.R. exchanged sexual text messages with Roy was relevant to impeach her claim that she was reluctant to meet him. Its probative value was not substantially outweighed by the danger of unfair prejudice.

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR FELONY DOMESTIC VIOLENCE.

After the State rested, Roy moved to dismiss the felony domestic-violence indictment for insufficient evidence. T3 608–16. He noted that the indictment alleged that Roy "threatened to use a deadly weapon against A.R. . . . when he brandished a firearm . . . and stated words to the effect of 'shut up or I'll kill you,'" but that A.R. testified that she did not see a gun. T3 608–09; A 339. While he agreed that the statute did not require that a gun be brandished, he noted that A.R. testified that she had consensual sex with Roy, making his possession of an unseen and unfelt gun unlikely. T3 609–11. He also noted that A.R. testified that Roy said, "['I will kill you,'] not . . . ['I will shoot you,' or] . . . ['I have a gun.']" T3 611.

The State objected. T3 612–16. It argued that "the threat doesn't necessarily have to be explicit. It can an implicit threat." T3 613. It noted that A.R. testified that "[she] was aware that [Roy] owned a firearm and that he was behaving in a way that suggested to her that he had it — that he was actually reaching for his belt as he was making the threat." T3 612–16.

After reviewing the trial recording, the court denied the motion. T3 634–35. It noted that A.R. testified "that . . . when she tr[ied] to get up, [Roy] would move his hand toward his

waistband" and "[t]hat she had knowledge of him carrying a gun regularly." T3 634. The court further noted that, "when asked about whether there was any discussion about the gun, she testified that he told her he had one." T3 634.

Following the verdicts, Roy filed a motion for judgment notwithstanding the verdict. A 422. He reiterated that A.R. testified that did not see a gun, even though she had consensual sex with Roy. A 423. He added that no gun was found on Roy when he was arrested or when police searched A.R.'s bedroom. A 423. Thus, Roy argued, "the jury was not presented with evidence to support a finding that A.R. was threatened with a firearm or any other deadly weapon." A 424.

The State objected. A 426. It reiterated that "A.R. testified that [Roy] threatened to kill her and that he continuously reached for his waistband while making those threats." A 427. It added that A.R. "knew the defendant to regularly carry a firearm." A 427.

The court denied the motion. AD 4. It noted that "[Roy] told [A.R.] he had a gun during the incident, which possession was consistent with his movements and history per [A.R.]. Questions of credibility are in the province of the jury, and a rational jury could find as this jury did based on the evidence presented." AD 4. By finding the evidence

sufficient to support a conviction for felony domestic violence, the court erred.

Motions to dismiss and a motions for judgment notwithstanding the verdict raise the same issue: the legal sufficiency of the evidence. See State v. Pratte, 158 N.H. 45, 49–50 (2008) (court erred in denying motion for JNOV because evidence was insufficient); State v. Spinale, 156 N.H. 456, 463 (2007) ("on a motion for JNOV, . . . the trial court applies the sufficiency standard"); State v. O'Neill, 134 N.H. 182, 185 (1991) ("We see no reason not to apply the same standard of review to [a trial court's ruling on a motion for JNOV] as we apply to a legal challenge for insufficiency of the evidence"). Evidence is legally insufficient if no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State." State v. Cavanaugh, ___ N.H. ___ (Dec. 29, 2020). When the evidence of an element is solely circumstantial, it must "exclude all reasonable conclusions except guilt." State v. Castine, 173 N.H. 217, 220 (2020).

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits convictions on the basis of legally insufficient evidence. Jackson v. Virginia, 443 U.S. 307, 317–18 (1979). Because "[a] challenge to the sufficiency of the evidence raises a claim of legal error[,] . . .

[this Court's] standard of review is de novo." Cavanaugh, ___ N.H. at ___.

In matters of statutory interpretation, this Court is "the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole." In re Estate of O'Neill, ___ N.H. ___ (Dec. 22, 2020). It "construe[s] the Criminal Code according to the fair import of its terms and to promote justice." State v. Woodbury, 172 N.H. 358, 366 (2019). Issues of statutory interpretation are reviewed de novo. Petition of New Hampshire Div. for Children, Youth & Families, ___ N.H. ___ (Dec. 9, 2020).

In subsection A, below, Roy argues that the evidence here would not have been sufficient to prove the felony of criminal threatening with a deadly weapon, under RSA 631:4, II(a)(2). In subsection B, Roy argues that, because the Executive Branch, in 2014, expressly told the legislature that Senate Bill 318, which enacted RSA 631:2-b, would not create any new crime or increase the penalty for any existing crime, it should be estopped from arguing that RSA 631:2-b, I(e) and II define, as a felony, conduct that was not already a felony under an existing statute, such as RSA 631:4, II(a)(2). In subsection C, Roy argues that, even if the State is not estopped from making that argument, the argument should be rejected on the merits; RSA 631:2-b, I(e) and II do not define, as a felony, conduct that was not already

a felony under an existing statute. In subsection D, Roy argues that, even if RSA 631:2-b, I(e) and II define, as a felony, some conduct that was not already a felony under an existing statute, the evidence here was still insufficient. Finally, in subsection E, Roy argues that, even if his argument is not preserved, the court committed plain error by finding the evidence sufficient.

