THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0432

State of New Hampshire

v.

Joshua D. Shea

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(Fifteen-minute oral argument requested)

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STATEMENT OF THE CASE

In August 2021, a Merrimack County grand jury indicted the defendant, Joshua Shea, with one felony count of criminal threatening with a deadly weapon occurring on or about May 30, 2021. T[1] 12-13; DA 47. The indictment specifically alleged that the defendant purposely, by physical conduct, placed or attempted to place [M.M.] "in fear of imminent bodily injury by pointing a firearm at [M.M.], the firearm being a deadly weapon under RSA 625:11." T 12-13. Following a two-day jury trial (*Schulman*, J.) in May 2022, the defendant was convicted of the criminal threatening charge. T 239.

On July 22, 2022, the trial court sentenced the defendant to six months in the house of corrections all deferred for one year and further suspended for three years, a $1,000.00 fine and $240.00 penalty assessment paid in full by July 21, 2023, no contact with the victim, an anger management evaluation, and compliance with any recommended treatment. DA 48-50. This appeal followed.

[1] Citations to the record are as follows:
"DA_" refers to the defendant's addendum to the brief and page number;
"DB_" refers to the defendant's brief and page number;
"SA_" refers to the State's appendix to the brief and page number;
"T_" refers to the trial transcript and page number.

STATEMENT OF FACTS

A. The State's Case at Trial.

On May 30, 2021, M.M. and his fiancée Katie Gioia, were driving north on Route 28 in Epsom, New Hampshire at approximately 10:00 a.m. on their way to hunt turkey by "traditional archery." T 28-29. M.M. was driving his Chevrolet truck and Gioia was in the front passenger seat. T 28. At that time, M.M. was driving around 50 miles per hour, which is the posted speed limit for parts of Route 28. T 29. Right before the Epsom traffic circle, the speed limit reduces to 35 miles per hour. *Id*.

As M.M. approached the traffic circle, but while the speed limit was still 50 miles per hour, "a small white car buzzed out right in front of [M.M.] forcing [M.M.] to slam on [his] brakes while [he] was doing 50 [miles per hour]. It was before it was the slow down zone" and on a straightaway. T 29-30. M.M. said that he "had no choice but to get close to the bumper by slamming on the brakes." T 30.

M.M. also said that he "hit the horn" when he slammed on his brakes. T 31. The white car kept "slamming on the brakes," causing M.M. to "almost stop in the middle of the road." T 30-31. Gioia said that the white car kept "brake-checking" M.M., meaning that the white car kept "going fast, [and] slamming on the brakes." T 54. M.M. and the driver of the white car, later identified as the defendant, "exchanged middle fingers" as they both drove towards the traffic circle. T 30. M.M. did not try to pass the defendant or pull up alongside him. T 38. He also denied trying "to edge [the defendant] over into the oncoming traffic." T 43.

M.M. said that after exchanging middle fingers, the defendant "slammed on the brakes again, probably two or three more times . . . and then eventually just sped up and took right off." T 31. M.M. noticed during this encounter that the driver's seat on the white car was on the right-hand side of the vehicle. *Id*.

As M.M. approached the traffic circle, he saw the white car a "couple cars ahead" of him. T 31. M.M. pulled into a gas station off of the traffic circle and saw the white car drive around the traffic circle, pull into the gas station, and park behind M.M.'s truck, blocking M.M. in his parking space in front of the gas station. T 31-32. M.M. said that when he saw the white car drive around the traffic circle, he was concerned and felt that he and Gioia were "in danger." T 39-40. M.M. did not recall seeing the defendant with a cell phone "out" when he first saw the white car park behind him. T 34.

Once the white car parked behind his truck, M.M. and the defendant exchanged words. T 35. M.M. said that he "probably asked [the defendant] if he was an idiot and if he had a fucking problem." *Id*. M.M. denied asking the defendant to fight him. *Id*. During the argument, the defendant "pulled out a gun and told [M.M.] . . . he'd blast a fucking hole through [M.M.] right now." *Id*. M.M. was "terrified" when the defendant pointed the firearm at him. T 40, 48. In response, M.M. told the defendant to "shoot [him] or [he'd] stuff it up his ass." T 36. Then, M.M. took out his cell phone and told Gioia to call 911 while M.M. photographed the defendant. *Id*. The defendant lowered the firearm once M.M. photographed him. T 39. Then, the defendant photographed M.M. and Gioia and drove away. T 37.

M.M. said that the firearm was still in a black and tan holster when the defendant pointed it at him. T 35. He also remembered seeing the barrel of the firearm. T 36. M.M. said that he did not walk past his truck's rear bumper while the defendant was parked behind him. T 35. M.M. agreed that he told police on May 30, 2021, that the defendant pointed the firearm at him and that he saw the barrel. T 39.

Gioia said that after the defendant parked behind their truck, she stayed in the truck while M.M. got out. T 56. She heard M.M. and the defendant "exchange words." *Id*. When she looked behind her to see what was happening, she saw the defendant "pull a gun on [M.M.]." *Id*. Gioia explained that she saw the defendant point the firearm at M.M. before pointing it down at the ground. T 61. She also said that the firearm was not in a holster when she saw it pointed at M.M. T 62.

When Gioia saw the firearm, she looked for her phone, which was somewhere in the truck, having been jostled around during the "brake-checking." T 56. She struggled to find her phone because she "kept her eyes on" the firearm until the defendant lowered it to make sure M.M. was safe. T 57. When she found her phone, she took a photograph of the defendant, who was no longer holding a firearm but instead was holding his cell phone. T 57-58. She also said that during this exchange with the defendant, M.M. did not walk beyond the truck's rear bumper. T 58.

