THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0360

State of New Hampshire

v.

Jeffrey Woodburn

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(Oral argument waived)

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ISSUES PRESENTED

I. Whether the trial court properly refused to give a self-defense instruction, where there was no evidence in the record that he reasonably believed the charged conduct was necessary to defend himself from the imminent use of unlawful, non-deadly force.

II. Whether the trial court properly excluded evidence of alleged prior acts of aggression by the victim against the defendant, when the defendant failed to establish any nexus between the alleged prior acts and the charged conduct.

III. Whether the trial court properly ruled that the State did not open the door to the admission of evidence of alleged prior acts of aggression by the victim against the defendant during its closing argument.

STATEMENT OF THE CASE AND FACTS[1]

A. The Charges

The defendant, Jeffrey Woodburn, was charged with several crimes which stemmed from three different criminal interactions with the victim. As the result of an interaction on August 10, 2017, he was charged with criminal mischief, RSA 634:2, and simple assault, RSA 631:2-a. On December 24, 2017, his interactions with the victim led to charges of simple assault and domestic violence, RSA 631:2-b. Finally, on December 15, 2017, his interactions with the victim led to the charges in this case: simple assault and domestic violence.[2]

After trial, the jury convicted the defendant of criminal mischief for the August 10, 2017 incident, criminal mischief for the December 24, 2017 incident, and simple assault and domestic violence for the December 15,

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[1] The defendant has not presented any arguments challenging either of his convictions for criminal mischief; instead, the defendant's brief focuses solely on his convictions of simple assault and domestic violence relating to the December 15, 2017 incident. The State therefore will address that incident only, and will provide only those facts from the record relevant to those charges.

[2] Citations to the record are as follows:
"DB__" refers to the defendant's brief and page number.
"DD__" refers to the defendant's addendum attached to his brief and page number.
"DA__" refers to the defendant's appendix and page number.
"SA__" refers to the State's appendix and page number.
"T1-__" refers to the paginated jury trial transcript from Day 1 of the jury trial, May 10, 2021 and page number.
"T2-__" refers to the paginated jury trial transcript from Day 2 of the jury trial, May 11, 2021 and page number.
"T3-__" refers to the paginated jury trial transcript from Day 3 of the jury trial, May 12, 2021 and page number.
"T4-__" refers to the paginated jury trial transcript from Day 4 of the jury trial, May 13, 2021 and page number.

2017 incident. The jury acquitted the defendant of the remaining charges. T4-80-84.

B. Facts

1. The State's Case

After knowing each other as friends and political colleagues, the defendant and the victim began a romantic relationship in August 2015. T1-32-33. The defendant and the victim got engaged on November 21, 2017. T1-34. During their relationship, the defendant and the victim maintained separate residences. The victim lived in Jefferson, while the defendant lived at his home in Whitefield when he was not staying with the victim. T1-36-37.

On December 15, 2017, the victim and the defendant attended a Christmas party together. T1-56. They arrived separately, having planned for the victim to drive them both back to her home in Jefferson after the party, so that the defendant could drink alcohol. T1-56-57.

On direct examination, the victim described the December 15, 2017 incident as follows: during the drive home from the party, the victim asked the defendant why he needed to drink at the party, because it meant that she had to wake up early to drive him home the next morning. T1-57. This upset the defendant, who resented the victim's question, and would not let it go. T1-58. As they drove, the victim "wasn't responding to his questions because it was the same thing over and over and over again," and the defendant said he wanted to get out. T1-58. The victim pulled the car over on Hyfield Lane, where her home was. She pulled over "by the red house."

T1-58. As the defendant was getting out, he threatened to call their mutual friend Art McGrath and ask him to pick him up. T1-58. The defendant would not allow her to call Mr. McGrath, and this upset the victim. T1-58. She reached for the defendant's phone. As she did so, the defendant bit her hand. T1-58.

When the victim reached for the phone, the defendant was holding it in his hand, although he did not hold it to his ear as he would have if he were making a call. T1-59. The victim stated that she did not make any physical contact with the victim. T1-59-60. After the defendant bit the victim, he got out of the car and called Mr. McGrath. The victim asked him to get back in the car and apologized. T1-60-61. The defendant got back in her car and they went back to the victim's house. T1-61.

On cross-examination, defense counsel asked the victim if the defendant "tr[ied] to get out of the car in December," in reference to the December 15, 2017 incident. The victim replied "[h]e got out of the car, yes." T1-116-117. Later, defense counsel asked the victim, "you didn't try to stop [the defendant] from getting out of the car?" T1-199. The victim replied, "That's correct." T1-199. Counsel next asked "Did you ever try to block Jeff from leaving?" T1-199. The victim replied that the only time was an incident in January 2018 when she attempted to prevent the defendant from driving drunk by sitting on the hood of his car. T1-199. The victim described this incident, saying that she sat on the hood of the defendant's car because she did not want the defendant to get hurt, and did not know how else to stop him. T1-200. The victim stated that the defendant drove off with her on the car and hit a snowbank. T1-200.

