

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2008-0840

State of New Hampshire

v.

Deborah Gelsi

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

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BRIEF FOR THE STATE OF NEW HAMPSHIRE

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THE STATE OF NEW HAMPSHIRE

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**ISSUE PRESENTED**

Whether it was plain error for the State to argue in closing that the evidence was uncontroverted and uncontradicted where there was no error because the comments addressed only the weight of the evidence and the fact that the six witnesses had not contradicted each other, and where even if there was error, the law is unsettled on this issue, the court's jury instructions cured any prejudice, and the evidence of guilt was overwhelming.

**STATEMENT OF THE CASE**

On November 30, 2007, the defendant, Deborah Gelsi, was charged by complaint with one misdemeanor count of simple assault. NOA 8.<sup>1</sup> See RSA 631:2-a (2007). Following a two-day jury trial in the Grafton County Superior Court (*Bornstein, J.*), the defendant was convicted as charged. JT-II 252-53. On November 6, 2008, the court sentenced the defendant to 30 days in the Grafton County House of Corrections, suspended for two years, and one year of probation, commencing forthwith. NOA 5. The court also ordered the defendant to pay restitution of \$638.71, to undergo a LADAC evaluation and follow all recommendations, to attend anger management counseling, and to have no contact with the victim, Rebecca Bernard, and no contact other than that authorized by the Family Division with the defendant's ex-husband, Arthur Gelsi. NOA 6. The defendant filed the instant appeal on November 24, 2008.

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<sup>1</sup> "DB" refers to the defendant's brief.

"JT-I" and "JT-II" refer to the transcripts of the jury trial on November 5-6, 2008.

"NOA" refers to the notice of appeal and appendix thereto.

## **STATEMENT OF FACTS**

### **A. The State's Case**

Around 2002 or 2003, the defendant and her then husband, Arthur Gelsi, moved to 51 Red Oak Hill Road in Wentworth. JT-I 41, 85. Shortly after that, they met Rebecca Bernard when they went into a store where Rebecca worked. JT-I 41. Rebecca and the defendant were friendly, and Rebecca sometimes babysat for the Gelsis' daughter, MG.<sup>2</sup> JT-I 41, 79.

In August of 2006, Arthur ended the marriage and moved out of the house. JT-I 85-86. The divorce, which was final in May of 2007, was very acrimonious. JT-I 85, 100. Although Rebecca had nothing to do with the breakup of the marriage, the defendant was upset because after her relationship with Arthur had ended, Rebecca and Arthur had begun dating and had then begun living together in a house in Rumney. JT-I 40, 42, 65, 78-79, 84, 101. Arthur was upset about custody issues, and he planned to go back to court to address those issues. JT-I 67, 102-03. He was also upset because he and the defendant had agreed that she could keep the house, that she would pay and then take over the mortgage, which was solely in Arthur's name, and that she would pay the 2007 real estate taxes, but she had failed to do so and the mortgage and taxes were in arrears. JT-I 66, 86-87, 103. At some point prior to November of 2007, Arthur filed a motion for

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<sup>2</sup> The Gelsis' daughter is a juvenile, so she will be referred to herein by her first and last initials.

contempt seeking to get possession of the house so he could protect his interests until he could sell the house. JT-I 86, 103.

On November 29, 2007, five-year-old MG called Arthur and asked if she could visit at his house. JT-I 87. The defendant and Arthur agreed that the defendant would drop MG off and then Arthur would bring MG back to the defendant's house at the end of the visit. JT-I 88. The defendant dropped MG off at Arthur's house around 6:30 p.m. JT-I 89. There were no problems at that time. JT-I 89. However, there had been problems in the past when Rebecca and Arthur had seen the defendant, so Rebecca asked Arthur to get the police to do a civil standby when they dropped MG off. JT-I 45, 88. Unfortunately, the Wentworth Police Department did not have an officer available, and Trooper Timothy Stevens at the New Hampshire State Police was too busy to go to a civil standby. JT-I 45-46, 163-64. He told Arthur to call again if there was an actual problem. JT-I 164.

Around 8:30 p.m., Arthur, Rebecca, and MG rode to the defendant's house in Arthur's two-door Lincoln Continental. JT-I 46-47. When they arrived, MG went into the house and then the defendant asked Arthur to come inside and get some boxes of his things. JT-I 47, 89-90. Arthur did not want to go inside, so he asked the defendant to bring the boxes out to the porch. JT-I 47, 89. Rebecca waited in the car while Arthur took the boxes off the porch, carried them to the car, and then put them in the trunk. JT-I 47, 89. When the defendant brought the last box out, Arthur took it and said, "Thank you." JT-I 90. At that point, the

defendant “started asking if [Rebecca] was in the car . . . in a very angry voice using profanity.” JT-I 90. The defendant slipped and fell, JT-I 48, 99-10, and then “storm[ed] off to the car and start[ed] pounding on the glass and on the door still calling profanities,” JT-I 91.

In the meantime, Rebecca had heard the defendant “yelling and screaming” and calling her names including “whore,” “slut,” “no good for nothing,” and “husband stealer,” so Rebecca had pushed the electric door lock button and locked the car doors. JT-I 50. The defendant continued yelling as she was pounding on the door and window next to Rebecca. JT-I 50. Arthur put the last box on the roof of the car because the trunk was full. JT-I 91. He was trying to open the driver’s side door so he could put the box in the back seat and leave before there was any more trouble. JT-I 50. Rebecca “really wasn’t thinking,” so instead of reaching over and opening just the driver’s side door, she “just automatically hit the button on the door,” which unlocked both doors. JT-I 76-77; *see also* JT-I 51, 106-07.

