

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-150

The State Of New Hampshire

v.

Scott Traudt

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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ISSUES PRESENTED

I. Whether the trial court committed plain error by allowing two witnesses to testify that the defendant consumed alcohol and threatened violence shortly before he committed the charged acts, where the defendant was the first to elicit substantive evidence of the threat, and he was intoxicated when he committed the charged crimes.

II. Whether the trial court correctly refused to suppress evidence that the defendant, who was the passenger in a car illegally stopped by the police, eventually got out of the car, yelled at the police, interfered with field sobriety tests that were being performed upon the driver, and punched a police officer in the head.

III. Whether the trial court correctly refused to dismiss the case because the prosecutor allegedly engaged in burden shifting during closing argument, where the defendant has not provided a transcript of closing argument.

STATEMENT OF THE CASE

A grand jury in Grafton County indicted the defendant on two counts of simple assault, both arising out of an incident in which he assaulted two police officers.

NOA 6; DBA Attachment A.¹ See RSA 631:2-a, I(a) (2007); RSA 651:6(g) (Supp. 2008). He was also charged by information with one count of disorderly conduct.

NOA 8. See RSA 644:2, II(d) (2007). The information alleged that he substantially interfered with a police investigation by arguing with police officers and refusing to return to his car during a roadside stop. NOA 8.

Following a three-day trial, a jury convicted him on one of the simple assault charges and on the disorderly conduct charge. The superior court (Bornstein, J.) sentenced him to an incarcerative term of one to three years on the simple assault conviction, NOA 7, and to pay a \$1,000 fine, with \$500 suspended, on the disorderly conduct conviction, NOA 9. This appeal followed.

¹ References to the notice of appeal will be made as NOA ____.
References to the defendant's brief will be made as DB ____, and the appendix thereto as DBA ____.
References to the transcript of trial will be made as T ____.
References to the transcript of the testimony of officers Smolenski and Gaspard on October 21, 2008, will be made as O ____.
References to the appendix to the State's brief will be made as SBA ____.

STATEMENT OF FACTS

A. The Charged Conduct.

On the evening of January 13, 2007, the defendant and his wife, Victoria, met their friend, Dr. Randy Shatsky, at the Canoe Club, a restaurant near Lebanon, New Hampshire. T 167. The trio socialized and then decided to go dancing at Club Electra in West Lebanon. T 167. They arrived at Electra at approximately 10:00 p.m. T 168. Once inside, all of them consumed alcohol and Victoria danced with some coworkers who happened to be there. T 5, 170, 191.

At some point, Richard LaRocque, Electra's security chief, saw the defendant stumble and concluded that he had consumed too much alcohol. T 5. So, he went over to the defendant, told him that he would not be served any more alcohol, and asked him to go home. T 5. The defendant did not express any disagreement with LaRocque's request. T 6. But approximately 20 to 30 minutes later, LaRocque saw the defendant with a beer in his hand, so he told the defendant that the defendant had to leave. T 6. The defendant then left with Victoria and Shatsky. T 22. On the way out, the defendant told the cashier, Cheryl Curtis, that although LaRocque apparently thought of himself as a tough guy, the defendant was going to bring 35 of his Navy SEAL "buddies" back to Electra to show LaRocque "what tough [was] all about." T 22, 24. The defendant also informed Curtis that he had been a Navy SEAL. T 24. Curtis immediately alerted LaRocque. T 22.

Meanwhile, the defendant and Victoria got into their car and followed Shatsky out of the parking lot. T 207. It was approximately 12:30 a.m. on January 14, 2007. T 43. The Traudts and Shatsky proceeded through the traffic light at the intersection of South Main Street, Route 12-A, and Benning Street, with Shatsky in the lead and Victoria driving the Traudts' car. T 44-45, 207. Lieutenant Phillip Roberts was parked at the traffic light, waiting to make a left turn onto Benning Street, when he saw Victoria pass through the intersection after the light governing her direction of travel had turned red. T 44. So, Roberts activated his blue lights and initiated a roadside stop. T 44-45.

Once Victoria pulled to the side of the road, Roberts approached her car, explained that he had stopped her for passing through a red light, and asked to see her license and registration. T 46. He detected a "very strong odor of alcohol coming from inside the car." T 46. So, he asked Victoria if she had consumed any alcohol that night. T 46. She told him that she had three drinks earlier in the evening. T 46. She also apologized, saying that she had thought that the light was yellow when she passed through it and that she was arguing with the defendant because he had danced with another woman in the nightclub. T 47. During this exchange, the defendant was "extremely agitated," and was twisting and turning his body in the car. T 47.

At that point, Roberts asked Victoria if she would be willing to perform some field sobriety tests (she said yes, T 50) and requested that a second cruiser come to the scene, a request apparently necessitated by a departmental policy requiring two police officers to be present if field sobriety tests were going to be conducted on the side of

the road. T 48. Corporal Richard Smolenski arrived approximately 20 seconds later and Roberts informed him that the defendant appeared "a bit belligerent and upset." O 5; T 48-49.

When Victoria got out of the car, she tripped and had to use the car to regain her balance. T 49. In the meantime, Smolenski shut off the front strobe lights on both cruisers. O 6. Roberts then administered the horizontal gaze nystagmus test. T 174. During this test, the defendant watched what was going on by turning around in the car. O 11.

After Roberts administered the HGN test, the defendant got out of the car. T 52, 79, 130; O 11. Because it was departmental policy to have the occupants of a car remain inside it while a driver was undergoing field sobriety tests, Smolenski went over and asked the defendant to get back into the car. T 52; O 11. After some two or three requests, which the defendant refused to accept, Roberts went over and joined Smolenski in asking the defendant to get back into the car. T 54. Roberts also explained that if the defendant did not comply with the officers' requests, he could be charged with disorderly conduct. T 54; O 13. The defendant, however, said that he did not have to comply with the officers' requests and told them that Victoria had certain rights. T 54; O 13. Roberts then informed the defendant that he was being given one last chance (after some four to six requests) to get back into the car; otherwise, he would be arrested. T 54; O 19. The defendant did not respond. Instead, he stared at Roberts. T 55.

At that point, the situation turned violent. As Roberts and Smolenski reached to grab the defendant's arms to place him in handcuffs, he stiffened his body. T 56. Then, after they had grabbed his arms, he dragged the two officers toward a nearby fence. T 56; O 22. Both officers asked him to stop resisting, but he replied, "[Y]ou want to fight. I'll fight." T 58; O 21. He then managed to free his right arm and to punch Roberts on the side of the head. T 58-59; O 22-23. The blow knocked Roberts to the ground. T 59. When Roberts regained awareness of what was happening, he saw that the defendant had lifted Smolenski up off the ground. T 59; O 25. Fearing that the defendant was about to "body slam" Smolenski to the pavement, a fear that Smolenski shared, Roberts used his knee to strike the defendant's rib cage. T 59; O 26. But those efforts were futile, and the defendant slammed Smolenski onto the pavement, landing on top of him. T 60-61. Then fearful that the defendant was about to punch Smolenski, Roberts got on top of the defendant and twice discharged his pepper spray. T 61; O 28. The spray had no effect. T 61; O 29. The defendant then reached for Roberts's duty belt. T 62. Worried that the defendant was trying to grab his gun, Roberts punched him on the head. T 62.

At that point, the defendant said, "Okay. I'm done." T 63; O 29. But it turned out that he was not quite done. He stiffened his body again, tried to get to his feet, wiggled, and continued to fight. T 63-64; O 30. Smolenski then struck the defendant with his baton, after which both officers finally were able to handcuff him. T 64; O 30-32.