A. Roy's conduct did not constitute criminal threatening with a deadly weapon under RSA 631:4, II(a)(2).

RSA 631:4, prohibiting "criminal threatening," was enacted in 1971. Laws 1971, 518:1. Among other things, the statute prohibits "threaten[ing] to commit any crime against the person of another with a purpose to terrorize any person." RSA 631:4, I(d). In 1994, the legislature amended RSA 631:4 to provide that the offense is a class B felony "if the person . . . uses a deadly weapon, as defined in RSA 625:11, V in [the commission of the offense]." Laws 1994, 187:2; 1994 HB 1134. "[A] firearm is a deadly weapon under RSA 625:11, V if, in the manner it is used, intended to be used, or threatened to be used, it is known to be capable of producing death or serious bodily injury." State v. Kousounadis, 159 N.H. 413, 425 (2009).

Under the plain language of RSA 631:4, I(d), a person is guilty of misdemeanor criminal threatening only if that person communicates, to someone else, a threat. A defendant's

internal thoughts for instance, cannot constitute "threaten[ing] to commit [a] crime." A person is guilty of felony criminal threatening under RSA 631:4, II(a)(2) only if that person "uses a deadly weapon" to communicate, to someone else, a threat. In order to "use" an object to communicate, to someone else, a threat, the other person must perceive the object; mere reference to an unperceived object is not sufficient. Thus, if a defendant says to the victim, "I'm going to shoot you," but does not use any object to communicate the threat, the defendant has committed only misdemeanor criminal threatening. Similarly, if a defendant, in the course of making the threat, attempts to display a deadly weapon to the victim, but the victim fails to perceive it, the defendant has committed misdemeanor criminal threatening, and likely attempted criminal threatening with a deadly weapon, see RSA 629:1 (defining attempt), but not the completed crime of felony criminal threatening.

Here, A.R. testified that Roy threatened to kill her. Thus, the evidence was sufficient to prove that Roy committed misdemeanor criminal threatening under RSA 631:4, I(d). The evidence was insufficient, however, to prove that Roy used a deadly weapon to commit this offense. A.R. did not see or feel a gun, even though she spent three days with Roy and had consensual sex with him. Thus, the evidence was insufficient to prove that Roy even had a gun during this

time. Even assuming that Roy had a gun, A.R. testified that she did not perceive it. Thus, had Roy been charged with felony criminal threatening under RSA 631:4, II(a)(2), the evidence presented here would have been insufficient to support a conviction.

B. The State is legislatively estopped from arguing that RSA 631:2-b creates any new crime or increases the penalty for any existing crime.

The State did not charge Roy with criminal threatening under RSA 631:4. Rather, it charged him with felony domestic violence under RSA 631:2-b. Paragraph I of that statute provides, in relevant part, "A person is guilty of domestic violence if the person commits any of the following against a[n] . . . intimate partner: . . . (e) Threatens to use a deadly weapon against another person for the purpose to terrorize that person." Paragraph II provides, "Domestic violence is a class A misdemeanor unless the person uses or threatens to use a deadly weapon as defined in RSA 625:11, V, in the commission of an offense, in which case it is a class B felony."

RSA 631:2-b was enacted in 2014 by Senate Bill 318. Laws 2014, 152:2. At hearings before the Senate Judiciary Committee and the House Criminal Justice and Public Safety Committee, Deputy Attorney General Ann Rice appeared on behalf of the Executive Branch. Hearing on SB 318-FN Before

the Senate Judiciary Comm. 16:35 (Jan. 14, 2014) ("Senate Comm. Hearing")[1]; Hearing on SB 318-FN Before the House Criminal Justice and Public Safety Comm. 15:20, 17:45 (Apr. 15, 2014) ("House Comm. Hearing"); A 28, 31, 231. According to Senator Donna Soucy, the bill's primary sponsor, Rice "was very involved in the drafting" of the bill. Senate Comm. Hearing 8:20. Rice stated that the primary purpose of the bill was to label convictions involving domestic violence, so that police officers, prosecutors and judges will have a better understanding of the specific nature of an offender's criminal history. Senate Comm. Hearing 16:55; House Comm. Hearing 18:15; A 28, 39 (Rice's prepared written testimony to the Senate Committee), 231, 236 (Rice's prepared written testimony to the House Committee). The secondary purpose, Rice said, was to correctly identify misdemeanor convictions that trigger the federal prohibition on firearms possession or ownership. Senate Comm. Hearing 19:00; House Comm. Hearing 20:55; A 28, 39, 231, 236.

