THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2016-0441

The State of New Hampshire

v.

Dominick Stanin, Sr.

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE HILLSBOROUGH COUNTY SUPERIOR COURT--NORTH

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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ISSUES PRESENTED

I. Whether the State's evidence and its fair inferences were sufficient to establish that the defendant was engaged in the course of committing a theft when he reached into the victim's pockets, turned them inside out, and removed the contents.

II. Whether defense counsel's inadvertent courtroom display of a photograph, that was not admitted into evidence, constituted a presumptively prejudicial extraneous influence on the jury that irredeemably tainted its impartiality.

STATEMENT OF THE CASE

The Hillsborough County Grand Jury indicted the defendant for three felonies. It alleged that, on August 14, 2014, he committed the offenses of first degree assault, T 19,[1] robbery, *Id.,* and felon in possession of a deadly weapon, T 19-20. *See* RSA 631:1, I(b) (2016) (first degree assault), RSA 636:1, I(a) (2016) (robbery), and RSA 159:3, I(a) (2014) (felon in possession). He stood trial from June 22-24, 2016. The jury found him guilty of all three offenses. T 553.

On July 20, 2016, the trial court (*Ruoff,* J.) sentenced the defendant. It imposed 7½ to 15 years' imprisonment, stand committed, with credit for 171 days of pretrial confinement, for first degree assault; 7½ to 15 years' imprisonment, stand committed, for robbery, which was consecutive to the first degree assault sentence; and 3½ to 7 years' imprisonment, suspended for a period of 10 years following release from the robbery sentence, for felon in possession of a deadly weapon. DBA 1-6, SH 21-24. The sentences were consecutive to one he was serving for an unrelated case. *Id.*

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[1] References to the record are as follows:
"T" refers to the transcript of the June 22-24, 2016 trial
"DB" refers to the defendant's brief
"DBA" refers to the appendix to the defendant's brief
"SH" refers to the July 20, 2016 sentencing hearing

STATEMENT OF FACTS

A. The evidence of robbery

Emergency services were dispatched to the vicinity of 287 Lowell Street in Manchester, mid-morning on August 14, 2014. T 254, 319. They found John Quinn, bloodied, and took him to the Elliot Hospital. T 104, 256, 394. Police investigated and later arrested the defendant on charges of first degree assault, robbery, and felon in possession of a deadly weapon.

Mr. Quinn rented half the duplex at 287 Lowell Street. T 93. He sublet rooms within that unit to three other adults. T 94. At various times, residents allowed guests and family members to stay with them. T 94-95.

Quinn went to work on the morning of August 14, 2014, but was sent home to await delivery of materials at the job site. T 96. He was in his room gathering money to buy a soda when the defendant and his son entered and closed the door behind them. T 95. The defendant and his adult son were known to Quinn as individuals who had lived on the premises for a couple of weeks at the invitation of another tenant. T 98.

Quinn was unnerved that the two entered the sanctuary of his room uninvited. T 95. He grew nervous as they drew close. T 99. Suddenly, the defendant pushed a knife into his back. T 99. Quinn caught a glimpse of the

knife, which he described as "kind of like a triangle, kind of wedged type thing, with a handle on it." *Id.* It was unlike any other knife he had seen. *Id.*

The defendant ran the knife up Quinn's back, began stabbing his head, and yelled to the son to "do something, do something." T 100-01. While Quinn was being stabbed, his pockets were "rifled through" and turned inside out so that the contents—a couple of dollars, a phone, and a set of keys—were dumped on the floor. T 101, 125. The defendant's son repeatedly kicked Quinn on his left side. T 101.

Quinn broke free, swung a book case behind him, and ran out of the room toward the back of the house. T 102. As he reached the top of the back door steps, the defendant caught up to Quinn and kicked his feet out from under him. *Id.,* T 103. He fell, ripping the skin from his arms. T 102. He got up and ran to a neighboring house; the residents, who were having a barbeque, called emergency services. T 104. Quinn never recovered the items that were taken from his pockets. T 101-02, 123.

Detectives interviewed Quinn at the Elliot. T 257. He gave them his assailants' physical descriptions and street names. T 257-59. The police compiled a photo line-up. Quinn identified the defendant—with 100% certainty—as the person who stabbed him. T 121, 264.

Krystal Gallien, one of Quinn's co-tenants, was doing laundry when the assault occurred. T 69, 72. She heard yelling, stepped from the laundry room, and

saw Quinn coming out of his room with blood on his face, and the defendant and his son behind him. T 72-73. She knew the defendant and his son because they had been to the apartment "more than 20 times" and socialized with residents there. T 73-74.

