

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-357

The State Of New Hampshire

v.

Daniel Fichera

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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TABLE OF CONTENTS

TABLE OF AUTHORITIESii

ISSUE PRESENTED 1

STATEMENT OF THE CASE2

STATEMENT OF FACTS4

 A. The Charged Conduct.....4

 B. The Defendant’s Case..... 12

 C. Pertinent Procedural Posture. 12

SUMMARY OF THE ARGUMENT 16

ARGUMENT..... 17

 THE TRIAL COURT CORRECTLY APPLIED THE STATUTE THAT
 AUTHORIZES AN ENHANCED SENTENCE FOR A FELONY CONVICTION
 INVOLVING THE POSSESSION, USE OR ATTEMPTED USE OF A
 FIREARM BECAUSE THE DEFENDANT WAS CONVICTED OF SECOND-
 DEGREE ASSAULT FOR SHOOTING THE VICTIM IN THE CHEST WITH A
 SHOTGUN. 17

CONCLUSION33

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U.S. 466 (2000).....passim

People v. Thurow, 786 N.E.2d 1019 (Ill. 2003)26

Pike v. Mullikin, 158 N.H. 267 (2009).....30

State v. Bain, 145 N.H. 367 (2000)29

State v. Beaudette, 124 N.H. 579 (1984).....23

State v. Brown, 155 N.H. 590 (2007).....17

State v. Daniels, 91 P.3d 1147 (Kan. 2004)26

State v. Fichera, 153 N.H. 588 (2006).....12

State v. Gauntt, 154 N.H. 204 (2006).....19, 29, 30

State v. Goodale, 144 N.H. 224 (1999)29

State v. Henderson, 154 N.H. 95 (2006)18

State v. Higgins, 149 N.H. 290 (2003)passim

State v. Horner, 153 N.H. 306 (2006)17

State v. Kousounadis, No. 2008-249, slip op. (N.H. Dec. 4, 2009)26, 27

State v. Lamarche, 157 N.H. 337 (2008).....26

State v. Littlefield, 152 N.H. 331 (2005).....20

State v. Russell, No. 2008-458, slip op. (N.H. Dec. 16, 2009).....27, 28

State v. St. John, 129 N.H. 1 (1986).....21, 23

State v. Taylor, 141 N.H. 89 (1996).....20

State v. Wall, 154 N.H. 237 (2006).....27

United States v. Adkins, 274 F.3d 444 (7th Cir. 2001).....26

United States v. Vasquez, 271 F.3d 93 (3d Cir. 2001).....26

Washington v. Recuenco, 548 U.S. 212 (2006)26, 27, 28

Statutes

RSA 625:11, V (2007).....20

RSA 625:3 (2007).....17

RSA 629:1 (2007).....2

RSA 631:1 (2007).....2

RSA 631:1, I(b) (2007).....20

RSA 631:2, I(b)passim

RSA 631:2-a, I(c) (2007).....21

RSA 633:1 (2007).....2

RSA 651:2, II-g (2007).....passim

RSA ch. 630 (2007)..... 2

ISSUE PRESENTED

Whether the trial court correctly applied a statute that authorizes an enhanced sentence for a felony conviction involving the possession, use, or attempted use of a firearm, where the defendant was convicted of second-degree assault for shooting the victim in the chest with a shotgun.

STATEMENT OF THE CASE

A grand jury in Strafford County indicted the defendant on one count of attempted murder, one count of first-degree assault, and one count of kidnapping. DBA A1-A3.¹ See RSA 629:1 (2007); RSA ch. 630 (2007); RSA 631:1 (2007); RSA 633:1 (2007). The attempted murder indictment alleged that the defendant tried to kill his wife, Monica King, by shooting her in the chest with a shotgun. DBA A1. The first-degree assault indictment alleged that the defendant knowingly used the butt end of a shotgun to strike King on the head. DBA A2. The kidnapping indictment contained two alternative counts. DBA A3. The first alleged that he confined King with the purpose of terrorizing her, and that he caused serious bodily injury to her. DBA A3. The second alleged that he confined her with the purpose to commit an offense against her, and that he caused her to suffer serious bodily injury. DBA A3.

At the conclusion of the trial, the superior court instructed the jury to consider first-degree, second-degree, and simple assault as lesser included offenses of the attempted murder charge. T 674-78. It also instructed the jury to consider second-degree and simple assault as lesser included offenses of the first-degree murder charge. T 674-78.

¹ 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 sentencing hearing held on April 14, 2009, will be made as S ____.

The jury acquitted the defendant of kidnapping, all charges resulting from the first-degree assault indictment, attempted murder, and the lesser included offense of first-degree assault. T 692-94. However, it convicted the defendant of the lesser included second-degree assault charge that derived from the attempted murder indictment. T 692. Applying a sentencing enhancement because the defendant used a firearm in the commission of the crime, the superior court sentenced him to an incarcerative term of 5½ to 11 years. S 28. See RSA 651:2, II-g (2007). This appeal followed.

STATEMENT OF FACTS

A. The Charged Conduct.

In May 2003, Monica King separated from the defendant, her husband. T 56. They had known each other for approximately seven years, and had been married for approximately one or two. T 56. When King left the defendant, she moved out of the house in which they had been living together. T 56. The house was located on White Mountain Highway in Milton and was owned by her father. T 56-57.

The couple owned a five-acre parcel of their own on Piggott Hill Road in Milton. T 57. The Piggott Hill parcel was undeveloped and had no direct access to the road. T1. 53-54, 56-57. They called the entire five-acre parcel, "Angel's Landing," and the camping site that they had created thereon, "Fool's Paradise." T 57-58. They accessed these remote spots by walking up their neighbor's (William French's) driveway, and then down a trail. T 34, 59. If they wanted to drive to Fool's Paradise, however, they had to communicate their intention to French because he had hung a padlocked cable across the end of his driveway. T 34.