Toward the end of the melee, another Lebanon police officer, Daniel Gaspard, arrived. O 83-84. Gaspard transported the defendant to the police station. O 33, 85, T 64. At the police station, Roberts asked the defendant if he was injured or required medical treatment, but the defendant declined medical treatment. T 65; O 36.

B. The Defendant's Case.

At trial, both Victoria and the defendant testified during the defendant's presentation of evidence. Victoria said that she was not aware that the defendant had been told that he could not consume any more alcohol at Club Electra. T 171. And she testified that the defendant did not threaten anyone on the way out of the club. T 173. She denied having said that she and the defendant were fighting at the time of the stop, instead claiming that they were on their way to pick up their daughter from the babysitter. T 171.

With respect to the stop itself, she claimed that after she performed the HGN test, she decided to remove her boots so that she could perform the walk and turn test in her bare feet. T 175, 183. The ground was covered in ice. T 182. She opined that by bending over to remove her boots, she may have led the defendant to believe that she had fallen, prompting him to get out of the car and ask the officers if she was ok. T 175. She said that the officers radioed for backup and yelled at the defendant once he got out of the car. T 177. Soon, according to Victoria, another cruiser arrived and the officers rushed at the defendant, tackling him to the ground, punching him,

spraying him, and beating him with a baton. T 178-80. She insisted that the defendant had not behaved aggressively at all. T 179.

The defendant gave similar testimony. After telling the jury that he was a security contractor who had broken his ankle during a trip to Afghanistan in December 2007, the defendant disputed nearly every aspect of the officers' testimony. T 200-04. He said that he did not threaten anyone inside Club Electra and denied that Victoria had passed through a red light. T 205, 207. He said that he thought Victoria had fallen during the field sobriety tests, so he got out to ask if she was ok. T 211-12. He said that as soon as he got out of the car, Smolenski and Roberts began screaming at him, rushed him from two angles, and threw him to the ground. T 212, 214. He said that he was punched repeatedly and tried to protect himself. T 216. He claimed that the officers emptied an entire can of pepper spray into his face, knocked out a disc in his neck, gave him a concussion that resulted in seizures, and caused his rotator cuff to be torn. T 217, 219. He acknowledged, however, that he declined medical treatment when he arrived at the police station and that he did not seek medical treatment at the house of corrections. T 249-50.

C. Pertinent Procedural Posture.

Before trial, the defendant filed a motion to suppress. DBA Attachment A. Therein, he noted that during criminal proceedings against Victoria, the Lebanon District Court had concluded that the roadside stop (described above) was unconstitutional because Roberts lacked reasonable, articulable suspicion to initiate it.

DBA Attachment A, at ¶3. In light of the district court's holding, the defendant asserted, and the State agreed, that the doctrine of collateral estoppel prevented the State from relitigating the constitutionality of the stop. DBA Attachment A, at ¶8; DBA Attachment B, at 3. So, the issue became whether, by punching Roberts, the defendant committed a new crime. DBA Attachment B, 3-4. If the defendant committed a new crime, the new crime exception to the exclusionary rule would apply to allow the admission of evidence derived from the stop. See DBA Attachment B, at 3-4.

The State argued that the assault on Roberts was an intervening event that purged the taint of the illegal stop, and that therefore evidence derived from the stop could be admitted. DBA Attachment B, at 3-4; SBA 5. The defendant took the opposite view. DBA Attachment A. The parties agreed that the court did not need to conduct a hearing and could rely upon Roberts's report to find the facts necessary to decide the merits of the defendant's motion. DBA Attachment B, at 1. After considering the parties' arguments and Roberts's report, the trial court (Houran, J.) agreed with the State. DBA Attachment B, at 3-4. It ruled, "By acting to evade arrest and by assaulting police officers, the defendant's independent actions purged the taint of the initial illegal stop of Ms. Tr[a]judt." DBA Attachment B, at 4.

SUMMARY OF THE ARGUMENT

I. The defendant contends that the trial court erred by allowing two witnesses to testify that he consumed alcohol and threatened violence shortly before he committed the charged acts. This argument must be rejected for several reasons. First, the defendant was the first to elicit substantive evidence of the threat, asking several questions about it during LaRocque's cross-examination. Therefore, he invited any error that may have occurred. Second, the defendant never objected to the evidence at issue and parties may use redirect examination to respond to questions and answers raised on cross-examination, so there was no plain error. Third, with respect to evidence that the defendant consumed alcohol at Club Electra, the defendant was intoxicated during the commission of the charged crimes, so evidence of his alcohol consumption was part and parcel of the criminal charges against him. Therefore, it was admissible.

II. The trial court correctly refused to suppress evidence that the defendant, who was a passenger in a car illegally stopped by the police, interfered with field sobriety tests that were being performed upon the car's driver and punched a police officer on the head. Both of those actions constituted new crimes that purged the taint of the initially illegal stop.

III. The defendant contends that the prosecutor engaged in burden shifting during closing argument and that the trial court erred by refusing to dismiss the case on that basis. This Court cannot review that claim, however, because the defendant has not provided a transcript of closing argument.

ARGUMENT

I. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR BY ALLOWING TWO WITNESSES TO TESTIFY THAT THE DEFENDANT CONSUMED ALCOHOL AND THREATENED VIOLENCE SHORTLY BEFORE HE COMMITTED THE CHARGED ACTS BECAUSE THE DEFENDANT WAS THE FIRST TO ELICIT SUBSTANTIVE EVIDENCE OF THE THREAT, AND HE WAS INTOXICATED WHEN HE COMMITTED THE CHARGED CRIMES.

The defendant contends that the trial court erred by admitting evidence that he had consumed alcohol and threatened violence at Club Electra. DB 15. He argues that testimony about alcohol consumption and threats of violence amounted to character or propensity evidence that was inadmissible under New Hampshire Rule of Evidence 404(b). DB 11-15. This argument must be rejected.

A. The Defendant May Not Have Appellate Review of His Claim Because He Invited The Error Of Which He Now Complains.

To the extent the defendant takes issue with testimony concerning his threat to return to Club Electra with 35 Navy SEALs to show LaRocque who was “tough,” he invited any error that may have occurred. LaRocque and Curtis both testified during the State’s case in chief, with LaRocque taking the stand first. T 3, 19. During LaRocque’s direct examination, the State did not elicit testimony concerning the defendant’s threat. T 3-7. However, during the defendant’s cross-examination of LaRocque, defense counsel asked, “Just as an aside, did [the defendant] threaten to come back with any of his buddies and clean the place up or anything like that?” T 11. LaRocque responded, “Not to me. No.” T 11. Defense counsel then asked, “No. You didn’t hear anything like that right?” T 12. LaRocque said, “Well, I heard about

it but it wasn't towards—you know, he didn't say it to me.” T 12 (emphasis added). Pressing the issue further, defense counsel inquired, “Right. No—you didn't hear—I mean, you didn't even hear it said to anybody, right?” T 12. LaRocque said, “No.” T 12. Thus, it was the defendant—not the State—who was the first to elicit evidence that the defendant had aggressively threatened to return to the club with his associates to “clean the place up.” T 11-12.

Because the defendant was the first to elicit the substance of the threat, he cannot now claim that its admission was error. “Under the invited error doctrine, a party may not avail himself of error into which he has led the trial court, intentionally or unintentionally.” State v. Goodale, 144 N.H. 224, 227 (1999) (quotations omitted); see State v. Bain, 145 N.H. 367, 370 (2000) (explaining invited error).