Rice expressly told the legislature that the bill would neither criminalize conduct that was not already criminal nor

[1] The audio recording of the Senate Committee Hearing is available at http://www.gencourt.state.nh.us/senateaudio/committees/2014/Jud/SB0318_011414.asx. The audio recording of the House Committee Hearing is available at http://www.gencourt.state.nh.us/houseaudio/2014/standing_committees/Criminal%20Justice/SB0318_04152014.asx. Links to both audio recordings are available at http://gencourt.state.nh.us/bill_Status/BillStatus_Media.aspx?lsr=2811&sy=2014&sortoption=billnumber&txtsessionyear=2014&txtbillnumber=sb318.

increase the penalty for conduct that was already criminal. She stated, "I want to make clear, this bill does not create any new crimes, it doesn't increase penalties for crime." Senate Comm. Hearing 20:05; accord House Comm. Hearing 22:40; A 28, 39, 236. She noted that the bill "lists eleven types of conduct that would constitute the offense of domestic violence. And each of those is drawn from current law." Senate Comm. Hearing 20:55; accord A 28, 40, 237.

"In some cases," Rice told the committees, "there are times when the crime as defined in Senate Bill [318] is slightly different than the crime under current law. And the reason for that is that what constitutes a qualifying domestic violence misdemeanor under federal law is sometimes more narrow than what our law defines as a crime. So we have narrowed the crimes in the domestic violence arena to fit the federal laws." House Comm. Hearing 24:55; accord Senate Comm. Hearing 22:10; A 28, 40, 237. At the House Committee hearing, she specifically cited criminal threatening as an example, and stated that criminal threatening under the bill was "narrower" than under the existing statute. House Comm. Hearing 25:30. Rice then reiterated that the bill "defines the penalties for the crime of domestic violence. These are drawn directly from current law. There are no changes. So we are not increasing the penalties at all."

House Comm. Hearing 26:15; accord Senate Comm. Hearing 23:40.

In response to questions from a member of the House Committee, Rice also said that a defendant could not be convicted, for the same act, under both an existing statute and the new crime of "domestic violence." House Comm. Hearing 10:55.

In Kelleher v. Marvin Lumber & Cedar Co., 152 N.H. 813 (2005), this Court adopted, as part of New Hampshire's common law, the doctrine of judicial estoppel. Id. at 848. The doctrine "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." Balzotti Glob. Grp. v. Shepherds Hill Proponents, 173 N.H. 314, 320 (2020).

Judicial estoppel is an equitable doctrine. Alward v. Johnston, 171 N.H. 574, 580 (2018). Its purpose is "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." Appeal of N.H. Elec. Coop., 170 N.H. 66, 83 (2017).

This Court should adopt a similar doctrine, what could be called "legislative estoppel." Just as it is important to protect the integrity of the judicial process, it is also important to protect the integrity of the legislative process.

Just as a party "abuse[s] . . . the judicial process" by "prevailing in one phase of a case on an argument and then relying on a contradictory argument . . . in another phase," Alward, 171 N.H. at 584, a party abuses both the legislative and judicial processes by persuading the legislature to pass a statute based on one interpretation and then advancing a contradictory interpretation in court, after the statute has been enacted.

In determining whether to apply judicial estoppel, courts consider three factors: "(1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." Balzotti, 173 N.H. at 320 (quotation omitted). In considering whether to apply legislative estoppel, courts should consider similar factors: (1) whether the party's later position, in court, is clearly inconsistent with its earlier position, expressed to the legislature; (2) whether the party succeeded in persuading the legislature to enact a statute; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Those factors weigh in favor of applying estoppel here. First, in 2014, the Executive Branch expressly told the legislature that Senate Bill 318 "d[id] not create any new crimes" and "d[id] not increase the penalty for any crime." It would be "clearly inconsistent" for the Executive Branch to now argue that RSA 631:2-b, defines, as a felony, conduct that previously constituted a misdemeanor under RSA 631:4.

Second, the Executive Branch succeeded in persuading the legislature to pass Senate Bill 318. Other than an amendment not relevant to this issue, A 21, the legislature enacted the version of the bill exactly as proposed and promoted by the Executive Branch, A 6, 16.

Third, the Executive Branch would derive an unfair advantage or impose an unfair detriment on Roy if not estopped. Everyone agrees that threatening to assault someone should constitute a crime. And everyone agrees that, if a deadly weapon is used to communicate that threat, the crime should constitute a felony. But reasonable people may disagree about whether a threat to harm someone — even a threat that refers to a deadly weapon — should constitute a felony if a deadly weapon was not, in fact, used to communicate the threat.

Before such conduct is classified as a felony, the question should be put through the rigors of the legislative process. Legislators should have the opportunity to debate

the merits of such a penalty and to hear from the general public on the issue.

