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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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(State Waives Oral Argument)

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1. A defendant who "threatens to use a deadly weapon against [an intimate partner] for the purpose to terrorize that person" commits felony domestic violence if he "uses or threatens to use a deadly weapon." RSA 631:2-b, I(e) and RSA 631:2-b, II. At trial, the victim, A.R. testified that the defendant: had a history of carrying a gun, said he had a gun, touched his waist band as if he had a gun, and told her he would kill her. Did the trial court err when it concluded this evidence was sufficient to support a conviction for felony domestic violence?

2. A trial court may exclude relevant evidence if its probative value is substantially outweighed by the risk of unfair prejudice or the evidence is needlessly cumulative. The trial court excluded a portion of a text message chain containing mutual sexual banter between the defendant and A.R. after A.R. testified that she pursued a sexual relationship with the defendant, sent him explicit photos, and that the two had consensual sex. Was the court's ruling clearly unreasonable or untenable to the prejudice of the defendant's case?

STATEMENT OF CASE

In July 2019, the State filed four complaints alleging that the defendant committed four counts of misdemeanor domestic-violence ("DV") simple assault against A.R., an intimate partner, when he "used his hand to slap A.R.'s face," "used his hand to pull A.R.'s hair," "spit on A.R.," and "used his fist to punch A.R.'s body multiple times" in violation of RSA 631:2-b, I(a). A[1] 340-43. In September 2019, the State obtained five indictments charging the defendant with five felonies: two counts of aggravated felonious sexual assault ("AFSA"), RSA 632-A:2, I(a); one count of robbery, RSA 636:1; one count of second-degree assault (strangulation), RSA 631:2, I(f); and one count of DV criminal threatening with a deadly weapon, RSA 631:2-b, I(e). *See* A 335-39.

During a four-day jury trial held on February 5-10, 2020, the court (*Nicolosi,* J.) dismissed one of the AFSA indictments. T3 605. Relevant to this appeal, the court denied defendant's request to dismiss the DV criminal threatening charge. T 634-35, AD 4**.** The court also denied the defendant's request to question A.R. about sexually explicit text messages. T 634-35. The jury received a redacted version of the text messages to consider for impeachment purposes. T 640-41, 691, A 373-91.

The jury convicted the defendant of felony DV criminal threatening and the four DV related simple assault charges. A 420-21. The jury found

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[1] Citations to the record are as follows:
"DB___" refers to the defendant's appellate brief and page number;
"A __" refers to the defendant's appendix other documents and page number;
"AD __" refers to the defendant's appendix appealed documents and page number;
"T __" refers to the consecutively paginated transcript of the jury trial held February 5-10, 2020.

the defendant not guilty of the remaining AFSA, robbery, and second-degree assault charges. A 418-19.

The trial court denied the defendant's motion for a finding of judgment notwithstanding the verdict ("JNOV") for all five convictions. A 422-425.

The court sentenced the defendant to a three to seven year stand committed sentence on the felony DV criminal threatening conviction; two twelve-month, concurrent, stand-committed sentences on two of the DV simple assault convictions; and two, twelve-month suspended sentences on the remaining DV simple assault convictions. A 430-40.

STATEMENT OF FACTS

A. A.R.'s testimony at trial about the defendant's actions

A.R. testified at trial that she and the defendant started dating in late 2018 or early 2019. T 173-74. The relationship ended after a few months. T 174, 292, 426. Approximately two months later, on July 13, 2019, the defendant called A.R. and said he "wanted to apologize for the breakup and what he did to me then." T 175, 293. The two communicated by text and telephone call decided to meet in person. T 175, 294-95, 300-01.

At approximately noon on July 14, 2019, A.R. drove to the T& N Gas Station in Manchester to pick up the defendant and the defendant's friend. T 321-23, *see also* T 176, T 321-23. The three returned to the apartment that A.R. shared with her friend, Tiffany Albert, and Albert's two children. T 116-17, 143-48, 171-72, 278. A.R., the defendant, and the defendant's friend watched TV in A.R.'s bedroom, listened to music, and drank alcohol. T 177-78, 304. Later that night, A.R and the defendant drove the friend home. T 179.

A.R. testified that she and the defendant returned to the apartment and had consensual sex. T 179, 194, 304-06, 427. The defendant did not apologize and the two did not discuss their previous relationship. T 179-80. A.R. did not plan to resume a romantic relationship with the defendant. T 179-80, 427.

The next morning, on July 15, 2019, A.R. received a phone call from a friend. T 180-82. The defendant "flew to anger" and asked A.R. a lot of questions about the call: "who it was, why, what, and [A.R.] was, like, it's not really any of your business." T 180-82. A.R. and the defendant "hung

out" for a while, drove to get food, ate in the car, and returned to the apartment. T 183. A.R. said hello to Albert and then she and the defendant went back to her bedroom. T 183.

In the bedroom, the defendant—still upset about the earlier phone call—starting hitting A.R. in the face and arms with his hand and fist. T 183-84. He spit on her, pulled her hair, and tried to strangle her. T. 184-85. A.R. tried to push him off her but was unable to do so because he was much bigger. T 185. She passed out. T 184-86. When she woke up, she asked why he was doing this to her. T 184. The defendant "had like a look in his eyes" and did not give her an answer. T 184, 188. The defendant continued to swear, punch, hit, choke, and slam A.R. on the ground "all night." T 187-88.

At approximately 3 a.m. on Tuesday morning, July 16, 2019, the defendant tried to kiss A.R. and initiate sex. T 195, 366. A.R. told him to get off of her and pushed him away because she did not want to have sex with him again. T 195, 364, 366. Her fingernail broke during the struggle. T 365-66. A.R. did not try to leave the room or scream for help because "[h]e said if I screamed, if I yelled, if I tried to get out, he would kill me. And then he said he would kill [Albert] and her children." T 356. The defendant pulled her off the bed, pulled down her shorts, removed his jeans, put a pillow over A.R's face, and forced his penis into her. T 195-97, 367-68.