Art McGrath also testified about the December 15, 2017 incident. On direct examination, Mr. McGrath stated that at some point in December 2017, he received a phone call from the defendant at night. T2-94. The defendant called and said that the victim had left him on the side of the road. T2-94. He then asked, "Do you want to go out and get a drink?" T2-94-95. The defendant said he was in Jefferson. T2-95. The call ended, and Mr. McGrath tried unsuccessfully to call the defendant back, but he did not speak again with the defendant that night. T2-95.

In July 2018, the victim called the defendant and they discussed each of the incidents that comprised the charged conduct with him. T1-113-114. Art McGrath was present during the phone call and heard the entire conversation because it was on speakerphone. T1-113-114.

Mr. McGrath testified about this conversation as well. He stated that, during the phone call, he heard the defendant admit to each of the acts he was charged with, including biting the victim on December 15, 2017. T2-107. Mr. McGrath said that when the victim asked him about the bite in December, the defendant said "I shouldn't have done that, Emily. I'm sorry, but these are our issues." T2-107. On cross-examination, Mr. McGrath agreed that during the phone call, the defendant "assigned blame" on the victim "by saying to her, you grabbed my shirt and tried to stop me from leaving the house," in response to the victim listing the incidents of charged conduct. T2-110. When asked if the defendant said that the victim ripped his shirt, Mr. McGrath said he could not recall. T2-110.

2. The Defendant's Case

The defendant testified as follows: during the drive from the Christmas party in Lancaster back to the victim's home in Jefferson, he began arguing with the victim. T2-183. As they argued, the defendant stated that he began to feel tense and claustrophobic. T2-183. The defendant stated:

> And I said to Emily – and this is where I asked her, pull over. And she did. And I got out, and I – I mean, I wasn't far out of Lancaster. Not far at all. And I called Art and said, you know, hey, you want to get together? And I – I needed a ride.

T2-183-184.

The defendant stated that after he got out of the car and started walking, the victim pulled up beside him and her demeanor changed to "kind and sweet and wonderful." T2-184. He got back into the car and, as they drove to the victim's house on Hyfield Lane, the argument continued. The defendant said that he asked the victim to pull over, and, after he grabbed at the wheel, she did. T2-184. The defendant said he "just—just had to get away from her. I had to get away from her." T2-185. The defendant said that he felt "as if I was drowning. It's like a panicky, you got to get away." T2-185. He testified that:

> next thing I'm aware, I'm on this dirt road and I had my phone in my hand. And – but there came a tug of war for the phone. And I – I'm sure I either twisted or did something to try to get her to let go. And it wasn't working.

T2-185.

Defense counsel asked the defendant "and did you eventually get her to let go?" Id. The defendant responded:

> I – I did. And – and I – I – I mean, don't remember the details. I just know that I did bite her. I – I mean, it was just so much so fast, but I know that that struggle, I – I was trying to get away and I – I – I did. You know, I did – I did – I believe I did do that.

T2-185.

The defendant said, "I just wanted my phone. I just – I – I – I wanted to call, you know, Art or somebody to come get me, and I wanted it – I did – I – I – just – that's –that's what I needed to – get out of that situation." T2-186. Defense counsel next asked, "If you lost that tug of war over the phone, would you still have gotten out of the car in December by yourself on the side of the road?" T2-186. The defendant responded, "Absolutely. I mean, I was – yeah. That was my – my goal was to get out of the car. I – I felt not having the phone was – was a problem. And it's a long walk to anything from there." T2-186.

The defendant further testified that:

> this flash of something
> happening so quickly, it – it's hard to sort of put like the whole dynamic of it all. But what I can remember is…me using both of my hands to try to get [the phone] away or pry it. Really pry her hand away. And that's…the only thing that sort of stands in my mind.

T2-186.

The defendant said he felt that "a panic…was overcoming me of…I need to get this and…that was not a good situation." T2-186-187.

The defendant also testified that in his relationship with the victim, "there was a constant problem of me trying to leave when things got too hot, and [the victim] blocking me, preventing me." The defendant stated that when he and the victim argued, there was a pattern where he felt that

he "had to get away. I had to get away. I felt like I was suffocating with this discussion." T2-172.

On cross-examination, the State asked the defendant, with regard to the December 15, 2017 incident, "you also testified that you were getting out of that car with or without your phone, correct?" T3-74. The defendant agreed, stating "[t]hat was my testimony yesterday." T3-75.

The defendant called Dr. Paul Donahue, a therapist who provided couples counseling to the defendant and the victim. Dr. Donahue testified about certain aspects of their counseling sessions. T3-131. During re-direct examination of Dr. Donahue, defense counsel asked Dr. Donahue whether the victim, during her counseling sessions with him, had described any mutually abusive conduct between her and the defendant. T3-152. After the State objected, defense counsel claimed that the State had opened the door to her line of questioning, and a chambers conference followed. T3-152. When asked by the trial court what specific instances of abuse Dr. Donahue would testify to, counsel replied "[j]ust that it was going on." T3-153-154. The trial court sustained the State's objection. T3-156.