King spent Columbus Day weekend in 2003 with her family on a farm in North Hampton. T 66. They were celebrating her son's marriage. T 66. Before the celebration, King had informed the defendant she would be bringing her new boyfriend, Jay Olsen, with her to the farm and invited him to attend. T 66-67, 610. He did not. T 66. The defendant did, however, call the farm while she was there. T 68. Although he was unable to reach King directly, he spoke with her sister and asked her to tell King that he needed to speak with her. T 68. King's sister relayed the message and King told her

to tell the defendant that she would stop by the White Mountain Highway home after the celebration. T 68.

When King left the celebration later that afternoon, she drove to the home on White Mountain Highway along with Olsen and Olsen's son. T 69. Olsen and his son stayed in the car while she went up to the house to speak with the defendant. T 69-70. King offered to let the defendant meet Olsen, but he refused. T 70. She characterized his demeanor as troubled but cordial. T 70.

When King and Olsen left the White Mountain Highway home, they went to Angel's Landing. T 70. Olsen was a woodworker and wanted to see if there were any good trees from which he could make something. T 71. Shortly after they arrived, King heard Olsen say, "Hey." T 72. She went to where he was standing and saw the defendant. T 73. The defendant said that he was there because a neighbor had told him that there were trespassers on the property, T 74, yet he had brought with him gifts for King. T 75. In any event, although King characterized the encounter as tense, it ended without incident and she and Olsen headed back to Vermont where they were living. T 75.

In the days that followed, the defendant called King several times. T 76. During one of the calls, he told King that he had brokered an agreement with French concerning the Piggott Hill parcel and needed her to meet with both him and French. T 76. She agreed to do so. T 76-77.

The defendant also spoke with Robert Willis, a pastor at the Journey Baptist Church in Rochester. T 479. He told Willis that he was distraught about some personal issues in his life, including his estranged wife. T 483. So, Willis agreed to meet the

defendant, at the defendant's house, on the morning of Tuesday, October 28, 2003. T 481.

When Willis arrived, they sat in the living room and talked about how the defendant could resolve the issues that he was facing. T 486. After approximately five or six minutes, King called to say that she would be coming to meet with the defendant that day. T 491-92. When the defendant hung up the telephone, he resumed his discussion with Willis and they talked about King in particular. T 486. The defendant said that he was looking for a way to reconcile with her and proposed having her sign a contract, promising to take her medication and abide by certain conditions relating to what he perceived to have been her adulterous ways. T 486-89. After speaking with the defendant for approximately forty to fifty minutes, Willis gave the defendant a Bible, prayed with him, and concluded their session. T 489-90. Before Willis left, the defendant showed him a large RV that was parked in his driveway and said that he was hoping to do some camping with King. T 490-91.

At some point during the day on October 28, 2003, French received a telephone call from his wife who said that the defendant wanted him to unlock the cable because he needed to drive up to Angel's Landing. T 41. So, French called the defendant and made arrangements to give him the key. T 42. During the conversation, the defendant told French that he needed access to the parcel so that a client of his could pick up some wood. T 43. French later met the defendant, gave him the key, and told him to hang it on a nail on his (French's) back porch when he was done. T 43-44.

When King arrived at the White Mountain Highway house at approximately 12:30 p.m., the defendant came out of the house and met her. T 79-80. He seemed

happy, and was eager to show her his new RV. T 80. Apparently, in the past, the defendant and King had discussed taking a trip across the country in an RV, and the defendant was hoping that she might be willing to actually go with him on such a trip. T 81. King, however, demurred and told the defendant that she hoped he could find a good woman to go with him. T 81.

At the defendant's urging, King agreed to go with him in his RV to Piggott Hill. T 82. She thought that they were going to meet French at his house, but when they arrived, French's house was dark. T 82-83. So, King asked the defendant where French was. T 82-83. He replied that French would be along soon and that they should wait at Fool's Paradise. T 82-83. He seemed agitated. T 83.

When they arrived at Fool's Paradise, the defendant took out some sandwiches and cold ginger ale, and suggested that they have a picnic, which they did. T 83. They talked for about thirty minutes. T 83-85. King repeatedly asked about French, and the defendant assured her that he would be coming. T 85. After approximately half an hour, the defendant's demeanor changed and he began to ask King more pointed questions. T 85. For example, he asked her if she was happy and if she was dating other men. T 86. He also told her that her refusal to accompany him on the cross-country trip was not the response that he wanted to hear. T 87. She insisted that she was happy with Olsen, wanted to stay with him, and had "moved on." T 87.

At that point, the defendant got up and began pacing. T 87. He asked her to write on a piece of paper that she was an adulterous woman. T 88. She laughed and asked if he also wanted her to put a scarlet "A" on her back. T 88. Her cavalier attitude upset the defendant. T 88. So he disappeared around the corner of the RV and came back holding

a shotgun. T 89. King had never seen the gun before. T 91. She told the defendant that their meeting was over and that she wanted to leave, but he said, "You're not going anywhere." T 91.

After a struggle, the defendant grabbed King, scratching her, and pushed her into the RV. T 93. Inside, he forced her to write out a confession, admitting to being an adulterous woman. T 93-96. When she tried to leave, he blocked her. T 96. At some point (it is not clear whether inside or outside RV), he took out a Bible, lay the shotgun on his knees, and began reading it. T 97. Apparently, he had highlighted several passages from the Old Testament concerning adultery, sin, revenge, and divorce, and he made King read some of those passages aloud while he held the gun to her head. T 97-99.

Later, when the defendant and King were outside, he pulled a pair of handcuffs and a roll of duct tape from a plastic bag. T 100. He tried to put the handcuffs on her, but she struggled and managed to cast them aside. T 100. At some point, she fell down and he hit her on the back, head, and shoulders with the butt of the gun. T 101. He also aimed the shotgun at her groin and picked up a knife. T 103, 114. "He was alternately professing undying love for [King] and then trying to kill [her]." T 104. The defendant then fired a "warning shot" toward the back of the property and reloaded the gun with a shell that he took out of a plastic bag. T 106-08.