Later Tuesday morning, the defendant drove A.R. to an appointment at the methadone clinic. T 213, 340. He would not let A.R. drive and insisted on joining her in the clinic even though the person at the window told him that "he couldn't be in there with me." T 213, 340-43. A.R. did not ask the clinic staff to call the police because the defendant told her "he

would kill me if I said anything." T 345. The defendant drove her back to the apartment. T 348. She did not jump out of the car during that drive because "he said he would kill me and my family." T 349. A.R. was concerned the defendant would also "try to kill my best friend that's there with her two children," and she "wasn't going to put anybody else's life in jeopardy." T 349. When they returned to the apartment, A.R., the defendant, Albert, and Albert's kids went to Dunkin' Donuts. T 214. The defendant made A.R. stay in the car and they went through a drive-through. T 352.

A.R. testified that at some point on Tuesday, July 16, 2019, her mother texted a couple of times asking for A.R.'s EBT card. T 189-90. The defendant had A.R's phone and would not let her answer the texts. T 189-90. A.R.'s mom came to the apartment. T 189-90. The defendant told A.R. not to open the door but A.R. quickly grabbed the door handle, opened the door, tossed her EBT card out, and closed the door. T 190. The defendant refused to return A.R.'s phone to her. T 192.

A.R. testified that the defendant allowed her to leave the bedroom one time to use the bathroom after making her hold it for hours. T 353. A.R. did not ask Albert for help because the defendant followed her to the bathroom, pushed her inside, and stayed there waiting for her. T 353-54.

At some point the morning of July 16, 2019 the defendant slammed A.R. on the ground and she replied "no, babe, stop." T 188. A couple of minutes later, Albert knocked on the door. T 188. The defendant told A.R. that if she opened the door "that he would kill" her, so she stayed quiet. T 188. A.R. knew that the defendant "used to always carry a gun on him." T 199. Although she did not see the gun that day, she testified that "he kept

acting like he had one, but I didn't see it." T 199. She thought the defendant had the gun because he kept grabbing his waistband every time she tried to get up. T 199. He also "said he had [a gun]." T 199 A.R. never saw a gun. T 199.

Later in the day on July 16, 2019, A.R. wanted to leave the bedroom room and stood up to do so. T 193. The defendant shoved her down. T 193. A.R. got back up and tried to go to the door quickly to leave, but the defendant punched her. T 192-93. After this cycle happened a couple of times, A.R. stopped trying to leave. T 193. The two ended up on the floor. T 193. The defendant hit A.R, got on top of her, grabbed her by the throat, squeezed her neck, and strangled her. T 19, 411-123. A.R. passed out for "a while." T 193.

The defendant was gone when A.R. woke up. T 193. A.R. felt really dizzy and it was hard to breathe or swallow. T 200. A.R.'s phone, her son's phone,[2] her keys, and her purse containing cash and cards were missing. T 199-203, 413. An older black phone that may have been the defendant's was on the bedroom floor. T 207. A.R. crawled to Albert's bedroom, opened the door, and spoke to Albert T 200-01, 216.

Albert gave A.R. her phone and the spare key to her car. T 201-02. A.R thought the defendant was going to drain her bank accounts so A.R. went to the bank to cancel her bankcards. T 202, 217. Then A.R. went to the police station. T 218-19. The receptionist called Officer Feliciano to

[2] It is not clear from the record how old A.R.'s son was or where he was during July 14-16, 2019. It appears to be undisputed that he was not at the apartment and did not interact with A.R. during the time period in question.

speak with A.R. T 219-21. Eventually, an ambulance brought A.R. to the hospital. T 219-21.

A.R. spoke to Officer Feliciano, Detective O'Meara, several nurses and a doctor over the next few hours. T 223, 337. A.R. told Officer Feliciano that the defendant had physically and sexually assaulted her, and threatened her with a gun, between 5 p.m. on July 15 through approximately 10 a.m. on July 16. T 336-38, *see also* T 84-85 (Officer Feliciano's similar testimony), T 522-24 (Officer O'Meara's testimony). A.R. refused a vaginal exam because after "what happened, [she] just didn't want to be touched down there." T 227. A.R. gave officers permission to search her apartment. T 229, 288. A friend drove A.R. home because she did not feel comfortable driving in her condition. T2 274. A.R. was in pain and "extremely depressed" for about two weeks. T 275. A.R.'s throat did not feel normal for a month and a half. T2 275.

On September 12, 2019, A.R. went to the Manchester Police Department and gave a statement to Detective Flanagan. T2 288-90.

At trial, the jury saw photos showing A.R.'s injuries including a bruise and red marks on her chest, a bruised neck, four bruised and punctured dermal piercings on her chest,[3] and a broken and bleeding nail. T 230-32.

[3] A.R. explained that a dermal piercing is a ball on the outside of the skin that is connected to a long bar under the skin. T 235-37. She testified that after the defendant assaulted her, all four piercings came out of her skin. T 237-38.

B. A.R.'s Testimony on Cross Examination about Text Messages

On cross-examination, A.R. affirmed that she felt "sketchy about meeting" the defendant and "had a little trepidation about meeting" up. T 299-300. In response, defense counsel questioned A.R. about a series of text messages between A.R. and the defendant that were from the defendant's phone and dated July 13 and 14. T 308, A 373-391 (Exhibit C as admitted). In the text chain, A.R. sent the defendant a sexually suggestive photograph and video, said, "I love you, too, Baby," and communicated details about where and when to meet up. T 308-34; A 373. A.R. testified that the messages were "old" and from July 13 and 14 of 2018 when the two "first got together." T 309-11, 313, 317, 318, 324, 327, 333. A.R. affirmed that the messages discussed meeting up at the same T&N gas station where she picked him up on July 14, 2019 explaining that the T&N was "where me meet . . . every time." T 333.