B. Defense counsel's inadvertent display of a photo in the courtroom

Immediately after the jury withdrew from the courtroom to deliberate, Juror 9 sent word that she wanted to address the trial court about "something inappropriate" she may have seen in the courtroom. T 521. She explained that while defense counsel was questioning a witness the day before, he handled the contents of his file in such a manner that she could see a photograph she "obviously wasn't supposed to see." T 522, 523. She described the image as "the weapon in question." T 523.

Defense counsel denied having a photograph of the weapon in question. T 525. The prosecutor explained that a detective investigating the case downloaded an image from the Internet of a weapon similar to one the victim described. T 523-24. That image was provided to the defendant during discovery but was not introduced into evidence at trial. T 524.

The trial court asked how the defendant wished to proceed under the circumstances. T 526. Defense counsel replied:

> We're not going to ask the juror to be excused if the Court would, I guess, question her about if [sic] first, that anything she may have seen inadvertently in my file is not evidence in the case and that as long as she agrees that she can disregard seeing it, we're not going to ask she be excused for cause.
>
> If she answers, I can't take that out of my mind, then we're going to say, well, you know, you have to be excused for cause.

Id. The prosecutor suggested that the court *voir dire* the juror to see whether she shared her observations with any other jurors, and conduct a colloquy with the defendant to ensure that he had no objection to Juror 9's continued service. T 524.

Juror 9 assured the court that she would give no consideration to the image during deliberations. T 528. She had not discussed what she observed with other jurors but surmised that three to five other jurors would have had the same opportunity to see the photograph that she had. *Id.* The court asked her to send word if any other jurors mentioned the photograph during deliberations. T 529.

The trial court did not think it needed "to bring the jury in here and ask them all," T 529, and defense counsel agreed. T 529, 530. The court then asked the defendant whether he wanted Juror 9 replaced with an alternate. T 530. He declined and expressed admiration for the juror's honesty. *Id.*

Less than an hour later, Juror 9 informed the court that other jurors saw the photograph. T 531. Addressing counsel, the court said:

> I'm thinking out loud, which is always a dangerous thing to do. I think there's a way—one of two ways to resolve this. Either I can, you know, pull all the jurors up here individually and ask them what they—what—if any comments were made about something like that, or I can just put them all in there and say, you know, we received

information that, you know, a witness or a juror, or a number of you have seen something in the file that's not evidence in this case and just instruct them that they cannot use that in any way, shape, or form.

DEFENSE COUNSEL: Right.

TRIAL COURT: And go forward. Because I don't think any—I don't see any way of not asking them explicitly, you know, did you see a picture, did you see something? Because we have to give them the context of why we're bringing them all in here, so.

PROSECUTOR: I think obviously, we need to talk to Juror Number 9 first—

TRIAL COURT: Yes, we do.

PROSECUTOR: —and sort of see what the scope of the comments is, whether it's –

TRIAL COURT: Yeah, I agree.

PROSECUTOR: —specifically referring to a file, whether it's just something they know to exist, how they may—

TRIAL COURT: Yeah. She may have been just hypervigilant or too, anyway.

DEFENSE COUNSEL: All right.

T 532-33.

Juror 9 returned to the courtroom and reported that another juror saw "the exact same thing" when defense counsel opened his folder "almost deliberately, for the jury to see," "[a]nd then other jurors chimed in that they had seen the same photo." *Id.* Defense counsel assured the trial court that he had not intentionally displayed the image to the jury. T 534, 537.

After conferring with the defendant, defense counsel moved for a mistrial. T 539-40. He argued that the jury drew adverse inferences from the incident that could not be remedied by a curative instruction. T 540-41. The trial court concluded that a mistrial would not be necessary so long as jurors acknowledged and agreed to abide by a curative instruction tailored to the circumstances. T 543-44, 546. Defense counsel responded:

> First, I understand the [c]ourt's going to poll the jury panel. First I think it should be done individually. With a group people are more apt to not volunteer.
>
> THE COURT: My intention wasn't to poll them, was just to bring them back in here and instruct them.
>
> DEFENSE COUNSEL: All right. Well, to instruct them individually and I think we need to explore further as to what each juror potentially saw and what their I guess, opinion about it is and the issue is for us.
>
> * * * *
>
> Now in addition, they—it's my strong opinion that they've already taken an adverse inference against the [d]efense for what somebody in there said in the—yeah, I think the [d]efense attorney intentionally did that so that we could see that. Now, I don't think an instruction for them to disregard it will unring the bell, so to speak, as to such a critical piece of evidence. I mean, if they're going to use that—if it's their opinion that I did I intentionally, that could—which I didn't do—it can—I guess, human nature is for them to use it against [the defendant]. And so they would be—now they're biased against [the defendant] for supposed improper conduct that I committed and I think, you know, and I don't want to do this, but I think we have to call for a mistrial.

