

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0372

The State Of New Hampshire

v.

Ward Bird

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS..... 3

 A. Testimony At Trial 3

 B. Other Events During and After Trial 7

SUMMARY OF THE ARGUMENT 11

ARGUMENT 13

I. THE STATE DID NOT CREATE A MISLEADING IMPRESSION THAT
 WOULD OPEN THE DOOR TO THE ADMISSION OF IRRELEVANT
 EVIDENCE ABOUT THE COMPLAINING WITNESS’S
 CONVICTIONS FOR ANIMAL CRUELTY. 13

II. THE JURY COULD REASONABLY HAVE FOUND THAT THE
 STATE REBUTTED THE DEFENDANT’S CLAIM OF DEFENSE OF
 PREMISES..... 18

III. THE JURY COULD REASONABLY HAVE FOUND THAT POINTING
 A PISTOL CONSTITUTES THE USE OF A DEADLY WEAPON TO
 PLACE ANOTHER PERSON IN FEAR OF IMMINENT BODILY
 INJURY..... 25

IV. THE SENTENCING COURT PROPERLY APPLIED RSA 651:2, II-G
 BECAUSE THE GUILTY VERDICT COULD ONLY MEAN THAT THE
 JURY HAD FOUND THAT THE DEFENDANT USED A FIREARM..... 27

V. APPLICATION OF RSA 651:2, II-g WAS NOT DISPROPORTIONATE
 TO THE DEFENDANT’S OFFENSE..... 31

CONCLUSION 34

STATE’S APPENDIX 35

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U.S. 466 (2000) 28

Beach v. Hancock, 27 N.H. 223 (1853) 22

Camm v. State, 812 N.E.2d 1127 (Ind. Ct. App. 2004)..... 15

Duquette v. Warden, 154 N.H. 737 (2007) 31

Grubbs v. Bailes, 445 F.3d 1275 (10th Cir. 2006)..... 20

Harmelin v. Michigan, 501 U.S. 957 (1991)..... 33

In re Baker, 154 N.H. 186 (2006) 21

King v. State, 790 S.W.2d 678 (Tex. App. 1989) 30

Nantz v. State, 740 N.E.2d 1276 (Ind. Ct. App. 2001)..... 20

People v. Broadie, 360 N.Y.S.2d 906 (App. Div. 1974),
aff'd, 371 N.Y.S.2d 471 (1975) 33

People v. Daniels, 22 Cal. Rptr. 2d 877 (Ct. App. 1993) 29

People v. Doud, 193 N.W. 884 (Mich. 1923) 23

Petition of State of N.H. (State v. Johanson), 156 N.H. 148 (2007) 27

Poole v. State, 974 S.W.2d 892 (Tex. App. 1998)..... 15

<i>Rivero v. State</i> , 871 So. 2d 953 (Fla. Dist. Ct. App. 2004)	20
<i>Sherrill v. State</i> , 277 P. 288 (Okla. Crim. App. 1929)	23
<i>State v. Abdul-Khaliq</i> , 39 S.W.3d 880 (Mo. Ct. App. 2001)	20
<i>State v. Cannell</i> , 916 A.2d 231 (Me. 2007)	20
<i>State v. Curtis</i> , No. A08-0705, 2009 WL 2925521 (Minn. Ct. App. Sept. 15, 2009)	15
<i>State v. Dean</i> , 115 N.H. 520 (1975)	31, 33
<i>State v. Deutscher</i> , 589 P.2d 620 (Kan.1979)	29
<i>State v. Dumont</i> , 122 N.H. 866 (1982)	31
<i>State v. Ellsworth</i> , 142 N.H. 710 (1998)	16
<i>State v. Gruber</i> , 132 N.H. 83 (1989)	18
<i>State v. Hall</i> , 154 N.H. 180 (2006)	31
<i>State v. Hatt</i> , 144 N.H. 246 (1999)	26, 29
<i>State v. Henderson</i> , 154 N.H. 95 (2006)	27, 28
<i>State v. Hermsdorf</i> , 135 N.H. 360 (1992)	22
<i>State v. Higgins</i> , 149 N.H. 290 (2003)	12, 28, 29
<i>State v. Hopkins</i> , 136 N.H. 272 (1992)	14
<i>State v. Lopez</i> , 156 N.H. 416 (2007)	13

State v. Ludt, 906 N.E.2d 1182 (Ohio Ct. App. 2009) 24

State v. MacInnes, 151 N.H. 732 (2005)..... 20

State v. McCue, 134 N.H. 94 (1991) 25

State v. Montgomery, 22 N.W. 639 (Iowa 1885) 22

State v. Moore, 729 A.2d 1021 (N.J. 1999) 21, 22

State v. Morrill, 154 N.H. 547 (2006)..... 9, 13

State v. Murphy, 500 P.2d 1276 (Wash. Ct. App. 1972)..... 23

State v. Peabody, 121 N.H. 1075 (1981)..... 31

State v. Scott, 55 S.E. 69 (N.C. 1906) 22

State v. Taylor, 20 Kan. 643 (1878) 22

State v. White, 155 N.H. 119 (2007) 9

United States v. Looney, 532 F.3d 392 (5th Cir. 2008)..... 32

Statutes

N.J.S.A. § 2C:3-11b (2006)..... 21

RSA 625:11, V (2007) 25, 26, 29

RSA 627:4 18

RSA 627:7 (2007) passim

RSA 627:9 (2007)	20
RSA 627:9, II	20, 22, 25
RSA 631:4 (2007)	2
RSA 631:4, I(a) (2007).....	25
RSA 631:4, II(a)(2) (2007).....	25
RSA 651:2, II-g (2007)	passim

Other Authorities

Model Penal Code § 3.11(2) (Official Draft and Revised Comments 1985).....	21
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Rules

<u>N.H. R. Ev.</u> 401	8
<u>N.H. R. Ev.</u> 403	8, 17
<i>Sup. Ct. R.</i> 15(2)(a), (3).....	10

Constitutional Provisions

N.H. CONST. part I, art. 18	31
U.S. CONST. amend. VIII	32

ISSUES PRESENTED

I. Whether the trial court correctly denied the defendant's motion to permit cross-examination of the complaining witness regarding her convictions for animal cruelty based on behavior eighteen months after the defendant's act of criminal threatening.

II. Whether the trial court correctly denied the defendant's motion to set aside the verdict based on defense of premises.

III. Whether the trial court correctly denied the defendant's motion to dismiss the charge of criminal threatening with a deadly weapon, when the complaining witness testified that the defendant pointed a pistol at her.

IV. Whether the sentencing court correctly applied the enhanced sentencing provision in RSA 651:2, II-g (2007), when it ruled that the jury's finding that the defendant threatened the victim with a deadly weapon could only mean that the deadly weapon was a firearm.

V. Whether RSA 651:2, II-g is unconstitutionally disproportional to the offense, as applied to this defendant, under part I, article 18 of the New Hampshire Constitution.