Kayla Boisvert, the gas station's manager, said that on May 30, 2021, at approximately 10:00 a.m., she was working the cash register at the front of the store when she heard a "loud exhaust revving its engine right outside the window" and "loud voices hollering." T 70. She looked in the direction of the yelling and saw a man "in camo" arguing with another man

in a car. *Id*. As she walked to the main door, she saw the man in the car "pull a gun up." *Id*. Boisvert clarified that this meant that she saw the man in the car point a black firearm out of the car window at the man in camo. T 70-72. She also explained that she was outside when she saw the firearm pointed at the man in camo. T 76. Boisvert then called the police. T 71. While she was on the phone with police, the man in the car drove away. T 72-73.

M.M. also called the police after the defendant left. T 59. Epsom Police Officer Jonathan Ebert responded to the gas station. T 97. When he arrived, he spoke to M.M., Gioia, and Boisvert. *Id*. After speaking with them, Officer Ebert traveled to the defendant's residence in Pittsfield. T 101. When he arrived, Pittsfield Police Officer Darrah was already there speaking with the defendant and a woman. T 103. Officer Ebert noted that the woman was writing a statement and the defendant was not. T 105. The officer told the defendant that he needed to write his own statement, which the defendant did. *Id*. The officer then read the defendant's written statement to the jury. T 106.

In his written statement, the defendant said that as he was pulling out of his shop, a truck "c[ame] flying about 100 miles per hour at back of [the defendant's] car." *Id*. The defendant said he braked and the truck almost hit him. *Id*. The defendant wrote that the truck pulled into a gas station parking lot off of the traffic circle and the driver yelled at him to "pull up." *Id*. The defendant wrote that M.M. "ran" at his car and screamed at him. *Id*. The defendant also wrote that he told M.M. that he was armed and to "get away" from the defendant and his vehicle, which M.M. tried to hit. *Id*. The defendant wrote that M.M. responded, "come on, bud. Me – me, I am

street, no cameras." T 107. The defendant wrote that he said, "no" and told M.M. to "go away" and "I don't need your threats." *Id*.

When Officer Ebert spoke with the defendant, the defendant was angry and upset. T 113. The defendant told the officer that he was in a "road rage incident." T 108. After the incident, he and the other vehicle involved pulled into a gas station off of the Epsom traffic circle "to make sure that neither vehicle had damage." *Id*. The defendant said that at that time, M.M. approached him yelling, causing the defendant to lift his shirt and "advise[] [M.M.] that he was armed and to get away from his vehicle." T 109. In neither his written statement nor in his statement to Officer Ebert did the defendant say that he pulled his firearm out or pointed it either at the ground or M.M. *Id*.

The defendant showed Officer Ebert his firearm, which matched M.M.'s description that he had provided to the officer. T 110. The officer seized the firearm as evidence. T 110-11.

B. The Defendant's Case at Trial.

The defendant testified as the defense's only witness. On May 30, 2021, the defendant saw M.M.'s truck pull out onto Route 28, about an eighth of a mile away, at the same time that the defendant pulled out onto Route 28. T 139-41. When the defendant pulled onto Route 28, he accelerated to 40 miles per hour. T 142. He observed that the truck that had pulled onto Route 28 was "accelerating rapidly" towards the back of his vehicle "until he came pretty much right up on [the defendant's] bumper." T 142-43. The defendant said that he sped up a bit, but that the truck drove in the breakdown lane next to the defendant's vehicle, trying to push the

defendant towards the double yellow lines. T 143. The defendant denied brake-checking the truck. *Id*. The defendant said that the driver of the truck "gave [him] the middle finger." T 144. The defendant "returned" the middle finder. *Id*.

As the vehicles approached the traffic circle, the defendant claimed that he slowed down to enter the circle while the truck drove past him at 30 miles per hour in the breakdown lane and into the gas station off of the traffic circle. T 145. As the defendant drove around the circle, he saw from the gas station parking lot that the truck driver was "yelling and flipping [him] off and waving [him] into the gas station." *Id*. The defendant claimed that he wanted to photograph the truck's license plate and report it to the police, so he decided to drive around the circle and pull into the gas station. T 145-46.

As the defendant pulled into the gas station, he photographed the truck and its license plate. T 146. He claimed that he parked 25-30 feet behind the truck. T 147. Then, the defendant contended, the truck driver walked towards the defendant "aggressively swearing and saying he was going to . . . rip [the defendant] out of [the] car." T 146. The defendant claimed that the driver also said that he would "beat [the defendant's] ass" and asked the defendant to "pull up into the parking lot next door where there's no cameras. You're a pussy." T 147. The defendant said he thought this encounter was humorous and called the driver a child. *Id*.

The defendant claimed that as the driver kept approaching him, he was "in fear" of a confrontation. T 148. The defendant "warned" the driver that he had a firearm "and [] tried to drive off as fast as [the defendant] could." T 151. The defendant explained that he warned the driver that he

had a firearm by unclipping the firearm in its holster from his belt and, while keeping the firearm in its holster, "rolled it up to [his] chest and informed [the driver] that [the defendant] had it." T 151. Then, the defendant put the firearm on the floorboard of his car. T 151. The defendant denied pointing the firearm at the driver. T 152.

The defendant claimed that when the driver saw the firearm, he said "what are you going to do that [sic]? Shoot me, you pussy? You won't even get out of your car." T 152. Then the defendant drove away. *Id*. When the defendant arrived home after this incident, he said that he intended to call the police, but first took some groceries inside and then went into his garage "real quick." *Id*. When he exited his garage, a Pittsfield police officer was in his yard. *Id*.