T 545. The court denied the request for a mistrial, reassembled the jurors, and instructed them as follows:

Ladies and gentlemen of the jury, I had to order you to stop deliberating because I wanted to call everybody back in here because it came to our attention that something may have happened during the course of the trial that may have filtered its way into discussion in the jury room.

Prior to going out and deliberating one of the jurors alerted us to the fact that she may have seen something, an image in one of the [d]efense—in the [d]efense attorney's files during a portion of his examination yesterday when he was in front of the jury and she thought that it would be important to let us know that she had seen that. She told us that she didn't think it [sic] prejudice her and that she could continue deliberating and I told her not to discuss anything she had seen, but if other jurors started to talk about it that she was to let us know because under your oath as jurors, you can only make your decision and discuss evidence that's presented at trial. I should be more explicit. That doesn't mean everything you see in the [c]ourtroom.

It comes to my attention that there may have been, in fact, something in one of the folders that a number of you saw. An image, a picture of something that is not in evidence in this case, may have no connection to this case, were [sic] guessing about what it was, and it is not something that you should be discussing or even thinking about if you saw something in either the [d]efense attorney's file or on anyone's desk. It should be only the legally admissible evidence. That's what my instruction was, okay?

And if you think you saw something that may have been relevant, but not evidence, you know, you can't—I can tell you right now if you did, it was not intentional. No one in this courtroom, none of these attorneys, want to infect you with anything that's not admissible. They'd get in a lot of trouble if they tried to do that and, you know, it's a very small courtroom so they would never take the risk, okay? So, if you did happen to see something in one of the files, I'm instructing you now that you can't consider it, okay?

The evidence that you've heard in this case is what you have to make your decision based on, you know, these case files contain thousands of pages of stuff, most of which is inadmissible, most of which has nothing to do with the issues in this case, okay? So, that's why you don't get to see it all. We have these rules of evidence in

> place for a reason so that you get reliable evidence that you can base your decision on. So to the extent—now I'm not saying anyone did anything wrong. You see what you see. So, but it came to my attention that there was some discussion about what was seen in the file. You can't do that. You can't base your decision based on those types of things. So, I'm instructing you not to discuss anything you saw. I'm instructing you to disregard if you did see anything, what you saw. You can't talk about it. It can't weigh in your decision in any way. Just like you can't read a newspaper account of this and have it affect your decision-making, okay?
>
> Now I need an affirmative showing from each one of you that you can honestly and with integrity, say that you will only base your decision based on the evidence that was legally admitted in this courtroom. I'm going to ask—I'm going to poll the jurors one at a time and you have to be able to say yes or no and if you have any concerns about whether you can do that, come up and we'll talk about it. This is a very important case. It's important to the State. It's very important to the [d]efendant. We have to make sure that you're fair and impartial and base your decision only on the evidence, okay?
>
> All right. So Juror Number 1, can you continue to fairly and impartially deliberate based on the evidence that's admitted at this trial?
>
> JUROR NO. 1: Yes, I can.

T 547-49. Each of the remaining jurors offered similar assurances. T 549-51.

The jury resumed deliberating and convicted the defendant of all charges. T 553.

SUMMARY OF THE ARGUMENT

I. The jury heard evidence that the defendant and his son entered the victim's room while he was counting money to buy a soda. As they approached the victim, the defendant drew a knife. Acting in concert, they physically attacked the victim—the defendant with a knife and his son with kicks and strikes—and rifled through is pockets, removing their contents, which fell to the floor. The victim broke away, fled for help, and was taken to the hospital by ambulance for treatment of injuries sustained in the attack. When he returned home, the property the defendant and his son pulled from his pockets was gone. Viewed in the light most favorable to the State, the evidence, and the fair inferences drawn from it, are sufficient to sustain a finding that the defendant and his son were in the course of committing theft or attempted theft when they used physical violence against the victim.

II. While questioning a witness in open court, defense counsel mishandled the contents of his file in such manner that he inadvertently displayed a photograph of a knife to the jury. The knife depicted in the photograph was not material to the case and the photograph was not admitted into evidence. The trial court learned of the incident only after giving final instructions to the jury.