3. Self-Defense

Prior to trial, the defendant filed a Notice of Self-Defense. DD 49. The notice stated that the evidence at trial would show that the victim:

> repeatedly tried to block and/or restrain [the defendant] from leaving her, including at one point her brandishing a knife, and that any force that [the defendant] used against [the victim] was necessary for him to use in order to either leave or attempt to leave a volatile situation created by [the victim].

DD 49.

At trial, at a hearing conducted outside the jury's presence after the conclusion of the defendant's testimony, the defendant argued that he was entitled to a self-defense instruction as to the December 15, 2017 incident because the victim admitted that she was trying to grab his phone. Since she was taking something that belonged to him without permission, the defendant reasoned, he was entitled to use force against her. T3-115.

After hearing arguments from both parties, the trial court found that the defendant was not entitled to a self-defense instruction because there was no evidence to support a rational finding that the defendant was acting in self-defense. T3-120.

4. Prior Instances Of Alleged Aggressive Behavior By The Victim Towards the Defendant.

During the trial, the defendant attempted to introduce evidence of alleged prior instances of aggressive behavior by the victim towards the defendant. The defendant attempted to do so during his cross-examination of the victim, during the defendant's direct examination, and during his direct examination of Dr. Donahue.

Defense counsel asked the victim about a professional misconduct complaint she had filed against Dr. Donahue. T1-176. Specifically, counsel asked the victim, if, during the process of her misconduct complaint against Dr. Donahue, "[she was] asked about whether or not [she] got involved in any aggressive physical action with [the defendant]." T1-177. The State objected. T1-177. After a chambers conference, the trial court sustained the

State's objection, ruling that the statement in question had no probative value, was generalized, and did not point to a specific incident. T1-185.

During the victim's cross-examination, defense counsel also asked if the defendant had said that she had "blocked him." T2-45. The State again objected. Defense counsel stated that she intended to ask the victim whether, on some occasions, she got in his way and blocked the defendant from leaving. T2-47. Defense counsel contended that this testimony would show the reasonableness of the defendant's response and use of force in self-defense. T2-50. Since the defendant had asserted self-defense, the defendant argued, the victim's aggressive character was pertinent. T2-51. The trial court sustained the State's objection, ruling that the "blocking" evidence that the defendant sought to introduce had no bearing on the defendant's self-defense claim and was irrelevant to the defendant's state of mind and use of force. T2-63-64.

The defendant also asked the victim about a prior incident in which she had allegedly ripped the defendant's shirt. T2-67. As noted earlier, on direct examination, the victim testified about a phone call in July 2018 where she and the defendant discussed the charged conduct. T1-113-114. On cross-examination, defense counsel asked the victim if, during that phone call, the defendant responded to the victim by saying that the victim had ripped his shirt. T2-67. The State objected. T2-67.

Defense counsel argued that this evidence was admissible under the doctrine of completeness. T2-67. Defense counsel admitted that she could not be specific as to when the alleged ripped shirt incident occurred, only that it happened "during the relationship" between the victim and the defendant. T3-9-10. The court sustained the State's objection, ruling that

the doctrine of completeness did not require the introduction of the proffered evidence. T2-74-75.

On direct examination, defense counsel asked the defendant, "Did [the victim] use physical force against you on some occasions?" T2-206. The State objected, and another chambers conference ensued. Defense counsel stated that she intended to elicit testimony that the victim was strong, not weak, and that the victim had punched the defendant in the past. T2-210-211. Defendant also mentioned an alleged body slam. T2-216.

Before the court ruled on the State's objection, the defendant submitted a memorandum of law in support of this line of questioning. [3] DD 50.[4] In the memorandum, the defendant contended that the court had improperly excluded three pieces of evidence relating to the victim's alleged prior aggressive acts towards the defendant. They were: (1) a statement by the victim that, "I may have been in his way, standing in his way, and which he would have pushed me out of the way"; (2) a statement by the victim, during an interview with investigators from the State, that she believed the defendant's defense would be that she had prevented him from leaving; and (3) a statement by the defendant during a phone call with the victim that the victim had scratched him, and that the defendant had told her that she had ripped his shirt. DD 51. The defendant claimed that this evidence of prior "aggressive and violent acts of the alleged victim" was

[3] The chambers conference occurred at the end of the day. The court allowed counsel to submit a memorandum of law on the issue before making a ruling the following morning.

[4] The page between pages 49 and 51 in the defendant's brief/addendum is not numbered.

being offered to shed light on the defendant's state of mind, rather than to show propensity. DD 53.

At a hearing on the motion, defense counsel admitted that none of the three proffered pieces of evidence occurred in temporal relation to any of the charged conduct. T3-4-11. The court sustained the State's objection and ruled that the proffered evidence was inadmissible because the defendant had not offered any testimony as to his state of mind when he used force against the victim. T3-27.

