

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2024-0073, State of New Hampshire v. Dale E. Holloway, Jr., the court on June 17, 2026, issued the following order:

The court has reviewed the written arguments and the record submitted on appeal, has considered the oral arguments of the parties, and has determined to resolve the case by way of this order. See Sup. Ct. R. 20(3). The defendant, Dale E. Holloway, Jr., appeals his convictions, following a jury trial in Superior Court (Temple, J.), on one count of attempted murder, see RSA 629:1 (2016); RSA 630:1-a, I (2016), one count of being a felon in possession of a dangerous weapon, see RSA 159:3 (2014); see also RSA 159:3 (2023) (language unchanged), two counts of first degree assault, see RSA 631:1, I (2016), one count of second degree assault, see RSA 631:2, I(b) (2016), and one count of simple assault, see RSA 631:2-a (2016). The defendant argues that the trial court erred by: (1) denying his motion for a change of venue; (2) failing to order a competency evaluation; (3) excluding his testimony about his prior convictions; (4) failing to instruct the jury on the definition of “felony”; (5) concluding there was sufficient evidence to support the felon in possession conviction; (6) sentencing him in absentia; and (7) imposing an extended term of imprisonment. We affirm.

I. Background

The jury could have found the following facts, or they are supported by the record. In October 2019, there was a wedding at a church in Pelham. Following the wedding, the church had a memorial service scheduled. The memorial service was for the defendant’s stepfather, who allegedly had been murdered by the groom’s son.

Near the end of the wedding ceremony, the defendant entered the church and sat in a pew. He then walked towards the altar, pulled a gun out of his pocket, and aimed it at the bishop who was officiating the wedding. The defendant shot the bishop in his upper chest. The defendant fired another shot, which hit the bride’s arm. He tried to fire again, but the gun jammed. The defendant hit the groom over the head with the gun. A wedding guest wrestled the gun out of the defendant’s hands, and the gun fell to the floor. This wedding guest and an employee of the church brought the defendant to the ground. The groom grabbed the defendant and held onto his legs. Several wedding guests joined in holding the defendant down until police arrived and arrested him.

A grand jury later indicted the defendant on two counts of attempted murder, one count of being a felon in possession of a firearm, and alternative charges of first and second degree assault. The defendant was charged by complaint with simple assault. In the time leading up to trial, the defendant vacillated between having appointed counsel and representing himself. During his trial, the defendant represented himself, with standby counsel present.

In the four years between the defendant's arrest and the start of trial, the defendant, both while represented by counsel and while representing himself, filed several motions and participated in numerous status hearings. The filings relevant to this appeal include: (1) the defendant's objection to the State's notice of intent to seek an extended term of imprisonment based upon the defendant's prior criminal convictions; (2) the defendant's motion for a change of venue; and (3) the defendant's motion to dismiss due to the court's failure to investigate his competency.

The defendant pleaded not guilty by reason of insanity. The trial court split the trial into three phases: first, the jury would consider the defendant's guilt on each of the charges; second, if the jury found during the first phase that the defendant possessed a firearm, it would then consider whether the defendant had previously been convicted of a felony; and third, the jury would determine whether the defendant was insane when he committed the criminal acts. After the State rested its case during the guilt phase, the court denied the defendant's motion to dismiss the charges. The jury found the defendant guilty on six of the seven charges.

The trial then proceeded to the second phase. Having already found that the defendant possessed a firearm, to convict the defendant for being a felon in possession, the jury had to determine whether the defendant had previously been convicted of a felony. The jury answered in the affirmative.

The trial then moved to the third phase. The jury was asked to determine whether the defendant was insane at the time he committed the criminal acts. The jury concluded that he was not. The court denied the defendant's motion to set the verdicts aside.

Seventy-two days before the sentencing hearing, the defendant filed a motion to continue the sentencing hearing, arguing that the New Hampshire Department of Corrections was interfering with his access to legal work and his ability to prepare for sentencing. The trial court denied the motion. On the day of the sentencing hearing, the defendant was absent from the courtroom. Based upon reports from the sheriff's department and the Department of Corrections that the defendant refused transport and expressed a desire to be sentenced in absentia, the court granted the State's motion to sentence the defendant in absentia. After determining that the extended term sentences proposed by the State were "appropriate, proper, and [had] legal authority," the

court sentenced the defendant on his attempted murder, first degree assault, felon in possession, and simple assault convictions. This appeal followed.