When an error is invited, a party may not have it reviewed even under the rigorous plain error standard. In short, the invited error doctrine precludes all appellate consideration of an issue. United States v. Griffin, 294 Fed. Appx. 393, 395 (10th Cir. 2008) (“plain error review is available for forfeited issues, but waiver bars a defendant from appealing an invited error” (quotation omitted)); Naeem v. McKesson Drug Co., 444 F.3d 593, 609 (7th Cir. 2006) (“when error is invited, not even plain error permits reversal”); United States v. Stewart, 185 F.3d 112, 127 (3d Cir. 1999) (“we would reverse only if the court committed plain error in instructing the jury on the counts where Stewart did not invite the error”); United States v. Mitchell, 85 F.3d 800, 807-08 (1st Cir. 1996) (holding that the court would not conduct a plain error analysis where the error was invited); United States v. Griffin, 84 F.3d 912, 924-25

(7th Cir. 1996) (explaining that affirmatively representing that a litigant does not have an objection to a trial court's proposed ruling waives all claims of error including plain error, whereas simply remaining silent in the face of objectionable trial conduct does not waive plain error consideration); United States v. Hubbard, 22 F.3d 1410, 1421 n.4 (7th Cir. 1994) (invited error, even if plain, will not be subject to reversal); Federal Crop Ins. Corp. v. Hester, 765 F.2d 723, 727 (8th Cir. 1985) (where the error was invited, court of appeals refused to conduct a plain error analysis); Jordan v. State, No. A-7413, 2001 WL 488000, at * 2 (Alaska Ct. App. May 9, 2001) ("Because Judge Fuld admitted the report after an express invitation by Jordan's trial counsel and Jordan now urges reversal on that basis on appeal, this claim arguably presents a claim of invited error that we should not review, even for plain error."); People v. McDonald, 852 N.E.2d 463, 468-69 (Ill. App. Ct. 2006) (invited error precludes consideration of even plain error claims); State v. Wilkinson, 474 S.E.2d 375, 396 (N.C. 1996) (indicating the invited error doctrine precluded consideration of alleged error, even under the plain error standard); State v. Redding, 172 P.3d 319, 325 (Utah Ct. App. 2007) ("Under the doctrine of invited error, we have declined to engage in even plain error review when counsel, either by statement or act, affirmatively represented to the trial court that he or she had no objection to the action taken." (Quotation and brackets omitted.)). But see Vigil v. State, 859 P.2d 659, 664 (Wyo. 1993) (conducting plain error analysis even though error was invited).

Although this Court has never expressly held that the invited error doctrine precludes even plain error review, there is no persuasive reason for it to turn its back

on the overwhelming weight of authority. In State v. Emery, 152 N.H. 783 (2005), this Court indicated that it would look “to the United States Supreme Court’s standards for the application of the federal plain error rule to inform [its] application of the State rule.” Id. at 786. As many of the courts cited in the previous paragraph have recognized, the United States Supreme Court’s standards for application of the federal plain error rule compel the conclusion that invited errors will not be reviewed on appeal, even under the rigorous plain error standard. See, e.g., Mitchell, 85 F.3d at 807.

In United States v. Olano, 507 U.S. 725 (1993), the United States Supreme Court held that a party waives a right when he makes an “intentional relinquishment or abandonment” of it, id. at 733. A party merely “forfeits” a right, however, if he fails to make a timely assertion of it. Id. The distinction between waiver and forfeiture is critical because, according to the Supreme Court, “mere forfeiture, as opposed to waiver, does not extinguish an error [for purposes of plain error review]” Id. at 733-34. In other words, under Olano, where a defendant forfeits an objection by failing to interpose a contemporaneous objection, appellate courts will apply a plain error analysis, but where a defendant waives an objection by affirmatively taking some action to introduce or agree to the evidence being challenged on appeal, appellate review is unavailable. Cf. Mitchell, 85 F.3d at 807. Accordingly, because Olano dictates the approach taken by an apparent majority of jurisdictions and because this Court has indicated that it will look to the United States Supreme Court’s application of the federal plain error rule, it should join the majority

of jurisdictions in holding that plain error review is available for forfeited issues, but waiver bars a defendant from appealing an invited error.

B. Even If This Court Concludes That The Invited Error Doctrine Does Not Apply, The Trial Court Did Not Commit Plain Error By Allowing LaRocque And Curtis To Testify About The Defendant's Alcohol Consumption And Threatening Behavior.

The defendant appears to assign error to the admission of two pieces of evidence: (1) evidence that he drank alcohol at Club Electra; and (2) evidence that he threatened to return to Club Electra with some of his friends. DB 11-15. Both pieces of evidence were introduced through LaRocque and Curtis, each of whom testified that the defendant had consumed alcohol and threatened violence at Club Electra. T 11-15, 22. Importantly, however, at no point did the defendant object to their testimony. To the contrary, as set forth above, he even was the first to have elicited some aspects of it. T 11-12. Because the defendant did not object to the testimony at issue, his appellate arguments are not preserved. See State v. Ryan, 135 N.H. 587, 588 (1992) (contemporaneous objection needed for preservation).

Since the defendant's arguments are not preserved, this Court will reverse only if the trial court committed plain error. Sup. Ct. R. 16-A.

The plain error rule allows [this Court] to consider errors not brought to the attention of the trial court. However, the rule should be used sparingly, and should be limited to those circumstances in which a miscarriage of justice would otherwise result. For [this Court] to find error under the rule: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

State v. Lopez, 156 N.H. 416, 424 (2007) (citations omitted). Once this Court finds “that there was error, and that the error was plain, the burden is on the defendant to prove that the error affected substantial rights.” Emery, 152 N.H. at 787. “Generally, to satisfy this burden, the defendant must demonstrate that the error was prejudicial—that it affected the outcome of the proceeding.” Id. The defendant cannot satisfy this test. The State will begin with the defendant’s arguments concerning his consumption of alcohol. It will then address his arguments concerning the threat to return to the club and engage in violence.

1. The Trial Court Did Not Commit Plain Error By Admitting Evidence That The Defendant Consumed Alcohol At Club Electra.

The defendant contends that it was plain error, under New Hampshire Rule of Evidence 404(b), for the trial court to have admitted evidence that he drank alcohol at Club Electra. DB 11-15. This argument must be rejected.

First, the trial court did not err. Lopez, 156 N.H. at 424 (first prong of plain error test requires an inquiry into whether the trial court erred). Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Under Rule 404(b), evidence of other acts is inadmissible unless: (1) it is relevant for a purpose other than to show the person’s bad character or disposition; (2) there is clear proof that the person committed the other crimes or acts; and (3) the prejudicial

effect of the evidence does not substantially outweigh its probative value. State v. Pepin, 156 N.H. 269, 277 (2007) (quotation omitted).