After exiting his garage, the defendant spoke with the police. T 153. He was anxious and his hands were shaking, so he told the police that he could not write a statement. *Id*. The defendant said that the officer told him he had to write one. *Id*. The defendant admitted that he did not write down every detail in his written statement. *Id*. On cross-examination, the defendant claimed that the statement Officer Ebert read to the jury was actually written by his wife and signed by the defendant in front of the police. T 156. He claimed that the police "forced" him to write a statement and to sign it. *Id*. Then, the defendant claimed that he had not signed the statement he admitted to signing, saying that his wife signed it for him. T 157. He then said that the statement his wife wrote had "become [his] statement forcefully," but that he told his wife what to write in the statement. *Id*.

C. The Jury Instructions and The Jury's Questions.

During a break on the first day of trial, the trial court discussed "some jury instruction issues" with the parties. T 77. The trial court asked if the parties agreed that the "display of firearms" was an affirmative defense that the State had to disprove beyond a reasonable doubt at trial.[2] T 78. This defense was codified by the legislature using identical language in both RSA 627:4, II-a the self-defense statute, and in RSA 631:4, IV, the criminal threatening statute. This provision provides that if "[a] person who responds to a threat which would be considered by a reasonable person as likely to cause serious bodily injury or death to the person or to another by displaying a firearm or other means of self-defense with the intent to warn away the person making the threat shall not have committed a criminal act." RSA 627:4, II-a

The defendant argued that, because this provision was listed in the self-defense statute, it is a "pure" defense requiring the State to disprove it beyond a reasonable doubt, if the defendant presented some evidence of the defense at trial. T 82. The defendant also argued that the exceptions in the self-defense statute to the use of non-deadly force, RSA 627:4, I (a)-(c) and

[2] It appears the trial court incorrectly referenced the burden of proof for an affirmative defense during this discussion. "A pure defense is a denial of an element of the offense, while an affirmative defense is a defense overriding the element. The former must be negated by the State by proof beyond a reasonable doubt and must be submitted to the jury for determination. The latter need not be negated by the State." *State v. Soucy*, 139 N.H. 349, 352-53 (1995). "[A]ffirmative defenses are those defenses that the defendant has the burden of establishing by a preponderance of the evidence." *State v. Munroe*, 173 N.H. 469, 473 (2020).

deadly force, RSA 627:4, III (a)-(d), did not apply to the display of a firearm defense. T 89-93. The defendant contended that the display of a firearm defense is a defense separate from the use of deadly or non-deadly force not subject to the exceptions listed in RSA 627:4, I or RSA 627:4, III. *Id*.

The State argued that the display of a firearm defense was an affirmative defense. T 78. The State did not, during this discussion, argue whether any of the self-defense exceptions applied to the display of a firearm defense.

The trial court agreed with the defendant, holding that to be justified in displaying a firearm in self-defense, a person must reasonably believe that there was an imminent threat of death or serious bodily injury. T 95. The trial court also held that the exceptions listed in non-deadly and deadly force did not apply to the display of a firearm defense. *Id*.

The trial court turned then to whether the display of a firearm defense was an affirmative or a pure defense, but did not finish this discussion during this break in the trial. T 96.

Later, during the lunch break, the parties again addressed the display of a firearm defense jury instruction. The trial court determined during this discussion that if there was some evidence that the defendant was threatened by imminent serious bodily injury or death, then the trial court would instruct the jury on the display of a firearm defense and instruct the jury that the State had to disprove that defense beyond a reasonable doubt. T 121, 125-26. The trial court then asked the State for its position on whether it should also instruct the jury on the initial aggressor exception to the use of non-deadly force in self-defense, T 126, and whether it should

instruct on the retreat exception to the use of deadly force in self-defense, T 133-34. The State and the trial court engaged in a series of hypothetical scenarios to determine whether either exception instruction was warranted. T 125-35. The trial court ultimately concluded that it would not instruct the jury on either the initial aggressor exception or the retreat exception to self-defense. T 126, 135.

After the close of evidence but before the parties delivered closing arguments, the trial court told the parties that it would instruct the jury that if it found that the State proved the elements of criminal threatening beyond a reasonable doubt, then it must also determine whether the State disproved the defendant's display of a firearm defense under threat of serious bodily injury or death beyond a reasonable doubt. T 164. The trial court also said that it would instruct the jury that it is not a crime to display a firearm if there is "such a threat that a reasonable person would consider it likely to cause death or serious bodily injury, that displaying must be for the purpose of (indiscernible) just the statutory elements." T 164-65.

After this ruling, the parties presented closing arguments, and the trial court told the jury it would instruct it on the law the following morning. T 166-178. The following morning, the trial court asked the parties if they had any objections to the proposed jury instructions. T 182. The State did not challenge any of the trial court's proposed instructions. *Id*. The defendant made two substantive challenges to the trial court's jury instructions. T 183-201.[3] Relevant to this appeal, the defendant challenged

[3] The defendant's first challenge to the jury instructions was an objection to the trial court's instruction regarding Rule of Evidence 609. T 183. Because the defendant has not appealed this instruction, this brief does not discuss this objection further.

the trial court's language in its instruction that, in considering the display of a firearm defense, the jury could consider, "in determining whether the threat existed, [] whether the defendant could have completely and safely left the area without any risk to himself or others." T 188. The defendant argued that this language referenced the duty to retreat, an exception to the use of deadly force in self-defense, which is not part of the display of a firearm defense. *Id*.

The defendant also argued that, because the State had argued in its closing argument that the defendant could have left the gas station if M.M. walked towards him, and therefore was not threatened by M.M., it was improper for the trial court to instruct the jury that it could consider the defendant's ability to leave the area because it would give "heightened relevance" to the State's argument. T 189.