II. Preservation

The State argues that the defendant failed to preserve any of his arguments on appeal. The defendant concedes that his jury instruction argument is not preserved, but otherwise contends that he preserved each issue on appeal. “Generally, we do not consider issues raised on appeal that were not presented to the trial court.” State v. Batista-Salva, 171 N.H. 818, 822 (2019). “This preservation requirement, expressed in both our case law and Supreme Court Rule 16(3)(b), reflects the general policy that trial forums should have an opportunity to rule on issues and to correct errors before they are presented to the appellate court.” Id. “The defendant, as the appealing party, bears the burden of demonstrating that he specifically raised the arguments articulated in his appellate brief before the trial court.” Id.

To the extent the defendant’s arguments are not preserved, he raises them as plain error. “The plain error rule allows us to exercise our discretion to correct errors not raised before the trial court.” Id. at 824. “The rule is used sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result.” Id. “For us to find plain error: (1) there must be error; (2) the error must be plain; and (3) the error must affect substantial rights.” Id. “If all three of these conditions are met, we may then exercise our discretion to correct a forfeited error only if the error meets a fourth criterion: the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings.” Id. “The defendant bears the burden of demonstrating plain error.” Id. We will address the preservation of each of the defendant’s arguments in turn.

III. Motion for Change of Venue

A. Background

The record establishes the following facts. In September 2021, the defendant filed a motion for a change of venue and requested a hearing. He contended that “a fair and impartial trial cannot be had in the Hillsborough County Superior Court,” and that “the case has been excessively televised and broadcasted.” (Bolding, capitalization, and underlining omitted.) The State objected on October 10. The defendant submitted a reply that was dated October 16, but the court did not receive it until October 22. Without a hearing and before receiving the defendant’s reply, the trial court denied the defendant’s motion on October 21. The court reasoned that the defendant had “not alleged a level of adverse, prejudicial and inflammatory publicity that justifies a change in venue,” and that he “only focused on the quantity of the publicity,” rather than the adverse nature of it.

B. Analysis

The defendant argues that the trial court erred by denying his motion for a change of venue without a hearing and without considering his reply. He contends that he “made a sufficient showing to warrant an evidentiary hearing.” We assume without deciding that the defendant preserved these arguments.

The Rules of Criminal Procedure do not expressly permit a reply to an objection. See N.H. R. Crim. P. 35(i). The defendant, therefore, would need to file a motion for leave to reply. The defendant did not do so. The court accordingly did not err when it issued its decision prior to the receipt of the defendant’s reply.

We next address the defendant’s argument that the trial court erred by denying his motion for a change of venue. “A trial court’s determination of the impartiality of the selected jurors is entitled to special deference.” State v. Webster, 166 N.H. 783, 793 (2014) (quotation omitted). “Particularly with respect to pretrial publicity, primary reliance on the judgment of the trial court makes good sense.” Id. (quotation and brackets omitted). We will not reverse the trial court’s decision unless it amounts to manifest error. Id.

It is well established that due process requires that an accused must receive a trial by a fair and impartial jury. Id. at 792. As we have explained, “Part I, Article 17 grants a criminal defendant two rights: the right to be tried where the crime was committed and the right to obtain a change of venue upon proof that he cannot obtain a fair trial there.” Id. (quotation omitted); see N.H. CONST. pt. I, art. 17; U.S. CONST. amend VI. Upon proof that a fair trial cannot be had in the place of proper venue, the defendant has an absolute right to a change of venue. Webster, 166 N.H. at 793. In this way, Part I, Article 17 provides the same level of protection as the Federal Constitution. Id.

“Publicity about a case can result in two types of prejudice . . . to the accused’s right to a fair trial: inherent prejudice and actual prejudice.” Id. We understand the defendant to argue only the former. Inherent prejudice arises when “the publicity by its nature has so tainted the trial atmosphere that it will necessarily result in lack of due process.” Id. (quotation omitted). Such prejudice “may properly be presumed where prejudicial, inflammatory publicity about a case so saturated the community from which the defendant’s jury was drawn as to render it virtually impossible to obtain an impartial jury.” Id. (quotation omitted). “It is the adverse nature of the publicity, not merely its quantity, that is critical in finding presumptive prejudice.” Id. (quotation and brackets omitted). “A presumption of prejudice because of adverse publicity attends only the extreme case.” Id. (quotation omitted). We have never found inherent prejudice in a case such that a change of venue was compelled. Id. at 791-93, 795 (concluding defendant failed to establish that a presumption of

prejudice due to pretrial publicity arose where defendant was charged with shooting a police officer that resulted in media coverage); see, e.g., State v. Addison, 165 N.H. 381, 411, 422-23, 433 (2013) (concluding that despite extensive media coverage, defendant had not presented “the type of emotionally charged, inflammatory, sensationalistic coverage needed to support a presumption of prejudice” where defendant was charged with the capital murder of a police officer and was facing the death penalty (quotation omitted)).