Shortly thereafter and with the sun setting, King decided she had to try to get away. T 123. She stood in the path and told the defendant she had to go. T 123. The defendant looked at the sky and said, "Woman I love you so much . . . but you're gonna die." T 123. Then he leveled the gun at her chest. T 123. King told him he would have

to look her in the eyes if he was going to shoot her. T 125. He fired the shotgun. T 125. The pellets struck King's chest, and she crouched down. T 126.

When King overcame the surprise of what had happened, she looked for the defendant and saw him "over toward the far end of the picnic table and he was madly, frantically looking through his bags with the shells and it looked like he was trying to reload the rifle again." T 127. So, King got up and started to head toward the path. T 128. Hearing the defendant's footsteps behind her, she started to "stride" down the path, holding her breasts. T 130-31. But the defendant caught up with her, grabbed her, and "using the rifle like a club, . . . beat [her] all over the back of [her] head and all over the back of [her] shoulders." T 132. She asked him in vain to help her and then pretended to be dead. T 133. The defendant then unsuccessfully tried to pull her up, before running back to the RV. T 133, 135.

At that point, King got up and went through the woods to find the nearest neighbor. T 135. She made it to Wayne Abram's yard, where she told him to call 911 because the defendant had shot her in the chest. T 136, 140-41. Abram took her into his house and helped comfort her until the paramedics came. T 141-42. The paramedics took her to Frisbie Memorial Hospital, where she had surgery to repair the gunshot wounds to her chest. T 146, 152.

Dr. Timothy Sherry was the general surgeon who operated on King at Frisbie Hospital. T 577-97. He said that King had bruising on her head and a "rather large open wound in her right breast." T 580, 582. He ordered an x-ray of King's chest, which revealed "a lot of pellets" in her chest. T 583. During the surgery, he "discovered [that] there [were] a lot of pellets within the tissue itself, in between the skin and the chest wall

muscle. And there was a also a wad from the shotgun shell itself” T 585. Sherry said that King’s injuries were consistent with her description of having been shot as she turned away from the gun, trying to escape. T 588. Sherry also said that he was unable to remove all of the pellets from King’s chest cavity and opined that the injuries might have been fatal under other circumstances. T 589, 597.

Elizabeth Keyes, a state trooper, went to Frisbie Memorial Hospital while King was there to get a statement from her and to collect her clothing as evidence. T 334. Keyes also took photographs of King’s injuries. T 337. In addition to King’s chest wound, Keyes noted cuts and scrapes on her hands, cuts and scrapes on her back, bruising on her forehead, and scrapes, bruising, and bumps on her right forearm. T 337-38, 341-42. Keyes was also able to feel a lump on King’s scalp. T 337.

Meanwhile, the defendant quickly drove to the house of another neighbor, John Grimaldi. T 363-64, 369. He asked to use Grimaldi’s telephone to call 911, and said that King had been hurt. T 364. More particularly, the defendant said something about King breaking her leg. T 365. The defendant then “spun out” and hit a nearby “for sale” sign as he erratically left Grimaldi’s driveway. T 366, 369.

Between 4:45 p.m. and 5:30 p.m., the defendant called Andrew Catino. T 511. Catino lived in the house next door to the defendant, on the White Mountain Highway in Milton. T 509-10. The defendant said there had been an accident on the Piggott Hill parcel and asked Catino to stop by his house. T 510-11.

When Catino arrived, the defendant was alone in the house, and the house was dark except for a candle burning and a flashlight that was on. T 512. The defendant told Catino that he and King had been arguing, that there was a “tussle” over a shotgun, and

that it had gone off, with the pellets hitting King on the shoulder. T 512-13. When Catino asked the defendant if he had gone to the police, the defendant said no. T 513. Catino found the defendant's response odd because he assumed that the defendant would have wanted to make sure that his wife got the care that she needed. T 513. Catino found equally odd the fact that the defendant appeared unconcerned about King's well-being. T 513. At the end of their conversation, the defendant gave Catino an audiocassette and the piece of paper with King's "confession." T 514. He asked Catino to hold those items for him. T 514. Catino, however, turned the cassette and "confession" over to the police. T 515.

Sergeant Richard Mitchell of the New Hampshire State Police executed a search warrant at the White Mountain Highway house and found the shotgun, a box of shotgun shells, and a Bible. T 414, 419. The safety was off on the shotgun and there was a live round in the breech. T 420, 423. At some point thereafter, Mitchell went back to the Piggott Hill parcel with King. T 425. There, he found a plastic bag with a roll of duct tape and a pair of handcuffs in it. T 439. He also found two spent shell casings. T 430-32. Mitchell returned to the Piggott Hill parcel the next day and found a live shell near the picnic table. T 432-33.

As part of the police investigation, Marc Dupre, a criminalist from the Department of Safety laboratory, performed several tests on the shotgun that was found at the White Mountain Highway home. T 522-53. For example, Dupre unsuccessfully tried to restore the shotgun's serial numbers, which had been "obliterated" from having been ground down and "scratched out." T 551-52. Dupre also tested the shotgun to determine if it could be accidentally discharged. T 538-40. He put a primed shot in the chamber,

took off the safety, and struck the gun from all sides with a mallet. T 539. It did not discharge. T 540. Based upon that test, Dupre concluded that the gun was not susceptible to accidental discharge. T 540. Dupre also tested the gun's trigger, and found that four to five pounds of pressure was needed to actually shoot the gun. T 535.

B. The Defendant's Case.

The defendant called Michael Hanitchak, who was the professor for a class that King had taken at Dartmouth College, to testify about his contact with her over the years. T 614-15. King apparently had sent many amorous messages to Hanitchak, even though he did not have any romantic interest in her. T 267-70. One message, sent just before trial, suggested that the outcome of the case was somehow connected to their future together. T 272. Hanitchak testified that King was not credible and could not be trusted. T 617. The defendant also called Tobey Adler, a friend of King, to testify that she had seen a gun in Olsen's truck at some point in early October 2003. T 610-11.