Under the circumstances, the trial court had a duty to make due inquiry into "the incident" and take measures, if possible, to ameliorate any prejudice that may have resulted from exposure to the photograph. The trial court duly inquired and

clearly identified the nature and scope of the incident. It concluded that jurors had been exposed to inadmissible evidence, which sometimes happened in court proceedings, and that the effects could be remedied by curative instructions.

The incident did not involve presumptively prejudicial extraneous influence or *ex parte* communication with the jurors that impliedly biased and disqualified them from continued service. The defendant's argument notwithstanding, the nature and character of the incident did not involve the kind of egregious conduct or aggravated circumstances that shift the burden to the State to establish that the incident was harmless.

ARGUMENT

I. THE STATE'S EVIDENCE AND ITS FAIR INFERENCES WERE SUFFICIENT TO ESTABLISH THAT THE DEFENDANT WAS ENGAGED IN THE COURSE OF COMMITTING A THEFT WHEN HE REACHED INTO THE VICTIM'S POCKETS, TURNED THEM INSIDE OUT, AND REMOVED THE CONTENTS.

The defendant moved to dismiss the robbery indictment at the conclusion of the State's case. T 380. The victim testified that his assailants rifled his pockets—emptying the contents on the floor—while stabbing and kicking him, but, because he fled, he did not see who left the room with his money, cellphone, and keys. T 101, 123, 126. The defendant argued that the evidence of robbery was insufficient absent testimony identifying the person or persons who left with the victim's property. T 380. He is wrong.

"To prevail upon his challenge to the sufficiency of the evidence, the defendant must prove that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt." *State v. Gibbs,* 164 N.H. 439, 445 (2012) (quoting *State v. Ruggiero,* 163 N.H. 129, 138 (2011)). Each evidentiary item is examined "in the context of all the evidence, not in isolation." *State v. Schonarth,* 152 N.H. 560, 563 (2005). The "trier may draw reasonable inferences from facts proved and also inferences from facts found as a result of other inferences, provided they can be reasonably drawn therefrom." *State v. Crie,* 154 N.H. 403, 406 (2006).

The defendant's robbery indictment alleged that:

> acting in concert with Dominick Stanin, Jr., in the course of committing a theft, he purposely used physical force on the person of another and such person was aware of the force; specifically, he and his son hit, kicked, and stabbed J. Q. . . . with a knife, a deadly weapon, in the manner it was used, while taking money and a cell phone from J. Q."

T 19. The defendant did not move to dismiss the indictments for first-degree assault or felon in possession of a deadly weapon. Nor did he contest the sufficiency of the State's evidence that he knifed the victim while removing the contents of his pockets. Rather, the only element of robbery he contested was whether there was sufficient evidence that he used the weapon to assault the victim "in the course of committing a theft." DB 10.

He claims the evidence of robbery is insufficient because "[t]he assailants' actions are ambiguous as to their motive." *Id.*

> While Quinn's pockets were emptied during the assault, there was no evidence that the assailants intended to take anything; they made no move towards the items once they were on the floor or towards any of Quinn's other belongings in the room. Rather, they followed Quinn out of the room instead of staying to steal Quinn's unattended property. Quinn believed that they continued to assault him on his way out of the house, indicating that they were motivated by a desire to hurt him and not a desire to steal from him.

Id.

"An act shall be deemed 'in the course of committing a theft' if it occurs in an attempt to commit theft, in an effort to retain the stolen property immediately after its taking, or in immediate flight after the attempt or commission." RSA

636:1, II (2016). The victim testified that the defendant put a knife in his back, ran it up to his head, and stabbed his head while instructing his son to "do something." The defendant and his son each reached into the victim's pockets, turned them inside out, and removed the contents. The victim broke free and was chased out of the house but never recovered his property.

Motive is not an element of this offense but, if the defendant's sole motive was to injure the victim, there would be no reason to reach into his pockets, turn them inside out, and remove the contents. A rational fact-finder could conclude the defendant did that because he was trying to take the victim's property. Whether the defendant abandoned that effort after the victim broke free to summon aid or whether the defendant's son collected the loot while the defendant chased the victim away, the evidence established that he knifed the victim in the course of committing a theft.

II. THE JURY WAS NOT INCURABLY TAINTED BY DEFENSE COUNSEL'S INADVERTANT DISPLAY OF A PHOTOGRAPH THAT WAS NEVER ADMITTED INTO EVIDENCE.