The defendant sought a change of venue based on his argument that the case had been “excessively televised and broadcasted since the arraignment.” (Bolding, capitalization, and underlining omitted.) The trial court denied the defendant’s motion, finding that he had not established presumptive prejudice and had only focused on the quantity of the publicity, rather than its adverse nature. This decision was not “manifest error.” Webster, 166 N.H. at 793. Although the defendant alleged there was publicity, he did not sufficiently demonstrate that the publicity was prejudicial. See id. (“It is the adverse nature of the publicity, not merely its quantity, that is critical in finding presumptive prejudice.” (quotation and brackets omitted)).

The defendant argues on appeal that “[j]ury selection bore out [his] concerns about pretrial publicity and a fair trial” because multiple jurors discussed watching stories about the case on the news. We disagree. Out of at least 40 prospective jurors that the court questioned, only six had knowledge of the news coverage and none of them sat on the jury.

Finally, the defendant argues that the trial court erred by denying his request for an evidentiary hearing. We review the trial court’s determination not to hold a hearing under our unsustainable exercise of discretion standard. State v. Tsopas, 166 N.H. 528, 530 (2014) (“In the absence of a statutory mandate, the superior court has discretion to determine whether a hearing is necessary.”). To show that the trial court’s decision is not sustainable, the defendant must demonstrate that the court’s ruling was clearly untenable or unreasonable to the prejudice of his case. Id.

As we concluded above, the trial court did not err in determining that the defendant failed to sufficiently demonstrate that the publicity was prejudicial. Nor are we persuaded by the defendant’s appellate arguments that a hearing was necessary to examine the publicity and evaluate its impact on the community. The judge, sitting in the county where the publicity allegedly had its effect, was able to use “his own perception of the depth and extent of news stories that might influence a juror” and evaluate any prejudice. Webster, 166 N.H. at 793. We conclude that the trial court acted within its discretion in denying the defendant’s motion for a change of venue without holding a hearing. See Tsopas, 166 N.H. at 530.

IV. Competency

A. Background

The record establishes the following facts. The day before the start of trial, the defendant filed a motion to dismiss. He argued that the trial court failed to “investigate [his] mental illnesses” and that the court “expressed concern for [his] willingness to assist prior counsel(s) in the preparation of his defense,” but did not “consider[] a competency evaluation.” (Capitalization and underlining omitted.) The trial court denied the motion, stating the argument regarding competency was untimely. The trial court also determined that the argument was not supported “by the law, the facts, or the procedural history of this case.”

B. Analysis

On appeal, the defendant argues that the trial court erred when it failed to order an evaluation of his competency. We assume without deciding that the defendant preserved this issue. For the purposes of this appeal, we will also assume that the defendant is correct that because competency may be raised at any time, his competency argument was not untimely. The trial court, however, made an alternative finding — that the defendant’s competency argument was not supported “by the law, the facts, or the procedural history of this case.” The defendant does not argue that this conclusion was erroneous, but instead argues that the trial court erred when it did not order a competency evaluation, either in response to his motion or sua sponte. We disagree.

“The mental competence of a criminal defendant is an absolute basic condition of a fair trial.” State v. Smith, 177 N.H. 159, 163 (2025), 2025 N.H. 1, ¶10. The test for competency, as formulated by the United States Supreme Court in Dusky v. United States, 362 U.S. 402, 402 (1960), and adopted by this court, requires that: “(1) the defendant must have a sufficient present ability to consult with and assist his lawyer with a reasonable degree of rational understanding; and (2) the defendant must have a factual as well as rational understanding of the proceedings against him.” Smith, 177 N.H. at 163-64, 2025 N.H. 1, ¶10 (quotations omitted).

We have held that a trial court, to comply with due process, “must order an evidentiary hearing on the issue of competency whenever a bona fide or legitimate doubt arises whether a criminal defendant is competent to stand trial.” State v. Kincaid, 158 N.H. 90, 93 (2008) (quotation omitted). In determining whether a “bona fide or legitimate doubt” exists with regard to a defendant’s competency, we have identified several factors that should be considered:

In determining whether to order a competency hearing, the trial court should consider evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competency. Where a trial court has before it only a tentative speculation that the defendant is incompetent, it need not order an evidentiary hearing into the defendant's competence. In addition, a trial record void of any indication that the defendant could not assist in his defense, or rationally comprehend the nature of the proceedings, provides substantial evidence of the defendant's competence.

Id. (quotation omitted). This list of factors, however, is not exclusive. Id. A trial court should exercise its discretion based upon the particular facts and circumstances of the case before it and order a competency hearing as it deems necessary, so as to uphold a defendant's right to due process. Id. As the trial court is in the best position to evaluate a criminal defendant's behavior, we grant deference to its decision regarding the need for a competency hearing. Id.