In addition, the defendant aggressively challenged King's credibility. He pointed to a letter that she had written to the president of Dartmouth, indicating that she had been "trained in all aspects of theater," and that "the courtroom is one of the finest places for drama." T 161, 166-67. He also pointed out inconsistencies between her testimony and what she had told the police in the aftermath of the shooting. See, e.g., T 183, 191-92.

C. Pertinent Procedural Posture.

Near the end of trial, the court held a charge conference. T 562. During the conference, the defendant proposed using the jury instructions from his first trial, with some limited exceptions. T 562. See State v. Fichera, 153 N.H. 588 (2006). For

instance, the defendant sought different instructions on witness credibility and inconsistent statements. T 562.

With respect to lesser included offense instructions, he specifically noted that the jury in the first trial was instructed on first-degree and second-degree assault as lesser included offenses of attempted murder. T 562-63. He contended that the evidence was insufficient to support a jury instruction on first-degree assault as a lesser included offense of attempted murder, but he conceded that the evidence was sufficient to warrant an instruction on second-degree assault. T 564. He also argued that the court should also instruct the jury on simple assault, as a lesser included offense of attempted murder. T 563. The court accepted the second argument, but rejected the first. T 674-76.

When the court instructed the jury, it noted that each “of the indictments against the defendant constitute[d] a separate offense” and that the jury was required to “consider each indictment separately in determining whether the State ha[d] proven the defendant’s guilt beyond a reasonable doubt.” T 674. Then, it turned to the attempted murder indictment and instructed the jury as to all of the elements of the offense, including that “the defendant shot Monica King in the chest with a shotgun and that the shooting [of] Monica King in the chest with a shotgun was intended to cause the death of Monica King.” T 675.

Immediately thereafter, it instructed the jury that

there is a concept in the law called a lesser included offense in which a jury is asked to consider lesser criminal charges if the jury finds the defendant not guilty as to the charged offense. The lesser included offense differs from the more serious charged offense by either having a less serious state of mind or a less physical act.

T 675. The court then told the jury that one “lesser included offense of attempted murder is a crime of first-degree assault.” T 675. It informed the jury as to all of the elements of first-degree assault and specified that one element was that the defendant caused bodily injury to King by means of a deadly weapon, which it then defined. T 675-76. It gave similar instructions with second-degree and simple assault as well. T 678. The court then discussed the charges alleged in the other indictments, including lesser included offenses, and gave an acquittal-first instruction, telling the jury, “As to all of the lesser included offenses, you must first unanimously find the defendant not guilty of the more serious charge before you consider the lesser included offense.” T 678-80.

At the end of the charge, the court asked the parties if they needed to raise any issues at sidebar. T 681. The State said yes. T 682. At sidebar, it argued that the defendant was subject to a sentencing enhancement on the lesser included offenses (to the attempted murder charge) because he used a firearm in the commission of the crime. T 682. See RSA 651:2, II-g (2007). The defendant objected, arguing that an enhancement could not apply unless the applicable indictment alleged the use of a firearm. T 683. The court disagreed. T 683-84.

Before sentencing, both parties filed memoranda. The defendant reasserted his contention that the sentence enhancement did not apply because he had not been indicted for a crime an element of which was the use of a deadly weapon. DBA A12. He also argued that applying the enhancement would run afoul of Apprendi v. New Jersey, 530 U.S. 466, 476 (2000), and that there had been no specific finding by the jury that he had used a firearm. DBA A12-A13. The State countered that the enhancement applied because the indictment alleged that the defendant fired a shotgun at King, and because no

other weapon had been the subject of any charges. DBA A15-A16. The court agreed with the State and sentenced the defendant to an enhanced term. DBA A20.

SUMMARY OF THE ARGUMENT

The trial court correctly imposed an enhanced sentence under RSA 651:2, II-g. The enhancement applies when a defendant has been convicted of a felony, an element of which is the possession, use, or attempted use of a firearm. Here, the defendant was convicted of the variant of second-degree assault that is set forth in RSA 631:2, I(b). According to RSA 631:2, I(b), "A person is guilty of a class B felony if he . . . [r]ecklessly causes bodily injury to another by means of a deadly weapon, except that if the deadly weapon is a firearm, he shall be sentenced in accordance with RSA 651:2, II-g." Thus, by its plain terms, a conviction under RSA 631:2, I(b), involving the use of a firearm, triggers the sentencing enhancement found in RSA 651:2, II-g.

Several circumstances demonstrate that the jury necessarily and unanimously concluded that the defendant used a "firearm" as a deadly weapon in the commission of the crime. First, during the jury charge, the court defined "deadly weapon" and instructed the jury that an element of second-degree assault was the use of a deadly weapon. Second, the only weapon at issue in the case was the shotgun that the defendant fired into King's chest. Third, the defendant did not contest that King was shot in the chest. Fourth, a forensics expert, Dupre, testified without objection that the shotgun was a firearm. Under these circumstances, the defendant was eligible for an enhancement under RSA 651:2, II-g. Therefore, his sentence should be affirmed.

ARGUMENT

THE TRIAL COURT CORRECTLY APPLIED THE STATUTE THAT AUTHORIZES AN ENHANCED SENTENCE FOR A FELONY CONVICTION INVOLVING THE POSSESSION, USE OR ATTEMPTED USE OF A FIREARM BECAUSE THE DEFENDANT WAS CONVICTED OF SECOND-DEGREE ASSAULT FOR SHOOTING THE VICTIM IN THE CHEST WITH A SHOTGUN.