The State argued that the trial court's jury instruction was proper because the trial court "merely identified [retreat] as a factor of reasonableness," meaning that the defendant's ability to leave the scene of the threat was a relevant consideration in determining whether the defendant acted in conformity with what a reasonable person would do in his situation. T 190.

The trial court said that it wrote this sentence of the jury instructions as a "factor" the jury "may" consider in the reasonableness analysis intentionally so that the jury would not be required to consider whether the defendant had a duty to retreat. *Id*. The trial court also explained that it drafted the instruction this way so that this factor was one of "a bunch of factors [the jury] may consider." T 193.

The defendant responded that the trial court's use of the word "likely" in saying that a reasonable person in the defendant's circumstances would have believed that a threat was "likely to kill or cause serious bodily injury" was too close to "the imminent language" in the duty to retreat exception in RSA 627:4, III. The defendant contended that the display of a firearm defense "centers around the threat," meaning that the analysis of the display of a firearm defense is whether the threat, if executed, is likely to cause death or serious bodily injury, not whether the person making the threat is "likely to actually follow through." T 197.

The trial court responded that, for the display of a firearm defense to apply, the threat must be one in which the display of a firearm would "ward off" the person making the threat. T 198. In other words, "[i]t has to be that the person making the threat is going to do something that you might stop by displaying your gun. And the thing that the person was going to do is likely to cause death or serious bodily injury." T 198.

The defendant again countered that the display of a firearm defense requires one to "assess the threat, and that threat, if executed, what it would do. And I think your instruction here centers more on the person and whether the person is likely to follow through with the threat. And I think that's different than what the statute sets forth." T 199.

The trial court responded, saying "I think that you have to believe that the person making the threat was likely to cause death or serious bodily injury, not just that the threat was that. That's my belief about what the statute means, if you unpack it." T 200-01.

Following this argument, the trial court delivered its jury charge. T 203-28. The trial court instructed the jury that the criminal threatening

charge against the defendant had five elements: "one, the defendant placed, or attempted to place, another person in fear of imminent bodily injury; two, the defendant did so through physical conduct; three, the physical conduct involved the use of a deadly weapon; four, the deadly weapon was a firearm; and five, the defendant acted purposely, with respect to the first four elements." T 219.

Regarding the display of a firearm defense, the trial court instructed:

> If you find that the State has proven all of the elements of criminal threatening with a firearm . . . which I've just explained to you, then you must go on to consider whether the State has also disproven beyond a reasonable doubt, one or more of the elements of the defense of displaying a firearm in response to a threat of deadly force.
>
> . . .
>
> The State has the burden to disprove the defense. And that's the way it works. If you have reasonable doubt as to whether the State has disproven this defense, then you must find the defendant not guilty. The defense of displaying a firearm in response to a threat of deadly force has three parts or elements. More particularly, under New Hampshire law, it is not a crime to display a firearm under the following circumstances. First, the display of a firearm must be in response to a threat. And second, the threat must be of such a nature that a reasonable person acting under the same circumstances as the defendant would have believed that the person or persons making the threat were likely to cause death or serious bodily injury to the defendant or a third party. So the threat must be of such a nature that a reasonable person thought that it would likely result in death or serious bodily injury. Lastly, and third, the display of the firearm must have been made with the intent to warn away the person making the threat.
>
> …

> In determining whether a reasonable person acting under the same circumstances would have believed that a threat of likely death or serious bodily injury was present, you must consider all the circumstances knowing [sic] to the defendant. You should consider these circumstances . . . as they were presented to the defendant at the time, and not necessarily as they appear upon detached reflection. One factor that you may consider in determining whether the threat existed is whether the defendant could have completely and safely left the area without any risk to himself or others.

T 219-22.

After approximately one hour of deliberations, the jury asked the trial court two questions: "is displaying the gun a crime, by the definition paperwork given to the jury? Or do you have to point the weapon at the other person to meet the definition of the crime?" T 229. The defendant proposed that the trial court answer these questions by pointing the jury to the indictment, which charged the defendant with criminal threatening by pointing a firearm at M.M. T 230. Thus, the State did need to prove that the defendant pointed the firearm at M.M. to find the defendant guilty. *Id*.

The trial court proposed telling the jury that it had already been instructed on the elements of the offense and that the trial court "[could not] define them any more narrowly in response to your question." *Id*. The trial court said that it believed this was the "right" answer because it limited the answer to the elements "as defined in the instructions." T 231. The trial court noted that if "the defendant wanted an instruction that said the State needed to prove that he pointed the firearm, the defendant should have brought that to the court's attention and argued that issue earlier." T 231.

The defendant responded that the "right" answer was to instruct the jury that the State had to prove the language of the indictment, that the defendant pointed a firearm at M.M., to prove the charge beyond a reasonable doubt. T 232. The defendant argued that he had viewed the case as one in which the State could not prove that the defendant pointed a firearm at M.M., which became his theory of the case, due to the indictment. *Id*. The defendant also contended that pointing the jury to the trial court's instructions "expands the indictment and amends the indictment." T 233. He further argued that the State denoted the *actus reus* of the crime as the defendant pointing a firearm at M.M., despite this specific act not being part of the criminal threatening statute. T 233.

The trial court responded that it did not see any prejudice to the defendant's trial strategy in the defendant's reliance on the phrase "pointing" a firearm in the indictment versus "using" a firearm, as the criminal threatening statute provides. T 236-37. The trial court also said that it did not find that its proposed answer would cause any prejudice to the defendant's case. T 237. The trial court explained that the element of criminal threatening at issue was "use," and as such, the State did not have to prove "pointing" as an element because "pointing" as it is used in the indictment is a fact alleged by the State to meet the "use" element in the criminal threatening statute. T 238. With that, the trial court answered the jury's questions with its proposed answer generally directing the jury to review the elements as they were defined in the jury instructions. *Id*.