Here, the trial court was thoroughly familiar with the case and with the defendant. The presiding justice had interacted with the defendant for four years, during which the defendant often represented himself. The court accordingly had the opportunity to observe the defendant's demeanor and listen to his arguments. See Hart v. Warden, N.H. State Prison, 171 N.H. 709, 723 (2019) ("When a mentally ill defendant exercises his or her right to self-represent at trial there will be more occasions for the trial court to observe the condition of the defendant and assess whether the conduct of the defense threatens the fairness, integrity, or validity of the proceedings."). Further, the trial court heard arguments both before and during trial about the defendant's mental health in relation to his insanity defense. The defendant expressed to the court that he "suffered" when he was initially arrested but that four years later, he had recovered and been restored to competency. Based upon this evidence and the circumstances of the case before it, the trial court could have determined that a competency hearing was not necessary. See Kincaid, 158 N.H. at 93.

From evidence in the record, the trial court could have found that the defendant had a "sufficient present ability to consult with and assist his lawyer with a reasonable degree of rational understanding." Smith, 177 N.H. at 163, 2025 N.H. 1, ¶10 (quotations omitted). Each time the defendant sought new counsel or to be self-represented, he articulated that his frustration was largely with being unable to actively lead his own defense. On multiple occasions, the defendant stated that although his counsel was effective, he wanted to be able to file motions on his own behalf, address the court directly, and have access to discovery materials. We accordingly disagree with the defendant that the

evidence shows he was unable to rationally consult with counsel such that his competency was cast into legitimate doubt.

The record also supports that the defendant had “a factual as well as rational understanding of the proceedings against him.” *Id.* at 164, 2025 N.H. 1, ¶10 (quotations omitted). In his motions and during the many status conferences and hearings in this case, the defendant raised coherent and reasoned arguments with citations to legal authority. The defendant articulated to the court the research he had done and stated that he understood the laws of New Hampshire and his constitutional rights.

Based upon our review of the record, we do not find sufficient evidence to raise a bona fide doubt as to the defendant’s competency to stand trial. *See State v. Zorzy*, 136 N.H. 710, 715 (1993) (concluding there was not sufficient evidence to raise bona fide doubt as to defendant’s competency to stand trial and thus that trial court did not err when it failed to evaluate defendant’s competency). We accordingly conclude that the trial court did not err in failing to order a competency evaluation.

V. Felon in Possession of a Firearm Conviction

A. Background

The record establishes the following facts. The defendant was charged with being a felon in possession of a firearm. The indictment alleged that the defendant knowingly possessed a firearm “after having previously been convicted . . . [i]n the Commonwealth of Massachusetts of a felony against a person or property of another, specifically Assault and Battery with a Dangerous Weapon and Assault to Kill in the Suffolk County Superior Court in 2003.”

“To secure a conviction for felon in possession of a firearm, the State must prove that: (1) the defendant knowingly owned, possessed or controlled a firearm; and (2) he was previously convicted of a felony.” *State v. Young*, 159 N.H. 332, 340 (2009); *see* RSA 159:3. Felony is defined as a “murder or a crime so designated by statute within or outside this code or a crime defined by statute outside of this code where the maximum penalty provided is imprisonment in excess of one year.” RSA 625:9, III (2016).

In two motions to dismiss, the defendant asserted the affirmative defense provided under RSA 159:3, III, which states that “[i]t is an affirmative defense . . . that a felony of which a defendant has been convicted in another jurisdiction would not have constituted a felony in the state of New Hampshire at the time such felony was committed.” He argued that his Massachusetts convictions would not have qualified as felonies in New Hampshire based on self-defense or defense of others under New Hampshire law.

In the first phase of trial, the jury found that the defendant possessed a firearm. To convict the defendant for being a felon in possession of a firearm, the second phase of trial required the jury to determine only whether the defendant had previously been convicted of “[a] felony against the person or property of another.” RSA 159:3, I(b)(1).

During this second phase, the only evidence put forth by the State was an exhibit that included the indictments and dispositions for the defendant’s 2003 convictions in Massachusetts. The defendant called himself as a witness and began to testify about the factual background behind his Massachusetts convictions. The State objected and argued that the testimony was not relevant. The defendant said that he was “talking about the incident itself” and the “indictment itself.” The court sustained the State’s objection, explaining that “the underlying facts [of the conviction were] not relevant.”

In providing instructions to the jury before deliberations, the court explained that the jury only had to determine whether the State had proved beyond a reasonable doubt that “the defendant [had] been convicted in either a state or federal court in this or any other state of a felony against the person or property of another.”