A. The trial court's inquiry into defense counsel's inadvertent courtroom display of a photograph was appropriate to the circumstances.

After the jury was instructed but before it began deliberating, Juror 9 expressed concern that she may have seen something "inappropriate." T 521. The trial court immediately investigated and determined that she saw a photograph defense counsel inadvertently displayed while questioning a witness in open court, which was not admitted into evidence. Juror 9 assured the court she could disregard the photograph and decide the case solely on the evidence admitted. T 528. Defense counsel conferred with his client and elected to leave Juror 9 on the jury. T 529-530. Later, when Juror 9 notified the court that other jurors had seen "the exact same thing," T 535, the defendant moved for a mistrial, T 540, 545. That motion was denied. T 546.

"Mistrial is the proper remedy only if the evidence or comment complained of was not merely improper, but also so prejudicial that it constitutes an irreparable injustice that cannot be cured by jury instructions." *State v. Ellsworth,* 151 N.H. 152, 154 (2004) (quotation omitted). "The trial court is in the best position to determine what remedy will adequately correct the prejudice." *Id.* The

trial court's decision will not be overturned absent an unsustainable exercise of discretion. *Id.*

On appeal, the defendant does not directly claim that his trial lawyer's display of a photo constituted an irreparable injustice that could not be cured by jury instructions. Rather, he challenges the *methodology* the trial court used to investigate the incident and its impact. He frames the sole appellate issue in terms of *process*—specifically, "[w]hether the court erred by denying [the defendant]'s request that each juror be questioned independently after the court learned that several jurors had seen a photograph of a weapon in defense counsel's file." DB 1. He concludes that the trial court erred because it failed to individually *voir dire* each juror. T 18, 21. His claim lacks merit. The nature and scope of the trial court's inquiry were appropriate to the circumstances.

When confronted with "a colorable claim" of jury taint or bias, the trial "court must undertake an adequate inquiry to determine whether the alleged incident occurred and, if so, whether it was prejudicial." *State v. Rideout,* 143 N.H. 363, 365 (1999) (citations omitted). The trial court has broad discretion to determine the extent and nature of its inquiry. *Id.* No particular form or format for that inquiry is prescribed. *Id.* It is a fact-specific determination. *Id.*

Any review of the trial court's methodology or process in this case should bear in mind that the inquiry into "the incident" developed over two distinct phases. The first phase focused on Juror 9's report that she had seen something

"inappropriate." The second phase addressed her subsequent report that another juror had seen "the exact same thing." The efficacy of the trial court's inquiry at each phase must be assessed by how well it accomplished the twin objectives of determining (1) whether an incident occurred and, if so, (2) whether it was prejudicial. The inquiry in this case was more than adequate to that task.

The first phase began with Juror 9's report that she may have seen "something inappropriate" during trial. Without any other information available, it was prudent for the court to be concerned about jury taint or bias and to begin an immediate inquiry. By questioning Juror 9 and conferring with counsel, the trial court first identified "the incident" that occurred: Defense counsel displayed a photograph in open court while questioning a witness. The photograph was not admitted into evidence. Counsel explained that the only photograph of a weapon in the defense file was one that detectives found on an Internet website, which was included among discovery material. T523-24. The photograph had not been displayed intentionally.

Second, the trial court's inquiry accurately identified the incident's prejudicial potential. Juror 9 said that, from where she was sitting, the photograph appeared to depict "the weapon in question." T 523. She also speculated that three to five other jurors would have had the same line of sight and opportunity to see the picture. The defendant had no objection to Juror 9's continued service if she acknowledged that the photograph was not evidence and offered her assurance

that she could disregard it. T 526. The court determined that any prejudice could be cured with an appropriate instruction and secured Juror 9's assurance that she would decide the case solely on the basis of the evidence admitted during trial and would disregard the photograph she had seen. T 528.

At the conclusion of this first phase, the parties represented that the issue was resolved to their mutual satisfaction. T 529-30. Neither asked the court to *voir dire* other jurors, individually or collectively, to determine whether any had seen the same photograph. The trial court offered to replace Juror 9 with an alternate, but the defendant personally expressed admiration for her honesty, T 530, and agreed to her continued service, T 531. The court directed Juror 9 to let it know if anyone mentioned the photograph during deliberations. T 529. The defendant's appeal does not challenge the trial court's handling of the first phase.