This legislative process is the cornerstone of the rule of law, and is the basis on which all statutes are enacted. Yet that process did not occur here. Because the legislature relied on the Executive Branch's assurance that Senate Bill 318 "d[id] not create any new crimes" and "d[id] not increase the penalty for any crime," it did not debate whether, for instance, a defendant who threatens to "shoot" his girlfriend, but without displaying or otherwise using a gun to communicate the threat, should be guilty of a felony rather than a misdemeanor.

Because the Executive Branch induced the legislature to pass Senate Bill 318 without having this debate, it would derive an unfair advantage or impose an unfair detriment if not estopped. This Court should hold that the Executive Branch is estopped from arguing that RSA 631:2-b, I(e) and II prohibit conduct that does not constitute criminal threatening with a deadly weapon under RSA 631:4, II(a)(2).

C. Even if estoppel does not apply, RSA 631:2-b, I(e) and II do not define, as a felony, conduct that does not constitute criminal threatening with a deadly weapon under RSA 631:4, II(a)(2).

Paragraph I of RSA 631:2-b, provides, in relevant part, "A person is guilty of domestic violence if the person commits

any of the following against a[n] . . . intimate partner: . . . (e) Threatens to use a deadly weapon against another person for the purpose to terrorize that person." Paragraph II provides, "Domestic violence is a class A misdemeanor unless the person uses or threatens to use a deadly weapon as defined in RSA 625:11, V, in the commission of an offense, in which case it is a class B felony."

"A statute is ambiguous if its language is subject to more than one reasonable interpretation." Attorney General, Dir. of Charitable Trusts v. Loreto Publ'ns, 169 N.H. 68, 74 (2016). Here, the phrase "threatens to use a deadly weapon" is subject to at least two reasonable interpretations. Under one interpretation, a defendant does not "threaten[] to use a deadly weapon" unless the defendant (a) threatens to use an object, (b) that object is present and perceived by the recipient of the threat at the time the threat is made, and (c) that object constitutes a deadly weapon. Under a second interpretation, a defendant "threatens to use a deadly weapon" whenever: (a) the defendant threatens to commit an act, and (b) that act, if committed, would involve the use of a deadly weapon. Under this second interpretation, it is not necessary that the defendant in fact "use" any object; a defendant can "threaten to use a deadly weapon" even if no object is present or perceived by the recipient of the threat.

Case law from other jurisdictions supports both interpretations. In State v. Franklin, 635 P.2d 1213 (Ariz. 1981), the defendant entered a liquor store, said, "[T]his is a holdup," and "made a motion inside his coat pocket as if he had a gun." Id. at 1214. The defendant was convicted of armed robbery. Id. at 1213. The armed-robbery statute provided that a person commits armed robbery if, "in the course of committing a robbery," the person "[u]ses or threatens to use a deadly weapon or dangerous instrument." State v. Laughter, 625 P.2d 327, 330 n.2 (Ariz. Ct. App. 1980) (setting forth statute as it existed when Franklin was decided). On appeal, the Arizona Supreme Court held that the statute "is not satisfied by the defendant pretending to have a gun or even using a fake gun." Franklin, 635 P.2d at 1214. "[T]he victim's belief that a weapon is present, even if justified by an objective standard," the court held, "is insufficient to establish guilt." Id.

The Washington Supreme Court reached the contrary conclusion in State v. Coe, 750 P.2d 208 (1988). There, the defendant sexually assaulted three women. Id. at 835–36. During each attack, the defendant told the victim that he had a knife. Id. at 835–36. He was convicted of three counts of first-degree rape, which applied when the attacker "uses or threatens to use a deadly weapon." Id. at 836, 844 (brackets omitted). The Washington Supreme Court affirmed the

convictions, holding that "the element . . . is satisfied by the threat itself, without evidence of the actual existence of a deadly weapon." Id. at 844.

The fact that two state supreme courts have adopted contrary interpretations of the same statutory language — "threatens to use a deadly weapon" — establishes that this language is susceptible of more than one reasonable interpretation, and RSA 631:2-b is thus ambiguous on this point.

If statutory language is ambiguous, this Court "will resolve the ambiguity by determining the legislature's intent in light of legislative history." Hogan v. Pat's Peak Skiing, LLC, 168 N.H. 71, 73 (2015). Because the statute is ambiguous, this Court should consult legislative history.

"[C]ourts generally view committee reports as the most persuasive indicia of legislative intent." Norman J. Singer & J.D. Shambie Singer, Statutory Construction § 48:6 (7th ed. Nov. 2020 update) (quotation omitted). In its report, the House Criminal Justice and Public Safety Committee explained that Senate Bill 318 "tak[es] charges that are commonly used in domestic violence related cases and reorganizes them in statute under one crime of 'Domestic Violence.'" N.H.H.R. Jour. 1817 (2014); A 330. It added, "It is important to note that this is a simple reorganization of current state law." N.H.H.R. Jour. 1817 (2014); A 330.