The defendant contends that the trial court erred by imposing an enhanced sentence under RSA 651:2, II-g (2007). He argues that in order for the enhancement to apply, the State had to “either indict [him] for second-degree assault with a firearm, or sufficiently charge the firearm enhancement in the attempted murder indictment from which the second-degree assault derived.” DB 10. These contentions must be rejected.

The defendant’s appellate contentions require this Court to interpret RSA 651:2, II-g. Statutory interpretation is an issue of law that this Court considers de novo. State v. Brown, 155 N.H. 590, 591 (2007). “When construing a statute, [this Court] first examines its language, ascribing the plain and ordinary meaning to the words used by the legislature. [This Court] consider[s] words and phrases within the context of the statute as a whole, and in light of the policy or purpose advanced in the statutory scheme.” Id. (citations omitted). It will “neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include.” Id. In addition, this Court construes a statute “to effectuate its overall purpose and avoid an absurd or unjust result.” State v. Horner, 153 N.H. 306, 314 (2006); see RSA 625:3 (2007) (“All provisions of th[e] [criminal] code shall be construed according to the fair import of their terms and to promote justice.”).

In pertinent part, RSA 651:2, II-g, provides,

If a person is convicted of a felony, an element of which is the possession, use or attempted use of a deadly weapon, and the deadly weapon is a firearm, such person may be sentenced to a maximum term of 20 years' imprisonment in lieu of any other sentence prescribed for the crime.

“The plain language of [that statute] makes clear that it applies when a defendant has been convicted of a felony, an element of which is the possession, use or attempted use of a firearm.” State v. Henderson, 154 N.H. 95, 98 (2006). “Absent a specific finding by the jury that an element of the felony for which it convicted the defendant was possession, use or attempted use of a firearm, . . . RSA 651:2, II-g is not applicable.” Id.; see also State v. Higgins, 149 N.H. 290, 300 (2003) (“Under Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)], any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to the jury and proven beyond a reasonable doubt.”).

Two questions must be answered in deciding whether the enhancement in RSA 651:2, II-g could apply in the instant case. The first is whether the jury unanimously found that the defendant used a firearm as a deadly weapon in the commission of the second-degree assault. The second, which needs to be considered only if the first is answered affirmatively, is whether a the use of a firearm in the commission of a second-degree assault under RSA 631:2, I(b) (2007) triggers the sentencing enhancement contained in RSA 651:2, II-g. The answer to both questions is yes.

With respect to the first question, the only weapon that the defendant was charged with using was the shotgun. DBA A1. That is, the attempted murder indictment provided that the defendant “did, with the purpose that the crime of murder be committed, perform an act or acts which, under the circumstances as he believed them to

be, constituted a substantial step toward the commission of said crime, in that Daniel Fichera did shoot Monica King in the chest with a shotgun.” DBA A1.

As lesser included offenses, the assault charges derived from the attempted murder charge. See State v. Gauntt, 154 N.H. 204, 206 (2006) (explaining lesser included offenses). They allowed the jury to examine the defendant’s intent and the extent of the injuries he caused when he shot King in the chest, and to assign an appropriate level of criminal responsibility. But they did not allow the jury to consider other acts that the defendant may have perpetrated against King. That is, nothing in the court’s instructions indicated or even suggested that the jury could have found the defendant guilty of second-degree assault for a different act (other than shooting King in the chest with the shotgun).

The court explained these principles to the jury in no uncertain terms. For example, it instructed the jury that first-degree, second-degree, and simple assault were called lesser included offenses and that a “lesser included offense differs from the more serious charged offense by either having a less serious state of mind or a less physical act.” T 675. Moreover, the court specifically told the jury that any act of striking King with the butt end of the gun constituted a different offense that it was required to consider separately. T 674, 678.

In addition, the court twice gave an acquittal-first instruction, informing the jury that it could descend the chain of lesser included offenses only if it concluded at each step along the way that the greater offense had not been committed. See T 675 (“there is a concept in the law called a lesser included offense in which a jury is asked to consider lesser criminal charges if the jury finds the defendant not guilty as to the charged

offense”); T 680 (“As to all of the lesser included offenses, you must first unanimously find the defendant not guilty of the more serious charge before you consider the lesser included offense.”). See State v. Taylor, 141 N.H. 89, 94-96 (1996) (holding that trial courts should give an acquittal-first instruction if the jury is instructed on lesser included offenses and that under an acquittal-first instruction, a jury must reject, *i.e.* acquit the defendant of, the greater charged offense before it may go on to consider lesser included offenses). The acquittal-first instruction thus guided the jury’s consideration of the lesser charges and ensured that it considered those charges only in the context of the indicted conduct.

So if the jury was following instructions—and this Court must assume that it was, see State v. Littlefield, 152 N.H. 331, 348 (2005) (juries are presumed to follow instructions)—its deliberative process necessarily followed a pattern. Broadly speaking, for each charge, it had to decide whether the defendant shot King in the chest with the shotgun. It could then consider his intent and the level of injuries that he caused.

More specifically, for the attempted murder charge, the jury had to find that the defendant shot King in the chest with the shotgun. If it answered yes to that question, it proceeded to decide whether he had the purpose to kill her. For the first-degree assault charge, the jury had to find that the defendant shot King in the chest with the shotgun. It then had to decide whether the shotgun was a deadly weapon in accordance with the definition that the court provided, which was consistent with RSA 625:11, V (2007). T 675-76. If it answered yes to those questions, it proceeded to decide whether the defendant knowingly tried to inflict serious bodily injury. See RSA 631:1, I(b) (2007). For the second-degree assault charge, the jury had to find that the defendant shot King in

the chest with the shotgun. It then had to decide whether the shotgun was a deadly weapon in accordance with the definition that the court provided. If it answered yes to those questions, it proceeded to decide whether the defendant recklessly inflicted serious bodily injury. See RSA 631:2, I(b). For the simple assault charge, the jury needed to find that the defendant shot King in the chest with the shotgun. It then needed to decide whether the shotgun was a deadly weapon within the meaning of the definition that the court provided. If it had answered yes to those questions, it would have proceeded to decide whether the defendant negligently caused bodily injury to King. RSA 631:2-a, I(c) (2007). Thus, because of the way the court instructed the jury, the guilty verdict necessarily was based upon a finding that the defendant shot King in the chest with the shotgun.