During re-direct examination of Dr. Donahue, defense counsel asked Dr. Donahue whether the victim, during her counseling sessions with him, had described any mutually abusive conduct between her and the defendant. T3-152. The State objected, and in a chambers conference, defense counsel claimed that the State had opened the door to her line of questioning, T3-152. When asked by the Court what specific instances of abuse Dr. Donahue would testify to, counsel replied "[j]ust that it was going on." T3-154. The trial court sustained the State's objection, ruling that the State had not introduced any evidence that had created a misleading advantage. T3-156.

5. The State's Closing Argument

In its closing argument, the State argued that during the July 2018 phone call, when the victim confronted him with each of the instances of charged conduct, the defendant admitted to them. Specifically, the State said that:

> [A]s you know, Art hears that conversation between [the victim] and the defendant, the conversation where he

> admits to doing everything – everything – he's charged with doing, his words, his words that Art hears. He doesn't deny it. He doesn't offer excuses.

T4-35.

The defendant objected that by stating that the defendant had not offered any excuses, the State had misstated the evidence. T4-36. The State had therefore opened the door to the evidence that the defendant, during the July 2018 phone call, had said that the victim had "ripped [his] shirt." T4-37. Counsel argued that introduction of the "ripped shirt" comment was appropriate and relevant due to the doctrine of completeness. T4-36-37.

The trial court ruled that the State had not made improper argument and had not misstated the evidence. T4-47. The court further ruled that, as the State had argued, the "ripped shirt comment" was not raised by the defendant as an excuse to the charged conduct and overruled the objection. T4-47.

SUMMARY OF THE ARGUMENT

This Court should deny the defendant's claims and affirm the trial court for the following reasons:

I. The trial court properly refused to give a self-defense instruction, where the defendant failed to proffer any evidence that he reasonably believed the charged conduct was necessary to defend himself from the imminent use of unlawful, non-deadly force. As the court noted, there was no evidence as to the defendant's mental state at the time he committed the charged assault; there was, therefore, no evidence to support his claim of self-defense. Even if there had been evidence that the defendant believed it was necessary to use non-deadly force in self-defense, his belief would have been unreasonable based on the circumstances.

II. The trial court properly excluded evidence of alleged prior acts of aggression by the victim against the defendant. The defendant failed to establish any nexus between the alleged prior acts and the charged conduct. In the absence of any testimony linking the alleged prior acts to the defendant's mental state at the time of the charged conduct, the alleged prior acts were irrelevant.

III. The trial court properly ruled that the State did not "open the door" by arguing that the defendant did not offer any excuses to the charged conduct in its closing argument. The State correctly argued with precision that the defendant had not provided excuses to the charged conduct and

there was no evidence linking the alleged prior acts of aggression to the defendant's mental state at the time of the charged conduct.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S REQUEST FOR A SELF-DEFENSE INSTRUCTION UNDER RSA 627:4.

The trial court properly refused to give a self-defense instruction because there was no evidence in the record of the defendant's state of mind when he bit the victim, much less any evidence showing that he reasonably believed that biting her was necessary to defend himself. As the trial court stated, there was simply "no evidence that [the defendant] believed *anything*." T3-121 (emphasis added).

This Court "will review the trial court's decision not to give a jury instruction for an unsustainable exercise of discretion." *State v. Chen*, 148 N.H. 565, 569 (2002) (citation omitted). "To show that the trial court's decision is not sustainable, the defendant must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of his case." *State v. Lambert*, 147 N.H. 295, 296 (2001).

"[A] person is entitled to use non-deadly force in self-defense from what he reasonably believes to be *imminent* use of unlawful, non-deadly force by another person." *State v. Chen*, 148 N.H. 565, 570 (2002) (emphasis in original). *See also* RSA 627:4, I. "A belief which is unreasonable, even though honest, will not support the defense." *State v. Holt*, 126 N.H. 394, 397 (1985).

Self-defense is a complete defense to a charge of assault. *State v. Richard*, 160 N.H. 780, 788 (2010). "Once the trial court admits some evidence of self-defense, it must instruct the jury on self-defense because conduct negating the defense becomes an element of the charged offense

that the State must prove beyond a reasonable doubt." *Id*. The trial court "must grant a defendant's requested jury instruction on a specific defense if there is some evidence to support a rational finding in favor of that defense. *Id.* (quoting *State v. Haycock*, 146 N.H. 5, 9 (2001)).

"'[S]ome evidence' [means] that there must be more than a minutia or scintilla of evidence." *State v. Haycock*, supra at 9 (quotation omitted). "[I]n reviewing the trial court's refusal to provide a requested self-defense instruction, [this Court will] search the record for evidence supporting the defendant's request. *State v. McMinn*, 141 N.H. 636, 646 (1997).

This Court "distinguishes between what [it has] called a 'theory of defense' and a 'theory of the case.'" *State v. Noucas*, 165 N.H. 146, 155 (2013). A trial court must instruct a jury on a defendant's "theory of defense," but not on a "theory of the case." *See State v. Bruneau,* 131 N.H. 104, 117-18 (1988). "A 'theory of defense' is akin to a 'civil plea of confession and avoidance, by which the defendant admits the substance of the allegation but points to facts that excuse, exonerate or justify his actions such that he thereby escapes liability.'" *Nouca*s, 165 N.H. at 155 (citation omitted). It "is a proposition about the legal significance of claimed facts, and it thus falls within the scope of a judge's responsibility to instruct the jFury on the law." *Bruneau,* 131 N.H. at 117–18.