When the defendant heard the door lock click, she “flung open” the car door, grabbed Rebecca’s hair and yanked on it with one hand while she was using her other hand to hit Rebecca repeatedly in the head and shoulders and to rip Rebecca’s glasses off her face and break them. JT-I 51-53, 71-74, 91-92. Rebecca could smell the odor of alcohol as the defendant was assaulting her. JT-I 52. Rebecca put her hands and arms up to try to block the blows and she asked the defendant to please stop, but the defendant continued hitting and scratching

Rebecca's face and hands. JT-I 51-53. The defendant was also kicking Rebecca and trying to drag her out of the car. JT-I 54, 73. Rebecca kept trying to push the defendant away and "make her stop so [they] could get out of there." JT-I 53. Rebecca saw MG watching them, so she pushed the defendant really hard, the defendant backed away, and Rebecca closed the car door. JT-I 53, 55, 93.

In the meantime, Arthur was also yelling at the defendant to stop assaulting Rebecca, go back in the house, and leave them alone. JT-I 92. He just wanted to get out of there, and he did not try to help Rebecca because he was afraid that if he pulled the defendant off Rebecca, the defendant would falsely accuse him of assaulting her or throwing her down. JT-I 92-93, 108-10. Arthur also noticed MG watching right before Rebecca pushed the defendant out of the way and slammed the car door. JT-I 93-94. After she did, Arthur drove about a mile to Shawnee's General Store to try to get help, but the store was closed and the pay telephone was not working, so he drove home and then Rebecca called 911 and asked the dispatcher to send the police and an ambulance. JT-I 55-56, 93-94.

Officer Brett Miller from the Rumney Police Department arrived with an ambulance and two emergency medical technicians (EMTs). JT-I 56. Rebecca's head was sore and she had fairly deep scratches on her chin and the back of her hand, which took several weeks to heal. JT-I 56, 95. Her back also hurt for several weeks because it had gotten "wrenched" when the defendant tried to pull her out of the car. JT-I 56, 96. The EMTs cleaned up the scratches and checked

Rebecca's head. JT-I 56. Officer Miller told Rebecca and Arthur to call the New Hampshire State Police because the assault had occurred in Wentworth. JT-I 57.

Trooper Stevens offered to meet with Rebecca and Arthur later that night. JT-I 57. However, by that point, it was after 10:00 p.m. and Arthur had to get up at 3:00 a.m., so Rebecca agreed to meet Trooper Stevens the following evening, and Arthur agreed to write a statement and have Rebecca deliver it. JT-I 57, 97, 165, 167. The following evening, Trooper Stevens took Rebecca's statement and noted that Rebecca had a scratch on her chin and a scrape on the back of her hand. JT-I 57, 167. He had a Plymouth officer take photographs of the injuries, but when he later went back to get the photographs, that officer had been deployed to Iraq and no one could find the camera, the film, or the photographs. JT-I 166-67.

In the meantime, the defendant had put the house in Wentworth up for sale. JT-I 104. In August of 2007, Ericka Superchi and David Beaudet agreed to rent the house with an option to purchase, and they signed a purchase and sales agreement. JT-I 112-13, 158. The defendant agreed to have all her property out of the house and to have it clean so Ericka and David could move in on December 1, 2007. JT-I 116. However, when Ericka and David arrived at the house that afternoon with a truck loaded with their household items, the defendant and MG were there along with a lot of the defendant's property and her cat. JT-I 114-16.

The defendant told David and Ericka that she was sorry about the condition of the house, but she had been busy and had "had a rough night last night" because

she had “beat[en] up her ex-husband’s girlfriend in her driveway in front of her daughter.” JT-I 114-15. The defendant also said “that she [had] broke[en] [the girlfriend’s] glasses and punched her in the face.” JT-I 114-15; *see also* JT-I 138. While the defendant was talking, she had a drink in her hand. JT-I 129. David asked the defendant why she had done what she had when it had not gotten her anywhere and had kept her from getting the house ready for them to move in. JT-I 138. The defendant did not answer. JT-I 138. The defendant then told David and Ericka that they could move her things downstairs or into the garage, and that she would be back in a week to get her property and her cat. JT-I 114, 117, 139.

Ericka and David were not happy because the house was not ready for them to move in, and Ericka was “deathly allergic to cats,” but they had to unload the truck because David had to return it to his employer the following day. JT-I 116, 126, 132-33. Ericka left to get more of their household items while David moved the defendant’s property out of the way, cleaned the house, and unloaded the truck. JT-I 117, 133, 139.

In the meantime, Trooper Stevens and Trooper Joshua McCarthy had been unaware that the defendant was moving, so they had gone to the house to arrest the defendant earlier in the day, but she had not been home. JT-I 170. An hour or two after David and Ericka arrived and the defendant left, the troopers returned and told David that they were looking for the defendant. JT-I 139, 171. When David asked why, the troopers said it was none of his business, so, even though he

thought he knew why the troopers were there, he did not tell them what the defendant had said about assaulting Rebecca. JT-I 141, 146, 155. David told the troopers that the defendant had left a couple hours earlier, that he thought she was going to Massachusetts, and that she was supposed to be back in a week to get the rest of her property. JT-I 139, 171. David also called Ericka, told her that the police were at the house looking for the defendant, and asked Ericka for the defendant's telephone number. JT-I 117. The troopers looked around the house and then told David to call them if he saw the defendant. JT-I 140, 171. The troopers also asked him not to tell the defendant they were looking for her because they were afraid that she would decide not to return. JT-I 140, 171-72.

In early December, Arthur was plowing the driveway at the defendant's former neighbor's house when Ericka walked over, told him that their driveway was not being plowed properly, and asked if he would plow for them. JT-I 70-71, 97. Arthur agreed to plow for no cost because he was a part owner of the property where Ericka and David were tenants, and because he knew that the driveway was easy to plow. JT-I 97-98, 144. A few days later, Ericka and David told Rebecca and Arthur that the defendant had been "bragging that she had beat the crap out of [Rebecca]." JT-I 60; *see also* JT-I 99, 107-08.