C. Tiffany Albert's Testimony

Tiffany Albert, A.R.'s housemate, aligned in significant ways with A.R.'s testimony. Albert testified that sometime "during the day"—and not at night—A.R., the defendant, and friend arrived at Albert's apartment on July 14, 2019. T 149-50. She confirmed that she went with A.R. and the defendant to get food on the morning of July 15. T 151-52. Albert also confirmed that A.R. received a "phone call or a text message or something" that "upset" the defendant and that Albert heard "some fighting." T 168.

Albert testified that on the morning of July 16, A.R.'s mother came by while the defendant was in A.R's room; A.R. did not come out of the

bedroom but instead spoke through the door. T 132-33, 137. According to Albert, A.R.'s behavior was "absolutely" unusual. T 133.

Albert testified that sometime after A.R.'s mother left, Albert heard A.R. saying "babe, no" and a boom. T 138, 163. She walked to the bedroom door, knocked, and asked: "are you guys fucking around in there." T 138. After hearing no reply, she decided to "mind my business and go in my room," where she fell asleep. T 138-39.

At approximately 3 p.m**.**, A.R. entered Albert's bedroom "holding her throat," and "crying frantically." T 125-27. A.R's face was red, her eyes were bloodshot, A.R. was coughing and crying, and she was "very distraught." T 127-29. A.R. asked to use Albert's phone because the defendant had taken A.R.'s phone. T 141. A.R. told Albert that her keys, her phone, her money, and other belongings had disappeared. T 141. A.R. drove away. T 143. Later, a friend informed Albert that A.R. was at the hospital. T 160-61.

D. Police Officers' Testimony

Detective Feliciano, a patrol officer with the Manchester Police Department testified that on July 16, 2019, he spoke with A.R. at the police station and at the emergency room. T 69-71. A.R. was "emotional," "distraught" and had a hoarse voice. T1 78, 81, 82. A.R. told Detective Feliciano that the defendant assaulted her, punched and slapped her, and choked and strangled her to the point of unconsciousness. T1 84-85. A.R. also testified that A.R. informed him that the defendant had threatened her with a gun. T 85.

Detective O'Meara also testified that on July 16, 2019, he was working in the domestic violence unit when he was contacted by a patrol officer and asked to report to the hospital for a possible sexual assault. T 436-38. He met Detective Feliciano in the emergency room and went to A.R.'s room. T 439. Detective O'Meara interviewed A.R. and photographed her injuries. T 439-40. A.R. told Detective O'Meara the defendant sexually assaulted her. T 522-24. She also said she had gone to the methadone clinic on the morning of July 16. T 525-26.

After A.R. gave Detective O'Meara permission to go to the apartment to look for evidence, he went to the apartment, took pictures, bagged the bedding, and took a phone off the floor of the room. T 441-46. Albert informed Detective O'Meara the phone belonged to the defendant. T 492.

Officer Jeffrey Fierimonte of the Manchester Police Department testified that prior to his patrol shift on July 16, 2019, he learned that Mr. Roger Roy was wanted for several domestic charges. T 538. Officer Fierimonte saw the defendant walking and arrested him. T 538-39. The Officer conducted a pat-down search and did not find any weapons or a firearm on the defendant. T 544. The police transported the defendant to the station. T 540.

Detective O'Meara testified that at approximately 8:40PM on July 16, 2019, he learned about the defendant's arrest and went to the booking area to meet with the defendant. T 447. On the defendant's person, Detective O'Meara found A.R.'s ATM cards as well as an iPhone that had A.R.'s name on the lock screen, a Motorola phone with a cracked screen that belonged to the defendant, and 189 dollars in cash. T 449, 469, 472,

492. The defendant agreed to an interview and Detective O'Meara read him the *Miranda* form. T 454-55.

The defendant reported that he and A.R. dated for a couple of months and that "it was a rough relationship." T 457. The defendant affirmed he had been with A.R. from Sunday to earlier in the day [Tuesday, July 16] and that A.R. had been "fine" when he left. T 458. He explained that he had A.R.'s phone on him because he used it to go on Facebook after his died, and he forgot that he had it. T 459. He claimed A.R. let him use her EBT card earlier in the day but did not know why he had her debit cards. T 460. The defendant stated that he and A.R. had sex the previous night, that he had "slapped her ass," and that he had no information on why A.R. was in the hospital with bruises. T 475-77, 524. The defendant affirmed A.R.'s mom came over but denied preventing A.R. from talking with her mom. T 478.

E. Procedural Rulings During Trial

After the State rested, the defendant moved to dismiss one of the charges, the robbery charge, and the charge for criminal threatening with a deadly weapon. T 604-08. The court dismissed the AFSA charge, T 605, but ruled there was sufficient evidence to send the robbery and DV criminal threatening charges to the jury. T 634-35.

The trial court also confirmed that the defendant could introduce most of Exhibit C—the text chain between A.R. and the defendant that included the sexually suggestive photographs of A.R. and dialogue about meeting up at the T&N gas station—for impeachment purposes but not as substantive evidence. T 640. The court ordered counsel to redact mutual,

explicit sexual banter within the text chain on the basis that it "doesn't add to the case," was "cumulative of her interest to get back in touch with [the defendant], and was "embarrassing" such that the "probative value is outweighed by the prejudice." T 268-69, 641, *compare* T 352-72 (Exhibit C as proffered), *with* A 373-91 (Exhibit C redacted at A 384-87 using post-it notes to redact some messages and omitting A 366-67).

The jury received a version of Exhibit C that redacted the mutual sexual banter but included two sexually suggestive photos from A.R. to the defendant. *Compare* A 352-372 (Exhibit C as proffered), *with* A 373-391 (Exhibit C as redacted and admitted). During jury instructions, the trial court told the jury that A.R.'s statements made in the redacted text messages in Exhibit C "may only be used in deciding whether to believe her trial testimony." T 691.