STATEMENT OF THE CASE

In 2007, a Carroll County grand jury indicted the defendant, Ward Bird, on a charge of criminal threatening, based on events occurring on March 27, 2006. T 4-5.¹ See RSA 631:4 (2007). In connection with a related charge, he had previously filed a “Notice of Possible Reliance on a Claim of Defense of Premises Pursuant to RSA 627:7.” DBA 6-7. He later filed two motions *in limine*, seeking to introduce evidence of the complaining witness’s criminal convictions based on events in September 2007. DBA 11-18, 22-25. The State objected, DBA 19-21, 26-28, and the Carroll County Superior Court denied the motions. T1 80-82.

The defendant was tried before a jury in the same court (*Houran, J.*) and convicted of criminal threatening; he was acquitted on the related charge. NOA 6. The court sentenced him to a mandatory term of three to six years in state prison pursuant to RSA 651:2, II-g (2007). NOA 2. This appeal followed.

¹ References to the record are as follows: “NOA” is the notice of appeal; “DB” is the defendant’s brief; “DBA” is the appendix to the defendant’s brief; “App.” is the appendix to this brief; “T1” through “T3” are the three volumes of transcript from the trial on June 25-27, 2008; “TM” is the transcript of the motion hearing on October 7, 2008; “TS” is the transcript of sentencing on April 24, 2009.

STATEMENT OF FACTS

A. Testimony At Trial

At some time before trial in June 2008 (the date is not in the appellate record), the victim, Christine Harris, pled guilty to a felony for passing a bad check. T1 58. The indictment in that case showed that she was also known as Christine Booth and Christine Lambert. T3 378.

In March 2006, Harris was interested in buying a large piece of land. T1 41-42, 60. She contacted a real estate agent in Center Harbor and arranged to meet him on March 27 to view a parcel in Moultonborough owned by Patricia Viano. T1 41-42, 178-79, 183-84. On March 26, she called several people in Moultonborough, including the defendant, whose property abutted the Viano property, to ask whether they knew of land for sale. T1 57; T2 180. When she found that she could not reach the real estate office by the appointed time of 1:00 p.m. on the 27th, she called the agent and learned that he could not meet her later that afternoon; she then went to look at the property by herself. T1 45.

Harris was unfamiliar with the area. T1 41. Despite having obtained maps from the Internet and asking for directions more than once, she was still lost when she stopped at the home of Laura Heald-Keyser. T1 46-47; T2 194-95. Heald-Keyser was the defendant's niece through marriage, and was familiar with the Viano property. T2 193-96. Harris rang her doorbell and introduced herself to

Heald-Keyser as Christine Lambert. T2 195, 243. She asked for directions to the Viano property. T1 195.

The most direct route to the Viano property involved turning off Route 109 in Moultonborough onto a dirt road called Emerson Path, taking a left fork onto Yukon Trail, and then a sharp left onto a road with a small bridge over a stream. T2 181. This led directly to the Viano property; the bridge itself had been built by one of the Vianos. *Id.* There were no real estate signs posted. *Id.* Anyone driving down Yukon Trail who did not turn onto the road with the bridge would eventually find himself at a dead end on the defendant's property. T2 185. The bridge, however, was not immediately visible from Yukon Trail. T2 253.

At the intersection of Emerson Path and Route 109, there was a sign reading, "Private Road, Keep Out." T2 182-83. There were other signs reading "No Trespassing" further up the road, and on Yukon Trail. T2 201-02. Heald-Keyser was familiar with these signs. T2 200-02. Nevertheless, she told Harris to go up Emerson Path and Yukon Trail, and to "bear left" and drive over a bridge. T2 197-98. She also said that if Harris saw a white "job trailer" or a Dumpster, it meant she was on the wrong property. T2 198. Harris then left, without writing down the directions. T1 48.

Heald-Keyser was "suspicious" because Harris had stopped at her house, which was not on a main road, so she called the defendant and his wife and told them that Harris might end up on his property. T2 198. Harris was wearing a red

dress and driving a green Ford Ranger. T1 47. Heald-Keyser described her clothing and her vehicle to the defendant. T2 199; T3 322.

Shortly thereafter, Harris drove up Yukon Trail. T1 49. She stopped at a house and beeped her horn, but no one responded. *Id.* Not seeing the bridge, she drove past the trailer and the Dumpster and continued for roughly another quarter mile until she saw a woman on the porch of the defendant's house. T1 49-51; T2 173, 210. She then pulled into the defendant's driveway. T1 51.

By the time Harris stopped, the woman had gone into the house. *Id.* Harris heard screaming as she opened her door and got out of the Ford; she stood next to the open door and saw the defendant on the porch, "screaming, get the F off my property." T1 51-52. He was waving a pistol at her. T1 52-53. Harris described it as "L shaped," "flat," and "dark color," but not black. T1 53. She asked if he was Steve Viano (Patricia's husband), and he repeated the command to get off his property, saying, "Do I look like Steve Viano?" T1 52.

Harris told him that she did not know what Viano looked like. *Id.* Seeing that the defendant persisted, she got back into the Ford and said to herself, "What an ass." T1 54. She thought the defendant must have read her lips because he came off the porch and toward her for a short distance as she backed down the driveway. T1 54; T2 145. He was still waving the gun. T2 54.

At 5:12 p.m., the defendant called the Moultonborough Police and reported a trespasser on his property. T2 254. At 5:13, Harris called the Moultonborough

Police and reported that she had been looking at property and someone had waved a gun at her. T1 57; T2 255. After receiving directions from the dispatcher, Harris arrived at the station ten minutes later and spoke to Lieutenant Thomas Dawson. T2 255-56. She was “very upset and crying.” T2 257. Dawson heard her story and had her write a statement; he then went to the defendant’s house. T2 256-62.

Dawson, who was a private businessman in addition to his police duties, knew the defendant through his work. T2 250. He met the defendant on his porch; the defendant told him that Harris had trespassed and that his driveway was posted. T2 262-63. Dawson asked about the gun, and the defendant said that he had it but “it never left his backside.” T2 264. He told Dawson that his niece had warned him that Harris might show up on his property. T2 266. He also said that when Harris left his property, he had taken the gun out of his belt to “make it safe” as he reentered the house. T2 273.

At Dawson’s request, the defendant retrieved and gave him the gun. T2 303-04. It was a Sig Sauer .45 caliber—a pistol that uses a magazine. T2 304-06. Also at Dawson’s request, the defendant gave him a written statement the next day. T2 306. In the statement, he said that his niece had told him Harris was wearing red and driving a green Ford. T3 322. He admitted that he had “lost his temper” and said “get the F off his property.” T3 325. He also said that he thought Harris had “mouthed the words F you” at him while in her vehicle. *Id.*

B. Other Events During and After Trial

During her direct examination, Harris was asked whether she had funds in March 2006 to buy the Viano property, which was then listed at \$990,000. T1 40, 60. She said she did not, because she was “looking to do an educational farm” and planned to get “state grants and federal grants.” T1 60. She said she had abandoned the idea after her encounter with the defendant, and because she had “been seriously sick.” *Id.* The State then ceased its direct examination. *Id.*

On cross-examination, the defendant inquired at length into Harris’s reasons for planning an educational farm, and her qualifications for operating one. T1 78-92. Among other things, Harris said that, while she had some experience with animals, she planned to hire others with “more expertise” to handle “the cattle, the sheep, [and] the goats” and to provide educational programs. T1 83. After more questions about her experience with animals, the defendant asked the court to rule that Harris had “opened the door” to cross-examination about her January 2008 convictions for animal cruelty in Salem District Court, because that evidence would cast doubt on “her ability to take care of animals.” T1 92.