Here, the defendant's consumption of alcohol was within minutes, or at most a few hours, of the charged act. T 6. And he was under the influence of alcohol when he assaulted Roberts and Smolenski. In fact, Smolenski specifically linked the defendant's consumption of alcohol to his intrusive behavior and the assault on Roberts when he testified that the defendant's "aggressive behavior was . . . indicative of intoxication." O 34. Perhaps more important, even during booking at the police station, the defendant "had kind of the standard bloodshot, watery eyes and the slurred speech that [the police] deal with when people are intoxicated [because of] alcohol." O 34. Therefore, the defendant's consumption of alcohol minutes before he assaulted Roberts and Smolenski was not an inadmissible prior wrongful act within the meaning of Rule 404(b). Instead, it was part and parcel of the episode that formed the basis of the assault and disorderly conduct charges against him. See generally 2 J. Weinstein & M. Berger, Weinstein's Federal Evidence ¶ 404.20[2][b], at 404-46.4 – 404-46.7 (J. McLaughlin, ed., LexisNexis 2d ed. 2009) (Federal Rule of Evidence 404(b) does not apply to intrinsic evidence, e.g. conduct that is part of the charged criminal episode or preliminary to the charged criminal episode and "contributes to an understanding of the event in question"); see N.H. R. Ev. 102 (decisions of federal courts involving the Federal Rules of Evidence may be helpful in analyzing problems and issues that arise under the New Hampshire Rules of Evidence). Cf. State v. Martin, 138 N.H. 508, 518 (1994) (Rule 404(b) did not apply where a prior threat was part of the charged act);

State v. Kulikowski, 132 N.H. 281, 287 (1989) (same). Therefore, evidence of the defendant's alcohol consumption was admissible.

Further, consuming alcohol is not an unlawful, or even bad, act. Nor is it a crime. No witness testified that the defendant did something unlawful such as distributing alcohol to a minor or driving after drinking it. For that reason as well, Rule 404(b) should not apply in this case. See State v. Piety, No. E2008-00263-CCA-R3-CD, 2009 WL 3011107, at *8-*10 (Tenn. Crim. App. Sept. 22, 2009) (holding, on plain error review, that Rule 404(b) did not apply to testimony that a defendant took pills, citing the fact that the victim did "not say [that the defendant] took illegal drugs or improperly took prescription drugs"). Because the trial court did not commit error by admitting evidence of the defendant's alcohol consumption, his plain error claim must fail.

To the extent this Court concludes that the trial court erred, the error was not plain.

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. Generally, 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.

Lopez, 156 N.H. at 424 (quotations and ellipsis omitted).

Although this Court has applied Rule 404(b) in the context of cases involving the provision of alcohol to minors in order to induce them to have sex, see, e.g., State v. Glodgett, 144 N.H. 687, 695 (2002); State v. Hennessey, 142 N.H. 149, 157 (1997), the State has been unable to find any cases in which this Court has held that alcohol

consumption, alone, is a prior bad act within the meaning of Rule 404(b). Nor has the State been able to find any cases in which this Court has addressed the question whether evidence of alcohol consumption minutes before a charged act falls within the ambit of Rule 404(b), especially where the defendant was intoxicated during the charged act. Because this Court does not appear to have addressed the question presented here and because Weinstein's treatise, Piety, Martin, and Kulikowski all appear to support admitting the evidence at issue, any error cannot have been plain.

Even if this Court concludes that the trial court plainly erred by allowing LaRocque and Curtis to testify about the defendant's alcohol consumption, the defendant cannot meet his burden of showing that the error affected his substantial rights. "Generally, to satisfy this burden, the defendant must demonstrate that the error was prejudicial—that it affected the outcome of the proceeding." Emery, 152 N.H. at 787.

Here, any error did not affect the outcome of the proceeding. There was overwhelming evidence of the defendant's guilt. Roberts and Smolenski were present when the defendant committed the charged acts and, as set forth above, described the charged acts with significant consistency. Gaspard corroborated their version of events. True, Victoria and the defendant tried to paint themselves as the victims of rogue and overly aggressive police officers. But their stories contained inconsistencies, compare, e.g., T 176-77 (Victoria's acknowledgment that Smolenski spoke with the defendant first) with T 212 (defendant's assertion that both officers immediately started yelling at him "in concert"), and the prosecutor exposed their

biases, see, e.g., T 240, and the implausible nature of many of their claims, such as Victoria's assertion that she intended to perform the walk and turn test in her bare feet on an icy road, see T 182; see also T 249-50, 269. Moreover, the jury apparently did not find either the defendant or Victoria credible because it convicted him of both charged offenses, despite their protestations that the defendant did nothing wrong. Under these circumstances, nothing in the record suggests that the outcome would have been different if the jury had not heard about the defendant's consumption of alcohol at Club Electra.

Finally, the error, if any, did not affect the fairness and integrity of the proceedings for several reasons. Lopez, 156 N.H. at 424. First, the evidence of the defendant's guilt was overwhelming. Second, other courts have admitted this type of evidence. Third, evidence of alcohol consumption is not inherently prejudicial because it is unlikely to be so inflammatory as to trigger the "mainsprings of human action." State v. Yates, 152 N.H. 245, 249 (2005). Accordingly, the defendant's convictions should be affirmed.

2. The Court Did Not Commit Plain Error By Admitting Evidence That The Defendant Made Threatening Comments At Club Electra.

The defendant contends that it was plain error, under New Hampshire Rule of Evidence 404(b), for the trial court to have admitted evidence that he threatened to return to Club Electra with his associates to engage in violence. DB 11-15. This argument must be rejected.

To the extent this Court concludes that the defendant did not invite any error by being the first to elicit testimony about his threatening comments at Club Electra, he still cannot prevail. Allowing the State to ask LaRocque and Curtis questions about the defendant's threat—in response to his own questions about the subject—did not amount to plain error.

First, there was no error. Lopez, 156 N.H. at 424. The State addresses LaRocque's testimony first and then Curtis's.² During LaRocque's direct examination, the State did not elicit testimony concerning the defendant's threat to return to Club Electra with his associates. T 3-7. However, during the defendant's cross-examination of LaRocque, defense counsel asked, "Just as an aside, did [t]he [defendant] threaten to come back with any of his buddies and clean the place up or anything like that?" T 11. LaRocque responded, "Not to me. No." T 11. Defense counsel then asked, "No. You didn't hear anything like that right?" T 12. LaRocque said, "Well, I heard about it but it wasn't towards—you know, he didn't say it to me." T 12 (emphasis added). Pressing the issue further, defense counsel inquired, "Right. No—you didn't hear—I mean, you didn't even hear it said to anybody, right?" T 12. LaRocque said, "No." T 12. Thus, it was the defendant—not the State—who was the first to elicit substantive evidence that he had aggressively threatened to return to the club with his associates.

² LaRocque testified before Curtis. T 3, 19.

Once the defendant elicited this substantive evidence on cross-examination, the State was within bounds to inquire about it on redirect examination. See Vanni v. Cloutier, 100 N.H. 272, 276 (1956) (holding that redirect examination was proper where it was designed to respond to “the question and answer inquired about on cross examination”). See generally 98 C.J.S. Witnesses § 513 (2009) (“The scope of redirect examination is generally limited to subjects covered in cross-examination . . . or facts which the cross-examination brought out or injected into the case. Similarly, the same line of inquiry followed on cross-examination may be pursued.” (Footnotes omitted.)); see also Commonwealth v. Mendes, 806 N.E.2d 393, 404 (Mass. 2004) (“A witness may properly explain on redirect examination her testimony elicited on cross-examination.”); Commonwealth v. Patosky, 656 A.2d 499, 504 (Pa. Super. Ct. 1995) (holding that when a defendant delves into what would have been objectionable testimony on the Commonwealth’s part, the Commonwealth can probe into objectionable area).