The second phase opened when, during deliberations, Juror 9 notified the court that other jurors were discussing the photograph. T 531. The court halted deliberations and brought Juror 9 into the courtroom. T 531, 534. Juror 9 told the court that another juror saw "the exact same thing," when defense counsel opened his file "almost deliberately, for the jury to see," and that the juror described the type of weapon by name. T 535. She also reported that "other jurors chimed in that they had seen the same photo." *Id.* The comments were made during general deliberations with all jurors present. T 536.

Based upon its inquiry, the trial court was able to determine that an incident occurred. "The incident" was the same one reported previously—namely, defense counsel's inadvertent courtroom display of a photograph, which was not admitted into evidence. The court learned that additional jurors observed the incident and that it was mentioned in the course of general deliberations.

The court was also able to assess the incident's potential prejudicial effect. Defense counsel expressed concern that jurors had concluded he intentionally displayed the image and that the image represented the weapon used to commit the crimes. T 540, 545. The trial court acknowledged those legitimate concerns. T 541. It even assessed the incident's prejudicial potential through a wider aperture and articulated how it could be harmful to the prosecution. T 546.

The defendant argues that the trial court's fatal error was the failure to individually *voir dire* each juror. DB 13. The record reflects that defense counsel said the trial court should "instruct [jurors] individually" and "explore further as to what each juror potentially saw and what their . . . opinion about it is." T 544-45. But before the court could even respond to that request, defense counsel voiced his "strong opinion" that the jurors had "already taken an adverse inference against the [d]efense" and that no instruction to disregard the photograph would "unring the bell." T 545. In essence, he no sooner suggested individual *voir dire* than he undermined his request by insinuating its futility. Nor has the defendant explained

on appeal how individual *voir dire* would have further illuminated the salient facts of "the incident" or its prejudicial potential.

The pivotal question, then and now, was not the methodology the trial court employed for its inquiry. Rather, it was whether the trial court could fashion a curative instruction that would ameliorate the potential prejudice posed by defense counsel's inadvertent display of a photograph in the courtroom. In other words, could it "unring the bell." The trial court concluded that it could.

"Due process does not require a new trial every time a juror has been placed in a potentially compromising situation." *Rideout,* 143 N.H. at 365 (quoting *Smith v. Phillips,* 455 U.S. 209, 217 (1982)). "Were that the rule, few trials would be constitutionally acceptable." *Phillips,* 455 U.S. at 217. "[I]nstances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently." *Bruton v. United States,* 391 U.S. 123, 135 (1968). "It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information." *Id.* The trial court is in the best position to determine what remedy will adequately correct any prejudice. *State v. Neeper,* 160 N.H. 11, 15 (2010). Its decision should be affirmed absent an unsustainable exercise of discretion. *Id.*

In this case, the court decided it could tailor a curative instruction to remedy any prejudice the incident occasioned. Its instruction was hardly a cursory admonition to disregard a piece of inadmissible evidence. Rather, it provided a

detailed instruction, which was quoted in full above. T 547-49. Among the instruction's salient elements, it:

- reminded jurors that they could only base their decision on evidence provided at trial, which did not include everything they could see in the courtroom;
- instructed jurors that neither party had intentionally displayed inadmissible evidence;
- explained that the Rules of Evidence only allow the admission of reliable evidence while attorneys' files included "thousands of pages of stuff, most of which is inadmissible, most of which has nothing to do with the issues in the case";
- directed jurors to disregard anything they may have seen from counsels' files or on counsel's desks that was not admitted into evidence;
- directed jurors not to discuss any such items during deliberations; and
- underscored the importance of the case to all parties and the necessity that jurors remain fair and impartial, and base their verdict solely on the evidence.

Id. "Our system of justice is premised upon the belief that jurors will follow the court's instructions." *State v. Smart,* 136 N.H. 639, 658, *cert. denied*, 510 U.S. 917 (1993). This Court presumes that jurors do so. *State v. Remick,* 149 N.H. 745, 747 (2003).

Furthermore, the court did not just instruct the jurors on these points. It individually polled each juror to obtain "an affirmative showing" that he or she could "honestly and with integrity" say that his or her verdict would only be based

on the evidence legally admitted in the courtroom. T 549. Each juror responded in the affirmative. T 549-51. "[A] juror is well-qualified to say whether he has an unbiased mind in a certain matter." *Rideout,* 143 N.H. at 367 (quoting *United States v. Boylan,* 898 F.2d 230, 262 (1st Cir.), *cert. denied*, 498 U.S. 849 (1990)).