By contrast, a "theory of the case" is "simply the defendant's position on how the evidence should be evaluated and interpreted." *Id.*; *State v. Shannon,* 125 N.H. 653, 662, 484 A.2d 1164 (1984) (defendant was not entitled to requested jury instruction because he was not admitting liability and offering facts to justify his conduct, but rather denying criminal behavior); *State v. Ramos,* 149 N.H. 272, 274–76, 821 A.2d 979

(2003) (no consent instruction because victim's and defendant's accounts on that point conflicted). "In other words, a defendant is not entitled to a jury instruction on a proffered 'defense' when he simply presents 'evidence of a different factual scenario than that presented by the State, and then argue[s] how the facts and evidence should be evaluated or interpreted by the jury.'" *Noucas*, 165 N.H. at 155-56. "Such a defense creates a 'credibility contest,' which [this Court has] recognized 'is not a legal defense to any charge.'" *Id.* (citation omitted).

A. The Trial Court Properly Denied The Defendant's Request For A Self-Defense Instruction.

In order to merit a self-defense instruction, the defendant would have had to elicit some evidence at trial that (1) he believed the victim was about to use unlawful, non-deadly force against him when he bit her; and (2) that his belief was reasonable. *Chen*, 148 N.H. at 570. The defendant failed to present any evidence about what he believed at the time he bit the victim. In other words, he failed to provide even a scintilla of evidence to support the jury instruction.

A defendant who asks for a self-defense instruction must provide at least some evidence relating to his state of mind. It is not enough for a defendant to admit that he committed the acts he is charged with; he must also explain *why* he committed those acts. No such evidence exists in this case. The defendant did not present any evidence that he reasonably believed that it was necessary to use non-deadly force against the victim on December 15, 2017. To the contrary, the defendant testified that he did not "remember the details" of the event. T2-185. He added: "I just know that I

did bite her." T2-185. He also testified that the only thing that stood out in his mind was "using both of my hands to try to get [the phone] away or pry it." T2-186. As a result, there was no testimony about his belief that non-deadly force was required, let alone any testimony that the belief was reasonable.

Even if the defendant had testified that he believed it was necessary to use non-deadly force in self-defense, his belief would not have been reasonable. There was no evidence that the victim used or attempted to use physical force against the defendant by grabbing him, hitting him, or otherwise making any physical contact with him; the victim stated that she never touched the defendant, and the defendant never challenged her on that point on cross-examination.

The defendant also never told Mr. McGrath, or testified on direct examination, that the victim restrained him or blocked him from leaving the car. This is in accord with the victim's testimony that she did not attempt to prevent the defendant from leaving the car. There was no evidence that the victim locked the car door, grabbed the defendant in an attempt to keep him in the car, or threatened him against leaving. In fact, the defendant testified to the opposite – that he was not restrained and that the alleged tug of war over his phone did not prevent him from leaving the car. When asked if he still would have exited the car if he had lost the tug of war over the phone, the defendant responded, "Absolutely. I mean, I was – yeah. That was my – my goal was to get out of the car." T2-186. Although he qualified his answer by stating that he felt it was a problem not having his phone, the import of the defendant's answer was clear – he would have left the car with or without his phone.

The defendant appears to argue that he was entitled to a self-defense instruction merely because his version of the events of December 15, 2017 was different than the victim's. This argument rests on the contention that he was entitled to a self-defense instruction based on his theory of the case, rather than on his theory of defense. As noted above, "a defendant is not entitled to a jury instruction on a proffered 'defense' when he simply presents 'evidence of a different factual scenario than that presented by the State, and then argue[s] how the facts and evidence should be evaluated or interpreted by the jury.'" *Noucas*, 165 N.H. at 155-56. "Such a defense creates a 'credibility contest,' which [this Court has] recognized 'is not a legal defense to any charge.'" *Id.* (citation omitted). The trial court committed no error in this record.

B. The Defendant Failed to Preserve The Issue Of A "Dangerous Situation."

The defendant argues that by attempting to take his phone, the victim was confining him, and thus using non-deadly force against him, because it was too dangerous for him to leave the car at that location and time of night. DB 12, 13, 21, 22, 23. The defendant failed to make this argument at trial, and has thus failed to preserve it as an issue on appeal.

This Court generally will not consider issues raised on appeal that were not presented to the lower court. *State v. Batista-Salva*, 171 N.H. 818, 822 (2019). *See Doyle v. Commissioner, New Hampshire Dept. of Resources and Economic Development*, 163 N.H. 215, 222 (2012) (similar). The defendant, as the appealing party, bears the burden of demonstrating that he specifically raised the arguments articulated in his appellate brief

before the trial court." *State v. Batista-Silva*, 171 N.H. at 822 (citing *State v. McInnis*, 169 N.H. 565, 573 (2017)).