In addition, it is worth pointing out that the State did not dwell on the subject during redirect examination. Instead, it asked only two questions, both of which mirrored the ones that defense counsel already had posed. See T 13-14 (“Q. You didn’t hear the defendant’s threat, but you said you heard about it? A. Yes. Q. What did you hear? A. Just what the attorney said here; that he was going to come back with some buddies and wreck the place or something or other.”). And, although the defendant now contends that all of this testimony, which he initiated, was harmful, he returned to the subject on re-cross-examination, eliciting the fact that the defendant

had made the threat to Curtis. T 14-18. Under these circumstances, where the defendant elicited the substantive evidence about which he now complains, the trial court did not err by allowing the State's re-direct examination of LaRocque.

With respect to Curtis's testimony, the State asked about the threat that the defendant had made, and it admittedly did so during direct examination. T 22. But as noted above, by the time Curtis testified about the threat, the defendant already had introduced it substantively through LaRocque. T 11-12. Therefore, Curtis's testimony was merely cumulative of evidence already offered by the defendant. Cf. State v. Young, 144 N.H. 477, 484 (1999) (concluding, in the course of a harmless error analysis, that a witness's testimony was cumulative because other witnesses already had testified to the same effect). So, the question here boils down to whether it was error for the trial court to have failed to exclude cumulative testimony sua sponte. The defendant cites no case law for the proposition that trial courts are required to exclude cumulative testimony sua sponte. Nor is the State aware of any. It necessarily follows that the trial court did not err.

To the extent this Court concludes that the trial court erred, the error was not plain.

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. Generally, 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.

Lopez, 156 N.H. at 424 (quotations and ellipsis omitted). Again, the State addresses LaRocque's testimony first and then Curtis's.

Any error with respect to LaRocque's testimony was not plain. The State's questions about the threat were a direct response to questions and answers that the defendant posed during cross-examination. Vanni, although a civil case, indicates that redirect examination is proper if it is designed to respond to a "question and answer inquired about on cross examination." Vanni, 100 N.H. at 276. Mendes and Patosky are to the same effect. In light of this legal authority, any error cannot have been plain.

With respect to Curtis's testimony, this Court has held that trial courts may exclude cumulative testimony. See, e.g., State v. Taylor, 141 N.H. 89, 98 (1996) (upholding the exclusion of cumulative evidence). But the State is unaware of any case law standing for the proposition that trial courts must sua sponte do so. Nor does the defendant cite any case law to that effect in his brief. Therefore, any error with respect to the admission of Curtis's testimony cannot have been not plain.

Even if this Court concludes that the trial court plainly erred by allowing LaRocque and Curtis to testify about the defendant's threatening behavior, the defendant cannot meet his burden of showing that the error affected his substantial rights. "Generally, to satisfy this burden, the defendant must demonstrate that the error was prejudicial—that it affected the outcome of the proceeding." Emery, 152 N.H. at 787. Here, the defendant elicited the testimony at issue, bringing the substance of the threat before jury. Because the defendant already had elicited the fact and substance of the threat, whatever follow-up questions the State may have

posed cannot have affected the outcome of the proceeding. Simply put, the cat was out of the bag.

Finally, the error, if any, did not affect the fairness and integrity of judicial proceedings. Lopez, 156 N.H. at 424. Because the defendant offered the evidence at issue, there is no basis to claim that the State or the court acted unfairly or heavily-handedly. Therefore, the defendant's conviction should be affirmed.

II. THE TRIAL COURT CORRECTLY REFUSED TO SUPPRESS EVIDENCE THAT THE DEFENDANT, WHO WAS A PASSENGER IN A CAR ILLEGALLY STOPPED BY THE POLICE, INTERFERED WITH FIELD SOBRIETY TESTS THAT WERE BEING PERFORMED UPON THE CAR'S DRIVER AND PUNCHED A POLICE OFFICER IN THE HEAD BECAUSE BOTH OF THOSE ACTIONS CONSTITUTED NEW CRIMES THAT PURGED THE TAIN OF THE INITIALLY ILLEGAL STOP.

Citing the fruit of the poisonous tree doctrine, the defendant contends that the trial court erred by refusing to suppress evidence obtained in connection the roadside stop. DB 16-19. This contention must be rejected.

When reviewing a trial court's ruling on a motion to suppress, this Court will accept the trial court's factual findings unless they lack support in the record or are clearly erroneous. State v. Hight, 146 N.H. 746, 748 (2001). It will consider the trial court's legal conclusions de novo. Id.

The fruit of the poisonous tree doctrine requires the exclusion from trial of evidence derivatively obtained through a violation of Part I, Article 19 of the New Hampshire Constitution [or the Fourth Amendment to the United States Constitution]. If the evidence in question has been obtained only through the exploitation of an antecedent illegality, it must be suppressed.

The purpose of the exclusionary rule is three-fold. It serves to: (1) deter police misconduct; (2) redress the injury to the privacy of the victim of the unlawful police conduct; and (3) safeguard compliance with State constitutional protections.

Nevertheless, there are exceptions to this rule. For instance, evidence will not be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is so attenuated as to dissipate the taint. In such cases, the question to be resolved is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

State v. Panarello, 157 N.H. 204, 207-08 (2008) (quotations and citations omitted).

In Panarello, this Court further explored the circumstances under which an exception to the exclusionary rule may exist, recognizing that

[t]he rationale of the exclusionary rule does not justify its extension to the extreme. The limited objective of the exclusionary rule is to deter unlawful police conduct, not to provide citizens with a shield so as to afford an unfettered right to threaten or harm police officers in response to the illegality. Extending the exclusionary rule to these circumstances gives a defendant an intolerable carte blanche. This result is too far reaching and too high a price for society to pay in order to deter police misconduct.

Id. at 208-09 (quotations, citations, brackets, and ellipsis omitted).

And so, this Court adopted the new crime exception to the exclusionary rule, id. at 209, noting that “[f]ederal and state courts alike have uniformly rejected the argument that trial courts should suppress evidence relating to the defendant’s violence or threatened violence toward police officers subsequent to an unlawful search or seizure or a warrantless entry,” id. at 208 (quotation omitted). Thus, “where the response to an unlawful entry, search or seizure has been a physical attack (or

threat of same) upon the officer, . . . the evidence of this new crime is admissible.” Id. (quotation and ellipses omitted).

Here, the trial court acknowledged that the original stop of the Traudts’ car was illegal. DBA Attachment B, at 3. But it found that during the stop, the defendant initiated contact with the officers by stepping out of his car while the police were conducting an investigation into whether Victoria was intoxicated. DBA Attachment B, at 4. He then refused to return to his car despite several requests. DBA Attachment B, at 4. The court specifically found, “Instead of complying with the officers’ requests to return to the vehicle, the defendant struck Sergeant Roberts.” DBA Attachment B, at 4. The court then concluded, “By acting to evade arrest and by assaulting police officers, the defendant’s independent actions purged the taint of the initial illegal stop of Ms. Tr[a]udt.” DBA Attachment B, at 4.³ These findings are supported by Roberts’s report, which was the source from which the parties agreed that the trial court could find the facts necessary to decide the defendant’s motion. DBA Attachment B, at 1; DBA Attachment D.