In Higgins, 149 N.H. at 301, and State v. St. John, 129 N.H. 1, 2-3 (1986), this Court considered and rejected arguments similar to those that the defendant advances here. In Higgins, “the jury instructions failed to require the jury to unanimously find that [Higgins] used a firearm, as opposed to some other deadly weapon to commit the charged criminal threatening offenses.” Higgins, 149 N.H. at 301. So Higgins argued that

because the evidence showed that [he] used a variety of objects during the attack [on the victim] (including a riding crop, handcuffs, shackles and blankets), . . . the jury could have rendered a verdict on the deadly weapon element of the criminal threatening charges without unanimously agreeing that a firearm, rather than the other objects, constituted the deadly weapon.

Id.

This Court flatly rejected that argument because (1) “[t]he indictments isolated particular moments during the approximately two-hour attack on the victim in which the defendant used a firearm to threaten”; (2) the court had informed the jury at the beginning

of trial and twice during the instructions that the criminal threatening allegations included the use of a firearm; and (3) “the State did not stray from the charges in the indictments in its opening and closing arguments and argued only that the defendant used a firearm to commit both criminal threatening offenses.” Id. at 301-02. It then held that “[i]n light of the instructions as a whole and the evidence presented at trial, . . . a reasonable jury would [have] underst[oo]d that the ‘deadly weapon’ element of both criminal threatening charges exclusively referred to the use of a firearm,” and thus, “the guilty verdicts reflect[ed] a unanimous conclusion that the defendant used a firearm, and no other object, as a deadly weapon to commit the crimes.” Id. at 302.

So it was here. The indictment “isolated [a] particular moment during the approximately [three]-hour attack on the victim in which the defendant used a [shotgun] to [shoot her].” Id. at 301; DBA A1. For the reasons explained earlier in this brief, a finding that the defendant shot King in the chest with the shotgun was a necessary component of a guilty verdict on any of the lesser included offenses as well. Therefore, because the charged offense and the lesser included offenses pertained to a specific and isolated moment in time, there was no risk that the jury would have considered other conduct or weapons. This is especially true in light of the fact that the court specifically told the jury that the other charged act involving the gun constituted a different offense that it was required to consider separately. T 674, 678.

In addition, the court repeatedly informed the jury that the charges involved the use of the shotgun. T 674-75, 678. It did not state or even intimate that any other weapon was the subject of the charges in this case. Equally important, the defendant did not dispute that King was shot in the chest with the shotgun. See, e.g., T 20 (“There’s no

doubt here that Monica was shot. This case is not about whether or not she was shot.”); T 21 (“The facts and evidence in this case show that this was an accidental shooting.”); T 629, 648. And the defendant did not object when the following exchange, concerning the shotgun, took place during Dupre’s testimony:

Q. Is this a firearm?

A. Absolutely.

Q. What does a firearm mean?

A. A firearm means that it has a source of detonation, gunpowder, some sort of power propellant, and it propels a projectile out of the barrel.

T 529-30. See State v. Beaudette, 124 N.H. 579, 581 (1984) (defining a “firearm” as “a weapon from which a shot is discharged by gunpowder”). So there was not even a dispute at trial about whether the deadly weapon used was actually a firearm. St. John, 129 N.H. at 2-3 (rejecting the claim that the State had failed to prove that a handgun was a firearm where the defendant never disputed that it was at trial).

Finally, here, as in Higgins, “the State did not stray from the charges in the indictments in its opening and closing arguments and argued only that the defendant used a firearm to commit [the] . . . offenses.” Higgins, 149 N.H. at 302. In his opening statement, the prosecutor said that the defendant “level[ed] the shotgun at her—right at chest level—and he pulled the trigger.” T 8; see also T 16 (explaining why the State’s evidence would prove that the defendant shot King with the intent to kill her). He also discussed the injuries that King had sustained as a result of having been shot, T 10-11, the shotgun shells and casings that the police recovered, T 12-13, and the forensic analysis that had been performed on the shotgun, T 14-15.

During closing arguments, the prosecutor said that the evidence had “show[n] beyond a reasonable doubt that Mr. Fichera pulled that trigger on October 2[8]th, 2003, with the intent to end his wife’s life.” T 649. He also specifically told the jury that the charges pertained only to the injuries that the defendant caused with the gun—not to injury by another means. T 663. Therefore, “[i]n light of the instructions as a whole and the evidence presented at trial, . . . a reasonable jury would [have] underst[oo]d that the ‘deadly weapon’ element of [the] . . . charge[] exclusively referred to the use of a firearm,” and thus, “the guilty verdict[] reflect[ed] a unanimous conclusion that the defendant used a firearm, and no other object, as a deadly weapon to commit the crime[].” Higgins, 149 N.H. at 302.

Because the circumstances of this case establish that the jury unanimously found that the defendant used a firearm as a deadly weapon in the commission of the second-degree assault, this Court must decide whether the sentencing enhancement contained in RSA 651:2, II-g applied. It did.

RSA 651:2, II-g applies when a defendant has been convicted of a felony, an element of which is the possession, use, or attempted use of a firearm. The trial court instructed the jury to consider whether the defendant committed the variant of second-degree assault that is set forth in RSA 631:2, I(b). T 678. According to RSA 631:2, I(b), “A person is guilty of a class B felony if he . . . [r]ecklessly causes bodily injury to another by means of a deadly weapon, except that if the deadly weapon is a firearm, he shall be sentenced in accordance with RSA 651:2, II-g.” So, by its plain terms, the statute establishes that the use of a firearm is an element of the offense. Therefore RSA 651:2, II-g applies.