The jury found the defendant guilty of felony DV criminal threatening and the four simple assault misdemeanor charges. T 732, A 420-21. The defendant moved for JNOV on all five charges. A422-25. The court denied the motion, A 422. The defendant did not file a motion for reconsideration challenging the evidentiary ruling regarding the text messages or the denial of JNOV.[4] See *N.H. R. Crim. P.* 43(a). This appeal followed.

[4] The defendant did file a motion for reconsideration during trial on a separate issue not relevant to this appeal. T 633.

SUMMARY OF THE ARGUMENT

1. This is a garden-variety sufficiency case. A.R. testified that the defendant confined her in her bedroom, told her he had a gun, told her he would kill her if she tried to leave, and made physical movements—touching his waist band when she stood up to leave the room—that suggested that he was carrying a gun on his body. The plain language of RSA 631:2-b, I(e) and RSA 631:2-b, II, states a person is guilty of felony domestic violence if he "[t]hreatens to use a deadly weapon against [an intimate partner] for the purpose to terrorize that person." Accordingly, the trial court did not err when it concluded the State had introduced sufficient evidence to allow the felony domestic violence charge to go to the jury and then subsequently denied the defendant's motion for JNOV. Many of the defendant's arguments to the contrary are either unpreserved or unsupported by any recognized legal authority. This Court should affirm the felony domestic violence conviction.

2. The trial court did not unsustainably exercise its discretion when it redacted sexually-explicit text messages between A.R. and the defendant that showed a mutual interest in having sex. The court allowed defense counsel to question A.R. about explicit photos and other messages she sent the defendant. A.R. affirmed that she had pursued a sexual relationship with the defendant and that the two had consensual sex on July 14, 2019 before the defendant committed criminal acts against her on July 15 and 16. The trial court did not commit reversible error when it excluded the sexually-explicit messages on the basis that these messages were cumulative, embarrassing, and did not show who initiated the sexual

relationship. Moreover, even if the trial court's evidentiary ruling was erroneous, any error was harmless. This Court should affirm the defendant's convictions.

ARGUMENT

I. THE STATE MET ITS BURDEN BECAUSE AMPLE EVIDENCE DEMONSTRATED THAT THE DEFENDANT THREATENED TO USE A DEADLY WEAPON AGAINST A.R.

This is a garden-variety sufficiency case and the trial court did not err when it concluded the State had adduced sufficient evidence to support a conviction for felony domestic violence. This Court should affirm.

A. The Trial Court's Procedural Rulings and Reasoning

The defendant first asked the trial court to dismiss the felony DV criminal threatening charge after the State rested during trial. T 608. The defendant argued that because A.R. did not "see the gun," the State had failed to establish a necessary element of a criminal threatening with a deadly weapon charge. T 609. The court read the statute aloud to counsel and noted that the statute does not require showing the gun and that "just words" could meet the statutory elements. T 610. Defense counsel stated he "agree[d] with [the court] on the statute," but argued that A.R.'s testimony did not meet the standard because the defendant "didn't say I have a gun, I'm going to get a gun, anything like that." T 610-11. Defense counsel asserted that in order for the State to meet its burden, "they need some evidence of a gun or some evidence that he indicated he had a gun. And there is none." T 611. Counsel also contended that because A.R. saw the defendant unclothed when the two had consensual sex, she "knew there was no firearm" and could not "have been concerned about a firearm." T 615-16.

After reviewing the record, the court denied the motion and explained that:

> [T]he alleged victim testified . . . that at the time when she was trying to get up, the Defendant would move his hand toward his waistband. That she had knowledge of him carrying a gun regularly. And that when asked about whether there was any discussion about the gun, she testified that he told her he had one. And so that is sufficient evidence for the jury to consider in connection with the robbery charge.

T 634, *see also* T 199 (Q: "Did he ever say anything about having a gun with him while he was there? A.R. answer: "He said he had one, but I never seen it."). The court reiterated that because the defendant "told her he had a gun," there was sufficient evidence for the charge to go to the jury. T 635.

After trial, the defendant moved for JNOV, arguing: "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 motion did not reference or acknowledge A.R.'s testimony that the defendant told her he had a gun. A 422-25. The trial court denied the motion and explained: "the trial recording reflected that the defendant told the victim he had a gun during the incident, which possession was consistent with his movements and history per the victim. 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." A 422.

B. The State Adduced Sufficient Evidence to Meet Its Burden; Therefore, the Trial Court Did Not Err When It Denied the Defendant's Motions

A defendant is entitled to a have a charge dismissed by the court, or is entitled to JNOV, when the defendant establishes "that the evidence viewed in its entirety, giving the State the benefit of all reasonable inferences, was insufficient to prove beyond a reasonable doubt that he was guilty of the crime charged." *State v. Littlefield*, 152 N.H. 331, 349 (2005) (discussing a motion to dismiss); *State v. Spinale*, 156 N.H. 456, 463 (2007) (discussing JNOV). However, at these phases of a trial, "the trial court cannot weight the evidence or inquire into the credibility of the witnesses and if the evidence adduced at trial is conflicting, or if several reasonable inferences may be drawn, the motion should be denied." *Spinale*, 156 N.H. at 463 (2007) (quotation and brackets omitted).

On appeal, this Court "objectively review[s] the record to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 464. (quotation omitted). "In reviewing the evidence, [this Court] examine[s] each evidentiary item in the context of all the evidence, not in isolation." *State v. Crie*, 154 N.H. 403, 406 (2006), *as modified on denial of reconsideration* (Jan. 11, 2007). When, as is the case here, a defendant's motion to dismiss or motion for JNOV relates to the sufficiency of the evidence, the motions present questions of law which this Court reviews *de novo*. *See Halifax-Am. Energy Co., LLC v. Provider Power, LLC*, 170 N.H. 569, 576 (2018) (discussing a motion for JNOV); *Littlefield*, 152 N.H. at 349 (discussing a motion to dismiss alleging insufficient evidence).