The defendant never raised the argument that it was too dangerous for him to leave the car without his phone, and that the victim therefore "confined" him by trying to take his phone. The defendant's Notice of Defense mentions a non-specific "volatile situation," but makes no mention of any dangerous conditions on the side of the road. The defendant did not testify that he felt unsafe without his phone, that he was in an isolated location far from any aid, that the area was unlit, that his clothing was not sufficient for the elements, or even that it was dangerously cold outside. Nor did defense counsel argue that the defendant felt unsafe or unable to leave due to the conditions or location. The issue was therefore not presented to the trial court and may not be raised on appeal.

The defendant not only failed to preserve the issue of the supposedly dangerous conditions; he actually provided evidence to the contrary. The defendant testified both on direct and cross-examination that he would have got out of the car even if he did not have his phone.

Although the defendant describes the area of the incident as an "isolated, mountainous, unpaved, unlit road" in his brief, DB 10, he tellingly fails to provide a citation to any trial testimony. The defendant later mentions his "established, safe plan to leave [the victim's] car," which the victim supposedly thwarted, by trying to take his phone and "thus causing the presence of danger for the defendant to navigate out of a frigid and isolated location." DB 21. The defendant again fails to provide a citation to any testimony at trial. There was no testimony that it was dangerously cold, how much snow or ice was on the ground, what sort of

clothing the defendant was wearing, what the lighting conditions were, or what opportunities there would have been for the defendant to seek help if necessary. There was no evidence that the defendant had an "established, safe" plan to do anything – to the contrary, the evidence was that the defendant had been drinking, got out of the car and called his friend to see if he would pick him and get another drink with him, and then drove home with the victim. On this record, the defendant has not shown that the situation was dangerous, meriting a jury instruction to that effect.

C. The Defendant Failed to Properly Notice or Present Any Evidence of the Affirmative Defense of Defense of Property.

The defendant quotes RSA 627:8 in his brief, DB 24, but presents no argument with respect to it. Any argument with respect to it is therefore deemed waived, and the Court should decline to address it. *See, e.g., State v. Blackmer*, 149 N.H. 47, 49 (2003) (judicial review confined to "only those issues that the defendant has fully briefed"); and *State v. Chick*, 141 N.H. 503, 504 (1996) (deeming waived undeveloped constitutional argument referenced in the brief but not elaborated upon). The defendant also failed to file a notice of such a defense prior to trial, as required by New Hampshire Rule of Criminal Procedure 14(b)(2)(A).

Although defense counsel appeared to make a defense of property argument in support of the defendant's request for a self-defense instruction below, she did not do so until after the State had rested its case and the defendant had concluded his testimony, far too late to provide adequate notice to the State. T3-115. Any argument that the charged conduct was

justified based on a defense of property theory should therefore be denied, since the defendant failed to properly notice or preserve it, or provide any evidence or appellate argument to support it.

II. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF ALLEGED PRIOR ACTS OF AGGRESSION BY THE VICTIM AGAINST THE DEFENDANT.

The trial court properly excluded evidence of alleged prior acts of aggression by the victim against the defendant, because the defendant failed to establish any nexus between the alleged prior acts and the charged conduct. T3-24-28. In fact, the defendant failed to describe the alleged prior acts of aggression with any specificity and was inconsistent in describing to the trial court what evidence he wished to elicit and for what purpose.

Rule 404(b) states that evidence of other crimes, wrongs, or acts "is not admissible to prove the character of a person in order to show that the person acted in conformity therewith," but may be admissible for other purposes. "[W]hen a defendant seeks to introduce prior bad acts of another to impugn the State's case, the defendant must demonstrate 'such evidence of other bad acts is relevant for a purpose other than to prove the [witness's] character or disposition.'" *State v. Douthart*, 146 N.H. 445, 447 (2001) (citation omitted); Rule 404(b)(2)(A).

"To meet the relevancy requirement of Rule 404(b), there must be a clear connection between the particular evidentiary purpose and the other bad acts." *Douthart*, 146 N.H. at 447-448. A defendant seeking to offer prior bad act evidence of a victim must also provide clear proof that the victim committed the act, and the probative value of the act must not be

substantially outweighed by the danger of unfair prejudice. Rule 404(b)(2)(C); *see also State v. Dukette*, 145 N.H. 226, 240 (2000) (with regard to prior bad acts by a defendant, "there must exist a sufficient logical connection between the prior acts and the defendant's state of mind at the time of the charged conduct").

This Court "accord[s] the trial court considerable discretion in its decision to admit or exclude evidence and thus will not disturb its decision absent an unsustainable exercise of discretion." *State v. Botelho*, 165 N.H. 751, 759 (2013). "In order to prevail under this standard, the defendant has the burden of demonstrating that the trial court's ruling was clearly untenable or unreasonable to the prejudice of her case." *Id*.