SUMMARY OF THE ARGUMENT

The trial court sustainably exercised its discretion in instructing the jury that, for the defendant to be justified in displaying a firearm in defense of a threat, he had to reasonably believe that the person's threat was likely to cause death or serious bodily injury. A credible threat is one which a reasonable person would believe is likely to occur. A credible threat cannot be measured by words alone, but by all of the facts and circumstances of that threat. As such, the trial court's instruction that the display of a firearm defense is available only when a defendant is faced with a threat that is "of such a nature that a reasonable person thought that it would likely result in death or serious bodily injury" fairly instructed the jury on the elements of this pure defense. T 220.

Likewise, the trial court did not impermissibly instruct the jury on a factor that it could consider it determining whether the defendant faced a credible threat prior to displaying a firearm. The trial court's instruction that the jury could consider whether the defendant could have "completely and safely left the area," when considered in light of all of the trial court's jury instructions, only recommended that the jury consider this factor, but did not require it to do so. T 221. Moreover, because the trial court did not explain or describe what facts would or would not establish this factor, the trial court did not impermissibly comment on the evidence present in the case or impermissibly bolster the State's theory of the case during the jury charge.

The trial court also sustainably exercised its discretion in answering the jury's general questions about what action constitutes use of a firearm

to meet that element of criminal threatening. The trial court's answer directing the jury back to its instructions on the elements of criminal threatening did not amend the criminal threatening indictment by expanding the charged elements. The trial court defined the elements of criminal threatening as requiring the State to prove, in part, that the defendant used a deadly weapon. This instruction was unchallenged by defense counsel at trial. As such, answering the jury's questions regarding whether displaying a firearm and pointing a firearm are crimes by referring it to the previously provided and unchallenged definition of criminal threatening did not amend the State's indictment.

If this Court finds that this answer did amend the indictment, this Court should still uphold the defendant's conviction because the defendant was not prejudiced or surprised by this amendment. The defendant has not alleged on appeal or at trial how his defense strategy would have changed had the trial court answered the jury's questions by defining use of a firearm as pointing a firearm. Moreover, he has not alleged how he was surprised by this answer to the jury's question, nor could he, given that neither party could have anticipated a jury's question prior to trial. Because actual prejudice cannot be speculative, *State v. Knickerbocker*, 152 N.H. 467, 470 (2005), the defendant was not prejudiced by this amendment to his indictment.

Accordingly, this Court should affirm the defendant's conviction.

ARGUMENT

I. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE DISPLAY OF A FIREARM DEFENSE.

A. Standard of Review.

The purpose of a trial court's jury instructions is to "state and explain to the jury, in clear and intelligible language, the rules of law applicable to the case." *State v. Littlefield*, 152 N.H. 331, 334 (2005) (quotations and citation omitted). "When reviewing jury instructions, [this Court] evaluate[s] allegations of error by interpreting the disputed instructions in their entirety, as a reasonable juror would have understood them, and in light of all the evidence in the case." *Id*. This Court determines "if the jury instructions adequately and accurately explain each element of the offense and reverse only if the instructions did not fairly cover the issues of law in the case." *Id*.

"Whether or not a particular jury instruction is necessary, the scope and wording of jury instructions, and the response to a question from the jury are all within the sound discretion of the trial court." *Id*. (citations omitted). Thus, this Court reviews "the trial court's decisions on these matters for an unsustainable exercise of discretion." *Id*.

B. The Trial Court Properly Instructed The Jury on The Display of a Firearm Defense.

The defendant argues on appeal that the trial court erroneously interpreted the elements of the display of a firearm defense in its jury instructions. DB 23-31. Specifically, the defendant argues that the trial court erred in focusing its jury instructions on the likelihood that a person

would carry out a threat directed at the defendant instead of focusing the jury instructions on the nature of the threat, disregarding the likelihood that the threat will occur. DB 23-27. He also argues that the trial court erred in instructing the jury that it could consider the defendant's ability to safely leave the area in determining whether the defendant was threatened by any person. DB 28-31.

The trial court properly instructed the jury that a display of a firearm defense is only justified if it is in response to a threat of death or serious bodily injury that a reasonable person would believe could be carried out by the person making the threat. "A credible present threat requires 'more than a generalized fear for personal safety.'" *Hurley v. Hurley*, 165 N.H. 749, 750 (2013) (quoting *Knight v. Maher*, 161 N.H. 742, 745 (2011). In *Hurley v. Hurley*, this Court held that a single text message reading "[w]ish you would die in a fiery crash," was no more than "transitory anger" and was not sent with a purpose to terrorize the victim, nor was it accompanied by any specific plans or threats that would result in the victim dying in a fiery crash. *Hurley*, 165 N.H. at 751. Specifically, this Court found that despite this "reprehensible" text message, the defendant did not threaten to "tinker" with the victim's car or threaten to start a fire. *Id*. at 750-51. As such, the plaintiff could not prove that the defendant's "wish" constituted criminal threatening pursuant to RSA 631:4.