Throughout December, the troopers drove by the house "quite frequently" and they also talked to David and Ericka several times a week. JT-I 140, 157. Although the defendant had promised to pick up her property and her cat in a

week, David and Rebecca had not seen the defendant since they had moved in, and she had never called them. JT-I 140. However, on January 3, 2008, about three hours after the defendant was arrested and then released, she left two angry voice mail messages on David and Ericka's answering machine. JT-I 142, 157-58, 191, 195. The defendant was yelling, and she said that she had been arrested, JT-I 142, 158, "that she wasn't very happy they had not let her know there was a warrant for her arrest," JT-I 130-31, that it was their fault that she had been arrested, JT-I 131, and that she might try to evict them, JT-I 151, 158. At that point, half the January rent had been paid, but the other half was two days late. JT-I 151, 158.

David called Trooper McCarthy and told him that the defendant had left two voice mail messages, JT-I 192, that she was yelling, JT-I 199, that "she was blaming him . . . for getting arrested," JT-I 198, and that she was "threatening them and stating that she was going to throw them out of the house," JT-I 192; *see also* JT-I 152, 158. David asked Trooper McCarthy if the defendant could evict them, and Trooper McCarthy said that was a civil matter. JT-I 152-53, 192.

On January 5, 2008, the defendant filed a formal demand for rent and an eviction notice requiring David and Ericka to move out by February 4. JT-I 127, 153. On January 12, the defendant finally picked up her cat. JT-I 117. After that, David and Ericka paid the rest of the rent for January, but they did not pay for February or March; they then filed counter-claims against the defendant, and they

moved out of the house in March or April of 2008. JT-I 119, 126. Eventually, they agreed to pay the defendant \$3,000 “just to be done with her.” JT-I 133-34.

In the meantime, Ericka had told Trooper Stevens that the defendant had said that she had been unable to move everything out of the house and clean “because she had beaten the snot or beaten the crap out of somebody on Friday night.” JT-I 172-73; *see also* JT-I 155, 157. On February 20, 2008, Trooper Stevens asked Ericka and David to write statements about the defendant’s admissions. JT-I 117, 173. Ericka wrote a statement for both of them to sign, but David was no longer living with her, so it took her until March 17 to get David’s signature, and until March 19 to get the statement back to the trooper. JT-I 121, 142, 146-47, 174. In the statement, Ericka wrote that the defendant had said that she “had one hell of a Friday night,” that she had beaten up her ex-husband’s girlfriend, that she had broken Rebecca’s glasses, and that she had “nearly pulled Rebecca out of the truck.” JT-I 122-23.

## **B. Relevant Events During Trial**

During defense counsel’s opening statement, he disputed the credibility of Rebecca and Arthur’s story about the assault and said that it was motivated by the acrimonious divorce and post-divorce litigation. JT-I 36-37. He also disputed the credibility of David and Ericka’s story about the defendant’s confession, and said that it was motivated by the landlord-tenant dispute. JT-I 38. However, he also

said that there was no disagreement that David and Ericka had “entered into a rent-to own agreement” with the defendant and had moved into the house on December 1, 2007. JT-I 37. Then, during his cross-examinations of Rebecca and Arthur, defense counsel had both of them agree that Rebecca had nothing to do with the breakdown of the marriage. JT-I 65, 101. He also had Ericka and David agree on cross-examination that there had been an ongoing landlord-tenant dispute between December 1, 2007, and March 17, 2008. JT-I 125, 153-54. Defense counsel did not, however, move to dismiss for insufficient evidence. JT-II 206, 213.

Prior to closing arguments, defense counsel asked the court to supplement its instruction on the defendant’s right to remain silent to include language that there could be many reasons why a defendant might not want to testify. JT-II 210-11. After the court refused to do so, JT-II 211, defense counsel agreed with the court’s plan to instruct the jury before closing arguments, JT-II 213. The court then instructed the jury, in relevant part:

A person accused of a crime has an absolute right not to take the . . . witness stand to testify. The fact that the defendant did not testify must not be considered by you in any way in dealing with this case. The burden is on the State to prove the defendant guilty beyond a reasonable doubt. The defendant has no obligation to present any evidence or to prove her innocence.

You will hear the lawyers discuss the facts and the law in their arguments to you. These arguments are not evidence. Their purpose is to help you understand the evidence and the law. If the lawyers state the law differently from the law as I explain it to you, then you must follow my instructions and ignore the statements of the lawyers. If the lawyers state the evidence differently from the way

in which you recall it, then you should follow your own memory of what the evidence was.

JT-II 215-16. Later in the instructions, the court said:

Under our constitutions, all defendants in criminal cases are presumed to be innocent until proven guilty beyond a reasonable doubt. The defendant does not have to prove her innocence. The defendant enters the courtroom as an innocent person and you must consider her to be an innocent person until the State convinces you beyond a reasonable doubt that she is guilty of every element of the alleged offense.

JT-II 218-19. It also said, "If you have a reasonable doubt as to whether the State has proved any one or more of the elements of the crime charged, you must find the defendant not guilty." JT-II 219. The court further said, "In deciding whether the State has proven the charge against the defendant beyond a reasonable doubt, you must decide the credibility of the witnesses. That is, it is up to you to decide who to believe." JT-II 220. After defining the crime, it said, "The State must prove each part of the definition beyond a reasonable doubt." JT-II 222.

Following those instructions, defense counsel argued in closing that Arthur, Rebecca, Ericka, and David had all met, that the connection between them had been their "common disdain" for the defendant, and that they had "talked about this assault that never happened." JT-II 231. He also said that although the State might argue that the jury should believe them because their stories were "pretty much the same," they had all had time "to get their stories straight," so the consistency did not "take away their motive to tell . . . something other than the truth," "make their stories anymore plausible," or "make their stories consistent

with the other evidence in this case.” JT-II 233. He further argued that Rebecca and Arthur were motivated by the post-divorce disputes, JT-II 224, 228-29, and that David and Ericka were motivated by the landlord-tenant disputes, JT-II 231-32. He also said, “I can’t tell you how Becky got those scratches. And that’s not [the defendant’s] obligation. It is not her burden.” JT-II 226. Defense counsel did not argue, however, that Rebecca had been responsible for the divorce, that Arthur and Rebecca had not taken MG home on November 29, 2007, that they had not asked for a civil standby, that Rebecca had not stayed in the car at the defendant’s house, or that Ericka and David had not rented the house and moved in on December 1, 2007. JT-II 224-234.