The jury concluded that “the [d]efendant has been convicted in either a state or federal court in this or any state of a felony against the person or property of another.” Thus, the jury found the defendant guilty of being a felon in possession of a firearm.

B. Analysis

1. Exclusion of the Defendant’s Testimony

The defendant argues that the trial court erred when it excluded his testimony about his prior convictions. He asserts that this testimony was “directly relevant to his affirmative defense that his Massachusetts convictions would not be crimes under New Hampshire law.” He contends that by raising the affirmative defense in multiple pretrial motions and by responding to the State’s objection to his testimony, he preserved this argument. We disagree.

At trial, the defendant had the burden to prove his affirmative defense by a preponderance of the evidence. See RSA 626:7, I(b) (2016). That he raised an affirmative defense in advance of trial did not relieve his burden or otherwise exempt him from asserting the defense at trial. Even if we assume that the defendant was planning to discuss the affirmative defense by testifying that in the Massachusetts case he “saved somebody from being beaten,” when the court asked the defendant what the relevance of his testimony was, the defendant did not state that his testimony was to support his affirmative defense. Rather, he replied that he was “talking about the case . . . about the

incident itself, [and about] [t]he indictment itself.” The court explained that “[t]he only element that’s at stake is whether there is a conviction for it,” and that “[t]he underlying facts and circumstances are not relevant.” The defendant responded “[o]kay,” and went on to discuss how the conviction was subject to annulment. On this record, for the defendant to prevail would require the trial judge to trace the defendant’s admissibility arguments back to his pretrial motion regarding affirmative defenses. The burden is on the party offering evidence to articulate his theory of admissibility. In his closing, the defendant did not specifically reference his affirmative defense or otherwise argue that his Massachusetts convictions were not felonies under New Hampshire law. Accordingly, the record does not support that the defendant made a sufficient offer of proof or a “contemporaneous and specific objection” such that he preserved this issue for appeal. State v. Hodgdon, 143 N.H. 399, 400 (1999); see State v. Plantamuro, 171 N.H. 253, 259 (2018).

Nor did the defendant move for reconsideration or otherwise alert the court to his view that the statements were in fact relevant. See State v. Gay, 169 N.H. 232, 248 (2016) (declining to consider the defendant’s appellate argument because, to the extent the defendant believed that the trial court misunderstood his argument and improperly ruled the statements were not relevant evidence of an alternative perpetrator, it was incumbent upon the defendant to move for reconsideration). We therefore conclude the defendant failed to demonstrate that this argument is preserved. See Batista-Salva, 171 N.H. at 822.

The defendant also asserts that the trial court’s exclusion of his testimony constitutes plain error. Even assuming that an error occurred and that the error was plain, we conclude that any such error does not satisfy the third prong of the analysis, which requires the defendant to demonstrate that the error was prejudicial. See State v. Leroux, 175 N.H. 204, 209 (2022). We will find prejudice under the third prong when we cannot confidently state that the fact-finder would have returned the same verdict in the absence of the error. Id.

The defendant argues that he would have testified “that both his convictions would have been self-defense or defense of another under New Hampshire law.” Even if the trial court admitted this testimony, the defendant offered no other evidence to support his affirmative defense that the Massachusetts convictions would not have constituted felonies in the state of New Hampshire. See RSA 626:7, I(b) (providing that the defendant bears the burden of proving an affirmative defense). On appeal, the defendant has not demonstrated how the alleged error “affected the outcome of the proceeding” and that the alleged error was thus prejudicial. Leroux, 175 N.H. at 209 (quotation omitted). We accordingly conclude that the defendant has not demonstrated plain error. See Batista-Salva, 171 N.H. at 824.

2. Jury Instruction on Definition of “Felony”

The defendant argues that the trial court erred by failing to instruct the jury on the definition of “felony” under New Hampshire law. He concedes that this issue is not preserved, and he therefore raises it as plain error. Whether the trial court erred by failing to instruct the jury on the definition of “felony” turns upon one issue: is the question of whether a defendant’s prior conviction is a “felony” under RSA 625:9, III one of law or of fact? For the defendant to demonstrate that the trial court erred by failing to instruct the jury on the definition of “felony,” he must demonstrate the question was one of fact. See N.H. Ball Bearings v. Jackson, 158 N.H. 421, 432 (2009) (providing that a question of law is within the province of the trial court judge, but that judges must “state and explain to the jury . . . the rules of law applicable to the issues of fact upon which their verdict is based” (quotation omitted)).