The trial court’s ruling was correct. Although the initial stop of the Traudts’ car was illegal, the defendant responded to the initial, illegal seizure by affirmatively interfering with the officers’ investigation and by punching Roberts on the head. Interfering with the investigation as to whether Victoria was intoxicated was an illegal

³ The trial court did not cite Panarello or refer to the “new crime exception” to the exclusionary rule. But Panarello was decided approximately two months after the trial court issued its order in this case. By analyzing the question presented by this case as whether the defendant’s independent actions “purged the taint” of the originally illegal stop, the trial court correctly anticipated the reasoning and holding from Panarello. Compare DBA Attachment B, at 3-4 with Panarello, 157 N.H. at 208.

act independent of the stop. RSA 644:2, II(d) (2007). So too was punching Roberts on the head. State v. Haas, 134 N.H. 480, 485 (1991) (RSA 594:5 supplements RSA 642:2 by imposing a statutory duty to submit to an arrest). RSA 594:5 (2001) (“If a person has reasonable ground to believe that he is being arrested and that the arrest is being made by a peace officer, it is his duty to submit to arrest and refrain from using force or any weapon in resisting it, regardless of whether there is a legal basis for the arrest.”). Therefore, both fall squarely within the new crime exception to the exclusionary rule. Panarello, 157 N.H. at 208 (where the response to an unlawful seizure is a physical attack upon the officer, evidence of the attack is admissible). Accordingly, the trial court correctly refused to “suppress evidence relating to the defendant’s violence or threatened violence toward police officers subsequent to an unlawful . . . seizure” Id. (quotation omitted).

The defendant seems to contend that the officers perpetrated an unconstitutional seizure when they attempted to arrest him, and that therefore the new crime exception does not apply. DB 17. But, with respect to the simple assault conviction, the timing of the illegal seizure does not matter, as long as it took place before the unlawful act of violence perpetrated by the defendant. Panarello, 157 N.H. at 208. Thus, even if the arrest was an illegal seizure, the defendant still could not lawfully have punched Roberts on the head. That act of violence was a new crime and evidence of it was admissible. Id.

At most, the defendant’s assertion that he was illegally arrested would bear upon the disorderly conduct conviction. But, in the end, it is not a persuasive basis

upon which to reverse that conviction either. The arrest was not illegal. Nor did it amount to an effort by the police to exploit the initially illegal stop. Id. at 207-08 (exclusionary rule applies where the police exploit the initial illegality). To the contrary, the police asked the defendant some four to six times, T 54; O 19, to return to his car. He, however, became increasingly belligerent. By becoming increasingly belligerent and disruptive, the defendant interfered with the officers' attempts to perform field sobriety tests, thereby committing a crime independent of the motor vehicle infraction for which Roberts had initially stopped the Traudts' car. Otherwise put, the defendant was not arrested as a direct consequence of the illegal stop; he was arrested as a direct result of his increasingly hostile behavior and refusal to comply with multiple requests, by two separate officers, that he return to the car. And importantly, nothing in the record suggests that the police deliberately took action designed to goad the defendant into leaving his car or becoming belligerent. Rather, for all that appears, he did both of those things of his own accord.

The officers' conduct here stands in sharp contrast to cases in which courts have held that the police exploited an initially illegal seizure. See, e.g., People v. Cantor, 324 N.E.2d 872, 878 (N.Y. 1975) (where three plainclothes police officers who had not identified themselves surrounded the defendant on the street, causing him to draw a gun, the gun was held to be the fruit of the illegal seizure); State v. Alexander, 595 A.2d 282, 285 (Vt. 1991) (if a roadblock was illegal, a defendant's failure to stop in response to a police order to do so could not be treated as a "distinct" and untainted crime; to hold otherwise would allow the police to set up bogus

roadblocks, to attempt random stops of drivers on less than probable cause, and when drivers failed, “for whatever reason, to stop, any evidence gathered at the illegal stop could not be suppressed”).

The defendant seems to be suggesting that but for the illegal stop, he would not have come into contact with the officers. DB 16. True, but that cannot be the basis for suppression. After all, an initial search or seizure is always going to be the cause or instigation for a would-be criminal defendant’s interactions with the police. Thus, the focus must instead be upon the defendant’s intervening behavior. See Wong Sun v. United States, 371 U.S. 471, 487-88 (1963) (“We need not hold that all evidence is ‘fruit of the poisonous tree’ simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is ‘whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.’”). Here, that intervening behavior amounted to new crimes.

The defendant also contends that State v. McGurk, 157 N.H. 765 (2008), compels reversal. In McGurk, a state trooper stopped a car, arrested its driver, and conducted an inventory search, during which he found marijuana. Id. at 768. The defendant interfered with the search, so the trooper arrested him. Id. The trooper then took both the defendant and the driver to the police station. Id. The trooper escorted the driver into the station first, leaving the defendant and the marijuana in the car. Id. While the trooper was inside the station, the defendant ate the marijuana. Id.

The defendant subsequently pled guilty to two counts of falsifying physical evidence and one count of possession of marijuana. Id. He later launched a collateral attack on his guilty plea, arguing that the initial stop of the car was illegal and that trial counsel was therefore ineffective because he failed to file a motion to suppress the evidence derived from the stop, i.e. that the defendant had ingested the marijuana. Id. The trial court rejected the defendant's collateral attack. Id. at 770.

This Court affirmed the trial court's decision. Id. at 770-72. Citing Panarello, it reasoned that even if the initial stop was illegal, the ingestion of the marijuana was "sufficient to purge the taint" of the illegal seizure because it was a new crime "that was distinct and separate." Id. at 771. Therefore, a motion to suppress would not have been successful and trial counsel was not ineffective. Id. at 772.

If anything, McGurk supports the trial court's decision here. Like ingesting marijuana, punching Roberts on the head was a "distinct and separate" crime that purged the taint of the initially illegal seizure. Id. at 771. Therefore, the new crime exception to the exclusionary rule applies and the defendant's convictions must be affirmed.

III. THIS COURT CANNOT REVIEW THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED BY REFUSING TO DISMISS THE CASE ON THE BASIS THAT THE PROSECUTOR ALLEGEDLY ENGAGED IN BURDEN SHIFTING DURING CLOSING ARGUMENT BECAUSE THE DEFENDANT HAS NOT PROVIDED A TRANSCRIPT OF CLOSING ARGUMENT.

The defendant contends that the trial court erred by refusing to dismiss the case after the prosecutor engaged in burden shifting during closing argument. DB 19.

This argument must be rejected.

The defendant has not provided this Court with a transcript of closing argument. The defendant's failure to provide a transcript means that he has failed to preserve this issue for appeal.

[The Supreme Court] rules affirmatively require the moving party to demonstrate where each question presented on appeal was raised below. See Sup. Ct. R. 16(3)(b); Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004). . . . See [also] Sup. Ct. R. 16(3)(d) (moving party's brief shall contain statement of facts material to consideration of questions presented "with appropriate references to the appendix or to the record"); Sup. Ct. R. 13(2) ("The moving party shall be responsible for ensuring that all or such portions of the record relevant and necessary for the court to decide the questions of law presented by the case are in fact provided to the supreme court."). . . . Where a party fails to demonstrate that it raised an issue before the trial court, the issue is not preserved for [this Court's] review. Bean, 151 N.H. at 250; see also Broughton v. Proulx, 152 N.H. 549, 555 (2005).

Blagbrough Family Realty Trust v. A & T Forest Prods., 155 N.H. 29, 35 (2007). In addition, although this Court may review unpreserved claims for plain error, see Sup. Ct. R. 16-A, it cannot do so here. By failing to obtain a transcript of closing argument, the defendant has failed to produce the portions of the record necessary to evaluate his claim. See Sup. Ct. R. 13(2). Accordingly, this Court must reject his assertions.