Conversely, this Court found in *State v. Bird*, that a "rational juror readily could have found that the defendant's actions of waving and pointing a gun toward the victim, while yelling, 'get the F off my property,' constituted felony criminal threatening." 161 N.H. 31, 38 (2010). This Court also found in *State v. Kousounadis* that the State presented sufficient

evidence to prove that the defendant's conduct, waiting outside near the victim's car, approaching her as she left work, opening the back door of his vehicle, removing a shotgun, and firing it after the victim told him she did not want to talk with him and they were "through," constituted criminal threatening. 159 N.H. 413, 417, 420-22 (2009). In *State v. Robbins*, this Court also found that the State presented sufficient evidence at trial to prove that the defendant's conduct constituted criminal threatening when the defendant swung a shovel at the arresting officer three to four times and told the officer, "you want some?" and "do you want a piece of this?" or words to that effect. No. 2011-813, 2014 N.H. LEXIS 90, at *2, 4 (Jul. 29, 2014) (unpublished opinion).[4]

It is clear from the cases cited above that a threat is not measured by words alone, but by the person's actions that accompany the threat. As illustrated above, a text message wishing that someone would die in a fiery crash, without more, is not a credible threat. However, an individual's actions establishing the ability to inflict imminent harm, such as pointing a firearm at an individual, firing a firearm in the air, or swinging a weapon at an individual, all constitute a threat. Thus, in this case, the trial court sustainably interpreted the term "threat" in the display of a firearm defense as defined not by the words of the threat itself, but by the ability of the person making the threat to carry out the threat.

[4] In holding that there was sufficient evidence of criminal threatening in these three cases, this Court did not explain why these cases constituted sufficient evidence of criminal threatening. Rather, this Court simply concluded that the facts as presented to the jury established criminal threatening beyond a reasonable doubt.

Moreover, for the display of a firearm to be justified, a defendant must display his or her firearm with "the intent to warn away the person making the threat." RSA 631:4, IV. As such, the defendant must reasonably believe that the person making the threat will be warned away by the display of the firearm. Thus, the gravamen of this statute is the intent of the person making the threat and the intent of the person displaying the firearm, not the contents of the threat alone.

Reading the trial court's jury instructions as a whole, the jury was properly instructed that, for the defendant's actions to be justified, he had to have been faced with a credible threat that a reasonable person would believe the person making the threat was likely to carry out, and the defendant's display of the firearm had to have occurred with an intent to warn off the person making that credible threat. T 219-21.

C. The Trial Court Properly Instructed The Jury Regarding The Factors it Could Consider in Determining Whether a Threat was Present.

The defendant contends that the trial court's instructions regarding his display of a firearm defense improperly commented on the evidence and "favored the State's view of the matter." DB 31. Here, the trial court did not comment on the evidence, nor did it appear to favor the State's case when it instructed the jury regarding the factors it could consider in determining the threat faced by the defendant.

At trial, the jury was instructed that "[i]n determining whether a reasonable person acting under the same circumstances would have believed that a threat of likely death or serious bodily injury was present,

you must consider all of the circumstances known to the defendant. You should consider these circumstances as they were . . . presented to the defendant at the time, and not necessarily as they appear upon detached reflection. One factor that you may consider in determining whether the threat existed is whether the defendant could have completely and safely left the area without any risk to himself or others." T 221.

"A trial judge's primary duty in charging the jury is to clarify the issues of the case, and to assist the jury in understanding the questions to be resolved." *State v. King*, 136 N.H. 674, 677 (1993) (quotations omitted). In New Hampshire, trial court judges do not "comment upon the evidence or upon the credibility of witnesses in the charge to the jury." *Id*. (quotations and brackets omitted). This is so because "the influence of the trial judge on the jury is necessarily and properly of great weight and his slightest word or intimation is received with deference, and may prove controlling." *Id*.

Here, the trial court did not comment on the evidence, nor did it indicate through its jury instructions that it favored the State's theory of the case. First, the instruction told the jury that it *must* consider all of the circumstances known to the defendant in determining the likelihood of the threat he faced. T 221. This instruction required the jury to consider all of the facts and circumstances surrounding the defendant's encounter with the victim in reaching its verdict.

Next, the instruction told the jury that it *should* consider the circumstances as the defendant experienced them in the moment, and not as they appear to the jury on "detached reflection." *Id*. However, unlike the instruction before it, this instruction did not require the jury to only consider the circumstances in the moment and not in hindsight, but instead

recommended that they do so. The trial court did not emphasize any particular circumstance in this instruction, but instead requested that the jury consider the circumstances from the defendant's perspective as they occurred on the day of the charged conduct.

Then, the instruction told the jury that a factor it *may* consider in determining what circumstances the defendant faced was whether the defendant could have left the area of the victim's threat safely without risk to himself or others. *Id*. The *may* in this instruction did not emphasize this factor over any other factor or circumstance that the jury was instructed to consider. Nor did it require the jury to consider this factor. *Id*. Thus, the instructions on this defense allowed the jurors to consider any circumstances they deemed relevant. Likewise, the instructions did not require the jurors to only consider the defendant's ability to leave the area of the threat, or any other specific factor or circumstances in determining if the defendant was justified in pointing a firearm at the victim.

Additionally, this Court considers jury instructions in their entirety in determining whether the trial court unsustainably exercised its discretion in charging the jury. *Littlefield*, 152 N.H. at 334. Here, the trial court's instructions required the jury to consider all the circumstances from the defendant's perspective and, because jurors are presumed to follow the trial court's instructions, the jury could have reached the conclusion it did without considering the defendant's ability to leave the area. *State v. Woodbury*, 172 N.H. 358, 369 (2019). It is possible that the jury in this case determined that the victim did not threaten the defendant. Or, it may have determined that the victim's alleged threat to the defendant did not threaten death or serious bodily injury. Or, it may have determined that the victim

made the alleged threat, but that the defendant's intent in pointing a firearm at the victim was to place the victim in fear of imminent bodily injury. Or, it may have determined that the victim posed no threat at all to the defendant because the victim did not engage in conduct that would lead a reasonable person to believe that he or she was faced with death or serious bodily injury.