New Hampshire law does not directly answer this question, but federal and state courts generally consider the misdemeanor or felony classification of a prior conviction as a question of law. See United States v. Broadnax, 601 F.3d 336, 345 (5th Cir. 2010) (“[T]he question whether a felony conviction may serve as a predicate offense for a prosecution for being a felon in possession of a firearm pursuant to [federal law] is ‘purely a legal one.’” (quotations omitted)); United States v. Boaz, 558 F.3d 800, 805 (8th Cir. 2009) (“[W]hether a particular conviction qualifies as a predicate felony for the purpose of [federal felon in possession statute] is a question of law for the district court.”); State v. Rainoldi, 268 P.3d 568, 575 (Or. 2011) (“The sole question before the jury is whether or not the defendant was previously convicted of the crime It is a matter of law for the court to determine whether the crime committed constituted a felony. . . .” (quotation omitted)); State v. Wilson, 534 P.3d 547, 557 (Idaho 2023) (stating that “[t]o the extent there is a question about the legal classification of the prior offense, that is a . . . purely legal question” and thus, “the determination of whether a prior conviction was a felony is . . . to be decided by a court rather than a jury” (quotation omitted)).

The parties do not ask us to decide this question as part of this appeal, and thus, we will not do so.¹ See In re J.W., 172 N.H. 332, 344 (2019) (“We are generally reluctant to address issues that the parties have neither raised nor

¹ We note that the defendant’s prior Massachusetts convictions would appear to satisfy the definition of “felony” set forth in RSA 625:9, III, which defines “felony,” in part, as a “crime defined by statute outside of this code where the maximum penalty provided is imprisonment in excess of one year.” See Mass. Gen. Laws Ann. ch. 265, §18 (b) (West 2000) (providing that maximum penalty for conviction of armed assault with intent to murder under this statute is twenty years); Mass. Gen. Laws Ann. ch. 265, §15A (West 2000) (amended 2002 & 2014) (providing that maximum penalty for conviction of assault and battery with a dangerous weapon under this statute is ten years in prison, or two and one-half years in jail).

briefed.”). Nor do we need to answer this question for the purposes of this appeal because we conclude that the defendant cannot demonstrate the alleged error was “plain.” See Batista-Salva, 171 N.H. at 824 (providing that second prong of plain error test requires that the error be plain).

“For the purposes of the plain error rule, an error is plain if it was or should have been obvious in the sense that the governing law was clearly settled to the contrary.” State v. Ortiz, 162 N.H. 585, 591 (2011) (quotation omitted). “When the law is not clear at the time of trial and remains unsettled at the time of appeal, a decision by the trial court cannot be plain error.” Id. (quotation omitted). “Plain’ as used in the plain error rule is synonymous with clear or, equivalently, obvious.” Id. (quotation omitted). Having not clearly settled the question, we cannot conclude that the trial court’s failure to provide jury instructions on the definition of “felony” was plain error. See id.

3. Sufficiency of Evidence

The defendant argues that the State did not introduce sufficient evidence to prove beyond a reasonable doubt that either Massachusetts conviction was a “felony” under RSA 625:9. We agree with the State, however, that the defendant failed to preserve this argument.

The defendant asserts that he raised this argument in his pretrial motion to dismiss and his motion to set aside the verdicts. The defendant filed his motion to dismiss the day before trial. The trial court could not have granted a motion purporting to complain about the State’s failure to produce sufficient evidence at trial when the motion was filed before trial even began. See State v. Labrie, 171 N.H. 475, 482 (2018) (“In reviewing a sufficiency of the evidence claim, we view the evidence presented at trial, and all reasonable inferences drawn therefrom, in the light most favorable to the State” (emphasis added)).

Further, in denying the motion, the trial court stated that “[t]he arguments regarding the sufficiency of evidence . . . will be addressed after the State rests its case under the applicable legal standard.” The court made no definitive ruling on any sufficiency arguments pretrial, meaning that in order to preserve them for appeal, the defendant needed to renew his objection on the same grounds at trial. See N.H. R. Ev. 103(b); see also Hodgdon, 143 N.H. at 400 (noting that to preserve issue for appeal, defendant must make contemporaneous and specific objection). The defendant did not do so.

Even if we assume that, had the defendant sufficiently raised this argument in his motion to set the verdicts aside, he would have thereby preserved it for appellate review, we nonetheless conclude that he failed to do so. In this motion, he generally contended that the evidence supporting his convictions was not sufficient, but did not assert the argument he now raises

on appeal: that the evidence was insufficient to establish that his Massachusetts convictions were felonies under RSA 625:9, III. See State v. Dodds, 159 N.H. 239, 243-44 (2009) (concluding that defendant's argument involving statutory interpretation was not preserved where his assertion to the trial court was only that the evidence was insufficient to support a conviction and he did not specifically address the State's failure to prove elements of statute). We accordingly conclude that the defendant has failed to demonstrate that he specifically raised this argument before the trial court, and it is thus not preserved. See Batista-Salva, 171 N.H. at 822.