CONCLUSION

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

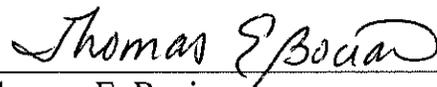
The State requests a 15-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

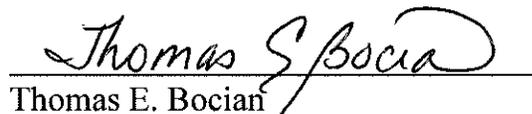
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November 2, 2009

I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Harry N. Starbranch, Esq., counsel of record.



Thomas E. Bocian

STATE'S APPENDIX

State's Obj. to Defendant's Mot. to Suppress, State v. Traudt, Grafton Cty.

Super. Ct. Nos. 2007-S-222, 223, 224, Aug. 31, 2007.....1

STATE OF NEW HAMPSHIRE

GRAFTON, SS.

SUPERIOR COURT

AUGUST TERM, 2007

State of New Hampshire

v.

SCOTT TRAUDT

2007-S-222, 223 and 224

STATE'S OBJECTION TO DEFENDANT'S MOTION TO SUPPRESS

NOW COMES, the State of New Hampshire, by and through its attorneys, the Office of Grafton County Attorney, and respectfully objects to the defendant's Motion to Suppress, and in support thereof states as follows:

1. On January 14, 2007, Sergeant Phillip Roberts of the Lebanon Police Department stopped a motor vehicle on South Main Street for a red light violation. The driver of the vehicle was Victoria Traudt and her husband, the defendant, was a passenger. See attached Narrative of Sergeant Phillip Roberts. The Lebanon District Court latter found that the stop was not justified and granted Victoria Traudt's motion to suppress. See Appendix A of defendant's motion.

2. In the course of the stop, Sergeant Roberts detected an odor of alcohol on the driver and notified dispatch that he would be testing her for DUI. Once Corporal Smolenski arrived, Sergeant Roberts went to the vehicle and asked the driver if she would

submit to standard field sobriety tests. She agreed to the testing.

Id.

3. Sergeant Roberts noted that the defendant was very argumentative about the stop and the officer could tell that he was highly intoxicated. When he went back to the vehicle to ask the driver to submit to SFST, he noted that the defendant was obviously very agitated and was looking back and kept moving about in the car. As the officer was explaining the second test to the driver, he saw the defendant get out of the vehicle. Sergeant Roberts saw Cpl. Smolenski go over to the defendant and ask him numerous times to get back in the car. The defendant was arguing with Cpl. Smolenski and would not get back into the vehicle. Id.

4. Sergeant Roberts joined Cpl. Smolenski and tried to talk with the defendant. He noted that the defendant was standing in an aggressive stance. Sergeant Roberts told the defendant that he needed to get back in the car as he was interfering with their investigation. The defendant refused and Sergeant Roberts told him again that he needed to get back in the car and not interfere. Sergeant Roberts explained to the defendant that he would be arrested for disorderly conduct if he did not comply and that he was giving the defendant a lawful order to get back in the car. The defendant again refused and, at this point, was told that he was under arrest. Id.

5. When told to put his hands behind his back, the defendant

did not comply and looked at Sergeant Roberts in an aggressive manner. Sergeant Roberts, then, reached for the defendant's right arm and the defendant turned away from him. Sergeant Roberts then grabbed his left arm as Cpl. Smolenski grabbed his right arm. The defendant stiffened his whole body and pulled away from the officers, pulling them toward a small fence. The officers told him to stop resisting and put his hands behind his back. The defendant refused and said "You want to fight, I'll fight." The defendant continued to pull away and, when Cpl. Smolenski reached for his cuffs, broke free with his right arm. Sergeant Roberts told Cpl. Smolenski to spray the defendant with OC. Before Cpl. Smolenski could even get at his OC, the defendant swung his right arm at the officers with a closed fist. Id.

6. Sergeant Roberts was struck on the right side of his head, near his ear, lost his balance and fell to the ground. As he got up, he saw the defendant holding Cpl. Smolenski by the legs and preparing to body slam him to the ground. Sergeant Roberts struck the defendant in the rib cage with a knee strike in an attempt to get him to release Cpl. Smolenski. The attempt didn't work and the defendant slammed Cpl. Smolenski to the ground. The defendant was on top of Cpl. Smolenski and attempting to punch him by getting his right arm in a position to throw a punch. Sergeant Roberts got on top of the defendant and told him to stop and that he was going to spray him. Sergeant Roberts told Cpl. Smolenski to turn his face,

then sprayed the defendant. The defendant was trying to grab Sergeant Roberts in the area of his duty belt and the officer was afraid that he was possibly trying to get his weapon from its holster. Sergeant Roberts struck the defendant several times in the back of the head. Finally, the defendant said "Okay. I'm done." Id.

7. The evidence of the defendant's conduct and statements that night are not "fruit of the poisonous tree" of the motor vehicle stop of Victoria Traudt and should not be suppressed. Although the Lebanon District Court did not find that the facts articulated by then ~~Lieutenant~~ ^{Sergeant} Roberts justified his stop for a red light violation, evidence of the defendant's conduct was not come at by exploitation of that illegality but by means sufficiently distinguishable to be purged of the primary taint.

8. New Hampshire's Supreme Court has adopted the reasoning that the United States Supreme Court set forth in Wong Sun v. United States, 371 U.S. 471, 487-88 (1963), stating that "[w]e need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." "Rather, under Wong Sun, the question to be resolved is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" State v. Cobb, 143 N.H. 638, 650 (1999).

9. In the present case, the police were conducting a routine investigation and the defendant's conduct was totally unexpected. The defendant's conduct was an intervening event with little or no connection to the illegal stop of Victoria Traudt. As in United States v. Brown, 628 F.2d 1019 (7th Cir. 1980), the defendant's actions were not the result of illegal police conduct but rather an unexpected event.

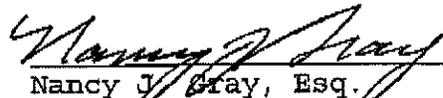
WHEREFORE, the State of New Hampshire respectfully requests that the Court:

- A. Deny the defendant's Motions to Suppress; or
- B. Schedule a hearing on these motions; and
- C. Grant such other and further relief as the Honorable Court may deem just and equitable.

Respectfully submitted,

State of New Hampshire

Date: August 31, 2007

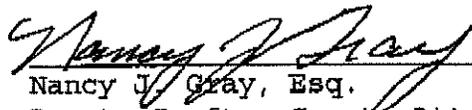


Nancy J. Gray, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded this day to Mark L. Sisti, Esq., counsel for the defendant.

Date: August 31, 2007



Nancy J. Gray, Esq.
Deputy Grafton County Attorney

Leffington Police Department
NARRATIVE FOR SERGEANT PHILLIP J ROBERTS

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Ref: 07L-55-AR

Entered: 01/14/2007 @ 1909
Modified: 01/14/2007 @ 2032Entry ID: PJR
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Date & Time of Incident: 01/14/07 @ ~ 0030 hrs

Officer in Charge: Sgt. Roberts

On the above date and time I stopped a motor vehicle on South Main Street at the intersection of I-89 north bound on ramp for a red light violation I had observed on Benning Street. I was sitting on South Main St facing south waiting for the red light. I observed a small compact car come off of Benning Street and run the red light while turning left onto South Main Street. The light was red when the vehicle was about 3 car lengths back from the stop line. The vehicle sped up as the light turned red.