"Courts interpreting an ambiguous statute can look to . . . executive messages to ascertain the evils at which a statute was aimed." Singer & Shambie Singer, supra § 48:5. Additionally, "courts may . . . give some weight to a drafter's view if the drafter clearly and prominently communicated the view to legislators and other interested parties during the process of enactment, and courts believe legislators' understanding of the bill was influenced by the communication." Id. § 48:12. As explained above, the Executive Branch was heavily involved in the drafting of Senate Bill 318 and expressly told the legislature that the bill would not create any new crime or increase the penalty for any existing crime.

The legislative history further demonstrates that the legislature shared the Executive Branch's understanding. "Legislators deliberating upon a bill may look to its sponsor as someone who is particularly well informed about the bill's purpose, meaning, and intended effect. Consequently, courts may use statements by a bill's sponsor as an interpretive aid . . ." Id. § 48:15. Senator Soucy, the bill's primary sponsor, told the committees that the bill "takes existing statutes, which are commonly used in domestic violence cases, and reorganizes them under the umbrella of one crime, domestic violence." Senate Comm. Hearing 2:30; accord House Comm. Hearing 2:50; A 27, 230. She added, "Let me

be clear, because I know there are some folks who might have some apprehension, we're not changing the law, we're putting it under a new umbrella." Senate Comm. Hearing 3:50; accord House Comm. Hearing 3:10; A 27. She reiterated that, "[i]n passing this bill, we will be giving existing crimes a new name," Senate Comm. Hearing 4:35; accord A 27, and that "the elements of the crime remain the same," Senate Comm. Hearing 7:05; accord House Comm. Hearing 3:40.

A House Committee member asked Soucy, "Would there be an enhanced penalty? Is that the purpose? I mean, if I hurt somebody, whether it's a person I know or not, I should probably do the same amount of time, or is that not the case?" House Comm. Hearing 9:55; A 231. Soucy responded, "[T]he penalties would remain the same, however, law-enforcement and prosecution would have the ability to track these crimes." House Comm. Hearing 10:15; A 231. She went on to explain that criminal records would reflect convictions for domestic violence. House Comm. Hearing 10:25; A 231. The committee member asked again, "But the penalties remain the same?" House Comm. Hearing 11:00. Soucy responded, "The penalties would remain the same." House Comm. Hearing 11:00.

In response to questions from another committee member, Soucy also said that a defendant could not be convicted, for the same act, under both an existing statute

and the new crime of "domestic violence." House Comm. Hearing 10:55; A 231.

Amanda Grady-Sexton, Director of Public Policy for the Coalition Against Domestic and Sexual Violence, stated that the bill "simply just takes the charges that are commonly used in domestic violence related cases and just reorganizes them under one new crime of domestic violence." Senate Comm. Hearing 43:50; accord House Comm. Hearing 49:15; A 29, 42, 44, 231, 242, 244.

Patricia LaFrance spoke to the committees in her capacity as the Hillsborough County Attorney, the same county attorney's office that prosecuted Roy in this case. Senate Comm. Hearing 37:55; House Comm. Hearing 1:30:15, 1:36:15; A 28–29, 32, 232. She stated that the bill "[is] not changing any crimes. It's not adding penalties. It's just classifying them as they should be." House Comm. Hearing 1:32:35.

For these reasons, the legislative history overwhelmingly establishes that Senate Bill 318 was not intended to create any new crimes or to increase the penalty for any existing crime. This resolves the ambiguity inherent in RSA 631:2-b, I(e) and II. For a defendant's conduct to constitute a felony under those provisions, the defendant must use a deadly weapon to communicate a threat. For the reasons stated in subsection A, above, the evidence here was

not sufficient to prove that Roy even had a gun, much less that he used a gun to communicate his threat.

Even if this Court concludes that legislative history does not resolve the ambiguity, the rule of lenity supports Roy's interpretation. "[T]he rule of lenity serves as a guide for interpreting criminal statutes where the legislature failed to articulate its intent unambiguously." In re Cody C., 165 N.H. 183, 186 (2013). It "generally holds that ambiguity in a criminal statute should be resolved against an interpretation which would increase the penalties or punishments imposed on a defendant." In re Alex C., 161 N.H. 231, 239 (2010). "It is rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." State v. Dansereau, 157 N.H. 596, 602 (2008) (quotation omitted). The rule is applied where "neither the language nor the legislative history . . . clearly establish what the legislature intended." Id. at 603.

Under the rule of lenity, the ambiguity inherent in RSA 631:2-b, I(e) and II should be resolved against the interpretation that would increase the penalty for a defendant who makes a threat, but does not use a deadly weapon to communicate that threat. For the reasons stated in subsection A, above, the evidence here was insufficient to prove that Roy used a gun to communicate his threat.

D. Even if this Court concludes that RSA 631:2-b, I(e) and II define, as a felony, a broader range of conduct than does RSA 631:4, II(a)(2), the evidence here was still insufficient.