At the beginning of the prosecutor’s closing argument, she said:

What did the evidence show in this case? That is what we evaluate. And the evidence in this case is uncontroverted, uncontradicted and uncontradicted by all the witnesses. Uncontradicted because Arthur Gelsi and Rebecca Bixby Bernard, that night, w[ere] doing everything in their power to avoid a confrontation. All they wanted to do was drop off [MG]. When the defendant said she had some boxes, that was fine. Arthur was happy to pick them up. But, then, all he wanted to do was pick up the boxes, get them in his car and leave. These are two people trying so hard to avoid a confrontation that they called the local police and the state police for a civil standby. People who are about to make up stories and frame people don’t ask the police to come and watch. But that’s what they did. Uncontroverted, that is fact.

JT-II 234.

The prosecutor later said: “And you would think that Rebecca Bernard would be somebody [the defendant] would be happy her ex-husband found,

because she was someone [who] she herself had entrusted her daughter with. Evidence is uncontradicted, Rebecca Bernard had nothing to do with the breakup of the marriage.” JT-II 235. At that point, defense counsel objected, arguing that the State was misleading the jury because evidence that “there was a condition specifically to prevent Rebecca from having unsupervised contact” with MG had previously been excluded. JT-II 236. The prosecutor then said, “He was the one who got out on cross-examination that Rebecca Bernard had nothing to do with the breakup of this relationship whatsoever.” JT-II 237. The court said it believed the objection was to earlier part of the statement, and then asked, “[S]o there’s no objection to . . . the State arguing that Rebecca had nothing to do with the break up of the marriage.” JT-II 237. Defense counsel said, “Of course not.” JT-II 237.

After the court struck the other argument and gave a curative instruction, the prosecutor said: “So the night in question, the evening in question, Arthur Gelsi and Rebecca Bernard go . . . . to the house. And Rebecca Bernard stays in the car. Uncontroverted. She did not get out of that car.” JT-II 238. The prosecutor then described the assault in great detail, JT-II 238-39, explained that the State did not have to prove anything other than the injuries alleged, JT-II 240-41, and argued that it defied common sense to believe that an allegation of assault could never be credible when there were pending child custody issues or that Rebecca would commit perjury simply because she loved Arthur and wanted to help, JT-II 241.

Still later in the argument, the prosecutor said:

So let's look at Ericka Superchi and David Beaudet, the two people [who] are also committing perjury. You have to feel bad for them. What is the uncontroverted evidence? Again, uncontradicted, uncontroverted evidence, they see a house. They go to [a] realtor. They look to move into the house. They move into the house on . . . a renting to own [agreement]. They signed [a] purchase and sale agreement. They're good tenants. His part of the rent gets deducted from his paycheck. I mean, that's a landlord's dream to have somebody whose rent gets deducted from [his] paycheck.

JT-II 243. The prosecutor then talked about the sequence of events between December 1, 2007, when David and Ericka moved in to the house, and January 3, 2008, when the defendant called upset because she had been arrested. JT-II 243-48. The prosecutor then closed her argument by saying:

We would ask that you find the evidence proving the defendant committed these crimes beyond a reasonable doubt. Obviously, we know that the officers wouldn't be lying as well. Six witnesses, six witnesses all agree on the testimony, uncontroverted. Thank you.

JT-II 248. The defendant never objected to any of those arguments.

Following closing arguments, the court again instructed the jury, in relevant part:

If you have a reasonable doubt as to whether the State has proved any one or more of the elements of the offense charged, you must find the defendant not guilty. However, if you find that the State has proved all of the elements of the offense charged beyond a reasonable doubt, then you should find the defendant guilty.

JT-II 249.

**SUMMARY OF THE ARGUMENT**

The prosecutor did not commit plain error when she argued that certain evidence was “uncontradicted” and “uncontroverted.” When the comments are viewed in context, it is clear that the prosecutor was commenting only on the weight of the evidence and the fact that the six witnesses had not contradicted each other, not implying that the defendant had any burden to testify, to present witnesses, or to present evidence. Further, even if the prosecutor could be said to have been commenting on the defendant’s failure to contradict the claims, the defendant was not the only person who could have done so. Moreover, even if it could be found that there was error, the error could not be plain because this issue has not been clearly decided by this Court and other jurisdictions are split on the issue. Lastly, even if it could be found that there was error and that the error was plain, the defendant cannot prove that the comments were so prejudicial that they affected the outcome of the case because the comments were about collateral matters and the evidence of guilt was overwhelming.

**ARGUMENT**

**THE STATE DID NOT COMMIT ERROR BY ARGUING THAT THE EVIDENCE WAS “UNCONTRADICTED” AND “UNCONTROVERTED” BECAUSE THE COMMENTS ADDRESSED ONLY THE WEIGHT OF THE EVIDENCE AND THE FACT THAT THE SIX WITNESSES HAD NOT CONTRADICTED EACH OTHER.**

The defendant argues that the court violated her “rights to silence, due process, and a fair trial” under part I, article 15 of the New Hampshire Constitution and the Fourth and Fourteenth Amendments to the United States Constitution when it failed to *sua sponte* declare a mistrial after the prosecutor argued in closing that the evidence was “uncontroverted” and “uncontradicted.” DB 9-10. She first analyzes this issue under the test this Court generally applies to determine whether claims of improper prosecutorial argument require reversal. DB 14-15 (citing *State v. Ellsworth*, 151 N.H. 152 (2004)). Under that test:

[This Court] must determine whether the prosecutor’s remark amounted to an impermissible comment upon the defendant’s decision not to testify. If the prosecutor’s remark was impermissible, [it] must then establish whether the error requires reversal of the verdict. In doing so, [it will] balance the following factors: (1) whether the prosecutor’s misconduct was isolated and/or deliberate; (2) whether the trial court gave a strong and explicit cautionary instruction; and (3) whether any prejudice surviving the court’s instruction likely could have affected the outcome of the case.