The State had previously argued that it “is not opening the door if the witness responds to a question that’s designed to open a door.” T1 88. It now reiterated this argument, and also repeated the arguments it had made in its objection to the defendant’s pre-trial motions *in limine*: that the animal cruelty convictions involved events occurring eighteen months after the defendant’s act of

criminal threatening; that they were not crimes of dishonesty; that Harris had noted her intent to appeal the convictions for trial *de novo* after the district court had sentenced her; that the convictions had no probative value; and that they were likely to create bias against the witness. T1 92-94; DBA 26-27.

The court denied the defendant's request "for the reason asserted by the State" and because, in view of Harris's testimony that she would hire others to tend the animals on the proposed farm, there was insufficient nexus between her testimony and the cruelty convictions. T1 94-95. At the end of the first day of trial, the defendant was still cross-examining Harris. He then filed another motion *in limine* (the written motion has not been included in the appellate record) to introduce evidence of Harris's cruelty convictions. T2 132-33. The court heard argument on the motion before the second day of testimony. T2 132-41.

The State again objected, referring to Harris's testimony cited in the court's ruling the day before, and pointing out that the convictions involved neglect of dogs and cats, not farm animals. T2 133-34. The court ruled that the evidence was not relevant under New Hampshire Rule of Evidence 401, and that it would also be excluded under Rule 403. T2 138-39. It further ruled that the State had not opened the door to the admission of such inadmissible evidence by creating a misleading impression, and that Harris's testimony about an educational farm was "[n]ot sufficient to open the door to taking care of cats and dogs eighteen months or two years later in Salem and the charges that resulted from that." T2 139-40.

The court concluded that the evidence was not admissible under this Court's holdings in *State v. Morrill*, 154 N.H. 547 (2006), and *State v. White*, 155 N.H. 119 (2007). T2 139-41.

When the State rested, the defendant moved to dismiss the threatening charge, first noting his claim of "defense of property and ... an uninvited trespasser coming onto his property for a non-legitimate purpose," and then arguing that "even if the Court were to accept that he waved [the gun], there's been no evidence that it was a deadly weapon and not a firearm at that point." T3 382-83. The State objected, noting that the court had to consider the evidence in the light most favorable to the State, and that Harris had testified both that the defendant had pointed the gun at her, and that she had been afraid. T3 384-85. It also argued that there was no need of proof that the gun could actually fire, because "[w]hat elevates a criminal threatening to a felony is using something that would put the person in fear of death or serious bodily injury by using an object that is known to cause death or serious bodily injury." T3 387-88. The court denied the motion, ruling that a reasonable finder of fact could conclude that the State had proved all the elements of criminal threatening. T3 390-92, 400.

The defendant requested a jury instruction on defense of premises using non-deadly force. T3 412. The State objected, arguing that there had been no "evidence that his property was in any danger or that he had any reasonable basis to believe this woman was a threat...." *Id.* The defendant responded that, because

Harris had not been invited onto the property, “by definition, she was a trespasser. He had his property posted....” T3 413. The court agreed to give the requested instruction. T3 414. The instructions themselves are not part of the appellate record because the defendant did not request that the Court order them transcribed. *See Sup. Ct. R. 15(2)(a), (3)*.

After the defendant was found guilty of criminal threatening, he filed a motion to set aside the verdict, arguing that the evidence was insufficient to convict and that the State had failed to rebut his claim of defense of premises. App. 1. At the hearing on the motion, the State argued that, viewing the evidence in the light most favorable to the State, the defendant had no reason to believe that pointing a gun at Harris was necessary to terminate any trespass. TM 14-20. The defendant responded that he had an “absolute defense to eject a criminal trespasser from his land” under the statutes (presumably referring to RSA 627:7, as in his original pleading, DBA 6). TM 21-23. The State then argued that such a claim “leaves out key words in [the statute], key words being reasonably believes is necessary” TM 26.

The court denied the motion, ruling that the evidence was sufficient to prove criminal threatening, and that a rational trier of fact could find that the defendant did not reasonably believe it necessary to use even non-deadly force in order to terminate Harris’s trespass of his property. App. 3-7.

SUMMARY OF THE ARGUMENT

I. The trial court properly denied the defendant's repeated attempts to cross-examine Harris on her 2008 convictions for animal cruelty. The State did not create a misleading impression about Harris's desire to start an educational farm: the evidence that was claimed to "open the door" to evidence of the convictions was elicited by the defendant on cross-examination, and was therefore not subject to impeachment by otherwise inadmissible evidence. In any case, the convictions had no probative value and great potential for prejudicial effect.

II. The motion to set aside the verdict was correctly denied, because the jury could reasonably have found that the State had rebutted the claim of defense of premises. Even if Harris was trespassing, and even if the defendant believed it was necessary to threaten her with a gun to terminate the trespass, the jury could have found that belief to be unreasonable. If this Court chooses to address the issue, it should hold either that pointing a gun constitutes deadly force, or that pointing a gun cannot be justified by a mere trespass even if it constitutes non-deadly force.

III. Because the two terms are defined by different statutes, the jury could have found that the defendant used a deadly weapon even if it found that he used non-deadly force. There was therefore sufficient evidence to convict the defendant of felony criminal threatening.

IV. The sentencing court correctly ruled that the enhanced sentencing provisions of RSA 651:2, II-g were applicable even though the jury was not given a special verdict form or instructed to find expressly that the defendant used a firearm. Under *State v. Higgins*, 149 N.H. 290, 302 (2003), the jury's verdict included a finding that the defendant used a deadly weapon, and in light of the evidence and all the instructions, this could only mean that he used a firearm.

V. The defendant has not shown that his sentence of three to six years was grossly disproportionate to the offense of criminal threatening with a deadly weapon. The legislature has the right to create mandatory sentences for felonies involving the use of firearms. Even if this Court were to consider such a sentence unjust, any remedy lies in the hands of the legislature.

ARGUMENT

I. THE STATE DID NOT CREATE A MISLEADING IMPRESSION THAT WOULD OPEN THE DOOR TO THE ADMISSION OF IRRELEVANT EVIDENCE ABOUT THE COMPLAINING WITNESS'S CONVICTIONS FOR ANIMAL CRUELTY.

The defendant argues that the trial court erred in denying his repeated requests to cross-examine Harris about her 2008 convictions for animal cruelty in Salem District Court. DB 7-11. This Court reviews the trial court's rulings on admissibility of evidence for an unsustainable exercise of discretion. *State v. Lopez*, 156 N.H. 416, 422 (2007). "To show that the trial court's exercise of discretion is unsustainable, the defendant must show that the decision was clearly unreasonable to the prejudice of his case." *Id.* at 420. The defendant here cannot meet this test.

The defendant's argument is based on the "specific contradiction doctrine" outlined in *State v. Morrill*, 154 N.H. 547 (2006). DB 7-10.

In order for that doctrine to apply, the State must have introduced evidence that provided a justification, beyond mere relevance, for the defendant to introduce evidence that would not otherwise have been admissible. The initial evidence must, however, have reasonably misled the fact finder in some way.