Given the myriad of circumstances that could have led the jury to conclude that the defendant was not justified in displaying a firearm at the victim, this Court cannot conclude that the trial court's instruction on the defendant's ability to leave the area, when considered in light of all of the trial court's jury instructions, improperly bolstered the State's case or improperly commented on the evidence.

II. THE TRIAL COURT SUSTAINABLY EXERCISED ITS DISCRETION IN ANSWERING THE JURY'S QUESTION BY REDIRECTING IT TO THE TRIAL COURT'S PRIOR INSTRUCTIONS.

A. Standard of Review.

"'The response to a jury question is left to the sound discretion of the trial court." *State v. Kelly*, 160 N.H. 190, 195 (2010) (quoting *State v. Poole*, 150 N.H. 299, 301 (2003). Thus, this Court reviews "the trial court's answer to a jury question under the unsustainable exercise of discretion standard." *Kelly*, 160 N.H. at 195. This Court reviews "the trial court's answer to a jury inquiry in the context of the court's entire charge to determine whether the answer accurately conveys the law on the question and whether the charge as a whole fairly covered the issues and law in the case." *State v. Stewart*, 155 N.H. 212, 214 (2007) (citation and quotations

omitted)). "When reviewing jury instructions, [this Court] evaluate[s] allegations of error by interpreting the disputed instructions in their entirety, as a reasonable juror would have understood them, and in light of all the evidence in the case." *State v. Leveille*, 160 N.H. 630, 631-32 (2010).

"[T]he general rule is that the trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion." *Goudreault v. Kleeman*, 158 N.H. 236, 250 (2009) (quotations and citation omitted). "It should address those matters fairly encompassed within the question." *Id*. (quotations and citation omitted). "Even if the supplemental instruction is shown to be a substantial error, [this Court] will only set aside a jury verdict if the error resulted in mistake or partiality." *Id*.

B. The Trial Court's Jury Charge, The Jury's Question, and The Trial Court's Answer.

In pertinent part, the trial court instructed the jury that, to find the defendant guilty of criminal threatening, it had to find that the State proved the following elements beyond a reasonable doubt: "one, the defendant placed, or attempted to place, another person in fear of imminent bodily injury; two, the defendant did so through physical conduct; three, the physical conduct involved the use of a deadly weapon; four, the deadly weapon was a firearm; and five, the defendant acted purposely, with respect to the first four elements." T 219.

After approximately an hour of deliberations, the jury asked the following question: "[i]s displaying the gun a crime by the definition/paperwork given to the jury? Or do you have to point the weapon at the person to meet the definition of the crime?" SA 41. The trial court answered the jury's question by responding that the trial court "had already provided you with the elements of the offense and [could not] define them any more narrowly in response to your question." SA 42.

As noted above, the defendant requested that the trial court answer the jury's question by telling the jury that "the State must prove by physical conduct that [the defendant] placed or attempted to place [the victim] in fear of imminent bodily injury, and that the physical conduct is pointing a firearm at [the victim]." T 232. The defendant reasoned that this answer tracked the language of the indictment. *Id*. The defendant also argued that pointing the jury back to the trial court's instructions amended the indictment by expanding what conduct the State had to prove to establish the elements in the indictment beyond a reasonable doubt. T 233. Notably, the defendant did not object to the trial court's instructions regarding the elements of the criminal threatening offense, including the trial court's instruction that the State had to prove beyond a reasonable doubt that the defendant's physical conduct "involved the use of a deadly weapon." T 220.

The State proposed that the trial court could simply answer the jury's question by saying "no," because the jury asked whether displaying a firearm was a crime and asked whether pointing a firearm at another person "[met] the definition of the crime?" T 235. The State reasoned that

answering no to both questions was permissible "under the definition of criminal threatening." *Id*.

The trial court justified its answer redirecting the jury to its instructions, finding that the instructions and the trial court's proposed answer did not prejudice the defendant at trial. T 237. Specifically, because the defendant did not argue he would have presented a different defense, or "would have called this witness[, or] I wouldn't have done this[, or] I would have rearranged things differently," T 236, if the indictment had charged the defendant with using the firearm instead of pointing the firearm, he had not established that he was prejudiced by the trial court's proposed answer. The trial court also found that one of the statutory elements of criminal threatening requires that the State prove that the defendant used the firearm in some manner. Given this statutory element, the trial court reasoned that the State did not need to prove the specific manner in which the defendant used the firearm, only that he used it. T 237-38.

C. The Trial Court's Answer Did Not Impermissibly Amend the State's Indictment.

In *State v. Elliot*, 133 N.H. 759, 764 (1990), this Court analyzed whether a trial court's jury instructions impermissibly amended a defendant's manslaughter indictment. This Court held that a trial court's jury instructions "impermissibly amend a grand jury's indictment if it allowed the jury to convict a defendant of a crime not charged in the grand jury's indictment." *State v. Elliot*. An impermissible amendment is one that changes the elements in a charged offense or adds an offense. *Id*.

"A trial judge may, however, amend a grand jury's indictment if the amendment is purely one of form, for such amendments do not jeopardize the right to be tried only on charges that have been passed on by a grand jury." *Id*. (internal citations, quotations, and citations omitted). "In between these two extremes is the amendment that does not alter the crime charged in an indictment, but changes an allegation in the indictment that has the effect of specifying and circumscribing the scope of the crime alleged; for instance, an allegation of how the crime was committed." *Id*. (quotations and citations omitted). "Such an allegation is part of the indictment's substance, but it is not as protected from trial court amendment as an element of the offense charged." *Id*.