This court also reviews a trial court's interpretation of a statute *de novo*. *State v. Proctor*, 171 N.H. 800, 805 (2019). This Court is the final arbiter of the intent of the Legislature as expressed in the words of a statute considered as a whole and construes provisions of the Criminal Code "according to the fair import of their terms and to promote justice." *Id.* This Court first looks to the language of the statute itself, and, if possible, construes that statutory language according to its plain and ordinary meaning. *Id.* This Court interprets legislative intent "from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Id.* This Court "must give effect to all words in a statute, and presume[s] that the legislature did not enact superfluous or redundant words." *Id.* This Court "interpret[s] a statute in the context of the overall statutory scheme and not in isolation." *Id.* This enables the Court "to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." *Hogan v. Pat's Peak Skiing, LLC*, 168 N.H. 71, 73 (2015). "In the event that the statutory language is ambiguous, "[this Court] will resolve the ambiguity by determining the legislature's intent in light of legislative history." *Id*

RSA 265-A:2 states that:

> 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.

RSA 265-A:2, I(e), II, *see also* RSA 625:11, V (which defines "deadly weapon" to include "any firearm . . . 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.").

Based on this statutory language, the trial court properly instructed the jury that the State had the burden to prove three elements in order to convict the defendant: (1) that the defendant threatened to use a deadly weapon against A.R.; (2) that the Defendant made the threat with the purpose to terrorize A.R.; and, (3) the Defendant and A.R. were intimate partners. T 700-701. The court also informed the jury: "[a] deadly weapon includes a firearm." T 701.[5] At no point did the defendant object to these jury instructions.

The defendant argues that the evidence "was simply too equivocal to constitute proof, beyond a reasonable doubt, that [the defendant] threatened to use a deadly weapon." DB 39. However, A.R.'s testimony provided a rational trier of fact with ample evidence from which to find the essential elements of felony domestic violence criminal threatening beyond a reasonable doubt. A.R. testified that the defendant himself told her during their interaction that he had a gun. T 199. She also testified that the

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[5] The court discussed the jury instruction on the definition of firearm with counsel after the State asked the court to include the definition of deadly weapon in the instructions. T 629-30. The court noted that "deadly weapon is a long definition" and asked, "[i]f I stop at firearm, everybody's good with that?" T 630. The defendant assented, stating: "I take no issue with that." T 630.

defendant told her "he would kill [her] if [she] tried to get out of the room, if [she] screamed, if [she] yelled." T 198. A.R. explained that she believed that the defendant would kill her with a gun because he "used to always carry a gun on him" and "kept acting like he had one" that day by grabbing his waistband every time she tried to get up "as if something was there." T 199. The Court specifically noted A.R's testimony when it denied the motion to dismiss, *see* T 634-35, and the motion for JNOV, *see* A 422. Therefore, based on the evidence, and drawing all reasonable inferences in the light most favorable to the State, the trial court did not err when it denied the defendant's motions. *See Spinale*, 156 N.H. 463-64. This Court should affirm.

C. The Defendant Failed to Preserve the Argument that Felony DV Criminal Threatening Requires a Defendant to Actually Possess a Deadly Weapon.

The defendant argues for the first time on appeal that RSA 631:2-b is ambiguous and that the statute's legislative history and the rule of lenity support construing the statute to require that a defendant actually have a gun on his person so as to have an apparent, immediate capacity to carry out his threat. DB 31-38. This argument is unpreserved, directly contradicts the defendant's assertions to the trial court, and finds no support in the statute's unambiguous language.

The defendant did not present the trial court with the argument that a defendant had to have a gun on his person in order to be convicted for "threaten[ing] to use a deadly weapon" under RSA 631:2-b, I(e) and RSA

631:2-b, II; therefore, this Court need not consider this argument in the first instance. *See Proctor*, 171 N.H. at 804.

The doctrine of invited error, which "precludes appellate review of error into which a party has led the trial court, intentionally or unintentionally," also forecloses appellate review of the newly raised statutory arguments. *State v. Richard*, 160 N.H. 780, 785 (2010). During a colloquy with the court at trial, defense counsel acknowledged that a person did not actually have to possess or visibly reveal a gun when making a threat in order to violate RSA 631:2-b. T 609-11. After the defendant moved to dismiss, the trial court stated that it did not understand RSA 631:2-b to require showing or brandishing a gun and asked the defendant whether he agreed "just words" could violate the statute. T 610. Defense counsel "agree[d]" that the statute did not require actual brandishing and asserted that the State needs "some evidence of a gun *or some evidence that [the defendant] indicated he had a gun. And there is none."* T 610-11 (emphasis added). After representing to the trial court that the State could meet its evidentiary burden under RSA 631:2-b, I(e) and RSA 631:2-b, II if it had "some evidence that [the defendant] indicated that he had a gun," T 610-11, this Court's preservation requirement and the doctrine of invited error prevent the defendant from arguing on appeal that the defendant's statement that he had a gun, together with the other evidence adduced at trial, is insufficient to support conviction. *See Richard*, 160 N.H. at 785 (2010) ("The invited error doctrine is designed to deter a party from inducing an erroneous ruling and later seeking to profit from the legal consequences by having the verdict vacated." (quotation omitted)).

The defendant, in his motion for JNOV, again failed to present the trial court with the argument that RSA 631:2-b, I(e) and RSA 631:2-b, II require a defendant to actually have a deadly weapon in order to commit felony DV criminal threatening. A 422-25. Indeed, the defendant's appellate brief recognizes that, at trial, defense counsel "acknowledged that a threat can be implicit." DB 39. Accordingly, the defendant failed to preserve the argument that the statue requires a person to actually brandish or possess a gun on his person at the time he "threatens to use a deadly weapon" and this Court need not consider the issue in the first instance. *See Proctor*, 171 N.H. at 804 (observing that generally, the failure to afford the trial court an opportunity to correct any errors in the first instance "bars a party from raising such claims on appeal" (quotation omitted)).

D. RSA 631:2-b, I(e) and RSA 631:2-b, II are Unambiguous and Do Not Require a Defendant to Actually Possess a Gun on His Person When Making a Threat Against an Intimate Partner In Order To Commit Felony DV Criminal Threatening.