Lopez, 156 N.H. at 422 (citations omitted). The first reason why the defendant's argument must fail is that the testimony that allegedly opened the door was not introduced by the State, but was elicited by the defendant on cross-examination.

As the State said at trial, it “is not opening the door if the witness responds to a question that’s designed to open a door.” T1 88.

This Court applied this principle in *State v. Hopkins*, 136 N.H. 272 (1992), a case in which the State had called the defendant’s mother as a rebuttal witness to contradict two statements made by the defendant when he testified. *Id.* at 274. The defendant cross-examined her and asked several questions intended to elicit facts showing that she was biased against him. *Id.* He then requested to be allowed to retake the stand to rebut this testimony. *Id.* at 275. The trial court denied the request, and this Court affirmed, saying:

The objective is to avoid a “trial within a trial,” that is, to avoid the litigation of issues that are collateral to the case at hand. ... The defendant appears to argue that the introduction of prejudicial evidence can make otherwise inadmissible evidence admissible. The term “opening-the-door” is used to describe situations in which a misleading advantage gained by the opposing party may be countered with previously suppressed or otherwise inadmissible evidence. The admissibility of such evidence is within the sound discretion of the trial judge. In the instant case the defendant brought the disadvantage upon himself, and the issues raised were collateral to the case at hand. We find no abuse of the trial court’s discretion.

Id. at 276 (citations omitted). Other courts have recognized the same principle:

[W]hen a witness voluntarily gives misleading testimony resulting in a false impression about a collateral matter, the witness may be impeached on that matter in order to correct the false impression. This can only be done when a witness has *voluntarily testified* to the collateral matter. A party cannot seek to impeach a witness by soliciting a misleading response to a collateral matter on cross-examination.

Poole v. State, 974 S.W.2d 892, 905 (Tex. App. 1998); *accord Camm v. State*, 812 N.E.2d 1127, 1135 (Ind. Ct. App. 2004) (“Statements made by a defendant that are elicited by the State on cross-examination cannot be relied upon to ‘open the door’ to otherwise inadmissible evidence.”); *State v. Curtis*, No. A08-0705, 2009 WL 2925521, at *4 (Minn. Ct. App. Sept. 15, 2009) (“The reason for this distinction between denials offered on direct examination and those elicited on cross-examination is that opposing counsel may manipulate questions to trap an unwary witness into ‘volunteering’ statements on cross-examination.” (Quotation omitted.)).

Here, on direct examination Harris only said that she wanted to start an educational farm and pay for it with state and federal grants. T1 60. On cross-examination, the defendant repeatedly asked Harris questions intended to elicit statements about her ability to care for animals. *See, e.g.*, T1 79 (“Do you have experience doing that [farming]?” “What kind of experience do you have?” “Do you have experience taking care of animals?”); T1 82-83 (“[Y]ou said that you had been with animals your whole life. ... Can you tell me about that?”); T1 86 (“Are you educated in this?” “And what courses have you taken?”); T1 89-90 (“How long have you been learning this?” “You seem to have extensive knowledge about animals. Do you?”); T1 91-92 (“You had mentioned earlier ... animal husbandry? ... Do you know how to do that?”). It was only after Harris had answered some or all of these questions that the defendant argued that the

door had been opened. T1 80, 92. It follows that the doctrine of specific contradiction can have no application here.

Other reasons argued by the State below, and also accepted by the court, T1 94-95, demonstrated that Harris's convictions were not probative even to impeach her testimony that she cared for animals. The convictions resulted from her "rescuing" too many cats and dogs, and being so overwhelmed by numbers that she was unable to keep them clean and fed. T1 92-94; T2 135. This suggested that she cared too much about animals, rather than too little. In addition, the convictions were too remote in time from the events of March 27, 2006. *Id.*, DBA 26. *Cf. State v. Ellsworth*, 142 N.H. 710, 717 (1998) ("the temporal (as well as logical) relationship between a victim's later act and his earlier state of mind attenuates the relevance of such proof" (quotation and brackets omitted)). The trial court accordingly ruled that there was insufficient nexus between the convictions and Harris's testimony in this case. T2 138-41.

As the State also noted, the convictions' probative value was further limited by the fact that they were not final, but would be relitigated in superior court in a trial *de novo*, T2 135, 138; they did not involve crimes of dishonesty, and thus could not be probative of truthfulness on that basis, DBA 27; and animal cruelty is a subject that could be expected to provoke strong emotions in jurors, T2 134-35. Thus, even if the evidence had been otherwise admissible, it should have been excluded because its prejudicial effect substantially outweighed any probative

value. *N.H. R. Ev.* 403. It follows that the defendant has not shown an unsustainable exercise of discretion.

II. THE JURY COULD REASONABLY HAVE FOUND THAT THE STATE REBUTTED THE DEFENDANT'S CLAIM OF DEFENSE OF PREMISES.

The defendant argues that the trial court should have granted his motion to set aside the verdict on grounds that the State failed to rebut his claim of defense of premises under RSA 627:7 (2007). DB 12-20. “[T]he determination whether to deny a motion to set aside the verdict rests within the sound discretion of the court. For this court to overturn the trial court’s decision, the defendant must establish that no rational trier of fact, viewing the evidence most favorably to the State, could have found guilt beyond a reasonable doubt.” *State v. Gruber*, 132 N.H. 83, 92 (1989) (citation and quotation omitted). The defendant here cannot meet this test.

The defendant’s argument rests on an incomplete reading of the defense of premises statute. That statute reads:

A person in possession or control of premises or a person who is licensed or privileged to be thereon is justified in using non-deadly force upon another when and to the extent that he reasonably believes it necessary to prevent or terminate the commission of a criminal trespass by such other in or upon such premises, but he may use deadly force under such circumstances only in defense of a person as prescribed in RSA 627:4 or when he reasonably believes it necessary to prevent an attempt by the trespasser to commit arson.

RSA 627:7. The defendant first argues that, even if the jury found that he pointed a pistol at Harris, that act constituted the use of non-deadly force. DB 15-18. He

then argues that when a trespass occurs, the use of such force to terminate the trespass is “*per se* reasonable” under the statute. DB 20.

There is nothing in the language of RSA 627:7 to support such a reading. As the State repeatedly argued below, *see, e.g.*, TM 14-15, 26, the jury could convict if it concluded that the defendant did not reasonably believe that the force he used was necessary to terminate the trespass. Here, there was no evidence that Harris did anything, or threatened to do anything, that would require a threat of shooting her to prevent it. Thus, even if the jury found that Harris was trespassing, and even if it found that the defendant believed it necessary to point a pistol at her to terminate the trespass, it could still convict if it found that belief to be unreasonable, and the evidence clearly permitted such a finding. The motion to set aside was therefore correctly denied.

Although unnecessary to the resolution of this issue, the Court may wish to address the question of whether deadly or non-deadly force was used. In its order denying the motion to set aside, the trial court stated, “It is uncontroverted that Mr. Bird ... did not use deadly force.” App. 6. This is incorrect. The State objected to the defendant’s request for a jury instruction on the use of “non-deadly force,” T3 412, and even at the hearing on the motion to set aside, it never conceded that pointing a pistol involved no more than non-deadly force. This Court has expressly stated that the issue of whether pointing a gun constitutes deadly or non-

deadly force remains an open question in New Hampshire. *State v. MacInnes*, 151 N.H. 732, 737 (2005).