"[T]he test for determining whether changing such an allegation causes an impermissible amendment of the indictment is whether the change prejudices the defendant either in his ability to understand properly the charges against him or in his ability to prepare his defense." *Id*. (quotation and citations omitted).

Here, the trial court's answer directing the jury back to its elemental instructions did not amend the indictment because it did not fundamentally change any allegation in the indictment. Prior to deliberations, the jury heard the indictment brought against the defendant, which alleged, in part, that the defendant placed or attempted to place the victim in fear of imminent bodily injury "by pointing a firearm" at the victim. T 12-13. Then, during jury instructions, the jury heard the trial court define the crime of criminal threatening as having five elements, one of which was that the defendant's charged physical conduct "involved the use of a deadly weapon." T 218.

In *Elliot*, this Court held that the trial court's jury instruction that the State need only prove at trial that the defendant's acts caused the rifle to discharge and kill the victim, despite the indictment alleging that the defendant shot the victim in the head with a rifle, altered the indictment's substance because the trial court did not specify and circumscribe the scope of the alleged crime in its instructions. *Elliot*, 133 N.H. 763, 765. Here, unlike *Elliot*, the trial court did not amend the indictment in its answer to the jury's questions. The trial court's answer simply referred the jury back to its unchallenged jury instructions regarding the criminal threatening elements the State must prove at trial. This did not expand the State's indictment to allow the State to prove criminal threatening without proving that the defendant pointed the firearm at the victim.

Moreover, the jury's questions asked the trial court if, in general, displaying a firearm and pointing a firearm at another person met the definition of criminal threatening. The jury did not ask the trial court whether the State had to prove in this particular case that the defendant either displayed a firearm or pointed a firearm at another person to convict him of criminal threatening. Put simply, the jury was asking if the acts of displaying a firearm and pointing a firearm both satisfied the use element of criminal threatening.

Answering the jury's questions the way the defendant posed, by quoting the indictment, would not have answered the jury's general question. Thus, the trial court's answer referring the jury to its initial jury instructions regarding the elements of criminal threatening, which neither party challenged prior to, during, or following the jury charge, adequately

responded to the jury's question without fundamentally altering the indictment or the criminal threatening elements.

If this Court finds that the trial court's answer did amend the indictment, the defendant's argument still fails because the answer did not prejudice the defendant's theory of defense or surprise him at trial. As the trial court found, the defendant's defense at trial was, in part, that the defendant did not point his firearm at the victim. T 235. However, as the trial court also found, "if the indictment said use, and didn't say point, the trial . . . would have gone the same way. The alleged victim was saying, pointing. He was arguing, defendant never pointed. . . . If the defendant was going to get the defense that he wanted[,] just as a practical matter, he testified and got the defense instruction. It's difficult to see how the trial would go differently if it was the word use, than it did the – you can't point a firearm without using it." T 235-36.

Moreover, the defendant did not specifically allege to the trial court how he would have proceeded differently at trial had he known that the trial court would answer the jury's question the way that it did. Likewise, on appeal, the defendant has not asserted that he would have employed a different defense strategy had the indictment read "use of a firearm" instead of "pointed a firearm," or if defense counsel knew at trial that the jury would ask the question it did and that the trial court would answer the way that it did. Thus, the defendant's generalized claim that his defense strategy was prejudiced by the trial court's answer to the jury's question is far too speculative to be actually prejudicial. *See Knickerbocker*, 152 N.H. at 470 ("The defendant must show actual prejudice that is definite and not speculative.") (quotations and citations omitted).

Moreover, the defendant did not allege at trial and has not alleged on appeal that he did not understand the charge brought against him or that he was surprised by the amendment to the charge. *See State v. Johnson*, 130 N.H. 578, 586 (1988) (quotations and citations omitted) ("[A]n amendment to an indictment might be disallowed, or might constitute ground for a new trial, if the amendment surprises the defendant and this surprise prejudices his defense.").

Defense counsel knew before the trial court answered the jury's question that the trial court had instructed the jury that an element of criminal threatening was the defendant's use of a deadly weapon. T 218. Not only was defense counsel present when these instructions were read to the jury, T 218, but the trial court provided the parties an opportunity to review the proposed jury instructions and object to them prior to the jury charge, T 182. Moreover, defense counsel objected to two portions of the trial court's jury instructions prior to the jury charge, neither of which regarded the five elements of criminal threatening. T 183-201. As such, defense counsel could not have been surprised by the trial court's answer referring the jury back to its definition of the five elements of criminal threatening, given that defense counsel was aware of the trial court's instruction on the criminal threatening elements and had not challenged it. Therefore, even if the trial court's answer to the jury's questions amended the criminal threatening indictment, it did not prejudice or surprise the defendant at trial.

Accordingly, this Court should uphold the defendant's conviction.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the defendant's conviction below.

The State requests a fifteen-minute oral argument delivered by Audriana Mekula, Esq.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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May 2, 2023

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CERTIFICATE OF COMPLIANCE

I, Audriana Mekula, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,479 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

May 2, 2023 *<u>/s/ Audriana Mekula</u>*
Audriana Mekula

CERTIFICATE OF SERVICE

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

May 2, 2023 *<u>/s/ Audriana Mekula</u>*
Audriana Mekula

ADDENDUM TABLE OF CONTENTS

Question

Is displaying the gun a crime by the definition/paperwork given to the jury? or Do you have to point the weapon at the other person to meet the definition of the crime?

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Merrimack, ss.

STATE OF NEW HAMPSHIRE

V.

JOSHUA SHEA

217-2021-CR-00745

I have already provided you with the elements of the offense and cannot define them any more narrowly in response to your question.

May 24, 2022

Andrew R. Schulman,
Presiding Justice