If this Court decides to waive its preservation requirement and consider the merits of the defendant's newly-raised statutory interpretation arguments in the first instance, the Court can affirm based on the plain meanings of the words used in the statute and the standard canons of statutory construction. The plain language of RSA 631:2-b, I(e) and RSA 631:2-b, II is unambiguous and does not require a defendant to actually possess or use a deadly weapon against a person in order to commit a class B felony: a person who "*threatens* to use a deadly weapon" has committed a felony offense. RSA 631:2-b, II (emphasis added).

RSA 265-A:2 does not define the terms "threaten" or "use." When a statute does not define a word, this Court looks to the word's common usage, using a dictionary for guidance. *See Appeal of Silva*, 172 N.H. 183, 188 (2019). *Webster's Third New International Dictionary* defines "threaten" as "to utter threats against: promise punishment, reprisal, or other distress to" and "to give signs of the approach of: indicate as impending." *Webster's Third New International Dictionary*, 2382 (unabridged ed. 2002); *see also Black's Law Dictionary*, 1708 (10th ed. 2014) (defining "threat" as "a communicated intent to inflict harm or loss on another . . . esp. one that might diminish a person's freedom to act voluntarily or with lawful consent; a declaration, express or implied, of an intent to inflict loss or pain on another."). *Webster's Third New International Dictionary* defines "use" as "the act or practice of using something." *Webster's Third New International Dictionary*, 2523 (unabridged ed. 2002); *see also Black's Law Dictionary*, 1776 (10th ed. 2014) (defining "use" as "[t]o employ for the accomplishment of a purpose"). These definitions establish "threaten" as broad enough to include spoken words or physical movements that convey a threat, in this case that the defendant had a gun and would use it if A.R. did not obey him and submit to his control.

The defendant argues that the statutory language "threatens to use a deadly weapon" is ambiguous because one interpretation requires the weapon to be "present and perceived by the recipient of the threat at the

time the threat is made"[6] but another interpretation of the phrase does not require the weapon to be physical present or perceived. DB 32. This assertion fails for multiple reasons.

First, the defendant's interpretation would render the words "threatens to" in RSA 631:2-b, I(e) and RSA 631:2-b, II meaningless: the words "threatens to" add nothing to the statute if the statute only criminalizes actual "use" of a deadly weapon. *See Garand v. Town of Exeter*, 159 N.H. 136, 141 (2009), (providing that "whenever possible, every word of a statute should be given effect" (quotation omitted)).

Second, if the Legislature had only intended to criminalize threatened use of a deadly weapon in instances where the victim believed the defendant had the present ability to carry out the threat, the legislature could have indicated as much as it did elsewhere in the same statute. *See* RSA 631:2-b, I(h) ("A person is guilty of domestic violence if the person . .

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[6] The defendant cites a single case, *State v. Franklin*, 130 Ariz. 291, 293 (1981) for the proposition that the phrase "threatens to use a deadly weapon" requires the weapon to be "present and perceived threat at the time the threat is made." DB 32. In *Franklin*, a man was convicted of armed robbery after he entered a liquor store, approached a clerk, said "this is a holdup," and made a motion in his coat pocket as if he had a gun. *Id.* at 292. The Arizona Supreme Court affirmed that under Arizona's then existing armed robbery statute, a defendant had to be actually armed with a deadly weapon because "where no weapon is actually present and the robber merely simulates the presence of a weapon by gesturing with a hand in the pocket, the rationale behind the greater punishment for armed robbery no longer exists." *Id.* at 292-93. The court reasoned that "the victim's belief that a weapon is present, even if justified by an objective standard, is insufficient to establish guilt." *Id.* at 292. Two years later, the Arizona legislature amended the statute to specify that "use[] or threaten[ed] use [of a] . . . simulated deadly weapon" also constituted a felony. A.R.S. §13-1904 (as amended in 1983). And significantly, as the Arizona Supreme Court pointed out twice—in *Franklin*, the defendant never said he had a gun or made "any verbal threats concerning the use of a gun." *Id.* 292, 293. This single case, which is not binding on this court, does not enough to prove that the phrase "threatens to use a deadly weapon" is ambiguous. RSA 631:2-b, I(e) and RSA 631:2-b, II

. [t]hreatens to use a deadly weapon to cause another to submit to sexual conduct *and the victim believes the actor has the present ability to carry out the threat.*" (emphasis added)). Similarly, if the legislature intended to make domestic violence a felony only when the defendant was "actually armed with a deadly weapon" or "[r]easonably appeared to the victim to be armed with a deadly weapon," the legislature could have made that intention clear by specifying that intent as it did in the robbery statute. *See* RSA 636:1, III. However, the plain language of RSA 631:2-b, I(e) and RSA 631:2-b, II contain no such requirement.

The statute's plain language supports the trial court's conclusion—and trial counsel's concession—that a defendant commits felony DV criminal threatening if he implicitly or verbally threatens to use a deadly weapon. Nothing in the statute requires the victim to actually *see* the gun. Because the statute is unambiguous, this Court need not consult the legislative history, and the rule of lenity does not apply. *See Forster v. Town of Henniker*, 167 N.H. 745, 650 (2015) ("Unless [the Court] find[s] statutory language to be ambiguous, [it] will not examine legislative history."); *State v. Paige*, 170 N.H. 261, 266 (2017) ("[T]he rule of lenity comes into play only when a statute is ambiguous."). Accordingly, based on the applicable standards of appellate review, the arguments raised by the defendant, and the plain language of RSA 631:2-b, the trial court properly denied the motion to dismiss and JNOV. A 422, AD 4. This Court should affirm.

E. The Defendant Failed to Preserve His "Legislative Estoppel" Argument and the Doctrine Finds No Support in Legal Authority

On appeal, the defendant raises an unpreserved and imaginative "legislative estoppel" argument that this Court should reject both as a matter of procedure and substantive law. DB 23-31.