There is a split among American jurisdictions on the issue. As the defendant correctly notes, in Maine the act of pointing a gun is held to be non-deadly force. *State v. Cannell*, 916 A.2d 231, 234 (Me. 2007) (cited at DB 15-17); *accord, Rivero v. State*, 871 So. 2d 953, 954 (Fla. Dist. Ct. App. 2004). Other states, however, have held to the contrary. *See, e.g., Grubbs v. Bailes*, 445 F.3d 1275, 1279 (10th Cir. 2006) (construing Oklahoma law); *Nantz v. State*, 740 N.E.2d 1276, 1280-81 (Ind. Ct. App. 2001); *State v. Abdul-Khaliq*, 39 S.W.3d 880, 886 (Mo. Ct. App. 2001).

The phrase “deadly force,” as used in RSA 627:7, is defined in RSA 627:9 (2007).

“Deadly force” means any assault or confinement which the actor commits with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily injury. Purposely firing a firearm capable of causing serious bodily injury or death in the direction of another person or at a vehicle in which another is believed to be constitutes deadly force.

RSA 627:9, II.

In matters of statutory interpretation, [this Court is] the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. [This Court will] first examine the language found in the statute, and where possible, [it will] ascribe the plain and ordinary meanings to words used. Where statutory language is ambiguous or where more than one reasonable interpretation exists, [this Court] must look beyond the statute itself to determine its meaning.

In re Baker, 154 N.H. 186, 187 (2006) (citations omitted). Here, reasonable persons could disagree as to whether pointing a firearm constitutes an “assault” that is known to “create a substantial risk of causing death or serious bodily injury.” Because more than one interpretation is possible, this Court should look beyond the statute itself to determine the legislature’s intent.

In this regard, two authorities cited in the defendant’s brief are helpful, although not for the proposition he advances. *See* DB 17. RSA 627:7 follows closely the language of the Model Penal Code (MPC), with one significant exception. The relevant MPC section says:

“[D]eadly force” means force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily injury, by the production of a weapon or otherwise, so long as the actor’s purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force.

Model Penal Code § 3.11(2) (Official Draft and Revised Comments 1985).

The New Jersey statute construed in *State v. Moore*, 729 A.2d 1021, 1027-28 (N.J. 1999) (cited at DB 17), effectively tracks the language of the MPC. N.J.S.A. § 2C:3-11b (2006). RSA 627:7 does the same, but does not include the last sentence—the exception that classifies threatening by “production of a weapon” as non-deadly force. As the *Moore* court noted, “the purpose of that exception is to change the common law rule that where there is no justification for

using extreme force in self-defense, threatening to use it may be considered an assault....” *Moore*, 729 A.2d at 1027. The only reasonable conclusion to be drawn is that, in enacting RSA 627:9, II, the New Hampshire legislature intended to retain the common-law rule. *See State v. Hermsdorf*, 135 N.H. 360, 363 (1992) (“In enacting legislation, the legislature is presumed to be aware of the common law: [this Court] will not construe a statute as abrogating the common law unless the statute clearly expresses such an intention.” (Quotations omitted.)).

This Court eloquently explained the reason for that rule many years ago, when it held that a defendant who threatened others with a gun was properly held liable for civil assault, even when the gun was not loaded:

One of the most important objects to be attained by the enactment of laws and the institutions of civilized society is, each of us shall feel secure against unlawful assaults. Without such security society loses most of its value. Peace and order and domestic happiness, inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security. We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain. And it surely is not unreasonable for a person to entertain a fear of personal injury, when a pistol is pointed at him in a threatening manner, when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort, if such things could be done with impunity.

Beach v. Hancock, 27 N.H. 223, 229-30 (1853). Under this common-law rule, it was generally held that such an assault could not be justified by a simple trespass. *See, e.g., State v. Montgomery*, 22 N.W. 639, 640-41 (Iowa 1885); *State v. Taylor*, 20 Kan. 643 (1878); *State v. Scott*, 55 S.E. 69, 70 (N.C. 1906) (“in order to prevent

a mere trespass, ... if [the defendant] offers to strike with a deadly weapon or to shoot with a pistol, ... before resorting to a milder mode of prevention, he shows ruthlessness and a wanton disregard of human life and social duty”); *Sherrill v. State*, 277 P. 288, 288-89 (Okla. Crim. App. 1929). In 1923, the Supreme Court of Michigan upheld a conviction for felonious assault where the defendant forced an alleged trespasser to leave by pointing a gun at him:

No man may, in defense of his mere land against trespassers, assault the invaders with a dangerous weapon. The law forbids such a menacing of human life for so trivial a cause. And the statute in question was enacted to prevent the use of dangerous weapons for the purpose of making assaults more effective through terror, and to prevent appeals to dangerous weapons as an arbiter in quarrels, brawls, and disputes.

People v. Doud, 193 N.W. 884, 887 (Mich. 1923).

Doud was cited with approval by the Court of Appeals of Washington when, after reversing on other grounds the conviction of a defendant who admitted holding a pistol (but not pointing it) while threatening alleged trespassers, it dealt with a modern statute providing that force, “not more than shall be necessary,” was justified when used to prevent “a malicious trespass, or other malicious interference with real or personal property....” *State v. Murphy*, 500 P.2d 1276, 1282-83 (Wash. Ct. App. 1972). The court found it unnecessary to construe this language, saying: “Under the statute or under the common law, the use of a deadly weapon by a private party to eject a mere nonviolent, nonboisterous trespasser, who, at most can be understood to be interfering with a private party’s intangible

proprietary interests, is, as a matter of law, not a justifiable use of force.” *Id.* at 1283; *see also State v. Ludt*, 906 N.E.2d 1182, 1188 (Ohio Ct. App. 2009) (“[I]f a person brandishes a deadly weapon to expel trespassers, then the defense-of-property argument would necessarily need to include proof of his fear of death or great bodily harm, rather than simple fear of any bodily harm.”).

Therefore, if this Court chooses to address this issue more fully, it should hold either that the pointing of a firearm constitutes deadly force, and was therefore unjustified in this case as a matter of law; or that it is irrelevant in this case whether pointing a firearm constitutes deadly or non-deadly force, because as a matter of law such an act can never be justified by a mere trespass.

III. THE JURY COULD REASONABLY HAVE FOUND THAT POINTING A PISTOL CONSTITUTES THE USE OF A DEADLY WEAPON TO PLACE ANOTHER PERSON IN FEAR OF IMMINENT BODILY INJURY.

The defendant argues that the trial court should have granted his motion to dismiss because the evidence was insufficient to prove that his actions fell under the felony provision of the criminal threatening statute. DB 21. As in the previous section, in this context “the defendant has the burden to demonstrate that no rational trier of fact, viewing the evidence in the light most favorable to the State, could have found guilt beyond a reasonable doubt.” *State v. McCue*, 134 N.H. 94, 104 (1991). The defendant cannot meet this test.