In sum, the trial court's inquiry was sufficient to identify the precise nature and scope of the reported incident and its prejudicial potential. The court concluded that any negative consequences could be remedied with a curative instruction tailored to the circumstances. The jurors individually acknowledged the instruction and assured the court they would abide by it. The trial court was in the best position to assess the adequacy of its remedy to correct any prejudice and its discretionary judgement should be sustained.

B. Defense counsel's inadvertent courtroom display of a photograph not admitted in evidence did not constitute presumptively prejudicial extrinsic communication with the jury.

"Generally, in a criminal case, a defendant alleging juror bias bears the burden to demonstrate actual prejudice." *Rideout,* 143 N.H. at 366. There are two exceptions to the general rule. "Both communications between jurors and *persons associated with the case* about matters unrelated to the case, and unauthorized communications between jurors and others *about the case* are presumptively prejudicial." *Id.* (citations omitted). "In those instances the burden shifts to the

State to prove that any prejudice was harmless beyond a reasonable doubt." *State v. Bathalon,* 146 N.H. 485, 487 (2001).

"It is axiomatic that a defendant has a right to be tried by a fair and impartial jury." *Id.* at 487. That right "is a fundamental principal of our system of justice." *Rideout,* 143 N.H. at 365. It is enshrined in our state and federal constitutions. *See* U.S. Const. amend. VI and N.H. Const. pt. I, art. 15. "[A] juror found to be disqualified at any time before or during the trial should be removed from further service." *State v. Weir,* 138 N.H. 671, 673 (1994); *see also* RSA 500-A:12, II (2010) ("If it appears that any juror is not indifferent, he shall be set aside on that trial."). "Indifference or impartiality 'is not a technical conception. It is a state of mind.'" *Weir,* 138 N.H. at 673 (quoting *Irvin v. Dowd,* 366 U.S. 717, 724 (1961)).

Presumptive prejudice arises when circumstances cast significant doubt upon a juror's impartiality. It is not possible to survey the breadth of federal and state case law on the subject within the confines of this brief, but the cases generally fall into two categories. One category includes cases involving juror misconduct or behavior incompatible with the duty to remain impartial. The defendant has not suggested any misconduct by any juror in this case. The trial court found no juror misconduct. T 541. The other category includes cases where jurors are subjected to extraneous influences that could undermine their

impartiality. The defendant argues that exposure to inadmissible evidence in the courtroom triggers presumptive prejudice. DB 15. It does not.

Remmer v. United States, 347 U.S. 227 (1954), is perhaps the seminal federal case on extraneous influence and the presumption of prejudice. During Remmer's tax evasion trial, a third party offered the jury foreman a bribe in exchange for a favorable verdict. *Id.* at 228. The foreman reported the incident to the trial judge, who informed the prosecutors but not defense counsel. *Id.* The Federal Bureau of Investigation conducted an investigation, which did not conclude until after the trial. *Id.* Defense counsel did not learn of the issue until after the trial but averred that he would have moved for a mistrial and requested the foreman be replaced by an alternate had he known earlier. *Id.* at 228-29.

The Supreme Court held that "[i]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial." *Id.* at 229. "The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Id.* The Court later explained that it applied the presumption in *Remmer,* in part, because of "the paucity of information relating to the entire situation" and "the kind of facts alleged." *Remmer v. United States,* 350 U.S. 377, 379 (1956).

Remmer represents one extreme of the extraneous influence-spectrum. In comparison, the Supreme Court has been reticent to employ presumptive prejudice under less egregious circumstances. In *Smith v. Phillips,* 455 U.S. 209 (1982), a sitting juror in a criminal case applied for a job with the prosecutor's office during the trial. *Id. at* 212. Prosecutors learned of the application during trial but did not inform the trial court until more than two weeks after the respondent's conviction. *Id.* at 212-13. The respondent then moved to set aside the verdict. *Id.* at 213. The Supreme Court held that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias," without the benefit of presumptive prejudice or implied bias. *Id.* at 215.

At least one federal circuit court has held that the Supreme Court's decision is *Phillips* reinterpreted *Remmer* to shift the burden of demonstrating prejudice to the defendant. *See United States v. Orlando,* 281 F.3d 586, 596-98 (6th Cir. 2002). The First Circuit reads *Phillips* as requiring a fair hearing for nonfrivolous claims of extraneous influence "but does not mandate the use of a rebuttable presumption in every case. Rather, the presumption is applicable only where there is an egregious tampering or third party communication which directly injects itself into the jury process." *United States v. Boylan,* 898 F.2d 230, 261 (1st Cir. 1990).