*Ellsworth*, 151 N.H. at 155 (quotation and citation omitted).

The defendant, however, concedes that this issue is not preserved. DB 19. That being the case, the foregoing standard of review does not apply here.

When a defendant defaults on [her] obligation [to protect her own interests] by failing to make a contemporaneous objection to questionable comments in the prosecution's closing argument the raise-or-waive rule applies. Afterthought claims of improprieties allegedly occurring during the summation are reviewed under the notably ungenerous plain error standard. Consequently, reversal is justified only if the illegitimate portion of the closing argument so poisoned the well that the trial's outcome was likely affected.

*United States v. Taylor*, 54 F.3d 967, 977(1st Cir. 1995) (quotation and citation omitted). Under the plain error rule, before this Court may "exercise [its] discretion to correct errors not raised in the trial court":

(1) there must be an error; (2) the error must be plain; and (3) the error must affect substantial rights. If all three of these conditions are met, [this Court] may exercise [its] discretion to correct a forfeited error, *only* if a fourth criterion is met: the error must seriously affect the fairness, integrity or public reputation of judicial proceedings. [This Court] use[s] this rule sparingly, limiting it to those circumstances in which a miscarriage of justice would otherwise result. [It will] look to the federal courts' application of the federal plain error rule to inform [its] application of the state rule.

*State v. Panarello*, 157 N.H. 204, 207 (2008) (quotations, citations, and brackets omitted). "[T]he plain error review standard requires a defendant to establish the underlying requisites necessary to overturn his conviction." *State v. Hebert*, 158 N.H. 306, 315 (2009). The defendant has failed to do so here.

"The right against self-incrimination is violated only when 1) it was the prosecutor's manifest intention to refer to the defendant's silence, or 2) the remark was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's silence." *United States v. Cotnam*, 88 F.3d 487, 497

(7th Cir. 1996); *see also Rodriguez v. State*, 753 So. 2d 29, 38 (Fla. 2000) (“A constitutional violation occurs . . . if either the defendant alone has the information to contradict the government evidence referred to or the jury ‘naturally and necessarily’ would interpret the summation as a comment on the failure to testify”). “While a prosecutor may not make a comment which is fairly susceptible of being interpreted as referring to the defendant’s failure to testify, this does not mean that he or she is prohibited from commenting on the uncontradicted nature of the evidence.” *Williams v. State*, 987 So. 2d 1, 8 (Fla. 2008). “The state is not prohibited from calling the jury’s attention to any portion of the evidence that stands uncontradicted.” *State v. Alvarez*, 897 A.2d 669, 676 (Conn. App. Ct.), *cert. denied*, 902 A.2d 1069 (Conn. 2006).

Here, there was no misconduct or error because, contrary to the defendant’s claim, when the disputed comments are reviewed in context, it is clear that the prosecutor’s “references to ‘uncontroverted’ facts, testimony, and evidence were not directed toward [the defendant’s] decision not to testify; they merely referred to the fact that the evidence was uncontradicted.” *Gavin v. State*, 891 So. 2d 907, 983 (Ala. Ct. Crim. App. 2003) (quotation and citation omitted), *cert. denied*, 891 So. 2d 998 (Ala. 2004), *cert. denied*, 543 U.S. 1123 (2005). Defense counsel’s theme during closing arguments was that Arthur and Rebecca were lying about the assault in order to gain an advantage in the ongoing post-divorce proceedings, that David and Ericka were also lying about the defendant’s confession to the assault

to gain an advantage in the landlord-tenant dispute, that their stories were consistent because they had talked, and that there were inconsistencies between their pretrial statements, their former testimony, and their trial testimony. JT-II 224-234.

In response to those arguments, the prosecutor said in the first paragraph of her opening argument: “[T]he evidence in this case is uncontroverted, uncontradicted and uncontradicted *by all the witnesses.*” JT-II 234 (emphasis added). Therefore, when that statement is viewed in the context of the defense’s claims, it is clear that the prosecutor was countering the defense argument by arguing that the witnesses’ statements must be true because they did not contradict each other in any way.

Following the first statement, the prosecutor said, “Uncontradicted because Arthur Gelsi and Rebecca Bixby Bernard, that night, w[ere] doing everything in their power to avoid a confrontation.” JT-II 234. She then described all the steps Arthur and Rebecca had taken to avoid conflict, including taking the boxes as the defendant had asked and “call[ing] the local police and the state police for a civil standby.” JT-II 234. She then said, “People who are about to make up stories and frame people don’t ask the police to come and watch. But that’s what they did. Uncontroverted, that is fact.” JT-II 234. Defense counsel had not disputed that Arthur and Rebecca had requested a civil standby, and the trooper witnesses had confirmed that they had. Therefore, it is clear that the prosecutor was not arguing

that it was uncontroverted that they were trying to avoid a dispute, but was instead arguing that it was uncontroverted that Arthur and Rebecca had tried to get a civil standby, a claim the defendant was not in a position to personally dispute.

The next disputed comment was, “Evidence is uncontradicted, Rebecca Bernard had nothing to do with the breakup of the marriage.” JT-II 235. “[T]his was a fact that even defense counsel conceded and attempted to use in [the defendant’s] favor.” *Williams*, 987 So. 2d at 9. See JT-I 65, 101 (counsel elicited Arthur and Rebecca’s agreement to that statement); JT-II 237 (defense counsel answered, “Of course not” when asked, “[S]o there’s no objection to the . . . State arguing that Rebecca had nothing to do with the breakup of the marriage”).