The State had to prove that, by physical conduct, the defendant “purposely place[d] or attempt[ed] to place [Harris] in fear of imminent bodily injury or physical contact,” while using a deadly weapon. RSA 631:4, I(a), II(a)(2) (2007). The defendant’s argument appears to conflate the term “deadly weapon,” as used in RSA 631:4, II(a)(2), and defined in RSA 625:11, V (2007), with the term “deadly force,” as defined in RSA 627:9, II. DB 21. There is no authority for such an argument. Even if the defendant’s acts could be deemed to constitute non-deadly force, the jury could find that he used a deadly weapon as long as it found that the pistol that Harris testified he had pointed at her (a Sig Sauer .45 caliber semi-automatic) was a thing “which, in the manner it is used, intended to be used,

or threatened to be used, is known to be capable of producing death or serious bodily injury.” RSA 625:11, V (2007).

It should go without saying that when a man points a pistol at someone, it can be inferred that he is threatening to fire it. It should also go without saying that when a pistol is fired, it is capable of producing death or serious bodily injury. *Cf. State v. Hatt*, 144 N.H. 246, 247-48 (1999) (a handgun that is threatened to be fired at a person is a deadly weapon under the statute, even if it is not loaded). Because Harris testified that the defendant pointed a pistol at her, T1 53, the jury could infer that he used a deadly weapon to purposely place her in fear of imminent bodily injury. The motion to dismiss was correctly denied.

IV. THE SENTENCING COURT PROPERLY APPLIED RSA 651:2, II-g BECAUSE THE GUILTY VERDICT COULD ONLY MEAN THAT THE JURY HAD FOUND THAT THE DEFENDANT USED A FIREARM.

The defendant argues that his sentence is unlawful, because the sentencing court improperly ruled that RSA 651:2, II-g (2007) was applicable. DB 22-23.

Because this issue involves statutory interpretation, this Court reviews it *de novo*.

Petition of State of N.H. (State v. Johanson), 156 N.H. 148, 151 (2007). The sentence was proper.

The statute reads in part:

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 person shall be given a minimum mandatory sentence of not less than 3 years' imprisonment for a first offense Neither the whole nor any part of the minimum sentence imposed under this paragraph shall be suspended or reduced.

RSA 651:2, II-g. This Court has held that the statute may not be applied “[a]bsent 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.” *State v. Henderson*, 154 N.H. 95, 98 (2006).

Here, the sentencing court cited *Henderson*, and acknowledged that “it did not by special verdict or by setting out an additional element obtain a specific finding by the jury that the deadly weapon [used by the defendant] was a firearm....” DBA 29-30. The court nevertheless ruled that RSA 651:2, II-g was

applicable under this Court's holding in *State v. Higgins*, 149 N.H. 290, 302 (2003). DBA 29-31. In that case, this Court held:

In light of the jury instructions as a whole and the evidence presented at trial, [this Court] conclude[s] that a reasonable jury would understand that the "deadly weapon" element of both criminal threatening charges exclusively referred to the use of a firearm. Therefore, the guilty verdicts reflect a unanimous conclusion that the defendant used a firearm, and no other object, as a deadly weapon to commit the crimes. Accordingly, [this Court] conclude[s] that the constitutional mandate of unanimity under [*Apprendi v. New Jersey*, 530 U.S. 466 (2000),] was fully satisfied in this case.

Higgins, 149 N.H. at 302.

In *Henderson*, under the instructions as given it was impossible to say whether the jury had found that the defendant had *possession*, as opposed to *control*, of a firearm; thus, this Court held that the statute could not be applied.

Henderson, 154 N.H. at 98. Here, however, as in *Higgins*, the indictment specified that the defendant had used a "firearm" and "deadly weapon." T1 4; *Higgins*, 149 N.H. at 299-300.

In *Higgins*, this Court held that the jury could be deemed to have unanimously found use of a firearm as a deadly weapon even though there was evidence that the defendant had used other objects, "including a riding crop, handcuffs, shackles and blankets," *id.* at 301, because the State's opening and closing, as well as the court's instructions and the evidence as a whole, had pointed to the gun as the only deadly weapon used, *id.* at 301-02. Here, there was no such complicating factor. The pistol was the only thing that could possibly

have been construed as a deadly weapon by any reasonable juror. Thus, the sentencing court was correct when it concluded that, because “*Higgins* remains good law,” it was obliged to apply the enhanced sentencing provisions of RSA 651:2, II-g. DBA 31.

The defendant’s only response is to argue that “[t]he facts of the case do not support that Mr. Bird used the gun as a deadly weapon. There was no evidence that he fired a shot or said he would shoot Ms. Harris.” This argument must fail as a matter of common sense, for the reasons outlined in the previous section of this brief. Under the statutory definition, the gun was a deadly weapon because, in the way it was threatened to be used, it was capable of inflicting death or serious bodily injury. RSA 625:11, V. *Hatt*, 144 N.H. at 247-48; *cf. State v. Deutscher*, 589 P.2d 620, 624-25 (Kan.1979) (“an unloaded revolver which is pointed in such a manner as to communicate to the person threatened an apparent ability to fire a shot and thus do bodily harm is a deadly weapon within the meaning expressed by the legislature in the assault statutes”).

When the defendant pointed a pistol at Harris, he was threatening to use it to inflict death or serious bodily injury, and the jury so found when it found that he had used a deadly weapon to put her in fear of death or serious bodily injury. *Cf. People v. Daniels*, 22 Cal. Rptr. 2d 877, 879 (Ct. App. 1993) (evidence that the defendant pointed a gun at everyone in living room and told them to get down was sufficient to support an inference that the defendant’s conduct was a

conditional threat constituting an assault); *King v. State*, 790 S.W.2d 678, 680-81 (Tex. App. 1989) (where there was evidence that defendant intentionally pointed shotgun at police officer, jury could infer that he threatened him with serious bodily injury). Neither the criminal threatening statute nor any other applicable statute requires more. There was no reversible error.

V. APPLICATION OF RSA 651:2, II-g WAS NOT DISPROPORTIONATE TO THE DEFENDANT'S OFFENSE.

The defendant argues that his sentence was unconstitutional because the mandatory sentence of three to six years in state prison under RSA 651:2, II-g was disproportionate to his offense under part I, article 18 of the New Hampshire Constitution. DB 24-27. This Court addresses constitutional issues *de novo*. *State v. Hall*, 154 N.H. 180, 182 (2006). This Court “must presume that the sentencing scheme is constitutional and [this Court] cannot declare it unconstitutional except upon inescapable grounds. For a sentence to violate Part I, Article 18 of the State Constitution, it must be grossly disproportionate to the crime.” *Duquette v. Warden*, 154 N.H. 737, 745 (2007) (citation and quotation omitted). The sentence was valid.

“The constitution does not prohibit the legislature from constricting the independent exercise of judicial discretion by the requirement of mandatory sentences.” *State v. Dean*, 115 N.H. 520, 523 (1975). As this Court has noted, “mandatory sentencing in New Hampshire has been cautiously and sparingly used,” and felonious use of a firearm is one of only a few areas in which the legislature has authorized such sentences. *State v. Peabody*, 121 N.H. 1075, 1078 (1981). Some of the reasons for this treatment were suggested when this Court upheld a six-month sentence for a first offense of receiving stolen firearms, where most first offenders received suspended sentences. *State v. Dumont*, 122 N.H.