The basis of defendant's argument is that he would not have been convicted of a felony under the non-DV version of criminal threatening because that statute requires a person to "use[] a deadly weapon"; therefore, he cannot be convicted of a felony under the DV version of criminal threatening. *See* RSA 631:4, II(a)(2); DB 23-25. In support of this argument, the defendant asserts that 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." DB 23-25. He also contends that even assuming the defendant had a gun, he could not have been convicted of felony criminal threatening under RSA 631:4, II(a)(2) because A.R. testified that she did not perceive the weapon. DB 25.

Next, relying on a doctrine of "legislative estoppel" that the defendant asserts is similar to judicial estoppel, the defendant argues that the State 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)" because of a statement a State representative made during the legislative process. DB 31. Specifically, the defendant asserts that the State has taken contradictory positions with regard to the proper interpretation of RSA 631:2-b because then Deputy Attorney

General Ann Rice—appearing on behalf of the Executive Branch—testified that the DV bill did not create new crimes or increase penalties for existing crimes. DB 25-28, *see also* A 28, 31, 39, 231, 236. Therefore, because he contends that his actions would not be a felony under the non-DV variant of criminal threatening, RSA 631:4, II(a)(2), he contends that he cannot be convicted of a felony under the DV variant of criminal threatening. DB 25-28.

The defendant never made a "legislative estoppel" argument to the trial court. Accordingly, this Court need not consider the defendant's "legislative estoppel" argument and should analyze the appeal under its well-established sufficiency and statutory interpretation standards, neither of which consider whether the State would have had sufficient evidence to convict the defendant of an uncharged crime. *See, e.g.*, *Petition of Carrier*, 165 N.H. 719, 720 (2013); *State v. Germain*, 165 N.H. 350, 359 (2013), *modified in part on other grounds by State v. King*, 168 N.H. 340, 345 (2015).[7]

Furthermore, as a matter of substantive law, the defendant cites no legal authority recognizing "legislative estoppel" as a legal doctrine at all, let alone a doctrine of sufficient persuasive authority to justify overriding this Court's long-standing principles of statutory interpretation. Indeed, a Westlaw search for "legislative estoppel" reveals that no court has ever

[7] The defendant argues that this Court should conclude that even if the defendant failed to preserve his statutory interpretation arguments, this Court should reverse because the trial court committed plain error. *See* DB 39-40 (raising plain error). However, the defendant provides no authority for the proposition that a trial court commits plain error if it fails to *sua sponte* create and apply a legal doctrine, here "legislatively estoppel," that no legal authority has ever recognized. Therefore, this Court should reject the defendant's assertion that the trial court committed plain error.

discussed, let alone adopted, the novel doctrine.[8] In addition, this Court—as opposed to individuals testifying before a legislative committee—is the final arbiter of legislative intent as expressed in the words of the statute. *See Proctor*, 171 N.H. at 805. As explained above, RSA 631:2-b, II is not ambiguous. The Legislature, in enacting RSA 631:2-b, "Domestic Violence," elected to make it a felony for someone to "use[] *or threaten[] to use* a deadly weapon" against an intimate partner while committing any one of the eleven proscribed acts. RSA 631:2-b, II (emphasis added). This Court would upend its regular cannons of statutory construction if it read the words "threaten[] to use" out of the statute merely because then Deputy Attorney General Ann Rice, when testifying before a committee, may have overlooked the fact that the DV statute may indeed increase penalties for a limited number of individuals charged with DV criminal threatening. Furthermore, a fiscal note from the Judicial Council stated that the bill did not "increase or decrease *most* of the penalties for offenses that are already crimes," A 19 (emphasis added), thereby implicitly informing the legislature that RSA 631:2-b may change a limited number of criminal

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[8] The Westlaw search revealed a 1910 Yale Law Journal article titled "judicial legislative estoppel." *See* R. Mason Lisle*, Judicial Legislative Estoppel*, 20 Yale L.J. 110 (1910). The article defines the doctrine as a "refusal of a court, by reason of its application of the doctrine of estoppel, to execute a constitutional grant." *Id.* However, that doctrine is completely different from the doctrine the defendant urges this Court to adopt. Indeed, under the doctrine of "judicial legislative estoppel" articulate in the Yale Law Journal, this Court would be doing "a thing abhorrent" if it "take[s] unto itself the authority to change a constitutional legislative grant, by estoppel." *Id.* This Court will be changing a constitutional legislative grant if it overlooks the legislature's choice to make use or *threatened use* of a deadly weapon a felony in the DV statute. *Compare* RSA 631:2-b, I(e), II ("Domestic violence is a class A misdemeanor unless the person uses or *threatens to use* a deadly weapon as defined by RSA 625:11, V, in the commission of the offense, in which case it is a class B felony.") *with* RSA 631:4, II (a)(2) ("Criminal threatening is a class B felony if the person [u]ses a deadly weapon as define in RSA 625:11, V . . . .").

penalties. This Court should apply its regular cannons of statutory construction and affirm. *See Proctor*, 171 N.H. at 805.

II. THE TRIAL COURT SUSTAINABLY EXERCISED ITS DISCRETION WHEN IT PRECLUDED THE DEFENDNT FROM QUESTIONING A.R. ABOUT SEXUALLY EXPLICIT TEXT MESSAGES.

The trial court did not err when it prevented the defendant from questioning A.R. about sexually-explicit text messages and redacted those messages from Exhibit C as provided to the jury. DB 41, 45. The trial court allowed the defendant to introduce the two sexually explicit photos A.R. sent the defendant. *See* 373-74. The court also allowed the defendant to cross-examine A.R. about the vast majority of the text messages on the basis that the messages were relevant on the issue of the defendant's credibility and reasoned that the messages "reflect a different emotional engagement [with the defendant] than what she testified to." T 265. The only messages the trial court did not the defendant to question A.R about, and did not allow to be introduced to the jury, were messages comprised of mutual, sexually-explicit "sexual banter." T 266-28, 269 (noting that "the only thing [the court is] excluding is the sexual banter"); *compare* T 352-72 (Exhibit C as proffered), *with* A 373-91 (Exhibit C redacted at A 384-87 using post-it notes to redact some messages and omitting A 366-67).