Therefore, it cannot be argued that the comment alluded to the defendant’s failure to put on evidence or testimony to dispute that helpful fact.

In the next disputed comment, the prosecutor said: “So the night in question, the evening in question, Arthur Gelsi and Rebecca Bernard go . . . . to the house. And Rebecca Bernard stays in the car. Uncontroverted. She did not get out of that car.” JT-II 238. Following that comment, the prosecutor described the assault in great detail without ever using the words “uncontroverted” or “uncontradicted.” JT-II 238-39. Therefore, it is clear that the prosecutor was arguing only that the fact that Rebecca stayed in the car, a fact that was never disputed by the defense, was “uncontroverted,” not that the evidence of the assault was “uncontroverted.”

The next disputed comment was made by the prosecutor in response to defense counsel's argument that Ericka and David had a motive to lie to gain an advantage in the landlord-tenant dispute. The prosecutor said:

So let's look at Ericka Superchi and David Beaudet, the two people [who] are also committing perjury. You have to feel bad for them. What is the uncontroverted evidence? Again, uncontradicted, uncontroverted evidence, they see a house. They go to [a] realtor. They look to move into the house. They move into the house on . . . a renting to own [agreement]. They signed [a] purchase and sale agreement. They're good tenants. His part of the rent gets deducted from his paycheck. I mean, that's a landlord's dream to have somebody whose rent gets deducted from [his] paycheck.

JT-II 243. The prosecutor then talked about the sequence of events between December 1, 2007, when David and Ericka moved in to the house, and January 3, 2008, when the defendant called upset because she had been arrested, JT-II 243-44, without ever using the words "uncontroverted" or "uncontradicted."

Therefore, it is clear that the prosecutor was arguing only that it was "uncontradicted" that Ericka and David entered into a rent-to-own agreement with the defendant and had moved into her house, "fact[s] that even defense counsel conceded and attempted to use in [the defendant's] favor." *Williams*, 987 So. 2d at 9. *See* JT-I 125-128, 150-53 (defense counsel questions Ericka and David about the landlord-tenant relationship); JT-II 229-232 (defense counsel argues that Ericka and David have a motive to lie because of the landlord-tenant dispute).

The last two disputed comments came at the end of the prosecutor's argument when she said:

We would ask that you find the evidence proving the defendant committed these crimes beyond a reasonable doubt. Obviously, we know that the officers wouldn't be lying as well. Six witnesses, six witnesses all agree on the testimony, uncontroverted. Thank you.

JT-II 248. Although it is true that this Court has held “that it is improper for prosecutors to profess to the jury their personal opinions as to the credibility of a witness,” *State v. Bujnowski*, 130 N.H. 1, 4 (1987), and “that prosecutor’s engage in improper argument when they argue that police officers risk their careers by lying to the jury,” *State v. Mussey*, 153 N.H. 272, 276 (2006), the prosecutor here did not do so. Defense counsel had already argued that Arthur and Rebecca were motivated to lie by the custody dispute, and that David and Ericka were motivated to lie by the landlord-tenant dispute, and the prosecutor had already disputed those claims. Therefore, it is clear from the context that the prosecutor was arguing that “the officers wouldn’t be lying as well” to further those goals, and that the testimony of all six witness was consistent because they did not contradict each other. Accordingly, “the prosecutor’s comments were not improper because [she] was permitted to point out evidence that was uncontested by the defendant.” *Alvarez*, 897 A.2d at 676.

In any event, even if it could be said that the prosecutor’s comments were susceptible to being interpreted as indirect comments on the defendant’s silence:

When a prosecutor’s comments, fairly viewed, are susceptible to two plausible meanings, one of which is unexceptionable and one of which is forbidden, context frequently determines meaning. Where feasible, a reviewing court should construe ambiguity in favor of a proper meaning:

A court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

This rule of construction has heightened desirability in the absence of a contemporaneous objection for, when the target of the comments does not interrupt and register a timely objection, it seems especially appropriate to give the arguer the benefit of every plausible interpretation of her words. [A court should be] especially reluctant to fish in the pool of ambiguity when, as now, the complaining party failed to bring a dubious comment, easily corrected on proper notice, to the immediate attention of the trial court.

*Taylor*, 54 F.3d at 980 (quotations and citations omitted).

Here, even if it could be argued that the prosecutor's comments that the evidence was "uncontroverted" or "uncontradicted" were susceptible of being interpreted as comments on the defendant's failure to testify or present evidence and witnesses, the above explanations were equally plausible. Therefore, this Court should give the prosecutor "the benefit of every plausible [unexceptionable] interpretation of her words." *Id.*; cf. *United States v. Grosz*, 76 F.3d 1318, 1326 (5th Cir. 1996) ("[t]he prosecutor's intent is not manifest if there is some other, equally plausible explanation for the remark.").

In any event, "[t]here were [two] other eyewitnesses to the [assault]; therefore, contrary to [the defendant's] contention, [s]he was not the only person who could have refuted [Arthur's testimony or Rebecca's] testimony about the [assault]." *Id.* Arthur, Rebecca, the defendant, and MG were all present when the assault occurred. Arthur could have disputed Rebecca's testimony, and Rebecca

could have disputed Arthur's testimony. *Cf. Hill v. State*, 980 So. 2d 1195, 1199 (Fla. Dist. Ct. App. 2008) (prosecutor's comment that the officer's testimony was uncontradicted could only refer to the defendant's failure to testify where the State did not call the additional witnesses who could have disputed the officer's testimony and the defendant had no obligation to do so). MG, although only five years old at the time of the assault, could have been found competent to testimony, and could have disputed at least some of the testimony of Arthur and Rebecca. Arthur's and the defendant's lawyers and court personnel could have disputed the testimony about the divorce and post-divorce litigation.