866, 867-68 (1982). The Court said: “[I]t is clear that society’s legitimate concern with the public danger of thefts involving firearms increases the need for general deterrence of such offenses, and serves as an adequate justification for imposition of a more severe penalty. Thus, New Hampshire judges have generally dealt more severely with offenses involving firearms.” *Id.* at 868.

In *United States v. Looney*, 532 F.3d 392 (5th Cir. 2008), the court addressed a claim of disproportionality under the Eighth Amendment’s ban on cruel and unusual punishment. *Id.* at 396-97. The co-defendant, a woman in her fifties with no previous convictions, had received a sentence of forty-five years (“effectively a life sentence”) in prison for conspiracy and possession of methamphetamine with intent to distribute and for possessing firearms in furtherance of drug-trafficking crimes. *Id.* at 393. After noting that “[a]lthough thirty years of her sentence can be attributed to possessing guns in furtherance of her methamphetamine dealing, there is no evidence that [the co-defendant] brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house,” the court said:

We have previously recognized, following guidance from the Supreme Court, that successful Eighth Amendment challenges to prison-term lengths will be rare. And while a life sentence for a crime involving no actual violence might be considered a disproportionate punishment, it is not “grossly disproportionate” as that term is understood under current law. In sum, although we consider [the co-defendant’s] sentence to be unduly harsh for someone who has no previous conviction of any sort, it is for

Congress to ameliorate the result of application of statutory mandatory minimum sentences if it deems it too harsh.

Id. at 396-97 (citations omitted). Similarly, in *Dean* this Court quoted with approval the words of the Appellate Division of the New York Supreme Court: “While the statutory penalties are indeed harsh and in many cases unjust, any amelioration of their mandatory nature is a function for the Legislature, not the courts.” *People v. Broadie*, 360 N.Y.S.2d 906, 912 (App. Div. 1974), *aff’d*, 371 N.Y.S.2d 471 (1975), *quoted in Dean*, 115 N.H. at 524. *See Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (“Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense”).

The fact that the sentencing judge in this case stated that the defendant’s “personal circumstances ... substantially mitigate the appropriateness of a harsher sentence” than one year of work release followed by two years’ probation, DBA 31-32, can have no effect on this analysis. The legislature has determined that criminal threatening with a firearm merits a mandatory sentence of three to six years in prison, and any change in that scheme is for the legislature to initiate. The statute was constitutional as applied.

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

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January 25, 2010

I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Mark L. Sisti, Esq., and Adam K. Cook, Esq., counsel of record.



Nicholas Cort

STATE'S APPENDIX

Order on Motion to Set Aside Verdict1-7

STATE OF NEW HAMPSHIRE

CARROLL, SS

SUPERIOR COURT

Docket No. 07-S-206

State of New Hampshire

v.

Ward Bird

ORDER ON MOTION TO SET ASIDE VERDICT

Pending before the court is the defendant's Motion to Set Aside the Jury's Verdict. The State objects. The hearing was held on October 7, 2008. Upon consideration of the record before the court, including the evidence presented at trial, and of the arguments of the parties by pleading and at hearing, the court determines and orders as follows.

By the jury's verdicts rendered on June 30, 2008, the defendant was acquitted of reckless conduct in Docket No. 06-S-154, but convicted of criminal threatening in this docket. He asserts that the jury's verdict of guilty must be set aside for three reasons: first, he asserts that the indictment was insufficient to allege the crime of criminal threatening; second, he asserts that the evidence was insufficient to show that he committed criminal threatening; and third, he asserts that there was no evidence to negate his defense-of-property justification. The State asserts first that the defendant's motion is untimely and should not be considered, and then that the indictment is sufficient, the evidence was sufficient to support a verdict of guilty, and that it met its burden of negating the defendant's defense-of-property justification. The court takes up each issue in turn.

Superior Court Rule 105 requires motions to set aside verdicts of guilty to be filed within seven days of the verdict's rendition. This motion was filed 18 days after rendition, and was accordingly untimely. The court declines, however, to grant the State's request that the motion be rejected as untimely, and instead will consider this motion on its merits, exercising the court's discretion under the Preface to the Superior

Court Rules, under Superior Court Rule 105 itself, and upon notions of justice captured in the longstanding policy in New Hampshire that “cases be decided on their merits, that a party have his day in court and that rules of practice and procedure shall be tools in aid of the promotion of justice rather than barriers and traps for its denial.” *American Express Travel v. Moskoff*, 144 N.H. 190, 193 (1999); see *Jaques v. Chandler*, 73 N.H. 376, 381 (1905).

The defendant first asserts that the indictment is insufficient to allege the crime of criminal threatening. “An indictment, information or complaint is sufficient if it sets forth the offense fully, plainly, substantially and formally, and it is not necessary to set forth therein the special statute, bylaw or ordinance on which it is founded.” RSA 601:4.

These requirements for sufficiency of charging documents arise from the Sixth Amendment to the United States Constitution and the Fifteenth Article of Part I of the New Hampshire Constitution. Thus, in order to be constitutionally sufficient, a charging document “requires inclusion of all the elements constituting the offense.” *State v. Shute*, 122 N.H. 498, 504 (1982); accord e.g. *State v. Stiles*, 123 N.H. 680, 683 (1983), *State v. Bussiere*, 118 N.H. 659, 661 (1978). “The sufficiency of [a charging document] is determined not by inquiring whether the indictment could be more certain and comprehensive, but by determining whether it contains the ‘elements of the offense and enough facts to warn the accused of the specific charges against him.’” *State v. Pelky*, 131 N.H. 715, 719 (1989) (quoting *State v. Manchester News Co.*, 118 N.H. 255, 257 (1978)).

In this case the State charges by indictment that the defendant:

did commit the crime of criminal threatening in that by his physical conduct he purposely attempted to place Christine Harris in fear of imminent bodily injury or physical contact by waving [a] 45-caliber handgun, a firearm and deadly weapon pursuant to RSA 625:11, V at Christine Harris while telling Christine Harris to get off of his property.

RSA 631:4 defines criminal threatening in relevant part as:

I. A person is guilty of criminal threatening when:

(a) By physical conduct, the person purposely places or attempts to place another in fear of imminent bodily injury or physical contact;

* * *

II. (a) Criminal threatening is a class B felony if the person:

* * *

(2) Uses a deadly weapon as defined in RSA 625:11, V in the violation of the provisions of subparagraph I(a), I(b), I(c), or I(d).

Thus under RSA 631:4, I(a) and II(a)(2), the indictment must set out the following elements in order to be constitutionally sufficient: that by physical conduct, the defendant placed or attempted to place another person in fear of imminent bodily injury or physical contact; and that the defendant used a deadly weapon; and that the defendant acted purposely. The indictment in this case sets out each of those elements, and is accordingly sufficient to warn the defendant of the specific charges against him.