Even if there were some room for debate on that point, the legislature removed all doubt about the applicability of RSA 651:2, II-g to convictions under RSA 631:2, I(b) by expressly stating that if a firearm was used in the commission of an assault under RSA 631:2, I(b), the sentencing enhancement in RSA 651:2, II-g would apply. See RSA 631:2, I(b). So, since the jury found the defendant guilty of violating RSA 631:2, I(b), and since a necessary component of that finding was that the defendant used a firearm—the shotgun that he fired into King’s chest—he was eligible for an enhancement under RSA 651:2, II-g. Therefore, his sentence must be affirmed.

The defendant says that the court could not impose the enhanced sentence based upon the use of a firearm because the petit jury could not “consider statutory elements the grand jury did not find.” DB 13.² His premise for that argument seems to be a contention that the grand jury did not make a specific finding that he used a firearm as a deadly weapon. But the grand jury handed up an indictment alleging that the defendant used a shotgun to shoot King in the chest. DBA A1. So, the grand jury did find that he used a firearm (the shotgun). It is also worth pointing out that the defendant requested the lesser included offense instructions, which is important because he injected the lesser included offenses into the trial and RSA 651:2, II-g conditions its applicability upon the offense for which a defendant was convicted—not the one for which he was indicted. See RSA 651:2, II-g.

² To the extent the defendant is contending that second-degree assault contains elements that do not fit within the legal definition of attempted murder, his argument must be rejected. For the reasons explained later in this brief, that argument is foreclosed by the doctrines of invited error and judicial estoppel.

Even if this Court concludes that the attempted murder indictment's language could not be read to say that the defendant used a firearm as a deadly weapon, reversal would be unwarranted because any error was harmless. The failure to allege the use of a firearm as a deadly weapon would be an "Apprendi error." See Apprendi, 530 U.S. at 476 ("any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt"). "The United States Supreme Court has held that Apprendi claims are subject to harmless error analysis. See Washington v. Recuenco, 548 U.S. 212, 218-22 (2006)." State v. Kousounadis, No. 2008-249, slip op. at 18 (N.H. Dec. 4, 2009) (Dalianis & Hicks, JJ., dissenting). Of course, the federal courts follow that rule. See, e.g., United States v. Adkins, 274 F.3d 444, 464 (7th Cir. 2001) ("[I]t is now well established in this circuit that Apprendi errors in both the indictment and the charge to the jury are subject to harmless error analysis.")—So too do several state courts. See, e.g., People v. Thurow, 786 N.E.2d 1019, 1028 (Ill. 2003); State v. Daniels, 91 P.3d 1147, 1157 (Kan. 2004). See generally United States v. Vasquez, 271 F.3d 93, 106 (3d Cir. 2001) (collecting cases).

These cases should be deemed highly persuasive and Recuenco must be controlling. After all, nowhere in the defendant's brief has he argued that application of the sentencing enhancement violated a specific provision of the state constitution. See State v. Lamarche, 157 N.H. 337, 340 (2008) ("To preserve a state constitutional claim, the defendant must: (1) raise it in the trial court; and (2) specifically invoke a provision of the State Constitution in his brief."). Therefore, to the extent this case raises constitutional issues, they are of a uniquely federal dimension.

To the extent this Court concludes that Recuenco is not controlling, the State is unaware of any case in which this Court has squarely decided whether the harmless error doctrine applies to Apprendi-type errors. The majority left that question open in Kousounadis, slip op. at 14. The two dissenting justices maintained that harmless error would apply to Apprendi errors. Id. at 18. The dissenting justices' position should be deemed correct. In addition to the authority cited above, both Higgins and State v. Russell, No. 2008-458, slip op. at 14-15 (N.H. Dec. 16, 2009), weigh in favor of applying the harmless error analysis to Apprendi-type errors.

In Higgins, as set forth more fully earlier in this brief, “the jury instructions failed to require the jury to unanimously find that [Higgins] used a firearm, as opposed to some other deadly weapon to commit the charged criminal threatening offenses.” Higgins, 149 N.H. at 301. But this Court nevertheless upheld the trial court’s decision to apply the sentencing enhancement in RSA 651:2, II-g “[i]n light of the instructions as a whole and the evidence presented at trial” Id. at 302. Refusing to reverse or vacate a trial court’s decision based upon the evidence adduced at trial is the very essence of a harmless error analysis. See State v. Wall, 154 N.H. 237, 245 (2006) (explaining harmless error).

In Russell, this Court held that a trial court’s imposition of an enhanced sentence under RSA 651:2, II-g, did not satisfy the fourth prong of the plain error test (whether the error affected the fairness, integrity, or public reputation of the proceeding). Russell, slip op. at 12-16. There, the court erroneously failed to instruct the jury that it was required to conclude unanimously that the defendant used a firearm during the commission of the charged offense. Id. at 12. In concluding that the fairness and integrity of the proceeding

were not affected by the court's error, this Court relied upon the overwhelming evidence presented at trial and federal cases holding that Apprendi errors are subject to harmless error review. Id. at 14-15. As noted above, upholding a sentence, based upon the evidence adduced at trial, is the very essence of a harmless error analysis. Thus, in light of Russell, Higgins, Recuenco, and all of the cases cited above, this Court should hold that Apprendi errors are subject to harmless error review.

Here, for all of the reasons set forth earlier in this brief, any error was harmless. To summarize briefly, the charged offense and the lesser included offenses pertained to a specific and isolated moment in time, so there was no risk that the jury would have considered other conduct. This was especially true in light of the fact that the court specifically told the jury that the other charged act involving the gun constituted a different offense that it was required to consider separately. In addition, the court repeatedly informed the jury that the charges involved the use of the shotgun and did not state or even intimate that any other weapon was the subject of the charges in this case. Equally important, the defendant did not dispute that King was shot in the chest with the shotgun and did not object when Dupre testified that the shotgun was a firearm. Finally, here, as in Higgins, "the State did not stray from the charges in the indictments in its opening and closing arguments and argued only that the defendant used a firearm to commit [the] . . . offenses." Higgins, 149 N.H. at 302. Under these circumstances, any error should be deemed harmless.