Further, the real estate agent could have disputed the testimony about the arrangement between the defendant and Ericka and David. The troopers could have disputed Ericka and David's testimony about the condition of the house. And, court personnel or the lawyers involved in the landlord-tenant dispute could have disputed the testimony about the ongoing litigation. Therefore, the comments could not be deemed improper even if they had referred to the defendant's failure to testify or present witnesses and evidence. *See State v. McMurry*, 143 P.3d 400, 403 (Idaho Ct. App. 2006) ("A prosecutor's general references to uncontradicted evidence do not necessarily reflect on the defendant's failure to testify, where *witnesses other than the defendant* could have contradicted the evidence."); *cf. Cotnam*, 88 F.3d at 497 ("comment that the government's evidence on an issue is 'uncontradicted,' 'undenied,' 'unrebutted,' 'undisputed,'

etc., will be a violation of the defendant's Fifth Amendment rights if the only person who could have contradicted, denied, rebutted or disputed the government's evidence was the defendant himself"); *State v. McKinney*, 33 P.3d 234, 243 (Kan. 2001) ("A prosecutor's assertion that evidence is uncontradicted is impermissible only if it is highly unlikely that anyone other than the defendant could rebut the evidence" (quotation and citation omitted)).

Moreover, here, unlike in *Girts v. Yanai*, 501 F.3d 743 (6th Cir. 2007), and *State v. Ellsworth*, 151 N.H. 152 (2004), cases relied on by the defendant, it is clear that the prosecutor neither directly said, nor indirectly implied, that the defendant had a burden to call witnesses, to testify, or to present evidence. See *Girts*, 501 F.3d at 755 (prosecutor said: (1) "There has been no evidence offered to say that these people are incorrect. None at all"; (2) "the defendant had no less than three occasions to tell the police that he had ordered the cyanide"; and (3) "there is only one person [who] can tell you how [the cyanide] was introduced, and that's the defendant"); *Ellsworth*, 151 N.H. at 155 (prosecutor argued: "there's one person [who] knows exactly how he made his foot go and touch the victim's private parts. That is the defendant. It is not the victim's job to try to explain it to you" (brackets in original omitted)). Therefore, it is clear that there was nothing improper about the comments made by the prosecutor. *United States v. Kuehne*, 547 F.3d 667, 690 (6th Cir. 2008) (there is "nothing improper about highlighting uncontroverted testimony" so long as the prosecutor does not suggest that the

defendant “had the burden of proving his innocence”); *State v. McNair*, 554 S.E.2d 665, 679-80 (N.C. Ct. App. 2001) (prosecutor’s comment that the evidence was “totally uncontradicted” was “directed solely toward the defendant’s failure to offer evidence to rebut the State’s case, not at the defendant’s failure to take the stand himself”).

In any event, even if there was error, it cannot be said that the error was plain. “For the purposes of the plain error rule, ‘an error is plain if it was or should have been obvious in the sense that the governing law was clearly settled to the contrary.’” *Panarello*, 157 N.H. at 209 (quoting *State v. Lopez*, 156 N.H. 416, 424 (2007)). “When the law is not clear at the time of trial and remains unsettled at the time of appeal, a decision by the trial court cannot be plain error.” *Panarello*, 157 N.H. at 209. “‘Plain’ as used in the plain error rule is synonymous with clear or, equivalently, obvious.” *Id.* (quotation and citation omitted).

Even assuming that the defendant had been the only person who could have disputed the evidence, this Court has never specifically held that it is necessarily improper for a prosecutor to argue that the evidence is uncontradicted under those circumstances. In *State v. Dymond*, 110 N.H. 228 (1970), the prosecutor had “referred to the fact that the complaining witness had herself testified, without objection by the defendant, that she was the defendant’s daughter, and then commented that the ‘defense didn’t see fit to bring forward any evidence to indicate there wasn’t a daughter-father relationship here.’” *Id.* at 230. “Upon

objection, the Court inquired: ‘Well you don’t mean to infer that the fact that the defendant failed to testify . . . can be used as an inference of guilt?’; to which the prosecutor responded, ‘Absolutely not.’” *Id.* The prosecutor then “ continued: ‘There are many ways in which the defense could have brought forward evidence aside from the defendant—.’” *Id.* The court “interposed with a statement that the burden of proof of all the elements of the crime was on the State.” *Id.*

This Court held that there was “no error” where no “improper inferences from the defendant’s failure to testify . . . were expressly suggested, any such purpose was promptly disclaimed by the State, and the charge adequately instructed the jury concerning the defendant’s right to remain silent.” *Id.* at 231.

This Court then said:

If this were a case where only the defendant himself could contradict the testimony of the complainant that she was his daughter, a purpose on the part of the prosecutor to suggest an improper inference *might* be a necessary conclusion. But the record in this case does not compel such a conclusion.

It should be recognized, however, that argument that the State’s evidence is uncontradicted *may* constitute a violation of the defendant’s constitutional rights requiring a conviction to be set aside.

*Id.* (emphasis added); *see also Gavin*, 891 So. 2d at 981 (“federal courts characterize comments as either direct or indirect, and, in either case, hold that an improper comment may not always mandate reversal”). Therefore, because this Court used the terms “might” and “may,” rather than absolute terms in *Dymond*, which has not been called into question by subsequent cases, it should not

conclude “that this language made it so obvious as to render the law clearly settled.” *Panarello*, 157 N.H. at 210 (quotation, citation, and brackets omitted); *see also Lopez*, 156 N.H. at 912 (citation omitted) (court could not conclude that the error in questioning a witness about another witness’s credibility was plain where it had previously held that doing so, “while not to be encouraged, was within the trial court’s discretion and was not error” in that case).