RSA 631:2-b, I(e) II apply if the defendant "[t]hreatens to use a deadly weapon against" an intimate partner. Even if this Court concludes that these provisions can apply even if the defendant does not use a deadly weapon to communicate a threat, the evidence was insufficient to prove that Roy threatened to use a deadly weapon against A.R.

Although A.R. testified that Roy "used to always carry a gun on him," that he told her, at some point in the course of the three days that he stayed with her, that he had gun, and that he threatened to kill her, T1 198–99, T2 356, she did not testify that Roy expressly threatened to use a gun or other deadly weapon. Nor did she testify that she saw or felt a gun.

Roy acknowledged that a threat can be implicit. Here, however, A.R.'s testimony that Roy "grabb[ed] his . . . waistband . . . every time . . . [she] tried to like get up," T1 199, was simply too equivocal to constitute proof, beyond a reasonable doubt, that Roy threatened to use a deadly weapon.

E. Even if the argument is not preserved, the court committed plain error.

To the extent that this Court finds that Roy did not preserve his argument below, it should find plain error. This

Court may reverse for plain and prejudicial errors that seriously affect the fairness, integrity or public reputation of judicial proceedings. State v. Stillwell, 172 N.H. 591, 608 (2019); Sup. Ct. R. 16-A. Although plain error "should be used sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result," id., this Court has found that convictions based on insufficient evidence constitute plain error. State v. Houghton, 168 N.H. 269, 273–74 (2015); State v. Guay, 162 N.H. 375, 380–84 (2011). Even if this Court concludes Roy did not preserve his sufficiency challenge, it should still find plain error.

For the reasons stated above, the court erred by concluding that the evidence was sufficient to convict Roy of felony domestic violence, and that error was plain. The error was prejudicial because it resulted in Roy's conviction for a felony. See Houghton, 168 N.H. at 274, Guay, 162 N.H. at 384. The error seriously affects the fairness, integrity or public reputation of judicial proceedings because the undisputed facts demonstrate that Roy is innocent of felony domestic violence; he stands convicted of a crime which he did not commit. See Houghton, 168 N.H. at 274, Guay, 162 N.H. at 384.

II. THE COURT ERRED BY PRECLUDING ROY FROM QUESTIONING A.R. ABOUT SEXUAL TEXT MESSAGES.

On the eve of trial, the State filed a motion to exclude, among other things, text messages exchanged between A.R. and Roy on July 13 and 14, 2019. A 345. The State argued, among other things, that the messages were irrelevant and that, even if relevant, the danger of unfair prejudice outweighed their probative value. A 346–48. It argued that the messages would "confuse the jury" and "provoke an emotional reaction toward A.R." A 348.

On the morning of the first day of trial, Roy submitted the text messages to the court. T1 6–7; A 352. The messages showed that, on July 13, A.R. sent Roy a sexually provocative photograph of herself and a video of her exposed breast. A 352–53. The following morning, Roy offered to come to A.R.'s home. A 357. A.R. responded, "Yeah babe when are you gonna be around the house like how long to you get here[?]" A 357. When Roy didn't arrive, A.R. expressed disappointment, writing, "I should have already new you never make time for me." A 362.

A.R. and Roy then exchanged sexually explicit texts. After Roy wrote, "I wanna make ur toes curl wit my mouth," A.R. responded, "Why don't you come and show me what that mouth do." A 363–64. In response to further sexually explicit texts from Roy, A.R. wrote, "[Y]ou can only have this you're a

A good boy and I think . . . you're far from a good boy you're a bad boy lol. . . But maybe if you're nice I can give you a taste." A 366. After Roy wrote, "I'm a good boy I want u bby," A.R. responded, "I want you to babe I want to ride your dick I want you to fuck me so . . . nice and kiss my body wile fuxking me and pull my hair I want you to . . . [t]ease me." A 366–67. A.R. and Roy then exchanged additional texts in which they arranged for A.R. to pick Roy up at a gas station. A 368–72.

Roy told the court that A.R. told the police, "Roy messaged me trying to apologize and he just wanted to hang out. I was, like, okay. And I was a little sketchy about it." T1 12. Roy argued that the text messages were relevant because they contradicted A.R.'s claim that Roy initiated the contact, and that she was "reluctant" and "had some trepidation about meeting [Roy]." T1 12–13, 16–17. Thus, Roy argued, the messages "[went] to the credibility of [A.R.]." T1 17–18, 19–20. He added the case turned on A.R.'s credibility. T1 20.

The State argued that there was no dispute that A.R. and Roy "had been in a relationship," "[t]hat it had been on and off," and that, "at this particular time, they decided to meet up." T1 24–25. It added that A.R. and Roy were together for "at least . . . 24 hours before the [charged crimes] occurred," and A.R. admitted that "things were good at that

time." T1 24–25. Thus, the State argued, the messages "don't . . . serve any purpose other than for the sexual content and to just show that she was texting him before." T1 25. When the court asked about A.R.'s claim to the police that she felt "sketchy" about meeting Roy, the State argued that the messages did not contradict that claim. T1 25–26.