The defendant also seems to suggest that the second-degree assault charge involved elements that did not fit within the legal definition of attempted murder as set forth in the indictment. DB 13-14, 16-17. That argument boils down to a contention that

the court should not have given the lesser included offense instructions, see Gauntt, 149 N.H. at 206 (defining lesser included offenses), and it must be rejected.

Remember, it was the defendant who sought the instructions on lesser-included offenses, not the State. DBA A15 (“The defendant requested from the Court a lesser included offense of second degree assault.”); T 562-63 (defendant proposing the use of the instructions from his first trial, with limited exceptions); S 11 (“The second-degree assault was interjected into this case in 2004 and again in 2009 by the defense. It was never a request by the State. It was a specific request by the defense based on the content of the record in that the defense wanted to argue acts that—recklessly would be consistent with that defense. So there was a specific reason why the defense was asking for recklessly in this particular case.”). And “[u]nder 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). So, the defendant cannot now assign error based upon the court’s giving an instruction that he requested. Further, by requesting and obtaining the instruction on second-degree assault, the defendant set the stage for the consequences that flowed from a conviction for that offense.

Even if this Court concludes that the invited error doctrine does not apply, the doctrine of judicial estoppel precludes the defendant from arguing on appeal that second-degree assault did not fall within the legal definition of attempted murder.

The doctrine of judicial estoppel generally prevents a party from prevailing in one phase of a case using one argument and then relying upon a contradictory argument to prevail in another phase. The general

function of judicial estoppel is to prevent abuse of the judicial process, resulting in an affront to the integrity of the courts. While the circumstances under which judicial estoppel may be invoked vary, three factors typically inform the doctrine's application: (1) whether the party's later position is clearly inconsistent with the party's earlier position; (2) whether the earlier position was accepted by the court; and (3) whether the party seeking to assert a later inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Pike v. Mullikin, 158 N.H. 267, 270 (2009) (quotations and citations omitted).

Here, all three prongs are satisfied. First, it is inconsistent to ask for a lesser included offense instruction, see Gauntt, 149 N.H. at 206 (defining lesser included offenses), and then later contend that the lesser included offense did not fall within the legal definition of the greater, charged offense because the lesser offense had an element that the greater did not. Second, the trial court gave the requested instruction, so it accepted the defendant's trial position. Third, it is unfair to the State for a defendant to be able to seek a benefit at trial (a conviction on a lesser offense) and then, having obtained that benefit, take a contrary position on appeal in order to avoid the consequences of his earlier strategy.

Finally, the defendant forthrightly acknowledges that there "is no statutory requirement that the State file a pretrial notice of its intent to seek an extended term of imprisonment under RSA 651:2, II-g." DB 18. That acknowledgement notwithstanding, he appears to suggest that he did not have adequate notice that the State would seek a sentencing enhancement under RSA 651:2, II-g if he were convicted of a lesser included offense of attempted murder. DB 19.

But the possibility of an enhanced sentence did not exist until the fourth day of trial when the defendant injected that issue into the case by requesting lesser included

offense instructions. DBA A15; T 562-63; S 11. That same day, immediately after the charge and before the jury was dismissed to deliberate, the State notified the defendant of his exposure to the enhanced sentence. T 682. Under these circumstances, and especially since there is no statutory requirement concerning notice of an enhanced term pursuant to RSA 651:2, II-g, the State should not be faulted—and the defendant's sentence should not be vacated—because the State did not provide earlier notice of a circumstance that the defendant created.

It is also worth pointing out that the State filed a notice under the docket number for the first-degree assault indictment (alleging that the defendant struck King with the butt end of the gun), indicating that it intended to seek an enhanced sentence under RSA 651:2, II-g “for the charged offenses and any other lesser-included offenses that may be delivered to the jury.” DBA A9. This notice, although not filed under the docket number for the attempted murder indictment, apprised the defendant that the State was seeking the maximum penalties possible for the harm that he had caused King. Indeed, at trial, when the court asked, “Can we all agree that notice is not an issue?” defense counsel replied,

Well, notice in the sense of the State [having] filed a pleading afterward, but not notice in the sense of a grand jury indictment which is required by due process. So notice has many components.

I will concede that the State filed an indication saying that that's something that they hoped that they might—well, if they were in the situation of a lesser included, but that's something they would like.

S 3-4.

In summary, the trial court correctly imposed an enhanced sentence under RSA 651:2, II-g. The enhancement applies when a defendant has been convicted of a felony,

an element of which is the possession, use, or attempted use of a firearm. Here, the defendant was convicted of second-degree assault for shooting King in the chest with a shotgun. Because the jury found the defendant guilty of violating RSA 631:2, I(b), because the court instructed the jury on the definition of "deadly weapon," because the only weapon used was the shotgun that the defendant fired into King's chest, because the defendant did not contest that King was shot in the chest, and because a forensics expert, Dupre, testified without objection that the shotgun was a firearm, the defendant was eligible for an enhancement under RSA 651:2, II-g. Therefore, his sentence should be affirmed.

CONCLUSION

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

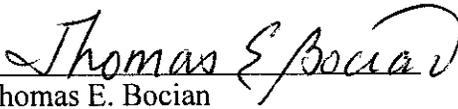
The State requests a 15-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

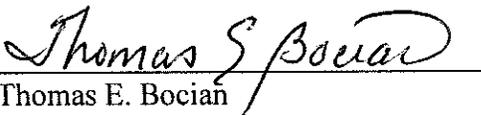
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I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Deputy Chief Appellate Defender David Rothstein, counsel of record.


Thomas E. Bocian