The court reasoned that the "sexual banter" should be redacted because it "doesn't add to the case," was "cumulative of [A.R.'s] interest to get back in touch with [the defendant], and was "embarrassing" such that the "probative value is outweighed by the prejudice." T 268-69, 641, *compare* T 352-72 (Exhibit C as proffered), *with* A 373-91 (Exhibit C redacted at A 384-87 using post-it notes to redact some messages and omitting A 366-67). The court also noted that the messages did not resolve

who initiated the contact between A.R. and the defendant because "we have no idea, based upon what the Defense has presented, whether or not there were messages before that that led to this contact." T 264. The court also observed that the messages were not necessary to prove that A.R. was interested in having a sexual relationship with the defendant because "there's no dispute in this case that she was interested in having sexual relations with him" and that A.R and the defendant had consensual sexual relations. T 265, 268.

On appeal, the defendant argues that the text messages were relevant and probative because they would undercut A.R.'s testimony that the defendant initiated contact with her and that she was apprehensive about seeing him. DB 45-46, 49; T2 299-300. He contends that the messages were not cumulative because the other text messages failed to show A.R.'s degree of interest in meeting the defendant, and were not particularly embarrassing because it was undisputed that the defendant and A.R. had a sexual relationship. DB 49-50. He further argues that his inability to question A.R. about the sexual text messages prejudiced his case because the text messages would have undercut A.R.'s credibility; therefore "[h]ad 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." DB 51. In sum, the defendant challenges the trial court's application of New Hampshire Rule of Evidence 403. DB 48-49.

Rule of Evidence 403 states, that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusing the issues,

misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *N.H. R. Ev.* 403.

The trial court has broad discretion to determine the admissibility of evidence, and this Court will not upset its ruling absent an unsustainable exercise of discretion. *State v. Towle*, 167 N.H. 315, 320 (2015). "The trial court is in the best position to gauge the potential prejudicial impact of particular testimony, and to determine what steps, if any, are necessary to obviate the potential prejudice." *Id.* at 324. Thus, this Court "afford[s] considerable deference to the trial court's determination in balancing prejudicial impact and probative worth." *Id.* "To prevail, the defendant must show that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case." *Id.*

The trial court acted well within its broad discretion when it concluded that the defendant could not ask A.R. about, and the jury did not need to see, a limited portion of the text messages that included sexually-explicit banter. *See* A 363-64, A 366-67. The court allowed the defendant to ask A.R. about the sexually explicit selfie and video image that appeared at the beginning of the text chain and A.R. confirmed that she sent the images to the defendant. T 308-11. The excluded, sexually-explicit messages provided cumulative evidence of A.R.'s interest in a sexual relationship and added no probative value to which year the messages were sent: 2018 as A.R. testified or 2019 as the defendant argued. Unlike in the 1844 case cited in the defendant's brief, the inference that the jury would draw from the excluded evidence—that A.R. was interested in a sexual relationship—did not contradict A.R's testimony and the court did not err by excluding it. DB 46-48 (*citing Town of Concord v. Concord Bank*, 16

N.H. 26, 32-33 (1844) (ordering a new trial after the court excluded a document that could have had a "legal tendency to contradict and render improbable" the witness's testimony).

Alternatively, even if the trial court committed any error in excluding the redacted portions of the text messages, any error was harmless beyond a reasonable doubt.

> The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

State v. Papillon, 173 N.H. 13, 28 (2020). "To establish that an error was harmless, the State must prove beyond a reasonable doubt that the error did not affect the verdicts*." Id.* "This standard applies to both the erroneous admission and exclusion of evidence." *Id.* at 28-29. "An error may be harmless beyond a reasonable doubt if the alternative evidence of the defendant's guilt is of an overwhelming nature, quantity, or weight and if the improperly admitted evidence is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt." *Id.* at 29. "In making this determination, [this Court] consider[s] the alternative evidence presented at trial as well as the character of the erroneously admitted evidence itself." *Id.*

As stated above, the excluded, sexually-explicit text messages were merely cumulative of A.R.'s interest in having a sexual relationship the defendant as of July 13 and 14 of an unstated year. A.R. testified that she sent sexually-explicit photographs and an explicit video to the defendant on

July 13, 2018. The jury was able to review the explicit photographs, dated July 13, during deliberations. A 373-74. The defendant had the opportunity to question A.R. about the photographs and her interest in having a sexual relationship with the defendant. T 308-11. Indeed, A.R. testified that she had consensual sex with defendant on the evening of July 14 2019, but that she "didn't want to have sex with him after" because they "started fighting the next day." A 194-95.

The excluded sexual banter between A.R. and the defendant dated July 13 and 14 indicates at most a mutual interest in having a sexual relationship at the time they were exchanged, leading to a sexual encounter that A.R. testified occurred. The texts predate the defendant's alleged criminal acts and shed no light on whether a fight between A.R. and the defendant occurred or whether the defendant committed crimes against A.R. on July 15 and 16, 2019. Therefore, in light of the admitted evidence, the excluded test messages were at best cumulative and inconsequential and any error in excluding them was harmless. *Papillon*, 173 N.H. at 29. Accordingly, this Court should affirm.

CONCLUSION

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

The State waives oral argument.

Respectfully Submitted,

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June 28, 2021

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CERTIFICATE OF COMPLIANCE

I, Elizabeth C. Velez, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,372 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.

June 28, 2021 *<u>/s/Elizabeth Velez</u>*
Elizabeth Velez

CERTIFICATE OF SERVICE

I, Elizabeth C. Velez hereby certify that a copy of the State's brief shall be served on Thomas Barnard, Senior Assistant Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

June 28, 2021 *<u>/s/Elizabeth Velez</u>*
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