Further, as demonstrated by the parenthetical references above and below, there is “a split among the jurisdictions that have considered the issue.” *Lopez*, 156 N.H. at 912. *See Kuehne*, 547 F.3d at 690 (“nothing improper about highlighting uncontroverted testimony” so long as the prosecutor does not suggest that the defendant “had the burden of proving his innocence”); *Gavin*, 891 So. 2d at 981 (reversible error only if there was “a virtual identification of the defendant as the person who did not become a witness,” which “will not exist where the prosecutor’s comments were directed toward the fact that the State’s evidence was uncontradicted, or had not been denied”); *Conahan v. State*, 844 So. 2d 629, 640 (Fla.) (“A prosecutor may . . . comment on the uncontradicted or uncontroverted nature of [the evidence] during closing argument so long as it is not susceptible to being interpreted as a comment on the defendant’s failure to testify”), *cert. denied*, 540 U.S. 895 (2003); *Taylor v. State*, 677 N.E.2d 56, 60 (Ind. Ct. App.) (“statements made by the State as to the uncontradicted nature of the State’s evidence do not violate a defendant’s Fifth Amendment rights” “as long as the

State focuses on the absence of any evidence to contradict the State's evidence and not on the accused's failure to testify" (quotation and citation omitted), *transfer denied*, 690 N.E. 2d 1178 (Ind. 1997); *Longoria v. State*, 154 S.W. 3d 747, 765 (Tex. Crim. App. 2004) ("A prosecutor's statement that the evidence is 'uncontroverted' or 'not contested' has been interpreted as a comment on the failure to testify"); *but see State v. Hodges*, 671 P.2d 1051, 1054 (Idaho 1983) (the rule against commenting on a defendant's failure to testify "does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses"); *People v. Fields*, 538 N.W.2d 356, 367 (Mich. 1995) (a prosecutor may comment that evidence is "uncontroverted" or "undisputed" even if the defendant is the only person who could have disputed the evidence); *State v. Quinn*, 871 S.W.2d 80, 81 (Mo. Ct. App. 1994) ("Comments indicating the evidence is 'uncontroverted' or 'uncontradicted' are not direct, indirect, or certain references to a defendant's failure to testify"); *State v. Ferguson*, 450 N.E.2d 265, 267-68 (Ohio 1983) (prosecutor's remarks were not improper because they "concern[ed] evidence that was uncontradicted not only by virtue of the fact that appellee did not testify, but also by any evidence whatsoever"); *Myers v. State*, 133 P.3d 312, 329 (Okla. Crim. App. 2006) ("It is not improper for a prosecutor to comment on State's evidence which is uncontroverted"), *cert. denied*, 549 U.S. 1120 (2007); *Proffit v. State*, 193 P.3d 228, 240-41 (Wyo. 2008) (prosecutor may comment "upon the state of the

evidence including a defendant's failure to introduce material evidence or to call logical witnesses," and "may point out that certain evidence is uncontroverted, or that there is no evidence on a certain point"). "The second criterion [of the plain error rule], therefore, is not met." *Panarello*, 157 N.H. at 210.

Moreover, even assuming there was error and the error was plain, "to satisfy the burden of demonstrating that an error affected substantial rights, the defendant must demonstrate that the error was prejudicial, *i.e.*, that it affected the outcome of the proceeding." *Lopez*, 156 N.H. at 425; *see also United States v. Dominguez Benitez*, 542 U.S. 74, 81-82 (2004) (a defendant must demonstrate a reasonable probability of a different outcome in order to prove that the error "affected his substantial rights"). She has failed to do so.

In determining whether a prosecutor's miscues in final argument require reversal under this hard-to-satisfy [plain error] standard, this [C]ourt considers all the attendant circumstances, paying special heed to factors such as (1) the extent to which the prosecutor's conduct is recurrent and/or deliberate; (2) the extent to which the trial judge's instructions insulated the jury against, or palliated, the possibility of unfair prejudice; and (3) the overall strength of the prosecution's case, with particular regard to the likelihood that any prejudice might have affected the jury's judgment.

*Taylor*, 54 F.3d at 977. Here, there is no basis to find that reversal is required.

First, although the comments were repeated several times, there is no reason to conclude that the prosecutor intentionally drew attention to appellant's silence at trial. Second, despite the lack of an objection, the . . . judge instructed the jury with painstaking care regarding the government's burden of proof, appellant's presumed innocence, and h[er] constitutional right to refrain from testifying. Among other things, the judge admonished that ["the fact that the defendant did not testify must not be considered by [the jury] in any way"]. [This

Court can be] confident that this explicit instruction was sufficient to combat any impermissible inference that might have been drawn from the prosecutor's statements.

*Id.* at 980. *See* JT-II 215-16, 218-20, 222 (instructions on the burden of proof, presumption of innocence, constitutional right not to testify, and fact that lawyers' arguments are not evidence given right before the closing arguments); JT-II 240 (instruction on outcome if State either met or failed to meet its burden given directly following the State's closing argument).

"Last-but far from least, the possibility that the comments, even if misconstrued, affected appellant's substantial rights is diminished by the potency of the government's proof." *Taylor*, 54 F.3d at 980 (internal citation and parenthetical phrase omitted). As demonstrated in the statement of facts, Rebecca's "testimony was unequivocal and corroborated on many points," *Id.*, by the testimony of Arthur, Ericka, David, and two troopers. It is also worth noting that although defense counsel had requested a supplement to the instruction on the burden of proof, the disputed comments "w[ere] not one of the comments [the defendant] objected to at trial, thus indicating that, at the time [they were] made, [the defendant] did not believe the remark[s] to be prejudicial." *Gavin*, 891 So. 2d at 984. Therefore, [i]n view of the substantial evidence against appellant, [this Court should] find it highly unlikely that the jury could have been swayed by the prosecutor's amphibolous remarks." *Taylor*, 54 F.3d at 980.

**CONCLUSION**

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

The State requests a 15-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

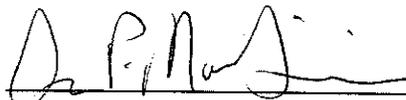
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September 29, 2009

I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Stephanie Hausman, Assistant Appellate Defender, counsel of record.



Susan P. McGinnis