In this case, the trial court correctly ruled that the alleged prior bad acts of the victim that the defendant attempted to introduce had no bearing on the defendant's self-defense claim. The defendant sought at various times to introduce evidence that the victim: (1) had told professional misconduct investigators that if the defendant was drunk, she would try to stand in his way, T1-181; (2) would, at unspecified times, "block" the defendant from leaving and get in his way, T2-45; (3) had ripped the defendant's shirt, at an unspecified time and for an unspecified reason, T2-67, 74-75; and (4) had used physical force against the defendant in an unspecified manner on unspecified occasions. T2-206. The defendant also attempted to introduce evidence that the victim had described a situation involving "mutually abusive conduct" between her and the defendant to Dr. Donahue during a therapy session. T3-152.

During the defendant's testimony, and in response to the State's objection, the defendant submitted a memorandum of law arguing that the

court had improperly excluded: (1) a statement by the victim that "I may have been in his way, standing in his way, and which he would have pushed me out of the way"; (2) a statement by the victim, during an interview with investigators from the State, that "one of [the defendant's] defenses would be like, you know, she's – she's preventing me from leaving…[s]he's blocking me"; and (3) a statement by the defendant during a phone call with the victim that the victim had scratched him, and that the defendant had told her that she had ripped his shirt." DD 51. After reviewing the memorandum and hearing argument from the parties, the court sustained the State's objection.

A. The Defense Established No Logical Connection Between The Alleged Prior Acts And The Charged Conduct.

With regard to each of the alleged prior acts of the victim, the court correctly ruled that there was no nexus between the prior act and the defendant's state of mind when he bit the victim. T2-63-64. Since there was no evidence about why the defendant bit the defendant, there can be no logical connection with any evidentiary purpose.

Not only did the defendant claim that he did not remember the details of the incident, he also testified that he would have exited the car regardless of whether or not he had his phone. This testimony further undermines his argument that prior acts of "blocking" by the victim were relevant to show his state of mind. It cannot be true that the defendant: (1) believed he had to bite the victim to retrieve his phone, because he couldn't leave the car without it; and also (2) would have left the car with or without his phone. If the defendant was going to leave the car with or without his

phone, he could not have felt that he was confined, and thus could not have felt it necessary to use non-deadly force against the victim to avoid confinement.

The defendant cites *State v. Vassar*, 154 N.H. 370, 376 (2006), for the proposition that "'evidence of the prior aggressive and violent acts of the alleged victim are relevant where they are being offered for a purpose other than propensity' and it 'is being offered to shed light on the defendant's state of mind, which is a permissible use of such evidence under Rule 404(b).'" DB 29-30. The defendant's reliance on *Vassar* is misplaced.

In *Vassar*, the defendant claimed that he killed his brother in defense of his mother. He explicitly testified to that effect at trial, stating that he shot and killed his brother because he believed his brother was going to kill his mother. *Vassar*, 154 N.H. at 374. There was also evidence that the brother made repeated threats to kill both the defendant and his mother, that the defendant heard his mother begging for her life, and that the defendant knew his brother had a gun with him at the time of the shooting. *Id.* This Court held that this evidence was sufficient to merit a self-defense instruction. *Id*.

After ruling that the evidence was sufficient to merit a self-defense instruction, this Court then ruled that other acts of a victim **may** be admitted pursuant to Rule 404(b) to show evidence of a defendant's state of mind, in cases where the defendant claims self-defense. *Id*. at 376 (emphasis added). The defendant sought to introduce evidence that the brother had had frequent and increasingly violent temper tantrums in the months prior to his death; had savagely beaten the defendant four months

before the shooting; and two weeks before the shooting, had fired shotgun shells while drunk, demanding that his mother get him a beer. *Id*. at 374.[5]

Vassar is distinguishable from this case. In *Vassar*, the defendant described his state of mind with regard to the charged conduct with specificity; he testified that he shot and killed his brother because he believed his brother was going to kill their mother. In this case, the defendant did nothing of the sort. To the contrary, the defendant testified that he did not remember the details of the biting incident, and consequently provided no evidence of his state of mind. *Vassar*, rather than providing support for the defendant's argument, actually highlights just how deficient the evidence was with regard to the defendant's state of mind.

III. THE TRIAL COURT PROPERLY RULED THAT THE STATE DID NOT OPEN THE DOOR TO THE ADMISSION OF EVIDENCE OF ALLEGED PRIOR ACTS OF AGGRESSION BY THE VICTIM DURING CLOSING ARGUMENT.

On appeal, the defendant reiterates an argument that the trial court rejected, claiming that the trial court erred in ruling that the State did not open the door to the admission of evidence of prior aggressive acts by the victim, either in its closing argument or in its questioning of Dr. Paul Donahue. DB 38. In support of his argument, the defendant cites the doctrine of verbal completeness. The defendant's argument must fail,

[5] This Court did not address the admissibility of the specific acts the defendant sought to introduce in *Vassar*, but rather ruled that such acts might be admissible pursuant to Rule 404(b). *Vassar*, 154 N.H. at 375.

however, since the State used specific language in its argument that in no way opened the door or created a misleading advantage.