We therefore analyze the defendant's unpreserved sufficiency argument for plain error. See State v. Hodges, 176 N.H. 751, 754 (2024), 2024 N.H. 44, ¶8. The defendant has failed to demonstrate that the alleged error was plain. See Ortiz, 162 N.H. at 591. The defendant's sufficiency argument is necessarily based upon the underlying premise that whether his prior Massachusetts convictions were felonies is a question of fact for the jury that requires sufficient supporting evidence. As we concluded above, this court has not addressed whether that determination is a question of fact or of law, and it has not been clearly settled. Thus, any alleged error could not have been plain. See id.

VI. Sentencing In Absentia

A. Background

The record establishes the following facts. Following trial, the defendant filed a motion to continue his sentencing seventy-two days prior to the scheduled hearing date. Representing himself, the defendant argued that the interference with his access to legal work restricted his ability to prepare for sentencing. The trial court denied that motion and the defendant's subsequent motion to reconsider. The State and the defendant each filed a sentencing memorandum in advance of the hearing.

On the day of the sentencing hearing, the defendant was absent from the courtroom. The sheriff's department and the Department of Corrections reported to the trial court that the defendant refused transport and expressed a desire to be sentenced in absentia. The trial court concluded that the defendant waived his right to participate in the sentencing hearing and granted the State's motion to sentence him in absentia, which the State had filed that morning.

B. Analysis

The defendant argues that the trial court erred when it sentenced him in absentia. The defendant argues that this issue is preserved by his motions to continue sentencing. We agree with the State, however, that those motions did

not preserve the issue. The defendant's motions for a continuance focused upon his lack of access to case materials, and the defendant did not reference his attendance at the sentencing hearing. We further disagree with the defendant that this issue is preserved for review because "someone gave the trial court the opportunity to consider the issue." (Quotation omitted.) Our preservation rules provide that "[t]he defendant, as the appealing party, bears the burden of demonstrating that he specifically raised the arguments articulated in his appellate brief before the trial court." Batista-Salva, 171 N.H. at 822 (emphasis added). Because the defendant has not demonstrated that he specifically raised this argument before the trial court, we conclude that he has failed to preserve this issue. See id.

The defendant argues that we should nonetheless address this argument because an "absent defendant cannot place his arguments before the trial court." We find this argument unavailing. The defendant had the opportunity to file a motion to reconsider the trial court's decision to sentence him in absentia but did not do so. See State v. Joshua Baud, No. 2014-0682 (non-precedential order at 2), 2015 WL 11071589 (N.H. Dec. 22, 2015) ("There is nothing in the language of [former Superior Court Criminal] Rule 59-A that bars a defendant from seeking reconsideration of his or her sentence, or deprives a trial court of authority to rule upon a motion to reconsider a sentence.").

The defendant states that to the extent we deem the issue not preserved, it nonetheless constitutes plain error. See Batista-Salva, 171 N.H. at 824. For the following reasons, we conclude that the defendant has failed to establish that the trial court's decision to sentence him in absentia constituted error.

"There is no prohibition against the right to be present at criminal proceedings being waived as the result of a defendant's voluntary absence from certain proceedings." State v. Davis, 139 N.H. 185, 190 (1994) (quotation and brackets omitted). "[T]his principle is equally applicable to an in-custody criminal defendant who refuses to attend court proceedings." Id. "Whether the defendant has voluntarily absented himself from the proceedings and thereby voluntarily waived his right to be present is a question of fact for the trial court to be established by the State by a preponderance of the evidence." State v. Lister, 119 N.H. 713, 717 (1979).

The trial court found that the defendant voluntarily waived his right to be present at the sentencing hearing, largely based upon the reports from the Department of Corrections and the sheriff's department.

The defendant argues that the trial court erred when it concluded that he voluntarily absented himself from the sentencing hearing and thereby voluntarily waived his right to be present. We disagree. The record supports that the defendant clearly understood when the sentencing hearing was

scheduled. The record further supports that the defendant refused transport to the court and expressed a desire to be sentenced in absentia. In reports from the sheriff's department, two officers stated that when they went to transport the defendant from the prison, a sergeant told them that the defendant "was refusing to go to court." The officers reported that when they spoke with the defendant, "he immediately stated he was refusing to go." The officers reported that the defendant "stated he was representing himself and the court could sentence him in absentia." The evidence therefore supports the trial court's finding that the defendant "voluntarily absented himself" and thereby voluntarily waived his right to be present." Id. at 717.