The defendant asserts that the physical conduct alleged, waving a handgun at Christine Harris while telling her to get off his property, is insufficient as a matter of law to constitute criminal threatening by physical conduct. The court disagrees. The court is mindful that the Second Amendment to the United States Constitution protects an individual right to possess a handgun in the house, and to use that firearm for traditionally lawful purposes such as immediate self-defense. *District of Columbia v. Heller*, 554 U.S. ___, ___ (slip op. 64, 2008). While it is uncontroverted that Mr. Bird was in lawful possession of his handgun, the issue is not his possession of the firearm but his use of it. A homeowner may be in lawful possession of a firearm but use it for an unlawful purpose. Here, the State charges that the defendant, by waving the handgun at Ms. Harris while telling her to get off his property, engaged in purposeful physical conduct placing or attempting to place Ms. Harris in fear of imminent bodily injury or physical conduct. The indictment is sufficient to allege the crime of criminal threatening.

The defendant next asserts that the evidence was insufficient to show that Mr. Bird committed the crime of criminal threatening.

With respect to sufficiency of the evidence, 'sufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law. Sufficiency is a test of adequacy . . . Determining whether evidence is sufficient requires both quantitative and qualitative analysis; 'quantitatively,' evidence may fail only if it is absent, that is, only where there is none at all, while 'qualitatively,' it fails when it cannot be said reasonably that the intended

inference may logically be drawn therefrom. Where evidence is insufficient, it is so lacking that [the case] should not . . . even be[] submitted to the jury.

State v. Spinale, 156 N.H. 456, 463 (2007) (quotations and citations omitted).

Thus, on a motion challenging the sufficiency of the evidence, the trial court "uphold[s] the jury's verdict unless no rational trier of fact could find guilt beyond a reasonable doubt, considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State." *State v. Gordon*, 147 N.H. 576, 579 (2002) (quotation and citation omitted).

In considering a motion for JNOV, the [trial] court cannot weigh the evidence or inquire into the credibility of the witnesses, and if the evidence adduced at trial is conflicting, or if several reasonable inferences may be drawn, the motion should be denied. Because the Due Process Clause prevents convictions based upon legally insufficient evidence, the question of whether a JNOV is required because of insufficient evidence is a question of law. Therefore, the trial court has little discretion when deciding whether to grant a motion for JNOV, and, on appeal, we objectively review the record to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [W]e will reinstate the jury's verdict unless no rational trier of fact could find guilt beyond a reasonable doubt, considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State.

Spinale, 156 N.H. at 463-64 (quotations and citations omitted).

In applying the facts to the sufficiency standard, [o]ur review does not involve an inquiry solely into whether the jury was given an instruction that guilt must be found 'beyond a reasonable doubt,' and then a search for any evidence of guilt. Rather, [t]he search for sufficient evidence involves an evaluation of the evidence to determine whether a 'reasonable' jury could have found guilt beyond a reasonable doubt. Where, as here, the victim's testimony suffices to establish a prima facie case, no corroborating evidence is needed. Further, [b]ecause this case does not rely solely upon circumstantial evidence, the evidence need not exclude all rational conclusions except guilt. The defendant bears the burden of demonstrating that the evidence was insufficient to prove guilt.

Spinale, 156 N.H. at 464 (quotations and citations omitted).

Here, Ms. Harris' eyewitness testimony considered in the light most favorable to the State, establishes each of the elements of criminal threatening. She testified to the effect that in looking for a property she was interested in purchasing in Mr. Bird's neighborhood she became lost and ended up at his house. She testified to the effect that he came out of the house, yelling at her and waving his handgun at her, and that as she drove away she broke down in tears, realizing that she could have been killed. Mr. Bird made a statement to the police to the effect that he made the handgun safe before going back into the house and, although corroboration is not required, Mr. Bird's own statements to the police corroborate significant parts of Ms. Harris' testimony. There was sufficient evidence from which a reasonable trier of fact could conclude that by physical conduct the defendant placed or attempted to place Ms. Harris in fear of imminent bodily injury, that in doing so the defendant used a deadly weapon, and that the defendant acted purposely. Taken in the light most favorable to the State, there was sufficient evidence upon which a reasonable trier of fact could find guilt beyond a reasonable doubt.

The defendant also asserts that no evidence negated his defense of his property justifying his use of non-deadly force to repel a known criminal trespasser.

The defendant filed a timely pretrial notice of Defense-of-property. Thus, because there was evidence at trial which could support a defense-of-property justification for the defendant's actions, the State bore the burden of proving beyond a reasonable doubt that the defendant's conduct was not justifiable defense-of-property.

RSA 627:7 provides that:

A person in possession or control of premises or a person who is licensed or privileged to be thereon is justified in using non-deadly force upon another when and to the extent that he reasonably believes it necessary to prevent or terminate the commission of a criminal trespass by such other in or upon such premises, but he may use deadly force under such circumstances only in defense of a person as prescribed in RSA 627:4 or when he reasonably believes it necessary to prevent an attempt by the trespasser to commit arson.

Thus, under RSA 627:7 a person who is in possession or control of premises is justified in using non-deadly force upon another when and to the extent he reasonably believes it necessary to prevent or terminate the commission of a criminal trespass by the

other person upon such premises. It is uncontroverted that Mr. Bird was in possession and control of his property and that he did not use deadly force. In order to focus and aid the court's analysis on the central issues argued by the parties, the court ~~assumes~~ without deciding that Ms. Harris was committing a criminal trespass on Mr. Bird's property. Thus, the central issues are whether the jury could reasonably have found that Mr. Bird's physical conduct constituted non-deadly force and, if so, whether he used such force "when and to the extent that he reasonably believe[d] it necessary" to terminate Ms. Harris' criminal trespass.

For the reasons outlined above, a reasonable trier of fact could find beyond a reasonable doubt from a totality of the evidence presented at trial that Mr. Bird's waving of his handgun at Ms. Harris while yelling at her constituted the use of non-deadly force. The remaining issue therefore is whether Mr. Bird used non-deadly force when and to the extent he reasonably believed necessary to terminate Ms. Harris' criminal trespass. In determining whether the State met its burden of proof beyond a reasonable doubt on this issue, the jury had Ms. Harris' testimony about her interchange with Mr. Bird, Ms. Heald-Keyser's testimony about what she told Ms. Harris about getting to the property she was searching for and more particularly about what she told Mr. Bird about Ms. Harris prior to Ms. Harris' arrival at Mr. Bird's property, Mr. Bird's statements to the police about what Ms. Heald-Keyser had told him, and the jury's own view of Mr. Bird's property. From this evidence, a reasonable trier of fact could conclude that the State met its burden of proving beyond a reasonable doubt that Mr. Bird did not reasonably believe that the use of non-deadly force was necessary to terminate Ms. Harris' criminal trespass on his property.

For the foregoing reasons, the court concludes that the indictment was sufficient to allege criminal threatening, that there was sufficient evidence upon which the jury could conclude that the State met its burden of proving the elements of criminal threatening beyond a reasonable doubt, and that there was sufficient evidence upon which the jury could conclude that the State had met its burden of proving beyond a reasonable

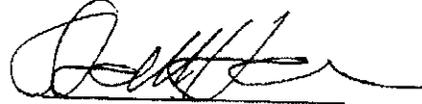
*Threatened
to use
deadly
force*

doubt that the defendant's action was not a justifiable defense of his property.

Accordingly, the defendant's motion to set aside the jury's verdict is denied.

So ordered.

October 15, 2008

A handwritten signature in black ink, appearing to read 'S. Houran', written over a horizontal line.

Steven M. Houran
Presiding Justice