Under the doctrine of verbal completeness, "a party has the right to introduce the remainder of a writing, statement, correspondence, former testimony or conversation that his or her opponent introduced so far as it relates to the same subject matter and hence tends to explain or shed light on the meaning of the part already received." *State v. Warren*, 143 N.H. 633, 636 (1999). The rule "seeks to prevent a selective and out-of-context presentation of evidence from misleading the trier of fact." *Id*. "While the rule does not render evidence automatically admissible, otherwise inadmissible evidence may be admitted to prevent a party from gaining a misleading advantage." *Id.*

This Court "review[s] a trial court's decision regarding the admissibility of evidence under the opening the door doctrine pursuant to the unsustainable exercise of discretion standard." *State v. Barr*, 172 N.H. 681, 692 (2019). "To prevail, the defendant must show that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case." *Id*. "If the record establishes that a reasonable person could have reached the same decision as the trial court on the basis of the evidence before it, we will uphold the trial court's decision." *Id*.

Here, the trial court correctly ruled that the State did not open the door during its closing argument, because it argued with specificity that the defendant had admitted to and offered no excuse to the charged conduct only. The State did not argue that the defendant had failed to offer excuses to other conduct not encompassed by the charges. Even if it had, such an argument would have been harmless error.

During closing, the State argued that, "Art hears that conversation between Emily and the Defendant, the conversation where he admits to doing **everything** – **everything** – **he's charged with doing**, his words, words that Art hears. He doesn't deny it. He doesn't offer excuses." T4-35 (emphasis added). As the transcript clearly shows, the State did not, as the defendant argues, make a sweeping claim that the defendant had not offered an excuse to everything the victim alleged he had done; rather, the State made an accurate, precise and limited claim that the defendant had admitted to and offered no excuses as to the charged conduct only. By using the words "everything…he's charged with doing," the State limited its argument to the defendant's admissions to the charged conduct.

The defendant claimed at trial that the doctrine of completeness required the court to reopen the case to allow the defendant to introduce evidence that during the July 2018 phone call, when the victim discussed each of the incidents of charged conduct with the defendant, the defendant responded by saying "you scratched me and you ripped my shirt." T4-37. When asked by the court if the ripped shirt statement was made by the defendant as an excuse specifically for the charged conduct, defense counsel stated that the defendant "was offering excuses as to any acts of abuse in the relationship," and that the defendant and the victim "were talking generally about the relationship…[h]e offers excuses during this – excuses in the form of that." T4-43.

Counsel's failure to answer the trial court's question about the link between the purported "excuse" regarding the ripped shirt and the charged conduct is telling. Counsel ultimately admitted that when the defendant said "you ripped my shirt," he was not referring to the charged conduct, and

thus could not have been offering any sort of excuse for it. There was no evidence or offer of proof that the ripped shirt comment related to the December 15, 2017 incident, or any of the other charged conduct.

Even if the State had improperly argued that the defendant had not offered an excuse to incidents beyond those encompassed by the charges, such an error would have been harmless. "In determining the gravity of an error, this Court asks whether it can be said beyond a reasonable doubt that the inadmissible evidence did not affect the verdict." *State v. Enderson*, 148 N.H. 252, 255 (2002) (quotation omitted). "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 inadmissible evidence is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt." *Id*. The State bears the burden of proving harmless error. *Id*.

Here, the State did not reference any inadmissible evidence, or open the door to the admission of previously inadmissible evidence. As stated above, the State used specific language in its closing linking the defendant's admissions and failure to offer any excuses to the charged conduct during the July 2018 phone call.

Even if the "ripped shirt" comment had been admitted, however, it would not have changed the outcome of the trial. The admitted lack of any nexus between the purported ripped shirt incident and any of the charged conduct means that admission of such evidence would have had no effect upon the jury's verdict. *See State v. Thibedau*, 142 N.H. 325, 330 (1997) (harmless error where the State referenced the disputed evidence in a "small portion" of its closing argument and the evidence was not "lengthy,

comprehensive, or directly linked to a determination of the guilt or innocence of the defendant"); *State v. Hennesy*, 142 N.H. 149, 159 (1997) (harmless error where the State did not "call particular attention to [the disputed evidence] in closing argument").

By arguing in closing that the defendant had offered no excuses for the charged conduct, the State did not create a misleading advantage – it accurately described the evidence in the record. The defendant's claim that the case should have been re-opened must be denied.

CONCLUSION

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

The State waives oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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CERTIFICATE OF COMPLIANCE

I, Joshua L. Speicher, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 8,082 words, which is fewer than the word limit allowed by rule. Counsel relied upon the word count of the computer program used to prepare this brief.

March 30, 2022 *<u>/s/ Joshua L. Speicher</u>*
Joshua L. Speicher

CERTIFICATE OF SERVICE

I, Joshua L. Speicher, hereby certify that I have arranged to send a copy of the foregoing to the defendant Jeffrey Woodburn, *pro se*, through the Court's electronic filing system, and via first-class mail at the following address:

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March 30, 2022 */s/ Joshua L. Speicher*
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