During the stop I detected the odor of alcohol coming from the vehicle. There were two occupants in the vehicle. The driver was identified as Victoria Traudt. There was a male passenger who was later identified as Scott Traudt. Scott was very argumentative with me about the stop. I could tell that he was highly intoxicated. Victoria told me that she ran the light because she was in a hurry to get home as her and Scott were upset with each other. She told me he was flirting with another women at the Electra Night club. She advised she thought the light was yellow. Victoria had red, watery and bloodshot eyes. She provided with me with her drivers license but could not find the registration. I could also tell that she had the odor of an alcoholic beverage coming from her. I went back to my cruiser to advise dispatch that I was testing the driver of my stop for DUI. As I was doing this I observed Victoria get out of her vehicle with her registration in hand. Once she got out of the car she lost her balance and had to use to side of the car to get her balance back. She came back and gave me the registration. I told her to return to her vehicle and that I would be right with her. She complied and went back to her vehicle.

Cpl. Smolenski then arrived to assist me. I went back up to the vehicle and I asked Victoria to get out of the vehicle to talk with me about how much she had to drink and to inquire with her if she would perform SFST. She agreed and spoke with me behind her vehicle. Cpl. Smolenski arrived at this time. I saw that Scott kept looking back and moving about in the car. He was obviously very agitated. I was told by Victoria that she had three drinks this evening including a shot of tequila, a martini and a glass of wine. She then said she also had some sips of beer throughout the night. I was able to do the HGN test with her.

I observed a lack of smooth pursuit in both eyes. I also saw a distinct jerking at maximum deviation in both eyes as well as prior to 45 degrees in both eyes. During the test she was laughing telling me that we were funny. She seemed to think the HGN test was funny.

As I was explaining the next test (OLS) to Victoria I saw Scott get out of the vehicle.

Cpl. Smolenski went over to him and spoke with him at first. I watched as Cpl. Smolenski asked him numerous times to get back in the vehicle while we spoke with his wife. He was arguing and giving Cpl. Smolenski a hard time. He would not get back in the vehicle. I then joined Cpl. Smolenski and attempted to speak with Scott. I noted that he was standing in an aggressive stance. I told him that he needed to get back in the car as he was interfering with our investigation. He refused to get in the car. He was telling us that we had no right to talk with his wife and she had rights. I again told him that he needed to get back in the car and not interfere. I explained to him that he would be arrested for disorderly conduct if he did not comply. I then explained to him that I was giving him a lawful order to get back in the car. He again refused and told me that he was not going to. He was still arguing about what was going on with his wife. Scott was then told that he was under arrest. I told him to put his hands behind his back. He just looked at me in an aggressive manner. I reached for his right arm but he turned away from me. I then grabbed his left arm as Cpl. Smolenski grabbed his right arm. Scott stiffened up his whole body and was pulling away trying to free himself from us. We attempted to get his hands behind his back and he pulled us towards a small fence that surrounds the near by laundry mat. We told him to stop his resisting and put his hands behind his back. He refused and made the comment "You want to fight, I'll fight". He was now pulling away hard and trying to free himself. Cpl. Smolenski reached for his handcuffs. Scott was able to brake free with his right arm when Cpl. Smolenski reached for his cuffs. His right arm was now in front of him. I told Cpl. Smolenski to spray him with OC. Before he could even get at his OC Scott was swinging his right arm at us with a closed fist. I was struck in the

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right side of my head near my ear with a fist. I still had a grip on his left arm, but lost my balance when I was struck as he was pulling away from me still. I fell to the ground. As I got up I saw that Scott had ahold of Cpl. Smolenski by the legs and was preparing to body slam him to the ground. As he was lifting Cpl. Smolenski up I struck Scott in the left rib cage area with a knee strike (softening technique). This was done in an effort to get him to release Cpl. Smolenski. It did not work and Scott slammed Cpl. Smolenski to the ground. He was on top of Cpl. Smolenski and attempting to punch him by trying to get his right arm in a position to throw a punch. I got on top of Scott and told him to stop assaulting us/resisting. He was not even hearing what I was saying. I advised I was going to spray and told Cpl. Smolenski to turn his head. I was able to get my OC can up to Scott's right side on his face and I sprayed a one second burst. Scott continued to struggle and the OC had no effect. I sprayed again for another second and still no effect. At this time Scott was trying to grab me and was grabbing the area of my duty belt with his left hand. Cpl. Smolenski was trying to get free and struck Scott several times with his fist in the right side of his head. At this time I feared that Scott was trying to possibly get my weapon from my holster as he was reaching in that area. He was trying to turn his head in my direction. At this time I struck him with a closed fist numerous times in the back of the head. I was doing this an attempt to distract him to allow Cpl. Smolenski time to free himself as well as keep Scott from seeing me or looking at my duty belt. After I struck him numerous times he made the comment "ok, I'm done". At this point I stopped striking him. Cpl. Smolenski was now free from underneath Scott.

We told Scott to put his hands out so we could handcuff him. He then stiffened up again and was attempting to get up. He would not move his hands out from underneath him. Cpl. Smolenski deployed his PR-24 and attempted to pry his right arm out from under him. This did not work. Scott was still wrestling with me trying to get to his feet. Cpl. Smolenski then struck Scott with his PR-24 twice below the ribs on his right side. At the same time I was telling Scott to just place his hands behind his back and stop fighting. I was controlling his left arm and keeping him pinned to the ground. Cpl. Smolenski was able to pry his right arm out using his PR-24 after the two strikes. I still had control of his left arm and forced it behind his back at this time. Cpl. Smolenski was able to use his PR-24 to lock Scott's right arm behind his back. Now that his hands were behind his back he was handcuffed by Cpl. Smolenski. Scott was still actively trying to free himself from our grip. He was handcuffed and assisted to his feet.

Ofc. Gaspard had arrived and Scott was placed into his cruiser. While we were struggling on the ground with Scott his wife came up and was yelling at us. She grabbed onto Cpl. Smolenski's jackets at one point when we were on the ground. She was told to back off and get away. She refused. Once Scott was in cuffs Cpl. Smolenski dealt with Victoria. She was following us to the cruiser as we loaded Scott. She was told numerous times to back away and she ignored us. She was taken into custody by Cpl. Smolenski.

Scott was transported to the station for processing. He was rude at times. He smelled strong of an alcoholic beverage. He displayed obvious signs of intoxication. I also saw that he had a black X on his hand. I am familiar that this mark is used by Benning Street Bar and Grill/Electra Night club to shut people off from being served anymore alcohol.

Once at the station Scott was processed. He was read the OC release of care sheet. He would not sign anything or cooperate. The OC did not seem to be bothering him, but he did say he had contacts in and that his right eye was burning a little bit. He was allowed to use the sink to rinse up. He was advised that he should remove his contacts. He refused and said he was all set.

Scott's pants were ripped at the knee's and he had some small cuts/abrasions that were bleeding. I asked him at one point he if needed an ambulance and he advised he was all set. He refused to let us look at his legs or take photo's of his injury. He also had a small red mark on his right hand from scraping on the ground.

Scott was processed by Cpl. Smolenski. I had Ofc. Gaspard process Victoria for her charges. He read her ALS and she ended up refusing any tests including the breath test. I had minimal contact with her during her booking. What I did observe of her I noted that she was very argumentative. She always had a moderate odor of alcohol coming from her.

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Scott was processed and later transported to the Grafton Jail on lack of \$3000 bail.

See Ofc. Gaspard and Cpl. Smolenski's reports for further info on the booking process.



Sergeant Phillip J Roberts

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