The court deferred ruling on the admissibility of the messages. T1 26. It stated that it would wait "to see what [A.R.'s] testimony is in order to decide whether or not [the messages] serve for impeachment." T1 26–27, 29–30.

On direct examination, A.R. testified that Roy "called [her], wanted to apologize for the breakup and what he did to [her] then. So decided to meet up and talk about it." T1 175.

The following morning, outside the presence of the jury, the court addressed the admissibility of the messages. T2 248. Roy submitted a transcript of A.R.'s interview with the police. T2 248; A 392. It established that A.R. told the police, "[Roy] messaged me, trying to apologize, and he just wanted to hang out. And I was a little sketchy about it." A 395. Roy noted that A.R. testified that "it was [Roy] who called her, [Roy] who reached out to come see her . . . to . . . see if they could make up and apologize." T2 248. The messages, Roy argued, "flatly contradict that." T2 248–49. He also noted that the case turned on A.R.'s credibility, and argued that, although the messages were "clearly prejudicial

to the State's case," they were not "unfairly prejudicial." T2 249–50.

The State reiterated its argument that the messages were "[not] contradictory at all." T2 253, 256–57. It claimed that "the real reason that [Roy] wants to admit them or impeach [A.R.] with them is to inflame the jury because they're sexual in nature, and this is a sexual assault case." T2 257.

The court noted that A.R. testified that, even after she had consensual sex with Roy, she still did not want to renew their romantic relationship. T2 265. It ruled that the text messages "reflect a different emotional engagement than what she testified to." T2 265. It ruled that Roy could cross-examine A.R. about the messages, but could not use the messages "in their entirety." T2 265–68; AD 3. It precluded Roy from asking A.R. about the sexually explicit messages, ruling that those messages were irrelevant and "cumulative of her interest to get back in touch with him." T2 266–69; AD 3. The court also noted that A.R. had already testified that she had consensual sex with Roy. T2 266, 268. It described the sexually explicit messages as "embarrassing" and ruled that their "probative value is outweighed by the prejudice." T2 268; AD 3.

On cross-examination, A.R. confirmed that she told the police that Roy initiated contact with her and that she was

apprehensive about seeing him. T2 299–300. When confronted with the messages, she claimed that they were sent in 2018, not 2019. T2 309. In light of that testimony, the court ruled that the messages would be admitted and provided to the jury, but redacted the sexually explicit messages. T3 640–41; A 384–86.

By precluding Roy from asking A.R. about the sexually-explicit text messages, and by redacting those messages from the exhibit provided to the jury, the court erred.

A trial court's evidentiary rulings are reviewed for an unsustainable exercise of discretion. State v. Munroe, ___ N.H. ___ (Aug. 4, 2020). The question is whether the court's ruling was clearly unreasonable or untenable to the prejudice of Roy's case. Id.

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. N.H. R. Ev. 401. Relevant evidence is admissible unless excluded by another legal authority. N.H. R. Ev. 402.

The text messages here, although sexual in nature, were relevant and probative as a prior inconsistent statement. A.R. testified that Roy "called [her], wanted to apologize for the breakup and what he did to [her] then. So decided to meet up and talk about it." T1 175. She testified that she told the police that Roy initiated contact with her and that she was

apprehensive about seeing him. T2 299–300. The text messages, including those of a sexual nature, flatly contradicted those claims.

"As soon as . . . testimony . . . is admitted, the credibility of the witness . . . becomes a fact of consequence within the range of dispute at trial." G. Dix et al., McCormick on Evidence § 33 (8th ed. Jan 2020 update). "[T]o be admissible, the prior statement need not flatly contradict the witness's trial testimony. The statement need only be inconsistent with the testimony." Id. § 34. Thus, "any material variance between the testimony and the previous statement suffices. The pretrial statement need only bend in a different direction than the trial testimony." Id. (internal quotation omitted). "The test ought to be: Could the jury reasonably find that a witness who believed the truth of the facts testified to would be unlikely to make a prior statement of this tenor?" Id. "[I]f the previous statement is ambiguous and according to one meaning inconsistent with the testimony, it ought to be admitted." Id. (citing Concord v. Concord Bank, 16 N.H. 26 (1844)). "Instead of restricting the use of prior statements by a mechanical test of inconsistency, in case of doubt the courts should lean toward receiving such statements to aid in evaluating the trial testimony." Id.