We disagree with the defendant that the court erred in relying upon the reports from the Department of Corrections and the sheriff's department. The defendant argues that the rules of evidence should apply to the court's factual determination of his waiver and that these "hearsay within hearsay" reports were not admissible. As he acknowledges, however, "[i]t's unclear whether the rules of evidence apply to the trial court's determination of waiver of the right to appear." Because this determination is unsettled, we cannot conclude that the trial court plainly erred. See Ortiz, 162 N.H. at 591. We also disagree with the defendant's contention that, if the rules of evidence did not apply, the evidence was not sufficiently reliable. The record on appeal does not contain the report from the Department of Corrections. Based upon our review of the record before us, however, we cannot conclude that the trial court erred in relying upon the reports from the sheriff's department. Thus, the defendant has not demonstrated that the trial court's decision to sentence him in absentia constituted plain error. See Batista-Salva, 171 N.H. at 824.

VII. Extended Sentence

A. Background

The record establishes the following facts. In June 2020, the State filed a notice of its intent "to seek an extended term of imprisonment pursuant to RSA 651:6" against the defendant on the two charges of first degree assault and the charge of second degree assault. See RSA 651:6, II(a) (2016). The State contended that the defendant "qualifies for an enhanced term because he has twice previously been convicted of [a] sentence in excess of one year." The defendant, while represented by counsel, objected. He primarily argued that RSA 651:6 creates "racial disparities in sentencing" and results in "disparate treatment" in violation of his equal protection rights.

Following a video hearing, the trial court issued an order in which it "decline[d] to consider the defendant's objection to the potential application of RSA 651:6 at [that] juncture in the proceedings," and stated that it would "only consider the defendant's arguments if he [were] ultimately convicted after trial." The court additionally noted that "as presently presented, the defendant's

equal protection challenge is woefully underdeveloped,” that it “would be inappropriate for the Court to declare RSA 651:6 unconstitutional in this context based solely on the allegations in the defendant’s objection,” and that “to the extent the defendant seeks to prove any fact in support of his argument, he would need to do so during an evidentiary hearing.” The trial court accordingly declined to strike the State’s notice of intent to seek an extended sentence.

An evidentiary hearing on the issue did not take place. In the defendant’s sentencing memorandum, the defendant did not make any reference to the extended sentence. At the sentencing hearing, the court heard argument from the State on the extended term. The court found that based on the State’s presentation and “the fact that there are three convictions with sentences in excess of one year . . . the extended term provision of [RSA] 651:6 is applicable to this case.” The court determined that the “extended term sentences are appropriate, proper, and have legal authority under that particular statute.”

B. Analysis

The defendant argues that the trial court erred when it applied RSA 651:6 to impose an extended term of imprisonment upon him. We agree with the State, however, that this argument is not preserved.

The defendant contends that he preserved this issue in his written motion in which he objected to the State’s notice to impose an extended term and asked the court to strike the notice. The court, however, declined to consider the objection at that time, found that his argument was “woefully underdeveloped,” stated that an evidentiary hearing would be required, and ultimately declined to strike the State’s notice.

The defendant did not raise the issue again before the trial court. Based upon our review of the record, the court discussed the extended term sentence at least twice in the presence of the defendant: at a status of counsel hearing in 2020 and on the sixth day of the jury trial. Each time, the court indicated that the applicability of the extended term would be for the court to address during sentencing. Despite these pretrial discussions, the defendant did not raise the extended sentence issue then nor did he do so after he was convicted. He had a clear opportunity to do so in his sentencing memorandum, but did not reference the extended sentence at all. We accordingly agree with the State that the defendant did not raise the arguments articulated in his appellate brief before the trial court and, accordingly, the issue is not preserved for our review. See Batista-Salva, 171 N.H. at 822-23.

The defendant states that to the extent we deem the issue not preserved, he raises it as plain error. See id. at 824. The defendant argues that the trial

court erred in applying RSA 651:6 to him because the statute “has a racially disparate impact on Black defendants and lacks even a rational basis.” (Capitalization and underlining omitted.) Even if we were to assume without deciding that there was an error, we conclude that the defendant has not demonstrated that the error was plain. See id.

The trial court’s error could not have been plain because it involves an issue of first impression. See Ortiz, 162 N.H. at 591. We have not before considered whether RSA 651:6 “has a racially disparate impact,” as the defendant suggests. (Capitalization and underlining omitted.) Accordingly, we find no plain error. See id.

Affirmed.

DONOVAN, COUNTWAY, and WILL, JJ., concurred.

**Timothy A. Gudas,
Clerk**