This Court has had rare occasion to apply presumptive prejudice or implied bias where a juror's impartiality is questioned. It has applied the presumption in a

case where, during deliberations, a prosecution witness performed a "special and substantial favor" by rendering aid to a juror whose health was at imminent risk. *Rideout,* 143 N.H. at 367. And it applied it in a case where, during deliberations, a juror told his fellow jurors he had returned to the scene of a fatal collision after the jury's pretrial view to conduct his own investigation. *State v. Lamy,* 158 N.H. 511, 521 (2009); s*ee also State v. Brown,* 154 N.H. 345, 349 (2006) (during trial a juror shared with other jurors observations she made of the defendant and his associates outside the courthouse; because the trial court's decision to presume prejudice was not challenged on appeal, this Court assumed, without deciding, that the trial court did not err by doing so).

On the other hand, a presumption of prejudice was not triggered by a juror's pretrial blog posts containing derogatory and biased opinions regarding criminal defendants and the judicial process. *State v. Goupil,* 154 N.H. 208, 219 (2006). Nor did it arise from alleged intrajury misconduct involving the foreman's refusal to forward other jurors' questions to the trial judge. *State v. Bader,* 148 N.H. 265, 278 (2002). Or a juror's improper expression of opinion about a defendant's guilt to other jurors even before the defense case began. *Bathalon,* 146 N.H. at 488.

This Court has never equated exposure to inadmissible evidence in the courtroom with the types of juror misconduct or extrinsic influence that triggers a presumption of prejudice. *See generally State v. Kuchman,* 168 N.H. 779, 788

(2016) (jury heard prejudicial testimony over a sustained defense objection); *State v. Sprague*, 166 N.H. 29, 36 (2014) (family member's emotional outburst in the courtroom during witness testimony); *State v. Guay*, 162 N.H. 375, 381 (2011) (victim had an emotional outburst and called defendant a "freaking liar" while he was testifying before the jury); *State v. Ellison*, 135 N.H. 1, 6-7 (1991) (a prosecution witness "blurt[ed] out" reference to a previous incident, violating a court ruling on a motion *in limine*). In each case, this Court used the general standard for determining the necessity of a mistrial without resort to presumptions of prejudice.

The defendant relies heavily upon *United States v. Gaston-Brito,* 64 F.3d 11 (1st Cir. 1995), in support of his position. That case is distinguishable from this one. Gaston-Brito and his co-defendants were charged with conspiracy to distribute cocaine among other charges. *Id.* One of their couriers was arrested and agreed to cooperate with the Government. *Id.* at 12. He testified that he was paid $15,000 to deliver a load of cocaine from Puerto Rico to New York. *Id.* He was asked, during cross-examination, whether the Government required him to return the $15,000 he allegedly was paid. *Id.* He answered that his wife was forced to give the money to unnamed persons before the Government could ask him to surrender it. *Id.* "Who ordered it I don't know, but they ordered it and if she did not turn it over they threaten to kill the little girl, but who ordered it I don't know." *Id.* Gaston-Brito's counsel asked to approach the bench and reported that while

the witness was professing not to know who ordered his wife to return the $15,000, the Government case agent sitting with the prosecutors "make a hand signal pointing to the defense table." *Id.* He moved for a mistrial, which motion the district court immediately denied. *Id.*

Unlike the instant case, the district court made absolutely no inquiry into the alleged hand signal despite the allegation that a government agent engaged in *ex parte* communication with the jury. *Id.* at 13. The district court never investigated to determine whether the case agent made the gesture or, if so, whether any juror had seen it. *Id.* It never offered a curative instruction or made any effort to ameliorate any possible prejudice. Instead, it "summarily concluded that even if the incident had occurred, no harm had inured to the defendants." *Id.*

This Court should decline the defendant's invitation to find that his own counsel's handling of a photograph in the courtroom constitutes a presumptively prejudicial extrinsic influence on the jury. That presumption should be reserved for egregious tampering or third-party communication which directly injects itself into the jury process. Under the circumstances presented in this case, a criminal defendant should have the opportunity to demonstrate actual bias, which cannot be remedied by a curative instruction. He was afforded that opportunity. The trial court concluded that it could fashion a curative instruction to ameliorate any prejudice resulting from defense counsel's inadvertent display of a photograph in

the courtroom. Its decision represented the sound exercise of the discretion entrusted to it.

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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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Deputy Chief Appellate Defender Stephanie Houseman, counsel of record, at:

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