This Court's case law is in accord with this "widely accepted view." Id. In Concord v. Concord Bank, 16 N.H. 26

(1844), the town of Concord alleged that the Concord Bank misappropriated $2000 that was given to the bank's cashier by Theodore French to satisfy a debt owed by French's business to the town. Id. at 29–32. The bank maintained that the money was given to the cashier for other purposes. Id. At trial, the town called French, who testified that he gave the cashier the money to satisfy the debt his business owed to the town. Id. at 32. To impeach this testimony, the bank proffered a writing signed by French and other owners of the business, several months later, directing the bank to pay $2000 from the business's account to the town, to satisfy the debt, although it appears that the account was by then overdrawn. Id. at 32. The court however, excluded the writing, finding that it did not contradict French's testimony. Id. After a verdict for the town, the bank appealed. Id. at 28.

The question, this Court held, was not "how much weight" the writing "might have as a contradiction," or whether it might be "explained that with a jury it would weigh little or nothing at all against" French's trial testimony. Id. at 33. Rather, the question was whether "an inference might be drawn from the writing and its phraseology against the truth of the story of French." Id. If so, "the writing was competent for contradiction, however little weight it might be found to have upon the whole case in the minds of the jury." Id.

This Court found that it "[m]ight . . . well be argued to a jury . . ." that if French's trial testimony were true, "the language of the writing would have been different." Id. It acknowledged that French's written statement "might strike different minds differently, and with some weigh[] for, and with others against his" testimony. Id. Precisely because the writing was "capable of more than one construction," however, this Court held that "it should have been left to the jury to have weighed it and given it such consideration as they might have seen fit." Id. This Court set aside the verdict and ordered a new trial. Id. at 34.

Here, as in Concord Bank, the sexual text messages were "competent for contradiction." Id. at 33. "[I]t should have been left to the jury to have weighed" those messages "and given [them] such consideration as they might have seen fit." Id.

A court may exclude relevant evidence under Rule 403 only if its probative value is substantially outweighed by an articulated danger, including the risk of unfair prejudice. "Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case." State v. Colbath, 171 N.H. 626, 636

(2019) (brackets omitted). "Unfair prejudice is not mere detriment to [the opposing party] from the tendency of the evidence to prove [the offering party's theory of the case], in which sense all evidence . . . is meant to be prejudicial." Id. (ellipsis omitted). "Rather, the prejudice required to predicate reversible error is an undue tendency to induce a decision . . . on some improper basis, commonly one that is emotionally charged." Id. Courts consider three factors: "(1) whether the evidence would have a great emotional impact upon a jury; (2) its potential for appealing to a juror's sense of resentment or outrage; and (3) the extent to which the issue upon which it is offered is established by other evidence, stipulation, or inference." Id.

This Court "ha[s] recognized that evidence that provides context to a witness's statements or actions may have significant probative value." State v. Towle, 167 N.H. 315, 323 (2015). For the reasons stated above, the sexual text messages were highly probative to impeach A.R.'s claim that she was reluctant to meet Roy.

The messages were not cumulative. Although the other text messages showed that A.R. was interested in meeting Roy, they failed to show the degree of her interest. Unlike the other messages, the sexual messages showed that A.R. did not want to meet with Roy so that he could apologize or so that they could discuss their relationship, as she claimed at

trial. Rather, they showed that she wanted to meet with him because she wanted to have sex with him.

Nor were the messages particularly embarrassing. As the court noted, it was undisputed that Roy and A.R. had a sexual relationship, and that they had consensual sex on the first night of his visit. See State v. Fiske, 170 N.H. 279, 286–87 (2017) (affirming admission of defendant's email stating that he had "perversion addictions" because, in the context of the sexual-assault trial, the statement "was relatively tame[and] thus, the danger of undue prejudice was minute."); State v. Castine, 141 N.H. 300, 306 (1996) (affirming admission of sexually graphic images because "the incremental prejudice . . . was minimal."). Trial in this case took place in 2020, not 1950. The notion that individuals in a sexual relationship would exchange sexually explicit messages is hardly shocking or scandalous. See State v. Hood, 131 N.H. 606, 608 (1989) (trial court properly admitted sexually provocative photographs of defendant and his wife nude, as "the photographs do not possess any significantly inflammatory character," and "there is no plausibility in the defendant's suggestion that the deliberative capacity of a juror sitting on a sexual assault trial in 1987 was likely to be much affected by seeing merely indecorous depictions of human nakedness."). And to the extent that the messages

were "embarrassing," they were embarrassing to both A.R. and Roy, as each sent sexually explicit messages.

Roy's inability to question A.R. about the sexual text messages prejudiced his case. The jury's resolution of the charges turned on A.R.'s credibility. Its verdicts demonstrate that, after considering the text messages in part, it rejected A.R.'s credibility in part, acquitting Roy of AFSA, burglary and second degree assault. Had the jury been permitted to consider the text messages in whole, it may have rejected A.R.'s credibility in whole, acquitting him of the remaining domestic violence charges as well.

CONCLUSION

WHEREFORE, Roger Roy respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

Two of the appealed decisions are in writing and are set forth in a separate appendix containing no other documents. The remaining decisions were not in writing.

This brief complies with the applicable word limitation and contains 9,230 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

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